Advocacy, Justice, and Prosecutorial Misconduct: The Death of the Prosecutor's Reasonable Inference on Credibility Issues

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I. Introduction

A hallmark of the American justice system is seeking truth by adversarial means.[1] Judge Edward Abbott Parry[2] once wrote that "without . . . advocates the world would hear little of the message of justice."[3] In sum, "advocacy connotes justice."[4] Nowhere is this more evident than in the criminal justice system, where advocacy is the tool of truth-seeking. To preserve this truth-seeking function, prosecutors' level of advocacy must be on equal footing with that of defense counsel. Beyond that, prosecutors must be given the latitude to argue the evidence during closing argument, especially when the evidence suggests reasonable inferences about truthfulness and credibility.

Through the evidence and arguments, criminal lawyers must convince a disinterested fact-finder that the evidence supports their case theory.[5] On one hand, the prosecution seeks to prove, through the evidence presented, that the defendant committed the crime charged. On the other hand, defense counsel argues that the State has either not met its burden of proof or that the defendant is innocent.[6]

The view of prosecutors as zealous advocates is not without its critics. Recently, critics have claimed that zealous advocacy is eroding

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1. *See* Rosemary Nidiry, *Restraining Adversarial Excess in Closing Argument*, 96 Colum. L. Rev. 1299, 1301 (1996).

2. Judge Edward Abbott Parry, The Seven Lamps of Advocacy (1968). Judge Parry's book championed for advocacy in the legal profession. Judge Parry described the seven lamps of honesty, courage, industry, wit, eloquence, judgment, and fellowship. *Id.*

3. *Id.* at 13.

4. *Id.*

5. Nidiry, *supra* note 1, at 1301-02.

6. The burden of proof in a criminal case remains with the prosecution at all times. The defendant is not required to put on evidence or prove his innocence. Kan. Stat. Ann. § 21-3109 (1995). However, many defenses used in criminal cases attempt to show the defendant is innocent rather than simply arguing the State has not met its burden. *See infra* note 75.

prosecutors' role as justice-seeking officers of the court.[7] Much of the concern stems from a perceived conflict between prosecutors' dual roles as advocates and quasi-judicial officers.[8] These critics argue that prosecutors, as quasi-judicial officers, must remain neutral and detached. They conclude that an "excess" of advocacy by prosecutors leads to neither effective truth-seeking nor just results.[9] However, prosecutors' neutral and detached role ends when a decision is made that the evidence supports the charges. At this time, prosecutors put on the hat of advocates, zealous advocates for justice.

Critics say that the adversarial process itself has caused prosecutors to be overzealous.[10] One suggested reform is mandating for advocates that the "basic consideration should become whether assisting the client would further justice."[11] However, supporters of this view do not believe the mandate should apply equally to criminal defense attorneys.[12] The logic behind this theory is that the criminal defense lawyer deals with threats to reputation, life, and liberty.[13] Thus, the defense attorney, acting not in the interest of justice but rather in the interest of his client, must be a more vigorous advocate than the prosecutor.[14]

These same critics suggest that a double standard is permissible because prosecutors should seek truth and justice, and not merely a mark in the win column.[15] This double standard opens the door for criminal defense attorneys to subvert truth and justice in an effort to obtain an acquittal. This approach also denies that the prosecutorial advocate is essential to the truth-seeking function. The truth-seeking process demands a common set of rules and an even playing field for both sides.

These suggestions for change have recently materialized in the opinions of Kansas appellate courts. These decisions already have limited the level of advocacy practiced by state prosecutors and have precipitated allegations of prosecutorial misconduct where prosecutors overstep the newly defined boundaries. The past three years have

7. Nidiry, *supra*, note 1. As an officer of the court, the attorneys' responsibilities are much broader. They include a responsibility to the court as well as to outside parties such as the public. This role also includes a duty to the law itself. *Id.*

8. ABA, *The Function of the Prosecutor*, *in* Standards for Criminal Justice Prosecution Function and Defense Function Standard 3-1.2(b) (3d ed. 1993) [hereinafter *Function of Prosecutor*]. This standard describes the function of the prosecutor as an advocate. *Id.* cmt. (referring to the prosecutor as a quasi-judicial position).

9. Nidiry, *supra* note 1, at 1302-03.

10. *Id.* at 1303.

11. *Id.* This would bind defense attorneys and prosecutors alike. *Id.*

12. *Id.* at 1304.

13. *Id.*

14. *Id.*

15. *Id.*; *cf.*, *Function of Prosecutor*, *supra* note 8, at Standard 3-1.2(c) (stating the prosecutor must "seek justice, not merely to convict").

marked a significant change in the review of cases involving allegations of prosecutorial misconduct in Kansas, particularly in closing arguments. Before 1999, Kansas courts applied the harmless error rule to all misconduct claims.[16] Under this rule, an error was harmless when the court "declare[d] beyond a reasonable doubt that the error had little, if any, likelihood of changing the result of the trial."[17] Additionally, this rule barred all claims of prosecutorial misconduct if defense counsel failed to make a contemporaneous objection at trial.[18]

In 1999, the Kansas Supreme Court changed the standard of review for improper comment to plain error.[19] Under the plain error rule, after determining that the comments were outside the latitude allowed during closing arguments, the court then determined whether "they were so gross and flagrant as to prejudice the jury against the accused and deny him a fair trial."[20] The most glaring difference between the plain error rule and the harmless error rule is that appellate courts can hear claims of prosecutorial misconduct absent a contemporaneous objection at trial, if the misconduct constitutes a denial of the defendant's right to a fair trial.[21] The practical result of these changes was that more cases became eligible for review based on prosecutorial misconduct.

In 2000, the Kansas Supreme Court again modified the law in *State v. Pabst*.[22] In *Pabst*, the court overturned twenty-year-old precedent with regard to the scope of prosecutors' closing arguments.[23] Specifically, the *Pabst* court denied prosecutors the right to comment in closing arguments on the credibility of a witness or defendant, even when evidence and testimony showed the witness to be untruthful, thus removing the comments from the forbidden area of personal opinion.[24] Further, the court lowered the bar for reversal by raising credibility comments to constitutional violations, which were once deemed harmless error. This change significantly curtailed prosecu-

16. State v. Sperry, 978 P.2d 933, 948 (Kan. 1999).
17. State v. Lockhart, 947 P.2d 461, 464 (Kan. Ct. App. 1997) (citing State v. White, 785 P.2d 950 (Kan. 1990)).
18. State v. Johnson, 502 P.2d 802 (Kan. 1972). "It is firmly established in this jurisdiction that reversible error cannot be predicated upon a complaint of misconduct of counsel in closing argument to the jury where no objection is lodged." *Id.* at 810.
19. In *Sperry*, the court established that although Kansas had not reviewed misconduct in the past with a plain error analysis, it will now. *Sperry*, 978 P.2d at 948; *cf.* State v. Murrell, 523 P.2d 348, 350 (Kan. 1974) (citing *Johnson*, 502 P.2d 802) (stressing that review of misconduct, under the harmless error standard, is not available when no objection is made).
20. State v. Lumley, 976 P.2d 486, 501 (Kan. 1999).
21. *Id.*
22. State v. Pabst, 996 P.2d 321 (Kan. 2000).
23. *See id.* at 326. In *State v. McClain*, the court allowed the prosecutor to comment on the credibility of a witness because his contradictory statements were presented as evidence. 533 P.2d 1277, 1282 (Kan. 1975), *overruled by* State v. Pabst, 996 P.2d 321 (Kan. 2000). The court found that the prosecutor was only arguing evidence presented and reasonable inferences drawn from that evidence. *Id.*
24. *See Pabst*, 996 P.2d 321.

tors' ability to advocate and deliver an effective and persuasive argument based on facts and testimony presented.[25] *Pabst* marked the start of a pronounced trend of reversals and findings by the Kansas appellate courts of improper argument by Kansas prosecutors.[26] These opinions restrain prosecutors' ability to advocate by prohibiting them from arguing reasonable inferences based on the evidence presented.

