

# Ain't Misbehavin'? Think Again

## Identifying Ten Improper Prosecutorial Arguments in Criminal Cases

By Daniel E. Monnat and Paige A. Nichols

"Think about how you would feel if what happened to this woman happened to you. The defendant lied about it, and then his lawyer used a common defense tactic—smearing the victim—to distract you from his client's behavior and lies. We can't tolerate this kind of behavior in our community. It is your duty to end it right here, by returning a guilty verdict."

Can you pick out at least four potentially reversible errors in this sample closing argument?

Prosecutorial misconduct during closing argument has recently led to the reversal of several Kansas convictions for crimes ranging from simple drug offenses to first-degree murder.<sup>1</sup> The Kansas appellate courts have become so determined to curtail improper closing arguments that—after years of refusing to consider misconduct to which there was no objection at trial—they have now adopted a "plain error" test that allows appellate review of the worst sorts of miscon-

duct even in the absence of a contemporaneous objection. This approach places the onus on trial judges to *sua sponte* "intervene where a prosecutor's comments amount to a constitutional violation or are so gross and flagrant that they impermissibly infringe upon a defendant's constitutional right to a fair trial."<sup>2</sup>

Given our appellate courts' current interest in tackling the problem of closing argument misconduct, it seems an appropriate time for those of us who litigate or preside over criminal cases at the trial level to re-educate ourselves about what types of arguments are improper. Fair trials can only be ensured at this level if practitioners avoid misconduct in the first place (the prosecutor's duty<sup>3</sup>), call attention to it immediately (defense counsel's duty<sup>4</sup>), and / or cure it when it arises (the trial judge's duty<sup>5</sup>).

While the recent Kansas cases have underscored the dangers of a few important categories of misconduct, they come nowhere near covering the

gamut of improper argument. This article also does not purport to offer an exhaustive enumeration or analysis of all categories of closing argument misconduct. Instead, what follows will be a quick listing of the five most readily recognizable types of misconduct, and then a slightly more detailed review of five subtler areas that are easily overlooked or that have not yet been addressed extensively by the Kansas appellate courts.

### Elementary Misconduct

The following five arguments are perhaps the most common and most easily recognizable categories of closing argument misconduct:

1. *Statements of personal opinions or beliefs, including comments either bolstering the credibility of the state's witnesses or impugning the credibility of the defendant, defense counsel and/or the defense witnesses.*<sup>6</sup>

2. *References to facts not in evidence.*<sup>7</sup>

3. *Comments on the defendant's invocation of rights, failure to testify at trial, or failure to present evidence.*<sup>8</sup>

4. *Inflammatory comments, such as name-calling and scare-tactics.*<sup>9</sup>

5. *Sympathy-begging comments, such as the "Golden Rule" argument, which asks jurors to put themselves in the victim's shoes.*<sup>10</sup>

### Distorting the Burden of Proof

6. *Arguments that the jury cannot acquit unless it finds that the state's witnesses (whether law enforcement, expert witnesses, third-party eye witnesses or victims) were lying or mistaken.*

It does not appear that the Kansas courts have considered arguments like



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this in any detail before. Other jurisdictions have considered such arguments and have strongly condemned them. For example, the Court of Appeals of Washington reversed two rape convictions because of this sort of argument in *State v. Fleming*.<sup>11</sup> The prosecutor there had argued in closing: “[F]or you to find the defendants...not guilty of the crime of rape in the second degree...you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.”<sup>12</sup>

The appellate court explained that this argument misstated the jury’s role as well as the state’s burden of proof:

This court has repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken.... The prosecutor’s argument misstated the law and misrepresented both the role of the jury and the burden of proof. The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit.<sup>13</sup>

#### 7. Arguments that the jury must convict if it finds that the defendant lied while testifying.

Although the Kansas Supreme Court’s opinion in *State v. Pabst*<sup>14</sup> has been most often cited for the proposition that a prosecutor may not call the defendant a liar, the Court also reversed Pabst’s conviction because the prosecutor argued: “[I]f you don’t believe [the defendant’s testimony], then he’s guilty.”<sup>15</sup> The Court explained that this argument misstated both the jury’s duty and the State’s burden:

...The prosecutor’s remark was improper. It is the State’s burden to prove beyond a reasonable doubt that the defendant is guilty of the crime charged.... If a jury disbelieves a testifying defendant’s testimony, that is insufficient to meet the State’s burden.... The important point is, if the jury did not believe Pabst, that was not enough to convict him of premeditated first-degree murder. The jury had to conclude that the State’s evidence proved Pabst guilty of premeditated first-degree murder beyond a reasonable doubt.<sup>16</sup>

