

Summer 1951

Limitations Upon the Prosecution's Summation to the Jury

A. Arthur Davis

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

A. Arthur Davis, Limitations Upon the Prosecution's Summation to the Jury, 42 *J. Crim. L. Criminology & Police Sci.* 73 (1951-1952)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in *Journal of Criminal Law and Criminology* by an authorized editor of Northwestern University School of Law Scholarly Commons.

CRIMINAL LAW CASE NOTES AND COMMENTS

Prepared by students of Northwestern University School of Law, under the direction of student members of the Law School's Legal Publication Board

.D. H. Reuben, *Editor*

LIMITATIONS UPON THE PROSECUTION'S SUMMATION TO THE JURY

A. Arthur Davis

It is an established fact that the accused in a criminal trial is protected by a great many substantive and procedural safeguards.¹ It is equally clear that the philosophy behind these protective devices places other specific limitations on the prosecution's actual conduct during the trial, and specifically on the summation to the jury. This is because the prosecutor is considered a quasi-judicial officer of the court, charged not only with prosecuting the state's case against the defendant, but also with protecting the interest of the defendant.²

As was stated by the Supreme Court of the United States, a prosecuting attorney "may prosecute with eagerness and vigor—indeed, he should do so,

1. See *Roper v. Territory*, 7 N.M. 255, 272; 33 Pac. 1014 (1893) (dissenting opinion of Freeman, J.) "We have long since passed the period when it is possible to punish an innocent man. We are now struggling with the problem as to whether it is any longer possible to punish the guilty. Every safeguard that wisdom can suggest or experience improve has been invoked by the law. Every intendment and presumption is in favor of the accused. No matter though he may have lived a life of crime, an indictment raises the presumption of innocence. The law gives him compulsory process for witnesses, and the judge assigns him counsel if he has none. The jury are told to regard him as an innocent man, and every device that legal acumen can suggest are placed at his disposal. He challenges the state to prove his guilt; and, though a thousand errors be committed in his favor, they are past recall. He enjoys not only the fruits of all the mistakes that are made in his favor, but the mistakes that are made against him serve a still better purpose of vitiating a conviction. This is as it should be."

2. *State v. Henry*, 196 La. 217, 198 So. 910 (1941); *Oglesby v. State*, 156 Fla. 481, 23 So. 2d 558 (1945); *People v. Tassiello*, 300 N.Y. 425, 91 N.E. (2d) 872 (1950); *Goddard v. State*, 143 Fla. 28, 196 So. 596 (1940); *Balis v. State*, 137 Neb. 835, 291 N.W. 477 (1940) (in which case there is an excellent pinpoint picture of many of the problems discussed within this comment including prejudicial remarks, personal belief as to the guilt of the accused, and presumption of innocence all of which are discussed before the court decides to reverse a forgery conviction and order a new trial); *McFarland v. United States*, 150 F.2d 593 (1943) ("It is often said and often forgotten that the duty of a prosecuting attorney is not to convict defendants but to try them fairly. Absolute fairness is the counsel of perfection."); *Hall v. Reagan*, 60 F. Supp. 820 (1945) ("... it is as much the duty of the State's Attorney and the Trial Judge to protect the rights of the defendant on trial as it is the duty of the State's Attorney to secure a conviction...").

Taliaferro v. United States, 47 F.2d 699 (1931); *Turk v. United States*, 20 F.2d 129 (1927); *Sunderland v. United States*, 19 F.2d 202 (1927). For the same type of cases concerning state prosecutors see *Wilbanks v. State*, 28 Ala. App. 456, 185 So. 770 (1939) ("The state does not deserve convictions of persons charged with crime unless the jury is convinced beyond a reasonable doubt that defendant is guilty as charged, unaided by impassioned appeals... by the solicitor whose sole duty is to see that state's cases are properly presented to the court.); *Young v. State*, 141 Fla. 529, 195 So. 569 (1940); *People v. Schneider*, 362 Ill. 478, 200 N.E. 321 (1936); *People v. Black*, 367 Ill. 209, 10 N.E. 2d 801 (1937); *People v. Crabb*, 372 Ill. 347, 24 N.E.2d 46 (1940) (where the court said that the state's attorney owes a duty not only to the people of the county and the state, but also to the accused.).

