

Why Can't I say That?

The Ethics of Opening and Closing Statements

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Prosecutorial Misconduct

- ▶ A prosecutor's actions and remarks constitute misconduct
- ▶ that merits reversal
- ▶ if the actions or remarks
- ▶ call to the attention of the jurors
- ▶ matters they would not be justified in considering in determining their verdict
- ▶ the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant.

State v. Tillman, 750 P.2d 546, 555 (Utah Sup.Ct. 1987)

Opening Statements

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"It sort of makes you stop and think, doesn't it."

- ❑ The purpose of an opening statement
- ❑ apprise the jury of what counsel intends to prove in his own case in chief
- ❑ provide the jury an overview of
- ❑ general familiarity with the facts
- ❑ should not be argumentative
- ❑ not proper to engage in anticipatory rebuttal or to argue credibility
- ❑ by referring to impeachment evidence the other side may adduce

State v. Williams, 656 P.2d 450, 451 (Utah Sup.Ct. 1982)

Exhibits



Prosecutor can refer to exhibits he in good faith believes will be admitted

“Victim”

The word "victim" should not be used in a case where the commission of a crime is in dispute.

State v. Devey, 2006 UT app 219, ¶ 1, 138 P.3d 90, 92

Closing Arguments

- ❑ RED HERRINGS
- ❑ ICONIC SYMBOLS
- ❑ CALLING THE
DEFENDANT A LIAR

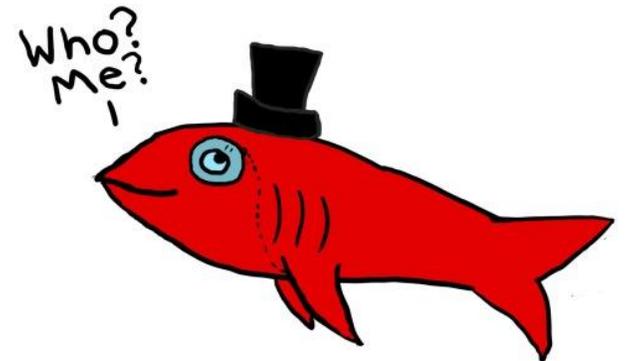
Red Herring

Refrain from argument which would divert the jury from its duty to decide the case on the evidence



Red Herring

Remarks intended to "disparage the defense or otherwise impugn the forthrightness of the defense strategy" constitute misconduct



