IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID BOOZE,	)	
	)	No. 90, 2006
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware
v.	)	in and for Sussex County
	)	
STATE OF DELAWARE,	)	Cr. ID No. 0412002779
	)	
Petitioners Below,	)	
Appellees,	)	
	)	

Submitted: November 8, 2006
Decided: February 13, 2007

Before **STEELE**, Chief Justice, **BERGER**, and **JACOBS**, Justices.

O R D E R

This 13th day of February, 2007, it appears to the Court that:

(1) David Booze appeals from judgments against him for various criminal offenses after a Superior Court jury trial. Booze presents four claims of error on appeal: (a) the trial judge erred when he found that a State Police affidavit in support of the warrant to search Booze's home established probable cause; (b) the prosecutor remarked improperly and prejudicially during his opening statement; (c) the prosecutor interjected her personal beliefs regarding Booze's guilt and misstated evidence in her opening statement *and* closing argument; and, (d) the trial judge reprimanded defense counsel in the presence of the jury thus depriving

Booze of his right to effective assistance of counsel and a fair trial. After reviewing the record, we find no merit to these claims and affirm.

(2) Booze was an electrician who resided on Lindale Road in Greenwood, Delaware, Sussex County. The Gerreses (Roger Gerres and his wife, Patricia Gerres) and the Mrosses (Carl Mross and his wife, Barbara Mross) were Booze's neighbors on Lindale Road.

(3) Beginning in 2001, Booze was involved in various incidents with the Gerreses and Mrosses. In 2001, while the Gerreses were building their house, Booze informed the developer that the Gerreses were building their house in violation of the deed restrictions. In August 2003, while Roger was cutting his grass, he heard a gun fire. Roger turned, saw Booze running across his yard with a gun, and called the police. When the police arrived, Booze told them that he was shooting at a groundhog on his property. The police did not arrest Booze.

(4) On August 19, 2003, the Gerreses were driving home and passed Booze, who was standing in front of his home. According to the Gerreses, Booze gave them "the finger" and yelled obscenities at them. Roger left his car and confronted Booze, where an oral altercation ensued. Patricia claimed that she tried to restrain Roger; however, when she stepped on Booze's property, Booze pushed his lawn mower towards her feet, causing her to step back. Booze called the police, and when police arrived, he asked the police to warn the Gerreses. Patricia

asked the officer to inform Booze that Roger had three previous heart attacks, and that if Booze would leave them alone, they would leave Booze alone.

(5) On July 8, 2004 Roger discovered shot gun pellet holes in the wall of his shed. Because the holes were inches from some gasoline cans, Roger called police, but the police made no arrests. On July 11, 2004, the Mrosses noticed that their workshop window was broken and the whole pane of glass shattered. The police responded and made a report but no arrests.

(6) On July 17, 2004, the Gerreses's contacted Verizon telephone company because their phone line was not working. A Verizon repairman responded to the scene and discovered that an unauthorized telephone line crossed with the Gerreses's telephone lines at the street side post. The Verizon repairman testified that the unauthorized line was connected to the rod that serves Booze's house, and would have enabled Booze to listen to and record the Gerreses's phone conversations. According to Roger, before his home phone stopped working, he was surprised to hear a voice he believed to be Booze's wife on the line. Also, one of the Gerreses's friends had called them twice to ask why Booze's telephone number had appeared on her caller ID.

(7) On July 28, 2004, Carl Mross discovered that someone had sprayed weed killer around the perimeter of his garden. The police again responded, but did not make any arrests. On August 28, 2004, the Mrosses and the Gerreses

discovered that their air conditioner units had been damaged by shotgun pellets. On September 30, 2004, the Mrosses and Gerreses discovered that their telephone lines had been cut and their lines were dead. The police responded to the scene, but did not make any arrests.

