Jury Arguments: Outline of the law or "Discretion in Quick-sand"

Special Superior Court Judge John W. Smith
N.C. Conference of Superior Court Judges, October, 2006

Principal Sources:

- *Strong's N.C. Index 4th(Reference are to Strong's N.C. Index, 4th, Criminal Law)*
- *Superior Court Criminal Bench Book, 3rd Edition, updated through 8/99, Chapter 36*
- *Professor Jessica Smith, IOG, PowerPoint presentation, NCCSCJ Conference, 10/2003*
- *Annotated Statutes: GS 7A-97; 8-54, 15A-1230; General Rule of Practice Rule 12*

The case descriptions are intended as short-hand, thumbnail summaries to identify the issue addressed. The cases themselves and sections in Strong's are more definitive statements of the law than these labels.

General Rules:

What is permissible:

State v. Covington, 290 N.C. 313 (1976), states the general rule, often cited and quoted. "Counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case. Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and an appellate court will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury. Counsel may not employ his argument as a device to place before the jury incompetent and prejudicial matter by expressing his own knowledge, beliefs and opinions not supported by the evidence. It is the duty of the trial judge, upon objection, to censor remarks not warranted by the evidence or the law and, in cases of gross impropriety, the court may properly intervene, ex mero motu."

What is impermissible:

- *G.S. 15A-1230:* Counsel may not be abusive, inject personal experiences, express personal belief as to truth or falsity of evidence or as to guilt or innocence of defendant or make arguments on basis of matters outside the record except for matters as to which court may take judicial notice.
- *Revised Rules of Professional Conduct of the North Carolina State Bar, Rule 3.4(e):* A lawyer shall not: … in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.
- *Rule 12 of the General Rules of Practice for the Superior and District Courts*: Counsel are at all times to conduct themselves with dignity and propriety. All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to. Colloquies between counsel should be avoided. Adverse witnesses and suitors should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited. The conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness.

When must you intervene *ex mero motu* in the absence of an objection?

- The general rule is stated recently in *State v Smith,* 359 NC 199 (2005): "The impropriety of an argument must be gross indeed in order for an appellate court to hold that a trial judge abused his discretion in not recognizing and correcting ex mero motu an argument which defense counsel apparently did not believe was prejudicial when he heard it. In such a circumstance, the prosecutor's closing argument is subject to appellate review for the existence of gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters ex mero motu."
- "The standard of review when a defendant fails to object at trial is whether the [closing] argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998).
- "In determining whether the prosecutor's argument was...grossly improper, this Court *must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers*." *State v. Hipps*, 348 N.C. 377 (emphasis added).
- Unless the defendant objects, the trial court is not required to interfere ex mero motu unless the arguments "stray so far from the bounds of propriety as to impede the defendant's right to a fair trial." *Small*, 328 N.C.175.

Applications of the Rules:

1. Failure to testify, G.S. 8-54 (Strong's, Cr.L. comments by state: §433; by defense: §434)

McLamb, 235 N.C. 251 (1952): Defendant "hiding behind wife's coattails." Wife testified, defendant did not. Improper.

State v. Roberts, 243 N.C. 619 (1956): "Defendants failed to produce evidence. I have not said a word about the defendant's not testifying." Improper.

State v. McCall, 286 N.C. 472 (1975): Comment on defendant's silence and by implication his failure to testify. Objection sustained, but no curative instruction. New trial.

State v. Monk, 286 N.C. 509 (1975): "We can't show you defendant's criminal record unless he testifies." Improper.

State v. Smith, 294 N.C. 365 (1978): Rule and case citations. Defendant failed to get back on stand to rebut rebuttal. Proper comment on these facts.

State v. Boone, 307 N.C. 198 (1982): Defense attempted to explain why defendant did not testify. Improper. State's objection sustained.

State v. Solomon, 40 N.C. App. 600 (1979): "neither the district attorney nor counsel for the defendant may comment on the defendant's failure to testify. When there is an objection to such prohibited statements it is "the duty of the court not only to sustain objection to the prosecuting attorney's improper and erroneous argument but also to instruct the jury that the argument was improper with prompt and explicit instructions to disregard it. [If] no proper curative instruction [is] given, the prejudicial effect of the argument requires a new trial. State v. Monk, 286 N.C. 509."

