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Prosecutorial Misconduct During Closing Argument: Florida Case Law

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TABLE OF CONTENTS

I. INTRODUCTION	486
II. CLOSING ARGUMENT	488
III. THE PROSECUTOR'S DUTY	488
IV. FOUL BLOWS	490
A. <i>Commenting on Defendant's Right to Remain Silent</i>	491
B. <i>Exhorting the Jury to "Do Its Job" and Convict</i>	493
C. <i>Personal Attacks on Defense Counsel</i>	494
D. <i>Calling the Defendant a Liar</i>	496
E. <i>Commenting on Defendant's Demeanor</i>	497
F. <i>Bolstering the Credibility of Police Officers</i>	498
G. <i>Sending a Message to the Community</i>	500
H. <i>Appeals to Sympathy, Bias, Passion or Prejudice</i>	501
I. <i>Miscellaneous Comments</i>	502
1. Referring to the Defendant as a Criminal	502
2. Commenting About When a Defense Witness Was Listed	502
3. Commenting on the Role of the Jury	503
4. Currying Favor with the Jury	503
5. Personal Belief of the Prosecutor	503
6. Asking the Jury to Determine Who Is Lying	504
7. References to Witnesses Not Called	504
8. Racial Comments	505
9. Commenting on Defendant's Failure to Produce a Witness	505
V. INVITED RESPONSE DOCTRINE	506
VI. HARMLESS ERROR RULE	507
VII. PRESERVING THE ISSUE FOR APPEAL	508
VIII. DISCIPLINARY ACTION	510
IX. CONCLUSION	510

I. INTRODUCTION

All too often, a criminal defendant is faced with an overzealous prosecutor devoted to winning at all costs. This “win at all costs” mind-set can lead to prosecutorial misconduct during closing argument, and continues to be a basis for reversing numerous convictions in Florida.¹

1. See *Smith v. State*, 699 So. 2d 629, 643–46 (Fla. 1997)(reversing death sentence and remanding for resentencing based on that prosecutor’s continued use of redacted statements of the co-defendant against Smith); *DeFreitas v. State*, 22 Fla. L. Weekly D2462, D2465-66 (4th Dist. Ct. App. Oct. 22, 1997)(reversing because that prosecutor impermissibly asked the jurors to place themselves in the position of the victims and asked them to think how they would feel if the crime happened to them, and because the prosecutor impermissibly compared the defendant’s case and the O.J. Simpson case); *McLellan v. State*, 696 So. 2d 928, 930 (Fla. 2d Dist. Ct. App. 1997)(reversing because the prosecutor bolstered witness’ testimony by saying patients give honest histories to their doctor, and thus, commented on facts outside the evidence, because the doctor in question did not testify); *Walker v. State*, 22 Fla. L. Weekly D1543, D1543 (5th Dist. Ct. App. June 27, 1997)(reversing because the prosecutor’s comment: “The defendant in order to claim entrapment had to say ‘if it wasn’t for the action of the government, I would not have even thought or tried to do what I did,’” was fairly susceptible to being interpreted as a comment on the defendant’s right to remain silent); *Fryer v. State*, 693 So. 2d 1046, 1048 (Fla. 3d Dist. Ct. App. 1997)(reversing because the prosecutor repeatedly expressed his personal opinion of the veracity of a police officer, and stated that defense counsel ‘knew’ his client was guilty); *Jackson v. State*, 690 So. 2d 714, 718 (Fla. 4th Dist. Ct. App. 1997)(reversing because the prosecutor argued that the defendant was guilty of a crime greater than the one for which he was tried); *Perez v. State*, 689 So. 2d 306, 307 (Fla. 3d Dist. Ct. App. 1997) (reversing for interjecting accusations of racism which were not justified by the evidence or relevant to the issues); *D’Annunzio v. State*, 683 So. 2d 151, 153 (Fla. 5th Dist. Ct. App. 1996)(reversing because the prosecutor argued the defendant failed to produce alibi witness although there was no evidence of the identity of the witness or whether the witness knew material facts); *Baldez v. State*, 679 So. 2d 825, 826 (Fla. 4th Dist. Ct. App. 1996)(holding “it is improper for a prosecutor to comment on the defendant’s demeanor when the defendant is not on the witness stand”); *Raupp v. State*, 678 So. 2d 1358, 1361 (Fla. 5th Dist. Ct. App. 1996)(reversing because the prosecutor insinuated that there were missing witnesses who had information, and the defendant had secreted those witnesses); *Cisneros v. State*, 678 So. 2d 888, 890 (Fla. 4th Dist. Ct. App. 1996)(reversing because the prosecutor argued that the police officer was “not the type of man that would come in here and violate that sacred oath.”)(emphasis omitted); *Northard v. State*, 675 So. 2d 652, 653 (Fla. 4th Dist. Ct. App. 1996)(finding the prosecutor’s argument improper because it asked the jury to determine who was lying as the test for deciding guilt); *Williams v. State*, 673 So. 2d 974, 975 (Fla. 1st Dist. Ct. App. 1996)(reversing for the prosecutor’s attempt to bolster the credibility of police officers); *Knight v. State*, 672 So. 2d 590, 591 (Fla. 4th Dist. Ct. App. 1996)(reversing because the prosecutor attacked the credibility of defense counsel, resorted to personal attacks on defense counsel, argued facts not in evidence, and commented on the defendant’s right to remain silent); *Willis v. State*, 669 So. 2d 1090, 1094 (Fla. 3d Dist. Ct. App. 1996)(finding that the prosecutor’s attack on the credibility of an alibi witness on the

Although prosecutorial misconduct may occur prior to or during the trial of a criminal case, such as during the discovery period,² during examination of witnesses,³ or during opening statement,⁴ this note will be strictly limited to a discussion of prosecutorial misconduct which occurs during closing argument, and will focus on Florida case law.

This note is divided into nine parts. Following the Introduction, Part II will briefly define the purpose of closing argument, and Part III will examine the prosecutor's duty. Part IV will address a variety of improper comments made during closing argument. Part V will review the "Invited Response" or "Fair Reply Rule,"⁵ Part VI will discuss the "Harmless Error Doctrine,"⁶ and Part VII will discuss preserving the issue for appeal. Part VIII will briefly address a disciplinary action through The Florida Bar, and Part IX will conclude that reversal of convictions has failed to deter prosecutorial misconduct during closing argument, and that the issue is deserving of closer attention by Florida trial courts.

basis that the witness was not listed until four months after the defendant's arrest was improper).

2. See *McArthur v. State*, 671 So. 2d 867, 870 (Fla. 4th Dist. Ct. App. 1996)(reversing where the state provided inaccurate and misleading information concerning the test results of victim's clothing).

3. See *Boatwright v. State*, 452 So. 2d 666, 668 (Fla. 4th Dist. Ct. App. 1984)(reversing because the prosecutor asked a witness whether the prior witnesses had lied).

4. See *Northard v. State*, 675 So. 2d 652, 652 (Fla. 4th Dist. Ct. App. 1996)(reversing in part because the prosecutor's comment during opening statement that the jury would return "a verdict that simply reflects the truth; that the defendant in this case was caught red-handed," could have resulted in the jury voting to convict because they believed the defendant had committed the crime, even if the state had not met its burden of proof).

5. See *United States v. Young*, 470 U.S. 1, 10-14 (1985)(explaining when defense counsel argues improperly and provokes the prosecutor to respond, the court will weigh the impact of the prosecutor's remarks, and take into account defense counsel's opening salvo).

6. Section 59.041 of the *Florida Statutes* provides in pertinent part:

No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice.

This section shall be liberally construed.

FLA. STAT. § 59.041 (1995).

