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Prosecutorial Misconduct in Closing Argument in Arkansas Criminal Trials

J. Thomas Sullivan
PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT IN
ARKANSAS CRIMINAL TRIALS

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Prosecutorial misconduct in jury argument proves to be one of the most difficult problems to address for criminal defense counsel. Although argument does not constitute evidence and the jury is instructed not to consider it as such, the use of dramatic, compelling, or even inflammatory argument reflects a perception that argument is a valuable ingredient in the deliberative process which may result in conviction or imposition of a substantial sentence within the sentencing range by the jury.

1. The significance of closing argument or summation in the trial process, generally, is perhaps best illustrated by the Supreme Court's decision in Herring v. New York, 422 U.S. 853 (1975), in which the Court held that denial of an opportunity for summation in the context of a non-jury trial constitutionally compromised the Sixth Amendment guarantee of effective assistance of counsel. Justice Stewart, writing for the majority, observed:

There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has been universally held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge.

Id. at 858.

2. The model jury instructions include a specific admonition to jurors not to consider the argument or comments of counsel as evidence: "Opening statements, remarks during the trial, and closing arguments of the attorneys are not evidence, but are made only to help you in understanding the evidence and applicable law. Any argument, statements, or remarks of attorneys having no basis in the evidence should be disregarded by you." ARKANSAS MODEL CRIMINAL INSTRUCTIONS 101(3) (1982). The Arkansas Supreme Court has viewed this general instruction as sufficient to de-emphasize the role of argument in preventing misuse of argument by jurors in their deliberations. For instance, in Abraham v. State, the court observed:

The jury is not unaware of the difference between argument and fact and is usually instructed that opening statements and closing arguments are not to be regarded as evidence. We believe those instructions and admonitions generally suffice, except where the comments are patently inflammatory and prejudicial, or where improper tactics are so repetitious that fairness is overcome.


3. For example, the Arkansas Supreme Court refused to reverse the prosecutor's argument that an acquittal would give the defendant, John "Fifteen" Tillman, a "license to kill" in Tillman v. State, 228 Ark. 433, 307 S.W.2d 886 (1957).

4. The Herring Court observed:

It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.
Nevertheless, in making the decision to object to improper argument, defense counsel is forced to make a number of subjective assessments concerning the potential prejudice which may result from the argument itself, or an adverse ruling on the objection by the trial court. Because any objection must generally be made contemporaneously to the argument, counsel is left with little time to consider whether an objection is appropriate; whether even a favorable ruling is likely to cure prejudice; and whether, in the context of the evidence developed at trial, relief in the form of mistrial is preferable to continuing to verdict.5

This article provides an overview of Arkansas case law addressing the proper scope of argument by counsel in criminal trials; examples of improper argument; preservation of error based on improper argument; and consequences of trial and appellate action ultimately granting relief.6 Because of the nature of the criminal process, in which appellate review is almost universally available only upon conviction of the defendant, the article addresses the problem of final argument error primarily from the perspective of prosecutorial misconduct.7

422 U.S. at 862; see also Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986). In Skipper, the majority observed that the prosecutor’s powerful closing argument “which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison” would support an instruction a that a capital defendant’s prior good behavior while confined be admissible as mitigation evidence in a capital sentencing proceeding, consistent with constitutional requirements. See id. at 8.

5. Declaration of mistrial on the defendant’s motion generally waives double jeopardy protections under the Fifth Amendment to retrial, of course. The significant exception to the general rule applies when the prosecution has “goaded” the defense into moving for mistrial through repeated acts of misconduct otherwise denying the accused a fair trial. See Oregon v. Kennedy, 456 U.S. 667 (1982).


7. In fact, the disparity in relative recourse to appellate courts for consideration of claims of misconduct which serves to virtually insulate defense misconduct from formal review may result in treatment by appellate courts de-emphasizing enforcement of rules concerning closing argument when error predicated on prosecutorial misconduct is urged. See, e.g., Nidiry, supra note 6, at 1300.

Current procedures fail because appellate enforcement falls more heavily on prosecutors, due to the inability of prosecutors to appeal trial-level misconduct
II. FEDERAL CONSTITUTIONAL CONSIDERATIONS

One important aspect of prosecutorial misconduct occurring in the argument of the case is that few United States Supreme Court decisions have addressed the problem in constitutional terms. In Donnelly v. DeChristoforo, for example, the Court rejected a state inmate's claim brought in federal habeas focusing on the prosecutor's personal assertion of the accused's guilt and characterization of the defense strategy. The tenor of the remarks which prompted the First Circuit to reverse the habeas court's denial of relief was certainly not so inflammatory or dramatically prejudicial as to have warranted review by the Supreme Court had the First Circuit not reversed the case. Because the First Circuit had essentially overstepped the bounds of federal habeas jurisdiction, its decision merited review not because of the desirability of considering the proper parameters of prosecution summation, but because the circuit court had miscast relatively modest trial error as a due process violation.

Typically, in fact, only limited circumstances have provoked the Court's review of argument impropriety in the past few decades. The Court has

9. See id. at 640 n.6 ("The challenged remark was: 'I honestly and sincerely believe that there is no doubt in this case, none whatsoever.").
10. See id. "The prosecutor's second challenged comment was directed at respondent's motives in standing trial: 'They (the respondent and his counsel) said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder.'" The trial court admonished the jury to disregard the statement, but denied the defense motion for mistrial. See id. at 640-41.
11. See DeChristoforo v. Donnelly, 473 F.2d 1236 (1st Cir. 1973).
12. The Donnelly Court relied on Cupp v. Naughten, 414 U.S. 141, 146 (1973) for the proposition that federal habeas relief is available only if state court error violates a right recognized as guaranteed to the petitioner by the Fourteenth Amendment. See Donnelly, 416 U.S. at 642. The Court then rejected the petitioner's argument that the prosecutor's misconduct so "infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643.
13. For example, in dissenting from the denial of certiorari in a capital case, Justice Marshall specifically related several improper comments made by the prosecution in closing argument which he believed fatally compromised the defendant's right to fair trial. See DePew v. Ohio, 489 U.S. 1042 (1989). In his brief opinion, Justice Marshall noted that the majority of the Ohio Supreme Court had observed in affirming the judgment and sentence: "While the prosecutorial misconduct in this case does not require a reversal of appellant's sentence, we express our mounting alarm over the increasing incidence of misconduct by both prosecutors and defense counsel in capital cases." Id. at 1044 (quoting State v. DePew, 528 N.E.2d 542, 556 (Ohio 1988)).
reviewed argument occurring in the context of capital prosecutions for basic unfairness in the sentencing process and claims focusing on the accused’s decision to exercise the Fifth Amendment privilege against self-incrimination. In *Caldwell v. Mississippi*, for instance, the Court reviewed an argument in a capital prosecution in which the prosecutor deliberately sought to minimize the significance of the jury’s sentencing decision by telling jurors that any error in their decision would be corrected by an appellate court on the appeal of the case. *Caldwell* precipitated additional litigation focusing on procedural default by counsel for capital defendants seeking to raise similar claims.

The hope for the criminal defense bar that *Caldwell* would provide a significant starting point for development of constitutional doctrine regarding prosecutorial misconduct in argument has been dampened by the Court’s subsequent decision in *Darden v. Wainwright*. There, the Court addressed a more typical variety of misconduct occurring in criminal trials, albeit in the context of a death penalty trial. The prosecutor engaged in a series of improprieties, including: characterizing the defendant as an “animal”; arguing

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15. *See id.* at 326. On direct appeal, the Mississippi Supreme Court had considered the issue *sua sponte*, but concluded over a vigorous dissent that the argument was not so unfair as to require vacation of the death sentence. *See Caldwell v. State*, 443 So. 2d 806, 807, 815 (Miss. 1983).
16. *See, e.g.*, Dugger v. Adams, 489 U.S. 401, 408 n.4 (1989); Sawyer v. Smith, 497 U.S. 227 (1990). In *Sawyer* the prosecutor argued, in part: [I]t is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions. *Id.* at 231-32. Because the litigation in *Sawyer* was finalized prior to the announcement of the Court’s decision in *Caldwell*, the Court held that the later ruling could only be relied upon by the petitioner if *Caldwell* did not announce a “new” rule of constitutional criminal procedure. *See id.* at 233. Otherwise, reliance on the more recent decision was barred under *Teague v. Lane*, 489 U.S. 288, 301 (1989), in which the Court had concluded that such new rules are not retroactive for similar constitutional claims raised in criminal cases which have become final prior to the announcement of the new rule. *See id.* In *Sawyer*, the Court held that the rule announced in *Caldwell* was not subject to retroactive reliance under *Teague* and its exception for “watershed rules of criminal procedure that guarantee the accuracy of a criminal proceeding.” *Sawyer*, 497 U.S. at 233. Yet, the tenor of the improper argument in *Caldwell* required reversal precisely because it threatened the accuracy of the jury’s sentencing decision. Nevertheless, this particular threat to accuracy apparently does not necessitate a rule rising to “watershed” status. *See id.* at 244.
18. *See Darden*, 477 U.S. at 180 & n.11. “As far as I am concerned, and as Mr. Maloney said as he identified this man, this person is an animal, this animal was on the public for one
that the Department of Corrections was culpable in having released the defendant, and thus, the death penalty was the only way to avoid the possibility that he might be released again; and making emotional pleas that he wished the victim had "blown [Darden's] face off" and that he could see Darden "sitting here with no face, blown away by a shotgun." After recounting changes in the defendant's appearance between the time of the offense and trial, the prosecutor told the jury that the only change in appearance Darden had not made was to "cut his throat." The Court observed that it was only after this final statement that defense counsel interposed an objection to the argument for the first time.

The Darden majority condemned the prosecutor's argument without reservation, noting that every other court reviewing it had reached the same conclusion. Nevertheless, the Court did not reverse because the argument was not deemed sufficiently egregious to demonstrate a violation of due process, the applicable standard for review of claims of prosecutorial misconduct in closing argument. The majority's rejection of constitutional error was supported by the unfortunate line of argument engaged in by the defense which essentially invited, if not justified, the prosecution's response. Because the trial court admonished the jurors that the arguments of counsel did not constitute evidence and instructed jurors to arrive at their verdict on the evidence alone, the majority concluded that the likelihood that the jury was unduly influenced by the prosecutor's closing was diminished. Finally, the majority was persuaded that defense counsel was actually able to utilize the...
inflammatory argument in a tactically sound manner in defusing jury passion against the accused.26

_Darden_ indicates continued viability of the general principle that extreme argument may implicate due process concerns. It also tempers the premise with the additional message that argument which is invited by defense counsel or addressed by timely curative action by the trial court will not afford an accused relief under federal constitutional protections.

The other generic source of constitutional final argument claims addressed in United States Supreme Court decisions involves those that arise from improper comment on the accused’s decision not to testify, specifically addressed in Section IV.A. of this article.

III. THE PROPER SCOPE OF ARGUMENT

Generally, counsel are afforded broad latitude in arguing the case to the jury in criminal trials. Typically, counsel are entitled to argue the evidence and reasonable inferences to be drawn from the evidence;27 to argue the credibility and demeanor of witnesses who have testified and credibility of evidence generally,28 to rebut the arguments of opposing counsel,29 and in the case of the prosecution, to make an appropriate plea for law enforcement.30 Prosecution argument which reflects a correct statement of law is also proper.31

26. See id. at 182-83.
28. The framework for analysis utilized here reflects a different assessment of the nature of the argument process than that which may be evident in other categorization of the permissible parameters of closing argument in the criminal case. For example, Texas courts have consistently adhered to the following scheme in discussing claims of prosecutorial misconduct in summation: “[I]n order to constitute proper jury argument, the argument must encompass one of the following: 1) summation of the evidence presented at trial, 2) reasonable deduction(s) drawn from that evidence, 3) answer(s) to the opposing counsel’s argument, or 4) a plea for law enforcement.” Shannon v. State, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996). The author believes that the first two categories noted by Texas courts involve much the same type of argument, while an entirely separate and critical line of argument focuses on relative credibility of the evidence presented.
30. For instance, in Byrd v. State, 76 Ark. 286, 88 S.W. 974 (1905), the court permitted argument in which the prosecutor alluded to the seriousness of the offense in arguing that the “case is so cruel and barbarous that it is without parallel in the history of crime.” Id. at 290, 88 S.W. at 976.
31. See, e.g., Bowen v. State, 322 Ark. 483, 508, 911 S.W.2d 555, 567 (1995) (trial court correctly overruled defense objection to prosecutor’s argument that mental or emotional disturbance must be “extreme” in order to qualify as mitigating circumstance in capital prosecution).
A. Summary of Evidence

The most obvious purpose of summation is to permit counsel to review the evidence in light of the theory of the case in a fair effort to persuade the factfinder to adopt counsel’s theory, or reject a theory propounded by the opposing party. The proper scope of summation includes not only reference to the specific testimony or evidence developed at trial, but also reasonable inferences which may be drawn from the evidence.32

Arkansas courts have afforded counsel broad latitude in arguing the evidence and reasonable inferences which may be drawn from the evidence. For example, in Samples v. State,33 the court of appeals upheld argument in a prosecution for first-degree sexual abuse in which the prosecutor characterized the defendant as a "sexual deviate" and "pervert." These characterizations were undoubtedly fairly drawn from evidence that the defendant had engaged in sexual contact with a thirteen-year-old child. However, the court also approved the prosecutor’s argument in which he stated “he’s taking pictures of this community’s children.” The evidence showed that the defendant had a photographic studio and took pictures of children. The court’s opinion does not reflect any evidence that defendant misused his photography studio for criminal purposes, yet the court held the argument was “proper.”35

The problem with the argument in Samples is that it is apparently not based upon evidence adduced at trial as reflected in the court’s review of the record in its opinion affirming the conviction. Nor is it necessarily a reasonable inference drawn from the evidence relating to the accused’s activity as a photographer. In fact, one might question why if the studio was being misused in such a fashion, evidence of additional sexual misconduct was not adduced at trial. Whether as a result of poor investigation, or the fact that the charge accurately reflected a single act of misconduct, the record did not reasonably support an inference that the defendant was indeed threatening the community’s children. Instead, the argument itself could only have been calculated as a deliberate and quite effective appeal to the jury’s passions to return a conviction and impose a substantial sentence in the case.

