

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY  
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Defendant.	)	Case No.

MOTION *IN LIMINE* PERTAINING TO STATE’S CLOSING ARGUMENT  
AND MEMORANDUM OF LAW IN SUPPORT

Counsel for the above-named defendant moves this Court, *in limine*, for an order instructing the prosecutors to refrain from making statements, commenting, or otherwise exclaiming during the closing arguments of this case any improper and prejudicial remarks as listed below, with authority in support. It should be observed that some remarks are so prejudicial that even an admonishment to the jury is not sufficient to cure the defect and that in some cases once the bell has been rung, then “the bell could not be unrung” and that “an overzealous attitude is, in most instances, detrimental to the prosecution and often results in a *retrial* of the case at *considerable expense* to the state.” See, *Wright v. State*, Okl.Cr., 325 P.2d 1089, 1093 (1958). Improper and prejudicial conduct on the part of an experienced prosecutor is more serious than if indulged in by one not accustomed to the duties. See, *Watson v State*, 1912 OK CR 224, 124 P. 1101, 7 Okl.Cr. 590.

DEFENDANT SO MOVES ON THE FOLLOWING GROUNDS:

1. It is improper and prejudicial for a prosecutor to use arguments calculated to inflame the passions or prejudices of the jury, or to go outside the record for appealing to passion or prejudice. *Bennett v. State*, 1976 OK CR 47, 546 P.2d 659, cert. Denied, 426 U.S. 940; ABA Standards for Criminal Justice 3-5.8 (c) (2<sup>nd</sup> Ed. 1982).

2. It is improper and prejudicial for a prosecutor to make references in closing argument to “societal alarm” and/or references to the “crime rate” and the court has found that same to be sufficient to reverse convictions, *Wright v. State*, 325 P.2d 1089 (Okl.Cr. 1958); see also, *Hager v. State*, 612 P.2d 1369 (Okl.Cr. 1980); and in some cases to modify sentences, *Cooper v. State*, 584 P.2d 234 (Okl.Cr. 1978), and in these case strongly condemned the same. The prohibited "societal alarm" argument is one that mentions crimes committed by other persons and not attributable to the defendant on trial such as arguments that the crime rate is increasing. The "societal alarm" argument is therefore irrelevant to the guilt or punishment of the defendant on trial except that it implies that the jury should "make an example" out of the defendant on trial to deter other potential criminals. Argument about "societal alarm" is substantially more prejudicial than probative, and is therefore prohibited. See *Cooper v. State*, 1978 OK CR 96, 13, 584 P.2d 234, 238-39.

3. The Oklahoma Court of Criminal Appeal has held numerous times that references to the crime rate are improper because they present matters extraneous to the evidence and tend to impose responsibility on the jurors for the rising crime rates. *Hager*, supra; *Coats v. State*, 589 P.2d 693 (Okl.Cr. 1978); *Cooper*, supra. It has been held that when the prosecutor twice referred to the possibility that, if acquitted, the appellant would commit similar crimes in the future that this line of argument is highly improper. It is error to comment on the possibility that a defendant may commit crimes in the future. See, *Hager*, supra; *Lime v. State*, 479 P.2d 608 (Okl.Cr. 1971).

4. It is improper and prejudicial for a prosecutor to make any of the arguments prohibited in *Cooper v. State*, 584 P.2d 234 (Okl.Cr. 1978), which held that “these tactics — calling defendants liars, playing on societal alarm, invoking the jurors to set an

example or instilling in their minds the impression that they are somehow accountable for the rising crime rate — are as reprehensible as they are familiar. Because they thwart the basic principle that the role of the jury is to determine only the guilt or innocence of an accused, they are offensive to a sense of justice and intolerable to this Court. These practices constituted error in *Robertson v. State*, Okl.Cr., 521 P.2d 1401 (1974); in *Herrod v. State*, Okl.Cr., 512 P.2d 1401 (1973); and in *Sizemore v. State*, Okl.Cr., 507 P.2d 1330 (1973). Furthermore, in our opinion such unfair arguments violate the American Bar Association's Standards Relating to the Prosecution Function, *adopted in Ray v. State*, Okl.Cr., 510 P.2d 1395 (1973), and other cases. Section 5.8, "Argument to the Jury," provides the following guidelines:

