Preserving Last Closing Argument

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Having the first *and last* opportunity to speak with the jury is a major advantage in any trial. Unfortunately, preserving the right to give last closing argument is no easy task. It requires vigilance and, in many cases, an involved and engaged trial judge. By strategically choosing not to "introduce" evidence, defense attorneys can take away plaintiff counsel's right to present the last closing argument. An area ripe for dispute in many trials is what actually constitutes the "introduction" of evidence by the defense. This paper will provide: **(1)** the rules and instructions that North Carolina trial judges are given in the Superior Court Judges' Benchbook, **(2)** summaries of pertinent appellate cases involving preservation of last close, **(3)** a model motion in limine to highlight the issue for the trial judge at the outset, **(4)** some practical tips and recommendations from experienced practitioners, and **(5)** a brief discussion regarding appeals of an incorrect ruling on preserving last close.

1. North Carolina Superior Court Judges' Benchbook

II. Order of Arguments

A. General Order (Where Defendant Introduces Evidence). In most civil trials, the plaintiff is permitted to both open and close the arguments. As the party with the burden of proof, the plaintiff is given the advantage of both "primacy" and "recency" in making its case to the jury. Thus, plaintiff typically is permitted to provide the first closing argument, defendant then provides its full closing argument, and plaintiff then offers a rebuttal of defendant's argument.

B. Where Defendant Introduces No Evidence

1. **Order of Arguments Reversed.** "[I]f no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him." N.C. R. SUPER. AND DIST. CTS. RULE 10 ("Rules of Practice"). Thus, defendant presents the first argument, plaintiff then presents its argument, and defendant offers a final rebuttal.[2]

2. **"Introduce Evidence."** A party introduces an item by offering it as substantive evidence or by presenting it so it may be examined by the jury to "determine whether it illustrates, corroborates, or impeaches the testimony of a witness." State v. Hall, 57 N.C. App. 561, 564 (1982).
   a. Showing an item to a witness to refresh the witness's recollection does not amount to offering the item into evidence. *Id.*
   b. Defendant does not "introduce evidence" by testifying during plaintiff's case after having been called to the stand by plaintiff. Hord v. Atkinson, 68 N.C. App. 346, 352 (1984).

3. **Disputes Over Order of Argument.** Rule of Practice 10 states that, "[i]f a question arises as to whether the plaintiff or defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final." Notwithstanding this language, the appellate courts, in the criminal context, have repeatedly held that it is reversible error to deny a defendant the right to first and last argument under Rule 10. *See* State v. Hogan, ___ N.C. App. ___, 720 S.E.2d 854, 856 (2012); State v. Bell, 179 N.C. App. 430, 432 (2006); State v. Shuler, 135 N.C. App. 449, 455 (1999); State v. Hall, 57 N.C. App. 561, 565 (1982) (noting that the error is reversible despite the language of Rule 10).

C. **Multiple Defendants.** "[W]here there are multiple defendants, if any defendant introduces evidence, the closing argument shall belong to the plaintiff, unless the trial judge shall order otherwise." Rule of Practice 10.

2. Cases Relating to Preservation of Last Close

A. *State v. Mitchell,* 17 N.C. App. 1, 193 S.E.2d 400 (1972) and *State v. Rich*, 13 N.C. App. 60, 185 S.E.2d 288 (1971)

Mitchell and *Rich* are important cases, particularly in situations where the defense will attempt to use photographs of property damage on cross-examination. In *Mitchell*, the Court wrote that:

> Defendant next assigns as error the ruling of the court that in order for defendant to use photographs on cross-examination to illustrate testimony of State's witness, the photographs must be introduced in evidence. Defendant argues that this results in prejudice to him and constitutes an abuse of the court's discretion because if the defendant offers no evidence, the right to open and close the argument to the jury shall belong to him. We said in *State v. Rich*, 13 N.C.App. 60, 185 S.E.2d 288 (1971), cert. denied and appeal dismissed 280 N.C. 304, 186 S.E.2d 179 (1972), that photographs must be introduced in evidence before they may be used to illustrate testimony. The photographs are not included as exhibits in the record. We find no abuse of discretion. This assignment of error is without merit.

