Case Summary

Improper or Proper? A review of Utah Appellate Court decisions on Prosecutor Misconduct in Closing Argument

Initial Test – Did the prosecutor's remarks "call to the attention of the jurors matters which they would not be justified in considering in determining their verdict? If so, is the error 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?

A prosecutor has the duty and right to argue the case based on the total picture shown by the evidence or the lack thereof… State v Hales 652 P.2d 1290, 1291 (Utah 1982)

So what CAN we say? – *"Prosecutor's rebuttal …in direct reply to the theory advanced by the defense counsel in his final argument" is acceptable. State v. Tillman 750 P.2d 546 (Utah 1987)*

Utah Supreme Court

State v. Maestas – 2012 UT 46 – in determining misconduct, the court considers the context of the entire trial including arguments by defense. Calling attention to Defendant's failure to testify is error, but in this case was harmless where it was an "isolated [comment] as opposed to extensive."

State v. Nelson-Waggoner – 2004 UT 29 – "A prosecutor has the duty and right to argue the case based on the total picture shown by the evidence or the lack thereof…[b]ut prosecutorial comment on a defendant's refusal to testify may violate a defendant's privilege against self-incrimination." There is a fine line between acceptable comments on the paucity of the defense and violation of the constitutional right against self-incrimination.

State v. Colwell – 2000 UT 8 – prosecutor inappropriately inferred that defense counsel "arranged it so that [his] son would fall off the monkey bars…and break his arm" the afternoon before closing remarks was improper. But tone is everything. Court found that the comment was made in jest and the trial court's curative instruction made the remark harmless.

State v. Bakalov – 1999 UT 45, ¶ 57 – Statements of personal belief constitute error, however, "assertions about what the jury should infer from the evidence" is not error.

State v. Dunn – 850 P.2d 1201 (UT 1993) – Asking the jury to "consider the judgment of society" when weighing the evidence constitutes error.

State v. Emmett – 839 P.2d 781 (UT 1992) – Commenting on prior convictions during closing argument was harmful error. See also *State v. Saunders*, 1999 UT 59, ¶ 25

State v. Hopkins – 782 P.2d 475 – "Vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused" is improper and "may induce the jury to trust the Government's judgment rather than its own view of the evidence."

Utah Court of Appeals

State v. Redcap – 2014 UT App 10 - Defense argued prosecutorial misconduct by prosecutor's suggestion in closing (1) that officer testimony was credible and (2) the defense witness credibility could be discounted, and (3) characterize defense witnesses as zoo animals who lived in cages and were governed by zoo rules." **COURT** found no misconduct where the statements were made in rebuttal to defense counsel's closing argument suggesting that the officers were lying and that the defense witnesses were "heroic". Further, prosecution reference to zoo animals was "life in prison, like life outside it, must be governed by rules."

Statements were "a fair reply to defense counsel's argument that the officers were not credible and that they were tasked to secure a conviction." ¶ 39. "Doctrine of Fair Reply" allows prosecutor to respond after defense counsel opens the door. ¶ 38. "Name calling", while rarely resulting in reversal, is not condoned. ¶51 -52, 55.

State v. Thompson - 2014 UT App 14 – Defense claims *under ineffective assistance of counsel* that prosecutor committed error in closing by (1) arguing that State's witnesses were credible and that defense counsel's were not, and (2) asking the jury to "send a message" and (3) arguing that "there had been no evidence presented that Thompson had never traveled through Laramie WY". **COURT** reversed and remanded - "prosecutors are held to a high standard regarding their conduct." Referring the jury to what they saw and heard from the witness stand was not misconduct (¶53) but an unsupported "I think" crosses the line (¶57-58) as does asking the jury to "send a message", even if the message is sent only to the defendant. ¶70. Taken as a whole counsel's failure to object constituted ineffective assistance of counsel.

"To be clear, the evil to be guarded against…is that a juror would consider [such] statements to be factual testimony from the prosecutor…a prosecutor engages in misconduct when he or she expresses personal opinion or asserts personal knowledge of the facts." ¶59. Citing State v. Davis 2013 UT App 228.