1981

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

Appeal from a jury verdict of guilty of [illegible] the Third Judicial District in and for Salt Lake [illegible] of Utah, the Honorable Homer F. Wilkinson, presiding.

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Plaintiff-Respondent,	:	
-v-	:	Case No. 17330
JOEY WILLIAMS,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

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

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant was charged with the crime of aggravated robbery pursuant to Utah Code Annotated, § 76-6-302. In a jury trial conducted in the Third Judicial District Court before the Honorable Homer F. Wilkinson, the appellant was convicted of the lesser included offense of robbery, a second degree felony.

DISPOSITION IN THE LOWER COURT

The appellant was charged with the aggravated robbery of a service station attendant by the use of a knife or facsimile of a knife pursuant to Utah Code Annotated, § 76-6-302. In a jury trial before the Honorable Homer F. Wilkinson, the appellant was convicted of the lesser included offense of robbery, a second degree felony, and was sentenced

to serve a term of confinement at the Utah State Prison of not less than one year nor more than fifteen years. This sentence was to be served concurrently with the sentence the appellant was serving at the time of conviction.

RELIEF SOUGHT ON APPEAL

Respondent seeks a judgment and order affirming the appellant's conviction in the lower court.

STATEMENT OF THE FACTS

On the afternoon of Saturday, November 24, 1979, Mike Weaver was observed shoplifting a leather coat from the Z.C.M.I. store located in the Cottonwood Mall (T 483, 484). Weaver was arrested, searched, and taken to the store security office by security personnel where the Salt Lake County Sheriff's Office was notified (T. 484). Deputy John Acomb was dispatched to pick up Weaver and return him to the Holladay Substation of the sheriff's department (T. 222). Enroute to the substation, during a conversation with Weaver, Deputy Acomb learned that Weaver had been recently paroled from the Utah State Prison (T. 223). Apprehensive about returning to the prison as a result of the shoplifting charge, Weaver expressed the desire to cooperate with authorities to prevent a robbery or apprehend the participants of a robbery which was already scheduled to occur later that evening (T. 223, 291).

During the interview with sheriff's deputies, Weaver noted that the appellant had called him earlier in the day wanting to commit an armed robbery and to discuss plans for the robbery that evening (T. 143-145). Weaver, a proven reliable police informant, then consented to call the appellant from the police station and further discuss plans for the robbery (T. 313, 314, 144). During this recorded conversation, Weaver and the appellant discussed the vehicle and weapons to be used, as well as the types of victims who were the easiest targets (T. 144, 445). As a result of the conversation, it was determined that no firearms would be used, that Weaver would use his vehicle to pick up the appellant at his parents' address, and that the robbery would be perpetrated (T. 19, 20, 316).

Before Weaver left the police substation to drive to the appellant's residence, officers instructed him to prevent any threat to life at all costs (T. 21). Police officers also instructed Weaver to drive straight through a designated intersection if the robbery had taken place, or to turn at that intersection if the crime had not been committed (T. 100). At the conclusion of these instructions, Weaver was then released to drive to another meeting point where police would give him final instructions (T. 100). Weaver was told to abort the robbery if a firearm was involved, and if possible, to inform the police when the location of the

robbery became known to him (T. 166). Weaver was also instructed that in order to keep his identity as an informer secret, he would be allowed to escape on foot after the vehicle was stopped by police (T. 21). Weaver then proceeded to drive to the address given him by the appellant during the earlier telephone conversation (T. 167).

Upon picking up the appellant, Weaver noticed that Williams had brought a household paring knife to be used as a weapon (T. 22). Weaver and the appellant proceeded to drive around in search of a place to rob (T. 23). This search led them to Holiday Oil, a service station located approximately two miles from appellant's residence (T. 23, 27). Weaver and the appellant arrived at the station just as the attendant was preparing to close the business (T. 83). As the attendant returned from emptying the garbage, the appellant approached him at the door of the station and informed him that "my partner has a gun and this is a holdup" (T. 83). The attendant was uncertain that a gun was actually involved (T. 89). The three men then entered the station where the attendant was forced to sit in a chair while the appellant took the attendant's wallet and money from the cash register (T. 86, 280, 297). The appellant and Weaver then exited the station area, entered their car, and sped away (T. 88, 170). A short time later, a police surveillance vehicle observed

Weaver's automobile travel straight through the designated intersection, indicating that the robbery had taken place (T. 106). The officers pursued the vehicle which eventually pulled to the side of the road and stopped (T. 107). As Weaver stopped the car, he jumped out and escaped on foot as planned (T. 107). The appellant was apprehended and taken back to the service station where the attendant identified him as one of the robbers (T. 90, 91).

At trial, Mike Weaver testified that he was returned to the prison in July of 1980 for violating his parole (T. 28-29). While there, Weaver was approached and threatened by the appellant on several occasions (T. 29, 32). At one point, Weaver was beaten by unidentified assailants (T. 33). The appellant also coerced Weaver into signing a hand-written statement saying in effect that Weaver had committed the robbery by himself and that the appellant was only a hitchhiker who was picked up just prior to the commission of the crime (T. 32-34). Weaver also testified that defense counsel and an investigator employed by counsel presented him with a typewritten statement for his signature (T. 34-35). This statement was presented to Weaver at the prison without the knowledge or approval of the prosecutor, and in the absence of a certified shorthand reporter (T. 35, 42-43). At the time this statement was signed, Weaver did not have the

benefit of counsel, nor was he placed under oath (T. 35, 43). Weaver was also not allowed to keep a copy of the statement (T. 39-40). Later, because of the threats and the coercive environment to which Weaver was subjected, he was granted protective custody (T. 36, 128, 209, 221).

In his opening statement at the trial, the prosecutor noted that while Weaver had been incarcerated in the State Prison, he had been threatened by several inmates including the appellant (T. 7). He also noted that because of this precarious position, Weaver was coerced into signing a statement exculpating the appellant from criminal liability (T. 7). The prosecutor stated further that Weaver would testify to the signing of the statement which was in the custody of defense counsel (T. 7). Defense counsel interposed no contemporaneous objection, and in fact did not mention the prosecutor's opening statement until some time later, prior to the cross examination of Weaver (T. 41).

At that time, out of the presence of the jury, defense counsel moved for a mistrial, not on the ground that counsel's integrity had been impugned, but on the ground that the prosecutor, through his opening statement and through the direct examination of Weaver, had informed the jury that the appellant had been previously convicted of a felony (T. 42). The court thereafter reconvened in chambers to discuss the

matter further, and eventually denied the motion for a mistrial (T. 44). In chambers, defense counsel made his first motion to withdraw as counsel on the ground that he was so upset he could not continue to competently represent the appellant (T. 44). The court likewise denied the motion to withdraw (T. 45). The trial proceeded in normal fashion (T. 45-46).

The second day of the trial, September 8, 1980, began with the trial judge excusing the jury in order to hear a series of defense motions (T. 118). Defense counsel moved for a mistrial on the ground that the prosecutor "introduced evidence" in his opening statement (T. 118). This alleged "incompetent evidence" was purported to be the prosecutor's comment made during his opening statement that Weaver had signed a statement under duress and coercion, exculpating the appellant, which statement was in the custody of defense counsel (T. 119). Defense counsel then asserted that he should be allowed to withdraw as counsel on the grounds that his character had been discredited (T. 121). He alleged that his credibility could be restored only if he were able to call the prosecutor to testify and withdraw as defense counsel himself, in order to testify to the events surrounding the signing of the statement by Weaver at the prison (T. 123-124). Defense counsel concluded his argument by again moving for a

mistrial on the ground that his client could not obtain a fair trial (T. 126). After a brief response by the prosecutor, the court, referring to a meeting held in chambers on the subject, denied the motion for a mistrial (T. 129).

