

THE LEGAL LIMITS OF PROSECUTION ARGUMENT

I. INTRODUCTION:

Duty of Prosecutor: The prosecutor's duty is to seek justice, not merely to convict.

It is the duty of the public prosecutor to see that the person charged with crime receives a fair trial so far as it is in his/her power to afford him one, and it is likewise his duty to use his/her best endeavor to convict persons guilty of crime; and in the discharge of this duty an active zeal is commendable, yet his/her methods to procure conviction must be such as accord with the fair and impartial administration of justice. . . .(P v Dane, 59 M 550, 552 [1886]).

"I intend to use every prejudicial and detrimental means necessary in prosecuting him, so I don't think that's at all shocking to anyone" (P v Hurt, 211 MA 349 [1995], lv den and depublished 450 M 958 [1995])

"In closing argument, emotional language is an important weapon in counsel's forensic arsenal limited by the principle that a lawyer cannot comment upon evidence which has not been introduced. ... Criminal trials are adversary proceedings, not social affairs." (P v Mischley, 164 MA 478, 483 [1987], lv den 430 M 868 [1988])

After all, the prosecutor is an advocate and, in closing argument, emotional language is an important tool. (P v Cowell, 44 MA 623, 629 [1973]). See also P v Allen, 351 M 535, 544 (1958); Mischley, supra, 482-483.

II. PROCEDURE:

A. Opening Statement:

The prosecutor must give an opening statement unless the parties and the court agree otherwise; however, the failure to do so is not reversible error absent some showing of prejudice. (P v Stimage, 202 MA 28 [1993]). MCR 6.414(B)

Opening argument is the appropriate time to state the facts to be proven at trial. P v Johnson, 187 MA 621, 626 (1991), lv den 439 M 978 (1992).

Failure to prove matters mentioned in the opening statement can lead to reversal. While good faith statements in opening that evidence will be presented which is subsequently not forthcoming ordinarily will not cause reversal, a demonstration of prejudice can nonetheless require a mistrial or reversal. For example:

Deputy Smyth will testify regarding the instrument [with] which he gave [the Breathalyzer] test. He'll testify that he's been to a training course and he's learned

how to give the test. He'll testify that he's given it a number of times[;] he'll testify that the instrument was properly maintained, properly certified, and in working order when he gave the test; and he will testify that the blood alcohol level in [defendant's] breath at the time was a .20 and a .19. (P v Wolverton, 227 MA 72 [1997])

Following this opening argument, the trial court excluded the Breathalyzer results and, therefore, they were not presented to the jury. Id. The COA reversed the defendant's conviction. Id.

B. Rebuttal:

"If the defendant makes an argument, the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument." MCR 6.414(E)

Thus, the prosecutor may not return to issues raised in his/her own opening final argument unless the defense touches upon them. In other words, don't think that "saving your best arguments" for rebuttal is a good idea because a smart defense attorney's objection may prevent you making them.

Practice Pointer: When a defendant argues in closing that the prosecutor has not proved their case beyond a reasonable doubt, doesn't that open the door to arguing how your case proved the defendant guilty beyond a reasonable doubt?

C. Time Limits: "The court may impose reasonable limits on closing argument." MCR 6.414(E)

III. CONTENT OF CLOSING ARGUMENT:

MRPC 3.4: "A lawyer shall not ... (e) during trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness ... or the guilt or innocence of the accused."

A. Drawing Inferences: A prosecutor may not make a statement of fact unsupported by the evidence, but may draw inferences for the jury from the facts of the case. (P v Bahoda, 448 M 261, 282 [1995]). See also MRPC 3.4(e)

B. Personal Knowledge or Belief/ Weight of Office: It is improper for the prosecutor to assert or imply his/her personal knowledge or belief in the evidence presented or place the weight of his/her office behind the evidence.

"I sit down and I speak to the witnesses, and I would never, ever present any testimony other than entirely truthful in my mind." (Hurt, supra, 349)

"[I]f I thought a witness would come into court and testify under oath a falsity of any kind, he would

never be called as a witness in behalf of the people, never. It is my duty to present the truth and I expect the witnesses that I call to present the truth, and his testimony is that there is no question that the defendant is the man." (P v Erb, 48 MA 622, 631 [1973])

"Some people will tell you that a lawyer telling you his personal belief on whether a witness is telling the truth is improper . . . We don't get to choose our witnesses. The scum of the earth, we get to call those people too, that's why you won't hear me referring to the Defendant however I may personally feel as scum ... One term I've learned from [sic] the Court of Appeals not to throw around is scum bag. I think people forget the derivation. A scum bag where I come from used to mean a used condom that you found out somewhere. . . ." (P v Guenther, 188 MA 174, 184-185; 469 NW2d 59 [1991], lv den 439 M 940 [1992])

"Now, this is a guy who, as far as the convictions that you know of, is a four-time convicted felon. You don't think he knows those rights?" (unobjected-to closing argument)

"Take it from someone who knows, who has seen these cases. This just doesn't happen. There isn't always physical evidence." (P v Yant, 464 M 878 [2001], lv was vacated and lv den, but dissenters believed that this argument among other questioning errors required reversal).

