CHAPTER 17
CLOSING ARGUMENT
Table of Contents

CHAPTER 17
CLOSING ARGUMENT

I. PRACTICE TIPS

A. REINFORCE THEMES

Closing argument provides a framework for the story you want to tell the jury. Closing can admit and explain "bad facts" as well as weave together favorable matters. Studies suggest most jurors have made up their minds by the time closing begins. Your closing should reinforce the themes you established during voir dire, opening, and the presentation of evidence. It pulls together and reinforces the narrative you imposed on the evidence during the trial.

B. DEALING WITH PROSECUTORS

Prosecutors frequently interject improper matters during closing argument. While you must object to improper statements at the time they are made, errors during closing are seldom grounds for reversal. This chapter contains considerations for objecting (or not). See III.B. below.

Section III.A below contains a list of common abuses committed by prosecutors and selected examples of improper statements, even when the errors did not result in reversal on appeal. It is possible for individual "harmless" errors to have a cumulative reversible effect. Errors during closing argument coupled with other misconduct during the trial may also result in relief on appeal. See, e.g., Gaby v. State, 949 N.E.2d 870 (Ind. Ct. App. 2011) (the cumulative effect of prosecutorial misconduct and an evidentiary error required reversal) and Brummett v. State, 10 N.E.3d 78 (Ind. Ct. App. 2013), *sum. aff'd*, 24 N.E.3d 965 (Ind. 2014).

1. Aggressive advocacy is required during closing

Especially if your judge may:

(1) sustain your objections;

(2) admonish the jury that they – not the prosecutor- are the finders of fact; or

(3) admonish the jury that the best source of law is the instructions of the court.

See section III.C. below.

C. BEWARE OF OPENING THE DOOR – STATEMENTS MAY BIND CLIENT

Don't make improper closing arguments, or you invite a similarly improper argument from the prosecutor to which you may not have a valid objection. Ryan v. State, 9 N.E.3d 663 (Ind. 2014). Further, remarks during closing argument may constitute judicial admissions that are binding on your client. Saylor v. State, 55 N.E.3d 354, 363 (Ind. Ct. App. 2016).

United States v. Robinson, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988) (defense counsel charged prosecution had unfairly denied defendant opportunity to explain his actions. Prosecutor argued in rebuttal that defendant "could have taken the stand and explained it to you, anything he wanted to." Held, no violation of privilege, prosecutor's reference to defendant's opportunity to testify was a fair response to a claim made by defendant or his counsel);

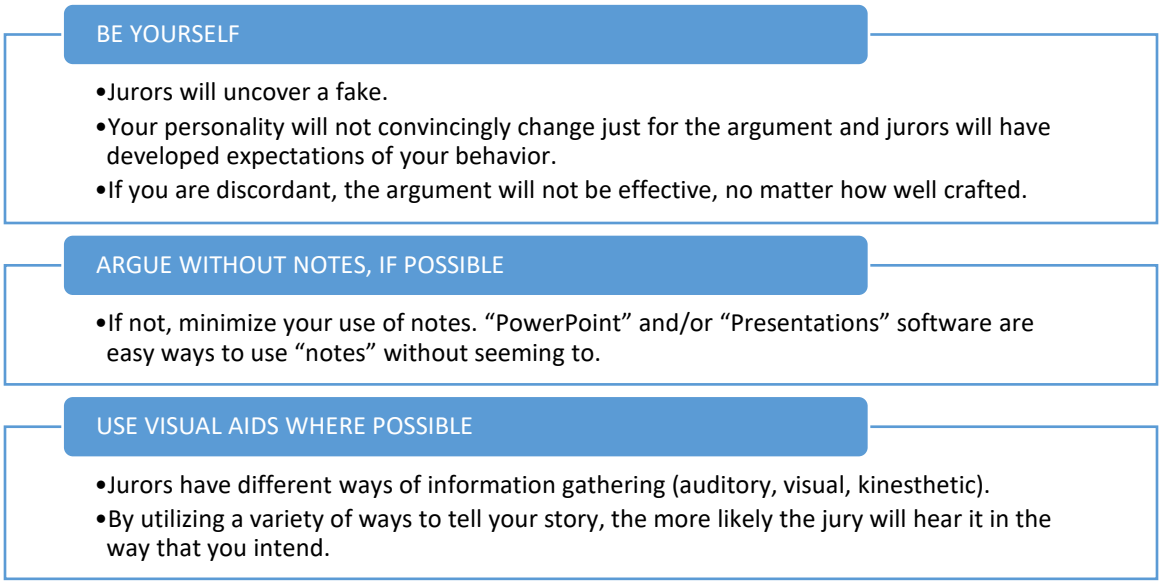
United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (defense counsel opened the door and invited prosecutor to make attack "by arguing that the case against respondent 'has been presented unfairly by the prosecution,' and that '[f]rom the beginning'

to 'this very moment the [prosecution's] statements have been made to poison your minds unfairly';");

Hand v. State, 863 N.E.2d 386 (Ind. Ct. App. 2007) (defendant opened the door to prosecutor's comments about defendant's failure to testify by arguing defendant need not testify because he already told his story through out-of-court statements).

Tanksley v. State, 144 N.E.3d 824 (Ind. Ct. App. 2020) (attorney's concession to identity in failure to appear case precluded review of sufficiency claim on appeal).

D. HELPFUL HINTS TO PREPARE



See IV.D, below.

E. WAIVER OF CLOSING

The focus of this chapter is on trials to a jury, but the interests of the client and the nature of the case may require a closing at a bench trial. The opportunity to make a closing argument is a basic element of the criminal process, even in bench trials. Nickels v. State, 81 N.E.3d 1092 (Ind. Ct. App. 2017). The client will expect you to speak up at that point, so if you are going to waive, discuss why with the client beforehand.

II. ORDER OF ARGUMENT

A. JUDGE'S DISCRETION

Scope and content of final argument within sound discretion of trial court. Rouster v. State, 600 N.E.2d 1342 (Ind. 1992) and Nelson v. State, 792 N.E.2d 588, 591-92 (Ind. Ct. App. 2003).

A trial court is not permitted to deny a defendant the right of giving a closing argument, even at a bench trial. Nickels v. State, 81 N.E.3d 1092 (Ind. Ct. App. 2017).

1. Time allotted

Time allotted for closing within discretion of trial court. Hashfield v. State, 247 Ind. 95, 110, 210 N.E.2d 429, 438 (1965).

Barnes v. State, 269 Ind. 76, 378 N.E.2d 839, 844 (1978) (restricting State and defendant to 30 minutes for final argument not error where defendant failed to object or show prejudice).

Whitehead v. State, 511 N.E.2d 284 (Ind. 1987) (limitation of final argument to one hour and fifteen minutes in murder case appropriate even though trial lasted for seven days and had thirty-seven witnesses; attorney's inability to summarize some of witnesses' testimony was more result of poor planning than of time limitation imposed by court).

2. Scope of closing statement

Scope of closing argument is within discretion of trial court - it is proper for counsel to argue both law and facts in closing argument, including theory of defense and any argument as to position or conclusions based on the attorney's analysis of the evidence. Nelson v. State, 792 N.E.2d 588, 591 (Ind. Ct. App. 2003).

Nelson v. State, 792 N.E.2d 588, 591 (Ind. Ct. App. 2003) (trial court abused discretion in declaring tests used to determine substance was drug and to measure distance to public park were per se reliable and that defense therefore could not raise unreliability of tests in closing argument; where court's basis for limiting argument is erroneous as matter of law, it is an abuse of discretion to apply such limits).

Lax v. State, 414 N.E.2d 555 (Ind. 1981) (trial court may prohibit counsel from reading cases or other legal authorities to jury).

Dixey v. State, 956 N.E.2d 783 (Ind. Ct. App. 2011) (trial court abused its discretion by refusing to allow defense counsel to argue that the evidence presented is more consistent with lesser included offenses that were not charged; the jury would have been aided by defense counsel's explanation of other offenses enacted by the legislature; reversible error).

Defense counsel has a constitutional right to argue both law and facts. See Ind. Const., art. 1, § 19; Taylor v. State, 457 N.E.2d 594, 599-600 (Ind. Ct. App. 1983).

Taylor v. State, 457 N.E.2d 594, 599 (Ind. Ct. App. 1983) (abuse of discretion to prevent defense counsel from arguing difference between negligence and recklessness in closing statement in trial for reckless homicide; jury's task of deciding whether State met burden in establishing recklessness was impossible without adequate concept of term "recklessness," and allowing defense to give examples of conduct that falls short of recklessness would not be unduly confusing to jury).

B. STANDARD OF REVIEW

Ruling of trial court will not be disturbed, unless: (1) clear abuse of discretion; and (2) clearly prejudicial to rights of accused. Rouster v. State, 600 N.E.2d 1342 (Ind. 1992).

To show abuse of discretion, object to time limitation, and show prejudice by limitation. Barnes v. State, 269 Ind. 76, 378 N.E.2d 839, 844 (1978).

C. GUIDELINES

1. May agree not to give closing argument

Ind. Code § 35-37-2-2(4) provides in pertinent part: "When the evidence is concluded the prosecuting attorney and the defendant or his counsel may, by agreement in open court, submit the case to the court or jury trying the case, without argument." See also Jury Rule 27.

2. Prosecution opens and closes final argument

Prosecuting attorney shall have opening and closing of argument. See Ind. Code § 35-37-2-2(4) and Jury Rule 27.

Buhring v. State, 453 N.E.2d 228, 231 (Ind. 1983) (legislature intended State to open and close final argument to jury in criminal case).

(a) Prosecutor shall disclose in opening all points relied on

Ind. Code § 35-37-2-2(4) provides: "However, the prosecuting attorney shall disclose in the opening all the points relied on in the case . . . ." See also Jury Rule 27.

(b) Even in insanity defense cases

Even though defendant bears burden of proving insanity defense, he does not have right to open and close final argument. Buhring v. State, 453 N.E.2d 228 (Ind. 1983).

Jones v. State, 825 N.E.2d 926 (Ind. Ct. App. 2005) (court rejected argument that since defendant carried burden to prove insanity, he should have opportunity to sum up with surrebuttal closing argument after State pursuant to Jury Rule 27).

3. Defendant's right to reply in surrebuttal to facts or points not disclosed in opening

If the prosecuting attorney refers in rebuttal to any new point or fact not disclosed in the opening, the defendant or defense counsel may reply to that point or fact, and that reply shall close the argument of the case. Ind. Code § 35-37-2-2(4); Jury Rule 27.

Inman v. State, 4 N.E.3d 190 (Ind. 2013) (State's rebuttal to defendant's closing argument about self-defense did not raise new facts but simply tried to rebut defendant's allegations; thus, defendant was not entitled to surrebuttal).

Goodman v. State, 588 N.E.2d 507 (Ind. 1992) (where defense counsel raised issue of voluntary manslaughter in his closing argument, prosecutor was not precluded from discussing voluntary manslaughter in his rebuttal closing, even though not referred to previously; defendant's closing invited prosecutor's comments and therefore it was not error for trial court to deny defendant's request for additional time to respond to prosecutor's rebuttal closing).

4. When State refuses to open

Ind. Code § 35-37-2-2(4) provides: "If the prosecuting attorney refuses to open the argument, the defendant or his counsel may then argue the case." See also Jury Rule 27.

5. Defense refuses to give closing after prosecution has opened argument

Ind. Code **§** 35-37-2-2(4) provides: "If the defendant or his counsel refuses to argue the case after the prosecuting attorney has made his opening argument, that shall be the only argument allowed in the case." See also Jury Rule 27.

