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CRIMINAL TRIAL TECHNIQUES & OVI DEFENSE

**Objecting to Closing: Should You?
It's Legal, It's Courteous, Is it
Mandatory?**

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Why would an appellate lawyer care whether you've objected at trial?

I. Objections Preserve the Record For Your Client's Appeal

You're fighting hard for your client at trial, and you're fighting to *win*. You know that the closing argument isn't evidence, and you've got a good set of instructions that will guide the jury to a verdict in your client's favor. So why should you care about objecting during closing argument?

It's the same reason you should make appropriate objections during the trial: To make and preserve a good record for your client, which will also do yourself or your client's next lawyer a huge favor, if your client needs an appeal.

A. Why care about the appellate lawyer's job?

To understand why preserving the record *now*, in trial, is important, understand the limitations that the law places on the Court of Appeals (and, in turn, your client's appellate counsel).

1. The "Record on Appeal" - Courts of Appeal may consider *only* the things that have been made part of the record on appeal.
 - a. Courts cannot add material to the record. See *State v. Ishmail*, 54 Ohio St.2d 402, 405-406, 377 N.E.2d 500 (1978).
 - b. App.R. 9(A)(1): the "record on appeal" consists of "The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases."
2. When you don't object, you waive review for everything but "plain error."
 - a. Crim. R. 52(B): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

B. Why does "plain error" review make it harder for your client to win on appeal?

1. Ordinary error: two steps
 - a. Show there's an error, and
 - b. Unless it's "structural," be able to defend against the notion that it's harmless
2. Plain error
 1. Federal standard – Four-prong test from *Puckett v. United States*, 556 U.S. 129, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) – Appellant must show:
 - a. There must be an error the defendant has not affirmatively waived
 - b. Error must be clear or obvious
 - c. Error must have affected the defendant's substantial rights, and
 - d. Appellate court has discretion to reverse if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings
 2. Ohio standard – *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶45 – Appellant must show:
 - a. An error (namely, a deviation from a legal rule)
 - b. The error is an obvious defect in the trial proceedings, *and*
 - c. The error must have affected the defendant's substantial rights, meaning that the trial court's error must have affected the outcome.

II. One Error You Want to Preserve: Prosecutorial Misconduct

A. Standard - see *State v. Raider*, 9th Dist. Lorain No. 13CR088148, 2017-Ohio-7788, ¶42-43

1. Two-part test - see *State v. Smith*, 14 Ohio St.3d 13, 14 (1984).
 - a. Are the prosecutor's actions improper? If so,
 - b. Were the defendant's substantial rights actually prejudiced?
 - i. But for the prosecutor's actions, the defendant would not have been convicted. - *State v. Brooks*, 9th Dist. Lorain No. 16CA010958, 2017-Ohio-5620, ¶13.
 - ii. Factors from *State v. Grady*, 11th Dist. Portage No. 2007-P-0010, 2007-Ohio-6411, ¶38:
 - i. Nature of the remarks;
 - ii. Whether an objection was made by counsel;
 - iii. Whether corrective instructions were given by the court; and
 - iv. The strength of the evidence against the defendant.
2. Touchstone: Fairness of the trial, not the culpability of the prosecutor. See *State v. Miller*, 9th Dist. Summit No. 27048, 2015-Ohio-279, ¶22; *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶140.
3. Totality of the Circumstances - in light of the whole trial *and* in light of the entire closing argument - *State v. Pleban*, 9th Dist. Lorain No. 10CA009789, 2011-Ohio-3254, ¶39.
 1. Isolated remarks won't justify reversal; "[A] reversal premised upon a prosecutor's statements is justified only where it 'permeates the entire atmosphere of the trial.'" *State v. Grady*, 11th Dist. Portage No. 2007-P-0010, 2007-Ohio-6411, ¶16.

B. Examples of types of improper comments (not an exhaustive list!)

1. Commenting on the defendant's education or special knowledge/training for the purposes of impeaching the defendant's credibility
 - a. *State v. Grady*, 11th Dist. Portage No. 2007-P-0010, 2007-Ohio-6411 - In a DUI trial, defendant said he was not drunk, but told police he did not understand the BMV 2255 Form. On cross, the prosecutor elicited testimony that defendant had a college degree and was the son of a lawyer. The prosecutor then said during closing that defendant surely understood the 2255 Form due to his education and his connection to his lawyer parent. The Court of Appeals found that the comment and question were improper, but noted counsel's failure to object to the questioning weighed in favor of affirming the defendant's conviction.
2. Commenting on the defendant's failure to testify at trial / post-Miranda silence
 - a. Failure to testify: *State v. Webb*, 70 Ohio St.3d 325, 328
 - b. Post-Miranda silence: *United States v. Hale*, 442 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975); *State v. Collins*, 89 Ohio St.3d 524, 733 N.E.2d 1118 (2000).