B. *Hord v. Atkinson*, 315 S.E.2d 339 (N.C. App. 1984)

Hord was an automobile negligence case where plaintiff's counsel chose to call the defendant during his case-in-chief. The relevant holding of *Hord* is simply that the defendant, by explaining his version of the crash in response to questioning by plaintiff's counsel, did not offer evidence of his own and was entitled to make the final argument to the jury.

C. *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994)

Skipper is consistent with the rulings in *Mitchell* and *Rich* but has the added value of being a North Carolina Supreme Court case. Defense counsel wanted to use a photograph to illustrate the testimony of a witness on cross-examination. The trial judge determined that the

exhibit could not be used in front of the jury until such time as it was introduced into evidence. In response, defense counsel actually introduced the exhibit and the Court held that the final jury argument would be with the State. The Supreme Court confirmed the trial court.

D. *State v. Macon*, 346 N.C. 109, 484 S.E.2d 538 (1997)

For plaintiff's counsel, *Macon* may be the most important case when arguing that a defendant has introduced evidence and lost last close. In addition to the rare finding that the defendant did indeed lose last closing argument, it has the added advantage of being one of only a few cases from the North Carolina Supreme Court.

The defendant in *Macon* was accused of several offenses arising out of the alleged murder of his estranged wife. Prior to analyzing the facts of the case, Justice Frye explained that "Rule 10 of the General Rules of Practice for the Superior and District Courts states that 'if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him.'" The Court went on to explain that:

> [W]e believe the proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence **or** so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of the witness.

(emphasis added).

During direct-examination of one of the investigating officers, the prosecution asked questions concerning details of the State's investigation, including letters the State found that indicated that the defendant planned to kill his victim. During cross-examination, defense counsel had the officer read notes created by another officer during an interview with the defendant. The notes were marked as an exhibit but neither offered in evidence nor published to the jury. The trial court determined that having the officer read the notes constituted the introduction of evidence such that defendant would not have the opportunity to give last close. The Supreme Court confirmed this constituted the introduction of evidence, finding that:

> During defendant's cross-examination of Officer Denny, and before the State had presented any evidence regarding defendant's postarrest statement to police, defense counsel asked Officer Denny to read notes of defendant's statement to the police given shortly after the shooting. Although the writing was not itself introduced into evidence by defendant, Officer Denny's reading of its contents to the jury satisfies the requirement in Rule 10 of the General Rules of Practice for the Superior and District Courts that evidence has to be introduced by defendant in order to deprive him of the opening and closing arguments to the jury. The jury received the contents of defendant's statement as substantive evidence without any limiting instruction, not for corroborative or impeachment purposes, as defendant did not testify at trial and the statement did not relate in any way to Officer Denny.

E. ***State v. Schuler*, 135 N.C. App. 449, 520 S.E.2d 585 (1999)**

One of the most cited cases by the defense is *Schuler*. The Court of Appeals set forth a basic framework of the analysis as to which party will have last closing argument:

(1) "When a defendant does not introduce evidence, he retains 'the right to open and close the argument to the jury.'"

(2) "As a general proposition, any testimony elicited during cross examination is 'considered as coming from the party calling the witness, even though its only relevance is its tendency to support the crossexaminer's case.'"

(3) "[T]he general rule also provides that there is no right to offer evidence during cross-examination." Parties are "not entitled to offer evidence of their own, under the guise of cross[-]examination."

(4) "Nonetheless, evidence may be 'introduced,' within the meaning of Rule 10, during cross-examination when it is 'offered' into evidence by the cross-examiner . . . and accepted as such by the trial court."

(5) "Although not formally offered and accepted into evidence, evidence is also 'introduced' when new matter is presented to the jury during cross-examination and that matter is not relevant to any issue in the case."

(6) "New matters raised during the cross-examination, which are relevant, do not constitute the 'introduction' of evidence within the meaning of Rule 10."

