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Identifying and Preventing Improper Prosecutorial Comment In Closing Argument

Robert W. Clifford

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IDENTIFYING AND PREVENTING IMPROPER PROSECUTORIAL COMMENT IN CLOSING ARGUMENT

Robert W. Clifford

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IDENTIFYING AND PREVENTING IMPROPER PROSECUTORIAL COMMENT IN CLOSING ARGUMENT

Robert W. Clifford*

I. INTRODUCTION

In recent years, several decisions of the Maine Supreme Judicial Court sitting as the Law Court have addressed the comments of prosecutors in final argument before criminal juries. Three of those decisions in particular have caused concern among prosecutors and have stirred discussion in the Maine legal community. In vacating convictions in State v. Steen, State v. Casella, and State v. Tripp, the Law Court focused on the language used by the prosecutors during closing argument and concluded that those prosecutors impermissibly expressed personal opinion concerning the credibility of the defendants, or witnesses called by the defendants.

This Article examines the decisional law of Maine in dealing with improper prosecutorial closing argument in the context of Steen, Casella, and Tripp. What the court has identified in those cases as prosecutorial misconduct in the closing argument is the expression of personal opinion by the prosecutor on the credibility of the defendant, or a witness for the defendant. The characterization of the closing argument as personal opinion is based on language used by prosecutors, frequently the use of pejorative language that the court found to be insufficiently connected to and justified by the evidence. A review of how the court has applied the law in this area reveals that, except in a few of its opinions, particularly Casella, and a 1983 case, State v. Smith, when emphasis was placed on the pejorative language used by the prosecutors without full consideration of the context in which the language was used, the court has correctly addressed the cases that have come before it.

* The Honorable Robert W. Clifford is an Associate Justice of the Maine Supreme Judicial Court.

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5. See State v. Steen, 632 A.2d at 149. Comments on the credibility of a witness for the State also may be improper. See State v. Comer, 644 A.2d 7, 10 (1994).
6. 456 A.2d 16 (Me. 1983).
7. In both Casella and Smith, the prosecutors referred to the defendants as liars. More careful use of language by the prosecutors, and a more proactive trial court could have avoided the allegations of misconduct. See infra note 88.
8. In State v. Tripp, 634 A.2d 1318 (Me. 1994), the court vacated the conviction by concluding that the prosecutor’s misconduct constituted obvious error. See id. at 1320; see also id. at 1321 (Clifford, J., dissenting). Although the court’s application of the obvious error standard in Tripp has been criticized, see Gunson, supra note 2, the improper application of obvious error generally has not been a recurring or persistent problem in dealing with alleged prosecutorial misconduct. Accordingly, this paper does not address the standard of obvious error in any detail. See infra notes 61 and 120.
The rationale for the limits imposed on what prosecutors are permitted to say in closing argument is related to the roles of the participants in a criminal trial, especially the unique factfinding role of the jury, and the prominence and the prestige associated with the prosecutor’s office, which in Maine is the office of the District Attorney9 or Attorney General.10 By expressing a personal opinion on the credibility of a witness in closing argument, an attorney is usurping the jury’s role as the factfinder, and diverting the attention of the jury from determining the guilt or innocence of the defendant based on the evidence.11 The rule has particular application to prosecutors “because of the possibility that the jury will give special weight to the prosecutor’s arguments, not only because of the prestige associated with the prosecutor’s office, but also because of the fact-finding facilities presumably available to the office.”12

The proper standard for prosecutorial summation is set out in Berger v. United States13 and is well known. A prosecutor

may prosecute with earnestness and vigor, indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.14

Maine’s Law Court long ago expressed a similar standard. “As is permitted to the debater in parliamentary contests the legal advocate may employ wit, satire, invective, and imaginative illustration in his arguments before the jury, both in civil and criminal trials, but in this the license is strictly confined to the domain of facts in evidence.”15 The court reiterated this standard more recently:

In arguing the State’s case to the jury, a prosecutor may use “wit, satire, invective and imaginative illustration.” . . . Nevertheless, “the prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, in injecting issues broader than the guilt or innocence of the accused under the prevailing law. . . . The prosecutor must limit his argument to the facts in evidence. . . . He must avoid prejudicial misstatements of the law. . . . Further, the prosecutor must not demean legitimate defenses available under the law. . . .”16

There appears to be little disagreement over what the standard is. The difficulty is in applying the standard to individual cases, distinguishing proper closing argument from improper personal opinion, and determining what language means in

12 A.B.A. STANDARDS FOR CRIMINAL JUSTICE 3-5.8 commentary (Prosecutorial function). See also DISORDER IN THE COURT: REGULATING THE CONDUCT OF THE PROSECUTOR, Report of the Bar of the City of New York, Special Committee on Courtroom Conduct, 185 (1973). See also State v. Comer, 644 A.2d 7, 9 (Me. 1974) (prosecutor cloaked with the authority of the State); see infra, pp. 258-64.
14. Id. at 88.
the context of the case in which it is used. "Each case, however, must be examined on its own facts."17

The impermissible conduct, the "foul blow," most often identified by the Law Court is the prosecutor's attacking the credibility of the defendant,18 or a witness for the defendant,19 or vouching for the credibility of a witness for the State.20 Review of allegations of prosecutorial misconduct by an appellate court is difficult. Action at the trial court level by the participants at the trial is significantly more effective in preventing, controlling, and correcting such misconduct. In particular, prosecutors can almost always avoid allegations of misconduct by arguing for the jury to reach only those conclusions justified by the evidence; by linking comments or witness credibility to facts in the evidence; and by avoiding the use of language that can be characterized as personal opinion or as attacks on the character of witnesses. Defense attorneys play an important role in policing the conduct of prosecutors by objecting to improper closing argument by the State so that the prejudice may be cured by the trial court. Unlike an appellate court, the trial court can identify improper summation as it occurs and take immediate and effective action to correct the damage caused by that summation.

II. RECENT CASES FOCUSED ON PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

Within a nine-month period during 1993 and 1994, the Law Court vacated three convictions on the basis of prosecutorial misconduct.21 In each of those cases, the comments made by the prosecuting attorney during closing argument were cited in part as the reason for the convictions being vacated. The opinions in those cases resulted in a critical comment in the *Maine Law Review*,22 and caused legitimate concern in the prosecutorial community.23 When reviewed in the context of prosecutorial misconduct cases that preceded them, however, and with the more recent opinions in which prosecutorial misconduct has been alleged, *Steen*, *Casella*, and *Tripp* do not lead to the conclusion that Maine prosecutors are prevented from arguing in an effective manner.

A. State v. Steen

In *State v. Steen*,24 Steen was charged with gross sexual assault after an incident that occurred at a college fraternity party in Gorham. The only two witnesses to the event were Steen and the victim. Steen did not deny that there was sexual contact; instead his defense was that the sexual conduct was consensual. Accord-

17. *Id.* (citing State v. Dana, 406 A.2d 83, 88 (Me. 1979)).
20. See *State v. Comer*, 644 A.2d 7, 10 (Me. 1994). See also Saltzburg, supra note 11, at 44.
22. See Gunson, note 2.
23. See *id.* at 242, n.15.
24. 623 A.2d 146 (Me. 1993).
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ing to the investigating detective, Steen made several inculpatory statements during the initial interview. Following a conviction after a jury trial, Steen appealed on the basis of prosecutorial misconduct. The court characterized the closing argument as improper, but the State’s cross-examination of the defendant was conduct far more egregious. The prosecutor asked Steen twenty-four questions requiring him to give an opinion as to whether other witnesses were lying. Although Steen objected to the questions several times, the trial court sustained only one of the objections. During her closing argument, the prosecutor denigrated the testimony of Steen’s medical expert.

The Law Court vacated the conviction based on the prosecutor’s conduct. The court noted that questions forcing a defendant to judge the credibility of other witnesses impermissibly invade the province of the jury to make that determination itself. The court, citing State v. Smith, also concluded that the prosecutor’s cross-examination of Steen and her closing argument were suggestions to the jury that the defendant lied on the stand. The court’s decision was unanimous.

The most pervasive prosecutorial misconduct in Steen, and the conduct most responsible for the decision to vacate, was the continued questioning of Steen, over his objection, as to whether other witnesses, whose testimony differed from Steen’s, were lying. Because such questions create the impression that the jury could believe the defendant only if the jury found another witness lied, and because credibility evaluation is for the jury, they are improper and the court was following clear precedent in concluding that the trial court erred in allowing those questions and that the error was harmful.

Similar questioning by the prosecutor during his cross-examination of the defendant was an important factor in the decision to vacate the conviction in State v.

