

the defendant to take the stand." The motion for mistrial was denied. We think there was error.

Even if the judge had then admonished the prosecutor and had promptly instructed the jury on the point, we would have had a close question. At least in those circumstances the jurors might have tried to eliminate from their thinking any possible inference of guilt from the appellant's failure to refute or explain his admissions⁵ or otherwise to counter what had been offered against him. Of course, the jury knew that White had not testified.

Here the judge did neither. He made no reference to the challenged episode in his charge. Although later he correctly instructed the jury "that no inference of guilt arises against the defendant because of his failure to testify as a witness in his own behalf" and properly explained the rationale of the rule, we are not persuaded that no prejudice arose. The prosecutor's statement had been made openly in argument before the jury. The colloquy, the judge's comment and his ruling on the motion for mistrial had occurred at the bench. The jury was without knowledge of what had there been said. How much "prejudice" may be attributable to an occurrence of this sort we have no way of knowing. The Supreme Court has said "The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it."⁶ We have noted that "strict observance [of this principle] has been many times commended to prosecuting attorneys."⁷

⁵ We assume it to be unlikely that they will be offered at a new trial.

⁶ *Wilson v. United States*, 149 U.S. 60, 65 (1893).

⁷ *Milton v. United States*, 71 App.D.C. 394, 396, 110 F.2d 556, 558 (1940); cf. *Stewart v. United States*, 366 U.S. 1, 2 (1961): "Ordinarily, the effectuation of this protection is a relatively simple matter—if the defendant chooses not to take