JURY ARGUMENT: CONTENT OF OPENING AND CLOSING STATEMENTS

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Contents

I. Introduction. This section covers recurring issues that arise regarding the content of opening and closing arguments to the jury.

II. 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. *See, e.g.,* State v. Phillips, 365 N.C. 103, 135 (2011); State v. Wilkerson, 363 N.C. 382, 423-24 (2009) (prosecutor's argument drew reasonable inferences from the evidence); State v. Jones, 355 N.C. 117, 128 (2002).

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. However, as discussed below, a lawyer should not recite the facts and holding of another case and suggest that the matter before the jury should be resolved similarly. As also is addressed below, a lawyer should not discuss irrelevant law.

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 II.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).

D. Credibility of Witnesses. Provided that counsel does not express a person opinion as to a witness's credibility, see Section III.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, *see, e.g., Augustine*, 359 N.C. at 725 (stating this principle); 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. For a discussion about the proper uses at trial of a defendant's pretrial silence, see Penny White, *Use of Defendant's Silence at Trial*, *in* N.C. SUPERIOR COURT JUDGES TRIAL NOTEBOOK (Criminal), http://www.sog.unc.edu/node/2198 (May 2010).

F. Comment on the Defendant's Failure to Present Evidence. As discussed in Section III.B.7 below, a prosecutor may not comment on a defendant's failure to testify and, as discussed in Section III.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 merely 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).

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 III.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). 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.
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).
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, __ N.C. App. __, 714 S.E.2d 502, 507-09 (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.** Although arguments regarding general deterrence are prohibited, see Section III.B.24 below, the prosecution may make specific-deterrence arguments. State v. Thomas, 350 N.C. 315, 362 (1999); State v. Campbell, 340 N.C. 612, 631-32 (1995) (not improper to argue that the jury should convict the defendant so he could not commit crimes in the future); State v. Chappelle, 193 N.C. App. 313, 328 (2008) (same).

III. **Impermissible Argument.** The subsections below explore a number of 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, __ N.C. App. __, 719 S.E.2d 164, 171 (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*, __ N.C. App. __, 719 S.E.2d at 171 (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).
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.** 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. Caldwell, 68 N.C. App. 488, 489 (1984) (it was improper for the 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").
    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 II.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 (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." *Id.* at 609 (citation omitted).

3. **Incorrect Statements of the Law.** It is improper for counsel to misstate the law during jury argument. This means that 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").

   It also means that the prosecutor 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 II.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 (1981) ("We perceive that the facts of *other* cases would ordinarily be inappropriate topics for jury argument." *Id.* at 355 (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.** For a discussion of the proper uses at trial of a defendant's pretrial silence, see Penny White, *Use of Defendant's Silence at Trial*, *in* N.C. SUPERIOR COURT JUDGES TRIAL NOTEBOOK (Criminal), http://www.sog.unc.edu/node/2198 (May 2010).

6. **Comment on the Defendant's Failure to Plead Guilty.** A prosecutor's reference to a defendant's failure to plead guilty is a violation of the defendant's constitutional right to a jury trial. State v. Kemmerlin, 356 N.C. 446, 482 (2002).

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.

   The rule prohibiting comment on a defendant's failure to testify applies to both the prosecutor and the defense lawyer. 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.").

   However, as discussed in Section II.F above, a comment on a failure by the defense to put on evidence is not a comment on the defendant's failure to testify. Also, defense counsel may argue to the jury that it 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 so arguing).

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. Gillikin, __ N.C. App. __, 719 S.E.2d 164, 171 (2011) (gross impropriety occurred when the prosecutor repeatedly engaged in abusive name-calling of the defendant and expressed his opinion that the defendant was a liar and was guilty; had the trial court not issued a curative instruction to the jury, a new trial would have been required). 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) ("As this was a trial for first-degree murder involving a calculated armed robbery and an unprovoked killing, it was not improper for the State to refer to defendant as 'cold-blooded murderer.' Similarly, the State's and defendant's evidence showed that defendant had a history of drug abuse and therefore the use of the word 'doper,' while colloquial, was an accurate term describing the defendant as portrayed by the evidence.").

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 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*, __ N.C. App. __, 719 S.E.2d at 171 (defendant).

