

## **JURY ARGUMENT**

### **Prosecutor’s Jury Argument at Sentencing Hearing on Aggravating Factor That Discussed Effect of Jury’s Finding of Aggravating Factor on Defendant’s Sentence Was Inaccurate and Misleading—Result of Court of Appeals Opinion Is Affirmed**

*State v. Lopez*, 363 N.C. 535, 681 S.E.2d 271 (28 August 2009), affirming result, 188 N.C. App. 553 (2008).

The court ruled that a prosecutor’s jury argument (at a sentencing hearing on an aggravating factor) that discussed the effect of the jury’s finding of an aggravating factor on the defendant’s sentence was inaccurate and misleading. The prosecutor’s discussion of the sentencing grid was inaccurate. In addition, the prosecutor’s argument was misleading because it indicated potential sentencing ranges for the defendant when the defendant’s sentencing range had not been, and in this case could not be, determined when the argument was made. The court stated that consistent with G.S. 7A-97, parties may explain to a jury the reasons why it is being asked to consider aggravating factors and may discuss and illustrate the general effect of finding such factors, such as a finding of an aggravating factor may allow the trial court to impose a more severe sentence or that the court may find mitigating factors and impose a more lenient sentence.

### **Trial Judge Erred in Denying Defendant Final Jury Argument Because Defendant Did Not Introduce Evidence When Cross-Examining State’s Witness**

*State v. English*, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 869 (16 December 2008).

The court ruled, distinguishing *State v. Macon*, 346 N.C. 109 (1997), that the trial judge erred in denying the defendant the final jury argument because the defendant did not introduce evidence under Rule 10 of the General Rules of Practice for the Superior and District Courts when cross-examining a state’s witness. Defense counsel referred to the contents of an officer’s report when cross-examining the officer. However, the officer’s testimony on cross-examination did not present “new matter” to the jury when considered with the state’s direct examination of the officer. Thus, the defendant did not introduce evidence under Rule 10. (Author’s note: This opinion contains a useful summary of case law on this issue that judges and lawyers may want to read if this issue arises at a future trial.)

### **During Sentencing Hearing Before Jury on Existence of Aggravating Factor in Non-Capital Case, Prosecutor’s Jury Argument Reviewing Sentencing Grid Was Improper**

## **Because It Was Irrelevant to Finding of Aggravating Factor**

*State v. Lopez, 188 N.C. App. 553, 655 S.E.2d 895 (5 February 2008).*

(Note: The North Carolina Supreme Court has granted the state's petition to review this ruling.) The defendant was convicted of several offenses arising from a vehicle crash that resulted in the death of one person and injuries to another. During the sentencing hearing before the jury on the existence of an aggravating factor, the prosecutor in jury argument reviewed the sentencing grid and explained the effect of a finding of an aggravating factor on the defendant's sentence and also explained the doctrine of merger of the convictions of involuntary manslaughter and felony death by vehicle. The court ruled that the jury argument was improper because it was irrelevant to the finding of the aggravating factor.

## **Defense Counsel's Cross-Examination of State's Witness Did Not Result in Forfeiture of Right to Last Jury Argument**

*State v. Hennis, \_\_\_ N.C. App. \_\_\_, 646 S.E.2d 398 (3 July 2007).*

The defendant was convicted of various drug charges resulting from an officer's stop of a vehicle in which the defendant was a passenger. On cross-examination, defense counsel requested the officer to draw a diagram of the arrest scene, which was marked as defendant's exhibit A. The diagram illustrated where a crack rock had been found. Defense counsel also questioned the officer about his incident report, which was marked as an exhibit. The report was never published to the jury, however. The defendant did not testify or offer witnesses on his behalf. The court ruled that the trial judge erred in ruling that the defendant had forfeited his right to last jury argument based on defense counsel's cross-examination. (See the court's discussion of case law on the issue of forfeiture of last jury argument.)

## **Criminal Law--prosecutor's argument\_not comment on defendants' failure to testify**

*State v. Jacobs, 174 NCA 1 (2005)*

The prosecutor did not improperly comment on defendants' failure to testify by his statements during his closing argument that the jury “did hear from the defendants” and that “they made statements” where the prosecutor was referring to statements made by defendants following their arrest. Furthermore, the trial court did not err by instructing the jury that defendants were under no obligation to testify during trial.

**Newly Discovered Evidence - The trial court has discretionary power to permit the introduction of additional evidence after a party has rested.**

*State v. Phillips, 171 NC App 622 (2005)*

Even after arguments to the jury have begun, it is not an abuse of discretion for a court to allow additional evidence.

**Criminal Law--recordation of trial--jury selection--arguments of counsel--bench conferences**

*State v. Price, 170 NCA 57 (2005)*

Jury selection in noncapital cases and the opening and closing arguments of counsel must be recorded upon the motion of either party or on the judge’s own motion. However, routine private bench conferences between the trial judge and attorneys are not required to be recorded. N.C.G.S. § 15A-1241(b).

**Criminal Law--final closing argument--evidence not introduced on cross-examination**

*State v. Wells, 171 NCA 136 (2005)*

Defendant did not introduce new evidence within the meaning of Rule 10 of the General Rules of Practice, and should have had the final argument, where he cross-examined a witness by reading from a prior statement which was never

formally introduced. The questioning was about statements directly related to the witness's testimony on direct examination.

