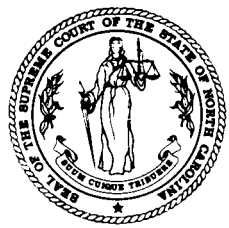
NORTH CAROLINA REPORTS

VOLUME 328

SUPREME COURT OF NORTH CAROLINA



10 JANUARY 1991

2 MAY 1991

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1991

CITE THIS VOLUME

328 N.C.

IN MEMORIAM

JOSEPH BRANCH

CHIEF JUSTICE
1 AUGUST 1979-31 AUGUST 1986

ASSOCIATE JUSTICE
29 AUGUST 1966-31 JULY 1979

TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

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SUSIE SHARP
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CHRISTIE SPEIR PRICE[2]

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DALLAS A. CAMERON, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

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1. Deceased 18 February 1991.

2. Appointed and sworn in 17 April 1991 to replace J. Gregory Wallace who resigned 1 February 1991.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

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	STEVEN J. BRYANT	Bryson City

1. Appointed to a new position and sworn in 1 March 1991.
2. Deceased 28 April 1991.

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PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

PETITIONS TO REHEAR

GENERAL STATUTES CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES
CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA
CITED AND CONSTRUED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 14th day of December, 1990 and said person has been issued a license certificate.

ISAAC LOCKHART THORP ..... Raleigh

Given over my hand and seal of the Board of Law Examiners this the 10th day of January, 1991.

FRED P. PARKER III
Executive Director
Board of Law Examiners of
The State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 25th day of January, 1991 and said persons have been issued certificates of this Board:

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Applied from the State of Oklahoma

JAMES M. SULLIVAN ..... Charlotte
Applied from the State of Virginia

WILLIAM R. WADDELL ..... Richmond, Virginia
Applied from the State of Virginia

DAVID BROOKS ADCOCK ..... Durham
Applied from the District of Columbia

Given over my hand and seal of the Board of Law Examiners this the 4th day of February, 1991.

FRED P. PARKER III
Executive Director
Board of Law Examiners of
The State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 1st day of March 1991 and said persons have been issued certificates of this Board:

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Applied from the District of Columbia

CHARLES DUDLEY MARSHALL ..... Paducah, Kentucky
Applied from the District of Columbia

GLORIA J. MYERS ..... Arden
Applied from the District of Columbia
RICHARD A. SANKS ..... Corolla
Applied from the State of Kentucky

Given over my hand and seal of the Board of Law Examiners this the 15th day of March, 1991.

FRED P. PARKER III
Executive Director
Board of Law Examiners of
The State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 22nd day of March, 1991 and said persons have been issued license certificates.

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Executive Director
Board of Law Examiners of
The State of North Carolina

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LIAM T. O'CONNOR ..... Raleigh
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Given over my hand and seal of the Board of Law Examiners this the 11th day of July, 1991.

FRED P. PARKER III
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The State of North Carolina

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. ANNE PHILLIPS AND SYLVESTER PHILLIPS

No. 205A88

(Filed 10 January 1991)

1. Grand Jury § 3.3 (NCI3d)— grand jury foreman—selection—racial discrimination

The trial court did not err in a murder and felony child abuse prosecution by determining that the State had rebutted defendants' *prima facie* case of racial discrimination in the selection of the grand jury foreman where, in response to defendants' motions to dismiss the indictments, the trial judge removed the foreman and asked the grand jury to retire to the jury room and nominate a new foreman from among themselves, including the foreman just removed; the grand jury retired and nominated the foreman just removed; the judge in his discretion reappointed that foreman; the district attorney resubmitted the bills of indictment; and the grand jury returned true bills. The trial judge's finding that the foreman of the grand jury which returned the second indictments against defendant was elected from the members of the grand jury was supported by the evidence, and his conclu-

sion that the method used in selecting the foreman was racially neutral was supported by the finding of fact. The record is silent as to the process used by the grand jury, there is no suggestion that the members of the grand jury acted in other than a racially neutral manner, and on its face the process appears to be racially neutral.

Am Jur 2d, Grand Jury § 12.

2. **Criminal Law § 106 (NCI4th) — murder and felony child abuse — pretrial interviews with child witnesses not allowed — no error**

Defendants in a prosecution for murder and felony child abuse had no right to pretrial interviews with children who were witnesses to the alleged child abuse without the witnesses' consent. The right to pretrial discovery is a statutory right and nothing in the statutory provisions compels the State witnesses to subject themselves to questioning by the defense before trial. North Carolina rules of discovery provide that statements by a State witness or prospective State witnesses other than defendant are not subject to discovery until that witness has testified on direct examination at trial. N.C.G.S. § 15A-903(f)(1) (1988).

Am Jur 2d, Depositions and Discovery §§ 401, 402, 404-406.

Accused's right to depose prospective witnesses before trial in state court. 2 ALR4th 704.

3. **Searches and Seizures § 43 (NCI3d) — motion to suppress — child witnesses — subpoenas quashed**

The trial court in a prosecution for murder and felony child abuse did not err by quashing subpoenas issued to two children ordering them to appear and testify at a hearing on defendants' motion to suppress evidence seized pursuant to a search warrant. Both children were subsequently found competent to testify at trial and their testimony was corroborated by the testimony of other witnesses. Defendants were not prejudiced by their inability to call the children as witnesses to impeach the search warrant because the affidavits support probable cause even without the statements of the children.

Am Jur 2d, Depositions and Discovery §§ 404-406; Searches and Seizures §§ 26, 64, 66, 66.5.

4. Criminal Law § 53 (NCI3d)— felony child abuse and murder—battered child syndrome

The trial court did not err in a prosecution for murder and felony child abuse by allowing a pediatrician to give testimony on the battered child syndrome or by instructing the jury on the battered child syndrome. The pediatrician was qualified and accepted by the court as an expert in pediatrics and child abuse, his opinions were within the realm of his expertise and his opinions were permissible subjects of expert opinion.

Am Jur 2d, Infants § 17.5.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome. 43 ALR4th 1203.

5. Parent and Child § 2.2 (NCI3d)— child abuse—battered child syndrome—instructions

The trial court made it clear when instructing the jury that while a finding that a child suffered from battered child syndrome permits an inference that such injuries were inflicted by a caretaker, such inference is not mandatory and the burden remains on the State.

Am Jur 2d, Infants § 17.5; Trial §§ 760, 761.

6. Parent and Child § 2.2 (NCI3d)— murder and felony child abuse—testimony concerning prior abuse—admissible

The trial court did not err in a prosecution for murder and felony child abuse by allowing a child abuse victim to testify that defendants had previously chained him to a pole in their basement in Chicago. Defendants contended that the injuries were inflicted by younger siblings and the evidence was relevant and admissible under N.C.G.S. § 8C-1, Rule 404(b) for the purpose of proving identity.

Am Jur 2d, Evidence §§ 321, 330; Infants § 17.5.

7. Criminal Law § 34.4 (NCI3d)— murder and felony child abuse—prior instances of abuse—admissible

The trial court did not err in a prosecution for murder and felony child abuse by admitting testimony from former foster children of defendants regarding child abuse occurrences taking place in Chicago one or two years prior to the present crimes. The testimony was essentially the same as the testi-

mony of one of the victims and another witness and was properly admitted as corroborative evidence. The trial judge properly gave a limiting instruction prohibiting the jury from considering against defendant Sylvester Phillips testimony regarding any instance that occurred when Sylvester Phillips was not present.

Am Jur 2d, Evidence §§ 321, 330; Infants § 17.5.

8. **Criminal Law § 43.4 (NCI3d)— murder and felony child abuse—autopsy and crime scene photos—admissible**

The trial court did not err in a prosecution for murder and felony child abuse by admitting eighteen autopsy photographs of the victim and photographs of defendants' home and automobile. The autopsy photographs of the victim were necessary to illustrate the testimony of the pathologist and were not excessive or repetitive. Photographs of the home depicted the murder scene and the scene of the child abuse crimes, and the photographs of the automobile were used in testimony describing the victim being transported to the hospital.

Am Jur 2d, Homicide §§ 417-419.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.

9. **Criminal Law § 169.6 (NCI3d)— murder and felony child abuse—offers of proof refused—no prejudicial error**

There was no prejudicial error and no abuse of discretion on the part of the trial judge in a prosecution for murder and felony child abuse in the court's refusal to permit certain offers of proof.

Am Jur 2d, Trial § 128.

10. **Appeal and Error § 147 (NCI4th)— murder and felony child abuse—child witnesses competent to testify—no objection at trial**

Defendants did not object at trial to the court's ruling finding three child witnesses competent to testify and were precluded from attacking the rulings for the first time on appeal. N.C.G.S. § 8C-1, Rule 103(a)(1) (1988).

Am Jur 2d, Appeal and Error §§ 517, 601, 602.

11. Witnesses § 1.1 (NCI3d)— murder and felony child abuse—child witnesses—independent psychiatric evaluations—denied

The trial court did not err in a prosecution for murder and felony child abuse by denying defendants' motions for independent psychiatric evaluations of the child witnesses. There is no statutory authority for a superior court judge to order a witness to undergo a psychiatric evaluation, and defendants have not shown any prejudice from the denial of their motions because the child witnesses had been given a psychiatric evaluation and the doctor's testimony was available to defendants.

Am Jur 2d, Witnesses § 92.

12. Criminal Law § 107 (NCI4th)— murder and felony child abuse—child witnesses—records sealed

The trial court in a prosecution for murder and felony child abuse acted properly in not reviewing records and not reversing another judge's order sealing for appellate review medical, hospitalization, school, and social services records pertaining to three child witnesses and the victim. The first judge examined all of the records *in camera*, stated that he found no evidence favorable to defendants, concluded that the documents were not discoverable by defendants, and that the information should be sealed for appellate review. The trial judge had not heard any evidence in the case and his reliance on the first judge's decision was proper; moreover, the Supreme Court reviewed the sealed documents and agreed with the first judge's conclusions.

Am Jur 2d, Depositions and Discovery § 425.

13. Homicide § 30.3 (NCI3d); Parent and Child § 2.2 (NCI3d)—murder and felony child abuse—involuntary manslaughter and misdemeanor child abuse not submitted—no error

The trial court did not err in a prosecution for murder and felony child abuse by refusing to submit verdicts of either involuntary manslaughter or misdemeanor child abuse where there was no evidence to support those verdicts.

Am Jur 2d, Homicide §§ 530, 544.5; Infants § 17.5; Trial §§ 878, 880.

14. Parent and Child § 2.2 (NCI3d)— felony child abuse—instruction on serious physical injury—no error

The trial court did not err in a prosecution for felony child abuse by instructing the jury that serious physical injury is "such physical injury as causes great pain and suffering." N.C.G.S. § 14-318.4(a) (1986).

Am Jur 2d, Infants § 17.5; Trial §§ 701, 705.

15. Homicide § 25 (NCI3d)— murder by torture—definition of torture—no error

There was no prejudicial error in a prosecution for murder and felony child abuse where the court did not initially include the definition of torture, but gave a definition when requested by the jury which did not include premeditation and deliberation. Neither premeditation and deliberation nor intent to kill are elements of murder in the first degree when the homicide is perpetrated by means of torture, and any error in omitting the definition of torture in the original jury instructions was cured when the jurors later requested and the judge provided a correct definition.

Am Jur 2d, Homicide §§ 48, 499.

16. Criminal Law § 685 (NCI4th)— murder and felony child abuse—instruction on failure to testify—not timely requested

The trial judge did not err in a prosecution for murder and felony child abuse by failing to instruct on defendant Sylvester Phillips' decision not to testify or by failure to give other special instructions which were not requested until after the court had charged the jury and the jury had been sent to the jury room.

Am Jur 2d, Criminal Law § 940; Trial § 775.

17. Homicide § 31 (NCI3d)— murder—verdict sheet—theories of premeditation and deliberation or torture listed—no error

There was no error in a prosecution for murder and felony child abuse where the trial court indicated on a verdict sheet that defendants could be found guilty of first degree murder based upon the theories of premeditation and deliberation or torture or both. The jury found both defendants guilty of murder in the first degree by torture, made no finding as to murder in the first degree based on premeditation and

deliberation, and there was no evidence the jurors were confused or prejudiced by the choices listed on the verdict sheet.

Am Jur 2d, Homicide §§ 48, 52, 541, 542.

18. Homicide § 21.5 (NCI3d); Parent and Child § 2.2 (NCI3d)—murder and felony child abuse—evidence sufficient

The trial court did not err or abuse its discretion in a prosecution for murder and felony child abuse by refusing to enter a judgment notwithstanding the verdict, to set aside the verdict, to grant a mistrial, or to grant a new trial where the evidence was sufficient to submit charges of first degree murder and felony child abuse to the jury and to sustain the jury verdicts.

Am Jur 2d, Homicide § 425; Infants § 17.5.

APPEAL by defendants pursuant to N.C.G.S. § 7A-27(a) from judgments sentencing them to life imprisonment entered by *Ferrell, J.*, on 25 February 1988, in Superior Court, NEW HANOVER County. Defendants' motions to bypass the Court of Appeals as to additional judgments allowed by the Supreme Court 10 May 1988. Heard in the Supreme Court 15 February 1990.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

Michael W. Willis and T. Craig Wright for defendant-appellant Anne Phillips.

H. Clifton Hester and Don W. Viets, Jr. for defendant-appellant Sylvester Phillips.

Malcolm Ray Hunter, Appellate Defender, for Office of the Appellate Defender, amicus curiae; and Benjamin B. Sendor, Assistant Appellate Defender, pro hac vice.

FRYE, Justice.

On 6 October 1987, the Bladen County Grand Jury indicted both defendants on first degree murder and felony child abuse charges. The murder indictments charged each defendant with the first degree murder of Tameka Lehmann, on 14 June 1987, in violation of N.C.G.S. § 14-17. The child abuse indictments charged each defendant with, on the same date, intentionally inflicting serious

physical injury on John Phillips, age thirteen, in violation of N.C.G.S. § 14-318.4, which makes such offense a Class H felony when committed by a parent or other person providing care to or supervision of a child less than sixteen years of age. The four cases were consolidated for trial. On motion by both defendants, and after stipulations by the State and defendants, Judge Henry W. Hight, Jr., ordered a change of venue from Bladen County to New Hanover County where the trial took place. A jury found each defendant guilty of first degree murder of Tameka Lehmann by torture and felony child abuse of John Phillips. At the sentencing phase of the capital trial, the jury made findings of aggravating and mitigating circumstances but recommended life imprisonment for each defendant after failing to find that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstances. The trial judge sentenced both defendants to life imprisonment for first degree murder in accordance with the recommendations of the jury and to ten years imprisonment for felony child abuse. Both defendants appealed.

The State's evidence at trial tended to show a horrifying pattern of child abuse.

Defendant Anne Phillips, age sixty-eight, and her husband, defendant Sylvester Phillips, age fifty-seven, were the foster parents of Tameka Lehmann, the eleven-year-old murder victim, and Tarrie Lehmann, age ten. The defendants were also the adoptive parents of John Phillips, the child abuse victim, and Vera Phillips, age eleven.

On advice of his doctor, Sylvester Phillips moved to North Carolina from Chicago in 1983. Anne Phillips remained in Chicago with the children until the house was sold. In the interim, Sylvester Phillips returned to Chicago on visits and sometimes stayed in Chicago for as long as two weeks. In April of 1987, Anne Phillips and the four children moved from Chicago to Sylvester Phillips' home in Bladenboro, North Carolina.

At 3:17 a.m. on 15 June 1987, Tameka was taken to the emergency room of the Bladen County Hospital and pronounced dead on arrival. An autopsy was performed by Dr. Smedburg, a pathologist at Chapel Hill. Dr. Smedburg found the following marks on Tameka's body: horizontal linear abrasions on her abdomen consistent with having been bound; two scars and six abrasions on her top left shoulder; two abrasions on the inner side of her right arm; a one-

inch abrasion and a one-half-inch abrasion with contusion bruising on the right side of her hip; circular scars on her right knee and multiple abrasions around her kneecap; vertical patterned abrasions on the front of the lower part of her legs and tops of her feet; three parallel horizontal patterned abrasions and a recent U-shaped patterned abrasion on her back; a large gash bruise on her lower back containing fifty milliliters of blood; injury to the kidneys; three lacerations to the inside of her vaginal wall; multiple abrasions on the mons pubis, consistent with skin being cut by scissors; a bite mark on the mons pubis; fresh abrasions around her nose, nostrils, and mouth; fresh semicircular abrasions with hemorrhage underneath her neck; two hemorrhages beneath her scalp; and her stomach, mouth, and breathing tube contained vomitus with red and black flecks of material.

Dr. Smedburg diagnosed Tameka as fitting the battered child syndrome. He based his opinion on the patterned injuries, the various stages of healing, and the types of injuries which exceeded corporal punishment.

On 15 June 1987, Dr. Stanley Rule, a pediatrician and child medical examiner, examined the other children, at the request of the Bladen County Department of Social Services. Dr. Rule found evidence of child abuse on John Phillips. He noticed over one hundred injuries with at least sixty percent of the injuries appearing to be as recent as three days old or less. He also observed John walking with a limp and noticed abrasions, scratches, and bruises on John's body.

On both of John's feet, Dr. Rule found a great deal of swelling from the ankle bones down to John's toes. In Dr. Rule's opinion, the swelling was caused by some type of restriction in that area and was suggestive of a constriction or of being bound. There were fresh lesions on top of the swollen areas of his ankles. Four recent lesions and three scars were on John's scalp. A total of forty-two bruises or abrasions from twenty-four hours to three days old were on his back. There were two ulcer type lesions on the left buttock which formed a crater in the skin one-eighth of an inch deep, about one and one-half inches across. On John's chest Dr. Rule found three linear abrasions nine millimeters apart and about a centimeter in width and eleven centimeters long from the front of the armpit to the area of the nipple. These markings could have been caused by a rope or chain. On the right side

of the upper abdomen, Dr. Rule found four linear abrasions from John's rib cage to his waist. There were lesions several weeks old in the groin area; a two-inch fresh bruise on the right thigh; ten bruises on the left posterior thigh that were several days old; a fresh ulcerated lesion on the right middle toe; a hand fracture; and serious tissue injuries to the ankles.

Defendant Anne Phillips testified at trial, and stated that she never physically punished the children, but disciplined them by talking. Defendant Sylvester Phillips did not testify at trial.

Additional evidence and other matters relevant to defendants' specific assignments of error will be discussed later in this opinion as necessary for an understanding of the twenty-six issues raised by defendants. We will address the questions raised by defendants in four categories: I. pretrial motions; II. general trial rulings; III. jury instructions; and IV. dismissal and post-trial motions.

I.

[1] The first question we address is whether the trial court erred in determining that the State had rebutted defendants' prima facie case of racial discrimination in the selection of the foreman of the grand jury that indicted them. We conclude that the trial court did not err.

Defendants were first indicted by the Grand Jury of Bladen County on 3 August 1987. On 30 September 1987, defendants filed motions to dismiss the 3 August 1987 indictments, alleging that there was racial discrimination in the selection of the grand jury foreman. Defendants relied upon this Court's decision in *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987) (*Cofield I*) (filed 7 July 1987). The presiding judge announced to the grand jury in open court that, based on his reading of this Court's decision, he was going to remove the foreman of the grand jury. He then asked the grand jury to retire to the jury room and nominate a foreman for the grand jury. He told the grand jury: "You may nominate any one of your members, including Mr. Sessoms [the present foreman]."

The grand jury retired and nominated Mr. Sessoms. The judge, in his discretion, reappointed Mr. Sessoms as foreman of the grand jury. The district attorney then resubmitted the bills of indictment against both defendants to the grand jury, which returned true bills on 6 October 1987.

In *Cofield I*, this Court defined two methods of establishing a prima facie case of racial discrimination. To establish racial discrimination under the first method, the defendant must show that the selection procedure itself was not racially neutral. *Id.* at 308-09, 357 S.E.2d at 629. In order to establish racial discrimination under the second method, the defendant must show that for a substantial period in the past, relatively few blacks have served as foremen. *Id.* Defendants in the present case presented evidence under the second method by showing that since 1960 only one black in Bladen County had served as foreman. The presiding judge concluded that this evidence was sufficient to establish a prima facie case of racial discrimination. However, this conclusion related to the selection of the foreman of the grand jury that returned the 3 August 1987 indictments against the defendants.

The State may rebut defendants' prima facie case of racial discrimination by offering evidence that the process used in the selection of the foreman of the grand jury that indicted defendants for the present crimes was in fact racially neutral. *Id.* at 309, 357 S.E.2d at 629. *See also State v. Cofield*, 324 N.C. 452, 379 S.E.2d 834 (1989) (*Cofield II*). No evidence was presented as to the process used in selecting previous grand jury forepersons. The State presented evidence, and the presiding judge found as a fact that the foreman of the grand jury that returned the 6 October 1987 indictments against defendants "was selected by being elected from the members of the Grand Jury sitting on said Grand Jury." He further concluded that "the method used in selecting the Grand Jury foreperson who presided over the Grand Jury which returned the Bill of Indictment in this cause was . . . racially neutral." We see no reason to disturb the presiding judge's finding of fact or conclusions of law. His finding as to how the foreman was selected is supported by the evidence and his conclusion that the method used in selecting the foreman was racially neutral is, under the circumstances of this case, supported by the finding of fact. The record is silent as to the process used by the grand jury in nominating Mr. Sessoms as the foreman. On its face the process appears to be racially neutral. Nor is there any suggestion that the members of the grand jury acted in other than a racially neutral manner. Accordingly, we reject defendants' contention that the 6 October 1987 indictments must be quashed.

[2] Next, defendants take issue with their inability to conduct pretrial interviews with the children who were witnesses to the

alleged child abuse. The Bladen County Department of Social Services, the legal guardian of the children, refused to allow the children to be interviewed, citing substantial health, legal, and safety rights of the children. Nevertheless, defendants contend that they had a right to interview the children in order to properly prepare for trial.

The right to pre-trial discovery is a statutory right. N.C.G.S. §§ 15A-901 thru 910 (1988). Nothing in the statutory provisions compels State witnesses to subject themselves to questioning by the defense before trial. *See generally State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983); *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982). North Carolina rules of discovery provide that in a State criminal prosecution, statements made by a State witness or prospective State witness, other than the defendant, are not subject to discovery until that witness has testified on direct examination at trial. N.C.G.S. § 15A-903(f)(1) (1988). The children were prospective State witnesses, and defendants had no right to interview them prior to trial without their consent.

[3] In defendants' third argument, they contend that the court erred in quashing subpoenas issued to two of the children ordering them to appear and testify at the 14 December 1987 hearing on defendants' motion to suppress evidence seized pursuant to a search warrant. Defendants contend that since Vera and John Phillips supplied some of the information used in obtaining the search warrant, defendants' inability to subpoena these two children deprived them of the opportunity to present evidence that they were not credible and that the information supplied by them was unreliable. We note first that both Vera and John Phillips were subsequently found competent to testify at trial and that their trial testimony was corroborated by the testimony of other witnesses. We further note that the search warrant contained information from other sources sufficient as an independent basis for issuance of the warrant and that the court's findings of fact supporting validity of the warrant made no reference to the statements of John or Vera Phillips. Since the affidavits supplied in this case support probable cause even without the statements of John and Vera Phillips, the defendants were not prejudiced by their inability to call them as witnesses to impeach the search warrant. *See State v. Louchheim*, 296 N.C. 314, 250 S.E.2d 630 (1979) (even false information contained in an affidavit will not invalidate a search warrant if there is probable cause to support the warrant without the false informa-

tion). We therefore reject defendants' contention that quashing the subpoenas constituted reversible error.

II.

[4] Defendants contend in issue IV that the trial court should not have allowed the pediatrician, Dr. Rule, to give certain testimony on the battered child syndrome and that the trial court should not have given an instruction to the jury on battered child syndrome. Defendants contend the use of battered child syndrome testimony and instruction improperly allows the jury to infer that the injury to the child in question was perpetrated by the caretaker and that this improperly relieves the State of its burden to show the identity of the perpetrator. The State responds that the testimony complained of is authorized by the Rules of Evidence, has been held by this Court to be a proper subject of expert opinion, and that the instructions complained of properly allow a permissible inference based on circumstantial evidence. We agree with the State.

Dr. Rule was qualified and accepted by the court as an expert in pediatrics and child abuse. The portions of Dr. Rule's testimony of which defendants complain are all simply expert opinions or statements of inferences accepted by his profession. Dr. Rule's opinion that children deny abuse when questioned, that parents' continuous access to children is a factor he takes into consideration in determining whether child abuse has occurred, his opinion that the child is abused, and his opinion that the smaller child could not lift the larger child are all within the realm of his expertise and are permissible subjects of expert opinion. *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978).

[5] In instructing the jury, the trial judge made it clear that while a finding that a child suffered from the battered child syndrome permits an inference that such injuries were inflicted by a caretaker, such inference is not mandatory, and the burden remains on the State, and not the defendant, in reference to this issue. Therefore, there is no mandatory presumption shifting the burden of persuasion to defendants in violation of *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508 (1975), and *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39 (1979).

[6] In questions V, VI, and VII defendants take issue with the trial judge's decision to allow the testimony of John Phillips, Walter White, and John Haugabook. Walter White and John Haugabook

are former foster children of the defendants. John Phillips, the subject of the child abuse charge in this case, testified that defendants chained him to a pole in the basement of their house in Chicago. Defendants objected on the grounds that this evidence was too remote in time. The trial court overruled the objection and instructed the State to be specific as to when these events occurred. John then testified that at the time he was chained to the pole, he was the same size as he was at trial. In light of the discussion which follows, we conclude that this testimony resolves any problem of remoteness. *See State v. Shamsid-Deen*, 324 N.C. 437, 379 S.E.2d 842 (1989).

Defendants were charged with felony child abuse of John. The State was required to prove the identity of the perpetrators. In *State v. Byrd*, 309 N.C. 132, 305 S.E.2d 724 (1983), this Court found insufficient evidence of the identity of the perpetrator of felony child abuse because the evidence showed that there were three other adults living in the house who had the opportunity to inflict the injuries. In the instant case, defendants contended that the injuries to John were inflicted by his younger siblings. In order to show that the defendants were the perpetrators, the State was allowed to present evidence through John that both defendants previously chained him to a pole in their basement in Chicago. These circumstances were similar to the evidence that John was tied with a dog chain in North Carolina and explained the medical evidence that the serious injury to John's ankles was caused by their being tightly bound. As in *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593 (1988), "the similarities [of the two incidents] support the reasonable inference that the same person committed both the earlier and the later crimes." The evidence was therefore relevant and admissible under N.C.G.S. § 8C-1, Rule 404(b), for the purpose of proving identity.

[7] Defendants sought to prohibit testimony from White and Haugabook concerning child abuse occurrences that took place in Chicago one or two years prior to the present crimes. White and Haugabook testified that they witnessed defendant Anne Phillips perform the same or similar child abuse acts on John Phillips that Vera and John Phillips had testified about. The trial court allowed the evidence for purposes of corroboration only. "Evidence which is inadmissible for substantive or illustrative purposes may nevertheless be admitted as corroborative evidence in appropriate cases

when it tends to enhance the credibility of a witness." *State v. Burns*, 307 N.C. 224, 229, 297 S.E.2d 384, 387 (1982).

Vera and John Phillips testified that defendants made Tameka eat red peppers and soap. Vera testified that defendants tied John and Tameka with a dog chain and hung them over a door. She stated that defendants beat Tameka with a pan, their fists, a lamp cord, a switch, and a rubber flap. Vera also testified that she saw defendant Anne Phillips put Tameka's head in a commode and flush it.

White and Haugabook provided testimony regarding John being chained to the pole, sexual acts, and the incident involving the red peppers. The testimony of White and Haugabook was essentially the same as the testimony of Vera and John, therefore it added credibility to Vera's and John's statements. White's and Haugabook's testimony was properly admitted as corroborative evidence. *See State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985).

Although the trial judge allowed the testimony of White and Haugabook for corroborative purposes, he also gave limiting instructions prohibiting the jury from considering, "for any purpose as against defendant Sylvester Phillips," testimony regarding any incidents that occurred when Sylvester Phillips was not present. A trial judge may allow evidence which is competent for one defendant, yet incompetent as to a co-defendant, so long as the judge provides an explicit instruction to the jury that such testimony should not be considered by the jury in any way in determining the charges against the co-defendant. *See State v. Franklin*, 248 N.C. 695, 104 S.E.2d 837 (1958). Since the trial judge gave a limiting instruction, there was no error, and these assignments of error are without merit and rejected.

[8] In questions VIII and IX, defendants contend that the trial court erred in allowing eighteen autopsy photographs of the victim and photographs of defendants' home and automobile into evidence. Defendants contend that the photographs were prejudicial and irrelevant.

Photographs of homicide victims are admissible at trial, even if they are "gory, gruesome, horrible, or revolting, so long as they are used by a witness to illustrate his testimony and so long as an excessive number of photographs are not used solely to arouse the passions of the jury." *State v. Murphy*, 321 N.C. 738, 741,

365 S.E.2d 615, 617 (1988); *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987). The autopsy photographs of the victim were necessary to illustrate the testimony of the pathologist, Dr. Smedburg, and were not excessive or repetitive. Therefore, the photographs were properly admitted. This assignment of error is without merit.

Photographs depicting crime scenes and automobiles belonging to defendants are routinely admitted in criminal trials. *1 Brandis on North Carolina Evidence* § 34 (3d ed. 1988). Photographs of the home depicted the murder scene and the scene of the child abuse crimes. Photographs of the automobile were used in testimony describing the victim being transported to the hospital. Thus, the photographs depicting defendants' home and automobile were properly admitted to portray the scene of the crime.

[9] In question X, defendants contend that the trial court erred in refusing to allow defendants to make offers of proof for the record. The first offer of proof concerned an inquiry of witness Vera Phillips about her knowledge that John Phillips had testified that he knew District Attorney Michael Easley, Assistant District Attorney Thomas Hicks, and Chris Blashfield, a psychologist. Defendants contend that they should have been allowed to ask Vera a series of questions not necessarily related to her knowledge of the charges against the defendants in order to determine whether she was competent to testify in this case. The second offer of proof concerned Mark Podolner's testimony relating to the psychological state of Tarrie Lehmann. Podolner, a social worker, would testify that Tarrie's testimony at trial was inconsistent with statements previously made by Tarrie although Podolner was not in the courtroom when Tarrie testified. The third offer of proof concerned statements made by the children to Detective Steve Bunn that they had been hung over the doors in their home by chains and ropes. The defendants attempted to clarify a previous answer given by Detective Bunn by asking him to specify exactly what doors in the home were used to allegedly hang the children. Three of the remaining four offers of proof concerned the defendants' religious beliefs and their involvement in the church. The final offer of proof concerned certain subpoenas which had been delivered to the Plainview School and the Tarheel School requiring the schools to give Detective Bunn their records regarding the children.

While "[o]rdinarily, counsel should be allowed to insert in the record the answer to a question to which objection has been sustained, . . . where the witness has already answered the question sufficiently to demonstrate the immateriality of the inquiry, the judge's refusal to allow the preservation of the answer will not be held prejudicial error." *State v. Chapman*, 294 N.C. 407, 415, 241 S.E.2d 667, 672 (1978). We have reviewed the seven instances cited by defendants in which the trial judge refused to permit offers of proof, as well as the numerous instances cited by the State in which the trial court permitted defendants to make extensive offers of proof for the record. We find no prejudicial error and no abuse of discretion on the part of the trial judge.

[10] Defendants contend in their next assignment of error that the trial court erred in denying their motion to determine the competency of the child witnesses and their motions for independent psychiatric evaluations of the children. We first note that there is no record of the trial judge denying defendants' motion to determine the competency of the children. However, just prior to trial, defendants renewed their motion and the trial judge at that point conducted a competency hearing for each child witness. The trial judge conducted the competency hearings and made rulings pursuant to N.C.G.S. § 8C-1, Rule 601. Determining the competency of a witness to testify is a matter which rests in the sound discretion of the trial court. *State v. Fearing*, 315 N.C. 167, 337 S.E.2d 551 (1985). Defendants made no objection to the court's rulings which found each of the three child witnesses competent to testify; therefore, defendants are precluded from attacking the rulings for the first time on appeal. N.C.G.S. § 8C-1, Rule 103(a)(1) (1988).

[11] There is no statutory authority for a superior court judge to order a witness to undergo a psychiatric evaluation. *See State v. Fletcher*, 322 N.C. 415, 368 S.E.2d 633 (1988); *State v. Clontz*, 305 N.C. 116, 286 S.E.2d 793 (1982). Also, defendants have not shown any prejudice from denial of their motions for independent psychiatric examinations of the children, assuming the court had such authority. The child witnesses had been given a psychiatric evaluation by Dr. Lee. Dr. Lee was not a State employee, and the psychiatric evaluations were not requested by the State of North Carolina. Dr. Lee's testimony was available to defendants to bring out at trial the mental retardation and psychiatric problems of the children. Thus, this assignment of error is without merit.

[12] Defendants' question XII asserts a Brady violation. The United States Supreme Court, in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Defendants contend that the trial court erred by refusing to conduct an *in camera* inspection or to order disclosure of psychological, medical, and school records. Defendants also contend that the court erred by refusing to admit testimony regarding psychological evaluations performed on the victim and the child witnesses. Defendants contend that they were denied access to medical, hospitalization, school, and social services records that pertained to the three child witnesses and the victim. Defendants further contend that these records were needed by them to make an informed decision about the relevancy of the documents.

A judge is required to order an *in camera* inspection and make findings of fact concerning the evidence at issue only if there is a possibility that such evidence might be material to guilt or punishment and favorable to the defense. However, if after the judge examines the evidence he rules against the defendant's discovery motion, the judge should order the records sealed for appellate review. *State v. Hardy*, 293 N.C. 105, 128, 235 S.E.2d 828, 842 (1977).

Judge Barefoot requested for his review all records in the possession of the Bladen County Department of Social Services, the Bladen County Mental Health Department, Cumberland County Hospital, the Bladen County Board of Education, and Dr. Fred Lee relating to John and Vera Phillips. On 18 December 1987, Judge Barefoot entered an order stating that he had received all of the records and examined them *in camera*. Judge Barefoot stated that he found no information favorable to the defendants. Judge Barefoot concluded that the documents examined were not discoverable by the defendants and that the information should be sealed for appellate review. Judge Ferrell, the trial judge, refused to review the records and also refused to reverse Judge Barefoot's order since Judge Barefoot had already reviewed the documents and had not found anything favorable to defendants. Judge Ferrell had not heard any evidence in the case prior to making his decision; therefore, his reliance on Judge Barefoot's order was proper. We have reviewed the sealed documents, and

we agree with Judge Barefoot's conclusions that the documents do not contain information favorable to either defendant and are not therefore subject to discovery by defendants.

III.

[13] Defendants contend in their next group of assignments of error that the trial court erred in several instructions given to the jury. In question XV defendants contend that the trial court erred by failing to charge the jury on involuntary manslaughter as to Tameka and misdemeanor child abuse as to John. Misdemeanor child abuse is the nonaccidental infliction of nonserious physical injury to a child by a caretaker. *State v. Byrd*, 309 N.C. 132, 305 S.E.2d 724 (1983). In the instant case, the children suffered serious physical injuries, and defendants contend that they did not inflict any of the injuries on the children. Throughout the trial defendants contended that the other children and not the defendants inflicted the injuries on the victims. The State proceeded on a theory that defendants intentionally inflicted the injuries. Therefore, no evidence was presented to support a verdict of misdemeanor child abuse, and the trial judge was correct in refusing to instruct on such a charge.

Defendants also contend that an instruction on involuntary manslaughter was improperly denied. Involuntary manslaughter is the unintentional killing of a human being without malice proximately caused by either (1) an unlawful act which does not amount to a felony and is not naturally dangerous to human life, or (2) a culpably negligent act or omission. *State v. Greene*, 314 N.C. 649, 336 S.E.2d 87 (1985). The homicide victim, Tameka Lehmann, died of serious physical injuries. There were fresh hemorrhages on her head, neck, genital area, and sacrum, as well as numerous other serious injuries on other parts of her body. The evidence tended to show that the injuries were intentionally inflicted by a cooking pan, a board, a rope, a chain, and scissors. Defendants denied having inflicted the injuries upon Tameka; their evidence tended to implicate the other children as the perpetrators. Therefore, there was no evidence to support involuntary manslaughter. The trial judge did not err in failing to submit involuntary manslaughter as a possible verdict. "It is well settled that a jury should only be instructed with regard to a possible verdict if there is evidence to support it." *State v. Clark*, 325 N.C. 677, 684, 386 S.E.2d 191 (1989). Since there was no evidence to support verdicts of either

involuntary manslaughter or misdemeanor child abuse, the trial judge did not err in failing to instruct the jury on these charges.

[14] In defendants' question XVI, they contend that the trial court committed reversible error in its instruction to the jury on felony child abuse. Felony child abuse is the intentional infliction of serious injuries by a caretaker to a child. *State v. Campbell*, 316 N.C. 168, 340 S.E.2d 474 (1986). Defendants contend that in the trial judge's instruction on felony child abuse he incorrectly defined serious physical injury to be "such physical injury as causes great pain and suffering." The relevant child abuse statute provides:

> A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class H felony.

N.C.G.S. § 14-318.4(a) (1986).

The trial judge defined serious physical injury as injuries that cause great pain and suffering. Defendants contend that the trial judge's definition of serious physical injury was incorrect in light of *State v. Young*, 67 N.C. App. 139, 312 S.E.2d 665 (1984). However, *Young* was overruled by *State v. Campbell*, 316 N.C. 168, 340 S.E.2d 474. *Young* also predates the relevant statute in the present case and therefore is not applicable. We hold that the trial court's instruction on felony child abuse was proper.

[15] In defendants' next assignment of error, they challenge the judge's instruction on murder by torture because a definition of torture was not given and because the evidence was not sufficient to support a verdict of murder in the first degree by torture.

Defendants' complaint is that although the judge instructed the jury that the State had the burden to prove beyond a reasonable doubt that defendants intentionally tortured Tameka, the judge nevertheless did not include a definition of torture. However, after deliberations had begun, the jury returned to the courtroom and requested a definition of torture. The judge then instructed that "torture is defined to be the act or process of inflicting great, severe or extreme pain by one or more persons upon another." He stated that "in this context, torture means something more than a single act." Defendants concede that the court's definition

of torture was correct; however, they contend that the judge failed to describe the differences between a first degree torture murder and an unlawful killing in which the victim suffered great, severe, or extreme pain. We note, and defendants admit, that the trial judge charged the jury that, to convict defendants of murder by torture, the torture must have been 1) intentionally inflicted, 2) with malice, and 3) a proximate cause of the death of the victim. Nevertheless, defendants contend that if they are charged with first degree murder by torture, the jury must be instructed that defendants committed the torturous acts with premeditation and deliberation. We disagree. The jury instructions given by the trial judge parallel the instructions approved in *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986), comport with the North Carolina Pattern Jury Instructions, and are correct.

North Carolina General Statute § 14-17 separates first degree murder into four distinct categories, as follows:

> 1. Murder perpetrated by means of poison, lying in wait, imprisonment, starving or torture;
>
> 2. Murder perpetrated by any other kind of willful, deliberate and premeditated killing;
>
> 3. Murder committed in the perpetration or attempted perpetration of certain enumerated felonies;
>
> 4. Murder committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon.

N.C.G.S. § 14-17 (1986 & Cum. Supp. 1990).

Neither premeditation and deliberation nor intent to kill are elements of murder in the first degree when the homicide is perpetrated by means of torture. *State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781. Since premeditation and deliberation are *not* elements of the offense as charged, the trial court was not required to instruct the jury on such elements. We further conclude that any error that may have been committed by omitting the definition of torture in the original jury instructions was cured when the jurors later requested and the judge provided them with a correct definition of torture.

[16] In defendants' question XVIII, they contend that the trial court committed prejudicial error by refusing to instruct on Sylvester

Phillips' decision not to testify. At the conclusion of the evidence, the trial court conducted a jury instruction conference as mandated by N.C.G.S. § 15A-1231(b). At the conference, defendant Sylvester Phillips made no written requests for instructions and did not make a written or oral request for the trial court to instruct the jury on the effect of the defendant's decision not to testify. Judge Ferrell then informed the parties, pursuant to N.C.G.S. § 15A-1231(b), what portions of the tendered instructions he would give, and also informed them of what offenses he would instruct. He also told counsel for defendant that his charge would be "right out of the [pattern jury instruction] book."

After Judge Ferrell gave his charge and sent the jury out, counsel for Sylvester Phillips, for the first time, requested pattern jury instruction 101.30 on his client's decision not to testify. Since counsel did not present the request in writing and did not request it prior to the jury charge, Judge Ferrell declined to call the jury back for this special instruction. This was not the same sequence of events as in *State v. Ross*, 322 N.C. 261, 367 S.E.2d 889 (1988), filed in May of 1988, three months after the trial of the instant case. In *Ross*, defendant's counsel made a timely request for the charge, the court agreed to give it, and then, apparently through inadvertence, omitted to give the charge. This Court found this to be a violation of the defendant's constitutional rights which was prejudicial. In the instant case, counsel for Sylvester Phillips did not make a timely request for the instruction and Judge Ferrell made no promise to give the instruction. This distinguishes the instant case from our decision in *Ross*. Nor is defendant entitled to relief under the United States Supreme Court's decision in *Carter v. Kentucky*, 450 U.S. 288, 67 L. Ed. 2d 241 (1981) (upon timely request, a state trial court must give an instruction that a defendant's failure to testify should not prejudice him).

We also reject defendants' contentions in argument XIX that the trial judge erred in failing to give special instructions not requested by defendants until after the court had charged the jury and the jury had been sent to the jury room. *See State v. Martin*, 322 N.C. 229, 367 S.E.2d 618 (1988) (defendant waived right to object by failing to submit request for instruction in writing at or before the jury conference).

[17] In defendants' question XX, they contend that the trial court erred by indicating on the verdict sheet that defendants could

be found guilty of first degree murder based upon the theories of either premeditation and deliberation or torture or both. Defendants contend that there was no justification for submitting the alternate theories of conviction of first degree murder to the jury and that submitting the issues in this manner caused the jurors to be confused. We find no evidence that the jurors were confused or prejudiced by the choices listed on the verdict sheet. The jury found both defendants guilty of murder in the first degree by torture and made no finding as to murder in the first degree based on premeditation and deliberation. Had the jury recommended a sentence of death, a finding of the existence of premeditation and deliberation could have been relevant to this Court's proportionality review of the sentence. *See State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984). We find no merit in this assignment of error.

IV.

[18] In defendants' questions XXI through XXVI they contend that the evidence was insufficient to withstand their motion to dismiss, that the court erred by refusing to enter a judgment notwithstanding the verdict or to set aside the verdict, and that the court erred by refusing to grant a mistrial or in the alternative a new trial. We conclude that the evidence was sufficient to submit the charges of first degree murder and felony child abuse to the jury and to sustain the jury verdicts, and that there was no error or abuse of discretion in denying defendants' requests submitted in questions XXI through XXVI.

For the reasons stated herein, we conclude that defendants received a fair trial, free from prejudicial error.

No error.

WAYNE COUNTY CITIZENS ASSOCIATION FOR BETTER TAX CONTROL: ROBERT OUTLAW, INDIVIDUALLY, AND AS CHAIRMAN OF THE WAYNE COUNTY CITIZENS ASSOCIATION FOR BETTER TAX CONTROL; JOE DAUGHTERY, INDIVIDUALLY, AND AS SECRETARY-TREASURER OF THE WAYNE COUNTY CITIZENS ASSOCIATION FOR BETTER TAX CONTROL; ED ALLEN, JIM BARNWELL, GARLAND JOYNER, AND THOMAS WOOTEN, ALL INDIVIDUALLY, AND AS MEMBERS OF THE BOARD OF DIRECTORS OF THE WAYNE COUNTY CITIZENS ASSOCIATION FOR BETTER TAX CONTROL v. WAYNE COUNTY BOARD OF COMMISSIONERS, ATLAS PRICE, JOHN WOOTEN, BETSY JOHNSON, TOMMY JARRETT, J. NELSON KORNEGAY, HOWARD BUDDY SHAW, AND JERRY BRASWELL, ALL AS MEMBERS OF THE WAYNE COUNTY BOARD OF COMMISSIONERS

No. 252PA90

(Filed 10 January 1991)

1. **Counties § 6.2 (NCI3d); Municipal Corporations § 38 (NCI3d) — local governments — financing improvements — installment contracts — security interest — constitutionality of statute**

The statute authorizing local governments to finance the construction of improvements on real property by installment contracts that create a security interest in the improvements and real property without a vote of the people, N.C.G.S. § 160A-20, does not violate Art. V, §§ 4(2), 4(5) and 7(2) of the N.C. Constitution since the statute clearly bars the pledging of the taxing power to secure monies due under a contract covered by the statute. The possibility that appropriations which might include income from tax revenues will be used to repay the indebtedness under the contract is not a constitutionally significant factor.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 100, 494.

2. **Counties § 6.2 (NCI3d); Municipal Corporations § 38 (NCI3d) — local governments — improvements to realty — installment purchase contracts — compliance with statute**

N.C.G.S. § 160A-20 implicitly authorized the use of county revenues to make payments under an installment purchase contract. Furthermore, a county board of commissioners complied with the provisions of § 160A-20 in entering an installment purchase contract for court, administrative and jail buildings where the contract granted a security interest in the real property on which the buildings were located; the

county's installment payments are to be made from appropriations in the sole discretion of the county for any fiscal year in which the contract is in effect; the contract and other documents provide that the taxing power of the county is not pledged directly or indirectly to secure any monies due; the lender's sole remedy for failure of the county to make the required payments is to repossess the real property; the contract provides that no deficiency judgment may be rendered against the county; and the Local Government Commission made the required findings and gave its required approval of the contract.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 100, 494.

ON discretionary review prior to determination by the Court of Appeals pursuant to N.C.G.S. § 7A-31 and Rule 15 of the North Carolina Rules of Appellate Procedure, upon the joint petition of the parties, of orders of *Butterfield, J.*, signed on 4 April 1990 and 6 April 1990, respectively, at the 26 March 1990 regular term of Superior Court, WAYNE County. Heard in the Supreme Court 14 November 1990.

Braswell & Taylor, Attorneys, by Roland C. Braswell, for plaintiff-appellants.

Baddour, Parker & Hine, P.A., by E.B. Borden Parker, and Parker, Poe, Adams & Bernstein, by Charles C. Meeker, Blair Levin, and Heman R. Clark, for defendant-appellees.

Lacy H. Thornburg, Attorney General, by Douglas A. Johnston, Assistant Attorney General, amicus curiae.

Hunton & Williams, by William H. McBride; N.C. Association of County Commissioners, by James B. Blackburn III, General Counsel; and N.C. League of Municipalities, by S. Ellis Hankins, General Counsel, for North Carolina Association of County Commissioners and North Carolina League of Municipalities, amici curiae.

MEYER, Justice.

Plaintiffs in this action are an unincorporated group known as Wayne County Citizens Association for Better Tax Control (hereinafter "Tax Association") and individuals who are citizens,

residents, and taxpayers of Wayne County acting individually and as officers and members of the Board of Directors of the Tax Association. By a complaint filed 26 January 1990, plaintiffs challenged the constitutionality of N.C.G.S. § 160A-20, which authorizes a local government unit to enter into a contract granting a security interest in real property subject to improvement. The relief sought by the plaintiffs was that N.C.G.S. § 160A-20 be declared unconstitutional as being in violation of article V, section 4 and section 7(2) of the North Carolina Constitution and, further, a declaration that defendants did not comply with the provisions of that statute in carrying out the transaction complained of. The defendant Board of Commissioners and its members filed an answer denying the material allegations of the complaint and subsequently filed motions for summary judgment and to dismiss the action.

The matter was heard before Butterfield, J., at the 26 March 1990 term of Superior Court on defendants' motion for summary judgment. By order entered 29 March 1990 and signed 4 April 1990, the trial judge, after ruling that there was no genuine issue as to any material fact and that the court would rule as a matter of law on all issues pending therein, (1) ordered, with the consent of all parties, that the Attorney General of North Carolina, who had filed a brief, be allowed to appear as a friend of the court; (2) held that the individual plaintiffs and the Tax Association have standing to bring the action and are proper parties; (3) held that the County of Wayne and the other defendants had complied with the provisions of N.C.G.S. § 160A-20 and that defendants' actions in the matter as they relate to that statute were lawful; (4) reserved ruling on the constitutionality of N.C.G.S. § 160A-20 and ruled that he would henceforth treat the action as an action for declaratory judgment; and (5) allowed the parties until 4 April 1990 to submit additional briefs.

On 6 April 1990, the trial judge, based upon the record in the case (including a stipulation of the parties), briefs submitted to the court, and oral argument, found as a fact and concluded as a matter of law that N.C.G.S. § 160A-20 was constitutional in every respect, taxed the costs of the action to the plaintiffs, and dismissed the action. Plaintiffs appealed from both orders, and we allowed the parties' joint petition and the Attorney General's supplemental petition to bypass the Court of Appeals on 26 July 1990.

Plaintiffs assign as error that the trial judge erred (1) in his ruling that N.C.G.S. § 160A-20 is constitutional in all respects; (2) in his ruling that defendants had complied with the provisions of N.C.G.S. § 160A-20; and (3) therefore, erred in dismissing the plaintiffs' action. We conclude that the trial judge did not err, and we therefore affirm his orders.

In 1989, the Board of Commissioners of Wayne County determined that the County needed to build additional county court, administrative, and jail facilities. These facilities consist of a new four-story court and administrative building with 96,590 square feet (including five new courtrooms and offices for the clerk of court, the district attorney, and the register of deeds) and a new five-story jail with 44,000 square feet. After public notice and hearing, the Board of Commissioners approved negotiation of a $7,500,000 installment purchase contract (hereinafter "the contract") with First Union Securities, Inc. Upon application by Wayne County, the Local Government Commission of North Carolina approved the contract. The contract was not submitted to a vote of the people of Wayne County for their approval.

As part of the contract, First Union Securities was granted a security interest on the real property on which the court, administrative, and jail buildings were located. Wayne County's installment payments are to be made from appropriations in the sole discretion of Wayne County for any fiscal year in which the contract is in effect. The contract and other documents associated with this transaction expressly provide that (1) the taxing power of Wayne County is *not* pledged directly or indirectly to secure any monies due; (2) to the extent that Wayne County does not make any payment beyond that appropriated by the County for any fiscal year in which the contract is in effect, First Union Securities' sole remedy is to repossess the real property; and (3) no deficiency judgment may be rendered against the County.

Specifically, article XV of the contract, in pertinent part, provides the following as to the "LIMITED OBLIGATION OF THE COUNTY":

> NO PROVISION OF THIS CONTRACT SHALL BE CONSTRUED OR INTERPRETED AS CREATING A PLEDGE OF THE FAITH AND CREDIT OF THE COUNTY WITHIN THE MEANING OF ANY CONSTITUTIONAL DEBT LIMITATION. NO PROVISION OF THIS CONTRACT SHALL BE CONSTRUED OR INTERPRETED AS CREATING A DELEGATION OF GOVERNMENTAL POWERS NOR AS A DONATION BY OR A LENDING

> OF THE CREDIT OF THE COUNTY WITHIN THE MEANING OF THE CONSTITUTION OF THE STATE. THIS CONTRACT SHALL NOT DIRECTLY OR INDIRECTLY OR CONTINGENTLY OBLIGATE THE COUNTY TO MAKE ANY PAYMENTS BEYOND THOSE APPROPRIATED IN THE SOLE DISCRETION OF THE COUNTY FOR ANY FISCAL YEAR IN WHICH THE CONTRACT IS IN EFFECT; PROVIDED, HOWEVER, ANY FAILURE OR REFUSAL BY THE COUNTY TO APPROPRIATE FUNDS, WHICH RESULTS IN THE FAILURE BY THE COUNTY TO MAKE ANY PAYMENT COMING DUE HEREUNDER WILL IN NO WAY OBVIATE THE OCCURRENCE OF THE EVENT OF DEFAULT RESULTING FROM SUCH NONPAYMENT. NO DEFICIENCY JUDGMENT MAY BE RENDERED AGAINST THE COUNTY IN ANY ACTION FOR BREACH OF A CONTRACTUAL OBLIGATION UNDER THIS CONTRACT AND THE TAXING POWER OF THE COUNTY IS NOT AND MAY NOT BE PLEDGED DIRECTLY OR INDIRECTLY OR CONTINGENTLY TO SECURE ANY MONEYS DUE UNDER THIS CONTRACT.

Plaintiff-appellants argue that under the installment purchase contract between First Union Securities and Wayne County, the Board could be forced to appropriate money in future years to make payments under the contract. We do not agree. The plain language of the document does not provide such power, and our decision is based upon our conclusion that such power does not exist.

Article XV of the contract provides in part:

> THIS CONTRACT SHALL NOT DIRECTLY OR INDIRECTLY OR CONTINGENTLY OBLIGATE THE COUNTY TO MAKE ANY PAYMENTS BEYOND THOSE APPROPRIATED IN THE SOLE DISCRETION OF THE COUNTY FOR ANY FISCAL YEAR IN WHICH THE CONTRACT IS IN EFFECT; PROVIDED, HOWEVER, ANY FAILURE OR REFUSAL BY THE COUNTY TO APPROPRIATE FUNDS, WHICH RESULTS IN THE FAILURE BY THE COUNTY TO MAKE ANY PAYMENT COMING DUE HEREUNDER WILL IN NO WAY OBVIATE THE OCCURRENCE OF THE EVENT OF DEFAULT RESULTING FROM SUCH NONPAYMENT.

This language makes clear that the annual events of appropriation are subject to the *sole discretion* of the Board. Under the plain language of the contract, the Board cannot be forced to appropriate amounts for payment of the contract in any year. Article XV also provides that, to the extent that there may be any conflict between this article and any other provision in the contract, article XV takes priority.

[1] We first address plaintiffs' contention that N.C.G.S. § 160A-20 is unconstitutional. In determining the constitutionality of N.C.G.S. § 160A-20, we begin with several well-settled principles. The first is that a statute enacted by the General Assembly is presumed to be constitutional.

> The presumption is in favor of the constitutionality of an act. All doubts must be resolved in favor of the Act. The Constitution is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision.

In re Housing Bonds, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982) (citations omitted) (issuance of bonds to finance housing for persons of moderate income held constitutional). A statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground. *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 63, 366 S.E.2d 697, 698 (1988) (it is well settled that an act passed by the legislature is presumed to be constitutional); *Ramsey v. Veterans Commission*, 261 N.C. 645, 647, 135 S.E.2d 659, 661 (1964) (a statute is presumptively valid and will not be declared void if it can be upheld on any reasonable ground). Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter. *Rhodes v. Asheville*, 230 N.C. 759, 53 S.E.2d 313 (1949) (statute construed so as to be within legislative authority of General Assembly).

The plaintiffs contend that N.C.G.S. § 160A-20 is invalid because it contravenes article V, section 4 of the Constitution of North Carolina. That section of our Constitution authorizes the General Assembly to regulate local government finance. The authority of the General Assembly in that regard is limited by subsection (2) of the same article, which provides:

> *Authorized purposes; two-thirds limitation.* The General Assembly shall have no power to authorize any county, city or town, special district, or other unit of local government to contract *debts secured by a pledge of its faith and credit* unless approved by a majority of qualified voters of the unit who vote thereon . . . .

N.C. Const. art. V, § 4(2) (emphasis added). Definitions for the terms used in that subsection are provided in subsection (5):

> *Definitions.* A debt is incurred within the meaning of this Section when a county, city or town, special district, or other unit, authority, or agency of local government borrows money. A pledge of faith and credit within the meaning of this Section is a pledge of the taxing power.

N.C. Const. art. V, § 4(5). Section 4 does not prohibit local governments from financing capital projects without a vote of the people so long as the financing is not by borrowing money, the debt for which is secured by a pledge of the taxing power.

Article V, section 7(2) provides: "No money shall be drawn from the treasury of any county, city or town, or other unit of local government except by authority of law."

N.C.G.S. § 160A-20 provides in pertinent part:

> (b) Cities, counties, and water and sewer authorities created under Article 1 of Chapter 162A of the General Statutes may finance the construction or repair of fixtures or improvements on real property by contracts that create in the fixtures or improvements, or in all or some portion of the property on which the fixtures or improvements are located, or in both, a security interest to secure repayment of moneys advanced or made available for such construction or repair.
>
> . . . .
>
> (e) A contract entered into under this section is subject to approval by the Local Government Commission under Article 8 of Chapter 159 of the General Statutes if it:
>
> (1) Meets the standards set out in G.S. 159-148(a)(1), 159-148(a)(2), and 159-148(a)(3), or involves the construction or repair of fixtures or improvements on real property; and
>
> (2) Is not exempted from the provisions of that Article by one of the exceptions contained in G.S. 159-148(b).
>
> (f) No deficiency judgment may be rendered against any city, county, or water and sewer authority created under Article 1 of Chapter 162A of the General Statutes in any action for breach of a contractual obligation authorized by this sec-

tion, and *the taxing power of a city or county is not and may not be pledged directly or indirectly to secure any moneys due under a contract authorized by this section.*

N.C.G.S. § 160A-20(b), (e), (f) (Cum. Supp. 1990) (emphasis added).

The statute could hardly be clearer in barring the pledging of the taxing power to secure moneys due under a contract covered by the statute. It, likewise, clearly authorizes the method of financing employed here and, by implication, the payment of the debt incurred. By its unmistakable terms, N.C.G.S. § 160A-20 respects the constitutional prohibitions of article V, sections 4 and 7; in addition, no deficiency judgment can be rendered against the local government. Plaintiffs contend that defendants, by the ruse of the contract, were attempting to do indirectly that which they could not do directly, that is, incur a contract debt wherein, as security, defendants pledged not only the property in question, but the faith and credit of the County, because defendants are going to pay the contract debt and interest with moneys raised through taxation. We disagree.

Plaintiffs argue that N.C.G.S. § 160A-20 is unconstitutional because the statute allows the County to enter into an agreement pursuant to which the County may expend tax revenues in future years without a vote of the people. We find no merit in this argument. What is being pledged as security is the constitutionally significant factor. Unlike general obligation bonds, wherein the taxing power of the governmental unit is pledged, in installment purchase contracts, only the property improved is pledged. The possibility that appropriations which might include income from tax revenues will be used to repay the indebtedness under the contract is not a constitutionally significant factor.

Courts in a number of other jurisdictions have upheld as constitutional installment purchase contracts by units of government such as the one here. *See Searcy County v. Horton*, 270 Ark. 22, 603 S.W.2d 437 (1980); *Glennon Heights, Inc. v. Central Bank & Trust*, 658 P.2d 872 (Colo. 1983); *State v. Johnson County Jail Bldg. Corp.*, 437 N.E.2d 477 (Ind. Ct. App. 1982); *Edgerly v. Honeywell Info. Syss., Inc.*, 377 A.2d 104 (Me. 1977); *Cox v. Jackson Mun. Separate School Dist.*, 503 So. 2d 265 (Miss. 1987); *St. Charles City-County Libr. Dist. v. St. Charles Libr. Bldg. Corp.*, 627 S.W.2d 64 (Mo. Ct. App. 1981); *Ruge v. State*, 201 Neb. 391, 267 N.W.2d 748 (1978); *Enourato v. N.J. Building Auth.*, 182 N.J. Super. 58,

440 A.2d 42 (1981), *aff'd*, 90 N.J. 396, 448 A.2d 449 (1982); *Burns v. Egan*, 129 Misc. 2d 130, 492 N.Y.S.2d 666 (N.Y. Sup. Ct. 1985), *aff'd*, 117 A.D.2d 38, 501 N.Y.S.2d 742 (3d Dept. 1986); *U.C. Leasing, Inc. v. State ex rel. State Bd. of Pub. Affairs*, 737 P.2d 1191 (Okla. 1987); *McFarland v. Barron*, 83 S.D. 639, 164 N.W.2d 607 (1969); *Texas Pub. Bldg. Auth. v. Mattox*, 686 S.W.2d 924 (Tex. 1985); *Municipal Bldg. Auth. of Iron County v. Lowder*, 711 P.2d 273 (Utah 1985); *Baliles v. Mazur*, 224 Va. 462, 297 S.E.2d 695 (1982); *State ex rel. W. Va. Resource Recovery v. Gill*, 323 S.E.2d 590 (W. Va. 1984); *State ex rel. Thomson v. Giessel*, 271 Wis. 15, 72 N.W.2d 577 (1955). For the most recent cases, see *State v. School Bd. of Sarasota County*, 561 So. 2d 549 (Fla. 1990), *Barkley v. City of Rome*, 259 Ga. 355, 381 S.E.2d 34 (1989), and *Haugland v. City of Bismarck*, 429 N.W.2d 449 (N.D. 1988).

In *Caddell v. Lexington County School Dist. No. 1*, 296 S.C. 397, 399, 373 S.E.2d 598, 599 (1988), the South Carolina Supreme Court rejected arguments such as those raised by the plaintiffs here and held that lease purchase agreements for construction and renovation of public school buildings were not "debt" under the South Carolina Constitution. The definition of "debt" in the South Carolina Constitution was: "any indebtedness of the school district which shall be secured in whole or in part by a pledge of its full faith, credit and taxing power." S.C. Const. art. X, § 15. In applying that definition, the South Carolina court noted that

> general obligation debt embraces neither yearly expenses payable from current revenues nor contingent liabilities of the governmental entity. This is so because the governmental entity is not obligated to impose property taxes for their payment.

Caddell, 296 S.C. at 400, 373 S.E.2d at 599 (footnotes omitted). The South Carolina Supreme Court held that because payment of taxes beyond the annual obligation could not be compelled, the obligation was not unconstitutional debt.

It also addressed the plaintiffs' contention that the agreement was a subterfuge to enable the district to construct needed facilities without contravening constitutional debt limitations. The court, in rejecting this argument, stated:

> The identical argument was rejected by the Supreme Court of Colorado, which upheld the financing of a city hall through a lease/purchase agreement containing a non-appropriation

clause. The following statement from that decision is pertinent here:

> The premise of the plaintiffs' argument that the plan for financing and construction of a city hall is a fraud or works an injustice upon the city's taxpayers is that it is a device to accomplish, by change of form with no change of substance, the same result which has been rejected by the voters. This premise is faulty. *It is not the construction of a city hall for which voter approval is required under Colo. Const. Art. XI, § 6. Rather, it is the creation of a general obligation debt of the city which requires the assent of the voters.* The plan submitted to and rejected by the voters would have created such a general obligation debt. The plan now proposed does not. This difference is constitutionally significant.

Id. at 401-02, 373 S.E.2d at 600 (quoting *Gude v. City of Lakewood*, 636 P.2d 691, 697 (Colo. 1981)).

[2] We find plaintiffs' argument on their second assignment of error, that is, that defendants did not comply with the provisions of N.C.G.S. § 160A-20, also to be without merit. Essentially, they argue that there is no authority of law which authorizes the taking of tax revenues to pay a contract debt. Quite clearly, N.C.G.S. § 160A-20, which expressly authorizes such contracts, implicitly authorizes the use of county revenues to make payments under the contract.

Although unnecessary to a decision of this case, in connection with plaintiffs' contention that defendants did not comply with the provisions of the statute, we find it significant that N.C.G.S. § 160A-20(e) requires the approval of the North Carolina Local Government Commission (hereinafter the "LGC") for such contracts if, as here, they involve the construction or repair of fixtures or improvements on real property.

The LGC is a statutorily established state agency, with the responsibility for overseeing local government finance. Its responsibilities include approving all issuances of debt secured by pledges of the faith and credit (N.C.G.S. ch. 159, art. 4), revenue bond indebtedness and issuances (N.C.G.S. ch. 159, art. 5), and certain financing agreements (N.C.G.S. ch. 159, art. 8), as well as annual approval over the budget and accounting practices of local govern-

ments. Due largely to the effective and extensive review of local financing by the LGC, North Carolina has not experienced any local government indebtedness defaults in over fifty years and currently has the highest number of the highest rated local government units of any state in the nation.

N.C.G.S. § 160A-20 specifically requires that such contracts be generally subject to LGC approval under article 8 of chapter 159. N.C.G.S. § 160A-20(e) (Cum. Supp. 1990). The statute which provides the usual conditions for requiring approval is N.C.G.S. § 159-148, not N.C.G.S. § 160A-20, and includes four criteria, all of which must be met to acquire LGC approval. The fourth criteria of N.C.G.S. § 159-148 is that the contract *obligate the local government "expressly or by implication, to exercise its power to levy taxes* either to make payments falling due under the contract, or to pay any judgment entered against the unit as a result of the unit's breach of the contract." N.C.G.S. § 159-148(a)(4) (Cum. Supp. 1990) (emphasis added). The significance of this is that the legislature, in amending N.C.G.S. § 160A-20, understood that contracts entered into under that statute would *not* obligate the unit expressly or by implication to exercise its power to levy taxes; therefore, a *specific* and different statutory provision was required to ensure that LGC approval be obtained in transactions such as the contract in question. Otherwise, there would be no need for the specific provision of N.C.G.S. § 160A-20(e).

The legislature has given the LGC rigorous standards for the approval of such contracts. N.C.G.S. § 159-151(a) mandates that in determining whether a proposed contract shall be approved, the LGC may consider:

(1) Whether the undertaking is necessary or expedient.

(2) The nature and amount of the outstanding debt of the contracting unit.

(3) The unit's debt management procedures and policies.

(4) The unit's tax and special assessments collection record.

(5) The unit's compliance with the Local Government Budget and Fiscal Control Act.

(6) Whether the unit is in default in any of its debt service obligations.

(7) The unit's present tax rates, and the increase in tax rate, if any, necessary to raise the sums to fall due under the proposed contract.

(8) The unit's appraised and assessed value of property subject to taxation.

(9) The ability of the unit to sustain the additional taxes necessary to perform the contract.

(10) If the proposed contract is for utility or public service enterprise, the probable net revenues of the undertaking to be financed and the extent to which the revenues of the utility or enterprise, after addition of the revenues of the undertaking to be financed, will be sufficient to meet the sums to fall due under the proposed contract.

(11) Whether the undertaking could be financed by a bond issue, and the reasons and justifications offered by the contracting unit for choosing this method of financing rather than a bond issue.

N.C.G.S. § 159-151(a) (1987). N.C.G.S. § 159-151(a) also gives the LGC authority to inquire into and give consideration to any other matters that it may believe will have a bearing on whether the contract is to be approved.

N.C.G.S. § 159-151(b) further requires the LGC to make the following findings before it can approve any contract:

(1) That the proposed contract is necessary or expedient.

(2) That the contract, under the circumstances, is preferable to a bond issue for the same purpose.

(3) That the sums to fall due under the contract are adequate and not excessive for its proposed purpose.

(4) That the unit's debt management procedures and policies are good, or that reasonable assurances have been given that its debt will henceforth be managed in strict compliance with law.

(5) That the increase in taxes, if any, necessary to meet the sums to fall due under the contract will not be excessive.

(6) That the unit is not in default in any of its debt service obligations.

> The Commission need not find all of these facts and conclusions if it concludes that (i) the proposed project is necessary and expedient, (ii) the proposed undertaking cannot be economically financed by a bond issue and (iii) the contract will not require an excessive increase in taxes.

N.C.G.S. § 159-151(b) (1987).

It should be noted that, in this case, Wayne County went through all the required procedures, and the LGC made the required findings and gave the required approval. Plaintiffs have not raised any issues related to the proceedings of the LGC's findings or approval. We find it significant indeed that, while our legislature clearly understood that transactions under N.C.G.S. § 160A-20 would not be subject to a vote of the people, it did subject such contracts to the rigorous scrutiny of the LGC and required its approval of such transactions.

In plaintiffs' argument on their third assignment of error, that is, that the trial judge erred in dismissing their complaint, the plaintiffs concede that if this Court concludes, as it has, that N.C.G.S. § 160A-20 does not violate article V, section 4 of our state Constitution, this assignment should be overruled.

In summary, we hold that N.C.G.S. § 160A-20 is constitutional, that the defendants fully complied with the provisions of that statute, and that the particular transaction represented by the contract is within the constitutional limitations and the statutory requirements of N.C.G.S. § 160A-20. The orders of Butterfield, J., signed 4 April 1990 and 6 April 1990, respectively, are hereby affirmed in all respects.

Affirmed.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND PENNSYLVANIA AND SOUTHERN GAS COMPANY (NORTH CAROLINA GAS SERVICE DIVISION) v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC.

No. 338A88

(Filed 10 January 1991)

1. Gas § 1.1 (NCI3d)— natural gas customers—different rates of return for customer classes not discriminatory

Findings of fact by the Utilities Commission supported its conclusion that different rates of return adopted for the various classes of customers of a natural gas company do not unreasonably discriminate against industrial customers in violation of N.C.G.S. § 62-140(a).

Am Jur 2d, Public Utilities §§ 110, 117.

2. Gas § 1.1 (NCI3d)— natural gas—transportation rates not unreasonable or discriminatory

A full profit margin transportation rate schedule which permits a natural gas company to earn the same profit margin for transporting customer owned gas as it would have earned had it sold the gas under its rate schedules is not unjust and unreasonable in violation of N.C.G.S. §§ 62-130(a) and 62-131(a) or unreasonably discriminatory in violation of N.C.G.S. § 62-140.

Am Jur 2d, Public Utilities §§ 110, 117.

3. Gas § 1 (NCI3d)— natural gas—separate industrial rate based on No. 6 fuel oil not required

The Utilities Commission did not act arbitrarily and capriciously in violation of N.C.G.S. § 62-94(b)(6) in failing to require a natural gas company to establish an additional industrial rate schedule based on the cost of No. 6 fuel oil where, at the time of the hearing, the company had no customers with the capacity to burn No. 6 fuel oil but had one customer in the process of converting its alternate fuel capacity to No. 6 fuel oil, and the company had the ability to make special sales at negotiated prices with any customer who might convert its alternate fuel capacity to No. 6 fuel oil.

Am Jur 2d, Public Utilities §§ 110, 117.

APPEAL by Carolina Utility Customers Association, Inc. pursuant to N.C.G.S. § 62-90 and N.C.G.S. § 7A-29(b) from the North Carolina Utilities Commission's Final Order Overruling Exceptions And Affirming Recommended Order entered on 12 January 1988 in Docket Nos. G-3, Sub 141 and G-3, Sub 145. Heard in the Supreme Court 13 December 1988.

Robert P. Gruber, Executive Director; Antoinette Wike, Chief Counsel, by David T. Drooz, Staff Attorney, for Public Staff—North Carolina Utilities Commission, appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams, Jr. and R. Marshall Merriman, Jr., for Pennsylvania and Southern Gas Company—North Carolina Gas Service Division, appellee.

Jerry B. Fruitt for Carolina Utility Customers Association, Inc., appellant.

EXUM, Chief Justice.

This is a general rate case which began when Pennsylvania and Southern Gas Company (North Carolina Gas Service Division) ("the Company") filed application with the North Carolina Utilities Commission ("Commission") on 5 May 1987 seeking authority to increase its rates for gas utility service in its service area in North Carolina so as to produce additional annual revenues of $350,000. The application was later amended to reduce the revenue increase to $244,358. The Public Staff responded to the application by stating that the Company's amended application complied with all adjustments proposed by the Public Staff and that the Public Staff had no objection to the increase requested in the amended application. The Company then filed Rate Schedule T (Docket No. G-3, Sub 145), a gas transportation rate schedule, which was consolidated for hearing and determination with its general rate case application (Docket No. G-3, Sub 141). Carolina Utility Customers Association, Inc. ("CUCA") moved and was allowed to intervene. After a hearing in Reidsville on 13 October 1987 before Hearing Examiner Bliss Kite, the Commission issued a Recommended Order allowing the Company the increase sought in its amended application. After oral argument the Commission, on 12 January 1988, adopted the Recommended Order as its Final Order. CUCA appealed.

CUCA has contended throughout this proceeding that the Company's proposed rates are excessive, unjust and unreasonable because (1) the differences in rates of return among the Company's various classes of customers are unreasonably discriminatory in violation of N.C.G.S. § 62-140(a)[1]; (2) Rate Schedule T is unreasonably discriminatory in violation of N.C.G.S. § 62-140(a) and unjust and unreasonable in violation of N.C.G.S. § 62-130(a) and N.C.G.S. § 62-131(a)[2]; and (3) the Company should be required to develop for customers that can use alternatively No. 6 fuel oil a new rate schedule based on the cost of No. 6 fuel oil. The Commission, both in its Recommended Order filed after hearing and its Final Order entered after oral argument, rejected all of CUCA's contentions. We likewise reject them here.

I.

The evidence before the Commission was largely uncontradicted. It consisted of testimony and exhibits offered by the Company and the Public Staff and testimony of certain officers and agents of various customers which are members of CUCA and which are served by the Company. It tended to show as follows:

The Company, through its North Carolina Gas Service Division, was a duly franchised public utility authorized to provide natural gas utility service in and around Reidsville, North Carolina, to residential, commercial and industrial customers. The Company also sought to provide transportation service for customer-owned gas, *i.e.*, gas purchased by customers directly from suppliers other than the Company but transported by the Company through its distribution system to certain commercial and industrial customers. All of the Company's natural gas supply, including customer-owned gas, came from Transcontinental Gas Pipeline Corporation ("Transco"). The Company has separate retail rate schedules for its various customers. The schedules at issue in this proceeding

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1. This statute provides that:

> No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service.

2. These latter statutes require, respectively, that the Commission establish rates which are "just and reasonable" and that any rate demanded or received by any public utility shall be "just and reasonable."

are: Rate Schedule 101—Residential & Multiple Dwelling Service; Rate Schedule 102—Commercial & School Service; Rate Schedule 201—Industrial Service (available to industrial consumers that use less than 50 dekatherms per day and have no alternative fuel capability); Rate Schedule 205—Industrial Service (available to industrial consumers that use between 50 and 300 dekatherms per day and have no alternative fuel capability); Rate Schedule 206—Industrial Service (available to industrial consumers that use between 300 and 3000 dekatherms per day); Rate Schedule 208—Industrial Service (available to industrial customers not covered by any other rate schedule); Rate Schedule 600—Boiler Fuel Service; and Rate Schedule "T"—Transportation Service.[3]

The Company's reasonable original cost rate base was $4,574,930 and its annual operating revenues under its current rates were $9,766,720. Annual revenues under the new rates approved by the Commission would be $10,011,078. The Company should be allowed a rate of return on its original cost rate base of 10.23 percent. Permitting the Company to increase its annual level of gross revenues by $244,358 would permit the Company to earn a 10.23 percent overall rate of return on its rate base.

The Company's customer mix on the basis of annual sales was 56 percent industrial, 28 percent residential, 15 percent commercial, and 1 percent agricultural. Under the rate structure proposed by the Company and approved by the Commission, the price of gas would be increased 12.8 percent for the Company's residential customers and 3.3 percent for the Company's commercial customers. The price of gas for all of the Company's industrial customers, which are represented by CUCA, would be decreased. The decreases would range from 2.0 percent for industrial customers in Schedule 201 to 4.4 percent for industrial customers in Schedule 600.

Rate Schedule T proposed by the Company and approved by the Commission was a "full margin" transportation rate based on the applicable rate schedule on which the customer would buy

3. The Company may choose to offer interruptible transportation service under this rate schedule to large commercial or industrial customers who are presently connected to its system, have qualified for service on Rate Schedule 205, 206, 208 or 600, have obtained an independent supply of natural gas, have made arrangements to have the gas delivered by Transco to one of the Company's existing delivery points, and have executed a contract with the Company.

the natural gas from the Company under its regular sales rate schedules. Under Rate Schedule T the Company earns the same profit margin on the gas transported as it would have earned had it sold the gas itself.

All of the foregoing were found as facts by the Commission in support of its order that the Company be authorized to increase its rates in order to produce $244,358 in additional annual gross revenues.

II.

[1] CUCA first argues that the rate schedules approved by the Commission are unreasonably discriminatory in violation of N.C.G.S. § 62-140(a) because there are no findings in the record to support the differences in rates of return among the Company's various classes of customers permitted by the Commission's order. The Company's rates of return among its various classes of customers are figured by first determining the operating revenues, the cost of service and the rate base allocable to each class. The allocable cost of service is subtracted from the operating revenues and the difference is divided by the rate base to arrive at the rate of return for that class. The mathematics are simple. The difficulty lies in the allocations of cost of service and rate base among the various customer classes.

Here Public Staff witness Davis testified to four different methodologies used in allocating costs, including rate base. Each methodology produced somewhat different rates of return among the customer classes. All methodologies, however, resulted in substantially higher rates of return for the industrial classes of customers than for the residential, and, to a lesser extent, the commercial classes. Depending on the methodology used, the rates of return for residential customers ranged from a high of 4.16 percent to a low of 1.78 percent. The rates of return for industrial schedule No. 205 ranged from 37.24 percent to 28.6 percent.

Because of these substantial differences in rates of return based essentially on cost of service, CUCA argues that the overall rate design permitted by the Commission unreasonably discriminates among customer classes. CUCA argues the Commission failed adequately to address this issue in its findings and conclusions; therefore the Commission's order fails to justify the differences in rates of return permitted. CUCA argues, further, that the Commission,

as a matter of law, should be required to adopt a specific methodology for the allocation of costs of service and to require the Company to use a rate design under which the rates of return among customer classes would not deviate more than 10 percent, plus or minus, from the total rate of return permitted to the Company, which in this case was 10.23 percent.[4]

CUCA's arguments here were made and rejected in *State ex rel. Utilities Commission v. Carolina Utility Customers Association*, 323 N.C. 238, 372 S.E.2d 692 (1988) (hereinafter *CUCA I*). In *CUCA I* the differences in the rates of return among the utility's various customers were even greater than they are here under the rate design approved by the Commission. We affirmed the Commission's order in *CUCA I*.[5] The Commission concluded in *CUCA I* that it would be unjust and unreasonable to establish a rate design in which rates for each customer class were based solely on the cost of service to that class and which would result in approximately equal rates of return for all customer classes. The Commission based this conclusion upon findings and evidence which demonstrated the following: All of the rate increase approved was borne by residential, commercial and small industrial customers of the utility; its industrial customers' rates were not increased at all. To equalize the rates of return among customer classes would result in a 32 percent rate increase to residential customers. Cost of service studies upon which rates of return are figured are, themselves, subjective and judgmental insofar as they try to allocate costs among classes; therefore, they should not be controlling in the establishment of a rate design but should be con-

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4. The overall rate of return is a percentage which the Commission concludes the Company should be permitted to earn on its rate base, which is the cost of the utility's property used and useful in providing service to the public. See N.C.G.S. §§ 62-133(b)(1) and (2). The rate of return percentage is calculated by subtracting from the Company's revenues its cost of service and dividing the difference by the rate base.

5. Initially in *CUCA I* this Court concluded that the Commission had not adequately addressed the differences in rates of return among the utility's customer classes in its order, and we remanded with instructions to the Commission to "consider this issue and make appropriate findings." *State ex rel. Utilities Commission v. N.C. Textile Manufacturer's Association, Inc.*, 313 N.C. 215, 223, 328 S.E.2d 264, 260-70 (1985). On remand the Commission reaffirmed its previously established rates but made additional findings seeking to justify its approval of the disparate rates of return. On the second appeal in *CUCA I*, as discussed in the text, this Court concluded that the Commission adequately addressed this issue and that its findings and conclusions justified its order approving the rate design.

sidered as only one among other factors. The other factors to be considered include "competitive conditions, consumption characteristics of the several classes and the value of service to each class, which is indicated to some extent by the cost of alternative fuels available." *Utilities Commission v. City of Durham*, 282 N.C. 308, 314-15, 193 S.E.2d 95, 100 (1972). In *CUCA I* the Commission found that most of the utility's industrial customers had capacity to switch to alternative fuels and were able to negotiate lower prices with the utility by threatening to switch to these alternative fuels. These customers thus had bargaining power unavailable to residential and small commercial customers and the risk inherent in serving these industrials was higher than the risk inherent in serving residential and commercial customers.

Likewise in the case before us the Commission gave detailed consideration to the disparate rates of return permitted. The Commission found as follows: The entire brunt of the rate increase permitted was borne by the Company's residential and commercial customers and "any further increase in the residential market would be inappropriate at this time."[6] Cost of service studies presented were not "objective in nature, but rather reflect the preparer's judgment as to how to fairly allocate common costs among customer classes, as well as being based on numerous assumptions." These studies should be considered an "important and relevant guide" in designing rates but should not necessarily be determinative. Rates of return for residentials who cannot switch to alternative fuels should not be compared to rates of return for industrials who can switch to alternative fuels. The Company's risk of maintaining its profit margin "is significantly less" on its residential service than on its service to large industrial customers. "Such risk is further magnified" here because of the Company's customer mix, which is 28 percent residential, 15 percent commercial, one percent agricultural, and "a substantial industrial market of 56 percent."

Ultimately the Commission concluded, based on the foregoing findings, "that the rate design approved in this proceeding does not unreasonably discriminate against the industrial customers after weighing and balancing all of the relevant factors discussed herein."

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6. In support of this finding the Commission specifically referred to Public Staff witness Davis's testimony that this was the only gas rate case in recent years in which the residential customer received an increase as great as 12.8 percent.

We hold that under *CUCA I* this conclusion, being fully supported by the Commission's findings,[7] should not be disturbed on appeal.

III.

[2] CUCA next contends that Rate Schedule T approved by the Commission is unjust and unreasonable in violation of N.C.G.S. §§ 62-130(a), -131(a), and unreasonably discriminatory in violation of N.C.G.S. § 62-140.

The Commission approved Rate Schedule T, which it defined in its Order as a schedule "for service to interruptible industrial customers who wished to transport natural gas for [qualified] uses [as] a full margin transportation rate based on the applicable rate schedule on which the customer would buy natural gas if the customer had been on a regular sales rate schedule." Rate Schedule T is a service sought to be provided by the Company to certain of its industrial customers who buy gas on the so-called "spot" market at prices below the Company's prices. If permitted the Company would transport this gas to its customers under Rate Schedule T. It would be entitled to earn under this schedule the same profit margin on the gas transported as it would have earned had it sold the gas under its regular sales rate schedules.

CUCA argues: (1) The regular sales rate schedules are unreasonably discriminatory; therefore Rate Schedule T, being based on the regular sales rate profit margins, must also be unreasonably discriminatory. (2) While the Company is authorized under Rate Schedule 1000 to negotiate transportation rates, its customers have no other alternative except the Company for transporting gas they purchase. There is, therefore, no real basis on which the customers can fairly negotiate a transportation rate, and the "full margin"

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7. The conclusion and findings to which we refer are actually contained in a portion of the Commission's Order captioned "EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 10-13." Finding No. 13 is that "The rates proposed by the Company in its amended application will produce the additional gross revenues necessary to provide the rate of return approved herein and are the appropriate rates in this proceeding." That the rates are "appropriate" is, of course, a conclusion of law, not a finding. We have in several cases noted this tendency of the Commission to mix its findings and conclusions in those portions of its Orders denominated "Findings of Fact" and "Evidence and Conclusions For Findings of Fact." This practice makes both appellate review and understanding of the Commission's Orders more difficult, but we have not overturned Orders on this basis so long as the Commission's chain of reasoning in arriving at its ultimate conclusions is appropriate. *See CUCA I*, 323 N.C. at 246, n.6, 372 S.E.2d at 697, n.6.

rate permitted by the Commission allows the Company to abuse the monopoly it has with regard to transporting gas. (3) The full margin transportation rate approved by the Commission requires customers to pay certain costs associated with procuring a gas supply which the Company does not incur when it simply transports gas sold by others. These costs, argues CUCA, include pipeline demand charges, storage cost and "peaking" cost. Indeed, argues CUCA, the full profit margin transportation rate may actually require customers to pay twice for certain services, first to the Company and second to Transco which transports the gas to the Company's distribution system.

On the record before us, we must reject each of these arguments. We have already concluded that the Commission's findings are sufficient to support its conclusion that the Company's regular sales rate schedules do not unreasonably discriminate among its customers. It must follow that the Commission's findings are sufficient to support its conclusion that Rate Schedule T is not unreasonably discriminatory insofar as it is based on the full profit margins provided by the regular sales rate schedules. *State ex rel. Utilities v. Carolina Utility Customers Association*, 323 N.C. 238, 372 S.E.2d 692.

With regard to nonnegotiability of Rate Schedule T, the double payment of certain costs and the payment of cost which the Company does not incur, there is no evidence in the record to support these factual contentions on the part of CUCA. The evidence on negotiability is contrary to CUCA's contentions.[8] The Company is not required by law to furnish a transportation service and, as we understand the record, has not in the past done so. It seeks in these proceedings to provide its customers with an additional nonessential service which they may or may not utilize. In lieu of using the Company's regular sales rate schedules, a customer may find it possible to save money by buying "spot market" gas and using the Company's negotiable full profit margin Rate Schedule T. If no such saving is possible, the customer can use the Company's regular sales rate schedules. Given that this choice remains the customer's and in no event is the customer required to pay more for the Company's services than the regular sales rate schedules require, it is difficult to see how Rate Schedule T, even if negotiable

8. The only testimony on the subject of negotiability of Rate Schedule T was from one of CUCA's witnesses who said he would negotiate this rate.

in the Company's discretion, can amount to an abuse of the Company's monopoly position.

Ultimately these aspects of CUCA's argument resolve themselves into its contention that transportation rates, like regular sales rate schedules, should be based entirely on the cost to the Company of providing the transportation service. Both the Commission and this Court have consistently rejected the notion that cost of service should be the sole factor in determining rates or rate designs, whether the rates are for the sale of gas or the transportation of gas. *Id.*; *State ex rel. Utilities Commission v. N.C. Textile Manufacturers Association, Inc.*, 313 N.C. 215, 328 S.E.2d 264 (1985); *Utilities Commission v. City of Durham*, 282 N.C. 308, 193 S.E.2d 95 (1972).

IV.

[3] Finally, CUCA contends that the Commission acted arbitrarily and capriciously in violation of N.C.G.S. § 62-94(b)(6) in failing to order an additional industrial rate schedule based on the cost of No. 6 fuel oil. Rate Schedule 600 was approved by the Commission as the Company's only boiler fuel service rate. Gas prices under Rate Schedule 600 were based upon the weighted average of the cost of No. 2 and No. 4 fuel oils. Apparently No. 6 fuel oil is cheaper than either No. 2 or No. 4 fuel oil.

Evidence on this issue was that at the time of the hearings the Company had no customers who had the capacity to burn No. 6 fuel oil. One customer testified that it was in the process of converting its alternate fuel capacity to No. 6 fuel oil. The Company offers special sales under negotiated rates. Its evidence tended to show that it would be willing to negotiate special sales with any customer who might convert its alternate fuel capacity to No. 6 fuel oil on a case-by-case basis.

Upon this evidence the Commission found that "the Company has very little and possibly no need at all for . . . a rate schedule comparable to No. 6 fuel oil . . . . The Company presently has the ability to make special sales at negotiated prices according to the terms and conditions of its Rate Schedule 1000. . . ." Upon these findings the Commission concluded that the Company "should not be required to establish a separate rate schedule comparable to No. 6 fuel oil at this time."

We hold that the Commission did not act arbitrarily and capriciously in violation of N.C.G.S. § 62-94(b)(6) in refusing to require the Company to establish a separate schedule based on the cost of No. 6 fuel oil. Whether to have such a rate schedule was, on this record, a matter for the sound regulatory judgment of the Commission. There was evidence in the record to support its findings on this question; and its conclusion was, in turn, supported by those findings. There is no legal error in this aspect of the Commission's order.

For the reasons given the order of the Commission is, in all respects,

Affirmed.

DEBRA KAY SHADKHOO v. SHILO EAST FARMS, INC.

No. 253A90

(Filed 10 January 1991)

Negligence § 6.1 (NCI3d)— speaker falling on nightclub patron— absence of exclusive control—res ipsa loquitur inapplicable

In an action to recover for injuries sustained by plaintiff when a large speaker fell on her knee while she was dancing at defendant's nightclub, plaintiff's evidence was insufficient to permit her recovery under a *res ipsa loquitur* theory because it established that a band playing at the nightclub had primary control and management responsibilities over the speaker and that the speaker was thus not in the exclusive control of defendant where the evidence showed that the band provided its own equipment, including speakers; defendant only designated an area for locating the speakers, and the band had control of setting up and operating the speakers as well as other band instruments; the only control shown to have been exercised by defendant over the band related to the volume at which the band played its music; and the band was not shown to be defendant's agent.

Am Jur 2d, Negligence §§ 1870, 1872, 1890; Premises Liability § 61.

Justice MARTIN dissenting.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 98 N.C. App. 672, 391 S.E.2d 841 (1990), affirming a judgment granting defendant's motion for directed verdict entered by *Allen (W. Steven, Sr.), J.*, on 16 February 1989, *nunc pro tunc* 14 February 1989, in Superior Court, GUILFORD County. Heard in the Supreme Court 12 November 1990.

Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence, by Norman B. Smith, for plaintiff appellant.

Henson Henson Bayliss & Sue, by Jack B. Bayliss, Jr., for defendant appellee.

WHICHARD, Justice.

Plaintiff seeks recovery for injuries she sustained when a large speaker fell on her knee while she was dancing at defendant's nightclub. The trial court granted defendant's motion for directed verdict at the close of all the evidence, and the Court of Appeals affirmed. *Shadkhoo v. Shilo East Farms*, 98 N.C. App. 672, 391 S.E.2d 841 (1990). Judge Phillips dissented, *id.* at 674-75, 391 S.E.2d at 843, and plaintiff exercised her right to appeal. N.C.G.S. § 7A-30(2) (1989).

In the trial court, the Court of Appeals, and this Court, plaintiff argued that the case was for the jury under the theory of *res ipsa loquitur*. The dissenting opinion in the Court of Appeals relates solely to the "exclusive control" aspect of the *res ipsa* doctrine. Because this appeal is before us pursuant to N.C.G.S. § 7A-30(2), our review is limited to the issue raised in the dissent: whether plaintiff presented sufficient evidence to establish the requisite of the doctrine of *res ipsa loquitur* that the speaker, the instrumentality that caused her injury, was under defendant's exclusive control and management. N.C.R. App. P. 16(b). We hold that she did not, and we thus affirm the Court of Appeals.

Plaintiff alleged in her complaint that on or about 15 January 1987 she was a patron of defendant's Carousel Lounge, a bar and nightclub. While she was dancing there, "a large and heavy amplifying speaker fell from its position atop another speaker, and struck [her] left knee with great force." The fall, she alleged, was caused by defendant's negligence in failing to secure the speaker properly, allowing it to remain in a position from which it was likely to

fall, and "causing [it] to vibrate from loud musical noises in such a way that it was likely to move from its original position and fall." Plaintiff allegedly suffered serious injury to her kneecap and leg bones as a result of the incident. Defendant answered, denying the essential allegations of the complaint.

Plaintiff's evidence tended to show that she and Mark Phillips were dancing at defendant's Carousel Lounge on the evening of 15 January 1987. A band was playing, and high fidelity amplifying speakers were situated around the dance floor. The speakers were stacked by twos, one atop the other. One of the speakers fell, striking plaintiff on her left knee. Neither Phillips nor plaintiff struck the speaker prior to its fall, nor did they observe other patrons strike the speaker. In Phillips' opinion no one was close enough to the speaker to strike it. Neither plaintiff nor Phillips knew of any previous incidents of falling speakers at the Lounge.

Defendant's principal stockholder, Richard Henderson, testified that a band named "Savvy" was playing at the Lounge on the evening in question. The band was obtained through a booking agent and was paid by defendant in one lump sum at the end of its performance. The band provided its own equipment, including speakers. Defendant had no control over the band's musical instruments or its speakers. It only designated an area for locating the speakers, and the band or its road crew did the "setting up." Defendant only corrected dangerous situations that it observed. Defendant kept a manager and security guards on the premises, but they "had nothing to do with any of the band equipment." Defendant had no ownership interest in the speakers. The band had "the control of setting up and operating [the] speakers" as well as the other band instruments. The only semblance of control defendant exercised over any band playing at the club was to request a reduction in volume when the sound exceeded one hundred decibels.

Prior to 15 January 1987, Henderson had not known of any problems with speakers falling at the Lounge. No one had brought to his attention any unsafe condition regarding the speakers prior to the incident with plaintiff.

In reviewing the grant of a motion for directed verdict, the reviewing court "consider[s] the evidence in the light most favorable to the non-movant . . . . [T]he evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved

in his favor[,] and he is entitled to the benefit of every inference reasonably to be drawn in his favor." *Summey v. Cauthen*, 283 N.C. 640, 647, 197 S.E.2d 549, 554 (1973). " 'On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, *as a matter of law*, the evidence is insufficient to justify a verdict for the plaintiff.' " *Kelly v. Harvester Co.*, 278 N.C. 153, 158, 179 S.E.2d 396, 398 (1971) (quoting 5 Moore's Federal Practice, § 41.13(4) at 155 (2d ed. 1969)).

"*Res ipsa loquitur* is an evidentiary rule which . . . permits a party to prove the existence of negligence by merely establishing the circumstances of an occurrence that produces injury or damage." *Snow v. Power Co.*, 297 N.C. 591, 596, 256 S.E.2d 227, 231 (1979). "For the doctrine to apply the plaintiff must prove (1) that there was an injury, (2) that the occurrence causing the injury is one which ordinarily does [not] happen without negligence on someone's part, (3) that the instrumentality which caused the injury was under the exclusive control and management of the defendant." *Jackson v. Gin Co.*, 255 N.C. 194, 197, 120 S.E.2d 540, 542 (1961).

> Plaintiff has the burden of proving each of these elements.
>
> In cases where the plaintiff's evidence is such as to justify the application of the doctrine of *res ipsa loquitur*[,] the nature of the occurrence itself and the inferences to be drawn therefrom are held to supply the requisite degree of proof to carry the case to the jury and to enable the plaintiff to make out a *prima facie* case without direct proof of negligence. However, this does not dispense with the requirement that the plaintiff who alleges negligence must prove negligence, but relates only to the mode of proving it. The fact of the accident furnishes merely some evidence to go to the jury and does not relieve the plaintiff of the burden of showing negligence. Before the plaintiff can be entitled to a verdict he must satisfy the jury by the preponderance of the evidence that the injuries complained of were proximately caused by the negligence of the defendant in the respects alleged.

Young v. Anchor Co., 239 N.C. 288, 291, 79 S.E.2d 785, 788 (1954).

"The doctrine of *res ipsa loquitur* does not apply 'when the instrumentality causing the injury is not under the exclusive control or management of the defendant.' " *Wyatt v. Equipment Co.*,

253 N.C. 355, 363, 117 S.E.2d 21, 26 (1960) (quoting *Smith v. Oil Corp.*, 239 N.C. 360, 367, 79 S.E.2d 880, 884 (1954)). *See also O'Quinn v. Southard*, 269 N.C. 385, 152 S.E.2d 538 (1967). This Court has stated:

> The rule of *res ipsa loquitur* never applies when the facts of the occurrence, although indicating negligence on the part of some person, do not point to the defendant as the *only* probable tortfeasor. In such a case, unless *additional evidence*, which eliminates negligence on the part of all others who have had control of the instrument causing the plaintiff's injury, is introduced, the court must nonsuit the case. When such evidence is introduced and the only inference remaining is that the fault was the defendant's, the plaintiff has produced sufficient circumstantial evidence to take his case to the jury.

Kekelis v. Machine Works, 273 N.C. 439, 444, 160 S.E.2d 320, 323 (1968) (emphasis in original). *See also Sharp v. Wyse*, 317 N.C. 694, 697-98, 346 S.E.2d 485, 487-88 (1986).

Under the facts here, even when viewed in the light most favorable to her, "plaintiff has failed to show that defendant is the only probable tortfeasor." *Sharp v. Wyse*, 317 N.C. at 698, 346 S.E.2d at 488. To recover on a *res ipsa* theory, plaintiff must show that defendant had exclusive control and management of the speaker, the instrumentality that caused her injury. The most the evidence shows is that defendant designated the general area in which the speaker was located. The band, which is not a party to this litigation, provided its own equipment. Defendant had no ownership interest in the equipment and "had nothing to do with" it. The band had control of setting up and operating the speakers as well as the other band instruments.

There was neither allegation nor evidence that the band was defendant's agent. The only control shown to have been exercised by defendant over the band related to the volume at which the band played its music. Under the evidence presented, the band, not defendant, had at least primary control and management responsibilities over the speaker. The speaker therefore was not in the exclusive control of defendant. Thus, "[u]nder the principles governing the application of the doctrine of *res ipsa loquitur*, we hold that this is not a case in which the doctrine may be appropriately applied." *Sharp v. Wyse*, 317 N.C. at 699, 346 S.E.2d at 488.

The other cases from this Court on which plaintiff relies are distinguishable. In *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E.2d 507 (1978), the plaintiff was injured when the rotating top of the stool on which she sat in a business establishment suddenly "went backwards" and flipped her onto the floor. Defendant there owned the stools, had been having problems with them, had removed two other stool tops after discovering that they were loose, and had knowledge that children came into the establishment and turned the tops. This Court noted that "a business proprietor retains exclusive control of such seating while it is being used by patrons for the purpose for which it was intended," *Husketh*, 295 N.C. at 462, 245 S.E.2d at 509, and held that the case was properly for the jury under a *res ipsa loquitur* theory. Similarly, in *Schueler v. Good Friend Corp.*, 231 N.C. 416, 57 S.E.2d 324 (1950), the plaintiff was injured when she sat in one of a tier of four chairs attached together and the entire row of seats toppled over backward. This Court concluded that the tier of chairs "was in the complete control of the defendant" and that "under the circumstances 'the accident presumably would not have happened if due care had been exercised.' " *Schueler*, 231 N.C. at 418, 57 S.E.2d at 325.

Thus, in *Husketh* and *Schueler* the plaintiffs established exclusive control and management of the injury-producing instrumentalities in the defendants. Here, by contrast, the evidence established that at least primary control was in another entity which was not shown to be defendant's agent and which is not a party to this litigation.

For the foregoing reasons, the decision of the Court of Appeals is

Affirmed.

Justice MARTIN dissenting.

I find that the evidence in this case viewed in the light most favorable to the plaintiff is sufficient to require a jury determination with respect to the issue of *res ipsa loquitur*. Therefore, I respectfully dissent from the opinion of the majority.

The evidence in the light most favorable to the plaintiff on this issue shows that the defendant owns the lounge where the plaintiff was injured. Plaintiff was an invitee for the purpose of attending a dance at the time in question. On each side of the

dance floor, the defendant maintains stacks of speakers, each stack consisting of two speakers about two and one-half feet in height (the stacks are about five feet high); the speakers weigh between three and four hundred pounds each. Some of the speakers are owned by the defendant, while others are brought in by different bands which are employed by the defendant to play at the lounge. The defendant directs the bands where to set up their speakers, but does not provide any devices for anchoring or fastening the speakers in any fashion. The defendant does have three or four security personnel when the lounge is open who have the duty of insuring the safety of the patrons. At about 11:00 p.m. on the evening in question, the plaintiff was dancing with a partner near a stack of speakers. Without any apparent reason, the upper speaker suddenly fell from its top location and struck the plaintiff's left knee causing her serious and permanent injuries.

The issue in this case is whether there was sufficient evidence for a jury determination of whether the instrumentality involved was under the exclusive control or management of the defendant. *Sharp v. Wyse*, 317 N.C. 694, 346 S.E.2d 485 (1986). In order for an instrumentality to be under the defendant's exclusive control or management, the defendant must have the right and power of control over the instrumentality and the opportunity to exercise it. *Snow v. Power Co.*, 297 N.C. 591, 256 S.E.2d 227 (1979).

In this case defendant clearly had both the right and the power to determine how and where the speakers were placed, and defendant had ample opportunity to exercise such power and actually did so. Defendant's representative testified that he had exclusive control over the lounge and everything within it. He further testified that if he noticed anything about the speakers that he deemed a problem, he would make the band correct the problem or change whatever was necessary.

Furthermore, the defendant in this case had a nondelegable duty to the plaintiff to provide reasonably safe premises for the use of the plaintiff. Under such circumstances the defendant is responsible for the plaintiff's injuries that are a proximate result of the placement of the speakers. In *Snow*, this Court held that exclusive control within the meaning of this doctrine could be shown even though the instrumentality in question was owned and installed by another party. The relevant factor as to exclusive control was that the power company had a duty to inspect and maintain

the instrumentality in question. The Court held that a jury could reasonably infer that the defendant in *Snow* in effect maintained exclusive control over the instrumentality in question.

Likewise, the defendant maintained control and power over the speakers while they were in the lounge, even though they were the property of the band. Defendant's representative told the band where to set up the speakers and prevented placement of the speakers so as not to block the exits. Further, the defendant's representative testified that if the defendant determined that the speakers looked dangerous or had dangerous potential, defendant's representative had the power to make the band change them or to do "whatever was necessary."

The law is clear that defendant owed the plaintiff a nondelegable duty to provide reasonably safe premises for plaintiff's benefit at the time in question. A dance hall proprietor who invites others to enter its place of business is under a legal duty to its patrons to exercise ordinary care to keep the premises in a reasonably safe condition for the use for which it was designed or intended and to give warning of any hidden dangers or unsafe conditions. *Revis v. Orr*, 234 N.C. 158, 66 S.E.2d 652 (1951).

Therefore, it appears to me that plaintiff's evidence, viewed in the light most favorable to her, establishes a prima facie case sufficient to survive the defendant's motion for directed verdict, and that the Court of Appeals erred in affirming the trial court's dismissal of the case.

Although this case is apparently not of major significance to the jurisprudence of the State, it is of utmost importance to the litigants. I believe that the evidence is such that plaintiff is entitled to have a jury pass upon the issues presented by her. I vote to reverse the Court of Appeals.

Justice MITCHELL joins in this dissenting opinion.

JANICE BILLMAN WILLIAMS v. THOMAS E. (JOCK) TYSINGER AND WIFE, PEGGY J. TYSINGER

No. 133A90

(Filed 10 January 1991)

1. **Animals, Livestock, or Poultry § 11 (NCI4th)— child kicked by horse—directed verdict for owner—error**

The trial court erred by granting directed verdict for defendants in a negligence action arising from defendants' horse kicking plaintiff's son where the gravamen of plaintiff's complaint was not keeping a dangerous animal, but that defendants were negligent in encouraging the two children, who had never been around horses, to play with the horse while unsupervised. The question of defendants' negligence does not depend upon defendants' knowledge of the horse's vicious or dangerous propensities, and it was not necessary that such evidence be presented.

Am Jur 2d, Animals §§ 86, 89, 100, 104.

2. **Animals, Livestock, or Poultry § 11 (NCI4th)— child kicked by horse—contributory negligence of parent**

It cannot be said as a matter of law in a negligence action that plaintiff was contributorily negligent in allowing her sons to go unattended to play with the horse after defendants told her that the horse was gentle and that their children and grandchildren all played with the horse.

Am Jur 2d, Animals §§ 100, 104, 108.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 97 N.C. App. 438, 388 S.E.2d 616 (1990), affirming the judgment of *Wood, J.*, at the 30 August 1988 Session of Superior Court, RANDOLPH County. Heard in the Supreme Court 6 September 1990.

Ottway Burton, P.A., by Ottway Burton, for plaintiff-appellant.

Henson Henson Bayliss & Sue, by Jack B. Bayliss, Jr., and Lawrence J. D'Amelio, III, for defendant-appellees.

FRYE, Justice.

In this appeal plaintiff raises the single issue of whether the trial court correctly granted a directed verdict to defendants because plaintiff failed to make a showing that defendants had any prior knowledge, actual or constructive, that their horse had any dangerous or vicious propensities. The Court of Appeals held that the directed verdict was properly granted because plaintiff failed to produce any evidence that defendants had knowledge of the horse's vicious propensities or evidence that a reasonable person would have had such knowledge. We conclude that under the facts of this case, making a showing that defendants had actual or constructive knowledge that their horse had vicious propensities is not necessary for plaintiff to prove defendants' negligence, and thus the trial court erred in granting defendants' motion for directed verdict.

Matthew Jonathan (Jimmy) Bowen, the son of plaintiff Janice Williams, was injured on 28 May 1983 when a horse owned by defendants, Thomas E. and Peggy J. Tysinger, kicked Jimmy in the head causing him to stay in the hospital overnight for observation of a possible concussion and causing permanent dental injury. Plaintiff instituted this action seeking recovery of Jimmy's medical expenses which were incurred as a result of this accident.

Plaintiff, her husband, and her two sons, Jimmy and Daniel Bowen, went to defendants' house on the afternoon of 28 May 1983. At the time of this incident, Jimmy was nine years old, and Daniel was eleven years old. Mr. Tysinger owned a sawmill which was located a few miles from his house, and he had his office for this lumber business at his house. Plaintiff and her husband had ordered some lumber from Mr. Tysinger, and they went to his house that afternoon to find out if the lumber was ready. When they arrived, the two boys were told to wait in the car, and plaintiff and her husband went to the house to talk with the Tysingers, who were both sitting on the front porch of the house. The four adults sat on the porch and talked for about ten minutes, and then Mr. Tysinger told Mr. Williams, plaintiff's husband, that he wanted to show him a new gun. Realizing that they were going to stay at least for a few more minutes, plaintiff called to her sons and told them that they could get out of the car and wait with her on the porch.

As the two boys reached the porch, Mr. Tysinger suggested that the boys go around to the pasture in the back of the house

and play with the horse and cow which he kept there. In her testimony at trial, plaintiff related the following exchange:

> And Mr. Tysinger told the boys that he had a horse and cow in the backyard, and he told me to let them go out and play with it. And I asked him, I said, "The boys have never been around any wild animals." They'd never been around any animals. I said, "Are you sure." And Mrs. Tysinger said that her children, her grandchildren had been raised up around the horse and cow, and that it would not hurt anyone. Well, as they was standing, fixing to go into the livingroom, which was—when you open up the door you went into the livingroom—. . . .
>
> I turned around and I asked Jock again, I said, "Are you sure." I said "Because they have never been around no animals." and He sid (sic), "Yes." So, the boys proceeded to go into he (sic) backyard—

Later in her testimony, plaintiff stated, "I asked him [Mr. Tysinger] three times if he was sure." In further response to questioning, plaintiff replied, "Each time he told me, he assured me one hundred percent that the animal would not hurt nobody. Not just my children, but nobody."

