OPENING STATEMENTS: WHAT TO SAY AND WHAT NOT TO SAY

DEFINED

"A lawyer's statement at the outset of a trial, in which the lawyer gives the fact-finder a preview of the case and of the evidence that will be submitted"

Black's Law Dictionary

AMERICAN BAR ASSOCIATION

"The purpose of opening statements by each side is to tell jurors something about the case they will be hearing. The opening statements must be confined to facts that will be proved by the evidence, and cannot be argumentative."

GOALS OF OPENING

- Capture Jury's Attention
- Clear Narrative
- Memorable
- 3 E's - Efficient/Effective/Engaging

ELEMENTS

- Case Theme
- Content - Know your facts
- Approach – Be strategic/intentional

CASE THEME

- What's the thing?
- Word or phrase or short sentence
- Jury's attention/investment

CONTENT

- Attention Step
- Outline / Overview
- Introduce key people and concepts
- Weaknesses
- Argument – NO / Persuasion – YES
- Exit - Charge

APPROACH

- BE YOU – mood, tone, language (within reason)
- Storytelling – outside observer or witness narratives
- Bring the defendant into it
- Do not make a promise you cannot keep
- Hold back a “little” something

DO NOT

- Waste time – “May it please the Court”, your bio.
- “I believe”, “I think”, “My”
- Violate the rules of evidence or motions

  (Doyle, Elnicki, Limine, Suppression, 60-455)
- Burden Shift

DO NOT

- Argue
- Overstate your evidence
- Use jargon or legalese
- Use passive, boring voice
- Use multiple labels/pronouns for same witness

K.S.A. 22-3414

Order of trial. (1) The prosecuting attorney shall state the case and offer evidence in support of the prosecution. The defendant may make an opening statement prior to the prosecution's offer of evidence, or may make such statement and offer evidence in support of such statement after the prosecution rests.

PIK 50.070

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.

State v, Kleypas 272 Kan. 894 (2001)

"If it please the Court, opposing counsel and ladies and gentlemen of the jury. [C.W.] was a bright, lively young woman just twenty-one years old. In March of 1996 she was a junior at Pittsburg State University in Pittsburg, Kansas. She was engaged to be married to [M.F.]. She was interested in tennis, in fashion merchandising, her major, and helping other people and in planning her wedding."

Kleypas

“The prosecutor's opening statements were within the reasonable latitude in stating facts or reasonable inferences from facts which the State would prove during the trial. It would be unreasonable to expect the State to refer to the victim in any case without some qualifiers concerning who this individual was in life. The absence of any characteristics of the victim would be artificial. There necessarily must be some reference to who the victim was and his or her relevance in the context of the time and place of the homicide. The prosecutor's comments here were not error.”

State v. Nguyen, 285 Kan. 418 (2007)

"When this case is over, the State will be asking that you bring back a verdict that the evidence in this case demands and that justice requires. That will be a verdict of guilty for the murder of Bang Nhut Tran."

Nguyen

“Nguyen reads that comment as playing to the sympathy of the jury by asking for justice for the victim Tran, prior to the introduction of any evidence. We cannot accept Nguyen's characterization. To the contrary, the comment is textbook opening statement language. The prosecutor is absolutely permitted to ask for a verdict which is supported by the evidence. Moreover, a verdict supported by the evidence is the very essence of justice.”

Nguyen

“ ‘Opening statements by counsel in criminal prosecutions are not evidence. They are given for the purposes of assisting the jury in understanding what each side expects its evidence at trial will establish and to advise the jury what questions will be presented for its decision. The tendency is to permit a prosecuting and defense attorney reasonable latitude in stating to the jury the facts they propose to prove.’ [State v. McCorkendale, 267 Kan. 263, Syl. ¶ 4, 979 P.2d 1239 (1999).]” State v. Kleypas, 272 Kan. 894, 957, 40 P.3d 139 (2001), cert. denied 537 U.S. 834, 123 S.Ct. 144, 154 L.Ed.2d 53 (2002), overruled **1171 on other grounds State v. Marsh, 278 Kan. 520, 102 P.3d 445 (2004), rev'd Kansas v. Marsh, 548 U.S. 163, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006).

State v. Tahah 302 Kan. 783 (2015)

"A prosecutor may use picturesque speech so long as he or she refers to facts disclosed by the evidence. Crawford, 300 Kan. at 749, 334 P.3d 311."

