

CROSSING THE LINE IN CLOSING ARGUMENT

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In the context of a trial, closing arguments afford both prosecutors and defense attorneys the best and most dramatic opportunity to persuade juries, based on the evidence, either that the defendant is guilty of the crime(s) charged or that the presumption of innocence has not been overcome by proof beyond a reasonable doubt.

Most prosecutors embrace their obligation to seek justice over convictions in every case, but trials are adversarial by definition and lawyers are competitive by nature. Consequently, the desire to win can sometimes cloud judgment and overcome restraint such that the line between zealous advocacy and unfair argument is crossed. And, occasionally, prosecutors who deem themselves unencumbered by the rules of decorum and fair comment, may misrepresent the evidence, argue unreasonable inferences or invite the jury to return a guilty verdict based on sympathy for the victim, enmity for the accused or fear for the safety and well-being of the community.

It is incumbent upon defense counsel, therefore, to be on the alert for improper arguments of the prosecutor and not be the least bit bashful about objecting, moving to strike and asking the court to instruct the jury to disregard the offending argument and, where appropriate, moving for a mistrial. And, when prosecutors cross the line of fair comment with improper, unfounded or inflammatory arguments, counsel cannot sit idly by if for no other reason than to avoid a viable claim of ineffective assistance of counsel. (See, for example, *People v Wright* 2015 NY Slip Op. 05621 [7/1/15]): Counsel's failure to object to prosecutor's multiple misrepresentations of the meaning of DNA test results in circumstantial murder case was ineffective assistance).

Attorneys generally have a lot of leeway in making arguments in summation, but it is not without limits. In *People v Ashwal* 39 NY2d 105 (1976), the Court of Appeals held that while counsel is free to comment on every pertinent matter of fact bearing on material issues in the case, "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/her command."

The Court advised that counsel may not, for example: refer to matters not in evidence (*People v Fielding* 158 NY 542 [1899]); ask the jury to draw conclusions that are not fairly inferable from the evidence or which "awaken resentment and prejudice" (*People v Van Aken* 217 NY 532 [1916]); lead the jury astray from the issues by drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant (*People v Posner* 273 NY 184 [1937]); or insinuate, suggest or convey the impression that the defendant is guilty of other crimes not charged in the case. (*People v Doody* 172 NY 165).

In *Ashwal*, a drug sale case, the prosecutor commented on the absence of a particular witness (a confidential informant who, according to the undercover detective, had been killed), by saying “maybe his death was the price he paid” (for being an informant), thereby implying without any basis in the record, that the defendant or other dealers had him silenced permanently. When defense counsel objected, the court “gave standing” to the argument by overruling the objection. Since the prosecutor went well beyond the four corners of the evidence and the court compounded the error with its ruling, the conviction was overturned.

A defendant can also be substantially prejudiced and deprived of a fair trial by the introduction and comment upon photographic evidence that advances no purpose other than to incite the passions of the jury (*People v Poblner* 32 NY2d 356). In *People v Lewis* 2019 NY Slip Op. 09023 (12/18/19), a child sex abuse case, the Court of Appeals held (upon interest of justice review), that it was error to admit photographs of the victims private parts after her pediatrician testified that she did not observe (nor did she expect to find under the circumstances of the case) any physical evidence of sexual abuse.

The prosecutor only made matters worse in summation by saying, “the victim had to get on a table, open up her legs and have her genitals photographed to be shown to 15 strangers, and what did she gain from this?... nothing.” Consequently, the error in admitting the photographs was not harmless.

In *People v Case* 150 AD3d 1634 (4th dep’t 2017), the Fourth Department held in this rape/assault/strangulation case that the prosecutor went overboard in summation when she derided the the defendant’s claim that he gave a false confession (so that he would be allowed to go to the bathroom) by saying, “I would sooner sit in my own urine than falsely admit to commit a crime.” The court found that this injection of personal opinion combined with repeated appeals to sympathy and the need to protect the victim by returning a guilty verdict had a decided tendency to prejudice the jury against the defendant (citing, inter alia, *People v Ballerstein* 52 AD3d 1192 [4th dep’t 2008]): improper appeal to sympathy in opening, vouching for victim’s credibility, commenting on credibility of an un-called witness, making irrelevant comments in summation, exhorting jury to protect the victim). In *Case*, the Court also found ineffective assistance in counsel’s failure to object to the prosecutor’s misconduct in summation.

