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Criminal Law - Prosecutor's Closing Argument - Improper Comment Versus Prejudicial Infringement

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cobedo, the state must accept the responsibility for compensating appointed counsel, for the profession, in view of today's complex and lengthy trials, cannot provide, by itself, adequate and efficient defenses for the indigent without ruinous consequences.

Bruce Petesch

CRIMINAL LAW–PROSECUTOR'S CLOSING ARGUMENT–IMPROPER COMMENT VERSUS PREJUDICIAL INFRINGEMENT

The defendant, John Woodards, was charged with the brutal slaying of Margaret Van Arsdale, an eighty-five year old woman, and was convicted of first degree murder. The Court of Appeals for Lorain County, and the Ohio Supreme Court considered the alleged prejudicial statements in the prosecutor's closing argument and held that while the remarks were intemperate, they were not prejudicial. *State v. Woodards,* 6 Ohio St.2d 14, 215 N.E.2d 568 (1966).

It is the purpose of this note to illustrate the wide latitude presently allowed a prosecutor in the closing argument of a criminal case.[1] To do so, this note will discuss the fundamental rules relating to improper argument which were at issue in the *Woodards* case. It will then be possible to delve into the considerations which determine whether or not a prejudicial infringement necessitating reversal has occurred. The most significant of these considerations are: whether or not the prosecutor's argument is supported by the evidence or is merely personal opinion; the strength of the states evidence; the nature of the crime; and whether opposing counsel made timely objection. The *Woodards* case is noteworthy since it demonstrates how a court weighs these considerations where there has been an infringement of the rules governing proper argument.

The first rule of significance deals with comment on the character and reputation of the accused. Ordinarily, where the accused does not put his character in issue by introducing evidence as to his good character, the prosecutor cannot comment thereon.[2] Secondly, it is improper to indulge

[1] *E.g.,* United States v. Mucherino, 311 F.2d 172 (4th Cir. 1962); State v. Dowthard, 92 Ariz. 44, 373 P.2d 357 (1962); People v. Weire, 198 Cal. App. 2d 138, 17 Cal. Rptr. 659 (1961); State v. Stacy, 355 S.W.2d 377 (Mo. 1962); State v. Christopher, 258 N.C. 249, 128 S.E.2d 667 (1962); Young v. State, 357 P.2d 562 (Okla. 1960); State v. Edgeworth, 239 S.C. 10, 121 S.E.2d 248 (1961); State v. Burtts, 132 N.W.2d 209 (S.D. 1964).

[2] Bland v. State, 210 Ga. 100, 78 S.E.2d 51 (1953); State v. Von Atzinger, 81 N.J.Super. 509, 196 A.2d 241 (1963); People v. Hentenyl, 304 N.Y. 80, 106 N.E.2d 20 (1952); State v. Roach, 248 N.C. 63, 102 S.E.2d 413 (1958); State v. Herrera, 236 Ore. 1, 386 P.2d 448 (1963); Clark v. State, 156 Tex. Crim. 526, 244 S.W.2d 218 (1951); State v. Lindsey, 185 Wash. 206, 52 P.2d 1246 (1936).

in abusive language and intemperate characterization tending solely to arouse or inflame the passions or prejudices of the jurors.[3] Although case law has defined other general rules concerning improper comment by the prosecutor,[4] the above are the most basic. Both were at issue in the *Woodards* case.

In the *Woodards* case, the prosecutor accused the defendant of faking insanity,[5] and called him a misfit.[6] Such language represents an improper characterization, since the defendant did not put his character or reputation in issue. Furthermore, the prosecutor called the defendant a parasite on society, like a gangrenous leg on a diabetic body threatening the body and society of the state.[7] This remark is violative of the second rule mentioned since it is abusive and tends to arouse and inflame the passions and prejudices of the jurors.[8] Upon review of the alleged error, the Ohio Supreme Court held that even though portions of the prosecutor's summation were improper, they were not prejudicial in view of all of the accompanying circumstances of the case.

[3] See Rogers v. State, 157 So.2d 13 (Ala. 1963); People v. Motherwell, 195 Cal. App. 2d 545, 16 Cal. Reptr. 140 (1961); Stewart v. State, 51 So. 2d 494 (Fla. 1951); People v. Mackey, 30 Ill. 2d 190, 195 N.E.2d 636 (1964); State v. Hubbard, 165 Kan. 406, 195 P.2d 604 (1948); Johnson v. Commonwealth, 302 S.W.2d 585 (Ky. 1957); Craft v. State, 226 Miss. 426, 84 So. 2d 531 (1956); State v. Harris, 351 S.W.2d 713 (Mo. 1961); State v. Von Atzinger, 81 N.J.Super. 509, 196 A.2d 241 (1963); Reich v. State, 111 Tex. Crim. 642, 13 S.W.2d 697 (1929); Compton v. Commonwealth, 190 Va. 48, 55 S.E.2d 446 (1949).

