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

[This is likely a 2 episode topic – separate outline for pt.2]

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

*And I am Tain Kell.*

We recently received an award – it was unexpected and we want to express deep thanks to the State Bar of Georgia

*Absolutely. We received the Spirit of Justice Award from the State Bar and we were both surprised and humbled to receive that recognition*

The award itself is pretty amazing – it is an actual piece of art

*It really is beautiful. But we are not attempting to blow our own horn for receiving an award – instead, us telling you about this amazing award really is part of a larger conversation*

That’s right. Someone recently asked us why we record this podcast and why we have led NJO for new judges for so long? Another person asked how or why do we make this work?

*They were all separate conversations so there was no single question or answer. Instead, we decided to take a minute to discuss why we record this podcast and why we care so much about training judges. It is definitely not for the pay because we do not earn a penny for leading NJO or for recording the podcast.*

We have probably discussed parts of what we want to say today in other podcast episodes but it bears repeating. When Tain and I became Superior Court judges, the NJO process was essentially broken. We sat through a ½ day discussion of a few substantive topics, were told about some internal procedures relating to health insurance, etc. and then were patted on the head and told to go be good judges.

*That is why we thought that NJO needed to be revamped. As to the podcast and why this works as a delivery platform for judges and others, it is probably directly related to how well the two of us get along, how often we have co-taught continuing education sessions and how important we think that it is for judges and others to actually understand what happens in court, and why it happens*

We try to make these episodes funny and entertaining

*Probably not having that effect right now….*

True – but we do try to interject some silly sounds, funny moments and other lighter things into these podcast episodes just to make it worthwhile for our listeners. We were just glad to hear that someone thought that our format “works”

*That brings us to the biggest point we wanted to make today. We make jokes about having a single listener and things like that but many of you have chosen to reach out to us and tell us you enjoy the podcast. You make it worth all of the time and effort we expend recording these episodes and we are incredibly grateful that you choose to spend your valuable time, listening to two goofballs discuss the law.*

Kinda’ reminds me of that time in 1985 when Sally Field gave an Oscar acceptance speech where she famously said "You like me. You really do like me.” We do not need awards, but it sure does feel good when we hear that you like what we are doing here at the Good Judge-Ment Podcast.

*Ok, enough of the gushing. Let’s talk about today’s episode.*

Oh yeah, we have an episode to record. Let’s talk about closing arguments in criminal cases. This will likely be a two part episode

*We were recently at the Summer Conference for Superior Court Judges and, as usual, we received some materials that we want to use as the basis for a podcast episode.*

We (as usual) need to shout out the author/presenter at the seminar, Linda Dunikoski. She is an Asst. DA in Cobb County and the head of their Appellate Section.

*I had the pleasure of knowing Linda during my time on the Cobb County bench. She’s great.*

And, also as usual, we are shouting her out today in our unique way of crediting authors and others from whom we get our inspiration for podcast topics. We are going to discuss things about closing arguments that were not a part of her presentation, hence the 2 part episode

*Shout out to Linda Dunikoski. If you have podcast topic ideas, send them to us at*

*goodjudgepod@gmail.com. With all of that being said, let’s talk closing arguments*

Lawyers are taught as early as law school just how important and effective closing arguments can be

We’ve all seen those rousing closing arguments on TV and movies – some of the greatest moments – filled with drama and unexpected turns in the plot lines

But, as judges, we have seen some closing arguments that were – less than awesome

In today’s episode, we want to discuss closing arguments generally and then get into some of the permissible, and impermissible, topics for closing arguments

We have seen a pronounced trend in recent years in “themes” – where a party tries to establish a theme in opening statement (maybe even in voir dire) and then extend that theme into the closing arguments

 Examples:

Greed,

One bad apple,

If he can’t have her, nobody else can either

I think this “theme strategy” is taught in trial practice classes in law school. I know it is taught in some continuing education classes dealing with trial strategy

And, to be clear, that can work

But it occasionally does not work and the entire trial lives or dies on whether a single witness says a particular phrase or not; whether the evidence comes out exactly as planned pre-trial

Also, there are times in the real life practice of law when it is difficult to have the time necessary to plan out all of the different things necessary to ensure the “theme” lands in closing argument

We have had lawyers, particularly younger lawyers, ask for our advice over the years about what they can do to be a great trial lawyer

 Not sure that can always be “taught”

But one of the things we have noticed is that when a lawyer tries to assume an identity that is not natural for him/her, it really does not turn out well

 And it is often revealed during closing arguments

There is a perception that, to be effective at closing, the lawyer has to be something akin to a “fire and brimstone” preacher

If that is not your normal “style,” it just comes across as someone who is getting loud during closing arguments

We think that it is important to understand that really effective lawyers who are great in closing arguments usually have one of two different “styles”

1. Preacher
2. Professor

And both can be incredibly effective – it really depends upon your “normal” personality type

[Discuss]

All of the foregoing “internal analysis” is wasted if you do not know the “rules” concerning closing arguments

Let’s start with basics (and remember we are discussing criminal cases today)

The state has the right to have an opening and concluding argument[[1]](#endnote-1)

 The defendant is sandwiched between

The more veteran listeners may remember that this was not always the case in Georgia

For years, if the defendant presented no evidence, the defendant got “last say”[[2]](#endnote-2)

That is not the law any longer and has not been for over 20 years

And because this episode is not dealing with a death penalty case, understand there are different rules, particularly in dealing with the penalty phase of a trial

There are **time limitations** for closing argument (that judges and juries hope never become relevant)

Unless an extension is granted by the judge BEFORE arguments begin:[[3]](#endnote-3)

(A) **Felony** cases punishable by the **death penalty** or **life** in prison - **2 hours** each side.

