THEODORE ROOSEVELT
AMERICAN INN OF COURT

– Inn-Sights on the Law: A Special Program Series –

FINER ARTS: CROSS-EXAMINATION AND SUMMATION

STEPHEN P. SCARING, ESQ.

Monday, June 27, 2022 6:00 PM

THEODORE ROOSEVELT

AMERICAN INN OF COURT

– Inn-Sights on the Law: A Special Program Series –

FINER ARTS: CROSS-EXAMINATION AND SUMMATION

6:00-6:03 - Program Introduction by Hon. Andrea Phoenix

6:04-6:06 – Introduction of Speaker STEPHEN P. SCARING, ESQ. by Lois Schlissel, Esq.

6:07-6:45 - Presentation on Cross-Examination and Summation by Stephen P. Scaring, Esq.

6:46-6:58 – Questions and Answers – Moderated by James O. Druker, Esq.

6:58-7:00 – Concluding Remarks – Russell G. Tisman, Esq,

New York State Bar Association's Recipient of the Charles F. Crimi memorial Award for the Outstanding Private Defense Lawyer.

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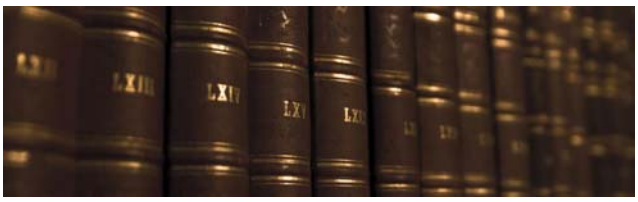
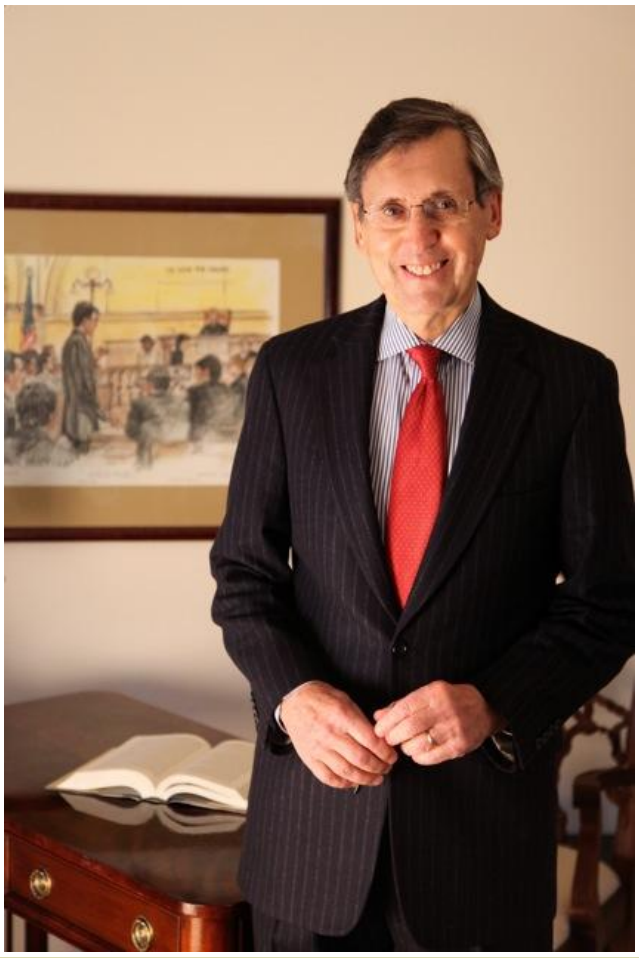


STEPHEN SCARING – ACCOMPLISHED ATTORNEY

A graduate of C.W. Post College and The Catholic University of America School of Law, Mr. Scaring served as an Assistant District Attorney and Chief of the Homicide Bureau in Nassau County, as well as a Special Prosecutor in Suffolk County. He also has served as an Associate Professor of Law and Psychiatry at C.W. Post College.

Mr. Scaring is a Fellow of the American College of Trial Lawyers and a Member of the New York Council of Defense Lawyers. He has been active in the Nassau County Bar Association (Member), the



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BACKGROUND

Stephen Scaring is engaged in the private practice of law, specializing in criminal law and white collar criminal matters. He was an Assistant District Attorney and Chief of the Homicide Bureau in Nassau County. He served as a Special Prosecutor in Suffolk County, and taught with the title of Associate Professor or Law and Psychiatry at C. W. Post College. He is a Fellow with the American College of Trial Lawyers, a member of the New York Council of Defense Lawyers, former President of the Theodore Roosevelt Inn of Court, and active in many bar associations. Mr. Scaring has been selected by the New York Times to its top 100 list of Super Lawyers in the New York Metropolitan area for the past 6 years and was selected by the New York State Bar Association for the Charles F. Crimi Memorial Award for Outstanding Defense Practitioner. He is a graduate of Catholic University Law School.

James O. Druker

Master of the Bench, American Inns of Court, Theodore Roosevelt Inn, 1987—. Author: "New Cars and UCC Section 2-608: Your Client Isn't Stuck with a Lemon," Clearinghouse Review, Vol. 4, No. 4, August, 1970. Lecturer, Criminal Procedure and Ethics, Nassau County Bar Association, 1979—. Guest Adjunct Law Professor, Fordham School of Law, 1990-2003. Assistant Attorney General, Commonwealth of Massachusetts, 1968-1969. Special Attorney, U.S. Department of Justice, Organized Crime and Racketeering Section, 1970-1974. Assistant U.S. Attorney, Eastern District of New York, 1975-1976. Deputy Chief, Criminal Division and Chief of Official Corruption Section, 1975-1976. Assistant District Attorney and Chief of Rackets and Narcotics Bureau, Nassau County District Attorney's Office, 1976-1978.
Charter member American Inns of Court, 1985 to present, lecturer at IRS and FBI workshops, guest lecturer at Fordham School of Law and Baruch College graduate business school (2012 - present), panelist
on criminal tax panels for the New York City Bar; lecturer at FBI and IRS workshops, and New York Ass'n. of CPAs.

CROSS-EXAMINATION

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4 Criminal Procedure in New York § 68:1 (2d)

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Chapter 68. Cross-Examination and Impeachment

§ 68:1. Cross-examination—Nature and purpose

References

West's Key Number Digest

West's Key Number Digest, Criminal Law 446
West's Key Number Digest, Criminal Law 489
West's Key Number Digest, Criminal Law 627.9(4)
West's Key Number Digest, Criminal Law 706(3)
West's Key Number Digest, Criminal Law 1170.5(4)
West's Key Number Digest, Criminal Law 1544
West's Key Number Digest, Evidence 558(1) to 558(11)
West's Key Number Digest, Witnesses 266

The United States Constitution and the Constitution of the State of New York both guarantee the basic right of confrontation to a person accused of a crime.[1] The confrontation clause of the United States Constitution applies to the criminal courts of the states and the right of confrontation is denied if the right of cross-examination is denied.[2]

Just as the art of examining a witness is an acquired art, so is the art of cross-examination. That does not leave the inexperienced practitioner at a loss to effectively cross-examine a witness, however. The purpose of cross-examination is not only to determine whether the witness has been truthful but also to expand the witness' testimony so that the whole truth may be known to the trier of fact.[3] Thus it may be that a witness' testimony is completely truthful but that not all of the facts are known. An example of this could be where a witness relates the events leading up to an assault that arises out of a fistfight between two persons. If that witness should leave out significant information to the effect that the person who is now the complainant did in fact provoke the fight then such information could be developed on cross-examination.

Even when the specific story of the witness is nonassailable on cross-examination, the credibility of that witness may be subject to attack by one or more of the methods which will be discussed in the following sections.

It should be noted by the practitioner that very often only one or two key points are available to the cross-examiner. If the cross-examiner attempts to go over each and every detail of the witness' story on direct examination, the practitioner runs the risk of

bolstering the opponent's case by having the same story repeated. The practitioner should concentrate on those points which are significant and which tend to show that the witness either had a failing memory, was untruthful or did not relate the full story. Once those points are made, the wise practitioner will sit down.

The trial court's participation in cross-examination is not reversible error, where the questions asked clarified the issues and expedited a lengthy cross-examination by the prosecution.[4]

The Appellate Division held that it would continue to express its disapproval of a trial judge's practice of improperly injecting him/herself into proceedings. However, the Court's conduct in this particular case did not deprive the defendant of a fair trial as there was sufficient direct and cross-examination on the part of the prosecutor and defense counsel to balance the testimony.[5]

Footnotes

1 US Const amend VI; NY Const art 1, § 6.

2 Douglas v. State of Ala., 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965); People v. Sepulveda, 105 A.D.2d 854, 481 N.Y.S.2d 870 (2d Dep't 1984) (court curtailing defendant's cross-examination of state's principal witness); People v. Rivera, 106 Misc. 2d 110, 431 N.Y.S.2d 316 (N.Y. City Crim. Ct. 1980) (disapproved of on other grounds by, People v. Chin, 67 N.Y.2d 22, 499 N.Y.S.2d 638, 490 N.E.2d 505 (1986)); People v. Conyers, 86 Misc. 2d 754, 382 N.Y.S.2d 437 (Sup 1976), judgment aff'd, 63 A.D.2d 634, 405 N.Y.S.2d 409 (1st Dep't 1978).

Although the defendant's right to confrontation was violated by the trial court allowing an unsworn seven-year-old prosecution witness to sit at a table facing the jury and turned away from the defendant, this did not warrant reversal since there was no possibility that the error might have contributed to defendant's conviction. People v. Tuck, 75 N.Y.2d 778, 552 N.Y.S.2d 85, 551 N.E.2d 578 (1989).

The court erred in limiting the cross-examination of one of the prosecution's main witnesses by precluding cross-examination regarding the underlying facts of a youthful offender adjudication. People v. Caines, 221 A.D.2d 278, 634 N.Y.S.2d 94 (1st Dep't 1995) (error was harmless).

3 The trial court acted properly in interrupting the prosecutor's cross-examination of the testifying defendant and rephrasing the questions in order to obtain a more responsive answer. People v. Bennette, 56 N.Y.2d 142, 451 N.Y.S.2d 647, 436 N.E.2d 1249 (1982).

4 People v. Moses, 126 A.D.2d 755, 511 N.Y.S.2d 338 (2d Dep't 1987).

5 People v. Chavis, 59 A.D.3d 240, 873 N.Y.S.2d 566 (1st Dep't 2009).

4 Criminal Procedure in New York § 68:2 (2d)

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Chapter 68. Cross-Examination and Impeachment

§ 68:2. Cross-examination—Nature and purpose—Satisfying right of cross-examination

References

West's Key Number Digest

West's Key Number Digest, Criminal Law 446
West's Key Number Digest, Criminal Law 489
West's Key Number Digest, Criminal Law 627.9(4)
West's Key Number Digest, Criminal Law 706(3)
West's Key Number Digest, Criminal Law 1170.5(4)
West's Key Number Digest, Criminal Law 1544
West's Key Number Digest, Evidence 558(1) to 558(11)
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Cross-examination of an adverse witness is a matter of right in every trial of a disputed fact.[1] Where a witness refused to answer a question on cross-examination either the witness should be compelled to answer the question or the witness' direct evidence should be stricken from the record.[2] Additionally, if the cross-examination is rendered impossible or ineffective by the death or illness of the witness after giving direct testimony, then the testimony on direct examination will also be rendered incompetent.[3] Where the right to cross-examine has been significantly curtailed, reversal will be required even without a showing of specific prejudice.[4]

Curtailment of cross-examination, occasioned by a witness' invocation of the Fifth Amendment, does not offend the confrontation clause if the unanswered questions are completely collateral to the direct evidence.[5] However, when the restriction on cross-examination goes beyond the exclusion of purely collateral matters, the testimony of the witness must be stricken in whole or in part.[6] There can be no restriction which would deprive a defendant of an important means of combating inculpatory testimony or at least the existence of a reasonable doubt as to guilt.[7]

The trial court has broad discretion in fashioning the appropriate corrective response, depending on the degree of prejudice incurred by the party whose right of cross-examination was impaired by the witness's invocation of the Fifth Amendment.[8] The court has presented three graduated levels of remedial action: striking the witness's entire testimony where the witness refused

to testify on matters closely related to the commission of the crime; a partial striking where the refusal to answer is connected solely with one phase of the case; or where the refusal to answer involves collateral matters or cumulative testimony concerning the credibility which would not require a direction to strike and which could be handled by the judge's charge if questions as to the weight to be ascribed to such testimony arose.[9] However, striking a witness's testimony is the most drastic relief available in such a situation, which should only be invoked when there are no less drastic alternatives, and the court has an obligation to weigh the options.[10] Accordingly, where the court was faced with the recantation of the crux of a key witness's testimony, and the witness indicated that she would assert her Fifth Amendment rights if she was again called to the stand, the court should have at least explored whether the witness had essentially refused to testify on questions or matters so closely related to the commission of the crime that the entire testimony of the witness should be stricken.[11] By contrast, the refusal to strike a prosecution witness's testimony, based on subsequently discovered evidence of a favorable disposition of drug possession charges against the witness, and based on the witness's indication that she would assert her Fifth Amendment privilege as to those dismissed charges was not an abuse of the court's discretion since this subsequently discovered evidence involved only collateral matters relating to general credibility.[12]

If counsel has the opportunity to cross-examine the witness but chooses not to do so, then the right of cross-examination and, therefore the right of confrontation, has been satisfied.[13] However, the opportunity for cross-examination at a pretrial suppression hearing does not satisfy a defendant's constitutional right of confrontation.[14]

Even where the right of cross-examination has been afforded in part, but cross-examination has not been completed and is thereafter thwarted by the illness or death of that witness, the complete testimony of the witness will be struck.[15]

A well-recognized exception to the right of confrontation authorizes the use at a later proceeding of a then unavailable witness' prior testimony, provided that the defendant at the prior proceeding was represented by counsel who was afforded the opportunity to adequately cross-examine the witness.[16]

A defendant's right of confrontation was not violated when the codefendant's videotaped post arrest statement was played before the jury, where the codefendant testified and was, therefore, subject to and in fact cross-examined by defense counsel in a way favorable to the defendant.[17]

The court's conduct in precluding the defendant during cross-examination of the complainant from inquiring into the precise amount of damages sought in the complainant's related civil action did not violate the defendant's right of confrontation where the defendant was permitted to question the complainant about the existence of the civil action, whether he was aware that it sought millions of dollars in damages, whether he had obtained legal representation and when the lawsuit was commenced, whereby the defendant was able to sufficiently probe the intended area of inquiry and explore the veracity of the complainant's direct testimony.[18]

The trial court deprived a defendant of the constitutional right to confront the witnesses against him, and committed reversible error, by refusing to allow the defendant to cross-examine the complainant with respect to his motives to fabricate his testimony, where the defendant was charged with the crimes of criminal impersonation, forgery, and possession of forged documents based on an allegation that he had sold a house barge belonging to the complainant, since the court's ruling effectively deprived the defendant of his defense that he had acted as the complainant's agent in the sale of the barge.[19]

At a rape trial, the court's erroneous redaction of complainant's e-mail messages to defendant and the limitation on cross-examination of complainant violated defendant's Sixth Amendment right to confrontation, where defendant was effectively precluded from offering any evidence to support the claim that complainant had indicated her involvement in a sadomasochistic relationship and her interest in participating in sadomasochism with him, from challenging complainant's veracity with evidence

that complainant's remarks were exaggerations or fabrications, or from offering any evidence of complainant's motive to fabricate.[20]

A witness's use of a pseudonym and the preclusion of evidence regarding his address and occupation at the defendant's trial for second-degree murder did not violate the defendant's right to confront the witness, where the court determined that the witness's safety concerns outweighed the defendant's interest in obtaining information regarding the witness's true identity for purely collateral impeachment purposes.[21]

A defendant was not deprived of his right to confrontation when the court interrupted a witness, who was the victim and the only testifying eyewitness, and warned him that he may have been perjuring himself because his trial testimony was so different from his grand jury testimony and assigned counsel for the witness, and after the witness consulted with counsel, the court permitted the prosecution to continue direct examination, during which the witness provided testimony that was extremely damaging to the defense and the defense was given an opportunity to cross-examine the witness without restriction.[22]

Footnotes

1 Friedel v. Board of Regents of University of New York, 296 N.Y. 347, 73 N.E.2d 545 (1947);People v. Ayrhart, 101 A.D.2d 703, 475 N.Y.S.2d 687 (4th Dep't 1984) (denial of right to cross-examination deprived defendant of fair trial).

2 People v. Corley, 77 A.D.2d 835, 431 N.Y.S.2d 21 (1st Dep't 1980); Gallagher v. Gallagher, 92 A.D. 138, 87 N.Y.S. 343 (3d Dep't 1904).

3 People v. Cole, 43 N.Y. 508, 1871 WL 9590 (1871).

4 People v. Pettaway, 153 A.D.2d 647, 545 N.Y.S.2d 163 (2d Dep't 1989) (trial court erroneously restricting defense counsel's cross-examination); People v. Carter, 86 A.D.2d 451, 450 N.Y.S.2d 203 (2d Dep't 1982).

Restriction of defendant's cross-examination of a witness, which excluded questioning which might establish that the witness was biased against the defendant, was harmless error where there was other evidence against the defendant. People v. Robinson, 116 A.D.2d 748, 498 N.Y.S.2d 42 (2d Dep't 1986).

Police officers' unintentional destruction of a physical description form filled out by the witnesses did not frustrate the defendant's right to cross-examine these witnesses. People v. Saylor, 113 A.D.2d 904, 493 N.Y.S.2d 621 (2d Dep't 1985).

Denial of the right to full cross-examination of the prosecution's witnesses may deprive the defendant of the constitutional right to cross-examine defendant's accusers. People v. Brinkworth, 112 A.D.2d 799, 492 N.Y.S.2d 309 (4th Dep't 1985).

5 Fountain v. U.S., 384 F.2d 624 (5th Cir. 1967); People v. Gugino, 229 A.D.2d 968, 645 N.Y.S.2d 249 (4th Dep't 1996); People v. Fominas, 111 A.D.2d 868, 490 N.Y.S.2d 268 (2d Dep't 1985); People v. Farruggia, 77 A.D.2d 447, 433 N.Y.S.2d 950 (4th Dep't 1980).

6 U.S. v. Cardillo, 316 F.2d 606 (2d Cir. 1963).

7 Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

The trial court committed reversible error where it prevented the defense counsel from using cross-examination of a witness to explore or challenge highly damaging but unsupported assertions. People v. Smith, 52 N.Y.2d 802, 436 N.Y.S.2d 867, 418 N.E.2d 382 (1980).

Although not every error which improperly curtails a defendant's right to cross-examine a prosecution witness is per se reversible error, such a limitation in a case where the issue of the credibility of the prosecution witness is crucial constitutes reversible error. People v. Brinkworth, 112 A.D.2d 799, 492 N.Y.S.2d 309 (4th Dep't 1985).

The direct testimony of a witness was struck where the defense counsel sought to establish the witness' motivation to fabricate his direct testimony and the witness repeatedly invoked his right against self-incrimination. People v. Farruggia, 77 A.D.2d 447, 433 N.Y.S.2d 950 (4th Dep't 1980).

8 People v. Siegel, 87 N.Y.2d 536, 640 N.Y.S.2d 831, 663 N.E.2d 872 (1995).

9 People v. Siegel, 87 N.Y.2d 536, 640 N.Y.S.2d 831, 663 N.E.2d 872 (1995).

10 People v. Vargas, 88 N.Y.2d 363, 645 N.Y.S.2d 759, 668 N.E.2d 879 (1996).

11 People v. Vargas, 88 N.Y.2d 363, 645 N.Y.S.2d 759, 668 N.E.2d 879 (1996).

12 People v. Vargas, 88 N.Y.2d 363, 645 N.Y.S.2d 759, 668 N.E.2d 879 (1996).

13 Bradley v. Mireck, 91 NY 293, 25 Hun 272.

14 People v. Rosario, 51 N.Y.2d 889, 434 N.Y.S.2d 973, 415 N.E.2d 962 (1980); People v. Berzups, 49 N.Y.2d 417, 426 N.Y.S.2d 253, 402 N.E.2d 1155 (1980).

15 In re Mezger's Estate, 154 Misc. 633, 278 N.Y.S. 669 (Sur. Ct. 1935).

16 People v. Simmons, 36 N.Y.2d 126, 365 N.Y.S.2d 812, 325 N.E.2d 139 (1975).

17 People v. Rivera, 234 A.D.2d 144, 651 N.Y.S.2d 455 (1st Dep't 1996).

18 People v. Miceli, 235 A.D.2d 551, 653 N.Y.S.2d 361 (2d Dep't 1997).

19 People v. Panetta, 250 A.D.2d 710, 673 N.Y.S.2d 434 (2d Dep't 1998).

20 People v. Jovanovic, 263 A.D.2d 182, 700 N.Y.S.2d 156 (1st Dep't 1999).

21 People v. Frost, 100 N.Y.2d 129, 760 N.Y.S.2d 753, 790 N.E.2d 1182 (2003).

22 People v. McKnight, 309 A.D.2d 1281, 764 N.Y.S.2d 734 (4th Dep't 2003).

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35A Carmody-Wait 2d § 195:88

Carmody-Wait 2d New York Practice with Forms | June 2022 Update

Chapter 195. Testimony of Witnesses

Stephanie A. Giggetts, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Judith Nichter Morris, J.D.; Yvette Wiltshire, J.D.; Theodore Wyman, J.D.; and Stephanie Zeller, J.D.

VI. Cross-Examination and Impeachment

A. Cross-Examination, Generally

1. Right to Cross-Examination

a. In General

§ 195:88. Right to cross-examination, generally

Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4678, 4679
West's Key Number Digest, Criminal Law 662.1, 662.7
West's Key Number Digest, Witnesses 266

Cross-examination of adverse witnesses is a matter of right in every trial of a disputed issue of fact.[1] It is a fundamental right of constitutional dimension.[2] The Sixth Amendment[3] right to be confronted with the witnesses against the accused, incorporated in the Fourteenth Amendment[4] and therefore available in state proceedings,[5] includes the right to conduct reasonable cross-examination.[6] In effect, the confrontation clause guarantees an opportunity for cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish.[7]

Observation:

The confrontation clause applies both to in-court testimony and to out-of-court testimonial statements introduced at trial, regardless of the admissibility of the statements under the rules of evidence. Testimonial statements of a witness who does not appear at trial are admissible only where the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. However, when a declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of the declarant's prior out-of-court testimonial statements.[8]

The state constitutional right of the accused to confront the witnesses against them also includes the right of cross-examination.[9] Additionally, the Criminal Procedure Law guarantees each party the right to cross-examine every witness called by the other party.[10]

Observation:

The right of confrontation does not impose an absolute right to cross-examine in camera where the witness would be available for cross-examination at trial.[11]

CUMULATIVE SUPPLEMENT

Cases:

Trial court did not violate defendant's constitutional right to confront at trial for burglary and possession of stolen property by limiting defendant's cross-examination of witness who he claimed also entered victim's apartment in order to secure the premises while defendant removed victim's property; defendant's trial counsel pursued an irrelevant line of questioning with witness that sought to elicit information about the client base of the charitable agency which provided housing assistance to victim and was witness's employer, and about victim's relationship with that agency, among other irrelevant matters. U.S. Const. Amend. 6; N.Y. Penal Law §§ 140.25(2), 165.40. People v. Porter, 184 A.D.3d 1014, 125 N.Y.S.3d 776 (3d Dep't 2020).

Trial court's limitation of defense counsel's cross-examination of complainants did not deprive defendant of his right to confrontation in prosecution for robbery and assault, where defendant was afforded opportunity to challenge credibility and accuracy of complainants' testimony. U.S. Const. Amend. 6; N.Y. Const. art. 1, § 6. People v. Wingate, 184 A.D.3d 738, 125 N.Y.S.3d 724 (2d Dep't 2020).

Trial court's decision to preclude defendant from cross-examining witness about an arrest that had resulted in a dismissal, absent showing that the charges were not dismissed on the merits, did not violate defendant's constitutional right to cross-examine witnesses. U.S. Const. Amend. 6. People v. Gamble, 179 A.D.3d 580, 117 N.Y.S.3d 43 (1st Dep't 2020).

Trial court's ruling limiting defendant's cross-examination of a state's witness did not violate defendant's right to confrontation in prosecution for murder in the first degree and robbery in the first degree, where the trial court ruled that defendant could not ask the witness about the underlying facts of pending charges for which witness secured some consideration in exchange for his testimony, and, notwithstanding the ruling, defendant questioned witness about his history of drug crimes, his violation of his parole, what the pending charges were and what offers or promises he had been given in exchange for his testimony. U.S. Const. Amend. 6; N.Y. Const. art. 1, § 6. People v. Wakefield, 175 A.D.3d 158, 107 N.Y.S.3d 487 (3d Dep't 2019).

Trial court's restricting rape defendant from cross-examining minor victim regarding her use of adult website through which she made contact with defendant did not violate his rights under Confrontation Clause; defendant was allowed to cross-examine victim as to fact that she met defendant through website, knew that purpose of site was for "finding people to have sex with," and lied about her age by affirming that she was over 18 to gain access to site, and any other information regarding victim's use of website was irrelevant. U.S. Const. Amend. 6; N.Y. Penal Law §§ 130.30(1), 130.45(1), 263.16. People v. Pendell, 164 A.D.3d 1063, 82 N.Y.S.3d 257 (3d Dep't 2018).

[END OF SUPPLEMENT]

Footnotes

1 Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); Alford v. U.S., 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931); People v. Chin, 67 N.Y.2d 22, 499 N.Y.S.2d 638, 490 N.E.2d 505 (1986); People v. Gissendanner, 48 N.Y.2d 543, 423 N.Y.S.2d 893, 399 N.E.2d 924 (1979).

2 People v. Baranek, 287 A.D.2d 74, 733 N.Y.S.2d 704 (2d Dep't 2001) (referring to U.S. Const Amends. VI, XIV and N.Y. Const. Art. I, § 6); People v. Elliot, 127 A.D.3d 779, 4 N.Y.S.3d 612 (2d Dep't 2015), leave to appeal denied, 26 N.Y.3d 928, 17 N.Y.S.3d 91, 38 N.E.3d 837 (2015); People v. Tirado, 109 A.D.3d 688, 970 N.Y.S.2d 342 (4th Dep't 2013).

3 U.S. Const Amend. VI.

4 U.S. Const Amend. XIV.

5 Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004); Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513, 26 Fed. R. Evid. Serv. 609 (1988).

6 Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513, 26 Fed. R. Evid. Serv. 609 (1988); People v. Jaikaran, 95 A.D.3d 903, 943 N.Y.S.2d 223 (2d Dep't 2012); People v. Ashner, 190 A.D.2d 238, 597 N.Y.S.2d 975 (2d Dep't 1993).

Where the People established by clear and convincing evidence that misconduct by the defendant or by someone acting at their behest caused the unavailability for trial of one of the witnesses to the crimes charged, the defendant forfeited their right to confront this witness, and the court properly permitted the People to introduce the witness's grand jury testimony. People v. Chandler, 30 A.D.3d 161, 815 N.Y.S.2d 567 (1st Dep't 2006).

7 People v. Smith, 27 N.Y.3d 652, 36 N.Y.S.3d 861, 57 N.E.3d 53 (2016); People v. Alcarez, 141 A.D.3d 943, 36 N.Y.S.3d 284 (3d Dep't 2016), leave to appeal denied, 28 N.Y.3d 1025, 68 N.E.3d 106 (2016); People v. Caballero, 137 A.D.3d 929, 27 N.Y.S.3d 84 (2d Dep't 2016), leave to appeal denied, 28 N.Y.3d 927, 40 N.Y.S.3d 356, 63 N.E.3d 76 (2016); People v. Taylor, 134 A.D.3d 739, 21 N.Y.S.3d 300 (2d Dep't 2015), leave to appeal denied, 26 N.Y.3d 1150, 32 N.Y.S.3d 64, 51 N.E.3d 575 (2016).

8 Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004) (holding that the admission of a wife's out-of-court statements to police officers, regarding an incident in which the defendant, her husband, allegedly stabbed the victim, violated the Confrontation Clause, regardless of whether the statements were deemed reliable by the court, where the statements were testimonial and the defendant was not given the prior opportunity to cross-examine their wife).

9 People v. Ashner, 190 A.D.2d 238, 597 N.Y.S.2d 975 (2d Dep't 1993) (referring to N.Y. Const. Art. I, § 6).

10 CPL § 60.15(1).

11 People v. Miranda, 197 A.D.2d 407, 602 N.Y.S.2d 372 (1st Dep't 1993).

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10 Tips on Conducting a Winning Cross Examination

May 22, 2021

Top 10 Tips on Cross Examination

In the words of famous law professor John Henry Wigmore (1863-1934), cross-examination is “beyond any doubt the greatest legal engine ever invented for the discovery of truth.” Unfortunately, what you learned in law school and most CLEs won't help you much because much of what is taught about cross examination is long outdated, ineffective and potentially dangerous for your case. In this in-depth dive into cross examination we address historical teachings on cross examination, why they are no longer relevant, and how new methods will help you succeed. This article is intended to help everyone from law students to 40 year veteran trial lawyers.

We’ve gathered expert advice from the authors of both historically important treatises on cross exam as well as our best-selling books on cross examination to bring you our Top 10 Tips to master the art of cross examination.

Experienced trial lawyers use the most effective cross examination methods of Trial Guides’ authors as they try today's most challenging and groundbreaking cases. Our cross examination methods are used in everything from small motor vehicle cases to Top 10 verdicts each year. New lawyers willing to invest the effort, benefit by learning what works and what doesn't from successful litigators. This post provides an efficient study guide to prepare for and conduct winning cross examinations.

If you’ve ever watched Perry Mason (based upon trial great Earl Rogers), you know that cross-examination is the most thrilling part of many trials. It carries the possibility

of the most compelling testimony and with the right approach can unveil key evidence that destroys your opponent's case. But even with great preparation you seldom achieve a "Perry Mason" moment.

But, what happens when you're faced with a difficult witness? Or, what if you've never deposed the opposing expert before, you don't know what questions to ask on cross examination, or you just aren't good at asking leading questions? Or worse yet, you face a highly biased insurance doctor engaged in moral turpitude, who has a 30 year career claiming every injured person is malingering while making millions of dollars doing nothing but defense medical examinations? Or a mentally unstable opponent eager to perjure themselves just to hurt your client.

These Top 10 Books on Cross Examination will teach you how to effectively elicit facts that are favorable to your case from every credible witness you examine, or alternatively, demonstrate the witness is so biased they will not admit even the most obvious facts that support your case. Whether you practice in the area of personal injury, business litigation, domestic relations, employment law, toxic torts, intellectual property litigation, criminal law, family law, or another area of law, knowing how to do a great cross examination is very important.

Tip 1: Preparation is Key - Create Lists for Each Witness

Starting with the most basic principles of trial, former President of the Inner Circle of Advocates, Rick Friedman reminds us in his book, *The Elements of Trial*, that "the key to good cross-examination is preparation." The nation's most influential trial consultant, David Ball recommends *The Elements of Trial* as a must-read for new lawyers because it provides a "clear concise checklist organized for every stage of trial." Starting with the basic lessons on cross in *The Elements of Trial* is a great place to start preparing for cross examination in deposition, arbitration or trial.

In the book, Friedman teaches that one of the main objectives in conducting a great cross-examination is asking questions that raise doubts about an adversary's credibility. However, he also poses an important question: whether to attack or not to attack the witness. (Attacking during cross is often referred to as "destructive
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Friedman teaches "many of the best cross-examinations do not attack the witness's credibility, but elicit—from the 'hostile' witness—facts favorable to your case." (This is often referred to as "constructive cross.")

In order to determine whether to attack or not, you first must know what you must prove in your case, and then determine whether the purpose of cross examination with an opposing witness should be to "construct" or support your case through admissions, rather than to "destruct" the witness through an attack. The knowledge that "constructive" cross examination is more effective than "destructive" cross examination is a sign of a more highly skilled advocate. If you can master this early, it will help your success in deposition, arbitration, and trial.

How do you elicit key facts from witnesses during cross-examination? In *The Elements of Trial*, Friedman suggests the first step in preparing for cross examination is to collect and organize information by topic. The best part about Friedman's book is that it's loaded with helpful templates and checklists for every stage of trial, as David Ball points out in his review. Friedman's sample outlines for preparing for cross-examination are some of the most helpful.

In Chapter 11, Rick Friedman shares an easy cross examination template featuring the journalistic method: *who, what, when, where, why and how*. For example, under *who*, outline that particular witness' relation to the case / key evidence, potential bias, etc. *What* will they say? *What* statements do you have from the witness? *When* did they make the statements? *When* did they witness key events? *Why* would they testify this way? *How* did the person become a witness for the other side?

Once you have this information listed for each witness, make an outline addressing each topic or area you might want to question the witness about. Based on the information collected for each witness, list the topic, and all evidence that you'll want to point out during your examination of the witness. Friedman also shares a sample topic outline template to reference while preparing for your next deposition or trial. Here are a few examples from the book, of how you might prepare the cross-examination of a police officer in a police misconduct case:

Bias/Credibility

> Personnel file, p. 4 [Was the officer disciplined for making statements that raise questions of bias or credibility?]

Incriminating Statements

Police report—no mention of statements on the way to the police station.

Grand jury, p. 68—says on ride to police station, client refers to having a gun.

Favorable Facts

Police never saw client with drugs (grand jury testimony, p. 89)

The officer looked where he says client threw “gun” and found nothing (grand jury, p. 93)

Client never ran or resisted (grand jury, p. 58)

Not client’s house (police report, p. 17, grand jury, p. 63)

A simple topic outline such as the one from Friedman's book can be used to prepare for any type of witness in deposition, arbitration or trial. Rick Friedman says for an expert witness, the citations may include prior testimony from other cases, medical or scientific articles or text, or even television interviews. When done correctly, all of the source material for your citations will be in a trial notebook, in a tab behind the witness’s name. Preparing a trial binder or notebook for court is crucial. While preparing or conducting your cross examination, you should immediately be able to find any document or transcript you need.

Friedman points out, "with all of your material organized, and comprehensive outlines created, you have two big advantages over the witness you’re about to cross-examine; you know the details of the entire case better than any single witness; and you decide what subjects to address with the witness, and what subjects to avoid." These two simple outlines are just a few of the templates Friedman shares in his top-selling book, *The Elements of Trial*. This book is the first step in preparing and conducting a winning cross-examination.

Tip 2: Lay the Foundation First When Impeaching a Dishonest Witness

An important part of becoming great at cross examination is distinguishing an important but outdated legal treatise on cross examination, from one that works most effectively today. Law schools, and many of the advocacy texts still used in law school based upon outdated methods, often do not help you distinguish between the

The Art of Cross Examination, by Francis Wellman first published in 1903, is often

The Art of Cross Examination, by Francis Wellman first published in 1903, is often considered by law school professors the definitive text on cross-examination and is listed as required reading. While the original form of *The Art of Cross Examination* (and its reprints) does still have important lessons on cross examination (mixed with truly awful advice for modern lawyers), we feel it is important to clearly distinguish the good from the bad for law students and new lawyers. In order to minimize the risk to new law school graduates, Trial Guides reprinted the second edition of Wellman's landmark text, annotated with important contemporary insights from America's leading expert on the practice of cross-examination, Roger J. Dodd.

Dodd, who co-authors the best selling modern text on the topic, *Cross-Examination: Science and Techniques*, guides the reader through Wellman's famous lessons, shares advice on what still works, and makes important points about how things have changed since Wellman wrote the book. *The Art of Cross Examination* is a short and entertaining read. As Dodd points out, "Wellman is the first, and one of the only authors on cross-examination to identify, let alone analyze, how to sequence portions of any cross-examination."

In Chapter 5, "The Sequence of Cross-Examination," Wellman teaches that when conducting a destructive cross-examination of a dishonest witness, "you should never hazard the important question until you have laid the foundation for it in such a way that, when confronted with the fact, the witness can neither deny or explain it." As excited as you may be to prove the witness is not credible, Wellman explains the importance of resisting the urge to discredit the witness too quickly.

Here is one example Wellman shares in the book: "if you have possession of a letter written by the witness, in which he takes an opposite position on some part of the case to the one he has just sworn to, avoid the common error of showing the witness the letter for identification, and then reading it to him within your inquiry, 'what do you have to say to that?' While you're reading his letter, the witness will be collecting his thoughts and preparing explanations in anticipation of the question that is to follow, and the effect of the damaging letter will be lost."

Instead, Francis Wellman teaches the correct method of using such a letter is to lead the witness quietly, into repeating the statements he has made in his direct testimony, and which his letter contradicts. For example, "I have you down as saying so and so; will you please repeat it? I am apt to read my notes to the jury, and I want to accurate." The witness will repeat his statement. Then, Wellman suggests you suddenly

spring the letter upon the witness. “Do you recognize your own handwriting, sir?” Then read him the letter. You will make your point in a way the jury will not easily forget it.

Your work isn’t done. While you might be eager to move on to the next topic before the witness tries to wriggle his way out, Wellman says now is the time to use your advantage. He states that when you have a witness under oath, who is orally contradicting a statement he has previously made when not under oath, you have him caught in a lie and there is less danger of him getting away without jeopardizing his credibility even more. Put his self-contradictions to him in as many different forms as you can invent before moving on:

> “Which statement is true?”
>
> “Had you forgotten this letter when you gave your testimony today?”
>
> “Did you tell your counsel about it?”
>
> “Were you intending to deceive him”
>
> “What was your object in trying to mislead the jury?”

Another form of sequencing is deciding when to attack the adverse witness. While modern lawyers often say you shouldn’t play your best cards first, in *The Art of Cross-Examination*, Wellman opines “sometimes it is advisable to deal the witness a stinging blow with your first few questions; this, of course, assumes that you have the material with which to do it. The advantage of putting your best point forward at the very start is to two-fold:

First, "the jury has been listening to his direct testimony and have been forming their own impressions of him, and when you rise to cross-examine, they are keen for your first questions. If you land one in the first bout, it makes far more impression on the jury than if it came later on when their attention has begun to lag, and when it might only appear as a chance shot."

The second, and perhaps more important effect of scoring on the witness with the first group of questions, is that it makes him more afraid of you and less hostile in his subsequent answers, not knowing when you will trip him again and give him another fall. This will often enable you to obtain from him truthful answers on subjects about which you are not prepared to contradict him.

This method allows you to lead the witness back to his original story, giving him the

opportunity to tone it down, or even change it to the point that he finds himself supporting your side of the case. If, however, you don't have the material at hand to frighten the witness into correcting his perjured testimony, Wellman says "never waste time by asking questions which will enable him to repeat his original testimony in the sequence in which he first gave it." Select the weakest points of his testimony and circumstances he would be least likely to prepare for. Don't ask your questions in a logical order, but instead "dodge him about in his story and pin him down to precise answers on all the accidental circumstances indirectly associated with his main narrative."

Wellman goes on to instruct, when the witness begins to invent his answers, ask your questions faster, asking several unimportant questions for every important question, all in the same tone of voice. Wellman says "if you have the requisite skill to pursue this method of questioning, you will be sure to land him in a maze of self-contradictions from which he will never be able to extricate himself." Get good enough at this method and you'll make your opponent's witnesses seem like your own.

The Art of Cross Examination is the best selling, and arguably the most influential book ever written on cross-examination. It continues to be recommended by law schools as required reading. But *we do not suggest reading a version of the book without a highly qualified modern expert to interpret the lessons* because some of the ideas are very outdated and will damage your case if used with today's jurors. The methods highlighted in Trial Guides' edition of *The Art of Cross Examination*, with annotations by Roger Dodd will help you learn important lessons of cross-examination; to elicit evidence favorable to your case no matter the witness you're up against. This book is a staple in a trial lawyer's library for those seeking to master cross examination.

Tip 3: Eye Contact is Important

Many older lawyers are also familiar with Irving Younger's "Ten Commandments of Cross-Examination" as it is often considered standard (albeit again largely outdated) advice on the topic. Roger Dodd opines in his commentary in Chapter 18 of The Art of Cross Examination, "Golden Rules for the Examination of Witnesses," that Frances Wellman influenced Younger's 10 Commandments of Cross as they apply to any type of cross examination.

The first of Wellman's "Golden Rules for the Examination of Witnesses," is: "Except in

indifferent matters, never take your eye from that of the witness; this is a channel of communication from mind to mind, the loss which nothing can compensate." At first, this may seem outdated, but eye contact during cross is still discussed by some Trial Guides authors, most notably Jim McComas in *Dynamic Cross Examination*. But, as McComas points out, the best eye contact today isn't always with the witness.

Not only is eye-contact considered a sign of respect in today's society—which jurors expect a lawyer to show even the most hostile or despicable of witnesses—it also allows you to remain connected to both your witness and the jury, as Jim McComas points out in his cutting edge book on cross-examination, *Dynamic Cross Examination*.

McComas illustrates the value in questioning the witness while making eye contact with the jury, so as to make them feel as if they're posing the questions themselves. This method puts the lawyer in the role of questioning witnesses on behalf of the jury, seeking the truth rather than acting as an advocate for one party. The witness must now answer to 13 people, 12 of whom he or she must convince. Maintaining eye contact also gives an otherwise distracted juror a reason to pay attention to what is occurring in the trial. When done correctly, cross examining a witness as a representative of the jury can also build rapport.

Dynamic Cross Examination largely discredits Irving Younger's 10 Commandments of Cross Examination as does Patrick Malone, in Trial Guides' best selling cross examination book, *The Fearless Cross Examiner*. Both books discard Irving Younger's commonly accepted rule to "never ask a question you don't already know the answer to" by only asking leading questions. Keeping the witness and jury engaged with leading questions can be difficult, especially when the cross examining attorney's instinct is to look down at their notes. The more prepared you are with easy to reference outlines and an organized trial binder, the easier it is to achieve success in cross. With trial skills so rare on both the plaintiff and defense sides, the opposing party might interpret your confidence and preparation as a threat and settle the case during trial when their witnesses fall apart on the stand.

The importance of eye contact with the witness during cross does have clear benefits. You must see the witness's facial expressions and emotion in order to catch them in a lie. In *Cross Examination Handbook*, by Ronald H. Clark, George R. (Bob) Deckle, Sr. and William S. Bailey, legendary trial attorney F. Lee Bailey, who famously joined O.J. Simpson's "dream team" in *The People of the State of California v. Orenthal Jam*

Simpson, illustrates a great example of masterful eye-contact during his impeachment of Detective Mark Fuhrman during cross-examination.

F. Lee Bailey's questioning of Detective Fuhrman concerning his racist remarks shows how O.J. Simpson's Dream Team won what is widely considered the most famous trial of the 20th century by attacking the credibility of the police investigation. In the video of the cross examination, you can see Bailey's laser-beam focus on the adverse witness as he first lays a foundation of trust with a gentle manner. He is exceptionally well prepared and his questions are deliberate and swift—leading the witness to destroy his own credibility. It is as if Mark Fuhrman didn't know the contradictory "Fuhrman tapes" even existed, despite him knowing he had made 13 hours of recordings between 1985-1994 using racist slurs and admitting that planting evidence was common at the Los Angeles Police Department.

In one of his several books, *Excellence in Cross Examination*, F. Lee Bailey recommends that in order to maintain eye contact, the cross-examiner must cross-examine without notes. In order to do this effectively you must know your case intimately. If you need to look at your notes, you should pause and go back to your table to do so. Continue to question the witness while maintaining eye-contact once you are ready. The importance of preparing for witness testimony cannot be stressed enough. When preparing for your next deposition or trial, keep this advice in mind if you want to conduct an effective cross examination.

With trial greats from the late Francis Wellman and Irving Younger, to more modern masters Roger Dodd, Jim McComas, Patrick Malone, and F. Lee Bailey, it's safe to say this is one golden rule of cross-examination that remain timeless. Trial Guides' second edition of The Art of Cross Examination, including Roger Dodd's practical commentary is a must read for any law student or new lawyer who wants to connect with the jury and conduct a great cross examination.

Tip 4: Learn to Ask Leading Questions

While leading questions are not allowed during direct examination, you are expected to ask leading questions on cross-examination. Learning to lead is important in order to best advocate for your client during cross-examination.

In *Trying Cases to Win*, by Herbert J. Stern and Stephen A. Saltzburg, the autl instruct that instead of asking open ended questions, like you would on direct

examination, you should *make statements* to the witness on cross. In Chapter 16, titled "Cross-examination: Purpose, Methods and Techniques", they suggest a simple training exercise recommended for law students, new lawyers, and anyone trying to learn how to effectively ask leading questions during cross examination.

It's a simple practice: begin each question with "isn't it a fact?", or end a question with "Isn't that true?" This training method forces the trial lawyer to make statements rather than ask questions. Once a lawyer understands this technique they will be more comfortable simply stating the proposition. For example:

Q: It rained that day?

Q: For hours?

Q: Beginning at 10 a.m.?

Q: Continuing until 2 p.m.?

In their book, Judge Stern and Professor Saltzburg note this does not mean that *all* questions on cross examination are questions, and remind their readers "there is a time for questions, and even exploratory questions to which the answers are unknown." Jim McComas, in his book "Dynamic Cross Examination" similarly rejects the adage that you must never ask a question to which you do not know the answer, and instead illustrates the importance of being flexible and willing to take risks.

Patrick Malone, in his book, *The Fearless Cross Examiner*, also agrees the outdated rule of cross examination--that you must only ask questions you know the answer to--"is one of those hoary maxims of trial law passed down through so many generations that its paternity has been lost. Which is good, because it's self-evidently wrong."

Malone (co-author of Trial Guides' best selling book *Rules of the Road*) offers a helpful explanation on this topic in Chapter 2 of his book, titled "Freeing Yourself from the Ten Commandments of Cross." He teaches us that "a leading question is not simply a yes-or-no question. A leading question is one that suggests an answer." Malone opines that a plain statement, without "true," "correct," "right," or "fair" added on is "probably the best way to ask a leading question" Malone suggests "silence, coupled with a gesture or a voice inflection that tells the witness this statement has a question mark at the end"

Pat Malone also points out another problem with asking only leading questio
Depending on your jurisdiction and court rules, it's routine for the judge to giv

preliminary instructions before the first witness testimony, one of which is that questions from lawyers are not evidence; *only the answers from the witness stand are evidence*. Jurors may believe your leading questions do not provide evidence under the rules of the court. (For more on this issue see *The Fearless Cross Examiner*.)

In Chapter 11 of *Trying Cases to Win*, titled, "The Purpose of Direct Examination: to Argue Your Case" Stern and Saltzburg point out that "we must recognize at the outset that although both the definition of leading and the prohibition against it are universal, both are illusory." They note the universal definition of leading is asking a question that suggests the answer. This seemingly objective definition is, in reality, entirely subjective. What one person finds suggestive, another may not.

For example, the question "what happened next?" Is that question leading? Sure, it suggests that *something* happened next, but it does not suggest *what* happened next. In their book, Stern and Saltzburg offer this valuable lesson on leading questions:

Lesson: In the subjective world of what is or is not a leading question, you can make any question sound not leading by appearing to give a choice, and you can make any question not leading by giving a choice.

Tip 5: Establish Rules Your Opponent Can't Argue

Who better to show us how to elicit favorable facts from a witness, than an award-winning investigative journalist turned leading plaintiff attorney Patrick Malone. Malone, alongside Rick Friedman, co-authored the book most civil lawyers have on their shelf already, *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability*.

The tried and true Rules of the Road™ method has been hailed as a "road map to success" by trial lawyers everywhere, as it can be applied to every case type. Malone's discussing use of the Rules of the Road™ method, titled *Winning Medical Malpractice Cases with Rules of the Road* provides important insights for cross examination.

Malone recommends that using the Rules of the Road™ approach can help you set up beautiful cross-examination—but only if you establish Rules of the Road for the case that the defense cannot argue with.

For example, in a car accident case when the lawyer is cross-examining a defendant in civil court, she might ask the defendant if he agrees that, by taking a driver's signing the back of his driver's license, he understands it's his duty to follow traffic

laws such as stopping at red lights. Most defendants will agree that they accept such duty.

Most jurors will connect to traffic laws that they know to be true. Malone notes this plants the seed for allowing the jurors to discount one side's experts without having to judge them liars, which many feel reluctant to do. Remember, the purpose of cross-examination is not to call opposing party liars, but to elicit the truth from their witnesses.

In *Winning Medical Malpractice Cases with Rules of the Road*, Malone states this can be done even if the rule itself sounds somewhat technical. This advice is especially important when cross-examining an expert witness. Malone offers an example from Brian McKeen, another member of the Inner Circle of Advocates. McKeen devised the following patient-safety rule in a case in which a baby suffered terrible brain damage from too low blood sugar levels at home, after having been treated in the hospital for low blood sugar:

"*Keep the baby in the hospital until the baby has the proven ability to maintain safe blood-sugar levels on oral feedings at home*."

This rule fits into the common sense idea that when treating any baby for a life-threatening condition, the doctor must not let the baby leave the safety of the hospital until it has been proven that it is safe. Once McKeen put this rule to defense lawyers, the defense lost all steam.

This straightforward approach coincides with keeping your questions simple. This book also offers wisdom from what Lawdragon called "the Dean of the plaintiffs' bar for all the Northwest," Trial Guides author Paul Luvera. Luvera offers this advice for bringing the Occam's Razor concept to preparing for the cross-examination of defense experts:

"I am unlikely to get into technical disputes or expert literature arguments. My cross-examination of medical experts will focus on issues of bias or insufficient information or inconsistency with common sense, rather than technical issues."

Luvera and Malone are both highlighting the fact that even though the expert witness testimony is focused on technical aspects of the case, your questions should remain focused on easy to understand rules that the jury can connect with.

By applying Occam's Razor to the Rules of the Road™ method, you're allowing the jury

to understand the simplicity of your case—the truth—even when the facts are complex. The more the witness is in conflict with or disagrees with the simple truth of these rules, the more credibility the witness will lose with the jury.

Like with many other Trial Guides publications, Pat Malone offers many helpful examples and trial transcripts showing you how to conduct an effective cross-examination of an expert witness using *Rules of the Road*.

Tip 6: Resist the Urge to Attack on Cross-examination

For those with less trial experience, this tip might seem very odd. For most lawyers cross examination is the "sexiest" part of the trial because you get to attack the other side's case through their witnesses. This is part of why CLEs on cross examination sell out, while education on direct examination is seldom of interest.

If you want to fully understand why you should prioritize getting helpful testimony from adverse witnesses rather than attacking them, you can get a career worth of excellent advice from cross examination expert Roger Dodd's lecture about cross examination on the *Trial Tactics* video. Dodd notes that it is always preferable to do constructive cross than destructive cross if you have the choice. But, let's discuss why a bit more here.

As Rick Friedman and Bill Cummings opine in their book, *The Elements of Trial*, far too many lawyers think the purpose of cross-examination is always to attack the opposing party witness's credibility. In *Trying Cases to Win*, Stern & Salzburg agree that "many lawyers relish the opportunity to attack the character of a witness."

Friedman warns that attacking a witness's credibility may, in fact, only hurt your own case. Not to mention the cross examining attorney could miss out on testimony that provides favorable facts for his/her case. Rick stresses the importance of eliciting favorable facts from the adverse witness when asking cross examination questions.

Even if you have the cross examination skills necessary, and the material to attack the witness's credibility, your better course may be to leave credibility alone and bring out favorable witness testimony instead. Rick teaches in his book that ***it's during cross examination that the jury decides if they like you or dislike you as a person***. They're judging you as much as they're judging the witness, and therefore how you treat the witness during your trial examination matters. This is why very experienced lawyers from Gerry Spence to Bill Barton, to Nick Rowley strongly suggest treating

even the worst defendants with respect - often more respect than they deserve. In Barton's words, failing to do so will vanquish the juror's anger at the bad witness and decrease your verdict. Spence, Barton and Rowley all note that plaintiff lawyers can compromise their verdict by attacking too stridently in cross.

When the witness answers your questions they'll be much more likely to offer the truth / favorable facts if you've built trust and rapport. This doesn't mean aggression is never warranted. In his book, *Dynamic Cross Examination*, Jim McComas says the witness's behavior in front of the jury might earn our aggression.

Even then, McComas teaches we should always measure aggression, and not be excessive. But, aggression does sometimes have a role to play in our cross-examination of a hostile witness. McComas says we should treat badly motivated witnesses, whom we need the jury to disbelieve, as if they are "wholly unworthy of belief."

If we anticipate the need for a destructive cross, we suggest reading *David Ball on Damages* in terms of discussing the need for this with potential jurors in voir dire. Ensure they give you permission to attack an adverse witness if necessary to get to the truth.

Adversarial cross examination dates back to the 1700s common law trial. History reflects many important developments in trial practice since then, including the birth of ethics and professional etiquettes that, depending on your jurisdiction, might impact how you handle an adverse witness today.

Juries' perception of a lawyer attacking a witness during cross-examination has changed over the years. While discrediting testimony might be an important goal to keep in mind during the examination of a witness in your case, it should be done with more careful thought than aggression. Leading questions can be formed so that the type of cross-examination is less hostile sounding to the jury.

In Chapter 17 of *Trying Cases to Win*, titled "Three Tools of Cross-Examination" Sterns and Saltzburg warn us there is reason to doubt that credibility attacks on non-party / expert witnesses are likely to win the day for the cross-examiner. Most courts have rules that regulate a lawyer's ability to attack the general character and integrity of a witness. Modern court rules limit the use of prior convictions, prior bad acts and other prejudicial evidence.

Furthermore, most of us believe that even dishonest people sometimes make

statements, and most people lie about something. You might think you're discrediting the entirety of the witness's testimony by attacking his/her character, when in fact you're risking the jury members discrediting your side for trying to put the witness in a false light.

In The Elements of Trial, Rick says to conduct an effective cross examination you must "resist the temptation to place the witness in a false light." Not all trials will provide thrills like the famous cross examinations of Earl Rogers or Clarence Darrow (or the fictional ones of Perry Mason), but each should be treated with great care and preparation. Next time you're preparing to cross examine a witness, don't just think about the content of your questions, but also remember your demeanor.

Lastly, we also live in a world where some may argue that truth and credibility may not matter as much to some jurors as they once did. Particularly for jurors who believe that making a lot of money, no matter what that takes, deserves respect even when it requires outright lying or hurting other people. Before attacking for bias because an opposing witness has made millions of doctors per year for decades from the insurance industry in exchange for opining that no plaintiff has ever been injured, ask yourself will the jury even think that lying for money is bad. **But, if you are civil plaintiff counsel don't even think about misrepresenting something, or hiring experts that have credibility problems. Establishing and building credibility remains a requirement for all parts of your case.**

Tip 7: Reveal Bias & Prejudice

Next to *Rules of the Road*, you'll find Rick Friedman's, *Polarizing the Case* on the bookshelves of most experienced trial lawyers in the United States. Cross examination examples and techniques are some of the many valuable lessons found in the book.

One of the best examples of questions to ask on cross examination offered by Friedman in the book, is with regards to the testimony of an insurance or "IME" doctor. Friedman says to reveal bias whenever you can, especially when it comes to expert witness testimony. In regards to a plaintiff's auto injury case, for example, he says "the IME doctor is the major spokesperson for the defense story."

In the book, Friedman uses a continuum outlining a horizontal line with the defense "D" on the left side, and plaintiff, or "P" on the right, ranging from 1-10. He demo

that "we don't need admissions from the IME doctor to destroy his credibility."

that "We don't need admissions from the IME doctor to destroy his credibility."

For example, if a doctor is vague about whether the plaintiff suffered a serious injury in the accident—press her on this point. Do this with each critical issue. For each, we want the doctor to either adopt our position (an 8) or move further away from us (move to 1).

Friedman says, if she agrees, we have important admissions. If she disagrees, she looks more radical and less credible, because we have lay witness testimony that says otherwise. This cross examination technique attacks the credibility of the expert witness, and also forces her to take a stand.

The more in conflict the expert witness is with your lay witness testimony, the less credible they will become to the jury. Friedman notes you should not be afraid of the negative things he / she might say about your client, but rather embrace them. This is all part of polarizing your case.

Cross examination training includes preparing cross examination questions, and doing your homework in order to expose bias. You should always do thorough research on opposing counsel's expert witnesses to find out their education, website, fees, publication history, association involvement, clientele; read prior reports, notable testimony, etc. This style of cross examination is discussed in *Dynamic Cross Examination.*

The easiest bias to expose during your cross of an IME doctor, is the fact that they're generally hired by defense counsel on behalf of insurance companies to testify against the plaintiff, and they get paid an exorbitant amount of money to do so. Always examine all sources of information in order to find bias and prejudice.

In Chapter 16 of *Polarizing the Case*, titled "Cross Examination of the IME Doctor", Friedman recommends reminding the jury that the witness [IME Doctor] is not a treating physician, and therefore has no ethical interest in the well being of the patient. There are many ways to reveal an adverse witness' bias during trial.

In 1925, Clarence Darrow provided one of the clearest examples of exposing bias during cross examination in the highly publicized (first-ever trial broadcast on radio), *State of Tennessee v. John Thomas Scopes* (AKA the Scopes Monkey Trial), when he put his opposing counsel, William Jennings Bryan, on the witness stand to question him about the theory of evolution at issue in the case, and his views on the Bible.

After the conservative judge (who began each courtroom presentation with a

and banned expert scientific witnesses) declared all the defense's testimony on the

and banned expert scientific witnesses, declared all the defense's testimony on the Bible irrelevant, Darrow questioned Bryan—who was leading the prosecution team—for roughly two hours, on his *literal* interpretation of the Bible.

Darrow proceeded to demonstrate Bryan's bias caused by his firmly held religious beliefs as he questioned him on everything from whether Eve was actually created from Adam's rib, to where Cain got his wife, and how many people lived in Cairo, Egypt. Bryan fell into every one of Darrow's traps and further undermined his credibility by stating, "I do not think about things I do not think about." In demonstrating his refusal to deviate from his firmly held beliefs, he discredited the prosecution's position by demonstrating his bias to believe even when the literal translation made no sense. This case also demonstrates the difference between a paid adverse witness who is willing to say anything for money, and one who simply isn't correct due to an honest belief system that they accepted without considering that it cannot be accurate.

Some lawyers believe that bias attacks are the most powerful attacks. As Stern and Saltzburg point out in *Trying Cases to Win*, "support for this is found in the United States Supreme Court decisions that hold that a criminal defendant has a Sixth Amendment confrontation right to explore the bias of a government witness. Attacks on a witness' bias or interest are intended to demonstrate that a witness has a motive to shade testimony for or against a party."

More examples of ways to reveal bias from adverse witnesses during cross examination can be found throughout Patrick Malone's *The Fearless Cross Examiner*, Rick Friedman's, *Polarizing the Case*, *Trying Cases to Win*, by Herbert J. Stern and Stephen A. Salzburg, and Pozner and Dodd's *Cross Examination: Science and Techniques*, among others.

Tip 8: Lay the Groundwork in Opening Statement

There may not be a special formula for winning trials, but many would argue that Rick Friedman's book, *Polarizing the Case*, outlines a tried and true technique that will certainly help win civil plaintiff's personal injury cases, and will set you up for a beautiful cross-examination of a defense IME doctor.

In the book, Rick offers some of his greatest advice for law students, new lawyers and experienced lawyers alike—plainly stated: "evolve or die." He emphasizes th importance of taking risks in order to see results in today's trials, and cautions against

finding comfort in the way you practiced in the past despite being unsatisfied with the results. The need to constantly evolve and to improve one's skills in today's environment is why Trial Guides exists.

The first step is laying the foundation for a productive cross-examination in your voir dire, opening statement, and case in chief with effective direct examination of the witness. Rick's book offers many examples of questions to ask on direct and cross examination of an expert witness at deposition or trial.

First and foremost, Rick says you must always speak the truth to the jury. Also, as a plaintiff lawyer you should remind yourself that defense counsel wants the jury to believe your client is "a liar, a cheat, and a fraud." While they might not come right out and say it, the defense will ultimately try to convince the jury that you and your client are not to be trusted.

