Prosecutorial Misconduct: Closing Argument in Oklahoma

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PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT IN OKLAHOMA

Charles L. Cantrell*

INTRODUCTION

The persistent and ongoing problem of prosecutorial misconduct during final arguments in criminal cases has been addressed in various scholarly journals and works.¹ This problem continues because of built-in pressures of the legal system that allow and even encourage it. This article does not address the poorly trained novice prosecutor, nor is it concerned with the momentary loss of temper that occurs in this type of litigation. It predominantly concentrates on recognizable patterns of continuing arguments employed to gain a tactical advantage over the defendant.

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The first inherent pressure that contributes to these improper arguments is the high threshold required by the Court of Criminal Appeals for reversing a decision for error in final argument.\textsuperscript{2} The second is the legal fiction that a judge’s admonishment to disregard the objectionable statement is actually effective. I have never met a trial attorney who believes that these admonishments work. I may meet one in the future, but for now, this tiny class has a membership of zero. Finally, perhaps the most important factor is that the prosecutors are more likely to brazenly employ this tactic in a case where the evidence overwhelmingly shows guilt. The obvious reason is that the likelihood of reversing the decision is small or non-existent.

Thus, the purpose of this article is to identify these patterns existing in Oklahoma criminal law. Hopefully, this identification will assist the prosecution in refraining from employing them as a forensic tool. Revealing these patterns should augment both the defense bar and the judiciary to prevent and remedy this type of misconduct. Finally, I will present some recommendations about what should occur if this pattern continues.

I. COMMENTS VIOLATING THE PRIVILEGE AGAINST SELF-INCRIMINATION

The Self-Incrimination Clause of the Fifth Amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”\textsuperscript{3} This provision obviously prohibits the state from calling a defendant to the stand, and also it has been interpreted in an expansive sense to protect the defendant from answering certain incriminating questions.\textsuperscript{4} In \textit{Griffin v. California},\textsuperscript{5} the United States Supreme Court analogized commenting on a defendant’s refusal to testify with “a remnant of the ‘inquisitorial system of criminal justice.’”\textsuperscript{6} The

\begin{itemize}
\item \textsuperscript{2} Patton v. State, 973 P.2d 270, 302 (Okla. Crim. App. 1998) (“Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such to deprive the defendant of a fair trial.”).
\item \textsuperscript{3} U.S. \textsc{const.} amend. \textsc{v}.
\item \textsuperscript{4} Hoffman v. U.S., 341 U.S. 479, 486 (1951).
\item \textsuperscript{6} Griffin, 380 U.S. at 614 (citing Murphy v. Waterfront Comm., 378 U.S. 52, 55
\end{itemize}
Court termed any such comment a penalty extracted on the defendant because of the exercise of a constitutional privilege.\(^7\)

\textit{A. Failure to Testify}

The first broad category of potentially impermissible comments arises from the prosecution's final argument. The relatively few published opinions that have resulted in reversals due to this particular error are astonishing. Several cases exist that should have resulted in reversals, but were cured by the court's admonishment or waived by the defendant. Although I continue to be skeptical of the effectiveness of admonishments and curative instructions, a few examples will illustrate my difficulty.

In \textit{Banks v. State},\(^8\) the prosecutor argued that Banks had not "come forward to be accountable for what ha[d] taken place."\(^9\) After an objection was overruled, he continued by stating, "the fact that he has not been held accountable or has said anything, even remotely-willing to come forward and say what happened."\(^{10}\) The Court of Criminal Appeals found that these remarks were improper, but because of the comments' "quick succession"\(^{11}\) and the court's admonishment, any errors were cured in both\(^{12}\) comments.

Contrast the effect of admonishments in \textit{Banks}\(^{13}\) with \textit{Prince v. State}.\(^{14}\) The court had sustained an objection to an improper question that elicited an answer commenting on the defendant's silence after he

\begin{itemize}
\item \textit{Id.} (1964).
\item \textit{Id.}
\item \textit{Id.} at 402.
\item \textit{Id.}
\item \textit{Id.} Surely the court did not intend to infer that if the prosecutor's comments were temporally separated, the error would somehow have been worse. I am aware of no such authority. The United States Supreme Court has held harmless error review is inappropriate "where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported acquittal." Anderson v. Nelson, 390 U.S. 523, 523-24 (1968). At any rate, I have a difficult time differentiating "quick succession" and "extensive." It seems that repeating any improper comment makes it doubly erroneous.
\item \textit{Id.} In addition, the prosecutor's first comment should be judged on its own. The court's admonishment was to the propriety of the second comment. How the first error was ever cured remains a mystery to me.
\item \textit{Banks}, 43 P.3d at 402.
\end{itemize}
had been arrested.\textsuperscript{15} The judge’s admonishment was as thorough and complete as one can hope for in such a situation.\textsuperscript{16} Apparently the prosecutor did not take the hint and proceeded to ask a similar question only to receive a similar response.\textsuperscript{17} Although the court preformed the identical rite of admonishment, the Court of Criminal Appeals reversed. It held that a presumption of prejudice occurs when the comment concerns the defendant’s right to silence.\textsuperscript{18} Rejecting a harmless error analysis, the court concluded the error contributed to the guilty verdict because the defendant “did not testify at trial and . . . the jury deliberated only 35 minutes before returning a guilty verdict.”\textsuperscript{19}

This is a curious distinction. The Miranda right to silence was once regarded as non-constitutional, and only a “measure to insure that the right against compulsory self-incrimination [is] protected.”\textsuperscript{20} When an error is of constitutional magnitude, “the burden falls upon the State to prove it harmless beyond a reasonable doubt.”\textsuperscript{21} Presumably, the right guaranteed by \textit{Griffin} is of constitutional stature and entitled to at least the same presumption of prejudice.

