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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 *State v. Buie*, 194 N.C. App. 725 (2009), 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. The defendant in *Buie* 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]." *Buie*, 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,* 217 N.C. App. 309 (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 independently 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).

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 requesting a curative instruction or 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.