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Criminal Trial Practice--Prosecutor's Closing Argument--Pleas for Law Enforcement and Proper Inferences from the Evidence--State v. Bryant

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credibility is barred by MISSOURI APPROVED JURY INSTRUCTIONS—CRIMINAL NO. 2.01(2).[35] However, the parties are allowed to argue the witness' credibility to the jury.

The methods adopted in *Brown* and *Carlos* for dealing with witnesses who refuse testimony should offer guidance to courts and trial lawyers in an area which has been litigated rarely, but is nonetheless critical to defendants in criminal prosecutions. Partial striking and the jury instruction offer reasonable alternatives for trial judges previously faced with a choice between the somewhat drastic sanction of total striking or allowing a witness to refuse testimony without sanctions.

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CRIMINAL TRIAL PRACTICE—PROSECUTOR'S CLOSING ARGUMENT—PLEAS FOR LAW ENFORCEMENT AND PROPER INFERENCES FROM THE EVIDENCE.

State v. Bryant[1]

Robert Kenneth Bryant and two accomplices robbed the First Bank of Commerce of Columbia, Missouri. As the robbers left the scene, police arrived and gave chase. The fleeing robbers discharged a shotgun at a pursuing police car and wounded a bystander. Bryant was captured and charged with first degree robbery and assault with intent to kill with malice aforethought.[2] At trial, the prosecutor made the following statements in his closing argument to the jury, without objection by the public defender:

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35. *Id.* at 347. Judge Donnelly, concurring in *Brown,* suggested that the trial judge could immediately advise the jury that they could weigh the witness' refusal to answer in assessing the credibility of the witness' testimony. *Id.* It is arguable that such a comment would violate MO. APPROVED INSTR.—CRIM. NO. 2.01(2) (1976 ed.): "[Y]ou alone must decide upon the believability of the witnesses and the weight and value of the evidence." The Notes on Use of this instruction caution: "Except as may be specifically provided for elsewhere in MAI-CR, no other or additional instruction may be given on the believability of witnesses, or the effect, weight or value of their testimony."

1. 548 S.W.2d 209 (Mo. App., D.K.C. 1977).
2. *Id.* at 210.

> [1] *They were shooting all over the place, and there were bullets and shells.* I don't think that was meant to scare anybody. I think it was meant to kill Harold Calvin [the pursuing officer], for example.
> [2] . . .[Y]ou can find this man guilty of first degree robbery with a dangerous and deadly weapon. You can find him not guilty. . . . If you find him not guilty I will give him the shotgun and send him back on the street. That is what "not guilty" means—right out the door today, a free man on Count I.
> . . . .
> [3] To set a man free on Count II would say to a policeman: "Tough, too bad, Harold. You are being shot at but too bad." *Say to a lot of policemen who go out there and get shot at when these crimes occur,* and they are occurring more every day. *Tough.* You have a chance to say something about it.[3]

Bryant was convicted on both counts. On appeal, he sought a new trial based on an allegation of plain error because the prosecutor's closing argument was "calculated to influence and arouse the personal passions, prejudices, and fears of the jury."[4] The Kansas City District of the Missouri Court of Appeals found no plain error and affirmed the conviction.[5] It held that the contested statements were either proper pleas for law enforcement or proper inferences from the evidence.[6]

Prosecutorial closing argument in a Missouri criminal trial has two primary purposes. The main purpose is to provide the jury with a rational summation and analysis of the evidence and its implications regarding the defendant's guilt.[7] The second purpose is to aid the jury in setting an appropriate sentence if it finds the defendant guilty.[8] Thus, a properly presented closing argument aids the jury to make a determination of the defendant's guilt or innocence based solely on the evidence and its implications. An improperly presented closing argument is one that stimulates the jury to find the defendant guilty for reasons other than those drawn from the evidence, *e.g.*, personal fear of crime in general or personal fear of the defendant. Consequently, any statement not contributing to the jury's rational conclusions about a criminal defendant's guilt should be scrutinized closely because such a statement may operate to deny the defendant a fair trial.

In *State v. Bryant* statement number three in the prosecutor's closing argument was upheld as a proper plea for law enforcement.[9] In Missouri the propriety of a plea for law enforcement is a well defined rule.

