

PowerPoint¹ in Court

The Devil's Own Device, or A Potent Prosecution Tool?

BY KYLE C. REEVES

“Argument is not required to be sterile or anemic; blunt and emphatic language is essential to effective advocacy in most cases.”²

CLEARLY, A PROSECUTOR MAY strike hard blows, as long as they are not foul ones.³ While a prosecutor will be given “wide latitude” in making her closing arguments,⁴ her comments must be limited to “properly admitted evidence and any reasonable inferences or conclusions that can be drawn from that evidence.”⁵ Moreover, a prosecutor “may not express his personal opinion on the merits of the case or the credibility of witnesses,” including the defendant.⁶

To assist in conveying arguments and inferences to a trial jury during summation, a prosecutor is generally free to use visual aids to accompany an oral argument. This may include aids that display images of trial exhibits, excerpts of testimony, the court’s charge and instructions to the jury, and even the prosecutor’s theme drawn from admissible evidence. One of the most effective tools to accomplish this goal is through the use of computer presentation software, such as Microsoft’s PowerPoint.

However, as Uncle Ben Parker once famously told his young nephew Peter, “With great power comes great responsibility.”⁷ As conscientious and dedicated prosecutors, we are well aware of the current accusations made by adver-

saries and detractors: injustice occurs all too often in the criminal justice system simply because prosecutors are willing to quietly place their thumbs on the scale of justice in order to improperly influence the outcome. Critics claim that prosecutors are intentionally trained to willingly conceal or destroy exculpatory evidence; that prosecuting attorneys blatantly discriminate and eliminate prospective fair jurors simply because of race, color or creed; that prosecutors deliberately coax witnesses into giving false or misleading testimony; that prosecutors knowingly and purposely rely on shoddy evidence gleaned from junk science to buttress weak cases; and that all prosecuting attorneys are driven not to seek justice, but to pile up convictions at any cost in order to win promotions, or to be elevated to higher office, or to secure high-paying jobs at white-shoe law firms.

Most recently, these same cynics tell of yet another horror story: a veritable Frankenstein’s monster lurching down the corridors of the courthouse, a deadly combination of the prosecutor’s heartless guile with shiny modern technology, and this fiend is now running amok in the courts.



KYLE C.
REEVES

¹ This article is an independent publication and is not affiliated with, nor has it been authorized, sponsored, or otherwise approved by Microsoft Corporation.

² *United States v. Turner*, 17 M.J. 997, 999 (A.C.M.R. 1984).

³ *United States v. Turner*, 651 F.3d 743, 752 (7th Cir. 2011); see *Berger v. United States*, 295 U.S. 78, 88 (1935); *United States v. Young*, 470 U.S. 1, 11 (1985).

⁴ *United States v. Thompson*, 482 F.3d 781, 785 (5th Cir. 2007).

⁵ *United States v. McCann*, 613 F.3d 486, 495 (5th Cir. 2010).

⁶ *United States v. Alaniz*, 726 F.3d 586, 616 (5th Cir. 2013) (quoting *United States v. Gallardo-Trapero*, 185 F.3d 307, 320 [5th Cir. 1999]).

⁷ “Spider-man”, 2002; Columbia Pictures/Marvel Enterprises.

Kyle C. Reeves is the chief trial counsel for the Richmond County District Attorney’s Office, Staten Island, New York.

Driven by prosecutorial misconduct and fueled with Microsoft's PowerPoint presentation software, this soul-less brute is just one more example of how prosecutors need to win at all costs. The existence of the creature was exposed in an article published by the Marshall Project with the eye-catching title, "PowerPoint Justice: When prosecutors slide around the law." Claiming that 10 cases had been reversed in the past two years because of the government's deliberate abuse of PowerPoint, the author of the article denounced the use of PowerPoint by prosecutors in various phases of trial as yet one more way for them to illicitly tip the scales of justice, and improperly obtain convictions. Defly ignoring the advantages of mixing visual and oral advocacy (and its proven impact on modern jurors), the author of the article focused on a handful of cases where convictions were reversed for what appears to be *blatant* prosecutorial misconduct — which in all likelihood, would have been reversed whether the prosecuting attorney had used PowerPoint or not. Quite simply, the moral of the story from the cases cited in the article is, "if it's wrong to say the words, it's equally wrong to display the words."

Notwithstanding the current climate across the legal landscape, it is undeniable that when used properly during trial, PowerPoint is a potent technological device for all attorneys, including prosecutors. When combined with effective oral advocacy skills, PowerPoint can *supplement* a prosecutor's closing argument, helping to narrow issues for

the jury, and at the same time, forcefully join the main theme and theory of a case with the admissible evidence. However, if used improperly, PowerPoint can quickly become the noose that prosecutors put around their own necks, either by displaying improper arguments or themes, showing the jury things that were not properly received in evidence, or oversimplifying the legal concepts relevant to the case. And because a prosecutor's improper oral argument was accompanied by an equally improper visual display, many appellate courts are likely to reverse convictions because of the increased magnitude of the perceived error.

But do not despair! The focus of this article is not to dissuade aggressive, experienced prosecutors from being on the cutting edge of technological advocacy. Instead, this article is designed to encourage all prosecutors to continue to be skillful, competent attorneys, by using every available tool at their disposal to advocate for their victims, within permissible bounds. By doing so, we can assure that the guilty will be swiftly convicted and properly punished, that the wrongfully accused will be quickly exonerated, and the public's confidence in our criminal justice system is rightly restored.

THE BACKGROUND OF POWERPOINT

Originally designed for the Macintosh computer, the first version of PowerPoint was called Presenter, and was devel-

PowerPoint Usage Resources

■ In addition to this article, prosecutors can find helpful information in Prosecutors' Encyclopedia (PE), a free resource available to prosecutors throughout the United States. You can obtain a PE account by going to www.myprosecutor.com and clicking on "Request an account." A list of cases cited in this article, with links directly to the full text of each case, is available in PE at https://pe.nypti.org/wiki/Simplifying_Technology/10_State_of_the_Law_on_PowerPoint, which is one part of the larger Simplifying Technology online resource, http://pe.nypti.org/wiki/Simplifying_Technology.

■ Additional PowerPoint help is available in PE on many pages. Here are a few to check out:

- https://pe.nypti.org/wiki/PowerPoint_Templates
- http://pe.nypti.org/wiki/How_To:_PowerPoint
- https://pe.nypti.org/wiki/Atomic_Training
- https://pe.nypti.org/wiki/PowerPoint_2010_-_Avoiding_Technical_Difficulties
- https://pe.nypti.org/wiki/PowerPoint_Recommended_Reading

■ In addition, the recently updated book *Litigation Technology — Becoming a High-Tech Trial Lawyer* by Mike Rogers is another excellent resource that will take you beyond PowerPoint:

- https://pe.nypti.org/wiki/Litigation_Technology_Becoming_a_High-Tech_Trial_Lawyer