In Perry v. Smith,36 the prosecutor argued the inference that the defendant, who had stabbed the victim after a drunken argument while gambling, had

32. ABA Standard for Criminal Justice 4-7.8, in pertinent part, provides: "(a) In closing argument to the jury the lawyer may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for a lawyer intentionally to misstate the evidence or mislead the jury as to the inferences it may draw." (2d ed. 1980).
34. See id. at 170, 902 S.W.2d at 262.
35. See id. at 171, 902 S.W.2d at 262.
actually "jumped on the victim's back." The eyewitnesses who testified only saw the two men fighting face-to-face. In the context of the accused's self-defense claim, the prosecutor's speculation, not based upon either eyewitness testimony or expert testimony concerning the likely origin of various wounds sustained by the victim, would seem unduly unfair. However, because the general admonition limits the jury's purview to evidence and advises that arguments of counsel do not constitute evidence, this may have been a case in which such speculation did not require curative action. Nevertheless, in a self-defense case, the mere suggestion that the prosecutor has a good faith or reasonable basis for suggesting facts other than those developed through eyewitness or expert testimony would appear prejudicial precisely because jurors may not recall that the argument simply represents the prosecutor's gloss on the evidence actually available.

Counsel is permitted to argue facts which could be judicially noticed by the trial court, as in Hall v. State, where the court held that prosecutor's argument that heroin is the "most dangerous drug" was not improper. The broad latitude afforded prosecutors in arguing inferences reasonably drawn from the evidence is evident in the court's opinions in Abraham v. State and Combs v. State. In Abraham, a prosecution for aggravated robbery of a pharmacy, the prosecutor argued that the State was "... fortunate, very fortunate that our witnesses are here to testify ... I have no idea what he intended to do with the drugs when they got there." The trial court did not rule on the defendant's mistrial motion, but offered to admonish the jury to disregard, which counsel declined. The court concluded that the argument was not impermissible because counsel is free to argue every plausible inference which may be drawn from the evidence. In so holding, it distinguished the facts from those in Combs, where the court had held the following argument prejudicial, but cured by the trial court's admonition: "[B]ut for the grace of God and the quick thinking of [Officer Howard] you might be considering today two counts of capital felony murder against this man." The facts showed that Combs had only moved toward his pocket, rather than actually withdrawing and threatening with a weapon. The Combs court termed

37. Id. at 386, 500 S.W.2d at 393.
38. In fact, the court noted that no motion for mistrial or request for admonition had been made by counsel. See id.
41. 270 Ark. 496, 606 S.W.2d 61 (1980).
42. Abraham, 274 Ark. at 508.
43. See id.
44. See Abraham, 274 Ark. at 509.
45. Id.
the argument a "significant impropriety" because it was too speculative in light of the facts actually developed at trial.46

In *Gruzen v. State*,47 the supreme court approved of the prosecutor's argument inferring that the defendant had traveled by automobile and train so that he could carry a gun without being detected by an airport security system. The inference was fair because the defendant had purchased a gun in Little Rock which was later found at his home in New Jersey after he returned there by train.48 The critical issue in this trial was the defendant's sanity; this line of argument was relevant in demonstrating his ability to act rationally.

B. Arguing Credibility of Witnesses and Evidence

Counsel may use argument to stress the relative strengths and weaknesses of testimony by arguing the credibility or lack of credibility of witnesses who have testified. One very significant area of argument generally available to counsel lies in assessing the relative credibility of witnesses and theories presented by the parties during the course of trial. This may involve commenting on the demeanor of witnesses while testifying, or on their admitted or denied interests or biases in presenting testimony.

In *Calloway v. State*,49 for example, defense counsel complained of the prosecutor's reference during argument in asserting that the accused had accused other witnesses of lying during her trial testimony. The court noted that while the defendant had never actually accused the State's witnesses of lying, there was contradiction on several points.50 The court observed:

... the prosecutor's arguments were logical inferences based on the testimony of the witnesses. It is logical to conclude that if a defendant testifies in a manner that completely contradicts a witness's testimony, there is an implication that the defendant is saying the witness is lying. This easily falls within the confines of permissible argument.51

Typically, counsel will pursue any basis for impeachment of the witness on cross-examination, such as the relationship of a witness to the victim or accused or any benefit conferred upon a witness inducing their testimony in the form of a plea bargain or compensation for expert testimony. Or, counsel may address the soundness of the theory proposed by the opponent, particularly

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46. See Combs, 270 Ark. at 498, 606 S.W.2d at 62-63.
47. 276 Ark. 149, 634 S.W.2d 92 (1982).
48. See id. at 158, 634 S.W.2d at 97.
49. 330 Ark. 143, 953 S.W.2d 571 (1997).
50. See id. at 150, 953 S.W.2d at 575.
51. Id.
when the prosecution relies on circumstantial evidence or accomplice testimony for conviction, or the defense asserts a defensive theory in the nature of self-defense, or the affirmative defense of insanity, duress, or entrapment. In Maxwell v. State, for example, the prosecutor characterized the defendant as a "rapist, thief and escapee" in a first-degree murder prosecution. In response to defense counsel’s motion for mistrial, the prosecutor explained that he only used these terms in arguing the defendant’s credibility against that of the police officers who testified against him at trial. The supreme court held that the argument was not improper "in that context," while reversing on other grounds. Proper argument should be based upon evidence or demeanor of the witness, however, rather than merely an assertion of counsel’s personal opinion concerning the credibility of the witness. In Young v. State, the prosecutor argued, though probably harmlessly, his personal opinion that his five-year-old child would have known that the sawed-off shotgun allegedly possessed by the defendant was an illegal weapon "just by looking at it." The trial court sustained defense counsel’s objection and admonished the jury to disregard, but the supreme court was not persuaded that the argument was improper. The court observed that the prosecutor was merely arguing the inherent incredibility of the defendant’s claim, which is not impermissible unless the argument purposely arouses passion and prejudice in the jury.

If anything, the argument was likely objectionable only because the prosecutor prefaced his statement with "I believe," an indicator that a prosecutor is actually interjecting his personal opinion of guilt or credibility in the case. The tenor of argument would clearly have been appropriate, although perhaps not terribly creative, had the prosecutor simply stated that "any five-year-old would know that gun was illegal" rather than in personalizing the argument with his opinion and reference to his five-year-old child.

A particularly powerful prosecution argument relating to witness credibility was upheld in McCroskey v. State. The prosecutor argued that
there was no misconduct evident in the witness's in-court identification of the accused, specifically noting: "But if anything unfair was done, did Mr. Simpson ask about it? No, you can be assured that the identification in this case is a fair one and it is based on the knowledge of the witnesses." The supreme court concluded that there was no impropriety in this line of argument and that it constituted a fair inference from the testimony. The interesting thing about this approach is that the prosecutor specifically relied on the fact that the witness apparently had not been impeached by defense counsel in arguing the credibility of the identification testimony. That the witness was not impeached or even crossed on the question of identification would not necessarily establish that the identification was, in fact, reliable, but it would clearly demonstrate that the defense had not given the jury any reason to doubt the testimony.

C. Responding to Argument of Opposing Counsel

Even facially improper prosecution argument is acceptable if made in response to defense counsel's summation which effectively opens the door to the response. For example, a comment on the defendant's election not to testify may be appropriate where the defense affirmatively argues or intimates that the police or prosecution did not afford the accused an opportunity to explain his defense.

The prosecutor may use argument to respond to a suggestion by defense counsel that the prosecutor has engaged in misconduct in the course of the proceedings. In Calloway v. State, defense counsel "repeatedly made reference" to the fact that a witness had changed his story after talking with the prosecutor. The prosecutor responded in argument:

And another thing about these oaths. I take an oath. He's exactly right. I took an oath as a deputy prosecutor. So, when he stands up here and says that Curtis Cochran tailored his testimony to suit me, then he maligns me.

60. Id. at 213, 608 S.W.2d at 11.
61. See id.
62. In United States v. Young, 470 U.S. 1 (1985), the Court held that improper argument in which the prosecutor asserted his personal opinion as to the merits of the case was not reversible as a matter of plain error (as opposed to error preserved by timely trial objection) because the prosecutor was actually responding to defense counsel's attack on the credibility of the government's case. See id. at 10-11 (citing Lawn v. United States, 355 U.S. 339, 359-60 n.15 (1958)), where the Court recognized the "invited response" doctrine as permitting reasonable reply to opposing counsel's argument.
64. 330 Ark. 143, 953 S.W.2d 571 (1997).
Well, ladies and gentlemen, I took an oath. So, if you believe that what I did was told Curtis Cochran what to say . . . .

The trial court sustained defense counsel’s objection and admonished the jury that counsel are not permitted to “inject their own personalities in the trial,” and the supreme court rejected the defendant’s argument on appeal that the admonition was ineffective in curing the error. Instead, the court relied on the trial court’s finding on the record that defense counsel had questioned the prosecutor’s integrity in argument and held that her response was “invited” by the defense argument.

Defense counsel’s action in “opening the door”67 to prosecution response, even with facts not adduced before the jury, typically impliedly waives objection to the response.68 Thus, where defense counsel asked the jury “Why didn’t the State call Dorothy Jean Gatewood,” this inquiry during argument justified the prosecutor’s explanation, in response, as to why Dorothy Jean Gatewood had not been called to testify.69

In *Rooks v. State*,70 the prosecutor interjected new facts in closing argument and commented on the defendant’s failure to call witnesses or produce evidence of the victim’s reputation for violence.71 The “new facts” included the prosecutor’s explanation that the defendant’s son had planted evidence, a wrench, under the body of the deceased. In a case suggesting

65. *Id.* at 149, 953 S.W.2d at 574.
66. *Id.* at 149-50, 953 S.W.2d at 574-75 (“We have no doubt that the prosecutor should be allowed to counter any suggestion of suborning perjury.”).
67. The principle of “opening the door” suggests a number of potentially dangerous traps for the defense. This general principle serves not only to permit otherwise improper argument rebutting defense argument, but also the admission of otherwise inadmissible evidence. For instance, in *Wilburn v. State*, 289 Ark. 224, 711 S.W.2d 760 (1986), the court observed that when the accused presents evidence of good character, evidence of bad character or commission of other crimes, which might otherwise be inadmissible, becomes admissible as proper rebuttal. *Accord*, *McFadden v. State*, 290 Ark. 177, 181, 717 S.W.2d 812, 814 (1986) (defendant’s testimony denying rape of complainant or other children who had lived with him “opened the door” to testimony from stepdaughter that she had also been raped by defendant).
68. The court has characterized the policy of permitting the prosecution or other party to respond to “an untruthful statement, introduction of inadmissible evidence, or . . . an improper closing argument” as “fighting fire with fire.” *See, e.g.*, *Larimore v. State*, 317 Ark. 111, 121, 877 S.W.2d 570, 574 (1994) (citing *Walder v. United States*, 347 U.S. 62, 65 (1954)) in which the Court held that constitutionally inadmissible evidence of other criminal activity may be rendered admissible if necessary to rebut an accused’s trial testimony denying prior criminal activity—in *Walder*, that he had never dealt in illegal narcotics.
70. 250 Ark. 561, 466 S.W.2d 478 (1971).
71. *See id.* at 565-66, 466 S.W.2d at 481.
“battered woman’s syndrome,” the defendant testified that she shot the victim after he threw a wrench at her. Injection of new facts during argument, however, was clearly improper unless invited by defense counsel’s argument. Here, the defensive testimony raised the issue of the victim’s act of aggression with the wrench. Without articulating the argument held to invite the response, the supreme court concluded that speculation about the son’s involvement in planting evidence was “proper rebuttal material in light of the matters discoursed upon in appellant’s preceding closing argument.”

Without more information concerning the precise argument advanced by the defense, it is not possible to evaluate the court’s conclusion that the rebuttal was, in fact, appropriate. However, it is important to note that the son was not called to testify either by the defense, which would have permitted the prosecution to cross-examine him, or by the prosecution, which could have clearly called the son in rebuttal. Rather than suggesting the son’s possible tampering with evidence in argument, the prosecutor should have properly produced the evidence alluded to in rebuttal. Otherwise, the potential for abuse of the “opening the door” justification for responding with “evidence” outside the trial record is apparent.

However, when the prosecutor responded to defense counsel’s argument in *Heritage v. State* that sentencing the accused to the penitentiary for a drug crime might result in the release of a “murderer or a rapist” due to overcrowding, the trial court properly overruled defense counsel’s motion for mistrial based on the prosecutor’s characterization of the argument as “improper,” “unfounded,” and “a false statement.” The supreme court noted that defense counsel had particularly objected to the prosecutor’s remarks during a bench conference because jurors were able to overhear the prosecutor’s argument to the trial court. The trial court had inquired of the jury as to whether they had overheard the remarks and jurors replied in the negative. The court also observed that defense counsel had not requested a specific admonition for the jury to disregard the prosecutor’s comments. More importantly, the court failed to address defense counsel’s strategy in arguing that jurors should base a sentencing decision on speculation that incarceration of the defendant would result in release of a more dangerous criminal. This argument itself appears patently improper, but the court nevertheless addressed the issue purely in terms of curative action taken by the trial court, rather than offering direction concerning the propriety of defense counsel’s line of argument.

72. *Id.* at 556, 466 S.W.2d at 481.
73. 326 Ark. 839, 936 S.W.2d 499 (1996).
74. *See id.* at 847-48, 936 S.W.2d at 504.
75. *See id.* at 848, 936 S.W.2d at 504.
D. Plea for Law Enforcement

The prosecution is typically afforded leeway to make a plea to jurors to enforce the law although unduly prejudicial or impassioned argument may exceed the bounds of propriety. In Wetherington v. State, the prosecutor argued in a DWI prosecution that the statute exists "so people won't be out there killing our kids." The trial court overruled defense counsel's objection to this line of argument.

In considering the issue, the supreme court held that the argument was not designed to appeal to the passions of the jury, but instead, represented a fair expression of the public policy underlying the DWI statute. Clearly, the statute is designed to prevent the death of children and adults as well. Moreover, the argument is certainly designed as a plea for law enforcement. Unless there was evidence of death, injury, or even near injury to a child as a result of the defendant's action in driving while intoxicated, however, the plea was not appropriate.

Predicating a plea for conviction on public policy should only be appropriate when the facts presented fairly raise the question of the policy supporting the statutory prohibition. In a DWI prosecution, the potential for prejudice resulting from an impassioned plea based upon the lives of the community's children is significant. It suggests the possibility of other misconduct committed by the accused, or the need to punish this particular accused for other offenses which have resulted in a loss of life.