The boys went to the pasture, and a few minutes later, Daniel, the older boy, called his mother to hurry to the pasture because Jimmy, the younger boy, had been hurt. When plaintiff reached the pasture, she found Jimmy lying on his back in the field.

Daniel testified that when he and his brother reached the pasture, they began petting the forehead of the horse and feeding it some grass. The horse walked away from the fence, and Jimmy crawled under the fence to pet the horse some more. Daniel also crossed the fence and noticed that the horse looked like it was going to run. The horse stood on its front legs and kicked Jimmy. Daniel testified that Jimmy landed on his back some three feet back from where he had been standing when the horse kicked him.

Plaintiff also testified that after the rescue workers arrived and as they attended Jimmy, the horse came charging up to the rescue workers. According to plaintiff, the horse got on its back legs and was standing over the workers as they attended her son there in the pasture. At that time, Mr. Tysinger came across the fence into the pasture and tried to get the horse away from

the workers. Plaintiff testified that the horse then tried to kick Mr. Tysinger and that he called to Ms. Tysinger who came into the pasture and moved the horse into a nearby barn.

After plaintiff presented her evidence, the trial court granted defendants' motion for directed verdict. Plaintiff appealed to the Court of Appeals which found no error in the trial court's grant of defendants' motion for directed verdict. *Williams v. Tysinger*, 97 N.C. App. 438, 388 S.E.2d 616 (1990). The Court of Appeals concluded that the directed verdict was proper because plaintiff failed to produce evidence of defendants' knowledge of the horse's vicious propensities or evidence that a reasonable person would have had such knowledge. *Id.* Judge Phillips dissented, concluding:

> Plaintiff's action does not fit into the "keeping a dangerous animal" niche that the majority confines it to. The main thrust of the complaint, her evidence, and her argument here is that defendants were negligent in inviting and encouraging inexperienced children to go into the horse lot by themselves and play with the animal."

Id. at 441-42, 388 S.E.2d at 619.

[1] When reviewing a trial court's grant of directed verdict, the court must review all of the evidence in the light most favorable to the nonmoving party, which in the present case is plaintiff. *Thames v. Teer Co.*, 267 N.C. 565, 148 S.E.2d 527 (1967). When viewing the evidence in the light most favorable to the plaintiff, we agree with Judge Phillips that the gravamen of plaintiff's complaint is not keeping a dangerous animal, rather it is that defendants were negligent in encouraging the two children, who had never been around horses, to go play with the horse while unsupervised. As noted in the portion of the transcript which is included in this opinion, plaintiff testified that she asked the defendants three times if it was safe for her boys to go play with the horse because they had never been around large animals. Each time either Mr. or Ms. Tysinger answered that it would be safe for the boys to play with the horse.

Defendants contend that the Court of Appeals was correct that the directed verdict was appropriate because plaintiff presented no evidence that defendants knew or should have known that the horse had vicious or dangerous propensities and that in order for plaintiff to recover she must present this evidence. The real issue

is whether plaintiff under the facts of this case has to make a showing of the dangerous propensities of the horse and the owner's knowledge of these propensities in order to recover. The "knowledge by the owner of the vicious propensities of his horse is not always essential to a recovery in an action for injuries alleged to have been caused by the owner's negligence." *Lloyd v. Bowen*, 170 N.C. 216, 221, 86 S.E. 797, 799 (1915). Thus, "not all actions seeking recovery for damage caused by a domestic animal need involve the vicious propensity rule." *Griner v. Smith*, 43 N.C. App. 400, 407, 259 S.E.2d 383, 388 (1979).

Griner provides us with a history of the law concerning actions involving the dangerous propensity rule. *See Griner*, 43 N.C. App. at 405-08, 259 S.E.2d at 387-88. *Griner* states the same rule stated by the Court of Appeals in the present case that before a plaintiff can recover for injuries caused by the domestic animal, the animal must be shown to have a vicious propensity and the owner must be shown to have actual or constructive knowledge of this propensity to be held liable for the damage which results. *Id.* at 407, 259 S.E.2d at 388. *Griner* then goes on to point out that this rule is not to be applied where the "injury is caused by conduct other than viciousness of an animal." *Id.* According to *Griner*, the accepted rule is "[t]he owner of a domestic animal is chargeable with knowledge of the general propensities of certain animals and he must exercise due care to prevent injury from reasonably anticipated conduct." *Id.*

Lloyd v. Bowen involved a situation where the owner of a horse had tied the horse to the dead limb of a tree. *Lloyd*, 170 N.C. at 217, 86 S.E. at 797. The horse broke loose from the limb and ran away. Plaintiff was walking down the street when the runaway horse knocked him down, injuring him seriously. *Id.* at 217-18, 86 S.E. at 797. Defendant complained that the trial court erred in not giving an instruction about defendant's knowledge of the dangerous propensities of the horse. However, this Court concluded that failure to give that instruction was not error because the "question of negligence in regard to the horse did not depend, in this case, solely upon defendant's previous knowledge of his vicious or unruly habits. It would be a circumstance to be weighed with others disclosed by the evidence." *Id.* at 220, 86 S.E. at 798.

As with *Lloyd*, the question of defendants' negligence in the present case does not depend upon defendants' knowledge of the

horse's vicious or dangerous propensities, and it was not necessary that such evidence be presented. The gravamen of this action is not the wrongful keeping of a vicious animal; rather the gravamen is the encouraging of two young children to play with a horse after being warned by the children's mother that they had no familiarity with horses or any other large animals. As *Griner* concluded, defendants, as the owners of the horse, are "chargeable with knowledge of the general propensities" of the horse. *Griner*, 43 N.C. App. at 407, 259 S.E.2d at 388. This knowledge of the general propensities of the horse would include the fact that the horse might kick without warning or might inadvertently step on a person. This is just the nature of the animal, and such behavior does not necessarily indicate that the horse is vicious. Young children who are the ages of the boys in this case and who had never been around horses might not know of these dangers. *But see Whitcanock v. Nelson*, 81 Ill. App. 3d 186, 192, 400 N.E.2d 998, 1002 (1980) ("We believe that children generally would be capable of appreciating the natural propensities of a fenced horse to bite, kick, and run and would take necessary precautions to avoid injury therefrom generally."). We conclude that the trial court erred in granting defendants' motion for directed verdict at the end of plaintiff's evidence and that the question of defendants' negligence in sending the young boys unsupervised to play with the horse is a question for the jury.

[2] Defendants also claim that they are not responsible for the injury and resulting damages because plaintiff, the boys' mother, was on the premises when Jimmy was injured and that she is responsible for the care, supervision and safety of her children. This issue properly goes to the question of contributory negligence which defendants raised as a matter of defense in their answer. The issue of contributory negligence is usually a question for the jury. *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 379 S.E.2d 719 (1990). On the facts of this case, we cannot say as a matter of law that plaintiff was contributorily negligent in allowing the boys to go unattended to play with the horse after defendants told her that the horse was gentle and that their children and grandchildren all played with the horse. Thus, this issue, like the question of defendants' negligence, is a question for the jury.

For the reasons stated above, the decision of the Court of Appeals affirming the trial court's grant of directed verdict for defendants is reversed, and this case is remanded to the Court

of Appeals for remand to the trial court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DAVID JAMES MASH

No. 241A90

(Filed 10 January 1991)

1. **Jury § 6.3 (NCI3d)— murder—voir dire—defendant not unduly restricted**

The trial court did not unduly restrict defendant's jury voir dire in a retrial for first degree murder where the court did not allow defendant to ask certain jurors who had already indicated their ability to be fair and impartial about their degree of certainty as to their impartiality and sustained objections to questions regarding jurors' difficulty considering expert mental health testimony and the jurors' personal experiences with alcohol. The court allowed questions sufficient to uncover any bias that a prospective juror might have had and to insure the defendant a fair and impartial jury; furthermore, defendant did not exhaust his peremptory challenges and therefore cannot show prejudice.

Am Jur 2d, Jury §§ 202, 207, 218.

2. **Criminal Law § 77 (NCI4th)— murder—change of venue—denied—no error**

The trial court did not err by denying defendant's motion for a change of venue in a retrial for murder where the court permitted sufficient individual voir dire on the subject of pretrial publicity, all jurors who ultimately sat on the jury stated that they could be fair and impartial, and none of the jurors had significant recall of the events of the case. Defendant's argument that allegedly undue restrictions on his jury voir dire somehow relieved him of his burden of showing that he exhausted his peremptory challenges is without merit.

Am Jur 2d, Criminal Law §§ 389, 841; Jury § 219.

3. Criminal Law § 417 (NCI4th)— murder—opening statement restricted—no error

There was no prejudicial error in a retrial for murder where the trial court sustained objections to much of defendant's opening statement and would not allow defense counsel to tell the jury to give its undivided attention to all of the witnesses. The trial court informed counsel prior to opening statements that he would not allow either to comment on the evidence to be presented by the other or on the law other than the burden of proof and the presumption of innocence, and most of the objections sustained by the court were to questions of the type clearly and properly prohibited in advance by the trial judge. While the court erred in preventing defendant from telling the jury to give attention to all witnesses, defendant has failed to demonstrate prejudice requiring a reversal of his conviction.

Am Jur 2d, Trial §§ 190, 191, 204.

4. Homicide § 18 (NCI3d)— murder—premeditation and deliberation—expert opinion—not admissible

The trial court did not err in the retrial of a murder prosecution by sustaining objections to defendant's questions to a mental health expert specifically asking whether defendant had the ability to premeditate the killing on the night in question. The trial court allowed the witnesses to testify about defendant's ability to form a plan or scheme.

Am Jur 2d, Homicide § 406.

5. Homicide § 18.1 (NCI3d)— murder—premeditation and deliberation—evidence sufficient

There was sufficient evidence to support a conviction for first degree murder where, although the evidence was undisputed that defendant had been drinking, contradictions existed about his level of intoxication, he was a longtime abuser who may have built up a tolerance to alcohol, and defendant was able to negotiate many steep "S" curves throughout the evening. On a motion to dismiss, any contradictions must be resolved in favor of the State; the State's evidence was sufficient for a rational juror to find the existence of premeditation and deliberation.

Am Jur 2d, Homicide § 439.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Rousseau, J.*, at the 31 July 1989 session of Superior Court, WILKES County. Heard in the Supreme Court on 15 November 1990.

Lacy H. Thornburg, Attorney General, by Joan Herre Byers, Special Deputy Attorney General, for the State.

Norman B. Smith and Bryan E. Lessley for the defendant-appellant.

MARTIN, Justice.

In 1986 defendant was indicted, tried, and convicted of first degree murder in the beating death of Randall Cupp. From a sentence of death, defendant appealed. This Court found error in the guilt phase and awarded the defendant a new trial. *State v. Mash*, 323 N.C. 339, 372 S.E.2d 532 (1988) (*Mash I*). Upon retrial, defendant was found guilty of first degree murder and received a sentence of life imprisonment. We hold that the trial was free of prejudicial error. Because the facts of this case are set out in our opinion in *Mash I*, we will discuss below only the facts pertinent to the issues in this appeal.

[1] Defendant's first assignment of error alleges that the trial court unduly restricted his jury voir dire. The trial court is given broad discretion to control the extent and manner of questioning prospective jurors, and its decisions will not be overturned absent an abuse of discretion. *E.g., State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (1988), *sentence vacated*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988) (mem.). Because of the number of potential jurors who had heard about this case, the trial court held individual voir dire in chambers to select a jury pool. During this process, the defendant attempted to ask certain potential jurors, who had already indicated their ability to be fair and impartial, about their degree of certainty as to this impartiality. Defendant also complains that the court prevented him from inquiring into the potential jurors' attitudes about alcohol and the expert testimony of psychiatrists and psychologists. These arguments are without merit. Each potential juror was asked if he or she could be fair and impartial. Those who ultimately sat on the jury responded affirmatively. The court sustained objections to the questions regarding the jurors' "difficulty" in considering the expert mental health testimony and the jurors' personal experiences with alcohol. Although the State and

defense counsel may inquire into a juror's beliefs and attitudes, "neither has the right to delve without restraint into all matters concerning potential jurors' private lives." *Id.* at 307, 364 S.E.2d at 321. The court allowed inquiry into views that would render the juror unable to be fair, consider the evidence, and follow the law. These questions were sufficient to uncover any bias that a prospective juror might have had and to ensure the defendant a fair and impartial jury. We further note that defendant did not exhaust his peremptory challenges and therefore cannot show prejudice. *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526 (1970). This assignment of error is overruled.

[2] Defendant next contends that the trial court erred in denying his motion for a change of venue. Thirty-eight of the ninety-six potential jurors were excused because they had formed opinions based on pretrial knowledge of the case. Half of the remaining jurors knew something about the case, and eighteen knew the outcome of the previous trial. The trial judge should grant defendant's motion for a change of venue "when he establishes that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed." *State v. Jerrett*, 309 N.C. 239, 255, 307 S.E.2d 339, 347 (1983). To meet his burden of proof, defendant must show that the jurors had prior knowledge of the case, that he exhausted his peremptory challenges, and that an objectionable juror sat on the jury. *Id.* Defendant's argument that the undue restrictions placed upon his jury voir dire somehow relieve him of his burden of showing that he exhausted his peremptory challenges is without merit. The court permitted sufficient individual voir dire on the subject of pretrial publicity. All the jurors who ultimately sat on the jury stated that they could be fair and impartial; none of them had significant recall of the events of the case. Defendant having failed to meet his burden, we overrule this assignment of error.

[3] Prior to opening statements, the trial judge informed counsel that he would not allow either to comment on the evidence to be presented by the other side or on the law, except as to burden of proof and presumption of innocence. Defendant alleges that the court erroneously sustained the prosecutor's objections to much of his opening statement and thereby abused its discretion. N.C.G.S. § 15A-1221(a)(4) provides that in a criminal jury trial "[e]ach party

must be given the opportunity to make a brief opening statement," but does not define the scope of the statement to be allowed. *E.g., State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986). Most of the arguments objected to by the prosecutor, and sustained by the trial court, were of the type clearly and properly prohibited in advance by the trial judge. For example, defense counsel attempted to argue what the State's witnesses would say and how the defense would contradict certain testimony. An opening statement is for the purpose of making a general forecast of the evidence, not for arguing the case, instructing on the law, or contradicting the other party's witnesses. 23A C.J.S. *Criminal Law* § 1239 (1989); *see Paige*, 316 N.C. 630, 343 S.E.2d 848. Here, the judge also sustained objections to the statement "I ask you to give attention to all of the witnesses," because it was not a forecast of the evidence. In *State v. Freeman*, 93 N.C. App. 380, 378 S.E.2d 545, *disc. rev. denied*, 325 N.C. 229, 381 S.E.2d 787 (1989), our Court of Appeals held that the trial court abused its discretion by interrupting defense counsel and classifying as argument the statement asking the jury to consider carefully each piece of the evidence. However, the Court determined that the error was not prejudicial. While the trial judge in this case erred in preventing defense counsel from telling the jury to give attention to all of the witnesses, defendant has failed to demonstrate prejudice requiring a reversal of his conviction. *Id.* at 390-91, 381 S.E.2d at 552. We cannot say that "had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (1988).

[4] The defendant next argues that the trial court erred in preventing his presentation of expert testimony regarding his ability to premeditate and deliberate. In *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988) (*Rose I*), this Court held that such testimony was inadmissible, because it involved a conclusion that a legal standard had or had not been met. That decision was reiterated in *Rose II*, 327 N.C. 599, 398 S.E.2d 314 (1990) (error for State's expert to testify that defendant was able to premeditate and deliberate at the time of the killing). In the instant case, defense counsel attempted to ask mental health experts specifically whether the defendant had the ability to premeditate and deliberate the killing on the night in question. The trial court sustained objections to these questions, but allowed the witnesses to testify about the defendant's ability to form a plan or scheme, in accordance with *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). In *State v.*

Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988), this Court reasoned that mental health experts were not in a better position than the jury to determine whether a legal standard had been met. Because premeditation and deliberation are legal terms of art, "[a] medical expert's opinion as to whether these legal standards have or have not been met is inadmissible. That determination is for the finder of fact." *Rose I*, 323 N.C. at 460, 373 S.E.2d at 430. Defendant's assignment of error is overruled.

[5] Defendant's final assignment of error is whether there was sufficient evidence to support a conviction for first degree murder. Defendant made motions to dismiss at the close of the State's case and at the close of all the evidence. When a defendant presents evidence, he waives his right to appeal the denial of his motion to dismiss at the close of the State's evidence. Therefore, only the motion to dismiss at the close of all the evidence is before the Court. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). A motion to dismiss is properly denied if there is substantial evidence of each element of the offense charged and of the defendant being the perpetrator of the offense. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences from that evidence. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). Defendant contends that the evidence was insufficient with respect to the essential elements of premeditation and deliberation, due to his severe intoxication. Premeditation and deliberation may be proved by circumstantial evidence, including absence of provocation, conduct of defendant before and after the crime, and the brutality of the crime. *E.g.*, *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated*, --- U.S. ---, 108 L. Ed. 2d 604 (1990) (mem.). Some witnesses for the State testified that defendant was wild and out of control when the killing occurred. However, others testified that, shortly after the killing, the defendant was not staggering or slurring his speech. The evidence, in the light most favorable to the State, also shows that defendant addressed the victim prior to the attack saying, "you guarded my brother, let's see if you can guard me"; that the victim stated that he did not want any trouble; that defendant landed the first blow and continued to beat the victim after he had fallen and was helpless;

that defendant lied to the arresting officers about his involvement and told his companions to lie; and that defendant confessed to a cellmate that the victim was a prison guard who had been harassing his brother and that if he had it to do over again, he would do the same thing. Although the evidence is undisputed that defendant had been drinking that evening, contradictions existed about his level of intoxication. Defendant's expert admitted that as a longtime abuser of alcohol, defendant may have built up a tolerance to alcohol. On a motion to dismiss, any contradictions must be resolved in favor of the State. *Bullard*, 312 N.C. 129, 322 S.E.2d 370. The evidence further shows that although defendant was driving recklessly, he was able to negotiate many steep "S" curves throughout the evening. We hold that the State's evidence was sufficient for a rational juror to find the existence of premeditation and deliberation. The jury could reasonably infer that defendant had the capacity to plan and carry out a plan to murder Randall Cupp, based upon the circumstances of the killing and his later inculpatory statements.

Accordingly, this assignment of error is overruled. In the defendant's trial, we find

No error.

CHARLENE CODY, WIDOW OF JOHN HOLLIS CODY, DECEASED, EMPLOYEE, PLAINTIFF v. SNIDER LUMBER COMPANY, EMPLOYER; SELF-INSURED, (HEWITT, COLEMAN & ASSOCIATES), DEFENDANT

No. 573PA89

(Filed 10 January 1991)

Master and Servant § 67 (NCI3d)— workers' compensation—heart attack—not a compensable accident

The Industrial Commission properly concluded in a workers' compensation action that decedent's heart attack was not the result of an accident arising out of and in the course of his employment where decedent was a sixty-two-year-old truck driver with high blood pressure and a preexisting heart condition; decedent attempted to remove a synthetic mesh tarp from his trailer; the tarp caught on something and decedent

had to jerk hard on the tarp three or four times; the problem appeared to frustrate decedent; decedent then began to back his truck up a ramp to a hydraulic lift; it took decedent four attempts to align the wheels correctly and successfully back the truck onto the lift; the lack of power steering made the maneuver more difficult; the situation also appeared to aggravate decedent; decedent hooked a safety chain to the truck, walked to a nearby control panel, and pressed a button to raise the lift platform and dump the load; and decedent collapsed and died shortly thereafter. Based upon substantial competent evidence, the Commission found that the only event which could be deemed unexpected and extraordinary was the sticking of the tarp and that the sticking of the tarp was not a precipitating factor in decedent's death.

Am Jur 2d, Workmen's Compensation § 300.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 96 N.C. App. 293, 385 S.E.2d 515 (1989), reversing an opinion and award of the Industrial Commission in favor of the defendant entered on 15 October 1987. Heard in the Supreme Court on 5 September 1990.

Thomas A. McNeely for the plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Hatcher Kincheloe and Mika Z. Savir, for the defendant-appellant.

MITCHELL, Justice.

The central issue before this Court is whether the Court of Appeals erred in concluding, contrary to the Industrial Commission's opinion and award, that the decedent-employee's fatal heart attack was the result of an "injury by accident" under N.C.G.S. § 97-2(6) (1985) and was compensable under our Workers' Compensation Act. We hold that the Court of Appeals erred in this regard. Accordingly, we reverse the decision of the Court of Appeals.

The defendant lumber company employed the decedent as a truck driver. The decedent regularly hauled residue consisting of sawdust and bark to paper mills in a tractor-trailer truck.

On 10 July 1984, the decedent hauled a load of residue to a mill in Rock Hill, South Carolina. At the designated dumping site, the decedent attempted to remove a synthetic mesh tarp cover-

ing the trailer. However, the tarp became caught on something. In order to free it, the decedent had to jerk hard on the tarp three or four times. A fellow truck driver opined that this problem appeared to frustrate the decedent.

The decedent then got into his truck and began to back it up a ramp to a hydraulic lift. Once again, the decedent had difficulty performing his task, and it took him four attempts to align the wheels correctly and successfully back the truck onto the lift. The lack of power steering in the truck made this maneuver more difficult. The other truck driver present opined that this situation also appeared to aggravate the decedent.

After the decedent properly aligned the truck with the lift, he hooked a safety chain to the truck, walked to a nearby control panel, and pressed a button to raise the lift platform and dump the load. Shortly thereafter, he collapsed and died of "sudden cardiac death."

At the time of his death, the decedent was sixty-two years old. He suffered from high blood pressure and a preexisting heart condition.

The Industrial Commission found, *inter alia*, that:

> 7. The only occurrence which *could* be found to have been out of the ordinary on this occasion was that the tarp became hung. However, decedent's heart attack did not occur until 15 to 20 minutes later after he had been involved in much more strenuous activity than his jerking on the tarp. His pulling on the tarp was not proven to be and is found not to be the precipitating cause of the heart attack. Rather, it was his emotional response to *the situation* in that he became aggravated and frustrated which was the precipating (sic) factor. Frustration, however, is a common reaction to many things which occur while driving on public streets and highways. Decedent had been a truck driver for most if not all of his adult life and had been subjected to these frustrations as a regular part of his life. The emotional response he had on this occasion does not constitute an injury by accident arising out of and in the course of his employment.
>
> 8. Decedent drove the same truck regularly in his employment with defendant, and he was often required to make deliveries to the Bowater Plant. He was accustomed to not

> having power steering. The evidence does not indicate how many times in the past he had had to back the truck up the ramp in order to get it between the rails or to what extent he would otherwise be struggling with the steering wheel in order to drive in and out of tight places in the course of his employment. Decedent was required to do work outside of the truck year around and in all temperatures. This was a typical July day, and the temperature was no hotter than it usually gets in July. Plaintiff did not prove that there was anything unusual in these activities of decedent on this occasion nor that there was an interruption of his regular work routine.

(Emphasis added.)

Review on appeal from an order and award of the Industrial Commission is limited to a determination of whether the Commission's findings are supported by the evidence and whether the findings, in turn, support the Commission's conclusions. *Dillingham v. Yeargin Construction Co.*, 320 N.C. 499, 502, 358 S.E.2d 380, 381-82, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 84 (1987). However, "[f]indings of fact which are essentially conclusions of law will be treated as such upon review." *Id.*, 358 S.E.2d at 382 (1987) (citing *Perkins v. Insurance Co.*, 274 N.C. 134, 161 S.E.2d 536 (1968)).

For an injury to be compensable, the plaintiff must introduce competent evidence to support the inference that an accident caused the injury in question. *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E.2d 389 (1980); *see Gunter v. Dayco Corp.*, 317 N.C. 670, 346 S.E.2d 395 (1986). As used in our Workers' Compensation Act, the terms "accident" and "injury" are not synonymous. *Rhinehart v. Roberts Super Market, Inc.*, 271 N.C. 586, 588, 157 S.E.2d 1, 3 (1967). "An accident, as the term is used in the Act, is '(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause.' " *Id.* (quoting *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E.2d 109, 110-11 (1962)). "[T]here must be some unforeseen or unusual event other than the bodily injury itself." *Id.* (citing *Keller v. Electric Wiring Co.*, 259 N.C. 222, 130 S.E.2d 342 (1963)).

Further, our Workers' Compensation Act states that " '[i]njury and personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and

unavoidably from the accident." N.C.G.S. § 97-2(6) (1985). When an employee is conducting his work in the usual way and suffers a heart attack, the injury does not arise by accident and is not compensable. *Jackson v. Highway Commission*, 272 N.C. 697, 701, 158 S.E.2d 865, 868 (1968). However, an injury caused by a heart attack may be compensable if the heart attack is due to an accident, such as when the heart attack is due to *unusual or extraordinary exertion*, *Lewter v. Abercrombie Enterprises, Inc.*, 240 N.C. 399, 404, 82 S.E.2d 410, 415 (1954), or extreme conditions. *Dillingham*, 320 N.C. at 503, 358 S.E.2d at 382.

Although it is unclear whether the Commission concluded in the present case that the sticking of the tarp was an "accident," we assume, *arguendo*, that it reached that conclusion. Since the Commission found that the only event which "could" be deemed unexpected or unusual and, thus, an accident was that the tarp became caught, the decedent suffered injury by accident only if that event caused his heart attack. Based upon medical evidence in the record, or the lack thereof, the Commission found that the physical exertion of tugging on the tarp was not the precipitating cause of the decedent's heart attack.

The Commission's opinion and award is not a model of clarity, but it seems clear that the Commission also found that the frustration the decedent experienced as a result of his efforts to free the tarp did not cause his heart attack. Instead, the Commission found that the decedent's emotional response to "the situation" was the precipitating factor. When the Commission's opinion is viewed in its entirety, it is apparent that the Commission used the term "situation" to describe events which were precipitating factors with regard to the decedent's heart attack, such as backing the tractor-trailer truck several times to align it properly, but which occurred after he had freed the tarp. The Commission clearly found from competent evidence, however, that the events comprising the "situation" after the decedent freed the tarp were neither unexpected nor extraordinary. Therefore, the "situation" and the decedent's frustration arising from it did not constitute an accident within the meaning of our Workers' Compensation Act.

The Court of Appeals reversed the opinion and award of the Commission and expressed the view that the facts as found by the Commission would support no conclusion other than that the decedent's heart attack was due to an accident and was a compen-

sable injury. The Court of Appeals stated that the Commission had concluded that the decedent's heart attack was not caused by an accident and was not compensable "because it was precipitated by a mental stimulus, frustration, rather than physical exertion . . . ." 96 N.C. App. 293, 297, 385 S.E.2d 515, 518 (1989). For the reasons previously set forth herein, we do not believe that the Commission reached or resolved the issue of whether a heart attack caused by unexpected and extraordinary frustration may be compensable.

We need not decide here whether the type of "extraordinary exertion" which makes a resulting heart attack compensable includes extraordinary emotional exertion. Based upon substantial and competent evidence, the Commission found in the present case that the only event which could be deemed unexpected and extraordinary and, thus, an accident was the sticking of the tarp. The Commission also found, however, that the sticking of the tarp was not a precipitating factor in the decedent's death. Therefore, the Commission properly concluded that the decedent's heart attack was not the result of an accident arising out of and in the course of the decedent's employment and that the defendant must prevail.

The decision of the Court of Appeals, reversing the opinion and award of the Industrial Commission in favor of the defendant, is reversed. This case is remanded to the Court of Appeals for further action consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. LARRY ANTHONY EVERETT

No. 157A90

(Filed 10 January 1991)

Rape and Allied Offenses § 5 (NCI3d) — rape and sexual offenses — child victim — sufficient evidence as to time

The State's evidence was sufficient to allow the jury to consider two first degree rapes and two first degree sexual offenses allegedly committed by defendant on his three-year-old stepdaughter between 1 and 29 February 1988 and between 1 and 31 March 1988 where it tended to show: the offenses

allegedly occurred in the mobile home where the victim lived with her mother and defendant; the victim told her stepsister, defendant's natural daughter, that defendant "won't leave me alone; he keep putting his private in mine"; the stepsister visited the home in February and March 1988, and on each visit the victim would talk to her about the assaults; one of these occasions was on Valentine's Day, which is 14 February; the stepsister went to a party for the victim's 16 March 1988 birthday, and the victim told her something had happened "near the birthday"; when asked how often defendant did bad things to her, the victim testified that "he did it when my mommy go to work" and that her mother went to work "most of the days"; the victim testified that the defendant "usually" did it in the bed and when her mother was there, he "usually" did it in the bathroom; the stepsister testified that she visited at the mobile home every other weekend and that the victim told her something had happened "all the time"; the victim told a social worker that defendant "had put his finger in her tail"; the victim told a pediatrician that defendant "stuck his fingers in my tail," and she responded "yes" when the pediatrician asked her if that had happened before; the victim told the examining physician defendant put "his thing" in her, and in response to the physician's inquiry concerning the number of times, she held up three fingers on each hand; the examining physician testified that the victim's vaginal opening was larger than he would have expected had only digital manipulation occurred; and the stepsister testified that defendant had abused her in a similar manner, including abuse by penetration. The temporal uncertainty affected the weight rather than the admissibility of the evidence, and the motion to dismiss on the ground that the State's evidence failed to fix a definite time was properly denied.

Am Jur 2d, Infants § 17.5; Rape §§ 52, 71, 73, 75, 88, 89, 101.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.

APPEAL by the State pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 98 N.C. App. 23, 390 S.E.2d 160 (1990), reversing judgments of imprisonment entered by *Britt, J.*, on 16 March 1989 in Superior Court,

CUMBERLAND County, upon defendant's convictions on two counts of first-degree rape and two counts of first-degree sexual offense. Heard in the Supreme Court 9 October 1990.

Lacy H. Thornburg, Attorney General, by James C. Gulick, Special Deputy Attorney General, for the State, appellant.

James R. Nance, Jr., for defendant appellee.

WHICHARD, Justice.

Defendant was indicted on three counts of first-degree rape and six counts of first-degree sexual offense. The indictments alleged that he committed one rape and two sex offenses during each of the following periods: (1) between 1 February and 29 February 1988; (2) between 1 March and 31 March 1988; and (3) between 1 April and 14 April 1988.

The trial court dismissed three of the six counts of first-degree sexual offense. It denied defendant's motion to dismiss the remaining counts, and the jury convicted defendant on the remaining charges. The trial court sentenced him to five concurrent life sentences and one consecutive life sentence.

On appeal, a divided panel of the Court of Appeals found the evidence insufficient to allow the charges in the indictments relating to the February and March offenses to go to the jury and reversed the judgments imposed on those counts. *State v. Everett*, 98 N.C. App. 23, 390 S.E.2d 160 (1990). Judge Cozort dissented, and the State exercised its right to appeal. N.C.G.S. § 7A-30(2) (1989).

Because this appeal is before us pursuant to N.C.G.S. § 7A-30(2), review is limited to the issue raised in Judge Cozort's dissent: whether there was sufficient evidence to allow the jury to consider the indictments charging two first-degree rapes and two first-degree sexual offenses committed in February and March 1988. *Everett*, 98 N.C. App. at 33, 390 S.E.2d at 165. We hold that the evidence was sufficient to allow the jury to consider these offenses. We thus reverse the Court of Appeals and remand for reinstatement of the judgments.

"In testing the sufficiency of the evidence to sustain a conviction and to withstand a motion to dismiss, the reviewing court must determine whether there is substantial evidence of each essen-

tial element of the offense and that the defendant was the perpetrator." *State v. Lyszaj*, 314 N.C. 256, 266, 333 S.E.2d 288, 295 (1985). The court "must consider the evidence in the light most favorable to the state, and the state is entitled to every reasonable inference to be drawn from the evidence." *State v. Artis*, 325 N.C. 278, 301, 384 S.E.2d 470, 483 (1989), *sentence vacated*, 494 U.S. ---, 108 L.Ed.2d 604 (1990); *see also State v. Forney*, 310 N.C. 126, 128, 310 S.E.2d 20, 21 (1984).

Generally, an indictment must include a designated date or period within which the offense occurred. N.C.G.S. § 15A-924(a)(4) (1990). However, the statute expressly provides that "[e]rror as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice." *Id.* Also, "[n]o judgment upon any indictment . . . shall be stayed or reversed for . . . omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly." N.C.G.S. § 15-155 (1990).

In cases of sexual assaults on children, temporal specificity requisites diminish.

> We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.

State v. Wood, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984) (citations omitted). Unless the defendant demonstrates that he was deprived of his defense because of lack of specificity, this policy of leniency governs. *See State v. Hicks*, 319 N.C. 84, 91, 352 S.E.2d 424, 428 (1987); *State v. Sills*, 311 N.C. 370, 376, 317 S.E.2d 379, 382 (1984). "[I]t is sufficient for conviction that the jury is satisfied *upon the whole evidence* that each element of the crime has been proved beyond a reasonable doubt." *State v. May*, 292 N.C. 644, 655, 235 S.E.2d 178, 185 (emphasis added), *cert. denied*, 434 U.S. 928, 54 L.Ed.2d 288 (1977).

Considered in light of the foregoing standards, the pertinent evidence here showed the following:

The victim, defendant's stepdaughter, was three years old at the time the offenses allegedly occurred in the mobile home where she lived with her mother and defendant. The victim's stepsister, defendant's natural daughter, testified that the victim told her defendant "won't leave me alone; he keep putting his private in mine." She testified that she visited the home in February and March 1988, and that every time she visited the victim would talk to her about the assaults. She testified, more specifically, that she went to see defendant near Valentine's Day, which is on 14 February. "[E]very time" she went to see defendant, the victim told her something had happened between her and the defendant. When asked whether the victim was at the home when she visited near Valentine's Day, defendant's daughter responded, "I think so." The prosecuting attorney then asked whether she gave the victim something for Valentine's Day in 1988, and she replied, "I think so." The defendant's daughter also testified that she remembered going to the victim's birthday party in 1988 and that the victim told her something had happened "near the birthday." The victim's birthday is 16 March.

The evidence indicated that the victim suffered repeated assaults. The victim told defendant's daughter: "My daddy won't leave me alone. He *keep* putting his—his private in mine (emphasis added)." When asked how often defendant did "bad things" to her, the victim testified that "[h]e did it when my mommy go to work" and that her mother went to work "most of the days." The victim testified that the defendant "*usually* do it in the bed. . . . [A]nd when my mommy is there, he *usually* do it in the bathroom (emphasis added)." Also, the victim testified: "[N]obody ever touched me how [the defendant did]."

The daughter testified that she visited at the trailer every other weekend and that the victim told her something had happened "all the time." When a social worker talked to the victim, she told him the defendant "had put his finger in her tail." The victim told a pediatrician that defendant "stuck his fingers in my tail," and she responded "yes" when the pediatrician asked her if that had happened before. She told her examining physician defendant put "his thing" in her, and in response to the physician's

inquiry concerning the number of times, she held up three fingers on each hand.

Further, the physical evidence was consistent with repeated penetration by a blunt object. The examining physician testified that the vaginal opening was larger, than he would have expected had only digital manipulation occurred.

Additional testimony established a pattern of child sexual abuse by defendant. The daughter testified that defendant had abused her sexually in a similar manner, including abuse by penetration.

We hold that the foregoing evidence, as a whole, considered in the light most favorable to the State as required, was sufficient to withstand the motion to dismiss and to allow the jury to consider the first-degree rapes and first-degree sexual offenses allegedly committed in February and March 1988. It permitted a reasonable inference that defendant regularly perpetrated rapes and sexual offenses on the minor victim and that one of each category of those offenses occurred on or near both 14 February and 16 March 1988, dates within the ranges set forth in the indictments. The temporal uncertainty affected the weight rather than the admissibility of the evidence, and the motion to dismiss on the ground that the State's evidence failed to fix a definite time was properly denied. *State v. Wood*, 311 N.C. at 742, 319 S.E.2d at 249.

For the foregoing reasons, the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for further remand to the Superior Court, Cumberland County, for reinstatement of the judgments.

Reversed.

STATE OF NORTH CAROLINA v. DREAMER LEE COTTLE ALSTON

No. 397A90

(Filed 10 January 1991)

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by *Strickland, J.*, at the 2 January 1990 Criminal Session of Superior Court, NEW

HANOVER County. Calendared for argument in the Supreme Court 10 December 1990; determined on the briefs without oral argument pursuant to N.C.R. App. P. 30(d).

Lacy H. Thornburg, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for defendant-appellant.

Dreamer Lee Cottle Alston, pro se.

PER CURIAM.

Defendant, Dreamer Lee Cottle Alston, was indicted by the New Hanover County grand jury on 28 August 1989 for the murder of Pernell Dewayne Joe. The case was tried noncapitally at the 2 January 1990 Criminal Session of Superior Court, New Hanover County.

The evidence tended to show that Pernell Dewayne Joe died shortly before midnight on 16 August 1989 as a result of a single gunshot wound to the upper chest. Earlier that evening, around 7:00 or 8:00, Joe got into an argument and fist fight with his brother, James William Joe, at the Dove Meadows apartment complex in Wilmington, where Pernell Joe resided with his girlfriend, Dana Aldelette. A group of people tried to break up the fight. Present in the crowd were Aldelette and several of James Joe's friends, including defendant, her husband Mike Alston, and a number of their companions. The fight lasted about ten minutes, and then Pernell went back to his apartment, and his brother James left for a short while.

Subsequently, around 9:00 p.m., defendant and her husband and friends were getting into defendant's car, and Pernell Joe was outside talking with his girlfriend. Mike Alston said something to Joe about the earlier fight to the effect, "[T]hat's why you got your a-- kicked," and Joe became angry and responded. Alston got out of the car, and the two men began fighting on the road in front of the apartment of Amanda Bryan and Dawn James. A large crowd gathered to watch, and the fight continued for fifteen to thirty minutes until police officers arrived to break it up. During the fight, James Joe heard Mike Alston say, "I am going to kill you Pernell." Several witnesses saw defendant run toward Pernell Joe with a forty-ounce beer bottle in her hand, but someone at

the scene stopped her from entering the fight by pushing her off or punching her.

When the fight ended, defendant and three of the girls who were with her got into defendant's white Nissan Sentra to leave. As she walked to the car, defendant said, "I've got something for ya'll. I've got something for ya'll." Defendant drove to her house and went inside briefly, then drove back to Dove Meadows and picked up her husband and Angela Gibson. Afterwards, they all went to the home of Catherine Smith at Garden Lakes Estates, approximately four miles from Dove Meadows. On the way there in the car, defendant was saying things like, "[Y]ou don't f--- with anybody I love because I will f--- you up too . . ." and "I will put a cap in his a-- and the only thing that is going to save him are the cops."

The group arrived at Garden Lakes Estates around 10:00 p.m. and visited for thirty to forty minutes with Catherine Smith on her front porch. Defendant told some of those present that they had just come from a fight at Dove Meadows between her husband and Pernell Joe, that Pernell's "home boys jumped on him [her husband]," that she was not going to have anybody "running over her man," and that she was "going back there and . . . f--- this mother f---er up." Defendant also patted her hip and stated, "I've got five rounds and I am going to unload every one of them in his . . . a--."

Meanwhile, Pernell Joe also was still at Dove Meadows with several friends, who were trying to calm him down. Then Joe and his friends began playing "baseball," with Joe using a boat paddle as a bat. Willie "Spanky" Smith, one of Joe's friends, had picked up a large stick like a closet rod. A while later, defendant returned, driving the white Nissan, with Mike Alston seated next to her and Angela Gibson on the far side of the front passenger seat. Three companions were in the back seat. The evidence was conflicting as to whether Joe was initially inside the apartment or outside the apartment when defendant drove past.

Eight eyewitnesses, including three of the women in defendant's car, two of Joe's friends, Joe's girlfriend, and two bystanders offered somewhat varied accounts of the events that followed. The witnesses generally agreed that, as defendant drove slowly past Joe's apartment, Joe ran alongside or behind the car, carrying the boat paddle over his shoulder. Smith also followed on the other

side, carrying the closet rod. Defendant made a U-turn at the intersection at the end of the street. At that point, Joe was on the driver's side of the car, and Smith was on the other side. A brief conversation occurred between Joe and the occupants of the car, then defendant's hand extended from the window, several (from two to five) shots were fired, and Joe ran back down the street and fell near his apartment.

According to two witnesses, when Joe approached the car, defendant said, "Mother f---er, you got to die," and fired.

As defendant and her companions left Dove Meadows, defendant stated that everyone had been laughing about the fight and that she had given them something to laugh about. Defendant also stated that she had only shot Joe once in the shoulder. She told the passengers in the car "[s]he had been in jail before and she don't care if she goes back again." They also stopped a car occupied by one of Mike Alston's friends, and defendant told him she had just shot somebody.

Officers who responded to the scene found Pernell Joe lying on the ground near his apartment at 218 Virginia Avenue. The boat paddle was lying in the street approximately 171 feet away from the body, and a trail of blood led from that point to where Joe was found. Defendant, her husband, and others were arrested later that night.

At the conclusion of the evidence, defendant's motion to dismiss was denied, and possible verdicts were submitted to the jury of first-degree murder, second-degree murder, and not guilty. The jury found defendant guilty of first-degree murder, as charged. From judgment entered 4 January 1990, imposing a sentence of life imprisonment, defendant appealed.

Upon defendant's application of indigency, the Appellate Defender was assigned to represent defendant on her appeal to this Court. After thorough review of the record and the relevant law and further consultation with fellow counsel, defense counsel stated that she was unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal. In accordance with *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), defense counsel submitted a brief in which she discussed four possible assignments of error "that might arguably support the appeal," *id.* at 744, 18 L. Ed. 2d at 498, and requested this

Court to conduct a full examination of the record. Defense counsel submitted a copy of her brief to defendant, with copies of the transcript and record and a letter notifying defendant of her right to submit a brief to this Court on her own behalf in accordance with *Anders*. Defendant subsequently filed a *pro se* brief. We conclude that defense counsel has fully complied with *Anders*.

Upon our thorough review of the transcript, record, briefs of counsel, and defendant's *pro se* brief, this Court finds no error warranting reversal of defendant's conviction or modification of her sentence. In defendant's trial and sentencing, we find

No error.

RECOVERY CENTERS OF AMERICA, INC., D/B/A NEW BEGINNINGS OF NORTH CAROLINA, PETITIONER-APPELLANT v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT-APPELLEE AND DUKE UNIVERSITY, INTERVENOR-RESPONDENT-APPELLEE

No. 126PA90

(Filed 10 January 1991)

ON petitioner-appellant's petition for discretionary review (prior to a determination by the Court of Appeals) of the 11 August 1989 final decision of the Department of Human Resources by I.O. Wilkerson, Jr., Director, Division of Facility Services. Submitted on briefs without oral argument 10 December 1990.

Thompson & Burgess, by Kenneth L. Burgess, for petitioner-appellant.

Lacy H. Thornburg, Attorney General, by James A. Wellons, Assistant Attorney General, for North Carolina Department of Human Resources, respondent-appellee.

Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr., and M. Elizabeth Gee, for Duke University, intervenor-respondent-appellee.

EXUM, Chief Justice.

Under the rationale and holding in *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 327 N.C. 573, 398 S.E.2d 466 (1990), the final decision of the Department of Human Resources

entered 11 August 1989 is vacated. The Department must issue the Certificate of Need for which the petitioner-appellant has applied. The matter is remanded to the Department for further proceedings not inconsistent with this decision. *Durham Meridian Partnership v. N.C. Dept. of Human Res.*, 327 N.C. 586, 398 S.E.2d 474 (1990).

Vacated and remanded.

Justice WHICHARD concurring.

While I continue to adhere to the reasoning in my dissenting opinion in *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 327 N.C. 573, 398 S.E.2d 466 (1990), the majority opinion there is now the law governing this case. For this reason, I concur in the foregoing opinion.

Justice FRYE joins in this concurring opinion.

STATE OF NORTH CAROLINA v. DEAN DARWIN FOLAND AND MATTHEW ERVIN PURDY

No. 62PA90

(Filed 10 January 1991)

ON the State's and defendants' petitions for discretionary review and defendants' appeal from a decision of the Court of Appeals, 97 N.C. App. 309, 388 S.E.2d 195 (1990). Heard in the Supreme Court 8 October 1990.

Lacy H. Thornburg, Attorney General, by James Peeler Smith, Special Deputy Attorney General, for the State-appellant and appellee.

Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellee and appellant Foland; Robin E. Hudson for defendant-appellee and appellant Purdy.

PER CURIAM.

We initially allowed the State's petition for discretionary review of the Court of Appeals' holding that the indictments must be dismissed under the Speedy Trial Act, N.C.G.S. § 15A-701, *et seq.*,

repealed by Chapter 688, 1989 Session Laws. Defendants appealed and petitioned for discretionary review of the Court of Appeals' holding that there was no error in the trial court's denial of defendants' motion to suppress certain evidence, a holding with which Judge Greene disagreed. We allowed defendants' petition and denied the State's motion to dismiss defendants' appeal.

After giving careful consideration to the oral arguments and new briefs of the State and defendants, the Court determines that the petitions for discretionary review were improvidently allowed. This leaves undisturbed the decision of the Court of Appeals that the indictments against defendants be dismissed and makes moot defendants' appeal, which we now dismiss because it is moot.

Petitions for discretionary review improvidently allowed; appeal dismissed.

STEWART OFFICE SUPPLIERS, INC. v. SOUTHERN NATIONAL BANK OF NORTH CAROLINA

No. 128A90

(Filed 10 January 1991)

APPEAL of right by defendant Southern National Bank of North Carolina pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 97 N.C. App. 353, 388 S.E.2d 599 (1990), reversing an order of summary judgment granted in favor of defendant entered by *Snepp, J.*, on 7 December 1988 in Superior Court, MECKLENBURG County. Heard in the Supreme Court 9 October 1990.

Lawrence U. Davidson, III, for plaintiff-appellee.

Parker, Poe, Adams & Bernstein, by Gaston H. Gage and Craig T. Lynch, for defendant-appellant Southern National Bank of North Carolina.

PER CURIAM.

For the reasons stated in the dissenting opinion of Greene, J., the decision of the Court of Appeals is

Reversed.

MARY BONNEAU (BONNIE) McELVEEN-HUNTER v. FOUNTAIN MANOR ASSOCIATION, INC.

No. 143PA90

(Filed 10 January 1991)

ON discretionary review of the decision of the Court of Appeals, 96 N.C. App. 627, 386 S.E.2d 435 (1989), reversing a judgment entered by *Cornelius, J.*, on 16 June 1988 after hearing at the 16 May 1988 Civil Session of Superior Court, GUILFORD County. Heard in the Supreme Court 10 December 1990.

Osteen & Adams, by William L. Osteen, Sr., for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by Charles E. Nichols and Everett B. Saslow, Jr., for defendant-appellee.

PER CURIAM.

Affirmed.

Chief Justice EXUM did not participate in the consideration or decision of this case.

IN RE FORECLOSURE OF STEWART

[328 N.C. 85 (1991)]

IN THE MATTER OF THE FORECLOSURE SALE OF THE PROPERTY OF W. CRAIG STEWART AND WIFE, CONNIE Y. STEWART, DEED OF TRUST BOOK 642, PAGE 916 AND BOOK 682, PAGE 563

No. 198PA90

(Filed 10 January 1991)

ON petition for discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of the Court of Appeals, 98 N.C. App. 154, 391 S.E.2d 224 (1990), affirming the order entered by *Griffin, J.*, in Superior Court, DAVIDSON County, on 14 March 1989. Heard in the Supreme Court on 13 December 1990.

Schoch, Schoch and Schoch, by Arch Schoch, Jr., and Karen M. Zaman & Associates, by Michael W. Sigler, for petitioner-appellee.

Stern, Graham & Klepfer, by James W. Miles, Jr. and J. Bradley Purcell, for respondent-appellants.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA v. BOBBY LEE WOODRUFF

No. 322A90

(Filed 10 January 1991)

APPEAL by the defendant pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 99 N.C. App. 107, 392 S.E.2d 434 (1990), finding no error in the judgment entered 13 April 1989, by *Sitton, J.*, in Superior Court, HENDERSON County. Heard in the Supreme Court 11 December 1990.

Lacy H. Thornburg, Attorney General, by Elisha H. Bunting, Jr., Special Deputy Attorney General, for the State.

Prince, Youngblood, Massagee & Jackson, by J. Michael Edney and Sharon B. Ellis, for the defendant-appellant.

PER CURIAM.

Affirmed.

FRANK S. J. McINTOSH, PLAINTIFF v. CAREFREE CAROLINA COMMUNITIES, INC., DEFENDANT v. R. P. THOMAS, THIRD-PARTY DEFENDANT

No. 279A90

(Filed 10 January 1991)

APPEAL of right by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 98 N.C. App. 653, 391 S.E.2d 851 (1990), affirming a judgment entered 6 October 1988 by *Lewis, J.*, in Superior Court, TRANSYLVANIA County. Heard in the Supreme Court 12 December 1990.

Adams, Hendon, Carson, Crow & Saenger, P.A., by Martin K. Reidinger and Lori M. Glenn, for plaintiff-appellant.

Harrell & Leake, by Larry Leake, for defendant-appellee.

Prince, Youngblood, Massagee & Jackson, by Boyd B. Massagee, Jr., and Sharon B. Ellis, for third-party defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion of Greene, J., the decision of the Court of Appeals is

Reversed.

RICHARD SHERWOOD WEBSTER AND BENNY MITCHELL CHURCH v. HARRELL POWELL, JR.

No. 258A90

(Filed 10 January 1991)

APPEAL by plaintiffs from the decision of a divided panel of the Court of Appeals, 98 N.C. App. 432, 391 S.E.2d 204 (1990), affirming a judgment of directed verdict in favor of defendant entered 21 October 1988, by *Morgan, J.*, in Superior Court, FORSYTH County. Heard in the Supreme Court 12 December 1990.

Robert R. Schoch for plaintiff appellants.

Womble Carlyle Sandridge & Rice, by William C. Raper and G. Michael Barnhill, for defendant appellee.

PER CURIAM.

For the reasons stated in the opinion for the Court of Appeals by Orr, J., relating to the statute of limitations on defendant's alleged malpractice, and relating to the failure of the insurance policy in question to cover the fiduciary duties alleged, the decision of the Court of Appeals is affirmed.

Affirmed.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

BOOHER v. FRUE

No. 299P90

Case below: 98 N.C.App. 585

Petition by defendant (Ronald K. Payne) for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

DUKE UNIVERSITY v. HESTER

No. 381P90

Case below: 99 N.C.App. 360

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

FLETCHER, BARNHARDT & WHITE, INC. v. MATTHEWS

No. 560P90

Case below: 100 N.C.App. 436

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

FORBES v. PAR TEN GROUP, INC.

No. 477P90

Case below: 99 N.C.App. 587

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

GLOVER v. N.C. FARM BUREAU MUT. INS. CO.

No. 347P90

Case below: 99 N.C.App. 360

Petition by plaintiff (Adlene R. Glover) for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

HAZELWOOD v. LANDMARK BUILDERS, INC.

No. 550P90

Case below: 100 N.C.App. 386

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

HUGGINS v. CRUTCHFIELD PLUMBING AND HEATING CO.

No. 418P90

Case below: 99 N.C.App. 582

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

IN RE BRITT

No. 343P90

Case below: 99 N.C.App. 360

Petition by Michael Ray Britt for writ of certiorari to the North Carolina Court of Appeals denied 10 January 1991.

IN RE GARDNER

No. 292P90

Case below: 98 N.C.App. 698

Petition by Caveators for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

KEMPSON v. N.C. DEPT. OF HUMAN RESOURCES

No. 570PA90

Case below: 100 N.C.App. 482

Petition by defendant for writ of supersedeas allowed 10 January 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 10 January 1991.

LEE v. VISION CABLE OF NORTH CAROLINA

No. 479P90

Case below: 100 N.C.App. 190

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

LYMANGROVER v. WAKE FOREST UNIVERSITY

No. 336P90

Case below: 99 N.C.App. 222

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

MID-STATE FORD, INC. v. ELDRIDGE

No. 517P90

Case below: 100 N.C.App. 329

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

MORTON v. FAHY

No. 503P90

Case below: 100 N.C.App. 329

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

MUDUSAR v. V. G. MURRAY & CO.

No. 552P90

Case below: 100 N.C.App. 395

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

NAPIER v. HIGH POINT BANK & TRUST CO.

No. 525P90

Case below: 100 N.C.App. 390

Petition by defendant (Henry Hazel Clodfelter) for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

NYE v. NYE

No. 530P90

Case below: 100 N.C.App. 326

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

PHEASANT v. MCKIBBEN

No. 551P90

Case below: 100 N.C.App. 379

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

PINEHURST AREA REALTY, INC. v. VILLAGE OF PINEHURST

No. 461P90

Case below: 100 N.C.App. 77

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 10 January 1991. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

RAGAN v. COUNTY OF ALAMANCE

No. 277PA90

Case below: 98 N.C.App. 636

Petition by defendants for discretionary review pursuant to G.S. 7A-31 as to additional issues allowed 14 January 1991.

ROANE-BARKER v. SOUTHEASTERN HOSPITAL SUPPLY CORP.

No. 341P90

Case below: 99 N.C.App. 30

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

SOUTH ATLANTIC PRODUCTION CREDIT ASSN. v. GREEN

No. 518P90

Case below: 100 N.C.App. 190

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

SPARKS v. NATIONWIDE MUT. INS. CO.

No. 313P90

Case below: 99 N.C.App. 148

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

SPROLES v. GREENE

No. 482PA90

Case below: 100 N.C.App. 96

Petitions by plaintiffs (Sproles and Phillips) and defendant (Integon) for discretionary review pursuant to G.S. 7A-31 allowed 10 January 1991.

STATE v. ABSHER

No. 543PA90

Case below: 100 N.C.App. 453

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 10 January 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. BLANKS

No. 496P90

Case below: 100 N.C.App. 332

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE v. DAIL

No. 415P90

Case below: 99 N.C.App. 584

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 10 January 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE v. HARRELL

No. 546P90

Case below: 100 N.C.App. 450

Petition by defendant for writ of supersedeas denied and temporary stay dissolved 10 January 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE v. HAWKINS

No. 515P90

Case below: 100 N.C.App. 330

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE v. JACKMAN

No. 562P90

Case below: 100 N.C.App. 601

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE v. JONES

No. 421P90

Case below: 99 N.C.App. 412

Motion by the Attorney General to dimiss appeal for lack of substantial constitutional question allowed 10 January 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE v. LOVE

No. 512P90

Case below: 100 N.C.App. 226

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 10 January 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE v. McKENDALL

No. 539P90

Case below: 100 N.C.App. 333

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 10 January 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE v. MOORE

No. 492P90

Case below: 100 N.C.App. 331

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. PETERSON

No. 420P90

Case below: 99 N.C.App. 585

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 10 January 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE v. RIGGS

No. 469P90

Case below: 100 N.C.App. 149

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE v. ROSS

No. 493A90

Case below: 100 N.C.App. 207

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 10 January 1991.

STATE v. SHOEMAKER

No. 363P90

Case below: 99 N.C.App. 363

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE v. SMITH

No. 390P90

Case below: 99 N.C.App. 67

Petition by defendant (Steven Jerome Crawford) for writ of certiorari to the North Carolina Court of Appeals denied 10 January 1991.

STATE v. WALKER

No. 349P90

Case below: 99 N.C.App. 363

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 10 January 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE v. WALLER

No. 508P90

Case below: 100 N.C.App. 331

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE EX REL. UTILITIES COMMISSION v. VILLAGE OF PINEHURST

No. 362PA90

Case below: 99 N.C.App. 224

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 10 January 1991.

SUMMER v. ALLRAN

No. 523P90

Case below: 100 N.C.App. 182

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

WADDLE v. SPARKS

No. 476A90

Case below: 100 N.C.App. 129

Petitions by defendant (Mills) and by defendant (Sparks) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 10 January 1991. Petition by plaintiff (Jacqueline E. Simpson) for discretionary review pursuant to G.S. 7A-31 allowed 10 January 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

WALKER v. N.C. DEPT. OF HUMAN RESOURCES

No. 557P90 (Walker)

No. 558P90 (Camp)

Case below: 100 N.C.App. 498

Petition by defendant for writ of supersedeas denied and temporary stay dissolved 10 January 1991. Petition by defendant for discretionary review in both cases pursuant to G.S. 7A-31 denied 10 January 1991.

WALL v. N.C. DEPT. OF HUMAN RESOURCES

No. 483P90

Case below: 99 N.C.App. 330

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

WEST v. SOUKKAR

No. 355P90

Case below: 99 N.C.App. 363

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 January 1991.

STATE OF NORTH CAROLINA v. ROGER LEE SMITH

No. 235A88

(Filed 7 February 1991)

1. Arrest and Bail § 63 (NCI4th)— warrantless arrest—probable cause—victim's description and other circumstances

The warrantless arrest of defendant was based on probable cause where a felonious assault and robbery victim told the police that he and a murder victim were robbed and shot by "a black male wearing blue jeans and a blue shirt"; a deputy sheriff driving a patrol car saw a person matching this description two hours later some two miles from the crime scene; defendant fled as the deputy approached him with the patrol car; the deputy called for backup to help search the area where the suspect ran; the search ended when the police discovered a black man running through the woods who matched the victim's and deputy's descriptions; the police called to the man to stop without success and apprehended him after a brief chase; when the deputy asked the suspect his name, he responded that he hadn't shot anybody; and the deputy then searched the suspect and discovered a billfold containing a blank check on the account of one of the victims. Assuming that the victim's vague description of the felon was insufficient to establish probable cause to arrest, the other circumstances of the arrest, combined with the description, made the arrest lawful.

Am Jur 2d, Arrest §§ 44-46, 48; Searches and Seizures §§ 92, 93.

What constitutes probable cause for arrest—Supreme Court cases. 28 L. Ed. 2d 978.

2. Criminal Law § 75.8 (NCI3d)— second interrogation—failure to repeat Miranda warnings—prior warnings not stale

The trial court did not err in finding that *Miranda* warnings given to defendant prior to his first interrogation by police officers had not grown stale at the time of his second interrogation by the sheriff and in concluding that defendant's statements to the sheriff and the fruits of those statements were not inadmissible because defendant was not given renewed *Miranda* warnings prior to the second interrogation.

Although evidence that defendant had not slept for thirty hours and had consumed large amounts of alcohol and drugs, that defendant had an IQ of only seventy-nine, that the sheriff was not present at the first interrogation and did not restate defendant's *Miranda* rights, and that there were significant differences in defendant's responses to questions in the two interrogations tended to indicate that the warnings had grown stale, the trial court's finding that the warnings had not grown stale was supported by evidence that the second interrogation followed the first by less than an hour and the sheriff began the interview by asking defendant if he had been advised of his *Miranda* rights; officers offered defendant food and drink before he was interrogated, and defendant accepted a soft drink; the interrogation was conducted in an air-conditioned office; the officers asked defendant if he was under the influence of drugs or other stimulants and defendant responded negatively; an officer advised defendant of his constitutional rights, orally explaining each of the rights to defendant and having defendant initial each right on the waiver of rights form as the right was explained to him; and defendant had been advised of his rights on four occasions prior to his arrest and admitted that he understood his rights on each of those occasions.

Am Jur 2d, Criminal Law §§ 791-794.

3. Criminal Law § 75.2 (NCI3d)— statements by sheriff— confession not involuntary

Defendant's confession to the sheriff was not involuntary because the sheriff told defendant that the Bible encouraged truth telling, that telling the truth would help with the judge and prosecutor, and that he could get the electric chair where the trial court found, based upon the sheriff's testimony, that no promises were made to defendant. Furthermore, the totality of the circumstances permitted the conclusion that the confession was voluntary where the State's evidence tended to show that the type of "police dominated atmosphere" which can tend to coerce an incriminating statement from a suspect was not present because the police offered him food and drink and took him to an air-conditioned office; an officer advised defendant of his constitutional rights prior to his first interrogation, orally explaining each of the rights to defendant and having defendant initial each right on the waiver of rights

form as the right was explained to him; defendant answered that he understood each of the rights and responded negatively when asked if he was under the influence of medicine, narcotics, intoxicating liquor, or other stimulants; when asked whether he wanted to speak to the officers or to see an attorney, defendant stated that he would talk to the officers; defendant was in his early twenties, had completed the ninth grade and had received an electrician's certificate from a technical school; defendant was able to read the waiver of rights form and could understand what it said; defendant had been advised of his rights on four occasions and admitted that he understood those rights when explained to him on the earlier occasions and on the date of his confession; officers gave defendant his *Miranda* warnings at approximately 10:00 a.m. and interrogated him until sometime after 1:00 p.m.; shortly thereafter, the sheriff began his interrogation by asking defendant if he had been advised of his constitutional rights and if he understood those rights, and defendant responded affirmatively to both questions; and any benefits the sheriff mentioned to defendant were in response to defendant's own inquiry.

Am Jur 2d, Evidence §§ 548, 565, 573.

4. Criminal Law § 76.5 (NCI3d)— admissibility of confession— findings as to promises

The trial court was not required to make findings of fact regarding the sheriff's statement to defendant that he could tell the judge and district attorney that defendant had cooperated where the sheriff's testimony that he made the statement was uncontradicted, and the statement by the sheriff did not render defendant's confession involuntary. While there was a material conflict in the evidence as to whether the sheriff made statements or promises about which defendant testified, the trial court's finding that no promises were made to defendant was, in essence, a finding that the promises about which defendant testified were never made, and this finding supported the conclusion that the confession was freely and voluntarily given.

Am Jur 2d, Evidence § 585.

5. Jury § 7.14 (NCI3d)— peremptory challenges—prima facie case of discrimination—rebuttal by State

A defendant charged with first degree murder, felonious assault and armed robbery established a prima facie case of purposeful discrimination in the prosecutor's exercise of peremptory challenges where the defendant is a young black man and both victims are white; the case attracted much attention; a statement by the district attorney criticizing defense counsel for using fifteen out of sixteen peremptory challenges to excuse white jurors tends to support an inference of discrimination; and although the prosecutor did not use all sixteen of his peremptory challenges, he exercised twelve of the fifteen used to exclude blacks. However, the State rebutted this prima facie case with evidence that the State did not use all of its peremptory challenges, it accepted nine blacks, and the jury was ultimately composed of seven blacks and five whites, and with the prosecutor's explanations that each peremptory challenge was exercised because of concerns for prospective jurors' uncertainties about the death penalty, nervousness in the face of voir dire questioning, prior contact with either defense counsel or the criminal justice system, or having children approximately the age of defendant. Further, the record supported trial court's conclusion that the reasons given by the prosecutor were not pretextual.

Am Jur 2d, Jury § 235.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

6. Jury § 7.14 (NCI3d)— peremptory challenges—disparate questioning of blacks—employment of whites by prosecutor—discrimination not shown

The district attorney's alleged disparate questioning of blacks did not indicate his intent to discriminate in the exercise of his peremptory challenges. Nor was discrimination evident merely because the district attorney's office employs a percentage of whites higher than that of the district itself.

Am Jur 2d, Jury § 235.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

7. Jury § 7.9 (NCI3d)— challenge for cause—juror's consideration of impaired capacity mitigating circumstance

The trial court did not err in the denial of defendant's challenge for cause of a prospective juror on the ground that he would not consider the statutory impaired capacity mitigating circumstance on the basis of alcohol or drugs where it is clear from the juror's answers to voir dire questions that, when instructed by the trial court to consider a statutory mitigating circumstance, he would consider that circumstance but would give it whatever weight he thought appropriate. While defendant is entitled to have the jury consider all appropriate mitigating circumstances, the weight to be given each circumstance is for the individual juror to determine.

Am Jur 2d, Jury §§ 279, 291.

8. Jury § 6.3 (NCI3d)— questioning of prospective jurors—sympathy from observing defendant

The trial court in a first degree murder case did not abuse its discretion in allowing the district attorney to ask potential jurors whether the fact that they could observe defendant in the courtroom each day would cause them to have sympathy toward defendant and not toward the victim, who obviously could not be present, since the district attorney's questions did not have the effect of urging jurors to ignore defendant's demeanor at trial but sought to identify those jurors who would be sympathetic to defendant due to his presence in the courtroom.

Am Jur 2d, Jury § 271.

9. Jury § 6.3 (NCI3d)— mitigating circumstance of age—illustration to prospective jurors

The trial court did not abuse its discretion in permitting the district attorney to inform prospective jurors during jury selection that the mitigating circumstance of age might be met if the person was sixteen, seventeen, or eighteen years old since the district attorney merely attempted to illustrate what was meant by the mitigating circumstance of age and did not attempt to "stake out" jurors to a particular test for this mitigating circumstance.

Am Jur 2d, Jury §§ 265, 267, 269.

10. Jury § 6.3 (NCI3d)— jury selection—description of mitigating circumstance for murder

The district attorney did not impermissibly limit the range of mitigating circumstances for first degree murder when he described such circumstances during jury selection as those which "make a murder not so bad."

Am Jur 2d, Jury §§ 265, 267, 269.

11. Jury § 6.3 (NCI3d)— jury selection—fairness to defendant and the people

The trial court did not abuse its discretion in permitting the district attorney to ask prospective jurors whether they understood that "we must be fair to the defendant and be fair also to the people of North Carolina and the victim's family."

Am Jur 2d, Jury §§ 265, 267, 269.

12. Jury § 6.4 (NCI3d)— jury selection—question about strength to recommend death penalty

The trial court did not abuse its discretion in permitting the district attorney to ask prospective jurors whether they were "strong enough to recommend the death penalty" since the question was not intended to stake out the jurors but was intended to elicit information that would indicate whether a challenge for cause was warranted.

Am Jur 2d, Jury §§ 289, 290.

Comment Note—Beliefs regarding capital punishment as disqualifying juror in capital cases—post-Witherspoon cases. 39 ALR3d 550.

13. Jury § 6.3 (NCI3d)— jury selection—mitigating circumstances—prosecutor's erroneous statement about weight—absence of prejudice

Defendant was not prejudiced by the district attorney's erroneous statement during jury selection that jurors could give mitigating circumstances no weight at all because the statement related only to the sentencing phase of defendant's trial, and defendant is being awarded a new sentencing proceeding on other grounds.

Am Jur 2d, Criminal Law § 538; New Trial § 413.

14. Jury § 6.4 (NCI3d)— jury selection—death penalty views—questioning of prospective jurors

The trial judge did not deny defendant his right to question prospective jurors about their death penalty views when he sustained the State's objection to defense counsel's question as to whether prospective jurors would recommend a life sentence if defendant was found guilty of first degree murder and the State failed to satisfy them beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances where the trial judge went to great lengths to help defense counsel phrase a question that would be acceptable to the court.

Am Jur 2d, Jury §§ 289, 290.

Comment Note—Beliefs regarding capital punishment as disqualifying juror in capital case—post-Witherspoon cases. 39 ALR3d 550.

15. Jury § 6.3 (NCI3d)— jury selection—more credibility to expert witness

The trial judge did not abuse his discretion by sustaining objections to questions by defense counsel that reasonably could be perceived as staking out jurors to a position that would have them giving more credibility to an expert witness than to other witnesses.

Am Jur 2d, Jury § 285.

16. Jury § 6.4 (NCI3d)— death penalty views—challenge for cause—refusal to permit rehabilitation

The trial court did not err in refusing to allow defense counsel to attempt to rehabilitate a venireperson before excusing her for cause based on answers to questions by the prosecutor about her death penalty views where there was no clear indication that the venireperson would have changed her position in response to questioning by defendant.

Am Jur 2d, Jury §§ 289, 290, 299, 304.

17. Jury § 6.4 (NCI3d)— jury selection—Biblical saying—disparate rulings—no absence of judicial impartiality

The trial court's disparate rulings on objections to similar voir dire questions about a juror's familiarity with the Biblical saying "an eye for an eye" by both defense counsel and the

district attorney did not reveal an absence of judicial impartiality where defense counsel's question was not immediately relevant to any characteristic of juror competence and so was properly disallowed, and the district attorney's question came in the context of exploring the depth of a juror's religious attitudes about punishment and was properly allowed on the issue of the juror's competence to sit on a death case.

Am Jur 2d, Jury § 268.

18. Jury § 7.9 (NCI3d)— challenges for cause—use of "might" by prospective jurors—different rulings—no abuse of discretion

The trial court did not abuse its discretion in denying defendant's challenge for cause of a prospective juror after she responded that drug or alcohol abuse "might" affect her impartiality and in dismissing another juror for cause on its own motion after she stated that the murder of her sister five years earlier "might" influence her decision where the juror challenged by defendant had stated in response to several questions that she would be able to be fair and impartial and could follow the court's instructions, and the second juror never stated that she would be able to ignore her sister's murder in her consideration of the case.

Am Jur 2d, Jury §§ 279, 291.

19. Homicide § 18.1 (NCI3d)— testimony about associate of defendant—competency to show premeditation and deliberation

In a prosecution for first degree murder, felonious assault and robbery of two grocery store managers who had come to the store early to prepare a hog for a customer, testimony by the store owner that she saw an associate of defendant in the store talking to a meat department employee the day before the crimes and that she noticed the associate in the store because he was not supposed to be there after he had once threatened to shoot the owner and her husband was relevant to support the State's theory of premeditation and deliberation that defendant had learned from the associate, who had learned from the meat department employee, that the managers would be coming to work early and that he could ambush them when they would be at the store alone.

Am Jur 2d, Homicide § 275.

20. Criminal Law § 95 (NCI3d)— religious statements by victim—relevancy to show consciousness

The trial court did not err in allowing a witness to testify about religious statements made by a murder victim during the ambulance ride to the hospital where the court correctly instructed the jury that this testimony was before it only to show the consciousness of the victim at that time.

Am Jur 2d, Homicide § 370.

21. Criminal Law § 102.5 (NCI3d)— improper questions by prosecutor—objections sustained—absence of prejudice

Defendant was not prejudiced by the prosecutor's improper questions as to whether a murder victim was able to make peace with the Lord before he died where the trial court properly sustained objections to those questions, and the improper questions were not persistently repeated.

Am Jur 2d, Trial § 194.

22. Criminal Law § 463 (NCI4th)— jury argument—defendant aiming at victim's head—proper inference from evidence

The district attorney did not commit prosecutorial misconduct amounting to plain error by arguing in both the guilt and sentencing phases of a first degree murder trial that defendant aimed at the victim's head when he shot him a second time during the course of a robbery at a store because a reasonable inference that defendant aimed at the victim's head arose from evidence that defendant shot the victim once from short range in the chest and the victim fell face forward toward an office door; defendant then went with another store employee to a second office where he took money from the cash register tills; defendant then walked back by the office where the victim still lay, crouched down at the office door, and shot the victim again; and the second shot entered the victim's right shoulder and traveled laterally toward the midline of the body.

Am Jur 2d, Trial § 260.

23. Homicide § 25.2 (NCI3d)— premeditation and deliberation—instructions—examples of circumstances—supporting evidence

Evidence that defendant shot the victim twice from short range in the course of a robbery supported the court's instruction that premeditation and deliberation could be inferred from

a brutal and vicious killing or the use of grossly excessive force under the circumstances. Furthermore, evidence that defendant shot the victim a second time while the victim was helpless and unarmed warranted the court's instruction, without proof by the State that the second shot caused the victim's death, that the jury could infer premeditation and deliberation from the infliction of lethal wounds after the victim was felled.

Am Jur 2d, Homicide §§ 439, 501.

24. Criminal Law § 1352 (NCI4th)— death sentence—mitigating circumstances—unanimity requirement—prejudicial error—new sentencing hearing

The State failed to demonstrate that the trial court's erroneous instruction imposing a unanimity requirement for finding mitigating circumstances in a capital sentencing proceeding was harmless error, and a sentence of death imposed on defendant must be set aside and the case remanded for a new sentencing proceeding, where the trial court submitted nine specific mitigating circumstances and the jury found only one; there was evidence to support at least some of the nine additional mitigating circumstances submitted; and the unanimity requirement may have affected at least one juror's vote on at least some of the nine remaining mitigating circumstances and thus affected the jury's sentencing recommendation.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 553-555.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Friday, J.*, at the 25 April 1988 Criminal Session of Superior Court, NORTHAMPTON County, upon a jury verdict finding defendant guilty of first-degree murder. This Court allowed defendant's motion to bypass the Court of Appeals on his related assault and armed robbery convictions on 25 August 1989. Heard in the Supreme Court 10 October 1990.

Lacy H. Thornburg, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Justice.

Defendant was convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. He was also convicted of assault with a deadly weapon with intent to kill inflicting serious injury and two counts of armed robbery. At defendant's capital trial, he was sentenced to death for the murder. The trial court sentenced him to a total of seventy-two years imprisonment on the other offenses. We find no prejudicial error in the suppression, jury selection, or other guilt phases of the trial. The State concedes, and we agree, that defendant is entitled to a new sentencing hearing under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

Mary Davenport and her husband own the B & D Foodland in Ahoskie. In July 1987, Frank Kurczek was the Foodland meat manager and Donnie Carr the store manager. On 25 July 1987, Kurczek and Carr came to work early, about 5:30 a.m., to prepare a hog for a customer. They took the hog out the back door of the store towards the outdoor hog cooker, where they encountered a black male wearing a black ski mask, blue jeans, blue shirt, and having "poppy eyes." The man stood up from behind the cooker with a .22 caliber pistol and said "put your hands up or I'll kill you." The robber patted the two men down, took a key case from Carr, and told them to go to the office where the safe was. Once in the office, the robber repeatedly demanded that they open the safe. Kurczek and Carr answered that they did not know the combination, and Carr said there was money in a cash register in another office. The robber then shot Kurczek in the chest once and went with Carr to the other office. The robber picked up three or four cash register tills and several money bags and told Carr to go to the back of the store. As the robber was leaving the store he went back by the first office, where Kurczek was, turned and squatted and shot him again, and went out the back door with Carr. Kurczek died as a result of the wounds caused by the shots. Once outside, the robber shot Carr three times (in the arm, side and back). The robber then left and Carr called the police. Carr described the robber's race, sex, and clothing to Ms. Davenport shortly after Carr's call to the police, and to policeman Steve Hoggard at the hospital.

Hertford County Deputy Sheriff Chris Williams testified that he was called at 6:00 a.m. on 25 July 1987 to assist in the armed

robbery investigation. The suspect was a black male wearing blue jeans and a blue shirt. At 8:15 a.m., Williams saw a black male walking on the side of the road two miles outside Ahoskie wearing blue jeans and a blue shirt. Williams accelerated his car to catch up with that person and in so doing his car made a loud noise. The person then ran away towards a farmhouse. Other officers came to the area to help look for the unidentified pedestrian.

At 9:20 a.m. Deputy Sheriff Ronnie Stallings saw a black male, who was wearing blue jeans and a blue shirt, running in the vicinity of the farmhouse; the officers present chased, apprehended, and handcuffed the person. The person apprehended was defendant. Stallings testified that he asked defendant what his name was and defendant replied, "why are you messing with me, I haven't shot anybody." Stallings searched defendant and found victim Kurczek's wallet in defendant's pocket. The trial court concluded that Stallings had probable cause to arrest defendant and a reasonable basis for the search and seizure.

Ahoskie policeman Doug Doughtie testified that he advised defendant of his *Miranda* rights at 10:10 a.m. on 25 July 1987. Doughtie and SBI agents Ransome and Wooten then interrogated defendant at the Ahoskie police station from 10:10 a.m. to 1:00 p.m. Defendant was hot, sweaty, and tired after having "hung out" at "The Corner," a noted Ahoskie "hangout" for drug use and drinking. Defendant told the officers he had not slept all night. He said he had not shot or robbed anyone, that he went to the grocery store to get a job, found the wallet on the ground outside the store, and ran when the police came.

After a short break, Sheriff Winfred Hardy, Jr. interrogated defendant at the police station from 1:45 p.m. to 2:05 p.m. Hardy did not repeat the *Miranda* warnings, but did ask if defendant had been read and understood his rights. Hardy then told defendant that he could get the electric chair, that the Bible encouraged truth telling, that defendant's parents would want him to tell the truth, and that it would help with the judge and prosecutor. Hardy testified that defendant agreed to take the police to the local recreation center where they would find a gym bag. Defendant went with the police to the center, but no one found the bag. The police returned defendant to the county jail. Later that afternoon, officers found the gym bag containing binoculars, a rifle scope, a ski mask,

a left-handed glove, a .22 caliber pistol, a baseball cap, and two money bags containing $1,112.97.

Policeman Doughtie, SBI agent Wooten, and another officer interrogated defendant a third time on 25 July 1987 at the Hertford County courthouse from 10:15 p.m. to 11:30 p.m. Defendant received the *Miranda* warnings and agreed to talk. Defendant said he had been drinking the night before and that some of the items found were not his. Doughtie described an incriminating scenario of the day's events to which defendant agreed.

Wooten, Ransome, and Doughtie interrogated defendant again the next day from 7:10 p.m. to 8:10 p.m. They gave him the *Miranda* warnings, and he gave substantially the same response as in the third interrogation.

Defendant was twenty-two years old at the time of trial and had finished the ninth grade. Defendant testified that he awoke at 10:00 a.m. on 24 July, did not have any sleep or food during the thirty hours between awakening and the interrogation on 25 July, and had consumed large amounts of alcohol, marijuana, and crack cocaine during that thirty hours. Dorothea Dix Hospital reports indicate defendant has an "adjustment disorder," poor judgment and insight, an IQ of seventy-nine, "borderline intellectual functioning," and a history of alcohol and cocaine abuse.

SBI agent Michael Creasey testified that defendant's gunshot residue test was negative. Agent Navarro testified that defendant's fingerprints were not on the bank bags, binoculars, rifle scope, gun, or money binders found in the gym bag.

GUILT PHASE

I

[1] Defendant filed motions to suppress evidence derived from his allegedly unlawful and unconstitutional arrest and interrogations. Defendant's first ground for seeking suppression of his confessions and the physical evidence found in the gym bag was that his arrest was without probable cause and was therefore unconstitutional. We have stated that:

> A warrantless arrest is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. . . . "Probable

> cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty."

State v. Zuniga, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984) (citations omitted), *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1984) (quoting *State v. Shore*, 285 N.C. 328, 335, 204 S.E.2d 682, 686 (1974). Defendant contends that the description of "a black male wearing blue jeans and a blue shirt" was insufficient to support a finding of probable cause when an officer saw a person matching the description two hours after the felony occurred and more than two miles from the scene of the felony.

Assuming, without deciding, that the vague description of the felon was insufficient to establish probable cause to arrest, the other circumstances of the arrest, combined with the description, made the arrest lawful. Between 8:00 and 8:30 a.m. Deputy Williams noticed a black man generally fitting the description he received at 6:00 a.m. regarding a robbery and shooting. Williams was in uniform and was driving his patrol car. The man stopped when he noticed Deputy Williams and then ran through a driveway and behind a house as Deputy Williams approached him with the patrol car. Flight may properly be considered in assessing probable cause when it is challenged. *See State v. Zuniga*, 312 N.C. at 263, 322 S.E.2d at 147.

Deputy Williams called for backup to help search the area where the suspect ran. The search ended when the police discovered a black man running through the woods who matched both the early morning description and Deputy Williams' description. Without success, the police called to the man to stop. After a brief chase, the authorities apprehended and patted down the suspect. When Deputy Stallings asked the suspect his name, he responded: "I haven't shot anybody." Deputy Stallings then searched the suspect and discovered a billfold containing a blank check on the account of one of the victims.

In light of all the facts and circumstances surrounding the arrest, we conclude that it was made with probable cause.

[2] Defendant next argues that the trial court should have suppressed the evidence arising out of the interrogation by Sheriff Hardy because the interrogation was conducted without *Miranda*

warnings. It is well settled that a confession obtained during custodial police interrogation is inadmissible unless the defendant has first been warned of his constitutional rights. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Here, there is uncontradicted evidence that Ahoskie policeman Doug Doughtie advised defendant of his rights prior to the first interrogation on the morning of 25 July 1987. Defendant nevertheless argues that the warnings given by Officer Doughtie had grown stale and "there is a substantial possibility the [defendant] was unaware of his constitutional rights at the time of the subsequent interrogation . . . ." *State v. McZorn*, 288 N.C. 417, 434, 219 S.E.2d 201, 212 (1975), *death penalty vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). This Court considers the totality of the circumstances to determine whether the *Miranda* warnings had grown so stale that defendant was unaware of his rights. *Id.; State v. Fisher*, 318 N.C. 512, 522-23, 350 S.E.2d 334, 340 (1986).

Officers first gave defendant warnings at approximately 10:10 a.m. on 25 July 1987, and three officers interrogated him until 1:00 p.m. The evidence tending to indicate that the warnings had grown stale by the time of the second interrogation includes the following: Defendant had not slept for about thirty hours prior to the interrogation and had consumed large amounts of alcohol and drugs in the meantime. Defendant has an IQ of seventy-nine, characterized as borderline intellectual functioning. Sheriff Hardy was not present at the first interrogation and did not restate defendant's *Miranda* rights before questioning him. There were significant differences in defendant's responses to questions in the first interrogation and his responses to Sheriff Hardy's questions in the second interrogation.

There is evidence, however, that the officers offered defendant food and drink before he was interrogated. They conducted the interrogation in an air-conditioned office. Before beginning the first interrogation, the officers asked defendant if he was under the influence of drugs or other stimulants and he responded negatively. The officers explained defendant's rights to him and asked if he would talk to them or if he wanted the services of an attorney. Defendant stated that he would talk to the officers. Each time officers gave the *Miranda* warnings, defendant's answers were recorded on the waiver of rights form; defendant initialled each of his answers and signed the waiver form. Defendant had been advised of his rights on at least four other occasions, and he admitted

that he understood his rights on each of those occasions. The second interrogation followed the first by less than an hour and Sheriff Hardy began the interview by asking defendant if he had been advised of his *Miranda* rights.

Among other findings, the trial court found that the *Miranda* warnings had not become stale by the time Sheriff Hardy interrogated defendant and that when Sheriff Hardy interrogated defendant, he was aware of all his *Miranda* rights and knew he did not have to make a statement if he so chose. These findings are supported by the evidence—particularly the short period of time between interrogations, the familiarity of defendant with the *Miranda* rights, and the comprehensive explanation of defendant's constitutional rights prior to his first interrogation that day—and are therefore binding on this Court. *State v. Johnson*, 322 N.C. 288, 293, 367 S.E.2d 660, 663 (1988); *State v. Williams*, 308 N.C. 47, 60, 301 S.E.2d 335, 344 (1983), *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). The trial court thus did not err in denying suppression of defendant's statements to Sheriff Hardy, or the fruits of those statements, on the basis that the *Miranda* warnings had not grown stale.

[3] Defendant also argues that Sheriff Hardy made improper promises to him in order to induce incriminating statements and that the effect of those promises was to make the confession involuntary. The trial judge found that "no promises or threats were made to the defendant at the time . . . ." "Findings of fact made by the trial judge following a voir dire hearing on the voluntariness of a defendant's confession are conclusive on appeal if supported by competent evidence in the record." *State v. Richardson*, 316 N.C. 594, 598-99, 342 S.E.2d 823, 827 (1986) (quoting *State v. Baker*, 312 N.C. 34, 39, 320 S.E.2d 670, 674 (1984)). Though findings of fact are binding when supported by competent evidence, conclusions of law following from the findings are a proper matter for review. *Id.* at 600-01, 342 S.E.2d at 828; *see also State v. Rook*, 304 N.C. 201, 216, 283 S.E.2d 732, 742 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982); *State v. Fuqua*, 269 N.C. 223, 227, 152 S.E.2d 68, 71 (1967). In reviewing whether the confession was voluntarily given, this Court considers the totality of the circumstances. *State v. Corley*, 310 N.C. 40, 47, 311 S.E.2d 540, 545 (1984).

The evidence of the alleged promises by Sheriff Hardy to defendant comes from two sources—defendant's testimony and Sheriff Hardy's testimony. Defendant testified at the suppression hearing that he confessed because "I knew what I did was wrong, and that he [Sheriff Hardy] said that he would talk to the judge, so I, you know, I thought maybe I could get a lighter sentence, you know." Defendant also testified that Sheriff Hardy said "[he] would talk to the judge and try to get [defendant] 20 years," and "out of that [defendant would] do eight or nine."

Sheriff Hardy testified at the suppression hearing: "I told him that the *Bible* speaks—I wanted him to tell the truth. I said, it's in the *Bible*, and if he would tell the truth about it, if the D.A. or the judge would ask me did he tell the truth, I would say yeah." Hardy also testified: "I couldn't tell him what would happened [sic], but it will be better for him when he came to court that he would tell—that we would tell the D.A. and the [judge] that he told the truth about it." On direct examination, however, Sheriff Hardy testified as follows:

> Q. All right, did you—at any time did you tell him—did you tell him you couldn't promise him anything?
>
> A. I did.

Hardy also testified as follows:

> Q. Did you ever promise him what would happen to him if he told the truth?
>
> A. I did not.

Hardy's testimony on direct examination is competent evidence to support the finding that no promises were made to defendant. Therefore, that finding is binding. *State v. Perdue*, 320 N.C. 51, 59, 357 S.E.2d 345, 350 (1987). The legal conclusion that the confession was given freely and voluntarily, however, is subject to review in light of the totality of the circumstances.

The State's evidence tending to show that the confession was given voluntarily is as follows: The type of "police dominated atmosphere" which can tend to coerce an incriminating statement from a suspect was not present here because the police offered him food and drink and took him to an air-conditioned office. Defendant took no food but accepted Deputy Doughtie's offer of a soft drink. The trial court expressly found as a fact that "at no

time [was] the defendant . . . under any dominating police atmosphere . . . ." Doughtie then advised defendant of his constitutional rights, orally explaining each of the rights to defendant and having defendant initial each right on the waiver of rights form as the right was explained to him. Defendant answered that he understood each of the rights explained to him and responded negatively when asked if he was under the influence of medicine, narcotics, intoxicating liquor, or other stimulant.

At the first interrogation, Doughtie asked defendant if he wanted to speak to the officers, or if he wanted to see an attorney. Defendant stated he would talk to the officers. Doughtie asked defendant if he was freely and voluntarily signing the waiver of rights form. Defendant responded: "Yes."

At the time of his arrest, defendant was in his early twenties. He had completed the ninth grade and had received an electrician's certificate after attending Roanoke-Chowan Tech for a year. Defendant was able to read the waiver of rights form and could understand what it said. In addition, prior to this arrest defendant had been advised of his rights on four occasions. Defendant admitted he understood the rights when explained to him on the earlier occasions and on the date of this arrest.

Officers gave defendant his *Miranda* warnings at approximately 10:00 a.m. and interrogated him until sometime after 1:00 p.m. During defendant's first interrogation, he admitted that he was at the crime scene earlier that morning and saw a man lying on the floor in a pool of blood. Defendant said he found the confiscated wallet near the garage part of the store and fled when the police arrived at the scene. Defendant denied robbing or shooting either victim.

Deputy Doughtie testified that during the interview defendant was alert and did not appear to be under the influence of any intoxicants. Defendant was tired but did not appear sleepy.

Shortly thereafter, Sheriff Hardy began his interrogation. Sheriff Hardy testified that he began his interview with defendant by asking if defendant had been advised of his constitutional rights. Sheriff Hardy also asked if defendant understood those rights. Defendant responded affirmatively to both questions.

In light of all the circumstances related to defendant's confession and the trial court's findings of fact, which were supported

by competent evidence, we uphold the conclusion that "the defendant freely and voluntarily told the Sheriff about the location of the nylon bag in question at the recreation department." There was "plenary competent evidence" to support the conclusion that the confession was voluntary. *State v. Corley*, 310 N.C. at 52, 311 S.E.2d at 547.

Defendant's reliance on *State v. Fox*, 274 N.C. 277, 163 S.E.2d 492 (1968) is misplaced. In *Fox* we found the admission of a confession to be prejudicial error where an officer told the suspect it would be better for him in court if he told the truth. *Id.* at 292, 163 S.E.2d at 503. In *Fox*, however, the trial court found as a fact that the promise at issue had been made, yet concluded as a matter of law that the confession was voluntary. In the case at bar, the trial court found that the officers made no promises, and competent evidence supports that finding. Thus, this case is not controlled by *Fox*.

Defendant also seeks to rely on *State v. Fuqua*, 269 N.C. 223, 152 S.E.2d 68. In *Fuqua*, however, the Court ordered a new trial because there were no facts to support the trial court's finding that the confession was not made under the hope of reward. *Id.* at 227-28, 152 S.E.2d at 71. Absent any conflict in the testimony, the Court concluded that the "total circumstances surrounding the defendant's confession impels [sic] the conclusion that there was aroused in him an 'emotion of hope' so as to render the confession involuntary." *Id.* at 228, 152 S.E.2d at 72. In this case, however, Sheriff Hardy denied making any promises to defendant, thereby supporting the trial court's finding of "no promises." In addition, as stated above, the totality of the circumstances permits the conclusion that the confession here was given voluntarily.

In *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975), this Court ordered a new trial where an officer testified that he told a suspect "it would simply be harder on him if he didn't go ahead and cooperate." 286 N.C. at 452, 212 S.E.2d at 99. The trial court had found that no inducements were made and that the confession was made knowingly and voluntarily. This Court considered the entire record and concluded that "the interrogation of defendant by three police officers took place in a police-dominated atmosphere" and that "one can infer that the language used by the officers tended to provoke fright." *State v. Pruitt*, 286 N.C. at 458, 212 S.E.2d at 102. The Court stated: "We are satisfied that both the

oral and written confessions obtained from defendant were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody." *Id.*, 212 S.E.2d at 102-03. Here, the trial court found that defendant was not in a police-dominated atmosphere, and there is no evidence that defendant was afraid. Defendant had significant experience with the criminal justice system, and it appears that the officers did little if anything to instill fear into him.

This case is more like *State v. Richardson*, 316 N.C. 594, 342 S.E.2d 823. In *Richardson* defendant's confession came as a result of bargaining with police officers. Thus, the promises made did not render his confession involuntary because "[p]romises or other statements indicating to an accused that he will receive some benefit if he confesses do not render his confession involuntary when made in response to a solicitation by the accused." *Id.* at 604, 342 S.E.2d at 831. In the present case, defendant testified that Sheriff Hardy asked where the "gun and stuff was at." Defendant asked why he should tell, and Sheriff Hardy responded that defendant could get the electric chair. Thus, according to defendant's own testimony, any benefits that Sheriff Hardy mentioned were in response to defendant's own inquiry.

For the reasons stated, we conclude that the trial court did not err in holding that defendant's confession was given freely and voluntarily.

[4] Defendant also contends he is entitled to a new suppression hearing because the trial court's findings were inadequate to resolve material issues of fact regarding the voluntariness of his confession. It is well settled that "[i]n determining whether a confession is voluntary it is the trial judge's duty to make findings of fact resolving all material conflicts in the evidence as to what the defendant and the investigating officers said and did during the relevant time period preceding the defendant's confession." *Id.* at 600, 342 S.E.2d at 828.

Defendant argues that there is a material conflict as to whether, and what kind of, promises were made to him in order to acquire his confession. Thus, defendant argues that the trial court should have made specific findings regarding what promises and statements were made. Further, defendant asserts that the actual finding made by the trial court that "no promises or threats were made to the defendant at the time . . . that on the contrary the defendant

freely and voluntarily [confessed]" was actually a conclusion of law as to the voluntariness of the confession and not a finding of fact regarding promises.

As stated above, the trial court must make findings of fact to resolve *material conflicts in the evidence.* We note, however, that Sheriff Hardy gave uncontradicted testimony that he told defendant he could tell the judge and district attorney that defendant had cooperated. Because such testimony was uncontradicted, there was no need for the trial court to make findings regarding that statement. Further, we concluded above that such a statement on the part of the Sheriff did not, in light of all the circumstances, make the confession involuntary.

There was a material conflict in the evidence, however, in that Sheriff Hardy denied making the statements or promises about which *defendant* testified. In finding that no promises were made to defendant, the court necessarily made the credibility resolution in favor of the Sheriff's denials. Thus, the court found, in essence, that the promises about which defendant testified were never made. This finding supported the conclusion, immediately following, that the confession was freely and voluntarily given.

For the foregoing reasons, defendant is not entitled to relief on this assignment of error.

II

[5] Defendant contends he is entitled to a new trial because the district attorney violated his state and federal constitutional rights by peremptorily challenging prospective jurors solely on the basis of race. Article I, section 26 of the Constitution of North Carolina prohibits such use of peremptory challenges. *State v. Crandell*, 322 N.C. 487, 501, 369 S.E.2d 579, 587 (1988). In addition, the equal protection clause of the Fourteenth Amendment of the United States Constitution prohibits such discrimination. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). *Batson* held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89, 90 L. Ed. 2d at 83.

In *Batson* the Supreme Court established a three-part test for determining whether a defendant has established a prima facie case of purposeful discrimination:

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id. at 96, 90 L. Ed. 2d at 87-88 (citations omitted). If defendant is able to make his prima facie case, the State must rebut with a "clear and reasonably specific" explanation revealing that each peremptory challenge was not based solely on race. *Id.* at 98 n.20, 90 L. Ed. 2d at 88 n.20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258, 67 L. Ed. 2d 207, 218 (1981)). Defendant "has a right of surrebuttal to show that the prosecutor's explanations are a pretext." *State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990).

There is no dispute that defendant is black and that the district attorney peremptorily challenged blacks in the venire. The question, then, is whether defendant "rais[ed] an inference" of purposeful discrimination and thus established a prima facie case of discrimination.

Since *Batson* was decided, this Court has described several of the factors relevant to the examination of a defendant's prima facie case of discriminatory use of peremptory challenges. *Batson* itself noted that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate,' " *Batson v. Kentucky*, 476 U.S. at 96, 90 L. Ed. 2d at 87, and that "these facts and any other relevant circumstances" are to be considered to determine if defendant has raised an inference of discrimination. *Id.*, 90 L. Ed. 2d at 87-88. Among the relevant circumstances are "[t]he race of the defendant, the victims, and the key witnesses." *State v. Porter*, 326 N.C. at 498, 391 S.E.2d at 150-51; *see also State v. Crandell*, 322 N.C. at 502, 369 S.E.2d at 588; *State v. Robbins*, 319 N.C. 465, 491, 356 S.E.2d 279, 296, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). We have also

considered "questions and statements made by the prosecutor during voir dire examination and in exercising his peremptories which may either lend support to or refute an inference of discrimination." *State v. Robbins*, 319 N.C. at 489, 356 S.E.2d at 293; *see also State v. Jackson*, 322 N.C. 251, 255, 368 S.E.2d 838, 840 (1988). One of the most important considerations is whether there is "repeated use of peremptory challenges to blacks which would tend to establish a 'pattern' of strikes against blacks in the venire," *State v. Robbins*, 319 N.C. at 490, 356 S.E.2d at 294, or "*the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case . . . .*" *Id.* at 490-91, 356 S.E.2d at 294 (emphasis added). We have concluded that the discrimination in a case need not be pervasive, as "[e]ven a single act of invidious discrimination may form the basis for an equal protection violation." *Id.* at 491, 356 S.E.2d at 295.

On the other hand, one factor tending to refute an allegation of discriminatory use of peremptories is the acceptance rate of black jurors by the State. The frequency with which a district attorney accepts black jurors is relevant to the issue of whether he is discriminating against blacks. *See State v. Allen*, 323 N.C. 208, 219, 372 S.E.2d 855, 862 (1988) (minority acceptance rate of 41% failed to establish prima facie case of discrimination); *State v. Abbott*, 320 N.C. 475, 481-82, 358 S.E.2d 365, 369 (1987) (acceptance rate of 40% fails to establish prima facie case); *State v. Belton*, 318 N.C. 141, 159-60, 347 S.E.2d 755, 766 (1986) (acceptance rate of 50% fails to establish prima facie case).

Thus, the acceptance rate of minorities by the State is relevant to our inquiry, but it is not dispositive. When a district attorney uses all his peremptories, discriminatorily or not, he will be forced to accept replacement jurors regardless of their race. Under such facts the acceptance rate would have little to do with the district attorney's actual intent to discriminate. Further, the presence of an intent to discriminate may be proved by a number of factors or circumstances, not just the acceptance rate of black jurors. Absent such circumstances, however, the acceptance rate of blacks might well be the best evidence of an intent to discriminate *vel non*. *See, e.g., State v. Allen*, 323 N.C. 208, 372 S.E.2d 855; *State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365; *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755. In that light, the district attorney's acceptance of nine out of twenty-one black prospective jurors (42.8%) is some evidence that there was no discriminatory intent. There are, however,

other factors that tend to indicate that defendant was able to raise an "*inference* of purposeful discrimination."

First, this case involved an interracial killing and attracted much attention. The defendant is a young black man and both victims were white. The racial emotions and publicity surrounding the case were substantial enough for defendant successfully to seek a change of venue from Hertford County to Northampton County. It is apparent that race-consciousness by both parties played a role throughout jury selection. As the district attorney explained to the trial court:

> Your Honor, I'd like to get something in the record, if I may.
>
> . . . .
>
> We'd also like for the record to reflect, Judge, that the counsel for the defendant excused two white jurors, who were there, and that the record is now, as I understand it, was—there are now six black jurors who are seated on the jury and there are only three white jurors who are seated on the jury, and I'd just like the record to reflect that—that the counsel for the defendant with the exception of I believe, only one, has excused all white jurors from the jury panel.
>
> . . . [B]ut I submit to the Court that the State, the victim in this case is also entitled to a fair representation of those jurors who are seated there. The victim is white, they ought to have a fair representation as to the number of black/white jurors that are on there, and at the rate that we're going, we'll have—if it's any wish apparently of the defendant, we'll have nine—nine/three or worse.
>
> . . . [B]ut since counsel has raised the State being discriminatory as far as what it's doing, we would also submit to the Court that the defendant is discriminating against white jurors so that the defendant himself who is in a majority county with mostly black people will have mostly black people on the jury or more or all black people as he can have, and the white person who is in the minority in Northampton County will have no—will have as little as—little as they can possibly get.

This statement should be read in its proper context—that of criticizing defense counsel for using fifteen out of sixteen peremp-

tory challenges to excuse white jurors. As our cases have held, however, such "questions and statements made by the prosecutor during voir dire examination and in exercising his peremptories . . . may either lend support to or refute an inference of discrimination." *State v. Robbins*, 319 N.C. at 489, 356 S.E.2d at 293; *State v. Jackson*, 322 N.C. at 255, 368 S.E.2d at 840. The statement described above tends to support, rather than refute, an inference of discrimination.

Another factor that distinguishes this case from the earlier line of cases emphasizing acceptance rates is the pattern of discrimination revealed by the use of peremptories. Here, the State used its first three peremptories, and six of its first seven, to remove blacks. Though the district attorney did not use all sixteen of his peremptories, he did use twelve out of fifteen to exclude blacks. Thus, the State exercised 80% of the peremptories used to remove black potential jurors in a case involving an interracial killing with highly charged racial emotions. The fact that the district attorney exercised a high percentage of peremptories to remove blacks corroborates the inference of discrimination arising from his statement described above.

In light of all the relevant circumstances, we conclude that defendant successfully raised "an inference of discrimination" and thus established a prima facie case of discriminatory use of peremptories.

[6] We note that defendant also seeks to support his case for discrimination by arguing that the district attorney's biased and disparate questioning of blacks indicated his intent to discriminate. We have stated, however, that

> alleged disparate treatment of prospective jurors would not be dispositive necessarily. Choosing jurors, more art than science, involves a complex weighing of factors. Rarely will a single factor control the decision-making process. Defendant's approach in this appeal involves finding a single factor among the several articulated by the prosecutor as to each challenged prospective juror and matching it to a passed juror who exhibited that same factor. This approach fails to address the factors as a totality which when considered together provide an image of a juror considered in the case undesirable by the State. We have previously rejected this approach.

State v. Porter, 326 N.C. at 501, 391 S.E.2d at 152-53. Likewise, we reject the argument made by defendant that discrimination is evident merely because the district attorney's office employs a percentage of whites higher than that of the district itself.

[5] Having concluded that defendant has raised an inference of discrimination, we must determine whether his prima facie case was rebutted. The State must rebut with a " 'clear and reasonably specific' explanation 'related to the particular case to be tried.' " *State v. Porter*, 326 N.C. at 497, 391 S.E.2d at 150 (quoting *Batson v. Kentucky*, 476 U.S. at 98 n.20, 90 L. Ed. 2d at 88 n.20). This explanation need not rise to the level required to justify exercising a challenge for cause. *Id.* at 498, 391 S.E.2d at 151. In considering the State's rebuttal, a reviewing court should remember that "the trial judge's findings 'largely will turn on evaluation of credibility, [and so] should give those findings great deference.' " *Id.*, 391 S.E.2d at 150. As quoted above, jury selection is "more art than science," *id.* at 501, 391 S.E.2d at 152, and "[s]o long as the motive does not appear to be racial discrimination, the prosecutor may exercise peremptory challenges on the basis of 'legitimate "hunches" and past experience.' " *Id.* at 498, 391 S.E.2d at 151 (quoting *State v. Antwine*, 743 S.W.2d 51, 65 (Mo. 1987) (en banc), *cert. denied*, 486 U.S. 1017, 100 L. Ed. 2d 217 (1988)).

We have held that it is permissible for the district attorney to explain to the court prior to jury selection that he "wanted a jury that was 'stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime solving problems and pressures.' " *State v. Jackson*, 322 N.C. at 257, 368 S.E.2d at 841. We have also held that the ultimate racial makeup of the jury is relevant but not dispositive. *See State v. Porter*, 326 N.C. at 500, 391 S.E.2d at 152; *State v. Abbott*, 320 N.C. at 481-82, 358 S.E.2d at 369-70; *State v. Allen*, 323 N.C. at 219, 372 S.E.2d at 862. Finally, as noted above, we have held that the State may rebut a charge of discrimination with evidence that the State accepted black jurors, that the State did not use all of its peremptory challenges, or that the early pattern of strikes does not indicate discriminatory intent. *See State v. Jackson*, 322 N.C. at 255, 368 S.E.2d at 840; *State v. Robbins*, 319 N.C. at 492-93, 356 S.E.2d at 294-95; *State v. Davis*, 325 N.C. 607, 620, 386 S.E.2d 418, 424 (1989), *cert. denied*, --- U.S. ---, 110 L. Ed. 2d 268 (1990).

Here, the trial court concluded that "the State has assigned substantial reasons in each and every instance for its exercise of . . . peremptory challenges and the Court finds no evidence of purposeful discrimination by the State." We note that the State did not use all its peremptories, that it accepted nine blacks, and that the jury ultimately was composed of seven blacks and five whites.

An examination of the actual explanations given by the district attorney for challenging black veniremen is a crucial part of testing defendant's *Batson* claim. The record reveals that the district attorney explained to prospective juror Barkley that "I think perhaps just because you're a little bit younger perhaps than some of the other jurors, I'm going to excuse you in this particular instance." Barkley was twenty-one and defendant was twenty-two at the time of trial. The district attorney also exercised peremptories to excuse prospective jurors Vick, Tann, Harris, and Daye because they each had sons approximately the age of defendant. In *State v. Davis* we considered such an explanation in rebuttal and concluded there was no discrimination. *Davis*, 325 N.C. at 619, 386 S.E.2d at 423 (age of juror and his children, as compared to defendant's age, proper evidence for rebuttal).

The district attorney explained that he excused prospective juror Reid because of Reid's earlier association with defense counsel. The district attorney excused prospective juror Sykes because he felt, based on information he had gathered previously, that Sykes gave misleading answers to voir dire questions. Prospective juror Seabrun was excused because the State's victim-witness coordinator had testified that she thought Seabrun had a nephew in trouble with drugs.

In excusing prospective juror Benjamin, the district attorney noted Benjamin's nervousness during questions about the death penalty. Prospective juror Brown was challenged peremptorily because his initial death penalty answers were uncertain. Likewise, the district attorney challenged prospective jurors Boone and Edwards because they appeared nervous at certain times during voir dire. Though the district attorney's other stated reason for excusing Brown and Boone—that they were unmarried parents—does not appear relevant to the case, jury selection is often driven by inferences about a juror's ability to be fair based upon counsel's observation of the juror's behavior during voir dire. *See, e.g., State*

v. Porter, 326 N.C. at 500, 391 S.E.2d at 152. Thus, a prospective juror's nervousness or uncertainty in response to counsel's questions may be a proper basis for a peremptory challenge, absent defendant's showing that the reason given by the State is pretextual.

At this stage in the analysis we conclude that while defendant established a prima facie case of discriminatory use of peremptory challenges, the State rebutted defendant's evidence with neutral explanations for each peremptory strike. The last step is to examine defendant's argument on surrebuttal that the State's explanations are pretextual.

Porter describes the framework for this analysis:

> Several courts have identified factors to which the judge should refer in assessing whether these articulated reasons are legitimate or a pretext. First, the judge should consider "the susceptibility of the particular case to racial discrimination." . . . Second, the judge should consider the prosecutor's demeanor to determine whether the prosecutor is "engaging in a careful process of deliberation based on many factors." . . . Third, the court should " 'evaluate the explanation itself.' " . . .
>
> Evaluation of the prosecutor's explanation involves reference to objective and subjective criteria. . . . The trial judge should consider whether "similarly situated white veniremen escaped the State's challenges" and "the relevance of the State's justification" to the case at trial. . . .
>
> The trial judge should evaluate the explanation "in light of the explanations offered for the prosecutor's other peremptory strikes" and "the strength of the prima facie case." . . . In assessing the "entire milieu of the voir dire," the judge must "compar[e] his observations and assessments of veniremen with those explained by the State," guided by his personal experiences with voir dire, trial tactics and the prosecutor and by any surrebuttal evidence offered by the defendant.

Id. at 498-99, 391 S.E.2d at 150-51 (citations omitted).

We hold that the record supports the trial court's conclusion that the reasons given by the district attorney were not pretextual. It permits a conclusion that the district attorney was primarily concerned with removing jurors who might not be able to give

defendant and the State a fair trial. These concerns arose due to prospective jurors' uncertainties about the death penalty, nervousness in the face of voir dire questioning, prior contact with either defense counsel or the criminal justice system, and having children approximately the age of defendant. The ability of the trial judge to observe firsthand the reactions, hesitations, emotions, candor, and honesty of the lawyers and veniremen during voir dire questioning is crucial to the ultimate determination whether the district attorney has discriminated. Because there is ample evidence to support the trial judge's conclusion that there was no racial discrimination by the State in this case, we overrule this assignment of error.