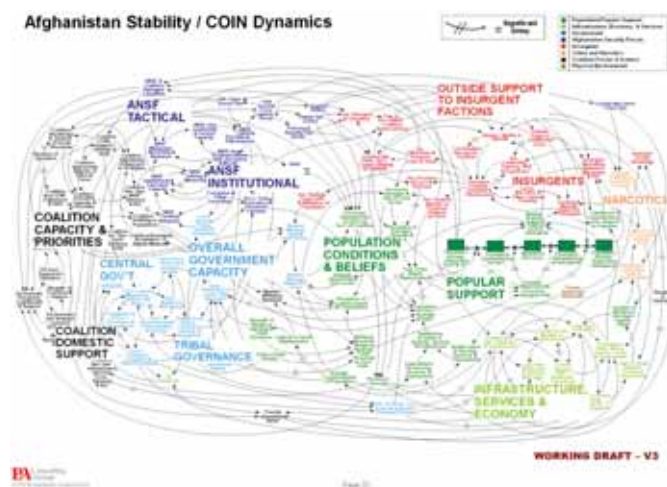
oped by Dennis Austin and Thomas Rudkin, who were working at a small tech firm called Forethought, Inc. In 1987, the nascent software was renamed to PowerPoint due to problems with trademarks, and was being developed as linear presentation software. By August 1987, Forethought was purchased by Microsoft for around \$14 million, and eventually became Microsoft's Graphics Business Unit. PowerPoint was officially launched May 22, 1990, the same day that Microsoft released Windows 3.0. By the end of 2012, various versions of PowerPoint claimed about a 95 percent share of the presentation software market, with installations on at least 1 billion computers. Among presentation software worldwide, the program is currently used at an estimated frequency of 350 times per second.

PowerPoint is an intuitive software program designed to create presentations for a multitude of uses, including school projects, lectures, business meetings, or as an incredibly efficient way to pass along information. The program has been part of the Microsoft Office package, which offers word processing, outlining, drawing, graphing, animation and presentation management tools, all of which are easy to learn and intuitive to use. When a presentation is created using PowerPoint, it is made up of a series of slides. The user can import text, photographs, audio and video clips, and other information on to slides, which are then displayed to the viewer.

People frequently lose sight of the fact that PowerPoint merely provides the technological platform for a presentation. The content of each slide, and the sequence of slides, are all created by the user of the software. Those who favor using PowerPoint as an efficient and effective method to deliver information have suggested that a good PowerPoint presentation must answer in the affirmative four basic questions: (1) Does it tell a story? (2) Is it presented in digestible chunks of information? (3) Does the presenter know enough to speak to the topic without the slides? (4) Are the slides written at a topical level that is appropriate for the audience? If a PowerPoint presentation meets these criteria, there is a greater likelihood that the audience will benefit from its use.⁸

But the detractors of PowerPoint claim that all too often, the person who has created the presentation has filled it with cluttered graphics, confusing information and mind-numbing text. As a result, the user is at fault, rather than the software itself. In an article published in the April 26, 2010,

edition of *The New York Times*, Elisabeth Bumiller chronicled the United States Army's "war on PowerPoint." Some leading generals, including Gen. Stanley McChrystal, the then-chief of American and NATO forces in Afghanistan, believed that the Army's persistent reliance on complex PowerPoint presentations led to an oversimplification of complex issues, while at the same time complicated simple directives and orders. McChrystal, referring to the slide below, famously remarked that the United States would win the Afghan war only when they were able to make sense of this PowerPoint slide, which purportedly detailed the complexity of American military strategy, but looked more like a bowl of spaghetti.



In developing and marketing PowerPoint, Microsoft has given the world an extremely useful presentation software package, capable of displaying information in a thoughtful and meaningful manner. However, the software is only as good as the person creating the presentation, and as with any technological advance, is subjected to practical use, or creative abuse.

THE DEVIL'S DEVICE: ILL-ADVISED USES OF POWERPOINT AT TRIAL

An informal survey of cases reported in all 50 states found that 37 states (about 64 percent) currently have appellate decisions in criminal cases that mention the use of PowerPoint by the prosecutor at some phase of trial — almost always in conjunction with a defendant's claim of

⁸ Proponents of the software often cite the "Rule of 10/25/65" in support of its use: most people are said to retain 10 percent of what they hear, 25 percent of what they see, but retain an amazing 65 percent of what they hear and see together. C. Chou, "The Role of Technology in Adult Learning and Development in Organization," Slides 23 and 24, <http://www.slideshare.net/ustmalt/the-role-of-learning-technology-in-adult-learning-and-organization-development>, 2000.

⁹ States with no reported decisions include Arkansas, Idaho, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, Rhode Island, South Carolina, South Dakota, Utah, Vermont and West Virginia.

¹⁰ See *New Jersey v. Sabar*, 2005 N.J. Super. Unpub LEXIS 728 (2005); *New Jersey v. Robinson*, 2007 N.J. Super. Unpub LEXIS 434 (2007).

prosecutorial misconduct.⁹ From a sampling of over 100 cases, it appears that prosecutors use PowerPoint most frequently during their closing arguments, followed closely by its use in displaying evidence during witness testimony. In several jurisdictions, PowerPoint has been used during opening statements and to a lesser degree, during *voir dire* and on cross-examination of defense witnesses. In fact, the appellate courts of New Jersey have commented favorably on a trial court's use of PowerPoint to assist in delivering their final instructions to the jury.¹⁰

Of the 37 states where the reported cases mention PowerPoint, seven states (or about 18 percent) have reported one or more criminal cases being reversed because of prosecutorial misconduct involving the use of PowerPoint.¹¹ A closer review of those cases indicates that reversal overwhelmingly stems from four specific errors: (1) the oversimplification of pertinent legal concepts or instructions to the jury; (2) improperly inserting a prosecutor's personal opinion on issues in controversy; (3) the inclusion of photographs or other materials that were not properly admitted in evidence; or (4) improper comments on the defendant's constitutional rights or other impermissible burden-shifting. It should be clearly noted that where convictions were overturned for prosecutorial error involving the use of PowerPoint, those same convictions likely would have been reversed simply if the offending prosecutor had merely spoken the words, rather than displayed them on a slide.

Oversimplification of legal instructions

One of the most common grounds for reversal involving the misuse of PowerPoint by a prosecutor is the oversimplification of the trial court's instructions on the law. Too often, in an attempt to make simpler the trial court's instructions on complex legal concepts, prosecutors make PowerPoint slides of visual examples or analogies of the law for the jurors' ease of understanding. And too often, these slides backfire, because they have distorted the law in their oversimplification.

For example, in *People v. Otero*, 210 Cal.App. 4th 865 (2012), a California appellate court reversed a conviction in part because a prosecutor used a "jigsaw puzzle slide" in her PowerPoint in summation in an ill-fated attempt to explain the concept of reasonable doubt to the jury.¹² The offending slide used by the prosecutor in *Otero* was captioned "No

Reasonable Doubt" over an outline of a map of California, with a dollar sign where Nevada would be, the word "ocean" where the Pacific Ocean would be, and the words "San Francisco" at the top of the map and "Los Angeles" at the bottom of the map. The word "San Diego" was deliberately placed over "San Francisco." The prosecutor's argument was that despite the incorrect information, no one looking at the map would have a reasonable doubt it was California. The *Otero* court reversed, in part finding that the prosecutor's argument, combined with the offending PowerPoint slide, denigrated the reasonable doubt standard to such a degree as to prejudice the defendant.

Similarly, in *People v. Centano*, 338 P.3d 938 (2014), decided two years after *Otero*, a California appellate court reversed a conviction for identical reasons. In *Centano*, the prosecutor focused on reasonable doubt in the rebuttal closing argument, by displaying a geographical outline of the state of California on a PowerPoint slide and rhetorically asking, "What state is this?" The prosecutor then made arguments about a hypothetical case, arguing that even without certain information, there was no reasonable doubt that the diagram on the slide outlined the state of California. The *Centano* court held that the defendant's conviction must be overturned because the argument was misleading and failed to accurately state the appropriate law; it also held that the prosecutor had inserted materials into the case that had not been received in evidence.