The prosecution is also afforded broad latitude in arguing policy concerns in its plea for punishment. In Hunter v. State, the prosecutor asked the jury to consider "all the circumstances" of the offense and impose the maximum punishment for burglary. The defense argued that the fact that the defendants

defense counsel opened the door to the prosecutor's discussion of parole which advised jurors that the defendant would only serve one-third of her sentence by arguing that the defendant would serve the entire sentence assessed.

77. In arguing for imposition of the death penalty, the prosecutor in Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986), argued that the defendant could not be trusted to behave if returned to prison. This line of argument was not condemned, but did warrant the Court's conclusion that the defendant's history of good behavior in prison was admissible as a mitigating circumstance.

78. For instance, in United States v. Johnson, 968 F.2d 768, 769 (8th Cir. 1992), the court reversed a drug conviction where the prosecution had argued that the jury should act as a "bulwark" against drug trafficking, where the argument served to inflame the jury in light of the marginal evidence of the defendant's guilt and the trial court's denial of the defense motion for mistrial.

79. 319 Ark. 37, 889 S.W.2d 34 (1994).
80. Id. at 40-41, 889 S.W.2d at 36.
81. See id. at 41, 889 S.W.2d at 36.
82. 264 Ark. 195, 570 S.W.2d 267 (1978).
had beaten the elderly victim of the burglary established a battery and should not be considered in imposing punishment on the burglary. The court upheld the argument as proper, noting that the range of punishment authorized by the legislature reflected its intent that the sentencing jury should consider aggravating and mitigating circumstances impacting on the sentencing decision in terms of the options available for setting the punishment. Otherwise, the court concluded there would be "no basis for the exercise of discretion."

Argument requesting jurors to "send a message" to criminals or would-be criminals invites conviction and punishment for policy reasons rather than strictly upon the evidence developed at trial; yet this line of argument has typically been approved in Arkansas trials. Thus, in Reynolds v. State, the prosecutor invited the jurors to "send a message" to drug dealers to stay out of Montgomery County and cautioned them against sending the opposite message that drug-trafficking and illegal firearms possession would not be prosecuted by acquitting the defendant. The trial court sustained defense counsel's objection and admonished the jury to disregard the statements, and the court of appeals noted that defense counsel had failed to request a stronger admonition or other relief. The observation is curious because the court proceeded to find the argument proper as a "plea to the jury to convict [the accused] on the evidence presented in order to deter others from engaging in the same conduct." Since the argument was deemed proper, any additional action sought by defense counsel should have been futile.

In Arkansas capital prosecutions, the general plea for law enforcement may actually be inappropriate because the General Assembly has specifically directed the capital sentencing jury to arrive at the punishment based on unanimous answers to specific interrogatories. As a consequence, a general

83. See id. at 196, 570 S.W.2d at 268.
84. Id. at 197, 570 S.W.2d at 268.
85. See, e.g., Floyd v. State, 278 Ark. 342, 347, 645 S.W.2d 690, 693 (1983) (Any prejudice from prosecutor's argument that "We can't continue in this community or any community to have these people commit crimes..." was cured by trial court's admonition that jury was aware of defendant's other criminal behavior).
86. 18 Ark. App. 193, 712 S.W.2d 329 (1986).
87. See id. at 199, 712 S.W.2d at 332.
88. Id. (citing Hill v. State, 253 Ark. 512, 487 S.W.2d 624 (1972) for reliance on long-standing approval of prosecution argument about "the futility of maintaining courts if juries do not convict on evidence of guilt or if laws are not enforced").
89. See ARK. CODE ANN. § 5-4-603 (Michie 1987) which provides in pertinent part:
   (a) The jury shall impose a sentence of death if it unanimously returns written findings that:
       (1) Aggravating circumstances exist beyond a reasonable doubt; and
       (2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and
       (3) Aggravating circumstances justify a sentence of death beyond a reasonable
plea may actually ask the jury to consider matters touching on public expectations for punishment which are not relevant to the sentencing jury’s deliberations. For example, in Bowen v. State the prosecutor argued that a former candidate for Attorney General had expressed his belief that the death penalty served as a deterrent to crime, a position impliedly already found by the General Assembly in enacting a capital sentencing statute. This line of argument is far different from a general plea for law enforcement, particularly because the jury in a capital prosecution has already been qualified on the question of opposition to the penalty during voir dire and the general issue of the value of capital punishment is not raised by the special issues upon which an Arkansas capital sentencing jury is charged by statute.

In a capital prosecution reversed on other grounds, Wilson v. State, the court held that the prosecutor’s argument urging jurors to “tell Ron Wilson he will never commit another murder” was merely designed to reinforce the jury’s need to act collectively in imposing sentence. The trial court had taken no action to address any prejudice from the remark, and the supreme court concluded that the argument was not designed to suggest that there was evidence from which the jury could infer that the defendant would kill in the future. While this line of argument might effectively constitute a plea for law enforcement in a non-capital trial, it does not bear on the special issues posed in the capital sentencing proceeding.

Defense counsel in capital cases should carefully consider whether generalized punishment argument may actually invite a jury to impose the death penalty for reasons unrelated to the precise issues before it, such as whether death would further a law enforcement interest not specifically encompassed within the sentencing issues. If so, then timely and specific objection which embraces federal constitutional grounds such as due process and fairness in capital sentencing to preserve misconduct claims for federal review is especially warranted.

91. 295 Ark. 682, 690, 751 S.W.2d 734, 739 (1988).
92. See, e.g., Miller v. Lockhart, 65 F.3d 676, 682-84 (8th Cir. 1995), in which the Eighth Circuit affirmed a grant of habeas relief in an Arkansas death penalty case based, at least in part, on multiple incidents of prosecutorial misconduct in closing argument, despite the state supreme court’s prior review resulting in affirmation of the conviction and death sentence. Miller v. State, 269 Ark. 341, 348-49, 605 S.W.2d 430, 435-36 (1980).
IV. LIMITATIONS ON CLOSING ARGUMENT

The Supreme Court’s message in addressing misconduct in closing argument by the prosecution has been clearly articulated, if not consistently applied. In Berger v. United States, the Court admonished prosecutors not to utilize improper methods “calculated to produce a wrongful conviction,” while recognizing the legitimate need for prosecutors to “prosecute with earnestness and vigor.” The Court’s subsequent history in reviewing misconduct claims suggests that one of the critical unanswered questions in its perspective may rest on one’s view of “wrongful conviction.” If the wrongfulness of the conviction is established by misconduct of the prosecutor in securing the conviction, then aggressive enforcement of all rules of trial procedure is essential. However, if the question of wrongfulness is viewed in terms of the actual guilt or innocence of the accused, then much misconduct is simply excused by application of harmless error rules in which the weight of evidence warrants the conclusion that an innocent defendant has probably not been convicted.

Arkansas courts have recognized a number of categories or species of prosecutorial misconduct in closing argument; others may be suggested by more general analysis which have not been specifically reviewed in published decisions of the Arkansas appellate courts.

A. Comment on Defendant’s Silence

A significant category of claims involving improper prosecution argument involve comments directly or indirectly referring to the accused’s decision to exercise the privilege against self-incrimination accorded by the Fifth Amendment. Often the most devastating argument a prosecutor may advance lies in a direct or indirect plea that the accused has failed to rebut evidence of his guilt by explaining why he is, in fact, not guilty. The sheer power of this line of argument and its inherent compromise of the right afforded by the

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93. 295 U.S. 78 (1935).
94. Id. at 88.
95. U.S. CONST. amend. V provides in pertinent part: “No person shall . . . be compelled in any criminal case to be a witness against himself . . . .” The Arkansas Constitution includes a similar guarantee in essentially the same language. See ARK. CONST. art. 2, § 8.
96. For instance, in Griffin v. California, 380 U.S. 609 (1965), the Court observed:
For comment on the refusal to testify is a remnant of the “inquisitorial system of criminal justice” which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused’s knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that
Fifth Amendment\textsuperscript{97} have resulted in the Supreme Court consistently holding that uninvited prosecutorial comment on an accused’s decision not to testify at trial violates the Fifth Amendment guarantee.\textsuperscript{98}

Moreover, the scope of the right to remain silent not only applies to the accused’s decision not to testify at trial, but to any evidence of silence subsequent to issuance of Miranda warnings in the course of investigation of the case. Thus, in \textit{Doyle v. Ohio},\textsuperscript{99} the Court held that once an accused has been informed of his right to remain silent, no constitutionally appropriate reference to post-warning silence is permissible. To hold otherwise would effectively compromise the exercise of the privilege. However, the prohibition does not apply to comments directed at pre-warned silence, when admissible under state evidence law.\textsuperscript{100} Consequently, final argument referring to any post-warning silence is subject to review on federal constitutional grounds.\textsuperscript{101}

The prohibition clearly addresses direct comments on silence, but also applies to indirect references to an accused’s decision not to testify. However, in the latter case, the prosecutor’s comment is much more likely to be assessed in terms of its probable understanding by and effect on jurors before error is declared, except in the rare case in which intent to engage in misconduct can be gleaned from the record. For example, in \textit{Adams v. State},\textsuperscript{102} the prosecutor asked “How many witnesses did the defense put on for your consideration?,” and the court concluded this question constituted an impermissible reference to the accused’s decision not to testify at trial. This line of argument does not necessarily implicate an accused’s decision not to testify, however, and may actually refer to the failure to produce evidence despite the ability of the
defense to use its subpoena power to develop a theory of the case. Thus, in *Van Cleave v. State* the court held that the prosecution’s reference to the failure of the defense to call expert witnesses to rebut conclusions drawn by the prosecution did not constitute a comment on the defendant’s exercise of his privilege against testifying personally at trial.

Argument which indirectly implicates the accused’s decision not to testify, however, has resulted in reversal in Arkansas. In *Bailey v. State*, the prosecutor impliedly raised the question of the defendant’s silence by arguing that his alleged rape victim was the only person to have testified concerning events occurring in the room where she testified defendant had raped her several times over a 24-hour period. The majority distinguished between comments directed at “the defendant’s failure to personally dispute the state’s case” from the “failure of the defense to present any witness or evidence to dispute the state’s case.” Subsequently, in *Aaron v. State*, the court relied on *Bailey* in reversing another rape conviction in which the prosecution had indirectly alluded to the accused’s failure to testify in arguing that in response to the prosecutrix’s testimony that sexual intercourse was not consensual: “There’s been no testimony to rebut that or no testimony inconsistent with that.”

Despite the court’s oft-expressed concern over prosecutorial misconduct in alluding to the decision not to testify, the failure of trial counsel to timely

103. For example, in *Cook v. State*, 316 Ark. 384, 872 S.W.2d 72 (1994), the prosecutor argued with vigor concerning the defense failure to produce a witness who would have corroborated the testimony of a key alibi witness. While conceding that the prosecutor might have attempted to shift the burden of proof to the accused, the court held that any prejudice was cured by the trial court’s admonition, which included an instruction that the defense was not required to subpoena or call “any particular individual for any reason.” *Id.* at 386-87, 872 S.W.2d at 73-74. Similarly, in *Bradford v. State*, 328 Ark. 701, 704, 947 S.W.2d 1, 2-3 (1997), the prosecutor did not improperly argue that there was “no dispute” that the defendant was found with drugs in his possession, citing the general proposition that the prosecution may “refer to the undisputed nature of testimony when the State’s evidence could have been disputed by evidence other than the testimony of the accused.” *Id.*

104. 268 Ark. 514, 598 S.W.2d 65 (1980).

105. The prosecutor argued: “Ladies and gentlemen, you have heard testimony here in this court by these witnesses that counsel for defense have had this stuff (defendant’s clothing worn on the night in question), since the 27th of June. If they wanted to dispute all of this, they have experts. They could examine it.” *Id.* at 522-23, 598 S.W.2d at 70.

106. See *id.*


108. See *id.* at 184, 697 S.W.2d at 110.

109. *Id.* at 185, 697 S.W.2d at 111. The majority’s differentiation was disputed by Justice Hays, in dissent, who argued that there was little difference in inferences drawn in cases previously affirmed from that in the instant case. See *id.* at 186-87, 697 S.W.2d at 112 (Hays, J., dissenting).

110. 312 Ark. 19, 846 S.W.2d 655 (1993).

111. *Id.* at 21-22, 846 S.W.2d at 656-57.
object to improper argument in this respect will result in a waiver of error. This approach reflects the general Arkansas rule rejecting a doctrine of fundamental error.112

B. Argument Outside of the Record

The well-recognized prohibition which restricts counsel to summation of evidence admitted at trial or reasonable inferences which may be drawn from that evidence is grounded, in part, in general requirements for professional behavior.113

Arkansas courts adhere to the general rule that argument which attempts to place before the jury facts not in evidence is improper. In *Williams v. State*,114 the supreme court reiterated this general principle, noting: "We have stated that we will *always* reverse a case where counsel goes beyond the record and states facts that are prejudicial to the opposite party *unless the trial court by its action has removed such prejudice.*"115 The *Williams* Court proceeded to observe that the prosecutor's duty is to "use all fair, honorable, reasonable, and lawful means to secure a conviction of guilty in a fair and impartial trial."116 It then admonished prosecutors not to engage in misconduct due to the desire to convict: "The desire to obtain a conviction is never proper inducement to include in closing arguments anything except the evidence in the case and legitimately deducible conclusions from the applicable law."117

The typical argument outside the record involves one of three scenarios: reference to the accused's criminal history or other criminal conduct not disclosed during testimony; reference to other evidence known to the prosecutor, but excluded by ruling of the trial court and thus, not disclosed to jurors during the case; and suggestion of "other" evidence or facts known only to the prosecutor and not disclosed to jurors.

