Jury Argument -- Part III

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In a prior post on this topic, I began outlining some impermissible types of jury argument. In this post, I'll continue that discussion with the following additional listing of improper argument:

- **Religious Arguments.** The N.C. Supreme Court has repeatedly cautioned against jury arguments based on religion, *see, e.g.,* State v. Barden, 356 N.C. 316 (2002), reasoning that they "inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials." *Id.* at 358 (quotation omitted).
- **Name Calling.** Name calling should be avoided in jury argument. N.C. R. Super. and Dist. Cts Rule 12; State v. Augustine, 359. N.C. 709, 736 (2005); State v. Jones, 355 N.C. 117, 133-34 (2002). Specifically, it is improper to refer to the defendant as:
  - a liar, *see, e.g.,* State v. Gell, 351 N.C. 192, 211 (2000);
  - a parasite, State v. Twitty, __ N.C. App. __, 710 S.E.2d 421, 426 (2011);
  - the devil, satan, or a demon, *see, e.g.,* State v. Matthews, 358 N.C. 102, 111 (2004);
  - a monster, *Id.* at 111;
  - a S.O.B., State v. Davis, 45 N.C. App. 113 (1980); or
  - a criminal, State v. Miller, 271 N.C. 646, 660-61 (1967) ("habitual storebreakers"); State v. Wyatt, 254 N.C. 220, 222 (1961) ("two of the slickest confidence men"); State v. Correll, 229 N.C. 640, 643 (1948) ("racketeering gangster").

It also is improper to compare the defendant to Hitler or to a Nazi. State v. Walters, 357 N.C. 68, 102-05 (2003); State v. Frink, 158 N.C. App. 581, 593-94 (2003).

- **Comparing Defendant to an Animal.** Although a prosecutor may use the phrase "he who hunts with the pack is responsible for the kill" to illustrate the legal theory of acting in concert, *see, e.g.,* State v. Bell, 359 N.C. 1, 20-21 (2004), caution should be exercised with regard to all comparisons between the defendant and an animal and the "hunts with the pack" argument has been held improper when used in a way that goes beyond "noninflammatory remarks." *See, e.g.,* State v. Roache, 358 N.C. 243, 297-98 (2004); State v. Jones, 355 N.C. 117, 134 (2002); State v. Smith, 279 N.C. 163, 165-67 (1971); State v. Ballard, 191 N.C. 122, 124-25 (1926).
- **Argument Regarding Defendant's Appearance.** It is improper to argue that a defendant should be convicted simply because of how he or she looks. *See, e.g.,* State v. Tucker, 190 N.C. 708 (1925) ("look at the defendants, they look like professed (professional) bootleggers; their looks alone are enough to convict them").
- **Racial References.** Racial references should be avoided unless relevant to the case. State v. Diehl, 353 N.C. 433, 436 (2001).
- **Referring to Tragic National Events.** It is improper for the prosecutor refer to national tragedies such as the Columbine school killings, *Jones*, 355 N.C. at 132-33, the 9/11 terrorist attacks, State v. Millsaps, 169 N.C. App. 340, 348-49 (2005), or the Oklahoma City federal building bombing, *Jones,* 355 N.C. at 132-33. Such remarks refer to matters outside the record, urge the jurors to compare the defendant's acts to others' infamous acts, and attempt appeal to the jurors' passion and prejudice. *Jones*, 355 N.C. at 132.
- **Personal Experiences.** During a closing argument a lawyer may not inject his or her personal experiences. G.S. 15A-1230(a); *Jones*, 355 N.C. at 127.

- **Personal Beliefs.** During a closing argument a lawyer may not express his or her personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant. G.S. 15A-1230(a); *see, e.g., Jones*, 355 N.C. at 127. Thus, a lawyer should not state a personal belief that a witness is lying or being truthful. *See, e.g.,* State v. Phillips, 365 N.C. 103, 139 (2011); State v. Wilkerson, 363 N.C. 382, 424-25 (2009). Also improper is an expression of personal belief as to the strength of the State's case or of a defense. *See, e.g.,* State v. Matthews, 358 N.C. 102, 110-12 (2004).
- **Personal Attacks on Opposing Counsel.** In argument to the jury, lawyers should not engage in personal attacks on opposing counsel. N.C. R. Super and Dist. Cts. Rule 12; *see, e.g.,* State v. Grooms, 353 N.C. 50 (2000); State v. Rivera, 350 N.C. 285, 290-91 (1999).
- **Personal Attacks on Witnesses.** "Adverse witnesses and suitors should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited." N.C. R. Super. and Dist. Cts. Rule 12; *see also* State v. Phillips, 365 N.C. 103, 138-39 (2011). Thus, scatological references to a witness' testimony are improper. State v. Smith, 352 N.C. 531, 560-61 (2000) ("manure").

Although the prosecutor may to impeach the credibility of an expert during closing argument, a prosecutor should not insinuate that a witness would perjure himself or herself for pay. State v. Vines, 105 N.C. App. 147, 156 (1992). It is also improper to malign the expert's profession. State v. Smith, 352 N.C. 531, 561 (2000).

- **Asking Jurors to Put Themselves in the Victim's Position.** It is improper for the prosecutor to ask the jurors to put themselves in the victim's place. State v. Roache, 358 N.C. 243, 298 (2004); State v. Prevatte, 356 N.C. 178, 244 (2002).
- **Role of the Jury.** It is improper for the prosecution to argue that the jury should lend an ear to the community, *see, e.g.,* State v. Golphin, 352 N.C. 364, 471 (2000), or decide a case based on public sentiment, State v. Conaway, 339 N.C. 487, 529 (1995); State v. Scott, 314 N.C. 309, 311-14 (1985).
- **Forecasting a Sentence under Structured Sentencing.** The courts have warned that "even a well-intentioned argument purporting to forecast a sentence under Structured Sentencing will almost invariably be misleading" and should be avoided. State v. Lopez, 363 N.C. 535, 540-42 (2009).
- **General Deterrence.** It is improper for the prosecution to argue general deterrence (that the jury should find the defendant guilty to deter others from committing crime). *See, e.g.*, State v. Abraham, 338 N.C. 315, 339 (1994).
- **Appealing to Juror's Fears.** It is improper to make an argument designed to appeal to the jurors' fears, such as a suggestion that if the defendant is acquitted he or she might harm a member of the jury. State v. Berry, 356 N.C. 490, 522 (2002).
- **Appellate Review and Other Post-Conviction Procedures.** It is improper for counsel to speculate on the outcome of possible appeals, paroles, executive commutations or pardons. *See, e.g.,* State v. Hunt, 323 N.C. 407, 428 (1988); State v. Jones, 296 N.C. 495, 497-500 (1979).

Although this series of posts doesn't provide exhaustive lists of permissible and impermissible argument, hopefully it will help keep you out of trouble.