1981

The State of Utah v. Joey Williams : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

-v-

JOEY WILLIAMS,

Defendant-Appellant.

Case No. 17330

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty of Robbery in the Third Judicial District in and for Salt Lake County, State of Utah, the Honroable Homer F. Wilkinson, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	
JOEY M. WILLIAMS,	:	Case No. 17330
Defendant-Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, JOEY M. WILLIAMS, appeals from a conviction of Robbery in the Third Judicial District Court, Salt Lake County, State of Utah.

DISPOSITION OF THE LOWER COURT

The appellant, JOEY M. WILLIAMS, was found guilty of Robbery, a Second Degree Felony, by a jury. The trial was conducted September 4th, 8th, and 9th, 1980, with the Honorable Homer F. Wilkinson, presiding. Appellant was sentenced on September 9, 1980, to serve an indeterminate term of not less than one year nor more than fifteen years at the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction and a new trial.

STATEMENT OF THE FACTS

The Holiday Oil Company service station at 3847 South Redwood Road, in Salt Lake County, was robbed during the evening of November 24, 1979. Mike Weaver committed the crime pursuant a plan designed by the Salt Lake County Sheriff's Department to charge Weaver's accomplice, Joey Williams, with a criminal offens This plan required Weaver to drive straight through a specified intersection if the robbery had occurred as planned or to make a turn at the intersection if the robbery had not taken place. (T. 20, 100, 106). In accordance with the plan, Weaver drove straight through the intersection after the robbery occurred and the vehicle was stopped by two sheriff's deputies. (T. 28, 107). Both occupants fled; Weaver was allowed to escape while Joey Williams, the defendant, was apprehended. (T. 28, 108).

The robbery plan was devised after Weaver was apprehend for shoplifting at the ZCMI store in Cottonwood Mall. Upon quest in connection with the shoplifting charge Weaver said he would cooperate with law enforcement officials with regard to a robbery scheduled for that night. (T. 52, 96). Weaver was taken to the Holiday Sheriff's substation where several members of the Sheriff Department collaborated with Weaver to formulate a plan for the robbery. Weaver called Joey Williams while at the substation and that conversation was recorded. (T. 17, 97). The transcript of t tape was introduced into evidence at the trial. (T. 101).

During both the prosecutor's opening remarks (T.7) and the testimony of Mr. Weaver (T.34), reference was made to an allegedly false statement secured from Mr. Weaver while he was in prison. These assertions, made in the presence of the jury, either directly or indirectly implied that counsel for the defense was instrumental in securing the perjorious statements. (T. 7, 34). The court denied two motions for mistrial (T. 41, 118) based upon these statements. The defense had given no indication that it intended to use these statements from Weaver.

As a result of the attack on defense counsel by the prosectuion, counsel moved to withdraw from the case. (T. 125). Defense counsel believed it would be necessary for him to testify about how the statements from Weaver were obtained. The court denied defense counsel's motion even though his continued representation of the defendant would be prejudicial to him because counsel's credibility had been attacked. A further attempt to clarify the relationship between Weaver and defense counsel was foreclosed when the court required that the defense make a motion to call the prosecutor as a material witness (T. 130) and then denied the motion. (T. 131).

James Miller, an inmate at the Utah State Penitentiary, was called as a witness for the defense to establish that Weaver had cause to fear the members of the prison population. (T. 220). Miller acknowledged that he had been convicted of a felony and was presently serving time in prison, however, the purpose of his testimony was to show that Weaver was generally disliked at the

prison. The prosecutor, on cross examination, inquired into the nature and the details of Mr. Miller's past criminal activity. (T. 222-223). Defense counsel objected to this line of inquiry, however the objection was overruled. (T. 222-223).

During closing arguments the prosecutor improperly invited the jurors to consider what might have happened had the victim of the robbery been injured. This argument was allowed by the court. (Closing Argument, T.4) The prosecutor rebutted an argument by defense counsel that Weaver had a motive to lie by pointing out that Weaver had a two year sentence to serve. Less t one month later, Weaver was granted parole after the prosecutor personally appeared before the Board of Pardons and urged his ear parole. (Board of Pardons, T. 5-7). The prosecutor asserted that Weaver's conduct during the trial had been so exemplary that he h decided to use his efforts to get Weaver out of prison. (Board of Pardons, T. 5-7).

POINT I

THE COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION FOR A MISTRIAL WHEN THE PROSECUTOR INTRODUCED TESTIMONY CONCERNING THE IMPEACHMENT OF THE STATE'S CHIEF WITNESS BEFORE THE DEFENSE HAD EVER SOUGHT TO IMPEACH THE WITNESS.

During his opening statement the prosecutor informed th jury that the defense possessed a statement made by Michael Weave that was inconsistent with what his trial testimony would be. De counsel objected to the reference because the alleged statement h not been introduced into evidence, nor had Michael Weaver's cred-

ibility been attacked. The appellant asserts that the court erred in overruling his timely objection.