State v. Timley 311 Kan. 944 (2020)

“In effect, the prosecutor's lead-up to the challenged statement laid out the factual premises upon which it rested, leaving the ultimate conclusion vulnerable to the jury's own reasoning. Further, we find it unnecessary to require the prosecutor to include the unspoken, but implicit, disclaimer inherent in all opening arguments, i.e., “If you look at the evidence, a reasonable inference is that ...” ”

State v. Thurber 308 Kan. 140 (2018)

- Portion of opening read

"The State contends each statement was a reasonable inference from the evidence eventually admitted at trial."

Thuber

Prosecutors step outside the wide latitude when employing an "imaginary script" to convey a victim's last moments because such a comment is unsupported by the evidence. State v. Robinson, 303 Kan. 11, 261, 363 P.3d 875 (2015), cert. denied —— U.S. ——, 137 S.Ct. 164, 196 L.Ed.2d 138 (2016). An evidentiary misstatement within an "imaginary script" may be amplified if the prosecutor uses this improper rhetorical device to arouse the jury's prejudice and passion. State v. Kleypas, 272 Kan. 894, Syl. ¶ 8, 40 P.3d 139 (2001) (Kleypas I) ("It is improper for a prosecutor to create an 'imaginary script' in order to create and arouse the prejudice and passion of the sentencing jury."). Thurber argues the prosecutor used an imaginary script during opening statement and closing argument.

Thurber

- The statements about J.S.'s suffering were within the latitude afforded during opening. Regardless of whether J.S. was conscious or unconscious for part of the attack, ample evidence that J.S. sustained injuries throughout fairly supported the statement that she "suffered" as that word is commonly understood.
- See, e.g., *State v. Alger*, 282 Kan. 297, 304, 306, 145 P.3d 12 (2006) (prosecutor stated during opening statement that two-year-old victim's " 'last memory will forever be that of the Defendant violently shaking the life out of her' "; prosecutor "danced on the line between mere recitation of expected evidence and forbidden argument" but did not step over it); *Tahah*, 302 Kan. at 788-89, 358 P.3d 819 (prosecutor's opening statement that defendant was " 'going hunting' " for victim was reasonable inference when evidence showed defendant sat in wait with rifle and shot victim through window in victim's house).

Thurber

But this court has "refrained from putting too fine a point on the distinction between stating the facts and making forbidden argument" during opening statement. State v. Nguyen, 285 Kan. 418, 422, 172 P.3d 1165 (2007). And we have continued to indicate reasonable inferences can be drawn during opening statement. See, e.g., State v. Tahah, 302 Kan. 783, 788-89, 358 P.3d 819 (2015) (prosecutor's comment during opening statement that defendant *163 was " 'going hunting' " for the victim was reasonable inference based on evidence eventually admitted at trial), cert. denied —— U.S. ——, 136 S.Ct. 1218, 194 L.Ed.2d 219 (2016); Kleypas I, 272 Kan. at 957, 40 P.3d 139.

PROSECUTOR STATEMENTS: *THURBER*

- “J.S. was looking up at a gray sky”
- “did not know the area”
- Photographic evidence showed J.S.'s body lying on her back with her eyes open
- No evidence supporting an inference = error

PROSECUTOR STATEMENTS: *THURBER*

- "And she was strangled. She was strangled. Repeatedly strangled. Repeatedly strangled of a tightening and relaxing, tightening, relaxing."

- "coroner testified J.S. was strangled and that bruising on her neck displayed "several discreet or outlying areas that could represent multiple applications of pressure." The coroner stated this bruising was consistent with repositioning the hands."

PROSECUTOR STATEMENTS: *THURBER*

- "And at the time that she would struggle and can get a little bit, she is gasping for air, gasping. And every time she did that, more oxygen went to her brain, allowed her to live longer. The strangulation, five to 12 minutes. Five to 12 minutes."

- "The coroner explained a strangulation victim would struggle; and, if pressure was released, a victim could possibly gasp for air. The coroner also testified the time to kill by strangulation "varies," but estimated it would take "three to five minutes." And if pressure was released, the coroner testified, it would prolong that time.
- "12 minutes" = error

EXAMPLES

QUESTIONS

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