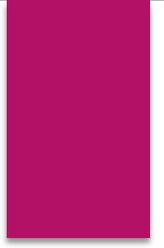
Red Herring

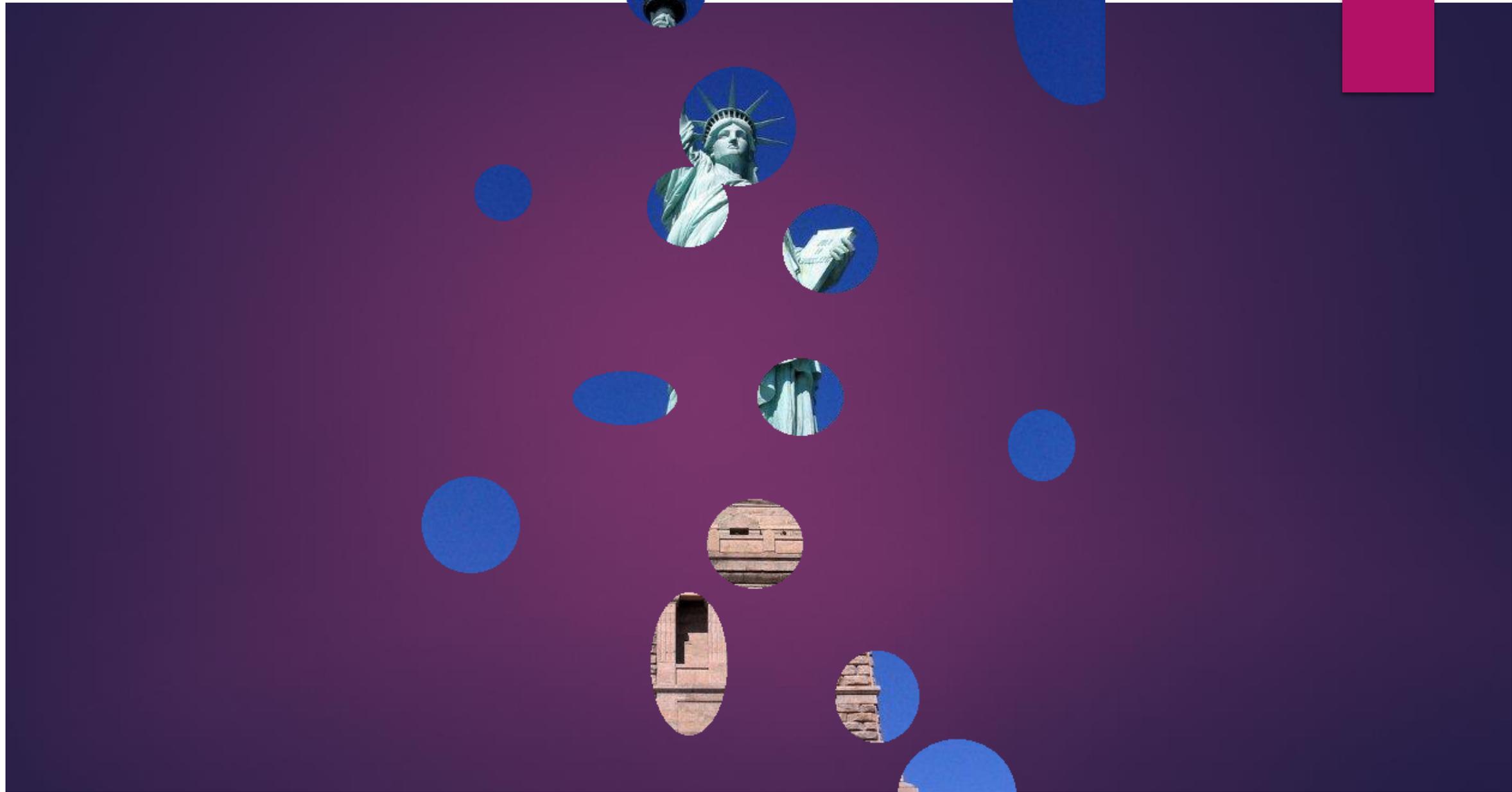
Arguing that the evidence does not support the defense theory and that the theory is thus a distraction from the ultimate issue is fundamentally different from arguing that defense counsel is intentionally trying to distract and mislead the jury

Nothing to see here, folks!



Iconic Symbols









Iconic Symbols



Court said the use of an “iconic” symbol misstates the law of reasonable doubt

Iconic symbols can imply to the jury that there is a quantitative element to reasonable doubt

Court will look for prejudice

May give a curative instruction

Burden Shifting

PROSECUTOR CANNOT MAKE DEFENDANT PROVE HIS INNOCENT
CANNOT COMMENT ON DEFENDANT NOT TESTIFYING

Prosecutors are permitted to argue reasonable inferences based on the record before the jury.

Comments intended to highlight the weaknesses of a defendant's case do not shift the burden of proof to the defendant

Where the prosecutor does not argue that a failure to explain them adequately requires a guilty verdict and reiterates that the burden of proof is on the government

The moral of the story?

A prosecutor is not an advocate in the ordinary meaning of the term. That is because a prosecutor owes a duty to the defendant as well as to the public.

The prosecutor's duty to the accused is to assure the defendant a fair trial by complying with the requirements of due process throughout the trial.

Thus, while a prosecutor is properly an advocate for the State within the bounds of the law, the prosecutor's primary interest should be to see that justice is done, not to obtain a conviction.