On the East Coast, an appellate court in New Jersey recently reversed an attempted murder case for prosecutorial misconduct which included some seemingly bizarre behavior by the prosecutor (*i.e.*, climbing into the jury box in the middle of cross-examination of a State witness), but also for misusing PowerPoint on his opening and closing. See *New Jersey v. Rivera*, 99 A.3d 847 (2014). In his opening, the prosecutor's 21-slide PowerPoint displayed, among other things, a photograph of the defendant's face covered with the word "GUILTY of ATTEMPTED MURDER" in red letters printed in a large typeface. Apparently the defense objection was overruled, and the trial court held that there was nothing "specifically prejudicial in the presentation," a ruling with which the appellate court found error. Finding such a declaration of guilt during an opening statement to be inconsistent with a prosecutor's obligation to prove a defendant's guilt of each and every element of a crime beyond a reasonable doubt, the appellate court held

¹¹ There are at least two cases that were reversed on other grounds, where the reviewing court mentioned the use of PowerPoint by a prosecutor. See *State v. Sena*, 168 P.3d 1101 (NM App. 2007); *Washington v. Fuller*, 282 P.3d 126 (WA App. 2012).

¹² While prosecutors have been using the "jigsaw puzzle" analogy for years to illustrate the concept of reasonable doubt, see *People v. Wilds*, 141 A.D.2d 395 (NY 1988); *Lord v. State*, 806 P.2d 548, 552 (Nev. 1991); *Kansas v.*

Crawford, 334 P.3d 311 (KS 2014); *South Dakota v. Hayes*, 855 N.W.2d 668 (SD 2014), it appears that only by visually displaying the analogy on PowerPoint slides have they run afoul of the appellate courts.

such a statement was “egregious misconduct,” but declined to reverse solely on those grounds. However, in light of the “cumulative impact” of prosecutorial misconduct, including the PowerPoint used on summation, the court reversed. *Rivera* at 857-58. The *Rivera* court found that the prosecutor’s PowerPoint in closing arguments contained slides that vastly oversimplified the defense of justification, which could not be cured by instructions from the trial court. In reversing the conviction, the appellate court held “the sheer quantity and variety of highly prejudicial remarks, visual displays and a courtroom antic give us reason to have serious doubt about the jurors’ capacity to follow those instructions.” *Rivera* at 865.

While slides using diagrams, maps, and puzzles to illustrate complex legal concepts may be entertaining and appropriate for PowerPoint used in conjunction with a continuing legal education lecture, there is a clear danger that such slides may be found to be legally offensive by appellate courts, to such a degree that reversal of a hard-earned conviction is required. Instead of using potentially misleading visual devices, a more prudent course would be to review the pattern jury instructions used by the trial court, and mimic the language of the charge on a PowerPoint slide — then take the time to explain the legal concept to the jury, without gimmicks or tricks.¹³

Insertion of a prosecutor’s personal opinion

“It is as much a prosecutor’s 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 With those words, Justice George Sutherland, writing for a unanimous United States Supreme Court, reminded the legal community that the primary duty of a prosecutor is not to obtain convictions, but to see that justice is done. However, often lost is the notion that prosecutors are human, and at times, allow their emotions and feelings to creep into their courtroom work. Prosecutors need to have the ability to keep their emotions in check, but on occasion, it’s easier said than done. So not surprisingly, the second most common reason that appellate courts reverse convictions where PowerPoint is used appears to be when a prosecutor improperly inserts his or her opinion on matters in evidence, such as a witness’s credibility or a defendant’s guilt.

These errors are not restricted to closing arguments. In *Watters v. State*, 313 P.3d 243 (2014), a Nevada appellate court reversed a conviction where a prosecutor, using

PowerPoint in his opening statement, displayed a photograph of the defendant with the ubiquitous word “GUILTY” stamped over it. The *Watters* court, in strong language condemning the prosecutor’s opening, noted that “PowerPoint, as an advocate’s tool, is not inherently good or bad.” However, the court ruled that repeated use of the offending slide pre-empted any presumption of innocence to which the defendant was entitled, by declaring from the very first moment of trial, before any evidence had been adduced that the defendant was guilty. In simple and concise language, the *Watters* court stated that which all wise prosecutors should know: “PowerPoint may not be used to make an argument visually that would be improper if made orally.” *Watters*, at 247.

Less than a year later, the same appellate court reversed another conviction for the very same error. *Carter v. State*, 2014 Nev. Unpub. LEXIS 1540 (2014). In *Carter*, the appellate court in Nevada reversed a burglary conviction, finding that a PowerPoint slide used in a prosecutor’s opening statement that depicted a booking photograph of the defendant with the word “GUILTY” superimposed on his forehead violated the defendant’s presumption of innocence. The court held that using such a slide was “clear error,” and reversed.

However, often lost is the notion that prosecutors are human, and at times, allow their emotions and feelings to creep into their courtroom work.

These types of slides are equally problematic when used in summation: as previously discussed, a conviction was reversed for the cumulative effect of prosecutorial misconduct that was found to deprive the defendant of a fair trial, including the use of a slide in closing arguments that showed the defendant’s picture with the word “GUILTY” superimposed over it. See *New Jersey v. Rivera*, 99 A.3d 847 (2014).

In what could be seen as an overt assault on the misuse

¹³ See *People v. Baker*, 14 N.Y.3d 266 (2010).

¹⁴ *Berger v. United States*, 295 U.S. 78, 88 (1935).

of PowerPoint by prosecutors in the state that Microsoft makes its corporate home, there have been no fewer than five reversals directly attributed to the abuse of PowerPoint in a prosecutor's summation since 2012. Beginning with the decision *In the Matter of Personal Restraint of Michael Glasmann*, 286 P.3d 673 (2012), the appellate courts in Washington have repeatedly reversed cases for "flagrant prosecutorial misconduct" stemming from the misuse of PowerPoint. In *Glasmann*, the Washington appellate court reversed a conviction for first-degree kidnapping and second-degree assault, finding that the prosecutor violated a defendant's right to a fair trial by displaying PowerPoint slides of photos received in evidence by inappropriately modifying them by adding captions like "Do you believe him" and "Guilty, guilty, guilty." Such slides, which reflected the prosecutor's own personal opinion of the case, "were the equivalent of unadmitted evidence." *Glasmann*, at 705. The reviewing court commented that the 50 PowerPoint slides used in the prosecutor's closing argument contained imagery that "likely inflamed the jury" because of the improper "visual shouts" of guilty, *id.* at 709, and that "[h]ighly prejudicial images may sway a jury in ways that words cannot." *Id.* at 707. The *Glasmann* court found that the cumulative effect of the prosecutor's misconduct was flagrant, and reversed the conviction and remanded for a new trial.

Shortly after *Glasmann* was decided, four other cases were reversed by the Washington appellate courts in short order for similar misconduct. See *Washington v. Herbin*, 2013 Wash.App. Unpub. LEXIS 1222 (2013); *In the Matter of Personal Restraint of Jay McKague*, 2014 Wash.App. LEXIS 1600 (2014); *Washington v. Hecht*, 319 P.3d 836 (2014); and *Washington v. Fedoruk*, 339 P.3d 233 (2014).

