

Things You Should Say, Things You Shouldn't Say: Avoiding Fundamental Errors in Trial

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The Plan

- Let's review issues that arise when
 - Someone comments on punishment
 - Someone refers to other cases
 - Someone appeals to the jury's emotions
 - Someone comments about whether a witness is telling the truth
 - Someone comments about the defendant's failure to testify
- And what the trial judge should do



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Commenting on Punishment



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Scenario 1

- Defense attorney is making a closing argument in a case involving multiple B1 sex crimes.
- DEFENSE COUNSEL: Conviction of any of these crimes will practically be a life sentence. You know, the judge cannot give probation.
- PROSECUTOR: Objection.



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State v. Cox, 292 N.C. App. 473 (2024)

- The trial court properly sustained the State's objection.
- Counsel may generally discuss a statute or rule of law relevant to a case, including a punishment provision, but not in a way that asks the jury to consider the punishment as part of its substantive deliberations.
- Defense counsel impermissibly implied that defendant should not be convicted because the punishment was too severe.



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Scenario 2

- Closing argument in first degree murder trial.
- PROSECUTOR: The punishment for first degree murder is life without parole. The judge will tell you that your decision is not to be based on what the punishment is or isn't. Saying what the punishment is simply impresses upon you the seriousness of your duty, and there's nobody that needs to impress that upon you. You already know that. You have already showed us that. You know, if I wanted to really upset you, I could tell you the punishment for second-degree murder, minimum punishment for second-degree murder for this defendant, 93 months.
- DEFENSE COUNSEL: Objection.



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State v. Branche, 291 N.C. App. 214 (2023)

- No prejudicial error. Trial court sustained objection but did not give curative instruction.
- At the beginning of trial, the court instructed the jury, "When the Court sustains an objection to a question, you must disregard the question and the answer, if one is being given."
- The trial court also instructed the jury: "The jury should not acquit or convict a defendant based on the severity or lack of severity of punishment that will be imposed for the offense."
- "Given the trial court's instructions, and even presuming the Prosecutor's statement was improper, we conclude the statement did not ultimately prejudice the outcome of Defendant's trial."



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References to Other Cases



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Scenario 3

- [PROSECUTOR]: I'm going to close by reading a case to you. This is a case that I tried in Superior Court probably six months ago. In that case the defendant was a medical student. He was driving around in the downtown area and he was stopped. And in that case his alcohol concentration was .08 or greater. A lot of the same factors in that, you know, there wasn't a whole, whole lot of evidence of impairment. It was an alcohol concentration of .08, right on the legal limit, and that defendant, just as this defendant, did really well on a lot of different field sobriety tests that were administered.
- [DEFENSE COUNSEL]: Objection.



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State v. Simmons, 205 N.C. App. 509 (2010)

- Objection was overruled, and prosecutor finished by saying: "And in that case, and, again, a jury just as yourself found that defendant guilty with a .08."
- New trial
- The prosecutor "inject[ed] his personal experiences" from his prosecution of the prior case, including facts that were "matters outside the record"
- The prosecutor "read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client."



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Scenario 4

- During closing argument in a child abuse case, the prosecutor read from and analogized to two other appellate cases with similar facts. In one prior case, a toddler was left alone in a car in freezing weather. In another, a toddler drowned in a swimming pool after being left unsupervised for 5 to 10 minutes.
- PROSECUTOR: So those are the types of things that you are to look at when you're determining the substantial risk of harm from someone to a child. Are they confined in a car? In this case she wasn't. Are they wandering, are they mobile, are they awake? If they're asleep, they're probably not much of a danger to themselves. But if they're awake and walking around, well, children have a mind of their own. What's the risk of being abducted or kidnapped, or other physical injury? Those are the things you must consider when determining whether or not there's a substantial risk of physical harm.
- DEFENSE COUNSEL: Objection. May I be heard?



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State v. Benton, 301 N.C. App. 32 (2025)

- No error.
- "In jury trials the whole case as well of law as of fact may be argued to the jury." G.S. 7A-97
- "While the prosecutor doubtlessly analogized the facts of [prior cases], he never compared the previous facts and holdings in a way to directly or implicitly argue Defendant should be convicted due to the similarity of parental behaviors at issue."



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Comments that Appeal to Emotion



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Scenario 5

The defendant is charged with raping and sexually abusing a young child. The prosecutor makes the following statements during closing argument:

PROSECUTOR: An eight- to 11-year-old child having sex with a man 16 years her senior who by his own testimony is sleeping with other women in this community with no protection. You think about that. You think about an eight- or nine-year-old walking around pregnant. You think about an eight- or nine-year-old poking around with herpes or gonorrhea or syphilis or AIDS.



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State v. Reber, 386 N.C. 153 (2024)

- Statements were an improper appeal to the jury's emotions, but did not rise to the "grossly improper" standard requiring the trial judge to intervene *ex mero motu*



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Scenario 6

PROSECUTOR: In my hand I'm holding 65 grams. Half a milligram. One one-thousandth of a gram is the lethal dose, and I'm holding 65 grams in my hand. That is why this is serious. That is why you should take this seriously. This is the drug. This is the fentanyl that is in your community. It's in your schools.

DEFENSE COUNSEL: Objection. The State is asking the jury to act as an ear to the community.



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State v. Williams, __ N.C. App. __ (April 1, 2026)

- Trial court sustained the objection and the State continued:
 - This is why this is important. This is why your job as jurors is important. The State is now asking you to do your job, to hold defendant accountable for the fentanyl that was inside of his pants, and inside of his man cave.
- No error in denying defendant's motion for mistrial.
- Defendant objected immediately and the trial court immediately sustained, removing any prejudicial effect from the State's objection to closing argument. Therefore, the State's closing argument, when the trial court sustained Defendant's objection, did not rise to the level of serious impropriety.



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Vouching for/Challenging Truthfulness



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Scenario 7

During closing arguments in a meth trafficking trial in which the defendant testified, the prosecutor makes the following comments:

PROSECUTOR: I would ask you to discount everything she said. And so that begs the question, who is this young lady? I will contend to you she's someone who's involved in drug deals. You heard about her prior record. Although it is larceny and obtaining property by false pretense, that gives you some preview as to who she is.



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State v. Figueroa, 291 N.C. App. 610 (2023)

- This statement improperly suggested that Defendant was more likely to be guilty of the charged offenses based on her past convictions.
- However, in the context of an 18-page closing argument, these few lines were not so “grossly improper” as to require the court to intervene *ex mero motu*. No error.



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Scenario 8

During closing arguments in a case involving false imprisonment and assault inflicting serious bodily injury, the prosecutor states:

PROSECUTOR: The prosecuting witness told the truth and that's all we can really ask of her. She told you what happened. She told you what he did to her. She told the truth.



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State v. Mercer, 928 S.E.2d 674 (N.C. App. 2026)

- Trial court did not err by not intervening *ex mero motu*.
- “[P]rosecutors owe honesty and fervor to the State and fairness to the defendant in the performance of their duties.”
- In closing arguments, an attorney 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.
- A prosecutor may argue that the State’s witnesses are credible in order to give the jury reasons to believe the State’s evidence.



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Commenting on Defendant’s Failure to Testify



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Scenario 9

During closing arguments in a murder trial where defendant admitted to the killing, the prosecutor made the following statement:

PROSECUTOR: 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. But that doesn’t mean he can’t call other witnesses.

DEFENSE COUNSEL: Objection.



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State v. Branche, 291 N.C. App. 214 (2023)

- Any direct reference to defendant's failure to testify is error and requires curative measures be taken by the trial court.
- There was no doubt here that the State's mention of Defendant's failure to testify was improper.
- But in view of the facts, the error was harmless beyond a reasonable doubt.



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Scenario 10

During closing arguments in an assault on a female trial, the State made the following comments:

PROSECUTOR: Now, the defendant of course, it is his right not to testify, and you are not to hold that against him. But I also want you to think about the fact that the defendant chose to put on evidence. He didn't have to do that. You can consider the evidence that the defendant put on. You cannot hold it against him, the fact that he did not testify. We do consider what they chose to put on. And it was just one distraction after another.

DEFENSE COUNSEL: Objection.



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State v. Grant, 293 N.C. App. 457 (2024)

- What should the trial court do?
- Sustain the objection and give an immediate curative instruction.
- No reference by the State to the defendant's decision not to testify is proper—even to remind the jury that it was not to hold that decision against the defendant.



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Takeaways

- Counsel may generally mention punishment but may not imply that it is too severe or too lenient and thus should affect the jury's verdict.
- Counsel may not argue that the jury should decide this case based on how another jury decided a different case.
- The State may not refer to a defendant's failure to testify – not even to say that a defendant is not required to testify.



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