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CLOSING ARGUMENT: PROSECUTION MISCONDUCT

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A prosecutor's improper comments during closing argument may "so infect [ ] the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Moreover, appellate courts throughout the country "have with mounting frustration expressed concern over the frequency with which such improprieties occur." 3 LaFave & Israel, Criminal Procedure § 23.5 (1984).

Unfortunately, Ohio has not escaped difficulties in this context. In State v. DePew, 38 Ohio St.3d 275, 288, 528 N.E.2d 542 (1988), the Ohio Supreme Court "express[ed] our mounting alarm over the increasing incidence of misconduct by both prosecutors and defense counsel in capital cases." The Court then quoted three provisions of the ethical rules: a lawyer shall not (1) "[e]ngage in conduct that is prejudicial to the administration of justice," DR 1-102(A)(5); (2) "[k]nowingly make false statements of law or fact," DR 7-102(A)(5); and (3) "[s]tate or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence." DR 7-106. Finally, the Court announced that "to preserve the fairness of trial proceedings and to deter further misconduct, it is henceforth the intention of this court to refer matters of misconduct to the Disciplinary Counsel." Id. at 288.

This article examines the law of final argument and in particular prosecutorial misconduct. See generally 2 Katz & Giannelli, Baldwin's Ohio Practice Criminal Law § 68.9 (West 1996).

PROSECUTOR'S ROLE

In Berger v. United States, 295 U.S. 78, 88 (1935), the United States Supreme Court condemned a prosecutor's summation, commenting:

> The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to provide a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> . . . Consequently, improper suggestions, insinuation and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

The Court went on to find that the "prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." Id. at 85. The prosecutor in *Berger* also acted improperly during the trial:

> He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon this basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, conducting himself in a thoroughly indecorous and improper manner. Id. at 84.

The dual aspect of the prosecutor's duty is codified in the Ohio Code of Professional Responsibility, EC 7-13, which states that the "responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."

ADMITTED EVIDENCE

An attorney's argument must be based on the evidence adduced at trial. The prosecutor may not "intentionally misstate the evidence or mislead the jury as to the inferences it may draw." ABA Standards for Criminal Justice, Prosecution Function § 3-5.8(a) (3d ed. 1993). In State v. DePew, 38 Ohio St.3d 275, 288, 528 N.E.2d 542 (1988), cert. denied,

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489 U.S. 1042 (1989), the Ohio Supreme Court commented: "[T]he prosecutor informed the jury of an alleged knife fight, which was not in evidence, and implied thereby that appellant was guilty of wrongdoing, of which there was absolutely no evidence. Further, the prosecutor commented to the jury on subsequent conviction of appellant, unsupported by any evidence in the record . . . ." Similarly, in State v. Braxton, 102 Ohio App.3d 28, 42, 656 N.E.2d 970 (1995), the court explained:

> By informing the jury that appellant was suspected of running a chop shop, the prosecutor improperly drew an inference on matters not supported by the evidence and improperly rendered an opinion as to appellant's guilt. While we believe the evidence supports a conclusion that appellant knowingly received the stolen automobile, the prosecutor's comment that appellant ran a chop shop went beyond the evidence in the record. There was no evidence that other automobile parts were stolen nor was it contended that they were stolen.

See also in Burns v. State, 75 Ohio St. 407, 412, 79 N.E. 929 (1907) ("This statement was improper . . . . It carried to the jury an assumption that the record would, had the state been permitted to offer it, show that the accused had been an inmate of the penitentiary.").

Determining what the "evidence" is in a trial raises a number of subsidiary issues.

Evidence Admitted Without Objection

"Unobjected to" evidence that would have been inadmissible had an objection been raised becomes part of the record of trial and may be considered for whatever probative value it possesses. See 1 Giannelli & Snyder, Ohio Evidence § 103.5 (1996); 1 McCormick, Evidence § 54, at 219 (4th ed. 1992) ("If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of the rational persuasive power it may have."). Accordingly, such evidence is subject to comment during closing argument. Thus, in State v. Richey, 62 Ohio St.3d 353, 362, 595 N.E.2d 915 (1992), cert. denied, 507 U.S. 989 (1992), the Ohio Supreme Court wrote: "By referring to Richey's threats, the prosecutor referred to evidence in the record admitted without objection."