A prosecutor can, however, comment on the evil results of crime. See Beck v. United States, 33 F.2d 107 (8th Cir. 1949); People v. Kendall, 212 Cal. App. 2d 472, 28 Cal. Rptr. 53 (1963); People v. Morgan, 28 Ill. 2d 55, 190 N.E.2d 755 (1963); People v. Hampton, 24 Ill. 2d 558, 182 N.E.2d 698 (1962); People v. Williams, 26 Ill. 2d 190, 186 N.E.2d 353 (1962); Workman v. Commonwealth, 309 Ky. 117, 216 S.W.2d 415 (1948); State v. Sercovich, 246 La. 503, 165 So. 2d 301 (1964); State v. Jones, 384 S.W.2d 554 (Mo. 1964); Muncy v. State, 330 S.W.2d 626 (Tex. 1959).

Prosecutor can also urge the jury to do its duty and urge a fearless administration of the law. See Thompson v. United States, 272 F.2d 919 (5th Cir. 1959), *cert. denied* 362 U.S. 940 (1960); Sanders v. State, 37 Ala. App. 487, 70 So. 2d 802 (1954); Bryant v. State, 208 Ark. 192, 185 S.W.2d 280 (1945); State v. Larsen, 81 Idaho 90, 337 P.2d 1 (1959), *cert. denied* 361 U.S. 882 (1959), *rehearing denied* 361 U.S. 973 (1960); State v. Jones, 358 S.W.2d 782 (Mo. 1962); State v. Wilson, 351 P.2d 944 (Ore. 1960); Strahan v. State, 172 Tex. Crim. 478, 358 S.W.2d 626 (1962).

[4] Definite categories of improper comment by a prosecutor in his closing argument. 23A C.J.S. *Criminal Law* §§ 1102-07 (1961, Supp. 1966).

[5] State v. Woodards, 6 Ohio St. 2d 14, 215 N.E.2d 568 (1966).

[6] *Ibid.*

[7] *Ibid.*

[8] An appeal to the pecuniary interests of the jurors is improper. See United States v. Lotsch, 102 F.2d 35 (2nd Cir. 1939); *cert. denied* 307 U.S. 622 (1939); Buttermore v. United States, 180 F.2d 853 (6th Cir. 1950); State v. Muskus, 158 Ohio St. 276, 109 N.E.2d 15 (1952); Fry v. State, 91 Okla. Crim. 326, 218 P.2d 643 (1950); Pennington v. State, 172 Tex. Crim. 40, 353 S.W.2d 451 (1962); Annot., 32 A.L.R. 2d 9 (1953); Annot., 33 A.L.R. 2d 442 (1954).

This holding demonstrates that a distinction exists between improper comment, merely violative of the rules set out above, and prejudicial comment. To be prejudicial, comment must first be improper and then of sufficient gravity to have adversely affected the verdict.[9] If the prosecutor's comments are improper, further considerations are then employed to determine if the remark is prejudicial. Foremost amongst these considerations is whether the prosecutor's argument is based on the evidence.

Arguments based on the evidence and any inferences reasonably to be derived therefrom are not prohibited even if they are couched in abusive and disparaging language.[10] If the court feels that the language or comment in question is not calculated to prejudice the jury and is supported by the evidence, the comment is deemed proper. The following case is illustrative:

> The prosecutor described the crime as animalistic and unnatural and referred to the defendant as an animal. Prosecutor is entitled to reflect unfavorably on a defendant and to comment on his actions if his remarks are based on pertinent and competent evidence.[11]

On the other hand, where there is no evidence whatsoever to substantiate the prosecutor's statements, the court is more apt to find prejudice. For example, the Alabama Supreme Court in the case of *Rogers v. State*,[12] reversed and remanded because of the prosecutor's improper closing argument which described the defendant as being like a "slick and slimy crow."[13] Since there was no evidence to support such an accusation, the remark was deemed prejudicial.