In *Herbin*, first-degree burglary and kidnapping convictions were reversed primarily because of "flagrant prosecutorial misconduct" through the use of PowerPoint slides that expressed the prosecutor's personal belief that the defendant was guilty. The *Herbin* court found that the prosecutor intentionally presented the jury with PowerPoint slides of "the defendant's booking photographs altered by the addition of phrases calculated to influence the jury's assessment of guilt," which required reversal. *Id.* at 23.

Similarly, in *McKague*, the appellate court reversed a first-degree robbery conviction because "the prosecutor altered the photograph of the defendant by cropping it and digitally placing the word "GUILTY" across it. Moreover, the slide, coupled with the prosecutor's comment that defen-

dant is guilty as charged, constituted an expression of the prosecutor's personal opinion on McKague's guilt. *Id.* at 8.

Likewise, reversal was required in two more Washington state cases in 2014 for identical errors. In *Washington v. Hecht*, the appellate court reversed the felony harassment and patronizing a prostitute convictions of an elected superior court judge. In a decision consistent with *Glasmann*, *Herbin* and *McKague*, the appellate court held that PowerPoint slides used in summation that contained altered photographs admitted in evidence with captions that expressed the prosecutor's opinion could not be cured by the trial court's prompt instructions to the jury.

Finally, in *Washington v. Fedoruk*, the appellate court reversed a second-degree murder conviction because of the prosecutor's "flagrant misconduct" in summation. Included in the offending PowerPoint used in summation were slides that showed the deceased's body lying in a ravine under the heading "Murder 2"; the presentation also included sound effects and animation, such as footprints appearing across the bottom of a crime scene photograph. The PowerPoint ended with several prejudicial slides: one depicted concentric rings of a target, corresponding to various pieces of evidence, appearing on the screen and culminating with an arrow pointing from the name "Sergey Fedoruk" to the bull's-eye. On the final slide, under an enlarged "Murder 2" heading, the word "GUILTY" flashed, written with all capitals in a 96-point red font. The appellate court, reversing Fedoruk's conviction, repeated the admonition it first espoused in *Glasmann*: a prosecutor cannot use his or her position of power to sway a jury. The *Fedoruk* court found that repeated expressions of personal opinion of the defendant's guilt, displayed by the prosecutor on PowerPoint slides, combined with improperly altered photographs, required reversal.

Clearly, a trend for appellate courts to reverse convictions for prosecutorial misconduct in summation stemming from an improper use of PowerPoint has begun. Because of this nationwide trend, sensible prosecutors will refrain from expressing their personal opinions on the guilt of a defendant on a PowerPoint slide. Able prosecutors will still make use of PowerPoint slides to make logical and rational inferences from the evidence without supplementing the slides with personal opinions.¹⁵

Inclusion of materials not in evidence

Another error that has been cause for reversal recently is the inclusion of materials that have not been received in evi-

¹⁵ *But see, New Jersey v. Love*, 2012 N.J. Super. Unpub. LEXIS 1678 (2012)(upheld conviction where prosecutor's summation was "overly dramatic and approached the boundaries of what was proper", and used slide with the word "Guilty" superimposed over a photo of defendant due to

overwhelming evidence of guilt); *New Jersey v. Bass*, 2013 N.J. Super. Unpub. LEXIS 1000 (2013)(upheld conviction where prosecutor's summation included PowerPoint slide that flashed the word "Guilty" for several seconds).

dence in PowerPoint presentations used in summation. Different and distinct from slides that contain “altered” photographs through the inclusion of captions or other devices previously discussed, this sub-genre of error is restricted to the closing argument PowerPoint display of testimony, documents, or photographs that were never received in evidence. Of course, if not otherwise vigilant to guard against it, there is always the danger that a prosecutor may mention a witness who did not testify, or evidence that was not presented, to the jury, in summation. However, when these errors are committed with the use of PowerPoint, the error may be compounded to the point that reversal is required.

In *Brown v. Florida*, 18 So.3d 1149 (2009), the Florida appellate court reversed a first-degree murder conviction where a prosecutor displayed a photograph not in evidence and discussed a witness who did not testify on rebuttal summation.¹⁶ After giving what was described as a “brief” initial closing argument, the prosecutor used an “extensive” 34-slide PowerPoint presentation which included a photograph that had not been received in evidence, and repeatedly referred to testimony of a witness who did not appear during the trial. On rebuttal, however, the State summarized, in a detailed PowerPoint presentation, the testimony of each witness, what was shown in the surveillance tape, and the elements of each crime for which Brown was charged. “The proper limit of a rebuttal is ‘a reply to what has been brought out in the defendant’s [closing] argument.’ The State’s rebuttal not only contained references to evidence that was never admitted at trial, but went beyond its function as a reply to Brown’s closing argument. This was improper.” *Id.* at 1151. In a dissenting opinion, one judge pointed out that the prosecutor’s initial summation discussed the implausibility of the defendant being guilty of the lesser-included crimes; the prosecutor focused her rebuttal summation on the issues raised by the defense concerning pre-meditated murder. The dissent suggested it was a proper thematic structure for a closing argument under Florida law. *Id.* at 1152. But while the dissent explained what it understood to be the logic behind including the name of a non-testifying witness in a PowerPoint slide, it did not address the inclusion of a photograph that had not been received in evidence.

In *Colorado v. Davis*, 280 P.3d 51 (2011), a Colorado appellate court reversed a conviction for sexual assault

because the prosecutor attempted to explain, without any expert testimony to support the argument, the different “stages” of rape trauma syndrome experienced by rape victims. Relying on the “common sense and experience” of the jurors, the prosecutor displayed a PowerPoint containing specific descriptions of the various stages of rape trauma, which “effectively amounted to expert testimony, which improperly bolstered [victim’s] credibility.” *Id.* at 54. Moreover, the PowerPoint implied that the prosecutor was an expert in the subject matter, causing him to become an unsworn expert witness. The appellate court found that while evidence of rape trauma syndrome was admissible in Colorado, since no such evidence had been adduced during the trial, the conviction was obtained in violation of the defendant’s rights to a fair trial, and reversed.

The old adage, “If you can’t say it, don’t display it” holds true.

Prosecutors should be mindful that the inclusion of any argument that would be either improper or impermissible to be spoken during the summation would be equally improper to show to a jury on a PowerPoint slide.

While reversing a conviction for criminal sexual contact of a minor on other grounds, an appellate court in New Mexico took aim at a prosecutor’s ambitious use of PowerPoint in opening statements in *State v. Sena*, 168 P.3d 1101 (2007). In *Sena*, the prosecutor’s PowerPoint used during opening contained statements made by the defendant’s wife, which the trial court had precluded because of the marital privilege. The Court found that the prosecutor’s misconduct “skate[ed] right on the line between permissible and willful misconduct.” *Sena* at 1108. The *Sena* court went further in its stinging rebuke of the prosecutor, calling the misconduct “a sloppy mistake that flouted the court’s

¹⁶ The circumstances of the reversal in *Brown* may be unique to Florida and other states that allow for a rebuttal summation.

specific order not to introduce [such] testimony.” *Id.*

Simply put, documents, photographs or other materials that have not been received in evidence cannot be displayed to a jury in summation. That bright-line rule of evidence does not change when PowerPoint is used to display evidence in summation. A cautious prosecutor must be acutely aware of what his or her evidence is when using PowerPoint in their closing arguments.

