1992

The State of Utah v. Cory M. Davison : Brief of Appellant

Utah Court of Appeals

R Paul; Attorney General; Attorney for Appellee.
Robert K. Heineman; L. Clark Donaldson; Attorney for Appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
CORY M. DAVISON,	:	Case No. 920591-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for unlawful distribution, offering, agreeing, consenting or arranging to distribute a controlled or counterfeit substance, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (1990 Repl. Vol.), a second degree felony, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1992 Repl. Vol.).

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

See Addendum A.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Did the prosecutor's closing argument violate appellant's right to due process of law?

Standard of review. In assessing the prosecutor's questions and argument, this Court will make an original determination of whether the prosecutor brought improper information to the jury's attention, and whether such information probably influenced the jurors. State v. Troy, 688 P.2d 483, 486 (Utah 1984). If this Court views the evidence of guilt to be ambiguous or in conflict with other evidence, this Court will "more closely scrutinize the conduct." Id. It is the State's burden to show that any error was harmless beyond a reasonable doubt. See State v. Tarafa, 720 P.2d 1368, 1373 and n. 21 (Utah 1986).

2. Did the prosecutor's misconduct constitute plain error so as to obviate the need for an objection below?

Standard of review.

> When objections are not made at trial and properly preserved, appellate review is under a "plain error" standard. Plain errors are those that "should have been obvious to the trial court and that affect the substantial rights of the accused."

State v. Ellifritz, 835 P.2d 170, 174 (Utah App. 1992) (quoting State v. Morgan, 813 P.2d 1207, 1210-11 (Utah App. 1991).

3. Does Utah law require counsel to object to a prosecutor's closing argument even where the objection would only serve to exaggerate the harm?

Standard of review. This is a legal question and should be determined by the court without deference to the trial court. Maxwell v. Maxwell, 796 P.2d 403, 404 (Utah App. 1990); Olwell v. Clark, 658 P.2d 585, 586 n. 1 (Utah 1982).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

On July 8, 1991 appellant Cory M. Davison was charged in an information with unlawfully offering and agreeing to sell a class II controlled substance, cocaine, to an undercover narcotics officer on May 21, 1990, over one year earlier.

A jury trial was held before Judge Leslie A. Lewis. In his closing argument, prosecutor Ernie Jones improperly mischaracterized the evidence, implied that Davison should be convicted in part because some of his family and acquaintances are drug dealers, and implied that Mr. Davison had an obligation to

show who actually did commit the crime he was charged with (in effect improperly shifting the burden of proof from the State to the defendant). After three hours forty five minutes of deliberation, the jury returned a verdict of guilty.

Appellant was sentenced to one to fifteen years in prison, stayed pending satisfactory completion of three years parole.

STATEMENT OF FACTS

On July 8, 1991 appellant Cory M. Davison was charged in an information with unlawfully selling cocaine to an undercover narcotics officer on May 21, 1990. R. 6-7.

A jury trial was held before Judge Leslie A. Lewis. R. 150-408. The only real issue at trial was identification, on which the evidence was conflicting. Officer Lucas testified that at the time of the sale he had been undercover for about two months, R. 250:9-11, had made approximately 100 drug buys from 25 to 100 people, and had had contact with many more. R. 270:14-21. Prior to the sale he had never spoken with the suspect, but he had seen him five to six times. R. 256:7-13. Approximately two weeks later Lucas identified the suspect as Cory Davison from a photo obtained from Motor Vehicles. R. 262:3-263:12. No photo spread or lineup was conducted. R. 271:9-272:3. Lucas was unable to identify any of the other individuals located at the crime scene at the time of the crime. R. 277:18-20. Lucas testified that the suspect was wearing a red sweat suit with white athletic shoes. R. 259:23-260:1. Mr. Davison and two other witnesses testified that he did

not own or wear a red sweat suit or white athletic shoes at the time of the sale. R. 323:20-324:14 (Cory Davison); R. 298:19-299:19 (Rosalie Allison); R. 312:25-313:15 (Tracy D. Davison). Cory Davison denied selling Lucas drugs. R. 324:23-325:1.