[7] Defendant next assigns as error the trial court's denial of defendant's challenge for cause of potential juror Williford. Defendant contends the record shows that Williford could not follow North Carolina law in that he would not consider the statutory mitigating circumstance set forth in N.C.G.S. § 15A-2000(f)(6)—whether "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." In questioning Williford, defense counsel referred to alcohol and drug use as a potential basis for the impaired capacity mitigation contemplated by section 2000(f)(6). *See State v. Irwin*, 304 N.C. 93, 106, 282 S.E.2d 439, 448 (1981). In response to the question whether he could consider impaired capacity due to intoxication by drugs or alcohol as a mitigating circumstance, Williford stated: "I think not." It is clear from the context of the questioning, however, that Williford understood the question to be whether the mere influence of drugs or alcohol would constitute a mitigating circumstance.

In seeking to clarify, defense counsel asked again whether Williford would consider impaired capacity as a mitigating circumstance if defendant proved that circumstance by a preponderance of the evidence. Williford again responded: "Not alcohol or drugs, no." The trial court finally resolved the confusion by asking Williford "[e]ven though the Court instructed you in that manner, you could not consider it, give the evidence such weight as you believe it to be due?" Williford responded: "I would weigh it, Your Honor, but it would carry little weight, I'm afraid. I don't consider that a mitigating circumstance, but I would weigh it." In addition, defense counsel later asked Williford "will your feelings about drugs prevent you from considering the evidence that may [be] presented

at the sentencing hearing . . . ?" Williford responded, "I think not." Thus, it is clear that Williford, when instructed by the trial court to consider a statutory mitigating circumstance, would consider that circumstance, but would give it whatever weight he thought appropriate. Defendant is entitled to have the jury consider all appropriate mitigating circumstances, but the weight to be given each circumstance is for the individual juror to determine. *See State v. Craig and State v. Anthony*, 308 N.C. 446, 460, 302 S.E.2d 740, 749, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983); *State v. Kirkley*, 308 N.C. 196, 220, 302 S.E.2d 144, 158 (1983), *overruled on other grounds, State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). Accordingly, the trial court did not err in denying the challenge to potential juror Williford.

Defendant next argues he is entitled to a new trial because of the district attorney's improper statements and questions during jury selection. The trial judge has broad discretion in the regulation of the jury voir dire. *State v. Lee*, 292 N.C. 617, 621, 234 S.E.2d 574, 577 (1977). To prevail on this assignment of error, defendant must show a clear abuse of discretion and prejudice from the trial court's rulings. *State v. Avery*, 315 N.C. 1, 20, 337 S.E.2d 786, 797 (1985).

[8] Over defendant's objection, the trial court allowed the district attorney to ask potential jurors whether the fact that they could observe defendant in the courtroom each day would cause them to have sympathy towards defendant and not towards the victim, who obviously would not be present. Defendant argues that this question was prejudicial because it involved an incorrect statement of the law. Under North Carolina law, jurors may consider as evidence what they observe about defendant in the courtroom. *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). Thus, defendant argues that the questions tended to suggest that the jury could not consider whatever sympathy they felt for the defendant based on their observations of him at trial.

The questions, however, had a narrower focus. The purpose was to discover whether prospective jurors would have sympathy for the defendant based on his mere presence in the courtroom. Such sympathy might be based on "emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." *California v. Brown*, 479 U.S. 538, 542,

93 L. Ed. 2d 934, 940 (1987). The crucial point is that the district attorney's questions did not have the effect of urging the jurors to ignore the defendant's demeanor at trial; rather, the questions sought to identify those jurors who would be sympathetic to defendant due to his presence in the courtroom. The trial judge did not abuse his discretion by allowing such questions.

[9] Defendant also argues that the district attorney misled potential jurors by informing them during jury selection that the mitigating circumstance of age might be met if the person was sixteen, seventeen, or eighteen years old. Defendant was twenty-two at the time of trial. While there is no "hard and fast rule" to follow in determining if the mitigating circumstance of age is met, "the chronological age of a defendant is not . . . determinative." *State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983). The statement made by the district attorney was accurate and did not violate the principles enunciated in *Oliver*. The district attorney attempted to illustrate what was meant by the mitigating circumstance of age, and it did not serve to "stake out" jurors to a particular test for this mitigating circumstance. The trial judge did not abuse his discretion by allowing this.

[10] Defendant contends the district attorney impermissibly limited the range of mitigating circumstances when he described such circumstances as those which "make a murder not so bad." The proper description of a mitigating circumstance is a fact "which may be considered as extenuating, or reducing the moral culpability of killing or making it less deserving of the extreme punishment than other first-degree murders." *State v. Boyd*, 311 N.C. 408, 421, 319 S.E.2d 189, 198 (1984), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985) (quoting *State v. Brown*, 306 N.C. 151, 178, 293 S.E.2d 569, 586 (1982)). The district attorney's description of mitigating circumstances was not so dissimilar from the full description that we can find an abuse of discretion by the trial court, especially in light of the fact that the court ultimately gave a proper instruction.

[11] On several occasions, the district attorney asked, over objection, "do you understand that . . . we must be fair to the defendant and be fair also to the people of North Carolina and the victim's family?" "Both the defendant and the State are entitled to a fair and unbiased jury," and "the primary purpose of the *voir dire* of prospective jurors is to select an impartial jury." *State v. Lee*, 292 N.C. 617, 621, 234 S.E.2d 574, 577 (1977). The primary thrust

of the question was to call the jury's attention to this right of both sides to a fair, unbiased, impartial jury, and we find no abuse of discretion in allowing it.

[12] Defendant also argues that when the district attorney asked potential jurors whether they were "strong enough to recommend the death penalty," he effectively staked them out to a position in which they felt obligated to return a sentence of death once they arrived at the sentencing stage. We have held, however, that a prosecutor's query as to whether a potential juror has the "backbone" to impose the death penalty does not constitute prejudicial error. *See State v. Hinson*, 310 N.C. 245, 252, 311 S.E.2d 256, 261, *cert. denied*, 469 U.S. 839, 83 L. Ed. 2d 78 (1984). In addition, N.C.G.S. § 15A-1212(8) allows counsel to challenge for cause a juror who "as a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina." The question was intended to elicit information that would indicate whether a challenge for cause was warranted. We find no abuse of discretion in allowing it.

[13] Finally, defendant argues that the district attorney erroneously was allowed to state that jurors could give mitigating circumstances no weight at all. We have previously stated that if a jury finds a mitigating circumstance to exist, it must "consider that mitigating circumstance in its final sentence determination." *State v. Kirkley*, 308 N.C. at 220, 302 S.E.2d at 158. We have also stated that once the jury finds the existence of a statutory mitigating circumstance, it "cannot determine that it does not have mitigating value." *State v. Fullwood*, 323 N.C. 371, 396, 373 S.E.2d 518, 533 (1988), *death sentence vacated*, --- U.S. ---, 108 L. Ed. 2d 602 (1990). The district attorney's statement thus was inconsistent with our law. Because the statement related only to the sentencing phase of defendant's trial, however, and because defendant is being awarded a new sentencing proceeding on other grounds, he has not shown prejudice from this statement that merits a new guilt phase trial.

[14] Defendant's next assignment of error concerns objections by the district attorney, sustained by the trial court, that allegedly denied defendant the opportunity to question potential jurors regarding their ability to follow the capital sentencing law and to follow the judge's instructions regarding expert testimony. On several occasions defendant sought to ask potential jurors questions such

as the following: "If the defendant is found guilty of first degree murder and ... the State has failed to satisfy you beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, would you recommend a life sentence?" Even if such questions were not impermissible attempts to "stake out" jurors, defendant has shown no abuse of discretion or prejudicial error in light of the fact that the trial judge went to great lengths to help defense counsel phrase a question that would be acceptable to the court. Defense counsel was allowed to ask: "[I]f after hearing the evidence and the law and if Mr. Smith was convicted of first degree murder, and if you were satisfied the State had not proven beyond a reasonable doubt that the death sentence should be imposed, could you recommend a life sentence?" We thus cannot conclude that the trial court denied defendant his right to question prospective jurors about their views on the death penalty. *See, e.g., State v. Adcock*, 310 N.C. 1, 10, 310 S.E.2d 587, 593 (1984).

[15] In addition, the trial judge did not abuse his discretion by sustaining objections to questions by defense counsel that reasonably could be perceived as staking out jurors to a position that would have them giving more credibility to an expert witness than to other witnesses. Defendant's question—"If someone is offered as an expert in a particular field such as psychiatry, could you accept him as a[n] expert, his testimony as an expert in that particular field?"—is not *per se* an attempt to stake out jurors. However, because the question followed a reference to the district attorney's earlier statements about not giving more credence to a witness just because the witness might be labelled an expert, the trial judge reasonably could have interpreted defendant's question as an attempt to stake out potential jurors. This assignment of error is without merit.

[16] Defendant assigns as error the trial court's refusal to allow defense counsel to rehabilitate venireperson Hardy before excusing her for cause on the grounds that the "juror's views would prevent or substantially impair the performance of [her] duties as a juror in accordance with [the] instructions and [the juror's] oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 65 L. Ed. 2d 581 (1980)). Hardy was excused after the following exchange:

> [Q.] [C]ould you yourself recommend the death penalty knowing that the Court would follow your recommendation?

[A.] I don't really know, I don't think I would.

[Q.] You don't think you would do what?

[A.] Take someone's life, no.

[Q.] Okay, are there any circumstances under which you yourself . . . could recommend to the Court the death penalty knowing the Court would be bound to follow your recommendation?

[A.] No.

[Q.] [Regardless] of what you may hear from the witness stand and what His Honor may tell you the law is in the case, there are no circumstances under which you yourself could recommend the death penalty?

Is that a fair statement?

[A.] Yes.

It is not disputed that such answers constitute grounds for challenge for cause. Defendant argues, however, that he is entitled to relief because the trial court did not allow rehabilitation. The trial court is entitled to great deference upon review of the dismissal of a juror for cause. In addition, we have held that the trial court does not abuse its discretion when it refuses to allow attempted rehabilitation of a juror absent a showing by defendant that different answers might have been forthcoming. *See State v. Oliver*, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981). Defendant contends that Hardy's initial responses to death penalty questions constituted the necessary showing. She did answer that in "some cases" the death penalty would be an appropriate punishment, and she did not have any personal or religious feelings against the death penalty. These statements, however, appear uncertain and ambiguous in light of her more definite, specific, and adamant responses which formed the basis for her excusal for cause. There is no clear indication that she would have changed her position in response to questioning by defendant; therefore, the trial court did not abuse its discretion in denying defendant's request to rehabilitate her.

Defendant's last assignment of error in the jury selection phase concerns the alleged absence of impartiality on the part of the trial judge. Without doubt, the trial judge has a "duty of absolute

impartiality." *State v. Frazier*, 278 N.C. 458, 460, 180 S.E.2d 128, 130 (1971).

[17] Defendant's first grounds for alleging absence of impartiality is disparate rulings on objections to similar voir dire questions by both defense counsel and the district attorney. At one point in voir dire defense counsel asked several jurors if they belonged to a church and if they held office in a church. Then, defense counsel asked juror Lanier if he had "heard of the Biblical saying 'an eye for an eye?' " The district attorney's objection to the question was sustained on grounds that the question did not relate to qualifying the jury. Shortly thereafter, the district attorney engaged juror Duke in the following exchange:

> [Q.] Do you have any personal or religious feelings against the use of the death penalty?
>
> [A.] Yes, I do, religious belief, I would hate to vote for it.
>
> . . .
>
> [Q.] How would you characterize your feelings?
>
> [A.] Well, just like I tell my kids, the only thing I know that's in the *Bible*, I don't know.
>
> [Q.] Of course, you understand there are other things that the *Bible* says?
>
> [A.] Yes.
>
> [Q.] A life for a life, an eye for an eye.

At this point, defense counsel's objection was overruled. Although it may appear that the district attorney received favorable treatment from the trial judge in that he was allowed to ask about a juror's familiarity with Biblical retribution, the context reveals the contrary. Defense counsel's question about the Biblical saying was not immediately relevant to any characteristic of juror competence and so was properly disallowed. The district attorney's question, however, came in the context of exploring the depth of a juror's religious attitudes about punishment, a matter clearly relevant to the juror's competence to sit on a death case. The trial judge's rulings in this regard did not reveal an absence of judicial impartiality.

[18] Defendant also objects to the trial judge's allegedly disparate rulings on similar challenges for cause. Defense counsel challenged juror Ricks for cause after she responded that drug or alcohol use "might" affect her impartiality, that she "would try" to be fair and impartial, though she could not "answer yes or no" and stated "I can't promise." The trial court denied defendant's challenge for cause. The trial court, however, on its own motion challenged juror Harris for cause after she stated that the murder of her sister five years before "might" influence her decision; Harris stated: "I ain't going to say it [will] and I ain't going to say it won't . . . ."

One significant factor serves to distinguish the challenges to the two jurors. Before being challenged for cause, Ms. Ricks had stated in response to several questions that she would be able to be fair and impartial and that she would follow the trial court's instructions. Juror Harris, on the other hand, never stated that she would be able to ignore her sister's murder in her consideration of the case. The decision to grant or deny a challenge for cause lies in the sound discretion of the trial court. *State v. Kennedy*, 320 N.C. 20, 28, 357 S.E.2d 359, 364 (1987). In light of the foregoing distinction, we find no abuse of discretion in this ruling.

Defendant also argues that the trial court was much more lenient with the district attorney's death penalty questioning than with defendant's. Defendant contends that impossible burdens were put on the phrasing of defendant's questions so as to disrupt the flow and direction of the voir dire. In addition, defendant contends that the court adopted a prosecutorial role by "helping" defendant rephrase his questions in a manner completely different from what defendant intended.

We have reviewed the restrictions on defendant's death penalty questioning above and found no abuse of discretion. Further, our examination of the record reveals that the voir dire questioning was a confusing, sporadic event that tested everyone's patience. It is evident that the trial judge attempted to help defense counsel phrase his questions in an appropriate manner so as to assure a qualified jury. We conclude that the trial court's actions did not communicate absence of impartiality to the jury. *Cf. State v. Staley*, 292 N.C. 160, 232 S.E.2d 680 (1977) (clear inference of judge's opinion regarding witness's truthfulness). Further, there is no evidence that the trial court's actions deprived defendant

of his right to effective assistance of counsel. This assignment is without merit.

III

[19] At trial, Mary Davenport testified to the effect that she owned the store that was robbed, that a person named Freddie Tann once worked for her, that Tann was in the store talking to Grantson Taylor the day before the robbery, that both Tann and Taylor were associates of defendant, and that Tann was not supposed to be in the store because he had once threatened to shoot Ms. Davenport and her husband. Defendant assigns as error the admission of irrelevant evidence that Tann was in the store and that he was not supposed to be there because of the threat.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1988). In this case the prosecution sought to prove premeditation and deliberation by several theories, one of which was that defendant knew the store employees would be coming to work early and that he could ambush them when they would be at the store alone. To prove this theory, the prosecution had Ms. Davenport testify that only the owners of the store and the meat department employees knew that someone would be at the store early. Ms. Davenport testified that Grantson Taylor worked in the meat department and that he was a friend of Freddie Tann and the defendant. Further, she testified that the reason she noticed that Tann was in the store the day before the robbery was that he was not supposed to be there. When asked why Tann was not supposed to be in the store, Ms. Davenport stated that Tann had threatened to shoot her and her husband. Ms. Davenport knew of the association of Tann and defendant because Tann, who once worked for the Davenports, had previously helped defendant get a job working for the Davenports at a store they had owned years before.

Thus, the prosecution sought to tie Taylor's knowledge of the early opening to his discussion with Tann at the store the day before the robbery. The key to Ms. Davenport's memory of Tann in the store was the fact that he had previously threatened her. Tann's friendship with defendant, then, established the knowledge defendant required for his ambush. Though the relationship is tenuous, the facts to which Ms. Davenport testified are relevant

to the theory the prosecution sought to prove. This assignment of error is without merit.

[20] Defendant's next assignment is that the trial court erroneously allowed State's witness Hoggard to testify about victim Kurczek's religious statements made during the ambulance ride to the hospital. Hoggard testified that Kurczek "said some religious things and I picked out the words Jesus and Father out of what he said." Defendant acknowledges that the fact that Kurczek spoke during the ambulance ride is relevant, but argues that the religious content of the statements should have been disallowed. The record clearly shows, however, that the trial court correctly instructed the jury, before witness Hoggard gave his statement, that the testimony was before it only to show the consciousness of Kurczek. Further, defendant did not object at trial to the religious aspect of the statement. This assignment of error is overruled.

[21] Defendant also argues it was improper for the district attorney to ask questions regarding whether Kurczek was able to make peace with the Lord before he died. The trial court properly sustained objections to those questions. We have held that repeated attempts by a district attorney to ask improper questions may require a new trial, *see State v. Phillips*, 240 N.C. 516, 82 S.E.2d 762 (1954), but where, as here, the improper questions are not persistently repeated, the trial court's decision to sustain defense counsel's objection is sufficient to prevent any prejudicial error. *See State v. Greene*, 285 N.C. 482, 495, 206 S.E.2d 229, 237 (1974); *State v. Ball*, 277 N.C. 714, 720, 178 S.E.2d 377, 381 (1971).

[22] Defendant next contends that the district attorney committed prosecutorial misconduct rising to the level of plain error by arguing in both the guilt and sentencing phases that defendant aimed at Kurczek's head when he shot him the second time as defendant left the store. Defendant argues that there is neither evidence in the record, nor reasonable inference therefrom, to support such a contention and that he thus is entitled to a new trial. *State v. Britt*, 288 N.C. 699, 711, 220 S.E.2d 283, 291 (1975).

Ordinarily, defense counsel must object to allegedly improper arguments by the prosecution in order to preserve the issue for review. *See State v. Brock*, 305 N.C. 532, 538, 290 S.E.2d 566, 571 (1982). Although we have relaxed that rule somewhat in capital cases, the impropriety alleged must be extreme before we will conclude that the trial judge abused his discretion in failing to

correct *ex mero motu* a prosecutor's argument. *Id.* at 537, 290 S.E.2d at 570. Counsel may argue before the jury all the facts in evidence and all reasonable inferences therefrom. *State v. Noland*, 312 N.C. 1, 15, 320 S.E.2d 642, 651 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369, *reh'g denied*, 471 U.S. 1050, 85 L. Ed. 2d 342 (1985).

The evidence in this case tends to show that defendant shot Kurczek once from short range in the chest and that Kurczek fell face forward towards the office door. Defendant then went with Carr to a second office where the cash register tills were kept. After taking money from the tills, defendant walked back by the office where Kurczek still lay. Defendant crouched down at the door to the office and shot Kurczek again. The second shot entered Kurczek's right shoulder and travelled laterally towards the midline of the body. This evidence permits a reasonable inference that defendant aimed at Kurczek's head, as the district attorney argued. Defendant, therefore, is not entitled to relief under this assignment of error.

[23] Defendant's last assignment in the guilt phase is that the trial court erroneously instructed the jury on theories of premeditation and deliberation that were not supported by the evidence. The trial court instructed the jury that it could infer premeditation and deliberation from the use of grossly excessive force under the circumstances, the infliction of lethal wounds after the victim was felled, the brutal and vicious nature of the killing, and the manner in which the killing was done. This instruction contains "examples of circumstances which, if found, the jury could use to infer premeditation and deliberation. It is not required that each of the listed [examples] be proven beyond a reasonable doubt before the jury may infer premeditation and deliberation." *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 76 (1990).

Again, we note that defendant has failed to preserve this alleged error by objecting to the instruction at trial. N.C.R. App. P. 10(b)(2). Defendant will be entitled to relief, then, only if he can show that the trial court's instructions contain "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982) (emphasis in original)). We cannot say that such

error occurred in this case where there is ample evidence that defendant shot Kurczek twice from short range in the course of a robbery. This evidence supports the court's instruction that premeditation and deliberation can be inferred from a brutal and vicious killing or the use of grossly excessive force under the circumstances. In addition, there was evidence that defendant inflicted upon Kurczek a blow from a lethal weapon while Kurczek was helpless and unarmed. We have held that such action supports an inference of premeditation and deliberation. *State v. Barbour*, 295 N.C. 66, 72, 243 S.E.2d 380, 384 (1978). Therefore, the State did not need to prove that the second shot caused Kurczek's death for the instruction given to be warranted.

Even if the instructions given by the trial court were not supported by the evidence, defendant has not shown plain error that prejudiced his trial because there was ample evidence from which the jury could have found premeditation and deliberation. *See id.; State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 823 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Zuniga*, 320 N.C. at 263, 357 S.E.2d at 916.

SENTENCING PHASE

[24] Defendant contends, and the State concedes, that the instructions imposed a unanimity requirement for finding mitigating circumstances and were therefore improper under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990); *see also State v. McKoy*, 327 N.C. 31, 394 S.E.2d 462 (1990).

> In *McKoy* the United States Supreme Court held unconstitutional North Carolina's capital sentencing jury instructions which required the jury to find the existence of a mitigating circumstance unanimously in order for any juror to consider that circumstance when determining the ultimate recommendation as to punishment. The Court reasoned that North Carolina's "unanimity" requirement was constitutionally infirm because it "prevent[ed] the sentencer from considering all mitigating evidence" in violation of the eighth and fourteenth amendments.

State v. Sanderson, 327 N.C. 397, 402, 394 S.E.2d 803, 805-06 (1990) (citations omitted).

Our review of the record establishes that the trial court did give the instruction requiring that the jury be unanimous before

it could find a mitigating circumstance. Under *McKoy*, this requires a new sentencing proceeding unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 462; N.C.G.S. § 15A-1443(b) (1988). The trial court submitted nine specific mitigating circumstances and the jury, operating under the unanimity instruction, found only one. There was evidence to support at least some of the nine additional mitigating circumstances submitted. The State does not deny that the unanimity requirement may have affected at least one juror's vote on at least some of the nine remaining mitigating circumstances and thus affected the jury's sentencing recommendation. *See State v. Brown*, 327 N.C. 1, 29-30, 394 S.E.2d 434, 451-52 (1990). We agree that we cannot conclude that the *McKoy* error was harmless, and we thus conclude that defendant must receive a new sentencing proceeding.

Defendant's remaining assignments of error relate to issues that defendant recognizes have previously been decided by this Court contrary to his position, but which he nonetheless brings forward to preserve for further appellate review. As we have previously decided those issues contrary to defendant's position, defendant's related assignments of error are overruled. *See State v. Payne*, 327 N.C. 194, 210, 394 S.E.2d 158, 166 (1990).

Guilt phase: no error.

Sentencing phase: new sentencing proceeding.

MICHAEL A. SMITH, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CRYSTAL MICHELLE SMITH, DECEASED v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 130A90

(Filed 7 February 1991)

Insurance § 69 (NCI3d)— underinsured motorist coverage—no applicable exclusion—stacking allowed

The Superior Court correctly concluded in a wrongful death action arising from an automobile accident that the underinsured motorist (UIM) coverages provided in two separate

automobile insurance policies issued to the individual plaintiff could be aggregated or "stacked" to compensate for the death of his daughter, who was killed driving a vehicle owned by plaintiff and herself, where the daughter and the vehicle were listed in only one of the policies. The Court of Appeals erred in relying on exclusions found only in the medical payments and liability portions of the policy to create a family member exclusion under the UIM portion of the policy. N.C.G.S. § 20-279.21 (1989).

Am Jur 2d, Automobile Insurance § 329.

Combining or "stacking" uninsured motorist coverages provided in separate policies issued by same insurer to same insured. 24 ALR4th 6.

Justice MEYER dissenting.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 97 N.C. App. 363, 388 S.E.2d 624 (1990), reversing and remanding the judgment entered by *Ellis, J.*, on 11 August 1988, in the Superior Court, WAKE County. Heard in the Supreme Court 8 October 1990.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Theodore B. Smyth, for plaintiff-appellant.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and Stephanie L. Hutchins, for defendant-appellee.

FRYE, Justice.

The issue presented in this appeal is whether the Court of Appeals erred in holding that the underinsured motorist (UIM) coverages provided in two separate automobile insurance policies issued to the individual plaintiff may not be aggregated or "stacked" to compensate for the death of his daughter who was killed while driving a vehicle owned by the individual plaintiff and the daughter, given that the daughter and the vehicle were listed in only one of the policies. The Court of Appeals, while acknowledging that a different result might be reached if writing on a clean slate, concluded that it was "compelled to follow the *Driscoll* rule enforcing the household-owned vehicle exclusion." *Smith v. Nationwide Mutual Ins. Co.*, 97 N.C. App. 363, 370, 388 S.E.2d 624, 629 (1990). Finding no "household-owned vehicle exclusion" applicable to the

UIM coverage in the policies at issue in *Driscoll* or in the present case, we overrule *Driscoll v. U.S. Liability Ins. Co.*, 90 N.C. App. 569, 369 S.E.2d 110, *disc. rev. denied*, 323 N.C. 364, 373 S.E.2d 544 (1988), and reverse the decision of the Court of Appeals in the case now before the Court.

On 2 October 1986, Crystal Smith was fatally injured in an accident while driving a 1977 Toyota Corolla automobile owned by Crystal Smith and her father, Michael Smith. The Toyota was insured under a liability insurance policy No. 61J097608 (Policy A) issued by Nationwide Mutual Insurance Company (Nationwide). Both Crystal Smith and Michael Smith were listed as insureds under Policy A. Michael Smith also had automobile liability insurance with Nationwide under policy No. 61E449873 (Policy B) which insured two other vehicles. Crystal Smith was not a named insured under Policy B, and she was not the owner of either of the two vehicles listed on Policy B. Crystal Smith was a member of her father's household at the time of the accident. Each of the Nationwide policies provided UIM coverage at limits of $100,000/$300,000.

The other vehicle involved in the accident was driven by Ricky Eugene Bates and owned by his wife, Virginia Bates. The Bates vehicle was insured by an automobile liability insurance policy issued by Farm Bureau Mutual Insurance Company (Farm Bureau). Farm Bureau paid its single limit liability coverage of $50,000 to the Estate of Crystal Michelle Smith.

On 13 January 1988, Michael Smith, individually and as administrator of his deceased daughter's estate, brought this declaratory judgment action pursuant to N.C.G.S. § 1-253 seeking a judgment for a "declaration of the rights that Michael Smith has in relation to two insurance policies issued by the defendant Nationwide Mutual Insurance Company." After setting out the factual dispute between plaintiff and defendant, plaintiff asked the Court to "enter a judgment declaring that underinsured motorist coverages provided for in the Nationwide policies numbered 61E449873 [Policy B] and 61J097608 [Policy A] may be stacked in calculating the total underinsured motorist coverage provided for to satisfy any settlement or judgment for the wrongful death of Crystal Michelle Smith." A wrongful death action, which sought to recover damages from the Bates for the wrongful death of Crystal Smith, was filed

in Wake County Civil Superior Court by Michael Smith as Administrator of Crystal Smith's Estate.

Nationwide does not deny that Crystal Smith was covered under Policy A; however, Nationwide does contest the issue of whether Policy B also provided UIM coverage for Crystal Smith. The trial court on 11 August 1988 denied defendant's motion to dismiss the action and granted plaintiff's motion for summary judgment. The trial court concluded that Crystal Smith was covered under the UIM provisions of Policy A and Policy B, which together provided a total of $200,000 in UIM coverage in favor of the Estate of Crystal Smith, subject to a $50,000 setoff representing payments received by the plaintiff from the tortfeasor's liability insurance carrier. On appeal by Nationwide, the Court of Appeals reversed, holding that "because the Toyota driven by Crystal was a household-owned vehicle not insured under Policy B, the UIM coverage provided by that policy is not available to compensate Mr. Smith for Crystal's death." *Smith v. Nationwide*, 97 N.C. App. at 370, 388 S.E.2d at 629. Judge Phillips dissented, concluding that under this Court's decision in *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989), the UIM coverages of both policies are available to the plaintiff. *Id.* at 371, 388 S.E.2d at 629. Plaintiff appealed to this Court on the basis of the dissenting opinion.

When examining cases to determine whether insurance coverage is provided by a particular automobile liability insurance policy, careful attention must be given to the type of coverage, the relevant statutory provisions, and the terms of the policy. In the present case, the type of coverage at issue is UIM coverage. The policies in question, Policy A and Policy B, both include uninsured motorist (UM) coverage and UIM coverage in addition to the standard liability coverage and medical payments coverage.

The relevant statute in this case is N.C.G.S. § 20-279.21 (1989). The policy requirements for liability coverage are found in N.C.G.S. § 20-279.21(b)(2), supplemented by other provisions of § 20-279.21. Uninsured motorist coverage is governed by N.C.G.S. § 20-279.21(b)(3), supplemented by other provisions of § 20-279.21. Underinsured motorist coverage is governed by N.C.G.S. § 20-279.21(b)(4), supplemented by other provisions of § 20-279.21.

As noted above, § 20-279.21(b)(3) addresses UM coverage. It includes the following definition of "persons insured":

> For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person in lawful possession of such motor vehicle.

N.C.G.S. § 20-279.21(b)(3) (1989). Section 20-279.21(b)(4) addresses UIM coverage and incorporates by reference the same definition of "persons insured." *See* N.C.G.S. § 20-279.21(b)(4) (1989). Thus, § 20-279.21(b)(3) defines "persons insured" for purposes of UM coverage and UIM coverage.

Our Court of Appeals explained the term "persons insured" in *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986).

> In essence, N.C. Gen. Stat. 20-279.21(b)(3) establishes two "classes" of "persons insured": (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

Id. at 554, 340 S.E.2d at 129. Members of the second class are "persons insured" for the purposes of UM and UIM coverage only when the insured vehicle is involved in the insured's injuries. Members of the first class are "persons insured" even where the insured vehicle is not involved in the insured's injuries. *Id.* at 554, 340 S.E.2d at 130. We are concerned in this case with the first group or "class" of "persons insured" under N.C.G.S. § 20-279.21(b)(3) for purposes of UIM coverage. The individual plaintiff (Michael Smith) and his daughter Crystal are clearly members of the first class and thus "persons insured" under both policies without regard to whether the insured vehicle is involved in the insured's injuries.

Both Policy A and Policy B are virtually identical, with the exception of the Declarations page of each policy. The policy contains definitions of certain terms used in the policy, including the following:

> Throughout this policy, "you" and "your" refer to:
>
> 1. The "named insured" shown in the Declarations; and
>
> 2. The spouse if a resident of the same household.
>
> "We," "us" and "our" refer to the Company providing this insurance.
>
> . . . .
>
> "**Family member**" means a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child.

In the instant case, "you" and "your" refer to Michael Smith as to Policy B and either Michael Smith or his daughter Crystal in Policy A. Crystal Smith was clearly a family member under Policy B.

Part D, the UM coverage section of both policies, provides that Nationwide

> will pay damages which a **covered person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of:
>
> 1. Bodily injury sustained by a **covered person** and caused by an accident . . . .

Covered person, as used in this type of coverage, includes "[y]ou or any **family member**." The definition of an uninsured motor vehicle in Part D of the policy is expanded by an UM/UIM Endorsement to include an underinsured motor vehicle. Thus, under Part D of both policies, Crystal Smith is a family member and a "covered person" who would be entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle for bodily injury sustained by her in an accident, subject to the applicable limitations and exclusions.

Part B, the "Liability Coverage" section of the policies, provides an exclusion which states in part,

> We do not provide Liability Coverage for the ownership, maintenance or use of . . . [a]ny vehicle, other than **your covered auto**, which is . . . owned by any **family member**.

Part C, the "Medical Payments Coverage" section of the policies, provides a similar exclusion which states in part,

> We do not provide Medical Payments Coverage for any person for bodily injury . . . [s]ustained while **occupying**, or when struck by, any vehicle (other than **your covered auto**) which is owned by any **family member**.

After careful examination of the policies, we are unable to find any similar "family member" exclusion in Part D, the UM coverage section of the base policies or in the UM/UIM Endorsement to the policies.

The "Liability Coverage" section of both Policy A and Policy B contains an "Other Insurance" exclusion. This exclusion provides:

> If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

The "Medical Payments Coverage" section of both Policy A and Policy B also contains a similar "Other Insurance" exclusion. This exclusion provides:

> If there is other applicable auto medical payments insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible auto insurance providing payments for medical or funeral expenses.

The "Uninsured Motorist Coverage" section of these policies originally contained a somewhat similar "Other Insurance" exclusion. The first paragraph of the "Other Insurance" clause provided:

> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your injuries under all the policies shall not exceed the highest applicable limit under any one policy.

However, Uninsured/Underinsured Motorist Coverage Endorsement 1676B amended the "Other Insurance" provision and replaced the anti-stacking language of the first paragraph with the following:

> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability

> for your or a family member's injuries shall be the sum of the limits of liability for this coverage under all such policies.

This Endorsement clearly allows the stacking of UIM coverages for a family member when the family member is covered by more than one policy issued to the named insured.

A careful reading of these policies discloses a clear pattern of treating UM/UIM coverages in a different manner from that accorded to both liability coverage and medical payments coverage, especially as it relates to other insurance and family member vehicles. This distinction between these types of coverages in the policy seems to comport with the distinction made in the statutory authorization for UM and UIM coverages. The UIM coverage portion of § 20-279.21, for example, specifically includes an expression of "intent . . . to provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies." N.C.G.S. § 20-279.21(b)(4) (1989). Likewise, the term "persons insured" is used in § 20-279.21(b)(3) relating to UM coverage (and by reference, to UIM coverage) but is not used in § 20-279.21(b)(2) relating to liability insurance. Both the policy and statutory schemes operate on the realization that the very nature of liability insurance coverage is different from UM/UIM insurance coverage. The former protects covered persons from the consequences of their own negligence; the latter protects covered persons from the consequences of the negligence of others. Medical payments coverage, on the other hand, gives very limited protection to the covered persons, without regard to their own negligence or that of others.

Our Court of Appeals has decided two significant cases determining whether UIM coverage is available in specific fact situations.[1] In *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127, the plaintiff was injured while riding as a passenger in a nonowned vehicle. The insurance company representing the tortfeasor paid the plaintiff $25,000, representing the full policy limit for automobile liability coverage. Plaintiff's father had an insurance policy with defendant Farm Bureau that included an UM/UIM Endorsement. *Id.* at 551-52, 340 S.E.2d at

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1. *Johnson v. Sprinkle*, 92 N.C. App. 598, 376 S.E.2d 771, *disc. rev. denied*, 324 N.C. 335, 378 S.E.2d 792 (1989), a case dealing with UIM coverage, is an unpublished decision which establishes no precedent. R. App. P. 30(e).

128. The issue raised in *Crowder* was "whether an insured person is covered by uninsured or underinsured motorist coverage when the insured or covered vehicle is not in any way involved in the insured's injuries." *Id.* at 553, 340 S.E.2d at 129. The court construed the language of the policy and N.C.G.S. § 20-279.21(b)(3) and held that "under the particular circumstances of this case, coverage extends to those insured even though not in the covered vehicle at the time of the injury." *Id.* However, the court also stated that its holding was "expressly limited to allowing underinsured motorist coverage for insureds operating, or riding in, a nonowned vehicle." *Id.* at 555, 340 S.E.2d at 130.

The Court of Appeals purported to address the question of UIM coverage for an insured riding in a family-owned vehicle in *Driscoll v. U. S. Liability Ins. Co.*, 90 N.C. App. 569, 369 S.E.2d 110. In *Driscoll*, the issue was whether plaintiff was covered under the UIM provision of her daughter's insurance policy with defendant insurance company. Plaintiff, her husband and their adult daughter shared the same household. Plaintiff's daughter owned a 1981 AMC Concord automobile which was insured by the defendant, and the policy contained UIM coverage limited to $100,000 per claimant. Plaintiff, a passenger in an automobile owned and driven by her husband, was injured when that automobile was struck by another vehicle. The tortfeasor's liability insurance coverage was limited to $25,000 per claimant. Plaintiff's damages exceeded that amount. *Id.*

The Court of Appeals construed the language of the policy and N.C.G.S. § 20-279.21 and concluded that neither "provided underinsured motorist coverage for Jane Driscoll for injuries sustained while riding in a household-owned vehicle not named in the policy." *Id.* at 572, 369 S.E.2d at 113.

Under § 20-279.21(b)(4), UIM coverage may be obtained only if the policyholder has liability insurance in excess of the minimum statutory requirement, and, in any event, the UIM coverage must be in an amount equal to the policy limits for bodily injury liability specified in the policy. The Court of Appeals in *Driscoll* stated, "Historically underinsured motorist coverage and increased liability coverage are coterminous in North Carolina." *Driscoll*, 90 N.C. App. at 572, 369 S.E.2d at 112. The Court of Appeals then concluded that plaintiff "would have no bodily injury liability coverage under her daughter's policy because the policy excluded medical payments

coverage for damages sustained by a 'family member' while occupying or struck by any vehicle (other than the insured's covered auto) owned by any 'family member.' " *Id.* Because plaintiff would not be covered by her daughter's bodily injury liability coverage, the court in *Driscoll* concluded "subsection (b)(4) does not mandate underinsured motorist coverage." According to the Court of Appeals, logic dictates that since the exclusion for the family-owned vehicle prevented plaintiff from being covered by the bodily injury liability section of her daughter's policy, plaintiff should likewise not be covered by the UIM coverage of her daughter's policy. *Id.*

We do not agree with the Court of Appeals' rationale in *Driscoll* that no recovery may be obtained under the UM/UIM coverages unless the insured would also be entitled to recover under medical payments or bodily injury liability coverages. As stated earlier in this opinion, the purpose of UM/UIM insurance differs from the purposes of medical payments insurance or liability insurance. Likewise, while the statutory scheme requires the insurance company to offer UM/UIM coverages only if liability coverages exceed the minimum statutory requirement and in an *amount* equal to the limits of bodily injury liability insurance, nothing in the statute requires that the *scope* of the coverage be the same. In fact, the statutory scheme suggests the opposite. The liability section of the statute provides that the owner's policy shall insure certain persons "using any such motor vehicle or motor vehicles . . . against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of *such motor vehicle or motor vehicles* . . . ." N.C.G.S. § 20-279.21(b)(2) (emphasis added). On the other hand, the UM (and by incorporation, the UIM) coverage is offered "for the protection of *persons insured* who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . ." N.C.G.S. § 20-279.21(b)(3) (emphasis added).

The statutory scheme for liability insurance is primarily vehicle oriented while UM/UIM insurance is essentially person oriented. Liability coverage is third-party insurance while UM/UIM coverage is first-party insurance. The relationship between liability insurance and statutorily mandated UM insurance was explained by the Michigan Supreme Court in an exhaustive opinion holding, inter alia, that an "owned vehicle exclusion" in the UM coverage provision of certain policies was unenforceable. *Bradley v. Mid-Century Ins. Co.*, 409 Mich. 1, 294 N.W.2d 141 (1980). The Michigan court concluded, "[t]he obligation to provide uninsured motorist coverage

was tied to liability coverage to facilitate its purchase and to determine the persons who must be provided with uninsured motorist coverage, and not to provide insurers a means of limiting the coverage to situations in which liability coverage would be in effect." *Id.* at 35-36, 294 N.W.2d at 151.

Driscoll held that a "family member" or "household-owned" vehicle exclusion in the liability coverage section of an owner's policy of liability insurance is effective to deny UIM coverage to a family member while a passenger in a family-owned vehicle not listed in the policy at issue. However, the definition of "persons insured" for UM/UIM coverage strongly suggests that the UM/UIM coverage for family members follows the person rather than the vehicle. Several courts have so held. *See, e.g., Higgins v. Firemen's Fund Ins. Co.*, 160 Ariz. 20, 770 P.2d 324 (1989) (UIM coverage is first party insurance, which protects and follows the person, not the vehicle); *Frank v. Horizon Assur. Co.*, 553 A.2d 1199 (Del. 1989) (UIM coverage is personal to insured, rather than vehicle related); *see generally* 8C J. Appleman, *Insurance Law and Practice*, § 5078.35 (1981 & Supp. 1990); 2 A. Widiss, *Uninsured and Underinsured Motorist Insurance* § 40.1 (2nd ed. 1987).

Even where the "family member" or "household-owned" vehicle exclusion is found in the UM/UIM section of the policy, the courts and legal scholars are divided as to its validity. John and Jean Appleman, in their treatise entitled, "Insurance Law and Practice," argue for upholding "family member" or "household member" exclusions when such exclusions are clearly stated in the UM/UIM section of the policy. Widiss, in his treatise entitled, "Uninsured and Underinsured Motorist Insurance," shows why such exclusions should not be upheld as to UM/UIM coverages.[2] Neither Widiss nor Appleman suggests judicial creation of such an exclusion where none exists in the section of the policy relating to UM/UIM coverage. Appleman says that the decisions which hold the household-owned vehicle exclusion to be valid would seem to be correct on principle. We note, however, that one of the cases cited as so holding, *Rodriquez v. Maryland Indem. Ins. Co.*, 24 Ariz. App. 392, 539 P.2d 196 (1975), was expressly overruled in *Calvert v. Farmers Ins. Co.*, 144 Ariz. 291, 697 P.2d 684 (1985), and the "household-owned" vehicle exclusion was held invalid as contrary to the coverage mandated by

2. *See* 8C J. Appleman, *Insurance Law and Practice*, § 5078.35 (1981 and Supp. 1990) (Appleman quotes Widiss, then gives an opposing view).

statute. *See* 8C J. Appleman, *Insurance Law and Practice*, § 5078.35 (Supp. 1990).

We need not decide whether a "family member" or "household-owned" vehicle exclusion clearly stated in the UM/UIM section of a policy would be invalid as being contrary to N.C.G.S. § 20-279.21(b)(3), since no such exclusion is found in the UM/UIM section of the policies in this case. We conclude, however, that the Court of Appeals erred in *Driscoll* in relying on exclusions found only in the medical payments and liability portions of the policy to create the "family member" exclusion under the UIM portion of the policy.

According to the language of Policy A and Policy B, Crystal Smith was a covered person under Part D of both policies. She was covered under Policy A because she was a named insured, and she was covered under Policy B as a family member. She was a "person insured" of the first "class" established by N.C.G.S. § 20-279.21(b)(3) even where the insured vehicle is not involved in the insured's injuries. *See Crowder*, 79 N.C. App. at 554, 340 S.E.2d at 130. The plaintiff in *Crowder* was covered under the UIM section of his father's policy because he was a person insured under the language of the policy and under N.C.G.S. § 20-279.21(b)(3) even though his injuries were unrelated to the use or operation of the vehicle named in his father's policy. The only distinction between *Crowder* and the present case is that in *Crowder*, the party was injured while riding in a "nonowned" vehicle, while in the present case the party was injured while driving an "owned" vehicle. As indicated by our previous discussion, the distinction between *Crowder* and this case does not warrant reaching a different result. We hold that Crystal Smith was a "covered person" under the UM/UIM section of her father's Policy B and a "person insured" of the first class under N.C.G.S. § 20-279.21(b)(3) even though her fatal injuries were unrelated to the use or operation of the vehicles named in Policy B.

Like the plaintiff in *Driscoll* who sought to recover under her daughter's automobile insurance policy on the basis of being a member of the household, recovery in the present case is sought on the basis that the deceased was a member of her father's household. There is no provision in the UM section of Policy B, the UM/UIM Endorsement to that policy, or the relevant statutory provisions which would exclude Crystal Smith, a member of her

father's household at the time of the fatal accident, from being covered by the UIM coverage available in Policy B issued to her father. Therefore, plaintiff may recover under the UIM provision of Policy B as well as under the UIM provision of Policy A.

Having determined that his daughter was covered for UIM purposes under both policies, plaintiff contends this Court's decision in *Sutton v. Aetna*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989), which addressed intrapolicy and interpolicy stacking of UIM coverages in automobile liability insurance policies, controls this case. In *Sutton*, the plaintiff was the named insured in two liability insurance policies, Policy A and Policy B. Policy A covered a Regal and a Camaro and provided $50,000 of UIM coverage for each automobile. Policy B covered a truck and a Plymouth and provided $100,000 UIM coverage for each automobile. The facts were stipulated. *Id.* at 261, 382 S.E.2d at 761. Plaintiff suffered damages in excess of $70,000 as a result of injuries sustained in an automobile accident caused by the negligence of a tortfeasor who had $50,000 of liability insurance coverage. *Id.* at 262, 382 S.E.2d at 761. Plaintiff recovered $50,000 from the tortfeasor and sought a declaratory judgment that her insurance policies (Policy A and Policy B) provided a total of $300,000 UIM coverage. This amount was determined by adding $50,000 UIM coverage for each of the two automobiles for which coverage was provided in Policy A and $100,000 UIM coverage for each of the automobiles provided for in Policy B. *Id.* at 263, 382 S.E.2d at 762. This Court concluded that under N.C.G.S. § 20-279.21(b)(4), plaintiff was entitled to have all UIM coverages in both policies aggregated or "stacked," resulting in total UIM coverage of $300,000. This coverage would be subject to a $50,000 offset paid by the tortfeasor's liability policy. *Id.*

There was no question that in *Sutton* the plaintiff was covered by both policies because the plaintiff was a named insured in each of the two policies. The only question was whether the UIM coverages for each automobile in the two policies issued to her could be aggregated or stacked so as to give plaintiff the benefit of each separate coverage. *Id.* at 260, 382 S.E.2d at 762. We held that this could be done.

In the instant case, the deceased, although clearly covered for UM/UIM benefits under Policy A as a named insured and under Policy B as a member of her father's household, was not a named

insured under Policy B. Thus, *Sutton* may be distinguished from the present case on this factual basis. Whether the principles enumerated in *Sutton* would require stacking in the instant case need not be decided since the same result is mandated by the policy language.

In order to determine whether plaintiff may aggregate or stack the UIM coverages under Policy A and Policy B, we first examine the policy language found in the Other Insurance provisions of Part D—Uninsured Motorists Coverage as amended by the UM/UIM coverage endorsement.

The UM/UIM endorsement amends the Other Insurance provision with respect to damages "you or a *family member* are legally entitled to recover from the owner or operator of an [*uninsured motor vehicle*]" as follows:

> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your or a *family member*'s injuries shall be the sum of the limits of liability for this coverage under all such policies.

Applying this Other Insurance provision of Policy B to the present case:

> If this policy (Policy B issued to Michael Smith, the individual plaintiff) and any other auto insurance policy issued to you (Policy A issued to Michael Smith and Crystal Smith) apply to the same accident (the accident of 2 October 1986 resulting in the death of Michael Smith's daughter, Crystal), the maximum limit of liability for your or a *family member*'s injuries shall be the sum (total) of the limits of liability ($100,000 under each policy) for this coverage (UIM) under all (both Policy A and Policy B) such policies.

The sum of the limits of liability for UIM coverage under both policies is clearly $200,000. Thus, under the language of the two policies, the limits of the UIM coverages may be aggregated or stacked to provide compensation to plaintiff in this case. We find nothing in the Motor Vehicle Financial Responsibility Act which compels a contrary reading or interpretation of the language of the two policies in this case. Thus, we find it unnecessary to decide whether the result reached in this case would also be mandated by our decision in *Sutton* or by any provision of the Motor Vehicle Financial Responsibility Act.

In the instant case, the deceased was a named insured under Policy A; however, she was covered under Policy B as a family member operating a household-owned vehicle unless excluded under a "family member" or "household-owned" exclusion in Policy B. As we have previously noted, no such exclusion appears in the UM/UIM sections of the policies. The only "family member" or "household-owned" vehicle exclusions in Policy B are found in the medical payments and liability sections of the policy. Contrary to the Court of Appeals' decision in *Driscoll*, these exclusions in the medical payments and liability sections of the policy are not to be read into the UM/UIM section of the policy. Thus, no "family member" or "household-owned" vehicle exclusion operates to prevent plaintiff from recovering under the UM/UIM Endorsement of Policy B.

The individual plaintiff was a named insured in both policies, the UIM coverages of both policies applied to the same accident, and the person fatally injured was a member of the individual plaintiff's household. Thus, under the insuring agreement of Part D and the "Other Insurance" provision of the UM/UIM Endorsement, the UIM coverages under Policy B may be stacked with the UIM coverage under Policy A.

For all of the above reasons, the decision of the Court of Appeals is reversed, and the case is remanded to that court for further remand to the Superior Court, Wake County, for reinstatement of the judgment of the Superior Court.

Reversed and remanded.

Chief Justice EXUM did not participate in the consideration or decision of this case.

Justice MEYER dissenting.

The 1977 Toyota automobile that Crystal Smith was driving when fatally injured was owned by Crystal Smith and her father, Michael Smith, and both were named insureds under Nationwide's policy of insurance on that vehicle, Policy A. The father owned two other vehicles individually, which were both covered under Nationwide's Policy B. Crystal had no ownership interest in either of these two vehicles, which were covered by Nationwide's Policy B, and she was not a named insured in Policy B. Crystal was

a member of her father's household at the time of the accident and was a "covered person" under Policy B's UIM coverage so long as she was not injured while driving another vehicle owned by a member of the household, which vehicle was not insured under Policy B. Both Policies A and B had UIM coverages of $100,000/$300,000. The vehicle which collided with Crystal's Toyota was insured by Farm Bureau, and that company paid its single limit coverage of $50,000 to Crystal's estate. Nationwide does not dispute that Crystal was insured under Policy A but denies that Policy B provides UIM coverage to her when injured while driving her Toyota. The Court of Appeals held that because the Toyota driven by Crystal was a household-owned vehicle not insured under Policy B, no UIM coverage was provided by Policy B. The majority of this Court has held that even though the Toyota was not an insured vehicle under Policy B and even though Crystal was excluded from coverage under the express and specific language of both Policy B's liability and medical payments provisions, she is not excluded from Policy B's UIM coverage because the exclusionary language does not specifically appear in the provisions governing UIM coverage. I believe that the majority has erred in so holding, and I therefore dissent.

Crystal's father, the individual plaintiff, purchased both policies and chose to name Crystal and himself as named insureds on the policy covering Crystal's car (Policy A) and not to include her car or to include her as a named insured on his individual policy (Policy B) covering his other two family vehicles. This was no doubt entirely satisfactory with Nationwide, as it thus, through the exclusionary provisions, avoided all liability on Policy B if Crystal were injured while driving the Toyota insured under Policy A—or so it assumed, as would anyone else prior to the majority's opinion in this case. *See* Annotation, *Uninsured Motorist Coverage: Validity of Exclusion of Injuries Sustained by Insured While Occupying "Owned" Vehicle Not Insured by Policy*, 30 A.L.R.4th 172 (1984).

The majority candidly admits that the deceased was neither the "owner" of Policy B nor the "owner" of a vehicle insured by Policy B. Thus, *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989), is inapplicable to the facts of this case. In *Sutton*, this Court held that a plaintiff who was issued two insurance policies by Aetna was entitled to stack the underinsured motorists coverages contained in each of the two policies (interpolicy stacking) and

the coverages contained in each policy (intrapolicy stacking). That holding was based exclusively on the express provision of N.C.G.S. § 20-279.21(b)(4) of the Motor Vehicle Safety and Financial Responsibility Act of 1953, as amended effective 1 October 1985. N.C.G.S. § 20-4.01(26) defines "owner" as:

> *A person holding the legal title to a vehicle*, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the mortgagor, conditional vendee or lessee, said mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this Chapter. For the purposes of this Chapter, the lessee of a vehicle owned by the government of the United States shall be considered the owner of said vehicle.

N.C.G.S. § 20-4.01(26) (1985) (emphasis added). This statute further provides that "[u]nless the context requires otherwise, the . . . definitions apply throughout this Chapter to the defined words and phrases and their cognates." N.C.G.S. § 20-4.01 (1985).

Holding that "the statute prevails over the language of the policy," *Sutton*, 325 N.C. at 263, 382 S.E.2d at 762, this Court in *Sutton* then considered the language of the statute which provides in relevant part:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the *owner's* underinsured motorist coverages provided in the *owner's* policies of insurance; *it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply*, the benefit of all limits of liability of underinsured motorist coverage under all such policies . . . .

N.C.G.S. § 20-279.21(b)(4) (1985) (emphasis added). The plaintiff in *Sutton* was the "owner" of both of the policies within the meaning of N.C.G.S. § 20-279.21(b)(4). The plaintiff in *Sutton* was also the *owner* of all of the vehicles insured in each of the two policies. Thus, the plaintiff in *Sutton* satisfied whatever interpretation of

the word "owner" this Court chose to apply when interpreting the statute.

Properly interpreted, N.C.G.S. § 20-279.21(b)(4) is intended to limit the underinsured motorists coverage applicable to any claim to

> the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the . . . [owner of the vehicle's] underinsured motorist coverages provided in the . . . [owner of the vehicle's] policies of insurance; it being the intent of this paragraph to provide to the owner [of the vehicles], in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies . . . .

N.C.G.S. § 20-279.21(b)(4) (1989). Here, the only vehicles insured under Policy B were owned exclusively by Michael Smith; the Toyota owned jointly by Crystal and her father was not insured under that policy. Even if "owner" is interpreted to mean owner of the policy, as opposed to owner of the vehicles insured under the policy, the same result obtains, as Crystal was not the owner of Policy B.

If the legislature had wanted all "covered persons," such as Crystal Smith under Policy B here, to have the benefit of the quoted paragraph of N.C.G.S. § 20-279.21(b)(4), the legislature could have used the phrase "covered persons" rather than the word "owner" to define the scope of the statute. The legislature instead chose to restrict the benefits of the quoted provision to those who owned the vehicle (or possibly who owned the policy). Under the ordinary rules of statutory construction, the legislature must be presumed to have intended to so restrict the statute's application, and where, as here, the statute is clear and unambiguous, it must be construed according to its plain meaning. *Lemons v. Old Hickory Council*, 322 N.C. 271, 367 S.E.2d 655, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988). Since, by its own clear terms, the statute is inapplicable because Crystal was not an "owner" under Policy B, the provisions of the policy control.

The first line of the uninsured/underinsured motorists coverage of Policy B (endorsement 1676B) states:

> This coverage is subject to all of the provisions of the policy *with respect to the vehicles for which the Declarations indicates that Uninsured/Underinsured Motorists Coverage applies* except as modified as follows . . . .

The only vehicles listed on the declarations sheet of Policy B are the father's other two vehicles, a 1960 Ford pickup and a 1977 Plymouth station wagon. The declarations sheet states that Policy B provides uninsured and underinsured motorists coverage for both of those vehicles in specified amounts. Nowhere does the declarations sheet "indicate" that uninsured/underinsured motorists coverage applies to the 1977 Toyota which was involved in the accident. Under the clear terms of endorsement 1676B, the underinsured motorists coverage provided in Policy B is applicable only to the vehicles listed, and not to any other vehicles. The language of endorsement 1676B in the first sentence and the insuring phrase for underinsured motorists ties the coverage into the vehicles on the policy and is tantamount to an exclusion for other vehicles in the household or owned by members of the household. It is immaterial that Crystal Smith was a "covered person" under the policy, since the very first sentence of the endorsement clearly limits the underinsured motorists coverage "to the vehicles for which the Declarations indicates that Uninsured/Underinsured Motorists Coverage applies."

Many jurisdictions have held the "other owned vehicles" or "household vehicle" exclusion valid for uninsured or underinsured motorists coverage to prevent an insured from operating or riding in an owned vehicle with low limits of underinsured coverage and obtaining the benefit of another policy in the household with higher limits. *See* Annotation, *Uninsured Motorist Coverage: Validity of Exclusion of Injuries Sustained by Insured While Occupying "Owned" Vehicle Not Insured by Policy*, 30 A.L.R.4th 172 (1984); *see also Crawford v. Emcasco Ins. Co.*, 294 Ark. 569, 745 S.W.2d 132 (1988); *Kluiter v. State Farm Mut. Auto. Ins. Co.*, 417 N.W.2d 74 (Iowa 1987); *Allen v. Auto Club Ins. Ass'n*, 175 Mich. App. 206, 437 N.W.2d 263 (1988); *Hind v. Quilles*, 745 P.2d 1239 (Utah 1987) (per curiam); *Deel v. Sweeney*, 383 S.E.2d 92 (W. Va. 1989).

Prior to the majority's holding in this case, I thought it too well established to be questionable that an automobile insurance policy covering one vehicle in the household does not provide underinsured motorists coverage for injuries sustained by a member of the household while occupying another household vehicle or vehicle owned by that member of the household not listed on the policy.

Under the majority's decision, there is nothing to prevent a family with two, three, four, or more vehicles from insuring one

of them at the most favorable premium rate and extending UIM coverage to the others. This could be the case even if the vehicle insured is the safest one and the others have proven to be unsafe or, for that matter, even if the others are covered by minimum coverage policies for which UIM coverage is not even available. It also occurs to me that the majority's decision allows a family to purchase high limits of underinsured coverage on drivers in the household with lower points or ratings at a low premium and to provide coverage to other members of the household with high point totals or ratings when they are injured in vehicles which they own individually. I cannot believe that our legislature intended such a result.

Insurance Co. of North America v. Hippert, 354 Pa. Super. 333, 511 A.2d 1365 (1986), addressed this very concern. In that case, the court upheld the validity of policy language which excluded injury to a named insured injured in an owned vehicle that was not on the particular policy and discussed some of the public policy reasons behind such exclusion. The court stated:

> We first address the possible effects of ruling the exclusionary clause invalid. If that is done, it is quite obvious that Judith Hippert, as owner of both the uninsured vehicle involved in the accident and the second vehicle insured by Allstate reaps the benefits. Such a holding would allow her to pay premiums on insurance for one vehicle while actually receiving coverage on two vehicles.

Id. at 339, 511 A.2d at 1368. The court continued in a footnote: "The potential for abuse is staggering. Should this result, there is nothing that would prohibit a family with three, four or more vehicles from insuring one at the most favorable rate and then extend coverage by virtue of this Court's ruling. We cannot imagine that the legislature intended the . . . Act impose such a heavy burden on the insurance companies." *Id.* at 339 n.4, 511 A.2d at 1368 n.4. The court in *Hippert* went on to hold that, even in view of the statute in question, defining a person insured as the named insured or a spouse or other relative resident of the household, it did not necessarily follow in all circumstances that the insurance " 'follows the person, not the vehicle.' " *Id.* at 342, 511 A.2d at 1369. The court declined to allow the premiums paid on one vehicle to extend to any vehicle driven by a "person insured" under the policy when operating an owned vehicle not on the policy.

Our own Court of Appeals evidenced a similar concern in *Driscoll v. U.S. Liability Ins. Co.*, 90 N.C. App. 569, 369 S.E.2d 110, *disc. rev. denied*, 323 N.C. 364, 373 S.E.2d 544 (1988):

> "[I]t is scarcely the purpose of any insurer to write a single UM [underinsured/uninsured motorist] coverage upon one of a number of vehicles owned by an insured, or by others in the household, and extend the benefits of such coverage gratis upon all other vehicles—any more than it would write liability, collision or comprehensive coverages upon one such vehicle and indemnify for such losses as to any other vehicle involved. Nor would any reasonable person so expect." 8C J. Appleman, *Insurance Law and Practice*, Section 5078.15 at 179.

Id. at 572, 369 S.E.2d at 112-13.

This Court recently reaffirmed the validity of a similar exclusion which is contained in the same paragraph of Policy B that contains the "other owned vehicle" exclusion. *N.C. Farm Bureau Mutual Ins. Co. v. Warren*, 326 N.C. 444, 390 S.E.2d 138 (1990). The rationale applied by the Court in *Warren* is equally applicable here. In his dissent, Justice Martin remarked:

> The insurance companies want to exclude vehicles used habitually by an insured without the payment of insurance premiums. The policy is to prevent a family or person from having two or more automobiles that are used interchangeably with only one automobile being insured.

Id. at 448, 450, 390 S.E.2d at 141, 142 (Martin, J., dissenting).

I believe that this Court should hold very plainly what I conceive to be the intent of our statute, that is, that underinsured coverage "follows suit" with the liability coverage. Non-owners get UIM coverage to the same extent the policy protects others under the "liability" coverage. If there is no "liability" coverage, there is no UIM coverage. Such a result is consistent with our statute, the policy language, and common sense and in no way conflicts with our Financial Responsibility Act. Furthermore, it would avoid the problems I have expressed in this dissent.

I desire to also point out two arguments made by Nationwide which neither the Court of Appeals nor the majority of this Court has addressed.

Nationwide contends, and properly so, that simply because it is the carrier under both policies, it should not be treated differently than if the policies had been issued by two separate companies. Part D of each of the Nationwide policies (Policies A and B), which sets forth the underinsured motorists coverage, contains a limit of liability clause which provides:

> *Any amounts otherwise payable* for damages under this coverage *shall be reduced* by all sums:
>
> 1. Paid because of the bodily injury or property damage *by or on behalf of persons or organizations who may be legally responsible.*

(Emphasis added.)

Nationwide contended before the Court of Appeals that this clause limited Nationwide's combined exposure under both policies to $50,000 because the clause required each policy to be reduced by certain other payments. Plaintiff did not address Nationwide's argument in its brief to the Court of Appeals, and the Court of Appeals failed to consider the substance of Nationwide's argument.

Nationwide's argument under the limit of liability clause contained in the policy is not an argument regarding stacking. Nationwide simply contends that, since both Policies A and B contain this clause, *each* policy must be reduced by the $50,000 payment by Farm Bureau to Crystal Smith's estate on behalf of the tort-feasor, Bates, a person who is "legally responsible." *See N.C. Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C. App. 507, 512-13, 369 S.E.2d 386, 389 (1988). Under the clear language of the policy, Policy B must also be reduced by the $50,000 payment to be made by Nationwide under Policy A. Furthermore, as to Policy B, a verdict was rendered against the tort-feasor, Bates, in the amount of $105,235.16. Nationwide has assumed this liability up to the limits contained in Policy A, $50,000. Accordingly, Nationwide's $50,000 payment under Policy A and the $50,000 payment from Farm Bureau on behalf of the tort-feasor must be credited against Nationwide's Policy B pursuant to the limit of liability clause contained in that policy. When these payments, totaling $100,000, are credited against the $100,000 underinsured motorists coverage under Policy B, no underinsured motorists coverage remains under that policy. Thus, Nationwide's total exposure under the combined policies, even if aggregated, is $50,000.

STATE OF NORTH CAROLINA v. CARLTON JAMES SMITH

No. 130PA89

(Filed 7 February 1991)

Courts § 135 (NCI4th)— murders by juvenile on military base— superior court without jurisdiction

The Onslow County Superior Court did not have concurrent jurisdiction to try a person as an adult for murders he allegedly committed as a juvenile on the Camp Lejeune military reservation where the State has ceded and the federal government has accepted exclusive jurisdiction over this territory, and the United States Attorney certified to the United States District Court pursuant to 18 U.S.C. § 5032 that the courts of North Carolina did not have jurisdiction over the defendant with respect to the acts committed on the military reservation. N.C.G.S. § 104-7; Art. I, § 8 of the U.S. Constitution.

Am Jur 2d, Courts §§ 11-13.

Justice MARTIN concurring.

ON writ of certiorari to review an order entered by *Strickland, J.*, at the 23 February 1989 Session of Superior Court, ONSLOW County. Heard in the Supreme Court 15 March 1990.

The defendant has been indicted on three charges of murder in the Superior Court, Onslow County. On 24 August 1981, when the defendant was fifteen years of age, the bodies of Connie Smith, Sharon Lee Sager, and Tyler Dash were found on the Marine Corps Base, Camp Lejeune, North Carolina. The area in which the bodies were found was purchased by the United States in 1941. In a letter to J. Melville Broughton, the Governor of North Carolina, dated 4 June 1941, Acting Secretary of the Navy James Forrestal notified the Governor that an Act of Congress required that in any case in which a State cedes jurisdiction over lands within its borders to the United States the head of any department having custody of such lands, shall, if such jurisdiction be accepted, file a notice of such acceptance with the Governor of such state ceding such jurisdiction. Acting Secretary Forrestal notified Governor Broughton that jurisdiction was accepted over the land effective at 12:00 noon on 9 June 1941 "in the manner and form provided by an act of 1907, Ch. 25, N.C. Code 1927, Sec. 8059." This is

now N.C.G.S. § 104-7. On 24 August 1981 an assistant district attorney of the Fourth Prosecutorial District wrote to an assistant United States Attorney that, "[i]t has always been my understanding that criminal offenses occurring on the Marine Corps installations in Onslow County fall exclusively within the federal jurisdiction. Even assuming concurrent jurisdiction exists, we will defer to cognizant federal authorities in this case."

On 8 July 1986 the federal government filed a juvenile information against the defendant, charging him with three counts of first degree murder. The information alleged that the murders were committed in violation of 18 U.S.C. § 1111 (1982) on the Marine Corps Base, Camp Lejeune, North Carolina under the exclusive jurisdiction of the United States. On the same day the United States Attorney certified to Chief Judge W. Earl Britt, United States District Court for the Eastern District of North Carolina, that pursuant to 18 U.S.C. § 5032 (1982) on the authority delegated to him by the Attorney General of the United States "no juvenile court or other appropriate court of any state, including the General Court of Justice of the State of North Carolina, has jurisdiction over said juvenile with respect to acts of juvenile delinquency alleged in this case, such acts having occurred on Marine Corps Base, Camp Lejeune, North Carolina, a military reservation acquired for the use of the United States and under exclusive jurisdiction thereof."

On 28 July 1986 the government's motion to transfer the defendant to United States District Court for trial as an adult was allowed. On appeal to the Fourth Circuit Court of Appeals this order was reversed. At the time the three persons were killed on the Camp Lejeune reservation a fifteen-year-old person who was convicted of first degree murder could be committed to a relatively short period of confinement or treatment. In 1984 the federal Juvenile Delinquency Act was amended to provide that a fifteen year old charged with murder could be tried as an adult and sentenced to life imprisonment or possibly death. The Fourth Circuit Court of Appeals held that it would violate the ex post facto clause of article I, section 9 of the United States Constitution to try the defendant under an act which was not in effect at the time the alleged crimes were committed and which would enhance the sentence which the defendant could receive. *United States v. Juvenile Male*, 819 F.2d 468 (4th Cir. 1987).

The United States Attorney then sought and was granted leave to dismiss the information. A federal grand jury then indicted the defendant on three counts of first degree murder. The district court denied a motion to dismiss the indictment and this order was reversed on appeal. The United States Court of Appeals for the Fourth Circuit held that once the government proceeded against a person under the Juvenile Delinquency Act it could not proceed against him under another act. *United States v. Smith*, 851 F.2d 706 (4th Cir. 1988). The indictment against the defendant was dismissed.

On 13 December 1988, the Onslow County grand jury indicted the defendant for the murders of the three persons whose bodies had been found on 24 August 1981. The superior court denied a motion to dismiss the indictments and we granted the defendant's petition for certiorari.

Lacy H. Thornburg, Attorney General, by Robert J. Blum, Associate Attorney General, and G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

Charles H. Henry, Jr. and Richard L. Cannon, III, for defendant appellant.

WEBB, Justice.

This case brings to the Court the question of whether the Superior Court, Onslow County has jurisdiction to try a person as an adult for crimes he allegedly committed as a juvenile on the Camp Lejeune military reservation. There are constitutional and statutory provisions that affect this question. Article I, § 8 of the Constitution of the United States provides in part:

> The congress shall have power. . . .
>
> . . . .
>
> [17.] To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the

same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings[.]

N.C.G.S. § 104-7 provides in part:

> The consent of the State is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in the State required for the sites for customhouses, courthouses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the government.
>
> Exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands. The jurisdiction ceded shall not vest until the United States shall have acquired title to said lands by purchase, condemnation, or otherwise.

40 U.S.C. § 255 provides in part:

> Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

In interpreting article I, § 8 of the Constitution of the United States and the statutory provisions, it has been held that if several steps are taken the federal government acquires jurisdiction over lands it owns. The government must acquire the land by condemnation or otherwise. If the state in which the land is situated cedes jurisdiction to the federal government, and if the government accepts jurisdiction, the state no longer has jurisdiction over this territory. *Paul v. United States*, 371 U.S. 245, 9 L.Ed.2d 292 (1963). Whether the United States has acquired jurisdiction is a federal question. *Silas Mason Co. v. Tax Com.*, 302 U.S. 186, 82 L.Ed. 187 (1937).

In this case all parties agree that the murders allegedly occurred on the Camp Lejeune military reservation and that the State has ceded and the federal government has accepted jurisdiction over this territory. The State contends the government's jurisdiction is not exclusive and the State has jurisdiction to try the defendant.

In criminal cases dealing with this problem the federal courts have said the jurisdiction of the United States is exclusive. In *United States v. Unzeuta*, 281 U.S. 138, 74 L.Ed. 761 (1930), the defendant assigned error for being tried in federal court for a murder committed on the Fort Robinson military reservation in Nebraska. In overruling this assignment of error the United States Supreme Court said, "[w]hen the United States acquires title to lands, which are purchased by the consent of the legislature of the state within which they are situated 'for the Erection of Forts, Magazines, Arsenals, Dock-yards and other needful Buildings' (Const. art. I, § 8) the Federal jurisdiction is exclusive of all state authority." *Id.* at 285, 74 L.Ed. at 773. In *Bowen v. Johnston*, 306 U.S. 19, 83 L.Ed. 455 (1939), the defendant was convicted of a murder committed in the Chickamauga and Chattanooga National Park. The United States Supreme Court said the federal district court had exclusive jurisdiction to try the defendant for crimes committed in this territory. *See also Benson v. United States*, 146 U.S. 325, 36 L.Ed. 991 (1892).

In *United States v. Daye*, 696 F.2d 1305 (11th Cir. 1983), the Court of Appeals for the Eleventh Circuit, in overruling the defendant's assignment of error to his being tried in federal court, said, "because the Everglades National Park remains in the exclusive jurisdiction of the federal government, Florida has not and cannot

extend its jurisdiction to cover Indian lands located within the Park." In *State v. DeBerry*, 224 N.C. 834, 32 S.E.2d 617 (1945), this Court, relying on federal cases, held it was error not to abate a criminal action for assault on a female which occurred on the premises of a post office. We said that at the time the United States acquired the land for the post office, "the Legislature had given its unqualified consent to the acquisition of lands within the State by the United States for the purpose of erecting thereon any post office, courthouse, etc., and the Federal jurisdiction therefore became exclusive." *Id.* at 837, 32 S.E.2d at 619. It appears from these cases that the Superior Court, Onslow County does not have jurisdiction to try the defendant.

The State argues that the federal government has not exercised exclusive jurisdiction over juvenile delinquency offenses which occur on the Camp Lejeune military reservation. It bases this argument on *Paul v. United States*, 371 U.S. 245, 9 L.Ed.2d 292; *Howard v. Commissioners of Sinking Fund of City of Louisville et al.*, 344 U.S. 624, 97 L.Ed. 617 (1953); *Stewart v. Sadrakula*, 309 U.S. 94, 84 L.Ed. 596 (1940); and *Chicago R.I. & P. Ry. Co. v. McGlinn*, 114 U.S. 542, 29 L.Ed. 270 (1885). These decisions have developed the doctrine that in civil cases the state laws in existence on federal enclaves at the time of the cession of the territory continue in effect until abrogated by the federal authority. This assures that no area, however small, will be left without a developed legal system for private rights. The State argues that the areas of interest to both sovereigns may co-exist within the enclave so long as there is no interference with the federal function.

The State argues that the federal government has not abrogated State jurisdiction over juvenile offenders on the Camp Lejeune military reservation and the State has concurrent jurisdiction. It relies on 18 U.S.C. § 5032 which says in part:

> A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume

> jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs of juveniles. . . .
>
> If the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such State.

The State contends that this statute and other legislative action show it was and is the position of Congress that states are better able to deal with the juvenile delinquency problems than federal authorities. The State concedes that it normally would not have jurisdiction over criminal matters but says in this case that a juvenile delinquency hearing is a civil matter. Once the state court obtained jurisdiction it did not lose it when the defendant became an adult. The State contends it has concurrent jurisdiction because the federal government has never accepted jurisdiction over juvenile matters on the Camp Lejeune reservation. It argues that 40 U.S.C. § 255 allows the federal government only the jurisdiction it requires.

The difficulty for the State in relying on 18 U.S.C. § 5032 to argue that the federal government recognizes that states are better able to deal with juvenile delinquency problems than the federal government is that the United States Attorney certified to the United States District Court pursuant to 18 U.S.C. § 5032 that the courts of North Carolina did not have jurisdiction over the defendant with respect to the acts committed on the Camp Lejeune military reservation. In *United States v. Vancier*, 515 F.2d 1378 (2nd Cir.), *cert. denied*, 423 U.S. 857 (1975), a juvenile was charged in the United States District Court for the Southern District of New York with an act of juvenile delinquency. He was also charged with a criminal act in a court in the State of New York. The United States Attorney certified to the federal district court that a juvenile or other appropriate court did not have jurisdiction over the defendant with respect to the alleged acts of juvenile delinquency. The state court dismissed the charges and the defendant was held in federal court to be a juvenile delinquent. On appeal he contended he should not have been tried in federal court because the state court had jurisdiction. The Second Circuit Court of Appeals held that the United States Attorney's certification, in the absence of a showing of bad faith, had to be accepted by the Court as final. It held the federal district court had exclusive jurisdiction. Because we are dealing with a federal question we must look to

the federal courts for guidance. If we must accept the United States Attorney's certification as final that the courts of this state do not have jurisdiction, then 18 U.S.C. § 5032 is not helpful to the State.

As to the State's argument that the federal government never accepted jurisdiction of juvenile delinquency matters on the Camp Lejeune reservation, the acceptance of Acting Secretary of the Navy Forrestal said that jurisdiction was "accepted on behalf of the United States in the manner and form provided by an act of 1907, Ch. 25, N.C. Code 1927, Sec. 8059" (N.C.G.S. § 104-7). N.C.G.S. § 104-7 says, "[e]xclusive jurisdiction . . . shall be and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State." It appears that the State ceded all jurisdiction that it could except for the service of process and this is what the United States accepted.

The State says that Acting Secretary Forrestal could not have accepted jurisdiction of persons charged with acts of juvenile delinquency because he did not know "the many complexities of jurisdictional law that would arise in the future." Whatever the Acting Secretary could foresee, we believe he accepted exclusive jurisdiction as completely as he could. The state and federal governments had laws in effect governing matters of juvenile delinquency at the time jurisdiction was ceded. There is nothing in either of the two opinions of the Court of Appeals for the Fourth Circuit dealing with this defendant that would indicate the district court did not have jurisdiction to conduct an adjudication of delinquency for this defendant.

As to the State's contention that a juvenile delinquency hearing is a civil matter in both federal and state courts and for that reason the state and federal governments have concurrent jurisdiction, it is true that in *Kent v. United States*, 383 U.S. 541, 16 L.Ed.2d 84 (1966), the United States Supreme Court said juvenile delinquency proceedings are designated civil and not criminal. Subchapter XI of Chapter 7A of the General Statutes, which contains the North Carolina Juvenile Code, does not classify a juvenile hearing as civil or criminal. We cannot find a case in this state which says a juvenile proceeding is a civil case. In regard to juvenile proceedings this Court has held that "[w]hatever may be their proper classification, they certainly are not 'criminal prosecutions' " which require a jury trial or a trial at which the public must

be admitted. *In re Burrus*, 275 N.C. 517, 529, 169 S.E.2d 879, 886 (1969). There are certain constitutional rights which a juvenile has at such a hearing which are not required in civil trials, such as the right to counsel if there is a possibility of commitment and the privilege against self-incrimination. This would suggest a juvenile hearing is not a civil case. We do not believe we have to decide whether a juvenile hearing is civil or criminal. In this case the proceedings against the defendant in the Superior Court, Onslow County are criminal proceedings. His case was transferred to superior court for trial on three charges of murder.

Bound as we are by the federal court's interpretation of this federal question, we must hold that the Superior Court, Onslow County does not have jurisdiction to try the defendant. If we were to hold otherwise we would have to overrule *State v. DeBerry*, 224 N.C. 834, 32 S.E.2d 617. As Chief Justice Stacy said in *DeBerry*, "[t]his may lead to an undesirable result. Nevertheless, we can only declare the law as we find it." *Id.* at 837, 32 S.E.2d at 619.

We reverse the order of the superior court and remand for the dismissal of the three charges against the defendant.

Reversed and remanded.

Justice MARTIN concurring.

I concur in the result reached by the majority but for different reasons.

A review of the history of this appeal is helpful to an understanding of the issues involved.

1. On 24 August 1981 Connie Smith, Tyler Todd, and Sharon Sager were found murdered in a residence located at 6080-A Kentucky Court in the Watkins Village housing area of the Camp Lejeune Marine Corps base. The victims were the defendant's aunt, his twelve year old sister, and his cousin.

2. On 24 August 1981 this defendant was fifteen years of age and resided with his mother and two sisters on the Marine Corps base at Camp Lejeune.

3. The defendant was immediately a suspect in the case. However, federal authorities evidently concluded that they did

not have sufficient evidence to proceed, and by 1983 they had lost track of this defendant altogether.

4. Sometime after the murders, defendant Smith moved with the remainder of his family to Oregon.

5. In 1986 defendant wanted to join the Oregon National Guard. That organization contacted Camp Lejeune for copies of defendant's medical records. Upon receipt of the records which included psychiatric reports, defendant was turned down for the National Guard. Defendant's mother contacted Camp Lejeune and asked that the investigation concerning defendant be closed so that he could "get on with his life." Agents from the Naval Investigative Service contacted defendant and conducted a number of interviews with him. At one of those interviews, defendant made incriminating statements concerning the murders and was arrested on 30 June 1986.

6. On 7 July 1986 Samuel T. Currin, United States Attorney, through his assistant, M.F. Bogdanos, filed a certificate with the Federal Court for the Eastern District of North Carolina certifying "no Juvenile Court or other appropriate court of any state including the General Court of Justice of the State of North Carolina has jurisdiction over said juvenile with respect to the acts of juvenile delinquency alleged in this case, such acts having occurred on Marine Corps base at Camp Lejeune, North Carolina, a military reservation acquired for the use of the United States and under exclusive jurisdiction thereof."

7. On 8 July 1986 the federal government filed a "juvenile information" charging defendant with these three murders, and a magistrate found probable cause to believe that "the juvenile committed the offenses alleged."

8. On 22 July 1986 the U.S. District Judge entered an order upon motion of the government transferring this case to the District Court for trial of the defendant as an adult. This order was appealed to the United States Court of Appeals, Fourth Circuit.

9. On 26 May 1987 the United States Court of Appeals, Fourth Circuit, entered a decision reversing the order of the trial court transferring this defendant's case for trial as an adult. The court held that at the time of the commission of these alleged crimes (24 August 1981) there was no provision in

the Federal Juvenile Delinquency Act which would permit the transfer of a juvenile's case to the District Court for trial as an adult. Although the statute in effect in 1981 was amended in 1984 to allow such transfer, the amendment could not be applied to this defendant for these alleged crimes as that would constitute a violation of the *ex post facto* clause of the United States Constitution. *United States v. Juvenile Male*, 819 F.2d 468 (4th Cir. 1987).

10. On 6 July 1987 the United States District Judge entered an order granting leave to the government to dismiss the juvenile information, and this dismissal was taken by the government.

11. On 7 July 1987 the United States government procured a true bill of indictment from the grand jury charging this defendant with three counts of murder in the first degree involving these alleged killings and a fourth count of escape.

12. On 8 July 1987 the defendant made a motion to dismiss the bills of indictment which was denied by the Federal Court on 3 December 1987. Notice of Appeal was taken to the United States Court of Appeals, Fourth Circuit.

13. The Court of Appeals on 12 July 1988 reversed the District Court Judge ordering that the three murder charges should have been dismissed.

14. On 14 December 1988 the United States District Judge entered an order pursuant to the Fourth Circuit opinion dismissing the three murder charges against this defendant. The theory of the Fourth Circuit decision was that the initiation of the juvenile proceedings against this defendant, which the government had previously dismissed, prevented the government from later prosecuting him as an adult by way of a bill of indictment.

15. Thereafter, on 12 January 1989 the government dismissed the escape charge with the consent of the Federal Court.

16. On 13 December 1988 the Onslow County grand jury returned indictments charging defendant with the 24 August 1981 murders of his aunt, cousin, and sister.

17. Defendant entered pleas of not guilty at his arraignment on 25 January 1989.

18. On 13 February 1989 defendant filed two motions to dismiss for lack of jurisdiction.

19. On 23 February 1989 Judge Strickland denied these motions. Whereupon the case was appealed to this Court.

At the outset, the validity of *State v. DeBerry*, 224 N.C. 834, 32 S.E.2d 617 (1945), is not necessary to a resolution of this appeal. This Court in *DeBerry* only held that N.C.G.S. §§ 104-1 and 104-7 did not apply to property acquired by the United States in 1899, years before the statutes were adopted. The case at bar is not concerned with the retroactivity of the statutes. The "unqualified consent" by the state to the federal acquisition of the post office property in *DeBerry* was based upon legislation adopted in 1887, not N.C.G.S. § 104-7. *DeBerry* is not relevant to the issue before the Court at this time.

The legal issue involved in this case is not the guilt or innocence of the defendant of the murders in question. The defendant has made a judicial stipulation that on 24 August 1981 the three victims were found *murdered* in a residence on the Marine Corps base at Camp Lejeune. The only question remaining as to guilt or innocence is whether this defendant was the perpetrator of the three murders, or any one or more of them. Defendant has made incriminating statements to Naval Investigative Service agents from which a jury could conclude that defendant was the person who perpetrated the crimes.

The issue before this Court is whether the Superior Court of Onslow County had jurisdiction to try this defendant upon the bills of indictment returned against him for the murders. The resolution of this issue depends upon this Court's interpretation of the United States Constitution, state and federal statutes, and the acts of the state and federal governments with respect to the acquisition of the land by the United States government upon which Camp Lejeune is now situated and within which the murders in this case occurred.

At the time of the murders in question there was no provision in the Federal Juvenile Delinquency Act for the trial of a juvenile as an adult when charged with such serious offenses as murder. The most that the federal government could do under the Federal Juvenile Delinquency Act at that time was to have a juvenile delinquency adjudication proceeding.

The United States government in 1981, at the time of these crimes, had no provision to try as an adult a juvenile who had committed three murders. Under the law of North Carolina in 1981, the defendant could be tried as an adult for the offense of murder. Where there is a gap in jurisdiction of the United States, upon the ceding of territorial jurisdiction by the state to the United States, the state retains its underlying territorial jurisdiction over the area in question insofar as the exercise of such jurisdiction by the state does not interfere with the activities of the federal government in carrying out its duties upon the federal enclave. However, the Federal Assimilative Crimes Act cures this gap in the federal jurisdiction. This act reads:

> Laws of States adopted for areas within Federal jurisdiction
>
> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title [18 USC § 7], is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 13 (1948).

The provisions of this Act have been in effect since 1825. The purpose of this statute is to provide for punishment in the federal courts, as an offense against the United States, of offenses committed within federal enclaves, but only in the way and to the extent that the offense in question would have been punishable if committed within the jurisdiction of the state. *United States v. Press Publishing Co.*, 219 U.S. 1, 55 L. Ed. 65 (1910). It provides criminal laws for federal enclaves by use of the state law to fill gaps in federal criminal law. *United States v. Brown*, 608 F.2d 551 (5th Cir. 1979). Where Congress has failed to pass specific criminal legislation, the Act is used to fill the gaps in criminal law in federal enclaves. *United States v. Fulkerson*, 631 F. Supp. 319 (D. Haw. 1986).

In 1981, the federal law failed to provide for the trial of a juvenile for the crime of murder committed within a federal enclave. The juvenile could only be proceeded against under the Federal

Juvenile Delinquency Act. Such proceedings are civil rather than criminal. *Kent v. United States*, 383 U.S. 541, 16 L. Ed. 2d 84 (1966). The juvenile court basically is determining the needs of the child and society rather than adjudicating criminal conduct or fixing criminal responsibility, guilt, or punishment. *Id.* Thus, in 1981, the federal laws failed to provide for the trial of this defendant, a juvenile, on criminal charges of murder.

To the contrary, North Carolina in 1981 did provide for the trial of a juvenile for the crime of murder. The statute, passed in 1979, reads:

> The court after notice, hearing, and a finding of probable cause may transfer jurisdiction over a juvenile 14 years of age or older to superior court if the juvenile was 14 years of age or older at the time he allegedly committed an offense which would be a felony if committed by an adult. If the alleged felony constitutes a capital offense and the judge finds probable cause, the judge shall transfer the case to the superior court for trial as in the case of adults.

N.C.G.S. § 7A-608 (1989).

Therefore, by applying the Federal Assimilative Crimes Act, thereby incorporating N.C.G.S. § 7A-608 as a part of the federal criminal law, the United States had jurisdiction to try this defendant for the capital charges of murder. Because the federal government thereby had jurisdiction to try this defendant on the murder charges, the state lacked jurisdiction to do so.

Inexplicably, counsel and the court failed to recognize and apply the Federal Assimilative Crimes Act in deciding and reviewing the issue of whether this defendant could be tried as an adult in the federal court for these three murders. *See United States v. Juvenile Male*, 819 F.2d 468 (4th Cir. 1987). Had the federal court done so, these murder cases could have been adjudicated in 1987. Nevertheless, the actions of the federal court cannot serve to expand the jurisdiction of the courts of this state.

For these reasons, I concur in the result.

STATE OF NORTH CAROLINA v. JOHNNY MICHAEL SMALL

No. 265A89

(Filed 7 February 1991)

1. **Robbery § 4.3 (NCI3d); Homicide § 21.6 (NCI3d)— armed robbery—felony murder—evidence sufficient**

There was substantial evidence of armed robbery and felony murder where the State's evidence established that defendant was at Delgado Square, the location of the pet store which was robbed, sometime between 5:40 p.m. and 6:00 p.m. on the date the offenses were committed; defendant left an accomplice waiting in a car for five minutes and returned wearing a different shirt from the one worn when he entered the store; a witness saw defendant leaving the pet store; defendant gave the accomplice $10.00 a few minutes later, told him that he had gotten the money from the pet store, stated that he had to "shoot her," and threatened to shoot the accomplice if he told anyone; the cash register's read-out slip permits an inference that the register drawer contained money moments before the victim was killed; the victim's brother testified that she normally kept at least $80.00 in the register drawer; the drawer contained only coins when the body was discovered; the accomplice testified that defendant possessed a .25 caliber weapon immediately after the incident; and the weapon used in the murder was a .25 caliber.

Am Jur 2d, Homicide § 435; Robbery § 64.

2. **Homicide § 21.5 (NCI3d)— premeditation and deliberation—evidence sufficient**

There was sufficient evidence of first degree murder based on premeditation and deliberation where the State's evidence tended to show that the victim, who operated a pet store, was shot while lying face down on the floor; the killer placed the gun directly against the victim's skull before pulling the trigger; there was no evidence of provocation by the victim; the store was orderly; the victim was a former bank employee who had been trained to submit without resistance to an armed robber's demands; and the victim was helpless while lying face down on the floor with her hands above her head.

Am Jur 2d, Homicide § 439.

3. Criminal Law § 464 (NCI4th)— closing argument—prosecutor's misstatement of evidence—not prejudicial

There was no prejudice in a prosecution for first degree murder and armed robbery from the erroneous overruling of defendant's objection to an incorrect statement in the prosecutor's closing argument where the prosecutor immediately apologized and clarified the misstatement.

Am Jur 2d, Trial §§ 280, 296-299.

4. Criminal Law § 451 (NCI4th)— prosecutor's closing argument—comment on defendant's age and prospects for prison release—no error

There was no prejudicial error in a noncapital prosecution for first degree murder and armed robbery from the prosecutor's closing argument that defendant was young and wouldn't stay in prison forever no matter what the jury did. The trial court immediately cured the impropriety by instructing the jury to disregard that portion of the prosecutor's argument.

Am Jur 2d, Trial §§ 280, 296-299.

5. Criminal Law § 445 (NCI4th)— prosecutor's closing argument—personal opinion—fear of defendant

There was insufficient prejudice to require a new trial for first degree murder and armed robbery where the prosecutor argued to the jury that this was one of the most heinous murders with which he had had contact and that defendant frightened him where the evidence supported the characterization of the murder as heinous and the statement that defendant frightened the prosecutor was not, standing alone, so prejudicial as to make a fair trial impossible. The trial court removed any possible prejudice by admonishing the jurors to disregard any personal opinions any attorney may have expressed during closing argument.

Am Jur 2d, Trial §§ 280, 296-299.

6. Criminal Law § 460 (NCI4th)— prosecutor's closing argument—inference of consciousness of guilt—no error

There was no merit in a prosecution for murder and armed robbery to defendant's contention that the prosecutor in closing arguments unreasonably inferred consciousness of guilt from the fact that defendant was found in the woods approx-

imately fifty feet from the fairground ride at which an accomplice was arrested.

Am Jur 2d, Trial § 261.

7. **Infants § 17 (NCI3d)— murder and armed robbery—tried as adult—inculpatory statement—failure to make required findings**

There was no prejudicial error in a prosecution of a juvenile as an adult for first degree murder and armed robbery from the failure to make the findings required by N.C.G.S. § 7A-595(d) to establish that defendant knowingly, willingly and understandingly waived his rights when making his post-arrest statement. The statement gave somewhat differing versions of defendant's whereabouts and activities, was not inculpatory, and, in light of the State's compelling evidence incriminating defendant, there was no reasonable possibility that a different result would have been reached at trial whether defendant's statement was admitted or excluded.

Am Jur 2d, Evidence §§ 611-614.

8. **Criminal Law § 76 (NCI4th)— murder and armed robbery—pretrial publicity—change of venue denied—no error**

There was no prejudicial error in a prosecution for murder and armed robbery in the denial of defendant's motion for a change of venue due to pretrial publicity, even though the trial court misstated the applicable standard in making its ruling, where defendant failed to carry his burden of showing that he exhausted his peremptory challenges or that jurors sat who were objectionable or who had prior knowledge of the case.

Am Jur 2d, Criminal Law §§ 374, 378.

Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.

9. **Criminal Law § 1148 (NCI4th)— armed robbery—contemporaneous murder—aggravating factor—especially heinous, atrocious or cruel**

The trial judge erred when sentencing defendant for armed robbery by finding in aggravation that the offense was especially heinous, atrocious or cruel where the State presented no evidence, apart from the murder for which defendant was contemporaneously convicted, to show that defendant's actions

in the robbery were more excessively brutal than those of other armed robbers or that the victim endured more psychological or physical pain or dehumanizing aspects than other armed robbery victims. N.C.G.S. § 15A-1340.4(a)(1)f.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the sentence of life imprisonment upon a jury verdict finding defendant guilty of murder in the first degree, entered by *Grant, Sr., J.*, at the 3 April 1989 Criminal Session of Superior Court, NEW HANOVER County. On 5 January 1990 we allowed defendant's motion to bypass the Court of Appeals as to a judgment of imprisonment for twenty years entered upon his conviction of robbery with a dangerous weapon. Heard in the Supreme Court 14 November 1990.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Justice.

Pursuant to a juvenile order entered 8 November 1988, defendant's case was transferred to Superior Court, New Hanover County, where he was tried as an adult on true bills of indictment charging him with murder in the first degree and armed robbery. Defendant pled not guilty, and the murder case was tried noncapitally because he was under the age of sixteen at the time of the crimes. *See Thompson v. Oklahoma*, 487 U.S. 815, 101 L. Ed. 2d 702 (1988). The jury found him guilty of first degree murder by premeditation and deliberation and under the felony murder rule, and of robbery with a firearm. We find no prejudicial error in the guilt phase of defendant's trial, but we remand for a new sentencing hearing on the armed robbery charge.

On 13 July 1988, at approximately 6:00 p.m., Joe Bryant found Pamela Dreher's body lying face down on the floor of the tropical fish store she operated at Delgado Square in Wilmington. Dreher had been shot in the head. The cash register drawer was open, and the money clips were up; there were no bills in the register. The time each cash register receipt was generated appeared on

the receipt. Dreher's last customer receipt showed 5:29 p.m. as the time the register printed it. Dreher's brother testified that the register's timing mechanism was a few minutes slow. Evidence introduced at trial included this and three other sales slips, one showing the day's receipts of $93.83 at 5:39 p.m. and two "no sales" slips at 5:46 p.m. and 5:49 p.m.

The investigating officers found only one fingerprint in the store, and it did not match defendant's. Joe Bryant, who operated the store next door, testified that he did not hear a shot that afternoon. He testified that he noticed some unusual lights in Dreher's store, and that when he looked in he saw her lying in a pool of blood.

On 29 October 1988, the police arrested David Wayne Bollinger while he and defendant were working together at the New Hanover County Fair. After the police interrogated Bollinger, they returned to arrest defendant. They found defendant in the woods approximately fifty feet from where he and Bollinger had been standing approximately an hour earlier.

The State's evidence tended to show that when witness Nina Raeford walked past the victim's store on her way home from work between 5:40 p.m. and 6:00 p.m. on 13 July, she saw defendant leave the store and get in a brown car driven by Bollinger. Bollinger, who was charged with being an accessory after the fact, testified that he and defendant were driving around on the afternoon of the murder. At defendant's request, he stopped at Delgado Square. As the car turned into the parking area, defendant turned the car radio to its maximum volume. Defendant told Bollinger he needed to make a phone call. Bollinger parked facing the street and sat in the car listening to the radio. When defendant returned a few minutes later, he was wearing a different shirt, and he told Bollinger to drive to defendant's mother's house. There, defendant gave Bollinger $10.00, telling him he got the money from the pet store. Bollinger asked if defendant had robbed the store, and defendant replied, "sort of." Defendant then pulled out a gun, stated that he "had to shoot [the pet store operator]," and threatened to shoot Bollinger if Bollinger told anyone about the incident.

The State's evidence also included testimony of Raymond Eugene Brigman, Jr., to the effect that his .25 caliber automatic pistol disappeared from the glove compartment of Bollinger's car in May 1988 after defendant borrowed the automobile. Dreher was shot with a .25 caliber weapon, but the weapon was never recovered.

Dr. Charles Garrett, a pathologist, testified that Dreher's wound was a "hard contact" wound and whoever inflicted it would have been "spattered" with blood.

Defendant's evidence tended to show that Nina Raeford did not "punch out" at her job at McDonald's until 5:55 p.m. on the day of the murder and that the restaurant is a forty-five minute walk from Delgado Square. Raeford did not contact law enforcement authorities until August, after Crimestoppers had offered a $5,000 reward for information leading to an indictment in the case. Also, Woodrow Ward, Bollinger's employer, testified that he and Bollinger left Wilmington between 5:30 and 6:00 (a.m. or p.m. not specified) on 13 July to attend an auto auction in Conway, South Carolina. Defendant's evidence also tended to show that Bollinger had a .25 caliber automatic weapon in the glove compartment of his car "at one time."

Defendant first assigns as error the trial court's denial of his motion to dismiss at the close of all the evidence. He contends that his conviction for first degree murder must be vacated because there is insufficient evidence both that: (1) he was the perpetrator, and (2) the killing was premeditated and deliberated. Defendant also contends that his conviction for armed robbery must be vacated because there is insufficient evidence both that he (1) was the perpetrator, and (2) took and carried away property.

"On a motion to dismiss on the ground of insufficiency of the evidence, the question for the court is whether there is substantial evidence of each element of the crime charged and of the defendant's perpetration of such crime." *State v. Bates*, 309 N.C. 528, 533, 308 S.E.2d 258, 262 (1983).

> [T]he trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it. . . . If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Locklear, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988) (citations omitted). Further, "[t]he defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). The determina-

tion of the witnesses' credibility is for the jury. *See Locklear*, 322 N.C. at 358, 368 S.E.2d at 383. "[C]ontradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982).

Armed robbery under N.C.G.S. § 14-87 consists of the following elements:

> (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened. 'Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense.'

State v. Beaty, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982) (in part quoting *State v. Mull*, 224 N.C. 574, 576, 315 S.E.2d 764, 765 (1944)); *see also State v. Williams*, 319 N.C. 73, 79, 352 S.E.2d 428, 433 (1987).

By statute in North Carolina, first degree murder includes "[a] murder . . . perpetrated by . . . willful, deliberate, and premeditated killing, or . . . committed in the perpetration or attempted perpetration of any . . . robbery . . . or other felony committed or attempted with the use of a deadly weapon. . . ." N.C.G.S. § 14-17 (1986). In defining premeditation and deliberation, this Court has stated:

> Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. . . . Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. . . .
>
> Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. . . . Instead, they usually must be proved by circumstantial evidence. Among other circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defend-

ant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Brown, 315 N.C. 40, 58-59, 337 S.E.2d 808, 822-23 (1985) (citations omitted), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

[1] Defendant contends that because Raeford's and Bollinger's testimony is all that places him in the pet store at or about the time of the offenses, and because that evidence is contradicted by the respective witnesses' employers, the evidence is insufficient to support the conviction. Raeford's and Bollinger's testimony, if believed, however, establishes that (1) defendant was at Delgado Square sometime between 5:40 p.m. and 6:00 p.m. on the date the offenses were committed, (2) defendant left Bollinger waiting in the car for five minutes, (3) defendant returned to Bollinger's car wearing a different shirt from the one worn when he entered the store, (4) Raeford saw defendant leaving the pet store, and (5) a few minutes later defendant gave Bollinger $10.00, told him he had gotten the money from the pet store, stated that he had to "shoot her," and threatened to shoot Bollinger if he told anyone about the incident. The cash register's "read-out" slip showing the day's sales of over $93.00 permits an inference that the register drawer contained money moments before Dreher was killed. Further, Dreher's brother testified that his sister normally kept at least $80.00 in the register drawer. The drawer contained only coins when Dreher's body was discovered. The evidence that money had been in the drawer, that the money clips were up and there were no paper bills, and that defendant gave Bollinger $10.00, stating that he "got it from the pet store," permits a finding that defendant took and carried away property belonging to the victim. Bollinger testified that defendant possessed a .25 caliber weapon immediately after the incident, and the weapon used in the murder was .25 caliber. This evidence, viewed in the light most favorable to the State, *Locklear*, 322 N.C. at 358, 368 S.E.2d at 382-83, permits a finding that defendant used a firearm in the robbery.

The foregoing evidence, viewed—as required—in the light most favorable to the State, constituted substantial evidence that defendant committed the offense of armed robbery. It also sufficed to support defendant's first degree murder conviction under the felony murder rule. *See* N.C.G.S. § 14-17 (1986).

[2] Further, there is sufficient evidence of murder in the first degree on the basis of premeditation and deliberation. The State's evidence tended to show that Dreher was shot while she was lying face down on the floor. The wound was a "hard contact" wound; the killer placed the gun directly against the victim's skull before pulling the trigger. There was no evidence of provocation by the victim. The store was orderly, and the victim was a former bank employee who had been trained to submit without resistance to an armed robber's demands. Lying face down on the floor with her hands above her head, the victim was helpless. The evidence presented, viewed in the light most favorable to the State, *Locklear*, 322 N.C. at 358, 368 S.E.2d at 382-83, supports the inference that the victim did not provoke defendant and that defendant killed the victim after she "ha[d] been felled and rendered helpless." *See Brown*, 315 N.C. at 59, 337 S.E.2d at 823. Defendant's first assignment of error is thus overruled.

Defendant next assigns as error the admission of portions of the prosecutor's closing arguments to the jury. He contends that the argument contains four errors, any one of which entitles him to a new trial: (1) the prosecutor's incorrect argument that Bollinger had confessed to armed robbery and murder, (2) the prosecutor's statements about how long defendant would be in prison, which constituted an impermissible comment on parole, (3) the prosecutor's argument injecting his personal opinion into the case, and (4) the prosecutor's reference to defendant's "flight" just prior to arrest, which was not supported by the evidence.

The relevant portions of the closing argument are:

> [Prosecutor]: "Do you believe that David Bollinger has in effect confessed to participating in an armed robbery and a first degree murder while in the company of [defendant] just for the heck of it? . . . . Would you confess to a first degree murder and an armed robbery if you had an airtight alibi and you weren't involved? Of course not.

[Defense counsel]: Objection, Your Honor. It's not confessed to first degree murder or armed robbery. He's entered a plea of not guilty.

The Court: Overruled.

[Prosecutor]: I apologize. Would you give a statement that in effect would amount to a confession to participating in an armed robbery and a first degree murder? Not just a first degree murder, but a first degree murder of one of the most heinous kind I have ever come in contact with."

. . . .

[Prosecutor]: "[The police] went back and where did they find Johnny Small? They found him in the woods crouched down behind some shrub bushes. An innocent person? Would an innocent person do that? Use your common sense. Use your intelligence and your common sense. Is that the reaction of an honest, innocent person?"

. . . .

[Prosecutor]: "What I have heard about 15-, 16-, 17- and 18- and 19-year-olds and what they participated in, in this particular matter saddens me. The thing that really frightens me is Johnny Small, because as I told you in the beginning, this is a first degree murder case and an armed robbery case, but it's not a capital case, because of his age, no matter what you do, Johnny Small won't stay in prison forever.

Defendant objected to the prosecutor's characterization of Bollinger's actual "not guilty" plea as a "confession" and to the prosecutor's reference to the possible duration of defendant's sentence if he was convicted. The trial court overruled the first objection. In response to the second objection, it instructed the jury to disregard the portion of the argument relating to defendant's not staying in prison because of his age. Defendant did not object to the prosecutor's innuendo that defendant fled because he was guilty or to the prosecutor's expression of his opinion that the murder was among the most heinous with which he had had contact.

"Prosecutors are granted wide latitude in the scope of their argument." *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). "An attorney

may, . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230(a) (1988). "A prosecutor's argument is not improper when it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *State v. Zuniga*, 320 N.C. at 253, 357 S.E.2d at 911. "Where, immediately upon a defendant's objection to an improper remark made by the prosecutor in his closing argument, the trial court instructs the jury to disregard the offending statement, the impropriety is cured." *State v. Woods*, 307 N.C. 213, 222, 297 S.E.2d 574, 579 (1982).

Further,

> [t]he conduct of the arguments of counsel is left to the sound discretion of the trial judge. In order for defendant to be granted a new trial, the error must be sufficiently grave that it is prejudicial. Ordinarily, an objection to the arguments by counsel must be made before verdict, since only when the impropriety is gross is the trial court required to correct the abuse *ex mero motu*.

State v. Britt, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977). Unless the defendant objects, the trial court is not required to interfere *ex mero motu* unless the arguments " 'stray so far from the bounds of propriety as to impede the defendant's right to a fair trial.' " *State v. Harris*, 308 N.C. 159, 169, 301 S.E.2d 91, 98 (1983) (quoting *State v. Davis*, 305 N.C. 400, 421, 290 S.E.2d 574, 587 (1982)).

We first consider those portions of the argument to which defendant objected. The standard of review is whether defendant was prejudiced. *See State v. Britt*, 291 N.C. at 537, 231 S.E.2d at 651.

[3] The prosecutor stated incorrectly that Bollinger had "confessed" to participating in an armed robbery and a first degree murder, and defendant's objection was improperly overruled. However, this erroneous ruling was not prejudicial. The prosecutor immediately apologized and clarified the misstatement, and defendant has not shown that he was prejudiced.

[4] Defendant also objected to the prosecutor's statement that "because of his age, no matter what you do, Johnny Small won't stay in prison forever." Because the trial court immediately instructed the jury to disregard that portion of the prosecutor's argument, the impropriety was cured. *State v. Woods*, 307 N.C.

at 222, 297 S.E.2d at 579. The prosecutor's statements here were very similar to those in *Woods*. There, the prosecutor argued:

> I think you should also know that you should convict that woman of first degree murder and conspiracy and should she be sentenced to a sentence of life imprisonment, she won't spend the rest of her life in a _____ . . . . You know, when is the last time anybody went to the gas chamber in this state? Twenty years. People in this state don't believe you go to the gas chamber on murder and maybe you don't.

Woods, 307 N.C. at 222, 297 S.E.2d at 580. The Court held that the improprieties were cured because the trial court sustained defense counsel's objections and instructed the jury to disregard the statements. Here, just as in *Woods*, the trial court sustained the objection, and the instruction corrected any improprieties.

[5] Next, we consider the two statements to which defendant did not object at trial. The prosecutor stated that this murder was "a first degree murder of one of the most heinous kind I have ever come into contact with" and that defendant frightened him. These infusions of the prosecutor's personal opinion were improper, but they were not so grossly improper as to require a new trial. The evidence supported the characterization of the murder as heinous. The statement that defendant frightened the prosecutor was not, standing alone, so prejudicial as to make a fair trial impossible. *See State v. Harris*, 308 N.C. at 169, 301 S.E.2d at 98. Lastly, in instructing the jury, the trial court remedied any possible prejudice from these statements by admonishing the jurors to disregard any personal opinions any attorney may have expressed during closing argument.

[6] The prosecutor also referred to the fact that, when arrested, defendant was found in the woods fifty yards from the fairground ride by which he and Bollinger were standing when the police arrested Bollinger about ninety minutes earlier. Defendant contends the prosecutor's argument that this action demonstrated a consciousness of guilt is not a reasonable inference from the record. We disagree and find this assignment to be without merit. *See* N.C.G.S. § 15A-1230(a) (1988).

[7] Defendant next contends he is entitled to a new trial because the trial court admitted his post-arrest statement to police officers without first making findings of fact to establish that he knowingly,

willingly, and understandingly waived his rights, as required by N.C.G.S. § 7A-595(d) (1989). The statute provides in pertinent part that:

> (a) Any juvenile in custody must be advised prior to questioning:
>
> (1) That he has a right to remain silent; and
>
> (2) That any statement he does make can be and may be used against him; and
>
> (3) That he has a right to have a parent, guardian or custodian present during questioning; and
>
> (4) That he has a right to consult with an attorney and that one will be appointed for him if he is not represented and wants representation.
>
> . . . .
>
> (d) Before admitting any statement resulting from custodial interrogation into evidence, the judge must find that the juvenile knowingly, willingly, and understandingly waived his rights.

N.C.G.S. § 7A-595(a), (d) (1989).