"(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

"(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

"(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

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

5. It is improper for the prosecuting attorney during closing argument to invade the **province of the jury** to determine the truth or falsity of the testimony of the witnesses appearing before them by telling the jury in absolute terms that the defendant lied on the stand, *Robertson v. State*, Okl.Cr., 521 P.2d 1401 (1974); see also, *Fulks v. State*, Okl.Cr., 481 P.2d 769 (1971).

6. It is improper and prejudicial for the prosecuting attorney in closing argument to “inject his personal opinion or beliefs, nor may he speculate as to future criminal proceedings, nor state that the witnesses have committed perjury absent a judgment of perjury,” see *Ray v. State*, Okl.Cr., 510 P.2d 1395 (1973).

7. It is improper and prejudicial for a prosecutor in a closing argument to present facts not pertinent to the issues and which are not in evidence. *Green v. State*, 39 Okla. Cr. 430, 266 P. 512; *Bilton v. Territory*, 1 Okla. Cr. 566, 99 P. 163; *Murray v. State*, 24 Okla. Cr. 113, 217 P. 891; *Thomas v. State*, 34 Okla. Cr. 63, 244 P. 1116; *Cline v. State*, 57 Okla. Cr. 206, 47 P.2d 191, and numerous other cases of similar import.

8. It is improper and prejudicial during a summation for a prosecutor to incite feelings of fear, anger, and a desire for revenge in the jury, or to make exhortations to join the “war against drugs” and/or the “war against people who fail to follow orders from police officers,” to make incitements to vengeance and predictions of the dire consequences that would befall the jurors, their families, and society if they were to turn the defendant loose, which are sufficiently flagrant as to result in reversal. *Hance v. Zant*, 696 F.2d 940 (11<sup>th</sup> Cir. 1983); *Reed v. U.S.*, 403 A.2d 725 (1979); *Franks v. State*, 1981 OK CR 138, 636 P.2d 361, *cert. denied*, 455 U.S. 1026.

9. It is improper and prejudicial for the prosecutor to argue acquittal of the defendant would be a license for every other person to do the same thing as the defendant is accused of doing. *Ball v. State*, 1962 OK CR 124, 375 P.2d 340.

10. It is improper and prejudicial for the prosecutor, during summation to advise the jury that it “owes the defendant something” for his crime. *Reed v. U.S.*, 403 A.2d 725, 730 (D.C. App. 1979).

11. It is improper and prejudicial for the prosecutor, during summation, to state, imply, or insinuate that a witness for the defense has testified falsely and that defense counsel coached such witness. *Garrett v. State*, 1942 OK CR, 123 P.2d 283.

12. It is improper and prejudicial for the prosecutor, during summation, to state, comment, insinuate, or imply that counsel for defense has hidden facts. *People v. Teiper*, 175 N.Y.S. 197, mod. on reh. on other grounds, 178 N.Y.S. 54 (1919).

13. It is improper and prejudicial for the prosecutor, during summation, to cast aspersions upon defense counsel. *Black v. State*, 1983 OK CR 60, 663 P.2d 22, 24; *Fry v. State*, 1950 OK CR, 91 Okl.Cr. 326, 218 P.2d 643.

14. It is improper and prejudicial for the prosecutor during summation, to denounce or vilify the defendant on account of the nature and character of his defense. *Ryan v. State*, 153 P 756 (Okl. 1915).

15. It is improper and prejudicial for the prosecutor, during summation to express personal opinions and beliefs about the evidence. *Grubb v. State*, 1983 OK CR 65, 663 P.2d 750; *U.S. v. Modica*, 663 F.2d 1773, 1178-79 (2<sup>nd</sup> Cir. 1980), cert. denied, 456 U.S. 989 (1982). See also, ABA Standards for Criminal Justice, 3-5.8(b) (2d Ed. 1982); ABA Code of Professional Responsibility, DR 7-106(4).