On the subject of calling the prosecutor as a defense witness and allowing defense counsel to withdraw and likewise become a defense witness, defense counsel stated expressly that he was not going to testify (T. 125). The court thereafter denied defense counsel's request to call the prosecutor as a witness when the prosecutor objected on the grounds of relevancy (T. 136). Defense counsel also noted that a curative instruction may be required concerning the "inadmissible evidence" mentioned in the prosecutor's opening statement (T. 132). The court replied that such an instruction would be given upon counsel's request; however, no such instruction was ever requested (T. 132-133).

Later in the trial, after the State had rested its case, the defense called Weaver as a witness (T. 202). Defense counsel questioned Weaver in depth about prior felony convictions (T. 203-209). During this time, defense counsel elicited information concerning crimes with which Weaver was charged but which were never brought to trial, and for which no conviction was obtained (T. 208). The entire line of questioning took place over the prosecutor's continuing objection (T. 206-207).

Therafter, defense counsel called and examined witness James Miller (T. 219). During direct examination, the witness testified that he was currently a resident of the Utah State Prison, having been convicted of robbery and kidnapping (T. 219-220). On cross examination, the witness was asked "What did you rob?" (T. 222). Defense counsel objected to the question stating that the prosecutor was entitled to ask only the nature and year of the conviction (T. 222). The prosecutor responded to the objection by moving to strike the previous improper examination of Weaver concerning previous charges and convictions, which was allowed pursuant to a side bar stipulation (T. 222). The prosecutor also observed that the defense counsel, by the improper examination of Weaver, had "opened the door respecting the parameters" of questioning (T. 222). The court overruled the objection and the witness replied that he had beaten two persons and had taken their driver's licenses and one of their wallets (T. 222). The prosecutor then asked the witness who he had kidnapped (T. 222). The witness replied that he had kidnapped an eleven-year-old child (T. 223). Although no contemporaneous objection was made to this question, an objection was interposed to a later question asking why the witness had committed the crime (T. 223). The witness refused to answer the question stating that the reason for the kidnapping was "beside the point" (T. 223).

Beginning the third day of trial, the court convened in chambers and discussed the matter of the parameters of the direct and cross examination of witnesses who had been convicted of felonies (T. 350). The prosecutor asked that the record reflect the contents of a discussion that took place at the side bar (T. 350). After brief comments were heard as to the contents of the side bar discussion, the court summarized the discussion for the record:

> And after the discussion we concluded that the Court was of the opinion that the examination by the defense was going beyond the scope permitted. That the State stipulated to it, and I believe I stated that on the record, the State agreed to it. But with the understanding that if you did go into it the door would be open and the State could also have the same latitude. That is my best recollection.

(T. 353). The court then allowed the prosecutor to call a rebuttal witness before counsel's arguments began (T. 354). Immediately prior to allowing counsel to argue their cases, and prior to giving the instructions to the jury, the court noted that the evidence had been completed (T. 357). The court then reiterated a note previously stated to the jury that counsel's arguments were not evidence, but rather constituted their attempt to tie the evidence together under their particular point of view (T. 357).

During the prosecutor's argument, reference was made to "what the impact would have been had Mr. Cassins Clark himself been injured" (T. 361). Although an objection to this comment was interposed, the court overruled the objection stating that the comment was proper under the offense charged (T. 361).

After deliberation, the jury returned a verdict, finding the appellant guilty of the lesser included offense of robbery (T. 367).

ARGUMENT

POINT I

REFERENCE BY THE PROSECUTOR IN HIS OPENING STATEMENT TO THE FACT THAT DEFENSE COUNSEL HAD CUSTODY OF A STATEMENT SIGNED BY THE STATE'S CHIEF WITNESS EXCULPATING THE APPELLANT FROM CRIMINAL LIABILITY WAS PROPER WHERE THE WITNESS WAS EXPECTED TO TESTIFY CONCERNING THE STATEMENT, THE REFERENCE WAS MADE IN GOOD FAITH, AND NO PREJUDICE RESULTED FROM THE COMMENT.

During his opening statement, the prosecutor commented:

> Bear in mind, also, that Mr. Weaver was brought from the State Prison this morning, and will return to prison at the

> conclusion of this case. Bear in mind, also, that while 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, including Mr. Williams, who threatened him if he was to testify. He was at one point coerced into signing a statement which would indicate that Mr. Williams was not involved in the crime. Bear in mind that he did that under duress and coercion at the time because of the circumstance 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 defense counsel, and I have nothing previous to that statement at this point in time.

(T. 7). Defense counsel interposed no contemporaneous objection to the above comment he now assails. At the end of the opening statement, defense counsel noted that he had a motion to make out of the presence of the jury, but would reserve it for a later, more convenient time (T. 11). After direct examination of Weaver, the motion was heard out of the presence of the jury. Counsel moved for a mistrial on the ground that the prosecutor "in both his opening statement and through the testimony of Mr. Warner, has elicited evidence now before the jury that Mr. Williams was in prison at the time the relationship [between Weaver and Williams] was first formed (T. 41). In response, the prosecutor noted that since a notice of entrapment had been filed by the appellant, appellant's relationship to Weaver and the fact that appellant

was on a work release program at the time of the robbery were certainly relevant (T. 42). It was not until this point, out of the presence of the jury, that counsel took offense to the prosecutor's response to his (defense counsel's) motion for a mistrial which had absolutely no connection with the alleged "attack" on the integrity of appellant's counsel in the prosecutor's opening statement, and which was no more than an appropriate comment on the anticipated testimony of the prosecutor's own witness. Counsel then moved for permission to withdraw from the case on the ground that because he was emotionally upset, he could not effectively represent his client (T. 44). The court denied both the motion for mistrial and the motion to withdraw (T. 44-45).

Not only did appellant fail to contemporaneously object to the prosecutor's comment, he also failed to object when the circumstances surrounding the signing of the statement were elicited on direct examination of Mr. Weaver (T. 34-36, 39-40). The only objections interposed at all during this line of questioning were: 1) to the witness' conclusion as to why he was asked to sign the statement (objection sustained); and 2) to the witness' comment as to what the public defender's investigator asked him to do (objection sustained) (T. 39). Again, at no point did the appellant object to the opening comments of the prosecutor or the

testimony by Weaver concerning the statement signed by Weaver at the prison on the grounds asserted in appellant's brief. The only two objections interposed at all were sustained on the grounds of conclusiveness of the answer and hearsay (T. 39-40). Furthermore, when appellant's counsel moved for a mistrial, the basis asserted then was far removed from the alleged basis proffered in appellant's brief. In such a case, appellant cannot be heard to complain on different grounds on appeal. In the case of State v. Long, 580 P.2d 1181, 1182 (Ariz. 1978), the Arizona Supreme Court was faced with an allegation of error committed in one of the trial court's jury instructions. At trial the defendant objected to the instruction on grounds different from those urged on appeal. Discussing the doctrine of waiver in this context, the court stated:

> However, raising one objection at trial does not preserve another objection on appeal. . . . Furthermore, an error in giving instructions is waived unless timely objection is made in the trial court. . . . Because appellant failed to raise the objection at trial that she now urges on appeal, the objection is waived.

Any comment by the prosecutor which could be construed as an affront to counsel's integrity only by the wildest stretch of the imagination occurred in chambers or in the courtroom out of the presence of the jury. The appellant thereby suffered absolutely no prejudice.

