THE PROSECUTION'S CLOSING ARGUMENT "DO's" AND "DON'Ts"

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THE DO's

"Members of the jury"

Preparation of Closing Argument starts. . . . . in the beginning

Closing argument "its genesis is in the foresight, the imagination, the dexterity, and the wit of the lawyer. It is shaped from the clay of the first meeting with the client, formed with the preparation for trial, and fired in the kiln of the trial itself."

-Albert Krieger

Attorney for Mafioso John Gotti

The fundamentals:

"Gentlemen, this is a football."

-Vince Lombardi

Tenn. Rule of Crim. P. 29.1

(a) State's First Closing Argument; Waiver.

(1) State's First Closing Argument. At the close of the evidence, the state has the right to make the first closing argument to the trier of facts.

(2) *Waiver.* If the state desires that all closing argument be waived, it may offer to waive such argument. If the defendant agrees, then no argument will be made. The state may not waive the first closing argument unless all closing argument is waived.

(3) *Scope of State's Opening Argument.* The state's first closing argument shall cover the entire scope of the state's theory.

Tenn. Rule of Crim. P. 29.1

(b) Defendant's Closing Argument; Waiver

(1) Defendant Argues after State. Each defendant shall be allowed to make a closing argument following the state's first closing argument. If the defendant waives this closing argument, the state is not permitted to make a final closing argument.

(2) Scope of Defendant's Argument. Defendant's closing argument may address any relevant and proper subject and is not limited to matters actually argued by the state.

Tenn. Rule of Crim. P. 29.1

(c) State's Final Closing Argument.

(1) State's Final Closing Argument. The state shall be allowed a final closing argument following the defendant's closing arguments, unless the defendant has waived closing argument or the state has waived all argument or its final argument.

(2) Scope of State's Final Closing Argument. The state's final closing argument is limited to the subject matter covered in the state's first closing argument and the defendant's intervening argument.

Tenn. Rule of Crim. P. 29.1

(d) Court's Discretion to Control Closing Arguments.

(1) Discretion to Regulate Arguments. The court has discretion to set:

(A) the number of closing arguments permitted on behalf of the state beyond the first and final closing arguments;

(B) the number of closing arguments in excess of one permitted each defendant; and

(C) the order and length of closing arguments.

Tenn. Rule of Crim. P. 29.1

(d) Court's Discretion to Control Closing Arguments.

(2) *Policies.* The court shall allow adequate but not excessive time for closing arguments to make a full presentation of the theory of the case. If more than two arguments are made for the state, the court shall ensure that no defendant is deprived of the opportunity to answer a new argument made by the state against that defendant. It is the purpose of this rule to ensure that all argument be waived only with the consent of both sides; that the defendant shall be permitted to waive all remaining argument after the state's first closing argument; and that while the state, having the burden of proof, has the right to open and close the argument, this right shall not be exercised in such way as to deprive the defendant of the opportunity to fully answer all state argument. The court, on motion, shall enforce this purpose.

Closing argument fundamentals ***Do*** these things

- Preparation for closing begins during the pre-trial process
- Remember primacy and recency effect-the jury remembers where you start and where you finish
- Take notes or designate someone to take notes during trial
- Organization, Organization, Organization
- Be passionate, BUT be intentional and deliberate with your words
- Speak loud and clear with conviction and confidence
- Vary tone of voice and location in relation to the jury as you make points of emphasis

Closing argument fundamentals ***Do*** these things

- Speak with sincerity and honesty-make them trust you
- Use analogies, quotes and creative descriptions to keep the jury's attention
- Thoughtful repetition for emphasizing significant points
- Script your ending and deliver it forcefully
- Be yourself
- Call the jury to action: Find the Defendant guilty

What "DO" we want to accomplish in the State's first closing argument?