The distinction between what a prosecutor may and may not say has some guidelines, but some prove mostly illusory. One fairly clear rule during a capital sentencing hearing is that a prosecutor may comment that the defendant has shown no remorse.\textsuperscript{22} This would likely be a

\begin{itemize}
\item \textsuperscript{15} \textit{Id.} at 432.
\item \textsuperscript{16} \textit{Id.} at 432-33.
\item The Court: I will admonish the jury, and maybe he will get the hint. The motion will be denied. Ladies and gentlemen of the jury, there are times in a trial when questions are asked and responses are given, and when a Judge has to ask jurors to disregard what they have heard, and I am going to ask you to disregard the last answer given by this witness. Now I need to have a response from you. We all understand the difficulty of your complying with this kind of instruction. Now, if you will disregard the last answer given by this witness pursuant to my instructing you at this time, raise your right hand. (Whereupon, all jurors raised their right hand.).
\item \textsuperscript{17} \textit{Id.} at 433.
\item \textsuperscript{18} \textit{Id.} (relying on Burroughs v. State, 528 P.2d 714, 717 (Okla. Crim. App. 1974)).
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{22} Short v. State, 980 P.2d 1081, 1105 (Okla. Crim. App. 1999).
\end{itemize}
powerful forensic tool for the state. The jury has only recently determined the defendant is guilty, and the court allows the prosecutor to call attention to the fact that the defendant has not “expressed” his remorse. The defendant could always break into tears or wail to the heavens to demonstrate his repentance. However, my speculation is that this type of remorse is generally expected to be delivered verbally. Such comment in *Short* was determined to be based upon the defendant’s demeanor in the courtroom.\textsuperscript{23} Reasonable persons could disagree with the court’s conclusion in *Short*. For this comment to be allowed after a verdict of guilt is one thing. Yet, comment regarding a lack of remorse on a non-testifying defendant would seem to clearly indicate a reference to his failure to testify.

One of the more popular jury arguments by prosecutors is the assertion that the state’s evidence is “uncontradicted.”\textsuperscript{24} In *Fite v. State,*\textsuperscript{25} the prosecutor stated, “[s]o you could look at all the evidence, what is presented and what is not—and it’s not controverted. Nobody has contested what was presented here.”\textsuperscript{26} Refusing to rule for the defendant, the court relied on *Lewis v. State*\textsuperscript{27} for the proposition that when the defense offers no evidence “on a particular issue, it may be fairly said that the evidence is undisputed, uncontradicted or unrefuted.”\textsuperscript{28} The court continued and stated the prosecutor’s remarks must “directly and unequivocally”\textsuperscript{29} call the jury’s attention to the defendant’s failure to take the stand.

Although this rule has been followed by the court in several decisions,\textsuperscript{30} it is not necessarily the most appropriate or fairest. In *United States v. Cotnam,*\textsuperscript{31} the court held such a comment to be error when the defendant was the only person who could supply the contradicting

\begin{itemize}
\item \textsuperscript{23} *Id.*
\item \textsuperscript{24} *Lewis v. State,* 732 P.2d 1, 3 (Okla. Crim. App. 1987).
\item \textsuperscript{25} *Fite v. State,* 873 P.2d 293 (Okla. Crim. App. 1993).
\item \textsuperscript{26} *Id.* at 297.
\item \textsuperscript{27} *Lewis,* 732 P.2d at 3.
\item \textsuperscript{28} *Id.* (citing Hays v. State, 617 P.2d 223, 230 (Okla. Crim. App. 1993)).
\item \textsuperscript{31} U.S. v. Cotnam, 88 F.3d 487 (7th Cir. 1996).
\end{itemize}
testimony. Adoption of the Cotnam inferential approach would seem to be consistent with a prior Oklahoma decision. In Lime v. State, the court drew a "distinction between saying the evidence is uncontroverted and specifically referring to the defendants, stating: 'They offer you no excuse.' We hold that this remark does not come within the scope of permissible comment." Thus, a substantial difference exists between referring to the absence of evidence and the defendant's failure to present contradictory evidence. An even finer distinction was made in Gilbert v. State where the state asserted "that reasonable doubt could only be found where the defense came forward with evidence to support another theory of facts." The court found this comment was a proper statement regarding the jury instruction on circumstantial evidence. Perhaps the context made the crucial difference, but I find it impossible to draw a meaningful distinction between "they" and "the defense."

The Gilbert decision may have had its genesis in Robedaux v. State. This was another case in which the comments occurred during explanation of the circumstantial evidence instruction to the jury. The prosecutor specifically named the defense attorneys when he said, "[I]adies and Gentlemen, Mr. Toure talked about it, Ms. Foley talked about it. Neither one of them offered you any reasonable theory of innocence." When the court allowed the defense attorneys to be used as proxies for the defendant it said that those remarks were references to the arguments of the defense attorneys, using the attorney as a proxy target would presumably not include such remarks as "Mr. Smith has failed to provide any testimony to the contrary," "Mr. Smith only had to call one witness to the stand to contradict our case," or "Mr. Smith had a choice with respect to calling the defendant to the stand. He didn't, and you should wonder why?" All of these examples clearly infer that the defendant could have taken the stand to rebut the state's case.

Finally, the emphasis on the uncontradicted nature of the state's testimony has proven to be a slippery slope in some instances. In Sisk v.
State, the prosecution made the following remark:

You can believe or disbelieve—that’s your job. That’s your duty, of course, but you must remember there is nothing to refute and, [of] course, the defendant did not make an announcement in your presence that he did not need to take the stand, but he has that right. He can do it if he wants to. I don’t want you to think he did not have that right. He does, and the testimony is not refuted in any manner whatsoever. 42

The court correctly held this to be an impermissible comment on the defendant’s failure to testify. 43 Apparently, this comment was error because the defendant was singled out. Likewise, calling the defendant by name yields the same result. In Marshall v. State, 44 the prosecutor commented, “[w]hat happened? Marshall knows what happened. Frye knows what happened. Did you hear a word from Marshall or Frye? You didn’t hear a word.” 45 Thus, it clearly appears that the subject matter of the absence of defendant’s testimony can be broached as long as the defendant is not named nor referred to as the “defendant.”

B. Failure to Call Witnesses

The state, in most instances, is allowed to comment on the failure of the defendant to call witnesses on his behalf. This permissible comment usually embodies one of two formats. The first form is a response to the defense’s criticism of the state’s witnesses or their testimony. In Parkhill v. State, 46 the prosecution stated, “[t]hat’s why he tells you that, to get

42. Id. at 1004.
   In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of a crime, offense or misdemeanor before any court or committing magistrate in this State, the person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him nor be mentioned on the trial; If commented upon by counsel it shall be ground for a new trial.
45. Id.
you away from the testimony that you heard on the witness stand and he is criticizing the state for not calling witnesses. Well he could have called witnesses sitting here in this courtroom ever since the trial started."  