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3. *Id.* at 211.
4. *Id.*
5. *Id.* at 212.
6. *Id.*
7. Crump, *The Function and Limits of Prosecution Jury Argument,* 28 Sw. L.J. 505, 506 (1974).
8. State v. Blumer, 546 S.W.2d 790, 792 (Mo. App., D.K.C. 1977).
9. 548 S.W.2d at 212.

The courts have long recognized the right of a prosecutor to urge the jury to enforce the law.[10] It is proper to point out the prevalence of crime or its purported increase. References to "the crime wave from which this city and other cities have suffered,"[11] and "the rising crime rate,"[12] have been permitted. It is also proper to argue for a stiff sentence to deter others from the commission of similar crimes. In *State v. Green* the prosecutor was permitted to request a five year sentence "so that the word will go out along the grapevine to the underworld that Springfield, Missouri, is not the place to come . . . ."[13] It is also proper for a prosecutor to elaborate on the consequences of a jury failing to do its duty. Thus, in urging the conviction of a defendant for striking a police officer, the prosecutor was permitted to predict "[A]n acquittal today will justify resisting arrest for any charge, allow striking of an officer, and may set a course of conduct that might open up the floodgates for an activity—for a summer of activity along this line. . . ."[14]

On the other hand, it is clearly improper for a prosecutor in Missouri to argue that the defendant should be imprisoned to prevent him from committing future crimes. In *State v. Mobley*, after referring to the defendant as an "habitual criminal, a professional burglar, and a dangerous criminal," the prosecutor improperly stated to the jury: "[Y]ou and only you, by your verdict, can deter him."[15] Similarly, the statement "I hope you don't put him back on the streets. I hope you give him sixty, or seventy, or eighty or ninety years, so he can't do this again" was held improper.[16] The courts prohibit these arguments because they can result in guilty verdicts based on the jury's speculation about future crimes rather than on the evidence presented concerning the crime for which the defendant is being tried. It is also improper to argue that the jury or members of their families are in danger. Thus, the argument, "[d]on't let him out running around the streets 'cause if any of you have any daughters and if this defendant ever got the opportunity your daughter could be the next one," was held improper in a case involving the attempted rape of a six year old girl.[17] The concern with this type of argument is that the jury will convict the defendant out of personal fear as opposed to his actual guilt as shown by the evidence and its implications.

As currently used, therefore, the plea for law enforcement is permitted so long as the language remains abstract. General comments

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10. State v. Mallon, 75 Mo. 355, 358 (1882).
11. State v. Wilson, 242 S.W. 886, 888 (Mo. 1922).
12. State v. Elbert, 438 S.W.2d 164, 166 (Mo. 1969).
13. 292 S.W.2d 283, 288 (Mo. 1956).
14. State v. Rodriguez, 484 S.W.2d 203, 207 (Mo. 1972).
15. 369 S.W.2d 576, 581 (Mo. 1963).
16. State v. Raspberry, 452 S.W.2d 169, 172 (Mo. 1970).
17. State v. Groves, 295 S.W.2d 169, 173-74 (Mo. 1956).

about the community's crime wave or the necessity of deterring criminals from future activity are permitted regardless of an emotional delivery of the prosecutor's argument or the emotional impact of the argument on the jury. The argument is improper, however, if it specifically focuses on the defendant, on the jury, or on the jurors' families.

The justification for permitting pleas for law enforcement in Missouri has varied. Originally such argument was admitted as a mere statement of the truth. In *State v. Hyland* the statement that "crimes of this character are becoming too frequent" was held unobjectionable because it was merely a "truism."[18] Pleas for law enforcement also have been admitted under the "common knowledge" exception to comments made outside the record. Thus, in response to the statement "you jurors may send out a warning or encouragement, whichever you may see fit," the Missouri Supreme Court held that "it is not improper for the prosecutor to refer to the prevalence of crime in the community, whether it appears from the evidence or is a matter of common knowledge. . . ."[19] There is also a confusing line of cases that appears to admit pleas of law enforcement because they are somehow within the record or its reasonable inferences.[20] The most common justification for admitting pleas for law enforcement is an adherence to *stare decisis*.[21] Finally, there is the position that pleas for law enforcement are admissible only for the secondary purpose of aiding the jury in setting an appropriate sentence.[22]

All of the justifications utilized to allow pleas for law enforcement beg the main question. As currently permitted, pleas for law enforcement are often more detrimental than beneficial in furthering the purposes of closing argument. The issue is whether such argument contributes to the jury's conclusions of guilt for reasons *other* than the properly admitted evidence and its implications. The answer in many cases is clearly affirmative.[23] The emotion and subject matter involved in pleas

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18. 144 Mo. 302, 313, 46 S.W. 195, 198 (1898).

