

asserts the prosecutor's question constituted misconduct because it was an 'impermissible comment on his right to remain silent.'" The defense did not object at the time.

Holding: The court noted that the U.S. Supreme Court has not "resolved the issue of whether, when a defendant does not testify, the state's use of the defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment." After analyzing the divergent case law, the court held: "We find the reasoning of the Fifth, Ninth and Eleventh Circuits persuasive and agree that, when a defendant's silence is not the result of state action, the protections of the Fifth Amendment do not prohibit the state's comment on that defendant's pre-arrest, pre-Miranda silence."

Therefore, the defendant's "silence is not protected by the Fifth Amendment, and the prosecutor's question was not improper."

E. Appeal to Emotion

1. Prosecutors may not appeal to the fears or passions of the jury

"A prosecutor has wide latitude in presenting arguments to the jury, including commenting on the 'vicious and inhuman nature of the defendant's acts,' but cannot make arguments that appeal to the fears or passions of the jury." *State v. Morris*, 215 Ariz. 324, 337, ¶ 58, 160 P.3d 203, 216 (2007) (citation omitted).

2. Discussion of victims

- a. *State v. Martinez*, 230 Ariz. 208, 215–16, ¶¶ 34–35, 282 P.3d 409, 416–17 (2012).

Facts: A defense expert testified about the impact to the defendant of growing up in a home with domestic violence. "In response, and without objection, the prosecutor asked the witness about the impact on a widow of 'hearing your husband being shot.'"

Holding: "The question did not compare the victim to [the defendant], but went to victim impact. The prosecutor did not later attempt to argue any comparison, and even if the question was objectionable, [the defendant] has failed to show the prejudice necessary to establish fundamental error."

Other sections cited in: Prosecutorial Conduct in General (Section II.5), Trial-Opening Statements in General (Section VIII.A.2), Trial-Vouching (Section VIII.C.2), Trial-Attacks on Defense

Counsel and Defendants (Section VIII.F.2), Trial-Closing Argument in General (Section VIII.G.1).

- b. *State v. Gallardo*, 225 Ariz. 560, 568–69, ¶¶ 36–40, 43–44, 242 P.3d 159, 167–68 (2010).

Facts: “In closing argument, [the defendant] argued that a life sentence was ‘sufficient punishment’ given the ‘severe restriction’ and ‘isolat[ion]’ of prison. In response, the prosecutor said that maximum security inmates are allowed to watch television, receive magazines, make phone calls, and see visitors. Noting that victim impact statements could rebut mitigation, the prosecutor then said, ‘Do you think [the victim’s father is] going to be able to call his son, Rudy’ The defense objected to the comparison between [the defendant] and the victim, and the trial court sustained the objection.”

Holding: “Even if the prosecutor’s statements were improper, reversal is not required. The trial court instructed the jurors ‘not to be swayed by mere sympathy not related to the evidence presented during this phase’ and to disregard any question to which the judge sustained an objection. These instructions negated the effect of the prosecutor’s statements.”

Other sections cited in: Prosecutorial Conduct in General (Section II.2).

- c. *State v. Morris*, 215 Ariz. 324, 335–36, ¶¶ 48–49, 160 P.3d 203, 214–15 (2007).

Facts: In closing argument of the aggravation phase of the trial, the prosecutor “invited jurors to put themselves in the place of the victims and singled out specific jurors based on appearance and gender.” “The prosecutor made the challenged comments while responding to defense counsel’s argument that the jurors could not determine whether the victims suffered because they were intoxicated when they were killed.” The defendant did not object to that argument.

Holding: The court found misconduct when the prosecutor “singled out particular jurors and addressed them personally, playing on their sympathy for the victims and fears of the defendant.” There was no fundamental error or prejudice because of the overwhelming evidence of cruelty to prove the “especially cruel”

aggravator.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.1), Early Investigation (Section III.1), Trial-Appeal to Emotion (Sections VIII.E.1 and VIII.E.4), Trial-Closing Argument in General (Section VIII.G.3).

- d. *State v. Roque*, 213 Ariz. 193, 223–25, ¶¶123–133, 141 P.3d 368, 398–400 (2006).

Facts: The prosecutor compared the defendant and the victim, noting that both were married and worked.

Holding: On the comparison of the defendant and the victim, the court noted that victim statements may be admitted “not to permit ‘a jury to find that defendants whose victims were assets to their communities are more deserving of punishment than those whose victims are perceived to be less worthy,’” but “to show instead each victim’s ‘uniqueness as an individual human being.’” The court found no error because the prosecutor’s statement “was a comparison of the two, but not a valuation of the two” and the jury was properly instructed.

Other sections cited in: Discovery (Section VI.2), Trial-Cross Examination of Defense Expert Witnesses and Comments on Psychological Theories (Section VIII.B.2), Trial-Appeal to Emotion (Section VIII.E.4), Trial-Closing Argument in General (Section VIII.G.1).

- e. *State v. Moody*, 208 Ariz. 424, 461, ¶¶ 155–156, 94 P.3d 1119, 1156 (2004).

Facts: The defendant claimed that the prosecutor “graphically describ[ed] the suffering of each decedent” and told the jury that the defendant “had no sympathy for the victims” such that they should “have no sympathy for him.”

Holding: The court did not find any “‘graphic description’ of the victims’ suffering.” “The prosecutor’s frank description of the murders themselves is permissible.” The court also found no issue with the prosecutor asking the jurors to have no sympathy for the defendant, in part because the court encourages “jurors not to decide cases based on emotion or sympathy.”

Other sections cited in: Trial-Cross Examination of Defense Expert

Witnesses and Comments on Psychological Theories (Section VIII.B.4), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2), Trial-Closing Argument in General (Sections VIII.G.3 and VIII.G.4).

- f. *State v. Jones*, 197 Ariz. 290, 306–307, ¶¶ 42–43, 4 P.3d 361–62 (2000).

Facts: In addition to other emotional appeals, the prosecutor stated: “I ask that you find him guilty on behalf of those people and their families and the people of the State of Arizona.”

Holding: The court found that the appeal on behalf of the victims was far less egregious than the appeal in *Ottman*, which did not require reversal. In addition, the “prosecutor did not attempt to inflame the jury or make an emotional plea to ease the suffering of the poor families.” “Those statements do not rise to the level of misconduct.”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.1), Prosecutorial Conduct in General (Section II.3), Trial-Appeal to Emotion (Sections VIII.E.2 and VIII.E.4).

- g. *State v. Bible*, 175 Ariz. 549, 602–03, 858 P.2d 1152, 1205–06 (1993).

Facts: During opening statement, the prosecutor said: “And justice doesn’t mean just giving [the defendant] a fair trial. It means looking at the rights of other people, too, like [the victim], and those rights include those that are enumerated in the Declaration of Independence, life, liberty and the pursuit of happiness. And there won’t be any of that for [the victim].”

During closing argument, the prosecutor again referred to the victim’s rights: “[The victim’s] rights were terminated on June 6 of 1988. She has no right to life. That was terminated with blows to her head. There is no liberty for a nine-year-old girl who is taken off of her bike, tied up and taken away from her family. And there certainly is no pursuit of happiness from the grave. . . . Your duty is to protect the defendant’s rights and also [the victim’s] rights.”

The defendant did not object at trial.

Holding: “A jury in a criminal trial is not expected to strike some sort of balance between the victim’s and the defendant’s rights. The judge, not the jury, balances conflicting rights; the jury must find the facts and apply the judge’s instructions. Accordingly, the clear weight of authority shows the impropriety of the prosecutor’s statements. The statements encouraged the jury to decide the case on emotion and ignore the court’s instructions. The statements should have been stricken and followed with corrective jury instructions.”

However, there was no fundamental error because of the general jury instructions and the strength of the evidence.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.4), Trial-Opening Statements in General (Section VIII.A.1), Trial-Vouching (Sections VIII.C.1, VIII.C.2, and VIII.C.3), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1), Trial-Closing Argument in General (Section VIII.G.3).

- h. *State v. Atwood*, 171 Ariz. 576, 609, 832 P.2d 593, 626 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

Facts: The prosecutor called “the victim’s mother to testify in both its case-in-chief and as a rebuttal witness.” The testimony was apparently quite emotional, and the defense argued that the prosecutor’s use of the testimony was “prejudicial misconduct designed to arouse sympathy from the jury.”

Holding: “Despite the potentially prejudicial effects of permitting a victim’s mother to testify, we do not believe that the trial court in this case erred in allowing this probative testimony.”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.3), Prosecutorial Conduct in General (Sections II.4 and II.5), Early Investigation (Section III.1), Pretrial (Section VII.I), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

- i. *State v. Ottman*, 144 Ariz. 560, 562–63, 698 P.2d 1279, 1281–82 (1985).

Facts: The prosecutor called for the jury to think of the victim’s wife before giving the defendant sympathy: “On December 16th at

about 7:30 in the evening she had everything to look forward to. She had her house here, they were retired, husband had a part-time job, her children are fine and well in New Jersey and at 9:30 she's at the hospital with her husband and he's dead. I can guarantee you that her life is totally destroyed. She had nothing to look forward to, nothing. You may think sympathy for someone else but in terms of that woman, she wants justice and that's your duty to [sic] as jurors."

Holding: "While these statements were improper, we believe that any error engendered by these comments was adequately cured by the trial court's limiting instruction." On the defendant's motion, the trial court had specifically instructed the jury to disregard "any statements regarding any sympathy for any person affected by the outcome of the case." The general jury instructions also told the jury not to be influenced by "sympathy or prejudice."

3. Discussion of disposition and future acts

- a. *State v. Moody*, 208 Ariz. 424, 459–60, ¶¶ 146–152, 94 P.3d 1119, 1154–55 (2004).

Facts: The prosecutor argued that "the defendant is asking you to excuse a man who has brutally [and] viciously . . . murdered two innocent women on the basis of a disorder that is not even settled in the mental health field. . . . Before you cut somebody loose on that kind of disorder . . ." The trial court ordered the jury to disregard those statements.

Holding: The court found that it was misconduct to "appeal to the jurors' fears that [a not guilty by reason of insanity] verdict will result in a defendant's release." "The prosecutor's 'cut loose' comment was irresponsible, inappropriate, and inflammatory. However, because it was an isolated comment, was promptly objected to, and was rendered less harmful by instructions by the court, we cannot conclude that the comment, by itself, denied [the defendant] a fair trial."

Other sections cited in: Trial-Cross Examination of Defense Expert Witnesses and Comments on Psychological Theories (Section VIII.B.4), Trial-Appeal to Emotion (Section VIII.E.3), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2), Trial-Closing Argument in General (Sections VIII.G.3 and VIII.G.4).

- b. *State v. Blackman*, 201 Ariz. 527, 543, ¶¶ 64–65, 38 P.3d 1192, 1208 (App. 2002).

Facts: The Prosecutor’s argument discussed how defendants would not be productive until they “understand one important lesson, and that is that when you commit a crime, there is a consequence for that crime.” The defense argued that the statement “improperly argued punishment by suggesting that conviction would benefit the defendants because it implies that, if convicted, defendants will be provided with counseling.”

