No. 23-

IN THE

Supreme Court of the United States

WOOJIN CHO,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM: FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is it constitutional error for a prosecutor in summation to express her personal belief that the defendant lied on the stand?

II. In reviewing summation misconduct for harmless error, is reversal required where there is any "reasonable possibility" that the constitutional error "might have contributed to the conviction?"

RELATED PROCEEDINGS

i. *People of the State of New York v. Woojin Cho*, Cnty. Clerk's No. 570516/22, Criminal Court of the City of New York, Bronx County. Judgment entered July 19, 2022.

ii. *People of the State of New York v. Woojin Cho,* Cal. No. 22-125 Supreme Court of the State of New York, Appellate Term, First Department. Order denying direct appeal entered July 3, 2023.

iii. *People of the State of New York v. Woojin Cho*, CLA-2023-00778, State of New York Court of Appeals. Order denying leave entered November 21, 2023.

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OPINIONS BELOW

The order of the New York Court of Appeals denying Woojin Cho's application for leave to appeal is unpublished. App. 1a. The order of the Supreme Court, Appellate Term, First Department affirming the judgment of the Criminal Court of the City of New York, Bronx County is unpublished. App. 2a-5a.

JURISDICTIONAL STATEMENT

The New York Court of Appeals entered judgment denying Dr. Cho's application for leave to appeal on November 21, 2023. App. 1a. This Court has jurisdiction under 28. U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any person be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed[.]

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

INTRODUCTION

The Supreme Court recognized in *United States v. Young*, 470 U.S. 1, 18 (1985), that it is improper for a prosecutor to "express[] his personal opinion concerning the guilt of the accused." This case involves the application of that principle to a closing argument that accuses a defendant of lying on the witness stand. Unlike in *Young*, where the Court reviewed the prosecutor's misconduct for plain error, the misconduct in this case was objected to.

Dr. Woojin Cho was tried in New York City Criminal Court, Bronx County in May 2022 on charges arising out of a medical exam in which he was alleged to have touched the patient in an improperly sexual manner. Dr. Cho and the complainant both testified. There was no physical evidence and nobody else was present when the offense was alleged to have occurred. In summation, the prosecutor told the jury that Dr. Cho "lied" to them when he denied committing the offense and suggested that the jury should punish Dr. Cho for having "the audacity to go up on the witness stand in a desperate attempt to mislead you."

Most jurisdictions, including New York, hold that a prosecutor may show that a witness is lying, but may not *say* it. Yet the consequences of such comments on

appeal vary, not so much because every case is different, but because many courts do not recognize the error to be constitutional in nature, and therefore do not apply the rigorous standard of review mandated in *Chapman v. California*, 386 U.S. 18, 24 (1967). Even where the correct standard is identified, courts often misapply it by focusing on whether there is sufficient evidence of guilt to sustain the conviction rather than examining the possible effect of the error on the jury. This Court should grant review to ensure that lower courts recognize the constitutional significance of summation misconduct and apply the correct standard of review where the misconduct undermines the fairness of the trial.

STATEMENT OF THE CASE

A. Background and Trial Proceedings

On May 25, 2022, a six-person Bronx jury convicted Dr. Woojin Cho, an orthopedic surgeon, of forcible touching, third degree sexual abuse, and second-degree harassment based on allegations that he kissed and groped a patient during a medical examination that he conducted on September 4, 2020.

At trial, the complainant testified that Dr. Cho kissed her on the cheek, put his finger in her vagina, and put her hand on his penis. Transcript of the Trial of Woojin Cho, Criminal Court, Bronx County, Docket No. CR-013117-20BX (hereinafter "TT") at 237:1 - 239:14. The complainant and several of her family members testified that the complainant intentionally overdosed on pain medication following the examination. TT 348:6 - 352:24-25. The People also played a recording of a controlled call

from four days after the examination in which Dr. Cho and the complainant mentioned the concept of a "sugar daughter" and the possibility of meeting socially. TT 252:18, TT 441:22 - 442:6.

