

Chapter 29: Opening Statements

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The opening statement is a critical part of the defendant’s case. Although the jury may have obtained some sense of the defendant’s side of the case during jury voir dire, opening statement is counsel’s first cohesive opportunity to communicate the theory of defense to the jury.

An opening statement is factual. It is a shortened version of the story of your case, giving the jurors the pertinent facts necessary for them to understand your client’s story of innocence or reduced culpability. See Ira Mickenberg, *Improve Your Opening Statements* (July 2007), at www.ncids.org/Defender%20Training/2007%20Defender%20Trial%20School/Opening%20Statements%20--%20Mickenberg.pdf. This chapter does not discuss in depth the different techniques

for delivering opening statements. It focuses instead on the procedural rules relating to opening statements as well as limitations on their scope.

29.1 Right to Opening Statement

G.S. 15A-1221(a)(4) grants the defendant the right to give an opening statement prior to the introduction of evidence. Rule 9 of the General Rules of Practice for the Superior and District Courts also provides that counsel for each party, at any time before the presentation of evidence, may make an opening statement setting forth the grounds for his or her claim or defense. The defendant has the right to make an opening statement regardless of whether he or she intends to present evidence. *State v. Paige*, 316 N.C. 630, 648 (1986) (“Even if the defendant does not intend to offer evidence, he may in his opening statement point out to the jury facts which he reasonably expects to bring out on cross-examination.”)

Although North Carolina law gives the defendant the right to make an opening statement prior to the guilt-innocence phase of the case, it does not give a defendant the right to give an opening statement prior to the sentencing phase of a capital trial. *State v. Call*, 349 N.C. 382 (1998) (trial court did not abuse discretion in denying opening statement before sentencing phase of capital case; court finds no authority that defendant is entitled to opening statement before sentencing phase of capital case). In practice, however, trial courts will often grant the defendant’s request to make an opening statement before sentencing in a capital case, and counsel should take advantage of this additional opportunity to address the jury.

Unlike the right to make a closing argument, the right to make an opening statement is not guaranteed by the United States Constitution. See *Herring v. New York*, 422 U.S. 853 (1975); *United States v. Salovitz*, 701 F.2d 17 (2d Cir. 1983); *United States v. Ciancaglini*, 945 F. Supp. 813 (E.D. Pa. 1996).

29.2 Purpose and Scope

A. Generally

The purpose of an opening statement is to allow the parties to present to the judge and jury the issues involved in the case and to permit them to give a general forecast of the evidence that they plan to offer. See *State v. Gladden*, 315 N.C. 398 (1986); *State v. Elliott*, 69 N.C. App. 89 (1984). Counsel is permitted “something more than just a limited preview” of his or her evidence and should be allowed to state his or her legal claim or defense in basic terms. *State v. Freeman*, 93 N.C. App. 380, 389 (1989). The purpose of an opening statement is not, however, to argue the case, instruct on the law, or contradict the other party’s witnesses. *State v. Mash*, 328 N.C. 61 (1991).

Whether to limit the scope of an opening statement rests largely within the trial judge's discretion. *State v. Paige*, 316 N.C. 630 (1986); *see also* N.C. Gen. R. Prac. Super. & Dist. Ct. 9 ("Opening statements shall be subject to such time and scope limitations as may be imposed by the court."). Generally, however, counsel is "afforded wide latitude in the scope of the opening statement." *Freeman*, 93 N.C. App. at 389, *quoting State v. Gladden*, 315 N.C. 398 (1989).