The result of appellant's failure to appropriately and contemporaneously object to the comments and rulings he now alleges were erroneous and prejudicial is a waiver of the right to present those issues to this Court. Such objections are required to properly preserve issues for appeal. See Rule 4 of the Utah Rules of Evidence and Rule 46 of the Utah Rules of Civil Procedure. Failure to properly preserve issues for appeal requires the operation of the doctrine of waiver as subscribed to by this Court in Brown v. Turner, 440 P.2d 968 (Utah 1968), and more recently in Andrews v. Morris, Utah, 607 P.2d 816 (1980) and Pierre v. Morris, Utah, 607 P.2d 812 (1980). The appellant compounded this waiver by failing to request any type of curative instruction. This failure, in itself, requires a ruling that the appellant has waived the issue on appeal. The court, in People v. Beivelman, 447 P.2d 913, 921 (Cal. 1968), stated with respect to improper remarks in opening statements, improper examination, or improper argument, that "Hence, if he [the defendant] is silent or merely objects or makes the assignment of misconduct but did not request an admonition, he cannot complain on appeal." In the present case, the appellant almost met this burden, but in the end failed to request any type of curative admonition even though the Court offered to give such an instruction.

Mr. Bugden: We are going to have to get a curative instruction as to the inadmissible evidence that is before the Court.

The Court: If you request the instruction. I would indicate to you I think it is very unwise. I think it is unnecessary. But if you requested it I would probably give it just because you asked for it. . . .

(T. 132-133). Appellant's counsel failed to take advantage of the court's offer by omitting any request for an instruction.

The United States Supreme Court has noted that the waiver doctrine will not be allowed to operate where an appellant demonstrates "cause" for his failure to comply with a state's procedural rule and actual prejudice resulting from the alleged error. Wainwright v. Sykes, 433 U.S. 72 (1977). The appellant demonstrates neither cause nor actual prejudice. Certainly, since counsel was present with the appellant at all times during the trial, there can be no reason for the failure to contemporaneously object. Likewise, because of the quality and quantity of evidence, as well as the fact that the appellant admitted committing the robbery (T. 277), no miscarriage of justice and consequently no prejudice resulted from the failure to object in a timely manner. See United States v. Addonizio, 442 U.S. 178, 185 (1979).

On September 8, 1980, court convened for the second day of trial. The jury was again excused in order for appellant's counsel to present several motions (T. 118). At that time, appellant renewed his motion for a new trial on the basis that the prosecutor introduced "incompetent evidence" in his opening statement, and accused appellant's counsel of "tampering with a witness" (T. 119). In response, the prosecutor noted that:

> I don't recall anything in the opening statement that I in any way besmirched Mr. Bugden. I certainly have the right to refer to evidence solicited. I don't have to sit around here and wait for defense counsel to spring a surprise statement on me with respect to a case, particularly when I have information that has been made available to me just prior to coming in here [to trial] that indicates that Mr. Weaver did make a statement that is inconsistent.

(T. 127). The court correspondingly denied the motion for a mistrial stating:

> The court does deny the motion as far as a mistrial is concerned. The court doesn't want to make further comment except this, that we discussed this matter last Friday, the court knows what was said, and I say knows, I recall somewhat. I do not feel there is anything on the record there that is prejudicial as far as the character of defense counsel anyway, and I denied the motion last Friday. There is nothing new before me today to make me change my mind. And I again deny the motion.

(T. 130).

A review of the comment made in the opening statement by the prosecutor supports the comments made by the court in denying the motion for mistrial and the prosecutor's response to the motion. At no time was counsel's name mentioned, nor was there mention of any impropriety or unethical conduct on behalf of appellant's counsel. Any possible suggestions of impropriety occurred out of the presence of the jury or in chamber consultations during recesses.

Furthermore, case law overwhelmingly supports the view that the appellant cannot prevail on this point. Since the opening statement is essentially an outline of the information and evidence which counsel will present in support of his case, at the time an opening statement is given, no facts have been proven and no rulings on the admissibility of evidence have been made. Therefore, it is a widely accepted practice that "Counsel may state what he expects the witness will testify if the witness is going to testify." Hall v. State, 225 S.E. 2d 705, 707 (Ga. App. 1976). This follows closely the reasoning expressed by the Supreme Court of Kansas which stated:

> This court has consistently held that a prosecuting attorney is allowed reasonable latitude in stating to the jury the facts he proposes to prove.... It is only when the prosecutor acts in bad faith and substantial prejudice results that appellate courts act.

State v. Jackson, Kan., 565 P.2d 278, 284 (1977).

Correspondingly, the controlling rule was stated by the court in the case of Gladden v. Frazier, 388 F.2d 777 (9th Cir. 1968). There the court was faced with a situation where the prosecutor in his opening statement commented in considerable detail on the evidence he intended to present and the witnesses who would testify to that evidence. In one instance he named a witness who was expected to testify to the commission of the crime, and thereafter recited what the testimony would be. When the witness was eventually called to the stand, he refused to answer the prosecutor's questions claiming the privilege against self-incrimination. On appeal, the court rejected appellant's claim of prejudicial error resulting from the prosecutor's opening statement by holding that:

> The controlling question should be the good faith or lack of good faith of counsel in saying what he said in his opening statement and the likelihood that the opening statement was unfairly prejudicial to the defendant.

388 F.2d at 779. In the instant case, not only did the prosecutor make proper mention in his opening statement of the testimony he expected from a named witness, but the testimony expected was actually produced without any contemporaneous objection made by appellant's counsel. Furthermore, appellant's counsel was afforded unlimited cross examination

of the witness, Mr. Weaver, and later called him as a witness for the defense. Consequently, the appellant was in no way prejudiced by the prosecutor's comment in his opening statement.

Moreover, since the testimony given by Weaver concerned only the physical and emotional environment of duress surrounding the signing of the statement, introduction of the statement itself was not necessary in order to make the prosecutor's comment proper. However, even if introduction of the statement had been necessary, the comment would still have been proper. In the case of Mares v. United States, 409 F.2d 1083, 1085 (10th Cir. 1968), the court stated:

> Appellant moved for a mistrial contending that the evidence did not sustain a prejudicial opening statement made by the government. The law does not require that opening trial statements be completely supported by evidence introduced at trial. Such a rule, rigidly enforced, would effectively eliminate opening remarks and deprive the jury of a very useful outline of the trial as the attorneys expect it to unfold. . . . The decision is discretionary and is for the trial judge.

In adopting the above rationale, the Supreme Court of Colorado stated in People v. Jacobs, Colo., 499 P.2d 615 (1972) that:

> We adhere to the general rule that error cannot ordinarily be predicated upon an opening statement of the prosecuting attorney as to what he expects to prove, where, for some reason he later fails to support some part of that statement, unless the unsupported portion of this statement was made in bad faith and was manifestly prejudicial. . . . Thus, absent an affirmative showing of prejudice as bad faith on the part of counsel making the statement, the decision of the trial judge controlling such remarks will not ordinarily be disturbed.

499 P.2d at 617. While the appellant has not shown the prosecutor's remark to be improper or prejudicial, and no showing of bad faith has been made, should this Court find error, the error was cured by the trial court's admonitions and instructions to the jury.

Immediately prior to instructing the jury on the applicable law and after both parties had rested their cases, the court noted:

> At this time, members of the jury, that does complete the evidence in the case, and as I indicated to you last night it now becomes the Court's responsibility to instruct you on the law in this matter, after which both counsel will have an opportunity to argue the law and the facts to you, the purpose of that argument being to persuade you as far as their position is concerned. <u>And of course, as I stated at the outset, what they say is not evidence, but they will tie the evidence together to give you information as to their particular view</u>. . . .

(T. at 357) (emphasis added). Although the court made this statement with particular reference to the closing arguments of counsel, the inference communicated by the court is that at some earlier point in time, probably at the beginning of trial, a similar admonition was given. In further amelioration of any error, the court made appropriate mention of the law and procedure of the admitting of evidence, and the jury's role in the trial. In instruction number six, the court recited that:

> You are not to consider any evidence offered but not admitted, nor any evidence stricken out by the court; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

(R. 90). In instructions numbers nine and ten, the court stated among other things that the jury was the exclusive finder of fact and weigher of the evidence (R. 93, 94). Such instructions and admonitions were more than sufficient to render harmless any alleged impropriety in the opening statement.