In his closing argument, prosecutor Ernie Jones impermissibly created the impression that appellant had the burden of proving who actually sold cocaine to officer Lucas. Mr. Jones also mischaracterized the evidence, and implied that Cory should be convicted in part because several if not all of his relatives and acquaintances were drug dealers. Mr. Jones stated:

> Well, finally we heard from the defendant. We heard from Cory Davison. And he gave us an interesting approach to the case. He started off by trying to suggest to you that maybe the person who was involved in this transaction was Bobby Davison, because Bobby had used his name on other occasions. Didn't you find it interesting that he didn't bring Bobby into court so you could see what Bobby looked like? He just wanted you to think that maybe Bobby Davison was using his name.
>
> Well, what did we do in that response? We first of all, we introduced a photograph, that's Exhibit 6, of Bobby Davison. These two men don't look alike at all. Bobby Davison doesn't look like Cory Davison in the least.
>
> But probably most important, is I put Officer Lucas back on the stand, and I said, "Officer Lucas, do you know Bobby Davison?"
>
> He said, "No, I've never met, I've never heard that name before." And then I showed him the photograph, and he said, "No, that's not the man that I purchased narcotics from. That's not the one who was involved in this transaction."
>
> **But you see, Cory Davison, the defendant, wanted you somehow to believe through an inference or a suggestion that maybe there was somebody out there like Bobby Davison, who was using his name. But he doesn't bother to produce him. He just wants you to think that.**
>
> There's no way that Bobby Davison was the one who was involved in the transaction. So we dispelled that.
>
> The next is, he starts throwing out a series of names to you about people who were living at the home,

other people who maybe were involved in this transaction, and maybe that's where the officer was mistaken.

One of the people he said, of course, was there, was Rudy Martin. Well, you saw Rudy Martin. Rudy Martin doesn't look anything like Cory Davison. And again, Officer Lucas testified, "Oh, I know Rudy Martin. I've bought drugs from Rudy Martin. But not on that day. Not on May 21st of 1990. That's not the person who was involved."

Well, the defense says, "Well, what about Kim McCardell?"

And again, I asked Officer Lucas, "Do you know Kim McCardell?"

"Yes, I know him because I purchased narcotics from him. But he's not the person I bought from on May 21st of 1990."

Well, another name the defendant threw out was George Wilkerson. George Wilkerson, Officer Lucas again with the same answer, "I know George Wilkerson. That's not the person I bought from. George is much older than the defendant. Much older than the person I bought from on May 21st."

Well, what about Lorenzo Davison? Again, Officer Lucas said, "I know Lorenzo. That's not the person I bought from. I bought from him before. He's twenty-six years old."

And finally they finished up with, "Well, Raymond Davison was living there." Raymond Davison's thirty-seven years old. And again, Officer Lucas with the same response. He knew who he was. But that's not the person he bought from on that day.

The one thing that was so interesting about all of the names that the defendant threw out to you is that all of them are drug dealers. Officer Lucas knew every one of them except Bobby Davison. And the reason he knew them? Because he'd purchased narcotics, he'd purchased cocaine, he'd purchased drugs from each and every one of those. But not on May 21st. Not on May 21st of 1990.

R. 370:11-373:3 (emphasis added). Mr. Donaldson, counsel for defendant, did not object.

After three hours forty five minutes of deliberation, the jury returned a verdict of guilty. R. 102. Appellant was sentenced to one to fifteen years in prison, stayed pending satisfactory completion of three years parole. R. 137-8.

SUMMARY OF THE ARGUMENT

The prosecutor's closing argument violated appellant's right to due process. The prosecutor:

(a) attempted to shift the burden of proof to appellant by implying that appellant had a duty to produce the person who actually sold drugs to the undercover narcotics officer,

(b) mischaracterized the facts in evidence, and

(c) implied that appellant should be convicted in part because he is acquainted with known drug dealers.

Although trial counsel did not object, the prosecutorial misconduct constitutes plain error and must be addressed by this Court.

In the context of closing arguments, Utah should recognize an exception to the rule requiring a contemporaneous objection to preserve an issue for review.

ARGUMENT

POINT I. THE PROSECUTOR'S CLOSING ARGUMENT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS.

The Utah Supreme Court has established a two prong test for reversals for improper statements of counsel. State v. Valdez, 513 P.2d 422 (Utah 1973); see also State v. Troy, 688 P.2d 483, 486 (Utah 1984), State v. Johnson, 663 P.2d 48 (Utah 1983), overruled on other grounds in State v. Roberts, 711 P.2d 235, 239 (Utah

1985), State v. Creviston, 646 P.2d 750 (Utah 1982), State v. Gaxiola, 550 P.2d 1298 (Utah 1976).