II. CLOSING ARGUMENT

Perhaps the most exciting and dramatic part of a criminal trial is closing argument, because it affords the attorneys the final opportunity “to argue the facts in evidence and/or reasonable inferences to be drawn therefrom.”⁷ However, it is also at this point in the proceedings that a prosecutor may have become so devoted to winning the case for the victim, or for the citizens of the State of Florida, that his or her emotions intrude and result in a “win at all costs” closing argument not based on the facts brought out during trial. For this reason, it is important to keep in mind the purpose of closing argument.

In *Bertolotti v. State*,⁸ the Supreme Court of Florida stated the purpose of closing argument:

The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.⁹

More recently, in *Terry v. State*,¹⁰ the Supreme Court of Florida reasoned that “[t]he purpose of closing argument is to help the jury understand the issues by applying the evidence to the law. Thus, the purpose of closing argument is disserved when comment upon irrelevant matters is permitted.”¹¹

III. THE PROSECUTOR’S DUTY

The prosecutor’s duty has been addressed in numerous Florida appellate cases. More than sixty years ago in *Roach v. State*,¹² the Supreme Court of Florida noted that “[a prosecutor] occupies a semijudicial position . . . with no greater duty imposed on him than to preserve intact all the great sanctions and

7. *Willis v. State*, 669 So. 2d 1090, 1094 (Fla. 3d Dist. Ct. App. 1996)(citing *Jones v. State*, 612 So. 2d 1370 (Fla. 1992); *Robinson v. State*, 610 So. 2d 1288 (Fla. 1992); *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985)).

8. 476 So. 2d 130 (Fla. 1985).

9. *Id.* at 134. See also *Weiland v. State*, 22 Fla. L. Weekly D1707, 1708 (2d Dist. Ct. App. July 11, 1997); *Hightower v. State*, 592 So. 2d 689, 693 (Fla. 3d Dist. Ct. App. 1991) (Gersten, J., dissenting); *Jackson v. State*, 522 So. 2d 802, 809 (Fla. 1988); *Rosso v. State*, 505 So. 2d 611, 614 (Fla. 3d Dist. Ct. App. 1987).

10. 668 So. 2d 954 (Fla. 1996).

11. *Id.* at 963.

12. 146 So. 240 (Fla. 1933).

traditions of the law.”¹³ Thirty-three years later, in *Adams v. State*,¹⁴ the Supreme Court of Florida added that “attorneys for the State should refrain from inflammatory and abusive argument, since they are officers clothed with quasi-judicial powers.”¹⁵

In *Tribue v. State*,¹⁶ the Second District Court of Appeal stated a prosecutor has a duty to refrain from making improper comments that may tend to affect the fairness and impartiality of the trial,¹⁷ and as expressed by the Fourth District Court of Appeal, it is the duty of a prosecutor “to be fair, honorable and just.”¹⁸ With regard to fairness of opposing party and counsel, the *Rules Regulating the Florida Bar*¹⁹ provide a lawyer shall not:

[I]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, 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.²⁰

The First District Court of Appeal in *Cochran v. State*,²¹ held that “[i]t is the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled.”²²

13. *Id.* at 240. See also *Young v. State*, 195 So. 569 (Fla. 1939).

14. 192 So. 2d 762 (Fla. 1966).

15. *Id.* at 764–65.

16. 106 So. 2d 630 (Fla. 2d Dist. Ct. App. 1958).

17. *Id.* at 633. See also *Mack v. State*, 461 So. 2d 142, 143–144 (Fla. 3d Dist. Ct. App. 1984); *Peterson v. State*, 376 So. 2d 1230, 1235 (Fla. 4th Dist. Ct. App. 1979); *Wilder v. State*, 355 So. 2d 188, 189–90 (Fla. 1st Dist. Ct. App. 1978)(Boyer, J., dissenting); *Kirk v. State*, 227 So. 2d 40, 42–43 (Fla. 4th Dist. Ct. App. 1969).

18. *Boatwright v. State*, 452 So. 2d 666, 667 (Fla. 4th Dist. Ct. App. 1984).

19. FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-3.4. Florida Rules of Professional Conduct are found in chapter 4 of the *Rules Regulating The Florida Bar*.

20. *Id.* at 4-3.4(e).

21. 280 So. 2d 42 (Fla. 1st Dist. Ct. App. 1973).

22. *Id.* at 43. See also *Darden v. State*, 329 So. 2d (Fla. 1976); *Briggs v. State*, 455 So. 2d 519, 521 (Fla. 1st Dist. Ct. App. 1984); *Hufham v. State*, 400 So. 2d 133, 136 (Fla. 5th Dist. Ct. App. 1981); *Davis v. State*, 397 So. 2d 1005, 1008 (Fla. 1st Dist. Ct. App. 1981); *Wilson v. State*, 371 So. 2d 126, 128 (Fla. 1st Dist. Ct. App. 1978); *Knight v. State*, 316 So. 2d 576, 578–79 (Fla. 1st Dist. Ct. App. 1975).

In *Kirk v. State*,²³ the prosecutor read off a list of defense witnesses who did not testify, and asked the jury where those people were.²⁴ The Fourth District Court of Appeal held the prosecutor's closing argument was prejudicial and required a new trial. The court noted a prosecutor has a greater responsibility than defense counsel,²⁵ and explained:

The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for.²⁶

IV. FOUL BLOWS

In *Berger v. United States*,²⁷ Justice Sutherland delivered the opinion of the United States Supreme Court and stated:

The [prosecuting] Attorney 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.²⁸

23. 227 So. 2d 40 (Fla. 4th Dist. Ct. App. 1969).

24. *Id.* at 42.

25. *Id.* at 43.

26. *Id.* See also *Darden v. State*, 329 So. 2d 287, 295 (Fla. 1976)(Sundberg, J., dissenting); *Sandoval v. State*, 689 So. 2d 1258, 1259 (Fla. 3d Dist. Ct. App. 1997); *Mack v. State*, 461 So. 2d 142, 143–144 (Fla. 3d Dist. Ct. App. 1984); *Mulford v. State*, 416 So. 2d 1199, 1201–02 (Fla. 4th Dist. Ct. App. 1982); *Peterson v. State*, *Peterson v. State*, 376 So. 2d 1230, 1235 (Fla. 4th Dist. Ct. App. 1979); *Cochran v. State*, 280 So. 2d 42, 43 (Fla. 1st Dist. Ct. App. 1973).

27. 295 U.S. 78 (1935).

28. *Id.* at 88 (emphasis added); see also *Craig v. State*, 685 So. 2d 1224, 1229 (Fla. 1996); *Hampton v. State*, 680 So. 2d 581, 585 (Fla. 3d Dist. Ct. App. 1996); *Boatwright v.*

Despite the Court's condemnation of improper argument, the issue continues to arise in Florida appellate courts. Numerous examples of "foul blows" struck by prosecutors during closing argument are discussed below.

A. *Commenting on Defendant's Right to Remain Silent*

All prosecutors are aware they are prohibited from commenting on a defendant's right to remain silent.²⁹ In the first half of 1997, Florida courts held that many comments made by prosecutors during closing argument were fairly susceptible of being interpreted by the jury as a comment on the defendant's failure to testify.³⁰ Additionally, as noted by the Supreme Court of Florida in *State v. DiGuilio*,³¹ comments on a defendant's failure to testify can be of an "almost unlimited variety."³²

During trial in *Davis v. State*,³³ the prosecutor commented on the lack of an identification defense, and stated: "Well, I didn't hear that from either of these Defendants."³⁴ Although the case was reversed on other grounds, the Fourth District Court of Appeal warned that the comment should not be repeated at the new trial because it was "fairly susceptible of being interpreted by the jury as a comment on the defendant's failure to testify."³⁵ While in *Knight v. State*,³⁶ the prosecutor made numerous references to "uncontradicted testimony"³⁷ of the police officers, and stated "God forbid you should believe a police officer whose testimony went uncontradicted by these Defendants who told you specifically what happened in this case."³⁸

State, 452 So. 2d 666, 667-78 (Fla. 4th Dist. Ct. App. 1984); *Rolle v. State*, 268 So. 2d 541, 542 (Fla. 3d Dist. Ct. App. 1972); *Marsh v. State*, 202 So. 2d 222, 224 (Fla. 3d Dist. Ct. App. 1967).