25. See id. at 148.
26. See id.
27. See id. n.2. The following questions were among those asked of Steen by the prosecutor:
   Q. I want you to tell me which statements you say really happened and which statements you’re saying detective Brown is lying about.
   Q. Well, are you saying that everything [the victim] said to this jury is a lie?
   Q. And everyone else who testified in this courtroom all week long was lying?
   The prosecutor also asked Steen: “So you made this one up on your own?” and “So now we have three versions . . . . It is hard for you to keep this all straight, isn’t it?” Id. at 149.
28. See id. at 149. In her closing argument, the prosecutor said: “so [Steen’s medical expert’s] opinion is not based on his clinical expertise, his opinion is not based on his education, his opinion is not based on studies that he has conducted or studies he has read. I suggest to you, ladies and gentlemen that his opinion [that the vaginal tear of the victim was not big enough for it to have been caused by rape] is based on $2,500, the money the defendant paid him for his testimony.” Id.
29. See id. at 148-49. See State v. Commeau, 409 A.2d 247, 249 n.1 (Me. 1974) (cross-examination that attempts to push defendant into saying other witnesses lied is improper); State v. Bourgeois, 639 A.2d 634, 638 (Me. 1994). But see State v. Goodwin, 1997 ME 69, ¶¶ 5–6, 691 A.2d 1246, 1247-48 (permissible in cross examination to identify and highlight differences between testimony of defendant and that of other witnesses if pertaining to questions of fact and not opinion).
32. See id. at 150.
Tripp, that followed soon after Steen.35 Moreover, in three subsequent decisions rejecting challenges to the conduct of the prosecutor in closing argument, the court noted the absence of questions asked of the defendant that “compelled” him to accuse a witness of lying.36 The Law Court has recently pointed out that it is permissible to “ascertain specifically areas in which the defendant disagrees with other witnesses, if such questioning calls for a statement of fact rather than of opinion. Differences in testimony can be identified without asking the defendant’s opinion whether the other witnesses were incorrect, mistaken, inaccurate, or suffered poor memory.”37

In retrospect, the prosecutor’s suggestion to the jury that the testimony of Steen’s expert was influenced by the $2,500 fee he was paid seems significantly less egregious than the questions asked of the defendant on cross-examination. That Steen’s conviction would have been vacated if the only issue on appeal were the prosecutor’s summation is doubtful. More careful use of language by the prosecutor, however, such as inviting the jury, in view of the evidence from the other expert witnesses, and the testimony of the victim, to consider whether the testimony of Steen’s expert may have been influenced by the $2,500 fee, could have avoided an issue on appeal.

B. State v. Casella

In State v. Casella,38 a four-member majority of the court vacated the defendant’s convictions of four counts of theft and one count of witness tampering on the basis that the prosecutor, by repeatedly asserting in his closing argument that Casella had lied, had impermissibly expressed a personal opinion that the defendant had lied.39 The charges against Casella stemmed from the failure to return down payments to customers and the failure to deliver to them a machine that he had represented that his company manufactured and sold.40 During the closing argument, the prosecutor stated forty-one times that Casella had lied.41 Casella’s counsel objected and unsuccessfully moved for a mistrial.42 Despite the prosecutor’s contention that deception on the part of Casella was the issue in the case, and that therefore his summation was based on the evidence and fully justified, the four justice majority disagreed:

The fact that the charges are based on deception does not mean that the prosecutor is therefore free to express his personal opinion that the defendant was lying in court. A rule allowing the prosecutor to express his opinion on the credibility of the defendant’s testimony in cases where the defendant’s veracity is central to the prosecution has no precedent in our jurisprudence.43

35. See State v. Tripp, 634 A.2d 1318, 1320 (Me. 1994).
37. State v. Goodwin, 691 A.2d at 1248.
38. 632 A.2d 121 (Me. 1993).
39. See id. at 122.
40. See id. at 121.
41. See id.
42. See id. at 122.
43. Id. at 123.
Three members of the court dissented. The dissent agreed that prosecutors should be prohibited from expressing a personal opinion on the credibility of the defendant. The dissent, however, concluded that the State’s closing argument, when examined in its entirety and in the context of the nature of the charges against Casella, and Casella’s defenses to those charges, was fairly based on the facts in evidence and that the vigor and zeal expressed in the State’s summation was permissible.

The central thrust of the State’s case was that Casella cheated the victims out of their money, and that he operated his business on the basic principle that he would say anything, do anything, and tell any lie to get their money. The evidence presented at trial demonstrated Casella’s elaborate scheme of defrauding his customers by making false promises and keeping their money without authorization. Casella himself took the stand, denied lying to the victims, and directly contradicted the State’s witnesses and evidence by stating that the charges brought against him merely involved simple business disputes. By equating the theory of Casella’s defense with the same principles that he exhibited in his business, and inviting the jury’s comparison, the State’s argument taken in full context does not amount to an expression of personal opinion as to Casella’s credibility.

Even though the defendant’s veracity was the central and, indeed, the only real issue during the trial, the majority viewed the prosecutor’s characterizations as personal opinion and overturned the conviction.

Because the prosecutors are “cloaked with the authority of the State,” they must choose their words in a closing argument with great care. Statements that a defendant is a “liar,” or is “guilty,” or that a State’s witness is “truthful,” without directly connecting those statements to evidence before the jury, are likely to be characterized by an appellate court as personal opinion. In Casella, language such as “I submit that the defendant’s testimony is not credible,” or “the evidence clearly demonstrates that the defendant’s testimony is not truthful,” if linked to the evidence, would be permissible.

C. State v. Tripp

State v. Tripp involved a father’s appeal from his conviction on three counts of gross sexual assault against his son. During the State’s cross-examination of Tripp, the prosecutor, as the prosecutor did in State v. Steen, asked the defendant...
several questions that required him to answer whether his son was lying. Tripp did not object to the questions. During closing argument, the prosecutor argued that the child victim would not lie about the details he related, and that either the victim or the defendant "wasn't telling the truth. One of them was lying here to all of us." Again, the defendant did not object to the State's closing argument.

Despite the failure of Tripp's counsel to preserve any objection to the method of cross-examination or the substance of the closing argument, the Law Court vacated Tripp's conviction. The court concluded that the State's cross-examination of Tripp amounted to obvious error, and that the statements in the prosecutor's closing argument constituted obvious error as well. The court stated that because the jury had heard both the victim and defendant testify the jury was in a position to make its own determination of the credibility of the witnesses in drawing its conclusions.

The dissent agreed that some of the questions asked by the State constituted error, but pointed out that Tripp's own attorney, in his summation, had said to the jury that "either... [the victim] or [Tripp] is lying. Either the assaults occurred or they didn't." The dissent concluded that, viewing the record in its entirety, the errors in the State's cross-examination and the closing argument of the prosecutor did not amount to obvious error.

As was the case in Steen, the improper cross-examination of the defendant by the prosecutor was the conduct most probably responsible for the conviction being vacated. The court would probably not have concluded that the summation alone, in the absence of the improper cross-examination of the defendant constituted obvious error. In three subsequent cases, decided not long after Steen and Tripp, the court noted the absence of improper questions to the defendant regarding credibility of other witnesses in concluding that there was no obvious error by the prosecutor in the closing argument.

The opinions in Steen, Casella, and Tripp received criticism from the bar, especially from prosecutors, and ultimately generated a well-written comment published in the Maine Law Review. That comment was critical of the opinions.

53. See id. nn. 2-4. See also State v. Commeau, 409 A.2d 247, 249 n.1 (Me. 1979); State v. Steen, 623 A.2d 146, 148-49 (Me. 1993).
54. See State v. Tripp, 634 A.2d at 1319.
55. See id. at 1319-20 n.5.
56. See id. at 1319-20.
57. See id. at 1320.
58. See id. at 1321. It appears that the prosecutor's closing argument in Tripp is not markedly different from the closing argument used by the prosecutor in State v. Smith, 456 A.2d 16, 17 (Me. 1983). See discussion infra at pp. 250-51. Based on the opinion in Tripp and on opinions in three cases since Tripp, it is clear that improper cross-examination questions of Tripp played a major role in the court's conclusion that the State's summation was obvious error. See supra note 35 and infra note 62.
59. See State v. Tripp, 634 A.2d at 1320.
60. See id. at 1321 (Clifford, J., dissenting).
61. See id. (Clifford, J., dissenting) (alterations in original).
62. See id. (Clifford, J., dissenting).
63. See State v. Corrieri, 654 A.2d 419, 422 (Me. 1995); State v. Moontri, 649 A.2d 315, 316-17 (Me. 1994); State v. Comer, 644 A.2d 7, 10 (Me. 1994).
64. See supra note 8 and infra notes 67 and 134.
65. See Gunson, supra note 2.
in Steen, Casella, and Tripp for failing to distinguish between proper argument based on the evidence in the record and the prosecutor's personal opinion, for focusing exclusively on the conduct of the prosecutor without analyzing the effect of that conduct on the deliberations of the jury, and, in Tripp, for redefining the standard for obvious error. The comment also prophetically suggested that these cases would lead to an increased number of appeals raising the issue of prosecutorial misconduct.