Step One: Start Strong –Attention Step
Restate your case ***theme*** and give a forceful ***capsule summary***

Step Two: ***Argue*** your case tell ***"The Story" with the evidence***, discussing key issues at appropriate points

Step Three: ***Review the jury*** instructions-discuss elements of the charged offenses-judiciously repeat key points of proof

Step Four: ***Finish Strong***

Step One: Start Strong –Attention Step

Restate your case ***theme***

Case theme-Examples:

- "Some people will kill for love. This case is about jealousy. If the Defendant couldn't have him/her, nobody was going to have him/her."
- "This case is about the brutal murder of John Smith on October 1, 2015, and the total disregard for human life, John Smith's life, that the Defendant showed when he stabbed him 19 times in the chest leaving him to die in the parking lot of Wendy's restaurant on Smith Street."
- "Desperate people do desperate things. On November 1, 2015, the Defendant was a desperate man. He was running a failing business. What did he do? He burned his business to the ground to collect $1,000,000 in property insurance."

Step One: Start Strong –Attention Step

Restate your case ***theme***

Case theme-Examples:

- "This is a case about family secrets and such horrific acts committed against a child that she could not tell her story for a long time. The trauma Jane Doe endured resulted in shame and confusion and fear because of acts of her (father, brother, uncle, etc.) the Defendant, John Doe that has changed her life forever."
- "This is a case about the fox guarding the hen house, an abuse of a position of trust and greed."
- "This is a case about the abuse of power and the public trust and that no person is above the law."

Step One: Start Strong –Attention Step

Restate your case ***theme***

Case theme-Examples:

- "An innocent man has no reason to flee. A guilty man has every reason to run."
- "'Just say no.' On January 1, 1999, Dan Drunkard, the defendant started out the New Year by 'Just saying no.' The defendant said NO to his girlfriend who asked him not to order any more drinks. The defendant said NO to his friends who offered him a ride home from the party. The defendant said NO to Officer Winters who requested he take the breath test. Lastly, the defendant said NO to little Amy Johnson being able to celebrate her next birthday."

Chapter 14 Trial Practice-Utah Sentencing Commission, 3/22/2007.

- "This is a case about violence, fear and love. Today you will hear the story of (Jane Doe), who called the police after her boyfriend-John Doe-struck her, twice in the face, with his fist. He broke her nose when he did that. For her, that was the last straw. Earlier that night, he had broken her phone when she tried to talk to a friend-a male friend. And he told her that ***he*** was going to be the only man in her life."

Wisconsin Prosecutor's Domestic Abuse Reference Book, 2012.

Step One: Start Strong –Attention Step

Give a forceful ***capsule summary***

- Two or three short paragraphs that are the cliff notes for "The Story" that is the State's case you are about to recount
- Scripted-commit it to memory and look at each of the jurors as you speak for maximum effectiveness
- Deliver it with sincerity and confidence

Step Two: **Argue** your case to tell **"The Story" with the evidence**

I. **DO** an outline of your argument of the evidence-memorize the outline, not words

II. **DO** talk about what the evidence has proven in a narrative chronology of the events and explain how you proved it and how your witnesses and evidence confirm the State's theory of the case. Remind the jury of the promises you made in your Opening-Do not simply repeat witness's testimony

III. **DO** address any weaknesses in the State's case head-on before the defense does

IV. **DO** expose the defense's weaknesses. Point out any broken promises by the defense. Make them have to respond

V. **DO** use visual aids-Jury's love "scratch-n-sniff"-Exhibits (pictures, key pieces of physical evidence, excerpts of witness testimony, charts, diagrams, PowerPoint)

Step Three: **Review the jury instructions**

- Go through the jury instructions and review the elements of the offense- briefly repeat the high points of how the State has proven each element of the offense(s)
- Emphasize the proof on elements contained in the jury instructions the defense is challenging
- Challenge lesser included offenses contained in the instructions as appropriate
- Tell the jury where to sign on the verdict form for emphasis

Step Four: **Finish Strong**

- Script your ending-Know it cold
- It should appeal to the jury's sense of justice and fairness
- The most effective finish should linger in the courtroom when you walk away

Rebuttal- "The Last Word" Tenn. Rule of Crim. P. 29.1

(c) State's Final Closing Argument.

(1) State's Final Closing Argument. The state shall be allowed a final closing argument following the defendant's closing arguments, unless the defendant has waived closing argument or the state has waived all argument or its final argument.