Reversible error for State to make rebuttal argument after defendant waived his closing argument. Hamke v. State, 189 Ind. 533, 127 N.E. 407 (1920).

III. CLOSING ARGUMENT OF PROSECUTOR

A. OBJECTING DURING PROSECUTOR'S CLOSING

Common objection that may be raised include:

(1) Attacking integrity of defense counsel;

(2) Commenting on role of defense attorney;

(3) Commenting on prosecutor's duty to all society ("good guy" or "bad guy");

(4) Insulting defendant (name calling);

(5) Mentioning inadmissible evidence;

(6) Commenting on exercise of defendant's rights;

(7) Defendant's election to not testify;

(8) Election to not call witnesses;

(9) Post-arrest silence;

(10) Reasonable doubt analogies;

(11) Grand jury improperly mentioned;

(12) Duration of punishment;

(13) Hung jury improperly mentioned;

(14) Jurors addressed by name;

(15) Law misstated;

(16) Matters not in evidence;

(17) Injecting personal experiences;

(18) Implying personal knowledge independent of evidence;

(19) Stating personal opinion or belief (on guilt of accused, credibility);

(20) Prejudicial or inflammatory statements;

(21) Appeal to prejudices and biases (racial, religious, class);

(22) Repetitious reading of indictment; and

(23) Rebuttal: matters not addressed by defense (sandbagging).

1. Attacking integrity of defense counsel

Highly improper to attempt to impinge integrity of opposing counsel. Splunge v. State, 641 N.E.2d 628 (Ind. 1994).

Nevel v. State, 818 N.E.2d 1 (Ind. Ct. App. 2004) (although not putting defendant in grave peril, prosecutor's comment that it is common defense tactic to distort the facts and characterization of defense's evidence as "smoke and mirrors" was improper; court admonished prosecutor that such comments can cross the line and warned that in a more marginal case such comments could justify reversal of a conviction).

Roller v. State, 602 N.E.2d 165 (Ind. Ct. App. 1992) (improper, but not fundamental error, to make un-objected to statement that defense counsel was trying to confuse jury; held, isolated comment was not determinative factor in jury's verdict and did not deprive defendant of fair trial).

Washington v. State, 902 N.E.2d 280 (Ind. Ct. App. 2009) (prosecutor's statements that defense counsel was unethical, inappropriate, ignorant, and improper were misconduct; also, prosecutor's comment that "I could get just as improper and more and I get jury verdicts returned all the time on this very evidence. All the time. Guilty" was misconduct; harmless error because almost all of the comments were related to charges

for which resulted in acquittal). See also Sobolewski v. State, 889 N.E.2d 849 (Ind. Ct. App. 2008) and Paschall v. State, 825 N.E.2d 923 (Ind. Ct. App. 2005).

Valdez v. State, 56 N.E.3d 1244 (Ind. Ct. App. 2016) (prosecutor committed misconduct during by claiming that defense counsel manipulated the testimony of defense expert to get him to testify that defendant was insane when he committed his offense; however, Court affirmed denial of motion for mistrial).

See also III. A.17 (b) below for attacking credibility of witness.

2. Commenting on role of defense attorney

Johnson v. State, 453 N.E.2d 365 (Ind. Ct. App. 1983) (defendant was subjected to grave peril where prosecutor made numerous improper comments including that defense attorney's job was to "get his client off" by bringing up "insignificant facts" and "legal technicalities"; comments were irrelevant to issues to be decided by jury and should not be allowed). See also Isom v. State, 479 N.E.2d 61, 68 (Ind. Ct. App. 1985), *overruled on other grounds by* Schwass v. State*,* 554 N.E.2d 1127, 1129 (Ind. 1990).

Brown v. State, 746 N.E.2d 63, 60-70 (Ind. 2001) (prosecutor did not cross line in stating that defense counsel's job is "to get you off that road [to make fair decision] however they can," and that the State blocked out witness addresses "because we don't want people like this going out and killing our witnesses"; comments were response to defense counsel's accusation that State had overlooked or covered up exculpatory evidence by crossing out addresses on witness list).

Ryan v. State, 9 N.E.3d 663 (Ind. 2014) (although prosecutor's statement that defense argument "is how guilty people walk" and "a classic defense attorney trick" violate Rules of Professional Conduct, they did not place defendant in a position of grave peril and as such did not constitute misconduct).

Donnegan v. State, 809 N.E.2d 966, 973-74 (Ind. Ct. App. 2004) (prosecutor's comment that entire defense was "smoke and mirrors designed to get you to take your eye off the ball and miss what's important and focus on something stupid that doesn't matter, has no relevance" was comment on quality of defense, not defense attorney's job, and was not grounds for mistrial, especially because trial court admonished jury).

Jackson v. State, 698 N.E.2d 809, 812 (Ind. Ct. App. 1998) (improper for prosecutor to state that defendant was represented by public defender who had same subpoena powers as prosecutor and was also paid by State).

(a) Reading from opinion which is derogatory about defense attorneys

Hubbard v. State, 313 N.E.2d 346 (Ind. 1974) (defendant not placed in grave peril where prosecutor read passage from dissenting opinion in United States v. Wade, 388 U.S. 218 (1967), that emphasized role of defense attorney is to serve his client rather than to join with law enforcement officers in abstract search for truth).

(b) Denigrating counsel's objections

Improper for prosecutor to comment on defense counsel's objections to evidence or testimony. Such comments are irrelevant because counsel's objections and reasons for objecting are not evidence and should be of no concern to jury.

Bates v. Bell, 402 F.3d 635, 647 (6th Cir. 2005) (prosecutor repeatedly denigrated counsel's objections); see also Commonwealth v. Balakin, 254 N.E.2d 422, 425, 356 Mass. 547, 550-51 (1969).

United States v. Hughes, 441 F.2d 12, 20, n.29 (5th Cir. 1971) (prosecutor not allowed to state: "One of the main reasons for objecting to [a prosecutor's] argument is because this distracts your thinking from what I am saying. This is one reason that some of those objections were made.").

3. Prosecutor's duty to society and defendant

Unfair tactic to comment prosecutor is "good guy."

(1) Negates defendant's presumption of innocence,

(2) Violates Ind. Rules of Prof. Conduct, Rule 3.4 (requiring fairness to opposing party and counsel and prohibiting attorney from alluding to matters that the lawyer does not reasonably believe are relevant or will not be supported by the facts in issue).

Craig v. State, 370 N.E.2d 880 (Ind. 1977) (unfair and highly improper for prosecutor to say that he had duty to all society, including accused; even though this is correct statement of law).

Sanders v. State, 724 N.E.2d 1127 (Ind. Ct. App. 2002) (prosecutor's description of her position as "ethic minister of justice" constituted prosecutorial misconduct because it conveyed to jury that seeking justice was her paramount concern, and by negative implication, conveyed idea that defense counsel's job was something else altogether).

Brummett v. State, 10 N.E.3d 78 (Ind. Ct. App. 2013), *sum. aff'd*, 24 N.E.3d 965 (Ind. 2014) (prosecutor improperly distinguished the roles of the prosecution and defense).

Bardonner v. State, 587 N.E.2d 1353 (Ind. Ct. App. 1992) (prosecutor committed misconduct and prejudiced jury by reading excerpts from Justice White's opinion, interspersed with questions and comments to the prospective jurors, during voir dire; only purpose for the prosecutor's comments on the respective roles of defense and prosecution is to prejudice jurors into viewing prosecutor as a "good guy" and defense counsel as a "bad guy.").

Matter of Keiffner, 79 N.E.3d 903 (Ind. 2017) (observing that improper prosecutorial arguments that invite conviction for reasons other than guilt, impugn integrity of defense counsel, or otherwise create good guy/bad guy dichotomy between respective roles of State and defense counsel, whether carelessly or intentionally made endanger defendant's right to fair trial).

Note: Court in Bardonner distinguished Hubbard, s*upra*, which involved prosecutor reading from same opinion, because comments coming at conclusion of long trial had little impact but remarks prior to trial tainted entire proceeding. Therefore, Bardonner may be of limited use in addressing improper prosecutorial comments during closing statements.

4. Insulting defendant (Name calling)

Although insulting and abusive rhetoric to describe defendant should not be employed by prosecution due to its prejudicial effects, Indiana has permitted limited disparagement of defendant when comments are a reasonable deduction from the evidence or are matters of common knowledge.

Sanders v. State, 724 N.E.2d 1127 (Ind. Ct. App. 2002) (no misconduct from prosecutor's repeated reference to defendant as "liar" during closing).

Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464 (1986) (reference by prosecutor to defendant as an "animal" and his implication that only the death penalty would prevent defendant from killing again did not make trial so unfair as to violate due process).

Bass v. State, 947 N.E.2d 456 (Ind. Ct. App. 2011) (in child molest case, prosecutor did not commit misconduct by calling the defendant a pervert in closing because pervert is slang for child molester).

Stephens v. State, 10 N.E.3d 599 (Ind. Ct. App. 2013) (prosecutor's references to defendant as a "knucklehead," "yahoo," "bully," and "not a noble heroic guy" during closing were not misconduct but were forceful argument of the type permitted by Indiana precedent).

5. Inadmissible evidence

Improper to mention inadmissible evidence. See also III. A. (14) below.

Indiana Rules of Evidence, Rule 103(d) provides: "[T]o the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means."

(a) Written statement of non-testifying codefendant

Abrams v. State, 525 N.E.2d 287 (Ind. 1988) (prosecutor guilty of misconduct by referring to written statement of non-testifying co-defendant, where written statement found to be inadmissible).

(b) "Mugshots"/pictures

Brooks v. State, 560 N.E.2d 49 (Ind. 1990) (prosecutorial misconduct to use "mugshot" during closing argument when referring to photographs of defendant shown to victim; injection of "mugshot" was deliberate choice made by prosecutor rather than inadvertent reference, however, defendant was not placed in grave peril).

Day v. State, 560 N.E.2d 641 (Ind. 1990) (prosecutor's comment, "[w]ell, I submit that we could have brought in a whole file cabinet full of pictures of the man but the proof could not be more evident than it is," was susceptible to several interpretations, and was not reversible error where comments were rebuttal to defense counsel's argument that proof was insufficient because no pictures were shown of perpetrator of earlier crimes).

6. Comment on exercise of one's rights

Prosecutor commits reversible error when he makes statement in closing argument which directly or indirectly may be seen as commenting on accused's exercise of his rights. Dack v. State, 479 N.E.2d 96 (Ind. Ct. App. 1985).

Reynolds v. State, 797 N.E.2d 864 (Ind. Ct. App. 2003) (prosecutor's comment in closing argument about defendant's invocation of Fifth Amendment at trial during cross examination constituted fundamental error when prosecutor stated: "You take the 5th Amendment when you got something to be concerned about" and "for [5th Amendment] to apply you have to have done something to incriminate yourself").

Nichols v. State, 974 N.E.2d (Ind. Ct. App. 2012) (after stating he normally would not comment on one's decision to exercise 5th Amendment rights but would make an exception in this case, prosecutor's comments about defendant's decision not to testify constituted fundamental error).

McCoy v. State, 574 N.E.2d 304, 307 (Ind. Ct. App. 1991) (constitutional error where prosecutor's comments in closing suggested that if defendant was innocent, he would

have not refused sterility test in child molestation case; court concluded comments did not constitute reversible error given amount of evidence supporting finding of guilt).