The defense relied principally on Dr. Cho's own testimony. Dr. Cho conceded that he acted unprofessionally by mentioning "sugar daughters" with the complainant and proposing that they meet socially. TT 695. He testified that he conducted an appropriate physical examination of the complainant during the September 4 appointment. TT 699 - 705. Dr. Cho denied touching the complainant's vagina or touching her in any way that was not part of the physical examination. TT 726:22-23. Finally, Dr. Cho testified that he did not understand parts of the conversation with the complainant on the controlled call because he has difficulty understanding English over the phone and was driving in New York City at the time of the call. TT 708:20 - 710:17.

In summation, the prosecutor went beyond attempting to undermine Dr. Cho's credibility and attacked him for his decision to testify, stating that it constituted proof of his guilt. The prosecutor argued that Dr. Cho "didn't have to testify[,] he had the right to remain silent," and told the jury that, "if you find the defendant was dishonest when testifying, then you can hold that against him and you can find that the reason he lied is that he has a consciousness of guilt." TT 824:15-17, 824:25-825:4. The court sustained an objection to that comment, but the prosecutor continued: "So don't just ignore his lies, ladies and gentlemen. Put the fact that he had the audacity to go up on the witness stand in a desperate attempt to mislead you and put it against all of the overwhelming evidence of his guilt." TT

825:7-11. The jury convicted Dr. Cho of all three counts. On July 19, 2022, Judge Audrey Stone sentenced Dr. Cho to nine months in jail.

B. Appellate Proceedings

Dr. Cho appealed his conviction to the Appellate Term, First Department. Dr. Cho argued that the prosecutor's summation comments criticizing Dr. Cho for having "the audacity" to testify and imploring the jury "don't just ignore his lies," violated Dr. Cho's right under the state and federal constitutions to testify in his own defense.

In briefing before the New York Appellate Term, Dr. Cho explained that the prosecutor's misconduct amounted to constitutional error. *See* Br. for Def.-Appellant at 36-41. Dr. Cho argued that, under *Chapman v. California*, 386 U.S. 18 (1967), comments that deprecate a defendant's right to testify require reversal unless "there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt." Br. for Def.-Appellant at 36.

The Appellate Term affirmed the conviction. In a two-page opinion, the court concluded that, "taken as a whole, the bulk of the challenged remarks were either fair response to defense counsel's arguments on summation or fair comment on the evidence, and any improprieties were not so egregious as to deprive defendant of a fair trial, including the prosecutor's improper references to defendant as a 'liar.'" App. 3a, 4a. On November 21, 2023, the New York Court of Appeals denied Dr. Cho's leave to appeal. App. 1a.

REASONS FOR GRANTING THE WRIT

I. This Court should grant review to resolve whether a prosecutor's statement to the jury accusing a testifying defendant of lying on the witness stand amounts to constitutional error.

A prosecutor who expresses her personal opinion about the credibility of a witness or the guilt of the accused poses "two dangers" to due process. *United States v. Young*, 470 U.S. 1, 18, 105 S.Ct. 1038, 1048, 84 L.Ed.2d 1 (1985). First, such comments "convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant." *Id.* (citing *Berger v. United* Sates, 295 U.S. 78, 88-99 (1935)). Second, a "prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.*; *see Bellamy v. New York*, 914 F.3d 727, 763 (2d. Cir. 2019) ("[I]t is the height of summation misconduct for a prosecutor to argue to the jury his personal opinion as to a defendant's guilt.").

Rarely are these dangers more acute than when a prosecutor directly accuses a criminal defendant of lying on the stand. *See, e.g.*, *United States v. Woods*, 710 F.3d 195, 203 (4th Cir. 2013) ("The gravity of these risks is amplified in the case of a criminal defendant exercising his constitutional right to testify in his own defense."). Stating that the defendant's testimony is "lies" or that the defendant is a "liar" may influence the jury to vote guilty based on personal opinion rather than on the evidence admitted at trial. Such comments contain both a moral judgment about the defendant's character and

factual assertions that the defendant committed the crime and lied about it on the stand—and that the prosecutor *knows* that the defendant is lying and that he is guilty. *See, e.g.*, *State v. Austin*, 422 P.3d 18, 51 (Haw. 2018); *Crider v. People*, 186 P.3d 39, 42 (Colo. 2008) (to accuse the defendant of lying is to express a "personal opinion concerning the guilt of the accused").