It is true that the record does not contain the finding this statute requires. The purpose of the requirement, however, is to establish the basis for admitting the statement. The statement merely gave somewhat differing versions of defendant's whereabouts and activities on the day in question; it was not inculpatory. In light of the State's compelling evidence incriminating defendant, there is no "reasonable possibility that . . . a different result would have been reached at trial" whether defendant's statement was admitted or excluded. N.C.G.S. § 15A-1443(a) (1988). The failure to make the finding thus did not affect the outcome of defendant's trial, and defendant has failed to carry his burden of showing prejudice from the trial court's failure to make the finding. *Id.*

[8] Defendant also argues that the trial court improperly denied his motion for a change of venue due to prejudicial pre-trial publicity. News coverage of the crimes included twelve to fifteen stories on television stations over a six-month period, radio reports, and six newspaper articles. A local newspaper printed a photograph of defendant in handcuffs. Some of the articles mentioned defendant's suicide attempt after his arrest, his previous larceny conviction, and a pending unrelated larceny charge. Only two of the

six articles mentioned defendant's name. Except for the article regarding defendant's suicide attempt, the articles merely reported the facts of the case.

Whether to grant a motion for a change of venue is in the trial court's discretion, and the "decision will not be disturbed on appeal unless the defendant can show an abuse of discretion." *State v. Dobbins*, 306 N.C. 342, 344, 293 S.E.2d 162, 164 (1982). "The test . . . is whether, due to pretrial publicity, there is a reasonable likelihood that the defendant will not receive a fair trial." *State v. Jerrett*, 309 N.C. 239, 254, 307 S.E.2d 339, 347 (1983).

The burden of proving that pretrial publicity precludes a fair and impartial trial rests with defendant. *State v. Dobbins*, 306 N.C. at 344, 293 S.E.2d at 163.

> [W]hen a defendant alleges prejudice on the basis of pretrial publicity and does not show that he exhausted his p[er]emptory challenges, or that there were jurors who were objectional or had prior knowledge of the case, defendant has failed to carry his burden of establishing the prejudicial effect of the pretrial publicity.

Id. at 345, 293 S.E.2d at 164. Further, if the defendant shows only that publicity consists of factual, noninflammatory news stories, denial of a motion for change of venue is proper. *State v. Vereen*, 312 N.C. 499, 511-12, 324 S.E.2d 250, 259, *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526 (1985).

Here, defendant has not carried his burden of showing that he exhausted his peremptory challenges or that jurors sat who were objectionable or had prior knowledge of the case. *Cf. State v. Moore*, 319 N.C. 645, 356 S.E.2d 336 (1987). Although the trial court misstated the applicable standard in making its ruling, defendant here has failed to establish the prejudicial effect of the pretrial publicity. *State v. Dobbins*, 306 N.C. at 345, 293 S.E.2d at 164. This assignment of error is therefore overruled.

[9] Defendant finally contends the trial court erred in finding as an aggravating factor on the armed robbery charge that the robbery was especially heinous, atrocious, or cruel. We agree.

> The Fair Sentencing Act and our cases interpreting it establish several rules which determine what evidence a sentencing judge may properly consider in aggravating a crime

> covered by the Act. First, a conviction may not be aggravated by prior convictions of other crimes which could have been joined for trial or by a contemporaneous conviction of a crime actually joined [or by] acts which form the gravamen of these convictions. . . . Second, evidence used to prove an element of a crime may not also be used to prove a factor in aggravation of that *same* crime. . . . Third, 'the same item of evidence may not be used to prove more than one factor in aggravation.' . . . Fourth, acts which could have been, but were not, the basis for other joinable criminal convictions may be used to aggravate the conviction for which defendant is being sentenced. . . . Finally, *evidence* used in proving an element of one crime may also be used to support an aggravating factor of a separate, though joined, crime for which defendant is being sentenced.

State v. Hayes, 323 N.C. 306, 312, 372 S.E.2d 704, 707-08 (1988) (in part quoting N.C.G.S. § 15A-1340.4(a)(1)p (1983)) (citations omitted). "In the context of the Fair Sentencing Act, one of the primary purposes of sentencing is to impose a punishment commensurate with the injury caused by the crime." *State v. Cofield*, 324 N.C. 452, 463, 379 S.E.2d 834, 841 (1989). Aggravating factors must be "proved by a preponderance of the evidence." N.C.G.S. § 15A-1340.4(a) (1988). In determining whether a crime was especially heinous, atrocious, or cruel under the Fair Sentencing Act, "the focus should be on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983) (emphasis in original). This Court has emphasized that comparisons must be drawn between offenses of the same type. *See State v. Torres*, 322 N.C. 440, 446, 368 S.E.2d 609, 612 (1988). "The test . . . is whether the State proved by a preponderance of the evidence that the victim's mental and emotional injury in this case was in excess of the injury normally present in the offense." *State v. Cofield*, 324 N.C. at 464, 379 S.E.2d at 841.

Under *Hayes*, it is clear that evidence presented to support the conviction of first-degree murder by premeditation and deliberation could also support an aggravating factor in the armed robbery conviction. However, the premeditated and deliberate murder that occurred during the armed robbery may not be used as an aggravating factor in the armed robbery sentencing here because

the murder was a joined offense. *See State v. Hayes*, 323 N.C. at 312, 372 S.E.2d at 707-08; *see also State v. Westmoreland*, 314 N.C. 442, 449, 334 S.E.2d 223, 228 (1985) ("a conviction of an offense covered by the Fair Sentencing Act may not be aggravated by contemporaneous convictions of offenses joined with such offense"). Here, apart from the murder for which defendant was contemporaneously convicted, and which thus cannot be considered in aggravation of the armed robbery charge, there was no evidence of excessive brutality, physical pain, psychological suffering, or dehumanizing aspects not present in every armed robbery. While any armed robbery is frightening to the victim and repugnant to lawful society, the aggravating factor set forth in N.C.G.S. § 15A-1340.4(a)(1)(f) expressly applies only to *especially* heinous, atrocious, or cruel offenses. The State presented no evidence to show that defendant's actions in the robbery were more excessively brutal than those of other armed robbers or that the victim endured more psychological or physical pain or dehumanizing aspects than other armed robbery victims. *Cf. State v. Bush*, 78 N.C. App. 686, 694, 338 S.E.2d 590, 594-95 (1986) (victim suffered more psychologically than the average armed robbery victim where the perpetrator was her son).

Thus, the State has failed to meet its burden of proving by the preponderance of the evidence that the armed robbery was especially heinous, atrocious, or cruel. Accordingly, defendant must be resentenced on the armed robbery charge.

First degree murder: no error.

Robbery with a dangerous weapon: guilt phase, no error; remanded for resentencing.

STATE OF NORTH CAROLINA v. DOUGLAS EARL BLACK

No. 568A88

(Filed 7 February 1991)

1. **Jury § 6 (NCI3d)— jury selection—statement by one prospective juror—motion to dismiss all prospective jurors denied**

The trial court did not err in a prosecution arising from a murder, armed robbery, and assault by denying defendant's motion to dismiss all prospective jurors who had heard one juror say "my wife and my child were assaulted by a black man with a deadly weapon" when asked if he would hold the State to its burden of proof. The prospective juror's statement did not give rise to a substantial reason to fear that the jury had been prejudiced because the prospective juror made no reference to any particular black male or to defendant. The prospective jurors must have known that there are many black males in North Carolina and that some of them commit assaults, as do members of all racial groups; moreover, defendant expressed satisfaction with each juror ultimately selected and did not exhaust his peremptory challenges.

Am Jur 2d, Jury §§ 229, 241, 284, 287.

2. **Criminal Law § 913 (NCI4th)— motion to poll jury—jury dispersed—motion untimely**

The trial court did not err in a prosecution for murder, robbery, and assault by denying defendant's motion to poll the jury after guilty verdicts had been returned and the jury was given a thirty-minute break before the sentencing proceeding. The motion to poll the jury must be made before the jury is dispersed; the jury here was dispersed within the meaning of N.C.G.S. § 15A-1238 because the members of the jury were exposed during the thirty-minute break to influences extraneous to the deliberations of the entire jury as a body.

Am Jur 2d, Trial § 1125.

Accused's right to poll of jury. 49 ALR2d 619.

3. **Robbery § 4.3 (NCI3d); Homicide § 21.6 (NCI3d); Assault and Battery § 26 (NCI4th)— evidence of identification—sufficient**

The State presented substantial evidence that defendant was one of the perpetrators of the crimes charged where de-

fendant was charged with first degree murder, armed robbery, conspiracy to commit armed robbery, and assault with a deadly weapon with intent to kill inflicting serious injury and the State introduced evidence tending to show that defendant told Gail Isom that he and Mack Lee Nichols had talked about robbing the victim, Pete Collins, because Collins carried a large amount of cash in a briefcase; the defendant and Isom cased Collins' store two times shortly before the killing; they saw Collins leave the store with a briefcase in his hand on one occasion; defendant convinced Isom to buy a shotgun for him a week before the killing; defendant was a tall, thin, light-complexioned black man who owned a tan London Fog-type raincoat; witnesses saw Mack Lee Nichols walking toward Collins' store with a tall, thin, light-complexioned black man wearing a tan London Fog-type raincoat a few minutes before the robbery and murder; witnesses in the store at the time of the murder stated that a tall, thin, light-complexioned black man wearing a tan, London Fog-type raincoat was one of the two men who entered the store firing weapons; the perpetrators took Collins' briefcase full of money, shot the attending clerk, and shot and killed Collins; defendant left Raleigh the day after the murder and went to Rhode Island with a friend; and the evidence tended to show that three $50 bills given to a friend by defendant came from Pete Collins.

Am Jur 2d, Homicide §§ 286, 435; Robbery § 64.

4. **Criminal Law § 557 (NCI4th)— reference to prior drug dealing—mistrial denied—no abuse of discretion**

The trial court did not abuse its discretion in a prosecution for murder, robbery, and assault by denying defendant's motion for a mistrial where a detective read from a witness's recorded statement which indicated that defendant had been involved in drugs in the past, even though his prior motion in limine to forbid evidence of his prior drug dealings had been granted. The trial court sustained defendant's objection and instructed the jury to disregard the evidence.

Am Jur 2d, Evidence § 320; Trial § 1107.

5. **Criminal Law § 794 (NCI4th)— felonious assault—acting in concert—evidence sufficient for instruction**

There was no plain error in a prosecution for assault, murder, and robbery in giving the jury an instruction to the

effect that defendant could be convicted of felonious assault upon a theory of acting in concert where there was evidence tending to show that defendant and another planned to commit the robbery with firearms; each of them entered the store with a firearm in his hands and several shots were fired; and one shot struck the victim, causing him serious injury.

Am Jur 2d, Assault and Battery § 11.

APPEAL of right by the defendant, pursuant to N.C.G.S. § 7A-27(a), from a judgment imposing a sentence of life imprisonment entered by *Herring, J.*, on 26 July 1988 in Superior Court, WAKE County. On 26 October 1989, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on his appeal from additional judgments imposing sentences of less than life imprisonment. Heard in the Supreme Court on 13 November 1990.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda Anne Morris, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant was tried upon proper bills of indictment charging him with first degree murder, armed robbery, conspiracy to commit armed robbery, and assault with a deadly weapon with intent to kill inflicting serious injury. He was tried in the manner prescribed for capital cases. The jury found the defendant guilty of first degree murder on a felony murder theory. The jury also found the defendant guilty of armed robbery, conspiracy to commit armed robbery, and assault with a deadly weapon inflicting serious injury. After a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment for the murder conviction. The trial court thereafter entered judgments imposing a sentence of life imprisonment for the murder conviction, a ten-year sentence for the conspiracy conviction and a ten-year sentence for the assault conviction. The trial court arrested judgment on the conviction for the armed robbery, as it formed the predicate felony for the first degree murder conviction under the felony murder theory.

The State's evidence tended to show that on 29 January 1985, two men entered Capital Variety and Video Store in Raleigh where they robbed and killed Roy Leonzia "Pete" Collins. Witnesses for the State testified that at approximately 8:00 p.m. on 29 January 1985, a total of seven people were in the store. A male employee, Gregory Council, was behind the counter. Collins, the owner of the store, was in a back office with his thirteen-year-old nephew. The door of the store flew open, and two men were standing in the doorway. One was a stocky black man wearing a green army jacket and carrying a pump-action shotgun. The second man was a thinner black man with a lighter complexion who was wearing a tan "London Fog-type" raincoat and holding a rifle. They yelled "freeze" and began shooting. Gregory Council felt something hit him in the side, and he spun around and fell to the floor. Shots were being fired by Collins from the office part of the store and by the two perpetrators from the front of the store. One of the perpetrators shouted to Collins to "put it down." Collins threw the gun in his hands to the floor.

The stocky man in the green army jacket came into the office and walked to within a few feet of Collins. He asked, "How you doing, Pete?" and fired one shot into Collins' abdomen. The perpetrators took a briefcase containing more than $30,000 in cash from Collins' hand. The man in the army jacket yelled, "Pick up the shells man. Pick up the shells." The man in the tan raincoat got down on the floor in the front part of the store and picked up shells before the two perpetrators left the store.

Collins died that evening from massive internal bleeding resulting from the gunshot wound to his abdomen. Council was required to undergo two operations to repair a punctured lung and other internal injuries resulting from the gunshot wound to his side.

James Cooley testified that he saw a black man in a tan "London Fog-type" coat and another man in a green army jacket whom he identified as Mack Lee Nichols heading in the direction of Collins' store immediately before Collins was killed.

Alvin Banks testified that the defendant and Nichols visited him on two occasions shortly before Collins was killed. On both occasions, the defendant was present when Nichols talked about a plan to rob and, if necessary, kill Pete Collins. The defendant and Nichols discussed using a shotgun during the course of a rob-

bery. When the defendant said that he did not know how to use a shotgun, Nichols told him that he would show him.

Dani Gail Isom, the defendant's former girlfriend, testified that a week before the robbery, she purchased a shotgun for the defendant at his request. She also testified that the defendant had told her that he and Nichols had talked about robbing Collins. In addition, Isom testified that she and the defendant "cased" Collins' video store on two different occasions prior to the robbery and killing.

The State's evidence also tended to show that the defendant went to the home of Dwight Douglas Allen three hours after the robbery and murder of Collins. The defendant told Allen that he wanted to go to Rhode Island the next day, 30 January 1985. The defendant gave Allen three $100 bills and told him to rent a car for that purpose. The following day, the defendant and Allen drove to Providence, Rhode Island. While they were in Providence, Allen's girlfriend called to tell him about the murder of Pete Collins. When Allen asked the defendant if he had anything to do with Collins' murder, the defendant responded, "If I don't tell you nothing, you won't know nothing." When Allen returned to Raleigh, the defendant did not come with him.

Upon Allen's return to Raleigh, the police questioned him about the defendant. Allen gave the police four $50 bills that the defendant had given him. Three of the bills had writing on them and bore the odor of cologne. The writing on the bills was identified as Collins' writing by Jackie Humphries, Collins' bookkeeper. She also identified the cologne on the bills as the cologne that Collins put on each bundle of bills in his briefcase.

The defendant was arrested on 12 May 1987 in Florence, Kentucky, on a warrant for unlawful flight to avoid prosecution. Thereafter, he was returned to North Carolina for trial on the charges giving rise to this appeal.

The defendant offered no evidence at trial.

[1] The defendant first assigns as error the trial court's failure to inquire into whether prospective jurors were prejudiced as a result of a statement by one prospective juror. After the first twelve prospective jurors were brought into the jury box, one of them, a Mr. McLean, was being questioned by the prosecutor. When asked if he would hold the State to its burden of proof, he said, "my wife and my child were assaulted by a black man

with a deadly weapon." The remainder of his answer was cut off by an objection by the defendant's counsel. The other prospective jurors were then excused from the courtroom, while McLean remained for further questioning. He was then excused on the joint motion of the defendant and the prosecutor. Thereafter, the trial court denied the defendant's motion to dismiss all of the prospective jurors who had heard McLean's statement. In denying the motion the trial court concluded that "the statement was not sufficient to inflame or prejudice the entire panel or taint the panel so as to prevent them from being fair as prospective jurors." Five members of the jury that actually served and rendered verdicts in the defendant's trial were present when prospective juror McLean made the statement. The defendant's counsel did not request that the jury be questioned about the statement.

When there is substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial. *State v. Barts*, 316 N.C. 666, 683, 343 S.E.2d 828, 839 (1986). The trial court "has the duty to supervise the examination of prospective jurors and to decide all questions relating to their competency." *State v. Young*, 287 N.C. 377, 387, 214 S.E.2d 763, 771 (1975). It also has broad discretion "to see that a competent, fair and impartial jury is impaneled and rulings in this regard will not be reversed absent a showing of abuse of discretion." *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979); *accord State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980).

In the case *sub judice*, the prospective juror's statement did not give rise to a substantial reason to fear that the jury had been prejudiced. The prospective juror made no reference to any particular black male or to the defendant. All of the prospective jurors must have known that there are many black males in North Carolina and that some of them—like some members of all other racial groups—commit assaults. The mere fact that the prospective juror referred to an assault committed by a black male, combined with the fact that the defendant was a black male, did not present the trial court with any substantial reason to fear that other prospective jurors who heard the statement would be prejudiced against the defendant. If such was the case, it would be difficult or impossible to assemble a jury given the fact that most jurors have been exposed to information about crimes committed by members of

all races in our society. Everyone is exposed to such information by reading newspapers, watching television, and through everyday life experiences. There simply is no merit to the defendant's contention that prospective juror McLean's statement, without more, required the trial court to conduct any special inquiry into possible jury prejudice. Our conclusion in this regard finds additional support in the fact that the defendant expressed satisfaction with each juror ultimately selected and the fact that the defendant did not exhaust the fourteen peremptory challenges permitted him under N.C.G.S. § 15A-1217(a)(1). *See State v. Artis*, 316 N.C. 507, 511, 342 S.E.2d 847, 850 (1986) (defendant's satisfaction with jury); *cf. State v. Quesinberry*, 319 N.C. 228, 235, 354 S.E.2d 446, 450 (1987) (failure to exhaust peremptory challenges). This assignment of error is without merit.

[2] By his next assignment of error, the defendant contends the trial court erred in denying his motion to poll the jury after the guilty verdicts had been returned and the jury had been given a thirty-minute break. In the present case, the guilty verdicts on all charges were received by the trial court at 12:05 p.m. The jury was then given a thirty-minute recess and instructed not to discuss this case among themselves or with any other persons. After the jury left the courtroom, the trial court asked the attorneys, "Gentlemen, is there any point you would care to raise at this point?" The defendant made no motion to poll the jury at that time. After a short discussion about the possible merger of two of the verdicts, the trial court again inquired, "Is there any other matter you gentlemen care to raise at this point?" Again, the defendant made no motion to poll the jury; instead, he requested five minutes before responding to the judge's inquiry. The trial court then discussed the sentencing proceeding to be held and granted a fifteen-minute recess. At 12:33 p.m., after the recess and while the jury was still on its break, the defendant moved that the jury be polled. The trial court denied the motion, stating the motion came too late.

The right to a poll of the jury in criminal actions is firmly established by Article I, Section 24 of the Constitution of North Carolina and by statute.

> Upon the motion of any party made after a verdict has been returned and *before the jury has dispersed*, the jury must be polled. The judge may also upon his own motion require

> the polling of the jury. The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict. If upon the poll there is not unanimous concurrence, the jury must be directed to retire for further deliberations.

N.C.G.S. § 15A-1238 (1988) (emphasis added).

The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered. *Lipscomb v. Cox*, 195 N.C. 502, 142 S.E. 779 (1928). If the jury is unanimous at the time the verdict is returned, the fact that some of them change their minds at any time thereafter is of no consequence; the verdict rendered remains valid and must be upheld. *Id.* The rationale behind requiring that any polling of the jury be before dispersal is to ensure that nothing extraneous to the jury's deliberations can cause any of the jurors to change their minds. *Id.* Once a juror leaves the courtroom after the verdict is returned and goes into the streets, despite her best efforts to shield herself, she still can be affected by improper outside influences. At that point, such improper outside influences may take the form of things the juror sees or hears or may be limited to the juror's own weighing of the evidence and the law independently and in the absence of other members of the jury. In other words, once the jury is dispersed after rendering its verdict and later called back, it is not the same jury that rendered the verdict.

In the case *sub judice*, when the trial court gave the jury a thirty-minute break, the jury was free to leave the courtroom and go into the streets. During that thirty-minute period, the members of the jury were exposed to influences extraneous to the deliberations of the entire jury as a body. Hence, the jury had been "dispersed" within the meaning of N.C.G.S. § 15A-1238, and the motion to poll the jury came too late. Consequently, the defendant waived the right to poll the jury. This assignment of error is without merit.

[3] The defendant next assigns as error the trial court's denial of his motion to dismiss all charges against him on grounds of insufficiency of the evidence. In support of this assignment, the defendant argues that there was no substantial evidence tending to identify him as one of the perpetrators of the crimes charged.

A guilty verdict will be upheld if the State presents substantial evidence of each element of the offense charged. *State v. Mercer*, 317 N.C. 87, 343 S.E.2d 885 (1986); *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The test of sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both. *Id.* When ruling on a motion to dismiss in a criminal case the trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. *Id.* Any contradictions or discrepancies are for resolution by the jury. *Id.*

Contrary to the defendant's argument in support of this assignment, the State presented substantial evidence that the defendant was one of the perpetrators of the crimes charged. The State introduced evidence tending to show that the defendant told Gail Isom that he and Mack Lee Nichols had talked about robbing Pete Collins because he carried a large amount of cash in a briefcase. Two times shortly before the killing, the defendant and Isom "cased" Collins' store. On one occasion they saw Collins leave the store with a briefcase in his hand. A week before the killing, the defendant convinced Isom to buy a shotgun for him. In addition, the defendant was a tall, thin, light complexioned black man who owned a tan London Fog-type raincoat. A few minutes before the robbery and murder, witnesses saw Mack Lee Nichols walking toward Collins' store with a tall, thin, light complexioned black man who was wearing a tan London Fog-type raincoat. The witnesses in the store at the time of the murder stated that a tall, thin, light complexioned black man wearing a tan London Fog-type raincoat was one of the two men who entered the store firing weapons. The perpetrators took Collins' briefcase full of money, shot the attending clerk and shot and killed Collins. The defendant left Raleigh the day after the murder and went to Rhode Island with a friend. The State's evidence also tended to show that three $50 bills given to a friend by defendant came from Pete Collins, because the bills bore Collins' markings and cologne. Taken as a whole, such evidence constitutes substantial evidence that the defendant was one of the perpetrators of the crimes charged. This assignment of error is without merit.

[4] The defendant next contends the trial court erred in failing to declare a mistrial when a detective read from a recorded statement of Gail Isom, part of which indicated that the defendant

had been involved with drugs in the past. Whether a motion for mistrial should be granted is a matter which rests within the sound discretion of the trial court, and a mistrial is appropriate only when there are such serious improprieties as would make it impossible to achieve a fair and impartial verdict under the law. *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982).

In the case *sub judice*, before Isom's statement was read, the trial court had granted the defendant's motion *in limine* and forbidden any evidence concerning the defendant's prior drug dealings. Even so, Isom's statement as read by the detective included the remark that, "I knew that he [the defendant] had, you know, drug involvement in the past." The defendant objected and his objection was sustained. The trial court then instructed the jury to disregard the statement. When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured. *See State v. Walker*, 319 N.C. 651, 655, 356 S.E.2d 344, 346 (1987). The trial court did not abuse its discretion by denying the defendant's motion for a mistrial. There is no merit to this assignment of error.

[5] By his final assignment of error, the defendant contends the trial court erred in giving a jury instruction to the effect that the defendant could be convicted of the felonious assault on Gregory Council upon a theory of acting in concert. In support of this assignment, the defendant argues that there was insufficient evidence to support such an instruction. However, since the defendant failed to object to the instruction, we find that the defendant waived any error in this regard. *State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983); N.C.R. App. P. 10. Therefore, our review is limited to review for "plain error." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

We have emphasized that:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the

> fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (*quoting with approval United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to convict the defendant. *Id.*

In the case *sub judice*, our review of the whole record in light of this assignment reveals no error and certainly no "plain error." In order to convict a defendant under a theory of acting in concert, it is not necessary that the defendant personally commit all the acts required to constitute the crime charged. When two or more persons act together with the common purpose to commit robbery, each is held responsible for the acts of the other done in the commission of the robbery. *State v. Harris*, 315 N.C. 556, 563, 340 S.E.2d 383, 388 (1986). Here, there was evidence tending to show that the defendant and Mack Lee Nichols planned to commit the robbery and to do so with firearms. The evidence also tended to show that each of them entered the store with a firearm in his hands and several shots were fired. One shot struck Council causing him serious injury. No more was required to justify the jury instruction on acting in concert which the defendant now contends was plain error. This assignment is without merit.

For the foregoing reasons, we conclude that the defendant received a fair trial free from prejudicial error.

No error.

MELVIN G. JOHNSON AND WIFE, AUDREY VIRGINIA JOHNSON v. BEVERLY-HANKS & ASSOCIATES, INC., HILL-GATEWOOD REALTY, INC., JAMES H. GORDON, JOHN R. KEFGEN AND WIFE, DOROTHY E. KEFGEN, ORKIN EXTERMINATING COMPANY, INC., THOMAS W. SUMNER, DONALD O. THOMPSON, AND WYNELLE M. THOMPSON

No. 90A90

(Filed 7 February 1991)

1. **Fraud § 12.1 (NCI3d); Unfair Competition § 1 (NCI3d)— sale of house—summary judgment for defendant builder—no error**

The trial court did not err by granting defendant Donald Thompson's motion for summary judgment as to allegations of fraud and unfair or deceptive practices arising from the sale of a house where plaintiffs produced no evidence that this defendant (the builder) made any false representation as to a material past or existing fact and no facts were presented by plaintiff to show any immoral, oppressive, unscrupulous, or deceptive conduct on the part of this defendant.

Am Jur 2d, Fraud and Deceit §§ 108, 158; Summary Judgment §§ 26, 27.

2. **Fraud § 12.1 (NCI3d)— sale of house—fraud—summary judgment for seller—no error**

The trial court did not err by granting summary judgment for defendant Dorothy Kefgen (the seller) on claims of fraud arising from the sale of a house where plaintiffs produced a forecast of some evidence of misrepresentation by Mrs. Kefgen about the condition of the house and that the house did not have termites, but did not bring forth any evidence which tends to show that Mrs. Kefgen knowingly made false misrepresentations with intent to deceive the plaintiffs.

Am Jur 2d, Fraud and Deceit §§ 108, 158; Summary Judgment §§ 26, 27.

Duty of vendor of real estate to give purchaser information as to termite infestation. 22 ALR3d 972.

3. **Fraud § 12.1 (NCI3d); Unfair Competition § 1 (NCI3d)— sale of house—fraud and unfair practice—summary judgment for realtor—error**

The trial court erred in granting summary judgment for defendants Wynelle Thompson (the realtor who showed the

house) and Beverly-Hanks (her real estate agency) on claims for fraud and unfair or deceptive practices arising from the sale of a house where the record reflects that plaintiffs discussed with Wynelle Thompson numerous times the need to have an independent inspection of the house before closing; plaintiffs provided evidence that they would not have closed on the house had they not received an independent investigation of the general soundness of the house; Mrs. Thompson told plaintiffs she would engage the services of a building inspector and asked the builder to specify the structural integrity of the house; and, while Mrs. Thompson testified that she did not know that the building inspector had previously inspected the house for the Kefgens (sellers), plaintiffs provided evidence tending to show that Mrs. Thompson had at minimum aided in engaging the inspector and that he was hired because he had inspected the house before.

Am Jur 2d, Fraud and Deceit §§ 108, 158; Summary Judgment §§ 26, 27.

Real estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold. 46 ALR4th 546.

APPEAL by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 97 N.C. App. 335, 388 S.E.2d 584 (1990), affirming summary judgments for defendants entered by *Lewis (Robert D.), J.*, on 12 July 1988, 14 September 1988, 15 September 1988, and 25 September 1988 in Superior Court, HENDERSON County. Heard in the Supreme Court 11 October 1990.

David Gantt for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, by James R. Morgan, Jr., for defendant-appellees Beverly-Hanks & Associates and Wynelle M. Thompson.

Prince, Youngblood, Massagee & Jackson, by Boyd B. Massagee, Jr., and Sharon B. Ellis, for defendant-appellees Donald O. Thompson and Estate of Dorothy E. Kefgen.

Lacy H. Thornburg, Attorney General, by James C. Gulick, Special Deputy Attorney General, and David N. Kirkman, Assistant Attorney General, Consumer Protection Section, amicus curiae.

MEYER, Justice.

By this lawsuit, plaintiffs sought compensatory and punitive damages for defendants' alleged fraud, unfair or deceptive acts or practices in or affecting commerce, and civil conspiracy arising in the sale of a house. The claims of alleged civil conspiracy are not before this Court on appeal.

After this Court's review of the record, our appraisal of the facts found in the documents and depositions elicited during discovery and presented in evidence for the trial court's review upon the motion for summary judgment differs somewhat from the facts stated in the opinion by the Court of Appeals. The forecast of evidence tended to show the following: John and Dorothy Kefgen, both now deceased, signed a listing contract with listing agent Thomas A. Sumner of Hill-Gatewood Realty, Inc., to list their home in Hendersonville, North Carolina, and to place the listing in the Multiple Listing Service. Plaintiffs, Melvin and Audrey Johnson, were shown the house on 18 April 1986 by Wynelle M. Thompson, a real estate broker with Beverly-Hanks & Associates, Inc. ("Beverly-Hanks"), and signed an offer to purchase that same day.

Plaintiffs returned to the house on 20 April 1986 for a closer inspection. While viewing the house, plaintiffs noticed peeling paint at the lowest level of the house, moisture coming through a wall, bad cracks, and a bulge in the rear wall of the house. Ms. Thompson was informed of the defects, and she indicated that she would have a building inspector examine the house and the builder verify its structural integrity.

After stating that she had discussed the Kefgen house with Donald O. Thompson, the builder, Ms. Thompson informed the plaintiffs that (1) the bulge in the wall was the result of settling, and (2) the house was structurally in good shape. In spite of the defects discovered by plaintiffs, they went to the real estate closing on 5 August 1986. Prior to the closing, plaintiffs received, *inter alia*, the following signed statements:

> (1) Two statements by Wynelle Thompson indicating that (a) a private inspector who looked at the house commented that he would not expect any further shifting, (b) the bulge in the rear wall occurred as a result of settling, (c) a door to the crawl space under the house as well as three vents

had been installed, (d) a termite inspection would be conducted prior to closing, and (e) "[e]verything look[ed] good."

(2) A memorandum by the builder, Donald Thompson, indicating that the concrete slab in the basement is thicker than normal and contains wire mesh and one-half inch Rebar installed at right angles.

(3) A letter from Attorney James E. Creekman, indicating that he represented Mr. and Mrs. Kefgen. He presented with his letter another statement from Donald Thompson stating that the wooden forms used in the construction of the foundation were inadvertently left in the crawl space beneath the house and could be removed, as they are not necessary to the structural integrity of the building.

(4) A letter from James H. Gordon of the Carolina Home Inspection Service indicating observations upon a limited inspection of specifically requested items: (a) northwest bedroom heat, (b) basement wall moisture, (c) brick mortar joint crack at southwest exterior corner, (d) termite damage at garage door jamb and frame, and (e) reinforced concrete slab. His observations indicated, among other things, some concern whether the concrete slab is designed and built to carry the concentrated loads transmitted from the center posts along the basement and garage areas above, but found that, during his limited inspection, it was impossible to determine if the structural concrete had been designed adequately.

Plaintiffs purchased the house on 5 August 1986 and shortly thereafter moved in. After moving into the house, plaintiffs consulted and retained the services of an engineering firm. A structural engineer inspected the premises and concluded that the house was not safe for occupancy due to the following reasons:

(1) Portions of the basement foundation walls were unstable and could fail with little or no warning.

(2) A concrete masonry wall beneath the left rear garage door was found to be bearing on earth where no concrete foundation existed.

(3) Cracks were found to exist in the basement floor slab. The basement slab was found to be spanning distances greater

than those recommended for a four inch thick concrete slab based on deflection criteria.

(4) The cracked, spanning basement slab was presently supporting the center steel columns, which support a portion of the upper floor and possibly 50% of the roof.

(5) Cracking and deflected surface conditions noted in the asphalt paving indicated settlement of the supporting subgrade adjacent to the home.

(6) Steel "jack post" type columns which supported the upper level of the residence were found not to be secured to the basement floor.

(7) Upper level wood floor joists were found to be unsecured atop the concrete masonry walls, and no wood plate or anchor bolts were found.

Upon receiving an estimate that it would cost approximately $70,000 to repair the structural damage, plaintiffs contacted all parties involved in the matter to see if each would contribute to the repairs. None of the parties responded, and plaintiffs filed their complaint in this action.

The trial court determined that there were no genuine issues of material fact as to each defendant for each of the three claims and entered summary judgment in favor of all defendants. The Court of Appeals affirmed, holding that the trial court did not err in granting defendants' motions for summary judgment. *Johnson v. Beverly-Hanks & Assoc.*, 97 N.C. App. 335, 388 S.E.2d 584 (1990).

The issue on appeal is whether the trial court erred in granting motions for summary judgment for defendants Donald Thompson, Dorothy Kefgen, Wynelle Thompson, and Beverly-Hanks. The question we must address in this case is whether there exists any genuine issue of material fact concerning defendants' alleged fraud or unfair or deceptive practices in selling this house to the plaintiffs. We hold that the forecast of the evidence as to defendants Donald Thompson and Dorothy Kefgen, when viewed in the light most favorable to the plaintiffs, did not raise genuine issues of material fact. We hold further, however, that the forecast of the evidence as to defendants Wynelle Thompson and Beverly-Hanks, when viewed in the light most favorable to the plaintiffs, did raise

genuine issues of material fact and that it was improper for the trial court to grant these defendants' motions for summary judgment.

This Court notes at the outset that the assignments of error raised by the plaintiffs are premised upon the same theories of recovery for fraud or for unfair or deceptive practices. The applicable rules of law do not differ with respect to each defendant, and therefore, a discussion of these rules, initially, will govern the following analysis.

It is well settled that a party moving for summary judgment is entitled to such judgment if the party can show, through pleadings, depositions, and affidavits, that there is no genuine issue of material fact requiring a trial and that the party is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56 (1983); *Beckwith v. Llewellyn*, 326 N.C. 569, 391 S.E.2d 189, *reh'g denied*, 327 N.C. 146, 394 S.E.2d 168 (1990); *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 343 S.E.2d 879 (1986). The party who moves for summary judgment has the initial burden to prove that there are no disputed factual issues. *Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co.*, 326 N.C. 771, 392 S.E.2d 377 (1990). Once the moving party has met this initial burden, the nonmoving party must produce a forecast of evidence demonstrating that he or she will be able to make out a prima facie case at trial. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 376 S.E.2d 425 (1989). Our initial inquiry, then, is whether there was a disputed factual issue raised concerning the existence of fraud or unfair or deceptive practices as to each defendant.

I. DONALD O. THOMPSON

[1] Plaintiffs' sole contention is that the trial court erred in granting defendant-builder Donald Thompson's motion for summary judgment as to allegations of fraud and unfair or deceptive practices. We disagree.

Plaintiffs' complaint sought relief for fraud and unfair or deceptive practices. To make out an actionable case of fraud, plaintiffs must establish that there existed a

> (1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.

Ragsdale v. Kennedy, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). The undisputed facts reflect that Donald Thompson built the residence of which plaintiffs complain. Mr. Thompson submitted two written statements attesting (1) to the specifications of the concrete slab in the basement and (2) that the wooden forms in the crawl space could be removed without affecting the structural integrity of the house. Here, plaintiffs have not produced any evidence that defendant Donald Thompson made any false representation as to a material past or existing fact.

Although Donald Thompson did not recall ever having spoken to her, during discovery Wynelle Thompson, the real estate broker, testified that Mr. Thompson told her that the house was "structurally in good shape" and that the bulge in the wall "occurred sometime ago as a result of settling" and was "not going to be a problem." While it was reported in the Court of Appeals decision that the builder himself testified to this effect, this Court is unable to verify from the record that the builder so testified. Even so, this testimony alone by Ms. Thompson is not sufficient to make out a prima facie case of fraud against Mr. Thompson, as no facts were presented by plaintiffs to show any wrongful conduct on his part. The trial court properly granted this defendant's motion for summary judgment as to the fraud allegation, as plaintiffs failed to establish that there existed a genuine issue of material fact with respect to their claim of fraud. Therefore, the result reached by the Court of Appeals affirming the grant of summary judgment in favor of the defendant-builder was correct.

Plaintiffs' second claim for relief is based upon unfair or deceptive practices. N.C.G.S. § 75-1.1(a) declares unlawful "unfair or deceptive acts or practices in or affecting commerce." As a general rule, "[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980), *rev'd on other grounds, Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). If a party engages in conduct that results in an inequitable assertion of his power or position, he has committed an unfair act or practice. *Id.* at 264, 266 S.E.2d at 622. No facts were presented by plaintiff to show any immoral, oppressive, unscrupulous, or deceptive conduct on the part of Donald Thompson. Thus, plaintiffs have failed to establish that there exists a genuine issue of material fact with

respect to their claim of unfair or deceptive practices as to Donald Thompson. The trial court, therefore, properly granted this defendant's motion for summary judgment with respect to the allegation of unfair or deceptive practices.

II. DOROTHY E. KEFGEN

[2] As a matter of clarity, this Court notes that plaintiffs initially brought a cause of action for fraud, unfair or deceptive practices, and civil conspiracy against both John and Dorothy Kefgen. Due to John Kefgen's death, his wife initially defended this action. However, prior to oral arguments before this Court, as a result of defendant Dorothy Kefgen's death, the coexecutors of her estate now defend, as a motion for substitution of party was allowed. The claims for alleged unfair or deceptive practices or civil conspiracy against Dorothy Kefgen are not on appeal before this Court.

Plaintiffs bear the burden of proving all elements of a cause of action for fraud in their forecast of the evidence. The record indicates that the Kefgens placed their house on the market at some point prior to 18 April 1986. The record further indicates that Mrs. Kefgen was present on 20 April 1986 when plaintiffs returned to the house and made inquiries as to specific defects. The plaintiffs did produce a forecast of some evidence of misrepresentations by Mrs. Kefgen to them about the "excellent shape" of the house and that the house did not have termites. From these statements, plaintiffs allege that Mrs. Kefgen committed fraud. They, however, have not brought forth any evidence which tends to show that Mrs. Kefgen *knowingly* made false representations *with the intent to deceive* the plaintiffs.

Though the record was voluminous, the trial court was unable to find any representations or omissions made by Dorothy Kefgen that rose to the level of fraud. Therefore, the trial court correctly concluded that no triable issues of fact existed on plaintiffs' claim of fraud and properly granted Dorothy Kefgen's motion for summary judgment.

III. WYNELLE THOMPSON AND BEVERLY-HANKS

[3] Plaintiffs contend that the trial court erred in granting the motions for summary judgment as to defendants Wynelle Thompson and Beverly-Hanks. The Court of Appeals held that the trial court properly granted defendants' motions for summary judgment as to the fraud allegation because "plaintiffs have not produced any

evidence that defendant, Wynelle Thompson, or any representative of defendant, Beverly-Hanks, made any false representations as to a material past or existing fact." *Johnson v. Beverly-Hanks & Assoc.*, 97 N.C. App. at 342, 388 S.E.2d at 588. We disagree.

This Court finds that plaintiffs' forecast of evidence as to Wynelle Thompson and therefore her employer, Beverly-Hanks, was sufficient to raise an issue of material fact as to the fraudulent concealment of facts which misled the plaintiffs into purchasing the Kefgen house.

> A broker who makes fraudulent misrepresentations or *who conceals a material fact* when there is a duty to speak to a prospective purchaser in connection with the sale of the principal's property is personally liable to the purchaser notwithstanding that the broker was acting in the capacity of agent for the seller.

P. Hetrick & J. McLaughlin, *Webster's Real Estate Law in North Carolina* § 132, at 165 (3d ed. 1988) (footnote omitted) (emphasis added). A broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information. *Spence v. Spaulding and Perkins, Ltd.*, 82 N.C. App. 665, 347 S.E.2d 864 (1986); *see also Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E.2d 557 (1976).

The record reflects that, numerous times, plaintiffs had discussed with Wynelle Thompson the need to have an independent inspection of the Kefgen house before closing. The plaintiffs provided evidence that they would not have closed on the house had they not received an *independent* investigation of the general soundness of the house. The evidence tends to show that Ms. Thompson told the plaintiffs that, since they were living in Michigan at the time, she would engage the services of a building inspector and ask the builder to verify the structural integrity of the house.

Plaintiffs' evidence showed that, to satisfy the plaintiffs' demand, James H. Gordon, a building inspector, conducted a limited inspection at the house of five specifically requested items. The record is unclear as to whether Ms. Thompson placed the telephone call to employ Mr. Gordon. Mr. Gordon first testified that a woman called him to request an inspection of five specific areas of the house and asked if he was the one who had previously been to the house. Later, Mr. Gordon denied ever having received a telephone

call from someone named Wynelle Thompson. However, these five items were the exact same areas of concern that the plaintiffs had related to Ms. Thompson. Even though Ms. Thompson stated that she did not recall placing the exact telephone call to Mr. Gordon, her own testimony repeatedly acknowledged her part in recommending Mr. Gordon to inspect the house. Ms. Thompson never mentioned to plaintiffs that Mr. Gordon had earlier inspected the house for the Kefgens at the request of Thomas Sumner, the listing agent during this transaction. Mr. Gordon concluded at the earlier inspection for the Kefgens that the house required an additional investigation by a structural engineer. Therefore, it is arguable that the inspection by Mr. Gordon for the plaintiffs was not a neutral, independent investigation. The plaintiffs relied on Wynelle Thompson's judgment in selecting Mr. Gordon as an independent, objective inspector.

The evidence presented for the trial court's review upon the motions for summary judgment as to the fraud allegation concerning Wynelle Thompson and her employer is thus conflicting and presents a genuine issue as to a material fact. Wynelle Thompson testified that she did not know that Mr. Gordon had previously inspected the house for the Kefgens, but the plaintiffs countered by producing evidence tending to show that she had, at the minimum, aided in engaging Mr. Gordon's services and that he was hired because he had inspected the house before. As defendants Wynelle Thompson and Beverly-Hanks have not shown that they were entitled to judgment as a matter of law, summary judgment as to these two defendants was improperly granted by the trial court.

In plaintiffs' second claim for relief as to these two defendants, the Court of Appeals held that the trial court properly granted defendants' motion for summary judgment with respect to the unfair or deceptive practices allegation because "[t]he forecast of the evidence [did] not reveal any oppressive, unscrupulous, or deceptive conduct on the part of Wynelle Thompson or any representative of Beverly-Hanks." *Johnson v. Beverly-Hanks & Assoc.*, 97 N.C. App. at 342, 388 S.E.2d at 588. We disagree.

This Court finds that the record reflects conflicting evidence as to the unfair or deceptive practices claim against Wynelle Thompson and Beverly-Hanks. Wynelle Thompson's representations and communications to the plaintiffs, as discussed above under the fraud count, could also tend to prove that Ms. Thompson was

involved in a deceptive act or practice in or affecting commerce. *Powell v. Wold*, 88 N.C. App. 61, 362 S.E.2d 796 (1987) (when fraud is proven, a violation of the prohibition of unfair and deceptive practices necessarily follows). Therefore, summary judgment was improperly granted as to defendants Wynelle Thompson and Beverly-Hanks.

For the reasons stated herein, we hold that the trial court properly granted motions for summary judgment in favor of defendants Donald O. Thompson and Dorothy E. Kefgen and that the trial court erred in granting motions for summary judgment for Wynelle M. Thompson and Beverly-Hanks & Associates, Inc. Accordingly, there is, as the trial judge concluded, no genuine issue as to any material fact of fraud or unfair or deceptive practices as to defendants Donald Thompson and Dorothy Kefgen, and they were entitled to judgment in their favor as a matter of law. N.C.G.S. § 1A-1, Rule 56 (1983). The grant of summary judgment as to these two defendants entered by the trial court was proper. However, the trial court erred in concluding that there was no genuine issue as to any material fact of fraud or unfair or deceptive practices as to defendants Wynelle Thompson and Beverly-Hanks.

The decision of the Court of Appeals is affirmed as to defendants Donald O. Thompson and Dorothy E. Kefgen and reversed as to defendants Wynelle M. Thompson and Beverly-Hanks & Associates, Inc., and the case is remanded to that court for further remand to the Superior Court, Henderson County, with instructions that the entry of summary judgment in favor of Wynelle Thompson and Beverly-Hanks be vacated and for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part and remanded.

STATE OF NORTH CAROLINA v. BOBBY MAY RIGGS AND PAMELA RIGGS

No. 30PA90

(Filed 7 February 1991)

1. **Searches and Seizures § 24 (NCI3d)— reliability of informant— statement in affidavit—incorrect subjective belief of affiant**

An officer's statement in an affidavit to obtain a search warrant that one informant used to purchase marijuana was reliable in that the information he had given in the past had been found to be true and exact was sufficient to establish that informant's reliability. The affidavit was not materially inaccurate because the officer testified at a pretrial suppression hearing that he had mistakenly represented that the informant was reliable where this testimony was based on the officer's incorrect subjective belief that the term "reliable" was a term of art applicable in drug cases only to persons who had made at least two prior controlled purchases of illegal drugs and on the fact that the informant had made only one prior purchase. The defendants' rights are governed by the law rather than by the officer's misunderstanding of it.

Am Jur 2d, Searches and Seizures § 65.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant. 10 ALR3d 359.

2. **Searches and Seizures § 21 (NCI3d)— search warrant—showing reliability of information**

In showing that information is reliable for purposes of obtaining a search warrant, the State is not limited to certain narrowly defined categories or quantities of information. What is popularly termed a "track record" is only one method by which a confidential source of information can be shown to be reliable for purposes of establishing probable cause.

Am Jur 2d, Searches and Seizures §§ 68, 69.

3. **Searches and Seizures § 24 (NCI3d)— marijuana purchases in driveway—probable cause for warrant to search residence**

Where information before a magistrate indicates that suspects are operating, in essence, a short-order marijuana drive-through on their premises, the logical inference is that

a cache of marijuana is located on those premises, and that inference establishes probable cause for a warrant to search the premises, including the residence. Therefore, evidence that two controlled purchases of marijuana, one only 48 hours earlier, were made by persons who had entered defendants' driveway established probable cause for the issuance of a warrant authorizing a search of defendants' residence.

Am Jur 2d, Searches and Seizures §§ 68, 69.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 96 N.C. App. 595, 386 S.E.2d 599 (1989), which reviewed the trial of the defendants and the judgments entered on 19 November 1987 by *Reid, J.*, in the Superior Court, ONSLOW County and awarded the defendants a new trial. Heard in the Supreme Court 9 October 1990.

Lacy H. Thornburg, Attorney General, by Jane R. Garvey, Associate Attorney General, for the State.

Jimmy F. Gaylor for defendant-appellees.

MITCHELL, Justice.

The central issue before us in this case is whether an application for a search warrant provided a sufficient showing of probable cause to support the magistrate's finding of probable cause and issuance of the warrant. We conclude that it did and that the trial court did not err by denying the defendants' motions to suppress evidence seized pursuant to the search warrant. Therefore, we reverse the Court of Appeals' decision awarding the defendants a new trial.

Evidence for the State tended to show that in early February 1987, Detective Sergeant Lee Stevens of the Onslow County Sheriff's Department received information from a confidential informant that the defendant Bobby Riggs was selling marijuana. On 26 February 1987, this informant was searched and found not to possess any drugs, equipped with a listening device, issued money for a drug purchase, and observed by officers as he went to the home of an unwitting middleman trusted by Riggs. Officers then observed the middleman leave his home, where the informant remained, go to the premises of the defendants Bobby and Pamela Riggs, and return to his own home. The middleman then delivered the

marijuana to the informant, which the informant turned over to Sergeant Stevens.

Deputy Sheriff Boyce W. Floyd supervised the use of a different informant during a nearly identical transaction on 25 March 1987. On 27 March 1987, Deputy Floyd applied for and received a warrant to search the defendants and their premises. During the resulting search, officers found approximately one-half ounce of marijuana and approximately twenty items of drug paraphernalia, including "roach clips" and scales, in the defendants' residence. Thereafter, each of the defendants was indicted for the felony of possession of marijuana with intent to sell and deliver and for the misdemeanor of possession of drug paraphernalia.

Prior to trial the defendants moved, pursuant to the laws and the Constitution of North Carolina and the Constitution of the United States, to suppress the evidence obtained during the search of their residence on the ground that the search warrant was issued and the search was conducted without probable cause. During a pretrial hearing on the defendants' motions to suppress, the application for the search warrant, comprised in part of an affidavit by Deputy Floyd, was introduced into evidence. The affidavit stated in pertinent part that:

> A confidential [s]ource stated that to purchase marijuana from the above described residence the [s]ource would bring a subject who is known and trusted by Riggs to the driveway of the above described residence, there the subject would walk to the above described residence purchase the marijuana ... return to the vehicle and deliver the marijuana to the [s]ource.
>
> On 3-25-87 [a]ffiant met with the [s]ource, the [s]ources [sic] vehicle and person was [sic] searched with no contraband being found. The [s]ource was issued $45.00 of Onslow County narcotics monies. The [s]ource thereafter was constanly [sic] under surveillance[;] the [s]ource then met with a [s]ubject known and trusted by Riggs, the [s]ource and this [s]ubject then traveled to the driveway of the above described residence, the [s]ource subsequently stated to affiant that at this point $45.00 was given to the subject and the [s]ubject walked down the driveway to the above described residence. Shorty [sic] thereafter the subject returned to the [s]ource's vehicle and the [s]ource stated that the subject delivered to the [s]ource appox. [sic] ¼ oz[.] of marijuana, the [s]ource then drove the [s]ubject a short

distance away and dropped the subject off. The [s]ource then came directly to affiant and turned over . . . appo. [sic] ¼ oz[.] of marijuana . . . .

This [s]ource is reliable in that this [s]ource knows what marijuana looks like and the information this [s]ource has given to affiant is [sic] always been found to be true and exact[.]

On 2-26-87 Deputy Sheriff L. S. Stevens and affiant searched a separate [s]ource of information and found no contraband. Deputy Stevens issued this [s]ource $45.00 and equiped [sic] the [s]ource with a liste[ning] device. The [s]ource was then followed by Deputy Stevens and affiant to a residence where the [s]ource gave a subject the $45.00. This subject was then followed to the above described residence and then back to the [s]ubjects [sic] residence where the [s]ubject delivered to the [s]ource appox [sic] ¼ oz. of marijuana. Deputy Sheriff Stevens [sic] [s]ource knows what marijuana looks like and has made 2 controlled purchases of narcotics in Onslow Co. for Deputy Stevens—and given information that has led to the arrest of 1 narcotics violat[or] . . . the information Deputy Steven's [sic] [s]ource has provided has always [been] found to be true and exact.

On 4-23-87 Bobby Riggs pled guilty to Felony Possession of Marijuana[.]

During his testimony at the pretrial hearing, Deputy Floyd stated that the informant he had used during the 25 March 1987 transaction described in his affidavit and application for the search warrant was not reliable. Deputy Floyd testified that the statement in his affidavit that the informant was reliable was a mistake. The magistrate who issued the search warrant testified that he had relied upon Deputy Floyd's statements in the affidavit that both of the sources were reliable in determining probable cause existed.

Following the pretrial hearing on the defendants' motions, the trial court concluded that "clearly probable cause was shown" and that "the search warrant was properly issued and properly executed." The trial court held that "the fruits of the search may be introduced in this case." Accordingly, the trial court denied the defendants' motions to suppress.

The defendants were tried before a jury. Each defendant was found guilty of the misdemeanors of simple possession of marijuana and possession of drug paraphernalia, and the trial court entered judgments sentencing the defendants. Pamela Riggs was sentenced for possession of drug paraphernalia to a term of one year of imprisonment, suspended upon the condition that she serve 60 days imprisonment and be placed on supervised probation for five years. She received a 30-day suspended sentence for simple possession of marijuana. Bobby Riggs was sentenced to a term of one year of imprisonment for possession of drug paraphernalia and to a 30-day suspended sentence for simple possession of marijuana. Both defendants appealed to the Court of Appeals.

The Court of Appeals held that the trial court had erred in denying the defendants' motion to suppress and awarded the defendants a new trial. The Court of Appeals concluded that Deputy Floyd's "affidavit did not provide a sufficient basis for the magistrate's issuance of the search warrant because there was no substantial basis for a finding of probable cause." 96 N.C. App. at 600, 386 S.E.2d at 602. In particular, that court emphasized that: "There was no statement in the affidavit that the drugs were purchased from the *defendants* in their *home.*" *Id.* at 598, 386 S.E.2d at 601. For this reason, the Court of Appeals felt that the affidavit failed to establish probable cause to believe that contraband was present in the defendants' residence.

The Court of Appeals also noted statements by Deputy Floyd, during his testimony at the pretrial hearing on the defendants' motions to suppress, to the effect that he had mistakenly represented in his affidavit that the informant he used during the 25 March 1987 transaction was reliable. As a result, the Court of Appeals concluded that:

> Consequently, even if the affidavit had contained enough information to support a finding of probable cause, and we conclude that it did not, the magistrate's decision would have been based, in part, on incorrect information. . . . To allow magistrates to rely upon affidavits which are materially inaccurate would make a mockery of the rules which were enacted to protect the rights of citizens from unreasonable searches and seizures.

Id. at 600, 386 S.E.2d at 602.

This Court allowed the State's petition for discretionary review on 10 May 1990. We now reverse the decision of the Court of Appeals.

An "affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984) (citing *State v. Riddick*, 291 N.C. 399, 230 S.E.2d 506 (1972)). The applicable test is

> whether, given all the circumstances set forth in the affidavit before [the magistrate], including "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. at 638, 319 S.E.2d at 257-58 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983)).

Deputy Floyd's affidavit tended to show that the informant used by Deputy Stevens on 26 February 1987 had made two prior controlled purchases of drugs and also previously had given accurate information which resulted in the arrest of a "narcotics violator." Such evidence established that informant's reliability.

[1] Any serious question as to the reliability of the informant involved in the 25 March 1987 purchase of marijuana described in Deputy Floyd's affidavit arose principally from his personal opinion concerning the definition of the term "reliable" as used in constitutional parlance. The search warrant application completed by Deputy Floyd states that: "This source is reliable *in that* this Source knows what marijuana looks like and the information this Source has given to the affiant is [sic] always been found to be true and exact." (Emphasis added.) The problems which arose during voir dire regarding this characterization of the informant as "reliable" were semantic rather than legal. It is clear from his testimony that Deputy Floyd incorrectly believed that the term "reliable" was a hypertechnical term of art, applicable in drug cases only to persons who had made at least two prior controlled purchases of illegal drugs. Because the informant had made only one such previous purchase, Deputy Floyd personally did not believe the

informant fell within this hypertechnical definition of the term "reliable." However, the officer's subjective belief does not control here; the defendants' rights "are governed by the law, rather than by the officers' misunderstanding of it." *State v. Coffey*, 65 N.C. App. 751, 758, 310 S.E.2d 123, 128 (1984); *see also United States v. Burnett*, 791 F.2d 64, 67-68 (6th Cir. 1986); *United States v. Tramontana*, 460 F.2d 464, 466-67 (2d Cir. 1972).

[2] In showing that information is reliable for purposes of obtaining a search warrant, the State is not limited to certain narrowly defined categories or quantities of information. What is popularly termed a "track record" is only one method by which a confidential source of information can be shown to be reliable for purposes of establishing probable cause. The clearest illustration of this fact is found in *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983), which has been accepted by this Court as setting the appropriate standard for showing probable cause under both the federal and state constitutions. *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984). In *Gates*, the Supreme Court of the United States indicated that "probable cause" is not a code phrase for any particular predetermined or required factual showing because "this area does not lend itself to a prescribed set of rules . . . ." 462 U.S. at 239, 76 L. Ed. 2d at 549. Instead, whether probable cause has been established is a "common sense, practical question" based on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 230-31, 235-36, 76 L. Ed. 2d at 543-44, 546. "[P]robable cause requires only *a probability or substantial chance* of criminal activity, not an actual showing of such activity." *Id.* at 243 n.13, 76 L. Ed. 2d at 552 n.13 (emphasis added).

In the affidavit forming part of the application for the search warrant, Deputy Floyd specifically qualified his statement that the informant was reliable as being based upon the fact that the information the informant had given in the past had been found to be true and exact. That statement by Deputy Floyd was true, even though his pretrial testimony indicated that the informant had given such information on only one prior occasion. Deputy Floyd's assertion in the warrant application that the informant was reliable cannot be construed as even marginally inaccurate, unless the word "reliable" is reduced to Deputy Floyd's hypertechnical definition requiring that the informant previously have given accurate and usable assistance in at least two drug

cases. Clearly, such a construction is contrary to the unequivocal meaning of *Gates* and its progeny. *See generally State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990); *State v. Beam*, 325 N.C. 217, 381 S.E.2d 327 (1989). Applying the nontechnical, common sense approach dictated by *Gates* and *Arrington* to the totality of circumstances in this case, it is clear that Deputy Floyd's affidavit did not state any material facts inaccurately.

The Court of Appeals also expressed the opinion that, even if all of the information in the warrant application was accurate, the two controlled purchases of marijuana by persons who had entered the defendants' driveway did not establish probable cause for the issuance of a warrant authorizing a search of the defendants' residence which the driveway served. The warrant application described the defendants' premises as follows:

> On Rt 1 Hubert, N.C. at the intersection of Bear Creek Road, Queens Creek Road and Great Neck Landing Road, . . . take the Great Neck Landing (state Road 1503) travel 2/10 of a mile to a dirt driveway to the left, travel 100 yards on the dirt driveway to a Mobil [sic] Home. . . . [T]o the left of the Mobil Home is a wooden unfinished shed at the edge of the trees also there will be numerous cars behind and to the left side of the Mobil Home.

From this description, it appears that the premises occupied by the defendants were of a nature fairly typical in rural areas of North Carolina.

Although apparently recognizing that the information before the magistrate was adequate to establish probable cause to believe that illegal drug transactions had occurred in the driveway on the defendants' premises, the Court of Appeals seems to have concluded that there was no probable cause to search their residence, because there was no direct evidence of the presence of contraband within its walls. 96 N.C. App. at 598, 386 S.E.2d at 601. However, the rule set forth in *Gates* is controlling and only requires that the magistrate make a practical, common sense determination whether, under all the circumstances, there is a fair probability that contraband or evidence will be found in the place to be searched. *Gates*, 462 U.S. at 238, 76 L. Ed. 2d at 548. Here, the evidence before the magistrate established a fair probability that contraband was located on the defendants' premises. Therefore, probable cause

was established supporting a warrant for a search of the premises, including the residence.

[3] Evidence before the magistrate tended to show that two different individuals had been able to secure drugs by sending an observed third party on the defendants' premises and that one of the transactions had occurred within the previous 48 hours. Therefore, it was reasonable for the magistrate to conclude that there was a fair probability or substantial chance that contraband was present in the defendants' residence. *See id.* at 243 n.13, 76 L. Ed. 2d at 552 n.13. The application for the search warrant did not specify the exact spot on the defendants' premises where the transactions occurred, nor was such a specification required. Reasonable inferences from the available observations, particularly when coupled with common or specialized experience, long have been approved in establishing probable cause. *See United States v. Cortez*, 449 U.S. 411, 66 L. Ed. 2d 621 (1981). A magistrate may "draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant. . . ." *Gates*, 462 U.S. at 240, 76 L. Ed. 2d at 549.

Where, as here, information before a magistrate indicates that suspects are operating, in essence, a short-order marijuana drive-through on their premises, the logical inference is that a cache of marijuana is located somewhere on those premises; that inference, in turn, establishes probable cause for a warrant to search the premises, including the residence. As *Arrington* instructs:

> The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence *probably* will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty. . . . A determination of probable cause is grounded in practical considerations.

311 N.C. at 636, 319 S.E.2d at 256 (citations omitted) (emphasis added). In addition, many other decisions of this Court and the Court of Appeals have found expressly that it is reasonable to infer that readily mobile contraband is kept at hand, whether in a dwelling, an outbuilding, or a vehicle. *See State v. Reid*, 286 N.C. 323, 210 S.E.2d 422 (1974) (search of car upheld without evidence it was present during surveillance or when officers obtained war-

rant); *State v. Courtright*, 60 N.C. App. 247, 298 S.E.2d 740, *disc. rev. denied*, 308 N.C. 192, 302 S.E.2d 245 (1983) (warrant for home extends to vehicle on premises); *State v. Mavrogianis*, 57 N.C. App. 178, 291 S.E.2d 163, *disc. rev. denied*, 306 N.C. 562, 294 S.E.2d 227 (1982) (search of car in campus parking lot, though not specified in warrant for dormitory room, upheld as "natural repository").

Under the totality of the circumstances presented, the magistrate in the present case had a more than ample basis upon which to find probable cause to authorize a search of the defendants' residence. "A grudging or negative attitude by reviewing courts toward warrants," is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Gates*, 462 U.S. at 236, 76 L. Ed. 2d at 547 (quoting *United States v. Ventresca*, 380 U.S. 102, 109, 13 L. Ed. 2d 684, 689 (1965)). "[T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Id.* at 237 n.10, 76 L. Ed. 2d at 547 n.10 (quoting same); *State v. Louchheim*, 296 N.C. 314, 324, 250 S.E.2d 630, 636, *cert. denied*, 444 U.S. 836, 62 L. Ed. 2d 47 (1979) (quoting same). While it remains true that the private residence is the most highly protected of all places under the Fourth Amendment, residents cannot claim unconditional sanctuary therein merely because they operate a drive-through drug service outside the residence rather than inviting their clientele inside.

The decision of the Court of Appeals, awarding the defendants a new trial on the ground that the trial court erred in denying their motions to suppress evidence seized pursuant to the search warrant in the present case, is reversed. This case is remanded to the Court of Appeals for further action not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JOHN LAVELLE MADRIC

No. 108A89

(Filed 7 February 1991)

1. **Criminal Law § 75 (NCI4th)— motion for change of venue—opinion testimony excluded—no prejudice**

There was no prejudice in a prosecution for murder, kidnapping, and armed robbery in the trial court's excluding from defendant's change of venue hearing opinion testimony on whether defendant could receive a fair trial in Rockingham County. In cases in which a jury has been selected and the trial court has thereafter considered the defendant's renewed motion for a change of venue, any opinion testimony given during a pretrial motion hearing will be of little value because the trial court will have before it the questions put to the actual jurors and their answers. Any error in excluding opinion testimony during an earlier pretrial motion hearing will be held harmless absent a clear showing to the contrary by the defendant.

Am Jur 2d, Criminal Law §§ 378, 382, 385-387.

2. **Criminal Law § 78 (NCI4th)— motion for change of venue—denied—no abuse of discretion**

The trial court did not abuse its discretion in a prosecution for murder, kidnapping, and armed robbery by denying defendant's motion for a change of venue where ten articles were introduced concerning the crimes for which defendant was to be tried; those articles were primarily factual; the trial court inquired at the outset whether any prospective jurors had read or heard about defendant's case before coming to court; the trial court inquired of those who answered in the affirmative whether they had formed opinions which would interfere with their ability to give defendant a fair and impartial trial; those who stated that they had formed opinions or that they could not give the defendant a fair and impartial trial were excused by the court; the remaining prospective jurors were questioned through the standard selection procedure; ten of the first twelve jurors passed by the State knew nothing about the case; defendant peremptorily excused six of the first twelve jurors; five of the twelve who actually

served had heard or read about the case; and all of the jurors who actually served stated unequivocally that they had formed no opinions about the case and would base their opinions solely on the evidence presented at trial.

Am Jur 2d, Criminal Law §§ 378, 385.

Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.

3. Criminal Law § 75 (NCI3d); Searches and Seizures § 14 (NCI4th)— evidence seized and statement made—admissible

The trial court did not err in a prosecution for murder, kidnapping, and armed robbery by denying defendant's motions to suppress the statement and evidence seized from his mobile home where the court made proper findings, there was competent evidence supporting the findings, and the findings supported the conclusion that defendant's consent to the search was voluntarily given and that he voluntarily gave his statement.

Am Jur 2d, Searches and Seizures § 46.

4. Constitutional Law § 202 (NCI4th)— kidnapping and murder—double jeopardy—not raised at trial

Defendant waived the issue of double jeopardy in the entering of judgments against him for both first degree murder and kidnapping by not raising any double jeopardy issue at trial.

Am Jur 2d, Abduction and Kidnapping § 9; Criminal Law § 461.

APPEAL of right by the defendant, pursuant to N.C.G.S. § 7A-27(a), from judgment imposing a sentence of life imprisonment for first degree murder, entered by *Beaty, J.*, on 29 September 1988 in the Superior Court, ROCKINGHAM County. On 14 March 1989, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on his appeal of additional judgments imposing sentences of less than life imprisonment. Heard in the Supreme Court on 8 October 1990.

Lacy H. Thornburg, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by M. Patricia Devine, Assistant Appellate Defender, for defendant-appellant.

MITCHELL, Justice.

The defendant was indicted on 22 February 1988 for first degree murder, first degree kidnapping, and robbery with a dangerous weapon. The jury returned verdicts finding the defendant guilty of all offenses as charged. After a sentencing proceeding under N.C.G.S. § 15A-2000, the jury recommended a life sentence for the first degree murder conviction. The trial court sentenced the defendant to life imprisonment for the murder and to consecutive sentences of 20 and 40 years imprisonment, respectively, for the kidnapping and robbery convictions. The defendant appealed the judgment imposing a sentence of life imprisonment to this Court as a matter of right. On 14 March 1989, this Court allowed his motion to bypass the Court of Appeals on his appeals from the kidnapping and robbery convictions.

On appeal, the defendant brings forward three assignments of error. First, he contends the trial court abused its discretion by denying his motion for change of venue. Second, he argues that the trial court erred in denying his motions to suppress evidence seized from his mobile home and a statement he gave to law enforcement officers. Finally, he maintains that the trial court erred by entering judgments against him on both the first degree murder and the kidnapping convictions. We conclude that the defendant's assignments of error are without merit.

The State offered evidence tending to show that at 8:30 p.m. on 4 February 1988, Sadie Booker, a pregnant mother of two, left home to run errands at the local shopping mall. Early the next morning, a deputy sheriff found Booker's car straddling a roadside ditch. The car was covered with frost and the letters "KKK" were drawn on the windshield, the back windows, the driver's side windows and the back seat. There were bloodstains on the back seat, and a trail of blood led from the car into the defendant's driveway on the other side of the road. The deputy sheriff and two detectives followed the trail of blood and found Booker's naked body in the woods beside the driveway. The officers noted that the body bore stab wounds around the neck and chest. The trail of blood led to the defendant's door, and there were bloodstains on the doorstep, doorknob and screen door.

The officers knocked on the door, and when the defendant opened the door, the officers observed fresh scratch marks on the left side of his face. With the defendant's consent, the officers

searched his mobile home. In the defendant's wood-burning stove, they found small pieces of blue cloth, a fingernail file, lipstick containers, perfume sample bottles and metal remnants of a change purse and pocketbook. The ashes also contained metal snaps of a type used on brassieres and ladies' clothing.

The defendant testified that he was looking for a ride home from McDonald's around 9:30 p.m. on 4 February. Three men gave him a ride, during which he fought with one of them and his face was scratched. After the fight, a police officer gave him a ride to a bridge near his home. While walking home from the bridge, he saw a car in the ditch. He examined the car, saw a purse on the floorboard, picked it up and took it to his home. Later, he returned and took the battery from the car. The battery was too small to power his car, so he tossed it down a hill. He returned to his home, threw contents of the purse into his fireplace and went to bed. He denied killing Sadie Booker.

Other pertinent facts are hereinafter set forth.

[1] The defendant first assigns as error the trial court's denials of his initial and renewed motions for change of venue. Prior to trial, the defendant filed a motion under N.C.G.S. § 15A-957 seeking a change of venue on the ground that existing prejudice against him in Rockingham County was so great that he could not receive a fair and impartial trial there. The trial court denied the defendant's motion at the close of a pretrial hearing and denied the motion again when the defendant renewed it after the jury had been selected, after three of the State's witnesses had testified, and at the close of the State's case. On appeal, the defendant argues that the trial court's rulings on his motion deprived him of his constitutional right to a fair trial.

The burden of proof in a hearing on a motion for a change of venue due to existing prejudice in the county in which a prosecution is pending is upon the defendant. *State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (1987); *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984). In order to prevail, the defendant must show that there is a reasonable likelihood that due to such prejudice he will not receive a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600 (1966); *State v. Hunt*, 325 N.C. 187, 381 S.E.2d 453 (1989). The determination of whether the defendant has carried this burden rests within the sound discretion of the trial court. *Id.* Absent a showing of abuse of discretion, its ruling

will not be overturned on appeal. *Id.; State v. Gardner*, 311 N.C. at 497, 319 S.E.2d at 598.

During the pretrial hearing on his motion for change of venue, the defendant put on evidence concerning the demographics of Rockingham County, local newspaper articles concerning the investigation of the crime for which the defendant was indicted in this case, and newspaper circulation figures. The defendant also sought to introduce testimony of one homemaker and several attorneys practicing in Rockingham County concerning their opinions as to whether the defendant could receive a fair trial there. Although the trial court permitted testimony by these witnesses concerning any conversations or comments they had heard about the defendant's case, the witnesses' statements of their opinions on the ultimate issue to be decided by the trial court—whether the defendant could receive a fair trial in Rockingham County—were not accepted in evidence and were allowed for record purposes only.

The defendant argues, *inter alia*, under this assignment of error that the trial court erred in excluding opinion testimony concerning whether he could receive a fair trial in Rockingham County. Assuming *arguendo* that such opinion testimony was admissible under N.C.G.S. § 8C-1, Rule 701 or Rule 704 as evidence helpful to the trial court as the fact finder on the ultimate issue, we conclude that any error in excluding it was harmless. In this regard, we note that the issue of admissibility of such opinion testimony must be decided as a question of statutory construction controlled by the North Carolina Rules of Evidence, N.C.G.S. § 8C-1 (1988). Therefore, the burden is upon the defendant to show that he was prejudiced by any error in the trial court's exclusion of such evidence. N.C.G.S. § 15A-1443(a) (1988).

The issue before the trial court here was whether it was "reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed." *State v. Jerrett*, 309 N.C. 239, 254-55, 307 S.E.2d 339, 347 (1983). Only in the most extraordinary cases can an appellate court determine *solely* upon evidence adduced prior to the actual commencement of jury selection that a trial court has abused its discretion by denying a motion for change of venue due to existing prejudice against the defendant. *E.g., Rideau v. Louisiana*, 373 U.S. 723,

10 L. Ed. 2d 663 (1963). Although opinion testimony of members of the community in which the defendant is to be tried as to whether the defendant can receive a fair trial may, in proper circumstances, be relevant and admissible, such evidence is not determinative on the question. In cases such as this in which a jury has been selected and the trial court has thereafter considered the defendant's renewed motion for change of venue, any opinion testimony given during a pretrial motion hearing as to whether the defendant can receive a fair trial will be of little value. In such cases, the trial court will have before it questions put to the actual jurors in the case and their answers—better and more reliable evidence on the question. In those cases, at least, any error by the trial court in excluding such opinion testimony during an earlier pretrial motion hearing will be held harmless absent a clear showing to the contrary by the defendant. We conclude that the defendant has failed to make such a showing and, therefore, we hold that any error by the trial court in excluding the opinion testimony proffered during the pretrial hearing on the defendant's motion was harmless.

[2] We turn next to the greater question raised by this assignment of error—whether the trial court abused its discretion by denying the defendant's motion for change of venue. The best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective jurors' responses to questions during the jury selection process. *State v. Richardson*, 308 N.C. 470, 480, 302 S.E.2d 799, 805 (1983). "If an impartial jury actually cannot be selected, that fact should become evident at the *voir dire*. The defendant will then be entitled to any actions necessary to assure that he receives a fair trial." *United States v. Haldeman*, 559 F.2d 31, 63 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933, 53 L. Ed. 2d 250, *reh'g denied*, 433 U.S. 916, 53 L. Ed. 2d 1103 (1977).

Where, as here, a jury has been selected to try the defendant and the defendant has been tried, the defendant must prove the existence of an opinion in the mind of *a juror who heard his case* that will raise a presumption of partiality. *Murphy v. Florida*, 421 U.S. 794, 800, 44 L. Ed. 2d 589, 595 (1975). The Supreme Court of the United States has noted in this regard that:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of

> swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722-23, 6 L. Ed. 2d 751, 756 (1961). Additionally, as we have previously pointed out:

> In *State v. Richardson*, 308 N.C. 470, 302 S.E.2d 799, this Court stated that "the most persuasive evidence that the pretrial publicity was not prejudicial or inflammatory" was the potential jurors' responses to questions asked during the *voir dire* hearing conducted to select the jury. 308 N.C. at 480, 302 S.E.2d at 805. . . . Moreover, we stated in *Richardson* that the most important evidence that the pretrial publicity about the case was not prejudicial was that each juror selected to hear the case "unequivocally answered in the affirmative when asked if they could set aside what they had previously heard about defendant's case and determine defendant's guilt or innocence based solely on the evidence introduced at trial." *Id.*

State v. Hunt, 325 N.C. 187, 199, 381 S.E.2d 453, 460 (1989).

In the case *sub judice*, ten articles concerning the crimes for which the defendant was to be tried were introduced as exhibits. However, as the trial court concluded, they were primarily factual in nature. "This Court has consistently held that factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue." *State v. Gardner*, 311 N.C. at 498, 319 S.E.2d at 598.

The trial court inquired at the outset of the jury selection process whether any prospective jurors had read or heard about the defendant's case before coming to court. As to those who answered in the affirmative, the trial court inquired further whether they had, as a result, formed opinions that would interfere with

their ability to give the defendant a fair and impartial trial. Those who stated they had formed opinions or who stated they could not give the defendant a fair and impartial trial were summarily excused for cause by the trial court. The remaining prospective jurors were questioned thereafter through the standard selection procedure.

Ten of the first twelve jurors the State passed to the defendant knew nothing about the case. The defendant excused peremptorily six of the first twelve jurors. Of the twelve who actually served as jurors during the defendant's trial, five had heard or read about the case; however, all of them stated unequivocally that they had formed no opinions about the case and would base their decisions solely on the evidence presented at trial. We cannot say, in light of such evidence, the trial court abused its discretion, either by concluding that the defendant had failed to rebut the presumption of juror impartiality, or by denying the defendant's motion for a change of venue. *See generally Murphy v. Florida*, 421 U.S. 794, 44 L. Ed. 2d 589 (1975); *State v. Hunt*, 325 N.C. 187, 381 S.E.2d 453 (1989); *State v. Richardson*, 308 N.C. 470, 302 S.E.2d 799 (1983). This assignment of error is without merit.

[3] The defendant next assigns as error the trial court's denial of his motion to suppress the evidence seized from his mobile home and the statement he gave on 5 February 1988. He contends that the State and the defense presented conflicting evidence at the *voir dire* hearing on his motions to suppress the evidence seized and his statement. Consequently, he argues, the trial court erred by failing to make specific findings of fact and conclusions of law when denying his motions to suppress. However, after the defendant's brief asserting this purported error was filed, the trial court's findings of fact and conclusions of law were made part of the record on a motion to amend granted by this Court on 7 August 1990.

The trial court made proper findings and concluded that the defendant's consent to the search was voluntarily given. The trial court also found that the defendant was advised of and waived his *Miranda* rights before he voluntarily gave his statement. These findings of fact are supported by testimony showing that at least two officers were invited inside the mobile home when they knocked on the door. Before the search began, the defendant signed a consent to search form which had been read and explained to him. In addition, there was testimony that the defendant was advised

of his *Miranda* rights and indicated that he understood them. Afterwards, he waived his rights and gave a statement to the officers. Since there is competent evidence supporting the trial court's findings of fact, the findings are conclusive. *State v. Barfield*, 298 N.C. 306, 339, 259 S.E.2d 510, 535 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980). Those findings in turn support the trial court's conclusions. As a result, the trial court did not err in denying the defendant's motion to suppress. *Id.* This assignment of error is without merit.

[4] The defendant next attempts to argue that the trial court deprived him of constitutional rights by entering judgments against him on both the first-degree murder and the kidnapping convictions. The defendant asserts that the trial court thereby subjected him to double jeopardy for the single act of causing injuries to Sadie Booker resulting in her death. The defendant candidly concedes, however, that he did not raise any double jeopardy issue at trial. Therefore, this issue has been waived. *State v. Mitchell*, 317 N.C. 661, 346 S.E.2d 458 (1986); *State v. McKenzie*, 292 N.C. 170, 232 S.E.2d 424 (1977).

The defendant received a fair trial free from prejudicial error, and we find

No error.

STATE OF NORTH CAROLINA v. ARTHUR MARTIN VAUSE, JR.

No. 275A90

(Filed 7 February 1991)

1. Criminal Law § 616 (NCI4th)— motion to dismiss—substantial evidence test

When a defendant moves for dismissal in a criminal case, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. It is not the rule in this jurisdiction that the trial court is required to determine that the evidence excludes every reasonable

hypothesis of innocence before denying a defendant's motion to dismiss.

Am Jur 2d, Criminal Law § 512.

2. **Criminal Law § 621 (NCI4th)— motion to dismiss—circumstantial evidence**

The test of the sufficiency of the evidence to withstand the defendant's motion to dismiss is the same whether the evidence is direct, circumstantial, or both. Therefore, if a motion to dismiss calls into question the sufficiency of circumstantial evidence, the issue for the court is whether a reasonable inference of the defendant's guilt may be drawn from the circumstances.

Am Jur 2d, Criminal Law § 512; Evidence §§ 1125, 1126.

3. **Homicide § 4.3 (NCI3d)— premeditation, deliberation and intent to kill—effect of passion**

One may deliberate, may premeditate and may intend to kill after premeditation and deliberation although prompted and to a large extent controlled by passion at the time.

Am Jur 2d, Homicide §§ 52, 53.

4. **Homicide § 21.5 (NCI3d)— premeditation and deliberation—intent to kill—sufficiency of evidence**

Evidence tending to show that defendant stabbed the female victim at least thirty-nine times after she had been shoved to a couch in her home by defendant and that defendant stabbed her with sufficient force to bend the first knife he used before he picked up a second knife to complete his murderous attack would permit reasonable findings that the killing was especially brutal and that the defendant struck many of the deadly blows after the victim had been felled and rendered helpless, and such evidence, standing alone, was substantial evidence tending to show premeditation and deliberation. Further, substantial evidence tending to show premeditation and deliberation was also substantial evidence of intent to kill.

Am Jur 2d, Homicide § 439.

5. Homicide § 25.2 (NCI3d)— intent to kill, premeditation and deliberation—mental capacity—instructions sufficient

Pattern jury instructions given by the trial court in a first degree murder case included the substance of defendant's requested instructions on intent to kill, premeditation and deliberation, and the court's instructions on mental capacity to form a specific intent or to premeditate or deliberate also included the substance of instructions requested by defendant. Therefore, the trial court did not err in declining to give defendant's requested instructions.

Am Jur 2d, Homicide § 497.

APPEAL by the defendant as a matter of right, pursuant to N.C.G.S. § 7A-27(a), from a judgment sentencing him to life imprisonment entered by *Freeman, J.*, on 13 February 1990, in Superior Court, GUILFORD County. Heard in the Supreme Court on 12 November 1990.

Lacy H. Thornburg, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.

H. Davis North III and A. Wayland Cook for the defendant-appellant.

MITCHELL, Justice.

The defendant Arthur Martin Vause, Jr. was tried upon a proper bill of indictment charging him with murder. A jury found the defendant guilty of first degree murder. After a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the same jury recommended a sentence of life imprisonment. The trial court entered judgment sentencing the defendant to life imprisonment, and the defendant appealed to this Court as a matter of right.

The defendant argues on appeal that the trial court erred by denying his motion to dismiss the first degree murder charge against him and by refusing to give certain jury instructions he requested. We find no error.

The State's evidence tended to show that the defendant Vause and Lori Lewis were living together in an apartment in Lexington in 1988. The defendant was fired from his job, and the couple eventually had to leave the apartment because they had no money to pay the rent.

In late August or early September of 1988, the defendant called his stepmother, Nancy Cook, in Greensboro. She told him that she could not lend him any money but that he and Lewis could live with her until he found a job and could pay his bills. The defendant and Lori Lewis moved in with Nancy Cook who was friendly, bought them food and made them feel welcome. After a week, Cook told Lori Lewis that she and the defendant would have to leave because they "were getting on her nerves and she couldn't handle it." When the defendant came home, Lewis told him what Cook had said. The defendant talked to Cook, and she said that the defendant and Lewis had to leave as soon as possible. However, Cook allowed the couple to spend that night in her home.

Sometime the next day, the defendant and Cook began arguing about the couple still being there, and she pushed the defendant. The defendant then pushed Cook down on a couch, grabbed a knife from an end table beside the couch and began stabbing her. When the knife bent, he threw it down, picked up another knife from the end table and continued stabbing Cook. Cook was screaming, and the defendant put his hand over her mouth to stop her screaming. She managed to yell that he was killing her and called out for Lori Lewis to help her. The defendant then got on top of Cook and continued stabbing her in her chest and neck.

After the defendant finished stabbing Cook, he sat down on the couch for a couple of minutes. He then got up, took off his clothes and rinsed off in the shower. He told Lewis to put the clothes that he had been wearing in a garbage bag and to get some other clothes together for them to wear and put them in garbage bags. The defendant then had Lewis help him drag Cook into a bedroom where he wrapped Cook in a blanket and left her beside the bed. The defendant took about $300.00 from Cook's pocketbook. He gathered the garbage bags containing the clothes, closed the blinds and locked the apartment. The defendant then drove away with Lewis in Cook's car.

The defendant told Lewis they were going to Canada. They drove through Virginia and West Virginia, where he disposed of the garbage bag containing the clothes he had worn when he stabbed Cook. The defendant and Lewis then proceeded to Pennsylvania, where they registered under a false name and spent the night. The next day they went to New York where they stayed for several days. Lewis testified that the defendant "was always looking out

the window, [to] make sure, you know, there wasn't any cops around." The defendant and Lewis later went to Niagara Falls where they stayed for two or three days. Lewis did not want to go to Canada, so she told the defendant that he could not enter Canada without a passport. The defendant and Lewis then started to Detroit, but they ran out of money. In Ohio, the car ran out of gas and they stopped on the side of the road. A state trooper gave them a ride to a toll booth for the defendant to call a garage, after the defendant told the trooper that the car had broken down. After the trooper left, the defendant and Lewis spent the night in the woods beside the toll booth. The next day, Lewis convinced the defendant that they should turn themselves in to the police. They went to a nearby gas station and called the local police. Shortly thereafter, police officers took the defendant and Lewis into custody.

On 8 September 1988, Officer Terry Scott of the Greensboro Police Department entered the residence of Nancy Cook. He found Cook's decomposing body covered with a blanket in a bedroom. He picked up the blanket and immediately noticed that the body bore a large gash in the throat and puncture wounds in the chest. He concluded that the death had not been by natural causes and immediately secured the crime scene.

Gloria Pettiford testified that she lived in the same apartment complex as Nancy Cook, and they shared the same front entrance. On 5 September 1988, Pettiford arrived home and could hear screaming coming from within Cook's apartment. She heard a female voice say, "Oh, God, why are you doing this to me?" The screaming then started again and continued until Pettiford saw "two kids getting into a blue station wagon and they left." One was male and the other female.

Dr. Thomas Clark, a forensic pathologist, performed an autopsy on the body of Nancy Cook on 9 September 1988. The body contained multiple stab wounds on the neck, chest, both arms and the right hand. In Dr. Clark's opinion, the stab wounds were inflicted prior to death and were the cause of death. An examination of the body revealed six stab wounds to the front of the neck and twenty-four stab wounds to the left side of the chest. Several of the chest wounds went into the chest cavity and came in contact with the heart; one punctured the heart, and one punctured the left lung. Eight "defense wounds" found on the arms of the body were consistent with the victim having raised an arm in a protec-

tive stance or raised the palm to try to grab a knife while being attacked. A total of at least thirty-nine discrete stab wounds were inflicted upon Cook. Dr. Clark testified that, because "[s]ome of the wounds had more than one track, indicating that the knife was withdrawn and inserted again through the same skin opening," Cook could have been stabbed more than thirty-nine times.

The defendant introduced the testimony of only one witness, Dr. Billy Royal, a forensic psychiatrist. Dr. Royal testified that in his opinion the defendant was emotionally and mentally disturbed and did not have the capacity to make and carry out plans or to form the intent to kill at the time he killed Nancy Cook. Dr. Royal also was allowed to testify, over objection by the State, that the defendant did not have the capacity to premeditate and deliberate at the time of the murder. Dr. Royal testified further that, in his opinion, the defendant

> had been under significant pressure, was very depressed, and somewhat frantic in terms of what was happening to him. Even so, he was still confident and responsible in the usual sense, until seconds prior to the murder in which all the things that had happened to him then resulted in his "snapping" and becoming temporarily psychotic and not in control of his functions.

The defendant first assigns as error the trial court's denial of his motion to dismiss the first degree murder charge against him at the close of all of the evidence. In support of this assignment, the defendant contends that no substantial evidence was introduced tending to show that he killed the victim intentionally after premeditation and deliberation.

[1] When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Whether evidence presented constitutes substantial evidence is a question of law for the court. *Id.* at 66, 296 S.E.2d at 652. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The term "substantial evidence" simply means "that the evidence must be existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

The trial court's function is to determine whether the evidence will permit *a reasonable inference* that the defendant is guilty of the crimes charged. *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652. "In so doing the trial court should only be concerned that the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *Id.* It is *not* the rule in this jurisdiction that the trial court is required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss. *Powell*, 299 N.C. at 101, 261 S.E.2d at 118; *State v. Stephens*, 244 N.C. 380, 383-84, 93 S.E.2d 431, 433 (1956).

[2] In ruling on a motion to dismiss:

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Powell, 299 N.C. at 99, 261 S.E.2d at 117. The test of the sufficiency of the evidence to withstand the defendant's motion to dismiss is the same whether the evidence is direct, circumstantial, or both. Therefore, if a motion to dismiss calls into question the sufficiency of circumstantial evidence, the issue for the court is whether a reasonable inference of the defendant's guilt may be drawn from the circumstances. *Id.*

In applying the foregoing rules to a motion to dismiss a first degree murder prosecution, the trial court must determine whether the evidence, viewed in the light most favorable to the State, is sufficient to permit a jury to make a reasonable inference and finding that the defendant, after premeditation and deliberation, formed and executed a fixed purpose to kill. *State v. Walters*, 275 N.C. 615, 623, 170 S.E.2d 484, 490 (1969). The defendant in the present case specifically argues that no substantial evidence was introduced at trial to support a reasonable inference or finding that he killed the victim intentionally or with premeditation and deliberation. Instead, he argues that all of the evidence tends to show that he acted as a result of passion and emotion arising from his argument with the victim.

[3] "First degree murder is the unlawful killing of a human being with malice, premeditation and deliberation." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981). Premeditation and deliberation generally must be established by circumstantial evidence, because they ordinarily " 'are not susceptible to proof by direct evidence.' " *Id.* (quoting *State v. Love*, 296 N.C. 194, 203, 250 S.E.2d 220, 226-27 (1978)). "Premeditation" means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. *Id.* "Deliberation" means that the intent to kill was formed while the defendant was in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation. *Id.* In the context of determining the existence of deliberation, however, the term "cool state of blood" does not mean " 'an absence of passion and emotion.' " *Id.* (quoting *State v. Faust*, 254 N.C. 101, 108, 118 S.E.2d 769, 773, *cert. denied*, 308 U.S. 851, 7 L. Ed. 2d 49 (1961)). One may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time. *Id.*

The defendant in the present case argues that the evidence introduced at his trial would support no reasonable finding other than that he acted under the influence of a violent passion suddenly aroused by sufficient provocation. Therefore, he contends that there was no substantial evidence tending to show that his action in killing Cook was intentional, premeditated or deliberate. We do not agree.

Premeditation and deliberation are processes of the mind. In most cases, they are not subject to proof by direct evidence but must be proved, if at all, by circumstantial evidence. Among other circumstances from which premeditation and deliberation may be inferred are (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds. *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693 (1986).

[4] In the present case, there was evidence tending to show that the defendant stabbed his victim no less than thirty-nine times. He stabbed her repeatedly with sufficient force to bend the first knife he used before he picked up a second knife to complete his murderous attack. The number of stab wounds inflicted upon the female victim after she had been shoved to a couch in her home by the defendant would permit a reasonable finding that the killing was especially brutal and that the defendant struck many of the deadly blows after the victim had been felled and rendered helpless. Such evidence, standing alone, was substantial evidence tending to show premeditation and deliberation. *See State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1209 (1976). The trial court did not err in concluding that there was substantial evidence tending to show that the defendant killed the victim after premeditation and deliberation. Further, substantial evidence tending to show premeditation and deliberation is also substantial evidence of intent to kill. *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 839 (1981). Therefore, the trial court did not err in denying the defendant's motion to dismiss, and this assignment of error is without merit.

[5] The defendant next assigns as error the trial court's refusal to give certain instructions on first degree murder as requested by the defendant. The trial court gave the appropriate pattern jury instructions, in their entirety, on the elements of first degree murder. With regard to the elements of intent to kill, premeditation and deliberation, the defendant requested additional instructions which he now contends would have elaborated on and clarified the language used in the pattern jury instructions. "Neither statutory nor case law requires that the trial court's charge be given exactly in the words of the tendered request for instructions. It is sufficient if the trial court gives the requested instructions in substance." *State v. Avery*, 315 N.C. 1, 33, 337 S.E.2d 786, 804 (1985). It suffices here to say that the pattern instructions given by the trial court included the substance of the requested instructions, and that the trial court did not err in declining to give the requested instructions. This assignment is without merit.

By his next assignment of error, the defendant contends that the trial court erred by failing to give certain special instructions the defendant requested concerning his mental capacity. In his brief, the defendant has failed to specifically identify or refer us to any portions of the trial court's instructions on mental capacity

which he now contends were inadequate or erroneous. *See* N.C.R. App. P. 10(c)(2) and 28(b)(5). Having reviewed the requested instructions and compared them with the instructions on mental capacity to form a specific intent or to premeditate or deliberate as actually given by the trial court, we conclude that the instructions given included the substance of the requested instructions. In fact, the instructions given appear to include the requested instructions almost verbatim. This assignment is without merit.

The defendant received a fair trial free of prejudicial error.

No error.

M. A. BHATTI v. CARL D. BUCKLAND

No. 431A90

(Filed 7 February 1991)

Unfair Competition § 1 (NCI3d) — sale of land at auction — inaccurate description — not covered by homeowner's exemption

The Court of Appeals' decision that the sale of two lots at auction with a faulty description was not "in or affecting commerce" within the meaning of N.C.G.S. § 75-1.1 was reversed where the presence of fraud was undisputed, the sale did not fall within either of the two statutory exemptions, and the transaction at issue was indisputably a commercial land transaction that affected commerce in the broad sense. Assuming that a homeowner's exemption exists, its application is limited to an individual involved in the sale of his or her own residence; the evidence in this record was insufficient to carry defendant's burden of proving that he was a "private party engaged in the sale of a residence." *Blackwell v. Dorosko*, 93 N.C. App. 310, is disapproved to the extent that it may be read as exempting from the Act the sale of property not used as a residence and not otherwise shown to be outside the commercial context to which the protection afforded by N.C.G.S. § 75-1.1 is applicable.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 99 N.C. App. 750, 394 S.E.2d 192 (1990), affirming an order denying plaintiff's motion for treble damages and attorney fees entered by *Fountain, J.*, on 23 August 1989 in Superior Court, ALAMANCE County. Heard in the Supreme Court 10 December 1990.

Latham, Wood & Hawkins, by B.F. Wood, and Stern, Graham & Klepfer, by William A. Eagles, for plaintiff appellant.

Douglas R. Hoy for defendant appellee.

WHICHARD, Justice.

Defendant owned two lots in a tract of land known as the Whitesell Home Place in Alamance County. In June 1987 defendant, through his agent Teague Auction and Realty, Inc. (Teague), advertised the property for sale at a public auction scheduled for 27 June 1987. His ad stated:

> Tract #1 Consists of 1.56 Acres with 302.06 ft. Fronting on Williamson Ave. 278.99 ft. Deep [and including a house and several outbuildings]. . . . Tract #2 Consists of 1.13+ Acres . . . w/ 299.61 ft. Fronting Whitesell Drive. 201.84 ft. Deep . . . . *Investors, Speculators, Homeseekers*, This Is Some Choice Property That You Will Want To Have A Look At. (Emphasis added.)

The ad listed defendant as the property owner and stated that Teague, third party defendant at trial, would conduct the sale.

At the auction on 27 June 1987, plaintiff purchased Tract #1 for $66,000 and Tract #2 for $39,000. Pursuant to the advertised terms of the sale, plaintiff deposited ten percent of the $105,000 purchase price, *i.e.*, $10,500, with Teague. The terms required that the balance be paid "upon delivery of deed." Subsequently, plaintiff discovered that the advertised frontage on Tract #1 was incorrect and that the deed plat in the Alamance County Register of Deeds office showed that the frontage was only 268.4 feet, substantially less than the 302.06 feet represented in the ad.

On 12 August 1987, plaintiff filed a complaint against defendant, alleging that defendant had misrepresented Tract #1's frontage and claiming that "other descriptions set forth in said advertisement, circulars, and flyers, were misleading and substantially dif-

ferent from the actual size and dimensions of said property." Plaintiff further alleged that defendant had refused to refund plaintiff's payment of $10,500, and that plaintiff had relied on defendant's intentionally or recklessly misleading statements to his detriment. Plaintiff concluded by alleging that defendant's actions constituted "unfair or deceptive acts or practices" in violation of N.C.G.S. Chapter 75. Plaintiff prayed for: (1) recovery of the $10,500 plus interest from 27 June 1987; (2) treble damages and reasonable attorney fees; and (3) payment of the court costs by defendant.

Defendant answered, denying that the descriptions were intentionally misrepresented and denying that plaintiff reasonably relied on the descriptions. Defendant also contended that "publication of the plat description, including accurate meets [sic] and bounds and distances, together with the announcement prior to the auction sale, correcting the error in advertising . . . constitutes estoppel against the plaintiff's action." Defendant counterclaimed for a sum of $150,000, attorney fees, and court costs, stating:

> the reason defendant was auctioning said property was that he had certain financial obligations, including obligations to the Internal Revenue Service, which required immediate payment, that as a result of the Plaintiff's breach of the Sales Contract and his failure to tender[ ] the agreed upon Purchase Price, the Defendant was required to sell his home and incur moving and storage expenses, disrupt his family, suffer interest payments and suffer other ancillary and other consequential damages.

Further, defendant filed a third party complaint against Teague, alleging that Teague was responsible for advertising and conducting the sale, and seeking indemnification and contribution from Teague. Teague answered, alleging that: (1) there was no mistake in the description of Tract #2, and (2) defects in the description of Tract #1 were "corrected by stopping the sale and passing around plats of the property giving the correct front footage . . . [and] after inspection had been made by all of those who wished to see said plat, the sale was resumed."

At trial, the jury found that the sale was procured by defendant's "fraudulent representation" and that it was not the result of a mutual mistake. It found that plaintiff was entitled to recover from defendant $10,500 with interest from the date the suit was commenced, plus costs. The trial court entered judgment according-

ly, but denied plaintiff's motion to treble the damages pursuant to N.C.G.S. Chapter 75.

On plaintiff's appeal, the majority in the Court of Appeals—relying on *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979), and *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988)—concluded that Chapter 75 did not apply because defendant "was a private individual who engaged a realtor to auction a residence on his behalf." *Bhatti v. Buckland*, 99 N.C. App. 750, 752, 394 S.E.2d 192, 193 (1990). Judge Greene dissented, reasoning that unlike in both *Rosenthal* and *Robertson*, "no record evidence supports a finding that defendant was a homeowner selling his own home," so the sale in question was "in or affecting commerce" within the meaning and intent of that phrase as used in N.C.G.S. § 75-1.1. *Bhatti*, 99 N.C. App. at 752, 394 S.E.2d at 194 (Greene, J., dissenting).

Because this case is before us pursuant to N.C.G.S. § 7A-30(2), our review is limited to the issue raised in Judge Greene's dissent: whether defendant's sale of the two lots was "in or affecting commerce" within the meaning and intent of that phrase as used in N.C.G.S. § 75-1.1. N.C.R. App. P. 16(b). For the reasons stated below, we hold that defendant's actions were "in or affecting commerce." We accordingly reverse.

N.C.G.S. § 75-1.1 declares unlawful "[u]nfair methods of competition in or affecting commerce." N.C.G.S. § 75-1.1(a) (1988). The case law applying Chapter 75 holds that a plaintiff who proves fraud thereby establishes that unfair or deceptive acts have occurred. "Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts . . . ." *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975). If a violation of Chapter 75 is found, treble damages must be awarded. *Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 61, 338 S.E.2d 918, 924 ("damages assessed pursuant to G.S. Sec. 75-1.1 are trebled automatically"), *cert. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986); *see also Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 715 (4th Cir.) ("award of treble damages is a right of the successful plaintiff"), *cert. denied*, 464 U.S. 848, 78 L. Ed. 2d 143 (1983). Once the plaintiff has proven fraud, thereby establishing prima facie a violation of Chapter 75, *see Powell v. Wold*, 88 N.C. App. 61, 68, 362 S.E.2d 796, 800 (1987), the burden shifts to the defendant to prove that he is exempt from the provisions of N.C.G.S.

§ 75-1.1. N.C.G.S. § 75-1.1(d) (1988); *see Edmisten, Attorney General v. Penney Co.*, 292 N.C. 311, 314, 233 S.E.2d 895, 897 (1977); *Olivetti Corp. v. Ames Business Systems, Inc.*, 81 N.C. App. 1, 22, 344 S.E.2d 82, 94 (1986), *aff'd in part and rev'd in part on other grounds*, 319 N.C. 534, 356 S.E.2d 578 (1987).

Application of Chapter 75 is not unfettered, however. The statute itself exempts both "professional services rendered by a member of a learned profession," N.C.G.S. § 75-1.1(b), and acts by an advertising medium unaware of their "false, misleading or deceptive character." N.C.G.S. § 75-1.1(c) (1988). Our Court of Appeals has engrafted a further exemption. In two cases—*Rosenthal*, 42 N.C. App. 449, 257 S.E.2d 63, and *Robertson*, 88 N.C. App. 437, 363 S.E.2d 672—that court has held that private homeowners selling a residence are not subject to the Act. In *Rosenthal*, the court stated:

> The defendants . . . were not engaged in trade or commerce. They did not by the sale of their residence on this one occasion become realtors. It is clear from the cases involving violation of the Unfair Trade Practices Act that the alleged violators must be engaged in a business, a commercial or industrial establishment or enterprise.

Rosenthal, 42 N.C. App. at 454, 257 S.E.2d at 67; *see also Robertson*, 88 N.C. App. at 443, 363 S.E.2d at 676 ("private parties engaged in the sale of a residence [are] not involved in trade or commerce and cannot be held liable under [Chapter 75].").

Defendant did not appeal from the jury's finding that the sale here was procured by his "fraudulent representation," so that finding is undisputed. Because the presence of fraud is undisputed, defendant's acts were "unfair or deceptive." *Hardy v. Toler*, 288 N.C. at 309, 218 S.E.2d at 346. The focus of our inquiry, then, is upon whether defendant has met his burden of proving that the sale nevertheless was not "in or affecting commerce" within the meaning and intent of N.C.G.S. § 75-1.1. N.C.G.S. § 75-1.1(a), (d).

It is clear beyond argument that the sale in this case does not fall within either of the two statutory exemptions. It remains, then, to determine whether it falls within the "homeowner's exception" created by the Court of Appeals, or is otherwise exempt. Apart from the "homeowner's exception," no basis for exempting the sale is either argued by the parties or suggested by the record.

While this Court has not passed upon the "homeowner's exception," for purposes of deciding this case we assume, *arguendo*, that it exists, and that the sale by a private party of his or her residence is not within the scope of Chapter 75.

In determining whether defendant has met his burden of proving himself within the scope of the "homeowner's exception," we consider the facts he has proved in the context of the purposes underlying the protections provided by Chapter 75. The General Assembly initially stated the purpose of section 75-1.1 as follows:

> The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business and between persons engaged in business and the consuming public within this State to the end that good faith and fair dealings between buyers and sellers at all level[s] of commerce be had in this State.

N.C.G.S. § 75-1.1 (1975) (quoted in *Threatt v. Hiers*, 76 N.C. App. 521, 522, 333 S.E.2d 772, 773 (1985), *disc. rev. denied*, 315 N.C. 397, 338 S.E.2d 887 (1986)). The law was enacted "to establish an effective private cause of action for aggrieved consumers in this State," and it "was needed because common law remedies had proved often ineffective." *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981); *see also Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 165 (4th Cir. 1985) ("The apparent purpose behind the enactment of § 75-1.1 was the protection of the consuming public.").

The General Assembly subsequently amended section 75-1.1(b) to define "commerce" inclusively as "business activity, *however denominated*," limited only by the express exemptions set forth above. N.C.G.S. § 75-1.1(b) (1988) (emphasis added). The term "business" generally imports a broad definition. *See, e.g.*, Webster's New Collegiate Dictionary 113 (G. & C. Merriam Co., Springfield, Mass., 1953) ("Business, *often an inclusive term*, specifically names the combined activities of those engaged in the purchase and sale of commodities or in related financial transactions") (emphasis added). Other courts have emphasized the inclusive nature of the statute in light of the foregoing considerations. Our Court of Appeals has stated: "The purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public in this State[,] and [it] *applies to dealings between buyers and sellers at all levels of commerce.*"

United Virginia Bank v. Air-Lift Associates, 79 N.C. App. 315, 320, 339 S.E.2d 90, 93 (1986) (emphasis added). A federal court sitting in North Carolina has stated, similarly: "[T]he Act is directed toward maintaining ethical standards in dealings between persons engaged in business and to promote good faith *at all levels of commerce." United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041, 1046 (E.D.N.C. 1979) (emphasis added).

So far as the record here reveals, the transaction at issue was indisputably a commercial land transaction that affected commerce in the broad sense. Defendant's advertising of this property explicitly appealed to "Investors [and] Speculators" as well as "Homeseekers." The more probable inference from this evidence is that the sale was not of residential property. This probability is further advanced by defendant's assertion in his counterclaim that plaintiff's failure to pay "the agreed upon Purchase Price" required defendant "to sell his home." This pleading does nothing to advance the proposition that defendant was selling residential property, but suggests instead that his residence and the property sold here were discrete entities. Assuming that a "homeowner's exception" exists, its application is limited to an individual involved in the sale of his or her own residence. The only evidence in this record tending in any way to prove that the property at issue was residential was that the advertisement noted that the lots to be sold included a house and several outbuildings. This evidence is insufficient to carry defendant's burden of proving that he was a "private party engaged in the sale of a residence."

On the contrary, to the limited extent that the transaction is depicted by the sparse facts in this record, it involved a buyer and seller in a commercial context to which the protections afforded by section 75-1.1, whether viewed literally or purposively, apply. The defendant did not prove that the transaction was anything other than a business activity well within the banks of the stream of commerce as broadly defined by the General Assembly in N.C.G.S. § 75-1.1. As such, plaintiff is entitled to the protection of the statute.

We thus conclude that the sale fell within the ambit of the inclusive phrase "business activities, however denominated," N.C.G.S. § 75-1.1(b), and was therefore "in or affecting commerce" within the meaning and intent of that phrase as used in N.C.G.S. § 75-1.1(a). Because the jury found that the sale was procured by defendant's

"fraudulent representation," plaintiff was entitled to treble damages. *Hardy v. Toler*, 288 N.C. at 309, 218 S.E.2d at 346.

Defendant relies in part on *Blackwell v. Dorosko*, 93 N.C. App. 310, 377 S.E.2d 814, *opinion withdrawn in part on other grounds upon rehearing*, 95 N.C. App. 637, 383 S.E.2d 670 (1989), which held that the owner of a resort condominium unit at Kure Beach, "as a private vendor of realty," could not be subject to liability under N.C.G.S. § 75-1.1 in its sale. *Blackwell*, 93 N.C. App. at 314, 377 S.E.2d at 817-18. It is impossible to determine from the opinion in *Blackwell* whether the condominium unit there was the seller's residence. To the extent that *Blackwell* may be read as exempting from the Act the sale of property not used as a residence and not otherwise shown to be outside the commercial context to which the protection afforded by N.C.G.S. § 75-1.1 is applicable, it is disapproved.

For the reasons stated, the decision of the Court of Appeals is reversed. The cause is remanded to the Court of Appeals for further remand to the Superior Court, Alamance County, for entry of a judgment for treble the amount of damages fixed by the verdict. N.C.G.S. § 75-16 (1988). The superior court shall also determine, in its discretion, whether to award plaintiff an attorney fee. N.C.G.S. § 75-16.1 (1988).

Reversed and remanded.

STATE OF NORTH CAROLINA v. JOSE MANUEL SANCHEZ

No. 292A89

(Filed 7 February 1991)

Criminal Law § 75.14 (NCI3d)— understanding of Miranda warnings—expert opinion testimony

The trial court erred in refusing to permit a forensic clinical psychologist to state his opinion that defendant did not understand the *Miranda* warnings given by police before he allegedly waived his rights and confessed since this evidence was competent as going to the weight and credibility of defendant's confession. The fact that *Miranda* warnings were not

required because of the trial court's determination that defendant was not in custody or under arrest is irrelevant. N.C.G.S. § 8C-1, Rule 104(e).

Am Jur 2d, Expert and Opinion Evidence §§ 176, 177, 190; Evidence §§ 791, 792.

Justice MEYER dissenting.

Justice MITCHELL joins in this dissenting opinion.

APPEAL as of right pursuant to N.C.G.S. § 7A-27 from a judgment of life imprisonment entered by *Lake, J.*, at the 10 April 1989 Session of Superior Court, DUPLIN County. Heard in the Supreme Court on 12 December 1990.