#### Denigrating Defense Tactics

8. Arguments generally attacking the defendant’s theory, i.e., calling it “just another defense tactic.”

This sort of argument denigrates the defendant’s constitutional rights both to counsel and to present a defense. A number of jurisdictions have reversed convictions obtained in the face of this category of misconduct. For example, in *State v. Salitros*,<sup>17</sup> the Minnesota Supreme Court held that the following general attack on the defense theory contributed to reversible error:

Now there’s another real common defense tactic that is used

over and over in criminal trials .... What do you typically hear about a rape case? You hear about the defense attorney putting the victim on trial. They do that because they focus the attention away from the client, what the client did, and focus the attention on what the victim did.<sup>18</sup>

The Court explained why this argument was improper as follows:

[I]n a number of cases we have cautioned prosecutors against generally belittling a particular defense in the abstract, as by saying, e.g., ‘That’s the sort of defense that defendants raise when nothing else will work.’ ... It is clearly improper for a prosecutor to suggest that the arguments of defense counsel are part of some sort of syndrome of standard arguments that one finds defense counsel making in “cases of this sort.”<sup>19</sup>

The Ohio Court of Appeals reversed aggravated murder and burglary convictions on similar grounds in *State v. Hart*.<sup>20</sup> There, the prosecutor’s improper summation included an attack on the defense lawyer’s “whole method of operation. Crank up the fog machine. Let’s try and conjure up a reasonable doubt.”<sup>21</sup> The appellate court strongly condemned the argument as a denigration of both the role of defense counsel and the defendant’s right to draw conclusions from the evidence in support of his theory of defense:

...A prosecutor may argue and argue ardently that the evidence does not support the conclusion postulated by defense counsel. A prosecutor may not, however, denigrate the role of defense counsel by injecting his personal frustration with defense tactics.... The prosecutor was not entitled to employ rebuttal argument to denigrate the role of defense counsel and to insinuate to the jury that [the defendant] and his counsel, by exercising their right to suggest what conclusions may or may not have been drawn from the evidence found at trial, were seeking to hide the truth.<sup>22</sup>

#### Misstating the Jury’s Responsibility

9. Comments minimizing the jury’s responsibility by reference to the appellate process.

Prosecutors may not downplay the jurors’ duty by telling them that their decision is not final. In *Stone v. State*,<sup>23</sup> the Texas Court of Appeals reversed a murder conviction because the prosecutor improperly argued to the jury that “when and if you find this man not guilty [sic], the case gets appealed.”<sup>24</sup> The court explained that “[t]he error made by the prosecutor was manifestly improper, and was calculated to give, and probably did give, the impression to the jury that if it made a mistake in convicting appellant, a higher court would correct the error.”<sup>25</sup>

Similarly, in *State v. Thomas*,<sup>26</sup> the South Carolina Supreme Court reversed a conviction for armed robbery and aggravated assault and battery because the prosecutor told the jury during closing argument that an appellate court would review their decision. The court cautioned that “arguments of this kind can rarely be harmless.”<sup>27</sup>

10. Arguments overstating the jury’s duty by calling upon it to render law enforcement or send a message to the community.

Prosecutors commit misconduct when they “divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused...or by making predictions of the consequences of the jury’s verdict.”<sup>28</sup> Prosecutors should thus refrain from defining the jury’s duty over-broadly, as though the jurors are the sole guardians of the law in their community. Consistent with this rule, the Kansas Supreme Court found the following argument to be plain error necessitating reversal:

You know, they say all the time that our police department enforces our laws in this country, that’s not true. It’s you guys. We have people in Topeka that make our laws, we have people in my office that prosecute them, but you all have the job of enforcing them. You all can find that he committed these crimes and hold him responsible for them. We cannot tolerate this kind of drug use in our community, especially when a person dies. You have to find him guilty.<sup>29</sup>

The Court emphasized that this argument diverted the jury from its real duty—to determine whether the State proved that the defendant had committed the charged offenses—because it was on “grounds completely unrelated to the question the jury should have considered.”<sup>30</sup> Pleas to the jury to reach a verdict that will “send a message” to the community are likewise improper.<sup>31</sup>

## Conclusion

As noted above, this list is certainly not exhaustive. However, it is offered in hopes that it might serve as a beginning checklist for curbing closing argument misconduct at the trial level. The Kansas appellate courts have made it clear that the burden of curbing misconduct lies not only with prosecutors themselves, but also with defense counsel and trial judges. Reminding ourselves of what arguments constitute misconduct is the first step toward fulfilling that duty.<sup>32</sup> ♦