B. Permissible Content

During opening statement, the defendant is allowed to:

- Preview the evidence he or she intends to present. *Gladden*, 315 N.C. 398.
- Set forth the grounds for his or her defense, *i.e.*, state the evidence on which the claim or defense is based. *Paige*, 316 N.C. 630.
- Point out facts that the defendant reasonably expects to bring out in cross-examination even if the defendant does not intend to present evidence. *Id.*

Defense counsel also may make certain general observations in an opening statement, although as a practical matter such observations may do little to articulate the defendant's theory of defense to the jury. Counsel may:

- Tell the jury that it should give attention to all of the witnesses. *Mash*, 328 N.C. 61.
- Ask the jury to consider each piece of evidence carefully. *Freeman*, 93 N.C. App. 380.
- Inform the jury that the defendant intends to rely on the presumption of innocence and that the State has the burden of proof beyond a reasonable doubt. *Paige*, 316 N.C. at 648.

For additional considerations and objectives in making an opening statement, *see infra* Appendix 29-1 (Guideline 7.4, Opening Statement, Performance Guidelines for Indigent Representation in Non-Capital Criminal Cases at the Trial Level (Nov. 2004)).

C. Impermissible Content

Counsel is generally given wide latitude in opening statements, but it is improper for counsel to engage in argument. The line between permissible opening statement and impermissible argument is not always easy to apply, however. *See Freeman*, 93 N.C. App. at 389 ("scope and extent of an opening statement are admittedly vague"). Relying on a treatise on trial practice, the court in *Freeman* observed that counsel should not:

- refer to inadmissible evidence;
- exaggerate or overstate the evidence; or
- discuss evidence he or she expects the other party to introduce (although it appears perfectly permissible to respond to the assertions made by the prosecutor in his or her opening statement, including promises of proof made by the prosecutor).

Freeman also observed that it is improper to ask the jurors to resolve disputes, make specific inferences, or interpret facts favorable to the speaker—in other words, to argue the evidence as opposed to describing or highlighting it in a way that supports the defendant’s theory of defense. *Id.* at 389; *see also* STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 415–18 (NITA, 3d ed. 2004) (describing the rule against argument and the techniques counsel may nonetheless use in opening statement).

D. Time Limits

The length of opening statements is a matter within the sound discretion of the trial judge. *See Call*, 349 N.C. 382; N.C. Gen. R. Prac. Super. & Dist. Ct. 9. The Supreme Court of North Carolina has upheld a trial judge’s decision limiting the defendant’s opening statement to five minutes. *See Call*, 349 N.C. 382; *see also State v. Fie*, 80 N.C. App. 577 (1986) (finding that trial judge acted within his discretion in limiting each defense counsel’s opening statement to fifteen minutes), *rev’d on other grounds*, 320 N.C. 626 (1987). Trial judges are generally not so restrictive, however.

Practice note: Regardless of whether the trial judge sets a time limit, counsel will want to focus the opening statement on the aspects of the case most important to the defendant’s theory of defense. If, however, the judge intends to set a time limit that does not allow you to apprise the jury adequately of the pertinent evidence to be presented in the case, be prepared to explain to the judge why the circumstances of the case require additional time.

29.3 Reserving or Waiving Opening Statement

A. Reserving

If the defendant will be offering evidence, he or she has the right to reserve opening statement and give it after the State’s case-in-chief. G.S. 15A-1221(a)(6). It is the rare case, however, in which it is beneficial to the defense to reserve opening until after the jury has heard the State’s entire case.

Opening statements afford counsel an opportunity at the outset to draw the jury’s attention to evidence that the parties expect to be introduced as well as to gaps in the evidence. By reserving opening statement, the defense allows the State’s evidence to be viewed without direction from defense counsel and without benefit of a forecast of the defense’s theory of the case. Some behavioral scientists have reached the conclusion that up to 80 to 90% of all jurors have “come to a decision during or immediately after the opening statements.” *See* Dr. Donald E. Vinson, *Excerpts from National Institute on Litigating “Rule of Reason” Cases: Jury Psychology and Antitrust Trial Strategy*, 55 ANTITRUST L.J. 591 (1986).