Lacy H. Thornburg, Attorney General, by James J. Coman, Senior Deputy Attorney General, and William N. Farrell, Jr., Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Justice.

Defendant was tried capitally and found guilty of murder in the first degree upon the theory of premeditation and deliberation. Failing to find any aggravating circumstances, the jury recommended a sentence of life imprisonment, from which defendant appeals. Defendant contends, *inter alia*, that the trial court erred in excluding expert opinion evidence that the defendant did not understand the warnings given by police pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), before he allegedly waived his rights and confessed. We hold that this exclusion was prejudicial error entitling defendant to a new trial. Therefore, it is not necessary to discuss defendant's other assignments of error.

William McKay was shot and killed on the morning of May 23, 1988 at Lyman's Crossroads in Duplin County. Because we remand for a new trial, a detailed discussion of the crime is not necessary. However, a recitation of the facts surrounding defendant's alleged confession will be instructive for the issue at hand. Shortly after the murder, Duplin County officials requested that the Florida Department of Law Enforcement aid their investigation of suspects living in Florida. Agents learned that defendant, a

Spanish-speaking immigrant from Puerto Rico, had borrowed a car matching the description of one seen at Lyman's Crossroads around the time of the murder. Four agents, two from North Carolina and two from Florida, went to defendant's apartment and asked him to accompany them to their vehicle. The agents were casually dressed and carried concealed weapons, although one officer placed his gun in the back of his trousers. Because it was hot in the car, defendant agreed to go with the agents to the police station and was read his *Miranda* rights in Spanish. The agents told him that he did not have to go and could drive his own car, but he indicated that his car was not operative.

Agents testified at the suppression hearing that defendant seemed aware, did not appear intoxicated, and responded affirmatively to the waiver of rights. Defendant originally told the agents that he borrowed the car to go to Disney World, but decided to drive to New York to see his girlfriend, got as far as North Carolina, and then returned to Florida. Twenty to thirty minutes into the questioning, defendant began to talk about his involvement in the crime. Agents testified that defendant confessed and made drawings of the crime scene to aid his explanation. Defendant indicated that Tammy Thompson, a co-worker, had offered to pay him to kill McKay. At the agents' request, defendant called Thompson and elicited incriminating statements. After being transported to North Carolina, defendant recanted his confession. However, when an officer told defendant that he did not believe his new story, defendant confessed again. The trial court denied defendant's motion to suppress the confession after a hearing.

At trial, the defense called Dr. Brad Fisher, a forensic clinical psychologist who had examined the defendant. Dr. Fisher testified about defendant's limited intelligence and dependent personality traits. However, the trial court prohibited Fisher from stating his opinion about the defendant's understanding of the *Miranda* warnings. On voir dire, Dr. Fisher testified as follows:

> Q: And, Dr. Fisher, based upon your knowledge, skill, experience, training, education and your clinical evaluation in this case, do you have an opinion as to whether Jose Pepe Sanchez understood his Constitutional rights, commonly referred to as Miranda Rights, including the right to remain silent and the right to an attorney as read to him on May 26, 1988 and

on June 3, 1988 and also on June 6, 1988 so that he could voluntarily, knowingly and intelligently waive these rights?

A: Yes.

Q: What is your opinion?

A: My opinion is that he did not. This is based on the specific questions I have spoken to earlier in my own testimony the first time [at the suppression hearing]. For example, that he didn't know what it meant to have a right to. He did not know what an attorney was. There are, there are a set of questions you give as a test for the extent to which you understand Miranda. I gave that and I found limits to the extent that I thought that he was not able to fully comprehend the Miranda Rights.

The State argues that this testimony was properly excluded as an attempt to relitigate the admissibility of the confession. Assuming, *arguendo*, that the confession was admissible, we hold that the court erred by preventing Dr. Fisher from testifying concerning the surrounding circumstances.

Under Rule 104(e) of the North Carolina Rules of Evidence, the preliminary determination of admissibility of evidence by the trial court "does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility." N.C.G.S. § 8C-1, Rule 104(e) (1988); *cf. State v. Walker*, 266 N.C. 269, 145 S.E.2d 833 (1966) (error for trial judge to make finding of fact that confession was voluntary in the presence of the jury). Dean Brandis wrote,

> [o]nce disputed evidence is admitted at the trial, its weight and credibility are for the jury. Therefore, if otherwise competent, to the extent that it bears upon such weight or credibility, the same testimony which failed to convince the judge to grant the motion to suppress is admissible before the jury.

1 Brandis on North Carolina Evidence § 19a (3d ed. 1988) (footnotes omitted). In *Walker* this Court stated the general rule:

> If the judge determines the proffered testimony is admissible, the jury is recalled, the objection to the admission of the testimony is overruled, and the testimony is received in evidence for consideration by the jury. If admitted in evidence, it is for the jury to determine whether the statements referred

> to in the testimony of the witness were in fact made by the defendant and the weight, if any, to be given such statements if made. Hence, evidence as to the circumstances under which the statements attributed to defendant were made may be offered or elicited on cross-examination in the presence of the jury. *Admissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge.*

266 N.C. at 273, 145 S.E.2d at 836 (emphasis added); *accord State v. Moore*, 321 N.C. 327, 339, 364 S.E.2d 648, 654 (1988).

The State argues that the opinion testimony was inadmissible as a conclusion that a legal standard had not been met, in violation of *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988). That argument has merit as to the part of the question concerning whether defendant could voluntarily, knowingly, and intelligently waive his *Miranda* rights. This, of course, did involve a legal standard and if the witness had replied to this part of the question, it would have been properly excluded. However, he confined his answer to defendant's understanding of his *Miranda* rights and gave certain specific examples such as defendant's ability to understand "right" and "attorney." Therefore, the part of the question dealing with voluntariness is not at issue on this appeal. The testimony at issue involved an opinion as to defendant's mental ability to understand the questions to him during his interrogation and therefore was competent as going to the weight and credit the jury should give to his confession.

The fact that the *Miranda* warnings were not required because of the trial court's determination that defendant was not in custody or under arrest is irrelevant. Assuming, *arguendo*, that the warnings were not required, the fact that they were given and allegedly waived by defendant is relevant to the jury's determination of weight and credibility, as is the mental condition of the defendant in making the confession. The State introduced evidence of the *Miranda* warnings to emphasize the confession's weight and credibility. If the jury believed that the defendant knew the full consequences of making the statements, they might be more likely to assign such statements greater weight.

The prohibited testimony related to the defendant's mental ability to understand the *Miranda* warnings. Testimony of this type is clearly admissible as evidence of the surrounding circum-

stances under which the statements were made. *State v. Walker*, 266 N.C. at 269, 145 S.E.2d at 833. In order for a jury to adequately evaluate the credibility and weight of confessions, they must hear all the competent evidence of the surrounding circumstances. Here, the court did not give the jury the opportunity to consider all the evidence. We hold that the exclusion of the evidence concerning defendant's understanding of the *Miranda* warnings was error. Moreover, we conclude as a matter of law that there was "a reasonable possibility that, had the error . . . not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (1988).

New trial.

Justice MEYER dissenting.

I cannot agree with the majority that the trial court erred in refusing to allow Dr. Brad Fisher, a forensic clinical psychologist, to state his opinion as to whether the defendant understood the *Miranda* warnings given to him so as to voluntarily, knowingly, and intelligently waive those rights.

On voir dire, Dr. Fisher testified as follows (I have emphasized the essence of the question asked and the answer given in response thereto):

> Q: And, *Dr. Fisher*, based upon your knowledge, skill, experience, training, education and your clinical evaluation in this case, *do you have an opinion as to whether Jose Pepe Sanchez understood his Constitutional rights*, commonly referred to as Miranda Rights, including the right to remain silent and the right to an attorney as read to him on May 26, 1988 and on June 3, 1988 and also on June 6, 1988 *so that he could voluntarily, knowingly and intelligently waive these rights?*
>
> A: Yes.
>
> Q: What is your opinion?
>
> A: *My opinion is that he did not.* This is based on the specific questions I have spoken to earlier in my own testimony the first time [at the suppression hearing]. For example, that he didn't know what it meant to have a right to. He did not know what an attorney was. There are, there are a set of

questions you give as a test for the extent to which you understand Miranda. I gave that and I found limits to the extent that I thought that *he was not able to fully comprehend the Miranda Rights.*

(Emphasis added.)

The State argued that the opinion testimony was inadmissible as a conclusion that a legal standard had not been met, in violation of *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988). The majority candidly admits: "That argument has merit as to the part of the question concerning whether defendant could voluntarily, knowingly, and intelligently waive his *Miranda* rights. This, of course, did involve a legal standard and if the witness had replied to this part of the question, it would have been properly excluded." The majority concludes, however, that Dr. Fisher "confined his answer to defendant's understanding of his *Miranda* rights and gave certain specific examples such as defendant's ability to understand 'right' and 'attorney,' " and thus "the part of the question dealing with voluntariness is not at issue on this appeal." I cannot agree.

As I have pointed out, the essence of the question asked was: "Dr. Fisher, . . . do you have an opinion as to whether Jose Pepe Sanchez understood his Constitutional rights, . . . so that he could voluntarily, knowingly and intelligently waive these rights?" Dr. Fisher's answer was: "My opinion is that he did not." Everything thereafter in his response was, as the majority characterizes it, merely "examples" to fortify his belief that defendant did not voluntarily, knowingly, and intelligently waive his rights. The majority clearly errs when it says Dr. Fisher confined his answer to defendant's understanding of his *Miranda* rights. The majority further errs in concluding that "the part of the question dealing with voluntariness is not at issue on this appeal."

Dr. Fisher's answer was that, in his opinion, defendant did not understand his constitutional rights *so as to voluntarily, knowingly, and intelligently waive those rights.* This addressed the ultimate legal standard and was properly excluded.

Justice MITCHELL joins in this dissenting opinion.

SUNAMERICA FINANCIAL CORPORATION (FORMERLY SUN FINANCE COMPANY)
v. DENNIS EUGENE BONHAM

No. 200PA90

(Filed 7 February 1991)

1. **Costs § 36 (NCI4th)— attorney fees—nonjusticiable case**

In deciding a motion for attorney fees under N.C.G.S. § 6-21.5, the trial court is required to evaluate whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue.

Am Jur 2d, Damages § 616.

2. **Costs § 36 (NCI4th)— attorney fees—nonjusticiable case shown by answer**

The trial court properly awarded attorney fees to defendant under N.C.G.S. § 6-21.5 on the basis that there was no justiciable issue where plaintiff's complaint adequately pled the existence of a debt between the parties under an installment sales contract; defendant's answer pled the statute of limitations as a defense; it should have been apparent to plaintiff that, barring circumstances permitting the statute of limitations to be tolled, the complaint no longer contained a justiciable issue; instead of seeking dismissal of the case, plaintiff opposed defendant's motion for summary judgment by affidavits showing unsuccessful attempts to locate defendant, which would not toll the statute of limitations; and summary judgment was entered in favor of defendant.

Am Jur 2d, Damages § 616.

3. **Costs § 36 (NCI4th)— attorney fees—absence of justiciable issue—evidence considered**

Neither the mere filing of an affirmative defense, nor the grant of a Rule 12(b)(6) motion, nor the entry of summary judgment, without more, is sufficient to establish the absence of a justiciable issue for the purpose of awarding attorney fees under N.C.G.S. § 6-21.5, but these events are evidence of the absence of a justiciable issue. Moreover, action by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented

a justiciable controversy may also serve as evidence for purposes of § 6-21.5.

Am Jur 2d, Damages § 616.

ON discretionary review of an unpublished opinion of the Court of Appeals which affirmed a judgment entered 24 April 1989 by *Bissell, J.*, in District Court of MECKLENBURG County. Heard in the Supreme Court on 10 December 1990.

Reginald L. Yates for plaintiff-appellant.

Levine & Levine, by Eric D. Levine, for defendant-appellee.

MARTIN, Justice.

The unverified complaint initiating this case sought recovery of $1,313.97 "for money loaned by plaintiff to defendant and [which defendant] has failed and refused to pay." Although filed on 27 August 1987, the complaint was not served on defendant until 25 January 1989. In a verified answer filed 14 March 1989, defendant denied that plaintiff had loaned him any money and also pled a Uniform Commercial Code statute of limitations as an affirmative defense. *See* N.C.G.S. § 25-2-725 (1986).

Defendant also filed a motion for summary judgment on 14 March 1989 in support of which he attached a consumer credit installment sales contract and two affidavits. These materials established that defendant had entered into a contract for the purchase of stereo equipment from Audio Systems of Charlotte on 11 June 1977. Further, pursuant to the contract defendant had agreed to finance the purchase of the equipment by making monthly payments, the first of which was to be made on 11 July 1977, and the last of which was due on 11 June 1979. Defendant admitted that he failed to make all of the required payments. However, defendant averred that, assuming that plaintiff was a successor in interest to Audio Systems, plaintiff's claim against defendant was barred because plaintiff failed to initiate the suit within the period allowed under the relevant statute of limitations. Defendant's motion (as well as his answer) included a prayer for his attorney's fees pursuant to N.C.G.S. § 6-21.5.

In opposition to defendant's motion, an employee of the plaintiff's successor in interest filed an affidavit detailing attempts to

locate defendant during 1977 and 1978. It stated, *inter alia*, that after such numerous unsuccessful attempts,

> 28. On September 28, 1978, plaintiff . . . "charged off" defendant's debt to plaintiff as allowed by law, although plaintiff continued to "skip trace" defendant from time to time.

Plaintiff's attorney in the present action also executed and filed an affidavit in which he recited various attempts he had made to locate defendant between late December 1984 and January 1989 and to serve him with the complaint.

After a hearing, summary judgment was entered in favor of defendant. The district court also awarded defendant an attorney's fee of $300.00 pursuant to N.C.G.S. § 6-21.5. Plaintiff appealed, and the Court of Appeals affirmed. This Court granted plaintiff's petition to review "the specific question of whether or not the mere filing of a complaint on a claim upon which the statute of limitations has run constitutes a complete absence of a justiciable issue of law, in view of the mandatory requirements of the defense of the statute of limitations being raised in a responsive pleading and the consequences of a waiver of such defense."

This case presents an opportunity for this Court to review an award of an attorney's fee under N.C.G.S. § 6-21.5. This statute provides as follows:

> In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's

fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.

Because statutes awarding an attorney's fee to the prevailing party are in derogation of the common law, N.C.G.S. § 6-21.5 must be strictly construed. *E.g., Ellington v. Bradford*, 242 N.C. 159, 86 S.E.2d 925 (1955). *Cf. generally* Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 Duke L.J. 435 (1986).

In this case plaintiff argues that as a matter of law the attorney's fee was improperly ordered because at the time plaintiff filed the complaint a justiciable controversy had been pled properly. It was not until defendant affirmatively pled the statute of limitations as a defense that the matters in the complaint were to be taken as anything other than true. *Cf.* N.C.G.S. § 1A-1, Rules 8(d) and 55 (1990). Therefore, plaintiff argues, it was not until the answer raising the statute of limitations was filed that the plaintiff's complaint could possibly be said to contain a nonjusticiable controversy. Plaintiff's argument implies that he contends that such an answer cannot convert a previously adequate pleading (such as the complaint here) into one containing a nonjusticiable controversy *nunc pro tunc*[1], and therefore that the award of the attorney's fee under N.C.G.S. § 6-21.5 in this case was error.

The Court of Appeals has recently correctly stated that:

> A justiciable issue has been defined as an issue that is "real and present as opposed to imagined or fanciful." *In re Williamson*, 91 N.C. App. 668, 373 S.E.2d 317 (1988) (*citing* [*Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 344 S.E.2d 55, *disc. rev. denied*, 318 N.C. 284, 348 S.E.2d 344 (1986)], . . .). In order to find complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss. [*Sprouse*, 81 N.C. App.] at 682-3, 373 S.E.2d at 325. (Citation omitted.)

K & K Development Corp. v. Columbia Banking Fed. Savings & Loan, 96 N.C. App. 474, 479, 386 S.E.2d 226, 229 (1989). *Cf.*

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1. This may be contrasted with the standard applied under N.C.R. Civ. P. 11. *Cf., e.g., Cooter & Gell v. Hartmarx Corp.*, --- U.S. ---, 110 L. Ed. 2d 359, 375 (1990) ("the 'violation of [federal] Rule 11 is complete when the paper is filed,' " quoting *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir. 1987)).

also N.C.G.S. § 1A-1, Rule 8(f) (1990). However, it is also possible that a pleading which, when read alone sets forth a justiciable controversy, may, when read with a responsive pleading, no longer present a justiciable controversy. The instant case presents just such an example. Here, plaintiff's complaint adequately pled the existence of a debt between the parties. Had defendant failed to answer, the allegations in plaintiff's complaint would have been deemed admitted, and a default judgment would have been possible. *See* N.C.G.S. § 1A-1, Rules 8 and 55 (1990). Thus, until an answer was filed, plaintiff's complaint in this case did set forth a justiciable issue. However, when defendant's answer raising the statute of limitations defense was filed and served, it should have become apparent to plaintiff that, barring circumstances permitting the statute of limitations to be tolled, the complaint no longer contained a justiciable issue. *Cf. Ford v. Temple Hospital*, 790 F.2d 342 (3d Cir. 1986).

[1] Although plaintiff had no right to file a responsive pleading to the answer in this case, *see* N.C.G.S. § 1A-1, Rule 7(a), plaintiff did have a continuing duty to review the appropriateness of persisting in litigating a claim which was alleged to be time-barred. N.C.G.S. § 6-21.5 provides in part that the entry of judgment pursuant to Rule 50 or Rule 56 may be some evidence that an attorney's fee may be warranted. The statute's reference to these Rules, which are applicable only if evidence in addition to the pleadings is before the court, thus implies that when deciding whether to grant a motion under N.C.G.S. § 6-21.5 the trial court may consider evidence developed *after* the pleadings have been filed. *See also* N.C.G.S. § 1A-1, Rules 7(a) and 11 (1990); Rules of Professional Conduct of the North Carolina State Bar, Rule 7.2(A) (1991). Thus, in deciding a motion brought under N.C.G.S. § 6-21.5, the trial court is required to evaluate whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue.

[2] Here, instead of seeking dismissal of the case in the wake of defendant's affirmative defense, plaintiff elected to oppose defendant's motion for summary judgment and an attorney's fee by submitting affidavits which outlined attempts to locate defendant during 1977-78 and 1984-89. Plaintiff's affidavits do not recite why defendant was not sought actively between 1978 and late 1984.

While North Carolina has no statute or reported common law which would toll the statute of limitations merely because plaintiff could not locate defendant, this is the gravamen of plaintiff's response to defendant's statute of limitations defense.[2] Even if North Carolina law did allow a statute of limitations to be tolled for this reason, plaintiff's discontinuous attempts to locate defendant would likely have been ineffectual to toll the limitation period.[3] *Cf. generally* 51 Am. Jur. 2d *Limitation of Actions* § 153 (1970). Thus, instead of acknowledging that the defendant's answer raised a virtually unassailable defense which foreclosed any reasonable expectation of an affirmative recovery by plaintiff, plaintiff forged on frivolously attempting to create a controversy. Under these facts the trial court could have found that "[s]uch frivolous litigation constitutes a reckless waste of judicial resources as well as the time and money of the prevailing litigants." *Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982) (decided under a Florida statute similar to N.C.G.S. § 6-21.5). *See generally* Note, *Attorney's Fees Under Florida Statute 57.105: Caselaw Development*, 10 Nova L.J. 155 (1985). In other words, the trial court was presented in this case with evidence that supported its conclusion of law that there was a complete absence of a justiciable issue, given defendant's statute of limitations defense and plaintiff's litigation in response thereto.

[3] It is important to note again that the mere filing of an affirmative defense without more is not sufficient to establish the absence of a justiciable issue, nor is the grant of a 12(b)(6) motion, nor the entry of summary judgment. N.C.G.S. § 6-21.5 (1986). These events may only be *evidence* of the absence of a justiciable issue. *Id.* However, action by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of N.C.G.S. § 6-21.5.[4] *Cf. Van Berkel v. Fox*

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2. Plaintiff's affidavits do not even suggest that defendant left the State of North Carolina at any time; thus N.C.G.S. § 1-21 cannot apply in the instant case.

3. Because of the gap in attempts, we cannot interpret plaintiff's strategy here as advancing a "good faith argument for an extension, modification, or reversal of law . . . ." N.C.G.S. § 6-21.5 (1986).

4. This is not to say that matters outside the litigation process, *e.g.*, personal attacks by a party on other parties or court personnel, can be regarded as relevant evidence. *See Bryant v. Short*, 84 N.C. App. 285, 352 S.E.2d 245, *disc. rev. denied*, 319 N.C. 458, 356 S.E.2d 2 (1987).

Farm and Road Machinery, 581 F. Supp. 1248 (D. Minn. 1984). Whether such evidence would be sufficient without more is determinable on a case-by-case basis.

Under N.C.G.S. § 6-21.5 the trial court "shall make findings of fact and conclusions of law to support its award of attorney's fees." In the present case the trial court's order granting defendant summary judgment and an attorney's fee contained the following findings of fact and conclusions of law:

> 1. The Complaint and Summons were filed on August 27, 1987.
>
> 2. On January 25, 1989, defendant was served with the Summons and Complaint in this case.
>
> 3. Plaintiff is suing over money due on a contract entitled Consumer Credit Installment Sales Contract (the "Contract") entered into between the defendant and plaintiff's assignor, Audio Systems of Charlotte on June 11, 1977. Under this Contract, defendant purchased various stereo equipment from Audio Systems by making a down payment of $227.20 and Audio Systems agreed to finance the remainder of the amount due and owing on the stereo equipment. The Contract required the defendant to make monthly payments beginning on July 11, 1977, and continuing for two years until the last payment was made on June 11, 1979.
>
> 4. Defendant failed to make all of the monthly payments due under the Contract. By failing to make all of the monthly payments, the defendant breached the Contract sometime between July 11, 1977 and June 11, 1979. Accordingly, the cause of action against defendant for breach of contract began to accrue no later than June 12, 1979.
>
> 5. Plaintiff submitted the Affidavit of Alisa Baucom in opposition to Defendant's Motion for Summary Judgment. The Baucom Affidavit states, in paragraph four, that defendant failed to make his April 11, 1978 monthly payment. Pursuant to plaintiff's own evidentiary affidavit, the cause of action against defendant for breach of contract began to accrue no later than April 12, 1978.
>
> 6. The Contract involved the sale of goods.

7. Subsequent to the execution of the Contract, Audio Systems of Charlotte assigned its rights under the Contract to plaintiff.

The Court states the following as its Conclusions of Law:

1. Since the Contract involved the sale of goods, the North Carolina Uniform Commercial Code, N.C. Gen. Stat. § 25-2-101 *et seq.*, applies to the Contract and all transactions associated with it.

2. The applicable Statute of Limitations for the Contract is found in N.C. Gen. Stat. § 25-2-729 which states that: "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued."

3. Since plaintiff's cause of action began to accrue no later than June 12, 1979, under N.C. Gen. Stat. § 25-2-725(1), plaintiff was required to file this cause of action within four years, by June 12, 1983. Since plaintiff failed to bring this action by June 12, 1983, the action is barred by the Statute of Limitations found in N.C. Gen. Stat. § 25-2-725.

4. According to the Baucom Affidavit presented by plaintiff, plaintiff's cause of action began to accrue on April 12, 1978. Since plaintiff failed to file this lawsuit by April 12, 1982, plaintiff is barred by the Statute of Limitations.

5. Plaintiff waited until August 27, 1987 to file this lawsuit, over four years after the applicable Statute of Limitations time period had expired. These facts indicate that there was a complete absence of a justiciable issue of law on the Statute [of] Limitations. Accordingly, the defendant is entitled to attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5 (1986).

We note that ordinarily, findings of fact and conclusions of law are not required in the determination of a motion for summary judgment, and if these are made, they are disregarded on appeal. *E.g., Mosley v. Finance Co.*, 36 N.C. App. 109, 243 S.E.2d 145, *disc. rev. denied*, 295 N.C. 467, 246 S.E.2d 9 (1978). In light of this (and the fact that the entry of summary judgment is not before this Court for review), we will consider the above findings and conclusions as pertaining to the trial court's grant of defendant's motion for attorney's fees. We hold that the trial court's findings and conclusions suffice to support the court's order of an attorney's

fee, and that the Court of Appeals properly affirmed the award to defendant.

Affirmed.

ROY BURT ENTERPRISES, INC. v. WAYMON MARSH AND WIFE, SHIRLEY MARSH

No. 561PA89

(Filed 7 February 1991)

Uniform Commercial Code § 23 (NCI3d)— action on debt—sale of fertilizer—revocation—summary judgment for plaintiff improper

The trial court erred by granting plaintiff's motion for summary judgment against defendant Waymon Marsh in an action on an unpaid account for fertilizer where there were genuine issues of material fact with respect to whether there was a revocation of acceptance of the allegedly contaminated fertilizer constituting a defense to the payment of the debt.

Am Jur 2d, Sales §§ 1192, 1193; Summary Judgment § 27.

Justice MEYER concurring in result only.

Justice MITCHELL joins in this concurring opinion.

ON discretionary review of an unpublished decision of the Court of Appeals, 96 N.C. App. 275, 385 S.E.2d 818 (1989), affirming in part and reversing in part the entry of summary judgment for the plaintiff by *Seay, J.*, at the 24 October 1988 Session of Superior Court of MOORE County. Heard in the Supreme Court 11 October 1990.

Brown, Robbins, May, Pate, Rich, Scarborough & Burke, by P. Wayne Robbins and Carol M. White, for the plaintiff-appellee.

John Randolph Ingram for the defendant-appellant Waymon Marsh.

MARTIN, Justice.

We hold that plaintiff was not entitled to summary judgment because there exist genuine issues of material fact.

In November 1987, plaintiff, Roy Burt Enterprises, Inc., sued defendants Waymon and Shirley Marsh for unpaid accounts for goods and services in the amount of $48,396.48. In response to the summons, Waymon Marsh wrote a letter to Mr. Roy Burt, president of Roy Burt Enterprises, stating that the fertilizer sold to him by plaintiff was contaminated and had damaged his crops, land and health and that he should not have to pay for it. This letter was dated 7 January 1988 and was filed with the Moore County Clerk of Court. The letter, and others written by Waymon Marsh, were verified as affidavits on 18 October 1988 and were before the trial court at the summary judgment hearing. The court granted plaintiff's motion for summary judgment after a hearing on 24 October 1988. From the court's order, defendants appealed. The Court of Appeals reversed the court's order of summary judgment against defendant Shirley Marsh, but affirmed as to defendant Waymon Marsh. We allowed Waymon Marsh's petition for discretionary review and now reverse the Court of Appeals as to the action against defendant Waymon Marsh.

The rules governing summary judgment are now familiar learning and we need not repeat them here. *Investors Title Ins. Co. v. Herzig*, 320 N.C. 770, 360 S.E.2d 786 (1987). We hold that based upon the materials before the trial court genuine issues of material fact exist which defeat plaintiff's motion for summary judgment. Summary judgment in this case was inappropriate.

In order to recover, plaintiff must prove (1) acceptance by the buyer of the goods; (2) the price of the goods accepted; (3) the past due date of the price; and (4) failure of buyer to pay. N.C.G.S. § 25-2-709(1) (1986); *Manufacturing Co. v. Manufacturing Co.*, 37 N.C. App. 726, 247 S.E.2d 1, *appeal dismissed*, 295 N.C. 734, 248 S.E.2d 864 (1978). *See also* N.C.G.S. § 8-45 (1986). Defendant admitted the sale and delivery of the fertilizer in the letter serving as his answer. However, the letter stated: "I, Waymon Marsh, feel I should not have to pay for fertilizer I purchased that was contaminated. . . . I believe it has damaged my farm land and pond, and cows and my health." Defendant claimed that the alleged contamination killed plant and animal life in the pond, and when the water was used for irrigation, it caused further damage on

the land. Defendant asserted that the fertilizer was not fit for the purposes for which it was sold and contained ingredients not listed on the label. Defendant stated that the "fertilizer does not guarantee a farmer to make his pounds on his farm. It guarantees whats [sic] in the bag."

The Uniform Commercial Code provides that under some circumstances a buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him. N.C.G.S. § 25-2-608 (1986). The contents of defendant's letter, verified as an affidavit, create material issues of fact as to whether defendant revoked his acceptance of the allegedly contaminated fertilizer. Defendant put plaintiff on notice of his defense in his letters, later incorporated into his affidavit.

Defendant's forecast of the evidence shows that the fertilizer was accepted without knowledge that the goods did not conform to the contract. It further shows that the contamination of the fertilizer could not reasonably be discovered until it was spread on defendant's cropland. N.C.G.S. § 25-2-608(1)(b). Formal notice that acceptance is being revoked is not necessary. Any conduct by the buyer manifesting to the seller the buyer's dissatisfaction with the goods and his expectation of redress is sufficient. *Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972). A tender of the goods to the seller is not required in order to revoke acceptance. *Id.* at 397, 186 S.E.2d at 168.

By at least 1985 plaintiff knew of the defective fertilizer and undertook to get relief from the manufacturer. Further, the evidence indicates that the alleged revocation of acceptance occurred within a reasonable time after the buyer discovered that the fertilizer was contaminated. N.C.G.S. § 25-2-608(2). Defendant's evidence also raises a material question of fact whether there was any substantial change in the condition of the fertilizer before defendant notified the seller of the contamination. N.C.G.S. § 25-2-608(2). This part of the statute is for the protection of sellers where the buyer allows the goods to deteriorate, creating the risk that the alleged defect was caused or aggravated by the buyer's action or inaction. N.C.G.S. § 25-2-608 comment 6 (1986). In this case such a risk was not present, since the alleged defect could not have been caused or aggravated by defendant's spreading of the fertilizer on his cropland. Further, the alleged lack of conformity here could not be discovered without difficulty except by spreading the fertilizer

upon the cropland. The seller contemplated that the buyer would use the fertilizer upon the cropland, and it was contaminated before defendant applied it. *See Warren v. Guttanit, Inc.*, 69 N.C. App. 103, 317 S.E.2d 5 (1984); *Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos.*, 803 F.2d 1160 (11th Cir. 1986).

We hold that there are genuine issues of material fact with respect to whether there was a revocation of acceptance constituting a defense to the payment of the debt, and therefore the trial court erred in entering summary judgment for the plaintiff.

We emphasize that the only issue before this Court in the present appeal is whether the trial court erred in granting summary judgment for plaintiff in the action on account. We do not express any opinion concerning any possible products liability claim or other claims that defendants may have against plaintiff. Accordingly, the issue of the applicability of N.C.G.S. Chapter 99B is not before this Court for determination in the instant appeal, *cf. Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 354 S.E.2d 495 (1987) (in products liability actions arising from breaches of implied warranties, the defenses provided by N.C.G.S. § 99B-2(a) are available), nor is any potential counterclaim seeking damages for breach of contract under theories based on warranty provisions of the Uniform Commercial Code.

Because the Court of Appeals' decision with respect to plaintiff's action against the defendant Shirley Marsh is not before this Court for review, we do not disturb the Court of Appeals' decision with respect to her. The decision of the Court of Appeals with respect to Waymon Marsh is reversed, and the cause is remanded to that court for further remand to the Superior Court, Moore County, for further proceedings not inconsistent with this opinion.

Reversed in part and remanded.

Justice MEYER concurring in result only.

Believing, as I do, that this Court should not decide this case on the basis of N.C.G.S. § 25-2-608(2) of the UCC (revocation of acceptance), but rather on the basis of N.C.G.S. § 25-2-314 (implied warranty: merchantability), and that summary judgment should have been entered for the defendant, I concur only in the result that the decision below should be reversed and the case remanded. Like the majority, I would reverse and remand this case, but for

an entirely different reason, which would produce an entirely different resolution of the case.

The "revocation of acceptance" theory is simply inapplicable here. Revocation requires a twofold finding:

> Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it *and before any substantial change in condition of the goods* which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

N.C.G.S. § 25-2-608(2) (emphasis added). The latter element cannot be found in this case. There had been a definite "substantial change" in the goods by the time the defect was discovered. The fertilizer was spread and absorbed into the earth and, indeed, by the season's crops, the animals that consumed the crops, the water in the pond, and the fish in the water.

N.C.G.S. § 25-2-608(2) (revocation of acceptance) protects sellers by allowing revocation where the buyer "returns" the merchandise to the seller. *See Village Mobile Homes v. Porter*, 716 S.W.2d 543 (Tex. Ct. App. 1986) (statute intended to protect the seller from changes which deteriorate the value of the goods). This contention is supported by the plain language of the statute and the first sentence of comment 6, which states that the policy of the section is to seek substantial justice in regard to the condition of goods "*restored to the seller.*" We do not have that situation here. It is true that comment 6 states that "[w]orthless goods . . . need not be offered back." In such a situation, the central issue of fact becomes whether the goods here were worthless. Unless the worthlessness of the goods is stipulated to or found as a fact (and it was not here), revocation of acceptance has not been proven.

Defendant has also pled failure of consideration as a defense. His forecast of evidence on the issues of breach of implied warranty *and* failure of consideration is unrefuted. The implied warranty of merchantability has been breached, and the consideration for the contract has failed.

Therefore, under either the theory of breach of the implied warranty of merchantability or failure of consideration, summary judgment should have been entered for defendant. Although the defendant, Mr. Marsh, did not move for summary judgment, he

was nevertheless entitled to the entry of such a judgment in his favor on the forecast of evidence presented here. Under Rule 56 of our Rules of Civil Procedure, a motion for summary judgment may be entered in favor of "any party." Rule 56 specifically provides that: "Summary judgment, when appropriate, may be rendered against the moving party." N.C.R. Civ. P. 56(c). I would reverse the decision below and remand the case for entry of summary judgment for the defendant.

Justice MITCHELL joins in this concurring opinion.

CLAUDE E. NASH AND JANIS WESSOLLECK v. MOTOROLA COMMUNICATIONS AND ELECTRONICS, INC., CHARLES ROBINSON, MOTOROLA, INC. AND AIRCALL, INC.

No. 568PA89

(Filed 7 February 1991)

ON discretionary review of the decision of the Court of Appeals, 96 N.C. App. 329, 385 S.E.2d 537 (1989), reversing a judgment entered by *Owens, J.*, in the Superior Court, HENDERSON County on 29 June 1988. Heard in the Supreme Court 6 September 1990.

Patrick U. Smathers, P.A., by Patrick U. Smathers, for plaintiffs appellees.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Roy W. Davis, Jr. and Michelle Rippon, for defendants appellants.

PER CURIAM.

Affirmed.

Justice MARTIN did not participate in this decision.

JAMES GORDON, T/A G & G UNLIMITED, AND G & G UNLIMITED, INC. v. NORTHWEST AUTO AUCTION, INC.

No. 63A90

(Filed 7 February 1991)

ON appeal of the decision of the Court of Appeals, 97 N.C. App. 88, 387 S.E.2d 227 (1990), vacating a judgment by *Huffman, J.*, in the District Court, RICHMOND County on 20 February 1990, *nunc pro tunc* 13 October 1988 and remanding. Heard in the Supreme Court 11 December 1990.

Sharpe & Buckner, by Richard G. Buckner, for plaintiff appellee and cross-appellant.

Weinstein & Sturges, P.A., by William H. Sturges and L. Holmes Eleazer, Jr., for defendant appellant.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion of Greene, J.

Reversed.

DEPARTMENT OF TRANSPORTATION v. SEABOARD SYSTEM RAILROAD, INC.; UNITED STATES TRUST COMPANY OF NEW YORK, TRUSTEE; WILLIAM M. HOWELL, TRUSTEE; ROGER L. MAIN, TRUSTEE; CHEMICAL BANK AND TRUST COMPANY OF NEW YORK, TRUSTEE; L. F. SADLER, TRUSTEE; DUNBAR CORPORATION, OPTIONEE; CHURCH'S FRIED CHICKEN, INC., OPTIONEE; AND COUNTY OF CUMBERLAND

No. 37PA90

(Filed 7 February 1991)

ON plaintiff's petition for discretionary review of the unpublished opinion of the Court of Appeals, which affirmed an order by *Brewer, J.*, at the 22 June 1988 Session of Superior Court, CUMBERLAND County. Heard in the Supreme Court 8 October 1990.

Lacy H. Thornburg, Attorney General, by John F. Maddrey, Assistant Attorney General, for plaintiff appellant.

Rand, Finch & Gregory, P.A., by Anthony E. Rand, and Rose, Ray, Winfrey & O'Connor, P.A., by Ronald E. Winfrey and Steven J. O'Connor, for defendants appellees.

PER CURIAM.

Discretionary review improvidently allowed.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

ALLEN v. RUPARD

No. 577PA90

Case below: 100 N.C.App. 490

Petition by Protective Insurance Co. for discretionary review pursuant to G.S. 7A-31 allowed 7 February 1991.

BARBEE v. HARFORD MUTUAL INS. CO.

No. 587PA90

Case below: 100 N.C.App. 548

Petition by David A. Barbee and the Harford Mutual Insurance Company for discretionary review pursuant to G.S. 7A-31 allowed 7 February 1991.

BROOKOVER v. BORDEN, INC.

No. 601P90

Case below: 100 N.C.App. 754

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

BURRIS v. FISHER

No. 578P90

Case below: 100 N.C.App. 600

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

COHEN v. COHEN

No. 549P90

Case below: 100 N.C.App. 334

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

DIAGNOSTIC IMAGING v. GRIFFIN ELECTRONIC CONSULTANTS, INC.

No. 589P90

Case below: 100 N.C.App. 600

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

ELLER v. J & S TRUCK SERVICES

No. 581P90

Case below: 100 N.C.App. 545

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

EVANS v. N.C. DEPT. OF CRIME CONTROL

No. 3P91

Case below: 101 N.C.App. 108

Petition by defendant for temporary stay allowed 7 January 1991 pending consideration and determination of a timely filed petition for discretionary review.

HOFFMAN v. COMPUTER TEXTUAL SERVICES, INC.

No. 611P90

Case below: 97 N.C.App. 507

Petition by defendant (G. Russell Evans) for writ of certiorari to the North Carolina Court of Appeals denied 7 February 1991.

IVES v. REAL-VENTURE, INC.

No. 160P90

Case below: 97 N.C.App. 391
327 N.C. 139

Motion by third-party defendants for reconsideration of petition for discretionary review denied 7 February 1991.

ROANE-BARKER v. SOUTHEASTERN HOSPITAL SUPPLY CORP.

No. 341P90

Case below: 99 N.C.App. 30
328 N.C. 93

Motion by defendant for reconsideration of petition for discretionary review dismissed 7 February 1991.

STATE v. BURGE

No. 602P90

Case below: 100 N.C.App. 671

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 February 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

STATE v. CROSS

No. 595P90

Case below: 91 N.C.App. 585

Petition by defendant for temporary stay denied 17 December 1990. Application by defendant for writ of habeas corpus denied 17 December 1990.

STATE v. DAVIS

No. 596P90

Case below: 100 N.C.App. 601

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

STATE v. EATON

No. 605P90

Case below: 100 N.C.App. 760

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

STATE v. ELLIS

No. 598P90

Case below: 100 N.C.App. 601

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

STATE v. ELLIS

No. 615P90

Case below: 100 N.C.App. 591

Petition by the Attorney General for writ of certiorari to the North Carolina Court of Appeals denied 7 February 1991.

STATE v. HOLMES

No. 24P91

Case below: 98 N.C.App. 515

Petition by the Attorney General for temporary stay allowed 28 January 1991 pending consideration and disposition of the petition for writ of certiorari. Petition by the Attorney General for writ of supersedeas allowed 7 February 1991. Petition by the Attorney General for writ of certiorari to the North Carolina Court of Appeals allowed 7 February 1991.

STATE v. MARSHALL

No. 584P90

Case below: 92 N.C.App. 398

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 February 1991.

STATE v. NORMAN

No. 609P90

Case below: 100 N.C.App. 660

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 February 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. RICHARDSON

No. 353PA90

Case below: 99 N.C.App. 496

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 7 February 1991.

STATE v. SHAW

No. 599P90

Case below: 100 N.C.App. 759

Petition by defendant for writ of supersedeas and temporary stay denied 20 December 1990.

STATE v. TURNAGE

No. 441A90

Case below: 100 N.C.App. 234

Petition by the Attorney General for writ of supersedeas allowed 4 January 1991.

STEGALL v. STEGALL

No. 561P90

Case below: 100 N.C.App. 398

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

WATKINS v. HUNT

No. 456P90

Case below: 99 N.C.App. 776

Petition by defendant (Ernest C. Hunt, Jr.) for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

WATTS v. BRYANT

No. 583P90

Case below: 100 N.C.App. 600

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

WILKINS v. J. P. STEVENS & CO.

No. 16PA91

Case below: 100 N.C.App. 742

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 February 1991.

WORLEY v. CITY OF ASHEVILLE

No. 576P90

Case below: 100 N.C.App. 596

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

WRIGHTSVILLE WINDS HOMEOWNERS' ASSN. v. MILLER

No. 604P90

Case below: 100 N.C.App. 531

Petition by defendant (Douglas E. Miller) for discretionary review pursuant to G.S. 7A-31 denied 7 February 1991.

PETITION TO REHEAR

KIRBY BUILDING SYSTEMS v. McNIEL

No. 222PA89

Case below: 327 N.C. 234

Petition by third-party defendants (James O. Morton, Jr. and Rebecca P. Morton) to rehear pursuant to Rule 31 denied 7 February 1991.

DANIEL STACHLOWSKI v. CAROL STACH

No. 286A90

(Filed 7 March 1991)

Rules of Civil Procedure § 58 (NCI3d)— entry of judgment— adoption of proposed order and findings

Plaintiff's written notice of appeal on 6 April 1989 in a child custody action was timely where entry of judgment occurred on 6 April 1989, the date the court adopted the proposed order and findings submitted by the prevailing party, rather than on 17 January 1989, when the court merely announced in open court its decision regarding custody. The language of N.C.G.S. § 1A-1, Rule 58 clearly establishes that entry of judgment occurs when the clerk makes a notation in the minutes; in cases where the procedures used do not fit within the express provisions of the rule or where there is no evidence to indicate when or whether such notation was made, the spirit and purpose of the rule should determine when entry of judgment occurs. Relevant factors in this analysis are: (1) an easily identifiable point at which entry occurred, such that (2) the parties have fair notice of the court's judgment and the time thereof, and that (3) the matters for adjudication have been finally and completely resolved so that the case is suitable for appellate review. Here, the 17 January announcement of the custody decision was not an easily identifiable point for determining that the court had entered rather than rendered judgment because there were required findings yet to be made and visitation was yet to be determined. The parties thus did not have fair notice that the time for taking an appeal had commenced and, furthermore, because visitation rights remained at issue, all matters for adjudication had not been resolved finally and completely.

Am Jur 2d, Appeal and Error §§ 69, 301; Judgments §§ 161, 163-165.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 98 N.C. App. 668, 391 S.E.2d 849 (1990), dismissing as untimely filed plaintiff's appeal from an order entered 6 April 1989 by *Wilkinson, J.*, in

District Court, PERSON County. Heard in the Supreme Court 15 November 1990.

John W. Lunsford for plaintiff appellant.

J. Kevin Moore and North Central Legal Assistance Program, by Nancy McKenzie Kizer, for defendant appellee.

WHICHARD, Justice.

On 14 July 1988 plaintiff filed in District Court, Person County, a suit seeking modification of an order from the state of Washington which gave defendant custody of the parties' two minor children. Plaintiff sought custody of the children through modification of the Washington order on the basis of a material change in circumstances. The trial court heard the matter on 17 January 1989 and announced in open court on that day that, seeing no change in circumstances to warrant changing custody, it would give full faith and credit to the Washington order. Counsel for defendant was to draft an order to that effect once the parties had negotiated visitation privileges—after counsel got "squared away on . . . Christmas." Plaintiff did not give oral notice of appeal in open court. The trial court signed a written order with findings of fact and conclusions of law on 6 April 1989, and plaintiff gave written notice of appeal on that date.

Without considering the merits, the Court of Appeals dismissed the appeal on the ground that plaintiff had not given timely notice of appeal as required by N.C.G.S. § 1-279 and Rule 3 of the North Carolina Rules of Appellate Procedure. *Stachlowski v. Stach*, 98 N.C. App. 668, 669, 391 S.E.2d 849, 850 (1990). Judge Parker dissented, and plaintiff exercised his right to appeal to this Court. N.C.G.S. § 7A-30(2) (1989). We conclude that plaintiff's appeal was timely filed, and we thus reverse.

The Court of Appeals stated correctly that N.C.R. App. P. 3 and N.C.G.S. § 1-279, as in effect prior to their amendment and repeal respectively effective 1 July 1989, govern plaintiff's appeal.[1] Rule 3 provided:

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1. Amendments to Rule 3, effective 1 July 1989, deleted the right to give oral notice of appeal. The legislature repealed N.C.G.S. § 1-279 effective 1 July 1989. These changes apply to all judgments entered on or after the effective date and thus do not affect this case. All references in this opinion to Rule 3 and N.C.G.S. § 1-279 are to the rule and statute as in effect when this case was heard in the trial court.

> (a) From Judgments and Orders Rendered in Session. Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding during a session of court may take appeal by
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> (1) giving oral notice of appeal at trial . . . ; or
>
> (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.
>
> . . . .
>
> (c) Time When Taken by Written Notice. If not taken by oral notice as provided in Rule 3(a)(1), appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its entry.

N.C.R. App. P. 3(a), (c) (1989). N.C.G.S. § 1-279 was virtually identical to Rule 3.

It is undisputed that plaintiff did not give oral notice of appeal on 17 January 1989. Under Rule 3, he thus was required to file written notice of appeal within ten days of entry of judgment. Plaintiff filed notice of appeal on 6 April 1989, the date the trial court signed the written order. The determinative issue, then, is whether entry of judgment occurred upon the oral pronouncement of the court's determination on the custody issue on 17 January 1989, or upon the signing of the written order on 6 April 1989.

> Rule 3 and N.C.G.S. § 1-279 draw a distinction between judgments 'rendered' and judgments 'entered.'
>
> To render judgment means to 'pronounce, state, declare, or announce' judgment. . . . Rendering judgment is 'not synonymous with "entering" . . . the judgment. Judgment is "rendered" when [the] decision is officially announced, either orally in open court or by memorandum filed with [the] clerk.'

Kirby Building Systems v. McNiel, 327 N.C. 234, 239-40, 393 S.E.2d 827, 830 (1990) (citations omitted). Rule 3(a)(1) provides that a party may give *oral notice* of appeal once judgment is *rendered. Written notice* is also appropriate once judgment is rendered, N.C.R. App. P. 3(a)(2), but "must be taken within 10 days after its *entry*." N.C.R. App. P. 3(c) (emphasis added). Thus, the *rendering* of judgment

establishes the point from which a party may appeal under Rule 3, and the *entry* of judgment marks the beginning of the period during which a party must file written notice of appeal.

Rule 58 of the North Carolina Rules of Civil Procedure governs entry of judgment. It provides:

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, *shall make a notation in his minutes* of such verdict or decision and *such notation shall constitute the entry of judgment* for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.
>
> In other cases where judgment is rendered in open court, the clerk *shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment* for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
>
> In cases where judgment is not rendered in open court, *entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties.* The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

N.C.G.S. § 1A-1, Rule 58 (1983) (emphasis added).

For the purpose of determining the timeliness of appeals, the time of entry of judgment should be established clearly. Rule 58 attempts to serve this purpose by declaring entry of judgment to occur through a notation in the clerk's minutes. In practice, however, this aspect of the rule often is not followed closely. Where, as here, no minute entry appears, and the trial court directs the prevailing attorney to draw a proposed judgment or order, the case does not fit squarely within the rubric of Rule 58.

Paragraphs one and two of Rule 58 apply to situations where judgment is rendered in open court. Under paragraph one, the

clerk is to make a notation of the jury verdict or judge's decision unless the judge directs to the contrary. *See Cochrane v. Sea Gate Inc.*, 42 N.C. App. 375, 377, 256 S.E.2d 504, 505 (1979). As Judge Parker noted in her dissent, here "the judge made a contrary direction—he directed the lawyer for the prevailing party to draw the order." *Stachlowski*, 98 N.C. App. at 671, 391 S.E.2d at 850-51. Thus, there was no entry of judgment under paragraph one of Rule 58 at the time the court rendered judgment on 17 January 1989.

Paragraph two governs "other cases where judgment is rendered in open court" and declares that "the clerk shall make a notation in his minutes *as the judge may direct* and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing." N.C.G.S. § 1A-1, Rule 58 (emphasis added). If the trial court directs the clerk to make a notation constituting entry of judgment, this paragraph ordinarily would cover situations where, as here, the trial court renders judgment and orders the prevailing party to draft the judgment or order. *See L. Harvey and Son Co. v. Shivar*, 83 N.C. App. 673, 674-75, 351 S.E.2d 335, 336 (1987); *Arnold v. Varnum*, 34 N.C. App. 22, 25, 237 S.E.2d 272, 275, *rev. denied and app. dismissed*, 293 N.C. 740, 241 S.E.2d 513 (1977). Subject to the discussion *infra* regarding the ability of a trial court to enter judgment in advance of making required findings of fact, this paragraph also would apply to bench trials at which the trial court is required to make findings to support its legal conclusions. *See* G. Wilson, *N.C. Civil Procedure* § 58-3 (1989). There is nothing in the record before us, however, to indicate that the clerk made a notation in the minutes pursuant to a direction by the court. *See Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 716, 220 S.E.2d 806, 810-11 (1975), *rev. denied*, 289 N.C. 619, 223 S.E.2d 396 (1976).[2] Therefore, we cannot

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2. In both *Taylor* and *Arnold* the court acknowledged that entry of judgment occurs when the clerk makes a notation in the minutes. In each case, however, the notation appearing in the minutes was defective. In *Taylor*, the court held that the clerk's notation was defective because there was no evidence the trial court *directed* entry. *Taylor*, 27 N.C. App. at 716, 220 S.E.2d at 810-11. In *Arnold*, the trial court ordered that the clerk's entry of judgment in the minutes was a misinterpretation of its direction and so was clerical error. *Arnold*, 34 N.C. App. at 28, 237 S.E.2d at 275. *See also Ives v. Real-Venture Inc.*, 97 N.C. App. 391, 395, 388 S.E.2d 573, 575, *rev. denied*, 327 N.C. 139, 394 S.E.2d 174 (1990); *Gates v. Gates*, 69 N.C. App. 421, 425-26, 317 S.E.2d 402, 405 (1984), *aff'd per curiam*, 312 N.C. 620, 323 S.E.2d 920 (1985); *Kahan v. Longiotti*, 45 N.C. App. 367,

conclude that entry of judgment occurred under paragraph two of Rule 58 when the court rendered judgment on 17 January 1989. *See also Stachlowski*, 98 N.C. App. at 671, 391 S.E.2d at 851 (Parker, J., dissenting).

Paragraph three deals with "cases where judgment is not rendered in open court . . . ." N.C.G.S. § 1A-1, Rule 58. As to the custody issue, it is clear that the trial court rendered judgment in open court, so this paragraph does not apply. *See Bunting v. Bunting*, 100 N.C. App. 294, 295, 395 S.E.2d 713, 714 (1990).

Each of the three paragraphs in Rule 58 declares that entry of judgment occurs when the clerk makes some notation in the minutes. There is no evidence in the record before us regarding such a notation. *Cf. Behar v. Toyota of Fayetteville*, 90 N.C. App. 603, 605, 369 S.E.2d 618, 620 (1988) (remanded for findings on whether court directed entry of judgment and if and when clerk noted entry of judgment). The analytical framework of Rule 58 thus does not establish when entry of judgment occurred in this case.

Where the express provisions of Rule 58 are ineffective to establish the point of entry of judgment, the intent and purpose of the rule should nevertheless guide our resolution of when entry of judgment occurred. The comment to Rule 58 indicates that:

> Entry of judgment, as distinguished from rendition of judgment, is a critical moment under these rules. Time periods for the filing of certain motions are keyed to the moment of entry. It is therefore highly desirable that the moment of entry of judgment be *easily identifiable* and it is also desirable that *fair notice* be given all parties of the entry of judgment. The rule is drawn to achieve these objectives.

N.C.G.S. § 1A-1, Rule 58, Comment (emphasis added). *Accord, State v. Boone*, 310 N.C. 284, 290-91, 311 S.E.2d 552, 557 (1984); *Ives*, 97 N.C. App. at 395, 388 S.E.2d at 576; *Behar*, 90 N.C. App. at 605, 369 S.E.2d at 619-20; *Landin Ltd. v. Sharon Luggage Ltd.*, 78 N.C. App. 558, 564, 337 S.E.2d 685, 689 (1985); *Rivers v. Rivers*,

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371, 263 S.E.2d 345, 348, *rev. denied*, 300 N.C. 374, 267 S.E.2d 675 (1980), *overruled on other grounds, Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982). *Cf. Council v. Balfour Products Group*, 74 N.C. App. 668, 673, 330 S.E.2d 6, 9, *rev. denied*, 314 N.C. 538, 335 S.E.2d 316 (1985), *app. dismissed*, 80 N.C. App. 157, 341 S.E.2d 74 (1986) (trial court "professed intent to enter the order," but clerk's minutes indicate no notation constituting entry of judgment).

29 N.C. App. 172, 173, 223 S.E.2d 568, 569, *rev. denied*, 290 N.C. 309, 225 S.E.2d 829 (1976); *Barringer & Gaither, Inc. v. Whittenton*, 22 N.C. App. 316, 317, 206 S.E.2d 301, 302 (1974). The comment emphasizes easy identification and fair notice to all parties as factors critical to the determination of when judgment is entered.

In addition, Rule 58 is made expressly "subject to the provisions of Rule 54(b)." N.C.G.S. § 1A-1, Rule 58. Rule 54 defines judgments as either interlocutory or final. *Id.*, Rule 54(a). It also allows the trial court, in multi-party or multi-claim litigation, to "enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment." *Id.*, Rule 54(b). Thus, the trial court may determine that some claims are final as to some parties and allow those claims to be appealed prior to a resolution of the entire case. However, Rule 54 also states that:

> In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Id. Rule 54 thus indicates that finality with respect to parties and claims is a key aspect of a judgment as it relates to its entry and appealability. These factors—easy identification of the time judgment is entered, fair notice to the parties, and finality of the decision—should determine the point at which entry of judgment occurs in cases in which the express provisions of Rule 58 are ineffective for that purpose.

When the clerk makes a notation in the minutes as provided in each paragraph of the rule, the time judgment is entered is readily apparent. Absent such a notation, however, as here, we must examine the facts of record to determine if judgment was entered at a clearly identifiable time. The record indicates that on 17 January 1989, the trial court announced in open court that the Washington decree would receive full faith and credit and

that custody would not change from defendant to plaintiff. The court thus *rendered* judgment that day on the custody issue. There is no indication, however, that it made any direction to the clerk to *enter* judgment. On the contrary, the court directed counsel for defendant to "draw the Order." The parties continued to negotiate visitation privileges with the express understanding that counsel would not draw the order until the parties got "squared away on . . . Christmas." Though the court *rendered* judgment as to custody on 17 January 1989, these circumstances do not establish an entry of judgment at that time.

The clearest description of what constitutes fair notice of entry of judgment is the typical case contemplated by paragraph one of Rule 58. Upon a jury verdict or a judge's decision that a party recover only a sum certain or costs or that all relief shall be denied, absent a direction to the contrary by the court the clerk makes a notation of the judgment in the minutes. Entry of judgment occurs at that time and because "it involves an open court verdict or decision, all parties are deemed to be on notice of the fact and time of the entry." W. Shuford, *N.C. Civil Practice and Procedure* § 58-4 (1988). On the other hand, when the judge makes a contrary direction, such as requesting one of the parties to draft the order or judgment, the likelihood of fair notice to both parties may be jeopardized. *See, e.g., Searles v. Searles*, 100 N.C. App. 723, 726, 398 S.E.2d 55, 57 (1990) (where defendant's attorney is directed to draft the judgment, but never does, there is no entry of judgment and plaintiff's appeal properly is dismissed). If judgment were deemed to have been entered prior to completion of the requested draft, the losing party would have to give notice of appeal and begin preparing the record on appeal without the benefit of the court's written order or judgment. This would be impractical if the anticipated order or judgment is to include findings of fact to support the legal conclusions rendered in open court. Thus, in cases where entry of judgment cannot be determined from the express language of Rule 58, fair notice concerns indicate that "entry" occurs only after draft orders or judgments are submitted to and adopted by the court.

When Rule 58 expressly applies, entry of judgment could occur prior to the court's adoption of a draft order or judgment.[3]

3. As discussed above, paragraph two of Rule 58 allows entry of judgment when the trial court renders judgment, directs the clerk to make a notation in the minutes, and orders the prevailing party to draft the judgment.

Paragraph two clearly states that after entry of judgment the trial court "shall approve the form of the judgment and direct its prompt preparation and filing." N.C.G.S. § 1A-1, Rule 58. As discussed *infra*, however, this language does not permit the court to direct entry of judgment and subsequently to adopt findings of fact that form the basis of the judgment.

The trial court here directed counsel for defendant to draft an order reflecting its decision. This draft order required findings of fact supporting the court's conclusion that there had been no material change of circumstances warranting a modification of the custody order. *See Stachlowski*, 98 N.C. App. at 670, 391 S.E.2d at 850 (Parker, J., dissenting). Fair notice concerns would dictate that entry of judgment occurred when the court adopted the draft order and proposed findings. Under this analysis, entry of judgment occurred on 6 April 1989, the day the court signed the order.

The last consideration is the finality of the matter being adjudicated. As noted above, the importance of finality to the timing of entry of judgment is apparent more from the interrelationship between Rule 54 and Rule 58 than from the express language of Rule 58 itself.

The principal concern regarding finality is that all matters for determination be resolved. Plaintiff's suit was not final on 17 January 1989 even though the trial court announced in open court that the Washington decree would receive full faith and credit. Though the decision to preserve the custody status quo was final, the Washington decree also contained provisions concerning visitation privileges that were still being negotiated. The court directed the parties to resolve this issue and to include the resolution in the final proposed order. This issue remained open until the parties presented the order for the court's signature. *See Stanback v. Stanback*, 287 N.C. 448, 456, 215 S.E.2d 30, 35-36 (1975). The court's decision thus was not final as to all matters before it at the time the court rendered its decision regarding custody on 17 January 1989.

Another aspect of finality is the extent to which the trial court may take action *after* entry of judgment. Paragraph two of Rule 58 indicates that after entry of judgment the court may still "approve the form of judgment and direct its prompt preparation and filing." N.C.G.S. § 1A-1, Rule 58. Whether adoption of findings of fact falls within the language of Rule 58 allowing approval of the "form of the judgment" and direction of its "prep-

aration and filing," such that entry of judgment can occur prior to adoption of such findings of fact as are required, is unsettled.

In addressing whether the trial court can enter judgment without making required findings, we look first to the Rules of Civil Procedure. Rule 52 states:

> (a) Findings.—
>
> (1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.
>
> . . .
>
> (b) Amendment.—
>
> Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly.
>
> . . .

N.C.G.S. § 1A-1, Rule 52 (1983). This rule imposes three requirements on the court sitting as finder of fact: it must (1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising from the facts found; and (3) enter judgment accordingly. *See Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371-72 (1975); *Coggins v. City of Asheville*, 278 N.C. 428, 434, 180 S.E.2d 149, 153 (1971); *Gilbert Engineering Co. v. City of Asheville*, 74 N.C. App. 350, 364, 328 S.E.2d 849, 857, *rev. denied*, 314 N.C. 329, 333 S.E.2d 485 (1985); *see also Kirby*, 327 N.C. at 241, 393 S.E.2d at 831 ("The requirement to make findings of fact and conclusions of law is mandatory, and a failure to do so is grounds for granting a new trial."). The court logically must comply with these three requirements in the above order. Thus, under Rule 58 there can be no valid entry of judgment absent necessary findings. *See, e.g., Cutts v. Casey*, 275 N.C. 599, 601-02, 170 S.E.2d 598, 600 (1969); *Johnson v. Johnson*, 67 N.C. App. 250, 257, 313 S.E.2d 162, 166 (1984) ("The entire judgment was not made until all this [*i.e.*, court's adopting findings and conclusions] was accomplished."); *Fitch v. Fitch*, 26 N.C. App. 570, 575, 216 S.E.2d 734, 736-37, *cert. denied*, 288 N.C. 240, 217 S.E.2d 679 (1975); *Bank v. Easton*, 12 N.C. App. 153, 155, 182 S.E.2d 645, 646, *cert. denied*, 279 N.C. 393, 183 S.E.2d 245 (1971).

Further, Rule 52 provides for amendments to findings or additional findings after entry of judgment. N.C.G.S. § 1A-1, Rule 52(b). This provision would be unnecessary if required findings did not have to precede entry of judgment. In addition, in cases where Rule 58 does not expressly apply, considerations of finality and fair notice to the parties militate against finding entry of judgment prior to adoption of the requisite findings.

Some decisions of the Court of Appeals apparently run counter to this analysis. In *Hightower v. Hightower*, 85 N.C. App. 333, 354 S.E.2d 743, *cert. denied*, 320 N.C. 792, 361 S.E.2d 761 (1987), the Court of Appeals stated: "Such authority [under Rule 58 to approve the judgment and direct its prompt preparation and filing] necessarily includes making appropriate findings of fact and entering appropriate conclusions of law, and the giving of notice of appeal in open court after 'entry' of judgment does not divest the trial court of such authority." *Id.* at 337, 354 S.E.2d at 745; *see also Morris v. Bailey*, 86 N.C. App. 378, 389, 358 S.E.2d 120, 127 (1987) (court suggests that findings of fact may follow open court entry of judgment). This statement seems to indicate that Rule 58 contemplates authority to make findings of fact after judgment is entered. Appellant in *Hightower*, however, attacked an order of contempt that allegedly was unsupported by adequate findings of fact *at the time he gave oral notice of appeal in open court*. The court in *Hightower* did not hold that Rule 58 allows findings of fact subsequent to entry of judgment. Rather, it cited Rule 58 as support for the proposition that oral notice of appeal after a judgment is *rendered* does not prevent the trial court from making findings of fact to support the conclusions of law it *enters* thereafter.

In *Banner v. Banner*, 86 N.C. App. 397, 358 S.E.2d 110, *rev. denied*, 320 N.C. 790, 361 S.E.2d 70 (1987), the Court of Appeals stated:

> A judgment or order is not final under Rule 58 until it is entered on the clerk's minute book. . . . However, the purpose of this rule is merely to give all parties fair notice of the entry of judgment. . . . Even though recording the judgment may be essential to be effective against third persons, the 'entry' of judgment is not essential as to the parties themselves.

Id. at 403, 358 S.E.2d at 113. To the extent *Banner* is inconsistent with the analysis herein, it is disapproved.

The majority in the Court of Appeals relied on *Patel v. Mid Southwest Electric*, 88 N.C. App. 146, 362 S.E.2d 577 (1987), *rev. denied*, 322 N.C. 326, 368 S.E.2d 868 (1988), for the proposition that "the date of entry of judgment 'does not depend on the date of formal signing or filing, but instead depends upon the date when oral notice of the judgment is given in open court.' " *Stachlowski*, 98 N.C. App. at 669, 391 S.E.2d at 850 (quoting *Patel v. Mid Southwest Electric*, 88 N.C. App. at 148, 362 S.E.2d at 578). To the extent *Patel* establishes entry of judgment apart from some notation in the minutes or in a manner consistent with the analysis herein, it is disapproved.

The language of Rule 58 clearly establishes that entry of judgment occurs when the clerk makes some notation in the minutes. In cases where the procedures used do not fit within the express provisions of the rule or where there is no evidence to indicate when or whether such notation was made, the spirit and purpose of the rule should determine when entry of judgment occurs. As described above, relevant factors in this analysis are: (1) an easily identifiable point at which entry occurred, such that (2) the parties have fair notice of the court's judgment and the time thereof, and that (3) the matters for adjudication have been finally and completely resolved so that the case is suitable for appellate review. The 17 January 1989 announcement of the custody decision, with required findings yet to be made and visitation yet to be determined, was not an easily identifiable point for determining that the court had entered, rather than rendered, judgment. The parties thus did not have fair notice that the time for taking an appeal had commenced. Further, because visitation rights remained at issue, all matters for adjudication had not been resolved finally and completely.

We conclude that entry of judgment occurred on 6 April 1989—the date the court adopted the proposed order and findings submitted by the prevailing party—rather than on 17 January 1989 when the court merely announced in open court its decision regarding custody. Plaintiff's written notice of appeal on 6 April 1989 was therefore timely and sufficient to vest jurisdiction in the Court of Appeals. Accordingly, we reverse the decision of the Court of Appeals and remand the case to that court for a determination on the merits.

Reversed and remanded.

STATE OF NORTH CAROLINA v. MICHAEL RAY QUESINBERRY

No. 95A88

(Filed 7 March 1991)

Criminal Law § 1352 (NCI4th)— McKoy error—sufficient evidence of impaired capacity mitigating circumstance—new sentencing hearing

The State failed to demonstrate that the trial court's erroneous instruction requiring unanimity on mitigating circumstances in a capital sentencing proceeding was harmless beyond a reasonable doubt, and a sentence of death imposed on defendant for first degree murder is vacated and the case is remanded for a new capital sentencing proceeding, where the jury failed unanimously to find the submitted statutory mitigating circumstance that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired because of his drug intoxication, and defendant's evidence that he abused drugs and alcohol over an eight-year period and that he consumed two beers and smoked five marijuana cigarettes during the six and one-half hours immediately preceding the murder was sufficient to permit one or more jurors to find the impaired capacity mitigating circumstance. Even though there was evidence tending to indicate that defendant continued to function normally despite the consumption of drugs and alcohol, one or more jurors, acting under constitutional instructions, may well have given the greater weight to defendant's testimony that he felt "high" and to their understanding of the effects of such extensive consumption, both over time and more immediately, on defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

Am Jur 2d, Criminal Law §§ 598, 599, 893.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.

Justice MEYER dissenting.

Justice MITCHELL joins in this dissenting opinion.

ON remand by the United States Supreme Court, --- U.S. ---, 108 L. Ed. 2d 603 (1990), for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). Heard on remand in the Supreme Court 13 February 1991.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Justice.

Defendant was convicted of the first-degree murder of Van Buren Luther and sentenced to death. This Court found no error in the guilt phase of defendant's trial but ordered a new sentencing proceeding. *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987). Following the new sentencing proceeding, defendant was again sentenced to death. This Court found no error and upheld the sentence. *State v. Quesinberry*, 325 N.C. 125, 381 S.E.2d 681 (1989).

Subsequently, the United States Supreme Court vacated the judgment and remanded the case to this Court for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *Quesinberry v. North Carolina*, --- U.S. ---, 108 L. Ed. 2d 603 (1990). On 3 October 1990 this Court ordered the parties to file supplemental briefs addressing the *McKoy* issue.

The evidence supporting defendant's conviction and death sentence is summarized in this Court's prior opinions—*State v. Quesinberry*, 325 N.C. 125, 381 S.E.2d 681; *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446—and will not be repeated here except as necessary to discuss the question before us on remand by the United States Supreme Court.

In *McKoy v. North Carolina*, the United States Supreme Court held unconstitutional under the eighth and fourteenth amendments of the federal constitution jury instructions directing that, in making the final determination of whether death or life imprisonment is imposed, no juror may consider any circumstance in mitigation of the offense unless the jury unanimously concludes that the circumstance has been proved. *McKoy*, 494 U.S. 433, 108 L. Ed. 2d 369. Our review of the record reveals, and the State concedes, that the jury here was so instructed. Specifically, the trial court

instructed the jury to answer each mitigating circumstance "no" if it did not unanimously find the circumstance by a preponderance of the evidence. Thus, the sole issue is whether this is the "rare case in which a *McKoy* error could be deemed harmless." *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990). "The error . . . is one of federal constitutional dimension, and the State has the burden to demonstrate its harmlessness beyond a reasonable doubt." *Id.*; N.C.G.S. § 15A-1443(b) (1988). On the record before us, we conclude that the State has not carried this burden.

The trial court submitted ten possible mitigating circumstances:

1) Michael Ray Quesinberry has no significant history of prior criminal activity.

. . . .

2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired because he was under the influence of drugs.

. . . .

3) The age of the defendant at the time of the murder.

. . . .

4) Prior to July 20, 1984, Michael Ray Quesinberry had no prior history of assaultive behavior.

. . . .

5) Since the arrest of the defendant for the offense before you the defendant has adapted well to life in custody and the defendant has shown no tendancies [sic] for violence against others.

. . . .

6) The defendant voluntarily confessed to the crime after being warned of his right to remain silent and without asking for or without assistance of counsel.

. . . .

7) Upon his arrest, the defendant cooperated with law enforcement officers.

8) The crime committed by the defendant was out of character for the defendant.

. . . .

9) The defendant is remorseful for the crime.

. . . .

10) Any other circumstances arising from the evidence.

. . . .

The jury unanimously found circumstances (1) and (4)-(9). Acting under the constitutionally defective instruction recited above, it rejected circumstances (2), (3) and (10).

The evidence relevant to the first of the submitted mitigating circumstances not found—"[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired because he was under the influence of drugs"—was from defendant's testimony and was as follows:

Defendant, who was twenty-two years old on the date of the murder, had been "smoking pot and drinking alcohol" since he was fourteen. By age fifteen-and-a-half he "was smoking pot, smoking hash, doing acid, speed." At about age seventeen-and-a-half, defendant entered the United States Army. He consumed illicit drugs and alcohol throughout his Army career. The Army ultimately sent him to a drug and alcohol rehabilitation center. When defendant finished his "schooling" at the center, he still tested positive for drugs, and the Army discharged him.

Upon his discharge defendant lived with his parents briefly, then married and moved in with his wife's parents. He continued to smoke marijuana and take other illegal drugs. He "was smoking pot, doing acid, speed, and smoking hash, and cocaine every now and then." He had a "physical need for the dependency of these drugs."

In the early part of 1984, an acquaintance arranged for defendant to find employment in Randolph County, North Carolina, the locale of the murder. He first acquired drugs there after two days on the new job. He never had trouble getting drugs in the plant or in the community.

On 20 July 1984, the day of the murder, defendant left home for work about 7:00 a.m. He smoked a marijuana cigarette on the way to work. During a 9:15 a.m. break, he "smoked a joint." Thus, by 9:15 a.m. he had smoked two joints of marijuana. Between the break and lunchtime, he smoked another joint. At lunchtime defendant and a co-worker smoked a joint. This was his fourth joint for the day. Shortly thereafter, defendant "swapped a marijuana cigarette for some beer." He drank two beers and felt "high." He returned to work for a while and "started feelin' worse," so he went out and smoked another joint. He smoked this, his fifth joint for the day, "somewhere around" 1:00 p.m.

Defendant then left the plant and went to the victim's store. The precise time he inflicted the blows which resulted in the victim's death is unknown, but the victim's unconscious body was found around 1:37 p.m.

The evidence thus demonstrated a pattern of drug and alcohol abuse extending over a period of approximately eight years. More relevantly, it showed that over the approximately six to six-and-one-half hours immediately preceding the murder, defendant consumed two beers and smoked five marijuana cigarettes. In light of this evidence, we cannot conclude beyond a reasonable doubt that the erroneous unanimity jury instruction did not preclude one or more jurors from considering in mitigation defendant's drug intoxication as diminishing his capacity to appreciate the criminality of his act or to conform his conduct to the requirements of the law. Nor can we conclude beyond a reasonable doubt that had such jurors been permitted, under proper instructions, to consider this circumstance, they would nevertheless have voted for the death penalty rather than life imprisonment. *See State v. Sanderson*, 327 N.C. 397, 403, 394 S.E.2d 803, 806 (1990).

In support of its argument that the error was harmless the State points to evidence tending to indicate that defendant continued to function normally despite the consumption of drugs and alcohol shown. Such evidence notwithstanding, one or more jurors, acting under constitutional instructions, may well give the greater weight to defendant's testimony that he felt "high" and to their understanding of the effects of such extensive consumption, both over time and more immediately, on defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law. Because the circumstance in question

is statutory, N.C.G.S. § 15A-2000(f)(6), it is presumed to have mitigating value if found. *State v. Pinch*, 306 N.C. 1, 27, 292 S.E.2d 203, 224, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled in part on other grounds*, *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988). A single juror's vote could change the sentencing result from death to life imprisonment. *State v. Brown*, 327 N.C. 1, 30, 394 S.E.2d 434, 452 (1990). Given the evidence, we cannot conclude beyond a reasonable doubt that the constitutionally erroneous instruction did not prevent at least one juror from finding the circumstance to exist, giving it mitigating value, and changing his or her vote from death to life imprisonment as a result.

Accordingly, the sentence of death is vacated, and the case is remanded to the Superior Court, Randolph County for a new capital sentencing proceeding. *See State v. McNeil*, 327 N.C. 388, 397, 395 S.E.2d 106, 112 (1990). Our disposition on the impaired capacity circumstance makes it unnecessary for us to consider the effect of the constitutionally erroneous instruction on the other mitigating circumstances not found.

Death sentence vacated; remanded for new capital sentencing proceeding.

Justice MEYER dissenting.

Defendant, in July 1984, bludgeoned to death with a ball peen hammer the seventy-one-year-old victim during a preplanned armed robbery of the victim's rural country store. The victim was struck ten times and died four hours later in excruciating pain. In April 1987, this Court, in a four-to-three decision, with Justices Martin, Meyer, and Mitchell dissenting, found error in the sentencing phase of defendant's trial and ordered a new sentencing hearing. After the new sentencing hearing, this Court, in July 1989, with Chief Justice Exum concurring and Justice Frye dissenting as to sentence, affirmed defendant's death sentence. Now, over six and a half years after the murder, the majority, upon finding the *McKoy* error not to be harmless, has ordered yet another sentencing hearing. While I readily concede the presence of *McKoy* error, I conclude that such error was harmless beyond a reasonable doubt.

At the conclusion of the resentencing hearing, the trial court submitted to the jury one aggravating circumstance and ten miti-

gating circumstances. The jury unanimously found the aggravating circumstance of pecuniary gain to be present. The jury unanimously found the following mitigating circumstances: "1) Michael Ray Quesinberry has no significant history of prior criminal activity"; "4) Prior to July 20, 1984, Michael Ray Quesinberry had no prior history of assaultive behavior"; "5) Since the arrest of the defendant for the offense before you the defendant has adapted well to life in custody and the defendant has shown no tendancies [sic] for violence against others"; "6) The defendant voluntarily confessed to the crime after being warned of his right to remain silent and without asking for or without assistance of counsel"; "7) Upon his arrest, the defendant cooperated with law enforcement officers"; "8) The crime committed by the defendant was out of character for the defendant"; and "9) The defendant is remorseful for the crime."

The jury did not unanimously find the following submitted mitigating circumstances to be present: "2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired because he was under the influence of drugs"; "3) The age of the defendant at the time of the murder"; and "10) Any other circumstances arising from the evidence."

Because the resentencing jury was required to be unanimous in its findings of mitigating circumstances and the individual jurors were not allowed to weigh mitigating circumstances not unanimously found, the *McKoy* error unquestionably occurred. In order to declare the *McKoy* error to be harmless, this Court must find beyond a reasonable doubt that no different recommendation would have resulted if the individual jurors had been permitted to consider mitigating circumstances not unanimously found. *State v. Jones*, 327 N.C. 439, 396 S.E.2d 309 (1990); *State v. Sanders*, 327 N.C. 319, 395 S.E.2d 412 (1990), *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 782 (1991); *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990). The burden is on the State to prove beyond a reasonable doubt that the jury would have recommended death if each individual juror had been allowed to consider all the mitigating circumstances which he or she found to be present from the evidence.

I am convinced beyond a reasonable doubt that the jury would have recommended the sentence of death even if the instructions had not required unanimity in finding mitigating circumstances, because there was little or no evidence presented to the jury upon

which a reasonable juror could base a finding of any of the three mitigating circumstances which the jury did not unanimously find to exist. *State v. McKoy*, 327 N.C. 31, 44 n.4, 394 S.E.2d 426, 433 n.4 (1990).

Circumstance (2): Impaired Capacity

The majority concludes that there was sufficient evidence of impaired capacity to permit a reasonable juror to find this mitigating circumstance in the absence of the unanimity requirement. I conclude that the evidence of impaired capacity through use of drugs at the time the crime was committed was insubstantial at best and that no reasonable juror would have found this circumstance to exist had the jury been correctly instructed.

While there was certainly evidence that defendant smoked four marijuana cigarettes and shared two others with friends, that he had two beers during the course of the morning before the murder, and that he had a long history of drug abuse, there is no evidence that defendant was under the influence of drugs *at the time of the murder*. Defendant testified that he smoked one marijuana cigarette at 7:00 a.m. on his way to work. He stacked furniture frames until 9:00 a.m. and then smoked another marijuana cigarette. He smoked another marijuana cigarette between break time and lunchtime. He shared two other marijuana cigarettes with co-workers at lunchtime and drank two beers. He testified that, at around noon, he felt high and a little nauseated. He went back inside and worked for a while. Around 1:00 p.m., he went to his truck and smoked another marijuana cigarette. He decided to go home, and he drove the back way to avoid being stopped for improper registration and driving without insurance on his truck. He drove to Luther's Grocery, sat in the truck for a while, and contemplated what he was going to do. He then took his hammer, went inside, and beat Mr. Luther on the head. He took a pouch full of money and drove back to Asheboro. Defendant knew he had killed Mr. Luther, but he went back to work and worked the remainder of the afternoon, leaving work five minutes early at 3:25 p.m. and driving to Asheboro. There was testimony that it takes the rescue squad twenty to twenty-five minutes to drive from Asheboro to Luther's Grocery on the main roads. The back roads taken by defendant were winding and more difficult to drive.

There was no evidence that defendant was under the influence of drugs *at the time of the murder*. All the evidence is to the

contrary. That his physical faculties were *not* appreciably impaired at the time of the murder is shown by his ability to work at his job; to jump-start his truck; to drive from Asheboro to Luther's Grocery, a distance of some twenty miles, using winding back roads; and then to drive back to Asheboro by the same route. That his mental faculties were not impaired is shown by the evidence that he decided to take back roads to avoid being stopped for improper registration and that he threw out the money bags and murder weapon on the way back in order to destroy evidence of the crime. When he was apprehended at 4:00 p.m., he did not tell officers he had been under the influence of drugs.

Nor could a reasonable juror have found from the evidence presented that defendant's long-term use of drugs *before* the day of the murder impaired him on that day. The evidence shows that defendant functioned all of his adult life while using marijuana and other drugs and that he held a job, supporting his wife and child, all while using drugs. The drug use on the day of the murder was no different from any other, except that on other occasions, he had used hashish, acid, and speed. On the day he murdered Mr. Luther, he only had four to six marijuana cigarettes and two beers over a period of six hours. There was no testimony or evidence that this amount of marijuana consumed over a period of six hours would impair defendant's capacity to appreciate the criminality of his conduct or to obey the law.

In *State v. Sanderson*, 327 N.C. 397, 394 S.E.2d 803 (1990), cited by the majority, this Court found that Sanderson had taken large amounts of drugs at the time of the murder and had injected two syringes of "dope" just before the murder. There was also evidence that when Sanderson confessed to the crime, he testified to being on drugs at the very time of the murder. This is far greater evidence of diminished capacity than Quesinberry presented as to his use of marijuana cigarettes and two beers over a period of six hours. This Court, in *State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106 (1990), also found that evidence of consumption of substantial amounts of alcohol on the weekend of one of the murders was sufficient to allow a reasonable juror to find the impaired capacity mitigating circumstance. In *McNeil*, however, there was expert testimony that consumption of alcohol impaired McNeil's judgment and was a contributing factor to his behavior. Defendant presented no evidence in this case that four to six marijuana cigarettes plus two beers over the course of six hours could have

impaired defendant's mental capacity, and this Court cannot presume that it could have.

I now address the mitigating circumstances, which defendant contends there was evidence to support but which, because of its conclusion as to circumstance (2), the majority found unnecessary to address.

Circumstance (3): Defendant's Age at the Time of the Crime

There was nothing about the defendant's age of twenty-two years which was mitigating. The defendant lacked neither chronological nor mental maturity. At age twenty-two, he had attained the age of majority and was fully responsible for his acts. He had been self-supporting since the age of sixteen. He had been emancipated since the age of seventeen and a half, when he went into the Army. He married at the age of twenty. Any one of these circumstances qualified him as an adult and as fully emancipated under N.C.G.S. § 7A-717.

Defendant contends that his limited educational experience somehow has a bearing on the age mitigating circumstance, since he quit school at the age of fifteen and a half while in the ninth grade. The evidence shows that defendant's educational experience was neither minimal nor even limited. Defendant went into the military, had no trouble getting through basic training, and successfully completed the course in small engine repair given by the military. The evidence further shows defendant had sufficient intelligence to complete his GED while in prison.

Defendant had been in the military since age seventeen and a half, had been self-supporting, had married and had a child, had lived in different areas of the United States, had met and seen a variety of people, and thus had a varied and mature life experience. The evidence in this case simply does not support the proposition that defendant's age was a mitigating circumstance.

Circumstance (10): Any other Circumstances Arising from the Evidence

Defendant contends that there are several items of evidence which a juror could find existed and had mitigating value. Some of these items bear no nexus to the case, and the remainder were subsumed in the mitigating circumstances actually submitted.

None of these items were argued to the jury at the sentencing hearing as being mitigating.

1. *Honorable Discharge*: Defendant was disciplined in the military for drug abuse, took drugs during the rehabilitation program, and was discharged from the military when he was again tested and found to be positive for drugs. Defendant received a Chapter 8 discharge, which was a discharge under honorable conditions except for drug and alcohol abuse. This simply does not rise to the level of evidence of an honorable discharge. No reasonable juror could find this type of discharge to be a mitigating circumstance.

2. *GED*: The fact that defendant completed his GED while in prison is subsumed in the mitigating circumstance that defendant adapted well to life in custody, which the jury found.

3. *Good Family Man*: Defendant was a drug abuser from the age of fourteen. The evidence shows that defendant was a problem to his parents because of his drug abuse, to the point that his father and the police chief talked him into going into the military at age seventeen and a half. When he married his wife, he was spending $40.00 a week on drugs. At the time of the murder, he was spending $45.00 a week on drugs while earning $105.00 a week at his job. His family's needs were not met because of his drug use. There was no evidence that defendant treated his family well and no evidence from which a juror could find this circumstance to mitigate the crime.

4. *Defendant's Upbringing*: There is no evidence that defendant had few opportunities in his life or came from very disadvantaged conditions. Defendant had a normal childhood living in a home with his father, mother, sister, and brother. His father worked as a coal miner, and his mother stayed home to care for the children. Defendant grew up on the farm, playing with the cows and horses, and played basketball with friends. All his life, there were people to help defendant, including his grandmother; the chief of police; the army, which gave him free drug rehabilitation treatment; his employer in North Carolina, who gave him a house rent-free for repairs; and his wife. There is no evidence of mitigating value of defendant's lack of opportunity or disadvantaged family life.

5. *Work Record*: Defendant's employer did not testify on his behalf, and the evidence showed that defendant smoked marijuana

on the job. There was simply no evidence that defendant had a good work record which would be of mitigating value.

Two juries have considered the facts of this case, the circumstances of the crime, and defendant Quesinberry's mitigating evidence; and both juries have recommended the sentence of death. While *McKoy* error occurred during the resentencing of the defendant, it was harmless beyond a reasonable doubt. I vote to find the *McKoy* error harmless in this case and to reaffirm the sentence of death.

Justice MITCHELL joins in this dissenting opinion.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA

No. 293A89

(Filed 7 March 1991)

1. **Utilities Commission § 35 (NCI3d) — rate base — water storage tank — disallowance of part of cost**

A finding by the Utilities Commission that only $78,898 of defendant utility's $187,853 investment in an elevated water storage tank in a subdivision was used and useful and should be included in the rate base was supported by evidence that the tank was built to serve 625 customers; defendant utility had only 261 customers at the end of the test year and 318 customers at the time of the hearing; and the tank was built to serve not only customers in the subdivision served by defendant but also customers in two new subdivisions which were not a part of defendant's service area.

Am Jur 2d, Public Utilities §§ 139, 141.

2. **Utilities Commission § 35 (NCI3d) — rate base — sewage plant expansions — disallowance of cost**

A finding by the Utilities Commission that only 30% of the cost of the expansion of a sewage treatment plant in a subdivision in Carteret County was used and useful and should be included in defendant utility's rate base was supported by evidence that there were 111 customers at the end of the

test year and the plant had a capacity to serve 375 customers. Furthermore, the Commission's finding that the entire expansion of a sewage treatment plant in Mecklenburg County was not used and useful and should not be included in defendant utility's rate base was supported by evidence that the plant had the capacity before its expansion to serve all of the utility's customers at the end of the test period.

Am Jur 2d, Public Utilities §§ 139, 141.

3. **Utilities Commission § 34 (NCI3d)— rate base—cost of plant for future customers—matching revenues and expenses**

The Utilities Commission's use of the concept of matching which requires that future revenues and expenses be matched with the part of the cost of a plant put in the rate base which is to serve future customers was authorized by N.C.G.S. § 62-133(c) and (d).

Am Jur 2d, Public Utilities §§ 173, 178.

4. **Utilities Commission § 35 (NCI3d)— rate base—excess plant—absence of evidence of matching revenues and costs**

The Utilities Commission did not use two mutually exclusive rate making theories when it held that sewage treatment plants constituted excess capacity and also held that it would not consider a part of the plants used and useful after the test period because there was no evidence of revenues or costs matched with the plants during that period.

Am Jur 2d, Public Utilities § 139.

5. **Utilities Commission § 34 (NCI3d)— rate base—post test year use of plant expansion—matching revenues and costs**

When a utility has asked that costs for post test year use of plant expansions be included in the rate base, the Utilities Commission may under N.C.G.S. § 62-133(c) require the utility to show matching revenues and costs.

Am Jur 2d, Public Utilities §§ 173, 204.

6. **Utilities Commission § 32 (NCI3d)— additions to rate base—used and useful plant—matching costs and revenues**

The Utilities Commission does not have to allow additions to the rate base for a used and useful plant if the evidence

does not show what changes there may be in matching costs and revenues.

Am Jur 2d, Public Utilities § 173.

7. **Utilities Commission § 32 (NCI3d)— rate base—plant expansions—failure to require payment by developers**

Evidence of a utility's failure to require subdivision developers or a prior owner to provide the capital for water and sewer plant expansions could be considered by the Utilities Commission under N.C.G.S. § 62-133(d) in determining the amount of plant expansion to be included in the rate base.

Am Jur 2d, Public Utilities §§ 139, 140.

8. **Utilities Commission § 4 (NCI3d)— exhibit filed after hearing—consideration by Commission—waiver of right to reopen hearing**

The Utilities Commission could properly receive and consider an exhibit filed after the close of a rate hearing subject to the right of the utility to have the hearing reopened for cross-examination and rebuttal, and the utility's failure to demand that the hearing be reopened constituted a waiver of this right.

Am Jur 2d, Public Utilities § 269.

APPEAL pursuant to N.C.G.S. § 7A-29(b) by Carolina Water Service, Inc. of North Carolina from a final order of the North Carolina Utilities Commission entered 7 February 1989 in Docket No. W-354, Sub 69 approving a partial rate increase and requiring improvements. Heard in the Supreme Court 14 December 1989.

Carolina Water Service, Inc. of North Carolina (CWS) provides water and sewer services to approximately 20,782 customers in 65 service areas in various locations across the state. On 5 July 1988, CWS filed an application for a rate increase of $969,140 per year for customers in most of its service areas. CWS sought to include in its rate base three major capital additions. These were a sewage treatment plant in the company's Danby/Lamplighter service area in Mecklenburg County which cost $209,000, a 250,000 gallon elevated storage tank in the Cabarrus Woods service area in Cabarrus County which cost $187,853, and a 100,000 gallon per day expansion of a sewage treatment plant in the Brandywine Bay service area in Carteret County. The Utilities Commission

declared the matter to be a general rate case, suspended the proposed rates for a period of up to 270 days and set the matter for a public hearing. The Attorney General and the public staff intervened.

After a hearing the Commission entered an order. It found as to the Cabarrus Woods elevated storage tank that it would benefit all customers in Cabarrus Woods. The Commission found, however, that only a portion ($78,898) in investment in the elevated storage tank should be allowed in the rate base. To support this finding the Commission relied on evidence that the tank had a capacity to serve 625 customers and there were 261 customers at the end of the test year. There were 318 customers at the time of the hearing. The Commission allowed a part of the cost of the tank to be put in the rate base based on the ratio of 261 customers to the 625 customers the tank was capable of serving. It said that if it were to allow the company to recover that part of the investment attributed to 318 customers it would also need to balance this investment with not only the revenues of the additional 57 customers (318 minus 261) but also the expenses that these additional customers would place on the company.

The Commission found as to the sewage treatment plant at Brandywine Bay that $97,437 of the cost of $324,789 should be included in the rate base. To support this finding the Commission relied on evidence that there were 111 customers for this facility at the end of the test period. The treatment plant has the capacity to serve approximately 375 customers. The Commission concluded only 30% (111 divided by 375) of the $324,789 or $97,437 should be included in the rate base.

As to the 500,000 gallon per day expansion of the sewer plant serving the Danby/Lamplighter subdivision, the Commission found it should not be included in the rate base. To support this finding the Commission relied on evidence that the plant had a capacity of 150,000 gallons per day before the expansion which would serve the 361 customers which CWS had at the end of the test period. The Commission said that to do otherwise would violate the concept of matching investment, expenses, and revenues and would require customers existing at the end of the test year to pay for plant expansion not needed to serve them.

Carolina Water Service appealed.

Robert P. Gruber, Executive Director, and Antionette R. Wike, Chief Counsel, by Paul L. Lassiter and Robert B. Cauthen, Jr., Staff Attorneys, Public Staff—North Carolina Utilities Commission, for the Using and Consuming Public, plaintiff appellee.

Hunton & Williams, by Edward S. Finley, Jr., for Carolina Water Service, Inc. of North Carolina, defendant appellant.

WEBB, Justice.

The Commission has held that the cost of the sewage disposal plant built for the Danby/Lamplighter subdivision in Mecklenburg County may not be included in the defendant's rate base. It has also held that only a percentage of the cost of the sewage treatment plant at Brandywine Bay in Carteret County and a percentage of the cost of the elevated water tank serving Cabarrus Woods in Cabarrus County may be included in defendant's rate base. In determining whether the cost of property is to be included in the rate base N.C.G.S. § 62-133 provides in part:

> (b) [T]he Commission shall:
>
> (1) Ascertain the reasonable cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period[.]

It is a question of fact to be decided by the Commission as to what part of the utility's property is "used and useful, or to be used and useful within a reasonable time after the test period." *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972). If a finding of fact on this issue is supported by competent, material and substantial evidence in view of the whole record we cannot disturb this finding. *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 358 S.E.2d 339 (1987); N.C.G.S. § 62-94(b)(5) (1975).

[1] In this case the evidence supports the findings of fact by the Utilities Commission. The evidence that the elevated storage tank at Cabarrus Woods was built to serve 625 customers and there were only 261 customers at the end of the test year and 318 customers at the time of the hearing, is evidence that the entire storage tank was not used and useful at the close of the test period and would not be used and useful within a reasonable time after the test year. There was also testimony that the tank was built to serve not only customers within the Cabarrus Woods

subdivision but customers in two new subdivisions which were not part of the defendant's service area. This evidence supported the Commission's finding as to the Cabarrus Woods storage tank.

[2] As to the Brandywine Bay sewage treatment plant, the evidence that there were 111 customers at the end of the test year and the plant had the capacity to serve 375 customers is evidence which supports the Commission's finding of fact that only 30% of the plant is used and useful. The evidence that the Danby/Lamplighter sewer plant, before its expansion, had sufficient capacity to serve its customers at the end of the test year supports a finding that this plant was not used or useful.

[3] CWS contends the Commission supported its disallowance of most of the investment in the Cabarrus Woods tank and all the investment in the Danby/Lamplighter plant by relying on the accounting concept of matching, which was error. Matching requires that future revenues and expenses be matched with the part of the cost of a plant put in the rate base which is to serve future customers. Its purpose is to prevent present customers from paying for that portion of a plant that will serve only future customers.

The appellee says matching is authorized by N.C.G.S. § 62-133 which provides in part:

> (c) The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.
>
> (d) The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates.

This section of the statute directs the Commission to consider changes after the test period in costs, revenues, or property used and useful. These are factors used in matching. It is authority for the Commission to use the matching concept.

[4] We do not believe, as argued by the appellant, that the Commission used two mutually exclusive rate making theories when it held the plants constituted excess capacity and also held it would not consider a part of the plants used and useful after the test period because there was no evidence of revenues or costs matched with the plants during that period. The Commission has simply found what parts of the plants were used and useful at the end of the test period and refused to find a larger part of the plants used and useful at the time of the hearing because there was not evidence of matching costs and revenues.

We also do not believe, as argued by the appellant, that the Commission has held that N.C.G.S. § 62-133(c) requires it to make matching adjustments. It requires the Commission to consider post test period usage of plants as well as costs and revenues. The Commission has to consider these factors but it is not bound by them. Nor do we believe, as the appellant contends, that the decision in this case is inconsistent with *State ex rel. Utilities Comm. v. The Public Staff*, 317 N.C. 26, 343 S.E.2d 898 (1986) (*Glendale*) or *Utilities Commission v. Public Staff*, 52 N.C. App. 275, 278 S.E.2d 599 (1981) (*Ans-A-Phone*). In *Glendale* this Court affirmed an order by the Commission which used salary expenses based on 1985 salaries rather than the test year of 1983. The Commission held that this more appropriately represented salary expenses than the test year salary expenses. The Commission rejected the Public Staff's argument that if post test year salaries were to be used, post test year revenues must be used. We held that there was no correlation between the increased revenues and the post test year salaries. In this case there is a correlation between increased use of the plants after the test year and costs and revenues.

In *Ans-A-Phone* the Commission allowed the cost of a machine which was purchased after the test year to be included in the rate base. The evidence showed the machine was not purchased to serve new customers but was to replace an older and more inefficient machine. There was no evidence of increased customers because of the new machine.

The appellant contends there is no evidence that the added post test period customers served by the Cabarrus Woods tank produced any revenues which can be attributed to the tank. We believe it is reasonable to conclude that if there were new customers they paid for the water, which would be revenues attributed to the tank. The appellant also contends that there is no evidence that the expansion of the Danby/Lamplighter treatment plant contributed to gaining the added customers. Whether or not the plant contributed to gaining new customers CWS wanted the Commission to hold that plant would be used and useful on account of these new customers. The Commission had the right to require a showing of matching revenues and costs.

The appellant further contends that if post test period adjustments exist that reduce the revenue requirement, the remedy is to quantify the adjustments and recognize them in calculating cost of service. The Commission's order is consistent with this premise. There was not sufficient evidence to quantify the adjustments and for that reason the Commission did not allow an addition to the rate base.

[5] CWS contends that the disallowance in the rate base of a part of the costs of plant expansion, because there was not evidence of matching costs and revenues, unlawfully shifted the burden to it of proving these factors. CWS, relying on *Utilities Commission v. Intervenor Residents*, 305 N.C. 62, 286 S.E.2d 770 (1982), says there is a presumption that it acted prudently in making the investments. It says that until some evidence of matching costs and revenues was offered, it had no duty to offer such evidence. We do not believe *Intervenor Residents* is helpful to CWS. That case dealt with the allowance of sums paid to affiliated corporations as expenses. In holding that the Commission's finding of fact that the sums paid were reasonable was supported by the evidence this Court said, "[t]he burden of going forward with evidence of reasonableness and justness arises only when the Commission requires it or affirmative evidence is offered by a party to the proceeding that challenges the reasonableness of expenses allocated to it by an affiliated company[.]" *Id.* at 76, 286 S.E.2d at 779.

Intervenor Residents deals with expenses shown by a utility and the proof necessary to support such an expense. In this case, CWS has asked that costs for post test year use of plants be included in the rate base. We hold that in such a case the Commis-

sion may under N.C.G.S. § 62-133(c) require a utility to show matching revenues and costs.

[6] CWS says that N.C.G.S. § 62-133(c) imposes the burden on parties seeking to show changes after the test period to prove such a change and this is inconsistent with the Commission's interpretation that it may reject evidence of an actual increase in the cost of the plant because the proponent of that evidence fails to provide evidence of a change in revenues or costs. N.C.G.S. § 62-133(c) only requires the Commission to consider post test period changes in used and useful plant. It also requires the Commission to consider changes in costs and revenues. If the evidence does not show what changes there may be in matching costs and revenues, the Commission does not have to allow additions to the rate base for a used and useful plant.

[7] The Commission said one reason it did not put all the plant expansion in the rate base was that CWS did not require developers or in the case of Brandywine Bay, the prior owner, to provide the capital for the plant additions. The rules of the Commission provide that a utility may require applicants for utility services, who require a main extension to serve a new subdivision or tract, to provide the costs for installing such a main. There was competent and material evidence in the record to support the Commission's finding of fact without relying on this evidence. We believe the Commission could consider it under N.C.G.S. § 62-133(d) which requires the Commission to consider all material facts of record that will enable it to determine what are reasonable and just rates.

CWS, relying on *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E.2d 705, argues that the Commission is laboring under the false impression that current ratepayers cannot be required to pay through rates for plant that can be used for future growth. That is not how we read the order of the Commission. As we read the order, the Commission allowed for capacity larger than presently needed which could reasonably be foreseen to be needed in the near future.

[8] In its last argument CWS contends the Commission violated its due process rights in the manner in which it disallowed the costs of the Danby/Lamplighter sewage plant. On the last day of expert testimony, a CWS witness testified on cross-examination that the Danby/Lamplighter sewer plant had been expanded by 500,000 gallons per day giving it a capacity of 650,000 gallons

per day. He testified further that this would give the system the capacity to serve 1,500 customers and there were 360 customers at the end of the test year. He said he did not know how much of the investment CWS proposed to include in the rate base.

The Public Staff then moved that CWS be required to provide it with a late-filed exhibit as to this plant which would show unrecovered investment (investment minus tap fees and/or amounts paid by developers), the number of customers that were presently served and the number of customers that could be served by the facilities. CWS objected to preparing and delivering this exhibit, but it did so. The exhibit was put in evidence after the close of the hearing and the Commission relied upon it in disallowing the costs of the Danby/Lamplighter plant. CWS did not object to the introduction of this exhibit but in the motion for reconsideration it said it had been denied due process because it was not allowed to cross-examine as to this exhibit or to offer rebuttal evidence to it.

CWS argues that it was denied due process because it did not have an opportunity to cross-examine as to this exhibit or to rebut it. We hold that we are bound by *Utilities Commission v. Telegraph Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966), to overrule this assignment of error. In that case, a party filed an exhibit after the conclusion of a hearing and the Utilities Commission relied upon it for a finding of fact. This Court held that the Commission could properly rely on the exhibit but said, "[u]nquestionably, Carolina thereupon had the right, unless waived, to demand that the hearing be reopened, in order to permit it to cross-examine witnesses for the Applicant with reference to data shown upon such 'late' exhibits, or to offer evidence of its own in rebuttal." *Id.* at 269, 148 S.E.2d at 109-110. Pursuant to *Utilities* we hold that the Commission could receive the late exhibit with the right of CWS to have the hearing reopened for cross-examination and rebuttal. CWS did not avail itself of this opportunity and it cannot now complain.

For the reasons stated in this opinion we affirm the order of the Utilities Commission.

Affirmed.

KIRKMAN v. WILSON

[328 N.C. 309 (1991)]

ROY L. KIRKMAN AND WIFE, LULA B. KIRKMAN; CLINTON (NMI) KIRKMAN AND WIFE, ANN LYVONNE KIRKMAN; AND JAMES E. KIRKMAN (UNMARRIED), PLAINTIFFS v. ADDIE WILSON (WIDOW); ZENO M. EVERETTE, JR. AND WIFE, CAROL H. EVERETTE; ERNEST F. BOYD AND WIFE, SYBIL E. BOYD; BRENDA H. MANNING; LOUIS EARL TOLER AND WIFE, JOYCE D. TOLER; LINWOOD EARL BRAXTON AND WIFE, EARLINE BRAXTON; ELVIRA JOHNSON (WIDOW); RICHARD D. JEWELL AND WIFE, PATSY JOHNSON JEWELL; AND MARIE H. WISE (WIDOW), DEFENDANTS AND THIRD PARTY PLAINTIFFS v. J. L. WILSON AND WIFE, ADDIE WILSON; CORA LEE BAILEY AND HUSBAND, DENNIS BAILEY; JIMMY MORRIS AND WIFE, JANICE MARLINE MORRIS; DORIS EVELYN SADLER AND HUSBAND, CLEM M. SADLER; BRITT ANNIE WARREN AND HUSBAND, JAMES W. WARREN; DORA LEE SUMRELL AND HUSBAND, WILLIAM H. SUMRELL; STEPHEN KITE AND WIFE, JULIA LAURA KITE; GUY C. FORNES AND WIFE, LENA FRANCES FORNES; JAMES S. DIXON AND WIFE, AMANDA DIXON; AND CLAUDIS DIXON AND WIFE, ADA MAE DIXON, THIRD PARTY DEFENDANTS

No. 242A90

(Filed 7 March 1991)

Appeal and Error § 167 (NCI4th)— action to determine title to real estate—advisory opinion

The Court of Appeals erred by treating plaintiffs' appeal as a petition for certiorari in an action to determine title to real estate where there were several unresolved issues of law and fact, and the proceedings in the trial court did not establish the essential factual and legal foundation for the issues the parties sought to have decided on appeal. A decision on this record would constitute an advisory opinion on abstract questions.

Am Jur 2d, Appeal and Error §§ 760-763.

Justice FRYE dissenting.

APPEAL by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 98 N.C. App. 242, 390 S.E.2d 698 (1990), which affirmed in part and reversed in part a judgment entered on 23 November 1988 by *Winberry, J.*, in Superior Court, CRAVEN County. On 29 August 1990 this Court allowed petitions for discretionary review of additional issues filed by plaintiffs and by defendants Zeno M. Everette, Jr., and wife Carol H. Everette. Heard in the Supreme Court 15 February 1991.

Ward and Smith, P.A., by Susan K. Ellis and J. Randall Hiner, for plaintiffs.

LeBoeuf, Lamb, Leiby & MacRae, by Jane Flowers Finch and Thomas W. Boyd, for defendants.

WHICHARD, Justice.

Plaintiffs brought this declaratory judgment action seeking to have themselves declared the fee simple owners of a tract of land and to have defendants ejected therefrom and plaintiffs placed in possession. All parties trace their alleged ownership to A. E. Kirkman, who had title to the land sometime prior to 22 August 1936. Kirkman died testate on 11 May 1941. He devised all his real estate to his son, G. C. Kirkman, "to have and to use during his lifetime, with out [sic] the right or privilege to sell or convey the said relstate [sic] in any form or manner, and at [his] death . . . the aforesaid relstate [sic] shall be left to the legal children of . . . the aforesaid, G. C. Kirkman."

While the original will filed in Folio Number 27 in the office of the Clerk of Superior Court, Craven County, contained the aforesaid restraint on alienation, the transcription recorded in Will Book K, page 27, did not. Instead, it erroneously stated that the property was devised "with the right or privilege to sell or convey the said real estate in any form or manner."

Prior to his death in 1982, G. C. Kirkman and his wife conveyed in fee simple, by general warranty deeds, all the land in question. Defendants claim title by virtue of direct or mesne conveyances from G. C. Kirkman and wife. Plaintiffs, the sons of G. C. Kirkman who were living at the time of A. E. Kirkman's death, and their spouses, claim title as remaindermen under the will of A. E. Kirkman.

The trial court did not determine whether plaintiffs held vested remainder interests. It found as a fact that plaintiffs had not registered "*any* claim or title they *may* have" within the thirty-year period provided for in N.C.G.S. § 47B-4, the Marketable Title Act. (Emphasis added.) It concluded that "*any* rights" of plaintiffs in the land thus were extinguished by N.C.G.S. Chapter 47B. (Emphasis added.)

On appeal, the Court of Appeals noted that several issues of law and fact raised by the pleadings remained unresolved, and

that the appeal thus was "interlocutory in nature." *Kirkman v. Wilson*, 98 N.C. App. 242, 245, 390 S.E.2d 698, 700 (1990). It nevertheless "treat[ed] plaintiffs' appeal as a petition for certiorari" and elected to consider it. *Id.*

The majority in the Court of Appeals held that:

> As to the claims of defendants Elvira Johnson; Richard Jewell and wife, Patsy Jewell; Marie H. Wise; Addie Wilson; and Zeno Everette and wife, Carol Everette; plaintiffs prevail because plaintiffs' interest was not extinguished by the Act because it was revealed in the muniments of title in their record chain of title. With respect to defendants Ernest Boyd and wife, Sybil Boyd; Louis Toler and wife, Joyce Toler; Brenda H. Manning; and Linwood Braxton and wife, Earline Braxton; because no registration of their interests by plaintiffs occurred pursuant to G.S. 47B-4 and no mention of the Kirkman will appeared in the muniments of title in their respective 30 year chain of record title, plaintiffs' interest was extinguished by the Act and these defendants prevail.

Id. at 252, 390 S.E.2d at 704. The court thus affirmed the trial court in part and reversed it in part. Judge Greene dissented in part on the ground that, in his view, the General Assembly did not intend in the enactment of the Marketable Title Act to eliminate any vested remainder interests. *Id.* at 252-53, 390 S.E.2d at 704. The Court of Appeals declined to rule on plaintiffs' challenge to the constitutionality of the Marketable Title Act because it had not been raised or considered in the trial court. *Id.* at 251-52, 390 S.E.2d at 703-04.

Plaintiffs exercised their right to appeal based on Judge Greene's dissent. N.C.G.S. § 7A-30(2) (1989). On 29 August 1990 we allowed plaintiffs' petition for discretionary review on the issue of "[w]hether application of the Marketable Title Act to extinguish a non-possessory vested remainder violates the Due Process Clause of the United States Constitution or the Law of the Land provision of the North Carolina Constitution." We also allowed a petition for discretionary review filed by defendants Zena M. Everette, Jr. and wife Carol H. Everette, on the issue of whether the "Marketable Title Act extinguish[ed] plaintiffs' vested remainder interest" in the property to which the Everettes hold a record title by mesne conveyances from G. C. Kirkman.

