1973

Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument

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WALKING A TIGHTROPE: A SURVEY OF LIMITATIONS ON THE
PROSECUTOR'S CLOSING ARGUMENT

HENRY BLAINE VESS

INTRODUCTION

The public prosecutor is responsible for the enforcement of the laws against those who disobey them. Unlike his opposing counsel, whose primary duty is to his client, the prosecutor represents all of the people within his jurisdiction. This creates in the prosecutor's office a position unique to that basic part of our judicial system, the adversary process; for it means that the accused can expect, and indeed must demand, the prosecutor to represent his interests insofar as he, too, is a member of the prosecutor's broad constituency.1

As a result, the prosecutor is forced to operate with one hand on the throttle and the other hand poised firmly on the brake. His primary duty is to earnestly and vigorously present the govern-

ment's case, using every legitimate means to bring about a conviction.2 It is not sufficient to

convict, however; for if justice has not been done, his “clients” have been poorly represented. Therefore, the prosecutor's duty is to convict only the guilty and, moreover, to do so in a manner consistent with recognized principles of justice.3

The net effect of this formulation of the prosecutor's obligations is the creation of a special tension in the government’s presentation of its criminal case. This is most clearly manifested in the last stage of the trial, the closing arguments.4 The jury, reflecting its confidence in the office of the prosecutor and its respect for the individual prosecutor in particular, properly regards him as unprejudiced and impartial.5 Thus he must refrain from doing anything intentionally or unintentionally which might improperly influence the jury and deny the defendant a fair trial.6

The purpose of prosecutorial closing argument,
not unlike that of the defense in this regard, is to enlighten the jury and to help the jurors remember and interpret the evidence. Its precise value is difficult to determine, although courts long ago recognized defense closing argument as a constitutional right, "as much a part of the trial as the hearing of evidence." Nevertheless, the value of closing argument to both prosecution and defense can be assessed when considered with reference to the other stages of the trial. While not many cases are won or lost through argument alone, it can be a decisive factor, particularly if the case is a close one. Since counsel is rarely certain which case is close it is unwise and impractical to overlook this last opportunity to plead a case.

The restrictions on closing argument do not prevent vigorous presentation of the prosecutor's case to the jury. The prosecutor may, of course, discuss the evidence, pointing out discrepancies and conflicts in the testimony, and argue that the evidence in the record supports and justifies a conviction. He may also dwell on the evil results of the crime, urge a fearless administration of the law, and comment on the conduct of the accused.

Furthermore, summation style, content, and presentation vary with each advocate and are not prohibitively limited. There is no uniform legal standard against which remarks can be measured. It is recognized that a successful argument depends upon a skillful discussion of facts and law, and, especially in a criminal case, the argument, "to be palatable, may require the lubrication not only of appealing organization and presentation, but of emotion as well." Thus, oratory and picturesque language and illustration are each within the boundaries of permissible argument.

But great latitude and freedom of expression can create problems, thereby emphasizing the precarious position of the prosecutor:

When a prosecutor...oversteps the bounds of strict legal propriety, the defense is quick to use the incident as reason for an appeal to a higher court. But if the defense lawyer does the same thing, to secure acquittal, there is no appeal. Once cleared, no defendant may be retried, no matter how flagrant his attorney's actions. So, many defense counsel do everything short of punishable contempt to provoke a prosecutor into a remark...which an appellate court might call erroneous influence on a jury.

While misconduct during summation does not always require the reversal of conviction, it is


15 Smith v. State, 282 Ala. 268, 210 So. 2d 826 (1968).

16 Waltz, supra note 9, at 310. An excellent discussion of the closing arguments in the Ruby trial appears at pages 310–36.


well established that improper argument alone may be sufficient grounds for reversal. But according fair treatment to the defendant does not require advocacy compromise. A summation may be highly damaging to the accused and still be within the bounds of propriety. Vigorousness and fairness are complementary qualities in an effective presentation, at least where the goal to be achieved is what it should be, a just conviction of the guilty.

This article will focus on the limitations which the courts, in an effort to enforce adherence to the duties outlined above, have imposed on prosecutorial closing argument in the less academic atmosphere of the criminal trial. The basic purpose of the article is to present, in abbreviated form, the law in this area as reflected in relatively recent court decisions. While no conscious effort was made to exclude analysis and critique, these were at most only secondarily important.

Henceforth the terms "proper" and "improper" are used to characterize the general judicial attitude toward a particular prosecutorial comment. Cases noted where the conviction was reversed solely on the basis of closing argument are marked with an asterisk (*).

THE JUDICIAL ROLE IN REGULATING CLOSING ARGUMENT

The trial judge is given, and must exercise, considerable discretion in evaluating the propriety of argument and in curing any alleged defects. The trial court's discretionary control also covers more specific aspects of the summation. For example, the time limits were strictly enforced.


United States v. Prentiss, 446 F.2d 923 (5th Cir. 1971) (not an abuse of discretion to refuse counsel permission to argue on the same day that court gave its oral charge).

Additionally, the trial court may decide whether the summation shall be split among members of the prosecution team, and also whether the defendant who is represented by counsel may himself participate in the summation.

LIMITATIONS UPON PROSECUTORIAL CLOSING ARGUMENT

THE RELATIONSHIP OF OPENING ARGUMENT TO REBUTTAL ARGUMENT

The prosecution usually makes the first closing argument and is generally granted rebuttal time in which to respond to the defense closing argument. All essential points must be fairly stated in the opening argument so that the defense has an adequate opportunity to respond. During the rebuttal the prosecutor may in turn only respond to the defense summation. No new line of argument may be introduced.

424 P.2d 704, 57 Cal. Rptr. 152 (1967) (time limit not error where not enforced); Robinson v. State, 415 S.W.2d 180 (Tex. Crim. App. 1967) (even if prosecutor exceeded time limit, no error where he concluded three sentences, or 123 words, after objection).

27 State v. Davis, 462 S.W.2d 798 (Mo. 1971) (letting another prosecutor make rebuttal argument was within the discretion of the trial court).

28 Thompson v. State, 194 So. 2d 649 (Fla. App. 1967) (where defense counsel made opening argument, it was proper to refuse defendant permission to make rebuttal argument); People v. Johnson, 45 Ill. 2d 38, 257 N.E.2d 3 (1970) (where court carefully determined that defendant wished to make his own closing argument, it was not an abuse of discretion to refuse defense counsel permission to argue thereafter).

29 This is because the government has the heavy burden of overcoming the presumption of innocence.

30 In opening argument prosecutor did not mention punishment, but in final argument asked for maximum sentence after defense did not mention punishment; held, there was prejudicial error even though the defendant was only given a three-year sentence).


original argument by the prosecution rebuttal is also not permitted since this would, in effect, constitute a new line of argument to which the defense would have no opportunity to reply. If defense counsel waives its summation the trial court may in its discretion determine whether or not the prosecution may make any further argument.

COMMENTING ON THE LAW

Since the purpose of argument is to enlighten the jury, the prosecutor may comment on the applicable principles of law during summation, emphasizing the theory of the government’s case and the criminal law and perhaps the purposes of the particular statutes involved. However, it is improper for the prosecutor to misstate the law.

32 State v. Fair, 467 S.W.2d 938 (Mo. 1971) (prosecutor in opening argument said he would not ask for the death penalty, than in closing argument told the jury it could inflict the death penalty after the defense did not argue punishment); State v. Wadlow, 450 S.W.2d 200 (Mo. 1970) (error to permit argument regarding punishment in rebuttal where not raised by defense). See Hayes v. State, 470 S.W.2d 950 (Tenn. Crim. App. 1971) (court in its discretion may allow defense attorney to respond to matters improperly discussed by prosecutor in rebuttal).


35 United States v. Boleh, 445 F.2d 34 (7th Cir. 1971) (misstating burden of proof on insanity); United States v. Gamber, 469 F.2d 383 (3rd Cir. 1969) (arguing defendant should be found guilty without regard to issue of insanity)*; United States v. Makal, 103 Ariz. 503, 455 P.2d 450 (1969) (arguing defendant should be found guilty without regard to issue of insanity)*; State v. Sorensen, 104 Ariz. 981, 455 P.2d 389 (1969) (misstating results of verdict of not guilty by reason of insanity)*; United States v. Moriarty, 194 Ariz. 475, 455 P.2d 450 (1969) (misstating law regarding involuntariness of confession); United States v. Murphy, 374 F.2d 651 (2d Cir. 1967) (arguing that grants of immunity should be taken as evidence that a crime was committed); Ewalt v. United States, 359 F.2d 534 (9th Cir. 1966) (misstating verdict of not guilty by reason of insanity)*; DeFranze v. State, 46 Ala. App. 283, 241 So. 2d 125 (1970) (misstating rules of evidence); State v. Malak, 194 Ariz. 475, 455 P.2d 450 (1969) (arguing defendant should be found guilty without regard to issue of insanity)*; State v. Cortez, 101 Ariz. 214, 418 P.2d 370 (1966) (arguing that judge would have directed verdict were the evidence insufficient to convict); People v. Modesto, 66 Cal. 2d 693, 427 P.2d 788, 59 Cal. Rptr. 124 (1967), cert. denied, 389 U.S. 1009 (1967) (misstating law regarding insanity); People v. Asta, 251 Cal. App. 2d 64, 59 Cal. Rptr. 206 (1967) (suggesting that in admitting evidence had weighed it for the jury); Washam v. State, 235 A.2d 279 (Del. 1967) (arguing that judge would have directed verdict were the evidence insuffi-
at least when done intentionally, or to correctly state irrelevant law, since this only confuses the jury and prejudices the accused. In any event, the prosecutor must not instruct the jury on the law, since this is the exclusive task of the court.

While all jurisdictions permit comment upon the law within these bounds, there is some conflict concerning the propriety of actually reading to the jury from cases, texts, or statutes. Jurisdictions which prohibit reading assert that this rule establishes a standard of propriety separating the impartial role of the judge from the adversarial role of counsel, thus insuring that the role of the judge

in instructing the jury is not usurped by counsel and the impartiality of the forum not destroyed. Nevertheless, it may be permissible to read from the instructions when they are given prior to the arguments.

Jurisdictions which hold that it is within the trial court's discretion to permit the reading of the law from approved texts or reported cases from the jurisdiction's appellate courts, which are usually the courts of last resort, do so on the premise that counsel's alternative statements of correct law may be helpful to the jury rather than confusing. When reading is permitted the court must be careful to insure that: (1) any reading and discussion of cases are kept within reasonable limits, both as to the number read and the time consumed; (2) only cases on point from the jurisdiction or statements of law in accord with such are read; and (3) the purpose of the reading is solely to clarify the law in the case and not to prejudice the jury against the accused.

When counsel desires to read from cases to the jury, or when there is a question regarding the accuracy or relevancy of a proposed statement of law, the court should be given an opportunity in advance to designate the portions which may be read and the principles which may be discussed.


See State v. Kearney, 75 Wash. 2d 168, 449 P.2d 400 (1969) (should not reverse solely because law read to jury from source other than instructions).


People v. Lloyd, 304 Ill. 23, 136 N.E. 505 (1922) (improper to read from a federal lower court decision in state prosecution).

Higgenbotham v. State, 124 Ga. App. 489, 184 S.E.2d 231 (1971) (portion sought to be read not germane to issues); McKeever v. State, 118 Ga. App. 386, 163 S.E.2d 919 (1968) (same); People v. Andree, 305 Ill. 530, 137 N.E. 496 (1923) (proper to refuse prosecutor permission to read from opinion in prior prosecution of defendant for murder, though the case arose from the same incident, since the questions of law were distinct); People v. Rees, 268 Ill. 585, 109 N.E. 473 (1915) (error to read from opinion which held evidence sufficient to convict one jointly indicted with defendant).
If counsel's view of the law differs from the court's view, only the latter should be presented.