III. PRIOR CASE LAW

Steen, Casella, and Tripp, however, were not the first cases dealing with the appropriateness of prosecutorial summation. Relatively few of those cases decided prior to Steen resulted in convictions being vacated. In State v. McDonald, the conviction was vacated because the State, in its closing, impermissibly denigrated the defense of insanity. In State v. Pineau, the Law Court vacated Pineau's conviction because in the State's closing, the prosecutor injected fear into an operating under the influence case by asking jurors to imagine being on the road at the same time as the defendant.

In State v. Reilly, Reilly's conviction for assault on an officer was vacated based on an improper closing argument by the prosecutor. In his closing, the prosecutor stated that the defense attorney had conceded that the police were telling the truth when no such concession had been made, that defense counsel knew the police were truthful, and that they knew the defendant was lying. The court characterized the State's summation as "prosecutorial overkill," and a violation of M. Bar R. 3.7(e), and vacated the conviction even though the defense had made no objection to the closing at the trial. The court commented that the prosecutor "clearly stepped across" the "line between proper and improper behavior," a line the prosecutor should "stay a safe distance away from" if he "cannot discern [it] with confidence." The Reilly court noted "we do not condone the use of pejoratives such as 'liar.'"
In 1983, in *State v. Smith*, the court again invoked prosecutorial misconduct to vacate a conviction. Smith was charged with assault against a teacher and a security guard at a boarding school in Bethel. The jury acquitted Smith of assault on the security guard, but found him guilty of attacking the teacher, who was acting as a supervisor. Smith's appeal was based on what he contended were prejudicial comments that the prosecutor made in closing argument.

In the closing, when commenting on some of the defendant's testimony and a prior inconsistent statement, the prosecutor stated, "'He [defendant] gets caught lying and he can't even admit it.'" In rebuttal, the prosecutor argued that "'[y]ou people are smarter than that, to let him [defendant] come in here and tell you he was telling the truth because he wasn't.'" Defense counsel did not object to either of these statements. The statement to which defense counsel did object was made by the prosecutor in finishing his rebuttal. He stated that the jury should hold the defendant responsible for what he did or "'you tell him it's okay to lie.'" Smith's counsel objected to the State's closing comment, asked for a corrective instruction, and moved for a mistrial after the court had instructed the jury. The trial court denied the motion and concluded that the argument was legitimate.

On appeal the Law Court disagreed and vacated the conviction based on prosecutorial misconduct. The court noted that "'[t]he trial essentially pitted Smith's credibility against that of [the teacher] and [the security guard]'" and concluded that the prosecutor's remark was "'conveying his opinion that Smith had lied and was therefore guilty.'" Stating the law correctly, the court noted that "'[a]lthough the prosecutor may properly attack defendant's credibility by analyzing the evidence and highlighting absurdities or discrepancies in defendant's testi-

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79. 456 A.2d 16 (Me. 1983).
80. See id. at 17.
81. See id. at 16-17.
82. Id. at 17.
83. Id.
84. See id.
85. See id.
86. Id.
87. Id.
88. See id. As the trial judge in *Smith*, I readily concede that the trial court should have addressed Smith's motion in a different manner. One can argue with the conclusion of the Law Court in *Smith* that the prosecutor's summation was the expression of a personal opinion not based on the evidence. Nevertheless, in view of the objection made, the jury should have been instructed that the argument of the prosecutor was not evidence, and that the jury should assess the evidence and the credibility of the witnesses on its own, based on the evidence. If such an instruction or a similar instruction had been given in response to the objection, the result of the appeal most likely would have been different. See State v. Reilly, 446 A.2d 1125, 1129 (Me. 1982) (prompt and appropriate curative instruction may well alleviate damage caused by very egregious conduct of prosecution); see discussion infra pp. 14016, (discussing the role of the trial court and the importance of curative instructions). Moreover, the prosecutor would have been well advised to use more care in his choice of words to couch his references to the defendant's credibility with words like "'I submit' or "'I suggest that the evidence shows,'" and to specifically connect the comments on credibility to the evidence. See discussion infra, pp. 263-64, (discussing careful use of language by prosecutors).
89. State v. Smith, 456 A.2d at 19.
90. Id. at 17 (alteration in original).
91. Id.
mony, and may present his analysis in summation with vigor and zeal, he may not properly convey to the jury his personal opinion that a defendant is lying."92 The court emphasized the special role of the prosecutor and that "[h]is remarks are those, not simply of an advocate, but rather of a [government] official duty-bound to see that justice is done."93 The court concluded that the trial court's refusal to give a corrective instruction after the reading of the jury instructions was an abuse of discretion.94

The Law Court, in its analysis of whether the error was harmless, noted that "[t]he credibility of the participants in the fight was crucial, and the prosecutor's improper remarks went directly to that issue."95 That the prosecutor's closing statement goes directly to credibility, however, should not alone make it improper. The issue should be whether the closing is based on and justified by the evidence. In Smith, the prosecutor's remarks appear to have been grounded in the evidence. Smith's own testimony, as well as other evidence, demonstrated his reputation for untruthfulness. Smith had recounted a different version of the assault under oath prior to the trial, and other witnesses testified that Smith told a different story on the night of the incident.96 Smith's counsel voiced no objection to the State's closing until after the jury instructions and the jury was about to retire to begin deliberations.97 Although the prosecutor's language did not always directly connect Smith's credibility to the evidence, and he would have been well advised to use language such as "the evidence shows that Smith is lying," or "I suggest to you, that based on the evidence in this case, the defendant did not tell the truth, and if you do not find him guilty, you are telling him that it's okay," the prosecutor did not clearly convey that he had a personal opinion as to Smith's credibility. He never said that he "believed" that Smith was lying. Smith was charged with a crime of violence not involving trickery and deception, and the credibility of the witnesses was central to the case. The court's decision is based on its conclusion that the prosecutor was impermissibly expressing an opinion on the defendant's credibility. Unfortunately, the opinion does not address the extent to which the prosecutor's comments in his summation may be justified by the evidence in the case, and the court comes close to applying a per se rule on the use of the word "liar."98 Nevertheless, more careful choice of language by the prosecutor certainly could have avoided the issue on appeal.99

Pre-Steen, Casella, and Tripp appeals based on prosecutorial misconduct, however, generally did not result in convictions being vacated. In State v. Dana,100 for

92. Id.
93. Id. at 18 (alteration in original) (quoting United States v. Modica, 663 F.2d 1173, 1178 (2d Cir. 1981)). See discussion infra pp. 258-64 (discussing unique role of prosecutor).
95. Id. at 19.
96. See State's brief at 12; State v. Smith, 456 A.2d 16 (Me. 1983).
98. In State v. Reilly, 446 A.2d 1125 (Me. 1982), in a footnote, the court seems to refer to a per se rule prohibiting the use of the word "liar." Id. at 1129-30 n.2. But see State v. Harnish, 560 A.2d 5, 9 (Me. 1989); State v. Pendexter, 495 A.2d 1241, 1241 (Me. 1985) (use of word "liar" in State's closing may be justified by the evidence).
99. See infra pp. 263-64.
100. 406 A.2d 83 (Me. 1979).
example, the prosecutor’s statements in closing argument as to what a jury should believe were held not to constitute error, and reference to the defendant’s race, because it was inadvertent, did not rise to the level of obvious error.

In State v. Vigue, the prosecutor’s reference to his own expertise and training in law enforcement was improper, but did not amount to obvious error. In State v. Terrio, the prosecutor improperly alluded to statements that were not in evidence, but it was not error for the trial court not to order, sua sponte, a mistrial, when defense counsel failed to object and adamantly refused a curative instruction suggested by the court. In State v. Johnson, a prosecutor’s remark in closing argument that of three versions of the event before the jury, not all could be true, was not error.

In State v. Hinds, in his closing argument, the prosecutor referred to charges against the defendant as “nasty stuff,” characterized a defense witness as “a very street-smart, intelligent, good-looking young man,” and referred to the prosecution against the defendant as “this kind of show.” In upholding the conviction, the Law Court stated that a “court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damming interpretations.” In addition, the prosecutor told the jury that if it believed the complainant, it should convict the defendant, and that if it did not believe the testimony, it should find the defendant not guilty. The court also rejected the defendant’s argument that the prosecutor’s remarks oversimplified the jury’s duty and misstated the burden of proof.