29. See J. Allison DeFoor II & Randolph Braccialarghe, *Florida Reverses its Per Se Reversal Rule on Improper Prosecutorial Comment on a Defendant's Rights to Remain Silent*, 13 FLA. ST. U. L. REV. 1119, 1122 (1986).

30. See *Walker v. State*, 22 Fla. L. Weekly D1543, D1544 (5th Dist. Ct. App. June 27, 1997)(reversing because the prosecutor argued that the defendant was not entitled to an entrapment defense because he had remained silent); *Dean v. State*, 690 So. 2d 720, 724 (Fla. 4th Dist. Ct. App. 1997)(reversing because the prosecutor argued that the defendant had failed to explain why he used an assumed name and failed to produce identification).

31. 491 So. 2d 1129 (Fla. 1986).

32. *Id.* at 1135-36.

33. 683 So. 2d 572 (Fla. 4th Dist. Ct. App. 1996).

34. *Id.* at 575 n.1.

35. *Id.* at 574-75.

36. 672 So. 2d 590 (Fla. 4th Dist. Ct. App. 1996).

37. *Id.* at 591.

38. *Id.*

The Fourth District Court of Appeal noted none of the comments were invited, and held the prosecutor's remarks were improper and commented on the defendant's right to remain silent.³⁹

Recently, in *Dean v. State*,⁴⁰ the prosecutor told the jury that they had not heard a reasonable explanation for the defendant using an assumed name and failing to produce identification.⁴¹ The Fourth District Court of Appeal reversed and found the prosecutor's comments to be "particularly egregious," because the only person who could have given that testimony was the defendant himself.⁴²

However, not all similar comments have been held improper. For example, in *Priestly v. State*,⁴³ the prosecutor remarked during closing argument that the defendants raising an entrapment defense would "have to show or has to be shown through evidence to you—in other words, through the State's presentation of evidence to you that they were entrapped."⁴⁴ The Fourth District Court of Appeal held the remarks merely called the jury's attention to the rule that the defense must prove the affirmative defense of entrapment, unless the State's case itself shows entrapment.⁴⁵ Therefore, the comments were proper and not violative of the defendant's right to remain silent.⁴⁶

In *Walker v. State*,⁴⁷ the prosecutor stated: "The defendant in order to claim entrapment had to say 'if it wasn't for the action of the government, I would not have even thought or tried to do what I did.'"⁴⁸ The Fifth District Court of Appeal held the remark to be an improper comment on the defendant's right to remain silent,⁴⁹ and noted, "Florida's courts have guarded against juries considering even the slightest suggestion that a defendant's failure to take the stand on his own behalf is evidence of guilt."⁵⁰ The fifth district found the remarks were not harmless error and reversed.⁵¹

Finally, in *Spry v. State*,⁵² the defendant did not take the stand. The prosecuting attorney, referring to a scene from the movie "Guide to the

39. *Id.*

40. 690 So. 2d 720 (Fla. 4th Dist. Ct. App. 1997).

41. *Id.* at 724.

42. *Id.*

43. 450 So. 2d 289 (Fla. 4th Dist. Ct. App. 1984).

44. *Id.* at 292.

45. *Id.*

46. *Id.*

47. 22 Fla. L. Weekly D1543 (5th Dist. Ct. App. June 27, 1997).

48. *Id.* at D1543.

49. *Id.*

50. *Id.*

51. *Id.* at D1544.

52. 664 So. 2d 41 (Fla. 4th Dist. Ct. App. 1995).

Married Man,” in which one character advised another that even if he got caught in an act of infidelity “[o]ne of the rules of the game, always deny it—never admit anything . . . even if you get caught in the act.”⁵³ The Fourth District Court of Appeal stated: “We would think that the fact that we have been compelled to reverse so many convictions because of improper comments on silence would result in prosecutors getting the message, yet they seem to keep coming up with arguments which can have a double meaning, and thus risk error.”⁵⁴ Apparently, many prosecutors have yet to read *Spry*.

B. *Exhorting the Jury to “Do Its Job” and Convict*

In *United States v. Young*,⁵⁵ the prosecutor argued:

I don’t know whether you call it honor and integrity, I don’t call it that, [defense counsel] does. If you feel you should acquit him for that it’s your pleasure. I don’t think you’re doing your job as jurors in finding facts as opposed to the law that this Judge is going to instruct you, you think that’s honor and integrity then stand up here in Oklahoma courtroom and say that’s honor and integrity; I don’t believe it.⁵⁶

Chief Justice Burger delivered the opinion of the United States Supreme Court and stated: “The prosecutor was also in error to try to exhort the jury to ‘do its job’; that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice.”⁵⁷ However, the court concluded the jury was not influenced by the improper remarks.⁵⁸

A variety of improper comments were made by the prosecutor in *Ryan v. State*.⁵⁹ The prosecutor asked the jury not to set the defendant free into the community not only because she lied, but because she was rich and would “thumb her nose at small Martin County and say, ‘Well, we really pulled one over those guys.’”⁶⁰ The Fourth District Court of Appeal noted “[a]rguments

53. *Id.* at 41.

54. *Id.* at 41–42.

55. 470 U.S. 1 (1985).

56. *Id.* at 5–6.

57. *Id.* at 18.

58. *Id.*

59. 457 So. 2d 1084 (Fla. 4th Dist. Ct. App. 1984).

60. *Id.* at 1088.

which beseech the jury to convict a defendant for any reason except guilt are highly prejudicial and are strongly discouraged.”⁶¹

A similar holding was made by the First District Court of Appeal in *Pacifico v. State*.⁶² In *Pacifico*, the prosecutor commented “[i]f the defendant walks out of here a free man today, that’s your decision,” and, “[n]ow, does he walk out of this courtroom today laughing, or do you make him take responsibility for what he did to [victim] that night?”⁶³ The first district held the comments were improper and, when considered together, “appears to constitute an implicit instruction to the jurors that it was their duty to society to return a verdict of guilty, a practice deemed to be reversible error.”⁶⁴

C. *Personal Attacks on Defense Counsel*

Without question, the vast majority of criminal prosecutions are competently and ethically tried by the prosecuting attorneys of this state. Too often, however, a prosecuting attorney succumbs to the temptation of putting the defense counsel on trial rather than the issues. “This temptation must be resisted completely in every case.”⁶⁵ In *Westley v. State*,⁶⁶ although the First District Court of Appeal found the prosecutor’s remarks were not a personal attack on defense counsel, the court warned “the prosecutor’s indulgence in improper argument is a perilous practice.”⁶⁷

In *Adams v. State*,⁶⁸ the Supreme Court of Florida stated prosecutors are not permitted to make references in closing argument to defense counsel “which are so extreme and of such a nature that they could be prejudicial” to the trial of the accused.⁶⁹ In *Briggs v. State*,⁷⁰ the prosecutor questioned the personal integrity of defense counsel by suggesting defense counsel had not been truthful and had deliberately misled the jury.⁷¹ The First District Court of Appeal held “[v]erbal attacks on the personal integrity of opposing counsel, rather than appropriate comments on the credibility of witnesses and

61. *Id.* at 1089.

