

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20050506-CA
v.)	
)	F I L E D
Joseph Hoskins,)	(June 29, 2006)
)	
Defendant and Appellant.)	2006 UT App 265

Second District, Ogden Department, 041906257
The Honorable John R. Morris

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Karen A. Klucznik, Salt Lake
City, for Appellee

Before Judges Greenwood, Billings, and Davis.

BILLINGS, Judge:

Defendant Joseph Hoskins appeals his convictions for robbery, a second degree felony, in violation of Utah Code section 76-6-301, and assault, a class A misdemeanor, in violation of Utah Code section 76-5-102. See Utah Code Ann. §§ 76-6-301 (Supp. 2005), 76-5-102 (2003). Defendant asserts that this court should reverse his convictions because the trial court (1) erred in denying his motion for directed verdict and (2) committed plain error when it failed to strike the prosecutor's remarks in closing argument concerning reasonable doubt.¹ Defendant also claims he received ineffective assistance

¹Defendant also contends the trial court erred in denying his motion for continuance because the State failed to provide timely notice of its intention to introduce the expert testimony of Defendant's parole officer. See Utah Code Ann. § 77-17-13 (2003). However, because Defendant failed to object below and neglects to argue plain error or exceptional circumstances on appeal, we decline to address the issue for the first time on
(continued...)

of counsel when his trial attorney failed to object to the prosecutor's allegedly improper remarks. We affirm.

First, Defendant argues the trial court erred in denying his motion for a directed verdict because at the close of the State's case there was insufficient evidence to support a conviction. A trial court properly denies a defendant's motion for directed verdict if at the close of the State's case the court finds "the [S]tate has established a 'prima facie case against the defendant by producing believable evidence of all the elements of the crime charged.'" State v. Montoya, 2004 UT 5, ¶29, 84 P.3d 1183 (quoting State v. Emmett, 839 P.2d 781, 784 (Utah 1992)) (additional quotations and citation omitted). On appeal, we review the evidence "in the light most favorable to the [S]tate." Id.

Defendant does not argue that the State failed to establish "believable evidence of all the elements of the crime[s] charged." Id. (quotations and citations omitted). Rather, Defendant asserts that "the reliability of the jury's verdict in this case must be called into question" because the testimony of the State's two witnesses was so contradictory that any reasonable inferences were so "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the Defendant committed the crime." Specifically, Defendant stresses that the State's witnesses were high on cocaine at the time of the crimes and that their testimony was not entirely consistent with the victim's testimony, with one another's testimony, or with their own prior statements.

We conclude the trial court properly determined there was sufficient evidence to submit the case to the jury. The Utah Supreme Court has instructed that "'[i]f there is any evidence, however slight or circumstantial, which tends to show guilt of the crime charged or any of its degrees, it is the trial court's duty to submit the case to the jury.'" Id. at ¶33 (quoting State v. Hamilton, 827 P.2d 232, 237 (Utah 1992)). Here, two witnesses

¹(...continued)
appeal. See State v. Brown, 856 P.2d 358, 359 (Utah Ct. App. 1993) ("As a general rule, appellate courts will not consider an issue . . . raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances."); see also State v. Johnson, 774 P.2d 1141, 1144 (Utah 1989) (explaining that for criminal cases, an issue is preserved for appeal only when "a contemporaneous objection or some form of specific preservation of the claims of error" is made in the trial court record).

agreed that Defendant was at the scene of the robbery. They also both identified Defendant as the individual who assaulted Powell.

Further, Defendant's assertion that the trial court improperly denied his motion for a directed verdict because the witnesses lacked credibility supports our decision that the trial court properly submitted Defendant's case to the jury. Utah courts have consistently held that "[i]t is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses." State v. Mead, 2001 UT 58, ¶67, 27 P.3d 1115.

Second, Defendant argues the prosecutor engaged in misconduct when he stated in closing argument that the jury need not worry about reasonable doubt. Ordinarily, this court reviews a claim of prosecutorial misconduct for an abuse of discretion. See State v. Pritchett, 2003 UT 24, ¶10, 69 P.3d 1278. However, because Defendant raises the issue of prosecutorial misconduct for the first time on appeal, we must review his claim under plain error or exceptional circumstances. See State v. Winfield, 2006 UT 4, ¶14, 128 P.3d 1171. For Defendant to prevail on his assertion of plain error, Defendant must show that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error [was] harmful." State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993).

Prosecutorial misconduct occurs when "the prosecutor's comments call the jurors' attention to matters not proper for their consideration and when the comments have a reasonable likelihood of prejudicing the jury by significantly influencing its verdict." State v. Reed, 2000 UT 68, ¶18, 8 P.3d 1025 (quotations and citation omitted). Defendant argues the prosecutor committed misconduct when he stated to the jury in closing argument: "[Y]ou don't need to look for doubt. You don't need to search for doubt. If doubt doesn't exist, then don't find it and find the defendant guilty. You don't have to go in worrying about reasonable doubt."

Concerning the first prong of the prosecutorial misconduct analysis, Defendant asserts that because the prosecutor's remark was a "simply incorrect" statement of the proper burden of proof in criminal cases, the remark called the jurors' attention to "matters which they would not be justified in considering in determining their verdict." We disagree. When reviewing statements for prosecutorial misconduct, those statements "must be viewed in context." State v. Baker, 963 P.2d 801, 804 (Utah Ct. App. 1998) (quotations and citations omitted). In doing so here, it is clear the prosecutor's comments were not inappropriate. More completely, the prosecutor remarked to the jury:

I want to talk about some of the things that you're supposed to use as a guide for your deliberations today. One is, reasonable doubt. The judge has instructed you on reasonable doubt. The reasonable doubt is Instruction No. 30. Sometimes you hear--it's used in the legal context sometimes and it bothers me when this is done. People say I know it's true beyond a shadow of a doubt or there's even a book, I think, a novel written about some courtroom case that said beyond a shadow of a doubt. Beyond a shadow of a doubt is not the test that you're required to apply. Your test is reason. You use reason. You're the reasonable man that we talked about. You're the reasonable person that's been brought here to consider this case and you don't need to look for doubt. You don't need to search for doubt. If doubt doesn't exist, then don't find it and find the defendant guilty. You don't have to go in worrying about reasonable doubt.

Because we conclude the prosecutor's remarks did not constitute misconduct, and thus, no error exists, Defendant's contention of plain error fails.

Finally, Defendant contends he received ineffective assistance of counsel when his attorney failed to object to the prosecutor's remarks in closing argument regarding reasonable doubt. "We review ineffective assistance of counsel claims raised for the first time on appeal for correctness." State v. Diaz, 2002 UT App 288, ¶13, 55 P.3d 1131. To show ineffective assistance of counsel, "the defendant must [first] show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687 (1984). Because we conclude the prosecutor's remarks during closing argument were not improper, defense counsel's failure to object to the remarks was not deficient. See State v. Whittle, 1999 UT 96, ¶34, 989 P.2d 52 ("[T]he failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance [of counsel]." (quotations and citations omitted)).

In conclusion, the trial court did not err in denying Defendant's motion for a directed verdict. Further, because the prosecutor's remarks during closing argument did not constitute prosecutorial misconduct, the trial court did not commit plain

error in failing to strike the prosecutor's remarks, and defense counsel was not ineffective in failing to object to the remarks. We therefore affirm.

Judith M. Billings, Judge

WE CONCUR:

Pamela T. Greenwood,
Associate Presiding Judge

James Z. Davis, Judge