The malingering defense, as outlined in *Polarizing the Case*, is commonly used by insurance companies to defend personal injury cases in the United States. Rick advises to introduce your polarizing theme, such as the malingering issue, in your opening statement. This is where he famously suggests that you task the jury with answering an initial question: "*Is my client a liar, a cheat and a fraud?*"

Next, Rick suggests you pin down the defense by showing the jury how the opposing party and their defense doctor has attacked your client. Instead of shying away from bad things they have to say about your client, embrace them. Explain to the jury what malingering means. "Characterize it as the attack on your client that you know it is."

This is all part of polarizing the case, and laying the foundation for an effective cross examination of their key witnesses, such as the IME doctor. By pinning down the malingering defense in your opening statement, Rick points out, the defense lawyer is left with an immediate choice: *embrace your characterization of her defense, or start to retreat from it*.

The more she embraces it, the closer you are to impeachment. Whereas, the more she retreats, the closer you are to proving defense counsel has no clear or convincing case to allow the jury to believe that your client is a liar, cheater and a fraud.

The book goes on to instruct ways to compare and contrast the defense malingering theme with the actual facts, and continue to refer to your client as "this perso calling a liar, a cheat and a fraud", to help the jury connect with the plaintiff a

case in chief.

One of the key pieces of advice Rick shares in regards to Polarizing the Case in preparation for cross-examination, is in Chapter 15 titled "Case in Chief | Direct Examination." Friedman says, "the more, the better" when it comes to good lay witnesses who can advance your case.

As noted previously in this article, the more the expert witness contradicts your lay witnesses, the less credible they become in the eyes of the jury. So, the more lay witnesses you present to support your case in chief and subsequently discredit the malingering defense, the better.

Sample expert witness direct examination questions, cross examination questions, and pertinent case law fill the pages of this easy-to-read manual on polarizing your case. This book offers insights and methods that can be implemented immediately, and applied to every subsequent plaintiff you represent. Whether you are just starting your practice, or looking to sharpen existing tool sets, this book is a must read for every trial lawyer learning the art of cross examination.

Tip 9: Restrict the Witness to One Subject

In his latest, cutting-edge book on the art of cross examination, *Dynamic Cross Examination*, Jim McComas says we can (and should) use leading questions to identify and limit the relevant area of questions and answers at the beginning of any section of cross-examination, or at any other point during our questioning of a witness.

McComas says to rely on the leverage points obtained in your direct examination of the expert witness. In Chapter 5 of his book, titled "The Dynamic Method of Cross-Examination," McComas teaches how the yes-no method of questioning can help us apply leverage points established for our case, to cross examination.

In his book, McComas offers a "Leverage Points List" that outlines lies admitted by the adverse witness, related statements, and contradictory stories that you can use in your direct and cross examination of a witness. He says you should always have leverage points easily accessible so that you can use them seamlessly during cross-examination. "Delay and fumbling dissipate the impact of Dynamic Cross-Examination", Jim says.

The book instructs that using the yes-no method to restrict witnesses to sing matter spheres also allows us to move to a "safe zone" if we need to reduce tension for

a few minutes to gather ourselves following unexpected witness testimony, or gear up for particularly tense deliberations to come.

When used by the cross-examining attorney, the yes-no method of questioning can also help regain control over "runaway witnesses." McComas suggests that the best way to avoid runaway witnesses is to prevent it from happening in the first place, of course. But, if you do encounter this problem, do not interrupt the witness, as it almost always elicits objection from opposing counsel.

Instead, use your leverage points to regain control of the witness and conduct an effective cross-examination, bringing them back to the topic of your questioning. Here are a few ways to regain control of your witness using leverage points:

> Repeat the exact question you asked, which led to the run on answer, and referring to the leverage point;
>
> Ask: "Sir, what was the question you were just asked?
>
> Ask: "There's a reason you don't want to tell us [insert the subject of the prior question], isn't there?"

Assuming re-cross examination is permitted in your court, McComas offers tips on using cross-examination leverage points on redirect examination and re-cross, too. McComas even provides an outline for trial preparation in *Dynamic Cross Examination*, along with helpful examples of questions to use when you prepare to examine your next witness.

McComas often refers to trial transcripts and templates used to demonstrate the purpose of cross examination, and other trial techniques that he has conveniently organized for lawyers pursuing the art of cross, in his supplemental text, *Case Analysis*.

Trial greats such as Paul Luvera, focus on the main points of contention in your case during cross examination, and staying out of the woods with unimportant details and complex medical facts, allows you to focus the jury's attention towards liability and damages.

The type of cross examination you conduct depends on your case, opposing party, and your witness. Regardless of your facts, however, there's no doubt McComas's *Dynamic Cross Examination* and *Case Analysis* will help you conduct winning cross-exam

Resources for that purpose include *Preparing for Deposition* (for the client to view), *The Deposition Handbook* (for your review prior to the client or witness meeting), and Repile's *Witness Preparation* video featuring Don Keenan and David Ball.

There is also the issue of "cleaning up" testimony by one of your witnesses. One of the many helpful maxims offered by Judge Herbert Stern in his books, *Trying Cases to Win*, is: *never leave a record dirty if it can be cleansed*. When it comes to defending a deposition of your client, these are certainly words of wisdom to live by. In their book, Stern and Saltzburg point out that, if damage has been done during your witness's testimony at deposition, for instance, it is your duty to offer an explanation for the record.

The authors urge that "if an adversary has scored against a witness or party, and you have something that could be used to ameliorate the harm, *use it*!" It is your only defense against the admission at trial of the hurtful material. Under the doctrine of completeness, you will have the right to read the other relevant portions of the testimony during cross examination, and therefore you better make sure you've taken the opportunity to explain the admission as it fits into the parameters of your case in chief. This is why it can be critical to ask your client questions at the end of their deposition in order to ensure the record is complete, and the explanation is in the record.

This concept applies to trial as well. While a trial lawyer's instinct may be to get their witness on and off the witness stand as quickly as possible, if the defense lawyer has caused harm with their questioning of your witness, you must not leave the line of questioning 'dirty' or unanswered, but rather, clean it up with clarifying questions that elicit more favorable facts for your case during re-direct.

You have an obligation to see if you can limit the harm. The more you do to 'cleanse the record' and defend your witness's testimony at deposition, the easier it will be to elicit favorable facts during trial.

In order to defend statements made by your witnesses, and conduct an effect
examination, you must always *listen intently during direct examination*. If you

to the testimony of the witness during direct examination how will you be able to effectively prepare your questions for re-direct?

Let's say you've read *The Fearless Cross Examiner*, *Dynamic Cross Examination*, Pozner & Dodd's *Cross Examination: Science and Techniques*, and *Trying Cases to Win*; you've prepared every checklist recommended in Rick's, *The Elements of Trial* and memorized all the latest treaties on cross-examination—the fact is: you still cannot know exactly what the witness will say on direct. Therefore, you must pay attention and take thorough notes during the opposing witnesses direct examination.

In Chapter 26 of *Trying Cases to Win*, Stern and Saltzburg make the important point that "the cross-examiner must win the vote [of the jury] as the battle takes place." During direct examination, the lawyer does all she can to reinforce testimony by calling for it to be repeated. But, the opposite is true during cross-examination.

An *inexperienced* lawyer shows his distress on cross-examination when he finds himself simply repeating the answer the witness has just given him. That is why the authors of *Trying Cases to Win* suggest the cross examiner should not make an assertion he is not prepared to vindicate forcefully, and preferably immediately, using the tools of cross examination.

The cross examining lawyer should take notes during the opposing counsel's opening statement, and direct examination, of topics they wish to address in a particular opposing witnesses' cross-examination. Don't be afraid to stray from your outline. Part of mastering the art of cross examination is learning to conduct a *Dynamic Cross Examination*, keeping all windows of opportunity open for your case.

To learn more about Cross Examination, please see Trial Guides Top 10 Books and Videos for Cross Examination.

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Article

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AVOIDING THE WRECKING BALL OF A DISASTROUS CROSS EXAMINATION: NINE PRINCIPLES FOR EFFECTIVE CROSS EXAMINATIONS WITH SUPPORTING EMPIRICAL EVIDENCE

***120** *Effective cross-examinations share three hallmarks: they recognize and strive only for realistic goals, they maintain witness control, and they cultivate and maintain rapport with the jurors. This Article posits nine principles central to achieving these three overarching goals. Each goal is supported by empirical research, and each principle is examined and illustrated.*

"Though this be madness, yet there is method in't."[1]

"[The Sixth Amendment] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[2]

I. Introduction

The graveyard of adverse verdicts is littered with the remains of disastrous cross-examinations, led to their demise by inept or overzealous advocates.[3] Yet, the myth persists of a brilliant lawyer blessed with a keen intellect and a quick wit dismantling a witness and winning her case with an exhaustive and withering cross examination.[4] As enticing as the prospect of executing

a winning and decisive cross-examination appears, the sobering reality is that trials are seldom won on cross-examination but are rather frequently damaged, sometimes fatally, by inept cross-examinations.[5]

***121** Make no mistake, cross-examination is an essential component of trial, and when executed effectively, is a critical weapon in an advocate's arsenal.[6] Effective cross-examinations can probe vulnerabilities and flaws in the opponent's case,[7] and can be particularly effective in exposing credibility issues.[8] Cross-examination can even occasionally be utilized to reinforce positive aspects of an advocate's case.[9] However, as suggested by the title and as will be developed throughout this Article, advocates must temper their cross-examinations in order to meet their trial objectives without jeopardizing their case.

With rare exception, effective cross-examinations share three hallmarks: they recognize and strive only for realistic goals, they maintain witness control, and they cultivate rapport with the jurors. This Article will posit nine principles central to achieving these three overarching goals. Each principle will be examined and illustrated, and each overarching goal will be supported by empirical research evidence. To that end, this Article seeks to illustrate not only the *what* and *how* of cross-examination, but also *why* these principles go to the heart of effective examinations.

***122** *A. Set Realistic Goals*

Imagine a stealthy nighttime raid on an enemy camp housing superior troops. The raider's sole goal is to get behind enemy lines in order to reconnoiter the enemy's fortifications and to safely return. There may be some targets of opportunity that present themselves during the foray, but engaging the targets could lead to a direct confrontation, jeopardizing the entire mission. That temptation to push beyond what is realistically and safely obtainable must be resisted. Cross-examination is about identifying and obtaining realistic goals without risking trial success.

1. Principle #1--First, Do No Harm

Trials are seldom won on cross-examination, but can well be lost there.[10] Cross-examinations should be conservative and only undertaken with great care.[11] Much like the oath taken by physicians to “first, do no harm,” trial lawyers should heed that same admonition.[12] Cross-examination is no time to jeopardize the case, or if you will, the patient. Rather, it requires a risk-averse assessment of the overall trial strategy, combined with a careful execution of questioning.[13]

***123** Adverse witnesses are by their very nature hostile to the examiner's position. As such, examiners must strive to prevent them from damaging their case beyond any damage already inflicted during the witness's direct examination.[14] Furthermore, cross-examiners must not allow the witness to simply reinforce their direct examination testimony[15] or to venture into areas that expose further vulnerabilities in the advocate's case.[16] Cross-examination is no time to take risks--rather, it is about obtaining favorable testimony without taking risks and probing fruitful points without jeopardizing the integrity of the examiner's case.[17]

Mistakes made during cross-examination may negate any positive gains achieved. Empirical research teaches that most people tend to recall the negative more than the positive.[18] Of course, a “negative” in the context of cross-examination is not necessarily a “no” so much as an unexpected response elicited by a question that should never have been asked. Because of the unexpected nature of the response, that negative response is more likely to stand out to the jurors.[19] It is perhaps a sad commentary on human nature, but the empirical research unflinchingly supports the fact that most people recall the negative more strongly, and in more detail, than the positive.[20] In a study conducted by Stanford, researchers found both physiological and psychological explanations for this phenomenon.[21] The study revealed that negative information is processed more deeply than positive information because negative information involves more thinking.[22] Specifically, the ***124** prefrontal cortex processes positive

and negative experiences in fundamentally different ways because the cells are built differently.[23] Using a type of genetic modification called "optogenetics," researchers were able to determine which brain cells were the most active during positive or negative experiences.[24] The results indicated that people tend to remember unpleasant information more vividly and in more detail than pleasant information.[25] Because of how the prefrontal cortex processes positive and negative experiences, the positive gets lost in the wreckage of an ineffective cross-examination, leaving only the negative fact, question, or answer to be remembered by the jurors.[26]

B. Control the Witness

1. Principle #2--Never Ask a Question to Which You Don't Know the Answer

In implementing a conservative approach to cross-examinations, effective examiners recognize that every question must have a known answer.[27] In other words: Never ask a question to which you don't know the answer. Advocates must be "protected" on every question, such that the question is one the witness has previously answered in a deposition, a statement to another, a document they prepared, and so on.[28] Indeed, the examiner may simply be ***125** protected by common sense.[29] And should the witness's response vary from the protected or common sense response, the examiner should consider impeaching the witness.[30] A notable example of asking an unprotected question occurred when former prosecutor Arthur Liman examined Colonel Oliver North as part of the Iran-Contra investigation:[31]

> Q: "Colonel North, was the day Iran[-]Contra unraveled the worst day of your life?"
>
> A: "No, Mr. Liman, the worst day was in Viet Nam [sic] when I was in a foxhole with my best friend, and the Viet Cong threw a grenade into the foxhole, and my friend threw himself on top of it and saved my life. My best friend died. That was the worst day of my life."[32]

Colonel North's answer devastated Liman's cross-examination and gained North the sympathy of the nation.[33] Liman overreached with an unprotected and unnecessary question, giving the witness the opportunity to give an answer that called the examiner's motives into question and simultaneously boosted the witness's character. Venturing into the unknown can be devastating for a cross-examination.

Effective cross-examiners strive to maintain absolute control of the witness.[34] Ideally, the witness's response to every question is a monosyllabic ***126** agreement with the examiner's inquiry.[35] That ideal situation is often not realized--hostile witnesses are typically non-compliant.[36] But even so, it should remain the goal.

Furthermore, controlling the witness is critical to ensure that the crossexaminer's story of the trial is told.[37] Rarely is cross-examination seen as a place in which an advocate can tell her client's story. However, it does present an opportunity for the advocate to frame the story in a way that helps the jury accept and interpret the evidence presented by the cross-examiner in a favorable light for her client.[38] Drawing on linguistics principles, in cross-examination the advocate takes on the role of author (selecting the phrasing and information expressed), animator (voicing the story), and principal (the person whose beliefs are represented), despite the fact that the witness is the primary knower--the person from whom the facts are extracted to tell the

story.[39] Even though the information is elicited from the witness in the form of confirmation during a cross-examination, the advocate embodies each of these roles, allowing her to carefully shape the story in a way that favors her client's position.[40]

Three types of stories can be told. First, the "challenge" narrative--in which the elements of the opponent's case are attacked as "inconsistent, ***127** unproven, or subject to a competing interpretation."[41] Second, the "redefinition" narrative--requiring the cross-examiner's story to "re-interpret ambiguous elements" of their opponent's case to lead to differing conclusions.[42] And lastly, the "reconstruction" narrative provides an entirely new context in which the facts should be seen and which, of course, yields an entirely different conclusion.[43]

2. Principle #3--Questions Should be in the Form of Assertions

At its baseline, witness control during cross-examination should consist of assertions seeking ratification by the witness.[44] Some may frame this principle by admonishing examiners to only ask leading questions.[45] While both iterations arrive at the same point, emphasizing assertions rather than questions perhaps makes the point clearer. Following the admonition set forth in Principle #2 to only ask questions that have a known or "protected" answer, this approach effectively controls the witness's response. Should the witness's answer vary from where the examiner is protected, once again impeachment should immediately follow.[46] One rule of thumb is to begin the question-assertion with "Isn't it true ..." or ending with "... correct?" A question-assertion in this form screams for a monosyllabic response. Conversely, questions should not begin with "who," "what," "when," "where," or "how." Framing questions in such a manner invites a more extensive, and, as a result, a less controlled response.[47]

***128** An example of this technique can be seen in the cross-examination of Richard Bruno Hauptmann, who was tried, convicted, and executed for kidnapping Charles Lindbergh's infant son.[48] From the start, the prosecutor made obvious use of this principle, asking specific question-assertions to shape the narrative that Hauptmann had benefited upon immigrating to America from Germany, and yet had the audacity to kill the son of an American icon.[49] While this trial is widely regarded as a miscarriage of justice,[50] the point remains that when Hauptmann took the stand in his own defense, the prosecutor effectively told a story that he was a villain who took advantage of an American opportunity:

> Q: "And you have been in the United States of America since 1923, haven't you?"
>
> A: "Yes."
>
> Q: "You have enjoyed the privilege and opportunity of earning a livelihood, haven't you?"
>
> A: "Yes."
>
> ....
>
> Q: "You married in this country."

A: "Yes."

Q: "You saved money."

A: "Yes."

Q: "You bought stocks."

A: "Yes."[51]

129** ***3. Principle #4--One Fact - One Question

A simple yet often ignored method to maximize witness control is to limit each question to one fact.[52] Methodical adherence to one fact-one question "keeps tight control of the witness and keeps the jury in sync with the attorney's line of questioning."[53] A question-assertion loaded with more than one fact can lead to ambiguities or confusion, which may allow the witness to open up and qualify his answer.[54] For example: "You went into the house and saw the gun, correct?" Such a seemingly straightforward question can be confusing. If the witness went into the house but did not see the gun, she cannot respond with a single affirmation and is now given license to respond beyond the scope of the question. Whereas simply breaking the compound question-assertion into two questions maximizes control.

An excellent example of this is found in the cross-examination of Dr. Hawley Harvey Crippen.[55] Dr. Crippen was tried in 1910 for the murder of his wife, whose remains were found buried in their London home months after he claimed she left him.[56] Fearing he would be arrested, Dr. Crippen fled on a ship headed for Canada with his mistress, who was disguised as his son.[57] Dr. Crippen testified in his own defense and claimed he was afraid that he would be arrested on the suspicion of his wife's disappearance.[58] During cross-examination, the prosecutor methodically used the one fact-one question approach, highlighting the intricate steps Dr. Crippen and his mistress took in fleeing the authorities:

Q: "You thought you were in danger of arrest?"

A: "Yes."

Q: "And so you fled the country?"

***130** A: "Yes."

Q: "Under a false name?"

A: "Yes."

Q: "Shaved off your moustache?"

A: "Yes."

Q: "Left off wearing your glasses in public?"

A: "Yes."

Q: "Took [your mistress] Le Neve with you?"

A: "Yes."

Q: "Under a false name?"

A: "Yes."

Q: "Posing as your son?"

A: "Yes."[59]

Note the complete control by the prosecutor.[60] Methodically building the examination one fact at a time follows the rationale of the scientific method which requires that "the experimenter has a controlled environment and adds one variable at that time

to that environment to determine the effect of that variable."[61] Adding one new fact at a time keeps the cross-examination focused and unambiguous, allowing the story to build one piece at a time.[62] The prosecutor's cross-examination of Dr. Crippen brilliantly illustrates this principle.

The one fact-one question principle is also significant in that it facilitates information "chunking." Chunking refers to related pieces of information. For instance, in the Crippen cross-examination, the "chunk" of information set ***131** forth related solely to Crippen's efforts at his flight. Most people can only process limited "chunks" of information at one time.[63] This limited ability to process and remember constrains "the amount of information that we are able to receive, process, and remember."[64] As the advocate adds each new fact during the cross-examination, each smaller piece of information can be integrated more easily into the larger "chunk" of information.[65] In the examination of Dr. Crippen, all the facts integrated together illustrate his guilty conscience. Each new fact which the witness affirms can be integrated more fully by the jury into the larger chunk of information if it is the only fact introduced in each question.

4. Principle #5--Use Characterizations Carefully

Cross-examiners, in their efforts to control witnesses, should be wary of characterizations.[66] Characterizations may often be subject to several interpretations which can allow the witness to offer her own interpretation or clarification that significantly differs from what the cross-examiner intended.[67]

One example of how careless characterizations can make a cross-examination go awry is illustrated in the following domestic violence case.[68] During the cross-examination of the victim, defense counsel took issue with the witness's description of her conduct as merely an attempt to "hit" the defendant.[69] Counsel, attempting to intensify the witness's conduct, sought to characterize her conduct as "smashing" the defendant in order to establish that the victim was also violent during the altercation:[70]

> ***132** Q: "It was at that point in the proceedings that you picked up an object with the view of smashing the defendant in the face with it?"
>
> A: "No. I was not going to smash him in the face. I was just going to hit him and the way I was aiming it was going to hit him in the face. Yes."
>
> ....
>
> Q: "Was it not your intention to hit him in the face?"
>
> A: "No. It was not my intention. No. I was just going to hit him, but the way I was holding it it would have caught him in the face. But I didn't hit him with it though."[71]

The cross-examiner's unartful characterization allowed the witness to reinforce her testimony that she was trying to make the defendant back off. The cross-examiner could have reached the same conclusion without drawing such strong resistance. For example, the cross-examination could have proceeded as follows:

Q: “During the fight, you picked up an object, correct?”

A: “Yes.”

Q: “And that object was made of metal, isn't that right?”

A: “I don't know what it was made of. It was like a silver bowl, an ashtray/bowl thing.”

Q: “So, you would agree with me that the object was silver, metallic?”

A: “Yes.”

Q: “And when you picked up the object, you did so to hit the defendant with it?”

A: “Yes, I was going to hit him.”

Q: “You intended to hit him?”

A: “That's what I told the police.”

Q: “And you would agree that when you hit him, it was in the face?”

***133** A: “Yes. I didn't mean to hit him in the face, I was going to hit him, but didn't mean for it to hit his face.”

Q: “But you would agree with me that you did hit him in the face?”

A: "Yes."

This version of the cross-examination reaches the same conclusion that the witness hit the defendant in the face with a metal object, but without giving the witness the opportunity to be evasive. Also, note that the use of one fact-one question kept the examination focused.

Another concern with the use of characterization during cross-examination is its potential to alienate jurors. Basic principles of persuasion and reaction suggest that characterizations by cross-examiners can cause a negative reaction.[72] Studies have shown that attempts at persuasion can cause reactance when using "forceful and controlling language," which is perceived "as more threatening and as eliciting more reactance than noncontrolling language."[73] In a study designed to test the impact of an opinion statement on the participants' rating of two different profiles, researchers found that a mild statement was more effective in persuading participants than a strong statement.[74] Researchers found that participants were more persuaded when the "experimenter's expression of preference [for one profile over the other] was designed not to restrict the subjects' freedom to hold an opposing point of view."[75] Conversely, the participants reacted negatively to the profile in which the experimenter expressed a strong preference which limited the participants' ability to make an independent judgment.[76] The admonition then is to utilize characterizations carefully so as to prevent negative reactions. While the goal of cross-examination is not usually to persuade the witness of the cross-examiner's case, advocates should strive to prevent the witness from reacting negatively to the advocate's case.[77] Of course, that is the whole point ***134** of cross-examination--constraining the witness to the answer the crossexaminer desires. Limited use of strategic characterizations can be effective while minimizing the risk of a negative response.

5. Principle #6--Controlling the Runaway Witness Through Repetition

Some witnesses on cross-examination will embellish their responses substantially beyond the call of the question. A question-assertion that clearly calls for a "yes" or "no" answer sparking a lengthy response presents a particular problem. Trial lawyers differ on strategies to cope with these "runaway witnesses."[78] Let's consider the following exchange:

Q: "Isn't it true that you filed for bankruptcy on October 5, 2016?"

A: "Yes, I did, because your client refused to pay me what he owed me, which started a chain reaction of financial problems, including the bank foreclosing on my building, which made it impossible to continue production."

Such a response is not uncommon with a witness experiencing the stress of cross-examination and seeking to push back against the cross-examiner.[79]

One school of thought to prevent the runaway witness from producing a response well beyond what was called for is to admonish the witness at the outset of the cross-examination to confine himself to "yes" or "no" responses.[80] Many judges will not allow such an admonition, reasoning that it unduly restricts the witness from testifying since not all questions can be answered with a

simple "yes" or "no."[81] Furthermore, despite the ***135** admonishment, the runaway witness may well pay no heed and continue to give lengthy non-responsive answers.[82]

Another school of thought is to immediately object as non-responsive once the witness continues past "yes."[83] Again, there are downsides to such an approach. The judge may or may not sustain the objection. Even though everything following "yes" is beyond the scope of the question, judges are often reticent to cut off a witness.[84] The greater concern in employing this approach, however, involved the jurors' perception of the cross-examiner.[85] Cutting off the response so quickly may be perceived as rude and disrespectful, and perhaps more importantly, may communicate to the jury that the advocate is overly concerned with the answer the witness would give.[86] In either scenario, the cross-examiner loses some objectivity as he descends into an overtly partisan position, uninterested in a full development of the facts.

A third school of thought is for the advocate to let the witness "gush-out" his non-response, to which the advocate simply repeats the question-assertion.[87] There are two advantages to this approach. First, it is courteous and respectful, and thereby does not run the risk of jury alienation.[88] Second, and more importantly, it provides an opportunity for the advocate to follow-up the non-answer and once again offer the same question-assertion, which will draw particular notice from the jury since the repetition of the question- ***136** assertion highlights the question as well as the evasive nature of the witness's response. The exchange would go as follows:

> Q: "Isn't it true that you filed for bankruptcy on October 5, 2016?"
>
> A: "Yes, I did, because your client refused to pay me what he owed me, which started a chain reaction of financial problems, including the bank foreclosing on my building, which made it impossible to continue production."
>
> Q: "Mr. Witness, let me return you to my question. Isn't it true that you filed for bankruptcy on October 5, 2016?"
>
> A: "I did. But as I explained I had no choice."
>
> Q: "So the answer to my question is 'yes,' you filed for bankruptcy on October 5, 2016."

Most witnesses will be hesitant to offer the same lengthy response a second or third time.[89] Should they persist, however, a non-responsive objection would be warranted, and at that point likely sustained by the judge.[90] This repetition approach will only be effective if the initial question is absolutely clear.[91] It must be free of ambiguities, obvious characterizations, or compound facts. The downside of the third approach is that the witness has once again repeated her position--the same response she offered during her direct examination and will most likely offer again during her redirect examination. But this is of little concern, as her explanation cannot be censored--it is there for all to hear. What is important during cross-examination is the repetition of the question-assertion to drive home the examiner's point. Further, witnesses who do not cooperate and fail to directly answer a question signal to the jury their evasiveness and even aggression, potentially impugning their own credibility.[92]

***137** One particularly striking example comes from the cross-examination of Charles Guiteau, who was tried for the assassination of President Garfield in 1881.[93] Guiteau claimed he shot Garfield because God commanded him to--not surprisingly, the defendant pleaded insanity.[94] Guiteau testified at the trial, plainly squirming under the prosecutor's cross-examination which attempted to make clear that the actions of Guiteau were his alone.[95] Guiteau resisted the assertion that his actions were wholly his own:

> Q: "You thought you had killed President Garfield?"
>
> A: "I supposed so at the time."
>
> Q: "You intended to kill him?"
>
> A: "I thought the Deity and I had done it, sir."
>
> Q: "Who bought the pistol, the Deity or you?"
>
> A: "I say the Deity inspired the act, and the Deity will take care of it."
>
> Q: "Who bought the pistol, the Deity or you?"
>
> A: "The Deity furnished the money by which I bought it, as the agent of the Deity."[96]

While the prosecutor did not get a clear affirmative answer from the witness, by repeating the question, he was able to get the witness to accept some agency in purchasing the gun that was used to commit the assassination. By using repetition to rein in the unruly witness, the jury is not only exposed to the same question-assertion two or three times, the jury will also be left to infer that the witness is being evasive if the question-assertion is carefully worded so as to not justify the witness's rejection of the advocate's phrasing.[97] In fact, if the jurors become aware that the witness is avoiding answering a reasonably phrased question, researchers have found that "jurors are more often persuaded when *they*, not the attorneys, draw the conclusion" that a witness is being evasive.[98]

***138** Further, a potential benefit of having to repeat the question-assertion is found in the "illusion of truth" effect.[99] The "illusion of truth" effect suggests that "statements repeated even once are rated truer or more valid than statements heard for the first time."[100] Researchers theorize that the reasons for this are varied, but such reasons can include that the hearer has been activated to the general topic, even if the specific statement is not presented until later.[101] Thus, if an advocate appropriately

primed the jury during opening (constructs the framework of the story), the cross-examination can be used to enhance the perceived truthfulness of the question-assertion.

C. Maintain Juror Rapport

It is, of course, axiomatic that advocates throughout trial must cultivate and maintain goodwill with their jurors.[102] Jurors respect professionalism and competence.[103] Conversely, an advocate who appears unprepared, disorganized, or disrespectful will not engender confidence or goodwill with his jurors.[104] Professionalism and confidence beget trust and credibility.[105] Throughout a trial, jurors are taking measure of the advocates, and those ***139** advocates who best instill that sense of professionalism hold an advantage over their adversaries, even so far as to impact the verdict.[106] The following principles help prevent juror alienation.

1. Principle #7--Strike the Proper Demeanor

An overly aggressive cross-examination runs the risk of losing the advocate any goodwill or likeability previously developed at trial.[107] That goodwill is more at risk during cross-examination than at any other phase of trial. Cross-examination, by its very nature, is a hostile exercise often sparking conflict.[108] Cross-examiners perceived as unnecessarily aggressive or disrespectful will pay the cost with their jurors.[109] Throughout this hostile phase of trial, it is particularly critical for advocates to be measured and respectful, with few exceptions.[110] The information to be obtained during cross-examination can be gotten without slipping into an attack mode.[111] It is better to use an ice pick than a broad axe. The point is still made, but there is a lot less blood splashed about the courtroom.

That being said, there may arise occasions during cross-examination when the witness is overtly hostile or evasive, which allows the examiner to become more assertive.[112] There is a sense of proportionality at play, and the jurors may feel that the witness's conduct merits a sterner approach. This is a very fine line that advocates should only cross when necessary and with extreme caution.

***140** *2. Principle #8--Respect the Jurors' Time and Patience*

Jurors' attention spans are frequently challenged throughout trial.[113] Advocates must realize that it is difficult, maybe even impossible, to successfully advocate when the target audience is not focused.[114] This maxim holds as true for cross-examination as it does in every other component of a trial. A tedious cross-examination loaded with unnecessary repetition or focused on peripheral points will cause jurors to question the advocate's competence and impact the advocate's ability to effectively make her case.[115] Further, such a cross-examination is disrespectful to the jurors in two ways. First, it is treating the jurors in a condescending manner to be unnecessarily repetitive; and, second, it wastes the jurors' time by unduly lengthening the trial. Any goodwill the advocate might have previously garnered is jeopardized as the jurors are left to wonder why this lawyer is engaged in such a tedious and pointless exercise.

3. Principle #9--Anticipate and Prepare for Objections

In preparing for trial, any good advocate assesses the evidence for potential flaws and pitfalls, and the same can be said of every aspect of the cross-examination.[116] In deciding which points must be addressed on cross examination and the manner in which those points will be addressed, the examiner must anticipate which question-assertions will be the most likely to draw an objection and anticipate the appropriate response.

On the front end, preparing for objections on cross-examination should start with crafting the question-assertions to avoid objections.[117] However, objections are inevitable and should be anticipated and dealt with expeditiously. An unartful response to an objection reflects a lack of ***141** preparation and professionalism which can impact the jurors' perception of the attorney.[118]

II. Conclusion

Cross-examinations should never be viewed as free-wheeling affairs striving to damage the witness and his view of the events at issue. There is little--*if any*--room for spontaneity. Even in the rare event that an opening to explore a fruitful area has unexpectedly appeared, cross-examination must still maintain a conservative, thoughtful approach and heed the principles set forth above. Trials are not often won on cross-examination, but can well be lost there.

Footnotes

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1 William Shakespeare, Hamlet act 2, sc. 2, ll. 205-06 (George Richard Hibbard ed., Oxford Univ. Press 1987) (1603).

2 Crawford v. Washington, 541 U.S. 36, 61 (2004) (overruling Ohio v. Roberts, 448 U.S. 56 (1980), and holding that ‘testimonial’ statements give rise to a right of cross-examination to test the validity of the statements).

3 Texas Trial Handbook§ 16:31 (3d ed. 2017) (noting that improper use of a cross-examination can be harmful to a trial attorney's case); Thomas D. Burns, *Cross-Examination*, 48 Mass. L.Q. 224, 225 (1963) (“Many cases are lost by the injudicious use of cross-examination ....”).

4 59 Am. Jur. *Trials* § 10 (2018) (noting that a persuasive advocate must expend effort, energy, and proper attention to the jury in order to ensure that she wins the battle that is cross-examination); Kenneth M. Mogill, Examination of Witnesses § 8.8 (2d ed. 2017) (describing that the media often portrays attorneys engaging in cross-examination by destroying a witness on the stand by accusing them of villainy, iniquity, or sin until the witness is broken, makes an admission, or makes a confession); *see* Francis L. Wellman, The Art of Cross-Examination 105-20 (new & enlarged ed. 1908) (studying methods of great cross-examiners).

5 Burns, *supra* note 3, at 225 (noting that many cases are lost by poor cross-examinations); Gerald A. Klein, *The Art of Cross-Examination*, The Gavel (2010), https://www.kleinandwilson.com/Publications/The-Art-Of-Cross-Examination.shtml (noting that oftentimes cross-examination will not add to an advocate's case); Irving Younger, The Art of Cross-Examination (Monograph Series 1, 1976).

6 Linda Miller Atkinson, *Depositions, in* 2 Litigating Tort Cases § 18:52 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2017) (stating that the most important tool is cross-examination); Albert S. Osborn, *Cross-Examination--Its Benefits and Defects*, 33 Canadian L. Times, 130, 130 (1913) (noting that cross-examination is highly valuable and indispensable); Paul J. Passanante &Dawn

M. Mefford, *Cross-Examination*, 62 J. Mo. B. 28, 28 (2006) (quoting the Supreme Court of Missouri's statement that "[t]he right of cross-examination exists solely because cross-examination is a necessary safeguard against the receipt of false or mistaken evidence").

7 Cathleen Bennett, *Trial Advocacy, in* Massachusetts District Court Criminal Defense Manual § 15.4.4 (Cathleen Bennett ed., 4th ed. 2016) (noting that cross-examination can be used to "under mine [sic] a witness so that the jury will reject the witness's testimony either because the witness is mistaken and unreliable, or the witness is untruthful"); Chris K. Gober, *Cross-Examination*, U.S. Att'ys' Bull., Nov. 1998, at 20, 21 (noting a form of cross-examination that is "designed to weaken the opponent's case through the testimony of ... witnesses").

8 Bennett, *supra* note 7, and accompanying text; Robert E. Jones et al., Federal Civil Trials & Evidence § 12:90 (Rutter Grp. Practice Guides, 2018) (noting that a witness's credibility can be attacked with evidence from a prior inconsistent statement or the witness's lack of memory).

9 43A Harry P. Carroll & William C. Flanagan, Massachusetts Practice Series § 14:1 (3d ed. 2017) (noting that one purpose of cross-examination is to validate an examiner's theory of the case); Mogill, *supra* note 4, § 8.8 (acknowledging that counsel can use cross-examination to elicit additional facts that support her case or place her direct examinations in a more sympathetic context); *see* 6 Am. Jur. *Trials* 297 § 3 (2018) (noting that one objective of cross-examination is to provide testimony to support counsel's case).

10 *See* Advertisement for Noel C. Stevenson, Successful Cross Examination Strategy (1971), 60 A.B.A. J. 765, 765 (1974) (noting that "[o]ne wrong question, one error in judgment--could be enough to cost you your case!"); *supra* note 3 and accompanying text.

11 L. Timothy Perrin et al., The Art & Science of Trial Advocacy 279 (2d ed. 2011) (indicating that "instead of cross-examining witnesses with the objective of singlehandedly winning the case through that particular cross, trial lawyers should approach each cross-examination as having more limited utility. The more modest objective of cross-examination should be *not to lose the case*.").

12 From the Latin *"primum non nocere*," which is translated from Greek. Ironically, the phrase "first, do no harm" is not part of the original Hippocratic Oath, but is derived from the ancient Greek physician Hippocrates' work *Of the Epidemics*. Robert H. Shmerling, *First, Do No Harm*, Harv. Health Blog (Oct. 13, 2015, 8:31 AM), https://www.health.harvard.edu/blog/first-do-no-harm-201510138421. Despite the absence of this phrase from the Oath, however, medical students pledge to avoid harming their patients. Some debate exists over the necessity or reality of this phrase. "The idea that doctors should, as a starting point, not harm their patients is an appealing one. But doesn't that set the bar rather low? *Of course* no physician should set out to do something that will only be accompanied by predictable and preventable harm." *Id. See also* John Wesley Hall, Jr., Professional Responsibility in Criminal Defense Practice § 9:6 (3d ed. 2017) (noting that attorneys should "do no harm to the[ir] client's case").

13 Steven Susser, *Rules for Successful Cross-Examination*, Mich. B.J., Oct. 2017, at 40-41 (noting techniques to turn the witness in your favor, like extracting helpful points during a cross-examination rather than attacking a witness).

14 *Id.* (indicating that two reasonable goals of cross-examination are to get useful admissions and dent witness credibility).

15 Robert E. Larson, Navigating the Federal Trial § 7:76 (2017) (warning examiners not to repeat direct examinations on cross-examination); 2 Paul H. Tobias, Litigating Wrongful Discharge Claims § 12:15 (2017) (noting that cross-examiners should limit and discredit a witness' testimony).

16 Tobias, *supra* note 15, at § 12:15 (noting that cross-examiners should limit and minimize the harm and adverse impact of a witness' testimony).

17 *See infra* Section C.

18 Alina Tugend, *Praise is Fleeting but Brickbats We Recall*, N.Y. Times, Mar. 23, 2012, http://www.nytimes.com/2012/03/24/your-money/why-people-remember-negative-events-more-than-positive-ones.html (noting that negative and positive information are processed in different hemispheres of the brain and that negative information is processed deeper than positive information).

19 *Id.*

20 *Id.*

21 *Id.* (indicating that the way we process negative and positive information impacts the significance that it holds within our brain).

22 Andrew Myers, *Stanford Research Shows that Different Brain Cells Process Positive and Negative Experiences*, Stan. News (May 26, 2016), https://news.stanford.edu/2016/05/26/stanford-research-shows-different-brain-cells-process-positive-negative-experiences. In another study, researchers conducted interviews with participants about their childhood, and even participants who categorized their childhood as happy revealed a litany of unpleasant memories. *See* Tugend, *supra* note 18.

23 Tugend, *supra* note 18.

24 Myers, *supra* note 22.

25 Tugend, *supra* note 18 (indicating that the deeper thinking that often accompanies negative emotions contributes to vivid recollections of unpleasant information).

26 *See supra* notes 23-24, and accompanying text.

27 Tom Branigan, *Cross-Examination of Technical Experts*, Mich. B.J., May 2015, at 59-60 (noting that the adage to "[n]ever ask a question on cross to which you do not know the answer" is a "well-worn mantra" of seasoned trial lawyers); Maureen A. Howard, *Revisiting Trial Basics Every Time: A Ritual for Courtroom Success*, 34 Am. J. Trial Advoc. 335, 357 (2010) (encouraging counsel to "source the answer to each question," requiring that she know answers and the evidence to prove up that fact in advance); 2A Daniel J. McAuliffe & Shirley J. McAuliffe, Civil Trial Practice § 22.4 (2d ed. 2016) (explaining that only asking questions that counsel knows the answer to is a basic principle of cross-examination).

28 3 Criminal Practice Manual § 84:2 (2017) (noting that effective advocates prepare background facts and depositions, among other things, in order to be adequately prepared); J. Duke Thornton, Trial Handbook for New Mexico Lawyers § 27.8 (2017) (explaining that counsel can utilize prior statements and depositions to ask questions on cross-examination).

29 *See* My Cousin Vinny (Twentieth Century Fox 1992). An excellent example of an impeachment by common sense (albeit dramatized) is shown in this film, when Joe Pesci's character (the eponymous "Vinny") impeaches an eyewitness on cross-examination with his having "magic grits." *Id.*

30 81 Am. Jur. 2d *Witnesses* § 714 (2018) (noting that advocates have wide latitude to impeach and discredit witnesses if they make an inconsistent statement); Roger C. Park & Aviva Orenstein, Trial Objections Handbook § 7:2 (Thomson Reuters, Trial Practice Ser., 2d ed. 2017) (explaining that a witness may be impeached to show defects in their "perception or ability to observe"); 9 Standard Pennsylvania Practice § 54:143 (2d ed. 2018) (emphasizing that advocates may introduce evidence that is inconsistent with the witness's testimony to impeach the witness).

31 Jim Zirin, *Getting at the Truth? Cross-Examination is the Crowning Glory of Our Legal System*, Forbes (Feb. 11, 2014, 4:28 PM), https://www.forbes.com/sites/jameszirin/2014/02/11/getting-at-the-truth-cross-examination-is-the-crowning-glory-of-our-legal-system/#13c1a5614465.

32 *Id.*

33 *Id.* (noting that the defendant garnered favor and changed the sympathies of spectators with his answer).

34 Homer L. Deakins, Jr., *Cross-Examining the Plaintiff in an Employment Tort Case, in* Litigating the Employment Tort Case § 7.04 (Daniel J. Rose ed., 2001) (noting that "it is critical that [a cross-examiner] control the witness"). *See also* 4 Robert L. Haig, Commercial Litigation in New York State Courts § 42:23 (Thomson West, New York Practice Ser., 4th ed. 2017) (explaining that leading questions are a primary tool that advocates use to control the witness); Jeffrey L. Kestler, Questioning Techniques and Tactics § 2:22 (Thomson Reuters, Trial Practice Ser., 3d ed. 2017) (noting that clear and simple questions can align the witness's narrative with the advocate's narrative); Fred Lane, 4 Lane Goldstein Trial Technique § 19:39 (3d ed. 2017) (indicating that advocates can retrieve desired responses from witnesses by asking leading questions).

35 Steven E. Arthur & Robert S. Hunter, Federal Trial Handbook Civil § 37.5 (4th ed. 2017) (observing that leading questions typically leave witnesses with the choice of answering "yes" or "no"). *See also* 6 David R. DeMuro, Colorado Practice Series § 9.17 (2d ed. 2017) (noting that "classic leading question[s]" begin with "Isn't it true that ..."); 22 Stephen A. Hess & Sheila K. Hyatt, Colorado Practice Series § 7:9 (2017-2018) (explaining that "[a] leading question is one that suggests to the witness the answer desired by the examiner") (quoting 1 John William Strong, McCormick on Evidence § 6 (5th ed. 1999)).

36 43A Harry P. Carroll & William C. Flanagan, Massachusetts Practice § 14:42 (3d ed. 2017); Kestler, *supra* note 34, § 5:9:50 (noting that hostile witnesses, by definition, are not cooperative).

37 *See* Branigan, *supra* note 27, at 59 (suggesting that attorneys use cross-examination only "to expose flaws, teach the jury, and prove [their] points through the opposing expert ....").

38 Todd E. Edelman, *Cross-Examination as Story-Telling*, 12 Clinical L. Rev. 107, 119 (2005) (indicating that opening and closing statements can frame the examiner's narrative, but cross-examination can reinterpret the narrative to that examiner's narrative).

39 Janet Cotterill, *Collocation, Connotation, and Courtroom Semantics: Lawyers' Control of Witness Testimony Through Lexical Negotiation*, 25 Applied Linguistics 513, 515, 533 (2004).

40 *Id.* at 533.

41 W. Lance Bennett & Martha S. Feldman, Reconstructing Reality in the Courtroom 94 (1981).

42 *Id.*

43 *Id.* at 94-95; Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. Verbal Learning & Verbal Behav. 585 (1974).

44 Perrin et al., *supra* note 11, at 286.

The precise form of the leading question is not as important as the fact that it is leading. Nevertheless, an easy method for ensuring that every question is appropriately leading is for the examiner to make a series of assertions, each preceded or followed, if necessary, by a word or phrase to make a question.

Id.

45 *See, e.g.*, Arthur & Hunter, *supra* note 35, § 37:5 (describing a leading question as "[t]he most powerful weapon the cross-examiner has to control an adverse witness"); *see also* Stephen E. Arthur & Robert S. Hunter, 2 Federal Trial Handbook: Criminal § 46:6 (4th ed. 2017).

46 *See* Nancy Hollander & Barbara E. Bergman, Everytrial Criminal Defense Resource Book § 40:5 (2017).

47 Carroll & Flanagan, *supra* note 36, § 13:25 (noting that open-ended questions yield expansive answers from witnesses); Perrin et al., *supra* note 11, at 286 (stating that "[c]ounsel relinquishes control by asking questions that are not leading, allowing hostile witnesses to reiterate their harmful testimony, and potentially compromising the examiner's case").

48 James W. McElhaney, Classics of the Courtroom: Highlights from the Direct and Cross-Examination of Richard Hauptmann i-iii (1988).

49 *See id.* at 112-13. The prosecutor's point was likely meant to vilify the defendant and paint him in direct contrast to his alleged victim's father, Charles Lindbergh, an American hero. *Id.* at i.

50 *See id.* at iii. This case is historically considered a miscarriage of justice for a number of reasons, including mishandled evidence and rampant prosecutorial and police misconduct. *Id.*

51 *Id.* at 112-13.

52 Francis P. Bensel et al., Personal Injury Practice in New York § 9:300 (2017) (noting that questions with multiple questions are objectionable); Jordan Patrick Browne & Carolyn C. Van Tine, *Trial Practice Techniques, in* 2 Massachusetts Divorce Law Practice Manual § 17.6.6(a) (3d ed. 2012 & Supp. 2016) (encouraging examiners to use short questions with plain language); 6 Lynn McLain, Maryland Practice Series§ 611:7 (2017) (explaining that questions that are disjunctive, conjunctive, contain couple positive elements and negative elements, and use double negatives are compound questions that are likely to be misleading and ambiguous).

53 Perrin et al., *supra* note 11, at 287-89.

54 *Id.* at 288.

55 Notable Cross Examinations 98-110 (Edward Wilfrid Fordham ed., Greenwood Press 1970).

56 *Id.* at 98-99.

57 *Id.* at 98.

58 *Id.* at 107-08.

59 *Id.*

60 Dr. Crippen was convicted and sentenced to death. *Id.* at 110.

61 Larry S. Pozner & Roger J. Dodd, Cross-Examination: Science and Techniques § 10.24 (3d ed. 2018) (indicating that cross-examination is a skilled enterprise); Perrin et al., *supra* note 11, at 286-87 ("[A]dvocates must ask short questions that seek only one fact each .... Cross-examiners must eliminate opportunities for the witness to give expansive or evasive answers and the best means of doing that is by asking short and simple questions--one fact, one question.").

62 *See* Pozner & Dodd, *supra* note 61, § 10.24 ("By placing only a single new fact before a witness, the witness's ability to evade is dramatically diminished. Simultaneously, the ability of the factfinder to comprehend the significance of the fact at issue is greatly enhanced.").

63 George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 101 Psychol. Rev. 343, 349 (1994).

64 *Id.* at 351.

65 *See id.* at 348.

66 *See* Mogill, *supra* note 4, § 8:59 (noting that oftentimes attorneys must use careful phrasing to ensure that their presentation is effective); Perrin et al., *supra* note 11, at 295 ("When advocates ask witnesses on cross-examination to agree with the advocate's characterizations of events or people, the witness may feel compelled to explain why the characterization is wrong or inaccurate. The more provocative the characterization, the more likely the witness will not simply answer 'yes' or 'no.'").

67 *See* Mogill, *supra* note 4, § 8:55.

68 Cotterill, *supra* note 39, at 525-27.

69 *Id.* at 525-26.

70 *Id.* at 527.

71 *Id.* at 525-26.

72 Christina Steindl et al., *Understanding Psychological Reactance: New Developments and Findings*, 223 Zeitschrift Für Psychologie [Mag. Psychol.] 205, 205 (2015). Reactance generally is defined as "an unpleasant motivational arousal that emerges when people experience a threat to or loss of their free behaviors." *Id.*

73 *Id.* at 209 (citing C.H. Miller et al., *Psychological Reactance and Promotional Health Messages: The Effects of Controlling Language, Lexical Concreteness, and the Restoration of Freedom*, 33 Hum. Comm. Res. 219, 230-31 (2007)); Brian L. Quick & Michael T. Stephenson, *Examining the Role of Trait Reactance and Sensation Seeking on Perceived Threat, State Reactance, and Reactance Restoration*, 34 Hum. Comm. Res. 448, 465-67 (2008).

74 Rex A. Wright et al., *Persuasion, Reactance, Judgments of Interpersonal Appeal*, 22 European J. Soc. Psychol. 85, 90 (1992).

75 *Id.*

76 *Id.*

77 *See id.*

78 Perrin et al., *supra* note 11, at 293.

In the same way, 'witness dumping,' wherein the witness attempts to dump as much of her case as possible into the opponent's cross-examination, is a time-honored practice. One effective device to deal with such efforts ... is to simply repeat the question. Another technique, however, is to discipline the witness for going beyond the scope of the question, to teach that such attempts to subvert the cross-examination will not be tolerated.

Id.

79 Larry Pozner & Roger J. Dodd, Cross Examination: Skills for Law Students 266-67 (2009) (identifying the runaway witness as "one of the greatest fears of the cross-examiner").

80 *See infra* note 81.

81 Jones et al., *supra* note 8, §§ 9:50, 9:90 (Rutter Grp. Practice Guides, 2018) (warning examiners of the dangers that can arise from "yes" or "no" questions); *Id.* § 9:99 (discouraging the overuse of leading questions). *See also* Lane, *supra* note 34, § 19:6 (noting that insulting, disparaging, and argumentative questions are not permitted).

82 2 Russ Herman & Joseph E. Cain, Louisiana Personal Injury § 12:147 (Louisiana Practice Ser., 2017-2018) (suggesting that examiners do not ask long narrative questions).

83 Pozner & Dodd, *supra* note 61, § 15.

84 *But see* 28 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure§ 6164 n.22 (2d ed. Sept. 2018 Update) (collecting cases in which courts have used their power to preclude narrative testimony).

85 *See* Terence MacCarthy, MacCarthy on Cross-Examination 120-21 (2007) (noting that an attorney demanding yes or no answers can appear "overbearing").

86 *Id.* at 121; James L. Mitchell, *Cross-Examination*, Payne Mitchell L. Grp. 13 (2007), http://paynemitchell.com/wp-content/uploads/24-Cross-Examination.pdf (noting that objections to non-responsive answers are the only type of legal objections that can be used as a technique to control the witness); Steven H. Goldberg & Tracy Walters McCormack, The First Trial: Where Do I Sit? What Do I Say? In a Nutshell 318 (2009) ("Interrupting is rude, and is not viewed any more favorably by jurors than by anyone else.").

87 8 Leonard R. Stamm, Maryland Practice Series § 8:5 (2017) (indicating over twelve methods to address nonresponsive witnesses).

88 *See* Sandra H. Robinson, *Cross-examination--A Delicate Balance, in* 2 American Trial Lawyers Association CLE Conference Materials (2002) (noting that preparation and strategy are essential to an effective presentation to a jury).

89 *See* Stamm, *supra* note 87, § 8:5 (noting that, "[w]hen asked the same question in the same words, in the same tone three times, it is difficult for the witness to continue evading the appropriate response").

90 Charles B. Gibbons, Federal Trial Objections § N20 (6th ed. 2017) (citing United States v. Carr, 5 F.3d 986 (6th Cir. 1993)) (indicating that, after an objection to a nonresponsive answer by witnesses, the court may strike the answer or give a limiting instruction); 2 Barbara E. Bergman et al., Wharton's Criminal Evidence § 8:36 (15th ed. 2017) ("When it appears that the witness is about to make a non-responsive answer, the court has the power to stop the witness from doing so.").

91 Stamm, *supra* note 87, § 8:5 (noting that the technique is effective "when counsel has asked a straightforward, well-crafted question").

92 *Id.*

93 Wellman, *supra* note 4, at 357.

94 *Id.*

95 *See id.* at 359-63.

96 *Id.* at 360.

97 *See* 98 C.J.S. *Witnesses* § 569 (Sept. 2018 Update) (noting that a witness who is nonresponsive may be pressed for an answer or compelled to answer by the court).

98 Jeffrey T. Frederick, The Psychology of the American Jury 179 (1987).

99 Wesley G. Moons et al., *The Impact of Repetition-Induced Familiarity on Agreement with Weak and Strong Arguments*, 96 J. Personality & Soc. Psychol. 32, 32 (2009). Of course, repetition alone is not the sole factor in persuading the recipient of the truth of the information; "[b]oth controlled processing of message content and the automatic impact of repetition-induced familiarity contribute to the agreement." *Id.* at 42.

100 *Id.* at 32.

101 *Id.* For instance, even exposure to the phrase "Statue of Liberty" prior to being presented with the statement "[t]he extended right arm of the Statue of Liberty is 42 feet long" causes the statement to be perceived as more true. *Id.*

102 4D American Law of Products Liability 3d § 71:44 (3d ed. 2018) (noting that examiners have to trust the jury); Harry J. Plotkin, *Building Trust Among the Jury*, Orange Cty. Law., Aug. 2005, at 28 (explaining that it is essential for examiners to build trust among the jury);Martin Blinder, Psychiatry in the Everyday Practice of Law § 15:1 (4th ed. 2016) (noting that jurors are more likely to trust the words of gracious and even-handed examiners).

103 Steve M. Wood et al., *The Influence of Jurors' Perceptions of Attorneys and Their Performance on Verdict*, Jury Expert, Jan. 2011, at 24, http://thejuryexpert.com/wpcontent/uploads/TJEVol23Num1_Jan2011.pdf (noting that juries evaluate the "dress, demeanor, and personality [of attorneys], along with the case evidence").

104 Blinder, *supra* note 102, § 15:3 (noting that it behooves examiners to be orderly and rational); Jason Bloom & Karin Powdermaker, *Building Rapport in the Courtroom*, 69 Tex. B.J. 540, 543 (2006) (emphasizing the importance of examiners to be prepared, organized, and succinct); 6 David Boies & Stephen Zack, *Litigation Technology, in* Business & Commercial Litigation in Federal Courts § 66:31 (Robert L. Haig ed., 4th ed. 2017) (noting that a disorganized and flustered examiner will negatively influence the jury's perception of their case).

105 *See* Blinder, *supra* note 102, § 15:1.

106 *See* Wood et al., *supra* note 103.

107 *See* Lane, *supra* note 34, § 19:13.

108 *See* Jake E. McGehee, *A Guide to Direct Examination and Cross-Examination*, GP Solo, Sept.-Oct. 2014, at 31 (noting that a common goal of cross-examinations is to decrease an adverse witness's credibility with the jury).

109 Mogill, *supra* note 4 ("[T]he attorney who shreds the personal dignity of a witness may end up finding that her apparent success has boomeranged on her, as the jury becomes offended at counsel's insensitivity.").

110 Perrin et al., *supra* note 11, at 296-97 (noting that a witness under cross-examination will never agree to a lawyer's characterization of the witness's actions as malicious or wrong, but will have no choice but to agree to simple statements of fact).

111 *See* Walter Probert, *Courtroom Semantics*, 5 Am. Jur. *Trials* 695, § 91 (1965); Carroll & Flanagan, *supra* note 36, § 14:25.

112 While these types of occasions run counter to Lane, *supra* note 34, § 19:13 and accompanying text, they do exist and must be handled carefully when presented.

113 Ryan J. Winter, *Would Someone Please Wake Juror Number Five?*, Monitor on Psychology, Sept. 2010, at 26 (indicating that juror boredom can create inattention).

114 *Id.*

115 Howard, *supra* note 27, at 357 (encouraging advocates to make clear and simple statements to ensure that they make their case effectively).

116 Perrin et al., *supra* note 11, at 328-29 ("Whether making or responding to objections, advocates should not be taken by surprise. An essential task in preparing for the examination of any witness is to anticipate the objections from opposing counsel and to know in advance appropriate responses.").

117 This will of course vary based on the advocate's knowledge of the judge in the particular trial. Care should be taken to prepare for possible objections on cross knowing their opponent's propensity to object, the likely arguments they will make for certain more

important objections, and how the judge might rule. This may pose a challenge for newer advocates unfamiliar with a particular judge and/or opposing counsel.

118 *See* Bloom & Powdermaker, *supra* note 104.

70 SCLR 119

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SUMMATION

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New York Jurisprudence, Second Edition | May 2022 Update

Criminal Law: Procedure
Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Elizabeth M. Bosek, J.D.; Paul M. Coltoff, J.D.; Christine M. G. Davis, J.D., LL.M.; Laura Hunter Dietz, J.D.; John J. Dvorske, J.D., M.A.; Romualdo P. Eclavea, J.D.; Tracy Bateman Farrell, J.D.; Mary Therese K. Fitzgerald, J.D.; Thomas M. Fleming, J.D.; John A. Gebauer, J.D.; Stephanie A. Giggetts, J.D.; John Glenn, J.D.; Lonnie E. Griffith, Jr., J.D.; Glenda K. Harnad, J.D.; Tammy E. Hinshaw, J.D.; Michele Hughes, J.D.; Rachel M. Kane, M.A., J.D.; Michele Meyer McCarthy, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Judith Nichter Morris, J.D.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Charles J. Nagy, J.D.; Karl Oakes, J.D.; Jeanne Philbin, J.D.; Mark T. Roohk, J.D.; Caralyn M. Ross J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; Kimberly C. Simmons, J.D.; Thomas Smith, J.D.; Eric C. Surette, J.D.; Susan L. Thomas, J.D.; Mary Ellen West, J.D.; Eileen Wierzbicki, J.D.; Elizabeth Williams, J.D.; Brenda Williamson, J.D.; Lisa A. Zakolski, J.D; Judy E. Zelin, J.D.; and Stephanie Zeller, J.D.

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(1) In General

§ 2712. Summation, generally; right to summation and order of presentation

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2071 to 2074

A.L.R. Library

- Prejudicial effect of statement by prosecutor that verdict, recommendation of punishment, or other finding by jury is subject to review or correction by other authorities, 10 A.L.R.5th 700
- Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases, 88 A.L.R.4th 209
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Treatises and Practice Aids

- Criminal Procedure in New York, Revised Edition § 46:9 (Summation)

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873

In a jury trial, at the conclusion of the presentation of the evidence, the defendant may deliver a summation to the jury.[1] Following the summation by the defense, the prosecution may deliver its summation to the jury.[2]

Both the defendant and the prosecutor in a criminal trial are guaranteed the right of counsel to comment, during summation, on every pertinent matter of fact bearing upon the questions the jury has to decide.[3] However, as an officer of the court, and as a representative of the People, a prosecutor must refrain from summing up in a manner that denies the defendant the right to a fair trial.[4]

CUMULATIVE SUPPLEMENT

Cases:

Slides from computerized presentation were properly used in summation; added captions or markings were consistent with trial evidence and fair inferences to be drawn from that evidence, and jury was told that the physical exhibits admitted into evidence would be made available to them, while the slides were not supplied to jury during deliberations. People v. Anderson, 29 N.Y.3d 69, 52 N.Y.S.3d 256, 74 N.E.3d 639 (2017).