16. It is improper and prejudicial for the prosecutor, during summation, to argue that the prosecutor has better reason than the jury for believing the defendant to be guilty. *Brower v. State*, 1924 OK CR, 26 Okl.Cr. 49, 221 P. 1050.

17. It is improper and prejudicial for the prosecutor during summation, to refer to matters outside the record, or expand the issues presented for determination. *Songer v. State*, 1969 OK CR 221, 464 P.2d 763. See also, ABA Standards for Criminal Justice, 3-5.8 (a), 3-5.9 (2<sup>nd</sup> Ed. 1982); *Harris v. State*, 1976 OK CR 247, 555 P.2d 76.

18. It is improper and prejudicial for a prosecutor, during summation, to state or comment that he or she would not have instituted prosecution had he not been convinced of the defendant's guilt. *Gossett v. State*, 1962 OK CR 75, 373 P.2d 285; *U.S. v Garza*, 608 F.2d 654, 662 (5<sup>th</sup> Cir. 1979);

19. It is improper and prejudicial for a prosecutor, during closing argument, to comment on evidence excluded from the trial. *Kendrick v. State*, 1964 OK CR 64, 393 P.2d 547.

20. It is improper and prejudicial for a prosecutor during closing argument, to tell the jury in absolute terms that the defendant lied on the stand. *Robertson v. State*, 1974 OK CR 87, 521 P.2d 1401.

21. It is improper and prejudicial for the prosecutor to state that the defendant and other witnesses may have lied or falsely testified, which deprives the defendant of a fair trial. *Dupree v. State*, 1973 OK CR 397, 514 P.2d 425; see also *Harris v. U.S.*, 402 F.2d 656 (D.C. Cir. 1968).

22. It is improper and prejudicial for the prosecuting attorney, during closing argument, to deride the character of the defendant's witnesses and state that they should not be believed. *Ray v. State*, 1973 OK CR 263, 510 P.2d 1395.

23. It is improper and prejudicial for the prosecutor to state, during final argument, that additional inculpatory or incriminating evidence exists that was not presented at trial because of legal rules, trial tactics, administrative convenience, or defense objections. *Berger v. U.S.*, 295 U.S. 78, 87 (1935).

24. It is improper and prejudicial for the prosecutor to misrepresent the record factually. *Miller v. Pate*, 386 U.S. 1 (1967).

25. It is improper and prejudicial for the prosecutor to advise the jury, during final arguments, that the defendant will not serve the full time of imprisonment if imposed, or to even refer to probation or parole, or credit for time served. *Tucker v. State*, 1972 OK CR 170, 499 P.2d 458.

26. It is improper and prejudicial for the prosecutor to state or comment during summation on the possibility of the defendant receiving a pardon or parole, or deduction for good time, or lenient treatment or other arguments for mitigation. *Behley v. State*, 1974 OK CR 69, 521 P.2d 418; *State v. Woodward*, 516 P.2d 589 (Ariz. 1973); *Ferquer v. U.S.*, 302 F.2d 214 (8<sup>th</sup> Cir. 1962).

27. It is improper and prejudicial for the prosecutor to comment or argue during summation on the availability of appellate review to review the jury's verdict. *Howell v. State*, 441 S.2d 772 (Miss. 1982); *State v. White*, 211 S.E.2d 445, 449-450 (N.C. 1975).

28. It is improper and prejudicial for the prosecutor during summation to direct his remarks at the defendant personally. *People v. Sawyer*, 256 Ga.App.2d 6, 63 Ga.Rept. 749 (1967); *People v. Gomparetto*, 193 N.W.2d 626 (Minn. 1971), or at the jurors individually. *Pendergast v. U.S.*, 416 F.2d 776 (D.C. Cir. 1969), cert. denied, 395 U.S. 926.

29. It is improper and prejudicial for the prosecuting attorney to personally vouch for the State's witnesses as being truthful and credible with regard to the testimony given by the witnesses. *U.S. v. Modica*, supra; *U.S. v. Garza*, 608 F.2d 659, 662 (5<sup>th</sup> Cir. 1979); *Hance v. Zant*, 696 F.2d 940, 951 (11<sup>th</sup> Cir 1983).

