# PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

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I. Prosecutor's Role:

> "[A] public prosecutor ... is a guasi-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment."

*State v. Walker*, 182 Wn.2d 463, 476, 341 P.3d 976, 984 *cert. denied*, 135 S. Ct. 2844 (2015).

II. Standard of review on appeal

A. Objection was made

If an objection was made, the court will look at two things:

1) Were the comments, in fact, improper? The defendant bears the burden of demonstrating the impropriety of the remarks

2) If improper, is there a substantial likelihood that the improper conduct affected the jury's verdict?

i. Standard of review when objection to misconduct is overruled or motion for new trial or mistrial is denied is abuse of discretion. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983)

B. Objection was not made

If there was no objection, the court employs a heightened standard of review. The defendant must show:

1) The impropriety of the remark

2) That it was flagrant and ill-intentioned

Editor's Note: What does flagrant and ill-intentioned really mean? The case law doesn't really say. But at a minimum, if you are making an argument that has been specifically disapproved, you have acted flagrantly and with ill-intention. See e.g. *State v. Fleming*, 83 Wn.App. 209, 214, 921 P.2d 1076 (1996):

> We note that this improper argument was made over two years after the opinion in Casteneda–Perez, supra. We therefore deem it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial.

3) That the prejudice from the remark could not have been neutralized by a curative instruction

4) That there is a substantial likelihood the misconduct affected the verdict.

Editor's Note: Once you have shown that a remark is so prejudicial that it could not have been neutralized by a curative instruction, you will have typically shown a substantial likelihood that the misconduct affected the verdict.

[Although in *State v. Emery*, *infra*, the Supreme Court noted in endnote 14 that even if the misconduct in question could *not* have been cured by an instruction, the defendants nevertheless failed to show a substantial likelihood the misconduct affected the jury's verdict. This is so because the improper "truth" and "fill in the blank" arguments were tempered by the prosecutor's repeated reference to the correct standard for reasonable doubt and references to the reasonable doubt instruction. Also, the State's case was very strong.

This footnote, however, contradicts other aspects of our jurisprudence. First, the Court has held that when it is determined that improper argument could not have been neutralized by a curative instruction, it is the functional equivalent of a mistrial. *Emery* at 761-62. Second, the Court has said that the strength of the State's case is *not* a proper basis on which to analyze prejudicial effect. *State v. Walker*, 182 Wn.2d 463 (2015). In other words, incurable means…incurable.]

However, a defendant can show that misconduct was substantially likely to have affected the verdict but *still* not get relief because the misconduct in question could have been fixed by a curative instruction.

Example: *State v. Olsen*, 185 Wn.App. 1036 (2015) *Unpublished*

Prosecutor misstated the law of self-defense when she argued that she was not required to disprove self-defense. The Court of Appeals found that, of course, the argument was improper, flagrant, and ill-intentioned. However, the remark could also have been corrected by a curative instruction from the court telling the jury that, in fact, the State bore the burden of disproving self-defense and the prosecutor was full of it. (Okay, it might not have said it in those words).

Thus, no reversible misconduct. (However, the defendant received ineffective assistance of counsel when his lawyer failed to object to this argument, so he won).

C. What about constitutional harmless error?

This is the standard that the defense wants the court to employ. Under this standard, we bear the burden of proof on appeal, whereas under the flagrant and ill-intentioned standard, the defendant bears the burden. The Supreme Court has employed this test where the misconduct directly impairs a constitutional right of the defendant.

Examples:

A prosecutor commenting on the defendant's prearrest silence (*State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996);

A prosecutor commenting on the defendant's post-arrest silence (seriously??) (*State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979);

A prosecutor making racially charged statements. *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011).

The Supreme Court declined to apply the constitutional harmless error test when the misconduct at issue was a "truth" argument or a burden shifting argument. *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012).[1]

D. The appellate court found that my misconduct could have been neutralized by an instruction, so I win, right?

Not so fast. Over the last few years, appellate counsel have finally embraced that anytime you allege prosecutorial misconduct for un-objected to stuff, you should also allege ineffective assistance of counsel for failing to object.

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[1] In *State v. Fleming*, supra, the Court of Appeals applied the constitutional harmless error test to a burden shifting argument without discussing why they were doing so, or discussing the usual standards of review for prosecutorial misconduct. On this point, *Fleming* is an outlier.