Holding: “We reject Defendant’s interpretation of the State’s remarks as being clear comments on punishment, in part because we cannot ascribe to them the meaning Defendant suggests. The prosecutor’s statements did not suggest that conviction would result in any particular form of punishment. In addition, in preparing the jury for deliberation, the court appropriately instructed the jurors that they were not to consider punishment in reaching their verdict. We presume that the jurors followed the instructions.”

Other sections cited in: Trial-Vouching (Section VIII.C.2), Trial-Comments on Defendants’ Failures to Testify (Section VIII.D.2), Trial-Closing Argument in General (Section VIII.G.3).

- c. *State v. Jones*, 197 Ariz. 290, 305–306, ¶¶ 38–40, 4 P.3d 360–61 (2000).

Facts: In closing argument, the prosecutor stated that one of the possible sentences was the death penalty. The prosecutor then stated that the prosecution was required to prove its case beyond a reasonable doubt, as in any other criminal case.

Holding: The court held that the statement did not constitute reversible misconduct for two reasons. “First, the reference to the death penalty does not call attention to a fact that the jurors would not be justified in considering during their deliberations. In fact, the prosecutor stated that the possibility of the death penalty should not influence a determination of reasonable doubt. Second, the probability that the statement improperly influenced the jurors was very low. The jurors had been told from the very beginning of the trial, through both direct statements and voir dire questions, that the prosecution was seeking the death penalty. The prosecutor did not commit misconduct by making a brief reference to the death penalty in the context of discussing the burden of proof.”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.1), Prosecutorial Conduct in General (Section II.3), Trial-Appeal to Emotion (Sections VIII.E.2 and VIII.E.4).

- d. *State v. Hughes*, 193 Ariz. 72, 85, 87–88 ¶¶ 56, 67–73, 969 P.2d 1184, 1197, 1199–1200 (1998).

Facts: The prosecutor’s rebuttal closing was “a masterpiece of misconduct.” Among other improprieties, it “got the jurors thinking about how guilty they would feel if they found Defendant not guilty by reason of insanity and heard about a murder in the future.”

Holding: The court found that the appeal to emotion could not be equated to the common defense argument of the case being “the only time you will ever be able to vote on the defendant being not guilty” because the prosecutor’s appeal was “a suggestion that the jurors will feel responsible for future crimes unless they reject the insanity defense.”

“A prosecutor can certainly argue that Defendant has the burden of proving insanity by clear and convincing evidence, for that is the law. However, the comment about a future ‘murder or something like that’ is an improper appeal to fear.” The court specifically noted that arguments that the insanity defense would “give [defendants] the opportunity to kill again” have been found to be improper.

The court distinguished the situation from others where commentary about future acts was harmless error because there was considerable evidence of insanity, and because the commentary was more prejudicial. Combined with the other misconduct, the court found that the defendant was deprived of a fair trial, and reversed.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.6), Trial-Cross Examination and of Defense Experts and Commentary on Psychological Theories (Section VIII.B.2), Trial-Comments on Defendants’ Failures to Testify (Sections VIII.D.1 and VIII.D.2).

- e. *State v. Cornell*, 179 Ariz. 314, 326–30, 878 P.2d 1352, 1364–68 (1994).

Facts: In cross examination of defense expert, the prosecutor asked whether the defendant would be released immediately if found

temporarily insane. There was no objection at the time.

Holding: “A long line of our cases has held that this type of statement is improper.” However, “under the facts of this case, the prosecutor’s suggestion was largely correct.” It was nevertheless improper for the jury to be directed to the consideration of the disposition of the case.

The court made a lengthy analysis of prejudice. The court rejected the idea that the standard jury instructions to not consider punishment eliminated any prejudice. However, the court still did not find prejudice because of the weak evidence for insanity and because the jury would likely have considered disposition regardless of whether the prosecutor mentioned it.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.3), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

- f. *State v. Grijalva*, 137 Ariz. 10, 13, 667 P.2d 1336, 1339 (App. 1983), *superseded by statute on other grounds as stated in State v. Cons*, 208 Ariz. 409, 413, ¶ 9, 94 P.3d 609, 613 (2004).

Facts: The defendant was convicted of attempted second degree burglary. He had knocked on the victim’s door to report that her car’s tires were flat, but she did not answer. Later, she called the police, who captured the defendant with some suspicious items, including a “tire valve-stem removed.” Some of the victim’s discarded undergarments were strewn about the yard and the victim’s tires were deflated.

“The appellant also maintains that the following statement by the prosecutor during closing argument was improper and intended to inflame the passions and fears of the jury: ‘I just raised this question, (sic) do we have to wait until this man finds a victim who will open his door, open that door to him. Do we have to wait until someone is raped to deal with this man.’”

Holding: “Standing alone this argument appears to be a classic illustration of an attempt to improperly influence the jury by calling on their emotions. However, when considered with the facts of this case, the deflated tires, the conversation at the door, the scattering of the victim’s underclothes and the vaseline, there is an arguable inference that this was a burglar who planned his crime and

therefore might do so again. Even more important is the fact that this was a charge of attempt and the fact that nothing really happened had been brought home to the jury from the beginning. This argument is proper to counteract that impression. Assuming arguendo that the argument was improper, the trial judge implicitly found that under the circumstances of the case the jury was probably not influenced by the remarks. Again, the trial judge was in the best position to decide this question, and we will adhere to his judgment since no clear abuse of discretion has been shown.”

Other categories cited in: Trial-Closing Argument in General (Section VIII.G.3).

4. General appeal to emotion

- a. *State v. Edmisten*, 220 Ariz. 517, 525, ¶¶ 24–25, 207 P.3d 770, 778 (App. 2009).

Facts: The defense had apparently asked the jury to look at the defendant’s demeanor while he was in court. The prosecution argued that “we certainly expect defendants, when they come into this courtroom, to sit here and be somewhat polite and not start shooting people” and that demeanor in the courtroom was irrelevant to whether he committed the crimes. The defense argued that the prosecutor’s comments appealed to the jury’s fear, passion, prejudice, and sympathy.

Holding: “The prosecutor’s comments about [the defendant’s] in-court demeanor responded directly to a point defense counsel had raised and fell well within the latitude afforded attorneys during closing argument. Even if the prosecutor’s comment could be considered improper or irrelevant, [the defendant’s] counsel opened the door to such argument, and the prosecutor was entitled to respond.”

Other sections cited in: Trial-Closing Argument in General (Section VIII.G.4).

- b. *State v. Morris*, 215 Ariz. 324, 338, ¶¶ 62–64, 160 P.3d 203, 217 (2007).

Facts: At the guilt phase of the trial, the prosecutor admitted a jacket that belonged to the defendant into evidence. It had a very bad smell because of its proximity to a decomposing body. At closing argument, the prosecutor said he offered the jacket for the

jury's "smelling pleasure."

Also, "during the guilt phase of the trial, the prosecutor kept on his table, in view of the jury, an excluded photograph showing a maggot infestation." "During a bench conference with the judge on another matter, defense counsel objected and the court ordered the prosecutor to move the photograph from the jury's view. The prosecutor did so."

Holding: There was no fundamental error from the admission of the jacket or the "smelling pleasure" comment. The Jacket was admitted to identify the defendant, so the admission was proper. "At worst, the offhand 'smelling pleasure' comment was inappropriate. It does not, however, rise to the level of fundamental error because this single remark did not deprive [the defendant] of a fair trial."

"Nothing in the record indicates that any juror actually saw the challenged photograph" of the maggot infestation, and the prosecutor complied with the judge's order to remove it from view.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.1), Early Investigation (Section III.1), Trial-Appeal to Emotion (Sections VIII.E.1 and VIII.E.2), Trial-Closing Argument in General (Section VIII.G.3).

- c. *State v. Roque*, 213 Ariz. 193, 224, ¶¶127–130, 141 P.3d 368, 399 (2006).

Facts: The prosecutor suggested that the defendant committed murder "under the guise of our flag and patriotism" and suggested that the decision made by the jury "speaks volumes about" the United States.

Holding: The court did not find fundamental error in the potential appeal to patriotism, and noted that the trial court was in the best position to evaluate the comments. In addition, the evidence supported the idea that the defendant's crimes were "motivated by patriotism and committed in reaction to terrorist attacks on American soil."

Other sections cited in: Discovery (Section VI.2), Trial-Cross Examination of Defense Expert Witnesses and Comments on Psychological Theories (Section VIII.B.2), Trial-Appeal to Emotion (Sections VIII.E.2), Trial-Closing Argument in General

(Section VIII.G.1).

- d. *State v. Jones*, 197 Ariz. 290, 306, ¶¶ 41, 4 P.3d 361 (2000).

Facts: In closing argument, the prosecutor noted that the defendant was a “nice guy” and “polite.” He then said that Ted Bundy and John Wayne Gacy were very polite, and that “[p]oliteness has nothing to do with it.” The prosecutor also made other appeals to emotion.

Holding: The court found that the error, “if any” from discussing the well-known serial killers “could not have affected the outcome of the trial.” The court reasoned that “jurors may be reminded of facts that are common knowledge.” Therefore, the prosecutor’s statements “did not introduce evidence completely outside the realm of the trial, but rather drew an analogy between [the defendant’s] attitude at trial and that of well-known murderers.”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.1), Prosecutorial Conduct in General (Section II.3), Trial-Appeal to Emotion (Sections VIII.E.2 and VIII.E.3).

- e. *State v. Henry*, 176 Ariz. 569, 581, 863 P.2d 861, 873 (1993).

Facts: “In closing, the prosecutor stated, ‘When [the defendant] was testifying all day Friday, did the word psychopath ever come to mind?’ The trial judge sustained an objection to the remark, but denied a mistrial.”

Holding: “The court properly sustained the objection. Within the wide latitude of closing argument, counsel may comment on the vicious and inhuman nature of defendant’s acts, but may not make arguments that appeal to the passions and fears of the jury.”

“Denying the mistrial, however, was not an abuse of discretion. The record supports the judge’s determination that this comment, made during nine days of testimony and arguments, over a total period of three weeks, did not influence the verdict and was not so egregious as to deny [the defendant] a fair trial.”

Other sections cited in: Trial-Vouching (Section VIII.C.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2), Trial-Closing Argument in General (Section VIII.G.3).

- f. *State v. Amaya-Ruiz*, 166 Ariz. 152, 172, 800 P.2d 1260, 1280

(1990).

Facts: “Defendant further contends that the prosecutor introduced irrelevant and prejudicial material that appealed to the sympathies of the jurors. He points to a photograph of the victim and her husband, apparently admitted into evidence for identification purposes, and the alleged admission of ‘girlie pictures’ belonging to defendant.” The defense did not object.