> 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.

Valdez, 513 P.2d at 426.

> If the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible of differing interpretations, there is a greater likelihood that they will be improperly influenced through the remarks of counsel. Indeed, in such cases, the jurors may be searching for guidance in weighing and interpreting the evidence. They may be especially susceptible to influence, and a small degree of influence may be sufficient to affect the verdict.

Troy, 688 P.2d at 486-87.

A. THE PROSECUTOR'S REMARKS CALLED TO THE ATTENTION OF THE JURORS MATTERS WHICH THEY WOULD NOT BE JUSTIFIED IN CONSIDERING IN DETERMINING THEIR VERDICT.

Mr. Jones improperly mischaracterized the law by implying that Cory Davison had an obligation to present evidence and prove who actually sold drugs to the undercover officer:

> But you see, Cory Davison, the defendant, wanted you somehow to believe through an inference or a suggestion that maybe there was somebody out there like Bobby Davison, who was using his name. But he doesn't bother to produce him. He just wants you to think that.

R. 371:7-11. Mr. Davison certainly had no obligation to produce in court the person who actually sold drugs to Officer Lucas on May 21, 1990. To the contrary, the burden was on the state to prove that Cory Davison was the person who sold drugs to Mr. Lucas on

that date. Utah Code Ann. §76-1-501 (1990 Repl. Vol.); State v. Sorenson, 758 P.2d 466 (Utah App. 1988); Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, __, 61 L.Ed.2d 39, 48 (1979).

The comments of Mr. Jones on the evidence directly contradicted the actual evidence elicited in this case. Jones mischaracterized Officer Lucas' testimony as being that he had bought drugs from Lorenzo Davison:

> Well, what about Lorenzo Davison? Again, Officer Lucas said, "I know Lorenzo. That's not the person I bought from. I bought from him before. He's twenty-six years old."

R. 372:13-16. To the contrary, Lucas testified:

> Q (BY MR. JONES) Are you familiar with a Lorenzo Davison?
> A With the name only.
> Q Does he look anything at all like the defendant?
> MR. DONALDSON: Objection, he said he's only familiar with the name. No foundation.
> THE COURT: Sustained.
> Q (BY MR. JONES) How do you know about Lorenzo Davison?
> A Just from hearing his name in the streets.

R. 337:14-23. On cross examination, Lucas admitted he did not know Lorenzo Davison. R. 339:19-22. There is absolutely no testimony indicating that Lucas bought drugs from Lorenzo Davison, or that Lorenzo ever sold drugs to anyone.

Deliberate misrepresentation of facts in a prosecutor's summation may rise to the level of a due process violation. United States v. Ruiz, 711 F.Supp. 145, 150 (S.D.N.Y. 1989), aff'd 894 F.2d 501 (2nd Cir. 1990). Given the evidence in this case and Mr. Jones' repeated misstatements of the evidence, Jones' argument appears to be more than a slip of the tongue. Jones refers to

"every one of them except Bobby Davison" and comments that Lucas had "purchased drugs from each and every one of those." Jones specifically excepted Bobby Davison, but failed to except Lorenzo Davison and furthermore affirmatively asserts that Lorenzo did sell drugs to Lucas. Anthony Davison, referred to by appellant (R. 322:11-23), is not mentioned by Jones, but Jones implies in no uncertain terms that he, too, would be included as someone who has sold narcotics to Lucas.

Jones implied that appellant should be convicted because he is acquainted with known drug dealers. In his closing argument, Jones stated:

> The one thing that was so interesting about all of the names that the defendant threw out to you is that all of them are drug dealers. Officer Lucas knew every one of them except Bobby Davison. And the reason he knew them? Because he'd purchased narcotics, he'd purchased cocaine, he'd purchased drugs from each and every one of those. But not on May 21st. Not on May 21st of 1990.

R. 372:22-373:3. Contrary to this mischaracterization, testimony of Officer Lucas fails to indicate:

(a) that he knew Lorenzo Davison (R. 339:19-22; 337:14-21 (indicating that Lucas knows of Lorenzo by name only)),

(b) that he bought drugs from Lorenzo Davison (id.; no mention of buying from Lorenzo anywhere in record),

(c) that he bought drugs from Bobby Davison (no mention of buying from Bobby anywhere in record), and

(d) that he bought drugs from Anthony Davison (no mention of buying from Anthony anywhere in record).

