**CLOSING ARGUMENTS IN CRIMINAL CASES - EPISODE NOTES**

[Part 2]

Hello everyone and welcome back to the Good Judge-Ment Podcast. I am Wade Padgett

*And I am Tain Kell.*

This is part two of a two part episode dealing with closing arguments in criminal cases. If you have not listened to Part 1, pause this episode and catch up. I think you will appreciate the content of this episode much more if you listen to both.

*Again, shout out to Linda Dunikoski, a Cobb County lawyer who made a presentation at the summer seminar for Superior Court judges which inspired us to tackle this topic.*

So, in episode 1 of this mini-series, we spent a lot of time talking about what is allowed in closing arguments

*And we even spent some time discussing the overall philosophy of closing arguments and the different “styles” we have each seen lawyers use while we have been on the bench.*

Now, we get to the controversial stuff – the “no-no’s” of closing arguments

*Here we go with closing arguments in criminal cases – round 2 (maybe Steven can find a boxing bell sound effect here…)*

While lawyers are free to make illogical and even absurd arguments or analogies in closing arguments, there are some things that just cannot be argued

That brings us to one of the more common objections we hear in closing arguments – the ever-dreaded “burden shifting” objection

To make sure that everyone is on the same page here, let’s discuss the attributes of an alleged burden-shifting argument

The prosecutor has the burden of proof – and, at no time, does that burden of proof shift to the defendant.[[1]](#endnote-1)

Any closing, opening or other argument made by a prosecutor that suggests that the defendant has the obligation to present evidence or that the burden of proof ever shifts to the defendant is simply error – reversible error if not cured by the trial judge.

But there is a HUGE difference between an argument that points out shortcomings in the evidence produced by the defendant and one that suggests that the defendant had an obligation to present evidence

Let’s look at some specific examples

“the prosecutor may properly draw inferences in his argument from the nonproduction of witnesses.”[[2]](#endnote-2)

1. Prosecutor commented on defendant’s failure to produce any evidence substantiating his alleged knee injury that impaired his ability to walk
	1. Not burden shifting – merely a comment on the failure to produce evidence[[3]](#endnote-3)
2. Where defendant claimed he was not present at the crime scene, no error when the prosecutor noted in closing that the defendant failed to produce any evidence as to where he was at the time (no alibi evidence presented)
	1. Not error – merely a comment on the defendant’s failure to rebut evidence presented by State[[4]](#endnote-4)
3. Where defendants claim they were merely present at the scene and did not know of a plan for a robbery to occur, the prosecutor can comment that the defendants have not rebutted the state’s evidence.[[5]](#endnote-5)

Therefore, it is NOT “burden-shifting” for a prosecutor to argue that the defendant failed to produce evidence that refuted the state’s case

But that brings us to a close cousin of the “burden-shifting” argument that has really been hotly debated in recent years – the defendant’s right to the remain silent and comments on that right by the prosecutor

Quick history lesson – in 1991, a case commonly referred to as *Mallory* was decided.[[6]](#endnote-6) Without going through the facts, a bright line rule was announced – the State can make no comment on the defendant’s exercise of his/her right to remain silent. Not during the investigation and not during the trial.

In 2019, the Supreme Court announced a new rule that overturned *Mallory’s* bright line rule prohibiting such a comment, at least relating to pre-trial silence of the defendant[[7]](#endnote-7)

In the decision in the case of *State v. Orr*, there was a domestic violence situation. The victim was Orr’s girlfriend. She testified to a set of facts that suggested that she was attacked without provocation and there was evidence that she had been severely beaten. Mr. Orr was the victim’s boyfriend and he was charged with the crime

At trial, Orr argued and testified that he was actually the victim of domestic violence committed by his girlfriend and that he was merely defending himself when we punched his girlfriend. In fact, he testified that she had hit him with a glass ashtray and split his skin which was the catalyst to the entire ordeal.

During the trial, the prosecutor asked responding officers whether the defendant had indicated that he was actually the victim in this incident and they responded that he had not told them that.

When the defendant testified, the prosecutor asked him whether he had called police about being attacked on the date in question or on any of the other prior occasions when he claimed his girlfriend had attacked him. The defendant testified that he had never made any such call to police

In closing argument, the prosecutor said:

That night the defendant—he wants to now claim self-defense. I find that particularly convenient. He never told the story to the police, never once said: [“]Hey, wait, wait, wait, wait. I’m the victim here. She came at me with an ashtray.[”] I submit to you that this is something made up because he has an interest in the outcome of this case.

