MINNESOTA JUDICIAL TRAINING UPDATE

PROSECUTORIAL MISCONDUCT

PROBLEM: WITH EACH NEW GENERATION OF PROSECUTORS MANY OF THE SAME PROSECUTORIAL MISCONDUCT MISTAKES ARE REPEATED. ENCLOSED ARE TWO JUDICIAL RESOURCES TO ASSIST THE COURT IN ADDRESSING THIS ONGOING CONCERN?

JUDGES GENERALLY FALL INTO ONE OF TWO PHILOSOPHICAL CATEGORIES:

REACTIVE APPROACH	PROACTIVE APPROACH
If you prefer to be REACTIVE, then you most likely will not raise the issue of prosecutorial misconduct with the attorneys prior to commencement of trial. In that case, you can use this update to assist you in ruling on possible objections raised during trial. **However, "Reducing the incidence of prosecutorial misconduct is a shared obligation and trial courts have a duty to intervene and caution the prosecutor, even in the absence of objection….." *State v. Ramey, 721 N.W.2d 294 (Minn. 2007).***	**If you prefer to be PROACTIVE, then you can use this update as a judicial reference tool and as a handout for the attorneys prior to commencement of trial:** **1. To establish judicial guidelines on what is and is not permissible.** **2. To establish the court's expectations on this issue.** **3. To direct that if either attorney plans to ask a question or raise an argument of doubtful propriety, under these guidelines, they should first seek permission from the trial court outside the presence of the jury.**

ATTACHMENT #1: A summary list of 15 common categories of prosecutorial error;

ATTACHMENT #2: Detailed citations and case law examples for each category.

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ATTACHMENT #1

PROSECUTORIAL MISCONDUCT: SUMMARY LIST

1) SHIFTING THE BURDEN OF PROOF
   a) Commenting on Defendant's failure to call witnesses or present evidence.
   b) Arguing that State's case is "undisputed."

2) INJECTING ISSUES BROADER THAN GUILT OR INNOCENCE
   a) Race or socioeconomic status when not relevant to the case.
   b) Gratuitous attacks on the defendant's character.

3) ACCUSE DEFENDANT OF TAILORING TESTIMONY, UNLESS SUPPORTED BY EVIDENCE

4) ASKING "WERE THEY LYING" QUESTIONS

5) ELICITING INADMISSIBLE EVIDENCE

6) MISSTATING THE BURDEN OF PROOF

7) MISSTATING THE PRESUMPTION OF INNOCENCE

8) EXPRESSING A PERSONAL OPINION – VOUCHING

9) BELITTLING THE DEFENSE

10) INFLAMING THE PASSIONS OF THE JURY
   a) Accountability
   b) Appeals to Justice
   c) Personalizing the Argument

11) COMMENTING ON A DEFENDANT'S FAILURE TO TESTIFY

12) MISUSING *SPREIGL* EVIDENCE

13) SPECULATING ABOUT EVENTS ABSENT A FACTUAL BASIS

14) ELICITING IMPROPER OR HIGHLY PREJUDICIAL TESTIMONY

15) INJECTING SELF INTO PROCEEDINGS: "I", "WE", "ME"

ATTACHMENT #2

THE FOLLOWING IS A DETAILED LIST OF CITATIONS AND CASE LAW EXAMPLES FOR THE 15 CATEGORIES OF PROSECUTORIAL MISCONDUCT LISTED ABOVE

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(My thanks to Hennepin County for granting permission to reprint this material)

1. SHIFTING THE BURDEN OF PROOF

A. Failure to call witnesses or present evidence.

Commenting on a defendant's failure to call witnesses or present evidence improperly shifts the burden of proof. State v. Race, 383 N.W.2d 656 (Minn. 1986); State v. Mayhorn, 720 N.W.2dd 776 (Minn. 2006).

However, if a defense theory is offered, the State may comment on the lack of evidence to support the theory.