We hold that the Court of Appeals erred in treating plaintiffs' interlocutory appeal as a petition for certiorari and considering the appeal. As the Court of Appeals noted, "[t]here still remain several unresolved issues of law and fact that were raised by the pleadings." *Kirkman*, 98 N.C. App. at 245, 390 S.E.2d at 700. Moreover, the proceedings in the trial court have not established the essential factual and legal foundation for the issues the parties seek to have decided in this appeal. The trial court did not determine whether plaintiffs have interests in the lands in question which give them standing to litigate the effect of the Marketable Title Act thereon. Instead, it purported to declare extinguished "any claim or title" or "[a]ny rights" plaintiffs "may have." A decision on such a record would constitute an advisory opinion on abstract questions, and this "court will not give advisory opinions or decide abstract questions." *Boswell v. Boswell*, 241 N.C. 515, 519, 85 S.E.2d 899, 902 (1955); *see also Henderson v. Vance County*, 260 N.C. 529, 532, 133 S.E.2d 201, 204 (1963) (per curiam); *Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931) (Declaratory Judgment Act "does not extend to the submission of a theoretical problem or a 'mere abstraction' "). "The function of appellate courts . . . is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation, and . . . questions or cases which [are] . . . academic are not a proper subject of review." 5 Am. Jur. 2d *Appeal and Error* § 761 (1962).

Accordingly, the opinion of the Court of Appeals is vacated, and the case is remanded to that court for further remand to the Superior Court, Craven County, where the parties may take such action as they deem advisable "so that the controverted and determinative facts may be established and rulings as to the law made in relation thereto." *Boswell v. Boswell*, 241 N.C. at 521, 85 S.E.2d at 904.

Vacated and remanded.

Justice FRYE dissenting.

I dissent from the majority's holding "that the Court of Appeals erred in treating plaintiffs' interlocutory appeal as a petition for certiorari and considering the appeal."

After making detailed findings of fact, the trial judge concluded as follows: "Any rights of the plaintiffs in the lands owned by A. E. Kirkman at the time of his death, as vested remaindermen under the Will of A. E. Kirkman, have been extinguished by Chapter 47B of the General Statutes of North Carolina (Real Property Marketable Title Act)." Judge Winberry then "ORDERED, ADJUDGED AND DECREED that the plaintiffs have and recover nothing of these defendants, that the Notice of Lis Pendens heretofore filed in this action be stricken from the record and the costs of this action be Taxed to the plaintiffs." From this judgment plaintiffs appealed to the Court of Appeals. The Court of Appeals affirmed in part and reversed in part, with Judge Greene dissenting on the question of whether the Marketable Title Act was intended to eliminate vested remainders.

The majority concludes that a decision on this record would constitute an advisory opinion on abstract questions. As I read the trial court's judgment, it resolves the primary question before the court, which is, whether the Marketable Title Act deprived plaintiffs of any claim to the property at issue. The order is neither advisory nor abstract but clearly provides that plaintiffs "have and recover nothing of these defendants" and orders that the notice of lis pendens be stricken from the record. I believe that the issues are ripe for decision. Sending the case back for the parties to start all over again is not in the interest of judicial economy.

STATE OF NORTH CAROLINA v. GARY D. BUCKOM

No. 335PA90

(Filed 7 March 1991)

1. Common Law § 1 (NCI4th)— effective parts of common law

So much of the common law as has not been abrogated or repealed by statute or become obsolete is in full force and effect in this state pursuant to N.C.G.S. § 4-1. The "common law" referred to in § 4-1 is the common law of England as of the date of the signing of the Declaration of Independence.

Am Jur 2d, Common Law §§ 13-18.

2. Criminal Law § 11 (NCI4th)— statutory punishment—failure to define crime elements—common law applicable

When a statute punishes a crime known at common law without defining its elements, the common law controls.

Am Jur 2d, Criminal Law §§ 7, 9.

3. Larceny § 7.5 (NCI3d)— larceny from person—taking money from cash register

The State's evidence was sufficient to support defendant's conviction for larceny from the person where it tended to show that a store clerk had just opened the cash register, had her left hand in the cash drawer, and was in the process of making change for the defendant when he reached into the cash register and forcibly removed a sum of money.

Am Jur 2d, Larceny § 48.

What constitutes larceny "from a person." 74 ALR3d 271.

4. Larceny § 8 (NCI3d)— instruction—removal of money from cash register—taking from the person

The trial court did not err in instructing the jury that a taking of property from a cash register while it was being operated by a store clerk would be a taking "from the person."

Am Jur 2d, Larceny § 48.

What constitutes larceny "from a person." 74 ALR3d 271.

5. Larceny § 8 (NCI3d)— felonious larceny—failure to submit misdemeanor

The trial court in a prosecution for felonious larceny from the person did not err in failing to submit to the jury a possible verdict for the lesser offense of misdemeanor larceny where no evidence tended to show that the lesser offense had been committed.

Am Jur 2d, Larceny § 174.

ON discretionary review, pursuant to N.C.G.S. § 7A-31, of the unpublished decision of the Court of Appeals, 99 N.C. App. 222, 393 S.E.2d 363 (1990), which found no error in the trial of the defendant before *Wright, J.*, or in the judgment entered against the defendant on 7 June 1989 by *Currin, J.*, in the Superior Court,

WAYNE County. Heard in the Supreme Court on 13 December 1990.

Lacy H. Thornburg, Attorney General, by Jacob L. Safron, Special Deputy Attorney General, for the State.

Glenn A. Barfield for the defendant-appellant.

MITCHELL, Justice.

The central issues before this Court on appeal are whether the trial court erred (1) by denying the defendant's motion to dismiss the charge against him for larceny from the person, or (2) by refusing to submit a possible verdict for the lesser offense of misdemeanor larceny for the jury's consideration. We affirm the holding of the Court of Appeals that the trial court did not err.

Evidence for the State tended to show that the defendant entered the Convenience Mart owned by James P. George—through his corporation, George of John Street, Inc.—on 25 October 1988. Catherine Stone testified that on 25 October 1988, she was working as a cashier in the store when the defendant entered shortly after 8:00 p.m. Stone twice refused to make change for the defendant to play video machines in the store. The third time the defendant approached the cash register, he purchased some candy. The defendant handed Stone his money and, as she opened the cash register to make change, he reached "over and pulled the money out of the, one of the slots that was in there and took out the largest sum of money and took off out the door." Stone testified that at that time her left hand was in the cash drawer. Evidence for the State tended to show that the defendant took $91.00 from the cash register.

The owner of the store, James P. George, testified that on his way to supper, he had seen the defendant in the parking lot. George then returned to the store to alert Stone to be careful of the defendant. When George returned to the premises after the larceny, Stone told him that the person he had pointed out to her had taken the money from the cash register.

After the State rested, the trial court denied the defendant's motion to dismiss the charges against him. The defendant presented no evidence.

After a charge conference, the trial court, over objection by the defendant, instructed the jury, *inter alia*, that: "Any property taken from the cash register when the cash register was being operated by Catherine Stone would be property taken from the person." The jury returned a verdict finding the defendant guilty of larceny from the person.

Judge Paul M. Wright, who had presided over the trial, recused himself from sentencing. Thereafter, a sentencing hearing was held before Judge Samuel T. Currin who sentenced the defendant to a ten-year term of imprisonment.

In an unpublished decision, the Court of Appeals held that the defendant's trial was free of error. On 29 August 1990, this Court allowed the defendant's petition for discretionary review.

By his first and second assignments of error, the defendant contends that the trial court erred by denying his motion to dismiss the charge of felonious larceny from the person and by instructing the jury to the effect that a taking of property from the cash register while it was being operated by Stone would be a taking from the person. We do not agree.

[1, 2] Before addressing the defendant's assignments of error, a review of certain principles of law is helpful. The General Assembly of North Carolina has declared that so much of the common law as has not been abrogated or repealed by statute or become obsolete is in full force and effect in this state. N.C.G.S. § 4-1 (1986); *see, e.g., Martin v. Thornburg*, 320 N.C. 533, 359 S.E.2d 472 (1987); *McMichael v. Proctor*, 243 N.C. 479, 91 S.E.2d 231 (1956); *State v. Hampton*, 210 N.C. 283, 186 S.E. 251 (1936). The "common law" referred to in N.C.G.S. § 4-1 is the common law of England as of the date of the signing of the Declaration of Independence. *Hall v. Post*, 323 N.C. 259, 372 S.E.2d 711 (1988); *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971). It is well settled that when a statute punishes a crime known at common law without defining its elements, the common law definition controls. *State v. Roberts*, 286 N.C. 265, 210 S.E.2d 396 (1974); *State v. Ingland*, 278 N.C. 42, 178 S.E.2d 577 (1971). Bearing these principles in mind, we turn to the defendant's assignments of error.

The defendant argues that the evidence in the present case was uncontroverted to the extent that it tended to show that any

money taken was taken from the cash register and, therefore, not taken from the person of Stone. We do not agree.

Our legislature has decreed that larceny is a felony. N.C.G.S. § 14-70 (1986). In N.C.G.S. § 14-72, however, the legislature declared *inter alia* that the larceny of goods of a value of not more than $400.00 is a misdemeanor. N.C.G.S. § 14-72(a) (1986). Nevertheless, the legislature specifically exempted the crime of larceny from the person from that provision, when it provided further that larceny from the person is a felony without regard to the value of the property taken. N.C.G.S. § 14-72(b)(1) (1986); *see State v. Benfield*, 278 N.C. 199, 179 S.E.2d 388 (1971); *State v. Massey*, 273 N.C. 721, 161 S.E.2d 103 (1968). As none of our statutes define the phrase "from the person" as it relates to larceny, the common law definition controls. *See State v. Massey*, 273 N.C. 721, 161 S.E.2d 103 (1968) (applying common law elements of larceny).

At common law, "Larciny [sic] from the *person* is either by *privately* stealing; or by open and violent assault, which is usually called *robbery*." 4 W. Blackstone, *Commentaries* *241. "Open and violent larciny [sic] from the *person*, or *robbery* . . . is the felonious and forcible taking from the person of another, of goods or money to any value by violence or putting him in fear." *Id.* The difference between the two forms of larceny referred to by Blackstone is that " 'robbery,' even in its least aggravated form, is 'an open and violent larciny [sic] from the person,' or the felonious taking, from the person [of,] or *in the presence of*[,] another, of goods or money against his will by violence or by putting him in fear, whereas" stealing from the person is concealed, clandestine activity. H. Broom, *Commentaries on the Common Law* *976 (1856) (footnotes omitted) (emphasis added). At common law, larceny from the person differs from robbery in that larceny from the person lacks the requirement that the victim be put in fear. *State v. Henry*, 57 N.C. App. 168, 169-70, 290 S.E.2d 775, 776, *disc. rev. denied*, 306 N.C. 561, 294 S.E.2d 226 (1982); *see* N.C.G.S. § 14-72. Larceny from the person forms a middle ground in the common law between the "private" stealing most commonly associated with larceny, and the taking by force and violence commonly associated with robbery. *See State v. John*, 50 N.C. (5 Jones) 163, 166-70 (1857) (Pearson, J., *seriatim* opinion).

Taken in the context of the foregoing common law principles, "[p]roperty is stolen 'from the person,' if it was under the pro-

tection of the person at the time. . . . [P]roperty may be under the protection of the person although not actually 'attached' to him." R. Perkins & R. Boyce, *Criminal Law* 342 (3d ed. 1982) (footnotes omitted). For example, if a jeweler places diamonds on a counter for inspection by a customer, under the jeweler's eye, the diamonds remain under the protection of the jeweler. *Id.* It has not been the general interpretation that larceny from the person "requires an actual taking from the person, and is not committed by a taking from the immediate presence and actual control of the person. . . . As said by Coke in the 1600's: 'for that which is taken in his presence, is in law taken from his person.' " *Id.* at 342-43 (quoting 3 Coke, *Institutes* *69).

[3, 4] In the instant case, all of the evidence tended to show that if the defendant committed any offense, he reached into the cash register and forcibly removed a sum of money. The clerk had just opened the register, had her left hand in the cash drawer, and was in the process of making change for the defendant when he reached in and grabbed the money. Such evidence was sufficient to support the defendant's conviction for larceny from the person. The trial court did not err by denying the defendant's motion to dismiss the charge against him for larceny from the person or in its instructions to the jury concerning the meaning of taking "from the person."

[5] In the defendant's next assignment of error, he contends that the trial court erred by failing to instruct the jury to consider a verdict against him for misdemeanor larceny. We do not agree. Submission of the lesser offense of misdemeanor larceny was not required when, as here, no evidence tended to show that the lesser offense had been committed. *See, e.g., State v. Poole*, 298 N.C. 254, 258 S.E.2d 339 (1979); *State v. Henry*, 57 N.C. App. 168, 290 S.E.2d 775, *disc. rev. denied*, 306 N.C. 561, 294 S.E.2d 226 (1982).

For the foregoing reasons, we affirm the holding of the Court of Appeals in its unpublished decision finding no error in the defendant's trial.

Affirmed.

STATE OF NORTH CAROLINA v. LARRY SPENCER EDGERTON

No. 433PA87

(Filed 7 March 1991)

Criminal Law § 75.9 (NCI3d)— manslaughter—confession—volunteered

The trial court did not err in a prosecution for manslaughter, assault, and discharging a firearm into an occupied building by admitting into evidence a confession made by defendant to a deputy sheriff where the court found that the deputy attempted to advise defendant of his constitutional rights but defendant spontaneously began making a statement and the deputy could not stop him. Earlier questioning of defendant by another deputy did not taint the subsequent confession even if defendant was in custody during the first questioning because there was no evidence that the questioning was coercive.

Am Jur 2d, Evidence §§ 537, 545, 557.

Admissibility of pretrial confession in criminal case—Supreme Court cases. 22 L. Ed. 2d 872.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous opinion of the Court of Appeals, 86 N.C. App. 329, 357 S.E.2d 399 (1987), reversing a judgment entered by *Hobgood, J.*, in Superior Court, FRANKLIN County, on 21 April 1986 and awarding defendant a new trial. Heard in the Supreme Court 17 May 1990.

The defendant was tried for first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into occupied property. The State's evidence showed that the defendant twice fired a shotgun into the mobile home of William Bumpers, killing Fred Alston, Jr. and wounding Bumpers. The defendant's evidence tended to show he fired the shotgun in self-defense.

In the course of the trial the defendant objected to the admission into evidence of a confession he made to Chief Deputy Sheriff Astor Bowden. The court held a voir dire hearing out of the presence of the jury on this objection. Deputy Sheriff Tommy Perry testified

at the hearing that he went to the scene of the shooting and then to the mobile home of the defendant's mother which was in the same mobile home park. He saw the defendant in the yard of his mother's home. Mr. Perry testified he asked the defendant to get into the patrol car, which the defendant did. Mr. Perry, without advising the defendant of his *Miranda* rights, asked the defendant if he had fired into William Bumpers' home and the defendant told him he had done so. Mr. Perry then told the defendant not to say anything more and drove the defendant to Bumpers' home. Chief Deputy Sheriff Bowden then entered the patrol car and sat on the back seat. Mr. Perry and the defendant sat in the front seat. Both the officers testified that Mr. Bowden started to read to the defendant his *Miranda* rights but before Mr. Bowden could finish reading them the defendant made a statement without any questions being asked of him.

The defendant's version at the voir dire hearing of the same event was that Mr. Perry carried him to the county jail where he was incarcerated for two days. Mr. Bowden and other officers then came to the jail and gave him his *Miranda* warnings. He asked for an attorney but Mr. Bowden continued questioning him.

The court made findings of fact that before Mr. Bowden could finish advising the defendant of his constitutional rights the defendant spontaneously began making a statement and Mr. Bowden could not stop him from talking. The court found that the statement was not made in response to a question and was given freely, voluntarily, and understandingly with knowledge of his constitutional rights. The court ordered the statement to be admitted into evidence.

The defendant was convicted of voluntary manslaughter, assault with a deadly weapon inflicting serious injury and discharging a firearm into an occupied building. He was sentenced to a total of 21 years in prison.

The Court of Appeals granted the defendant a new trial. It held that because the court had not determined whether the statement which defendant made to Mr. Perry when he entered Mr. Perry's automobile was involuntary, and if it was involuntary what effect it had on his confession to Mr. Bowden, that the court had made inadequate findings of fact to admit into evidence the statement to Mr. Bowden.

We granted the State's petition for discretionary review.

Lacy H. Thornburg, Attorney General, by Joan H. Byers, Special Deputy Attorney General, for the State, appellant.

D. Bernard Alston for defendant appellee.

WEBB, Justice.

We reverse the Court of Appeals. The United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966), that confessions which result from in-custody interrogations initiated by police officers without proper warning as to constitutional rights must be excluded unless a defendant knowingly, voluntarily and understandingly waives his rights. In order to trigger the exclusionary rule of *Miranda*, it is necessary that the statement be the result of interrogation. *Colorado v. Connelly*, 479 U.S. 157, 93 L.Ed.2d 473 (1986); *State v. Leonard*, 300 N.C. 223, 266 S.E.2d 631, *cert. denied*, 449 U.S. 960, 66 L.Ed.2d 227 (1980); *State v. Adams*, 85 N.C. App. 200, 354 S.E.2d 338 (1987).

In this case the court found as facts that at the time Mr. Bowden was in the automobile with the defendant Mr. Bowden attempted to advise him of his constitutional rights but that the defendant spontaneously began making a statement and Mr. Bowden could not stop him. These findings of fact were supported by the evidence. They support the conclusion that the statement was not the result of an interrogation in custody or otherwise. The superior court made no finding that the statement was not as a result of an interrogation but this is a question of law which we can determine. *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982). Based on the court's finding of fact that the defendant's statement to Mr. Bowden was spontaneous and that Mr. Bowden could not stop him from making it, we conclude it was not as the result of an interrogation. It was not error to admit it into evidence.

The questioning of the defendant by Mr. Perry did not taint the confession given to Mr. Bowden. Even if the defendant was in custody when questioned by Mr. Perry there was no evidence that the questioning was coercive. The United States Supreme Court in *Oregon v. Elstad*, 470 U.S. 298, 84 L.Ed.2d 222 (1985), held that a noncoercive interrogation while the defendant was in custody, at which time the defendant made an incriminating statement, did not poison a confession made a short time later after the

defendant had received a *Miranda* warning. We hold that pursuant to *Elstad* the interrogation by Mr. Perry did not bar the admission of the statement to Mr. Bowden.

For the reasons stated in this opinion we reverse the Court of Appeals.

Reversed.

IN THE MATTER OF: THE APPEAL OF FOUNDATION HEALTH SYSTEMS CORPORATION FROM THE DENIAL OF ITS REQUEST FOR EXEMPTION BY THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1986

No. 45PA90

(Filed 7 March 1991)

ON discretionary review of a unanimous opinion of the Court of Appeals, 96 N.C. App. 571, 386 S.E.2d 588 (1989), vacating and remanding the judgment of the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review, which denied Foundation Health Systems Corporation's request for exemption from property taxation for Hawthorne Surgical Center under N.C.G.S. § 105-278.7 for "[r]eal and personal property used for . . . charitable purposes" and under N.C.G.S. § 105-278.8 for "[r]eal and personal property used for charitable hospital purposes." Heard in the Supreme Court 13 February 1991.

Petree Stockton & Robinson, by G. Gray Wilson and Steve M. Pharr, for petitioner-appellee Foundation Health Systems Corporation (Hawthorne Surgical Center).

David F. Tamer, Attorney for Forsyth County, P. Eugene Price, Jr., County Attorney, and Tina F. Heelan, Assistant County Attorney, for respondent-appellant Forsyth County.

Smith Helms Mullis & Moore, by Thomas S. Stukes, Maureen Demarest Murray, and Matthew W. Sawchak, for The North Carolina Hospital Association; C. J. Harris Community Hospital, Incorporated, of Sylva, North Carolina; Community General Hospital of Thomasville, Inc.; Memorial Mission Medical Center, Inc.; The Moses H. Cone Memorial Hospital; Murphy Medical Center; N.C.

Baptist Hospitals, Incorporated; Presbyterian Hospital; Roanoke-Chowan Hospital, Inc.; Union Memorial Hospital, Inc.; Valdese General Hospital, Inc.; Wayne Memorial Hospital, Inc.; and Wesley Long Community Hospital, Inc., amici curiae.

PER CURIAM.

After a thorough review of the record and briefs and arguments of counsel in this case, we conclude that our discretionary review of the unanimous decision of the Court of Appeals was improvidently allowed.

Discretionary review improvidently allowed.

GARNER MAHAFFEY AND WIFE, BARBARA T. MAHAFFEY v. FORSYTH COUNTY: JAMES N. ZIGLAR, JR., RICHARD V. LINVILLE, FORREST E. CONRAD, WAYNE G. WILLARD, AND JOHN S. HOLLEMAN, JR., MEMBERS OF THE BOARD OF COMMISSIONERS OF FORSYTH COUNTY; BEREAN BAPTIST CHURCH: HAROLD GIBSON, TIM MYERS, EARL EATON, BILL KIZER AND JIM TALBERT, TRUSTEES OF BEREAN BAPTIST CHURCH; AND CLADIE GRAY DENNY

No. 443A90

(Filed 7 March 1991)

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 99 N.C. App. 676, 394 S.E.2d 203 (1990). Heard in the Supreme Court 13 February 1991.

Wolfe and Collins, P.A., by A. L. Collins and John G. Wolfe, III, for plaintiff-appellees.

Thomas M. King for Berean Baptist Church, the Trustees of Berean Baptist Church, and Cladie Gray Denny, defendant-appellants; Womble, Carlyle, Sandridge & Rice, by Anthony H. Brett and Dale E. Nimmo, for Forsyth County and the Forsyth County Commissioners, defendant-appellants.

PER CURIAM.

Affirmed.

CANDACE CLARK WITHEROW v. CHARLES WILLIAM WITHEROW, JR.

No. 324A90

(Filed 7 March 1991)

APPEALS by the plaintiff and by the defendant, pursuant to N.C.G.S. § 7A-30(2), from a decision of a divided panel of the Court of Appeals, 99 N.C. App. 61, 392 S.E.2d 627 (1990), which affirmed in part and reversed in part a judgment entered in District Court, FORSYTH County, by *Reingold, J.*, on 19 January 1989. The plaintiff's petition for discretionary review was allowed by the Supreme Court, as to one additional issue, on 30 August 1990. Heard in the Supreme Court 11 February 1991.

Clyde C. Randolph, Jr., for the plaintiff.

Morrow, Alexander, Tash, Long & Black, by John F. Morrow and Ronald B. Black, for the defendant.

PER CURIAM.

Affirmed.

MARGARET Y. BISHOP, PETITIONER-APPELLEE v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, O'BERRY CENTER, RESPONDENT-APPELLANT

No. 465PA90

(Filed 7 March 1991)

ON discretionary review of a unanimous decision by the Court of Appeals, 100 N.C. App. 175, 394 S.E.2d 702 (1990), affirming an order entered 12 May 1989 by *Phillips, J.*, in Superior Court, WAYNE County. Heard in the Supreme Court 15 February 1991.

Eastern Carolina Legal Services, Inc., by Wesley Abney, for petitioner-appellee.

Lacy H. Thornburg, Attorney General, by Valerie B. Spalding, Associate Attorney General, for respondent-appellant.

PER CURIAM.

Having reviewed the record and briefs and heard argument, we conclude that the petition for discretionary review filed by the North Carolina Department of Human Resources, O'Berry Center, was improvidently allowed.

Discretionary review improvidently allowed.

HARTRICK ERECTORS, INC. v. MAXSON-BETTS, INC.

No. 194PA90

(Filed 7 March 1991)

ON discretionary review of a unanimous decision by the Court of Appeals, 98 N.C. App. 120, 389 S.E.2d 607 (1990), reversing an order entered 14 February 1989 by *Owens, J.*, in Superior Court, BUNCOMBE County, granting defendant's motion to dismiss. Heard in the Supreme Court 15 February 1991.

Steven Andrew Jackson for plaintiff-appellee.

Roberts Stevens & Cogburn, P.A., by Steven D. Cogburn and Marjorie Rowe Mann, for defendant-appellant.

PER CURIAM.

We conclude that defendant's petition for discretionary review was improvidently allowed.

Discretionary review improvidently allowed.

ADDIE FORREST, EMPLOYEE, PLAINTIFF v. PITT COUNTY BOARD OF EDUCATION, EMPLOYER; SELF-INSURED (STATE BOARD OF EDUCATION), DEFENDANTS

No. 472A90

(Filed 7 March 1991)

APPEAL by the defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 100 N.C. App. 119, 394 S.E.2d 659 (1990), affirming in part, vacating in part and remanding the decision and award entered by the Industrial Commission, on 13 June 1989. Heard in the Supreme Court 13 February 1991.

Hugh D. Cox for plaintiff-appellee.

Lacy H. Thornburg, Attorney General, by D. Sigsbee Miller, Assistant Attorney General, for the defendant-appellants.

PER CURIAM.

Affirmed.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

ABRAM v. CHARTER MEDICAL CORP. OF RALEIGH

No. 14P91

Case below: 100 N.C.App. 718

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

ALLEN v. RUPARD

No. 577PA90

Case below: 100 N.C.App. 490
328 N.C. 270

Motion by Protective Insurance Company to be allowed to withdraw petition for discretionary review has been filed and the following order entered: The petition for discretionary review having been allowed, this motion is treated as a motion to withdraw the appeal and is allowed 25 February 1991.

BARCLAYSAMERICAN/LEASING, INC. v.
N.C. GUARANTY ASSN.

No. 365P90

Case below: 99 N.C.App. 290

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

BASS v. N.C. FARM BUREAU MUT. INS. CO.

No. 12P91

Case below: 100 N.C.App. 728

Petition for discretionary review is allowed 7 March 1991 for the limited purpose of entering the following order: The case is remanded to the Court of Appeals for reconsideration in light of *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139 (1991).

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

BRAXTON v. ANCO ELECTRIC, INC.

No. 614PA90

Case below: 100 N.C.App. 635

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 March 1991.

BROWN v. FOX

No. 6P91

Case below: 100 N.C.App. 757

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

CHICOPEE, INC. v. SIMS METAL WORKS

No. 260PA90

Case below: 98 N.C.App. 423
327 N.C. 426

Motion by plaintiff to be allowed to withdraw appeal allowed 18 February 1991.

COHEN v. COHEN

No. 594P90

Case below: 100 N.C.App. 600

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

FLOYD C. PRICE & SON, INC. v. DIXON

No. 55P91

Case below: 100 N.C.App. 759

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

FORREST v. PITT COUNTY BD. OF EDUCATION

No. 472A90

Case below: 100 N.C.App. 119

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 4 February 1991.

GRAY v. GRAY

No. 37P91

Case below: 101 N.C.App. 242

Petition by defendant (William L. Gray) for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

HARROFF v. HARROFF

No. 19P91

Case below: 100 N.C.App. 686

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

IN RE CAUDLE

No. 47P91

Case below: 101 N.C.App. 242

Petition by Florence A. Caudle for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991. Motion to permit an amended affidavit, etc. denied 7 March 1991.

IN RE FORECLOSURE OF GREENLEAF CORP.

No. 445P90

Case below: 99 N.C.App. 489

Petition by Yates Construction Co. for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

KNIGHT v. TODD

No. 39P91

Case below: 99 N.C.App. 361

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 7 March 1991.

MARTIN v. MARTIN

No. 54P91

Case below: 101 N.C.App. 243.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 7 March 1991.

MELVIN v. GLOVER

No. 13P91

Case below: 100 N.C.App. 757

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

METRO. SEWERAGE DIST. v.
N.C. WILDLIFE RESOURCES COMM.

No. 442PA90

Case below: 100 N.C.App. 171
327 N.C. 484

Motion by plaintiff to dismiss appeal allowed 18 February 1991.

N.C. DEPT. OF CRIME CONTROL v. HOOKS

No. 48P91

Case below: 101 N.C.App. 243

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

OXENDINE v. BOWERS

No. 7P91

Case below: 100 N.C.App. 712

Petition by defendant (Sarah Bowers) for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

PALMER v. N.C. DEPT. OF CRIME CONTROL & PUBLIC SAFETY

No. 98P91

Case below: 101 N.C.App. 572

Petition by defendant for temporary stay allowed 25 February 1991 pending timely filing of a petition for discretionary review.

PENLEY v. PENLEY

No. 35P91

Case below: 101 N.C.App. 225

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991. Motion by defendant for sanctions denied 7 March 1991.

PFOUTS v. THE VILLAGE BANK

No. 56P91

Case below: 98 N.C.App. 154

Petition by plaintiffs for writ of certiorari to the North Carolina Court of Appeals denied 7 March 1991.

ROGERS v. T.J.X. COMPANIES

No. 32A91

Case below: 101 N.C.App. 99

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

S. F. McCOTTER & SONS v.
AMERICAN GUARANTY INS. CO.

No. 30A91

Case below: 101 N.C.App. 243

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 7 March 1991.

SHAFFNER v. WESTINGHOUSE ELECTRIC CORP.

No. 53P91

Case below: 101 N.C.App. 213

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

SHINE v. GALBAUGH

No. 31P91

Case below: 101 N.C.App. 243

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

SPOON v. GRAHAM

No. 106P91

Case below: 101 N.C.App. 575

Petition by defendant for writ of supersedeas and temporary stay denied 1 March 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 March 1991.

STATE v. ALFORD

No. 5P91

Case below: 100 N.C.App. 757

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. AUBIN

No. 608P90

Case below: 100 N.C.App. 628

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 March 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

STATE v. BARBER

No. 151P89

Case below: 93 N.C.App. 42

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 17 June 1989.

STATE v. BUNCH

No. 52P91

Case below: 101 N.C.App. 243

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

STATE v. CARTER

No. 378P90

Case below: 99 N.C.App. 361

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

STATE v. DRDAK

No. 107P91

Case below: 101 N.C.App. 659

Petition by Attorney General for temporary stay allowed 26 February 1991 pending consideration and determination of the petition for discretionary review.

STATE v. GREEN

No. 59P91

Case below: 101 N.C.App. 317

Petition by defendant for writ of supersedeas and temporary stay denied 4 February 1991.

STATE v. GREGORY

No. 111P91

Case below: 101 N.C.App. 723

Petition by defendant for temporary stay allowed 7 March 1991 pending consideration and determination of the petition for discretionary review.

STATE v. McMILLIAN

No. 63P91

Case below: 101 N.C.App. 425

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

STATE v. MOORE

No. 511A90

Case below: 100 N.C.App. 217

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 7 February 1991.

STATE v. NORRIS

No. 4P91

Case below: 101 N.C.App. 144

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 March 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. WILFONG

No. 51A91

Case below: 101 N.C.App. 221

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 March 1991.

PETITIONS TO REHEAR

McELVEEN-HUNTER v. FOUNTAIN MANOR ASSOC.

No. 143PA90

Case below: 328 N.C. 84

Petition by plaintiff to rehear pursuant to Rule 31 denied 7 March 1991.

WILSON v. McLEOD OIL CO.

No. 506A89

Case below: 327 N.C. 491

Petition by defendant (Estate of Riggan) to rehear pursuant to Rule 31 denied 7 March 1991.

STATE OF NORTH CAROLINA v. JAMES EDWARD ROPER

No. 301A88

(Filed 3 April 1991)

1. **Constitutional Law § 347 (NCI4th)— continuance—discretion of court—rights to due process and compulsory process**

Generally, the granting of a continuance is within the sound discretion of the trial court. A significant limitation on that discretion occurs where denial of a continuance results in the violation of a defendant's right to due process or his Sixth Amendment right to compulsory process.

Am Jur 2d, Criminal Law § 717.

2. **Constitutional Law § 347 (NCI4th)— denial of continuance—constitutional error—balancing of individual and government interests**

In examining the denial of a motion for a continuance for error under either the federal constitution or the state constitution, the courts balance the private interest that will be affected and the risk of erroneous deprivation of that interest through the procedures used against the government interest in fiscal and administrative efficiency.

Am Jur 2d, Criminal Law § 717.

3. **Constitutional Law § 347 (NCI4th)— witness not located—denial of continuance—no denial of constitutional rights**

The trial court's denial of defendant's motion for a continuance because a witness to the shooting of the deceased could not be located was not an abuse of discretion, did not deny defendant his Sixth Amendment right to compulsory process or his right to due process under the U. S. Constitution, and did not violate defendant's right of confrontation guaranteed by Art. I, § 23 of the N. C. Constitution where the State made extensive efforts to locate the witness after diligently serving him with a subpoena; testimony at trial indicated that the witness had previously been known to hide from authorities and that he was able to live in the woods for an extended period of time under conditions that others could not survive; and testimony by the witness was admitted into evidence by

way of statements he had made to a sheriff's department detective and to defendant's counsel.

Am Jur 2d, Criminal Law § 717.

4. **Constitutional Law § 346 (NCI4th)— denial of funds for investigator—no violation of constitutional rights**

The trial court's denial of funds for an investigator to help defendant locate a witness to the shooting of the deceased was not an abuse of discretion or a violation of defendant's constitutional rights to compulsory process and due process where statements made by the witness during interviews by a sheriff's department detective and defendant's counsel were admitted into evidence, and the witness was unlikely to be discovered given the evidence of his flight and the significant good faith efforts expended by the sheriff and others to find him.

Am Jur 2d, Criminal Law §§ 719, 771, 955, 1006.

5. **Constitutional Law § 344 (NCI4th)— right to be present at trial—venire persons sworn by another judge**

Defendant was not denied his right to be present at every stage of his trial because the trial judge supplemented the jury venire with venire persons who had been sitting in an adjoining courtroom and those jurors had already been sworn by another judge but had not been empaneled or selected for another case.

Am Jur 2d, Jury § 340.

6. **Criminal Law § 73.2 (NCI3d)— statement causing action by witness—not inadmissible hearsay**

In a prosecution for first degree murder, first degree rape and first degree kidnapping as an habitual felon, testimony by a witness that, after he and his wife were awakened by a gunshot and he had called the sheriff's department, his wife heard the rape and kidnapping victim ask, "Are you going to shoot me, too?" was not inadmissible hearsay but was relevant and properly admitted for the limited purpose of showing that a statement was made which caused the witness to call the sheriff's department a second time.

Am Jur 2d, Evidence § 496.

7. Constitutional Law § 340 (NCI4th)— testimony showing statement was made—right of confrontation not violated

Defendant's constitutional right of confrontation was not violated by the admission of a witness's testimony that his wife heard a kidnapping and rape victim ask, "Are you going to shoot me, too?" where the testimony was used merely to show that the statement had been made and its effect on the witness.

Am Jur 2d, Evidence § 496.

8. Criminal Law § 73.2 (NCI3d)— statements by unavailable witness—residual exception to hearsay rule

Testimony by a deputy sheriff that a murder victim told him the day he died that defendant had threatened his life and threatened to rape a kidnapping and rape victim was admissible under the residual exception to the hearsay rule where the declarant was present during the events he related to the deputy; the declarant's motivation to tell the truth was supported by the fear for his life as shown by evidence that he had caused the other victim to call the authorities and was proceeding to the magistrate's office when he was killed; the declarant never recanted his statements; and his unavailability resulted from his death at the hands of defendant.

Am Jur 2d, Evidence § 496.

9. Constitutional Law § 349 (NCI4th)— hearsay testimony—indicia of reliability—right of confrontation not denied

Defendant's Sixth Amendment right of confrontation was not violated by the admission of a deputy sheriff's hearsay testimony that a murder victim told him the day he died that defendant had threatened his life and had threatened to rape a kidnapping and rape victim where the hearsay statements possessed indicia of reliability in that the deputy's discussion with the murder victim contained particularized guarantees of trustworthiness which rendered the victim worthy of belief.

Am Jur 2d, Evidence § 496.

10. Searches and Seizures § 43 (NCI3d)— motion to suppress at trial—statement of legal ground—affidavit unnecessary

A motion to suppress made at trial, whether oral or written, should state the legal ground upon which it is made.

While an affidavit is not required for a motion to suppress timely made at trial, the defendant must specify that he is making a motion to suppress and request a voir dire.

Am Jur 2d, Evidence §§ 425, 426.

11. Searches and Seizures § 43 (NCI3d)— general objection to seized evidence—failure to state basis—absence of motion to suppress

The trial court did not err in admitting evidence seized during a search of defendant's residence where defendant made only a general objection and motion to strike at trial that failed to state any legal or factual basis for the objection, and defendant never made a motion to suppress and never requested a voir dire.

Am Jur 2d, Evidence §§ 425, 426.

12. Criminal Law § 425 (NCI4th)— jury argument—no comment on defendant's failure to testify

Where the prosecutor in a murder case was responding to defendant's assertion that the State's case rested solely on the testimony of one witness, the prosecutor's closing argument pointing out that the witness to defendant's alleged acts of self-defense had not come forward to testify was not inappropriate and did not constitute a comment on defendant's failure to testify.

Am Jur 2d, Trial §§ 240, 244, 245.

13. Criminal Law § 1190 (NCI4th)— prior convictions—use to establish habitual felon and as aggravating factor

Evidence of defendant's convictions of offenses punishable by imprisonment for more than sixty days was properly used to establish the status of habitual felon as well as to establish the aggravating factor of prior felony convictions to increase the presumptive sentence for the underlying felony. The status of habitual felon merely enhanced the punishment of another crime and was not a crime in and of itself, and the prior convictions were thus not essential elements of the crime for which defendant was convicted.

Am Jur 2d, Criminal Law § 599; Habitual Criminals and Subsequent Offenders §§ 26, 27; Homicide § 554.

14. Criminal Law § 1337 (NCI4th)— capital case—prior conviction—circumstances admissible in penalty phase

The State is entitled to present witnesses in the penalty phase of a capital trial to prove the circumstances of a prior conviction and is not limited to the introduction of evidence of the record of conviction.

Am Jur 2d, Criminal Law § 599; Habitual Criminals and Subsequent Offenders §§ 26, 27; Homicide § 554.

15. Criminal Law § 1337 (NCI4th)— capital case—penalty phase—circumstances of prior conviction

Testimony by a former SBI agent that he was informed while investigating a prior killing for which defendant pled guilty to voluntary manslaughter in 1971 that defendant had responded to his victim's request for help by telling him that "if he didn't die, he would shoot him again" was admissible in the penalty phase of a first degree murder trial to prove the circumstances of the crime for which defendant was convicted. Assuming *arguendo* that this testimony was inadmissible hearsay and violated defendant's right of confrontation, its admission was harmless error beyond a reasonable doubt where defendant did not dispute that he was convicted of the killing in 1971, and more probative and persuasive of defendant's character to the jury was evidence of recent sex offenses for which defendant was convicted, the cold-blooded calculation of the present crimes, and the senseless nature of the killing simply to facilitate the rape of a second victim.

Am Jur 2d, Criminal Law § 599; Habitual Criminals and Subsequent Offenders §§ 26, 27; Homicide § 554.

16. Criminal Law § 1337 (NCI4th)— capital case—penalty phase—circumstances of prior convictions

Testimony by an eyewitness to a prior killing to which defendant pled guilty to voluntary manslaughter that defendant went to his car and returned with a gun to shoot the victim and testimony by defendant's stepniece that defendant actually raped her in 1985 although he had pled guilty only to attempted second degree rape was admissible in the penalty phase of a first degree murder trial to prove the circumstances of the crimes for which defendant had been convicted.

Am Jur 2d, Criminal Law § 599; Habitual Criminals and Subsequent Offenders §§ 26, 27; Homicide § 554.

17. Criminal Law § 85.2 (NCI3d)— character witnesses—cross-examination by State—knowledge of prior rape by defendant

The State was properly permitted to elicit from defendant's character witnesses evidence that they heard an alleged rape victim say that defendant had raped her just three months prior to the rape charged in this case in order to rebut the witnesses' prior testimony as to defendant's good character by showing specific instances of defendant's conduct. N.C.G.S. § 8C-1, Rule 405(a).

Am Jur 2d, Criminal Law § 599; Witnesses § 503.

18. Criminal Law § 1334 (NCI4th)— capital case—aggravating circumstances—prior crimes—notice not required

The State is not required to give defendant specific notice of the particular convictions or even the aggravating circumstances it plans to rely upon in a capital case. The provisions of N.C.G.S. § 15A-2000(e)(3) and defendant's own personal knowledge of his criminal history provide defendant with adequate notice of what crimes might be presented as aggravating circumstances.

Am Jur 2d, Criminal Law § 599; Habitual Criminals and Subsequent Offenders § 19.

19. Criminal Law § 1355 (NCI4th)— capital case—mitigating circumstance—no history of prior criminal activity—evidence of prior rape

Testimony by a witness that defendant raped her and threatened to rape and kill her daughter just three months prior to the murder, kidnapping and rape in question was admissible in response to defendant's request that the court consider the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance that defendant had no significant history of prior criminal activity.

Am Jur 2d, Criminal Law § 599; Homicide § 554.

20. Criminal Law § 1347 (NCI4th)— capital case—course of conduct aggravating circumstance—not vague or overbroad

The course of conduct aggravating circumstance for first degree murder set forth in N.C.G.S. § 15A-2000(e)(11) is not

unconstitutionally vague and overbroad on its face or as applied in this case.

Am Jur 2d, Criminal Law § 599; Homicide § 554.

21. Criminal Law § 1322 (NCI4th)— capital case—mitigating circumstance—time served before parole for life sentence

The trial court properly denied defendant's request that the jury in a first degree murder case be allowed to consider as a mitigating circumstance that defendant would serve at least twenty years before parole eligibility if sentenced to life imprisonment.

Am Jur 2d, Criminal Law § 599; Homicide § 554.

22. Criminal Law § 1327 (NCI4th)— capital case—aggravating outweighing mitigating circumstances—finding death sentence inappropriate—instruction improper

The trial court did not err in refusing to instruct the jury in a first degree murder case that even if it found that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, the jury could still determine that death was inappropriate punishment in this case.

Am Jur 2d, Criminal Law § 599; Homicide §§ 554, 555.

23. Criminal Law § 1321 (NCI4th)— capital case—failure of jury to agree—life sentence—instruction not required

The trial court did not err in failing to instruct the jurors that if they could not agree on a sentence to be imposed for first degree murder, a life sentence would be imposed.

Am Jur 2d, Homicide §§ 513, 553, 555.

24. Criminal Law § 1326 (NCI4th)— capital case—mitigating circumstances—instruction on burden of proof

The trial court in a capital case did not err in failing to instruct the jury that the State had the burden of proving the nonexistence of each mitigating circumstance beyond a reasonable doubt and in placing the burden of proof on defendant to prove each mitigating circumstance by a preponderance of the evidence.

Am Jur 2d, Homicide § 555.

25. Criminal Law § 1352 (NCI4th)— capital case—mitigating circumstances—instruction requiring unanimity—harmless error

Any error by the trial court in requiring the jury to unanimously find a mitigating circumstance before it could be meaningfully considered in defendant's favor in a capital case was harmless beyond a reasonable doubt where the jury found all of the mitigating circumstances presented by defendant and submitted to the jury.

Am Jur 2d, Homicide § 555.

26. Criminal Law § 1298 (NCI4th)— constitutionality of death penalty statute

The North Carolina death penalty statute, N.C.G.S. § 15A-2000, is neither unconstitutionally vague nor overbroad and is not applied in a discriminatory and discretionary manner.

Am Jur 2d, Criminal Law § 628; Homicide § 556.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-Gregg cases. 65 ALR4th 838.

27. Criminal Law § 1373 (NCI4th)— death sentence not disproportionate

A sentence of death imposed on defendant for first degree murder was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant, where defendant was found guilty on theories of both felony murder and premeditation and deliberation; the murder was committed in order to allow defendant to commit a rape upon another victim; defendant fled the scene and made no effort to aid the victim; the jury found as aggravating factors that defendant had previously been convicted of crimes involving the use or threat of violence to the person and that the murder was part of a course of conduct involving other violent crimes; only three of the fifteen mitigating factors found by the jury were statutory and much of defendant's mitigating evidence related to his conduct after he was in jail and to his relationship with family and close friends; and the jury weighed this evidence against evidence that defendant had

previously been convicted of a killing in 1971, a felonious breaking and entering in 1982, and a sexual assault in 1985 and the fact that the present killing was accompanied by a kidnapping and rape of another person.

Am Jur 2d, Criminal Law § 628; Homicide § 556.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-Gregg cases. 65 ALR4th 838.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Lamm, J.*, at the 17 June 1988 Criminal Session of Superior Court, BURKE County. Defendant's motion to bypass the Court of Appeals as to his convictions of first-degree rape and first-degree kidnapping as a habitual felon was allowed by this Court on 21 October 1988. Heard in the Supreme Court 9 October 1990.

Lacy H. Thornburg, Attorney General, by Debra C. Graves, Associate Attorney General, for the State.

James R. Glover for defendant-appellant.

MEYER, Justice.

In the early morning hours of 24 June 1987, after a heated confrontation with Ned Rader at Rader's mobile home near Morganton, defendant followed Rader after he left the mobile home. Rader stopped his truck, and defendant pulled his car alongside Rader. Words were exchanged between the occupants of the two parked vehicles; then defendant killed Rader with a single gunshot to the head from a nine-millimeter pistol. After killing Rader, defendant forcibly abducted the female passenger in Rader's truck. She was taken to a wooded area near defendant's home and raped. A jury found defendant guilty of first-degree murder, first-degree rape, and first-degree kidnapping as a habitual felon. After a sentencing proceeding, the jury recommended a sentence of death for the murder conviction. The trial court sentenced in accordance with the recommendation and, additionally, sentenced defendant to consecutive terms of life imprisonment for first-degree rape and for first-degree kidnapping as a habitual felon. We find no error.

On 23 June 1987, Judy Townsend moved away from the mobile home she had shared with her estranged husband. With Ned Rader's help, she moved her belongings into Rader's mobile home. At dusk, defendant, an acquaintance of Townsend, telephoned Townsend at Rader's and was given directions to Rader's home.

Defendant and Lester Wyatt arrived an hour later with beer and white liquor. After the four drank for a few hours, Townsend told the men she was tired and was going to bed. Defendant followed her into her bedroom, and Rader and Wyatt followed shortly thereafter. Townsend insisted that they all leave so she could go to bed. As defendant and Wyatt walked outside, Townsend heard defendant tell Wyatt, "I am going to kill Ned before the night's over with[;] . . . I want you to take this rifle and watch him and don't let him get out of the trailer. Don't you let him get by."

In response to defendant's threat, Townsend told Rader to stay in the bedroom. She again asked defendant to leave, and he refused. Defendant reentered the mobile home. He sat on a stool in the living room, with a gun in his lap, and said, "I'm not going to go . . . because before the night's over with, . . . I'm going to rape you and pistol-whip you with this gun if I have to go through Ned Rader to do it."

At approximately 2:00 a.m., Townsend managed to call her divorce attorney, who notified the Sheriff's Department. Upset at Townsend for "call[ing] the law" on him, defendant detached the telephone receiver when the phone subsequently rang. Townsend reattached the receiver and managed to place another phone call, this time to Karen Snyder, who also notified the Sheriff.

By this time, Ned Rader had armed himself with a shotgun and told defendant to leave. As defendant and Wyatt drove away, Rader shot twice above the top of their car.

When members of the Sheriff's Department arrived with Karen Snyder, they advised Rader to take out a warrant against defendant and left.

Shortly thereafter, Rader and Townsend began the drive to the Sheriff's Department in Rader's truck. Rader drove with the shotgun across his lap with the barrel pointing out the driver's side window. As they neared the highway, defendant's car appeared from behind and began gaining on them. Townsend lowered her head, and Rader stopped the vehicle. When defendant's car stopped

beside Rader's truck, words were exchanged, and defendant killed Rader with a single gunshot to the head from a nine-millimeter pistol belonging to Wyatt.

Defendant then appeared at the passenger side door of Rader's truck and ordered Townsend to get out. Upon her refusal, he broke the window with the stock of the pistol, unlocked the door, pulled her out of the truck, and struck her on the right side of the head with the gun. Defendant threatened to kill Townsend by morning because she "knew too much."

Roy Ray Willis, who lived nearby, testified that at approximately 4:30 a.m. he was awakened by a noise that sounded like a car accident. He telephoned the Sheriff's Department. Upon returning to his wife, she related that she had heard a woman say, "Are you going to shoot me, too?" Willis then telephoned the authorities again and relayed this additional information.

Defendant, Wyatt, and Townsend drove to defendant's mobile home, where Wyatt was instructed to remain. Defendant took Townsend into the woods, where he continued to threaten her life, ordered her to disrobe at gunpoint, and then raped her.

Based largely on pretrial statements given by Lester Wyatt, defendant contended that he acted in self-defense in killing Ned Rader. When Lester Wyatt failed to appear to testify in response to a subpoena and an extensive search, Wyatt's testimony was admitted in the form of the reading of his pretrial statements made separately in tape-recorded interviews with a detective of the county Sheriff's Department and defendant's counsel.

The jury returned verdicts finding the defendant guilty of first-degree murder, first-degree rape, and first-degree kidnapping as a habitual felon. Following a sentencing proceeding, the jury found two aggravating circumstances: (1) that defendant had been previously convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3) (1988); and (2) that the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person, N.C.G.S. § 15A-2000(e)(11) (1988). The jury unanimously found all of the submitted mitigating circumstances to exist. On finding that the mitigating circumstances were not sufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial

to call for the death penalty, the jury recommended a sentence of death for the murder.

Defendant was also charged with being a habitual felon. At the hearing on this charge, the State offered into evidence defendant's Burke County criminal court record. Defendant had previous convictions in 1971 for voluntary manslaughter, in 1982 for felonious breaking or entering, and in 1985 for attempted second-degree rape. Defendant presented no evidence. The jury found defendant to be a habitual felon.

On 17 June 1988, defendant was sentenced to die for the murder of Ned Rader, in accordance with the jury's verdict. Defendant was also sentenced to life imprisonment for first-degree rape, that sentence to be served consecutive to the sentence imposed for the murder, and to life imprisonment for first-degree kidnapping as a habitual felon, that sentence to be served consecutive to the sentence imposed for rape.

GUILT PHASE ISSUES

Since there is no dispute as to who fired the shot that killed Ned Rader, defendant notes that the central issue in this case is whether the fatal shot was fired in self-defense. Besides defendant and the deceased, only two people were present and eyewitnesses to the shooting. One eyewitness to the circumstances of Rader's death was Judy Townsend, who testified for the State. The other eyewitness was Lester Wyatt. Wyatt did not testify in person; consequently, the jury heard reading of the two unsworn statements that he had made prior to the trial.

I.

Defendant contends that the trial court's denial of his motions for a recess or continuance and for a mistrial after Lester Wyatt could not be located denied him his sixth amendment right to compulsory process and due process under the United States Constitution and his comparable state constitutional rights. We conclude that these arguments have no merit.

A. *The Sixth Amendment and Procedural Due Process Rights of the United States Constitution*

[1] Generally, the granting of a continuance is within the sound discretion of the trial court. *Ungar v. Sarafite*, 376 U.S. 575, 11 L. Ed. 2d 921, *reh'g denied*, 377 U.S. 925, 12 L. Ed. 2d 217 (1964);

Avery v. Alabama, 308 U.S. 444, 84 L. Ed. 377 (1940). A significant limitation on that discretion occurs where denial of a continuance results in the violation of a defendant's right to due process or his sixth amendment right to compulsory process. The sixth amendment of the United States Constitution provides in pertinent part as follows:

> In all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .

U.S. Const. amend. VI. In *Washington v. Texas*, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 1023 (1967), the United States Supreme Court noted that "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense."

Courts have discussed numerous factors which are weighed to determine whether the failure to grant a continuance rises to constitutional dimensions. Of particular importance are the reasons for the requested continuance presented to the trial judge at the time the request is denied. *Ungar v. Sarafite*, 376 U.S. at 589, 11 L. Ed. 2d at 931.

[2] A continuance in a criminal trial essentially involves a question of procedural due process. Implicitly, the courts balance the private interest that will be affected and the risk of erroneous deprivation of that interest through the procedures used against the government interest in fiscal and administrative efficiency. *See generally Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18 (1976) (procedural due process standard).

When the individual interest at stake is the defendant's life or liberty, the individual interest is especially compelling. An interest such as, in this case, defendant's life is factored heavily into the analysis. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68, 78, 84 L. Ed. 2d 53, 63 (1985).

On the other side of the scale, the government has an interest in procuring testimony within a reasonable time. *Hicks v. Wainwright*, 633 F.2d 1146, 1149 (5th Cir. 1981); *see also Diggs v. Owens*, 833 F.2d 439, 444 (3d Cir. 1987) (in a first-degree murder and kidnapping case, government interest prevailed where excluded testimony was available from another source), *cert. denied*, 485 U.S. 979, 99 L. Ed. 2d 488, *reh'g denied*, 486 U.S. 1018, 100

L. Ed. 2d 220 (1988); *McKinney v. Wainwright*, 488 F.2d 28, 30 (5th Cir.) (in an assault with intent to commit murder case, government interest prevailed where defendant failed to articulate specific basis for request at time of motion for continuance), *cert. denied*, 416 U.S. 973, 40 L. Ed. 2d 562 (1974); *Taylor v. Minnesota*, 466 F.2d 1119, 1122 (8th Cir. 1972) (in a case involving an attempt to force a young woman to become a prostitute, government interest prevailed where there was no showing of a lack of diligence by the state), *cert. denied*, 410 U.S. 956, 35 L. Ed. 2d 689 (1973); *Allen v. Rhay*, 431 F.2d 1160, 1166 (9th Cir. 1970) (in a robbery case, government interest prevailed where defendant failed to preserve error in record), *cert. denied*, 404 U.S. 834, 30 L. Ed. 2d 64 (1971).

Where highly relevant and noncumulative evidence is excluded by the denial of the continuance, courts have often held that the defendant's constitutional rights outweighed the government's interest. *See, e.g., Bennett v. Scroggy*, 793 F.2d 772, 775-76 (6th Cir. 1986) (in a murder case, individual interest prevailed where missing witness' testimony was unique and noncumulative); *Dickerson v. Alabama*, 667 F.2d 1364, 1370-71 (11th Cir.) (in a robbery case, individual interest prevailed because inherent credibility of alibi testimony by police officer was not considered cumulative), *cert. denied*, 459 U.S. 878, 74 L. Ed. 2d 142 (1982); *Hicks v. Wainwright*, 633 F.2d 1146, 1148-50 (in a breaking and entering with intent to commit a felony and involuntary sexual battery case, individual interest prevailed where testimony was from defendant's only expert witness on issue of insanity defense). Moreover, cases have further shifted the balance away from the government's interest where significant culpability by the government is found. *See, e.g., Renzi v. Virginia*, 794 F.2d 155, 159 (4th Cir. 1986) (in a possession of PCP case, individual interest prevailed in due process challenge where government gave intentionally misleading information to defendant, who lost opportunity to produce critical witness); *Singleton v. Lefkowitz*, 583 F.2d 618, 624-26 (2d Cir. 1978) (in a possession of a dangerous drug case, individual interest prevailed where government improperly released defendant's witness from custody after his arrest pursuant to a material witness order), *cert. denied sub nom. Abrams v. Singleton*, 440 U.S. 929, 59 L. Ed. 2d 486 (1979); *United States v. Barker*, 553 F.2d 1013, 1018-23 (6th Cir. 1977) (in a bank robbery case, individual interest prevailed where government both did not exercise due diligence in securing presence of

expert witnesses and violated a stipulation not to make a certain related argument); *Shirley v. North Carolina*, 528 F.2d 819, 822 (4th Cir. 1975) (in a violation of state narcotics laws case, individual interest prevailed in due process challenge where government made clearly unsupported assertion that witness "might never be available").

[3] Lester Wyatt failed to appear in response to a timely and properly issued subpoena by the State. Subsequent extensive efforts made in good faith by the State to locate him were unsuccessful. Testimony at trial indicated that Wyatt had previously been known to hide out from authorities "until things calmed down or [until authorities] weren't looking for him any more." Additional testimony indicated that he was able to live in the woods for an extended period of time under conditions that others could not survive. The full foliage in the mountains added to the difficulty in locating him. There was no culpability by the State in this case, because the authorities had made extensive efforts to locate him after diligently serving him with a subpoena. In fact, there were warrants out for Wyatt's arrest on totally different charges in addition to the order for his arrest which the trial court issued in this case. Moreover, in light of the fact that Lester Wyatt's testimony was admitted into evidence by way of statements he had made in an interview with a detective of the county Sheriff's Department and, more importantly, statements he had made in an interview with defendant's counsel, the risk of error resulting from a denial of the continuance is significantly low here. We hold that the trial court neither abused its discretion nor violated defendant's constitutional rights to compulsory process or due process in denying the continuance.

B. *North Carolina Law*

The analogous North Carolina constitutional provision at issue is article I, section 23, which provides in pertinent part as follows:

> In all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony . . . .

N.C. Const. art. I, § 23.

A motion for a continuance is normally addressed to the sound discretion of the trial court, and its ruling will not be disturbed

on appeal absent a showing of an abuse of discretion. *State v. Rigsbee*, 285 N.C. 708, 208 S.E.2d 656 (1974).

In examining the denial of a motion for a continuance for constitutional error, North Carolina case law, like its federal counterpart, implicitly balances the individual interest and the risk of an erroneous deprivation of that interest in light of the procedure being used against the State's interest in fiscal and administrative efficiency. *See, e.g., State v. Barfield*, 298 N.C. 306, 321-22, 259 S.E.2d 510, 525-26 (1979) (in a murder case, State's interest prevailed where testimony of absent witness was available by way of deposition), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980); *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986) (in a first-degree sex offense, attempted first-degree rape, and assault with a deadly weapon with intent to kill inflicting serious injury case, State's interest prevailed where absent witness' testimony would not have materially aided defendant); *State v. Lee*, 293 N.C. 570, 574, 238 S.E.2d 299, 302 (1977) (in an armed robbery and aggravated kidnapping case, State's interest prevailed where defendant both failed to make adequate showing of the importance of the witness to the case and did not avail himself of the procedures for obtaining out-of-state witnesses); *State v. Rigsbee*, 285 N.C. 708, 711, 208 S.E.2d 656, 658-59 (in a possession with intent to distribute and distribution of drugs case, State's interest prevailed where the content of the testimony by the absent witness was not fully established at trial); *State v. Utley*, 223 N.C. 39, 45, 25 S.E.2d 195, 200 (1943) (in a murder case, State's interest prevailed where defendant had the benefit of witness' testimony in another form); *State v. Wellmon*, 222 N.C. 215, 216-17, 22 S.E.2d 437, 438 (1942) (in a capital rape case, State's interest prevailed where testimony of absent alibi witnesses, who were beyond the State's jurisdiction, was available through trial transcripts of *habeas corpus* proceedings).

This Court has also found either an abuse of discretion or constitutional error in denying a continuance. *State v. Smathers*, 287 N.C. 226, 214 S.E.2d 112 (1975); *State v. Twiggs*, 60 N.C. (Win.) 142 (1863).

Both *Twiggs* and *Smathers* are distinguishable from the instant case. In *Twiggs*, there was no indication either that the absent witness could not be found within a reasonable time or that the defendant received the benefit of the witness' testimony

in some other form. *Smathers* is likewise distinguishable because it involved witnesses whose only impediment to being located was that they were not within the jurisdiction. In *Smathers*, the absent witnesses apparently could have been procured within a reasonable time. In this case, the defendant had the benefit of the witness' statements to both the Sheriff's Department and his own counsel, and the evidence indicated that the witness had gone into hiding for a long period under circumstances indicating no likelihood of locating him within a reasonable period of time. We therefore hold that the trial court neither abused its discretion nor violated the North Carolina Constitution.

[4] Defendant further contends that the trial court's denial of funds for an investigator to help him locate Wyatt violated his constitutional right to compulsory process and due process when Wyatt failed to appear at trial. We hold that defendant's use of Wyatt's statements sufficiently lessened the need to have Wyatt in person, such that the denial of funds for an investigator was neither an abuse of discretion nor a constitutional violation.

The leading federal case on point is *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53. In *Ake*, the United States Supreme Court balanced the private interest and the risk of erroneous deprivation of that interest if additional safeguards were not provided against the government's interest that would be affected if the safeguard were provided. *Id.* at 77, 84 L. Ed. 2d at 62 (citing *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18). The Court held that the state is obligated to provide the defendant a psychiatrist's assistance at state expense when the defendant makes a preliminary showing that his sanity is likely to be a "significant factor" in his defense. *Id.* at 83, 84 L. Ed. 2d at 66. Subsequently, this Court, consistent with post-*Ake* decisions, has held that in addition to a threshold showing of a "significant factor," which has been interpreted to mean a "specific necessity," the defendant "must demonstrate either that without expert assistance he will be deprived of a fair trial, or that there is a reasonable likelihood that it will *materially* assist him in the preparation of his case." *State v. Bridges*, 325 N.C. 529, 531, 532, 385 S.E.2d 337, 338 (1989) (citing *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986)).

Both *Ake* and *Bridges* are sufficiently distinguishable from the case at hand in that they involved situations where the testimony sought was not available in any other reasonable form to assist

the defendant. In *Ake*, without an expert witness, defendant had no other credible evidence to establish the critical element of his defense. Therefore, the testimony proffered by the expert witness in *Ake* would certainly have been a significant factor in defendant's defense. *Ake v. Oklahoma*, 470 U.S. at 82-83, 84 L. Ed. 2d at 65-66. In the instant case, defendant had the benefit of statements made to both the Sheriff's Department and defendant's own counsel.

Bridges is likewise distinguishable. In *Bridges*, fingerprints at the crime scene were the critical link connecting the defendant to the crime. In *Bridges*, we held that a fingerprint expert would have materially assisted the indigent defendant in preparing his case. *State v. Bridges*, 325 N.C. at 532-33, 385 S.E.2d at 339. We noted in *Bridges* that the fingerprint evidence was crucial to the State's case, and the nature of that evidence required that defendant have the right to an independent expert to assess that evidence. *Id.* While the defendant in *Bridges* was unable to interpret the fingerprint evidence without assistance, the defendant in this case had the benefit of a substantial portion of Wyatt's testimony by means of the introduction of his pretrial statements. In addition, the witness in this case was unlikely to be discovered, given the evidence of his flight and the significant good faith efforts which had been expended by the Sheriff and others. Unlike *Bridges*, the burden on the State's interest in fiscal and administrative efficiency was great, given the likelihood of an extended delay in locating the witness. We hold that under the facts of this case, there was no error in denying the motion for a continuance.

II.

[5] Defendant next argues that he was denied his due process right to a fair and impartial jury, to effective assistance of counsel, and to be present at every stage of the trial because the trial court supplemented the jury venire with venire persons who had been sitting in a different courtroom. This assignment of error is without merit.

In this case, when the trial judge determined that the venire pool was too small to allow a jury to be selected, he ordered that additional venire persons be selected at random from an array which was present for the trial of other cases in an adjoining courtroom. The jurors selected from the adjoining courtroom had already been sworn but not impaneled or selected for another case when they were summoned to defendant's trial.

Defendant relies on *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987), apparently contending that any communication with a juror, even by another trial judge in another courtroom, violates the defendant's right to be present at every stage of his trial. *Payne* involved an *ex parte* communication by the presiding trial judge with a jury that was sitting on the case after the close of all the evidence. In the instant case, the jurors in issue were merely sworn by another judge in another courtroom. There was no possibility of improper communication by the presiding trial judge with a juror sitting on the defendant's case such that defendant's rights were compromised.

III.

[6] Defendant next contends that the trial court improperly admitted portions of witness Roy Willis' testimony, which he asserts were inadmissible hearsay and violated defendant's constitutional right to confrontation. Willis and his wife were apparently awakened by the gunshot that killed Ned Rader. At issue is a statement allegedly made by Judy Townsend that was heard by Roy Willis' wife. Apparently, as Townsend was confronted by defendant, Mrs. Willis heard Townsend exclaim, "Are you going to shoot me, too?" After Mrs. Willis related this additional information to her husband, Roy Willis called the Sheriff's Department for the second time in the early morning hours of 24 June 1987.

Defendant objected to the admission of Mr. Willis' testimony, but the trial court admitted it with a limiting instruction that the testimony was "not to show the truth of what was stated but to show what [Willis] told the Burke County Sheriff's Department." Defendant contends that the evidence, admitted for that purpose, is not relevant to any issue in the case.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1988). The value of the evidence need only be slight. *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989). "In criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020, 16 L. Ed. 2d 1044 (1966).

In order to be relevant, testimonial evidence need not bear directly on the question in issue if it is helpful to understand the conduct of the parties, their motives, or if it reasonably allows the jury to draw an inference as to a disputed fact. *State v. Arnold*, 284 N.C. 41, 47-48, 199 S.E.2d 423, 427 (1973). This Court has held that out-of-court statements offered to explain the conduct of a witness are relevant and admissible. *State v. Potter*, 295 N.C. 126, 132, 244 S.E.2d 397, 401-02 (1978) (witness' testimony as to a threat to her husband admissible to explain her subsequent conduct in calling the police).

The evidence in this case shows that defendant killed the victim, then drove away with Townsend and Wyatt. Thus, the ultimate issue for the jury, on the kidnapping charge, was whether Townsend consented to leaving with defendant or was forcibly abducted. Whether Townsend was forced to get out of the truck and into defendant's car is in dispute. While evidence of commotion at the scene necessitating a second telephone call to the Sheriff's Department does not bear directly upon the ultimate question before the jury, it does tend to throw some light upon the crime and defendant's conduct and motives. We hold that the evidence was relevant for the limited purpose of showing that a statement was made which caused Mr. Willis to call the Sheriff's Department a second time in the early morning hours of 24 June 1987. Defendant does not argue or contend that this evidence, though relevant, was more prejudicial than probative.

Having determined that the evidence is relevant for a purpose other than its truth, we now turn to consider defendant's contention that the statement was inadmissible hearsay.

An out-of-court assertion offered for any relevant purpose other than the truth of the matter asserted may be admissible. The commentary to N.C.G.S. § 8C-1, Rule 801, provides: "If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." *See also* 1 Brandis on North Carolina Evidence § 141 (1988). We hold that the trial court properly instructed the jury that the testimony could be used for the limited purpose of explaining why the witness called the Sheriff's Department a second time and not for the purpose of establishing the truth of any implied assertion made by Judy Townsend.

Defendant contends that the prosecutor's use of Mr. Willis' statement during his closing argument confirms defendant's argument that the statement was admitted for substantive purposes. The reference to Mr. Willis' statement in the prosecutor's two closing arguments is as follows:

> He said he was awakened that night; that he heard a woman's voice. . . . He remembers that he made a phone call to the sheriff and that after hearing, "Are you going to shoot me, too," he ran back in and he made a second call to the sheriff's department . . . . And the important thing I say to you is everything he said but particularly, she was very upset and scared, "Are you going to shoot me, too."

Assuming, *arguendo*, that the prosecutor's argument may have approached the limit of the legitimate use of Mr. Willis' statement, it drew no objection from defendant. Thus, defendant waived any error. Moreover, the trial judge's instruction at the time the testimony was offered properly and explicitly limited the statement's use.

[7] We now turn to address the defendant's confrontation clause argument as to this evidence. The United States Supreme Court has specifically addressed the circumstance of a statement offered not for its truth, but as proof that the statement had been made:

> Neither a hearsay nor a confrontation question would arise had [the witness'] testimony been used to prove merely that the statement had been made. The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the *proof of fact* through extrajudicial statements. From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard.

Dutton v. Evans, 400 U.S. 74, 88, 27 L. Ed. 2d 213, 226 (1970) (emphasis added).

As previously noted, the statement, "Are you going to shoot me, too?" was admissible for the limited purpose of showing that there was a commotion at the scene of the crime, thereby inferring a forcible abduction of Townsend. The testimony here was used merely to show that the statement had been made and its effect

on the witness. Since the trial judge limited the jury's consideration of the statement and Mr. Willis was subject to cross-examination as to what he had heard, we hold that the use of the statement for this limited purpose did not violate defendant's right to confront witnesses against him.

Assuming, *arguendo*, that the statement was inadmissible hearsay, it was harmless beyond a reasonable doubt. The statement infers no more than that the defendant shot Rader, and this was never disputed. Defendant himself admits that he shot Rader; he claims, however, that he shot him in self-defense.

IV.

[8] Defendant next takes exception to the trial court's admission of a deputy sheriff's testimony as to what Ned Rader had told him the day he died. The deputy testified that Rader told him that defendant had threatened his life and had threatened to rape Townsend. Defendant argues that the evidence was not admissible under the residual exception to the hearsay rule, as the trial court found, and that the evidence was admitted in violation of his sixth amendment right to confront any witnesses against him. We hold that the testimony was admissible under the residual exception to the hearsay rule.

For evidence to be admissible under the residual exception to the hearsay rule, the following factors are considered: (1) the declarant's personal knowledge of the underlying event, (2) the declarant's motivation to speak the truth, (3) whether the declarant recanted, and (4) the reason for the declarant's unavailability. *State v. Nichols*, 321 N.C. 616, 365 S.E.2d 561 (1988). In the instant case, Ned Rader, the declarant, was present during the events that he related to the sheriff's deputy. Rader's motivation to tell the truth is supported by the fear for his life, which caused him to send Townsend to call the authorities in the first place. Moreover, the evidence indicates that Rader was proceeding to the magistrate's office when he was killed, which supports the contention that he legitimately feared for his life. Rader never recanted the statements, and his unavailability was as a result of his death at the hands of the defendant.

Defendant argues that the statement's trustworthiness is questionable because of discrepancies between Rader's statement and statements made by Townsend and Wyatt. Primarily, the discrepan-

cies relate to the circumstances causing Rader to be in the back of the mobile home. We need not go into the specific details, but we point out that Rader's statements are substantially corroborated such that, in context, the testimony is sufficiently trustworthy.

[9] In response to defendant's confrontation clause argument as to this evidence, we must examine the scope of the constitutional right that he asserts. The sixth amendment to the United States Constitution provides in pertinent part as follows:

> In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

U.S. Const. amend. VI.

While defendant does not assert a violation of the North Carolina Constitution, it contains a similar provision:

> In all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony . . . .

N.C. Const. art. I, § 23.

The United States Supreme Court has set out certain broad standards that govern the constitutionality of the admission of hearsay in criminal prosecutions. Hearsay must contain "indicia of reliability." *Idaho v. Wright*, 497 U.S. ---, ---, 111 L. Ed. 2d 638, 651-53 (1990); *see generally* McCormick on Evidence § 252 (1984). The Court has indicated that hearsay statements that fall within a "firmly rooted hearsay exception" inherently possess an "indicia of reliability." *Compare Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980) (former testimony did not violate the confrontation clause where government carried burden of showing declarant's unavailability to testify at trial and defendant "cross-examined" the witness at preliminary hearing) *and United States v. Bourjaily*, 483 U.S. 171, 182-84, 97 L. Ed. 2d 144, 157-58 (1987) (co-conspirator's statement did not violate the confrontation clause where statement met requirements of federal Rule 801(d)(2)(E)—the co-conspirator exception) *with Idaho v. Wright*, 497 U.S. ---, 111 L. Ed. 2d 638 (residual hearsay exception is not "firmly rooted hearsay exception" and violated confrontation clause absent showing of "particularized guarantees of trustworthiness").

Assuming that a statement does not fall within the category of a "firmly rooted hearsay exception," the Court has provided

some guidance on an alternative method of showing "indicia of reliability":

> [T]he "indicia of reliability" requirement could be met in either of two circumstances: where the hearsay statement "falls within a firmly rooted hearsay exception," or where it is supported by "a showing of particularized guarantees of trustworthiness."

Idaho v. Wright, 497 U.S. at ---, 111 L. Ed. 2d at 653. These guarantees of trustworthiness are based on a consideration of the totality of the circumstances but "only those that *surround the making of the statement* and that render the declarant particularly worthy of belief." *Id.* at ---, 111 L. Ed. 2d at 655 (emphasis added).

We note that, although the residual exception is not a firmly rooted hearsay exception, the deputy sheriff's discussion with Rader contained "particularized guarantees of trustworthiness." *Id.* at ---, 111 L. Ed. 2d at 654-60. No evidence was presented that the statement was made to the deputy sheriff in response to leading questions or that the deputy had a preconceived notion of what would be disclosed during the conversation regarding defendant's actions. Under the totality of the circumstances, the declarant's truthfulness is sufficiently clear that cross-examination at the time of the statement would be of marginal utility. Moreover, even if the evidence were improperly admitted, there was other evidence to the same effect from Townsend corroborating this testimony by Rader; and thus the error, if any, was harmless beyond a reasonable doubt.

V.

Defendant next contends that the search of his mobile home, with Lester Wyatt's consent, by the Burke County Sheriff's Department violated his fourth amendment right to be free from unreasonable searches and seizures and that the evidence of the search, which disclosed the clothing and a shotgun, was improperly admitted by the trial court. We conclude that the trial court properly admitted the evidence.

N.C.G.S. § 15A-974 provides that unlawfully obtained evidence may be suppressed, upon timely motion, if its exclusion is required by the United States Constitution or the North Carolina Constitution. The defendant has the burden of establishing that the motion to suppress is both timely and in proper form. *State v. Satterfield*, 300 N.C. 621, 624-25, 268 S.E.2d 510, 513-14 (1980); *State v. Simmons*,

59 N.C. App. 287, 296 S.E.2d 805 (1982), *cert. denied*, 307 N.C. 701, 301 S.E.2d 395 (1983).

[10, 11] In this case, the State did not give the defendant notice prior to trial that it would offer evidence from the consent search of defendant's residence. The absence of notice allowed the defendant to make a motion to suppress for the first time during trial. N.C.G.S. § 15A-975(b) (1988). Therefore, defendant's objection was timely, but it was not in proper form. A motion to suppress made at trial, whether oral or written, should state the legal ground upon which it is made. While an affidavit is not required for a motion timely made at trial,[1] the defendant must, however, specify that he is making a motion to suppress and request a voir dire. Defendant never made a motion to suppress and never requested a voir dire. The record in this case reveals only a general objection and motion to strike that failed to state any legal or factual basis for the objection. This provides a sufficient ground for upholding the trial court's ruling.

VI.

[12] In defendant's sixth assignment of error, he argues for a new trial, alleging that the prosecutor improperly commented on the exercise of defendant's constitutional right to remain silent. We hold that the prosecutor's comments were not improper in the context in which they were made and note that any possible error by the prosecutor was quickly cured by the trial judge. The relevant portion of the prosecutor's argument is as follows:

> [PROSECUTOR]: —He asked him about that point when they leave the trailer. When they're run off from the trailer. And Wyatt (sic) says, "You look like an intelligent man. You didn't ask Jim what the hell Ned was shooting at him for." "No, he was in kind of an ill mood and I figured he'd tell me later."

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1. In *State v. Satterfield*, the Court stated: "[A] motion to suppress made at trial, whether oral or written, should state the legal ground upon which it is made and should be accompanied by an affidavit containing facts supporting the motion." *Satterfield*, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980). To the extent that this language suggests a requirement for an affidavit when the motion to suppress is made at trial, as here, it is hereby disapproved. Moreover, the Court of Appeals, in interpreting *Satterfield*, stated: "A motion without such a supporting affidavit may be summarily denied." *State v. Simmons*, 59 N.C. App. 287, 290, 296 S.E.2d 805, 808 (1982), *cert. denied*, 307 N.C. 701, 301 S.E.2d 395 (1983). This aspect of *Simmons* is overruled.

"Jim was." "Yeah." [Defense counsel] then tells Mr. Wyatt, "You just figured it was something that would pass." Wyatt, "Yeah." Jim Roper was in an ill mood. Jim Roper hadn't got what he wanted. And on top of not getting what he wanted—on top of not getting—of not being able to rape Judy Townsend right there in the trailer, he'd been run off. Man had shot at him and run him off so he was mad. He was mad as hell. [Sheriff's detective] asked him how long did it take him to calm down. Wyatt, "Thirty or forty-five minutes. Set there and drank and drank [sic] a beer. Calmed down a little." Now, in his opening remarks to you, [defense counsel] mentioned to that, well, the State didn't present to you Mr. Wyatt. State either didn't want to present him or they just didn't present him. Well, Jim Roper—James Roper tells you—he says I've got a defense. He says it's self-defense. If he's got a self-defense, then let him present it. The State—

[DEFENSE COUNSEL]: —OBJECTION, Your Honor.

THE COURT: —SUSTAINED. Members of the jury, do not consider any reference to any—

[PROSECUTOR]: —I'm talking about Mr. Wyatt.

THE COURT: —Just a minute.

[PROSECUTOR]: —I'm sorry, Your Honor.

THE COURT: —I will give you instructions that cover that in my instructions when he completes his argument but you're not to consider any allegation or argument that the defendant has failed to do anything.

In considering the prosecutor's closing argument in context, it becomes apparent that the prosecutor was responding to defendant's assertion that the State's case rested solely on Judy Townsend's testimony. Under those circumstances, it was not inappropriate for the prosecutor to point out that the witness to defendant's alleged acts of self-defense had not come forward to testify. We hold that the prosecutor's remarks were not a comment on defendant's failure to testify. Moreover, any prejudice was cured by the trial court's limiting instructions and subsequent jury instructions.

NONCAPITAL SENTENCING ISSUE

[13] Defendant argues that the trial court improperly applied an aggravating factor to his conviction for kidnapping. Defendant was convicted of kidnapping as a habitual felon. The trial court applied the punishment-enhancing factor of habitual felon to the kidnapping conviction, elevating the kidnapping conviction from a class D felony to a class C felony, in accordance with N.C.G.S. § 14-7.6. The trial court also found the aggravating factor of prior conviction of offenses punishable by imprisonment for more than sixty days and imposed the maximum sentence for a class C felony, which was life imprisonment. *See* N.C.G.S. § 15A-1340.4 (1988). Defendant notes that the same felonies were used to establish both the aggravating factor and the habitual felon status.

Defendant cites *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983), wherein this Court held that the trial judge erred in finding an element of the crime also to be a factor in aggravation. In *Blackwelder*, defendant was convicted of assault with a deadly weapon, and the trial court found that the defendant had used a deadly weapon as a factor in aggravation.

We have previously held that factors which relate to "*the character or conduct of the offender*" may become the basis for increasing or decreasing a presumptive term. *State v. Chatman*, 308 N.C. 169, 180, 301 S.E.2d 71, 78 (1983) (citing *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983)). However, a significant limitation on that general rule is that an essential element of the underlying crime may not also be asserted as an aggravating factor for that crime, since those factors were presumably considered in determining the presumptive sentence for the offense. *State v. Blackwelder*, 309 N.C. at 418, 306 S.E.2d at 789.

Here, the status of habitual felon merely enhances the punishment of another crime, and that status is not a crime in and of itself. The *Blackwelder* limitation thus does not apply because these convictions for prior crimes were not essential elements of the crimes for which defendant was convicted. We hold that the evidence of defendant's prior crimes was properly used to establish the status of a habitual felon as well as to establish the aggravating factor of prior felony convictions to increase the presumptive sentence of the underlying felony.

[14, 15] In proving the aggravating circumstance that "defendant had been previously convicted of a felony involving the use or threat of violence to the person," N.C.G.S. § 15A-2000(e)(3) (1988), the State presented testimony of a former SBI agent who had investigated a prior felony of which defendant had been convicted. Defendant contends that he was prejudiced when the trial court allowed the former SBI agent to testify as to a statement that had been related to him by an unidentified declarant while the agent was investigating the prior killing for which defendant was convicted in 1971. The former SBI agent testified that defendant had responded to his victim's request for help by telling him that "if he didn't die, he would shoot him again." Defendant contends that the admission of this evidence violates his rights under the United States Constitution. Defendant argues that only the record of the prior crime should have been admitted, and in any event, the testimony was inadmissible hearsay and violated defendant's constitutional right to confront witnesses against him. We disagree and hold that evidence of the circumstances of prior crimes is admissible to aid the sentencer. Moreover, we note that the evidence in issue was admissible because it was relevant to sentencing. Assuming, *arguendo*, that the evidence was admitted in violation of defendant's sixth amendment right to confront the declarant, it was harmless beyond a reasonable doubt.

Defendant first contends that in establishing aggravating circumstances, the State is limited to presenting only the record evidence of prior crimes and not the *circumstances* of those crimes. Defendant notes that he had pled guilty to voluntary manslaughter in that killing and argues that the trial court's admission of evidence of the circumstances of the prior crime violated his rights to due process and freedom from cruel and unusual punishment.

In *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983), this Court addressed essentially the same question presented here, that of whether the State could introduce evidence of the circumstances of a prior murder when the defendant had stipulated to having been found guilty of the charge. *See also State v. Green*, 321 N.C. 594, 610-12, 365 S.E.2d 587, 597, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988); *State v. McDougall*, 308 N.C. 1, 17-23, 301 S.E.2d 308, 318-22, *cert. denied*,

464 U.S. 865, 78 L. Ed. 2d 173 (1983). The *Taylor* Court found no error in admitting an autopsy report to prove certain aggravating circumstances:

> The objection made by defendant is that, as he had stipulated the fact of his prior conviction, the State should not have been allowed to introduce testimony concerning the murder. The State argues that when proving as an aggravating circumstance that defendant was previously convicted of a capital felony or of a felony involving the use or threat of violence to the person (G.S. 15A-2000(e)(2) and (3)), the State should not be limited to admission of the court record of conviction.
>
> We think the better rule here is to allow both sides to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation. If the capital felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed.

State v. Taylor, 304 N.C. at 279, 283 S.E.2d at 780.

Consistent with prior decisions of this Court, the State is entitled to present witnesses in the penalty phase of the trial to prove the circumstances of prior convictions and is not limited to the introduction of evidence of the record of conviction. We hold that the testimony of the circumstances of the prior killing was admissible in the penalty phase of the trial.

Defendant next contends that the defendant's statement made at the prior killing presented in the former SBI agent's testimony was inadmissible hearsay and violated his right of confrontation. Assuming, *arguendo*, that the admission of this evidence was error, it was harmless. In the context of all the evidence presented at trial, we find that the error was not prejudicial. Defendant does not dispute that he was convicted of the killing in 1971. We conclude that much more probative and persuasive of defendant's character to the jury was the evidence of the recent sex offense for which defendant was convicted, the cold-blooded calculation of the present crimes, and the senseless nature of the killing, that is, simply to facilitate the rape of Townsend. We note that the jury deliberated for less than one hour during the guilt phase of this trial before returning guilty verdicts of first-degree murder, first-degree kidnapping, and first-degree rape. During the sentencing phase of

the trial, when the alleged error occurred, the jury deliberated just under one hour and fifteen minutes. We hold that, assuming the admission of the testimony was error, it was harmless beyond a reasonable doubt.

[16] Defendant also objects to two other statements offered by the State to prove circumstances in aggravation that the trial court admitted. In one, an eyewitness to the previous killing to which defendant pled guilty to voluntary manslaughter testified that defendant went to his car and returned with a gun to shoot the victim. In the other statement, defendant's stepniece testified that in 1985 defendant actually raped her, although in that prior case defendant had pled guilty to attempted second-degree rape. For the reasons previously stated, we also hold these statements were admissible to prove the circumstances of the crimes for which defendant had been convicted.

[17] Defendant next contends that evidence of yet another alleged prior rape by the defendant, three months prior to the incident charged in this case, was improperly admitted. We disagree. After defendant presented testimony as to his good character, the State cross-examined his character witnesses and elicited from each of them evidence that they heard the alleged rape victim say that defendant had raped her just three months prior to the rape charged in this case. Defendant argues that the testimony was offered to prove the truth of the matter asserted and is therefore inadmissible hearsay. We note that the evidence was offered for impeachment purposes and was admissible to show the witnesses' knowledge of specific instances of defendant's conduct to rebut the witnesses' prior testimony as to defendant's good character. *See* N.C.G.S. § 8C-1, Rule 405(a) (1988); *State v. Gappins*, 320 N.C. 64, 68-70, 357 S.E.2d 654, 657-59 (1987).

[18] Defendant also contends that he should have been notified of the aggravating circumstances the State would attempt to prove during sentencing and reminds us that he made a pretrial motion to this effect. This Court has previously held that the State is not required to give the defendant specific notice of the particular convictions or even the aggravating circumstances that it plans to rely upon. *State v. Young*, 312 N.C. 669, 674-77, 325 S.E.2d 181, 184-86 (1985); *State v. Brown*, 306 N.C. 151, 183-84, 293 S.E.2d 569, 589-90, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982); *State v. Taylor*, 304 N.C. 249, 256-58, 283 S.E.2d 761, 767-68. The

provisions of the statute, N.C.G.S. § 15A-2000(e)(3) (1988), and defendant's own personal knowledge of his criminal history provide defendant with adequate notice of what crimes might be presented as aggravating circumstances. We hold that the trial court properly denied defendant's request.

[19] Finally, defendant contends that the alleged 1987 rape victim should not have been allowed to testify that defendant raped her and threatened to rape and kill her daughter just three months prior to the rape charged here, a crime for which defendant has never been convicted. The statement was not offered by the State as an aggravating circumstance, but was offered in response to defendant's request that the court consider mitigating circumstance N.C.G.S. § 15A-2000(f)(1)—that defendant had no significant history of prior criminal *activity*. It was clearly admissible for that purpose. We note that after this evidence was presented, defendant withdrew his request for this mitigating circumstance.

PRESERVATION ISSUES

[20] Defendant brings forward seven issues for preservation purposes. First, defendant contends that N.C.G.S. § 15A-2000(e)(11) is unconstitutionally vague and overbroad on its face and as applied. N.C.G.S. § 15A-2000(e)(11) establishes an aggravating circumstance if the jury finds that the murder was committed as a "part of a course of conduct in which defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." This Court has previously rejected the argument that the provision is unconstitutional on its face. *State v. Williams*, 305 N.C. 656, 684-86, 292 S.E.2d 243, 260-61, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983). In regard to defendant's argument that the statute is vague and overbroad as applied, we hold that, based on the evidence and the procedure in this case, defendant's assignment of error is without merit.

[21] Second, defendant contends that the trial court erred in denying his request that the jury be allowed to consider as a mitigating circumstance that defendant would serve at least twenty years before parole eligibility if sentenced to life imprisonment. This issue has previously been decided against defendant. *State v. McNeil*, 324 N.C. 33, 42-44, 375 S.E.2d 909, 915-16 (1989), *sentence vacated on other grounds in light of McKoy*, --- U.S. ---, 108 L. Ed. 2d

756 (1990) (mem.); *State v. Robbins*, 319 N.C. 465, 517-23, 356 S.E.2d 279, 310-13, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

[22] Third, defendant contends that the trial court erred in refusing to instruct the jury that even if it found that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, the jury could still determine that death was inappropriate punishment in this case. This Court has previously decided this issue adversely to defendant. *State v. Holden*, 321 N.C. 125, 160, 362 S.E.2d 513, 535 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988).

[23] Fourth, defendant contends that the trial court erred in failing to instruct the jurors that if they could not agree on a sentence to be imposed, a life sentence would be imposed. We have previously held that "*upon inquiry by the jury* the trial court must inform the jurors that their inability to reach a unanimous verdict should not be their concern but should simply be reported to the court." *State v. Smith*, 320 N.C. 404, 422, 358 S.E.2d 329, 339 (1987). As we have previously noted, to instruct the jury otherwise would be "tantamount to 'an open invitation for the jury to avoid its responsibility and to disagree.' " *State v. Smith*, 305 N.C. 691, 710, 292 S.E.2d 264, 276, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982) (quoting *Justus v. Commonwealth*, 220 Va. 971, 979, 266 S.E.2d 87, 92 (1980)), *quoted in State v. Smith*, 320 N.C. at 421-22, 358 S.E.2d at 339.

[24] Fifth, defendant contends that the trial court erred in failing to instruct the jury that the State had the burden of proving the nonexistence of each mitigating circumstance beyond a reasonable doubt and in placing the burden of proof on defendant to prove each mitigating circumstance by a preponderance of the evidence. We have previously considered this contention and have decided it adversely to defendant. *State v. Holden*, 321 N.C. 125, 158-59, 362 S.E.2d 513, 534; *State v. Barfield*, 298 N.C. 306, 353, 259 S.E.2d 510, 543; *State v. Johnson*, 298 N.C. 47, 75-76, 257 S.E.2d 597, 617-18 (1979).

[25] Sixth, defendant contends that the trial court's instructions requiring the jury to unanimously find a mitigating circumstance before it could be meaningfully considered in defendant's favor deprived defendant of his right to a reliable sentencing determination, his right to due process of law, and his right to be free

from cruel and unusual punishment. We hold that since the jury found all submitted mitigating circumstances, any error was harmless beyond a reasonable doubt.

Taking note of the United States Supreme Court decision in *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988), the trial court repeatedly instructed the jury to consider essentially whether

> any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances *present in this case.*

(Emphasis added.) However, after each of fifteen mitigating circumstances, the trial court gave substantially the following instruction:

> If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.

Later, the trial court summarized as follows:

> Issue four is do you unanimously find, beyond a reasonable doubt, that the aggravating circumstance or circumstances found by you is or are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstance or circumstances *present in this case.*
>
> In deciding this issue, you're not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances *present in this case. In answering this last question, no juror is precluded from considering and weighing anything in mitigation that he or she finds to exist by a preponderance of the evidence, even if that mitigating circumstance was not unanimously agreed upon by the jury under issue two above.*
>
> . . . .
>
> Again, when making this final balancing, *each juror may consider any circumstance in mitigation that juror determines to exist by a preponderance of the evidence, whether or not that circumstance was found to exist unanimously by the jury in issue two.* After so doing, if you are satisfied, beyond a

reasonable doubt, that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, it would be your duty to answer the issue yes.

If you are not so satisfied or have a reasonable doubt, it would be your duty to answer the issue no.

In the event none of you find the existence of any mitigating circumstances, you must still answer this fourth issue. In such case you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence, or significance as to be sufficiently substantial to call for the imposition of the death penalty.

(Emphasis added.)

Defendant notes that the United States Supreme Court has held that the requirement of unanimity by the jury as to each mitigating circumstance violates defendant's eighth amendment rights because one juror could effectively preclude the others from considering a given mitigating circumstance. *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990); *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384.

The State contends, and we agree, that since the jury found every one of the fifteen mitigating circumstances presented by defendant, any constitutional error is harmless beyond a reasonable doubt. *See, e.g., Franklin v. Lynaugh*, 487 U.S. 164, 101 L. Ed. 2d 155, *reh'g denied*, 487 U.S. 1263, 101 L. Ed. 2d 976 (1988); *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384; *Demps v. Dugger*, 874 F.2d 1385, 1388-90 (11th Cir. 1989), *cert. denied*, --- U.S. ---, 108 L. Ed. 2d 963 (1990).

[26] Seventh, defendant contends that the North Carolina death penalty statute, N.C.G.S. § 15A-2000 (1988), is unconstitutionally vague and overbroad and is applied in a discriminatory and discretionary manner. This Court has recently held that the North Carolina death penalty statute is neither unconstitutionally vague nor overbroad and is not applied in a discriminatory and discretionary manner. *State v. Artis*, 325 N.C. 278, 335-36, 384 S.E.2d 470, 503 (1989), *sentence vacated on other grounds in light of McKoy*, --- U.S. ---, 108 L. Ed. 2d 604 (1990); *State v. McLaughlin*, 323 N.C. 68, 102, 372 S.E.2d 49, 71 (1988), *sentence vacated on other grounds in light of McKoy*, --- U.S. ---, 108 L. Ed. 2d 601 (1990) (mem.).

In summary, all of these contentions as to the preservation issues have been decided contrary to defendant's position.

PROPORTIONALITY REVIEW

[27] Defendant contends that his sentence of death should be overturned because it violates the proportionality requirement of N.C.G.S. § 15A-2000(d)(2). That statute provides in pertinent part as follows:

> The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court [1] upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or [2] upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or [3] upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

N.C.G.S. § 15A-2000(d)(2) (1988).

After examining the full record, we first conclude that the evidence supports the jury's finding of the aggravating circumstances submitted. We also hold that the record is devoid of any evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

As to the critical task of examining the third element, the proportionality review, we first set out our method for analysis. The Court considers all capital cases tried since 1 June 1977, when our capital punishment statute became effective, in which the defendant received a sentence of death or life imprisonment. *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). Only cases that were free from error in both phases of the trial are considered. *Id.* We then consider the character, background, and physical and mental condition of the defendant in the case under review as well as the circumstances of the case and the manner in which defendant committed the crime with those same factors of other defendants to establish a pool of similar cases. *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). While we expressly analogize and distinguish many cases,

we do not feel bound to cite all cases that we consider. *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356.

In the instant case, the jury found two aggravating circumstances: (1) that defendant had been previously convicted of a crime involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3) (1988); and (2) that the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person, N.C.G.S. § 15A-2000(e)(11) (1988). The jury found all fifteen mitigating circumstances submitted by defendant.[2]

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2. The jury found as mitigating circumstances:

1. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

2. The age of the defendant at the time of this murder is a mitigating circumstance.

3. Since Mr. Roper's arrest and while awaiting trial in this matter, he has always exhibited good behavior while in the Burke County Jail, has caused no problems while confined therein and has been a model inmate.

4. That James Edward Roper surrendered to officers of the Burke County Sheriff's Department on these charges and did not offer resistance.

5. That James Edward Roper is a man with a limited education, to wit: sixth grade.

6. That the deceased victim was found with a loaded, cocked single-barrel shotgun in his lap with the barrel protruding from an open window.

7. That James Edward Roper was reared in an economically deprived environment.

8. That James Edward Roper has provided honest and truthful aid and assistance to the Burke County Sheriff's Department resulting in arrests and convictions for controlled substance violations.

9. That James Edward Roper's eyewitness, Frank Lester Wyatt, was unavailable for testimony in this trial through no fault of the defendant.

10. The defendant has a warm and loving relationship with Martha Giles who loves him like a brother.

11. That James Edward Roper has shared cigarettes, pictures and other jail items with less fortunate inmates at the Burke County Jail while awaiting trial in this matter.

12. That James Edward Roper has previously been employed as a pulp wood cutter and has worked for Albert Suttle and that he works hard.

13. That James Edward Roper has a loving relationship with his brother, Dallas Roper.

We first point out that our review is not simply limited to a rebalancing of the aggravating and mitigating circumstances. *State v. McLaughlin*, 323 N.C. 68, 109, 372 S.E.2d 49, 75. We strive to find similarities between the crimes and the character of the defendant with previous cases in which the sentence of death or life imprisonment has been affirmed.

We note at the outset that we do not have other cases where a perpetrator killed with premeditation and deliberation for the purpose of facilitating the rape of another, different victim. Nonetheless, we will first compare the defendant's crime and character to each of the cases where the Court found the sentence of death to be disproportionate. Second, we will compare the defendant's crime and character to the sexual assault cases where defendant received the sentence of life imprisonment. Finally, we will review the particular facts of this case to consider whether the defendant's actions are so aggravated as to warrant the death penalty.

We have held that the sentence of death is disproportionate in seven cases but note that none involved sexual assaults. After an examination of each of the following cases where the death sentence was disproportionate, we conclude that the defendant's actions in the case at bar were more culpable than the actions of the defendants in the cases where the Court found the death sentence to be disproportionate.

In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), the defendant was convicted of first-degree felony murder and armed robbery after shooting his robbery victim in the legs with a shotgun. The victim subsequently died of cardiac arrest due to loss of blood from the shotgun wounds. The Court noted that the only aggravating circumstance found in that case was that the crime was committed for pecuniary gain. N.C.G.S. § 15A-2000(e)(6) (1988). In mitigation, the Court further noted, most significantly, that there was no significant history of prior criminal activity and that the defendant was under mental and emotional distress. N.C.G.S. § 15A-2000(f)(1), (2)

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14. That James Edward Roper has developed a close friendship with Burke County Detective Albert Suttle and Detective Suttle's family within the last four years; and is trusted by Detective Suttle in and around his home and family.

15. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

(1988). In this case, the defendant was found guilty of murder on both the theories of felony murder and of murder with premeditation and deliberation. Moreover, the jury found two aggravating circumstances, both of which indicate that the defendant was more criminally culpable than the defendant in *Benson*.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), the defendant was convicted of first-degree felony murder, armed robbery, and felonious larceny as a result of severely beating his robbery victim, which caused the victim's death. In finding the sentence of death to be disproportionate, the Court noted the defendant's young age—seventeen; the mitigating circumstance of mental or emotional disturbance; and the defendant's record of having committed only property offenses and one assault committed as a juvenile. By comparison, the defendant in this case was found guilty of both felony murder and murder with premeditation and deliberation. Moreover, the defendant's record of criminal conduct here included prior convictions for voluntary manslaughter and attempted rape.

In *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), the defendant was convicted of first-degree murder with premeditation and deliberation and assault with a deadly weapon with intent to kill. Defendant fatally shot his victim in an apartment building parking lot. The Court noted that the jury found only that the defendant's action was part of a course of conduct involving other violent crimes. N.C.G.S. § 15A-2000(e)(11) (1988). After comparing the crime with other crimes where only that factor was found, the Court reduced the sentence to life imprisonment. In this case, in contrast, the defendant's character was significantly worse, in that the additional aggravating circumstance of previous convictions for crimes involving the use or threat of violence to the person was also found. N.C.G.S. § 15A-2000(e)(3) (1988).

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the nineteen-year-old defendant was convicted of first-degree murder with premeditation and deliberation, first-degree burglary, and robbery with a dangerous weapon. Defendant and his companions had entered the victim's house on the pretext of a liquor transaction and had stabbed the victim to death. In reducing the sentence to life imprisonment from the death penalty, the Court noted that the jury found only that the crime was committed while the defend-

ant was engaged in a robbery and that the crime was committed for pecuniary gain. N.C.G.S. § 15A-2000(e)(5), (6) (1988). The Court also relied on cases with similar facts where the defendant was given a sentence of life imprisonment. In this case, not only did the crime involve a sexual assault, but the defendant's prior history of criminal activity suggests a more culpable defendant.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the defendant was convicted of first-degree murder with premeditation and deliberation for shooting a police officer. The police officer had struggled with the defendant after briefly pursuing him on foot. In reducing the sentence to life imprisonment, the Court noted, among other things, the apparent lack of motive, the apparent absence of any simultaneous offenses, the lack of past criminal activity, and the fact that the defendant was gainfully employed. By comparison, the evidence shows that the defendant in this case was motivated to commit a planned rape and had been convicted of prior felonies.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the defendant was convicted of first-degree murder with premeditation and deliberation after he killed a drinking companion. The Court, in reducing the sentence to life imprisonment from death as imposed by the jury, considered, among other factors, the defendant's intoxication, the absence of motive, and most importantly, that the defendant sought medical assistance for his victim. In this case, the evidence shows that the murder was committed in order to allow the defendant to commit a rape. Moreover, the defendant fled the scene, and the evidence shows no effort by the defendant to aid the victim or even check his condition.

Finally, in *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant was convicted of first-degree felony murder, kidnapping, and robbery with a dangerous weapon when he shot his robbery victim. The Court noted that only the aggravating circumstance of commission of the crime for pecuniary gain had been found. N.C.G.S. § 15A-2000(e)(6) (1988). In addition, since the defendant was alone with the victim at the time of the crime, there was little evidence of the crime itself. As a result, the Court reduced defendant's sentence to life imprisonment. By comparison, the evidence in this case indicates other, more serious aggravating circumstances. In addition, two witnesses were present, and a jury

decided that the murder was committed with premeditation and deliberation and not in self-defense.

The cases involving sexual assaults that resulted in life imprisonment all are also distinguishable. In two, the presence of at least one significant mitigating circumstance was present which was not present in this case. *State v. Temple*, 302 N.C. 1, 273 S.E.2d 273 (1981) (defendant was eighteen years old, with no record); *State v. Clark*, 301 N.C. 176, 270 S.E.2d 425 (1980) (defendant suffered from schizophrenia). In others, the defendant was only found guilty of felony murder. *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983); *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983), *overruled on other grounds, State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985); *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). In the instant case, defendant was found guilty of both murder with premeditation and deliberation and felony murder. In *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986), the jury did not find the aggravating circumstance, as it did in this case, that the murder was part of a course of conduct in which defendant engaged and which included the commission by the defendant of other crimes of violence against another person. N.C.G.S. § 15A-2000(e)(11) (1988).

We now specifically examine defendant's crime and character to determine if his actions are sufficiently aggravated to support a sentence of death. After considering both his motivation for the killing and his past criminal conduct, we hold that the sentence of death is warranted. The evidence of the crime committed by the defendant indicates that defendant killed Ned Rader to enable him to rape Judy Townsend. Moreover, the State's evidence indicates that the fatal shot was fired with the cold-blooded calculation of an executioner for the sole purpose of facilitating the rape of Judy Townsend. Even Lester Wyatt, defendant's own eyewitness to the murder, indicated an apprehension at the time of the killing that defendant might shoot him as well.

As to defendant's character, we note that the mitigating circumstances found by the jury in defendant's case were numerous; however, only three were statutory, and much of defendant's mitigating evidence related to his conduct after he was in jail and to his relationship with family and close friends. The jury weighed this evidence against the fact that defendant had previously been convicted of a killing in 1971, of a felonious breaking and

entering in 1982, and of a sexual assault in 1985 and the fact that the present killing was accompanied by other serious crimes against another person. After considering the defendant's crime and character, in context, we hold that defendant's actions were sufficiently aggravated to support the sentence of death.

In summary, we have addressed all of defendant's assignments of error after careful review of the record, the transcript of his trial, and the briefs filed herein. We hold that defendant received a fair trial and sentencing proceeding free of prejudicial error, before an impartial judge and jury. The convictions and the aggravating circumstances upon which the sentence is based are supported by the evidence. The sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor and is not disproportionate.

No error.

STATE OF NORTH CAROLINA v. RANDY JOE PAYNE

No. 254A88

(Filed 3 April 1991)

1. **Jury § 6.3 (NCI3d)— voir dire—detailed questioning restricted—no error**

The trial court did not err during jury selection in a first degree murder prosecution by allowing defense counsel to question in detail only those individual jurors who responded positively to questions of the whole panel and who seemed to favor the death penalty. The trial court's conduct of the jury selection process was well within its discretionary authority and did not violate N.C.G.S. § 15A-1214(c).

Am Jur 2d, Jury §§ 200, 202.

2. **Constitutional Law § 344 (NCI4th)— jury selection—absence of defendant—no prejudicial error**

There was no prejudicial error in a first degree murder prosecution where the trial court began the second day of jury selection before defendant was present in court. It was error for the trial court to question jurors in defendant's absence,

but defendant's absence during the preliminary questioning of prospective jurors did not result in the rejection of any juror whom defendant was entitled to have on the panel or the seating of any juror whom defendant was entitled to reject either for cause or peremptorily.

Am Jur 2d, Jury § 190.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case. 33 ALR4th 429.

3. Jury § 6 (NCI3d)— voir dire—statements of prosecutor—aggravating circumstances not ultimately relied upon

There was no prejudicial error during jury selection for a first degree murder from the prosecutor's reference to certain aggravating circumstances upon which the State ultimately did not rely. A new sentencing proceeding was ordered on other grounds and, as to the guilt phase, there was no further mention of other crimes; the evidence of defendant's guilt of murder and rape was strong; and the entire focus of the trial related solely to those crimes. Although a prosecutor during jury voir dire should limit references to aggravating factors, including the underlying felonies listed in N.C.G.S. § 15A-2000(e)(5), to those of which there will be evidence and upon which the prosecutor intends to rely, here there was no reasonable possibility that a different result would have obtained had not the prosecutor mentioned the other crimes.

Am Jur 2d, Jury §§ 204, 207.

4. Criminal Law § 412 (NCI4th)— voir dire—prosecutor's forecast—aggravating factor rejected by judge

There was no prosecutorial misconduct in a first degree murder prosecution from the prosecutor's forecast to the jury during voir dire that it might consider evidence of an especially heinous, atrocious or cruel killing as an aggravating factor when the judge decided at sentencing not to submit that factor. Even if the evidence was not sufficient to sustain submission of the especially heinous aggravating factor, the case was not so lacking in evidentiary support for that factor that it was impermissible for the prosecutor to forecast reliance on it at the outset of the trial.

Am Jur 2d, Jury §§ 204, 207.

5. Criminal Law § 361 (NCI4th)— members of victim's family—seated behind prosecution within bar—no abuse of discretion

There was no abuse of discretion in a first degree murder prosecution where the court allowed the prosecutor to seat members of the victim's family behind the prosecution table and within the bar of the courtroom where the prosecutor made no mention of the victim's family and did not identify family members sitting inside the bar. Where particular persons who are witnesses or who have an interest in the trial sit in the courtroom is a matter left to the trial court's discretion.

Am Jur 2d, Criminal Law § 878; Trial § 296.

6. Criminal Law § 506 (NCI4th)— first degree murder—unsworn deputy transporting jury—no prejudicial error

There was no prejudicial error in a first degree murder prosecution from an unsworn deputy transporting the jury where the properly sworn bailiff was disabled; another deputy was assigned to the task and transported the jurors without being sworn; the court questioned the deputy for the record upon discovering what had happened; the deputy stated that he knew nothing about the case other than defendant's name when he transported the jury and that he had not discussed the facts or circumstances or proceedings of the case with any jury member; and the court then swore in the deputy. Defendant does not contend that his case was affected by the unsworn deputy and prejudice will not be presumed, as in *State v. Mettrick*, 305 N.C. 383, because the appearance of impropriety which prompted the *Mettrick* decision did not exist here. N.C.G.S. § 15A-1236.

Am Jur 2d, Trial §§ 943, 944.

7. Searches and Seizures § 36 (NCI3d)— clothing—seized after arrest—no error

The trial court did not err in a first degree murder prosecution by denying defendant's motion to suppress clothing seized from him several hours after his arrest where the police had already taken lawful custody by arresting defendant.

Am Jur 2d, Searches and Seizures §§ 37, 93.

Modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as af-

fected by lapse of time between, or difference in places of, arrest and search. 19 ALR3d 727.

8. **Searches and Seizures § 36 (NCI3d)— murder—alleged unnecessary delay in first appearance—seizure of clothing—no error**

The clothing of a first degree murder defendant was not taken as evidence as a result of an unnecessary delay in defendant's appearance before a magistrate in violation of N.C.G.S. § 15A-501(2) where defendant was arrested between 10:30 and 11:00 a.m. and taken to a detective's office; taken before a magistrate about noon, charged with murder, and returned to the detective's office; and defendant's clothing was taken sometime between 1:00 and 3:00 p.m. There was no showing of any unnecessary delay between defendant's arrest and appearance before the magistrate, and, even if there was, no showing that the clothes were taken as a result.

Am Jur 2d, Searches and Seizures §§ 37, 93.

Modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search. 19 ALR3d 727.

9. **Criminal Law § 84 (NCI3d)— hair samples—nontestimonial identification order—no unreasonable intrusion on privacy**

The taking of head and pubic hair samples pursuant to a nontestimonial identification order was not an unreasonable intrusion on defendant's privacy. N.C.G.S. § 15A-271.

Am Jur 2d, Expert and Opinion Evidence §§ 278, 301; Searches and Seizures § 105.

10. **Criminal Law § 50 (NCI3d)— murder—opinion testimony of serologist—admissible**

There was no error in a first degree murder prosecution from the admission of an SBI serologist's testimony that approximately one percent of North Carolinians have the same blood characteristics as the victim where the witness testified that his opinion was based on statistics from SBI studies conducted between 1979 and 1983 and from scientific journals, both of which he testified are generally relied on by other experts in his field. The agent's testimony laid a sufficient

foundation to support the admission of his expert opinion, and his estimate of the number of blood analyses he had performed in his career was relevant to the issue of his experience.

Am Jur 2d, Expert and Opinion Evidence §§ 60, 62, 63; Homicide § 397.

11. Criminal Law § 42.1 (NCI3d)— murder—carpet fibers—admissible

The trial court did not err in a first degree murder prosecution by admitting testimony comparing carpet fibers from defendant's residence taken more than a month after his arrest with fibers found on his clothing the day of his arrest where the officer who took samples from defendant's home testified that he did not know if the carpet had been in defendant's home at the time of the murder. It is common knowledge that homeowners do not change or replace carpets as frequently as once every several months and, nothing else appearing, a jury could reasonably infer that a carpet was in a home several months before and after the time it was actually found there. That there was no direct evidence that the carpet was in defendant's home at the time of defendant's arrest goes to the weight of the evidence rather than its admissibility.

Am Jur 2d, Evidence §§ 774, 776.

12. Criminal Law § 50.1 (NCI3d)— murder—hair analysis—expert opinion

The trial court did not err in a first degree murder prosecution by allowing the State to introduce certain testimony by an SBI expert in hair analysis where the SBI agent's testimony that a hair found on the victim's clothing had some characteristics, albeit limited, inconsistent with the victim's hair tends to make the sexual assault upon the victim more probable and his testimony that the hair had some characteristics, albeit limited, consistent with defendant's hair tends to make defendant's contact with the victim more probable.

Am Jur 2d, Expert and Opinion Evidence §§ 278, 301; Homicide § 397.

13. Criminal Law § 88.2 (NCI3d)— murder—cross-examination of defendant's mother—inflammatory questions concerning inadmissible evidence

There was insufficient evidence to require a new trial in a murder prosecution where the prosecutor's questions and statements concerning locks on defendant's door and whether defendant's mother feared him were clearly improper, but the trial court sustained defendant's objections, defendant's mother testified that she was not afraid of her son, and the properly admitted evidence against defendant was strong. Defendant did not meet his burden of showing a reasonable possibility that there would have been a different result without the prosecutor's improper cross-examination. N.C.G.S. § 8C-1, Rule 404(a).

Am Jur 2d, Trial § 194; Witnesses §§ 471-476.

14. Homicide § 21.5 (NCI3d)— first degree murder—evidence sufficient to submit to jury

The evidence of first degree murder was sufficient to submit to the jury where it was clear that the circumstantial evidence was sufficient to enable a rational jury to find that defendant was the perpetrator of the crimes for which he was convicted, and evidence that defendant cites as anomalous to his guilt simply raised a conflict for the jury to resolve.

Am Jur 2d, Homicide §§ 425, 426.

15. Criminal Law § 462 (NCI4th)— murder—prosecutor's argument on matters not in evidence—no objection—no error

The trial court in a first degree murder prosecution was not required to intervene *ex mero motu* where the prosecutor argued that a hair from defendant's head was found under the victim's fingernail and the pathologist testified that the hair was retrieved either from under the victim's fingernail or from the back of the victim's hand. The prosecutor's statement did not so grossly contradict the evidence as to require the trial court to recognize the discrepancy and intervene *ex mero motu.*

Am Jur 2d, Trial §§ 234, 259.

16. Criminal Law § 436 (NCI4th)— murder—prosecutor's argument—conviction needed to prevent defendant from committing more crimes—objection sustained—no error

Although it was improper for the prosecution in a first degree murder prosecution to urge the jury to convict defendant in order to prevent him from committing more crimes, the court properly sustained defendant's objection and instructed the jurors not to consider the argument, and it must be assumed the jury followed the instruction.

Am Jur 2d, Trial §§ 226, 315.

17. Criminal Law § 1352 (NCI4th)— murder—sentencing—McKoy error—sentence vacated and remanded

A death sentence was vacated and remanded under *State v. McKoy*, 327 N.C. 31, where it could not be said beyond a reasonable doubt that, absent the unanimity instruction, no juror could have found the existence of the impaired capacity mitigating factor, weighed it in the final balancing process in deciding between life imprisonment and death, and concluded that life imprisonment should have been imposed.

Am Jur 2d, Criminal Law § 609; Homicide § 553.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27, from a judgment imposing a sentence of death entered by *Long, J.*, at the 10 February 1988 Criminal Session of Superior Court, DAVIDSON County. Defendant also gave notice of appeal from his conviction and sentence of life imprisonment for rape but failed to move to bypass the Court of Appeals; this Court, *sua sponte*, allowed the bypass. Heard in the Supreme Court 13 December 1989.

Lacy H. Thornburg, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

Benjamin G. Philpott and Franklin A. Bell for defendant-appellant.

EXUM, Chief Justice.

This appeal is from the second trial of this case. We ordered a new trial on defendant's first appeal in *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987).

Defendant was tried and convicted on proper bills of indictment charging him with first degree murder (No. 83CRS16387) and first degree rape (No. 83CRS16747). We find no error in the guilt phase of defendant's trial. The decision in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369, *on remand*, 327 N.C. 31, 394 S.E.2d 426 (1990), requires that we remand for a new sentencing hearing.

I.

The State's evidence at trial tended to show the following:

Between 10:15 and 10:30 a.m. on 9 November 1983, Frances Leonard, while working at the Davidson Animal Hospital in Lexington, N.C., looked out a window and noticed someone running from the rear door of Kathleen Weaver's house and into a barn located between the house and the hospital. Leonard described the person running as thin, about 5'4" tall with "hippie type" hair blowing in the wind, wearing a light-colored tee shirt and faded pants, and carrying something green. Leonard then saw feet protruding from the barn door as if the person had fallen inside.

The Davidson County Sheriff's Department was contacted at 10:34 a.m. while Leonard and Dr. Gregory Hedrick watched the barn. Sgt. Robert Henderson arrived about four minutes later and was told that no one had been seen leaving the barn.

Henderson and Lt. Ken Owens entered the barn and found defendant Randy Payne lying down in an upstairs loft. Defendant was wearing a light yellow tee shirt underneath a brown pullover shirt with a green collar. He also was wearing blue jeans. Owens noticed what looked like bloodstains on defendant's pants leg.

Henderson entered the Weaver house and found Kathleen Weaver, age sixty-nine, dead in her bedroom. Weaver was lying facedown on the floor with her head between the wall and the bed. Her legs were spread apart, and the pajamas she was wearing were split open at the crotch. The bed linens were disarrayed and heavily stained with blood. Henderson saw bloodstains on the back door handle, the back door curtains, and the floor leading through the kitchen and hall to the bedroom.

Chief Deputy Jim Johnson arrived and noticed pry marks and damage to the back door and a broken safety chain. Deputy Johnson then explored the barn and found a hatchet and two white athletic

socks, one of which was underneath a loose floorboard near the entrance to the barn. Blood and hair were on the hatchet; the sock under the floorboard was soaked with blood. These and items from the house and yard were gathered as evidence. When defendant was brought to jail, his clothes were taken by sheriff's deputies. Pursuant to a nontestimonial identification order, defendant surrendered head and pubic hair samples to the deputies.

Dr. Robert Anthony, a forensic pathologist, performed an autopsy. He noted wounds to the head, neck, and back of the victim, including one which penetrated the skull into the brain. The wounds were consistent with assault by a cleaver, machete, or hatchet. Dr. Anthony also noted several wounds on the left arm and both hands, which were likely defense wounds. Upon internal examination Dr. Anthony found the victim had received a blow to her abdomen that could have led to bleeding in her liver. The injuries and blood loss caused death, not immediately, but perhaps rapidly.

Dr. Anthony's autopsy also revealed that the victim's vagina had been penetrated, either shortly before her death or while her heart was still beating. He took samples of the victim's blood, head and pubic hair, and a vaginal swab, which he gave to the sheriff's department.

Forensic experts from the State Bureau of Investigation testified about their analyses of blood, fiber, and hair samples obtained from the victim, the victim's clothes, the defendant, the defendant's clothes, and the crime scene. Agent David Hedgecock testified that certain characteristics of blood samples from items taken from the barn were consistent with the characteristics of Weaver's blood groupings and these blood characteristics occurred in 1.3 percent of North Carolina's population. Agent John Bendure testified that a fiber taken from Weaver's backyard fence was consistent with fibers from defendant's brown pullover shirt; fiber on the hatchet found in the barn was consistent with fiber from the victim's pajamas; and a red fiber on defendant's brown pullover shirt was consistent with a red bathroom rug in the Weaver house. Agent Scott Worsham testified that one hair taken from Weaver's left hand was consistent with defendant's head hair; hairs taken from the hatchet were consistent with the victim's head hair; and the socks found in the barn loft and near the hatchet each yielded a hair consistent with the victim's head hair and a hair consistent with the victim's pubic hair.

Defendant's evidence tended to show as follows: Defendant's mother, Violet Payne, testified that defendant had been drinking on the evening of 8 November 1983, and that she saw him asleep in the barn loft at approximately 10 p.m. that night. She said he was wearing the same clothes on 8 November 1983 as were taken from him on 9 November 1983.

Jeffrey Smith, an emergency medical technician, testified that he arrived at the Weaver home at 10:55 a.m. on 9 November 1983 and examined Weaver. Smith observed no pulse and noted that her body was cold, her blood had pooled to the extremities and rigor mortis had started. Dr. Anthony, the pathologist, estimated the time of death could have been as short as one hour or as long as eight hours before Smith's arrival.

The jury returned verdicts on 9 February 1988 finding defendant guilty of first degree rape and first degree murder. The first degree murder verdict was based on both the theory of premeditation and deliberation and the felony murder rule. On 10 February 1988 defendant moved that his court-appointed counsel be dismissed before the capital sentencing proceeding began. The trial court allowed the motion but ordered counsel to stand by at defendant's disposal during the sentencing proceeding.

At the sentencing proceeding neither the State nor defendant offered evidence. The State suggested and the trial court submitted to the jury only one aggravating circumstance: the murder was committed while defendant was engaged in the commission of the felony of first degree rape. N.C.G.S. § 15A-2000(e)(5) (1988 & Cum. Supp. 1990). The trial court, on its own motion, submitted two statutory mitigating circumstances: that defendant committed the murder "under the influence of mental or emotional disturbance" and that defendant's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C.G.S. § 15A-2000(f)(2) and (6) (1988 & Cum. Supp. 1990). The trial court also instructed the jury that it could consider any other circumstance arising from the evidence which it deemed to have mitigating value.

The jury found the aggravating circumstance, did not find any mitigating circumstance, and recommended that defendant be sentenced to death. Defendant was sentenced to death for first degree murder and a mandatory term of life imprisonment for first degree rape.

II.

A.

[1] Defendant first contends that the trial court abused its discretion in restricting individual *voir dire* of jurors, allowing defense counsel to question in detail only those individual jurors who responded to questions of the whole panel and seemed to favor the death penalty. We find no error.

The trial court allowed defense counsel to ask each juror individually whether that juror had any moral or religious scruples in favor of the death penalty. After defense counsel questioned each juror a second time about the death penalty, the trial court ruled as follows:

> The defense may examine the jurors with regard to any opinions they have which may predispose them to vote for the death penalty, but I am ruling that you may not ask a long series of questions to each of the twelve jurors, but you must ask the entire panel a question, and upon a positive response, you may pursue those positive responses. . . . It is simply more orderly, a more efficient, expedient way to examine the jurors.

The trial court's conduct of the jury selection process was well within its discretionary authority and did not violate N.C.G.S. § 15A-1214(c), which provides for the personal questioning of prospective jurors "individually concerning their fitness and competency to serve." The statute does not deprive the trial court of its authority to maintain appropriate supervision of the jury selection process by requiring counsel to address some generic questions to the entire jury panel, provided subsequent individual questioning is permitted when prompted by answers to the generic questions. *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980).

B.

[2] Defendant next contends that because the trial court began the second day of jury selection before defendant was present in court, he is entitled to a new trial. We disagree.

At the beginning of the second day of jury selection, in defendant's absence, the trial court asked a new pool of additional prospective jurors, who had been summoned for defendant's trial, whether

any of them lived outside of Iredell County[1]; had served as a juror during the last two years; was younger than eighteen years old; had been convicted of a felony; had difficulty hearing; had difficulty speaking or understanding English; had any illness or other reason he or she should not be required to serve on the jury. These preliminary questions were obviously designed to insure that the new prospective jurors were qualified to serve under N.C.G.S. § 9-3. Eight prospective jurors responded to this inquiry and were excused by the trial court prior to *voir dire* by counsel. Defendant was then brought into the courtroom and was present for the continuing petit jury selection process.

To conduct any portion of a capital trial in the defendant's absence deprives the defendant of the right to be present guaranteed by the confrontation clause of our State Constitution, N.C. Const. art. I, § 23. In a capital trial defendant may not waive this right. *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987). A violation of defendant's right to be present is, however, subject to harmless error analysis. *State v. Artis*, 325 N.C. 278, 297, 384 S.E.2d 470, 480 (1989), *sentence vacated*, 494 U.S. ---, 108 L. Ed. 2d 604 (1990).

Defendant argues that by not being present during the trial court's preliminary questioning of prospective jurors pursuant to N.C.G.S. § 9-3 he missed the opportunity to examine the demeanor and behavior of these prospective jurors, thereby hindering his ability to assist his counsel in the selection of the petit jury. Under *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990), this argument has some merit. We conclude the questioning of the jurors in defendant's absence erroneously deprived defendant of his right to be present at his trial, but we find the error to be harmless.

In *Smith* we held that a capital defendant's right to be present during all stages of trial attached to preliminary questioning in open court at, during and in the context of defendant's trial of newly summoned prospective jurors called specifically for service in defendant's trial. We held the trial court erroneously deprived defendant of this right to be present when it excused prospective jurors under these circumstances at *an unrecorded bench conference* with the jurors. *Id.* at 793, 392 S.E.2d at 363. We also held in

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1. The jury pool was drawn from Iredell County, part of the same judicial district as Davidson County.

Smith that the State failed to show the error was harmless because no transcript was made of the exchange and we could not surmise what was said or done or the reason for the juror's having been excused. *Id.* at 794, 392 S.E.2d at 363-64.

Here, defense counsel and a court reporter were present during the preliminary questioning of prospective jurors, and the trial transcript reveals all that was said. All prospective jurors who responded to the trial court's questions during defendant's absence were excused for unobjectionable reasons—recorded in the trial transcript—before the *voir dire* by counsel.[2] These facts are similar to those in *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *sentence vacated*, 494 U.S. ---, 108 L. Ed. 2d 601 (1990), in which the trial court examined jurors outside the presence of defendant but with a court reporter in attendance. We held it was error for the trial court to question jurors in defendant's absence; but, because the court reporter's transcript of the proceeding revealed that defendant's presence would have made no difference in the outcome, the error was harmless. *Id.* at 222-23, 372 S.E.2d at 863-64.

Whether this kind of error is harmless depends, we conclude, on whether the questioning of prospective jurors in defendant's absence might have resulted in a jury composed differently from one which defendant might have obtained had he been present and participated in the process. We are satisfied here beyond a reasonable doubt that defendant's absence during the preliminary questioning of prospective jurors did not result in the rejection of any juror whom defendant was entitled to have on the panel or the seating of any juror whom defendant was entitled to reject either for cause or peremptorily. Those potential jurors who were excused because of their responses to questions about statutory qualifications, physical infirmities, and personal hardships were either ineligible to serve or excused for manifestly unobjectionable reasons regardless of what defendant might have observed or desired. The remaining prospective jurors were available during selection of the petit jury, and defendant had sufficient opportunity to observe

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2. The trial court excused the eight potential jurors for the following reasons: one had been sworn in to serve on a jury recently in Iredell County; two had difficulty hearing; one had ulcers; three cared for invalids at home; and one ran a business by himself.

their demeanor and behavior in considering whether to accept or reject them.

C.

[3] Defendant contends the prosecutor's reference during jury *voir dire* to certain aggravating circumstances upon which the State did not ultimately rely in the sentencing phase of the trial constituted prosecutorial misconduct warranting a new trial.

During selection of the petit jury, the following colloquy occurred:

> PROSECUTOR: Aggravating factors are factors which operate in favor of the State. . . . One such aggravating factors [sic] would be, for instance, the capital felony was committed by a person lawfully incarcerated. Well, that's not—
>
> DEFENSE COUNSEL: OBJECTION.
>
> PROSECUTOR: —in this case—
>
> TRIAL COURT: SUSTAINED.
>
> PROSECUTOR: Well, if you want me to give the ones I'm relying on, that will be fine; . . . the State is relying on . . . the capital felony was committed while the defendant was engaged, or was an aider and abettor in the commission of, or attempt to commit, or flight after attempting to commit any homicide, robbery, rape or sex offense, arson, burglary, kidnapping—
>
> DEFENSE COUNSEL: OBJECTION.
>
> PROSECUTOR: That's one aggravating factor, if Your Honor please.
>
> TRIAL COURT: OVERRULED.
>
> PROSECUTOR: Thank you. That would be one of them. The capital felony that was committed was especially heinous, atrocious and cruel. That may be one of them that the State relies on.

During the sentencing phase of the case the State relied only on the underlying felony of rape to establish the aggravating factor provided in N.C.G.S. § 15A-2000(e)(5), "[t]he capital felony was committed while the defendant was engaged . . . in the commission

of . . . any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb." N.C.G.S. § 15A-2000(e)(5) (1988 & Cum. Supp. 1990). The trial court instructed the jury that it could find this aggravating factor only if the murder was committed while defendant was engaged in rape.

Defendant first contends he was prejudiced by the prosecutor's forecasting to the jury during *voir dire* that it might be called on to consider evidence of robbery, arson, burglary, or kidnapping when the prosecutor knew no evidence of those aggravating circumstances existed. We disagree.

It is not clear to us whether defendant's arguments in support of this assignment refer only to the sentencing proceeding or to both the guilt and sentencing proceedings. Insofar as this assignment relates to the sentencing proceeding, we need not discuss it because we are ordering a new sentencing proceeding for other reasons. Insofar as it relates to the guilt phase of the trial, we are confident the prosecutor's conduct was harmless.

It appears the prosecutor mentioned these offenses because they were listed in N.C.G.S. § 15A-2000(e)(5), the statutory subsection providing for the aggravating factor of committing murder during the commission of other listed offenses which include rape.

Nonetheless, a prosecutor during jury *voir dire* should limit references to aggravating factors, including the underlying felonies listed in N.C.G.S. § 15A-2000(e)(5), to those of which there will be evidence and upon which the prosecutor intends to rely.

Assuming the prosecutor's reference here to other underlying felonies was error, we conclude it is not of constitutional dimension. The burden is on defendant to show there is a reasonable possibility there would have been a different result at trial had the error not been committed. N.C.G.S. § 15A-1443(a) (1988 & Cum. Supp. 1990).

Defendant has failed to meet this burden. There was no further mention of these other crimes at the trial. The evidence of defendant's guilt of rape and murder was strong. The entire focus of the trial, including the evidence, final arguments, and the jury instructions related solely to these crimes and no others. We are confident there is no reasonable possibility that a different result would have obtained at trial had not the prosecutor mentioned these other crimes.

[4] Defendant next contends the prosecutor engaged in misconduct by forecasting to the jury during *voir dire* that it might consider evidence of an especially heinous, atrocious or cruel killing as an aggravating factor when, at sentencing, the trial judge decided not to submit that factor. We conclude no misconduct occurred.

To the extent that such statements are allowed at all, it is permissible for a prosecutor during jury *voir dire* to state briefly what he or she anticipates the evidence may show, provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor, as may be later revealed by evidence actually adduced. Evidence for the State tended to show that Weaver sustained multiple stab wounds, including several defensive wounds. Even if this evidence was not sufficient, as the trial court finally ruled, to sustain submission of the especially heinous aggravating factor, a question we do not address, the case is not so lacking in evidentiary support for this factor that it was impermissible for the prosecutor to forecast reliance on it at the outset of the trial.

D.

[5] Defendant contends the trial court committed reversible error by allowing the prosecutor over defendant's objection to seat members of the victim's family behind the prosecution table and within the bar of the courtroom during the trial. We find no merit in this assignment of error.

Before trial, defendant moved to prohibit the prosecutor from seating members of the victim's family inside the bar and immediately behind the prosecution table. The trial court denied the motion. During trial, members of the victim's family sat within the bar and immediately behind the prosecution table. The prosecutor did not identify those persons to the jury.

Defendant first argues that seating members of the victim's family inside the bar and close to the jury violates the principle of *Booth v. Maryland*, 482 U.S. 496, 96 L. Ed. 2d 440, *reh. denied*, 483 U.S. 1056, 97 L. Ed. 2d 820 (1987). *Booth* held introduction of a victim impact statement at the sentencing proceeding in a capital murder case violates the eighth amendment. *Id.* at 509, 96 L. Ed. 2d at 452. In *State v. Laws*, 325 N.C. 81, 102-03, 381 S.E.2d 609, 622 (1989), *sentence vacated*, 494 U.S. ---, 108 L. Ed. 2d 603 (1990), this Court held the prohibition of victim impact

statements in *Booth* did not extend to a prosecutor's statement identifying members of the victim's family in the courtroom at the beginning of a capital trial. In the present case, the prosecutor made no mention of the victim's family and did not identify family members sitting inside the bar. We decline to extend *Booth*'s holding to restrict, as a matter of law, where in a courtroom unidentified family members of the deceased may be seated in the courtroom during a murder trial.

Defendant further argues that seating members of the victim's family inside the bar runs afoul of this Court's decisions which caution against arguing for a verdict of guilt on the basis of the crime's impact on the victim's family. In *State v. Brown*, 320 N.C. 179, 202-03, 358 S.E.2d 1, 13, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987), this Court held a prosecutor's argument that jurors should find defendant guilty in order to grant justice to the victim's family was not so improper as to require the trial court to correct it *ex mero motu* in the absence of an objection by defendant. Similarly, in *State v. Cummings*, 323 N.C. 181, 192, 372 S.E.2d 541, 549 (1988), *sentence vacated*, 494 U.S. ---, 108 L. Ed. 2d 602 (1990), this Court held that a prosecutor's statement about the victim's family members was not so improper as to require the trial court to intervene *ex mero motu*. Nevertheless, we emphasized that "[a]rguments emphasizing mercy, prejudice, pity, or fear are inappropriate in the guilt phase of the trial, in which the jury's focus is properly upon guilt or innocence." *Id.*

Merely seating members of the victim's family, not identified as such, behind the prosecutor's table and within the bar of the court does not violate the principles enunciated in *Brown* and *Cummings*.

Defendant has cited no authority, and we have found none, which finds this circumstance to be error. Where particular persons who are witnesses or who have an interest in the outcome of a trial sit in the courtroom is a matter left to the trial judge's discretion. We find no abuse of that discretion here.

E.

[6] Defendant next contends the trial court committed reversible error by continuing the trial after it discovered the jury had been transported by an unsworn deputy in violation of N.C.G.S. § 15A-1236(c). The statute provides:

> If the jurors are committed to the charge of an officer, he must be sworn by the clerk to keep the jurors together and not to permit any person to speak or otherwise communicate with them on any subject connected with the trial nor to do so himself, and to return the jurors to the courtroom as directed by the judge.

N.C.G.S. § 15A-1236 (1988 & Cum. Supp. 1990).

During the fifth day of defendant's trial, the bailiff who originally had been assigned to transport jurors and was properly sworn was disabled. Another deputy was then assigned that task and transported jurors without having been sworn. Upon discovering this, the trial court asked the deputy several questions for the record. The deputy stated that when he transported the jury, he knew nothing about the case except defendant's name, and that he had not discussed the facts or circumstances or proceedings of the case with any jury member. The trial court then swore in the deputy according to the statute. Defendant neither objected to this procedure nor did he move for a mistrial.

By failing to object or move for a mistrial in regard to the unsworn deputy, defendant has waived his right to have this issue considered on appeal. N.C.G.S. § 15A-1446(b) (1988 & Cum. Supp. 1990). *State v. McDougall*, 308 N.C. 1, 9, 301 S.E.2d 308, 317, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). Nonetheless, since this is a capital case, we will address the issue.

Defendant does not contend that his case was affected by the unsworn deputy, but argues that this error should be conclusively presumed prejudicial under *State v. Mettrick*, 305 N.C. 383, 385, 289 S.E.2d 354, 356 (1982). In *Mettrick* we held that prejudice should be conclusively presumed when jurors were transported by deputies who were witnesses for the State. In the case before us the deputy in question was not a witness for the State and was in no way involved in the prosecution. The error in *Mettrick* was permitting jurors to be transported by state's witnesses. The error here is that jurors were transported by a deputy who was not sworn. The appearance of impropriety which prompted our decision in *Mettrick* obviously does not exist here, and prejudice will not be presumed. We find the error to be clearly harmless, entitling defendant to no relief.

F.

[7] Defendant next contends the trial court erred in denying his motion to suppress the evidence of his clothes seized from defendant on the day of his arrest.[3] We disagree.

Before trial, defendant moved to suppress evidence of his clothes seized by law enforcement officers several hours after his arrest. The trial court conducted a lengthy *voir dire* hearing. Evidence presented on *voir dire* tended to show the following pertinent facts:

Defendant was arrested between 10:30 and 11 a.m. on 9 November 1983 near the scene of the crime. An officer advised defendant of his rights. Another officer held defendant at the back of the victim's yard while officers gathered evidence inside the victim's home. At approximately 11 a.m. Deputy Hedrick drove defendant to the Davidson County Courthouse and Sheriff's Department. There, a sheriff's detective, Jim Johnson, interrogated defendant for a few minutes until defendant said he would talk no more without a lawyer present. Deputies then took defendant before a magistrate, charged him with first degree murder, and returned defendant to a detective's office. Lt. Richard Sink, who had collected evidence at the crime scene earlier that day, arrived soon thereafter, sometime between one and three o'clock in the afternoon. Another detective ordered defendant to remove his clothing and placed it in a bag that Sink held open. Sink then fastened a label on the bag for custodial purposes. Deputies provided defendant with an orange jumpsuit from the jail. Defendant's clothes were taken within five hours of his arrest.

After finding facts according to this evidence, the trial court concluded that the seizure of defendant's clothing was incident to a lawful arrest and inventory procedure and did not violate defendant's constitutional right against unreasonable searches and seizures under the fourth and fourteenth amendments.

Because his clothes were not taken from him at the crime scene at the time of arrest, defendant argues, their seizure was so remote from the arrest as to require a warrant. Defendant

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3. Although defendant's assignment of error forming the basis for this argument mentions a statement taken from him while in police custody and before his appearance before the magistrate, defendant's brief does not present or discuss any argument about his statement. Thus, this assignment of error is deemed abandoned under Rule 28(a) of the North Carolina Rules of Appellate Procedure.

does not contend that his arrest was unlawful. This issue is controlled adversely to defendant by *United States v. Edwards*, 415 U.S. 800, 39 L. Ed. 2d 771 (1974), in which the United States Supreme Court upheld the seizure without a warrant of clothes taken from a suspect the morning after his arrest.

In *Edwards* the defendant was arrested late at night on a charge of attempted breaking and entering and placed in a jail cell. Contemporaneously or shortly after the arrest, officers discovered paint chips on a windowsill where the illegal entry was attempted. The next morning officers seized defendant's clothing and matched paint chips from the clothing with paint chips on the windowsill. Defendant contended that neither the clothing nor the evidence found on it were admissible because the clothes had been taken in violation of his fourth amendment rights. The Supreme Court upheld the seizure and use of the evidence. The Court cited *United States v. Caruso*, 358 F.2d 184 (2nd Cir.), *cert. denied*, 385 U.S. 862, 17 L. Ed. 2d 88 (1966), for the principle that

> once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other.

Id. at 807, 39 L. Ed. 2d at 778. The Court noted that on the night of defendant's arrest and on the following day when police seized the clothing,

> the police had lawful custody of Edwards and necessarily of the clothing he wore. When it became apparent that the articles of clothing were evidence of the crime for which Edwards was being held, the police were entitled to take, examine, and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered.

Id. at 805, 39 L. Ed. 2d at 777.

In the present case, as in *Edwards*, police arrested defendant and kept him in lawful custody for several hours before seizing as evidence the clothing he was wearing when arrested. Defendant attempts to distinguish *Edwards* by noting the police in that case

delayed taking defendant's clothes until the next day because they could not obtain substitute clothing before that time. Defendant argues that no such reason for delay existed in this case because jail officials had a suit for him at the time of his arrest. The reason for the delay was not, however, dispositive in *Edwards*. The Court emphasized that on the day defendant's clothes were taken and submitted for laboratory analysis, the police had already taken lawful custody of them by virtue of arresting defendant. "Indeed, it is difficult to perceive what is unreasonable about the police examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest." *Id.* at 806, 39 L. Ed. 2d at 777. Following that same reasoning, we hold that the seizure of clothing in this case was not unreasonable, and the trial court did not err in denying defendant's motion to suppress the evidence.

[8] Defendant further argues that his clothes were taken as a result of what he contends was an unnecessarily long delay in his appearance before a magistrate in violation of N.C.G.S. § 15A-501 (2). This statute requires police to "take the person arrested before a judicial official without unnecessary delay." N.C.G.S. § 15A-501 (1988 & Cum. Supp. 1990). N.C.G.S. § 15A-974 provides that upon timely motion, evidence must be suppressed if it "is obtained as a result of a substantial violation of the provisions of this Chapter." N.C.G.S. § 15A-974 (1988 & Cum. Supp. 1990).

Testimony on *voir dire* indicated that defendant was arrested between 10:30 and 11 a.m. on 9 November 1983 and taken to the detective's office. He was taken before a magistrate at approximately noon, charged with murder, and then returned to the detective's office. Thereafter his clothing was taken sometime between 1 and 3 p.m. None of defendant's clothing was taken before his appearance before the magistrate.

Defendant's argument obviously has no merit. First, there is no showing that there was any unnecessary delay between his arrest and his appearance before the magistrate. Second, even if there was an unnecessary delay, there was no showing that the taking of his clothes was obtained as a result of it. *State v. Richardson*, 295 N.C. 309, 245 S.E.2d 754 (1978).

G.

[9] Defendant also contends the trial court erred in denying his motion to suppress evidence of hair samples taken in compliance

with a nontestimonial identification order entered pursuant to N.C.G.S. § 15A-271.

After he was charged with first degree murder before the magistrate and returned to a detective's office, defendant was served with a nontestimonial identification order requiring him to furnish investigators samples of his head and pubic hair. An officer then handed defendant a pair of clean scissors and asked defendant to trim some of his head hair and pubic hair. Defendant complied. Although defendant argues that this seizure was unconstitutional because it unreasonably intruded on his privacy, this Court has long recognized that the taking of hair samples in this manner is reasonable and not constitutionally infirm. *See, e.g., State v. Reynolds*, 298 N.C. 380, 401, 259 S.E.2d 843, 855 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 795 (1980); *State v. Sharpe*, 284 N.C. 157, 163, 200 S.E.2d 44, 48 (1973).

H.

[10] Defendant next assigns error to the admission of certain opinion testimony given by a serologist.

State Bureau of Investigation Agent David Hedgecock, an expert in the field of blood analysis, stated that approximately one percent of North Carolinians have the same blood characteristics as the victim. Defense counsel objected on the ground the State had not established the opinion was based on current authorities relied on by experts in the field of blood analysis. The trial court overruled the objection and defendant contends this was error.

There was no error in this ruling. North Carolina Rule of Evidence 703, N.C.G.S. § 8C-1, provides that an expert may base his opinion on facts or data not otherwise admissible if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences. . . ." N.C.G.S. § 8C-1, Rule 703 (1988 & Cum. Supp. 1990). Agent Hedgecock testified that his opinion was based on statistics from SBI studies conducted between 1979 and 1983 and from scientific journals, both of which he testified are generally relied on by other experts in his field. Agent Hedgecock's testimony laid a sufficient foundation to support admission of his expert opinion. N.C.G.S. § 8C-1, Rule 703 (1988 & Cum. Supp. 1990); *State v. Allen*, 322 N.C. 176, 184, 367 S.E.2d 626, 630-31 (1988); *State v. Huffstetler*, 312 N.C. 92, 107-08, 322

S.E.2d 110, 120 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985).

Nor do we find merit in defendant's argument that the trial court improperly allowed Agent Hedgecock to estimate how many blood analyses he had performed in his career. This evidence was relevant to the issue of the witness's experience. *See State v. Graham*, 35 N.C. App. 700, 703-04, 242 S.E.2d 512, 514 (1978).

I.

[11] Defendant next assigns error to the admission of testimony comparing carpet fibers from his residence with fibers found on his clothing the day of his arrest.

State Bureau of Investigation Agent John Bendure, an expert in forensic fiber examination, testified that a red fiber from defendant's shirt was microscopically consistent with fiber from a rug in the victim's home and microscopically inconsistent with fiber taken forty-nine days after the crime from carpet in defendant's residence. The comparison with carpet fiber from defendant's home was offered to eliminate that carpet as a possible source of the fiber.

Sgt. Sam Hampton of the Davidson County Sheriff's Department testified that he visited defendant's home on 28 December 1983 and collected carpet samples from the living room and from defendant's mother's bedroom. One sample was a reddish fiber that Sgt. Hampton marked as having been taken from the living room carpet. Sgt. Hampton testified on cross-examination that he did not know if the carpet had been in defendant's home at the time of the murder.

Defendant argues that because the carpet fiber sample was not taken until more than a month after the crime, and because the State did not establish the carpet was in defendant's residence at the time of the crime, the comparison was irrelevant and should not have been allowed. We disagree.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1988 & Cum. Supp. 1990). This Court has held that evidence is relevant if it has "*any* logical tendency, however slight, to prove a fact in issue in the case." *State v. Perry*, 298 N.C. 502, 510, 259 S.E.2d 496,

501 (1979); *accord State v. Hannah*, 312 N.C. 286, 294, 322 S.E.2d 148, 154 (1984). Evidence that the fiber on defendant's shirt was not consistent with fiber from carpet samples taken from defendant's home has some logical tendency to show that the source of the fiber was not this carpet.

The State need not prove by direct evidence that the red carpet was in defendant's home at the time of the crimes as a prerequisite to introducing the carpet fiber and comparison as evidence. It is common knowledge that homeowners do not change or replace carpets as frequently as once every several months. Nothing else appearing, a jury could reasonably infer, because it is more probable than not, that a carpet was in a home within several months before and after the time it was actually found there. That there was no direct evidence that the carpet was in fact in defendant's home at the time of defendant's arrest goes to the weight of the evidence rather than its admissibility. *State v. Simpson*, 327 N.C. 178, 191, 393 S.E.2d 771, 779 (1990).

J.

[12] Defendant next argues the trial court committed prejudicial error in allowing the State to introduce certain testimony by an expert in hair analysis.

S.B.I. Agent Scott Worsham testified about "limited characteristics" of similarity between hairs found on defendant's tee shirt and hair of the victim, and between hairs found on the victim's panties and defendant's head hair. He found a hair with limited identifiable characteristics on a tee shirt worn by defendant. The limited characteristics present in one hair from the shirt were consistent with the victim's hair. Agent Worsham examined hairs taken from panties Weaver was wearing when her body was found. One of those hairs was "limited in microscopic characteristics and, therefore, I chose not to draw any conclusions as to who it may have, or could have originated from." When asked whether that hair's limited characteristics were similar to defendant's pubic hair or head hair, Agent Worsham responded that one or more characteristics was similar to defendant's head hair.

Defense counsel unsuccessfully objected to this testimony. Defendant contends that because Agent Worsham could not conclusively determine the origins of the hairs found on defendant's shirt and

the victim's panties, his testimony had so little probative value that it was error for the trial court to admit it.

We rejected a similar argument in *State v. Perry*, 298 N.C. 502, 259 S.E.2d 496 (1979). In *Perry* the defendant assigned error to the trial court's refusal to exclude expert testimony that blond hairs found on the murder victim's sweater had microscopic characteristics similar to head hairs taken from defendant. *Id.* at 510, 259 S.E.2d at 501. On cross-examination, the witness stated that although the hairs were similar, the number of characteristics they shared was "limited." We upheld the introduction of the testimony despite the expert's tentative conclusion, in light of other evidence that tended to place the defendant at the crime scene. *Id.* at 511, 259 S.E.2d at 501. The other evidence included evidence that someone of the defendant's blood type raped the victim, that the defendant was in the victim's presence at the time she disappeared, and that defendant's gun was the murder weapon. *Id.*

Here, too, there is other evidence tending to place defendant at the crime scene. Defendant's attempts to distinguish *Perry* by arguing that here the State's other evidence against defendant is weaker than in *Perry* is unpersuasive. Under *Perry* the evidence in this case was relevant and admissible.

Defendant also argues this case differs from *Perry* in that Agent Worsham expressly testified that the microscopic characteristics he observed were insufficient for him to form an opinion regarding the hairs' origins. This distinction also is unpersuasive. Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1988 & Cum. Supp. 1990). "On the other hand, evidence which has no tendency to prove a fact in issue in the case is inadmissible." *Perry*, 298 N.C. at 510, 259 S.E.2d at 501. An individual piece of evidence need not conclusively establish a fact to be of some probative value. It need only support a logical inference of the fact's existence.

Applying Evidence Rule 401, we cannot conclude the challenged testimony has no tendency to prove a fact in issue. Agent Worsham's testimony that a head hair found on the victim's panties had some characteristics, albeit limited, inconsistent with the victim's hair tends to make the sexual assault upon the victim more probable. *See State v. McNicholas*, 322 N.C. 548, 553, 369 S.E.2d

569, 572 (1988). His testimony that the hair had some characteristics, albeit limited, consistent with defendant's head hair tends to make defendant's contact with the victim more probable. That the characteristics identified in the hair could be consistent with hair from persons other than defendant or the victim goes to the weight, not the admissibility, of this evidence. *State v. Short*, 322 N.C. 783, 792, 370 S.E.2d 351, 356 (1988).

K.

[13] Defendant next contends that he deserves a new trial because the prosecutor asked inflammatory questions concerning inadmissible evidence.

The prosecutor asked defendant's mother about locks she had placed on the outside of defendant's bedroom door. The prosecutor also asked defendant's mother, "you were afraid of him, weren't you?" The trial court sustained defense counsel's objection, but not before the witness responded that she was not afraid of her son. The prosecutor then repeatedly questioned her about the locks, despite objections by defense counsel that were sustained by the trial court. At one point, when defense counsel objected and said the question was irrelevant, the prosecutor replied, "No, it's not. I want to know why she's got a lock on her son's door." After that objection, too, was sustained by the trial court, the prosecutor continued:

> PROSECUTOR: So, in any event, there were at least two locks on this door, inside—
>
> DEFENSE COUNSEL: OBJECTION, asked and answered.
>
> PROSECUTOR: —and out.
>
> DEFENSE COUNSEL: OBJECTION.
>
> PROSECUTOR: I don't think there's anything wrong with that question.
>
> COURT: SUSTAINED.

The prosecutor's questions and statements concerning locks on defendant's door and whether his mother feared him were clearly improper and the trial court properly and consistently sustained objections to them. This information, highly prejudicial and of no probative value, suggested only that defendant was dangerous to

others. It was prohibited by Evidence Rule 404(a). N.C.G.S. § 8C-1, Rule 404(a) (1988 & Cum. Supp. 1990).

Cross-examination by which an attorney attempts to place before the jury inadmissible and prejudicial evidence is improper and, if knowingly done, unprofessional. *State v. Britt*, 288 N.C. 699, 712, 220 S.E.2d 283, 291 (1975), *later app.* 291 N.C. 528, 231 S.E.2d 644 (1977); *State v. Daye*, 281 N.C. 592, 596, 189 S.E.2d 481, 483 (1972); North Carolina State Bar, *Rules of Professional Conduct* Canon VII, Rule 7.1(A)(1) (1990); *cf.* American Bar Association, *Model Rules of Professional Conduct*, Rule 3.4(e) (1990); American Bar Association, Project on Standards for Criminal Justice, *Standards Relating to Prosecution Function and the Defense Function*, § 3-5.6(b) at 81 (1980).

Had this case been closer on the question of defendant's guilt, we would have difficulty upholding the trial in face of the prosecutor's improper cross-examination. That the trial court sustained defendant's objections and defendant's mother testified she was not afraid of her son lessened the prejudice that might otherwise have occurred. The properly admitted evidence against defendant was strong. We can, therefore, conclude that defendant has not met his burden of showing a reasonable possibility that there would have been a different result at trial had the prosecutor's improper cross-examination not been committed. N.C.G.S. § 15A-1443(a) (1988 & Cum. Supp. 1990).

L.

[14] Defendant contends the trial court erred in denying defendant's motion after all evidence was presented to dismiss the charge of first degree murder for insufficiency of evidence. We hold the evidence was sufficient to be submitted to the jury.

Defendant argues that an inference of his innocence arises from the State's evidence more readily than an inference of his guilt. He contends the blood, hair, and fiber transfers the State's evidence tends to show occurred between himself and the crime scene likely occurred at times before and after the crime, as when he walked through Weaver's yard the day before the crime or when deputies escorted him through bloody leaves in the yard after arresting him. Defendant hypothesizes that fiber from the victim's house could have been transferred to his shirt by deputies who investigated the crime scene and then collected his clothing,

and that hair from his head could have been transferred to the victim's hand by Lt. Sink, who handled the body after inspecting the barn that defendant frequently inhabited.

Defendant contends that certain anomalies in the State's evidence conflict with an inference of his guilt, rendering an inference of his innocence more plausible by comparison. He first notes that Frances Leonard, who was familiar with defendant, who had seen him the day before the killing in Weaver's yard, and who had ample opportunity to observe the person fleeing Weaver's home shortly after the crimes, failed to identify that person as defendant. Leonard described the person fleeing as having characteristics consistent with defendant's general appearance and stated that the person was wearing a yellow or light-colored tee shirt. Defendant notes that the yellow tee shirt in his possession was covered on the front with a dark screen-printed design. He argues, based on that conflicting detail, that the person Leonard saw leaving the Weaver home must have been someone else.

Defendant also notes that a serologist who identified semen in a sample of fluid from the victim's vagina failed to identify blood in that sample as blood of defendant. The serologist testified that because the vaginal swab contained a mixture of vaginal fluid and seminal fluid, he could not isolate foreign blood groupings for identification.

Defendant concludes that the circumstantial evidence in this case leads most logically not to an inference of his guilt but to the conclusion that blood, hair, and fibers linking him and the victim were inadvertently transferred by the path of the real killer fleeing through the barn or by police officers investigating both the Weaver home and the barn. He argues, therefore, that the trial court should have granted his motion to dismiss the charge of first degree murder.

We disagree. Defendant's arguments on this issue are more properly for the jury, not the court. They go to the weight of the evidence, not its sufficiency. In considering a motion to dismiss, the trial court is to consider the evidence in the light most favorable to the State, to resolve all conflicts and draw every reasonable inference in favor of the State. *State v. Snead*, 295 N.C. 615, 617-18, 247 S.E.2d 893, 895 (1978). "To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect

constitute the presiding judge the trier of facts." *State v. Stephens*, 244 N.C. 380, 383-84, 93 S.E.2d 431, 433 (1956).

A trial court properly denies a motion to dismiss when there is sufficient evidence from which a rational trier of fact may find beyond a reasonable doubt the existence of every essential element of the crime charged. *State v. McCoy*, 303 N.C. 1, 24, 277 S.E.2d 515, 532 (1981). As is the case here,

> [w]hen the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.

State v. Rowland, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965).

It is clear that the circumstantial evidence in this case is sufficient to enable a rational jury to find defendant was the perpetrator of the crimes for which he was convicted. The evidence that defendant cites as anomalous to his guilt simply raised a conflict for the jury to resolve. That other inferences could be drawn is not sufficient to require dismissal of the charges.

M.

[15] Defendant next contends that he is entitled a new trial because the prosecutor during his closing argument repeatedly and deliberately misrepresented to jurors that a hair from defendant's head was found underneath one of the victim's fingernails.

Dr. Robert Anthony, a forensic pathologist, testified that a hair from defendant's head was retrieved either from under the fingernail or from the back of the victim's hand. The exact origin could not be determined because scrapings from both locations were placed in the same evidence bag. The prosecutor argued to the jury the only way defendant's hair could have gotten under the victim's fingernail was by her efforts to defend herself against him. Defendant did not object to this argument at trial.

Because defendant did not object at trial to the prosecutor's argument, the question is whether the argument was so grossly improper that the trial court abused its discretion in not recognizing and correcting the impropriety *ex mero motu*. *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). While the prosecutor's

argument was not altogether supported by the evidence because the pathologist could not say exactly where on the victim's hand the hair was found, the pathologist did say the hair came from either the back of the victim's hand or underneath a fingernail. We conclude, therefore, that the statement did not so grossly contradict the evidence as to require the trial court to recognize the discrepancy and intervene *ex mero motu*.

N.

[16] Defendant finally argues that he deserves a new trial because of the prosecutor's inflammatory and prejudicial remarks urging the jury to find defendant guilty in order to prevent him from committing more crimes. The prosecutor argued as follows during the guilt phase of the trial:

> The law is for your protection, and the only way that you can be sure that this crime will never be perpetrated again by Randy Payne is to find him guilty of first degree murder by reason of premeditation and deliberation, and find him guilty of rape in the first degree. . . . But if you don't think he's guilty, you go right back in there and turn him loose, and we'll give him Mrs. Weaver's hatchet back—

Defense counsel objected, but the prosecutor continued, "and, let him go and kill somebody else," before the trial court sustained the objection. The trial court then instructed jurors not to consider the argument.

To argue that a defendant, if acquitted, will commit a future crime is improper. *State v. Zuniga*, 320 N.C. 233, 257, 357 S.E.2d 898, 914, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). Juries should be urged to convict on the basis of the evidence tending to show guilt, not on the basis of emotional appeals to jurors' fears. *State v. Cummings*, 323 N.C. 181, 372 S.E.2d 541 (1988), *sentence vacated*, 494 U.S. ---, 108 L. Ed. 2d 602 (1990). The trial court properly sustained the objection and instructed the jurors not to consider the argument. We must assume the jury followed this instruction and the instruction cured the improper argument. *Cf. State v. Covington*, 290 N.C. 313, 328-29, 286 S.E.2d 629, 641 (1976); *Zuniga*, 320 N.C. at 257, 357 S.E.2d at 914.

III.

We now turn to capital sentencing issues.

[17] The trial court instructed the jury to find unanimously each mitigating circumstance before considering that circumstance in the ultimate sentencing decision. This instruction was error under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369, *on remand*, 327 N.C. 31, 394 S.E.2d 426 (1990). Such error requires us to order a new sentencing hearing unless the State can demonstrate beyond a reasonable doubt that it was harmless. *State v. McNeil*, 327 N.C. 388, 393, 395 S.E.2d 106, 110 (1990); *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990).

Defendant did not present any evidence in the sentencing phase of his trial. However, based on evidence presented during the guilt phase, the trial court submitted the following mitigating factors to the jury for its consideration: the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6), and, pursuant to N.C.G.S. § 15A-2000(f)(9), any other circumstance arising from the evidence which the jury might deem to have mitigating value. After receiving instructions from the trial court that since have been held to constitute *McKoy* error, the jury found no mitigating circumstance.

This Court has encouraged trial courts to hold defendants to a low burden of production when determining whether to submit a mitigating circumstance for jury consideration. In *State v. Pinch*, 306 N.C. 1, 27, 292 S.E.2d 203, 223, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled in part on other grounds, State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), we held that "common sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice . . . ." We endorsed a similar approach in *McKoy*, recognizing "the constitutional importance of preserving the jury's ability to consider under proper instructions all evidence proffered by a capital defendant that could reasonably mitigate the sentence to something less than death." *McKoy*, 327 N.C. at 44, 394 S.E.2d at 433.

On this appeal we need focus only on the impaired capacity mitigating circumstance. There was evidence tending to support this circumstance. One witness testified that on more than one

occasion before November 1983 she had seen defendant inhaling gasoline from a can, stumbling, and talking as if he believed another person were with him, although he was alone.[4] Defendant's mother testified that her son had been drinking alcohol the night before the victim's body was found. This evidence, considered with testimony that sheriff's deputies found defendant smelling like beer and lying in a barn loft strewn with a gasoline can and several beer cans, could support a reasonable inference that defendant was intoxicated at the time of the crime and, as a result, his ability to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired. *State v. Quesinberry*, 328 N.C. 288, 401 S.E.2d 632 (1991).

We cannot say beyond a reasonable doubt that absent the unanimity instruction no juror could have found the existence of this mitigating factor, weighed it in the final balancing process in deciding between life imprisonment and death and, having done so, concluded that life imprisonment should have been imposed. The potential prejudice from improper instructions on this mitigating factor is considerable because the factor is statutory and, therefore, deemed to have mitigating value. *Id.* at 293, 401 S.E.2d at 634; *Pinch*, 306 N.C. at 27, 292 S.E.2d at 224.

We therefore vacate the sentence of death and remand to Superior Court, Davidson County, for a new sentencing proceeding in the first degree murder case.

For the reasons given, we find no error in the rape case and remand the murder case to the Superior Court, Davidson County, for a new sentencing proceeding not inconsistent with this opinion or the opinion of the United States Supreme Court in *McKoy*.

Case No. 83CRS16747—no error.

Case No. 83CRS16387—new sentencing proceeding.

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4. Frances Leonard, an employee of Davidson Animal Hospital who recognized defendant after sheriff's deputies brought him out of the barn, testified that she had observed this behavior by defendant near the barn and the animal hospital on more than one occasion. Although Mrs. Leonard did not testify that she saw defendant inhaling gasoline close to the date of the killings, her testimony is relevant in light of other evidence discussed in the text.

STATE OF NORTH CAROLINA v. JERRY WAYNE EASON

No. 485A89

(Filed 3 April 1991)

1. **Constitutional Law § 354 (NCI4th)— murder—Fifth Amendment privilege—valid claim**

The trial court did not err in a noncapital prosecution for first degree murder and arson by refusing to require defendant's mother to answer questions during a *voir dire* hearing on a motion to suppress after she invoked her Fifth Amendment privilege against self-incrimination. Defendant's mother had been convicted of giving false information to the police about the defendant and her case was on appeal for trial *de novo* in superior court; she invoked her Fifth Amendment privilege for the very purpose the protections embodied in that amendment were created and thus had a valid claim of privilege. U. S. Const., amend. V; N. C. Const., Art. I § 23.

Am Jur 2d, Criminal Law § 943.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question. 9 ALR3d 990.

2. **Searches and Seizures § 21 (NCI3d)— search warrant—informant named in warrant—sufficient**

There was a substantial basis for a magistrate's determination that probable cause existed to issue a search warrant in a murder and arson prosecution where the informant who provided the information was Doris T. Hoffman, a "citizen-informant" whose name appeared in the search warrant; the fact that Hoffman was named and identified as the informant provided the magistrate with enough information to permit him to determine that Hoffman was reliable.

Am Jur 2d, Searches and Seizures §§ 65, 68, 69.

3. **Appeal and Error § 147 (NCI4th)— murder and arson—procedure for serving search warrant—not raised at trial—not considered on appeal**

A contention in a murder and arson prosecution that the officer serving a search warrant failed to comply with N.C.G.S. § 15A-252 was not preserved for appellate review where nothing in the record indicates that the trial court had anything before

it referring to the officer's alleged violation of the statute when it denied defendant's motion.

Am Jur 2d, Appeal and Error § 545.

4. **Criminal Law § 68 (NCI3d)— murder and arson—victim's little finger—admissible as to identity**

The trial court did not err in a prosecution for murder and arson by allowing the State to introduce the victim's left little finger where the victim's body was charred almost beyond recognition and the identity of the body was a proper issue for determination. Its probative value was not substantially outweighed by any danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 402.

Am Jur 2d, Evidence § 775.

5. **Criminal Law § 50.1 (NCI3d)— murder and arson—testimony of arson expert—admissible**

The trial court did not err in a prosecution for murder and arson by denying defendant's motion to strike opinion testimony by the State's expert witness that the burning of the victim's home was of incendiary origin. There was a sufficient basis upon which the expert could base his opinion and his testimony was not so speculative as to require striking it from the record. N.C.G.S. § 8C-1, Rule 702.

Am Jur 2d, Arson and Related Offenses § 49; Expert and Opinion Evidence § 407.

Expert and opinion evidence as to cause or origin of fire. 88 ALR3d 230.

6. **Criminal Law § 356 (NCI4th)— murder and arson—defendant placed in custody during trial—no abuse of discretion**

The trial court in a murder and arson prosecution did not abuse its discretion by having defendant taken into custody while his trial was in progress where the court had previously ordered defendant not to have any direct or indirect contact with any of the State's witnesses; defendant, in a courthouse hallway during a morning break, "gave the finger" and made another gesture toward a State's witness; the court ordered defendant taken into custody; the court's action was taken out of the presence of the jury and there is nothing to indicate that the jury knew of or was influenced by the court's order;

and the trial court specifically ordered the sheriff to give defendant's attorney free access to defendant. The trial court has discretionary power to order a defendant into custody during the progress of a trial.

Am Jur 2d, Trial §§ 39, 43.

7. **Criminal Law § 75.15 (NCI3d)— statement by defendant to officer—made while hung over—admissible**

The trial court did not err in a murder and arson prosecution by denying defendant's motion to suppress a statement made while hung over where defendant's contention that he was not in control of his mental faculties was contradicted by evidence sufficient to support a determination by the trial court that he was not so hung over as to render his statement involuntary.

Am Jur 2d, Evidence §§ 557, 1134.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs. 25 ALR4th 419.

8. **Criminal Law § 75.3 (NCI3d)— statement by defendant—recitation of evidence against him—statement admissible**

The trial court did not err in a murder and arson prosecution by denying defendant's motion to suppress his statement on the basis that an officer's statement of the evidence against defendant constituted mental duress where defendant raised the issue and the officer answered truthfully.

Am Jur 2d, Evidence §§ 544, 575.

9. **Criminal Law § 75.11 (NCI3d)— waiver of rights—refusal to sign waiver—statement admissible**

There was no merit to a murder and arson defendant's contention that his refusal to sign a waiver was tantamount to invoking his right to counsel and to remain silent where there was evidence to support the trial court's finding that defendant had agreed to answer questions without the presence or advice of counsel.

Am Jur 2d, Evidence § 555.

What constitutes assertion of right to counsel following Miranda warnings—state cases. 83 ALR4th 443.

10. Arrest and Bail § 39 (NCI4th)— murder and arson—arrest warrant—probable cause

A murder and arson defendant's statement did not result from an unlawful seizure of his person where there was sufficient probable cause to support the warrant upon which he was arrested in that defendant's mother had told an officer that defendant admitted shooting the victim and setting fire to the victim's house, and the mother's statements were corroborated by physical evidence and the statements of other individuals known to the officer.

Am Jur 2d, Arrest § 16.

11. Criminal Law § 35 (NCI3d)— murder and arson—victim's insurance beneficiary—not admissible

The trial court did not err in a prosecution for murder and arson by sustaining the State's objection to a defense question as to whether the victim's wife was a beneficiary of the victim's life insurance policy. Although defendant contended that the evidence was relevant to show that someone else committed the murder, the evidence tended only to show that the victim's wife was the beneficiary of his life insurance policy, did not point directly at the guilt of another, and does not meet the test of relevancy under N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Evidence § 441.

12. Witnesses § 1.2 (NCI3d)— murder and arson—nine-year-old witness—testimony admissible

The trial court did not err in a murder and arson prosecution by allowing a nine-year-old to testify even though the trial court did not make a specific finding as to whether the child was capable of expressing herself concerning the matters to which she was to testify. It is obvious that the court determined that the witness was able to express herself and the record supports that conclusion.

Am Jur 2d, Witnesses §§ 88, 90, 92, 93.

13. Criminal Law § 73 (NCI3d)— letters from defendant in prison—admissible

The trial court did not err in a prosecution for murder and arson by permitting testimony about a statement defendant made in a letter to the witness after he was arrested

and placed in jail even though defendant's letters to the witness had disappeared. The witness testified that she recognized the letters as being in defendant's handwriting and that they were signed with defendant's first name, the letters were not under the witness's exclusive control when they disappeared, and the letters were not too remote in time to be relevant. N.C.G.S. § 8C-1, Rule 801(d).

Am Jur 2d, Evidence §§ 451, 473.

14. Homicide § 21.5 (NCI3d); Arson and Other Burnings § 25 (NCI4th)— murder and arson—evidence sufficient

The trial court did not err in a murder and arson prosecution by denying defendant's motion to dismiss at the close of all of the evidence where there was more than sufficient evidence to support a finding of premeditation and deliberation and, taken in the light most favorable to the State, there was evidence that the victim was alive at the moment when the mobile home was set on fire, so that the mobile home was occupied at the time it burned. N.C.G.S. § 14-58.

Am Jur 2d, Homicide §§ 439, 442.

15. Homicide § 30 (NCI3d)— murder—failure to submit lesser verdicts—no error

The trial court did not err in a murder prosecution by failing to submit possible verdicts of second degree murder, voluntary manslaughter and involuntary manslaughter where the State introduced evidence tending to show that every element of first degree murder was present and, with the exception of defendant's general denial that he had anything to do with the killing, there was no evidence to negate the State's proof as to any element.

Am Jur 2d, Homicide §§ 530, 531.

16. Criminal Law § 427 (NCI4th)— murder and arson—argument that State's evidence uncontradicted—not a comment on defendant's failure to testify

The prosecutor's argument to the jury in a murder and arson prosecution that the State's case was uncontradicted did not amount to a comment on defendant's failure to testify.

Am Jur 2d, Trial § 241.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify. 14 ALR3d 723.

17. Criminal Law § 496 (NCI4th)— jury's request to review testimony—denied—no abuse of discretion

The trial court did not abuse its discretion in a murder and arson prosecution by denying the jury's request to review the testimony of the State's firearm and tool mark identification expert. The trial court indicated that it was denying the request because it did not want to give undue emphasis to the testimony of any particular witness. N.C.G.S. § 15A-1233(a).

Am Jur 2d, Trial § 1041.

Right to have reporter's notes read to jury. 50 ALR2d 176.

18. Criminal Law § 91 (NCI4th)— murder and arson—no probable cause hearing—grand jury indictment—no error

There was no error in trying a defendant for murder and arson without a probable cause hearing where defendant was indicted by a grand jury.

Am Jur 2d, Criminal Law §§ 412, 413.

19. Constitutional Law § 252 (NCI4th)— murder and arson—funds for private investigator—insufficient showing

The trial court did not err in a prosecution for murder and arson by denying defendant's motion for funds to hire a private investigator where the only information in the record was defendant's two motions. In order for an indigent criminal defendant to be entitled to funds with which to hire a private investigator, the defendant must show that there is a reasonable likelihood the investigator will materially assist him in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial.

Am Jur 2d, Criminal Law § 1006.

Right of indigent defendant in state criminal case to assistance of investigators. 81 ALR4th 259.

20. Criminal Law § 959 (NCI4th)— motion for appropriate relief—newly discovered evidence—insufficient

A murder and arson defendant's motion for appropriate relief, filed with the Supreme Court, was denied where Nick

Stroud came forward eight days after defendant's conviction and confessed to the murder, but recanted his confession the next day. Defendant failed to establish that Stroud would give newly discovered evidence in that Stroud stood by his disavowal; confessed while in a state of confusion and depression after consuming a large quantity of beer; the confession was without corroboration; and the confession was not credible.

Am Jur 2d, New Trial §§ 444, 467.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment for first degree murder entered by *Grant, J.*, at the 17 July 1989 Criminal Session of Superior Court, LENOIR County. On 21 December 1989, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on the appeal of his first degree arson conviction. Heard in the Supreme Court on 12 December 1990.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the State.

William D. Spence and T. Dewey Mooring for the defendant-appellant.

MITCHELL, Justice.

The defendant Jerry Wayne Eason was tried non-capitally upon proper bills of indictment charging him with first degree murder and arson of a mobile home. A jury found the defendant guilty of both offenses as charged. The trial court then entered judgment sentencing the defendant to imprisonment for life for the first degree murder conviction and to a consecutive term of imprisonment for thirty years for the arson conviction. On appeal, the defendant brings forward numerous assignments of error which we address *seriatim*. We conclude that the defendant received a fair trial free from prejudicial error.

The State's evidence at trial tended to show that on 4 August 1988, Guy Vernon Warren was found dead amongst the burned remains of his mobile home. He was last seen alive at approximately 11:45 p.m. on 3 August 1988. The victim's body was charred all over with the exception of a small area on the front which had been against the floor, and the facial features were burned beyond recognition. A neighbor could identify the victim's body only by

a scar on the neck. An autopsy revealed that the victim had been shot three times in the chest.

SBI Agent Phillip Brinkley who investigated the scene opined that the fire was of an incendiary origin ignited by an open flame source next to the point where the body was found in the center of the mobile home where the victim's bedroom had been located. Near the mobile home the agent observed a pickup truck the victim had been using, which was owned by Terry Moore. All four tires on the vehicle bore slash marks and were flat.

Dennis Hayes testified that approximately three weeks before the murder, the defendant suffered facial cuts during a fight with the victim. Hayes further testified that he and the defendant discussed the fight while they were shooting pool on 3 August 1988. During the conversation, the defendant stated he was going to get even.

Phillip Mitchum testified that he was with the defendant until 2:30 a.m. on 4 August 1988. When the defendant got out of Mitchum's truck, Mitchum saw the handle of a small gun wrapped in a cloth in defendant's possession.

Melissa Bush, a nine-year-old girl, testified that the defendant was in her home on the evening of 3 August 1988. She testified that he pulled out a gun and said, "I want to kill somebody tonight."

Sandy Potter, Melissa's mother, testified that the defendant came to her house with Mitchum at about 7:30 or 8:00 p.m. on 3 August 1988. Potter was living at the time with the defendant's half-brother. Potter said the defendant was upset and had been drinking. He had a small gun with him, which she identified as being similar to State's Exhibit No. 7, a .25 caliber Raven automatic pistol. The defendant kept saying that he was going to get back at somebody who had "messed him up." Earlier in the day, Potter had seen the defendant with a long knife at his house. She identified that knife as being the same knife that was recovered from the defendant's house during a search by investigators.

Roger Brown and Raeford Page testified that they had previously co-owned a .25 caliber automatic pistol which Page sold to the defendant for $35.00. They had fired that pistol and other guns at a point behind Brown's home. During the investigation of the victim Warren's death, an investigator went with them to that site and recovered six spent projectiles and four spent shell casings.

Captain Lester Gosnell of the Lenoir County Sheriff's Department testified that the defendant was arrested at approximately 10:27 a.m. on 4 August 1988 and taken to the sheriff's department where he was read his *Miranda* rights. After waiving his *Miranda* rights, the defendant stated that he came home at 11:00 p.m. on 3 August 1988 and stayed there until he was arrested. He stated that he had been in a fight with the victim on an earlier date. During that incident, the victim had hit the defendant causing an injury to his mouth which required twenty stitches. The defendant said he did not own any firearms other than a 7.35 millimeter bolt action rifle and did not know about anything happening to the victim; however, he added that whatever the victim got, he deserved. A search of the defendant's residence pursuant to a search warrant produced a large knife, an empty box of Federal .25 caliber automatic bullets, and a spent .25 caliber shell casing.

Susan Komar, an SBI Agent, was qualified as an expert in firearms and tool mark identification and gave her opinion that the .25 caliber shell casing found at the defendant's home and two of the spent .25 caliber shell casings recovered behind Brown's home had been fired from the same gun. Moreover, she testified that the three .25 caliber projectiles removed from the victim and the six .25 caliber projectiles found behind Brown's home had been fired by the same weapon. She stated that the projectiles were consistent with either Remington or Federal manufactured ammunition. In addition, she compared the cuts in the four tires of the pickup truck at the victim's home with a test cut made using the knife found in the defendant's home. She testified that the knife found in the defendant's residence made the cut in one of the tires. The other three tire cuts had microscopic characteristics similar to the test cut, but she could not make a conclusive match.

After the defendant was arrested, he underwent an evaluation at Dorothea Dix Hospital. During the evaluation period, he and Sandy Potter corresponded by letter. Potter testified that in one of his letters to her, the defendant indicated that "he was satisfied that the SOB knew who he was before he died."

The defendant introduced no evidence at trial.

I.

The Defendant's Appeal

[1] By his first assignment of error, the defendant contends that the trial court erred in refusing to require his mother, Doris T.

Hoffman, to answer questions during a *voir dire* hearing concerning the defendant's motion to suppress items seized pursuant to a search warrant. The defendant's attack on the search warrant focused on the alleged use of untruthful information to establish probable cause for the issuance. During the *voir dire* hearing on the defendant's motion, Captain Gosnell testified that Doris Hoffman met him on the morning of 4 August 1988 at the Lenoir County Sheriff's Department. She said the defendant had told her that earlier that morning he had shot Guy Warren three times and set Warren's mobile home on fire. She also stated that the defendant had admitted slicing the tires on a vehicle owned by Terry Moore.

Gosnell relied upon the information supplied by Hoffman in his affidavit establishing probable cause for the search warrant. On 11 January 1989, Hoffman testified under oath in a bond hearing and admitted talking to Gosnell on 4 August 1988 but denied telling him that the defendant had said anything about killing Warren.

After Gosnell testified during the *voir dire* hearing on the defendant's motion to suppress, the defendant called Hoffman who, after answering preliminary questions, invoked her fifth amendment privilege against self-incrimination and refused to answer questions concerning anything the defendant may have told her about killing Guy Warren or questions concerning anything she may have told Gosnell on the morning of 4 August 1988. When Hoffman invoked the privilege and refused to answer questions, the defendant requested that the trial court compel her to answer. The trial court denied all such requests.

At the conclusion of Hoffman's testimony, the trial court had the prosecutor state for the record the nature of the charges pending against Hoffman. The prosecutor noted for the record that based on her testimony at the 11 January 1989 bond hearing, Hoffman had been charged with giving false information to a police officer. She had been convicted of that charge in district court, and the case was then on appeal for trial *de novo* in superior court.

An individual has the right to invoke her fifth amendment privilege to avoid being compelled to give testimony which might make her subject to prosecution under state or federal laws. U.S. Const. amend. V; N.C. Const. art. I, § 23. When the individual invokes the fifth amendment privilege, the trial court must determine whether the question is such that it may reasonably be inferred that the answer may be self-incriminating. *See, e.g., Hoffman*

v. United States, 341 U.S. 479, 486-87, 95 L. Ed. 1118, 1124 (1951); *Lafontaine v. Southern Underwriters*, 83 N.C. 132, 139 (1880). In situations where the trial court determines that the answer will not be self-incriminating, the trial court may compel the individual to answer the question. *Id.* In this case, at the time of the *voir dire* hearing, Hoffman had been convicted of giving false information to the police about the defendant, and her case was on appeal for trial *de novo* in superior court. When Hoffman invoked her privilege at the *voir dire* hearing, she was being asked to testify about the very incident which led to her conviction and for which she still faced trial *de novo*. In other words, Hoffman invoked her fifth amendment privilege for the very purpose the protections embodied in that amendment were created. Thus, Hoffman had a valid claim of privilege, and the trial court did not err in denying the defendant's motion to compel her to testify. This assignment of error is without merit.

[2] By his next assignment of error, the defendant contends the trial court erred in concluding that the statements of Hoffman included in the search warrant affidavit possessed sufficient aspects of reliability and credibility to establish probable cause. The defendant alleges that Gosnell's affidavit did not contain sufficient facts to permit the magistrate to find that Hoffman's information was reliable and credible; therefore, there was no basis upon which the magistrate could conclude probable cause existed. This assignment is without merit.

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

State v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (citing *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548 (1983)). This approach to determining probable cause is known as the totality of the circumstances analysis. *Id.* In this case, the informant who provided the information for the search warrant was Doris T. Hoffman, a "citizen-informant" whose name appeared

in the search warrant affidavit. The fact that Hoffman was named and identified as Gosnell's informant in the search warrant affidavit provided the magistrate with enough information to permit him to determine that Hoffman was reliable. *See People v. Simon*, 107 A.D.2d 196, 198, 486 N.Y.S.2d 118, 120 (1985) (individual's status as a named and identified private citizen is sufficient to establish his reliability); *cf. United States v. Harris*, 403 U.S. 573, 599, 29 L. Ed. 2d 723, 743 (1971) (Harlan, J., dissenting) (the citizen informant is the most credible type of informant); *People v. Glaubman*, 175 Colo. 41, 51, 485 P.2d 711, 717 (1971) (when an ordinary citizen comes forward with reports of criminal activity, there is no need to subject the information to the same special scrutiny given information supplied by unidentified or "confidential" informants).

Further, the affidavit before the magistrate stated, *inter alia*, that Hoffman was the defendant's mother and that at 3:54 a.m. on 4 August 1988, the defendant came to her house and told her he had just killed Guy Warren by shooting him three times and setting his bed on fire. The affidavit also stated that when the defendant came to Hoffman's house he had a pistol, a shotgun, and a big knife with him. Applying the totality of the circumstances test prescribed in *Arrington* and giving proper deference to the decision of the magistrate to issue the search warrant, we conclude that there was more than a "substantial basis" for his determination that probable cause existed.

[3] By his next assignment of error, the defendant contends the trial court erred in denying his motion to suppress evidence seized pursuant to the search warrant because the officer serving it failed to comply with N.C.G.S. § 15A-252. We decline to consider this assignment because the defendant failed to preserve this question for appellate review. In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent. N.C.R. App. P. 10(b)(1). Nothing in the record before us indicates that the trial court had anything before it referring to the officer's alleged violation of the statute when it denied the defendant's motion. This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal. *State v. Smith*, 50 N.C. App. 188, 272 S.E.2d 621 (1980).

[4] By his next assignment of error, the defendant contends that the trial court erred by allowing the State to introduce State's Exhibit No. 37A, a plastic cup containing the victim's left little finger. We disagree.

Generally, any relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1988). On the other hand, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (1986). Nevertheless, relevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it as evidence. *See, e.g., State v. Williams*, 17 N.C. App. 39, 43, 193 S.E.2d 452, 455 (1972), *cert. denied*, 282 N.C. 675, 194 S.E.2d 155 (1973) (victim's tattooed skin relevant to identity).

In this case, the victim's body was charred almost beyond recognition. In fact, a neighbor was only able to identify the victim's body by a scar on the neck. Hence, the identity of the body found was a proper issue for determination. In order to prove the identity of the victim, the State introduced the finger found at the crime scene and presented evidence that the fingerprint taken from it matched a fingerprint from the little finger of Guy Warren on file with the Kinston Police Department. We conclude that the trial court did not err by admitting the finger as evidence, because its probative value as to the issue of the identity of the victim was not substantially outweighed by any danger of unfair prejudice. This assignment of error is without merit.

[5] By his next assignment of error, the defendant contends the trial court erred by denying his motion to strike opinion testimony by the State's expert witness, SBI Agent Phillip Brinkley, that the burning of the victim's home was of incendiary origin. The defendant argues that the opinion testimony was entirely speculative and without basis. We disagree.

A witness qualified as an expert may give testimony in the form of an opinion if his or her specialized knowledge will assist the trier of fact. N.C.G.S. § 8C-1, Rule 702 (1988). The expert may base such an opinion on information not otherwise admissible, so long as it is the type of information reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. N.C.G.S. § 8C-1, Rule 703 (1988).

On direct examination, the expert described the findings of his investigation which revealed several things. The ends of the mobile home were heavily damaged yet still maintained some structural integrity. All of the center portion of the mobile home, however, was totally destroyed. A set of bed springs found in the remains of the center portion of the mobile home had been completely burned clean of bedding material leaving only the metal springs. The springs were only six inches from the body. A couch immediately adjacent to the springs was heavily damaged yet not totally consumed. On the ceiling over the bed, the metal part of the roof had been burned clean of soot, yet soot was present on the portion of the roof above the couch. Based on such facts, the expert concluded that the hottest and longest burning area in the mobile home had been the point at which the bed springs were located. Also, he could not find any apparent evidence of an accidental origin such as a short in the electrical wiring. The expert testified that based on those facts, he formed the opinion that the fire had an incendiary origin which would mean it was an intentionally set fire as opposed to one that was purely accidental or started without intent to burn the mobile home.

On cross-examination, the defendant inquired further into the basis of the expert's opinion that the fire had an incendiary origin. The expert testified that his opinion was based primarily on the elimination of any accidental source, explaining that he eliminated the suggestion of a cigarette ignition by what he had been told about the time frame of the fire. Because of the time frame associated with the fire, the expert believed that an open flame source was necessary to cause it to start and burn as quickly as it did. The expert admitted that he did not know the exact cause of the fire but stated that based on his findings, an open flame source was necessary to create a fire with the characteristics of the one which burned the victim's mobile home. Given such testimony, we conclude that there was a sufficient basis upon which the expert could base his opinion; therefore, his opinion testimony was not so speculative as to require striking it from the record. Accordingly, this assignment of error is without merit.

[6] The defendant next contends the trial court erred by ordering that he be taken into custody while his trial was in progress. The defendant contends the trial court's action constituted punishment and improperly obstructed his defense by limiting his access to his attorneys. We disagree.

On 18 July 1989, after the noon recess on the second day of trial, the trial court denied the State's motion to have the defendant taken into custody for improperly contacting and tampering with the State's witnesses. Instead, the trial court ordered the defendant not to have any direct or indirect contact with any of the State's witnesses. The trial court further informed the defendant that if he or anyone on his behalf violated this order, the trial court would consider such conduct to be witness tampering and have the defendant taken into custody.

Two days later, the defendant was in the courthouse hallway during a morning break. In the presence of State's witness, Michael Watson, the defendant "gave the finger" to Watson and grabbed himself in the groin area in a gesture toward Watson. Upon being informed of this conduct and hearing evidence concerning the defendant's actions, the trial court ordered that the defendant be taken into custody.

The trial court has discretionary power to order a defendant into custody during the progress of the trial, and its action in so doing in the absence of the jury, without anything to indicate in the presence of the jury that the defendant has been taken into custody, is not prejudicial. *State v. Smith*, 237 N.C. 1, 21, 74 S.E.2d 291, 304 (1953). The record before us clearly shows that the trial court acted with good cause to prevent the defendant from intimidating or tampering with the State's witnesses. The trial court's action was taken out of the presence of the jury, and there is nothing in the record to indicate the jury knew of or was influenced by the court's order. In addition, the trial court specifically ordered the sheriff to give the defendant's attorneys free access to the defendant "to allow him to assist them in the preparation of their case." We conclude the trial court acted properly in ordering that the defendant be taken into custody. Accordingly, this assignment of error is without merit.

[7] By his next assignment of error, the defendant contends the trial court erred in denying his motion to suppress a statement he made to Captain Gosnell in which he admitted prior problems with the victim but stated that he had not left home after 11:00 p.m. on the night of 3 August 1988 and knew nothing about the crimes in question. In support of this assignment, the defendant contends that (1) the statement was involuntary and given under duress because the defendant was hung over at the time, (2) the

statement was given after Captain Gosnell told the defendant that a witness would say that the defendant had admitted killing the victim and setting fire to his mobile home, (3) the defendant's refusal to sign the waiver of rights form was tantamount to asserting his right to an attorney and to remain silent, and (4) the defendant's statement was the product of an unlawful arrest.

The defendant's contention that he was hung over and, thus, not in control of his mental faculties is contradicted by evidence introduced during a *voir dire* hearing. That evidence tended to show that the defendant was arrested at 10:27 a.m. on 4 August 1988, transported to the Lenoir County Sheriff's Department and then advised of his *Miranda* rights. At the time he was advised of his rights, the defendant did not appear to be under the influence of any drugs or alcoholic beverages, appeared to understand where he was and what was going on around him and appeared to understand what he was being asked. Evidence tended to show that he was not threatened, promised anything or offered any inducement to respond to questions. Further, evidence was introduced tending to show that the defendant asked Captain Gosnell what evidence the police had against him before Gosnell asked him any questions. Such evidence was sufficient to support a determination by the trial court that the defendant was not so hung over as to render his statement involuntary. *See State v. Jones*, 327 N.C. 439, 447, 396 S.E.2d 309, 313 (1990) (when determining whether a confession is voluntary, the court must examine the totality of the circumstances).

[8] Similarly, the defendant contends that Captain Gosnell's response to the defendant's question constituted mental duress causing the defendant to make a statement. In response to the defendant's question concerning what evidence the police had against him, Captain Gosnell told the defendant that a witness had stated that the defendant had said he set fire to Guy Warren's bed and then shot Guy Warren. It is well settled in this jurisdiction that mere confrontation of an accused with inculpatory evidence does not render any ensuing confession inadmissible. *State v. Stokes*, 308 N.C. 634, 646, 304 S.E.2d 184, 192 (1983). Here, the evidence tended to show that the defendant raised the issue of whether the State had discovered any information pointing to his guilt, and Gosnell answered truthfully. The defendant's contention is meritless.

[9] Next, the defendant argues the statement was obtained in violation of his right to remain silent because his refusal to sign the waiver of rights form was tantamount to invoking his right to an attorney and right to remain silent. On *voir dire*, Captain Gosnell testified that the defendant was fully advised of his rights and asked if he wanted a lawyer. The defendant responded he did not want a lawyer at that time and would answer questions. When given a waiver of rights form for his signature, the defendant said he would not sign anything from the sheriff's department. Gosnell then started to ask a question, but the defendant interrupted to ask about any incriminating evidence. The trial court found from such evidence that the defendant agreed to answer questions without the presence or advice of counsel. Since this finding of fact is supported by competent evidence, it is conclusive on appeal. *State v. Chamberlain*, 307 N.C. 130, 297 S.E.2d 540 (1982). Accordingly, there is no merit to the defendant's contention that his refusal to sign the waiver was tantamount to invoking his rights to counsel and to remain silent.

[10] Finally, in support of his motion to suppress his statement, the defendant contends he was arrested without probable cause; therefore, his statement should be suppressed because it resulted from an unlawful seizure of his person. *Dunaway v. New York*, 442 U.S. 200, 60 L. Ed. 2d 824 (1979). We disagree. There was sufficient probable cause to support the warrant upon which the defendant was arrested. The defendant's mother had told Gosnell that the defendant admitted shooting the victim and setting fire to his mobile home. The mother's statements were corroborated by physical evidence and the statements of other individuals known to Gosnell. Since there was probable cause for the issuance of the warrant and for the defendant's arrest, this contention is meritless. For the foregoing reasons, the trial court did not err by denying the defendant's motion to suppress his statement. Accordingly, this assignment of error is without merit.

[11] By his next assignment of error, the defendant contends that the trial court erred by sustaining the State's objection to a question his counsel asked Captain Gosnell as to whether the victim's wife was the beneficiary of the victim's life insurance policy. The defendant contends this inquiry was relevant because it sought to elicit evidence tending to show that someone else committed the murder. We disagree.

> A defendant may introduce evidence tending to show that someone other than defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third person. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible.

State v. Hamlette, 302 N.C. 490, 501, 276 S.E.2d 338, 346 (1981). To be relevant under Rule 401 of the North Carolina Rules of Evidence, such evidence must tend *both* to implicate another *and* be inconsistent with the guilt of the defendant. *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 279-80 (1987).

After reviewing Captain Gosnell's answer, which was preserved for the record, we conclude that it fails to meet the test of relevancy under Rule 401. When asked if Denise Warren was the beneficiary of the victim's life insurance, Gosnell only responded, "To my knowledge." Even when taken in the light most favorable to the defendant, the answer only tended to show that the victim's wife was the beneficiary of his life insurance policy. Such evidence does not point directly to the guilt of another; at most, it casts suspicion upon another or raises a mere conjectural inference that the crime may have been committed by another. *State v. McDowell*, 301 N.C. 279, 292, 271 S.E.2d 286, 295 (1980). Therefore, it does not meet the Rule 401 test of relevancy. *Cotton*, 318 N.C. at 667, 351 S.E.2d at 279-80. This assignment of error is without merit.

[12] By his next assignment of error, the defendant contends the trial court erred in allowing Melissa Bush, a nine-year-old, to testify. He argues that the trial court erred in concluding that she was competent to testify because the trial court failed to specifically find that she was capable of expressing herself concerning the matter at hand. We disagree.

There is no age below which one is incompetent as a matter of law to testify. *State v. Jones*, 310 N.C. 716, 314 S.E.2d 529 (1984). The determination of the competency of a child to testify is a matter that rests within the sound discretion of the trial court. *State v. Fearing*, 315 N.C. 167, 337 S.E.2d 551 (1985). However,

> A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him,

or (2) incapable of understanding the duty of a witness to tell the truth.

N.C.G.S. § 8C-1, Rule 601(b) (1988). Therefore, it is the obligation of the trial court to make a preliminary determination as to the competency of a witness when a question as to the competency of the witness is raised by a party or by the circumstances. *See Fearing*, 315 N.C. at 173, 337 S.E.2d at 555.

The defendant in the present case concedes that the trial court specifically found that Melissa Bush "appreciates the meaning of an oath, one; and two, she understands what it means to swear on the Bible and the ramifications of not telling the truth." Based on its findings and personal observation of the child, the trial court determined that Melissa Bush was competent to testify as a witness in this case. Although the trial court did not make a specific finding as to whether the child was capable of expressing herself concerning the matters as to which she was to testify, the findings made by the trial court and its conclusion that she was competent clearly establish that the trial court exercised its discretion in declaring her competent as a witness. *Cf. id.* (holding that trial court did not exercise its discretion).

As it is clear that the trial court exercised its discretion in declaring the child witness competent, its determination in this regard must be left undisturbed on appeal, absent a showing that the trial court's ruling as to the competency of the witness could not have been the result of a reasoned decision. *State v. Spaugh*, 321 N.C. 550, 364 S.E.2d 368 (1988); *State v. Rael*, 321 N.C. 528, 364 S.E.2d 125 (1988); *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987). During a *voir dire* hearing, Melissa Bush testified that she had completed the third grade and was entering the fourth, made straight A's and B's in her schoolwork and knew her address. Further, she recalled the incident when she saw the defendant with a gun and remembered who was present at the time. Even though no specific finding was made regarding Melissa's ability to express herself, it is obvious that the trial court determined that she was able to do so. Further, the record supports that conclusion. The defendant has failed to show that the trial court's ruling that Melissa Bush was competent as a witness could not have been the result of a reasoned decision. Hence, the trial court did not abuse its discretion in allowing her to testify. This assignment of error is without merit.

[13] By his next assignment of error, the defendant contends the trial court erred by permitting Sandy Potter to testify regarding a statement the defendant made in a letter he wrote to her after the murder. The defendant contends that the statement contained in the letter was admitted without proper foundation and that the statement was too remote in time to be relevant to the issues at trial. We disagree.

During the trial, Sandy Potter testified that after the defendant was arrested and placed in jail, she and the defendant corresponded five or six times. The letters she received from the defendant were kept in her dresser drawer along with other important papers; however, after she first told Captain Gosnell about the letters, they disappeared. At the time the letters disappeared, Potter was living with the defendant's half-brother, Fred Hoffman. She testified that she recognized the letters as being in the defendant's handwriting and that they were signed "Jerry." Potter also testified that the defendant stated in one of the letters that "he was satisfied that the SOB knew who he was before he died."

A statement is admissible as an exception to the hearsay rule if it is offered against a party and is that party's own statement. N.C.G.S. § 8C-1, Rule 801(d) (1988). At trial, defense counsel admitted that the statement of the defendant was admissible as an exception to the hearsay rule. Nevertheless, the defendant now contends that the State did not properly account for the loss of the letters and failed to lay a foundation regarding the defendant's handwriting. We disagree.

Potter testified that the letters disappeared after she went to the police. At that time, she was living with the defendant's half-brother, so she did not have exclusive control over the letters when they disappeared. She also testified that she recognized the letters as being in the defendant's handwriting and that they were signed with his first name. Such evidence established a sufficient foundation for Potter's testimony.

In addition, the defendant's contention that the defendant's statement in the letter was too remote is meritless. The murder occurred on 4 August 1988. After the defendant was arrested and before his trial which began on 17 July 1989, he was evaluated at Dorothea Dix Hospital. Potter testified that she received the letter after the defendant was arrested and while he was being evaluated at Dorothea Dix Hospital. The defendant's statement

was not too remote in time to be relevant. Potter's testimony concerning the statement in the defendant's letter was admissible under Rule 801(d) of the North Carolina Rules of Evidence as an admission by a party opponent. The trial court did not err by admitting the testimony. Hence, this assignment of error is without merit.

[14] The defendant next contends that the trial court erred in denying his motion to dismiss the charge of first degree murder at the close of all evidence. The defendant argues that there was no substantial evidence tending to show that he killed Guy Warren with premeditation and deliberation.

The rules for testing the sufficiency of evidence to overcome a motion to dismiss in a criminal case have been stated in detail in numerous decisions of this Court. *E.g.*, *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991). It would serve no useful purpose to recite those rules again in detail here. Instead, it suffices for the purposes of this case to point out that, in considering a motion to dismiss, the evidence must be taken in the light most favorable to the State with every reasonable inference drawn in favor of the State. *Id.*

Here, substantial evidence tended to show that the murder was the product of the defendant's desire for revenge. The defendant had been significantly injured in a fight with the victim approximately three weeks before the murder. Between the time of the fight and the victim's death, the defendant told several people he was going to get even. Shortly before the murder, the defendant bought a .25 caliber automatic pistol from Raeford Page. Spent .25 caliber projectiles recovered from a place where Page had fired that pistol and the three projectiles removed from the victim's body were all fired from the same gun. This evidence is more than sufficient to support a finding of premeditation and deliberation.

The defendant also contends that the trial court erred in failing to dismiss the arson charge against him. By statute, the willful and malicious burning of a mobile home which is the dwelling house of another and occupied at the time constitutes first degree arson. N.C.G.S. § 14-58 (1986). The defendant was charged with and convicted of that statutory offense. The defendant argues that in this case the mobile home was not occupied at the time it burned, because no evidence tended to show that the victim was alive at the moment when the mobile home was set on fire. Assuming,

arguendo, that such a showing was required in this case, we nevertheless disagree with the defendant's argument.

The pathologist who examined the victim's remains testified that the victim would have been able to move for as much as two minutes after the infliction of the gunshot wounds. Afterwards, the victim would likely have lost consciousness from loss of blood. The fact that the pathologist found no sooty material in the victim's airway is not conclusive proof that the victim died before the fire was set. In fact, the pathologist testified that the lack of soot "indicated to me that there was *little* or no *fire* in the area at the time he took his last breath." (Emphasis added.) The evidence permitted the jury to find that the victim was alive when the fire was set but died before he inhaled any fumes or soot. Taken in the light most favorable to the State, the evidence supports a finding that the victim was alive when the fire was set. Accordingly, the trial court properly denied the defendant's motion to dismiss, and the defendant's contention is without merit.

[15] By his next assignment of error, the defendant contends that the trial court erred by refusing to submit possible verdicts for second degree murder, voluntary manslaughter and involuntary manslaughter to the jury. The defendant acknowledges that if the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than the defendant's denial that he committed the offense, the trial court should not submit second degree murder as a possible verdict. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983). The State introduced evidence tending to show every element of first degree murder was present in this case. With the exception of the defendant's general denial that he had anything to do with the killing, there was no evidence to negate the State's proof as to any element of first degree murder. Accordingly, this assignment of error is without merit.

[16] By his next assignment of error, the defendant contends that the trial court erred by allowing the prosecutor to argue during his closing argument to the jury that the State's case was "uncontradicted." The defendant's objection to the prosecutor's argument was overruled. The defendant argues that the prosecutor's statement amounted to an improper comment on the defendant's failure to testify. This assignment of error is without merit. *State v. Jordan*,

305 N.C. 274, 280, 287 S.E.2d 827, 831 (1982) (prosecutor's argument that the State's evidence is uncontradicted does not constitute an improper comment upon the defendant's failure to testify).

[17] By his next assignment of error, the defendant contends that the trial court erred in refusing to grant the jury's request to "review" the testimony of the State's firearm and tool mark identification expert. The trial court, in its discretion, denied the request.

If the jury, after retiring for deliberation, requests a review of testimony or physical evidence presented during trial, the decision whether to allow the review rests within the discretion of the trial court. N.C.G.S. § 15A-1233(a) (1988). In discussing the request with the attorneys, the trial court indicated it was denying the request because it did not want to give undue emphasis to the testimony of any particular witness. We conclude that the trial court did not abuse its discretion. *See State v. Jones*, 47 N.C. App. 554, 563, 268 S.E.2d 6, 12 (1980) (same reason given by trial court held not to be an abuse of discretion).

[18] The defendant next assigns as error the trial court's denial of his motion for a probable cause hearing. The defendant was arrested on a warrant on 4 August 1988 charging him with first degree murder. A probable cause hearing was scheduled for 18 August 1988, but the State has stipulated that none was ever held. The defendant filed a motion on or about 10 January 1989 requesting a probable cause hearing. The defendant was indicted by the grand jury on 27 March 1989. Subsequently, on 8 June 1989, the defendant's motion for a probable cause hearing was heard and denied. After indictment, it is not error to try a defendant who has not received a probable cause hearing. *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978). The defendant concedes this but requests that this Court reconsider its prior decisions. The defendant advances no reason for this Court to reconsider its past decisions, and we decline to do so.

[19] By his next assignment of error, the defendant contends that the trial court erred by refusing to provide him with funds to hire an investigator to assist him with his defense. In order for an indigent criminal defendant to be entitled to funds with which to hire a private investigator, the defendant must show that there is a reasonable likelihood the investigator will materially assist him in the preparation of his defense or that without such help it is probable that the defendant will not receive a fair trial. *State*

v. Holden, 321 N.C. 125, 136, 362 S.E.2d 513, 522 (1987). In this case, the defendant did not attempt to make any such showing. The only information in the record before this Court concerning this assignment of error is two separate motions for funds to hire a private investigator. Accordingly, this assignment of error is without merit.

For the foregoing reasons, we conclude that the defendant received a trial free from prejudicial error.

II.

The Defendant's Motion For Appropriate Relief

[20] Having dealt with the issues raised on the direct appeal by the defendant concerning his trial and conviction, we turn now to consideration of the defendant's motion for appropriate relief which was filed with this Court prior to our consideration of his appeal. On 5 April 1990, this Court partially allowed the defendant's motion for appropriate relief and remanded this case to the Superior Court, Lenoir County, for an evidentiary hearing and the entry of findings and conclusions by the superior court as to whether there was " 'newly discovered evidence' meriting a new trial."

Pursuant to this Court's order, an evidentiary hearing was held on 12 July 1990 in Superior Court, Lenoir County, before Judge James A. Strickland. Evidence introduced at that hearing tended to show that on 1 August 1989, eight days after the defendant's conviction, Captain Lester P. Gosnell of the Lenoir County Sheriff's Department interviewed Nick Russell Stroud and Tom Hagert about the Guy Warren murder. In essence, Stroud confessed to the murder of Guy Warren; however, the next day, Stroud repudiated his confession.

At the hearing, Captain Gosnell testified that Stroud and Hagert came to the Lenoir County Sheriff's Department at approximately 10:00 p.m. on 1 August 1989. Stroud was under the influence of an impairing substance and told Gosnell that he wanted to confess to the murder of "Guy Eason." After again being questioned about the identity of the murder victim, Stroud said, "I mean Guy Warren." Gosnell then advised Stroud of his constitutional rights and went through the standard *Miranda* rights form with him. While going through the rights form, Stroud told Gosnell that he did not wish to talk to him. When Gosnell questioned how Stroud was going to confess if he did not talk to him, Stroud then changed his answer

and agreed to talk. Gosnell first asked Stroud how much he had had to drink, Stroud responded that he had consumed twelve beers that day, the last one about a half an hour before coming to the sheriff's department.

Gosnell further testified that even though Stroud wanted to confess, he volunteered little information about the murder, and Gosnell had to drag the alleged details from Stroud. Stroud said he shot the victim with a Jennings .25 caliber automatic which he purchased "about three years before" from a black guy. Stroud said he threw the gun in the river at Jarman's Landing after the murder. Stroud stated that the murder was accomplished by breaking through the rear door of Warren's mobile home and shooting Warren in the back; however, Stroud did not know how many times the victim had been shot. He said he set the mattress on fire after shooting Warren. Stroud went on to add that he did not slash the tires of any truck parked outside the mobile home. He said he had not told anyone he committed the murder nor did anyone have any knowledge of his act. He stated that his reason for killing Warren was "somebody needed to do it because he [Warren] was an asshole." Stroud also stated that he knew the defendant Jerry Eason.

After interviewing Stroud, Gosnell interviewed Hagert. Hagert stated that he and Stroud had been fishing that afternoon and then went to some bars. While fishing and attending the bars, Stroud consumed about nine beers. While at the bars, Stroud discussed news reports of the just completed Eason trial with other bar patrons. After leaving the second bar, Stroud went to the home of an aunt of his former girlfriend and then to his mother's home where he told his mother he was going to confess to a murder. After talking with his mother, Stroud persuaded Hagert to take him to the sheriff's department. Gosnell recognized the aunt of Stroud's former girlfriend to be Doris Hoffman, the mother of the defendant. Hagert told Gosnell he didn't believe Stroud and thought the confession was the "beer talking." Hagert went on to say that Stroud had been having a lot of emotional problems since he had broken up with his girlfriend. In Hagert's opinion, Stroud was not in his right mind on the day he confessed because earlier Stroud had given his fishing boat to Hagert. When Gosnell completed interviewing Hagert, they went out to a waiting area where they found Stroud asleep.

On 2 August 1989, the day after Stroud confessed, Gosnell went to Stroud's home in order to take him to a polygraph examination. At that time, Stroud told Gosnell that there was no need for a polygraph examination because he had lied the night before about murdering Guy Warren. Stroud explained he had been experiencing personal problems recently and was depressed. When asked to explain the nature of his problems, Stroud stated that his ex-wife had moved to Iowa with his daughter, preventing him from seeing the child. Additionally, his girlfriend, the defendant Jerry Wayne Eason's first cousin, broke off their relationship the first day of the defendant's trial. Stroud said the breakup came as a complete surprise to him. Stroud went on to say he had been drinking heavily on a daily basis.

Further evidence at the hearing tended to show that the Warren murder and the defendant's trial generated considerable news-media coverage. The information given by Stroud in his 1 August 1989 statement had been given wide publicity by the news media.

On 3 August 1990, Judge Strickland entered "Findings of Fact and Conclusions" in which he concluded that the defendant's motion for appropriate relief for newly discovered evidence should be denied. The defendant contends that Judge Strickland erred in concluding that the post-trial confession of Nick Stroud did not constitute newly discovered evidence under N.C.G.S. § 15A-1415(b)(6) and in recommending that this Court deny the defendant's motion for appropriate relief. We disagree.

Since the defendant is the moving party under his motion for appropriate relief, he has the burden of showing by a preponderance of the evidence every fact essential to support the motion. N.C.G.S. § 15A-1420(c)(5) (1988). In order to establish that Stroud's 1 August 1989 statement constituted "newly discovered evidence" entitling him to a new trial, the defendant was required to show that (1) Stroud would give newly discovered evidence, (2) such evidence is probably true, (3) such evidence is competent, material and relevant, (4) due diligence was used and proper means were employed to procure the testimony at the trial, (5) the newly discovered evidence is not merely cumulative, (6) such evidence does not tend only to contradict a former witness or to impeach or discredit him, and (7) the evidence is of such a nature as to show that at another trial a different result will probably be reached

and that the right will prevail. *State v. Britt*, 320 N.C. 705, 713, 360 S.E.2d 660, 664 (1987).

Based upon the evidence introduced at the hearing, Judge Strickland made extensive findings and conclusions that the defendant had not made the required showing. Based upon the evidence, we adopt Judge Strickland's findings and conclusions. First, the defendant failed to establish that Stroud would give newly discovered evidence. Stroud recanted his 1 August 1989 confession the next day and stood by his disavowal throughout the hearing before Judge Strickland. Further, Stroud confessed while in a state of confusion after consuming a large quantity of beer, and the confession was without corroboration. Consequently, there is every reason to believe that at a new trial Stroud would testify that he had nothing to do with the murder of Warren.

Further, the evidence tends to show that Stroud's 1 August 1989 confession was not credible. First, evidence at the hearing tended to show that Stroud was drunk as well as depressed when he went to the sheriff's department to confess. In addition, during his statement, Stroud was confused about the name of the murder victim and had limited knowledge of the details of the crime. For example, he did not know how many times the victim had been shot. Furthermore, the evidence tended to show that Jennings .25 caliber automatic handguns were not even being manufactured at the time Stroud said he acquired the alleged murder weapon. This evidence, coupled with the fact Stroud recanted his statement and admitted that he had lied when confessing, tended to show that Stroud's confession was not truthful.

Based upon Judge Strickland's findings and conclusions, which we have adopted, we deny the defendant's motion for appropriate relief filed with this Court.

No error; motion for appropriate relief denied.

CYNTHIA BOCKWEG AND HUSBAND, GREGORY BOCKWEG v. STEPHEN G. ANDERSON, BONNEY H. CLARK, EXECUTRIX OF THE ESTATE OF R. PERRY B. CLARK, A. STANLEY LINK, JR., RICHARD M. HOLLAND AND LYNDHURST GYNECOLOGIC ASSOCIATES, P.A.

No. 52PA90

(Filed 3 April 1991)

Rules of Civil Procedure § 41.1 (NCI3d)— voluntary dismissal in federal court—refiling within one year in state court—statute of limitations

The Court of Appeals' decision was affirmed, for reasons other than those stated in the Court of Appeals' opinion, where plaintiffs filed a medical negligence action in federal court in North Carolina based on diversity; plaintiffs took a voluntary dismissal of one of their claims; that claim was refiled within one year in the Superior Court of Forsyth County, but more than four years from the date care was last rendered to plaintiff wife; defendants moved to dismiss on the ground that the suit was outside the statute of limitations of N.C.G.S. § 1-15(c); the trial court treated the motion as one for summary judgment and granted it based on the statute of limitations; and the Court of Appeals reversed, holding that the one-year savings provision of N.C.G.S. § 1A-1, Rule 41(a)(1) applied to the voluntary dismissal in federal court. *High v. Broadnax*, 271 N.C. 313, and *Cobb v. Clark*, 4 N.C. App. 230, are overruled; a plaintiff who stipulates to a voluntary dismissal, without prejudice, of a timely filed action in a federal court sitting in diversity jurisdiction and applying North Carolina substantive law, and refiles the action in a North Carolina state court, may invoke the one-year savings provision in N.C.G.S. § 1A-1, Rule 41.

Am Jur 2d, Limitation of Actions §§ 307, 313.

Justice MARTIN dissenting.

Justice MEYER joins in this dissenting opinion.

ON discretionary review of a decision of the Court of Appeals, 96 N.C. App. 660, 387 S.E.2d 59 (1990), reversing a summary judgment for defendants entered by *Freeman, J.*, in Superior Court, FORSYTH County, on 6 January 1989. Heard in the Supreme Court 7 September 1990.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., Kenneth B. Oettinger, and William R. Hamilton, for plaintiff appellees.

Tuggle Duggins Meschan & Elrod, P.A., by J. Reed Johnston, Jr., and Rachel B. Hall, for defendant appellant A. Stanley Link, Jr.

Petree Stockton & Robinson, by J. Robert Elster, Stephen R. Berlin, and Patrick G. Vale, for defendant appellants Stephen G. Anderson, Bonney H. Clark, Executrix of the Estate of R. Perry B. Clark, Richard M. Holland, and Lyndhurst Gynecologic Associates, P.A.

WHICHARD, Justice.

This case presents the issue of whether the one-year savings provision of N.C.G.S. § 1A-1, Rule 41(a)(1) applies when plaintiffs and defendants stipulate to a voluntary dismissal without prejudice of an action in a federal district court sitting in North Carolina and plaintiffs file the same action within the one-year period in a North Carolina state court. We hold that it does, and we thus affirm the decision of the Court of Appeals, though upon different reasoning. In so doing, for reasons fully set forth herein, we overrule *High v. Broadnax*, 271 N.C. 313, 156 S.E.2d 282 (1967), and *Cobb v. Clark*, 4 N.C. App. 230, 166 S.E.2d 292 (1969).

On 4 December 1986, plaintiffs filed a diversity action in the United States District Court for the Middle District of North Carolina against these named defendants and others for their alleged negligence in the delivery of plaintiff-wife's fetus. On 28 October 1987 plaintiffs and defendant A. Stanley Link, Jr., stipulated to a voluntary dismissal without prejudice, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. On 2 November 1987 plaintiffs and the remaining defendants stipulated to a voluntary dismissal without prejudice, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, as to one of the claims. The other claim proceeded to trial in federal court.

Plaintiffs filed suit against these defendants on the dismissed claim in Superior Court, Forsyth County, on 18 October 1988, within one year of the voluntary dismissals in federal court, but more than four years from the date care was last rendered to plaintiff-wife. Defendants moved to dismiss on the grounds that the suit was outside the applicable statute of limitations, N.C.G.S. § 1-15(c).

The trial court treated defendants' motion as one for summary judgment and, by order of 6 January 1989, granted the motion on the basis that the statute of limitations had expired.

The Court of Appeals unanimously reversed the trial court's grant of summary judgment, holding that the one-year savings provision of N.C.G.S. § 1A-1, Rule 41(a)(1) applied to the voluntary dismissal of the action in federal court. *Bockweg v. Anderson*, 96 N.C. App. 660, 387 S.E.2d 59 (1990). Plaintiffs' action therefore was not brought beyond the statute of limitations because it was filed within one year of the dismissals. On 5 April 1990 we allowed discretionary review pursuant to N.C.G.S. § 7A-31(c).

Plaintiffs seek to apply the North Carolina savings provision to an action, originally commenced in a federal court sitting in North Carolina, which was dismissed pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. The Court of Appeals was incorrect in stating that "the Federal Court in this case did not specify whether it granted dismissal pursuant to the North Carolina Rules of Civil Procedure." *Id.* at 661, 387 S.E.2d at 60. The dismissals clearly were taken pursuant to the federal rules. The issue, however, is the effect of the dismissals on plaintiffs' subsequent attempt to refile the action in state court within the one-year savings provision in N.C.G.S. § 1A-1, Rule 41(a)(1), but outside the period of limitations that controls unless N.C.G.S. § 1A-1, Rule 41(a)(1) applies.

Ordinarily, a voluntary dismissal in federal court under Federal Rule 41 "leaves the situation as if the action had never been filed." Wright & Miller, *Federal Practice and Procedure*: Civil § 2367 (1971). "The statute of limitations is not tolled by bringing an action that is later voluntarily dismissed." *Id.* Federal courts ordinarily need not consider the applicability of a savings provision, as the federal rule contains no such provision. This applies to cases in federal court in which jurisdiction is not based on diversity of citizenship and in which there is no occasion for the federal court to apply state substantive law.

For example, in *Humphreys v. United States*, 272 F.2d 411 (9th Cir. 1959), a plaintiff sued the United States government under the Federal Tort Claims Act. Plaintiff's first suit in federal court was brought within the statute of limitations, but plaintiff voluntarily dismissed in order to sue in another federal court more convenient to the parties and witnesses. Plaintiff refiled in the other federal court outside the statute. The court upheld the denial

of plaintiff's motion to set aside the order of dismissal and reinstate her first suit. It noted that the statute had expired when the motion was made because plaintiff's dismissal under the federal rules did not toll the statute and left "the situation the same as if the suit had never been brought in the first place." *Id.* at 412. Similar treatment of federal voluntary dismissals in nondiversity cases is seen in patent claims—*see A.B. Dick Co. v. Marr*, 197 F.2d 498 (2d Cir. 1952), *cert. denied*, 344 U.S. 878, 97 L. Ed. 680, *reh'g denied*, 344 U.S. 905, 97 L. Ed. 699 (1952)—and cases involving § 1983 claims, *see Cabrera v. Municipality of Bayamon*, 622 F.2d 4 (1st Cir. 1980). Thus, a voluntary dismissal under the Federal Rules in a nondiversity case in federal court does not toll the statute of limitations or invoke a savings provision.

By contrast, except in matters governed by the federal Constitution or acts of Congress, diversity cases involve application by the federal court of substantive provisions of state law. *Erie Railroad v. Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 1194 (1938). The effect of a voluntary dismissal in a federal court sitting in a diversity case thus may be different from a similar dismissal in a federal question case, depending on the substantive provisions of the applicable state law regarding voluntary dismissals. If the state's rule concerning voluntary dismissals is no different from the federal, the effect of the dismissal is the same as if the case involved solely federal law, *i.e.*, dismissal leaves the situation as if no case had been filed. However, if the state rule concerning dismissal differs from the federal, *Erie* and its progeny provide the appropriate framework for analysis, and the effect of a voluntary dismissal taken in a federal court sitting in diversity is determined by the applicable substantive state law. With respect to the issue at hand, "[t]he tolling of a state statute of limitation in a diversity case is strictly a substantive matter of state law which *Erie* commands that [a federal court] follow absent substantial countervailing federal interests." *Kahn v. Sturgil*, 66 F.R.D. 487, 491 (M.D.N.C. 1975).