State v. Oates, 65 N.C.App. 112 (1982): Beckton, Johnson & Braswell reverse based on prosecutor's comment despite trial court sustaining objection and providing curative instructions. Discretionary review was denied. But, distinguished in Kemmerlin 356 N.C. 446, which found immediate instructions sufficient to cure.

State v. Ferrell, 75 N.C. App. 176 (1985): prohibition applies to defendant's election not to testify in District Court In a case on trial de-novo in Superior Court. Improper to question defendant concerning silence in the previous trial.

State v. Batchelor, 157 N.C. App. 421 (2003): A *witness* makes comments about def. not testifying. Court under no duty to intervene or give instruction absent an objection and request.

State v. Banks, 322 N.C. 753 (1988): "We hold that defense counsel should have been permitted to read to the jury that clause of the Fifth Amendment material to his election not to testify, i.e., 'No person . . . shall be compelled in any criminal case to be a witness against himself . . .' and to say simply that because of this provision, the jury must not consider defendant's election not to testify adversely to him, or words to this effect. No further comment or explanation of his election should have been permitted."

2. Failure to offer evidence (Strong's, §429)

State v. Smith, 290 N.C. 148 (1976): "The evidence is un-contradicted" (repeated 8 times). Proper.

State v. Peplinski, 290 N.C. 236, 250 (1976): "Every scintilla of evidence adduced in this courtroom was put on by the State of N.C., every bit of it. You see, the way the case has developed, the State presenting all the evidence in this case, I find myself in a position of being sandwiched on the arguments," No prejudicial error.

State v. Thompson, 110 N.C. App. 217 (1993): Failure to offer alibi or evidence was proper area for argument.

3. Failure to call spouse (Strong's, §430)

State v. Thompson, 290 N.C.431 (1976): "Have you heard from his wife?" (referring to defendant). Grossly improper requiring intervention sua sponte.. Requires detailed curative instruction.

State v. McCall, 289 N.C. 570 (1976): "The defendant married witness to silence her as a witness." (no evidence), Improper.

State v. Ward, 34 N.C. App. 598 (1977): Prosecutor's argument implied wife did not testify and said "She didn't say where she was." Improper, and reversed considering other factors with that error.

State v. Barden, 356 N.C.316, 381 (2002): "[PROSECUTOR]: '*Why do you think they didn't call his wife? Maybe 'cause she would have testified to something they didn't want to hear.*[COUNSEL]: Objection. COURT: Objection sustained. The jury will disregard that argument.' In light of the unequivocal requirement for a detailed peremptory curative instruction set out in *Helms* (218 N.C.

592), we agree with defendant that the trial court's actions were insufficiently detailed and therefore error." Not prejudicial. Distinguished *Ward* and *Thompson*.

4. Failure to call other witnesses (Strong's §431)

State v. Thompson, 293 N.C. 717 (1977): Proecutor's comment on defendant's failure to call alibi witness who could verify alibi if true, calling alibi witnesses "hot numbers." and "cohorts", and saying "Defendant has an interest in telling you any sort of transparent fabrication his imagination can dream up and he thinks you are gullible enough and naïve enough to buy." No prejudicial error.

State v. Jordan, 305 N.C. 274 (1982): Prosecutor commented that the defendant failed to produce alibi witness. Proper.

State v. Caldwell, 68 N.C. App 488 (1984): Explanation of why a witness did not testify, which was not supported by any evidence. Improper.

State v. Ward, 354 N.C. 231 (2001): Prosecutor's prolonged argument without objection that defendant has same subpoena power as state. No error, ex mero motu intervention not required.

5. Pretrial silence (Strong's §432)

State v. Buckner, 342 N.C.198 (1995): Prosecutor's argument about silence of defendant when first confronted by officers where there was a reasonable inference that he should have responded is proper impeachment. Court did not err in allowing argument.

6. Calling the defendant or witness a "liar."
Rule: Improper unless either carefully circumscribed or supported by clear evidence.

*State v. Miller***,** 271 N.C. 646 (1967): "I knew the witness was lying." Improper.

State v. Noell, 284 N.C. 670 (1974): "I submit to you that the defendant's witnesses have lied to you." Proper. Here the argument relates to inferences about the evidence, not an expression of opinion as in *Miller*.

State v. Davis, 291 N.C. 1, 12 (1976): "[We] would argue and contend to you that [D's] testimony was nothing but the testimony of a pathological liar." No objection. Not error. Cites *Miller* and *Noell*.

State v. Bunning, 338 N.C. 483, 489 (1994): Evidence supported prosecutor's characterization.

Couch v. Duke, 133 N.C. App. 93 (1999): Civil case, great discussion with dissent on balancing issue. On appeal, the North Carolina Supreme Court, 351 N.C. 92, stated: "All members of the Court are of the opinion that the trial court erred by not sustaining defendant's objection and by not intervening *ex mero motu.* Justices Lake, Martin, and Wainwright believe that the error was prejudicial to the appealing defendant and would vote to grant a new trial. Chief Justice Frye and Justices Parker and Orr are of the opinion that the error was not prejudicial to the appealing defendant and would vote to affirm the result reached by the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. Furthermore, this Court, being of the opinion that plaintiff's counsel's conduct violated Rule 12 of the General Rules of Practice for the Superior and District Courts and was not in conformity with the Rules of Professional Conduct, remands this cause to the trial court for the determination of an appropriate sanction." Subsequent history: 146 N.C. App. 648, 355, 348 Sanctions imposed.

State v. Gell, 351 N.C. 192, 211 (2000): Calling witness liar. Improper.

State v. Sexton, 336 N.C. 321, 363 (1994): Similarl to *Gell*.

State v. Nance, 157 N.C. App. 434 (2003): Severe rebuke for use of term "liar." Expects and demands more from counsel. Warning if conduct continues. Cites statues listed in sourcesand Rule 12.

7. Characterizations of defendant (Strong's § 436-444)
Rule: Must be supported by evidence or reasonable inference, and not intended to appeal to prejudice or passion.

State v. Tucker, 190 N.C.708 (1925): "Gentlemen of the jury, look at the defendants, they look like professed (professional) bootleggers, their looks are enough to convict them." Defendant did not testify. Improper.

State v. Ballard, 191 N.C.122 (1926): Defendant as a human hyena. Improper.

State v. Correll, 229 N.C. 640 (1948): Defendant a small-time racketeering gangster. Improper.

State v. Bowen, 230 N.C. 710 (1949): These two thieves. Improper.

State v. Wyatt, 254 N.C. 220 (1961): Two of the slickest confidence men we have had in court. Improper.

State v. Miller, 271 N.C. 646 (1967): Prosecutor implied defendants were "professional storebreakers" when there was no evidence to support it. Improper. Reversed even though judge sustained objection. no curative instructions.

State v. Westbrook, 279 N.C. 18 (1971): "[T]wo robbers, two thieves, two gunmen, who practiced their trade,-Killers."Proper .based on facts.

State v. Smith, 279 N.C. 163 (1971): Defendant lower than the belly bone of a cur dog. Improper.

State v. Wortham, 287 N.C. 541 (1975): "[T]hey are thieves, they are rogues, they are scoundrels." Not improper "The prosecuting attorney may use 'appropriate epithets which are warranted by the evidence.' We think it only proper to observe that the District Attorney was perilously near crossing the line from allowable denunciation into the forbidden territory of abuse which would have required reversal. In any event, we agree with the Court of Appeals that, in light of the stated circumstances, reversible error does not appear.".

State v. Rouf, 296 N.C. 623 (1979): Defendant's motor cycle gang connections. Proper.

State v. Davis, 45 N.C. App. 113 (1980): Defendant is a mean S.O.B. Improper.

State v. Myers, 299 N.C. 680: Prosecutor argued: "you observed that the defendant observed those pictures …didn't bat an eye, …no remorse." Demeanor of defendant before the jury is relevant.

State v. Pinch, 306 N.C. 1 (1982): Defendant "not Jack the Ripper yet" and his state of mind was a cesspool. Proper.

State v. Craig, 308 N.C. 446 (1983): Defendants were a pack of wolves, when stated in a non-inflammatory manner to illustrate concert of action.

State v. Jarrett, 309 N.C. 289 (1983): Defendant a conman and disciple of Satan. Improper.

State v. Hunt, 323 N.C. 407 (1988): "[A]ssassin" and "contract killer." No error because supported by evidence.

State v. Jones, 355 N.C. 117 (2002): Comment deriding defendant as "lower than the dirt on a snake's belly." Grossly improper and prejudicial.

State v. Walters, 357 N.C. 68 (2003): Comparing defendant to Hitler, improper but not prejudicial, because of context of statements.

State v. Bullock, __ N.C. App. __ (7/18/2006): "No one wants to believe that such a vile, such a [sic] amoral, wicked, evil man might live in that community. But ladies and gentlemen, such a man lives here in Wake County. Such a man is seated at the table and his name is [defendant.]" Not so grossly improper as to require intervention.

8. Characterizations of witnesses (Strong's §445-447)

State v. Thompson, 293 N.C. 717: Calling alibi witnesses "hot numbers" and "cohorts." No error, supported by evidence, but objections sustained.

9. Special rules as to expert witnesses (Strong's §447); evolution of a new rule on intervention?

State v Rogers, 355 N.C. 420 (2002): While payment of an expert is legitimate basis to argue bias, when the argument goes to a direct allegation of perjury by a paid expert without further foundation, the error may be gross and require intervention ex mero motu. The *Rogers* court stated: " We admonish counsel to refrain from arguing that a witness is lying solely on the basis that the witness has been or will be compensated for his or her services. We also instruct trial judges to be prepared to intervene ex mero motu if such arguments continue to be made."

10. Comment on role of jury (Strong's §448-449)

State v. Thompson, 293 N.C. 713: Prosecutor contended that juries must accept the blame if criminals are turned loose and set back on society. Improper but cured by instruction.

11. Interjection of personal opinions (Strong's §450-451)

State v. Miller, 271 N.C. 646 (1967): I knew the witness was lying Improper.

State v. Noell, 284 N.C. 670 (1974): I submit to you that the defendant's witnesses have lied to you. Proper. This is more of a comment on what the evidence supports as opposed to the expression of a personal opinion as in Miller, but even so, exercise discretion.

State v. Britt, 291 N.C. 528 (1977): Defendant is guilty as sin and I'm asking you to put him out of the shooting business. Proper argument on these facts.

12. Miscellaneous inflammatory comments (Strong's §452-456)

State v. Adcock, 310 N.C. 1 (1984): The fact that the defendant is in court indicates he violated the law. Improper.

State v. Potter, 69 N.C. App. 199 (1984): Officers, if they lied, could be fired and lose their pensions. Improper.

State v. Scott, 314 N.C. 309 (1985): Prosecutor in DWI: There is a lot of public sentiment now against driving and drinking, causing accidents Improper.

State v. McCollum, 334 N.C. 208 (1993) Put yourself in the place of the victim—how would you feel… (assuming improper arguendo, unlikely to have denied defendant due process).

13. Issues of race or personal characteristics (Strong's 455)
Rule: Improper to appeal to racial prejudice.

State v. Murdock, 183 N.C. 779 (1922): "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 ear-marks of a blockader." Highly improper, corrected by judge in charge. "The trial judges are cautioned to immediately and fully correct abuses of this character."

State v. Moose, 310 N.C. 482 (1984): Arguing racial motive for the crime was proper on these facts, evidence supported.

14. Punishment (Strong's §457-461)

State v. Wilson, 293 N.C. 47 (1977): May argue punishment to impress on jury gravity of its responsibility, but not to urge verdict based on sympathy or prejudice.

State v. Walters, 294 N.C. 311 (1978): Counsel may not argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the prescribed punishment. Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely.

15. Effect or availability of appeal or parole (Strong's §462-466)

State v. Jones, 296 N.C. 495 (1979): State's references to appellate review or parole. Improper.

State v. McMorris, 290 N.C. 286 (1976): Improper for either side to argue.

State v. Barber, 93 N.C. App. 42 (1989): Improper to suggest that the sentence will be reduced.

16. Religious arguments

State v. Oliver, 309 N.C. 326 (1983): The prosecutor argued that the Bible does not prohibit the death penalty. He quoted portions of scripture to support his statement. He did not suggest that North Carolina's death penalty was "divinely" inspired; he simply stated that it was not inconsistent with scriptures of the Bible. Invited, not gross.

State v. Moose, 111 N.C. 482 (1984): Prosecutor argued that he was ordained by God as his representative on earth. Grossly improper.

State v. Boyd, 211 N.C. 408 (1984): "The biblical quotations which form the basis of defendant's next exception are not improper in context, when defendant's propensity to quote the Bible in his defense is considered. The prosecutor may have injected his personal opinion as to the value of the Bible as being 'maybe . . . the very best law book we have got,' but we do not consider this statement grossly improper."

State v. Gell, 351 N.C. 192 (2000): "it is improper for prosecutors to make Bible-based arguments to the jury…. we do not approve of the prosecutor's use of biblical references in the closing arguments of this sentencing proceeding, we do not find the argument to be so grossly improper that the trial court erred by failing to intervene *ex mero motu*." Cited in *State v. Jones*, 351 N.C. 216 with a warning.

State v. Barden, 356 N.C. 316 (2002): "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." Reviews cases.

17. Misstating the evidence, Improper. (Strong's 471).

State v. Nance, 157 N.C. App. 434 (2003): Prosecutor's misreading of defendant's statement was not error where the trial court sustained defendant's objection and required the prosecutor to read the entire statement in context.

18. Reading indictment prohibited by statute (Strong's §481, G.S. 15A-1221)

19. Arguing law: Generally permissible. (Strong's §472)

State v. Tilley, 292 N.C. 132, 143 (1977): If victim's rights had been observed to the extent that we are now undertaking to observe these defendants' rights, victim would be alive. No error.

State v. Griffin, 308 N.C. 303, 314 (1983): At one point the prosecutor remarked that defense counsel "will have the last argument because they did not put on any evidence . . . ." and also argued evidence was uncontradicted. Not reversible error. May not be error as long as it relates to failure to produce available evidence and not a comment on failure to testify.

State v. Gardner, 316 N.C. 605 (1986); quoted in State v. Thomas, 350 N.C. 315: In all superior court jury trials, "the whole case as well of law as of fact may be argued to the jury." N.C.G.S. § 7A-97. We have previously reviewed the scope of a party's right under this statute: [This statute] grants counsel the right to argue the law to the jury which includes the authority to read and comment on reported cases and statutes. There are, however, limitations on what portions of these cases counsel may relate. For instance, counsel may only read statements of the law in the case which are relevant to the issues before the jury. In other words, "the whole corpus juris is not fair game." Secondly, counsel may not 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. Furthermore, counsel may not read from a dissenting opinion in a reported case."

State v. Austin, 320 N.C. 276 (1986): Although counsel may properly read statements of law and their attendant facts found in the original opinion to the jury, counsel may not read matters which are not law but rather constitute mere dicta and therefore are not within the scope of G.S. [7A-97].

20. Improper arguments might become proper if invited by argument of opponent.

State v. McCall, 289 N.C. 512 (1976): Various otherwise improper arguments invited by defense arguments. Court: "Defense counsel is in fact from Raleigh and in our opinion his remarks invited the response of the district attorney. This Court has disapproved the type of argument made by defense counsel."

State v. Fearing, 304 N.C. 471 (1981): On wife's failure to testify.

State v. Davis, 305 N.C. 400, 422 (1982): State responded to defense attack on credibility of officers.

State v. Taylor, 289 N.C. 223 (1976): Argument of defense not recorded, so court could not tell what was invited. This failure was factor in finding no prejudicial error.

21. Personalities, characterizations of counsel (Strong's §473; Rule 12, Rules of Practice)

State v. Miller, 271 N.C. 646 (1967): Defense lawyer was a prosecutor until other things tempted him to become defense attorney. Improper.

State v. Covington, 290 N.C. 313 (1976): Defense lawyers must do everything to sway your mind from justice and get their clients off. Improper but timely curative instruction cured the error.

State v. Harris, 338 N.C. 211 (1994): Reference to ingenuity of counsel did not require intervention ex mero motu.

State v. Rivera, 350 N.C. 285 (1999): Disapproving of remark that defense counsel "displayed one of the best poker faces" when state's witness that contradicted defendant's alibi defense.

State v. Grooms, 353 N.C. 50 (2000): Intervention ex mero motu not required; prosecutor referred to counsel's strategy as "ingenuity of counsel" and argued: "what is a defense counsel's role in this case? ... Their job is . . . to create as much smoke and fog ... as possible."

State v. Jordan, 149 N.C. App. 838, 843-44 (2002): New trial; prosecutor compared counsel to Joseph McCarthy, D objected but judge failed to instruct jury to disregard.

22. Anecdotes, stories, analogies, & miscellaneous matters

State v. Jones, 317 N.C. 487 (1986): Reference to "that lady that wanted to marry Briley in Virginia right before his execution and did in fact and she was from North Carolina," as analogous to situation in the case at hand. Improper, not gross.

State v. Rogers, 323 N.C. 658 (1989): That 95% of murderers would be free if intoxication was defense: hyperbole related to fact that voluntary intoxication is no defense to crime. Not error.

State v. Pittman, 332 N.C. 244 (1992): If defendant acquitted, justice in Halifax County would be dead. Hyperbolic expression of State's position that not-guilty verdict, in light of evidence of guilt, would be an injustice. Not an improper argument.

State v. Ingle, 336 N.C. 617 (1994): Prosecutor's lengthy argument that, in essence, speculated how Paul (child), when he became an old man of eighty-six years, would look back on the day when he "flew" into the home of his grandparents and encountered their dead bodies, finding that he could not kiss his grandma and grandpa because defendant had bludgeoned them to death. Legitimate "scenario" argument.

State v. Larrimore, 340 N.C. 119 (1995): Prosecutor argued defense counsel "cast up" a "cloud" of "smoke," "smog," "dust," & "dirt" & that "The defense wants you chasing rabbits, when you ought to be hunting bear. And the bear is the truth. But they want you chasing rabbits;" although rich in hyperbole, no error in these arguments.

State v. Jones, 355 N.C. 117 (2002): our Supreme Court held that a prosecutor's comparative references between the defendant's shootings and the Columbine shootings and the bombing of the federal building in Oklahoma City were improper because they (1) "referred to events and circumstances outside the record;" (2) "urged jurors to compare defendant's acts with the infamous acts of others;" and (3) "attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice."

State v. Nance, 157 N.C. App. 434 (2003): No new trial; prosecutor referred to "The Shadow," a fictional crime fighter who "had the power to cloud men's minds," stating "that's what the defense is attempting to do."

State v. Millsaps, 169 N.C. App. 340 (2005): "They want you to disregard all that evidence of strong motive and say, well, he just had this crazy delusion about following God's orders. Yeah, that's like people that fly airplanes into buildings for their ends and claim to be doing God's work. Improper.

23. Capital case arguments (Strong's §458, 460, 461, 470, 474)

Jones, 355 N.C. 117 (2002)"We should note at this point that in determining prejudice in a capital case, such as the one before us, special attention must be focused on the particular stage of the trial. Improper argument at the guilt-innocence phase, while warranting condemnation and potential sanction by the trial court, may not be prejudicial where the evidence of defendant's guilt is virtually uncontested. However, at the sentencing proceeding, a similar argument may in many instances prove prejudicial by its tendency to influence the jury's decision to recommend life imprisonment or death. We also point out that by its very nature, the sentencing proceeding of a capital case involves evidence specifically geared towards the defendant's character, past behavior, and personal qualities. Therefore, it is certainly appropriate for closing argument at the sentencing hearing to incorporate reasonable inferences and conclusions about the defendant that are drawn from the evidence presented. However, mere conclusory arguments that are not reasonable -- such as name-calling -- or that are premised on matters outside the record -- such as comparing defendant's crime to infamous acts -- do not qualify and thus cannot be countenanced by this or any other court in the state. 'If verdicts cannot be carried without appealing to prejudice or resorting to unwanted denunciation, they ought not to be carried at all.'"

State v. Walters, 357 N.C. 68 (2003). Sets out the Rules. While what is improper remains same, standards for what is prejudicial may differ in guilt and punishment phases, depending upon strength of case.

24. Improper arguments requiring court to intervene *ex mero motu* (Strong's §469)

State v. Jones, 317 N.C. 487 (1986): We hold that appellate review of a prosecutor's argument for gross impropriety in absence of an objection at trial is not limited to capital cases, but may be invoked as well in non-capital cases.