113. For example, Rule 3.4(e) of the Arkansas Model Rules of Professional Conduct precludes a lawyer from "allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, [or] assert[ing] personal knowledge of facts in issue except when testifying as a witness . . . ." *Id.*
114. 294 Ark. 345, 742 S.W.2d 932 (1988).
115. *Id.* at 350, 742 S.W.2d at 935 (emphasis added) (citing Adams *v.* State, 176 Ark. 916, 5 S.W.2d 946 (1928)).
116. *Williams*, 294 Ark. at 350, 742 S.W.2d at 935.
117. *Id.* at 351, 742 S.W.2d at 935 (citing Mays *v.* State, 264 Ark. 353, 571 S.W.2d 429 (1978)).
1. Defendant's Other Criminality

All defense attorneys recognize that the accused's prior record, if serious, or other criminal activity, is typically the most devastating fact that can be disclosed to a jury in the trial of the average criminal case. This perception often dominates counsel's strategy in advising the defendant not to take the witness stand, precisely because prior felony convictions will be admissible to impeach the defendant's testimony. In addition, while extraneous offense evidence may be admissible for purposes other than impeachment under Evidence Rule 404(b), an accused may open the door to admission of extraneous offenses while testifying.

The supreme court reversed the convictions in Simmons and Flippo v. State where the prosecutor in a rape trial alluded to an allegation that co-defendant Flippo had committed an unrelated rape. The closing argument reflected cross-examination of Flippo on this issue which had been permitted by the trial court in overruling defense counsel's timely objection to the questioning. The court concluded: "There is no evidence in the record which provides, under any logical analysis, a foundation for the prosecuting attorney's statement to the jury." The court then relied on its earlier expression in Brown v. State:

118. Although Ark. R. Evid. 404 precludes admission of other criminal activity to prove defendant's predisposition to commit the crime charged, this rule is riddled with exceptions for use of other crimes evidence to show the defendant's guilt for the instant offense by showing "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ark. R. Evid. 404(b).

119. See Alford v. State, 223 Ark. 330, 266 S.W.2d 804 (1954) (holding evidence of other criminal activity inadmissible to show defendant has criminal propensity). In Holbird v. State, 299 Ark. 551, 775 S.W.2d 893 (1989) the prosecutor argued that the robbery had been committed by "a real professional" and that the evidence showed that the defendant was a "real professional." Id. at 552, 775 S.W.2d at 893. The trial court admonished the jury to base the decision only on evidence and not on the basis of counsel's argument, curing error. See id. However, Arkansas decisions have found no error in referring to some individuals as "rats," see Gustafson v. State, 267 Ark. 278, 590 S.W.2d 853 (1979); to the defendant as a "con artist," see Miller v. State, 250 Ark. 199, 464 S.W.2d 594 (1971); or when the prosecutor referred to the defendant as making his living from crime, see Johnson v. State, 249 Ark. 208, 458 S.W.2d 409 (1970).

120. See Ark. R. Evid. 609(a), which permits impeachment with prior convictions involving felonies or offenses involving dishonesty or false limit, subject to a limitation that convictions more than ten years old are not admissible for impeachment. See also Ark. R. Evid. 609(b).

121. See supra n.119.

122. 233 Ark. 616, 346 S.W.2d 197 (1961).

123. See id. at 617, 346 S.W.2d at 198.

124. See id.

125. Id. at 618, 346 S.W.2d at 198.
The prosecuting attorney is not allowed to state, as a matter of fact, that of which there is no evidence. His statement in the case at bar was not within the latitude of discussion the law affords to counsel. Its evil tendency and prejudice to the rights of the defendant are manifest.126

Characterization of the accused as a “dope dealer” resulted in reversal in Mays v. State,127 in an aggravated robbery prosecution in which there was no evidence that the accused was a drug dealer or user. Because the prosecutor persisted in the argument even though the jury was admonished by the trial court not to consider the argument, the supreme court concluded that the admonition was inadequate to cure prejudice resulting from the argument.128

Similarly, in Wimberley v. State,129 the court held that the prosecutor’s argument that “every time he [the defendant] gets in trouble his poor old mother comes up here and pays his fine” improperly characterized the defendant as an habitual offender.130 The resultant prejudice could not be cured by the trial court’s “mild admonition” to consider only argument based on testimony and required reversal.131

In Free v. State,132 the reversal was based not on improper argument, but on the prosecutor’s tactics in cross-examining the defendant in a rape trial by intimating that the defendant had committed a similar act some three years before which resulted in an accusation of rape.133 The trial court’s admonition to the jury to disregard the question was deemed inadequate to prevent the likely prejudice from the suggestion that the defendant had previously committed a rape.134 The court reached a similar conclusion in Dillon v. State135 when the prosecutor referred to commission of other criminal acts in her cross-examination.

126. 143 Ark. 523, 531, 222 S.W. 377, 380 (1920).
128. See id. at 356, 571 S.W.2d at 430.
129. 217 Ark. 130, 135, 228 S.W.2d 991, 994 (1950).
130. Id.
131. See id. at 136, 228 S.W.2d at 944. In contrast, in Tallant v. State, 42 Ark. App. 150, 156-57, 856 S.W.2d 24, 28 (1993), the court concluded that the trial court’s admonition to jurors to disregard the prosecutor’s comment that the defendant “had been there before” (which defense counsel argued alluded to the accused’s prior convictions) was sufficient to cure any prejudice from the admittedly ambiguous comment.
132. 293 Ark. 65, 732 S.W.2d 452 (1987).
133. See id. at 71-72, 732 S.W.2d at 455. The trial court sustained an objection to the improper line of questioning and admonished the jury, but denied defendant’s motion for mistrial. See id. at 72-73, 732 S.W.2d at 456.
134. See id. at 73, 732 S.W.2d at 456.
The prosecutor's reference to the defendant's commission of another murder in a capital prosecution in *Nooner v. State* was deemed a "slip of the tongue" by the circuit court, which instructed the jury to disregard the comment on defense counsel's motion, but overruled the motion for mistrial. The court concluded that the admonition cured any prejudice resulting from the comment, but the instruction that arguments of counsel do not constitute evidence would appear inadequate. In the context of a capital murder trial, the most damning potential reference to facts outside the trial record would be disclosure of a conviction or charge of murder not otherwise proved by the prosecution. Instructing jurors that argument does not constitute evidence fails to dispel the quite logical conclusion that the defendant had, in fact, committed another murder that simply was not relied upon as part of the prosecution's case. The prejudice lies not only in the fact that jurors might have improperly considered the argument as a summation of evidence, but that they would also factor the improperly disclosed murder into their deliberations on the punishment issues, assuming that the defendant had committed another murder. The trial court's admonition was simply insufficient to prevent a misuse of the disclosure by jurors who could hardly be expected not to believe the prosecutor's statement unless expressly advised that the statement was, itself, not correct.

Similarly, argument suggesting commission of additional crimes in the future by the defendant may be inappropriate, even when the evidence has included proof of extrinsic offenses, as the opinion in *Magar v. State* suggests. There, the trial court sustained defense counsel's objection in a child sexual abuse prosecution to the prosecutor's statement: "And I don't know how many more small children we are going to allow him to . . . ." The court of appeals upheld the denial of mistrial by the trial court while it had specifically admonished the jury to disregard the prosecutor's speculation about the defendant's future behavior without ruling on whether the argument was improper.

137. See id. at 110, 907 S.W.2d at 689.
138. See id.
140. See Magar, 39 Ark. App. at 51, 836 S.W.2d at 386-87.
2. *Evidence Known to Prosecutor, but Not Admitted Before the Jury*

Prosecutors often are privy to significant information which simply cannot be used at trial, whether as a result of constitutional violations in its acquisition or evidentiary infirmities, such as operation of the hearsay rule. For instance in *Jewell v. State*, the prosecutor alluded to a statement made by the defendant admitting the shooting to officers upon his arrest, which was ordered suppressed by the trial court. On cross-examination, the prosecutor inquired as to whether the defendant had made the statement admitting he shot the "son of a bitch." The defendant did not answer as a result of a timely objection and admonition by the trial court to jurors to disregard the question. In closing, the prosecutor again alluded to the statement. On appeal, the court concluded that the trial court's admonition to jurors to disregard the statement cured prejudice, particularly in light of the defendant's admission that he shot the victim. The only potential prejudice resulted from the disclosure that he had referred to the victim pejoratively, a fact minimized by other evidence in the record demonstrating a history of animosity between the two which supported the defendant's conviction for manslaughter. In dissenting, Judge Mayfield argued that the reference was significant in suggesting that the defendant did not believe his use of force was reasonable, but that he fired because of his dislike for the victim and that this evidence could hardly have not impacted on the jury's consideration of the self-defense claim.

In *Littlepage v. State*, a drug case, the prosecutor alluded to information that one witness, Ball, had received regarding a "white Cadillac" being driven by the defendant. Defense counsel objected that this evidence had not been adduced during trial and the trial court admonished the jury that argument of counsel did not constitute evidence. In fact, the evidence had been developed at a pre-trial hearing and not offered in the jury's presence. The court concluded that the admonition cured the error.

This type of reference to evidence not before the jury is particularly pernicious because not only does the prosecutor make reference to matters which otherwise would not be considered by the jury because they were admitted at trial, but the reference undermines the role of the trial court in protecting the accused's right to a fair trial. When the prosecutor is able to

142. See id. at 256, 832 S.W.2d at 857.
143. See id. at 259, 832 S.W.2d at 858 (Mayfield, J., dissenting). The dissent was apparently concerned that the prosecutor had deliberately attempted to circumvent the trial court's pre-trial ruling and initial admonition to disregard the improper question propounded on cross-examination through his allusion to statement in argument.
144. 314 Ark. 361, 863 S.W.2d 276 (1993).
145. See id. at 371, 863 S.W.2d at 281-82.
circumvent the trial court’s action in protecting the accused from evidence improperly seized or lacking a proper evidentiary foundation for admissibility, not only is the integrity of the resulting verdict compromised, but the trial court’s role in the criminal process is jeopardized.

3. Suggestion of “Other” Evidence or Facts Known Only to the Prosecution

In Timmons v. State,146 the prosecutor engaged in a deliberate tactic to suggest the existence of probative evidence which had been excluded by the court. The forensic serologist who had examined blood samples in the rape investigation could not establish the requisite chain of custody, yet the prosecutor deliberately called her to testify. Defense counsel timely objected to the testimony and the state admitted it could not establish the chain of custody through the witness. Nevertheless, the prosecutor then asked if the witness had examined “some items” submitted by the complaining witness. The court again sustained the objection, but denied defendant’s motion for mistrial.147

In argument, the prosecutor related that he had called the serologist, but that her testimony had been excluded as a result of defense counsel’s objection. The court held that it was improper for the prosecutor to call a witness knowing that the witness could not give “valid relevant testimony” and then argue that the testimony was excluded because of the defendant’s objection.148 The supreme court held that “conduct was prejudicial and could not have been corrected by anything less than a new trial.”149

In contrast, a witness’s unresponsive answer that another suspect had “pled guilty” in the case, was held not to warrant mistrial in Patrick v. State.150 The prosecutor had only asked the officer whether other suspects had been identified in the case and the court held that the admonition to disregard given by the trial court in denying defendant’s motion for mistrial cured error.151

146. 286 Ark. 42, 688 S.W.2d 944 (1985).
147. See id. at 43, 688 S.W.2d at 944.
148. See id. Justice Hays, dissenting, argued that the prosecutor was merely responding to defense counsel’s argument that there was no evidence supporting proof of rape because there was “no examination by a doctor.” He concluded that the prosecutor’s response that he had called the serologist and she had examined samples submitted by the complainant was actually only a response to the door opened by defense counsel. See id. at 48, 688 S.W.2d at 947 (Hays, J., dissenting).
149. Id. at 44, 688 S.W.2d at 945.
151. See id. at 287, 862 S.W.2d at 241.
When the allusion to facts not adduced at trial is insignificant, reversal is not required despite the fact that the prosecutor may have deliberately suggested the existence of other evidence or information in arguing the case to the jury. For instance, in *Gruzen v. State*\(^{152}\) the prosecutor alluded to a "confidential memorandum" which had prompted the investigation of a gruesome Arkansas murder by a New Jersey law enforcement officer. During the trial the officer's testimony had been restricted with regard to the source of information initiating his investigation following a bench conference. The supreme court concluded that the jury must have understood that some information had triggered the investigation and that reference to the "confidential memorandum" did not constitute error.\(^{153}\)

C. Unsworn Personal Opinion of Defendant's Guilt, Merits of the Case, or Credibility of Witnesses

In *United States v. Young*,\(^{154}\) the Supreme Court reaffirmed the general principle that a prosecutor, as an advocate, should not express any personal opinion as to the guilt of the accused or the merits of the government's case.\(^{155}\) Justice Blackmun, dissenting in *Darden*, related the specific argument made at the petitioner's trial which failed to gain relief when the case was considered by the Court:

> Yet one prosecutor, White, stated: 'I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life.' And the other prosecutor, McDaniel, stated, with respect to Darden's testimony: 'Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out.'\(^{156}\)

This type of argument illustrates the impact which a prosecutor may have when asserting personal opinion in support of the merits of the case, or the motive of the accused in contesting guilt.

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152. 276 Ark. 149, 634 S.W.2d 92 (1982).
153. *See id.* at 158, 634 S.W.2d at 97.
154. 470 U.S. 1, 8 (1985).
155. The Court observed: "It is unprofessional conduct for the prosecutor to 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." *See id.* at 8 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE 3-5.8(b) (2d ed. 1980)).
1. **Assertion of the Prosecutor’s Personal Credibility**

The model rules preclude counsel from asserting personal opinion on a series of matters while serving as an advocate. Specifically, counsel is barred from stating: "A personal opinion as to the justness of a cause, the credibility of a witness... or the guilt or innocence of an accused." The general principle is designed to avoid prejudice to the accused’s fair trial right which may occur when the prosecutor, particularly by virtue of public office, is permitted to personally attest to the credibility of her own case. However, Arkansas law permits a prosecutor to express an opinion about the case, such as Tillman v. State in which the prosecutor suggested that an acquittal will serve to give the defendant a “license to kill.”

In Littlepage v. State, the prosecutor argued that the defendant was a drug dealer in a drug trial and opined: "I have no doubt [the defendant] also used some of those drugs but that does not absolve him of the fact that he is also a drug dealer. . . ." The argument did not necessarily constitute an impermissible interjection of personal opinion in the case because it may well have simply been a response to a defensive theory that the defendant was only a user of drugs and not a dealer. Nevertheless, the error was not properly preserved for review because defense counsel neither requested an admonition nor moved for mistrial after the trial court sustained the objection to the argument.

157. For example, in Aaron v. State, 312 Ark. 19, 23-24, 846 S.W.2d 655, 657 (1993), defense counsel’s objection to the prosecutor’s comment that “[t]he victim was telling the truth” was properly sustained by the trial court which then specifically admonished the jury that it was to determine the facts. The admonition cured error, and mistrial was properly denied. See id. at 24, 846 S.W.2d at 657.