### **Criminal Law--prosecutor's argument--defendant's failure to testify**

*State v. Campbell, 359 NC 644 (2005)*

The trial court did not err in a capital first-degree murder case by overruling defendant's objection to the portion of the prosecutor's closing argument that allegedly alluded to defendant's failure to testify, because: (1) during closing arguments, the prosecutor may properly bring to the jury's attention the failure of a defendant to produce exculpatory evidence or to contradict evidence presented by the State; (2) the prosecutor's statement was not an improper comment on defendant's failure to testify, but instead reminded the jury that defendant's confession was not admitted as substantive evidence and could not be used for that purpose; and (3) defendant's constitutional arguments are not properly before the Court of Appeals when defendant did not raise these issues at trial.

### **Criminal Law--insanity defense--prosecutor's improper arguments**

*State v. Millsaps, 169 NCA 340 (2005)*

The trial court abused its discretion in a prosecution for first-degree murder and other offenses by overruling defendant's objections to the prosecutor's improper and prejudicial remarks during closing arguments, and defendant is entitled to a new trial, because: (1) the prosecutor argued outside the evidence presented that it was 99 percent certain a judge someday can and will say release defendant, and the remark impermissibly indicated that defendant would likely be released after a very short period of time if he was found not guilty by reason of insanity; (2) the comparison of defendant's acts to those of the September 11 terrorists, which had occurred only a little over a year earlier, appealed to the jury's sense of passion and prejudice by comparing defendant's acts to infamous events outside the record; and (3) it cannot be said beyond a reasonable doubt that the improper and prejudicial arguments by the prosecutor, which were neither checked nor cured by the trial court, did not contribute to defendant's conviction.

## **Sentencing–prosecutor’s argument–gunshot sound effects**

*State v. Jones, 358 NC 330 (2004)*

There was no gross error requiring intervention by the trial court ex mero moto in a capital sentencing proceeding where the prosecutor used sound effects while holding the shotgun used to kill the victims. However, the prosecutor’s use of sound effects is not condoned.

## **Criminal Law--closing arguments--defense of accident**

*State v. Gattis, 166 NCA 1 (2004)*

The trial court did not erroneously deprive defendant of his right to present the defense of accident in a first-degree murder, first-degree burglary, and assault with a deadly weapon case by prohibiting defendant from using the word “accidentally” in his closing argument, because: (1) evidence does not raise the defense of accident where defendant was not engaged in lawful conduct when the killing occurred; and (2) to the extent defendant contends the trial court’s ruling precluded him from negating premeditation and deliberation, the closing argument reveals otherwise.

## **Criminal Law--prosecutor’s argument--personal attack--name-calling**

*State v. Walters, 357 NC 68 (2003)*

Although one of the State’s closing arguments in a case involving two capital first-degree murders and nine other felony convictions that consisted of a rambling disjointed personal attack on defendant filled with irrelevant historical references and name-calling was close to mandating reversal, our Supreme Court was constrained by the lack of objections by the defense counsel, the lack of intervention by the trial judge, the limited number of questions presented on

appeal, and defendant's failure to properly assign error.

### **Criminal Law--prosecutor's argument--comparing defendant and gang members to Adolph Hitler**

*State v. Walters, 357 NC 68 (2003)*

The trial court did not abuse its discretion in a case involving two capital first-degree murders and nine other felony convictions by failing to sustain defendant's objection to the State's improper closing argument comparing defendant and her fellow gang members to Adolph Hitler, because: (1) given the overwhelming evidence of defendant's guilt, it cannot be said that the prosecutor's remarks were of such magnitude that their inclusion prejudiced defendant; (2) this argument which came after two proper arguments by the district attorney and an assistant district attorney most likely had little, if any, impact on the jurors' decision on the issue of guilt or innocence; and (3) the argument appears far more incomprehensible and disjointed than powerful and persuasive.

### **Criminal Law--prosecutor's argument--weight of mitigating circumstances**

*State v. Walters, 357 NC 68 (2003)*

The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the State's closing argument that defendant's mitigating circumstances were excuses for the murders committed and that challenged the weight of defendant's mitigating circumstances, because: (1) the prosecutor simply contended that the jury should not give weight to defendant's mitigating circumstances; and (2) a prosecutor is permitted to legitimately belittle the significance of mitigating circumstances.

### **Criminal Law--prosecutor's argument--biblical reference**

*State v. Walters, 357 NC 68 (2003)*

The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the State's closing argument involving a biblical reference, because: (1) the prosecutor did not argue that the Bible commanded that defendant be put to death, but instead used the statement in question to respond to defendant's testimony that she did not want her children in the Davis Street environment; and (2) the prosecutor used this colloquy to amplify defendant's bad parenting and to attempt to eliminate any sympathy the defense might try to invoke with the jury based on the fact that defendant had children.

### **Criminal Law--prosecutor's argument--asking defendant rhetorical questions**

*State v. Frink, 158 NCA 581 (2003)*

The trial court did not err in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by failing to intervene ex mero motu when the State asked defendant rhetorical questions during closing arguments, because the questions did not stray far enough from the parameters of propriety that the trial court abused its discretion by not intervening on its own accord.

### **Criminal Law--prosecutor's argument--suffering and mental torture of victims**

*State v. Frink, 158 NCA 581 (2003)*

The trial court did not err in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by failing to intervene ex mero motu when the State asked the jurors during closing argument to think about what happened to the three victims as they were in their car trunk not knowing what was going to happen to them, because the argument focused on the suffering and mental torture of the victims.

