IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Bulice Adolphus Rushing Jr., Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040399-CA F I L E D (December 8, 2005) 2005 UT App 527

Second District, Ogden Department, 031902868
The Honorable Pamela G. Heffernan

Attorneys: Dee W. Smith, 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:

Bulice Adolphus Rushing Jr. appeals his enhanced conviction for robbery, see Utah Code Ann. §§ 76-3-203.1, -3-203.5, -6-301 (2003), and his conviction for attempted burglary, see id. §§ 76-4-101, -6-202 (2003). We affirm.

Rushing argues that the trial court committed plain error by admitting testimony concerning Rushing's prior drug use and sales in violation of rule 404(b) of the Utah Rules of Evidence.

> To 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. If any one of these requirements is not met, plain error is not established.

State v. Dean, 2004 UT 63,¶15, 95 P.3d 276 (quotations and citations omitted).

We have reviewed the challenged testimony and conclude that, even if we could be persuaded that admission of the testimony constituted error--a determination we do not make--any such error would not have been obvious to the trial court. Therefore, Rushing's plain error argument fails. See id.

Rushing also 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 the challenged testimony. Because there was overwhelming evidence of Rushing's guilt presented to the jury, exclusive of the challenged testimony, the alleged failures committed by Rushing's trial counsel in connection with admission of the testimony, if any, were harmless. See State v. Evans, 2001 UT 22,¶20, 20 P.3d 888 ("[H]armless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings. Put differently, an error is harmful only if the likelihood of a different outcome is sufficiently high that it undermines our confidence in the verdict." (citation omitted)); State v. Helmick, 2000 UT 70,¶9, 9 P.3d 164 (holding that because "there was overwhelming evidence of [the defendant]'s guilt[,] . . . any error in admitting [the challenged] testimony was harmless"). As a result, Rushing cannot demonstrate any prejudice that resulted from his trial counsel's alleged failures; therefore, his claim for ineffective assistance of counsel fails. See State v. Chacon, 962 P.2d 48, 50 (Utah 1998) (stating that a defendant must show prejudice to succeed on a claim for ineffective assistance of counsel); State v. Pirela, 2003 UT App 39,¶¶25-26, 65 P.3d 307 (holding that because the alleged error was harmless, the defendant could not establish prejudice; therefore, his claim for ineffective assistance of counsel failed).

Affirmed.

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Carolyn B. McHugh, Judge

WE CONCUR:

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Russell W. Bench,
Associate Presiding Judge

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William A. Thorne Jr., Judge