Prosecutorial Misconduct in Kansas: Still Hazy After All These Years*

The Honorable Robert L. Gernon**

> "It is the duty of a county attorney in a criminal prosecution to see that the state's case is properly presented with earnestness and vigor and to use every legitimate means to bring about a just conviction, but he should always bear in mind that he is an officer of the court and as such he occupies a quasi-judicial position whose sanctions and traditions he should preserve."[1]

The Supreme Court of Kansas first considered cases of prosecutorial misconduct in 1878. One of the cases involved William Comstock, who had broken into a saloon in Atchison, Kansas, and stolen $15.56.[2] Found guilty of both burglary and larceny, Comstock was sentenced to five years and three months.[3] He then appealed.

During the trial, Comstock's attorney had objected to several remarks of the Atchison County Attorney.[4] In referring to a witness in his opening statement, the county attorney said: "Everybody knows that this man is a felon."[5] Later during the trial, when Comstock's attorney objected to other statements made by the prosecution, the prosecutor responded by stating: "'Yes, you may keep on objecting. I never knew a guilty man to be on trial for a felony who did not object, and object, until he wore striped clothes in the penitentiary.'"[6]

The decision in *State v. Comstock*[7] is significant for the language the court used to justify the remarks of the county attorney, but more so for stating a potential standard for reviewing such incidents in the future. In what was the first harmless error ruling, the Kansas Su-

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1. State v. Majors, 323 P.2d 917, 920 (Kan. 1958).
2. State v. Comstock, 20 Kan. 650, 650 (1878).
3. *Id.*
4. *Id.* at 652.
5. *Id.* at 651.
6. *Id.* at 652.
7. 20 Kan. 650 (1878).

preme Court wrote that the county attorney's remarks were "probably improper,"[8] and held that

> [u]nder the facts of this case however we must presume that the verdict would necessarily have been just what it was, even if the remarks as made by the county attorney had never been made. We must presume that said remarks did not have the slightest effect upon the verdict of the jury.[9]

The opinion also asserted that courts should punish counsel who make arguments outside of the facts by fine or imprisonment, and should set aside verdicts obtained in this manner.[10] The court, however, affirmed the conviction.[11]

The standards and remedies for prosecutorial misconduct have not become much clearer in the 124 years since the *Comstock* opinion. Case statistics show that prosecutorial misconduct claims have not increased in proportion over the years. The incident rate of prosecutorial misconduct that appellate courts are reporting in bound volumes has remained approximately the same since 1933. However, the total number of cases handled by Kansas courts has grown so significantly that many more prosecutorial misconduct cases are seen by the appellate courts. While the problem of prosecutorial misconduct may not have become worse over time, it also has not improved in spite of the development of ethical rules for prosecutors and judges and the activities of the Kansas Disciplinary Administrator. This article will focus on the manner in which prosecutorial misconduct is treated on appeal and the responsibilities of judges in dealing with misconduct issues.

The goal of each participant in the criminal justice system ought to be to seek justice, not simply to convict an individual of an offense charged. Toward that end, it is the goal of the writer that each participant in the process be attuned to his or her legal and ethical limits and responsibilities in the prosecution of a criminal case and the proceedings attendant to such prosecution.

I. Defining Prosecutorial Misconduct

The Kansas Supreme Court has indirectly defined prosecutorial misconduct that requires reversal as being "of such a magnitude as to deny a defendant's constitutional right to a fair trial."[12] Other courts have used a variety of similar phrases to attempt to define prosecutorial misconduct.

8. State v. Comstock, 20 Kan. 650, 654 (1878).
9. *Id.* at 655.
10. *Id.*
11. *Id.*
12. State v. Pabst, 996 P.2d 321, 324-25 (Kan. 2000) (citing State v. Sperry, 978 P.2d 933, 948 (Kan. 1999)).

An Illinois appellate court referred to "prosecutorial overreaching" and stated that the definition of prosecutorial overreaching is "prosecutorial misconduct specifically designed to cause or provoke a mistrial in order to obtain a second more favorable opportunity to convict the accused."[13] The Illinois appellate court went on to suggest that prosecutorial misconduct also arises when the prosecutor's conduct "is motivated by bad faith intended to prejudice or harass the [defendant]."[14]

A California court asserted that the term misconduct "implies a dishonest act or an attempt by an attorney to persuade the court or jury by the use of deceptive or reprehensible methods."[15] A similar opinion was expressed by a Colorado court: "[A] prosecutor, while free to strike hard blows, 'is not at liberty to strike foul ones.'"[16]

In *Kyle v. United States*,[17] the Second Circuit suggested, as a way to measure and perhaps develop a rational test to judge prosecutorial misconduct cases, that "the required showing of prejudice, [seems] to vary inversely, with the degree to which the conduct of the trial has violated basic concepts of fair play."[18] Under the *Kyle* analysis, the more egregious the conduct of the prosecutor, the less the level of prejudice that needs to be shown for reversal.

II. ABA Standards and Model Rules

Standards relating to permissible conduct and behavior of prosecutors have been in place for some time. The American Bar Association (ABA) has long been concerned with this topic and has published standards for both the prosecution and the defense.[19] The following ABA standards are particularly relevant to prosecutorial misconduct issues:

> Standard 3-1.2(c) The duty of the prosecutor is to seek justice, not merely to convict.
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> . . . .
>
> Standard 3-2.8(a) A prosecutor should not intentionally misrepresent matters of fact or law to the court.
>
> . . . .
>
> Standard 3-5.5 The prosecutor's opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible. A prosecutor should not al-

13. People v. Brown, 584 N.E.2d 355, 361 (Ill. App. Ct. 1991).
14. *Id.*
15. People v. Beivelman, 447 P.2d 913, 921 (Cal. 1968).
16. Wilson v. People, 743 P.2d 415, 418 (Colo. 1987).
17. 297 F.2d 507 (2d Cir. 1961).
18. Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961).
19. ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed. 1993).