(8) On October 1, 2004, Roger ran over an object with his lawn mower. Roger got off the mower to investigate, and he found that some metal pegs were embedded in the grass on Booze's side of their shared property line. According to Roger, he yelled at Booze, and Booze told Roger to "get a life" and made a throat slashing gesture towards Roger. The Gerreses called police, but they did not make any arrests. The police took statements from both parties.

(9) On October 3, 2004, Carl discovered roofing nails scattered around his driveway. On October 6, 2004, around 1:00 a.m., Roger noticed that his outside motion detector light was flashing. Roger went to his window and saw a person matching Booze's description duck around the corner of his shed. Roger called Carl, and they discovered that someone had spray painted messages on their doors. Roger's garage door had a big "X" in bright red paint, followed by "BEWARE PN." The door to Carl's workshop had been painted with the message, "U2 RN."[1]

[1] Carl and Roger stated that, to them, "PN" meant "Perfect Neighbor" while "RN" meant either "Roger's Neighbor" or "Red Neck."

(10) In response to these incidents, Delaware State Police installed surveillance equipment in the Gerreses's shed and in the Mrosses's attic. On October 30, 2004, Roger discovered that the surveillance equipment installed in his shed had been smashed into pieces on the ground, and that the videotape was missing from its camera. The Mrosses stated that they observed Booze installing his own surveillance equipment.

(11) On December 2, 2004, Roger discovered a small box wrapped in clear tape and duct tape in his mailbox. The printed words "BEWARE CRUISE" were affixed on the box. The Gerreses were scheduled to leave the following day on a cruise, and Patricia had spoken about their plans on the telephone. Roger called the police, and they determined that the device was a hoax and the box contained a piece of wooden 2" x 4."

(12) Based on the foregoing facts, on December 2, 2004, the State Police executed a search warrant at Booze's residence and discovered a handgun under Booze's bed, numerous weapons in a gun safe, boxes of ammunition, military literature, fireworks, a pellet gun, cans of spray paint, an inert grenade, and surveillance videos from Booze's camera.[2] The police arrested Booze for numerous offenses.

[2] As a result of this search, the police obtained two additional search warrants which permitted them to search Booze's home on December 3, 2004, and December 9, 2004.

(13) At trial, Booze denied having committed any crimes. Nevertheless, the jury found Booze guilty of two counts of stalking, violation of privacy, six counts of criminal mischief, two counts of criminal trespass in the third degree, and possession of fireworks. On February 10, 2006, the trial judge sentenced Booze to one year and forty-five days at Level V supervision followed by probation. Booze appealed.

(14) Under Article IV, § 11 (1) (b) of the Delaware Constitution, our appellate criminal jurisdiction is limited to cases "in which the sentence shall be death, imprisonment exceeding one month, or fine exceeding One Hundred Dollars."[3] Because of this threshold criminal jurisdiction inquiry, both parties agree that only Booze's stalking convictions are properly before this Court. Therefore, we will address issues related only to those convictions.

(15) The first issue is whether the affidavit supporting the warrant used to search Booze's home established probable cause. This Court reviews the Superior Court's determination of probable cause *de novo* when the facts are not disputed and only a constitutional claim of lack of probable cause is at issue.[4] We review a

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[3] Del. Const. Art. IV, § 11 (1) (b) (2004).

[4] *Sisson v. State*, 903 A.2d 288, 296 (Del. 2006).

determination that sufficient probable cause exists to issue a search warrant with great deference.[5]

(16) Booze argues that "mere allegations of random speculative acts of criminal mischief" cannot establish probable cause to believe that the fruits, instrumentalities, or evidence of crimes could be found in Booze's residence. Booze contends that the State Police failed to establish a nexus between the allegations contained in the affidavit of probable cause and the items the police found in Booze's home.

(17) Under the Delaware and United States Constitutions, "a search warrant may be issued only upon a showing of probable cause."[6] This Court follows the "totality of the circumstances" test in determining whether probable cause to obtain a search warrant exists.[7] Under this test, "a magistrate may find probable cause when, considering the totality of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'"[8]

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5 *Id.*

6 *Fink v. State*, 817 A.2d 781, 786 (Del. 2003).

