IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee, v. Douglas Dillon, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20020595-CA F I L E D (December 8, 2005) 2005 UT App 533

Fifth District, St. George Department, 001500517
The Honorable James L. Shumate

Attorneys: Margaret P. Lindsay, Provo, for Appellant
Mark L. Shurtleff and Christopher D. Ballard, Salt Lake City, for Appellee

---

Before Judges Bench, Greenwood, and McHugh.

PER CURIAM:

Douglas Dillon appeals his convictions of one count each of theft, burglary, and failure to respond to an officer's signal to stop, each third degree felonies; one count of driving on a revoked or suspended license, a class B misdemeanor; and one count of speeding, a class C misdemeanor.

Dillon claims the district court committed plain error by submitting the burglary charge to the jury. Alternatively, he claims that defense counsel was ineffective by failing to make a motion for directed verdict. "To demonstrate that plain error occurred in the context of a challenge to the sufficiency of the evidence, an appellant must show 'first that the evidence was insufficient to support a conviction of the crime[s] charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.'" State v. Diaz, 2002 UT App 288,¶32, 55 P.3d 1131 (quoting State v. Holgate, 2000 UT 74,¶17, 10 P.3d 346). Only after an appellant demonstrates that the evidence was insufficient to support the verdict is the appellate court called upon to "determine whether the evidentiary defect was so obvious and fundamental that it was plain error to submit the case to the jury." Holgate, 2000 UT 74 at ¶18. We reverse a jury verdict

only when the evidence "is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt." State v. Mead, 2001 UT 58,¶65, 27 P.3d 1115. "So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops." Id. at ¶67. Viewing the evidence and all inferences therefrom in the light most favorable to the jury's verdict, we cannot conclude that the evidence was so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the crime of burglary had been committed. The claim that the district court committed plain error in submitting the case to the jury fails because Dillon "failed to establish, as a threshold matter, that there was insufficient evidence to support [the] charge." Holgate, 2004 UT 74 at ¶29. Given the sufficiency of the evidence supporting the burglary charge, we conclude that the district court did not commit plain error, and counsel was not ineffective in failing to make a motion for directed verdict.

Dillon next claims that he was denied a fair trial as a result of prosecutorial misconduct. He contends that, during his cross-examination, the prosecutor improperly asked him (1) questions about the veracity of another witness, and (2) questions seeking to elicit evidence of his prior bad acts. The test applied to claims of prosecutorial misconduct requires an appellant to demonstrate that

> 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, under the circumstances of the particular case, whether 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.

State v. Cummins, 839 P.2d 848, 852 (Utah Ct. App. 1992) (alteration in original)(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." Id.

Dillon correctly asserts that the line of questioning about the officer lying was improper. See State v. Emmett, 839 P.2d 781, 787 (Utah 1992) (stating that questions regarding veracity of another witness are improper and argumentative). However, he does not undertake any analysis of the harmful effect of the

questioning in light of the totality of the evidence. The Utah Supreme Court in Emmett did not analyze this prong of the test for prosecutorial misconduct as applied to this line of questioning because it had previously determined to grant a new trial on other grounds. See id. ("It is not necessary to address how these questions affected the trial, given our previous holding."). Although the questions were improper, Dillon has not demonstrated that the questions had a harmful effect and denied him a fair trial under the circumstances.

Dillon also asserts that the prosecutor committed misconduct by questioning him in an alleged attempt to elicit testimony about his prior bad acts. Dillon did not object to any questions on this basis, but he alleges plain error. He first contends that the prosecutor's inquiry whether he had previously purchased stolen tools called attention to his criminal history. The answer to this question, however, did not elicit evidence of any prior criminal history. When viewed in context, these questions did not "call to the attention of the jury a matter that it would not have been justified in considering." Cummins, 839 P.2d at 852 (quotations and citation omitted). Dillon contends that questions about his reasons for running from the police were allegedly intended to elicit evidence of a criminal past. However, the questions did not elicit any such evidence.

Dillon contends that prejudice from allegedly improper questioning by the prosecutor is demonstrated because the evidence in the case was not compelling. However, he has undertaken no analysis of the evidence in the context of his prosecutorial misconduct claim. Accordingly, even if we were to assume the questioning was improper, Dillon has not demonstrated that "viewed in light of the totality of the evidence presented at trial," there is a reasonable likelihood of a more favorable result. Id. at 852.

We affirm the judgment and conviction.

_____
Russell W. Bench,
Associate Presiding Judge

_____
Pamela T. Greenwood, Judge

_____
Carolyn B. McHugh, Judge