COMMENTING ON THE EVIDENCE

A trial is a patchwork of bits and pieces of evidence. A jury may not appreciate the significance of many of these scraps until they have been pieced together by an articulate advocate.45

The prosecution and defense counsel are likely to take very different, possibly diametrically opposed, approaches to piecing together the evidence in closing argument. Hence, as noted previously, the court must confer great latitude in the manner, style, and content of summation.47

The general rule regarding comment on the evidence is that such comment is proper if it is either proved by direct evidence or is a fair and reasonable inference from the facts and circumstances proved and has bearing on an issue.48 The prosecutor is permitted to argue from his own understanding and interpretation of the evidence49 and

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Conversely it follows from the general rule that the prosecutor's remarks are improper if not based directly on the evidence, 48 if not reasonably inferred from the evidence, 49 or if they relate to

389 (1969) (stating that prosecuting witness could be considered a passive homosexual as a result of defendant's taking indecent liberties with him where unsupported by the evidence); People v. Opara, 85 Ill. App. 2d 35, 228 N.E.2d 291 (1967) (remarking that it would be a long time before rape victim recovered from shock to her nervous system was improper); State v. Fleury, 213 Kan. 888, 457 P.2d 44 (1969) (argument that rape victim suffered mental impairment where no evidence; two judges in dissent thought the argument was prejudicial error).

48 United States v. Hoskins, 446 F.2d 564 (9th Cir. 1971) (reference to conversation prosecutor had with witness before trial improper, but not reversible error where the witness at trial testified to everything prosecutor had said); United States v. Small, 443 F.2d 497 (5th Cir. 1971) (asserting defendant had been a fugitive from justice longer than he was wanted where not supported by evidence)*; Hanley v. United States, 416 F.2d 1160 (5th Cir. 1969) (going outside record to describe person as defendant's brother-in-law); Horner v. Florida, 312 F. Supp. 1292 (M.D. Fla. 1967) (facts not in record and unsupported charges)*; State v. Williams, 107 Ariz. 262, 485 P.2d 832 (1971) (reference to increase in crime rate in city where not in evidence); Wooten v. State, 228 Ga. 106, 160 S.E.2d 403 (1968) (should not introduce any new facts into record in argument); People v. Roman, 36 Ill. 2d 315, 223 N.E.2d 121 (1967) (unfounded assertions that defendant started his girlfriend on heroin and made a trip to get drugs); People v. Griffin, 29 N.Y.2d 91, 272 N.E.2d 477, 323 N.Y.S.2d 964 (1971) (where identification in issue, argument that defendant had recently inflicted wound above his eye to create a distinguishing facial mark, where not sustained by evidence and where jury obviously considered it, requesting a magnifying glass to examine a photograph of defendant of which was wanted where not supported by evidence)*; People v. O'Farrell, 349 Ill. 129, 181 N.E. 703 (1932) (assertion that it was natural to presume that piano boxes transported by defendant contained gasoline where no evidence); State v. Iverson, 251 La. 425, 204 So. 2d 772 (1967) (had sheriff not taken statement on night of offense, defendant would have claimed at trial that victim was armed); State v. Jones, 277 Minn. 174, 152 N.W.2d 67 (1967) (where evidence showed that co-defendant's accomplice shot with right hand, and defendant was left-handed, improper to argue "It may be a little awkward to handle a rifle or six-shooter with either hand, but we isn't truth with a hand gun..." We know this from television by the old-timers when they were in spots like this."); State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App. 1971) (argument that accused contracted hepatitis from injecting himself with heroin was improper where prosecutor was not permitted to elicit testimony that hepatitis could be so contracted and the crime charged

matters outside the issues in the case. 46 Such comments are speculative and conjecture which may confuse and mislead the jury. 47 Furthermore, argument going beyond the evidence tends to make the prosecutor a witness. His unsworn testimony and personal beliefs, although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence. 48

For these same reasons 49 it is improper to refer was selling narcotics); People v. Schatz, 37 App. Div. 2d 584, 322 N.Y.S.2d 802 (1971) (suggesting defendants had motive for burning their own building and that it was over-insured where the only evidence was to the contrary)*. 50

48 United States v. Craft, 423 F.2d 829 (9th Cir. 1970) (stating defendant refused induction after trip to induction center where charge was failing to report for induction). United States v. United States, 358 F.2d 442 (10th Cir. 1966) (even if jury believed defendant's conduct would amount to extortion, where extortion was not charged); Carr v. State, 44 Ala. App. 40, 202 So. 2d 59, cert. denied, 390 U.S. 969 (1967) (reference to "Thou Shalt Not Kill" in robbery prosecution where victim died of unrelated causes); People v. Washington, 71 Cal. 2d 1061, 458 P.2d 479, 80 Cal. Rptr. 567 (1969) (that defendant was seeking a sexual thrill when he searched a female robbery victim during the commission of a prior crime)*; People v. McMillan, 130 Ill. App. 2d 621, 264 N.E.2d 554 (1970) (referring to defendant as "turning on teeny hoppers" where charge was possession); Killie v. State, 14 Md. App. 465, 287 A.2d 310 (1972) (introducing homosexuality during argument in drug possession prosecution)*; People v. Plautz, 28 Mich. App. 621, 184 N.W.2d 761 (1970) (asserting defendant had stolen property where charge was receiving and concealing, where otherwise there was no way to infer possession in county in which case tried); State v. Polsky, 82 N.M. 393, 482 P.2d 257, (Ct. App. 1971); State v. Young, 7 Ohio App. 2d 194, 220 N.E.2d 146 (1966) (repeatedly arguing that defendant was guilty of aiding and abetting murder where charge was harboring a felon)*; Barron v. State, 479 P.2d 614 (Okla. Crim. App. 1971) (where charge was drunk driving, argument that defendant had run over and killed boy, which did not occur)*; Dishman v. State, 460 S.W.2d 855 (Tenn. App. 1970) (arguing sale of narcotics where crime charged was possession); Johnson v. State, 467 S.W.2d 247 (Tex. Crim. App. 1971) (use of "riot" in prosecution for injuring property belonging to another); Kemp v. State, 464 S.W.2d 112 (Tex. Crim. App. 1971) (referring to seduction of murder victim's sister where no evidence of such)*.


64 State ex rel. Black v. Tahash, 280 Minn. 155, 158 N.W.2d 504 (1968) (what is inadmissible directly
to specific evidence which was never introduced or to the existence of other evidence not in the record. It is also improper to refer to evidence which was excluded by the court, except in certain instances where there is testimony regarding the excluded or unintroduced evidence. It may not be improper to refer to evidence which was improperly admitted, or to evidence which was excluded by an agreement between counsel. When there is more than one defendant, and evidence is admitted but restricted to use against less than all of the co-defendants, the prosecutor’s remarks must conform to the restrictions. In conformity to the general rule and the enumerations of the co-defendants, the prosecutor’s remarks must conform to the restrictions.

Limitations on Closing Argument

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associated policies, it is naturally improper to misstate the evidence23 or contradict the record.24 These may not be grounds for reversal, however, where the mistake is slight or inadvertent.25

There is one recognized exception to the rule that remarks not based in the evidence are improper; such remarks are proper if they concern matters of general knowledge or experience.26 Usually such comments are made by the prosecutor for illustrative purposes or dramatic effect and refer to historical facts, public personalities, principles of divine law, biblical teachings, or prominent current events in the community or the nation.27 In addition, the statements may also be

lecion of evidence, where there was no such evidence, it was not error because prosecution correctly stated that jury's recollection was to control, court gave the correct instruction, and defense counsel took advantage of an opportunity to reply to the alleged misstatement; People v. Beivelman, 70 Cal. 2d 60, 447 P.2d 913, 73 Cal. Rptr. 521 (1968) (unintentional misstatement); Fernandez v. People, 490 P.2d 690 (Colo. 1971) (misstatements not error where done honestly and unintentionally and three witnesses correctly stated facts); People v. Weaver, 18 Ill. 2d 108, 163 N.E.2d 483 (1960) (misstatements not a material factor in conviction); People v. Pecora, 107 Ill. App. 2d 253, 246 N.E.2d 865, cert. denied, 397 U.S. 928 (1969) (misstate); People v. Ohlrich, 444 S.W.2d 272 (Ky. Crim. App. 1969) (slightly inaccurate statement); State v. Hoover, 257 La. 877, 244 So. 2d 818 (1971); Commonwealth v. Martin, 357 Mass. 190, 257 N.E.2d 444 (1970) (stating substantially what witness had said, though with some inadvertent errors); People v. Padula, 34 Mich. App. 302, 191 N.W.2d 73 (1971) (not intentionally inaccurate); State v. Davidson, 44 Wis. 2d 177, 170 N.W.2d 755 (1969) (calling defendant wrong name).

United States v. Browning, 390 F.2d 511 (4th Cir. 1968); State v. Willis, 107 Ariz. 262, 485 P.2d 832 (1971); People v. Smith, 118 Ill. App. 2d 65, 254 N.E.2d 596 (1969) (abstract only) (exhorting the jury to use their own experience in use of telephone in weighing evidence given by defense witness in regard to phone going dead was proper and did not constitute the giving of expert testimony by the prosecutor though no evidence on the point was in the record); State v. Smith, 257 La. 1109, 245 So. 2d 527 (1971); See Embrey v. State, 283 Ala. 110, 222 So. 2d 507 (1969); Bagley v. State, 131 Ariz. 413, 444 S.W.2d 576 (1969); State v. Maynor, 272 N.C. 524, 158 S.E.2d 612 (1968). See also cases cited in notes 76 & 77 infra.

United States v. Weiser, 428 F.2d 932 (2d Cir. 1969); Wright v. State, 279 Ala. 543, 188 So. 2d 272 (1966) (Biblical analogy); Robinson v. State, 249 So. 2d 872 (Ala. Crim. App. 1971) (reference to recent fire bombings in city in arson prosecution); Martin v. State, 223 Ga. 649, 157 S.E.2d 488 (1960) (argument that returning defendant to society someday would be greater danger than the community and vice versa); People v. Lion, 10 Ill. 2d 208, 139 N.E.2d 757 (1957) (comment upon character testimony for defendant that “Alger Hiss, the convicted communist, had some perfect testimonials,” was said to be perhaps improper). But see United States v. Cotter, 425 F.2d 450 (1st Cir. 1970) (argument at time of first moon landing in income tax evasion case that if people do not pay their taxes there will be no more moon landings, improper); McKee v. State, 118 Ga. App. 386, 163 S.E.2d 919 (1968) (defendant more of a threat to lives of people of Atlanta
permitted where they concern the interpretation of the evidence in the case.\textsuperscript{77}

PROSECUTORIAL CONDUCT DURING ARGUMENT

General Actions

The considerable latitude permitted the prosecutor in commentary is equally applicable to his conduct during summation. Thus it is generally proper for him to move freely about the courtroom. However, the prosecutor should not sit in the witness chair while delivering his argument since it might give the jury the impression that the argument is testimonial in nature or possibly suggest the truth of the statements made.\textsuperscript{78} Also because of the potential impact on the jurors, addressing individual jurors has been repeatedly disapproved.\textsuperscript{79} Similarly, remarks directed to the defendant are not condoned.\textsuperscript{80}

As indicated above, in some circumstances the prosecutor may read the law to the jury from reported cases or approved texts.\textsuperscript{81} It is also proper to read from and comment upon books, records, or documents which are properly before the court,\textsuperscript{82} though any reference to a change of venue in the case is disallowed.\textsuperscript{83} Counsel's recollection may be refreshed from the stenographer's minutes,\textsuperscript{84} but it is proper to read from the transcript only when the defense concurs that the matter is not in dispute.\textsuperscript{85} Where the testimony is disputed, reading is not permitted, on the theory that the jury will decide the thrust of such testimony.\textsuperscript{86} While the prosecutor may refer to a memorandum or personal notes regarding the defense summation,\textsuperscript{87} it is not proper to read testimony from a personal memorandum rather than the transcript since the memorandum may emphasize the prosecutor's version of the testimony.\textsuperscript{88}

Use of Real and Demonstrative Evidence

The use of and reference to admitted real evidence is widely recognized as proper, so long as the action portrayed conforms with that indicated in the record.\textsuperscript{89} For example, it was permissible than Viet Cong, improper); State v. Spence, 271 N.C. 23, 155 S.E.2d 802 (1967) (proper to refuse defense counsel permission to argue the Sacco-Vanzetti case and history of the M'Naghten rule); State v. Jacobson, 74 Wash. 2d 36, 442 P.2d 629 (1968) (while generally proper to refer to matters of common knowledge, and problems of auto deaths, legislative concern with auto deaths, parole a matter of common knowledge); Graham v. United States, 316 U.S. 530 (1942) (statutory definitions of offenses, where same appeared in instructions); State v. McNeal, 167 N.W.2d 674 (Iowa 1969) (dictum); State v. Rouse, 236 La. 275, 236 So. 2d 211 (1970) (bill of information amended during trial). See People v. Gambo, 5 Cal. App. 3d 187, 84 Cal. Rptr. 906 (1970) (proper to refer to establishment of necessary element of offense by stipulation).

