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PROSECUTORIAL MISCONDUCT EDITION

Don't Let The Prosecutor Strike At The Defendant Over Your Shoulders

By Mark Stevens

When a prosecutor attacks the defense lawyer in his summation, he is "striking at the defendant over the shoulders of his counsel." This sort of prosecutorial misconduct has long been condemned in Texas.

Even the most inexperienced and ethically-challenged lawyers recognize this sort of misconduct in its most extreme forms. A good example of flagrant misconduct is found in the seminal case of *Fuentes v. State*, which will be discussed at greater length below.

These days, though, prosecutors are typically more subtle than those in *Fuentes*. So subtle, sometimes, that we defense lawyers don't think to object. If we get better about objecting to this type of misconduct, prosecutors may attempt it less often.

In section I this article discusses the general rule that prohibits striking at the defendant over the shoulders of his lawyer. Section II catalogues various arguments that have been found to be erroneous by Texas appellate courts. Section III focuses on preservation of error, and section IV discusses the different harm analyses that have been applied.

I. The Law

A. In general.

"It is axiomatic that the State may not strike at a defendant over the shoulders of his counsel or accuse defense counsel of bad faith and insincerity."[1] Arguments attacking defense counsel "are manifestly improper because they serve to inflame the minds of the jury to the accused's prejudice."[2] Texas Courts have long "shown a special concern for final arguments that constitute uninvited and unsubstantiated accusations of improper conduct directed at a defendant's attorney."[3]

B. Two important cases that illustrate this misconduct.

In *Fuentes v. State*,[4] the prosecutors made not one but several improper personal attacks on defense counsel. One prosecutor said: "He is in bad faith like usual and we object to it. That is a bunch of garbage and he knows it."[5] Later, the same prosecutor argued: "Now Judge, now we are getting into what is read in the newspaper, I don't know that the Court has the time to give Mr. Ethics--Mr. Teter a crash course in evidence here but we are going to object to what was read in the newspaper or anything else."[6] The second prosecutor later argued that the jury should disregard what happened between counsel and implied that defense counsel's improper behavior would result in disciplinary action after the trial.[7] The Court of Criminal Appeals characterized these arguments as "manifestly improper, harmful, and prejudicial," and reversed Fuentes's conviction.[8] "The effect of these remarks was to leave the impression that the entire defense effort was ethically tainted."[9]

Wilson v. State,[10] is another important case. There the prosecutor made this argument:

> The only thing that I wish is that justice is done in this case. I have taken a very sacred oath, in my opinion, to see that justice is done in every case I prosecute. It is your duty--and in the last paragraph of this charge you can see--to see that justice is done in this case.
>
> [Defense Counsel] has no such oath, and what he wishes is that you turn a guilty man free. That's what he wishes, and he can wish that because he doesn't have the obligation to see that justice is done in this case.
>
> His oath is to represent the interest of his client to his utmost within the bounds of the law. He's done that. But, see, it's not important to seek truth and justice under his oath. It is under mine."[11]

The Court of Criminal Appeals reversed Wilson's conviction for capital murder, finding that the prosecutor's argument had injected a new fact into the case, since there had been no evidence presented to show the oath taken by the prosecutor.[12]

II. A Variety Of Arguments Have Been Found Erroneous

A. Erroneous, harmful, and reversible.

In the following cases, the prosecutorial misconduct constituted reversible error:

1. *Wilson v. State*, 938 S.W. 2d 57, 58 (Tex. Crim. App. 1996)(prosecutor argued, without evidence, that he had taken "a sacred oath . . . to see that justice is done in every case I prosecute.").
2. *Gomez v. State*, 704 S.W. 2d 770, 771 (Tex. Crim. App. 1985)(prosecutor accused defense lawyer of dragging witness down from Lubbock to "manufacture evidence," and said that defense lawyer was "paid to get this defendant off the hook").
3. *Fuentes v. State*, 664 S.W. 2d 333, 335-37 (Tex. Crim. App. 1984)(prosecutors accused counsel of being "in bad faith like usual;" of arguing "a bunch of garbage; of being "Mr. Ethics;" and of deserving disciplinary action for his behavior).
4. *Bell v. State*, 614 S.W. 2d 122, 123 (Tex. Crim. App. 1981)("Mr. Scheve (defendant's counsel) is a criminal defense lawyer. He doesn't have the same duty I do. He represents the criminal. His duty is to see that his client gets off even if it means putting on witnesses who are lying.").
5. *Cook v. State*, 537 S.W. 2d 258, 260 (Tex. Crim. App. 1976)(according to prosecutor, filing a motion to sever was a "classic example of trickery").
6. *Lewis v. State*, 529 S.W. 2d 533, 534 (Tex. Crim. App.