It is well settled that the purpose of an opening statement in a jury trial is limited to a brief statement of the issues and an outline of what counsel believes he can support with the admissible evidence. A.B.A. Standards, The Prosecution Function and The Defense Function, 119 (1971). The opening statement may not refer to particular evidence". . . unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted into evidence." A.B.A. Standards, Prosecution and Defense Function, §3-5.5 (2nd Ed. 1979).

In the present case the prosecutor, in his opening statement, referred to a statement that was allegedly in the possession of defense counsel.

The prosecutor told the jury that:

> [Michael Weaver] was, at one point in time, coerced into signing a statement which would indicate that Mr. Williams was not involved in a crime. Bear in mind that he did that under duress and coercion at the time because of the circumstances he was in. He will testify to the fact that he did sign this particular statement. This statement at the present time is in custody of the defense counsel. (T. 7)

The prosecutor had no power over the introduction of the statement, and indeed, did not have any knowledge that the statement would be introduced into evidence. Thus, his reference to the statement was clearly improper.

The Supreme Court of Vermont recently held that the tri court had erred by allowing the prosecution to make references to prior consistent statements of the principal prosecution witness its opening statement. Woodmansee v. Stoneman, 344 A.2d 26 (Vt. In that case the defendant was charged with assisting someone to avoid arrest and punishment for the crime of murder. The princip witness against the defendant had made several different statemen during the investigation of the case. These statements were outlined in the prosecution's opening statement and were admitte during the prosecution's case. The prosecution argued that the statements should be admitted to rehabilitate a witness who had been impeached by a previous showing of "bias, interest or corrup Id. at 30. The court stated:

> The impeachment referred to, or the claim of recent continuance, can hardly be said to have transpired when the state made its opening argument. . . [t]he asserted purpose could not be a grounds for admissibility when [defense counsel] had not yet even been heard, much less introduced evidence.

Id. at 30-31.

The Wisconsin Supreme Court faced a similar situation i Baker v. State, 69 Wis. 32, 33 N.W. 52, (1887). In that case the court said:

> In opening the case [the prosecutor] stated, in effect, that the accused would introduce testimony touching the character of the complainant, and as to what he tried to prove upon the former trial; but upon objection being made, the court promptly ruled that he must confine himself to stating to the jury the

> cause of the prosecution, but that he must not state the cause of the accused to the jury.
> Id. at 56.

Courts recognize that the purpose of the opening statement is to orient the jury, so that they have a framework within which to analyze the evidence. In the present case the prosecution laid out this framework, then went further and told the jury of evidence he thought the defense would present. The prosecution was, in effect, anticipating the defense and attempting to defuse it at the start. This was clearly an improper argument which prejudiced the appellant by attacking the integrity of the defense counsel. The magnitude of the mischief occasioned by the prosecutor's character assassination of defense counsel is not easily palpable. However, the tip of the iceberg is at least recognizable when one considers that the purpose and effect of the prosecutor's broadside was to cast the defense counsel as an unscrupulous rogue wholly underserving of belief. Thus, as a result of the prosecutor's opening statement, before a shread of admissible evidence was before the jury, the appellant found himself beginning his trial with a lawyer which the prosecutor had painted as the picture of perfidy.

POINT II

DEFENSE COUNSEL SHOULD HAVE BEEN ALLOWED TO WITHDRAW FROM THE CASE.

(A) The court erred in denying defense counsel's motion to withdraw as counsel when he notified the court that it would be necessary for him to testify on behalf of the defendant.

The American Bar Association (A.B.A.) Code of Professi Ethics provides:

> DR 5-102 Withdrawal as counsel when the lawyer becomes a witness.
>
> (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial. . ."

This rule is subject to certain exceptions not applicable in the present case.

The A.B. A. committee set out the reasoning behind the rules under Canon 5 in the ethical considerations. In EC 5-9 they state:

> Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

Ethical Consideration 5-10 provides in part:

> . . . where the question [of a lawyer becoming a witness] arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

In the present case the prosecutor, in his opening sta stated that his principal witness, Weaver, was coerced by the de

into signing a statement inconsistent with what his trial testimony would be. He intimated that defense counsel had somehow played a role in obtaining this statement. (T.7) During the direct examination of Weaver the prosecutor's questions implied that defense counsel had approached Weaver and coerced him into signing a statement favorable to the appellant. (T.34) At this point defense counsel made a motion for a mistrial and a motion to withdraw from the case.[1] Defense counsel felt it would be in the best interests of his client for him to testify in order to rebut the prosecutor's insinuations. Counsel proposed to testify about the circumstances

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[1] Defense counsel endeavored to explain his motion in light of the aforementioned Disciplinary Rule and Ethical Considerations, but was met with some resistence from the court. Some time later, the court evidently realized the relevance of the rule, and then referred to it.

