TAB 13: Closing Arguments

CLOSING ARGUMENTS

IN THE GUILT AND PENALTY PHASES OF A CAPITAL TRIAL

Jeff Welty

Plan

- General Rules
- Guilt phase
  - Order, number, and timing
  - Harbison/admitting guilt to a lesser offense
- Penalty phase
  - Order, number, and timing
  - Common issues

General Rules

- "During a closing argument . . . an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record."
  - G.S. 15A-1230

General Rules

- "Counsel are at all times to conduct themselves with dignity and propriety. . . . All personalities between counsel shall be avoided. The personal history . . . of counsel on the opposing side should not be alluded to. . . . [Witnesses and parties] should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited."
  - Gen. R. Pract. 12

General Rules

- A lawyer shall not "allude to any matter . . . not . . . supported by admissible evidence, assert personal knowledge of facts in issue . . . or state a personal opinion as to the justness of a cause, the credibility of a witness . . . or the guilt or innocence of an accused."
  - Rule of Prof'l Cond. 3.4(e)

Guilt Phase: Order, Number, Timing

- Order – Gen. R. Pract. 10
  - Same as non-capital
    - If D introduces evidence: State → D → State
    - If D does not introduce evidence: D → State → D
- Number – G.S. 7A-97
  - May limit to three lawyers per side
  - May not limit number of addresses per lawyer
- Timing – G.S. 7A-97
  - May not limit duration

Guilt Phase: Harbison

- State v. Harbison, 315 N.C. 175 (1985) (when attorney admits defendant's guilt without consent, new trial required because attorney in effect entered guilty plea for defendant)
- Florida v. Nixon, 543 U.S. 175 (2004) (attorney admitted defendant's guilt of first-degree murder to preserve credibility for penalty phase; no automatic new trial; defendant must show ineffective assistance under traditional test)
- NC appellate courts continue to apply Harbison

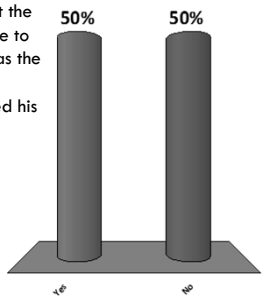
Penalty Phase: Order, Number, Timing

- Order – G.S. 15A-2000(a)(4)
  - Defense last
  - Usually State → D
  - Statute appears to permit D → State → D
- Number – G.S. 7A-97
  - May limit to three lawyers per side
  - May not limit number of addresses per lawyer
- Timing – G.S. 7A-97
  - May not limit duration

Question 1

May a defense attorney argue that the case at bar is unlike cases that come to mind as death penalty cases, such as the cases of Olympic Park bomber Eric Rudolph or Scott Peterson, who killed his pregnant wife Laci in California?

1. Yes
2. No



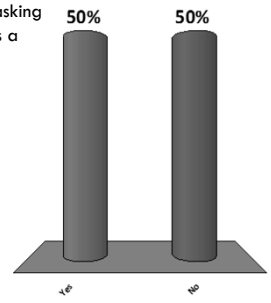
Issue 1: Cases Not in Evidence

- No, under State v. Taylor, 362 N.C. 514 (2008). See also State v. Jones, 355 N.C. 117 (2002) (improper for prosecutor to refer to the Columbine school shooting and the Oklahoma City bombing).

Question 2

May a prosecutor argue that "I'm asking you to impose the death penalty as a deterrent, to set a standard of conduct"?

1. Yes
2. No



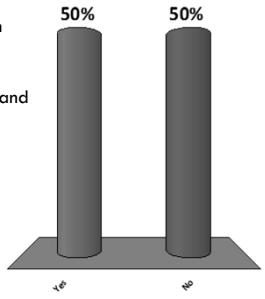
Issue 2: Deterrence

- No. Arguing general deterrence is improper under State v. Kirkley, 308 N.C. 196 (1983)
- Arguing specific deterrence/incapacitation/future dangerousness to prison staff is OK
- Arguing the possibility of escape appears to be improper under State v. Steen, 352 N.C. 227 (2000) (curative instruction sufficient to address prosecutor's comment that "there is no prison in North Carolina that is escape proof")

Question 3

May a prosecutor argue that if the defendant were sentenced to life in prison, he would spend his time comfortably doing things such as playing basketball, lifting weights, and watching television?

1. Yes
2. No



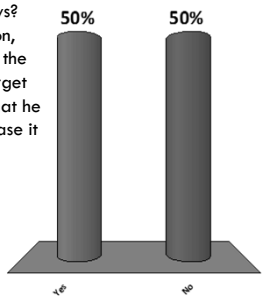
Issue 3: References to Prison Life

- Yes. Under State v. Smith, 347 N.C. 453 (1998), such an argument properly "emphasize[s] the State's position that the defendant deserve[s] the penalty of death rather than a comfortable life in prison."
- Presumably the defense may argue that prison life is difficult and unpleasant

Question 4

May the prosecutor argue as follows? "They want to talk about compassion, mercy. That's not the law. That's not the standard. If it was, you wouldn't forget about the compassion and mercy that he showed for [the victim]. No, don't base it on any of that."