The Kansas appellate courts have created an imbalance in the criminal justice system by urging one party to act as an advocate while restricting the actions of the other.[27] Further, such changes in the standard of review have sparked many frivolous appeals and increased the likelihood of reversal,[28] even in cases where the appellate courts found sufficient evidence to support a conviction.[29]

Kansas courts must allow prosecutors to advocate on behalf of the State. By curtailing the ability of prosecutors to advocate for the State and changing the appellate standard of review of prosecutorial misconduct claims, the Kansas Supreme Court implemented an inappropriate remedy for a problem of its own making. Ultimately, this trend will erode the adversarial process and its truth-seeking function.

There needs to be a middle ground where the truth-seeking function of the courts and the attorneys' role as advocates combine to create the most effective adversarial process. This Note will explore the historical basis of the adversarial system and the development of the current judicial and regulatory view of prosecutorial misconduct. It will outline the path that Kansas cases traveled to reach the recent rulings and explore the effects the new decisions have had on closing arguments. Finally, it will examine the consequences and implications of recent changes in Kansas law and offer guidelines for prosecutors.

25. Essentially, the prosecutor may not characterize witnesses as liars even though they gave contradictory testimony or lied during the statements made on the stand or in statements given prior to trial. *See id.*

26. State v. Magdelano, 17 P.3d 974 (Kan. 2001); State v. Smith, 11 P.3d 520 (Kan. Ct. App. 2000); State v. Hazley, 19 P.3d 800 (Kan. Ct. App. 2001).

27. *Function of Prosecutor*, *supra* note 8, at Standard 3-1.2(c), cmt. (stating that justice requires all three legs of the system and calling the prosecutor an advocate, not an impartial party).

28. Cases cannot be reversed if they cannot be heard on appeal. With the plain error rule, a case has a better chance of review because there is no requirement of a contemporaneous objection. Further, placing credibility comments in a constitutional analysis lowers the standards for reversal.

29. *See Pabst*, 996 P.2d at 330. The court reversed this conviction even though it found that sufficient evidence was presented for the jury to find the defendant guilty of premeditated murder. *Id.*

II. BACKGROUND

A. *Evolution of American Trial Advocacy*

The American adversarial system emerged in the late 1700s.[30] The American system was modeled after the English system, though little resemblance remains.[31] The most glaring difference is the role of the judge. In the eighteenth century, judges played a dominant role in the trial process,[32] and the criminal trial was anything but adversarial.[33] The judge called and examined all of the witnesses, including the defendant.[34] The questioning was informal and often more like a conversation between the bench, defendant, and other witnesses.[35] The judge summarized the case for the jury after he was satisfied with the examination.[36] Often the judge advised the jury as to a verdict and could even fine or imprison jurors who disagreed.[37] During this period, the defendant could neither present evidence nor have an attorney present.[38] It was not until the mid-1800s that defense counsel appeared in general felony cases.[39]

Lawyers began to play a more dominant role in the courtroom from the late 1700s through the 1800s.[40] Although no specific turning point explains why this change occurred,[41] legal, social, political, and economic changes give some insight into the system that we have today.[42] In America, the ratification of the Constitution was the most profound change in the law. The Constitution emphasized the rights of the individual, including the right to a trial by jury.[43] The industrial revolution, brought about by entrepreneurial aspirations, further emphasized the power of the individual.[44] The birth of the new nation brought the need for a system to deal with disputes.[45] An adversarial

30. *See* Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 426 (1992).
31. *Id.*
32. *Id.*
33. *See* STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 16 (1984). This book is an excellent short work describing the evolution of the adversary process and discussing its shortcomings and advantages.
34. *Id.* at 17. Landsman describes this process as a "freewheeling discussion." *Id.*
35. *Id.*
36. *Id.* This crude form of closing statement matched the method in which the jury was chosen. *Id.* at 16. Each juror entered one at a time and was seated unless the defendant objected. *Id.* Once all twelve seats were full, the trial began. *Id.*
37. *Id.* at 17. In this system it was the judge who decided when sufficient evidence had been presented and testimony given. *Id.* Once he was satisfied with a decision of guilty or not guilty, he put the case to the jury in the manner that he felt it should be decided. *Id.* at 16-17.
38. *Id.*
39. Kessel, *supra* note 30, at 426.
40. LANDSMAN, *supra* note 33, at 20-21.
41. *Id.* at 23.
42. *Id.*
43. *Id.* at 19; U.S.CONST. amend. VI.
44. LANDSMAN, *supra* note 33, at 23-24.
45. *Id.* at 24.

court system answered that need and appealed to the public's desire to control its destiny in legal disputes.[46]

The legal profession evolved at the same time that the nation developed socially and economically. The idea of zealous representation emerged around the turn of the nineteenth century.[47] This new idea called for attorneys to be advocates for their clients' causes.[48] Along with this came the ethical requirement that attorneys, as officers of the court, seek the truth and not mislead or prejudice the finder of fact.[49]

Because of these changes, the trial process evolved into a kind of play. The judge, who directed the action, had the power to make technical, but not substantive changes in how scenes were carried out. The attorneys wrote the script, played key roles, and made decisions regarding trial progression, witnesses, and what evidence to present.

B. *The Role of the Prosecutor*

The United States Supreme Court defined the role of the prosecutor in the oft-cited 1935 decision *Berger v. United States*:[50]

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[51]

Within this role, the prosecution has been allowed to paint with a broad brush during closing argument, so long as the argument coincides with the evidence presented.[52] Kansas courts have frequently cited and elaborated on the *Berger* quotation.[53] For example, in *State v. Scott*,[54] the court stated that "[p]rosecutors may . . . appeal to the

46. *Id.*
47. *Id.* at 22.
48. *Id.*
49. *Id.* As a by-product of this evolution, judges lost much of their power. Kessel, *supra* note 30, at 427. An explanation cited for this loss of power is a general distrust of judicial authority in criminal trials. *Id.* This evolution took the judge out of his formerly active role and placed him in one of neutrality. *Id.*
50. Berger v. United States, 295 U.S. 78 (1935).
51. *Id.* at 88.
52. *See* State v. Scott, 21 P.3d 516, 526 (Kan. 2001) (citing State v. Miller, 997 P.2d 90 (Kan. 2000)). "[T]he prosecution is given wide latitude in language and in manner or presentation of closing argument as long as the argument is consistent with the evidence." *Id.*
53. *See* State v. Pabst, 996 P.2d 321, 325 (Kan. 2000).
54. 21 P.3d 516 (Kan. 2001).

jury with all the power and persuasiveness that their learning, skill, and experience enable them to use."[55] The message from the Kansas courts is prosecutors' power is great, but prosecutors must exercise it only in the name of justice. Prosecutors must not seek glory or victory, but instead ensure that only the guilty are punished and the innocent vindicated.[56]

The American Bar Association (ABA) has also defined the role of prosecutors:

> (a) The office of the prosecutor is charged with the responsibility for prosecutions in its jurisdiction.
> (b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.
> (c) The duty of the prosecutor is to seek justice, not merely to convict.[57]

The dichotomy of the prosecutor's role is apparent in the language of the ABA Standard. The ABA Standard specifically refers to the prosecutor as both an advocate and one who seeks justice and not merely victory.[58] The commentary following the ABA Standard refers to the prosecutor as a "minister of justice" occupying a "quasi-judicial position."[59] This suggests that the prosecutor must act with disinterest and impartiality. While this role is necessary in the charging and sentencing stages, the trial stage demands an advocate. In the trial stage the prosecutor hands over the role of judicial officer to the judge and assumes one of advocate.[60] Once the prosecutor makes an impartial decision, based on the evidence, that the defendant is guilty, justice requires that the prosecutor become a zealous advocate. The prosecutor must present the evidence vigorously in order that justice be served.