This framework can be difficult to understand and apply to the facts of a particular case. For example, evidence should never be allowed that is "not relevant to any issue in the case," so the fifth and sixth rules above can lead to considerable confusion. That being said, when read alongside *Macon*, there may be a framework to *Schuler* that actually makes sense – as discussed below.

The defendant in *Shuler* had been charged with offenses relating to alleged embezzlement from her employer. During cross-examination of witnesses from defendant's employer, defense counsel "placed a document" in front of the witness labeled "Defendant's Exhibit No. 9" which the witness then identified as a transcript of an interview the employer took of defendant during a fraud investigation. Defense counsel read portions of the transcript to the witness, including answers from the defendant. A second document labeled "Defendant's Exhibit No. 10" was also referenced but not read to the witness. Finally, defense counsel questioned the witness regarding a second interview of defendant by the witness. The witness testified as to one of the communications on the recording.

Ultimately, the Court of Appeals determined in *Shuler* that the defendant had not put on evidence. The primary reason was that during direct examination the State had asked questions regarding statements made by defendant during the interview. The Court reasoned that the answer to defense counsel's questions merely put the responses during direct examination "in context." The "new matter" which was addressed during cross-examination "was relevant to [the] testimony during direct examination." Similarly, additional "new matter" which was addressed during cross-examination was relevant to certain financial records introduced during the State's case-in-chief, as well as information brought out in the State's case-in-chief relating to an investigation by the defendant's employer.

One can read *Schuler* and *Macon* together to indicate a rule that if "new matters" are raised through documentary exhibits used during cross-examination, but those new matters are relevant to the testimony elicited on direct-examination, then the defense does not lose last close. On the other hand, the defendant would lose last closing argument if new matters are raised through documentary exhibits used during cross-examination that are not relevant to prior testimony elicited on direct-examination.

F. *State v. Wells*, 171 N.C.App. 136, 613 S.E.2d 706 (2005)

Wells involved a criminal defendant who was indicted on charges including first-degree murder. The victim was killed after a fight outside a studio where the defendant was working with the victim to produce a music recording. At trial, the jury found the defendant guilty of second-degree murder.

The trial judge concluded that defendant had put on evidence during cross-examination of an eye witness and had thereby lost last close. After examining the transcript, the Court of Appeals disagreed and ordered a new trial. In reaching its conclusion, the Court of Appeals relied heavily on the legal principles set forth in the *Schuler* opinion.

The primary analysis in *Wells* centered on whether the defendant introduced evidence when his counsel questioned the eye witness over a prior statement he gave. During its case-in-chief, the State introduced into evidence a statement the eye witness gave to detectives on December 18, 2002 describing the shooting. On cross-examination, the defendant moved to introduce another statement from the eye-witness given the day before, December 17, 2002. This December 17 statement directly contradicted the December 18 statement given to the detectives the following day. Because the State was still putting on its case in chief, the Court did not allow defendant to "introduce" the statement during cross-examination, but defense counsel was allowed to mark the exhibit. Defense counsel thereafter read each line of the statement, and asked the eye-witness if he agreed with each. Defense counsel never actually admitted this document, or any other document, into evidence.

The Court of Appeals ultimately held that the questioning of the eye witness by defense counsel with the December 17 statement was not the introduction of evidence within the meaning of Rule 10. The Court held that, in contrast to the *Macon* case, the eye-witness "was questioned about statements directly related to the witness' own testimony on direct examination." Essentially, because this was a form of impeachment on an issue already addressed by the State's case-in-chief, the questioning and reading from the document was not the introduction of new evidence.

G. *Caudill v. Holt*, 609 S.E.2d 497 (N.C. App., 2005)

Like *Wells*, *Caudill* references to the principles set forth in *Schuler*. After setting forth those principles, the Court of Appeals addressed plaintiff's argument that defense counsel should not have had the opportunity to give last closing argument because he used portions of plaintiff's deposition in cross-examining plaintiff's treating physician. After considering plaintiff's argument, the Court determined that the defense had not introduced evidence under Rule 10 and had the right to give last closing argument.