Stettler v. State, 70 N.E.3d 874 (Ind. Ct. App. 2017) (during closing argument, prosecutor referred to defendant's videotaped statement and suggested that defendant might have objected more strenuously during questioning and also asked why defendant did not object more aggressively during voir dire about why witnesses might choose to not testify; these statements did not suggest that defendant's decision to not testify implied his guilt).

Cf. Portuondo v. Agard, 529 U.S. 61, 120 S.Ct. 1119, 1123-28 (2000) (a prosecutor's comments in closing argument that the defendant's testimony was untrue because the defendant had heard all the witnesses and was able to tailor his testimony accordingly did not violate the defendant's right to be present, right of confrontation, right to testify, or right to due process).

See also:

(1) Defendant's election to not testify ((d) this section below)).

(2) Election not to call witnesses (page 117-13).

(3) Post-arrest silence (III. A.6 (f)).

(a) Question as to whereabouts of codefendant and comments as to codefendant's failure to testify

Prosecutor not permitted to rhetorically ask jury whereabouts of accomplice. Accomplice had not yet been tried and if called would only refuse to testify on grounds it might incriminate him. Such would be highly prejudicial to defendant.

Chapman v. State, 556 N.E.2d 927, 929 (Ind. 1990) (comment highly improper and had prosecutor pursued matter any further new trial would have been indicated; defense counsel immediately objected, and court instructed jury to disregard comment and not consider it for any purpose).

(b) Blaming shortcoming in State's evidence on invocation of right to speedy trial

To blame a shortcoming in the State's evidence on a defendant's invocation of a fundamental constitutional right, e.g., speedy trial, is prosecutorial misconduct and likely also constitutes fundamental error. Thornton v. State, 25 N.E.3d 800 (Ind. Ct. App. 2015).

(c) Comment on right to jury trial

Ryan v. State, 9 N.E.3d 663 (Ind. 2014) (defendant's exercise of his right to jury trial was not negatively implicated when prosecutor stated: "I want to be really clear, we are here because everyone has a right to have a jury trial. We're not here because he didn't do it, we're here because he wants to get away with it. So, don't let him, thank you.").

Cf. State v. Snow, 144 P.3d 729 (Kan. 2006), *disapproved of on other grounds by*, State v. Guder, 267 P.3d 751 (Kan. 2012) (prosecutor's disparaging remarks that defendant "has had his jury trial, and it's time to put an end to this nonsense," were "insulting, demeaning, and unprofessional").

(d) Comment on defendant's election to not testify

Prosecutor cannot invite jury to infer evidence of guilt from defendant's decision not to take witness stand. Hopkins v. State, 582 N.E.2d 345 (Ind. 1991) and Carter v. State, 686 N.E.2d 1254, 1262 (Ind. 1997). "Any comment which may be interpreted as implying that the defendant must be guilty, or he would have testified cannot be condoned." Parsons v. State, 472 N.E.2d 915, 916 (Ind. 1985).

Brooks v. State, 598 N.E.2d 519, 520 (Ind. 1992) (reversible error, direct reference to defendant's exercise of constitutional rights to say, "The defendant chose to exercise his 5th Amendment rights which he has an absolute right to do. The only words that we have heard from the defendant throughout this trial. . . .").

Williams v. State, 426 N.E.2d 662, 666 (Ind. 1981) (comment on defendant's failure to take stand and invasion of Fifth Amendment where prosecutor pointed out that codefendant's story was the only story; only other person placed at scene who did not testify was the defendant, subject to interpretation by jury as comment on election not to testify).

Herron v. State, 801 N.E.2d 761 (Ind. Ct. App. 2004) (prosecutor violated defendant's Fifth Amendment privilege against self-incrimination and committed fundamental error when he stated during closing argument, "but as for not presenting the gun to you, that actually fired those bullets, members of the jury, right over there at that table, that's the only one in the courtroom that can certainly tell us where the gun is").

Thomas v. State, 9 N.E.3d 737 (Ind. Ct. App. 2014) (State's reference during closing, specifically, "there's not another story that's going on here," was improper reference to 5th Amendment right).

(1) Prohibited by constitutions and Indiana Evidence Rules

Indiana Rules of Evidence, Rule 501(d)(1) provides: "Neither the judge nor counsel may comment upon the claim of a privilege, whether in the present proceeding or on a prior occasion. No inference may be drawn from the claim of a privilege."

"No-comment on failure to testify" rule falls within protection of Indiana Bill of Rights (Ind. Const. Art. I, § 14). See Keifer v. State, 204 Ind. 454, 184 N.E. 557 (1933).

Prosecutorial comments on defendant's silence violate Fifth Amendment privilege against compulsory self-incrimination. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); Reynolds v. State, 797 N.E.2d 864 (Ind. Ct. App. 2003).

Practice Pointer: Provide separate cogent argument based on Indiana Constitution. Indiana's right not necessarily coextensive with federal Fifth Amendment.

(2) Court cannot admonish jury, unless defendant requests

State trial judge has constitutional obligation, upon proper request, to minimize danger jury will give evidentiary weight to defendant's failure to testify.

Priest v. State, 270 Ind. 449, 386 N.E.2d 686 (1979) (under Indiana Constitution, accused may bar giving of instruction, if accused does not object to instruction when proposed, he has communicated to judge that he consents to its being given).

Jury should be given admonition only when defendant requests one. *Indiana Rules of Evidence, Rule* 501(d)(3) provides: "If requested by a party against whom the jury might draw an adverse inference of a claim of privilege, the court must instruct the jury that the jury must now draw an adverse inference from the claim of privilege."

Horan v. State, 642 N.E.2d 1374, 1375 (Ind. 1994) (reversible error where court failed to instruct jury, upon defendant's request, that defendant's refusal to testify raised no presumption against him).

(3) Test under federal constitution

Fifth Amendment privilege against compulsory self-incrimination violated:

(1) when prosecutor makes statement

(2) subject to reasonable interpretation by jury

(3) as invitation to draw adverse inference from defendant's silence.

Moore v. State, 669 N.E.2d 733 (Ind. 1996).

Moore v. State, *supra* (jury could not have interpreted, "he didn't choose to testify which is his right, and he certainly doesn't, isn't compelled to testify . . ." as suggestion to infer guilt from defendant's silence; prosecutor inadvertently mentioned decision not to testify and immediately attempted to correct slip of tongue).

(4) Burden of proof

(1) defendant must prove prosecutor's remark penalized exercise of his right to remain silent,

(2) if defendant shows remark improper, court presumes reversal necessary,

(3) until State proves beyond reasonable doubt that any error was harmless (demonstrate beyond reasonable doubt that remark - with its rhetorical impact weighed against closeness of case and discounted by corrective effect of judicial action - did not alter jury's verdict).

Moore v. State, *supra, applying* harmless error analysis in Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

(5) Harmless error considerations

Reviewing court considers whether jury would have convicted defendant absent the comment. United States v. Hasting, 461 U.S. 499, 510-11, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983).

Considerations include:

(1) persuasiveness of comment

(a) imploring jurors to infer guilt

(b) directly referring to silence

(c) extensive or repetitive comments

(d) inflammatory rhetoric

(e) intentional comments

(f) larger context of comments

(2) relative strength of State's case

(a) overwhelming nature of evidence

(b) review redacted replay of trial through jurors' eyes.

(3) effectiveness of corrective measures by trial judge

(a) curative instruction defused impact

(b) presence of immediate affirmative action by judge

Moore v. State, 669 N.E.2d 733 (Ind. 1996).

Caveat: Where rhetorical impact of remark of sufficient magnitude to alter verdict because of closeness of case and defendant does not request instruction, State should be permitted to demonstrate that had instruction been requested and given, prejudice of comment would have been neutralized so reviewing court could declare harmless error beyond reasonable doubt. See Moore v. State, 669 N.E.2d 733, n.15 (Ind. 1996).

Johnson v. State, 901 N.E.2d 1168 (Ind. Ct. App. 2009) (although prosecutor improperly referred to the defendant's invocation of his right to counsel at least six times during her closing, including saying that "you need a lawyer when you know you've done something wrong," the quantum of evidence of guilt was substantial and the trial court's admonishment cured the prejudice). See also Thomas v. State, 9 N.E.3d 737 (Ind. Ct. App. 2014).

Owens v. State, 937 N.E.2d 880 (Ind. Ct. App. 2010) (prosecutor's single, vague statement that "other than the defendant, [the victim] is the only one who knows what happened" did not constitute fundamental error).

(6) Not improper to point out case un-contradicted

Prosecutor is permitted to summarize evidence "so long as the State focuses on the absence of any evidence to contradict the State's evidence and not on the accused's failure to testify." Dumas v. State, 803 N.E.2d 1113, 1118 (Ind. 2004); Price v. State, 656 N.E.2d 860, 863 (Ind. Ct. App. 1995); and Feyka v. State, 972 N.E.2d 387 (Ind. Ct. App. 2012).

Zamani v. State, 33 N.E.3d 1130 (Ind. Ct. App. 2015) (prosecutor's comments about "no explanation" and "no alternative theory" about State's case were addressed to the evidence rather than defendant's failure to testify).

(7) Prosecutor may refer to lack of any rebuttal of State's witnesses

Schmidt v. State, 816 N.E.2d 925 (Ind. Ct. App. 2004) (comment by prosecutor that officer's observations were "sole testimony you have as to his driving behavior" was proper reference to lack of evidence presented by defense, not improper reference to Fifth Amendment right to remain silent).

Hopkins v. State, 582 N.E.2d 345 (Ind. 1991) (not an improper comment where prosecutor said, "it is certainly worthy of comment that you never heard any testimony during this trial that the defendant was anywhere else than the victim's home when he was murdered.").

Callahan v. State, 527 N.E.2d 1133 (Ind. 1988) (proper to comment about lack of explanation by defense concerning otherwise incriminating evidence, so long as State

focuses on absence of evidence to contradict State's evidence and not on accused's election to not testify).

Emerson v. State, 524 N.E.2d 314 (Ind. 1988) (no improper comment when prosecutor said that there had been no self-defense; defense counsel stated there would be evidence of self-defense, and during voir dire questioned potential jurors at length on their views of self-defense and repeatedly stressed that self-defense would be an issue).

(e) Election to not call witnesses

Comment on defendant's election to not call witnesses improper, but often harmless error.

Mitchell v. State, 455 N.E.2d 1131 (Ind. 1982) (error for prosecutor to comment on defendant's election not to call two prospective witnesses; trial court properly sustained defendant's objection and correctly instructed jury to disregard improper suggestion; however, error was cured by instructions). See also Harrison v. State, 901 N.E.2d 635 (Ind. Ct. App. 2009).

Chubb v. State, 640 N.E.2d 44 (Ind. 1994) (comments improper, but de minimis and overcome by court's preliminary instructions given a few hours earlier in one-day trial; prosecutor remarked, "where are the witnesses? . . . They are not here. But, if those witnesses were important to the defendant's case . . . where are they?").

Pettiford v. State, 506 N.E.2d 1088 (Ind. 1987) (error where prosecutor said, "[i]f you want to believe him that he was in the presence of the Rev. Bell, I ask you today, where is the Reverend"; but error harmless in view of evidence and failure of defendant's evidence to establish alibi, and trial court's preliminary and final instructions' correct statement that defendant not required to present any evidence whatsoever and not required to prove his innocence).

Ramsey v. State, 853 N.E.2d 491 (Ind. Ct. App. 2006) (prosecutor's comment on lack of defense witnesses in response to defense counsel's contention that the State had failed to call certain witnesses did not improperly shift burden of proof from State to defense and did not constitute misconduct; rather, prosecutor was explaining the subpoena power given to both parties in the case by saying that the defendant could have called the witnesses to testify). See also Reliford v. State, 436 N.E.2d 313 (Ind. 1982).