Limited Admissibility

Evidence admitted at trial for one purpose may not be argued for another purpose. Evidence Rule 105 not only directs the court to give a limiting instruction upon request, it also requires courts to "restrict the evidence to its proper scope." One purpose of this phrase is to limit counsel's use of the evidence to its proper purpose during closing argument. See 1 Giannelli & Snyder, Ohio Evidence § 105.7 (3d ed. 1996). For example, in Drake v. Caterpillar Tractor Co., 15 Ohio St.3d 346, 348, 474 N.E.2d 291 (1984), the Ohio Supreme Court found error where counsel referred in closing argument to evidence admitted solely for impeachment as if such evidence were substantive. See also United States v. Gross, 511 F.2d 910, 919 (3d Cir. 1975), cert. denied, 423 U.S. 924 (1975).

Accused's Demeanor

Comments about a defendant's demeanor at trial may be proper because a "defendant's face and body are physical evidence." State v. Lawson, 64 Ohio St.3d 336, 347, 595 N.E.2d 902 (1992) (comment implied accused "so cold and callous that he was unaffected by his mother's tearful pleas for his life."); State v. Brown, 38 Ohio St.3d 305, 317, 528 N.E.2d 523 (1988) ("A defendant's face and body are physical evidence.").

Reasonable Inferences

Although the attorneys' argument must be based on the evidence adduced at trial, counsel have great leeway with respect to the inferences that may be drawn from the trial evidence. State v. Benge, 75 Ohio St.3d 136, 141, 661 N.E.2d 1019 (1996) ("[A] prosecutor is entitled to a certain degree of latitude in closing argument."), cert. denied, 117 S.Ct. 224 (1996); State v. Richey, 62 Ohio St.3d 353, 362, 595 N.E.2d 915 (1992) ("Prosecutors are entitled to latitude as to what the evidence has shown and what inference can be drawn therefrom."), cert. denied, 507 U.S. 989 (1992); State v. Byrd, 32 Ohio St.3d 79, 82, 512 N.E.2d 611 (1987); State v. Stephens, 24 Ohio St.2d 76, 82, 263 N.E.2d 777 (1970).

MISSTATEMENTS OF EVIDENCE

Miller v. Pate, 386 U.S. 1, 7 (1967), is one of the most flagrant examples of misconduct. A prosecution expert testified that stains on underwear shorts were type A blood, which matched the defendant's blood type. The prosecutor waived the "bloody" shorts in front of the jury in closing argument. Later proceedings established that the stains were paint, not blood, and that the prosecutor knew this fact at the time of trial. The United States Supreme Court reversed, holding that "the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."

The significance of scientific evidence is often misstated. Cases involving evidence of hair comparisons illustrate this point. An expert can rarely make a positive identification based on hair analysis; at best, the expert can testify only that the crime scene and defendant hair samples are "consistent." In People v. Linscott, 142 Ill.2d 22, 30, 566 N.E.2d 1355 (1991), the court wrote: "With these statements, the prosecutor improperly argued that the hairs removed from the victim's apartment were conclusively identified as coming from defendant's head and pubic region. There simply was not testimony at trial to support these statements. In fact, [the prosecution experts] and the defense hair expert . . . testified that no such identification was possible." Similarly, in Williamson v. Reynolds, 904 F. Supp. 1529, 1558 (E.D. Okl. 1995), the prosecutor said in his closing argument, "[T]here's a match." This argument even confused the state court, which wrote: "hair evidence placed [petitioner] at the decedent's apartment." On habeas, the federal court concluded that "the prosecutor's mischaracterization of the hair evidence misled the jury . . . ." Id. at 1557.

MISSTATEMENTS OF LAW

Once the trial court has ruled on the final jury instructions, the attorneys may comment on those instructions. Misstatements of law, however, are improper. For example, in State v. Moore, 97 Ohio App.3d 137, 143, 646 N.E.2d 470 (1994), the court of appeals stated: "Despite this ruling [refusing to read a prosecution requested jury instruction on self-defense] the prosecutor argued to the jury in closing argument that one loses the claim of self-defense when, after reaching a place of safety, that person returns to the scene of the confrontation."

PERSONAL OPINIONS

Attorneys, both prosecution and defense, are prohibited from stating their personal opinions in closing argument. The Ohio Code of Professional Responsibility states: "In appearing in his professional capacity before a tribunal, a lawyer shall not: . . . Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, . . . or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein." DR 7-106(C)(4). Similarly, ABA Criminal Justice Standard § 3-5.8(b)(2) (3d ed. 1993) provides: "The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant."