(B) **Any other felony** case - **1 hour** each side.

(C) **Misdemeanor** case - **30 minutes** each side.[[4]](#endnote-4)

There are also rules about how many lawyers can argue the case if there are multiple lawyers representing one party[[5]](#endnote-5)

(We have citations in the outline and will not go through all the rules here)

Just know that only one lawyer can present argument during the “last word” portion of the argument

In case anyone needs a citation to authority, the use of a PowerPoint in closing argument is generally allowed but you better have the ability to display the PowerPoint on your own equipment and not rely upon the “built in” systems in the courtroom

**Use of “props” during closing:**

It remains discretionary with the court to allow “demonstrative devices” in closing[[6]](#endnote-6)

 “The Supreme Court of Georgia has approved the use of props, maps, charts, and other analogous model and illustrative material in closing argument when based on evidence admitted at trial….”[[7]](#endnote-7)

Stated another way, be careful with what you include in the PowerPoint – make sure you are not introducing new material into the evidence

By way of example, I have seen PowerPoints used during closing arguments of a still photo from a surveillance video that had been admitted and published during trial

But your PowerPoint cannot include a Facebook photo of the Defendant or anything else that was not presented during the trial

Georgia’s appellate courts have attempted to clarify whether a lawyer can use a “fake gun” or

a wiffle ball bat to make a demonstration during closing when the offensive weapon was an actual bat[[8]](#endnote-8) or

a 5 pound bag of sugar to demonstrate what a “five pound trigger pull” means[[9]](#endnote-9)

The underlying rule is that you can generally display admitted exhibits and even potentially demonstrate how particular admitted exhibits were used

But you cannot perform experiments or introduce into the trial new evidence

Consider this example:

At trial, it was established that the gun in question had a 20 pound trigger pull. During closing arguments, the prosecutor had a colleague come forward who weighed approximately 100 pounds. He had the colleague pull the trigger of the gun in front of the jury which she could easily do.[[10]](#endnote-10) Defendant objected.

The Supreme Court of Georgia reversed the conviction and said:

The prosecutor's actions introduced new evidence during closing argument: the fact that a small person could easily pull the trigger of the gun in question. This fact was specifically used to respond to appellant's evidence that the trigger was extremely difficult to pull. Appellant had no chance to rebut the prosecutor's demonstration, a demonstration that could have easily been performed during trial when both sides could have fleshed out its implications thoroughly. This demonstration should have taken place during trial or not at all.[[11]](#endnote-11)

The Supreme Court referred to that as an experiment. Compare that case to the following:

Prosecutor used a hammer during closing – after telling the jury it was not evidence and was not the hammer that was the actual murder weapon – to argue how a hammer might well have been the murder weapon because the evidence strongly suggested a hammer was used in the crime[[12]](#endnote-12)

To be clear, the use of any “prop” during closing is always within the trial court’s discretion and it is dangerous to assume the judge will exercise that discretion in a way that allows the use of a prop.

 Consider:

1. Trial court allowed prosecutor to use a piece of wood – 18 inches in length – to make a demonstration has to how the sawed off shotgun that was admitted might have been used. Affirmed on appeal[[13]](#endnote-13)
2. Bat used in crime that broke during the crime. Lawyer attempted to use a wiffle ball bat during closing that was not broken. Court did not allow use of the wiffle ball bat. Affirmed on appeal.[[14]](#endnote-14)

The point of this entire conversation is that it is within court’s wide discretion to allow for “props” and you need to know that before having the teeth of your closing argument taken from you as you are standing before the jury

If you are going to allow a party to use a “prop” during closing argument to make a demonstration, judges are advised that many of the appellate decisions that approved that practice noted repeatedly that the jury was advised that the knife/gun/bat/etc. being shown to them by the lawyer was not evidence and is not claimed to be the thing used in the crime[[15]](#endnote-15)

The basic rule in closing arguments is that lawyers should be afforded “all reasonable latitude” in argument of his/her case before the jury[[16]](#endnote-16)

But there are limitations to that “broad latitude” that include several clear prohibitions

 And some that are not quite as clear

There are certain topics that are always “fair game”

**Inconsistencies in the evidence**

**Credibility concerns of witnesses (even defendant if defendant testifies)**[[17]](#endnote-17)

Always fair game to argue that witnesses received benefits for testifying such as potential prison time being avoided, etc.[[18]](#endnote-18)