(f) Commenting on post-arrest silence

Prosecutors may not use a defendant's post-arrest and post-Miranda warning silence against him either in argument or in examination of witnesses because it is contrary to the Due Process clause of Fourteenth Amendment. Doyle v. Ohio, 426 U.S. 610 (1976).

White v. State, 647 N.E.2d 684 (Ind. Ct. App. 1995) (use of defendant's post-arrest silence throughout trial, and use of implications concerning post-arrest silence during closing arguments created reversible error).

Splunge v. State, 641 N.E.2d 628 (Ind. 1994) (prosecutor committed misconduct by arguing: "Think about the victim. The victim in this case has the right to remain silent, too. And he will for all eternity, thanks to [defendant]."; harmless error in light of overwhelming evidence).

Delarosa v. State, 938 N.E.2d 690 (Ind. 2010) (prosecutor's statement that "it would have been nice if he had admitted to this officer… He admitted to [co-defendant], he

admitted to [other co-defendant] and he admitted to his cellmate…" was too attenuated to be a comment on the defendant's failure to testify).

(g) Undecided whether it is improper to use post-arrest, pre-Miranda silence

It remains an open question whether a defendant's post-arrest, pre- Miranda silence may be used substantively as evidence or for impeachment purposes against a defendant. The Supreme Court has not addressed the issue, and federal circuits are split on the question. Kelly v. State, 122 N.E.3d 803, 806 (Ind. 2019).

7. Reasonable doubt analogies

Prosecutors who are tempted to enliven voir dire and/or opening and closing arguments with visual aids or analogies" to illustrate the reasonable doubt standard is "dangerous and unwise." Adcock v. State, 933 N.E.2d 21, 28 n. 6 (Ind. Ct. App. 2010).

Adcock v. State, 933 N.E.2d 21 (Ind. Ct. App. 2010) (prosecutor did not commit fundamental error when he analogized a twenty-piece jigsaw puzzle with just two pieces missing to explain the difference between "proof beyond a reasonable doubt" and "before beyond all possible doubt; however, the court warned that these types of analogizes are dangerous).

8. Grand jury improperly mentioned

Sailors v. State, 593 N.E.2d 202 (Ind. Ct. App. 1992) (references improper and fundamental error where prosecutor twice remarked jury was "actually the second jury to consider this matter" and that "[t]he indictment was returned by six of your fellow citizens"; defendant convicted on basis of contested inferences drawn solely from circumstantial evidence).

9. Duration of punishment

In case where jury may not consider potential punishment because Legislature has pre-determined the penalty, "[a]ny remarks by the prosecuting attorney . . . regarding the possibility of parole could only be calculated to encourage the jury to disapprove of the punishment for a lesser included offense and to find guilt of the greater offense because of the punishment to be imposed." Rowe v. State, 250 Ind. 547, 237 N.E.2d 576 (1968).

Rowe v. State, *supra,* (reversal because prosecutor interjected issue of duration of punishment, "[i]f [the defendant, charged with murder in the second degree] is convicted of manslaughter he might be out in two years.").

Hadley v State, 165 Ind. App. 416, 332 N.E.2d 269 (1975) (cumulative effect of misconduct necessitates defendant be given a new trial; in addition to commenting on defendant's failure to testify, prosecutor (1) attempted to minimize in the minds of the jurors the seriousness of their task by informing them that even if their verdict was guilty, trial judge might suspend any sentence or that the parole board might release defendant, (2) attempted to interject the belief defendant was actively engaged in drug trafficking, by telling the jurors that they didn't know all the evidence or all things that transpired, continually propounding questions concerning previous drug related activities, (3) commented upon defendant's "failure" to attempt to exculpate himself by not issuing a subpoena nor presenting testimony from a co-defendant, emphasizing defendant had constitutional right to do so and that he had refused).

Brown v. State, 799 N.E.2d 1064 (Ind. Ct. App. 2003) (in murder case, prosecutor's comparison during closing argument of lesser offense of reckless homicide to other class C felonies was improper, analogous to disclosing statutory penalties, but did not constitute fundamental error).

Baer v. State, 866 N.E.2d 752 (Ind. 2007), *habeas relief granted*, Baer v. Neal, 879 F.3d 769 (7th Cir. 2018) (court disapproves of trial court or prosecutor gratuitously informing jury that varying appellate consequences may attach to different verdict choices before the jury).

Note: When it is for the jury to determine a sentence or a penalty, it was improper for prosecutor to argue convicted defendant will serve lesser sentence than that to which jury sentences him See, e.g., Dailey v. State, 406 N.E.2d 1172 (Ind. 1980) and Pollard v. State, 166 N.E. 654 (Ind. 1929).

10. Mentioning previous hung jury

Wickliffe v. State, 523 N.E.2d 1385 (Ind. 1988) (reference to hung jury not so prejudicial to place defendant in grave peril where prosecutor's remark regarding previously hung jury did not impinge reliability of jury's verdict; counsel immediately objected, asked reference be stricken, and court instructed jury to disregard remark).

11. Jurors addressed by name

Clearly improper to address individual jurors by name in closing argument. Because juror especially likely to be influenced by direct appeal to his or her individual fears or prejudices. Bessette v. State, 101 Ind. 85 (Ind. 1885).

Johnson v. State, 453 N.E.2d 365, 369 (Ind. Ct. App. 1983) (defendant placed in position of grave peril and improper to single out juror and play on his individual fears for his wife's safety. "How about you Mr. Kirby? Do you want your wife to be raped in her own house? Do you want to come home and find your wife has been attacked?").

See also Annot. 55 A.L.R.2d 1198.

12. Misstatement of law

Indiana Rules of Professional Conduct, Rule 3.3(a)(1) prohibits lawyers from making knowing, false statement of material fact or law to a tribunal or failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

Castillo v. State, 974 N.E.2d 458 (Ind. 2012) (the prosecutor committed fundamental error by misstating the law and by improperly arguing the Defendant's character; during closing in penalty phase, prosecutor told jurors "do not compare what you're evaluating, the aggravating factor and these mitigating factors that the defense has brought" and described the defendant as "a problem," "uncontrollable," "violent, vicious, manipulative," and told the jury that "she is broken. She has been broken since she was a kid and there is no fixing her.").

Allen v. State, 716 N.E.2d 449, 453-54 (Ind. 1999) (prosecutor improper to misquote trial court's instruction concerning effect of verdict of guilty but mentally ill; but error had no prejudicial effect on jury).

Baer v. Neal, 879 F.3d 769 (7th Cir. 2018) (among other things, prosecutor repeatedly told jurors that a guilty but mentally ill conviction might preclude a death sentence and incorrectly stated the guilty but mentally ill standard).

(a) Arguing appellate standard of review

It is improper for prosecutors to argue appellate standards of review in closing argument. Such arguments may confuse or mislead the jury because they focus the jury away from how the evidence meets the elements required for conviction and toward the appellate

standard, which the Indiana Supreme Court made clear "is irrelevant to a jury's function as fact-finder." See Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003).

Vasquez v. State, 174 N.E.3d 623 (Ind. Ct. App. 2021) (harmless error to allow prosecutor to argue in closing argument that the jury should construe the evidence in light of legal precedent holding that the uncorroborated testimony of a child victim is sufficient to support a child molesting conviction; argument created the real risk of confusing the jury into thinking they do not have the ability to question the complaining witnesses' credibility and reject it).

(b) Final instructions presumed to correct misstatement of law

Final instructions are presumed to correct any misstatements of law made during final argument. Barnes v. State, 435 N.E.2d 235, 242 (Ind. 1982) and McCoy v. State, 574 N.E.2d 304, 308 (Ind. Ct. App. 1991).

Incorrect statements of law, although not in evidence, can be cured by proper instruction in same manner as erroneous admission of evidence may be cured. Reliford v. State, 436 N.E.2d 313, 315 (Ind. 1982).

McCoy v. State, 574 N.E.2d 304 (Ind. Ct. App. 1991) (prosecutor misstated law when he told jury that defendant's admission that he kissed victim was enough to obtain conviction for "fondling or touching" but misstatement was cured by court's instructions. Prosecutor's action did not influence jury, which could have based conviction on victim's statements as to her sexual relationship with defendant).

13. Misstatement of evidence

Collins v. State, 966 N.E.2d 96 (Ind. Ct. App. 2012) (prosecutor's objection to defense counsel's closing argument in which prosecutor stated that "counsel knows very well that her client was convicted. It was reduced to a misdemeanor" improperly disparaged defense counsel and mischaracterized the evidence to reflect that defendant had a prior conviction when she did not).

Bailey v. State, 131 N.E.3d 665 (Ind. Ct. App. 2019) (prosecutor misstated the amount of cash recovered from defendant's address, but statement appeared to be an inadvertent mistake rather than a calculated attempt to inflame the passions of the jury; error was not so egregious as to constitute fundamental error).

14. Matters not in evidence

Improper for counsel to comment on matters not in evidence. Trice v. State, 519 N.E.2d 535 (Ind. 1988). See also III.A.5 on page 17-8. A prosecutor must confine closing argument to comments based only upon evidence presented in the record.

Dailey v. State, 273 Ind. 595, 406 N.E.2d 1172, 1175 (1980) (defendant placed in position of "grave peril" where at least 10 times prosecutor asked witnesses whether defendant gave statement to police, in order to bring before jury suppressed confession).

Howey v. State, 557 N.E.2d 1326 (Ind. 1990) (misconduct, but not reversible error when prosecutor referred to bloodstain on pillowcase which was not in evidence and to fact that police were investigating fourteen other murders at the time of this investigation).

Gasper v. State, 833 N.E.2d 1036 (Ind. Ct. App. 2005) (prosecutor improperly commented on "bloody" washcloths when there was no evidence that the substance on the washcloths was blood).

Donnegan v. State, 809 N.E.2d 966 (Ind. Ct. App. 2004) (prosecutor committed misconduct by broaching subject of whether one of State's witnesses had taken polygraph examination when subject was not addressed during trial; however, Defendant was not placed in position of grave peril).

Miller v. State, 916 N.E.2d 193 (Ind. Ct. App. 2009) (prosecutor improperly played a demonstration video to show how easy a person could conceal a weapon inside his or her clothing; the showing of the video was highly prejudicial because it showed a man removing several guns from his clothing whereas the defendant was charged with using only one gun in the robbery and there was no real issue about his concealment of the gun in his clothing).

Cox v. State, 854 N.E.2d 1187 (Ind. Ct. App. 2006) (prosecutor put quotations from transcript of officer's interrogation of defendant that was not entered into evidence; error was harmless, but court "[i]n no way…condon[ed] the prosecutor's erroneous and misleading assurances to defense counsel and the court that the transcript of the interrogation was in evidence.").

Rodriquez v. State, 795 N.E.2d 1054 (Ind. Ct. App. 2003) (prosecutor's act of displaying a shotgun that had not been admitted into evidence did not warrant a mistrial, where trial court immediately sustained defendant's objection and admonished jury, and several witnesses had described weapon used during offense).

Neville v. State, 975 N.E.2d 1252 (Ind. Ct. App. 2012) (it was improper for the prosecutor to describe the defendant as gloating over the victim's dead body where there was no evidence supporting this argument).

(a) Prohibited by rules of evidence and professional conduct

Indiana Rules of Evidence, Rule 103(d) provides: "To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means."