30. It is improper and prejudicial for the prosecuting attorney during summation to state or imply, or insinuate that defense counsel "contrived testimony," *U.S. v. Rios*, 611 F.2d 1335, 1341-42 (10<sup>th</sup> Cir. 1979); or "fabricated a defense theory," *People v.*

*Emerson*, 455 N.E.2d 41 (Ill. 1983); engaged in “illegal conduct,” *Bruno v. Rushen*, 721 F.2d 195 (9<sup>th</sup> Cir. 1983), or was “dishonest,” *Cline v. U.S.*, 395 F.2d 138 (8<sup>th</sup> Cir. 1968).

31. It is improper and prejudicial for the prosecuting attorney to insinuate or comment that defense counsel does not believe his client’s testimony, or has no confidence in the defendant’s case. *U.S. v. Kirkland*, 637 F.2d 654 (9<sup>th</sup> Cir. 1980); *Scalf v. State*, 424 N.E.2d 1084 (Ind. 1981); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

32. It is improper and prejudicial for the prosecuting attorney, during final argument, to comment on defense counsel’s objections to evidence or testimony. *Sharp v. State*, 421 S.W.2d 663 (Tex.Cir. 1967); *U.S. v. Hughes*, 441 F.2d 12, 20 N.E. 29 (5<sup>th</sup> Cir. 1971).

33. It is improper and prejudicial for the prosecuting attorney to argue, during summation, that the defendant witnesses should not be believed because they failed to come forward before trial with exculpatory reports. *People v. Figueroa*, 436 N.Y.S.2d (1981); *People v. Goins*, 407 N.Y.S.2d 891 (1978); *People v. Lindsay*, 402 N.Y.S.2d 435 (1978).

34. It is improper and prejudicial for the prosecuting attorney to comment on the post-arrest silence of the defendant or silence of the defendant after Miranda warnings have been given. *Doyle v. Ohio*, 426 U.S. 610 (1976).

35. "It is error for the prosecutor to comment — either directly or indirectly — at any stage of trial — upon the defendant's right to remain silent." *Hanf v. State*, 560 P.2d 207, 211 (Okla. Cr. 1977).

Title 22 O.S. 1971 § 701 [22-701], reads as follows:

"In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of a crime, offense or misdemeanor before any court of committing magistrate in this State, the person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him nor be mentioned on the trial; if commented upon by counsel it shall be ground for a new trial."

36. The court has repeatedly stated that it is improper for prosecutors to ask jurors to have sympathy for victims. *Williams v. State*, 658 P.2d 499 (Okl.Cr. 1983). In *Scott v. State*, 649 P.2d 560 (Okl.Cr. 1982), it called such attempts to invoke sympathy by the prosecutor "reprehensible." Furthermore, such appeals are violative of The ABA Standards for Criminal Justice, § 3-5.8(c) (1980), adopted by this court in *Dupree v. State*, 514 P.2d 425 (Okl.Cr. 1973) and *Ray v. State*, 510 P.2d 1395 (Okl.Cr. 1973). It is improper for the prosecution to ask jurors to have sympathy for victims. *Pickens v. State*, 850 P.2d 328, 342 (Okl.Cr. 1993), cert. denied, \_\_\_ U.S. \_\_\_, 114 S.Ct. 942, 127 L.Ed.2d 232 (1994). While victim impact evidence may be appropriate in the sentencing phase of trial, it is error to introduce victim impact evidence in the guilt/innocence phase. *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720, 736 (1991). While the prosecution and the defense have the right to discuss fully from their standpoint the evidence, and the inferences and deductions arising therefrom, the guilt/innocence phase of trial is no place for subtle appeals for victim sympathy. *Pickens*, 850 P.2d at 342; *Carol v. State*, 756 P.2d 614, 617 (Okl.Cr. 1988).

