

96 A.D.2d 866, 465 N.Y.S.2d 755  
(Cite as: 96 A.D.2d 866, 465 N.Y.S.2d 755)


**C**

Supreme Court, Appellate Division, Second Department, New York.  
The PEOPLE, etc., Respondent,  
v.  
John COOPER, James Wallace and Wyandanch Economic Development Corp., Appellants.  
Aug. 8, 1983.


Defendants were convicted in the County Court, Suffolk County, Harris, J., of offering a false instrument for filing in the first degree and one defendant was also convicted of attempted grand larceny in the third degree, and they appealed. The Supreme Court, Appellate Division, held that interference of trial judge during course of trial whereat he assumed prosecutorial role seriously prejudiced defendants' right to a fair trial so as to require reversal of their convictions where incriminating testimony was elicited by court's own questioning.

Reversed.

West Headnotes

**[1] Criminal Law 110**  **1166.22(1)**


110 Criminal Law  
110XXIV Review  
110XXIV(Q) Harmless and Reversible Error  
110k1166.5 Conduct of Trial in General  
110k1166.22 Remarks and Conduct of Judge  
110k1166.22(1) k. In General. **Most Cited Cases**  
(Formerly 110k1166.22)

**Criminal Law 110**  **1170.5(5.5)**


110 Criminal Law  
110XXIV Review  
110XXIV(Q) Harmless and Reversible Error  
110k1170.5 Witnesses  
110k1170.5(5.5) k. Examination by

Court. **Most Cited Cases**


(Formerly 110k1170.5, 110k11701/2, 110k11701/2(51/2), 110k11701/2(5))  
Interference of trial judge during course of trial whereat he assumed prosecutorial role seriously prejudiced defendants' right to a fair trial so as to require reversal of their convictions where incriminating testimony was elicited by court's own questioning.

**[2] Criminal Law 110**  **656(2)**

110 Criminal Law  
110XX Trial  
110XX(B) Course and Conduct of Trial in General  
110k654 Remarks and Conduct of Judge  
110k656 Comments on Evidence or Witnesses  
110k656(2) k. Examination and Cross-Examination of Witnesses. **Most Cited Cases**

**Witnesses 410**  **246(2)**

410 Witnesses  
410III Examination  
410III(A) Taking Testimony in General  
410k246 Examination by Court or Jury  
410k246(2) k. Calling and Examination by Court. **Most Cited Cases**  
It is duty of trial judge to actively examine witnesses to clarify issues for jury or to facilitate or expedite the orderly progress of the trial; however, that duty must be properly circumscribed so as not to result in court's taking an adversarial position at the trial.

**[3] Criminal Law 110**  **1035(8.1)**

110 Criminal Law  
110XXIV Review  
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review  
110XXIV(E)1 In General  
110k1035 Proceedings at Trial in Gen-

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110k1035(8) Remarks and Conduct

of Judge

110k1035(8.1) k. In General.

#### Most Cited Cases

(Formerly 110k1035(8))

Defendants, whose counsel entered objections to court's conduct at a meaningful time and who objected to the fact of court's questioning and not merely the nature of the question at other times, preserved for appellate review issue as to propriety of trial judge's assumption of a prosecutorial role at the trial.

\*755 **Joel A. Brenner**, East Northport, for appellants.

Patrick Henry, Dist. Atty., Riverhead (Mark D. Cohen, Asst. Dist. Atty., Riverhead, of counsel), for respondent.

Before DAMIANI, J.P., and TITONE, MANGANO and GIBBONS, JJ.

#### \*756 MEMORANDUM BY THE COURT.

Appeals by defendants from three judgments of the County Court, Suffolk County, all rendered August 6, 1982, convicting each defendant of two counts of offering a false instrument for filing in the first degree and also convicting defendant Wyandanch Economic Development Corp. of attempted grand larceny in the third degree, upon jury verdicts, and imposing sentences.

Judgments reversed, on the law, and new trial ordered before a Judge other than the Judge who presided at the first trial.

[1][2] We find that the interference of the Trial Judge during the course of the trial whereat he assumed a prosecutorial role seriously prejudiced defendants' right to a fair trial so that their convictions must be reversed and a new trial ordered. We recognize that it is the duty of a Trial Judge to actively examine witnesses to clarify the issues for the

jury or to facilitate or expedite the orderly progress of the trial ( *People v. Yut Wai Tom*, 53 N.Y.2d 44, 57, 439 N.Y.S.2d 896, 422 N.E.2d 556). This duty, however, must be properly circumscribed so as not to result in the court taking an adversarial position at the trial ( *People v. Tucker*, 89 A.D.2d 153, 455 N.Y.S.2d 1). Under the circumstances of this case, where incriminating testimony was elicited by the court's own questioning, a reversal is required to insure defendant's right to a fair trial.

[3] The People argue that defendants have not preserved this issue for review (see *People v. Charleston*, 56 N.Y.2d 886, 453 N.Y.S.2d 399, 438 N.E.2d 1114). Our review of the record however, indicates that counsel entered objections to the court's conduct at a meaningful time but to no avail. It is clear that at other times counsel objected to the fact of the court's questioning and not merely the nature of the question as was the situation precluding review of the court's conduct in *People v. Charleston (supra)*. Accordingly we find the issue is preserved.

In light of our determination we need not reach the other issues presented.

N.Y.A.D. 2 Dept., 1983.  
 People v. Cooper  
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