The second consideration of importance is closely related to legitimate inference from the evidence and is concerned with the personal opinion of the prosecutor. It is improper for the prosecution to express its personal belief in the guilt of the accused, unless it is clear that such opinion is based

[9] *E.g.*, State v. Carter, 1 Ariz. App. 57, 399 P.2d 191 (1965); People v. Johnson, 236 Cal. App. 2d 62, 45 Cal. Rptr. 619 (1965); People v. Jones, 207 Cal. App. 2d 415, 24 Cal. Rptr. 601 (1962); People v. Laczny, 63 Ill. App. 2d 324, 211 N.E.2d 438 (1965); People v. Stahl, 26 Ill. 2d 403, 186 N.E.2d 349 (1962).

[10] State v. Adams, 1 Ariz. App. 153, 400 P.2d 360 (1965); Grigsby v. Commonwealth, 302 Ky. 266, 194 S.W.2d 363 (1946); Bland v. State, 166 So. 2d 728 (Ala. 1964) ("trigger Phil"); Mathews v. State, 166 So. 2d 883 (Ala. 1964) ("fence"); People v. McMahon, 254 P.2d 903 (Cal. 1953) ("filthy pervert"); People v. Stahl, *supra* note 9 ("killer"); People v. Elder, 25 Ill. 2d 612, 186 N.E.2d 27 (1962) ("animalistic"); State v. Tettamble, 394 S.W.2d 375 (Mo. 1965) ("sexual pervert"); Hayes v. State, 397 P.2d 524 (Okla. 1964) ("living in animal kingdom"); Corry v. State, 390 S.W.2d 763 (Tex. 1965) ("assassin").

[11] People v. Elder, *supra* note 10, at 614-15, 186 N.E.2d at 29. *Accord,* Collins v. State, 180 So. 2d 340, 342 (Fla. 1965); People v. Polk, 37 Cal. Rptr. 753, 390 P.2d 641 (1964).

[12] 157 So. 2d 13 (Ala. 1963).

[13] *Id.* at 17. *Accord,* People v. Meckler, 13 N.Y.2d 168, 193 N.E.2d 891 (1963); State v. Rose, 62 Wash. 2d 309, 382 P.2d 513 (1963).

solely on the evidence.[14] In the *Woodards* case, defense counsel contended that the words of the prosecutor were improper as personal opinion not supported by the evidence. To substantiate this point, he cited *State v. Lett*,[15] wherein the Ohio Court of Appeals stated:

> The vice which has been declared . . . is that the jury may understand such opinion or belief to be based upon something which the prosecutor knows outside of the evidence so that he is in effect making himself a witness without submitting to cross examination and is injecting his personal or official influence into the case.[16]

Yet, when the *Woodards* case reached the Supreme Court of Ohio, the conviction was affirmed. The court held, in accordance with the majority of jurisdictions, that a reversal is only proper if the statements are so prejudicial that they adversely affect the verdict.[17] The case of *People v. Ramsey*,[18] decided by the California District Court of Appeals is exemplative. "In his argument, the prosecutor in effect called the defendant a liar, implied that he was an idiot, referred to him as a clod and a piece of garbage."[19] However, the evidence apart from these prejudicial comments was so strong that the improper remarks could not have adversely affected the verdict. Consequently, the California court upheld the verdict. This brings us to the third consideration of importance, the strength of the state's case.

If the state's evidence is strong, most misconduct by the prosecutor is considered harmless error. Thus, in a recent decision by the Supreme Court of New York, *People v. Webb*,[20] the prosecutor referred to the defendant as a bum and complained of the necessity of a trial being occasioned by the apprehending officer's failure to shoot the defendant during pursuit.[21] The court held that the proof of defendant's guilt was clear and convincing under all circumstances disclosed by the record and thus such improprieties were not material and did not affect the result or deprive the defendant of a fair trial. The District Court of Appeals of California dealt with a similar situation in the case of *People v. Dixon*.[22]

[14] Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960); People v. Warren, 175 Cal. App. 2d 233, 346 P.2d 64 (1959); Grant v. State, 171 So. 2d 361 (Fla. 1965); People v. Weger, 25 Ill. 2d 370, 185 N.E.2d 183 (1962); State v. Bilby, 194 Kan. 600, 400 P.2d 1015 (1965); Shoemaker v. State, 228 Md. 462, 180 A.2d 682 (1962); State v. Feltrop, 343 S.W.2d 36 (Mo. 1961); Wilson v. State, 170 Neb. 494, 103 N.W.2d 258 (1960), *cert. denied* 364 U.S. 887 (1960); People v. Montgomery, 252 N.Y.S.2d 194, *aff'd* 256 N.Y.S. 2d 942, 205 N.E. 206 (1965); State v. Cloud, 168 N.E.2d 761 (Ohio 1960); Lacy v. State, 374 S.W.2d 244 (Tex. 1963); Young v. State, 49 Wash. 2d 66, 373 P.2d 500 (1956). *Contra*, McClaskey v. State, 168 Ark. 339, 270 S.W. 498 (1925); Lawler v. Commonwealth, 182 Ky. 185, 206 S.W. 306 (1918).