> lude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.
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> . . . .
>
> Standard 3-5.6(b) A prosecutor should not knowingly and for the purpose of bringing inadmissible matters to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.
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> . . . .
>
> Standard 3-5.8(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not make arguments calculated to appeal to the 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.[20]

The Kansas Rules of Professional Conduct (KRPC) mirror, with some modification, the Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association.[21] The Kansas Supreme Court adopted the KRPC "as general standards of conduct and practice required of the legal profession in Kansas."[22] "Violation of such standards constitutes grounds for disciplinary action."[23] Several rules applicable for misconduct cases follow:

> Rule 3.4 A lawyer shall not: . . . (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;
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> . . . .
>
> Rule 8.4 It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; . . .[24]

The Model Code of Judicial Conduct, which has for the most part been adopted in Kansas, requires a judge to take "appropriate action"

20. *Id.* at §§ 3-1.2(c), 3-2.8(a), 3-5.5, 3-5.6(b), 3-5.8(a).
21. KAN. CODE OF PROF'L RESPONSIBILITY, *in* KAN. SUP. CT. R. 226 (2000).
22. *Id.*
23. *Id.*
24. *Id.* at §§ 3.4, 8.4.

whenever a judge receives substantial information that a lawyer has violated the rules of professional responsibility.[25]

III. Judicial Treatment of Prosecutorial Misconduct

A. *The Harmless Error Rule*

The over-arching rule used by appellate courts when addressing prosecutorial misconduct cases is the harmless error rule. This rule, which is recognized by every state, allows appellate courts to ignore trial errors that, in theory, do not prejudice a defendant's substantive rights.[26] The relevant Kansas statute, chapter 60, article 2, section 61 of the Kansas Statutes Annotated, states:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.[27]

The 1967 United States Supreme Court case of *Chapman v. California*[28] is often cited for its language, which fashioned the modern harmless error rule. The high court, Justice Black writing, had two questions to consider: (1) whether there can ever be harmless constitutional error, and (2) whether the error in *Chapman* was harmless.[29] The Court stated:

> In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one. What harmless-error rules all aim at is a rule that will save the good in harmless-error practices while avoiding the bad, so far as possible.[30]

The Court reversed the conviction based on the prosecutor's references to the failure of the defendants to testify and the trial judge's instruction to the jury, which allowed the jury to make impermissible inferences.[31] The majority stated that "absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts."[32]

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25. Kan. Sup. Ct. R. 601, Canon 3 § D(2) (2000).
26. *See* State v. Mitchell, 7 P.3d 1135, 1144 (Kan. 2000).
27. Kan. Stat. Ann. § 60-261 (2000).
28. 386 U.S. 18 (1967).
29. Chapman v. California, 386 U.S. 18, 20 (1967).
30. *Id*. at 22-23.
31. *Id.* at 25-26
32. *Id*.

Justice Stewart, concurring in the result, immediately recognized the quandary the harmless error rule would create for all courts:

> The adoption of any harmlesserror [sic] rule, whether the one proposed by the Court, or by the dissent, or some other rule, commits this Court to a case-by-case examination to determine the extent to which we think unconstitutional comment on a defendant's failure to testify influenced the outcome of a particular trial. This burdensome obligation is one that we here are hardly qualified to discharge.[33]

Justice Harlan, dissenting, also recognized the dilemma with the rule and stated: "[I]t seems to me highly inappropriate for this Court to presume to take upon itself the power to pass directly on the correctness of impact evaluations coming from 50 different jurisdictions."[34]

The comments of Justices Stewart and Harlan go to the core of the criticism of the harmless error rule. Appellate decisions, Kansas included, repeat the mantra that appellate courts will not reweigh the evidence.[35] However, at times that is precisely what reliance on the harmless error rule requires.

The criminal trial is the process that determines guilt or innocence. Society has attached a value to our process by concluding "that it is far worse to convict an innocent man than to let a guilty man go free."[36] The determination of guilt or innocence must take place within the framework of due process. Michael T. Fisher, in his discussion of harmless error and due process, states:

> As applied to the criminal justice system, the due process clause requires that the procedures used to determine the guilt or innocence of the defendant comport with "fundamental ideas of fair play and justice." The primary goal of the criminal justice system is to "provide for the effective enforcement of the criminal law through the detection, apprehension, conviction, and punishment of guilty persons." This primary goal, however, must be accomplished consistent with other "process goals" that are concerned with the quality of the processes used to accomplish the primary goal. Relevant process goals include the maintenance of the adversarial and accusatorial systems, the assurance of respect for individual dignity, the minimization of erroneous convictions, the appearance of fairness, and the equal application of the law.
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> Due process is thus a set of fair procedures designed to determine truth in a manner consistent with the process goals of the system. Due process requires not only that criminal proceedings reach a correct outcome—that justice be done—but also that the correct

33. *Id.* at 45 (Stewart, J., concurring).
34. *Id*. at 56 (Harlan, J., dissenting).
35. *See* State v. Williams, 988 P.2d 722, 734 (Kan. 1999); State v. Clemons, 929 P.2d 749, 753 (Kan. 1996).
36. In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

outcome be reached only through the use of fundamentally fair procedures.[37]

Although due process continues to be referenced as a fundamental tenet of criminal trials, concerns about due process have been tempered by a change in the types of crimes committed and the increasing power of prosecutors. In 1992, Bennett L. Gershman noted that:

> [T]he transition from a due process-oriented criminal justice model to a model that has placed increasing emphasis on crime control and crime prevention. Crime has grown more complex and sophisticated since the early 1970s, particularly narcotics, racketeering, official corruption, and business fraud crimes, requiring a coordinated, powerful, and equally sophisticated response. The prosecutor has emerged as the central figure with the training and experience to administer this effort.
>
> Examples of this new prosecutor can be seen in the so-called "special prosecutors" appointed to conduct major investigations such as Watergate, Iran-Contra, and local corruption probes, as well as the expanded use of undercover sting operations led by prosecutors. To support these new prosecutorial initiatives, legislatures have armed prosecutors with broad new weapons such as RICO, Drug Enterprise, Forfeiture, and Sentencing Guidelines. The judiciary has cooperated in this new effort too. First, by relaxing constitutional protections embodied in the exclusionary rule and due process, and by interpreting statutory and evidentiary rules broadly in the prosecutor's favor, the courts have made it much easier for prosecutors to win convictions. Second, by their increasing deference to prosecutorial discretion in every form, the courts have stimulated a law enforcement mentality that the "end justifies the means." Finally, as resort to the death penalty increases, the prosecutor has become the most dominant figure on the question of who will live and who will die for crimes committed.[38]

Chapman, read in conjunction with *Fahy v. Connecticut*[39] and *Donnelly v. DeChristoforo*,[40] gives credence to Gershman's assertions. The influence of the "law and order" political climate of the 1970s, as well as court cases such as *Chapman* and *Donnelly*, provided a nurturing environment for the harmless constitutional error rule to flourish.