Numerous cases have addressed this issue. For example, in Berger v. United States, 295 U.S. 78, 88 (1935), the United States Supreme Court commented: "Improper suggestions, insinuation and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." See also State v. Hill, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996) ("The prosecutor improperly injected his personal opinion that Hill lied."); State v. Appanovitch, 33 Ohio St.3d 19, 24, 514 N.E.2d 394 (1987); State v. Hall, 106 Ohio App.3d 183, 190, 665 N.E.2d 728 (1995) ("[I]t is improper for a prosecutor to offer her personal opinion as to the veracity of a witness during closing argument, though she may properly suggest that the evidence in the record belies a witness's testimony."); State v. Braxton, 102 Ohio App.3d 28, 42, 656 N.E.2d 970 (1995) ("[A] prosecutor should not express his personal belief or opinion as to the credibility of a witness or as to the guilt of an accused or allude to matters that are not supported by admissible evidence.") (citing State v. Smith 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984)).

APPEAL TO PREJUDICES & EMOTIONS

A prosecutor "should not make arguments calculated to appeal to the prejudices of the jury." ABA Criminal Justice Standard 3-5.8(c) (3d ed. 1993). This type of argument may also violate due process. The Ohio Supreme Court has remarked that "a conviction based solely on the inflammation of fears and passions, rather than proof of guilt, requires reversal." State v. Keenan, 66 Ohio St.3d 402, 409, 613 N.E.2d 203 (1993). The Court also stated that a prosecutor may not "saturate trial with emotion. . . . Excessively emotional arguments may deny due process. In our view, the prosecutor's histrionic approach to this case crossed the line that separates permissible fervor from a denial of a fair trial." The Court censured the prosecutor for

> substituting emotion for reasoned advocacy in his closing arguments. He expressly encouraged the jury to react emotionally to the evidence, specially the gruesome photographs of Klann's corpse. . . . [H]e encouraged the jurors to regard those feelings as relevant — indeed, central — to their task. In the prosecutor's argument, the role of the photographs was not evidentiary; it was visceral. Id. at 407-08.

See also State v. Hall, 106 Ohio App.3d 183, 190, 665 N.E.2d 728 (1995) ("They were inflammatory and certainly improper.").

REFERENCES TO DEFENDANT

A prosecutor's description of the defendant as a "maggot" is "unprofessional and is deserving of a stern admonition." State v. Chandler, 19 Ohio App.3d 109, 111-12, 483 N.E.2d 192 (1984). The court elaborated:

> The word . . . has no specific application. It conveys no proper information to the jury. It is nothing more than a general derogatory epithet. The use of such language serves only to subvert our trial system. Just and accurate verdicts are likely to be rendered only if the jury is able to maintain objectivity. . . . The prosecutor's references to the appellant as a "creep" and a "vicious criminal" are also devoid of useful information . . . .

Similarly, the terms "thugs" and "goons" are improper. State v. Liberatore, 69 Ohio St.2d 583, 590, 433 N.E.2d 561 (1982).

In contrast, labelling the defendant an "animal" is not per se improper, according to the Ohio Supreme Court. State v. Keenan, 66 Ohio St.3d 402, 408, 613 N.E.2d 203 (1993) ("Such invective is not unfair per se . . . .") (citing Darden v. Wainwright, 477 U.S. 168, 180-81 (1986)). The Court went on to acknowledge: "Realism compels us to recognize that criminal trials cannot be squeezed dry of all feeling." Id. at 409. Moreover, in another case the Court concluded that the "prosecutor's reference to Richey as a sociopath or psychopath was a fair inference based on the evidence." State v. Richey, 62 Ohio St.3d 353, 362, 595 N.E.2d 915 (1992), cert. denied, 507 U.S. 989 (1992).

ATTACKS ON DEFENSE COUNSEL

The prosecutor may not attack the defense attorney through argument. The Ohio Supreme Court criticized a prosecutor's argument that the defense attorneys "are paid to get him off the hook. . . . [T]his comment imputed insincerity to defense counsel, thus suggesting that they believed Keenan guilty. It was therefore improper." State v. Keenan, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993). In a different case, the Court reversed a conviction due to misconduct:

> [T]he assistant prosecutor referred to defense evidence as "lies," "garbage," "garbage lies," "[a] smoke screen," and "a well conceived and well rehearsed lie." In addition, the assistant prosecutor intimated that defense counsel had suborned perjury by manufacturing, conceiving and fashioning lies to be presented in court. There was no evidence to substantiate these accusations. State v. Smith, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984).