The ABA Standard supports this dynamic and specifically recognizes the prosecutor's role as advocate in the trial stage.[61] The ABA Standard describes the trial stage as requiring three parties: 1) counsel for the State; 2) counsel for the defendant (unless waived); and 3) an impartial judiciary (and jury).[62] Further, the ABA Standard refers to the zealous advocacy by both defense counsel and the State:[63] "[t]he adversary system requires defense counsel's presence and zealous pro-

55. *Scott*, 21 P.3d at 526 (citing State v. Baker, 549 P.2d 911 (Kan. 1976)).
56. *Function of Prosecutor*, *supra* note 8, at Standard 3-1.2.
57. *Id.*
58. *Id.*
59. *Id.* at cmt.
60. *Id.*
61. *Id.*
62. *Id.*
63. ABA, *The Function of the Defense Counsel*, *in* Standards for Criminal Justice Prosecution Function and Defense Function, Standard 4-1.2, cmt. (3d ed. 1993) [hereinafter *Function of Defense Counsel*].

fessional advocacy just as it requires the presence and zealous advocacy of the prosecutor . . . ."[64]

The language of the standard places the prosecutor in a dual position.[65] The prosecutor must make an impartial decision to seek justice in each case but also must advocate in the courtroom. Both roles are necessary for the prosecutor to fulfill his obligation as an officer of the court.

C. *The Role of Defense Counsel*

The role of defense counsel is entirely different; it is broadly described and rarely defined.[66] United States Supreme Court Justice Byron R. White, in a dissenting opinion, carved out a controversial description of the role of defense counsel in 1967.[67] His description coincides with some of the ABA Standards for defense counsel, while other sections of the ABA Standards directly contradict his views.

The ABA Standards and United States Supreme Court decisions impose a duty on the prosecutor to seek justice through the finding of the truth.[68] Justice White, however, stated that defense counsel has no similar duty. He stated that "defense counsel has no comparable obligation to ascertain or present the truth."[69] In fact, "defense counsel need present nothing, even if he knows what the truth is . . . we countenance or require conduct which in many instances has little, if any, relation to the search for truth."[70] Both Justice White and the ABA Standards condone or even urge that defense attorneys attempt to impeach or discredit a witness known to be truthful.[71] Justice White went a step further and stated: "[P]ut the State's case in the worst possible light, regardless of what he thinks or knows to be the truth."

The ABA Standards refer to defense counsel as an officer of the court who, in that role, should not misrepresent "matters of fact or law to the court."[72] Avoiding the misrepresentation of matters of fact to the court appears to contradict the position of Justice White and

64. *Id.*
65. *See id.* at cmt. (referring to the prosecutors' role as a "quasi-judicial position," but also as an advocate, emphasizing the criminal justice system would not be complete absent this role).
66. Misconduct of defense counsel is seldom reviewed due to the State's limited right to appeal. Case law does little to expound upon their mission.
67. United States v. Wade, 388 U.S. 218 (1967) (White, J., dissenting in part and concurring in part). This description of defense counsel's role is cited often and seen as a legitimate definition.
68. *Supra* text accompanying note 50.
69. *Wade*, 388 U.S. at 256-57.
70. *Id.* at 257.
71. *Id.* "If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course." *Id.*; *Function of Defense Counsel*, *supra* note 63, at Standard 4-7.6.
72. *Function of Defense Counsel*, *supra* note 63, at Standard 4-1.2, cmt.

other ABA Standards on discrediting truthful witnesses.[73] This practice is a stark contrast to a prosecutor's ability to cross examine, as he is explicitly prohibited from using this tactic.[74]

The false defense is another example of a tactic available only to defense counsel. The false defense allows a defense attorney to argue that facts known to be true are false, and that facts known to be false are true.[75] One example is when a defense attorney argues that an innocent co-defendant is responsible for the crime.[76] The presentation of a false defense may be the ultimate contradiction to truth and misrepresentation of facts. Defense counsel is required to argue a false truth if the defendant has no other defense available.[77]

III. Closing Argument: Types of Misconduct and the Scope of Summation

Prosecutorial misconduct can occur at all stages of the trial. For example, it can involve comments regarding a defendant's post-*Miranda* silence or failure to testify;[78] evidence not in the record; appeals to emotions or religious fervor; the prejudices of the jury; or the credibility of the defendant or witnesses. Comments during closing argument account for most appeals.[79]

The closing argument serves a broad purpose in a criminal trial. Part of that purpose is to provide the jury with an explanation of the

73. *See supra* note 71 and accompanying text.

74. *See Function of Prosecutor*, *supra* note 8, at Standard 3-5.7, cmt. It could be argued that allowing defense counsel to discredit a truthful witness, as allowed by ABA Standard 4-1.2, permits the attorney to misrepresent facts to the court by attempting to mislead the fact finder. There is a fine line between the misrepresentation of facts and the mischaracterization of witness testimony. Not all attorneys are willing to accept this distinction.

75. *See* Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 Geo. J. Legal Ethics 125, 126 (1987) [hereinafter *Different Mission*]; Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 Geo. J. Legal Ethics 689 (1987) [hereinafter *Necessary Lie*].

76. *Different Mission*, *supra* note 75; *Necessary Lie*, *supra* note 75.

77. *See Different Mission*, *supra* note 75, at 126. The author of this article described his own experience with the false defense: "I was prepared to stand before the jury posing as an officer of the court in search of the truth, while trying to fool the jurors into believing a wholly fabricated story, i.e., that the woman had consented, when in fact she had been forced at gunpoint to have sex with the defendant." *Id.* at 135.

78. *See generally* Alan V. Johnson & Jeffrey S. Southard, *Prosecutorial Misconduct in Closing Argument: Does Harmless Error Mean Never Having to Say "Reversed?*," 49 J. Kan. B. Ass'n 205, 205 (Fall 1980).

79. Remarks about the credibility of the defendant or witnesses are the most common basis for misconduct appeals in Kansas. *See* State v. Gould, 23 P.3d 801 (Kan. 2001) (improper statement of thanks to the jury during closing argument); State v. Scott, 21 P.3d 516 (Kan. 2001) (improper closing argument where prosecutor called defendant a killer); State v. Pabst, 996 P.2d 321, 328 (Kan. 2000) (appealing comments about defendant's veracity during closing argument); State v. Whitesell, 13 P.3d 887 (Kan. 2000) (unsuccessful appeal citing prosecutors use of pattern of stalking evidence); State v. Pham, 10 P.3d 780 (Kan. 2000) (improper closing where prosecutor said defense counsel did not want the truth); State v. Hazley, 19 P.3d 800 (Kan. Ct. App. 2001) (improper closing where prosecutor commented on defendant's credibility); State v. Smith, 11 P.3d 520 (Kan. Ct. App. 2000) (improper closing on credibility); Hon. R. Scott McQuinn, *Dangerous Crossing: The Line Between Proper and Improper Argument*, 70 J. Kan. B. Ass'n 14 (2001).

charges against the accused and with definitions of any legal jargon that may have been used during the trial.[80] However, the most important role of the closing argument is to provide the attorneys an opportunity to pull together the evidence presented and argue that it supports their theory.[81] The closing argument is also used to assist the jury in determining the credibility of evidence and testimony.[82]

From the perspective of advocates, the closing argument is the last chance to present the jury with their theory of the case. Attorneys for both sides use their oratory skills and presentation styles to craft the most believable and solid interpretation of the evidence. The holding in *State v. Pabst*,[83] reviewing misconduct as plain error and denying prosecutors' ability to argue reasonable inferences, strikes directly at the ability of the prosecution to perform this essential function. In essence, *Pabst* removed common sense interpretations of the evidence from the prosecution's closing argument.

IV. Prosecutorial Misconduct in Kansas

Recently, Kansas courts have significantly changed prosecutorial misconduct claim review. That change has dealt with the harmless error rule,[84] the contemporaneous objection requirement,[85] and credibility comments by prosecutors.[86]

The Kansas Supreme Court heard its first prosecutorial misconduct claim in the 1878 case of *State v. Mortimer*.[87] During the *Morti-*

80. David Crump, *The Function and Limits of Prosecution Jury Argument*, 28 Sw.L.J. 505, 506 (1974). One oft-cited form of misconduct is when the prosecution misstates the burden of proof. *Id.* Prosecutors can make it appear that the defendant has something to prove or, more commonly, that the State's burden is lower than beyond a reasonable doubt, such as a burden of common sense. *Id.*; *see also* State v. Stevenson, No. 84833, 20 P.3d 98 (Kan. Ct. App. Mar. 9, 2001) (unpublished opinion).