“Lastly, defendant claims that [the prosecutor] appealed to the passions of the jurors by stating, in his closing argument, that ‘[i]f you let him go, you would let a confessed murderer go.’ Defendant objected to this comment during closing argument, and the trial court allowed [the prosecutor] to continue, after cautioning him to refrain from speculating about crimes defendant might commit if acquitted.”

Holding: The court found that the trial court’s did not abuse its discretion regarding the photographs: “We note that the ‘girlie pictures’ were not admitted into evidence; they were merely visible in a photograph of defendant’s living quarters that was introduced. Additionally, defense counsel failed to object in either instance.”

The court also found no misconduct in the reference to the “confessed murderer:” “Again, the prosecutor was merely commenting on the evidence, as he may properly do. Defendant’s confession was properly admitted into evidence, and the prosecutor did not err by calling that fact to the jury’s attention.””

Other sections cited in: Trial-Opening Statements in General (Section VIII.A.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1), Trial-Closing Argument in General (Section VIII.G.3).

F. Attacks on Defense Counsel and Defendants

1. Attacks on defense counsel

- a. *State v. Ramos*, 235 Ariz. 230, 237–38, ¶¶ 24–25, 330 P.3d 987, 994–95 (App. 2014).

Facts: “During his rebuttal argument, the prosecutor claimed that defense counsel’s focus on the State’s failure to prove [the defendant] owned the property upon which the trailer and stripped vehicle were found was an attempt to divert the jurors from the

relevant evidence by raising distractions or ‘red herrings.’ The prosecutor also told jurors that defense counsel asked them to speculate and ‘check [their] common sense at the door.’”

Holding: “Although some of the prosecutor’s comments suggested that defense counsel was attempting to mislead the jury, we cannot say that those statements did more than criticize defense tactics.”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.A.2), Trial-Vouching (Section VIII.C.2), Trial-Comments of Defendants’ Failure to Testify (Section VIII.D.2).

- b. *State v. Newell*, 212 Ariz. 389, 403–04, ¶¶ 66–70, 132 P.3d 833, 847–48 (2006).

Facts: The prosecutor stated that “[N]o matter what defense counsel tells you, we all know that DNA is . . . the most powerful investigative tool in law enforcement at this time.” The prosecutor also stated that the defense counsel “knew this was true.”

Holding: “The prosecutor’s statement about the superiority of DNA evidence improperly vouched for the State’s evidence. No opinions had been elicited about the preeminence of DNA evidence. The prosecutor’s comment here—that everyone knows that DNA evidence is the best investigative tool around—did improperly vouch for the strength of the State’s evidence against [the defendant].”

In addition, “[b]ecause defense counsel, in his closing argument, had questioned whether the DNA evidence proved anything beyond a reasonable doubt, the prosecutor’s response in claiming that defense counsel knew that DNA was superior evidence called into question the integrity of defense counsel.”

However, the court held that the statements did not affect the jury’s verdict and deny the Defendant a right to a fair trial because of the jury instructions, a sustained objection to the statements impugning the defense counsel’s honesty, and a general lack of prejudice in light of the “overwhelming evidence of guilt.”

Other sections cited in: Trial-Vouching (Sections VIII.C.2 and VIII.C.3).

- c. *State v. Armstrong*, 208 Ariz. 345, 357–58, ¶¶ 60–64, 93 P.3d 1061,

1073–74 (2004).

Facts: “At various times, over more than twelve months of proceedings, [the prosecutor] remarked that defense counsel distorted facts, attempted to cast the State in a bad light, played games, made ‘atrocious’ and ‘disingenuous’ arguments, pulled stunts, lied, made misrepresentations about his knowledge of crucial evidence, and failed to disclose such crucial evidence. The remarks were made, however, in the absence of the jury, during a handful of contentious arguments before the judge.”

Holding: “The record reflects [the prosecutor’s] frustration and, at times, anger with defense counsel. However, as the State points out, the record also reflects times when even the trial judge expressed frustration with defense attorney’s posturing, failure to timely disclose witness lists and exhibits, misstatements of the record, and inability to set a realistic trial date. While defense counsel’s questionable conduct does not justify impropriety by [the prosecutor], it does indicate defense counsel was more than a mere onlooker in the creation of an acrimonious environment.”

“We further note that the level of antipathy between the attorneys absolutely was unacceptable. At one pretrial hearing, the court noted the following:

I have never seen such animosity between the attorneys. It is very unhealthy for everybody. There is so much at stake . . . between [the attorneys], I have not seen this ever, either as judge or a lawyer and it is not a good situation.

We share the trial judge’s sentiment. Even so, we conclude the attorneys’ incivility did not violate rights essential to [the defendant’s] defense. Because the acrimonious and inappropriate remarks occurred outside the presence of the jury, reversal of [the defendant’s] convictions is not warranted.”

Other sections cited in: Prosecutorial Conduct in General (Sections II.3 and II.4), Discovery (Section VI.2).

- d. *State v. Rosas-Hernandez*, 202 Ariz. 212, 218–19, ¶¶ 21–25, 42 P.3d 1177, 1183–84 (App. 2002).

Facts: “In his opening statement, defense counsel presented a detailed version of the events at issue. . . . The evidence at trial did not support the scenario presented by defense counsel.”

During the State’s closing argument, the prosecutor argued: ““You have to keep in mind that everything that you-or your decision has to be based on what came from the witness stand. It can’t be based on what came from that chair-I’m pointing to [the defense counsel’s] chair.”

“You remember during his opening statement, he wove quite a tale to you about what happened on the way down to south Phoenix or perhaps what you thought the evidence would be. That’s not what the evidence was. None of that is before you. You are not to consider it. *It is as if it were a lie.* That’s exactly what it is.”

The defense objected, and the trial court sustained the objection and instructed the jury to disregard the comment. The defense later moved for a mistrial.

Holding: “When defense counsel takes the calculated risk of setting forth a detailed accounting of defendant’s testimony-knowing full well that there is no other factual support for defendant’s anticipated testimony and that the defendant may choose not to testify-the opening statement is clearly subject to attack just as the prosecutor (with one exception) did here. The one exception here was the statement: ‘It is as if it were a lie.’ This added nothing to the legitimate argument, but served merely to personalize it. We do not determine that there are no circumstances in which one lawyer may characterize another lawyer’s argument as ‘a lie,’ but the trial judge was well within her discretion in finding the argument improper here.”

However, the court held “that the prosecutor’s one comment does not warrant reversal.” The court noted that the jurors are presumed to follow instructions. The court also found that the record supported “the trial court’s determination that the comment did not prevent the jury from fairly considering the evidence.”

Other sections cited in: Trial-Vouching (Section VIII.C.3).

- e. *State v. Cornell*, 179 Ariz. 314, 330–33, 878 P.2d 1352, 1368–71 (1994).

Facts: In cross examination of defense expert, the prosecutor suggested that the defendant’s advisory counsel had coached the defendant to “feign symptoms of epilepsy.” There was no evidence of such coaching, and the advisory counsel offered to testify to that

effect. The defendant did not object to the line of questions as an improper attack, but did object on other grounds.

Holding: “We agree with the trial court that the prosecutor undoubtedly intended these questions to place in the jurors’ mind the idea that advisory counsel coached Defendant on how to feign this symptom of temporal lobe epilepsy. We have repeatedly held that a prosecutor must not make prejudicial insinuations without being prepared to prove them.”

Nevertheless, the court found no fundamental error. Most importantly, “the prosecutor’s improper questions did not tend to undermine Defendant’s primary defense based on the psychotic trigger reaction theory.” “Rather, they only tended to discredit the theory that the killing occurred because Defendant had an epileptic seizure.” The court found that the defendant “ultimately failed to present enough evidence to support an epilepsy defense,” so the error was harmless.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.3), Trial-Appeal to Emotion (Section VIII.E.3).

- f. *State v. West*, 176 Ariz. 432, 446, 862 P.2d 192, 206 (1993).

Facts: “Defendant claims that the state engaged in misconduct by stating in closing argument that certain questions by defense counsel were ‘a defense ploy,’ ‘improper,’ and ‘outrageous.’”

Holding: “The argument, in context, was well within the wide latitude afforded both parties in closing argument.”

Other sections cited in: Trial-Vouching (Section VIII.C.4), Trial-Comments on Defendants’ Failures to Testify (Section VIII.D.2), Trial-Closing Argument in General (Section VIII.G.4).

- g. *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993).

Facts: “During voir dire, the prosecutor stated that some of the questions in the questionnaire ‘may seem a little silly to you, and some of them are silly, as a matter of fact, but please be very honest when you fill out this form.’ Defense counsel told the venire that he wrote the questionnaire and took exception to its characterization as silly.”

Holding: “While the prosecutor’s comment was inappropriate, we

believe that it falls far short of actionable misconduct.” Further, the venire was instructed that the questions were approved and that the attorneys’ feelings about them were irrelevant.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.4), Trial-Opening Statements in General (Section VIII.A.1), Trial-Vouching (Sections VIII.C.1, VIII.C.2, and VIII.C.3), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Closing Argument in General (Section VIII.G.3).

- h. *State v. Atwood*, 171 Ariz. 576, 610–11, 832 P.2d 593, 627–28 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

Facts: “Defendant also argues that he was prejudiced by the prosecutor’s statements during closing argument. Specifically, the record reveals that the prosecutor questioned defense counsel’s motives for making certain improper statements in closing argument, and repeatedly joked about the defense counsel’s lengthy presentation style.”

Holding: “We are more reluctant, however, to dismiss as innocuous [the prosecutor’s] jocular remarks about defense counsel’s closing argument and especially his comments concerning defense counsel’s. Although we recognize that an adversarial setting may encourage some good humored—and even ill-humored—repartee between attorneys, we believe that, regardless of its effect on defendant’s trial, the prosecutor’s attempts to discredit the defense attorney before the jury evidenced a lack of discretion and a disregard for the high standards expected of attorneys who represent the public interest, and as such they were not ‘innocuous.’ Regardless of whether [the prosecutor’s] glibness and his personal comments about the defense counsel were precipitated by the culmination of a long, emotional trial, or whether they were encouraged by the gavel-to-gavel televised coverage of the case, we find his statements unnecessary and inappropriate.”

Nevertheless, the court deferred to the trial court and found no prejudice from the statements.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.3), Prosecutorial Conduct in General (Sections II.4 and II.5), Early Investigation (Section III.1), Pretrial (Section VII.1), Trial-Appeal to Emotion (Section VIII.E.2).

- i. *State v. Amaya-Ruiz*, 166 Ariz. 152, 171–72, 800 P.2d 1260, 1279–80 (1990).

Facts: “Defendant also alleges that the prosecutor made improper comments about defense counsel during his closing statement. Specifically, [the prosecutor] attacked the defense theory of a frame-up, saying that [the defense attorney] ‘blind sided’ witnesses, relied on ‘innuendo and inference’ to support her theory, and made accusations against witnesses who were unable to respond. He characterized the defense as a ‘smoke screen,’ stating:

As to the framing of [the defendant] by [a detective], I want to make a couple of observations on that. That is quite an outrageous argument for her to make. She may not be outraged by this prospect, but I certainly am.”

