Chapter 28
Opening Statements

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 main opportunity to communicate the theory of defense to the jury.

An opening statement is factual. It is a condensed 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* (North Carolina Defender Trial School, July 2011), *available at* www.ncids.org/Defender%20Training/2011DefenderTrialSchool/OpeningStatements.pdf. This chapter does not discuss in detail 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.

28.1 Right to Opening Statement

Section 15A-1221(a)(4) of the North Carolina General Statutes (hereinafter G.S.) grants the defendant the right to give an opening statement before 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 settingf orth 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 before the guilt-innocence phase of the case, it does not give a defendant the right to give an opening statement before the sentencing phase of a capital trial. *State v. Call*, 349 N.C. 382 (1998) (trial judge did not abuse his discretion in forbidding opening statement before sentencing phase of capital case; supreme court found 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 U.S. 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).

28.2 Purpose and Scope

A. In General

"The purpose of an opening statement is to permit the parties to present to the judge and jury the issues involved in the case and to allow them to give a general forecast of what the evidence will be." *See State v. Gladden*, 315 N.C. 398, 417 (1986); *see also State v. Elliott*, 69 N.C. App. 89, 93 (1984) ("[T]he proper function of an opening statement is to allow the party to inform the court and jury of the nature of his case and the evidence he

plans to offer in support of it."). 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. 380, 389 (quoting *State v. Gladden*, 315 N.C. 398, 417 (1986)).

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 the following general observations in an opening statement, although as a practical matter such observations 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. 630, 648.

For additional considerations and objectives in making an opening statement, see *infra* Appendix 28-1, Guideline 7.4 Opening Statement from N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL (Nov. 2004). For the complete guidelines, see *infra* Appendix A of this manual.

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 a permissible opening statement and an impermissible argument is not always easy to apply. *See Freeman*, 93 N.C. App. 380, 389 ("The 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.

Id. at 389. These principles do not appear to preclude the defense from responding to 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 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 374–76 (4th ed. 2009) (describing the rule against argument and the techniques counsel may nonetheless use in an opening statement).

D. Time Limits

The length of opening statements is a matter within the sound discretion of the trial judge. *See State v. Call*, 349 N.C. 382 (1998); N.C. GEN. R. PRAC. SUPER. & DIST. CT. 9. The N.C. Supreme Court 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.

28.3 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 percent of all jurors come to a decision during or immediately after the opening statements." 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, 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 to develop the theory of defense that the defendant will advance. There may be strategic reasons not to reveal particular information in an opening statement—for example, problems with the anticipated testimony of a State's witness, which you hope to draw out on cross-examination, or evidence that you aren't certain will be admissible. 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 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 a 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 keep that perspective in mind during the State's presentation of its case.

28.4 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 § 15.06[3], at 15–18 (2008).

As the N.C. Supreme Court 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, 401 (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 defendant's own testimony").

B. Failure to Keep Promises and Ineffective Assistance of Counsel

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); *State v. Anderson*, 200 N.C. App. 216 (2009). Defense counsel likewise may take advantage of the prosecutor's failure to follow through on promised proof.

Counsel may render ineffective assistance of counsel if he or she fails to keep promises made during opening statement about central aspects of the case. *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 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).

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 know whether you can deliver the evidence before describing it in your opening statement. When the course of a trial leads you to decide not to present evidence or call witnesses promised during your opening statement, you should acknowledge the change during your closing argument and explain to the jury the reasons for your deviation.

28.5 Opening the Door to Otherwise Inadmissible Evidence

The N.C. Supreme Court has held that opening statements are ***not*** evidence. *See State v. Faison*, 330 N.C. 347 (1991). Nevertheless, some North Carolina appellate decisions have found no error where a trial judge allowed arguably inadmissible evidence to be introduced by the State to rebut a defendant's contentions made during opening statement. The defendants in those cases were found to have "opened the door" during their opening statements to the introduction of the otherwise inadmissible evidence. *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's attorney contended in opening statement that the defendant's former girlfriend had reported him for murder in order to get away from 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 separate 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 defense counsel 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).