- c. BUT NOTE: A prosecutor *can* validly comment on a defendant's failure to provide evidence to support his theory of the case. See *State v. Brown*, 10th Dist. Franklin No. 12CR-986, 2013-Ohio-5391, ¶23.
- 3. Making remarks that are likely to inflame the passions of the factfinder and lead the factfinder to convict for improper reasons
 - a. *Brown*, supra
 - b. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) (“But while [a prosecutor] 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.”)
- 4. Vouching for the credibility of a witness – *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶117.
- 5. Insisting that the the defendant lied – *State v. Labriola*, 9th Dist. Medina No. 12CA0030-M, 2013-Ohio-2604, 993 N.E.2d 829 (2013), ¶280-29:

“During closing argument, the State repeatedly commented on Labriola's testimony as untruthful, implausible, and full of lies. For example, in comparing Labriola's testimony to that of other witnesses, the assistant prosecutor asserted: ‘You only heard that from Mr. Labriola who, by the way, his testimony is untruthful and I’ll point out a lot of ways why it's untruthful.’ Labriola objected to this statement, arguing that the prosecutor ‘has no idea whether it's truthful or not. That's misleading.’ When directed by the trial court to rephrase, the State continued by asserting that ‘this man right here, Vincent Labriola, his testimony is full of mistruths and lies. It's clear as it can be and that's my argument to you.’ Later, the State informed the jury: ‘You heard what I call and what I submit to you is false testimony of the Defendant * * *.’ The assistant prosecutor asserted that Labriola's ‘excuses’ were ‘implausible’ and that he ‘in fact, lied.’ The State argued that if * * * you're Vincent Labriola, and I submit to you a liar as he has been throughout this case when he testified, you think up another lie for that * * *.”

The 9th District reversed Labriola's conviction for complicity to commit arson and remanded the case.
- 6. Shifting the burden of proof to the defendant – *State v. Thompson*, 33 Ohio St.3d 1, 514 N.E.2d 407 (1987).

III. Are You Ineffective If You Don't Object?

- A. **Standard for Ineffective Assistance of Counsel** - Objective reasonableness
 - 1. Defendant bears burden of persuasion
 - 2. Two-part test from *Strickland v. Washington*, 466 U.S. 668, 688 (1984) - see *State v. Warrington*, 9th Dist. Medina No. 14CA0080-M, 2016-Ohio-244, ¶14
 - a. Deficiency in performance of counsel so serious that counsel “was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment” (*Strickland* at 687), and
 - b. Counsel's errors were so serious that they deprived the defendant of a fair trial – a demonstration of prejudice. (*Strickland* at 689).

- i. Reasonable probability that, but for counsel's errors, the outcome of the trial would have been different.
- ii. Strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance.

B. In most cases, you're not ineffective.

1. If the Court finds there's been no error, then there's no ineffective assistance for not objecting. See, e.g., *Brown*, 2013-Ohio-5391, at ¶38.
2. *State v. Raider*, 2017-Ohio-7788, ¶38: "The Supreme Court of Ohio has held that 'the failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel.' *** In light of Raider's blanket assertion that '[i]t is not within the professional norm to fail to object to such unfairly prejudicial testimony[,] without a discussion of prejudice, we conclude he has not demonstrated ineffective assistance of counsel.'" (Citations omitted)

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**OBJECTING TO PROSECUTORIAL
MISCONDUCT IN SUMMATION**

Eddie Sipplen Attorney At Law, LLC

DEFENSE COUNSEL POINT OF VIEW

**Criminal Trial Techniques and OVI Defense
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OBJECTING TO PROSECUTORIAL MISCONDUCT IN SUMMATION

Eddie Sipplen Attorney At Law, LLC

In general, it is not impolite to interrupt opposing counsel's summation -- it is mandatory to preserve error and stop the prejudice.

Be sure to ask for some remedy any time an objection is sustained to remarks in a prosecutor's closing argument.

1. Admonish the jury to ignore the statements.
2. Admonish the prosecutor not to do it again.
3. Mistrial.

TYPES OF MISCONDUCT IN SUMMATION

I. EVIDENTIARY ERRORS

The prosecutor's argument must stay within "the four corners of the evidence" presented at trial. Therefore, the prosecutor commits error when she makes improper use of the evidence presented at trial, facts not presented at trial, or inferences not supported by the evidence.

- Referring to matters not in evidence
- Misstating/misrepresenting the facts
- Drawing unwarranted inferences from the evidence
- Arguing a possibility known to be false
- Suggesting there is more evidence

II. DENIGRATION

The prosecutor may not resort to name-calling or impugning the defendant, defense counsel, or the defense theory. Such attacks lead the jury away from the issues before it and exceed the bounds of legitimate advocacy.

- Calling the defendant a liar
- Impugning the defendant
- Impugning defense theory of the case/defense counsel
- Denigrating defense witnesses

III. BURDENING RIGHTS

A defendant's constitutional rights are infringed upon if the prosecutor is permitted to attach the cost of impeachment to the exercise of these rights. A defendant's exercise of a constitutional right generally has little probative value as to the question of guilt or innocence. Therefore, it is improper for a prosecutor to argue that the jury should infer guilt based on a defendant's assertion of a constitutional right.