(2) Scope of State's Final Closing Argument. The state's final closing argument is limited to the subject matter covered in the state's first closing argument and the defendant's intervening argument.

State's Rebuttal argument

- Cover all key points in your initial closing-beware sandbagging and the Defendant waives or makes a narrow argument preventing issues not argued
- Do save persuasive and powerful argument for rebuttal-the defense will have no response
- Do emphasize your strongest points in a fresh way-resist the temptation to respond to defense red herring questions
- Refute the defense's contentions by referring back to testimony or jury instructions to demonstrate any errors or omissions by the defense
- Conclusion

Ethical considerations for the prosecution's closing argument

***Berger v. United States*, 55 S.Ct. 629, 633 (1935)**

The prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. **He may prosecute with earnestness and vigor-indeed, he should do so. *But, while he may strike hard blows, he is not at liberty to strike foul ones*. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.**"

Ethical considerations for the prosecution's closing argument

State v. Sexton, 368 S.W.3d 371, 417 (Tenn. 2012)

"[c]ounsel may employ 'forceful language in their closing arguments, as long as they do not stray from the evidence and the ***reasonable inferences*** to be drawn from the evidence.' "

Ethical considerations for the prosecution's closing argument

Reasonable inferences

"Reasonable"=Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. Having the faculty of reason, rational; governed by reason; under the influence of reason; agreeable to reason. Thinking, speaking or acting according to the dictates of reason."

Blacks Law Dictionary

Ethical considerations for the prosecution's closing argument

"As the Court of Criminal Appeals cautioned more than thirty years ago, "[r]emarks which skirt the edges of impermissible comment are neither desirable nor worth the risk of reversal of what may well be a thoroughly deserved conviction." *State v. Jackson*, 444 S.W.3d 554, 589 (Tenn. 2014), citing *Taylor v. State,* 582 S.W.2d 98, 101 (Tenn.Crim.App.1979) (quoting *State v. Dent,* 51 N.J. 428, 241 A.2d 833, 840–41 (1968))

American Bar Association Criminal Justice Standards for the Prosecution Function

These standards set forth objectives for professional conduct related to the prosecution function and have to a large degree been adopted by the Tennessee Courts in case decisions as directory. *State v. Goltz*, M-2001-02019-CCA-R3-CD, 2003 WL 141060 (Tenn. Crim. App. Jan. 15, 2003), *perm. app. denied* (Tenn. May 27, 2003) (Held: Prosecutor's repeated improper and inflammatory comments during closing argument affected the verdict and required reversal.); *State v. Culbreath*, 30 S.W.3d 309 (Tenn. 2000)

American Bar Association Criminal Justice Standards for the Prosecution Function

ABA Standard 3-1.1(b) Scope and Function of These Standards-"These Standards are intended to provide guidance for the professional conduct and performance of prosecutors."

American Bar Association Criminal Justice Standards for the Prosecution Function

ABA Standard 3-1.1(c) Scope and Function of These Standards- "Because the Standards for Criminal Justice are aspirational, the words "should" or "should not" are used in these Standards, rather than mandatory phrases such as "shall" or "shall not," to describe the conduct of lawyers that is expected or recommended under these Standards. The Standards are not intended to suggest any lesser standard of conduct than may be required by applicable mandatory rules, statutes, or other binding authorities."

American Bar Association Criminal Justice Standards for the Prosecution Function

ABA Standard 3-1.2(a) Functions and Duties of the Prosecutor-"The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. . . ."

American Bar Association Criminal Justice Standards for the Prosecution Function

ABA Standard 3-1.2(b) Functions and Duties of the Prosecutor-"The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."

American Bar Association Criminal Justice Standards for the Prosecution Function

ABA Standard 3-6.2(a) Civility With Courts, Opposing Counsel, and Others-"As an officer of the court, the prosecutor should support the authority of the court and the dignity of the courtroom by adherence to codes of professionalism and civility, and by manifesting a professional and courteous attitude toward the judge, opposing counsel, witnesses, defendants, jurors, court staff and others."