7 *Sisson*, 903 A.2d at 296, *see also Gardner v. State*, 567 A.2d 404 (Del. 1989).

8 *Sisson*, 903 A.2d at 296, citing *Stones v. State*, 676 A.2d 907 (Del. 1996) (Order).

(18) Here, the police had sufficient grounds to support a reasonable belief that Booze had committed offenses against his neighbors. A series of incidents highlighted and exacerbated tensions between Booze and his neighbors. Booze and the Gerreses had been involved in several fierce oral confrontations for over a year. Booze also had been implicated in various incidents of criminal mischief directed against the Gerreses and Mrosses. During these incidents, Booze displayed significant hostility toward the Gerreses and Mrosses. Although the police never caught Booze in the act of committing a crime, his identity could be inferred from the known facts and circumstances.[9]

(19) The State Police affidavit in support of the warrant described the items to be searched and seized from Booze's residence that could be reasonably expected, given the nature of the crimes and the evidence that the police possessed. Given the nature of the crimes[10] and the proximity of Booze's residence to the crime scene, a reasonable person could expect to find items such as guns, spray paint, nails, metal pegs, weed killer, wire cutting, equipment, wood, cardboard, clear tape, etc. in Booze's house. Therefore, the affidavit supporting the warrant

[9] For example, in August 2003, after Roger heard shots being fired over his dead, Booze confessed that he had been shooting a gun in his yard. Also, on October 6, 2004, Roger saw a man matching Booze's description run from his shed into the woods.

[10] The nature of the crimes were: shooting at Roger, shooting the air conditioning units and shed, spray painting garage doors, strewing nails and tacks over the Mrosses's driveway, destroying the Mrosses's garden with weed killer, tapping and cutting telephone lines, creating a fake bomb with duct tape and wood.

set forth facts adequate for a neutral judicial officer to form a reasonable belief that Booze had committed a series of offenses and that evidence of those offenses reasonably could be found in Booze's home.[11]

(20) Alternatively, Booze argues that the police improperly omitted material information from the affidavit of probable cause. Specifically, Booze argues, that police omitted a vandalism incident that occurred on his property. It is well established that if the police omit facts that are material to a finding of probable cause with reckless disregard for the truth, then the omitted information must be added to the affidavit so that the existence or absence of probable cause can be re-evaluated.[12] The trial judge did include and consider the omitted facts when reexamining the affidavit of probable cause. After doing so, the trial judge properly held that the fact that Booze's residence was only vandalized once during this time period did not diminish the force of the facts that supported the finding of probable cause.

(21) The second issue is whether the prosecutor spoke inappropriately during her opening statement. Defendant's counsel objected and moved for a mistrial. The standard of review on appeal from the denial of a motion for a

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[11] *Dorsey v. State,* 761 A.2d 807, 811 (Del. 2000).

[12] *Smith v. State,* 887 A.2d 470, 472 (Del. 2004); *see also Franks v. Delaware,* 438 U.S. 154 (1978).

mistrial is abuse of discretion.[13] This Court reviews a claim of prosecutorial misconduct *de novo* to determine whether the conduct was improper or prejudicial.[14]

(22) During her opening remarks to the jury, the prosecutor stated that "you will hear that as soon as the defendant was arrested, that the behavior stopped, that Mr. and Mrs. Mross and Mr. and Mrs. Gerres have never had a problem since." Booze characterizes this comment as "vouching" and, therefore, as prosecutorial misconduct amounting to a violation of his right to a fair trial. We disagree.

(23) In *White v. State*,[15] this Court held that that "[i]mproper vouching occurs when the prosecutor implies some personal superior knowledge, beyond that logically inferred from the evidence at trial, that the witness has testified truthfully."[16] We further noted that the prosecutor in his or her closing argument is "allowed and expected to explain all the legitimate inferences of the appellants' guilt that flow from that evidence."[17] Here, it is undisputed that the continuous

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13 *Bugra v. State*, 818 A.2d 964, 966 (Del. 2003).

