IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Thomas Westland Callahan, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20050753-CA F I L E D (June 15, 2006) 2006 UT App 240

Third District, Salt Lake Department, 021911299
The Honorable Robin W. Reese

Attorneys: Elizabeth Hunt, Salt Lake City, for Appellant
Jon D. Shuman and David E. Yocom, Salt Lake City, for Appellee

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Before Judges Greenwood, Davis, and Thorne.

DAVIS, Judge:

Defendant appeals from two convictions for assault on a police officer, class A misdemeanors, and one conviction for criminal trespass, a class C misdemeanor. See Utah Code Ann. §§ 76-5-102.4, -6-206(2)(a)(iii) (2003).[1] We affirm.

Defendant argues that the prosecutor's remarks made during his closing argument constituted misconduct necessitating a new trial. We review prosecutorial misconduct claims for an abuse of discretion and will reverse only if Defendant has shown that

> [(1)] the actions or remarks of prosecuting counsel call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, if so, [(2)] under the circumstances of the particular case, whether the error is substantial and prejudicial such that there

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[1]The applicable statutes have remained the same for all times relevant to this appeal. We therefore cite to the current codification of the applicable statutes as a convenience to the reader.

> is a reasonable likelihood that, in its absence, there would have been a more favorable result.

State v. Cummins, 839 P.2d 848, 852 (Utah Ct. App. 1992) (quotations, citation, and alterations omitted); see also State v. Bakalov, 1999 UT 45,¶56, 979 P.2d 799 ("To prevail in this claim [of prosecutorial misconduct], defendant must show that the remarks called to the jurors' attention matters which they would not be justified in considering in reaching a verdict and, if so, that the remarks were harmful." (quotations and citation omitted)).

We hold that the prosecutor's comments did not constitute misconduct. "Utah law affords trial attorneys considerable latitude in closing arguments," Cummins, 839 P.2d at 852, and, "[w]hile encouraging jurors to consider matters outside the evidence is prosecutorial misconduct, the prosecutor may fully discuss with the jury reasonable inferences and deductions drawn from the evidence," Bakalov, 1999 UT 45 at ¶59 (internal citation omitted); see also State v. Dunn, 850 P.2d 1201, 1223 (Utah 1993) ("We have observed repeatedly that counsel for each side has considerable latitude [in closing arguments] and may discuss fully his or her viewpoint of the evidence and the deductions arising therefrom."); State v. Parsons, 781 P.2d 1275, 1284 (Utah 1989) (stating that counsel for both sides have "a right to discuss fully from their standpoints the evidence and the inferences and deductions arising therefrom," but that a prosecutor "engages in misconduct when he or she asserts personal knowledge of the facts in issue or expresses personal opinion" (quotations and citation omitted)). "In determining whether a given statement constitutes prosecutorial misconduct, the statement must be viewed in light of the totality of the evidence presented at trial." Cummins, 839 P.2d at 852; see also Bakalov, 1999 UT 45 at ¶56 (considering prosecutor's comments "in context of all the evidence" when assessing whether error occurred).

Defendant here contends that, contrary to the prosecutor's closing argument, there was no evidence that "an officer approached [Defendant] and asked to speak to him, and [Defendant] spit at him, kicked him[,] and wa[]ved a can opener in his face." But the record supports those statements. For example, although he could not remember specifically with regard to Defendant, Officer Peterson testified that it was his normal practice to request identification, identify himself, and announce his purpose when initiating an investigation. Officer Peterson also testified that he told Defendant that he was "just trying to find out what [Defendant] was doing there" and that Defendant spit at and tried to kick him when the police were leading Defendant to the police car.

Defendant also asserts that, contrary to the prosecutor's closing argument, there was no evidence that "[Defendant] pointed the Leatherman at the officers and threatened [Officer] Wihongi with it." But Officer Peterson specifically testified that Defendant threatened Officer Wihongi with the Leatherman. After Officer Peterson finished his initial investigation, he went to his police car and left Officer Wihongi with Defendant. At that time, Defendant grabbed his Leatherman from the table and refused to put it down, stating "I'm not going to drop it. [Y]ou'll have to shoot me to make me drop it."

In other words, the prosecutor here did not encourage the jurors to consider matters outside the evidence, nor did he assert personal knowledge of the facts or express a personal opinion. See Bakalov, 1999 UT 45 at ¶59 (encouraging jurors to consider matters outside evidence is prosecutorial misconduct); Parsons, 781 P.2d at 1284 (asserting personal knowledge of facts or expressing personal opinion is prosecutorial misconduct). Instead, the prosecutor here merely summarized his "viewpoint of the evidence and the deductions arising therefrom." Dunn, 850 P.2d at 1223. Therefore, in light of the totality of the evidence presented at trial, the comments made by the prosecutor during his closing argument were supported by the record.