The supposed advantages of reserving opening statement—such as waiting to hear the State’s evidence before revealing the defendant’s theory of defense—are generally

outweighed by the advantages of communicating to the jury early in the case. Ordinarily, counsel should have sufficient information through discovery, particularly under the broader discovery rules now in effect in North Carolina, to know the evidence that the State will present and the theory of defense that the defendant will advance. There may be strategic reasons not to reveal particular information in opening—for example, problems with the anticipated testimony of a State’s witness, which you hope to draw out on cross-examination. Even a brief opening statement, however, will communicate to the jury the broad outlines of your theory of defense and convey an alternative way to view the evidence.

B. Waiving

Either party may elect to waive opening statements. N.C. Gen. R. Prac. Super. & Dist. Ct. 9. Waiver can be express or implied. A defendant’s failure to request the opportunity to make an opening statement amounts to a waiver of this procedural right. *State v. McDowell*, 301 N.C. 279 (1980).

As with the reservation of opening statement, it is the rare case in which defense counsel should consider waiving opening statement. By waiving opening statement, the defense allows the State’s evidence to be viewed without direction from defense counsel and without benefit of a forecast of the defense’s theory of the case. Accordingly, waiver of opening statement is generally ill-advised.

C. Giving an Opening Statement in District Court Cases

Defense counsel often do not request the opportunity to make an opening statement in cases tried in district court, thus waiving the right. Although district court judges may be resistant to taking up court time for opening statements, the same reasons for giving an opening statement in jury trials apply to bench trials—to give the fact finder an alternative view of the case at the outset. To alleviate the judge’s concerns about moving the docket along, counsel may want to give a summary opening statement rather than provide a more detailed review of the evidence—for example, in an assault case, counsel may limit the opening to alerting the judge that the case involves self-defense. Such a statement may help the judge consider the State’s evidence in that light while it is presented.

29.4 Variance between Opening Statement and Proof

A. Importance of Keeping Promises

Counsel should not promise to present witnesses or evidence unless he or she is sure of being able to follow through with that promise. The failure to keep a promise to the jury made during opening statement impairs personal credibility, and the jury may view unsupported claims as an outright attempt at misrepresentation. *See* 2 PATRICK L.

MCCLOSKEY & RONALD L. SCHOENBERG, CRIMINAL LAW DESK BOOK § 1506[3], at 15–18 (LexisNexis, 2008).

As the Supreme Court of North Carolina has noted, “[a] cardinal tenet of successful advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate’s cause.” *State v. Moorman*, 320 N.C. 387, 400 (1987) (defense counsel’s failure to present evidence of a complete defense to rape as promised in his opening statement severely undercut the credibility of the actual evidence offered at trial, including the defendant’s own testimony).

B. Failure to Keep Promises and Ineffective Assistance of Counsel

Counsel may render ineffective assistance of counsel if he or she fails to keep promises made during opening statement or jury *voir dire*. *See, e.g., State v. Campbell*, 359 N.C. 644 (2005) (defense counsel was possibly ineffective by promising that the jury would hear evidence and instructions on self-defense and intoxication when he knew that the State might not introduce the defendant’s confession supporting these claims and the confession was subsequently not introduced); *Moorman*, 320 N.C. 387 (defense counsel was ineffective because, among other things, he failed to present promised evidence of a complete defense to rape); *State v. Duncan*, 188 N.C. App. 508, 515–16 (2008) (ineffective assistance found where, among other things, defense counsel promised in his opening statement to “offer evidence as to the defendant’s state of mind, but he failed to do so, undercutting any possible defense that Defendant could offer to the serious charges against him”), *rev’d on other grounds*, 362 N.C. 665 (2008)).

It is not improper for the prosecutor, during closing argument, to highlight the defendant’s failure to introduce evidence that was promised during opening statement. *State v. Harris*, 338 N.C. 211 (1994). Defense counsel likewise may take advantage of the prosecutor’s failure to follow through on promised proof.