Mr. Jones' misstatements are misleading and prejudicial. The prosecutor implies that every person defendant knows is a drug dealer, with the possible exception of Bobby Davison. The record does not indicate this to be the case. Furthermore, even if true this would be an improper basis on which to sustain a conviction. The relevance of any drug sales by acquaintances of Mr. Davison is limited to the issue of identification by Officer Lucas. To the extent Lucas knew these other individuals, it indicates that he did not buy from one of these individuals and then mistakenly identify someone else.[1] To the extent the prosecution has used this evidence to indicate that Mr. Davison's family and acquaintances are criminals, it is unduly prejudicial and insufficiently probative to be of any value. Rule 403, Utah Rules of Evidence.

Convictions should not be based on guilt by association. Cory Davison may only be convicted based on his acts, not based on his status of living near, being related to, or being acquainted with drug dealers. See Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (criminal liability could not be premised on defendant's status of "being addicted to the use of narcotics").

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[1]In fact, Lucas' familiarity with these other individuals is only relevant if it can be shown that he knew these other individuals **at the time of the sale.** The fact that Lucas later became acquainted with some of these other individuals does not tend to establish that he would have recognized them at an earlier date. With the exception of Rudy Martin, the record does not indicate that Lucas knew any of the individuals prior to the drug sale on May 21, 1990.

Mr. Jones' closing argument drew the juror's attention to matters which should not have been considered in determining their verdict. In State v. Andreason, 718 P.2d 400, 402 (Utah 1986) the Utah Supreme Court reversed a conviction because of improper argument by the prosecutor:

> The jury's attention was clearly called to matters outside the evidence of the case, e.g., that defendant's alleged conduct was "pervasive," that others were involved in similar conduct, and that the jury needed to be concerned about those "who aren't innocent but are turned loose." What others did or did not do was not in evidence and was certainly not relevant to defendant's guilt or innocence. State v. Johnson, 663 P.2d at 51. Consequently, the jury was not justified in considering the statements.

Similar conduct occurred here. The prevalence of drug dealers in appellant's neighborhood is not probative on the issue of his innocence or guilt, but serves only to prejudice the jury against him. Mr Davison's conviction should be reversed.

B. THE JURY WAS PROBABLY INFLUENCED BY THE PROSECUTOR'S IMPROPER REMARKS.

The evidence as to identification in this case was highly conflicting. Officer Lucas testified that he was sure of his identification, R. 256:1-3, but was unable to identify any of the other individuals located at the crime scene at the time of the crime. R. 277:18-20. Lucas testified that the suspect was wearing a red sweat suit with white athletic shoes. R. 259:23-260:1. Mr. Davison and two other witnesses testified that defendant did not own or wear a red sweat suit or white athletic shoes at the time of the sale. R. 323:20-324:14 (Cory Davison); R. 298:19-299:19 (Rosalie Allison); R. 312:25-313:15 (Tracy D. Davison).

Given the conflicting nature of this evidence, it is more probable that the improper statements of Jones affected the verdict. Troy, 688 P.2d at 486-87; State v. Andreason, 718 P.2d 400, 402-03 (Utah 1986). The burden is on the state to show beyond a reasonable doubt that the prosecutor's misconduct was not prejudicial. State v. Tarafa, 720 P.2d 1368, 1373 and n. 21 (Utah 1986) (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-11, reh'g denied, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967)); State v. Hackford, 737 P.2d 200, 204-05 (Utah 1987) (constitutional harmless error standard rather than evidentiary abuse of discretion standard is applicable where a constitutional right is impinged). Since the jury deliberated for close to four hours before rendering its verdict, it cannot be said that the prosecutor's misconduct was harmless beyond a reasonable doubt.

POINT II. THE PROSECUTOR'S CONDUCT CONSTITUTES PLAIN ERROR.

Litigants are precluded from asserting a claim on appeal for the first time unless the trial court committed plain error. State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1991).

> The first requirement for a finding of plain error is that the error be "plain," i.e., from our examination of the record, we must be able to say that it should have been obvious to a trial court that it was committing error. The second requirement for a finding of plain error is that the error affect the substantial rights of the accused, i.e., that the error be harmful.