The court, in State v. Bowie, 580 P.2d 1190, 1194 (Ariz. 1978), concurred with this point of view. In that case, the prosecutor, in his opening statement, described the defendant's lewd and lascivious acts committed against a

four-year-old victim. Later, this victim was found to be incompetent to testify. The appellant moved for a mistrial on the basis of alleged prejudice resulting from evidence described in the statement but not produced at trial. Regarding the trial court's instructions to the jury, the Arizona Supreme Court stated that:

> Any possible prejudice from the opening statement was overcome by the court's cautionary instructions that evidence did not come from the attorneys and that the verdict must be determined only by reference to the evidence.

The two cases referred to by appellant in support of his cause are either inapposite to, and distinguishable from, the instant case, or supportive of the respondent's view. In Woodmansee v. Stoneman, 344 A.2d 26 (Vt. 1975), the defense objected on hearsay grounds to the admission of prior consistent statements which were outlined in the prosecutor's opening statement. On appeal, the state argued the propriety of the statements' admission on the ground that prior consistent statements are admissible where a witness has been impeached. In the present case, no prior consistent statements were used or mentioned. Also, unlike Woodmansee, no contemporaneous objections were interposed.

In Baker v. State, 33 N.W. 52 (Wis. 1887), the appellant's conviction was affirmed after the court noted

that counsel should be given broad latitude in their statements, and where questions arise, the trial court's discretionary ruling is respected absent any abuse of discretion.

In the present case, the record reveals that the comment made by the prosecutor with respect to the fact that a statement was signed by witness Weaver in reality contained no reference to appellant's counsel, and in no way impugned the credibility of counsel. Moreover, complaints of the appellant are not properly before this Court where the appellant failed to contemporaneously object in the lower court on the grounds presented in this appeal. Furthermore, the appellant makes no demonstration of actual prejudice resulting from the comment. The discussions and motions for mistrial were heard outside the presence of the jury. In the absence of any reference to appellant's counsel's name or insinuation of a lack of integrity, it cannot be assumed that prejudice resulted.

Likewise, the comment cannot be viewed as the introduction of incompetent evidence. The comment contained no reference to the processes or manner by which the statement was obtained, nor was any reference made to the language of the statement. The comment, which simply mentioned the statement in passing, was well within the realm of proper comment by the prosecutor who is allowed wide latitude in

outlining the witnesses and their expected testimony to the members of the jury panel. Nor was the comment left to stand alone or unsupported. During direct examination, witness Weaver testified to the environment of duress at the prison which resulted in the signing of the statement. Moreover, Weaver was subject to a full and rigorous period of cross examination. In view of this entire courtroom scenario, the appellant was not in any way prejudiced by this occurrence properly commented upon by the prosecutor.

POINT II

SINCE THE PROSECUTOR'S REFERENCE IN HIS OPENING STATEMENT TO AN INCONSISTENT STATEMENT SIGNED BY THE STATE'S CHIEF WITNESS DID NOT DISCREDIT DEFENSE COUNSEL, THE TRIAL COURT EXERCISED SOUND DISCRETION IN DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW IN ORDER TO TESTIFY AND TO COMPEL THE PROSECUTOR TO TESTIFY, WHERE THE PROFFERED TESTIMONY COULD HAVE BEEN OBTAINED FROM OTHER PERSONS.

In responding to Points II and III of appellant's brief, it is important to note the comment made by the prosecutor in his opening statement, which is proffered as the basis of appellant's allegations.

> He has had several threats made to him from prison inmates including Mr. Williams who threatened him if he was to testify. He 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 circumstance he was in. He will testify to the fact that he did sign this particular statement. This statement at the present time is in the custody of defense counsel, and I have nothing previous to that statement at this point in time.

(T. 7). At no time is the name of appellant's counsel mentioned, nor is there any allegation of impropriety on the part of counsel in the manner by which the statement was obtained. Likewise, no mention is made of counsel's investigator nor of visits made to the prison. It is important to remember also that the witness, Weaver, testified in support of the above comment without objection from appellant's counsel. Note also that counsel conducted cross examination of the witness and introduced witnesses to counter Weaver's testimony. In view of these facts, it was simply unnecessary for appellant's counsel or the prosecutor to withdraw and testify in the case, particularly where no contemporaneous objection on the grounds now alleged was made either during the opening statement or direct examination.

The first reference made to a motion to withdraw is found during the discussion of a motion for a mistrial out of the presence of the jury (T. 44). There, appellant's counsel moves to withdraw on the basis that he could no longer

effectively represent his client; he makes no mention of withdrawing in order to testify. After the motion was denied, appellant's counsel conducted the cross examination of several witnesses. Not until the second day of the trial, four days after the first day of trial, did counsel move to withdraw on the grounds now asserted. At that time, counsel also expressed his intention to call the prosecutor as a defense witness (T. 121). In response to counsel's motion, the court stated:

> I don't think there is a need for either one of you testifying. I think all you are doing, Mr. Bugden, to be perfectly frank with you, is stirring this matter up and creating a want for something there that is just not there. There has not been the prejudice on this record of which you are referring to.

(T. 132). Appellant's counsel later disposed of the present issue in a colloquy with the court:

The Court: That is my understanding. So if you call yourself as a witness, then you are doing that of your own choice.

Mr. Bugden: Well, I am doing it because the Court won't declare a mistrial.

The Court: No you are not. You are calling yourself as a witness. What you are saying is that you will not argue the case, is that correct counsel?

Mr. Bugden: Well, that is what the canons require.

The Court: Well, then I want to get this clear. Is that what you intend to not argue the case?

Mr. Bugden: I haven't decided, Your Honor, if I am going to testify. I have decided that Mr. Christensen is.

The Court: My question to you is this--

Mr. Bugden: I am not going to testify.

(T. 135) (Emphasis added). Simply stated, there was no reason for the court to allow appellant's counsel to withdraw in order to testify since appellant's counsel had decided not to testify. This issue was rendered moot by appellant's counsel in the lower court.

Courts in general are hesitant to allow participating counsel to be called as a witness since "The role of advocate and witness should be kept separated and an advocate should be called as a witness only in circumstances of the utmost necessity." Cavaness v. State, Okl. Cir., 581 P.2d 475, 478 (1978). Such necessity did not exist in the present case. It is important to note that the details of the signing of the statement by Weaver and the alleged insinuations of misconduct were never presented to the jury. Had the jury been informed of the manner in which the statement was obtained by defense counsel, the necessity of

further evidence of the details and telephone conversations might be arguable. However, even in that event, the testimony of either counsel would not have been required. Appellant's counsel could easily have called as a witness the investigator who actually obtained the statement (T. 119). Counsel could also have called John Hill, who was also apparently connected with the signing of the statement (T. 121). As to any information concerning Weaver's initial contact with counsel and Weaver's prison status at the time of the contact, Weaver himself could have testified to those events on direct examination by appellant's counsel. As to Weaver's prison status at the time of initial contact, Beverly Tisher, custodian of prison records, could have provided the necessary testimony. All of the necessary information could have been obtained without the testimony of the prosecutor or the appellant's counsel.

In the present case, counsel's proffered showing of the necessity of calling the prosecutor as a defense witness was insufficient to compel the court to rule in counsel's favor over the objection of the prosecutor. In Riboni v. District Court in and for the Tenth Judicial District, Colo., 586 P.2d (1978), the court held that:

> To disqualify a prosecuting attorney, the defendant has the burden of establishing facts sufficient to persuade the trial court that he probably will be denied a fair trial if the prosecuting attorney is not removed. . . . The mere fact that the defense intends to call the prosecutor as a witness does not, without more, dispose of the question.