The specifics of the defense's cross-examination are straight-forward. During plaintiff's deposition, he testified to having ongoing pain in his neck, arm, and hand prior to the subject motor vehicle crash. Defense counsel read portions of that deposition transcript during cross-examination of the plaintiff's treating physician, and used those portions of the plaintiff's deposition to challenge the doctor's testimony that the plaintiff had been asymptomatic prior to the collision. The Court's analysis as to whether this constituted introducing evidence under Rule 10 is noteworthy:

> Even though this testimony was elicited during cross-examination, it is considered as coming from plaintiff, the party that called the witness, rather than defendants, the parties that did the cross-examination. We have also mentioned that evidence can be introduced when new matter is presented to the jury during cross-examination and that matter is *not* relevant to any issue in the case. We do not believe that defendants' attorney offered new matter by questioning Dr. Paul as to whether plaintiff was asymptomatic before the accident because this was an issue that plaintiff brought up on direct examination. Even if this could be classified as new matter, it would be relevant to the issue of whether the 1999 accident caused plaintiff's injuries.

(internal citations and quotations omitted).

The Court of Appeals went on to address plaintiff's argument that the *Macon* opinion applied. The Court indicated that "[t]he present case is distinguishable from *Macon* because here, plaintiff was the first party to introduce evidence that he was asymptomatic before the 1999 accident. Thus, unlike the cross-examiner in *Macon,* defendants were reacting to evidence that was already in the record. Furthermore, in the present case, we have established that defendants questioned Dr. Paul to impeach his earlier statement that plaintiff was

asymptomatic; it was not offered as new substantive evidence. Accordingly, the outcome in *Macon* does not control the outcome of this case."

H. *State v. Bell,* 179 N.C.App. 430, 633 S.E.2d 712 (2006)

Bell is another case where the Court of Appeals reversed a trial court's ruling denying last closing argument to a criminal defendant. The case involved charges of possession of cocaine and the issue of attaining habitual felon status. The trial court "stated that he was allowing the State the final argument to the jury because defense counsel had forfeited the right to final closing argument by cross-examining the State's witness . . . with a document which was not admitted into evidence, and questioning her concerning that document."

In the written Court of Appeals' opinion, Judge Wynn reiterated that "[a]lthough there is no right to offer evidence during cross-examination, evidence may be found to be 'introduced' during cross-examination, within the meaning of Rule 10, when: (1) it is 'offered' into evidence by the cross-examiner; or (2) the cross-examination introduces new matter that is not relevant to any issue." He also explained that "[i]f new matter raised during cross-examination is relevant, it is not considered 'introduced' within the meaning of Rule 10."

The witness in *Bell* whose cross-examination was in question was a forensic drug chemist for the State. Defense counsel asked her about various documents created in the course of her analysis, including graphs, a lab report, and her records and notes. Judge Wynn found that "defense counsel's questioning was related to Agent Bommer's testimony on direct examination regarding the method and instruments she used to determine the nature of the substance seized from defendant's sock." The Court of Appeals concluded that the cross-examination was relevant to existing issues and directly related to testimony elicited during direct-examination. Therefore, the defense was entitled to last closing argument. This decision would seem consistent with the discussion above pertaining to the crossover analysis between *Macon* and *Schuler*.

I. *State v. Hennis*, 646 S.E.2d 398 (N.C. App., 2007)

The defendant in *Hennis* was accused of possession of cocaine and possession of drug paraphernalia. During cross-examination of a detective from the Rockingham County Sheriff's Department, defense counsel asked the detective to draw a diagram of the crime scene. This diagram was marked as Defendant's Exhibit A. The diagram was simply used to show where the alleged drugs were found in relation to the defendant's truck. Additionally, defense counsel questioned the detective about the incident report he filed in the case. At the State's request, the report was marked as an exhibit. Defense counsel questioned the witness about "changes and additions to the report that were added months after it was initially written." The report was never published to the jury.