Practice note: If you are unsure of the admissibility of evidence you intend to offer during trial, ask the trial judge for a pretrial ruling on the record so that you will be certain of your ability to deliver promised evidence. When the course of a trial alters your original defense strategy and leads you to decide not to present evidence or call witnesses promised during opening statement, you should acknowledge the change during closing argument and explain to the jury the reasons for your deviation.

29.5 Opening the Door to Otherwise Inadmissible Evidence

Counsel should take care not to make assertions during opening statement that “open the door” to the introduction of evidence that would otherwise be inadmissible. Although opening statements are not evidence, North Carolina appellate courts have found no error where a trial judge allowed otherwise inadmissible evidence to be introduced by the State to rebut a defendant’s contentions made during opening statement. *See, e.g., State v.*

Murillo, 349 N.C. 573 (1998) (character evidence relating to the victim's performance as a school teacher was properly admitted where defense counsel, during opening statement, contended that the victim was a violent, abusive alcoholic); *State v. Jones*, 342 N.C. 457 (1996) (where the defendant contended in opening statement that his former girlfriend had reported him for murder in order to get back at him and to get reward money, the State was entitled to introduce evidence that the three-year delay in reporting was actually due to her fear of the defendant based on a prior assault she knew he had committed); *State v. Peterson*, 179 N.C. App. 437 (2006) (State properly introduced evidence of the defendant's bisexuality where the defendant had asserted in opening statement that the defendant and the victim had an idyllic marital relationship), *aff'd on other grounds*, 361 N.C. 587 (2007).

29.6 Admissions of Guilt during Opening Statement

A. Defendant's Consent Required Prior to Admission of Guilt

Prior to admitting the defendant's guilt to the crime charged or to a lesser included offense, counsel must obtain the defendant's express consent. *See State v. Berry*, 356 N.C. 490 (2002). If counsel admits the defendant's guilt without first obtaining consent, it is *per se* ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution because counsel's admission deprives the defendant of the right to have his or her guilt or innocence determined by the jury. *State v. Harbison*, 315 N.C. 175 (1985).

In *Florida v. Nixon*, 543 U.S. 175, 192 (2004), the U.S. Supreme Court held on the facts of the case that, under the federal constitution, counsel's admission during opening statement of the defendant's guilt without his express consent was not *per se* ineffective assistance of counsel but was subject to the prejudice analysis of *Strickland v. Washington*, 466 U.S. 668 (1984)). The court reasoned, "[I]n a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." The North Carolina Supreme Court has not disavowed the *Harbison* rule in light of the narrow ruling in *Nixon*.

The rule prohibiting defense counsel from admitting a defendant's guilt to the jury without the defendant's consent applies only to the guilt/innocence phase of a trial. *State v. Walls*, 342 N.C. 1 (1995).

B. What Constitutes Admission of Guilt

Admission must be express. There must be an actual admission of guilt for error to occur. It is not impermissible under *Harbison* to argue that the defendant is not guilty, but if he or she is found guilty of any crime, it should be of a lesser included offense or of a

lesser crime for which he or she has not been charged. *See State v. Gainey*, 355 N.C. 73, 93 (2002) (defense counsel did not admit guilt to murder but only that “if he’s guilty of anything, he’s guilty of accessory after the fact”); *State v. Greene*, 332 N.C. 565, 572 (1992) (no admission of guilt where defense counsel argued that the defendant was innocent of all charges, but if found guilty of any charge it should be of the lesser crime of involuntary manslaughter “because the evidence came closer to proving that crime than any of the other crimes charged”); *see also State v. Hinson*, 341 N.C. 66 (1995) (defense counsel’s statements regarding the guilt of a co-defendant did not amount to an admission that the defendant himself had committed any crime).

