JURY ARGUMENT
CONTENT ISSUES

N.C.G.S. §15A-1230(a): During a closing argument to the jury 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 except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. R. Super. & Dist. Cts. Rule 12: (In relevant part) Counsel are at all times to conduct themselves with dignity and propriety. . . . Adverse witnesses and suitors should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited. . . . Counsel shall not knowingly misinterpret the contents of a paper, the testimony of a witness, the language or argument of opposite counsel or the language of a decision or other authority; nor shall he offer evidence which he knows to be inadmissible.

N.C. R. Prof. Cond. Rule 3.4(e): Fairness to opposing party and counsel - A lawyer shall not: (e) 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.

St. v. Huey, 370 N.C. 174 (2017)

Within these statutory confines, we have long recognized that prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.

St. v. Jones, 355 N.C. 117 (2002)

Thus, it 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.

1) Facts in Evidence and All Reasonable Inferences:

May Argue: Prosecutors may, in closing arguments, create a scenario of the crime committed as long the record contains sufficient evidence from which the scenario is reasonably inferable. **St. v. Frye, 341 N.C. 470 (1995), *cert. denied*, 517 U.S. 1123 (1996).**

May Not Argue: Counsel may not argue to the jury incompetent and prejudicial matters and may not "travel outside the record" by injecting into his argument facts of his own knowledge or other facts not included in the evidence. **St. v. Lynch, 300 N.C. 534 (1980).**

Counsel is prohibited . . . from arguing facts which are not supported by the evidence. **St. v. Wiley, 355 N.C. 592 (2002).**

2) Credibility of Witnesses:

May Argue: So long as not offered as a personal opinion, "prosecutors are allowed to argue that the State's witnesses are credible." **St. v. Wilkerson, 363 N.C. 382 (2009).**

May Not Argue: It is improper for a lawyer to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar. **St. v. Hembre, 368 N.C. 2 (2015).**

3) Role of the Jury

May Argue: This Court has repeatedly stated that the prosecutor may properly urge the jury to act as the voice and conscience of the community. **St. v. Bishop, 346 N.C. 365 (1997)**

May Not Argue: Prosecutorial argument encouraging 'the jury to lend an ear to the community rather than a voice' is improper. **St. v. Bishop, 346 N.C. 365 (1997).**

Key Distinction: In other words, the jury may speak for the community, but the community cannot speak to the jury. **St. v. Barden, 356 N.C. 316 (2002).**

4) Defendant's Pretrial Silence

May Argue: We have stated that prosecutors may comment on a defendant's failure to produce witnesses (**except** failure to call Defendant's spouse as witness) or exculpatory evidence to contradict or refute evidence presented by the State. **St. v. Barden, 356 N.C. 316 (2002) (as to spouse see HN58).**

May Not Argue: A defendant has the right to refuse to testify under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment. . . A defendant's exercise of this right may not be used against him, and any reference by the State to a defendant's failure to testify violates that defendant's constitutional rights. A statement that may be *interpreted* (emphasis added) as commenting on a defendant's decision not to testify is improper if the jury would naturally and necessarily understand the statement to be a comment on the failure of the accused to testify. **St. v. Mitchell, 353 N.C. 309 (2001).**

5) Name Calling and Abusive Arguments

N.C. R. Super. & Dist. Cts. Rule 12: Abusive language or offensive personal references are prohibited.