The State did not argue on appeal that the matters inquired into constituted a "new and irrelevant issue" under the standard set forth in *Bell.* Instead, the State argued that the defendant had "offered" the diagram and incident report into evidence during cross-examination. Chief Judge Martin reiterated that the standard for whether evidence is "offered" within the meaning of Rule 10 is "whether a party has offered [an object] as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of the witness." With respect to the diagram, the Court determined that it was merely used to illustrate the witnesses testimony and not as substantive evidence. With respect to the incident report, the Court determined that it was not "introduced" because it was not published to the jury as substantive evidence, nor was it given to the jury to examine whether it illustrated, corroborated, or impeached the detective's testimony.

J. ***State v. Hogan*, 720 S.E.2d 854 (N.C. App., 2012)**

Hogan is another criminal case where the Court of Appeals ultimately held defendant had not "introduced" evidence. Chief Judge Martin compared the facts of *Hogan* to those presented in *Wells*. During cross-examination of the victim, defense counsel in *Hogan* read portions of the victim's prior statements in an effort to show inconsistencies and impeach his trial testimony. Judge Martin wrote:

> In sum, our review of the transcript reveals that statements read and referenced by defendant's counsel were 'directly related to [McQueen's] own testimony on direct examination.' Furthermore, as in *Wells,* defendant's counsel never 'formally introduced the statement' into evidence. *Id.* at 139, 613 S.E.2d at 707. Accordingly, we must hold that defendant never 'introduced' evidence within the meaning of Rule 10.

(internal citations omitted).

K. ***State v. Lindsey*, 791 S.E.2d 496 (N.C. App. 2016)**

Lindsey is one of the few recent cases where the Court of Appeals determined that the defendant was properly denied last closing argument. The defendant was being prosecuted for DWI and habitual DWI. The State's only witness was the arresting officer. During cross-examination of the officer, the defense played video footage of the arrest of the defendant, arguing that it was merely used to illustrate the testimony of the officer and was not evidence relating to a "new matter." Judge McCullough found that:

> Although Officer Sykes had provided testimony describing the stop that was shown in the video, we agree with the trial court that the video evidence in this case goes beyond the testimony of the officer, and is different in nature from evidence presented in other cases that was determined not to be substantive. Here, the playing of the video of the stop allowed the jury to hear exculpatory statements by defendant to police beyond those testified to by the officer and introduced evidence of flashing police lights, that was not otherwise in the evidence, to attack the reliability of the HGN test. This evidence was not merely illustrative. Moreover, the video allowed the jury to make its own determinations concerning defendant's impairment apart from the testimony

> of the officer and, therefore, amounted to substantive evidence. Consequently, we hold the trial court did not err in determining defendant put on evidence and in denying defendant the final argument to the jury.

Lindsey may have some use for plaintiffs in personal injury trials. Its use in cases where there is video footage is obvious. More notably, though, it might be used in other cases to argue that the defendant introduced "new matters" and has gone beyond the testimony elicited during direct-examination, as the Court in *Lindsey* seemed to draw a tighter net around what matters were already addressed than had earlier cases. Moreover, it provides further evidence that the line of "relevance" explained in *Shuler* is simply whether the "new matter" goes to some issue already addressed in the case, not whether it is "relevant" in any general sense to the case as a whole.

3. <u>Model Motion in Limine</u>

There are a number of motions in limine that have floated around the Autotorts Listserve to help flag this issue for the trial judge but the most important thing appears to be to just make sure you do it early and often. I would propose using two separate motions – one for illustrative exhibits such as photographs and another for other cross-examination fodder such as medical records or plaintiff's deposition. Here are two proposed boilerplate motions:

(a) That the defendant and their counsel not be allowed to examine witnesses either through direct or cross-examination with any illustrative exhibits such as photographs or video if the evidence is published or shown to the jury but not offered into evidence. All photographs must be introduced in evidence before they may be used to illustrate testimony. *See State v. Mitchell*, 17 N.C. App. 1, 193 S.E.2d 400 (1972) and *State v. Rich*, 13 N.C. App. 60, 185 S.E.2d 288 (1971). If such photographs are introduced in evidence either during direct or cross-examination, then pursuant to Rule 10 of the General Rules of Practice for the Superior and District Courts, Defendant should not be entitled to the last argument to the jury. *Id*.