> MR. BUGDEN: EC 5-10 states--
>
> THE COURT: Mr. Bugden, we are not going to read all the canons of ethics here today.
>
> MR. BUGDEN: Well, the next canon is directly in point. It specifically says if there is any questions as to whether or not the lawyer should act as a lawyer or be a witness, all of those questions have to be resolved in allowing the lawyer to be a witness.
>
> In this case I have to be a witness to rebut the insinuation of the prosecutor and Mr. Christensen has to be a witness to rebut that.
>
> THE COURT: Mr. Bugden, just refer to the canon and don't take time to read it. (T.124)
>
> * * *
>
> THE COURT: And are you going to call yourself as a witness?
>
> MR. BUGDEN: I haven't made that decision.
>
> THE COURT: Then it is my understanding as I remember some-in the ethics that states if counsel takes the stand as a witness in the case he cannot proceed and argue the case. (T.134)

surrounding the receipt of Weaver's statements.[2] Defense counsel also moved to call the prosecutor as a witness in order to show that he had been aware of the fact that Weaver had approached defense counsel wishing to help with the defense.[3] These motions were denied by the court.

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[2]MR. BUGDEN: At this time, Your Honor, I would also mak a motion to withdraw from the case. I feel that after the remarks that Mr. Christensen had made in the reco for his honor, my state of mind is such that I truly a upset and I am now presented with cross-examining a witness who I am accused of [intimidating]. I am also accused of coercing his testimony or tampering with hi testimony. Of course, Mr. Christensen has made the sa insinuation to this Court. Obviously, this is the mos important witness for the case. The defense will not able to cross-examine this witness effectively. I would certainly be less than candid if I did not state for the record that I do not feel that I am in a posit now that I can go forward and vigorously cross-examin this witness. I truly am upset. I am shocked that Mr Christensen would make the accusation that he had abou I don't believe that I can adequately and competently completely defend Mr. Williams' interests at this time (T. 44).

[3]Mr. Christensen was aware that Weaver solicited the defense attorney first, not the defense attorney solic Weaver first. Yet he in opening statement insinuated the jury that I engaged in improper conduct by sending my investigators out to the prison to obtain a stateme And that is false. And the only way that can be rebut is if Mr. Christensen himself testifies in this case, a he must testify in this case. (T. 123).

Defense counsel should have been allowed to withdraw from the case and testify on behalf of the defendant. The general rule is that an attorney is competent to testify on behalf of his client. Am. Jur. Witnesses §152. In State v. Blake, 157 Conn. 99, 249 A.2d 232 (1968), the defense counsel asked to withdraw so that he could testify as to a conversation he had with a prosecution witness prior to trial. The Connecticut Supreme Court said:

> [T]he Canons of Professional Ethics [do] not disqualify or render incompetent as a witness, an attorney who has participated in a trial; it is error to refuse to permit him to offer himself as a witness. [Citations Omitted]. Id. at 234.

Similarly, where defense counsel in the present case asked to withdraw so that he could testify as to the circumstances surrounding obtaining Weaver's statement, such motion should not have been refused.

In People v. Kuczynski, 23 Ill. 2d 320, 178 N.E. 2d 294 (1961), the court reversed the defendant's conviction of armed robbery where the trial court had refused to allow defense counsel to withdraw and testify. At defendant's preliminary hearing a prosecution witness had been unable to identify the defendant, however at trial the witness testified that he had identified the defendant at the preliminary hearing. The Illinois court stated:

> As it is apparent that Schewe's testimony surprised defendant, the trial judge should have allowed defendant's attorney to testify. . ." Id. at 295.

Although the Utah Supreme Court has never spoken directly to this issue, they have accepted the theory underlying Canon 5 of the A. B. A. Code of Professional Ethics. In Galarowicz v. Ward,

230 P.2d 576 (Utah 1951), defense counsel called as a witness his co-counsel. Although co-counsel had participated in the trial, his role had been limited. Plaintiff's counsel objected to defense counsel being allowed to testify without withdrawing and the court overruled this objection. The court noted that the purpose of the rule:

> ". . .is to avoid putting a lawyer in the obviously embarrassing predicament of testifying and then having to argue the credibility and effect of his own testimony. Id. at 580.

The court went on to note that the plaintiff's counsel was attempt to use the rule to disqualify competent counsel from continuing the trial, and that the rule could not be used for such a purpos

In the present case it was error to deny defense counse motion to withdraw so that he could testify on behalf of his cli Defense counsel was surprised by the accusations of the prosecut and the testimony of Weaver and believed it essential to testify to rebut the prosecutor's innuendoes. In order to testify as a witness defense counsel desired to withdraw so that he would not have to argue his credibility and testimony to the jury. The cou erred in overruling defense counsel's motion to withdraw.