81. Crump, *supra* note 80, at 506-07.

82. *Id.*

83. 996 P.2d 321 (Kan. 2000).

84. *See* State v. Sperry, 978 P.2d 933 (Kan. 1999). Under the harmless error rule, a defendant is not entitled to reversal if the error did not change the result of the trial. The harmless error rule emerged in *State v. Comstock*, 20 Kan. 650 (1878). In *Comstock*, the prosecutor called the defendant a felon and told the jury that defense counsel objected to the prosecutor's statements because the defendant was in fact guilty. *Id.* at 652. Specifically, the prosecutor said that "I never knew a guilty man to be on trial for a felony who did not object . . . until he wore striped clothes in the penitentiary." *Id.* On appeal, the court made no specific ruling as to whether the statements were in fact improper. *Id.* at 655. Rather, it found that even if they were improper, the verdict was supported by the evidence and would have been the same with or without the comments by the prosecutor. *Id.* The harmless error rule applied to all claims of misconduct, including those alleging constitutional violations. *Id.* An example of this was *State v. Peterson*, where the court held that a prosecutor's comments on the defendant's wife's failure to testify were to be weighed under a harmless error analysis. 171 P. 1153 (Kan. 1918). Even these comments must be shown to have affected the verdict before reversal is allowed. *Id.* Kansas courts followed this standard of review until 1999. *Sperry*, 978 P.2d 933 (holding Kansas applies the plain error rule in cases where the defendant is denied a right to a fair trial).

85. *Sperry*, 978 P.2d 933.

86. *Pabst*, 996 P.2d 321.

87. 20 Kan. 93 (1878). This is the first published decision found on prosecutorial misconduct.

mer trial, the prosecutor told the jury that the defendant was in prison on a prior conviction.[88] Defense counsel contemporaneously objected that the prosecutor was introducing an inadmissible prior conviction of the defendant.[89] The court sustained the objection, and the judge advised the jury to disregard the statement.[90]

The *Mortimer* appeal also marked the first instance where a Kansas appellate court held that an instruction to disregard a prosecutor's improper statement cured the error.[91] Reversal was not warranted because the prosecutor's statements were in response to defense counsel's statements.[92] The court said defense counsel should have withdrawn his own statements before objecting to the prosecutor's comments.[93]

Claims of prosecutorial misconduct are reviewed by Kansas appellate courts on a case-by-case basis.[94] Traditionally, Kansas applied the harmless error rule.[95] As such, the court determined whether, beyond a reasonable doubt, the comments had likely changed the outcome of the case.[96] Additionally, for a court to even consider the claim on appeal, a contemporaneous objection must have been made at trial.[97]

For more than a century the Kansas Supreme Court refused to hear an appeal based on prosecutorial misconduct that was not preserved by an objection at trial.[98] For example, in the 1974 case of *State v. Murrell*,[99] the prosecutor spoke about the credibility of the State's witness during closing argument.[100] He told the jury that because the

88. State v. Mortimer, 20 Kan. 93, 97 (1878).

89. *Id.*

90. *Id. Mortimer* marked the beginning of the recognition of the use of a curative instruction in cases of improper comment by prosecutors. In *Mortimer*, the defendant objected to the prosecutor's statements, and the jury was told to disregard them. *Id.* Kansas follows this rule today in cases where the court believes a curative or cautionary instruction by the court is enough to remedy any prejudice from improper remarks.

91. *Id.*

92. *Id.*

93. *Id.* This may be one of the first appearances of the doctrine of invited response. This doctrine essentially holds that the improper remarks of a prosecutor are not error when they are given in response to improper comments made by defense counsel. United States v. Young, 470 U.S. 1 (1985).

94. Each case requires an individual determination based on the weight of the evidence against the defendant compared to the likelihood that an improper comment swayed the jury's decision. State v. Lumley, 976 P.2d 486, 501 (Kan. 1999).

95. State v. Sperry, 978 P.2d 933, 948 (Kan. 1999).

96. State v. Lockhart, 947 P.2d 461, 464 (Kan. Ct. App. 1997) (citing State v. White, 785 P.2d 950 (Kan. 1990)).

97. State v. Johnson, 502 P.2d 802, 810 (Kan. 1972).

98. State v. Comstock, 20 Kan. 650 (1878); *see* State v. Murrell, 523 P.2d 348, 350 (Kan. 1974) (citing State v. Johnson, 502 P.2d 802 (Kan. 1972)); State v. Dorsey, 578 P.2d 261, 264 (Kan. 1978).

99. 523 P.2d 348 (Kan. 1974).

100. State v. Murrell, 523 P.2d 348, 349-50 (Kan. 1974).

witness was in prison, testifying put his life in danger.[101] The defense alleged that through these statements the prosecutor gave his opinion on the credibility of the witness.[102] The court held that even if the statements were not fair comment, they could not constitute reversible error because defense counsel did not object at trial.[103]

Two Kansas Supreme Court cases in the 1990s adhered to the harmless error rule and necessarily the contemporaneous objection requirement.[104] In the 1994 case *State v. Whitaker,*[105] the court held that the prosecutor's comments about the truthfulness of the defendant were not reversible error absent a contemporaneous objection.[106] In 1998, the court explicitly held that "reversible error cannot be predicated upon prosecutorial misconduct during closing argument where no contemporaneous objection has been lodged."[107]

In 1999, the Kansas Supreme Court changed its standard for reviewing prosecutorial misconduct from harmless error to plain error.[108] Prosecutorial misconduct claims no longer needed a contemporaneous objection at trial to be preserved for appeal if a defendant's constitutional right was affected.[109] This change created the

101. *Id.* The prosecutor stated, "Mr. Burnett is at the Industrial Reformatory. He has now come into court and testified against somebody. I will leave that to your own imagination as to what that means insofar as he is concerned." *Id.*

102. *Id.* The implication was that the witness must be truthful if he would risk his safety to testify.

103. *Id.* at 350.

104. State v. Whitaker, 872 P.2d 278 (Kan. 1994); State v. Heath, 957 P.2d 449 (Kan. 1998).

105. 872 P.2d 278 (Kan. 1994).

106. *Id.* at 290. The Court found that the statements did not deny the defendant a fair trial. *Id.* The prosecutor said that "[y]ou were lied to during this trial." *Id.* at 289. The implication was that the defendant's story did not match with the prosecution's witnesses, who told consistent stories. *Id.* at 289-90.

107. *Heath*, 957 P.2d at 467-68.

108. *See Sperry*, 978 P.2d 933 (Kan 1999). An area of misconduct not covered in this note deals with comments regarding the defendant's Fifth Amendment right to remain silent, a constitutional right. State v. Tennison, 22 P. 429 (Kan. 1889), *overruled in part by* State v. Peterson, 171 P. 1153 (Kan. 1918); City of Topeka v. Myers, 8 P. 726 (Kan. 1885), *overruled in part by Peterson*, 171 P. 1153; State v. Balch, 2 P. 609 (Kan. 1884), *overruled in part by Peterson*, 171 P. 1153. Judge Gernon of the Kansas Court of Appeals has suggested that misconduct amounting to a constitutional violation may have been treated differently in early cases, thus, taking misconduct out of the harmless error realm. *See* Judge Robert L. Gernon, *Prosecutorial Misconduct in Kansas: Still Hazy After All These Years* 37 (2001) (unpublished Master of Laws of Judicial Process Theses, University of Virginia School of Law) (on file with University of Virginia School of Law) (modified and reprinted in 41 WASHBURN L.J. 245 (2002)). In these cases, the court found that reversal was warranted when the prosecutor commented on the defendant exercising his constitutional right to silence. *Id.* at 33. In making these comments, the prosecutor violated a specific Kansas statute forbidding prosecutors to comment on the defendant exercising his right to not incriminate himself. *Id.* Upon further analysis, it became clear that the court did not apply any different standard to constitutional violations. All of these decisions were overruled by *State v. Peterson* wherein the court explained that a standard of harmless error applied even to these types of comments going directly to a constitutional right. 171 P. 1153 (Kan. 1918). The court explained that the prosecutor's comments on the defendant's silence did not require reversal. *Id.* Rather, there must be evidence that the jury gave weight to the prosecutor's comments or that the comments influenced the verdict. Thus, it is clear that even where Fifth Amendment rights were concerned, the standard of review remained one of harmless error. *Id.*