Two approaches for dealing with prosecutorial misconduct and harmless error issues exist side by side, and they are in some tension with each other. Both approaches can be read in Kansas appellate decisions regarding prosecutorial misconduct. One is found in *Strickland v. Washington*,[41] an ineffective assistance of counsel case in which the burden remains on a defendant to show that his or her counsel's conduct fell below an objective standard, and, if so, but for the errors,

37. Michael T. Fisher, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1299-1300 (1988).
38. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 393-94 (1992).
39. 375 U.S. 85 (1963).
40. 416 U.S. 637 (1974).
41. 466 U.S. 668 (1984).

the result would have been different.[42] The ineffective assistance of counsel issues come into play when a defendant is convicted and later raises the issue of prosecutorial misconduct and failure to raise an objection to a prosecutor's remarks or conduct during trial.[43]

The other approach is set forth by the United States Supreme Court in *Doyle v. Ohio*.[44] Under *Doyle*, once the improper conduct is established, the burden is placed on the government to show that the conduct did not deprive the defendant of a fair trial.[45] Fisher argues that only the *Doyle* test should be used in dealing with prosecutorial misconduct cases, maintaining that because only the state is responsible for, and in a position to prevent, such misconduct, the state should bear the burden of demonstrating that the prosecutorial misconduct did not affect the outcome of the proceeding.[46]

Two University of Kansas law professors, Tom Stacy and Kim Dayton, wrote an article for the Columbia Law Review concerning harmless constitutional error.[47] One of the points they made concerned the scope of review.[48] They caution that the jury's exclusive authority to decide the weight and credibility of the evidence must be preserved.[49]

Stacy and Dayton argue that it is problematic to allow appellate judges to draw conclusions as to "a defendant's guilt based on [the judge's] own view[ ] of the weight and credibility of the evidence."[50] They suggest that there is sufficient empirical data to support an assertion that judges "do a . . . poor job of evaluating the importance jurors attach to specific issues and evidence."[51]

Kansas cases, when discussing prosecutorial misconduct and the harmless error rule, usually find the error to be harmless, relying on *Chapman*, rather than applying the *Doyle* test, although there are some exceptions. A typical analysis is as follows:

> We hold that although the prosecutor's remarks were improper, they were not so gross and flagrant as to prejudice the jury against Mitchell and deny him a fair trial. The error, when viewed in light of the record as a whole, had little, if any, likelihood of changing the result of the trial.[52]

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42. Strickland v. Washington, 466 U.S. 668, 693 (1984).
43. *Id.* at 690.
44. 426 U.S. 610 (1976).
45. Doyle v. Ohio, 426 U.S. 610, 619-20 (1976).
46. Fisher, *supra* note 37, at 1319.
47. Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988).
48. *Id.* at 127.
49. *Id.*
50. *Id.*
51. *Id*. at 129.
52. State v. Mitchell, 7 P.3d 1135, 1144 (Kan. 2000).

This approach is open to question on several levels. It requires an appellate court to perform two functions it is ordinarily extremely reluctant to do: (1) weigh the evidence, and (2) without any empirical evidence, place itself inside each factfinder's mental process. This results in a sliding-scale approach to some cases. The exact same conduct will result in a reversal if the case is close, but an affirmance if the evidence of guilt is strong.

B. *Curative Instructions*

The use of a curative instruction may prevent reversal but does not ensure that the trial is fair. The courts must recognize the limits of such instructions and that there is some conduct that simply cannot be cured. At least one judge, in dissent, has called such curative instructions a kind of "judicial lie":

> Like many other sorts of cautionary instructions, it asks the jury to do the well-nigh impossible. In Nash v. United States, . . . Judge Learned Hand wrote of 'the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else'; in United States v. Gottfried, . . . he said, 'nobody can indeed fail to doubt whether the caution is effective * * * '; see also his remarks in United States v. Delli Paoli, ... In United States v. Antonelli Fireworks Co., . . . dissenting opinion, it was noted that a cautionary instruction may emphasize the very matter the jury is told to forget, 'as in the story, by Mark Twain, of the boy told to stand in a corner and not think of a white elephant.' Mr. Justice Jackson, concurring in Krulewitch v. United States, . . . observed: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * , all practicing lawyers know to be unmitigated fiction.' It 'is well enough,' said Wigmore, . . . 'to contrive artificial fictions for use by lawyers, but to attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends towards confusion and disrespect for the law's reasonableness.' In United States v. Paoli, supra, Judge Hand referred to such an instruction as a 'placebo.' Fletcher, . . . calls a 'placebo' or 'bread pill' a 'medicinal lie' which undermines 'a truly moral relationship between physician and patient'; it 'encourages the idea * * * that drugs will cure most ailments and this serves to extend the patent-medicine evil.' Similarly, such a cautionary instruction is a kind of 'judicial lie': It undermines a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice.[53]

C. *The Role of the Trial Judge*

The trial judge clearly has the responsibility to see that trials are conducted with the goal of fairness in mind and also to report any

53. United States v. Grunewald, 233 F.2d 556, 573-74 (2d Cir. 1956) (Frank, J., dissenting) (alteration in original) (citations omitted).

ethical violations that occur during the course of the proceedings. Two very early Kansas cases, *State v. Comstock*[54] and *State v. Gutekunst*,[55] dealt with the role of the trial judge in prosecutorial misconduct matters. These cases clearly place an obligation on the trial judge to be active in preventing trial misconduct. Rather than assume the role of an observer, these cases admonish the trial judge to remember his or her role as a participant in an important event. In *Comstock*, the court stated:

> Courts ought to confine counsel strictly within the facts of the case; and if counsel persistently go outside of the facts of the case in their argument to the jury, then the court should punish them by fine and imprisonment; and if they should obtain verdict by this means, then the court should set such verdicts aside.[56]

In *Gutekunst*, the court highlighted:

> [T]he duty of the district courts in jury trials to interfere in all cases of their own motion, where counsel forget themselves so far as to exceed the limits of professional freedom of discussion. Where counsel refers to pertinent facts not before the jury, or appeals to prejudices foreign to the case, it is the duty of the court to stop him then and there. The court need not and ought not to wait to hear objection from opposing counsel. The dignity of the court, the decorum of the trial, the interest of truth and justice forbid license of speech in arguments to jurors outside of the proper scope of professional discussion.[57]

The duty of the trial court was emphatically restated by the Kansas Supreme Court in the 1958 case of *State v. Majors*:[58]

> Where an attorney persists in objectionable argument after the trial court has admonished him, as it did here, then the court may, and should, declare a mistrial, or grant a new trial . . . . No possible doubt should have remained in counsel's mind that he should discontinue such improper argument or that by his failure to do so he was flying in the face of an order of mistrial or the granting of a new trial. Further, it was the duty of the trial court to try to stop the unprofessional discussion of the county attorney and when that attempt failed, the jury should have been admonished to disregard the argument. Failure by the trial court herein to so admonish the jury was prejudicial error.[59]

It needs to be noted that an objection must usually be made to prosecutorial misconduct in order to properly preserve the issue, but this is not always the case.