Personal attacks on a defendant's credibility work an additional harm when directed at the defendant's decision to testify rather than the testimony itself. "Because a defendant's constitutional right to remain silent cannot be used against him to draw an inference of guilt, it follows that a defendant's exercise of his constitutional right to a trial by jury cannot be used against him to create an inference of guilt." *People v. Rodgers*, 756 P.2d 980, 983 (Colo. 1988), *overruled on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005). "Such prosecutorial imputation of guilt clashes head-on with the presumption of innocence and undermines the very foundations on which our system of criminal justice is built." *Rodgers*, 756 P.2d at 986 (Quinn, C.J., dissenting). *See also People v. Hicks*, 478 N.Y.S.2d 256, 262-63 (N.Y. App. Div. 1st Dep't 1984) (vacating conviction where the prosecutor's personal attack on the defendant's credibility amounted to "urging the jury to draw a negative inference from the defendant's decision to [testify].").

Although state courts broadly discourage prosecutors from calling the defendant a liar or making similar comments, there is no consensus as to whether such errors are constitutional in nature. *Compare Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010) (*en banc*) (finding a reversible due process violation where prosecutor referred

to defendant's out-of-court statements as "lies and lies and lies"), *with State v. Lankford*, 399 P.3d 804, 827 (Idaho 2017) (finding that the "repeated use of the term 'liar' and its various grammatical forms is troubling and ill-advised" but not applying constitutional harmless-error review.), *Crider v. People*, 186 P.3d at 42 ("[T]hreatening to mislead a jury with expressions of personal opinion or inflammatory comments . . . does not rise to the level of constitutional error.").

A thorough opinion by the Supreme Court of Hawaii noted that "courts across the country have recognized" that using the word "lie" in reference to a witness's testimony is unfairly prejudicial, but that many courts have, with "deep uneasiness," accepted the practice. *State v. Austin*, 422 P.3d 18, 51, 55 (Haw. 2018) (collecting cases). In some jurisdictions, courts have affirmatively held that a prosecutor *may* call the defendant a "liar" if the defendant's testimony "contradicts the strong evidence of his guilt." *See, e.g.*, *People v. Friend*, 211 P.3d 520, 545 (Cal. 2009); *see also State v. Oehman*, 562 A.2d 493 (Conn. 1989) (holding that it was "unprofessional" but not improper to call the defendant a "liar").

Even within the state of New York there is disagreement about how to review improper personal attacks on a defendant's credibility. The New York Court of Appeals has not addressed whether and under what circumstances an accusation that the defendant lied deprives the defendant of a fair trial. Intermediate courts condemn the tactic but disagree on whether reversal is an appropriate remedy. *Compare People v. Walters*, 674 N.Y.S.2d 114, 116 (N.Y. App. Div. 2d Dep't 1998) (reversing where prosecutor referred to defendant's testimony as "lies on top of lies,

on top of lies"); *People v. Dowdell*, 453 N.Y.S.2d 174 (N.Y. App. Div. 1st Dep't 1982) (finding prosecutor's comments that the defendant lied on the stand denied defendant a fair trial); *People v. Hicks*, 478 N.Y.S.2d at 262–63; *with People v. Dunn*, 158 A.D.2d 941, 942, 551 N.Y.S.2d 432, 432 (4th Dep't) ("although the prosecutor was overzealous and improperly ... called defendant a liar, we cannot say under all the circumstances that defendant was deprived of a fair trial"); *People v. Chaney*, 155 A.D.2d 985, 986, 548 N.Y.S.2d 129, 130 (4th Dep't 1989) ("Although the prosecutor acted overzealously ... in one instance calling defendant a liar, we cannot say under all the circumstances that defendant was deprived of a fair trial."). *See generally*, *Green v. Herbert*, 01-cv-11881(SHS)(AJP), 2002 WL 1587133, at *17 (S.D.N.Y. July 18, 2002) (observing that an improper comment about a defendant's credibility "does not necessarily deprive the defendant of a fair trial as a matter of New York state law.").