Admissions of facts or elements. Merely admitting the existence of a fact or an element of an offense is not the equivalent of an admission of guilt. *See State v. Wiley*, 355 N.C. 592 (2002) (placed in context, defense counsel’s remarks that there may be some physical evidence linking the defendant to the murder victim’s car did not constitute an admission); *State v. Strickland*, 346 N.C. 443 (1997) (statements by defense counsel during jury *voir dire* that the uncontroverted evidence showed that the defendant was holding a gun when the victim was killed did not amount to a concession of guilt to which defendant had not agreed); *State v. Fisher*, 318 N.C. 512 (1986) (defense counsel’s admission of the existence of malice was not an admission of guilt so it was not *per se* ineffective assistance of counsel); *State v. Maniego*, 163 N.C. App. 676 (2004) (defense counsel’s admission of the fact that the defendant was present at the scene of the crime was not an admission of guilt and was consistent with the theory of defense).

Assertion of defense. Some defenses may constitute an admission of guilt, at least of a lesser offense, and require the defendant’s consent. *See State v. Johnson*, 161 N.C. App. 68 (2003) (defense counsel in opening statement stated that defendant was unable to premeditate and deliberate killings because of his intoxication and jury should return verdict of lesser offense; trial court’s inquiry of defendant was adequate to show consent); *see also State v. Berry*, 356 N.C. 490 (2002) (trial court conducted *Harbison* inquiry to determine whether defendant consented to insanity defense, which necessitated admission of critical aspects of charged offense).

C. Procedural Requirements

Although there is no particular procedure that the trial judge “must invariably follow when confronted with a defendant’s concession,” (*Berry*, 356 N.C. at 514), an on-the-record exchange between the trial judge and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt. *See State v. McDowell*, 329 N.C. 363 (1991); *see also State v. Matthews*, 358 N.C. 102 (2004) (holding that *Harbison* requires more than implicit consent based on an overall trial strategy and the defendant’s intelligence). A clear record of consent is required, but the trial judge need not engage in the formal colloquy that is required for a guilty plea under G.S. 15A-1022(a). *State v. Perez*, 135 N.C. App. 543 (1999). Appellate courts will not presume the defendant’s lack of consent from a silent record. *State v. Boyd*, 343 N.C. 699 (1996).

Practice note: If you decide that a concession of guilt is the best strategy in a particular case, it is imperative that you fully discuss the value of such a concession with the defendant. Prior to admitting guilt to the charge or to a lesser included offense during opening statement (or closing argument), present the defendant’s written consent to the trial judge if you have obtained one or ask the judge to inquire of the defendant and obtain his or her express consent on the record. *See State v. House*, 340 N.C. 187 (1995) (urging both the bar and the trial bench to be diligent in making a full record of a defendant’s consent when a *Harbison* issue arises at trial).

29.7 Preservation of Issues for Appellate Review

A. Necessity for Objection

If the prosecutor makes improper and prejudicial statements during opening statement, defense counsel must object in a timely manner in order to preserve the issue for appeal. *See State v. Smith*, 96 N.C. App. 352 (1989). The standard of review on appeal is rigorous even if a timely objection is made. The trial court’s discretion in permitting the statements “will not be reviewed unless counsel’s remarks are extreme and are clearly calculated to prejudice the jury in its deliberations.” *See State v. Burmeister*, 131 N.C. App. 190, 196 (1998) (citing *State v. Taylor*, 289 N.C. 223 (1976)). Without an objection, however, the trial court is far less likely to curtail improper argument.

B. Waiver

If no timely objection is made to the prosecutor’s opening statement in a capital case, review is limited to an examination of whether the remarks were so “grossly improper” that the trial judge abused his or her discretion in failing to intervene *ex mero motu*. *See State v. Gladden*, 315 N.C. 398, 417 (1986). It appears that this standard will also be utilized in non-capital cases although it has never been specifically addressed in a published opinion.

C. Complete Recordation

Requirement for and timing of motion. Pursuant to G.S. 15A-1241(a)(2), trial judges are not required to order the court reporter to record opening statements and closing arguments. However, upon the motion of any party (or on the judge’s own motion), these proceedings must be recorded. G.S. 15A-1241(b). “The motion for recordation of jury arguments must be made before the commencement of any argument and if one argument is recorded all must be.” *Id.*

If a party suggests during an unrecorded argument that an improper statement has been made, the judge has the discretion to require the rest of the argument to be recorded. G.S. 15A-1241(b).