American Bar Association Criminal Justice Standards for the Prosecution Function

ABA Standard 3-6.8-Closing Arguments to the Trier of Fact-" In closing argument to a jury (or to a judge sitting as trier of fact), the prosecutor should ***present arguments and a fair summary of the evidence that proves the defendant guilty beyond reasonable doubt***. ***The prosecutor may argue all reasonable inferences from the evidence in the record, unless the prosecutor knows an inference to be false***. The prosecutor should, to the extent time permits, review the evidence in the record before presenting closing argument. . . "

Striking hard blows NOT foul ones

Characterizing the evidence of the defendant's conduct, not improper personal opinion:

State v. Willis, ____ S.W.3d ____, 2016 WL 4791743 (Tenn. July 6, 2016) (Prosecutor's argument predicated by words "I think" or "I submit" characterizing the defendant's demeanor as ***"cold"*** was not improper opinion. The prosecutor argued appellant's mental state could be inferred from the evidence, which was permissible).

Striking hard blows NOT foul ones

Characterizing the evidence of nature of the defendant's conduct not improper personal opinion:

State v. Husky, E-1999-00438-CCA-R3-CD, 2002 WL 1400059 (Tenn. Crim. App. June 28, 2002) *perm. app. denied* (Tenn. Feb. 18, 2003) (Given the rape victims' testimony, prosecutor's argument predicated by words "I think" or "I submit" using the words ***brutalize and brutalization*** to describe defendant's conduct not improper opinion of prosecutor.)

(Prosecutor's comment that defendant "***preyed on the weakest of the weak***" not improper opinion given victims were prostitutes, and the evidence showed that in their profession, they were susceptible to sexual assaults and rapes.

Striking hard blows NOT foul ones

Prosecutor's statement that the State's evidence is uncontradicted not improper comment on defendant's failure to testify:

State v. Thornton, 10 S.W.3d 229, 234-35 (Tenn. Crim. App. 1999), *(no perm. app. filed)* (Held: Prosecutor's comment "I submit to you, ladies and gentlemen, there has not been any defense asserted here whatsoever. . . . There is no defense, there is nothing to it" was referring only to defendant's failure to refute the State's case, NOT the defendant's failure to testify.

Striking hard blows NOT foul ones

Prosecutor's statement that the State's evidence is unrefuted or uncontradicted not improper comment on defendant's failure to testify:

State v. Rice, 638 S.W.2d 424, 427 (Tenn. Crim. App. 1982)(Held: Generally, mere argument by the State that its proof is unrefuted or un-contradicted is not improper comment upon a defendant's failure to testify.)(citations omitted.)

Striking hard blows NOT foul ones

Prosecutor's statement not improper comment on defendant's failure to testify:

State v. Ward, 138 S.W.3d 245 (Tenn. Crim. App. 2003) *perm. app. denied* (Tenn. June 1, 2004) (Held: prosecutor's statement "There's only one person, one person, that could have possibly offered up a history of accidental suffocation, and that was the defendant. She had that opportunity on three separate occasions when she spoke with Detective Carter, medical personnel and other individuals to offer that explanation. She offered no explanation that would suggest accidental suffocation" not improper comment on defendant's decision not to testify).

Striking hard blows NOT foul ones

Prosecutor's statement comparing credibility of two witnesses not improper vouching:

State v. Foust, 482 S.W.3d 20, (Tenn. Crim. App. 1982) *reversed on other grounds* (Prosecutor's statements comparing the credibility of two witnesses and telling jury they had to decide which statement to believe ***NOT*** improper vouching.)

Striking hard blows NOT foul ones

Prosecutor references to a missing witness may be proper:

State v. Bough, 152 S.W.3d 453, 462 (Tenn. 2004) *reh. denied* (Tenn. Dec. 3, 2004) ("A party may comment about an absent witness when the evidence shows that the witness had knowledge of material facts, that a relationship exists between the witness and the party that would naturally incline the witness to favor the party and the missing evidence was available to the process of the Court for trial. The burden is on the proponent of the missing witness rule to establish the prerequisites.") (Internal citations omitted.)