We urge the Court to hold that a prosecutor commits constitutional error by expressing her personal belief that the defendant lied on the stand. To do so, the Court need only apply the principle it recognized in *Berger* and *Young*: that a prosecutor's expressed opinion about key issues of fact risks depriving the defendant of a trial by an "impartial" jury. U.S. Const. Amend. VI. Where the opinion takes aim at a defendant's testimony, the prosecutor's statements also contravene the defendant's separate, related right to testify in his own defense. *See, generally*, *Rock v. Arkansas*, 483 U.S. 44, 52-53 (1987) (deriving the right to testify from the Fifth, Sixth, and Fourteenth Amendments).

The prosecutor's comments in this case were a frontal attack on Dr. Cho's trial rights. The jury's verdict hinged

on whether it credited the complainant or Dr. Cho. The prosecutor put a heavy thumb on the scale by referring to Dr. Cho's testimony as "lies," criticizing him for having the "audacity" to exercise his right to testify, and telling the jury he was trying to "mislead" them. TT 825:7-11. The prosecutor exceeded the bounds of legitimate advocacy by weaponizing Dr. Cho's rights against him. This was constitutional error and should have been reviewed under the harmless-error standard articulated in *Chapman v. California*, 386 U.S. 18, 24 (1967).

II. Certiorari is warranted because appellate courts frequently misapply the *Chapman* harmless error standard in cases involving prosecutorial misconduct in summation.

This Court established the standard of review for constitutional trial errors in *Chapman v. California*, 386 U.S. 18, 24 (1967). *Chapman* concerned a prosecutor's argument that the jury should draw a negative inference from the defendant's failure to testify, an argument permitted under California law but forbidden by the Court's recent holding in *Griffin v. California,* 380 U.S. 609 (1965). The California Supreme Court affirmed the conviction in light of "substantial evidence" in the record that "proof of guilt" was "overwhelming." 386 U.S. at 23, n.7. This Court reversed, holding that a different, stricter standard applies to constitutional errors: "the beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24. That remains the standard today. *See, e.g.*, *Davis v. Ayala*, 576 U.S. 257, 267 (2015) (reaffirming *Chapman*).

Chapman explained that California's standard of review was deficient in its "overemphasis" on the existence of "overwhelming evidence" of guilt. *Chapman v. California*, 386 U.S. at 23. In other words, the task for appellate courts is not to determine whether a reasonable jury would have convicted the defendant had there been no error, but whether there was any "reasonable possibility" that the error "might have contributed" to the jury's decision. *Id.* at 23. *See also Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error."). "That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Id.* at 279–280.

Chapman established three things. First, not every constitutional error requires reversal. Second, a constitutional error requires reversal *unless* it is harmless beyond a reasonable doubt, *i.e.* unless there is no "reasonable possibility" that the error "contributed to the conviction." 386 U.S. at 23. Third, where there is a reasonable possibility that the error contributed to the guilty verdict, reversal is necessary even if the reviewing court finds that properly admitted evidence was sufficient, perhaps overwhelmingly sufficient, to convict.

As to the third point, the Court's subsequent harmless-error cases made clear that overwhelming evidence *can*, in *some* cases, be dispositive of harmless-error review. For example, in *Harrington v. California*, 395 U.S. 250, 254

(1969), the Court upheld a conviction despite the erroneous admission of a codefendant's confession in violation of *Bruton v. United States*, 391 U.S. 123 (1968), because the state's case was "so overwhelming" and the tainted evidence was "cumulative." The Court emphasized that it was not detracting from *Chapman*. *Id.* Rather, the weight of the evidence against Harrington was so strong that to that to overturn the conviction would effectively hold that "no violation of *Bruton* can [ever] constitute harmless error," which would create the sort of automatic-reversal rule that *Chapman* rejected. Thus, the Court concluded, "[w]e do not depart from *Chapman*; nor do we dilute it by inference. We affirm it." *Id.*

Since then, in *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Court affirmed that *Chapman* requires appellate courts to conduct a searching review of the record, considering the nature of the constitutional error, its connection to properly admitted evidence, and its possible effect on the jury. *Id. Fulminante* involved the improper admission of an involuntary confession at a murder trial. The jury had been shown corroborative physical evidence about victim's wounds as well as testimony about a second, voluntary confession that largely mirrored the first one. After noting the "profound impact" that confessions can have on a jury, the Court determined it could not rule out the possibility that the initial confession influenced how the jury assessed the credibility of the witness who testified about the second one. *Id.* at 298-99. Thus, despite the strength of the untainted evidence, the Court held that the state had failed to show beyond a reasonable doubt that the involuntary confession did not contribute to the conviction. *Id.* at 295-96.