People v. Smith, 280 Ill. 32, 117 N.E. 286 (1917).


People v. Bell, 322 Ill. 434, 153 N.E. 639 (1926).

People v. Willy, 301 Ill. 307, 133 N.E. 859 (1921).

People v. Brisco, 15 Mich. App. 428, 166 N.W.2d 475 (1968) (exposure of knife which was dumped from an envelope on counsel table within sight of jurors who noticed it was prejudicial error where the knife had been ruled inadmissible); Jackson v. State, 465 S.W.2d 642 (Mo. 1971); Commonwealth v. Glover, 446 Pa. 492, 286 A.2d 349 (1972) (display of a knife not in evidence during argument was improper but not reversible error where the jury knew no knife was involved in the case). But see People v. Morris, 10 Mich. App. 526, 159 N.W.2d 886 (1968) (conduct of prosecutor in using in demonstration a gun which had been suppressed was improper but not prejudicial.
for the prosecutor, in describing an event, to pick up and swing a two-wheeled hand cart, suggesting the manner in which the wounds were inflicted, where this was in accord with the testimony.\textsuperscript{90} It was also proper for the prosecutor, in attempting to demonstrate the manner in which the defendant's fingerprints were left on a door at the scene of the crime, to show how the door had been pushed back and forth, since there was testimony to this effect.\textsuperscript{91} Furthermore, the prosecutor was permitted to jump repeatedly for about two minutes in a loud and noisy manner on a piece of paper he had thrown on the floor where such conformed with the description of the defendant's treatment of the victim.\textsuperscript{92} On the other hand, it was error for the prosecutor to stand before the jury for three minutes holding a sawed-off shotgun in his hands since the conditions of the crime had not been adequately recreated.\textsuperscript{93}

It may also be proper for the prosecutor to demonstrate the government's theory of the crime where there is no affirmative testimony but his action conforms to the state of the evidence. Thus, it was permissible for the prosecutor to rub a pistol with a shirt, both of which were in evidence, to demonstrate his theory supporting the reason why no prints were found on the gun.\textsuperscript{94}

The primary question to be asked concerning reference to or use of real evidence is whether the manner of reference or use is such that the juror's fears and prejudices will be aroused in a way which impairs reasoned judgment.\textsuperscript{95} While reference to and exhibition of some pieces of real evidence\textsuperscript{96} or the repetition of an earlier demonstration are proper during argument,\textsuperscript{97} the prosecutor must be careful to avoid unfair lengthy demonstration or emphatical comment.\textsuperscript{98}

It is clear that the use of demonstrative evidence—visual aids not actually admitted into evidence—is appropriate.\textsuperscript{99} The general requirements for the use of demonstrative evidence are that the conditions shown by the exhibit do not vary significantly from those that existed at the time of the events in question, and that the exhibit constitutes a "true and fair representation" of what it purports to show.\textsuperscript{100} As a general proposition,
courts apply the same rules regarding these questions in criminal cases as they do in civil cases.\textsuperscript{101}

\section*{Commenting on Witnesses}

The examination of witnesses is likely to take up a good part of any trial. Commentary on the testimony, character, and credibility of the witnesses will often require a proportional amount of the prosecutor's summation. Proper remarks by the prosecutor are those which are reasonably justified by the evidence or testimony, and are restricted to presenting an interpretation of the testimony, pointing out conflicts and inconsistencies, and discussing the reliability of the witnesses.\textsuperscript{102}

The ultimate issue of credibility is for the jury alone.\textsuperscript{103} For the same policy reasons previously discussed,\textsuperscript{104} the prosecutor's personal beliefs and opinions as to the truthfulness of the testimony and the character of the witnesses must be avoided; otherwise the veracity of the prosecutor may be placed in issue.\textsuperscript{105}

Within these limitations the prosecutor may comment favorably\textsuperscript{106} or unfavorably\textsuperscript{107} on any

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\textsuperscript{103} See People v. United States, 403 F.2d 569 (D.C. Cir. 1968).

\textsuperscript{104} See People v. Montevcechico, 32 Mich. App. 163, 188 N.W.2d 118 (1971). See also notes 62 & 63 supra, and accompanying text.

\textsuperscript{105} United States v. Hoskins, 446 F.2d 564 (9th Cir. 1971) (repeatedly asserting personal belief in accuracy of testimony of government witnesses was improper, but here not deliberate and at any rate invited); United States v. Miceli, 446 F.2d 256 (1st Cir. 1971) (that accomplice of defendant who testified for government had made an arrangement to testify truthfully); United States v. American Radiator and Standard Sanitation Corp., 433 F.2d 174 (3d Cir. 1970) (personally vouching for credibility); United States v. Daniel, 422 F.2d 816 (6th Cir. 1970) ("I believe him, and I submit to you that this aspect of his testimony is worthy of belief"); Clark v. United States, 391 F.2d 57 (8th Cir. 1968); United States v. Murphy, 374 F.2d 651 (2d Cir. 1967) ("I think" may be proper phrase where it is clear that prosecutor is merely introducing a statement of what conclusions he is led to by the evidence); Stout v. People, 211 Colo. 142, 464 P.2d 872 (1970) (complaining witnesses were good and fine girls and not types defendant and his witnesses said they were); People v. Montevcechico, 32 Mich. App. 163, 188 N.W.2d 186 (1971) (remarks characterizing defendant as a professional whose friends had perjured themselves in testifying as to defendant's alibi were made as factual statements which would lead jury to believe prosecutor believed defendant guilty)*; People v. Stroble, 31 Mich. App. 94, 187 N.W.2d 474 (1971) (personal belief that detective had told truth); People v. Poe, 27 Mich. App. 422, 183 N.W.2d 628 (1970) (personal belief that prosecution witness not entitled to credibility); People v. Hickman, 34 App. Div. 2d 831, 312 N.Y.S.2d 644 (1970) (where case rested entirely on credibility, vouching for such credibility and stating personal knowledge whether there were other eyewitnesses)*; People v. Davis, 29 App. Div. 2d 556, 285 N.Y.S.2d 719 (1967) (opinion as to truthfulness of complainant's testimony); Sisk v. State, 487 P.2d 1003 (Okla. Crim. App. 1971) (stating personal belief in validity of testimony to reinforce it); Shepard v. State, 437 P.2d 565 (Okla. Crim. App. 1971) (argument that a witness was a "plant and we know it"); State v. Gains, 484 P.2d 854 ( Ore. App. 1971); State v. Walton, 5 Wash. App. 150, 486 P.2d 1118 (1971).

\textsuperscript{106} Cf. United States v. Crisp, 435 F.2d 354 (7th Cir. 1970) (that government witness has testified truthfully
witness who testified for either the government or the defense. This includes comment upon the

was proper where prosecutor did not say or insinuate that his statement was based upon personal knowledge; United States v. Guilliano, 383 F.2d 30 (3d Cir. 1967) (regarding testimony of informers with admitted records, “It takes a thief to catch a thief”); United States v. DeAlesandro, 361 F.2d 694 (2d Cir. 1966) (to acquit defendant jury would have to find witnesses perjurers); Jackson v. State, 359 F.2d 660 (D.C.Cir. 1966) (“reputable” officers and “very sweet” complainant witness); Valdez v. People, 168 Colo. 425, 435 P.2d 75 (1968); Commonwealth v. Gerald, 356 Mass. 386, 252 N.E.2d 344 (1969) (that there was not one bit of conduct on part of witness that could not prejudice defendant); People v. Williams, 393 Ill. 698, 471 P.2d 175 (1967); Jillicon v. Jackson, 201 Kan. 795, 443 P.2d 279 (1968) (a matter about which a defense witness is properly questioned is a proper subject for comment); People v. Weinstein, 35 Ill. 2d 467, 220 N.E.2d 432 (1966), after remand, 110 Ill. App. 2d 382, 249 N.E.2d 687 (1969) (accounts by defendant while testifying).

Nicolaus, 65 Cal. 2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967) (should not argue personalities; here regarding doctor who testified for defense); Fuks v. State, 481 P.2d 769 (Okla. Crim. App. 1971) (defendant’s family “tried to frame up a story” and jury should not let them “come in here with some trumped up perjury defense” improper).


State v. Jackson, 201 Kan. 795, 443 P.2d 279 (1968) (a matter about which a defense witness is properly questioned is a proper subject for comment).


People v. Washington, 71 Cal. 2d 1061, 458 P.2d 479, 80 Cal. Rptr. 567 (1969) (doctor hired by defense was defense-oriented); People v. Winstead, 90 Ill. App. 2d 167, 234 N.E.2d 175 (1967); Jump v. Commonwealth, 444 S.W.2d 723 (Ky. Crim. App. 1969) (that defendant’s witnesses, who were his friends, were naturally going to be friendly to him and might try to slant their testimony); State v. Rose, 270 N.C. 406, 154 S.E.2d 492 (1967) (defendant’s brother was more likely to fabricate than was rape victim); State v. Litterlough, 6 N.C. App. 36, 169 S.E.2d 269 (1969) (witness was “living in sin” with defendant).


James v. People, 161 Colo. 105, 420 P.2d 229 (1966) (witness had “pleaded himself out”); Herzig v. State, 213 So. 2d 900 (Fla. App. 1968) (testimony highly questionable and witness had already been charged with and probably would be tried for a similar offense arising from the same incident); People v. Magby, 37 Ill. 2d 197, 226 N.E.2d 33 (1967).

United States v. Ceniceros, 427 F.2d 685 (9th Cir. 1970) (where there was good reason to believe the fifth amendment privilege was being misused to create an unjustified inference favorable to the party calling the witness, the prosecutor properly noted this in his argument); United States ex rel. Irwin v. Pate, 357 F.2d 911 (7th Cir. 1966) (where there was no good reason to believe that state defendant’s refusal to answer question was legally permissible, prosecutor could properly comment on the refusal to testify); State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App. 1971) (remarks proper where related only to defense inconsistent accounts of the crime, possible sources of bias, and prior convictions, as well as participation in the crime and courtroom conduct. It has also been considered appropriate to make reference to invocation of the fifth amendment by the witness, at least in those instances
in which the prosecutor did not know that such action would be taken until the witness was called to the stand. There is some question concerning the propriety of characterizing a witness as liar or perjurer, however, even if accurate.

If justified by the evidence, reference to the fact that a witness was afraid to testify and was given protection may be condoned. However, when a witness does not testify, it is improper to suggest witness's credibility, with no inference drawn regarding the defendant).

* * *

Failure to Testify at Trial

The United States Supreme Court has said that where the defendant does not testify at trial, the Fifth Amendment, in its direct application to the Federal Government and its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

The basic policies underlying this rule are the preservation of official integrity and morality requiring the government to independently prove its case, and the respect for and desirability of individual privacy.

Several different standards have been espoused by lower courts to aid them in determining whether a transgression of this rule has occurred in particular situations. The federal courts and some state courts, adopting the above language, state the test in terms of the intention of the prosecutor and the

an important witness was not called because his life would have been endangered, improper).