There was an objection made during closing, claiming that the prosecutor was making an improper comment on the defendant’s right to remain silent.

In the *Orr* decision, the Georgia Supreme Court traced the origins of *Mallory* and determined that the bright line rule established in *Mallory* was “judicial lawmaking” because it was not based on Constitutional principles and was not based on then-existing evidence law in Georgia.

The Court then discussed that Rule 402 and 403 are the new barometers of what evidence is relevant and whether, even if relevant, the evidence should be excluded due to unfair prejudice that substantially outweighs the probative value of the evidence.

Stated another way, the *Orr* Court held that there is no longer a “bright line” rule of exclusion and that the traditional evidence rules should govern whether a defendant’s failure to come forward with evidence is admissible

Instead, the *Orr* Court said that trial courts should determine whether the failure to come forward should be considered an “adoptive admission” under Rule 801(d)(2)(B) or even a “regular” admission under Rule 801(d)(2).

So that evidence venture aside, you may be asking how the *Orr* decision impacts closing arguments

You may recall that we told you in the last episode (“call back”) that lawyers are allowed to argue reasonable inferences – and even unreasonable inferences – from the evidence actually admitted.

If the failure of the defendant to come forward to refute charges, claims, etc. is admissible, the lawyers can comment on it during closing arguments

We do NOT want you to get this concept twisted – no comment can be made on the defendant’s refusal to give a custodial statement or refusal to testify at trial

The defendant has NO obligation to do so – in either scenario – as a general rule

“The State may note in closing argument the defense’s failure to present any evidence to rebut the proof adduced by the State. It is reference to the failure of the defendant himself to testify which is prohibited.”[[8]](#endnote-8)

BUT, if the failure to come forward amounts to an adoptive admission, what was said, or not said, prior to trial may well be proper for closing arguments

There are currently 57 appellate cases which cite to *Orr* and we recommend all of them to you if you find yourself in a trial involving these issues

We really could spend hours discussing *Orr* and the cases that followed – but that’s not the sole focus on this episode. Just understand that pre-arrest silence of the defendant is not always improper for closing arguments – but there are hoops to jump through that need to be addressed before simply launching into such an argument

**FLIGHT**

The topic of the defendant’s flight – whether it be from the scene of the crime, escape from custody, resistance to arrest, concealment, assumption of a false name and related conduct – is circumstantial evidence of guilt.[[9]](#endnote-9)

But is absolutely reversible error for the court to ***charge the jury*** on the topic of flight.[[10]](#endnote-10) Evidence can be admitted and the parties may argue whether the defendant fled and what that may mean, you simply cannot get a jury charge on the topic of flight, telling the jury what legal significance flight has on the case.

“we have said that evidence of flight is generally relevant and supports an inference of consciousness of guilt of the underlying crime regardless of whether any flight-related crime is also charged.”[[11]](#endnote-11)

One other “biggie” that seems to have arisen recently that we need to cut off and eliminate

 That is attempting to quantify reasonable doubt

Lawyers know that, as part of our charge, we will tell the jury that they do not have to be convinced beyond all doubt or to a mathematical certainty.

 Well, some lawyers took that instruction and warped it a bit.

They began arguing that the jury does not have to be even 51% sure of the defendant’s guilt – or that 90% was enough.

 This is third rail – absolutely improper argument[[12]](#endnote-12)

“We admonish lawyers not to confuse jurors by attempting to quantify a standard of proof that is not susceptible of quantification.”[[13]](#endnote-13)

More no-no’s during closing argument

1. Defendant cannot argue for jury nullification – telling the jury they have the right to ignore the law – impermissible**[[14]](#endnote-14)**
2. The “Golden Rule” argument is impermissible – asking jurors to put themselves in the shoes of the victim or “imagine how you would have felt…”[[15]](#endnote-15)
3. Cannot argue the defendant should be convicted to prevent future dangerousness. You can argue that the defendant is dangerous as evidence by the facts of the case – just cannot argue that he should be convicted because he might do the same thing again.[[16]](#endnote-16) (not applicable in penalty phase of death penalty case)[[17]](#endnote-17)
	1. Prosecutor can urge the jury to “speak on behalf of the community” which can occasionally become blurred with an immersible argument dealing with “future dangerousness”[[18]](#endnote-18)
4. Cannot argue that a witness was not indicted which proves that he/she is not guilty of a crime[[19]](#endnote-19)
5. Cannot argue punishment (obviously not applicable to death penalty cases)[[20]](#endnote-20)
6. Cannot introduce “new evidence” that was not presented during the trial[[21]](#endnote-21)
7. Improper for counsel to express his/her personal belief as to the guilt or innocence of the defendant – or whether any witness was believable[[22]](#endnote-22)
8. Prosecutor cannot argue that their office only prosecutes guilty people – or that grand juries only indict guilty people[[23]](#endnote-23)

So, what should a trial judge do it there is improper argument made?