158. ARK. MODEL R. PROF. CONDUCT 3.4(e). See also ABA STANDARDS FOR CRIMINAL JUSTICE: 3-5.8(d) (2d ed. 1980) (“The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury’s verdict.”).

159. See Duncan v. State, 291 Ark. 521, 726 S.W.2d 653 (1987), appeal after remand, 309 Ark. 218, 831 S.W.2d 115 (1992) (prosecutor expressed personal opinion about facts in case). However, in Pickens v. State, 292 Ark. 362, 371, 730 S.W.2d 230, 236 (1987), the court rejected the defendant’s argument that the prosecutor’s reference to himself as representing “the people” constituted error requiring reversal, suggesting that the argument was probably permissible.

160. 228 Ark. 433, 307 S.W.2d 886 (1957).

161. Id. at 438, 307 S.W.2d 889-90.

162. 314 Ark. 361, 863 S.W.2d 276 (1993).

163. Id. at 370, 863 S.W.2d at 281.

164. See id. at 371, 863 S.W.2d at 281.
In contrast, in Neff v. State, the supreme court criticized the prosecutor's interjection of a personal opinion of guilt in arguing in the first person: "I'm confident" and "I think you know the defendant is guilty." The court criticized the tenor of this argument, referring to the "bad practice" of interjecting personal opinion, yet held that the argument did not require relief from the conviction on an application for collateral relief, noting that the argument itself did not render the conviction unreliable.

2. Assertion of Credibility of Witnesses or Evidence

The prosecutor vouched for the credibility of evidence in Robinson v. State in arguing that a "neutral authority," the trial judge, had previously approved the photographic lineup procedure which led to the identification of the defendant in court by a number of witnesses. Defense counsel had attacked the lineup because the defendant had not had counsel present during the lineup who might have contested the proceedings for possible coercion of the eyewitnesses. The supreme court held that the trial court's admonition to the jury cured any prejudice from this bolstering of the identification testimony, but Chief Justice Adkisson, joined by Justices Purtle and Hays, offered a vigorous dissent. The dissenters complained that the majority improperly characterized the prosecutor's comment as "invited" precisely because defense counsel had never referred to the trial court's pre-trial ruling in any sense in questioning the identification process.

In Harrison v. State, the court affirmed the defendant's rape conviction over his complaint that the prosecutor had improperly vouched for the credibility of the state's witness, Brooks, in arguing that he was certain that Brooks had not made a statement to the defendant which the defendant claimed he made. Brooks denied making the statement in testimony and the prosecutor argued that he knew that Brooks knew better than to make such a statement. The trial court denied mistrial and admonished the jury to disregard the

165. 287 Ark. 88, 696 S.W.2d 736 (1985).
166. Id. at 93, 696 S.W.2d at 740.
167. See id.
169. See id. at 476, 631 S.W.2d at 296.
170. See id.
171. See id. at 477, 631 S.W.2d at 297 (Adkisson, J., dissenting).
172. See id. at 477-79, 631 S.W.2d at 297-98 (Adkisson, J., dissenting). The dissenters also argued that the prejudicial impact of the prosecutor's allusion to the trial court's participation in the case could not be cured by any admonition, much less that actually given at trial. See id. (Adkisson, J., dissenting).
173. 276 Ark. 469, 637 S.W.2d 549 (1982).
statement, and the court concluded the admonition was adequate to cure prejudice.\textsuperscript{174}

Finally, in \textit{Calloway v. State},\textsuperscript{175} the prosecutor asserted both her own and her witness's credibility in responding to defense counsel's suggestion that the witness had changed his story after discussing the case with the prosecutor. Because counsel impugned the integrity of the prosecutor personally, the supreme court concluded that this response was appropriate, particularly after the trial court admonished the jury that "counsel are not allowed to interject their own personalities in the trial" and that such comments were to be disregarded.\textsuperscript{176}

D. Reference to Polygraph Examination or Results

Arkansas law very clearly recognizes exclusion of polygraph evidence in criminal trials except upon stipulation by counsel prior to administration of the examination.\textsuperscript{177} A reference to polygraph examination or results in closing argument is, therefore, improper.\textsuperscript{178} However, where improper argument followed an unobjected reference to polygraph examination earlier in the course of testimony, the court held that the reference during final argument did not warrant mistrial.\textsuperscript{179}

E. Argument Designed to Inflame Passions of the Jury

Although Arkansas appellate courts adhere to the general principle that argument designed to inflame the passions of jurors against the defendant is impermissible,\textsuperscript{180} the tenor of argument accepted by the courts suggests that prosecutors enjoy great latitude in their attempts to inflame those passions. In \textit{Van Cleave v. State},\textsuperscript{181} for instance, the prosecutor argued: "He's had an opportunity to appear in this courtroom. He has had an opportunity to be tried in a court of law. James Dean [the defendant] never gave Debbie King that opportunity when he cut the life out of her in the store that night."\textsuperscript{182} The

\textsuperscript{174} See \textit{id.} at 475-76, 637 S.W.2d at 553.
\textsuperscript{175} 330 Ark. 143, 953 S.W.2d 571 (1997).
\textsuperscript{176} \textit{id.} at 149-50, 953 S.W.2d 574-75.
\textsuperscript{177} See \textit{Gardner v. State}, 263 Ark. 739, 756, 569 S.W.2d 74, 82-83 (1978).
\textsuperscript{178} See \textit{Van Cleave v. State}, 268 Ark. 514, 524, 598 S.W.2d 65, 70-71 (1980).
\textsuperscript{179} See \textit{Foots v. State}, 258 Ark. 507, 528 S.W.2d 135 (1975); \textit{Van Cleave}, 268 Ark. at 524, 598 S.W.2d at 70.
\textsuperscript{180} "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." \textit{ABA STANDARDS FOR CRIMINAL JUSTICE} 3-5.8(c) (2d ed. 1980).
\textsuperscript{181} 268 Ark. 514, 598 S.W.2d 65 (1980).
\textsuperscript{182} \textit{id.} at 526, 598 S.W.2d at 71.
supreme court upheld the argument, despite its impassioned nature, noting that the argument was "true." The court’s holding demonstrates its lack of fidelity to the principle it simultaneously affirmed. "Truth" is not the touchstone for propriety in terms of the parameters of closing argument. Otherwise, many disclosures during argument of matters not in evidence would be permitted, based on their "truth"; yet they are not permitted, precisely because they are not predicated on the evidence adduced at trial. The issue of the "truth" of the assertion itself warrants inquiry: after all, the assumption that the argument is true rests on the jury finding that the defendant committed the murder. If that finding was tainted by inflammatory argument, then the inference drawn by the appellate court that the prosecutor spoke the "truth" rests on a finding contaminated by the improper argument.

Moreover, the argument approved by the court in Van Cleave is particularly dangerous because it invites jurors to retaliate against the defendant due to his assertion of legal rights, such as his right to demand a trial by jury. If the Fifth Amendment privilege is so susceptible to compromise by comment on its assertion as suggested by the Supreme Court in Griffin v. California, then why is the accused’s demand of jury trial, a right protected under the Sixth Amendment, not equally susceptible to misuse by jurors? Clearly, the argument raises several impermissible inferences, which include the conclusion that the accused is not entitled to rely on the Sixth Amendment or that he only demanded a jury trial because he was factually guilty and hoped to avoid conviction by deceiving jurors.

Commonly, improper appeals designed to inflame the passions of the jury will involve argument expressing the personal opinion of the prosecutor. In Reynolds v. State, the prosecutor argued that jurors faced a difficult duty in determining the guilt of the accused, effectively warning jurors that failure to perform their duty would "strip the Statue of Liberty down, tear away the

183. See id.
184. In fact, Van Cleave had no option in this capital case. Under Arkansas law, he was forced to trial because he could not enter a plea of guilty and avoid a capital sentencing proceeding before a jury. See Ark. R. Crim. Proc. 31.4; see also Fretwell v. State, 289 Ark. 91, 708 S.W.2d 630 (1986).
186. See U.S. Const. amend. VI. The Sixth Amendment right to a jury trial has been expressly extended to state prosecution. See Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial right for all serious, but not petty offenses). However, not all characteristics of the common law jury trial right have been deemed fundamental to the Sixth Amendment guarantee, so that neither twelve person juries, Williams v. Florida, 399 U.S. 78 (1970) (six person jury constitutional), nor unanimous verdicts are required for conviction. See Johnson v. Louisiana, 406 U.S. 356 (1972) (conviction on 9-3 verdict upheld); Apodaca v. Oregon, 406 U.S. 404 (1972) (conviction on 10-2 verdict upheld).
187. 220 Ark. 188, 246 S.W.2d 724 (1952).
American flag, and let them go where they will.” The court held that reversal would result only from flagrant argument arousing the passion and prejudice of the jury, as opposed to “mere” expression of counsel’s opinion.

In Kemp v. State, the prosecutor improperly referred to the feelings of a murder victim’s family stating, “[A]nd I know that his family, when they heard Dr. Peretti testify, they just prayed he was already dead . . . .” However, the supreme court held the trial court’s admonition to jurors to disregard the prosecutor’s reference was sufficient to cure prejudice despite the fact that there was no evidence in the record supporting this line of argument.

And, in Bowen v. State, the Supreme Court of Arkansas considered defense counsel’s objection to the prosecutor’s reference to a conversation with a candidate for the office of Attorney General in which the candidate allegedly affirmed his belief that the death penalty serves as a deterrent to crime. This conversation, assuming that it ever happened, was clearly outside the record of trial and improper, yet the supreme court did not even label the trial court’s action in overruling the objection as “error.” Instead, the court concluded that the statement was simply an expression of the prosecutor’s own belief in capital punishment, insufficient to “inflame the passion of the jury.” This characterization is curious, because the prosecutor’s assertion of his own personal belief in capital punishment would clearly have been improper, yet the implication that elected public law enforcement officials support the penalty permitted the prosecutor to make the point indirectly that would have never been appropriate directly.

F. “Golden Rule” Argument

One line of argument that the Arkansas courts have specifically rejected concerns counsel’s attempt to influence jury deliberations by suggesting that jurors place themselves in the position of the victim of the crime. In King v. State, the prosecutor had argued in a sexual assault case involving a child that jurors should send “a message to those folks” who might want to molest.

188. Id. at 195, 246 S.W.2d at 728.
189. See id.
190. 324 Ark. 178, 919 S.W.2d 943 (1996).
191. See id. at 197-98, 919 S.W.2d at 952.
192. See id.
194. See id. at 508, 911 S.W.2d at 567.
195. Id. at 509, 911 S.W.2d at 567.
196. 317 Ark. 293, 877 S.W.2d 583 (1994).
their neighbors' children, their own children or grandchildren. The state supreme court explained the general rule:

The 'golden rule' argument suggests to jurors that they place themselves in the position of a party or victim. The golden rule argument is impermissible because it tends to subvert the objectivity of the jury. It is seen as an attempt to dissuade the jurors from their duty to weigh the evidence and instead to view the case from the standpoint of a litigant or party. The rule is applied to criminal cases as well as civil cases.

The King Court held that the trial court's timely and specific admonition to jurors to disregard the comment by telling them "not to place themselves in the position of the victim" was sufficient to cure prejudice from the argument. It thus distinguished the case from its prior reversal in Adams v. State where a general admonition was deemed inadequate, noting that the admonition by the trial court in King was specific in instructing jurors not to view the case from the perspective of the victim.

An example of an argument rejected as violative of the Arkansas rule is set forth in Puckett v. State, in which the reviewing court did not find a violation in the following statement made by the prosecutor:

Those of you who have heard all your live[s] about women who do not report rapes--I think can understand why. After seeing and hearing what you have today, you know, you can't imagine why anyone would make a report and come in and get to tell all this dirty little stuff that's happened to you, and you come in here and hear yourself air your life in front of two children. Why would anyone want to go through that?

The court concluded that this argument did not violate the "Golden Rule" prohibition.

G. Argument Attacking Counsel

Another improper strategy for prosecutors is to attack the conduct of the defense in an effort to bolster the credibility of its own case. For instance, in

197. See id. at 296, 877 S.W.2d at 585.
198. Id. at 293, 877 S.W.2d at 586.
199. See id. at 296, 877 S.W.2d at 586.
201. See King, 317 Ark. at 298, 877 S.W.2d at 586.
202. 324 Ark. 81, 918 S.W.2d 707 (1996).
203. Id. at 88, 918 S.W.2d at 711.
204. See id. The Court stated "[t]he closing argument of counsel...[fell] short of suggesting to the jurors that they place themselves in the posture of the victim." Id.
Timmons v. State, the prosecutor specifically alluded to defense counsel’s actions in objecting to evidence and arguing the case to the jury in terms of “doing his job.” In fact, the prosecutor’s deliberate tactic was to suggest the existence of inculpatory evidence which could not otherwise be admitted by blaming defense counsel’s objection for the jury’s inability to hear the evidence.

The prosecutor may also seek to emphasize defense counsel’s relative advantages in an effort to bolster the state’s case. In Gruzen, the prosecutor told the jury that he and his deputy were new to the case and had worked on it for only a short period of time, while defense counsel had spent some five years on the matter. The supreme court ruled the statement “improper,” but did not reverse in light of the trial court’s immediate admonition to jurors that closing argument does not constitute evidence.

A more direct attack on the credibility of defense counsel was noted by the Texas court in reversing a capital murder conviction on the basis of the prosecutor’s argument:

The only thing that I wish is that justice is done in this case. I have taken a sacred oath, in my opinion, to see that justice is done in every case I prosecute... [Defense counsel] has no such oath, and what he wishes is that you turn a guilty man free. That’s what he wishes, and he can wish that because he doesn’t have the obligation to see that justice is done in this case.

The trial court overruled the objection made by defense counsel that the prosecutor was “striking at the defendant over the shoulders of his attorney,” a proper phrasing of the objection under Texas law. The Court of Criminal Appeals, noting the inherent impropriety in permitting the prosecutor to bolster the credibility of his case by arguing his oath, relied on prior Texas decisions in reversing.