The defense did not object at the time.

Holding: “However, when taken in context, the remarks appear merely to point out that the prospect of a conspiracy between at least two law enforcement agencies to frame defendant is and should be outrageous to any concerned citizen. [The prosecutor] attacked defendant's argument, rather than his counsel. ‘Wide latitude is given in closing arguments and counsel may comment on the evidence and argue all reasonable inferences therefrom.’ ‘[S]ome amount of emotion in closing argument is not only permissible, it is to be expected.’ The prosecutor's comments were not improper, and certainly did not rise to the level of fundamental error.”

Other sections cited in: Trial-Opening Statements in General (Section VIII.A.2), Trial-Appeal to Emotion (Section VIII.E.4), Trial-Closing Argument in General (Section VIII.G.3).

- j. *State v. Dumaine*, 162 Ariz. 392, 401–02, 783 P.2d 1184, 1193–94 (1989), *disapproved on other grounds by State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010).

Facts: During closing argument, the defense attorney argued that the detective told a witness that the defendant committed the murder. The defense attorney asked rhetorically: “Where is the evidence?” “What did [the detective] have at that point?” “Is there something that [the prosecutor] has got that he hasn’t shown you?” The prosecutor objected saying: “He knows darned well that isn’t

true.” The trial court later denied a motion for a new trial.

Holding: “We hold that the prosecutor’s comment in response to defense counsel’s closing comment was not so egregious as to deny the defendant a fair trial because it did not bring improper matters to the attention of the jury nor was it probable that it influenced their verdict in light of all the evidence.”

Other sections cited in: Prosecutorial Conduct in General (section II.4), Trial-Vouching (Sections VIII.C.1 and VIII.C.4), Trial-Comments on Defendants’ Failures to Testify (Section VIII.D.2), Trial-Closing Argument in General (Section VIII.G.3).

2. Attacks on defendants

- a. *State v. Martinez*, 230 Ariz. 208, 216–17, ¶¶ 38–41, 282 P.3d 409, 417–18 (2012).

Facts: In the opening statement to the penalty phase of a trial, the prosecutor “talked about the State’s expert who would testify and suggested [the defendant] malingered on that expert’s test because he ‘will do anything, say anything, use anyone to save his own skin.’” The defense moved for a mistrial.

Holding: “As for the insinuation that [the defendant] concocted his mental health mitigation, the prosecutor’s statement was not improper because it was supported by testimony from the State’s expert that [the defendant] malingered on examinations. The trial court correctly denied the motion for mistrial.”

Other sections cited in: Prosecutorial Conduct in General (Section II.5), Trial-Opening Statements in General (Section VIII.A.2), Trial-Vouching (Section VIII.C.2), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Closing Argument in General (Section VIII.G.1).

- b. *State v. Moody*, 208 Ariz. 424, 460, ¶¶ 153–154, 94 P.3d 1119, 1155 (2004).

Facts: “The prosecutor, in discussing the defense’s claim that people did not understand dissociative identity disorder, referred to the defendant as ‘poor Robert Moody’ for being afflicted with a disorder that no one understands. [The defendant] did not object to this comment.”

Holding: “Although we agree that belittling a criminal defendant in

closing argument is improper and unnecessary, given the evidence in this case we do not find that the passing comment constituted fundamental error. We therefore conclude that referring to the defendant as ‘poor Robert Moody’ was not an error ‘of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial.’”

Other sections cited in: Trial-Cross Examination of Defense Expert Witnesses and Comments on Psychological Theories (Section VIII.B.4), Trial-Appeal to Emotion (Sections VIII.E.2 and VIII.E.3), Trial-Closing Argument in General (Sections VIII.G.3 and VIII.G.4).

- c. *State v. Hardwick*, 183 Ariz. 649, 651–54, 905 P.2d 1384, 1386–89 (App. 1995).

Facts: The defendant testified. On cross-examination, the prosecutor used a non-admitted document that purported to list several characteristics of child molesters.

The defendant’s answers indicated that he had those characteristics. The prosecutor asked the defendant: “Based on those traits, isn’t it also true you are a classic child molester?” The defendant answered that he had no idea. The prosecutor then confronted the defendant with the document. Later, the prosecutor “argued to the jury that Defendant was a child molester based upon the characteristics set forth in the document.”

Holding: “The prosecutor’s questions to Defendant reiterated passages from a document (Exhibit 8) that purported to establish the traits of child molesters. Identifying common traits of child molesters is the province of experts. Information of this nature can only be admitted into evidence in the form of expert testimony or, alternatively, in the form of learned treatises if the proponent has shown that the treatise is reliable authority. Ariz. R. Evid. 803(18).”

The court found that there was no foundation for the use of the document. “The prosecutor’s cross-examination of Defendant communicated to the jury the content of an otherwise inadmissible document. Furthermore, the prosecutor forced Defendant to testify in a manner that was particularly self-incriminating, a manner in which Defendant would not have otherwise testified were it not for the trial court’s refusal to sustain defense counsel’s timely objection.”

“The prosecutor purposefully and repeatedly introduced the damaging contents of this unadmitted and inadmissible document, and then subsequently argued to the jury that Defendant was a child molester based upon the characteristics set forth in the document. No relief will cure this error short of a new trial. The state may have obtained the convictions on the strength of this inadmissible evidence.”

- d. *State v. Henry*, 176 Ariz. 569, 581, 863 P.2d 861, 873 (1993).

Facts: “In closing, the prosecutor stated, ‘When [the defendant] was testifying all day Friday, did the word psychopath ever come to mind?’ The trial judge sustained an objection to the remark, but denied a mistrial.”

Holding: “The court properly sustained the objection. Within the wide latitude of closing argument, counsel may comment on the vicious and inhuman nature of defendant's acts, but may not make arguments that appeal to the passions and fears of the jury.”

“Denying the mistrial, however, was not an abuse of discretion. The record supports the judge’s determination that this comment, made during nine days of testimony and arguments, over a total period of three weeks, did not influence the verdict and was not so egregious as to deny [the defendant] a fair trial.”

Other sections cited in: Trial-Vouching (Section VIII.C.2), Trial-Appeal to Emotion (Section VIII.E.4), Trial-Closing Argument in General (Section VIII.G.3).

- e. *State v. Comer*, 165 Ariz. 413, 426–27, 799 P.2d 333, 346–47 (1990).

Facts: The prosecutor characterized the defendant as a “monster” during his opening statement. The defense objected. “The trial court sustained the objection and urged the prosecutor to refrain from using that type of language again in reference to appellant. The prosecutor asked the judge whether he could call appellant a monster in closing argument. The trial court distinguished between opening statement and closing argument and noted that defense counsel’s objection was to the use of argument in the opening statement.”

“In his closing argument, the prosecutor characterized appellant as a ‘monster’ and as ‘filth.’ Defense counsel did not object. The

prosecutor also referred to appellant as the ‘reincarnation of the devil.’ Defense counsel made a timely objection to this characterization. Initially, the trial judge noted the objection and, following another characterization of appellant, overruled the objection.”

Holding: The court noted wide latitude available in closing argument, but found the comments improper: “We believe that in this case the prosecutor’s name-calling went beyond arguing the vicious nature of appellant’s acts and was an appeal to the jury’s passion and prejudice. Although the prosecutor’s comments exceeded the bounds of appropriate closing argument, we nevertheless conclude the error was harmless beyond a reasonable doubt. In light of the overwhelming evidence of appellant’s guilt, it is evident that the prosecutor’s comments did not contribute to the verdict.”

Other sections cited in: Trial-Closing Argument in General (Section VIII.G.3).

- f. *State v. Hansen*, 156 Ariz. 291, 296–97, 751 P.2d 951, 956–57 (1988).

Facts: The defendant argued that the prosecutor used her “lack of English skills to confuse and ridicule her, and to communicate to the jury that her testimony was not credible.” “According to [the defendant], the cumulative effect of the prosecutor’s cross-examination was overwhelming, and the jury could not separate the wheat from the chaff.” The defendant moved for a new trial, but the trial court rejected the argument.

Holding: “After reviewing the prosecutor’s cross-examination of [the defendant], we do not believe that the prosecutor’s questions, or the manner in which they were presented were so prejudicial as to require a new trial. Although the prosecutor may have been impatient with [the defendant] in some instances, even the trial court noted that it was difficult to get a response from [the defendant]. Moreover, we note that the trial court is in a better position to judge whether the prosecutor is unduly sarcastic, his tone of voice, facial expressions, and their effect on the jury, if any. Accordingly, we defer to the trial court’s judgment in the absence of patent error. We find no such error on the record.”

- g. *Pool v. Superior Court*, 139 Ariz. 98, 100–04, 109, 677 P.3d 261,

263–67, 272 (1984).

Facts: The prosecutor awkwardly charged the defendant. At trial, the cross examination of the defendant “moved from the irrelevant and prejudicial to the egregiously improper.” After a motion to amend the indictment was denied, the trial court declared a mistrial.

Holding: The court found numerous types of improper questions on cross-examination:

For instance, references to handling a gun while intoxicated and the drinking habits of the defendant and his acquaintances were both irrelevant and prejudicial. . . . Questions characterizing the defendant as a “cool talker,” a knowledgeable witness and a “good buddy” of defense counsel are argumentative, grossly improper and designed to raise prejudice in jurors. Questions characterizing the evidence, asking the witness for his view of evidence received or his expectations of evidence that will be given are not designed to produce admissible facts but only to invite speculation and argument from the witness in order to put him in a bad light; they are, therefore, argumentative and improper. Questions asking the witness to speculate on testimony which might have been given by someone who has claimed the fifth amendment are improper and constitute misconduct. Suggestion by question or innuendo of unfavorable matter which is not in evidence and which would be irrelevant, or for which no proof exists is improper and can constitute misconduct. Unwarranted abuse of opposing counsel or his client is improper and can be misconduct. The trial judge was quite correct in deciding that these and similar matters in cross-examination of the defendant were improprieties which warranted, if not required, mistrial.

In addition, “[e]ven if the defense had been guilty of serious misconduct, the prosecutor would not have been entitled to engage in abusive, argumentative and harassing conduct.”

Based on the misconduct, the court held that double jeopardy precluded a retrial: “Applying minimum standards of legal knowledge and competence, we must conclude that the prosecutor’s conduct was not simply erroneous, negligent or mistaken; portions of the questioning are so egregiously improper that we are

compelled to conclude that the prosecutor intentionally engaged in conduct which he knew to be improper, that he did so with indifference, if not a specific intent, to prejudice the defendant.”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Sections I.A.1, I.A.2, and I.B.6), Double Jeopardy (Sections IX.1 and IX.2).

G. Closing Argument in General

1. Mitigation evidence

- a. *State v. Martinez*, 230 Ariz. 208, 216, ¶¶ 36–37, 282 P.3d 409, 417 (2012).