### **Criminal Law--prosecutor's argument--comparison of Crips gang's writings to Nazi**

## writings

*State v. Frink, 158 NCA 581 (2003)*

Although the trial court abused its discretion in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by allowing the prosecutor during closing argument to compare the Crips gang's writings demonstrating their intent to the Nazi writings since they needlessly reference infamous acts that may improperly affect the jury, the requisite prejudice was not demonstrated to show that a reasonable possibility exists that a different result would have occurred.

## **Criminal Law—prosecutor's argument--defendant's versions of facts not in evidence—not comment on failure to testify**

*State v. Miller, 357 NC 583 (2003)*

The trial court did not err during a capital sentencing proceeding by failing to intervene ex mero motu during the prosecutor's closing argument that defendant's version of the facts is not in evidence, because: (1) the prosecutor's statement was aimed at demonstrating a weakness in defendant's theory of the case and was not an improper comment on defendant's failure to testify; and (2) the statement properly demonstrated that the evidence did not confirm defendant's version of the facts.

## **Criminal Law—prosecutor's argument—no evidence of victim's convictions—prior motion to exclude victim's convictions**

*State v. Castor, 150 NCA 17 (2002)*

There was no error so egregious as to be grossly improper and warrant intervention ex mero motu in a first-degree murder prosecution where the prosecutor successfully filed a motion in limine to prevent mention of the victim's criminal convictions, then argued to the jury that defendant had produced no

evidence of any criminal convictions to support the claim that the victim had been a violent person. Given the evidence, there is no reasonable likelihood that a different result would have been reached had the argument not been made or had the trial court intervened ex mero motu

### **Criminal Law--prosecutor's argument--equating members of jury to the State of North Carolina**

*State v. Patterson, 146 N.C. App. 113 (2001)*

The trial court did not commit plain error in a first-degree murder case by failing to intervene ex mero motu when the prosecutor during his closing argument equated members of the jury to the State of North Carolina, because it is proper to urge the jury to act as the voice and conscience of the community.

### **Criminal Law--aiding and abetting--advising jury of maximum sentence**

*State v. Patterson, 146 N.C. App. 113 (2001)*

Although the trial court erred in an aiding and abetting case involving robbery and murder by disallowing defense counsel to advise the jury of the maximum sentence defendant could receive if found guilty, there was no prejudicial error because the evidence of defendant's guilt was overwhelming and this error was insignificant by comparison.

### **Criminal Law - prosecutor's argument - defendant's power to subpoena witnesses - failure to do so - not comment on failure to testify**

*State v. Ward, 354 N.C. 231 (2001)*

The prosecutor did not improperly comment on defendant's failure to testify in a first-degree murder trial when he argued to the jury that defendant had the power

to subpoena witnesses to refute the State's evidence but failed to do so even though defendant contends he is the only witness who could have refuted the relevant evidence, because the prosecutor never directly commented on defendant's failure to testify, nor did he suggest that defendant should have taken the stand to refute the State's evidence.

**Criminal Law - prosecutor's argument - defendant's post-arrest silence \*\*\*\*\***

*State v. Ward, 354 N.C. 231 (2001)*

The trial court abused its discretion during a capital sentencing proceeding by failing to intervene ex mero motu during the prosecutor's argument regarding defendant's post-arrest silence while at Dorothea Dix Hospital, because: (1) the prosecutor impermissibly commented on defendant's silence; and (2) it cannot be concluded that this omission had no impact on the jury's sentencing recommendation.

**Criminal Law--defendant's argument--reading from appellate opinion**

*State v. Anthony, 354 NC 372 (2001)*

The trial court did not err in a capital sentencing proceeding by sustaining the State's objection to portions of defendant's closing argument in which his counsel sought to read the facts and the holding from a North Carolina Supreme Court case regarding the especially heinous, atrocious, or cruel aggravating circumstance.

**Criminal Law--prosecutor's argument--explanation for incident**

*State v. Ackerman, 144 N.C. App. 452 (2001)*

The trial court did not commit plain error by allowing the prosecution to make a

statement in its opening argument allegedly drawing attention to the likelihood that defendant would not testify and that allegedly attempted to shift the burden of proof to defendant, because: (1) at no time during the opening argument did the prosecutor affirmatively state, or even infer, that defendant will not testify; and (2) the prosecutor merely stated the jury will not hear a plausible explanation for why the incident occurred, other than the defense's claim that the victim may have been to blame.

### **Criminal Law--prosecutor's argument--defendant's prior convictions**

*State v. Mceachin, 142 N.C. App. 60 (2001)*

The trial court's failure to intervene ex mero motu in one instance and to grant an objection in another in the prosecutor's closing argument in a murder prosecution did not result in prejudicial error where defendant had testified on cross-examination that he had been convicted of voluntary manslaughter and the prosecutor argued that defendant had killed before. Such evidence is not admissible as substantive evidence and the prosecutor's statements were improper; however, the State presented overwhelming evidence of defendant's guilt and the trial court instructed the jury that it was not to consider evidence of defendant's prior convictions as evidence of defendant's guilt.

### **Criminal Law--defendant's closing argument--suggestion that others not investigated**

*State v. Floyd, 143 N.C. App. 128 (2001)*

The trial court did not abuse its discretion in a first-degree murder prosecution by sustaining the State's objection during defendant's closing argument to the expression of an opinion that there was sufficient evidence to implicate others. The evidence had been properly excluded and, assuming error, there was not a reasonable possibility of a different result without the error.