**Prior consistent or inconsistent statements**

**Deficiencies in the case made by the opposing party**[[19]](#endnote-19)

 More on this point in Part 2 of this episode

**Explaining the law**

But has to be the law/charge that the court is actually going to give – cannot misstate the law, make up legal concepts, or discuss legal concepts that will not be a part of the charge of the court[[20]](#endnote-20)

Counsel can quote or even read a portion of the charge that is to be given – actually error for trial court to refuse to allow counsel to do so[[21]](#endnote-21)

 **Urging jury to convict on lesser included offenses**

 **Applying law to facts**

 **Asking jury to put aside prejudice or bias**

 **Urging the jury to follow the law**

 **Using figurative speech**

 **Urging jury to use their common sense**

**Applicable analogies**

Movies, books, personal stories

Even ridiculous arguments are allowed – even illogical, unreasonable or even absurd arguments are allowed[[22]](#endnote-22)

So let’s stop here for the first part of this episode and we will discuss some of the more hotly contested issues dealing with closing arguments and the topics that are absolutely forbidden in the second part of this episode.

*We never want these episodes to run too long so we try our best to keep them within certain time constraints. We really are NOT trying to create cliff hangers.*

But we need to leave you with a couple of things:

Send us e-mails at goodjudgepod.com

*Look for this episode outline at goodjudgepod.com*

I am Wade Padgett

*And I am Tain Kell*

*Finally, our music trivia for the day- it’s time we changed music genres for a minute. Today we are going to discuss an amazing artist, Garth Brooks. His real, “government” name is Troyal Garth Brooks. Glad he chose that middle name. Garth has always been a bit of a music nerd – like me but with more talent than me. He named his first child “Taylor” after the icon, James Taylor. He was inducted into the Country Music Hall of Fame in 2012, the Songwriters hall of fame in 2011 and the Musicians hall of fame in 2016. Finally, I want you to consider the number of monster hits that appeared on Garth’s album, “No Fences.” The “Thunder Rolls,” “Friends in Low Places,” “Unanswered Prayers,” and “Two of a Kind, Working on a Full House” were all on that album. So here comes the question. In what year was “Friends in Low Places” awarded the Single of the Year by the Academy of Country Music? (I am going to bet you guess older than it actually won) Give up? 1990. Maybe its just me – that doesn’t seem old enough but many of our listeners were not even born then. Dang, I am getting old.*

1. O.C.G.A. § 17-8-71. [↑](#endnote-ref-1)
2. This changed in 2005 Ga. Laws 8. [↑](#endnote-ref-2)
3. U.S.C.R. 13.2 [↑](#endnote-ref-3)
4. See O.C.G.A. §§ 17-8-72 (misd); 17-8-3 (felony); 17-8-74 and U.S.C.R. 13.1 and 13.2 (extensions). [↑](#endnote-ref-4)
5. O.C.G.A. § 17-8-70 and U.S.C.R. 13.3. [↑](#endnote-ref-5)
6. *Grant v. State*, 245 Ga.App. 652 (2000). [↑](#endnote-ref-6)
7. *Grant*, at 654. [↑](#endnote-ref-7)
8. *Grant v. State*, 245 Ga.App. 652, 654 (2000). [↑](#endnote-ref-8)
9. *Laney v. State*, 271 Ga. 194, 197-198 (1999). [↑](#endnote-ref-9)
10. *Williams v. State*, 254 Ga. 508 (1985). [↑](#endnote-ref-10)
11. *Williams*, at 511. [↑](#endnote-ref-11)
12. *Ellington v. State*, 292 Ga. 109 (2012), disapproved in part on other grounds, *Willis v. State*, 304 Ga. 686, 707, n. 3 (2018). [↑](#endnote-ref-12)
13. *Norton v. State*, 293 Ga. 332, 335 (2013). [↑](#endnote-ref-13)
14. *Grant v. State*, 245 Ga.App. 652, 654 (2000). [↑](#endnote-ref-14)
15. *President v. State*, 367 Ga.App. 680, 685-686 (2023). [↑](#endnote-ref-15)
16. *Waller v. State*, 80 Ga.App. 488 (1949). [↑](#endnote-ref-16)
17. *Wells v. State*, 200 Ga.App. 104, 106 (1991). [↑](#endnote-ref-17)
18. *Palma v. State*, 280 Ga. 108 (2005). [↑](#endnote-ref-18)
19. *Kilgore v. State*, 300 Ga. 429, 432 (2017). [↑](#endnote-ref-19)
20. *Lopez-Vasquez v. State*, 331 Ga.App. 570, 575 (2015); *Perez v. State*, 309 Ga. 687, 695-696 (2020). [↑](#endnote-ref-20)
21. *Allen v. State*, 2023 WL 4336965, S23A0436 (Ga. 7/5/2023). [↑](#endnote-ref-21)
22. *Sharp v. State*, 153 Ga. App. 486 (1980). [↑](#endnote-ref-22)