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*, __ N.C. App. __, 710 S.E.2d 421 (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).

b. Parasite. Counsel should not refer to the defendant as a parasite. *Twitty*, __ N.C. App. at __, 710 S.E.2d at 426 (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, __ N.C. App. __, 720 S.E.2d 441, 445 (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 (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, is improper to refer to the defendant as a criminal. State v. Miller, 271 N.C. 646, 660-61 (1967) ("Considering the argument of the solicitor as a whole, and particularly that part of his argument which in substance states that the appealing defendants are habitual storebreakers, we are of opinion, and so hold, that to sustain the trial below would be a manifest injustice to the defendants' right to a fair and impartial trial."); 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" 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 supported by the facts. State v. Harris, 338 N.C. 211, 229-30 (1994) (evidence supported reference to the defendant as a "cold-blooded murderer" and a "doper").

13. Comparing the Defendant to an Animal. The courts have held that it is not improper for the prosecutor to use the phrase "he who hunts with the pack is responsible for the kill" to illustrate the legal theory of acting in concert. State v. Bell, 359 N.C. 1, 20-21 (2004); *see also* State v. Craig,

308 N.C. 446, 457-58 (1983) (not improper to refer to the defendants as a pack of wolves when stated in a non-inflammatory manner to illustrate concert of action). However, caution should be exercised with regard to all comparisons between the defendant and an animal and the "hunts with the pack" argument has been held improper when used in a way that goes beyond "noninflammatory remarks." 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); 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"); 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.").

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.

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); *Jones*, 355 N.C. at 127 (citing the statute); State v. Waring, 364 N.C. 443, 500-01, 515 (2010) (the prosecutor improperly injected his personal beliefs by stating, "I think" and "I believe"). 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. Phillips, 365 N.C. 103, 139 (2011) (improper for the prosecutor to assert that a defense expert's testimony was "wholly unbelievable"); State v. Wilkerson, 363 N.C. 382, 424-25 (2009) (the 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. Gillikin, __ N.C. App. __, 719 S.E.2d 164, 171 (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"). Also improper is an expression of 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."); State v. Grooms, 353 N.C. 50 (2000) ("[A] trial attorney may not make uncomplimentary comments about opposing counsel." *Id.* at 83 (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; *see also* State v. Phillips, 365 N.C. 103, 138-39 (2011) (the prosecutor's statement that the expert's testimony was "wholly unbelievable" improper). Thus, for example, scatological references to a witness' testimony are improper. State v. Smith, 352 N.C. 531, 560-61 (2000) ("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' 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. 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), *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, __ N.C. App. __, 721 S.E.2d 299, 308 (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 II.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.

23. **Forecasting a Sentence under Structured Sentencing.** The courts have 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).

24. **General Deterrence.** It is improper for the prosecution to argue general deterrence – that the jury should find the defendant guilty to deter others from committing crime. *See, e.g.*, State v. Abraham, 338 N.C. 315, 339 (1994). This is distinguished from an argument as to specific deterrence which, as discussed above in Section II.I above, is permissible.

25. **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. State v. Berry, 356 N.C. 490, 522 (2002) (in a murder case it was improper for the prosecutor to argue: "Folks, right now you know he had his hand on that knife. Right now you know he put that knife in her skull. Right now you know he stabbed her eight times. And if that ain't an attempt to kill, if that ain't first degree murder, then cut him loose. Let him back out at Wrightsville Beach, let him back out at South College Road. If that's not first degree murder, let him go, but I'll tell you one thing, if you're a woman, if you're alone, if you're defenseless, don't be where he is."); *see also* State v. Payne, 328 N.C. 377, 406 (1991) ("To argue that a defendant if acquitted, will commit a future crime is improper.").

26. **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. 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.* Barnes v. North Carolina, 494 U.S. 1022 (1990); State v. McMorris, 290 N.C. 286, 288 (1976); State v. Barber, 93 N.C. App. 42, 48 (1989) (citing *McMorris*).

> In fact mere a 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.").

IV. Judge's Role.

A. Generally. In *State v. Jones*, 355 N.C. 117 (2002), the N.C. Supreme Court succinctly stated that 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.

B. 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. Obviously 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?]*

C. Standard of Review. If a defendant objects to the prosecutor's jury argument the appellate courts review for abuse of discretion. *Jones,* 355 N.C. at 131. 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*. *Id*. at 134.