### **Criminal Law--prosecutor's argument--hope you are not a victim in a criminal case--police do the best they can to fight crime--defendant's characterization of shooting--biblical**

## reference

*State v. Lloyd, 354 NC 76 (2001)*

The trial court did not abuse its discretion in a capital first-degree murder prosecution by allowing the State to argue during closing arguments that "you better hope you're not a victim in a criminal case," "the police do the best they can to fight crime," "defendant's characterization of the shooting was the most proposterous accident that has even happened," and by citing the biblical reference of the "Dance, Death" poem, because: (1) the State did not urge the jurors to put themselves in the place of the victim; (2) the prosecutor was defending the tactics of the police department; (3) the prosecutor did not improperly state his personal opinion; and (4) the remarks in the poem did not suggest that the law enforcement powers of the State were divinely ordained or inspired by God, nor did they suggest that to resist such powers is to resist God. (See Text)

## **Criminal Law--prosecutor's argument--credibility of hearsay statements--communication of judge's ruling**

*State v. Allen, 353 N.C. 504 (2001)*

A prosecutor violated N.C.G.S. § 15A-1230(a) in a first-degree murder prosecution by traveling outside the record in his closing argument to disclose the legal opinion of the trial court as to the credibility of hearsay evidence where a witness had returned to Mexico and was unavailable, the court allowed an officer to testify as to her statements, and the prosecutor argued that the court had found the statements to be trustworthy and reliable. The jurors were not entitled to hear the trial judge's legal findings and conclusions regarding the admissibility of these hearsay statements, the argument clearly conveyed an opinion as to the credibility of the evidence attributed directly to the trial judge in his presence, and the judge then overruled defendant's objection. Special care must be taken against expressing or revealing to the jury legal rulings which have been made by the trial court; although this court did not convey an improper opinion in its own words, it did allow the prosecutor to convey the court's opinion with virtually the same effect. Much of the State's evidence was circumstantial and this evidence was possibly determinative; it cannot be said that there is no reasonable possibility of

a different result without this argument.

**Criminal Law--defendant's argument--request to show statute to jury--incorrect statement of law**

*State v. Smith, 139 N.C. App. 209 (2000)*

The trial court did not abuse its discretion under N.C.G.S. § 7A-97 by refusing to allow defendant to show the jury a copy of the habitual misdemeanor assault statute under N.C.G.S. § 14-33.2 and its effective date, in an attempt to argue that two of the offenses named in the indictment occurred prior to the enactment of the habitual misdemeanor assault statute and could not be considered in determining defendant's guilt, because: (1) the argument defendant wanted to make regarding N.C.G.S. § 14-33.2 was both incorrect and unrelated to the issues before the jury at that time; and (2) the use of offenses occurring before the effective date of N.C.G.S. § 14-33.2 to satisfy its elements is neither improper nor unconstitutional.

**Criminal Law--prosecutor's argument--defendant's failure to claim self-defense or accident prior to trial**

*State v. Washington, 141 N.C. App. 354 (2000)*

The trial court did not err by failing to intervene ex mero motu during the State's closing argument using defendant's pretrial silence to show that defendant failed to claim self-defense or accident prior to trial, because: (1) defendant made numerous spontaneous statements to investigators acknowledging that he was in trouble prior to trial, and it would have been natural for defendant to have added that he shot two of the victims in self-defense and a third victim by accident; (2) defendant's pretrial silence was evidence of an inconsistent statement since defendant had the opportunity during his trial testimony to justify his failure to claim self-defense earlier; and (3) even though it was unclear at what point defendant was given his Miranda warnings, it was defendant's burden to establish when he was given Miranda warnings and he could have done so during his testimony or through cross-examination of various witnesses.

## **Criminal Law - Prosecutor's argument - biblical reference**

*State v. Cummings, 352 N.C. 600 (2000)*

The prosecutor's biblical reference during closing arguments of a capital sentencing proceeding to Christ's suggestion that we should "render unto Caesar" was not grossly improper.

## **Criminal Law - prosecutor's argument - references to witness as liar - no gross impropriety**

*State v. Gell, 351 N.C. 192 (2000)*

Although the prosecutor's jury argument that a defense witness was lying and his references in the argument to the witness as a liar were improper, the argument was not so grossly improper that the trial court erred by failing to intervene ex mero motu where the witness had been impeached by prior convictions for embezzlement and writing worthless checks, and the evidence at trial supported the assertion that the witness testified falsely.

## **Criminal Law - Defendant's argument - quoting secular sources - relevancy**

*State v. Braxton, 352 N.C. 158 (2000)*

The trial court did not err in a capital sentencing proceeding by prohibiting defense counsel from quoting from secular sources during his closing argument, because the trial court afforded counsel ample opportunity to argue using ideas and quotes from secular sources and properly prohibited counsel from arguing the facts of other cases since those facts are not pertinent to any evidence in this case and are, thus, improper for jury consideration.