That is, you argue that even though the improper argument (such as a misstatement of the law) could have been neutralized by a curative instruction, it was nevertheless incompetent of defense counsel not to object, and the outcome of the trial would probably have been different were it not for the misstatement of the law.

Example: See *State v. Olsen*, supra, *Unpublished*:

Although the prosecutor's blatant misstatement of the law of self-defense could have been fixed with a curative instruction, counsel was deficient for not objecting and defendant met his burden of showing that the outcome of the trial probably would have been different absent this misstatement of the law.

So the defendant wins anyway.

See also: *In re Parker*, 2015 WL4459185 *Unpublished* (Pierce County)

Defendant received ineffective assistance of appellate counsel when appellate counsel failed to challenge prosecutorial misconduct that, had it been challenged in direct appeal, would have resulted in a new trial.

III. Specific arguments/acts that are prohibited

1. Arguments that trivialize the burden or analogize the decision on guilty to everyday decision making. This includes puzzle arguments, or arguments which undermine the gravity of the decision the jury has been asked to make.

2. Injecting evidence that wasn't admitted

This can be the product of a totally innocent mind. You guys know your cases so well, and you have so many facts in play, that you may simply forget that a particular fact you are aware of was not, in fact, testified to. Example:

*State v. Chenault*, 185 Wn.App. 1036 (2015) *Unpublished*:

PA accidentally mentioned during closing that the beer the defendant had been drinking was an "Earthquake" brand beer. Turns out, nobody said this at trial, even though it was no doubt mentioned somewhere, at some point, by somebody prior to trial. The brand of the beer was absurdly collateral. The defendant admitted to drinking beer at the location of the rape, and admitted offering it to the victim. The brand made no difference. The prosecutor made an innocent mistake. Court of Appeals agreed.

But see *State v. Fanelli*, 155 Wn.App. 1039 (2010) *Unpublished*

Child sex case, victim was volleyball in a vicious custody dispute. Defense theory was that victim was coached to make up allegations by dad against mom's new boyfriend. At one point during forensic interview the victim said the defendant needed "to go down," which is a very un-four year-old thing to say, according to the defendant's argument during closing. It smacked of dad coaching her.

Prosecutor, during rebuttal closing, claimed that what the victim really said was that the defendant "must go down, he must go to heaven." The problem is that the victim never said this at any point in the court proceedings, nor did any of the people to whom she made hearsay statements testify that she said this.

Conviction reversed. The prosecutor's statement destroyed a key pillar of the Fanelli's defense.

3. Exhorting the jury to "do its job" and convict. *United States v. Young*, 470 U.S. 1, 18, 105 S.Ct. 1038 (1985).

It is not the jury's job to convict. It is their job to consider the evidence fairly, to keep an open mind, and presume the defendant innocent until such time as that presumption has been overcome by proof beyond a reasonable doubt.

"Do your job" arguments carry the clear import

> [T]hat unless the jury convicted the defendant, the jurors would violate their oaths. Warnings to a jury about not doing its job is considered to be amongst the most egregious forms of prosecutorial misconduct. That argument alone had the clear capacity to deprive the defendant of his constitutional right to a fair trial.

*State v. Coleman*, 74 Wn.App. 835, 840, 876 P.2d 458 (1994), quoting *State v. Acker*, 265 N.J.Super. 351, 627 A.2d 170, cert. denied, 134 N.J. 485, 634 A.2d 530 (1993)

4. Appeals to passion or prejudice

a. Asking the jury to put itself into the shoes of the victim

Example: *In re Parker, supra,* Prosecutor repeatedly asked the jury to imagine victim's "terror" during the crime.

b. Appealing to matters outside the record and which arouse indignation unrelated to the evidence

> Example: *State v. Claflin*, 38 Wn.App. 847, 690 P.2d 1186 (1984), Prosecutor read a poem by an anonymous rape victim to show the jury how the victims "probably felt."
>
> This is totally improper. Although a prosecutor is permitted to reference the heinous nature of a crime and the effect of the crime on the victim (to the extent that it is relevant ), the prosecutor's duty is to ensure a verdict free of prejudice and based on reason.

c. Improperly injecting race (obviously)—*State v. Belgarde, State v. Monday, State v. Walker*, etc.