The court held this remark was not a comment of the defendant’s failure to testify, but rather a “response to criticism by the defense.”

The more prevalent situation is where the defendant does not call a material witness who logically would testify consistently with the defense’s theory of the case. The court in Trice v. State accordingly wrote, “[h]owever, the general rule in Oklahoma is that where a person might be a material witness in a defendant’s behalf and the accused neither places him on the stand nor accounts for his absence, failure to produce him as a witness is a legitimate matter for comment during the State’s argument.”

The decisions finding error in commenting on the failure to call witnesses are few in number and unique in their circumstances. In Thompson v. State, the court determined the state had crossed the line when the comments also included improper references to other crimes, facts outside the record, and a personal opinion of guilt. The Thompson holding has been interpreted to mean that any such comment “may not mislead or draw questionable references from outside the record.”

Another rare situation where error may occur is when the comment refers to a co-defendant. In Fry v. State, such a remark was held to be

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47. Id. at 1390.
48. Id.
51. An excellent example of a missing “material” witness occurred in McCarty v. State, where the court explained that when the defense attacked the testimony of the state’s expert witness, but chose not to call its own experts, it gave rise to “a fair inference that had the defense experts arrived at any other conclusions regarding the analysis of this evidence they would have been called by the defense to testify.” McCarty v. State, 904 P.2d 110, 123 (Okla. Crim. App. 1996).
53. Id. at 305. See also Baldwin v. State, 519 P.2d 922 (Okla. Crim. App. 1974) (citing Thompson as controlling, although the other errors were not present).
improper because the co-defendant had gained a severance of his trial, and could not be compelled to testify for his co-defendant. Fry was distinguished in Bernard v. State, where the charges against the co-defendant had been dropped prior to trial. Although no Oklahoma decision was found, a logical extension of the rule prohibiting comments about a co-defendant would include the situation where such person would logically claim a Fifth Amendment privilege against testifying.

C. The Defendant’s Post-Arrest Silence

In 1976 the United States Supreme Court decided the case of Doyle v. Ohio. The decision was straightforward in its prohibition of the use of a defendant’s silence. One sentence stated: “We hold that the use for impeachment purposes of petitioner’s silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment.” Apparently news of Doyle was a bit slow to reach some parts of the country. In Smith v. State, the following exchange occurred:

[B]ut the most damming [sic] evidence, the most damaging testimony, and the reason, quite honestly, that when we ask you to render your verdict here, we’re going to ask you to disbelieve Timothy Smith’s testimony, is because nobody knew his story, nobody knew his story until he came here in court on Friday and told you, nobody . . . . Ron Layton . . . told you that Timothy Dean Smith wouldn’t give his statement, he wanted to talk to his lawyer, and that’s a Constitutional right right [sic] and a privilege.

[Defense]: Your Honor, I want to object at this time to these comments by counsel and the fact that he is invading the province of the jury again. He is telling this jury, trying to impassion them or inflame them by the reason and by the fact

56. Id. at 652.
58. Id. at 1112.
59. U.S. v. Miller, 460 F.2d 582, 588 (10th Cir. 1972).
61. Id. at 619.
63. Id. at 1283-84.
that Mr. Smith did not make any statement at the time he was arrested; and, of course, he has a complete constitutional right to do that. We would object to these - this particular line of argument by the state and we would also move for a mistrial at this time.

[Prosecutor]: It’s in the evidence.
[Court]: Overruled.
[Prosecutor]: Thank you, your Honor.
[Court]: I’m sure you’re acquainted with the great latitude given in closing arguments.
[Defense]: Yes, I am, your Honor.
[Court]: I was wondering. Go ahead.64

In ruling that those (and other) remarks violated the Doyle rule, the Court of Criminal Appeals noted that Oklahoma had the same rule two years before the Doyle decision was handed down.65

One important exception to the Doyle rule is when the defendant speaks after the Miranda warnings. Because he has not relied on his right to silence, the comment of the prosecutor could not possibly refer to any silence.66 This exception has been addressed by the Court of Criminal Appeals. In Black v. State,67 the court duly noted that the defendant initially had spoken with the police, and accordingly, the prosecutor’s questions were directed at what he said at that time.68

II. ATTACKING THE DEFENSE COUNSEL

A. Personal Attacks over Credibility or Integrity

A prosecutor undoubtedly risks reversal when he personally attacks the defense counsel. The examples of such attacks are widespread and include a variety of insults, rebukes, and name calling. One of the worst examples found is where personal threats were made against the defense

64. Id. at 1284.
65. Id. (citing Buchanan v. State, 523 P.2d 1134, 1137 (Okla. Crim. App. 1974)).
attorney.

First, in response to an objection by defense counsel, the prosecutor stated, “Mr. Hickman doesn’t want to hear the truth.” The record reflects that similar comments were made by the prosecutor on two other occasions during the course of the trial. Again in response to defense counsel’s objection the prosecutor stated, “One more minute Mr. Hickman and we are going out in the hall.” The prosecutor continued to threaten defense counsel when he stated, “One more word and I’m going to pop you in the mouth.”

The court held the comments to be “grossly improper.”

The majority of attacks do not contain threats, but rather embody criticism of the defense’s witnesses, strategies, themes or tactics. If those subjects were the only targets of the state, there would be no objectionable basis for appeal. An example can be found in two of the “smoke screen” cases. In *Hoover v. State*, the prosecution stated, “and don’t let the defense counsel send up a smoke screen to you to try to draw you away from what the facts are, because that is what he is trying to do.” The court found this and another comment to be ridiculing the “attorney and the defense.” In another recent case, the prosecutor asked the jurors during voir dire, “[y]ou won’t let a smoke screen fool you?” Although the trial court admonished the venire to disregard the comment, the Court of Criminal Appeals found no error in the remark. Absent personalization, “[t]he prosecutor was merely asking the jury to use common sense to evaluate evidence and not be fooled by irrelevant information.” Other “smoke screen” cases had the improper personalization element present.