State v. Race (permissible to comment on lack of evidence to support defense claim that life raft was vandalized).

State v. Gassler, 505 N.W.2d 62 (Minn. 1993)(permissible to argue that defendant's claim in opening statement of an alternative perpetrator was not supported by the evidence).

State v. Haynes, 725 N.W.2d 524 (Minn. 2007)(No reversible error in cross-examining defendant as to whether his mother and sisters could have seen him sleeping on couch – did not directly comment on failure to call those witnesses, the questioning was brief, and not referenced in closing argument).

B. Arguing that State's case is "undisputed."

Arguing that the State's case or certain elements are "undisputed" improperly shifts the burden of proof. State v. Bailey, 677 N.W.2d 380 (Minn. 2004) (prosecutor argued only issue was identity).

2. INJECTING ISSUES BROADER THAN GUILT OR INNOCENCE

A. Race or socioeconomic status when not relevant to the case.

i) *Other World Arguments*

It is improper to ask jurors to apply irrelevant racial and socioeconomic considerations to their deliberations.

State v. Ray, 659 N.W.2d 736 (Minn. 2003)(Improper to argue case was about "three black males from the 'hood" a "world wholly outside [the jurors'] own]").

State v. Clifton, 701 N.W.2d 793 (Minn. 2005)(Improper to argue that State's witnesses were from Tangletown which is a "different world" than the jurors').

State v. Dobbins, 725 N.W.2d 492 (Minn. 2006)(Improper to refer to defendant's "world" as different than "our world").

However, it may be permissible to discuss the "gang world" or the "real world" if the comments are brief, supported in the record, do not attempt to compare others to the jurors, and do not reference a particular race, neighborhood or culture**.**

State v. Jackson, 714 N.W.2d 681 (2006)(Permissible to refer to "gang world" in introducing argument about "respect" and the role it played in the murder).

State v. Paul, 716 N.W.2d 329 (Minn. 2006)(Permissible for prosecutor to describe "real world" where witnesses were uncooperative and argument urged jurors to focus on the evidence).

State v. Mayhorn, supra (Reference to "drug world" might have been proper by itself, but it became improper when prosecutor said that this "drug world" is "kind of foreign for all of us" and thus aligned herself with the jury).

ii) ***Race***

It is highly improper for a prosecutor to inject race into the trial where it is not raised in testimony and not relevant to issues of guilt or innocence.

State v. Cabrera, 700 N.W.2d 469 (Minn. 2005)(Suggesting that defense was "throwing mud on young black men" and that defense questions amounted to "racist speculation" highly improper).

B. Gratuitous attacks on the defendant's character.

i) ***Fidelity***

Questions about a defendant's fidelity are also error unless they have relevance to guilt or innocence because they amount to character attacks.

State v. Dobbins, 725 N.W.2d 492 (Minn. 2006)(Prosecutorial error in questions regarding defendant's faithfulness to his girlfriend and the paternity of her child because they were not relevant to guilt or innocence).

State v. Mayhorn, supra (Improper to ask nearly 40 questions about various girlfriends and "baby mamas," and if he lied to the girlfriends by not telling them about each other).

ii) ***Derogatory comments about the defendant.***

State v. Buggs, 581 N.W.2d 329 (Minn. 1998)(Improper to refer to defendant as a "coward" with a "twisted" thought process" but harmless).

State v. Ives, 568 N.W.2d 710 (Minn. 1997)(Improper to argue defendant was "would-be punk…with a pathetic little life).

State v. Washington, 521 N.W.2d 35 (Minn. 1994)(Improper character attack to use Aesop's Fable about scorpion to argue that defendant committed the crime because "It's in my nature.").

3. COMMENTING ON TAILORING TESTIMONY

Commenting on a defendant's ability to be present at trial and hear the witnesses implicates a defendant's Sixth Amendment rights.

State v. Davis, 735 N.W.2d 674 (Minn. 2007)(No record of actual tailoring).