[END OF SUPPLEMENT]

Footnotes

1 CPL § 260.30(8) (superior courts), CPL § 360.05 (local criminal courts).

2 CPL § 260.30(9) (superior courts), CPL § 360.05 (local criminal courts).

3 People v. Ashwal, 39 N.Y.2d 105, 383 N.Y.S.2d 204, 347 N.E.2d 564 (1976).

4 People v. Schaaff, 71 A.D.2d 630, 418 N.Y.S.2d 155 (2d Dep't 1979).

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c. Summation

(1) In General

§ 2713. Trial court's supervision and control of summations

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2195

A.L.R. Library

- Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases, 88 A.L.R.4th 209
- Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases, 88 A.L.R.4th 8

- Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases, 70 A.L.R.4th 664

Counsel should be afforded the widest latitude by way of comment, denunciation, or appeal in advocating his or her client's cause.[1] However, the conduct of counsel in and during summation is subject to the supervision of, and full control by, the trial judge.[2] For example, the trial court's decision to preclude the defendant from making summation comments that lack a good-faith basis and rest on speculation does not impair the defendant's right to deliver a summation and present a defense.[3] Likewise, a minor limitation placed on defense counsel's summation is proper, where counsel persists in making an argument that is not based on the evidence and amounts to personal attacks on the prosecutor.[4]

Illustrations:

The county court's improper limitation of defense counsel's summation required reversal, where defense counsel was commenting on previously elicited testimony and evidence of the defendant's guilt was not overwhelming.[5]

However, defense counsel's comment during summation on the behavior of a spectator during the victim's testimony did not concern evidence under the circumstances of the case, and, thus, the trial court properly exercised its discretion in directing defense counsel to confine his summation to matters in evidence, where the court did nothing to restrict counsel's ability to comment on the demeanor of the victim or any other witness.[6]

The trial judge has the duty to prevent abuses by stopping and admonishing counsel whenever there is an improper reference to extraneous and prejudicial matters.[7] Thus, for instance, reversal is mandated where the court permits the summation of the prosecutor to degenerate into a character assassination,[8] or where the court improperly delegates its own duty to the prosecutor.[9]

Illustration:

The trial court's allowing the prosecutor, during summation, to instruct the jury on matters of law with respect to the validity of a concealed weapon and the defendant's ignorance of the law, after the trial court had declined to give such instructions, deprived the defendant of a fair trial; the court's delegation of a critical judicial function to the prosecutor significantly impaired the integrity of the proceedings.[10]

However, the People's use of a projector to display the legal definitions of "depraved indifference" and "recklessness" to the jury during summation did not prejudice the defendant or undermine his right to a fair trial in a prosecution for depraved indifference murder of a child and manslaughter, as the slides used contained virtually verbatim definitions of those terms as set forth in the pattern Criminal Jury Instructions, and the trial judge's instructions dispelled any possibility that the jury would give precedence to or place undue emphasis on the prosecutor's use of the slides.[11]

Closing argument is a basic element of defense in a criminal trial. [12] Accordingly, the court must ensure that counsel has the full and proper opportunity to properly and effectively present his or her client's case. [13] The right of defense counsel to make effective closing argument is impaired when counsel is unjustifiably limited or repeatedly interrupted during summation, [14] although the trial court has great latitude in controlling the duration and limiting the scope of summations, and may limit counsel to a reasonable time and may terminate argument when continuation would be redundant. [15] For instance, the trial court's interruption of the defendant's summation to provide the jury with a brief instruction on police investigatory techniques did not deprive the defendant of the right to present an effective summation or of the right to a fair trial; after the interruption, the defendant was fully able to pursue and complete the same line of argument he had been making, and the court's instruction did not undermine the defendant's defense. [16] Similarly, the trial court's interruption of the defendant's summation to inform the parties that it had reversed its original decision to deny the People's request for a lesser-included offense did not prejudice the defendant, where the charge was submitted after the court heard defense counsel's description of the trial evidence in his summation and he was permitted to alter his summation to address the submission of that count. [17]

As long as counsel properly stays within the evidence and does not dwell upon matters that are immaterial or irrelevant to the issues, counsel's summation should not be interrupted by undue criticism by opposing counsel or by the court. [18] However, the trial court may properly exercise if discretion to preclude defense counsel from making a summation argument that requires the jury to draw excessively speculative inferences from the evidence. [19]

CUMULATIVE SUPPLEMENT

Cases:

Summation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at his or her command; rather, there are certain well-defined limits, including, among others, that the prosecutor may not refer to matters not in evidence. People v. Ramirez, 150 A.D.3d 898, 2017 WL 1902545 (2d Dep't 2017).

The privilege of counsel to comment in summation on any matters of fact pertinent to questions that the jury must decide is not absolute. People v. Kennedy, 177 A.D.3d 628, 113 N.Y.S.3d 122 (2d Dep't 2019).

Trial court acted within its discretion when it precluded the defendant from making arguments in summation related to the significance of the sequential numbering of two wanted posters in assault prosecution, where the argument was speculative and not supported by the evidence. People v. Kennedy, 177 A.D.3d 628, 113 N.Y.S.3d 122 (2d Dep't 2019).

Summation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at his or her command, but rather, there are certain well-defined limits; counsel must, among other things, stay within the four corners of the evidence and avoid irrelevant and inflammatory comments which have a tendency to prejudice the jury against the accused. People v. Hightower, 176 A.D.3d 865, 110 N.Y.S.3d 37 (2d Dep't 2019).

At robbery trial, court providently exercised its discretion in limiting scope of defense counsel's summation; court struck certain arguments that strayed from evidence or did not bear on any legitimate issues in the case, and court generally permitted counsel to make arguments that were similar to the excluded arguments, but in different form. People v. Flow, 149 A.D.3d 647, 53 N.Y.S.3d 51 (1st Dep't 2017).

[END OF SUPPLEMENT]

Footnotes

1 People v. Ashwal, 39 N.Y.2d 105, 383 N.Y.S.2d 204, 347 N.E.2d 564 (1976).

2 People v. Marcelin, 23 A.D.2d 368, 260 N.Y.S.2d 560 (1st Dep't 1965).

3 People v. Barton, 19 A.D.3d 304, 798 N.Y.S.2d 406 (1st Dep't 2005).

4 People v. Chebere, 292 A.D.2d 323, 740 N.Y.S.2d 25 (1st Dep't 2002).

5 People v. Williams, 101 A.D.3d 1728, 957 N.Y.S.2d 783 (4th Dep't 2012).

6 People v. Rodriguez, 52 A.D.3d 268, 860 N.Y.S.2d 30 (1st Dep't 2008).

7 People v. Mott, 94 A.D.2d 415, 465 N.Y.S.2d 307 (4th Dep't 1983); People v. Marcelin, 23 A.D.2d 368, 260 N.Y.S.2d 560 (1st Dep't 1965).

8 People v. Mott, 94 A.D.2d 415, 465 N.Y.S.2d 307 (4th Dep't 1983); People v. Brown, 60 A.D.2d 917, 401 N.Y.S.2d 572 (2d Dep't 1978).

9 People v. Brown, 104 A.D.3d 864, 961 N.Y.S.2d 293 (2d Dep't 2013).

10 People v. Brown, 104 A.D.3d 864, 961 N.Y.S.2d 293 (2d Dep't 2013).

11 People v. Baker, 14 N.Y.3d 266, 899 N.Y.S.2d 733, 926 N.E.2d 240 (2010).

12 People v. Brown, 136 A.D.2d 1, 525 N.Y.S.2d 618 (2d Dep't 1988).

13 People v. Marcelin, 23 A.D.2d 368, 260 N.Y.S.2d 560 (1st Dep't 1965).

14 People v. Brown, 136 A.D.2d 1, 525 N.Y.S.2d 618 (2d Dep't 1988).

The defendant's criminal conviction for first-degree robbery would be reversed where, during defense counsel's summation at the trial in which the crucial issue was identification, the judge, acting sua sponte, frequently interrupted and limited defense counsel's legitimate comments on matters of evidence and disparaged defense counsel's arguments as "surmise" and "speculation." People v. Reina, 94 A.D.2d 727, 462 N.Y.S.2d 264 (2d Dep't 1983).

15 § 2714.

16 People v. Canto, 31 A.D.3d 312, 818 N.Y.S.2d 218 (1st Dep't 2006).

17 People v. Young, 271 A.D.2d 263, 707 N.Y.S.2d 41 (1st Dep't 2000).

18 People v. Hernandez, 143 A.D.2d 842, 533 N.Y.S.2d 488 (2d Dep't 1988); People v. Marcelin, 23 A.D.2d 368, 260 N.Y.S.2d 560 (1st Dep't 1965).

19 People v. Smith, 61 A.D.3d 579, 877 N.Y.S.2d 316 (1st Dep't 2009), aff'd, 16 N.Y.3d 786, 920 N.Y.S.2d 284, 945 N.E.2d 477 (2011).

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c. Summation

(1) In General

§ 2714. Trial court's supervision and control of summations—Time allotted for summation

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law ⚿ 2075, 2195

A.L.R. Library

- Propriety of trial court order limiting time for opening or closing argument in criminal case—state cases, 71 A.L.R.4th 200

The time allotted to each party for summation is within the discretion of the trial court.[1] The court has great latitude in controlling the duration and limiting the scope of summations, and, thus, may limit counsel to a reasonable time and may terminate the argument when continuation would be redundant.[2] The time allotted usually depends upon the seriousness of the charges, the length of the trial, the complexity of the issues presented, and other factors.[3]

Unreasonable limitation, however, is deemed to be an abuse of discretion and may result in reversal,[4] since closing argument is a basic element of defense in a criminal trial, and the right of defense counsel to make an effective closing argument is impaired when counsel is unjustifiably limited.[5] Likewise, a trial court's imposition, midway through defense counsel's summation, of a time limit on the remainder of the summation was an improvident exercise of its discretion, when no prior limitation had been announced.[6]

Footnotes

1 Herring v. New York, 422 U.S. 853, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975).

2 People v. Brown, 136 A.D.2d 1, 525 N.Y.S.2d 618 (2d Dep't 1988).

3 People v. Mayer, 132 A.D. 646, 117 N.Y.S. 520 (1st Dep't 1909).

A trial court was justified in limiting the length of defense counsel's summation where most of the evidence adduced at trial was uncontested, and defense counsel, despite being warned several times that he should focus on the issues presented, refused to heed the court's warnings and budget his time efficiently. People v. Brown, 136 A.D.2d 1, 525 N.Y.S.2d 618 (2d Dep't 1988).

4 People v. Mayer, 132 A.D. 646, 117 N.Y.S. 520 (1st Dep't 1909).

5 § 2713.

6 People v. Gibian, 76 A.D.3d 583, 907 N.Y.S.2d 226 (2d Dep't 2010).

The trial court's directing defense counsel, near the end of counsel's lengthy closing argument, to stop being repetitive did not prevent counsel from making a full summation. People v. Turcotte, 124 A.D.3d 1082, 3 N.Y.S.3d 429 (3d Dep't 2015), leave to appeal denied, 25 N.Y.3d 1078, 12 N.Y.S.3d 629, 34 N.E.3d 380 (2015).

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§ 2715. Comment by defense counsel in closing statement upon missing witness; failure to call witness

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2093, 2094

Defense counsel may properly comment upon the failure of the prosecution to present a witness whose testimony would have been expected to be adverse to the defendant, where the testimony would not have been cumulative and where the witness is sufficiently within the prosecution's control that presentation of the testimony would have been possible. [1] Thus, where, under the circumstances of the trial, it would be error for the trial court to fail to instruct the jury that an unfavorable inference may be drawn from the failure of the prosecution to call a particular witness, it is also error to prohibit the defendant's counsel from arguing this point to the jury in summation. [2]

Illustrations:

Defense counsel was entitled to comment in summation on the prosecution's failure to call a "ghost" witness who had supposedly witnessed the drug transaction at issue, even if the criteria for a missing witness charge were not entirely satisfied, since such comments, to which the prosecutor raised no objection, had an adequate foundation in the record. [3]

Where the defendant was arrested during an exchange of money and heroin with another person, and contended at trial that the other person was the seller, defense counsel should have been permitted to comment, on summation, that the People failed to call as a witness the other person involved in the transaction, even if the requirements for a missing witness charge did not exist. Moreover, the error was compounded when, in response to the prosecutor's statement that the defense should have called the witness, the court declined to instruct the jury that no negative inference could be drawn from the defendant's failure to present testimony or introduce evidence. [4]

However, a witness to the defendant's assault on the complainant, who was not called by the state as a witness in the defendant's assault and criminal trespass prosecution, was not under the state's control, and thus defense counsel was properly prevented from commenting on the witness's absence, where by the time of trial, the witness and the complainant were no longer dating each other, the witness had been arrested and had spent time in jail for assaulting the complainant, an order of protection obtained by the complainant against the witness was in effect, and the witness otherwise was not in contact with anyone involved in the case and had indicated his unwillingness to cooperate; moreover, the trial court had specifically precluded the People from eliciting testimony to explain the witness's absence. [5]

The inference that the jury may draw is permissive. The prosecution is permitted to argue in summation against the inference and may seek to explain the absence of the witness by reference to evidence in the record. [6]

On the other hand, where the missing witness is not under the control of the prosecution, it is improper for defense counsel to comment on the prosecutor's failure to produce the witness at trial. [7] Such a comment, under the circumstances, is beyond the bounds of fair and permissible comment, particularly where defense counsel's failure to request a missing witness charge prior to summation has precluded the court from preventing an unfair reference to the prosecution's responsibility. [8] A court will likewise sustain an objection to defense counsel's summation comment that the prosecution has failed to produce a missing witness, where the witness's potential testimony is not material. [9] For instance, the defendant was not entitled to argue in summation that the jury should draw a negative inference from the prosecution's failure to call additional police officers to testify in a drug prosecution, where no basis existed to believe that any uncalled officers were in a position to see the drug transaction or would otherwise have been able to provide any relevant testimony. [10] Similarly, the defendant was properly precluded in his summation in a prosecution for selling drugs from commenting on the state's failure to call a buyer as a witness, where the defendant had no good-faith basis for the comment, as the buyer had been prosecuted for possessing drugs he bought from the defendant, so there was no reason to expect the People to call him as a prosecution witness. [11]

Defense counsel lacked a good-faith basis for making a comment, during summation, on the prosecution's failure to call a police witness who testified at the defendant's first trial, which ended in a mistrial, but who was not called by the prosecution at retrial, where defense counsel represented the defendant at both trials and was familiar with the officer's testimony, which was completely favorable to the prosecution at the first trial. [12]

Footnotes

1 People v. Paulin, 70 N.Y.2d 685, 518 N.Y.S.2d 790, 512 N.E.2d 312 (1987); People v. Wright, 41 N.Y.2d 172, 391 N.Y.S.2d 101, 359 N.E.2d 696 (1976).

2 People v. Gonzalez, 68 N.Y.2d 424, 509 N.Y.S.2d 796, 502 N.E.2d 583 (1986).

As to the court's disposition of a defendant's request for a missing witness instruction to the jury, see § 2813.

3 People v. Williams, 10 A.D.3d 213, 780 N.Y.S.2d 335 (1st Dep't 2004), aff'd, 5 N.Y.3d 732, 800 N.Y.S.2d 360, 833 N.E.2d 695 (2005).

4 People v. Rios, 223 A.D.2d 390, 636 N.Y.S.2d 753 (1st Dep't 1996).

5 People v. Smith, 71 A.D.3d 1174, 898 N.Y.S.2d 599 (2d Dep't 2010).

6 People v. Gonzalez, 68 N.Y.2d 424, 509 N.Y.S.2d 796, 502 N.E.2d 583 (1986).

7 People v. Huhn, 140 A.D.2d 760, 527 N.Y.S.2d 643 (3d Dep't 1988).

Defense counsel was properly precluded from commenting during summation on the People's failure to call a witness to the robbery, where the witness was the mother of the defendant's son, who refused to return the calls of the prosecutor. People v. Wood, 245 A.D.2d 200, 666 N.Y.S.2d 599 (1st Dep't 1997).

In a prosecution for sexual abuse allegedly committed on the defendant's stepdaughter, the court properly ordered defense counsel not to comment on the prosecutor's failure to call the defendant's wife as a witness, where the wife was still living with defendant at the time of trial and could not be considered under the control of the People. People v. Huhn, 140 A.D.2d 760, 527 N.Y.S.2d 643 (3d Dep't 1988).

8 People v. Muhammed, 109 Misc. 2d 1042, 441 N.Y.S.2d 591 (Sup 1981).

9 People v. Castro, 221 A.D.2d 245, 633 N.Y.S.2d 495 (1st Dep't 1995).

10 People v. Andrew, 54 A.D.3d 618, 863 N.Y.S.2d 676 (1st Dep't 2008).

11 People v. Vega, 37 A.D.3d 351, 831 N.Y.S.2d 376 (1st Dep't 2007).

12 People v. Jordan, 18 A.D.3d 329, 795 N.Y.S.2d 46 (1st Dep't 2005).

34 N.Y. Jur. 2d Criminal Law: Procedure § 2716

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§ 2716. Vouching for credibility of defendant in closing statement; personal opinion as to client's innocence

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2098(2)

A.L.R. Library

- Propriety and prejudicial effect of comments by counsel vouching for credibility of witness—state cases, 45 A.L.R.4th 602

- Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused —modern state cases, 88 A.L.R.3d 449

Neither counsel for the defense nor the district attorney may state a personal opinion as to the guilt or innocence of the accused, since that determination ultimately rests with the jury. [1] Although defense counsel may vouch for the defendant's veracity or credibility, or suggest that the complainant may have some reason to lie about the defendant, if counsel does so, the way is opened for the prosecutor to respond in kind, even though such argument by the prosecutor is generally to be discouraged. [2]

Footnotes

1 People v. Jones, 47 A.D.2d 761, 365 N.Y.S.2d 36 (2d Dep't 1975); People v. Castelo, 24 A.D.2d 827, 264 N.Y.S.2d 136 (4th Dep't 1965).

2 People v. Shaw, 112 A.D.2d 958, 492 N.Y.S.2d 470 (2d Dep't 1985).

34 N.Y. Jur. 2d Criminal Law: Procedure § 2717

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§ 2717. Comment on jury nullification concept during defense summation

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2074

Although there is nothing to prevent a jury from acquitting a defendant despite finding that the prosecution has proven its case, the defendant is not entitled to present the concept of jury nullification to the jury during summation. [1] Permitting the defendant to encourage the jury to abdicate its primary function directly contravenes the trial court's authority to instruct the jury that it has to follow and properly apply the law. [2] Thus, for instance, a court properly denies defense counsel an opportunity to present the concept of jury nullification during the summation in a prosecution for the failure to file tax returns, since the so-called "mercy-dispensing power" is not a legally sanctioned function of the jury. [3]

CUMULATIVE SUPPLEMENT

Cases:

Jury nullification is not a legally sanctioned function of the jury. People v. Mendoza, 33 N.Y.3d 414, 104 N.Y.S.3d 38, 128 N.E.3d 165 (2019).

[END OF SUPPLEMENT]

Footnotes

1 People v. Weinberg, 83 N.Y.2d 262, 609 N.Y.S.2d 155, 631 N.E.2d 97 (1994).

2 People v. Weinberg, 83 N.Y.2d 262, 609 N.Y.S.2d 155, 631 N.E.2d 97 (1994).

3 People v. Weinberg, 83 N.Y.2d 262, 609 N.Y.S.2d 155, 631 N.E.2d 97 (1994).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2718

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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2718. Fair comment upon evidence in prosecutor's summation; rhetoric

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2093 to 2095

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§§ 30 to 39 (Comment on the Evidence)

The limits beyond which the prosecution may not be permitted to go in summing up its case to the jury are determined by the simple principle of fairness. [1] A prosecutor's remarks in summation are permissible where they are a fair comment upon the evidence, [2] are responsive to defense counsel's summation, [3] or otherwise do not deprive the defendant of a fair trial. [4] The prosecutor's remarks should be taken in context in determining whether they have deprived the defendant of a fair trial. [5] Rhetorical comment is also broadly permissible during closing argument. [6]

Illustrations:

The prosecutor did not improperly act as an expert witness during a prosecution on murder and weapons charges with regard to the meaning of coded phrases in telephone calls made by the defendant while he was incarcerated, as the prosecutor's remarks on the subject were fair comments on the evidence and proper efforts to ask the jurors to draw reasonable inferences. [7]

Although the prosecutor made one improper remark vouching for the credibility of the representative of police department's exclusive vendor for making badges, her remarks and stylistic use of personal pronouns such as "we" did not deprive the defendant of a fair trial or due process, as they were otherwise fair comment on the evidence and were reasonable responses to the defense summation, in the prosecution of the defendant, a police officer, for possession of a forged instrument in the second degree for sending an image of a fraudulent police identification card to the vendor to create a retired police officer badge for him. [8]

In a prosecution for various sexual offenses against a child, the prosecutor's summation argument that the testimony of an expert witness regarding behavioral characteristics of sexually abused children was consistent with and explanatory of the victims' behavior constituted fair comment on the evidence; any confusion due to the prosecutor's statement that the expert presented "evidence in the case" that explained and described what the victims went through was minimized when the prosecutor repeatedly made clear in her summation that the expert did not talk to the victims or the defendant and did not know anything about the defendant's case. [9]

However, the defendant was denied a fair trial by the cumulative effect of the prosecutor's improper summation comments, including telling the jury that uncalled witnesses had nothing to offer, inviting the jury to engage in speculation, telling the jury that it had not heard a compelling reason for the victim to lie, suggesting that the jury would have to conclude that the victim was evil in order to acquit the defendant, and making inflammatory references to the defendant's using the victim as his personal sex toy. [10]

A prosecutor may, in summation, draw reasonable inferences from the evidence presented, [11] as by arguing that the perpetrator's acts during separate incidents were sufficiently distinctive and similar to each other as to establish a modus operandi. [12] So, the trial court, in a prosecution for first-degree robbery and other offenses, properly exercised its discretion in permitting the prosecutor to argue that the similarities among the three crimes warranted an inference that they were committed by the same person, where the court properly instructed the jury on the subject; the pattern of the crimes, which involved similar victims, occurred within a radius of a few blocks, and involved a defendant who spoke into a cell phone as he followed the victim into her building, was sufficiently distinctive as to be probative of the defendant's identity. [13] Simlarly, the remarks by the prosecutor, on summation in a murder trial, about the defendant's use of a blanket to wrap the victim's body were fair comment on the evidence; although there was no blanket found with the remains of the victim's body, there were fibers in that location that were consistent with a woven material, the defendant and the victim's daughter had testified that the defendant had wrapped her mother in a colorful blanket, another witness testified that a colorful blanket owned by the victim was missing from the victim's home, and a jailhouse informant testified that defendant told him that a body should be wrapped in a blanket and disposed of in a shallow grave. [14]

The prosecutor may comment during summation on the particularly brutal nature of the crime with which the defendant has been charged without depriving the defendant of a fair trial. [15] A prosecutor's description of the crime as "brutal" during summation is not inflammatory, for example, where the evidence at trial shows that the victim has been choked into unconsciousness. [16]

Similarly, a mere statement that the defendant's account of events is implausible, [17] or absurd and ridiculous, [18] is permissible rhetoric where it would not inflame the jurors nor encourage them to substitute passion for evidence. [19] For instance, the prosecutor's statement during summation, that, in order to believe the defendant's version of what happened, the jury would "have to believe that every witness the People called was lying, including the police officer ... had some hidden agenda," was fair commentary on the evidence, and did not constitute prosecutorial misconduct, where the defendant made witness credibility a central issue. [20] Similarly, comments by the prosecutor during summation, noting the unsavory character of the witnesses to the charged robbery and describing the defendant's claimed lack of participation as "ridiculous," were not prejudicial where they were a fair response to the defendant's theory that he was an unwitting recipient of the stolen money and that the prosecution witnesses were lying. [21]

Prosecutors' characterizations of the defenses offered at trial as "diversions" [22] and as attempts to distract or mislead the jury with conjecture, theorizing, and hypothesizing, [23] and of the defense theory as "outrageous" [24] have been held not to exceed the broad bounds of permissible rhetorical comment. Likewise, a prosecutor's reference to the defendant's version of the facts as a "story" has been held to fall within the broad bounds of permissible rhetoric, [25] as have prosecutors' characterizations of the defense's contentions as a "smokescreen," [26] "smoking mirrors" [sic], [27] a "red herring," [28] a "ruse," [29] or "fiction" and "fantasy," [30] and a prosecutor's reference to a financial transaction being "fake" and "bogus." [31]

Observation:

An improper summation, at least when the objectionable parts consist largely of abusive and intemperate language, should be assessed for its prejudicial effect, and it requires greater impropriety to produce that effect in a stronger case. [32]

Where it is at most only arguable that the prosecutor's misconduct could have produced a greater adverse effect on the jury than have the facts of the crime and the overwhelming evidence of culpability, reversal is not mandated. [33]

CUMULATIVE SUPPLEMENT

Cases:

Prosecutor's remarks in summation did not deprive defendant of fair trial in murder prosecution, where remarks did not exceed the broad bounds of rhetorical comment permissible in closing argument, and any improper comments were not egregious. U.S. Const. Amend. 14. People v. Innab, 119 N.Y.S.3d 174 (App. Div. 2d Dep't 2020).

Defendant was not deprived of a fair trial by alleged prosecutorial misconduct in prosecution for murder in the second degree, attempted murder in the second degree, assault in the first degree, gang assault in the first degree, and criminal possession of a weapon in the fourth degree, where challenged remarks were either permissible rhetorical comment, fair response to the arguments and issues raised by the defense, fair comment on the evidence, cured by the trial court's jury instructions, to which the defendant did not object, or, if improper, were not so egregious. People v. Escamilla, 91 N.Y.S.3d 197 (App. Div. 2d Dep't 2019).

Prosecutor's allegedly improper remarks during opening statement and summation of trial for rape in the first degree did not deprive defendant of his right to a fair trial, where the remarks were either fair comment on the evidence and reasonable inferences to be drawn therefrom, or responsive to arguments and theories presented in defense counsel's summation. People v. Thomas, 91 N.Y.S.3d 192 (App. Div. 2d Dep't 2019).

Trial court did not improperly permit prosecutor to repeatedly refer to victim during summation as victim of domestic violence, at trial for first-degree assault; prosecutor's references to victim as victim of domestic violence were not so flagrant or pervasive in context of entire summation as to deprive defendant of fair trial, and such references were fair comment on evidence and reasonable inferences to be drawn therefrom. N.Y. Penal Law § 120.10(1). People v. Abussalam, 196 A.D.3d 1000, 151 N.Y.S.3d 743 (3d Dep't 2021).

Defendant was not deprived of a fair trial by prosecutor's summation remarks in prosecution for manslaughter in the second degree, even though certain remarks from prosecutor were improper, including those which denigrated the defense and could have been intended to evoke the jury's sympathy, where most of the challenged remarks were within the broad bounds of permissible rhetorical comment, fair comment on the evidence, or did not prejudice defendant. People v. Oliver, 193 A.D.3d 1081, 146 N.Y.S.3d 666 (2d Dep't 2021).

Any impropriety in prosecutor's comments in summation identifying defendant's voice on audio recording that was admitted in evidence was not so egregious as to deny defendant a fair trial, even if comments went beyond bounds of permissible commentary, in prosecution for criminal possession of a controlled substance in third degree and criminal sale of controlled substance in third degree, in light of trial court's instruction to jury that an attorney's summation was not evidence. People v. Warmley, 179 A.D.3d 1537, 118 N.Y.S.3d 866 (4th Dep't 2020).

Prosecutor's improper comments during closing argument, referring to blessing the stabbing, and purporting to pose a hypothetical thought experiment to the jury, did not amount to reversible error, in prosecution for assault in the second degree; the trial court struck the comments from the record, and provided curative jury instructions, advising the jury that its decision was to be based solely upon the evidence introduced at trial, and emphasizing that closing arguments were not evidence. People v. Pitt, 170 A.D.3d 1282, 95 N.Y.S.3d 459 (3d Dep't 2019).

Defendant was not deprived of a fair trial by certain prosecutorial remarks on summation in prosecution for criminal contempt in the first and second degree, attempted assault in the third degree, endangering the welfare of a child, aggravated harassment in the second degree, and stalking in the fourth degree, even though the prosecutor exceeded the bounds of permissible rhetorical comment, where the cumulative effect of alleged errors were harmless as most of the challenged comments constituted fair comment on the evidence, were responsive to arguments and theories presented in defense counsel's summation, or were permissible rhetorical comment. People v. Carmichael, 170 A.D.3d 742, 95 N.Y.S.3d 271 (2d Dep't 2019).

Prosecutor's improper remarks did not deprive defendant of a fair trial in prosecution for robbery in the first and second degree, attempted robbery in the second degree, assault in the second degree, criminal possession of a weapon in the fourth degree, criminal possession of stolen property in the fifth degree, and menacing in the second degree, where remarks did not rise to the level of egregious misconduct. People v. Freire, 168 A.D.3d 973, 92 N.Y.S.3d 115 (2d Dep't 2019).

Prosecutor's comments in summation concerning victim's medical records did not constitute misconduct, where prosecutor's comments were responsive to arguments raised by defendant, were fair comment on evidence and inferences to be drawn therefrom, and there was no indication that prosecutor's elicitation of certain demonstrative evidence was intended to arouse emotions of the jury or to prejudice defendant. People v. Lowe, 166 A.D.3d 901, 88 N.Y.S.3d 214 (2d Dep't 2018).

Prosecutor's remarks made during summation did not deprive defendant of a fair trial, in prosecution for course of sexual conduct against a child in the first degree and endangering the welfare of a child; most of prosecutor's remarks were either fair comment on the evidence, fair response to the defendant's summation, or permissible rhetorical comment, although some of the prosecutor's remarks were improper, such remarks were not flagrant or pervasive, and to the extent that any prejudicial effect may have resulted from any of the challenged remarks, it was ameliorated by the trial court's instructions. People v. Hernandez, 166 A.D.3d 647, 88 N.Y.S.3d 51 (2d Dep't 2018).

Defendant was not deprived of a fair trial based on prosecutorial misconduct during summation, in prosecution for possession of a weapon in the second degree; majority of the comments in question were within the broad bounds of rhetorical comment permissible during summations and they were either a fair response to defense counsel's summation or fair comment on the evidence. People v. Thomas, 165 A.D.3d 1636, 85 N.Y.S.3d 322 (4th Dep't 2018).

Prosecutor's statements made during summation, that she met with key witness on several occasions, that "he did not know that his DNA was on the trigger," that "he told me that he held that firearm," and that "he's telling me and he doesn't even know what I have; honesty; straightforward about what happened," constituted prosecutorial misconduct, which required reversal of defendant's convictions, in prosecution for murder in the second degree and criminal possession of a weapon in the second degree; prosecutor's comments impermissibly encouraged inferences of guilt based on facts not in evidence, injected her own credibility into the trial, and vouched for credibility of a witness for the state. People v. Powell, 165 A.D.3d 842, 84 N.Y.S.3d 563 (2d Dep't 2018).

Prosecutor committed misconduct when she mischaracterized the DNA evidence by stating that murder defendant's DNA "matched" DNA found on the victim's acrylic nail, rather than simply that defendant could not be excluded as source of the DNA and that chance of randomly selecting unrelated individual as source was less than one in 114,000. People v. Lively, 163 A.D.3d 1466, 82 N.Y.S.3d 671 (4th Dep't 2018).

Certain remarks made by prosecutor during summation did not constitute reversible error, in prosecution for sexual conduct against child in the second degree; challenged portions of prosecutor's summation were fair comment on evidence and reasonable inferences to be drawn therefrom, were fair response to defense counsel's summation,and were within bounds of permissive rhetorical comment. People v. Herrera, 161 A.D.3d 1006, 77 N.Y.S.3d 510 (2d Dep't 2018).

Prosecutor's statement on summation at murder trial that DNA found under victim's fingernails was defendant's was fair comment on evidence, even though forensic biologist testified that defendant could not be excluded as source of DNA, where forensic biologist testified that "probability of randomly selecting an unrelated individual who could be a contributor to the mixture obtained under the fingernail clippings of the right hand of [victim] was less than 1 in 59.4 million." People v. Boyd, 159 A.D.3d 1358, 73 N.Y.S.3d 301 (4th Dep't 2018).

Defendant charged with drug possession after police officers' search of backpack found in vehicle in which defendant was a passenger yielded large quantity of cocaine and marihuana was not deprived of a fair trial due to four statements made by the prosecutor during summation; comments regarding fact that defendant was seen rocking back and forth in police car, and statements drawing jury's attention to defendant's repeated attempts to get driver of vehicle to take responsibility for the underlying charges constituted fair commentary on the evidence and inferences to be drawn therefrom, the prosecutor did not misstate the law regarding defendant's dominion and control of searched backpack, and the prosecutor's statement that "[the driver] came in here and he told you the truth," while improper, was cured by County Court's instruction that jury was to disregard it, as it was jury's province to assess driver's credibility. U.S. Const. Amend. 6. People v. Wheeler, 159 A.D.3d 1138, 72 N.Y.S.3d 220 (3d Dep't 2018).

Defendant was not deprived of fair trial by prosecutor's comments during summation, in prosecution for manslaughter in the second degree, criminal possession of a weapon in the second degree, and reckless endangerment in the first degree; prosecutor's comments on summation were either fair comment on evidence and reasonable inferences to be drawn therefrom or responsive to defense counsel's summation. U.S. Const. Amend. 6. People v. Allen, 157 A.D.3d 810, 69 N.Y.S.3d 104 (2d Dep't 2018).

Prosecutor's remarks during summation did not deprive defendant of a fair trial in attempted murder prosecution, since challenged remarks were either within the broad bounds of permissible rhetorical comment, or fair comment on the evidence and the reasonable inferences to be drawn therefrom. People v. Ramirez, 157 A.D.3d 718, 69 N.Y.S.3d 76 (2d Dep't 2018).

Portion of the prosecutor's summation in kidnapping trial, suggesting that defense witness had a "motive to fabricate," was a fair comment on the evidence that was responsive to defense summation. People v. Hill, 157 A.D.3d 505, 69 N.Y.S.3d 17 (1st Dep't 2018).

Prosecutor's statement during summation in vehicular manslaughter prosecution concerning defendant's truthfulness was a fair comment on the evidence that did not amount to prosecutorial misconduct; prosecutor did not call defendant a "liar," but rather

argued that defendant lied to the police about his alcohol consumption prior to operating his motor vehicle. People v. Mastowski, 155 A.D.3d 1624, 65 N.Y.S.3d 388 (4th Dep't 2017).

Prosecutor's comments during summation at trial for, inter alia, criminal possession of a controlled substance were within the broad bounds of rhetorical comment permissible during summations and were either a fair response to defense counsel's summation or fair comment on the evidence. People v. Stumbo, 155 A.D.3d 1604, 64 N.Y.S.3d 428 (4th Dep't 2017).

Prosecutor's comments during summation did not deprive defendant of a fair trial, where the majority of the comments were within the broad bounds of rhetorical comment permissible during summations, the comments were a fair response to defense counsel's summation, which put into issue the witnesses' character and credibility, and did not exceed the bounds of legitimate advocacy, and comments were not pervasive or egregious. People v. Jones, 155 A.D.3d 1547, 64 N.Y.S.3d 803 (4th Dep't 2017), amended on reargument, 2017 WL 6601822 (N.Y. App. Div. 4th Dep't 2017).

Defendant was not deprived of a fair trial by certain remarks made by prosecutor during summation; most of the challenged remarks constituted fair response to arguments made by defense counsel during summation or fair comment on the evidence and did not denigrate the defense, and Supreme Court properly sustained defendant's objections to certain improper comments and corrected any possible prejudice by issuing curative instructions. People v. Gomez, 153 A.D.3d 724, 61 N.Y.S.3d 70 (2d Dep't 2017).

Defendant's contention that hearing court in prosecution for first-degree criminal possession of marijuana, which detected a pungent odor of marijuana from the exhibit produced in court, was misled by prosecutor's incorrect statement that the marijuana was packaged in same way at time of the hearing as it had been at time of the arrest, did not warrant reversal; hearing testimony made it clear to the court that after being opened for testing by the police lab, the marijuana had been repackaged, and in any case the court twice specifically stated that it had not been misled, rejecting the notion that it had adopted the premise that the packaging of the drugs was unchanged between the arrest and the hearing. People v. Luna, 151 A.D.3d 619, 57 N.Y.S.3d 148 (1st Dep't 2017).

Prosecutor's statement, on summation in prosecution for criminal possession of a weapon, characterizing DNA evidence as "overwhelming" proof establishing defendant's "guilt beyond all doubt" was a flagrant distortion of the evidence that caused defendant such substantial prejudice that he was denied due process of law; forensic expert had testified that analysis of DNA evidence collected from gun only indicated that defendant was among one in 15 Americans who could not be excluded as a contributor. U.S.C.A. Const.Amend. 14. People v. Rozier, 143 A.D.3d 1258, 39 N.Y.S.3d 340 (4th Dep't 2016).

[END OF SUPPLEMENT]

Footnotes

1 People v. Tassiello, 300 N.Y. 425, 91 N.E.2d 872 (1950).

2 People v. Ormsby, 119 A.D.3d 1159, 989 N.Y.S.2d 688 (3d Dep't 2014), leave to appeal denied, 24 N.Y.3d 963, 996 N.Y.S.2d 223, 20 N.E.3d 1003 (2014); People v. Jean, 118 A.D.3d 1024, 987 N.Y.S.2d 630 (2d Dep't 2014), leave to appeal denied, 25 N.Y.3d 1165, 15 N.Y.S.3d 297, 36 N.E.3d 100 (2015); People v. Martinez, 114 A.D.3d 1173, 980 N.Y.S.2d 191 (4th Dep't 2014), leave to appeal denied, 22 N.Y.3d 1200, 986 N.Y.S.2d 421, 9 N.E.3d 916 (2014).

3 § 2720.

4 People v. Liu, 131 A.D.3d 547, 14 N.Y.S.3d 506 (2d Dep't 2015), leave to appeal denied, 27 N.Y.3d 1001, 2016 WL 2889699 (2016); People v. Ramrattan, 126 A.D.3d 1013, 6 N.Y.S.3d 131 (2d Dep't 2015), leave to appeal denied, 25 N.Y.3d 1170, 15 N.Y.S.3d 301, 36 N.E.3d 104 (2015); People v. Hall, 106 A.D.3d 1513, 964 N.Y.S.2d 390 (4th Dep't 2013).

5 People v. Rosado, 143 A.D.2d 1061, 533 N.Y.S.2d 890 (2d Dep't 1988).

6 People v. Lenihan, 125 A.D.3d 788, 2 N.Y.S.3d 617 (2d Dep't 2015), leave to appeal denied, 26 N.Y.3d 969, 18 N.Y.S.3d 605, 40 N.E.3d 583 (2015); People v. Terry, 122 A.D.3d 882, 996 N.Y.S.2d 362 (2d Dep't 2014), leave to appeal denied, 25 N.Y.3d 953, 7 N.Y.S.3d 283, 30 N.E.3d 174 (2015).

7 People v. Squire, 115 A.D.3d 454, 982 N.Y.S.2d 23 (1st Dep't 2014), leave to appeal denied, 23 N.Y.3d 1043, 993 N.Y.S.2d 256, 17 N.E.3d 511 (2014).

8 People v. Hughes, 111 A.D.3d 1170, 975 N.Y.S.2d 507 (3d Dep't 2013), leave to appeal denied, 23 N.Y.3d 1038, 993 N.Y.S.2d 251, 17 N.E.3d 506 (2014).

9 People v. Jabaut, 111 A.D.3d 1140, 976 N.Y.S.2d 262 (3d Dep't 2013), leave to appeal denied, 22 N.Y.3d 1139, 983 N.Y.S.2d 498, 6 N.E.3d 617 (2014).

10 People v. Singh, 128 A.D.3d 860, 9 N.Y.S.3d 324 (2d Dep't 2015).

11 People v. Ramrattan, 126 A.D.3d 1013, 6 N.Y.S.3d 131 (2d Dep't 2015), leave to appeal denied, 25 N.Y.3d 1170, 15 N.Y.S.3d 301, 36 N.E.3d 104 (2015); People v. Johnson, 76 A.D.3d 937, 907 N.Y.S.2d 494 (1st Dep't 2010).

12 People v. Boone, 129 A.D.3d 1099, 11 N.Y.S.3d 687 (2d Dep't 2015), leave to appeal granted, 26 N.Y.3d 1086, 23 N.Y.S.3d 642, 44 N.E.3d 940 (2015); People v. Lewis, 101 A.D.3d 1154, 956 N.Y.S.2d 526 (2d Dep't 2012); People v. Salton, 74 A.D.3d 997, 905 N.Y.S.2d 199 (2d Dep't 2010).

13 People v. Medina, 66 A.D.3d 555, 887 N.Y.S.2d 567 (1st Dep't 2009).

14 People v. Foster, 101 A.D.3d 1668, 956 N.Y.S.2d 753 (4th Dep't 2012).

15 People v. Robinson, 150 A.D.2d 812, 542 N.Y.S.2d 44 (2d Dep't 1989).

16 People v. Green, 159 A.D.2d 325, 552 N.Y.S.2d 602 (1st Dep't 1990).

17 People v. Westfall, 95 A.D.2d 581, 469 N.Y.S.2d 162 (3d Dep't 1983).

18 People v. Washington, 278 A.D.2d 517, 718 N.Y.S.2d 385 (2d Dep't 2000); People v. Sprinkle, 221 A.D.2d 269, 634 N.Y.S.2d 83 (1st Dep't 1995); People v. Glover, 165 A.D.2d 761, 564 N.Y.S.2d 273 (1st Dep't 1990).

19 People v. Glover, 165 A.D.2d 761, 564 N.Y.S.2d 273 (1st Dep't 1990); People v. Jones, 162 A.D.2d 204, 556 N.Y.S.2d 579 (1st Dep't 1990).

20 People v. Cunningham, 12 A.D.3d 1131, 785 N.Y.S.2d 244 (4th Dep't 2004).

21 People v. Hughes, 280 A.D.2d 694, 720 N.Y.S.2d 586 (3d Dep't 2001).

22 People v. Allen, 121 A.D.2d 453, 503 N.Y.S.2d 143 (2d Dep't 1986), order aff'd, 69 N.Y.2d 915, 516 N.Y.S.2d 199, 508 N.E.2d 934 (1987).

23 People v. Taylor, 68 A.D.3d 1728, 891 N.Y.S.2d 822 (4th Dep't 2009).

24 People v. Lynch, 60 A.D.3d 1479, 875 N.Y.S.2d 730 (4th Dep't 2009).

25 People v. Gonzalez, 194 A.D.2d 436, 599 N.Y.S.2d 30 (1st Dep't 1993).

26 People v. Goncalves, 239 A.D.2d 923, 659 N.Y.S.2d 596 (4th Dep't 1997); People v. Pierce, 219 A.D.2d 856, 632 N.Y.S.2d 905 (4th Dep't 1995); People v. Tidwell, 207 A.D.2d 957, 617 N.Y.S.2d 76 (4th Dep't 1994).

27 People v. Benton, 106 A.D.3d 1451, 964 N.Y.S.2d 386 (4th Dep't 2013).

28 People v. Molina, 79 A.D.3d 1371, 914 N.Y.S.2d 331 (3d Dep't 2010).

29 People v. Angona, 119 A.D.3d 1406, 989 N.Y.S.2d 746 (4th Dep't 2014), leave to appeal denied, 25 N.Y.3d 987, 10 N.Y.S.3d 530, 32 N.E.3d 967 (2015).

30 People v. Barber, 13 A.D.3d 898, 787 N.Y.S.2d 424 (3d Dep't 2004).

The prosecutor's comments during summation mocking the defendant's account of having discovered the knife on the floor of a social club after the victim was fatally stabbed were fair comments on a central issue at the defendant's murder trial. People v. Stanford, 130 A.D.3d 1306, 14 N.Y.S.3d 560 (3d Dep't 2015), leave to appeal denied, 26 N.Y.3d 1043, 22 N.Y.S.3d 172, 43 N.E.3d 382 (2015).

31 People v. Abraham, 22 N.Y.3d 140, 978 N.Y.S.2d 723, 1 N.E.3d 797 (2013).

32 People v. Roopchand, 107 A.D.2d 35, 485 N.Y.S.2d 332 (2d Dep't 1985), order aff'd, 65 N.Y.2d 837, 493 N.Y.S.2d 129, 482 N.E.2d 924 (1985).

The prosecutor's insinuation during summation that a gun which had been recovered from the defendant two weeks after the crime in an unrelated arrest may have been the gun which was used to shoot the victim, in which the prosecutor persisted despite his knowledge that a ballistics test conclusively established that the gun had not been used in the crime, was improper, and constituted an abrogation of his responsibility as prosecutor. People v. Walters, 251 A.D.2d 433, 674 N.Y.S.2d 114 (2d Dep't 1998).

33 People v. Roopchand, 107 A.D.2d 35, 485 N.Y.S.2d 332 (2d Dep't 1985), order aff'd, 65 N.Y.2d 837, 493 N.Y.S.2d 129, 482 N.E.2d 924 (1985).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2719

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Criminal Law: Procedure
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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2719. Attempt to shift burden of proof in prosecution summation

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2093 to 2095

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§ 39 (Weight of the evidence)
- Prosecution Summations, 6 Am. Jur. Trials 873§ 43 (Reference to instructions—Charge on burden of proof)

It is improper for the prosecutor, in his or her summation, to attempt to shift the burden of proof to the defendant. [1] Thus, for instance, the prosecutor improperly shifts the burden of proof to the defendant during summation by specifically inviting the jury to wonder why the defendant has chosen not to testify, [2] or by stating that the defendant has not demonstrated any credible motive for the complainant to falsify his or her allegations. [3] In addition, the prosecutor's remark, that the only evidence in the defendant's favor is his or her own testimony, suggests that the defendant is obligated to put on additional evidence, and, thus, constitutes an improper attempt to shift the burden of proof to the defendant. [4]

Illustrations:

The prosecutor's comment during summation that the defense failed to ask a single question of a particular witness impermissibly shifted the burden of proof to the defendant. [5]

The defendant was not deprived of a fair trial as a result of the prosecutor's summation, although some of the prosecutor's statements implied that the defendant had some burden of proof, in a prosecution for driving while intoxicated, where some of the statements objected to were fair comment on the evidence or in response to the defense summation, and when the defendant objected to statements that did impermissibly attempt to shift the burden, the court immediately instructed the jury that the burden of proof was on the prosecution and to disregard the improper statements. [6]

The prosecutor did not improperly shift the burden of proof to the defendant on summation by commenting on the lack of proof substantiating the testimony of the defendant's alibi witnesses; rather, those remarks constituted fair comment on the capacity of the alibi witnesses to recall the events of the date and time in question. [7]

However, in a prosecution for first-degree robbery, the prosecutor's remarks during summation were not a fair response to defense counsel's summation, and, thus, denied the defendant a fair trial, where the evidence against the defendant was not overwhelming; the prosecutor impermissibly shifted the burden of proof to the defendant by posing certain rhetorical questions to the jury, referring to the defendant's failure to call witnesses on his own behalf, and suggesting the defendant failed to call a lineup expert because the expert's testimony would have been unfavorable. [8]

A prosecutor does not shift the burden of proof by pointing out logical gaps in the defendant's testimony and in defense counsel's arguments. [9]

A prosecutor's comments on summation that shift the burden of proof may nonetheless not deny the defendant a fair trial, where the trial court clearly and unequivocally instructs the jury that the burden of proof on all issues remains with the prosecution. [10]

CUMULATIVE SUPPLEMENT

Cases:

Prosecutor's comments during summation regarding defendant's failure to call certain witnesses to corroborate his testimony did not impermissibly shift burden of proof; comments were not made in bad faith and were merely efforts to persuade the jury to draw inferences supporting the People's position. People v. Tout-Puissan, 63 N.Y.S.3d 507 (App. Div. 2d Dep't 2017).

Prosecutor's statements during summation, indicating that defendant had to explain a certain fact in the case or to convince jury of his defense, did not improperly shift the burden of proof to defendant or deprive defendant of fair trial, in trial for criminal

sexual act in the first degree, where prosecutor and court repeatedly made clear to the jury that the burden of proof rested with the People and never shifted to the defense. People v. Atkinson, 185 A.D.3d 1447, 127 N.Y.S.3d 220 (4th Dep't 2020).

Prosecutor's improper summation comments on the lack of an innocent explanation for certain evidence, which tended to shift the burden of proof to defendant, did not prejudice defendant in prosecution for second degree murder and second degree assault, where trial court gave sufficient curative instructions. People v. Gamble, 179 A.D.3d 580, 117 N.Y.S.3d 43 (1st Dep't 2020).

Prosecutor's brief commentary implying that defendant had some obligation to provide innocent explanation for a witness's testimony, taken in context of entire summation, did not reflect flagrant and pervasive pattern of prosecutorial misconduct, and thus did not deprive defendant of fair trial in prosecution for murder in the second degree and criminal possession of a weapon in the second and third degrees. People v. Johnson, 176 A.D.3d 1392, 113 N.Y.S.3d 294 (3d Dep't 2019).

Trial court providently exercised its discretion in denying defendant's mistrial motion in second degree murder prosecution based on a portion of prosecutor's summation that allegedly shifted the burden of proof; comment was responsive to an argument made in defendant's summation argument, and when prosecutor made a similar comment later in summation, the court sustained defendant's objection and gave an instruction that was sufficient to prevent either the earlier or later remarks from causing any prejudice. People v. Suero, 159 A.D.3d 656, 73 N.Y.S.3d 57 (1st Dep't 2018).

At summation of identity theft trial, prosecutor's single comment, which allegedly improperly shifted burden of proof, was not so egregious that defendant was thereby deprived of fair trial; court sustained defendant's objection to comment and instructed jury to disregard it. McKinney's Penal Law § 190.80(1). People v. Box, 145 A.D.3d 1510, 44 N.Y.S.3d 645 (4th Dep't 2016).

Although prosecutor's summation comment, to which defendant objected on the ground of burden-shifting, was inappropriate and he should have avoided making the remark, trial court's thorough instructions on the presumption of innocence and burden of proof were sufficient to prevent any undue prejudice, at defendant's trial for burglary, criminal mischief, and aggravated unlicensed operation of a motor vehicle. People v. Green, 144 A.D.3d 589, 42 N.Y.S.3d 24 (1st Dep't 2016).

[END OF SUPPLEMENT]

Footnotes

1 People v. Tankleff, 84 N.Y.2d 992, 622 N.Y.S.2d 503, 646 N.E.2d 805 (1994), disapproved on other grounds in later proceedings, 49 A.D.3d 160, 848 N.Y.S.2d 286 (2d Dep't 2007), for additional opinion, see, 46 A.D.3d 846, 848 N.Y.S.2d 277 (2d Dep't 2007); People v. Matthews, 27 A.D.3d 1115, 811 N.Y.S.2d 514 (4th Dep't 2006); People v. Dombrowski-Bove, 300 A.D.2d 1122, 753 N.Y.S.2d 259 (4th Dep't 2002); People v. Negroni, 280 A.D.2d 497, 720 N.Y.S.2d 522 (2d Dep't 2001).

2 People v. Harte, 29 A.D.3d 475, 815 N.Y.S.2d 93 (1st Dep't 2006).

Prosecutorial comment on defendants' failure to testify is discussed in §§ 2661, 2722.

3 People v. Griffin, 125 A.D.3d 1509, 4 N.Y.S.3d 434 (4th Dep't 2015); People v. Allen, 13 A.D.3d 892, 787 N.Y.S.2d 417 (3d Dep't 2004).

During summation in a rape trial, the prosecutor shifted the burden of proof by telling the jury, and repeatedly returning to this theme, that it had not "heard" any "compelling reason" for the complainant to

lie, and by suggesting that the jury would have to convict the defendant if it did not "buy" the defendant's explanation of certain evidence. People v. Singh, 128 A.D.3d 860, 9 N.Y.S.3d 324 (2d Dep't 2015).

4 People v. Collins, 12 A.D.3d 33, 784 N.Y.S.2d 489 (1st Dep't 2004).

5 People v. Grant, 94 A.D.3d 1139, 942 N.Y.S.2d 223 (2d Dep't 2012).

6 People v. Beyer, 21 A.D.3d 592, 799 N.Y.S.2d 620 (3d Dep't 2005).

7 People v. West, 4 A.D.3d 791, 772 N.Y.S.2d 166 (4th Dep't 2004).

8 People v. LaPorte, 306 A.D.2d 93, 762 N.Y.S.2d 55 (1st Dep't 2003).

9 People v. Sunter, 57 A.D.3d 226, 868 N.Y.S.2d 194 (1st Dep't 2008) (noting that the jury could not have been misled as to the burden of proof, even though some of the prosecutor's phrasing should have been avoided, where the court properly instructed the jury as to the burden of proof).

10 People v. Ielfield, 132 A.D.3d 1298, 18 N.Y.S.3d 229 (4th Dep't 2015); People v. Page, 105 A.D.3d 1380, 964 N.Y.S.2d 339 (4th Dep't 2013), leave to appeal denied, 23 N.Y.3d 1023, 992 N.Y.S.2d 806, 16 N.E.3d 1286 (2014); People v. Doll, 98 A.D.3d 356, 948 N.Y.S.2d 471 (4th Dep't 2012), order aff'd, 21 N.Y.3d 665, 975 N.Y.S.2d 721, 998 N.E.2d 384 (2013), cert. denied, 134 S. Ct. 1552, 188 L. Ed. 2d 568 (2014).

The People did not improperly shift the burden of proof to the defendant, a police officer, at his trial for possession of a forged instrument in the second degree for sending an image of a fraudulent police identification card to a vendor to create a retired police officer badge for him; when the prosecutor rhetorically asked the jurors if there was any evidence that the defendant had inquired into the authenticity of the image of the police identification card he submitted to the vendor, the court sua sponte advised the jury that the People bore the burden of proof and the defendant had no burden, and the court reiterated this principle in its final charge. People v. Hughes, 111 A.D.3d 1170, 975 N.Y.S.2d 507 (3d Dep't 2013), leave to appeal denied, 23 N.Y.3d 1038, 993 N.Y.S.2d 251, 17 N.E.3d 506 (2014).

As to curative instructions regarding comments made during summation, generally, see § 2737.

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2720

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Criminal Law: Procedure
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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2720. Argument in prosecutor's summation in response to defendant's summation

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 726, 2073

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§ 55 (Reply to defense remarks)

The prosecutor's summation does not deprive a defendant of a fair trial where his or her remarks generally constitute a fair comment on the evidence, [1] or a fair response to arguments made by defense counsel in summation. [2] Thus, where defense counsel has, in summation, opened the door to the prosecutor's remark, which might otherwise be improper, the prosecutor's response in his or her own summation does not deny the defendant a fair trial. [3] For instance, although a prosecutor may not generally vouch for the credibility of the prosecution witnesses during his or her summation, [4] a prosecutor's statement that a prosecution witness has no motive to lie is permissible where it constitutes a fair response to defense counsel's attack, in summation, on the witness's credibility, [5]

Likewise, although a prosecutor may not shift the burden of proof to the defendant, [6] a prosecutor's remarks in summation that might be seen as burden-shifting may be constitutionally permissible if they are comments on the evidence in response to defense arguments. [7] Thus, the prosecution's summation should be evaluated in comparison to that of the defense. [8]

Illustrations:

The prosecutor's comment, that a witness had testified notwithstanding potential repercussions, constituted a fair response to defense counsel's argument that the drugs attributed to the defendant were found in a crime-ridden neighborhood. [9]

The prosecutor's reference to uncharged crimes evidence during summation did not prejudice the defendant in his robbery prosecution, as the comments were limited to a witness's ability to identify the defendant as a result of earlier robberies and were made in response to defense counsel's summation argument that his client was the victim of mistaken identity. [10]

A prosecutor's comments in summation, in a prosecution for attempted assault arising from an altercation in a correctional institution, were a fair response to defense counsel's closing argument, in which he questioned why not one inmate had come forward to accuse the defendant, a fellow inmate; the prosecutor legitimately suggested possibilities other than the defendant's innocence, including the prospect of retaliation or adherence to a code of silence. [11]

The prosecutor's remarks in summation in a rape prosecution, explaining what the victim had to go through after disclosing the abuse, including speaking with different agencies after she made her initial disclosure, undergoing a genital exam, and appearing before the grand jury and at trial, were a fair response to defense counsel's theory that the victim fabricated the allegations. [12]

CUMULATIVE SUPPLEMENT

Cases:

Prosecutor's comments in summation to the effect that defendant was trying to deceive and hide the truth from the jury or prosecutor's argument that defendant tailored his testimony to the proof by first claiming that he had an affair with victim's babysitter only after he learned about the DNA evidence on victim's bedding was a fair response to defense counsel's arguments about his alleged affair being the source of semen found on victim's bedsheets, and therefore did not amount to prosecutorial misconduct in prosecution for predatory sexual assault against a child. People v. Johnson, 122 N.Y.S.3d 137 (App. Div. 3d Dep't 2020).

Prosecutor's remarks did not constitute prosecutorial misconduct that denied defendant a fair trial, in prosecution for murder in the second degree; prosecutor's allegedly improper remarks were either a fair response to defense counsel's summation or fair comment on the evidence. People v. Szatanek, 92 N.Y.S.3d 516 (App. Div. 4th Dep't 2019).

Remarks made by prosecutor during summation did not deprive defendant of fair trial, in prosecution for burglary in the second degree and petit larceny; remarks were permissible rhetorical comment, responsive to defense counsel's summation, or fair comment on evidence. People v. Mendoza, 64 N.Y.S.3d 54 (App. Div. 2d Dep't 2017).

Defendant's contention that remarks made by prosecutor in summation were improper and deprived him of a fair trial was without merit, in prosecution for criminal contempt for violation of two orders of protection; challenged remarks were fair comment on the evidence, fair response to issues raised in defense counsel's summation, or were not so egregious as to have deprived defendant of a fair trial. U.S. Const. Amend. 6. People v. Woodley, 201 A.D.3d 749, 162 N.Y.S.3d 69 (2d Dep't 2022).

Even if defendant's contention that he was deprived of fair trial by alleged prosecutorial misconduct during prosecutor's summation had been preserved for appellate review, defendant was not deprived of fair trial by prosecutor's conduct, in prosecution for murder in the second degree and criminal possession of a weapon in the second degree, where remarks at issue were either fair comment on evidence and reasonable inferences to be drawn therefrom, fair responses to defense summation, or not so flagrant or pervasive as to have deprived defendant of fair trial. People v. Kiarie, 198 A.D.3d 814, 155 N.Y.S.3d 212 (2d Dep't 2021).

People's use of defendant's street name, Animal following defense counsel's summation at trial for, inter alia, assault and criminal use of firearm was not so egregious as to deprive him of fair trial; defendant's street name was listed in caption of indictment, defendant did not move to strike it, evidence at trial demonstrated that he was generally referred to by his street name in community, and evidence was probative as to defendant's identity as shooter. People v. Campbell, 196 A.D.3d 834, 149 N.Y.S.3d 720 (3d Dep't 2021).

Prosecutor's summation, in defendant's prosecution for second degree murder and criminal possession of a weapon, did not deprive defendant of a fair trial, where the challenged comments were mostly based on inferences to be drawn from the trial evidence or were a fair responses to the defendant's arguments in summation, and, even if any single remark made by the prosecutor was improper, the error was not so egregious as to have deprived defendant of fair trial. People v. Cagan, 185 A.D.3d 836, 128 N.Y.S.3d 26 (2d Dep't 2020).

Even if any of prosecutor's comments during summation exceeded bounds of propriety, comments were not so pervasive or egregious as to deprive murder defendant of fair trial; prosecutor's closing statement had to be evaluated in light of defense summation, which put into issue witnesses' character and credibility and justified prosecutor's response. People v. Lundy, 178 A.D.3d 1389, 116 N.Y.S.3d 831 (4th Dep't 2019).

Defendant was not denied fair trial due to certain remarks made by prosecutor during summation of trial for sex offenses; most challenged remarks were either fair comment on evidence or fair response to arguments and theories presented in defense summation, and, to extent that prosecutor's remarks were improper, cumulative effect of improper remarks did not deprive defendant of fair trial. People v. Yegutkin, 176 A.D.3d 748, 110 N.Y.S.3d 714 (2d Dep't 2019).

Prosecutor's comments regarding defense counsel's failure to address identification of murder defendant's girlfriend were a fair response to arguments presented by defendant's counsel in summation, and thus were not improper in prosecution for murder in the second degree and criminal possession of a weapon in the second degree. People v. Walton, 168 A.D.3d 1103, 92 N.Y.S.3d 390 (2d Dep't 2019).