**Criminal Law 447 (NCI4th) -first-degree murder -prosecutor's argument - comment on impact on victim's family - no error**

*State v. Morston, 336 N.C. 381 (1994) \_\_\_ S.E.2d \_\_\_*

**Criminal Law 460 (NCI4th) - murder - prosecutor's argument concerning defendant's alibi - no error**

*State v. Wilson, 335 N.C. 220 (1993) 436 S.E.2d 831*

**Criminal Law 466 (NCI4th) - jury argument - defense tactic - no comment on counsel's credibility**

*State v. Willis, 332 N.C. 151 (1992) 420 S.E.2d 158*

**Criminal Law 439 (NCI4th) - jury argument - type of witnesses available - no improper characterization of defendant**

*State v. Willis, 332 N.C. 151 (1992) 420 S.E.2d 158*

The district attorney's statement in his jury argument that "when you try the devil, you have to go to hell to find your witnesses" was not an improper characterization of defendant as the devil but was merely an illustration of the type of witnesses available in this case.

**Criminal Law 466 (NCI4th) - murder - closing argument - reference to defense counsel raising smoke screens - no prejudice**

*State v. Ligon, 332 N.C. 224 (1992) 420 S.E.2d 136*

**Criminal Law 445 (NCI4th) - first-degree murder - jury argument against lesser verdict – no impropriety**

*State v. Ingle, 336 N.C. 617 (1994) \_\_\_ S.E.2d \_\_\_*

The prosecutor's jury argument in a first-degree murder trial that it was his preference that the jury should "throw the whole thing out of this courtroom" rather than return a verdict of second-degree murder with regard to both victims was not an impermissible statement of opinion and was not improper.

**Criminal Law 414 (NCI4th) - defendant's introduction of evidence - loss of right to open and close arguments -no coercion by trial court**

*State v. Skipper, 337 N.C. 1 (1994)*

The trial court did not coerce defendant into introducing evidence so that he lost his right to open and close the final argument where the prosecutor objected to defendant's use of a photograph to help illustrate a witness's testimony during cross-examination unless it was introduced into evidence; the court sustained the objection and defendant immediately asked to introduce the photograph into evidence.

**Criminal Law 427 (NCI4th) noncapital first-degree murder - prosecutor's closing arguments - defendant's failure to testify**

*State v. Taylor, 337 N.C. 597 (1994) \_\_\_ S.E.2d \_\_\_*

There was no plain error in a noncapital first-degree murder prosecution where the prosecutor stated in his closing argument that "Generally in a homicide, there's two kinds of parties there, the victim who can't say anything, and the perpetrator,

who won't say anything" and later said, when arguing that there was no logical explanation as to why the defendant's vehicle was found near a ravine, "The defendant has got to explain something to you. But what he has explained is absurd."

**Criminal Law 463 (NCI4th) murder and assault - self-defense - prosecutor's argument - victim shot in back**

*State v. Terry, 337 N.C. 615 (1994) \_\_\_ S.E.2d \_\_\_*

The trial court did not err in a prosecution for first-degree murder, second-degree murder, and assault in which defendant claimed self-defense by overruling defendant's objection to the prosecutor's closing argument that one victim could not have been a threat where the medical examiner had testified that the victim was shot once in the abdomen and twice in the back.

**Criminal Law 442 (NCI4th) first-degree murder - sentencing - prosecutor's argument - jury as conscience of community**

*State v. Moseley, 338 N.C. 1 (1994) \_\_\_ S.E.2d \_\_\_*

There was no error in a first-degree murder sentencing hearing where defendant contended on appeal that the prosecution had argued at trial that the jury should convict defendant because of public sentiment, but the prosecutors were merely reminding the jurors that they would be the voice and conscience of the community, which is not improper.

**Criminal Law 434 (NCI4th) - closing argument - prosecutor's statement about defendant's probation supporting evidence**

*State v. Harris, 338 N.C. 129 (1994) \_\_\_ S.E.2d \_\_\_*

The district attorney's jury argument in a robbery-murder case that defendant was already on probation for another crime, that he knew what he was doing, and that "[w]e don't have a person who [has] never been in trouble" was supported by substantive evidence and was not improper where defendant stated in his recorded confession, which was played for the jury, that he was afraid that his probation would be revoked and he needed money to leave town,

**Criminal Law 454 (NCI4th) capital sentencing - jury argument - life sentence like slap on wrist**

*State v. Harris, 338 N.C. 129 (1994) \_\_\_ S.E.2d \_\_\_*

It was not error for the prosecutor to argue in a capital sentencing hearing that a life sentence was like a "slap on the wrist" or a "pat on the back,"

**Criminal Law 427 (NCI4th) closing argument-- opening statement facts unsupported by evidence --no comment on defendant's failure to testify**

*State v. Harris, 338 N.C. 129 (1994) \_\_\_ S.E.2d \_\_\_*

**Criminal Law 433 (NCI4th) closing argument - references to defendant as "cold-blooded murderer" and "doper"**

*State v. Harris, 338 N.C. 129 (1994) \_\_\_ S.E.2d \_\_\_*

**Criminal Law 434 (NCI4th) first-degree murder - prosecutor's argument - defendant's prior conduct**

*State v. Abraham, 338 N.C. 315 (1994) \_\_\_ S.E.2d \_\_\_*

There was no error in a first-degree murder prosecution where a prior shooting had been admitted for identification purposes and the prosecutor referred to that incident in his closing argument and said "Make him stop." The prosecutor reminded the jury that the evidence surrounding the prior incident was properly admitted for the limited purpose of showing identity and it was not improper for the prosecution to emphasize the similarities between the two incidents or to note that different and unrelated witnesses had testified that defendant Abraham had assaulted them on separate occasions. As for the "Make it stop" argument, the prosecutor may not argue the effect of defendant's conviction on general deterrence, but may argue specific deterrence, that is, the effect of conviction on defendant.

