

28.7 Preservation of Issues for Appellate Review

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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 noncapital cases. *See State v. Mills*, ___ N.C. App. ___, 788 S.E.2d 640 (2016) (utilizing the *ex mero motu* standard of review in a noncapital case where defendant failed to object to the prosecutor’s opening statement denigrating defendant’s claim of self-defense); *see also State v. Klinger*, 226 N.C. App. 202 (2013) (unpublished); *State v. Williams*, 213 N.C. App. 425 (2011) (unpublished); *State v. Leggett*, 149 N.C. App. 977 (2002) (unpublished).

C. Complete Recordation

Requirement for and timing of motion. Pursuant to G.S. 15A-1241(a), trial judges are not required to order the court reporter to record opening statements and closing arguments (or jury selection in noncapital cases). 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).

Sample Motions for Complete Recordation, with or without supporting grounds, can be found on the Office of Indigent Defense Services website in the “[Adult Criminal Motions](#)” (indexed under the “Juries” heading). While counsel need not state any grounds to obtain complete recordation, doing so may help the trial judge understand its importance. The motions cover not only jury arguments but also pretrial hearings, jury selection in noncapital 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); *see also State v. Foster*, 236 N.C. App. 607 (2014). 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 and are often the most effective way for appellate counsel to show prejudice from errors occurring during trial. 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. If you meet resistance to your motion for complete recordation from the trial judge, you can point out that there are good reasons for making a complete record of the proceedings. You can argue something along the lines of the following:

Your Honor, if this case comes before an appellate court, my client will be required to show two things in order to obtain relief for virtually any error at trial: (1) preservation and (2) prejudice. Our appellate courts enforce these rules very strictly. Without a record of objections and rulings made during jury selection, at bench conferences, and during opening statements and closing arguments, any issues raised in those portions of the trial would be waived. Violations of my client’s constitutional rights could be waived completely, without the possibility of plain error review. A record of how the case was presented to the jury in opening and closing may be essential for a reviewing court to determine whether the errors affected the jury’s verdict. In order to protect my client’s constitutional and statutory rights and to preserve his or her objections for appellate review, I respectfully request full recordation of these proceedings as provided for in G.S. 15A-1241(b).

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 opening statement and closing argument. *Cf. State v. Jones*, 355 N.C. 117, 127 (2002) (noting “that some attorneys intentionally ‘push the envelope’ with their jury arguments in the belief that there will be no consequences for doing so.”). 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.