Prosecutor's statements during summation of burglary trial did not deprive defendant of fair trial; although prosecutor commented on defendant's failure to provide corroboration regarding his reason for being in building, the comments did not serve to shift the burden of proof to defendant, other statements constituted fair comment on evidence or were otherwise responsive to defense counsel's summation, trial court subsequently instructed the jury that prosecution maintained the burden of establishing defendant's guilt beyond a reasonable doubt, cumulative effect of the challenged comments was not so prejudicial as to deny defendant his fundamental right to a fair trial. People v. Shamsuddin, 167 A.D.3d 1334, 90 N.Y.S.3d 376 (3d Dep't 2018).

Prosecutor's remarks during summation did not deprive defendant of a fair trial in prosecution for murder in the second degree and attempted murder in the second degree, where remarks were fair comment on the evidence, a fair response to defense counsel's summation, or were sufficiently addressed by the trial court's jury instructions. U.S. Const. Amend. 6. People v. Holmes, 167 A.D.3d 1039, 89 N.Y.S.3d 674 (2d Dep't 2018).

Prosecutor's remarks during summation did not constitute prosecutorial misconduct in prosecution for robbery in the first degree and criminal possession of a weapon in the second degree, where comments at issue constituted fair comment on the evidence and were responsive to defendant's own summation. N.Y. CPL § 470.05(2). People v. Hogue, 166 A.D.3d 1009, 88 N.Y.S.3d 465 (2d Dep't 2018).

In prosecution for murder in the second degree, prosecutor's remarks during summation did not deprive defendant of his right to a fair trial; majority of the remarks were either fair comment upon the evidence or a fair response to defense counsel's summation, and, to extent that the remarks that the defendant was a "trained combat veteran" and "trained warrior" were improper, such isolated errors were not so prejudicial as to deprive the defendant of a fair trial. People v. Lynch, 166 A.D.3d 904, 88 N.Y.S.3d 424 (2d Dep't 2018).

Alleged improper remarks during prosecutor's summation did not deprive drug sale defendant of fair trial, where most of the challenged statements were responsive to defense counsel's sharply critical remarks in summation about credibility of the People's witnesses, or were fair comment on evidence and reasonable inferences to be drawn therefrom, and trial court gave appropriate limiting jury instructions. People v. Williams, 163 A.D.3d 1160, 80 N.Y.S.3d 547 (3d Dep't 2018).

Defendant was not deprived of his right to a fair trial due to improper remarks made by the prosecutor during his opening statement and summation; prosecutor's comments were either fair comment on the evidence and the reasonable inferences to be drawn therefrom or responsive to defense counsel's summation, or otherwise did not deprive defendant of a fair trial. People v. Giddens, 163 A.D.3d 990, 81 N.Y.S.3d 515 (2d Dep't 2018).

Defendant was not deprived of a fair trial by certain comments made by prosecutor's during the People's opening statement and summation, in defendant's trial for murder in the second degree and criminal possession of a weapon in the second degree; defendant either failed to object or made only a general one-word objection to nearly all of the challenged remarks, the majority of the challenged comments were either fair comment on the evidence and the inferences to be drawn therefrom, fair response to the defense summation, or otherwise not improper, and to the extent that some of the comments were improper, they did not deprive defendant of a fair trial. People v. Wells, 161 A.D.3d 1200, 77 N.Y.S.3d 668 (2d Dep't 2018).

Prosecutor's summation did not deprive drug defendant of fair trial, where challenged comments were properly based on inferences that could be drawn from evidence, constituted a fair response to defendant's arguments in summation that his confession was coerced and that there was no direct evidence of his guilt, and did not denigrate the defense. People v. Giddens, 161 A.D.3d 1191, 78 N.Y.S.3d 355 (2d Dep't 2018).

Prosecutor's remarks in summation in prosecution for third-degree rape, forcible touching, and endangering the welfare of a child, characterizing the defense theory as a conspiracy by the prosecution witnesses to convict the defendant, constituted a fair response to defense counsel's summation; in summation, defense counsel argued that the victims had fabricated their testimony and conspired to hurt defendant in the worst way. People v. Lewis, 154 A.D.3d 1329, 63 N.Y.S.3d 156 (4th Dep't 2017).

Prosecutor's comment during summation that complainant should be believed because she had been interviewed by law enforcement authorities and testified before grand jury, and because "she has never wavered," was fair response to the defense counsel's argument that complainant's account was not plausible, and may have involved "implanted memories," and thus comment did not deprive defendant of fair trial, in prosecution for attempted rape in the first degree, sexual abuse in the first degree, and endangering the welfare of a child. U.S.C.A. Const.Amend. 6. People v. Gurdon, 153 A.D.3d 1430, 61 N.Y.S.3d 333 (2d Dep't 2017).

Defendant was not deprived of his right to a fair trial due to improper remarks made by prosecutor during summation; most of the challenged remarks were fair comment on the evidence or fair response to arguments made by defense counsel in summation, and to extent that some of the prosecutor's remarks made during summation were improper, they did not deprive defendant of a fair trial. People v. Chinloy, 153 A.D.3d 1269, 61 N.Y.S.3d 587 (2d Dep't 2017).

Prosecutor did not engage in misconduct on summation, in prosecution for murder in the second degree and criminal possession of weapon in the second degree; comments at issue were within broad bounds of rhetorical comment permissible during summations and were either fair response to defense counsel's summation or fair comment on evidence. People v. Lewis, 151 A.D.3d 1727, 57 N.Y.S.3d 293 (4th Dep't 2017).

To limited extent that prosecutor's remarks during summation may have exceeded permitted scope of summation or fair comment upon evidence or fair response to defense summation, trial court promptly addressed defendant's objections and issued appropriate curative instructions, thereby alleviating any potential prejudice to defendant, in prosecution for first-degree attempted murder and other crimes. People v. Fermin, 150 A.D.3d 876, 55 N.Y.S.3d 286 (2d Dep't 2017).

Prosecutor's comments in burglary trial did not constitute prosecutorial misconduct; remarks were fair response to the defense counsel's summation, fair comment on the evidence, or permissible rhetorical comment, and to the extent that some remarks were improper, they did not rise to the level of egregious misconduct that would have deprived the defendant of a fair trial. People v. Tapia, 148 A.D.3d 940, 50 N.Y.S.3d 412 (2d Dep't 2017).

Prosecutor's remarks during summation did not warrant reversal of defendant's convictions for assault and attempted assault; remarks generally constituted permissible responses to defense counsel's summation, and to the extent there were improprieties, they did not deprive defendant of a fair trial. People v. Woodley, 148 A.D.3d 572, 49 N.Y.S.3d 689 (1st Dep't 2017).

Remarks made by prosecutor on summation in prosecution for second-degree auto stripping were not so egregious as to warrant new trial; remarks were fair responses to defense counsel's summation arguments and were based on reasonable inferences drawn from the evidence. People v. Torres, 148 A.D.3d 490, 50 N.Y.S.3d 40 (1st Dep't 2017).

Corrective action by appellate court in interest of justice was not warranted on defendant's claims of prosecutorial misconduct during government's summation, where challenged comments either constituted fair comment on evidence or were responsive to statements made by defense counsel during summation. People v. Scippio, 144 A.D.3d 1184, 41 N.Y.S.3d 563 (3d Dep't 2016).

Most of allegedly improper remarks made by prosecutor during his opening statement and summation were either fair comment on the evidence and reasonable inferences to be drawn therefrom, or fair response to arguments made by defense counsel in summation. People v. King, 144 A.D.3d 1176, 41 N.Y.S.3d 751 (2d Dep't 2016).

Comments made by prosecutor during summation were not improper in prosecution for criminal possession of weapon and marijuana; comments were fair response to defense counsel's summation or fair comment on the evidence and inferences to be drawn from the evidence. People v. Thomas, 143 A.D.3d 1006, 40 N.Y.S.3d 462 (2d Dep't 2016).

[END OF SUPPLEMENT]

Footnotes

1 § 2718.

2 People v. Green, 134 A.D.3d 418, 20 N.Y.S.3d 73 (1st Dep't 2015), leave to appeal denied, 27 N.Y.3d 965, 2016 WL 1436274 (2016); People v. Maxey, 129 A.D.3d 1664, 14 N.Y.S.3d 845 (4th Dep't 2015), leave to appeal denied, 27 N.Y.3d 1002, 2016 WL 2890278 (2016); People v. Jean, 118 A.D.3d 1024, 987 N.Y.S.2d 630 (2d Dep't 2014), leave to appeal denied, 25 N.Y.3d 1165, 15 N.Y.S.3d 297, 36 N.E.3d 100 (2015).

3 People v. Shelton, 15 A.D.3d 1004, 789 N.Y.S.2d 346 (4th Dep't 2005).

4 § 2727.

5 People v. Mirabella, 126 A.D.3d 1367, 5 N.Y.S.3d 650 (4th Dep't 2015), leave to appeal denied, 25 N.Y.3d 1168, 15 N.Y.S.3d 300, 36 N.E.3d 103 (2015); People v. Williams, 123 A.D.3d 1152, 997 N.Y.S.2d 499 (2d Dep't 2014), leave to appeal granted, 25 N.Y.3d 1173, 15 N.Y.S.3d 305, 36 N.E.3d 108 (2015); People v. Gross, 118 A.D.3d 1383, 988 N.Y.S.2d 733 (4th Dep't 2014), leave to appeal granted, 24 N.Y.3d 966, 996 N.Y.S.2d 226, 20 N.E.3d 1006 (2014).

A defendant charged with drug crimes was not deprived of a fair trial due to the prosecutor's statements during summation, which were fair responses to the defense summation that attacked a confidential informant's credibility and questioned actions taken by the informant and undercover officers. People v. Richards, 124 A.D.3d 1146, 2 N.Y.S.3d 689 (3d Dep't 2015), leave to appeal denied, 25 N.Y.3d 992, 10 N.Y.S.3d 535, 32 N.E.3d 972 (2015).

The prosecutor's summation remarks about prosecution witnesses' fear of the defendant were made in response to defense counsel's attack on the witnesses' credibility, and thus were a fair comment based upon the evidence. People v. Bahamonte, 89 A.D.3d 512, 932 N.Y.S.2d 62 (1st Dep't 2011).

6 § 2719.

7 People v. Green, 105 A.D.3d 611, 963 N.Y.S.2d 257 (1st Dep't 2013).

8 People v. Colon, 122 A.D.2d 150, 504 N.Y.S.2d 528 (2d Dep't 1986).

9 People v. James, 90 A.D.3d 1249, 934 N.Y.S.2d 619 (3d Dep't 2011).

10 People v. Kadarko, 73 A.D.3d 639, 901 N.Y.S.2d 612 (1st Dep't 2010).

11 People v. Henderson, 13 N.Y.3d 844, 892 N.Y.S.2d 292, 920 N.E.2d 348 (2009).

12 People v. Martinez, 114 A.D.3d 1173, 980 N.Y.S.2d 191 (4th Dep't 2014), leave to appeal denied, 22 N.Y.3d 1200, 986 N.Y.S.2d 421, 9 N.E.3d 916 (2014).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2721

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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2721. Prosecutor's comment in summation on defendant's failure to testify

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2129, 2130

A.L.R. Library

- Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error—modern cases, 32 A.L.R.4th 774
- Violation of federal constitutional rule (Griffin v. California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error, 24 A.L.R.3d 1093
- Propriety under Griffin v. California and prejudicial effect of unrequested instruction that no inferences against accused should be drawn from his failure to testify, 18 A.L.R.3d 1335

- Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify, 14 A.L.R.3d 723

Treatises and Practice Aids

- Criminal Procedure in New York, Revised Edition § 46:10 (Silence of defendant)

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§ 38.5 (Defendant's failure to testify)

The prosecutor on summation may not comment, directly or indirectly, on the failure of the defendant to take the stand or to testify on his or her own behalf. [1] Thus, for instance, a prosecutor's summation comment that the evidence is uncontested in any relevant way constitutes an improper reference to the defendant's decision not to testify, but is harmless where there is overwhelming evidence of guilt. [2]

Illustrations:

The prosecutor's comments in summation that he disliked "individuals who attempt to testify without taking that witness stand" and that, if an individual was "not willing to take that witness stand and be cross-examined, then they shouldn't be testifying" did not improperly call the jury's attention to defendant's failure to testify; rather, the comments referred to defendant's conduct, during his representation of himself at trial, in making numerous improper factual assertions while questioning witnesses, despite being repeatedly instructed not to do so, and his subsequent attempts to cite his own assertions as evidence in his summation. [3]

The prosecutor's references during summation to "unchallenged" and "uncontroverted" evidence of the defendant's involvement in an attempted robbery and assault were not so prejudicial as to constitute reversible error, in light of strong evidence of the defendant's guilt and the minimal likelihood that the jury's verdict was influenced by the challenged remarks, and where the jury charge emphasized that the burden of proof remained with the state and admonished the jury that no inference was to be drawn from the defendant's failure to testify. [4]

However, the prosecutor's comments made throughout summation placed an improper emphasis on the defendant's decision not to testify, where the prosecutor commented over 20 times during summation that the testimony of various prosecution witnesses was undisputed and uncontested, and when the defendant's objection based on the right against self-incrimination was overruled, the prosecutor was permitted to state to the jury that "nothing came in from that witness stand to contradict the things I'm telling you." [5]

An indirect reference to the defendant's silence, such as a statement that only one witness has testified as to what has taken place, which amounts to an improper reference to the defendant's failure to take the stand, [6] is no more permissible than a direct reference. [7] For example, the prosecutor's statement on summation that "I am going to ask you to return to the jury room and return a verdict that is consistent with uncontradicted evidence in this case" constitutes an improper reference to the defendant's failure to testify. [8]

Observation:

A prosecutor's comment in his or her summation concerning the defendant's failure to testify may be rendered harmless where the court gives careful instructions with respect to the prosecution's burden of proof and to the presumption of innocence, and a specific instruction that no inference may be drawn from the fact that the defendant has not testified. [9]

CUMULATIVE SUPPLEMENT

Cases:

Defendant was not prejudiced by any error that occurred when trial court allowed prosecution to inquire as to matters that occurred prior to defendant's spontaneous, postdetention statement; evidence was overwhelming, and content of statement was already before jury through two conflicting versions, thus allowing jurors to draw their own conclusion as to credibility from plainly inconsistent testimony. People v. Chery, 28 N.Y.3d 139, 42 N.Y.S.3d 655, 65 N.E.3d 684 (2016).

[END OF SUPPLEMENT]

Footnotes

1 People v. Crimmins, 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E.2d 787 (1975); People v. Brown, 256 A.D.2d 414, 682 N.Y.S.2d 229 (2d Dep't 1998); People v. Torres, 223 A.D.2d 741, 637 N.Y.S.2d 214 (2d Dep't 1996).

2 People v. Melendez, 143 A.D.2d 946, 533 N.Y.S.2d 396 (2d Dep't 1988).

3 People v. Clark, 65 A.D.3d 755, 883 N.Y.S.2d 824 (3d Dep't 2009).

4 People v. Breen, 257 A.D.2d 661, 684 N.Y.S.2d 575 (2d Dep't 1999).

5 People v. Carvalho, 256 A.D.2d 1223, 682 N.Y.S.2d 745 (4th Dep't 1998).

6 People v. Conklin, 39 A.D.2d 160, 332 N.Y.S.2d 826 (3d Dep't 1972).

7 People v. Scott, 138 A.D.2d 421, 525 N.Y.S.2d 703 (2d Dep't 1988).

A prosecutor's comment during summation in a murder prosecution that the defendant could not "run" from the evidence was not necessarily an improper allusion to the defendant's failure to testify, and in any event the court's curative instruction was sufficient to obviate any prejudice to the defendant resulting therefrom. People v. Stacio, 261 A.D.2d 560, 692 N.Y.S.2d 79 (2d Dep't 1999).

8 People v. Scott, 138 A.D.2d 421, 525 N.Y.S.2d 703 (2d Dep't 1988).

9 People v. Halm, 180 A.D.2d 841, 579 N.Y.S.2d 765 (3d Dep't 1992), order aff'd, 81 N.Y.2d 819, 595 N.Y.S.2d 380, 611 N.E.2d 281 (1993); People v. Stafford, 79 A.D.2d 435, 437 N.Y.S.2d 195 (4th Dep't 1981).

As to curative instructions in this regard, generally, see § 2737.

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2722

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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2722. Prosecutor's comment during summation on defendant's postarrest silence

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2129, 2130

A.L.R. Library

- Impeachment of defendant in criminal case by showing defendant's prearrest silence—state cases, 35 A.L.R.4th 731

- Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error—modern cases, 32 A.L.R.4th 774

It is improper for a prosecutor to comment about the defendant's silence or failure to exculpate himself or herself at the time of arrest. [1]

Illustrations:

The prosecution's comment that the defendant caused the death of an infant because the defendant remained silent while rescue workers were attempting to save the infant did not constitute reversible error, since the comments were not an attempt to impeach the defendant by referring to the pretrial silence, but were made in response to the defense counsel's characterization of the defendant as in a condition of shock and unable to respond during the rescue attempt. [2]

Likewise, the defendant was not deprived of fair trial by the prosecutor's summation comments on the defendant's failure to make an exculpatory statement, as the prosecutor did not make an improper reference to the defendant's failure to speak or cooperate when confronted by law enforcement officials, rather, referred to the defendant's interactions with store employees who had accused her of shoplifting. [3]

A prosecutor's inappropriate references to the defendant's postarrest silence may not be justified by the fact that the prosecution is required to prove the voluntariness of the defendant's statements to the police beyond a reasonable doubt. [4]

On the other hand, where the issue of the defendant's credibility has already been raised, it is not improper for the prosecutor to comment that the defendant has said that he or she has not made any statement at the time of arrest. [5] Moreover, where a defendant chooses to forego the right to remain silent and instead voluntarily makes a statement about the crime, the prosecutor may use any significant omission from that statement for impeachment purposes, and, thus, may commented upon such an omission. [6] Thus, for instance, the prosecutor can properly refer, during summation in an assault prosecution, to the defendant's failure to mention, in voluntary postarrest statements to the police, an alleged prior assault against the defendant by the victim that purportedly supports a self-defense claim. [7]

The attribution of communicative value to a defendant's actions upon being arrested may serve to thwart the defendant's Fifth Amendment right to remain silent, where the admission of testimony relating those actions as being indicative of a consciousness of guilt is error because the evidence is ambiguous and its probative value is minimal, and the prosecutor on summation comments upon the testimony and invites the jury to infer from those acts that, although guilty, the defendant believes he or she has sufficiently removed himself or herself from any illegality to avoid a finding of criminal liability. [8]

Illustration:

Error warranting a new trial occurred where an interrogating officer was permitted to describe the defendant's reaction, a shrug of the shoulders, when he was presented with the charges against him, where it was not clear, because of the defendant's language

difficulty, that he understood the charge, and the prosecutor's summation comment on the defendant's shrug, characterizing it as an indicator of the defendant's guilt, compounded the serious error in admitting the evidence. [9]

The prosecutor's comments on defendant's initial refusal to speak to the police does not deny a defendant a fair trial, where the court gives curative instructions in response to defense objections and the defendant neither requests further curative instructions nor moves for a mistrial. [10]

CUMULATIVE SUPPLEMENT

Cases:

Prosecutor did not violate defendant's right to silence by either cross-examining him on why he had not mentioned his alleged affair with the babysitter before the trial, including when speaking with police, or by arguing during summation that his failure to do so indicated that the claimed affair was fabricated, since he could be impeached with the material as defendant spoke to the police and omitted exculpatory information which he presented for the first time at trial. People v. Johnson, 122 N.Y.S.3d 137 (App. Div. 3d Dep't 2020).

[END OF SUPPLEMENT]

Footnotes

1 People v. Copp, 107 A.D.3d 911, 967 N.Y.S.2d 411 (2d Dep't 2013); People v. Williams, 67 A.D.2d 613, 411 N.Y.S.2d 630 (1st Dep't 1979).

2 People v. Balls, 118 A.D.2d 887, 499 N.Y.S.2d 454 (3d Dep't 1986), order aff'd, 69 N.Y.2d 641, 511 N.Y.S.2d 586, 503 N.E.2d 1017 (1986).

3 People v. Lynch, 131 A.D.3d 876, 16 N.Y.S.3d 550 (1st Dep't 2015), leave to appeal denied, 26 N.Y.3d 1041, 22 N.Y.S.3d 170, 43 N.E.3d 380 (2015) (adding that, in any event, the trial court had provided a suitable remedy by cautioning the jury against shifting the burden of proof).

4 People v. Hults, 122 A.D.2d 857, 505 N.Y.S.2d 723 (2d Dep't 1986).

5 People v. Davis, 92 A.D.2d 177, 460 N.Y.S.2d 289 (1st Dep't 1983), order aff'd, 61 N.Y.2d 202, 473 N.Y.S.2d 146, 461 N.E.2d 283 (1984).

6 People v. Hagi, 169 A.D.2d 203, 572 N.Y.S.2d 663 (1st Dep't 1991).

7 People v. McTootle, 276 A.D.2d 348, 714 N.Y.S.2d 42 (1st Dep't 2000).

8 People v. Basora, 75 N.Y.2d 992, 557 N.Y.S.2d 263, 556 N.E.2d 1070 (1990).

9 People v. Lourido, 70 N.Y.2d 428, 522 N.Y.S.2d 98, 516 N.E.2d 1212 (1987).

10 People v. Trembling, 298 A.D.2d 890, 748 N.Y.S.2d 631 (4th Dep't 2002).

As to curative instructions given in response to summation arguments, generally, see § 2737.

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2723

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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2723. Comment during prosecution summation on defendant's failure to call witnesses

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 1884, 1924, 2136

A.L.R. Library

- Propriety and prejudicial effect of prosecutor's argument commenting on failure of defendant's spouse to testify, 26 A.L.R.4th 9

- Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify, 14 A.L.R.3d 723

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§ 38 (Nonproduction of evidence or witnesses)

It is improper for the prosecutor, in summation, to convey to the jury the erroneous impression that the defendant has an obligation to call witnesses on his or her own behalf. [1] For instance, a prosecutor's remark that the jury has heard no one and no other testimony to contradict the People's evidence by anyone who is not a party to the case improperly conveys to the jury the erroneous impression that the defendant has an obligation to call witnesses in his or her behalf. [2] Courts have held more recently, however, that where a defendant elects to present evidence of his or her innocence, the prosecutor may bring the defendant's failure to call certain witnesses to the jury's attention on summation, provided that the prosecutor's comments are not made in bad faith and are merely efforts to persuade the jury to draw inferences supporting the people's position. [3]

The prosecution may comment upon the defendant's failure to present a certain witness where it is a fair response to defense counsel's summation. [4] Thus, a prosecutor may properly refer in summation to the subpoena power of the defendant's attorney, where the defense in its summation implies that the prosecution has failed to call certain witnesses because their testimony would have been damaging to the prosecution's case. [5] Furthermore, where a missing witness charge would have been appropriate, the prosecutor acts within the legitimate bounds of advocacy by urging the jury to draw a negative inference from the absence of the witness. [6] Likewise, a prosecutor's summation comment about the defendant's failure to produce a relative as a witness is not improper where the witness is available and has material information, which is not trivial or cumulative, to support the defendant's justification defense. [7] For example, the prosecutor had a sufficient basis on which to comment on the defendant's failure to call his brother to corroborate his own testimony, and the prosecutor's comment on summation did not improperly shift the burden of proof, where the defendant's brother was an available and presumably favorable witness who could have provided material, noncumulative testimony. [8]

Similarly, the prosecutor's summation comments as to the absence of the defendant's grandmother at trial did not exceed fair comment and deprive the defendant of a fair trial, where the defendant's defense was that he was at his grandmother's house at the time of the cocaine purchase, the remarks were preceded by an explanation that the defendant had no obligation to put any witness on the stand, and the court issued an immediate instruction curing any potential prejudice. [9]

CUMULATIVE SUPPLEMENT

Cases:

Prosecutor acted in good faith when discussing in closing argument the cross examination of defense witnesses regarding their failure to come forward with exculpatory information at an earlier date, where the prosecutor's remarks in summation were a fair comment on the testimony of the witnesses. People v. Thomas, 169 A.D.3d 1451, 92 N.Y.S.3d 818 (4th Dep't 2019).

Even if defendant had preserved for appellate review his contention that certain comments made by prosecutor in summation were improper and deprived him of fair trial in prosecution for criminal sexual act in the third degree, patronizing a prostitute in the third degree, and endangering the welfare of a child, defendant's contention lacked merit, where prosecutor's comment highlighting defendant's failure to produce documentary evidence which he testified established the truth of his defense was

not improper, and prosecutor's other alleged remarks were either fair comment on evidence, fair response to defense counsel's summation, or were sufficiently addressed by the trial court's jury instructions. People v. Katzman, 161 A.D.3d 770, 77 N.Y.S.3d 73 (2d Dep't 2018).

Defendant was not denied fair trial by prosecutorial misconduct, in prosecution for criminal contempt in the first degree, criminal trespass in the third degree, endangering the welfare of a child, harassment in the second degree, and criminal contempt in the second degree; prosecutor's comments with respect to defendant's failure to present witness did not constitute impermissible effort to shift burden of proof inasmuch as defendant elected to present a defense. People v. Aikey, 153 A.D.3d 1603, 62 N.Y.S.3d 655 (4th Dep't 2017).

[END OF SUPPLEMENT]

Footnotes

1 People v. Crimmins, 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E.2d 787 (1975); People v. Grice, 100 A.D.2d 419, 474 N.Y.S.2d 152 (4th Dep't 1984); People v. Ingram, 49 A.D.2d 865, 374 N.Y.S.2d 327 (1st Dep't 1975); People v. Conklin, 39 A.D.2d 160, 332 N.Y.S.2d 826 (3d Dep't 1972).

2 People v. Murray, 64 A.D.2d 916, 407 N.Y.S.2d 890 (2d Dep't 1978).

It has been held that it is prejudicial for the prosecutor to state that the defendant has not offered any evidence in the case other than his or her own testimony denying the commission of the crime, and that the defendant's mere denial is not sufficient to create a reasonable doubt. People v. Pabon, 48 A.D.2d 862, 368 N.Y.S.2d 581 (2d Dep't 1975).

3 People v. Tankleff, 84 N.Y.2d 992, 622 N.Y.S.2d 503, 646 N.E.2d 805 (1994), disapproved on other grounds in later proceedings, 49 A.D.3d 160, 848 N.Y.S.2d 286 (2d Dep't 2007), for additional opinion, see, 46 A.D.3d 846, 848 N.Y.S.2d 277 (2d Dep't 2007); People v. Wongsam, 105 A.D.3d 980, 963 N.Y.S.2d 345 (2d Dep't 2013).

4 People v. Youmans, 292 A.D.2d 647, 738 N.Y.S.2d 756 (3d Dep't 2002); People v. Hoke, 276 A.D.2d 903, 714 N.Y.S.2d 602 (3d Dep't 2000); People v. Speringo, 258 A.D.2d 379, 686 N.Y.S.2d 8 (1st Dep't 1999); People v. Townsley, 240 A.D.2d 955, 659 N.Y.S.2d 906 (3d Dep't 1997); People v. Brown, 216 A.D.2d 670, 628 N.Y.S.2d 211 (3d Dep't 1995).

The prosecutor was entitled to comment in summation on a robbery defendant's failure to call witnesses who, according to the defendant's testimony, were friends of his who could corroborate his claim of innocent presence at the scene of the crime. People v. Durden, 211 A.D.2d 568, 621 N.Y.S.2d 611 (1st Dep't 1995).

As to the right of the prosecutor to respond to the defendant's summation, see § 2720.

5 People v. Mackey, 52 A.D.2d 662, 381 N.Y.S.2d 1004 (3d Dep't 1976).

6 People v. Hagi, 169 A.D.2d 203, 572 N.Y.S.2d 663 (1st Dep't 1991).

7 People v. Williams, 140 A.D.2d 570, 528 N.Y.S.2d 430 (2d Dep't 1988).

8 People v. Kowlessar, 82 A.D.3d 417, 918 N.Y.S.2d 41 (1st Dep't 2011).

9 People v. Luciano, 213 A.D.2d 729, 623 N.Y.S.2d 345 (3d Dep't 1995).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2724

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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2724. Assertions of personal opinions of prosecutor in summation

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 1944

Treatises and Practice Aids

- Criminal Procedure in New York, Revised Edition § 46:11 (Personal opinions)

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§ 26 (Expression of personal belief)

The assertion by a prosecuting attorney of personal knowledge of matters that may influence the jury's verdict should have no place in the record of a criminal trial. [1] Thus, statements during summation in which the prosecutor gives his or her own opinion regarding the truth or falsity of witnesses' testimony, and vouches for the victim's credibility, are improper. [2]

Observation:

The prosecutor's use of the word "I" during summation is not an impermissible expression of personal opinion if it is merely stylistic. [3]

CUMULATIVE SUPPLEMENT

Cases:

Fact that prosecutor frequently prefaced conclusions during summation with "I think" or "I don't believe" was not so prejudicial as to deny defendant his fundamental right to fair trial, in prosecution for second-degree murder; people's summation was a fair commentary on defendant's summation, and County Court reminded jury during its instructions that summations are not evidence. People v. Lang, 164 A.D.3d 963, 82 N.Y.S.3d 229 (3d Dep't 2018).

Prosecutor's statements expressing his personal upset over allegations in trial in which depraved indifference murder of a child was alleged, and vouching for credibility of certain evidence at several points during his summation, did not represent a flagrant and pervasive pattern of misconduct that deprived defendant of a fair trial; prosecutor apologized for his excesses when the comments were called to his attention and he suggested a curative instruction, defendant crafted curative instruction, and County Court delivered it, clearly advising the jury that the comments were improper and needed to be completely disregarded. N.Y. Penal Law § 125.25(4). People v. Stahli, 159 A.D.3d 1055, 72 N.Y.S.3d 200 (3d Dep't 2018).

Prosecutor's statements during summation, that he thought defendant's testimony contained lies and was "completely false," and that he thought victim gave accurate and honest account of what happened, did not deprive defendant of fair trial, in prosecution for burglary in the first degree and related offenses; comments were confined to one section of summation, rather than dispersed throughout, and trial court instructed jury both before and after summations that what lawyers said was not evidence and that jury alone was responsible for finding facts. People v. Devictor-Lopez, 155 A.D.3d 1434, 66 N.Y.S.3d 346 (3d Dep't 2017).

[END OF SUPPLEMENT]

Footnotes

1 People v. Tassiello, 300 N.Y. 425, 91 N.E.2d 872 (1950); People v. Hall, 138 A.D.2d 404, 525 N.Y.S.2d 687 (2d Dep't 1988).

The prosecutor erred during summation when he contrasted the defendant's quiet and soft-spoken demeanor in the face of an accusation of having committed rape, sodomy, and burglary, with the way in which the prosecutor himself would have reacted if he had been wrongly accused of such offenses.

People v. Morgan, 66 N.Y.2d 255, 496 N.Y.S.2d 401, 487 N.E.2d 258 (1985).

2 People v. Walters, 251 A.D.2d 433, 674 N.Y.S.2d 114 (2d Dep't 1998).

As to the prosecutor vouching for the credibility of witnesses during summation, see § 2727.

3 People v. Sudler, 75 A.D.3d 901, 906 N.Y.S.2d 373 (3d Dep't 2010); People v. Lamont, 21 A.D.3d 1129, 800 N.Y.S.2d 480 (3d Dep't 2005); People v. Franklin, 288 A.D.2d 751, 733 N.Y.S.2d 283 (3d Dep't 2001).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2725

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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2725. Assertions of personal opinions of prosecutor in summation—As to guilt or innocence of defendant

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 1980, 1982, 1985

A.L.R. Library

- Propriety and prejudicial effect of prosecutor's argument giving jury impression that judge believes defendant guilty, 90 A.L.R.3d 822
- Propriety and prejudicial effect of prosecutor's argument giving jury impression that defense counsel believes accused guilty, 89 A.L.R.3d 263

- Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused —modern state cases, 88 A.L.R.3d 449
- Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused —federal cases, 41 A.L.R. Fed. 10

Treatises and Practice Aids

- Criminal Procedure in New York, Revised Edition § 46:11 (Personal opinions)

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§ 26 (Expression of personal belief)

The prosecutor may not state a personal opinion of the guilt or innocence of the accused, since that determination ultimately rests with the jury.[1] It is thus improper for a prosecutor, during summation, to express his or her personal opinion on the evidence,[2] to offer his or her personal belief as to the complainant's testimony,[3] or to present his or her own belief as to the lack of merit of the defense testimony.[4]

Illustrations:

In the prosecution of a corporation's executives for grand larceny, arising from the defendants' allegedly obtaining unapproved "bonuses" from the corporation, the prosecutor's closing-statement assertion that the company's board of directors had only become aware of the defendants' activities after its completion of an internal investigation, which was in response to the defendants' contention that they were scapegoats, did not improperly convey the prosecutor's personal belief or opinion regarding the defendants' guilt, but was derived from testimony concerning the course of the internal investigation, and inferences drawn from that testimony.[5]

The prosecutor's expression of his personal opinion regarding a drug defendant's truthfulness, during summation, did not deprive the defendant of a fair trial, where the references were fleeting, did not reflect a flagrant and pervasive pattern of prosecutorial misconduct, and were not egregious.[6]

On the other hand, the prosecutor's improper, repeated, and unqualified pronouncements of the defendant's guilt during her summation at the defendant's robbery and grand larceny trial supported the defendant's claim that he had not received a fair trial.[7]

CUMULATIVE SUPPLEMENT

Cases:

While a prosecutor is free to respond to defense counsel's comments about the failure of the victim to testify, the response must be evidence-based and may not improperly convey the prosecutor's personal opinion of defendant's guilt. People v. Hoey, 41 N.Y.S.3d 477 (App. Div. 1st Dep't 2016).

[END OF SUPPLEMENT]

Footnotes

1 People v. Jones, 47 A.D.2d 761, 365 N.Y.S.2d 36 (2d Dep't 1975); People v. Castelo, 24 A.D.2d 827, 264 N.Y.S.2d 136 (4th Dep't 1965).

The district attorney erred in stating that even the defendant's counsel did not believe the defendant's story. People v. Tatum, 54 A.D.2d 950, 388 N.Y.S.2d 329 (2d Dep't 1976).

2 People v. Knox, 71 A.D.2d 41, 421 N.Y.S.2d 992 (4th Dep't 1979).

3 People v. Trinidad, 59 N.Y.2d 820, 464 N.Y.S.2d 740, 451 N.E.2d 487 (1983); People v. Davis, 29 A.D.2d 556, 285 N.Y.S.2d 719 (2d Dep't 1967).

4 People v. Lee, 79 A.D.2d 641, 433 N.Y.S.2d 610 (2d Dep't 1980).

5 People v. Kozlowski, 11 N.Y.3d 223, 869 N.Y.S.2d 848, 898 N.E.2d 891 (2008).

6 People v. McCombs, 18 A.D.3d 888, 795 N.Y.S.2d 108 (3d Dep't 2005).

7 People v. Smith, 288 A.D.2d 496, 733 N.Y.S.2d 237 (2d Dep't 2001).

34 N.Y. Jur. 2d Criminal Law: Procedure § 2726

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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2726. Assertions of personal opinions of prosecutor in summation—Integrity of prosecutor's office

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2071 to 2073

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§§ 22 to 29 (Content of Summation; Generally)

It is improper for a prosecutor on summation to vouch for the propriety of his or her own conduct by injecting the integrity of the district attorney's office into the case. [1] Thus, it is error for a prosecutor to remark on the integrity of the district attorney's office during summation, and to make similar insinuations suggesting that the prosecution's case is more believable because of the public nature of the office, [2] or to state that he or she would not countenance false testimony by the state's witnesses. [3]

Illustrations:

The prosecutor improperly became an unsworn witness during summation by vouching for the witness with the most favorable testimony for the prosecution by reference to his own pretrial conduct and credibility by virtue of his position in the district attorney's office. [4]

The prosecutor's expressed statement, on summation, of his outrage over defense counsel's suggestion that the prosecutors were complicit in what amounted to an effort to convict an innocent person, was not proper, although it did not rise to the level of reversible error. [5]

CUMULATIVE SUPPLEMENT

Cases:

Prosecutor's comments during summation improperly injected the integrity of the district attorney's office into sexual assault case, where prosecutor stated that he had a significant advantage over the jury because he had been working on the case for more than a year, possessed an entire cart of evidence of questions and paperwork, and had the opportunity to talk to the witnesses and review reports. People v. Getman, 199 A.D.3d 1318, 158 N.Y.S.3d 437 (4th Dep't 2021).

[END OF SUPPLEMENT]

Footnotes

1 People v. Morgan, 111 A.D.3d 1254, 974 N.Y.S.2d 687 (4th Dep't 2013); People v. Carter, 52 A.D.2d 829, 384 N.Y.S.2d 167 (1st Dep't 1976); People v. Mantesta, 27 A.D.2d 748, 277 N.Y.S.2d 442 (2d Dep't 1967).

2 People v. Koullias, 96 A.D.2d 869, 465 N.Y.S.2d 748 (2d Dep't 1983).

3 People v. Brown, 43 A.D.2d 743, 350 N.Y.S.2d 717 (2d Dep't 1973), order aff'd, 35 N.Y.2d 916, 364 N.Y.S.2d 900, 324 N.E.2d 368 (1974).

4 People v. Moye, 12 N.Y.3d 743, 879 N.Y.S.2d 354, 907 N.E.2d 267 (2009).

5 People v. Gumbs, 56 A.D.3d 345, 868 N.Y.S.2d 29 (1st Dep't 2008).

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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2727. Vouching by prosecutor for credibility of witness in summation

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2099 to 2101

A.L.R. Library

- Use of plea bargain or grant of immunity as improper vouching for credibility of witness—state cases, 58 A.L.R.4th 1229
- Propriety and prejudicial effect of comments by counsel vouching for credibility of witness—state cases, 45 A.L.R.4th 602

- Propriety and prejudicial effect of questions or comments as to witness' religious beliefs or standards designed to enhance credibility, 27 A.L.R.4th 1167

Treatises and Practice Aids

- Criminal Procedure in New York, Revised Edition § 46:12 (Integrity of district attorney's office)

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§ 36 (Credibility of witnesses)
- Prosecution Summations, 6 Am. Jur. Trials 873§ 26.5 (Vouching for prosecution witness)
- Prosecution Summations, 6 Am. Jur. Trials 873§ 36.5 (Credibility of defendant's testimony)

It is highly prejudicial for a prosecutor to vouch for the truthfulness of prosecution witnesses and thus to make himself or herself an unsworn witness. [1] Thus, an attempt by a prosecutor in summation to bolster the testimony of a witness with reference to the danger the witness will face upon his or her return to the community after the trial is improper. [2] Likewise, it is improper for a prosecutor to bolster the credibility of a major prosecution witness, who is also a participant in the crime, by asserting that no deal has been made with the witness in consideration for his or her testimony against the defendant. [3] On the other hand, a prosecutor's statement in summation, suggesting to the jury that a police officer is an honest officer, worthy of belief, has been held not to constitute impermissible vouching for the credibility of a witness. [4]

Illustrations:

The prosecutor's comments during summation that the People's witnesses testified as to what they "honestly remember happening," and that the jury should not "buy" into the defendant's testimony that he merely picked up the weapon used in the crimes after someone else committed them, did not exceed the bounds of rhetorical comment permissible in closing argument, and constituted either fair comment on the evidence that was presented or fair response to the defense summation. [5]

However, the prosecutor improperly vouched for a witness during summation, thus depriving the defendant of a fair trial, when the prosecutor stated, over objection, that witness the testified "not knowing what the ramifications would be for herself and her family;" there was no support in the record of any threats to the witness or her family, and the prosecutor's comments violated the rule prohibiting prosecutor from trying to convey to jury, by insinuation, suggestion, speculation, or impression, that the defendant was guilty of other crimes not in issue at trial. [6]

A prosecutor also violated the unsworn witness rule by vouching during his summation for a police officer's testimony that it was possible to see the driver handing a package from a vehicle from the officer's observation post during the re-creation of a drug arrest, where the officer's credibility was at the crux of the case, a photographer who participated in the re-creation testified that it was not possible to see the driver's hand from the observation post, and the prosecutor stated that any impropriety that purportedly occurred during the incident necessarily occurred in front of him, given his presence at the re-creation, but that his very presence made any impropriety unlikely, and that he should be fired if he prosecuted the case based on such misconduct. [7]

Where it is alleged that the prosecutor has impermissibly vouched for the credibility of the complainant or other prosecution witness, the prosecutor's remarks must be evaluated in comparison with the summation of the defense counsel.[8] A prosecutor is entitled to respond to defense counsel's attack on the credibility of the People's witnesses by arguing that the witnesses were, in fact, credible.[9]

A prosecutor's comments in support of a witness's veracity are permissible where they constitute a fair comment on the evidence or fair response to defense counsel's summation.[10] However, although the prosecutor's discussion of the credibility of the People's witnesses is appropriate where the defense has placed their veracity at issue, remarks that exceed the bounds of fair comment and constitute improper vouching for the prosecution's witnesses are improper.[11]

Illustrations:

The prosecutor did not improperly bolster the credibility of a police officer by asking the officer on redirect examination if the officer would be jeopardizing his career by "making this stuff up" over "one arrest," and by making comments of a similar nature during summation, as the prosecutor's comments were a fair response to defense counsel's cross-examination of the officer.[12]

Defense counsel made a sufficient attack on the credibility, motives, and biases of a prosecution eyewitness to entitle the prosecutor to argue in summation that the witness was not biased and had no motive to lie, even though defense counsel's cross-examination of the eyewitness did not directly address her motives for testifying, where the cross-examination did question the eyewitness's credibility and ability to observe the incident, and defense counsel's opening statement referred generally to witness "biases" and asserted that "[p]eople sometimes make things up because they have reasons to make things up."[13]

However, the prosecutor's remarks during summation in a first-degree robbery trial were not a fair response to defense counsel's summation, and, thus, denied the defendant a fair trial, where the evidence against the defendant was not overwhelming; the prosecutor vouched for the credibility of the victim's identification of the defendant, and appealed to the jury's sympathies and fears, by suggesting that the victim's status as a veteran and his age warranted respect, and trying to make the jury feel guilty if it doubted the victim's identification of his assailant.[14]

CUMULATIVE SUPPLEMENT

Cases:

Defendant was deprived of his right to fair trial given the highly prejudicial nature of prosecutor's comments during summation regarding grand jury testimony of complainant's sister; prosecutor acted as unsworn witness when he addressed impeachment of complainant's sister, one of the People's main witnesses, when he argued to the jury that they should disregard the sister's grand jury testimony, in which she failed to name defendant as participant in subject assault, because there was more to the testimony than they knew, and prosecutor's references to complainant's father and sister, who was present during the subject assault but

was not called to testify, invited jury to speculate that father would have given testimony supportive of his children had he been called to testify. McKinney's CPL § 470.15(6)(a). People v. Ramirez, 150 A.D.3d 898, 2017 WL 1902545 (2d Dep't 2017).

Even if defendant had preserved claim for appellate review, prosecutor's conduct during summation at trial for predatory sexual assault against a child did not amount to prosecutorial misconduct such that defendant was deprived of a fair trial; prosecutor's comments during summation that defendant characterized as vouching for victim were fair responses to repeated arguments in summation that victim was lying, and prosecutor's other comments were either fair comments on the evidence or appropriate responses to arguments made in defendant's summation. N.Y. CPL § 470.05(2). People v. Tucker, 195 A.D.3d 1547, 150 N.Y.S.3d 443 (4th Dep't 2021), leave to appeal denied, 2021 WL 4777608 (N.Y. 2021).

A prosecutor may not act as an unsworn witness by supporting arguments with his or her own veracity and position. People v. Sammeth, 190 A.D.3d 1112, 139 N.Y.S.3d 435 (3d Dep't 2021).

Prosecutor engaged in multiple instances of inappropriate and unacceptable advocacy throughout her summation in prosecution for attempted murder in the second degree, assault in the first degree, and gang assault in the first degree; prosecutor vouched for the credibility of first witness and argued to the jury that there were no coincidences, that defendant was not the unluckiest guy, that defendant engaged in machismo at the time of the events, that all the evidence pointed directly at defendant because he was guilty, and, that because defendant did the crimes, the jury would have to do a lot of mental gymnastics to believe the defendant did not commit the crime. People v. Robles, 174 A.D.3d 653, 105 N.Y.S.3d 111 (2d Dep't 2019).

Prosecutor's isolated comment on credibility of a witness during summation did not deprive defendant of a fair trial in prosecution for burglary in the first degree, grand larceny in the fourth degree, and unlawful imprisonment in the first degree, where comment was a fair response to comments of defense counsel on summation attacking the conduct and credibility of that witness. People v. Fick, 167 A.D.3d 1484, 90 N.Y.S.3d 421 (4th Dep't 2018).

Defendant, who was convicted of forcible touching, was not denied right to fair trial by improper remarks made by prosecutor during summation, where comments alleged to be prejudicial were fair response to defendant's attacks on credibility of People's complaining witness, permissible rhetorical comment, or did not otherwise warrant reversal. People v. Zaimi, 167 A.D.3d 954, 90 N.Y.S.3d 104 (2d Dep't 2018).

Given the importance to the defense of the testimony of complainant's grandmother in prosecution for first-degree rape and endangering the welfare of a child, prosecutor's repeated injections of her own credibility into trial while cross-examining the grandmother, who was the sole witness for the defense other than defendant, about pretrial out-of-court statements the grandmother made to the prosecutor concerning complainant's outcry, deprived defendant of a fair trial, requiring reversal and remittal for new trial. N.Y. CPL §§ 470.05(2), 470.20(1). People v. Moulton, 163 A.D.3d 724, 80 N.Y.S.3d 418 (2d Dep't 2018).

Prosecutor's remarks during summation of drug trial did not amount improper vouching of confidential informants' testimony, where comments were, at least in part, responsive to defendant's argument in summation that charges against him were the result of forgeries and police corruption. People v. Jackson, 160 A.D.3d 1125, 74 N.Y.S.3d 661 (3d Dep't 2018).

Prosecutor's improper comments during summation questioning whether the victim had any motive to lie and then answering that question by stating that the victim had [a]bsolutely no motive to lie about this, while an unnecessary characterization of the victim's testimony and her credibility, fell short of sort of egregious misconduct that would have deprived defendant of fair trial; comments were not pervasive or frequent, and were in direct response to defense counsel's summation, which focused on the victim's credibility and the lack of corroboration. People v. Hartle, 159 A.D.3d 1149, 72 N.Y.S.3d 639 (3d Dep't 2018).

Prosecutor's comments, on summation, regarding credibility of a prosecution witness were fair response to defense counsel's summation, and did not exceed the bounds of legitimate advocacy; defense counsel's summation put into issue the witness's character and credibility. People v. Thomas, 158 A.D.3d 1135, 70 N.Y.S.3d 695 (4th Dep't 2018).

Prosecutor did not improperly vouch for credibility of the prosecution witnesses in prosecution for third-degree rape, forcible touching, and endangering the welfare of a child; prosecutor's attempts to persuade the jurors as to credibility of the victims and their accounts constituted fair comment on the evidence and fair response to the summation of defense counsel. People v. Lewis, 154 A.D.3d 1329, 63 N.Y.S.3d 156 (4th Dep't 2017).

Prosecutor's statement during summation that complainant had no motive to lie was fair response to defense counsel's argument in summation that "any little thing could set a kid off" based upon small or big grievances, and thus statement did not deprive defendant of fair trial, in prosecution for attempted rape in the first degree, sexual abuse in the first degree, and endangering the welfare of a child. U.S.C.A. Const.Amend. 6. People v. Gurdon, 153 A.D.3d 1430, 61 N.Y.S.3d 333 (2d Dep't 2017).

Prosecutor did not improperly vouch for credibility of confidential informant by stating that the jury "saw that she was open about the questions that were asked of her," where, in making such statement, the prosecutor repeatedly emphasized to the jurors that they were the judges of credibility and that the issue of the informant's credibility was left to them to decide. People v. Casanova, 152 A.D.3d 875, 60 N.Y.S.3d 503 (3d Dep't 2017), leave to appeal denied (N.Y. Sept. 13, 2017) and leave to appeal denied (N.Y. Sept. 13, 2017).

Prosecutor did not improperly vouch for credibility of prosecution witness on summation, and thus defendant was not deprived of fair trial in prosecution for criminal possession of a forged instrument in the second degree and offering a false instrument for filing in the first degree; prosecutor's remarks were fair response to defense counsel's summation, as defense counsel's entire summation was an attack on credibility of prosecution witness. People v. Womack, 151 A.D.3d 1754, 57 N.Y.S.3d 301 (4th Dep't 2017).

Prosecutor's remark during summation for jurors to consider victim's testimony as if it came from friend in casual conversation was permissible rhetoric, in defendant's trial on charges of grand larceny in the fourth degree, criminal contempt in the first degree, criminal contempt in the second degree, and tampering with a witness in the fourth degree, since remark did not vouch for witness. People v. Brown, 149 A.D.3d 584, 53 N.Y.S.3d 626 (1st Dep't 2017).

Prosecutor's attempts to persuade the jurors as to the credibility of the victim and her account constituted fair comment on the evidence and fair response to summation of defense counsel in trial in which sexual abuse in the first degree was alleged. McKinney's Penal Law § 130.65(4). People v. Redfield, 144 A.D.3d 1548, 41 N.Y.S.3d 632 (4th Dep't 2016).

Prosecutor's summation remarks regarding credibility of the People's witnesses and robbery defendant were permissible; defendant attacked the credibility of police witnesses in his summation, permitting prosecutor to respond, prosecutor expressed no personal opinion regarding officers' veracity, and issue of defendant's credibility was central to trial. People v. Morrow, 143 A.D.3d 919, 39 N.Y.S.3d 232 (2d Dep't 2016).

Prosecutor's summation, emphasizing the 14-year-old complainant's youth and vulnerability and the ordeal experienced by such a person in being required to speak publicly before strangers about an experience that had embarrassed and traumatized him, and in being subject to an attack on his integrity in terms of truth telling, even on his sexuality, was entirely responsive to defense counsel's closing argument attacking complainant's credibility, in prosecution alleging that defendant groped complainant's buttocks and penis at public library, and thus, defendant could not complain, even if the remarks, considered out of context, might be objectionable. People v. McCray, 53 Misc. 3d 19, 38 N.Y.S.3d 682 (App. Term 2016).

[END OF SUPPLEMENT]

Footnotes

1 People v. Smith, 288 A.D.2d 496, 733 N.Y.S.2d 237 (2d Dep't 2001); People v. Robinson, 260 A.D.2d 508, 689 N.Y.S.2d 163 (2d Dep't 1999); People v. Walters, 251 A.D.2d 433, 674 N.Y.S.2d 114 (2d Dep't 1998); People v. Overlee, 236 A.D.2d 133, 666 N.Y.S.2d 572 (1st Dep't 1997).

A prosecutor engaged in misconduct during his summation by repeatedly vouching for the credibility of the prosecution's witnesses, stating that they were "credible and accurate," and telling the jury that one witness "told you the truth," while the other "told you exactly how it happened." People v. Brown, 26 A.D.3d 392, 812 N.Y.S.2d 561 (2d Dep't 2006).

2 People v. Bryant, 77 A.D.2d 603, 430 N.Y.S.2d 101 (2d Dep't 1980) (informant).

3 People v. Carter, 40 N.Y.2d 933, 389 N.Y.S.2d 835, 358 N.E.2d 517 (1976).

4 People v. Silva, 66 A.D.2d 662, 410 N.Y.S.2d 828 (1st Dep't 1978).

5 People v. Whitehurst, 70 A.D.3d 1057, 895 N.Y.S.2d 523 (2d Dep't 2010).

6 People v. Spence, 92 A.D.3d 905, 938 N.Y.S.2d 622 (2d Dep't 2012).

7 People v. Moye, 52 A.D.3d 1, 857 N.Y.S.2d 126 (1st Dep't 2008), order aff'd, 12 N.Y.3d 743, 879 N.Y.S.2d 354, 907 N.E.2d 267 (2009).

8 People v. Melendez, 31 A.D.3d 186, 815 N.Y.S.2d 551 (1st Dep't 2006); People v. Ruiz, 8 A.D.3d 831, 778 N.Y.S.2d 559 (3d Dep't 2004); People v. West, 4 A.D.3d 791, 772 N.Y.S.2d 166 (4th Dep't 2004); People v. Miller, 239 A.D.2d 787, 658 N.Y.S.2d 482 (3d Dep't 1997), order aff'd, 91 N.Y.2d 372, 670 N.Y.S.2d 978, 694 N.E.2d 61 (1998); People v. Bolden, 216 A.D.2d 45, 627 N.Y.S.2d 660 (1st Dep't 1995).

A prosecutor's comments to the effect that the complainant and the arresting officer have no motive to lie do not constitute vouching where they are a fair response to comments of defense counsel characterizing the complainant's testimony as a fabrication. People v. Rodriguez, 159 A.D.2d 356, 552 N.Y.S.2d 634 (1st Dep't 1990); People v. Miller, 143 A.D.2d 1055, 533 N.Y.S.2d 756 (2d Dep't 1988).

9 People v. Ielfield, 132 A.D.3d 1298, 18 N.Y.S.3d 229 (4th Dep't 2015); People v. Moore, 92 A.D.3d 575, 938 N.Y.S.2d 552 (1st Dep't 2012); People v. Liggins, 49 Misc. 3d 650, 12 N.Y.S.3d 533 (Sup 2015) (prosecutor's comments relating to the complainant's lack of a motive to lie).

10 People v. Walker, 117 A.D.3d 1441, 986 N.Y.S.2d 284 (4th Dep't 2014), leave to appeal denied, 23 N.Y.3d 1044, 993 N.Y.S.2d 258, 17 N.E.3d 513 (2014) and leave to appeal denied, 23 N.Y.3d 1042, 993 N.Y.S.2d 256, 17 N.E.3d 511 (2014).

11 People v. Draksin, 145 A.D.2d 500, 535 N.Y.S.2d 439 (2d Dep't 1988).

Although the prosecutor improperly vouched for the credibility of a confidential police informant once during his summation, the conduct was not so egregious as to deny the defendant a fair trial. People v. Weaver, 118 A.D.3d 1270, 988 N.Y.S.2d 346 (4th Dep't 2014), leave to appeal denied, 24 N.Y.3d 965, 996 N.Y.S.2d 225, 20 N.E.3d 1005 (2014).

12 People v. Howard, 129 A.D.3d 1469, 12 N.Y.S.3d 404 (4th Dep't 2015), leave to appeal denied, 26 N.Y.3d 968, 18 N.Y.S.3d 605, 40 N.E.3d 583 (2015).

13 People v. Heiserman, 127 A.D.3d 1422, 7 N.Y.S.3d 653 (3d Dep't 2015).

14 People v. LaPorte, 306 A.D.2d 93, 762 N.Y.S.2d 55 (1st Dep't 2003).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2728

New York Jurisprudence, Second Edition May 2022 Update

Criminal Law: Procedure
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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2728. Reference in prosecutor's summation to matters not in evidence, or otherwise irrelevant

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2071 to 2073

A.L.R. Library

- Attorney's argument as to evidence previously ruled inadmissible as contempt, 82 A.L.R.4th 886
- Propriety and prejudicial effect of prosecutor's argument giving jury impression that judge believes defendant guilty, 90 A.L.R.3d 822

- Propriety and prejudicial effect of prosecuting attorney's arguing new matter or points in his closing summation in criminal case, 26 A.L.R.3d 1409

Treatises and Practice Aids

- Criminal Procedure in New York, Revised Edition § 46:13 (Matters not in evidence)

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§ 32 (Excluded evidence)

During summation, the prosecution may not refer to matters not in evidence, or call on the jury to draw conclusions which are not fairly inferable from the evidence. [1] For instance, the prosecution may not try to convey to the jury, by insinuation, suggestion or speculation, the impression that the defendant is guilty of other crimes not in issue at the trial, [2] or that there may have been additional evidence, not admitted at trial, that would support a guilty verdict. [3] Neither may the prosecutor's argument be based upon testimony that has been excluded. [4] Such errors may be particularly damaging, and, thus, not capable of being found harmless, where the evidence of the defendant's guilt is not overwhelming. [5]

Illustrations:

The prosecutor improperly encouraged inferences of guilt based on facts not in evidence in a child abuse prosecution by referring during summation to the child victims' prior consistent statements, where no such statements had been admitted in evidence because there had been no claim of recent fabrication. [6]

The prosecutor's comment on summation, in a prosecution for criminal sexual act in the third degree, that the defense's only witness was an accused child molester, had no basis in the record, in light of the witness's unequivocal testimony that he had not sexually abused two young boys and had never been accused of doing so, and thus the comment was improper. [7]

The defendant's right to a fair trial was infringed when the People were allowed to refer during summation to the specific contents of the defendant's cellular telephone, which included logs of incoming and outgoing calls, none of which was introduced into evidence at trial. When seeking to admit the telephone itself into evidence, the People had indicated that it would be operated for the purpose of displaying pictures of the defendant, apparently to prove that the telephone belonged to him; the defendant maintained throughout the trial, including during his own testimony, that he was not the person who fled from the officers; his theory of the case hinged in part on his contention that he could not have dropped the telephone on the date that the cocaine underlying the charges against him was seized, because the officers had seized the phone three days before; his defense would have been undermined if the jury attributed to the defendant any of the calls made from his telephone during the intervening three-day period; and defense counsel did not open the door to this evidence by his comment during summation that the People had not introduced the contents of the telephone into evidence. [8]

The summation must stay within the four corners of the evidence and irrelevant comments that have no bearing on any legitimate issue in the case be avoided. [9] The prosecution should not seek to lead the jury away from the issues by drawing irrelevant and inflammatory conclusions that tend to prejudice the jury against the defendant. [10] Thus, reversal of a manslaughter conviction was warranted by the prosecutor's repeatedly arguing during his summation that the four prosecution witnesses who were inside a produce store when the shooting occurred were reluctant to testify against the defendant, and implying that he had threatened them; these comments were not within the four corners of the evidence, and were highly prejudicial. [11]

A prosecutor's minor misstatement in summation does not deprive the defendant of a fair trial. [12]

CUMULATIVE SUPPLEMENT

Cases:

Prosecutor may not refer to matters not in evidence or call upon jury to draw conclusions which are not fairly inferable from the evidence. People v. Anderson, 29 N.Y.3d 69, 52 N.Y.S.3d 256, 74 N.E.3d 639 (2017).

Defendant was deprived of his right to fair trial due to prosecutor's improper and prejudicial comments during summation; prosecutor improperly suggested that jury should disregard the grand jury testimony of one of the People's main witnesses and invited the jury to speculate that a missing witness would have given supporting testimony if he had been called to testify, the credibility of the People's witness was crucial to the case against this defendant, and the evidence against defendant was not overwhelming. People v. Ramirez, 180 A.D.3d 811, 117 N.Y.S.3d 696 (2d Dep't 2020).

Prosecutor's statements made during summation, that "defendant's DNA was on the safety of that gun" and that "the science finds him guilty," constituted prosecutorial misconduct, which deprived defendant of his right to a fair trial and required reversal of convictions, in prosecution for murder in the second degree and criminal possession of a weapon in the second degree; prosecutor's comments were overstatements and misrepresentations of statistical comparison testified to by the People's expert who performed DNA analysis of swab taken from safety of the murder weapon, and even though prosecutor was entitled to fair comments on the DNA evidence, she was not entitled to present results in manner that was contrary to evidence and science. People v. Powell, 165 A.D.3d 842, 84 N.Y.S.3d 563 (2d Dep't 2018).

Defendant was not deprived of a fair trial by prosecutor's reference, in his opening statement, to a witness who ultimately did not testify; defendant did not establish either bad faith on the People's part or undue prejudice, and he abandoned his request for a curative instruction and only requested the drastic remedy of a mistrial. People v. Miles, 157 A.D.3d 641, 70 N.Y.S.3d 189 (1st Dep't 2018).