70. Id.
72. Id. at 946.
73. Id. (“if any of you have been [in] a courtroom before you may have heard on old adage we refer to and that is if you don’t have any facts or law try to confuse the jury.”).
74. Id.
76. Id. at 470.
77. Id.
Other personal attacks involve the prosecution alleging that the defense counsel is a liar, or at best, unethical. In the former category DeRosa v. State\footnote{DeRosa v. State, 89 P.3d 1124 (Okla. Crim. App. 2004). Id. at 1144.} featured the prosecution’s questions as giving “the clear import . . . [of accusing] the defense counsel of lying.” In Norman v. State\footnote{Norman v. State, 648 P.2d 1243 (Okla. Crim. App. 1982). Id. at 1246.} the prosecution commented that the defense attorney had postponed his opening statement so he could tailor his evidence to rebut the state’s case.\footnote{Id.} While the defense considered this comment as tantamount to an allegation of perjury, the court held that the court’s admonishment cured the error.\footnote{McCarty v. State, 765 P.2d 1215 (Okla. Crim. App. 1988). Id. at 1220.} An express assertion of lying was made in McCarty v. State,\footnote{Spees v. State, 735 P.2d 571 (Okla. Crim. App. 1987). Id. at 576.} wherein the district attorney “improperly attacked the credibility of defense counsel by accusing him of ‘making up a story.’”\footnote{Jones v. State, 738 P.2d 525, 530 (Okla. Crim. App. 1987). Id.} 

A final category of personal attack is characterized by describing the defense counsel’s job in a particularly sordid manner. One such example is in Spees v. State\footnote{Spees v. State, 763 P.2d 106, 108 (Okla. Crim. App. 1988) (“This [c]ourt finds particularly offensive the remark that defense counsel was throwing up a ‘smoke screen to confuse the jury and play upon their sympathies.’”).} where the prosecutor stated “[w]hat you see is a classic defense tactic of pointing the finger-pointing the finger at the police, at the prosecutor, anything to direct your attention from the elements and the facts.” Remarkably, in the same year, the court held that a remark that defense counsel’s job was to “get their client Richard Jones off”\footnote{Chandler v. State, 572 P.2d 285 (Okla. Crim. App. 1977). Id. at 289.} constituted an improper attack on the credibility of Jones’ attorney.\footnote{Id.} A final example of denigrating credibility through job description is found is Chandler v. State.\footnote{Id. at 289.} In that case, the comments were “[t]here isn’t an objection to the defense lawyer. He goes from one courtroom to another,” and “[t]his is just another paid client and if you go to another courtroom, you will hear the same objections.”
The court went so far as to declare such remarks denied “the defendant his constitutional right to be represented by counsel.”

B. Nonpersonal Attacks

Several decisions view caustic comments directed against the defense as nonpersonal and fair under the circumstances. In *Gilbert v. State*, several comments, including “contribute a defense when there isn’t one,” were simply a “comment on the evidence and inferences therefrom.” An even more egregious case is *Banks v. State*, wherein the district attorney alleged that the defendant’s theory was “likely born in these lawyers’ offices last night.” Again, the court considered this remark as simply “challenging Bank’s defense in light of the evidence.”

The final category in this section is where the prosecution’s comments are clearly attacking or mocking the defense counsel, but the prejudicial effect is offset by other non-related factors. For example, in *Powell v. State*, the court found one objectionable attack in addition to a statement that the defense attorney’s legal argument was “reprehensible.” The court considered the comments unimportant and stated that the “central theme” of the prosecutor’s argument was not attacking the defense counsel. Again, in *Black v. State*, the prosecutor mocked the defense attorney’s objections by stating, “I object. When it hurts, object. When it starts to hurt, he objects. That’s what you have heard.” After the defense lodged a continuing objection, the prosecutor continued saying “I object. It hurts . . . .” This playground

93. *Id.* (citing *Fry v. State*, 218 P.2d 643 (Oklahoma Crim. App. 1950)).
95. *Id.* at 121.
96. *Id.*
98. *Id.* at 402.
99. *Id.*
101. *Id.* at 537 n.41.
102. *Id.*
103. I am unclear what this means. A “central theme” of attack had never been required for this to constitute error. One does not need to repeat a mantra of “smoke screen” comments for reversal. See *Hoover v. State*, 738 P.2d 943 (Oklahoma Crim. App. 1987).
105. *Id.* at 24.
106. *Id.* I would assume “intentional brinkmanship” is not a valid objection.
fit of taunting and attributing a false motive was somehow characterized as "intentional brinkmanship."\textsuperscript{107} Thankfully, those latter cases do not comprise a significant percentage of decisions in this area. They are, at least to me, inexplicable.

III. PERSONAL OPINION

A. Guilt or Evidence

A prosecutor may not express a personal opinion as to his belief of the guilt of the defendant or the trustworthiness of evidence in the case. Such opinions are thought to be particularly egregious because his personal ""experience in criminal trials may induce the jury to accord unwarranted weight to [his opinions regarding the defendant's guilt].""\textsuperscript{108} An extraordinary number of appellate decisions dealing with this ground of error exist. Remarkably, a great deal of variety is lacking because the vast majority of cases concern improper comments over the defendant's guilt or the credibility of testimony.

One notable exception to the above is when a prosecutor expresses his personal opinion over the appropriateness of the death penalty. In particular, Oklahoma County had several of these cases a few years ago. In \textit{McCarty v. State},\textsuperscript{109} the prosecutor stated, "this defendant deserves it . . . This is a proper case for the death penalty . . . and justice demands it."\textsuperscript{110} Similar remarks such as "[i]f this isn't a death penalty case, what is it?" were made in \textit{Ochoa v. State}\textsuperscript{111} and \textit{Torres v. State}.\textsuperscript{112} All of these comments were held to be impermissible personal opinions. Contrast these cases with \textit{Young v. State},\textsuperscript{113} wherein the court noted that a "prosecutor may make a recommendation as to punishment."\textsuperscript{114}

A variation of the personal opinion strand occurs when a prosecutor injects unsworn testimony into the case. This took place in \textit{Gossett v. State}\textsuperscript{115}.

\begin{thebibliography}{99}
\bibitem{107} \textit{Id.} at 25.
\bibitem{108} Cargle v. Mullin, 317 F.3d 1196, 1218 (10th Cir. 2003) (quoting U.S. v. Splain, 545 F.2d 1131, 1135 (8th Cir. 1976)).
\bibitem{110} \textit{Id.} at 1221.
\end{thebibliography}
State\textsuperscript{115} when the county attorney began recalling the investigation.