United States v. Lawler, 413 F.2d 622 (7th Cir. 1969) (where defense counsel argued that seller of narcotics could not be obtained as defense witness, improper to say that defense did not subpoena seller because it knew he would assert fifth amendment); State v. Levy, 160 N.W.2d 460 (Ia. 1968) (testimony of defendant's wife would be damaging); People v. Fields, 27 App. Div. 2d 736, 277 N.Y.S.2d 21 (1967) (that murder victim would have testified against defendant but for his death); Robinson v. State, 489 P.2d 1358 (Okla. Crim. App. 1971) (testimony of defendant's wife would have been damaging). See State v. Hodnett, 82 N.M. 710, 487 P.2d 138 (Ct. App. 1971) (not misconduct where postconviction hearing showed that testimony of witnesses would not have been favorable to defendant, where prosecutor did not call them at trial and then commented on the failure of the defense to call them).

character of his commentary: was the language used by the prosecutor manifestly intended to be, or of such a character that the jury would naturally and necessarily take it to be, a comment on the defendant’s failure to testify?\(^{122}\) In contrast, in Texas the language is viewed entirely from the standpoint of the jury, and the implication that the language might be construed as an implied or direct allusion to the defendant’s failure to testify must be clear.\(^{120}\) An even more restricted approach is taken in Alabama, where there must be almost direct identification of the defendant as the individual who has failed to testify; covert references are construed against the defendant, regardless of possible jury inference.\(^{124}\)

Under any formulation of the standard it is clear that a blatant and obvious reference to the failure of the accused to testify at trial is improper, whether the remark is made in positive\(^{125}\) or negative manner. But the propriety of many other types of remarks which would appear to highlight the prohibited comment equally effectively is left open.

Statements which fall within this middle ground and are often deemed proper generally relate to the state of the evidence in the case where no defense has been presented. Included within this category are comments to the effect that the government’s case is uncontradicted,\(^{127}\) uncontroverted,\(^{128}\) denied,\(^{129}\) or refuted\(^{130}\) or that the

\(^{122}\) United States v. Chaney, 446 F.2d 571 (3d Cir. 1971); United States v. White, 444 F.2d 1274 (5th Cir. 1971); United States v. Tierney, 424 F.2d 643 (9th Cir. 1970); United States v. Gatto, 299 F. Supp. 697 (E.D. Pa. 1969); Martinez v. People, 162 Colo. 195, 425 P.2d 299 (1967). See United States v. Miceli, 446 F.2d 256 (1st Cir. 1971) (proper, absent direct or indirect focus); People v. Mills, 40 Ill. 2d 4, 259 N.E.2d 697 (1966) (whether the reference was intended or calculated to direct the attention of the jury to defendant’s failure to testify); State v. Flores, 76 N.M. 134, 412 P.2d 560 (1966)*.


\(^{125}\) Smith v. Decker, 270 F. Supp. 225 (N.D. Tex. 1967) (reading portion of charge to jury which stated no inference from failure to testify)*; Miller v. State, 240 Ark. 590, 401 S.W.2d 15 (1966) (that defendant had chosen not to take the stand and that was his privilege)*; People v. Stout, 66 Cal. 2d 184, 424 P.2d 704, 57 Cal. Rptr. 152 (1967)*; Carter v. State, 199 So. 2d 324 (Fla. App. 1967) (defendant had constitutional right not to testify and exercise of that right cannot be held against him)*; State v. Raymond, 258 La. 1339, 142 N.W.2d 444 (1964)*; People v. Hopkins, 124 Ill. App. 2d 215, 259 N.E.2d 577 (1970) (that any defendant had the right to take the stand)*; State v. Jones, 80 N.M. 753, 461 P.2d 235 (Ct. App. 1969) (there is no testimony at all from either one of these sterling defendants)*; State v. Smith, 10 Ohio App. 2d 186, 226 N.E.2d 807 (1967) ("this man never took the stand to tell you that")*; Sisk v. State, 347 P.2d 1003 (Okla. Crim. App. 1961) (twice saying there was not testimony to refute what victims said, and recognizing there were no eyewitnesses, and "the defendant did not make an announcement in your presence that he did not need to take the stand, but he has that right")*. Compare Jacobs v. United States, 395 F.2d 469 (8th Cir. 1968) (where four defendants, arguments that there are only four people in courtroom who know
government’s witnesses were not shaken by cross-examination.\(^{113}\) When making such statements, however, the prosecutor must exercise care, for if the defendant is the only person who could contradict or deny the evidence, the comment is improper.\(^{112}\) If it is apparent that there are other witnesses who could contradict the government’s case, the remark is within bounds.\(^{113}\) When it is not clear to the jury that there were other witnesses, jurisdictions disagree as to propriety.\(^{114}\) Jurisdictions also differ on the question whether

373 (Ky. Crim. App. 1967) (no witness had taken the stand to deny); State v. Hampton, 430 S.W.2d 160 (Mo. 1968).

113 United States v. Guilliano, 383 F.2d 30 (3d Cir. 1967); People v. Northern, 256 Cal. App. 2d 28, 64 Cal. Rptr. 15 (1967); State v. McDavis, 463 S.W.2d 803 (Mo. 1971).

112 Parks v. Wainwright, 429 F.2d 1240 (5th Cir. 1970) (nothing had been added on cross-examination to contradict the testimony on direct); Woodside v. State, 206 So. 2d 426 (Fla. App. 1968); Parks v. State, 206 So. 2d 431 (Fla. App. 1968). See Cook v. State, 43 Ala. App. 304, 189 So. 2d 595 (1966) (all witnesses agreed on testimony).


116 Rodriguez-Sandoval v. United States, 409 F.2d 529 (1st Cir. 1969) ("uncontested" was plain error where not clear from the record that there was someone other than defendant who could have been called as a witness, especially since the prosecutor hammered the point home at least five times)*; State v. Sinclair, 49 N.J. 525, 231 A.2d 565 (1967) (should clearly appear that someone other than defendant could have taken the stand). But see United States v. Handman, 447 F.2d 853 (7th Cir. 1971) (referring to accomplice’s testimony as uncontradicted where nothing in record showed anyone other than defendant could deny it)*; United States ex rel. Leak v. Follette, 418 F.2d 1266 (2nd Cir. 1969) (not error even if in practical fact, though not in theory, no one other than defendant could have contradicted); United States v. O’Brien, 255 F. Supp. 755 (E.D. Mich. 1965) (even where in fact only defendant could contradict, not error unless the prosecutor may add that the defendant was present at the scene of the crime).\(^{115}\)

Even more direct comments concerning the defense are permitted. For example, the prosecutor may be permitted to state positively that the evidence is uncontradicted by referring to the fact that no defense was presented,\(^{116}\) or by commenting on the difference in the order of argument when the defense presents no evidence.\(^{117}\) Moreover, statements may be made regarding the defense attorney which would be prohibited if made about the defendant,\(^{118}\) such as a statement

...the jury would be likely to conclude from the statement in the context of the argument that such was the situation); State v. Ashby, 77 Wash. 2d 33, 459 F.2d 403 (1969) (other persons could conceivably have denied statement, though not clear from the record).

...people v. Durham, 13 Ill. App. 2d 1033, 269 N.E.2d 385 (1971) (proper); Commonwealth v. Frands, 357 Mass. 356, 259 N.E.2d 195 (1970) (same). See State v. Shillow, 252 La. 1105, 215 So. 2d 828 (1968) (absence of evidence to contradict the state’s version of defendant’s whereabouts); Johnson v. State, 9 Md. App. 327, 264 A.2d 280 (1970) (where prosecutor was merely reviewing the evidence, proper to ask, "If defendant was not at the scene of the crime, where was he?"); Barron v. State, 479 F.2d 614 (Okla. Crim. App. 1971) ("if he was there why didn’t he just say it?" was a comment on defendant’s alibi, not his failure to testify). But see People v. Baker, 7 Mich. App. 471, 152 N.W.2d 43 (1967) (where person with whom defendant allegedly committed acts of gross indecency testified, improper for prosecution to argue that only two people knew what happened and one of them testified).

...United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969) (defense offered no evidence except from cross-examination); McCracken v. State, 431 F.2d 513 (Alaska 1970); People v. Kostos, 21 Ill. 2d 499, 154 N.E.2d 467 (1958); Williams v. State, 454 S.W.2d 244 (Ky. Crim. App. 1971); State v. Huddleston, 462 S.W.2d 691 (Mo. 1971). See State v. Martin, 85 S.D. 587, 187 N.W.2d 576 (1971) (that if one doesn’t have any evidence to talk about he tries to make out complaining witness to be a liar). But see State v. Murphy, 13 Ohio App. 2d 159, 234 N.E.2d 619 (1967) ("Have you heard anything from the defense? Did they tell you anything? Did you hear any reference or any testimony on behalf of this defendant?"); Lime v. State, 479 F.2d 605 (Okla. Crim. App. 1971) ("there is no excuse and they offer no excuse for the manner in which this was done"). But see v. Persiano, 91 N.J. Super. 299, 220 A.2d 116 (1966) ("Normally we have two sides to a story. Here, we only have one side. There is no defense.").

...Williams v. State, 200 So. 2d 636 (Fla. App. 1967), denial of habeas corpus aff’d sub. nom. Williams v. Wainwright, 416 F.2d 1042 (5th Cir. 1969) (that defendant was entitled to opening and final arguments where he puts on no evidence or testimony "other than perhaps his own," and prosecution’s summation would be sandwiched since defendant put on no evidence). See Taylor v. United States, 390 F.2d 278 (8th Cir. 1968) (order of opening statements and closing arguments and when defense might have a chance to speak was proper comment).

...Hollbrook v. United States, 441 F.2d 371 (6th
to the effect that defense counsel did not prove during the trial what he had alleged he would in his opening statement.\footnote{139} An interesting situation arises when the defendant appears pro se. While it has been held improper to point out that the defendant is so appearing during the trial what he had alleged he would do, the prosecutor is permitted to refer to and discuss what the defendant says as an advocate. Any other approach would render nugatory the prosecutor’s valuable right to attack the defense’s theory of the case, obviously permitted when the defendant is represented by counsel. The jury may also be told that the defendant counsel’s presentation is not evidence but argument only.\footnote{140} If the defendant persists in making statements which amount to the offering of testimony not presented during trial the prosecutor may then respond directly to the defendant’s failure to testify.\footnote{141} 

Cir. 1971) (that “jury was entitled to hear from the defendants,” where context indicated that prosecution was referring to defense counsel); McCracken v. State, 431 P.2d 513 (Alaska 1967) (counsel could say nothing on behalf of his client); Lipscomb v. State, 467 S.W.2d 417 (Tex. Crim. App. 1971) (failure of defense counsel to express claim of innocence); Barrionentes v. State, 462 S.W.2d 292 (Tex. Crim. App. 1971) (counsel “can tell us,” referring to where defendant received items connected with burglary); Bass v. State, 427 S.W.2d 624 (Tex. Crim. App. 1968) (counsel had not explained how marijuana seeds got into defendant’s pocket); Meyer v. State, 416 S.W.2d 414 (Tex. Crim. App. 1967) (counsel “makes the insinuation that this defendant has told him he wasn’t guilty, but he won’t take the stand under oath and tell you that”). \footnote{142}

Compare Taylor v. State, 279 Ala. 390, 185 So. 2d 414 (1966) (counsel asked the jury to assume that the witness said it is true, you haven’t heard anyone say here that it wasn’t true, to answer what the attorney who was representing the defendant “and ‘Are you going to let the man say or tell you that’”) with State v. Hart, 154 Mont. 310, 462 P.2d 885 (1969) (counsel failed to offer any evidence to controvert incriminating testimony of state’s witness, was indistinguishable from a prohibited reference where defendant was the only one who could contradict)\footnote{143} and Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971) (improper to say jury had never heard counsel ask defendant whether he was responsible for the crime). \footnote{144}

When there are multiple defendants not all of whom testify, the courts generally hold that reference to the fact that some testified is improper, since attention is thereby directed to those who did not.\footnote{145} If such a reference warrants a reversal, it is unclear whether the convictions of those who testified must be reversed along with the convictions of those who did not.\footnote{146}

There is one special relaxation of the prohibition on comment on the defendant’s failure to testify at trial. Where the recent unexplained possession of stolen property raises a presumption of guilt, the prosecutor may so state.\footnote{147}
 Where the defendant's testimony refutes only part of the government's proof, silence with regard to other damaging evidence which is within the defendant's knowledge is subject to adverse comment. But if the defendant's testimony is topically restricted, the prosecutor may not comment on the failure to testify on other matters. Similarly, where there are several defendants and only some of them assert a particular defense, the prosecutor must restrict any comments accordingly.