The language of *Comstock*, *Gutekunst*, and *Majors* places an affirmative duty on the trial judge to step in and stop improper argu-

54. 20 Kan. 650 (1878).
55. 24 Kan. 252 (1880).
56. State v. Comstock, 20 Kan. 650, 655 (1878).
57. State v. Gutekunst, 24 Kan. (rev.) 183, 184, 24 Kan. 252, 254 (1880) (original).
58. 323 P.2d 917 (Kan. 1958).

ments or statements of counsel even when there is no objection. This view was reinforced in *State v. Wilson*,[60] where the court quoted the *Gutekunst* opinion on the duty of the judge.[61] The court also referred to *State v. Netherton*,[62] where the defendant did not object to the prosecutor's comments until after the jury had retired.[63] The *Netherton* court held that an objection made after the jury had retired was sufficient, and granted a new trial:

> Appellee pleads justification on the ground of provocation by the remarks of the attorneys for the defendant. This has sometimes been recognized as a legitimate excuse, even in a criminal case, for some rash, extravagant, inflammatory, or prejudicial remarks in a sudden outburst of retaliation, but hardly for an extended repetition or a series of objectionable statements along several different lines. We think the failure of the court to admonish the jury to disregard these remarks was error, even if the jury had retired from the room before the request was made.[64]

However, shortly after the admonitions in *Comstock* and *Gutekunst*, the Kansas Supreme Court, in *State v. Yordi*,[65] refused to set aside a conviction of murder in the first degree even though it agreed that there had been prosecutorial misconduct in the prosecutor's opening statement, noting there was no objection and that the evidence was strong.[66]

> Perhaps the language attributed to the counsel opening for the state, that "public sentiment is against him, he has no friends," etc., is objectionable, and ought not to have been indulged in. Yet no objection was made at the time; no suggestion to the court to correct counsel or correct any impression which might be made thereby upon the jury by suitable instructions. The first time the matter was called to the attention of the court was on the motion for a new trial, on which motion a dispute arose as to the language used, and the language in the record is according to the certificate of the court given as the substance of the remarks claimed to have been objectionable. We cannot think there is enough in this to justify us in disturbing the conviction and ordering a new trial, especially when we take into account the strength of the testimony offered against the defendant.[67]

The distinction between the *Comstock* and *Gutekunst* opinions and the *Yordi* decision might be that the offenses in *Comstock* were burglary in the second degree and petty larceny, and the offense in *Gutekunst* was a violation of the dram shop act, while the offense in

60. 360 P.2d 1092 (Kan. 1961).
61. State v. Wilson, 360 P.2d 1092, 1097 (Kan. 1961) (quoting State v. Gutekunst, 24 Kan. (rev.) 183, 24 Kan. 252 (1880) (original)).
62. 279 P. 19 (Kan. 1929).
63. *Wilson*, 360 P.2d at 1097 (citing State v. Netherton, 279 P. 19 (Kan. 1929)).
64. *Netherton*, 279 P. at 24-25.
65. 2 P. 161 (Kan. 1883).
66. State v. Yordi, 2 P. 161, 164-65 (Kan. 1883).
67. *Id.* at 164.

Yordi was murder in the first degree. What is significant about these cases and many others concerning a lack of a contemporaneous objection is that the appellate courts make no mention of the trial judge's duty to step in and stop the improper arguments or remarks.[68] However, in a 1999 opinion, *State v. Sperry*,[69] the Kansas Supreme Court again emphasized the duty of the trial judge to act:

> Where prejudicial conduct would make it impossible to proceed without injustice to either party, the trial court may stop a trial and order a mistrial. K.S.A. 22-3423(1)(c). However, where such conduct amounts to a violation of a defendant's constitutional rights or is so gross and flagrant as to undermine the fundamental fairness of the trial, intervention by the trial court is no longer discretionary . . . . The right to a fair trial is a fundamental constitutional right which the trial court has a duty to protect regardless of a defendant's failure to contemporaneously object. The trial court has a duty to intervene where a prosecutor's comments amount to a constitutional violation or are so gross and flagrant that they impermissibly infringe upon a defendant's constitutional right to a fair trial. Ordinarily, we do not apply the plain error rule. We are, however, 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.[70]

In 1884, after thirty volumes of cases had been published, the Kansas Supreme Court, for the first time, reversed on the basis of prosecutorial misconduct. In *State v. Balch*,[71] George Balch and R. M. Watson were charged with "criminal libel" relating to a printed article designed to influence an election.[72] The county attorney referred to the fact that Balch had not testified and had not denied that he had signed and circulated the article.[73] Kansas then had a specific statute concerning a defendant's right not to testify.[74]

The court noted that the county attorney was inexperienced and stated:

> But still, the rights of the defendant cannot be ignored or overlooked for that reason; nor can the principle be tolerated that convictions for violated law may be procured or brought about by the inauguration and accomplishment of other violations of law. It is also true that in this case the court below instructed the jury that the statement made by the county attorney should not be allowed to work any prejudice to the rights or interests of the defendant. But, under the authorities, the evil done by such an infringement of the law—an infringement of law by the prosecuting officer of the

68. *See, e.g.,* State v. Bird, 708 P.2d 946 (Kan. 1985); State v. Sexton, 886 P.2d 811 (Kan. 1994).
69. 978 P.2d 933 (Kan. 1999).
70. State v. Sperry, 978 P.2d 933, 948 (Kan. 1999).
71. 2 P. 609 (Kan. 1884).
72. State v. Balch, 2 P. 609, 609 (Kan. 1884).
73. *Id.* at 610-11.
74. *Id.* at 611.