1975)(prosecutors told the jury that they had "taken a solemn oath to God to seek justice . . . [and] [n]o such oath bears on either one of these attorneys (defense counsel)").

7. *Anderson v. State*, 525 S.W. 2d 20, 22 (Tex. Crim. App. 1975)(prosecutor improperly argued that defense counsel would lie and try "to pull the wool over the jurors' eyes;" that counsel did not have guts enough to argue that his client was not guilty; and that he needed more time to argue because of the defense's frivolous objections).

8. *Boyde v. State*, 513 S.W. 2d 588, 591-93 (Tex. Crim. App. App. 1974)("Well, ladies and gentlemen, I will tell you one thing in response to that, you will never find me defending criminals in this or any other County. You will never find me accepting stolen money, stolen merchandise as a fee.").

9. *Lopez v. State*, 500 S.W. 844, 846 (Tex. Crim. App. 1973)(prosecutor argued that defense and defendants lied to the jury when they pleaded not guilty).

10. *Crutcher v. State*, 481 S.W. 2d 113, 117 (Tex. Crim. App. 1972)(after defense counsel momentarily left the courtroom, the prosecutor argued: "I'd sort of hoped Mr. Bruner would stay with us in the Courtroom . . . but I can assure you one thing, that wherever he has gone, he is not down on his knees praying to his God. I can assure you that . . . .").

11. *Bray v. State*, 478 S.W. 2d 89, 89-90 (Tex. Crim. App. 1972)("Ladies and Gentlemen I am grateful and I shall be eternally grateful that you are the people that are my employers and not the likes of him and that I am not representing this sort of thing. Rest assured I am very happy about that. I am grateful that I don't have to make my living that way.").

12. *Jones v. State*, 205 S.W. 2d 590, 592 (Tex. Crim. App. 1947)(prosecution argued that defense lawyer fabricated evidence).

13. *Summers v. State*, 182 S.W. 2d 720, 721-22 (Tex. Crim. App. 1944)(prosecutor improperly argued that the lawyer had previously represented other persons in other cases and had asserted inconsistent defenses).

14. *McMurrough v. State*, 995 S.W. 2d 944, 947 (Tex. App.– Fort Worth 1999, no pet.)(accusation that the defense of traveling arose after the defendant hired his lawyer "constituted an outside the record attack on defense counsel's integrity").

15. *Branson v. State*, 825 S.W. 2d 162, 164 (Tex. App.– Dallas 1992, no pet.)(prosecutor's argument that defense counsel "lied" to the jury "invited the jury to discredit appellant's defense, based on his counsel's character.").

16. *Sunday v. State*, 745 S.W. 2d 436, 440 (Tex. App.– Beaumont 1988, pet. ref'd)("He didn't come up with any claim like that until after the State had presented its case and until well after he had gone down to Houston and hired him an attorney.").

17. *Johnson v. State*, 649 S.W. 2d 111, 115 (Tex. App. – San Antonio 1983), *aff'd*, 662 S.W. 2d 368 (Tex. Crim. App. 1984)("after the statement '. . . defense counsel for the next thirty minutes will deceit you . . .' reference is made in the same paragraph by the prosecutor that the defense counsel '. . . will waive for thirty minutes the American flag and he will seek to make you feel this big if you convict his client.'").

B. Improper, but harmless.

In these cases, the appellate courts found, at least for the sake of argument, that the prosecutor had impermissibly struck at defendant, but went on to hold that the error was harmless:

1. *Mosley v. State*, 983 S.W. 2d 249, 258-260 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1070 (1999)("The defense has attempted to get you off the main road, to divert you. They don't want you to stay on the main road because they know where that will take you." "They want you to take a side road, a series of side roads, rabbit trails, and a rabbit trail that will lead you to a dead-end. The truth is not there.").

2. *Orona v. State*, 791 S.W. 2d 125, 127-130 (1990)("I would caution you, ladies and gentlemen, that they are both very experienced Defense lawyers. They know how to argue to get people off the charges they are charged with.").