Accordingly, it is improper to ask questions or argue that a defendant has "tailored" trial testimony based upon the defendant's presence in court unless there is actual evidence of tailoring. Davis.

State v. Dobbins, supra, (Improper to question defendant about presence at trial and ability to tailor testimony absent evidence of actual tailoring but error was harmless).

State v. Buggs, 581 N.W.2d 329 (Minn. 1998)(Cautioning prosecutors that excessive dwelling on defendant's presence in court absent evidence of fabrication may lead to future reversals but harmless in this case).

However, where there is evidence of actual tailoring, e.g. a change in story from pre-trial to trial, it may be proper for the prosecutor to ask questions regarding tailoring.

State v. Ferguson, 729 N.W.2d 604 (Minn. App. 2007)(Proper to argue tailoring when defendant denied to police that he had seen victim, but after receiving discovery in case and learning State's evidence, changed his story at trial).

4. ASKING "WERE THEY LYING" QUESTIONS

It is generally improper to ask one witness to comment on the credibility of another witness. This occurs most often when the prosecution cross-examines the defendant about the testimony of other witnesses and asks "Were they lying when they testified…?"

State v. Pilot, 595 N.W.2d 511 (Minn. 1999)("Were they lying" questions generally improper.)

State v. Morton, 701 N.W.2d 225 (Minn. 2005)(Improper to cross-examine defendant with "were they lying" questions where it could lead jury to believe that they must think witnesses were lying in order to acquit defendant).

State v. Wren, supra, (Asking police officer to comment on credibility of defendant's statement that could be proven false was error).

However, "were they lying" questions may be permitted if the defendant "holds the credibility of the State's witnesses in central focus" by claiming that the witnesses are lying or flatly denying the occurrence of the events.

State v. Pilot, supra, (Adopting a flexible rule permitting such questions where "were they lying" questions may have a probative value in (1) clarifying a particular line of testimony, (2) in evaluating the credibility of a witness claiming that everyone but the witness lied or, (3) the witness "flatly denies the occurrence of events.")

State v. Dobbins, supra, (No error in "are they lying" questions where defendant claimed State's witness did the shooting and put witness' credibility in 'central focus').

5. ELICITING INADMISSIBLE EVIDENCE

It is improper to elicit inadmissible evidence.

State v. Fields, 730 N.W.2d 777 (Minn. 2007)(Improper to elicit, or attempt to elicit clearly inadmissible evidence – may extend to evidence not previously ruled inadmissible by trial court).

State v. Brown, 739 N.W.2d 716 (Minn. 2007)(Improper to cross-examine defendant about shoe print evidence previously ruled inadmissible – curative instruction adequately addressed the error).

State v. Ray, 659 N.W.2d 736 (Minn. 2003)(Prosecutor repeatedly elicited testimony previously ruled inadmissible).

State v. Williams, 525 N.W.2d 538 (Minn. 1994)(Improper to elicit inadmissible hearsay and "drug courier profile" evidence through officer).

6. MISSTATING THE BURDEN OF PROOF

It is highly improper to misstate the burden of proof. State v. Coleman, 373 N.W.2d 777 (Minn. 1985).

State v. Hunt, 615 N.W.2d 294 (Minn. 2000)("Questionable" whether analogy to Greek system of placing stone on scale for each successful argument was improper, but no plain error where prosecutor also correctly stated burden).

State v. Strommen, 648 N.W.2d 681 (Minn. 2002)(Misstatement of burden for prosecutor to ask jury to "weigh the story in each hand and decide which is the most reasonable.").
State v. Stone, 2004 WL 1776005 (Minn. App. 2004)(unpublished) (No error in arguing that reasonable doubt was "not some sort of magical standard that the state meets every once in a great while.").
State v. Bailey, 677 N.W.2d 380 (Minn. 2004)(Cautioning prosecutors against "equating DNA probability statistics with proof beyond a reasonable doubt.")