109. *See Sperry*, 978 P.2d at 948 (holding that by this decision, Kansas courts apply the plain error rule in cases where the defendant is denied a right to a fair trial).

possibility of reversal in cases where review would have been impossible under the old standards.[110] The turning point was *State v. Sperry*.[111]

In *Sperry*, the defendant alleged error in the prosecutor's closing argument.[112] The prosecutor sarcastically referred to the defendant as a "fine upstanding citizen" and highlighted the defendant's inconsistent statements.[113] On appeal, the Kansas Supreme Court noted that "[o]rdinarily, we do not apply the plain error rule."[114] Moreover, it stated that "[w]e are . . . by this decision, applying the plain error rule where the prosecutor's misconduct is so prejudicial or constitutes a constitutional violation which, if not corrected, will result in injustice or a miscarriage of justice."[115] However, the court affirmed the defendant's conviction and stated that improper statements by the prosecutor did not deny the defendant a fair trial.[116] This change paved the way for the 2000 decision *State v. Pabst*.[117] In *Pabst*, the court relied on the new plain error standard in *Sperry* but went a step further.

Leading up to *Pabst*, appeals based on improper comments based on credibility were settled under the harmless error rule in Kansas.[118] Traditionally, prosecutors' comments about the credibility of a witness were not considered reversible error when their basis could be established or reasonably inferred from the evidence.[119] An excellent example is the Kansas Supreme Court's 1975 decision *State v. McClain*.[120] In *McClain*, the defendant claimed that the prosecutor improperly commented on the credibility of his testimony.[121] The court evaluated the prosecutor's statements in light of the ABA Stan-

110. *See Whitaker*, 872 P.2d at 290 (stating no reversal allowed absent a contemporaneous objection); State v. McClain, 533 P.2d 1277, 1282 (Kan. 1975) (holding that reversal is not allowed without a contemporaneous objection and that comments on credibility are proper if the evidence proves them or a reasonable inference can be drawn).

111. 978 P.2d 933 (Kan. 1999).

112. State v. Sperry, 978 P.2d 933, 945 (Kan. 1999).

113. *Id.* at 946.

114. *Id.* at 948.

115. *Id.* The prosecutor used a sarcastic tone and pointed out the inconconsistencies in the defendant's stories to undermine the defendant's credibility. *Id.* at 946.

116. *Id.* at 948.

117. 996 P.2d 321 (Kan. 2000).

118. State v. Whitaker, 872 P.2d 278 (Kan. 1994); State v. Heath, 957 P.2d 449 (Kan. 1998).

119. *See* State v. McClain, 533 P.2d 1277, 1282 (Kan. 1975), *overruled by* State v. Pabst, 996 P.2d 321 (Kan. 2000).

120. *Id.*

121. *Id.* at 1281-82. The prosecutor's language was not set out in the opinion. The opinion simply stated that the defense attorney accused the prosecutor of giving a personal opinion about credibility. *Id.*

dards[122] as well as the Kansas Code of Professional Conduct.[123] The court agreed that the personal opinions and beliefs of either party had no place in jury arguments.[124] However, after evaluating the statements of the prosecutor, the court found that no violation existed.[125] It reasoned that the prosecutor was merely commenting on the improbability of the defendant's testimony.[126] This was a reasonable inference drawn from the evidence, which was fair comment.[127] The court said that "[c]ounsel may comment on the credibility of the witness where his remarks are based on the facts in evidence and a considerable latitude is allowed in that discussion."[128]

For more than two decades after *McClain*, reversal was rare, even when the court found a prosecutor's comments regarding credibility to be improper.[129] As previously stated, Kansas appellate courts were unlikely to reverse because of the application of the harmless error rule and the need for a contemporaneous objection. Additionally, Kansas appellate courts did not consider improper comments on credibility to necessarily implicate a defendant's constitutional right to a fair trial. In fact, the Kansas appellate court stressed that a defendant was not entitled to a perfect trial, only to a fair trial.[130]

This view changed in *State v. Pabst*.[131] In *Pabst*, the court used the new plain error standard of review from *Sperry* and changed how a prosecutor could refer to contradictory statements during closing arguments.[132] The facts of *Pabst* provide a backdrop for highlighting the dangers of applying the plain error rule.

During the trial, the defendant testified that he had accidentally shot his fiancée.[133] They had been arguing, and as they struggled for control of a gun from a standing position, they fell onto a couch and

122. *Function of Prosecutor*, *supra* note 8, at Standard 3-5.8(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." *McClain*, 533 P.2d at 1282 (citing ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standards 3-5.8 (1971)).

123. KAN. CODE OF PROF'L RESPONSIBILITY R. 501, DR 7-106(c)(4) (superceded by KAN. CODE OF PROF'L CONDUCT § 3.4(e), *in* KAN. SUP. CT. R. 226 (2001)). "[A]ssert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of the accused." *Id.*

124. *McClain*, 533 P.2d at 1282.

125. *Id.*

126. *Id.*

127. State v. Gauger, 438 P.2d 455, 460 (Kan. 1968).

128. *McClain*, 533 P.2d at 1282.

129. State v. Whitaker, 872 P.2d 278, 290 (Kan. 1994) (holding no reversal absent contemporaneous objection).

130. State v. Lumley, 976 P.2d 486, 503 (Kan. 1999). "A defendant is entitled to a *fair* trial but not a perfect one, for there are no perfect trials." *Id.* (quoting State v. Bly, 523 P.2d 397 (Kan. 1974), *overruled on other grounds* State v. Mims, 556 P.2d 387 (Kan. 1976)).

131. 996 P.2d 321 (Kan. 2000).

132. *State v. Pabst*, 996 P.2d 321 (Kan. 2000); State v. Sperry, 978 P.2d 933, 948 (Kan. 1999).

133. *Pabst*, 996 P.2d at 324.

the gun went off.[134] The defendant claimed that "both of their hands were on the gun for at least the first shot."[135] The defendant testified that he got blood on his hands when he tried to lift his fiancée off the couch.[136] "He wiped the blood off of his hands and then dialed 911."[137]

The defendant's testimony was contradicted by both forensic evidence and expert testimony.[138] According to the pattern of blood, the fiancée was shot while she was in an upright, sitting position on the couch.[139] The ballistic evidence showed no gunpowder residue on the victim's hands, and her fingerprints were not found on the weapon.[140] Contrary to the defendant's testimony, forensics found no trace of blood on his hands or clothes.[141] "An expert for the State testified that it would [have been] physically impossible for [the victim's hands] to be on the gun when fired due to the trajectory of the shots."[142] During the closing argument the prosecutor referred to the defendant as a liar, or said that he lied, eleven times.[143]

The defendant appealed his conviction on the grounds that the prosecutor's comments were improper and that the evidence was insufficient to support the conviction.[144] The Kansas Supreme Court held that it was improper for the prosecutor to refer to the defendant as a liar; however, the court noted a contradiction in the defendant's testimony and the scientific evidence.[145]

By applying the plain error rule recently established in *Sperry*, the court altered the two-step test previously used in evaluating misconduct. The first step was to determine whether remarks made by the prosecutor were outside the wide latitude granted to the prosecutor.[146] This latitude is considerable so long as the argument is consistent with the evidence presented at trial.[147] The *Pabst* court held that calling a defendant a liar was not within the latitude allowed the pros-

134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 325. The prosecutor used many different phrases to emphasize that the defendant's testimony was untruthful. The prosecutor said "[y]ou heard many lies . . . [t]he defendant sat right before you and lied to you . . . [h]e lied to you. Many, many times, he lied to you . . . I look into each one of your eyes and I tell you he lied . . . [t]he State tells you he lied . . . lied directly to you . . . he again lied directly to you." *Id.*
144. *Id.* at 324.
145. *Id.*
146. *Id.* at 325.
147. *See* State v. Scott, 21 P.3d 516, 526 (Kan. 2001) (citing State v. Miller, 997 P.2d 90 (Kan. 2000)).

ecution.[148] This was a significant departure from the holding in *State v. McClain*, which allowed prosecutors to make reasonable inferences on credibility.[149]

The second step asked whether the actions of the prosecutor violated the defendant's right to due process.[150] In determining whether the remarks constituted plain error, the court looked at whether they "[were] so gross and flagrant as to prejudice the jury against the accused and deny a fair trial, requiring reversal."[151] In prior cases, credibility comments during closing arguments were not considered unconstitutional, even if they were sometimes found to be improper.