Improper comments on defendant’s constitutional rights

To a lesser degree, prosecutorial misconduct for commenting on a defendant’s right to remain silent while using PowerPoint slides in closing arguments has also resulted in the reversal of several cases across the country. Because it is a constitutionally protected right, courts are inclined not to find harmless any comment or remark that touches on a defendant’s right to remain silent, including statements by prosecutors that discuss a defendant not putting on a defense at trial or exercising their right to trial. Often, as noted above, the use of PowerPoint to complement oral arguments will exacerbate any errors made during the summation, as courts will consider those errors to have been premeditated and deliberate because of their inclusion on a slide.¹⁷

In *Kansas v. Kemble*, 238 P.3d 251 (2010), the court reversed a conviction for aggravated indecent liberties with a child under age 14 in part because an error committed by the prosecutor in summation was compounded by the use of a PowerPoint slide that illustrated the error.¹⁸ In *Kemble*, the prosecutor, in closing arguments, made an improper reference to the defendant’s post-*Miranda* assertion to remain silent, commenting that “He never said [he] was too drunk to remember until today.” Her argument was buttressed with a PowerPoint slide displaying the same words to the jury. The *Kemble* court clearly rejected the prosecution’s argument on appeal that the error was made spontaneously or in the heat of the moment, because the offending statement was included on a slide in a PowerPoint presentation. Reasoning that the PowerPoint was made well before the summation, the *Kemble* court found that it was not a “spur-of-the-moment comment delivered extemporaneously under the stress of countering a defense argument.” *Kemble* at 124. Moreover, the court dryly observed the error could have been avoided if there had been “[s]ome forethought

during trial preparation.” *Id.*

Likewise, in *State v. Reineke*, 337 P.3d 941 (2014), an Oregon appellate court reversed a conviction for murder based on impermissible comments made by the prosecutor on the defendant’s invocation of his right to remain silent. The improper comments made in closing argument were accompanied by a corresponding PowerPoint slide illustrating the same comments. After his arrest, the defendant was given his *Miranda* warnings, and invoked his right to remain silent. During trial, when defense counsel asked the investigating detectives if their post-arrest interactions with the defendant had been recorded, the trial court permitted the prosecutor to elicit evidence that nothing was recorded because the defendant had invoked his right to remain silent. However, during closing argument, the prosecutor included a slide in the PowerPoint that contained four phrases, one being, “His refusal to speak at the police station” with an arrow pointed toward the word “guilty” and a photograph of the defendant. Because the prosecutor’s PowerPoint presentation expressly urged the jury to decide that the defendant’s refusal to speak to the police was one of the four main reasons that he was guilty of murdering the victim, the conviction was overturned. *Id.* at 948.

The old adage, “If you can’t say it, don’t display it” holds true. Prosecutors should be mindful that the inclusion of any argument that would be either improper or impermissible to be spoken during the summation would be equally improper to show to a jury on a PowerPoint slide. And as the holdings in *Kemble* and *Reineke* illustrate, appellate courts will consider that such statements were deliberately and purposely made in violation of a defendant’s rights because of the intentional effort needed to include them in the PowerPoint.

Harmless Errors

To be sure, not every defense claim of a prosecutor’s alleged abuse of PowerPoint will result in reversal. A fair number of appellate courts across the country have found that such error or misconduct did not rise to the level requiring reversal.¹⁹ However, sagacious prosecutors will minimize the chances of reversal by avoiding slick PowerPoints filled with objectionable content and inappropriate arguments.

In *People v. Santiago*, 22 N.Y.3d 740 (2014), the New York Court of Appeals modified a murder conviction by reducing the conviction to second-degree manslaughter on other

¹⁷ See *State v. Macias*, 2013 N.M. Unpub LEXIS 1 (2013)(briefly displayed a PowerPoint slide commenting on defendant’s right to silence not unduly prejudicial).

¹⁸ Judicial misconduct, as evinced by the sympathetic manner in which the trial court treated a child victim, appears to have also contributed to the reversal.

¹⁹ The following cases are included not as examples of how close to the sun a prosecutor should endeavor to fly; instead, these cases appear to be warning shots fired over the bow of prosecutors whose presentations are coming dangerously close to misconduct requiring reversal.

grounds. However, one issue raised on appeal was the prosecutor's use of a photograph of the deceased child victim that had been received in evidence, displayed during summation on a PowerPoint slide for six minutes before fading to white screen — with captions appearing at 30-second intervals that corresponded to medical testimony about the physical injuries sustained while the defendant smothered the victim. "Whether the trial court would have been required by the law to sustain an objection to the entirety of the PowerPoint presentation is not clear from this record. The slides depicting an already admitted photograph, with captions accurately tracking prior medical testimony, might reasonably be regarded as relevant and fair, albeit dramatic, commentary on the medical evidence . . . On the other hand, the relevance of the visual device whereby the post-mortem picture faded at 30-second intervals over a six-minute period — with each slide fading more and more to white, and the final slide appearing totally white — is difficult to discern. This did not show how [victim's] death occurred nor would it have aided the jury in its fact-finding function."²⁰ *Santiago* at 751.

In *Hawaii v. Aragona*, 2005 Haw. App. LEXIS 351 (2005), a Hawaii appellate court found that the prosecutor's preface to his closing argument, a PowerPoint slide containing a written quotation and audio clip of Marlon Brando's iconic line from the movie "The Godfather" ("I'll make him an offer he can't refuse."), was "otiose and trite, but nevertheless not prosecutorial misconduct" requiring reversal.²¹

In *People v. Scarberry*, 2008 Cal. App. Unpub. LEXIS 5794 (2008), a California appellate court upheld the defendant's conviction for attempted lewd and lascivious conduct on a child under age 14, where the prosecutor included a PowerPoint slide of a public service announcement denouncing child prostitution as a nationwide problem; the text in the announcement urged the jury to hold "adults responsible for the supply and demand of this industry." Apparently, the slide was not read aloud to the jury, but was left on the screen long enough for the jury to read it.²² The trial court denied the defense request for a mistrial; the appellate court held that prompt and responsive instructions from the trial court cured any error. *Id.* at 39-40.

In *People v. Katzenberger*, 178 Cal. App. 4th 1260 (2009), the Third Appellate District of the Court of Appeal of California upheld a conviction of inflicting corporal injury but was highly critical of a prosecutor who used a "jigsaw

puzzle slide" in her PowerPoint in summation. In an attempt to explain the concept of reasonable doubt to the jury, the prosecutor used a slide that showed six of eight puzzle pieces forming a picture of the Statue of Liberty. The prosecutor argued that even with two pieces missing, there was no reasonable doubt that the picture was the Statue of Liberty. The Court ruled that while the presentation was improper, it was not prejudicial to the defendant. "We caution prosecutors who are tempted to enliven a closing argument with visual aids that using such aids to illustrate the 'beyond a reasonable doubt' standard is dangerous and unwise." *Katzenberger*, at 1269.

While the prosecutor argued that the slide was merely a demonstrative aid for the jury, the trial court told the prosecutor, "You cannot show things to the jury that are not in evidence."