7. MISSTATING THE PRESUMPTION OF INNOCENCE

It is improper for a prosecutor to misstate the presumption of innocence. State v. Salitros, 499 N.W.2d 815 (Minn. 1993).

State v. Young, 710 N.W.2d 272 (Minn. 2006)(Not improper to argue that defendant was presumed innocent until state produced proof beyond a reasonable doubt- similar statement found in CRIMJIG 3.02).
State v. Jensen, 242 N.W.2d 109 (1976)(Improper to argue that presumption of evidence is shield for innocent not cloak for guilty)

8. EXPRESSING A PERSONAL OPINION - VOUCHING

It is improper for a prosecutor to interject personal opinion, become an unsworn witness, or otherwise personally attach himself or herself to the cause which he or she represents. State v. Everett, 472 N.W.2d 864 (Minn. 1991).

A. *"I submit"*

State v. Blanche, 696 N.W.2d 351 (Minn. 2005)(Phrases "I submit" and "I think" were improper expressions of personal opinion).
State v. Bradford, 618 N.W.2d 782 (Minn. 2000)(Phrase "I submit" did not inject personal opinion but merely offered an interpretation of the evidence).
State v. Hobbs, 713 N.W.2d 884 (Minn. App. 2006)(State's use of "I submit" preceded several statements regarding the evidence while also acknowledging jury's role in fact finding therefore no error).

B. *Other Personal Opinions*

State v. Dobbins, supra, (Improper for prosecutor to state "I would be honest if I testified").
State v. Mayhorn, supra, (Improper personal opinion for prosecutor to infer that a witness was a "liar").

C. *Vouching*

Vouching occurs "when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." State v. Lopez-Rios, 669 N.W.2d 603 (Minn. 2003).
State v. Hobbs, supra, (Improper vouching for prosecutor to argue "she told you the truth" about victim.).
In re D.D.R, 713 N.W.2d 891 (Minn. App. 2006)(Improper vouching for prosecutor to state that young child "can't" repeat lie consistently over time).
State v. Lopez-Rios, 669 N.W.2d 603 (Minn. 2003) (No improper vouching where prosecutor argued "He had to be truthful and I submit to you he was truthful from the beginning.").
State v. Gail, 713 N.W.2d 851 (Minn. 2006)(No improper vouching where prosecutor argued that a State's witness was "a believable person" and "frank and sincere" where State was arguing that witness was credible based upon the evidence-The State may argue that particular witnesses were or were not credible).

9. BELITTLING THE DEFENSE

The State may argue that the evidence does not support a particular defense but it is improper to belittle a defense in the abstract or to suggest that a defense was raised because it is the only one that would be successful. State v. MacLennan, 702 N.W.2d 219 (Minn. 2005).

State v. Williams, 525 N.W.2d 538 (Minn. 1994)(Improper belittling to suggest that the defendant had to raise a particular defense).

State v. Salitros, supra, (Improper to argue "there's another real common defense tactic…" and "They throw in the kitchen sink").

State v. Bettin, 244 N.W.2d 652 (Minn. 1976)(Improper to call insanity a pushbutton defense).

State v. Bashire, 606 N.W.2d 449 (Minn. App. 2000)(Improper to call the consent defense the "oldest game in town.").

State v. Jones, 753 N.W.2d 677 (Minn. 2008)(Characterizing the defense as an "old trick" is plain error).

BUT SEE

State v. Ashby, 567 N.W.2d 21 (Minn. 1997)(Not improper for prosecutor to argue that allegations are easy to make but hard to prove in addressing the defense theory of an alternative perpetrator).

State v. Davis, supra, (Prosecutor's "colorful" argument, that the defense was "preposterous" and that the defense argument would lead to "anarchy," did not improperly belittle the claim of self-defense).

State v. Graham, 764 N.W.2d 340 (Minn. 2009)(Not improper for the state to argue that the defense had not, based on the evidence, presented a solid case).