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 produce a wrongful conviction as it is to use every legitimate means to bring about a just one.³ A prosecutor, then, is burdened with a two fold duty which presents him with a difficult problem in conducting his case, for the line that separates the "hard blows" from the "foul" is at best a nebulous one. Because of the difficulty in applying this distinction it is not surprising that prosecutors may be losing cases which should result in conviction.⁴ The reason for this may be that because of a fear of reversals and an overconsciousness of these limitations, they do not take advantage of the possibilities which may be open to them.

Nowhere in the course of the trial is this difficulty more apparent than in the summation to the jury. It is the purpose of this comment to examine those areas of argument which have presented the most perplexing problems to the prosecutor, and to attempt to define, as much as the cases will permit, the line beyond which the prosecutor may not venture. In considering the suggestions which are made as a result of this analysis, the prosecutor should keep in mind that it is of extreme importance to avoid reversals and new trials, and that admonition by the trial judge, although distasteful, is not so serious. Although it may be embarrassing to the prosecutor to be corrected in open court, it does not generally affect the outcome of the trial nor cost the state the added expense of a new trial.

Comments on the Failure of the Accused to Testify

The problem presented by a defendant's refusal to testify is a subject which does not readily lend itself to any general rule which would be of value to a prosecutor in helping him to answer the question as to how far he can go in his summation to the jury with regard to the failure of the accused to testify. The real problem is to distinguish between those comments which will cause reversal, those which will merely be stricken from the record by the trial court, and those which will be allowed. While the prosecuting attorney should be conscious of the possibility of reversal, this possibility should not force him to abandon what he thinks will be a worthwhile and appropriate form of argument. Before making an analysis of the holdings, the basis for what is termed the present "general rule" should be established. As a rule of thumb it might be said that the prosecutor may not comment on the failure of the accused to testify.⁵ However, what we are here interested in is what exceptions there are to this rule, and what the consequences of erroneous remarks will be.

It might be well at the outset to point out that the basis for the rule in state courts is not the United States Constitution.⁶ Even in federal criminal pro-

3. *Berger v. United States*, 295 U.S. 78 (1935).

4. 1 WIGMORE, EVIDENCE §21 (3d ed. 1940) ("There seems to be a constant neglect of the pitiful cause of the injured victim, and the solid claims of law and order. All the sentiment is thrown to weight the scales for the criminal—that is, not for the mere accused who may be presumed innocent, but for the man who upon the record plainly appears to be the offender that the jury have pronounced him to be.").

5. *United States v. Sprengel*, 103 F.2d 876 (1934) ("The law is well settled that a defendant can not be compelled to testify against himself and that a prosecuting attorney may not comment on his failure to so testify."). The holding in this case is applicable to the federal courts. For a complete discussion of the problem in the state courts see *Adamson v. California*, 332 U.S. 46 (1947). Also see, VIII WIGMORE, EVIDENCE §412 (3d ed. 1940) for a summation of the statutory provisions of all the states.

6. *Adamson v. California*, see Note 5 *supra*.

ceedings the defendant's rights are granted by statute rather than by an interpretation of the prohibition against self-incrimination of the fifth amendment alone.⁷ In 1878 the federal courts established for their own use the rule that failure of the accused to testify did not create any presumption against him.⁸ The majority of the states have statutes or common law rulings to the same effect. However, there are jurisdictions which allow considerable latitude in this area, and it therefore becomes important to determine what the rules are which govern the prosecutor's comments on the failure of the accused to testify.

The Kentucky courts have consistently held that a prosecutor's comment on the defendant's failure to testify is ground for reversal; yet in the case of *Brooks v. Commonwealth*,⁹ where the defense attorney attempted to explain the failure of the defendant to testify, and the prosecutor commented on the failure, the court held that such comment was not improper. Other qualifications which the Kentucky courts have made to the general rule, which may allow the district attorney more latitude, appear in cases where the reference to failure of the accused to testify is not direct enough.¹⁰ For example, in *Miller v. Commonwealth*,¹¹ where the prosecutor in his argument to the jury said, "No witness has gone upon that stand to deny the statements made . . . that the defendant had had intercourse with [her]," it was held that this was not a comment direct enough to be considered improper.