62. 642 So. 2d 1178 (Fla. 1st Dist. Ct. App. 1994).

63. *Id.* at 1182.

64. *Id.* at 1182–83.

65. *Briggs v. State*, 455 So. 2d 519, 522 (Fla. 1st Dist. Ct. App. 1984).

66. 416 So. 2d 18 (Fla. 1st Dist. Ct. App. 1982).

67. *Id.* at 20.

68. 192 So. 2d 762 (Fla. 1966).

69. *Id.* at 764 (where the prosecutor said “[l]et me just show you what perverted and distorted things a lawyer can do when he wants to do it”).

70. 455 So. 2d 519 (Fla. 1st Dist. Ct. App. 1984).

71. *Id.* at 520.

inferences to be drawn from the evidence before the jury, are wholly inconsistent with the prosecutor's role."⁷²

The Fourth District Court of Appeal has strongly disapproved of these comments. In *Landry v. State*,⁷³ when the prosecutor attempted to denigrate defense counsel by arguing the defense had "conjured up" a witness,⁷⁴ the fourth district held that the comment was highly improper.⁷⁵ Verbal attacks on defense counsel can "poison the minds of the jury,"⁷⁶ and attacks on the personal integrity of defense counsel are "utterly and grossly improper."⁷⁷

Prosecutors continue to launch personal attacks on defense lawyers and exceed the bounds of proper argument. In many cases, the state's closing argument may cause one to wonder who is on trial, the defendant or the defense counsel.⁷⁸

72. *Id.* at 521.

73. 620 So. 2d 1099 (Fla. 4th Dist. Ct. App. 1993).

74. *Id.* at 1101.

75. *Id.*

76. *Ryan v. State*, 457 So. 2d 1084, 1089 (Fla. 4th Dist. Ct. App. 1984).

77. *Jackson v. State*, 421 So. 2d 15, 15 (Fla. 3d Dist. Ct. App. 1982).

78. *See Knight v. State*, 672 So. 2d 590, 590 (Fla. 4th Dist. Ct. App. 1996)(where prosecutor attacked the credibility of defense counsel for objecting to the state's introduction of inadmissible evidence); *Landry v. State*, 620 So. 2d 1099, 1101 (Fla. 4th Dist. Ct. App. 1993)(where prosecutor suggested the defense conjured up a witness or, in other words, was presenting false testimony); *Valdez v. State*, 613 So. 2d 916, 918 (Fla. 4th Dist. Ct. App. 1993)(where prosecutor argued the defense failed to give the jury an accurate story); *Alvarez v. State*, 574 So. 2d 1119, 1120 (Fla. 3d Dist. Ct. App. 1991)(where prosecutor stated: "So, if you are nitpicking and trying to insult somebody's intelligence, as the defense is really doing today")(emphasis omitted); *Huff v. State*, 544 So. 2d 1143, 1144 (Fla. 4th Dist. Ct. App. 1989)(where prosecutor opined the defense was a fabrication); *Waters v. State*, 486 So. 2d 614, 616 (Fla. 5th Dist. Ct. App. 1986)(where prosecutor repeatedly characterized defense counsel's argument as a "smoke screen"); *Ryan v. State*, 457 So. 2d 1084, 1089 (Fla. 4th Dist. Ct. App. 1984)(where prosecutor referred to defense counsel as a fancy lawyer from a big city, and accused him of not being totally honest with the jury); *Briggs v. State*, 455 So. 2d 519, 520 (Fla. 1st Dist. Ct. App. 1984)(where prosecutor suggested defense counsel "was not being truthful and was deliberately misleading the jury"); *Jackson v. State*, 421 So. 2d 15, 15-16 n. 1 (Fla. 3d Dist. Ct. App. 1982)(where prosecutor asked, "[w]ould you buy a used car from this guy, ladies and gentlemen of the jury?")(emphasis omitted); *Peterson v. State*, 376 So. 2d 1230, 1233 (Fla. 4th Dist. Ct. App. 1979)(where prosecutor stated "not only do they have to get into these disguises and crawl down there and deal with people like this, but they have to deal with people like his lawyer"); *Carter v. State*, 356 So. 2d 67, 67 (Fla. 1st Dist. Ct. App. 1978) (where prosecutor argued defense counsel was trying to "distort the evidence" and mislead the jury); *Adams v. State*, 192 So. 2d 762, 764 (Fla. 1966)(where prosecutor said defense counsel's statements perverted and distorted things, and violated his oath as a lawyer);

D. *Calling the Defendant a Liar*

In *O'Callaghan v. State*,⁷⁹ during the defendant's trial testimony about his presence at the crime scene, the prosecutor stated: "That's a lie. I would like to go to the bench."⁸⁰ In response, the Supreme Court of Florida stated it is "unquestionably improper" for a prosecutor to assert that the defendant has lied.⁸¹ "Any trial lawyer should know that this type of conduct is completely beyond the limits of propriety."⁸² However, the remarks did not warrant a reversal of the conviction.⁸³

This year, in *Washington v. State*,⁸⁴ the defendant denied the accusations of sexual battery and sexual activity with a minor and the prosecutor, in addressing the defendant's testimony, stated:

Joseph Goebbels, who was a propaganda minister for Germany back at the time of Adolf Hitler, had a theory. He believed that you should lie to the people but that you shouldn't lie with small lies because you can get caught in small lies. What you should do is you should lie big, come up with a big lie because that's something that you might be able to have the people buy is the big lie. Of course, at that time it was that the Jews were responsible for everything that was wrong in the world and they should be exterminated. Well, the defense in this case is nothing but a big lie.⁸⁵

The Second District Court of Appeal in *Washington* stated: "[I]t is difficult for us to perceive a more egregious and prejudicial statement,"⁸⁶ and held "[i]t is 'unquestionably improper' for a prosecutor to state that the defendant has lied . . . it constitutes an improper statement of opinion by the prosecutor."⁸⁷ The second district concluded it had "no choice but to reverse Washington's judgment and sentence."⁸⁸

Douglas v. State, 184 So. 756, 757 (Fla. 1938)(where, in a prosecution for incest, the prosecutor suggested that defense counsel was also guilty of incest).

79. 429 So. 2d 691 (Fla. 1983).

80. *Id.* at 696.

81. *Id.*

82. *Id.*

83. *Id.*

84. 687 So. 2d 279 (Fla. 2d Dist. Ct. App. 1997).

85. *Id.* at 280.

86. *Id.*

87. *Id.* (citing *O'Callaghan v. State*, 429 So.2d 691, 696 (Fla. 1983)).

88. *Id.*

In *Bass v. State*,⁸⁹ the prosecutor told the jury “[i]f you want to tell Jimmy Wayne Bass he lied, there is only one verdict, guilty. The man is guilty.”⁹⁰ The First District Court of Appeal concluded the prosecutor’s remarks “could have been and were likely construed by the jury as directing them to ‘send a message’ about lying in the courtroom rather than focusing their attention on whether the state had proven Bass’ guilt beyond a reasonable doubt.”⁹¹

A similar comment was made by the prosecutor in *Jones v. State*.⁹² The *Jones* prosecutor did not mince words when he said: “What about Tyrone Jones? I submit, that when Tyrone Jones took the stand, he lied to you”⁹³ The First District Court of Appeal reversed because of the “improper comments and argument and the state’s tenuous case against Jones”⁹⁴ However, in *Brown v. State*,⁹⁵ the Fourth District Court of Appeal held “[i]t is clearly not improper for either counsel in closing argument to characterize specific witnesses as liars, so long as counsel relates the argument solely to the testimony of the witnesses and evidence in the record.”⁹⁶

E. *Commenting on Defendant’s Demeanor*

The Fourth District Court of Appeal addressed a comment concerning the defendant’s demeanor in *Baldez v. State*.⁹⁷ In *Baldez*, the prosecutor said the defendant was “glaring” at the witness while the witness was on the stand.⁹⁸ The fourth district stated: “It is improper for a prosecutor to comment on the defendant’s demeanor when he is not on the witness stand.”⁹⁹ The court also held the prosecutor used the defendant’s demeanor to bolster the credibility of the witnesses by suggesting they were truthful simply because they testified in the face of intimidation.¹⁰⁰

89. 547 So. 2d 680 (Fla. 1st Dist. Ct. App. 1989).