586 P.2d at 11. In the present case, the appellant has not even approached this level of proof. Indeed, it is difficult to imagine how the appellant was denied a fair trial in view of his admission that he committed the robbery:

Mr. Bugden: You did the robbery, didn't you?

Mr. Williams: Yeah. Yes, I did.

(T. 277).

The Court, in Riboni. also stated the reason for its holding was that:

> Every prosecutor who participates directly in interviewing and otherwise investigating his cases subjects himself to the risk of being called as a witness. But to allow opposing counsel the unfettered option of removing any prosecutor who has personal knowledge of any material fact in the case might well result in restricting the prosecution function to the ill-prepared.

586 P.2d at 11. Since no "material fact" was involved in the present case, the above stated reason looms as a more ominous danger.

Not only must the appellant demonstrate that he will be denied a fair trial in order to prevail, his burden is compounded by the fact that the issue is addressed to the discretion of the trial court. In State v. Hegervorst, 566 P.2d 828 (N.M. Ct. App. 1977), the court stated:

> Nevertheless, a trial court has discretion respecting the examination of witnesses and, in appropriate circumstances, may refuse to allow a witness to take the stand. Courts are reluctant to allow attorneys to be called as witnesses in trials in which they are advocates. When a trial court refuses to allow a prosecutor to be called as a witness for the defense, the appellate issue is whether the trial court abused its discretion.

566 P.2d at 834. In light of the fact that the evidence sought to be obtained from the prosecutor's testimony could have been obtained from a number of other individuals, it cannot be said that the lower court abused its discretion in refusing to allow appellant's counsel to call the prosecutor as a witness. Likewise, it is clear that where evidence of the details of the signing of the statement were not before the jury, the appellant was not denied his right to the confrontation of witnesses under Article I, Section 12 of the Utah Constitution.

POINT III

WHERE THE EVIDENCE OF APPELLANT'S GUILT WAS OVERWHELMING, HE HAS FAILED TO OVERCOME HIS BURDEN OF SHOWING THAT THE TRIAL COURT DID NOT EXERCISE SOUND DISCRETION IN ALLOWING THE PROSECUTOR TO ASK QUESTIONS CONCERNING PRIOR FELONY CONVICTIONS OF A WITNESS WHO WAS NOT THE DEFENDANT, PARTICULARLY WHERE SUCH QUESTIONING WAS STIPULATED TO, AND OPENED BY APPELLANT'S COUNSEL.

Appellant complains in Point IV of his brief that the prosecutor's cross examination of witness James Miller was improper and constituted reversible error. On direct examination, appellant's counsel asked Miller where he resided, for what crimes he had been convicted, and in what year he was convicted (T. 219-220). The witness answered that he had been convicted of robbery and kidnapping (T. 220). On cross examination, the prosecutor asked the witness what he robbed, beginning the following colloquy:

By Mr. Christensen: What did you rob?

Mr. Bugden: He is not entitled to ask that question.

Mr. Christensen: I am if he is, Your Honor.

Mr. Bugden: He is entitled to ask the nature of the conviction, the year of the conviction.

Mr. Christensen: I move to strike every bit of Mr. Weaver's testimony. I indicate Mr. Bugden has opened the door respecting parameters of this.

The Court: The Court would overrule the objection. (T. 222). The witness continued on to answer that he had beaten two persons and had taken their wallets (T. 222). The witness later responded concerning the kidnapping conviction that he had kidnapped an eleven-year-old child (T. 223). It is notable that no objection was made to the questioning about the kidnapping until the witness was asked why he committed the crime (T. 222-223). Also interesting to note is the prosecutor's response to the objection (T. 222). The prosecutor moved to strike Weaver's testimony elicited on direct examination by appellant's counsel (T. 222). Also, the prosecutor indicated that appellant's counsel had opened the parameters of the questioning (T. 222). A closer scrutiny of the grounds for these comments reveals justification overlooked by the appellant.

An analysis of appellant's counsel's direct examination of Weaver shows that the questioning was conducted for the sole purpoe of impeaching Weaver's credibility. During this examination, appellant's counsel paraded before the jury allegations of charges that the witness had no knowledge of, or that were dismissed prior to trial (T. 205, 208). Such improper questioning was allowed to continue throughout direct examination, over the state's objection, and was the object of the prosecutor's response that if

appellant was allowed such questioning, he should be afforded the same latitude. Further light is shed on this entire issue by a colloquy which took place during the last day of trial.

Mr. Christensen: [A]lso there was an objection that the State made. I am trying to recall exactly what the wording of it was. Oh, yes, dealing with the parameters of cross-examination, or direct examination of a witness who takes the stand and has been convicted of a felony.

At that time I objected to Mr. Bugden's broad latitude and broad questioning and going beyond the scope of the statute in asking questions that were not relative or probative to either impeachment or credibility of the witness, and under the statute to avoid embarrassment to a witness. There are certain parameters that must be governed.

I believe my objection was based upon Mr. Bugden's going beyond that, and that this necessitated me to go beyond the parameters in cross-examining his witness. As we indicated in the side bar, Mr. Bugden may be opening the door to broader discovery and broader examination than he is entitled to under the statute.

(T. 350-351). After a brief response by appellant's counsel, the prosecutor replied:

Mr. Christensen: You recall that this is not the side bar conference I am talking about. Your Honor, I am talking about the one where Mr. Weaver was being inquired as to the details of his felony offenses, as to the details what had taken place, talking about guns and possession of the gun.

At this time I objected to his going beyond the scope of the statute in asking those

particular questions. And again questions came up when he started referring to complaints which Mr. Weaver was never even convicted with regard to inquiry. . . .

(T. 352). The court then summarized the essence of the side bar conference by stating:

The Court: My mind is somewhat hazy on this, but I do recall, especially with Mr. Weaver, of course, there was somewhat of a discussion, and that the State did object to you going too far into it. And after the discussion we concluded that the Court was of the opinion that the examination by the defense was going beyond the scope permitted. That the State stipulated to it, and I believe stated that on the record, the State agreed to it. But with the understanding that if you did go into it the door would be open, and the State could also have the same latitude. That is my best recollection.

Mr. Bugden: Thanks.

(T. 353) (emphasis added). This summary, accompanied by counsel's acquiescence, demonstrates that appellant's counsel stipulated to the broad questioning by the prosecutor of defense witnesses who had been convicted of felonies. The accuracy of the lower court's summary is supported by the actual conference and statement as the court recounted (T. 210). The appellant cannot be heard to complain of the parameters of the prosecutor's cross examination which was stipulated to by counsel and the subject matter of which was opened by appellant's counsel.

In the circumstance where the defense counsel has opened the matter, or in this case where defense counsel has stipulated to the questioning, this Court has ruled that such questioning is proper. In State v. Adams, 26 Utah 2d 337, 489 P.2d 1191 (Utah 1971), this Court dealt with an allegation of error in the questioning of the accused who appeared as a witness in his own behalf. The Court noted that defense counsel had sought to portray the defendant as a person of good character who had been harrassed by the police.

> In doing so he brought out various matters in which the defendant had been accused of crime. The defendant himself having thus opened up the subject, it was quite proper for the State to question him on matters which might tend to challenge, contradict or explain his assertions on direct examination.

489 P.2d at 1193. Similarly, where the appellant had opened the subject by in-depth questioning of a State's witness and stipulated to similar questioning of defense witnesses, appellant's assertions are properly rejected.

However, should this Court recognize the appellant's allegations, they must nevertheless be rejected as failing to overcome the burden of proof required for reversal. This Court, in State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936), provided an extensive examination of issues surrounding the questioning of witnesses concerning prior

felony convictions. This examination resulted in several guildelines for future litigants. The Court held that:

> (3) Questions whose only object could be to call for answers to affect the credibility of the witness and which answers would tend to degrade his or her character, but not tend to subject the witness to punishment for a felony, are permissible over a general objection as to their relevancy or competency, in the sound discretion of the court. . . .
>
> (5) The discretion referred to in rules 3 and 4 is to be exercised in view of the varying circumstances of each particular case and not limited by the intrinsic and immediate considerations arising out of the cross-examination.