Facts: The prosecutor noted that the judge had instructed the jury that they were “not required to find a connection between a mitigating circumstance and the crime committed in order to consider the mitigating evidence,” but suggested that “a lack of any connection between the mitigating circumstance and the murder is one thing to consider in deciding how compelling any mitigating circumstance[] you may find to have been proven really is.” The defendant did not object.

Holding: The defendant argued “that this statement improperly implied that the jurors had to find a nexus between [the defendant’s] childhood and the murder. But the prosecutor did not tell the jury that a nexus was required; rather she said lack of a connection can be considered in determining ‘how compelling any mitigating circumstance[] you may find to have been proven really is.’ This is a proper statement of the law. ‘Although a connection between a defendant’s proffered mitigation and the crime is not required, the state may fairly argue that the lack of a nexus to the crime diminishes the weight to be given alleged mitigation.’”

Other sections cited in: Prosecutorial Conduct in General (Section II.5), Trial-Opening Statements in General (Section VIII.A.2), Trial-Vouching (Section VIII.C.2), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2).

- b. *State v. Roque*, 213 Ariz. 193, 224, ¶¶ 127–30, 141 P.3d 368, 399 (2006).

Facts: The primary issue was insanity. The prosecutor asked the

jury to ask themselves whether the defendant's low IQ and history of mental illness caused or excused the crimes.

Holding: The trial court did not abuse its discretion in allowing the prosecutor's arguments about whether mitigating evidence "excused" the crimes. The instructions properly told jurors how to interpret mitigation evidence.

Other sections cited in: Discovery (Section VI.2), Trial-Cross Examination of Defense Expert Witnesses and Comments on Psychological Theories (Section VIII.B.2), Trial-Appeal to Emotion (Sections VIII.E.2 and VIII.E.4).

2. Aggravating factors and circumstances

- a. *State v. Anderson*, 210 Ariz. 327, 341–42, ¶ 47–52, 111 P.3d 369, 383–84 (2005), *supplemented* 211 Ariz. 59, 116 P.3d 1219.

Facts: The prosecutor argued that a prior armed robbery conviction "proved" the pecuniary gain aggravating factor. However, armed robbery and the pecuniary gain aggravator have distinct elements: "To prove robbery, the state must show a taking of property from the victim, see A.R.S. § 13–1902(A); to prove pecuniary gain, the state must show the actor's motivation was the expectation of pecuniary gain, see A.R.S. § 13–703(F)(5). Proving a taking in a robbery does not necessarily prove the motivation for a murder. . . ."

"The prosecutor also argued that the multiple homicides aggravating factor, A.R.S. § 13–703(F)(8), was established by the three first-degree murder verdicts. Again, the statement was inaccurate. To establish this aggravating factor, the State must prove not only that the defendant committed multiple homicides, but also that the murders occurred during 'a continuous course of criminal conduct.'"

The defense did not object in either situation.

Holding: The court found that the prosecutor's misstatement of the law was not fundamental error. In both cases, the trial court properly instructed the jury as to the elements of the aggravators, and also instructed that the closing arguments were not evidence.

Other sections cited in: Trial-Opening Statements in General (Section VIII.A.2).

3. Reference to evidence

- a. *State v. Loney*, 230 Ariz. 542, 544–45, ¶¶ 8–13, 287 P.3d 836, 838–39 (App. 2012), *vacated in part on other grounds*, 231 Ariz. 474, 296 P.3d 1010 (App. 2013).

Facts: An officer had given testimony about the profile of sexual predators. During closing argument, the defense questioned the credibility of the minor witness. In rebuttal closing argument, the prosecutor pointed to the officer’s profiling to rebut that argument.

The defendant argued that “the prosecutor’s comments improperly asked the jury to find him guilty because he fit the sexual predator profile testified to by [the officer].”

Holding: “We disagree because the prosecutor’s effort to draw comparisons between [the defendant] and the sexual predator profile fell within the proper scope of closing argument.” The officer’s testimony was admissible. “Because the prosecutor was permitted to argue all reasonable inferences based on the testimony of [the officer], she could properly argue that [the defendant] fit the profile of a sexual predator.”

- b. *State v. Martinez*, 218 Ariz. 421, 427, ¶¶ 17–20, 189 P.3d 348, 354 (2008).

Facts: The defendant and his friends killed the victim, piled trash on the body, and lit it on fire. When police officers stopped the defendant, he said they had come “from a barbeque at ‘Cisco’s.’” During closing argument at the aggravation phase, the prosecutor stated that the defendant “provided his friends ‘a sickening excuse to offer up to the police officers—we were at Cisco’s barbecue—so he cannot be connected with this crime.’” The defense claimed that some evidence showed that the “Cisco” reference was not a “joke,” but a reference another “Cisco.”

Holding: “A prosecutor is entitled to make arguments supported by the record. The prosecutor’s comment about the alibi was a suggestion that [the defendant’s] reference to ‘Cisco’ could not credibly be called a coincidence. The police interviews and free talks emphasized by [the defendant] on appeal do not rule out the possibility that [the defendant] did, in fact, intend the alibi to refer to the crime. The prosecutor’s statement was neither false nor a mischaracterization. There was simply no misconduct in this

instance.”

The court also summarily dealt with other statements that were supported by the evidence.

Other sections cited in: Prosecutorial Conduct in General (Section II.3).

- c. *State v. Harrod*, 218 Ariz. 268, 278, ¶¶ 34–36, 183 P.3d 519, 529 (2008).

Facts: At the guilt phase of the trial, the prosecutor argued that the defendant assisted the shooter. During closing argument in the resentencing trial, the prosecutor argued that the defendant actually killed the victim. The defense did not object.

Holding: The prosecutor’s argument that the defendant killed the victim was a reasonable inference from the evidence, so was not misconduct.

- d. *State v. Morris*, 215 Ariz. 324, 335–36, ¶¶ 48–49, 160 P.3d 203, 214–15 (2007).

Facts: In closing argument, the prosecutor argued that the defendant killed the victims “to have sexual intercourse with their corpses.” There was evidence showed some selective skin slippage in selective parts of the victims’ bodies, as well as DNA evidence suggesting sexual intercourse.

Holding: There was sufficient evidence “to permit the prosecutor to make such an argument.” In addition, the jury was instructed properly regarding drawing their own conclusions about the strength of the evidence. Finally, there was ample other evidence for the jury to make the relevant finding that the crime was “heinous or depraved.”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.1), Early Investigation (Section III.1), Trial-Appeal to Emotion (Sections VIII.E.1, VIII.E.2, and VIII.E.4).

- e. *State v. Moody*, 208 Ariz. 424, 463–66, ¶¶ 169–184, 94 P.3d 1119, 1158–61 (2004).

Facts: The defendant’s videotaped confession was not admissible to show guilt, but was appropriately used by an expert to evaluate whether the defendant’s mental illness was “malingering.” During

closing argument, the prosecutor played the video for the jury, and pointed them to a portion where the defendant allegedly behaved inconsistently with a malingering mental illness. The prosecutor argued that the video contradicted the defense expert's opinion. The defendant did not object.

During closing argument, the defense argued that some of the State's experts' reports were unreliable because they relied in part on information from a purportedly false witness. The prosecutor countered in rebuttal closing by pointing to facts supporting that witness's credibility. The defendant did not object.

Holding: "The prosecutor's substantive use of the tape's contents in closing appears to have been error" because the prosecutor discussed the substance of the videotape. However, that error was mitigated because the defense had once wanted to use the videotape substantively, the prosecutor pointed the jury to the particular issue that would support his expert's opinion, and his expert was allowed to consider the content of the videotape. Therefore, there was no fundamental error.

On the facts regarding the questioned witness, the court first found: "Defense counsel's suggestion that the State intentionally tainted its experts opened the door for the prosecution to rebut the assertion." The court also found that the prosecutor's comments were supported by the evidence, so there was no error.

Other sections cited in: Trial-Cross Examination of Defense Expert Witnesses and Comments on Psychological Theories (Section VIII.B.4), Trial-Appeal to Emotion (Sections VIII.E.2 and VIII.E.3), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2), Trial-Closing Argument in General (Section VIII.G.4).

- f. *State v. Blackman*, 201 Ariz. 527, 543–44, ¶¶ 66–71, 38 P.3d 1192, 1208–09 (App. 2002).

Facts: The defense argued that the victim's testimony about her interaction with police officers was contradicted by recordings. The prosecutor suggested that what she testified about could have happened during the time period between the two recordings.

Holding: "The prosecutor's statement clearly referred to [the victim's] testimony about her conversations with [the detective]."

No testimony was presented that all of their conversations were recorded.” Based on the sequence of the recordings, “a reasonable inference could be drawn that some of the conversations to which [the victim] testified were not recorded and took place between the times represented by the two tape-recorded conversations.”

“Therefore, the prosecutor’s statement that it was for the jury to decide what happened when the tape was not recording was a logical inference from evidence presented at trial and did not direct the jury to matters that they could not consider. The prosecutor’s statement did not constitute misconduct, and we find no error, much less fundamental error, on this point.”

Other sections cited in: Trial-Vouching (Section VIII.C.2), Trial-Comments on Defendants’ Failures to Testify (Section VIII.D.2), Trial-Appeal to Emotion (Section VIII.E.3).

- g. *State v. Corona*, 188 Ariz. 85, 89–90, 932 P.2d 1356, 1360–61 (App. 1997).

Facts: The prosecution had called a witness to testify about gangs, and the defense did not. During closing argument, the prosecutor discussed the state’s expert, and stated: “The defense did not provide you with any expert who testified.”

The defense objected at the time.

Holding: The court noted cases about “the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it.” However, the court distinguished the case because of “the general rule that closing arguments must be based on facts that the jury is entitled to find from the evidence and not on extraneous matters not received in evidence.” “Because there was no mention during the trial that the defendant had retained or even consulted an expert witness on gangs, unlike [*McDougal*] in which the defendant had received a sample for the very purpose of independent consultation, the prosecutor’s comment was improper and the defendant’s objection should have been sustained.”

The court had already decided to reverse on other grounds, so did not determine whether the error was prejudicial.

Other sections cited in: Trial-Vouching (Section VIII.C.2), Trial-Closing Argument in General (Section VIII.G.4).

- h. *State v. Henry*, 176 Ariz. 569, 581, 863 P.2d 861, 873 (1993).

Facts: During closing argument, the prosecutor stated: “They were trying to get away only they didn’t make it. That’s why they resorted—both of them—to the basic defense you’ve got in this situation. The other guy did it. The evidence in this case shows they both did it. [The other person and the defendant] are equally guilty of first degree murder.”

The defendant argued that “it was inappropriate for the prosecutor to intimate that [the other person] had accused him, since he had no opportunity to cross-examine [the other person] during trial.”

Holding: “We find no error, fundamental or otherwise. At trial, [the defendant] elicited testimony from a Mohave County Jail inmate who claimed to have overheard [the other person] say he was blaming [the defendant] for the murder. Counsel may comment on evidence and argue all reasonable inferences therefrom. Even defense counsel argued that [the defendant and the other person] were ‘pointing the finger at each other.’”