Indiana Rules of Professional Conduct, Rule 3.4(e) provides that a lawyer shall not in trial allude to any matter that will not be supported by admissible evidence.

(b) Reference to other crimes of defendant

Oldham v. State, 779 N.E.2d 1162, 1175-76 (Ind. Ct. App. 2002) (prosecutorial misconduct and fundamental error for prosecutor to make comments on defendant's character, such as implying he was a drug dealer, that was based on inadmissible evidence, refer to irrelevant and prejudicial handgun evidence, and refer to alleged bad acts that were not in record).

Flynn v. State, 379 N.E.2d 548 (Ind. Ct. App. 1978) (reversible error to overrule defendant's objection to the deputy prosecutor's statement that defendant is "drug dealer" when not supported by evidence. Unfounded charge that defendant is a "drug dealer" may suggest to the jury that the deputy prosecutor possessed undisclosed evidence bearing upon other possible crimes by the defendant; error is especially serious where the evidence is "close" on the charge for which defendant was being tried).

Adler v. State, 175 N.E.2d 358 (Ind. 1961) (judgment reversed where prosecutor stated: "this boy has an organized gang like the ones in New York that attack people and two of them have already been sent to the reformatory." Defendant objected and moved for admonishment of jury, but court refused).

Thompkins v. State, 383 N.E.2d 347 (Ind. 1978) (comment improper because it referred to matters not in evidence, however, not reversible error where prosecutor stated: ". . . and, let me tell you, ladies and gentlemen, you can know that all three of those people have committed many other crimes." Judge promptly admonished jury and warned prosecutor to refrain from making improper comments).

Cooper v. State, 854 N.E.2d 831 (Ind. 2006) (prosecutor's remarks concerning defendant's prior acts that were admitted into trial, that defendant "is a back shooter and a woman beater," were at least approaching, if not improper, comments on defendant's character, but error was harmless).

Farmer v. State, 481 N.E.2d 154 (Ind. Ct. App. 1985) (by mentioning a plea agreement from another case, prosecutor improperly addressed a matter outside the evidence; yet reference was brief, undeveloped, and abandoned following defendant's objection, and defendant failed to demonstrate he was placed in grave peril by misconduct).

(c) Excluded material

Improper to discuss testimony that had been stricken out and withdrawn from jury. Buffkin v. State, 106 N.E. 362 (Ind. 1914); see also *Indiana Rules of Evidence, Rule* 103 (d) (to the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means).

15. Injecting personal experiences

Improper for prosecutor to attempt to inject his personal experiences into trial during final argument. Bonner v. State, 650 N.E.2d 1139, 1142 (Ind. 1995).

Eliacin v. State, 325 N.E.2d 201 (Ind. 1975) (Improper to state "[t]his crime is probably one of the most aggravated and unprovoked and merciless crimes I have seen;" error harmless because of admonitions and evidence produced at trial).

16. Implying personal knowledge independent of evidence

Misconduct for prosecutor to imply he possesses evidence not known to jury indicating defendant is guilty of crime charged because it may induce jury to decide case in reliance on matters outside evidence. Merritte v. State, 438 N.E.2d 754 (Ind. 1982) and Marsh v. State, 396 N.E.2d 883, n.3 (Ind. 1979), *overruled on other grounds by* Beattie v. State, 924 N.E.2d 643 (Ind. 2010).

Lopez v. State, 527 N.E.2d 1119 (Ind. 1988) (Prosecutor did not imply personal undisclosed evidence of guilt when she stated, "[i]f you want to ask me afterwards why Manuel Mendez was not called, I will be more than happy to tell you, . . . "; no misconduct because prosecutor merely suggested undisclosed reasons for not calling certain witnesses and responded on rebuttal to defendant's argument which repeatedly emphasized absence of witnesses).

Johnson v. State, 453 N.E.2d 365, 369 (Ind. Ct. App. 1983) (Clearly misconduct where prosecutor asked jury to remember evidence excluded on defendant's objection. Prosecutor implied he had additional inculpatory evidence, which defense attorney kept from jury on "technical" grounds in order to "get his client off.").

McBride v. State, 785 N.E.2d 312 (Ind. Ct. App. 2003) (Prosecutor's statement about mechanism of revolver during final argument did not constitute prosecutorial misconduct and was not based on personal knowledge about functioning of revolvers; comments were about evidence and inconsistencies already in record).

Baer v. Neal, 879 F.3d 769 (7th Cir. 2018) (among other things, prosecutor stated that victim's family wanted defendant to be sentenced to death; reversed and remanded for re-sentencing).

17. Personal opinion or belief stated

Prosecutor may not state his personal beliefs in closing argument. Lopez v. State, 527 N.E.2d 1119 (Ind. 1988).

Indiana Rules of Professional Conduct, *Rule* 3.4 provides in pertinent part: "A lawyer shall not: (e) in trial, . . . state a personal opinion as to the justness of a cause, the credibility of a witness, . . . or the guilt or innocence of an accused;"

Note: Mere use of phrases "I believe" or "I think" does not constitute improper argument.

Rodriguez v. State, 795 N.E.2d 1054, 1059 (Ind. Ct. App. 2003) (prosecutor saying she would expect her own daughter to submit to rape just like victim did in order to save life was improper, but not prejudicial enough to be fundamental error).

Gregory v. State, 885 N.E.2d 697 (Ind. Ct. App. 2008) (prosecutor's closing concerning the dangers and prevalence of methamphetamine were only his opinions and not misconduct).

Baer v. Neal, 879 F.3d 769 (7th Cir. 2018) (among other things, prosecutor inserted his personal opinion and facts that were not in evidence into other portions of the trial; reversed and remanded for re-sentencing).

(a) Cannot assert opinion as to guilt of accused

Lawyers should not assert their personal opinion as to guilt or innocence of accused. Rufer v. State, 342 N.E.2d 856 (Ind. 1976).

Gaby v. State, 949 N.E.2d 870 (Ind. Ct. App. 2011) (prosecutor's argument that she was "confident" that the jury "would come to the same conclusion" that she and the detectives had come to, that "I cannot and would not bring charges that I believe were false" and that "I can tell you with a guilty verdict on this case I will be able to sleep fine tonight. Just fine. In fact, better than fine. You will be able to also" were impressible vouching; cumulative effect of the misconduct and an evidentiary error required reversal).

Wells v. State, 848 N.E.2d 1133 (Ind. Ct. App. 2006) (under Rule of Professional Conduct 3.4(e), it was improper for prosecutor to express his personal opinion as to merits or justness of the case against defendant, when during closing he stated: "If there had been a slightest bit of credible evidence that [officers] conspired …to arrest [defendant], I wouldn't have prosecuted this;" defendant did not suffer grave peril as result of this conduct).

It is within bounds of permissible advocacy for prosecutor to express belief in guilt of accused, so long as clearly stated or implied that predicate for belief is evidence presented. Swope v. State, 263 Ind. 148, 325 N.E.2d 193 (1975).

Robinson v. State, 499 N.E.2d 253 (Ind. 1986) (no misconduct where prosecutor stated that in his judgment facts conclusively established defendant knowingly killed victim; statement merely reflected prosecutor's judgment that facts established one of elements of crime).

Saylor v. State, 55 N.E.3d 354 (Ind. Ct. App. 2013) (prosecutor's comments on witnesses' credibility during closing argument were based on reasons arising from evidence presented at trial and was not vouching).

Colvin v. State, 264 Ind. 514, 346 N.E.2d 737 (1976) (no personal knowledge of defendant's guilt outside record, "I think Mr. Colvin is guilty and not unjustly accused." Statement reasonable in response to judge telling jurors that reasonable doubt standard intended to guard innocent and unjustly accused and made in context of asking jury to "look hard" at evidence and apply reasonable doubt standard).

Ellison v. State, 717 N.E.2d 211 (Ind. Ct. App. 2002) (reference to defendant as "murderer" fell into grey area between fair comment and personal expressions of belief; error was not fundamental).

Bradley v. State, 113 N.E.3d 742 (Ind. Ct. App. 2018) (Court disapproved of prosecutor's comment that defendant had "a guilty look on his face because he's guilty;" however, comment was de minimis and did not make fair trial impossible).

See also 75A Am.Jur.2d Trial § 637, - NECESSITY OF PREJUDICE.

(b) Attacking credibility of defense witnesses

Unprofessional conduct for attorney to simply assert witness untruthful. *See Indiana Rules of Professional Conduct,* Rule 3.4(e).

Craig v. State, 267 Ind. 359, 370 N.E.2d 880 (1977) (improper unexplained references to defense perjury where prosecutor said, "the perjured testimony of some of the defense witnesses," and "perjured testimony of a defense witness.").

Worthington v. State, 405 N.E.2d 913 (1980) (prosecutor's remarks improper to extent they intimated personal knowledge and opinion as to credibility of witness, however, improper conduct did not violate substantial rights of defendant, nor did they contribute to conviction).

Valdez v. State, 56 N.E.3d 1244 (Ind. Ct. App. 2015) (trial court properly denied defendant's motion for a mistrial despite prosecutor improperly claiming during closing argument that defense counsel manipulated defense expert's testimony to support insanity claim).

However, prosecutor may comment upon credibility of witnesses if assertions based on reasons which arise from evidence. Beard v. State, 428 N.E.2d 772, 775 (Ind. 1981).

Lopez v. State, 527 N.E.2d 1119, 1127 (Ind. 1988) (prosecutor merely expressed preference for her own witnesses where she said "[t]hey are professional, and I will stand by them any day over the likes of Jesse Lopez.").

Merritt v. State, 438 N.E.2d 754, 756-57 (Ind. 1982) (statement not improper where prosecutor's comment merely based on prosecutor's analysis of evidence and not intended as inference prosecutor had some special knowledge of defendant's guilt).

Portundo v. Agard, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) (prosecutor's argument in closing, that the testifying defendant was less credible because he had been present in the courtroom and heard the testimony of the other witnesses before testifying himself, was not an unconstitutional burden on defendant's right to be present at trial, to testify, and to confront his accusers under the Fifth, Sixth, and Fourteenth Amendments).

Surber v. State, 884 N.E.2d 856 (Ind. Ct. App. 2008) (given evidence presented and defendant's arguments at trial, prosecutor did not commit misconduct by arguing that CW was telling truth and defendant was lying).

West v. State, 938 N.E.2d 305 (Ind. Ct. App. 2010) (the prosecutor acted properly during closing argument when he said the defendant's sole alibi witness was the defendant's girlfriend who would lie for him).

(c) Bolstering credibility of State's witness

Improper for prosecutor to bolster credibility of State's witnesses by conveying to jury his/her personal belief that witnesses spoke the truth. Brummett v. State, 10 N.E.3d 78 (Ind. Ct. App. 2013), *sum. aff'd*, 24 N.E.3d 965 (Ind. 2014).

Farmer v. State, 481 N.E.2d 154 (Ind. Ct. App. 1985) (in rebuttal argument, misconduct for prosecutor to suggest jury should give greater weight to testimony of State's witnesses, but defendant did not suffer grave peril and court admonished jury to disregard the statement).

Lainhart v. State, 916 N.E.2d 924 (Ind. Ct. App. 2009) (prosecutor committed misconduct by arguing in closing that "if any officer would even come close to not putting out exactly what happened telling the truth, they're out. I would never, ever, put them in front of a Jury, if I suspected anything.").

Cowan v. State, 783 N.E.2d 1270, 1277-78 (Ind. Ct. App. 2003) (improper for prosecutor to personally vouch for witness, but assertion that prosecutor does not encourage people to lie on stand and is not paid for obtaining conviction does not amount to assertion that witness is not lying).