64 P.2d at 238. The Court noted further that with respect to such questions if they were not excluded by the court, they are always subject to exclusion by the witness. While not conceding that the prosecutor's questions were improper under the totality of the circumstances, had they been improper, the witness was free to exercise his privilege not to answer. The appellant simply cannot show the degree of proof necessary to overcome the discretionary ruling of the trial court to allow the questions in view of the totality of the circumstances, particularly where the scope of the questioning was stipulated to by the appellant.

Questions concerning the robbery committed by the witness were of particular importance to the credibility of

the witness. In states which have limited the impeachment of witnesses through the use of prior felony convictions, involving acts of dishonesty, robbery has been held to be a crime of dishonesty admissible for impeachment purposes. Alexander v. State, 611 P.2d 469 (Alaska 1980).

It should be remembered that in the present case, unlike the cases referred to by the appellant, the questions were asked of a witness who was not the defendant. In this state, where the details of felony convictions of the defendant may be inquired into in unusual circumstances (State v. Hansen, 448 P.2d 720, 721 (Utah 1968)), the appellant has an even higher burden in showing prejudice resulting from such questions posed to a witness who was not the accused. The appellant would have this Court believe that the result of the prosecutor's cross examination of witness Miller was to portray the appellant's witnesses as "bad guys." However, it should be noted that defense counsel's direct examination established the witness' status as a prisoner. Moreover, defense counsel "opened the door" to this type of questioning in his examination of Weaver and attempting to make Weaver appear to be the "bad guy."

The appellant would also ask this Court to believe that a decision in the State's favor would begin a period of abuse which would result in the wholesale refusal of persons

to appear as witnesses. However, not every case involves the unusual circumstance of defense counsel stipulating to and opening the door to such questioning. The parameters of direct and cross examination would remain as they are under the present law since a decision in favor of the State would add nothing new.

POINT IV

REFERENCE BY THE PROSECUTOR IN HIS CLOSING ARGUMENT TO THE POSSIBILITY THAT THE VICTIM OF THE ROBBERY COULD HAVE BEEN INJURED WAS WITHIN THE PROPER SCOPE OF COMMENT WHERE THE JURY COULD PROPERLY CONSIDER THE POSSIBILITY OF INJURY TO THE VICTIM IN REACHING A VERDICT, AND ABSENT THE COMMENT, THE VERDICT WOULD HAVE BEEN THE SAME.

During the prosecutor's closing arguments he made the comment:

Mr. Christensen: [A]sk yourself whether or not this was sufficient to justify an aggravated robbery or a simple robbery, or for that matter a crime of any kind.

Ask yourselves what you would have done under that set of circumstances.

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. 361). The appellant alleges error where reference was made to the possibility of injury to Mr. Clark, the victim.

Such a reference was appropriate in a trial where the crime charged was that of aggravated robbery by use of a knife or facsimile of a knife. The record is replete with references to the possible use of knives or a gun in the commission of the robbery. The evidence suggests that the appellant had possession of a knife only seconds before the robbery occurred (T. 22, 277-278). There is also testimony to suggest that the existence of a gun was simulated in order to accomplish the robbery (T. 25). Moreover, Mr. Clark testified that something resembling a short-barreled gun was pointed at him during the course of the robbery (T. 80). The abundance of evidence concerning the use or apparent use of a deadly weapon in the course of the robbery provided a sufficient basis for the prosecutor's comment where a significant issue at trial was whether the crime committed was aggravated robbery, requiring the use of a deadly weapon or facsimile thereof, or simple robbery, where no deadly weapon or facsimile is used (see U.C.A. § 76-6-302 and U.C.A. § 76-6-301).

This Court has addressed the issue of alleged impropriety in the closing arguments of counsel. In State v. Valdez, 30 Utah 2d 54, 513 P.2d 442 (1973), this Court held that:

> Counsel for both sides have considerable latitude in their arguments

> to the jury; they have the right to discuss fully from their standpoints the evidence and the inferences and deductions arising therefrom. The test of whether the remarks made by counsel are so objectionable as to merit a reversal in a criminal case is, did the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by those remarks.

513 P.2d at 426. In the present case, the prosecutor legitimately inferred from the evidence that some type of weapon or facsimile of a deadly weapon was used in the robbery. Where such weapons are used in the course of a robbery, concern for the safety of the victim is of primary concern and forms the basis for the difference in the penalties for aggravated robbery, a first degree felony, and simple robbery, a second degree felony. The prosecutor was therefore wholly justified in calling the jurors' attention to the concern of potential injury to the victim. However, even if no such justification existed for the comment, it does not merit reversal in the present case since the jury was in no way influenced by the remark. The jury apparently rejected the prosecutor's view that a deadly weapon was used since it convicted the appellant of only simple robbery (R. 110). Therefore, even if this Court were to find error in the comment, such error would constitute at most only harmless

error, having no substantial effect upon the appellant's right to a fair trial in that in the absence of the alleged error, the result would have been the same. See State v. Kazda, Utah, 540 P.2d 949, 951 (1976), and Utah Code Annotated, § 77-35-30.

In Elston v. State, 321 So.2d 267 (Ala. Crim. App. 1975), the prosecutor made a comment during closing arguments almost identical to that made by the prosecutor in the present case. In that case, the prosecutor remarked "[I] submit to you ladies and gentlemen of the court that we were lucky no one was hurt in the robbery, and the next time that might not be true." 321 So.2d at 266. Of this argument, the court stated:

> This argument was reasonably calculated to call the jury's attention to the serious aspect of the robbery and to appeal for law enforcement. It was within the realm of legitimate appeal to the jury. The court's ruling [denying the motion for a mistrial], supra, was not error.

321 So.2d at 266. Likewise, in the present case, the trial court's ruling that the comment was proper under the crime charged was not error (T. 361).

Even though the appellant makes no showing that the prosecutor's remark adversely influenced the jury, and in actuality, no such showing can be made, the appellant must be

held to this standard. In State v. Galbraith, 559 P.2d 1089 (Ariz. App. 1977), the court held: "Also, it should be noted that the appellant has not made any showing that the remark in any manner influenced the jury. Such a showing would be required before a reversal would be proper." 559 P.2d at 1093.

The prosecutor's reference in the closing argument to the possibility that the victim of the robbery could have been injured was within the realm of proper comment under the offense charged, and was an expression of his view of the evidence. Furthermore, the jury was justified in considering such a possibility where the panel was required to decide whether a deadly weapon or facsimile of a deadly weapon was used in the perpetration of the crime. Moreover, the verdict that the appellant was guilty of simple robbery is evidence that the comment in no way influenced the jury's decision. Consequently, even if the comment was error, it was at most harmless error since, in view of the appellant's admission to committing the crime, the result of the trial would have been the same.

POINT V

REFERENCE BY THE PROSECUTOR TO THE FACT THAT WITNESS WEAVER STILL HAD APPROXIMATELY TWO YEARS TO SERVE ON A PREVIOUS CONVICTION WAS NOT IMPROPER AS PROMULGATING A FALSE IMPRESSION WHERE THE COMMENT WAS ACCURATE AND NO PROOF IS PRESENTED SHOWING THE STATEMENT'S INACCURACY AT THE TIME IT WAS MADE.