Prosecutor engaged in misconduct that had a decided tendency to prejudice the jury against defendant, warranting a new trial on rape and other charges, where, during closing statement, prosecutor repeatedly appealed to the jury's sympathy, asked the jury to do justice and protect the victim by convicting defendant, bolstered the victim's credibility, and injected her personal opinions into the trial, including by arguing that the jury should reject defendant's testimony that he confessed falsely to the police because he needed to use the bathroom, based on her opinion that she would sit in her own urine rather than falsely admit that she committed a crime. People v. Case, 150 A.D.3d 1634, 54 N.Y.S.3d 475 (4th Dep't 2017).

Any mischaracterization of the evidence by the prosecutor on summation did not constitute prosecutorial misconduct as would deny defendant fair trial; prosecutor's statement on summation was isolated, and the court's instructions during the jury charge ameliorated any prejudice to defendant. U.S.C.A. Const.Amend. 6. People v. Morgan, 148 A.D.3d 1590, 50 N.Y.S.3d 699 (4th Dep't 2017).

Isolated error during prosecutor's summation, in referring to a gun when posing the rhetorical question, "In what world can a person get pushed, take out a gun or a knife or some other weapon and then use it on the person who pushed them?" did not warrant reversal of defendant's conviction for first-degree assault, relating to an incident in which the only weapon was a knife. People v. Villalona, 145 A.D.3d 625, 46 N.Y.S.3d 7 (1st Dep't 2016).

[END OF SUPPLEMENT]

Footnotes

1 People v. Ashwal, 39 N.Y.2d 105, 383 N.Y.S.2d 204, 347 N.E.2d 564 (1976); People v. Collins, 12 A.D.3d 33, 784 N.Y.S.2d 489 (1st Dep't 2004); People v. Miller, 149 A.D.2d 439, 539 N.Y.S.2d 782 (2d Dep't 1989); People v. McCloskey, 92 A.D.2d 672, 460 N.Y.S.2d 177 (3d Dep't 1983).

It was improper to allow the prosecutor to state that the complainants had testified that the defendant pistol-whipped them when they actually testified that the defendant was not one of their attackers. People v. Pavao, 59 N.Y.2d 282, 464 N.Y.S.2d 458, 451 N.E.2d 216 (1983).

2 People v. Nelson, 90 A.D.3d 954, 935 N.Y.S.2d 133 (2d Dep't 2011).

3 People v. Slide, 76 A.D.3d 1106, 908 N.Y.S.2d 414 (2d Dep't 2010).

4 People v. Lane, 10 N.Y.2d 347, 223 N.Y.S.2d 197, 179 N.E.2d 339 (1961).

A prosecutor's repeated references to tape recordings of the defendant and another individual, which had been excluded by the court as unclear, and the prosecutor's reference in his summation to such recordings as "a third witness," deprived the defendant of a fair trial. People v. Rosenfeld, 11 N.Y.2d 290, 229 N.Y.S.2d 360, 183 N.E.2d 656 (1962).

5 People v. Lyking, 147 A.D.2d 504, 537 N.Y.S.2d 314 (2d Dep't 1989).

As to harmless error and overwhelming evidence of guilt, see § 2736.

6 People v. Fisher, 18 N.Y.3d 964, 944 N.Y.S.2d 453, 967 N.E.2d 676 (2012).

7 People v. Lebovits, 94 A.D.3d 1146, 942 N.Y.S.2d 638 (2d Dep't 2012).

8 People v. Francis, 58 A.D.3d 1015, 872 N.Y.S.2d 588 (3d Dep't 2009).

9 People v. Ashwal, 39 N.Y.2d 105, 383 N.Y.S.2d 204, 347 N.E.2d 564 (1976); People v. Spruill, 110 A.D.2d 981, 488 N.Y.S.2d 114 (3d Dep't 1985).

10 People v. Ashwal, 39 N.Y.2d 105, 383 N.Y.S.2d 204, 347 N.E.2d 564 (1976).

As to inflammatory argument in summation, generally, see § 2731.

11 People v. Facciolo, 288 A.D.2d 392, 734 N.Y.S.2d 179 (2d Dep't 2001).

12 People v. Thomas, 131 A.D.3d 712, 15 N.Y.S.3d 221 (2d Dep't 2015), leave to appeal denied, 26 N.Y.3d 1043, 22 N.Y.S.3d 172, 43 N.E.3d 382 (2015) (misstatement as to the type of vehicle involved in an accident with the defendant).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2729

New York Jurisprudence, Second Edition | May 2022 Update

Criminal Law: Procedure
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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2729. Mischaracterization or denigration of defendant during prosecutor's summation

Topic Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2071 to 2073

A.L.R. Library

- Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases, 88 A.L.R.4th 209
- Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases, 88 A.L.R.4th 8
- Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases, 70 A.L.R.4th 664

- Prejudicial effect of prosecutor's reference in argument to homosexual acts or tendencies of accused which are not material to his commission of offense charged, 54 A.L.R.3d 897

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§ 34.5 (Character of defendant)

A prosecutor's statements in summation exceed the bounds of legitimate advocacy where the prosecutor engages in any personal abuse or vilification of the defendant. [1] Thus, for example, the prosecutor may not improperly attack the defendant's lifestyle, [2] state that the defendant is trying to con the jury, [3] or continually call the defendant a liar, as by stating that the defendant's testimony is a fabrication concocted after hearing the People's witnesses. [4] On the other hand, such errors may be found harmless where the evidence of guilt is overwhelming, [5] or the court has provided curative instructions, which the jury is presumed to have followed. [6]

Illustrations:

The defendant was deprived of a fair trial on charges of robbery, kidnapping, and assault by references to his nickname, "Killer," made by the prosecutor five times during summation; the references to defendant's nickname were highly prejudicial and had minimal, if any, probative value, and the prosecutor's comment that there was a reason for the nickname improperly urged the jurors to consider defendant's nickname as evidence that he had committed murder. [7]

Likewise, the prosecutor's use, during summation, of the defendant's nicknames "Crim" and "Criminal" was harmless, inasmuch as the evidence of defendant's guilt was overwhelming and there was no significant probability that the defendant would have been acquitted but for the alleged error, especially in light of the court's instruction to the jury that evidence concerning the defendant's nicknames was competent only for establishing the defendant's identity. [8]

A prosecutor's improper remarks during summation relating to the defendant's tattoos, which depicted, among other things, a smoking gun, bullets, and the words "gangster life," deprived the defendant of fair trial, in a prosecution for criminal possession of a weapon; since there was no evidence from any eyewitness that the person seen at the crime scene had tattoos, the only possible purpose of the comments would have been to improperly argue that it was more likely that the defendant had committed crime because of his bad character, which the prosecutor constructed for the jury from the violent nature of the tattoos. [9]

However, the prosecutor's reference to a sexual abuse defendant as a "vicious dog" during summation was a fair response to defense counsel's statements, made during jury selection and summation, implying that the victim was not credible; counsel's statements were to the effect that a person who had been bitten by a vicious dog would not return to the home of that dog and would defend himself or herself when attacked by the dog. [10]

Likewise, the prosecutor's comments insinuating that a murder defendant had intimidated witnesses or potential witnesses did not deprive the defendant of a fair trial, as the comments were relevant to the issues raised at trial and the defendant's recorded conversations permitted a reasonable inference that he was involved in witness intimidation. [11]

CUMULATIVE SUPPLEMENT

Cases:

Any error in prosecution's reference in opening statement to expected testimony of non-appearing, alleged victim was harmless in prosecution for sex trafficking, promoting prostitution in the second and third degrees, and endangering the welfare of a child; the reference would only have affected the sex trafficking charge, which Appellate Division dismissed. People v. Hayes, 180 A.D.3d 423, 118 N.Y.S.3d 621 (1st Dep't 2020).

[END OF SUPPLEMENT]

Footnotes

1 People v. Rivera, 116 A.D.2d 371, 501 N.Y.S.2d 817 (1st Dep't 1986).

2 People v. Moore, 26 A.D.2d 902, 274 N.Y.S.2d 518 (4th Dep't 1966) (wherein the defendant was a welfare recipient).

3 People v. Fogel, 97 A.D.2d 445, 467 N.Y.S.2d 411 (2d Dep't 1983).

4 People v. Whalen, 59 N.Y.2d 273, 464 N.Y.S.2d 454, 451 N.E.2d 212 (1983); People v. Skinner, 298 A.D.2d 625, 747 N.Y.S.2d 857 (3d Dep't 2002); People v. Chislum, 244 A.D.2d 944, 665 N.Y.S.2d 183 (4th Dep't 1997); People v. Jackson, 143 A.D.2d 363, 532 N.Y.S.2d 303 (2d Dep't 1988).

Remarks during summation in which a prosecutor described the defendant's testimony as "continued lies on top of lies, on top of lies," and "tales and lies, back and forth, back and forth," exceeded the boundaries of appropriate advocacy. People v. Walters, 251 A.D.2d 433, 674 N.Y.S.2d 114 (2d Dep't 1998).

The defendant was deprived of a fair trial by the prosecutor's repeated attempts on cross-examination and summation to characterize the defendant as a liar, and to compel the defendant to characterize the complainant as a liar, where such conduct was critical to the outcome of the case, in that the key issue was the relative credibility of the defendant and the complainant. People v. Kim, 209 A.D.2d 167, 617 N.Y.S.2d 748 (1st Dep't 1994).

5 People v. Clausell, 223 A.D.2d 598, 636 N.Y.S.2d 823 (2d Dep't 1996); People v. Brown, 223 A.D.2d 597, 636 N.Y.S.2d 821 (2d Dep't 1996).

The prosecutor improperly labeled the defendant as a coward during closing argument; however, reversal of the conviction was not warranted in light of the overwhelming evidence of guilt. People v. Johnson, 212 A.D.2d 362, 622 N.Y.S.2d 245 (1st Dep't 1995).

As to harmless error and overwhelming evidence of guilt, see § 2736.

6 People v. Chapin, 265 A.D.2d 738, 697 N.Y.S.2d 713 (3d Dep't 1999); People v. Melendez, 211 A.D.2d 436, 621 N.Y.S.2d 56 (1st Dep't 1995).

As to curative instructions regarding remarks made in summation, see § 2737.

7 People v. Collier, 114 A.D.3d 1136, 979 N.Y.S.2d 726 (4th Dep't 2014).

8 People v. Tolliver, 93 A.D.3d 1150, 940 N.Y.S.2d 398 (4th Dep't 2012).

9 People v. Spence, 92 A.D.3d 905, 938 N.Y.S.2d 622 (2d Dep't 2012).

10 People v. Kessler, 122 A.D.3d 1402, 996 N.Y.S.2d 836 (4th Dep't 2014), leave to appeal denied, 25 N.Y.3d 990, 10 N.Y.S.3d 533, 32 N.E.3d 970 (2015) and leave to appeal denied (N.Y. Apr. 7, 2015).

11 People v. DeJesus, 105 A.D.3d 476, 963 N.Y.S.2d 91 (1st Dep't 2013), leave to appeal granted, 22 N.Y.3d 1198, 986 N.Y.S.2d 418, 9 N.E.3d 913 (2014) and order aff'd, 25 N.Y.3d 77, 7 N.Y.S.3d 246, 30 N.E.3d 137 (2015).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2730

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Criminal Law: Procedure
Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Elizabeth M. Bosek, J.D.; Paul M. Coltoff, J.D.; Christine M. G. Davis, J.D., LL.M.; Laura Hunter Dietz, J.D.; John J. Dvorske, J.D., M.A.; Romualdo P. Eclavea, J.D.; Tracy Bateman Farrell, J.D.; Mary Therese K. Fitzgerald, J.D.; Thomas M. Fleming, J.D.; John A. Gebauer, J.D.; Stephanie A. Giggetts, J.D.; John Glenn, J.D.; Lonnie E. Griffith, Jr., J.D.; Glenda K. Harnad, J.D.; Tammy E. Hinshaw, J.D.; Michele Hughes, J.D.; Rachel M. Kane, M.A., J.D.; Michele Meyer McCarthy, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Judith Nichter Morris, J.D.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Charles J. Nagy, J.D.; Karl Oakes, J.D.; Jeanne Philbin, J.D.; Mark T. Roohk, J.D.; Caralyn M. Ross J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; Kimberly C. Simmons, J.D.; Thomas Smith, J.D.; Eric C. Surette, J.D.; Susan L. Thomas, J.D.; Mary Ellen West, J.D.; Eileen Wierzbicki, J.D.; Elizabeth Williams, J.D.; Brenda Williamson, J.D.; Lisa A. Zakolski, J.D; Judy E. Zelin, J.D.; and Stephanie Zeller, J.D.

§ 2730. Denigration of defense and defense counsel in prosecution summation

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2073

A.L.R. Library

- Criticism or disparagement of attorney's character, competence, or conduct as defamation, 46 A.L.R.4th 326
- Propriety and effect of attack on opposing counsel during trial of a criminal case, 99 A.L.R.2d 508

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§ 53 (Limiting attacks on defense counsel)

It is improper for a prosecutor in his or her summation to denigrate the defense and defense counsel [1] make unnecessary attacks on defense counsel, [2] knowingly mischaracterize the defense, [3] or assert that the defense is a trick. [4] Thus, for instance, a prosecutor's comments on summation analogizing defense counsel to a magician performing magic tricks is improper. [5]

Illustrations:

A new trial was required where the prosecutor improperly denigrated the defense by repeatedly likening it to a Hollywood story and characterizing it as "ridiculous" and "absurd," and also improperly attacked defense counsel's credibility by accusing him of withholding the truth from the jury. [6]

The prosecutor, at summation in a prosecution for first-degree attempted sexual abuse and endangering the welfare of a child, engaged in what amounted to an improper personal attack on defense counsel, when the prosecutor remarked that he was beginning to question whether he would have wanted his own children alongside the defendant's attorney. [7]

The prosecutor's remarks during summation were not a fair response to defense counsel's summation and thus denied the defendant a fair trial, where the evidence against the defendant was not overwhelming; the prosecutor impugned defense counsel's integrity, ridiculed the defense theory as mumbo jumbo, and warned the jurors several times in so many words that defense counsel was manipulating them and trying to prevent them from using their common sense. [8]

However, a prosecutor's improper denigration of defense counsel does not require reversal of a conviction if the prosecutor's remarks are not such as to deprive the defendant of a fair trial. [9] Any prejudice that might result from the prosecutor's improper denigration of defense counsel may also be alleviated by the trial court's prompt curative instructions to the jury, directing that the jury disregard the prosecutor's remarks and explaining why the remarks were improper. [10]

Illustration:

The prosecutor's reference to defendant and defense counsel as "sharks," together with comments during summation that the jurors would "see a lot of sharks" during trial, that sharks "sitting on that side of the Courtroom" did not "take witness stand" like prosecution witnesses did "and tell you the truth," did not warrant a mistrial; although the trial court should have instructed jury about defendant's right not to testify, the court issued a curative instruction for the jury to disregard the prosecutor's "comment that there's two sharks sitting over there" that did not take the witness stand, and that "obviously [defense counsel] doesn't have to testify," because "[h]e is not a witness in this case," and the comments were not so egregious as to deny the defendant a fair trial. [11]

CUMULATIVE SUPPLEMENT

Cases:

Although prosecutor's remark in summation, that defense counsel was "championing the art of deception," was better off left unsaid, it did not deprive defendant of a fair trial; County Court sustained defendant's objection to the remark and reminded prosecutor that he could comment on the evidence and not defense counsel, and defendant did not request any additional curative instructions. People v. Deshane, 160 A.D.3d 1216, 74 N.Y.S.3d 418 (3d Dep't 2018).

Prosecutor's statement during summation, that an argument made by defense counsel was "offensive," came within the broad latitude afforded to attorneys on summation, in prosecution for first-degree assault. People v. Villalona, 145 A.D.3d 625, 46 N.Y.S.3d 7 (1st Dep't 2016).

[END OF SUPPLEMENT]

Footnotes

1 People v. Morgan, 111 A.D.3d 1254, 974 N.Y.S.2d 687 (4th Dep't 2013).

2 People v. Damon, 24 N.Y.2d 256, 299 N.Y.S.2d 830, 247 N.E.2d 651 (1969); People v. Jenkins, 104 A.D.2d 563, 479 N.Y.S.2d 270 (2d Dep't 1984).

3 People v. Miller, 149 A.D.2d 439, 539 N.Y.S.2d 782 (2d Dep't 1989).

4 People v. Westfall, 95 A.D.2d 581, 469 N.Y.S.2d 162 (3d Dep't 1983); People v. Etheridge, 71 A.D.2d 861, 419 N.Y.S.2d 188 (2d Dep't 1979); People v. Rogers, 59 A.D.2d 916, 399 N.Y.S.2d 151 (2d Dep't 1977).

Viewed in the context of the entire summation, the prosecutor's statements to the effect that the defense was contrived did not have a decided tendency to prejudice the jury, and thus, the statements did not deprive the defendant of a fair trial. People v. Alexander, 255 A.D.2d 708, 681 N.Y.S.2d 109 (3d Dep't 1998).

5 People v. Torres, 171 A.D.2d 425, 567 N.Y.S.2d 5 (1st Dep't 1991).

6 People v. Gordon, 50 A.D.3d 821, 855 N.Y.S.2d 617 (2d Dep't 2008).

7 People v. Spruill, 5 A.D.3d 318, 775 N.Y.S.2d 249 (1st Dep't 2004).

8 People v. LaPorte, 306 A.D.2d 93, 762 N.Y.S.2d 55 (1st Dep't 2003).

9 People v. Miller, 104 A.D.3d 1223, 960 N.Y.S.2d 584 (4th Dep't 2013) (holding that the prosecutor's statement that defense counsel was trying to "divert [the jury's] attention away from the truth" did not deprive the defendant of a fair trial).

The prosecutor's comment that it was defense counsel's job to call the People's main witnesses "liars" was an isolated inflammatory remark that did not require reversal. People v. Peters, 98 A.D.3d 587, 949 N.Y.S.2d 491 (2d Dep't 2012).

10 People v. Sheehan, 105 A.D.3d 873, 963 N.Y.S.2d 309 (2d Dep't 2013).

As to curative instructions regarding summation, generally, see § 2737.

11 People v. Coles, 105 A.D.3d 1360, 966 N.Y.S.2d 288 (4th Dep't 2013).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2731

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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2731. Inflammatory argument in prosecution summation; appeal to jurors' emotions or sense of duty

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2073, 2157

A.L.R. Library

- Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases, 70 A.L.R.4th 664

- Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 A.L.R.3d 8

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§§ 52 to 55 (Avoiding Inflammatory Remarks)

A defendant may be deprived of a fair trial where the summation of the prosecution is inflammatory and incapable, because of the prosecution's disregard of its rulings, of control by the court. [1] A summation is inflammatory, for instance, where the defendant is portrayed as undesirable and is depicted as maintaining his or her power within the community by intimidation and force. [2]

Illustrations:

The prosecutor in a burglary trial made an improper appeal to the sympathy of the jury during summation, where the prosecutor stated that there were "100 Pakistani men who were supporters of the defendants" and that those men were "glaring" at the complainant while he gave his testimony, that the complainant was "taunted" and "mocked" by three defense attorneys during cross-examination, and that the jury "saw what happened during cross-examination," specifically, that it "saw what [the complainant] went through on the witness stand and I'm going to ask when you go back in the jury room to treat [the complainant] with dignity." [3]

The prosecutor's comments during a robbery trial summation that the presumption of innocence was "gone" or "vanished," that the defendant had a "lot of rights," but the jury should consider the victims' rights, and that the defendant's guilt could be inferred by the fact that he had a lawyer at the time he surrendered to the police, were clearly improper. [4]

The prosecutor improperly deflected the jurors' attention from issues of fact on the question of guilt or innocence to that of achieving vengeance and the protection of the community, in a prosecution for third-degree criminal sale of a controlled substance arising from a single drug sale to an undercover police officer for which the defendant apparently earned $5, where the prosecutor, without any evidentiary basis, suggested during summation that the defendant was a major drug dealer who was "paid handsomely" for her crimes, and the prosecutor repeatedly elicited irrelevant and prejudicial testimony concerning the neighborhood in which the sale occurred, including the location of the nearest church and school and whether there were children in the school yard. [5]

It is likewise improper for a prosecutor to tell the jurors, in effect, that their deliberations should be controlled by the moral law that "Thou shalt not kill," as such an appeal might well persuade one or more jurors that, if the question of guilt is close, there is nevertheless an imperative, supervening law that demands satisfaction. [6] For example, a prosecutor in summation goes beyond the permissible point of asking the jury to disbelieve an adulterous defendant, and turns the defendant's admitted acts of adultery into the equivalence of guilt of violation of the 10 Commandments, moral offenses for which the defendant is not on trial. [7] A prosecutor may not make inflammatory "fire and brimstone" speeches, especially where the prosecutor aligns himself or herself with the jury and the forces of good against the defendant and the forces of evil. [8]

Furthermore, the argument of the prosecutor may not appeal to the fears and emotions of the jurors. [9] The prosecutor's urging the jury to evaluate the testimony of the complainant as they would have wished the testimony of a close relative to be evaluated by another jury is similarly improper summation. [10]

Illustrations:

The prosecutor improperly warned the jury, in closing at a trial for course of sexual conduct against a child and sexual abuse, not to fall into the same trap that the social services department had fallen into, whereby the victim got lost in the system; this appeal to emotion tended to deflect the jurors' attention from issues of fact on the question of guilt or innocence. [11]

The prosecutor's remarks during summation, that a sodomy victim was "so cute" and the "most conscientious, respectful kid she had ever seen" improperly appealed to the jury's sympathy. [12]

The portion of the prosecutor's summation in which the prosecutor suggested that inconsistencies in the prosecution witnesses' testimony had resulted from their fears, and related those witnesses' fears to those of certain prospective jurors who were familiar with the neighborhood where the murder in question took place and had sought to be excused on voir dire, tended to appeal to the jury's fears and emotions and amounted to misconduct. [13]

The prosecutor's extended references and analogies at the outset of his summation to the September 11 terrorist attacks, which occurred only a week prior to the defendant's burglary trial, constituted an improper appeal to the jurors' fears. [14]

On the other hand, the remarks of the prosecutor may not warrant the reversal of the defendant's conviction, even though the prosecutor has improperly denigrated the defense and appealed to the jurors' emotions, where there is overwhelming evidence of the defendant's guilt. [15] Neither does the prosecutor, by suggesting the jury put themselves in the complainant's shoes, appeal to the jurors' sympathy when considered along with defense counsel's attack upon the credibility of the complainant. [16] Moreover, a prosecutor's unobjected-to description of a crime as "brutal" is not inflammatory, depriving the defendant of a fair trial, where the evidence at trial shows that the complainant was choked into unconsciousness. [17]

Illustrations:

A defendant charged with drug crimes was not deprived of a fair trial due to the prosecutor's statements during summation; most of the statements challenged by the defendant were fair responses to the defense summation that attacked a confidential informant's credibility and questioned the actions taken by the informant and undercover officers, and although the prosecutor improperly referred to defendant as a "cocaine peddler" who "made money off of people with faces like" the jurors', the trial court immediately struck those remarks from the record and instructed the jury to disregard them. [18]

The prosecutor's extended references during summation to the victim and his family, continuing even after being directed by the trial court to move on, although blatantly improper emotional appeals to the jury, did not require a new trial in a felony murder prosecution, where the court instructed the jury that sympathy was not to play a role in their deliberations or verdict, and the jury engaged in lengthy deliberations and made numerous, extensive requests for testimony and additional instructions. [19]

CUMULATIVE SUPPLEMENT

Cases:

Conduct of a prosecutor was improper, in prosecution of church pastor for sexual abuse and endangering the welfare of a child, where the prosecutor attempted to arouse the sympathies of the jury during summation by referencing sexual abuse scandals involving the Catholic Church and Orthodox Jewish communities, and pointed out that prospective jurors had not felt comfortable sitting on the case because of all the priests who had gotten away with child abuse or a family member having been raped by a member of the clergy. People v. Lewis, 178 A.D.3d 952, 116 N.Y.S.3d 49 (2d Dep't 2019).

[END OF SUPPLEMENT]

Footnotes

1 People v. Damon, 24 N.Y.2d 256, 299 N.Y.S.2d 830, 247 N.E.2d 651 (1969); People v. Walters, 251 A.D.2d 433, 674 N.Y.S.2d 114 (2d Dep't 1998); People v. Ravenell, 82 A.D.2d 868, 440 N.Y.S.2d 30 (2d Dep't 1981); People v. Mordino, 58 A.D.2d 197, 396 N.Y.S.2d 737 (4th Dep't 1977).

2 People v. Walker, 66 A.D.2d 863, 411 N.Y.S.2d 377 (2d Dep't 1978).

3 People v. Mohammed, 81 A.D.3d 983, 917 N.Y.S.2d 295 (2d Dep't 2011).

4 People v. Alfaro, 260 A.D.2d 495, 688 N.Y.S.2d 567 (2d Dep't 1999).

5 People v. Davis, 256 A.D.2d 474, 683 N.Y.S.2d 276 (2d Dep't 1998).

6 People v. Fields, 27 A.D.2d 736, 277 N.Y.S.2d 21 (2d Dep't 1967).

7 People v. Canty, 31 A.D.2d 976, 299 N.Y.S.2d 524 (2d Dep't 1969).

However, the prosecutor's single improper Biblical reference during summation in a manslaughter prosecution was not so harmful as to deprive the defendant of a fair trial. People v. Adams, 267 A.D.2d 140, 701 N.Y.S.2d 22 (1st Dep't 1999).

8 People v. Johnston, 47 A.D.2d 897, 366 N.Y.S.2d 198 (2d Dep't 1975).

9 People v. DeJesus, 137 A.D.2d 761, 525 N.Y.S.2d 613 (2d Dep't 1988).

The prosecutor inappropriately appealed to the jurors' sympathy during summation when she told them, "God forbid you had a gun pointed at your side," in a prosecution for robbery and reckless endangerment. People v. Brown, 26 A.D.3d 392, 812 N.Y.S.2d 561 (2d Dep't 2006).

10 People v. Hamilton, 121 A.D.2d 176, 502 N.Y.S.2d 747 (1st Dep't 1986).

11 People v. Ballerstein, 52 A.D.3d 1192, 860 N.Y.S.2d 718 (4th Dep't 2008).

12 People v. Presha, 83 A.D.3d 1406, 919 N.Y.S.2d 713 (4th Dep't 2011).

13 People v. Gibbons, 15 A.D.3d 196, 789 N.Y.S.2d 125 (1st Dep't 2005).

14 People v. Thornton, 4 A.D.3d 561, 771 N.Y.S.2d 597 (3d Dep't 2004).

15 People v. Head, 90 A.D.3d 1157, 933 N.Y.S.2d 774 (3d Dep't 2011); People v. Reed, 136 A.D.2d 577, 523 N.Y.S.2d 569 (2d Dep't 1988).

As to harmless error and overwhelming evidence of guilt, see § 2736.

16 People v. Rodriguez, 159 A.D.2d 356, 552 N.Y.S.2d 634 (1st Dep't 1990).

17 People v. Green, 159 A.D.2d 325, 552 N.Y.S.2d 602 (1st Dep't 1990).

18 People v. Richards, 124 A.D.3d 1146, 2 N.Y.S.3d 689 (3d Dep't 2015), leave to appeal denied, 25 N.Y.3d 992, 10 N.Y.S.3d 535, 32 N.E.3d 972 (2015).

Curative instructions regarding comments made in summation are discussed generally in § 2737.

19 People v. Williamson, 267 A.D.2d 487, 699 N.Y.S.2d 749 (3d Dep't 1999).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2732

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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2732. Comment in prosecution summation designed to silence defendant

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2152

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§§ 52 to 55 (Avoiding Inflammatory Remarks)

An attempt to silence the defendant during the prosecution's summation, calculated to make the defendant's attorney appear destructive, and, thus, to turn the jury, or even one juror, against the defendant, when defendant's counsel thereafter objects to the state's summation, is highly improper. [1] It is improper, therefore, at the beginning of the state's summation, for the prosecutor to state that he or she has courteously remained silent during the defendant's summation and hopes that defendant's counsel will maintain a similar silence during the state's summation. [2]

Footnotes

1 People v. Fields, 27 A.D.2d 736, 277 N.Y.S.2d 21 (2d Dep't 1967).

2 People v. Fields, 27 A.D.2d 736, 277 N.Y.S.2d 21 (2d Dep't 1967).

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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(3) Particular Types of Comments by Prosecution

§ 2733. Other prosecutorial comments in summation

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2060, 2087, 2088, 2093

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873

Various prosecutorial comments have been considered improper where—

— the prosecutor stated in summation that every person convicted of a crime since the nation's founding had been convicted under the "beyond a reasonable doubt" standard, as the summation linked the defendant to every defendant who had been found guilty and sentenced to imprisonment, thus inviting the jury to consider his status as a defendant as evidence tending to prove his guilt, and the summation tended to minimize the jury's sense of responsibility for the verdict. [1]

— the prosecutor admonished the jury, during summation in a child abuse prosecution, that their acceptance of the testimony of the child witnesses was essential to the administration of justice. [2]

— the prosecutor, despite the court's strong rebuke and threat of sanction, and over a sustained objection, implied during summation that the defendant intentionally withheld photographs of a lineup in which he was identified from the jury and that the People had to try to get the photographs. [3]

— the prosecutor suggested, during summation, that the testimony of a child sexual abuse syndrome expert was some evidence of sexual abuse, when, in fact, it was only admissible as a tool to explain the victim's behavior, in a prosecution for sexual abuse and endangering the welfare of a child. [4]

— the prosecutor commented that the defendant, charged with multiple counts of criminal possession of a forged instrument and forgery, "needs a strong message." [5]

— the prosecutor stated in summation that the jurors should attach significance to a defendant's signing of stipulations that chemists, if called as witnesses, would testify that certain glassine envelopes they examined contained heroin, improperly suggesting that the defendant's signature acknowledged his knowing possession of heroin. [6]

Various other prosecutorial comments have not required reversal, either because the comments were improper or because the defendant was not denied a fair trial, where—

— the prosecutor's comments during summation in an assault trial suggested that the mother of the infant victim would not have put the defendant through the ordeal of the trial if the defendant had not participated in the assault, where the trial court immediately sustained the defendant's objection to the improper comments and struck them from the record. [7]

— the prosecutor referred to accomplice liability, even though the indictment charged the defendant only as a principal, as there was no legal distinction between liability as a principal or criminal culpability as an accomplice, and the court did not instruct the jury on accomplice liability. [8]

— the prosecutor's summation arguments in a homicide trial included the mention of a prior incident in which the defendant allegedly choked his wife, the homicide victim, to unconsciousness during a fight, where the trial court repeated and emphasized the limited value of evidence of marital strife and the alleged assault. [9]

— the prosecutor stated during summation that fingerprints recovered from the crime scene matched those of the burglary defendant stored with an associated identification number in the state computer system, which was not specifically identified as police-related, as the comments did not improperly convey the inference that the defendant had a past criminal history. [10]

— the prosecutor told the jury in summation that "[y]ou don't even have to leave your seats … to convict [defendant] of felony murder"; although the comment was improper and in derogation of the jury's obligation to duly deliberate upon the evidence, the defendant's right to a fair trial was not compromised thereby, where the trial court clearly instructed the jury as to its role as a factfinder and its responsibility to extend due deliberations to all the evidence presented in determining the defendant's guilt or innocence. [11]

— the prosecutor stated, during summation in a burglary prosecution, that the victim had "come alive" through the reading into the record of his testimony from the defendant's first trial, even though the court had ordered that neither side was to reveal that the victim had died, as the phrase referred to the fact that the jury had heard the testimony of an unavailable witness, and did not convey the impression that the witness was dead. [12]

— the prosecutor made an isolated remark during summation that no complaints were filed against the arresting officers. [13]

— the People made a limited reference to a definition of "serious physical injury," in order to give meaning to the facts referenced in summation in a trial for second-degree assault; the reference was not error, and, even if it were, the error was obviated when the supreme court instructed the jury that it must accept the law as given to it by the court. [14]

— the prosecutor removed a pen cap from her pen during summation, while arguing to the jury that their familiarity with such everyday objects was analogous to the testifying officer's familiarity with crack vials, since the demonstration was brief and not overly dramatic, and did not purport to replicate the officer's viewing conditions. [15]

— the defendant was convicted on the testimony of a victim who observed the defendant at close proximity for about three minutes during the robbery and who later spotted the defendant on the street and pointed him out to the police, and the prosecutor suggested in summation that the jurors could stare at one another for three minutes while they deliberated; the defendant admitted that he could not show that the jurors had engaged in an improper experiment in the jury room. [16]

CUMULATIVE SUPPLEMENT

Cases:

Prosecutor's comments in summation, that defendant's knife looked like a weapon, and its pristine condition contradicted defendant's testimony that he had possessed the knife for nine months and routinely used it in his work as a truck driver, complied with the trial court's order precluding her from arguing that the knife could be flicked open in anticipation of committing a crime, and thus did not support defendant's motion for a mistrial in prosecution for murder; prosecutor's comments did not make any reference to how the knife operated. People v. Jenkins, 127 N.Y.S.3d 82 (App. Div. 1st Dep't 2020).

Prosecutor's remark in summation that if there was a conspiracy in the grand jury, it's me too, although an improper reference to his own credibility that caused some prejudice to defendant, did not cause such substantial prejudice as to deprive defendant of due process or a fair trial in prosecution for attempted second-degree rape; comment was isolated and in context of defense counsel's summation arguments about officers' inaccurate testimony before grand jury, the trial court gave curative instruction, and, given defendant's admissions and physical evidence, resolution of the matter did not depend solely upon credibility assessments. U.S. Const. Amend. 5. People v. Sammeth, 190 A.D.3d 1112, 139 N.Y.S.3d 435 (3d Dep't 2021).

People limited their theory of burglary in their bill of particulars, which incorporated allegations of criminal complaint, to intent to commit property damage and/or theft, and thus, Supreme Court erred by permitting prosecutor to argue, during summation, and in permitting jury to consider, uncharged theory that defendant intended to assault complainant. N.Y. CPL § 200.50(7)(a). People v. Petersen, 190 A.D.3d 769, 140 N.Y.S.3d 234 (2d Dep't 2021).

Summation remark by prosecutor, to which defendant had objected on ground of its allegedly being unsupported by evidence, constituted fair comment that drew reasonable inference from record in prosecution for burglary in the second degree, attempted burglary in the second degree, and possession of burglar's tools, where defendant made generalized objections, and failed to request further relief after objections were sustained. People v. Butler, 190 A.D.3d 464, 140 N.Y.S.3d 21 (1st Dep't 2021).

Prosecutor's remark at the beginning of his summation, in prosecution for attempted kidnapping in the second degree and assault in the second degree, that he declined to object during defense counsel's summation, not because he agreed with everything that defense counsel said, but because he thought that it was important that the jury hear everything that [defense counsel] ha[d] to say, was improper; that remark implied that, if defense counsel were to object during the prosecutor's summation, then defense counsel would be trying to keep information from the jury, and was an improper attempt to discourage defense counsel from objecting during the prosecutor's summation. People v. Vick, 173 A.D.3d 1776, 102 N.Y.S.3d 841 (4th Dep't 2019).

Prosecutor's comments concerning victim's failure to testify were fair response to summation of defense counsel, in prosecution for assault in the second degree; in his summation, defense counsel informed jurors that trial had taken them into a very strange environment and that state prison was a violent, unpredictable place, and after noting absence of victim from trial, defense counsel invited jurors to speculate about why victim was not there. People v. Farrington, 171 A.D.3d 1538, 99 N.Y.S.3d 555 (4th Dep't 2019).

Trial court properly exercised its discretion in first-degree robbery prosecution by permitting prosecutor to argue that similarities among crimes warranted an inference that they were committed by same person, since pattern of crimes was sufficiently

distinctive so as to be probative of defendant's identity; there were numerous similarities among crimes as to time, location, and details of manner in which they were committed. People v. Hill, 155 A.D.3d 557, 65 N.Y.S.3d 193 (1st Dep't 2017).

Any improper reference by prosecutor to one defense witness's failure to come forward during grand jury proceedings was isolated instance that was not so misleading as to warrant reversal of convictions for criminal possession of a weapon. People v. Kaval, 154 A.D.3d 875, 63 N.Y.S.3d 411 (2d Dep't 2017).

Defendant was not deprived of fair trial by prosecutor's alleged misstatement, during summation, of law concerning knowledge element of criminal possession of stolen property in the fourth degree; remarks could not have been interpreted by jury as instruction on law, as trial court repeatedly advised jurors that it would instruct them on law and subsequently gave correct instructions on law. People v. Elder, 152 A.D.3d 787, 59 N.Y.S.3d 134 (2d Dep't 2017).

Prosecutor's misconduct during summation, in prosecution for sexual conduct against a child in the second degree, in denigrating defense counsel by saying that he intentionally attempted to confuse adolescent witness, misstating evidence with respect to whether witness had spoken with defendant regarding allegations against him, and vouching for credibility of victim's testimony did not substantially prejudice defendant's trial, as would require reversal; trial court gave curative instructions after objections it sustained, and evidence against defendant was overwhelming. McKinney's Penal Law § 130.80(1)(b). People v. Flowers, 151 A.D.3d 1843, 57 N.Y.S.3d 598 (4th Dep't 2017).

Supreme Court did not err in giving jury lunch recess during prosecutor's summation at trial for criminal possession of a weapon in the second degree; prosecutor's summation followed summations by attorneys for defendant and codefendant, and defendant did not show any prejudice resulting from recess. People v. Williams, 148 A.D.3d 620, 50 N.Y.S.3d 362 (1st Dep't 2017).

Testimony of prosecution witnesses, cross-examination of defendant by the prosecutor, and the prosecutor's comments during summation, all of which concerned the alleged failure of defendant to voluntarily turn herself in to the police after the police had prepared a "wanted package" and undertook efforts to locate her, was extremely prejudicial and deprived defendant of a fair trial, thereby requiring reversal. People v. Horton, 145 A.D.3d 1575, 43 N.Y.S.3d 654 (4th Dep't 2016).

[END OF SUPPLEMENT]

Footnotes

1 People v. Jones, 125 A.D.3d 403, 2 N.Y.S.3d 455 (1st Dep't 2015).

2 People v. Fisher, 18 N.Y.3d 964, 944 N.Y.S.2d 453, 967 N.E.2d 676 (2012).

3 People v. Calabria, 94 N.Y.2d 519, 706 N.Y.S.2d 691, 727 N.E.2d 1245 (2000).

4 People v. Barber, 13 A.D.3d 898, 787 N.Y.S.2d 424 (3d Dep't 2004).

5 People v. Burroughs, 280 A.D.2d 965, 721 N.Y.S.2d 213 (4th Dep't 2001).

6 People v. Olivero, 272 A.D.2d 174, 710 N.Y.S.2d 29 (1st Dep't 2000).

7 People v. Badalamenti, 124 A.D.3d 672, 1 N.Y.S.3d 242 (2d Dep't 2015), leave to appeal granted, 25 N.Y.3d 949, 7 N.Y.S.3d 278, 30 N.E.3d 169 (2015) and order aff'd, 2016 WL 1306683 (N.Y. 2016).

8 People v. Ettleman, 109 A.D.3d 1126, 971 N.Y.S.2d 621 (4th Dep't 2013), leave to appeal denied, 22 N.Y.3d 1198, 986 N.Y.S.2d 419, 9 N.E.3d 914 (2014).

9 People v. Bierenbaum, 301 A.D.2d 119, 748 N.Y.S.2d 563 (1st Dep't 2002) (adding that the arguments did not warrant reversal when viewed in the context of the defendant's closing statement).

10 People v. Garcia, 294 A.D.2d 515, 743 N.Y.S.2d 127 (2d Dep't 2002).

11 People v. Foss, 267 A.D.2d 505, 700 N.Y.S.2d 499 (3d Dep't 1999).

12 People v. Cordon, 261 A.D.2d 278, 691 N.Y.S.2d 390 (1st Dep't 1999).

13 People v. Diaz, 254 A.D.2d 94, 682 N.Y.S.2d 123 (1st Dep't 1998).

14 People v. Smith, 246 A.D.2d 852, 668 N.Y.S.2d 281 (3d Dep't 1998).

15 People v. Fonder, 211 A.D.2d 445, 621 N.Y.S.2d 54 (1st Dep't 1995).

16 People v. Harpton, 211 A.D.2d 642, 620 N.Y.S.2d 485 (2d Dep't 1995).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2734

New York Jurisprudence, Second Edition May 2022 Update

Criminal Law: Procedure
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§ 2734. Cumulative effect of comments in prosecution summation

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law ⚖ 2060, 2087, 2088, 2093

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873

A summation is improper where, viewed as a whole, it constitutes a flagrant or pervasive pattern of prosecutorial misconduct. [1]

Illustrations:

The cumulative effect of the prosecutor's misconduct during cross-examination of defendant and on summation deprived the defendant of a fair trial; the prosecutor improperly functioned as an unsworn witness when she cross-examined defendant regarding closing time of a restaurant, improperly suggesting facts not in evidence by implying that district attorney's office had called the restaurant to ascertain its hours of operation and asking defendant whether he testified that the traffic stop occurred at a particular time because he knew that the restaurant was not open at the time of the traffic stop, and during summation, the prosecutor again improperly implied, without having submitted any evidence about the restaurant's closing time, that the defendant had lied about what he was doing at the time of the traffic stop, made improper remarks suggesting that the defendant possessed a weapon with intent to use it to harm someone, improperly argued that the defendant had learned certain information during the pretrial hearing even though no evidence supported that assertion, and engaged in improper speculation that the defendant had committed similar offenses on multiple occasions. [2]

The cumulative effect of the prosecutor's multiple improprieties during summation, in impermissibly shifting the burden of proof from the People to the defendant and improperly vouching for the credibility of prosecution witnesses, caused such substantial prejudice to the defendant that he was denied a fair trial on drug charges. The prosecutor suggested that it was defendant's affirmative burden to present an excuse for the crimes, suggested that the defendant had been unable to establish that the confidential informant to whom the defendant allegedly sold heroin had a motive to lie, advised the jury that it would have to believe that police misconduct had occurred in order to acquit the defendant, and repeatedly described his witnesses as honest or declared that they had told the truth. Many improper remarks passed without objection or admonishment, and few curative instructions were given. [3]

A robbery defendant was deprived of a fair trial due to prosecutorial misconduct, warranting a new trial, where the prosecutor improperly characterized the People's case as "the truth" and denigrated the defense as a diversion, implied that the defendant bore the burden of proving that the complainant had motive to lie, impermissibly shifting burden of proof, repeatedly and improperly vouched for the veracity of the complainant, the only witness, and improperly appealed to the sympathies of the jury by extolling the complainant's "bravery" in calling the police and testifying against the defendant. [4]

However, the sole instance in which the prosecutor expressed his personal belief as to the credibility of a prosecution witness did not require reversal of defendant's conviction for sexual abuse in the first degree and endangering the welfare of a child, since those comments did not demonstrate a persistent egregious course of conduct that was deliberate and reprehensible and did not deprive the defendant of a fair trial. [5]

CUMULATIVE SUPPLEMENT

Cases:

Defendant was not deprived of his right to a fair trial by certain remarks during summation by prosecutor, in prosecution for robbery in the first degree and assault in the second degree; majority of prosecutor's remarks during summation constituted acceptable rhetorical comment, fair comment on the evidence, fair response to defense counsel's summation, or permissible comment on inferences to be drawn from the evidence, to the extent that some of the remarks may have been improper, they were not so flagrant or pervasive as to have deprived defendant of fair trial, and any potential prejudice was ameliorated by trial court's repeated limiting instructions that the remarks of counsel were not evidence. People v. Bianchini, 198 A.D.3d 912, 155 N.Y.S.3d 569 (2d Dep't 2021), leave to appeal denied, 2021 WL 6428205 (N.Y. 2021).

Defendant was not deprived of due process by four alleged instances of prosecutorial misconduct on summation in prosecution for sexual assault against a child, where the court effectively sustained defendant's objections to all four challenged comments,

defendant did not seek any further relief in connection with three of the four challenged comments, and any prejudice from those three comments was presumptively corrected to defendant's satisfaction. U.S. Const. Amend. 14. People v. Cutaia, 167 A.D.3d 1534, 90 N.Y.S.3d 444 (4th Dep't 2018).

Prosecutor's summation comments did not deprive defendant of a fair trial, in prosecution for attempted second-degree murder, first-degree assault, and first-degree robbery; prosecutor's remarks in summation, for the most part, constituted fair comment on the evidence and inferences to be drawn therefrom, or were fair response to defense counsel's comments during summation, and any improper statements were not so flagrant or pervasive as to deprive defendant of a fair trial. People v. Ellis, 166 A.D.3d 993, 88 N.Y.S.3d 537 (2d Dep't 2018).

When viewed in context, the prosecutor's summation comments did not treat its principal witness's grand jury testimony, which the People had used to impeach his testimony on cross-examination and redirect examination, as evidence in chief, in prosecution for first-degree manslaughter and two counts of second-degree criminal possession of a weapon. McKinney's CPL § 60.35(2). People v. Johnson, 148 A.D.3d 444, 49 N.Y.S.3d 400 (1st Dep't 2017).

[END OF SUPPLEMENT]

Footnotes

1 People v. Rivera, 124 A.D.3d 1070, 2 N.Y.S.3d 279 (3d Dep't 2015), leave to appeal denied, 26 N.Y.3d 971, 18 N.Y.S.3d 607, 40 N.E.3d 585 (2015) and leave to appeal denied, 26 N.Y.3d 971, 18 N.Y.S.3d 607, 40 N.E.3d 585 (2015); People v. Dickson, 58 A.D.3d 1016, 872 N.Y.S.2d 216 (3d Dep't 2009).

2 People v. Rowley, 127 A.D.3d 884, 7 N.Y.S.3d 338 (2d Dep't 2015).

3 People v. Casanova, 119 A.D.3d 976, 988 N.Y.S.2d 713 (3d Dep't 2014).

As to the prosecutor's shifting the burden of proof, see § 2719.

As to the prosecutor's vouching for the veracity of government witnesses, see § 2727.

As to curative instructions regarding summation, generally, see § 2737.

4 People v. Griffin, 125 A.D.3d 1509, 4 N.Y.S.3d 434 (4th Dep't 2015).

As to the prosecutor's denigration of the defense, see § 2730.

5 People v. Ielfield, 132 A.D.3d 1298, 18 N.Y.S.3d 229 (4th Dep't 2015).

34 N.Y. Jur. 2d Criminal Law: Procedure § 2735

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Criminal Law: Procedure
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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(4) Objection and Cure of Error

§ 2735. Preserving error for comments in summation; objection or motion for mistrial

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law ⚖ 2184 to 2189, 2195

A.L.R. Library

- Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error—modern cases, 32 A.L.R.4th 774

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§§ 56, 57 (Cure of Error)
- Making and Preserving the Record—Objections, 6 Am. Jur. Trials 605

Forms

- Bailey and Fishman, Complete Manual of Criminal Forms §§ 80:2, 80:3 (3d ed.) (Oral motion addressed to improper summation)

Where no objection is registered against improper remarks made in the opposing counsel's summation, the alleged errors are not preserved for review pursuant to statute, [1] and review of any claimed prosecutorial misconduct during summation is precluded. [2] A defendant fails to preserve for appellate review the argument that he or she was deprived of a fair trial by the prosecutor's comments in summation where the defense fails to object to the challenged comments, makes only general objections, or fails to request additional relief, such as a mistrial, when the trial court sustains an objection. [3] The objection requirement applies not only to the prosecutor's remarks the defendant claims were inflammatory or outside the evidence, but also to remarks the defendant claims misstated the law [4] or violated a pretrial evidentiary ruling. [5] Even where the defendant raises an objection and the court sustains it, the trial court is deemed to have corrected the error where the defendant does not request further curative instructions or move for mistrial. [6]

A defendant's objection to a prosecutor's comment during summation must be timely [7] — that is, the defendant must object to the comment at the time the prosecutor makes it. [8]

Furthermore, the objection must be to the specific statements or conduct complained of [9] and on the specific grounds raised on appeal. [10]

General objections are not sufficient. [11] Thus, an unelaborated general objection by defense counsel to the prosecutor's referring to "speculative facts" during the prosecution's summation does not alert the court to any of the specific comments of the prosecutor, and, therefore, is not sufficient to preserve the alleged prejudicial statements for appellate review. [12] Likewise, the defendant's argument that certain comments made by the prosecutor during summation have violated the defendant's rights to equal protection and due process is not preserved for review where, when the comments are made, the defendant makes only a general objection. [13]

Illustrations:

Defense counsel's general objection to the admission of audio recordings of mobile telephone messages from the defendant to the victim was insufficient to preserve for appellate review the defendant's argument that the prosecutor improperly made himself an unsworn witness by offering his personal interpretation of the messages. [14]

The defendant's motion for a mistrial following the prosecutor's summation in the guilt phase of a capital murder trial, arguing that the prosecutor sought to inflame the jury, was insufficient to preserve for appeal the defendant's arguments that the prosecutor made several improper remarks during summation. [15]

The defendant failed to preserve for appellate review his contentions that he was deprived of due process by prosecutorial misconduct during summation at his trial for burglary and attempted robbery; the defendant objected to six instances of alleged misconduct during the prosecutor's summation, the court sustained those objections and also gave curative instructions on two occasions, but defense counsel neither objected further nor requested a mistrial, and the defendant did not object to the remaining instances of alleged misconduct during summation that he challenged on appeal. [16]

However, a prosecutor's summation comments may be subject to review in the interest of justice, even if the defendant fails to object to them, where the summation is inflammatory, is not related to the issues in the case, and is not considered a fair response to defense counsel's summation. [17]

Illustrations:

The defendant's contentions, on appeal of his convictions for contempt, assault, endangering the welfare of a child, and a weapons violation, regarding improper comments by the prosecutor on summation were unpreserved for appellate review, and the Appellate Division would decline to reach them in the exercise of its interest of justice jurisdiction. [18]

Likewise, the Appellate Division declined to review, in the interest of justice, the defendant's unpreserved claim that the prosecutor improperly impeached him by way of his alleged exercise of his right to remain silent, and then improperly commented on his silence during summation. [19]

However, although the defendant's contention that he was deprived of a fair trial as result of certain instances of alleged prosecutorial misconduct during the prosecutor's cross-examination of him and during summation was largely unpreserved for appellate review, the Appellate Division nevertheless reached it in the exercise of its interest of justice jurisdiction. [20]

In light of the fact that defense counsel objected when the trial court, in a prosecution for sexual abuse, allowed the People's expert witness to define the terms "pedophile" and "sexual fetish," the Appellate Division would address issue of whether the prosecutor acted improperly in telling the jury, in summation, that the defendant fit the definition of a pedophile, even though the defendant had not objected to those remarks. [21]

CUMULATIVE SUPPLEMENT

Cases:

Defendant failed to preserve for appellate review his claim that his right to a fair trial was violated by certain remarks made by the prosecutor on summation, in prosecution of defendant for manslaughter, criminal contempt, tampering with physical

evidence, and bail jumping, where defendant either failed to object to the remarks at issue or made only a general objection, and failed to make a timely motion for a mistrial, and in any event, most of the challenged remarks constituted fair comment on the evidence and the reasonable inferences to be drawn therefrom, a fair response to the defense summation, or permissible rhetorical comment. U.S. Const. Amend. 6. People v. Rodriguez, 199 A.D.3d 838, 156 N.Y.S.3d 432 (2d Dep't 2021).

Defendant failed to preserve for appellate review contention that he was deprived of fair trial by alleged prosecutorial misconduct during prosecutor's summation in prosecution for murder in the second degree and criminal possession of a weapon in the second degree, where defendant either failed to object to remarks at issue, failed to request curative instructions or additional relief when trial court instructed prosecutor not to make certain remarks, or failed to timely move for mistrial. N.Y. CPL § 470.05(2). People v. Kiarie, 198 A.D.3d 814, 155 N.Y.S.3d 212 (2d Dep't 2021).

Defendant failed to preserve for appellate review his contention that prosecutor's summation remarks constituted reversible error, where defendant failed to object or made only general objections, failed to request curative instructions, and did not timely move for a mistrial on that ground. N.Y. CPL § 470.05(2). People v. Ogilvie, 197 A.D.3d 730, 152 N.Y.S.3d 739 (2d Dep't 2021).

Defendant failed to preserve for appellate review his contention that he was deprived of fair trial by prosecutor's comments allegedly vouching for credibility of People's witnesses, where, after trial court sustained defendant's objections to prosecutor's comments about victim's state of mind, defendant failed to request curative instructions or move for mistrial. People v. Perkins, 196 A.D.3d 1107, 151 N.Y.S.3d 583 (4th Dep't 2021).

Defendant failed to preserve for appellate review his contention that his judgment of conviction should be reversed due to prejudicial effect of People referencing him by his street name, Animal following defense counsel's summation, at trial for, inter alia, assault and criminal use of firearm, where defendant did not object to use of the name at trial. People v. Campbell, 196 A.D.3d 834, 149 N.Y.S.3d 720 (3d Dep't 2021).

Defendant failed to preserve for appellate review his contention that certain remarks made by prosecutor during summation deprived him of a fair trial, in prosecution for second-degree attempted murder, first-degree attempted assault, second-degree attempted assault, first-degree criminal use of a firearm, second-degree criminal use of a firearm, and second-degree criminal possession of a weapon, where defense counsel did not object to the challenged remarks. N.Y. CPL § 470.05(2). People v. Argueta, 194 A.D.3d 857, 149 N.Y.S.3d 104 (2d Dep't 2021), leave to appeal denied, 37 N.Y.3d 970, 150 N.Y.S.3d 680, 172 N.E.3d 792 (2021).

Defendant failed to preserve his contentions regarding alleged instances of prosecutorial misconduct during summation, in prosecution of defendant for attempted criminal sexual act in the first degree, attempted sexual abuse in the first degree, attempted criminal sexual act in the third degree, coercion in the first degree, endangering the welfare of a child and unlawfully dealing with a child in the first degree; defense counsel did not object to certain instances, made only unspecified, general objections to others alleged instances and failed to take any further actions such as requesting a curative instruction or moving for a mistrial when his objections were sustained. People v. Lewis, 192 A.D.3d 1532, 145 N.Y.S.3d 230 (4th Dep't 2021).

Defendant did not preserve for appeal his contention that he as deprived of a fair trial by prosecutorial misconduct in making certain remarks during summation, in trial for criminally negligent homicide, operating a vessel while under the influence of alcohol or drugs, endangering the welfare of a child, and unlawful possession of marihuana, where defendant failed to object to those remarks during summation. People v. Wisniewski, 191 A.D.3d 1435, 142 N.Y.S.3d 260 (4th Dep't 2021).

Defendant failed to preserve for appeal his claim that he was deprived of a fair trial based upon various actions of the prosecutor, where defendant failed to raise timely, specific objections to each instance of alleged prosecutorial misconduct. People v. Barzee, 190 A.D.3d 1016, 138 N.Y.S.3d 718 (3d Dep't 2021).

Defendant failed to preserve for appellate review his contention that certain remarks made by the prosecutor in summation deprived him of a fair trial, in prosecution for course of sexual conduct against a child in the first degree and endangering the welfare of a child, because defendant either failed to object to the contested remarks or raised only a general objection, and failed to make a timely motion for a mistrial on the specific grounds he raises on appeal, and, even if the argument were preserved for review, it was without merit, as the remarks were either fair comment on the evidence, a fair response to the defense summation,

or not so flagrant or pervasive as to have deprived the defendant of a fair trial. N.Y. CPL § 470.05(2); N.Y. Penal Law §§ 130.75, 260.10(1). People v. Molina, 188 A.D.3d 920, 133 N.Y.S.3d 618 (2d Dep't 2020).

By failing to object, making general objections or failing to request any further relief after the court sustained an objection, defendant failed to preserve for appeal his claim that prosecutor's summation remarks were inappropriate, in prosecution for criminal possession of a controlled substance; even if defendant had preserved this challenge, prosecutor's remarks were appropriate responses to defense counsel's attacks on the police officers' credibility, and any error was harmless. People v. Gibson, 186 A.D.3d 419, 127 N.Y.S.3d 475 (1st Dep't 2020).

Defendant failed to preserve for appellate review his contentions that prosecutor improperly shifted the burden of proof to the defense during summation, vouched for or bolstered the testimony of prosecution witnesses, and used inflammatory statements when asking questions and during summation, in trial for criminal sexual act in the first degree, to the extent that defendant failed to object to the instances of misconduct. People v. Atkinson, 185 A.D.3d 1447, 127 N.Y.S.3d 220 (4th Dep't 2020).

Defendant failed to preserve for appellate review claim that he was denied fair trial for attempted murder and criminal use of firearm due to prosecutorial misconduct during summation, where defendant failed to object to any alleged improprieties during summation. N.Y. Penal Law §§ 110.00, 125.25(1), 265.09(1)(a). People v. Boyd, 184 A.D.3d 1151, 126 N.Y.S.3d 252 (4th Dep't 2020).

Murder defendant failed to preserve for appellate review claim that he was constitutionally entitled to make summation argument that was not based on evidence in case but instead referred to news media coverage of unrelated cases and claim of prosecutorial misconduct, where defendant failed to raise claims at various stages of trial. People v. Crum, 184 A.D.3d 454, 126 N.Y.S.3d 7 (1st Dep't 2020).

Defendant's claim, that remarks made by prosecutor during summation allegedly vouching for the credibility of the People's witnesses was so prejudicial as to deprive him of a fair trial in prosecution of defendant for forgery in the second degree, was unpreserved for appellate review, where defendant did not object to remarks at trial. N.Y. Penal Law § 170.10(1). People v. Logan, 178 A.D.3d 1386, 116 N.Y.S.3d 835 (4th Dep't 2019).

Defendant failed to preserve for appellate review contention that he was deprived of fair trial by certain of prosecutor's remarks in summation in prosecution for criminal possession of a weapon, criminal possession of marijuana, and unlawful possession of marijuana, where defendant failed to request further relief when trial court gave curative instructions with regard to challenged remarks. N.Y. CPL § 470.05(2). People v. Ealey, 176 A.D.3d 735, 110 N.Y.S.3d 124 (2d Dep't 2019).

Defendant failed to preserve for appellate review his claims regarding the People's summation and the court's charge in prosecution for burglary and criminal possession of stolen property, where they were raised for the first time on appeal. People v. Luke, 176 A.D.3d 428, 110 N.Y.S.3d 17 (1st Dep't 2019).

Defendant failed to preserve for review on direct appeal his arguments that prosecutor improperly referenced suppressed statement during her opening statement, improperly elicited testimony from arresting officer regarding suppressed statement, and improperly referred to suppressed statement on summation, where defendant did not raise any objections below. People v. Ransom, 170 A.D.3d 1199, 97 N.Y.S.3d 283 (2d Dep't 2019).

Defendant failed to preserve for appellate review his claim that he was deprived of a fair trial in prosecution for burglary in the first degree, grand larceny in the fourth degree, and unlawful imprisonment in the first degree, where defendant did not object to any of the alleged instances of prosecutorial misconduct during prosecutor's opening and closing statements or during cross-examination of defense witness. People v. Fick, 167 A.D.3d 1484, 90 N.Y.S.3d 421 (4th Dep't 2018).

Defendant failed to preserve for appellate review his claim that he was denied a fair trial by prosecutorial misconduct on summation in prosecution for murder in the second degree, assault in the first degree, assault in the second degree, and criminal possession of a weapon in the second degree; defense counsel did not object to summation and failed to take any further actions, such as requesting a curative jury instruction for mistrial when his objection was sustained. People v. Flowers, 166 A.D.3d 1492, 87 N.Y.S.3d 425 (4th Dep't 2018).

Defendant failed to preserve for appellate review his contention that he was deprived of due process and a fair trial by certain of the prosecutor's summation remarks, in prosecution for obstructing governmental administration in the second degree, where defense counsel failed to object to the challenged comments. N.Y. CPL § 470.05(2). People v. Hardy, 166 A.D.3d 645, 88 N.Y.S.3d 54 (2d Dep't 2018).