### **Criminal Law 433 (NCI4th) jury argument- reference to defendant as "killer"**

*State v. Jones, 339 N.C. 114 (1994) \_\_\_ S.E.2d \_\_\_*

The prosecutor's reference to defendant as a "killer" was not improper where there was no conflict in the evidence that it was defendant who fired into a vehicle and killed the victim.

### **Criminal Law 468 (NCI4th) - first-degree murder - sentencing - prosecutor's argument - photographs of victims**

*State v. Conaway, 339 N.C. 487 (1995) \_\_\_ S.E.2d \_\_\_*

There was no error in a first-degree murder sentencing hearing where defendant contended that photographs of the victims' partially decomposed bodies were not relevant to sentencing and should not have been shown to the jury during the prosecutor's closing argument, but the record reflects only that pictures of the victims while living were shown to the jury during this argument. Assuming that the photographs of the bodies were shown to the jury during the prosecutor's closing argument, all of the evidence properly admitted during the guilt determination stage is competent for consideration by the jury at sentencing, and photographs which depict the circumstances of the murder are relevant and admissible at sentencing.

**Criminal Law 468 (NCI4th) first-degree murder - prosecutor's argument - footprint evidence - analogy to fingerprints in rape cases**

*State v. Williams, 339 N.C. 1 (1994) \_\_\_ S.E.2d \_\_\_*

There was no error in a first-degree murder prosecution where the prosecutor in his summation compared footprint evidence to fingerprint evidence in rape cases.

**Criminal Law 436, 445 (NCI4th) -capital murder - prosecutor's argument - insanity defense -- evasion of responsibility - return to community - no prejudice**

*State v. Lynch, 340 N.C. 435 (1995) \_\_\_ S.E.2d \_\_\_*

**Criminal Law 454 (NCI4th) capital sentencing prosecutor's closing argument jurors in position of victims no due process violation no gross impropriety**

*State v. Garner, 340 N.C. 573 (1995) \_\_\_ S.E.2d \_\_\_*

**Criminal Law 436 (NCI4th) first-degree murder prosecutor's argument for conviction deterrence**

*State v. Campbell, 340 N.C. 612 (1995) \_\_\_ S.E.2d \_\_\_*

There was nothing improper in a first-degree murder prosecution where the prosecutor argued that defendant should be convicted so that he would not commit crimes in the future.

**Criminal Law 454 (NCI4th) first-degree murder sentencing hearing prosecutor's argument pause to show time for death by asphyxiation no error**

*State v. Alston, 341 N.C. 198 (1995) \_\_\_ S.E.2d \_\_\_*

**Criminal Law 460 (NCI4th) capital sentencing closing argument thoughts of victim during murder permissible inferences from evidence**

*State v. Frye, 341 N.C. 470 (1995) \_\_\_ S.E.2d \_\_\_*

**Criminal Law 450 (NCI4th) closing argument - he who runs with pack acting in concert illustration- no impropriety**

*State v. Goode, 341 N.C. 513 (1995) \_\_\_ S.E.2d \_\_\_*

The trial court did not err by failing to intervene ex mero motu when the prosecutor stated during his closing argument in a first-degree murder prosecution that "he who runs with the pack is responsible for the kill" where this statement was used to illustrate acting in concert

**Criminal Law 454 (NCI4th) first-degree murder - prosecutor's argument - four minute silence - time required for victim to die**

*State v. Walls, 342 N.C. 1 (1995) \_\_\_ S.E.2d \_\_\_*

The portion of a first-degree murder sentencing hearing closing argument during which the prosecutor remained silent for four minutes to illustrate the time the victim lay on the river bottom was proper.

**Criminal Law 546 (NCI4th) indecent liberties and first-degree sexual offense evidence of prior abuse of child by another party excluded argument that child would have no knowledge but for this abuse allowed mistrial**

*State v. Bass, 121 N.C. App. 306 (1-2-1996) \_\_\_ S.E.2d \_\_\_*

**Criminal Law 442 (NCI4th) capital sentencing prosecutor's argument crime rate jury's duty**

*State v. Jones, 342 N.C. 457 (1996) \_\_\_ S.E.2d \_\_\_*

It was not error for the prosecutor to argue in a capital sentencing proceeding that "you read the newspapers and magazines, and you watch TV, and you say, good gracious, look at this crime rate, it is out of hand, why don't they do something about it? . . . You are they."

**Criminal Law 436 (NCI4th) capital sentencing - prosecutor's closing argument -failure to tell what occurred - lack of remorse**

*State v. Chandler, 342 N.C. 742 (3-8-1996) \_\_\_ S.E.2d \_\_\_*

The prosecutor's comments in his jury argument in a capital sentencing proceeding regarding defendant's insincerity and lack of remorse shown by his failure to tell his version of what happened on the night of the crime until he testified were permissible inferences from the evidence and not improper.

**Criminal Law § 427 (NCI4th) capital trial guilt phase closing argument defendant's demeanor not comment on failure to testify**

*State v. Barrett, 343 N.C. 164 (1996) 469 S.E.2d 888*

**Criminal Law § 425 (NCI4th) first-degree murder prosecutor's argument defendant's failure to introduce letter**

*State v. Burrus, 344 N.C. 79 (1996) 472 S.E.2d 867*

There was no gross impropriety in a first-degree murder prosecution where the prosecutor argued that a letter would have been read from the witness stand if it was exculpatory. A prosecutor may comment on a defendant's failure to produce exculpatory evidence to contradict or refute evidence presented by the State.