19. State v. Hart, 292 Mo. 74, 99, 237 S.W. 473, 481 (1922).

20. State v. Laster, 365 Mo. 1076, 1085, 293 S.W.2d 300, 306 (En Banc), *cert. denied,* 352 U.S. 936 (1956). *Contra,* State v. Cheatham, 340 S.W.2d 16, 20 (Mo. 1960) (the defense claimed the plea for law enforcement was inadmissible because it was outside the record; the Missouri Supreme Court held that such a plea does not need to be within the record).

21. State v. Lang, 515 S.W.2d 507, 511 (Mo. 1974); State v. Wright, 515 S.W.2d 421, 432 (Mo. En Banc 1974).

22. State v. Blumer, 546 S.W.2d 790, 792 (Mo. App., D.K.C. 1977).

23. In a very few cases, the possibility exists that jurors will not find the defendant guilty even though they feel the evidence proves his guilt. If the jurors have obvious sympathy for the defendant, or believe the activity involved should not be criminal, then a controlled plea for law enforcement would be permissible. Thus, a prosecutor confronted with this situation should be allowed to set out the specific elements of the crime and instruct the jurors that if they find these elements to exist, they must do their duty and find the defendant

for law enforcement suppress rationality, confuse the issue, stimulate latent fears and prejudices, and overcome reasonable doubts about a particular defendant's guilt.[24] The courts have reduced this problem somewhat by allowing only pleas of an abstract nature. As a practical matter, however, jurors are sophisticated enough to apply an abstract plea to the specific crime or defendant before them.

In the final analysis, the only substantial justification for admitting law enforcement pleas is for the secondary purpose of sentencing. If the defendant is not to be sentenced by the jury, pleas for law enforcement are not justified. In cases where the jury will be sentencing the defendant, the possible prejudicial impact of the subject matter should be weighed against its benefits. The courts should reject the abstract-specific distinction and ask whether this type of crime requires prosecutorial urging before a jury will be likely to set an appropriate sentence.[25] If the answer is *no*, it is submitted that the prosecutor should be prohibited from making a plea for law enforcement. If this analysis had been applied in *Bryant*, an opposite result would have been reached. In *Bryant* there was little chance the jury would not set a severe sentence if the defendant were found guilty. The armed robbery of a bank and wounding of an innocent bystander is the type of crime which generally emotionalizes a jury. Few juries would be sympathetic toward an armed bank robber. Therefore, although the plea for law enforcement in *Bryant* was proper under the current rule, it should not have been permitted.

The first and second statements by the prosecutor in *Bryant* were upheld as proper inferences from the evidence.[26] There are two problems surrounding the proper inference rule in Missouri. One is that Missouri has recognized three inconsistent rules for admitting inferential argument. There are a few decisions which have followed the "anything goes" rule and have held that no error is committed by a prosecutor "drawing an unwarranted inference."[27] There is an independent line of cases that have held that "a prosecutor has the right to draw any infer-

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guilty, despite either their sympathy for the defendant or personal beliefs that the activity involved should not be criminal.

24. *See* Alschuler, *Courtroom Misconduct By Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 636 (1972).

25. This type of offense almost always would be minor in nature, *e.g.*, the 57 m.p.h. highway speeder. One major crime where a plea for law enforcement might be appropriate is the rape of a woman who is shown to have engaged in previous sexual activity. Missouri's new shield law, H. 502, 79th Gen. Assem., 1st Reg. Sess., (1977) (effective Sept. 28, 1977), 1977 Mo. Legis. Serv. 306 (Vernon), which prohibits evidence in a rape case of the victim's previous sexual conduct, apparently will avoid the problem of the overly lenient jury.

26. 548 S.W.2d at 212.