(B) Defense counsel should have been allowed to withdraw where his credibility had been attacked by the prosecutor.

The trial judge refused defense counsel's motion to withdraw in the face of an attack on his integrity and credibilit by the prosecutor. The Supreme Court, in Berger v. United State 295 U.S. 78, 88 (1935) stated:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

In the present case the prosecutor struck foul blows. He implied that defense counsel had been instrumental in obtaining perjurious statements from a prosecution witness in order to aid his client. This assertion was calculated to influence the jury improperly. Accordingly, the trial court erred by not permitting defense counsel to withdraw.

Although the Utah Court has never dealt with the issue of a prosecutor's misconduct in attacking defense counsel, several other courts have addressed it. In Watkins v. State, 140 Tenn. 1, 203 S.W. 344 (1917), the Tennessee Supreme Court established the standard of conduct for a district attorney general:

> Imputation of dishonesty to adversary counsel in remarks addressed to them by the district attorney touching their conduct of the defense was an impropriety so gross that it must now appear to be such to the offical who gave the words utterance. . . It was error not to sustain objection when interposed. Id. at 346.

This standard was reiterated and followed in Dupree v. State, 410

S.W. 2d 890 (Tenn. 1967). When the facts of the present case are analyzed in light of this standard, it is clear that the prosecut attack on the integrity and credibility of defense counsel was improper.

The Tenth Circuit Court recently examined the issue of prosecutorial misconduct in United States v. Jones, 578 F.2d 133 (10th Cir. 1978). The court first noted that in general it is ". improper for the district attorney to imply that defense counsel has been involved in subornation of perjury. . ." [Citations omitted] Id. at 1338. The court went on to hold, however, that where defense counsel had introduced and emphasized testimony that implicated him in an attempt to obtain a perjurious statemen the jury verdict would not be reversed.

The Second Circuit, in United States v. Burse, 531 F.2d 1151 (2d Cir. 1976), found that the prosecutor, in a trial for conspiracy to rob a federally insured bank, had implied improper purpose to defense counsel's questioning. The court noted that ". . . successful - even zealous - prosecution does not require improper suggestions, insinuating and, especially, assertions of personal knowledge." Id. at 1155. The court reversed the case. In Weathers v. United States, 117 F.2d 585 (5th Cir. 1941) the defendant was convicted of sending abortion information through the mails. The prosecutor argued that: "It was plain to be seen that the defendant, or defendant's counsel or somebody, had gotte [sic] to this woman between the time she delivered that paper to and the time she was called to testify." Id. at 586. The court

that the argument ". . .was calculated to, and did, prejudice the rights of the defendant before the jury. It was the duty of the trial court to have promptly excluded this improper argument and directed the jury not to consider it. Failing in this the court committed perjudicial error." [Citations omitted]. Id. at 586.

In Carter v. State, Fla. App., 356 So. 2d.67, 1978, the Court reversed the defendant's conviction of robbery because of prosecutorial misconduct. During closing arguments the prosecutor attacked the defense attorney saying "she's trying to mislead you. That's her job. She's been appointed to be the defendant's mouthpiece, and she's done it." Upon objection the prosecutor explained "I'm not accusing her of anything, I said, 'almost', I'm not saying that she is." Id. at 67. Based upon this argument the court reversed the defendant's conviction.

Similarly, in the present case the prosecutor attacked the integrity of the defense with wholly inadmissible evidence. The following colloquy demonstrates the character of the prosecutor's tactics:

BY MR. CHRISTENSEN Q: When you saw this typewritten statement that was there to discredit and get Joey off the charges, did you ever receive a copy of that statement?

BY MR. WEAVER A: For a couple of hours.

Q: Who gave you that copy initially?

A: An investigator for the public defender's office.

Q: What happened to that copy?

A: They repossessed it.

Q: Did they tell you why?

A: No.

Q: Did they give you any indicati of why they were doing it?

A: I assume it was incriminating.

(T.39)

The most logical conclusion for a juror to draw from this conversation is that defense counsel somehow tried to coerce the witness into signing a false statement to exculpate the appellant.

As in Weathers, supra, the prosecutor's questioning was calculated to "prejudice the rights of the defendant before the jury." The questioning is aimed at directing the jury's thoughts to the impropriety of defense counsel's actions, not the guilt or innocence of the defendant. The implication is that defense counsel had no case and thus must force a witness to perjure himself in order to manufacture a defense. Such trial tactics are shockingly improper.

Defense counsel's testimony would have shown that Weaver voluntarily approached defense counsel desiring to aid in the defense of the appellant. Weaver first approached defense counsel the prosecutor was immediately notified of the conversation. When defense counsel later approached Weaver to obtain a statement of the events he did so because of the insistence of Weaver on the

earlier occasion.[5]

The jury could not fairly evaluate the case without knowledge of the relationships between defense counsel, Weaver and the prosecutor. The testimony of Weaver should have been put in proper perspective; and the only persons who could do this were the defense counsel and the prosecutor. Thus, in view of the prosecutor's clearly improper argument, defense counsel should have been allowed to withdraw and testify as to the circumstances surrounding the statement in question.