14 *Price v. State*, 858 A.2d 930, 939 (Del. 2004).

15 816 A.2d 776 (Del. 2003).

16 *Id.* at 779.

17 *Johnson v. State*, 711 A.2d 18, 31 (Del. 1998) (quoting *Hooks v. State*, 416 A.2d 189, 204 (1980)).

incidents plaguing the Gerreses and Mrosses for almost sixteen months stopped after December 2, 2004, the day police arrested Booze. Therefore, the prosecutor's statement is a legitimate and logical inference form the evidence presented at trial. There is nothing to support Booze's argument that the prosecutor was suggesting to the jury that she was aware of information, not presented to the jury, that would tend to support the truthfulness of the Gerreses's and Mrosses's testimony. Therefore, the trial judge did not err when he denied Booze's motion for a mistrial because no prosecutorial misconduct occurred.

(24) The third issue is whether the prosecutor interjected her personal beliefs regarding Booze's guilt and misstated the evidence.

(25) Booze claims that the prosecutor interjected her personal beliefs about Booze's guilt and also misstated the evidence in both her opening statement and closing argument.[18] Booze contends that the prosecutor expressed her personal

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[18] In her closing argument, the prosecutor stated in relevant parts, as follows:

> . . . . [T]he state has relied, in large part, on circumstantial evidence in this case . . . . Did we catch him in the act of doing any of the vandalism acts? No. We caught him in the act of wire-tapping. We caught him in the act of putting the pegs in the ground. We caught him in the act of spray-painting that fence, his fence. Not the garages, but his fence. . . .
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> [Booze] describes [the Gerreses] as being retards from Stockley Center with their faces pressed up against the glass window staring at him. How offensive, obnoxious, and hateful a statement is that?
>
> . . . . He did all of that. There is no other logical explanation. . . .

belief about Booze's guilt by using the phrases "we know" and "we caught him" several times in her closing argument. Booze also claims that the prosecutor attacked Booze personally by interjecting her own personal opinions and beliefs by characterizing Booze's relationship with his neighbors as "offensive, obnoxious, and hateful."

(26) This Court has never "adopt[ed] a rule which says that the use of the word 'I' or 'we' in a closing argument is *per se* improper."[19] "When deciding whether a comment is improper prosecutorial misconduct, our cases often turn on the nuances of the language and the context in which the statements were made."[20] In this case, the prosecutor's statement was not an opinion formed from whole cloth. Rather, asserting "we know" and "we caught" referred to the evidence introduced at trial and the legitimate inferences drawn from that evidence. The prosecutor's negative comment was an impersonal and reasonable response to Booze's contemptuous language, not a statement of her personal belief or opinion regarding the truth or falsity of any testimony or evidence touching on Booze's guilt. The prosecutor's statement did not cross the "line of demarcation" between proper and improper argument. The trial judge properly instructed the jury, in any

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> [Booze] is choreographing. He is manipulating. He is the mastermind. He has no life.

19 Br*okenbrough v. State*, 522 A.2d 851, 859 (Del. 1987).

20 *Kurzmann v. State*, 903 A.2d 702, 710 (Del. 2006).

event, that they should be governed solely by the evidence and the instructions and that they should not consider any of the prosecutor's personal opinions should they believe she had offered her personal view.[21]

(27) Finally, Booze argues that the prosecutor misstated the evidence by saying that police caught Booze in the act of wiretapping. The record shows that police suspected Booze of wiretapping because the Verizon repairman identified the unauthorized telephone line coming from Booze's house.[22] In *Kurzmann v. State*, this Court held that "the prosecutor's comments might be hyperbolic argument, in which the prosecutor made legitimate inferences from the evidence at.