State v. Eldredge, 773 P.2d 29, 35 (Utah), cert. denied, 493 U.S. 814, 110 S.Ct. 62, 107 L.Ed.2d 29 (1989) (cites omitted). In

appropriate cases, the court may "dispense with the requirement of obviousness so that justice can be done, as when an error not readily apparent to the court or counsel proves harmful in retrospect." Id. at 35, n. 8. The prosecutor's conduct in this case should be reviewed on appeal under the plain error doctrine.

A. THE PROSECUTOR'S MISCONDUCT WAS PLAIN.

The prosecutor openly stated that appellant had failed to produce the person who actually sold drugs to officer Lucas. R. 371:7-11. This statement is contrary to the established burden of proof in criminal cases. Utah Code Ann. §76-1-501 (1990 Repl. Vol.); State v. Sorenson, 758 P.2d 466 (Utah App. 1988); Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, __, 61 L.Ed.2d 39, 48 (1979). The trial court should have recognized the impropriety of this statement and instructed the jury to disregard it entirely.

In State v. Emmett, 184 Utah Adv. Rep. 34 (Utah April 7, 1992) the prosecutor improperly commented on a prior forgery conviction and indicated that the defendant was prone to taking advantage of his family. The Utah Supreme Court held:

> This comment clearly urged the jury to view Emmett as a person who commits crimes against his family and to use this characteristic as evidence that Emmett sodomized his son. Therefore, the comments are in direct violation of rules 404 and 609. Given the clarity of the law in this area and the blatant nature of the prosecutor's statements, it should have been obvious to the trial court that the prosecutor's remarks called to the juror's attention matters they were not justified in considering.

Id. at 35. The burden of proof in criminal matters is at least as fundamental as rules 404 and 609. See Utah Code Ann. §76-1-501

(1990 Repl. Vol.). The prosecutor's misconduct in the instant case is at least as blatant as that in Emmett.

Even if the court had made a curative instruction to the jury, there is a serious question as to whether appellant's due process rights were irreparably prejudiced. See State v. Peters, 796 P.2d 708, 712 (Utah App. 1990) ("We have no delusion that a limiting instruction can undo serious prejudice"). Even if this court should find that the prosecutor's misconduct in this case was not plain, it should exercise its discretion and reach the merits because this conduct was very prejudicial and affected appellant's fundamental right to a fair trial. See Eldredge, 773 P.2d at 35 n. 8.

B. THE PROSECUTORIAL MISCONDUCT WAS HARMFUL.

As addressed in Section I.B., supra at 11, the prosecutor's statements were harmful. The jury deliberated for nearly four hours on the simple question of identification before rendering a verdict of guilty. The United States Supreme Court has explicitly held that the reasonable doubt standard has constitutional ramifications:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, __, 61 L.Ed.2d 39, 48 (1979) (quoting In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, __, 25 L.Ed.2d 368, 375 (1970)).

Mr. Jones' closing argument could well have had the effect of making the jury believe that appellant had some obligation to prove who actually sold drugs to Officer Lucas. This impermissibly shifts the burden of proof from the state to the defendant, in violation of Mr. Davison's right to due process. See Sandstrom v. Montana, supra.

It is impossible to tell in this case if the jury's verdict was motivated by a legitimate lack of reasonable doubt or if it was tainted by the prosecutor's suggestion that appellant should have produced the actual criminal in court. Since the prosecutor cannot prove his comments were harmless beyond a reasonable doubt, see Tarafa, 720 P.2d at 1373, appellant is entitled to a new trial.

POINT III. DEFENSE COUNSEL SHOULD NOT BE COMPELLED TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT WHERE PREJUDICE CANNOT BE CURED OR OBJECTION WOULD ONLY SERVE TO EXAGGERATE THE HARM.

Counsel for each side has considerable latitude in argument to the jury. State v. Dibello, 780 P.2d 1221, 1225 (Utah 1989); State v. Tillman, 750 P.2d 546, 560 (Utah 1987); Gaxiola, 550 P.2d at 1301; Valdez, 513 P.2d at 426. Given this latitude, the trial court is less likely to sustain objections except in the most egregious of cases.[2] An objection by counsel is likely to exaggerate the harm done by the prosecutor's misconduct. While

[2]See R. 393:7-18, where appellant's trial counsel properly objected to the prosecutor referring to the length of the transcript from the preliminary hearing, a fact that was not in evidence, and the trial court summarily overruled the objection.

this would serve to preserve an issue for appeal, it does not make sense for counsel to jeopardize his or her best chance for acquittal merely to preserve the right to appeal. If counsel is successful in obtaining an acquittal, then no appeal is necessary and judicial resources are saved by not necessitating an appeal and a new trial before an acquittal is obtained.