> state—cannot be remedied or cured by any mere instructions from the court. The only complete remedy, if the defendant is convicted, is to grant him a new trial on his motion.[75]

For a time, the holding in *Balch* seemed to settle the issue. Two cases followed within five years. *City of Topeka v. Myers*,[76] a liquor violation case, was reversed on the basis of the comment of the prosecutor that "'[i]f the defendant is not guilty, why did he not take the stand? He could have easily proven that he did not keep the place.'"[77] *State v. Tennison*,[78] a murder case in which Lucy Tennison was accused of poisoning her husband, was also reversed on account of a comment on the fact that the defendant did not testify.[79]

While there has generally been some consensus among the appellate courts that remarks of a prosecuting attorney upon the failure of a defendant to testify are improper, other types of misconduct have often not been found to be sufficient for reversal.

In *State v. Whitaker*,[80] the Kansas Supreme Court affirmed Whitaker's convictions of "aggravated robbery . . . two counts of kidnaping . . . one count of aggravated battery against a law enforcement officer . . . and one count of attempted aggravated robbery."[81] In dealing with the prosecutorial misconduct issue, the court stated that the defendant had "recognize[d] that his attorney [had] failed to object to . . . comments made by the prosecutor during closing argument . . . [but] contend[ed] that even when there is no objection the trial judge has an independent duty to stop the prosecution from making improper comments during closing argument to the jury."[82] The court also noted that "the question of prosecutorial misconduct was not raised in Whitaker's motion for a new trial."[83]

In *Whitaker*, the prosecutor made the following remarks:

> You were lied to during this trial. Somebody sat on that witness stand, took [an] oath to tell the truth, looked at all of you and out and out lied. Was it Trotter and Carr? Well now, let's see. They both told the same story. They didn't have time to concoct it. The police are on the scene like that (indicating) because an officer is shot. And strangely enough all the physical evidence backs up their story. We find the handcuffs, we find the chains, we find the tape, we find Ford Carr's shoes where he has bailed out of the car, and we find the 'phone cover, we find everything. There are 90 some exhibits that all match up with what Trotter and Carr told you happened. Even the defendant admits being there. There [are] a few problems

75. *Id.* at 612.
76. 8 P. 726 (Kan. 1885).
77. City of Topeka v. Myers, 8 P. 726, 726 (citing State v. Balch, 2 P. 609 (Kan. 1884)).
78. 22 P. 429 (Kan. 1889).
79. State v. Tennison, 22 P. 429, 429-30 (Kan. 1889).
80. 872 P.2d 278 (Kan. 1994).
81. State v. Whitaker, 872 P.2d 278, 282 (Kan. 1994).
82. *Id.* at 288-89.
83. *Id.* at 289.

> that he couldn't deal with when he testified. Did someone lie? Yeah. He is sitting right there (indicating). You see, the defendant told you—although he had studied the police reports, there was a couple of oops he made while testifying . . . .
>
> And the empty holster? You've got to love the empty holster. He wants you to believe that he is being threatened somehow by Aldred Neal, although he wasn't afraid, he wasn't scared, he knew he wasn't going to shoot him. But, he was being threatened. He gets away, goes into his house, clips on a holster and then can't find his gun. And he gets back into the car with Aldred Neal who has a gun and who he is afraid of and wants Aldred Neal [sic] to see his holster and wonder if he has a gun? Come on. He had the holster because he had the gun. It fits the holster. There is no reason for Aldred Neal to have a .32. That is just a blatant lie. Afraid of him and hides in his house?
>
> The one thing that he couldn't handle when he testified, the one lie he hadn't prepared, didn't know how to deal with was, there was Marsha Woltman and Lee and Tom York. He couldn't fit it into his story. You know, Mr. York sat there and told you, I am not a hundred percent sure, but that is the guy, the one in the purple shirt standing next to the guy with the briefcase, the guy in the purple shirt doing all the talking that we sent down to Ford Carr's house where they opened a briefcase, pounded on the door and ultimately walked away. He was there and he just wants you just to ignore that. Mysteriously it just couldn't have been him. And he can't tell you who it was. He spends all the time before this happens and all the time after this happens with Aldred Neal, but somehow in this little 15 minute time span someone else dressed like him, looking exactly like him, shows up with Aldred Neal at Ford Carr's house. He can't explain that because he's lying to you. He has sat here and bold face lied to you.
>
> . . . .
>
> Do you want to put any weight into what a liar tells you on the witness stand throughout his testimony? There are 20 some witnesses, 90 some exhibits, that also support what Trotter and Carr told you, as well as Officer Don Taylor. And there is no doubt that they planned and jointly committed each and every one of these crimes they are charged with.[84]

The opinion recognized that counsel are required "to confine their remarks to matters in evidence."[85] The opinion also recognized the duty of the trial court to stop improper argument.[86] The opinion further stated that improper remarks are grounds for reversal when they are gross and flagrant and deprive a defendant of a fair trial, but "reversible error cannot be predicated upon a complaint of misconduct of counsel during closing argument where no contemporaneous objection is lodged."[87] The opinion then summarily disposed of this issue in the following language: "In this case, the comments improp-

84. *Id.* (alterations in original) (internal quotations omitted).
85. *Id.* at 290 (citing State v. Bradford, 548 P.2d 812, 813 Syl. ¶ 4 (Kan. 1976)).
86. *Id.* (citing State v. Ruff, 847 P.2d 1258, 1266 (Kan. 1993)).
87. *Id.* (citing State v. Baker, 819 P.2d 1173, 1184 (1991)).

erly characterized Whitaker as a liar but did not so prejudice the jury against him as to deny him a fair trial."[88]

The very next year, 1995, the appeal of Jeffrey Spresser was considered by the Kansas Supreme Court.[89] Spresser was convicted of rape, aggravated kidnaping, and aggravated criminal sodomy.[90] During the State's closing, the prosecutor told the jurors that they may have other victims' lives in their hands if the defendant is released.[91] Defense counsel objected, the objection was sustained, and the jury was instructed to disregard the comment.[92]

The majority opinion recited the duties and obligations of the prosecution during closing arguments as follows:

> In criminal trials, the prosecution is given wide latitude in language and in manner or presentation of closing argument as long as it is consistent with the evidence adduced. Improper remarks made by the prosecutor in closing argument are grounds for reversal only when they are so gross and flagrant as to prejudice the jury against the defendant and to deny the defendant a fair trial . . . .
>
> * * *
>
> In closing argument to the jury, the prosecutor should not use statements calculated to inflame the passions or prejudices of the jury. 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 . . . . In closing argument, an attorney may indulge in impassioned bursts of oratory or may use picturesque language as long as he or she introduces no facts not disclosed by the evidence . . . .
>
> In summing up a case before a jury, the prosecutor may not introduce or comment on the facts outside the evidence, but reasonable inferences may be drawn from the evidence and considerable latitude is allowed in discussing it . . . . Counsel may appeal to the jury with all the power and persuasiveness his or her learning, skill, and experience enable counsel to use . . . .[93]