POINT III

THE COURT ERRED BY REFUSING TO PERMIT DEFENSE COUNSEL TO CALL THE PROSECUTOR AS A MATERIAL WITNESS.

The Utah Rules of Evidence, Rule 7 provides:

"Except as otherwise provided in these Rules or the statutes of this state, (a) every person is

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[5] MR. BUGDEN: I would submit to the court, proffer to the Court at this time; that prior to the time that Mike Weaver was incarcerated at the prison, prior to the time his parole was revoked, Mr. Weaver called me at my office. . . Mr. Weaver did in fact, make contact with me by telephone and told me in telephone conversation that he wanted to cooperate with the defense in this case, that he did not want to testify against Mr. Williams in this case, and testify on behalf of the State, and indicated to me that he was willing to make a statement that would be favorable to the defense in this case. . .

I then immediately called Mr. Christensen and related to him that this man, his witness, Mr. Weaver had called me at my office. . .

I then told Mr. Christensen that in fact, I was of the opinion that Mike Weaver was trying to set me up. (T. 121-123).

> qualified to [sic] a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter. . ."

Thus there is no statutory bar to defense counsel calling the prosecutor as a witness.

The general rule is that a prosecutor is a competent witness. 149 A.L.R.1305. The Utah Supreme Court recognized this rule in State v. Greene, 38 Utah 389, 115 P.181 (1910). Courts recognize, however, the problems inherent in calling the prosecutor as a witness for the defense. Thus, the South Carolina Supreme Court, in State v. Lee, 28 S.E.2d 402 (1943), refused to allow defense counsel to call the prosecutor where his evidence was merely cumulative. The Court also found that the trial court had discretion to limit the number of defense witnesses called to establish a single point. The court noted, however:

> There is no statutory prohibition which prevents the calling of a prosecuting attorney by the defense as a witness, and generally speaking he is a competent witness to testify as to all relevant facts coming to his knowledge, except privileged communications. It is not believed that the right to call the prosecuting attorney as a witness for the defense would result in an inveterate practice. Else, it is readily seen that it might result in embarrassment in the due administration of justice. However, the constitutional guarantees of the defendant's (Const. 1895, Art. 1, Sec. 18) outweigh the evil which may be anticipated. Id. at 405.

In the case at bar the prosecutor implied that defense had approached the prosecution's major witness and coerced him i

signing a statement favorable to appellant. The prosecutor explained the circumstances under which Weaver was approached. "Mr. Weaver was incarcerated at the State Prison, he was in a rather precarious situation since he is now a state witness. He has had several threats made to him from prison inmates. . . he [signed the statement] under duress and coercion at the time because of the circumstance he was in." (T.7)

Although the circumstances as described by Mr. Christensen were true, he failed to accurately describe the whole picture. Although Weaver was in prison at the time the statement was taken, he had approached defense counsel with an offer to help while he was free on bail and under no coercion. (T. 121-123) This added explanation changes considerably the import of Mr. Christensen's argument. It was, therefore, necessary for defense counsel to call Mr. Christensen as a witness so that he could elicit the missing circumstances surrounding the signing of the statement.

In Chatman v. State, 334 N.E. 2d 673 (Ind. 1975), the Indiana Supreme Court noted that counsel should be subject to call as a witness when he ". . . is believed to have material information that cannot be otherwise disclosed." Id. at 682. In the present case the prosecutor alone could testify that defense counsel had contacted him concerning Weaver's desire to assist in the defense of Joey Williams. Moreover, by refusing to allow the appellant to call Mr. Christensen to the stand, the court denied the appellant his right to confrontation as protected by Article I, Section 12 of the Utah Constitution. Because the state was the beneficiary of this constitutional error, the State must bear the burden of proving beyond a

reasonable doubt that the error was harmless. Chapman v. Califo
386 U.S. 18 (1967).

POINT IV

THE COURT ERRED BY PERMITTING THE PROSECUTOR TO CROSS-EXAMINE A DEFENSE WITNESS ABOUT THE DETAILS OF HIS PRIOR FELONY CONVICTION.

Utah Code Annotated §78-24-9 (1953 as amended) provide

> A witness must answer questions legal and pertinent to the matter in issue, although his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony, nor need he give an answer which will have a direct tendency to degrade his character, unless it is to the very fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction of a felony.