**Criminal Law § 443 (NCI4th) capital murder and felony child abuse prosecutor's argument what the victim would have been thinking**

*State v. Elliott, 344 N.C. 242 (1996) 475 S.E.2d 202*

The trial court did not abuse its discretion by failing to intervene ex mero motu in a prosecution for capital first-degree murder and felony child abuse where defendant contended that the prosecutor asked the jurors to put themselves in the position of the victim, but the prosecutor's remarks described what the two-year old victim may have been thinking as defendant beat her and did not ask the jurors to put themselves in her position. The argument was based upon the evidence presented at trial and reasonable inferences which could be drawn therefrom.

**Criminal Law § 460 (NCI4th Rev.) capital sentencing prosecutor's argument absence of acknowledgement of wrongdoing not a comment on failure to testify**

*State v. Woods, 345 N.C. 294 (1997) \_\_\_ S.E.2d \_\_\_*

**Criminal Law § 446 (NCI4th Rev.) capital sentencing defense witnesses prosecutor's**

## **argument**

*State v. Woods, 345 N.C. 294 (1997) \_\_\_ S.E.2d \_\_\_*

There was no error in a capital sentencing hearing where defendant contended that the prosecutor in his closing argument expressed his opinion that defendant's mother, his sisters, and another witness (who all testified to defendant's stepfather's absence during most of defendant's childhood and adolescence) were liars. The prosecutor was arguing to the jury that it should not find the submitted circumstance that defendant grew up without a father figure during his formative years. Defendant's mother testified that defendant never knew his natural father and that she married his stepfather when defendant was an infant and it was thus reasonable to infer that defendant's biological father might still be alive.

## **Criminal Law § 456 (NCI4th Rev.) capital sentencing prosecutor's argument general fear of crime**

*State v. Woods, 345 N.C. 294 (1997) \_\_\_ S.E.2d \_\_\_*

The prosecutor in a capital sentencing proceeding did not make an improper argument based on the general public's fear of violent crime and on the jurors' own fears of violent crimes where the prosecutor held up a picture of the exterior of the victim's apartment building and argued that, of all the pictures, that one was the most grotesque because "she was where we all think we can go and be safe," continued to argue the sanctity of the home, and ended with "and that's why this is grotesque, cause it tells each and every one of you are safe nowhere now. You're safe nowhere."

## **Criminal Law § 453 (NCI4th Rev.) capital sentencing prosecutor's arguments victims' last moments**

*State v. Conner, 345 N.C. 319 (1997) \_\_\_ S.E.2d \_\_\_*

There was no error requiring intervention ex mero motu in a capital sentencing

proceeding where defendant contended that the State improperly attempted to elicit sympathy for the victims by arguments that the victims would have no futures and vivid descriptions of what the victims might have done and felt in their last moments. Minor references to the rights of the victims are not so grossly improper as to require ex mero motu intervention.

**Criminal Law § 420 (NCI4th Rev.) - cross-examination - officer's reading of notes - introduction of evidence - loss of right to last argument**

*State v. Macon, 346 N.C. 109 (1997)*

Although an officer's notes taken during an interview of defendant following the shooting of defendant's estranged wife were not themselves introduced into evidence, the officer's reading of those notes to the jury during cross-examination by defendant constituted the introduction of evidence by defendant which deprived defendant of the right to make the final argument to the jury where the jury received the contents of defendant's statement as substantive evidence without any limiting instruction. Rule 10, General Rules of Practice for the Superior and District Courts.

**Evidence and Witnesses § 1776 (NCI4th) - first-degree murder - time period in which murder occurred - demonstration by prosecutor**

*State v. Jones, 346 N.C. 704 (1997)*

The trial court did not err in a capital prosecution for first-degree murder by overruling defendant's objection to a demonstration by the prosecutor during guilt-innocence closing arguments where an expert witness had testified that the victim would have lost consciousness between two and five minutes after receiving the fatal knife wounds and the prosecutor silently timed five minutes, then argued that five minutes was a long time to be slashed, cut, and stabbed; that the victim had up to five minutes to experience the pain of being stabbed thirty-one times; that the victim had the experience of seeing her own blood; and asked the jury to consider what the victim was thinking during the five-minute period. The evidence presented at trial permitted the prosecutor to argue that defendant

pursued, stabbed, and slashed the victim during the five-minute period after defendant inflicted the fatal wounds, the demonstration was designed to give the jury a better grasp of what occurred during this period, and the demonstration was proper.

**Criminal Law § 454 (NCI4th Rev.) - capital murder - prosecutor's argument - victim's thoughts - not grossly improper**

*State v. Jones, 346 N.C. 704 (1997)*

An argument by a prosecutor in a capital prosecution for first-degree murder that described what the victim may have seen and felt and asked the jury to speculate about what the victim may have been thinking was not so grossly improper as to require the trial court to intervene ex mero motu. The description of what the victim may have seen and felt was based upon the evidence presented at trial and the comments with respect to what the victim may have been thinking as she died were similar to the prosecutor's remarks in *State v. King, 299 N.C. 707*.