"[T]his is the best case of first-degree murder that I've ever seen." [unpublished COA opinion affirmed def's conviction despite improper argument]

The Hurt court stated: [T]he prosecutor by repeated instances of misconduct, snatched defeat from the jaws of victory. Regretfully, we find it necessary to reverse as a result."

The Guenther court stated: "The prosecutor would do well to remember that it is better to use a rapier than an axe." The COA added: "we should all remember what Spinoza once said: '[M]en govern nothing with more difficulty than their tongues.'"

The use of the term "we know that" by a prosecutor in discussing the evidence is not necessarily an assertion of personal knowledge. Rather, the prosecutor may well be asserting that "we know" on the basis of the evidence presented at trial, and inferences drawn from that evidence, that the propositions advanced by the prosecutor have been established. P v Reed, 449 M 375 (1995).

Compare: "So let's look at the testimony in the case and essentially it comes from Det. Velliquette who I submit to you is quite credible and his testimony is very believable and should be believed." [unpublished COA opinion, where COA found improper vouching, but no prejudice.]

C. Unsupported by Evidence: A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence.

=> THE RECORD MUST SUPPORT YOUR ARGUMENT

"As I indicated before, the body itself through forensic evidence that would be available, the experts

looking at a body could tell us a great deal. And I would suggest that Jerry Fisher didn't want to give us that opportunity, because it would show consistent behavior with the past where it wasn't one blow. Well, where it was a well thought out situation of tying someone up or whatever precisely happened." (P v Fisher, 193 MA 284 [1992], lv den 440 M 907 [1992]) [Def's involuntary manslaughter conviction reversed. The victim's body was never found.]

The prosecutor repeatedly referred to the victim as "mentally challenged", but presented no evidence. (P v Leshaj, 249 MA 417 [2002]) [COA reversed on different ground (see religion, infra) but cautioned against such argument absent sufficient evidentiary support]

The prosecutor argued that blood on a jacket probably belonged to the two victims when there was no such evidence or reasonable inference. [COA unpublished opinion, holding it was error, but not reversible error]

D. Reference to Infamous Figures: An APA should avoid references or comparisons to infamous figures.

He [defendant] is the biggest actor in this court. He should go to law school and defend O. J. Simpson. (P v Ullah, 216 MA 669 [1996])

P v Kelley, 142 MA 671, 673 (1985), where the defendant's conviction was reversed because the prosecutor referred to John Wayne Gacey and there was a great likelihood that the jury would compare the defendant's character with Gacey's because the charge was criminal sexual conduct involving a young girl.

P v Pullins, 145 MA 414 (1985), where the prosecutor equated defendant with Sirhan Sirhan or Charles Manson when discussing the presumption of innocence.

P v Rowen, 111 MA 76, 82-83 (1981), where the prosecutor noted that Jack Ruby had the same presumption of innocence as defendant even though Ruby shot Lee Harvey Oswald on television in front of millions of people was not improper, because it could be viewed as a comment on the strength of the prosecutor's case.

E. Credibility of Witnesses

1. Arguing Credibility:

The prosecutor may call the defendant and his witnesses liars. He may argue that a witness is or is not worthy of belief where there are testimonial conflicts or arguably incredible testimony. P v Howard, 226 MA 528, 548 (1997), lv den 459 M 884 (1998); P v Viaene, 119 MA 690, 697 (1982).

In P v Rosengren, 159 MA 492, 504 (1987), lv den 429 M 870 (1987), where the prosecutor referred to the defendant's testimony as horse manure, the COA stated: "There is absolutely no reason why a prosecuting attorney may not, in advocating his/her cause, point out the incredibility of a

defendant's testimony when analyzing the evidence and describe that incredibility in the terminology customarily employed for that purpose.”

APA called defendant a brute, a bully, a liar and a cheat. Recent unpublished case, finding no misconduct because argument was based on evidence.

WARNING: You cannot argue that defendant is a liar simply because he is on trial:

Who does have a motive to maybe not be honest with you, to maybe try and mislead you a little bit, try and make you think some other things were going on that maybe weren't? The Defendant, ladies and gentlemen. He's the one on the hook here. He's the one on trial. He is a criminal Defendant in this case. Does he have any reason to maybe mislead you? Try and make you believe some other things were going on there that maybe weren't?