In State v. Dube, a statement by the prosecutor that “I think [the State’s witness] is a very good witness,” although an improper assertion of the prosecutor’s personal opinion, was held not to constitute obvious error. Statements in the State’s closing argument that the police had done good work in their investigation likewise did not rise to the level of obvious error in State v. Niemszyk. In his closing statement in State v. Tomah, the prosecutor told the jury that he believed the police testified professionally, that the tracking dog did a good job, that people do not forget the names of people with whom they served in the military, that his questioning of the defendant had “stretched defendant’s credibility to the breaking

101. See id. at 86.
102. See id.
103. 420 A.2d 242 (Me. 1980).
104. See id. at 246-47.
105. 442 A.2d 537 (Me. 1982).
106. See id. at 540-43.
108. See id. at 1373.
110. Id. at 237.
111. Id. at 238 (quoting State v. Gordon, 321 A.2d 352, 364 (Me. 1974)).
112. See id. at 238.
113. See id.
114. 522 A.2d 904 (Me. 1987).
115. Id. at 908.
116. 551 A.2d 842, 844 (Me. 1988).
A brief overview of those cases gives us a better understanding of where the court locates the line between proper argument and improper personal opinion. In *State v. Comer*, the defendant was convicted of five counts of gross sexual misconduct and five counts of unlawful sexual contact. The victim was the young son of the defendant's girlfriend. After accusing the defendant of sexual misconduct, the victim later retracted the accusation before testifying at the trial that the abuse occurred. Comer contended on appeal that the prosecutor had improperly commented on the veracity of the victim during the prosecutor's final argument. The prosecutor "suggested" to the jury that the victim "told you the truth," that the victim's testimony is "the truth," that the victim "came in here to tell you the truth," that the victim had no motive to lie, that the jury's role is to seek the truth and the victim "is giving you what you are seeking and that is the truth." Because Comer never objected to the conduct at trial, the court correctly reviewed the contention on appeal for obvious error.

Faced with a similar procedural situation as in *Tripp*, the court affirmed the conviction. The court noted that the case was a close one and reviewed its prior opinion in *Tripp*. Although the outcome may have been different had the defendant properly objected at trial, the court found no obvious error. The court noted that the prosecutor did not ask any improper questions regarding witness credibility, nor did he suggest that the defendant, who did not testify, had lied. The court noted that:

> As the argument progressed, the phrase "from the evidence" was dropped, and the prosecutor came perilously close to replicating the offending argument in *Tripp*. We cannot say that this is not error, but reading the entire argument as a whole, it is reasonable to assume that the jury was not induced to focus on anything other than the evidence.

The court described the prosecutor's words as "ill-chosen" but found that Comer, unlike Tripp, had not been deprived of a fair trial. Had the prosecutor continued to connect his references to the victim's credibility to the evidence, his words would not have been considered "ill-chosen."

129. 644 A.2d 7 (Me. 1994).
130. See *id.* at 8.
131. See *id.*
132. *Id.* at n.1.
133. See *id.* at 9. The court described "obvious error" as error "so highly prejudicial that it tainted the proceedings and virtually deprives defendant of a fair trial." *Id.* at 9 (citing *State v. True*, 438 A.2d 460, 468 (Me. 1981)). See also *State v. Pelletier*, 673 A.2d 1327, 1330 (Me. 1996) (obvious error standard also applies to statements made during opening statement of prosecutor if no objection made). Not surprisingly, vacating a judgment on the basis of obvious error is exceedingly rare. See *State v. Borucki*, 505 A.2d 89, 94 (Me. 1986) (review of obvious error exercised when effect of inadmissible evidence was "seriously prejudicial error tending to produce manifest injustice.") (quoting *State v. True*, 438 A.2d at 469). The Law Court has correctly applied that standard in cases since *State v. Tripp*. See supra notes 8 and 67.
134. See *State v. Comer*, 644 A.2d at 10.
135. See *id.* See also supra note 34, infra note 143.
136. See *id.*
137. See Stephen A. Saltzburg, *supra* note 11, at 44; see also discussion infra Part V.A.
139. See *id.*
point," and that "if you sit on a jury for twenty years, you'll never see a more rock solid case." The court considered the argument improper, but concluded that it was not obvious error.

In two cases the Law Court concluded that references to the defendant or to a witness as a liar were permissible, because the references were justified by the evidence. In State v. Pendexter, the prosecutor referred to a witness as "an admitted thief and an admitted liar." Rejecting Pendexter's contention that the court should have given a curative instruction or granted a motion for a mistrial, the court concluded that because the witness freely admitted to stealing a motor vehicle and lying about it, the comment was fairly based on the evidence. In State v. Harnish, the prosecutor stated that the defendant did not tell the truth, "suggested" that he reacted with lies, talked about his false statements, asked why he lied, stated that he made misstatements or lies, and that he did not tell the truth. The Law Court observed that the argument was based on the evidence and noted that, because Harnish did not request a curative instruction, that the denial of his motion for a mistrial was not an abuse of the court's discretion.

A fair reading of the cases prior to Steen, Casella, and Tripp alleging prosecutorial misconduct in closing argument do not reflect an unfair advantage in favor of defendants, nor do they show that prosecutors were being unduly restricted in what they could argue to the jury in summation. The opinions in Steen, Casella, and Tripp apparently caused some concern about the extent to which prosecutors were still free to vigorously argue in favor of convictions, and resulted in more challenges on appeal based on alleged misconduct on the part of prosecutors.

Most of the challenges were based on an obvious error standard of review, objections to the closing arguments of the State not having been preserved. They did not result in any convictions being vacated.

IV. POST-TRIPP CASE LAW

Although the Law Court's opinions since Steen, Casella and Tripp have been critical of some of the language used by prosecutors in closing arguments, fairly read they say that if prosecutors base closing arguments on the evidence, choose carefully the language they use, and avoid stating what reasonably can be taken as personal opinion, they can advocate with zeal and vigor without fear of a just conviction being vacated.

118. Id. at 1269.
119. See id. at 1269-70. It may be difficult to reconcile the result in State v. Tomah with that reached by the Court in State v. Tripp, 634 A.2d 1318 (Me. 1994).
120. 495 A.2d 1241 (Me. 1985).
121. Id. at 1241.
122. See id. Although Pendexter seems inconsistent with language appearing in other cases, see, e.g., State v. Reilly, 446 A.2d 1125, 1129 n.2 (Me. 1982) ("we do not condone the use of pejoratives such as "liar""), nevertheless, the open admission of the witness to lying and to theft connected the comment of the prosecutor to the evidence and justified the result.
123. 560 A.2d 5 (Me. 1989).
124. See id. at 9.
125. See id. at 10.
126. See Gunson, supra note 2, at 242 n.15.
127. See id. at 282.
128. See infra note 133.
In *State v. Moontri*, the defendant appealed his conviction for murder, aggravated assault, criminal threatening with a dangerous weapon, and assault. During the closing argument the prosecutor explained inconsistencies between the testimony of eyewitnesses by suggesting that it was not unusual for witnesses to have different recollections of the same event. These comments were not objected to. Although the court noted that the prosecutor used the "unfortunate" and "ill-chosen" phrase "I think," the court concluded that the State's argument was not obvious error. Citing Maine Bar Rule 3.7(e)(2)(v), which allows a lawyer, including the prosecutor, to argue "for any position or conclusion" grounded in the evidence, the court concluded that the State's argument was fairly based on the evidence and did not improperly reflect a personal belief that a witness had lied. The court described the State's argument as an appeal to common sense and experience that did not cross the line into prohibited argument. The court concluded that "[w]hen viewed in context, the State's comment is based on the evidence . . . ." The court correctly viewed the State's closing in the context of the entire trial and concluded that some use of careless language, such as "I think" (as opposed to more carefully selected language such as "the evidence suggests") did not rise to the level of obvious error.

In *State v. Hoffstadt*, a case involving unlawful sexual contact, the defendant contended on appeal that the State, in its closing argument, improperly commented on the veracity of the victim and the victim's mother. Recognizing that Maine Bar Rule 3.7(e)(2)(v) prohibits all attorneys from expressing personal opinion as to the credibility or truthfulness of a witness and that this rule has particular application to a prosecutor, the court nevertheless pointed out that the State "is . . . not barred from commenting on the fact that witness credibility is a crucial issue in a case." The court went on:

The central question is whether the comments are fairly based on the facts in evidence. . . . The record in this case discloses that the State did not give its personal opinions as to witness credibility, but rather suggested to the jury that the testimony of the victim and her mother was properly motivated by truth and not fabricated because of bias against Hoffstadt, or because the victim wanted to shift blame for what she was observed doing with another child in the neighborhood. The State pointed toward the inferences that it wanted the jury to draw from the evidence and argued "[its] analysis of the evidence for [a] . . . conclusion [of the defendant's guilt]."