After *Pabst*, prosecutors' improper comments on the credibility of witnesses are evaluated in the constitutional framework of the plain error rule.[152] A defendant now can claim a Fourteenth Amendment violation if a prosecutor improperly comments on the credibility of a witness, regardless of whether the comment is supported by the evidence or whether it is objected to at trial.[153]

The *Pabst* holding revealed the dangerous and realistic consequences of changing the standard to plain error. The *Pabst* court found sufficient evidence for the jury to convict the defendant of first degree murder.[154] Even so, the court, based solely on the claim of prosecutorial misconduct, reversed the conviction of what it saw as an obviously guilty defendant.[155]

In reviewing a claim for sufficiency of evidence, the *Pabst* court pointed out that there was direct evidence that the defendant not only shot the victim, but it was premeditated.[156] The court went on to conclude that "beyond a reasonable doubt . . . there was sufficient evidence to support a conviction in this case."[157] Beyond a reasonable doubt is a very high burden—the highest burden a jury must find. Reversing the conviction based on misconduct appeared to be reversing the conviction for a lower burden. If the sufficiency of the evidence test is met, then the lower test of whether improper conduct affected the outcome of the trial should not be able to reverse a conviction. If sufficient evidence exists, then the jury's verdict was reasonable and rational.

148. *Pabst*, 996 P.2d at 325-29.
149. *See supra* text accompanying note 119.
150. *Pabst*, 996 P.2d at 325.
151. *Id.*
152. *Id.* at 324-29.
153. *Id.*; State v. Sperry, 978 P.2d 933, 948 (Kan. 1999).
154. *Pabst*, 996 P.2d at 330.
155. *Id.* The court stated that premeditation and deliberation could be inferred from the evidence presented. *Id.*
156. *Id.* at 329-30.
157. *Id.* at 330.

The pivotal decisions of *Sperry* and *Pabst* created a prohibition on prosecutors' use of the word liar and brought improper credibility comments into a constitutional analysis. Additionally, these decisions now allow reversal in cases where evidence is sufficient to support a conviction. These holdings limit the ability of prosecutors to argue reasonable inferences on credibility.[158] Ultimately, these decisions hinder the goal of prosecutors, which is to seek justice.

V. Reasonable Inferences of Untruthfulness

Upon deciding the *Pabst* case, the Kansas Supreme Court made a pivotal change in the character of prosecutors' closing arguments by overruling twenty-five years of precedent.[159] The court forbade a prosecutor from ever referring to the defendant as a liar or inferring that he lied during the trial, without risking reversal.[160] This holding contradicted the basic premise that an attorney may argue anything presented as evidence during the trial and all reasonable inferences from that evidence in closing argument.[161]

The court's justification for this holding was that calling the defendant or a witness a liar was a violation of the ethical standards in both the Kansas Rules of Professional Conduct (KRPC)[162] and the ABA Standards for Criminal Justice.[163] The court found that calling the defendant a liar, or saying the defendant lied, injected a personal opinion as to the credibility of the witness.[164] The court's broad holding in *Pabst* is flawed because it precludes prosecutors from being able to argue that a defendant is not being truthful even when the evidence supports that conclusion. The court failed to consider whether the scientific evidence and expert testimony supported the reasonable inference that the defendant was not being truthful. Because the statements were supported by the evidence, the statements were a reasonable inference and not the prosecutor's personal opinion.

The KRPC and ABA Standards explicitly prohibit prosecutors from expressing personal opinions about the credibility of a witness or

158. *See* State v. Gauger, 438 P.2d 455, 460 (Kan. 1968). "[C]ounsel is allowed considerable latitude in discussing the evidence and drawing reasonable inferences therefrom . . . ." *Id.*

159. State v. McClain, 533 P.2d 1277 (Kan. 1975), *overruled by* State v. Pabst, 996 P.2d 321 (Kan. 2000).

160. *Pabst*, 996 P.2d at 326.

161. *Gauger*, 438 P.2d at 460.

162. Kan. Code of Prof'l Conduct § 3.4(e), *in* Kan. Sup. Ct. R. 226 (2001). "[I]n trial . . . state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." *Id.*

163. *Function of Prosecutor*, *supra* note 8, at Standard 3-5.8(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." *Id.*

164. *Pabst*, 996 P.2d at 326.

defendant.[165] Credibility statements do not violate either rule when the evidence supports the comments.[166] No violation occurred in *Pabst* because the evidence supported a reasonable inference that the defendant's credibility was in question. These rules were established to prevent attorneys from giving personal opinions and drawing conclusions that would prejudice the jury.[167] These rules did not, nor was their purpose to, prevent the prosecution from arguing the evidence presented and any reasonable inferences.[168]

When the *Pabst* court overruled *State v. McClain*[169] it failed to make the distinction recognized in *McClain* between a reasonable inference supported by the evidence and a personal opinion.[170] The *McClain* court, which allowed comments about the defendant's credibility, held that the evidence supported the reasonable inference that the defendant lied.[171] The *Pabst* court described the holding in *McClain* as a contradiction of the KRPC, stating that the prosecutor's comments were improper personal opinions.[172]

In *Pabst*, all the scientific evidence established a crime scene very different from that described by the defendant in his testimony.[173] The scientific and expert evidence openly contradicted the defendant's depiction of what transpired that fateful day.[174] That contradiction allowed the prosecutor to draw the reasonable inference that either the defendant or the scientific evidence was lying. It was up to the jury to decide which version to believe. The prosecutor's remarks painted the defendant's testimony as untruthful.[175] In turn, defense counsel would be expected to argue that the scientific evidence was false.[176] The ABA Standards and Justice White's decision demand that defense counsel make those arguments.[177] This is the adversarial process at work; however, this does not condone the repeated use of the word liar in the prosecutor's closing argument.

While it is conceded that calling the defendant a liar eleven times is excessive, simply stating that the defendant or any witness lied does not necessarily amount to injecting a personal opinion into a court

165. KAN. CODE OF PROF'L CONDUCT § 3.4(e), *in* KAN. SUP. CT. R. 226; *Function of Prosecutor*, *supra* note 8, at Standard 3-5.8(b).
166. State v. McClain, 533 P.2d 1277 (Kan. 1975).
167. *Function of Prosecutor*, *supra* note 8, at Standard 3-5.8(b).
168. State v. Gauger, 438 P.2d 455, 460 (Kan. 1968). "[C]ounsel is allowed considerable latitude in discussing the evidence and drawing reasonable inferences therefrom . . . ." *Id.*
169. *McClain,* 533 P.2d at 1282.
170. State v. Pabst, 996 P.2d 321, 326 (Kan. 2000).
171. *McClain,* 533 P.2d at 1282.
172. *Pabst*, 996 P.2d at 326.
173. *Id.* at 324.
174. *Id.*; *see supra* text accompanying notes 133-42.
175. *Id.* at 325.
176. United States v. Wade, 388 U.S. 218, 255-57 (1967) (White, J., dissenting in part and concurring in part).
177. *Id.*

proceeding. When the evidence supports a reasonable inference that someone lied, the jury must ultimately decide which theory and which evidence to believe. The prosecutor merely acts as an advocate in presenting his interpretation of the evidence during closing argument. The jury is free to disregard the prosecutor's theory and accept defense counsel's theory.