3. *Dinkins v. State*, 894 S.W. 2d 330 (Tex. Crim. App.), *cert. denied*, 516 U.S. 832 (1995)(defense counsel "wants to mislead you a little bit").

4. *Allen v. State*, 2004 WL 1944742 *5-6 (Tex. App.–Fort Worth 2004, no pet. h.)(prosecutor's claim that she was "appalled and quite frankly . . . disgusted" at defense counsel's argument was erroneous because it "was not relevant, it injected personal opinion, and it violated the Texas Lawyers Creed").

5. *Phillips v. State*, 130 S.W. 3d 343, 356-58 (Tex. App. – Houston [14th Dist.] 2004, no pet. h.)(prosecutor's accusations that the defense had nailed its complainant to the cross and called her a whore were erroneous because "the comments were targeted at defense counsel's handling of the case, and were made toward defense counsel personally").

C. Improper, but not objected to.

In these cases, the arguments were erroneous, but the error was not preserved by a proper objection:

1. *Borgen v. State*, 672 S.W. 2d 456, 457-460 (Tex. Crim. App. 1984)("as long as lawyers are for hire justice is for sale").

2. *George v. State*, 117 S.W. 2d 285, 287-89 (Tex. App.– Texarkana 2003, pet. ref'd)(by arguing that the defense's accident reconstruction expert "was paid to come in here and say whatever it took to get [George] off . . . the prosecutor indirectly attacked the integrity of defense counsel by implying that counsel would allow, even encourage, a witness to give false testimony before the trial court in order to get a defendant off.").

III. Preservation Of Error

A. Constitutionalize your objections.

Generally, a timely and specific objection is required to preserve error in Texas.[13] Objecting that the prosecutor is striking at the defendant over counsel's shoulder is correct, but this objection identifies a non-constitutional error, subject to the less favorable analysis for harm under Rule 44.2(b) of the Texas

Rules of Appellate Procedure, as will be discussed in the next section. You should certainly make that objection, but I also suggest that you add that the erroneous argument further deprives the defendant of a fair and impartial trial, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, §§ 13 and 19 of the Texas Constitution. These constitutional objections will not hurt, and they may give you a more favorable standard of review under Rule 44.2(a).

B. Can this error be fundamental?

Several cases suggest that this sort of error is waived absent an objection. In *Cockrell v. State*, the Court of Criminal Appeals specifically overruled older cases that had forgiven the failure to object to certain improper jury arguments.[14] Citing *Marin v. State*, the Court noted that "a defendant's 'right' not to be subjected to incurable erroneous jury arguments is one of those rights that is forfeited by a failure to insist upon it."[15]

To be sure, the smart Texas lawyer lodges timely and specific objections to all potential errors. But what if you represent a defendant on appeal whose trial lawyer failed to object? In that unfortunate situation, you may have no choice but to argue that the misconduct is fundamental error of the sort that is not waived by the failure to object. Although this is not the position you would choose to be in, if you find yourself there you should argue that the prosecutor deprived your client of a fundamental constitutional right, namely, his right to a fair and impartial trial, guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, §§ 13 and 19 of the Texas Constitution.[16] And under the *Marin* case, you could then argue that the right to a fair and impartial trial is a right so important that it "cannot be made subject to rules of procedural default" because, by definition, it is not forfeitable.[17]

IV. Harm

As noted above, sometimes an appellate court will find that the prosecutor erred when he struck at the defendant over his lawyer's shoulders, but will find that this error was harmless. Trial lawyers don't worry much about whether error is harmless. If our opponent does something we believe is objectionable, we object, and we let the appellate lawyers and judges determine harm.

The trial lawyer can have some impact on the harm analysis, though. Under Rule 44.2(a) of the Texas Rules of Appellate Procedure, where the appellate court finds that *constitutional* error was committed, reversal is required unless the court finds, beyond a reasonable doubt, that the error did not contribute to the conviction or the punishment. If the error is *non-constitutional*, on the other hand, the error must be disregarded unless some substantial right was affected.[18]

Accordingly, when a prosecutor improperly strikes at our client, in addition to the non-constitutional objection, you should object that the misconduct also denies the client his right to a fair and impartial trial, in violation of the Fourteenth Amendment to the United States Constitution, and Article I, §§ 13 and 19 of the Texas Constitution.[19] This will maximize your chances of success on appeal.[20]

V. Conclusion

I don't like it when the prosecutor attacks me, and in the process, tries to hurt my client. Historically, the Court of Criminal Appeals has "shown a special concern" for this sort of prosecutorial misconduct, and it does so for a very good reason.