In a recent case, however, the N.C. Court of Appeals reiterated that statements made by counsel during opening statement are not evidence and therefore do not "open the door" to the State's admission of otherwise inadmissible evidence during its case-in-chief. In *State v. Buie*, 194 N.C. App. 725 (2009), the defendant argued on appeal that the State should not have been permitted to introduce testimony of the alleged victim's good character under N.C. Rule of Evidence 404(a)(2) when the defendant had not presented any evidence to the contrary. The State asserted that the defendant had "opened the door" to the Rule 404(a)(2) evidence when defense counsel called the alleged victim's character into question during opening statement. The *Buie* court cited the N.C. Supreme Court's decision in *Faison*, 330 N.C. 347, for the proposition that opening statements are not evidence and then held that "the State should not have been allowed to introduce evidence in its case-in-chief about the female's good character merely because the Defendant forecast the introduction of evidence of the female's bad character [during the defendant's opening statement]." 194 N.C. App. 725, 729. The *Buie* court further held that since the defendant had offered no evidence of the alleged victim's character during his case-in-chief, the admission of the State's character evidence was erroneous (although not prejudicial in light of the other evidence introduced by the State against the defendant). *See also United States v. Green*, 648 F.2d 587, 595 (9th Cir. 1981) ("An opening statement, . . . having no evidentiary value, cannot operate to place an issue in controversy."); *United States v. Tomaiolo*, 249 F.2d 683, 689 (2d Cir. 1957) (holding that the opening statement of defense counsel "could not have put the defendant's character in issue" because it had "no evidentiary value, and therefore does not call for or justify cross-examination or rebuttal evidence"; also stating that "[a]n instruction from the Court or argument of counsel is sufficient correction, not the introduction of otherwise inadmissible evidence."); *State v. Anastasia*, 813 A.2d 601, 606 (N.J. Super. Ct. App. Div. 2003) ("Opening statements are not evidential and should not be responded to by

'rebuttal' evidence. If improper remarks are made by counsel, the remedy lies in a curative instruction to the jury or, if absolutely necessary, a mistrial."); *Bynum v. Commonwealth*, 506 S.E.2d 30, 34 (Va. Ct. App. 1998) ("[S]tatements made during an opening statement are not evidence; therefore, opening statements may not 'open the door' to otherwise inadmissible evidence.").

Assuming that a defendant's opening statement does not open the door to inadmissible evidence, it still could affect the trial judge's consideration of the admissibility of evidence proffered by the State. In *State v. Britt*, ___ N.C. App. ___, 718 S.E.2d 725 (2011), the trial judge initially granted the defendant's motion in limine precluding the State's expert witnesses from testifying that the bullets at issue were fired from the same gun. Thereafter, in opening statement the defendant told the jury that his experts would testify that the bullets at issue could not be matched. In light of the defendant's opening statement and forecast of the evidence, the trial judge reversed his ruling and allowed the State's experts to give their opinion that the bullets matched. The Court of Appeals upheld the trial judge's ruling on the ground that the State's expert testimony was admissible and that the trial judge had the discretion to allow it.

For a discussion of the split of authority elsewhere on the "opening the door" theory of admissibility as it relates to statements made during opening statement, see *Commonwealth v. Cepeda*, 2009 MP 15 (N. Mar. I. 2009), *available at* http://www.cnmilaw.org/pdf/supreme/2009-MP-15.pdf.

Practice note: If the State attempts to introduce inadmissible evidence during its case-in-chief and asserts that your forecast of evidence during your opening statement "opened the door" to its admission, you should object and cite *Buie* and *Faison* for the proposition that opening statements made by attorneys are not evidence. Although there are some inconsistencies in the appellate court rulings in this area of the law, you can argue that *Buie* and *Faison* are the two decisions that specifically address whether assertions made in opening statements are evidence and are the more thoroughly reasoned opinions. You can point out that the State has other remedies to address an improper opening statement, including objecting to the opening statement and commenting in closing on promises made but not kept. *See supra* § 28.4B, Failure to Keep Promises and Ineffective Assistance of Counsel. Further, the State may introduce evidence in rebuttal if the defendant introduces evidence that makes the State's evidence relevant and admissible.

28.6 Admissions of Guilt During Opening Statement

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

If trial counsel concludes that the best trial strategy is to concede a defendant's guilt to a criminal charge in order to secure a conviction for a less serious offense (or a sentence of life instead of death), counsel must obtain the defendant's informed consent before making such a concession. *See State v. Harbison*, 315 N.C. 175 (1985). The decision to consent "must be made exclusively by the defendant," and it must be "made knowingly

and voluntarily . . . after full appraisal of the consequences." *Id.* at 180; *see also State v. Thomas*, 327 N.C. 630 (1990) (remanding case to superior court for an evidentiary hearing to determine whether defendant knowingly consented to concessions of guilt made by trial counsel during closing argument); *State v. Perez*, 135 N.C. App. 543 (1999) (due process requires that a defendant's consent to concede guilt be made knowingly and voluntarily after full appraisal of the consequences).