It should be noted that it is not necessary for the defendant to formally take the stand in order for some comment to be proper. A mere "testimonial appearance" by the defendant may open the door for comment on his failure to deny other evidence or to take the stand.

Nonetheless, in
those jurisdictions where the defendant may submit an unsworn statement to the court without waiving the privilege, it has been held that the prosecutor, although able to discuss, criticize, and comment on the statement, may not comment directly on the decision to make such a statement rather than take the stand.\(^\text{104}\)

**Other Crimes**

A common method to impeach a witness is to elicit testimony or otherwise demonstrate that the witness has been previously convicted of a crime or crimes. When the defendant testifies, or does not testify but attempts to show his good character and reputation, the prosecutor may use this method of impeachment and in summation refer to the prior crimes.\(^\text{105}\) The evidence must be properly before the court, and no comment should be made if no evidence has been brought forward,\(^\text{106}\) or if the evidence was Improperly admitted.\(^\text{107}\)


\(^\text{105}\) See People v. Brooks, 197 Ariz. 320, 487 P.2d 387 (1971) (defendant tended to flirt with the truth, and he did so the previous week and a jury found him guilty, proper where defendant testified as to his recent conviction); People v. Jones, 123 Ill. App. 2d 123, 250 N.E.2d 8 (1970) (proper to refer to defendant as a "twice convicted fellow" and a "convicted stickup man" where two prior convictions in evidence); Jefferson v. State, 452 S.W.2d 462 (Mo. 1970) (proper to refer to robbery and kidnapping where in evidence in robbery prosecution); State v. Lawrence, 243 S.W.2d 807 (Mo. 1951); People v. LeBeaux, 34 App. Div. 2d 596, 308 N.Y.S.2d 270 (1970) (proper to refer to conviction admitted by defendant in testimony); Kennedy v. State, 443 S.W.2d 127 (Okl. Crim. App. 1968); Poole v. Commonwealth, 211 Va. 262, 176 S.E.2d 917 (1970) (may introduce evidence of prior crime to attack defendant's character if he has testified or has attempted to show his good character).

\(^\text{106}\) United States v. Schartner, 426 F.2d 470 (3d Cir. 1970) (improper to permit reading of a portion of defendant's statement which mentioned a prior conviction); Rogers v. United States, 411 F.2d 228 (10th Cir. 1969) (references to jail stays are improper where no convictions shown); Horner v. Florida, 312 F.

Prosecutors often attempt three rather subtle methods of calling juror attention to the defendant's prior crimes in cases in which no such evidence was presented. The first is to refer to the accused's "rap sheet" or to the appearance of his picture in police files. Each of these has been condemned repeatedly by the courts.\(^\text{108}\) The second method, comment upon testimony that a witness met the defendant during incarceration, is also improper.\(^\text{109}\) The third, equally improper in most cases, is suggestion that the defendant is an habitual criminal or professional miscreant.\(^\text{110}\)

\(^\text{108}\) See People v. Tyson, 130 Ill. App. 2d 140, 264 N.E.2d 403 (1970) ("professional auto thief" where only one prior conviction shown, improper); Lynch v. Commonwealth, 433 S.W.2d 340 (Ky. Crim. App. 1968) (that defendants had committed same crime before and would do it again and were professionals where no evidence); Commonwealth v. Balakin, 356 Mass. 547, 254 N.E.2d 422 (1969) (referring to certain defendants as more reprehensible than others in such a way as to suggest prior criminal records); People v. Milovich, 51 Mich. App. 532, 155 N.W.2d 124 (1971) (reference to defendant's four-page driving record); People v. Askar, 8 Mich. App. 95, 153 N.W.2d 888 (1967); People v. Schatz, 37 App. Div. 2d 584, 322 N.Y.S.2d 802 (1971) (that each defendant had a long history of arson where no evidence); Toooley v. Commonwealth, 448 S.W.2d 683 (Tenn. App. 1969) (reference to rape in unrelated murder prosecution); State v. Shuttle, 126 Vt. 379, 230 A.2d 794 (1967).

\(^\text{109}\) See People v. Hein, 84 Ill. App. 2d 322, 227 N.E.2d 792 (1967), aff'd. 40 Ill. 2d 39, 237 N.E.2d 433 (1968) (court martial conviction should not have been read to jury and commented upon).


\(^\text{107}\) Barfield v. United States, 391 F.2d 251 (5th Cir. 1968); People v. Dunn, 26 App. Div. 2d 285, 275 N.Y.S.2d 285 (1966) (witness's testimony that defendant said he had met co-defendant while they were being returned to prison).*
Even if the evidence is properly in the record the prosecutor must be cautious not to assume facts in connection with the prior crimes beyond those shown by the evidence. Similarly, the prosecutor must confine his remarks to the purposes for which the proof was admitted, which usually restricts his comments to the credibility of the defendant. The only exception in which the remarks may relate more directly to guilt is where the evidence of prior similar convictions is considered probative of intent or motive to commit the present offense.

The prosecutor is not restricted to referring only to prior cases in which a conviction of the defendant was obtained. Consistent with the above limitations, comments on indictments and other like offenses admitted are proper.\(^\text{164}\) The prosecutor may wish to discuss the defendant's conduct for two reasons. First, actions in the course of the crime and the investigation of it may be probative of guilt. Second, evidence of conduct in general may refute the accused's assertion of good character and reputation.

The same rule governing comments on the evidence is applicable to comments on the character of the defendant—the remarks must be based in the evidence or be reasonable inferences therefrom.\(^\text{165}\) The statements may relate to the accused's conduct in the course of or after the crime which is the basis for the prosecution.\(^\text{166}\) Whether

\(^{161}\) United States v. Williams, 435 F.2d 1001 (5th Cir. 1970) (admitted violations of law for which defendant had not been arrested or prosecuted); State v. Allison, 1 N.C. App. 623, 162 S.E.2d 63 (1968) (in bench trial, stating that several other cases were pending against the defendant). \(^{166}\) Whether

\(^{162}\) Sablan v. People of Territory of Guam, 434 F.2d 837 (9th Cir. 1970) (comment on defendant's conduct after crime improper where no evidence); United States v. Cook, 432 F.2d 1093 (7th Cir. 1970) (prosecution can comment legitimately and speak fully though harshly about defendant's action and conduct where supported by the evidence); Van Nattan v. United States, 357 F.2d 161 (10th Cir. 1966) (defendant a dope addict where no evidence of such in robbery prosecution); State v. McGill, 101 Ariz. 320, 419 P.2d 499 (1966) (same); Smith v. State, 118 Ga. App. 464, 164 S.E.2d 238 (1968) (that defendant was "pushing women" in burglary prosecution, the only evidence being that defendant was an informer in prostitution cases); People v. Smith, 24 Ill. 2d 198, 181 N.E.2d 77 (1962); Webb v. Commonwealth, 451 S.W.2d 397 (Ky. Crim. App. 1970) (suggesting that defendant a draft evader improper).

\(^{163}\) United States v. Williams, 435 F.2d 1001 (5th Cir. 1970) (admitted violations of law for which defendant had not been arrested or prosecuted); State v. Allison, 1 N.C. App. 623, 162 S.E.2d 63 (1968) (in bench trial, stating that several other cases were pending against the defendant).
or not the defendant testifies at the trial, the prosecutor may be able to refer to the defendant’s pre-trial statements or to conversations with law enforcement officers. The prosecutor may also comment on the accused’s conduct in court, as well as conduct at other times and places. There is some disagreement among the courts concerning whether the use of invective or epithets in characterizing the accused is proper, even when based upon proven conduct. Whatever the view of a particular jurisdiction, a great variety of disparaging language has been permitted, perhaps made in 41 days between the sale charged and his arrest, improper); People v. Damon, 24 N.Y.2d 256, 247 N.E.2d 651, 220 N.Y.S.2d 830 (1969) (implying that because defendant had been in prison he was homosexual or abnormal deviate)*; People v. Chance, 37 App. Div. 2d 572, 322 N.Y.S.2d 433 (1971) (suggesting defendant charged with possession only was trafficking in narcotics)*; People v. Canty, 31 App. Div. 2d 976, 259 N.Y.S.2d 524 (1965) (where prosecutor went beyond merely asking jury to disbelieve defendant who admitted committing adultery, and turned defendant’s admitted acts into equivalence of guilt of violating Ten Commandments) (proper to impeach his credibility); State v. Milbradt, 68 Wash. 2d 684, 415 P.2d 2, cert. denied, 385 U.S. 905 (1966) (references to homosexual tendencies proper where discussed by defense psychiatrist).

17 United States v. Chaney, 446 F.2d 571 (3d Cir. 1971) (an exclamatory statement made with the intent to divert suspicion or mislead the police, when shown to be false, may have probative force and be commented upon); United States v. Smith, 441 F.2d 539 (9th Cir. 1971) (statement to FBI agent properly in evidence); United States v. Toler, 440 F.2d 1242 (5th Cir. 1971) (at no time had defendant denied filing a pre-trial statement in evidence, not a comment on defendant’s conduct); People v. Canty, 31 App. Div. 2d 976, 259 N.Y.S.2d 524 (1965) (where prosecutor went beyond merely asking jury to disbelieve defendant who admitted committing adultery, and turned defendant’s admitted acts into equivalence of guilt of violating Ten Commandments) (proper to impeach his credibility); State v. Milbradt, 68 Wash. 2d 684, 415 P.2d 2, cert. denied, 385 U.S. 905 (1966) (references to homosexual tendencies proper where discussed by defense psychiatrist).

18 Carter v. United States, 437 F.2d 692 (D.C. Cir. 1970), cert. denied, 402 U.S. 912 (1971) (should avoid inappropriate references); People v. Rodriguez, 10 Cal. App. 2d 18, 86 Cal. Rptr. 789 (1971) (may use appropriate epithets where warranted by the nature of the case and the evidence adduced; prosecutor is allowed to urge his case with vigor); People v. Elder, 25 Ill. 2d 612, 186 N.E.2d 27, cert. denied, 374 U.S. 814 (1962) (use of invective discouraged); People v. Jefferson, 69 Ill. App. 2d 490, 217 N.E.2d 564 (1965) (abstact only; proper to reflect unfavorably on accused and to use invective); State v. Yates, 202 Kan. 406, 449 P.2d 575 (1968) (use of invective discouraged); State v. Burnett, 429 S.W.2d 239 (Mo. 1968) (should not apply unbecoming names to defendant); State v. Tumman, 403 S. E.2d 570 (Mo. 1968) (improper to apply personal epithets or engage in abusive vilification of either parties or witnesses); State v. White, 151 Mont. 573, 440 P.2d 269 (1968) (should not use derogatory epithets); State v. Miller, 271 N.C. 464, 157 S.E.2d 335 (1967) (should not indulge in vulgarities, and should refrain from abusive, vituperative, and opprobrious language, and from indulging in invective); State v. Gibson, 75 Wash. 2d 174, 449 P.2d 692 (1969), cert. denied, 396 U.S. 1019 (1970).

because a reviewing court is reluctant to find reversible error on characterization alone. Furthermore, such remarks may be appropriate if based upon the charge which the evidence tends to prove, rather than upon the conduct of the defendant as shown by the evidence. A common example is reference to one charged with armed robbery as a potential murderer. An epithet which lacks a reasonable foundation in the evidence or the charge is improper; it is simply abusive and serves only to inflame and arouse the passions and prejudices of the jury.