In State v. Bullock, 791 P.2d 155 (Utah 1989), cert. denied, __ U.S. __, 110 S.Ct. 3270, 111 L.Ed.2d 780 (1990), the Utah Supreme Court enunciated an exception to the plain error rule where counsel's failure to object was part of a conscious trial strategy.[3] Bullock involved counsel's failure to object to the admissibility of evidence at trial. This case is distinguishable from Bullock in that it involves closing arguments rather than evidentiary matter in trial. Utah has not addressed this issue in the context of closing arguments of counsel, and a different rule should pertain.

The danger of harm from prejudicial closing arguments is higher than for other aspects of the trial:

> If the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible of differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel. Indeed, in such cases, the jurors may be searching for guidance in weighing and interpreting the evidence. They may be especially susceptible to influence, and a small degree of influence may be sufficient to affect the verdict. Counsel is obligated to avoid, as far as possible, any reference to those matters the jury is not justified in considering.

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[3]See also State v. Medina, 738 P.2d 1021, 1023 (Utah 1987) (conscious failure to object to jury instruction waives review under manifest error provision of Utah R. Crim. P. 19(c)).

Troy, 688 P.2d at 486-87; accord Andreason, 718 P.2d at 403. Closing arguments are also closer in proximity to jury deliberations and therefore may be remembered more clearly.

It has been recognized that objections may serve to exaggerate the harm sought to be avoided. See, e.g., United States v. Berry, 627 F.2d 193, 199 (1980), cert. denied, 449 U.S. 1113, 101 S.Ct. 925, 66 L.Ed.2d 843 (1981) ("no objection is required when the prejudice cannot be corrected or when objection would exaggerate it")(citing United States v. Young, 463 F.2d 934, 940 (D.C.Cir. 1972); United States v. Freeman, 514 F.2d 1314, 1319 n. 34 (D.C.Cir. 1975), vacated on other grounds, 598 F.2d 306 (D.C.Cir. 1979)). This Court itself has recognized that curative instructions aren't always effective. Peters, 796 P.2d at 712. Accord, State v. Franks, 445 P.2d 200 (Wash. 1968); State v. Claflin, 690 P.2d 1186 (Wash. App. 1984).

> Not even appellate judges can be so naive as really to believe that all twelve jurors succeeded in performing what Judge L. Hand aptly called "a mental gymnastic which is beyond, not only their powers, but anybody's else." Nash v. United States, 54 F.2d 1006, 1007 (2nd Cir. 1932).

United States v. Bozza, 365 F.2d 206, 215 (2nd Cir. 1966).

In the context of prosecutorial misconduct in closing arguments, Utah should adopt a rule whereby plain error will be reviewed on appeal despite a conscious tactical decision not to object on the part of defense counsel. Only if prosecutors are regularly reversed for their misconduct will they conform their conduct to that which is legally and ethically required.

> [A prosecuting 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.

State v. Emmett, 184 Utah Adv. Rep. 34, 36 (Utah April 7, 1992) (quoting Berger v. United States, 295 U.S. 78, 88 (1935). Appellant is entitled to a fair prosecutor and a fair trial.

CONCLUSION

Appellant respectfully requests that this Court reverse the conviction of Cory M. Davison and remand for a new trial.

SUBMITTED this 8th day of December, 1992.

ROBERT K. HEINEMAN
Attorney for Defendant/Appellant

L. CLARK DONALDSON
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Robert K. Heineman, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 8th day of December, 1992.

Robert K. Heineman

DELIVERED/MAILED this _____ day of December, 1992.

_____

ADDENDUM A

Amendment XIV to the Constitution of the United States, as applicable by the fifth amendment, provides:

> **Section 1. [Citizenship -- Due process of law -- Equal protection.]**
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Article I, section 7 of the Constitution of Utah provides:

> **Sec. 7. [Due process of law.]**
>
> No person shall be deprived of life, liberty or property, without due process of law.