33.8 Preservation of Issues for Appellate Review

A. Necessity for Objection

If the prosecutor makes improper and prejudicial statements during closing argument, defense counsel must object before the verdict to preserve the issue for appeal. "Upon objection, the trial court has the duty to censor remarks not warranted by the evidence or law. . . ." *State v. Anderson*, 322 N.C. 22, 37 (1998). Absent an objection, the trial judge only has a duty to intervene, ex mero motu, if the prosecutor's argument is grossly improper. *Id.*; *see also infra* § 33.8B, Waiver.

Generally, when a party objects to an improper argument of counsel, "it is not sufficient for the court merely to stop the argument without instructing the jury, either at the time or in the jury charge, to ignore the improper argument." *State v. Barber*, 93 N.C. App. 42, 48 (1989). However, when an objection to an improper argument is sustained, it is incumbent on the defendant to request a curative instruction. If he or she does not request a curative instruction, the judge does not err in failing to give one. *Id.*; *State v. Goblet*, 173 N.C. App. 112 (2005).

If a timely objection to an improper argument is made, the trial judge's error in failing to sustain the objection will be reviewed by the appellate court for an abuse of the trial judge's discretion. *See State v. Walters*, 357 N.C. 68 (2003); *State v. Jones*, 355 N.C. 117 (2002); *see also State v. Rashidi*, 172 N.C. App. 628 (2005) (to justify a new trial under the abuse of discretion standard of review, a prosecutor's improper remark during closing arguments must have been so grave that it prejudiced the result of the trial), *aff'd per curiam*, 360 N.C. 166 (2005).

Practice note: "It is not impolite to interrupt opposing counsel's summation—it is mandatory to preserve error and stop the prejudice." Ira Mickenberg, *Preserving the Record and Making Objections at Trial: A Win-Win Proposition for Client and Lawyer*, at 4 (North Carolina Defender Trial School, July 2012). Assert both statutory and constitutional grounds for the objection if applicable. State on the record that the improper argument violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, as well as article I, sections 19, 23, and 27 of the N.C. Constitution. If your objection is sustained, immediately ask the judge to instruct the jury to disregard the improper statements. You should also carefully consider whether further remedy is

necessary or whether it would serve to draw further negative attention to the comments. If you decide that the prejudice resulting from a prosecutor's improper argument was severe and in need of further remedy, you may ask the judge to:

- admonish the prosecutor to refrain from that line of argument;
- require the prosecutor to retract the improper argument;
- repeat the curative instruction during the jury charge; or
- grant a mistrial.

See State v. Jones, 355 N.C. 117, 129 (2002) (it is incumbent on trial judge to vigilantly monitor closing arguments, "to intervene as warranted, to entertain objections, and to impose any remedies pertaining to those objections"); *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473 (1967) (listing several methods by which a trial judge, in his or her discretion, may correct an improper argument).

B. Waiver

Failure to timely object to the prosecutor's argument constitutes a waiver of the alleged error. In the absence of an objection, appellate courts will review the prosecutor's argument to determine "'whether it was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error.'" *State v. Taylor*, 337 N.C. 597, 613 (1994) (quoting *State v. Allen*, 323 N.C. 208, 226 (1988), *vacated on other grounds*, 494 U.S. 1021 (1990)).

To establish an abuse of discretion in this context, the defendant must show that the prosecutor's comments "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Rose*, 339 N.C. 172, 202 (1994) (citations omitted) (internal quotation marks omitted). This is a much more stringent standard of review than is applied to preserved errors so it is critically important for appellate purposes to timely object to improper statements made by the prosecutor and to request curative instructions if the objection is sustained.

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 during an unrecorded argument that an improper statement has been made, 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. These 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). Where a defendant does not undertake the efforts necessary to reconstruct the record with regard to improper statements made by the prosecutor during closing argument, appellate courts will decline review. *See 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 or a defense argument that was improperly prohibited, you must take steps to immediately ensure that the record is accurately reconstructed or the court will likely not be able to evaluate the issue on appeal. *See State v. McGill*, 217 N.C. App. 401 (2011) (unpublished) (stating that the court was unable to assess the impact that a defense jury argument would have had if permitted by the trial judge because closing arguments were not recorded and counsel did not attempt to reconstruct them).

D. Absence of Trial Judge During Closing Argument

For a discussion addressing the absence of the trial judge during closing argument (and other parts of the trial, such as jury voir dire), see *supra* § 22.1D, Absence of Trial Judge During Proceedings.

E. Additional Resources

For a short, practical perspective on the topics covered in this section, see Staples Hughes, *Curbing Prosecutorial Misconduct and Preserving the Record in Closing Argument* (Public Defender Conference, Nov. 2008).