Defendant did not object to any of the alleged instances of prosecutorial misconduct during prosecutor's opening statement or summation, and he therefore failed to preserve for appellate review his contention that he was thereby deprived of a fair trial. People v. Lundy, 165 A.D.3d 1626, 85 N.Y.S.3d 665 (4th Dep't 2018).

Defendant failed to preserve for appellate review his claim that certain remarks made by the prosecutor during summation required reversal, in prosecution for burglary in the second degree, where defendant either completely failed to object to the remarks at issue or made only general objection, and he failed to make a timely motion for a mistrial on such grounds. People v. Willis, 165 A.D.3d 984, 85 N.Y.S.3d 230 (2d Dep't 2018).

Defendant's claim that prosecutor vouched for witnesses' credibility repeatedly during second-degree murder trial, depriving him of a fair trial, was not preserved for review, where defense counsel did not object to any such instance during the trial. People v. Lang, 164 A.D.3d 963, 82 N.Y.S.3d 229 (3d Dep't 2018).

Defendant failed to preserve for appellate review his arguments that, during her summation, prosecutor improperly vouched for the credibility of witnesses, misrepresented the facts, shifted the burden of proof, denigrated the defense, and inflamed the jury; defendant either failed to object to the comments, failed to request further curative instructions after his objection was granted, or failed to timely move for a mistrial on the specific grounds he asserted on appeal. N.Y. CPL § 470.05(2). People v. Rogers, 161 A.D.3d 1013, 77 N.Y.S.3d 431 (2d Dep't 2018).

Defendant failed to preserve for appellate review contention that certain remarks made by prosecutor during summation constituted reversible error, in prosecution for sexual conduct against child in the second degree; defendant either failed to object to remarks at issue, or made only general objection, and he failed to make timely motion for mistrial on specific grounds he asserted on appeal. N.Y. CPL § 470.05(2). People v. Herrera, 161 A.D.3d 1006, 77 N.Y.S.3d 510 (2d Dep't 2018).

Defendant's contention that prosecutor's comments during her opening statement and summation were improper and deprived him of fair trial in burglary prosecution was unpreserved for appellate review, where defendant either failed to object to the comments or made only general one-word objection, and defendant failed to either request curative jury instruction or move for mistrial. N.Y. CPL § 470.05(2). People v. Bragg, 161 A.D.3d 998, 77 N.Y.S.3d 435 (2d Dep't 2018).

Defendant's contention that certain comments made by prosecutor in summation were improper and deprived him of a fair trial was unpreserved for appellate review, where defendant failed to object or asserted only a general objection to the prosecutor's remarks. N.Y. CPL § 470.05(2). People v. Katzman, 161 A.D.3d 770, 77 N.Y.S.3d 73 (2d Dep't 2018).

Defendant failed to preserve challenge to the People's summation, in defendant's prosecution for crimes including kidnapping, and appellate division would decline to review claim in the interest of justice. People v. Lopes, 161 A.D.3d 456, 77 N.Y.S.3d 22 (1st Dep't 2018).

Defendant failed to preserve for appellate review contention that certain remarks made by prosecutor during summation deprived him of fair trial and constituted reversible error, because she allegedly mischaracterized evidence, vouched for credibility of People's witnesses, and made inflammatory comments, in prosecution for assault in the first and second degrees and robbery in the first and second degrees; defendant either made only one-word objections, failed to request curative instructions, or failed to timely move for mistrial on this ground. N.Y. CPL § 470.05(2). People v. Sukhu, 157 A.D.3d 973, 69 N.Y.S.3d 697 (2d Dep't 2018).

Defendant waived for appellate review in prosecution for obstructing governmental administration in the second degree his claim that trial court violated state evidentiary law in admitting police officers' highly prejudicial testimony regarding safety issues involved in investigating narcotics trafficking and in the execution of search warrants, where defendant interposed no

objection to any of the testimony, except for a single, early objection on relevance grounds. N.Y. Penal Law § 195.05. People v. Wheeler, 61 Misc. 3d 30, 85 N.Y.S.3d 329 (App. Term 2018).

Defendant's contention that trial court assumed role or appearance of prosecutor was not preserved for appellate review, in prosecution for manslaughter in the first degree and criminal possession of weapon in the second degree; at the conclusion of trial court's questioning of prosecution witness, defense counsel made only general objection. People v. Bursey, 155 A.D.3d 1513, 64 N.Y.S.3d 418 (4th Dep't 2017).

Assault defendant failed to preserve for appeal his challenges to People's summation, where he failed to object to any of the alleged prejudicial comments by prosecutor. People v. Garland, 155 A.D.3d 527, 65 N.Y.S.3d 167 (1st Dep't 2017).

Defendant failed to preserve for appellate review claims that prosecutor improperly vouched for credibility of four prosecution witnesses during summation, in prosecution for murder in the second degree, assault in the second degree, and criminal possession of a weapon in the second degree; defendant failed to object to allegedly improper comments. People v. Williams, 154 A.D.3d 1290, 63 N.Y.S.3d 161 (4th Dep't 2017).

Defendant failed to preserve for appellate review his contention, in prosecution for second-degree robbery and third-degree assault, that he was deprived of a fair trial by some of prosecutor's summation remarks, in which prosecutor allegedly played on emotions of the jury, supported the case through his own veracity and position, commingled identification evidence, and mischaracterized other evidence; defendant failed to object, request curative instructions, or timely move for a mistrial on those grounds. McKinney's CPL § 470.05(2). People v. Brooks, 154 A.D.3d 955, 63 N.Y.S.3d 434 (2d Dep't 2017).

Weapons defendant's contention that certain comments made by prosecutor during summations were improper and deprived him of fair trial were unpreserved for appellate review since he either failed to timely object to the remarks or made only general objections. McKinney's CPL § 470.05(2). People v. Kaval, 154 A.D.3d 875, 63 N.Y.S.3d 411 (2d Dep't 2017).

Defendant's contention that he was deprived of a fair trial based on several instances of alleged prosecutorial misconduct was unpreserved for appellate review, since defense counsel did not object to any of the alleged misconduct. McKinney's CPL § 470.05(2). People v. DiValentino, 154 A.D.3d 872, 62 N.Y.S.3d 488 (2d Dep't 2017).

Defendant, by merely objecting to most of prosecutor's comments during summation, which allegedly usurped jury's role as factfinder and impermissibly bolstered the People's witnesses, without raising any objections to curative instructions given by trial court in response to defendant's objections or seeking a mistrial, failed to preserve an appellate change to those comments. People v. Burkette, 153 A.D.3d 635, 61 N.Y.S.3d 53 (2d Dep't 2017).

Defendant failed to preserve for appellate review his contention that he was deprived of a fair trial by prosecutorial misconduct on summation, in prosecution for criminal possession of a forged instrument in the second degree and offering a false instrument for filing in the first degree; defendant failed to object to any of the remarks by the prosecutor during summation. People v. Womack, 151 A.D.3d 1754, 57 N.Y.S.3d 301 (4th Dep't 2017).

Murder defendant failed to preserve for appellate review his claim that he was deprived of a fair trial by prosecutorial misconduct on summation, where he failed to object to any of the alleged improprieties. People v. Pizarro, 151 A.D.3d 1678, 57 N.Y.S.3d 283 (4th Dep't 2017).

Murder defendant failed to preserve for appellate review his claim regarding interpreter's alleged incompetence, where he failed to challenge proficiency of appointed interpreter at trial. People v. Pizarro, 151 A.D.3d 1678, 57 N.Y.S.3d 283 (4th Dep't 2017).

Defendant's argument that the loss of a surveillance video deprived him of a fair trial on charges of rape in the third degree, attempted criminal sex act in the first degree, and unlawful imprisonment in the second degree was unpreserved for appellate review, where he did not object to the testimony about the contents of the tape or request an adverse inference charge. McKinney's CPL § 470.05(2). People v. Wallace, 149 A.D.3d 878, 51 N.Y.S.3d 606 (2d Dep't 2017).

Defendant failed to preserve for appellate review challenges to prosecutor's summation, in prosecution for criminal possession of weapon in the second and fourth degrees and criminal possession of controlled substance in the fourth degree; defendant failed

to object, made only unspecified generalized objections, or failed to complain that court's curative actions were inadequate. People v. Flagg, 149 A.D.3d 513, 51 N.Y.S.3d 504 (1st Dep't 2017).

Defendant's failure to object to alleged misconduct by prosecutor or to move for mistrial when objections were sustained was a failure to preserve prosecutorial misconduct claims for appellate review. People v. Goodson, 144 A.D.3d 1515, 41 N.Y.S.3d 635 (4th Dep't 2016).

Claim of prosecutorial misconduct on summation was not preserved for appellate review, where in one instance defense counsel made no objection, the Criminal Court having "sustained" objection sua sponte, and where in other instances defense counsel stated only "objection," without specifying basis for objection. People v. Westwood, 53 Misc. 3d 74, 41 N.Y.S.3d 347 (App. Term 2016).

[END OF SUPPLEMENT]

Footnotes

1 CPL § 470.05(2).

2 People v. Ielfield, 132 A.D.3d 1298, 18 N.Y.S.3d 229 (4th Dep't 2015); People v. Nadal, 131 A.D.3d 729, 14 N.Y.S.3d 591 (3d Dep't 2015), leave to appeal denied, 26 N.Y.3d 1041, 22 N.Y.S.3d 171, 43 N.E.3d 381 (2015); People v. Harris, 129 A.D.3d 990, 13 N.Y.S.3d 443 (2d Dep't 2015), leave to appeal denied, 26 N.Y.3d 1088, 23 N.Y.S.3d 645, 44 N.E.3d 943 (2015).

3 People v. Then, 128 A.D.3d 864, 10 N.Y.S.3d 135 (2d Dep't 2015), leave to appeal granted, 25 N.Y.3d 1208, 16 N.Y.S.3d 530, 37 N.E.3d 1173 (2015); People v. Ramrattan, 126 A.D.3d 1013, 6 N.Y.S.3d 131 (2d Dep't 2015), leave to appeal denied, 25 N.Y.3d 1170, 15 N.Y.S.3d 301, 36 N.E.3d 104 (2015).

As to motions for mistrial, generally, see §§ 2738 to 2757.

As to the effect of overwhelming evidence of the defendant's guilt where an objection is made to the prosecution's summation, see § 2736.

4 People v. Harper, 132 A.D.3d 1230, 17 N.Y.S.3d 797 (4th Dep't 2015), leave to appeal denied, 27 N.Y.3d 998, 2016 WL 2889359 (2016).

5 People v. Giuca, 58 A.D.3d 750, 871 N.Y.S.2d 709 (2d Dep't 2009).

6 People v. Duell, 124 A.D.3d 1225, 999 N.Y.S.2d 288 (4th Dep't 2015), leave to appeal denied, 26 N.Y.3d 967, 18 N.Y.S.3d 603, 40 N.E.3d 581 (2015); People v. Wallace, 123 A.D.3d 1151, 997 N.Y.S.2d 756 (2d Dep't 2014), leave to appeal denied, 25 N.Y.3d 993, 10 N.Y.S.3d 536, 32 N.E.3d 973 (2015); People v. Brown, 120 A.D.3d 1545, 992 N.Y.S.2d 591 (4th Dep't 2014), leave to appeal denied, 24 N.Y.3d 1082, 1 N.Y.S.3d 9, 25 N.E.3d 346 (2014).

The defendant failed to preserve for appellate review his contention that the prosecutor's suggestion to jury during summation that it was plausible that the victim became a sex offender later in life based on the defendant's perpetration of the indicted acts deprived him of a fair trial on charges of sodomy in the first degree, where the court sustained defense counsel's objections to the prosecutor's remarks and instructed the jury to disregard them, and the defendant did not thereafter request further curative instructions or

move for a mistrial. People v. Angona, 119 A.D.3d 1406, 989 N.Y.S.2d 746 (4th Dep't 2014), leave to appeal denied, 25 N.Y.3d 987, 10 N.Y.S.3d 530, 32 N.E.3d 967 (2015).

7 People v. Mamadou, 129 A.D.3d 993, 13 N.Y.S.3d 440 (2d Dep't 2015), leave to appeal denied, 26 N.Y.3d 969, 18 N.Y.S.3d 606, 40 N.E.3d 584 (2015).

8 People v. Portes, 125 A.D.3d 794, 4 N.Y.S.3d 97 (2d Dep't 2015), leave to appeal denied, 26 N.Y.3d 933, 17 N.Y.S.3d 96, 38 N.E.3d 842 (2015).

The defendant failed to preserve for appeal his arguments that statements made in the prosecutor's summation deprived him of a fair trial, since the challenged statements were unaccompanied by a contemporaneous objection at trial. People v. Rivera, 124 A.D.3d 1070, 2 N.Y.S.3d 279 (3d Dep't 2015), leave to appeal denied, 26 N.Y.3d 971, 18 N.Y.S.3d 607, 40 N.E.3d 585 (2015) and leave to appeal denied, 26 N.Y.3d 971, 18 N.Y.S.3d 607, 40 N.E.3d 585 (2015).

9 People v. Balls, 69 N.Y.2d 641, 511 N.Y.S.2d 586, 503 N.E.2d 1017 (1986); People v. Williams, 123 A.D.3d 1152, 997 N.Y.S.2d 499 (2d Dep't 2014), leave to appeal granted, 25 N.Y.3d 1173, 15 N.Y.S.3d 305, 36 N.E.3d 108 (2015); People v. Montalvo, 34 A.D.3d 600, 825 N.Y.S.2d 101 (2d Dep't 2006); People v. Anderson, 24 A.D.3d 460, 805 N.Y.S.2d 655 (2d Dep't 2005).

10 People v. Simmons, 106 A.D.3d 1115, 965 N.Y.S.2d 618 (2d Dep't 2013).

11 People v. Mais, 133 A.D.3d 687, 20 N.Y.S.3d 129 (2d Dep't 2015), leave to appeal denied, 26 N.Y.3d 1147, 2016 WL 1059380 (2016) and leave to appeal denied (N.Y. Feb. 19, 2016); People v. Howard, 120 A.D.3d 1259, 992 N.Y.S.2d 144 (2d Dep't 2014), leave to appeal denied, 24 N.Y.3d 1120, 3 N.Y.S.3d 762, 27 N.E.3d 476 (2015); People v. Parks, 66 A.D.3d 1429, 886 N.Y.S.2d 316 (4th Dep't 2009).

12 People v. Balls, 69 N.Y.2d 641, 511 N.Y.S.2d 586, 503 N.E.2d 1017 (1986).

13 People v. Rivera, 73 N.Y.2d 941, 540 N.Y.S.2d 233, 537 N.E.2d 618 (1989); People v. Ford, 69 N.Y.2d 775, 513 N.Y.S.2d 106, 505 N.E.2d 615 (1987).

14 People v. Heesh, 94 A.D.3d 1159, 941 N.Y.S.2d 767 (3d Dep't 2012).

15 People v. LaValle, 3 N.Y.3d 88, 783 N.Y.S.2d 485, 817 N.E.2d 341 (2004).

16 People v. Carson, 122 A.D.3d 1391, 997 N.Y.S.2d 881 (4th Dep't 2014), leave to appeal denied, 25 N.Y.3d 1161, 15 N.Y.S.3d 293, 36 N.E.3d 96 (2015).

17 People v. Stewart, 92 A.D.2d 226, 459 N.Y.S.2d 853 (2d Dep't 1983).

18 People v. Walters, 127 A.D.3d 889, 7 N.Y.S.3d 336 (2d Dep't 2015), leave to appeal denied, 25 N.Y.3d 1209, 16 N.Y.S.3d 531, 37 N.E.3d 1174 (2015).

19 People v. Brown, 127 A.D.3d 640, 7 N.Y.S.3d 137 (1st Dep't 2015), leave to appeal denied, 26 N.Y.3d 926, 17 N.Y.S.3d 89, 38 N.E.3d 835 (2015).

20 People v. Rowley, 127 A.D.3d 884, 7 N.Y.S.3d 338 (2d Dep't 2015) (holding that the cumulative effect of the prosecutor's misconduct deprived the defendant of a fair trial, and ordering a new trial).

21 People v. Riback, 57 A.D.3d 1209, 870 N.Y.S.2d 517 (3d Dep't 2008), rev'd on other grounds, 13 N.Y.3d 416, 892 N.Y.S.2d 832, 920 N.E.2d 939 (2009).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2736

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Criminal Law: Procedure
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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(4) Objection and Cure of Error

§ 2736. Comment in summation harmless error; overwhelming evidence of guilt

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2184 to 2189, 2195

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§§ 56, 57 (Cure of Error)

A prosecutor's improper but harmless remark during summation does not entitle the defendant to a new trial. [1] Where proof of the defendant's guilt is overwhelming, otherwise questionable conduct by the prosecutor in delivering the People's summation may not warrant reversal of a conviction [2] where there is no significant probability that the errors contributed to the defendant's conviction. [3] This is particularly the case where the court gives a prompt curative instruction, [4] where the prosecutor's remark is isolated and not egregious, [5] or where the prosecutor's comments are in response to the summation of defense counsel. [6]

Illustrations:

Most of the challenged remarks made by the prosecutor in summation were within the broad bounds of rhetorical comment permissible in closing arguments, responsive to arguments made by defense counsel in summation, or constituted fair comment on the evidence, but to the extent some of the remarks were improper, such as ad hominem remarks made about the defendant and about defense counsel, any error resulting from the admission of those remarks was harmless in light of the overwhelming evidence of defendant's guilt. [7]

The error in allowing the prosecutor's comment during summation, that the defense failed to ask a single question of a particular witness, was harmless, since the evidence of the defendant's guilt on charges of attempted murder in the second degree, attempted aggravated assault upon a police officer, attempted robbery in the first degree, and criminal possession of a weapon in the second degree was overwhelming, and there was no reasonable possibility that the comment might have contributed to the defendant's conviction. [8]

Any error arising from the prosecutor's comments during summation at a criminal sexual act trial, which arguably shifted the burden of proof or vouched for the complainant's credibility, was harmless, since there was overwhelming evidence of the defendant's guilt; any sexual conduct between the defendant and the victim could not have been consensual due to their ages, the victim provided detailed testimony about the encounter, the victim's testimony was corroborated by the presence of the defendant's semen on the victim's underwear, and the defendant offered no explanation for presence of his semen on the victim's underwear. [9]

In a prosecution for first-degree sodomy, second-degree sexual abuse, and endangering the welfare of a child, the prosecutor's unwarranted and improper comments during summation, including remarks that denigrated defense counsel and an inappropriate attempt to appeal to the sympathy of the jury by asking the jury to fight for the victim during deliberations, were not so substantially prejudicial as to deprive the defendant of a fair trial, in violation of his right to due process, in light of the strength of the People's case and the overwhelming proof of the defendant's guilt, which included the victim's detailed testimony regarding the sexual acts to which the defendant subjected him on three occasions, and the defendant's brother's testimony that the defendant admitted having sex with the victim. [10]

Observation:

A prosecutor's improper comment during summation at a bench trial does not deprive the defendant of a fair trial, as the court as trier of fact is presumed to be capable of disregarding such remarks. [11]

CUMULATIVE SUPPLEMENT

Cases:

Prosecutor's comments in summation, while better left unsaid, were generally responsive to defense arguments and fell within the broad leeway afforded prosecutors on summation, and any improprieties were harmless in light of the overwhelming evidence of guilt. People v. Rizzo, 41 N.Y.S.3d 35 (App. Div. 1st Dep't 2016).

Any error from prosecutor's improper appeal to jury's sympathy by eliciting testimony from victim's mother that the victim was her only child, with whom she stayed in the hospital while he was dying, and that after the victim's death, she brought the victim's college acceptance letter to his grave, was harmless, in prosecution for second degree murder and criminal possession of a weapon in the second degree; there was overwhelming evidence of defendant's guilt, and no significant probability that the error contributed to defendant's conviction. People v. Hubert, 194 A.D.3d 959, 147 N.Y.S.3d 137 (2d Dep't 2021).

Prosecutor's improper remarks during summation were harmless, in trial for course of sexual conduct against a child in the first degree and endangering the welfare of a child; there was overwhelming evidence of defendant's guilt and no significant probability that any error that remarks might have contributed to the convictions, and remarks were not egregious or pervasive enough to have deprived defendant of fair trial. People v. Green-Faulkner, 189 A.D.3d 1070, 136 N.Y.S.3d 319 (2d Dep't 2020).

Even if comments made by prosecutor during opening statement and summation exceeded the bounds of fair comment and could be characterized as inflammatory and an improper denigration of defendant's trial strategy, any error was harmless in prosecution for course of sexual conduct against a child in the first degree and endangering the welfare of a child; there was overwhelming evidence of defendant's guilt and no significant probability that such error contributed to defendant's conviction. People v. Ortiz, 189 A.D.3d 891, 137 N.Y.S.3d 139 (2d Dep't 2020).

Any error in prosecutor's comments during summation in prosecution for falsifying business records in the first degree, endangering the welfare of an incompetent or physically disabled person in the first degree, and wilful violation of the Public Health Law was harmless, where remarks either were fair comment on the evidence or the reasonable inferences to be drawn therefrom, were fair response to arguments raised by the defense in summation, did not exceed the bounds of permissible rhetorical comment, or, to the extent they were improper, constituted harmless error. People v. Fassino, 169 A.D.3d 921, 94 N.Y.S.3d 360 (2d Dep't 2019).

Remaining alleged instances of misconduct during the prosecutor's summation did not deprive defendant of a fair trial in prosecution for burglary in the first degree, grand larceny in the fourth degree, and unlawful imprisonment in the first degree, where instances were fair comment on the evidence, fair response to defense counsel's summation, and, to the extent that prosecutor made inappropriate remarks, were not so pervasive or egregious. People v. Fick, 167 A.D.3d 1484, 90 N.Y.S.3d 421 (4th Dep't 2018).

Prosecutor's single improper comment that defense counsel "can't lie to a jury," made during exchange with defense counsel following objection to defense summation, was harmless, in prosecution for criminal possession of a weapon in the second and fourth degrees; evidence of defendant's guilt was overwhelming, and in view of trial court's subsequent instruction to jury, there was no significant probability that jury would have acquitted defendant had it not been for error. People v. Watson, 163 A.D.3d 855, 81 N.Y.S.3d 449 (2d Dep't 2018).

Even if prosecutor's single comment during summation in prosecution for grand larceny in the third degree on defendant's refusal to take a polygraph was erroneous, the comment was not so egregious as to deny defendant a fair trial; defense counsel elicited testimony that defendant initially accepted a request to take a polygraph and, shortly thereafter, defense counsel elicited further testimony that, when defendant was presented with the opportunity to take the polygraph, she refused to do so, and in summation, the prosecutor made one reference to that refusal, contending that the refusal could be considered by the jury as

evidence of defendant's consciousness of guilt. McKinney's Penal Law § 155.35(1). People v. Case, 160 A.D.3d 1448, 76 N.Y.S.3d 696 (4th Dep't 2018).

Prosecutor's summation remarks in first degree manslaughter trial did not constitute reversible error; although defendant claimed that prosecutor vouched for credibility of witnesses, made inflammatory comments, misled jury about evidence, and denigrated defense, comments alleged to be prejudicial were either fair comment on the evidence, responsive to arguments and theories presented in defense summation, or harmless in light of overwhelming evidence of the defendant's guilt, and did not impermissibly shift the burden of truth. People v. Mairena, 160 A.D.3d 986, 75 N.Y.S.3d 246 (2d Dep't 2018).

Defendant's trial for murder in the second degree, attempted robbery in the first degree, attempted robbery in the second degree, criminal possession of a weapon in the second degree, and tampering with physical evidence was fair; use of electronic slides during summation to display, in question format, most of the elements of the charged crimes to the jury was not improper, court instructions were sufficient to dispel any possibility that jury would give precedence or place undue emphasis on the prosecutor's use of the slides, jurors were presumed to follow legal instructions given, and any error arising from prosecutor improperly vouching for credibility of witness and displaying slide with accompanying text that highlighted prosecutor's statement during summation was not so egregious as to deprive defendant of fair trial. People v. Johnson, 159 A.D.3d 833, 72 N.Y.S.3d 536 (2d Dep't 2018).

Even if prosecutor's summation in defendant's trial for aggravated unlicensed operation of a motor vehicle and driving while impaired exceeded the bounds of appropriate comment, defendant was not deprived of a fair trial, since county court sustained the sole objection, and even though defendant complained that court did not give any limiting instructions, none were requested. People v. Styles, 154 A.D.3d 1184, 63 N.Y.S.3d 578 (3d Dep't 2017).

Most of prosecutor's remarks in summation were either fair comment on the evidence presented, fair response to defendant's and codefendant's summations, or permissible rhetorical comment, and to extent that some of the challenged remarks were improper, the errors were either sufficiently addressed by Supreme Court's instructions to jury or not so egregious as to have deprived defendant of a fair trial. People v. Brooks, 154 A.D.3d 955, 63 N.Y.S.3d 434 (2d Dep't 2017).

Defendant was not deprived of a fair trial by allegedly improper remarks made by prosecutor during summation; challenged remarks were within the broad bounds of rhetorical comment permissible in closing arguments, constituted fair response to arguments made by defense counsel in summation or fair comment on the evidence, or, to extent they were improper, did not deprive defendant of a fair trial, and any other error as to individual comments was harmless. People v. Sparagano, 153 A.D.3d 1367, 60 N.Y.S.3d 484 (2d Dep't 2017).

Even assuming that defendant preserved for appeal his claim that certain remarks made by prosecutor during his opening statement and summation were improper, in defendant's prosecution for criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, any improprieties were not so pervasive or egregious as to deprive defendant of a fair trial. People v. Vanalst, 148 A.D.3d 1658, 50 N.Y.S.3d 729 (4th Dep't 2017).

Trial court did not improperly limit defense attorney's summation, in prosecution for criminal sex act in the first degree, robbery in the first degree as sexually motivated felony, criminal possession of weapon in the fourth degree, and menacing in the second degree; comments by defense counsel, which concerned defendant's conduct during trial and in courthouse lobby, did not relate to any issue in case. McKinney's CPL § 470.05(2). People v. Tullock, 148 A.D.3d 1061, 50 N.Y.S.3d 135 (2d Dep't 2017).

Prosecutor's improper comments during summation, that proof of intent was not required to convict defendant for robbery in the first degree and attempted robbery in the first degree and that defendant knew that the firearm he used during the robbery was loaded, did not amount to reversible prosecutorial misconduct; although the challenged comments appeared to misstate the evidence, they were not flagrant or pervasive enough to deprive defendant of a fair trial, and trial court correctly instructed the jury on the element of the charges. People v. Collier, 146 A.D.3d 1146, 46 N.Y.S.3d 276 (3d Dep't 2017).

Trial court's evidentiary errors during second degree murder prosecution of allowing prosecutor to impeach her own witness and to introduce hearsay evidence, combined with prosecutor's improper remarks during summation referring to this evidence, were not harmless, and thus warranted new trial, where evidence of guilt was not overwhelming. People v. Thomas, 143 A.D.3d 923, 39 N.Y.S.3d 214 (2d Dep't 2016).

[END OF SUPPLEMENT]

Footnotes

1 People v. Mitchell, 125 A.D.3d 790, 3 N.Y.S.3d 124 (2d Dep't 2015), leave to appeal denied, 25 N.Y.3d 1168, 15 N.Y.S.3d 300, 36 N.E.3d 103 (2015).

A murder defendant was not deprived of a fair trial, and reversal was not required, by the prosecutor's improper comment, made after the defendant elicited testimony that she had intended to surrender to the police but had been arrested before she was able to do so, rhetorically asking why the defendant retained an attorney after the shooting if she did not do anything and did not know that the police were looking for her. People v. Credle, 124 A.D.3d 792, 998 N.Y.S.2d 466 (2d Dep't 2015), leave to appeal denied, 25 N.Y.3d 1161, 15 N.Y.S.3d 294, 36 N.E.3d 97 (2015).

While the prosecutor's repeated comments during summation in a trial for murder in the second degree, to the effect that the defendant aimed the rifle at the fleeing victim, may have been an overstatement of the facts, those comments remained within the broad bounds of rhetorical comment permissible during summations, and they were not so pervasive or egregious as to deprive the defendant of a fair trial. People v. Gottsche, 118 A.D.3d 1303, 987 N.Y.S.2d 736 (4th Dep't 2014).

2 People v. Johnson, 131 A.D.3d 893, 16 N.Y.S.3d 553 (1st Dep't 2015), leave to appeal denied, 26 N.Y.3d 1089, 23 N.Y.S.3d 646, 44 N.E.3d 944 (2015); People v. Winchell, 129 A.D.3d 1309, 13 N.Y.S.3d 587 (3d Dep't 2015), leave to appeal denied, 26 N.Y.3d 973, 18 N.Y.S.3d 609, 40 N.E.3d 587 (2015) and leave to appeal denied, 26 N.Y.3d 973, 18 N.Y.S.3d 609, 40 N.E.3d 587 (2015); People v. Collins, 122 A.D.3d 873, 996 N.Y.S.2d 365 (2d Dep't 2014), leave to appeal denied, 25 N.Y.3d 950, 7 N.Y.S.3d 279, 30 N.E.3d 170 (2015).

3 People v. Williams, 124 A.D.3d 920, 1 N.Y.S.3d 372 (2d Dep't 2015), leave to appeal denied, 25 N.Y.3d 993, 10 N.Y.S.3d 536, 32 N.E.3d 973 (2015); People v. Collins, 122 A.D.3d 873, 996 N.Y.S.2d 365 (2d Dep't 2014), leave to appeal denied, 25 N.Y.3d 950, 7 N.Y.S.3d 279, 30 N.E.3d 170 (2015).

The trial court's error in allowing the prosecutor during summation to contravene its pretrial ruling that allowed the People to use a detective's testimony about the defendant's hand-to-hand exchange in a drug-prone area only to explain the subsequent actions of the police, but precluded its use as evidence of the defendant's intent to sell the drugs found in his possession, was not harmless; although the court instructed the jury not to consider the exchange for any purpose other than to explain the police conduct, there was a significant probability that the defendant would have been acquitted of criminal possession of a controlled substance if not for prosecutor repeatedly urging the jury to consider the exchange as evidence of intent, and the hand-to-hand exchange was strongly probative of defendant's intent to sell, which was the central issue at trial. People v. Minus, 126 A.D.3d 474, 5 N.Y.S.3d 76 (1st Dep't 2015).

Errors arising from the prosecutor's improper vouching for a witness and references to the defendant's tattoos during summation were not harmless, as it could not be said that there was no significant probability that the verdict would have been different absent the cumulative, prejudicial errors. People v. Spence, 92 A.D.3d 905, 938 N.Y.S.2d 622 (2d Dep't 2012).

4 People v. London, 124 A.D.2d 254, 508 N.Y.S.2d 262 (3d Dep't 1986); People v. Reed, 120 A.D.2d 552, 502 N.Y.S.2d 48 (2d Dep't 1986); People v. Sanchez, 92 A.D.2d 595, 459 N.Y.S.2d 488 (2d Dep't 1983), order aff'd, 61 N.Y.2d 1022, 475 N.Y.S.2d 376, 463 N.E.2d 1228 (1984).

Any error arising from the prosecutor's single misstatement regarding the defendant's testimony was harmless, in a prosecution for menacing police officer; the testimony was read back to the jury during the course of its deliberations, and the trial court expressly instructed jurors prior to summations that they alone were the finders of fact, that if one of the attorneys asserted a fact not in evidence, it must be disregarded, and that it was the jurors' own recollection of the evidence that controlled. People v. Principio, 107 A.D.3d 1572, 966 N.Y.S.2d 801 (4th Dep't 2013), leave to appeal denied, 22 N.Y.3d 1090, 981 N.Y.S.2d 675, 4 N.E.3d 977 (2014).

As to curative instructions regarding summation comments, see § 2737.

5 People v. Valdez, 69 A.D.3d 452, 893 N.Y.S.2d 527 (1st Dep't 2010); People v. Scott, 60 A.D.3d 1483, 875 N.Y.S.2d 728 (4th Dep't 2009).

6 People v. Molinaro, 62 A.D.3d 724, 880 N.Y.S.2d 91 (2d Dep't 2009); People v. Conethan, 120 A.D.2d 604, 502 N.Y.S.2d 79 (2d Dep't 1986).

As to the prosecutor's privilege to argue in response to the defendant's argument, see § 2720.

7 People v. Hanson, 100 A.D.3d 771, 953 N.Y.S.2d 684 (2d Dep't 2012), rev'd on other grounds, 24 N.Y.3d 294, 998 N.Y.S.2d 154, 22 N.E.3d 1022 (2014).

8 People v. Grant, 94 A.D.3d 1139, 942 N.Y.S.2d 223 (2d Dep't 2012).

9 People v. Liggins, 49 Misc. 3d 650, 12 N.Y.S.3d 533 (Sup 2015).

10 People v. Nelson, 68 A.D.3d 1252, 890 N.Y.S.2d 189 (3d Dep't 2009).

11 People v. Smith, 77 A.D.3d 564, 909 N.Y.S.2d 70 (1st Dep't 2010).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2737

New York Jurisprudence, Second Edition May 2022 Update

Criminal Law: Procedure
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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

3. Arguments to Jury

c. Summation

(4) Objection and Cure of Error

§ 2737. Curative instructions regarding remarks during summation

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2192

Trial Strategy

- Prosecution Summations, 6 Am. Jur. Trials 873§§ 56, 57 (Cure of Error)

Forms

- Am. Jur. Pleading and Practice Forms, Criminal Procedure § 484 (Instruction—Duty of jury to determine facts)
- Am. Jur. Pleading and Practice Forms, Criminal Procedure § 488 (Instruction—Burden of proof on prosecution)
- Am. Jur. Pleading and Practice Forms, Criminal Procedure § 496 (Instruction—Jury not to be influenced by defendant's exercise of right not to testify)

To the extent that prejudicial effect may have resulted from a prosecutor's remarks, it may be ameliorated by the trial court's act of striking the remark [1] or giving an immediate curative instruction. [2] A defendant's conviction will be affirmed, even where the defendant's objections to the remarks by the prosecutor on summation are sustained, if the court gives adequate curative instructions to the jury. [3] In the absence of a request for further curative instructions, the trial court, in giving curative instructions, is deemed to have corrected the error to the defendant's satisfaction, [4] as the jury is presumed to have followed the court's instructions. [5]

Illustrations:

While some of the prosecutor's comments would have been better left unsaid, viewed as a whole, her summation, including her final statement asking the jury to do what it swore to do and find the defendant guilty, did not deprive the defendant of a fair trial on charges of robbery, larceny, and a weapons offense, where just prior to summations, the court had instructed the jury that if it sustained an objection to a comment of a lawyer, the comment was stricken from the record and the jury must disregard it, and the court then sustained defense counsel's objections to those of the prosecutor's comments that were inappropriate. [6]

The defendant was not deprived of a fair trial by the prosecutor's closing argument suggesting that the defendant, in support of his theory that his accomplice was the "criminal mastermind" behind the charged burglary, had "made stuff up" and engaged in burden shifting; the court ameliorated any prejudice to the defendant by sustaining defense counsel's objection, promptly instructing the jury to disregard the prosecutor's comment and, during the course of its final jury charge, reiterating that the defendant was not required to prove that he was not guilty. [7]

The prosecutor's improper comments during summation in a trial on weapons charges, that the jury should not allow defendant to walk the streets with a gun, that the gun might have been used to kill somebody, and that the defendant would not have run from police if he were not guilty, did not operate to deprive the defendant of a fair trial, where defense counsel raised numerous objections during the course of the People's summation, many of which were sustained, and the trial court both struck portions of the summation from the record and admonished the prosecutor in the presence of the jury. [8]

In a prosecution for rape, sexual abuse, and endangering the welfare of a child, the prosecutor's improper comment during summation, in which the prosecutor said that the defendant never denied touching the victim on her breasts and never denied having oral sex with the victim, did not deny the defendant a fair trial, in violation of his right to due process; the trial court's curative instruction, given immediately after the prosecutor's comment, clearly advised the jury that the People, not the defendant, bore the burden of proof, and that the defendant's failure to deny an allegation did not mean that he admitted it. [9]

Reversal is not mandated unless it appears that the conduct of the prosecutor has deprived the defendant of a fair trial and the trial court's instructions to the jury are not sufficient to dissipate the prejudice. [10] The prosecutor's summation remark that the defendant has failed to make a closing statement does not deprive the defendant of a fair trial, for instance, where there is overwhelming evidence of the defendant's guilt and the court gives a lengthy curative instruction. [11] Moreover, a comment by the prosecutor during summation on the failure of the defense to offer certain evidence, which could be interpreted as shifting the prosecution's burden of proof, does not deprive the defendant of a fair trial where an immediate curative instruction is sufficient to dissipate any possible prejudice. [12]

Under some circumstances, however, a new trial is warranted where jury instructions do not cure the prejudice resulting from improper summation comments. [13]

Illustration:

The trial court's instruction advising the jury that the burden of proof is on the People to prove the defendant's guilt, in a prosecution for first-degree assault, was insufficient to cure the prejudice to the defendant caused by the summation comments of the attorney of the codefendant, who had confessed to stabbing the victim, which comments refer to the unlikelihood of the codefendant's having committed the crime without the defendant's assistance, particularly where the evidence against the defendant was not overwhelming, and, thus, a new trial was warranted. [14]

CUMULATIVE SUPPLEMENT

Cases:

Even if defendant had preserved for appellate review his contention that prosecutor's summation remarks constituted reversible error, all the remarks were either fair comment on the evidence, a fair response to arguments and theories presented in the defense summation, or harmless, and thus the remarks were not prejudicial, in defendant's trial for attempted assault, assault, and criminal possession of a weapon; there was overwhelming evidence of defendant's guilt, there was no significant probability that any errors regarding the remarks might have contributed to defendant's convictions, and, to the limited extent that prosecutor's remarks may have exceeded the bounds of propriety, trial court promptly addressed defendant's objections and issued appropriate curative instructions. N.Y. Penal Law §§ 110.00, 120.10(1). People v. Ogilvie, 197 A.D.3d 730, 152 N.Y.S.3d 739 (2d Dep't 2021).

Defense counsel's statements in summation were improper because they went beyond merely questioning witness credibility and were designed to elicit sympathy from the jury, supporting trial court sustaining objection to and issuing a curative instruction regarding those statements, in trial for criminal sexual act in the first degree and rape in the first degree. People v. Maisonette, 192 A.D.3d 1325, 144 N.Y.S.3d 752 (3d Dep't 2021).

Any prejudice resulting from prosecutor's remarks in summation was alleviated by court's prompt curative instructions, and thus remarks did not deprive defendant of fair trial in prosecution for criminal possession of a weapon, criminal possession of marijuana, and unlawful possession of marijuana. People v. Ealey, 176 A.D.3d 735, 110 N.Y.S.3d 124 (2d Dep't 2019).

Prosecutor's alleged misstatement of law during summation did not warrant reversal of defendant's convictions for robbery and resisting arrest; any prejudice was avoided by trial court's charge, which the jury was presumed to have followed. People v. Ramos, 162 A.D.3d 453, 78 N.Y.S.3d 125 (1st Dep't 2018).

Any prejudicial effect caused by prosecutor's improper statement, in summation, that there was no psychiatrist testimony in the case, was cured by trial court's jury instruction that defendant could assert his affirmative defense of extreme emotional disturbance (EED) without expert testimony. People v. Valenzuela, 146 A.D.3d 675, 47 N.Y.S.3d 249 (1st Dep't 2017).

[END OF SUPPLEMENT]

Footnotes

1 People v. Edwards, 120 A.D.3d 1435, 992 N.Y.S.2d 368 (2d Dep't 2014), leave to appeal denied, 24 N.Y.3d 1083, 1 N.Y.S.3d 10, 25 N.E.3d 347 (2014).

2 People v. Marks, 128 A.D.3d 852, 9 N.Y.S.3d 120 (2d Dep't 2015), leave to appeal denied, 26 N.Y.3d 931, 17 N.Y.S.3d 94, 38 N.E.3d 840 (2015); People v. Chancey, 127 A.D.3d 1409, 8 N.Y.S.3d 451 (3d Dep't 2015), leave to appeal denied, 25 N.Y.3d 1199, 16 N.Y.S.3d 522, 37 N.E.3d 1165 (2015); People v. Stanton, 117 A.D.3d 412, 985 N.Y.S.2d 39 (1st Dep't 2014), leave to appeal denied, 23 N.Y.3d 1043, 993 N.Y.S.2d 256, 17 N.E.3d 511 (2014).

3 People v. Tardbania, 72 N.Y.2d 852, 532 N.Y.S.2d 354, 528 N.E.2d 507 (1988); People v. Edwards, 63 A.D.3d 855, 882 N.Y.S.2d 684 (2d Dep't 2009); People v. Martinez, 58 A.D.3d 754, 872 N.Y.S.2d 159 (2d Dep't 2009); People v. Martinez, 214 A.D.2d 429, 625 N.Y.S.2d 190 (1st Dep't 1995).

A robbery defendant was deprived of a fair trial as a result of the prosecutor's improper statements during summation that insinuated that more than one witness had identified the defendant; in overruling defense counsel's objections, the trial court legitimized the prosecutor's improper remarks, the defendant was given no opportunity to cross-examine the unnamed witness who had allegedly implicated him in the robbery, and the evidence against the defendant was not overwhelming. People v. Benitez, 120 A.D.3d 705, 991 N.Y.S.2d 133 (2d Dep't 2014).

As to the requirement that an error relating to improper remarks during summation must be preserved, see § 2735.

4 People v. Ielfield, 132 A.D.3d 1298, 18 N.Y.S.3d 229 (4th Dep't 2015); People v. Dunham, 261 A.D.2d 909, 692 N.Y.S.2d 244 (4th Dep't 1999); People v. Rivera, 142 A.D.2d 615, 530 N.Y.S.2d 270 (2d Dep't 1988).

5 People v. Spencer, 108 A.D.3d 1081, 968 N.Y.S.2d 792 (4th Dep't 2013), leave to appeal denied, 22 N.Y.3d 1159, 984 N.Y.S.2d 643, 7 N.E.3d 1131 (2014); People v. Page, 105 A.D.3d 1380, 964 N.Y.S.2d 339 (4th Dep't 2013), leave to appeal denied, 23 N.Y.3d 1023, 992 N.Y.S.2d 806, 16 N.E.3d 1286 (2014).

6 People v. Banchs, 129 A.D.3d 466, 11 N.Y.S.3d 571 (1st Dep't 2015), leave to appeal denied, 26 N.Y.3d 965, 18 N.Y.S.3d 601, 40 N.E.3d 579 (2015).

7 People v. Morrison, 127 A.D.3d 1341, 6 N.Y.S.3d 781 (3d Dep't 2015), leave to appeal denied, 26 N.Y.3d 932, 17 N.Y.S.3d 95, 38 N.E.3d 841 (2015).

8 People v. Goldston, 126 A.D.3d 1175, 5 N.Y.S.3d 600 (3d Dep't 2015), leave to appeal denied, 25 N.Y.3d 1201, 16 N.Y.S.3d 524, 37 N.E.3d 1167 (2015).

9 People v. Diotte, 63 A.D.3d 1281, 880 N.Y.S.2d 397 (3d Dep't 2009).

10 People v. Chandler, 119 A.D.2d 764, 501 N.Y.S.2d 172 (2d Dep't 1986).

The defendant was not deprived of a fair trial by any alleged prosecutorial misconduct on summation; even if some of the prosecutor's remarks were improper, they were not so egregious as to deprive the defendant of a fair trial, and any prejudice was alleviated by the court's prompt curative instruction and its later instruction that the jury may not consider sympathy. People v. Mack, 128 A.D.3d 1456, 8 N.Y.S.3d 848 (4th Dep't 2015), leave to appeal denied, 26 N.Y.3d 969, 18 N.Y.S.3d 605, 40 N.E.3d 583 (2015).

11 People v. London, 124 A.D.2d 254, 508 N.Y.S.2d 262 (3d Dep't 1986).

12 People v. Hathaway, 159 A.D.2d 748, 551 N.Y.S.2d 975 (3d Dep't 1990).

An isolated comment of the prosecutor during closing argument in a murder prosecution that improperly suggested a shift in the burden of proof did not deprive the defendant of a fair trial, where the trial court clearly and unequivocally instructed the jury that the burden of proof on all issues remained with the prosecution. People v. Pepe, 259 A.D.2d 949, 689 N.Y.S.2d 310 (4th Dep't 1999).

13 People v. Blake, 6 A.D.3d 545, 775 N.Y.S.2d 62 (2d Dep't 2004).

14 People v. Blake, 6 A.D.3d 545, 775 N.Y.S.2d 62 (2d Dep't 2004).

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34 N.Y. Jur. 2d Criminal Law: Procedure § 2738

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Criminal Law: Procedure
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Part Three. Criminal Evidence and Trial

XVI. Trial

D. Conduct of Trial

4. Motion for Mistrial

a. Declaration of, and Grounds for, Mistrial

(1) In General

§ 2738. Declaration of mistrial, generally

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 867.1

A.L.R. Library

- Disruptive Conduct of Spectators in Presence of Jury During Criminal Trial as Basis for Reversal, New Trial, or Mistrial —Gestures, Passive Demonstrations, and the Like, 3 A.L.R.7th Art. 3
- Disruptive Conduct of Spectators in Presence of Jury During Criminal Trial as Basis for Reversal, New Trial, or Mistrial —Laughter, Crying, and Other Nonverbal Sounds by Spectators, 103 A.L.R.6th 35
- Disruptive Conduct of Spectators in Presence of Jury During Criminal Trial as Basis for Reversal, New Trial, or Mistrial —Spoken Words, 102 A.L.R.6th 279
- Disruptive Conduct of Spectators in Presence of Jury During Criminal Trial as Basis for Reversal, New Trial, or Mistrial —Applause and Cheering by Spectators, 101 A.L.R.6th 499
- Emotional Manifestations by Victim or Family of Victim During or Immediately Before or After Own Testimony During Criminal Trial as Ground for Reversal, New Trial, or Mistrial, 99 A.L.R.6th 113

- Emotional Manifestations by Victim or Family of Victim During Criminal Trial as Ground for Reversal, New Trial, or Mistrial—Emotional Manifestations by Victim or Relative as Spectator During Particular Trial Phases, 98 A.L.R.6th 455
- Propriety and Prejudicial Effect of Requiring Defendant to Wear Stun Belt or Shock Belt During Course of State Criminal Trial, 71 A.L.R.6th 625
- Threats of violence against juror in criminal trial as ground for mistrial or dismissal of juror, 3 A.L.R.5th 963
- Unauthorized view of premises by juror or jury in criminal case as ground for reversal, new trial, or mistrial, 50 A.L.R.4th 995
- Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal, 46 A.L.R.4th 11
- Propriety and prejudicial effect of gagging, shackling, or otherwise physically restraining accused during course of state criminal trial, 90 A.L.R.3d 17
- Disruptive conduct of accused in presence of jury as ground for mistrial or discharge of jury, 89 A.L.R.3d 960
- Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126
- Counsel's reference in criminal case to wealth, poverty, or financial status of defendant or victim as ground for mistrial, new trial, or reversal, 36 A.L.R.3d 839
- Juror's reluctant, equivocal, or conditional assent to verdict, on polling, as ground for mistrial or new trial in criminal case, 25 A.L.R.3d 1149

A trial court is required by statute to declare a mistrial and order a new trial of the indictment upon the proper motion of a party, or upon the court's own motion, under certain specified circumstances. [1] A mistrial can be declared at any time during the trial. [2] However, before declaring a mistrial, a court must explore all appropriate alternatives and must provide a sufficient basis in the record for resorting to this drastic measure. [3]

Observation:

The trial court has the discretion to grant a mistrial, and absent an abuse of discretion, the appellate court will not interfere with that discretion. [4] The trial court also has discretion to rescind its previous declaration of a mistrial before the jury is discharged. [5]

CUMULATIVE SUPPLEMENT

Cases:

Even if the reasons for granting a mistrial are deemed actual and substantial, the trial court must explore appropriate alternatives and provide a sufficient basis in the record for resorting to this drastic measure, for the grant of mistrial to be supported upon appellate review. People v. Smith, 176 A.D.3d 1114, 111 N.Y.S.3d 46 (2d Dep't 2019).

Trial court properly exercised its discretion in declaring a mistrial sua sponte before the completion of jury selection, over both parties' objections, in prosecution for criminal sale of a controlled substance in the third degree, due to scheduling problem that was unavoidable given the information available to the court at the time. People v. DeSusa, 151 A.D.3d 537, 57 N.Y.S.3d 142 (1st Dep't 2017).

[END OF SUPPLEMENT]

Footnotes

1 CPL § 280.10.

As to the particular circumstances under which the court will declare a mistrial, see §§ 2746 to 2747.

As to mistrial where the jury is deadlocked, see §§ 2897 to 2899.

2 CPL § 280.10, as discussed in § 2748.

3 Roey v. Lopresto, 122 A.D.3d 929, 998 N.Y.S.2d 91 (2d Dep't 2014).

4 People v. Garrette, 223 A.D.2d 749, 636 N.Y.S.2d 433 (3d Dep't 1996).

As to the discretion of the court to decide the motion, generally, see § 2752.

5 Gorman v. Rice, 106 A.D.3d 1000, 965 N.Y.S.2d 601 (2d Dep't 2013).

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§ 354. Remarks, generally

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 125

A.L.R. Library

- Prejudicial effect in civil trial of counsel's use during summation, of a litigant for a physical demonstration as to how the accident or incident happened, 74 A.L.R.2d 1094

In summing up, counsel may restate the issues and logically apply the evidence to them,[1] but an improper remark during summation can cause a jury verdict to be reversed and a new trial ordered, as where counsel states a personal opinion concerning the case and the credibility of witnesses[2] or counsel improperly places his or her own credibility on the side of a party and makes him- or herself an unsworn witness.[3] Summations that emphasize questions of credibility and suggestions of collusion to such an extent as to overshadow the basic issues of liability may require a new trial after a verdict of no cause of action.[4]

Illustration:

Misconduct by counsel for the administrator of the deceased patient's estate deprived the defendant gynecologist of a fair trial, in an action for wrongful death and medical malpractice, where counsel persistently questioned witnesses concerning evidence that the trial court had previously deemed inadmissible, and improperly referred to that evidence in summation. [5]

The rule confining counsel to legitimate argument is not based on etiquette but on justice, and its violation is not merely an overstepping of the bounds of propriety but a violation of a party's rights. The jurors must determine the issues upon the evidence; summations should help them to do this, not tend to lead them astray. [6]

Although a party may not, as part of his or her summation, advance a new legal theory of the case, a summation argument that merely offers a possible explanation for the defendant's alleged negligence does not advance a new legal theory and is not objectionable. [7]

A court may exercise its discretion in prescreening a defendant's summation and restricting a defendant's counsel's commentary on admitted evidence, especially where counsel acquiesces to those rulings at trial. [8]

Illustration:

The court's denial of the plaintiff's application to strike the testimony of defense witnesses regarding the effects of smoking, and the refusal to preclude defense counsel from commenting in summation on smoking as a cause of the plaintiff's injury, was proper in a medical malpractice action, since the testimony offered regarding the effects of smoking on the plaintiff's injuries was based on facts in the record and expert analysis, not mere speculation. [9]

CUMULATIVE SUPPLEMENT

Cases:

The facts recited in a closing statement do not reflect the evidence from a hearing but rather the position of a particular party, and a court should refrain from adopting closing statements by the parties as findings of fact. Kathleen K. v. Daniel L., 177 A.D.3d 1130, 115 N.Y.S.3d 117 (3d Dep't 2019).

[END OF SUPPLEMENT]

Footnotes

1 Bowen v. Mahoney Coal Corp., 256 A.D. 485, 10 N.Y.S.2d 454 (1st Dep't 1939).

2 Caraballo v. City of New York, 86 A.D.2d 580, 446 N.Y.S.2d 318 (1st Dep't 1982) (noting, however, that this was only one of several seriously prejudicial remarks made by counsel during summation).

3 Sanchez v. Manhattan and Bronx Surface Transit Operating Authority, 170 A.D.2d 402, 566 N.Y.S.2d 287 (1st Dep't 1991).

4 Knapik v. Whitaker, 30 A.D.2d 915, 292 N.Y.S.2d 781 (3d Dep't 1968) (also stating that the diverted emphasis was heightened by interruption of the summations and protracted colloquies by counsel and the court and by the fact that twice the jury was excused twice and the colloquies continued in the courtroom and, off the record, in chambers).

5 Stewart v. Olean Medical Group, P.C., 17 A.D.3d 1094, 795 N.Y.S.2d 420 (4th Dep't 2005).

6 Cherry Creek Nat. Bank v. Fidelity & Casualty Co. of New York, 207 A.D. 787, 202 N.Y.S. 611 (4th Dep't 1924).

7 Simon v. Indursky, 211 A.D.2d 404, 630 N.Y.S.2d 2 (1st Dep't 1995) (in a dental malpractice case, the patient was not improperly allowed to advance a new theory in summation by arguing that the dentist might have been "high" on drugs when he performed oral surgery).

8 Feliciano v. Ford Motor Credit Co., 28 A.D.3d 221, 812 N.Y.S.2d 508 (1st Dep't 2006) (personal injury suit).

9 Allen v. Uh, 82 A.D.3d 1025, 919 N.Y.S.2d 179 (2d Dep't 2011).

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XIII. Summation

B. Proper and Improper Remarks

1. In General

§ 355. Appeal to passion or prejudice

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 125

A.L.R. Library

- Prejudicial effect of counsel's argument, in civil case, urging jurors to place themselves in the position of litigant or to allow such recovery as they would wish if in the same position, 70 A.L.R.2d 935
- Prejudicial effect of counsel's addressing individually or by name particular juror during argument, 55 A.L.R.2d 1198

Appeals to prejudice or passion have no place in a trial because a verdict should be founded only on the law and the evidence. [1] Thus, counsel in summation should not make irrelevant [2] or unsubstantiated charges against a party [3] or make a special appeal to one member of the jury. [4]

Illustrations:

Inappropriate remarks, made by the state's attorney during the summation in a proceeding ultimately concluding that the respondent was a dangerous sex offender requiring commitment, that the jury would be at fault if the respondent molested another child, compromised the respondent's right to a fair trial, even though the trial judge reminded the jurors that the attorney's arguments were not testimony, where the judge failed to sustain the objection to the attorney's remarks, failed to strike the remarks from the record,

and failed to direct the jurors to disregard the inflammatory commentary.[5] Similarly, references made by the state's counsel during the summation in a proceeding pursuant to the Mental Hygiene Law to the dispositional phase of the proceeding by commenting on the possibility of the sex offender's release into the community were improper, since the only issue before the jury was whether the offender suffered from a mental abnormality.[6]

Even highly inflammatory and improper remarks made during a summation do not entitle the opposing party to a new trial where the remarks do not divert the jurors' attention from the issues or deprive the opposing party of a fair trial.[7] However, some commentary is so inflammatory that it contaminates the proceedings and deprives a party of a fair trial.[8]

Footnotes

1 Cattano v. Metropolitan St. Ry. Co., 173 N.Y. 565, 66 N.E. 563 (1903); Tacktill v. Eastern Capitol Lines, 260 A.D. 58, 21 N.Y.S.2d 14 (1st Dep't 1940); Wood v. New York State Elec. & Gas Corp., 257 A.D. 172, 12 N.Y.S.2d 947 (3d Dep't 1939), judgment aff'd, 281 N.Y. 797, 24 N.E.2d 480 (1939); Bowen v. Mahoney Coal Corp., 256 A.D. 485, 10 N.Y.S.2d 454 (1st Dep't 1939).

2 Maple Leaf Motor Lodge, Inc. v. Allstate Ins. Co., 53 A.D.2d 1045, 386 N.Y.S.2d 162 (4th Dep't 1976) (holding it reversible error to permit, over objection, comment on the defendant's television advertising slogan so as to impugn the defendant's business ethics and good faith, neither the propriety of the slogan nor the defendant's good faith being relevant to the issues in the action).

3 Cattano v. Metropolitan St. Ry. Co., 173 N.Y. 565, 66 N.E. 563 (1903) (charge that the defendant maintained a school for perjury); Caraballo v. City of New York, 86 A.D.2d 580, 446 N.Y.S.2d 318 (1st Dep't 1982) (accusation of perjury and subornation of perjury); Kraus v. Sobel, 203 A.D. 582, 196 N.Y.S. 845 (1st Dep't 1922).

4 Zemliansky v. United Parcel Service, 175 Misc. 829, 24 N.Y.S.2d 672 (Sup 1940) (suggestion that one juror, a nurse, could provide information on which the jury could act).

5 State v. Andrew O., 16 N.Y.3d 841, 922 N.Y.S.2d 255, 947 N.E.2d 146 (2011).

6 State v. Timothy JJ., 70 A.D.3d 1138, 895 N.Y.S.2d 568 (3d Dep't 2010).

7 Jun Suk Seo v. Walsh, 82 A.D.3d 710, 918 N.Y.S.2d 146 (2d Dep't 2011) (defense counsel's summation comments not so inflammatory or prejudicial as to deprive plaintiff of a fair trial); Torrado v. Lutheran Medical Center, 198 A.D.2d 346, 603 N.Y.S.2d 325 (2d Dep't 1993).

8 McArdle v. Hurley, 51 A.D.3d 741, 858 N.Y.S.2d 690 (2d Dep't 2008) (defense counsel's argument that plaintiff's family was seeking to "max out in the civil justice system").

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§ 356. Financial or pecuniary matters

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 121

A.L.R. Library

- Propriety and effect, in eminent domain proceeding, of argument or evidence as to source of funds to pay for property, 19 A.L.R.3d 694
- Counsel's appeal in civil case to wealth or poverty of litigants as ground for mistrial, new trial, or reversal, 32 A.L.R.2d 9

Counsel should not comment on the wealth or poverty of the parties during summation [1] nor appeal to the financial interests of the jurors. [2]

Footnotes

1 Kenneth v. Gardner, 36 A.D.2d 575, 317 N.Y.S.2d 798 (4th Dep't 1971).

2 Wood v. New York State Elec. & Gas Corp., 257 A.D. 172, 12 N.Y.S.2d 947 (3d Dep't 1939), judgment aff'd, 281 N.Y. 797, 24 N.E.2d 480 (1939).

As to the propriety of indicating that the defendant in a negligence action is or is not covered by liability insurance, see § 358.