Striking hard blows NOT foul ones

Statements of prosecutor during closing argument which are nothing more than a statement to consider evidence in light of human experience and common sense are proper:

State v. Brown, 795 S.W.2d 689, 696 (Tenn. Crim. App. 1990) (Held: Prosecutor's statement in closing argument "If it please the Court, I want you to take two more witnesses back there in that room and they didn't testify here today and nobody subpoenaed them, and those two witnesses are human experience and common sense. And I think you will know what to treat this" was proper. *See also State v. Green*, E1999-02204-CCA-R3-CD, 2000 WL 1839130 *11-12 (Tenn. Crim. App. Dec. 14, 2000) *perm. app. denied* (Tenn. May 21, 2001)

Striking hard blows NOT foul ones

State's rebuttal prompted by defense counsel's argument prompted by defense counsel's argument were proper

State v. Ibrahim, No. M2015-01360-CCA-R3-CD, 2016 WL 4449571 *14-15 (Tenn. Crim. App. Aug. 22, 2016) (Prosecutor's rebuttal prompted by defense counsel's argument that law enforcement personnel should have conducted further examination of evidence).

Striking hard blows *NOT* foul ones

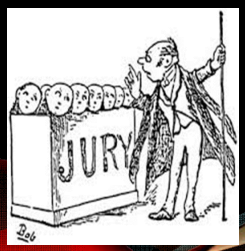
State's rebuttal prompted by defense counsel's argument prompted by defense counsel's argument were proper

State v. Payne, No. 1168, 1988 WL 82958, at *3 (Tenn. Crim. App. Aug. 12, 1988)(Held: Prosecutor's argument that the defendant was entitled to call character witnesses was proper when made in response to defense argument that the State failed to rebut the defendant's testimony.)

Striking hard blows *NOT* foul ones

Rebuttal argument prompted by defense counsel's argument prompted by defense counsel's argument were proper

United States v. Wimbley, 553 F.3d 455, 461-62 (6th Cir. 2009) (Held: Prosecutor's argument that the defense had the opportunity to test for fingerprints or DNA, but did not do so was a proper response to defense counsel's statements that the government had not performed proper testing of the evidence).



THE DON'Ts

BERGER V. UNITED STATES

"It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry as much weight against the accused when they should properly carry none."

Justice Sutherland
United States Supreme Court (1935)

MOST RESTRICTIONS DURING FINAL ARGUMENT ARE PUT ON THE STATE BECAUSE OF OUR ROLE IN THE CRIMINAL JUSTICE SYSTEM.

GUIDELINES: WATCH YOUR "MOJO"

AFFECTS ADMINISTRATION OF JUSTICE

- ABA Criminal Justice Standards for the Prosecution Function 3-6.8 and 3-6.9 (jury argument outside record prohibited)
  - 3-6.8(a) & 3-6.9 — **M**isstatement of evidence/law
  - 3-6.8(b) — **O**pinion of prosecutor
  - 3-6.8(c) — **J**ury inflammation/diversion
  - 3-6.8(d) — **O**ffer new issues in rebuttal

STATE RULES: MANDATORY

- Tenn. R. Prof. Conduct 3.4(e)(1)-(3) similar to **MOJO**
- Tenn. R. Prof. Conduct 8.4(a) and (d) prejudicial to justice
- Tenn. R. Crim. P. 29.1(c)(2) scope of rebuttal

IS THIS SERIOUS?

It is the trial court's duty to restrict improper argument.

Improper argument can result in:

- **Reversal on appeal**
- **Discipline at trial (halt argument/contempt), or**
- **BPR report if the infraction is serious enough or you have a history of making improper comments—even when the improper comments are harmless error on appeal**

United States v. Hasting, 461 U.S. 499 (1983): suggesting disciplinary action against prosecutor for improper argument

United States v. Modica, 663 F.2d 1173 (2nd Cir. 1981): flagrant misconduct may warrant contempt or ethical complaint

"SUFFICE IT TO SAY THAT A LAWYER IS MISTAKEN IF HE OR SHE THINKS THAT IMPROPER ARGUMENT WILL NOT THREATEN THE CONVICTION OR JUDGMENT OR RESULT IN DISCIPLINARY SANCTIONS AGAINST THE OFFENDING LAWYER."