[15] 106 Ohio App. 285 (1958).

[16] *Id.* at 289.

[17] *Supra* note 9.

[18] 202 Cal. App. 2d 856, 21 Cal. Rptr. 406 (1962).

[19] *Id.* at 409.

[20] 23 App. Div. 2d 893, 260 N.Y.S.2d 95 (1965).

[21] *Ibid.*

[22] 99 Cal. App. 2d 94, 221 P.2d 198 (1950).

Appellant complains of misconduct of the district attorney in his argument to the jury. We do not condone some of the district attorney's language which in a close case might call for reversal, but appellant's guilt is too obvious for us to hold that he suffered prejudice in this case.[23]

Conversely, if the state's evidence is weak, even slight misconduct may be held prejudicial. The Supreme Court of Illinois reversed and remanded because of an improper closing argument in the case of *People v. Freedman*.[24] "The evidence in the case at bar was highly close and highly conflicting. It is impossible for us to say on this record that the defendant was not prejudiced by the argument in question and a new trial will therefore be granted."[25]

Still another consideration of importance is the nature of the crime. In cases of a heinous or brutal nature where the evidence is overwhelming, the courts will not reverse merely because of the prosecutor's misconduct.[26] The *Woodards* case is illustrative of the type of case required.

The autopsy revealed lacerations of the chin, of the upper lip and left ear, fracture of the left clavicle, bleeding from the area of the genitalia; cause of death was the crushing injury of the chest in which all the ribs were fractured on both sides.[27]

With facts similar to the brutal and vicious rape-murder in *Woodards,* coupled with concrete evidence to support a conviction, extreme latitude is allowed to the prosecutor in his summation.

Perhaps the most significant consideration employed by the courts to determine whether comment is prejudicial, is timely objection. Generally, it is essential that the objectionable statement be called to the attention of the trial court at the time of its occurrence.[28] In the *Woodards* case, counsel failed to object at the time of the alleged misconduct. This proved to be a costly error. The prosecutor attacked defense counsel's failure to object

[23] *Id.* at 199-200. *Accord,* People v. Mackey, 30 Ill. 2d 190, 195 N.E.2d 636 (1964).

[24] 4 Ill. 2d 414, 123 N.E.2d 317 (1954). [25] *Id.* at 422, 123 N.E.2d at 321.

[26] *E.g.*, People v. Kendall, *supra* note 3; People v. Jones, 207 Cal. App. 2d 415, 24 Cal. Rptr. 601 (1962); Johnson v. Commonwealth, *supra* note 3; People v. Stahl, *supra* note 9.

[27] Brief for Appellee, p. 506, State v. Woodards, 6 Ohio St. 2d 14, 215 N.E.2d 568 (1966).

[28] See United States v. Harmon, 339 F.2d 354 (6th Cir. 1964), *cert. denied* 380 U.S. 944 (1965), *rehearing denied* 380 U.S. 989 (1965); Orebo v. United States, 293 F.2d 747 (9th Cir. 1961); Flowers v. State, 269 Ala. 395, 113 So. 2d 344 (1959); Rank v. State, 373 P.2d 734 (Alaska 1962); State v. Boozer, 80 Ariz. 8, 291 P.2d 786 (1955); People v. Williams, 187 Cal. App. 2d 355, 9 Cal. Rptr. 722 (1960); People v. Donald, 29 Ill. 2d 283, 194 N.E.2d 227 (1963); Grimes v. State, 365 P.2d 739 (Okla. 1961); Commonwealth v. Berkery, 204 Pa. Super. 319, 204 A.2d 664 (1964); Cavaness v. State, 358 P.2d 355 (Wyo. 1961). *But see* Pait v. State, 112 So. 2d 380 (Fla. 1959); People v. Moore, 9 Ill. 2d 224, 137 N.E.2d 246 (1956); State v. Rhoden, 243 S.W.2d 75 (Mo. 1951); State v. Dockery, 238 N.C. 222, 77 S.E.2d 664 (1953).

arguing that "errors have been deemed to have been waived where they have not been specifically assigned."[29] To oppose this contention, defense counsel cited the Ohio case of *State v. Morris*,[30] which held that if the debasing characterizations directed towards the defendant were wholly without support and so clearly prejudicial as to prevent a fair trial, error may still be grounded thereon despite failure to object by the defense.[31] However, the Supreme Court of Ohio held that the misconduct in the *Woodards* case was not of sufficient magnitude to fit the rule established in the *Morris* case. Thus, unless the error is grossly prejudicial to the defendant, counsel must object at the time of the alleged misconduct.