State v. Jones, 355 N.C. 117 (2002): Columbine reference. Appeal to passions. Improper, reversible in sentencing hearing.

State v. Smith, 359 N.C. 199 (2005): Sets out rule. No error in this case.

State v. Millsaps, 169 N.C. App. 340 (2005): Reference to 9/11 terrorists. Improper and prejudicial.

State v. McCollum, __ N.C. App. __ (6/6/2006): Reference to 9/11 terrorists. Improper but did not require intervention in the absence of an objection. Sets out standards. Clear statement of duty when there is or is not an objection.

25. Civil Jury Arguments Generally (Strong's Index 4th, *Trial*, §182-208)

State v. Jones, 355 N.C. 117 (2002): "The standards articulated in G.S. § 15A-1230(a) are applicable to civil as well as criminal cases."

Couch v. Duke, 133 N.C. App. 93 (1999): Discussed in detail above under Section 6 above, "liar."

Wilcox v. Glover, 269 N.C. 473: "counsel may not properly argue: The facts in the reported case were thus and so; in that case the decision was that there was no negligence (or was negligence); the facts in the present case are the same or stronger; therefore, the verdict in this case should be the same as the decision there."

Spivey v. Wilcox, 264 N.C. 387 (1965): (cited in *Scallion*) During the trial of a case it is improper to mention insurance in either a positive or negative manner. *See also Electric Company v. Dennis*, 259 N.C. 354, (1963); 1 Stansbury's N.C. Evidence § 88 (Brandis rev. 1973); Annotations to G.S. 8C Rule 411; 90-10.2(e).

Scallon v. Hooper, 58 N.C. App. 551 (1982): Improper to argue nontaxibility of damages; and improper to argue that client would be "legally obligated to pay every single dollar of the verdict" because it implies there is no insurance.

Watson v. White, 309 N.C. 498 (1983): "Can you imagine what a low jury verdict would do to that family." Improper. "In a court of justice neither the wealth of one party nor the poverty of the other should be permitted to affect the administration of the law."

Conn. v. Seaboard, 201 N.C. 157 (1931): "It is clear that a dissenting opinion is not admissible in evidence, and hence cannot be classified as a fact. Neither is it the law of the particular case, else it would not be a dissenting opinion. Manifestly, a dissenting opinion expresses the individual view of the judge who writes it, and thus would logically fall into the classification of newspaper editorials, magazine articles, pamphlets, or other writings, which have not received the judicial sanction of a court. The trial judge, upon objection, made a general observation to the jury, but this was not sufficient. It was his duty, upon objection duly made, either to direct counsel to refrain from such reading or instruct the jury plainly and unequivocally that the dissenting opinion had no legal bearing upon the case. Counsel are not permitted to read to the jury, as law, decisions which are inapplicable to the facts, or which do not declare the law as held by the jurisdiction in which the trial occurs. But he may refer to well-known facts in history, literature, and science by way of illustration and ornament. He may argue matters of common knowledge, or matters of which the court will take judicial notice, and within the limits of the evidence the manner of presenting the case is left to his own judgment. He may indulge in impassioned bursts of oratory, or what he may consider oratory, so long as he introduces no facts not disclosed by the evidence. It is not impassioned oratory which the law condemns and discredits in the advocate, but the introduction of facts not disclosed by the evidence. It has been held that he may even shed tears during his argument, the only limitation on this right being that they must not be indulged in to such excess as to impede or delay the business of the court." (Dissenter: "From the charge of the court below: 'The jury will take the law from the court and not from counsel,' a new trial granted in **this case will seriously hamper the sound discretion of the court below and tend to land its discretion in quick-sand.")**

Curative instruction, from the Benchbook:

Superior Court Criminal Bench Book, 3rd Edition, updated through 8/99, Chapter 36

"Members of the jury, you are to disregard counsel's statement that *[repeat, rephrase, or quote the offending argument sufficiently to unambiguously identify it in non-prejudicial manner. Avoid expressing an opinion as to the facts in evidence]*.

It is improper for counsel to *[state the rule violated, eg, "state his personal opinions"]*.

You are to disregard this improper statement and not to allow it to affect your decision. [Do you understand my instructions? Can you follow them?]