O'Bryant v. State, 222 Ga. 326, 149 S.E.2d 654 (1966) (thug); People v. Myers, 35 Ill. 2d 311, 220 N.E.2d 297 (1966) (where defense counsel referred to defendant's conduct and ability to choose between right and wrong with chimpanzee, dog, and trained animal, based on psychiatrist's testimony, proper for prosecutor to reply that defendant had morals of a snake and was a slimy beast); Ferguson v. Commonwealth, 401 S.W.2d 225 (Ky. Crim. App. 1965) (beast); State v. Kohuth, 215 Minn. 520, 176 N.W.2d 372 (1970) (under some circumstances, it may be reversible error to characterize defendant as offender; here, it was proper to refer to defendant as robber where witness identified him); State v. Tate, 468 S.W.2d 646 (Mo. 1971) (mean punks and vicious men); Paul v. State, 483 P.2d 1176 (Okla. Crim. App. 1971) (goons); State v. Bradford, 256 S.C. 51, 180 S.E.2d 632 (1971) (mad dog); Grant v. State, 472 S.W.2d 531 (Tex. Crim. App. 1971) (beast); Olivia v. State, 459 S.W.2d 824 (Tex. Crim. App. 1971) (wolves, in sodom) prosecution); Easley v. State, 454 S.W.2d 758 (Tex. Crim. App. 1970) (savage). But see Marzucah v. United States, 398 F.2d 548 (1st Cir.), cert. denied, 393 U.S. 928 (1968) (big fish, improper); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968) (beast, improper); People v. Garreau, 27 Ill. 2d 388, 189 N.E.2d 287 (1963) (referring to defendant as a pervert, weasel, moron, and telling jury that defendant who raped his mother's friend, would rape a dog and would rape each and every member of the jury, there being no evidence in the record to support such remarks) State v. McGregor, 257 La. 955, 244 So. 2d 107 (1971) (unpredictable animal, improper); Carr v. State, 208 So. 2d 866 (Miss. 1968) (beastly nature, improper); People v. Hickman, 34 App. Div. 2d 831, 312 N.Y.S.2d 644 (1970) (junky, rat, and sculptor with a knife, improper); State v. Smith, 279 N.C. 163, 181 S.E.2d 548 (1971) (lower than the bone belly of a cur dog).*

People v. Carpenter, 131 Ill. App. 2d 187, 266 N.E.2d 478 (1970); People v. Sibley, 93 Ill. App. 2d 38, 236 N.E.2d 5 (1968). See People v. Romo, 256 Cal. App. 2d 589, 64 Cal. Rptr. 151 (1967) ("potential killers" where charged with assault with a deadly weapon). United States v. Birrell, 421 F.2d 665 (9th Cir. 1970) (where defense was insanity, that defendant should not be turned loose on society because of his homosexual proclivities invited a conviction because defendant was an homosexual); United States v. Hughes, 389 F.2d 535 (2d Cir. 1968) (defendant was doubly vicious because, knowing he was guilty, he demanded his constitutional rights, including right to trial, at which victim of alleged homosexual extortion ring was required to testify); People v. Trotter, 84 Ill. App. 2d 388, 228 N.E.2d 467 (1967) (reference to defendant as a dope peddler where only possession charged).*

State v. Sorensen, 104 Ariz. 503, 455 P.2d 981 (1969) (where defendant testified and prosecutor did not offer evidence of his bad reputation, commenting that there were areas of character testimony which would have been material but which defendant did not discuss); People v. Bonham, 348 Ill. 575, 181 N.E. 422 (1932) (comment founded on evidence is proper where matter is in issue); State v. Lawrence, 423 S.W.2d 807 (Mo. 1968) ("this man who has manifested dishonesty in the past" was proper where prior convictions in evidence, and was not as attack on defendant's character and reputation); Poole v. Commonwealth, 211 Va. 262, 176 S.E.2d 917 (1970) ("When they call you a killer, tell them you're a punk and vicious men"); Paul v. State, 483 P.2d 1176 (Okla. Crim. App. 1968) (big fish, improper); Miller v. State, 454 S.W.2d 758 (Tex. Crim. App. 1970) (savage). But see Marzucah v. United States, 398 F.2d 548 (1st Cir.), cert. denied, 393 U.S. 928 (1968) (big fish, improper); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968) (beast, improper); People v. Garreau, 27 Ill. 2d 388, 189 N.E.2d 287 (1963) (referring to defendant as a pervert, weasel, moron, and telling jury that defendant who raped his mother's friend, would rape a dog and would rape each and every member of the jury, there being no evidence in the record to support such remarks) State v. McGregor, 257 La. 955, 244 So. 2d 107 (1971) (unpredictable animal, improper); Carr v. State, 208 So. 2d 866 (Miss. 1968) (beastly nature, improper); People v. Hickman, 34 App. Div. 2d 831, 312 N.Y.S.2d 644 (1970) (junky, rat, and sculptor with a knife, improper); State v. Smith, 279 N.C. 163, 181 S.E.2d 548 (1971) (lower than the bone belly of a cur dog).*

The prosecutor may comment on the reputation and character of the accused only when the defendant has put such matters in issue, and the comments must be reasonably justified by the evidence.174 If the defendant's physical appearance is gross in nature, the physical attributes are certainly obvious to the jury and emphasis should not be added through prosecutorial comment.175 The exception is where identification is put in issue by the defendant himself or his counsel; under such circumstances it may be appropriate for the prosecutor to comment upon the appearance of the defendant.176

174 United States v. Borello, 435 F.2d 500 (2d Cir. 1970), cert. denied, 401 U.S. 946 (1971) (proper to comment on defendant's crooked foot and posture in courtroom where there were testimony and films of crime in evidence, and jury might have already noticed facts pointed out); People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968); People v. Archibald, 129 Ill. App. 2d 400, 263 N.E.2d 711 (1970) (where defense argued that state's identification was inadequate, proper to ask jury to notice that defendant was a very identifiable person); People v. Jefferson, 69 Ill. App. 2d 490, 217 N.E.2d 564 (1966) (defendant had worst face for an armed robber any man could have, proper); People v. Griffin, 29 N.Y.2d 91, 272 N.E.2d 477, 323 N.Y.S.2d 994 (1971). But see Chamberlain v. State, 46 Ala. App. 642, 247 So. 2d 683 (1971) (asking jury to remember defendant as he appeared in line-up picture in which his clothes were dirty and wrinkled, rather than the way he was in court with a polish job put on him by his lawyers, where not directed to issue of identity but was an unfair comparison of his appearance in court with his appearance in the picture, and imputed unethical conduct on part of defense counsel); Spencer v. State, 466 S.W.2d 749 (Tex. Crim. App. 1971) (stating that defense counsel would have had defendant in court with sunglasses or with a sack over his head if he could have, improper where identification in issue).
Failure to Cooperate Before Trial

As indicated earlier, the prosecutor may properly refer to statements made by the defendant before trial where such statements constitute a waiver of the fifth amendment right to remain silent. The general rule, though, is that the defendant's silence before trial is not a proper subject for comment, at least his silence subsequent to arrest. It is not clear whether the defendant's decision to testify at the trial constitutes a waiver of the right to remain silent before as well as during the trial, thus making comment on either situation improper.

Similarly, the courts have generally condemned remarks referring to the failure of the accused to make an exculpatory statement at the time of arrest, since this is merely another way of pointing out the defendant's silence. It has also been deemed improper to comment upon the defendant's invocation of the fifth amendment in prior judicial proceedings, regardless of whether the defendant was the accused or a witness.

In those situations in which the courts have held that no privilege to refuse to cooperate exists, comment on such refusal, if properly proved, is permissible. Thus it is proper to point out that the defendant refused to participate in a lineup, or, with the exception of the polygraph, to remark and not making a bomb, he would have told agents; not invited by defense argument that agents never asked defendant whether he was conducting an experiment; United States v. Winters, 420 F.2d 523 (3d Cir. 1970) (man without guilty knowledge would have denied seeing bag containing stolen money); United States v. Noland, 416 F.2d 585 (10th Cir. 1969) (failure to make exculpatory statement at time of arrest); People v. Crawford, 253 Cal. App. 2d 524, 61 Cal. Rptr. 472, cert. denied, 390 U.S. 1006 (1967) (failure to disclose alibi when arrested); Ester v. United States, 253 A.2d 537 (D.C. Ct. App. 1969) (comment on failure to make exculpatory statement after arrest prohibited; but comment on defendant's conduct when he saw police arrive was proper, since he was not then under arrest or in custody); People v. Christian, 23 N.Y.2d 429, 244 N.E.2d 703, 297 N.Y.S.2d 134 (1969) (that defendant had not told police of alibi at time of arrest)*; State ex rel. Simos v. Burke, 41 Wis. 2d 129, 143 N.W.2d 177 (1968) (if defendant elects not to give notice of alibi pursuant to notice of alibi statute, that fact cannot be commented upon, and if he elects to do so and subsequently does not assert alibi at trial, this is not to be commented upon either). But cf. State v. Cranke, 13 Ariz. App. 587, 480 P.2d 8 (1971) (suggests that lack of exculpatory statement at time of arrest is proper for comment); State v. Burt, 107 N.J. Super. 390, 258 A.2d 711 (1969) (proper to say if shooting had been accidental, as defendant claimed at trial, he would have told police officers at the earliest opportunity).


People v. Brocato, 17 Mich. App. 277, 169 N.W.2d 483 (1969) (no privilege to disclose polygraph report inadmissible); United States v. Flores, 425 F.2d 204 (10th Cir. 1970) (if all defendant was doing was an experiment...
on the failure of the accused to cooperate in the performance of certain experiments or tests.  

Guilt

Consistent with the right to comment on the state of the evidence in the case, it is proper for the prosecutor to argue or express the opinion that the accused is guilty, but only where the prosecutor states or it is apparent that the opinion is based solely on the evidence.  

As in other contexts, the prosecutor must not make the statement one of personal belief, thereby suggesting to the jury that there is other convincing evidence of the defendant’s guilt which is not before them.  

Accordingly, the test adopted by the federal courts for determining the propriety of the statement is whether the remark might reasonably lead the jury to believe that there was other evidence unknown or unavailable to it upon which the prosecutor’s belief rested.

While it is unclear whether the phrases “I think” and “I believe” are proper, a statement of personal belief is not proper merely because the prosecutor offers it as fact without the use of such phrases.  

Nor should the prosecutor emphasize

186 United States v. Schartner, 426 F.2d 470 (3d Cir. 1970) (“I have a duty to protect the innocent and to see that the guilty do not escape, and I say to you with all the sincerity I can muster that you do not convict the defendant the guilty will escape”); Devine v. United States, 403 F.2d 93 (10th Cir. 1968); People v. Conover, 243 Cal. App. 2d 38, 52 Cal. Rptr. 172 (1966) (would not prosecute defendant unless personally believed him guilty); People v. Bratcher, 88 Ill. App. 2d 108, 236 N.E.2d 132 (1967) (not going to prosecute people who are innocent); People v. Bell, 94 Ill. App. 2d 48, 228 N.E.2d 574 (1966) (proper to say could see no room for reasonable doubt); State v. Schmidt, 259 Ia., 972, 145 N.W.2d 631 (1966) (“But if you believe, as I do” improper); People v. Slater, 21 Mich. App. 561, 175 N.W.2d 786 (1970) (“I do know this much: that fellow there is the guy who killed victim”); People v. Pankin, 4 Mich. App. 19, 143 N.W.2d 806 (1966) (convinced beyond a reasonable doubt of defendant’s guilt, improper); State v. Moore, 428 S.W.2d 563 (Mo. 1968) (comment proper if it does not indicate other knowledge); State v. Smith, 279 N.C. 163, 181 S.E.2d 548 (1971) (prosecutor knew when to convict and when not to, improper); State v. Gairson, 484 P.2d 854 ( Ore. App. 1971); Blackstock v. State, 433 S.W.2d 699 (Tex. Crim. App. 1968) (not going to prosecute people who are innocent); State v. Jacobsen, 74 Wash. 2d 36, 442 P.2d 629 (1968) (would not prosecute unless sure of guilt); State v. Tollett, 71 Wash. 2d 805, 431 P.2d 165 (1967), cert. denied, 392 U.S. 914 (1968); State v. Walton, 5 Wash. App. 150, 462 P.2d 118 (1971) (had never used the term demand in argument but in this case the facts demanded a verdict of guilty).  