In the present case the defendant called as a witness Miller. Miller was an acquaintance of the appellant and Weaver prison. Defense counsel asked Miller if he had been convicted of a felony, the nature of that felony conviction, and when the viction was handed down. Defense counsel then proceeded to elic testimony as to Weaver's reputation at the prison for being a "s and his need to fear the other inmates. On cross-examination th prosecutor, over objection, asked Miller the specifics of his co viction. He asked what he robbed and who he kidnapped and why h had kidnapped someone. (T. 222-223). This was clearly an outra

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Q: (BY MR. CHRISTENSEN) What did you rob?
A: (BY MR. BUGDEN) He is not entitled to ask that q

* * *

THE COURT: The Court would overrule the objection.

* * *

A: (BY MR. MILLER) I beat up two guys and took thei licenses and one of their wallets.
Q: Who did you kidnap?
A: Back in '79.
Q: Who did you kidnap?
A: This kid that I know.
Q: You kidnapped a kid that you know?
A: Yes.

line of questioning and should never have been condoned.

The credibility of the witness had already been put at issue by his admission of a prior felony conviction. The only possible reason for the prosecutor's attack on this witness was to smear his character and to degrade him. This is the very mischief which the Utah Rules of Evidence are designed to preclude. If such questioning was permitted many witnesses would balk at testifying knowing that any embarrassing incidents in their past might be dredged up and paraded before the jury. The effect of the prosecutor's degrading cross-examination was to portray the defendant's witnesses as "bad guys", a patently improper practice.

This court announced its rule limiting the questions that could be asked about a prior felony conviction in State v. Johnson 287 P.909 (Utah 1930), citing 1 Wharton, Criminal Evidence, (10th Ed.) p. 404. The court stated the general rule:

> A witness, as affecting his credibility, may be asked if he had not previously been convicted of a felony, and the kind or name of the felony, but not as to the details or circumstances of it.

> Q: How old was the kid?
> A: Eleven.
> Q: Did you hold him for ransom?
> A: No.
> Q: Why did you kidnap him?
> A: That is beside the point.
> [Objection by Mr. Bugden]
> The Court: The court is going to hold that the witness has been called and counsel has the right to attack the credibility of the witness and to go into the matters and I will overrule the objection. (T. 223)

This general rule has been scrupulously followed by the Utah Courts. In State v. Kazda, 14 Utah 2d 266, 382 P.2d 4(1963), the Supreme Court detailed the reasoning for such a rul

> The apparent purpose and reason for permitting the prosecution to question the accused regarding prior felony convictions is to affect his credibility as a witness. [Citations omitted]. However, the details or circumstances surrounding the felony or felonies for which the accused was convicted may not be inquired into except under unusual circumstances.

In the present case the witness was called for the lim purpose of showing Weaver's reputation at the prison. Over the objections of defense counsel, the prosecutor proceeded to degra the witness by eliciting from him the specifics of the prior conviction. The court, however, overruled defense counsel's objection on the grounds that the prosecutor had the right to attack the credibility of the witness. (T. 223)

The prosecutor's questions clearly went beyond acceptab bounds. He was bent on vilifying the witness regardless of the limitations imposed by the Rules of Evidence. The prosecutor is at liberty to smear the character of the defense witnesses in or to strengthen his case. The court committed prejudicial error b permitting the prosecutor to sidestep the Kazda rule and debase witness with unabashed zeal.

POINT V

THE COURT ERRED BY OVERRULING DEFENSE COUNSEL'S OBJECTION TO THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT WHEREIN HE REFERRED TO INJURIES TO THE VICTIM WHICH WERE UNSUPPORTED BY THE EVIDENCE.

During the course of his closing argument the prosecutor stated:

> Bear in mind also up to what the impact would have been had Mr. Cassins Clark himself been injured or other "bitches" for victims. (T. Book 2 page 4)

Defense counsel immediately objected to this line of argument, however his objection was overruled. There was no evidence introduced at trial that Mr. Cassins Clark had been injured. The appellant claims that such an argument prejudiced him and entitled him to a new trial.

The Utah Supreme Court has never addressed the present issue, however other courts have. The Idaho Supreme Court, in State v. Spencer, 258 P.2d 1147 (Idaho 1953), held that an improper closing argument by a prosecutor was reversible error. In that case the defendant was convicted of second degree murder. During his closing argument the associate prosecutor referred to the grisly details of another murder. The prosecutor also made comments meant to "impress the jury to determine the case on factors outside the evidence." Id. at 1153. In reversing the defendant's conviction, the Idaho court held:

> Where the record shows that the prosecuting attorney has been guilty of misconduct calculated to inflame the minds of the jurors and arouse prejudice or passion against the accused by statements in his argument of facts not proved by evidence, the conviction will be set aside and a new trial granted. [Citations omitted].

Statements of fact not in evidence by the prosecuting attorney in his argument to the jury may constitute prejudicial misconduct. [Citations omitted]. Id. at 1154.