Similarly, in the case at bar, we hold that the prosecutor's repeated degradations of defendant: (1) shifted the focus from the jury's opinion of defendant's character and acts to the prosecutor's opinion, offered as fact in the form of conclusory name-calling, of defendant's character and acts; and (2) were purposely intended to deflect the jury away from its proper

role as a fact-finder by appealing to its members' passions and/or prejudices. As a consequence, we deem the disparaging remarks grossly improper and prejudicial. **St. v. Jones, 355 N.C. 117 (2002).**

6) Placing Jurors in Victim's Position

May Argue: …(T)his Court has repeatedly found no impropriety when the prosecutor asks the jury to imagine the fear and emotions of a victim. **St. v. Warren, 348 N.C. 80 (1998).**

May Not Argue: The State is not permitted to make arguments asking the jurors to put themselves in the victims' places. **St. v. Roache, 358 N.C. 243 (2004).**

Trial Court's Role

When opposing counsel objects during a closing argument, we review for abuse of discretion. When there is no objection, we review for gross impropriety. In all cases, we view the remarks in context and in light of the overall factual circumstances to which they refer. **St. v. Hembre, 368 N.C. 316 (2015).**

In the instant case no proper curative instruction was given. Defendant's objection to the argument was overruled. The general instruction on defendant's right to testify or not at his option, given later by the court in the course of the charge, was insufficient to remove the prejudice because no reference was made to the offending argument and the damage done by it remained largely unrepaired. **St. v. Monk, 286 N.C. 509 (1975).**

Curative Instruction Approved by the N.C. Supreme Court

I instruct you members of the jury that the defendant has no duty to establish anything and that his decision not to take the witness stand is not to be held against him by you in the course of the deliberations, so if anything was said to you on the point, you are to disregard it, and I will instruct you again on that point in the course of the charge. **St. v. Lindsay, 278 N.C. 293 (1971). This curative instruction expressly approved in St. v. Monk, 286 N.C. 509 (1975).**

Appellate Courts Remain Vigilant

(W)e are disturbed that some counsel may be purposefully crafting improper arguments, attempting to get away with as much as opposing counsel and the trial court will allow, rather than adhering to statutory requirements and general standards of professionalism. Our concern stems from the fact that the same closing argument language continues to reappear before this Court despite our repeated warnings that such arguments are improper. . . We, once again, instruct trial judges to be prepared to intervene *ex mero motu* when improper arguments are made. **St. v. Huey, 370 N.C. 174 (2017).**

N.C.S.C.J. Benchbook, Jury Argument, by Professor Jessica Smith

JURY ARGUMENT
HARBISON ISSUES

When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

For the foregoing reasons, we conclude that ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent. **St. v. Harbison, 315 N.C. 175 (1985).**

Still Applicable Post-Florida v. Nixon

Further, subsequent to *Nixon,* (**Florida v. Nixon, 543 U.S. 363 (1991),** the North Carolina Supreme Court has continued to apply the analysis set forth in *Harbison,* even in death penalty cases. Because our Supreme Court has not overruled ***Harbison*** and, in fact, continues to apply its holding after *Nixon,* we are bound by this precedent. **St. v. Maready, 205 N.C. App. 1 (2010).**

Limitations on Harbison:

Admission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a *Harbison* error. *See* ***State v. Fisher***, 318 N.C. 512, 533, 350 S.E.2d 334, 346 (1986) ("Although counsel stated [at closing that] there was malice, he did not admit guilt . . . . [Therefore,] this case does not fall with the *Harbison* line of cases[.]"). **St. v. Wilson, 236 N.C. App. 472 (2014).**

Because this purported admission by Defendant's counsel did not refer to either the crime charged or to a lesser-included offense, counsel's statements in this case fall outside of *Harbison*. **St. v. Wilson, 236 N.C. App. 472 (2014).**

Best Practices at Trial. Judges are advised to ask--before both opening and closing statements--whether counsel plans to admit guilt. If so, the judge should determine, on the record, whether the defendant consents to this strategy. Defense counsel may not proceed with this strategy unless the defendant gives explicit consent. If counsel unexpectedly admits guilt during trial, the trial judge should excuse the jury and determine, on the record, whether the defendant consents to the admission. If the defendant does not consent, a mistrial may be required. **N.C.S.C.J. Benchbook, Professor Jessica Smith, Ineffective Assistance of Counsel Claims, Pg. 3.**