**Criminal Law § 430 (NCI4th Rev.) - prosecutor's argument - failure to call alibi witness**

*State v. Sidden, 347 N.C. 218 (1997)*

The prosecutor's jury argument that defendant failed to call his ex-wife to support his alibi that he was with her at the time of the crimes even though she had been present in the courtroom for the entire trial was a proper comment on defendant's failure to produce exculpatory evidence.

**Criminal Law § 439 (NCI4th Rev.) - prosecutor's argument - characterization of defendant as devil - no gross impropriety**

*State v. Sidden, 347 N.C. 218 (1997)*

The prosecutor's jury argument that when you "try the devil, you've got to go to hell to get your witnesses" and that the defendant "qualifies in that respect" was not so egregious that the court should have stricken it ex mero motu.

**Criminal Law § 431 (NCI4th Rev.) - capital murder - prosecutor's argument - evidence not rebutted by defendant-not a comment on defendant's failure to testify**

*State v. Stephens, 347 N.C. 352 (1997)*

There was no violation of a defendant's constitutional rights in a capital prosecution for first-degree murder where the prosecutor in his closing argument challenged the defense to explain why defendant was found in an attic with one of the murder weapons if he was not guilty. The prosecutor did not comment directly on defendant's failure to testify, but fairly argued that defendant had failed to present exculpatory evidence that rebutted the State's evidence relating to where the murder weapon was found.

**Criminal Law § 445 (NCI4th Rev.) - State's closing argument - defense witness - characterized as drug dealer**

*State v. Williams, 127 N.C. App. 464 (1997)*

The trial court did not err in not correcting on its own motion remarks made by the State in its closing argument which characterized a defense witness as a "drug dealer" where evidence elicited on cross-examination established that the witness had been convicted of possession with intent to sell and deliver cocaine and selling cocaine to an undercover officer.

**Criminal Law § 431 (NCI4th Rev.) - prosecutor's closing argument - speculation as to why witness didn't testify - no impropriety**

*State v. Clark, 128 N.C. App. 87 (1997)*

The prosecutor's closing argument in a first-degree murder trial about the failure of defendant's first psychiatrist to testify, including statements that defendant may have had to get a new psychiatrist because defendant told the first psychiatrist a different version of the killings than defendant told in court, merely raised an inference as to why one of defendant's witnesses had not testified and was not improper.

**Criminal Law § 467 (NCI4th Rev.) - capital murder - prosecutor's argument - premeditation and deliberation - choking**

*State v. Richmond, 347 N.C. 412 (1998)*

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by not intervening ex mero motu when the prosecutor argued that the acting of choking someone establishes premeditation and deliberation. The jury may infer premeditation and deliberation from the circumstances of a killing, including the fact that the death was by strangulation, and the prosecutor's statement was not a misstatement of the law or of the facts.

**Criminal Law § 433 (NCI4th Rev.) - prosecutor's closing argument - not comment on defendant's failure to testify**

*State v. Trull, 349 N.C. 428 (1998)*

The prosecutor's comment during closing argument in a capital trial concerning defendant's attacks on the victim and the State's witnesses, "It's the shotgun approach. Hide your defendant, hide all the evidence that incriminates him and the sinister spin," was not an improper comment on defendant's decision not to testify but was simply a response to and rebuttal of defense counsel's claims made during closing argument.

**Criminal Law - prosecutor's closing argument - not shifting of burden of proof**

*State v. Parker, 350 N.C. 411 (1999)*

The prosecutor's argument to the jury in a prosecution for two first-degree murders, "Get him to show you the evidence says those weren't his fingerprints. And, that he wasn't at 203 Northeast Street in the early morning hours of the 2nd of October, 1994," and "Get them to show the evidence that he didn't have anything [sic] with the murders" did not shift the burden of proof to defendant; rather, when considered in the overall context in which the remarks were made and the overall factual circumstances to which they referred, they constituted comments on the strength of the State's evidence and the absence of any contradictory evidence.

**Criminal Law – Defendant’s closing argument - evidence not introduced during cross-examination - right not waived**

*State v. Shuler, 135 N.C. App. 449 (1999)*

Defendant is entitled to a new trial in a judgment finding her guilty of twelve counts of embezzlement since the trial court erred in denying defendant the right to conduct the closing argument to the jury when it improperly concluded defendant waived this right by introducing evidence, within the meaning of Rule 10 of the Superior and District Courts' General Rules of Practice, during her cross-examination of a witness about the contents of three interviews.

**Criminal Law 92 - consolidation of charges against defendants - testimony by one defendant – Loss of argument**

*State v. Taylor, 289 N.C. 223 (1976)*

Defendant was not prejudiced by the consolidation of his murder trial with that of a codefendant charged with the same crime even though the codefendant elected to testify at the trial and defendant was thus deprived of his right to open and close the jury arguments.

**Criminal Law § 102.6 -- prosecutor's argument on the duty of prosecution versus duty of defense counsel -- no error**

*State v. Payne, 312 N.C. 647 (1985)*

The trial court did not err by failing to interfere ex mero motu where the prosecutor commented during his closing argument that the prosecutor's duty is to see that the guilty are convicted and the innocent acquitted because defendant did not object during the argument, and the comment was within the wide latitude afforded counsel when considered with the State's opening argument and with the defense counsel's imputation of a lack of good faith in the investigation and prosecution of the defendant. (See also *State v. Lloyd* 354 NC 76, at 114. Prosecutors may “defend their own tactics, as well as those of the investigating authorities, when challenged.”