90. *Id.* at 682 (emphasis omitted).

91. *Id.* at 682–83.

92. 449 So. 2d 313 (Fla. 5th Dist. Ct. App. 1984).

93. *Id.* at 314.

94. *Id.* at 315.

95. 678 So. 2d 910 (Fla. 4th Dist. Ct. App. 1996).

96. *Id.* at 912.

97. 679 So. 2d 825 (Fla. 4th Dist. Ct. App. 1996).

98. *Id.* at 826.

99. *Id.* (citing *Pope v. Wainwright*, 496 So. 2d 798 (Fla. 1986)).

100. *Id.* at 827.

A similar argument was reviewed by the Supreme Court of Florida. In *Pope v. Wainwright*,¹⁰¹ the prosecutor stated: "I don't know if you saw it; but I saw it, [Pope] was grinning from ear-to-ear. This is supposed to be a wrongful accused man, grinning from ear-to-ear? I don't know why he grins from ear-to-ear."¹⁰² In *Pope*, the court held the prosecutor's comments were clearly improper, but were not reviewable on appeal because of the defendant's failure to object and move for a mistrial.¹⁰³

F. *Bolstering the Credibility of Police Officers*

In *Fryer v. State*,¹⁰⁴ the prosecutor vouched for the credibility of an officer at least six times.¹⁰⁵ The Third District Court of Appeal held the prosecutor's remarks were "patently improper and violative of the rules of professional conduct,"¹⁰⁶ and concluded the "prosecutor's remarks compromised the jury's ability to fairly evaluate the evidence and, in turn, Fryer's right to a fair trial."¹⁰⁷

In *Cisneros v. State*, the Fourth District Court of Appeal explained the reasons why attempting to bolster the credibility of a police officer is improper:¹⁰⁸

First, although such comments may not in some instances constitute an affirmative statement of the prosecutor's personal belief in the veracity of the police officer, they do constitute an inappropriate attempt to persuade the jury that the police officer's testimony should be believed simply because the witness is a police officer. Second, such comments make reference to matters outside the record and constituted impermissible bolstering of the police officer's testimony.¹⁰⁹

The fourth district's explanation was brought about by the prosecutor's closing argument in *Cisneros*, wherein he made numerous statements about

101. 496 So. 2d 798 (Fla. 1986).

102. *Id.* at 802.

103. *Id.*

104. 693 So. 2d 1046 (Fla. 3d Dist. Ct. App. 1997).

105. *Id.* at 1047.

106. *Id.* at 1047-48(citing *Cisneros v. State*, 678 So. 2d 888 (Fla. 4th Dist. Ct. App. 1996); *Davis v. State*, 663 So. 2d 1379 (Fla. 4th Dist. Ct. App. 1995); *State v. Ramos*, 579 So. 2d 360 (Fla. 4th Dist. Ct. App. 1991); *Singletary v. State*, 483 So. 2d 8, 10 (Fla. 2d Dist. Ct. App. 1985); FLA. RULES OF PROFESSIONAL CONDUCT 4-3.4(e)).

107. *Id.* at 1048.

108. 678 So. 2d 888 (Fla. 4th Dist. Ct. App. 1996).

109. *Id.* at 890 (citations omitted).

the police officer's credibility: "To win a case he jeopardizes his career, to win a case he's going to put someone in jail? . . . He's not the man to come in here and violate that oath."¹¹⁰

Similarly, in *Williams v. State*,¹¹¹ the prosecutor stated: "I submit to you that it's not reasonable to consider that sworn police officers, doing their job, could come into court and perjure themselves."¹¹² The court found the comment improper and stated: "An attempt by the prosecuting attorney to bolster the credibility of police officers testifying in the case is improper argument entitling the defendant to a new trial."¹¹³

This type of improper argument is no stranger to the Fourth District Court of Appeal. In *Davis v. State*,¹¹⁴ the court condemned the prosecutor's argument when he remarked:

The Judge is also going to tell you that you have the right to determine or to evaluate somebody's testimony by what they have to gain from it . . . What does Officer Hadden and Officer Kahir have to gain by putting their careers in jeopardy, taking the stand and perjuring themselves?¹¹⁵

In *Clark v. State*,¹¹⁶ the Fourth District Court of Appeal condemned an argument almost identical to the prosecutor's argument in *Davis*, and concluded "[i]n no uncertain terms, the prosecutor's argument was that police officers would not testify falsely because they have too much at stake and would not risk their jobs."¹¹⁷ Further, in *Landry v. State*, a case replete with improper comments, the Fourth District Court of Appeal reversed the conviction and sentence because of the prosecutor's improper closing argument.¹¹⁸ During closing argument, the *Landry* prosecutor referred to the

110. *Id.* at 889 (emphasis omitted).

111. 673 So. 2d 974 (Fla. 1st Dist. Ct. App. 1996).

112. *Id.* at 975.

113. *Id.* (citing *Robinson v. State*, 637 So. 2d 998 (Fla. 1st Dist. Ct. App. 1994); *Clark v. State*, 632 So. 2d 88, 91 (Fla. 4th Dist. Ct. App. 1994)).

114. 663 So. 2d 1379 (Fla. 4th Dist. Ct. App. 1995).

115. *Id.* at 1380 (emphasis omitted).

116. 632 So. 2d 88 (Fla. 4th Dist. Ct. App. 1994).

117. *Id.* at 91.

118. 620 So. 2d 1099 (Fla. 4th Dist. Ct. App. 1993). The *Landry* prosecutor was previously chastised in *Klepak v. State*, 622 So. 2d 19 (Fla. 4th Dist. Ct. App. 1993). In *Klepak*, the prosecutor argued to the court that the jury was "made up of buffoons" and "lobotomized zombies" and suggested that their verdict was returned because they were "eating pizza or salads instead of deliberating." *Id.* at 20. Further, the prosecutor said this jury is "a classic reason I don't believe in the jury system." *Id.* Presently pending is another

“unblemished record”¹¹⁹ of the police officers several times. The fourth district found the prosecutor’s claim was unsupported by the record and “constituted impermissible bolstering of the officers’ testimony.”¹²⁰

G. *Sending a Message to the Community*

The Supreme Court of Florida has stated that urging the jury to consider the message its verdict would send to the community at large is “an obvious appeal to the emotions and fears of the jurors.”¹²¹ In *Boatwright v. State*,¹²² the prosecutor stated: “I’m asking you to do your job today, here in this courtroom and send these folks a message . . . This is our country, this is our nation, it’s time to send ’em—send criminals a message we’re not gonna tolerate it any more”¹²³ The Fourth District Court of Appeal held that “[t]he ‘send ’em a message’ argument may have some cachet in the political arena, but it is grossly improper in a court of law. It diverts the jury’s attention from the task at hand and worse, prompts the jury to consider matters extraneous to the evidence.”¹²⁴

Last year, in *Campbell v. State*,¹²⁵ the Supreme Court of Florida reiterated its holding in *Bertolotti*: “‘Message to the community’ arguments are impermissible—they are ‘an obvious appeal to the emotions and fears of the jurors.’ These considerations are outside the scope of the jury’s deliberation and their injection violates the prosecutor’s duty to seek justice”¹²⁶ The Supreme Court of Florida reversed *Campbell* “due to improper conduct by the prosecutor,”¹²⁷ and warned:

[W]e are deeply disturbed as a Court by continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases. As a Court, we are constitutionally charged not only with appellate review but also “to regulate . . . the discipline of

appeal involving the same prosecutor wherein one of the issues on appeal is whether “THE PROSECUTOR COMMITTED INTENTIONAL MISCONDUCT BY VIRTUE OF HIS CLOSING ARGUMENTS TO THE JURY.” Brief for Appellant at 29, *Cochran v. State*, No. 97-00189 (Fla. 4th Dist. Ct. App. filed June 23, 1997).