140.  649 A.2d 315 (Me. 1994).
141.  See id. at 316-17.
142.  See id. at 317.
143.  Id. The court, as it did in *State v. Comer*, 644 A.2d 7, 10 (Me. 1994), noted that the State did not question the defendant concerning the veracity of other witnesses. See *State v. Moontri*, 649 A.2d at 317; *see also* *State v. Corrieri*, 654 A.2d 419, 422 (Me. 1995).
144.  652 A.2d 93 (Me. 1995).
145.  See id. at 96. The opinion does not set out in detail the actual language used by the prosecutor.
146.  Id. at 96.
147.  Id. at 96-97 (citing ME. BAR R. 3.7(e)(2)(v)); *see also* *State v. Ardolino*, 1997 ME 41, ¶ 22, 697 A.2d 73, 80 (finding that, if summation is based on evidence and inferences that may be drawn from evidence, it is not error for prosecutors to argue for any position or conclusion in respect thereto).
In *State v. Weisbrode*, the defendant appealed from his conviction for three counts of unlawful sexual contact. He contended that during the closing argument the prosecutor expressed his personal opinion on the credibility of the witness when he stated "[o]r you may end up saying that this 12-year old boy ... told you this for one reason and one reason only, and that is because it happened." The court concluded that the statement was not improper because the prosecutor "was merely advising the jury that it could conclude that the victim was telling the truth." The court noted that the "[defendant] took the stand and directly contradicted the victim’s testimony, turning the trial into a credibility contest." The court then concluded:

The prosecutor’s statements did not represent improper personal opinion. The argument was a reply to a defense strategy that placed the defendant’s credibility in competition with that of the victim; it asked the jury to use its common sense to assess the credibility of witnesses in light of the testimony given by the victim and the defendant’s vested interest in securing an acquittal.

The court also rejected Weisbrode’s contention that the comment made during the final argument that if the victim is making up the story he told, he would “have to be a sociopathic little devil,” was improper. The court said that even though the prosecutor’s comment came close to “divert[ing] the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the prevailing law,” nevertheless it did not constitute obvious error.

Prosecutorial misconduct has been alleged in several other post-*Tripp* cases as well. None of these allegations have resulted in a conviction being vacated.

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148. 653 A.2d 411 (Me. 1995).
149. *Id.* at 416.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* The court noted the absence of evidence that the victim was a sociopath and that that was not the issue to be decided by the jury.
154. See *State v. Stanton*, 1998 ME 85, ¶ 13, 15, 710 A.2d 240, 244 (reference by prosecutor to suffering of victim was legitimate attempt to prod jury to consider victim’s motivation in testifying, and statement attacking defendant’s defense were in context, intended to draw attention to lack of evidence supporting theory of defense). See also *State v. Lewis*, 1998 ME 83, ¶ 7, 711 A.2d 119, 122 (holding that prosecutor’s comparison of victim’s learning to take responsibility for himself to the defendant who was not taking any responsibility did not constitute an expression of the prosecutor’s personal opinion); *State v. Ardolino*, 1997 ME 41, ¶ 22, 697 A.2d 73, 80 (holding that it was not error for State to base summation on facts and testimony in evidence and reasonable inferences and to argue for any position or conclusion in respect thereto); *State v. Pelletier*, 673 A.2d 1327, 1330 (Me. 1996) (alleging improper *opening* statements, with part of opening objected to not error, and part of opening statement not objected to not obvious error); *State v. Ashley*, 666 A.2d 103, 105-06 (Me. 1995) (prosecutor’s closing argument not improper advocacy, but rather forceful but fair comment on the evidence); *State v. Bennet*, 658 A.2d 1058, 1063 (Me. 1995) (statements in State’s closing injecting extraneous matters of fear into case improper, but failure to grant mistrial within court’s discretion when curative instruction given or offered to be given by court); *State v. Corrieri*, 654 A.2d 419, 422 (Me. 1995) (no obvious error in State’s closing argument that referred to defense of duress as “bunch of nonsense”; the court noted, however, the fact that the State did not ask the defendant to comment on the credibility of other witnesses); *State v. Doak*, 651 A.2d 342, 344 (Me. 1994) (statements in State’s closing on credibility of state witness not obvious error); *State v. Bourgeois*, 639 A.2d 634, 638 (Me. 1994) (improper for court to ask defendant if other witnesses lied; conviction, however, vacated on other grounds).
Moreover, the court has not misapplied the obvious error standard of review when prosecutorial misconduct has been alleged. In State v. Comer, State v. Moontri, State v. Pelletier, State v. Corrieri, and State v. Doak, the court applied the doctrine of obvious error in an appropriate fashion, concluding in each case that there was no obvious error. Moreover, the opinions reflect that the court has looked at the closing statements as well as questions asked by prosecutors alleged to constitute the misconduct in the context of the entire trial and not in isolation. Indeed the opinions in Casella and Smith appear to be unique; they contain minimal discussion of the evidentiary context in which the language of the prosecutor in summation deemed to constitute personal opinion is used. In both of those cases, however, the allegations of misconduct could have been avoided by better use of language by the prosecutors, and by curative action by the trial court.


A. The Appellate Court

Review of allegations of prosecutorial misconduct in closing argument is a difficult task for an appellate court. The appellate court is removed from the circumstances of the trial and must assess the closing argument based on the choice of words actually used by the prosecutor, without the benefit of the "feel" for the trial gained only through presence at the trial. Even if the prosecutor's intent in closing argument is to suggest to the jury that the evidence justifies an inference that the testimony of the defendant is not credible, if in fact the prosecutor uses language that could be characterized as the expression of a personal opinion, the appellate court has to deal with the language used. Moreover, when a defendant does not object to language used in a closing argument, the appellate court can easily assume that the defendant is satisfied that there is no prejudice because inaction on the part of the defense counsel may lead to a conclusion by the

155. See supra notes 8, 67, and 133.
156. 644 A.2d 7, 10 (Me. 1994).
158. 673 A.2d 1327, 1330 (Me. 1996).
159. 654 A.2d 419, 422 (Me. 1995).
160. 651 A.2d 342, 344 (Me. 1994).
162. See infra pp. 263-64.
165. See State v. Wallace, 1997 ME 51, ¶ 6, 691 A.2d 1195, 1197 ("appellate court must depend to a great extent on the trial court's perception of prejudice . . . and defer generally to the judgment of the trial court"). See also United States v. Young, 470 U.S. 1, 9 (1985).
166. See State v. Pelletier, 534 A.2d at 972-73.
appellate court that the attorney made a tactical decision to waive objection.\textsuperscript{167} Moreover, when the trial court, closer to the scene of the trial and with the benefit of the “feel” for the trial, does not intervene to declare a mistrial or give a curative instruction, a deferential appellate court is reluctant to vacate a conviction that is supported by substantial evidence.\textsuperscript{168}

B. The Prosecutor

Appellate court review of appeals based on prosecutorial misconduct is made more difficult by the unique role of the prosecutor in our criminal justice system. The actions of the prosecutor are reviewed by an appellate court differently than conduct of other attorneys. The primary responsibility of the prosecutor is to see that justice is accomplished,\textsuperscript{169} to “protect the innocent as well as convict the guilty.”\textsuperscript{170} The prosecutor “has the responsibility of a minister of justice and not simply . . . an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”\textsuperscript{171} The Law Court has said that the prosecutor represents the community\textsuperscript{172} and “an impartial sovereign.”\textsuperscript{173} He or she “stands before the jury, cloaked with the authority of the State and is duty-bound to see that justice is done.”\textsuperscript{174} Thus because of that unique position of authority, the words used by a prosecutor during closing argument should be and are closely scrutinized.\textsuperscript{175}

Yet, in addition to protecting the innocent from improper prosecution, a prosecutor is responsible for insuring that people who commit crimes are brought to justice.\textsuperscript{176}

\[\text{T]he prosecutor is forced to operate with one hand on the throttle and the other hand poised firmly on the brake. His primary duty is to earnestly and vigorously present the government’s case, using every legitimate means to bring about a conviction. It is not sufficient to convict, however; for if justice has not been done, his “clients” have been poorly represented. Therefore, the prosecutor’s duty is to convict only the guilty and, moreover, to do so in a manner consistent with recognized principles of justice.}\textsuperscript{177}

\textsuperscript{167.} See State v. Vigue, 420 A.2d 242, 247 (Me. 1980).
\textsuperscript{169.} NATIONAL DIST. ATTORNEYS ASS’N, NAT’L PROSECUTOR STANDARDS § 1.1 (2d cd. 1991). See also State v. Wallace, 1997 ME 51, ¶ 5, 691 A.2d 1195, 1197 (noting prosecutor’s “duty is not simply to obtain a conviction but rather to ensure that justice is done”).
\textsuperscript{170.} A.B.A. STANDARDS 3-1.2 (3d ed. 1993).
\textsuperscript{171.} MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1983).
\textsuperscript{172.} See State v. Ashley, 666 A.2d 103, 105 (Me. 1995).
\textsuperscript{173.} State v. Collin, 441 A.2d 693, 697 (Me. 1982).
\textsuperscript{174.} State v. Comer, 644 A.2d 7, 9 (Me. 1994).
\textsuperscript{175.} See State v. Ashley, 666 A.2d at 105 (Bar Rules governing conduct at trial apply with “particular force” to prosecutors). See NORMAN DOTSEN & LEON FRIEDMAN, DISORDER IN THE COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COURTROOM CONDUCT 185 (1973) (comments by defense attorney have little weight compared with similar statements of the district attorney).
\textsuperscript{176.} A prosecutor, in addition to protecting the innocent, must “prosecute crimes vigorously and . . . ensure public safety.” John H. King, Jr., Note, Prosecutorial Misconduct: The Limitations Upon the Prosecutor’s Role as an Advocate, 14 SUFFOLK U. L. REV. 1095, 1102 (1980).
The responsibilities of the prosecutor are dual, and they are not always easy to carry out. Confusion often results when the prosecutorial function is not clearly defined and prosecutors are left without a coherent understanding of their role.\(^{178}\)

The convictions prosecutors seek are pursued within an adversarial system.