State v. Norris, 874 S.W.2d 590 (Tenn. Crim. App. 1993), *overruled on other grounds*, *State v. Imfeld*, 70 S.W.3d 698 (Tenn. 2002).

adopting *Hastings* and *Modica* position

"M"
THOU SHALT NOT MISSTATE EVIDENCE OR LAW

"IT IS UNPROFESSIONAL CONDUCT FOR THE PROSECUTOR TO INTENTIONALLY MISSTATE THE EVIDENCE OR MISLEAD THE JURY AS TO THE INFERENCES IT MAY DRAW. . . [OR] INTENTIONALLY REFER TO OR ARGUE FACTS OUTSIDE THE RECORD UNLESS THE FACTS ARE MATTERS OF COMMON PUBLIC KNOWLEDGE." (*Goltz*)

ABA Standard 3-6.8(a) & 6.9

The prosecutor should not knowingly misstate the evidence in the record, or argue inferences that the prosecutor knows have no good-faith support in the record. The prosecutor should scrupulously avoid any reference to a defendant's decision not to testify. . .

unless such facts are matters of common public knowledge based on ordinary human experience or are matters of which a court clearly may take judicial notice.

Tenn. R. Prof. Conduct 3.4(e)(1)

"A lawyer shall not in trial . . . allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."

MISSTATEMENT OCCURS WHEN A PROSECUTOR:

- Misstates admitted evidence or creates improper inference
- Refers to inadmissible evidence
- Uses limited-purpose evidence for another purpose
  - 404(b) or 609 evidence
  - Impeachment evidence
- Shifts burden to defendant
- Distorts concept of reasonable doubt

MISSTATES TESTIMONY AND CREATES IMPROPER INFERENCE

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

FOUL BLOW

United States Supreme Court: Prosecutor's jury argument was undignified, intemperate, contained improper insinuations and assertions calculated to mislead the jury; jury invited to conclude prosecutor had personal knowledge that Goldie knew Berger but she pretended otherwise.

CREATES IMPROPER INFERENCE

State v. Dobbins, 754 S.W.2d 637 (Tenn. Crim. App. 1988), *perm. app. denied* (Tenn. July 5, 1988).

COMMENTS ON INADMISSIBLE EVIDENCE

State v. Hodge, 989 S.W.2d 717 (Tenn. Crim. App. 1998) (no perm. app. filed).

State v. Jordan, 116 S.W.3d 8 (Tenn. Crim. App. 2003) (no perm. app. filed).

USES LIMITED-PURPOSE EVIDENCE FOR ANOTHER PURPOSE

State v. Ward, 138 S.W.3d 245 (Tenn. Crim. App. 2003), *perm. app. denied* (Tenn. June 1, 2004).

"O"

THOU SHALT NOT GIVE PERSONAL OPINIONS

improperly uses the power of our office

"IT IS UNPROFESSIONAL FOR THE PROSECUTOR TO EXPRESS HIS PERSONAL BELIEF OR OPINION AS THE TRUTH OR FALSITY OF ANY TESTIMONY OR EVIDENCE OR THE GUILT OF THE DEFENDANT."
(Goltz)

ABA Standard 3-6.8(b)

"The prosecutor should not argue in terms of counsel's personal opinion, and should not imply special or secret knowledge of the truth or of witness credibility."

Tenn. R. Prof. Conduct 3.4(e)(2), (3)

"A lawyer shall not in trial . . . assert personal knowledge of facts in issue except when testifying as a witness; or

state a personal opinion as to the justness of a cause, the credibility of a witness, . . . or the guilt or innocence of an accused."

VOUCHES FOR WITNESSES/EVIDENCE

State v. Thornton, 10 S.W.3d 229 (Tenn. Crim. App. 1999) (no perm. app. filed).

Judge v. State, 539 S.W.2d 340 (Tenn. Crim. App. 1976) (no perm. app. filed).

State v. Goltz, 111 S.W.3d 1 (Tenn. Crim. App. 2003), *perm. app. denied* (Tenn. May 27, 2003).

State v. Robinson, No. M2013-02703-CCA-R3-CD, 2015 WL 3877705 (Tenn. Crim. App. June 23, 2015) (no perm. app. filed).