The State had conceded that the sentence in question was improper.[94] The court found that while "there may be remarks that are so prejudicial as to be incurable," no cases with such incurable remarks had been presented and these facts did not "support declaring the improper remark to be the first incurable remark in our case law."[95]

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88. *Id.*
89. State v. Spresser, 896 P.2d 1005 (Kan. 1995).
90. *Id.* at 1006.
91. *Id.* at 1009.
92. *Id*.
93. *Id.* (citations omitted).
94. *Id.*
95. *Id.* at 1011.

What distinguishes *Spresser* from the prior cases is the concurring opinion of Justice Abbott, in which he was joined by Justice Six and Justice Davis. Justice Abbott stated:

> I concur in the majority opinion, but express my separate concern that we have painted defendants into a corner. Despite our recognition that a prosecutor's argument to a jury can be so prejudicial as to be incurable, the rule we enforce is that if the defendant does not object to an improper closing argument the error is waived and if the defendant objects and the trial judge instructs the jury to disregard the improper argument the error is cured.
>
> I am very concerned that prosecutors who have an ethical obligation to insure that defendants receive a fair trial are aware of this court's tendency as set forth above. 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.[96]

Between 1995 and 2000, the Supreme Court dealt with many cases involving prosecutorial misconduct.[97] Each was affirmed, almost invariably by using the harmless error rule. In 2000, the Kansas Supreme Court decided *State v. Pabst*.[98] In a unanimous opinion, the court wrote: "This is the rare case in which the prosecutor's improper remarks during closing argument were so prejudicial that a new trial is required."[99] In fact, *Pabst* was the first homicide case since the 1889 *State v. Tennison*[100] decision in which a conviction was reversed solely on the basis of prosecutorial misconduct.

Pabst shot and killed his fiancée, with whom he had been living and with whom he had a three-year-old daughter.[101] The controlling question on appeal was whether Pabst was denied a fair trial because of prosecutorial misconduct.[102] During closing argument, "the prosecutor accused Pabst of lying at least 11 times."[103] This misconduct, coupled with the trial court's overruling defendant's timely objection, denied Pabst a fair trial.[104] The opinion noted not only the case law but also the Kansas Rules of Professional Conduct (KRPC) and the

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96. *Id*. at 1012 (Abbott, J., concurring).

97. *See* State v. Cravatt, 979 P.2d 679 (Kan. 1999); State v. McCray, 979 P.2d 134 (Kan. 1999); State v. Sperry, 978 P.2d 933 (Kan. 1999); State v. Valdez, 977 P.2d 242 (Kan. 1999); State v. Lumley, 976 P.2d 486 (Kan. 1999); State v. Johnson, 970 P.2d 990 (Kan. 1998); State v. Harris, 970 P.2d 519 (Kan. 1998); State v. Gardner, 955 P.2d 1199 (Kan. 1998); State v. White, 950 P.2d 1316 (Kan. 1997); State v. Follin, 947 P.2d 8 (Kan. 1997); State v. Ordway, 934 P.2d 94 (Kan. 1997); State v. Robinson, 934 P.2d 38 (Kan. 1997); State v. Rice, 932 P.2d 981 (Kan. 1997); State v. Aikins, 932 P.2d 408 (Kan. 1997); State v. Baacke, 932 P.2d 396 (Kan. 1997); State v. Webber, 918 P.2d 609 (Kan. 1996); State v. Collier, 913 P.2d 597 (Kan. 1996); State v. Miller, 912 P.2d 722 (Kan. 1996); State v. Foster, 910 P.2d 848 (Kan. 1996); State v. McClanahan, 910 P.2d 193 (Kan. 1996); State v. Smith, 904 P.2d 999 (Kan. 1995).

98. 996 P.2d 321 (Kan. 2000).

99. State v. Pabst, 996 P.2d 321, 324 (Kan. 2000).

100. 22 P. 429 (Kan. 1889).

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

102. *Id.*

103. *Id.* at 325.

104. *Id*. at 326.

American Bar Association's Standards of Criminal Justice.[105] The court specifically disapproved of language in *State v. McClain,*[106] which allowed a prosecutor to comment on the defendant's credibility, noting that it was "not in accord with KRPC 3.4(e)."[107] The court further noted that an issue for the jury was "to decide whether the shooting was accidental or planned."[108] Therefore, the credibility of the defendant was one of the core considerations the jury needed to address.[109] The *Pabst* ruling found that the prosecutor "improperly and prejudicially attempted to introduce evidence on the ultimate issue."[110]

The role of the trial judge was addressed in the opinion. The following colloquy took place:

> The prosecutor told the jury, "I look into each one of your eyes and I tell you he lied." Defense counsel objected. The objection was sustained. The district court properly directed the jury to disregard the comment. The next words from the prosecutor were "The State tells you he lied. The State of Kansas—." Defense counsel objected. Before the district court could rule on the objection, the prosecutor interjected, "That's fair comment, Your Honor." Rather than again sustaining the objection and again directing the jury to disregard the remarks, the district court overruled the objection.[111]

After the district court overruled the last objection, the prosecutor continued to accuse Pabst of lying.[112] The court noted that "a jury [likely] sees little difference . . . between the prosecutor personally calling the defendant a liar and the 'State' calling the defendant a liar," and that "the district court's endorsement may have increased the prejudicial effect of the improper comments."[113]

The opinion further states:

> A prosecutor is a servant of the law and a representative of the people of Kansas. We are unable to locate an excuse for a prosecutor's failure to understand the remarkable responsibility he or she undertakes when rising in a courtroom to announce an appearance for the State of Kansas. Instructional materials abound on this topic. Sixty-five years ago the United States Supreme Court said that the prosecutor represents
> "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." *Berger v. United States* . . . .[114]

105. *Id.*
106. 533 P.2d 1277 (Kan. 1975).
107. *Pabst*, 996 P.2d at 326.
108. *Id.* at 327.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 328.
114. *Id*. (citation omitted).