187 Schmitt v. United States, 413 F.2d 219 (5th Cir. 1969); Gradsky v. United States, 373 F.2d 706 (5th Cir. 1967)*.
his personal assessment of the strength of the case, or the various investigative procedures which lead him to believe the defendant guilty.

COMMENTING ON THE DEFENSE AND DEFENSE COUNSEL

Failure to Produce Witnesses

Since the burden of proof is on the government, the defense has the right to comment on the state's unexplained failure to produce witnesses. And even though the defense is not bound to present a case, it has been pointed out that the prosecutor may comment that no defense was presented, as a fair reference to the state of the evidence. It has been specifically recognized as proper for the prosecutor to note that the defense did not use its power to subpoena witnesses, or that the defense failed to produce any witnesses or specific witnesses. The latter comment is particularly appropriate and damaging when the absent witness is a material one, the most common example being the alibi witness.

See notes 127-31 & 136 supra, and accompanying text.


United States v. Seay, 432 F.2d 395 (5th Cir. 1970) (comment on failure to call defendants' wives, who were present at time of arrest, not improper); Ignacio v. Guam, 413 F.2d 513 (9th Cir. 1969) (failure of defense to call its own ballistics expert); People v. Grant, 268 Cal. App. 2d 470, 74 Cal. Rptr. 111 (1968), cert. denied, 396 U.S. 858 (1969) (material and logical witness); State v. Allison, 147 S.W.2d 396 (Ky. 1941) (material witness); State v. McLarty, 467 S.W.2d 58 (Mo. 1971) (material witness); Barron v. State, 479 P.2d 614 (Okla. Crim. App. 1971) (witness whose testimony would be expected to be favorable); Miller v. State, 458 S.W.2d 680 (Tex. Crim. App. 1970).

United States v. Welp, 446 F.2d 867 (9th Cir. 1971) (failure to call defendant's father who was in court, and arguing for an adverse inference); Kroll v. United States, 433 F.2d 1252 (5th Cir. 1970) (where defense in mail fraud was that defendant tried to protect investors' funds, proper to say that no investors were called to testify); United States v. Cox, 428 F.2d 683 (7th Cir. 1970) (proper to argue that defendant's companion, who according to defendant's excusatory statements could have provided alibi, remained anonymous); United States v. Banks, 426 F.2d 292 (6th Cir. 1970) (if defendant's alibi were really true, others than his wife and brother could have been called); People v. Chandler, 17 Cal. App. 3d 798, 93 Cal. Rptr. 146 (1971); People v. Romeo, 244 Cal. App. 2d 495, 53 Cal. Rptr. 260 (1966) (could draw adverse inference from failure to produce companions); Miller v. State, 224 A.2d 592 (Del. 1966) (proper to comment where state had affirmatively proved alibi, and defense made no effort to call presumably accessible witnesses); People v. Nilsson, 44 Ill. 2d 244, 255 N.E.2d 432, cert. denied, 398 U.S. 954 (1970) (unclear under Illinois law whether proper to comment on failure to produce alibi witnesses); Frazier v. State, 3 Md. App. 470, 230 A.2d 305 (1967); State v. Atlee, 57 N.J. 3a, 269 A.2d 1 (1970); Simon v. State, 400 S.W.2d 460 (Tex. Crim. App. 1966) (where defendant's brother was called by state and defense did not cross-examine, proper to argue that if defendant's version of the crime were true he would have asked his brother to support his story); See Alsobrook v. State, 43 Ala. App. 473, 192 So. 2d 478 (1966). But see Simon v. United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970) (as to defendant's failure to produce witnesses, proper where defense counsel felt he's guilty—"proper where defense counsel interrupted").
In limiting the above, the courts have emphasized that any comments on an absent witness may be improper where the witness is equally available or accessible to the government, though the presumptions and burdens in proving availability are not clear. If the witness is equally accessible it is not error for the prosecutor to reply to a question propounded by defense counsel during summation. If defense counsel's question concerns the whereabouts of certain witnesses it is proper for the prosecutor to ask why the same persons were not produced by the defense. Moreover, where the defendant attempts to explain the absence of a witness while testifying, the prosecutor may then refer to that absence, although such commentary is not otherwise permitted.

Although it is generally improper to refer to the fact that certain co-defendants failed to testify, the courts have permitted remarks concerning the failure of a defendant to produce his co-defendants as witnesses. The courts have been harsher where the absent witness was not a defendant, but one who would have to incriminate himself. Where the uncalled witness is the defendant's spouse, the propriety of a comment on the failure to call will depend upon the particular statute creating the husband-wife privilege.

While the court may permit reference to the failure of the defense to produce a witness or witnesses, especially in light of the currently confused state of the law, it is dangerous for the prosecutor to go further by arguing that the testimony would have been adverse. It is also perilous failure to present the testimonial account of a witness who was equally accessible; such that it was not improper to refer to this fact as an adverse comment on the witness's unavailability. Furthermore, it is not improper to comment on the unavailability of a witness who was absent for reasons of self-incrimination, as long as the prosecutor does not suggest the witness's unavailability to incriminate himself.

See note 142 supra, and accompanying text. 202 Berry v. State, 123 Ga. App. 616, 182 S.E.2d 166 (1971) (proper); Minor v. Commonwealth, 478 S.W.2d 716 (Ky. Crim. App. 1972) (argument that defendant had not put his co-defendant on stand, while not condoned, was not reversible error); State v. Hudson, 253 La. 992, 221 So. 2d 484 (1969) (where codefendant pleaded guilty at beginning of trial, he could have been called and failure to do so was proper subject of comment).

United States v. Smith, 436 F.2d 787 (5th Cir. 1971) (where defendant had previously escaped, it was improper in his prosecution for forgery to refer to failure to call certain witnesses where the court could not grant them immunity from prosecution for harboring and assisting a fugitive); Bradley v. United States, 420 F.2d 181 (D.C. Cir. 1969) (improper to argue that adverse inference could be drawn from failure to call witnesses who would have had to incriminate themselves); Morrison v. United States, 365 F.2d 521 (D.C. Cir. 1966) (where a defense witness invokes privilege on stand and government refuses to grant immunity, court should instruct both sides not to make a missing witness argument). See generally cases cited in notes 116, 118 & 119, supra.

to argue for an adverse inference unless the prosecutor has obtained an advance ruling from the court.207

Failure to Produce Evidence

The same general rules governing the failure of the defense to produce witnesses also apply to its failure to produce evidence.208 However, the question of accessibility has not received as much attention here.209 One reason for this is that the prosecutor’s remarks are more often viewed as invited by defense counsel,210 though it must be remembered that the defense attorney may, and indeed must, comment on the government’s failure to produce material evidence.211 Two remarks commonly made concern the defendant’s knowledge of the whereabouts of a missing gun,212 and the absence of fingerprints.213 In both situations the prosecutor is taking advantage of an opportunity to place blame for the government’s failure to produce evidence on the defense. Whatever the remark, the prosecutor must be certain that it is supported as much as possible by the evidence in the case. For example, it is not proper to attribute the absence of fingerprints to the defendant unless it has been shown that there were no fingerprints.214

Defense Counsel

It is permissible for the prosecutor to characterize the defense presented.215 However, he has less latitude when the focus of his argument turns from the defense generally to the defendant’s counsel.

Consistent with this approach, it has been held improper for the prosecutor to comment in argument on defense counsel’s objection to the admission of evidence or testimony216 or to portions of the prosecutor’s summation.217 Speculation on the
reasons why counsel waived opening statement or summation is also not condoned.\textsuperscript{218}

It is also improper to reflect unfavorably on the role of defense counsel, implying the use of improper or unethical tactics,\textsuperscript{219} where such remarks are not justified by the evidence.\textsuperscript{220} Personal attacks on defense counsel are highly improper.\textsuperscript{221}

If the defense attorney takes the stand, his testimony is a proper subject for comment under the rules applicable to commenting on witnesses generally.\textsuperscript{222}


\textsuperscript{219} United States v. Wilshire Oil Co. of Texas, 427 F.2d 969 (10th Cir. 1970) (confusing issue and throwing sand in juror’s eyes); United States v. Marcello, 423 F.2d 993 (5th Cir. 1970); United States v. Di-Giovanni, 397 F.2d 409 (7th Cir.), cert. denied, 393 U.S. 924 (1968) (cheap trick); Cline v. United States, 395 F.2d 138 (8th Cir. 1968) (dishonest); Chamberlain v. State, 46 Ala. App. 642, 247 So. 2d 683 (1971); State v. Zunwalt, 7 Ariz. App. 449, 439 P.2d 511 (1968) (that defense counsel not an officer of court as prosecutor was); People v. Savage, 395 F.2d 138 (8th Cir. 1968) (impolite pun on counsel’s name); People v. Lombardi, 247 N.E.2d 215 (1967) (repeatedly asserting that prosecutor was); People v. Panczko, 20 Ill. 2d 399, 185 N.W.2d 408 (1969) (sandbagging witnesses); Bray v. State, 478 S.W.2d 89 (Tex. Crim. App. 1972); Grant v. State, 472 S.W.2d 531 (Tex. Crim. App. 1971) (‘‘defense lawyer’s job is to try to get your eye off the defendant,” improper).

\textsuperscript{221} See note 38 supra, and accompanying text.

\textsuperscript{222} People v. Adkins, 22 Ill. 2d 175, 157 N.E.2d 449 (1958) (proper to state that defense counsel’s style of cross-examination deterred people from coming into court to testify, a fair comment on the record); People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968) (cross-examination of expert witness was an exhibition to confuse jury, proper); People v. Tolver, --- Ill. App. 2d ---, 273 N.E.2d 274 (1971) (where defense was that defendant had been involuntarily drugged by his companion, and did not have the requisite mental capacity to commit crime, proper to argue that a defendant who has been advised by a good attorney will not deny his presence at the crime scene but will raise this defense); State v. Smith, 431 S.W.2d 74 (Mo. 1968) (throwing dust in jurors’ eyes proper).

\textsuperscript{223} People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968) (cross-examination of expert witness was an exhibition to confuse jury, proper); People v. Tolver, --- Ill. App. 2d ---, 273 N.E.2d 274 (1971) (where defense was that defendant had been involuntarily drugged by his companion, and did not have the requisite mental capacity to commit crime, proper to argue that a defendant who has been advised by a good attorney will not deny his presence at the crime scene but will raise this defense); State v. Smith, 431 S.W.2d 74 (Mo. 1968) (throwing dust in jurors’ eyes proper).

\textsuperscript{224} Adams v. State, 192 So. 2d 762 (Fla. 1966) (convinced and distorted things, and had violated his oath as a lawyer and as a human being); People v. Kirk, 361 Ill. 2d 292, 222 N.E.2d 498 (1966) (converse taking doctrine of Adolph Hitler, in that if enough lies were told by enough people, they would be believed); Bonnenten v. State, 86 Nev. 393, 469 P.2d 401 (1970) (impolite pun on counsel’s name); People v. Lombardi, 22 N.Y.2d 262, 229 N.E.2d 206, 223 N.Y.S.2d 513 (1967) (‘‘great defender of civil liberties” and dishonest); Dupree v. State, 219 Tenn. 492, 410 S.W.2d 890 (1967) (in spite of highly improper defense argument that he would not represent defendant if he thought him guilty, response that defense counsel lied when he said he believed defendant innocent)\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{}}}}}}}

APPENDIX

It is obviously improper for the prosecutor to do or say anything in summation that has the sole effect of injuring the passion of or arouse the prejudice of the jury. Such remarks may encourage the jury to render a verdict based on its emotional response to unadmitted evidence which has no relationship to the guilt or innocence of the accused, rather than a verdict based upon reasoning from the record. The questions for review are to what extent, for what reasons, and with what effect were the arguments advanced. While caution against such comments is always required, it has been said that special care is required in the prosecution of sex offenses.