[A]nd there is our evidence that we got off of the screen wire—just a little piece of red cotton. It matches perfectly with this red cotton ‘T’ shirt that came off of the defendant. I know that it came off of the defendant—I was up there when it came off, in the jail, and, the soles the same way.\textsuperscript{116}

Holding this to be an improper comment,\textsuperscript{117} the court relied on Fitzgerald v. State\textsuperscript{118} wherein the prosecutor referred to testimony (he did not testify) that he was present at the jail when the defendant was initially transferred from custody.\textsuperscript{119} Thus, he argued to the jury “I will never knowingly permit a man to testify falsely in order to obtain a conviction, while I am County Attorney, and it has been testified here that I was present in the [j]ail when this man was brought in.”\textsuperscript{120} All of these comments constitute a form of the objectionable personal opinion argument.

As stated earlier, most of these arguments concern the prosecutor attempting to bolster the credibility of the state’s case by opining his strong belief in it. This can be accomplished by many forensic devices. For example, “I thought and believed it was Murder in the First Degree when I filed this case . . . I think we believe that it is now.”\textsuperscript{121} More to the point was Spees v. State,\textsuperscript{122} which featured the prosecutor stating, “I think they are guilty; that’s what I’m saying. I think they are guilty.”\textsuperscript{123} Often, witnesses are targeted in closing argument. Accusing the defendant of “making up a story” has been held to be impermissible.\textsuperscript{124} Even better was Dupree v. State,\textsuperscript{125} where the state argued, “[w]ell, he told a lie, and then he had the guts to set [sic] on that stand and say that Mrs. Brown was wrong . . . . He knew that he wasn’t telling the truth.”\textsuperscript{126}

\begin{thebibliography}{9}
\bibitem{116} \textit{Id.} at 288.
\bibitem{117} \textit{Id.} at 290.
\bibitem{119} \textit{Id.} at 1026.
\bibitem{120} \textit{Id.}
\bibitem{123} \textit{Id.} at 575.
\bibitem{126} \textit{Id.} at 426.
\end{thebibliography}
Vouching occurs if the prosecutor "expresses a personal belief in a witness's credibility, either through explicit assurances or by implying that other evidence, not presented to the jury, supports the witness's testimony."\textsuperscript{127} The latter category dealing with inferring other evidence of guilt is available, but not presenting it to the jury is somewhat rare. A good example of this argument can be found in \textit{Omalza v. State}.\textsuperscript{128} In that case, the prosecutor "informed the jury the State had more evidence of guilt than it could present."\textsuperscript{129} In addition, the state's opening statement contained references to certain evidence being barred by privilege.\textsuperscript{130} These and other errors caused the court to reverse the conviction.\textsuperscript{131}

A unique method of impermissible vouching can occur when a prosecutor is called to the stand. During such a case, the prosecutor was asked why he dismissed the case against a second defendant. He replied, "[i]n my opinion, he wasn't guilty of the crime, and I'm not going to prosecute someone that's not guilty."\textsuperscript{132} This testimony was again raised in the state's final argument.\textsuperscript{133} The court reversed the conviction and held that the opinion "improperly bolstered the credibility of the second prisoner."\textsuperscript{134}

The more common method of vouching presents itself during final argument when the prosecutor makes reference to his witnesses. In \textit{Sisk v. State},\textsuperscript{135} the district attorney argued that "[l]ike I told you before, there are no witnesses except the participants. You can either believe or disbelieve, but I believe them."\textsuperscript{136} Once again, the court reversed the conviction.\textsuperscript{137} A similar improper argument was found where the district attorney "repeatedly told the jury that the appellant had lied,"\textsuperscript{138} and

\textsuperscript{129} \textit{Id.} at 309.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.} at 311.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.}
\textsuperscript{136} \textit{Id.} at 1004.
\textsuperscript{137} \textit{Id.}
bolstered his own witness by asserting "everybody . . . who came here to testify when the State presented their case, told you the truth." 139

Two decisions address an unusual issue of vouching. In both cases, an immunity agreement or memorandum of understanding was admitted into evidence. This is the equivalent of introducing the terms of a plea agreement between the state and one of its witnesses. Each of these documents has a section that requires the witness testify truthfully. In *Nickell v. State*, 140 the court held this was not improper vouching but "did nothing more than reveal that he had an obligation to testify truthfully . . . Nothing in the plea agreement . . . indicates the prosecutor explicitly or implicitly indicted he had means to verify that Waller was telling the truth." 141

The recent federal case of *Cargle v. Mullin* 142 expressed a good deal of skepticism about the admission and use of such a document. 143 The second and third provisions of the agreement called for the witness to be subjected to scientific testing, 144 and required that his testimony be capable of independent corroboration. 145 The court correctly identified the troubling inferences.

The agreement's requirement that (1) Jackson's account be capable of confirmation by independent evidence and (2) that he would subject himself to scientific testing (for the obvious purpose of corroboration), coupled with the fact that the government put on his testimony, unavoidably implies to the jury that his truthfulness was corroborated outside the record by the State, and thus those provisions in the agreement lent the "imprimatur of the Government" to his testimony, potentially "induc[ing] the jury to trust the Government's judgment rather

139. *Id.*
141. *Id.* at 674.
142. *Cargle v. Mullin*, 317 F.3d 1196, 1219 (10th Cir. 2003) ("The immunity agreement, which was introduced into evidence, recited that (1) Jackson would testify truthfully, (2) he would subject himself to scientific testing, (3) his information must be capable of corroboration by independent evidence, and (4) the agreement would be void should evidence arise that he was a principal in the murders.").
143. *Id.*
144. *Id.*
145. *Id.*
than its own view of the evidence."