In contrast to the English experience, the criminal justice system in the United States rests upon the supposition that counsel for the prosecution and the defense function as adversaries umpired by an impartial judge. Although both systems strive for the truth, the American reliance on an adversary process results in a dissimilar trial methodology.\(^{179}\)

"The central figure in this system is the partisan advocate... [I]n a very real sense it may be said that the integrity of the adjudicative process itself depends on the participation of the advocate."\(^{180}\) Complying with the "do justice" mandate is not easy for prosecutors working within the adversary system. Codes of conduct do not exempt them from "the requirements of zealous advocacy."\(^{181}\) Reading the cursory "do justice" language as a denunciation of competitive fact-finding therefore would create an internal contradiction.

Prosecutors are subject to the codes of conduct applicable to all attorneys in our adversarial system.\(^{182}\) That system requires that litigants in criminal matters, including the State, have competent representation. Good lawyering by a prosecutor makes a conviction more likely.\(^{183}\)

"In the adversary system, a defendant's remedy for a vociferous closing argument by the prosecutor is an effective summation of his own."\(^{184}\) Indeed, it would undermine truth-seeking to let defense lawyers stimulate a jury, while confining a prosecutor to a dry rational recitation of the facts. Juror sympathy is consistent with adversarial justice so long as that sympathy derives from the evidence."\(^{185}\)

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179. King, supra note 177, at 1098.

180. Rosemary Nidiry, Note, Restraining Adversarial Excess in Closing Argument, 96 COLUM. L. REV., 1299, 1301-02 (1996). "Presumably, the collection and presentation of favorable information by opposing advocates ensures that the trier of fact has access to all the relevant information required for a correct decision." Id. at 1301 n.16.


182. See United States v. Young, 470 U.S. 1, 8 (1985) ("[C]ounsel on both sides share duty to confine arguments to jury within proper bounds.").

183. Zacharias, supra note 181, at 52.

184. The Law Court has recognized that the nature and vigor of prosecutorial argument may be affected by the strategy of the defendant. See State v. Weisbrode, 653 A.2d 411, 416 (Me. 1995). Maine has not, however, sanctioned the doctrine of "invited response." See Nidiry, supra note 164, at 1319.

185. Zacharias, supra note 182, at 98. Some argue for a very different standard to be applied to prosecutors. For example, legal scholar Albert W. Alschuler contends that the prosecutor should be "afforded less leeway than the defense attorney." Albert W. Alschuler, Courtroom Misconduct by Prosecutors and Trial Judges, 50 TEX. L. REV. 629, 633 (1972). Believing misconduct by prosecutors to be pervasive, he thinks we should emulate the English system and that prosecutors should strive for more Chesterfieldian politeness. See id. at 635. Alschuler writes that if a defense attorney, through emotional appeal, is able to persuade a jury that his client's conviction would be unfair, there should be no cause for alarm. Although an occasional conviction not based on the evidence is a terrifying prospect, an occasional "nonevidentiary" acquittal is a tolerable and probably desirable occurrence.
The "'do justice' rule... forbids ploys resting on sympathy or prejudice, but only if those emotions are extrajudicial—not rooted in the admissible facts of the case." 186

"A prosecutor may be zealous. She may advocate, almost to the limits of her talents. Once the charging and plea bargaining stages are complete, she usually may act like any trial lawyer acts." 187 Although a prosecutor does have a duty to "protect the innocent," as an advocate he or she "has the obligation to prosecute crimes vigorously and to ensure public safety." 188

Whitney Seymour argues that in the adversary system the prosecutor's duty to "seek justice" applies mainly to the decisions made by the prosecutor regarding whether a case should be prosecuted, and to the preparation of the case before the grand jury. 189 The decision to prosecute, Seymour contends, is "tantamount to deciding that prosecution 'is how justice will be done.'" 190 During a trial, a prosecutor is an advocate. 191 Once a decision has been made to prosecute, and in view of the burden of proof beyond a reasonable doubt that the prosecutor must meet to secure a conviction, the prosecutor should be able to prosecute at trial with zeal and vigor. 192 The Law Court has recognized this view. In State v. Walsh, 193 the prosecutor, in her opening statement, stated "I believe beyond a reasonable doubt [that the victim] has the right person." 194 In concluding that there was no obvious error, the court noted the awareness of jurors that "the role of the prosecutor is to argue for guilt, and might just as well read nothing more into 'I believe' than they have already read into the decision to prosecute." 195

Judge Learned Hand stressed the importance of allowing the prosecutor the freedom to argue vigorously to a jury.

\[\text{Id. at 637. Maine has never taken Professor Alschuler's position that "an occasional 'nonevidentiary' acquittal is a tolerable and probably desirable occurrence." It is clear from its opinions, however, that the Law Court places a burden on prosecutors to do justice as well as to seek convictions. See, e.g., State v. Collin, 441 A.2d 693, 697 (Me. 1982) ("As a representative of an impartial sovereign the prosecutor's duty to ensure that a criminal defendant receives a fair trial must far outweigh any desires which may exist to achieve a successful track record of convictions."); State v. Reilly, 446 A.2d 1125, 1128-29 (Me. 1982) (characterizing State's closing as "prosecutorial overkill.").}\]

\[\text{186. Zacharias, supra note 181, at 98-99.}\]

\[\text{187. Id. at 113. A prosecutor, of course, is obligated to call to the attention of the court and the defendant any exculpatory evidence that comes to his or her attention. See Me. R. Crim. P. 16(a)(2) (stating that "[t]he attorney for the State shall have a continuing duty to disclose [exculpatory] matters").}\]

\[\text{188. See King, supra note 176, at 1102.}\]

\[\text{189. See Whitney Seymour, Why Prosecutors Act Like Prosecutors, 11 Rsc. Ass'n B. Ctrr N.Y., 302, 312-13 (1956).}\]

\[\text{190. Id. As part of their duty to protect the innocent and to do justice, prosecutors are "under no duty to file charges... before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." United States v. Lovasco, 431 U.S. 783, 791 (1977). See also Zacharias, supra note 182, at 51 (stating that once the case reaches trial, the prosecutor "already has made her good faith determination that the defendant is guilty").}\]

\[\text{191. See Stanley A. Fisher, supra note 178, at 16.}\]

\[\text{192. See Zacharias, supra note 181, at 52.}\]

\[\text{193. 558 A.2d 1184 (Me. 1989).}\]

\[\text{194. Id. at 1187.}\]

\[\text{195. Id. (emphasis added). See also supra note 190.}\]
While, of course, we recognize that the prosecutor is by custom more rigidly limited than the defense, we must decline to assimilate its position to that of either judge or jury, or to confine a prosecuting attorney to an impartial statement of the evidence. He is an advocate, and it is entirely proper for him as earnestly as he can to persuade the jury of the truth of his side, of which he ought to be thoroughly convinced before he begins at all. To shear him of all oratorical emphasis, while leaving wide latitude to defense, is to load the scales of justice; it is to deny what has always been an accepted incident of jury trials, except in those jurisdictions where any serious execution of the criminal law has yielded to a ghostly phantom of the innocent man falsely convicted. 196

Other courts have likewise emphasized the need for prosecutors to argue with vigor. "[I]f the conduct of the prosecution in argument in this case constitutes error, then, the prosecution in every case is limited to a listless, vigorless summation of fact in Chesterfieldian politeness. Gone are the days of the great advocates whose logic glowed and flowed with the heat of forensics!" 197

There are separate standards of conduct applied to prosecutors and to defense attorneys. 198 Nevertheless, in the adversary system, the standards governing how they conduct closing argument at trial are similar, and courts should avoid relying on differences that do not exist to conclude that prosecutors commit misconduct in their summation. 199 A defense attorney is prohibited from intentionally misstat-
ing the evidence and misleading the jury as to inferences that may be drawn from
the evidence,200 and from expressing "a personal belief or opinion in his or her
client's innocence or personal belief or opinion in the truth."201 Although there
are some differences in the standards and how they apply,202 the commentary to
the ABA Standards notes: "It should be accepted that both prosecutor and defense
counsel are subject to the same general limitations upon the scope of their argu-
ments."203

The Maine Bar Rule applying to "Adversary Conduct" makes no distinction
between prosecutors and criminal defense counsel when it prohibits the assertion
of personal knowledge of the facts at issue, and the assertion of a personal opinion
as to the justness of a cause, the credibility of a witness, or the guilt or innocence of
an accused.204 The same rule allows both prosecutors and defense attorneys to
"argue, on the lawyer's analysis of the evidence, for any position or conclusion
with respect to the matters stated therein . . . ."205 This standard reflects what the
law has always been:

The right of discussing the merits of the cause, both as to the law and the facts, is
unabridged. The range of discussion is wide. [The attorney] may be heard in
argument upon every question of law. In his addresses to the jury, it is his privi-
lege to descant upon the facts proved, or admitted in the pleadings; to arraign the
conduct of the parties; impugn, excuse, justify or condemn motives, so far as
they are developed in evidence, assail the credibility of witnesses, when it is
impeached by direct evidence, or by the inconsistency or incoherence of their

200. See id. 4-7.7(a).
201. Id. 4-7.7(b). See also Me. Bar R. 3.7(e)(2)(v).
202. For example, it is improper for the State to disparage a legitimate theory of defense. See
State v. McDonald, 472 A.2d 424, 425-26 (Me. 1984). Likewise, a prosecutor is prohibited
from playing on the fear of jurors. See State v. Pineau, 463 A.2d 779, 780-81 (Me. 1983). See
203. A.B.A. Standards for Criminal Justice Prosecution 4-7.7 commentary. See also King,
supra note 176, at 1103. The conduct of defense attorneys in criminal cases is rarely reviewed
See also Werner v. Lane, 393 A.2d 1329 (Me. 1978) (reviewing defense attorney conduct in civil
case).
204. Ms. Bar R. 3.7(e)(2) provides:
(e) Adversary Conduct.

(2) In appearing in a professional capacity before a tribunal, a lawyer shall not:

(i) State or allude to any matter that the lawyer has no reasonable basis to believe
is relevant to the case or will not be supported by admissible evidence;
(ii) Ask any question that the lawyer has no reasonable basis to believe is relevant
to the case and that is intended to degrade a witness or other person;
(iii) Assert personal knowledge of the facts at issue, except when testifying as a
witness;
(iv) Assert a personal opinion as to the justness of a cause, as to the credibility of a
witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an
accused; but a lawyer may argue, on the lawyer's analysis of the evidence, for any
position or conclusion with respect to the matters stated therein; or
(v) Engage in undignified or discourteous conduct that is degrading to a tribunal.

Id.
205. Id. 3.7(e)(2)(v).
testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination.206

The Law Court's sound 19th century analysis of the duties of the attorneys during closing argument is consistent with the standard for prosecutors set out in Berger v. United States.207 "As is permitted to the debater in parliamentary contests the legal advocate may employ wit, satire, invective, and imaginative illustration in his arguments before the jury, both in civil and criminal trials, but in this the license is strictly confined to the domain of facts in evidence."208

An appellate court must assess the State's closing argument based on the record.209 The words actually used by the prosecutor are crucial to the legitimacy of the argument. When the Law Court has vacated convictions based on the State's closing argument, it has done so because the prosecutors were expressing what the court considered to be personal opinion on the credibility of witnesses.210 Such expressions of personal opinion are prohibited because they invade the province of the jury to assess credibility of witnesses, and are particularly off-limits to prosecutors because they speak with the authority of the State and the potential for improper jury influence is greater.211 Thus, the license to employ "wit, satire [and] invective... is strictly confined to the domain of facts in evidence."212

Prosecutors can avoid the perception that they are expressing personal opinion in closing argument by carefully selecting the language they use. It is not permissible, for example, for the prosecutor to state, "I know that the defendant lied," or "I know that a witness lied," or "I know that our witness was truthful," or "I believe witness 'X'," or "Don't believe witness 'Y'," or "I know the defendant is guilty."213 Those are clearly expression of personal opinion that are made without reference to the evidence. Less objectionable, and closer to legitimate argument are statements such as, "I submit that a witness is not credible," or "I suggest that our witness is telling the truth."214 Even better would be, "I suggest that the evidence shows that the defendant's testimony is not believable," or "I submit that the evidence points to the guilt of the defendant," provided the "suggestion" or "submission" is supported by a reasonable view of the evidence. Although the use of strong language such as "liar" may be permissible when the evidence clearly justifies its use,215 the better practice is to avoid the use of pejorative "liar" lan-

208. State v. Martel, 103 Me. 63, 66, 68 A. 454, 455 (1907).
209. See State v. Pelletier, 534 A.2d 970, 972-73 (Me. 1987) (holding that a case must be decided by the appellate court on record before it). See also State v. Wheeler, 444 A.2d 430, 432 (Me. 1982); State v. Gribbin, 360 A.2d 517, 518 (Me. 1976).
211. See State v. Comer, 644 A.2d 7, 9 (Me. 1994).
212. State v. Martel, 103 Me. 63, 66, 68 A. 454, 455 (1907).
213. See Saltzburg, supra note 11, at 44.
214. See id.
215. See State v. Pendexter, 495 A.2d 1241 (Me. 1985) (holding that it was permissible for the prosecutor to characterize as a liar and thief a witness who admitted he was a liar and thief).
language, taking away an issue for appeal. The more the prosecutor refers to the evidence, and uses language that draws the evidence into the argument, the less likely the summation will be found to violate acceptable standards.

In State v. Harnish, the prosecutor, in his closing argument, said that the defendant "did not tell you the truth," but "reacted with lies." The prosecutor also talked about the "false statements," "misstatements," and "lies" of the defendant. The court concluded that the prosecutor's remarks, as strong as they were, did not constitute an impermissible expression of personal opinion on the credibility of the defendant. It is important to note, however, that the prosecutor in at least one of the references to the defendant's credibility, prefaced his remarks with "I suggest," and that because the defendant admitted at his trial that he had lied, the argument being made by the prosecutor was connected to the facts in evidence. The selection of language in the closing argument is within the complete control of the prosecutor and its judicious use can go a long way toward avoiding serious allegations of prosecutorial misconduct.

### C. Role of the Defense Attorney

Just as the prosecutor can avoid a charge of misconduct by the careful use of language, the defense attorney must be alert to such misconduct when it occurs so that it can be objected to and called to the attention of the trial court. The defendant is obligated to make timely objections to improper closing arguments. A proper objection calls the trial court's attention to the offending conduct and gives the court the opportunity to take corrective action. Proper objection allows the trial justice to correct errors and reduce prejudice, thus serving the interests of promptness and accuracy in the administration of justice. Without a specification of the grounds for objection or a request for a curative instruction on the record, an appellate court may conclude that counsel made a tactical decision to waive his objection.

216. Moreover, sharp attacks on the character of the defendant or witnesses for the defendant are generally thought not to be effective. See Robert E. Keeton, Trial Tactics and Methods § 7.19, at 293 (2d ed. 1973).


218. Id. at 9.

219. Id.

220. See id. at 9-10. The court also examined the prosecutor's closing argument in the context of the evidence.

221. See id.

222. Although the conduct of a defense attorney in arguing to a jury is not frequently reviewed by an appellate court on appeal, see supra note 203, defense attorneys are, nevertheless, bound by the same standards of conduct as prosecutors in conducting closing argument; they are prohibited from usurping the factfinding function of the jury and from diverting the attention of the jury away from the evidence. See supra pages 243-45 (discussing rationale for rules governing conduct of attorneys in closing argument); Me. Bar R. 3.7(e)(2)(v); see supra note 199. Moreover, their conduct may affect what the prosecutor is allowed to do.

223. See State v. Watson, 63 Me. 128, 138 (1873). See Me. R. Crim. P. 30(b), 51, 52(b).

224. See State v. Martel, 103 Me. 63, 66, 68 A. 454, 455 (1907) (objection allowed trial court to interrupt objectionable closing and to give curative instruction, thus eliminating prejudice). See also State v. Hinds, 485 A.2d 231, 237 (Me. 1994).

In *State v. Terrio*, the defendant's counsel failed to object to a clearly improper closing argument and even refused a curative instruction suggested by the trial court. On appeal, the Law Court concluded that the defendant would be required to live with his choice of seeking a verdict from the jury rather than accepting a mistrial and possibly a new trial. The failure to object to an impermissible closing argument will limit any review on appeal to one of obvious error. Needless to say, it is not an easy task to persuade an appellate court that an error is "so highly prejudicial that it taints the proceedings and virtually deprives the defendant of a fair trial." It is not frequently done.

**D. Role of the Trial Court**

An appellate court has an important function in establishing standards for prosecutors in closing arguments. The role of the trial court, however, in controlling prosecutorial misconduct and in lessening the impact of improper conduct is crucial. The trial court should take prompt action to deal with any improper action by any attorney. "The Judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." Prompt action from the bench in the form of corrective instructions and admonitions to the attorneys can be very beneficial and discourage improper behavior.