 First, look to O.C.G.A. § 17-8-75:

“Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the prosecuting attorney is the offender”

“But a trial judge has no obligation under OCGA § 17-8-75 to ‘rebuke a prosecuting attorney or give a curative instruction in the absence of a timely objection.’”[[24]](#endnote-24)

Stated another way, it appears that the trial court has an obligation to interject when there is improper argument being made but the obligation to rebuke, etc. is based upon a timely objection. Ms. Dunikoski suggested, and we agree, that the best practice is to give a curative instruction if an objection is made.

Examples of a curative instruction:

Counsel, that is an improper argument. The jury’s verdict should be a true verdict based upon the jury’s view of the evidence according to the laws I will give them during the charge. Ladies and gentlemen, it is your duty to consider the facts objectively without favor, affection, or sympathy to either party.

Or

Counsel, that is an improper argument. The burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt. There is no burden of proof upon the defendant whatsoever, and the burden never shifts to the defendant to introduce evidence or prove innocence. Counsel, you may proceed.

As you can see, you might need a moment or two to gather your thoughts in such a situation.

Our advice it to send the jury out and formulate your response before merely “winging it”

But “rebuke” does not equate to “berate”

While a timely objection is required to preserve the issue on appeal, if the argument is sufficiently egregious, it may be found to constitute reversible error (or ineffective assistance of counsel) on appeal[[25]](#endnote-25)

If the argument complained of is “merely improper,” and can be cured by the trial court’s rebuking counsel and/or giving curative instructions, the trial judge should do just that[[26]](#endnote-26)

But where the argument complained of is inflammatory or prejudicial to the extent that no curative instruction can remove the stain of the argument from the minds of the jurors, a mistrial should be declared.[[27]](#endnote-27)

So that’s all for our episodes on closing arguments in criminal cases

*The law is clear that lawyers have broad latitude , can use figurative speech and can even go on flights of fancy – but there are some guardrails*

Again, huge shout out to Linda Dunikoski for such a great presentation that spawned not 1 but 2 episodes on the Good Judge-Ment Podcast.

*Remember:*

*Send us e-mails at goodjudgepod.com and*

*Look for this episode outline at goodjudgepod.com*

I am Wade Padgett

*And I am Tain Kell*

*Music trivia time – quick peek behind the curtain – or microphone. Wade prepares our outlines most of the time. He began adding this music trivia section a few months ago. But we agreed I would not read them before the recording session. So I am usually as surprised as you are about the topics. Today is no exception.*

*1990’s music trivia. We know we have predated the birth year with much of our music trivia “stuff” so, today, we are moving forward a couple of decades. There were lots of different “genres” of music that became popular in the 1990’s. With all of that diversity, what was the best selling album of the 1990’s? Give up? Alanis Morissette’s “Jagged Little Pill.” I mean this decade had hits from bands like TLC, Whitney Houston and Celine Dion while, at the same time, had hits from bands such as Pearl Jam and Nirvana. But this last part of today’s trivia might take the cake. Who had the first rap single to reach number 1 on the Billboard Hot 100 in 1990? Give up? Vanilla Ice with “Ice, Ice Baby.” I still believe he stole that bass line from Queen – I don’t care what he says! Have a great day.*