37. The Oklahoma Court of Appeals have held that it improper and prejudicial for a prosecutor to make repeated derogatory characterizations of appellant, and to use name calling and which included calling him a "doper," a "marijuana expert man," and referring to the homosexuality of the defendant for no legitimate purpose. In closing argument during sentencing phase, the prosecutor listed on a blackboard several "characteristics" of appellant, including "transient," and "hitchhiker," among others already mentioned. Such name calling and characterizations have never been permitted

by this court and only served to inflame the jury. See e.g. *Robinson v. State*, 574 P.2d 1069 (Okl.Cr. 1978), and *Lewis v. State*, 569 P.2d 486 (Okl.Cr. 1977).

38. It is improper for a prosecutor to tell a jury they must determine guilt or innocence. It is the jury's duty to determine whether the State has demonstrated guilt beyond a reasonable doubt. If the State fails to sustain its burden, the jury must find the defendant not guilty. *Vuletich v. State*, 1987 OK CR 61, 735 P.2d 568, 569 (Okl.Cr. 1987). If the State fails to sustain its burden, the jury must find the defendant not guilty. See 22 O.S. 1981 § 836. A determination of innocence is not required.

39. As quoted in the Oklahoma case, *Vickers*, cited hereinafter, in the case of *People v. Aiken*, 66 Mich. 460, 33 N.W. 821, 11 Am. St. Rep. 512, the court, in part, says:

"It must also be remembered that, however heinous the crime, and however difficult it may be to establish it by the usual and approved means of procedure, and no matter how firmly the public prosecutor and the community at large may be satisfied of the guilt of the accused, and even though in fact he may be guilty, the rules and methods of trial, permitted to be relaxed or disregarded in his particular case, with perhaps the laudable object and desire that justice may be done, must nevertheless, as a natural consequence of the ways of our jurisprudence, appear hereafter, as so relaxed or disregarded, as precedents to be used against all persons accused of crime, to vex the innocent as well as the guilty. There is therefore no safety and justice in allowing the supposed merits of a particular case to override and set aside, even for a moment, the barriers that our Constitution and laws have hedged about the citizen when arraigned and put upon trial for an alleged crime."

Further, *Vickers*, stated: "A public prosecutor is presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action, to become a heated partisan, and by vituperation of the prisoner, and appeals to prejudice, seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and seeks no conviction through the aid of passion, sympathy, or resentment. The only way to secure fair trials is to set aside the verdicts so procured. .... Whether the defendant be innocent or guilty, in our

opinion he has not been adjudged guilty in accordance with law, because he has not had a fair and impartial trial, which the law prescribes for a person charged with crime.” See, *Vickers v. United States*, 1908 OK CR 37, 98 P. 467, 1 Okla. Cr. 452, 98 P. 467.

41. It is improper and prejudicial for the prosecutor to present facts not pertinent to the issues and the court has held it improper in a closing argument to present facts not pertinent to the issues and which are not in evidence. *Green v. State*, 39 Okla. Cr. 430, 266 P. 512; *Bilton v. Territory*, 1 Okla. Cr. 566, 99 P. 163; *Murray v. State*, 24 Okla. Cr. 113, 217 P. 891; *Thomas v. State*, 34 Okla. Cr. 63, 244 P. 1116; *Cline v. State*, 57 Okla. Cr. 206, 47 P.2d 191, and numerous other cases of similar import.

WHEREFORE, the defendant respectfully requests this Court to exercise its discretion and make an order absolutely prohibiting the District Attorney and Assistant District Attorney from commenting, stating, or otherwise insinuating in its argument and final summation to the jury in the above matter, any of the above and foregoing remarks as indicated by the authority delineating such remarks as improper and prejudicial.

Respectfully submitted,

Glen R. Graham OBA 12110  
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CERTIFICATE OF DELIVERY

The undersigned does hereby certify that on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, a true and correct copy of the above and foregoing instrument was hand-delivered to the Tulsa County District Attorney’s Office, 500 S. Denver Ave., Tulsa, Oklahoma.

By: \_\_\_\_\_  
GLEN R. GRAHAM