1. Yes
2. No



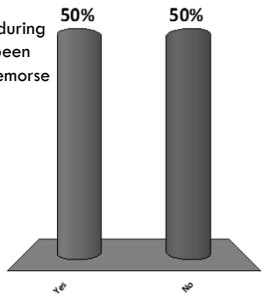
Issue 4: Sympathy and Mercy

- Yes. Under State v. Cummings, 361 N.C. 438 (2007), such an argument encourages the jury to decide the case based on the law rather than on personal feelings.

Question 5

May the prosecutor argue that "[n]owhere in any of the testimony during the sentencing phase has remorse been mentioned about the defendant's remorse for [the victim's] death"?

1. Yes
2. No



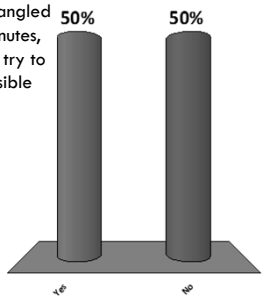
Issue 5: Remorse

- Yes. State v. Taylor, 362 N.C. 514 (2008).
- However, the state may not
  - Argue that lack of remorse is an aggravating factor
  - Point out that the defendant failed to confess after being advised of his Miranda rights

Question 6

In a case in which the defendant strangled the victim over the course of four minutes, may the prosecutor ask the jurors to try to hold their breath for as long as possible during a four-minute span?

1. Yes
2. No



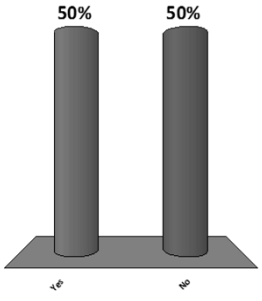
Issue 6: Jurors as Victims

- Yes. In State v. Artis, 325 N.C. 278 (1989), the court ruled that this properly helped the jury to understand the dynamics of manual strangulation.
- However, the state may not ask jurors to put themselves in the victim's place. State v. McCollum, 334 N.C. 208 (1993).

Question 7

May a prosecutor argue that the Bible says that "he that smiteth a man so that he die shall surely be put to death," and that there is "Biblical authority for a death sentence" imposed under the law?

1. Yes
2. No



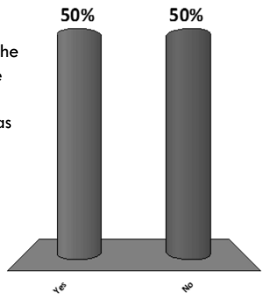
Issue 7: Biblical References

- Yes and no. Such an argument appears to be improper but not so much so as to require a new trial. State v. Haselden, 357 N.C. 1 (2003).

Question 8

The defendant bound the victim, stuffed paper in her mouth, and covered her mouth with duct tape. She died of asphyxiation while he made off with her property. May the prosecutor describe the defendant as a monster, a demon, and a man without morals?

1. Yes
2. No



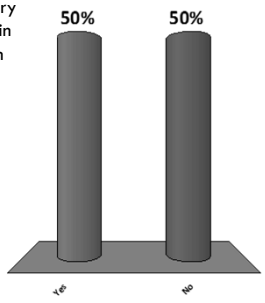
Issue 8: Disparaging the Defendant

- No. State v. Matthews, 358 N.C. 102 (2004). The prosecutor was name-calling, not arguing the evidence or inferences therefrom.

Question 9

May defense counsel read to the jury G.S. 15A-2000(b), which provides in part that "[i]f the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment"?

1. Yes
2. No



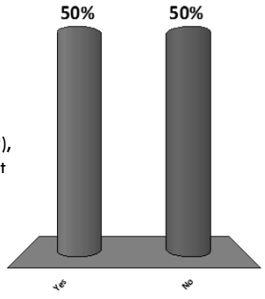
Issue 9: Encouraging Holdouts

- No. State v. Johnson, 317 N.C. 343 (1986).

Question 10

The state plans to rely on aggravating circumstances (e)(3) (prior violent felony conviction) and (e)(9) (especially heinous/atrocious/cruel). May defense counsel describe aggravating circumstances (e)(1)-(2), (4)-(8), and (10)-(11), and note that the state has not presented any evidence of those factors?

1. Yes
2. No



Issue 10: Absence of Aggravators

- No, because the absence of an aggravating factor is not a mitigating factor. State v. Buckner, 342 N.C. 198 (1995).
- Presumably the state likewise may not note the absence of statutory mitigating circumstances

CLOSING ARGUMENTS

IN THE GUILT AND PENALTY PHASES OF A CAPITAL TRIAL

Jeff Welty

Significant Closing Argument Cases Since 2012

Jeff Welty

Can't accuse defense counsel of suborning perjury without evidence.