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XIII. Summation

B. Proper and Improper Remarks

2. Comment on Particular Matters

§ 357. Matters not in evidence

Topic Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Trial 119, 120

A.L.R. Library

- Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits, 69 A.L.R.4th 131
- Propriety and prejudicial effect of argument or comment by counsel as to settlement negotiations during trial of personal injury action, 99 A.L.R.2d 737
- Prejudicial effect in civil trial of counsel's misconduct in physically exhibiting to jury objects or items not introduced as evidence, 37 A.L.R.2d 662

The rule allowing counsel the greatest freedom in discussing the evidence and presenting his or her client's theories during summation [1] does not justify the introduction of matters not in evidence. [2] Because a verdict should be founded only on the law and the evidence, a statement of facts neither proven nor presumed has no place in a trial. [3] Thus, when counsel makes reference to the facts during summation, the facts referred to must have been introduced into the record. [4]

An improper argument was raised for the first time in summation where—

— the surrogate's court decided to entertain argument of the administrator of the decedent's estate that a constructive trust was warranted in a proceeding to recover the proceeds of the policy, where the argument was raised for the first time in the administrator's posttrial summation papers. [5]

— a trial court directed a motorcyclist's attorney not to refer to an injury sustained by the motorcyclist in a collision as a "separated shoulder" because the term "separated shoulder" is a medical term of art and no expert testimony had been adduced defining it. [6]

— counsel asserted, in an action for wrongful death, battery, and false arrest, that the decedent had a propensity to aggression and theorized that he died as a result of a drunken fall where there was no evidence to support either statement. [7]

However, a statement during summation was based on evidence in the trial, [8] and thus was proper, where—

— in an action against the landlord, alleging that the tenant was injured while cooking in the apartment when flames shot out of stove, startling the tenant and causing her to drop a pot of boiling water on herself, defense counsel's comments during summation, that the tenant was trying to get new stove through her repeated complaints, was a fair comment on the evidence at trial. [9]

— defense counsel's argument that a second injury, a month after the first, triggered the injured patient's reflex sympathetic dystrophy, was based on the evidence in the trial record. [10]

— the statement of the patient's counsel of a "theory" that the doctors had intentionally compressed an artery to stop the patient from hemorrhaging and to provide a clean operational field was considered a fair comment upon the evidence, where reasonable inferences from the evidence indicated that the action was taken in the initial stages of surgery to restrict blood loss. [11]

— defense counsel addressed testimony that a house guest had consumed up to half a bottle of wine at dinner prior to falling into an exterior basement stairwell while walking around the side of the house in the dark, despite the fact that it did not establish that the guest was intoxicated, because it was relevant to the issue of whether the house guest was fully attentive to her surroundings when the accident occurred. [12]

CUMULATIVE SUPPLEMENT

Cases:

Comments by counsel for estate of mesothelioma patient, during closing argument on claim that patient's disease was caused by exposure to asbestos in talcum powder, did not improperly influence jury to find asbestos entered patient's body transvaginally as opposed to by breathing; comments were isolated remarks during lengthy argument, comments did not divert jury's attention from core issues of exposure and causation, comments were based on expert testimony about transvaginal asbestos exposure in general to which talc distributor failed to object, distributor made no effort to blunt expert testimony during its own closing arguments, jury was instructed not to consider counsel's remarks as evidence, and trial judge stated he believed counsel's comments were not motivated by bad faith. Nemeth v. Brenntag North America, 123 N.Y.S.3d 12 (App. Div. 1st Dep't 2020).

[END OF SUPPLEMENT]

Footnotes

1 § 354.

2 DiMichel v. South Buffalo Ry. Co., 80 N.Y.2d 184, 590 N.Y.S.2d 1, 604 N.E.2d 63 (1992); Aurnou v. Craig, 184 A.D.2d 1048, 584 N.Y.S.2d 249 (4th Dep't 1992).

3 Clarke v. Selover, 260 A.D.2d 981, 689 N.Y.S.2d 300 (3d Dep't 1999); Wood v. New York State Elec. & Gas Corp., 257 A.D. 172, 12 N.Y.S.2d 947 (3d Dep't 1939), judgment aff'd, 281 N.Y. 797, 24 N.E.2d 480 (1939); Bowen v. Mahoney Coal Corp., 256 A.D. 485, 10 N.Y.S.2d 454 (1st Dep't 1939).

Defense counsel's summation comment that the plaintiff had failed to advise the defendants' examining physician of the plaintiff's fall three years after the accident was improper where the physician did not testify and counsel acted as an unsworn witness as to facts not in evidence. Stangl v. Compass Transp., 221 A.D.2d 909, 635 N.Y.S.2d 376 (4th Dep't 1995).

4 GERTRUDE KOELGES, Respondent, v. THE GUARDIAN LIFE INSURANCE COMPANY, Appellant., 57 N.Y. 638, 1874 WL 13455 (1874); In re Roberts' Will, 246 A.D. 87, 283 N.Y.S. 50 (4th Dep't 1935).

5 Roberts v. Borg, 83 A.D.3d 947, 922 N.Y.S.2d 426 (2d Dep't 2011) (beneficiary of life insurance policy was prejudiced).

6 Clarke v. Selover, 260 A.D.2d 981, 689 N.Y.S.2d 300 (3d Dep't 1999).

7 Taggart v. Alexander's Inc., 90 A.D.2d 542, 455 N.Y.S.2d 117 (2d Dep't 1982).

8 Novikov v. Zamdborg, 79 A.D.3d 833, 913 N.Y.S.2d 295 (2d Dep't 2010); Winter v. Stewart's Shops Corp., 55 A.D.3d 1075, 866 N.Y.S.2d 397 (3d Dep't 2008) (statements made by counsel during summation were relevant on the issue of foreseeability and constituted fair comment on the evidence presented at trial); Dhillon v. Bryant Associates, 26 A.D.3d 155, 809 N.Y.S.2d 25 (1st Dep't 2006) (summation by plaintiff's counsel was fair comment on medical evidence in case, or lack thereof).

9 Ruiz v. Summit Appliance Div., 92 A.D.3d 429, 938 N.Y.S.2d 25 (1st Dep't 2012) (personal injury action).

10 Friedman v. Marcus, 32 A.D.3d 820, 821 N.Y.S.2d 136 (2d Dep't 2006) (medical malpractice suit).

11 Taype v. City of New York, 82 A.D.2d 648, 442 N.Y.S.2d 799 (2d Dep't 1981).

12 Karsdon v. Barringer, 20 A.D.3d 551, 799 N.Y.S.2d 548 (2d Dep't 2005).

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XIII. Summation

B. Proper and Improper Remarks

2. Comment on Particular Matters

§ 358. Liability insurance

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 127

A.L.R. Library

- Counsel's argument or comment stating or implying that defendant is not insured and will have to pay verdict himself as prejudicial error, 68 A.L.R.4th 954
- Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance, 4 A.L.R.2d 761

Forms

- Am. Jur. Pleading and Practice Forms, Trial § 142 (Motion—In limine—Mention of insurance)

Counsel should not, in summation, indicate that the defendant in a negligence action is [1] or is not [2] protected by liability insurance with respect to the occurrence in question. Interjection of the fact of insurance may even require reversal when done by defense counsel employed by the insurer. [3]

Evidence that a defendant carries liability insurance is generally inadmissible.[4] However, if the evidence of the existence of liability insurance is relevant to a material issue in the trial, it may be admissible notwithstanding the resulting prejudice of divulging the existence of insurance to the jury. Evidence of liability insurance may be excluded if the trial court finds that the risk of confusion or prejudice outweighs the advantage in receiving it.[5] Also, a defendants is not entitled to a mistrial based on remarks made by plaintiffs' counsel during summation regarding the existence of liability insurance, where there was little probability that the remarks actually prejudiced defendants.[6]

Since the advent of compulsory automobile liability insurance, it has been suggested that the rule may not apply in automobile accident cases.[7] Assuming such an exception exists, however, comments by the plaintiff's attorney as to the adequacy of the defendant's coverage will still require reversal in a close case.[8]

CUMULATIVE SUPPLEMENT

Cases:

Defense counsel's statements to jury that allegedly implied that defendant motorist had no insurance did not entitle plaintiff motorist to new trial in her negligence action seeking recovery for personal injuries she allegedly sustained when vehicle she was driving collided with vehicle operated by defendant; defense counsel did not improperly refer to defendant as her "client," and while defense counsel stated that defendant should not be held responsible for medical expenses, these statements were in response to plaintiff's testimony and arguments of plaintiff's counsel, and defense counsel never stated or implied defendant lacked insurance coverage or would have to pay out of pocket. Boehm v. Rosario, 154 A.D.3d 1298, 63 N.Y.S.3d 164 (4th Dep't 2017).

[END OF SUPPLEMENT]

Footnotes

1 Butigian v. Port Authority of NY & NJ, 293 A.D.2d 251, 740 N.Y.S.2d 305 (1st Dep't 2002); Freeman v. Manhattan Cab Corp., 1 Misc. 2d 601, 150 N.Y.S.2d 674 (Sup 1956).

Where the only defendant was a violin player and plaintiff's counsel, in summation, said that "people" represented by defendant's counsel make a practice of investigating jurors and "other things," the word "people" certainly did not refer to the sole defendant, nor was it likely that counsel intended the jury to understand that the violin player made a practice of investigating jurors and "other things," so the remark could only have been intended to convey to the jury that the defendant was insured; whether intentional or not, such a remark is prejudicial where the question of causal relationship is a close one. Kuznicki v. Kuszowski, 2 A.D.2d 216, 153 N.Y.S.2d 705 (4th Dep't 1956).

2 Rendo v. Schermerhorn, 24 A.D.2d 773, 263 N.Y.S.2d 743 (3d Dep't 1965) (holding that the jury should have been instructed to disregard the defense counsel's remark that if the plaintiff recovered a large sum, the defendant would have to work the rest of his life to pay it).

3 Masone v. Gianotti, 54 A.D.2d 269, 388 N.Y.S.2d 322 (2d Dep't 1976) (holding that reversal is required where the defense counsel, in suit by an infant against its grandparents, advises the jury that the sole reason for the lawsuit is because the defendants have liability insurance; if the counsel employed by

the insurer believes there is collaboration between the plaintiffs and the defendants, her remedy is by disclaimer and not by disavowal of the clients she is called upon to represent).

4 Grogan v. Nizam, 66 A.D.3d 734, 887 N.Y.S.2d 607 (2d Dep't 2009) (medical malpractice); Salm v. Moses, 13 N.Y.3d 816, 890 N.Y.S.2d 385, 918 N.E.2d 897 (2009).

5 Salm v. Moses, 13 N.Y.3d 816, 890 N.Y.S.2d 385, 918 N.E.2d 897 (2009).

6 Smith v. Vohrer, 62 A.D.3d 528, 880 N.Y.S.2d 16 (1st Dep't 2009) (single passing reference to letters from insurance company); Hinterberger v. Leslie, 45 A.D.3d 1314, 846 N.Y.S.2d 504 (4th Dep't 2007) (mistrial not warranted in personal injury action arising out of motor vehicle collision); Hammond v. Welsh, 29 A.D.3d 518, 815 N.Y.S.2d 147 (2d Dep't 2006) (personal injury action).

7 Senecal v. Hovey, 44 Misc. 2d 409, 253 N.Y.S.2d 698 (County Ct. 1964) (stating that where the plaintiff sues only for property damage and his counsel admits in opening statement that he is insured for the damage, with a deductible, the plaintiff cannot complain if the defendant's counsel tells the jury in summation that his client is also insured, at least where "liability" insurance is not expressly mentioned).

8 Depelteau v. Ford Motor Co., 28 A.D.2d 1178, 284 N.Y.S.2d 490 (3d Dep't 1967).

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§ 359. Military service

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 121

A.L.R. Library

- Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof, 24 A.L.R.6th 747

It is improper to comment in summation on the military service, or lack thereof, of a party or the party's family members. [1]

Footnotes

1 E.A. Strout Farm Agency v. De Forest, 201 A.D. 777, 195 N.Y.S. 101 (3d Dep't 1922) (it was improper for the plaintiff's counsel, talking to a wartime jury, to refer to statements in a letter by the defendant, introduced in evidence to explain why the defendant did not wish to sell his farm, concerning the draft

exemption of the defendant's son; such statements are calculated to arouse prejudice in the minds of the jury and cause it to forget that the issue is whether the defendant owes the plaintiff money).

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XIII. Summation

B. Proper and Improper Remarks

2. Comment on Particular Matters

§ 360. Opposing counsel

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 126

A.L.R. Library

- Prejudicial effect, in argument or summation in civil case, of attacks upon opposing counsel, 96 A.L.R.2d 9

Treatises and Practice Aids

- Lane, Goldstein Trial Technique § 23:17 (3d ed.) (Scope of the arguments—Personal animosity of attorney)

Forms

- Am. Jur. Pleading and Practice Forms, Trial § 357 (Motion for mistrial—Misconduct of counsel—Inflammatory reference to race or religion of party)

There is no justification for attacking the credibility of opposing counsel in a summation; the veracity of counsel is simply not a subject for summation. [1] However, remarks made during summation attacking the credibility of opposing counsel, although offensive and uncalled for, do not improperly affect the verdict if the remarks are brief, and where the remarks are unlikely to have affected the outcome of the case. [2]

A personal attack on the opposing attorney is improper as a part of summation. [3] Thus, counsel overstepped the bounds of permissible summation in the second trial of an action by attempting to draw an inference unfavorable to the plaintiff from the fact that the plaintiff was represented by a different counsel from the one who had represented him on the first trial, stating that the original attorney probably "heard of things here because of which he wouldn't have anything to do with it." [4] So too would a judgment for the plaintiff in a wrongful death action be reversed due to the personal attacks of the plaintiff's counsel on the defendant's trial attorney where the plaintiff's counsel urged the jury that "the purpose of his nice, friendly, gentle affable presence is to make you forget" likened the defense counsel to a professional mourner at a funeral who would "cry and apologize and feel sorry" and characterized the defense counsel as "the master of the half-truth." [5]

Footnotes

1 Pareja v. City of New York, 49 A.D.3d 470, 854 N.Y.S.2d 380 (1st Dep't 2008).

2 Pareja v. City of New York, 49 A.D.3d 470, 854 N.Y.S.2d 380 (1st Dep't 2008) (personal injury action).

3 Caraballo v. City of New York, 86 A.D.2d 580, 446 N.Y.S.2d 318 (1st Dep't 1982); Bowen v. Mahoney Coal Corp., 256 A.D. 485, 10 N.Y.S.2d 454 (1st Dep't 1939) (imputation of religious and racial prejudice).

4 Shea v. Shea, 209 A.D. 228, 204 N.Y.S. 560 (4th Dep't 1924).

5 Escobar v. Seatrain Lines, Inc., 175 A.D.2d 741, 573 N.Y.S.2d 498 (1st Dep't 1991).

105 N.Y. Jur. 2d Trial § 361

New York Jurisprudence, Second Edition May 2022 Update

Trial

Elizabeth M. Bosek, J.D.; Russell J. Davis, J.D., M.A.; John J. Dvorske, J.D., M.A.; Thomas M. Fleming, J.D.; Tammy E. Hinshaw, J.D.; John Kimpflen, J.D.; Charles J. Nagy, J.D.; Kimberly C. Simmons, J.D.; Mary Ellen West, J.D., and Lisa A. Zakolski, J.D.

XIII. Summation

B. Proper and Improper Remarks

2. Comment on Particular Matters

§ 361. Prejudice based on race, creed, color, or similar matters

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 126

A trial judge must require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based on age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, or socioeconomic status against parties, witnesses, counsel, or others. This rule does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, socioeconomic status, or other similar factors are issues in the proceeding. [1]

During summation, counsel must not appeal to the jury's racial prejudice [2] or impute racial or religious prejudice to the opposing side [3] where the existence of such prejudice is not an issue in the case. It is also reversible error to impute religious and racial prejudice to the opponent's attorney with a view to influencing the verdict. [4]

Even though both parties allow a cause to be submitted to the jury without objection, a judgment may be reversed because of improper remarks of counsel that inject race prejudice into the trial. [5]

CUMULATIVE SUPPLEMENT

Statutes:

22 NYCRR § 100.3(B)(5), N.Y. Ct. Rules § 100.3(B)(5) (Rules of the Chief Administrator Governing Judicial Conduct) was amended effective June 25, 2018, to add that judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon gender identity or gender expression.

[END OF SUPPLEMENT]

Footnotes

1 22 NYCRR § 100.3(B)(5), N.Y. Ct. Rules § 100.3(B)(5) (Rules of the Chief Administrator of the Courts).

2 Dhillon v. Bryant Associates, 26 A.D.3d 155, 809 N.Y.S.2d 25 (1st Dep't 2006) (summation did not improperly inject issue of ethnic stereotyping or racial prejudice into trial); Caraballo v. City of New York, 86 A.D.2d 580, 446 N.Y.S.2d 318 (1st Dep't 1982).

3 Bowen v. Mahoney Coal Corp., 256 A.D. 485, 10 N.Y.S.2d 454 (1st Dep't 1939).

4 Classen v. Ashkinazy, 258 A.D.2d 863, 686 N.Y.S.2d 164 (3d Dep't 1999) (remarks made by the counsel during summation were not an improper reference to race, nationality, or religion); Bowen v. Mahoney Coal Corp., 256 A.D. 485, 10 N.Y.S.2d 454 (1st Dep't 1939).

5 Abbate v. Solan, 257 A.D. 776, 15 N.Y.S.2d 332 (2d Dep't 1939); Kluchenia v. Hodge, 38 N.Y.S.2d 545 (Sup 1942).

End of Document

105 N.Y. Jur. 2d Trial § 362

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Trial

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XIII. Summation

B. Proper and Improper Remarks

2. Comment on Particular Matters

§ 362. Witnesses

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 121

In summing up, counsel may comment on the evidence, within reasonable limitations, and may include comment on those who gave evidence. [1] However, ad hominem attacks on witnesses in the course of summation are generally improper. [2]

The conduct of the plaintiff's counsel in stating, in summation to the jury, that a physician, who had testified as to his opinion respecting the extent of the plaintiff's injuries and who was concededly a highly qualified practitioner, was "the greatest and most unmitigated rotten liar I have ever seen in a court room" and "a tool of the defendants" exceeded permissible bounds and required setting aside of a verdict for the plaintiff. [3] It is also not proper for a summation to include unsubstantiated charges of perjury and subornation of perjury. [4] However, improper comments as to witnesses have been held insufficient to set aside a judgment where the judgment was supported by strong evidence [5] or where such comments did not deprive the opposing party of a fair trial. [6]

CUMULATIVE SUPPLEMENT

Cases:

Defense counsel's statements as to plaintiff's treating physician's financial arrangement with plaintiff's counsel's firm constituted fair commentary on the evidence, and were within the wide latitude afforded on summation, in trial in which plaintiff sought to recover damages for personal injuries she allegedly incurred when she slipped and fell on stairs. Santana v. 3410 Kingsbridge LLC, 148 A.D.3d 557, 51 N.Y.S.3d 29 (1st Dep't 2017).

[END OF SUPPLEMENT]

Footnotes

1 Zemliansky v. United Parcel Service, 175 Misc. 829, 24 N.Y.S.2d 672 (Sup 1940).

2 Hardwick v. Fensterstock, 258 A.D.2d 330, 685 N.Y.S.2d 446 (1st Dep't 1999).

3 Zemliansky v. United Parcel Service, 175 Misc. 829, 24 N.Y.S.2d 672 (Sup 1940).

4 Caraballo v. City of New York, 86 A.D.2d 580, 446 N.Y.S.2d 318 (1st Dep't 1982).

The court would order a new trial in a medical malpractice action where the plaintiff's attorney made several unfair comments regarding the defendant's expert during summation, including the suggestion that he was "shading the truth," an accusation that he was a "hired gun," and remarks that his "idea of truth and justice is that this is a game to be played," especially because liability was not shown with clarity and the plaintiff's expert was unconvincing at best. Steidel v. County of Nassau, 182 A.D.2d 809, 582 N.Y.S.2d 805 (2d Dep't 1992).

5 O'Neil v. Klass, 36 A.D.3d 677, 829 N.Y.S.2d 144 (2d Dep't 2007) (counsel's many improper, inflammatory remarks during summation deprived plaintiff of a fair trial where counsel repeatedly characterized responses of plaintiff's expert witness as "lies," accused witness of "deliberately misleading the jury," and called him "an evasive person" as well as a "professional" witness); Vazquez v. Costco Companies, Inc., 17 A.D.3d 350, 792 N.Y.S.2d 593 (2d Dep't 2005) (counsel stepped over bounds of legitimate advocacy in suggesting to jury that witness had been "coached" and counsel's comments improperly diverted attention of jury from evidence and improperly invited jury to speculate); Riffel v. Brumburg, 91 A.D.2d 842, 458 N.Y.S.2d 373 (4th Dep't 1982).

6 Hardwick v. Fensterstock, 258 A.D.2d 330, 685 N.Y.S.2d 446 (1st Dep't 1999) (noting that some of the comments were not objected to and the remainder were not serious enough to deprive the defendant of a fair trial).

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105 N.Y. Jur. 2d Trial § 363

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Trial

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XIII. Summation

B. Proper and Improper Remarks

2. Comment on Particular Matters

§ 363. Witnesses—Absence of witnesses

Topic Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 122

A.L.R. Library

- Comment, in argument of civil case, on adversary's failure to call employee as witness, 68 A.L.R.2d 1072

Treatises and Practice Aids

- Lane, Goldstein Trial Technique § 23:12 (3d ed.) (Scope of the arguments—Failure to produce witness or evidence)

In summation, counsel may comment upon the failure of his or her adversary to produce certain witnesses who must have known about the matters in question, provided that it appears from the evidence introduced that such witnesses do have such knowledge,[1] and the plaintiff's counsel is permitted to comment on the defendant's failure to take the stand.[2] However, accusations of attempted deceit regarding failure to call a witness are improper,[3] as is comment on the failure of a personal injury plaintiff to produce coemployees who were present at the scene of the accident but are not under the plaintiff's control.[4]

Footnotes

1 Seligson, Morris & Neuburger v. Fairbanks Whitney Corp., 22 A.D.2d 625, 257 N.Y.S.2d 706 (1st Dep't 1965).

2 Sky v. Kahan-Frankl, 47 A.D.2d 939, 367 N.Y.S.2d 84 (2d Dep't 1975).

3 Bagailuk v. Weiss, 110 A.D.2d 284, 494 N.Y.S.2d 205 (3d Dep't 1985).

It is error to permit the defendant to mention in closing before a trial of a witness that the plaintiff is in possession of an examination but chose not to produce it where the existence of the examination is not mentioned in the record and the defendant stated in the opening argument that the defendant, not the plaintiff, would produce said witness at trial. Williams v. Long Island R. R., 41 A.D.2d 940, 343 N.Y.S.2d 700 (2d Dep't 1973).

Plaintiff's counsel in a personal injury case improperly commented in summation on the failure of a defense witness to appear to rebut the plaintiff's evidence that the witness had ordered a ladder (from which the plaintiff had fallen) destroyed, and improperly argued that the defendant did not produce the witness in an effort to cover up the real facts behind the accident, where the court, although sustaining the defendant's objection and instructing the jury to disregard the point, had previously refused to permit the defendant to offer medical testimony to explain the witness's failure to appear. DiMichel v. South Buffalo Ry. Co., 80 N.Y.2d 184, 590 N.Y.S.2d 1, 604 N.E.2d 63 (1992).

4 Lyons v. City of New York, 29 A.D.2d 923, 289 N.Y.S.2d 2 (1st Dep't 1968), order aff'd, 25 N.Y.2d 996, 305 N.Y.S.2d 509, 253 N.E.2d 221 (1969) (further adding that the prejudice was compounded by the trial court's overruling of the plaintiff's objection, failure to rebuke opposing counsel, and the failure to give proper instructions to the jury).

8 Carmody-Wait 2d § 56:312

Carmody-Wait 2d New York Practice with Forms June 2022 Update

Chapter 56. Presentation of the Case
Tracy Bateman, J.D.; Janet Elaine Curry, J.D.; Laura Hunter Dietz, J.D.; John A. Gebauer, J.D.; Tammy E. Hinshaw, J.D.; Amanda B. Lawrence, J.D.; and Elizabeth Williams, J.D.

VI. Summation

§ 56:312. Summation kept within the four corners of the evidence

Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 111, 112, 114

A.L.R. Library

- Propriety of trial court order limiting time for opening or closing argument in civil case—state cases, 71 A.L.R.4th 130
- Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case, 38 A.L.R.2d 1396

Legal Encyclopedias

- N.Y. Jur. 2d, Trial § 352 (Latitude permitted)

During summation, as long as the summation is confined to the four corners of the evidence, counsel is given the widest latitude in the way of comment, denunciation, or appeal in advocating the cause. [1] Counsel may draw any inferences from the evidence actually introduced that is believed to be warranted and that the jury will believe and may comment upon every pertinent matter of fact bearing upon the questions which the jury have to decide. [2] As long as counsel stays within these parameters and does not dwell upon matters that are immaterial or irrelevant to the issues, the summation should not be interrupted. Because frequent breaking in on counsel's closing argument has a tendency to destroy or impair its effect, therein no justification for interruption

a summation to interject baseless objections or improper comment, and firm action should be taken by the trial court to prevent improper interruption of a summation. [3]

Illustration:

The motorist was not denied a fair trial in motorist's personal injury action, seeking to recover damages for injuries allegedly sustained in a motor vehicle accident, based on allegedly improper remarks of the defendants' attorney during summation, although the remarks were arguably improper, where they did not constitute a pattern of behavior designed to divert the attention of the jurors from the issues at hand. [4]

Counsel is afforded wide latitude in summation to characterize and comment on the evidence; defense counsel remains within the broad bounds of rhetorical comment in pointing out the insufficiency and contradictory nature of a plaintiff's proof without depriving a plaintiff of a fair trial, and making a reference to alternative ways in which evidence can be interpreted may constitute a fair comment upon the evidence. [5] However, there are limits to the behavior and arguments which may be made in summation; objection to improper remarks is permissible, [6] and improper remarks may be the basis for a new trial, particularly where they are repeated. [7]

Illustrations:

Misconduct by counsel for the administrator of a deceased patient's estate deprived a gynecologist of a fair trial in an action for wrongful death and medical malpractice; counsel persistently questioned the witnesses concerning evidence that the trial court had previously deemed inadmissible and improperly referred to that evidence in summation. [8]

On the other hand, while testimony that a house guest had consumed up to half a bottle of wine at dinner prior to falling into the exterior basement stairwell while walking around the side of the house in the dark did not establish that the house guest was intoxicated, it was relevant to the issue of whether the house guest was fully attentive to the surroundings when the accident occurred and thus was a proper subject for the defense counsel's summation in the guest's suit against the homeowners. [9]

CUMULATIVE SUPPLEMENT

Cases:

Trial counsel is afforded wide latitude in presenting arguments to a jury on summation; however, counsel may not engage in deliberate or persistent efforts to divert the jury's attention from the relevant issues to be determined. Lopez v. City of New York, 192 A.D.3d 634, 146 N.Y.S.3d 81 (1st Dep't 2021).

[END OF SUPPLEMENT]

Footnotes

1 Nieves v. Riverbay Corp., 95 A.D.3d 458, 944 N.Y.S.2d 51 (1st Dep't 2012) (counsel's isolated remarks in summation constituted fair comment on evidence); Braun v. Ahmed, 127 A.D.2d 418, 515 N.Y.S.2d 473 (2d Dep't 1987).

2 Williams v. Brooklyn Elevated R. Co., 126 N.Y. 96, 26 N.E. 1048 (1891); Kasman v. Flushing Hosp. and Medical Center, 224 A.D.2d 590, 638 N.Y.S.2d 687 (2d Dep't 1996) (prejudicial error to prevent counsel from commenting on medical insurance records that were received into evidence).

3 People v. Marcelin, 23 A.D.2d 368, 260 N.Y.S.2d 560 (1st Dep't 1965).

4 Kmiotek v. Chaba, 60 A.D.3d 1295, 875 N.Y.S.2d 670 (4th Dep't 2009).

5 Selzer v. New York City Transit Authority, 100 A.D.3d 157, 952 N.Y.S.2d 26 (1st Dep't 2012).

6 § 56:313.

7 § 56:314.

8 Stewart v. Olean Medical Group, P.C., 17 A.D.3d 1094, 795 N.Y.S.2d 420 (4th Dep't 2005).

9 Karsdon v. Barringer, 20 A.D.3d 551, 799 N.Y.S.2d 548 (2d Dep't 2005).

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8 Carmody-Wait 2d § 56:313

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VI. Summation

§ 56:313. Objecting to and curing improper remarks

Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 131 to 133.6

Legal Encyclopedias

- N.Y. Jur. 2d, Trial § 369 (Generally)

Forms

- Am. Jur. Pleading and Practice Forms, Evidence § 95 (Instruction to jury—Duty to disregard stricken testimony)
- Am. Jur. Pleading and Practice Forms, Evidence § 96 (Instruction to jury—Jury not to consider stricken evidence for any purpose)
- Am. Jur. Pleading and Practice Forms, Evidence § 97 (Instruction to jury—Duty to disregard any statements of counsel ordered stricken from record)
- Am. Jur. Pleading and Practice Forms, Evidence § 108 (Instruction to jury—Summation of evidence by counsel)
- West's McKinney's Forms, Civil Practice Law and Rules § 7:93 (Objections; instructions to jury)

Where counsel, in summing up, proceeds to enlarge upon facts not in evidence, or to press upon the jury considerations which the jury have no right to regard, the remedy of the opposing party is to object, specifically pointing out the language deemed objectionable, and requesting that the court rule on the objection. [1] Such objections are generally allowed during summation,

so that immediate curative action can be taken as needed, [2] though it is permissible for counsel to agree that an opponent could make its objections to a party's summation after the summation was finished without waiving any right to object. [3]

An objection to improper comment or argument during summation should be accompanied by a request that the court admonish counsel to desist and that the court direct the jury to disregard improper statements. [4] Where such an objection and request is properly made, it is the duty of the court to interpose; its refusal to do so is legal error for which a new trial will be granted if the rights of the offended party are prejudiced; [5] it is not enough for the trial judge merely to remind jurors that the attorneys' arguments are not testimony. [6] The trial court may in such a case grant a motion for a mistrial [7] or for a new trial. [8]

However, not all improper comment and argument in summation warrant a new trial; [9] an inadvertent or isolated improper statement in summation may sometimes be corrected by prompt curative action, such as a direction by the judge to the jury to disregard that remark or the issuance of curative instructions. [10]

Illustrations:

Curative instructions given after architectural firm's references to settlement demands, in trial for professional malpractice, were sufficient to neutralize the prejudicial effect of the errors, such that mistrial was not warranted. [11]

The supreme court's sustainment of student's objection to school's discussion of the doctrine of primary assumption of the risk in summation, open admonishment of school's counsel, and curative instructions, corrected any possible prejudice from the improper summation comments, thus precluding the grant of student's application for a mistrial. [12]

Where the misconduct of counsel is persistent and counsel's fault is flagrant, the error is not corrected by an instruction to the jury to disregard the improper statements. [13] The same is also true where the trial court refuses to instruct the jury to disregard improper remarks on timely objection [14] or gives instructions which are inadequate [15] or untimely. [16]

Failure to object, request curative instructions, or move for a mistrial on a timely basis generally waives any objection to improper comment or argument in summation, [17] though a judgment may be reversed because of improper remarks of counsel on summation, where the remarks refer to liability insurance [18] or inject race prejudice into a trial, where the existence of such prejudice is not an issue, [19] even absent a timely request for a mistrial. A motion for a mistrial not made until after the jury returns an adverse verdict is generally untimely, [20] though a motion for mistrial promptly made before the jury is charged satisfies the requirement of prompt objection, since it affords the court an opportunity for any corrective action it deems appropriate. [21]

CUMULATIVE SUPPLEMENT

Cases:

Challenges by town to motorist's counsel's summation at trial on motorist's claim for damages for injuries sustained in a motor vehicle accident were unwarranted; record showed that Supreme Court sustained each of defendant's relevant objections and, when requested, gave curative instructions that corrected any possible prejudice occasioned by the purportedly improper comments. Grasha v. Town of Amherst, 191 A.D.3d 1286, 141 N.Y.S.3d 587 (4th Dep't 2021).

Where counsel, in summing up, exceeds the bounds of legal propriety, it is the duty of the opposing counsel to make a specific objection and for the court to rule on the objection, to direct the jury to disregard any improper remarks, and to admonish counsel from repetition of improper remarks. Yu v. New York City Health and Hospitals Corporation, 191 A.D.3d 1040, 142 N.Y.S.3d 580 (2d Dep't 2021).

[END OF SUPPLEMENT]

Footnotes

1 Dimon v. New York Cent. & H.R.R. Co., 173 N.Y. 356, 66 N.E. 1 (1903); Layton Sales & Rentals, Inc. v. Somat Realty Corp., 39 A.D.2d 640, 331 N.Y.S.2d 164 (4th Dep't 1972).

2 Van Valkenburgh v. Koehler, 164 A.D.2d 971, 559 N.Y.S.2d 766 (4th Dep't 1990); Kraus v. Sobel, 203 A.D. 582, 196 N.Y.S. 845 (1st Dep't 1922).

3 Ginsberg by Ginsberg v. North Shore Hosp., 213 A.D.2d 592, 624 N.Y.S.2d 257 (2d Dep't 1995).

4 Cattano v. Metropolitan St. Ry. Co., 173 N.Y. 565, 66 N.E. 563 (1903); Dimon v. New York Cent. & H.R.R. Co., 173 N.Y. 356, 66 N.E. 1 (1903); Binder v. Miller, 39 A.D.3d 387, 835 N.Y.S.2d 62 (1st Dep't 2007); Kinne v. International Ry. Co., 100 A.D. 5, 90 N.Y.S. 930 (4th Dep't 1904).

5 Williams v. Brooklyn Elevated R. Co., 126 N.Y. 96, 26 N.E. 1048 (1891); Horton v. Terry, 126 A.D. 479, 110 N.Y.S. 646 (3d Dep't 1908); Strickland v. New York Cent. & H.R.R. Co., 88 A.D. 367, 84 N.Y.S. 655 (4th Dep't 1903); Stewart v. Metropolitan St. Ry. Co., 72 A.D. 459, 76 N.Y.S. 540 (2d Dep't 1902).

6 State v. Andrew O., 16 N.Y.3d 841, 922 N.Y.S.2d 255, 947 N.E.2d 146 (2011) (inappropriate remarks made by state's attorney during summation in proceeding ultimately concluding that respondent was a dangerous sex offender requiring commitment, that jury would be at fault if respondent molested another child, compromised respondent's right to a fair trial although the trial judge reminded the jurors that the attorney's arguments were not testimony where judge failed to sustain the objection to attorney's remarks, failed to strike the remarks from the record, and failed to direct the jurors to disregard the inflammatory commentary).

7 Cherry Creek Nat. Bank v. Fidelity & Casualty Co. of New York, 207 A.D. 787, 202 N.Y.S. 611 (4th Dep't 1924).

8 E.A. Strout Farm Agency v. De Forest, 201 A.D. 777, 195 N.Y.S. 101 (3d Dep't 1922).

9 Stanton v. Price Chopper Operating Co. Inc., 243 A.D.2d 934, 663 N.Y.S.2d 390 (3d Dep't 1997).

10 Burlingame v. G & G Auto Repair, 229 A.D.2d 511, 646 N.Y.S.2d 32 (2d Dep't 1996); Beth Israel Hosp. North v. Castle Oil Corp., 220 A.D.2d 257, 632 N.Y.S.2d 78 (1st Dep't 1995); Giraldez v. City of New York, 214 A.D.2d 461, 625 N.Y.S.2d 517, 100 Ed. Law Rep. 240 (1st Dep't 1995).

Supreme court corrected any possible prejudice caused by improper comments made by the plaintiff's counsel during summation in personal injury action where court sustained the objection to those comments, provided curative instructions, and openly admonished the plaintiff's counsel. Fekry v. New York City Transit Authority, 75 A.D.3d 616, 906 N.Y.S.2d 297 (2d Dep't 2010).

11 Country Park Child Care, Inc. v. Smartdesign Architecture PLLC, 129 A.D.3d 1636, 12 N.Y.S.3d 706 (4th Dep't 2015).

12 Richardson v. City of New York, 109 A.D.3d 808, 971 N.Y.S.2d 154, 296 Ed. Law Rep. 603 (2d Dep't 2013).

13 Stein v. Brooklyn, Q. C. & S. R. Co., 62 Misc. 309, 114 N.Y.S. 791 (App. Term 1909).

14 Rendo v. Schermerhorn, 24 A.D.2d 773, 263 N.Y.S.2d 743 (3d Dep't 1965).

15 Stewart v. Metropolitan St. Ry. Co., 72 A.D. 459, 76 N.Y.S. 540 (2d Dep't 1902).

16 Boyd v. Blessey, 96 A.D.2d 816, 465 N.Y.S.2d 563 (2d Dep't 1983).

17 Jean-Louis v. City of New York, 86 A.D.3d 628, 928 N.Y.S.2d 310 (2d Dep't 2011); Keeler v. Reardon, 49 A.D.3d 1211, 853 N.Y.S.2d 780 (4th Dep't 2008); Smith v. City of New York, 217 A.D.2d 423, 629 N.Y.S.2d 411 (1st Dep't 1995).

18 Regan v. Frontier Elevator & Mill Co., 211 A.D. 164, 208 N.Y.S. 239 (4th Dep't 1924); Kluchenia v. Hodge, 38 N.Y.S.2d 545 (Sup 1942).

As to remarks in summation referring to insurance coverage, see § 56:318.

19 Abbate v. Solan, 257 A.D. 776, 15 N.Y.S.2d 332 (2d Dep't 1939); Kluchenia v. Hodge, 38 N.Y.S.2d 545 (Sup 1942).

As to remarks in summation appealing to prejudice, see § 56:315.

20 Reilly v. Wright, 55 A.D.2d 544, 390 N.Y.S.2d 1 (1st Dep't 1976); Dunne v. Lemberg, 54 A.D.2d 955, 388 N.Y.S.2d 635 (2d Dep't 1976).

21  Bagailuk v. Weiss, 110 A.D.2d 284, 494 N.Y.S.2d 205 (3d Dep't 1985).

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8 Carmody-Wait 2d § 56:314

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VI. Summation

§ 56:314. Cumulative effect of multiple improper remarks

Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 131 to 133.6

Legal Encyclopedias

- N.Y. Jur. 2d, Trial § 376 (Cumulative effect of multiple improper remarks)

In some cases, the cumulative effect of repeated departures from the rules of proper summation may warrant an order for a new trial. Thus, a new trial has been found to be appropriate where—

— defense counsel made many improper, inflammatory remarks during summation where counsel repeatedly characterized the responses of the plaintiff's expert witness as "lies," accused the witness of "deliberately misleading the jury," and called plaintiff's expert "an evasive person" as well as a "professional" witness. [1]

— the plaintiff's counsel disparaged another housing authority witness as a "yahoo," suggesting that the witness was coached, and made irrelevant reference to an alleged fraud involving time records. [2]

— the plaintiff's attorney made improper comments during summation in a medical malpractice action, including erroneous comments concerning apportionment of damages, accusations of attempted deceit regarding failure to call a witness, and assertions that a defendant delayed testimony so that defendant could tailor it to conform to the testimony of earlier witnesses. [3]

— the plaintiff's attorney's summation included a personal attack on the defendant's attorney, unsubstantiated charges of perjury and subornation of perjury, racial overtones, and assertions of personal knowledge, of a personal opinion as to the case, and as to the credibility of witnesses.[4]

Observation:

Even in situations involving multiple errors, however, reversal may not be warranted if there is strong evidence of lack of fault on the defendant's part.[5]

Footnotes

1 O'Neil v. Klass, 36 A.D.3d 677, 829 N.Y.S.2d 144 (2d Dep't 2007)(Deprived plaintiff of a fair trial in medical malpractice action).

2 Rodriguez v. New York City Housing Authority, 209 A.D.2d 260, 618 N.Y.S.2d 352 (1st Dep't 1994).

3 Bagailuk v. Weiss, 110 A.D.2d 284, 494 N.Y.S.2d 205 (3d Dep't 1985).

4 Caraballo v. City of New York, 86 A.D.2d 580, 446 N.Y.S.2d 318 (1st Dep't 1982) (wherein the jury's verdict in favor of the plaintiff was reversed and a new trial was ordered).

5 Riffel v. Brumburg, 91 A.D.2d 842, 458 N.Y.S.2d 373 (4th Dep't 1982)(Upholding a judgment for the defendant on a jury verdict despite the fact that defense counsel made improper remarks during summation in attempting to discredit the plaintiff's expert by implying dishonest motives or that monetary considerations were paramount to the truth).

8 Carmody-Wait 2d § 56:315

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VI. Summation

§ 56:315. Appealing to passion or prejudice

Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 125

A.L.R. Library

- Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof, 24 A.L.R.6th 747
- Counsel's appeal in civil case to self-interest or prejudice of jurors as taxpayers, as ground for mistrial, new trial, or reversal, 93 A.L.R.3d 556
- Prejudicial effect of counsel's argument, in civil case, urging jurors to place themselves in the position of litigant or to allow such recovery as they would wish if in the same position, 70 A.L.R.2d 935
- Prejudicial effect of counsel's addressing individually or by name particular juror during argument, 55 A.L.R.2d 1198
- Counsel's appeal in civil case to wealth or poverty of litigants as ground for mistrial, new trial, or reversal, 32 A.L.R.2d 9

Legal Encyclopedias

- N.Y. Jur. 2d, Trial § 355 (Appeal to passion or prejudice)

A verdict should be founded only on the law and the evidence; appeals to prejudice or passion have no place in a trial.[1] In this connection, by rule, a judge must require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based on age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, or socioeconomic status, against parties, witnesses, counsel, or others, though the rule does not preclude

legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, or socioeconomic status or other similar factors are issues in proceeding. [2]

It is therefore improper for counsel, in summation, to:

- appeal to the jury's racial prejudice [3] or impute racial or religious prejudice to the opposing side, [4] where the existence of such prejudice is not an issue in the case
- comment on the wealth or poverty of the parties [5]
- comment on the military service, or lack thereof, of a party or the party's family members [6]
- make unsubstantiated charges against a party [7]
- appeal to the financial interests of the jurors [8]
- tell jurors that it would be their fault if they did not commit the respondent sex offender for psychiatric treatment, and the respondent later molested another child [9]
- make a special appeal to one member of the jury [10]

However, not every improper appeal to the jury's passion or prejudice is sufficient to warrant reversal of a verdict; reversal is not warranted where the misconduct does not divert the jurors' attention from the issues to be determined or deprive the opponent of a fair trial. [11]

Illustration:

Remarks made by a patient's counsel during summation in a dental malpractice action, referring to the Jewish wedding custom of breaking a glass as symbolic of the fragility of marriage and analogizing that act to the destruction of trust between plaintiff and defendant in their dentist-patient relationship, were not improper reference to race, nationality, or religion even if the defendant dentist was Jewish; there was nothing inherently offensive in the remark, and its significance was not related in any way to the defendant's being Jewish. [12]

CUMULATIVE SUPPLEMENT

Cases:

Statement made by defense attorney, in veteran's employment discrimination action against state psychiatric center and several state employees individually alleging that he was denied promotion based on military status, that individual employees should not be forced to open their checkbook, deprived veteran of a fair trial; attorney's statement was grossly improper, since it implied that employees would be required to pay out-of-pocket damages even though State had obligation to indemnify employees for judgments arising out of actions taken within scope of public duties. N.Y. Public Officers Law § 17. Hubbard v. New York State Office of Mental Health, 192 A.D.3d 1586, 145 N.Y.S.3d 711 (4th Dep't 2021).

In some circumstances, implorations to juries during summation to send a message are improper. Lopez v. City of New York, 192 A.D.3d 634, 146 N.Y.S.3d 81 (1st Dep't 2021).

[END OF SUPPLEMENT]

Footnotes

1 Cattano v. Metropolitan St. Ry. Co., 173 N.Y. 565, 66 N.E. 563 (1903); Torrado v. Lutheran Medical Center, 198 A.D.2d 346, 603 N.Y.S.2d 325 (2d Dep't 1993); Tacktill v. Eastern Capitol Lines, 260 A.D. 58, 21 N.Y.S.2d 14 (1st Dep't 1940); Wood v. New York State Elec. & Gas Corp., 257 A.D. 172, 12 N.Y.S.2d 947 (3d Dep't 1939), judgment aff'd, 281 N.Y. 797, 24 N.E.2d 480 (1939); Bowen v. Mahoney Coal Corp., 256 A.D. 485, 10 N.Y.S.2d 454 (1st Dep't 1939).

2 22 NYCRR § 100.3(B)(5), N.Y. Ct. Rules § 100.3(B)(5) (Rules of the Chief Administrator of the Courts).

3 Caraballo v. City of New York, 86 A.D.2d 580, 446 N.Y.S.2d 318 (1st Dep't 1982); Kluchenia v. Hodge, 38 N.Y.S.2d 545 (Sup 1942).

4 Bowen v. Mahoney Coal Corp., 256 A.D. 485, 10 N.Y.S.2d 454 (1st Dep't 1939).

5 Kenneth v. Gardner, 36 A.D.2d 575, 317 N.Y.S.2d 798 (4th Dep't 1971).

6 E.A. Strout Farm Agency v. De Forest, 201 A.D. 777, 195 N.Y.S. 101 (3d Dep't 1922).

7 Cattano v. Metropolitan St. Ry. Co., 173 N.Y. 565, 66 N.E. 563 (1903); Caraballo v. City of New York, 86 A.D.2d 580, 446 N.Y.S.2d 318 (1st Dep't 1982); Kraus v. Sobel, 203 A.D. 582, 196 N.Y.S. 845 (1st Dep't 1922).

8 Wood v. New York State Elec. & Gas Corp., 257 A.D. 172, 12 N.Y.S.2d 947 (3d Dep't 1939), judgment aff'd, 281 N.Y. 797, 24 N.E.2d 480 (1939).

9 State v. Andrew O., 16 N.Y.3d 841, 922 N.Y.S.2d 255, 947 N.E.2d 146 (2011).

10 Zemliansky v. United Parcel Service, 175 Misc. 829, 24 N.Y.S.2d 672 (Sup 1940).

11 Jun Suk Seo v. Walsh, 82 A.D.3d 710, 918 N.Y.S.2d 146 (2d Dep't 2011) (defense counsel's summation comments not so inflammatory or prejudicial as to deprive plaintiff of a fair trial); Torrado v. Lutheran Medical Center, 198 A.D.2d 346, 603 N.Y.S.2d 325 (2d Dep't 1993).

12 Classen v. Ashkinazy, 258 A.D.2d 863, 686 N.Y.S.2d 164 (3d Dep't 1999).

8 Carmody-Wait 2d § 56:316

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VI. Summation

§ 56:316. Commenting on witnesses or evidence

Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 121

Legal Encyclopedias

- N.Y. Jur. 2d, Trial § 362 (Witnesses)

In summing up, counsel may draw any inferences from the evidence actually introduced that counsel thinks are warranted and that the jury will believe, [1] within reasonable limitations, and may include comment on the credibility of those who gave evidence. [2] In doing so, counsel enjoys a wide degree of latitude. [3]

Illustrations:

Allowing counsel for the plaintiff pedestrian to cross-examine pedestrian's treating physician from the hospital emergency room regarding the payment to physician, from defendant installer of fiber-optic cable, of an allegedly disproportionate witness fee for a subpoenaed fact witness, and allowing counsel to comment during summation regarding the allegedly disproportionate payment, was not an abuse of discretion, in negligence action. [4]

On the other hand, statements made by a customer's counsel during summation in a slip and fall action against a store, that the accident would not have happened had the store's employees performed the floor cleaning after business hours and while the store was closed, were relevant on the issue of foreseeability and, as such, constituted fair comment on the evidence presented at trial. [5]

Nevertheless, there are limits to counsel's freedom in this regard; [6] prejudice to the opponent occurs where counsel in summation acts as an unsworn witness or vouches for the credibility of counsel's witnesses, [7] accuses defense witnesses of lying without justification, [8] or accuses the opponent's expert of lying for pay [9] where such conduct is not inadvertent or harmless but a continual, calculated effort to influence the jury by considerations which were not legitimately before it. [10]

Observation:

Notwithstanding the prejudicial effect of such comment, a judgment which is supported by strong evidence may be allowed to stand despite opposing counsel's improper comments regarding evidence or witnesses, [11] and a new trial may not be warranted where improper comments are addressed by prompt curative action and do not improperly affect the jury's determinations. [12]

Footnotes

1 Williams v. Brooklyn Elevated R. Co., 126 N.Y. 96, 26 N.E. 1048 (1891).

2 Rodriguez v. New York City Housing Authority, 209 A.D.2d 260, 618 N.Y.S.2d 352 (1st Dep't 1994); Cerasuoli v. Brevetti, 166 A.D.2d 403, 560 N.Y.S.2d 468 (2d Dep't 1990); Zemliansky v. United Parcel Service, 175 Misc. 829, 24 N.Y.S.2d 672 (Sup 1940).

3 Cerasuoli v. Brevetti, 166 A.D.2d 403, 560 N.Y.S.2d 468 (2d Dep't 1990).

During summation, an attorney remains within the broad bounds of rhetorical comment in pointing out the insufficiency and contradictory nature of a plaintiff's proofs without depriving the plaintiff of a fair trial. Acosta v. City of New York, 153 A.D.3d 765, 61 N.Y.S.3d 559 (2d Dep't 2017).

Defense counsel's statements as to plaintiff's treating physician's financial arrangement with plaintiff's counsel's firm constituted fair commentary on the evidence, and were within the wide latitude afforded on summation, in trial in which plaintiff sought to recover damages for personal injuries that were allegedly incurred when plaintiff slipped and fell on stairs. Santana v. 3410 Kingsbridge LLC, 148 A.D.3d 557, 51 N.Y.S.3d 29 (1st Dep't 2017).

4 Caldwell v. Cablevision Systems Corp., 20 N.Y.3d 365, 960 N.Y.S.2d 711, 984 N.E.2d 909 (2013).

5 Winter v. Stewart's Shops Corp., 55 A.D.3d 1075, 866 N.Y.S.2d 397 (3d Dep't 2008).

6 Sanchez v. Manhattan and Bronx Surface Transit Operating Authority, 170 A.D.2d 402, 566 N.Y.S.2d 287 (1st Dep't 1991).

7 Clarke v. New York City Transit Authority, 174 A.D.2d 268, 580 N.Y.S.2d 221 (1st Dep't 1992); Sanchez v. Manhattan and Bronx Surface Transit Operating Authority, 170 A.D.2d 402, 566 N.Y.S.2d 287 (1st Dep't 1991).

8 Clarke v. New York City Transit Authority, 174 A.D.2d 268, 580 N.Y.S.2d 221 (1st Dep't 1992); Caraballo v. City of New York, 86 A.D.2d 580, 446 N.Y.S.2d 318 (1st Dep't 1982).

9 Rodriguez v. New York City Housing Authority, 209 A.D.2d 260, 618 N.Y.S.2d 352 (1st Dep't 1994); Clarke v. New York City Transit Authority, 174 A.D.2d 268, 580 N.Y.S.2d 221 (1st Dep't 1992); Berkowitz v. Marriott Corp., 163 A.D.2d 52, 558 N.Y.S.2d 511 (1st Dep't 1990).

Defense counsel's many improper, inflammatory remarks during cross-examination of the plaintiff's experts and in summation in a medical malpractice action deprived the plaintiff of a fair trial where counsel repeatedly characterized responses of the plaintiff's expert witness as "lies," accused the witness of "deliberately misleading the jury," and called plaintiff's expert witness "an evasive person," as well as a "professional" witness. O'Neil v. Klass, 36 A.D.3d 677, 829 N.Y.S.2d 144 (2d Dep't 2007).

10 Clarke v. New York City Transit Authority, 174 A.D.2d 268, 580 N.Y.S.2d 221 (1st Dep't 1992).

In patron's action against owner of supermarket for personal injuries allegedly sustained in slip and fall accident, comments by patron's counsel in summation, which commented upon failure of owner's witness, a triage nurse, to testify, were not supported by evidence and were inflammatory and unduly prejudicial, thereby depriving owner of a fair trial. Nelson v. Bogopa Service Corp., 123 A.D.3d 780, 999 N.Y.S.2d 88 (2d Dep't 2014).

11 Riffel v. Brumburg, 91 A.D.2d 842, 458 N.Y.S.2d 373 (4th Dep't 1982).

12 Liebman v. Otis Elevator Co., 145 A.D.2d 546, 536 N.Y.S.2d 100 (2d Dep't 1988); Abbott v. New Rochelle Hosp. Medical Center, 141 A.D.2d 589, 529 N.Y.S.2d 352 (2d Dep't 1988).

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§ 56:317. Commenting on witnesses or evidence—Failure to produce witnesses or evidence

Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 122

A.L.R. Library

- Comment, in argument of civil case, on adversary's failure to call employee as witness, 68 A.L.R.2d 1072

Legal Encyclopedias

- N.Y. Jur. 2d, Trial § 363 (Witnesses—Absence of witnesses)

In summation, counsel may comment upon the failure of counsel's adversary to produce certain witnesses who must have known about the matters in question, including a party, [1] provided it appears from the evidence introduced that such witnesses do have such knowledge, [2] even in circumstances where a missing witness charge would not be warranted, [3] though such comments are improper where the witness not produced was not under the control of the party. [4] Counsel may make such comments during summation under the presumption that the testimony would have been unfavorable to that party. [5]

Illustration:

Counsel for a woman who brought an action against a county after the woman was assaulted by her boyfriend during a visit to the county jail where her boyfriend was incarcerated could not argue during summation that the county could have subpoenaed the woman's cousin, who was present at the time of the assault but who had not been called as a witness by the woman and in connection with whom a missing witness charge was given with respect to the woman, if it had believed that the cousin's testimony would have been favorable to the county since the cousin was not under the county's control. [6]

Accusations of attempted deceit regarding failure to call a witness are improper, [7] and a party may not comment on failure of the opponent to produce evidence where the trial court had precluded introduction of such evidence [8] or where the evidence was not relevant to the issues in the case about which summation was proper. [9]

Further, where a party comments in summation about the absence of a witness or evidence, or seeks and obtains a missing witness charge, the opponent is permitted to explain the absence. [10]

Footnotes

1 Sky v. Kahan-Frankl, 47 A.D.2d 939, 367 N.Y.S.2d 84 (2d Dep't 1975).

2 DeVaul v. Carvigo Inc., 138 A.D.2d 669, 526 N.Y.S.2d 483 (2d Dep't 1988); Seligson, Morris & Neuburger v. Fairbanks Whitney Corp., 22 A.D.2d 625, 257 N.Y.S.2d 706 (1st Dep't 1965).

3 DeVaul v. Carvigo Inc., 138 A.D.2d 669, 526 N.Y.S.2d 483 (2d Dep't 1988).

As to the propriety of a missing witness charge, generally, see § 56:23.

4 Jackson v. County of Sullivan, 232 A.D.2d 954, 648 N.Y.S.2d 808 (3d Dep't 1996); DeVaul v. Carvigo Inc., 138 A.D.2d 669, 526 N.Y.S.2d 483 (2d Dep't 1988); Lyons v. City of New York, 29 A.D.2d 923, 289 N.Y.S.2d 2 (1st Dep't 1968), order aff'd, 25 N.Y.2d 996, 305 N.Y.S.2d 509, 253 N.E.2d 221 (1969).

5 Placencia v. Torres, 194 Misc. 2d 623, 754 N.Y.S.2d 867 (N.Y. City Civ. Ct. 2003).

6 Jackson v. County of Sullivan, 232 A.D.2d 954, 648 N.Y.S.2d 808 (3d Dep't 1996).

7 Bagailuk v. Weiss, 110 A.D.2d 284, 494 N.Y.S.2d 205 (3d Dep't 1985); Williams v. Long Island R. R., 41 A.D.2d 940, 343 N.Y.S.2d 700 (2d Dep't 1973).

8 Diorio v. City of New York, 232 A.D.2d 367, 648 N.Y.S.2d 618 (2d Dep't 1996).

9 Godfrey v. Dunn, 190 A.D.2d 896, 593 N.Y.S.2d 120 (3d Dep't 1993).

10 Minick v. Liquid Air Corp., 240 A.D.2d 477, 658 N.Y.S.2d 420 (2d Dep't 1997).

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§ 56:318. Commenting on matters not in evidence; insurance coverage

Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 127

A.L.R. Library

- Counsel's argument or comment stating or implying that defendant is not insured and will have to pay verdict himself as prejudicial error, 68 A.L.R.4th 954
- Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance, 4 A.L.R.2d 761

Legal Encyclopedias

- N.Y. Jur. 2d, Trial § 358 (Liability insurance)

Forms

- Am. Jur. Pleading and Practice Forms, Trial § 142 (Motion—In limine—Mention of insurance)

When counsel, in summation, makes reference to the facts, the facts referred to must have been introduced into the record, since a verdict should be founded only on the law and the evidence, and statement of or comment on facts neither proven nor presumed has no place in a trial. [1] The rule allowing counsel, when addressing the jury, the greatest freedom in discussing the evidence and presenting the client's theories does not justify the introduction of matters not in evidence [2] or which the trial court has previously deemed inadmissible. [3]

Illustrations:

In an action for wrongful death, battery, and false arrest, the trial court improperly allowed defense counsel to assert that the decedent had a propensity to aggression and to theorize that the decedent died as a result of a drunken fall, there being no evidence to support either statement. [4]

On the other hand, the denial of a motion for mistrial for remarks by a pedestrian's attorney during closing argument alluding that there was a conspiracy to cover up the facts surrounding the pedestrian's fall on a subway platform was a proper exercise of discretion, where the pedestrian's case was very strong, and the net effect of counsel's improper conspiracy allusion was minimal. [5]

Counsel should not, in summation, indicate that the defendant in an action is [6] or is not [7] protected by insurance as to the occurrence in question. Interjection of the fact of insurance may even require reversal when done by defense counsel employed by the insurer [8] though an isolated reference to insurance may not require reversal. [9] If the evidence of the existence of liability insurance is relevant to a material issue in the trial, it may be admissible notwithstanding the resulting prejudice of divulging the existence of insurance to the jury. Evidence of liability insurance maybe excluded if the trial court finds the risk of confusion or prejudice outweighs the advantage in receiving it. [10]

Observation:

Where both parties allow the cause to be submitted to the jury without objection, a judgment may be reversed because of improper reference to liability insurance, [11] but since the advent of compulsory automobile liability insurance, it has been suggested that such might not be the case in automobile accident cases [12] though even if it be supposed that juries now assume defendants to be covered by liability insurance, comments by the plaintiff's attorney as to the adequacy of the defendant's coverage require reversal in a close case. [13] However, patients' counsel are entitled to comment during summation on medical insurance records received into evidence. [14]

CUMULATIVE SUPPLEMENT

Cases:

The passing reference to insurance or similar benefits, in a personal injury negligence action, will not necessarily result in reversal; however, if the testimony goes beyond mere mention of insurance, then a mistrial may be warranted. Campbell v. St. Barnabas Hospital, 195 A.D.3d 405, 150 N.Y.S.3d 63 (1st Dep't 2021).

Counsel is afforded wide latitude in summation to characterize and comment on the evidence. Kulynska v. Agayeva, 188 A.D.3d 659, 133 N.Y.S.3d 290 (2d Dep't 2020).

[END OF SUPPLEMENT]

Footnotes

1 Warner v. Village of Chatham, 194 A.D.2d 980, 598 N.Y.S.2d 863 (3d Dep't 1993).

2 Bennett v. Town of Wheeler, 209 A.D. 283, 204 N.Y.S. 695 (4th Dep't 1924); Cherry Creek Nat. Bank v. Fidelity & Casualty Co. of New York, 207 A.D. 787, 202 N.Y.S. 611 (4th Dep't 1924).

3 Stewart v. Olean Medical Group, P.C., 17 A.D.3d 1094, 795 N.Y.S.2d 420 (4th Dep't 2005).

4 Taggart v. Alexander's Inc., 90 A.D.2d 542, 455 N.Y.S.2d 117 (2d Dep't 1982).

5 Calzado v. New York City Transit Authority, 304 A.D.2d 385, 758 N.Y.S.2d 303 (1st Dep't 2003).

6 Butigian v. Port Authority of NY & NJ, 293 A.D.2d 251, 740 N.Y.S.2d 305 (1st Dep't 2002); Herbert H. Post & Co. v. Sidney Bitterman, Inc., 219 A.D.2d 214, 639 N.Y.S.2d 329 (1st Dep't 1996); Constable v. Matie, 199 A.D.2d 1004, 608 N.Y.S.2d 10 (4th Dep't 1993).

Where the only defendant was a violin player and plaintiff's counsel, in summation, said that "people" represented by defendant's counsel make a practice of investigating jurors and "other things," the word "people" certainly did not refer to the sole defendant, nor was it likely that couples intended the jury to understand that the violin player made a practice of investigating jurors and "other things," so the remark could only have been intended to convey to the jury that the defendant was insured; whether intentional or not, such a remark is prejudicial where the question of causal relationship is a close one. Kuznicki v. Kuszowski, 2 A.D.2d 216, 153 N.Y.S.2d 705 (4th Dep't 1956).