Generally, if counsel admits the defendant's guilt without first obtaining consent, it is per se ineffective assistance of counsel because counsel's admission deprives the defendant of the right to have his or her guilt or innocence determined by the jury. *See Harbison*, 315 N.C. 175, 180 ("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."); *State v. Wiley*, 355 N.C. 592, 619 (2002) (interpreting *Harbison* as based on Sixth Amendment of U.S. Constitution and article 1, section 19 (law of the land) and section 23 (rights of the accused) of N.C. Constitution); *see also* N.C. CONST. art. I, section 24 (right to unanimous verdict by jury).

In *Florida v. Nixon*, 543 U.S. 175 (2004), the U.S. Supreme Court held on the facts of the case that, under the U.S. Constitution, counsel's admission of the defendant's guilt during opening statement without the defendant's 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." *Nixon*, 543 U.S. 175, 192. Although the N.C. Supreme Court has had opportunities to do so, it has not disavowed the *Harbison* rule in light of the narrow ruling in *Nixon*. *See State v. Goss*, 361 N.C. 610 (2007); *State v. Campbell*, 359 N.C. 644 (2005); *see also State v. Maready*, 205 N.C. App. 1 (2010) (discussing *Nixon* and holding that North Carolina continues to adhere to the *Harbison* rule).

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. Boyd*, 343 N.C. 699 (1996); *State v. Walls*, 342 N.C. 1 (1995).

Practice note: *Boyd* and *Walls*, cited above, were decided before the line of U.S. Supreme Court cases culminating in *Blakely v. Washington*, 542 U.S. 296 (2004), in which the Court recognized that circumstances that increase a defendant's sentence beyond the maximum authorized for an offense are the functional equivalent of an element of a greater offense. *See also Ring v. Arizona*, 536 U.S. 584 (2002) (holding that factors that authorize imposition of the death penalty are subject to the same analysis). The N.C. appellate courts have not specifically considered the impact of *Blakely* and like cases on the application of *Harbison* to what previously were characterized as purely sentencing matters, such as the determination of aggravating factors. *Cf. State v. Harris*, 175 N.C. App. 360 (2006) (observing that North Carolina cases finding that defense

counsel's concession of aggravating factors were a sufficient admission by the defendant were not applicable after *Blakely*, which requires a valid waiver by the defendant of the right to a jury trial; the court cites *Harbison* in support of the requirement of a valid waiver), *vacated on other grounds*, 361 N.C. 154 (2006) (remanding for determination whether the failure to submit aggravating factors to the jury was harmless beyond a reasonable doubt). *But cf. State v. Womack*, ___ N.C. App. ___, 712 S.E.2d 193 (2011) (relying on prior cases and rejecting the argument that defense counsel violated *Harbison* by conceding the defendant's prior convictions at the habitual felon phase of the case without the defendant's consent because, among other things, *Harbison* does not apply to proceedings to determine whether the defendant's sentence should be enhanced). Regardless of how the N.C. appellate courts resolve this issue, as a practical matter defense counsel should ***not*** admit in jury argument a matter that increases the defendant's sentence beyond the statutory maximum for the underlying offense without the client's consent.

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 judge's inquiry of defendant was adequate to show consent); *see also State v. Berry*, 356 N.C. 490 (2002) (trial judge 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. 490, 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, fully discuss the concession and its value with the defendant. Before admitting guilt to the charge or to a lesser included offense during opening statement (or closing argument), present the defendant's written consent (if you have obtained one) to the trial judge 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, 197 (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).

28.7 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 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 judge'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)).

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

A sample Motion for Complete Recordation appears in the non-capital trial motions bank (under the Training & Resources link) at www.ncids.org. This motion covers not only jury arguments but also pretrial 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) unless a request for recordation is made.

Reconstruction of record. If an objection is made to an unrecorded statement or other conduct in the presence of the jury, on 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 defense 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 28-1
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.

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*Reprinted from N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL (Nov. 2004). For the complete guidelines, see *infra* Appendix A of this manual.