Many appellate courts do not apply the exacting review mandated by *Chapman* and *Fulminante* in cases of constitutional prosecutorial misconduct. Instead, they do what *Chapman* and *Fulminante* explicitly forbade: they imagine a trial in which the misconduct never took place and then determine whether the jury would have convicted anyway, without considering the error's effect on the *actual* jury. By analyzing constitutional error in this way, the reviewing court improperly assumes the role of factfinder. *See, e.g.*, Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 Cal. L. Rev. 1335 (1994) (discussing "confusions" among "both federal and state courts" on the role that "overwhelming evidence" plays in *Chapman* review).

One vivid example of this problematic analysis is *State v. Anthony*, 309 So. 3d 912, 924 (La. App. 5th Cir. 2020), *writ denied*, 325 So. 3d 1067 (La. 2021), *writ denied* 143 S.Ct. 29 (2022). There, a prosecutor gave sworn testimony vouching for the police investigation and referring to evidence outside the record. The appellate court declined to reverse, because "the evidence at trial supports defendant's convictions, even excluding [the prosecutor's] testimony." 309 So.3d at 922. As several members of this Court acknowledged, the state court's holding, "based solely on the sufficiency of the evidence that remained after excising [the prosecutor's] testimony . . . has [been] repeatedly repudiated" by *Chapman* and its progeny. *Anthony v. Louisiana*, 143 S. Ct. 29, 35 (2022) (Sotomayor, J., dissenting).

The Louisiana court's fixation on the sufficiency of evidence, rather than an error's prejudicial effect,

pervades other state and federal jurisdictions. *See United States v. Thomas*, 377 F.3d 232, 245 (2d Cir. 2004) (affirming a conviction where prosecutor argued that defendant "lied," because defendant failed "to demonstrate that, absent the misconduct, he would not have been convicted."); *United States v. Kravchuk*, 335 F.3d 1147, 1154 (10th Cir. 2003) (concluding, without explanation, that a prosecutor's comment that defendant "lied and lied and lied" was harmless in light of "overwhelming" evidence); *Temple v. State*, 342 S.W.3d 572, 617 (Tex. App.--Hous. [14th Dist.] 2010), *aff'd*, 390 S.W.3d 341 (Tex. Crim. App. 2013) (affirming conviction in light of "the certainty of conviction absent the misconduct," where prosecutor accused the defendant of lying on the stand); *People v. Townsend*, 483 N.E.2d 340 (Ill. App. 1st Dist. 1985) ("[P] rosecutorial remarks do not generally mandate reversal unless . . . the jury would likely have reached a contrary verdict had they not been made.") (citations omitted); *see generally* Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 Wis. L. Rev. 35, 59 (2005) (observing that courts have replaced *Chapman* review with an assessment of whether "independent evidence of guilt taken alone could support the conviction.").

Courts have drifted from *Chapman* in other critical ways. The Second Circuit has placed the burden on the *defendant* to show that a prosecutor's improper, objected-to comment was not harmless. *See United States v. Thomas*, 377 F.3d at 245. Some jurisdictions consider whether the prosecutor's conduct was deliberate, *State v. Mussey*, 893 A.2d 701, 708 (N.H. 2006), a factor that has no bearing on the fairness of a particular trial.

By focusing primarily on the weight of evidence, appellate courts risk affirming convictions in cases where prosecutorial error affected the trial. *See, e.g.*, Mitchell, *supra*, at 1336. This approach usurps the jury's role as factfinder. *See, e.g.*, Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?* 70 N.Y.U.L. Rev. 1167 (1995) (criticizing "guilt-based" approaches to harmless error review). Although the Court's post-*Chapman* decisions on harmless error contain observations about "overwhelming evidence," most of those cases concerned erroneous evidentiary rulings as opposed to improper argument. *See, e.g.*, *Harrington*, 395 U.S. at 254 (improper admission of co-defendant's confession); *Milton v. Wainwright*, 407 U.S. 371 (1972) (improper admission of defendant's involuntary confession); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (improper admission of expert testimony about future dangerousness).