Other sections cited in: Trial-Vouching (Section VIII.C.2), Trial-Appeal to Emotion (Section VIII.E.4), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2).

- i. *State v. Bible*, 175 Ariz. 549, 601–02, 858 P.2d 1152, 1204–05 (1993).

Facts: During opening statement, the prosecutor “suggested that the victim was ‘perhaps tortured.’” During closing argument, the prosecutor stated that “after the victim’s hands were tied, she may have been ‘forced into some sort of torment.’”

Holding: Given the proper scope of opening statements, the “perhaps tortured” comment was improper.

“The comment during closing argument that the victim may have been tormented was proper. Unlike opening statements, during closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions. Given the evidence presented at trial, we find no impropriety in the prosecutor suggesting—*during closing argument*—that the victim had been tormented. The nine-year-old victim was abducted, taken to a remote area, her clothes removed and scattered, her hands tied, and

her head beaten. Such evidence would permit a jury to infer that she had been subject to both physical and emotional torment.”

Under the circumstances, the error in the opening statement did not deprive the defendant of a fair trial.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.B.4), Trial-Opening Statements in General (Section VIII.A.1), Trial-Vouching (Sections VIII.C.1, VIII.C.2, and VIII.C.3), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

- j. *State v. Amaya-Ruiz*, 166 Ariz. 152, 171–72, 800 P.2d 1260, 1279–80 (1990).

Facts: In his opening statement, the prosecutor noted that the police had found nude photographs and that the defendant had admitted to viewing them before murdering the victim. “During closing argument, he told the jury that although defendant denied that rape was the motive for this crime, such a motive might be inferred in light of the evidence.” The defense did not object at the time.

“Lastly, defendant claims that [the prosecutor] appealed to the passions of the jurors by stating, in his closing argument, that ‘[i]f you let him go, you would let a confessed murderer go.’ Defendant objected to this comment during closing argument, and the trial court allowed [the prosecutor] to continue, after cautioning him to refrain from speculating about crimes defendant might commit if acquitted.”

Holding: “In this case, the record indicates that defendant looked at pictures of nude women shortly before killing the victim. Although defendant denied that his motive was rape, that inference was supported by the evidence. We find no error, fundamental or otherwise.”

The court also found no misconduct in the reference to the “confessed murderer:” “Again, the prosecutor was merely commenting on the evidence, as he may properly do. Defendant’s confession was properly admitted into evidence, and the prosecutor did not err by calling that fact to the jury’s attention.””

Other sections cited in: Trial-Opening Statements in General (Section VIII.A.2), Trial-Appeal to Emotion (Section VIII.E.4), Trial-Attacks on Defense Counsel and Defendants (Section

VIII.F.1).

- k. *State v. Comer*, 165 Ariz. 413, 426–27, 799 P.2d 333, 346–47 (1990).

Facts: The prosecutor stated in closing argument that another person “was never charged” with the murder. The prosecutor apparently later said that she “is not charged.” In fact, that person was charged in the original indictment. “The trial court remanded the case to the grand jury for a redetermination of probable cause. The second indictment did not charge [the other person] with the murder of [the victim]. Defense counsel offered a copy of the second indictment against [the other person] into evidence.”

The prosecutor also “stated several times that [the victim] was robbed “immediately” after he was shot.” The defendant did not object at trial to either statement.

Holding: “Although the prosecutor’s comment that [the other person] was never charged with the murder is an incorrect statement of the facts, he corrected this misstatement when he stated she ‘is not charged’ with the murder.”

The court also found that the prosecutor’s statement that the victim was robbed “immediately” after being shot was a fair inference from the evidence. The evidence showed that he victim had used an EMT badge shortly before the shooting, and that the defendant used the badge at later robberies.

Other sections cited in: Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2).

- l. *State v. Dumaine*, 162 Ariz. 392, 402, 783 P.2d 1184, 1194 (1989), *disapproved on other grounds by State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010).

Facts: During closing argument, the prosecutor stated: “Now, there are some things that I cannot tell you about this case. I want to talk to you about those. I cannot tell you precisely what happened between the OK Corral and the gravesite where [the victim’s] body was found. There are only two or possibly more people who could have told you that. One is the assailant, and he is sitting at the defense table right now.”

“Defendant contends the prosecutor’s statements referred to

evidence not in the record, thus implying that more evidence existed.”

Holding: “The prosecutor’s comment that ‘there are some things that I cannot tell you’ was not a comment on extraneous matters not admitted in evidence. He merely illustrated the logical inference that at the scene of the crime there were only two persons who could give the complete story: the victim and the defendant. The prosecutor did not bring in new evidence nor did he refer to any inadmissible evidence for the jury to consider. Neither do we find the remarks by the prosecutor a comment on the defendant’s failure to testify since the defendant did in fact take the stand and testify in his own behalf. Under the facts of this case, we hold that the prosecutor did not refer to matters not admitted into evidence.”

Other sections cited in: Prosecutorial Conduct in General (section II.4), Trial-Vouching (Sections VIII.C.1 and VIII.C.4), Trial-Comments on Defendants’ Failures to Testify (Section VIII.D.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

- m. *State v. Grijalva*, 137 Ariz. 10, 13, 667 P.2d 1336, 1339 (App. 1983), *superseded by statute on other grounds as stated in State v. Cons*, 208 Ariz. 409, 413, ¶ 9, 94 P.3d 609, 613 (2004).

Facts and Holding: “The appellant next contends that the prosecutor improperly argued during closing that the appellant was a ‘four time felon Good Samaritan’ and referred to the felony which the appellant intended to commit in the house as a ‘rape that never happened.’ Several comments by the prosecutor developed this theme. We find no error justifying reversal. The appellant’s counsel also described him as a Good Samaritan who only sought to notify [the victim] that her tires were flat. The prior convictions were in evidence. Likewise, the state, as an element of attempted second degree burglary, had to show that the appellant intended to commit a felony in the house. The appellant also complains of comments regarding the psychological trauma of rape and the difficulty rape victims may have identifying rapists. The state’s theory of the case was that the intended felony was rape. Circumstantial evidence was admitted which supported that theory. The prosecutor’s remarks were supported by the evidence, and were not error. The trial court was in the best position to judge the effect of the prosecutor’s

closing arguments.”

Other categories cited in: Trial-Appeal to Emotion (Section VIII.E.3).

4. Burden of proof

- a. *State v. Edmisten*, 220 Ariz. 517, 525–26, ¶¶ 26–27, 207 P.3d 770, 778–79 (App. 2009).

Facts: A detective had identified the defendant as the person who pointed a gun at him. During closing argument, prosecutor argued that the defendant did not call another deputy who was also present. The defense argued that the prosecution “confused the jury regarding who had the burden of proof.”

Holding: The prosecutor “merely pointed out during closing arguments that, although [the defendant] had no burden to present any evidence or prove anything, he could have called another deputy who—according to the first deputy’s testimony—had been present at the time of the identification. . . . The state was not unreasonable in suggesting that [the defendant’s] failure to produce the witness gave rise to an inference that the witness’s testimony would have been unfavorable to [the defendant].”

Other sections cited in: Trial-Appeal to Emotion (Section VIII.E.4).

- b. *State v. Sarullo*, 219 Ariz. 431, 437–38, ¶¶ 22–24, 199 P.3d 686, 692–93 (App. 2008).

Facts: One of the key witnesses was the defendant’s girlfriend. The defendant sought her medical and psychological counseling records. The defendant’s theory was that the girlfriend knew the incident at issue was really a suicide attempt by the defendant, but the girlfriend had a psychological need to portray it as an assault.

During the defendant’s closing argument, the defense argued “that, ‘on some sort of psychological level,’ [the girlfriend] needed to see [the defendant’s] suicide attempt as an assault.” “In rebuttal, the prosecution noted that, while the burden of proof is on the prosecution, [the defendant] failed to call any witnesses to support his theory. [The defendant] objected and the trial court struck the statement. The court denied his subsequent motion for a mistrial, finding that the prosecutor’s comment was not improper and, in retrospect, should not have been struck.”

Holding: “When a prosecutor comments on a defendant’s failure to present evidence to support his or her theory of the case, it is neither improper nor shifts the burden of proof to the defendant so long as such comments are not intended to direct the jury’s attention to the defendant’s failure to testify. Here, the prosecutor’s comments did not refer to [the defendant] at all, but rather to his failure to call expert witnesses to support his theory regarding the victim’s psychological status. Contrary to [the defendant’s] assertions, the prosecutor’s comment did not unfairly take advantage of the court’s denial of his attempts to conduct ‘psychological discovery.’ As the state argued before the trial court, even though [the defendant] could not have introduced this particular evidence, he remained free to present an expert to testify generally about a witness’s psychological need to re-interpret events. Accordingly, because we agree there was no prosecutorial misconduct, the trial court did not err in denying [the defendant’s] motion for a mistrial and no curative instruction was required.”

Other sections cited in: Trial-Comments on Defendants’ Failures to Testify (Section VIII.D.2).

- c. *State v. Moody*, 208 Ariz. 424, 465–66, ¶¶ 185–87, 94 P.3d 1119, 1160–61 (2004).

Facts: In closing argument, the prosecutor argued that “the defense had the burden of producing ‘evidence that makes it highly probable’ that [the defendant] was insane at the time of the murders and was ‘not malingering.’”

Holding: The court found that the prosecutor’s argument was an accurate statement of the law, because a defendant asserting the insanity defense must prove insanity by “clear and convincing evidence.”

Other sections cited in: Trial-Cross Examination of Defense Expert Witnesses and Comments on Psychological Theories (Section VIII.B.4), Trial-Appeal to Emotion (Sections VIII.E.2 and VIII.E.3), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2), Trial-Closing Argument in General (Section VIII.G.3).

- d. *State v. Corona*, 188 Ariz. 85, 91, 932 P.2d 1356, 1362 (App. 1997).

Facts: “During her rebuttal closing argument, the prosecutor stated that ‘the State submits to you that if you find the Defendant not guilty you need to have a reason in order to find reasonable doubt.’ The defendant argues that this remark shifted the burden of proof to him.”

Holding: “In saying that to ‘find the Defendant not guilty you need to have a reason,’ the prosecutor erroneously suggested that the jurors had to have a justification to find the defendant not guilty. On the contrary, in order to find the defendant not guilty, jurors simply needed to possess a doubt that the defendant was guilty and that doubt must have been based upon reason. The requirement that a doubt possessed by jurors be ‘reasonable’ does not mandate that the jurors find an affirmative reason to support their finding of not guilty; rather, the doubt must not conflict with reason or sound judgment. To say that the jurors must have a ‘reason in order to find reasonable doubt’ adds an extra stratum to the jury’s analysis, one that is neither necessary nor permissible.”

The court had already decided to reverse on other grounds, so did not determine whether the error was prejudicial.

Other sections cited in: Trial-Vouching (Section VIII.C.2), Trial-Closing Argument in General (Section VIII.G.3).

- e. *State v. West*, 176 Ariz. 432, 446, 862 P.2d 192, 206 (1993).