- Right to remain silent or testify at trial
- Right to remain silent pretrial
- Right to be present at trial/confront accusers
- Right to public trial

IV. VOUCHING

The jury alone is responsible for determining the credibility of witnesses at trial based on the evidence presented. Although the prosecutor may argue that the evidence presented at trial supports certain inferences with respect to a witness's credibility, it is improper for the prosecutor to express a personal belief as to the credibility of witnesses or urge the jury to give weight to the prosecution's case based on the prosecutor's own credibility or the prestige of the district attorney's office. In doing so, the prosecutor acts as an unsworn witness and thus supports her case by her own veracity, a plainly improper basis for the jury's decision.

- Expression of personal belief
- Putting prestige of office in issue
- Arguing the prestige/credibility of police officers
- Vouching based on race

V. IMPROPER APPEALS

The prosecutor may not make appeals to the jury based on sympathy or prejudice or otherwise attempt to inflame the emotions or passions of the jury. Likewise, the prosecutor may not ask the jury to use its verdict to send a message or achieve vengeance and protection for the community. Such appeals improperly deflect the jurors' attention away from the issues of fact on the question of guilt or innocence.

- Appeals to Emotion or Sympathy
- Appeals to race
- Arguing stereotypes
- Race-based credibility arguments
- Asking Propensity arguments
- asking the jury to send a message/ "safe streets" argument

VI. Misinstructing the jury

Improperly reducing jury's task to a credibility assessment
Arguing the significance of the indictment

VII. MISSTATING THE LAW

The prosecutor may not instruct the jury on the law. Likewise, the prosecutor may not urge the jury to convict the defendant upon a legally improper basis, misstate or misrepresent the law to the jury, or otherwise undermine the defendant's legal rights during summation.

Shifting the burden of proof

Ohio Rules of Professional Conduct

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not do any of the following: ...

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence or by a good-faith belief that such evidence may exist, 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, the culpability of a civil litigant, or the guilt or innocence of an accused;

RULE 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case;
- (3) the disqualification of the lawyer would work substantial hardship on the client.

(c) A government lawyer participating in a case shall not testify or offer the testimony of another lawyer in the same government agency, except where division (a) applies or where permitted by law.

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR,

Comment:

[1] A prosecutor has the responsibility of administer of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded justice and that guilt is decided upon the basis of sufficient evidence. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4. A prosecutor also is subject to other applicable rules such as Rules 3.6, 4.2, 4.3, 5.1, and 5.3.

American Bar Association Criminal Justice Section Standards Prosecution Function

PART 1. GENERAL STANDARDS

Standard 3-1.1 The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Standard 3-1.2 The Function of the Prosecutor

(a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

(d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.

(e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.

Standard 3-5.8 Argument to the Jury

(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

(b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

Standard 3-5.9 Facts Outside the Record

The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

Standard 3-5.10 Comments by Prosecutor After Verdict

The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.

Constitutional Provisions

U.S. Const. Amends. V, VI, XIV; Ohio Const. Art. 1 1, 5, 10 (due process, prosecution burden of proof, right to silence, effective assistance of counsel, right to present a defense, fair trial)

Caselaw

Doyle v. Ohio (1976), 426 U.S. 610 (prosecutor may not use defendant's exercise of right to silence to impeach defendant's testimony);

State v. Leach (2004), 102 Ohio St. 3d 135 (prosecutor may not use defendant's pre-arrest or post-arrest, post-Miranda silence or invocation of right to counsel as evidence of guilt)

Berger v. United States, 295 U.S. 78 (1935) and *State v. Keenan (1993)*, 66 Ohio St. 3d 402 on prosecutor's unique role and influence, and his/her Due Process duty to do justice:

'The prosecutor carries into court the prestige of 'the representative *** of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest *** is not that it shall win a case, but that justice shall be done. * Consequently, improper suggestions,

insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none...

Categories of improper argument (Keenan, supra):

- Imputing insincerity to defense counsel, insinuating that defense counsel believes client is guilty ("They are paid to get him off the hook . . . hired guns . . . not once did they tell you their client was innocent. Not once did they tell you to find him not guilty")
- Disparaging defense counsel (e.g., "he's out of his mind", "yes, let's object to that, we don't want the jury to hear that")
- Appealing to emotion, passion, prejudice ("If it bothers you, then you are a moral, decent person. . . . When you recount the facts of this case you will be shocked.")
- Disparage defendant (calling defendant an "animal" not unfair per se but "added to the emotional smoke screen surrounding the prosecutor's entire argument")
- Injecting prosecutor's own personal opinion ("When you see what has been done to him, then you will know the outrage that we feel over it, that it is justifiable. .. You will be upset, at least as upset as I am")
- Arguing guilt by association
- Speculation or arguments not based on the evidence (State v. Stephens (1970), 24 Ohio St.2d 76, 82)
- Urging jurors to "send a message" or respond to public opinion through verdict (State v. Bryan (2004), 101 Ohio St. 3d 272, 299)

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