A standard focused on "overwhelming evidence" becomes incoherent when the trial error relates to summation comments, as in *Chapman*, as opposed to the admission or exclusion of evidence. Where an evidentiary ruling is at issue, an appellate court may attempt to evaluate the error's effect by reference to the aggregate weight of properly admitted evidence. But errors in summation cannot be easily mapped onto the factfinding process because they do not affect what evidence the jury hears, but rather "the jury's ability to judge the evidence fairly." *United States v. Young*, 470 U.S. at 12.

Here, the prosecutor expressed her personal opinion that Dr. Cho perjured himself and lied to the jury. The error is clear, but its effect is difficult to assess. The

comments may have caused the jurors not to believe Dr. Cho, or they may have had no effect at all. Given the inherent limitations of appellate review and importance of trial rights, reversal is necessary unless there is no reasonable possibility that the error contributed to the jury's verdict.

The Court should grant review to ensure that state and federal courts correctly apply *Chapman* to constitutional summation misconduct.

III. On review, this Court should reverse the New York appellate decision because the prosecutorial misconduct here could not have been harmless under *Chapman*.

In this case, the Appellate Term failed to explain why the prosecutor's improper statements were harmless, and instead concluded that "any improprieties were not so egregious as to deprive defendant of a fair trial . . . including the prosecutor's improper reference to defendant as a 'liar[.]'" App. 3a, 4a. The Appellate Term would not have reached that conclusion had it applied the correct standard of review under *Chapman*.

This case charged sexual assault, but the only witness was the complainant and the only viable defense was Dr. Cho's own testimony. Dr. Cho's right was to have an impartial jury decide who was telling the truth. The prosecutor flagrantly undermined that right when she implored the jury to not "ignore his lies" and to punish Dr. Cho for "having the audacity to go up on the witness stand in a desperate attempt to mislead you." TT 825:7-11. As many courts in New York and around the country have

held, such personal attacks on a defendant's credibility subvert the jury's exclusive role as the arbiter of facts. Indeed, the trial judge acknowledged the impropriety by sustaining the defense's prior objection, and the appellate court characterized the comments as improper.

Of course, the jury *might* have reached that the same verdict had the prosecutor not improperly disparaged Dr. Cho and his decision to testify. For instance, the jury might have discredited Dr. Cho based on his demeanor, the embarrassing phone conversation Dr. Cho had with the complainant, or its assessment of the complainant's testimony. But how could an appellate court find, on this record, that there is no "reasonable possibility" that the prosecutor's aspersions "contributed" to the jury's verdict? *Chapman*, 386 U.S at 23. The only evidence that arguably corroborated the complainant's testimony was the controlled call. TT 252:18, TT 441:22 - 442:6. Yet, the jury's assessment of that call depended on whether they believed Dr. Cho when he testified that he had trouble understanding the complainant during the controlled call because he struggles to understand English over the phone and was driving in New York City at the time of the conversation. TT 708:20 - 710:17. And there *were* reasons to believe him. It was clear from Dr. Cho's testimony that English was not his first language, and Dr. Cho can be heard on the controlled call saying that he was driving a car and emphasizing that when he touched the complainant he did so as an appropriate part of the physical examination. *Id.*

Accordingly, there is no way to find the prosecutor's comments harmless beyond a reasonable doubt without imagining a trial in which they did not occur, which this

Court forbids. *See, e.g.*, *Sullivan v. Louisiana*, 508 U.S. at 279–280. The Court should grant review and reverse the conviction.

CONCLUSION

Certiorari should be granted so that the Court can address the important question of when a prosecutor's summation stating that the defendant lied on the witness stand amounts to constitutional error and to instruct appellate courts to apply the *Chapman* harmless error analysis.

Respectfully submitted,

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Dated: February 19, 2024
New York, New York

APPENDIX

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APPENDIX A — ORDER OF THE STATE OF NEW YORK COURT OF APPEALS, DATED NOVEMBER 21, 2023

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

WOOJIN CHO,

Appellant

BEFORE: HON. ROWAN D. WILSON, Chief Judge

ORDER DENYING LEAVE

Appellant having applied for leave to appeal to Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;[1]

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: November 21, 2023

/s/_____
Chief Judge

1. Description of Order: Order of the Appellate Term, First Department, decided July 3, 2023, affirming a judgment of the Criminal Court of the City of New York, Bronx County, rendered July 19, 2022.