Facts: “

“The prosecutor argued:

But defense has to consider what to say, knowing there is a killing, knowing that three witnesses are going to come into court and say what the defendant said, talk about what he said he did to [the victim], what’s the explanation?

Both the prosecutor and the judge informed the jury that, in the words of the prosecutor, ‘what the lawyers say is not evidence . . .’ and ‘[t]he defendant doesn’t have to do anything in a criminal trial, they don’t have to do a thing, they don’t have to call a witness[.] . . .’”

Holding: “The cases cited by defendant in support of his argument on this point deal with situations where the trial court instructed the jury in a manner that impermissibly shifted the burden of proof to

the defendant. Here, however, defendant claims that arguments by the prosecutor shifted the burden of proof to the defendant. The challenged statements could not possibly have affected the jury's view of the burden of proof.”

Other sections cited in: Trial-Vouching (Section VIII.C.4), Trial-Comments on Defendants' Failures to Testify (Section VIII.D.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

IX. Double Jeopardy

1. General rules for double jeopardy and prosecutorial misconduct

“[A] mistrial based on prosecutorial misconduct generally does not bar a later retrial.” *State v. Trani*, 200 Ariz. 383, 384, ¶ 6, 26 P.3d 1154, 1155 (App. 2001) (citation omitted). However, double jeopardy considerations do preclude retrial under the following circumstances:

1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Pool v. Superior Court, 139 Ariz. 98, 108–09, 677 P.2d 261, 271–72 (1984).

“In determining whether the prosecutor acted intentionally, knowing his conduct to be improper, and in the pursuit of an improper purpose without regard to the possibility of causing a mistrial, the trial court looks to objective factors, including ‘the situation in which the prosecutor found himself, the evidence of actual knowledge and intent[,] . . . any other factors which may give rise to an appropriate inference or conclusion,’ and ‘the prosecutor’s own explanations of his knowledge and intent.’” *State v. Trani*, 200 Ariz. 383, 384, ¶ 7, 26 P.3d 1154, 1155 (App. 2001)

(quoting *Pool v. Superior Court*, 139 Ariz. 98, 108 n.9, 677 P.2d 261, 271 n.9 (1984) (some quotation marks omitted).

However, under some circumstances, “preservation of the integrity of our legal system” can require the prohibition of a retrial. *Milke v. Mroz*, 236 Ariz. 276, 284, ¶¶ 20–21, 339 P.3d 659, 667 (App. 2014). If potential violations of constitutional rights “are not merely technical or minor in nature,” but instead ““go to the core of the State's ability to prove [a defendant's] guilt, raise grave questions concerning the integrity of the criminal justice system, and come within ‘the type of governmental abuse at which the double jeopardy clause was aimed,’” then double jeopardy considerations can preclude a retrial. *Id.*

2. Double jeopardy can preclude retrial

- a. *Milke v. Mroz*, 236 Ariz. 276, 284–85, ¶¶ 20–23, 339 P.3d 659, 667–68 (App. 2014).

Facts: The defendant confessed to murdering her son. The detective had a lengthy history of questionable interrogation methods. The prosecuting office had litigated at least seven prior cases involving that detective. The detective also had other disciplinary issues, and the police department objected to subpoena production of disciplinary records. None of the detective's prior history was disclosed to the Defense.

Holding: The court first held that there was a severe discovery violation even though the individual prosecutor did not know about the detective's issues. The court later noted: “For *Brady/Giglio* purposes, the [police department] is part of the State.” Therefore, the court held that the police department's motion to quash a subpoena about the detective's records was improper and attributable to the State, particularly because the court found that the prosecution should have automatically disclosed the records.

The court finally held that double jeopardy considerations barred a retrial: “Our decision in this case is based on principles that follow naturally in the wake of *Pool*, *Jorgenson*, and *Minnitt*. Yet, unlike those cases, our decision is not based on a finding that a particular prosecutor intentionally and knowingly violated *Brady* or otherwise sabotaged the defendant's right to a fair trial before the original jury. Rather, our emphasis here is necessarily on the State as a whole, the significance of the *Brady/Giglio* violations, and the

entire record. We conclude that this is the rare case in which preservation of the integrity of our legal system requires application of the bar of double jeopardy.”

“The State’s case rested primarily on the testimony and credibility of a police detective with a documented history of misconduct and dishonesty. Yet, in a case in which the State was seeking the death penalty, it failed to disclose critical impeachment evidence that was essential to the question of reasonable doubt, and thus, [the defendant’s] innocence or guilt. Based on the record of this prosecution, fidelity to our supreme court’s decisions interpreting the Arizona Constitution’s Double Jeopardy Clause requires us to bar retrial of [the defendant]. No lesser sanction would rehabilitate the damage done to the integrity of the justice system.”

Other sections cited in: Discovery (Section IV.1), Double Jeopardy (Section IX.1).

- b. *State v. Aguilar*, 217 Ariz. 235, 238–39, ¶¶ 11–12, 172 P.3d 423, 426–27 (App. 2007).

Facts: The initially-assigned prosecutor requested a ballistics report. A different prosecutor took the case to trial, but did not know that the ballistics report was complete until the trial was underway. At that time, the prosecutor disclosed the report. The prosecutor requested either a continuance or a mistrial so that the defense could examine the report. The trial court declared a mistrial.

Holding: “Although the failure to timely discover and disclose the report was entirely attributable to the state, and the prosecutor’s argument was erroneous, the prosecutor’s actions do not amount to prosecutorial misconduct.”

However, the court found that double jeopardy considerations from the mistrial precluded retrial because there was no manifest necessity for the mistrial. The decision was largely because the mistrial only benefited the State.

Other sections cited in: Discovery (Section VI.2).

- c. *State v. Minnitt*, 203 Ariz. 431, 55 P.3d 774 (2002).

Facts: This defendant was tried three times total, with the first two trials ending in mistrials. The defense argued that that a key

prosecution witness learned his story from a detective in an untapped interview that happened shortly before the witness implicated the defendant on tape.

At the first trial, the prosecutor falsely stated during his opening statement that the timeline of the case meant that the detective could not have been the witness's source of information. When the detective testified, the prosecutor elicited testimony again indicating that the detective could not have been the source of the witness's information. The record showed that the prosecutor knew "that this line of testimony was utterly false."

At the second trial, the prosecutor asked the detective similar questions to bolster the other witness's story and rebut the idea that the detective was the other witness's source. Approximately one week after that trial ended, some of the false statements were revealed at a co-defendant's trial which ended in acquittal. The third trial was apparently free from any such false testimony.

Holding: The court found severe misconduct: "The prosecutor knowingly and repeatedly misled the jury as to how, when, and from whom [the detective] first learned the names of the three defendants. By allowing the jury to believe that [the other witness] was the initial source, the state avoided the credibility obstacle that would have been apparent had [the detective] himself been the source. It is clear that [the detective] testified falsely and that his testimony was used to bolster the credibility of the state's key witness. Moreover, the record establishes that [the prosecutor] knew the testimony was false and not only failed to clarify the mistake but argued the evidentiary point to the jury. [The prosecutor's] calculated deception reveals the actual weakness of the state's case."

Further, the record "supports the conclusion . . . that the prosecutor engaged in a pattern of intentional misconduct in the 1993 and 1997 trials aimed at preventing an acquittal and serving to deprive the defendant of a fair trial." The court found that double jeopardy precluded retrial even though the final trial did not have the same level of egregious misconduct.

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Section I.A.1), Prosecutorial Conduct in General (Section II.1).

- d. *State v. Jorgenson*, 198 Ariz. 390, 391–93, ¶¶ 1–15, 10 P.3d 1177, 1178–80 (2000).

Facts: The defendant’s trial had been found to be tainted by prosecutorial misconduct. *See Hughes*. The prosecutor’s rebuttal closing was a “masterpiece of misconduct” that included hostility towards defense experts, commentary on the defendant’s failure to testify by accusing the experts of being his “mouthpieces,” and appeals to emotion regarding the potential of the defendant being released if found insane.

Holding: The court held that double jeopardy precluded a retrial even though there was no mistrial, because the holding in *Hughes* was that there should have been a mistrial. Accordingly: “Application of double jeopardy is not only doctrinally correct when egregious and intentional prosecutorial misconduct has prevented acquittal, it is also required as a matter of pragmatic necessity. Any other result would be an invitation to the occasional unscrupulous or overzealous prosecutor to try any tactic, no matter how improper, knowing that there is little to lose if he or she can talk an indulgent trial judge out of a mistrial. The worst that could then happen is reversal for a new trial and another shot at a conviction. This, of course, is exactly the type of governmental abuse at which the double jeopardy clause was aimed.”

- e. *Pool v. Superior Court*, 139 Ariz. 98, 100–04, 109, 677 P.3d 261, 263–67, 272 (1984).

Facts: The prosecutor awkwardly charged the defendant. At trial, the cross examination of the defendant “moved from the irrelevant and prejudicial to the egregiously improper.” After a motion to amend the indictment was denied, the trial court declared a mistrial.

Holding: The court found numerous types of improper questions on cross-examination:

For instance, references to handling a gun while intoxicated and the drinking habits of the defendant and his acquaintances were both irrelevant and prejudicial. . . . Questions characterizing the defendant as a “cool talker,” a knowledgeable witness and a “good buddy” of defense counsel are argumentative, grossly improper and designed to raise prejudice in jurors. Questions characterizing the evidence, asking the witness for his view of evidence received

or his expectations of evidence that will be given are not designed to produce admissible facts but only to invite speculation and argument from the witness in order to put him in a bad light; they are, therefore, argumentative and improper. Questions asking the witness to speculate on testimony which might have been given by someone who has claimed the fifth amendment are improper and constitute misconduct. Suggestion by question or innuendo of unfavorable matter which is not in evidence and which would be irrelevant, or for which no proof exists is improper and can constitute misconduct. Unwarranted abuse of opposing counsel or his client is improper and can be misconduct. The trial judge was quite correct in deciding that these and similar matters in cross-examination of the defendant were improprieties which warranted, if not required, mistrial.

In addition, “[e]ven if the defense had been guilty of serious misconduct, the prosecutor would not have been entitled to engage in abusive, argumentative and harassing conduct.”

Based on the misconduct, the court held that double jeopardy precluded a retrial: “Applying minimum standards of legal knowledge and competence, we must conclude that the prosecutor’s conduct was not simply erroneous, negligent or mistaken; portions of the questioning are so egregiously improper that we are compelled to conclude that the prosecutor intentionally engaged in conduct which he knew to be improper, that he did so with indifference, if not a specific intent, to prejudice the defendant.”

The court adopted the three-part standard that forms the basis of Arizona double jeopardy law in the area of prosecutorial misconduct. That standard is based upon Article 2, Section 10 of the Arizona Constitution. The court adopted a more restrictive standard than the U.S. Supreme Court in *Oregon v. Kennedy*, 456 U.S. 667 (1982). *Kennedy* holds that double jeopardy under the United States Constitution only precludes a retrial if prosecutorial misconduct “was intended to provoke the defendant into moving for a mistrial.”