Additionally, during closing argument the prosecutor referred to the immunity agreement and emphasized that no evidence "has come forth" clearly implying further police investigation that was never presented. Although finding instances of prosecutorial misconduct, the decision was not reversed because the trial was not fundamentally unfair.

IV. MATTERS OUTSIDE THE RECORD

The guideline for attorneys in final argument has been articulated as extending "only to the evidence presented at trial and to reasonable inferences drawn therefrom." In fact, prosecutors often stray far outside these parameters in an attempt either to alarm the jury or to prejudice the defendant. Although a particular error is not usually repeated, a coherent grouping of several different remarks exists that may be combined. Thus, regardless of the facts surrounding a remark, it can be accurately placed in a particular section.

A. Attacking the Defendant

Personal attacks on the defendant can take various forms. The prosecutor can refer to specific acts, prior crimes, character traits and just about anything he can manufacture in order to convince the jury that the defendant is a criminal. One method has been to compare the defendant or the case generally, to famous or legendary criminals. In Hope v. State, the prosecutor started reciting the nursery rhyme about Lizzie Borden, but "substituted the names of both co-defendants" into the rhyme. The court condemned the practice and commented that the comments "likely denigrated the office" Other district attorneys have named Charles Manson, John Dillinger, Sirhan Sirhan and James

146. Id. (quoting U.S. v. Young, 470 U.S. 1, 18-19 (1985)).
147. Id. at 1220.
148. Id.
151. Id. at 907.
152. Id.
Earl Ray.\textsuperscript{156} A second general group of remarks occurs when prior crimes or bad acts outside the record are mentioned at trial. In Bryant v. State\textsuperscript{157} the prosecution brought out a prior conviction of the defendant on cross-examination. Unfortunately, in closing argument, he proceeded to go into the facts by saying that “he beat this little boy until his eye went out.”\textsuperscript{158} In a similar situation, the state had to explain why the prosecutrix in a rape case did not make an outcry of help. The prosecution apparently manufactured a factual scenario that would help his argument. The court described the argument was improper because “[t]here is no evidence that the appellant threatened to kill or harm the prosecutrix if she screamed. Nor does the record reflect that the appellant intended to injure or hold hostage the . . . children.”\textsuperscript{159} Again, in a prosecution for driving under the influence, a prosecutor allegedly remarked how the defendant had run over a boy on a bicycle and killed him.\textsuperscript{160} Reversing the conviction, the court noted that there was no evidence in the record of any such event.\textsuperscript{161} This exact argument was disapproved of in a much earlier case in 1948.\textsuperscript{162} Other examples of comments in this category include comments regarding the defendant’s escape from custody,\textsuperscript{163} selling drugs to school children,\textsuperscript{164} writing out a confession\textsuperscript{165} and alleging that the defendant illegally possessed other pills.\textsuperscript{166}

A couple of cases merit further mention. In both situations, the prosecutor commented that the defendant was mocking the justice system. In Howell v. State,\textsuperscript{167} the prosecutor “asserted to the jury . . . that [a]ppellant had laughed throughout the proceedings.”\textsuperscript{168} Based on this improper argument and other errors, the court reversed. A similar

\textsuperscript{154} Id.
\textsuperscript{156} Id.
\textsuperscript{158} Id. at 381.
\textsuperscript{161} Id.
\textsuperscript{168} Id. at 1094.
strategy was employed in *McCarty* when the district attorney stated, "I wonder if [appellant] was grinning and laughing that night when he murdered Pam Willis." That decision was also reversed on the basis of several errors. Both cases demonstrate the improper tactic of calling the jury's attention to the defendant in the courtroom and ascribing a non-existent malevolent attitude.

**B. Appeals to Law and Order**

The second category of comments outside the record includes those that address the jury as part of the community and appeal to a sense of law and order. In a similar sense, remarks about the government generally or an appeal to civic pride can be included in this area. The typical example occurred in *Coleman v. State* wherein the district attorney asked the jury "[n]ow, is that what you want the law to be in Tulsa? Is your message going to be that [to] the Tulsa Police Department . . . ."

He continued "here is your chance to do something, not about crime in the United States, but about one crime in Tulsa County, Oklahoma." Another improper law and order appeal is found in the *Ward* case.

He says you can't secure law and order through the fear of punishment. Members of the jury, if there was no punishment on the books for anything, can you imagine what kind of a society we would live in that we would turn over to the Kelly Spencer Wards, the Sirhan Sirhans, the James Earl Rays? Do you think that your rights as individuals would be protected? I think not.

Not all of these arguments are direct calls to the jury for law and order. Some are directed to the jury to distinguish the defendant from the honest, tax-paying citizens on the jury. In *Treece v. State*, the district attorney made the following argument.

170. *Id.* at 1222.
172. *Id.* at 246.
173. *Id.* at 247.
For fear of letting some member of our society starve, we cast the net of generosity too wide. And we pick up freeloaders who are interested in one thing, getting something for nothing.

Well, we got one of those people in Court today . . . . I am advocating striking out with a vengeance at people who take advantage of the government’s generosity.

That is what the defendant has done in this case. She has taken advantage of every hard working taxpayer, in the State of Oklahoma, who gets up 8:00 to 5:00 every morning and puts in an honest days work. She has slapped those people right in the face.

Well, as Harry Truman used to say, the buck stops here. She is not going to steal from the people of the State of Oklahoma and get away with it. Not if I can help it . . . . Folks, I feel like I have done my part . . . . Now, I am going to call on you to do your part. 176

A variation of this theme is commenting on the cost of the trial. In Fry, 177 the prosecutor remarked “if the defendant had stayed in Pittsburgh County the taxpayers of Latimer County would have been several hundred dollars better off.” 178 Both of the arguments above were determined to be improper.

The final category is comprised of statements about evidence not presented at trial. This should not be confused with the first category where the defendant is personally attacked by the prosecution. In Ellis v. State 179 the prosecution referred to a witness to a confession 180 and a handwriting expert 181 who were allegedly prepared to testify. Neither one testified during trial, and the argument was deemed improper. 182 In another case, the prosecution insinuated “that the defense was hiding evidence” 183 when it objected to the admissibility of the state’s evidence. Both of these arguments were impermissible, but both were cured by admonishments to the jury.