See also State v. Braxton, 102 Ohio App.3d 28, 42, 656 N.E.2d 970 (1995) ("in opining that the defense was getting up and hiding behind a smoke screen, the prosecutor improperly intimated that defense counsel 'had suborned perjury by manufacturing, conceiving and fashioning lies.'") (citing *Smith*).

The prosecutor in *Keenan* also commented, "Not once did [the defense attorneys] tell you their client was innocent." This was also improper: "The personal opinion of the defense counsel of their client's guilt or innocence is no more relevant than the opinion of the prosecutor." State v. Keenan, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993).

The rule prohibiting attacks on defense counsel also applies to comments made during trial. See State v. Keenan, 66 Ohio St.3d 402, 406, 613 N.E.2d 203 (1993) ("It is im-

proper 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. . . . In light of Ohio's contemporaneous-objection requirement, such conduct is especially reprehensible.") (citations omitted).

EXTRANEOUS FACTORS

The prosecutor "should refrain from argument which would 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 under the controlling law, or by making predictions of the consequences of the jury's verdict." ABA Criminal Justice Standards § 3-5.8(d) (2d ed. 1980). This includes arguments that an erroneous conviction can be reversed on appeal or that the defendant will commit further crimes if acquitted. 3 LaFave & Israel, Criminal Procedure § 23.5, at 34 (1984). Also, an "emotional appeal based on the public demand to stamp out the narcotics evil" is improper. State v. Cloud, 112 Ohio App. 208, 214, 168 N.E.2d 761 (1960).

Moreover, "[t]hreatening the jury in a criminal case that they will be branded as condoning crime if they acquit an accused is never permissible. The jury is not on trial. The issue is not whether the jury approves of crime, but whether the evidence shows the accused is guilty of it under the law." State v. Davis, 60 Ohio App.2d 355, 362, 397 N.E.2d 1215 (1978).

In contrast, an "[a]rgument suggesting the jury 'send a message to the community' through its verdict was not an exhortation to succumb to public demand, but was instead more akin to a request to maintain community standards." State v. Napier, 105 Ohio App.3d 713, 725, 664 N.E.2d 1330 (1995) (citing State v. Williams, 23 Ohio St.3d 16, 20, 490 N.E.2d 906 (1986) ("A request that the jury maintain community standards is not equivalent to the exhortation that the jury succumb to public demand . . . .")).

GUILT BY ASSOCIATION

"The prosecutor made another gravely improper argument when he used the bad character of Keenan's friends to attack Keenan's own character. . . . In relying on the 'thoroughly discredited doctrine' of guilt by association, the prosecutor violated 'a fundamental principle of American jurisprudence, inhabiting a central place in the concept of due process.' A defendant cannot be adjudged guilty on the ground that he or she associates with bad people." State v. Keenan, 66 Ohio St.3d 402, 409, 613 N.E.2d 203 (1993) (quoting People v. Chambers, 231 Cal. App.2d 23, 41 Cal. Rptr. 551, 555 (1964)).

COMMENT ON EXERCISE OF RIGHTS

The prosecutor's argument may be improper because "it implicate[s] other specific rights of the accused such as the right to counsel or the right to remain silent." Darden v. Wainwright, 477 U.S. 168, 182 (1986). In addition, a "prosecutor's statements concerning Kendle's plea of guilty and acceptance of responsibility for the same crimes for which appellant had been charged implied that appellant acted improperly by exercising his right to a jury trial." State v. Tumbleson, 105 Ohio App.3d 693, 699-700, 664 N.E.2d 318 (1995).

Fifth Amendment

In Griffin v. California, 380 U.S. 609 (1965), the United States Supreme Court held that the Fifth Amendment prohibits the use of an accused's failure to testify as evidence of guilt. The Court wrote:

> [Comment on the refusal to testify] is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Accordingly, the Court held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Id. at 615.

The Court limited *Griffin* in United States v. Robinson, 485 U.S. 25 (1988), in which the defendant was convicted of mail fraud. The prosecution introduced a number of out-of-court statements made by Robinson, who did not testify. In closing argument Robinson's counsel tried to minimize the prior statements by suggesting that his client had not been given the opportunity to explain his actions. In response, the prosecutor told the jury: "He could have taken the stand and explained it to you. The United States of America has given him, throughout, the opportunity to explain." Id. at 28. The Supreme Court distinguished *Griffin*. In the Court's view, it is one thing to use the Fifth Amendment as a shield; it is quite another thing to use it as a sword:

> Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin* holds that the privilege against compulsory self-incrimination is violated. But whereas in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege. Id. at 32.

