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Curbing Prosecutorial Misconduct and Preserving the Record in Closing Argument

Public Defender Conference, November 6, 2008, Boone, N.C.

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You don't need a bunch of case cites to keep the prosecutor honest and to preserve the record. The cases may mislead you. The holdings may be the result of result-oriented jurisprudence exercised on the specific facts of a specific case, and almost certainly will be a function of the state of trial preservation.

What you need is to RECORD, LISTEN, and OBJECT.

I. RECORD – have opening statements and closing arguments recorded in every trial.

1. G.S. §15A-1241 gives you the **right** to recordation upon request.

§ 15A-1241. Record of proceedings.

(a) The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except:

- (1) Selection of the jury in noncapital cases;
- (2) Opening statements and final arguments of counsel to the jury; and
- (3) Arguments of counsel on questions of law.

(b) **Upon motion of any party** or on the judge's own motion, proceedings excepted under subdivisions (1) and (2) of subsection (a) **must be recorded**. 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. Upon suggestion of improper argument, when no recordation

has been requested or ordered, the judge in his discretion may require the remainder to be recorded.

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(emphasis added)

2. If you are afraid that you will alienate the court reporter and judge, you might consider another line of work. Change the culture in your jurisdiction by asking for recordation of argument in every case.
3. Record because it may be a deterrent, sometimes.
4. Record because it is absolutely crucial to preservation of prosecutorial misconduct in closing argument, and to full appellate presentation of other issues.
5. Do not decide to get recordation in the middle of argument when you hear something bad – reconstruction is a mess and may prejudice your client if you get fact-found away by the judge.

II. LISTEN. You very well may be emotionally and physically drained at the end of the trial, but you cannot relax. You have to be focused on what the DA is saying (and maybe doing). Take notes to keep yourself focused and listening.

What are you listening for? What follows are general categories of objectionable argument.

1. Something that wasn't in evidence. DA just makes it up or talks about evidence that was excluded outside the presence of the jury.
2. Arguing evidence which was struck or to which an objection was sustained.
3. Any comment on the defendant's "failure" to testify, particularly cast as a right that the defendant has that the jury should not hold against him.
4. Any comment based on assertion of a privilege or constitutional right (e.g. marital privilege ["Where's his wife if he didn't do it. Why didn't

- she testify?"]; right to silence [“Don’t you know if he won’t there, he would have told the police about this silly alibi.”]; again, the testimonial privilege (“Now, the defendant has the right not to testify.”)
5. The DA’s personal opinion (“I think he was lying.” “I don’t believe a word of what he said.”)
 6. Name calling and mud-slinging. (“Animal.” “Liar.” “Not a human being.” “Child of Satan.” “S.O.B.”) Etc. etc. etc.
 7. References and comparisons to historic monsters (“He’s the same as Hitler.”), or monstrous historical events (“Oklahoma City,” “Columbine.”).
 8. Evidence argued for purpose outside the basis for its admission into evidence. The classic is arguing a conviction admitted for impeachment as character evidence (“Anyone convicted of breaking into another person’s house is the same kind of person that would sell drugs.”).
 9. “The community demands that you convict this defendant,” and similar arguments that society demands a conviction because of a generalized problem (drunk driving, drug dealing).
 10. Unsupported assertions of characteristics of a class of cases (“In rape cases, the victim always gets put on trial.”).
 11. Guilt based on previous proceedings (arrest, probable cause hearing, grand jury proceedings, prosecutor’s decision to try the case).
 12. The guilt or guilty plea of a co-defendant as evidence of guilt of the defendant on trial.
 13. Arguing the facts of appellate decisions (usually OK to argue and quote relevant statutes and case law).
 14. Intimations that appellate review will fix any mistakes the jury makes.
 15. Intimations that the judge wouldn’t have let evidence in unless it was trustworthy.

16. Addressing jurors personally (“Ms. Adams, can you put him where he belongs? Mr. Smith can put him where he belongs?” etc etc
17. “It could have been you, Mr. Adams,” or “It could have been any one of you,” i.e. putting jurors in the place of the victim.
18. Personal attacks on defense counsel’s integrity or veracity.
19. Argument based on ethnicity (“Welcome to America, Mr. Hernandez.”) or economic status (“You are paying for his public defender, folks.”) or any other general characterization based on some group classification.

GENERALLY, IF IT SEEMS UNFAIR OR WRONG OR VERY FAR OUT THERE, IT PROBABLY IS.

III. OBJECT!

“Although he did not object at the time, defendant now argues that the argument by the prosecutor was grossly improper. Where a defendant fails to object, an appellate court reviews the prosecutor's arguments to determine whether the argument was so grossly improper that the trial court committed reversible error in failing to intervene ex mero motu to correct the error. Only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting ex mero motu an argument that defense counsel apparently did not believe was prejudicial when originally spoken.”

State v. Elliott, COA07-626 (N.C.App. 9-2-2008) (citations and quotations omitted). *See also*, literally several hundred other opinions.

1. Appellate review of closing argument is crippled if trial counsel does not object.
2. If trial counsel objects, the gut level point that it hurt is made manifest.
3. *Do not object unless you think the argument is improper.* You cede the high ground and violate several ethical directives if you object to closing argument in bad faith. Be attentive; don’t be stupid. Leave the misconduct to the prosecutor.

4. *If you think objecting to closing argument will alienate the jury, you are wrong.* They all watch TV and enjoy some drama in the courtroom. They will just think you are being a lawyer. If your objection is sustained, the DA may look like an ass. If the judge overrules your objection in a nasty way and you have maintained the high ground, the jury may think he's an ass and count that in favor of your client. If you object and the client is convicted, you have preserved the error for appeal.
5. Object as specifically as the judge will let you, e.g.:
 - a. "Objection, not in evidence."
 - b. "Objection, personal opinion."
 - c. "Objection to the inflammatory argument."
 - d. or maybe just "Objection to " [what he said]."
6. If the judge indicates the he or she doesn't want you to make a specific objection, fine, or if you can't articulate exactly why the argument is improper, keep a list going, and after argument is over and before the jury is instructed, ask for a hearing to flesh out the basis for your objection. The delay may give you a better opportunity to fully articulate your objection. Even if you make a specific objection, you may be able to sharpen it in such a hearing.
7. If the prosecutor has a reputation for abusive argument, file a motion before argument asking for a ruling prohibiting what he does, tailored to the specific facts of the case (e.g. namecalling, using evidence outside the purpose for which it is admitted). If the judge denies your motion in whole or in part, object during the argument to those parts that the judge denied. Otherwise the appellate court may hold (or, at a gut level, feel) that you have waived the argument.
8. Move for a mistrial as appropriate, but only if you want one.

RECORD. LISTEN. OBJECT.