176. Id. at 379.
178. Id. at 653.
180. Id. at 771.
181. Id.
182. Id.
V. Inflammatory Remarks

A. Victim Sympathy

The fundamental risk in eliciting sympathy during closing argument is that the jurors will identify with the victim and allow their passions to decide the case. Countless issues have arisen on appeal, but very few reversals exist because of these comments. The main reason stems from the defense's lack of objection. This leaves the Court of Criminal Appeals performing a plain error review. The scope of this section is limited to allow coverage of all first-stage arguments and sentencing arguments that do not include victim impact evidence.

It appears that the prosecution usually can make these types of arguments when the foundation is set up through prior testimony. Frequently, the state will ask a medical examiner, physician or police officer about the victim's condition or wounds. From these answers, an evidentiary foundation is laid for the prosecutor's later comments. For example, in Moore v. Gibson, the court stated, "[t]o the extent the prosecutor speculated about what petitioner did to the victim, the federal district court determined the comments were a tenable explanation based on evidence and logical inferences from the evidence." The Oklahoma Court of Criminal Appeals has adopted this approach in several cases. Naturally, the lesson to be learned from all of this is that the defense must object to any of these questions as speculative before they are answered. An example of how powerful (and speculative) this type of argument can be is set out below.

The prosecutor made the following comments: (1) "Did he have this knife in his hand then or did he pull it out when he got

185. Id.
188. Id. at 1172.
in the car?” (2) “[F]rom th[e] time [he got her inside the car] until her bruised, battered and lifeless little body was found the next morning beside the road, we don’t know exactly what he did to her.” (3) “We have a pretty good idea of some of the things he did.” (4) “She was probably scared to death and struggling.” (5) “She died in order for this baby killer to satisfy his own sadistic sexual desires.” (6) “Can you imagine what that baby was going through? Took her out to his trailer, taped her up with that tape, took that knife right there and cut that uniform off of her and kept her there for hours.” (7) “Jenipher will never be a teenager.” (8) “[Her mom] is never going to drive her to school again.” (9) “[The victim’s family] will never be the same.”

One prosecutorial technique that is improper is to elicit sympathy for the victim by recourse to facts outside the record. In *Mailicoat v. State*, the prosecution told the jury that “Tessa got her name from a (television) angel, and arguing that the family was present for Mailicoat but the jury was there for Tessa.” Even though these very arguments had been held improper in earlier cases, the court did not reverse the decision.

The most noteworthy decision in Oklahoma is *Tobler v. State*. Although the defense failed to object to most of the comments, the court termed the prosecution comments as “outrageous” and held that the defendant was denied a fair trial. The prosecution’s reported comments were not made during final argument, but rather during voir dire and direct examination. However, the remarks were in all likelihood reemphasized in closing. During voir dire the prosecutor stated:

[Will everyone of you promise that every time you think of Mr. Tobler and his rights under the laws of our land, that you’ll

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190. *Moore*, 195 F.3d at 1172 n.10.
192. *Id.* at 402.
196. *Id.* at 353.
197. *Id.*
also turn that coin over and you’ll think about the two victims of this crime, Paul and Carroll Hayden? Will each of you do that for me? 198

This question was again asked of each juror individually during the course of voir dire. This plea was reasserted with renewed vigor during the prosecutor’s closing arguments. After comparing the appellant’s and victims’ ages, and stating that the victims worked for a living and appellant did not, the prosecutor said: “... when you look over here and you see any sympathy about the age of this Defendant, I’d sure like for you to remember the two people that you see in Defendant’s Exhibit Number 2. [Photo of Victims] ... You talk about sympathy in the case, you told me you would look at both sides of the coin when you made a determination.”199

The court correctly characterized this as a straightforward plea for sympathy.200 In reversing the decision, the opinion further noted that the victim’s brother was allowed to testify concerning the victim’s visit to his mother, her Mother’s Day present and how happy the family had been.201

Taking all these cases together, along with many others, clearly a type of netherworld or purgatory created by the court appears. That is to say, improper arguments are identified by the court, but they are insufficient for reversal. Because these arguments are powerful and persuasive before a jury, the prosecution has no incentive to stop using them. A host of cases exist stating that “we do not condone the making of such comments, they are not so egregious as to amount to fundamental error.”202 “These comments were improper. However, to constitute reversible error, improper prosecutorial comment must be so grossly improper and unwarranted that it may affect the rights of the defendant.”203 “[T]hese ‘improper and reprehensible’ comments did not deprive Mailcoat of a substantial right or go to the foundation of his

198.  Id.
199.  Id. at 353-54.
200.  Id. at 354.
201.  Id.
defense,"  and "[t]his Court has specifically condemned many of the comments made in second stage, stating '[t]here is no reason for them and counsel knows better and does not need to go so far in the future."  

\section{B. Name Calling and Abusive Language}

Prosecutors often engage in colorful hyperbole in characterizing the defendant. While this practice has been condemned by the Court of Criminal Appeals, it has been employed by prosecutors with varying measures of success. The general position of the court is best summoned up as "[t]he State should refrain from unwarranted personal criticism or name calling." The key word in that quote is "unwarranted."

The inquiry becomes whether the language used can be constructed as a fair inference from the evidence presented in court. On occasion, the court has explicitly agreed with the prosecutor's name-calling. In \textit{Roberts v. State}, the district attorney characterized the defendants as "trash." The court concluded that "[a]lthough the facts would seem to justify such a reference a different phraseology would be preferable." Other decisions have upheld convictions when the defendant was compared to a "dangerous animal" and a rabid animal. Perhaps the most enthusiastic endorsement of this type of language occurred in \textit{Williams v. State}. The prosecutor termed the "[d]efendant was under the record the vilest type of character known to humanity. (He has) 'a warped brain, a degenerate mind.' (He) 'should be killed just as a person would kill a rattlesnake.'" In agreeing with the prosecutor's language, the court commented "that an adult who would commit the acts done by the defendant shows that he is, 'lowdown, degenerate, and filthy'. He richly deserves the punishment which he received."

\begin{thebibliography}{99}
\bibitem{208} \textit{Id.} at 136.
\bibitem{209} \textit{Id.}
\bibitem{210} \textit{Id.}
\bibitem{214} \textit{Id.} at 997.
\end{thebibliography}
Another form of personal attack is when the prosecutor presents an argument in a confrontational manner directed toward the defendant. In *Mitchell v. State*, the prosecutor allegedly pointed and yelled at the defendant during final argument. Much of the argument in the case was directed to the defendant. For example, “[w]hen you went for the coat rack, she suffered the first time you hit her with the coat rack... God knows how many times, until she was quiet and you were done.”