The Illinois courts show an interesting distinction which may be a very basic one, depending upon the interpretation given to the two cases involved. *People v. Donahoe*¹² held that the prosecutor may comment upon the fact that the testimony of the prosecution's witnesses is uncontradicted. This was allowed despite the fact that it appeared obvious that the defendant was the only person who could have contradicted such testimony, and that he did not testify. A later Illinois case held that the fact that the prosecutor referred to the failure of the defendant to go to the stand and testify, or to produce any witness to establish his innocence was in and of itself reversible error.¹³ What the court left unsaid was whether it considered the error to be the comment on the failure of the defendant to testify or the comment that the defense had produced no witnesses to prove innocence. In any event, these cases illustrate that there are certainly instances where it does not jeopardize defendant's basic right to make a comment of the sort here considered. Even in those jurisdictions where statements of this type by the prosecuting attorney are considered to be prejudicial many of the courts have held that the error

7. Bruce, *The Right To Comment Upon the Failure of the Defendant to Testify*, 31 MICH. L. REV. 226 (1933); Swope, *Constitutionality of a Comment on Defendant's Failure to Testify*, 37 MICH. L. REV. 777 (1939).

8. *Milton v. United States*, 110 F.2d 556 (1940) contains the Act of March 16, 1878, 20 Stat. 30, 28 U.S.C.A. 632. "In the trial of all indictments, informations, complaints, and other proceeding against persons charged with the commission of crimes, offenses and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or Territory, including the District of Columbia, the person so 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."

9. 281 Ky. 415, 136 S.W.2d 552 (1940).

10. *Arant v. State*, 232 Ala. 275, 167 So. 540 (1936) ("Nobody knows how they were shot but him [defendant], and whether he will ever state it 'or not, I don't know." This was held too indirect to be error.). *People v. Clement*, 285 Ill. 614, 121 N.E. 213 (1918) ("Not one scintilla of evidence to contradict the state's case . . ." This was held to be a not unwarranted reference to failure of the accused to testify).

11. 153 Va. 890, 149 S.E. 459 (1929).

12. 198 Ill. App. 1, aff. 279 Ill. 411, 117 N.E. 105 (1917).

13. *People v. Ayers*, 250 Ill. App. 526 (1928).

can be corrected by an admonition from the trial judge.¹⁴ It is not advocated, of course, that prosecutors knowingly make prejudicial remarks merely because such remarks would result in admonitions of the trial judge rather than a mistrial.

In federal decisions it has been held that even in the most flagrant and open violation of the federal rule against comments on the failure of the accused to testify that the trial judge's instructions corrected the error.¹⁵ State courts have also followed this line of reasoning.¹⁶ The minority rule that remarks by the prosecutor on the failure of the accused to testify, made in violation of statute, are so prejudicial that they can not be cured in any case by instructions to the jury has never been adopted in more than eleven states.¹⁷

The final factor that seems to be pertinent is the effect that the withdrawal of the comment by the prosecutor will have. It has been held that if he withdraws his statement there will be no sufficient ground for reversal of the case.¹⁸ This result has been held to be further strengthened where the withdrawal has been supplemented by instructions from the court that such statements are not to be considered by the jury.¹⁹

From an examination of these cases it may be seen that no universal rule can be proposed as to what the prosecuting attorney may say in his summation to the jury concerning the failure of the accused to testify. Some states will allow him to make the comment where the defense attorney had mentioned it previously. Others will allow it where the reference is "indirect." Even where it is held error to make a comment many courts say that it is merely error; others adopt the view that a withdrawal of the remark by the prosecutor, coupled with instructions, or either one alone, will suffice in correcting it. Still others say that the judge's instructions alone will correct it.

Expression of Opinion as to the Guilt of the Accused

A prosecutor may nullify all of his efforts in obtaining a conviction by an improper comment on the guilt of the defendant. Here again there may be formulated a rule of thumb which, however, upon full investigation, is found not to be universally applicable. The rule, as generally stated, is that the prosecuting attorney may not express his personal opinion or belief as to the guilt of the accused in such a way as to permit the jury to think that his opinion is based on information not placed in evidence.²⁰ However, it is important to avoid taking this statement too literally. To examine its practical

14. *Morton v. State*, 207 Ark. 704, 182 S.W.2d 675 (1944); *Cahill v. People*, 111 Colo. 173, 138 P.2d 936 (1943).

15. *United States v. Di Carlo*, 64 F.2d 15 (1933) (where the prosecutor said, "The defendant has not taken the stand," the court said that the instruction that, "the fact that he did or did not take the stand is not to create any presumption against him," corrected the error.)