APPENDIX B — OPINION OF THE NEW YORK SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT, DATED JUNE 30, 2023

SUPREME COURT, APPELLATE TERM,
FIRST DEPARTMENT

THE PEOPLE OF THE STATE
OF NEW YORK,

Respondent,

v.

WOOJIN CHO,

Defendant-Appellant.

June 2023 Term

Brigantti, J.P., Michael, James, JJ.

NY County Clerk's No.
570516/22

Calendar No. 22-125

Defendant appeals from a judgment of the Criminal Court of the City of New York, Bronx County (Audrey E. Stone, J.), rendered July 19, 2022, after a jury trial, convicting him of forcible touching, sexual abuse in the third degree and harassment in the second degree, and imposing sentence.

Appendix B

Per Curiam.

Judgment of conviction (Audrey E. Stone, J.), rendered July 19, 2022, affirmed.

Defendant was convicted, after a jury trial, of forcible touching (*see* Penal Law § 130.52[1]), third-degree sexual abuse (*see* Penal Law § 130.55) and second-degree harassment (*see* Penal Law § 240.26[1]). The People's proof was strong and persuasive, and is not now challenged by defendant on sufficiency or weight of the evidence grounds. Complainant credibly testified that during a consultation, defendant, a spinal surgeon, asked her if she wanted to be his "sugar baby;" removed her bra; kissed her on the neck; squeezed her breasts; inserted his fingers into her vagina, and placed her hand on his erect penis. The complainant's account was corroborated by other evidence, including a controlled telephone call with police, wherein defendant told complainant she should be "discreet," that he had many "sugar daughters," and then giggled and replied "absolutely" when asked by the complainant if he enjoyed touching her.

By failing to make objections or request further relief after the court took curative action, defendant failed to preserve most of his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. Taken as a whole, the bulk of the challenged remarks were either fair response to defense counsel's arguments on summation or fair comment on the evidence, and any improprieties were not so egregious as to deprive

defendant of a fair trial *(see People v Garland,* 155 AD3d 527, 529 [2017], *affd* 32 NY3d 1094 [2018], *cert denied* ___ *US* ___, 140 S Ct 2525 [2020]; *People v Feola,* 154 AD3d 638, 639 [2017], *lv denied* 31 NY3d 1013 [2018]), including the prosecutor's improper references to defendant as a "liar" (*see People v Feliciano,* 133 AD3d 469, 470 [2015], *lv denied* 27 NY3d 1150 [2016]). In any event, the court's curative instructions were sufficient to prevent any prejudice (*see People v Overlee,* 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]). Nor could the prosecutor's comments be perceived as vouching for the credibility of the complainant, since those remarks were a permissible comment on a matter of credibility, and the prosecutor did not become an unsworn witness (*see People v Ringer,* 90 AD3d 439, 439-440 [2011], *lv denied* 18 NY3d 927 [2012]; *People v Massie,* 305 AD2d 116, 117 [2003], *affd* 2 NY3d 179 [2004]).

The evidentiary rulings challenged on appeal, to the extent preserved, were provident exercises of the court's discretion that did not cause defendant any prejudice. The court properly exercised its discretion in limiting defendant's use of leading questions on direct examination (*see People v Martina,* 48 AD3d 1271, 1272 [2008]). Nor was defendant denied a fair trial when the court precluded the testimony of defendant's secretary, who was not present during the controlled call and had no direct knowledge of the facts *(see People v Scarola,* 71 NY2d 769, 777 [1988]). Finally, the testimony of complainant and a physician's assistant at Jacobi Hospital - that the complainant ingested 15-20 tablets of a prescription medication for pain management and anxiety immediately

after defendant's conduct, resulting in her hospitalization because she felt upset and "very sad"- was probative of complainant's lack of consent and not unduly prejudicial *(see People v Frumusa,* 29 NY3d 364, 372 [2017]). In any event, even assuming the trial court erred in admitting the challenged evidence or precluding testimony, any error was harmless in light of the overwhelming evidence of defendant's guilt *(see People v Crimmins,* 36 NY2d 230 [1975]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur