

## JURY ARGUMENT: CONTENT OF OPENING AND CLOSING STATEMENTS

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I. **Introduction.** This section covers many recurring issues that arise regarding the content of opening and closing arguments to the jury. This section does not discuss *Harbison* claims, a special type of ineffective assistance of counsel claim alleging that counsel admitted a defendant’s guilt to the jury without the defendant’s consent. Such claims often arise from statements made during opening or closing arguments and are discussed in detail in the [Ineffective Assistance of Counsel](#) section of this Benchbook.

II. **Timing, Number, and Duration of Arguments.** G.S. 15A-1221(a)(4) addresses the order of proceedings in a jury trial and requires that after the jury is impaneled each party be given an opportunity to make an opening statement prior to the state’s presentation of evidence. A defendant may “reserve” his or her opening statement. *Id.* If a defendant does so, he or she may precede the defense’s presentation of evidence with that statement. G.S. 15A-1221(a)(6).

G.S. 7A-97 addresses the superior court’s control of the number and duration of arguments that may be presented; the statute provides different rules for non-capital and capital cases as explained below.

A. **Non-Capital Cases.** In non-capital cases, G.S. 7A-97 mandates “two addresses to the jury for the State . . . and two for the defendant.” A superior court judge is authorized to limit the time of argument to not less than one hour on each side in misdemeanor cases and not less than two hours on each side for non-capital felony cases. G.S. 7A-97. A superior court judge has discretion to allow a greater number of addresses or extensions of time upon a party’s motion, “as the interests of justice may require.” *Id.*

B. **Capital Cases.** G.S. 7A-97 states that “there shall be no limit as to the number” of addresses to the jury in capital cases. The statute goes on to provide that, except by consent, the time of argument may not be limited in capital cases, though the trial court may limit the number of attorneys who may address the jury to three attorneys on each side. *Id.* While the number of attorneys addressing the jury in a capital case may be limited to three, those attorneys are not limited in the number of addresses they may make. *State v. Mitchell*, 321 N.C. 650, 659 (1988). It is per se prejudicial error in a capital case to limit the number of defense counsel who may address the jury to fewer than three. *Id.* The provisions of G.S. 7A-97 apply to both the guilt-innocence and the sentencing phase of a capital trial. *Mitchell*, 321 N.C. at 657-59.

The North Carolina Supreme Court has synthesized the application in capital cases of G.S. 7A-97 and Rule 10 of the North Carolina General Rules of Practice for the Superior and District Courts (discussed immediately below) as follows:

[A]lthough the trial court in a capital case may limit to three the number of counsel on each side who may address the jury, those three (or however many actually argue) may argue for as long as they wish and each may address the jury as many times as he desires. Thus, for example, if one defense attorney grows weary of arguing, he may allow another defense attorney to address the jury and may, upon being refreshed, rise again to make another address during the defendant's time for argument. However, if the defendant presents evidence, all such addresses [in the guilt-innocence phase] must be made prior to the prosecution's closing argument.

State v. Gladden, 315 N.C. 398, 417 (1986); see also State v. Barrow, 350 N.C. 640, 644 n.2 (1999) (noting that cases such as *Gladden* decided under the predecessor statute to G.S. 7A-97, G.S. 84-14, remain "fully applicable").

**III. Order of Arguments.** Rule 10 of the North Carolina General Rules of Practice for the Superior and District Courts governs the order of arguments to the jury.

If a defendant introduces no evidence, Rule 10 gives the defendant the right to open and close jury argument. The "test as to whether [something] has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of [a] witness." State v. Macon, 346 N.C. 109, 113 (1997) (quoting State v. Hall, 57 N.C. App. 561 (1982)); see also State v. Lindsey, 249 N.C. App. 516, 527 (2016) (discussing additional case law on the issue from the Court of Appeals); State v. English, 194 N.C. App. 314, 318-19 (2008) (same). It is possible for a defendant to introduce evidence within the meaning of the Rule 10 test while conducting cross-examination of a state's witness. *Macon*, 346 N.C. at 114 (defendant inadvertently did so by asking officer to read aloud for the jury notes taken by another officer during an interview with defendant); *Lindsey*, 249 N.C. App. at 528 (defendant did so by playing video recorded by officer's in-car camera). The Court of Appeals has suggested that in cases where the defendant has the final argument because he or she has not put on evidence, the better practice is for the prosecutor not to explain the order of arguments to the jury. State v. Miller, 32 N.C. App. 770, 771 (1977) (so suggesting but finding no prejudicial error in case where prosecutor explained to jury that "the defense has the last argument when the defense does not offer evidence"); see also State v. Griffin, 308 N.C. 303, 314 (1983) (citing *Miller* favorably).

If there is a question as to the proper order of arguments, Rule 10 provides that the trial court decides the issue. Note, however, that it is reversible error to deny a defendant the final argument to the jury on the basis of an incorrect determination that he or she has introduced evidence. *English*, 194 N.C. App. at 317 (defendant's right to open and close argument is "critically important" and improper deprivation of right entitles defendant to new trial).

While Rule 10 applies to the guilt-innocence phase of a capital trial, see State v. Gladden, 315 N.C. 398, 421 (1986), G.S. 15A-2000(a)(4) guarantees the defendant the right to the last argument in a capital sentencing proceeding regardless of whether the defendant has presented evidence during the sentencing phase. State v. Barrow, 350 N.C. 640, 644 (1999); G.S. 15A-1230, official commentary (so noting).

**IV. Permissible Argument.** The subsections below explore the scope of proper jury argument.

- A. Facts in Evidence and All Reasonable Inferences.** A lawyer may argue to the jury the facts in evidence and all reasonable inferences from those facts. *Compare* *State v. McNeill*, 371 N.C. 198, 251 (2018) (in a murder case where the defendant permitted defense counsel to reveal the location of the victim's body to law enforcement without revealing the defendant as the source of that information, it was proper for the prosecutor argue to the jury the reasonable inference that the defendant was the source of the information), *and* *State v. Wilkerson*, 363 N.C. 382, 423-24 (2009) (prosecutor's argument that defendant told an associate about murders in a phone call, the substance of which was not testified to at trial, properly drew reasonable inferences from evidence of cell phone records and the associate's behavior following the call), *with* *State v. Dalton*, 369 N.C. 311, 318-19 (2016) (prosecutor's argument that it was "very possible" that defendant in murder case would be released from civil commitment in fifty days if found not guilty by reason of insanity was improper where only reasonable inference from un rebutted evidence was that release within such time frame was highly unlikely). Note the important distinction between properly drawing a reasonable inference from the facts in evidence and improperly drawing inferences from or asserting facts not in evidence, as discussed below in Section V.B.1.a. *Compare* *State v. Hensley*, 277 N.C. App. 308, 312-13 (2021) (proper in an indecent liberties case for prosecutor to argue that defendant wanted to access victim's cellphone to look at sexual photos of victim where there was evidence of defendant's sexual attraction towards victim), *and* *State v. Collins*, 283 N.C. App. 458, 466-67 (2022) (proper for prosecutor to argue that there was a risk defendant could have killed someone on the road while fleeing law enforcement at high rate of speed in a truck), *with* *State v. Reber*, 289 N.C. App. 66, 81-82 (2023) (grossly improper for prosecutor to infer that defendant spread sexually transmitted diseases to or impregnated alleged child victim where there was evidence in the record of sexual intercourse but no evidence concerning STDs or pregnancy).
- B. Relevant Law.** Counsel may argue to the jury all relevant law. G.S. 7A-97 ("In jury trials the whole case as well of law as of fact may be argued to the jury"); *State v. Thomas*, 350 N.C. 315, 353-55 (1999) (not improper for prosecutor to read to the jury an excerpt from a prior published decision where the principles stated in that case were relevant to the evidence and the issues in the case being tried). This includes reading from a published decision. *Thomas*, 350 N.C. at 353-55 (noting that only portions of the decision relevant to the matter at hand may be read and that an attorney may not read a dissenting opinion in a published decision). As discussed below, however, a lawyer should not recite the facts and holding of another case and suggest that the matter before the jury should be resolved similarly; nor should a lawyer discuss irrelevant law.
- 1. Potential Punishment or Penalty.** Since "the sanction prescribed for criminal behavior is part of the law of the case," it is permissible to inform the jury of the punishment for the offense for which a defendant is being tried. *State v. McMorris*, 290 N.C. 286, 287-89 (1976) (so stating); *State v. Walters*, 294 N.C. 311, 313 (1978); *State v. Cox*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 898 S.E.2d 94, 100-01 (2024); *State v. Parker*, \_\_\_ N.C. App. \_\_\_, 893 S.E.2d 544, 550 (2023). Relatedly, it is permissible to encourage the jury to deliberate seriously and carefully where the possible consequences of conviction include incarceration. *McMorris*, 290 N.C. at 288. However, as discussed below in Section V.A.23, it is impermissible

to argue that the jury should reach a decision on the basis of a punishment's severity, to question the "wisdom or appropriateness" of the punishment, or to inaccurately forecast the punishment. *Id.*

In *State v. Lopez*, 363 N.C. 535, 540-42 (2009) the North Carolina Supreme Court observed that the enactment of Structured Sentencing after *McMorris* made it much more difficult to accurately forecast the sentence that a particular defendant will receive if convicted and consequently cautioned attorneys against attempting to make such a forecast. The *Lopez* court held that it was error for a trial judge to overrule defense counsel's objection to the prosecutor's inaccurate and misleading forecast of the defendant's sentence under Structured Sentencing. Because *Lopez* involved an inaccurate and misleading forecast, it is not fully clear the extent to which *Lopez* abrogates the general rule stated in *McMorris* and other earlier cases that it is permissible, when done accurately or in a manner that is not misleading, to inform the jury of the punishment for an offense. *Cf. McMorris*, 290 N.C. at 288 (stating that the general rule permitting argument describing statutory punishment "applies with even greater force" in cases where consequence of conviction is mandatory life sentence). Cases decided after *Lopez* continue to state the general rule described in *McMorris*. See, e.g., *Cox* \_\_\_ N.C. App. at \_\_\_, 898 S.E.2d at 100-01; *Parker*, \_\_\_ N.C. App. at \_\_\_, 893 S.E.2d at 550.

In capital cases, G.S. 15-176.5 specifically states, with respect to the capital offense, that "either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge," and G.S. 15-176.1 specifically permits a prosecutor to "argue to the jury that a sentence of death should be imposed and that the jury should not recommend life imprisonment."

2. **Collateral Consequences.** A variety of collateral consequences may result from a criminal conviction, such as sex offender registration, professional licensure revocation, or limitation of civic rights. See generally [Collateral Consequences Assessment Tool](#) (a searchable database of collateral consequences prepared by the UNC School of Government). There is limited case law on the propriety of discussing the collateral consequences of conviction during jury argument, though one unpublished case held that the trial judge erred by refusing to allow defense counsel to inform the jury that the defendant would be required to register as a sex offender if convicted of the sexual battery offenses for which he was being tried. *State v. Prestwood*, 211 N.C. App. 198, \*3 (2011) (unpublished) (relying on *McNeil* and related precedent; noting that registration was a mandatory consequence of conviction). For a fuller analysis of the issue, see John Rubin, [Letting the Jury Know about "Collateral" Consequences of a Conviction](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Mar. 5, 2019).

- C. **Positions or Conclusions.** During argument a lawyer may "on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." G.S. 15A-1230(a). Thus, for example, as discussed in Section IV.D. below, it is proper to argue that the jury should not believe a witness's testimony. *State v. Phillips*, 365 N.C. 103, 139-40 (2011). So long as he or she does not become abusive, misstate the law or the facts, or otherwise exceed the bounds of permissible argument, a lawyer has leeway to use hyperbolic or vivid

language to express his or her position. See, e.g., *State v. Tart*, 372 N.C. 73, 84 (2019) (prosecutor's argument that conviction would ensure that the defendant would not be "unleashed, yet again, onto our streets" was permissible vivid communication); *State v. Braxton*, 352 N.C. 158, 203 (2000) (permissible to use phrase "vomit on the law of North Carolina" to express position that it would be an injustice for jury to find the defendant acted in self-defense); *State v. Pittman*, 332 N.C. 244, 262 (1992) (permissible to use phrase "justice in Halifax County will be dead" as hyperbolic expression of position that a not guilty verdict would be an injustice).

- D. Credibility of Witnesses.** Provided that counsel does not express a personal opinion as to a witness's credibility, see Section V.B.18 below, a lawyer may:
- argue that witnesses are credible, see, e.g., *State v. Wilkerson*, 363 N.C. 382, 425 (2009) (stating this principle); *State v. Augustine*, 359 N.C. 709, 725 (2005) (same);
  - argue that the jurors should or should not believe a witness, including an expert witness, see, e.g., *Augustine*, 359 N.C. at 725 (stating this principle as to lay witnesses); *State v. Phillips*, 365 N.C. 103, 139 (2011) (stating this principle as to expert witnesses); *State v. Scott*, 343 N.C. 313, 344 (1996); and
  - give reasons why the jury should or should not believe a witness, see, e.g., *Wilkerson*, 363 N.C. at 425 (the prosecutor properly argued that the jurors should believe one witness's testimony because it was corroborated and that they should believe another's because it was consistent with the evidence); *Augustine*, 359 N.C. at 727 (the prosecutor's argument appropriately focused on reasons why the jury should not believe the witness); *State v. Anderson*, 322 N.C. 22, 39 (1988) ("In arguing to the jury, the State may comment on any contradictory evidence as a basis for the jury's disbelief of a witness's testimony.").
- E. Pretrial Silence.** A defendant's pretrial silence in connection with a criminal investigation prior to receiving *Miranda* warnings sometimes may be used to impeach the defendant if he or she testifies at trial by suggesting that the pretrial silence is inconsistent with the defendant's testimony. See generally *State v. Boston*, 191 N.C. App. 637, 648-52 (2008) (describing North Carolina case law on this issue); Jessica Smith, [Use of a Defendant's Pre- and Post-Arrest Silence at Trial](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 13, 2012) (same); see also [Impeachment](#), in this Benchbook (explaining foundational requirement that the defendant's prior silence must amount to an inconsistent statement in order to be introduced as impeachment evidence). So long as a prosecutor does not express a personal opinion, it is permissible to make an argument attacking a defendant's credibility by referencing such impeachment evidence of pretrial silence amounting to a prior inconsistent statement when it has been introduced. *State v. Buckner*, 342 N.C. 198, 223 (1995) (prosecutor properly made such an argument).
- F. Comment on the Defendant's Failure to Present Evidence.** As discussed in Section V.B.7 below, a prosecutor may not comment on a defendant's failure to testify and, as discussed in Section V.B.8 below, the prosecutor may not use a defendant's failure to call a spouse as a witness against the defendant. A prosecutor may, however, comment on the defendant's failure to put on

evidence. See, e.g., *State v. Phillips*, 365 N.C. 103, 138 (2011) (“[t]he State is free to point out the failure of the defendant [ ] to produce available witnesses” and “[t]he prosecution may argue that a defendant failed to produce a witness or other evidence to refute the State's case”; in this case, the prosecutor’s argument properly “pointed out that a witness was available who could have corroborated [the] defendant's defense, if that defense were valid” (citation omitted)); *State v. Griffin*, 308 N.C. 303, 314 (1983) (prosecutor properly pointed out that aspects of the State’s case had not been contradicted); *State v. Jordan*, 305 N.C. 274, 279-80 (1982) (it was proper for the prosecutor to comment on the defendant’s failure to produce an alibi witness).

When a defendant forecasts evidence in his or her opening statement, it is not improper for a prosecutor in closing argument to comment upon the defendant’s failure to introduce evidence to support the forecast, provided the comment does not implicate the defendant’s choice not to testify. *State v. Harris*, 338 N.C. 211, 229 (1994) (noting that this is permissible even where the forecasted evidence was not introduced because it was ruled inadmissible); see also *State v. Owens*, 287 N.C. App. 513, 517 (2023) (suggesting that a defendant may do the same when a prosecutor forecasts evidence in opening argument and thereafter fails to introduce it).

#### G. Role of Jury.

1. **Voice and Conscience of the Community.** Although a prosecutor may not argue to the jury that it should lend an ear to the community or decide a case based on community sentiment, see Section V.B.22.a below, the State may argue that a jury is “the voice and conscience” of the community. See, e.g., *State v. Barden*, 356 N.C. 316, 367 (2002) (such an argument was proper); *State v. Fletcher*, 354 N.C. 455, 484 (2001) (same); *State v. Shelton*, 263 N.C. App. 681, 696 (2019) (same). As the courts have explained, “the jury may speak for the community, but the community cannot speak to the jury.” *Barden*, 356 N.C. at 367; *State v. Wardrett*, 261 N.C. App. 735, 745-46 (2018) (citing *Barden* favorably to conclude that prosecutor properly argued that community deserved justice and did not improperly advocate for a result based on the community’s demands).
2. **“Send a Message” to the Community.** It is not improper for the prosecutor to argue that by its verdict the jury will “send a message” to the community. See, e.g., *Barden*, 356 N.C. at 367; *State v. Nicholson*, 355 N.C. 1, 43-44 (2002); *Shelton*, 263 N.C. App. at 696.
3. **“Buck Stops Here.”** Prosecutors are allowed to outline the function of the various participants in a trial and such an argument may include statements concerning the vital importance of jurors to the system of justice and an admonition that the “buck stops here.” *State v. Prevatte*, 356 N.C. 178, 242-43 (2002); *State v. Scott*, 314 N.C. 309, 311-12 (1985) (statement “correctly informed the jury that for purposes of the defendant's trial, the jury had become the representatives of the community”); *State v. Brown*, 320 N.C. 179, 204 (1987) (citing *Scott*).
4. **Justice For The Victim.** A prosecutor may argue that the jury should do justice for the victim and the victim’s family, provided that the argument does not address the victim’s family’s opinions about the defendant or the crime. *Prevatte*, 356 N.C. at 269.