Walker v. State, 988 N.E.2d 341 (Ind. Ct. App. 2013) (prosecutor's acknowledgement of victim's father's emotional distress was not an endorsement of father's truthfulness).

Phillips v. State, 22 N.E.3d 749 (Ind. Ct. App. 2014) (rather than improperly vouching for State witnesses' testimony, prosecutor just connected her commentary on their credibility with evidence in the record that supported that testimony).

18. Prejudicial or inflammatory statements that ask to convict for reasons other than guilt

Improper and prosecutorial misconduct to ask jury to convict defendant for any reason other than his/her guilt by phrasing final arguments in manner calculated to inflame passions or prejudices of jury. Limp v. State, 431 N.E.2d 784 (Ind. 1982).

Danger inherent in inflammatory conduct is that jury, because it is fearful, angry, or controlled by other emotions, will find guilt no matter what the evidence may indicate. Gasaway v. State, 547 N.E.2d 898, 902 (Ind. Ct. App. 1989).

Prosecutor may not unduly arouse jury's fears and prejudices and impair reasoned judgment.

Adler v. State, 225 N.E.2d 171, 174 (Ind. 1967) (reversible error, in robbery prosecution, where prosecutor made statements to jury in his final argument and exhibited a photograph of body of robbery victim which in effect emphasized that defendants were to blame for victim's death).

United States v. Chong Won Tai, 994 F.2d 1204 (7th Cir. 1993) (misconduct in displaying two very large guns having no probative value and not connected with defendant).

Gasaway v. State, 547 N.E.2d 898 (Ind. Ct. App. 1989) (defendant not placed in grave peril by prosecutor's reading of poem while showing autopsy slides, where during trial jury heard extensive testimony and viewed slides used by prosecution, and poem made no substantial reference to matters not in evidence, presentation did not inflame jury because they convicted defendant of involuntary manslaughter, not murder).

Bailey v. State, 131 N.E.3d 665 (Ind. Ct. App. 2019) (prosecutor's suggestion to jurors during closing arguments that the volume of fentanyl in a habitual drug dealer's possession had the potential to kill thousands of people did not constitute fundamental error; statement appeared to be inadvertent mistake rather than calculated attempt to inflame the passions of the jury).

(a) Appeals to law and order

Closing argument should not be used to incite feelings of fear, anger, and desire for revenge in jury. Invitations to jury to join in the "war against crime," incitements to vengeance, and predictions of the danger that would result if defendant was found not guilty are improper and if sufficiently prejudicial can result in reversal. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464 (1986).

Johnson v. State, 453 N.E.2d 365, 368-69 (Ind. Ct. App. 1983) (defendant placed in position of grave peril where prosecutor asked jurors to convict defendant because he was dangerous, not because he was guilty; stressed jurors' right to be safe in their own homes; and asked one juror if he wanted his wife raped).

Messer v. State, 509 N.E.2d 249, 253 (Ind. Ct. App. 1987) (prosecutorial misconduct where, in closing argument, prosecutor sought to have jury decide verdict not on basis of any real issues or facts presented but on defendant's past record and on jury's perception of community interest).

Ryan v. State, 9 N.E.3d 663 (Ind. 2014) (in sexual misconduct with a minor case, prosecutor's request for jury to look at the "bigger picture" and telling them that they are in "an incredible position to stop" this type of behavior and "send the message that we're not going to allow people to do this" clearly invited the jury to convict for reasons other than guilt and constituted improper conduct; however, misconduct did not constitute fundamental error).

Wisehart v. State, 693 N.E.2d 23, 59 (Ind. 1998) (prosecutor's request that jury convict defendant so that he not commit rape implicated principles of not frightening jury or inflaming jury's passion, but was permissible advocacy where evidence included letter in which defendant referred to rape).

Hand v. State, 863 N.E.2d 386, 395-96 (Ind. Ct. App. 2007) (prosecutor properly told jurors in closing argument that they were the moral conscience of the community).

Warner v. State, 265 Ind. 262, 354 N.E.2d 178, 181 (1976) (defendant not placed in position of grave peril were prosecutor requested jury find defendant guilty in order to avert tyranny without further argument along that line; but reference to tyranny was improper exaggeration, unnecessary and unprofessional).

Baer v. Neal, 879 F.3d 769 (7th Cir. 2018) (among other things, prosecutor stated that victim's family wanted death sentence and repeatedly told jurors that a guilty but mentally ill conviction might preclude a death sentence and incorrectly stated the guilty but mentally ill standard).

(b) Appeals to jurors as parents

Remsen v. State, 428 N.E.2d 241, 245 (Ind. 1981) (rhetorical question improper because it had no bearing on guilt or innocence of crime charged and was calculated to inflame jury where prosecutor asked whether, "[y]ou would like to have your little daughter or little loved one of yours view a forced rape?" Comment did not have such persuasive effect on jury's decision to warrant new trial, as incident was isolated moment of improper conduct and jury was fully aware child had witnessed sexual offense).

McBride v. State, 785 N.E.2d 312, 320 (Ind. Ct. App. 2003) (prosecutor's suggestion that jurors imagine their own children in victim's place was ill-advised and inappropriate but did not constitute fundamental error).

Rodriquez v. State, 795 N.E.2d 1054 (Ind. Ct. App. 2003) (prosecutor's comment in rape and confinement trial that victim acted in a way she wished her daughter would act if attacked was isolated incident and made to counter defense that victim had consented to her attack; **note:** concurring opinion condemned prosecutor's tactics and may be helpful authority in arguing misconduct issues).

(c) Invoking sympathy for a victim as basis for conviction

Improper to invoke sympathy for a victim as a basis for conviction, or to urge the jury to convict a defendant to encourage other victims to come forward. Woolston v. State, 453 N.E.2d 965 (Ind. 1983); Hand v. State, 863 N.E.2d 386 (Ind. Ct. App. 2007).

Thornton v. State, 25 N.E.3d 800 (Ind. Ct. App. 2015) (improper for prosecutor to ask jurors to consider "that we re-victimize these people who come forward with rape).

Deaton v. State, 999 N.E.2d 452 (Ind. Ct. App. 2013) (statement that complaining witness's testimony alone was sufficient to convict defendant and that no other evidence was necessary to corroborate her testimony was a correct statement of law, not prosecutorial misconduct).

Baer v. Neal, 879 F.3d 769 (7th Cir. 2018) (among other things, prosecutor repeatedly told jurors that a guilty but mentally ill conviction might preclude a death sentence and stated that victim's family wanted defendant to be sentenced to death; reversed and remanded for re-sentencing).

(d) Arguments for aggravation

Improper to coerce guilty verdict or death sentence by unfair and misleading predictions of consequences of not guilty verdict or life imprisonment.

Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464 (1986) (reversal where prosecutor stated that death sentence must be imposed because life sentence "never really means life").

Washington v. State, 390 N.E.2d 983 (Ind. 1979) (prosecutorial misconduct where prosecutor stated that he felt a verdict of not guilty by reason of insanity would do nothing more than give defendant a license to kill; however, court found defendant not placed in grave peril under all circumstances and evidence in case).

(e) Other examples of improper comments

Neville v. State, 976 N.E.2d 1252 (Ind. Ct. App. 2012) (Prosecutor's comparison of the defendant's trial with the victim's murder and argument that the defendant did not give the victim the same treatment he was receiving, along with the prosecutor's request to

convict in order to provide justice for the family and repeated characterization of the prosecutors as "powerless" to do any more than put the defendant on trial, was misconduct; no fundamental error).

Limp v. State, 431 N.E.2d 784 (Ind. 1982) (statements did not have such persuasive effect as to warrant new trial where prosecutor asked, "[w]hat type of psychological damage has been done to this little girl because of these acts inflicted upon her? Will she ever recover from these acts? There's no way of telling, there's no way of knowing." Court admonished jury to disregard and jury was silent when court asked whether any juror could not disregard remarks).

Emerson v. State, 952 N.E.2d 832 (Ind. Ct. App. 2011) (Prosecutor's request that the jury should "stand up to this bully" by convicting was improper; but, because the requests were fleeting and the jury was instructed that the arguments were not evidence, they did not rise to fundamental error).

(f) Appeal to prejudices and biases

Insidious and improper for prosecutor to appeal to racial, national, religious, or class prejudices in which prosecutor deliberately plays on stereotypical themes to exploit jury bigotry.

United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990) (racial prejudice where prosecutor repeatedly referred to defendants as "the Jamaicans.").

United States v. Goldman, 563 F.2d 501, 504 (1st Cir. 1977) (reversible error where prosecutor stated "[b]ased upon the facts of this case that religious symbol has been defamed, defiled and scandalized" in response to defendant wearing a skullcap in court).

United States v. Payne, 2 F.3d 706 (6th Cir. 1993) (reversal where prosecution suggested that defendant is an evil person who would take advantage of poor, pregnant women, diaper-less babies, and laid-off workers).

Samaniego v. State, 679 N.E.2d 944 (Ind. Ct. App. 1997) (although prosecutor engaged in misconduct by making improper remarks about defendant's Native American heritage and religion, comments were not likely to have unfairly prejudiced jury and therefore did not constitute fundamental error).

Smith v. State, 516 N.E.2d 1055 (Ind. 1987) (prosecutor's use of the term "the boys" was general slang, not racial comment; characterizing testimony of black defense witness as "shucking and jiving on the stand" reminds jury of untrustworthy appearance of witness. Despite racial content of term, not out of bounds to say defendant acted like "Superfly" to imply defendant's behavior modeled on fictional figure).

United States v. Cabrera, 222 F.3d 590 (9th Cir. 2000) (government's references to the drug market falling under control of Cuban dealers, suggestion that Cubans were flight risks, and description of how Cubans tended to package their drugs, were plain error where defendant was Cuban).

Withers v. United States, 602 F.2d 124, 125 (6th Cir. 1979) (prosecutor's reference to the fact that "not one white witness" has produced contradictory evidence was plain error).

Hakim v. United State, 344 F.3d 324 (3d Cir. 2003) (reference to defendant's Muslim faith and showing his passport to jury to demonstrate that he had traveled to Saudi

Arabia, were troubling but were not plain error because good reason existed to mention faith as way of showing that witness respected defendant and would not lie about him).

19. Repetitious reading of indictment

Excessive repetition of indictment is error. State v. London, 295 S.W. 547 (Mo. 1927).

Faust v. State, 266 Ind. 640, 366 N.E.2d 175, 177 (1977) (no error to use indictment as means of comparison with the proof; prosecutor read indictment at beginning of final argument, followed by explanation of elements of offense charged, and then stated what was shown by the evidence; even though indictment had been read twice and court gave final instruction that indictment is not evidence in determining guilt).

20. Rebuttal: matters not addressed by defense (sandbagging)

Sandbagging occurs when prosecutor argues new theories, issues or arguments during rebuttal that were not made in opening argument. This is prohibited under Ind. Code §35-37-2-2(4): "if in the closing he refers to any new point or fact not disclosed in the opening, the defendant or his counsel may reply to that point or fact, and that reply shall close the argument of case." See also Jury Rule 27.

Practice Tip: Counsel should timely object to sandbagging because new material or issue may be destructive to defendant's case. However, if jury has already been exposed to new issues or argument, promptly request time be allotted to respond to prosecutor's statement following rebuttal.

Inman v. State, 4 N.E.3d 190 (Ind. 2013) (State's rebuttal to defendant's closing argument about self-defense did not raise new facts but simply tried to rebut defendant's allegations; thus, defendant was not entitled to surrebuttal).