In addition, some prosecutorial comments have been ruled benign and not violative of the *Griffin* rule. For example, where a prosecutor in final argument referred to the state's case as unrefuted and uncontradicted, reversal was not required because this comment added nothing to the impression already created by the defendant's failure to testify after her lawyer had promised the jury that the defendant would take the stand. Lockett v. Ohio, 438 U.S. 586, 595 (1978). Moreover, a "reference by the prosecutor in closing argument to uncontradicted evidence is not a comment on the accused's failure to testify, where the comment is directed to the strength of the state's evidence and not to the silence of the accused, and where the jury is instructed . . . to not consider the accused's failure to testify." State v. Williams, 23 Ohio St.3d 16, 19-20, 490 NE(2d) 906 (1986).

A *Griffin* error is subject to "harmless error" analysis. In State v. Clark, 74 Ohio App.3d 151, 598 N.E.2d 740 (1991), the defendant was found guilty of aggravated robbery, aggravated burglary, and two counts of aggravated murder. During closing arguments, the prosecutor commented on the defendant's silence: "We weren't there. The only two people that were there was James Clark [the defendant] and George Donnelly [the victim]. George can't talk, Clark won't." The state must "demonstrate beyond a reasonable

doubt that the prosecutor's comment did not contribute to each of [the defendant's] convictions." Id. at 158. The court of appeals held that the state demonstrated beyond a reasonable doubt that the prosecutor's comment during closing argument was harmless because there was overwhelming evidence of guilt on the aggravated robbery and aggravated burglary charges. However, the state failed to prove that the remark about silence did not influence the jury's deliberations on the aggravated murder charges. The court held that the trial court erred in failing to grant a mistrial on the aggravated murder charges.

PROCEDURAL REQUIREMENTS

Failure to Object

Failure to object to improper argument constitutes a waiver of the objection, and appellate review is then limited to plain error. See Crim R. 52(B); State v. Hill, 75 Ohio St.3d 195, 203, 661 N.E.2d 1068 (1996) ("However, Hill failed to object to these remarks and thus waived all but plain error."); State v. Slagle, 65 Ohio St.3d 597, 605 N.E.2d 916 (1992), cert. denied, 510 U.S. 833 (1993).

Prejudice Requirement

In Smith v. Phillips, 455 U.S. 209, 219 (1982), the United States Supreme Court remarked that "the touchstone of due-process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." In another case, the Court noted, "If every remark made by counsel outside of the testimony were grounds for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." Dunlop v. United States, 165 U.S. 486 (1897).

Thus, even if the argument is improper, the defendant must still demonstrate prejudice. See State v. Benge, 75 Ohio St.3d 136, 141, 661 N.E.2d 1019 (1996) ("A conviction will be reversed only where it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found appellant guilty."), cert. denied, 117 S.Ct. 224 (1996); State v. Hill, 75 Ohio St.3d 195, 203, 661 N.E.2d 1068 (1996) ("[W]e find no prejudice to Hill in light of the overwhelming evidence of his guilt."); State v. Phillips, 74 Ohio St.3d 72, 90, 656 N.E.2d 643 (1995) (the issue is "whether the [prosecutor's] remarks prejudicially affected substantive rights of the defendant") State v. Appanovitch, 33 Ohio St.3d 19, 24, 514 N.E.2d 394 (1987) ("The conduct of a prosecuting attorney during trial cannot be made a ground of error unless the conduct deprives defendant of a fair trial."); State v. Smith, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984) ("The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.").

Entire Argument

In determining the impropriety of final argument, courts view the argument as a whole. "The closing argument must . . . be reviewed in its entirety to determine if the prosecutor's remarks were prejudicial." State v. Oritz, 63 Ohio St.3d 150, 157, 407 N.E.2d 1268 (1980). See also Darden v. Wainwright, 477 U.S. 168, 181-82 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 643-45 (1974); State v. Keenan, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993) ("We consider the effect the misconduct had on the jury in the context of the entire trial."); State v. Byrd, 32 Ohio St.3d 79, 82, 512 N.E.2d 611 (1987).

