

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20050522-CA
v.)	
)	
Robert Sherry,)	F I L E D
)	(June 15, 2006)
)	
Defendant and Appellant.)	<u>2006 UT App 239</u>

Fifth District, Cedar City Department, 041500345
The Honorable J. Philip Eves

Attorneys: Randall C. Allen, Cedar City, for Appellant
Mark L. Shurtleff and Karen A. Klucznik, Salt Lake
City, for Appellee

Before Judges Billings, Davis, and Orme.

BILLINGS, Judge:

Defendant Robert Sherry appeals the trial court's denial of his motion for mistrial and asks this court to reverse his jury convictions for possession of methamphetamine with intent to distribute, a first degree felony, see Utah Code Ann. § 58-37-8(1)(a)(iii), (b)(i) (Supp. 2005), and possession of drug paraphernalia, a class A misdemeanor, see Utah Code Ann. § 58-37a-5(2) (2002). We affirm.

On appeal, Defendant argues the trial court improperly denied his motion for mistrial because the prosecutor committed misconduct when he indicated in his closing argument that there had been suppression issues in the case. This court "will not reverse a trial court's denial of a mistrial motion based on prosecutorial misconduct absent an abuse of discretion." State v. Pritchett, 2003 UT 24, ¶10, 69 P.3d 1278 (emphasizing that abuse of discretion is the appropriate standard of review "[b]ecause a trial court is in the best position to determine an alleged error's impact on the proceedings" (quotations and citation omitted)). "This standard is met only if 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 for the defendant." Id. (quotations and citation omitted).

In his rebuttal at closing argument, the prosecutor remarked, "Sometimes juries get . . . caught up in . . . suppression issues and things like that when they get back to deliberate. I just want to tell you that . . . those issues . . . have already been resolved in this case." Defendant objected to the prosecutor's remark, claiming it was inappropriate. The trial court sustained Defendant's objection, describing the prosecutor's comment as "inappropriate . . . [because t]here [was] no evidence in the record regarding [suppression issues] that the jury c[ould] consider." In response, the prosecutor clarified the purpose of his statement, explaining to the jury,

My point is that when you get back to deliberate[,] . . . you're not to consider search and seizure issues or whether or not the search was lawful [Rather] instructions[] 1 through 24[are] where you're to find your law and your instructions. And anything outside of that . . . is not to be considered . . . in your deliberations. [The instructions are] where your law is contained.

At the close of trial, Defendant moved for a mistrial, claiming the prosecutor's comment indicating there had been suppression issues in the case constituted prosecutorial misconduct. The trial court denied Defendant's motion.

On appeal, the State focuses on the prejudice prong of the prosecutorial misconduct determination. Thus, for purposes of our analysis we assume the impropriety of the prosecutor's reference to suppression issues. Nonetheless, we conclude the prosecutor's comment did not "have a reasonable likelihood of prejudicing the jury by significantly influencing its verdict." State v. Pearson, 943 P.2d 1347, 1352 (Utah 1997).

First, although the prosecutor's remark noted the existence of suppression issues in the case, the prosecutor provided no further elaboration or explanation. Thus, it was highly unlikely the jurors were able to assess the nature and relevance of such suppression issues, much less consider them, in reaching their verdict. See id. at 1353 (stressing the brevity and irrelevance of the prosecutor's comments in determining whether such comments "were likely to [have] prejudice[d] the outcome of the jury's deliberations").

Second, "[D]efendant promptly objected," and "the [trial] court sustained the objection" and immediately informed the

jurors that the prosecutor's comment was inappropriate. State v. Kohl, 2000 UT 35, ¶24, 999 P.2d 7 (noting defendant's prompt objection, the trial court's sustainment of that objection, and the trial court's immediate curative instruction to the jury as negating a demonstration of prejudice resulting from the prosecutor's improper comments). Further, the prosecutor promptly clarified his statement, reminding the jury that in its deliberations it was not to consider anything outside the jury instructions.

Finally, the trial court provided jury instructions, both orally at the start of trial and in writing at the conclusion of trial, directing the jury to not consider excluded evidence and to "disregard any statement of an attorney which ha[d] no basis in the evidence." These curative instructions--applicable to the prosecutor's remark, which the trial court deemed inappropriate because "[t]here[was] no evidence in the record regarding [suppression issues] that the jury c[ould] consider"--sufficiently mitigated any possible prejudice. See Pearson, 943 P.2d at 1353 (concluding the prosecutor's remarks had not prejudiced defendant, in part, because of trial court's earlier instructions "inform[ing] them that the arguments of counsel [did] not constitute evidence and that they were to rely only on the evidence in reaching factual conclusions").

In conclusion, Defendant has failed to demonstrate the prosecutor's remark "[wa]s substantial and prejudicial such that there [wa]s a reasonable likelihood that in its absence, there would have been a more favorable result for . . . [D]efendant." State v. Pritchett, 2003 UT 24, ¶10, 69 P.3d 1278. Therefore, we hold the trial court did not abuse its discretion in denying Defendant's motion for mistrial on the basis of prosecutorial misconduct. We affirm.

Judith M. Billings, Judge

WE CONCUR:

James Z. Davis, Judge

Gregory K. Orme, Judge