- H. Display or Use of Evidence.** Items that were introduced in evidence may be used during argument. See, e.g., *State v. Billings*, 348 N.C. 169, 188 (1998) (in a capital sentencing proceeding the prosecutor properly played an audio tape of a 911 call when the tape was admitted into evidence); *State v. Sidden*, 347 N.C. 218, 229 (1997) (because photographs of the victims had been introduced into evidence, they could be used in closing argument by either party); *State v. Johnson*, 214 N.C. App. 436, 442-45 (2011) (the trial court did not abuse its discretion by allowing the State to play a video recording during closing arguments when the recording had been admitted into evidence; the fact that the recording was presented in a frame-by-frame manner did not change this result).
- I. Specific Deterrence.** Specific deterrence refers to the notion that the jury's verdict will prevent the defendant from committing crimes in the future, whereas general deterrence refers to the idea that the jury's verdict will deter other people from committing crimes.

The prosecution may make specific-deterrence arguments in the sentencing phase of a capital trial. *State v. Zuniga*, 320 N.C. 233, 269 (1987) (proper to make such an argument in capital sentencing proceeding); *State v. Thomas*, 350 N.C. 315, 362 (1999) (citing other capital cases and stating in the context of a capital sentencing proceeding: "We have consistently held . . . that the specific deterrence argument is permissible"); *State v. Larry*, 345 N.C. 497, 528 (1997) (same). The North Carolina Supreme Court case law is mixed as to whether specific deterrence arguments are permissible in the guilt/innocence phase of a capital trial. Compare *State v. Campbell*, 340 N.C. 612, 631-32 (1995) (not improper in guilt/innocence phase of capital trial to argue that the jury should convict the defendant so he could not commit crimes in the future), and *State v. Abraham*, 338 N.C. 315, 339 (1994) (same), with *State v. Payne*, 328 N.C. 377, 406 (1991) (relying on a passage in *Zuniga* that assumed *arguendo* that a general deterrence argument was improper to support the broader statement in the context of guilt/innocence phase argument: "To argue that a defendant, if acquitted, will commit a future crime is improper"), and *State v. Berry*, 356 N.C. 490, 522 (2002) (finding a specific deterrence argument improper but not prejudicial in a capital case where the state conceded that it could not find any authority to the contrary).

General deterrence arguments are impermissible, at least in capital cases, *Abraham*, 338 N.C. at 339 (so stating in a capital case). Such arguments, also are presumably improper in non-capital cases as they constitute speculative personal opinion on a matter outside the record. Cf. *State v. Kirkley*, 308 N.C. 196, 216 (1983) (prosecutor's general deterrence argument in capital case was improper "personal viewpoint"), *overruled in part on other grounds by State v. Shank*, 322 N.C. 243, 251 (1988).

Cases from the North Carolina Court of Appeals state that specific deterrence arguments are permissible in the guilt/innocence phase of non-capital cases. See, e.g., *State v. Strickland*, 283 N.C. App. 295, 309 (2022) (not grossly improper to argue that convicting defendant would protect the victim and "every other vulnerable female in Edgecombe County that might find herself in the unfortunate position of being in a domestic relationship with [the] defendant"); *State v. Chappelle*, 193 N.C. App. 313, 328 (2008) (finding similar argument proper). As discussed above, however, the North Carolina Supreme Court case law upon which these cases rely was developed largely in the context of capital



sentencing proceedings, and the Court's case law outside that context is mixed as to the propriety of specific deterrence arguments.

- V. Impermissible Argument.** The subsections below explore several categories of impermissible argument.
- A. Generally.**
- 1. Abusive Arguments.** During a closing argument a lawyer may not become abusive. G.S. 15A-1230(a); N.C. R. SUPER. AND DIST. CTS. Rule 12 (“Abusive language [is] prohibited”); *State v. Matthews*, 358 N.C. 102, 111-12 (2004) (inappropriate to refer to the defense case as “bull crap”); *State v. Jones*, 355 N.C. 117, 127 (2002) (citing the statute); *see also State v. Gillikin*, 217 N.C. App. 256, 266-67 (2011) (closing argument was “grossly improper” where the prosecutor repeatedly engaged in abusive name-calling of the defendant and expressed his opinion that defendant was a liar and was guilty).
  - 2. Lack of Dignity or Propriety.** During jury argument lawyers must conduct themselves with “dignity and propriety.” N.C. R. SUPER. AND DIST. CTS. Rule 12; *see also Gillikin*, 217 N.C. App. at 267 (the entire tenor of the prosecutor’s argument was undignified).
  - 3. Arguments Appealing to Passion or Prejudice.** It is improper to make an argument designed to appeal to the jurors’ passions or prejudices. *See, e.g., Jones*, 355 N.C. at 132-33 (prosecutor’s reference to the Columbine school shooting and Oklahoma City federal building bombing was an improper attempt to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice); *State v. Norris*, 287 N.C. App. 302, 319-20 (2022) (citing *Jones* and finding prosecutor’s argument improper where it referenced nationally salient acts of mass violence in a murder solicitation prosecution involving a defendant who was a high school student); *State v. Reber*, 289 N.C. App. 66, 81-82 (2023) (grossly improper for prosecutor to make baseless inference that defendant spread sexually transmitted diseases to or impregnated alleged child victim as the unsupported inflammatory argument appealed to passion or prejudice).
  - 4. Lack of Candor and Unfairness.** “The conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness.” N.C. R. SUPER. AND DIST. CTS. Rule 12. Thus, for example, counsel should not “not knowingly misinterpret . . . the language or argument of opposite counsel.” *State v. Phillips*, 365 N.C. 103, 136-37 (2011) (quoting R. 12; prosecutor improperly suggested that defense counsel had admitted the defendant’s guilt to first-degree murder).
- B. Specific Types of Impermissible Arguments.**
- 1. Matters Outside the Record.** A lawyer may not make arguments based on matters outside the record except for matters that are the proper subject of judicial notice. G.S. 15A-1230(a).
    - a. Facts Not in Evidence or Misstatement of Facts in Evidence.** A lawyer may not argue facts that are not in evidence. *See, e.g., State v. Jones*, 355 N.C. 117, 132 (2002) (improper to refer to the Columbine school shooting and the Oklahoma City federal building bombing as those events were outside of the record); *State v. Reber*, 289 N.C. App. 66, 81-82 (2023) (grossly improper for prosecutor to infer that defendant spread sexually transmitted

diseases to or impregnated alleged child victim where there was no evidence in the record supporting that inference); *State v. Caldwell*, 68 N.C. App. 488, 489 (1984) (improper for prosecutor to make assertions about why a witness did not testify when that explanation was not supported by the evidence); see also N.C. R. PROF'L CONDUCT Rule 3.4(e) (lawyer may not "allude to any matter . . . that will not be supported by admissible evidence").

It also is improper for a lawyer to misstate the facts that are in evidence, though appellate courts are reluctant to find prejudicial error in situations where a misstatement is unintentional or constitutes a small portion of an otherwise proper argument. *State v. Parker*, 377 N.C. 466, 473 (2021) (trial court did not abuse its discretion by failing to intervene *ex mero motu* to correct prosecutor's unintentional misstatements concerning the location of defendant's tattoos; "We decline to impose a perfection requirement on the attorneys and trial courts of this State, ever mindful that parties are entitled to a fair trial but not a perfect one." (internal quotation omitted)); *State v. McNeill*, 371 N.C. 198, 251 (2018) (in a murder case where defense counsel revealed the location of the victim's body to law enforcement without revealing the defendant as the source of that information, it was improper for the prosecutor argue that the body was found "where the defendant's lawyer said [the defendant] put the body"; trial court did not abuse its discretion by denying defendant's motion for mistrial as the remark was part of an otherwise proper argument inferring that the defendant was the source of the information); *State v. Scott*, 343 N.C. 313, 344-45 (1996) (trial court did not err by failing to intervene *ex mero motu* to correct prosecutor's "slight" mix-up of facts concerning two different assaults). The pattern jury instruction for remarks to jurors before final arguments, NCPI Crim. 101.37, specifically admonishes jurors to be guided exclusively by their recollection of the evidence if it differs from that recounted by a lawyer.

A related issue to improperly misstating the facts in evidence is improperly misstating the purpose for which certain facts have been admitted into evidence. When evidence is introduced under an evidentiary rule specifically limiting the purpose for which it may be used, it is improper to argue that the jury should consider the evidence for another purpose. See, e.g., *State v. Tucker*, 317 N.C. 532, 542-43 (1986) (improper as a material misstatement of the evidence for prosecutor to argue that the jury should consider defendant's prior convictions as substantive evidence of guilt when the convictions were introduced solely for impeachment under Rule 609); see also *State v. Phachoumphone*, 257 N.C. App. 848, 864-65 (2018) (improper for prosecutor to recite impeachment evidence of witness's prior inconsistent statement as though statement was substantive evidence).

- b. Trial Court's Legal Rulings.** A lawyer may not introduce into argument legal rulings of the trial court. *State v. Allen*, 353 N.C. 504, 508-11 (2001) (new trial required when the prosecutor

argued to the jury with respect to hearsay statements admitted at trial: “the Court let you hear it, because the Court found they were trustworthy and reliable . . . . If there had been anything wrong with that evidence, you would not have heard that”; the court cautioned: “Parties in a trial must take special care against expressing or revealing to the jury legal rulings which have been made by the trial court, as any such disclosures will have the potential for special influence with the jurors.”).

2. **Irrelevant Statements of the Law.** Although counsel may argue all relevant law to the jury, see Section IV.B above, it is improper for counsel to argue points of law that have no bearing on the case at hand. See, e.g., *State v. Gardner*, 316 N.C. 605, 609 (1986) (“Although it is well settled that counsel may argue the law as well as the facts, he may not read to the jury decisions discussing principles of law which are irrelevant to the case and have no application to the facts in evidence.” (citation omitted)).
3. **Incorrect Statements of the Law.** It is improper for counsel to misstate the law during jury argument. *State v. Fletcher*, 370 N.C. 313, 322 (2017) (prosecutor’s argument was improper where it incorrectly asserted that certain conduct would constitute first-degree sexual exploitation of a minor); *State v. Martin*, 248 N.C. App. 84, 90 (2016) (improper for prosecutor to argue in armed robbery case that it made no difference whether a shotgun was loaded as this incorrectly stated the law regarding an element of the offense). In addition to the straightforward prohibition of arguments that are legally incorrect, counsel may not:
  - present a statement of the law out of context, see, e.g., *Gardner*, 316 N.C. at 610,
  - read from a dissenting opinion in a reported case, see, e.g., *id.* at 611, or
  - read from a case that no longer has precedential value, see, e.g., *id.* (trial court did not err by prohibiting defense counsel from reading from a case when at the time the opinion had no “legal precedential value as part of the body of the law of this State”).

The prosecutor also may not make arguments that undermine the presumption of innocence. *State v. Wilder*, 124 N.C. App. 136, 142-43 (1996) (the prosecutor's remarks improperly undermined the presumption of innocence; the prosecutor implied that by pleading not guilty in order to put the State to its burden of proving the charge against him, the defendant was really guilty).

4. **Arguing that a Result is Mandated by a Prior Case.** As discussed in Section IV.B above, a lawyer may argue all relevant law to the jury, and this may include reading from prior cases. Caution should be exercised, however, with regard to recitation of the facts of other cases. *State v. Wright*, 304 N.C. 349, 355 (1981) (“We perceive that the facts of *other* cases would ordinarily be inappropriate topics for jury argument.” (emphasis in original)). Additionally, a lawyer may not recite the facts of another tried case together with the result to suggest that a similar result should obtain in the case at hand. *Gardner*, 316 N.C. at 611; *State v. Thomas*, 350 N.C. 315, 353-55 (1999) (quoting *Gardner*, prosecution’s argument was proper where it was limited to reciting relevant statement of law); *State v. Billings*, 348 N.C. 169, 185 (1998) (citing *Gardner* for this

proposition); *State v. Burr*, 341 N.C. 263, 307 (1995) (same); *State v. Simmons*, 205 N.C. App. 509, 515-16 (2010) (improper for prosecutor to make such an argument).

5. **Pretrial Silence.** As discussed above in Section IV.E, if a defendant testifies at trial, evidence of the defendant's pretrial silence in connection with a criminal investigation prior to receiving *Miranda* warnings sometimes may be introduced to impeach the defendant's testimony. It is improper in a jury argument to reference such silence as substantive evidence of guilt as this constitutes a misstatement of the facts in evidence, see Section V.B.1.a (noting the prohibition on misstating impeachment evidence as substantive evidence of guilt), and infringes upon the defendant's Fifth Amendment right to silence. See *State v. Boston*, 191 N.C. App. 637, 649-52 (2008) (holding in a case where the pretrial silence at issue occurred prior to the non-testifying defendant being arrested or receiving *Miranda* warnings that "a proper invocation of the privilege against self-incrimination is protected from prosecutorial comment or substantive use, no matter whether such invocation occurs before or after a defendant's arrest"). It is impermissible to comment on a defendant's pretrial silence that has not been admitted into evidence or that has been improperly admitted. See Section V.B.1.a (discussing prohibition on comment on matters outside the record); *State v. Richardson*, 226 N.C. App. 292, 308 (2013) (improper for prosecutor in closing argument to reference improperly admitted evidence of defendant's pretrial silence).
6. **Comment on the Defendant's Exercise of Right to Jury Trial or Failure to Plead Guilty.** A prosecutor's reference to a defendant's choice to exercise the right to a jury trial or failure to plead guilty is a violation of the defendant's constitutional right to a jury trial. *State v. Goins*, 377 N.C. 475, 480 (2021) ("undeniably improper" for prosecutor to comment on defendant's decision to plead not guilty and exercise right to jury trial); *State v. Kemmerlin*, 356 N.C. 446, 482 (2002) (so stating); *State v. Degraffenried*, 262 N.C. App. 308, 311 (2018) ("Counsel is admonished for minimalizing and referring to Defendant's exercise of his right to a trial by jury in a condescending manner.>").
7. **Comment on the Defendant's Failure to Testify.** A defendant has a constitutional right to refuse to testify at trial and exercise of this right may not be used against the defendant. *State v. Mitchell*, 353 N.C. 309, 326 (2001). As a result, any reference to a defendant's failure to testify violates the defendant's constitutional rights. *Id.*; *Kemmerlin*, 356 N.C. at 481. A statement may be interpreted as commenting on a defendant's decision not to testify "if the jury would naturally and necessarily understand the statement to be a comment on the failure of the accused to testify." *Mitchell*, 353 N.C. at 326. Beyond prohibiting comment on a defendant's failure to testify, the rule broadly prohibits any comment by the prosecutor on the existence of the right. *State v. Branche*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 895 S.E.2d 597, 609 (2023) (stating that there was "no doubt" that it was improper for prosecutor to argue: "The Judge will tell you [the defendant] does not have to testify, and the fact that he does not testify cannot be used against him and I want you to make sure you don't use it against him.>").

The rule prohibiting comment on a defendant's failure to testify applies to both the prosecutor and the defense attorney. *State v. Bovender*, 233 N.C. 683, 689-90 (1951) (trial court did not err by sustaining objection to defense counsel's closing argument statement "the law says no man has to take the witness stand"), *overruled in part on other grounds by State v. Barnes*, 324 N.C. 539 (1989); *State v. Soloman*, 40 N.C. App. 600, 603 (1979) ("It is a well-established rule that neither the district attorney nor counsel for the defendant may comment on the defendant's failure to testify."). While some North Carolina appellate cases discussing the prohibition on comments concerning a defendant's right not to testify state that the rule constrains the trial judge, a non-testifying defendant has a constitutional right, upon request, to have the trial judge instruct the jury that his or her failure to testify may not be held against the defendant. *State v. Randolph*, 312 N.C. 198, 205-06 (1984); *see also* N.C.P.I. Crim. 101.30 (Effect of the Defendant's Decision not to Testify). Though defense counsel may not comment on a defendant's failure to testify, it is permissible for defense counsel to argue that the jury should not consider against the defendant the defendant's election not to testify. *State v. Banks*, 322 N.C. 753, 764 (1988) (error to preclude defense counsel from reading relevant clause of Fifth Amendment and so arguing; stating, however, that "[n]o further comment or explanation" should be permitted").

As discussed in Section IV.F above, a comment on a failure by the defense to put on evidence or contradict the State's evidence is not a comment on the defendant's failure to testify. *See, e.g., State v. Fabian*, 286 N.C. App. 712, 726-27 (2022) (prosecutor's statement that child sex abuse victim's parents still were waiting on the defendant to "deny it" was not a comment on defendant's failure to testify at trial but rather a comment on properly admitted evidence showing that defendant did not deny the conduct when confronted by the parents); *State v. Foust*, 220 N.C. App. 63, 75 (2012) (prosecutor's argument that aspects of the State's case had not been contradicted was not an improper comment on the defendant's right not to testify).

8. **Failure To Call a Spouse.** A defendant's failure to call a spouse as a witness may not be used against the defendant. G.S. 8-57(a); *State v. Barden*, 356 N.C. 316, 380-81 (2002) (citing the statute and holding that the prosecutor's argument about why the defense did not call the defendant's wife was improper).
9. **Reading the Indictment.** Neither lawyer may read the indictment to the jury. G.S. 15A-1221(b).
10. **Religious Arguments.** The North Carolina Supreme Court has repeatedly cautioned against the use of arguments based on religion. *See, e.g., State v. Barden*, 356 N.C. 316 (2002). It has explained:
 

Jury arguments based on any of the religions of the world inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials. Although we may believe that parts of our law are divinely inspired, it is the secular law of North Carolina which is to be applied in our courtrooms. Our trial courts must vigilantly ensure that counsel

for the State and for defendant do not distract the jury from their sole and exclusive duty to apply secular law.

*Id.* at 358 (quoting *State v. Williams*, 350 N.C. 1, 27 (1999)); see also *State v. Gell*, 351 N.C. 192, 215 (2000) (quoting the same). Thus, for example, the North Carolina Supreme Court has disapproved of arguments citing Bible passages and arguing in effect that the powers of public officials, including the police, prosecutors and judges are ordained by God as his representatives on earth and that to resist these powers is to resist God, *State v. Moose*, 310 N.C. 482, 501 (1984), and of argument implying that if the defendant was guilty and the jurors convicted him that they would be blessed by God. *State v. Bunning*, 338 N.C. 483, 490 (1994). However, Biblical references are not always improper. See *Barden*, 356 N.C. at 358 (the court has “found biblical arguments to fall within permissible margins more often than not” (citation omitted)); *Gell*, 351 N.C. at 215 (same); *State v. Call*, 349 N.C. 382, 420-21 (1998) (it was not improper for the prosecutor, in closing argument, to use the Bible passage, “[t]he wicked flee when no man pursueth, but the righteous are bold as a lion,” as explanation of significance of defendant's flight).

11. **Name Calling.** As a general rule, name calling should be avoided in jury argument. N.C. R. SUPER. AND DIST. CTS. Rule 12 (“offensive personal references are prohibited”); *State v. Augustine*, 359 N.C. 709, 736 (2005) (disapproving of a prosecutor’s reference to the defendant as a “despicable human being”); *State v. Jones*, 355 N.C. 117, 133-34 (2002) (prosecutor improperly engaged in name-calling when he said of the defendant: “You got this quitter, this loser, this worthless piece of-who's mean . . . He's as mean as they come. He's lower than the dirt on a snake's belly.”); *State v. Madonna*, 256 N.C. App. 112, 118 (2017) (improperly abusive for prosecutor to state that the defendant “can’t keep her knees together or her mouth shut” and to refer to her as a “narcissist”); *State v. Gillikin*, 217 N.C. App. 256, 266-67 (2011) (grossly improper for prosecutor to repeatedly engage in abusive name-calling of the defendant). Specific names are discussed in the subsections below. However, when certain appellations accurately reflect the evidence, use of them has been held not to be error. See, e.g., *State v. Thomas*, 350 N.C. 315, 361-62 (1999) (in a first-degree murder case, it was not improper for the prosecution to refer to the defendant as “a cold-blooded . . . killer”); *State v. Harris*, 338 N.C. 211, 229-30 (1994) (not improper to refer to the defendant as a “cold-blooded murderer” and a “doper” where he was on trial for first-degree murder and evidence of his past drug use was introduced”); *State v. Strickland*, 283 N.C. App. 295, 307 (2022) (not improper to refer to the defendant as “unpredictable,” “impulsive,” “angry,” “obsessed,” “frustrated,” and “dangerous” because, while derogatory, all characterizations were supported by the evidence); *State v. Wardrett*, 261 N.C. App. 735, 741 (2018) (not improper to refer to the defendant as a “fool” where evidence showed he, while being a convicted felon, intervened in an argument between two other people, pointed a loaded firearm at a person, and enlisted the help of others to hide the firearm).
- a. **Liar.** It is improper for a lawyer to call a defendant, a witness, or opposing counsel a liar. *State v. Gell*, 351 N.C. 192, 211 (2000) (prosecutor’s argument was improper); *State v. Sexton*, 336 N.C. 321, 363 (1994) (same). Likewise, as discussed below in Section V.B.18, it

is improper for a lawyer to express the opinion that either the defendant or a witness is a liar or is lying. *State v. Miller*, 271 N.C. 646, 659 (1967) (witness); *Gillikin*, 217 N.C. App. at 267 (defendant who testified).

One exception to this rule is when the defendant is charged with a crime involving falsehoods and the evidence supports the appellation. In *State v. Twitty*, 212 N.C. App. 100, 104 (2011), for example, the defendant was charged with obtaining property by false pretenses, an offense committed by deceiving or lying to win the confidence of victims. In jury argument the prosecutor referred to the defendant as a con man and a liar. The court concluded that because the defendant lied to a church congregation in order to convince them to give him money, there was no impropriety, reasoning that the terms accurately characterized the charged offense and the evidence presented at trial.

Also, it is not improper for a lawyer to submit to the jury that the defendant or a witness has lied on the basis of the evidence presented. *State v. Bunning*, 338 N.C. 483, 489 (1994) (“[The prosecutor] asked the jury to conclude the defendant was lying because he had lied about his name and other things. There was evidence that the defendant had used several aliases and had used his dead brother's social security card to obtain food stamps. This was evidence from which the prosecuting attorney could argue that the defendant had not told the truth on several occasions and the jury could find from this that he had not told the truth at his trial.”); *State v. Davis*, 291 N.C. 1, 12 (1976) (the prosecutor’s argument was not improper; the prosecutor argued: “The State would argue and contend to you that [the defendant's] testimony was nothing but the testimony of a pathological liar”; the prosecutor merely submitted the defendant's credibility to the jury); *State v. Mumma*, 257 N.C. App. 829, 840 (2018) (not improper for prosecutor to state “[a]re you kidding me?” and “give me a break” when recounting defendant’s inconsistent statements and testimony during closing argument), *aff’d as modified on other grounds*, 372 N.C. 226 (2019).

- b. **Parasite.** Counsel should not refer to the defendant as a parasite. *Twitty*, 212 N.C. App. at 104 (prosecutor’s use of the term “parasite” constituted unnecessary and unprofessional name-calling).
- c. **The Devil and Related Terms.** Counsel should avoid referring to the defendant as the devil, satan, or a demon. See, e.g., *State v. Matthews*, 358 N.C. 102, 111 (2004) (“During closing argument the prosecutor characterized defendant as a ‘monster,’ ‘demon,’ ‘devil,’ ‘a man without morals’ and as having a ‘monster mind.’ Such improper characterizations of defendant amounted to no more than name-calling and did not serve the State because the prosecutor was not arguing the evidence and the conclusions that can be inferred therefrom.”). However, not all arguments using these terms are improper. Thus, the courts have held it not improper to argue that “when you try the devil, you have to go to hell to find your witnesses.” *State v. Willis*, 332 N.C. 151, 171 (1992) (“At one point the district attorney argued, ‘when you try the devil, you have to go to hell to find your witnesses.’ Defendant . . . says it was prejudicial error to

characterize him as the devil. We do not believe the district attorney was characterizing [the defendant] as the devil. He used this phrase to illustrate the type of witnesses which were available in a case such as this one.”); *State v. Bell*, 359 N.C. 1, 21-22 (2004) (same; citing *Willis*); *State v. Johnson*, 217 N.C. App. 605, 611 (2011) (same; citing *Willis*).

- d. **Monster.** The prosecutor should not refer to the defendant as a monster. *State v. Matthews*, 358 N.C. 102, 111 (2004) (“During closing argument the prosecutor characterized defendant as a ‘monster,’ ‘demon,’ ‘devil,’ ‘a man without morals’ and as having a ‘monster mind.’ Such improper characterizations of defendant amounted to no more than name-calling and did not serve the State because the prosecutor was not arguing the evidence and the conclusions that can be inferred therefrom.”).
  - e. **S.O.B.** Referring to the defendant as a S.O.B. is improper. *State v. Davis*, 45 N.C. App. 113, 115 (1980) (ordering a new trial where the prosecutor referred to the defendant as a “mean S.O.B.”).
  - f. **Hitler and other Nazis.** It is improper to compare the defendant to Hitler or to a Nazi. *State v. Walters*, 357 N.C. 68, 102-05 (2003) (prosecutor’s argument comparing the defendant to Hitler was improper); *State v. Frink*, 158 N.C. App. 581, 593-94 (2003) (prosecutor’s references to the Nazis and Heinrich Himmler were improper).
12. **Referring to the Defendant as a Criminal.** As a general rule, it is improper to refer to the defendant as a criminal on the basis of conduct which is not the subject of the trial absent evidence in the record establishing that fact. *State v. Miller*, 271 N.C. 646, 660-61 (1967) (improper to refer to defendants as “habitual storebreakers” where there was no evidence in the record of any previous break-ins by the defendants); *State v. Wyatt*, 254 N.C. 220, 222 (1961) (prosecutor’s reference to the defendants as “two of the slickest confidence men we have had in this court for a long time” and speculating that they had stolen more money than charged in the indictment was “highly improper and objectionable”); *State v. Correll*, 229 N.C. 640, 643 (1948) (improper to refer to the defendant as “a small-time racketeering gangster”); see also *State v. Bowen*, 230 N.C. 710, 711 (1949) (disapproving of the prosecutor’s argument referring to the defendants as “these two thieves”). However, such argument may be proper when referring to the conduct at issue at trial or when criminal conduct not at issue is supported by facts in the record. *State v. Harris*, 338 N.C. 211, 229-30 (1994) (not improper to refer to the defendant as a “cold-blooded murderer” and a “doper” where he was on trial for first-degree murder and evidence of his past drug use was introduced); *State v. Guy*, 262 N.C. App. 313, 325 (2018) (not improper to refer to defendant and codefendants as “gang members” where defendant called codefendants as witnesses and they testified to their collective gang involvement).
13. **Comparing the Defendant to an Animal.** The appellate courts have repeatedly stated that comparisons between the defendant and an animal are disfavored and have held such comparisons to be improper argument in many cases. See, e.g., *State v. Roache*, 358 N.C. 243, 297-98 (2004) (prosecutor’s argument characterizing the defendant and his accomplice



as wild dogs “high on the taste of blood and power over their victims” and stating that “just like wild dogs, if you run with the pack you are responsible for the kill” was improper; stating generally that “this Court does not condone comparisons of defendants and animals”); *State v. Jones*, 355 N.C. 117, 134 (2002) (improper to refer to the defendant as “lower than the dirt on a snake’s belly”); *State v. Smith*, 279 N.C. 163, 165-67 (1971) (improper to argue that the defendant was “lower than the bone belly of a cur dog”); *State v. Ballard*, 191 N.C. 122, 124-25 (1926) (improper to call the defendant a “human hyena”).

In a few cases, the courts have held that it was not improper for a prosecutor to analogize a legal or factual theory of the case to situations involving animals where the analogy was presented in a non-inflammatory manner. See, e.g., *State v. Bell*, 359 N.C. 1, 20-21 (2004) (not improper to use the phrase “he who hunts with the pack is responsible for the kill” to illustrate the legal theory of acting in concert); see also *State v. Craig*, 308 N.C. 446, 457-58 (1983) (not grossly improper to refer to the defendants as a pack of wolves when stated in a non-inflammatory manner to illustrate concert of action); *State v. Foust*, 220 N.C. App. 63, 72-73 (2012) (not grossly improper in a rape case to analogize defendant to a “beast in the field . . . stalking the prey” in a non-inflammatory manner to illustrate theory of the crime); *State v. Oakes*, 209 N.C. App. 18, 25 (2011) (noting that animal comparisons are “strongly disfavored” but finding analogy of defendant to tiger hunting a gazelle not grossly improper as to require intervention *ex mero motu* where used to explain legal theory of premeditation and deliberation in first-degree murder case). However, because of the general rule disfavoring such comparisons, caution should be exercised with regard to all comparisons between the defendant and an animal. For example, the “hunts with the pack” argument has been held improper when used in a way that goes beyond “noninflammatory remarks.” *Roache*, 358 N.C. at 297-98; *State v. Sims*, 161 N.C. App. 183, 194-95 (2003) (prosecutor improperly went beyond the “he who hunts with the pack is responsible for the kill” analogy where the defendant was African-American and the prosecutor also referred to “wild dogs or hyenas hunting on the African plain” and used the term “alpha male”).

14. **Argument Regarding the Defendant’s Appearance.** It is improper to argue that a defendant should be convicted because of how he or she looks. *State v. Murdock*, 183 N.C. 779, 780-82 (1922) (prosecutor improperly argued: “I do not know when I have seen a more typical blockader. Look at him, his red nose, his red face, his red hair and moustache. They are the sure signs. He has the earmarks of a blockader.”); *State v. Tucker*, 190 N.C. 708 (1925) (improper to argue: “Gentlemen of the jury, look at the defendants, they look like professed (professional) bootleggers; their looks alone are enough to convict them”). However, certain arguments as to the defendant’s demeanor may be proper. See, e.g., *State v. Augustine*, 359 N.C. 709, 734-35 (2005) (not improper for prosecutor to urge jurors to consider the defendant’s courtroom demeanor as showing a lack of remorse); *State v. Nicholson*, 355 N.C. 1, 42-43 (2002) (not improper for prosecutor to argue that the defendant looked bored during even emotional points of the trial as this pertained to his demeanor at trial); *State v. Brown*, 320 N.C. 179, 198-99

(1987) (not improper for prosecutor to assert that the defendant's demeanor in court showed a lack of remorse).

15. **Racial References.** Racial references should be avoided unless relevant to the facts of the case. *State v. Diehl*, 353 N.C. 433, 436 (2001) (“Although it is improper gratuitously to interject race into a jury argument where race is otherwise irrelevant to the case being tried, argument acknowledging race as a motive or factor in a crime may be entirely appropriate.”); see also *State v. Copley*, 374 N.C. 224, 228-29 (2020) (assuming without deciding that prosecutor's closing argument comments concerning race were improper in a murder case involving a Black victim and a white defendant); *Copley*, 374 N.C. 224, 232-238 (Earls, J., concurring) (setting out case law relevant to analysis of propriety of jury arguments concerning race).
16. **Referring to Tragic National Events.** It is improper for the prosecutor to make a reference to national tragedies such as the Columbine school killings, *State v. Jones*, 355 N.C. 117, 132-33 (2002), the 9/11 terrorist attacks, *State v. Millsaps*, 169 N.C. App. 340, 348-49 (2005), or the Oklahoma City federal building bombing, *Jones*, 355 N.C. at 132-33. The North Carolina Supreme Court has explained that such remarks are improper because they refer to matters outside the record, urge the jurors to compare the defendant's acts to the infamous acts of others, and attempt to lead the jurors away from the evidence by appealing to their sense of passion and prejudice. *Jones*, 355 N.C. at 132; see also *State v. Norris*, 287 N.C. App. 302, 319-20 (2022) (citing *Jones* and finding prosecutor's argument improper where it referenced nationally salient acts of mass violence in a murder solicitation prosecution involving a defendant who was a high school student).
17. **Personal Experiences.** During a closing argument a lawyer may not inject his or her personal experiences. G.S. 15A-1230(a); *Jones*, 355 N.C. at 127 (citing the statute).
18. **Personal Beliefs.** During a closing argument a lawyer may not express his or her personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant. G.S. 15A-1230(a). *Compare* *State v. Waring*, 364 N.C. 443, 500-01, 515 (2010) (the prosecutor improperly injected his personal beliefs by stating, “I think the evidence is overwhelming [and] the defendant is guilty” and “I believe the evidence is overwhelming that the defendant is guilty”), and *State v. Wardrett*, 261 N.C. App. 735, 744 (2018) (“obviously improper” for prosecutor to argue that the defendant was “absolutely guilty of the crime he's charged with” and there was “just no question about it”), with *State v. Peace*, 256 N.C. App. 590, 593-95 (2017) (prosecutor's argument in DWI case that “[t]he State has proven beyond a reasonable doubt that this man was under the influence of some impairing substance” was not improper personal belief as it merely summarized the evidence, argued that the State had proven what is required by law, and attempted to persuade the jury to a particular verdict).

A number of cases have held that it is improper for a lawyer to state a personal belief that a witness is lying or telling the truth. *State v. Huey*, 370 N.C. 174, 182 (2017) (improper for prosecutor to assert opinion that defendant lied while testifying); *State v. Hembree*, 368 N.C. 2 (2015) (same); *State v. Phillips*, 365 N.C. 103, 139 (2011) (improper for

prosecutor to assert that a defense expert's testimony was "wholly unbelievable"); *State v. Wilkerson*, 363 N.C. 382, 424-25 (2009) (prosecutor's statement that he believed that a State's witness was telling the truth was improper vouching); *State v. Miller*, 271 N.C. 646, 659 (1967) (improper to argue: "I knew he was lying"); *State v. Hensley*, 277 N.C. App. 308, 312-13 (2021) (improper for prosecutor to describe defendant's testimony as "a ridiculous excuse" as this expressed personal belief that the testimony was false); *State v. Gillikin*, 217 N.C. App. 256, 266-67 (2011) (the prosecutor improperly expressed his opinion that the defendant was a liar and was guilty); see also N.C. R. PROF'L CONDUCT Rule 3.4(e) (a lawyer may not "state a personal opinion as to the justness of a cause, the credibility of a witness . . . or the guilt or innocence of an accused"). As discussed above, it is not improper for a lawyer to make arguments undermining a witness's credibility when there is an evidentiary basis to do so. *State v. Mumma*, 257 N.C. App. 829, 840 (2018) (prosecutor's statements during closing argument including "[a]re you kidding me?" and "give me a break" when recounting defendant's inconsistent statements and testimony were not impermissible personal opinions), *aff'd as modified on other grounds*, 372 N.C. 226 (2019). It is improper to express a personal belief as to the strength of the State's case or of a defense. See, e.g., *State v. Matthews*, 358 N.C. 102, 110-12 (2004) (prosecutor's comment during closing argument that the defendant's theory of case was "bull crap" constituted an impermissible personal opinion and exceeded bounds of civility).

19. **Personal Attacks on Opposing Counsel.** In argument to the jury, lawyers should not engage in personal attacks on opposing counsel. N.C. R. SUPER AND DIST. CTS. Rule 12 ("All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to."); *Huey*, 370 N.C. at 182 (improper for prosecutor to accuse defense counsel of suborning perjury without evidence); *Hembree*, 368 N.C. 2 (same); *State v. Grooms*, 353 N.C. 50, 83 (2000) ("[A] trial attorney may not make uncomplimentary comments about opposing counsel." (citation omitted)); *State v. Rivera*, 350 N.C. 285, 290-91 (1999) (disapproving of a remark that defense counsel displayed "one of the best poker faces" when a State's witness contradicted the defendant's alibi defense); *State v. Miller*, 271 N.C. 646, 659 (1967) (disapproving of the following comment by the prosecutor about defense counsel: "There is something in this case that is not very pretty. Mr. Walker, himself a former solicitor of this court until other things tempted him to the place where he now is"); *State v. Riley*, 202 N.C. App. 299, 304-06 (2010) (the prosecutor's jury argument was improper where it attacked the integrity of defense counsel and was based on speculation that the defendant changed his story after speaking with his lawyer); *State v. Jordan*, 149 N.C. App. 838, 843-44 (2002) (comparing defense counsel to Joseph McCarthy "thoroughly undermined [the] defense by casting unsupported doubt on counsel's credibility and erroneously painting defendant's defense as purely obstructionist.").
20. **Personal Attacks on Witnesses.**
- a. **Generally.** "Adverse witnesses and suitors should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited." N.C. R. SUPER. AND DIST. CTS.

Rule 12. Thus, for example, scatological references to a witness's testimony are improper. *State v. Smith*, 352 N.C. 531, 560-61 (2000) (improper to characterize expert witness's testimony as "manure").

- b. Experts.** It is not improper for the prosecutor to impeach the credibility of an expert during closing argument. See, e.g., *State v. Phillips*, 365 N.C. 103, 139 (2011); *State v. Campbell*, 359 N.C. 644, 677 (2005). Thus, it is proper for a lawyer to point out that the witness's compensation may be a source of bias. *State v. Taylor*, 362 N.C. 514, 555 (2008); *State v. Nicholson*, 355 N.C. 1, 44 (2002); *State v. Walls*, 342 N.C. 1, 63 (1995) (prosecutor's statement referring to a defense expert as a "paid psychiatrist" was not improper). However, a prosecutor should not insinuate that a witness would perjure himself or herself for pay. *Huey*, 370 N.C. at 183 (improper to refer to defendant's expert witness as an "excuse man"); *State v. Bowman*, 274 N.C. App. 214, 222 (2020) ("clearly improper" for prosecutor to argue that forensic psychology expert was paid to fabricate an excuse for defendant's conduct); *State v. Vines*, 105 N.C. App. 147, 156 (1992) (the prosecutor improperly stated the following regarding the defendant's expert witness, Dr. Leshner: "And here comes Dr. Leshner. . . . You can get a doctor to say just about anything these days" and went on to imply or suggest that Dr. Leshner's testimony was motivated by "pay.").

It is also improper to malign the expert's profession. Compare *State v. Smith*, 352 N.C. 531, 561 (2000) (so stating the law; improper to analogize psychologists that testify as experts to animals "flocking to what they perceive to be the public trough of the criminal justice system"), with *State v. Womble*, 343 N.C. 667, 692-93 (1996) (prosecutor's argument that one of the defendant's experts, a psychiatrist, was a medical doctor who dealt with facts but the other, a psychologist, dealt with theory and was not a medical doctor was not improper; the prosecutor did not ridicule the psychologist but merely pointed out differences between psychiatrists and psychologists).

- 21. Asking Jurors to Put Themselves in the Victim's Position.** It is improper for the prosecutor to ask the jurors to put themselves in the victim's place. *State v. Roache*, 358 N.C. 243, 298 (2004); *State v. Prevatte*, 356 N.C. 178, 244 (2002). Thus, in a case in which the defendant was charged with the murder and rape of a seven-year-old child, it was improper for the prosecutor to argue:

Put yourselves . . . in that back bedroom, a little old red night light on, and Jo-Jo in a little daybed with her three year old brother, in the middle of the night. Just put yourself in her shoes. . . . Put yourselves, for just a minute, put yourselves where she was. And you're in that little daybed in the middle of the night and for some reason you wake up and you sit up in bed. Something had startled you or something and you had sat up and there is [defendant] and he pushes you down on the bed, covers your little face with a pillow, starts to suffocate you, smother you, and rape you. And you're twisting and turning and gasping for breath, and he continues and he continues

and he continues. And not only are you gasping for breath, your legs are spread apart and he's pushing his penis into you. A seven year old child. And it goes on and it goes on and it goes on until you're unconscious.

State v. Perkins, 345 N.C. 254, 285-86 (1997).

However, asking the jury to imagine how the victim felt or what he or she was thinking is not improper. State v. Jones, 358 N.C. 330, 357 (2004) (no impropriety when the prosecutor repeatedly asked the jury to imagine what the victims were thinking); State v. Fletcher, 354 N.C. 455, 485 (2001) (not improper for prosecutor to ask the jurors to "imagine" the victim's fear and the pain of the stabbings).

## 22. Role of the Jury

**a. Lending an Ear to the Community/Public Sentiment.** It is improper for the prosecution to argue that the jury should lend an ear to the community, State v. Golphin, 352 N.C. 364, 471 (2000); State v. McNeil, 350 N.C. 657, 687-88 (1999); see also State v. Privette, 218 N.C. App. 459, 469-70 (2012) (the prosecutor would have been better advised to have refrained from making comments that might have encouraged the jury to lend an ear to the community), or decide a case based on public sentiment, State v. Conaway, 339 N.C. 487, 529 (1995) ("Arguments that emphasize the public sentiment about a particular crime and demand that the jury convict and punish the defendant in compliance with this public sentiment are impermissible."). Thus, in a homicide case involving impaired driving and a vehicle accident, it was improper for the prosecutor to argue that "there's a lot of public sentiment at this point against driving and drinking, causing accidents on the highway." State v. Scott, 314 N.C. 309, 311-14 (1985). The court determined that this argument was improper in part because the statement "could only be construed as telling the jury that the citizens of the community sought and demanded conviction and punishment of the defendant." *Id.* at 312 (new trial).

However, as discussed in Section IV.G above, it is not improper to argue that the jury is the voice and conscience of the community and that its verdict will send a message to the defendant or to the community.

**b. Arm of the State or Last Link of Law Enforcement.** It is improper for the prosecution to suggest to the jury that it is "effectively an arm of the State in the prosecution of the defendant or that the jury is the last link in the State's chain of law enforcement." State v. Prevatte, 356 N.C. 178, 242 (2002) (quotation omitted). As discussed in Section IV.G above, however, it is not improper to make an argument to the jury that the "buck stops here" or expressing a similar sentiment. *Id.* at 243 (so stating); *McNeil*, 350 N.C. at 688 ("We have held on several prior occasions that . . . arguments advising jurors that law enforcement and the State can do no more are not prejudicial.").

23. **Arguments Concerning Punishment or Penalty.** As discussed above, it is permissible to inform the jury of the punishment prescribed for the offense for which a defendant is being tried, *State v. Cox*, \_\_\_ N.C. App. \_\_\_, 898 S.E.2d 94, 100-01 (2024) (summarizing North Carolina law on this issue) and to impress upon the jury its duty to deliberate carefully and seriously. *State v. McMorris*, 290 N.C. 286, 287-88 (1976). There are, however, limitations on arguments concerning punishment and sentencing.