On October 8, 1980, the State's chief witness in the present case appeared before the Board of Pardons for a parole violation hearing concerning charges which had been dismissed (H.T. 2). During the course of the hearing, Weaver's counsel, Mr. Steven Hansen, testified that the State did not have sufficient evidence to prosecute the charges and that since Weaver had cooperated with the State in appellant's case and had served three months in the county jail in protective custody, revocation of parole was inappropriate (H.T. 3, 4). Mr. Hansen also commented, in reliance upon communications with prison officials, that Weaver's life would be seriously jeopardized should he remain at the prison for an extended period of time, that the earliest possible release would be advisable (H.T. 4). Prosecutor Christensen also testified that Weaver had been the object of many threats before and during the appellant's trial (H.T. 6). Mr. Christensen pointed out that Weaver was only peripherally involved in the events that led to the charges forming the basis for the revocation hearing (H.T. 9). The emphasis of the hearing then turned to Weaver's safety as a result of his testimony against the appellant (H.T. 10, 11). The Board dismissed all charges against Weaver and placed him on parole after testimony was heard concerning his familiar responsibilities and employment prospects (H.T. 14).

Appellant assails comments made by the prosecutor to the effect that the witness Weaver still had two years to serve on a previous conviction. The comment was an attempt to buttress the credibility of the witness' testimony as being testimony against his own interests. This remark was appropriate in the particular circumstances of the case since the appellant had vehemently attacked the witness' credibility during cross examination, direct examination, and during closing arguments. The propriety of this remark, which was never objected to at trial, is further supported by an examination of defense counsel's closing argument to the jury.

> Mr. Bugden: Well, just how much time is Weaver doing? Mr. Christensen doesn't remind you when he says that he is doing his time that all he is doing is time for one Class A Misdemeanor. And what was he charged with? He was charged with possessing a firearm, punishable by one to fifteen years in the prison. He was charged with possession, or theft by receiving, punishable by one to fifteen years in prison. But he is pleading guilty to a Class A Misdemeanor, punishable by twelve months.
>
> Well, maybe he is doing some time, but hasn't he gotten a pretty good deal? He is not going to be charged with the robbery that he did. He is getting two felonies dismissed and he is only going to do twelve months.
>
> Don't do the crime unless you can do the time. Weaver is not doing the time. He got a great deal.

(T. 18). The above passage is only one of many similar passages in which defense counsel attacked the credibility of

Mr. Weaver. However, this particular passage is especially illuminating when compared with the appellant's assertions on appeal. The remark assailed by the appellant is found in the prosecutor's rebuttal to the closing arguments of defense counsel. Since the above-quoted passage is contained in defense counsel's closing arguments, it can appropriately be said that defense counsel "opened the door" to the prosecutor's subsequent remark. Where remarks by defense counsel have "opened the door" or invited the remarks of the prosecutor, the comments of the prosecutor are not improper. This Court, in State v. Boone, Utah, 581 P.2d 571 (1978), acknowledged the validity of such a rule when it refused to find reversible error in the remarks of the prosecutor concerning the defendant's failure to testify. The Court held that the remarks were prompted by the comments of defense counsel and merely emphasized one of the reasons suggested by defense counsel for the defendant's failure to testify. 581 P.2d at 574. Similarly, the Arizona Supreme Court, in the case of State v. Hannon, 451 P.2d 602 (Ariz. 1969), held that "The prosecutor was entitled to discuss the credibility of the state's witnesses since the issue had been repeatedly raised by defense counsel." 451 P.2d at 604.

In the present case, any comment by the prosecutor concerning the credibility of Weaver and the length of his

remaining prison terms was a valid issue open to comment. Defense counsel had raised the specific issue previous to the remarks of the prosecutor, thereby foreclosing any complaint of impropriety on appeal. This, and the fact that no contemporaneous objection was interposed at the time of the comment, absolutely waive the issue for consideration on appeal. State v. White, Utah, 577 P.2d 552, 555 (1978). Moreover, testimony at trial by numerous witnesses both for the State and for the defense had established that Weaver was not liked at the prison and was the object of physical assaults and threats because of his cooperation with the police.

The appellant further asserts that because this comment was made and Weaver has not in fact served two more years in prison, the prosecutor purposely, and in bad faith, misled the jurors to attach more credibility of Weaver's testimony than they ordinarily would have absent the comment. The appellant further asserts that at the time of the closing argument, the prosecutor either knew or strongly suspected he would do everything he could to prevent Weaver from serving more time at the prison. A careful examination of the trial record demonstrates the appellant's assertion to be groundless. During the cross examination of Weaver on the first day of trial, the following colloquy was recorded:

By Mr. Bugden: Q: You indicated that there is presently a commitment for you that results in your being placed in the Utah State Prison, is that right?

By Mr. Weaver: A: Yes.

Q: What was that for?

A: Possession of a handgun and theft by receiving.

Q: Now, those charges are still pending against you?

A: Yes.

Q: Theft by receiving?

A: Yes.

Q: And that is a second-degree felony?

A: Yes.

Q: You are also presently charged with possession of a firearm?

A: Yes.

. . .

By Mr. Bugden: Q: Now, you've entered a plea negotiation with the State; is that correct?

By Mr. Weaver: A: Yes.

Q: You understand that in return for your testimony, you are being given the opportunity to have charges dismissed against you; is that correct?

A: Just to be reduced.

Q: Well, if I understand what Mr. Christensen has said, you are going to plead guilty to one crime, Class A Misdemeanor?

A: Yes.

(T. at 48-49). The above colloquy demonstrates that at the time of the trial, including the closing argument, the only arrangements made by way of plea negotiations for Weaver's testimony were that he would plead guilty to one Class A Misdemeanor instead of being charged and tried for three felonies. See also T. 36,37. In the face of this direct contradiction to the appellant's assertion, he offers no more than speculation and conjecture about the prosecutor's intention. Such conjecture cannot form the basis of an issue cognizable on appeal. There simply is no evidence that the prosecutor intended to testify at the parole revocation hearing at the time the questioned remark was made during closing arguments.

Moreover, even if the prosecutor at the time of his closing argument intended to appear before the Board of Pardons and speak in Weaver's behalf, the prosecutor had no way of actually securing Weaver's release. Utah Code Annotated, Section 77-62-3 provides in pertinent part that:

> (a) It shall be the duty of the board of pardons to determine by majority decision, when and under what conditions, subject to the provisions of this act, persons now or hereafter serving sentences, in all cases except treason or impeachments, in the penal or correctional institutions of this state, may be released upon parole, pardoned, or may have their fines or forfeitures

> remitted, or their sentences commuted or terminated; provided, no fine or forfeiture shall be remitted, no parole or pardon granted, or commutation or sentence terminated, except after a full hearing before said board. . . .

Under this statute, the Board of Pardons has exclusive jurisdiction to grant sentence terminations, and such terminations may be granted only after a hearing has been held before the Board. In the present case, the testimony of the prosecutor before the Board can be viewed as nothing more than a recommendation. Such recommendations are by no means binding on the Board. In this situation, the appellant is hard-pressed to suggest that the Board decided in favor of parole solely on the prosecutor's recommendation. Even if the Board's decision rested on the prosecutor's recommendation alone, the appellant would still be required to show that the prosecutor knew parole would be granted at the time of his argument. Such a showing is only a minimum requirement in proving the appellant's assertion. This requirement is not conceded to be the only demonstration element of an alleged improper argument or prejudicial comment. Rather, the appellant would be required to show much more before he could prevail. However, not even the minimum requirement has been met in this case.

Furthermore, this issue raised by the appellant is not appropriately before this Court. The practice of designating the record of proceedings occurring after the trial and conviction, having nothing to do with the appellant, is at best of questionable propriety. However, even if the record of witness Weaver's parole revocation hearing was appropriately before this Court on appeal, any potential remedy should have been explored in the lower court by any one of a number of procedures. Primarily, the appellant could have filed a motion for a new trial on the basis of newly discovered evidence pursuant to Utah Code Annotated, § 77-35-24 (1981 Supp.). If such a motion had been found to be inappropriate, appellant could have filed a petition for an extraordinary writ of error coram nobis under Rule 65B(i), Utah Rules of Civil Procedure. Either of these alternative remedies would have placed the matter before the district court for decision and consequently preserved the issue for appeal to this Court. However, where the appellant has failed to utilize such remedies, the issue must be viewed as having been waived.