27. State v. Wright, 319 Mo. 46, 52, 4 S.W.2d 456, 458 (1928). *Accord,* State v. Rosengrant, 338 Mo. 1153, 1175, 93 S.W.2d 961, 973-74 (1936); State v. Hart, 292 Mo. 74, 97, 237 S.W. 473, 480 (1922).

ence from the evidence which he in good faith believes to be justified."[28] There is also the position that "as long as the prosecutor stays within the confines of the evidence and its reasonable inferences therefrom, the argument is legitimate."[29] It is true that the majority of recent cases appear to have followed the reasonable inference rule, but neither the good faith rule nor the anything goes rule has been overruled. A decision expressly overruling the good faith and anything goes rules would help clarify the situation.

The second problem with the rule allowing argument of proper inferences from the evidence arises when the reasonable inference approach is followed. The courts are continuously handing down inconsistent opinions regarding the reasonableness of similar statements. Three cases provide an example. In *State v. Williams* the defendant was charged with assault with intent to kill with malice aforethought because he shot a man with a sawed-off shotgun.[30] In closing argument, the prosecutor stated to the jury that "you've got a great responsibility. You put this man on the street again and he'll have another shotgun."[31] The trial court sustained an objection to this statement and instructed the jury to disregard it. The court of appeals held that the sustained objection and the instruction to disregard the statement were sufficient to remove the prejudicial effect of the error. In *State v. Henderson* the defendant was on trial for second degree murder and assault with intent to kill without malice aforethought.[32] The defendant had killed a man during a holdup with a revolver that was found in his room after the incident.[33] Without objection by the defendant's attorney, the prosecutor argued that "if you want to put this defendant back on the street, I will give him his .38 and he can go back. . . ."[34] Although the court of appeals did not rule on the propriety of the remark due to the inadequate objection, it did hold that the remark was not so serious as to constitute plain error. In *State v. Bryant* the defendant was convicted of armed robbery and assault with intent to kill with malice aforethought.[35] The defendant was captured hiding in some shrubs after fleeing from the scene of the robbery. He was arrested by a police officer who approached him from behind while the defendant was aiming his sawed-off shotgun at an

28. State v. Smith, 527 S.W.2d 731, 733 (Mo. App., D. St. L. 1975). *Accord,* State v. Feger, 340 S.W.2d 716, 728 (Mo. 1960); State v. Francis, 330 Mo. 1205, 1212, 52 S.W.2d 552, 556 (1932).

29. State v. Nichelson, 546 S.W.2d 539, 543 (Mo. App., D. St. L. 1977). *Accord,* State v. Bolden, 525 S.W.2d 625, 634 (Mo. App., D. St. L. 1975); State v. Fox, 510 S.W.2d 832, 838 (Mo. App., D. St. L. 1974).

30. 525 S.W.2d 395, 396 (Mo. App., D. St. L. 1975).

31. *Id.* at 400.

32. 510 S.W.2d 813, 816 (Mo. App., D. St. L. 1974).

33. *Id.* at 817.

34. *Id.* at 823.

35. 548 S.W.2d 209, 210 (Mo. App., D.K.C. 1977).

unsuspecting officer approaching from the opposite direction.[36] The prosecutor, without objection from the public defender, stated: "If you find him not guilty I will give him the shotgun and send him back on the street."[37] The court of appeals ignored the fact that the defendant would never have the shotgun returned because the mere possession of such a weapon is a federal offense.[38] It held the remark to be "inoffensive" and "an accurate and proper inference."[39] Thus, the same basic statement has been inconsistently held to be objectionable, not plain error, and an inoffensive, accurate, and proper inference.

There are four primary reasons for the inconsistency regarding reasonable inferences from the evidence. The first is that there is an obvious and uncorrectable difficulty in reaching a consensus on what is "reasonable."

The second reason for inconsistency is that there is a tendency for courts to avoid the substantive issue of reasonableness entirely by an unduly technical reliance on the rules of criminal procedure. Failure to object immediately, specifically, and repeatedly to an improper argument is often fatal because courts rarely exercise their discretion to grant a motion for new trial or to reverse on appeal due to plain error when improper prosecutorial closing argument is the basis for the motion or appeal.[40] This reliance on procedural rules to avoid ruling on the propriety of prosecutorial inferences not only postpones the establishment of a well-defined rule, but such judicial inaction operates to confer approval on improper arguments.[41] Procedural strictness resulting in the admission of prejudicial statements can deny a defendant a fair trial. Permitting a jury to consider prejudicial statements in determining guilt has the potential to cause a conviction for a reason other than what was shown in the evidence.