In the case at bar the prosecutor's reference to what might have happened had Mr. Clark been injured was clearly meant to

"inflame the minds of the jurors and arouse prejudice or passion against the accused." Such an argument was totally improper. A defendant should not be convicted based upon the conjecture of what might have happened to the victim.

The California Supreme Court has held that statements facts that are not in evidence constitute misconduct. In People v. Kirkes, 249 P.2d 1 (Calif. 1952) the defendant was convicted of a murder that had occurred eight years before the trial. The state's chief witness was a woman who said she had seen the victi get into the defendant's car the night of the murder. This witn however, did not tell her story until the defendant had been ind eight years after the murder.

> "[T]he deputy district attorney excused [the witness'] long silence by her asserted fear for her own safety if she testified against Kirkes. There is no evidence whatever upon which to base that statement. To pictur Kirkes as a murderer who would kill again to cover his crime and so bold that he had threatened those who might testify against him was entirely unjustified." Id. at 4-5.

Based upon this improper argument the court reversed t defendant's conviction.

Similarly, in the present case, by asking the jury to consider 'what if Mr. Clark had been injured," the prosecutor was portraying the appellant as a ruthless person who would have maimed or injured at the slightest provocation. Such an argumen was highly prejudicial to the appellant. There was no evidence indicate that the appellant was in fact a ruthless criminal, the the prosecutor's argument, wholly unsupported by the evidence, constituted misconduct. Because of the highly prejudicial natur

argument the appellant's conviction should be reversed.

In State v. Vickroy, 205 N.W. 2d 748 (Iowa 1973), the Iowa Supreme Court reversed the defendant's conviction for drunk driving because of the prosecutor's improper closing argument. The court noted:

> "Additionally, the prosecutor undertook to inflame the fears, passions and prejudice of the jury as against the defendant. This was done by inferentially urging the jurors to place themselves and members of their families in a hypothetical position of peril created by a drunken, [sic] car operating defendant." Id. at 751.

The court found that such an argument prejudiced the defendant and based upon this and other improprieties the conviction was reversed. The logic of the Vickroy case is just as compelling in the case at bar.

POINT VI

THE APPELLANT WAS DEPRIVED OF A FAIR TRIAL AND DENIED DUE PROCESS OF LAW WHEN THE PROSECUTOR KNOWINGLY FOSTERED THE FALSE IMPRESSION THAT WEAVER WOULD STILL SERVE TWO YEARS IN PRISON EVEN THOUGH HE TESTIFIED FOR THE STATE.

During closing arguments, defense counsel argued that Weaver had a motive to lie because in exchange for this favorbale testimony the county attorney was willing to strike a generous plea bargain and dismiss two pending felony charges which both carried possible prison sentences. To rebut this argument the prosecutor asserted:

> Mr. Bugden seemed to highlight the fact that Mr. Weaver also has an incentive to lie here today, because he may [not] have to do the time. Mr. Weaver is doing the time. He's got two more years to do on his time. (T. 20)

> Do you think another Class A conviction would really affect him that much out there at the State prison? Another year in jail at the prison? He is out there two years already. It is much more to his advantage to lie to you and say that Joey Williams wasn't involved. (T.23)

Thus, the prosecutor asserted not only that Weaver had no reason to the jury, but that in spite of his cooperation with the State Weaver would serve two more years at the prison.

Contrary to the prosecutor's assurances, Weaver did not spend the next two years in prison. In fact, Weaver was out of prison within one month after he had helped the appellant. One of the major factors behind Weaver's early parole was the prosecutor plea to the Board of Pardons. It appears that the prosecutor also dismissed totally the charges that were pending against Weaver at the time of his participation in the appellant's trial. In testi before the Board of Pardons the prosecutor stated:

> "My way of assessing that, [Weaver's potential to society if he is released at some reasonable date in the future] of course, the trial against Joey Williams, which was an aggravated robbery charge.
>
> He could have backed out at any time, and didn't. And as a result of the conviction that we got against Mr. Williams and at that point of time, I assessed with myself the type of character that I felt Mr. Weaver would be. And at that time, I -- on my own motion -- moved the court to dismiss the other charges against him.
>
> I didn't have to do that. The plea bargain was set. I could have insisted that he plead to another felony charge. Which I do not do. And it was based upon my assessment of him. Although I've only been a prosecutor for four years, I believe that my assessment is somewhat valid. And I feel Mr. Weaver is an asset. And Mr. Weaver recognizes his shortcomings and his shortfalls. He recognizes that his main problem has been the people he associates with.