## Endnotes

- <sup>1</sup> See *State v. Magdaleno*, No. 82,947 (Kan. Ct. App. Jan. 5, 2001); *State v. Pham*, 10 P.3d 780 (Kan. Ct. App. 2000); *State v. Finley*, 268 Kan. 557, 998 P.2d 95 (2000); *State v. Pabst*, 268 Kan. 501, 996 P.2d 321 (2000); *State v. Lockhart*, 24 Kan. App. 2d 488, 947 P.2d 461 (1997); *State v. Ruff*, 252 Kan. 625, 847 P.2d 1258 (1993).
- <sup>2</sup> *State v. Sperry*, 267 Kan. 287, 308-09, 978 P.2d 933 (1999).
- <sup>3</sup> See K.R.P.C. 3.4(e); ABA Standards of Criminal Justice (Prosecutor’s Function), Standard 3-5.8.
- <sup>4</sup> Although *Sperry*, *supra* note 2, allows for appellate review of some types of misconduct even in the absence of a contemporaneous objection, defense counsel is well-advised to continue making objections at the trial level. The standard of review for demonstrating plain error on appeal under *Sperry* is higher for the defendant than that for demonstrating reversible error when objections are preserved, at least for most types of federal constitutional error. Compare *Sperry*, *supra* note 2 (reviewing court will only set aside convictions for misconduct if *defendant* shows that “misconduct is so prejudicial or constitutes a constitutional violation which, if not corrected, will result in injustice or a miscarriage of justice”), with *Chapman v. California*, 386 U.S. 18, 24 (1967) (reviewing courts must set aside convictions if misconduct (or other error) amounts to federal constitutional error, unless *the state* shows that the error was “harmless beyond a reasonable doubt”).
- <sup>5</sup> See *Sperry*, *supra* note 2.

- <sup>6</sup> See, e.g., *Pabst*, *supra* note 1, 268 Kan. at 505-07 (prosecutor’s extended argument that defendant lied was misconduct necessitating reversal); *Lockhart*, *supra* note 1, 24 Kan. App. 2d at 491-93 (prosecutor’s arguments that defendant and defense counsel were liars constituted “serious breaches of the standard of fair comment permitted to lawyers when making closing arguments”).
- <sup>7</sup> See *State v. Foster*, 259 Kan. 198, Syl. ¶ 2, 910 P.2d 848 (1996) (“No rule governing oral argument is more fundamental than that requiring counsel to confine remarks to matters in evidence. The stating of facts not in evidence is clearly improper.”); K.R.P.C. 3.4 (forbidding lawyers from referring to matters “not supported by admissible evidence”).
- <sup>8</sup> See, e.g., *State v. Foust*, 18 Kan. App. 2d 617, 857 P.2d 1368 (1993) (prosecutor committed reversible misconduct by cross-examining defendant about post-arrest and post-Miranda silence, and commenting on silence during closing argument); *State v. Dill*, 3 Kan. App. 2d 67, 589 P.2d 634 (1979) (prosecutor committed reversible misconduct in rebuttal closing argument by commenting on defendant’s failure to refute the state’s testimony by testifying or presenting available witnesses).
- <sup>9</sup> See, e.g., *State v. Gammill*, 2 Kan. App. 2d 627, 585 P.2d 1074 (1978) (noting that “reference to defendant’s being an animal was definitely improper”); *Urbain v. State*, 714 So. 2d 411 (Fla. 1998) (prosecutor committed reversible misconduct in “dehumaniz[ing] and demoniz[ing]” defendant during closing argument when he described defendant as “cold-blooded killer,” “ruthless killer,” “violent to the core, violent in every atom of his body,” claimed that offenses were “the coldest violence most people have ever encountered,” and argued that defendant showed “true, violent, and brutal and vicious character” in committing charged murder); *Green v. State*, 427 So. 2d 1036 (Fla. Dist. Ct. App. 1983) (prosecutor committed reversible misconduct in arguing that defendant-attorney charged with misappropriating client funds was a “Dragon Lady, beautiful, cunning, and evil”: “It is improper in the prosecution of persons charged with a crime for the representative of the state to apply offensive epithets to defendants or their witnesses, and to engage in vituperative characterizations of them. There is no reason, under any circumstances, at any time for a prosecuting attorney to be rude to a person on trial; it is a mark of incompetency to do so.”).
- <sup>10</sup> See, e.g., *Jenkins v. State*, 563 So. 2d 791, 792 (Fla. Dist. Ct. App. 1990) (holding that prosecutor’s “appeal to the jurors to place themselves in the position of the state’s sole witness – the supposed ‘victim’ of the crime involved – was an entirely unjustified ‘golden rule’ argument of a type which has been universally condemned”); *Dean v. Commonwealth*, 777 S.W.2d 900, 904-05 (Ky. 1989) (prosecutor committed reversible misconduct by emphasizing good character of murder victim and asking jurors to “imagine the fear that went through the life of [the victim] on this day... imagine the fear and embarrassment... the terror... the humiliation”; prosecutor’s conduct was “yet another instance of impermissible glorification of the victim,” which, “[w]hen combined with sensationalizing the victim’s suffering... tend[ed] to pressure the jury to decide the issue of guilt or innocence on considerations apart from the evidence of the defendant’s culpability, and thus cannot be approved”); *Lucas v. State*, 335 So. 2d 566, 567 (Fla. Dist. Ct. App. 1976) (reversing sexual battery conviction where prosecutor asked female members of jury, “Think how you ladies would feel if that happened to you,” explaining: “The technique of asking jurors to place themselves in the position of the victim has been held to be improper in both criminal and civil cases. The prosecutor’s statement to the jurors, sometimes referred to as the ‘Golden Rule argument’, is improper in that it tends to deprive a defendant of a fair trial by impartial jurors.”); *Walters v. Hitchcock*, 237 Kan. 31, 33, 697 P.2d 847 (1985) (Kansas civil case noting that a “golden rule” argument is an argument of counsel “that jurors should place themselves in the position of the plaintiff. Such arguments are usually improper and may constitute reversible error.”).