(b) That counsel for Defendant be prohibited from reading any medical record or other documentary exhibit into the record, under the guise of impeaching the Plaintiff or otherwise, until such medical record or other documentary exhibit has been admitted into evidence. To the extent that Defendant is allowed to do so, he should lose the opportunity to present the last closing argument in this case. *See State v. Macon*, 346 N.C. 109, 484 S.E.2d 538 (1997).

4. <u>Practical Tips</u>

Maintaining the ability to give last closing argument is a topic that has been widely discussed by plaintiffs' counsel in North Carolina. Some pieces of advice that different attorneys have recommended include:

(1) Even if you lose a Motion in Limine – it is important to put the issue in front of the Judge early so that he or she can be thinking about it throughout the trial and the presentation of evidence. After all, it is a difficult Motion in Limine to rule upon in a vacuum. It's much easier for the Judge to rule later after he or she actually sees how the defense attorney uses the evidence and asks his or her questions.

(2) Take time to think about whether you want to (a) object to the introduction of the evidence through cross-examination unless it is deemed admitted into evidence, or (b) wait until the defense closes their case to argue they have introduced evidence and should not have last closing argument. There could be strategic advantages to both approaches.

(3) If defense counsel begins questioning the client about a document, immediately ask for it be marked and identified. Ask if defense counsel plans on reading parts of the document. If so, argue that it needs to be introduced and offer to let the defense offer it as evidence "out of order" since technically the witness is the plaintiff's.

(4) If a defense attorney is informing the Court and jury that he or she is reading from a particular document, and begins doing so, you may object. Counsel may not read documents that are not in evidence over an objection. Defense counsel can, of course, ask if Plaintiff said X on such and such day, but you cannot simply inform the jury you are reading a document and that it says X.

(5) According to attorney David Stradley – "You should never allow opposing counsel to hand a witness an unmarked document and, while the witness still holding the document, ask the witness a question. That is not proper form for refreshing recollection. A refreshed recollection is the actual memory of the witness independent of whatever is used to refresh the recollection. A document used to refresh recollection need not be admissible. On that account, the witness should not be allowed to testify while looking at a document which is being used to refresh recollection.

    If the witness has the document while testifying, the document must be marked and its contents must be admissible. Otherwise the witness may not testify from it. It's an unauthenticated out of court statement. Without establishing what it is, the court can't even rule on whether it is inadmissible hearsay.

    That said, an attorney is free to ask a witness, without showing the witness a document, 'Didn't you tell Dr. X that you had a history of back pain that started before this accident?' If he's not prepared to use a document, he's stuck with the answer he gets. If he hands the witness the medical record and asks the same question, you should object and ask that it be marked, authenticated and introduced or withdrawn from the

witness. I would also argue that, unless the witness says the equivalent of I don't remember, refreshing recollection is not an option for the attorney."

5. Appealing Lost Opportunity for Last Close

In the criminal context, it is improper to deprive the defendant the right to final closing argument and that failure "entitles . . . defendant to a new trial." *State v. Hogan*, 720 S.E.2d 854 (N.C. App., 2012) (quoting *State v. English*, 194 N.C. App. 314, 317, 669 S.E.2d 869, 871 (2008)). There do not appear to be any civil cases applying this remedy. That is largely because nearly all of the cases discussing preservation of last close are criminal cases. The only notable exceptions this author has found are *Hord* and *Caudill*. In both *Hord* and *Caudill*, the Court of Appeals confirmed the trial judge's decision to give last close to defense counsel. However, given the long line of criminal cases discussed above, plaintiff's counsel should assume that, even in a civil appeal, the remedy for the defense incorrectly not being given last close is a new trial. This makes it dangerous to push hard for last closing argument unless counsel is sure that the decision would be upheld on appeal. Therefore, plaintiff's counsel should be careful in a trial that has proceeded well not to shoot him or herself in the foot by fighting for last close unless it is absolutely clear that the defense has introduced evidence.