"J"

THOU SHALT NOT INFLAME OR DIVERT JURORS

"THE PROSECUTOR SHOULD NOT USE ARGUMENTS CALCULATED TO INFLAME THE PASSIONS OR PREJUDICES OF THE JURY. . . [OR] WHICH WOULD DIVERT THE JURY FROM ITS DUTY TO DECIDE THE CASE ON THE EVIDENCE, BY INJECTING ISSUES BROADER THAN THE GUILT OR INNOCENCE OF THE ACCUSED UNDER THE CONTROLLING LAW, OR BY MAKING PREDICTIONS OF THE CONSEQUENCES OF THE JURY'S VERDICT." (*Goltz*)

ABA Standard 3-6.8(c)

"The prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact. The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty."

Tenn. R. Prof. Conduct 8.4(d)

"It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."

IMPLICATES DUE PROCESS

Directly
- Gory photos

Indirectly
- General deterrence/war on crime
- Threats that jury will condone crime if acquit
- Golden Rule (puts jurors in place of victim)
- Guilt by association
- Commenting on defendant's failure to testify (5th Amendment)
- Name-calling/racial, religious, ethnic bias
- Striking over the shoulder of defendant to counsel
- Biblical references
- Commenting on defendant's wealth or status
- Addressing jurors by name

NAME-CALLING

State v. Talley, No. W2003-02237-CCA-R3-CD, 2006 WL 2947435 (Tenn. Crim. App. Oct. 16, 2006), *perm. appeal denied* (Tenn. Mar. 19, 2007)—"hatred, vengeance, and evil"

State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998)—"the evil one"

State v. Thomas, 158 S.W.3d 361 (Tenn. 2005)—"greed and evil"

State v. Bates, 804 S.W.2d 868 (Tenn. 1991)—"rabid dog"

NAME-CALLING

State v. Gann, 251 S.W.3d 446 (Tenn. Crim. App. 2007), *perm. appeal denied* (Tenn. Apr. 7, 2008)—"homicidal maniac"

NAME-CALLING, BIBLICAL REFERENCES, DIVERTING

State v. Middlebrooks, 995 S.W.2d 550 (Tenn. 1999).

State v. McCary, 119 S.W.3d 226 (Tenn. Crim. App. 2003), *perm. app. denied* (Tenn. July 7, 2003).

DENIGRATES DEFENDANT'S TESTIMONY, ATTORNEY, WEALTH OR STATUS

State v. Gann, 251 S.W.3d 446 (Tenn. Crim. App. 2007), *perm. appeal denied* (Tenn. Apr. 7, 2008).

State v. West, 767 S.W. 2d 387 (Tenn. 1989).

State v. Bates, 804 S.W.2d 868 (Tenn. 1991).

State v. Thornton, 10 S.W.3d 229 (Tenn. Crim. App. 1999) (no perm. app. filed).

INVOKES DUTY TO VICTIM OR COMMUNITY /CONSEQUENCES IF ACQUIT

State v. Talley, No. W2003-02237-CCA-R3-CD, 2006 WL 2947435 (Tenn. Crim. App. Oct. 16, 2006), *perm. appeal denied* (Tenn. Mar. 19, 2007).

State v. Goltz, 111 S.W.3d 1 (Tenn. Crim. App. 2003), *perm. appeal denied* (Tenn. May 27, 2003).

State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998).

State v. Pulliam, 950 S.W.2d 360 (Tenn. Crim. App. 1996), *perm. appeal denied* (Tenn. May 12, 1997).

SPECIAL WARNING

COMMENTS ON STATE'S UNREFUTED EVIDENCE

Prosecutors are allowed to comment on any proof the defendant presents and point out that the State's evidence is unrefuted by any witnesses in certain circumstances,

BUT

when defendant is the *only* person who could offer contradictory evidence, the Tennessee Sup. Ct. and CCA have construed this to be a violation of defendant's constitutional right to remain silent.