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[21] The trial judge instructed the jurors that they should not allow themselves to be swayed by sympathy or passion, but should let their verdict be the result of a fair and dispassionate consideration of the testimony given at trial. The trial judge also instructed the jurors as follows:

> [The prosecutor and Booze's defense counsel] are merely making arguments about what the evidence may or may not mean. Ultimately, you folks will decide. So to the extent that at any time during her closing argument, [the prosecutor] may have expressed her personal opinion about the evidence or testimony, or anything else, you are to simply disregard that. You folks will be the judges of the evidence and what it means and what conclusions you may draw from that.
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> Similarly, I want to remind you that you make your decision in this case based on the evidence; not based on sympathy and not based on emotion. Nothing of that nature.

[22] The relevant testimony from the Verizon repairman was as follows:

> I went to the telephone box, lifted off the cover and noticed that there were two pairs of wires on one – what is the binding post, the screws, which they are not supposed to . . . I found one of the pairs of wires coming from the Booze house was connected to the screws that serviced the Gerres house. . . . [it would enable Booze to] make phone called on the Gerres', long distance calls and/or listen and record any of the phone calls, the Gerreses' phone calls.

. . [trial], but they are supported by the record, are not misstatements, and, in context, are not improper in any way."[23] Here, the prosecutor's statement was a reasonable inference that can be drawn from the evidence presented at trial and was not a false statement or misrepresentation of fact.

(28) Booze's final claim of error is that the trial judge openly reprimanded his defense counsel, in the presence of the jury, thereby depriving him of his right to effective assistance of counsel and a fair trial.

(29) During the cross examination of the defendant, defense counsel objected to the prosecutor's question, stating: "Your Honor, is this a psychiatric evaluation? I object." The trial judge responded: "[defense counsel], I am not going to tell you any more. If you have an objection, make it. Stop making comments out in open court. I'm tired of it. You have done it for the better part of two weeks. Stop."

(30) During the prayer conference the next morning, the prosecutor brought up this incident, expressing some concern about the role of judge as arbitrator and defense counsel's duty to zealously represent their clients. Defense counsel replied, ". . . I don't think that there was any tension. . . . I understand exactly what the Court was saying back to me, and I didn't think it was an issue of

[23] 903 A.2d 702, 713 (Del. 2006).

tenseness." Thereafter, the trial judge and defense counsel discussed whether there was a need for additional jury instructions:

> Trial judge: would you like me to say anything, [defense counsel]?
> Defense counsel: No. First of all, I don't think there was any tension.
> Trial judge: I did admonish you in front of the jury.
> Defense counsel: But I don't think there was any tension. That was an admonishment. If I remember correctly, soon thereafter, you sustained one of my objections. And, also, I notice you put in there – I read it last night.
> Trial judge: It is usually in the very beginning. "You should not be prejudiced in any way by the attorneys making objections."
> Defense counsel: I, respectfully, don't think it has to be put in there.
> Trial judge: All right.

(31) During his charge to the jury, the trial judge included a cautionary instruction.[24] After carefully reviewing the record, we find that Booze's defense counsel expressly declined the trial judge's offer to give a

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[24] The trial judge stated:

> At times, throughout this trial, I have been called upon to pass upon the question of whether or not certain evidence may be properly admitted. It is the duty of a lawyer to object to evidence which he or she believes may not be properly offered, and you should not be prejudiced in any way against the lawyer who makes objections or the party he or she represents. . . . In admitting evidence to which an objection is made, I do not determine what weight should be given to such evidence, nor do I pass upon the credibility of the witnesses.

curative instruction knowingly, voluntarily, and intelligently. Therefore, Booze waived this claim, and plain error review would be inappropriate.[25]

For the foregoing reasons, the Superior Court's judgments of conviction are AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

[25] *Warner v. State*, 787 A.2d 101 (Del. 2001) (Order), *see also Bultron v. State*, 897 A.2d 758, 764 (Del. 2006).