<sup>11</sup> 921 P.2d 1076 (Wash. Ct. App. 1996), *rev. den.* 936 P.2d 417 (Wash. 1997).  
<sup>12</sup> *Id.* at 1078.  
<sup>13</sup> *Id.*  
<sup>14</sup> *Pabst*, *supra* note 1.  
<sup>15</sup> *Id.*, 268 Kan. at 511.  
<sup>16</sup> *Id.*  
<sup>17</sup> 499 N.W.2d 815 (Minn. 1993).  
<sup>18</sup> *Id.* at 818-19.  
<sup>19</sup> *Id.* at 818.  
<sup>20</sup> 641 N.E.2d 755 (Ohio Ct. App. 1994).  
<sup>21</sup> *Id.* at 760.  
<sup>22</sup>

*Id.*; see also *State v. Keenan*, 613 N.E.2d 203 (Ohio 1993) (“It is improper to denigrate defense counsel in the jury’s presence for making objections. Such conduct infringes on the defendant’s right to counsel and penalizes him for attempting to enforce procedural rights”); *D’Ambrosio v. State*, 736 So. 2d 44 (Fla. Dist. Ct. App. 1999) (“repeatedly referring to the defendant’s defense as innuendo, speculation and ‘a sea of confusion’ that defense counsel ‘prays you will get lost in’ is an improper attack of the defense and defense counsel”); *State v. Smith*, 470 N.E.2d 883 (Ohio 1984) (improper for prosecutor to refer to defense evidence as “lies” and “a smoke screen”); *Spees v. State*, 735 P.2d 571, 576 (Okla. Ct. Crim. App. 1987) (prosecutor made “highly improper attack on the integrity of defense counsel” by arguing: “[w]hat you see is a classic defense tactic of pointing the finger—pointing the finger at the

police, at the prosecutor, anything to divert your attention from the elements and the facts in this case and the evidence”); *United States v. Friedman*, 909 F.2d 705 (2<sup>nd</sup> Cir. 1990) (prosecutor’s denigration of defense counsel improperly “urg[ed] the jury to ignore defense counsel’s entirely legitimate role as an advocate, discharging as important a responsibility in representing the defendant as the prosecutor has in representing the United States”).

<sup>23</sup> 751 S.W.2d 579 (Tex. Ct. App. 1988).

<sup>24</sup> *Id.* at 586.

<sup>25</sup> *Id.*

<sup>26</sup> 339 S.E.2d 129 (S.C. 1986).

<sup>27</sup> *Id.* at 129; see also *Howell v. State*, 411 So. 2d 772, 777 (Miss. 1982) (Prosecutor “went beyond the bounds of giving the appellant a completely fair and impartial trial by injecting into the closing argument the instructions to the jury, both directly and indirectly by implication, that if they should make a mistake, it would be corrected. The jury was not informed that the jurors only were the ones who determined the facts, not the appellate court.”)

<sup>28</sup> ABA Standards, *supra* note 3.

<sup>29</sup> *Finley*, *supra* note 1, at 572.

<sup>30</sup> *Id.*

<sup>31</sup> *Ruff*, *supra* note 1 (prosecutor committed reversible misconduct in exhorting jury: “do not allow this conduct to be tolerated in our county”).

<sup>32</sup> The errors in the sample closing argument at the start of this article fall into categories 5, 1, 8, and 10, respectively.

Reprinted from the March 2001 issue of the Kansas Trial Lawyers Association Journal.