It is widely recognized that these canons of ethics are not generally understood by the public from which the members of the jury panel are drawn. Many do not believe an attorney should undertake the defense of a person charged with a crime particularly if there is some indication that the defendant is guilty.[21]

The next time your prosecutor attacks you personally or impugns your character, make a timely and specific objection and get a ruling from the trial court. While the prosecutor may strike hard blows, "he is not at liberty to strike foul ones."[22]

1 *Fuentes v. State*, 664 S.W. 2d 333, 335 (Tex. Crim. App. 1984); *accord Wilson v. State*, 938 S.W. 2d 57, 60 (Tex. Crim. App. 1996).

2 *Wilson v. State*, 938 S.W. 2d at 59; *see also Lopez v. State*, 500 S.W. 844, 846 (Tex. Crim. App. 1973)(arguments attacking defense counsel to inflame the jury against the accused "can not be condoned"); *accord Sunday v. State*, 745 S.W. 2d 436 (Tex. App. – Beaumont 1988, pet. ref'd).

3 *Gomez v. State*, 704 S.W. 2d 770, 771 (Tex. Crim. App. 1985).

4 664 S.W. 2d 333 (Tex. Crim. App. 1984).

5 *Id.* at 335.

6 *Id.* at 337.

7 *Id.*

8 *Id.* at 338.

9 *Id.*

10 938 S.W. 2d 57 (Tex. Crim. App. 1996).

11 *Id.* at 58.

12 *Id.* at 60.

13 TEX. R. APP. PROC. ANN. 33.1(a).

14 933 S.W. 2d 73, 89 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1173 (1997).

15 *Id*; *see also Borgen v. State*, 672 S.W. 2d 456, 460 (Tex. Crim. App. 1984).

16 *Gomez v. State*, 704 S.W. 2d 770, 773 (Tex. Crim. App. 1985)(the cumulative effect of the two impermissible arguments striking at defendant "was to deny appellant a fair and impartial trial"); *Anderson v. State*, 525 S.W. 2d 20, 22 (Tex. Crim. App. 1975)(prosecutor's attack on the defense "denied the appellant a fair trial"); *Branson v. State*, 825 S.W. 2d 162, 167 (Tex. App. – Dallas 1992, no pet.)(attack on defense counsel "denied appellant a fair and impartial trial.").

17 *Marin v. State*, 851 S.W. 2d 275, 279 (Tex. Crim. App. 1993); *see also Blue v. State*, 41 S.W. 3d 129 (Tex. Crim. App. 2000); TEX. R. EVID. 103(d).

18 TEX. R. APP. PROC. 44.2(b); *see also Johnson v. State*, 43 S.W. 3d 1, 4 (Tex. Crim. App. 2001).

19 *Gomez v. State*, 704 S.W. 2d 770, 773 (Tex. Crim. App. 1985); *Anderson v. State*, 525 S.W. 2d 20, 22 (Tex. Crim. App. 1975)(prosecutor's attack on the defense "denied the appellant a fair trial"); *Branson v. State*, 825 S.W. 2d 162, 167 (Tex. App. – Dallas 1992, no pet.)(attack on defense counsel "denied appellant a fair and impartial trial.").

20 In *Wilson v. State*, 938 S.W. 2d 57, 61-62 (Tex. Crim. App. 1996), after finding that the prosecutor had impermissibly struck at the appellant over his lawyer's shoulders, the Court of Criminal Appeals conducted a harm analysis under Rule 81(b)(2) of the Texas Rules of Appellate Procedure. Although Rule 81(b)(2) was repealed, its successor – Rule 44.2(a) – is worded identically, so the harm analysis in *Wilson* will also apply under the newer rule. The Court in *Wilson* considered the following five factors: "1) the source of the error; 2) the nature of the error; 3) whether the error was emphasized and its probable collateral implications; 4) the weight a juror would probably place upon the error; and 5) whether declaring the error harmless would encourage the State to repeat it with impunity."

21 *Bray v. State*, 478 S.W. 2d 89, 90 (Tex. Crim. App. 1972).

22 *Berger v. United States*, 295 U.S. 78, 88 (1935).