205. 290 Ark. 121, 717 S.W.2d 208 (1986).
206. See id. at 123, 717 S.W.2d at 210.
207. See id. at 124-25, 717 S.W.2d at 211. The record reflected that the prosecutor deliberately referred to defense counsel once the trial court admonished the prosecutor: “The Court: The objection is sustained. You cannot refer to any evidence that was not admitted in this trial. [Prosecutor]: I'm not referring to the evidence. I'm referring that she [forensic serologist] was on the stand and he's the one who objected to it, not me.” Id.
208. See Gruzen, 276 Ark. at 158, 634 S.W.2d at 97.
209. See id.
211. Id. at 58.
212. Id.
214. See, e.g., Lewis v. State, 529 S.W.2d 533, 534 (Tex. Crim. App. 1975) (prosecutor
V. PRESERVATION OF ERROR FOR APPELLATE REVIEW

Relief based on improper prosecution argument in closing is relatively rare under Arkansas law, in part because the state supreme court itself has expressed a preference for upholding verdicts even when misconduct has admittedly occurred. The court has observed, for example: "Indeed, a reversal of a judgment due to remarks made by counsel during closing arguments is rare and requires that counsel make an appeal to the jurors' passions and emotions." As a general principle, preservation of misconduct occurring during closing argument requires both a contemporaneous objection and request for relief which is not granted. Additionally, counsel's failure to obtain a ruling on the objection, as in *Dunlap v. State*, where the trial court responded to defense counsel's objection by stating that it would "let the jury decide this case on the instructions I've given you" may result in waiver of any claim on appeal. Or, a failure to abstract the record correctly to properly set forth the complained-of comment and context in which it occurred may also result in a waiver of error on appeal.

One aspect of the objection process often apparently ignored by the appellate courts is the prejudice which may result when the trial court overrules a proper objection or mistrial motion and permits the prosecution to continue an impermissible line of argument. In reviewing an Arkansas capital case in a federal habeas corpus action, the Eighth Circuit Court of Appeals noted that the state trial court had compounded the prejudice resulting from inflammatory argument when it denied defense counsel's mistrial motion and instructed the prosecutor to continue. The prejudice inherent in the trial court's error in

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argued he had taken "solemn oath to God to seek justice, [while] [n]o such oath bears on either one of these [defense] attorneys."); Bell v. State, 614 S.W.2d 122, 123 (Tex. Crim. App. 1981) ("[Defense counsel] is a criminal defense attorney. He doesn't have the same duty I do. He represents the criminal. His duty is to see that his client gets off even if it means putting on witnesses who are lying.") (emphasis added); and Bray v. State, 478 S.W.2d 89, 90 (Tex. Crim. App. 1972) ("We represent the people here in this County. That's who [our] employer is and suffice it to say Ladies and Gentlemen I am grateful and I shall be eternally grateful that you are the people that are my employers and not the likes of him and that I am not representing this sort of thing. Rest assured that I am very happy about that. I am grateful that I don't have to make my living that way."); Boyde v. State, 513 S.W.2d 588, 593 (Tex. Crim. App. 1974) (statement by prosecutor that he would never represent a criminal designed to improperly inflame the minds of jurors against the rights of the defendant).


217. See id. at 162.

218. See id., at 65, 728 S.W.2d at 155 (1987).

219. See id. at 65, 728 S.W.2d at 162.


220. See Miller v. Lockhart, 65 F.3d 676, 684 (8th Cir. 1995).
overruling defense counsel's timely and correct objection lies in the fact that the jury may ultimately reach its verdict or sentencing verdict based upon the improper reasoning advanced by the prosecution, especially in light of the trial court's apparent approval of the prosecutor's argument.

A. Requirement for Contemporaneous Objection

Even when the prosecuting attorney has made improper references in closing argument, relief is available for the defendant only upon timely objection by counsel.\(^2\) Arkansas courts have consistently rejected adoption of a doctrine of fundamental error which would afford review of unpreserved error, regardless of its potential for prejudice.\(^2\) In *Wicks v. State*,\(^2\) the Arkansas Supreme Court discussed its traditional rejection of "plain error doctrine"\(^2\) and noted the very limited circumstances in which unpreserved error might appropriately be subject to review.\(^2\) The court observed that one circumstance might involve such prejudicial error that would impose a duty on the trial court to take corrective action *sua sponte*:

> A third exception is a mere possibility, for it has not yet occurred in any case. That relates to the trial court’s duty to intervene, without an objection, and correct a serious error either by an admonition to the jury or by ordering a mistrial. We implied in Wilson v. State, 126 Ark. 354, 190 S.W. 441 (1916), that no objection is necessary if the trial court fails to control a prosecutor's closing argument and allows him to go too far: Appellant cannot predicate error upon the failure of the court to make a

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222. Other jurisdictions recognize that some misconduct occurring during argument merits appellate review, even in the absence of a contemporaneous objection by trial counsel. *See*, e.g., *State v. Hennessy*, 837 P.2d 1366 (N.M. App.), *cert. denied*, 835 P.2d 80 (1992) (holding prosecutor's reference to defendant's silence is a matter of fundamental error, reviewable without timely objection at trial). Of course, once a doctrine of fundamental error is applied to jury argument, trial counsel may be forced to make a tactical decision resulting in deliberate non-objection to avoid giving the trial court an opportunity to cure the error through admonition.

223. 270 Ark. 781, 606 S.W.2d 366 (1980).

224. Federal courts recognize a doctrine of plain error which permits review of error occurring at trial not subject to timely contemporaneous objection. *Fed. R. Crim. Proc. 52(b)*. The *Wicks* court expressly distanced itself from this concept. *Wicks*, 270 Ark. at 785, 606 S.W.2d at 369.

225. *See id.* However, Arkansas has recognized a limited role for fundamental or structural error cognizant on appeal without preservation by timely objection made in the trial court. This approach has recently been applied in *Grinning v. City of Pine Bluff*, 322 Ark. 45, 907 S.W.2d 690 (1995) to void a conviction obtained without a waiver of the right to jury trial and again in *Goff v. State*, 329 Ark. 513, 525, 953 S.W.2d 38, 44-45 (1997), where the trial judge improperly entered the jury room during its deliberations to respond to an inquiry from the jury.
ruling that he did not at the time ask the court to make, unless the remarks were so flagrant and so highly prejudicial in character as to make it the duty of the court on its own motion to have instructed the jury not to consider the same. See Kansas City So. Ry. Co. v. Murphy, 74 Ark. 256, 85 S.W. 428 (1905); Harding v. State, 94 Ark. 65, 126 S.W. 90 (1910).

It must be noted that, first, we did not reverse the judgment in Wilson, and second, the quoted statement was taken essentially from the cited Murphy case, where we went on to say explicitly that if the court fails to restrain on improper argument, counsel should make a definite objection and call for a ruling. We have mentioned the Wilson suggestion in two recent cases, but in neither one was the judgment actually reversed because of the trial court's failure to act on its own motion. Ply v. State, 270 Ark. 554, 606 S.W.2d 556 (1980); Wilson and Dancy v. State, 261 Ark. 820, 552 S.W.2d 223 (1977). Thus every statement of the original Wilson suggestion has been obiter dictum, because no judgment has been reversed on account of the trial court's failure to intervene. Such a reversal would necessarily be an extremely rare exception to our basic rule.226

The Wicks Court confirmed its position on its firmness in application of the traditional rule against review for plain or fundamental error, noting "in hundreds of cases we have reiterated our fundamental rule that an argument for reversal will not be considered in the absence of an appropriate objection in the trial court."227

In the supreme court's recent decision in a highly-publicized West Memphis murder case, Echols v. State,228 the court again affirmed its rejection of a fundamental or plain error rule which would permit appellate review of otherwise unobjected-to error.229 This position is clearly fixed in the decisions of Arkansas appellate courts, yet this posture seems wholly inconsistent with the language of Evidence Rule 103(d), which appears to specifically adopt a plain error rule, at least with respect to evidentiary issues.230 Nevertheless, the

226. Wicks, 270 Ark. at 786-87, 606 S.W.2d at 369-70.
227. Id. at 785, 606 S.W.2d at 369. However, in Bowen v. State, 322 Ark. 483, 507-08, 911 S.W.2d 555, 567 (1995), the court, citing Wicks, reiterated its suggestion that an unobjected closing argument could be so "flagrantly improper and so highly prejudicial in character as to have made it the duty of the [trial court] on its own motion to instruct the jury not to consider it." Id.
228. 326 Ark. 917, 936 S.W.2d 509 (1997).
229. See id. at 990, 936 S.W.2d at 547 (citing Childress v. State, 322 Ark. 127, 135, 907 S.W.2d 718, 723 (1995) (noting that the court will not consider errors not brought to the attention of the trial court)).
230. ARK. R. EVID. 103(d) provides: "Errors affecting substantial rights. Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court." Yet, the Wicks court expressly considered this language, rejecting a general right to review for plain or fundamental error despite the suggestion in subdivision
supreme court has adhered to the position that reversal cannot be predicated on trial court error never noticed at trial.\(^\text{231}\) In *Echols*, the appellants sought review of unpreserved errors, arguing that Supreme Court Rule 4-3(h),\(^\text{232}\) which requires review of the trial record for errors not argued on appeal, effectively warranted consideration of even unpreserved error.\(^\text{233}\) The supreme court rejected this argument in the context of a capital prosecution in which the defendants had been respectively sentenced to life imprisonment and death, holding that its rule only required review of *preserved* error. The court's approach to this rule of expanded review may serve to preempt later allegations of ineffective assistance of counsel on appeal, which will arise when counsel fails to advance meritorious claims properly preserved at trial.

Moreover, reversal based on the misconduct of the prosecutor is unlikely when the objection is sustained, even when counsel makes a timely or contemporaneous objection to improper argument. The appellate court may find the argument insufficient to warrant reversal as a result of application of harmless error rules or because the trial court's action in sustaining the objection cured any error. For example, in *Boyd v. State*,\(^\text{234}\) the timely objection and ruling by the trial court precluded the prosecutor from engaging in the anticipated prejudicial misconduct and, consequently, no reversible error occurred.\(^\text{235}\) Or, if trial counsel fails to move for additional relief, the action of

\(^\text{231}\) See *Echols*, 326 Ark. at 990, 936 S.W.2d at 547.  
\(^\text{232}\) See *id.* at 803-04, 889 S.W.2d at 22.  
\(^\text{233}\) See *id.* at 803-04, 889 S.W.2d at 22.
the trial court in sustaining the objection will result in counsel obtaining all relief requested. Only in the most egregious case would relief then be appropriate on appeal, such as where the prejudicial comment was so inflammatory that even a specific admonition by the trial court to disregard would prove futile.\footnote{236}

B. Preference for Resolution by Admonition

The existence of a timely objection to improper closing argument by the prosecution does not necessarily warrant relief in the form of mistrial or reversal on appeal. For example, in \textit{Foots v. State},\footnote{237} the prosecutor made a clearly improper allusion to a polygraph examination in closing argument. While counsel’s objection to this line of argument was sustained, the supreme court observed that counsel’s failure to move for an admonition from the trial court impliedly waived the claim of prejudice because the subject had earlier been mentioned without objection.\footnote{238}

The \textit{Foots} court noted that mistrial is an extreme remedy. This position is consistently noted in the decisions of the Arkansas appellate courts: “A mistrial is an extreme and drastic remedy which should be resorted to only when there has been an error so prejudicial that justice could not be served by continuing the trial.”\footnote{239}

\footnote{236} For example, in a federal habeas action reviewing an Arkansas prosecution for multiple rapes, \textit{Logan v. Lockhart}, 994 F.2d 1324 (8th Cir. 1993), the court considered the petitioner’s claim that the prosecutor’s misconduct in alluding to a medical examination not in evidence was so inflammatory that no admonition could have removed the taint. \textit{See id.} at 1329-30. Defense counsel’s timely objection had been sustained by the trial court, but counsel did not request further relief either in the form of admonition or mistrial. \textit{See id.} at 1330. The Eighth Circuit concluded that the prosecutor’s argument was “highly improper.” \textit{See id.} However, the court observed:

\begin{quote}
Defense counsel’s failure to seek a corrective instruction or to move for mistrial is, however, critical to our conclusion that Petitioner was not denied due process by the prosecutor’s objectionable comments. While we think the comments at issue were likely injurious, we are unwilling to say that the trial judge was constitutionally required to admonish the jury absent a request from defense counsel. We therefore find no constitutional error.
\end{quote}

\textit{Id.}

\footnote{237} 258 Ark. 507, 528 S.W.2d 135 (1975).

\footnote{238} \textit{See, e.g., Porter v. State}, 308 Ark. 137, 147, 823 S.W.2d 846, 851 (1992) (spontaneous outburst from trial audience did not require reversal where counsel did not request trial court to admonish jury to disregard).

\footnote{239} \textit{Miller v. State}, 269 Ark. 341, 605 S.W.2d 430 (1980). For example, in \textit{Holbird v. State}, 299 Ark. 551, 775 S.W.2d 893 (1989), the court held that mistrial should only be ordered when prejudice from improper argument cannot be cured through admonition. \textit{See Holbird}, 299 Ark. at 552, 775 S.W.2d at 893.
Mistrial necessarily results in increased costs in terms of court time occasioned by the need for retrial. Moreover, in many circumstances, the accused himself would otherwise have been content to proceed with resolution of the case by the empaneled jury rather than starting over with a new jury. When the misconduct is triggered by weakness in the prosecution’s case, the accused is truly prejudiced by misconduct in which a prosecutor resorts to inflammatory argument as a means of deflecting attention from the weaknesses resulting from investigation inadequacies or poor witness performance. Mistrial is the only remedy certain to ensure that the prejudicial conduct will not taint the ultimate verdict, but its application may unfairly burden the defendant. Consequently, alternative remedies to mistrial are important in the disposition of meritorious misconduct claims.

The trial court may engage in a range of corrective measures when confronted by timely objection to improper argument including a direct admonition to offending counsel. Although imposition of discipline for contempt of court represents a significant source of control for the trial judge, reliance on discipline as a means of redressing misconduct during the course of trial hardly represents a corrective measure designed to cure prejudice flowing from the misconduct. Rather, the range of effective remedies is limited to those remedial measures reasonably calculated to ensure a fair trial. Theoretically, of course, the grievance mechanism might be utilized as an alternative remedy to mistrial.

240. In his dissenting opinion in Mays v. State, 264 Ark. 353, 571 S.W.2d. 429 (1978), Justice Fogleman observed: "When objection is made, the presiding judge should appropriately reprimand counsel and instruct the jury not to consider the statement, and in short, do everything possible to see that the verdict of the jury is neither produced nor influenced by such argument." Id. at 358, 571 S.W.2d at 431 (Fogleman, J., dissenting) (emphasis added).