1. *Johnson v. State*, 204 Ga.App. 369 (1992); *Gordon v. State*, 210 Ga.App. 224 (1993). [↑](#endnote-ref-1)
2. *Long v. State*, 309 Ga. 721, 728 (2020). [↑](#endnote-ref-2)
3. *Davis v. State*, 358 Ga.App. 832, 840 (2021). [↑](#endnote-ref-3)
4. *Overton v. State*, 295 Ga.App. 223, 242 (2008). [↑](#endnote-ref-4)
5. *Kilgore v. State*, 300 Ga. 429, 432 (2017). [↑](#endnote-ref-5)
6. *Mallory v. State*, 261 Ga. 625 (1991). [↑](#endnote-ref-6)
7. *State v. Orr*, 305 Ga. 729 (2019). [↑](#endnote-ref-7)
8. *Brown v. State*, 267 Ga.App. 642 (2004). [↑](#endnote-ref-8)
9. *Torres v. State*, 353 Ga. App. 470, 484 (2020). “ ‘[i]t is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, [is] admissible as evidence of consciousness of guilt, and thus of guilt itself.’ ” *United States v. Borders*, 693 F.2d 1318, 1324-1325 (11th Cir. 1982) (citation omitted). See also *Renner v. State*, 260 Ga. 515, 517, 397 S.E.2d 683 (1990) (“The fact that a suspect flees the scene of a crime points to the question of guilt in a circumstantial manner.”). [↑](#endnote-ref-9)
10. *Renner v. State*, 260 Ga. 515, 518 (1990); *Rawls v. State*, 310 Ga. 209 (2020); [↑](#endnote-ref-10)
11. *State v. Brinkley*, 2023 WL 4088308, S23A0507 (Ga. 6/21/2023). [↑](#endnote-ref-11)
12. *Debelbot v. State*, 308 Ga. 165, 167-169 (2020). But see *Warren v. State*, 314 Ga. 598, 602-603 (2022) where conviction was not reversed for similar transgression. [↑](#endnote-ref-12)
13. *Debelbot v. State*, 308 Ga. 165, 167-169 (2020). [↑](#endnote-ref-13)
14. *Andrews v. State*, 222 Ga. App. 129 (1996). [↑](#endnote-ref-14)
15. *Braithwaite v. State*, 275 Ga. 884 (2002); *McClain v. State,* 267 Ga. 378 (1996). *McKibbins v. State*, 293 Ga. 843, 849-850 (2013); *Robinson v. State*, 353 Ga.App. 420, 423 (2020). [↑](#endnote-ref-15)
16. *Turner v. State*, 345 Ga. App. 427, 433 (2018); *Stroud v. State*, 272 Ga. 76, 77 (2000). [↑](#endnote-ref-16)
17. *Hill v. State*, 263 Ga. 37, 46 (1993). [↑](#endnote-ref-17)
18. *Philmore v. State*, 263 Ga. 67, 69 (1993); *Poellnitz v. State*, 296 Ga. 134, 136 (2014); *Faust v. State*, 302 Ga. 211 (2017). See *Hamlette v. State*, 353 Ga.App. 640 (2020) for an argument that was held to be permissible but which walked the tightrope with a “future dangerousness” argument. [↑](#endnote-ref-18)
19. *Caldwell v. State*, 313 Ga. 640, 647-648 (2022) (prosecutor argued that the DA under a duty to not indict innocent people and that is why witness was not indicted). [↑](#endnote-ref-19)
20. O.C.G.A. § 17-8-76. [↑](#endnote-ref-20)
21. The State cannot comment that the forensic witness was in the hall all week (because that was not in evidence) BUT the prosecutor CAN comment that the defendant also has subpoena power provided that the prosecutor does not imply that the defendant has any burden of proof. *Campbell v. State*, 329 Ga. App. 317 (2014). Same with a girlfriend who was in court but was not called to testify—improper to have her stand up in closing and point out she could have been called if she had relevant evidence. *Mowoe v. State*, 328 Ga. App. 536 (2014). [↑](#endnote-ref-21)
22. *McKibbins v. State*, 293 Ga. 843, 850 (2013). [↑](#endnote-ref-22)
23. *Powell v. State*, 291 Ga. 743 (2012). [↑](#endnote-ref-23)
24. *Diamauro v. State*, 341 Ga.App. 710, 730 (2017), overruled on other grounds by *State v. Lane*, 308 Ga. 10 (2020). See also *Powell v. State*, 291 Ga. 743, 746 (2012); *accord Smith v. State*, 296 Ga. 731, 736 (2015). [↑](#endnote-ref-24)
25. *Rogers v. State*, 363 Ga.App. 794, 796-7978 (2022). [↑](#endnote-ref-25)
26. *Hicks v. State*, 196 Ga. 671 (1943). [↑](#endnote-ref-26)
27. *Domingo v. State*, 213 Ga. 24, 27 (1957). [↑](#endnote-ref-27)