B. AVOIDING WAIVER

1. Timely object

Prompt objection required as prerequisite to appellate review. Burris v. State, 465 N.E.2d 171 (Ind. 1984); Perdue v. State, 398 N.E.2d 1290 (Ind. Ct. App. 1979).

Zenthofer v. State, 613 N.E.2d 31 (Ind. 1993) (defendant waived possible error concerning prosecutor's closing where he fails to object to argument at trial).

(a) Specify objection(s)

State specific, precise legal ground(s). See Ind. Evid.R. 103(a)(1).

Tyson v. State, 619 N.E.2d 276, 291 (Ind. Ct. App. 1993), *cert. den'd* (defendant waived alleged error with his general objection, "I object to Mr. Garrison reading case law to the jury." On appeal defendant argued different grounds, that passage was prejudicial and irrelevant).

(b) Argue objection on the record

Ask to be heard on matter. Full explanation of counsel's objection should be put on record at sidebar.

2. Request admonition and mistrial, even if your objection overruled

Ask judge to instruct jurors to disregard comment, even if objections were overruled. If not satisfied with admonishment, move for mistrial. Failure to do this results in waiver of issue. Dumas v. State, 803 N.E.2d 1113, 1117 (Ind. 2004).

Caveat: Indiana Supreme Court seldom finds reversible error when trial court admonishes jury to disregard statement made during proceedings. Davidson v. State, 580 N.E.2d 238 (Ind. 1991).

Practice Pointer: Be aware of the case law requiring a request for an admonishment or a mistrial after an objection to improper arguments made by the prosecutor. See Dumas v. State, 803 N.E.2d 1113, 1117 (Ind. 2004); Brown v. State, 799 N.E.2d 1064, 1066 (Ind. 2003); Brewer v. State, 605 N.E.2d 181 (Ind. 1993); and Tyson v. State, 619 N.E.2d 276 (Ind. Ct. App. 1993). This required admonishment is different than a limiting instruction in *Indiana Rule of Evidence* 105 in that the judge is not instructing on limited admissibility but rather instructing to disregard the improper argument entirely. Although these cases require a request for an admonishment or a mistrial even after an objection is overruled in order to preserve error, argue, if necessary, that this requirement serves no purpose and should be overruled. The purpose of an objection is to allow a trial court the opportunity to rule on an issue and provide a record for an appellate court. A judge, who has already determined there is no error by overruling an objection, has implicitly ruled that there is no need to admonish the jury. See Williams v. State, 29 N.E.3d 144 (Ind. Ct. App. 2015), *sum. aff'd,* 43 N.E.3d 578 (Ind., 2015) (noting that "[i]t makes absolutely no sense" to require a defendant to "request an admonishment or a mistrial after having been told by the trial court that no misconduct occurred").

3. Request prosecutor be admonished

If prosecutor continues to make improper comments after objection sustained, consider asking that he/she be admonished in addition to other curative actions.

4. Stringent standard of review if no objection made or fail to move for admonishment or mistrial

Indiana Supreme Court will review issue not properly raised and preserved only when record reveals blatant violations of basic and elementary principles, and harm or potential for harm could not be denied. Northern v. State, 489 N.E.2d 520, 521 (Ind. 1986).

Brown v. State, 799 N.E.2d 1064, 1066 (Ind. 2003) (although prosecutor's comments were improper and admonishment would have been proper if defendant had requested one or moved for mistrial after objection was overruled, incident fell short of fundamental error and did not require new trial).

C. PROSECUTORIAL MISCONDUCT

1. Maldonado test

(1) show improprieties under case law or canons of conduct;

(2) which placed defendant in "grave peril."

See Maldonado v. State, 265 Ind. 492, 498-99, 355 N.E.2d 843, 848 (1976) and Impson v. State, 721 N.E.2d 1275, 1280 (Ind. Ct. App. 2000).

(a) Prejudice

Prosecutor's comments prejudicial if they have impact on jury's ability to judge evidence fairly. Gasaway v. State, 547 N.E. 2d 898, 902 (Ind. Ct. App. 1989).

Whether conduct under totality of circumstances placed defendant in position of grave peril to which he should not have been subjected. Bixler v. State, 471 N.E.2d 1093, 1102-03 (Ind. 1984).

Grave peril is measured by: (1) probable persuasive effect of misconduct on jury's decision; and (2) whether there are repeated instances of misconduct which would evidence deliberate attempt to improperly prejudice defendant. Splunge v. State, 641 N.E.2d 628 (Ind. 1994).

Johnson v. State, 453 N.E.2d 365, 369 (Ind. Ct. App. 1983) (defendant placed in position of grave peril because court did not admonish jury to disregard improper statements; evidence of specific intent was close, prosecutor implied he had additional inculpatory evidence, and he played on jurors' individual fears).

Allen v. State, 716 N.E.2d 449, 453-54 (Ind. 1999) (a claim of prosecutorial misconduct during closing arguments requires a determination that there was misconduct by the prosecutor and that it had a probable persuasive effect on the jury's decision).

(b) Multiple incidents may require reversal if grave peril in aggregate

Repeated instances of misconduct evidencing deliberate attempt to prejudice defendant may require reversal, even absent showing grave peril resulted from isolated instance of misconduct. Everroad v. State, 571 N.E.2d 1240, 1244 (Ind. 1991).

(c) Susceptible to permissible and impermissible interpretations

Not reversible error if statement in closing susceptible to both permissible and impermissible interpretations, if probable impact on jury was minimal. Day v. State, 560 N.E.2d 641, 644 (Ind. 1990).

Turnbow v. State, 637 N.E.2d 1329, 1334 (Ind. Ct. App. 1994) (in reckless homicide prosecution, statement that if it found that victim deserved to die, it should find defendant not guilty could have been interpreted to mean that jury should determine defendant's guilt based on whether victim was innocent or blameless in altercation with defendant, but it could also have been construed as comment on defendant's theory of self-defense; therefore statement was not reversible error).

2. If no contemporaneous objection and motion for admonishment, both Maldonado elements and fundamental error must be shown

An appellate claim of prosecutorial misconduct presented on appeal in the absence of contemporaneous objection will not succeed unless defendant established both grounds for prosecutorial misconduct and additional grounds for fundamental error. Booher v. State, 773 N.E.2d 814 (Ind. 2002).

To constitute fundamental error, it must "make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process [and] present an undeniable and substantial potential for harm." Id. at 817. Brummett v. State, 10 N.E.3d 78 (Ind. Ct. App. 2013), *sum. aff'd*, 24 N.E.3d 965 (Ind. 2014) (cumulative effect of prosecutorial misconduct placed defendant in grave peril and constituted fundamental error).

Misconduct more likely to be fundamental error where the evidence of guilt is not overwhelming. Oldham v. State, 779 N.E.2d 1162, 1175-76 (Ind. Ct. App. 2002).

Oldham v. State, *supra* (misconduct of alleging that defendant was a drug dealer when facts not in evidence was fundamental error because evidence was not overwhelming).

Flynn v. State, 379 N.E.2d 548 (Ind. Ct. App. 1978) (unfounded charge that defendant was a "drug dealer" was especially serious where the evidence is "close" on the charge for which defendant was being tried).

D. PERMISSIBLE ARGUMENTS

Line between acceptable and improper advocacy not easily drawn; question is whether defendant was deprived of fair trial. United States v. Young, 470 U.S. 1, 7, 105 S.Ct. 1038, 1042, 84 L.Ed.2d 1 (1985) and Gasaway v. State, 547 N.E.2d 898, 902 (Ind. Ct. App. 1989).

1. Comment on testimony in evidence, and exhibits admitted

Proper to comment upon evidence elicited from witness stand and presented by exhibits properly admitted into evidence. Howey v. State, 557 N.E.2d 1326 (Ind. 1990).

2. May point out reasonable inferences from facts

May point out any reasonable inference from facts in evidence.

Rhone v. State, 492 N.E.2d 1063 (Ind. 1986) (no error where prosecutor commented rape victim had to move out of her apartment because she was afraid to stay; evidence that defendant lived above victim, victim had others stay with her, she did not want to return to apartment, and she did move out).

However, counsel may not imply personal knowledge independent of evidence. Barnes v. State, 435 N.E.2d 235 (Ind. 1982).

(a) Statistical probabilities

Statistical argument not improper.

Roach v. State, 451 N.E.2d 388 (Ind. Ct. App. 1983) (not improper for prosecutor to calculate probability of all pieces of evidence matching as "one in ten million," based on estimating likelihood that glass in defendant's shoe matched glass found at burglary scene and defendant's shoe matched footprint and shoe size; when assigning probabilities prosecutor did not state as fact any specific probability was correct, prosecutor merely supplied method of analyzing evidence in record, leaving jurors free to assign any statistical probability to various facts).

But see State v. Copeland, 922 N.E.2d 1304, 1331 (Wash. 1996) (explaining disapproval of Roach's analysis of prosecutor's use of "product rule" to multiply probabilities and suggest mathematical likelihood of guilt).

Practice Pointers: Roach found no error on theory that prosecutor did not assign probabilities to each piece of evidence, and therefore did not state facts not in evidence. Do not accept Roach as allowing any mathematical calculations in closing arguments, as it suggests that certainty may arise from circumstantial evidence. Strenuously object if prosecutor starts writing out numbers on board and suggesting odds of different pieces of evidence matching is reducible to probability, as in Roach where prosecutor said: "What's the possibility first that the individual was at this scene, if it wasn't Tim Roach, had the same size shoes? . . . One in a hundred, one in fifty, one in twenty-five? How about one in ten?..What's the chance, then, that these footprints were the same size and the same wear pattern and the same tread pattern and belonged to somebody else? . . . One in a thousand? Maybe that's a little heavy. Let's try one in a hundred. . . . using these amounts, there's three, four, five, six, seven zeros. One in ten million, chances of all these things happening." Roach v. State, 451 N.E.2d 388, 392 (Ind. Ct. App. 1983)

(b) Conclusion and urging result

Proper to argue for position or conclusion based on analysis of evidence but may not assert personal opinion as to guilt of defendant. Flynn v. State, 177 Ind. App. 360, 379 N.E.2d 548 (1978).

3. Law

Trial court may not interfere with defendant's presentation of legal argument.

Article I, §19 of Indiana Constitution gives jury right to determine law, as well as facts. Lax v. State, 275 Ind. 34, 414 N.E.2d 555 (1981).

Dixey v. State, 956 N.E.2d 783 (Ind. Ct. App. 2011) (trial court abused its discretion by refusing to allow defense counsel to argue that the evidence presented is more consistent

with lesser included offenses that were not charged; the jury would have been aided by defense counsel's explanation of other offenses enacted by the legislature; reversible error).

(a) Reading from cases

Not error for prosecutor to read from reported cases during final argument. Hubbard v. State, 262 Ind. 176, 313 N.E.2d 346 (1974); Harrison v. State, 32 N.E.3d 240 (Ind. Ct. App. 2015); and Schlabach v. State, 459 N.E.2d 740 (Ind. Ct. App. 1984).

(b) Reading verdict forms and discussing final instructions

Party may discuss in final argument instructions court will give. Morris v. State, 270 Ind. 245, 384 N.E.2d 1022, 1025 (1979).

Perdue v. State, 398 N.E.2d 1290 (Ind. Ct. App. 1979) (no error in referring to refused instructions where instructions did not misstate law or were irrelevant).