Even assuming there was a slight discrepancy between the evidence presented at trial and the prosecutor's summation thereof, Defendant has the burden of demonstrating that the prosecutor's comments were prejudicial. See State v. Kohl, 2000 UT 35,¶24, 999 P.2d 7. "[S]tep two of the prosecutorial misconduct test requires consideration of the circumstances of the case as a whole. In making such a consideration, it is appropriate to look at the evidence of defendant's guilt." State v. Longshaw, 961 P.2d 925, 931 (Utah Ct. App. 1998) (quotations and citation omitted). "If proof of defendant's guilt is strong, the challenged conduct or remark will not be presumed prejudicial," but "[i]f the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible [to] differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel." State v. Troy, 688 P.2d 483, 486 (Utah 1984) (quotations and citation omitted); see also Dunn, 850 P.2d at 1224 ("When the evidence in the record is circumstantial or sufficiently conflicting, jurors are more likely influenced by an improper argument." (quotations and citation omitted)). Furthermore, numerous Utah cases have held that a curative instruction cautioning the jurors not to consider the statements of counsel as evidence may diminish any improper impact of a prosecutor's comments. See, e.g., Kohl, 2000 UT 35 at ¶24; Dunn, 850 P.2d at 1225; Parsons, 781 P.2d at 1284.

Here, the evidence against Defendant was strong. Defendant presented no witnesses and instead rested on the presumption of innocence, thereby reducing the likelihood that the jurors "weigh[ed] conflicting evidence or evidence susceptible [to] differing interpretations." Troy, 688 P.2d at 486. Furthermore, during the prosecutor's closing argument, the trial court twice cautioned the jurors that counsel were advocates and not witnesses, that counsel's statements did not constitute evidence, and that the jurors had a duty to rely on their own recollections of the evidence. Finally, in their written instructions, the jurors were cautioned that

> each of the lawyers is here in a partisan capacity, and it is both the duty and responsibility of them to be advocates . . . . If during the trial or in their closing arguments, the lawyers have made statements concerning the evidence which do not conform with your recollection of it, you should disregard the lawyers['] statements and rely solely on your own recollection of the evidence.

We therefore conclude that the prosecutor's remarks made during his closing argument did not constitute misconduct necessitating a new trial.

Defendant next argues that the evidence was insufficient to sustain a conviction for criminal trespass. "Our power to review a jury verdict . . . is quite limited. We view the evidence, along with the reasonable inferences from it, in the light most favorable to the verdict." State v. Moore, 802 P.2d 732, 738 (Utah Ct. App. 1990). When reviewing the sufficiency of the evidence, "[w]e will uphold the [jury's] decision if, upon reviewing the evidence and all inferences that can reasonably be drawn from it, we conclude that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." State v. Dibello, 780 P.2d 1221, 1225 (Utah 1989).

Under the Utah Criminal Code, a person is guilty of criminal trespass if he "enters or remains unlawfully on property" and "is reckless as to whether his presence will cause fear for the safety of another." Utah Code Ann. § 76-6-206(2)(a)(iii). A person engages in conduct recklessly "with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." Id. § 76-2-103(3) (2003).

Defendant argues that he was not informed until August 28, 2002, that he was banned from the Senior Center, and therefore, "there [was] no evidence that he should have known that his presence [at the Senior Center] on August 26th would cause anyone to fear for their safety." However, the fact that Defendant was not banned from the Senior Center until after the incident in question is irrelevant to whether Defendant was "reckless as to whether his presence [would] cause fear for the safety of another." Id. § 76-6-206(2)(a)(iii).[2] Indeed, evidence was presented at trial regarding two previous occasions on which Defendant acted in a violent and threatening manner towards staff members at the Senior Center; after one such occasion, one staff member felt so threatened that he asked the Senior Center to seek a restraining order against Defendant. Because ample evidence exists that Defendant was "reckless as to whether his presence [would] cause fear for the safety of another," id., we uphold his conviction for criminal trespass.

Affirmed.

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James Z. Davis, Judge

WE CONCUR:

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Pamela T. Greenwood,
Associate Presiding Judge

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William A. Thorne Jr., Judge

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[2]The fact that Defendant was not banned from the Senior Center until after the incident in question is relevant to the issue of whether Defendant "enter[ed] or remain[ed] unlawfully on the property." Utah Code Ann. § 76-6-206(2)(a) (2003); see also id. § 76-6-201(3) (2003) (stating someone "enters or remains unlawfully" on property when property "at the time of the entry or remaining [is] not open to the public and when the actor is not otherwise licensed or privileged to enter or remain" on property). However, this issue was not addressed by the parties, and we therefore do not reach it.