16. *State v. McKeever*, 339 Mo. 1066, 101 S.W.2d 22 (1936) (this case gives a good summation of many of the problems encompassed in this comment and is recommended as worthy of a careful reading.)

17. See Note, 68 A.L.R. 1109 (1929); 84 A.L.R. 786 (1933). The eleven states are Florida, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Mississippi, Oklahoma, South Dakota and Texas. Indiana changed to the majority rule in 1900. See *Blum v. State*, 154 Ind. 343, 56 N.E. 771 (1900).

18. *State v. England*, 321 Mo. 633, 12 S.W.2d 37 (1928); *State v. Baker*, 246 Mo. 357, 376, 152 S.W. 46, 52 (1923) (where the court said, "No case has yet held that remarks of counsel in argument which were withdrawn by counsel constituted reversible error.")

19. *Green v. United States*, 266 Fed. 777 (1921).

20. 23 C.J.S. §1104, p. 578.

significance we turn again to the really important question, 'Where will a violation of this rule mean a reversal, and where will it at worst be cited as error and stricken from the record?'

The case of *People v. Brown*²¹ presents an almost perfect example of a completely misdirected remark by the prosecuting attorney. There the prosecutor in his closing argument to the jury, said, "there must have been something in that testimony that did not convey innocence to that coroner's jury, because they didn't give him a clear bill of health." This remark was found to be cause for reversal. It is apparent that the impression conveyed to the jury by such a comment was that there was some damaging fact that the state was aware of but for some unknown reason had not been able to introduce against the defendant. Or that some other jury, about which this jury knows nothing, has already made a decision as to this issue. Reversals have also resulted from remarks such as, "I know defendant was guilty, or he would not have fled," where there was no evidence of flight,²² and if "defendant were not guilty he would not be on trial. . . . I know him to be guilty. . . . I am in possession of facts that convince me of his guilt."²³

Beyond this absolute area, however, the law is not clear. In a recent Illinois case,²⁴ the court saw a significant difference between the prosecuting attorney saying to the jury that he believed the defendant to be guilty beyond a shadow of a doubt, and saying after a summation of facts, that he believed *from the evidence* that the defendant was guilty beyond reasonable doubt. The prosecutor in that case used the former of the alternative statements and an exception by the defense attorney was sustained.

A liberal viewpoint on the expression by the prosecutor of his belief in the guilt of the accused is reflected by a decision rendered by the Supreme Court of Washington which held that it was permissible to make a statement as to a belief in the guilt of the accused without directly tying it up with the evidence, provided that the evidence would support such a view.²⁵ The court supported its opinion by reference to the ruling by some courts that a mere expression of opinion as to guilt is not prejudicial in any event. In a great number of cases it has been held that the prosecuting attorney's mere expression, in the course of his argument, of his personal belief that the evidence shows the defendant to be guilty, without anything to indicate that his opinion was not based on the evidence, is not such error as requires of itself a new trial, or reversal of his conviction, if actual prejudice is not shown.²⁶

The foregoing cases illustrate that there is no hard and fast line which the prosecutor may use as a guide. Again he must combine a knowledge of the law with a good deal of imagination in order to take full advantage of the facts of his case. A study of these cases, along with the countless others dealing with this or related problems, reveals that trial courts are interested in substantial justice, but that this interest does not force them to repel all

21. 81 Cal. App. 226, 253 Pac. 735 (1927).

22. *James v. State*, 123 Ga. 129, 51 S.E. 312 (1905).

23. *People v. King*, 276 Ill. 138, 114 N.E. 601 (1916); *State v. Newburn*, 178 Ore. 238, 116 P.2d 470 (1946).

24. *People v. Lawson*, 331 Ill. 380, 163 N.E. 149 (1928).

25. *State v. Buttry*, 199 Wash. 228, 90 P.2d 1026 (1939) (which holds that, "If the evidence indicates that the defendant is a murderer or a killer it is not prejudicial to designate him as such . . . whether he was a murderer and an assassin was the very question that was on trial, and we do not consider it improper for the district attorney, in the course of his argument, to make a statement to the jury which amounted to nothing more or less than an expression of his opinion that defendant was guilty.")

26. See Note 75 A.L.R. 53 (1931).

advances by prosecutors into the area of reasonable supposition. What the general rule might label a "foul" blow may, through a thoughtful analysis, become a "hard" one.