(Unpublished COA opinion from 6/4/02 – finding such argument improperly implied that defendant's incentive to lie stemmed from his status as a criminal defendant, but not reversing because there was no objection)

BUT: You can argue that by watching the other witnesses testifying, Defendant had an opportunity to tailor his own testimony. *Portuondo v Agard*, 529 US 61 (2000); *Buckey*, 424 M 1 (1985).

a. Defendant's Failure To Call Corroborating Witnesses

The general rule is that the prosecution may question and comment on the filing of a notice of a defense and upon the defendant's failure to produce corroborating witnesses *after defendant has actually put forth that defense*. *P v Fields*, 450 M 94, 111-112, 114-115 (1995); *P v Spivey*, 202 MA 719, 721-723 (1993) *P v Holland*, 179 MA 184, 188-193 (1989), *lv den* 434 M 888 (1990); *P v Lyles*, 148 MA 583, 592-593 (1986); *P v Jackson*, 108 MA 346, 351-352 (1981); *P v Ford*, 59 MA 35, 39 (1975); *P v Gant*, 48 MA 5, 8-9 (1973).

Exceptions:

1. Existence of Privilege: The prosecutor may not comment on the failure to call a witness who has a privilege (such as his wife). (*P v Johnston*, 76 MA 332 [1977]).

2. Exclusion of Witnesses by Prosecutor: The prosecutor may not successfully exclude witnesses (for lack of timely alibi/insanity notice or as a condition of bond) and then comment on the failure to call these witnesses. (*P v Householder*, 74 MA 399 [1979]).

3. Insanity Case: The prosecutor may not comment on defendant's failure to call an expert listed in his notice of insanity. (*P v Pate*, 108 MA 802 [1981]), where the prosecutor asked a series of questions implying that defendant was "hiding doctors" who would have testified that he was sane when the listed doctor had not interviewed defendant. COA added that alibi was different than insanity.)

4. Noticed Defense: The prosecutor may not comment on defendant's failure to present any evidence whatsoever after having filed a notice of alibi. (P v Shannon, 88 MA 138 [1979]) [COA held that that shifts the burden of proof rather than exposing the weakness in the defendant's case.] See also P v McCray, 245 MA 631, 637 n 1 (2001), lv den 466 M 872 (2002) [COA held that once defendant presents an inconsistent defense, including an inconsistent alibi defense, he can be impeached.]

F. Strength of the case/uncontradicted evidence/defense "failures" of proof

1. Uncontradicted Evidence: The prosecutor may state that the evidence is uncontradicted (when, in fact, it is).

BUT BE CAREFUL: An "evidence is uncontradicted" argument can be improper in a factual circumstance where the only possible rebuttal would have had to come from the defendant himself. (P v White, 401 M 482, 511-512 [1977]).

2. Failure to prove opening statement: The prosecutor may argue that the defense did not prove what is said it would in opening statement. (White, supra; P v Sanders, 163 MA 606 [1987], COA noted prosecutor stated he did not intend to shift the burden of proof and that defendant did not have an obligation to prove anything.)

G. Defendant's failure to testify/take the stand: The prosecutor may not comment on defendant's failure to take the stand. (Griffin v California, 380 US 609, 85 S Ct 1229, 14 L Ed 2d 106 [1965]).

"Normally, I can't comment on the Defendant failing to testify – and the Defendant chose not to – but he stood up and made inferences and a comment—" unpublished COA opinion reversing def's conviction for embezzlement.

APA asked police officer if defendant was given an opportunity to tell his side of the story and read his Miranda rights. Police officer testified that defendant invoked his right to remain silent. COA held questioning improper.

APA asked police officer if defendant had made a statement and was given a chance to tell his side of the story. COA reversed stalking conviction in unpublished opinion, noting that defendant had not testified and that his silence was not used to explain a separate statement he had made.

* A variation: recent opinion gave defendant a new trial where APA argued that defendant's wife invoked the Fifth because she did not want to lose her husband and marriage of 16 years.

PRACTICE POINTER: Defendants who represent themselves and do not testify present special problems in closing argument when they begin to set forth their version of the events. Your objection should be on the ground that the defendant is arguing facts not in evidence, not that he

cannot testify now. If defendant persists, ask to approach the bench and make clear what he should stop doing.

H. Financial condition of defendant:

General Rule: The prosecutor may not show or argue that defendant is poor or unemployed as motive for a theft crime.

BUT: Lack of funds may be shown as motive in a particular case, such as where a person is experiencing a shortage of funds that appears to be novel or contrary to what one would expect is typically felt by such a person. P v Henderson, 408 M 56 [1980] [arson and embezzlement.]