4. Failure to be present

Not improper for prosecutor to comment regarding defendant's refusal to be present in courtroom during penalty phase of trial; comments merely pointed out that defendants were absent from courtroom and did not comment on defendant's exercise of his privilege against self-incrimination. Resnover v. Pearson, 965 F.2d 1453 (7th Cir. 1992).

5. Credibility of evidence

Expression of personal opinion not improper where prosecutor commented on credibility of evidence, as long as no implication he had access to special information outside evidence presented to jury, and such outside information convinced prosecutor of guilt of accused.

Nagy v. State, 505 N.E.2d 434 (Ind. 1987) (proper comment on credibility of evidence and no inference prosecutor had information outside evidence by saying, "[w]as there a fear or a threat of bodily harm. I think there was. I think so. . . . But, is that insanity, as we think of it, the law. Or in general everyday life. Is that insanity? I think not.").

Donnegan v. State, 809 N.E.2d 966 (Ind. Ct. App. 2004) (prosecutor's remark that defendant's entire defense was "smoke and mirrors" concerned quality of defendant's defense and was permissible comment on evidence).

6. Character of offense

Proper comment on character of offense where prosecutor said, "[t]his type of activity we cannot accept in this community." Johnson v. State, 436 N.E.2d 796, 798 (Ind. 1982).

7. Opinion

Statements of opinion not prohibited "as long as he does not imply that he has personal knowledge of an accused's guilt or innocence." Faust v. State, 266 Ind. 640, 366 N.E.2d 175, 178 (1977).

8. Right to respond even if objectionable

Argument otherwise objectionable may be justified if provoked or invited by opposing counsel. Prosecutors are entitled to respond to allegations and inferences raised by the defense, even if the prosecutor's response would otherwise be objectionable. Ryan v. State, 9 N.E.3d 663 (Ind. 2014); Brown v. State, 746 N.E.2d 63, 68 (Ind. 2001).

Dumas v. State, 803 N.E.2d 1113, 1117-18 (Ind. 2004) (where defense counsel argued vehemently that key State's witness was lying and covering for her boyfriend, prosecutor

was entitled to counter with argument that witness was not lying, she had no reason to do so, and defense had presented no evidence of motive for lying).

Brown v. State, 746 N.E.2d 63, 60-70 (Ind. 2001) (prosecutor did not cross line in stating that defense counsel's job is "to get you off that road [to make fair decision] however they can," and that the State blocked out witness addresses "because we don't want people like this going out and killing our witnesses," because comments were response to defense counsel's accusation that State had overlooked or covered up exculpatory evidence by crossing out addresses on witness list).

Lopez v. State, 527 N.E.2d 1119, 1126 (Ind. 1988) (on rebuttal, prosecutor's improper personal opinion justified where proper response to defendant's argument that defendant was not "main man" in drug deal; personal opinion not directed to defendant's guilt, but to extent of defendant's involvement).

Marshall v. State, 438 N.E.2d 986 (Ind. 1982) (where defendant had argued that commission of the crime in the manner asserted by the State would have been foolish, prosecutor was properly permitted to argue that it is nowhere written that a criminal has to be smart).

Williams v. State, 29 N.E.3d 144 (Ind. Ct. App. 2015), *sum. aff'd*, 43 N.E.3d 578 (Ind. 2015) (prosecutor's comment that drugs are a serious problem did not amount to reversible error, as it was made in response to defense counsel's implicit request for jury nullification and that defendant was an addict whose small-time drug deal did not warrant punishment).

Norris v. State, 113 N.E.3d 1245 (Ind. Ct. App. 2018) (in trial for unlawful possession of firearm by serious violent felon, prosecutor's statement in rebuttal that defendant "was not supposed to have a gun" was designed to counter defendant's closing argument that he had motives to flee other than the crime charged).

IV. DEFENDANT'S CLOSING ARGUMENT

A. OBJECTIVES

Opportunity to:

(1) refresh jury's recollection on favorable evidence;

(2) explain significance of evidence;

(3) explain legal theories;

(4) draw inferences, argue conclusions;

(5) comment on credibility and explain implications that jurors may not perceive; and

(6) provide focus, structure, and themes for entire trial.

B. MUST HAVE OPPORTUNITY TO MAKE CLOSING

Opportunity to make final argument required as basic element of adversary criminal process. Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 59 (1975).

It is proper for counsel to argue both law and facts in closing argument, including any argument as to position or conclusion based on attorney's analysis of the evidence. Taylor v. State, 457 N.E.2d 594, 599 (Ind. Ct. App. 1983).

Nelson v. State, 792 N.E.2d 588 (Ind. Ct. App. 2003) (trial court abused its discretion when it *sua sponte* prohibited defendant from commenting on reliability of State expert witnesses' testing methods in his closing argument).

1. Request opportunity to close or it is waived

If an accused fails to request the opportunity to give a closing argument, it cannot be claimed that the trial court denied him the right. Lee v. State, 369 N.E.2d 1083, 1085 (Ind. Ct. App. 1977).

Casterlow v. State, 256 Ind. 214, 218, 267 N.E.2d 552 (1971) (defendant waived oral argument where both sides rested after State's rebuttal evidence. Court immediately announced its verdict of guilty and ordered pre-commitment investigation, and defendant did not object to rendition of verdict nor offer summation. Defendant should have raised issue at stage of proceedings when arguments would otherwise have been heard).

2. Trial court should inquire whether defendant has closing argument

"By far the better practice would be for the trial court to expressly inquire whether counsel has a final argument or summation. If the reply is negative, a very clear record of waiver exists, and there is no question of denial of an opportunity to make a summation." Lee v. State, 369 N.E.2d 1083, 1085 (Ind. Ct. App. 1977).

C. PREPARATION

1. Start early

Plan issues, themes, and theories during initial preparation of case for trial. It provides focus for entire case. Throughout trial, prepare jury or judge for what will be heard during closing argument. Factual and legal foundation that supports closing argument must be laid during entire case.

2. Refine issues and themes

Refine or expand issues, themes, and theories, depending on how evidence developed during trial.

3. Review final jury instructions

Review final instructions that will be given by judge prior to closing argument to make certain evidence explained in summation supports elements of law as explained by judge. Know what judge will say and define law exactly as judge does.

4. Anticipate state's position

Anticipate and know prosecutor's issues, themes, and theories she will argue in closing.

5. Use visual aids and exhibits

You may use real evidence, demonstrative evidence, visual aids, deposition transcripts, witness statements, discovery responses, and any other exhibit that has been introduced. Consider:

(1) impact visual aid or exhibit may have on jury,

(2) importance of exhibit in trial,

(3) whether you are capable of effectively using them, and

(4) the resources and acoustics of the courtroom (can the jury see and/or hear the presentation?).

6. Prepare written outline

Outline should include all matters which need to be addressed.

7. Rehearse

Become comfortable with material and delivery style before presentation to jury. May be helpful to rehearse with persons unfamiliar with case to assess clarity and effectiveness of argument.

8. Self-critique

(a) Ask yourself

Does the closing argument:

- Explain why to find for the defendant?
- Make the decision-maker want to find for the defendant?
- Describe how to find for the defendant?
- Cover all facts and circumstances that should be considered in reaching desired result?

(b) Introduction

Sets tone. Designed to have persuasive impact on jury or judge.

(c) Seriousness of charge(s)

Explain seriousness of charges. Bailey v. State, 412 N.E.2d 56, 61-62 (Ind. 1980) (right to argue that defendant is facing "serious penal consequences," a Class A felony, "of gravest importance to the accused").

(d) Case theory

Summarize critical factual and legal theories in a few sentences.

(e) Summarize story

Summarize facts in way reasonable and consistent with recollection of trier of fact.

(f) Deal with weaknesses of the case

Explain any obvious weaknesses. If you cannot think of mitigating explanation(s), recognize weakness and, if important, concede in candid manner.

(g) Identify broken promises of the prosecutor

Identify and comment on all unfulfilled statements made by prosecutor in opening statement or closing argument.

(h) Challenge prosecutor

Put prosecutor on spot by challenging him/her to deal with defendant's strongest points in rebuttal.

(i) Describe burden of proof

Explain significance of "beyond a reasonable doubt."

(j) Explain lies vs. mistakes

Describe conflicting witness as mistaken about facts rather than liar, unless facts actually establish lies. State that everyone sees an event from different perspectives and how witness has perceived an event may be mistaken observation.

(k) Explain law in jury trials

Accurately summarize and explain pivotal instructions that judge will give during final jury instructions.

(l) Request verdict

Explain specific verdict you want for accused.

(m) Conclusion

Conclude with strong ending. Well thought out and designed to tie argument together in clear and obvious ending. Emphasize possible conviction of innocent man.

D. DOS & DON'TS

1. Do

(a) Organize

(1) organize facts around issues;

(2) it fits together to strengthen each other in support of common points;

(3) points should come up in order that is most persuasive.

(b) Admit to some bad facts

Admit facts jury is going to believe anyway. Admission gains you credibility and confidence of jury.

(c) Allow jury participation

Actively involve jurors in presentation. Conclusions and results you suggest should be position jurors have reached and adopted as their own.

(d) Simplicity

Rely upon simple, common-sense themes which can be easily understood and accepted by the jurors. Jurors should be able to easily define and articulate defendant's position during deliberations.

2. Do not

(a) "Open the door"

Argue matters in closing which will "open the door" for rebuttal.

(b) Misstate law

You lose credibility by misstatement of law. Also, you diminish impact of an otherwise good closing argument.

(c) Misstate evidence

Improper to do so. Objection can be made if you mischaracterize evidence. Objections only diminish effectiveness of closing arguments.

(d) Read closing

Jury will bore quickly.

(e) Put jurors in place of party or witness

Improper to ask trier of fact to put themselves in place of party or witness.

E. INEFFECTIVE ASSISTANCE OF COUNSEL FOR CLOSING ARGUMENTS

1. Judicial review of closing argument highly deferential

Right to effective assistance extends to closing arguments. However, deference to counsel's tactical decisions in closing presentation is particularly important because of broad range of legitimate defense strategy at that stage. Judicial review of closing argument is therefore highly deferential. Yarborough v. Gentry, 540 U.S. 1, 5-6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003); Herring v. New York, 422 U.S. 853, 865, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).

Robles v. State, 612 N.E.2d 196 (Ind. Ct. App. 1993) (nature of counsel's cross-examination and closing argument was simply matter of strategy that did not work, not ineffective assistance of counsel).

Absher v. State, 162 N.E.3d 1141 (Ind. Ct. App. 2021) (trial counsel reasonably and strategically chose not to object to prosecutor's inflammatory remarks made on rebuttal during closing arguments and therefore did not provide ineffective assistance).

2. Unsympathetic or prejudicial comments about defendant may be unreasonable

Douglas v. State, 663 N.E.2d 1153, 1156 (Ind. 1996) (defense counsel's comments made during closing argument that killing was "senseless" and defendant was either "the craziest person on earth, or one of society's most dangerous persons," were a negative portrayal of client and fell below the standard of reasonable assistance; however, no prejudice was shown).

Burris v. State, 558 N.E.2d 1067 (Ind. 1990) (counsel's comments that: "We've got a street person defendant . . . he's not the best I've ever had . . . I don't even like him. He and I have had several arguments" fell below reasonable professional standard, but did not prejudice jury regarding defendant's guilt).

Christian v. State,712 N.E.3d 4 (Ind. Ct. App. 1999) (where defense counsel conceded during closing argument that there was penetration in rape case despite defendant's testimony that there was no penetration, defendant was denied effective assistance of counsel).