241. See, e.g., United States v. Hasting, 461 U.S. 499, 506 n.5 (citing United States v. Modica, 663 F.2d 1173, 1183-86 (2nd Cir. 1981), suggesting prosecutorial misconduct could appropriately be dealt with through the trial court’s contempt power, by referral for disciplinary investigation, or by identification of the offending prosecutor in a published opinion of a reviewing court).

242. Moreover, courts are often reluctant to infer conscious misconduct on the part of a prosecutor who engages in misconduct, particularly when the comments are facially ambiguous. For instance, in Donnelly v. DeChristoforo, the Supreme Court observed:

The ‘consistent and repeated misrepresentation’ of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury’s deliberations. Isolated passages of a prosecutor’s argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully construed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do such that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly, 416 U.S. at 647 (emphasis added).
alternative means for policing prosecutorial misconduct. However, the prospect that this approach could serve to curb abuses is dim, in part because the reporting parties would likely have to be defense counsel or the accused personally, compromising success in punishing an offending prosecutor when the accused has been convicted, or the trial court, whose complaint would likely ring hollow if curative action had not been taken at trial.243

One alternative not generally considered by trial judges or counsel is designed to address the type of misconduct which occurs when counsel refers to matters outside the record or draws improper inferences from the evidence. The trial court may simply permit counsel to re-open its case to offer proof in rebuttal, or accord counsel a formal opportunity to respond to impermissible argument. In Calloway v. State,244 for instance, defense counsel requested the opportunity to present surrebuttal to respond to the prosecutor's characterization of the defendant's testimony in her rebuttal argument. The trial court denied the request, noting on the record: "Counsel, if I allowed that, I'm afraid there would never be an end to this trial."245 The supreme court upheld the trial court's exercise of discretion, observing that defense counsel did not object to the alleged misstatements of counsel during her rebuttal argument.246

The ultimate remedy for misconduct occurring during final argument lies in mistrial ordered on the defendant's request.247 However, because of the general reluctance to reverse for failure to order mistrial, Arkansas appellate courts have looked to the trial court's exercise of discretion to admonish the jury, either contemporaneously248 or through limiting instruction,249 as the

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243. See Walter W. Steele, Jr., Unethical Prosecutors and Inadequate Discipline, 38 SW. L.J. 965 (1984). "To expect the defendant, personally, to report misconduct by a prosecutor is unrealistic. Even if a defendant had the capacity to recognize unethical trial conduct, reporting the prosecutor to a grievance committee does not serve the defendant's self-interests." Id. at 980.

244. 330 Ark. 143, 151, 953 S.W.2d 571, 575 (1997).

245. Id. at 151, 953 S.W.2d at 575.

246. See id. The court observed that defense counsel had objected to "alleged factual misstatements during the prosecutor's initial closing argument." Id. at n.2. However, the trial court apparently declined to rule on the objections to avoid commenting on the evidence. The trial court's position might explain why defense counsel did not object to the complained-of misstatements made in the prosecutor's rebuttal. If the objection process is futile, then application of the usual preservation of rules to find procedural default makes no sense and may result in unfairness to the litigant. Although the Calloway court did not expressly find that the defendant had defaulted, the reference to counsel's failure to object certainly suggests that the court at least considered this alternative basis for deciding the case.

247. Reversal for improper argument is a remedy only for the trial court's abuse of discretion in failing to grant appropriate relief or "manifest prejudice" to the defendant. See Vasquez v. State, 287 Ark. 468, 701 S.W.2d 357 (1985); Harvey v. State, 261 Ark. 47, 545 S.W.2d 913 (1977).

248. In Williams v. State, 294 Ark. 345, 742 S.W.2d 932 (1988), the court considered the trial court's response to "admittedly" improper argument, noting: "Obviously, the best course
The proper phrasing of the admonition—which ensures that the jury understands that a particular line of argument is unwarranted and should not enter into the deliberative process—will generally be deemed to cure prejudice.\(^{251}\) Where the trial court admonishes the jury in terms objectionable to the defense, moreover, a failure to object to the admonition at trial waives error, the argument being improper if made for the first time on appeal.\(^{252}\)

Nevertheless, even the supreme court has recognized that on occasion, prosecutorial misconduct is so egregious as to defy cure even by timely ruling sustaining defendant’s objection and admonition to the jury to disregard. Thus, in *Dillon v. State*,\(^ {253}\) for example, the court held that the prejudice resulting from the prosecutor’s cumulative misconduct in relating other incidences of criminal behavior in her cross-examination required reversal, even when the trial court had admonished the jury to disregard the comments.

C. Motion for Mistrial

The motion for mistrial made by defense counsel typically signifies that counsel believes the error or misconduct engaged in by the prosecution is so egregious that no action by the trial court, whether in the form of a sustained objection or a motion to disregard, will be sufficient to cure or remove the prejudice occasioned by the misconduct. The failure to move for mistrial may be deemed a default when counsel accepts a sustained objection or admonition as the stopping point in the process of challenging misconduct.\(^ {254}\) The position of action would have been for the trial court to *immediately reprimand* the prosecutor in front of the jury.” *Id.* at 351, 742 S.W.2d at 936 (emphasis added).

249. See, e.g., *Abraham v. State*, 274 Ark. 506, 508, 625 S.W.2d 518, 520 (noting the court’s basic reliance on the general instruction that arguments of counsel do not constitute evidence).

250. See, e.g., *Dandridge v. State*, 292 Ark. 40, 43, 727 S.W.2d 851, 853 (1987), in which the prosecutor’s reference to the accused as a “gross animal” was deemed cured by the trial court’s admonition to jurors to disregard the remark.

251. See, e.g., *King v. State*, 317 Ark. 293, 296, 877 S.W.2d 583, 585-86 (1994) (prosecutor’s argument that jurors should consider their neighbors’ children, their own children, and grandchildren in child sexual assault prosecution, a violation of the prohibition against the “golden rule” argument, was properly addressed by trial court’s admonition that jurors were not to place themselves in the position of the victim).


254. In *Betts v. State*, 317 Ark. 624, 625, 882 S.W.2d 671, 671 (1994), for instance, defense counsel obtained a very specific admonition from the trial court directing the jury to disregard the improper argument which invited jurors to impose a life sentence based on their own personal fears and not to consider their personal safety for any purpose in their
at least suggested by the Supreme Court of Arkansas is that mistrial is an alternative remedy to admonition, rather than a final step in the preservation process.

In _Boyd v. State_, the trial court sustained defense counsel's objection to an improper argument by the prosecution and counsel followed by moving for mistrial. The state argued on appeal that counsel's decision to object impliedly waived the defense position that error could not be cured, requiring mistrial, a position the supreme court noted drew some support from its prior holding in _Sullinger v. State_. This proposition was predicated on the court's characterization of an objection as "an acknowledged means for curing error."

The _Boyd_ Court distinguished between objection and motion for mistrial, however, as serving different purposes, with mistrial "being appropriate to more serious episodes." The specific sequence for preservation was not adopted as mandatory, but the court clearly suggested that upon denial of mistrial, counsel may properly request an admonition to the jury without waiving the claim on appeal that the denial of mistrial constituted an abuse of discretion. However, when counsel moves alternatively for mistrial or admonition, the trial court's decision to admonish the jury does serve to waive error in denial of mistrial, precisely because counsel requested alternative relief, following the holding in _Sullinger_.

Thus, counsel faced with the need to fully protect the client's interests at trial and preserve error for appellate review should probably engage in the following sequence in order to obtain an appealable denial of relief. First, object in timely fashion and on proper grounds to the improper argument. Second, move for mistrial in the event the error is sufficiently prejudicial as to seriously compromise the defendant's right to a fair trial, or to preserve a colorable claim for review, recognizing that the trial court might grant mistrial upon the defense motion which will waive both the defendant's right to proceed to verdict by the empaneled jury and any realistic claim of prior jeopardy. Third, counsel may seek an admonition from the court if the mistrial motion is denied, particularly if an admonition may serve the defendant's actual interest in counteracting the likely impact of the misconduct. In fact, failure to seek the admonition may be construed against the defendant in deliberations. Counsel did not press for a ruling on the mistrial motion made contemporaneously with the initial objection. The court held that the admonition cured prejudice. _See id._

256. 310 Ark. 690, 840 S.W.2d 797 (1992).
257. _Boyd_, 318 Ark. at 805, 889 S.W.2d at 23 (citing _Sullinger v. State_, 310 Ark. 690, 840 S.W.2d 797 (1992)).
258. _See id._ at 805, 889 S.W.2d at 23.
259. _See id._ at 806, 889 S.W.2d at 23.
consideration of the denial of mistrial. Alternatively, counsel may forego mistrial and move for admonition as a second step in the process.

Boyd represents, then, a step toward formal recognition of a two or three-step process in the preservation of error based on prosecutorial misconduct in closing argument. Although the supreme court does not appear to require an initial objection addressed to the trial court prior to the motion for mistrial, in most cases counsel will need to object to set in motion the full process of preservation. If the trial court overrules the objection, no further step should be required of defense counsel in terms of either the motion for mistrial or request for specific admonition to disregard precisely because the trial court has ruled that no misconduct has occurred. Consequently, curative action could hardly be rationally contemplated by a court that has rejected the defense challenge. Once the objection is sustained, counsel should press either for mistrial or admonition, but recognize that a premature request for admonition is likely to waive any appellate claim based on denial of mistrial. The better practice is to defer any request for admonition until after mistrial is denied, unless counsel actually prefers admonition for tactical purposes. If the trial court admonishes the jury to disregard, sua sponte, counsel’s motion for mistrial will then properly preserve the issue for appellate review.

VI. Appellate Disposition of Improper Argument Claims

Facially improper argument, even when preserved by timely objection, a request for curative instruction, or a motion for mistrial, does not necessarily demonstrate reversible error in Arkansas prosecutions. The argument is still subject to harm analysis on appeal and the application of the “abuse of

260. The Boyd court suggested that a failure to request the admonition may “negate” the mistrial motion. See Boyd, 318 Ark. at 805, 889 S.W.2d at 23 (citing Aaron v. State, 312 Ark. 19, 846 S.W.2d 655 (1993)). This position is reasonable only if the admonition would have likely cured the prejudice from the misconduct. However, given the tendency of Arkansas appellate courts to find such admonitions adequate in this respect, the Boyd court’s position may reflect a structurally logical approach to the preservation process.

261. Failure to move for the admonition waives any claim of error based on the trial court’s failure to instruct the jury to disregard improper argument. See Boyd, 318 Ark. at 805, 889 S.W.2d at 23 (citing Woodruff v. State, 313 Ark. 585, 856 S.W.2d 299 (1993); Perry v. State, 255 Ark. 378, 500 S.W.2d 387 (1973)).

262. See, e.g., Betts v. State, 317 Ark. 624, 625, 882 S.W.2d 671, 671 (1994) (admonition precisely tailored to address improper comment during argument sufficient to cure prejudice, particularly in light of counsel’s failure to request ruling on mistrial motion).

263. See Calloway v. State, 330 Ark. 143, 149-50, 953 S.W.2d 571, 574 (1997), where counsel was allowed to argue on appeal, although unsuccessfully, that the trial court’s admonition to the jury to disregard the prosecutor’s interjection of her unsworn testimony was inadequate and thus warranted mistrial.
discretion” standard for review of trial court action, or inaction, creates a difficult hurdle for appellants.

A. Application of Abuse of Discretion Standard

Because the standard of review of the trial court’s action is deferential, even facially improper argument does not necessarily require reversal under Arkansas law. Thus, in *Williams v. State*, the court, while admonishing prosecutors against improper conduct in closing argument, candidly admitted:

> It is a serious matter when an attorney attempts to appeal to the prejudice of the jury by arguing matters outside the record. *However, we usually defer to the trial court in the exercise of discretion in such matters.* The trial court is in superior position to determine the possibility of prejudice, and to observe the mannerisms, expressions, and demeanor of the parties in determining whether to grant a mistrial.

A failure of the trial court to exercise discretion to control improper argument warrants reversal of conviction. An abuse of discretion will also require reversal. The only difficulty with these two general propositions, consistently reiterated by Arkansas appellate courts, is that the process of deference itself insulates trial court decisions from objective review on appeal. That is, by applying a subjective approach in which the trial court’s role is paramount in the evaluation of facially improper argument, appellate courts fail to articulate clear guidelines as to what generic lines of argument are impermissible.

Moreover, when the trial court overrules an objection to improper argument, the actual effect of the trial court’s exercise of discretion may be to afford to the improper argument the court’s imprimatur of legitimacy.

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264. 294 Ark. 345, 742 S.W.2d 932 (1988).
265. *Williams*, 294 Ark. at 351, 742 S.W.2d at 935-36 (emphasis added).
268. *See, e.g., Williams*, 294 Ark. at 350, 742 S.W.2d at 935.
269. In *Blanton v. State*, 249 Ark. 181, 458 S.W.2d 373 (1970), the court observed that deference to the trial court was appropriate “since the presiding judge can best determine the effect of unwarranted arguments at the time the argument is made.” *Id.* at 190, 458 S.W.2d 377.
270. This proposition was noted by Justice Blackmun, dissenting in *Darden v. Wainwright*. He observed that the majority’s reliance on admonitions by the trial court effectively neutralized any prejudice resulting from impropriety by the prosecution in closing:

But the trial court overruled Darden’s objection to McDaniel’s repeated expressions of his wish that Darden had been killed, thus perhaps leaving the jury with the impression that McDaniel’s comments were somehow relevant to the question before them. The trial judge’s instruction that the attorneys were ‘trained in the law,’ and thus that their ‘analysis of the issues’ could be ‘extremely helpful,’ might
Deference to the trial court’s exercise of discretion not only compromises an accused’s likelihood of reversal on appeal when the court properly considered defense counsel’s objection, but compounds prejudice when the trial court errs in its ruling, yet nevertheless is upheld on appeal based upon application of the “abuse of discretion” standard.