> Be very careful here. You WILL get reversed (assuming your appellate unit doesn't concede error entirely before an appellate court ever sees it) if you engage in the kind of behavior that the prosecutors in the above three cases engaged in.

d. Asking the jury to send a message to society with the verdict
e. Asking the jurors whether they would have done what the defendant did
f. Appeals to patriotism

Illustrative examples on passion or prejudice:

Saying the defendant, on trial for child rape, destroyed the victim's "innocence and purity."

Asking the jury to send a message to gang members that their crimes won't be tolerated.

Fabricating an entire narrative about what the murder victims thought and felt as they were being murdered—*State v. Pierce*, 134 Wn.App. 907 (2006)

Fabricating an entire narrative about a dog barking because it was traumatized at seeing its master beaten. (Pretty sure the dog didn't provide a statement).

Asking the jury to give justice to the victim by their verdict. The jury, again, is simply there to decide whether you have met your burden of proof, not to right a wrong for the victim.

Aligning yourself with the victim or the police.

5. "Truth" arguments—the jury is not there to "solve" the case, the jury is merely there to determine whether the State has proven its case beyond a reasonable doubt. Don't tell the jury they are there to determine the "truth" of what happened.

6. Burden shifting

Example:

Arguing that in order to acquit the defendant, they must find the victim (or police officer, or another witness) were lying

7. Liar statements—Don't call the defendant a liar. Don't call anyone a liar.

8. Commenting on the defendant's exercise of a constitutional right, such as the right to counsel or the right to be present. Exception: You may comment on a defendant's tailoring of his testimony but only if he opens the door to such questioning. He might do so directly, or it might be a fair inference from his testimony. Proceed CAREFULLY and advise the court, prior to your cross, that you believe the door has been opened and seek judicial imprimatur of these questions. Then, don't hammer it to death in closing. Cases: *State v. Wallin*, 166 Wn.App. 364 (2012); *State v. Martin,* 171 Wn.2d 521 (2011).

9. Disparaging defense counsel

10. Invoking race

11. Asking a witness to comment on the credibility of another witness

12. Fill in the blank arguments

IV. My case survived appeal, so why should I care about misconduct?

A. Justice

Ask yourself this: If you have to employ disapproved arguments or tactics to win a case, should you really be winning that case? If your conduct or remarks amount to a due process violation (as they did in *State v. Monday,* 171 Wn.2d 667, 257 P.3d 551 (2012), and *PRP of Glassman*, 175 Wn.2d 696, 286 P.3d 673 (2012) and *State v. Walker*, 182 Wn.2d 463, 341 P.3d 562 (2013)) have you done justice? Was the proceeding fair? Has your conduct comported with the expectations of the Prosecuting Attorney? Has your conduct comported with the RPCs?

Here's what the Court of Appeals thinks of this:

> We agree with the comment of defendant Lee's counsel in his brief that "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics *are necessary to sway the jury in a close case*."

*State v. Fleming*, 83 Wn.App. 209, 215, 921 P.2d 1076 (1996)

To engage in impropriety, in other words, is to signal the reviewing court that your case is weak and that reversal is probably the right way to go. [2]

B. Personal consequences

1. Bar discipline:

We don't see a lot of Bar discipline of prosecutors who commit misconduct, and notice is being taken. Numerous commentators are calling for Bar associations to step in and act where appellate courts won't.

As we know, the role of the appellate court is not to impose discipline, but to determine whether error at trial warrants a new trial. If a prosecutor makes an argument that he/she has been instructed repeatedly, via case law, NOT to make, the question on appeal remains whether a new trial is warranted. Just making an argument that is flagrant and ill-intentioned (as such an argument would be) is *not* the only question before an appellate court.

But if an argument is flagrant and ill-intentioned, should there be no consequence for the behavior? If there is no consequence, where are the incentives to stop (beyond the risk of retrial)? This is a question being asked by commentators and judges across the nation.

2. Losing your job:

The prosecutor in *State v. Monday*, who used racially charged stereotypes and mockery in his presentation to the jury ended up resigning and being admonished and reprimanded by the Bar.

C. Cost to Society

You may have won at the first level of appeal, but you may not win on collateral review. And by the time *that* reversal comes down, your case might be quite old.

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[2] FYI, if the opinion quotes the appellant's brief with approval on a misconduct claim, you know you are in trouble.

Justice may be frustrated if we have to make a lenient plea deal due to loss of evidence. And if we retry the case, it is costly and can be traumatic for the victim.