Likewise, in *People v. Mullenix*, 2010 Cal. App. Unpub. Lexis 3479 (2010), the California appellate court affirmed a murder conviction, but voiced concerns about the conduct of the prosecutor, which included the display of a movie poster that had not been received in evidence on a PowerPoint slide. While the prosecutor argued that the slide was merely a demonstrative aid for the jury, the trial court told the prosecutor, "You cannot show things to the jury that are not in evidence." The appellate court upheld the conviction, finding that some of the antics engaged in by the prosecution were regrettable, but holding there was no resulting prejudice to the defendant because of prompt action and responsive curative instruction by the trial judge. Regarding the PowerPoint slide, the appellate court held that the defendant "suffered no possible prejudice from the display of the movie poster, which was primarily an affront to the court as a violation of its earlier order." *Id.* at 47.

In *Colorado v. Lucas*, 232 P.3d 155 (2009), the inclusion of

²⁰ In a strongly written dissent, two judges opined that the conviction should be reversed, as the PowerPoint presentation manipulated the evidence, and was designed to inflame the passion of the jury in order to engender prejudice against the defendant, and that counsel's failure to object constituted an error that so tainted the jury's deliberative process as to deny defendant a fair trial. *Id.* at 752.

²¹ In *Aragona*, the defendant's defenses of choice of evils and duress depended upon the same ominous threat of armed violence, which is the "choice" the prosecutor alluded to in the reference to "The Godfather."

²² From the decision, it appears that the defense attorney did not see the slide, because she was taking notes during its display.

a PowerPoint slide used in closing argument that stated “rape was a single woman’s worst nightmare” was imprudent and inflammatory, but did not rise to the level of constitutional error requiring reversal. *Id.* at 166.

In *Ross v. Indiana*, 2008 Ind. App. Unpub. LEXIS 1541 (2008), the Indiana appellate court found that an inadvertent display of unredacted evidence did not require the reversal of a murder conviction. The prosecutor, while discussing the defendant’s cellphone records, displayed a PowerPoint slide of the records to the jury during closing arguments, which contained a reference to the defendant by the nickname of Ghetto Godfather, in violation of the trial court’s pretrial rulings. The trial court denied the subsequent motion for a mistrial, finding that the jury’s exposure to the slide was brief, and the prosecutor inadvertently displayed the slide while reviewing other non-offensive portions of the records. The appellate court upheld the conviction.

In *Missouri v. Walter*, 2014 Mo. App. LEXIS 1130 (2014), a Missouri appellate court upheld a conviction for attempted manufacture of a controlled substance where the prosecution displayed a PowerPoint slide showing the defendant in an orange jumpsuit with the word “guilty” superimposed over the photo in large red letters. While the appellate court sustained the conviction, the decision turned on defense counsel’s failure to object to the slide in a timely fashion. The appellate court strongly condemned the prosecutor’s use of the slide: “[i]t defies logic why even an overzealous prosecutor would tempt the grant of a mistrial during closing argument on a case where the evidence of guilt is this overwhelming. The display of the photograph alone raises serious concerns and the addition of the large red letters across the photo reading “GUILTY” increases the concerns exponentially. Such egregious conduct on the part of the prosecutor is unwarranted and cannot be condoned by any court.” *Id.* at 48.

In *State v. Adcock*, 2013 Tenn. Crim. App. LEXIS 1028 (2013), a Tennessee appellate court sustained a conviction for simple assault and domestic assault, where the defense alleged prosecutorial misconduct in summation, claiming the prosecutor vouched for the credibility of the victim, both orally and visually. While discussing the testimony of the victim, the prosecutor displayed a PowerPoint slide which rhetorically stated that for the defense version of events to have been true, the victim would have had to

“effectively fool[ed] police and prosecutors with the sophistication of a CIA field operative.” The appellate court found that during the prosecutor’s 50-minute summation, the offending slide was displayed for less than three and one-half minutes, and that while it may have been inappropriate, it did not rise to the level of misconduct requiring reversal. *Id.* at 43.

Undoubtedly, as illustrated by some of the preceding close calls and boneheaded mistakes, PowerPoint presentations can compound errors made by prosecutors. However, with some discretion and a little self-control, this powerful presentation tool can enhance a prosecutor’s case at trial and make good arguments even better.

A POTENT PROSECUTION TOOL: ACCEPTABLE USES OF POWERPOINT

As previously noted, the majority of states have commented favorably on a prosecutor’s use of PowerPoint at different phases of a criminal case. To date, there have been no reported cases that outright prohibit the use of PowerPoint. Mindful of the common pitfalls facing prosecutors who seek to present evidence in a more palatable fashion, or to make more persuasive closing arguments, the technologically savvy prosecuting attorney will use PowerPoint to seek justice for their victims in a variety of innovative ways.

Voir Dire

The use of PowerPoint in *voir dire* appears to be uncommon, as most trial courts prefer to only briefly explain the law to the prospective jurors during jury selection, instead delivering a full explanation during their final instructions. However, in an unusual use of PowerPoint at trial, a prosecutor supplemented his questioning of the prospective jurors during jury selection with a visual display explaining the concepts of circumstantial and direct evidence.²³ Although the actual PowerPoint used was never entered into evidence, the appellate court, reviewing the transcript of the prosecutor’s comments, upheld the use of PowerPoint merely as a tool to assist jury selection. The decision noted that instructions from the trial court explaining that specific laws to be applied to a case come only from the trial court effectively cured any error. *Louisiana v. Gillespie*, 934 So.2d 707 (2005).

In *Britain v. Texas*, 392 S.W.3d 244 (2012), a Texas appel-

²³ For reasons left unexplored on appeal, the PowerPoint appears to have also included photographs of the prosecutor’s family and pets.

late court reversed a conviction for reckless manslaughter on other grounds, and did not reach the issue of whether it was an error for a prosecutor to use PowerPoint in *voir dire*.

Opening Statements

The use of PowerPoint in opening statements is increasing in frequency, but prosecutors must be mindful to only display items they anticipate being moved into evidence during the trial.

An Arizona appellate court upheld a second-degree murder conviction, where, before trial, the prosecutor informed the trial court and defense counsel that he intended to use a 30-slide PowerPoint presentation during his opening statement. The presentation consisted of a title page, photographs of the vehicles and accident scene with superimposed descriptions and headings, a map, a listing of the defendant's blood alcohol content and physical symptoms, and a list of the elements of the two charged offenses. Finding no abuse of discretion in permitting the PowerPoint, the appellate court ruled "[t]he trial court has full discretion in the conduct of the trial, and that discretion will not be overturned on appeal absent a clear showing of an abuse of discretion." *State v. Sucharew*, 66 P.3d 59 (Ariz. App 2003).²⁴

In *Lewis v. State*, 744 S.E.2d 21 (2013), a Georgia appellate court upheld a murder conviction where the prosecutor used PowerPoint slides in opening statement that showed two photographs of the crime scene that had not yet been received in evidence. After sustaining a defense objection, the trial court gave prompt curative instructions to the jury, and the prosecutor continued the opening without the PowerPoint. Eventually, the two photographs were admitted into evidence. The appellate court found no error in denying the defense request for a mistrial.

Likewise, in *Wesner v. Commonwealth*, 2012 Ky. Unpub LEXIS 37 (2012), a Kentucky appeals court upheld a murder conviction where a prosecutor displayed the defendant's mugshot in a PowerPoint slide during his opening statement. Although the appellate court found the photograph was not necessary since identity was not an issue, it held that any resulting error was harmless because the picture was not altered or captioned, it depicted the defendant as he appeared at the time of his arrest, and it did not suggest that the defendant had a prior criminal history. *Id.* at 18.