A sample Motion for Complete Recordation appears in the non-capital trial motions bank

at www.ncids.org. This motion covers not only jury arguments but also pre-trial hearings, jury selection in non-capital cases, motions hearings, and bench conferences since those proceedings are also exempt from mandatory recordation under G.S. 15A-1241(a).

Reconstruction of record. If an objection is made to an unrecorded statement or other conduct in the presence of the jury, upon motion of either party, the trial judge “must reconstruct for the record, as accurately as possible, the matter to which objection was made.” G.S. 15A-1241(c). It is counsel’s responsibility to ensure that the record is reconstructed with regard to improper statements made by the prosecutor, and the appellate courts will decline review if the record is incomplete. *See, e.g., State v. Spellman*, 167 N.C. App. 374 (2004); *State v. Ussery*, 106 N.C. App. 371 (1992).

Practice note: The appellate courts have never held that it is ineffective assistance of counsel *per se* for defense counsel to fail to request complete recordation. *See, e.g., State v. Hardison*, 326 N.C. 646 (1990) (defendant cannot show ineffective assistance of counsel where there are no specific allegations of prejudice and no attempt to reconstruct the record); *State v. Verrier*, 173 N.C. App. 123, 130 (2005) (denying defendant’s request to adopt “a *per se* rule granting a new trial where counsel neither requests nor the trial court requires that the entire trial, jury selection, arguments of counsel and bench conferences” be recorded). Still, there is no good reason not to make the request! Opening statements and closing arguments are often fertile ground for appellate issues. You must protect the rights of your client even if it means irritating the judge or court reporter, who may not feel that complete recordation is necessary. Complete recordation will obviate the need for reconstruction of the transcript in the event that improper statements are made and will greatly facilitate appellate review. It may also inhibit prosecutors from “push[ing] the envelope” during closing argument. *See State v. Jones*, 355 N.C. 117, 127 (2002). If, however, you have failed to request complete recordation and an issue arises regarding an improper statement made by the prosecutor, you must take steps immediately to ensure that the record is accurately reconstructed.

Appendix 29-1

Guideline 7.4 Opening Statement*

- (a) Prior to delivering an opening statement, counsel should consider whether to ask for sequestration of witnesses.
- (b) Counsel should be familiar with North Carolina law and the individual trial judge's practices regarding the permissible content of an opening statement. Counsel should consider the need to, and if appropriate, ask the court to instruct the prosecution not to mention in opening statement contested evidence for which the court has not determined admissibility.
- (c) Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement.
- (d) Counsel's objectives in making an opening statement may include the following:
- (1) to introduce the theory of the defense case;
 - (2) to provide an overview of the defense case;
 - (3) to identify the weaknesses of the prosecution's case;
 - (4) to emphasize the prosecution's burden of proof;
 - (5) to summarize the anticipated testimony of witnesses, and the role of each in relationship to the entire case;
 - (6) to describe the exhibits that will be introduced and the role of each in relationship to the entire case;
 - (7) to clarify the jurors' responsibilities;
 - (8) to state the ultimate inferences counsel wants the jury to draw;
 - (9) to personalize the client and counsel for the jury; and
 - (10) to prepare the jury for the client's testimony or decision not to testify.
- (e) Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement into the defense opening statement and summation.
- (f) Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless sound tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:
- (1) the significance of the prosecutor's error; and
 - (2) the possibility that an objection might enhance the significance of the information in the jurors' minds, or otherwise negatively affect the jury.

*Reprinted from North Carolina Commission on Indigent Defense Services, *Performance Guidelines for Indigent Defense Representation in Non-Capital Cases at the Trial Level* (Nov. 12, 2004), online at www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Trial%20Level%20Final%20Performance%20Guidelines.pdf.