Consequently, "[i]solated comments by a prosecutor are not to be taken out of context and given their most damaging meaning." State v. Hill, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996). See also Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) ("one moment in an extended trial"); Berger v. United States, 295 U.S. 78, 89 (1935) ("[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."); State v. Keenan, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993) ("One factor relevant to the due-process analysis is whether the misconduct was an isolated incident in an otherwise properly tried case. . . . That was not true here. To the contrary, the prosecutor's errors were part of a protracted series of improper arguments, 'a textbook example of what a closing argument should not be.'") (quoting State v. Liberatore, 69 Ohio St.2d 583, 589, 433 N.E.2d 561 (1982)).

Curative Instructions

Appellate courts often cite the giving of curative instructions in this context. In one case, the United States Supreme Court noted that the "trial court took special pains to correct any impression that the jury could consider the prosecutor's statements as evidence in the case. . . . . [T]he judge directed the jury's attention to the remark particularly challenged here, declared it to be unsupported, and admonished the jury to ignore it." Donnelly v. DeChristoforo, 416 U.S. 637, 644 (1974). See also Darden v. Wainwright, 477 U.S. 168, 182 (1986) ("The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence."). In contrast, in State v. Keenan, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993), "[t]he trial court gave no curative instruction; indeed, it overruled an objection, giving the prosecutor's comment its approval in the jury's eyes." (citation omitted)

Invited Response

The courts have also recognized the doctrine of invited response — whether the argument was "invited" by something said by the defense. See Darden v. Wainwright, 477 U.S. 168, 182 (1986) ("Much of the objectionable content was invited by or was responsive to the opening summation of the defense."); State v. Keenan, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993). This doctrine, however, does not mean that any response, no matter how improper, is acceptable. In United States v. Young, 470 U.S. 1, 12 (1985), the United States Supreme Court elaborated:

> In retrospect, perhaps the idea of "invited response" has evolved in a way not contemplated. . . . [T]he earlier cases . . . should not be read as suggesting judicial approval or — encouragement — of response-in-kind that inevitably exacerbate the tensions inherent in the adversary process. . . . [T]he issue is not the prosecutor's license to make otherwise improper arguments, but whether the prosecutor's "invited response," taken in context, unfairly prejudiced the defendant.

Bench Trials

Another factor is whether the case involved a jury or bench trial because "in a bench trial, trial judges are presumed to rely only upon relevant, material, and competent

evidence, in arriving at their judgments." State v. Richey, 62 Ohio St.3d 353, 362, 595 N.E.2d 915 (1992), cert. denied, 507 U.S. 989 (1992). In State v. Wiles, 59 Ohio St.3d 71, 86, 571 N.E.2d 97 (1991), the Ohio Supreme Court stated:

> Appellant correctly contends that this evidence and argument constituted an irrelevant appeal to the emotions. However, in reviewing a bench trial, an appellate court presumes that the trial court considered nothing but relevant and competent evidence in reaching its verdict. The presumption may be overcome only by an affirmative showing to the contrary by the appellant.

State v. Post, 32 Ohio St.3d 380, 384, 513 N.E.2d 754 (1987).

Broad Leeway

Moreover, courts have traditionally given the attorneys much freedom in closing argument. As the Ohio Supreme Court has noted, "wide latitude is given to counsel during closing argument to present their most convincing positions." State v. Phillips, 74 Ohio St.3d 72, 90, 656 N.E.2d 643 (1995). See also State v. Woodards, 6 Ohio St.2d 14, 26, 215 N.E.2d 568 (1966) ("some latitude and freedom of expression"). Learned Hand once wrote that "the truth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals in misericordiam [sic] which long custom has come to sanction." United States v. Wexler, 79 F.2d 526, 530 (2d Cir. 1935), cert. denied, 297 U.S. 703 (1936).

DEFENSE COUNSEL

Much of the misconduct discussed above also applies to defense counsel, because "both prosecutor and defense counsel are subject to the same general limitations in the scope of their argument." ABA Criminal Justice Standards 227 (3d ed. 1993). "This means that a defense attorney should not (1) intentionally misstate the evidence or mislead the jury as to the inferences it may draw, (2) express a personal belief or opinion in his client's innocence or in the truth or falsity of any testimony or evidence, (3) attribute the crime to another person unless such an inference is warranted by the evidence, (4) make arguments calculated to inflame the passions or prejudices of the jury, or (5) make [arguments that divert the jury from it duty to decide cases on the evidence]." 3 LaFave & Israel, Criminal Procedure § 23.5(c), at 37 (1984).

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