The third reason is that the strength of the evidence pointing to the defendant's guilt often is used as a factor in determining whether an inference is improper. In *State v. Frazier*, after upholding a questionable inference, the court stated in dictum:

> [E]ven assuming arguendo that the comment was improper, we believe that the alleged error would be governed by the doctrine of harmless error.

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36. Interview with Officer Carroll Highbarger, Columbia Police Dept., Columbia, Missouri (October 26, 1977).

37. 548 S.W.2d at 211.

38. 26 U.S.C. §§ 5845(a), 5861(b) (1970 & Supp. 1977).

39. 548 S.W.2d at 212.

40. *See* State v. Johnigan, 494 S.W.2d 23, 26 (Mo. 1973); State v. Anderson, 384 S.W.2d 591, 609-10 (Mo. En Banc 1964) (comparison of the defendant's crime to the gas chambers in Germany was permitted due to lack of objection); State v. Farmer, 536 S.W.2d 748, 751-52 (Mo. App., D. St. L. 1976).

41. *See* State v. Bryant, 548 S.W.2d at 211. The Court misread *Henderson* to hold the "back on the street" statement a proper inference when, in fact, it was held merely not to be plain error.

> . . . An error which in a close case might call for reversal may be disregarded as harmless when the evidence of guilt is strong. . . . The judgment should not be reversed when this court is fully satisfied that the error did not contribute to the result reached in the trial court.[42]

One criticism of this factor is that some questionable inferences are labeled reasonable by the courts, not because they actually are reasonable, but because they are considered harmless. This further confuses the definition of reasonable inference. A second problem is the constitutional propriety of weighing guilt. Permitting otherwise prejudicial error because the court feels the defendant is guilty is tantamount to holding that the innocent are entitled stricter procedural standards than the guilty.[43] The court also cannot determine with precision whether the improper closing argument did, in fact, influence the jury's verdict. Thus, the guilt factor should be excluded from decisions concerning the reasonableness of inferences.

The fourth reason for inconsistency is that the courts often use the reasonable inference rule to justify arguments that should not be permitted because they violate other rules.[44] The *Bryant* "back on the street with his shotgun" statement is an example in point.[45] Assuming the statement was a reasonable inference from the evidence, it is still subject to attack under three other rules. First, the statement contributed absolutely nothing to the jury's rational conclusions of guilt and was, therefore, irrelevant. Second, the statement had the obvious potential of personalizing the jury. Because it is error to put the jury in personal fear of the defendant,[46] the statement was improper. Third, the statement carried the ominous warning that the defendant was going to commit future crimes. Because suggestions of future criminal activity are improper,[47] the statement was improper. This abuse of the reasonable inference rule not only confuses the proper use of reasonable inferences but also restricts the operation of the other rules ignored by the courts.

Allegations of prejudicial prosecutorial closing argument are prevalent in Missouri.[48] Although prosecutorial abuse is not as widespread as convicted criminal defendants claim, it is a serious problem. Further-

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42. 522 S.W.2d 46, 48-49 (Mo. App., D. St. L. 1975).

43. Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case,* 54 COLUM. L. REV. 946, 971 (1954).

44. *See* State v. Nichelson, 546 S.W.2d 539, 543 (Mo. App., D. St. L. 1977).

45. 548 S.W.2d at 211.

46. State v. Paxton, 453 S.W.2d 923, 926 (Mo. 1970); State v. Groves, 295 S.W.2d 169, 174 (Mo. 1956). *But cf.* State v. Childers, 268 S.W.2d 858, 860-61 (Mo. 1954) (in a child molesting case, statements concerning the jurors' daughters were held to be reasonable inferences).

47. State v. Green, 534 S.W.2d 600, 602 (Mo. App., D.K.C. 1976); State v. Heinrich, 492 S.W.2d 109, 114 (Mo. App., D.K.C., 1973).

48. There were more than 110 Missouri appellate decisions involving this allegation in 1975 and 1976.