No attempt should be made to pressure the jury, such as by referring to the actions of other juries or to public sentiment regarding either the particular case or the jury system in general. It has also been deemed improper to refer to the victim of the crime or the victim’s family.

Furthermore, the prosecutor should not refer to the jurors or their families, hypothesizing the commission of the crime at issue against them.

Comments exciting racial, religious, or class prejudice have been repeatedly condemned, as have...

APPENDIX

229 United States v. Fullmer, 457 F.2d 447 (7th Cir. 1972); United States v. Gambert, 410 F.2d 383 (4th Cir. 1969) (suggesting that judge believes defendant guilty); State v. Beers, 8 Ariz. App. 534, 448 P.2d 104 (1969) (suggesting that judge believes defendant guilty); People v. Teague, 66 Ill. 2d 189 (1970) (suggesting that the weapon was not being introduced for security reasons where there was no basis for such statement); Thompson v. State, 194 So. 2d 649 (Fla. App. 1967); Carnes v. Commonwealth, 406 S.W.2d 849 (Ky. Crim. App. 1966); People v. Slaughter, 28 App. Div. 2d 1082, 285 N.Y.S.2d 146 (1967); State v. Beatty, 1 N.C. App. 365, 161 S.E.2d 650 (1968); Seeley v. State, 471 P.2d 931 (Okla. Crim. App. 1970) (great number of traffic deaths in drunk driving prosecution); State v. Mancini, 108 R.I. 261, 274 A.2d 742 (1971) (improper to refer to the weapon as having been introduced for security reasons where there was no basis for such statement); Conboy v. State, 455 S.W.2d 605 (Tenn. App. 1970); Wright v. State, 46 Wis. 2d 75, 175 N.W.2d 646 (1970) (reading profanity which witness attributed to defendant during course of crime may have been unnecessary).

People v. Hyde, 1 Ill. App. 3d 831, 275 N.E.2d 239 (1971) (improper to refer to wife or family of murder victim whether reference is by evidence or argument, but mere fact that evidence of such appears in trial incidentally or is the subject of comment does not automatically require reversal).
appeals to the interests of the jurors as taxpayers or as members of a particular community.27

Homer, 423 F.2d 630 (9th Cir. 1970) (asking whether defense counsel was trying to let defendants hide behind their race, improper); Brent v. White, 276 F. Supp. 386 (E.D. La. 1967) (reference to rape victim as a white girl where defendant was black was not pre-judicial where she testified and it was evident that she was white); Fisher v. State, 241 Ark. 545, 408 S.W.2d 894 (1966), cert. denied, 389 U.S. 821 (1967) (argument that never before in county had black received a life sentence upon conviction, not error where jury recommended a 15 year sentence); People v. Brown, 86 Ill. App. 2d 163, 229 N.E.2d 922 (1967) (must be a showing of non-black jury for censure of racial prejudice to warrant consideration on appeal); State v. Kirk, 205 Kan. 681, 472 P.2d 237 (1970); Irwin v. Commonwealth, 446 S.W.2d 570 (Ky. Crim. App. 1969) (argument that defendants had been hiding because they knew “the jig was up” was proper where clear there was no derogatory intention); State v. Alexander, 255 La. 941, 233 So. 2d 491 (1970) (mispronouncing “Negroes” not improper); Riley v. State, 83 Nev. 282, 439 P.2d 59 (1968) (no showing of racial bias); State v. Young, 374 S.W.2d 150 (Tenn. 1963) (argument referring to race and nationality or that a verdict would serve as a good example to young people.24 On the other hand, the prosecutor may comment on the brutal nature of the crime,24

While it is generally permissible to argue that a conviction would deter others from the commission of similar crimes,23 it has been held improper to suggest that if the defendant were acquitted he would commit further crimes or that a verdict of guilty would serve as a good example to young people.24 On the other hand, the prosecutor may comment on the brutal nature of the crime,24

211 People v. Washington, 71 Cal. 2d 1061, 458 P.2d 479, 80 Cal. Rptr. 357 (1969); People v. Nemke, 46 Ill. 2d 49, 263 N.E.2d 97 (1970); State v. Williams, 276 N.C. 703, 174 S.E.2d 503 (1970). But see Tenorio v. United States, 390 F.2d 96 (9th Cir. 1968) (comment on destruction and human waste resulting from heroin, 382 S.W.2d 777 (Ky. Crim. App. 1969) (if jury wanted a Clark County lawyer to come over and defend a Clark County chief who broke into an Estill County place of business, that was their business)21; Gibson v. State, 430 S.W.2d 507 (Tex. Crim. App. 1968) (in prosecution for assault with intent to kill, argument that “we have another shooting on our hands right here in Dallas, the place that the world is referring to as the murder capital of the world,” improper). See State v. Foster, 2 N.C. App. 109, 162 S.E.2d 583 (1968).
point out the number of crimes that go unpunished, and stress the responsibility of the jury for law enforcement.

**Mitigating Factors**

In addition to the above limitations, there are several doctrines which may affect the attitude of the trial and reviewing courts toward a remark which on its face would seem improper. These doctrines to some extent broaden the bounds of propriety while at the same time imposing some new limitations.

**Retaliatory Statements and Remarks**

When counsel believes that opposing counsel has made an improper comment, it should be called to the attention of the court as soon as possible through an objection. However, it is well established that the prosecutor has the right to make a fair reply to an argument previously made by the defense. Furthermore, the defense has no grounds for objection at trial or complaint on review where the prosecutor's remarks were invited or provoked by the improper comments of the defense, even though the prosecutor's remarks would otherwise be improper. This principle applies generally to all the limitations discussed above.

The courts have recognized, however, that this rule does not convert an improper remark into a proper one; an improper remark is still improper, even in retaliation. But response or invitation is a factor to be considered in evaluating the impact of the remark on the jury and determining possible prejudice to the defendant. Further, this is not to suggest that any remark offered in response to an improper defense comment will be considered specially. The prosecutor's statement must be a fair reply in order to avoid the danger of reversible error.

**Retaliatory Statements and Remarks**

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Curing and Preserving Improper Argument

The rule generally applicable in the criminal law, that a failure to make a timely objection waives the defect on review, applies to prosecutorial conduct during argument. The recognized exception to this rule is also applicable; that is, failure to object does not effect a waiver where the error is such that it could not have been cured and a refusal to review would deprive the defendant of a fair trial.

The courts are only slightly receptive to the contention that an objection merely places greater emphasis on the subject matter of the alleged transgression. The defense attorney is thus left in a dilemma, where the choice may be between waiving the error or making the prosecutor’s point. This situation is further complicated by the requirement that an objection be timely, complete and specific.

Assuming an objection is made, the prosecution

**State v. Costello, 415 S.W.2d 816 (Mo. 1967)** (error not properly preserved even though defense attorney’s reluctance to object within the hearing of the jury was understandable); State v. Polsky, 82 N.M. 393, 482 P.2d 257, cert. denied, 82 N.M. 377, 482 P.2d 241 (1971); State v. McGee, 52 Wis. 2d 756, 190 N.W.2d 893 (1971); cf. United States v. Grunberger, 431 F.2d 1052 (2d Cir. 1970) (no waiver where “it is understandable that defense counsel may wish to avoid underscoring a prejudicial remark in the minds of the jury by drawing attention to it”); State v. Fowler, 110 N.C. 110, 261 A.2d 429 (1970) (recognizing that an immediate objection may draw attention to remark); State v. Davidson, 44 Wis. 2d 177, 170 N.W.2d 755 (1969) (proper for trial judge to elect not to emphasize remark by repeating it to jury, where objection was made at end of argument).
tor's transgression is considered cured where the trial court sustains the objection and either ad-
monishes the jury to disregard, instructs the jury to disregard, or rebukes the prosecutor, or any combination of these which the trial court believes necessary to remove possible prejudice. It is
only when the error is so fundamental that it can- not be cured by these methods that the trial
court need resort to the more drastic remedy of mistrial.

Besides corrective action by the court, it has been held in some cases that the prosecutor or even the defense attorney had taken sufficient action to himself remedy the error.

Miscellaneous Considerations Affecting the Appel-
late Decision

In determining whether substantial prejudice to the defendant resulted from the prosecutorial sum-
mation, reviewing courts have looked to six other factors besides the law and the exact words used.
First, the courts consider the strength of the evidence in the case, applying the standard harmless beyond a reasonable doubt. Thus, if the reviewing court finds overwhelming evidence of guilt, it will probably uphold the conviction, even though it may point to some improprieties which were properly preserved and before the court on re-

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258 United States v. Halli, 443 F.2d 1295 (9th Cir. 1971) (instruction); United States v. Strauss, 443 F.2d 986 (1st Cir. 1971) (explaining what prosecutor meant); Turner v. United States, 441 F.2d 736 (5th Cir. 1971) (sustaining objection); United States v. DiGiovanni, 397 F.2d 409 (7th Cir.), cert. denied, 393 U.S. 924 (1968) (rebuke and instruction); People v. Hall, 1 Ill. App. 3d 949, 275 N.E.2d 196 (1971) (objection and later instruction); McCulloch v. State, 272 N.E.2d 613 (Ind. 1971) (admonishment usually cures); State v. Franklin, 459 S.W.2d 314 (Mo. 1970) (failure to instruct sua sponte to disregard after sustaining objection was not error).


260 United States v. Huidson, 423 F.2d 413 (9th Cir. 1970); Grant v. State, 472 S.W.2d 531 (Tex. Crim. App. 1971) (noting that improper remark was discussed by defense in summation); State v. Huson, 73 Wash. 2d 660, 440 P.2d 192 (1968) (defense made no objection but in summation told jury prosecution summation was unfair and an inflammatory tirade); Deja v. State, 43 Wis. 2d 488, 168 N.W.2d 856 (1969).

Fourth, the court may take into account the length of the trial or the length of the argument. It may be that a misstatement in a short trial is not serious error, since the jurors should have an independent recollection of the evidence. On the other hand, a lengthy argument after a long trial is more likely to be imperfect, and minor transgressions in this setting may also be excused.

Fifth, the court may consider the atmosphere of the courtroom throughout the trial, and may be more reluctant to find reversible error where the case was “hotly contested” on both sides.

Finally, where the error in summation alone is not sufficient to require reversal, the court may then examine the cumulative effect of this impropriety in conjunction with other errors which occurred during the rest of the trial.

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CONCLUSION

It is clear that some fine distinctions have been made by the courts in an effort to reconcile the prosecutor’s dual roles as impartial representative of the people and vigorous advocate for the state. The prosecutor may fail to meet both obligations in a particular case, performing one task to the exclusion of the other. The appellate court, however, does not sit primarily to enforce ethical or moral standards (though it may frequently speak to the question of what constitutes propriety), but rather to determine whether, all things considered, the defendant did in fact receive a fair trial. The case law of a particular jurisdiction will reveal few if any forms of speech or conduct during summation which are per se reversible error. It will suggest many forms which are potentially reversible error and generally improper. It is the combination of these with the particular facts of a case which will dictate the limits of propriety for the prosecutorial closing argument.

The most important learning to be gained by a study of the foregoing is that most prosecutorial conduct and comment is considered by reviewing courts in the context in which it occurred. Given the disparate approaches by the various jurisdictions in which these cases arose, it is impractical, if not impossible, to generalize upon the result which will be reached in any given case. Nevertheless, in most cases there is evident in the court decisions an honorable effort to protect the defendant’s right to a free and unbiased trial, while at the same time refraining from excessive impingement on the prosecutor’s obligation to vigorously present his case.

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266 United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (noting trial was a prolonged one); United States v. Heidson, 432 F.2d 413 (9th Cir. 1970) (trial lasted less than two days); People v. Hancock, 326 Mich. 471, 40 N.W.2d 689 (1959) (hotly-contested two-month trial); People v. Kearns, 280 N.Y. 763, 21 N.E.2d 525 (1939) (18-day trial).