Other sections cited in: Legal Overview of Prosecutorial Misconduct (Sections I.A.1, I.A.2, and I.B.6), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2), Double

Jeopardy (Section IX.1).

3. Less severe misconduct does not preclude a retrial

- a. *State v. Korovkin*, 202 Ariz. 493, 495–96, ¶¶ 5–10, 47 P.3d 1131, 1133–34 (App. 2002).

Facts: Two defendants were tried together. Both “had made statements about ‘racing’ that were admissible against themselves but, arguably, not against their codefendant, each defendant had a different jury, which allowed for the appropriate screening of inadmissible evidence.” “In opening statements made before both juries, the prosecutor stated, ‘Both defendants admitted racing down Oracle.’”

Both defendants moved for a mistrial, which was granted. They originally did not claim that double jeopardy precluded retrial, but later made that argument.

Holding: “Under *Pool*, the Double Jeopardy Clause of the Arizona Constitution, article II, § 10, bars a retrial if a mistrial is granted because of improper conduct by the prosecutor that is not merely the result of mistake, negligence, or minor impropriety but, rather, amounts to intentional misconduct pursued for an improper purpose and which causes prejudice to the defendant that cannot be cured other than by declaration of a mistrial. We defer to the trial court’s finding that the prosecutor’s comment here, if improper, was not intentionally so.”

The court also found that the defendant could not show any prejudice: “Ordinarily, a defendant who successfully moves for a mistrial is deemed to have consented to the retrial, thereby waiving any double jeopardy claim. But, double jeopardy principles will bar a retrial when the prosecutor intentionally commits prejudicial misconduct to the state’s advantage such as in the face of an impending acquittal, giving the defendant the Hobson’s choice of suffering the resulting prejudice or asking for a mistrial in a case he or she might be winning. . . . [The defendant’s] trial had not, therefore, progressed to a point at which the state would benefit from starting the trial anew. Because [the defendant] was not prejudiced by a mistrial and resulting retrial, it was an appropriate and adequate remedy.”

The court also noted that the defendant had argued that the

particular prosecutor had a history of misconduct: “Retrials are barred under the principles set forth in *Pool* not to punish prosecutorial misconduct, but to safeguard defendants’ double jeopardy rights. Although a pattern of misconduct might help establish that a prosecutor intended to cause a mistrial or was indifferent to that possibility in a given case, that principle has no application to a situation such as the one here, involving, at worst, a single misstep at the beginning of trial, for which the trial court expressly found ‘the prosecutor had no motivation—much less specific intent to provoke a mistrial.’ The trial court did not abuse its discretion in denying [the defendant’s] motion to dismiss the prosecution.”

- b. *State v. Trani*, 200 Ariz. 383, 384–87, ¶¶ 3–4, 10–16, 26 P.3d 1154, 1155–57 (App. 2001).

Facts: The defendant was accused of “ordering the raid of the home of a person who owed him a drug-related debt.” The defense suggested that a witness benefitted from a plea agreement, and therefore that the witness’s testimony was fabricated.

To rehabilitate the witness’s testimony, the prosecutor read from that witness’s statement which predated the plea agreement. The prosecutor read a question and answer indicating that the defendant had ordered the raid, which was inadmissible hearsay on the “central issue of the case: whether [the defendant] had ordered the raid and murder.” The trial court granted a motion for mistrial, and found that a retrial was precluded by double jeopardy.

Holding: The court described the case law, particularly *Pool* and *Jorgenson*. The court noted: “When the mistrial is the result of less egregious prosecutorial misconduct, however, appellate courts have rejected claims that the Double Jeopardy Clause bars a retrial.” The court found that prosecutor’s conduct was an isolated incident because the State did not gain significantly from the mistrial, the prosecutor immediately stopped when he realized he had read inadmissible hearsay, and there was no clear evidence that the prosecutor intended to cause the mistrial.

The court concluded: “We do not read *Pool* as prohibiting retrial any time a mistrial is declared or new trial ordered based upon prosecutorial misconduct. In order to justify a mistrial, the prosecutor’s conduct must deny the defendant a fair trial. But an

additional, improper intent to infect the trial with prejudicial error must exist, at least implicitly, in order to justify barring a retrial based upon double jeopardy.”

- c. *Miller v. Superior Court*, 189 Ariz. 127, 130–31, 938 P.2d 1128, 1131–32 (App. 1997).

Facts: The defendant was granted a new trial for prosecutorial misconduct. In his first trial, the defense attorney “sought to bolster the credibility of the victim’s new story by telling the jury that the victim had come from Massachusetts to testify because she was ‘not going to let the Defendant get convicted of something that didn’t happen.’” The concept of the victim coming from Massachusetts was not in evidence.

In his rebuttal closing argument, the prosecutor argued: “Did you hear any evidence that she was from Massachusetts? How did [defense counsel] know [the victim] was in Massachusetts? Unless [the victim] contacted the defendant recently and said, I am going to change my story and help you, that’s another fact.”

The defense moved for a new trial. The trial court found that the prosecutor’s comment was not supported by the evidence, and therefore “created a misleading impression,” so granted the motion. A different judge then denied a defense motion to dismiss on double jeopardy grounds.

Holding: The court analyzed the case under the three *Pool* factors. The court found that the conduct was sufficiently prejudicial and improper as to meet the first and third *Pool* factors.

However, the court found that the trial court did not abuse its discretion in denying the motion to dismiss: “The prosecutorial misconduct in this case was considerably more limited than that in *Pool*, and it was differently motivated. Here, the misconduct was one improper comment, the purpose of which was to rebut an improper comment by defense counsel. . . . One counsel’s error is no excuse for another’s misconduct, but the court can consider what provoked the misconduct.” Therefore, the court did not overrule the trial court’s decision that a new trial was the appropriate remedy.

- d. *State v. Detrich*, 178 Ariz. 380, 384–85, 873 P.2d 1302, 1306–07 (1994).

Facts: The appeal was of a second trial. The first trial ended in a

mistrial because “a police officer testified that defendant had remained silent when questioned.”

Holding: The court rejected the double jeopardy argument, and distinguished the case from *Pool*: “There, the prosecutor deliberately injected error in the first trial in order to force the defendant to request a mistrial. We found the conduct of the prosecutor in *Pool* ‘egregiously incorrect to the extent that we must infer that the questions were asked with knowledge that they were improper.’ Here the record shows no signs of the prosecutor “inviting” the error and with it, necessarily, a mistrial; thus, there was no egregious prosecutorial misconduct in the first trial.”

X. Alphabetical Listing of Arizona Cases on Prosecutorial Misconduct

Milke v. Mroz, 236 Ariz. 276, 339 P.3d 659 (App. 2014).

Sections: Discovery (Section IV.1), Double Jeopardy (Sections IX.1 and IX.2).

Miller v. Superior Court, 189 Ariz. 127, 938 P.2d 1128 (App. 1997).

Sections: Double Jeopardy (Section IX.3).

Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261(1984).

Sections: Legal Overview of Prosecutorial Misconduct (Sections I.A.1, I.A.2, and I.B.6), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2), Double Jeopardy (Sections IX.1 and IX.2).

State v. Aguilar, 217 Ariz. 235, 172 P.3d 423 (App. 2007).

Sections: Discovery (Section VI.2), Double Jeopardy (Section IX.2).

State v. Amaya-Ruiz, 166 Ariz. 152, 800 P.2d 1260 (1990).

Sections: Trial-Opening Statements in General (Section VIII.A.2), Trial-Appeal to Emotion (Section VIII.E.4), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1), Trial-Closing Argument in General (Section VIII.G.3).

State v. Anderson, 210 Ariz. 327, 111 P.3d 369 (2005), *supplemented* 211 Ariz. 59, 116 P.3d 1219.

Sections: Trial-Opening Statements in General (Section VIII.A.2), Trial-Closing Argument in General (Section VIII.G.2).

State v. Armstrong, 208 Ariz. 345, 93 P.3d 1061 (2004).

Sections: Prosecutorial Conduct in General (Sections II.3 and II.4), Discovery (Section VI.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

State v. Atwood, 171 Ariz. 576, 832 P.2d 593 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

Sections: Legal Overview of Prosecutorial Misconduct (Section I.B.3), Prosecutorial Conduct in General (Sections II.4 and II.5), Early Investigation (Section III.1), Pretrial (Section VII.1), Trial-

Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993).

Sections: Legal Overview of Prosecutorial Misconduct (Section I.B.4), Trial-Opening Statements in General (Section VIII.A.1), Trial-Vouching (Sections VIII.C.1, VIII.C.2, and VIII.C.3), Trial-Appeal to Emotion (Section VIII.E.2), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1), Trial-Closing Argument in General (Section VIII.G.3).

State v. Blackman, 201 Ariz. 527, 38 P.3d 1192 (App. 2002).

Sections: Trial-Vouching (Section VIII.C.2), Trial-Comments on Defendants' Failures to Testify (Section VIII.D.2), Trial-Appeal to Emotion (Section VIII.E.3), Trial-Closing Argument in General (Section VIII.G.3).

State v. Bracy, 145 Ariz. 520, 703 P.2d 464 (1985).

Sections: Prosecutorial Conduct in General (Section II.4), Discovery (Section VI.1), Pretrial (Section VII.1), Trial-Opening Statements in General (Section VIII.A.2).

State v. Brun, 190 Ariz. 505, 950 P.2d 164 (App. 1997).

Sections: Charging (Sections IV.1 and IV.2).

State v. Comer, 165 Ariz. 413, 799 P.2d 333 (1990).

Sections: Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.2), Trial-Closing Argument in General (Section VIII.G.3).

State v. Cornell, 179 Ariz. 314, 878 P.2d 1352 (1994).

Sections: Legal Overview of Prosecutorial Misconduct (Section I.B.3), Trial-Appeal to Emotion (Section VIII.E.3), Trial-Attacks on Defense Counsel and Defendants (Section VIII.F.1).

State v. Corona, 188 Ariz. 85, 932 P.2d 1356 (App. 1997).

Sections: Trial-Vouching (Section VIII.C.2), Trial-Closing Argument in General (Sections VIII.G.3 and VIII.G.4).

State v. Caperon, 151 Ariz. 426, 728 P.2d 296 (App. 1986).

Sections: Plea Negotiations (Section V.2).

State v. Detrich, 178 Ariz. 380, 873 P.2d 1302 (1994).

Sections: Double Jeopardy (Section IX.3).

State v. Doerr, 193 Ariz. 56, 969 P.2d 1168 (1998).

Sections: Trial-Vouching (Section VIII.C.2).

State v. Dickens, 187 Ariz. 1, 926 P.2d 468 (1996), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012).

Sections: Prosecutorial Conduct in General (Section II.3),
Discovery (Section VI.1).

State v. Dumaine, 162 Ariz. 392, 783 P.2d 1184 (1989), *disapproved on other grounds by State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010).

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