It is worth noting that a lawyer can commit PROFESSIONAL MISCONDUCT in violation of the Rules of Professional Responsibility by: stating or alluding to any matter that he/she does not reasonably believe is relevant or is not supported by admissible evidence (Rule 3.4[D][1]); or to assert a PERSONAL OPINION as to the justness of a cause, the credibility of a witness, the guilt or innocence of the accused; or ask any question for which there is no reasonable basis to believe is relevant to the case or which is intended to degrade a witness or any other person (Rule 3.4 [D] [3] and [4]).

The rules that define the boundaries of permissible oral argument also apply to the use of visual aids such as Power Points (with or without annotations) used to illustrate or amplify the argument. In *People v Williams* 2017 NY Slip Op. 02588 (4/4/17), the Court of Appeals in this home invasion/assault case held that the prosecutor misrepresented the testimony of a witness with annotations superimposed upon still photos from a surveillance video which said, “Victim’s brother’s truck,” (the brother actually said, “it looks like my truck,”) and “V’s brother sees Defendant,” (he actually said, “ I think it’s him”).

The conviction was saved, however, in the Court's view, by the trial court's sustaining of defense counsel's objections and instructing the jury to disregard the misleading annotations coupled with the court's repeated instructions that summations are only argument and not evidence in the case.

The court also noted that there is no inherent problem with the use of Power Points but the longstanding rules governing proper conduct in summation apply equally to the use of visual aids so that if you can't say it, you can't show it. (See also *People v Anderson* 29 NY3d 69 [2017]: Power Points may be used in summation where any added captions or markings are consistent with the evidence and fair inferences, and there is no risk of confusing evidence with argument).

Prosecutorial overstepping can also occur in arguments about the meaning and significance of scientific evidence in the case. In *People v Wright* supra, the Court of Appeals, in this circumstantial rape/murder case, found the prosecutor's misrepresentation that DNA found on the victim (in her vagina and on a hand ligature wound) matched the defendant's DNA (when, in fact, he only could not be excluded as a possible source), combined with defense counsel's unjustifiable failure to object, deprived the defendant of a fair trial. The Court stated that "in light of the powerful influence of DNA evidence on juries, the opportunity for juror confusion regarding the limited probative value of the DNA methodology employed in this case, and the qualified nature of the test results, counsel's failure to object rendered him ineffective". (2015 NY Slip Op 05621).

References to prior bad acts and uncharged crimes (offered to suggest propensity), can also create an "atmosphere of prejudice" around the accused. In *People v Gorghan* 13 AD3d 908 (3d dep't 2004), (sex abuse case), for example, the prosecutor went too far from opening statement to closing argument by referencing the defendant's alleged possession of a .357 handgun which had no connection the People's theory of forcible compulsion, and improperly bolstered the victim's testimony thereby creating prejudice that could not be undone by the court's curative instructions.

Defense attorneys are also bound by the rules of fair and reasonable comment on the evidence presented. In *People v Smith* 16 NY3d 786 (2011), (an assault case involving a fight over a gun) for example, the Court of Appeals held that it was not error to deny defense counsel the opportunity to argue that the victim was the first person to produce the gun where there was no evidence in the record to support that contention. Similarly, in *People v Singh* 138 AD3d 767 (2d dep't 2016), it was not error to preclude counsel from arguing that the defendant did not understand the meaning of the order of protection for lack of an interpreter when there was no evidence adduced that he didn't understand English.

Counsel should also be aware that if he/she makes outlandish, over-the-top or inflammatory arguments in summation, the DA will have at least some latitude to respond in kind in order to set the record straight, (*People v Hines* 18 AD3d 908 [2d dep't 2005]), but while prosecutors can strike back with hard blows, as in boxing, they cannot hit below the belt.

If there is reasonable doubt to be found in the evidence, or more likely, from the lack of convincing evidence, counsel is better served by pointing it out with effective advocacy rather than by playing into prosecutors' hands with arguments that sound more like distraction than reasoned argument. For their part, prosecutors typically go off the rails when their case is weak or their zeal for a conviction eclipses

their obligation to confine their arguments to the evidence in the case. When that happens, counsel must do their part to stand up and strike back with prompt and persuasive objections that put them in their place, preserve the record for appeal and protect the rights of the client.