IN THE UTAH COURT OF APPEALS

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| State of Utah,<br><br>Plaintiff and Appellee,<br><br>v.<br><br>Markell Jesse Harrison,<br><br>Defendant and Appellant. | ) | MEMORANDUM DECISION<br>(Not For Official Publication)<br><br>Case No. 20040350-CA<br><br>F I L E D<br>(December 8, 2005)<br><br>2005 UT App 525 |

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Second District, Ogden Department, 031902805
The Honorable Pamela G. Heffernan

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake City, for Appellee

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Before Judges Bench, McHugh, and Thorne.

McHUGH, Judge:

Markell Jesse Harrison appeals his enhanced conviction for robbery, see Utah Code Ann. §§ 76-3-203.1, -6-301 (2003), and his conviction for attempted burglary, see id. §§ 76-4-101, -6-202 (2003). We affirm.

Harrison argues that he received ineffective assistance when his trial counsel failed to make any pretrial motions or objections during trial to prevent the introduction of evidence of Harrison's prior drug use and to object to the introduction of evidence of his codefendant's alleged drug sales. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law" that we review for correctness. State v. Clark, 2004 UT 25,¶6, 89 P.3d 162. To demonstrate ineffective assistance of counsel, Harrison "must meet the heavy burden of showing that (1) trial counsel rendered deficient performance which fell below an objective standard of reasonable professional judgment, and (2) counsel's deficient performance prejudiced him." State v. Chacon, 962 P.2d 48, 50 (Utah 1998).

To satisfy the first prong of this test, Harrison "must rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy."

Carter v. Galetka, 2001 UT 96,¶40, 44 P.3d 626 (quotations and citation omitted); see also State v. Perry, 899 P.2d 1232, 1241 (Utah Ct. App. 1995) ("An ineffectiveness claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." (quotations and citation omitted)). "Moreover, this court will not second-guess trial counsel's legitimate strategic choices, however flawed those choices might appear in retrospect." Perry, 899 P.2d at 1241 (quotations and citations omitted).

Our review of the record reveals that trial counsel's alleged failures were, in fact, tactical choices he made that comported with his strategy for defending Harrison--namely, that although Harrison may have been involved with and used drugs, that did not make Harrison guilty of the charged crimes. Indeed, Harrison's trial counsel referenced Harrison's involvement with drugs and prior drug use in both his opening and closing statements. In addition, defense counsel also elicited testimony from Harrison concerning his involvement with drugs and prior drug use. Because we have determined that the alleged failures of Harrison's trial counsel were the product of trial strategy, we conclude that Harrison has failed to satisfy the first prong of the test for ineffective assistance of counsel. Therefore, his claim for ineffective assistance of counsel fails. See State v. Wright, 2004 UT App 102,¶9, 90 P.3d 644 ("[B]ecause a defendant has the burden of meeting both parts of [this] test, it is unnecessary for this court to apply both parts where our inquiry reveals that one of its parts is not satisfied." (first alteration in original) (quotations and citation omitted)).

Harrison also argues that the trial court committed plain error by failing to exclude evidence of his prior drug use and his codefendant's alleged drug sales. "However, we do not appraise all rulings objected to for the first time on appeal under the plain error doctrine. For example, if trial counsel's actions amounted to an active, as opposed to a passive, waiver of an objection, we may decline to consider the claim of plain error." State v. Bullock, 791 P.2d 155, 158 (Utah 1989).

> In the context of this case, before addressing [Harrison]'s claim of plain error, it is necessary to address the threshold issues: Was the failure to raise the objections before the trial court the result of a consciously chosen strategy of trial counsel rather than an oversight, and if it was a strategic decision, did the making of that choice constitute ineffective assistance of counsel? If the decision was conscious and did not amount to ineffective assistance of counsel, [we] should refuse to consider the merits of the trial court's ruling. . . .

> The necessity for an appellate court's following such an approach is obvious when the consequences of the alternative are considered. If trial counsel were permitted to forego objecting to evidence as part of a trial strategy that counsel thinks will enhance the defendant's chances of acquittal and then, if that strategy fails, were permitted to claim on appeal that [we] should reverse because it was plain error for the court to admit the evidence, we would be sanctioning a procedure that fosters invited error. Defendants are thus not entitled to both the benefit of not objecting at trial and the benefit of objecting on appeal.

Id. at 158-59 (footnote omitted); see also State v. Morgan, 813 P.2d 1207, 1210-11 (Utah Ct. App. 1991). We have already concluded that the alleged failures of Harrison's trial counsel were part of a conscious and sound trial strategy that did not amount to ineffective assistance of counsel. Therefore, we "decline to consider the claim of plain error." Bullock, 791 P.2d at 158.

Finally, Harrison asserts that he was denied his right to confrontation when the trial court allowed a witness to testify about certain statements that Harrison's codefendant made concerning the commission of the charged crimes. Because Harrison has not demonstrated that this issue was preserved at trial and does not argue plain error or exceptional circumstances on appeal, we do not address its merits. See State v. Labrum, 925 P.2d 937, 939 (Utah 1996).

Affirmed.

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Carolyn B. McHugh, Judge

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WE CONCUR:

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Russell W. Bench,
Associate Presiding Judge

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William A. Thorne Jr., Judge