Reviewing the death sentence, the court found the argument was “highly improper and potentially prejudicial.” The effect of this type of argument was described as allowing the district attorney “perhaps more forcefully than words alone could do—to express the utter contempt and disdain that he personally felt toward the defendant and his crime.”

I believe the forensic point is easily established. Equating the defendant with a disparaging term has a tendency to remain in the jury’s mind during deliberations. Modern trial advocacy training focuses on a thematic approach featuring a simple and understandable minimum of words. Examples are limited only by the prosecutor’s imagination. The court has disapproved a defendant being called a “monster and... evil.”

Undoubtedly, this is not a summation of evidence, but rather a direct attack on the character of the defendant by choosing especially vicious characterizations. Other examples include terms such as “doper,” “homosexual,” “savage,” “professional criminal,” “losers,” “ex-convict” and “dam [sic] wild man.”

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216. *Id.* at 708.
217. *Id.* at 710 n.212.
218. *Id.*
219. *Id.*
223. *Id.*
227. *Id.*
C. Societal Alarm and Passions

The area of prosecutorial misconduct that is the most prevalent in final argument is when there is a call for societal alarm that directly appeals to the passion and prejudice of the jury. One technique is a direct call for revenge from the jury. In *Wilson v. State*,229 the district attorney termed the trial the “great equalizer,”230 and stated that the defendant was faced with “the justice 12 of you can deliver in your verdict.”231 The court determined this to be error, but did not reverse the decision because of the overwhelming evidence of guilt.232

The idea of societal alarm has been a predominant theme of prosecutors in Oklahoma. The idea is to appeal to the sense and civic pride of the jury. Fundamental error was determined in *West v. State*233 when the district attorney argued that the defendant had not fooled anyone “[p]articularly not the people of this community. And that you’re not going to stand for a man who wants to burn houses, possibly injure and kill firemen and his neighbors.”234 Variations of this theme can be seen in remarks such as “the people of this county will not condone homicide,”235 “[c]itizens of Oklahoma County cannot risk the presence of Leon Vernon Lowe on the streets of our county,”236 and “here is your chance to do something, not about crime in the United States, but about one crime in Tulsa County.”237

Personalizing the case to the jury is closely related to the above argument calling for societal alarm. A perfect example can be found in *Marshall v. State*238 when the prosecutor stated, “[w]hen Ernie Marshall comes to your house and calls you or your wife a bitch and then threatens to kill you, you’d better do what he wants and not try to protect yourself.”239 Portraying the members of the jury as possible victims, having a mutually shared interest in law enforcement, is another favored

230. *Id.* at 471.
231. *Id.*
232. *Id.* at 473.
234. *Id.* at 529.
239. *Id.* at 430.
subject. The court in *Herrod v. State* found it highly improper to argue "that the citizens of this county and this community, including yourself, myself and our families, have a right to be protected from these inmates." It is perfectly logical to comment on the defendant and any possible victim during the final argument. However, there are limitations on comparing the two parties. Prosecutors can run afoul of the presumption of innocence when they comment "the defendant stands guilty as charged" because his "cloak of innocence" has been ripped off. A similar remark was deemed improper when the district attorney rhetorically asked, "[d]o you think we're trying to prosecute somebody that's innocent?"

Commenting on victims presents a risky strategy. Referring to the unfair result of a prison sentence, a prosecutor said the defendants would have food and shelter while the victims "lie cold in their graves." Although the decision was not reversed, the argument was held to be improper. Likewise, comparing the defendant's rights to the victim's rights has been condemned by the court. In a similar view, the prosecution claiming that it represents the victims of the crime is improper.

Another appeal to the jury's prejudice is to inform them of the effect of their verdict by mentioning commutation or parole. In *Johnson v. State*, the court aptly described the problem as "[c]omments about commutation are prohibited as they inject speculation into sentencing, lead to death sentences due to juror fear of defendants' release, and undermine the jury's sense of responsibility for its sentencing decision." Accordingly, a prosecutor may not argue to the jury that a prior sentence of twelve years only kept the defendant in prison for thirteen months.

241. *Id.* at 1403.
243. *Id.*
245. *Id.* at 18.
249. *Id.* at 1102.
The final area of forensic misconduct involves the prosecution’s use of the Bible. The Court of Criminal Appeals has held that the prosecutor should not imply that God is on the side of a death sentence.\textsuperscript{251} Any reference to the Bible during closing argument by the state are considered improper.\textsuperscript{252} These errors do not usually end up being serious enough to cause reversal because most prosecutors do not urge the jury “to follow biblical standards rather than the court’s instructions.”\textsuperscript{253}

CONCLUSION

The foregoing article classifies prosecutorial misconduct into five general areas of concentration. Recognition and avoidance of these arguments are essential for a legal system priding itself in demanding ethical fairness in criminal trials. The hope is that the bench and bar can cure these problems through education in the trial process. It is unrealistic to expect the Court of Criminal Appeals to micromanage the details of numerous criminal trials. There must be a frank acknowledgement that the costs of a reversal are substantial in terms of economic resources, witnesses and victims. Reversals are not common, nor should they be.

The problem should be addressed initially by informing prosecutors what crosses the forensic line of impropriety. This can be accomplished by the prosecution itself, the bar association or the judiciary. Once informed, there should be few or no excuses for this behavior. Finally, the trial courts must take control of the courtroom and inform both parties that the trial will not proceed down the “admonishing” pathway. This may seem harsh, but the occasional fine, contempt or grievance referral will likely prove a worthy solution. In any event, making these errors disappear in the first instance is far better than sending the questions to an appellate court.