B. Harmless Error Analysis

Application of harm analysis in a case in which the prosecutor relied on clearly improper argument may also serve to defeat a facially meritorious claim of misconduct. In Fisher v. State, the prosecutor argued that no “Negro” had ever been sentenced to life imprisonment in Saline County before. Defense counsel’s motion for mistrial was denied and no request for admonition was made. Despite the inflammatory nature of the comment, which was not only suggestive of racial prejudice but also involved communication of facts outside the record, the supreme court held that reversal was not warranted because the jury imposed a sentence of fifteen years, rather than life. The court reasoned that the sentence imposed indicated that the jury was not influenced by the prosecutor’s argument.

C. Double Jeopardy Considerations

One generally unstated consideration for a trial court aggressively enforcing limitations upon prosecution misconduct in final argument lies in the operation of the Double Jeopardy Clause. The United States Supreme Court has held that reversal of conviction on appeal for trial error typically does not subject the prosecution to the jeopardy bar. Thus, a defendant prevailing on appeal on a claim of prosecutorial misconduct in final argument almost necessarily faces retrial on the theory that the prior jeopardy claim is waived when the defendant requests appropriate relief on appeal. As the Supreme

also have suggested to the jury that the substance of McDaniel’s tirade was pertinent to their deliberations.


271. For example, in Donnelly v. DeChristoforo, 416 U.S. 637, 639 (1974), the Supreme Court noted that prejudice resulting from an improper argument or remark should be reviewed in light of its place in the entire proceeding in order to assess whether the impropriety has made the accused’s trial “so fundamentally unfair as to deny him due process.” The court noted the remark was “but one moment in an extended trial ... followed by specific disapproving instructions.” Id. at 645.


273. See id. at 548, 408 S.W.2d at 896.


Court noted in *Oregon v. Kennedy*,276 misconduct by the prosecution that may be seen as “harassment or overreaching” and consequently justifies mistrial, will not bar retrial “absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.”277

The Arkansas Supreme Court addressed the double jeopardy issue in *Timmons v. State (Timmons II)*,278 in which the court reviewed a claim predicated on its reversal for prosecutorial misconduct the preceding year (*Timmons I*).279 In the subsequent appeal, the court extensively reviewed the misconduct at defendant's first trial which required reversal in *Timmons I*. In the second appeal, Timmons relied on the Eighth Circuit’s decision in *United States v. Martin*280 in which the court considered a claim of prosecutorial overreaching by disclosing to the jury highly prejudicial grand jury testimony. The *Martin* Court held that retrial was barred because of the bad faith evinced by the prosecution’s tactics.

The *Timmons II* court concluded that because retrial had been ordered on the reversal of the defendant’s first conviction on direct appeal, rather than as a result of mistrial, the prior jeopardy bar did not preclude the retrial and the subsequent conviction.281 The opinion makes no mention of *Oregon v. Kennedy*, however, in which the Supreme Court had clearly limited the application of the bar to retrials occasioned by mistrial to those rare circumstances in which the prosecution deliberately goads defense counsel into moving for mistrial. Surprisingly, perhaps, the facts in *Timmons* suggests that application of the bar might have been appropriate in the case precisely because the prosecutor’s clear strategy was to force defense counsel into moving for mistrial when he offered the evidence of the forensic serologist that he knew could not be developed as a result of a break in the chain of custody. However, the misconduct was not undertaken to compel a mistrial;282 rather, the prosecutor’s misconduct was intended to suggest that defense counsel had prevented jurors from hearing the presumably inculpatory evidence. The issue clearly contemplates both the Eighth Circuit’s concerns in *Martin* and the logical implication of the Supreme Court’s opinion in *Oregon v. Kennedy*

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necessity” is applied to justify retrial when the accused impliedly “waives” his jeopardy protection by requesting relief in the form of mistrial.  
277. Id.  
278. 290 Ark. 121, 717 S.W.2d 208 (1986).  
280. 561 F.2d 135 (8th Cir. 1977).  
281. See *Timmons*, 290 Ark. at 126, 717 S.W.2d at 211.  
282. Justice Hickman dissented in *Timmons I* and analyzed the prosecutor’s tactic as “deliberately offer[ing] misleading and inadmissible evidence.” *Timmons*, 286 Ark. at 44, 688 S.W.2d at 945.
regarding the prosecutor's deliberate actions inviting defense counsel's motion for mistrial.

In failing to address the Supreme Court's opinion, however, the \textit{Timmons II} court left the impression that mistrial occasioned by misconduct was more likely to result in bar to retrial than \textit{Oregon v. Kennedy} actually holds. Consequently, the effect of \textit{Timmons II} may be to encourage trial courts not to order mistrial, even when necessary to ensure a fair trial, out of concern that the mistrial ordered will terminate the prosecution with prejudice to the State.

\section*{VII. Conclusion}

Arkansas courts have developed only a very loose body of case law which guides appellate review of claims based on improper closing argument by prosecutors.\footnote{For example, affirming the conviction in Garza \textit{v. State}, 293 Ark. 175, 735 S.W.2d 702 (1987), the supreme court admitted: “We cannot prescribe an exact outline to be used by attorneys in closing arguments.” The defendant complained of the prosecutor's exclamation, “[p]ow, pow, pow!,” that had been used to illustrate the shooting of the victim, his arguments concerning the number of years the victim had been married to appellant, and the number of children she had borne him. Neither line of argument warranted reversal. \textit{See id.} at 178, 735 S.W.2d at 704. The court did observe that it had often discussed prosecutorial misconduct in closing argument, noting that many of its prior decisions had been discussed in Hill \textit{v. State}, 289 Ark. 387, 713 S.W.2d 233, 236 (1986). \textit{See id.} In fact, \textit{Hill} does not provide a comprehensive view of closing argument because the decision focused on general precepts in their application to a \textit{demonstration} used by a prosecutor in closing. \textit{See id.}} One problem lies in the fact that appellate courts often affirm based on curative action taken by the trial court without actually ruling on whether the objected-to argument was, in fact, prejudicial. The identification of improper argument is itself significant in the expression of the appellate courts concerning the proper parameters of closing argument. For example, in \textit{Dandridge v. State},\footnote{292 Ark. 40, 727 S.W.2d 853 (1987).} an otherwise unremarkable opinion, the court deemed the prosecutor's reference to the accused as a “gross animal” as improper, although cured by the trial court's specific admonition to the jury not to consider the comment. Even in affirming, the supreme court sent an important message to prosecutors concerning its perception about the lack of appropriateness of this type of depersonalizing characterization of an accused in a criminal trial.

Yet, Arkansas opinions are often without a specific assessment of the propriety of comment; instead, the trial court is affirmed based on timely curative measures. For example, in \textit{Magar v. State}\footnote{39 Ark. App. 49, 836 S.W.2d 385 (1992).} the court of appeals upheld the verdict where the trial court had admonished jurors to disregard the prosecutor's argument that suggested the defendant would commit acts of
sexual assault against other children in the future.286 The argument would undoubtedly have been improper as a suggestion of other criminality, except that the evidence included proof of the defendant's four prior convictions for sexual abuse of children. In light of the state of the evidence, the prosecutor's comment appears at the worst to be the most logical inference which could be drawn from the evidence concerning the accused's criminal behavior. However, the court of appeals did not address the propriety of the argument, perhaps erroneously implying that the argument was indeed improper in noting the trial court's specific admonition as sufficient to warrant denial of mistrial. In failing to address the exact comments of prosecutors in terms of propriety, the appellate courts failed to take advantage of the important opportunity to direct trial courts in their assessment of the proper parameters of prosecutorial closing argument.

Moreover, although the appellate courts have repeatedly cautioned against impropriety in argument, they have generally failed to fashion remedies designed to ensure that prosecutors not resort to improper argument in order to gain conviction or obtain desired sentences.287 In addition, the tenor of appellate court review itself suggests that trial courts will not apply articulated principles with vigor.

Arkansas trial courts are continually reminded in appellate opinions that the remedy of mistrial is "drastic" and to be avoided. Consequently, the only true vehicle for enforcing rules on the prosecution concerning argument is disfavored in the view of the state's appellate courts. Instead, the option of admonishment is favored, even though all lawyers recognize that admonishing a jury to disregard evidence, testimony, comment, or argument virtually invites individualized consideration of the objectionable matter by jurors even though the subject is not included in the formal deliberation process.

Additionally, the Supreme Court has not only encouraged trial courts to avoid mistrial as a matter of judicial economy, but in Timmons v. State,288 the

286. See id. at 51, 836 S.W.2d at 386-87.
287. See Steele, supra note 243, at 978:
A typical example of this appellate court hesitancy is Rodriguez v. State, [644 S.W.2d 200 (Tex. App.-San Antonio 1982, no pet.)] in which the appellate court found that "this case approaches the limit to which a prosecutor may strain the patience of justice . . ." [Id. at 202]. The court affirmed the conviction for lack of reversible error and then made this somewhat insipid remark:
Further, judicial acquiescence in such misconduct only marks it with a silent seal of approval, making it the acceptable norm for all other prosecutors. In the face of this kind of impropriety, trial judges must not fear to move decisively in using their admonishment and contempt powers to assure that the proper ends of justice and the integrity of our legal system are preserved. [Id. at 209].
288. 290 Ark. 121, 717 S.W.2d at 208 (1986).
court noted that mistrial itself may in some situations result in application of
the prior jeopardy bar to prevent conviction of a defendant whom the courts
would otherwise expect to convict, based upon evidence available to the
prosecution.289 In fact, the bar of double jeopardy based on Fifth Amendment
protection is applicable only when the prosecution has deliberately provoked
the mistrial, a rare occurrence. In impliedly threatening double jeopardy
implications in the grant of mistrial, the Timmons II court observed that
reversal on appeal does not result in bar to retrial,290 thus suggesting that
appeal, rather than mistrial, is a preferable way to handle the problem of
prosecutorial misconduct.

Were the appellate courts vigorously enforcing the rules of proper final
argument on direct appeal, the message in Timmons II would have less
ominous consequences. However, the appellate courts apply a strong principle
of deference to trial court decision making in responding to objections
concerning misconduct in final argument.291 Thus, the appellate courts have
created a hostile climate to legitimate complaints about prosecutorial miscon-
duct in argument by first stressing the desirability of avoiding mistrial, and then
in deferring to trial court decisions not to declare mistrial.292 Because mistrial
typically will not result in appeal anyway, this posture on the part of the
appellate courts severely limits the expectation that misconduct will be
effectively addressed in the direct appeal process.

The long term consequence of the Arkansas Supreme Court’s stated
policy is that trial court decisions are effectively insulated from appellate
review in most cases, even when the improper argument is egregious.293 Rather

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289. See id. at 126, 717 S.W.2d at 211.
290. The court observed: “His retrial resulted from reversal of his first conviction not from
a premature ending of his first trial.” Id. at 126, 717 S.W.2d at 211.
291. For example, in Berna v. State, 282 Ark. 563, 670 S.W.2d 434 (1984), the supreme
court deferred to the trial court’s ruling sustaining a defense objection and admonishing the jury
in reference to the prosecutor’s argument which apparently correctly drew upon evidence
presented concerning the typical length of time an individual would be held in the Arkansas
State Hospital for psychiatric evaluation before being released. See id. at 568, 670 S.W.2d at
437-38. The court found no reversible error in noting that the remark “was found to be
improper by the trial court.” Id. The court then related a portion of the psychiatrist’s testimony,
oberving: “This could be the testimony that the prosecuting attorney was referring to in his
argument.” Id. A fair reading of the supreme court’s opinion is that, unable to determine
exactly why the trial court sustained the objection based on the record excerpt available, the
court would nonetheless defer to the trial court’s judgment, rather than criticizing that court by
suggesting that it had erroneously limited the prosecutor’s argument.
292. The significance of appellate review lies in the power of appellate courts to discourage
prosecutorial misconduct through the “proper exercise of their supervisory power.” Donnelly
293. Of course, some misconduct eventually leads to reversal in the form of a grant of
federal habeas relief pursuant to 28 U.S.C. § 2254. In Miller v. Lockhart, 65 F.3d 676 (8th Cir.
1995), for instance, the state prosecutor had engaged in a serious of improper remarks in closing
than aggressively enforcing rules defining the parameters of permissible argument, the state supreme court's policy of deference to trial court inaction or denial of mistrial sends the clear message that prosecutors actually will suffer no penalty for stretching the bounds of argument in any given trial. Apart from individual censure of offending prosecutors, which might strike one as particularly unfair in light of prior decisions which have rather proudly applauded broad discretion for counsel in summation, the only remedy to ensure fair trial is reversal.

The circular reasoning in which the appellate courts defer to trial court discretion in not sanctioning improper argument with mistrial, while condemning mistrial as a "drastic" remedy to be avoided, serves to perpetuate the unprofessional approach to closing argument demonstrated in many affirmances. While the courts often strain to rely on general admonitions to the jury not to consider argument as evidence in the case, the continuing emphasis given argument as a significant event in the criminal trial itself demonstrates its potentially powerful impact in shaping jury attitudes concerning the evidence adduced under oath. Consequently, laxity in enforcement of accepted norms regarding the proper scope of argument in the guise of miscalculating its important role at trial simply rewards what might be viewed as creative lawyering, while setting unethical standards for prosecution conduct in the criminal trial.

in a capital trial. The prosecutor argued the wishes of the victim's family members, despite the fact that they had not testified; argued that execution would save taxpayers' money when compared against the cost of lifetime incarceration, despite the fact that no evidence in the record supported the argument; referred to an extraneous offense of escape which was without support in the record; referred to the defendant's failure to take the stand and ask for mercy during the penalty phase of trial; and finally, characterized the defendant as a "mad dog" who had to be put to death because of his history of escape from jail which made a life sentence a dangerous alternative to death. See id. at 682. The habeas court granted relief based upon the misconduct and the Eighth Circuit affirmed, noting the lack of curative action by the trial court and the inadequacy of the general admonition that arguments of counsel do not constitute evidence. See id. at 684. The Arkansas Supreme Court had rejected this claim of error on direct appeal and affirmed the conviction and sentence of death. See Miller v. State, 269 Ark. 341, 348-49, 605 S.W.2d 430, 435-36 (1980).


295. The majority in Darden v. Wainwright, 477 U.S. 168 (1986), rejected Justice Blackmun's criticism in dissent that its failure to enforce standards for prosecutorial conduct through the mechanism of reversal, arguing: "We agree that the argument was, and deserved to be, condemned. Conscientious prosecutors will recognize, however, that every court that criticized the argument went on to hold that the fairness of petitioner's trial was not affected by the prosecutors' argument." Id. at 181 n.13.