

Scanning The Prosecutor's Argument For Things *Other* Than Misconduct

(Neil Auwarter, 10/18)

The prosecutor's argument to jurors is often relevant to issues *other* than prosecutorial misconduct. Jury argument summarizes each side's theory of the case, which can be highly relevant to establishing whether errors occurred elsewhere in the trial, and if so whether those errors were prejudicial.

Some attorneys even *begin* record review by reading the closing arguments. Knowing the prosecution and defense theories of the case from the start can help make sense of the rest of the record and distinguish grain from chaff in the search for errors. While prosecutorial misconduct is an important potential issue to watch for, hyper-focusing on the hunt for instances of actual misconduct can cause the reader to miss other important aspects of argument. Psychologists call this "selective attention" or "inattentive blindness."

The Invisible Gorilla Experiment (Harvard/University of Illinois, 1975)



Examples:

1) Establishing Prejudice From Other Errors

–Did the prosecutor's argument exacerbate an **evidentiary error** by emphasizing the challenged evidence; or did the prosecutor's theory of the case rely on the challenged evidence, even though the prosecutor did not expressly refer to that evidence?

–Did the prosecutor's argument exacerbate **instructional error** by expressly arguing the instruction or advancing a theory or inference supported by the challenged instruction?

–If so, such argument is highly relevant to showing prejudice from that evidentiary or instructional error. (*People v. Hendrix* (2013) 214 Cal. App. 4th 216, 250 [prosecutor argument relevant to prejudice from instructional error].) This is true even though the prosecutor committed no misconduct in making the argument.

2) Prosecutor's "Election" To Rely On One Of Multiple Factual Bases For Guilt

–Did the prosecution make an “election” to rely on one of multiple evidentiary bases to prove a charged offense, doing away with the need for a unanimity instruction? Note that there is authority that the mere fact the prosecution emphasized one fact rather than another is not an “election” obviating a unanimity instruction. Instead, the prosecutor must make clear to jurors that they are required to focus on one evidentiary basis versus another. (*People v. Mehlado* (1998) 60 Cal.App.4th 1529, 1535-1536 [prosecutor's election must “directly inform the jurors of his election and of their concomitant duties . . .”].)

3) Establishing A Jury Instruction Was Erroneously Ambiguous

An often-overlooked variety of instructional error is the claim an instruction, even if not facially incorrect, is **ambiguous**, i.e., subject to two interpretations, one of which is legally incorrect. As detailed below, the prosecutor's argument to jurors is relevant to establishing an instruction is erroneously ambiguous. And if the instruction was erroneous, the prosecutor's argument is also relevant to whether the error was prejudicial.

On appeal, the most common claim of instructional error is that an instruction is *incorrect*, i.e., it affirmatively misstates a legal principle. But another avenue of attack, vastly underutilized by appellate counsel, is that an instruction is *ambiguous*. An ambiguous instruction is not facially incorrect, but is confusing enough to be susceptible to an incorrect interpretation by jurors. The seminal cases on ambiguous instructions are *Boyd v. California* (1990) 494 U.S. 370, 378, *Estelle v. McGuire* (1991) 502 U.S. 62, 72 and *Calderon v. Coleman* (1998) 525 U.S. 141, 146. These US Supreme Court cases involve instructional ambiguities implicating a federal constitutional right. But the California Supreme Court has adopted the same rule for assessing ambiguous jury instructions that amount to only errors of state law. (*People v. O'Malley* (2016) 62 Cal.4th 944, 987; *People v. Clair* (1992) 2 Cal.4th 629, 663.)

These cases set up a two-pronged inquiry for the reviewing court. First, is it “reasonably probable” the jury adopted an incorrect interpretation of the instruction? While this inquiry uses the familiar “reasonably probable” language found in California's *Watson* standard of prejudice, it is *not* a prejudice test. Instead, it is a standard of review to determine whether the instruction was erroneously ambiguous. If this inquiry is answered in the affirmative, then the reviewing court poses the second part of the inquiry--was the erroneous ambiguity prejudicial in the context of the case? If the ambiguity implicates a federal constitutional right, the applicable prejudice test is the *Chapman* “harmless beyond a reasonable doubt” test. If the ambiguity implicates only a state law principle, then the prejudice test is that of *Watson*, i.e., is there a “reasonably probability” of a more favorable outcome absent the error.

In *Middleton v. McNeil* (2004) 541 U.S. 433, the US Supreme Court added a couple of important nuances to the law on ambiguous instructions. First, the court held that since jury instructions must be viewed “as a whole,” a single facially incorrect instruction, when contradicted by a *correct* instruction on the same point, amounts to an ambiguity and must be analyzed as such. (*Id.* at 434-437.)

The second nuance added by *Middleton v. McNeil* was the court's finding that **arguments by counsel to the jury** may be considered in determining the first prong, i.e., whether the instruction was erroneously ambiguous. In *Middleton v. McNeil*, the jury was instructed ambiguously on the defense of imperfect self-defense, with one instruction stating incorrectly that the defendant must have "reasonably" believed there was imminent peril. The state court held, and the US Supreme Court affirmed, that comments made by the prosecutor during argument resolved the ambiguity in favor of the legally correct construction and so avoided the error. (*Middleton v. McNeil*, 541 U.S. at p. 438.) But in a different context the prosecutor's argument might fail to resolve an ambiguity—or might actually exacerbate it. (See *People v. McCarrick* (2016) 6 Cal.App.5th 227, 261 (conc. & dis. opn. of Streeter, J.)) If so, this would strengthen the claim the instruction was erroneously ambiguous.

The most apparent impact of this part of *Middleton v. McNeil* is that it allows the parties to argue in the first prong of the inquiry (i.e., was there error?) that comments by trial counsel either ameliorated or exacerbated an ambiguous instruction. By contrast, where an instruction is facially incorrect, comments of trial counsel are relevant only to determining prejudice.

A less obvious aspect of the comments-of-counsel holding in *Middleton v. McNeil* is that it permits a reviewing court to find an instruction erroneously ambiguous in the context of a particular case, *without necessarily finding the instruction is erroneous in other cases*. This is significant because a reviewing court is always concerned about the broader implications of its ruling. A claim of erroneous ambiguity gives the reviewing court a means of correcting an injustice in a particular case without disapproving the same instruction in other cases.

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