The *Pabst* opinion captured a crucial issue when it stated: "The point of not allowing a prosecutor to comment on the credibility of a witness *is that expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony, not commentary on the evidence of the case.*"[115]

Several questions remain after the *Pabst* decision. It is agreed that it is improper for a prosecutor to characterize a defendant as a liar. However, is it of significance that it occurred eleven times in the *Pabst* transcript? How much of an impact is the fact that defense counsel objected and the court issued seemingly contradictory rulings on objections? Had the objections not been made, would the Kansas court conclude that the failure to object was a waiver? If the credibility of a defendant is central to a fact situation, and the defendant is called a liar, and defense counsel fails to object, after *Pabst*, does such a scenario raise a legitimate claim of ineffective assistance of counsel?

The question of the effect of the *Pabst* ruling may in part be answered by several subsequent decisions of the Kansas Court of Appeals. These decisions reversed convictions solely on the basis of prosecutorial misconduct or found prosecutorial misconduct to be part of cumulative error.

In *State v. Pham*,[116] the court of appeals reversed Pham's conviction based on remarks of the prosecutor that, in essence, called the defendant a liar and then suggested the defense counsel was a liar also.[117] The prosecutor, at closing, also suggested to the jury that she had many additional witnesses who would tie the defendant to the crime, but she simply chose not to call them to avoid wasting time.[118] The decision noted that this was an expression of her opinion, was an attempt to put matters in evidence by the prosecutor, and was further evidence of ill-will by an overzealous prosecutor.[119]

In *State v. Magdaleno*,[120] the prosecutor objected to defense counsel's argument, and the court sustained the objection.[121] The prosecutor later stated that the defense attorney was lying.[122] Defense counsel objected, and the trial court invited the prosecutor to explain herself.[123] The prosecutor expanded on her opinion that the defense counsel was presenting testimony or arguments that were not true.[124] The court noted that this was the same prosecutor as in *Pham*

115. *Id*.
116. 10 P.3d 780 (Kan. 2000).
117. State v. Pham, 10 P.3d 780, 785 (Kan. 2000).
118. *Id.*
119. *Id.* at 787-88.
120. 17 P.3d 974 (Kan. 2001), *review denied* (May 1, 2001).
121. State v. Magdaleno, 17 P.3d 974, 977 (Kan. Ct. App. 2001), *review denied* (2001).
122. *Id.*
123. *Id.*
124. *Id.*

and that the statements made by the prosecutor suggesting defense counsel lied to the jury reflected ill-will on the part of the prosecutor and constitute gross and flagrant misconduct.[125] The court concluded that the prosecutor's misconduct was part of cumulative trial errors and reversed.[126]

In *State v. Hazley*,[127] the court considered two issues of prosecutorial misconduct: a *Doyle*[128] violation, "improperly question[ing] a state witness regarding post-*Miranda* silence;" and made "improper comments during closing argument."[129] In *Hazley*, there were no objections by the defense counsel to the comments of the prosecutor during argument.[130] The court concluded that "*Doyle* requires a timely and specific objection to preserve [the post-*Miranda* silence comments] for appeal."[131] The court noted the comments during closing argument in which the prosecutor expressed his personal opinion on a witness' credibility, made an argument focusing on the post-*Miranda* silence of the same witness, and misstated defense counsel's argument.[132] The opinion cited extensively to *Pabst*, and used the closing argument as part of cumulative error to reverse and remand.[133]

In *State v. Smith*,[134] the defendant was convicted by a jury of possession of cocaine and failure to have a drug tax stamp.[135] Smith argued on appeal that "the state's cross-examination of him constitut[ed] plain error . . . and that [the prosecutor] committed . . . misconduct by repeatedly referring to him as a liar."[136] On cross-examination, without objection by Smith's attorney, the prosecutor asked Smith "to comment on the veracity and credibility of the State's witnesses."[137] The court of appeals concluded that since the point was not objected to at trial, Smith was precluded from raising the issue on appeal.[138] The court of appeals, however, took a different view concerning the closing argument of the prosecutor, wherein Smith was repeatedly referred to as a liar.[139] "The State argue[d] that Smith did not object to the prosecutor's statements and, [therefore, had no right

125. *Id.* at 979.
126. *Id.* at 980.
127. 19 P.3d 800 (Kan. Ct. App. 2001).
128. State v. Hazley, 19 P.3d 800, Syl ¶ 2 (Kan. 2001) (citing Doyle v. Ohio, 426 U.S. 610 (1976)).
129. *Id.* at 801.
130. *Id.* at 802-03.
131. *Id.* at 803.
132. *Id.* at 804-05.
133. *Id.* at 806.
134. 11 P.3d 520 (Kan. Ct. App. 2000).
135. State v. Smith, 11 P.3d 520, 523 (Kan. Ct. App. 2000).
136. *Id.*
137. *Id.* at 524.
138. *Id.*
139. *Id.* at 527.

to bring the issue on appeal,] and further that the statements were not so gross and flagrant as to prejudice Smith's right to a fair trial. . ."[140] The court of appeals found that "[a]lthough the State [has] wide latitude in closing argument and may point out inconsistencies in [the] defendant's statements," it was prosecutorial misconduct to repeatedly refer to Smith as a liar.[141] The court then considered whether the prosecutor's improper conduct unfairly prejudiced the jury against Smith and denied him a fair trial:

> We find that Smith did not receive a fair trial. The improper remarks of the prosecutor during closing argument coupled with the ongoing inference that Smith was a criminal were so gross and flagrant as to prejudice the jury against Smith. The prosecutorial misconduct began during the presentation of the evidence when the State insinuated that Smith had a criminal history and continued through closing argument when the State repeatedly called Smith a liar. It cannot be said that the cumulative nature of the State's misconduct did not prejudice Smith's right to a fair trial, especially considering the fact that no physical evidence connected Smith to the drugs.[142]

Other cases since *Pabst* have made it clear that prosecutorial misconduct cases will turn largely on their facts. In *State v. Campbell*,[143] the Kansas Supreme Court emphasized that each case of alleged prosecutorial misconduct must be decided on its peculiar facts and held that the prosecutor's statements that a witness is "not lying" and "has no motive to come in and tell . . . anything but the truth" did not amount to "vouching" for the witness' credibility.[144]

The *State v. Finley*[145] case was reversed after a prosecutor's statements that jurors have the job of enforcing the law and that drug use cannot be tolerated, especially when someone dies.[146] The Kansas Supreme Court stated: "While it is more likely than not that the jury would have convicted the defendant absent the State's remarks, it is not at all clear beyond a reasonable doubt that the error had little, if any, likelihood of changing the result of the trial."[147]

While few outright reversals have been published as a result of prosecutorial conduct, one can easily draw the conclusion from appellate decisions filed in 1999 and 2000 that the appellate courts are increasingly less tolerant of prosecutorial misconduct, and that if other error occurs in the trial, a reversal is more likely.