At least one other state court has recognized that some credibility comments are proper when supported by the evidence and reasonableness. In *State v. Pendexter*,[178] the Maine Supreme Court recognized that when a defendant admits in his testimony that he lied, the comments are "fairly based on the evidence" and not personal opinion.[179] Kansas courts have not accepted this reasoning, as best illustrated in *State v. Smith*.[180]

In *Smith*, the court attempted to guide prosecutors in a classic legal dance when dealing with credibility arguments.[181] The court held that prosecutors could point out contradictions in testimony and evidence; nonetheless, it drew a fictional line between pointing out the inconsistency and inferring that one version is untruthful. The defendant admitted at trial that he lied to police and gave a different version of the events during his testimony.[182] In *Smith* the prosecutor pointed out during his closing argument that the defendant changed his story:

> The defendant wants you to believe that he was lying back in April . . . *[t]here is no doubt whatsoever that he's a liar. Given the best picture here, the best for him, he's lying in April. He's definitely a liar one way or another.*[183]

The court held that the comments about the defendant's credibility constituted reversible error.[184] While the court acknowledged that the prosecution had broad discretion during closing argument, it reiterated that even though a prosecutor may argue that some testimony was not believable, the prosecutor may not draw a conclusion as to the witness' truthfulness.[185] The court conceded that the prosecutor could point out inconsistent statements given by the defendant.[186]

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178. 495 A.2d 1241 (Me. 1985).

179. *Id.* at 1241.

180. State v. Smith, 11 P.3d 520 (Kan. 2000).

181. Lawyers distinguish the facts of their cases from cases with contrary holdings. This often amounts to splitting hairs over such minute details that the average person, including a juror, cannot see the distinction. One might wonder whether the attorney sees it or if it is a legal fiction they have learned to accept and utilize when needed.

182. *Smith*, 11 P.3d at 528.

183. *Id.*

184. *Id.* at 529. This decision came after *State v. Sperry* and *State v. Pabst*.

185. *Id.*

186. *Id.*

Essentially, the court advised that prosecutors may argue that two contradictory stories cannot both be true.[187] The court went a step further, allowing prosecutors to argue the reasonable inference that one statement was "fabricated."[188] However, a prosecutor must never argue that testimony was not believable, leaving that matter to the jury.[189] The court stated that the prosecutor in *Smith* should have stopped at pointing out the inconsistent statements.[190] Even though the defendant admitted that he lied, the court found the prosecutor went too far by stating that because the defendant gave inconsistent statements he was a liar.[191]

This holding is contradictory to *McClain* where the court allowed the reasonable inference of untruthfulness if established by the evidence.[192] This is consistent with Kansas courts' recognition that prosecutors may argue any evidence presented at trial and any reasonable inferences drawn from that evidence.[193] This rule should have been applied in *Smith* where the defendant himself raised the issue of his credibility.[194]

In *Smith*, the prosecutor's statement was not a reasonable inference. Rather, it was a restatement of the defendant's own testimony.[195] When the court precluded the prosecutor from using this evidence during closing argument, the prosecutor was limited in his role as an advocate.

The *Smith* court distorted the rules applicable to closing arguments. The court created a ridiculous standard that allows prosecutors to acknowledge inconsistencies in evidence, but it disallows drawing reasonable inferences from that evidence.

VI. THE RULES HAVE CHANGED: A PROSECUTOR'S PLAYBOOK

The *Smith* court set parameters on how prosecutors can argue contradictory statements during closing arguments.[196] Within those parameters, prosecutors should vigorously argue the evidence and any reasonable inferences, short of calling the defendant or a witness a liar.[197]

187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. State v. McClain, 533 P.2d 1277, 1282 (Kan. 1975).
193. State v. Smith, 11 P.3d 520, 528 (Kan. 2000).
194. *Id.*
195. *Id.*
196. *Id.* at 529.
197. *Id.*

In the wake of *Pabst*, the law in this area remains unsettled.[198] The ABA Standards impose a duty on prosecutors to advocate for changes in the law when those changes would better serve justice.[199] As with any change, the forum lies with appellate courts. While prosecutors should never violate binding precedent to bring this issue before the appellate courts, there will be appeals alleging misconduct that occurred before the recent decisions of *Pabst* and *Sperry*.[200] Thus, prosecutors should grasp these opportunities to limit the fallout from *Pabst*. In doing so, prosecutors should consider these alternative positions:

1. Closing arguments may consist of evidence presented and any reasonable inferences drawn from such evidence.[201]
2. If a defendant or witness gives contradictory statements, those statements are now evidence and lead to a reasonable inference of untruthfulness.
3. If the witness admitted during the trial that he lied, it is evidence and arguable during closing arguments.[202]
4. The jury will make the ultimate determination as to which evidence to believe; however, both advocates must be allowed to articulate reasonable inferences from the evidence presented.[203]

In addition, prosecutors should always consider whether their comments were justified under the doctrine of invited response, which Kansas courts recognize.[204] If defense counsel makes improper arguments, a prosecutor may respond even if the comments would otherwise be improper.[205] The United States Supreme Court discussed the doctrine of invited response in *United States v. Young*.[206] In *Young*, the Court emphasized that the doctrine does not approve or encourage improper comment by prosecutors.[207] The prosecutor's com-

198. It is unclear after *Pabst* whether any evidence on credibility can allow for a reasonable inference that can be argued during closing arguments.

199. *Function of Prosecutor*, *supra* note 8, at Standard 3-1.2.

200. State v. Pabst, 996 P.2d 321, 328 (Kan. 2000); State v. Sperry, 978 P.2d 933, 948 (Kan. 1999). Generally, the appeals process takes a considerable amount of time. Due to delays, or extensions requested by the parties, allegations of misconduct that occurred prior to the *Pabst* decision could still surface.

201. State v. Gauger, 438 P.2d 455, 460 (Kan. 1968).

202. *Id.*

203. *Id.*

204. *See generally* State v. Manning, 19 P.3d 84 (Kan. 2001); State v. Baker, 819 P.2d 1173 (Kan. 1991); State v. Zamora, 803 P.2d 568 (Kan. 1990). For example, in *State v. Baker*, the prosecutor bolstered the credibility of the prosecution's expert with his personal opinion. The court found that this was not reversible error because the comments were in response to comments by defense counsel. During defense counsel's closing, the attorney accused the prosecution of buying an expert witness. Thus, the court found that the prosecutor could discuss the witness' credibility in response to defense counsel's improper accusation. *Baker*, 819 P.2d at 446-49.

205. *See generally* Bruce J. Berger, *The Prosecution's Rebuttal Argument: The Proper Limitations of the Doctrine of Invited Response*, 19 CRIM. L. BULL. 5 (1983).

206. 470 U.S. 1 (1985).

207. *Id.* at 12.

ments are still improper, but the test in weighing the affect of those comments must take into account comments of defense counsel.[208]

The purpose of the doctrine is to "right the scale" in the adversary process when defense counsel steps over the line.[209] The court must decide whether the prosecutor's comments were invited and, ultimately, whether the jury was led astray.[210] Reversal is rare in cases where improper remarks by the prosecutor were invited by defense counsel.[211]

VII. Consequences and Implications

The most disconcerting result of the changes in reviewing allegations of prosecutorial misconduct is the recent trend of reversals.[212] Changing the standard from harmless error to plain error has allowed more claims to reach the appellate courts and has lowered the bar for reversing district court convictions.[213] The change to the plain error rule allows review for claims not objected to at trial.[214] Consequently, a defendant may raise a claim of misconduct for the first time on appeal.[215] Many cases that were barred by the contemporaneous objection rule before *Sperry* now will proceed on appeal.[216] Before *Pabst*, statements characterizing a witness or defendant as a liar were not considered so egregious as to require reversal because they did not implicate a constitutional right.[217] Now, the mere mention of the word acts as a talisman before the court, demanding reversal.