Appeals to Individual Prejudice

When a jury of twelve people is selected, there is often a certain element in that group which can be swayed by an appeal to their prejudices. It is with respect to this possibility that the courts have been particularly careful to keep the prosecuting attorney within proper bounds, and it is here that the rules are the most stringent and unyielding.

There have been a multitude of cases where the prosecutor has appealed to prejudice against people of the Jewish faith.²⁷ Statements such as "I did not make them Jews. I am not responsible for the fact that they are Jews" have been held to be highly prejudicial and have led to a reversal of a conviction.²⁸ In one case the trial court itself said, "If, indeed, the defendant be a Jew it is no disgrace and should not be referred to at all," for which reason the appellate court reversed.²⁹

The same type of problem is met in the prosecution of Negroes. Although appeals to prejudice against Negroes have been rare in northern courts,³⁰ there have been a great many such cases in the southern states.³¹ It seems that the courts have reversed these cases in order to insure a fair trial without consideration of any other factors.³² Other races and nationalities have been accorded the same protection.³³

Outside of this more obvious type of appeal to prejudice, however, there are more subtle appeals, as for example, making reference to a political affiliation of the defendant. Associating the defendant with the International Workers of the World has been held to be sufficient grounds for reversal where the statement was based in part on evidence which the trial court had

27. See Note 78 A.L.R. 1438 (1932). A very extensive account of all prejudice cases, both civil and criminal. This section of the comment attempts to draw out the particular cases where the prosecutor is found to have appealed to prejudice in his summation.

28. *People v. Simon*, 80 Cal. App. 675, 252 Pac. 758 (1927) (where the court says, "If, however, where it fairly appears, as we think it does in the case at bar, all the record, including the evidence considered, that the remarks of the district attorney were a factor in influencing the jury in arriving at their verdict of guilty, such result is a miscarriage of justice, and the judgment and order should be reversed. It might be added at this point that the remarks of the district attorney were in our opinion, of such character that any attempted correction thereof by the trial court might well have had the effect of further embedding in the minds of the jury prejudice against the Jewish people when they are accused of burning insured property.")

29. *People v. Newman*, 113 Cal. App. 679, 298 Pac. 1044 (1931).

30. *People v. Brigham*, 234 N.Y. Supp. 567, 226 App. Div. 104 (1929) (where the case involves the maintenance of a disorderly house by a Negro defendant).

31. *Jones v. State*, 21 Ala. App. 234, 109 So. 189 (1926) (where argument by the state's counsel in a criminal case, stressing the fact that defendant was a Negro, was a sufficient ground for reversal). To the same effect see *Green v. State*, 22 Ala. App. 56, 112 So. 98 (1927); *Harris v. State*, 22 Ala. App. 121, 113 So. 318 (1927). (The court in the *Harris* case said, "Justice is blind, says the law, and in her judgment must see no man, color, race or condition.") *Walton v. State*, 147 Miss. 17, 112 So. 189 (1926) (the district attorney said that the jury should send "negro defendant out of the community for the protection of the white boys").

32. *Morehead v. State*, 12 Okl. Crim. Rep. 62, 151 Pac. 1183 (1915); *Taylor v. State*, 50 Tex. Crim. Rep. 560, 100 S.W. 393 (1907).

33. *State v. Ulrich*, 110 Mo. 350, 19 S.W. 656 (1892) (where the district attorney referred to the defendant as a "sugar loafed, squirrel-headed Dutchman."); *Fontenello v. United States*, 19 F.2d 921 (1927) (where the prosecutor said that the majority of persons running illegal stills were Italians).

erroneously failed to strike out.³⁴ It has also been held reversible error for the prosecutor to tell the jury that the type of prosecution in which he is engaged at the moment may cost him votes in the next election.³⁵

It may be interesting to note appeals made to prejudice based upon the wealth or poverty of the defendant. In *Newton v. Commonwealth*,³⁶ for example, the prosecutor stated that the jury had convicted "every trifling scoundrel and poor country devil," and that if they did not convict the defendant, who was accused of having illegal possession of liquor, because he happened to be wealthy enough to own a three story brick building, it would be a crime. This was held to be reversible error.

Other areas in which prejudicial appeal will result in a reversal are where unfair reference is made to non-union workers,³⁷ or to the use of intoxicating liquors.³⁸

It may be noted from a careful examination of these cases that this is a particularly dangerous field for the prosecuting attorney. It is also one in which the attitude of the courts seems thoroughly justified. The prosecutor will do well, therefore, to avoid any reference to individual prejudicial matters. It should be quite simple for any prosecutor to avoid such mistakes since he should have a very good idea in his own mind whether his contemplated remark is likely to be found prejudicial.