=CONSTITUTIONAL ERROR

COURTS HAVE REVERSED CONVICTIONS

COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY *OFF LIMITS*

State v. Jackson, 444 S.W.3d 554 (Tenn. 2014):

2-part test for whether comment violates 5th Amendment right:

- Whether prosecutor's intent was to comment on right not to testify
- Whether remark would be taken by jury as such

Covers direct and indirect references

"Just tell us where you were! That's all we are asking, Noura!"

REVERSED: message was that it was reasonable and the least defendant could do if she expected to be acquitted and her silence was a tacit admission of guilt

COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY
OFF LIMITS

State v. Robinson, No. M2013-02703-CCA-R3-CD, 2015 WL 3877705 (Tenn. Crim. App. June 23, 2015) (no perm. app. filed):

prosecutor made numerous improper statements—unconstitutional comment on defendant's failure to testify was reversible error plus cumulative effect of non-constitutional errors: derogatory remarks about defense counsel, bolstered and vouched for witnesses, inserted matters outside the record to appeal to jury's duty to community, appealed to prejudices and disdain for child sexual crimes, repeated calls to "send a message"

applied *Jackson* test and REVERSED

"O"
THOU SHALT NOT OFFER NEW EVIDENCE IN REBUTTAL

ABA Standard 3-6.8(d)

"If the prosecutor presents rebuttal argument, the prosecutor may respond fairly to arguments made in the defense closing argument, but should not present or raise new issues. If the prosecutor believes the defense closing argument is or was improper, the prosecutor should timely object and request relief from the court, rather than respond with arguments that the prosecutor knows are improper."

Tenn. R. Crim. P. 29.1(c)(2)

"The state's final closing argument is limited to the subject matter covered in the state's first closing argument and the defendant's intervening argument."

Tenn. R. Prof. Conduct 3.4(c)

"A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists."

OFFERS NEW EVIDENCE IN REBUTTAL

State v. Pappas, 754 S.W.2d 620 (Tenn. Crim. App. 1987), *perm. app. denied* (Tenn. Aug. 3, 1987).

Prosecutor improperly referred to missing police reports as "all right there in that pile," implying that defense had access to entire report which prosecutor had not provided to defense. CCA said not warranted by facts nor invited by defense closing.

NON-CONSTITUTIONAL ERRORS SUBJECT TO HARMLESS ERROR TENN. R. APP. P. 36(b)

defendant's burden to show improper argument probably affected outcome of trial (must object at trial)

unless

plain error

flagrant error that affects a substantial right of the accused and strikes at the fundamental fairness, honesty, or public reputation of the trial

PLAIN ERROR WHEN NO OBJECTION

State v. Adkisson, 899 S.W.2d 626 (Tenn. Crim. App. 1994), factors:

- The record must clearly establish what occurred at trial;
- A clear and unequivocal rule of law must have been breached;
- A substantial right of the accused must have been adversely affected;
- The accused did not waive the issue for tactical reasons; and
- Consideration of the error is "necessary to do substantial justice."

Due process implicated

CLEAR AND UNEQUIVOCAL BREACH OF LAW FOR PLAIN ERROR

State v. Goltz, 111 S.W.3d 1 (Tenn. Crim. App. 2003):

Misstating evidence
Opinion of prosecutor
Jury Inflammation
Injecting broader issues than guilt or innocence
Referring to facts outside the record that are not matters of common public knowledge

Defendant does not have to object for the court to look at these.

TO DETERMINE WHETHER HARMLESS

Factors:

- Prosecutor's conduct in light of facts and circumstances
- Curative measures taken by the trial court
- Prosecutor's intent in making improper remarks
- Cumulative effect of improper remarks and other errors
- Strength and weakness of the case

Judge v. State, 539 S.W.2d 340 (Tenn. Crim. App. 1976).

NON-STRUCTURAL CONSTITUTIONAL ERRORS

State's burden to show harmless beyond a reasonable doubt

Example: direct or indirect comment on defendant's failure to testify

Off limits!

TO DETERMINE WHETHER HARMLESS BRD

CCA looks at:

- Nature and extensiveness of the prosecutor's argument
- Curative instructions given
- Strength of the evidence of guilt

THANKS FOR YOUR ATTENTION