7 Rendo v. Schermerhorn, 24 A.D.2d 773, 263 N.Y.S.2d 743 (3d Dep't 1965).

8 Masone v. Gianotti, 54 A.D.2d 269, 388 N.Y.S.2d 322 (2d Dep't 1976).

9 Sobie v. Katz Const. Corp., 189 A.D.2d 49, 595 N.Y.S.2d 750 (1st Dep't 1993); Allen v. Harrington, 156 A.D.2d 854, 550 N.Y.S.2d 79 (3d Dep't 1989).

10 Matter of Herlihy Will, 13 N.Y.2d 816, 242 N.Y.S.2d 346, 192 N.E.2d 223 (1963).

11 Regan v. Frontier Elevator & Mill Co., 211 A.D. 164, 208 N.Y.S. 239 (4th Dep't 1924); Kluchenia v. Hodge, 38 N.Y.S.2d 545 (Sup 1942).

12 Senecal v. Hovey, 44 Misc. 2d 409, 253 N.Y.S.2d 698 (County Ct. 1964).

13 Depelteau v. Ford Motor Co., 28 A.D.2d 1178, 284 N.Y.S.2d 490 (3d Dep't 1967).

14 Kasman v. Flushing Hosp. and Medical Center, 224 A.D.2d 590, 638 N.Y.S.2d 687 (2d Dep't 1996).

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8 Carmody-Wait 2d § 56:319

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§ 56:319. Commenting on actions of opposing counsel

Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial [redacted] 126

A.L.R. Library

- Prejudicial effect, in argument or summation in civil case, of attacks upon opposing counsel, 96 A.L.R.2d 9

Legal Encyclopedias

- N.Y. Jur. 2d, Trial § 360 (Opposing counsel)

Forms

- Am. Jur. Pleading and Practice Forms, Trial § 357 (Motion for mistrial—Misconduct of counsel—Inflammatory reference to race or religion or party)

There is no justification for attacking the credibility of opposing counsel in summation; the veracity of counsel is simply not a subject for summation. [1] However, remarks made during summation attacking the credibility of opposing counsel, although offensive and uncalled for, do not improperly affect the verdict if the remarks are brief, and where the remarks are unlikely to have affected the outcome of the case. [2] It is reversible error to impute religious and racial prejudice to the opponent's attorney with a view to influencing the verdict. [3]

Illustrations:

A judgment for the plaintiff in a wrongful death action would be reversed due to the plaintiff's counsel's personal attacks on the defendant's trial attorney where the plaintiff's counsel, inter alia, urged the jury that "the purpose of his nice, friendly, gentle affable presence is to make you forget"; likened defense counsel to a professional mourner at a funeral who would "cry and apologize and feel sorry"; and characterized defense counsel as "the master of the half-truth." [4]

Defense counsel stepped over the bounds of legitimate advocacy in suggesting to the jury that plaintiff's stepson had been "coached," thus implying that plaintiff, or plaintiff's attorney, or someone under direction of either plaintiff or plaintiff's attorney had improperly attempted to induce the stepson to lie; there was no proof that the stepson's decision not to testify was a product of a guilty conscience rather than of simple shyness, and the counsel's comments improperly diverted attention of the jury from the evidence and improperly invited the jury to speculate. [5]

Remarks made during summation by defense counsel in a city bus passenger's personal injury action against the city and city transit authority arising from a bus accident, attacking the credibility of opposing counsel, did not improperly affect the verdict although the remarks were offensive and uncalled for since the remarks were brief and, after a 12-day trial with numerous witnesses, were unlikely to have affected the outcome. [6]

Footnotes

1 Pareja v. City of New York, 49 A.D.3d 470, 854 N.Y.S.2d 380 (1st Dep't 2008).

2 Pareja v. City of New York, 49 A.D.3d 470, 854 N.Y.S.2d 380 (1st Dep't 2008).

3 Bowen v. Mahoney Coal Corp., 256 A.D. 485, 10 N.Y.S.2d 454 (1st Dep't 1939).

4 Escobar v. Seatrain Lines, Inc., 175 A.D.2d 741, 573 N.Y.S.2d 498 (1st Dep't 1991).

5 Vazquez v. Costco Companies, Inc., 17 A.D.3d 350, 792 N.Y.S.2d 593 (2d Dep't 2005).

6 Pareja v. City of New York, 49 A.D.3d 470, 854 N.Y.S.2d 380 (1st Dep't 2008).

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§ 56:320. Reading from pleadings and other materials

Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 115 to 119, 128

A.L.R. Library

- Counsel's right in arguing civil case to read medical or other learned treatises to the jury, 72 A.L.R.2d 931

Legal Encyclopedias

- N.Y. Jur. 2d, Trial § 364 (Reading from pleadings)
- N.Y. Jur. 2d, Trial § 365 (Reading from books, articles, or pamphlets, generally)

Because allegations in pleadings are always in evidence for all purposes and may be used for any legitimate purpose, counsel may read from the pleadings [1] or comment upon them [2] even though they have not been formally introduced into evidence. Thus, the fact that counsel read a portion of the opponent's pleading to the jury and commented upon it does not furnish good ground for appeal where it is not shown that such comments were injurious to the opponent. [3] Similarly, it is error for the trial court to prevent defense counsel from reading a paragraph of plaintiff's verified bill of particulars to the jury upon summation and contrasting it to the proof adduced. [4] However, while counsel may in summation place before the jury the contents of a

plaintiff's pleadings regarding damages sought, [5] the court should charge that the jury must determine the amount of its verdict solely from the evidence and that the allegations of the complaint are not evidence and should not be considered as such by the jury in fixing the amount of its verdict. [6]

On summation, counsel should not be permitted to read to the jury from medical books on which an expert witness has based an opinion, for the opinion of the expert who testified thus becomes secondary to the opinion expressed in the books, without the opposing party have had an opportunity to cross-examine the authors. [7] Counsel may not, in summing up, read a newspaper article that is wholly irrelevant and obviously intended for no purpose other than to influence the jury. [8] Similarly, it is error to allow counsel to read extracts from a pamphlet published by the defendant where the pamphlet was proven but not received in evidence. [9] However, it is proper to read to the jury from evidence in the record. [10]

Footnotes

1 C.J. O'Brien, Inc. v. Stokes, 192 A.D. 668, 183 N.Y.S. 172 (1st Dep't 1920); Field v. Surpless, 83 A.D. 268, 82 N.Y.S. 127 (1st Dep't 1903).

2 Holmes v. Jones, 121 N.Y. 461, 24 N.E. 701 (1890).

3 Tisdale v. Delaware & Hudson Canal Co., 116 N.Y. 416, 22 N.E. 700 (1889).

4 Owen A. Mandeville, Inc. v. Zah, 38 A.D.2d 730, 329 N.Y.S.2d 552 (2d Dep't 1972), order aff'd, 35 N.Y.2d 769, 362 N.Y.S.2d 149, 320 N.E.2d 865 (1974).

5 Garcia v. City of New York, 173 A.D.2d 175, 569 N.Y.S.2d 27 (1st Dep't 1991); Terone v. Anderson, 54 A.D.2d 562, 387 N.Y.S.2d 16 (2d Dep't 1976).

6 Terone v. Anderson, 54 A.D.2d 562, 387 N.Y.S.2d 16 (2d Dep't 1976).

As to remarks in summation suggesting the amount of a verdict, see § 56:321.

7 Phillips v. Roux Laboratories, 286 A.D. 549, 145 N.Y.S.2d 449 (1st Dep't 1955).

8 Williams v. Brooklyn Elevated R. Co., 126 N.Y. 96, 26 N.E. 1048 (1891) (Emotional, inflammatory article condemning corporation as heartless).

9 GERTRUDE KOELGES, Respondent, v. THE GUARDIAN LIFE INSURANCE COMPANY, Appellant., 57 N.Y. 638, 1874 WL 13455 (1874).

10 Siegel v. County of Monroe, 207 A.D.2d 959, 617 N.Y.S.2d 669 (4th Dep't 1994).

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8 Carmody-Wait 2d § 56:321

Carmody-Wait 2d New York Practice with Forms June 2022 Update

Chapter 56. Presentation of the Case
Tracy Bateman, J.D.; Janet Elaine Curry, J.D.; Laura Hunter Dietz, J.D.; John A. Gebauer, J.D.; Tammy E. Hinshaw, J.D.; Amanda B. Lawrence, J.D.; and Elizabeth Williams, J.D.

VI. Summation

§ 56:321. Suggesting amount of verdict

Summary Correlation Table References

West's Key Number Digest

- West's Key Number Digest, Trial 113, 114

Legal Encyclopedias

- N.Y. Jur. 2d, Trial § 368 (Effect of rule prohibiting demand for damages in the pleadings)

Plaintiff's counsel is entitled to place before the jury the allegations as set forth in the complaint, including the damages demanded, [1] provided that the amount suggested is within the amount demanded in the complaint, and the jury is instructed that the ultimate measure of damages is a sum which justly and fairly compensates the plaintiff. [2] However, there are limitations on counsel's right to do so. For example, counsel in a personal injury case may not use the "per diem" or "unit of time" argument, under which small units of time of pain and suffering are given a monetary value and multiplied at that rate for the entire time for which it might be endured. [3]

In personal injury or wrongful death actions, pleadings may not state the amount of damages to which the pleader is under the impression they are entitled to receive. [4] However, in any action to recover damages for personal injuries or wrongful death, the attorney for a party must be permitted to make reference, during the closing statement, to a specific dollar amount that the attorney believes to be an appropriate compensation for any element of damage that is sought to be recovered in the action. [5] In the event that an attorney makes such a reference in an action being tried by a jury, the court must, on the request of any party, during the court's instructions to the jury at the conclusion of all closing statements, instruct the jury that (1) the attorney's reference to such specific dollar amount is permitted as argument, (2) the attorney's reference to a specific dollar amount is not evidence and should not be considered by the jury as evidence, and (3) the determination of damages is solely for the jury to decide. [6]

Illustration:

Defense counsel in an action arising from an automobile accident could properly suggest a monetary amount that defense counsel felt would adequately compensate the plaintiff for the injuries during closing argument where the court had instructed the jury that the plaintiff was entitled to an amount that would justly and fairly compensate the plaintiff for the injuries and advised that counsels' summations could be accepted or rejected based on the jury's view of the evidence. [7]

Plaintiffs are not categorically precluded under New York law from suggesting to the jury specific amounts of punitive damages to be awarded. [8]

CUMULATIVE SUPPLEMENT

Cases:

Error, if any, by counsel representing motorist in indirectly encouraging jury in summation to apply an improper time-unit formula in calculating damages for pain and suffering was harmless at trial on motorist's claim for damages for injuries sustained in a motor vehicle accident; counsel coupled remarks regarding amount requested with a reminder that jurors were sole judges of what constituted a fair verdict. Grasha v. Town of Amherst, 191 A.D.3d 1286, 141 N.Y.S.3d 587 (4th Dep't 2021).

[END OF SUPPLEMENT]

Footnotes

1 McFarland v. Makowski, 112 A.D.2d 922, 492 N.Y.S.2d 439 (2d Dep't 1985); Williams v. Long Island R. R., 41 A.D.2d 940, 343 N.Y.S.2d 700 (2d Dep't 1973); Cohen v. Leon A. Axel, Ltd., 272 A.D. 753, 69 N.Y.S.2d 250 (1st Dep't 1947).

2 Tate by McMahon v. Colabello, 58 N.Y.2d 84, 459 N.Y.S.2d 422, 445 N.E.2d 1101 (1983).

3 Jacobs v. Peress, 24 A.D.2d 746, 263 N.Y.S.2d 675 (1st Dep't 1965); Miller v. Owen, 184 Misc. 2d 570, 709 N.Y.S.2d 378 (Sup 2000).

4 CPLR 3017(c).

5 CPLR 4016(b).

6 CPLR 4016(b).

7 Baker v. Shepard, 276 A.D.2d 873, 715 N.Y.S.2d 83 (3d Dep't 2000).

8 TVT Records v. Island Def Jam Music Group, 257 F. Supp. 2d 737 (S.D. N.Y. 2003).

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§ 17.04 Preparation of a Summation*

Because the summation is the part of the trial that ties the lawsuit together, it can be said that every part of the case prior to the summation is really preparation for the summation. Ideally, every step in the case should advance the theory of the case and develop evidence relevant to the major issues, and these things are the heart of the summation. Not only does the preparation of the case in general serve as preparation for the summation, but preparation of the summation well in advance of trial can prove invaluable in the preparation of the entire case.

[1] Preparation of a Summation Outline Prior to Trial

An attorney should begin to prepare an outline of a summation very early in the case. In some instances, this should be done as soon as the initial meeting with the client is concluded. Obviously, the summation in its final form may vary considerably from the initial outline prepared months or years earlier,[1] but the preparation of a summation draft early in the case will assist in the preparation of the entire case.

This is so for several reasons. First, the preparation of a summation outline at the beginning of a case will help the attorney establish a theory of the case and determine the major issues about which evidence must be gathered. Once the outline is prepared, it provides a framework into which evidence can be fitted as it is discovered. The summation outline will also keep the attorney focused on the fundamentals of the case through the discovery process and prevent him from becoming lost in minutiae. Finally, a summation outline will give the attorney an idea of the ultimate jury appeal of a case so that its worth can be better evaluated and so that the attorney can be a better advocate in settlement negotiations.

For many of the same reasons, it is very important to prepare a more detailed outline of the summation immediately prior to trial. Again, this will provide a theory of the case on which the attorney can focus during the trial and provide a checklist of evidence that must be admitted during the trial. It will also assist in the preparation of the opening statement, so that opening and summation can be coordinated. This allows the attorney to demonstrate to the jury that the promises made in the opening statement have been kept.

[2] Preparation of the Summation During Trial

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* Chapter revised in 1993 by Walter Barthold, member of the New York Bar, New York, New York.

[1] Preparation of a draft outline early in the case should be subject to modification or even complete revision if, for example, the law changes or new evidence is uncovered which affects the theories of the case. The final outline will have to take into account how the evidence developed during trial.

During the trial, the principal job of the attorney with regard to the summation is to collect the evidence and exhibits that will be used. This begins with the opening statements, especially that of the opposition. The attorney should procure verbatim quotes from the other side's opening for use during summation. This can be done by ordering the transcript of opening statements from the court reporter or by taking meticulous notes oneself.

During the testimony, the attorney must keep track of and highlight those passages that may prove of use in the summation. If funds permit, it is an excellent idea to procure daily copy from the court reporter, so that verbatim quotes may be culled from the transcript as they occur. Quoting witness testimony verbatim in the summation has greater impact on jurors than a paraphrasing by the attorney.

Although it is easy to rely upon the transcript for verbatim quotes, this does not mean that the summation should be prepared by an examination of the transcript at the conclusion of the trial. The attorney should always highlight areas in his own trial notes that are valuable for the summation as they occur. This is so for two reasons. First, it will save time and prevent lengthy searches through the transcripts to find a particular passage of testimony that the attorney remembers but cannot pinpoint. Second, it lowers the likelihood that the attorney will miss important passages of testimony. The attorney's mind is much more focused on the value and importance of testimony as it is spoken than while looking at a cold transcript at night in the office.

It is also important to keep track of exhibits and demonstrative evidence used during the trial so that these things can be procured easily in time for the summation and so that, when it comes time to prepare the summation, the attorney already knows which exhibits will be used. It is also important to procure the demonstrative exhibits that will be used in the summation, but which have not yet been admitted in the trial, well in advance of the summation.

[3] The Final Preparation

The too frequent practice of trial attorneys is to begin preparing the summation the night before it is to be delivered. Though common, this practice is hardly advisable. One reason is that the attorney may be caught unprepared if the time for summation arrives sooner than expected. The opposition may not put on a case or a rebuttal case, or, if it does so, much less evidence may be introduced than the attorney anticipated. A defendant may be caught by a plaintiff's attorney who waives his right to give the first summation. If the summation has been at least partially prepared in advance, this problem is avoided, so that at any time during the trial the attorney will be able to step forward and deliver a credible summation.

Another advantage to having the summation at least partially prepared in advance is that it leaves the time immediately preceding the delivery of the summation for three important activities that frequently are overlooked. The first of these activities is fine tuning the summation with last-minute additions of evidence and exhibits. The second activity is rehearsal of the summation. No good oration can be given without practice that will make the words flow more easily and make the attorney feel comfortable. Rehearsal is only meaningful, however, if the attorney has the summation prepared and organized in advance. The final activity that early preparation allows for is sleep. In the ultimate moment of the trial, the attorney should not allow a short night of sleep caused by panic-stricken preparation of the summation to undermine his ability to be an energetic, confident, and forceful advocate.

At every stage of preparation of the summation, from the beginning of the case to the day before the summation is given, the summation should be prepared in outline form. The outline will change many

times during this period, and at times it will have considerably more detail than at others. But the outline form should always remain so that the summation is logical and organized for easy understanding. The outline from which the summation is actually delivered, assuming that notes are used at all, should be very bare—really nothing more than a list of a few lines long of the major topics that are to be covered. This will make for spontaneous delivery rather than slavish devotion to notes or a written text and will make the attorney appear more appealing and personable to the jury.

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3 Criminal Procedure in New York § 46:9 (2d)

Criminal Procedure in New York | September 2021 Update
Hon. Robert G. Bogle

Part 1. Practice and Forms

Chapter 46. Submission to Jury and Rendition of Verdict

§ 46:9. Summation

References

West's Key Number Digest

West's Key Number Digest, Criminal Law 2072 to 2074

When the presentation of evidence is concluded by both sides and all motions have been made and disposed of, the defendant may deliver a summation to the jury, followed by the state's summation.[1] Neither the state nor the defense is required to deliver a summation to the jury, although the right is rarely waived by either side since the summation affords both parties the opportunity for summing up its version of the evidence and of presenting cogent arguments in support of its position to the jury. This is especially true where the trial has been a lengthy one and the evidence has been diffuse and contradictory. Counsel should be alert to advise the jury that the state always has the burden to establish guilt on the part of the defendant beyond a reasonable doubt and that if that burden has not been sustained, the defendant is entitled to a verdict of acquittal.

The time allowed each party for summation is in the court's discretion.[2] The time allotted to summation by the court usually depends on the seriousness of the charges, the length of the trial, the complexity of the issues presented and other factors. Unreasonable limitation is deemed an abuse of discretion and may result in reversal.[3]

The trial court was justified in limiting the length of defense counsel's summation since most of the evidence adduced at trial was uncontested, and defense counsel, despite being warned several times that he should focus on the issues presented, refused to heed the court's warnings and budget his time efficiently.[4]

The limits beyond which the prosecution may not be permitted to go are determined by the simple principle of fairness. The assertion by a prosecuting attorney of personal knowledge of matters which may influence the jury's verdict should have no place in the record of a criminal trial.[5] The district attorney is free to employ all of the traditional forensic arts and wiles of the advocate so long as viewed as a whole, the defendant had a fair trial.[6] The prosecutor may comment during summation on the particularly brutal nature of the crime with which the defendant has been charged without depriving the defendant of a fair trial.[7]

A reversal is not always mandated unless it appears that the prosecutor's conduct deprived the defendant of a fair trial.[8] A prosecutor's closing statement must be evaluated in light of the defense summation and with the recognition that the prosecution is given latitude to advocate its cause and is free to concentrate on the proven facts and circumstances and the inferences to be drawn therefrom to support the credibility of the witnesses.[9] A conviction will be affirmed if the defendant's objections to the remarks by the prosecutor on summation were sustained and if adequate curative instructions were given to the jury.[10] Reversal of the conviction on the basis of improper summation is warranted if the conduct has caused substantial prejudice to the defendant so that he has been denied due process of law, which determination turns on the severity and frequency of the conduct, whether the court took appropriate action to dilute the effect of the conduct and whether, from a review of the evidence, it can be said that the result would have been the same absent such conduct.[11]

The fact that an alibi witness did not come forward and contact the police or the district attorney may not be commented upon by the prosecutor in summation.[12] This is especially true where defense counsel has made repeated objections to this line of summation.[13] However, a prosecutor's comments during summation concerning the failure of defendant's alibi witness to come forward prior to the first day of trial were proper, since defense counsel had initially elicited testimony concerning the witness's failure to contact him prior to the first day of trial and had made extensive comments trying to explain this failure during his summation, which "opened the door" for the comments made by the prosecutor.[14]

It is also improper for the district attorney to try to shift the burden of proof to the defendant[15] or engage in any personal abuse or vilification of the defendant or make remarks prejudicial to defendant.[16] A prosecutor's comments during summation concerning the defendant's failure to present an alibi witness did not shift the burden of proof to the defendant where the defendant had elected to present an alibi defense, and where the comments were not made in bad faith and were merely efforts to persuade the jury to draw inferences favorable to the prosecution.[17]

The prosecutor should not seek to lead the jury away from issues by drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant.[18] Although the prosecutor's discussion of the credibility of the state's witnesses is appropriate where the defense places their veracity at issue, the prosecutor may not exceed the bounds of fair comment by improperly vouching for the prosecution's witnesses.[19] A prosecutor may not use racial similarity as a means of identification evaluation by comparing the similar ethnic background of a witness and a defendant.[20] Further, in a closely contested case where the main issue concerns the identification testimony of the victim, improper comments by a prosecutor may serve to deprive a defendant of a fair trial despite the legal sufficiency of the evidence.[21] The court has also condemned the use of verbal crudities and rantings.[22]

Where counsel for the defense oversteps the bounds of propriety in summation, the proper remedy is to punish defense counsel for contempt rather than to permit retaliatory vituperation and abuse in the district attorney's summation.[23]

The U.S. Supreme Court has held that a prosecution's summary to the jury in which the prosecution calls the jury's attention to the fact that the defendant has the opportunity to hear all other witnesses testify and to tailor his testimony accordingly does not deny a defendant's constitutional rights since when a defendant takes the stand his or her credibility may be impeached and the defendant's testimony assailed like that of any other witness.[24] Further, the fact that the comments are made, not during cross-examination, but at summation, leaving the defense no opportunity to reply does not change the result and does not present a "constitutionally significant distinction."[25] In so holding, the Court rejected the argument that because New York law required him to be present at his trial, the prosecution violated his right to due process by commenting on that presence.[26] In the Court's words, "There is, however, no authority whatever for the proposition that the impairment of credibility, if any, caused by mandatory presence at trial violates due process."[27]

A prosecutor went beyond the permissible point of asking the jury to disbelieve the adulterous defendant, and turned the defendant's admitted acts of adultery into the equivalence of guilt of violation of the Ten Commandments, moral offenses for which the defendant was not on trial, thereby overstepping the boundary line of fair play and requiring reversal of the judgment of conviction and a new trial.[28] A new trial was necessary where the prosecutor made references to the accused and made unnecessary attacks on defense counsel.[29] Reversal was also warranted where the prosecutor indicated that the defendant was a welfare recipient and told the jury "… that if they wanted to live in a community where crime runs rampant, they should acquit the defendant."[30] Similarly, a prosecutor's suggestion during summation that if the jury were to acquit the defendant he would be on the street again in 30 days, uncorrected by the court, constituted prejudicial error.[31] In that case, the prosecutor stated that the appellant hoped that by pleading insanity he would be committed to a hospital and out on the street again in 30 days. The court failed to sustain a timely objection to this erroneous statement or to instruct the jury that it was erroneous.[32]

The prosecution's summation, stating that the sole eyewitness testified that the defendant fired three shots at the victim after an initial round of shots, that the eyewitness was the sole witness whose testimony was consistent with ballistic evidence, and that the eyewitness said that she was indirectly threatened was not a fair comment on the testimony, thereby requiring a new trial in the interest of justice, where, apart from the four shots initially fired by an unapprehended gunman, the eyewitness did not state that any particular number of shots were fired, the eyewitness's testimony was not consistent with ballistics evidence, and the evidence contradicted the prosecution's numerous remarks that the case was one of witness intimidation.[33] The court reasoned that in a case which pitted the credibility of the prosecution's sole eyewitness against the several witnesses presented by the defense, the prosecution's comments served to inflame the passions of the jurors such that the resulting prejudice was not harmless.[34]

A prosecutor's statement that he had courteously remained silent during the defendant's summation and hoped that defendant's counsel would maintain a similar silence during the state's summation was an improper attempt to silence defendant during the state's summation and is calculated to make defendant's attorney appear destructive, and thus to turn the jury, or even one juror, against the defendant, when defendant's counsel thereafter objects to the state's summation.[35]

A judgment of conviction was affirmed although the court stated that the defendant had the right to have his counsel make a summation without undue criticism by the court or opposing counsel as long as he confined himself to the four corners of the evidence, and it did not appear that he was deprived of a fair trial except for the prosecutor's alleged misconduct.[36] Where a defendant's guilt was overwhelmingly established, he made no motion for a mistrial and did not object to the summation, he could not complain on appeal of the alleged misconduct in the prosecutor's summation to the jury.[37]

Reversal was mandated where the court permitted the summation of the prosecutor to degenerate into a character assassination.[38] It was also improper for the prosecutor to continuously call the defendant a liar during the prosecutor's summation.[39] Calling the defendant a liar was also condemned where the prosecutor called the defendant a liar and asserted that the defense was a legal one and a trick.[40]

The prosecutor's reference to the defendant as a "sophisticated drug dealer" was appropriately responsive to the defense argument that the defendant must be innocent because he had neither drugs nor buy money in his possession.[41]

A defendant was deprived of a fair trial where the prosecutor repeatedly referred to the defendant as a convicted felon where such were not fair comments on the evidence of the defendant's prior felony conviction, and where the comments served to urge the jury to convict the defendant because he had a criminal propensity.[42]

It was not proper for the prosecutor to state in summation that "if the defendant had not committed a crime he would not have been arrested."[43] It was improper behavior on the part of the prosecutor to state in summation, "It is not an innocent man who tries to pull the wool over your eyes with an alibi witness."[44] It was also not proper for the prosecution in summation to make a highly improper inflammatory call for revenge.[45]

A summation was held to be inflammatory when the defendant was portrayed as undesirable and was depicted as maintaining his power within the black community by intimidation and force. Further, the court specifically condemned the following conclusion of the prosecutor: "… if Teddy Walker [defendant] isn't guilty, Lee Harvey Oswald didn't shoot President Kennedy, Sirhan Sirhan didn't shoot the second Kennedy and Hoffman [sic] didn't kidnap the Lindberg [sic] baby."[46]

The court has cautioned prosecutors against making inflammatory "fire and brimstone" speeches especially where the district attorney aligned himself with the jury and the forces of good against the defendant and the forces of evil.[47]

The district attorney was improper when he described the defendant as an assaultive type and suggested that the defendant had been treated too leniently in the past, which could be remedied by returning a verdict of guilty.[48]

Cumulatively, the prosecution's summation deprived the defendant of a fair trial where the prosecution urged the jury to accept evidence elicited during cross-examination as direct evidence, improperly characterized the defendant as a "gun man" and murderer, and invited the jury to convict based on that characterization.[49]

It was reversible error to limit defense counsel's summation comments upon a report which had been admitted into evidence, without limitation, for the purpose of impeaching the testimony of a police officer.[50]

In recent years, courts seem to have overlooked questionable conduct on the part of prosecutors in delivering summations where the proof of the defendant's guilt was overwhelming.[51] Where a prosecutor's remarks were not such verbal crudities and rantings as would inflame the jury they were not of the type to be condemned by reversal.[52]

Where there was no objection registered against improper remarks in summation, the alleged errors were not preserved for review.[53] However, a prosecutor's summation comments were subject to review in the interest of justice despite the fact that they were not objected to, since the summation was inflammatory, was not related to the issues in the case, and was not considered a fair response to the defense counsel's summation.[54]

A conviction was reversed and a new trial ordered where the prosecutor in summation vouched for the truthfulness of the complaining witness, denigrated the defense and defense witnesses, referred to suppressed evidence, and misrepresented other evidence before the court.[55]

Where the two crimes on which the defendant was tried involved a unique "over-all pattern" the prosecution could properly argue that the distinct modus operandi established the defendant's identity as the perpetrator.[56]

The interest of justice required the reversal of defendant's manslaughter conviction and a new trial where, during summation, the prosecution advanced a theory premised on a fact that it knew to be false in order to discredit defendant's justification when it argued that if decedent had drawn a gun as defendant contended, defendant would not have had time to turn around, take a few steps, receive a gun from someone in the crowd, turn back and fire several bullets before decedent was able to fire a single shot, since the prosecution knew that the gun defendant contended decedent aimed at him was inoperable.[57]

Reversal was required where this blatant misrepresentation of the facts known to the prosecution went to the heart of defendant's justification defense, which defense the prosecution was obligated to disprove beyond a reasonable doubt, and where the evidence against defendant was not overwhelming and the prosecution's misconduct was flagrant and closely related to a credibility issue presented at trial.[58]

The prosecutor's improper summation comments, which included purposefully inflammatory remarks designed to appeal to the jury's sympathy, gave the prosecutor's opinion regarding the truth and falsity of the testimony of the witnesses, improperly shifting the burden of proof to the defendant, and advocated a position the prosecutor new to be false, exceeded the boundaries of appropriate advocacy, and warranted a new trial for attempted murder, where the evidence was not overwhelming in the one-witness case, and prejudice was compounded by the court's actions in improperly overruling defense objections, and berating defense counsel for constantly interrupting the prosecutor.[59] Specifically, the prosecutor's purposefully inflammatory remarks during summation, which included statements that the victim was left "on the street to die, to die like a dog" and but for the crime "was probably going to be a brilliant artist" and an invitation for the jurors to imagine the shock felt by the victim's wife, who was eight months pregnant, were unnecessary and improper.[60] Remarks describing the defendant's testimony as "continued lies on top of lies, on top of lies," and "tales and lies, back and forth, back and forth," exceeded the boundaries of appropriate advocacy.[61] Further, the prosecutor's insinuation that a gun which had been recovered from the defendant two weeks after the crime in an unrelated arrest may have been the gun which was used to shoot the victim, in which the prosecutor persisted despite his knowledge that a ballistics test conclusively established that the gun had not been used in the crime, was improper and constituted an abrogation of the prosecutor's responsibility.[62]

Although the prosecution's extended references to the victim and his family, continuing even after the court directed it to move on, were blatantly improper emotional appeals to the jury, they did not require a new trial, where the court instructed the jury that sympathy was not to play a role in their deliberations or verdict, and the jury engaged in lengthy deliberations and made several, extensive requests for testimony and additional instructions.[63]

The prosecution misled the jury by pointing to the absence of evidence that the prosecution knew existed, requiring reversal of the defendant's conviction, where, during summation and after the trial court excluded the exculpatory portion of the defendant's statement indicating that the defendant had been with a certain person at the time of the crime, the prosecution argued that the defendant had not told the police that he was with such person.[64]

A prosecutor exceeded the bounds of fair advocacy and engaged in prosecutorial misconduct requiring a reversal of a defendant's conviction, where, among other things, he commented during summation that the defendant had no choice but to testify in his defense and referred to news reports of alleged drug dealing by his parents.[65]

In a case where, after the testimony was completed, the parties stipulated that if certain chemists had come to court they would have testified that glassine envelopes contained heroin, which stipulation was signed by the defendant and the lawyers, and the prosecution, during summation, stated that by signing the stipulation he was saying that he knew that the packages contained heroin, the conviction was reversed based on the prosecution's summation, which placed undue emphasis on the defendant's signature and constituted a mischaracterization or overstatement of the import of the stipulations and improperly suggested that defendant's signature acknowledges his knowing possession of heroin.[66] It was clear, in this case, that the court's curative instructions were insufficient to correct the situation when, during deliberations, the jury sent a note inquiring about the definition of a stipulation and whether the defendant was required to sign it. The appellate court concluded that the prosecution's summation created an unavoidable inference that defendant's signature meant something other than an agreement to allow testimonial substitutes.[67]

Cumulatively, the prosecution's summation that included unqualified pronouncements of the defendant's guilt, injected the prosecution's personal views, vouched for the witnesses' credibility, appealed to the jury's sympathy, made veiled references to

the defendant's failure to testify by characterizing the evidence as uncontroverted, and repeatedly stated that a second person at the scene was unable to testify because he could not speak but implied that if he had he would have fully corroborated the complaining witness deprived the defendant of a fair trial and required a new trial.[68]

Cumulatively, the following remarks by the prosecution in summation deprived the defendant of a fair trial: (1) comments impugning defense counsel's integrity, ridiculing the defense theory as "mumbo jumbo," and warning the jurors several times that defense counsel was manipulating them; (2) vouching for the credibility of the victim's identification of the defendant, and appealing to the jury's sympathies and fears by suggesting that the victim's status as a veteran and his age warranted respect and trying to make the jury feel guilty if it doubted the victim's identification of his assailant; (3) impermissibly shifting the burden of proof to the defendant by posing certain rhetorical questions to the jury, referring to the defendant's failure to call witnesses on his own behalf, and suggesting that the defendant failed to call a lineup expert because the expert's testimony would have been unfavorable and (4) urging the jury to infer the defendant's bad character from his homelessness, suggesting that the defendant chose to live on the streets so that he could fulfill his propensity to commit crime, and referring to him as a predator.[69]

In *People v. Harris*,[70] at the end of the nonjury bench trial for a Class B Misdemeanor and related charges, the trial judge announced that the Court would exercise its "prerogative" not to hear closing arguments, even though the day before the judge granted the parties permission to deliver summations. Immediately thereafter, the judge delivered a guilty verdict and sentenced the defendant to 90 days incarceration.

The Court of Appeals found the trial judge violated the Sixth Amendment United States Constitutional right to counsel when that court denied the defense counsel the opportunity to present a summation. It was not constitutionally proper to allow the trial judge the discretion of either granting or denying the opportunity to give a summation, particularly in light of the fact the charge resulted in an imposition of a 90-day jail sentence.

Footnotes

1 McKinney's CPL § 260.30(8) and (9).

The bifurcation of the summations by both the prosecution and defense did not constitute an abuse of the trial court's discretion, since both sides were directed to sum up prior to the testimony of a witness who had yet to be produced from an out-of-state correctional facility despite numerous efforts to secure his presence. The court then permitted both sides to reopen their summations following the witness's testimony with instructions to limit their summations to such testimony. People v. Hernandez, 137 A.D.2d 560, 524 N.Y.S.2d 300 (2d Dep't 1988).

2 People v. Kelly, 94 N.Y. 526, 1884 WL 12248 (1884).

3 People v. Mayer, 132 A.D. 646, 117 N.Y.S. 520 (1st Dep't 1909).

4 People v. Brown, 136 A.D.2d 1, 525 N.Y.S.2d 618 (2d Dep't 1988).

5 People v. Tassiello, 300 N.Y. 425, 91 N.E.2d 872 (1950).

6 People v. Glover, 165 A.D.2d 761, 564 N.Y.S.2d 273 (1st Dep't 1990) (prosecutor's characterization of defense as absurd and ridiculous permissible rhetoric); People v. Hathaway, 159 A.D.2d 748, 551 N.Y.S.2d 975 (3d Dep't 1990) (prosecutor's remarks during summation not exceeding bounds of propriety); People v. Rodriguez, 147 A.D.2d 719, 538 N.Y.S.2d 67 (2d Dep't 1989) (in summation, prosecutor is permitted fair response to defense counsel's summation); People v. Allen, 121 A.D.2d 453, 503 N.Y.S.2d 143 (2d Dep't 1986), order aff'd, 69 N.Y.2d 915, 516 N.Y.S.2d 199, 508 N.E.2d 934 (1987) (prosecution's characterization of defenses offered at trial as diversions as not exceeding broad bounds of permissible rhetorical comment);

People v. Jenkins, 104 A.D.2d 563, 479 N.Y.S.2d 270 (2d Dep't 1984) (prosecutor's characterization of defense counsel as magician did not deprive defendant of fair trial).

7 People v. Robinson, 150 A.D.2d 812, 542 N.Y.S.2d 44 (2d Dep't 1989).

The prosecutor's description of the crime as brutal during summation was not inflammatory since the evidence at trial showed that the victim had been choked into unconsciousness. People v. Green, 159 A.D.2d 325, 552 N.Y.S.2d 602 (1st Dep't 1990).

8 People v. DeJesus, 137 A.D.2d 761, 525 N.Y.S.2d 613 (2d Dep't 1988); People v. London, 124 A.D.2d 254, 508 N.Y.S.2d 262 (3d Dep't 1986) (prosecutor's summation remark that defendant failed to make closing statement as not depriving defendant of fair trial given overwhelming evidence of guilt and lengthy curative instruction given by court); People v. Chandler, 119 A.D.2d 764, 501 N.Y.S.2d 172 (2d Dep't 1986) (immediate curative instruction following defense counsel's objection to remark in prosecutor's summation sufficiently dispelled any prejudice); People v. Smalls, 94 A.D.2d 777, 462 N.Y.S.2d 728 (2d Dep't 1983) (prosecutor's comments during summation concerning defendant and alibi witnesses as depriving defendant of fair trial); People v. Fields, 27 A.D.2d 736, 277 N.Y.S.2d 21 (2d Dep't 1967).

Prosecutor's remarks did not warrant reversal of defendant's conviction, even though the prosecutor improperly denigrated the defense and appealed to the jurors' emotions, given overwhelming evidence of defendant's guilt. People v. Reed, 136 A.D.2d 577, 523 N.Y.S.2d 569 (2d Dep't 1988).

A prosecutor engaged in reversible misconduct where, during summation, she insinuated that more than one witness had identified defendant, despite the fact that only one eyewitness actually testified at the trial, stating that she could have brought in 15 witnesses, and where there was evidence that her comments may have misled one or more of the jury, and where the evidence of guilt was less than overwhelming. People v. Mendez, 22 A.D.3d 688, 804 N.Y.S.2d 337 (2d Dep't 2005).

Defendant was denied a fair trial based on the prosecutor's summation, where the prosecutor repeatedly referred to robbery defendant's testimony as a “story” and a “load of garbage,” suggesting that defendant “had all the time in the world to tailor his testimony” to conform to the prosecution's proof, and vouched for the credibility of the prosecution witnesses, stating that they were “credible and accurate,” and telling the jury that one witness “told you the truth,” while the other “told you exactly how it happened.” People v. Brown, 26 A.D.3d 392, 812 N.Y.S.2d 561 (2d Dep't 2006).

9 People v. Dunbar, 213 A.D.2d 1000, 625 N.Y.S.2d 772 (4th Dep't 1995).

10 People v. Tardbania, 72 N.Y.2d 852, 532 N.Y.S.2d 354, 528 N.E.2d 507 (1988); People v. Cortes, 173 A.D.2d 319, 575 N.Y.S.2d 660 (1st Dep't 1991) (curative instructions alleviating any prejudice resulting from prosecutor's improper summation).

Any prejudice resulting from the prosecution's improper comments suggesting that the voluntariness of the defendant's videotaped confession introduced at trial had already been decided in a pretrial hearing was eliminated by the court's sustaining the defendant's objection and its extensive charge on the subject of the voluntariness of the defendant's confession. People v. Hurd, 223 A.D.2d 448, 637 N.Y.S.2d 44 (1st Dep't 1996).

11 People v. Russell, 307 A.D.2d 385, 761 N.Y.S.2d 400 (3d Dep't 2003).

12 People v. Rivera, 70 A.D.2d 625, 416 N.Y.S.2d 621 (2d Dep't 1979).

13 People v. Termini, 65 A.D.2d 825, 410 N.Y.S.2d 338 (2d Dep't 1978).

14 People v. Hardwick, 122 A.D.2d 165, 504 N.Y.S.2d 541 (2d Dep't 1986).

15 People v. Lothin, 48 A.D.2d 932, 369 N.Y.S.2d 532 (2d Dep't 1975).

The prosecutor's comment during summation on the failure of the defense to offer certain evidence which could have been interpreted as shifting the prosecution's burden did not deprive the defendant of a fair trial since an immediate curative instruction was sufficient to dissipate any possible prejudice. People v. Hathaway, 159 A.D.2d 748, 551 N.Y.S.2d 975 (3d Dep't 1990).

16 People v. Minor, 119 A.D.2d 836, 501 N.Y.S.2d 462 (2d Dep't 1986), order rev'd on other grounds, 69 N.Y.2d 779, 513 N.Y.S.2d 107, 505 N.E.2d 617 (1987) (prosecutor's remarks in summation not prejudicial since they were made in response to defense summation); People v. Rivera, 116 A.D.2d 371, 501 N.Y.S.2d 817 (1st Dep't 1986) (comments on defendant's decision to go to trial and characterization of defendant's calling his son as witness as exploitation were improper and prejudicial); People v. Fogel, 97 A.D.2d 445, 467 N.Y.S.2d 411 (2d Dep't 1983) (statement by prosecutor that defendant was trying to con jury was improper).

17 People v. Guillebeaux, 229 A.D.2d 399, 645 N.Y.S.2d 59 (2d Dep't 1996).

18 People v. Ashwal, 39 N.Y.2d 105, 383 N.Y.S.2d 204, 347 N.E.2d 564 (1976); People v. Hamilton, 121 A.D.2d 176, 502 N.Y.S.2d 747 (1st Dep't 1986) (prosecutor's urging of jury to evaluate testimony of complainant as they would have wished testimony of close relative to be evaluated by another jury as improper summation); People v. Libbett, 101 A.D.2d 705, 476 N.Y.S.2d 220 (4th Dep't 1984) (inflammatory and prejudicial for prosecutor to state in summation that defendant's previous acquittal on rape and kidnapping charges was miscarriage of justice because decision was rendered by “outsider” visiting judge from different county).

19 People v. Dunbar, 213 A.D.2d 1000, 625 N.Y.S.2d 772 (4th Dep't 1995); People v. Tolbert, 198 A.D.2d 132, 603 N.Y.S.2d 844 (1st Dep't 1993).

20 People v. Green, 89 A.D.2d 874, 453 N.Y.S.2d 228 (2d Dep't 1982) (reversible error for prosecutor to state in summation that there was no motivation for specific witness to lie since both witness and defendant were black); People v. Williams, 40 A.D.2d 812, 338 N.Y.S.2d 221 (1st Dep't 1972).

21 People v. Farmer, 122 A.D.2d 801, 505 N.Y.S.2d 683 (2d Dep't 1986).

22 People v. Brosnan, 32 N.Y.2d 254, 344 N.Y.S.2d 900, 298 N.E.2d 78 (1973).

23 People v. Gitlow, 195 A.D. 773, 187 N.Y.S. 783 (1st Dep't 1921), aff'd, 234 N.Y. 132, 136 N.E. 317 (1922), aff'd, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925) and (overruled in part by, People v. Epton, 19 N.Y.2d 496, 281 N.Y.S.2d 9, 227 N.E.2d 829 (1967)) and (defendant summing up in own behalf was properly admonished for stating matters not shown to be fact); People v. Wansker, 108 Misc. 84, 177 N.Y.S. 295 (Sup 1919).

24 Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47, 53 Fed. R. Evid. Serv. 337 (2000).

25 Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47, 53 Fed. R. Evid. Serv. 337 (2000).

26 Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47, 53 Fed. R. Evid. Serv. 337 (2000).

27 Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47, 53 Fed. R. Evid. Serv. 337 (2000).

28 People v. Canty, 31 A.D.2d 976, 299 N.Y.S.2d 524 (2d Dep't 1969).

29 People v. Damon, 24 N.Y.2d 256, 299 N.Y.S.2d 830, 247 N.E.2d 651 (1969).

30 People v. Moore, 26 A.D.2d 902, 274 N.Y.S.2d 518 (4th Dep't 1966).

31 People v. Slaughter, 28 A.D.2d 1082, 285 N.Y.S.2d 146 (4th Dep't 1967).

32 People v. Slaughter, 28 A.D.2d 1082, 285 N.Y.S.2d 146 (4th Dep't 1967).

33 People v. Lantigua, 228 A.D.2d 213, 643 N.Y.S.2d 963 (1st Dep't 1996).

34 People v. Lantigua, 228 A.D.2d 213, 643 N.Y.S.2d 963 (1st Dep't 1996).

35 People v. Fields, 27 A.D.2d 736, 277 N.Y.S.2d 21 (2d Dep't 1967).

36 People v. Reina, 94 A.D.2d 727, 462 N.Y.S.2d 264 (2d Dep't 1983) (defendant's right to make effective closing argument was substantially impaired by trial court's repeated interruptions which constituted reversible error and deprived defendant of fair trial); People v. Marcelin, 23 A.D.2d 368, 260 N.Y.S.2d 560 (1st Dep't 1965).

37 People v. James, 24 A.D.2d 608, 262 N.Y.S.2d 197 (2d Dep't 1965), judgment aff'd, 17 N.Y.2d 552, 268 N.Y.S.2d 320, 215 N.E.2d 504 (1966).

Prosecutor's statements concerning the frequent and prolonged descriptions of the brutality of the murder, references to another case, and a suggestion that the jury might have difficulty explaining its decision to the community if they acquitted the defendant were not grounds for reversal since the defendant failed to object to most of the statements and the trial court promptly attempted to cure their prejudicial affect. People v. Sanchez, 92 A.D.2d 595, 459 N.Y.S.2d 488 (2d Dep't 1983), order aff'd, 61 N.Y.2d 1022, 475 N.Y.S.2d 376, 463 N.E.2d 1228 (1984).

38 People v. Mott, 94 A.D.2d 415, 465 N.Y.S.2d 307 (4th Dep't 1983); People v. Brown, 60 A.D.2d 917, 401 N.Y.S.2d 572 (2d Dep't 1978).

Prosecution's reference to defendant as a "rat" was proper when made in response to defense counsels summation which referred to prosecution's witness as a rat. People v. Martino, 244 A.D.2d 875, 665 N.Y.S.2d 768 (4th Dep't 1997).

39 People v. Whalen, 59 N.Y.2d 273, 464 N.Y.S.2d 454, 451 N.E.2d 212 (1983) (characterization of defendant's alibi as fabrication concocted during trial as reversible error); People v. Jones, 89 A.D.2d 875, 453 N.Y.S.2d 231 (2d Dep't 1982); People v. Goggins, 64 A.D.2d 717, 407 N.Y.S.2d 531 (2d Dep't 1978).

40 People v. Westfall, 95 A.D.2d 581, 469 N.Y.S.2d 162 (3d Dep't 1983) (prosecutor's remark in summation indicating that defendants' account of events was implausible did not require reversal of convictions); People v. Rogers, 59 A.D.2d 916, 399 N.Y.S.2d 151 (2d Dep't 1977).

See also People v. Etheridge, 71 A.D.2d 861, 419 N.Y.S.2d 188 (2d Dep't 1979).

41 People v. Ortiz, 217 A.D.2d 425, 629 N.Y.S.2d 235 (1st Dep't 1995) (prompt curative instruction given).

42 People v. Scott, 217 A.D.2d 564, 629 N.Y.S.2d 267 (2d Dep't 1995).

43 People v. Rodriguez, 62 A.D.2d 929, 403 N.Y.S.2d 275 (1st Dep't 1978).

44 People v. Davis, 53 A.D.2d 870, 385 N.Y.S.2d 345 (2d Dep't 1976).

45 People v. Mims, 59 A.D.2d 769, 398 N.Y.S.2d 721 (2d Dep't 1977).

46 People v. Walker, 66 A.D.2d 863, 411 N.Y.S.2d 377 (2d Dep't 1978).

47 People v. Johnston, 47 A.D.2d 897, 366 N.Y.S.2d 198 (2d Dep't 1975).

48 People v. Buffalino, 49 A.D.2d 950, 374 N.Y.S.2d 48 (2d Dep't 1975).

49 People v. Hawkins, 220 A.D.2d 365, 633 N.Y.S.2d 132 (1st Dep't 1995).

50 People v. Riccardo, 77 A.D.2d 578, 429 N.Y.S.2d 737 (2d Dep't 1980).

51 People v. Reed, 120 A.D.2d 552, 502 N.Y.S.2d 48 (2d Dep't 1986) (improper statements regarding defendant's postarrest silence harmless in light of prompt curative instruction and overwhelming evidence of guilt); People v. Conethan, 120 A.D.2d 604, 502 N.Y.S.2d 79 (2d Dep't 1986) (remarks in summation not reversible error where they were in response to defense counsel's summation and there was overwhelming proof of guilt); People v. Harris, 51 A.D.2d 556, 378 N.Y.S.2d 446 (2d Dep't 1976) (prosecutor's conduct in no way impaired development of issues).

52 People v. Owens, 58 A.D.2d 898, 396 N.Y.S.2d 893 (2d Dep't 1977).

53 People v. Dien, 77 N.Y.2d 885, 568 N.Y.S.2d 899, 571 N.E.2d 69 (1991) (defendant's general objection to summation not preserving issue on appeal); People v. Kuss, 32 N.Y.2d 436, 345 N.Y.S.2d 1002, 299 N.E.2d 249 (1973); People v. Acosta, 180 A.D.2d 505, 580 N.Y.S.2d 927 (1st Dep't 1992); People v. Torres, 171 A.D.2d 425, 567 N.Y.S.2d 5 (1st Dep't 1991); People v. Reed, 136 A.D.2d 577, 523 N.Y.S.2d 569 (2d Dep't 1988); People v. Pickett, 48 A.D.2d 748, 368 N.Y.S.2d 324 (3d Dep't 1975).

Defendant did not preserve for appellate review the propriety of the prosecutor's statements during summation that the defendant was running a drug factory, since the defense attorney did not object to the statements or object to the adequacy of the curative instruction. People v. Seaberry, 138 A.D.2d 422, 525 N.Y.S.2d 704 (2d Dep't 1988).

54 People v. Stewart, 92 A.D.2d 226, 459 N.Y.S.2d 853 (2d Dep't 1983).

55 People v. Tolbert, 198 A.D.2d 132, 603 N.Y.S.2d 844 (1st Dep't 1993).

Prosecutor's summation denied defendant right to fair trial by improperly vouching for complainant's truthfulness, appealing to jury's sympathies and fears by describing elderly, diabled complainant as a "classic victim," disparaging defense case as being "scripted," and accusing defense of manufacturing evidence. People v. Robinson, 260 A.D.2d 508, 689 N.Y.S.2d 163 (2d Dep't 1999).

56 People v. Odenthal, 217 A.D.2d 412, 629 N.Y.S.2d 414 (1st Dep't 1995).

57 People v. Cotton, 242 A.D.2d 638, 662 N.Y.S.2d 135 (2d Dep't 1997).

58 People v. Cotton, 242 A.D.2d 638, 662 N.Y.S.2d 135 (2d Dep't 1997).

59 People v. Walters, 251 A.D.2d 433, 674 N.Y.S.2d 114 (2d Dep't 1998).

60 People v. Walters, 251 A.D.2d 433, 674 N.Y.S.2d 114 (2d Dep't 1998).

61 People v. Walters, 251 A.D.2d 433, 674 N.Y.S.2d 114 (2d Dep't 1998).

62 People v. Walters, 251 A.D.2d 433, 674 N.Y.S.2d 114 (2d Dep't 1998).

63 People v. Williamson, 267 A.D.2d 487, 699 N.Y.S.2d 749 (3d Dep't 1999).

64 People v. Anderson, 256 A.D.2d 413, 682 N.Y.S.2d 231 (2d Dep't 1998).

65 People v. Calabria, 94 N.Y.2d 519, 706 N.Y.S.2d 691, 727 N.E.2d 1245 (2000).

66 People v. Olivero, 272 A.D.2d 174, 710 N.Y.S.2d 29 (1st Dep't 2000).

67 People v. Olivero, 272 A.D.2d 174, 710 N.Y.S.2d 29 (1st Dep't 2000).

68 People v. Smith, 288 A.D.2d 496, 733 N.Y.S.2d 237 (2d Dep't 2001).

69 People v. LaPorte, 306 A.D.2d 93, 762 N.Y.S.2d 55 (1st Dep't 2003).

70 People v. Harris, 31 N.Y.3d 1183, 82 N.Y.S.3d 321, 107 N.E.3d 541 (2018).

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4A N.Y.Prac., Com. Litig. in New York State Courts § 52:18 (5th ed.)

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Robert L. Haig[a0]

Chapter 52. Final Arguments in Jury and Bench Trials
by Claire P. Gutekunst[*]

III. Strategic and Tactical Considerations for Jury Summations

B. Practical Guidance

§ 52:18. Preparing the summation

References

Preparation for the summation begins, in principle, with the formulation of the Trial Game Plan.[1] Although many trial practice books or articles note that a preliminary draft or outline of the summation should be prepared before the trial begins, in real life commercial trials of any duration, this rarely (if ever) occurs, and for good reason. However well prepared counsel may be before the trial begins, there are many other items of trial preparation that have more immediate priority, and a great deal happens during the trial that will affect the actual shape and content of the summation.

In a commercial trial, hard on the heels of preparing, submitting, and arguing often complex jury instruction issues, the actual preparation of the summation is probably the most pressured task that counsel faces during the trial. Although the basic disciplines are the same for simple or more complicated trials, the difficulties of preparing the summation mount as the volume of evidence and complexities of the case increase.

As trial proceeds, a daily trial journal is a very helpful aid in preparing the summation, by recording the significant occurrences of the day: keeping track of the introduction of helpful or damaging evidence, identifying the reactions of the jury members to particular evidence or witnesses, noting promises in the opening statement by adversary counsel that may go unfulfilled, and any other trial events important enough to be considered for inclusion in the summation.

The significance and the context of certain evidence should be further developed in the summation, and the trial journal provides a good source of those issues that need further elaboration. A great deal occurs in a usual trial day, and even the best of memories are imprecise. The jury, however, in its collective memory, will surely remember helpful and damaging evidence and, therefore, counsel must be prepared to address and argue it in summation. It is, therefore, unwise for counsel in a trial of any duration to rely solely on memory or on lengthy trial transcripts that counsel may well not have time to review before summation. A trial journal can be easily maintained during the trial proper, during the luncheon recess, or after the close of the trial day.

The first step in preparing the summation is to consider the general objectives—the themes and general theory of the case[2] in light of the specific facts, issues and evidence of the case, other significant trial events that have occurred, and the jury instructions, special verdicts or interrogatories that will be put to the jury. Essentially, the specific goals—the content and structure of the summation—must be based on the elements of law and the critical facts and issues of the case. As a practical matter, it should be possible in every case, no matter how difficult or complicated, no matter how large or small, to write down on a single piece of paper in bullet or outline form: "to win we need to convince the jury of this …, this …, this … and this …." Most often, the special verdict questions and jury interrogatories will help frame those specific goals. Once these goals are established, decisions must be made concerning the projected amount of time for the summation and whether certain graphics will be used during the summation.[3]

If the summation will be entirely oral, it should be as brief as the substance of the case will allow. It is hard to imagine that closing argument should ever exceed one hour, even if the court were to permit a greater amount of time. As Wellman observed back in 1910, it can "be taken as a fixed rule, that the popular mind can never be vigorously addressed, deeply moved, and stirred and fixed for more than one hour …."[4] This was said long before television programming and use of Internet features, which generally have shortened viewers' attention span, and long before the public became accustomed to well-crafted and often effective trial summations in the movies or on television that last a few minutes or less. This translates into the need to adapt to the relatively short attention span that can reasonably be anticipated for jury members.

The use of graphics in the summation can extend the attention span to some extent. The use of blow-ups of documents, charts, the blackboard, enlarged writing pads, or other of the many types of interactive graphics,[5] offers the potential of theater, enhancing the communication and forensics by simultaneously engaging jurors' auditory and visual senses and maintaining attention. Considerations as to graphics, therefore, are vital in structuring the summation because their use may allow, where desirable, a longer, more informative and more persuasive summation. There is a limit, however, and the longer the summation, the greater the need for justifying the extended length.[6]

Like the opening statement,[7] the summation is a speech to the jury that includes an introduction, a body, and a conclusion. The themes of the case, expressed to the extent possible in lively and different forms, belong in each segment of the summation. Unlike the opening statement, where the issues, facts, and evidence are being previewed or forecast, the summation comes after the jury has heard a wealth of evidence, perhaps over a number of days or weeks, and has come to understand a great deal about the case. Summations, therefore, must be careful not to revisit every aspect of the case in laborious or boring detail.

Accordingly, jury knowledge at the close of evidence is an important ingredient to be considered, and counsel must assess how much the jury really knows, how much must be explained, focused, repeated or amplified, and how much should be the subject of brief reference or summary. Similarly, counsel must decide how quickly or slowly counsel can "get to the point," how much and to what extent the key testimony of favorable or adverse witnesses should be revisited or recited, which important documents should be discussed or quoted, and what graphics should be used to make specific points.

Structuring the summation requires organizing it, whether by the issues, the chronology of events, the subject matter, or some appropriate combination of all of these. The first part of the summation often may highlight areas of agreement so as to better focus and narrow the areas of factual dispute for jury deliberation. The emphasis, and manner of emphasis, given to documents contemporaneous to the transactions at issue is a particular concern in complex commercial cases where numerous exhibits and documents were presented at trial.

In structuring the summation, the many other objectives discussed above[8] need to be considered. These include, for example, the best way to discuss and handle the credibility or lack of credibility of particular witnesses, rebuttal of the adversary's arguments, and displaying the strengths of the case.

The timing and manner in which the weaknesses of the case or the strengths of the adversary's case will be confronted is often a difficult element of structure and preparation for the summation. If too early in the summation, will it divert the jury's attention from the strengths of the case? If too late in the summation, will it linger too long and obscure the benefits of having the opportunity to present the most forceful closing? Thus, it is generally best to lead with one's strengths, then address weaknesses of the case and close by bringing the jury's attention back to the strengths of your client's case.

The conclusion of the summation, if it draws together with simplicity the themes and threads of the argument to a just and rational conclusion, has the greatest potential for being remembered during the jury's deliberations. Although every element of the summation must be thought out carefully before being delivered, the dynamics of the summation should build to an ultimate and well-prepared climax near or at the end.

Footnotes

a0 Editor-in-Chief

* Claire P. Gutekunst is the Executive Director of Judges and Lawyers Breast Cancer Alert and an independent mediator. She served as President of the New York State Bar Association from 2016–2017. She previously was a commercial litigator at Proskauer Rose LLP for nearly 30 years and then Special Master for the New York City Asbestos Litigation. Stephen Rackow Kaye, Claire's close friend and mentor at Proskauer, was the author of the versions of this chapter which appeared in the First and Second Editions of this work. Steve died on October 30, 2006. To honor Steve's memory, to pay homage to his lifetime of selfless devotion to teaching in the law, and in recognition of his enduring legacy, Claire thereafter undertook to prepare the annual supplements for this chapter and to author the chapter, which retains in very substantial part Steve's prior work, in subsequent editions of this work. In the Third Edition, Claire authored the chapter with assistance from Randi-Lynn Smallheer and Michelle E. Arnold, while they all were attorneys at Proskauer. Joelle Milov, who was a Proskauer attorney at the time, assisted Claire in preparing the Fourth Edition of this chapter. Bassam Gergi, Aaron Quint and Andrew Hartman, summer associates at Proskauer in 2016, 2017 and 2018, respectively, assisted Claire in preparing the 2016, 2017 and 2018 updates to the chapter. Krisly Zamor, a graduate of Fordham University School of Law, assisted Claire in preparing the 2019 update to the chapter. Yena Hong, a Proskauer attorney, assisted Claire in preparing the Fifth Edition of this chapter.

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1 As to the Trial Game Plan, see Chapter 44, "Trials" (§§ 44:1 et seq.).

2 As to themes, see § 52:10.

3 As to presenting the closing argument, see § 52:19; as to special verdicts and interrogatories, and samples of verdict sheets, see Chapter 53, "Jury Conduct, Instructions and Verdicts" (§§ 53:1 et seq.); as to formulation of the Trial Game Plan, see Chapter 44, "Trials" (§§ 44:1 et seq.); for a sample demonstrative, see § 52:25.

4 Wellman, Day In Court or The Subtle Art of Great Advocates 246 (1910).

5 As to interactive techniques, see Chapter 49, "Graphics and Other Demonstrative Evidence" (§§ 49:1 et seq.).

6 As to the many aspects of trial graphics, see Chapter 49, "Graphics and Other Demonstrative Evidence" (§§ 49:1 et seq.).

7 As to the opening statement, see Chapter 45, "Trial Preliminaries and the Opening Statement" (§§ 45:1 et seq.).

8 See §§ 52:9 to 52:17.

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