Use of Abusive Language

In his summation to the jury the prosecutor very often attempts to characterize the defendant in an unfavorable light. Because of this desire, it is not surprising that many times he will go astray. For example, in a rape prosecution the prosecutor called the defendants "yellow rats."³⁹ This was objected to by the defense counsel, but the case resulted in convictions of both defendants. On appeal the court held that it was improper to make such a statement, but that it was not enough for a reversal in view of the weight of the evidence. Similarly it has been held improper to refer to the defendant as a "hoodlum."⁴⁰ One of the most significant cases in the field, however, is the leading case of *Commonwealth v. Capella*.⁴¹ The defendant in this case was found guilty of voluntary manslaughter despite his plea of self-defense. He appealed the decision and his third assignment of error was based upon the court's overruling his objection to the prosecutor's closing argument. The prosecutor, in that summation pointed to defendant and called him a "cold blooded killer." The court said that it was no part

34. *People v. Rosa*, 97 Cal. App. 501, 275 Pac. 961 (1929) (where a statement by the district attorney that the defendant's mother had had nothing to do with him since the I.W.W. got hold of him was held to constitute a sufficient ground for the reversal of a conviction of arson).

35. *People v. Brigham*, 226 App. Div. 104, 234 N.Y. Supp. 567 (1929).

36. 195 Ky. 764, 243 S.W. 1031 (1922).

37. *State v. McPherson*, 114 Minn. 498, 113 N.W. 645 (1911) (where the district attorney said that the defendant was a "scab who bought a revolver to shoot union sailors with" and the court felt that this was improper but not alone enough to cause a reversal).

38. *Boyd v. State*, 108 Tex. Crim. Rep. 221, 299 S.W. 645 (1927) (where the prosecutor said that the state must "keep big old town boys like this defendant from going around the country raping little country girls.")

39. *People v. Burnette*, 39 Cal. App. 2d 215, 102 P.2d 799 (1940).

40. *State v. Palmer*, 206 Minn. 185, 288 N.W. 160, (1939) (where the court says of the prejudicial remark "it is not an argument"). See also 5 Dunnel, Minn. Dig. (2d ed. & Supps.) paragraph 7102 (see note 69 thereunder); *State v. Clark*, 114 Minn. 342, 131 N.W. 369 (1911); *State v. Peterson*, 153 Minn. 310, 190 N.W. 345 (1922).

41. 322 Pa. 200, 185 A. 203 (1936).

of the prosecutor's duty or right to stigmatize the defendant. The court reasoned that the prosecutor had a right to argue that the evidence proves the defendant guilty as charged in the indictment, but to characterize him as a "cold blooded killer" is something quite different. One of the interesting parts of the opinion appears in a footnote to the principal case:

"All prosecuting attorneys would do well to study as a model the justly renowned address of Daniel Webster in the case of *Commonwealth of Massachusetts v. John F. Knapp* for the murder of Capt. Joseph White. No more powerful and convincing address in a criminal trial is to be found in any language, and yet nowhere during the course of the closing argument for the commonwealth did Webster apply any epithets to the defendant or express any opinion as to his guilt or innocence. At the outset of his address he made it clear that as the commonwealth's attorney he would not attempt to hurry the jury against the law or beyond the evidence. After a vivid and moving word picture of the killing of the victim as he slept, 'the beams of the moon resting on the gray locks of his aged temple,' Webster made a clear and complete analysis of the testimony and showed how it logically pointed to the guilt of the accused. In almost his final paragraph he said, 'Toward him (i.e. the defendant), as an individual, the law inculcates no hostility, but toward him if proved to be a murderer, the oaths you have taken and public justice demand you to do your duty.' It should be noted that Webster did not characterize the defendant as a murderer or as a 'cold blooded killer.' Instead of that, he impressed upon the members of the jury that they should do their duty 'if' the defendant on trial 'proved to be the murderer.'"