119. *Landry*, 620 So. 2d at 1101.

120. *Id.*

121. *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985).

122. 452 So. 2d 666 (Fla. 4th Dist. Ct. App. 1984).

123. *Id.* at 667.

124. *Id.* (citations omitted).

125. 679 So. 2d 720 (Fla. 1996).

126. *Id.* at 724 (quoting *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985)).

127. *Id.* at 726.

persons admitted” to the practice of law. This Court considers this sort of prosecutorial misconduct . . . to be grounds for appropriate disciplinary proceedings. It ill becomes those who represent the state in the application of its lawful penalties to *themselves* ignore the precepts of their profession and their office.¹²⁸

H. *Appeals to Sympathy, Bias, Passion or Prejudice*

The Supreme Court of Florida has addressed a prosecutor’s appeal to sympathy, bias, passion, or prejudice on several occasions. In *King v. State*,¹²⁹ the prosecutor mentioned during opening and closing arguments that the victim was a mother.¹³⁰ The Supreme Court of Florida concluded the comments did not affect the verdict and were harmless error.¹³¹ However, in regards to additional remarks made during closing argument of the penalty phase, the court stated: “if ‘comments in closing argument are intended to and do inject elements of emotion and fear into the jury’s deliberations, a prosecutor has ventured far outside the scope of proper argument.’”¹³² The court ordered a new sentencing proceeding before a jury.¹³³

In *Rhodes v. State*,¹³⁴ at the conclusion of the prosecutor’s closing argument, he urged the jury to “show Rhodes the same mercy shown to the victim on the day of her death.”¹³⁵ The Supreme Court of Florida reversed and found the “argument was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation.”¹³⁶

The Third District Court of Appeal also addressed the issue in *Edwards v. State*,¹³⁷ where the prosecutor argued to the jury, “[a]ll I’m going to ask you for is justice. I ask you for justice both on behalf of myself and the people of the State of Florida, also on behalf of [victim’s] wife and children.”¹³⁸ The court held “[t]he prosecutor’s argument was an improper appeal to the jury for

128. *Id.* at 725 (quoting *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985)). See also *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993); *Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990).

129. 623 So. 2d 486 (Fla. 1993).

130. *Id.* at 488 n.1.

131. *Id.* at 488.

132. *Id.* (quoting *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988)).

133. *Id.* at 488–89.

134. 547 So. 2d 1201 (Fla. 1989).

135. *Id.* at 1206.

136. *Id.*

137. 428 So. 2d 357 (Fla. 3d Dist. Ct. App. 1983).

138. *Id.* at 359 (emphasis omitted).

sympathy for the wife and children of the victim, the natural effect of which would be hostile emotions toward the accused.”¹³⁹

I. *Miscellaneous Comments*

1. Referring to the Defendant as a Criminal

In *Pacifico v. State*, the Fourth District Court of Appeal noted “a prosecutor may use a defendant’s prior conviction as an impeachment tool, but it is improper to refer to the defendant’s previous convictions for the purpose of indicating that he or she has a propensity to commit crime.”¹⁴⁰ At trial, the prosecutor argued to the jury “[t]his defendant is a criminal, and he needs to be convicted.”¹⁴¹ Moreover, it is improper to imply that a defendant has committed other crimes, or that the defendant may commit a future crime.¹⁴² It is also improper to comment on prior felonies and to state what they were for when the defendant correctly admitted the number of his felony convictions.¹⁴³

2. Commenting About When a Defense Witness Was Listed

In *Willis v. State*,¹⁴⁴ the prosecuting attorney “suggested that one of Willis’ alibi witnesses was not to be believed because the witness was not immediately listed on the defense’s pretrial witness list.”¹⁴⁵ The Third District Court of Appeal held that it was improper to attack the credibility of an alibi witness merely because that witness was not listed until four months after the defendant was arrested.¹⁴⁶ The court noted “the decision of whether or when to list a particular witness on a pretrial witness list is beyond the control of the witness.”¹⁴⁷

139. *Id.*

140. 642 So. 2d 1178, 1183 (Fla. 1st Dist. Ct. App. 1994) (citing *Davis v. State*, 397 So. 2d 1005, 1008 (Fla. 1st Dist. Ct. App. 1981)).

141. *Id.*

142. *Gleason v. State*, 591 So. 2d 278, 279 (Fla. 5th Dist. Ct. App. 1991).

143. *Gavins v. State*, 587 So. 2d 487, 490 (Fla. 1st Dist. Ct. App. 1991).

144. 669 So. 2d 1090 (Fla. 3d Dist. Ct. App. 1996).

145. *Id.* at 1091.

146. *Id.* at 1094.

147. *Id.*

3. Commenting on the Role of the Jury

In *Landry v. State* the prosecutor argued to the jury: “[Y]ou took the oath whether you like the law or not. And, you know, when you’re asked about your decision here being final, our system is huge. You have appellate courts, you have the supreme court.”¹⁴⁸ The Fourth District Court of Appeal agreed those remarks suggested to the jury that their role was only an advisory one, because it would be reviewed by appellate courts.¹⁴⁹

4. Currying Favor with the Jury

Additionally, in *Landry v. State*, the prosecutor made references to his military service in the Persian Gulf.¹⁵⁰ The Fourth District Court of Appeal held that although such a comment alone was not reversible error, it was an improper attempt to “curry favor with the jury”¹⁵¹ The court noted this is especially true where the comment “is entirely irrelevant to any issue being tried or argued.”¹⁵² The fourth district reversed and remanded for further proceedings.¹⁵³

5. Personal Belief of the Prosecutor

In *Jones v. State*, the Fifth District Court of Appeal held that it is improper and inappropriate for a prosecutor to express a personal belief in the guilt of the accused, or in the veracity of the state’s witnesses.¹⁵⁴ The fifth district concluded that the combined effect “of the prosecutor’s improper comments and argument and the state’s tenuous case against Jones convinces us that on balance Jones did not receive a fair and impartial trial”¹⁵⁵ In *Jones*, “the prosecutor alluded to or stated his personal beliefs in Jones’ guilt and the veracity of the state’s witnesses”¹⁵⁶ Over thirty years ago, the Supreme Court of Florida addressed such comments:

148. 620 So. 2d 1099, 1102 (Fla. 4th Dist. Ct. App. 1993).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Landry*, 620 So. 2d at 1103.

154. 449 So. 2d 313, 314–15 (Fla. 5th Dist. Ct. App. 1984).

155. *Id.* at 315.

156. *Id.* at 314.