The appellant refers to the case of Walker v. State, No. 16705 (Utah, filed January 23, 1981) as supporting his position. In that case, the prosecutor was credited with the knowledge of evidence, exculpatory to the defendant, as

early as the second day of the trial; yet the prosecutor thereafter produced two witnesses who testified to that which was known to be incorrect. Thereafter, the prosecutor deliberately relied upon this incorrect testimony in his closing argument to the jury. In reaching its decision, this Court noted that the State's case against the defendant was based on circumstantial evidence which would have been contradicted by the new evidence brought to the attention of the prosecutor during the second day of trial. The present case bears no similarity to Walker. The prosecutor simply had no way of knowing before the actual decision of the Board that parole would have been granted. Moreover, the case against the appellant here was not circumstantial, particularly in view of appellant's admission to committing the crime. Simply stated, the prosecutor could not have knowingly fostered the false impression that Weaver had two more years to serve in prison since at the time the comment was made the statement was true.

This Court has addressed the issue of the propriety of comments in closing arguments to the jury in State v. Bautista, 30 Utah 2d 112, 514 P.2d 530 (1973). There the Court concluded that:

> The prosecutor in summing up his case before the jury as well as defense counsel has wide discretion and is entitled to exercise considerable freedom in expressing to the jury his view of the evidence.

514 P.2d at 533. Correspondingly, any ruling made by the trial court on an objection interposed to a comment made during the closing argument can be disturbed only where it is shown that the trial court's discretion has been abused. People v. Alvarez, Colo., 530 P.2d 506, 507 (1975).

The appellant has failed at every turn to overcome his burden of proving an abuse of discretion on the part of the trial court. He asserts that the prosecutor created a false impression in the minds of the jurors when the comment which created this allegedly false impression was absolutely true. This Court simply cannot consider such groundless allegations of error since the entire issue has not been preserved for review.

POINT VI

IN VIEW OF THE TOTALITY OF THE PROCEEDINGS IN THE TRIAL COURT, ANY ALLEGED ERROR, OR THE CUMULATIVE EFFECT OF SUCH ALLEGED ERRORS, WAS HARMLESS.

The appellant alleges that errors committed by the prosecutor continued throughout the trial, relying on his previous allegations of error. He asserts that the result of these alleged errors was a denial of his right to a fair trial. This Court has addressed the issue of fair trial under circumstances similar to the present case. In State v.

Hodges, 30 Utah 2d 367, 517 P.2d 1322 (1974), this Court was asked to evaluate the prejudicial effects of a question asked by the prosecutor of the defendant. Counsel for the defendant objected to the question and the trial court sustained the objection. On appeal, the defendant asserted that the error was so grievous as to be incurable, and deprived the defendant of a fair trial. The Court observed that:

> Nevertheless, the processes of justice should not be distorted simply for the purpose of censuring a mistake. The critical inquiry should be whether there is a reasonable likelihood that the incident so prejudiced the jury that in its absence there might have been a different result.

517 P.2d at 1324. The Court noted further that the trial court, in ruling on a motion for a mistrial, should view such episodes in light of the total proceeding to determine whether there had been such prejudice as would deprive the defendant of an impartial determination of guilt. 517 P.2d at 1324. Here, in view of the totality of the proceedings in the trial court, the admission of guilt by the appellant, the tape-recorded telephone conversation confirming the appellant's initiation of the idea to commit the robbery, and the victim's identification of the appellant as one of the robbers, any alleged error must have been harmless.

Also, in Hodges, this Court noted that it was conceivable that reversible error could result from suggestion or innuendo, but declined to recognize such a situation since that recognition would eliminate the need or incentive for a trial court to rule correctly on objections. This case does not present the circumstance postulated by the Court in Hodges and therefore provides no reason for accepting appellant's allegations.

Important to note also is the fact that this Court in Hodges recognized that:

> In the absence of the appearance of something persuasive to the contrary, we assume that the jurors were conscientious in performing to [sic] their duty, and that they followed the instructions of the court.

517 P.2d at 1324. The importance of this presumption in the present case lies in the fact that the trial court admonished the jury that the arguments of counsel were not evidence (T. 357). The court later instructed the jury on the admission of evidence and questions to which objections were sustained (R. 90). The court also instructed that the jury was the finder of fact and as such was the exclusive judge of the credibility of witnesses and weight of the evidence (R. 93-94). The court further instructed the jury that the fact that a witness had been convicted of a felony could be considered only in judging

the credibility of a witness and that such a conviction did not necessarily impair or destroy credibility (R. 96).

In view of the entire record of the trial below, if this Court observes any error, it must be disregarded. Rule 61 of the Utah Rules of Civil Procedure states:

> No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court to be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

See also Rule 30, Utah Rules of Criminal Procedure.

In the present case, an analysis of the record of the proceedings of the court below fails to reveal any prejudicial error in the absence of which the result of the trial would have been different.

CONCLUSION

The appellant suffered no prejudice from any remark made by the prosecutor in either his opening statement or closing argument. In the case of the remark made by the prosecutor in his opening statement about the statement signed

by Weaver exculpating the appellant from criminal responsibility, the remark was proper as part of the outline of Weaver's testimony. On direct examination, Weaver did in fact testify to the incident. Moreover, since no contemporaneous objection was interposed by the appellant to the remark, the appellant has waived consideration of the issue on appeal.

Appellant's allegation that the trial court erroneously denied his motion to withdraw in order to be called as a witness, and to call the prosecutor as a defense witness, lacks the explanation that is supplied by the transcript of the proceedings. Where counsel's motion to withdraw was predicated upon his anticipated appearance as a witness, and counsel himself decided not to become a witness, the question was rendered moot by counsel's own decision. Moreover, there was no need for either defense counsel or the prosecutor to become witnesses where the opening remark lacked any implication of unethical conduct by defense counsel, and any evidence surrounding the signing of the statement could have been obtained from a number of other persons.

The reference by the prosecutor during his closing argument to the possibility of injury to the victim was proper in light of the offense charged, aggravated robbery. It is exactly the possibility of injury by use of a deadly weapon

that differentiates aggravated robbery from simple robbery, making the former a more serious offense. In view of the fact that weapons were used, or at least had been obtained for use in the robbery, the prosecutor was properly commenting according to his view of the case. However, even if the comment had been improper, the appellant makes no demonstration of prejudice resulting from the remark. In fact, no prejudice did result from the comment since the jury obviously rejected the prosecutor's view and convicted the appellant of simple robbery.

Further comment during closing argument by the prosecutor concerning witness Weaver's remaining two-year prison term was likewise proper. Simply stated, the comment could not have fostered any prejudicial false impression since, at the time of the argument, the comment was true. The prosecutor had no way of knowing or guaranteeing that Weaver would be released one month later. The appellant has not demonstrated any prejudice resulting from the comment.

Similarly, even if appellant's allegations of error were well founded, each error was harmless in view of the totality of the evidence and proceedings. The appellant simply has not shown that a fair trial was not conducted. Where the court's admonitions and instructions to the jury are presumed to have been followed, appellant's right to a fair trial was scrupulously protected.

DATED this 3rd day of November, 1981.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed three true and exact copies of the foregoing Brief, postage prepaid, to Walter F. Bugden, Jr., Attorney for Appellant, Salt Lake Legal Defenders Association, 333 South 200 East, Salt Lake City, Utah, 84111, this 3rd day of November, 1981.

Robert N. Parrish