In light of this excellent summation it seems unnecessary to go into a more complete analysis of the cases. It would be well, however, to point out the fact that courts will allow a prosecutor to reflect unfavorably on the accused or to denounce his wickedness if his remarks are based upon competent evidence.⁴² The question as to whether or not the evidence supports such a comment is often a difficult one. However, the prosecuting attorney should realize that there are not a large number of cases where convictions are reversed because of a mistake of this nature. It may be worthwhile for the prosecutor to adjust his remarks along these lines carefully and yet affirmatively, so that he will not only be giving the defendant a fair trial, but also will be presenting the case for the state in the most convincing manner possible.

Retaliatory Statements and Remarks

There are instances in a criminal trial where defense counsel may open the way for certain comments by the prosecuting attorney which may not otherwise be tolerated by the trial court.⁴³ For example in *Baker v. United States*.⁴⁴ defense counsel had attacked the integrity of one of the witnesses for the prosecution, whereupon the prosecutor said, of that witness: "He at least had manhood enough and respectability enough to leave Baker when he found out what sort of a racket he had. And then, another thing that strikes me as strikingly strange, is that there is not one line of testimony to

42. *People v. Gleitsmann*, 384 Ill. 303, 51 N.E.2d 261 (1943); *People v. Moe*, 322 Ill. App. 696, 54 N.E.2d 638 (1944).

43. *State v. Lande*, 345 Mo. 185, 132 S.W.2d 501 (1939) (where the record discloses that the statement objected to was in direct reply to arguments advanced on behalf of appellants, and the court has ruled legitimate argument in reply is not improper).

44. 115 F.2d 533 (1940).

contradict what Bunker the witness said. If Bunker is Bunk, why didn't they prove it? But they were silent. . . ." The court allowed this comment by the prosecutor. They reasoned that if it appears that the counsel for the defendant provoked the remarks of the prosecuting attorney by assailing the veracity and credibility of the witness, the prosecutor may reply to the argument and in so doing make statements which would otherwise be improper.

State courts have used the same type of reasoning where the retaliatory statement related to quite different matters.⁴⁵ Appellant complained of certain remarks of the prosecutor in his closing argument to the jury, in which the prosecutor referred to the defendant's character, which had not been put in issue. The court held that although the law is clear that such a comment by the prosecutor is improper, it was apparent, upon the facts of the case, that the alleged prejudicial comment was made in reply to an argument that had been made by the defendant's counsel. The courts have begun to hold generally that "where remarks are provoked and invited by opposing counsel it does not constitute error."⁴⁶

In these cases it seems that the trial court will allow a great deal of latitude if it is felt that the defense attorney himself brought about the situation. The prosecutor may deduce from this that he would do well to watch carefully for certain mistakes that the defense counsel may make, and, instead of objecting if that course is open to him, attempt to take advantage of that mistake in the manner in which it has been done in the foregoing cases. On the other hand it may be very difficult for the prosecutor to know whether or not he will gain a new freedom because of the remark of defense counsel. If he should be wrong, he will have waived the privilege of objecting to what the defense attorney has said without gaining anything by his strategy.

Conclusion

How can a prosecuting attorney make his summation a more effective one? First, he must prepare his summation after carefully studying the position of his own state court on what he feels may be a controversial matter. Along with this he should whenever possible consider what courts in other states allow. The protection required to be given the accused by the prosecution should be based upon what the courts and statutes of the state encompass and need not be amplified by further safeguards which the prosecutor personally thinks should be given. It is felt here that the making of new law in the way of restriction on the prosecution is not a part of the prosecutor's quasi-judicial function.

Secondly, the prosecutor must develop his strategy not with a mind to completely avoiding the use of effective arguments which may be ruled prejudicial, but with an attempt to get the maximum value from the material which he has in his possession. This, of course, must be done within the scope of good ethical standards.

Finally, the prosecutor must realize not only that reversals are expensive to the community and himself in time and money, but that a miscarriage of justice caused by an ineffective prosecution may cost society considerably more.

45. *Moyers v. State*, 135 Tex. Crim. Rep. 387, 120 S.W.2d 597 (1938) (where the prosecutor was allowed to tell the jury in his closing argument that he had, on several occasions, told juries that in his opinion the accused on trial was innocent and should be acquitted; because the argument complained of was made in reply to argument made by defendant's counsel).

46. *State v. Lindsay*, 192 Wash. 356, 73 P.2d 391 (1937); *Oliver v. Taylor*, 119 Wash. 190, 205 Pac. 746 (1922); *State v. Banton*, 150 Wash. 59, 173 Pac. 723 (1918).