Similarly, in *Miller v. Montana*, 280 P.3d 272 (2012), a Montana appeals court held that the use of PowerPoint in both an opening statement and closing argument by the

prosecutor was permissible. In sustaining a murder conviction, the appellate court noted that the defense request to preserve the PowerPoint presentations as court exhibits was untimely. Interestingly, the defense attorney noted on the trial record that he had no objection to either the contents or use of either PowerPoint, but simply wanted an accurate record made for appeal.

Based on the existing case law, several courts have sanctioned the use of PowerPoint by a prosecutor during opening statements. However, in an excess of caution, it would be wise for prosecutors to restrict the contents of such presentations during openings to either items that have been pre-admitted as evidence, or those things that will undisputedly be admitted, and a general statement of the applicable law relevant to the case to be decided by the jury.

Direct Case

PowerPoint is an effective tool that can streamline the delivery of visual and audio evidence to a jury in a professional and efficient manner. The primary benefit in displaying visual evidence through PowerPoint is that all 12 jurors can observe the evidence at the same time. Gone are the days of jurors straining over the railing to see 8 x 10 crime scene photographs held out by court officers as they parade by the jury box, or jurors squinting to watch a surveillance video on a 20-inch monitor. With PowerPoint, the images crucial to our case can be projected onto a large screen or high-definition monitor simultaneously with a witness's testimony. Likewise, visual demonstrative evidence, such as crime scene simulations and certain expert testimony, is best displayed to the jury through PowerPoint, which allows contemporaneous understanding by the jury of complex matters explained by expert witnesses.

Displaying evidence during testimony

In *Woodward v. Alabama*, 123 So.3d 989 (2011), the Alabama appeals court upheld a first-degree murder conviction resulting in a death sentence, where the defendant had been videotaped by an in-dash police car camera shooting to death an on-duty police officer who had stopped the defendant during a routine traffic stop. The video, which had been enhanced by a member of the Alabama Bureau of Investigation's Bomb Squad and Technical Services Unit, was displayed during the agent's direct testimony. The PowerPoint contained the original video from the in-dash camera system, as well as a frame-by-frame breakdown of

continued on page 38

²⁴ The defense attorney initially objected to the PowerPoint because he thought it would be a computer-generated simulation of the crime, and not still photographs, maps, and diagrams.

the video. From the PowerPoint, the agent then testified that “he attempted to determine several pieces of information from the videotape: the tag number of the vehicle; the make, model, year and color of the vehicle; the identity of the person inside the vehicle; whether the gun was fired with the shooter's right hand or left hand; the make, model, and caliber of the weapon used in the shooting; the number of shots fired; the duration of the shooting; the trajectory of the shell casings; the color of the shell casings; and any actions [the deceased officer] took as he approached the vehicle.” *Woodward*, at 1011. The agent’s testimony was preceded by the trial court’s instruction to the jury on how such testimony and evidence was to be used by the jury; at the conclusion of the agent’s testimony, to which the defense did not object, a similar instruction was given again by the court. The appellate court found no error in the trial court’s exercise of its discretion in permitting the agent’s testimony and corresponding PowerPoint display. *Id.* at 1012.

In *Thomas v. Commonwealth*, 688 S.E.2d 220 (2010), a Virginia appeals court upheld a murder conviction, where, during the testimony of a medical examiner, properly admitted photographs of the autopsy of the deceased victim were displayed to the jury through the use of a PowerPoint presentation. Likewise, other courts have upheld the use of PowerPoint used in conjunction with, or to illustrate, witnesses’ testimony. See also, *Louisiana v. Robbins*, 986 So.2d 828 (LA 2008)(use of PowerPoint to display evidence to jury upheld as similar to “use of charts, summary or calculations”); *Serge v. Commonwealth*, 896 A.2d 1170 (PA 2006)(PowerPoint technology properly used to present admitted exhibits during the direct/cross-examination); *State v. Borelli*, 769 N.W.2d 573 (WI 2009)(prosecutor’s use of PowerPoint to display autopsy photos admitted in evidence was proper).²⁵

Demonstrative Evidence

In addition to its use in illustrating a witness’s testimony with maps or diagrams, or concurrently display photographs admitted in evidence with a witness’s testimony, several appellate courts have sustained the use of PowerPoint to show demonstrative aids to the jury.

In New York, an appellate court sustained a first-degree assault conviction where the trial court permitted the prosecution’s expert witness to use a PowerPoint presentation to illustrate and demonstrate the mechanics of “shaken-baby syndrome” and the injuries that could result. Used in conjunction with the expert’s testimony, the PowerPoint accu-

rately showed the jury what happens to an infant’s brain when exposed to excessive and violent shaking, which was normally beyond the ken of the average juror. *People v. Sulayao*, 58 A.D.3d 769 (NY 2009). See also *People v. Mora*, 57 A.D.3d 571 (NY 2008)(proper exercise of trial court’s discretion to permit expert to use PowerPoint to illustrate/demonstrate injuries and mechanics of shaken-baby syndrome); *People v. Caldavado*, 78 A.D.3d 962 (NY 2010)(same). New York is not unique among the states that permit such evidence. See *State v. Daly*, 775 N.W.2d 47 (NE 2009)(PowerPoint presentation about intoxicated driving properly received as demonstrative aid to jury); *State v. Vance*, 204 P.3d 31 (NM 2008)(use of PowerPoint slides to demonstrate methamphetamine production proper as aid to jury).

Closing Arguments

The purpose of closing arguments is for an attorney “to explain to the jury what it has to decide, and what evidence is relevant to its decision.”²⁶ In criminal cases, the closing argument is said to be “that moment in a trial where the prosecutor is required to reveal her understanding of the case, as part of her effort to guide the jury’s comprehension of the facts presented to them.”²⁷ Although the purpose of closing argument is to assist the jury in analyzing the evidence, a prosecutor may not exceed the evidence presented at trial during her closing argument, but she is free to state conclusions and draw all reasonable and logical inferences from the trial evidence favorable to her position.²⁸ And on appellate review, a prosecutor’s comments in closing statement must be viewed in the context of the trial as a whole.²⁹

While staying within the permissible boundaries described above, prosecutors can effectively use PowerPoint in their closing arguments in a variety of ways: to reinforce their theme and theory of the case; to incorporate photographs; to display video and audio recordings, diagrams and maps received in evidence; to display transcripts of witness testimony; and to accurately display the anticipated charge the trial court will deliver to the jury. As a practical matter, PowerPoint can add an element of organization to a closing argument, by helping the prosecutor focus on particular issues. It can also be a touchstone for jurors to follow a summation, particularly on complex cases. Over the years, appellate courts across the nation have approved the use of PowerPoint in summation, provided it does not stray beyond the bounds of permissible argument.

²⁵ See also, *Eaton v. Wyoming*, 192 P.3d 36 (2008)(use of PowerPoint in death phase of capital trial by defense psychiatrist was permitted).

²⁶ *Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2001).

²⁷ *Gault v. Lewis*, 489 F.3d 993, 1014 (9th Cir. 2007)(emphasis added).

²⁸ *United States v. Reeves*, 742 F.3d 487, 506 (11th Cir. 2014).

²⁹ *United States v. Bailey*, 123 F.3d 1381, 1400 (11th Cir. 1997).