> I think that's going to change for him in the future. And Mike knows I'll go to bat for him one time. And he's the first person I've gone to bat for, because of the observations I've made in the court proceeding, and the struggle I watched him with. (Board of Pardons Transcript, 5-7)

Appellant contends that the inconsistent arguments of the prosecutor before the jury and before the Board of Pardons denied him both a fair trial and due process of law. During closing arguments the prosecutor asserted, more than once, that Weaver's testimony was believable because by so testifying he would be in danger during the next two years while in prison. However, one month later the prosecutor told the Board of Pardons that because of Weaver's conduct during the trial, he, the prosecutor, had decided to ask the court to dismiss all pending charges and to ask the Board of Pardons to release Weaver immediately. At the time of the closing argument the prosecutor either knew for certain, or strongly suspected, that he would do everything he could to get Weaver out of prison. Thus, his argument to the jury was grossly improper and constituted misconduct.

The Utah Supreme Court recently considered a similar situation. In Walker v. State, Case No. 16705, filed January 23, 1981, this court reversed the defendant's conviction where the prosecutor exploited what he knew as a false impression in the minds of the jurors. In that case the defendant was convicted of unlawful possession of heroin with the intent to distribute for value. During a search of the living quarters above defendant's restaurant the police discovered

heroin. They also arrested a man who was sleeping above the restaurant at the time of the raid. Walker's defense at trial wa that she did not have exclusive use and control of the room where the heroin was found. She argued that the man had been using the room and that the heroin must have been his.

The prosecutor presented evidence that the room in ques was locked at the time of the raid and that no men's clothing was found in the room. During the trial the prosecutor learned that man had been sleeping in the room and that his clothing was locat in that room. The prosecutor, however, in closing arguments, sta that there was not evidence to support the defendant's contentior that she did not have exclusive control over the room.

In reversing the defendant's conviction this court stat

> "Whether or not the prosecution was aware of the fact this testimony was incorrect at the time it was given, he was later made expressly aware of that fact during the course of the trial. Yet, the prosecuting attorney failed to disclose the contradicting testimony to the plaintiff or the court, and instead deliberately relied on the false impression created by the original testimo in both his closing argument and summation to the jury.
>
> We have previously stated that the State while charged with vigorously enforcing the laws "has a duty to not only secure appropriate convictions, but an even higher duty to see that justice is done. [Citation omitted]. In his role as the state's representative in criminal matters, the prosecutor, therefore, must not only attempt to win cases, but must see that justice is done. [Citation Omitted] Thus, while he should prosecute with earnestness and vigor, it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. [Citation omitted].

> Applying this standard to the present case, we believe their exists a reasonable likelihood the false impression fostered by the prosecutor could have affected the judgment of the jury. Id. at 4-6.

Similarly, in the present case, the prosecutor created a false impression before the jury. He argued that Weaver was believable because he had two more years to serve at the prison, and because his testimony was against his best interest. Yet one month later, this same prosecutor argued for Weaver's immediate parole, an act which totally repudiated his remarks to the jury. This duplicity is in contravention of the standard laid down in State v. Adam, 583 P.2d 89 (Utah 1978) and Walker v. State, supra. As in Walker, there is a "reasonable likelihood the false impression fostered by the prosecution could have affected the judgment of the jury." Thus, the appellant's conviction should be reversed.

POINT VII

THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS DENIED BY THE CUMULATIVE EFFECT OF THE PROSECUTOR'S MISCONDUCT.

Appellant submits that each of the errors in the preceding points constitutes prejudicial error that would require a reversal of the judgment of the court below. But these errors must also be considered to have had a cumulative effect on the outcome of the trial. The misconduct of the prosecutor was hardly confined to a single instance. Rather, the prosecutor's conduct was egregious from his opening remarks, throughout the trial, and during his closing argument. From beginning to end Mr. Christensen exhibited conduct unacceptable for a prosecutor. The combination of the prosecutor's

insinuation that defense counsel coerced a false statement from Weaver; the court's refusal to allow defense counsel to rebut the innuendo by either testifying himself or calling the prosecutor to the stand; the unrestricted and unabashed character assassinat of defense witnesses; the prosecutor's reference in his closing argument to what might have happened had the victim been injured (where the evidence disclosed that the victim was uninjured); and the prosecutor's exploitation of the false impression that Weaver not get a "free ride" in return for his testimony because he woul still be serving two years in prison operated to prejudice the appellant by denying him a fair and impartial trial. In Berger v United States, supra, the United States Supreme Court held:

> We have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. Id. at 89.

And so it was in the present case. The misconduct of t prosecutor was so "pronounced and persistent" that it requires th reversal of defendant's conviction.

CONCLUSION

Appellant respectfully submits that the individual and cumulative errors stated herein require reversal of the jury verd and the judgment entered thereon. The appellant therefore asks t

Court to grant him a new trial in the Third Judicial District Court.

DATED this 28 day of May, 1981.

Respectfully submitted,

Walter F. Bugden, Jr.
Attorney for Defendant-Appellant

MAILING CERTIFICATE

Mailed a copy of the foregoing to the Attorney General's Office, 236 State Capitol, Salt Lake City, UT 84114 this ___ day of May, 1981.