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PROSECUTOR'S ISOLATED COMMENT DURING TRIAL HELD PREJUDICIAL ERROR

New York's Code of Criminal Procedure provides that a court must give judgment without regard to technical errors which do not affect the substantial rights of the parties.[57] In *People v. Jackson*,[58] a robbery in a liquor store was committed by two men. Two Patrolmen gave chase, capturing a man named Brown, but losing the other. One of the Patrolmen said he had a brief glimpse of the man but he was not certain he could identify him. He was not asked to look for the man's picture in the Rogues Gallery. Defendant Jackson was picked up a few weeks later, and at a lineup held in City Prison, attended only by one of the proprietors of the liquor store, the defendant was not picked out. At the trial, both proprietors and the patrolman testified that Jackson was the other perpetrator of the crime. The defense in summation pointed out that this failure of the proprietor to pick out the defendant from the lineup two weeks after the crime was a crucial point, and that this failure should detract from the identification at the trial. During his summation, the prosecutor assured the jury that the proprietor had recognized the defendant in the lineup and that although he didn't pick him out, there was good reason for this. He then stated, "I'll be more than happy to tell you . . . why after this trial is over." The Court immediately granted counsel's motion to strike the remark and instructed the jury to disregard it, and any implication which might be drawn therefrom. The jury began deliberation and reported to the Court they had reached a verdict as to Brown, but that a unanimous decision on Jackson looked doubtful. Some eight hours later they returned a verdict of guilty against both. The Appellate Division in a memorandum decision unanimously affirmed the judgment of conviction.[59]

The issues before the Court of Appeals were whether the single isolated remark was prejudicial or merely technical error under Section 542 of the Code of Criminal Procedure, and whether in view of the other evidence the remark was harmless. "In determining whether improper remarks in summation require a new trial, it would seem of vital significance whether the trial court . . . gave standing to the statement of the District Attorney as legitimate argument or whether . . . the trial court promptly advised the jury that the statement was improper and must be wholly disregarded. The prompt and complete instruction of the trial court in the instant case . . . prevented the improper argument from having any serious consequences."[60] This statement implants the position that isolated improper remarks if followed by speedy correction by

57. N.Y. Code of Crim. Proc. § 542:
After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties. Prejudicial statements may affect the substantial rights of parties if they affect the verdict.
58. 7 N.Y.2d 142, 196 N.Y.S.2d 79 (1959).
59. 8 A.D.2d 613, 185 N.Y.S.2d 743 (1st Dep't 1959).
60. People v. Broady, 5 N.Y.2d 500, 516, 186 N.Y.S.2d 230, 244 (1959).

the trial judge is not grounds for reversing a judgment, and that such remarks are only "technical errors" within Section 542 Code of Criminal Procedure. But in *People v. Swanson,*[61] the Court stated that the defendant is entitled to a fair trial neither colored nor influenced by the prejudicial arguments of counsel likely to mislead the jury. Even where the court has warned the jury to disregard the prosecutor's remarks, it has been noted that "the virus . . . implanted in the minds of the jury is not so easily extracted".[62] In *People v. Marks,*[63] decided one year earlier by the Court of Appeals, neither reversal nor new trial was granted where prejudice was not considered great in view of the strong case presented against the defendant by other evidence. This was stated as the New York rule, but it should be observed that Judge Desmond, with two other judges, maintained that misconduct alone can be enough for reversal.

Before the Court of Appeals in the instant case, the State argued that, where, as here, the comment was a single, isolated instance of impropriety—not part of a repetitive pattern of prejudicial deportment—and the trial court promptly and adequately took firm steps to erase its effect, reversal of a judgment supported by strong and cogent proof is not required and should not be allowed. The defendant argued that in view of the lack of evidence on identification, the remark was so prejudicial that the comment enabled the jury to draw improper inferences and conclusions which were enough to constitute reversible error.

The Court of Appeals,[64] by a four to three majority essentially adopted the view the dissenting judges had taken in the *Marks* case,[65] where they stated that gross impropriety of a prosecutor's making himself an unsworn witness and supporting his case by his own veracity and position was sufficient to warrant a reversal and a new trial. The Court felt that the evidence on identification of the defendant was not overwhelming, due to the admitted doubt of the Patrolman and the failure of the proprietor to identify the defendant at the lineup. They held that even if the proof of identification could be considered overwhelming, the impropriety could still not be classified as harmless error, nor would they hold that the instructions of the trial court eliminated the harm occassioned by the admittedly prejudicial remark. The fact that the remark was isolated and singular did not detract from the impact it had upon the jury, and in circumstances such as these it may not be treated as technical or harmless.

The dissent felt it was bound by previous cases which held that impropriety when confined to a single isolated instance and cured by prompt

61. 278 App. Div. 864, 104 N.Y.S.2d 400 (2d Dep't 1951).
62. People v. Levan, 295 N.Y. 26, 36, 64 N.E.2d 341, 346 (1945).
63. 6 N.Y.2d 67, 188 N.Y.S.2d 465 (1959).
64. Supra note 58.
65. Supra note 63.

ruling of the trial court was too inconsequential to adversely affect any substantial right of the defendant in view of the overwhelming evidence of guilt.[66] Had this remark been systematically repeated the prejudice sustained would have been great, and reversal proper, but a new trial is unwarranted in this case where the remark was isolated and therefore falling within Section 542 of the Code of Criminal Procedure.

The decision in the instant case is a culmination of a warning advanced sixty years ago,[67] manifested in the dissenting opinions of many previous cases,[68] which stated that a prosecuting attorney should put himself under proper restraint and should not, in his remarks to the jury, go beyond the evidence.

CORROBORATION OF TESTIMONY OF ACCOMPLICE

The Code of Criminal Procedure Section 399 states, "A conviction cannot be had on the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." In the case of *People v. Weiss*,[69] a small store was robbed by five men, four of whom were apprehended, convicted, and were awaiting sentence at the time of the present case. The defendant Weiss was allegedly the fifth robber. Two of those convicted testified for the People and implicated Weiss. The other two were called by the defendant and, contrary to expectations, also implicated the defendant. The owner of the store testified that "I couldn't say with certainty that this (Weiss) is the man," and "I looked at him but I wouldn't remember his face because I was frightened," and "I think it's the same man."

The issue of this case was whether the testimony of the store owner was sufficient to corroborate the accomplices who testified for the people. The People argued that such testimony did satisfy the "tends to connect" requirement of Section 399, whereas the defendant contended such testimony was too vague. The Court, in affirming the conviction, held that positive identification is not the minimum standard, but that it is sufficient that the owner believed Weiss was the fifth robber and that the jury believed the owner.

The People also argued that assuming, arguendo, the owner's testimony did not corroborate the accomplices who testified for the People, since the defendant's own witnesses also implicated him, he must be convicted, because Section 399 does not apply to testimony given by an accomplice called by the defense. The Court held that since the owner's testimony was sufficient to corroborate the People's witnesses, this question need not be decided.

66. People v. Lovello, 1 N.Y.2d 436, 154 N.Y.S.2d 8 (1956); People v. Marks, supra note 63; People v. Broady, supra note 60.
67. People v. Fielding, 158 N.Y. 542, 53 N.E. 497 (1899).
68. People v. Marks, supra note 63; People v. Broady, supra note 60.
69. 7 N.Y.2d 139, 196 N.Y.S.2d 76 (1959).