It is improper for defense counsel to argue to the jury that the defendant should not be convicted of a particular offense because the punishment is severe. *State v. Wilson*, 293 N.C. 47, 57 (1977); *Cox*, \_\_\_ N.C. App. at \_\_\_, 898 S.E.2d at 100-01 (improper for defense counsel to argue that conviction of any of the charged sex offenses “will practically be a life sentence,” noting that defense counsel did not attempt to give a precise sentence range for each offense or frame the potential punishment in terms of years sentencing).

It also is improper to inaccurately forecast a defendant’s punishment if convicted. *McMorris*, 290 N.C. at 288. Because of its complexity, the courts have specifically warned that “even a well-intentioned argument purporting to forecast a sentence under Structured Sentencing will almost invariably be misleading” and therefore should be avoided. *State v. Lopez*, 363 N.C. 535, 540-42 (2009) (finding such a forecast improper). As discussed in more detail above, however, cases decided after *Lopez* continue to state the general rule that it is permissible, when done in a manner that is accurate and not misleading, to inform the jury of the punishment for the offense for which a defendant is being tried. See Section IV.B.1.

24. **Appealing to Juror’s Fears.** It is improper to make an argument designed to appeal to the jurors’ fears, such as a suggestion that if the defendant is acquitted he or she might harm a member of the jury. *Cf. State v. Thomas*, 350 N.C. 315, 361-62 (1999) (analyzing contention that prosecutor’s argument in capital sentencing proceeding that the defendant “would take your life and my life” improperly inflamed the jury against the defendant; concluding that the statement was not improper as it merely described the defendant’s willingness, as supported by the evidence, to murder a stranger for money).

25. **Appellate Review and Other Post-Conviction Procedures.** It is improper for counsel to speculate on the outcome of possible appeals, paroles, executive commutations, or pardons. *State v. McMorris*, 290 N.C. 286, 288 (1976) (so stating); see also *State v. Hunt*, 323 N.C. 407, 428 (1988) (“A defendant’s eligibility for parole is not a proper matter for the jury’s consideration.”), *vacated on other grounds sub nom. Hunt v. North Carolina*, 494 U.S. 1022 (1990); *State v. Barber*, 93 N.C. App. 42, 48 (1989) (citing *McMorris*). In fact, a mere reference to the availability of appellate review of a conviction has been held to be improper. *State v. Jones*, 296 N.C. 495, 497-500 (1979) (it was improper for the prosecutor to argue: “Now you know, if you do err in this case he [defendant] has the right of appeal. The State doesn’t have that. State has no right of appeal from a case like this”; the argument improperly suggested that the appellate division would review the jury’s verdict “thereby causing the jury

to believe that the Supreme Court would share with them a burden and responsibility which was in fact their sole responsibility”).

## VI. Judge's Role.

- A. Generally.** In *State v. Jones*, 355 N.C. 117 (2002), the N.C. Supreme Court succinctly stated a trial judge's role with respect to jury argument:

[I]t is incumbent on the trial court to monitor vigilantly the course of such arguments, to intervene as warranted, to entertain objections, and to impose any remedies pertaining to those objections. Such remedies include, but are not necessarily limited to, requiring counsel to retract portions of an argument deemed improper or issuing instructions to the jury to disregard such arguments.

*Id.* at 129. In the context of improper argument by a prosecutor, the North Carolina Supreme Court has said that a trial court is required to intervene *ex mero motu* when a prosecutor makes a “[g]rossly improper argument [which] is defined as conduct so extreme that it renders a trial fundamentally unfair and denies the defendant due process.” *State v. Parker*, 377 N.C. 466, 472 (2021) (quoting *State v. Fair*, 354 N.C. 131, 153 (2001)). In evaluating challenges to a trial court's failure to intervene *ex mero motu* Court has said: “In circumstances in which a defendant in his or her role as an obvious interested party in a criminal trial fails to object to the other party's closing statement at trial, yet assigns as error the detached trial judge's routine taciturnity during closing arguments in the absence of any objection, this Court has consistently viewed the appealing party's burden to show prejudice and reversible error as a heavy one.” *State v. Tart*, 372 N.C. 73, 81 (2019).

- B. Remarks to Jurors Before Final Arguments.** N.C.P.I. Crim. 101.37 provides a model jury instruction that a trial judge may use prior to closing statements.
- C. Curative Instructions.** When an improper argument is made but can be cured with an instruction to the jury, the instruction should be prompt and explicit. This is especially true where the improper argument infringes upon a defendant's constitutional rights, as discussed below in Section VI.D.

The content of the curative instruction will vary depending on the nature of the improper argument. Provided below is a sample curative instruction that can be used when counsel improperly expresses the opinion that a witness is lying. This sample instruction can be modified to accommodate the particular objectionable argument at issue.

### SAMPLE INSTRUCTION:

*“Members of the jury, you are to disregard the prosecutor's statement that [he or she] believes the witness [name] is lying. It is improper for a lawyer to express the personal belief that a witness is lying. You are to disregard this improper statement and not to allow it to affect your decision. [Do you understand my instruction? Can you follow it?]”*

- D. Standard of Review.** When evaluating an allegedly improper jury argument, the appellate courts do not examine the argument in isolation but instead consider the context in which the argument was made and the overall factual circumstances to which the argument refers. *State v. Dalton*, 369 N.C. 311, 316 (2016). The standard of review depends upon whether the argument was objected to at trial and whether it directly implicates and infringes upon a constitutional right. *Jones*, 355 N.C. at 131-134; see also *State v. Gladden*, 315 N.C. 398, 417 (1986) (holding that the variable standard of review, which was developed in the context of closing statements, also applies to opening statements).
- 1. Defendant Objects.** If a defendant objects to the prosecutor's jury argument, the appellate courts review the trial court's decision to overrule the objection for abuse of discretion. *Jones*, 355 N.C. at 131. A trial court abuses its discretion if its failure to sustain an objection to an improper argument could not be the result of a reasoned decision. *Id.* An abuse of discretion in failing to sustain an objection to an improper argument is reversible error if it prejudices the defendant. *State v. Copley*, 374 N.C. 224, 230 (2020). Prejudice exists where there is a reasonable possibility, accounting for the nature and circumstances of the proceeding, that the jury would have reached a different verdict absent the error. *Id.* (observing that an argument deemed improper and prejudicial in one case may not be informative as to the propriety or prejudice of a similar argument in a different case); *Jones*, 355 N.C. at 134 (observing that whether an improper argument is prejudicial in a capital case may depend on whether the argument is made at the guilt/innocence phase or at the sentencing phase of the trial); *State v. Roache*, 358 N.C. 243, 297 (2004) (citing *Jones* favorably on this point).
  - 2. Defendant does not Object.** If the defendant fails to object, the appellate courts determine whether the argument is so grossly improper that the trial court erred in failing to intervene *ex mero motu*. *Jones*, 355 N.C. at 134. As discussed above, a failure to intervene *ex mero motu* is reversible error only when an argument involves "extreme impropriety" by a prosecutor rendering the trial fundamentally unfair as a matter of due process. See *State v. Parker*, 377 N.C. 466, 472 (2021); *State v. Huey*, 370 N.C. 174, 180-81 (2017). The defendant bears the burden of showing prejudice from the trial court's failure to intervene.
  - 3. Arguments Infringing Upon Constitutional Rights.** When a defendant objects to a prosecutor's improper argument directly implicating and infringing upon the defendant's constitutional rights, for example an improper argument concerning a defendant's failure to testify or a defendant's exercise of his or her right to a jury trial, it is reversible error for the trial court to fail to sustain the objection or to sustain the objection but fail to give a timely and specific curative instruction, unless the State shows the error to be harmless beyond a reasonable doubt. See, e.g., *State v. Kemmerlin*, 356 N.C. 446, 482 (2002) (trial court cured prosecutor's improper references to defendant's exercise of right to jury trial and failure to testify by sustaining objection and giving immediate curative instruction); *State v. Reid*, 334 N.C. 551 (1993) (trial court committed reversible error by not sustaining defendant's objection to prosecutor's reference to his failure to testify); *State v. McCall*, 286 N.C. 472, 487 (1975) (trial court committed reversible error by sustaining



objection to prosecutor's comment on defendant's right to not testify without providing curative instruction); see *also* State v. Branche, \_\_\_ N.C. App. \_\_\_, 895 S.E.2d 597, 609 (2023) (trial court's failure to cure prosecutor's reference to defendant's failure to testify after sustaining objection thereto was harmless error). If a defendant fails to object to such an improper argument, the appellate courts require the defendant to show that the trial court's failure to intervene *ex mero motu* was prejudicial. See State v. Goins, 377 N.C. 475, 478 (2021) (putting burden on defendant to show prejudice arising from prosecutor's improper reference to his decision to plead not guilty where the defendant did not object at trial).

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