I. Civic duty:

An APA should refrain from argument which injects issues broader than defendant's guilt or innocence into the trial and improperly attempts to appeal to the fears and prejudices of jury members. Bahoda, supra, 284-285.

P v Gloria Williams, 65 MA 753, 755 (1975) ("Ladies and gentlemen of the Jury, you have an opportunity to effect [sic] the drug traffic in this city. You have a voice. You have a chance to use it.")

P v Biondo, 76 MA 155 (1977), lv den 402 M 835 (1978) ("[I]f these businesses * * * are preyed upon, then they will leave the city and the city will die.")

P v Sterling, 154 MA 223, 233 (1986) ("rid community of rapists")

P v Schwartz, 171 MA 364 (1988) ("this type of activity should not be tolerated in this county" during opening statement)

P v Schmitz, 231 MA 521 (1998), lv den 459 M 938 (1999):

This defendant didn't want to be associated with homosexuals, and he crossed the line. What's it going to be next? You don't want to be associated with somebody from a particular religious persuasion, so you kill that person? A particular race, so you kill that person? Where does it stop after this if defendant is allowed to kill somebody because he doesn't want to be associated with a homosexual?"

J. Disposition

Penalty: Neither counsel may argue regarding possible penalty upon conviction. CJ12d 3.13.

NGRI / GBMI:

Neither counsel may argue regarding the possible disposition of a defendant if found not guilty by reason of insanity or guilty but mentally ill. P v Szczytko, 390 M 278 [1973]; P v Wallace, 160 MA

1 [1987], where the prosecutor told the jury if they came back with a verdict of NGRI, defendant would be sent to the forensic center and, if determined not to be mentally ill, he would be released.)

K. Miscellaneous

1. Challenging Defense to Answer Questions/Or Shifting the Burden of Proof: A prosecutor cannot challenge defense counsel to answer specific questions [11] about defendant's involvement in the crime. (P v Green, 131 MA 232 [1983])

2. Lesser-Included Offenses: In P v Gray, 57 MA 289, 298 (1975), and P v Fry, 55 MA 18, 23-24 (1974), the COA held that it is improper for the court to inform the jury about who requested a particular instruction; however, reversal is not required absent manifest injustice. Likewise, you should not inform the jury that defense counsel requested an instruction and the trial court agreed to give it (over your objection).

3. Comment Upon Defense Attorney's Veracity: It has been held that the prosecutor cannot disparage defense counsel. P v Wise, 134 MA 82 (1984), lv den 422 M 852 (1985) (repeatedly stated: "he is not a very candid person" and added "he intentionally misled you" as well as he "may try to confuse you regarding the law.")

P v Dalessandro, 165 MA 569, 581-582 [1988], lv den 430 M 880 [1988]), "sham"/"sham meant to mislead you"/"whole boat load" of red herrings.

"The defense has one job, ladies and gentlemen and that job is to lead you astray on any issue it can. Any side issue." (improper argument, but not reversible because of defense counsel's immediate objection and the trial court's curative instruction).

Muddy the waters/Divert you from the truth/smokescreens

4. References to Religion: Appeal to religion requires reversal.

"[Defendant lied.] And who are you going to believe, the liar, or [the complainant] with her sense of deep rooted belief in God and righteousness?" (Leshaj, supra).

Bible quotations may properly be used as an illustration. Mischley, supra ["The wicked flee when no man pursueth." Proverbs, chapter 28, verse 1 (conviction affirmed, over dissent)].

But see, P v Sutherland, 149 MA 161 (1985) (COA disapproved of prosecutor's reference to the Ten Commandments during closing argument)

5. Using Properly Admitted Evidence for an Improper Purpose:

It is improper to argue statements admitted for impeachment purposes as substantive evidence.

(Dalessandro, supra, 581-582).

"This is a man who has lied to get himself out of trouble in the past and who got up on the stand and lied to get himself out of trouble today." [unobjected-to closing argument where prior drug deal was admitted to show intent to deliver, but used for the improper purpose of showing propensity].

6. Sympathy for the Victim

Avoid overkill. In Dalessandro, supra, 580-581, repeated references to the 10-month-old victim as an "little innocent baby" crying out pain with a look of terror on his face was held improper.

7. Can't ask jury to put themselves in place of D or victim

L. Fair response: Remarks of the prosecutor induced by and made in direct response to statements by defense counsel will not be held to be reversible error, even where those remarks would be considered improper. (Fields, supra, 110-111)

CAUTION: COA has held that for it to "condone an improper argument by the prosecutor, it must be made in response to an equally (or more) improper argument by defense counsel." Wise, supra, 103.