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140. *Id.* at 527-28.
141. *Id.* at 529.
142. *Id.*
143. 997 P.2d 726 (Kan. 2000).
144. State v. Campbell, 997 P.2d 726, 735-36 (Kan. 2000).
145. 998 P.2d 95 (Kan. 2000).
146. State v. Finley, 998 P.2d 95, 105 (Kan. 2000).
147. *Id.*

IV. Professional Discipline as a Remedy for Misconduct

Prosecutors who cross the line of fair comment and zealous prosecution interfere with the administration of justice, and their conduct results in cost to the system at several levels. The public's perception of the courts and the justice system suffers. On a monetary level, it costs the taxpayers public funds to retry cases that are reversed. In addition, prosecutions on retrial are sometimes difficult because witnesses cannot be located or other pieces of evidence may not be found.

A reversal in a case of prosecutorial misconduct is a severe sanction. Judge Learned Hand, in *United States v. Lotsch*,[148] suggested that reversal would do little "towards punishing the offender, and would upset the conviction of a plainly guilty man."[149] Where no prejudice is shown from the misconduct, it can be argued that the ends of justice are not served by a reversal or a dismissal but rather by other sanctions, such as an attorney discipline complaint.

The realities of practicing law and prosecuting cases in a state the size of Kansas must be recognized. Kansas is a small state. The bench and bar total approximately 5,000 active lawyers, 156 district judges who are law trained, and seventeen appellate judges. Given the size of the bar and the few appellate judges who see prosecutorial misconduct cases, reversal may act as a meaningful sanction, for many reasons. A prosecutor who measures his or her "success" in the profession may find reversals for prosecutorial misconduct both embarrassing and damaging to his or her reputation and career. Reversals mean that either the case must be retried, at great expense and with greater risk of missing or weaker evidence, or a defendant who was convicted may walk away from the process a free person. A prosecutor who draws attention to himself or herself by engaging in misconduct may draw the attention of news organizations. A prosecutor who is castigated by an appellate court in a published opinion may also draw the attention of the attorney discipline office.

Disciplinary referrals can be an effective means of addressing misconduct issues, especially in cases where there have been repeated incidents. While appellate courts may take notice of a prosecutor whose actions are repeatedly raised on appeal, the Disciplinary Administrator is in a better position to recognize attorneys who engage in prosecutorial misconduct on a recurring basis.

An excellent article relating to the role of intent and appellate review of prosecutorial misconduct in closing argument may be found

148. 102 F.2d 35 (2d Cir. 1939).
149. United States v. Lotsch, 102 F.2d 35, 37 (2d Cir. 1939).

in *The Journal of Appellate Practice and Process*.[150] Spiegelman concluded:

> First, the standards of proper prosecutorial misconduct in argument are sufficiently clear that virtually all courts that reversed were unanimous in their view that the conduct was improper. Thus, the arguments that resulted in reversals were almost always ones that prosecutors knew or should have known were improper. Second, once conduct is found improper, doctrine concerning when reversal is appropriate is complex, is misunderstood by the courts of appeals, and is particularly convoluted and conflicting on the role of intent in reversals. Third, the case study of recidivist prosecutors suggest that if courts wish to control the conduct of prosecutors, they need to consider the history of the prosecutor or office and have available an integrated arsenal of weapons, including both reversals and lesser sanctions.[151]

Prosecutorial misconduct, whether intentional or due to carelessness or inexperience, is subject to mandatory reporting by judges. Kansas Supreme Court Rule 207(d) is unambiguous:

> It shall be the duty of each judge of this state to report to the Disciplinary Administrator any act or omission on the part of an attorney appearing before the court, which, in the opinion of the judge, may constitute misconduct under these rules.[152]

An argument could be made, based upon the case law and the few discipline cases involving prosecutors, that Kansas judges do not fully appreciate their role and obligation regarding the reporting of prosecutorial misconduct. In order for the good to be achieved that justice be done in each criminal case, trial judges must recognize their role and obligation to be more than passive observers of the contest between the prosecutor and the defense.

V. Suggestions For Future Action

Prosecutorial misconduct cases on appeal in Kansas will continue to be decided on a case-by-case basis. Trial judges in Kansas need to exercise more influence during trials, and in particular during closing arguments, in order to prevent prosecutors from crossing the line in criminal trials. Judges at all levels need to be aware of their obligation to report unethical conduct on behalf of all lawyers, including prosecutors. Clearly, from the case law and from the Cannons of Judicial Ethics, the judge's role is an active one, not a passive one.

The following specific suggestions are proposed as ways of informing the judiciary on issues relating to prosecutorial misconduct. It is hoped that continued education and the development of clearer

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150. Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. App. Prac. & Process 115 (1999).
151. *Id.* at 183.
152. Kan. Sup. Ct. R. 207(d) (2000).

standards will lead to a decrease in incidents of prosecutorial misconduct and an enhanced level of fairness in criminal trials.

(1) The Kansas Supreme Court, through its educational opportunities, which include two judges' conferences per year, should educate Kansas trial judges as to their obligations and powers when prosecutorial misconduct issues arise. Efforts should also be made to reach out to the respective groups of prosecutors and defense counsel in order to better define their roles and educate as to the rules.

(2) Kansas judges, at all levels, must recognize that prosecutorial misconduct not only places an immediate trial at risk of reversal, but it also constitutes an ethical violation by the attorney committing the misconduct, which should be reported.

(3) All prosecutorial misconduct should be reported to the Disciplinary Administrator's office. That office should serve as the clearinghouse for complaints and is in the best position to determine when there might be multiple complaints about a prosecutor and whether such conduct rises to the level of an ethical violation.

(4) The Kansas Supreme Court and the Kansas Court of Appeals should develop a consistent doctrinal approach, deciding whether the burden of proof should be upon a defendant, as in *Strickland*, to show both error and prejudice, or whether the appellate courts should move toward a *Doyle* test, in which the state should bear the burden of showing that no harm resulted from the prosecutorial misconduct.