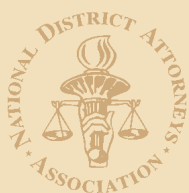
Comments on Evidence

A recent case in Michigan, which upheld a first-degree murder conviction, illustrated the proper and effective use of PowerPoint in a prosecutor's summation. *Michigan v. Young*, 2014 Mich.App LEXIS 2582 (2014). In *Young*, the prosecution's PowerPoint presentation during closing argument included slides ranging from lists of the elements of the offenses to pictures of defendant and the victims with text adjacent to the pictures. While the defendant claimed the entire PowerPoint presentation was inflammatory, he specifically attacked only eight slides, predominantly slides containing photographs of the victims before and after the attack, and pictures of the defendant's blood-stained clothing, all of which had been received in evidence. Several slides also contained text next to the pictures, which had been gleaned from corresponding testimony. Rejecting the defense contention that the offending text contained the prosecutor's personal belief about the evidence, the appellate court found that the text accurately reflected the evidence presented at trial, which created the reasonable inference that the defendant beat the victim to death, *i.e.*, that defendant was the killer. "In light of this, we fail to see how the prosecution's argument, which need not be stated in the blandest possible terms, by the way, was improper just

because it was also presented in a visual medium." *Young, Id.* at 18.

Recently, in *Delaware v. Spence*, 2014 Del. Super. LEXIS 242 (DE 2014), a Delaware appellate court sustained a conviction for first-degree murder where the defense's primary claim of error was the prosecutor's inclusion of slides in a PowerPoint presentation used in closing arguments that contained the words "MURDER" written in red ink above a photograph of the victim (that had been properly admitted in evidence), and a slide that read "defendant is guilty of all charges." Citing *Glasmann*, the defense argued that such a slide injected the prosecutor's opinion into the deliberations, and required reversal. The Delaware appeals court disagreed, and distinguished *Spence* from the Washington case: "While admittedly strongly worded, the slide is linked to evidence adduced at trial and consistent with the trial record." *Id.* at 15. Interestingly, the prosecutor in *Spence* had provided a copy of the PowerPoint used in summation to the defense prior to giving his closing argument; the defense made no objections to its use. See also, *Ohio v. Hilton*, 2008 Oh.App. LEXIS 2550 (OH 2008)(prosecutor's use of PowerPoint in summation proper, although prosecutor's use of scales to depict state's burden should be avoided).

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Similarly, provided that prosecutors do not overstep the bounds of permissible argument, appellate courts in many states have all upheld the use of PowerPoint in closing arguments. See *People v. Williams*, 2014 N.Y. App. Div. LEXIS 9078 (NY 2014)(use of PowerPoint slides in summation proper); *People v. Berry*, 110 A.D.3d 1002 (NY 2013)(prosecutor's use of PowerPoint as visual aids in summation not prejudicial to defendant); *People v. Tiro*, 100 A.D.3d 663 (NY 2012)(same); *Rogers v. Alaska*, 280 P.3d 582 (2012)(no misconduct in use of rhetorical PowerPoint slide used by prosecutor in summation, where slide suggested that defendant had fabricated story); *California v. Pridmore*, 2007 Cal.App. Unpub LEXIS 9025 (2007)(PowerPoint used by prosecutor in summation permissible); *State v. Francione*, 46 A.3d 219 (CT 2012) (use of PowerPoint slides in summation by prosecutor consisting of pictures in evidence with text of prosecutor's comments was proper); *Reeves v. Florida*, 67 So.3d 380 (FL 2011)(prosecutor's use of PowerPoint in summation proper); *State v. Conley*, 2011 Minn.App. Unpub. LEXIS 813 (MN 2011)(prosecutor's use of PowerPoint in summation is proper); *Hawaii v. Yamada*, 173 P.3d 569 (HA 2007)(use of PowerPoint by prosecutor in summation to illustrate arguments permissible); *State v. Feemster*, 2013 IL App Unpub LEXIS 912 (IL 2013)(no abuse of discretion to permit PowerPoint in summation, as prosecutor has broad latitude to draw logical inferences from evidence); *Campbell v. Indiana*, 2013 Ind.App Unpub LEXIS 256 (IN 2013)(use of PowerPoint in summation proper); *State v. Wheeler*, 219 S.W.3d 811 (MS 2007)(use of PowerPoint in summation proper); *State v. Kalmio*, 846 N.W.2d 752 (ND 2014)(display of evidence during summation with PowerPoint is permitted); *Browning v. Oklahoma*, 134 P.3d 816 (OK 2006) (prosecutor's summation aided by use of PowerPoint that included exhibits properly admitted into evidence accompanied by "talking points" permitted in capital murder case); *Rouchon v. Texas*, 2001 Tex.App. LEXIS 7118 (2001)(prosecutor's use of PowerPoint in summation in capital murder case permitted).

Legal Instructions

Another effective use of PowerPoint in closing argument is to accurately and correctly display the trial court's anticipated charge on the law to the jury. When done properly, such slides can help focus the jury's attention on the applicable law, and narrow the issues for them to decide. For example, by displaying the specific elements of a given crime required to be proven, a prosecutor can plug the credible evidence adduced at trial into the elements to demonstrate to a jury how the defendant's guilt has been proven beyond a reasonable doubt. Great care should be taken to ensure that any slide focusing on a statement on the law is exact and tracks the pattern jury instructions, and

the prosecutor should always advise the jury that the trial court is the source of the law.

In New York, the highest state appellate court sustained a second-degree murder conviction, and held that a prosecutor's display of legal definitions on PowerPoint slides was proper. In fact, during the trial judge's presumption charge to the jury, he specifically advised: "I am responsible for setting forth the law, not the lawyers." The judge also explained that the lawyers were given a copy of the court's legal instructions before summations and might refer to those instructions during closing arguments. The judge cautioned the jurors that they had to "listen carefully to all the instructions that I will give you after the summations. And if you think there's any difference between what the lawyers may have said and what I say the law is, your sworn duty as jurors is to follow my instructions on the law." In the final charge, the court reiterated that the jurors were duty bound to "apply to the facts the law as I explain it." *People v. Baker*, 14 N.Y.3d 266, 273 (NY 2010). See also, *People v. Bryan*, 46 A.D.3d 1219 (NY 2007)(display of legal instructions on PowerPoint slides during summation by prosecutor was proper); *Iowa v. Deemer*, 2010 Iowa App Lexis 1389 (IA 2010)(no error in prosecutor's display in PowerPoint in summation of court's charge as text was accurate); *Washington v. Allen*, 317 P.3d 494 (WA 2014)(prosecutor's closing argument with PowerPoint including text related to court's charge was permissible).

CONCLUSION

With a modicum of restraint, the application of common sense, and obedience to existing rules of evidence, a prosecutor can supplement her oral advocacy skills with an effective use of technology to skillfully and efficiently present evidence, or to deliver a commanding closing argument. However, problems have and will continue to occur if prosecuting attorneys become too creative or stray beyond acceptable boundaries in their use of PowerPoint. Given the stakes, there is no need for prosecutors to "push the envelope" when using technology at trial — a simple and concise PowerPoint presentation used by witnesses on direct to display evidence, or to complement a dominant and masterful summation, is all that is needed. By adhering to these rules, prosecutors across the country can dispel the baseless allegations by the defense bar and the media alike that all prosecutors have a "win at all costs" mentality that results in the wrongful convictions of innocent people. Indeed, through the effective use of PowerPoint and other technology at our disposal, prosecuting attorneys can ensure that justice is done by convicting the guilty, exonerating the wrongly accused, and returning public confidence to the justice system.