State v. Hembree, 368 N.C. 2 (2015). The defendant admitted killing two women. At trial, he claimed that his confession was false. The state suggested that the defendant was pursuing a dishonest strategy initiated by his attorneys:

> [A]t no point, no point in the last 18 months since this has been pending trial, has he ever recanted killing Heather or Randi. Never. Not until two years later when he could look at everything, when he can study the evidence, when he can get legal advi[c]e from his attorneys, does he come up with this elaborate tale as to what took place. . . . Two years later, after he gives all these confessions to the police and says exactly how he killed Heather and Randi Saldana ... the defense starts. The defendant, along with his two attorneys, come together to try and create some sort of story.

Absent evidence suggesting that the attorneys were suborning perjury, this argument was "grossly improper" and should have resulted in *ex mero motu* intervention by the trial judge.

State v. Huey, __ N.C. App. __, 777 S.E.2d 303 (2015), temporary stay allowed, 368 N.C. 433. In this homicide case, a new trial was required where the trial court failed to intervene on its own motion to the State's improper statements made during closing argument. The State argued to the jury not only that the defendant was a liar but that he had lied on the stand in cooperation with defense counsel and the defendant's mental health expert. The State also indicated that the jury should not trust defense counsel because he was "paid to defend the defendant." [Summary: Jessie Smith]

Can't exaggerate the likelihood that a verdict of not guilty by reason of insanity would quickly lead to the defendant's release.

State v. Dalton, __ N.C. __, 794 S.E.2d 485 (2016). The defendant asserted an insanity defense. At closing, the prosecutor argued: "[S]he can be committed to a hospital if you find that verdict. And it is very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself, she will be back home. . . . She very well could be back home in less than two months." The state supreme court held that this argument was misleading and prejudicial. Although the defendant would get a hearing within 50 days, she would not be released if she remained mentally ill and dangerous. All the evidence at trial indicated that she would be mentally ill for the rest of her life, and the fact that she committed a homicide was prima facie evidence of dangerousness.

Arguing that the state's evidence is uncontradicted does not infringe on the defendant's right not to testify.

State v. Martinez, __ N.C. App. __, 795 S.E.2d 386 (2016). The state argued that "the only evidence you heard in this case has been presented by the State"; that "[t]he State's evidence is uncontradicted"; and that "the defense has an opportunity to put on evidence to support their arguments" but didn't take it. The court of appeals found that "[v]iewed as a whole, the prosecutor's statements pertain to Defendant's failure to produce exculpatory evidence," and were not an improper comment on the

defendant's failure to testify. However, the court stated that it found the prosecutor's conduct "troublesome" and that "the prosecutor flew exceedingly close to the sun during his closing argument."

No Harbison problem where the defendant agreed to admit to "some criminal conduct" and counsel's closing argument did no more than that.

State v. Cook, __ N.C. App. __, 782 S.E.2d 569 (2016). Before jury selection, the trial judge conducted a Harbison hearing. The defendant agreed that counsel could admit that the defendant killed the victim, and recognized that it was likely that he would be convicted of some crime as a result. The trial judge found that the defendant agreed to admit responsibility for "some criminal conduct." The case was eventually submitted on first- and second-degree murder. At closing, defense counsel said:

> With the mental health issues that we presented to you, ladies and gentlemen, today, are we saying to you that [defendant] committed no crime and he should somehow walk, or something to that effect? Absolutely not. On a charge of first-degree murder, you'll also receive a second charge of second-degree murder, also a very serious felony charge. Those will be the two charges for your consideration for the homicide.

The court of appeals ruled that defense counsel did not specifically admit the defendant's guilt of second-degree murder, and did no more than acknowledge that the defendant was guilty of "some criminal conduct" – a strategy to which the defendant had agreed.

No Harbison problem where counsel admitted that the defendant completed elements of an offense but did not admit guilt to the entire offense.

State v. Cholon, __ N.C. App. __, 796 S.E.2d 504 (2017). The court re-emphasized that conceding a defendant's guilt of some elements of an offense [here, sex offenses involving a minor] does not equate to conceding guilt to the offense, and so does not require the defendant's consent or a Harbison inquiry.

A defendant introduced evidence and so was not entitled to the final closing argument where he called no witnesses but introduced a video through the investigating officer that went beyond the officer's testimony on direct examination.

State v. Lindsey, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). The trial court did not err by denying the defendant final closing arguments in this DWI case. Rule 10 of the General Rules of Practice for the Superior and District Courts provides that "if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him." Here, the defendant did not call any witnesses or put on evidence but did cross-examine the State's only witness and sought to play a video of the entire traffic stop recorded by the officer's in-car camera during cross-examination. At issue on appeal was whether admitting the video of the stop during cross-examination constituted introducing evidence. Although the officer provided testimony describing the stop shown in the video, the video went beyond the officer's testimony and "is different in nature from evidence presented in other cases that was determined not to be substantive." Playing the video allowed the jury to hear exculpatory statements by the defendant to the police beyond those testified to by the officer and introduced evidence of flashing police lights that was not otherwise in evidence to attack the reliability of the HGN test. The video was not merely illustrative. It allowed the jury to make its own determinations concerning the defendant's impairment apart from the officer's testimony and therefore was substantive evidence.