Basically, the decision as to whether comment is prejudicial rests within the discretion of the trial judge. Thus, the defendant must do everything possible to impress the court with the damaging effect of the prosecutor's argument upon his case. Timely objection becomes almost compulsory since the court may feel that the error could have been removed by proper instruction to the jury.[32]

Related to the necessity of timely objection is the hesitancy of the appellate courts to reverse the decision of the lower court which heard the allegedly prejudicial comment within the context of the whole trial and courtroom atmosphere.[33] If, however, defense counsel does object and is overruled, he can at least raise his objection on appeal. Furthermore, the fact that he was overruled can work to his advantage. The Ohio case of *State v. Muskus*,[34] relied on the defendant and cited by the Ohio Supreme Court in the *Woodards* case illustrates this point. In the *Muskus* case, the defense counsel objected to prejudicial remarks of the prosecutor in his summation. The trial court overruled his objection and directed the prosecuting attorney to proceed. The Ohio Supreme Court reasoned that the overruling and direction to proceed acted to give tacit approval of the prejudicial statements in the prosecutor's closing argument. Consequently, the verdict was reversed. The tacit approval accorded by the trial judge prevents consideration of the element of mercy unimpaired by prejudice with which a defendant charged with such a crime is entitled.[35]

Both *Muskus* and *Woodards* were capital cases. In both cases, the evi-

[29] Brief for Appellee, p. 24, State v. Woodards, 6 Ohio St. 2d 14, 215 N.E.2d 568 (1966).

[30] 100 Ohio App. 307, 136 N.E.2d 653, (1954). [31] *Id.* at 313.

[32] 23A C.J.S. § 1117(1) (Supp. 1966). Counsel must suffer the consequences of his own failure to make proper objection, unless prosecutor's remarks were obviously prejudicial.

[33] *E.g.*, Orebo v. United States, *supra* note 28.

[34] 158 Ohio St. 276, 109 N.E.2d 15 (1952). [35] *Id.* at 284, 109 N.E.2d at 19.

dence was strong and the defense was basically a fervent plea for mercy. In the *Muskus* case, the court reversed and remanded while in the *Woodards* case, the verdict was affirmed. One crucial distinction between the two cases is that in *Woodards,* defense counsel failed to make timely objection whereas in the *Muskus* case, counsel objected and was overruled. Had the defendant objected in the *Woodards* case, the similarities between the two cases would be so great that it seems unlikely that the same court would reverse one and not the other.

The *Woodards* case is demonstrative of a trend allowing greater latitude to the prosecutor in his closing argument, specifically in the area of abusive language. Where the evidence is strong and the crime of a serious and heinous nature, the courts will not reverse merely because of an overzealous summation by the prosecutor. Even greater latitude is allowed where the defense counsel fails to object to the improper remark. Thus, in a proper case, the prosecutor can employ prejudicial comment to his advantage with little fear of reversal. He need only be willing to face possible reprimand by the court or instruction to the jury informing them of the prejudicial nature of his comment. However, the effectiveness of such an instruction is questionable once the comment has made an impression upon the minds of the jurors.

Barry Woldman

LANDLORD AND TENANT–DUTY TO REMOVE ICE AND SNOW FROM COMMON SIDEWALK

The plaintiff, a tenant in the defendant's apartment building, was injured when he slipped and fell on a common sidewalk, controlled and maintained by the defendant for the tenants' use. The plaintiff alleged that the defendant was negligent both in allowing snow and ice to remain on the walk and in removing it. The trial court ruled for the plaintiff and the Supreme Court of Appeals of Virginia affirmed the judgment holding that the landlord had a duty to use reasonable care to remove natural accumulations of snow and ice from the walkways reserved for the common use of his tenants within a reasonable time after the snow had ceased. *Langhorne Road Apartments, Inc. v. Bisson,* 207 Va. 474, 150 S.E.2d 540 (1966).

The *Langhorne Road Apartments* case is a significant decision in the recently emerging law of a landlord's liability to a tenant, his guests, and business invitees, for failure to remove snow and ice from common walkways. The purpose of this note is to analyze and compare the underlying rationale of the various courts indicating the law's evolution from placing the duty of removing snow and ice from the common premises