One example discussed earlier was *State v. Smith*.[218] The *Smith* court held that saying the defendant lied was improper, even though the defendant testified that he lied.[219] Arguably, this conviction would have been affirmed under the old standards, based on *State v. McClain*, as evidence supported the prosecutor's statements.[220]

208. *Id.*
209. *Id.* at 13.
210. *Id.*
211. *Id.* at 12.
212. State v. Pabst, 996 P.2d 321 (Kan. 2000); State v. Smith, 11 P.3d 520 (Kan. 2000).
213. *Supra* text accompanying notes 16-26.
214. State v. Sperry, 978 P.2d 933 (Kan. 1999) (changing the standard of review to plain error).
215. State v. Johnson, 502 P.2d 802, 810 (Kan. 1972). "It is firmly established in this jurisdiction that reversible error cannot be predicated upon a complaint of misconduct of counsel in closing argument to the jury where no objection is lodged." *Id.*
216. *Id. Johnson* was decided before *Sperry*. Thus, the harmless error standard applied, necessitating an objection to raise the issue on appeal.
217. State v. Whitaker, 872 P.2d 278, 290 (Kan. 1994).
218. 11 P.3d 520 (Kan. 2000).
219. State v. Smith, 11 P.3d 520, 528 (Kan. 1994).
220. State v. McClain, 533 P.2d 1277 (Kan. 1975) (holding that credibility comments were proper when the evidence allowed for a reasonable inference of untruthfulness), *overruled by* State v. Pabst, 996 P.2d 321 (Kan. 2000).

One source of support for this assumption is *State v. Whitaker*.[221] In *Whitaker*, the prosecution called the defendant a liar seven times.[222] On appeal, the court found that those comments did not so prejudice the jury as to deny the defendant a fair trial.[223] That holding was inconsistent with the court's ruling in *Smith*, where the court reversed based on the prosecutor using the word liar three times.[224]

Equally significant to the onslaught of reversals is their intended purpose. Even before the recent controversial changes, the court suggested that reversals be used as a deterrent or remedy to what it saw as a recurring problem of prosecutorial misconduct.[225] This would not be the first time a standard was implemented in an effort to deter improper conduct. The exclusionary rule, which provides for the exclusion of evidence seized in violation of the Fourth Amendment, is a good example.[226] However, courts recognized that excluding all evidence because of Fourth Amendment violations did not always serve the mission of justice.[227] Thus, the court created exceptions because excluding evidence was not always an effective remedy. Although many exceptions exist, the good faith exception is a relevant analogy to prosecutorial misconduct.[228] Under this exception, illegally seized evidence can be used against the defendant, without recourse, if officers obtained such evidence in good faith.[229] Similarly, the good faith or intention of the prosecutor should be considered under claims of prosecutorial misconduct.[230]

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221. 872 P.2d 278 (Kan. 1994).

222. State v. Whitaker, 872 P.2d 278, 289-90 (Kan. 1994).

223. *Id.* at 290.

224. *Id.*

225. *See* State v. Spresser, 896 P.2d 1005, 1012 (Kan. 1995) (Abbott, J., concurring). "I am very concerned that prosecutors who have an ethical obligation to insure [sic] that defendants receive a fair trial are aware of this court's tendency [referring to the harmless error rule] . . . . We are seeing far too many unethical, improper closing arguments. If this trend continues, I see no alternative but to grant a new trial even though the trial judge instructs the jury to disregard the improper remarks." *Id.*

226. *See generally* Chapman v. California, 386 U.S. 18 (1967).

227. People v. Defore, 150 N.E. 585 (N.Y. 1926). Judge Cardozo criticized the exclusionary rule:

> The criminal is to go free because the constable has blundered . . . . The pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes most flagitious. A room is searched against the law, and a body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free.

United States v. Cusumano, 67 F.3d 1497 (10th Cir. 1995) (discussing the lack of statistical data supporting the exclusionary rule as a deterrent to police misconduct; questioning the logic of assuming police officers consider the rule while conducting job duties; and reevaluating the purpose and other options that might better suit the justice system), *vacated by* 83 F.3d 1247 (10th Cir. 1996).

228. John F. Deters, *The Exclusionary Rule*, 89 GEO L.J. 1216 (2001).

229. *Id.*

230. *See generally* Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 1 (1999).

Much like the exclusionary rule, a nearly across-the-board reversal rule for referring to the defendant as a liar may not always further justice. Judge Learned Hand agreed that even if a prosecutor chose to make comments outside the ethical parameters, reversal would do little or nothing to punish the prosecutor.[231] More importantly, Judge Hand specifically mentioned the true cost of reversal in cases of misconduct: "[I]t would accomplish little towards punishing the offender, and would upset the conviction of a plainly guilty man."[232] In light of this unjust result, a similar good faith exception must be allowed under the new sweeping review of plain error.

The legal profession provides a forum to deal with improper conduct by attorneys.[233] Unethical or improper conduct by attorneys is referred to the State Disciplinary Administrator.[234] In fact, judges and attorneys alike have a duty to report such conduct.[235] The Disciplinary Administrator's purpose is to deal with ethical violations of attorneys.[236] If the court believes prosecutorial misconduct is a growing problem, despite figures to the contrary,[237] then it should look to harsher penalties and more frequent referrals to the Disciplinary Administrator when prosecutors have violated ethical rules. By doing so, the court would stand a better chance of deterring future misconduct. Further, the court would not burden society with the retrial of a guilty defendant.[238]

Contempt orders are another potential deterrent.[239] Using a contempt order, the judge could fine, imprison or otherwise sanction the prosecutor for violating the ethical rules of the profession.[240] If the court wants to change the tactics used by prosecutors, the message must be sent personally. Reversals send a message to society or the criminal justice system as a whole. The message is that the criminal justice system takes a greater interest in punishing unethical conduct than ensuring that justice is served. By doing this, the court leaves the prosecutor nearly untouched, as there are no sanctions involved in reversal and the same prosecutor may not even get the case back for retrial on remand. Additionally, society may further suffer if the State lacks the resources to retry the defendant.

231. United States v. Lotsch, 102 F.2d 35, 37 (2nd Cir. 1939).
232. *Id.*
233. KAN. S. CT. R. 201 (2001).
234. *Id.*
235. KAN. CODE OF PROF'L CONDUCT § 8.3, *in* KAN. SUP. CT. R. 226.
236. KAN. S. CT. R. 205 (2001).
237. *See* Gernon, *supra* note 108, at 7-12.
238. Micheal T. Fisher, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1301 (1988).
239. KAN. STAT. ANN. § 20-1201 et.seq. (1995).
240. *Id.*

VIII. Conclusion

Kansas courts have taken a wrong turn where prosecutorial misconduct is concerned. When sufficient evidence exists for a conviction, reversal is an inappropriate remedy and ignores the justice-seeking process. Much like the exclusionary rule, this treatment will not deter what the court considers misconduct, but rather, in the words of Judge Learned Hand, "would upset the conviction of a plainly guilty man." Further, these decisions have curtailed prosecutors' ability to argue the evidence of a case to reach a just result by taking away the ability to present reasonable inferences based on the evidence. Allowing immense power on the part of defense counsel and diminishing prosecutors' power in trial only subverts efforts to reach a truthful and just result.

While prosecutors must not inject personal opinions during trial, they should be allowed to argue any evidence presented during trial and any reasonable inferences drawn therefrom. This has long been the rule of advocacy and should not now be deemed inapplicable to prosecutors. Surgically removing a word from prosecutors' vocabulary serves no purpose but to limit the tools of justice. Lies are a reality and sometimes are not provable. Other times, the evidence brings them into the realm of a reasonable inference. When this happens, prosecutors should not be prevented from stating that the evidence shows that a defendant or witness lied. Although it is for the jury to determine the ultimate truth, both sides should have equal power to argue what the evidence supports.