It is unnecessary to enlarge upon the sound rule of practice that the prosecution will not in argument express belief in the guilt of the defendant¹⁵⁷ and will not make inflammatory reference to the victim's family.¹⁵⁸ Competent counsel avoid such breaches of legal propriety and the courts will scrutinize such offensive conduct with great care.¹⁵⁹

6. Asking the Jury to Determine Who Is Lying

Last year, in *Northard v. State*,¹⁶⁰ the Fourth District Court of Appeal found the prosecutor's closing argument¹⁶¹ "impermissible because it improperly asked the jury to determine who was lying as the test for deciding if the appellant was not guilty."¹⁶² The *Northard* prosecutor told the jury "you're going to have to believe that the defendant was telling the truth and the officer was lying"¹⁶³ The fourth district noted these type of remarks "constitute error because they invite the jury 'to convict the defendant for a reason other than his guilt of the crimes charged.'"¹⁶⁴

7. References to Witnesses Not Called

In *Landry v. State*, the prosecutor suggested there was other evidence that was not brought to the jury's attention.¹⁶⁵ The Fourth District Court of Appeal found this to be "clear error, made more egregious by the fact" the prosecutor's remarks were made to the jury even after the prosecutor's motion

157. *Grant v. State*, 171 So. 2d 361, 365 (Fla. 1965)(citing *Tyson v. State*, 100 So. 2d 254 (1924)).

158. *Id.* (citing *Barnes v. State*, 58 So. 2d 157 (Fla. 1952)).

159. *Id.*

160. 675 So. 2d 652 (Fla. 4th Dist. Ct. App. 1996).

161. In *Northard*, the prosecutor argued:

If you believe the defendant's events the police cannot possibly be telling you the truth, and you've got to decide if that's what they did and they got up here and deliberately fabricated evidence and fabricated testimony for you in order to convict this guy. In order to find him not guilty you're going to have to believe that. And that's what your verdict, in order to find him not guilty you're going to have to believe that the defendant was telling the truth and the officer was lying strictly about the twenty-dollar bill because there's really not much else.

Id. at 653.

162. *Id.*

163. *Id.*

164. *Id.* (quoting *Bass v. State*, 547 So. 2d 1166 (Fla. 1989)).

165. 620 So. 2d 1099, 1101-1102 (Fla. 4th Dist. Ct. App. 1993).

to allow him to comment on the excluded evidence had been denied.¹⁶⁶ The Fourth District Court of Appeal stated: “There are few errors which could fundamentally affect a jury verdict in a criminal trial more than a prosecutorial argument tantamount to ‘trust me, there’s more evidence here but I can’t get it in because the judge won’t let me.’”¹⁶⁷

8. Racial Comments

In *Perez v. State*,¹⁶⁸ the defendants, Perez and Rodriguez, were inmates at the Dade County Jail. They were found guilty of the improper exhibition of a weapon and aggravated assault on a corrections officer. Although there was no evidence of a racial factor contributing to an incident in jail, the prosecutor argued a racial war had divided the inmates, the defendant was part of the war, and that a defense witness thought along racial lines.¹⁶⁹ The Third District Court of Appeal stated:

It is, of course, highly improper to interject even a reference to, let alone an accusation of racism which is neither justified by the evidence nor relevant to the issues into any part of our judicial system. It is particularly reprehensible when this is done by a representative of the state in a criminal prosecution.¹⁷⁰

9. Commenting on Defendant’s Failure to Produce a Witness

The defendant in *D’Annunzio v. State*¹⁷¹ was convicted of two counts of lewd and lascivious assault on a child.¹⁷² Prior to trial, a notice of alibi was filed by the defense.¹⁷³ However, at trial, the defense did not call any alibi witnesses.¹⁷⁴ During closing argument, the prosecutor informed the jury that the defendant had filed a notice of alibi, said they were going to put witnesses on the stand, but did not call one witness to testify about the whereabouts of the defendant at the time of the crime.¹⁷⁵ The Fifth District Court of Appeal

166. *Id.* at 1102.

167. *Id.*

168. 689 So. 2d 306 (Fla. 3d Dist. Ct. App. 1997).

169. *Id.* at 306–07.

170. *Id.* at 307.

171. 683 So. 2d 151 (Fla. 5th Dist. Ct. App. 1996).

172. *Id.* at 152.

173. *Id.*

174. *Id.*

175. *Id.* at 152.

held a “prosecutor can only comment on the defendant’s failure to produce a witness when the witness knows material facts which are helpful to the defendant’s case and the witness is available and competent to testify.”¹⁷⁶ The court found there was no evidence establishing the identity of the alibi witness, and whether he or she was competent, or whether he or she knew material facts.¹⁷⁷

V. INVITED RESPONSE DOCTRINE

This year, in *Fryer v. State*, the Third District Court of Appeal found the comments of the United States Supreme Court in *United States v. Young*, to be particularly instructive:¹⁷⁸

The situation brought before the Court of Appeals was but one example of an all too common occurrence in criminal trials—the defense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action. Clearly two improper arguments—two apparent wrongs—do not make for a right result. Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor’s comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor’s conduct affected the fairness of the trial. To help resolve this problem, courts have invoked what is sometimes called the “invited response” or “invited reply” rule. [T]he Court must consider the probable effect the prosecutor’s response would have on the jury’s ability to judge the evidence fairly. In this context, defense counsel’s conduct, as well as the nature of the prosecutor’s response, is relevant. [T]he reviewing court must not only weigh the impact of the prosecutor’s remarks, but must also take into account defense counsel’s opening salvo. Thus the import of the evaluation has been that if the prosecutor’s remarks were “invited,” and did no more than respond substantially in order to “right the scale,” such comments would not warrant reversing a conviction.¹⁷⁹

The *Fryer* court reversed the conviction although the defense initiated the improper comments. As noted in the concurring opinion of *Fryer*, a prosecutor must object to improper comments by defense counsel at the time

176. *D’Annunzio*, 683 So. 2d at 153 (citation omitted).

177. *Id.*

178. 693 So. 2d 1046, 1048.

179. *Id.* (citing *United States v. Young*, 470 U.S. 1, 9–11 (1985)).

they are made in order for the trial judge to impose timely restrictions on defense counsel.¹⁸⁰ “The doctrine of invited comment does not contemplate that a prosecutor will sit silently while defense counsel pursues an impermissible line of argument so that he or she can then pursue his or her own impermissible and highly prejudicial response.”¹⁸¹

VI. HARMLESS ERROR RULE

Improper prosecutorial comments during closing argument are subject to the harmless error rule as provided in section 59.041 of the *Florida Statutes*:

No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.¹⁸²

Additionally, section 924.33 of the *Florida Statutes* provides “[n]o judgment may be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of appellant.”¹⁸³

The Supreme Court of Florida has held that the harmless error test “places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.”¹⁸⁴

In *King v. State*, the Supreme Court of Florida stated the standard of review is whether the prosecutor’s comment was “so prejudicial as to vitiate the entire trial.”¹⁸⁵ In *State v. Murray*,¹⁸⁶ the Supreme Court of Florida noted

180. *Id.* at 1051. (Sorondo, J., concurring specially).

181. *Id.*

182. FLA. STAT. § 59.041 (1995).

183. FLA. STAT. § 924.33 (1995).

184. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986)(quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

185. 623 So. 2d 486, 488 (Fla. 1993)(citing *State v. Murray*, 443 So. 2d 955 (Fla. 1984)).

“prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless.”¹⁸⁷

The Supreme Court of Florida, in *State v. DiGuilio*, advised that the “harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence.”¹⁸⁸ The *DiGuilio* court went further and stated:

Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution’s case may have played a substantial part in the jury’s deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.¹⁸⁹

VII. PRESERVING THE ISSUE FOR APPEAL

The law is clear that “improper prosecutorial comment which does not constitute fundamental error must be objected to and a motion for mistrial requested to preserve [the] issue for appeal.”¹⁹⁰ When the objection is overruled, “[t]he objection itself calls the court’s attention to the error alleged to have prejudiced the party making the objection and to the possibility that a mistrial may be in order.”¹⁹¹ However, in *Pait v. State*¹⁹² the Supreme Court of Florida stated:

[W]hen an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influence, then it may be considered as a ground for reversal despite the absence of an

186. 443 So. 2d 955 (Fla. 1984).

187. *Id.* at 956.

188. 491 So. 2d 1129, 1136 (Fla. 1986).

189. *Id.* (quoting *People v. Ross*, 429 P.2d 606, 621 (1967)(Traynor, C.J. dissenting), *rev’d sub nom.* *Ross v. California*, 391 U.S. 470 (1968)).

190. *Pope v. Wainwright*, 496 So. 2d 798, 802 (Fla. 1986)(citing *State v. Cumbie*, 380 So. 2d 1031 (Fla. 1980)).

191. *Holton v. State*, 573 So. 2d 284, 288 (Fla. 1990)(citing *Simpson v. State*, 418 So. 2d 984, 986 (Fla. 1982)).

192. 112 So. 2d 380 (Fla. 1959).

objection below, or even in the presence of a rebuke by the trial judge.¹⁹³

In *Knight v. State*, the prosecutor made a variety of improper comments.¹⁹⁴ However, defense counsel failed to object to each of the impermissible remarks.¹⁹⁵ The Fourth District Court of Appeal observed that “[w]e recognize that appellant failed to object to several of the prosecutor’s improper comments and only made one objection at the end of the state’s closing. However, this court has held that ‘if the improper comments rise to the level of fundamental error, then multiple objections are not necessary.’”¹⁹⁶

Most recently, in *DeFreitas v. State*,¹⁹⁷ the Fourth District Court of Appeal reversed although defense counsel failed to object, request a curative instruction, or move for a mistrial.¹⁹⁸ In taking this action, the court stated: “we ‘perceive very few instances where remarks or conduct by an attorney are of such sinister influence as to constitute reversible error absent objection.’”¹⁹⁹ The fourth district found a portion of the prosecutor’s closing remarks fell well within this category when the prosecutor asked the jurors to imagine how terrifying it would be if a gun with a laser was pointed at their chest by the defendant.²⁰⁰ Golden rule arguments are improper, the lines are clear and bright, and they enjoy no safe harbor in the trial of a criminal case.²⁰¹ Additionally, the court found the prosecutor compounded the misconduct when he compared the *DeFreitas* case with the “O.J. Simpson” case.²⁰² The fourth district reversed, but stressed defense counsel’s duty to object: “[D]efense counsel has the duty to remain alert to such things in fulfilling his responsibility to see that his client receives a fair trial. Except in rare instances where a grievous injustice might result, this court is not inclined to excuse counsel for his failure in this regard.”²⁰³

193. *Id.* at 385.

194. 672 So. 2d 590 (Fla. 4th Dist. Ct. App. 1996).

195. *Id.* at 590–91.

196. *Id.* at 591 (quoting *Ryan v. State*, 457 So. 2d 1084, 1091 (Fla. 4th Dist. Ct. App. 1984) (citing *Peterson v. State*, 376 So. 2d 1230 (Fla. 4th Dist. Ct. App. 1979)).

197. 22 Fla. L. Weekly D2462 (Fla. 4th Dist. Ct. App. Oct. 22, 1997).

198. *Id.* at D2466.

199. *Id.* (quoting *Norman v. Gloria Farms, Inc.* 668 So. 2d 1016, 1023 (Fla. 4th Dist. Ct. App. 1996)).

200. *Id.* at D2469 n.7.

201. *Id.* at D2465.

202. *DeFreitas*, 22 Fla. L. Weekly at 2465–66.

203. *Id.* at 2466.

Finally, it should be noted that in order for a prosecutor to avail himself of the doctrine of "invited comment," a prosecutor must object to defense counsel's improper comments at trial.²⁰⁴

VIII. DISCIPLINARY ACTION

In *State v. Murray*, and cases cited therein, the Supreme Court of Florida suggested disciplinary action²⁰⁵ may be appropriate in some cases: "When there is overzealousness or misconduct on the part of either the prosecutor or defense lawyer, it is proper for either trial or appellate courts to exercise their supervisory powers by registering their disapproval, or, in appropriate cases, referring the matter to The Florida Bar for disciplinary investigation."²⁰⁶

IX. CONCLUSION

Despite warnings, admonitions, and reversals of convictions by Florida's appellate courts, prosecutorial misconduct continues, as evidenced by the Second District Court of Appeal's remarks this year in *Weiland v. State*.²⁰⁷

The law, as a profession, carries with it not only competency requirements but also ethical and professional requirements. As a result, lawyers have an obligation not to present legally correct arguments but also to present them in a professional manner.

204. *Fryer v. State*, 693 So. 2d 1046, 1051 (Fla. 3d Dist. Ct. App. 1997).

205. Rule 3-7.8(a) provides:

Whenever it shall be made known to any of the judges of the district courts of appeal or any judge of a circuit court or a county court in this state that a member of The Florida Bar practicing in any of the courts of the district or judicial circuit or county has been guilty of any unprofessional act as defined by these rules, such judge may direct the state attorney for the circuit in which the alleged offense occurred to make in writing a motion in the name of the State of Florida to discipline such attorney, setting forth in the motion in the name of the State of Florida to discipline such attorney, setting forth in the motion the particular act or acts of conduct for which the attorney is sought to be disciplined.

FLA. RULES OF PROFESSIONAL CONDUCT 3-7.8(a) (1997).

206. *Murray*, 443 So. 2d at 956 (citing *Arango v. State*, 437 So. 2d 1099 (Fla. 1983); *Jackson v. State*, 421 So. 2d 15 (Fla. 3d Dist. Ct. App. 1982), *Spenkelink v. Wainwright*, 372 So. 2d 927 (Fla. 1979)(Alderman, J., concurring specially)).

207. 22 Fla. L. Weekly D1707 (2d Dist. Ct. App. July 11, 1997).

Unfortunately, too many lawyers are forgetting their obligation of professionalism.²⁰⁸

It appears prosecutorial misconduct during closing argument will continue in Florida unless the trial courts recognize closing arguments which are designed to be inflammatory, as opposed to dramatic, and either grant mistrials, or proceed with a disciplinary action through The Florida Bar.²⁰⁹ Perhaps a proper deterrent would be to require prosecutors and defense counsel to attend oral argument when there are issues of prosecutorial misconduct and invited response.

It is imperative that lawyers be aware of the specific ethical obligation they assume when they step into the role of an advocate.²¹⁰ "If attorneys do not recognize improper argument, they should not be in a courtroom."²¹¹ All attorneys should govern themselves by the words of Chief Justice Gerald Kogan: "[Y]ou can win your cases, you can win the tough ones, but you have to do it with dignity and with honor We are a noble and an honorable profession."²¹²

Candice D. Tobin

208. *Id.* at D1708.

209. FLA. RULES OF PROFESSIONAL CONDUCT Rule 3-7.8(a).

210. See Timothy P. Chinaris, *Professional Responsibility: 1996 Survey of Florida Law*, 21 NOVA L. REV. 231, 278 (1996).

211. *Luce v. State*, 642 So. 2d 4, 4 (Fla. 2d Dist. Ct. App. 1994).

212. Honorable Gerald Kogan, *Keynote Address at the Annual Nova Law Review Banquet March 29, 1996*, 21 NOVA L. REV. 1, 4 (1996).

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