10. INFLAMING THE PASSIONS OF THE JURY

A "prosecutor must avoid inflaming the jury's passions and prejudices against the defendant." State v. Porter, 526 N.W.2d 359 (Minn.1995).

A. *Accountability*

State v. Salitros, supra, (Argument unduly emphasizing accountability -- "Accountability is a lesson that this young man has not yet learned, and the State is asking you to teach it to him." -- is inflammatory and improper)

State v. Gates, 615 N.W.2d 331 (Minn. 2000)(It is permissible for a prosecutor to discuss accountability and urge jurors not to decide a case based on sympathy for the defendant -- "Everyone loses if the persons responsible are not held accountable. And what we ask you to do ... is render a verdict that is fair and just. On that is a confirmation of the truth.").

B. *Appeals to Justice*

State v. McNeil, 658 N.W.2d 228 (Minn. App. 2003)(In a child sexual abuse case, it is improper for the prosecutor to tell the jury "You can't give her back her childhood. You can't give her back her virginity. But you can give her justice.").

C. *Personalizing the Argument*

Arguments that invite the jurors to put themselves in the shoes of the victim are considered improper. State v. Johnson, 324 N.W.2d 199 (Minn. 1982).

11. COMMENTING ON A DEFENDANT'S FAILURE TO TESTIFY

It is generally improper for a prosecutor to allude directly or indirectly to the defendant's failure to testify. State v. Whittaker, 568 N.W.2d 440 (Minn. 1997).

State v. Naylor, 474 N.W.2d 314 (Minn. 1991)(Prosecutor's statements that "we're never going to know what happened" but that the "defendant knows the truth" was improper but not prejudicial where comment was brief and not emphasized and other evidence was overwhelming).

State v. DeRosier, 695 N.W.2d 97 (Minn. 2005)(same)

State v. Johnson, 679 N.W.2d 378 (Minn. App. 2004)(Where consent defense raised in sex case it was improper for prosecutor to argue that "There is not a single witness who can stand up and say I heard" the victim consent).

State v. Coley, 468 N.W.2d 552 (Minn. App. 1991)(same).

12. MISUSING *SPREIGL* EVIDENCE

It is improper for a prosecutor to use closing argument to make Spreigl evidence into improper substantive evidence. State v. Peterson, 530 N.W.2d 843 (Minn. App. 1995)(Prosecutor improperly argued Spreigl evidence by referring to "two boys" and that the idea of a coincidence "stretches reality and common sense too far.").

13. SPECULATION

It is improper for counsel to speculate about events occurring at the time of the crime absent a factual basis on the record. State v. Thompson, 578 N.W.2d 734 (Minn. 1998). State v. Bradford, 618 N.W.2d 782 (Minn. 2000)(The prosecutor committed misconduct by engaging in speculation about the events surrounding the victim's death, even to the point of creating dialogue.)

14. ELICITING IMPROPER OR HIGHLY PREJUDICIAL TESTIMONY

"It is improper for a prosecutor to ask questions that are calculated to elicit or insinuate an inadmissible or highly prejudicial answer. Any time a prosecutor desires to make an inquiry of doubtful propriety, the prosecutor should seek permission from the trial court in chambers before asking the question. Prosecutorial error, however, may be cured by court instructions unless the error imparts substantial prejudice into the case." State v. Brown, 739 N.W.2d 716 (Minn. 2007)(internal citations omitted).

15. INJECTING SELF INTO PROCEEDINGS: "I", "WE", "ME"

a. Align self with jury and exclude Defendant
   i. "We aren't a part of Defendant's world," *State v. Mayhorn, 720 N.W.2d 776 (Minn. 2006)*
b. Refer to prosecutorial experience
   i. "I've tried a lot of cases, and I know…", *See State v. Abendroth, 2006 WL 2598207, unpublished, (Minn. App. September 12, 2006)*
c. Personalize evidence
   i. "If my children were involved…", *See State v. Abendroth, 2006 WL 2598207, unpublished, (Minn. App. September 12, 2006)*