The importance of the role of the trial court in controlling and lessening the impact of prosecutorial misconduct has been emphasized many times in Maine case law. For example, in *State v. Burgoyne*, the court's prompt and appropriate curative instructions overcame the State's improper efforts to play on the jury's sympathy during closing argument. In *State v. Gritzky*, the Law Court con-

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226. 442 A.2d 537 (Me. 1982).
227. See id. at 543. See also *State v. Conner*, 434 A.2d 509, 511 (Me. 1981) (stating that the defendant acquiesced in a curative instruction prompted by State's closing argument when defendant did not request mistrial and did not argue it would be impossible for jury to disregard such argument).
228. See *State v. Hinds*, 485 A.2d 231, 237 & n.4 (Me. 1984) (stating that a defendant's choice not to seek mistrial may be tactical decision to seek a verdict rather than accept mistrial); see also *United States v. Thierman*, No. 94-10279, 1996 WL 18638, at *3 (9th Cir. 1996) (pointing out importance of defense raising objection to improper argument); *State v. Harnish*, 560 A.2d 5, 10 (Me. 1989) (defense counsel failed to seek curative instruction, court did not give curative instruction).
230. See *State v. Borucki*, 505 A.2d 89, 94 (Me. 1986) (stating that "the appellate court must be reluctant to reverse a judgment on the basis of an error not brought to the attention of the trial court").
232. Id. at 10 (quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933)).
233. See id. at 13. See also *United States v. Thierman*, 1996 WL 18638, at *3 (9th Cir. 1996) (the personal attacks should have been stopped at once by the trial court). The responsibility of the trial court to control the actions of the attorneys, however, does not absolve the attorneys of their responsibilities to conduct themselves in accordance with the appropriate standards of conduct. See *State v. Cotton*, 673 A.2d 1317, 1319 (Me. 1996) (reciting prosecutor's improper statement that trial judge is "supposed to pay attention, know what he's doing, know when I'm crossing the line").
235. See id. at 396.
236. 587 A.2d 234 (Me. 1991).
cluded that the trial court’s chastisement of the prosecutor for improper comments on witness credibility during closing argument, and its instructions to the jury to disregard the improper remarks “easily precluded any need for a new trial.”237 In State v. MacLean,238 the prosecutor commented in closing argument that the defendant had been drinking all day, a statement that was not based on the evidence. The prejudice was cured, however, by the trial court’s instruction to the jury that it was their recollection, not the State’s closing argument, that controlled their determination of the facts.239 “Only when there are exceptionally prejudicial circumstances or prosecutorial bad faith will a curative instruction be deemed inadequate to eliminate the prejudice.”240 Damage caused by very egregious conduct of the prosecutor is more likely to be cured by prompt and appropriate curative instructions, if those instructions are “specifically addressed to the prosecutor’s misconduct.”241 Although an instruction to the jury that the opening and closing statements of the attorneys do not constitute evidence should always be given,242 such

237. Id. at 236.
238. 560 A.2d 1088 (Me. 1989).
239. See id. at 1091. See also State v. Hinds, 485 A.2d 231, 237 (Me. 1984) (curative instruction can preserve fair trial for defendant); Vess, supra note 177, at 53-54.
240. State v. Hilton, 431 A.2d 1296, 1302 (Me. 1981) (trial court in better position to gauge impact of objectionable conduct). In not all cases, however, can a curative instruction cure the prejudice resulting from improper closing argument. In State v. Bujnowski, 532 A.2d 1385 (N.H. 1987), the defense objected to the prosecutor’s statement in his closing argument that “I think for ninety-percent of it [the witness] was lying. I think she’s here to protect her husband.” Id. at 1386. Before resuming his closing he issued a retraction to the jury and said that he had made a mistake in expressing his personal opinion. He proceeded to state to the jury, however, that “I think [the defendant is guilty].” Id.

After the State concluded its closing argument, the trial court denied the defendant’s motion for a mistrial, then gave the jury a specific instruction to “ignore what [the prosecutor] said was his personal opinion, as he himself has also asked that you ignore.” See id.

Noting that curative instructions “normally” can negate misconduct, the New Hampshire Supreme Court nonetheless vacated the conviction and remanded for a new trial, stating: “In this case such intentional, repetitive misconduct may well have rendered the court’s curative instructions meaningless.” Id. at 1388.

See also State v. Stith, 856 P.2d 415 (Wash. Ct. App. 1993) (prosecutor’s flagrant personal assurances to the jury as to the defendant’s guilt, because such comments strike at the very heart of a defendant’s right to a fair trial before an impartial jury, could not be cured). It is not common, however, for a closing argument that cannot be cured by a corrective instruction to be the subject of appellate review because the trial court will likely grant a mistrial based on such a closing. One commentator has suggested that the standard is similar to the obvious error standard. See Vess, supra note 177, at 53.

241. See State v. Reilly, 446 A.2d 1125, 1129 (Me. 1982).

§ 5-8. Instruction 12—Closing Argument.
Members of the jury. The evidence is completed. We are ready to proceed to closing argument. The purpose of closing argument is for counsel to discuss the evidence and points of law which they believe are most significant for your consideration. I would emphasize, however, that argument is not evidence. You are going to decide the case based on the evidence. The evidence is the sworn testimony of the witnesses and the exhibits offered and admitted into evidence at trial. Counsel’s arguments are legitimate efforts to guide your consideration of the evidence. If during the course of argument, counsel’s recollection on some point of evidence differs from your own, it will be your recollection of the evidence that is important. Id. (emphasis added).
an instruction given by the court in routine fashion, and not given for the purpose of curing what the defendant or the trial court perceives as an improper closing argument, is less likely to be considered sufficient to overcome impermissible statements during summation.\textsuperscript{243} The conviction in Casella may well have been affirmed if the trial court had directed an instruction to the jury in response to Casella’s objection to the State’s closing argument, and again reminded them that the closing statements of the attorneys do not constitute evidence, and that the jury must determine the facts based on the evidence as they perceive it.

In hindsight as the trial judge in State v. Smith,\textsuperscript{244} I can say that I could have taken action in the form of an instruction to the jury in response to Smith’s objection prior to the jury’s retiring to begin deliberations that would have focused the attention of the jury on the fact that the arguments by counsel are not evidence, and that it is the jury’s own view of the evidence on which they should base their decision.\textsuperscript{245} It is important to remind jurors in all cases that closing arguments are not evidence, but particularly important to give special emphasis to that instruction when attorneys stray at all from arguing the facts based on the evidence, and begin to state what could be characterized as personal opinion.

\textbf{VI. CONCLUSION}

Although appeals to the Law Court based on allegations of prosecutorial misconduct in the closing argument have not frequently succeeded, direct comments by prosecutors on the credibility of the defendant or of witnesses, and in particular when pejorative language such as “liar” has been used, have been closely scrutinized.\textsuperscript{246} The outcome of those appeals have generally depended on whether those comments are connected to and based on the evidence. It is the province of the jury to determine the credibility of witnesses, and prosecutors, even though they are governed in their closing argument by standards no different from those applying to attorneys for the defense, because they speak for the State, are subjected to closer scrutiny and are not permitted to express personal opinions on that credibility.\textsuperscript{247} Prosecutors are permitted, however, to argue “for any position or conclusion” stated in the evidence,\textsuperscript{248} and to employ “wit, satire [and] invective” in arguing for that position or conclusion, provided it is grounded in the evidence.\textsuperscript{249}

In considering allegations of an improper closing argument on appeal, the Law Court must review the language used in the context of the entire case,\textsuperscript{250} and determine whether the prosecutor’s comments are “fairly based on the facts in the

\textsuperscript{243} See State v. Casella, 632 A.2d 121, 124 (Me. 1993) (Rudman, J., dissenting) (reference to court’s routine instruction to the jury).

\textsuperscript{244} 456 A.2d 16 (Me. 1983). See supra discussion of State v. Smith at pp. 250-51, and note 88.

\textsuperscript{245} See Alexander, supra note 243, at § 5-8, Instruction 12 and § 6-10, Instruction 21.

\textsuperscript{246} See, e.g., State v. Tripp, 634 A.2d 1318, 1321 (Me. 1994); State v. Casella, 632 A.2d 121, 123 (Me. 1993); State v. Smith, 456 A.2d 16, 17 (Me. 1983); see also State v. Reilly, 446 A.2d 1125, 1129 n.2 (Me. 1982).

\textsuperscript{247} See State v. Comer, 644 A.2d 7, 10 (Me. 1994); State v. Smith, 456 A.2d at 17.

\textsuperscript{248} Me. Bar R. 3.7(e)(2)(v).

\textsuperscript{249} See State v. Martel, 103 Me. 63, 66 (1907).

\textsuperscript{250} See State v. Moontri, 649 A.2d 315, 317 (Me. 1994).
It is primarily at the trial court, however, where improper closing argument can be avoided and corrected. By carefully choosing language and connecting their comments to the evidence, prosecutors can almost always avoid charges of misconduct in closing argument. Defense attorneys should be alert to call impermissible argument to the attention of the trial court. The trial court, through the use of admonishment and curative instructions, and even the threat of declaring a mistrial, can prevent and cure most improper argument by prosecutors.

252. See Saltzburg, supra note 11, at 44.