In *Webb v. Nolan*, 361 F. Supp. 418 (1972), *aff'd*, 484 F.2d 1049 (4th Cir. 1973), *cert. denied*, 415 U.S. 903, 39 L. Ed. 2d 461 (1974), the plaintiff filed a malpractice action in a federal court sitting in North Carolina, and the defendant moved to dismiss for lack of diversity. Plaintiff then voluntarily dismissed the action. The court stated: "At this stage the situation was the same as if the suit had never been filed. . . . *However, under Rule 41(a)(1)*

and (2), N.C. Rules of Civil Procedure, a voluntary dismissal without prejudice allows a new action on the same claim to be instituted within one year." Id. at 420 (emphasis added). The court thus implicitly acknowledged the distinction between a dismissal in the context of purely federal law and a dismissal in a diversity case applying state law. Because the case was in diversity applying North Carolina law, plaintiff was allowed to refile in federal court within the one-year period. The plaintiff ultimately suffered involuntary dismissal because of lack of diversity, not because of the statute of limitations.

Other federal courts sitting in diversity and applying North Carolina law have acknowledged that the savings provision of North Carolina Rule 41 applies in diversity cases dismissed in federal court and recommenced in federal court. In *Haislip v. Riggs*, 534 F. Supp. 95 (W.D.N.C. 1981), plaintiff filed in federal court a medical malpractice claim which was voluntarily dismissed, by stipulation of the parties, without prejudice. Plaintiff sought to file the same action in a North Carolina state court within a year of the dismissal, but outside the statute of limitations, and suffered summary judgment on statute of limitations grounds because *High v. Broadnax* precluded application of the savings provision where the original suit was brought in a federal court (*see infra*). Plaintiff then sought to refile his suit in federal court, whereupon defendant again moved to dismiss. The court in *Haislip* stated:

> This Court is of the opinion North Carolina Rule 41(a) is a tolling provision legislatively adopted and falls within the first category of the analysis [requiring application of state substantive law]. . . . The tolling of a state statute of limitations in a diversity case is strictly a substantive matter of state law which *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188 (1938) and *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L. Ed. 2079 (1945) command that this Court follow absent substantial countervailing federal interests. *Id. Therefore, this Court holds that North Carolina Rule 41(a) applies in this case and finds and concludes that the action was filed within one year of the voluntary dismissal without prejudice and is not barred by the North Carolina statute of limitations.*

Id. at 98 (emphasis added) (citation omitted). The court then had to consider whether plaintiff's action should be dismissed, not because

of statute of limitations considerations, but because plaintiff suffered involuntary dismissal in the earlier state court action and was therefore barred under principles of res judicata from continuing the litigation.

Likewise, in *Shuford v. K. K. Kawamura Cycle Co.*, 649 F.2d 261 (4th Cir. 1981), both parties agreed, and the court assumed, that "as a result of his voluntary dismissal of his first action, [plaintiff] gained the protection of the state rule [*i.e.*, the savings provision in N.C.G.S. § 1A-1, Rule 41(a)(1)]." *Id.* at 262. The question in *Shuford* was whether the additional year commenced with plaintiff's oral dismissal in open court or with the court's written order allowing the dismissal, *i.e.*, whether the state law or the federal law concerning commencement of the period would govern. In resolving that issue, the court noted that "the state procedural rule concerning the beginning of the period is 'intimately bound up with the state right' to commence a new action and therefore should be applied," and held that "the federal rule does not supplant the state rule that is an integral part of the state's one year savings statute." *Id.* at 263.

The effect of a voluntary dismissal in federal court, pursuant to the Federal Rules, thus depends on whether the federal court's jurisdiction is based on the existence of a federal question or on diversity of citizenship. In federal question cases, or diversity cases in which the state law concerning voluntary dismissal is no different from federal law, a voluntary dismissal will "leave[ ] the situation as if the action had never been filed." Wright & Miller, *Federal Practice and Procedure*: Civil § 2367. In diversity cases in which state law concerning voluntary dismissal is different from federal law, the federal court will conduct an analysis under *Erie* and its progeny to determine the applicable law. Further, federal courts sitting in diversity applying North Carolina substantive law have concluded that when a plaintiff voluntarily dismisses in federal court and recommences in federal court, he is entitled to the benefit of the North Carolina savings provision as a matter of state substantive law. *Shuford*, 649 F.2d 261; *Haislip*, 534 F. Supp. 95; *Webb*, 361 F. Supp. 418; *see also Kahn*, 66 F.R.D. 487. Thus, the effect of a voluntary dismissal taken under the Federal Rules by a plaintiff in a federal court sitting in diversity applying North Carolina law is to allow the plaintiff up to one year to refile in federal court.

The issue here is the effect of plaintiffs' voluntary dismissal under the Federal Rules in a federal court sitting in diversity applying North Carolina law on a subsequent refiling outside the statute of limitations in state court. In *High v. Broadnax*, 271 N.C. 313, 156 S.E.2d 282, this Court denied application of the precursor to the applicable savings provision in a situation where plaintiff filed originally in a federal court in Virginia, sitting in diversity applying North Carolina law, and refiled in a North Carolina state court after the statute of limitations had run. Subsequently, our Court of Appeals held that *High* governed, even though the federal court in which plaintiff originally filed was located in North Carolina. *Cobb v. Clark*, 4 N.C. App. 230, 166 S.E.2d 692 (1969). Judge (later Justice) Britt noted in *Cobb*: "It appears that the majority of the states do not agree with the holding in *High v. Broadnax* . . . . Nevertheless, the *High* case is binding on this court." *Cobb*, 4 N.C. App. at 233, 166 S.E.2d at 694.

High involved a lawsuit instituted by plaintiff in a federal court in Virginia, dismissed in that court, and refiled within one year in a North Carolina court. Because the new action was filed outside the statute of limitations, the issue was whether the savings provision of N.C.G.S. § 1-25, the precursor to the savings provision in Rule 41, applied to toll the statute and preserve plaintiff's claim. In concluding that the savings provision did not apply, the Court stated: "Where the action is regarded as controlled by the statute of limitations of the forum, it has usually been held that a plaintiff invoking the saving[s] statute of the forum may not rely upon a nonsuit in an earlier action *brought in another state.*" *High*, 271 N.C. at 315, 156 S.E.2d at 284 (quoting Annot., 55 A.L.R. 2d 1038, 1039 (1957)) (emphasis added). The Court ultimately adhered "to the general rule that a statute of the forum which permits a suit to be reinstituted within a specified time after dismissal of the original action otherwise than upon its merits has no application *when the original suit was brought in another jurisdiction.*" *Id.* at 316, 156 S.E.2d at 284 (emphasis in original). Because the plaintiff originally brought suit in Virginia, the Court refused to apply the savings statute.

The issue in *High* was one of first impression in this state. In approaching it, the Court looked for guidance to references indicating the majority rule on the question and to the individual decisions of other states. As noted above, the Court looked first to an A.L.R. annotation covering situations where the original suit

was brought in another state. *High*, 271 N.C. at 315, 156 S.E.2d at 284. That annotation indicated that the usual rule was to deny application of the savings statutes in such cases. Such a rule may be sound when the original action is brought in *another state* because parties know the law of the forum will apply and they need not anticipate the application of another state's rules.

The precise issue in *High*, however, was narrower than its holding and the annotation cited as authority would seem to indicate. Though plaintiff's first filing was in another state, it was in a *federal court* which was applying North Carolina substantive law. Another, and more specific, annotation addressed this subject. *See* Annot., "State statute permitting new action within specified time after judgment or decree not on the merits in a previous action, *as applicable where either the first action or the new action was brought in or removed to a Federal court*," 156 A.L.R. 1097 (1945) (emphasis added). This annotation states:

> Although there is some conflict on this question, *the great weight of authority either assumes the applicability or applies the tolling statute* in cases where the original action is brought in the state forum, and the section [sic] action, after the dismissal, etc., of the first, in a Federal forum, *or vice versa.*

Id. at 1098-99 (emphasis added). The apparent rationale for this principle is that the parties to a federal action in diversity should know that state substantive law governs their case and whether the applicable state substantive law contains a savings provision.

It appears, then, that the precise issue in *High* would have been addressed more appropriately by reference to the annotation just discussed, and that adherence to "the general rule" set forth there would have led to a different result. *See High v. Broadnax*, 271 N.C. at 316, 156 S.E.2d at 284 (Court apparently intended to "adhere to the general rule."). Further, practically all of the additional authority the Court relied on in *High* either was inapposite at the time or has been overruled legislatively or judicially.

The earliest case cited in *High* is *Riley v. Union Pac. R. Co.*, 182 F.2d 765 (10th Cir. 1950). *Riley* involved a personal injury suit commenced in Illinois state court, removed by defendant to federal court, and dismissed as outside the Illinois statute of limitations. Plaintiff then filed in Wyoming federal court, and this action also was dismissed. The federal court followed *Herron v. Miller*,

96 Okl. 59, 220 P. 36 (1923), and held that the Wyoming savings provision did not apply to a prior action *commenced in another state. Riley*, 182 F.2d at 766-67.

High also cites *C & L Rural Electric Cooperative Corp. v. Kincade*, 175 F. Supp. 223 (N.D. Miss., 1959), *aff'd*, 276 F.2d 929 (5th Cir. 1960). There the court denied application of a Mississippi savings statute to a case originally filed in an Arkansas state court. *Id.* at 227.

Riley and *C & L Rural Electric* thus support the legal principle expressed in the annotation quoted in *High*, *viz*, that when parties litigate in the framework of a particular state's substantive law, it is inappropriate to allow one party later to rely on another state's substantive law to the disadvantage of his opponent. The situation actually presented in *High*, however, and the situation here, are different from the situations in those cases. In both *High* and the present case the parties were litigating in a federal court applying North Carolina substantive law. In such instances the substantive law does not change when the parties dismiss in federal court and refile in a state court. The unfairness that could flow from allowing a party to change the applicable substantive law in the course of the litigation thus was not a proper consideration in *High* and is not here, and *Riley* and *C & L Rural Electric* are inapposite to the precise issue presented both in *High* and here.

Three other cases cited in *High*—*Sorensen v. Overland Corp.*, 142 F. Supp. 354 (D. Del. 1956), *aff'd*, 242 F.2d 70 (3d Cir. 1957), *Sigler v. Youngblood Truck Lines, Inc.*, 149 F. Supp. 61 (E.D. Tenn. 1957), and *Anderson v. Southern Bell Telephone & Telegraph Company*, 108 Ga. App. 314, 132 S.E.2d 820 (1963)—have been overruled legislatively or modified judicially.

Anderson was decided on facts somewhat similar to the case at bar. The plaintiff filed in a Georgia federal court, was dismissed for lack of diversity, and subsequently filed in a Georgia state court. The court held that the Georgia savings statute did not apply. *Id.* The Georgia legislature subsequently amended the savings provision to make it applicable to federal dismissals. Ga. Code Ann. § 9-2-61 (1985).

The court in *Sigler* construed Tennessee law and held that a federal dismissal in North Carolina was not effective to invoke the Tennessee savings statute in a subsequent federal action in

Tennessee. The Tennessee savings provision at the time had "reference to actions commenced in Tennessee courts only." *Sigler*, 149 F. Supp. at 66. Thus, the limited scope of the savings statute prohibited its application to cases involving an action originally brought in federal court. The Tennessee legislature, however, later amended its savings statute to provide that "any party filing an action in federal court that is subsequently dismissed for lack of jurisdiction shall have one (1) year from the date of such dismissal to timely file such action in an appropriate state court." Tenn. Code Ann. § 28-1-115 (1984). This amendment broadened application of the Tennessee savings provision to include not only actions commenced in Tennessee courts, but also actions commenced in federal court. A federal court construing Tennessee law after the amendment to the savings statute would not be compelled to limit its application to actions originally filed in state court, as the court was in *Sigler*.

Finally, in *Sorensen* the federal trial court sought to predict what the Delaware courts would do if asked to apply the Delaware savings statute to "prior actions arising out of foreign courts, state or federal." *Sorensen*, 142 F. Supp. at 363. The court stated, "[t]he Delaware statute from its plain meaning leads me to believe its provisions were not intended to cover actions commenced beyond the boundaries of the state." *Id.* When ultimately faced with the issue, Delaware state courts criticized *Sorensen* and held that the Delaware savings statute applied to dismissed federal actions subsequently brought in Delaware state court, *Howmet Corporation v. City of Wilmington*, 285 A.2d 423, 426 (Del. Super. Ct. 1971), and even to an action brought and dismissed in a Pennsylvania state court, then refiled in a Delaware state court. *Leavy v. Saunders*, 319 A.2d 44, 46 (Del. Super. Ct. 1974).

Two other cases cited in *High* are *Milliken v. O'Meara*, 74 Colo. 475, 222 P. 1116 (1924), and *Scurlock Oil Co. v. Three States Contracting Co.*, 272 F.2d 169 (5th Cir. 1959). *Milliken* is not relevant to the issue in *High* and here. *Scurlock* is a *per curiam* affirmance holding that a federal suit in Louisiana dismissed on limitation grounds did not toll the running of a Texas limitation in a subsequent action filed in federal court in Texas. It thus is not pertinent here, where the dismissal was voluntary and within the applicable statute of limitations.

The only authority cited in *High* that appears to remain the law is *Morris v. Wise*, 293 P.2d 547 (Okla. 1955). *Morris* denied application of the Oklahoma savings statute to an action originally filed in a federal court in Texas and subsequently filed in an Oklahoma state court. *Id.* at 550-51. The court in *Morris*, however, followed without discussion the syllabus of *Herron v. Miller*, noted above, to the effect that the Oklahoma savings statute did not apply to cases originally filed *in another state*. It did not discuss the merits or demerits of extending that rule to dismissals in federal courts sitting in diversity.

Thus much, if not all, of the authority relied on in *High* either was inapposite initially or is now overruled. Further, other courts have since addressed the problem at issue in *High* and have noted a marked trend toward a liberal application of state savings provisions due in large part to a recognition of their remedial nature and purpose. *See Templer v. Zele*, 1990 WL 31698 (Ariz. App.) (citing *Technical Consultant Services v. Lakewood Pipe*, 861 F.2d 1357, 1359-62 (5th Cir. 1989)) (Texas law). *See also Prince v. Leesona Corp., Inc.*, 720 F.2d 1166, 1169 (10th Cir. 1983) (Kansas law); *Long Island Trust Co. v. Dicker*, 659 F.2d 641, 645-47 (5th Cir. 1981) (Texas law); *Allen v. Greyhound Lines, Inc.*, 656 F.2d 418, 422 (9th Cir. 1981) (Montana law); *Stare v. Pearcy*, 617 F.2d 43 (4th Cir. 1980) (West Virginia law); *Abele v. A.L. Dougherty Overseas, Inc.*, 192 F. Supp. 955, 957 (N.D. Ind. 1961) (Indiana law); *McCrary v. United States Fidelity & Guaranty Co.*, 110 F. Supp. 545, 548 (W.D.S.C. 1953) (Arkansas law); *Nichols v. Canoga Industries*, 83 Cal. App. 3d 956, 962, 148 Cal. Rptr. 459, 463 (1978); *Schneider v. Schimmels*, 256 Cal. App. 2d 366, 370, 64 Cal. Rptr. 273, 275 (1967); *Leavy v. Saunders*, 319 A.2d 44 (Del. Super. Ct. 1974) (Delaware law); *DeClerck v. Simpson*, 200 Ill. App. 3d 889, 146 Ill. Dec. 271, 558 N.E.2d 234 (1990), *appeal allowed*, 133 Ill. 2d 554, 149 Ill. Dec. 319, 561 N.E.2d 689 (1990); *Eves v. Ford Motor Co.*, 152 Ind. App. 34, 42, 281 N.E.2d 826, 831 (1972).

Additional support for this approach is found in cases discussing the relationship between voluntary dismissal under the Federal Rules and state rules of civil procedure. For example, the 4th Circuit Court of Appeals has stated: "We think the difference in a [Federal] Rule 41 dismissal and a Virginia nonsuit . . . goes more to matters of form than substance. . . . [B]oth the federal rule and the Virginia statute have as their purpose the voluntary dismissal of an action by a plaintiff without prejudice at some

stage of a proceeding." *Scoggins v. Douglas*, 760 F.2d 535, 538 (4th Cir. 1985) (*per curiam*).

In addition to its eroding—if not eroded—basis of authority, *High* has complicated the relationship between federal and state courts and marred the symmetry of our law in this area. There are four possible configurations of voluntary dismissals and refilings between the state and federal systems: (1) state dismissal/state refile; (2) federal dismissal/federal refile; (3) state dismissal/federal refile; and (4) federal dismissal/state refile. A plaintiff may, without question, file in state court, dismiss, and refile in a state court within a year. Under the authority discussed above, a federal plaintiff in diversity may dismiss and refile in federal court within a year. *Shuford*, 649 F.2d 1049; *Haislip*, 534 F. Supp. 95; *Webb*, 361 F. Supp. 418. Likewise, a state plaintiff may dismiss and refile in federal court within a year. *Porter v. Groat*, 713 F. Supp. 893 (M.D.N.C. 1989). Yet, under the rule in *High*, a plaintiff may not dismiss in federal court and seek the benefit of the North Carolina savings provision when he refiles his action in a North Carolina state court.

Courts should not "mar the symmetry of the legal structure by the introduction of inconsistencies and . . . artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history or custom or policy or justice." B. Cardozo, *The Nature of the Judicial Process* 33 (1921). No reason is apparent sufficient to justify this inconsistency or artificial exception in our law. The purpose of the statute of limitations, which is to avoid stale claims by giving a defendant notice of a claim within a prescribed period, would not be undermined, and the remedial purpose of the savings provision would be furthered, by allowing a federal dismissal/state refiling, just as refiling is allowed in all other configurations possible in the federal-state relationship in diversity cases.

The mere fact that plaintiff took his dismissal in federal court clearly is not sufficient reason to deny application of the savings provision; even in *High*, this Court explicitly stated that when a defendant removes a plaintiff from state to federal court, plaintiff may dismiss in federal court and still take advantage of the North Carolina savings provision. *High*, 271 N.C. at 316, 156 S.E.2d at 284-85 (citing *Motor Co. v. Credit Co.*, 219 N.C. 199, 13 S.E.2d 230 (1941); *Brooks v. Lumber Co.*, 194 N.C. 141, 138 S.E. 532 (1927); *Fleming v. R.R.*, 128 N.C. 80, 38 S.E. 253 (1901)). While there

may be legitimate reasons to deny application of our savings provision when a party has voluntarily dismissed in another state's court system, there is no apparent reason for doing so when the parties move from the federal system when it is applying our state substantive law regarding voluntary dismissals. When federal courts are sitting in diversity following North Carolina substantive law, they are like another court of the state. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108, 89 L. Ed. 2079, 2086 (1945) ("a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State").

In addition, an examination of the language of North Carolina Rule 41, which encompasses the savings provision, reveals no purpose to limit the provision to dismissals taken in state court. Rule 41 states:

> (a) Voluntary dismissal; effect thereof.—
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> (1) By Plaintiff; by Stipulation.—Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice *under this subsection*, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.
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> (2) By Order of Judge.—Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the

> order, a dismissal under this subsection is without prejudice. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice *under this subsection*, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.
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> (b) Involuntary dismissal; effect thereof.— . . . Unless the court in its order for dismissal otherwise specifies, a dismissal *under this section* and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal. . . .

N.C.G.S. § 1A-1, Rule 41 (1990) (emphasis added). The rule itself does not expressly extend or limit the application of the savings provision to dismissals or refilings in any particular court. The words "under this subsection" do not *limit application* of the savings provision; rather, they acknowledge that plaintiff may take a subsection (a)(1) voluntary dismissal by stipulation, a subsection (a)(2) voluntary dismissal by order of the court, or a subsection (b) involuntary dismissal without prejudice. Slightly different consequences follow dismissal under each of the three subsections.

In summary, our examination of the principles and authority upon which *High* is based leads us to the conclusion that it should no longer be the law of this state. With one relatively minor exception, all of the authority supporting *High* is either inapposite to the precise issue or has been modified or overruled. The trend of recent decisions is clearly contrary to *High*. There is no express language in the rule creating the savings provision that would prevent its application to this case. Finally, the rule in *High* creates an inconsistency or artificial exception between procedure in state and federal court that serves no articulable purpose, mars the symmetry of our law, and may result in arbitrariness and unfairness to litigants.

For the reasons stated, we overrule *High v. Broadnax*, 271 N.C. 313, 156 S.E.2d 282, and *Cobb v. Clark*, 4 N.C. App. 230, 166 S.E.2d 292. We hold that a plaintiff who stipulates to a voluntary dismissal, without prejudice, of a timely filed action in a federal court sitting in diversity jurisdiction and applying North Carolina substantive law, and refiles the action in a North Carolina state court, may invoke the one-year savings provision in N.C.G.S. § 1A-1, Rule 41. For the reasons stated, rather than those contained in the Court of Appeals opinion, the decision of the Court of Appeals is affirmed.

Affirmed.

Justice MARTIN dissenting.

I must respectfully dissent from the majority opinion.

> "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate or superimpose, provisions and limitations not contained therein."

State v. Camp, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong, N.C. Index 2d *Statutes* § 5 (1968)). *Accord, e.g., Pavelic & LeFlore v. Marvel Group*, 493 U.S. 120, ---, 107 L. Ed. 2d 438, 445 (1989) (when interpreting a statute, "[o]ur task is to apply the text, not to improve upon it."). In the instant case, the statute we are applying, North Carolina General Statute § 1A-1, Rule 41(a)(1), provides as follows:

> (a) *Voluntary dismissal; effect thereof.*—
>
> (1) By Plaintiff; by Stipulation.—
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> Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once

> dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice *under this subsection*, a new action based on the same claim may be commenced within one year after *such* dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time. (Emphasis supplied.)

The plain meaning of the last sentence of this subsection is that in order for the one-year extension to be available to a party, the party must have dismissed the action under North Carolina General Statute § 1A-1, Rule 41(a)(1). In the instant case, the parties have stipulated that the dismissal at issue was taken under *Federal* Rule of Civil Procedure 41(a)(1). The cases were originally filed in federal district court; because they were not removed there from a State court, principles relevant to removal cases do not apply in the instant case. Obviously, where a case was initiated by plaintiffs in a federal court, a dismissal without prejudice under Federal Rule of Civil Procedure 41(a)(1) is not a dismissal "under this subsection" of North Carolina Rule 41(a)(1); only a voluntary dismissal taken pursuant to North Carolina Rule of Civil Procedure 41(a)(1) can be "under this subsection." Contrary to the majority's statement that "the words 'under this subsection' do not *limit application* of the savings provision," *Bockweg v. Anderson*, 328 N.C. 436, 449, 402 S.E.2d 627, 636, the rule *does* limit the class of litigants who may benefit from the savings clause to those who take dismissals pursuant to the North Carolina Rules of Civil Procedure. State Rule 41(a)(1) in no way permits a case initiated and dismissed under the Federal Rules of Civil Procedure to be considered to have been "under this subsection"—that is under a North Carolina Rule of Civil Procedure—for the purpose of the one-year extension.[1]

Had the General Assembly intended claims which were initially brought and dismissed in federal courts or in courts of other states to come under the sentence at issue, it could have so provid-

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1. If any section of North Carolina Rule of Civil Procedure 41 applies to evaluating the prior dismissal taken by the instant plaintiffs in federal court, it is Rule 41(b) which provides that "any dismissal not provided for in this rule . . . operates as an adjudication upon the merits."

ed. *Cf., e.g.*, Ga. Code Ann. § 9-2-61 (Supp. 1990). When drafting North Carolina General Statute § 1A-1, Rule 41(a) and amendments thereto, the legislature was aware of the possibility of dismissal in other jurisdictions, as can be seen by the second sentence of Rule 41(a)(1) in which direct reference was made to the prejudicial effect of dismissing a case more than once "in any court of this or any other state or of the United States . . . ." The fact that this sentence is followed by a sentence expressly limiting the one-year extension to voluntary dismissals taken "under this subsection" indicates that the dismissals must be taken pursuant to North Carolina Rule 41(a)(1) and not the rules of any other jurisdiction in order to take advantage of the one-year extension.

The majority opinion's extensive analysis of the reasons for having symmetry between State and Federal Rules 41 is interesting; however, the statute can be amended only by the General Assembly, not by this Court. The fact of the matter is that Federal Rule 41 and North Carolina Rule 41 do not have equivalent language, and to amend the North Carolina Rule as the majority has done in its opinion is to invade the province of the General Assembly with respect to North Carolina General Statute § 1A-1, Rule 41. While this Court has exclusive authority to amend the appellate rules, the General Assembly is the sole source of the North Carolina Rules of Civil Procedure, unless this authority is expressly delegated to the Supreme Court. N.C. Const. art. IV, § 13(2) (1984). *Cf. State v. Campbell*, 14 N.C. App. 596, 188 S.E.2d 558 (1972). This the General Assembly has not done.

The majority's discussion of the law to be applied in federal courts in diversity settings is similarly interesting, but without any relevance to the application of a North Carolina rule of procedure in a North Carolina court. Further, the majority's remark that "[t]he issue here is the effect of plaintiffs' voluntary dismissal under the Federal Rules in a federal court sitting in diversity applying North Carolina law on a subsequent refiling outside the statute of limitations in state court" is misleading. *Bockweg v. Anderson*, 328 N.C. at 442, 402 S.E.2d at 631. Whether or not the federal court was sitting "in diversity" in the original case initiated and dismissed by the plaintiffs is irrelevant, as the federal court properly applied the *federal* rules of *procedure* at the time the dismissal was taken in that court. There was no application whatsoever of North Carolina substantive or, for that matter, procedural law in the federal court in the prior voluntary dismissal

by plaintiffs. As a consequence, the majority's discussion of *High* and the cases cited therein is presented in a false light. The fact that in *High* the parties were litigating a diversity case has nothing to do with the instant case, except for the incidental similarity that had the original case that was brought in federal court not been dismissed, State substantive law would have been applied in deciding the merits of the case. The reason that *High* is relevant is because there, as in the present case, this Court was called upon to determine whether, under the then applicable North Carolina statute, the plaintiff's voluntary dismissal of a case he initiated in federal court could toll a period of limitations so as to allow another case predicated on the same cause of action to be later filed in a North Carolina court.

In fact, the majority inappropriately overrules *High v. Broadnax*, 271 N.C. 313, 156 S.E.2d 282 (1967). In *High*, this Court was applying North Carolina General Statute § 1-25 (1953), which provided:

> *New action within one year after nonsuit, etc.*—If an action is commenced within the time prescribed therefor, and the plaintiff is non-suited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in forma pauperis.

The *High* court correctly held that this statute had no application "*when the original suit was brought in another jurisdiction,*" *id.* at 316, 156 S.E.2d at 284 (emphasis in original), including a federal jurisdiction. The statute we are applying in the instant case is not materially different from former section 1-25 in this respect.

It should also be noted that the majority appears to suggest that *High* did not refer to a particular American Law Reports ("A.L.R.") annotation concerning the effect of a voluntary dismissal in federal court on a later case attempting to rely on a state tolling provision. *Bockweg v. Anderson*, 328 N.C. at 443, 402 S.E.2d at 631-32. In fact, *High* did cite this annotation, and properly placed it in the context of discussing the application of such a statute in *removal* cases. *See High*, 271 N.C. at 316, 156 S.E.2d at 285. The majority opinion makes much of the fact that this A.L.R. annotation recites that "the great weight of authority either assumes

the applicability or applies the tolling statute in cases where the original action is brought . . . in a [f]ederal forum . . . ." *Bockweg v. Anderson*, 328 N.C. at 443, 402 S.E.2d at 631, quoting from Annot., "State statute permitting new action within specified time after judgment or decree not on the merits in a previous action, as applicable where either the first action or the new action was brought in or removed to a Federal court," 156 A.L.R. 1097, 1099 (1945). However, this "great weight of authority" as listed in the annotation consists of the citation of case law in only six states (including North Carolina) and a number of federal courts, some of which cases (including those from North Carolina) are discussing the application of this sort of statute in *removal* contexts. Presumably, the reason a statute such as former section 1-25 or current section 1A-1, Rule 41(a) applies in a removal situation is because it would be unfair to allow defendants to gain control of plaintiff's ability to take advantage of a tolling statute such as former section 1-25 by removing a case to a federal forum where plaintiff's voluntary dismissal would then otherwise be considered as having been taken in "another jurisdiction." This is a more plausible reason for the "great weight of authority" of (removal) cases cited in the annotation at issue than the majority's statement that "[t]he apparent rationale for this principle is that the parties to a federal action in diversity should know that state substantive law governs their case and whether the applicable state substantive law contains a savings provision." *Bockweg v. Anderson*, 328 N.C. at 443, 402 S.E.2d at 631. *See, e.g., Brooks v. Lumber Co.*, 194 N.C. 141, 138 S.E. 532 (1927).

Further, the fact that there may be a "trend towards a liberal application of state [statutory] savings provisions," *Bockweg v. Anderson*, 328 N.C. at 446, 402 S.E.2d at 633, does not permit this Court to amend the statute. Again, it is not this Court which is "mar[ring] the symmetry of the legal structure," *Bockweg v. Anderson*, 328 N.C. at 447, 402 S.E.2d at 634; it is the General Assembly which deliberately has passed and ratified a rule of civil procedure which is not symmetrical to the federal rule. *Cf.* N.C.G.S. § 1A-1, Rule 41, Comment to the 1969 Amendment (Noting that while "[s]ection 41(b) has been rewritten[ ] *in conformity with the present federal rule*," the newly amended section 41(a) was not.).[2]

2. Presumably, the General Assembly was aware of the 1967 *High* case when it amended Rule 41(a) in the way that it did in 1969.

Although the majority says that "[n]o reason is apparent sufficient to justify this inconsistency or artificial exception in our law," *Bockweg v. Anderson*, 328 N.C. at 447, 402 S.E.2d at 634, this alleged inconsistency is not a matter for the Court to remedy. It is the General Assembly's mandate to bring symmetry between North Carolina Rule of Procedure 41 and Federal Rule of Procedure 41, if that is what the General Assembly would like to do. As the majority opinion observes, the Georgia legislature amended Georgia Code § 9-2-61 in 1985 to provide a six-month tolling provision "[w]hen any case has been commenced in either a state *or federal court* . . . and the plaintiff discontinues or dismisses the same." Ga. Code Ann. § 9-2-61 (Supp. 1990) (emphasis supplied). Of course, until the Georgia legislature did so, the Georgia courts were required to apply an earlier statute which, like the present North Carolina General Statute § 1A-1, Rule 41(a)(1), did not contain a tolling provision if a case was dismissed in a federal court. *E.g.*, *Blaustein v. Harrison*, 160 Ga. App. 256, 286 S.E.2d 758 (1981) (where plaintiff's medical malpractice suit was initiated and dismissed in United States District Court for the Northern District of Georgia, plaintiff could not take advantage of the six-month tolling provision to institute action in state court after the usual two-year statute of limitations had run its course). As the majority opinion also says, like Georgia, Tennessee has apparently also amended a refiling-tolling statute to make it applicable to dismissals of federal cases. *Bockweg v. Anderson*, 328 N.C. at 445, 402 S.E.2d at 632. In North Carolina, we, too, must wait for the General Assembly to act.

This Court has inappropriately amended Rule 41 and overruled its own prior case law. I dissent.

Justice MEYER joins in this dissenting opinion.

THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF EDUCATION; AND BOB ETHERIDGE, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, PLAINTIFFS v. WHITTLE COMMUNICATIONS AND THE THOMASVILLE CITY BOARD OF EDUCATION, DEFENDANT-COUNTERCLAIMANTS, AND THE DAVIDSON COUNTY BOARD OF EDUCATION, DEFENDANT-INTERVENOR AND COUNTERCLAIMANT v. THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF EDUCATION; AND BOB ETHERIDGE, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; AND HOWARD S. HAWORTH; BARBARA M. TAPSCOTT; KENNETH R. HARRIS; TEENA SMITH LITTLE; W. C. MEEKINS, JR.; MARY B. MORGAN; PATRICIA H. NEAL; CARY C. OWEN; DONALD D. POLLOCK; PREZELL R. ROBINSON; NORMA B. TURNAGE; STATE TREASURER HARLAN E. BOYLES; AND LT. GOVERNOR JAMES C. GARDNER; IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE NORTH CAROLINA STATE BOARD OF EDUCATION, COUNTERCLAIM DEFENDANTS

No. 164PA90

(Filed 3 April 1991)

1. **Courts § 5 (NCI4th)— subject matter jurisdiction—complaint dismissed—harmless error**

The trial court's error in dismissing a complaint for lack of subject matter jurisdiction was harmless where the court correctly adjudicated the issues before it prior to deciding to dismiss the complaint.

Am Jur 2d, Courts § 105.

2. **Schools § 4.1 (NCI3d)— commercial news program—supplementary instructional materials—authority of State Board of Education**

The trial court did not err by holding that a temporary rule adopted by the State Board of Education was not binding on defendant Thomasville, which had already accepted a contract with defendant Whittle for a news program which included commercial advertising, because the General Assembly placed the procurement and selection of supplementary instructional materials under the control of local school boards. Moreover, amendments to N.C.G.S. § 115C-98(b) have removed any doubt by providing that local school boards have the authority to contract for materials containing commercial advertising without the approval of the State Board.

Am Jur 2d, Schools §§ 5-7.

3. Constitutional Law § 28 (NCI4th)— schools—commercial news program—not unconstitutional

A contract under which a news program with commercial advertising was supplied to public schools by a private company did not violate Article V, § 2(1) of the North Carolina Constitution, which provides that the power of taxation shall be used for public purposes only, where plaintiffs' premise that tax money was being spent to subsidize private business was incorrect in that the contract provided that defendant Whittle would furnish all of the equipment necessary to show the program; the school system provides only records of the number of days the program is shown and the number of students watching; and the money spent for running buses and paying teachers is the same amount that would be spent if the local school board did not enter into the contract.

Am Jur 2d, Schools §§ 91, 95.

4. Schools § 2 (NCI3d)— commercial news program—not unconstitutional

A contract under which defendant Whittle provided a news program with commercial advertising to schools did not violate Article IX, § 2(1) of the North Carolina Constitution, which provides for a general and uniform system of free public schools. Plaintiffs' argument that students are made to pay for the contract through their time spent watching the program was not convincing.

Am Jur 2d, Schools §§ 91, 95.

5. Schools § 1 (NCI3d)— commercial news program—no violation of public policy

The trial court did not err by declaring that a contract under which a news program with commercial advertising was provided to schools did not violate public policy. The legislature has given local school boards the authority to enter into contracts for supplemental instructional materials which involve commercial advertising without seeking approval of the State Board of Education. N.C.G.S. § 115C-98(b); N.C.G.S. § 115C-47(33).

Am Jur 2d, Schools §§ 91, 95.

Justice MARTIN dissenting.

Chief Justice EXUM joins in this dissenting opinion.

ON discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of an order dismissing plaintiffs' complaint entered on 8 March 1990 by *Stephens, J.*, at the 26 February 1990 Session of Superior Court, WAKE County. Heard in the Supreme Court 10 October 1990.

Lacy H. Thornburg, Attorney General, by Edwin M. Speas, Jr., Senior Deputy Attorney General, and Laura E. Crumpler, Assistant Attorney General, for the State.

Hunton & Williams, by John R. McArthur, for Whittle Communications; Russell W. Batten for Thomasville City Board of Education; and Brinkley, Walser, McGirt, Miller, Smith & Coles, by Walter F. Brinkley, for Davidson County Board of Education.

George T. Rogister, Jr., and Rod Malone for North Carolina School Boards Association, Amicus Curiae.

FRYE, Justice.

Plaintiffs bring this appeal from the order by Judge Stephens filed on 8 March 1990 which, among other things, granted defendants' motion to dismiss plaintiffs' complaint under Rule 12(b)(6), decided *ex mero motu* that plaintiffs' complaint was dismissed for lack of subject matter jurisdiction, and declared that the contracts at issue are not invalid, unlawful, or otherwise unenforceable under North Carolina law. Plaintiffs raise three issues on appeal dealing with the constitutionality of the contracts between defendant Whittle Communications, L.P. (Whittle), and the various local school boards, as well as the validity of the temporary rule adopted by the State Board of Education concerning these contracts. We conclude that the State Board of Education did not have the authority to enact the temporary rule concerning the Whittle contracts because these contracts involve the selection and procurement of supplementary materials, an area which the General Assembly has specifically placed under the control and supervision of the local school boards. We further conclude that these contracts do not violate the North Carolina Constitution or the public policy of North Carolina.

Whittle, one of the defendants in this case, is a limited partnership which writes, publishes, and distributes, among other things, educational publications. In 1988, Whittle developed a short video news program, known as *Channel One*, which was designed to keep students informed on current affairs. *Channel One* would be

provided on a daily basis to the school systems which contracted with Whittle. The daily program is twelve minutes long, and two of the twelve minutes are commercial advertising. All of the video equipment needed to show the program is given to the contracting school systems to use for the duration of the system's contract with Whittle.

Under the contract, *Channel One* would be broadcast to the individual schools at 6:00 a.m. each morning, and a staff member or committee at the school would preview the program to see if it was appropriate to be shown to the students. If appropriate, the program would be shown in its entirety during the school day. Students who do not wish to view the program would be allowed to do something else while the program was being shown to the rest of the school. The contract further provides that the program must be shown at the same time each school day and must be shown at least ninety-five per cent (95%) of the number of days on which the school is in session and the program is available in any calendar quarter. The contract requires the schools to keep detailed records as to when the program is shown and how many students are watching it.

Whittle made a presentation concerning *Channel One* to officials at the State Department of Public Instruction in July 1989 and began to make presentations to local school boards in the fall of 1989. The Davidson County Board of Education (Davidson), an intervenor defendant in this action, entered into a contract with Whittle on 29 January 1990, and the Thomasville City Board of Education (Thomasville), a defendant in this action, entered into a contract with Whittle on 8 February 1990.

The State Board of Education discussed *Channel One* at its regular January meeting and decided that it needed additional time to study the matter before its February meeting. On 1 February 1990, the State Board of Education adopted a temporary rule prohibiting local school boards from entering into a contract which

(1) Limits or impairs its authority and responsibility, or the authority and responsibility of administrators and teachers, to determine the materials to be presented to students during the school day; or

(2) Limits or impairs its authority and responsibility or the authority and responsibility of administrators and teachers,

> to determine the times during the school day when materials will be presented to students.

N.C. Admin. Code tit. 16, r. 6D .0105 (February 1990). The rule further provided:

> (b) Local boards of education are obligated to assure that students, as a consequence of the compulsory attendance laws, are not made a captive audience for required viewing, listening to, or reading commercial advertising. Therefore, no local board of education may enter into any contract or agreement with any person, corporation, association or organization, pursuant to which students are regularly required to observe, listen to, or read commercial advertising.

Id.

When this temporary rule was adopted, the State Board of Education decided that it would not be made retroactive to existing contracts; rather the rule would prohibit new contracts and the renewal of the existing contracts. The Superintendent of Public Instruction forwarded a copy of the new rule along with appropriate certification to the Office of Administrative Hearings (OAH) as a temporary rule effective immediately.

On 15 February 1990, the Administrative Rules Review Commission (Commission) met and considered the temporary rule passed by the State Board of Education on 1 February 1990. This Commission wrote a letter dated 16 February 1990 to the State Board of Education informing the Board that the Commission objected to the temporary rule "due to a lack of authority for use of the temporary rulemaking procedure and lack of statutory authority for the rule." The Commission explained further that the State Board did not have the authority to make this temporary rule because "the execution of the commercial contracts prohibited by the rule did not pose either a serious or unforeseeable threat to public welfare."

Defendant Thomasville signed a contract with Whittle, as noted earlier, on 8 February 1990, which was after the State Board of Education had enacted its temporary rule prohibiting new contracts after 1 February 1990. In a special session on 19 February 1990, the State Board of Education met and voted to amend the rule adopted 1 February 1990 in order to make the rule retroactive to existing contracts. The Superintendent of Public Instruction filed

this amendment and proper certification with the OAH as a temporary rule effective immediately.

On 19 February 1990, the State Board of Education voted to file this action against Whittle and Thomasville. The Superintendent of Public Instruction and the State of North Carolina joined the State Board of Education in filing this action which asked the court to declare void and unenforceable the contract entered into by Whittle and Thomasville on the grounds that the contract was contrary to the rules adopted by the State Board of Education, was contrary to public policy, and violated the North Carolina Constitution. The complaint filed by plaintiffs further sought to enjoin Thomasville and Whittle from implementing their contract and to enjoin Whittle from contracting with other local school boards in North Carolina.

On 19 February 1990, the State Board of Education also filed a motion for a temporary restraining order enjoining defendants from implementing the contract made by them on 8 February 1990. The motion for the temporary restraining order was granted that same day with a hearing on a preliminary injunction set for 1 March 1990. The 19 February 1990 order granting the temporary restraining order was vacated in an order filed 26 February 1990 because the original order failed to comply with Rule 65 of the Rules of Civil Procedure.

Whittle and Thomasville filed answers and counterclaims on 23 February 1990. The counterclaim asked: (1) that the court declare the contract executed by Whittle and Thomasville to be valid and enforceable; (2) that the court declare the action of the State Board of Education in adopting the temporary rule on 1 February 1990 and amending it on 19 February 1990 to be unlawful, unconstitutional, and in violation of the State Board's own rules; and (3) that the court permanently enjoin the State Board of Education from enforcing this rule. Davidson filed a motion to intervene in this action as a defendant-counterclaimant, and this motion was allowed without objection.

On 16 February 1990, Thomasville and Whittle filed a verified petition for a contested case hearing and application for stay of agency action, temporary restraining order, and preliminary injunction with the OAH. These parties filed an amended verified petition for a contested case hearing, application for stay of agency action, and preliminary injunction on 27 February 1990. On 28 February

1990, plaintiffs filed a petition in superior court for writ of certiorari and writ of supersedeas and a motion to consolidate the administrative proceeding with the complaint which was filed on 19 February 1990. Defendants Thomasville and Whittle filed a response to plaintiffs' motion asking that the superior court deny plaintiffs' motion since jurisdiction of this matter had already attached in the OAH. These matters were all consolidated and were the subject of Judge Stephens' March 1990 order from which plaintiffs now appeal.

The 8 March 1990 order adjudged and decreed:

(1) Defendant-Counterclaimants' motion to dismiss the Complaint under Rule 12(b)(6) is allowed; and, the Court on its own motion dismisses the Complaint and the counterclaim under Rule 12(b)(1) for lack of subject matter jurisdiction.

(2) Plaintiffs' petition for certiorari to review Administrative Law Judge Gray's February 27, 1990 order is allowed and such order is vacated.

(3) Upon Judicial Review under G.S. § 150B, Article 4, of the validity of the temporary rule of February 1, 1990, as amended and promulgated by the North Carolina State Board of Education, the Court holds such rule to be invalidly adopted in violation of the provisions of Article 2, G.S. § 150B and declares such rule to be void.

(4) The Court concludes that the contracts which are the subject of these proceedings are not invalid, are not unlawful and are not otherwise unenforceable under North Carolina law.

Plaintiffs filed notice of appeal to the Court of Appeals on 8 March 1990 and then filed a petition on 24 April 1990 with this Court for discretionary review prior to determination by the Court of Appeals. This petition was allowed on 10 May 1990. Plaintiffs raise three issues in this appeal: (1) whether the trial court erred in determining *ex mero motu* that it lacked subject matter jurisdiction over the complaint; (2) whether the trial court erred in failing to find that Whittle's contract is contrary to public policy and the North Carolina Constitution and therefore void; and (3) whether the trial court erred in holding that rules adopted by the State Board of Education on 1 February 1990 were not binding on defendant Thomasville. We conclude that the State Board of

Education did not have the authority to promulgate a temporary rule governing this contract because the contract involves supplementary materials, an area which the General Assembly has delegated to the local school boards to oversee. *See* N.C.G.S. § 115C-98(b) (1987). We further conclude that this contract does not violate the North Carolina Constitution and is not contrary to public policy.

[1] We first address plaintiffs' contention that the trial court erred in determining *ex mero motu* that it lacked subject matter jurisdiction over the complaint. In their complaint plaintiffs sought the aid of the court in enforcing the State Board's rules and also sought a declaration that certain contracts were void and unenforceable as against public policy and the North Carolina Constitution. Clearly the superior court is the proper forum for resolving the matters set forth in the complaint. *See* N.C.G.S. § 7A-245 (1989). There is no requirement that the agency must exhaust any administrative remedies before seeking the court's help in enforcing an administrative rule adopted by that agency or in seeking a declaration that contracts adopted in violation of the agency's rule are contrary to public policy or the constitution. Thus, we agree with plaintiffs that the trial court erred in dismissing the complaint on grounds that the court lacked subject matter jurisdiction. However, a review of the remaining conclusions in the trial court's order clearly demonstrates that the trial court correctly exercised subject matter jurisdiction over plaintiffs' complaint and decided the issues raised before it. Thus, plaintiffs received what they sought—a full adjudication of the issues raised in the complaint—and the trial court's error in dismissing for lack of subject matter jurisdiction had no effect on plaintiffs. Since the trial court correctly fully adjudicated the issues before it prior to deciding to dismiss the complaint for lack of subject matter jurisdiction and these issues are now properly before us on appeal, the trial court's error was harmless.

[2] We now turn to issue three in which plaintiffs contend that the trial court erred in holding that the temporary rule adopted by the State Board of Education on 1 February 1990 was not binding on defendant Thomasville. Plaintiffs contend the trial court incorrectly concluded both that the State Board of Education is subject to the Administrative Procedure Act (APA) found in N.C.G.S. § 150B and that the State Board of Education's actions in adopting the temporary rule on 1 February 1990 did not comply with the specific requirements for promulgating a temporary rule found in

N.C.G.S. § 150B-13. Plaintiffs assert that this temporary rule was promulgated under the authority granted to the State Board of Education by art. IX, § 5, of the North Carolina Constitution which provides in part:

> The State Board of Education shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. Const. art. IX, § 5. Plaintiffs cite *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), for the proposition that where the General Assembly has not acted to limit the power of the State Board to adopt rules on a particular subject this power is limited only by other provisions in the Constitution. According to plaintiffs, the APA rulemaking requirements only apply to rules implementing statutes, and the temporary rule promulgated on 1 February 1990 was not implementing a statute; rather the rule was implementing the North Carolina Constitution's grant of authority to the State Board found in art. IX, § 5. However, we do not have to decide whether plaintiffs' assessment is correct because at the time this temporary rule was promulgated, N.C.G.S. § 115C-98(b) was in effect and directly spoke to this issue.

Article IX, § 5 of the North Carolina Constitution, which grants the State Board the authority to "make all needed rules," also limits this authority by making it "subject to the laws enacted by the General Assembly." Thus, we must examine our statutes to ascertain whether the General Assembly has enacted laws which would limit the power of the State Board in the area of selection of materials such as *Channel One* which we conclude is a supplementary instructional material. To fully answer this question, we look to the statutory treatment of selection and procurement of supplementary instructional materials.

In 1969, the General Assembly enacted chapter 519 entitled "AN ACT TO AMEND AND REVISE ARTICLES 25 and 26 OF CHAPTER 115 OF THE GENERAL STATUTES TO AUTHORIZE COUNTY AND CITY BOARDS OF EDUCATION TO PROVIDE FOR THE SELECTION AND PROCUREMENT OF SUPPLEMENTARY TEXTBOOKS, LIBRARY BOOKS, PUBLICATIONS, AND OTHER INSTRUCTIONAL MATERIALS FOR THE PUBLIC SCHOOL

SYSTEM." 1969 N.C. Sess. Laws ch. 519, § 1.[1] Chapter 519 created Article 25A entitled "TEXTBOOKS AND INSTRUCTIONAL MATERIALS," which outlined the procedures to be used for the adoption of textbooks and supplementary instructional materials. A fair reading of the statutory scheme reveals that while local school boards may only select textbooks from a list approved by the State Board, the selection of supplementary instructional materials is left entirely to the discretion of local school boards. In the preamble to chapter 519, the General Assembly provided an explanation for the adoption of Article 25A. As for the selection of supplementary materials, this preamble specifically provided: "it is desirable that the selection of supplementary instructional materials be made by each school administrative unit . . . ." *Id.*

With only minor differences, N.C.G.S. § 115-206.14(b), which was codified in 1969 in chapter 519, is identical to N.C.G.S. § 115C-98(b) which was in effect at the time the State Board of Education enacted the temporary rule in question. Section 115C-98(b) provides in part:

> Local boards of education shall adopt written policies concerning the procedures to be followed in their local school administrative units for the selection and procurement of supplementary textbooks, library books, periodicals, and other instructional materials needed for instructional purposes in the public schools of their units.

N.C.G.S. § 115C-98(b) (1987). When N.C.G.S. § 115-206.14(b) was enacted, the General Assembly also enacted § 115-206(13), presently found at § 115C-97, which authorized the State Board of Education to discontinue handling supplementary books and other supplementary instructional materials. *See* N.C.G.S. § 115C-97 (1987).

As noted earlier, chapter 519, which was codified as Article 25A of the General Statutes, set out the procedures for adoption

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1. We note that chapter 519 of the 1969 Session Laws created Article 25A of the General Statutes, codified as N.C.G.S. § 115-206.1 *et seq.* The 1981 General Assembly recodified all of Chapter 115 of the General Statutes. *See* 1981 N.C. Sess. Laws ch. 423, § 1. The statutes relevant to this appeal were first enacted in 1969, and their language remained virtually unchanged by the recodification in 1981. Rather than including parallel citations to both the 1969 version and the 1981 recodification of the statutes, we will only include a citation to the version in effect when this action was brought and provide reference in the text of the opinion to the 1969 version enacted by chapter 519.

of textbooks as well as supplementary instructional materials. The General Statutes clearly provide that the State Board of Education is to adopt textbooks. *See* N.C.G.S. § 115C-86 (1987). Section 115-106.14(a), now codified at § 115C-98(a), directed the local school boards to adopt rules and regulations concerning the local operation of the textbook program, but these rules and regulations were not to be "inconsistent with the policies of the State Board of Education concerning the local operation of the textbook program." N.C.G.S. § 115C-98(a) (1987).

The General Statutes do not contain a similar direction to the State Board of Education for the adoption of supplementary instructional materials. The only statute which speaks to this issue is N.C.G.S. § 115C-98(b) which directs each local school board to adopt "written policies concerning the procedures" used in the adoption of supplementary instructional materials in its own unit. N.C.G.S. § 115C-98(b) (1987). Furthermore, this statute contains no limitation on the local school boards' directive to adopt these written policies on supplementary instructional materials similar to the limitation concerning the local adoption of rules dealing with the local operation of the textbook program found in § 115C-98(a). The only limitation found in section (b) of the statute concerning supplementary instructional materials is that these "materials shall neither displace nor be used to the exclusion of basic textbooks." N.C.G.S. § 115C-98(b) (1987). Thus, the General Assembly, by adopting chapter 519 in 1969, placed the decision-making process for the selection and procurement of these supplementary instructional materials in the exclusive domain of the local school boards while clearly making the rules adopted by the local boards concerning textbooks subject to the policies of the State Board. This legislative policy of allowing local school boards to have control over the adoption and procurement of supplementary instructional materials has remained undisturbed since its enactment by the General Assembly in 1969.

Since *Channel One* is a supplementary instructional material and since the General Assembly placed the procurement and selection of supplementary instructional materials under the control of the local school boards, the State Board acted in excess of its authority in enacting this rule because the State Board had no authority to enact a rule on this subject. Thus, deciding whether the State Board had the authority, absent legislative action, to enact this rule through direct constitutional authority and deciding

whether the APA provisions concerning the adoption of temporary rules apply are not necessary to a resolution of this issue.

We further note that if there was any doubt as to whether materials which involved commercial advertising in general were included in the provision of § 115C-98(b) as it existed at the time the temporary rule was adopted, the 1990 Session of the North Carolina General Assembly removed the doubt by amending this statute and providing that the local school boards have the authority to contract for materials containing commercial advertising without the approval of the State Board. In its amended form the statute now provides:

> (b) Local boards of education shall adopt written policies concerning the procedures to be followed in their local school administrative units for the selection and procurement of supplementary textbooks, library books, periodicals, *audio-visual materials*, and other supplementary instructional materials needed for instructional purposes in the public schools of their units.
>
> *Local boards of education shall have sole authority to select and procure supplementary instructional materials, whether or not the materials contain commercial advertising, to determine if the materials are related to and within the limits of the prescribed curriculum, and to determine when the materials may be presented to students during the school day. Supplementary materials and contracts for supplementary materials are not subject to approval by the State Board of Education.*
>
> Supplementary books and other instructional materials shall neither displace nor be used to the exclusion of basic textbooks.

N.C.G.S. § 115C-98(b) (Cum. Supp. 1990) (emphasis added reflects the 1990 amendments).

Section 115C-47 which enumerates the powers or duties of the local boards of education was also amended by the 1990 Session to add:

> (33) Local boards of education shall have sole authority to select and procure supplementary instructional materials, whether

> or not the materials contain commercial advertising, pursuant to the provisions of G.S. 115C-98(b).

N.C.G.S. § 115C-47(33) (Cum. Supp. 1990).

These amendments were enacted as a part of the "Capital Improvement Appropriations Act of 1990" and became effective 1 July 1990. *See* 1989 N.C. Sess. Laws (Reg. Sess. 1990) ch. 1074. These amendments clearly provide that the local school boards have the power, without the need of approval of the State Board of Education, to select and contract for supplementary materials, including those which contain commercial advertising such as the contracts at issue in this case. *See* N.C.G.S. § 115C-98(b) and -47(33) (Cum. Supp. 1990). Through these amendments the General Assembly made clear what the statutes already provided—that decisions concerning the procurement of supplementary instructional materials, including those which involve commercial advertising, are to be made exclusively by the local school boards without having to seek approval of the State Board. Thus, the State Board had no authority to make rules regarding supplementary instructional materials, an area which was and still is under the supervision of the local school boards rather than the State Board. Therefore, the trial court did not err in holding that the temporary rule adopted by the State Board on 1 February 1990 was not binding on defendant Thomasville.

[3] We now turn to plaintiffs' remaining issue concerning whether Whittle's contract is void because it violates the North Carolina Constitution and is contrary to public policy. We will first consider plaintiffs' constitutional arguments and then address the public policy argument.

Plaintiffs claim that the contract violates both article V, § 2(1) and article IX, § 2(1) of the North Carolina Constitution. Article V, § 2(1) provides: "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." N.C. Const. art. V, § 2(1). Article IX, § 2(1) provides in part: "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools." N.C. Const. art. IX, § 2(1).

Plaintiffs contend that the "public purposes only" limitation of article V, § 2(1) is violated when tax dollars are used, directly or indirectly, to subsidize private business. Plaintiffs claim that the Whittle contract violates this public purpose limitation under

the North Carolina Constitution because tax dollars are being spent under this contract to further Whittle's business and because the purpose of the contract is to further Whittle's private business and the business of the commercial sponsors of *Channel One*. Plaintiffs claim that tax dollars are being spent to further private enterprise through this contract because tax funds are being spent to pay for buses and gasoline to get the students to school every day and to pay the salaries of the teachers who supervise the students while they watch the program during the school day. Plaintiffs perform some mathematical computations and reach the conclusion that the contract with Whittle is costing taxpayers "roughly four million dollars per school year," based on the amount of time students spend watching the program and the amount of tax money spent to maintain the public schools.

Plaintiffs cite no authority for their contention that this contract results in the expenditure of tax money, and we find no authority which supports their contention. Aside from the money which is spent to furnish the electricity to run the machinery required for showing the *Channel One* program, which would be nothing more than a *de minimis* expenditure, we see no expenditures of tax money for showing the program. The contract provides that Whittle will furnish all of the equipment necessary to show the program, and the school system only provides the records showing the number of days the program is shown and the number of students watching it. The money spent for running buses and paying teachers is the same amount that would be spent if the local school board did not contract with Whittle to show *Channel One*; no further tax money is being expended to support this contract. Thus, plaintiffs' original premise that tax money is being spent to subsidize private business is incorrect. Since no tax money is being spent for the program, article V, § 2(1) is not applicable to this situation, and we need not address whether the expenditure of tax money is for a "public purpose" as required by the North Carolina Constitution. *See* N.C. Const. art. V, § 2(1). Therefore, we conclude that the contract does not violate article V, § 2(1).

[4] Plaintiffs also contend that the contract violates the requirement for a "general and uniform system of free public schools" found in article IX, § 2(1) of the North Carolina Constitution. According to plaintiffs, the equipment provided by Whittle to the schools is not free because students pay for it with the time they spend watching commercial advertising for Whittle's financial benefit

and the benefit of the *Channel One* advertisers. Citing *Sneed v. Greensboro Board of Education*, 299 N.C. 609, 264 S.E.2d 106 (1980), plaintiffs argue that charging students in time rather than in dollars is *per se* an unreasonable charge within the meaning of *Sneed*.

The plaintiffs in *Sneed* contended that the incidental course and instructional fees charged by the local school board violated the constitutional provision requiring free public schools. *Id.* at 612, 264 S.E.2d at 110. This Court concluded that there was "no constitutional bar to the collecting by our public schools of modest, reasonable fees for the purpose of enhancing the quality of their educational effort." *Id.* at 610, 264 S.E.2d at 108. The fees involved in *Sneed* ranged from $4 to $7 per semester, and the Court viewed these fees as "reasonable and their burden *de minimis.*" *Id.* at 617 n.5, 264 S.E.2d at 113 n.5.

Sneed does not provide any authority for the proposition that charging students in time is the same thing as charging them in dollars, and plaintiffs provide no authority for their contention that the students are being "charged" to watch *Channel One* by the time they spend watching the program. Furthermore, the contract clearly provides that students are not required to watch the program, and the students do not have to "spend their time" watching the program if they do not wish to do so. Therefore, any comparison to *Sneed* is lost because *Sneed* involved mandatory fees, and watching *Channel One* is not mandatory. We do not find convincing plaintiffs' argument that students are being made to pay for the contract through their time spent in watching the program, and we reject this argument. We conclude that the contract does not violate article IX, § 2(1).

[5] Plaintiffs also contend that the contract violates the public policy of the State and is therefore void. The general rule in North Carolina is that absent "constitutional restraint, questions as to public policy are for legislative determination." *Gardner v. North Carolina State Bar*, 316 N.C. 285, 293, 341 S.E.2d 517, 522 (1986) (citing *Martin v. Housing Authority*, 277 N.C. 29, 175 S.E.2d 665 (1970)). In the present case the legislature spoke specifically to this issue when it amended N.C.G.S. § 115C-98(b) and added N.C.G.S. § 115C-47(33) which were set out earlier in this opinion. Both sections give local school boards the authority, without seeking approval of the State Board of Education, to enter into contracts for supplementary instructional materials which involve commercial

advertising. *See* N.C.G.S. § 115C-98(b) and -47(33) (Cum. Supp. 1990). These amendments are an expression of the legislature regarding the public policy of this State on this matter.

"Whether the public policy established by [these provisions of the statutes] is wise or unwise is for determination by the General Assembly" unless the statute is determined to be unconstitutional. *Martin v. Housing Authority*, 277 N.C. at 41, 175 S.E.2d at 672 (citations omitted). The General Assembly has set the public policy in the present situation so that the State Board of Education does not have any authority over the contracts which local school boards may enter into concerning the purchase of supplementary instructional materials even if these materials involve commercial advertising. In this appeal, plaintiffs have not challenged the constitutionality of these amendments to the statutes, and we have already determined that the contract itself does not violate article V, § 2(1) or article IX, § 2(1) of the North Carolina Constitution. Under these circumstances, we will not second-guess the General Assembly's statement of public policy as set out in these amendments to the statutes. *See Martin v. Housing Authority*, 277 N.C. at 41, 175 S.E.2d at 671-72.

For the reasons set out above, we conclude that the trial court had subject matter jurisdiction over plaintiffs' complaint and did not err in declaring that the Whittle contract does not violate the North Carolina Constitution or public policy. We further conclude that the State Board did not have authority to promulgate the temporary rule of 1 February 1990. For these reasons, we affirm the trial court's order dismissing plaintiffs' complaint.

Affirmed.

Justice MARTIN dissenting.

I respectfully dissent from the majority opinion. There are three basic grounds for my dissent which I shall discuss separately.

I.

Citing N.C.G.S. § 115C-98(b), the majority first holds that the State Board of Education did not have authority to promulgate a temporary rule governing the subject contract with Whittle because the contract involves supplementary instructional materials, an area

whose oversight the General Assembly had exclusively delegated to local school boards. I find this to be an erroneous statement of law.

As the majority states, Article IX, section 5 of the Constitution of North Carolina mandates that "The State Board of Education shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly." The majority then argues that the legislation in N.C.G.S. § 115C-98(b) grants to the local school boards the exclusive authority over supplemental instructional materials needed for the respective schools and therefore the State Board has no authority to promulgate a rule with respect to supplemental instructional materials. N.C.G.S. § 115C-98 reads in pertinent part:

> (b) Local boards of education shall adopt written policies concerning the procedures to be followed in their local school administrative units for the selection and procurement of supplementary textbooks, library books, periodicals, and other instructional materials needed for instructional purposes in the public schools of their units.

This subsection does not grant the local boards of education *exclusive* authority to purchase for their schools all supplementary instructional materials. The statute simply requires the local boards to adopt written policies concerning the procedures to be followed for the selection and procurement of supplementary instructional materials. It in no way grants to the local boards the sole authority with respect to such materials. In truth, the amendment to this statute adopted in 1990 was for the purpose of granting the local boards sole and exclusive authority to procure supplementary instructional materials and does so. If the local boards had this exclusive authority prior to the 1990 amendment, the amendment would indeed have been unnecessary and useless. Even a casual reading of subsection 98(b) as it existed at the time this contract was entered into discloses that this statute simply required that local boards adopt written policies concerning the procedures to be followed in the selection and procurement of such materials; it in no wise granted to the local boards the exclusive and sole authority with respect to such materials. To reach the conclusion desired by the majority it is necessary to interpret the statute contrary to the plain meaning of the words used by the General

Assembly. I find the majority opinion to be in error in adopting this argument.

II.

Assuming for the purpose of argument that N.C.G.S. § 115C-98(b), as it existed at the time of the execution of the Whittle contract, did grant the local boards sole and exclusive authority over supplemental instructional materials, I do not find that the rule promulgated by the State Board of Education in any way interfered with the exercise of that authority by the Thomasville City Board of Education. The temporary rule adopted by the State Board of Education on 1 February 1990 prohibited any local school board from entering into a contract which

> (a) Limits or impairs its authority and responsibility, or the authority and responsibility of administrators and teachers, to determine the materials to be presented to students during the school day; or
>
> (b) Limits or impairs its authority and responsibility or the authority and responsibility of administrators and teachers, to determine the times during the school day when materials will be presented to students.
>
> . . .
>
> 2. Local boards of education are obligated to assure that students, as a consequence of the compulsory attendance laws, are not made a captive audience for required viewing, listening to, or reading commercial advertising. Therefore, no local board of education may enter into any contract or agreement with any person, corporation, association or organization, pursuant to which students are regularly required to observe, listen to, or read commercial advertising.

N.C. Admin. Code tit. 16, r. 6D .0105 (February 1990). Under paragraph (a) of the temporary rule, the State Board of Education prohibited the Thomasville School Board from entering into a contract which impaired its authority and responsibility to determine what materials would be presented to the students during the school day. In other words, this rule prevented the local school board, local school administrators, and teachers from delegating by contract to Whittle the determination of what materials would be presented to the students during the school day. This part

of the rule does not impair the authority of the local school board to procure supplementary instructional materials, but simply prevents the local school board from failing to exercise its duties and responsibilities in determining what materials should be used to educate the students during the school day.

By executing the Whittle contract, the local board delegated to Whittle the determination of what materials would be presented to the students during the twelve minutes when Channel One was to be exhibited to the students. Although a representative of the school could preview the Channel One program each day to determine if it was appropriate to be shown to students, the school was required under the contract to exhibit the program to students at least ninety-five percent of the number of days that school was in session. In effect, the school had no meaningful control over what materials would be used under the Whittle contract. This was in violation of the rule adopted by the State Board of Education and is a sufficient ground to invalidate the Whittle contract. Yet, paragraph (a) in no way infringes upon or impairs the alleged exclusive authority that the local school boards had at the time of the Whittle contract to procure supplementary instructional materials.

Likewise, in paragraph (b) above the State Board of Education by its rule proscribed the local school board from failing to carry out its authority and responsibility to determine the *times* during the school day when materials would be presented to the students. Again, it is the duty of the local school board, administrators, and teachers to determine when during the school day certain educational materials should be presented to the students. Under the Whittle contract, the local board of education *and* Whittle determined the times during the school day that Channel One would be presented to the students. By entering into this contract the local board failed to carry out its duty under the rules issued by the State Board.

In discussing this issue, the majority apparently assumes that N.C.G.S. § 115C-97 authorized the State Board of Education to "discontinue handling . . . supplementary instructional materials." However, an examination of the statute reveals that it authorizes the State Board of Education to discontinue the adoption of supplementary *textbooks* and discontinue the *distribution* of supplementary textbooks as well as the purchase and resale of library books.

Nowhere in the statute is the State Board of Education authorized to "discontinue handling . . . supplementary instructional materials."

Under paragraph 2 of the temporary rule, the local boards could not compel students to view commercial advertising; this part of the rule was based upon the compulsory attendance laws. It is plainly apparent that paragraph 2 of the rule does not in any way affect the authority of the local board to procure supplementary instructional materials, as it only prohibits the local board from requiring students to view commercial advertising. The authority granted the local boards under subsection 98(b) is not impaired.

For these reasons, assuming local boards were granted exclusive authority to procure supplementary instructional materials prior to the amendment of N.C.G.S. § 115C-98(b), the rule adopted by the State Board of Education in no way conflicted with or impaired such authority of the local board. The statute and the temporary rule are not mutually exclusive. Thus, by executing the Whittle contract the Thomasville School Board violated the temporary rule of the State Board of Education.

III.

Finally, N.C.G.S. § 115C-98(b), the statute in effect at the time of the Whittle contract, referred to supplementary *instructional* materials *needed for instructional purposes* in the public schools. In order for the local board to procure materials pursuant to this statute the materials must be supplementary, they must be instructional, and they must be needed for instructional purposes. The materials in question were supplementary. However, there is a serious issue as to whether Channel One is instructional. The evidence discloses that the students are not required to use Channel One in any way. They are not required to view it, and during the time when it is being exhibited every student in the school could absent himself from the showing of Channel One. How can materials be instructional if the students are not required to use them? Further, there is no evidence that any teacher or other person explains Channel One or uses it in any way while it is being exhibited or thereafter. No teacher expounds upon Channel One to any students, whether assembled to watch Channel One or in any other way. In short, Channel One is not used as instructional material. Also, there is no evidence that students are tested in any way upon the matters broadcast over Channel One. No teacher ques-

tions any student concerning his viewing of Channel One, and no student is required to prepare any essay or other written material concerning Channel One. The students are not in any way required to demonstrate any knowledge of the materials contained in Channel One that they might acquire *en passant*. It is apparent that whatever is broadcast over Channel One is not "instructional" material, but is more in the nature of entertainment which students might enjoy during recess.

The record also does not contain any evidence that these materials are *needed for instructional purposes* as required by the statute. Having viewed the Channel One programs submitted to this Court as exhibits, I find nothing in those materials which is needed for instructional purposes for the students. The materials are admittedly edited and designed for exhibition to persons of school age. Such preparation of materials creates the risk that the program may be slanted to favor the best interests of Whittle and its advertisers.[1] Also, one-sixth of the total program is devoted to commercial advertising of such things as Snickers candy bars, Coca Cola, and other goods which would appeal to school-age children. I doubt that it can be said that the advertisements contained in Channel One broadcasts are needed for instructional purposes as recognized by the statute, or portray products which are beneficial to the students.

A recent study by the Southeastern Educational Improvement Laboratory in Research Triangle Park[2] surveyed 3,000 high school students and 140 teachers in North Carolina and Mississippi concerning Channel One.[3] This survey reviewed twenty-six schools in North Carolina. The students were tested twice, in October and December 1990, on current events. This study found that such programs had no significant effect on what students retained unless teachers reinforced the broadcasts with additional lessons. Further,

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1. All school instructional materials should be for the best interests of the students, not commercial ventures.

2. A summary of this study appeared in the Raleigh News and Observer newspaper on 21 March 1991.

3. CNN Newsroom has a somewhat similar program; however, it does not use commercials nor does it require schools to show at least ninety percent of its broadcasts as required by Channel One in order to keep the video equipment which schools receive on loan as consideration for exhibiting the commercial advertisements.

the students responded that they thought that the products advertised during the broadcast were good for them because they would not be shown in the school if this were not true. This study is a challenging indictment of the Channel One program and lends support to the conclusion that these materials are not instructional and are not needed for instructional purposes within the meaning of the controlling statute.

For these reasons I respectfully dissent from the majority's opinion. Channel One does not improve the education of North Carolina's school children. The contract in this case is in actuality a means by which schools acquire the use of television equipment by allowing Channel One to broadcast commercial advertising to the school students. Channel One is neither instructional nor needed for instructional purposes. To the contrary, it endorses and exacerbates the prevalent habit of watching TV which inhibits the education of our school children. As demonstrated, by contracting with Whittle Thomasville has failed to carry out its duties concerning the materials which may be used in the school program, when they may be used, as well as by procuring materials which are neither instructional nor needed within the meaning of the controlling statute. The board did not have authority to so contract with Whittle. My vote is to reverse.

Chief Justice EXUM joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. MARK EDWARD THOMPSON

No. 217A90

(Filed 3 April 1991)

1. Criminal Law § 17 (NCI4th)— insanity—presumption of sanity—burden of proof not shifted

The trial court did not err in a prosecution for burglary, armed robbery, and murder by instructing the jury that everyone is presumed sane and that soundness of mind is the natural and normal condition of people. The cases relied upon by defendant, *Francis v. Franklin*, 471 U.S. 307, and *Sandstrom v. Montana*, 442 U.S. 510, prohibit the use of presumptions which would shift the burden of proof of any

essential element of the offense. The presumption of sanity does not relieve the State of its burden of proof of any essential element of the crimes committed in this case.

Am Jur 2d, Criminal Law § 111; Trial § 742.

2. **Criminal Law § 767 (NCI4th)— insanity—instruction—burden of proof not shifted**

The trial court's instruction on insanity in a prosecution for burglary, armed robbery, and murder did not violate due process by shifting the burden of proof on the *mens rea* element of first degree murder or the scienter elements of burglary and armed robbery.

Am Jur 2d, Criminal Law § 111; Trial § 742.

3. **Criminal Law § 771 (NCI4th)— insanity—requested instruction refused—no error**

The trial court in a prosecution for murder, burglary, and armed robbery did not err by refusing to give defendant's instruction on "knowing the nature and quality of the act" where defendant's requested instruction, in light of the expert testimony in this case, would have tended to confuse rather than enlighten the jury.

Am Jur 2d, Trial §§ 738, 739.

4. **Criminal Law § 413 (NCI4th)— right to open and close arguments—denied—insanity defense**

The trial court did not err in a prosecution for burglary, armed robbery, and murder by denying defendant the opportunity to open and close the final arguments because he bore the burden of proving his sanity. Although defendant contends that *State v. Battle*, 322 N.C. 69, can be distinguished by the prosecution's less than accurate arguments in this case, defendant did not object to the prosecutor's argument and has brought forth no assignment of error complaining of prosecutorial misconduct.

Am Jur 2d, Trial § 213.

5. **Criminal Law § 793 (NCI4th)— insanity—acting in concert—requested instruction given in substance**

The correct portion of defendant's requested instruction on acting in concert as it relates to insanity was given in

substance in a prosecution for burglary, armed robbery, and murder.

Am Jur 2d, Trial §§ 738, 739.

6. **Criminal Law § 46.1 (NCI3d)— flight—requested instruction denied—evidence not sufficient**

The trial court did not err in a prosecution for burglary, armed robbery, and murder by denying defendant's requested jury instruction on flight from the scene. Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight; there must also be some evidence that defendant took steps to avoid apprehension. Although defendant contended here that the prosecution's argument was the equivalent of an argument that defendant was taking steps to avoid apprehension, nowhere in the prosecutor's argument was there any contention that there was flight by defendant.

Am Jur 2d, Trial §§ 788, 789.

7. **Homicide § 24.1 (NCI3d)— murder—use of deadly weapon—requested instruction given in substance**

The trial court did not err in a murder prosecution by refusing defendant's requested jury instruction on the use of a deadly weapon, malice, and premeditation and deliberation where defendant's requested language was taken almost verbatim from an appellate opinion concerning legal sufficiency of the evidence to support the jury's finding of premeditation and deliberation. This statement was not intended to be a jury instruction and it is confusing and not helpful to instruct a jury in terms of what an appellate court will consider sufficient to sustain a jury finding. Moreover, the trial court gave defendant's requested instruction in substance.

Am Jur 2d, Trial §§ 589-592.

8. **Criminal Law § 43.4 (NCI3d)— murder—photographs of victims—admissible**

The trial court did not err in a prosecution for murder, burglary, and armed robbery by admitting photographs of the victims. Although some of the photographs were gruesome, they were relevant to illustrate the testimony of two State's witnesses and were not excessive or repetitious. Moreover,

the court gave cautionary instructions on the use of photographs for illustrative purposes.

Am Jur 2d, Homicide §§ 417-419; Trial § 682.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.

9. **Criminal Law § 1123 (NCI4th)— burglary and robbery—sentencing—nonstatutory aggravating factor—planning**

The trial court did not err during sentencing for burglary and robbery convictions by finding as a nonstatutory aggravating factor that the burglary and robberies were planned, premeditated and deliberate. It was clear that the defendant took extraordinary steps to prepare for the commission of the crimes and it is apparent that what the sentencing judge actually found was that the extraordinary planning in this case exceeded that which is ordinarily present or inherent in the crimes of first degree burglary and armed robbery. The additional finding that the offenses were premeditated and deliberate was surplusage. N.C.G.S. §§ 15A-1340.4(a), 15A-1340.3.

Am Jur 2d, Burglary § 73.5; Criminal Law §§ 598, 599; Robbery § 84.

10. **Criminal Law § 1128 (NCI4th)— burglary and robbery—sentencing—aggravating factor—victims helpless and defenseless**

The trial judge did not err when sentencing defendant for burglary and robbery by considering the age of the victims, the location of their home in a rural area, and the fact that one of the victims was asleep at the time of the crimes in finding in aggravation that defendant took advantage of the victims being helpless and defenseless. The evidence supports the finding that the victims were vulnerable and helpless and that defendant took advantage of their situation. A person who is attacked while asleep is in a more vulnerable position than one who is conscious of his surroundings and *State v. Underwood*, 84 N.C. App. 408, is overruled to the extent it conflicts with this decision.

Am Jur 2d, Burglary § 73.5; Criminal Law §§ 598, 599; Robbery § 84.

STATE v. THOMPSON

[328 N.C. 477 (1991)]

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing consecutive sentences of life imprisonment entered by *Herring, J.*, on 25 September 1989, in Superior Court, NEW HANOVER County. Defendant's motion to bypass the Court of Appeals on additional judgments allowed by the Supreme Court 1 June 1990. Heard in the Supreme Court 11 December 1990.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

William O. Richardson and Richard B. Glazier for defendant-appellant.

FRYE, Justice.

On 2 February 1987, the Cumberland County Grand Jury indicted defendant on first degree burglary, robbery with a dangerous weapon and first degree murder charges. The first count of the indictment charged defendant with breaking and entering the occupied dwelling house of Paul H. and Janie M. Kutz during the nighttime between the hours of 11:30 p.m. on 1 December 1986 and 12:30 a.m. on 2 December 1986, with the intent to commit larceny therein, in violation of N.C.G.S. § 14-51. Counts two and three of the indictment charged defendant with unlawfully, willfully and feloniously taking and carrying away, by means of an assault with a deadly weapon, and from the person and presence of Paul H. and Janie M. Kutz, specifically described personal property, whereby the lives of Paul H. and Janie M. Kutz were endangered, in violation of N.C.G.S. § 14-87. Counts four and five of the indictment charged defendant with the murder of Paul H. and Janie M. Kutz in violation of N.C.G.S. § 14-17. All of the offenses were alleged to have occurred between the dates of 1 December 1986 and 2 December 1986. On defendant's motion, Judge Giles Clark ordered a change of venue from Cumberland County to New Hanover County where the trial took place.

The State presented evidence which tended to show that defendant, Mark Edward Thompson, age seventeen, was in the army and stationed at Fort Bragg, North Carolina, when the crimes occurred. In November of 1986, defendant and Jeff Meyer (Meyer), age twenty, were playing Dungeons and Dragons, a game of adventure in a medieval setting, where several Ninja assassins go into the house of an elderly couple and assassinate them.

On 1 December 1986, dressed in their Ninja outfits, defendant and Meyer broke into the Kutz home in rural Cumberland County around 11:15 p.m. The defendant and Meyer chose the Kutz home because it had something like a moat around it, which matched particular features of the game they were playing. After breaking into the house they found Mr. Kutz, age sixty-nine, in a recliner and Mrs. Kutz, age sixty-two, asleep in the bedroom. They killed Mr. Kutz by stabbing him seventeen times. They killed Mrs. Kutz by stabbing her twenty-five times.

Defendant and Meyer stole jewelry, credit cards and a television from the Kutz home. They drove back to Fort Bragg, still dressed in their Ninja outfits, and were stopped by military police because they were in an off-limits area. The officer who stopped them saw a knife, some jewelry, and a television set inside the vehicle. Upon searching the truck, the officer found credit cards and business papers which belonged to Paul Kutz. Another military police officer found two pairs of latex gloves with blood on them in the truck. The officers then contacted the Cumberland County Sheriff's Department. Deputy Stewart was sent to the Kutz residence. Deputy Stewart went inside the Kutz home and found the dead bodies of Mr. and Mrs. Kutz.

An autopsy was performed on both victims. Laboratory experts found the following: 1) One of the Ninja shoes defendant was wearing was consistent with a footwear impression found on a seat cushion from the living room of the Kutz home; 2) The cushion was on a chair located under the front window; 3) Blood on the butterfly knife, found closest to defendant when stopped, matched the blood type of Mrs. Kutz; 4) Fibers from Mrs. Kutz's nightgown matched fibers on the knife found next to defendant; 5) Fibers from Mrs. Kutz's bed blanket and also her quilt matched those found on the same knife; 6) A fiber found on defendant's shirt matched the fibers of Mrs. Kutz's bedsheet; and 7) A carpet fiber found on defendant's pants matched the carpet in the den where Mr. Kutz's body was found.

Defendant confessed to being present at the time of the murders, stealing the property, and watching Meyer stab Mrs. Kutz. Defendant stated in his confession that Meyer broke into the house and opened the front door for defendant to enter the house. Defendant later confessed to his psychologist that he participated in the stabbing of Mrs. Kutz.

Defendant presented an insanity defense. Dr. Rollins, a forensic psychiatrist at Dorothea Dix Hospital, testified that defendant had a personality disorder and was emotionally unstable, but at the time he committed the crimes, defendant knew the nature, quality, and wrongfulness of his acts. Dr. Logan, a forensic psychiatrist at the Menniger Clinic in Topeka, Kansas, testified that defendant had an identity disorder and that he knew the nature of the crimes, but he did not realize the moral impact of what he was doing. However, Dr. Logan later testified defendant knew the killing was morally wrong, but defendant quickly retreated into a fantasy. Dr. Foster, a forensic psychologist with the Federal Bureau of Prisons in Rochester, Minnesota, testified that in his opinion defendant was not psychotic, that he knew right from wrong in a sense of cognitive knowing, but could not appreciate the quality of his act.

The jury found defendant guilty of first degree burglary, two counts of robbery with a dangerous weapon, and two counts of first degree murder. After hearing evidence in the penalty phase, the jury recommended that defendant be sentenced to life imprisonment on both counts of first degree murder. The trial judge sentenced defendant to two consecutive terms of life imprisonment for murder and an additional consecutive life term for first degree burglary plus forty years imprisonment for the combined counts of robbery with a dangerous weapon. Defendant appealed.

[1] The first question we address is whether the trial court committed reversible error in instructing the jury that everyone is presumed sane and that soundness of mind is the natural and normal condition of people. We conclude that the trial court did not err.

Defendant contends that the part of the North Carolina Pattern Jury Instructions which states that "everyone is presumed sane" and that "soundness of mind is the natural and normal condition of people" is an unconstitutional burden shifting jury charge and blatantly at odds with *Francis v. Franklin*, 471 U.S. 307, 85 L. Ed. 2d 344 (1985), and *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39 (1979). Defendant contends that *Franklin* and *Sandstrom* prohibit the use of conclusive or even rebuttable presumptions against the defendant in any criminal case.

In *Franklin*, the trial court instructed the jury that "the acts of a person of sound mind and discretion are presumed the product

of a person's will, but the presumption may be rebutted and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." 471 U.S. at 316, 85 L. Ed. 2d at 354. The Supreme Court held in *Franklin*, that the instruction at issue "undeniably created an unconstitutional burden-shifting presumption with respect to the element of intent." 471 U.S. at 318, 85 L. Ed. 2d at 356. In *Sandstrom*, the trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Supreme Court found that the instruction violated the defendant's Fourteenth Amendment right to due process because it tended to relieve the State of the burden of proof, on the critical question of state of mind. 442 U.S. at 524, 61 L. Ed. 2d at 51.

The cases relied upon by the defendant prohibit the use of presumptions which relieve the State of the burden of proof of any essential element of the offense. The presumption of sanity does not relieve the State of its burden of proof of any essential element of the crimes committed in this case. In *State v. Marley*, 321 N.C. 415, 364 S.E.2d 133 (1988), this Court concluded that the nature of the insanity defense is a separate issue from proof of the elements of a crime. Just as in *Marley*, the trial judge in this case instructed the jury that it could not consider the issue of defendant's insanity unless it first found beyond a reasonable doubt the existence of each element of the five crimes for which the defendant had been charged. There was nothing in the trial judge's instruction, considered as a whole, which would lead the jury to understand the instructions to mean that the State was relieved of its burden to prove all of the essential elements of each of the five crimes.

If we could not presume sanity, the State would have to prove sanity in every case, and there would be no burden of proof of insanity on the defendant. This Court has reaffirmed the presumption of sanity in many cases. *See State v. Battle*, 322 N.C. 69, 366 S.E.2d 454 (1988); *State v. Heptinstall*, 309 N.C. 231, 306 S.E.2d 109 (1983); *State v. Jones*, 293 N.C. 413, 238 S.E.2d 482 (1977). The defendant in the present case has not provided an argument sufficient to cause an overturning of the well-established precedent of this Court.

[2] In defendant's second argument, defendant contends that the trial court committed reversible error in placing the burden of proof on the issue of insanity on defendant in violation of his due process right to have the prosecution prove every element of the crime beyond a reasonable doubt. Defendant contends that the instruction at issue violates due process by shifting the burden of proof on the *mens rea* element of first degree murder as well as the scienter elements of burglary and robbery with a dangerous weapon.

Defendant concedes that this Court rejected this very argument in *State v. Evangelista*, 319 N.C. 152, 353 S.E.2d 375 (1987), and *State v. Mize*, 315 N.C. 285, 337 S.E.2d 562 (1985). However, he requests that we reconsider our previous decisions on this matter. We decline to overrule these cases. *See State v. Battle*, 322 N.C. 69, 366 S.E.2d 454.

[3] In defendant's third assignment of error, he contends that the trial court committed reversible error in refusing to grant his requested jury instruction on the definition of "knowing the nature and quality of the act" as that term is used in the North Carolina Pattern Jury Instruction on insanity. It is defendant's contention that the testimony of expert witnesses concerning his mental state indicated that he could not appreciate the quality of the acts which occurred on 1 December 1986, or the fact that anyone was killed. According to defendant, a definition of the term "knowing" was required. The defendant requested the following jury instruction in connection with his insanity defense:

> The definition of "knowing" in this context encompasses more than just minimal awareness of facts or the ability to mechanically repeat what has happened. Knowledge, for purposes of this test, exists when defendant is able to evaluate his conduct in terms of its actual impact upon himself and others and when he is able to appreciate the total setting in which he is acting.

The trial court refused to give this instruction. We find no error.

North Carolina utilizes the *M'Naghten* rule, and our cases have stated the test for insanity as follows:

> [A]n accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime, and at the time of so

> doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act he is doing, or, if he does know this, incapable of distinguishing between right and wrong in relation to such act.

State v. Johnson, 298 N.C. 47, 65-66, 257 S.E.2d 597, 612 (1979) (quoting *State v. Swink*, 229 N.C. 123, 125, 47 S.E.2d 852, 853 (1948)). In most *M'Naghten* jurisdictions the word "know" is not defined at all, leaving the jury free to determine the meaning on the basis of the expert testimony received at trial. W. LaFave and A. Scott, *Substantive Criminal Law*, § 4.2 (1986). The failure to define "knowing" has been explained as follows:

> An expansive definition of "knowing" may create two significant difficulties. First, expert psychiatric witnesses may invoke a definition of "knowing" which could confuse lay jurors unfamiliar with psychiatric terms. The jury, judge, and psychiatrist well may have different conceptions when using the word "knowing." Furthermore, cross-examination probably would exacerbate the confusion. Second, the complexity involved in defining "knowing" differently from its common usage may undermine the advantages of the *M'Naghten* insanity test, which jurors theoretically understand without difficulty.

Comment, *The Insanity Defense in North Carolina*, 14 Wake Forest L. Rev. 1157 (1978).

In the present case, there was both lay and expert testimony on the issue of insanity. The trial judge charged the jury in pertinent part as follows:

> The test of insanity as a defense is whether the defendant at the time of the alleged offense was laboring under such a defect of reason from disease or deficiency of the mind as to be incapable of *knowing the nature and quality of the act*; or, if he did know this, whether he was, by reason of such defect of reason, incapable of distinguishing between right and wrong *in relation to the act committed.*
>
> This defense consists of two things. First, the defendant must have been suffering from a disease or defect of his mind at the time of the alleged offense. Second, this disease or defect must have so impaired his mental capacity that he either did not *know the nature and quality of the act as he was*

committing it; or, if he did, that he did not know that this act was wrong. (Emphasis added.)

In addition the trial court gave a supplemental instruction as follows:

> With respect to whether or not the defendant *knew* his act was wrong, the law does not require a defendant to *know* his act in question was both legally wrong and morally wrong. *The test does not involve the understanding of abstract wrong. What it does require is that the defendant understand the moral wrongfulness of the particular and specific act at issue.* (Emphasis added.)

We are not convinced that a further attempt to define the words "know," "knowing," or "knowledge" would be helpful to the jury in determining whether defendant had met his burden of establishing his insanity. Telling the jury, as defendant requested, that knowledge exists when one "is able to appreciate the total setting in which he is acting" would, in light of the expert testimony in this case, tend to confuse rather than assist the jury. Therefore, the trial judge did not err in refusing to give the requested instruction.

[4] In defendant's next assignment of error, he contends that the trial court erred in denying defendant the opportunity to open and close the final arguments because he bore the burden of proving his insanity. Defendant contends that since his presence at the scene of the crimes and his partial participation were uncontradicted, defendant bore the burden of proving the only salient issue to the jury, the question of his insanity. Defendant concedes that this Court previously considered this issue and ruled that, even in insanity cases, where the defendant introduces evidence, Rule 10 of the General Rules of Practice for the District and Superior Courts controls, with the State having the right to opening and closing arguments. *State v. Battle*, 322 N.C. 69, 366 S.E.2d 454. However, defendant contends that considering the prosecution's less than accurate arguments in this case, the fact that both prosecutors argued after defense counsel, and counsel's repeated requests to rebut those arguments solely limited to the issue of insanity, *Battle* is not dispositive.

As defendant concedes, this Court has considered and rejected this very argument in *Battle*. While defendant contends that the present case is different because of the prosecutor's less than ac-

curate arguments, he has brought forth no assignment of error complaining of prosecutorial misconduct, nor did he object to the prosecutor's argument; therefore, we find our decision in *Battle* dispositive. This assignment of error is without merit and rejected.

[5] Defendant next takes issue with the trial court's refusal to grant his requested jury instruction concerning limitations on the acting in concert theory as it relates to insanity and mental health defenses. The trial judge charged the jury in accordance with the Pattern Jury Instruction as follows:

> For a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit a crime, [such as first degree burglary or armed robbery or murder], each of them is held responsible for the acts of the others done in the commission of that crime.

Defendant requested, as a supplement to the Pattern Jury Instruction, that the trial judge also give the following instruction:

> This instruction is subject to and is limited by the Court's subsequent instructions with respect to the defenses of diminished capacity and insanity. That is to say, if the jury finds the State has failed to prove beyond a reasonable doubt that defendant possessed the specific intent to kill, premeditate or deliberate or that he shared the same criminal purpose as Jeffrey Karl Meyer, then the fact that Meyer possessed these elements or acted with a specific criminal purpose may *not* be transferred to this defendant.
>
> Furthermore if the defendant proves to the jury's satisfaction that he was insane at the time of the crime, a defense which I will fully instruct you on later, then whether or not Jeffrey Karl Meyer was sane or not is irrelevant to the issue of this defendant's sanity.

Defendant contends that the Pattern Jury Instruction was insufficient to explain the law in the context of the facts in this case. Defendant contends that the jurors could have relied on Meyer's mental state to override any doubts they had about defendant's mental state and thereby find defendant guilty of the crimes by acting in concert.

When a request for instructions is correct in law and supported by the evidence in the case, the court must give the instruction in substance. *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976). However, "the trial court is not required to give a requested instruction in the exact language of the request." *Id.* at 54, 229 S.E.2d at 174.

The State contends, *inter alia*, that the trial court gave the substance of the relevant portion of the requested instruction numerous times throughout the charge. The trial judge instructed the jury that if, as a result of the lack of mental capacity, *this defendant* did not have the specific intent to kill the deceased which was formed after some premeditation and deliberation, then he would not be guilty of first degree murder. He then reminded the jury as follows, "Again, I point out to you that the lack of mental capacity as I am discussing it here is entirely separate and distinct from the affirmative defense of insanity." Our review of the jury instructions discloses a careful effort on the part of the trial judge to explain to the jury that the mental state of defendant, and not Meyer's mental state, is the relevant inquiry. We are satisfied that the instructions given by the trial judge were in substance those requested by defendant, except for the last sentence of the proposed instructions which should not have been given at that time. Thus, we find no error in failing to give the requested additional instructions.

[6] Defendant next takes issue with the trial court's refusal to grant his requested jury instruction regarding defendant's flight from the scene. Defendant's requested instruction cautioned the jury that it could not consider flight as evidence of premeditation and deliberation in order to convict him of murder in the first degree. Defendant contends that the trial judge should have instructed the jury on flight because 1) the evidence is uncontroverted that defendant left the scene of the murder, and 2) the prosecution argued, in a direct attempt to show premeditation and deliberation, that defendant and Meyer took steps on Fort Bragg to avoid apprehension by the military police. We do not agree that an instruction on flight was required in this case.

A trial judge is not required to instruct a jury on defendant's flight unless "there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged." *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d

429, 435 (1990). Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension. *Id.* Here, the evidence showed that defendant and Meyer left the Kutz residence in defendant's truck after the crimes were committed. Defendant drove to Fort Bragg. Once defendant reached the military reservation, he mistakenly got off the main road and began driving along a road behind the officer's club which was considered an off-limits area. Defendant stopped his truck next to a dumpster behind the officer's club; however, upon seeing the military police car approaching his truck, defendant began to drive away. This evidence alone is not enough to warrant an instruction on flight.

Defendant argues that the evidence, when coupled with the prosecution's summation, is enough to require an instruction on flight. During summation, the prosecutor stated that once the defendant noticed the officer approaching his truck, he started to drive away. The prosecutor argued, "when they were pulled over, [defendant] had his driver's license in his hand." The defendant contends that this argument by the prosecutor was the equivalent of an argument that defendant was taking steps to avoid apprehension and thus required an instruction on flight. The State contends that the prosecutor's argument was made to show the jury that the behavior of the defendant when stopped suggested that he knew the consequences of his acts. Having reviewed the transcript of the jury argument, we agree with the State. Nowhere in the prosecutor's argument do we find any contention that there was flight by the defendant.

[7] Defendant's next assignment of error is that the trial court erred in failing to give the following requested jury instruction:

> While the intentional use of a deadly weapon may, in and of itself, give rise to a presumption that a killing was malicious, this fact alone is insufficient to sustain a finding of premeditation or deliberation.

This language is taken almost verbatim from *State v. Zuniga*, 320 N.C. 233, 258, 357 S.E.2d 898, 914 (1987). In *Zuniga*, this Court made that statement while conducting appellate review of the legal sufficiency of the evidence to support the jury's finding of premeditation and deliberation. The statement was not intended to be a jury instruction. It is confusing and not helpful to instruct a jury

in terms of what an appellate court will consider sufficient to sustain a jury finding. The proposed instruction is so couched, and it is therefore not an appropriate jury instruction.

In any event, a trial court is not required to give a requested instruction verbatim even when it is a correct statement of law, so long as the requested instruction is given in substance. *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163. In the present case, the trial court gave defendant's requested instruction in substance by giving instructions on malice, intentional use of a deadly weapon, premeditation and deliberation, and second degree murder. The trial court also instructed the jury that if it found malice and unlawfulness the defendant would be guilty of second degree murder. Only upon an additional finding of premeditation and deliberation could the jury find defendant guilty of murder in the first degree. The instructions given by the trial judge accomplished the same result as the one-sentence statement from *Zuniga* which was requested by defendant. This assignment of error is without merit and rejected.

[8] Defendant next contends that the trial court committed reversible error in denying defendant's motion to exclude or limit the number of photographs of the victims' bodies introduced into evidence and repeatedly shown to the jury, and allowing the jury to view all the photographs again at the close of the State's evidence. It is defendant's contention that no relevant fact concerning the numerous insults to the bodies of the victims could be gleaned from the photographs that was not or could not otherwise have been testified to or presented by documentary evidence. Defendant argues that given the number of exhibits offered, their extraordinary gruesomeness, their detail, the fact that they were in color, and the fact that a number of them were close-ups of grotesquely distorted faces of the victims mandates a finding that most of the photographs admitted possessed little probative value relevant to the extraordinary prejudice to the defendant engendered by such admission.

Photographs of homicide victims are admissible at trial even if they are "gory, gruesome, horrible, or revolting, so long as they are used by a witness to illustrate his testimony and so long as an excessive number of photographs are not used solely to arouse the passions of the jury." *State v. Murphy*, 321 N.C. 738, 741, 365 S.E.2d 615, 617 (1988); *State v. Holden*, 321 N.C. 125, 362 S.E.2d

513 (1987). The use of photographs and slides of a victim to illustrate testimony of a witness for the State, if excessive and for the purpose of inflaming the jury, is prejudicial error necessitating a new trial. *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988) (State presented ninety-nine photographs, trial court allowed thirty-five photographs into evidence, which were shown on a large screen behind defendant's head).

In this case, we find that the ten photographs presented by the State were properly admitted into evidence. Although some of the photographs may be considered gruesome, they were relevant to illustrate the testimony of two State's witnesses and were not excessive or repetitious. Also, the trial court gave cautionary instructions on the use of the photographs for illustrative purposes, thus limiting the likelihood of unfair prejudice from use of the photographs. This assignment of error is rejected.

[9] In defendant's next assignment of error, he contends that the trial court erred during sentencing on the burglary and robbery convictions by finding as a nonstatutory factor in aggravation that the burglary and robberies were planned, premeditated and deliberate. Defendant argues that allowing the sentencing court to increase sentences for these offenses on the basis that the defendant planned, premeditated, and deliberated them would violate the rule that a factor should not be used to aggravate a sentence unless it makes the defendant more blameworthy than he already is as a result of committing the crime. *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985).

Pursuant to N.C.G.S. § 15A-1340.4(a), a sentencing judge may consider any nonstatutory aggravating factor which is reasonably related to the purposes of sentencing and is proven by the preponderance of the evidence. One who commits a burglary or robbery which is meticulously planned, with substantial time and opportunity for the offender to change his mind, is arguably more blameworthy than one who commits the same crime on the spur of the moment. It is the *degree* of planning and deliberating that makes the crime more blameworthy. A factor that increases an offender's culpability is reasonably related to the purposes of sentencing. N.C.G.S. § 15A-1340.3 (1988).

Defendant further argues that since burglary and robbery are specific intent crimes, a certain amount of planning is inherent in the offenses; therefore, a finding in aggravation that defendant

planned the crime is improper. The State relies upon *State v. Chatman*, 308 N.C. 169, 301 S.E.2d 71 (1983), in which this Court upheld the finding of a nonstatutory aggravating factor that the offense was planned in a burglary and rape case. In *Chatman*, the defendant was convicted of first degree rape, first degree sexual offense, and first degree burglary. *Id.* at 171, 301 S.E.2d at 73. There was evidence presented that the defendant would drive around in his car at night and break into homes for the purpose of raping women. *Id.* at 180, 301 S.E.2d at 77. The defendant in *Chatman* argued that the evidence was insufficient to support a factor in aggravation that the offense was planned. This Court stated, "We reject defendant's position that in order to find that the offense was planned it was necessary to show that defendant methodically surveyed . . . houses or carefully chose a particular night before entering. The argument is specious. We find plenary evidence to support [a] finding [that the offense was planned]." *Id.*

In the present case, it is clear that defendant took extraordinary steps to prepare for the commission of the crimes. There was ample evidence apart from that presented to prove robbery and burglary to support the trial court's finding that defendant planned, premeditated, and deliberated the crimes. Here, defendant and Meyer were looking for an elderly couple who lived in a rural area to assassinate and rob in accordance with their game of Dungeons and Dragons. They had purchased Ninja clothing and a butterfly knife to be used when they found suitable victims. Defendant and Meyer followed Mrs. Kutz, an elderly woman, home from the grocery store. They found the Kutz home to be similar to the house described in the game of Dungeons and Dragons because the house had something like a moat around it. Later that night, defendant and Meyer drove near the Kutz home, parked the truck away from the house, approached the house on foot, entered and killed both victims by stabbing them to death.

The State has shown by a preponderance of the evidence the meticulous planning that preceded the actual commission of these crimes. It is apparent that what the sentencing judge actually found was that the extraordinary planning in this case exceeded that which is ordinarily present or inherent in the crimes of first degree burglary and robbery with a dangerous weapon. Thus, we find no error in the trial court's finding as a nonstatutory factor in aggravation that the burglary and robberies were planned. We

treat the additional finding that the offenses were premeditated and deliberate as surplusage.

[10] In defendant's last assignment of error, he contends that the trial court erred at sentencing on the burglary and robbery charges by finding in aggravation that defendant took advantage of the victims being helpless and defenseless. It is defendant's contention that the trial court made no additional factual findings supporting this nonstatutory aggravating factor. Defendant contends that the only two conceivable explanations for this finding in aggravation would have to be the age of the victims and the fact that they were sleeping when the defendant entered their home. Defendant notes that the Court of Appeals held in *State v. Underwood*, 84 N.C. App. 408, 352 S.E.2d 898 (1987), that the fact that the victim was asleep when defendant committed an assault with a deadly weapon inflicting serious injury was not a proper aggravating factor because the victim was in no worse position than any other unsuspecting victim.

In the present case, the evidence showed that defendant told his psychologist that he and Meyer had followed Mrs. Kutz home from the grocery store, found the characteristics of the house to their liking and decided to rob it. The evidence also showed that the defendant had been playing a game of Dungeons and Dragons which involved going into the house of an elderly couple living in a rural area and assassinating them. Mr. and Mrs. Kutz were both in their sixties and lived in a rural area. Mrs. Kutz was asleep when defendant and Meyer broke into the Kutz home and robbed them. This evidence supports a finding that the victims were vulnerable and helpless and that the defendant took advantage of their situation.

"Pursuant to the Fair Sentencing Act, the trial court is not confined to consideration of statutory factors only, but may consider nonstatutory factors to the extent they are 1) related to the purposes of sentencing and 2) supported by the evidence in the case." *State v. Taylor*, 322 N.C. 280, 287, 367 S.E.2d 664, 668 (1988). In *Taylor*, this Court held that a trial court could properly find as a nonstatutory aggravating factor that a defendant used information gained as a result of his inquiry to determine whether the victim would be alone and defendant's use of keys surreptitiously copied while they were entrusted to his wife.

In the present case, defendant knew that Mrs. Kutz was elderly, and he followed her home one evening, thus discovering that she lived in a rural area. The State contends that the victim being asleep is a particular vulnerability because it is a circumstance not inherent in most crimes, whereas lack of warning or lack of provocation is inherent in most crimes. We agree with the State. We believe that a person who is attacked while asleep is in a more vunerable position than one who is conscious of his surroundings. The sentencing judge did not err in considering the age of the victims, the location of their home in a rural area, and the fact that one of the victims was asleep at the time of the crime, in determining that defendant took advantage of the victims being helpless and defenseless. To the extent the Court of Appeals' decision in *Underwood* conflicts with this decision, we overrule it.

We conclude that defendant has had a fair trial, free of prejudicial error.

No error.

BETSY VANCAMP v. WANDA CARTER BURGNER AND SAMUEL RICHARD BURGNER

No. 312A90

(Filed 3 April 1991)

Automobiles and Other Vehicles § 570 (NCI4th)— pedestrian—struck by automobile—crossing road—last clear chance

The Supreme Court could not conclude as a matter of law that plaintiff's evidence was insufficient to invoke the doctrine of last clear chance where the evidence, in the light most favorable to plaintiff, indicates that plaintiff pedestrian was within defendant driver's clear line of sight for five seconds before the collision, there was expert testimony that defendant had "ample" reaction time in which to see plaintiff and come to a complete stop, and a jury could thus reasonably infer both that defendant had the time and means to avoid the collision and that defendant negligently failed to use the available time or means to avoid injury to plaintiff.

Am Jur 2d, Automobiles and Highway Traffic § 475.

Justice MEYER dissenting.

Justices MITCHELL and MARTIN join in this dissenting opinion.

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 99 N.C. App. 102, 392 S.E.2d 453 (1990), reversing a judgment granting defendants' motion for directed verdict entered by *Ellis, J.*, on 22 February 1989 in Superior Court, ORANGE County. Heard in the Supreme Court 12 March 1991.

Jeffrey H. Blackwell for plaintiff appellee.

David F. Tamer for defendant appellants.

WHICHARD, Justice.

On 25 January 1988 plaintiff filed a lawsuit against defendants, alleging negligent operation of a motor vehicle resulting in a collision with plaintiff as she walked across West Hill Avenue in Hillsborough. Defendants answered, denying negligence on their part and alleging contributory negligence on the part of plaintiff. Plaintiff replied, denying contributory negligence and alleging that defendant-wife, the driver, had the last clear chance to avoid the collision.

The cause came on for trial at the 20 February 1989 Civil Session of Superior Court, Orange County. At the conclusion of plaintiff's evidence, the trial court granted defendants' motion for directed verdict. Upon plaintiff's appeal, a divided panel of the Court of Appeals reversed and ordered a new trial. Defendants exercised their right to appeal based on Judge Lewis's dissent. N.C.G.S. § 7A-30(2) (1989). The issue raised by the dissent is whether plaintiff's evidence was sufficient to invoke the doctrine of last clear chance. We hold that it was, and we thus affirm the Court of Appeals.

Plaintiff's evidence showed that at approximately 6:40 a.m. on 16 December 1986 plaintiff left her home and walked down her front walk towards West Hill Avenue. The morning was still fairly dark, but the sky was beginning to lighten and the weather was clear. Two street lights and a yard light provided additional illumination. Plaintiff was wearing blue jeans, a light-colored coat, and a red toboggan. Plaintiff had walked about three-quarters of

the way across the street when defendants' automobile collided with her, causing serious injury. West Hill Avenue is straight, with unobstructed daytime visibility of approximately 400 feet. Defendant-wife was traveling twenty to twenty-five miles per hour with her headlights providing illumination for approximately 300 feet.

Allen Weliford, an expert in accident reconstruction, traffic engineering, and highway safety, testified on behalf of plaintiff. Weliford's testimony indicated that the collision occurred when plaintiff had walked approximately fourteen feet into the roadway. Weliford also testified that the average walking speed for pedestrians, and plaintiff's actual walking speed, was four feet per second. Thus, according to the expert testimony, it would have taken plaintiff five seconds to walk from six feet off the street to the point of impact. In addition, plaintiff would have been walking in the street for approximately 3.5 seconds before the collision. The expert testimony also indicated that the average reaction time for a driver is from 1.5 to 2.0 seconds and the stopping time for the range of speeds at which defendant was traveling is 1.0 second. Thus, the expert concluded that it would

> take 5 seconds for the pedestrian to go from 6 feet off the pavement to the point of impact. If the car was in a skid for the last second, then it would, it leaves 4 seconds for reaction time. The average reaction time for drivers is around one and a half seconds. If you allow two seconds, in this case, because it's at night, . . . that still leaves an additional two seconds or ample reaction time for the driver to have seen the pedestrian in the act.

In reviewing the grant of a motion for directed verdict, the reviewing court

> consider[s] the evidence in the light most favorable to the non-movant. . . . [T]he evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in his favor[,] and he is entitled to the benefit of every inference reasonably to be drawn in his favor.

Summey v. Cauthen, 283 N.C. 640, 647, 197 S.E.2d 549, 554 (1973) (citation omitted).

> "On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only

> if, *as a matter of law*, the evidence is insufficient to justify a verdict for the plaintiff."

Kelly v. Harvester Co., 278 N.C. 153, 158, 179 S.E.2d 396, 398 (1971) (quoting 5 Moore's Federal Practice, § 41.13(4) at 1155 (2d ed. 1969)) (emphasis in original).

The issue, then, is whether the evidence summarized above, in the light most favorable to plaintiff, is sufficient to invoke the doctrine of last clear chance.

> All the necessary elements of the doctrine [of last clear chance] are . . . as follows: "Where an injured pedestrian who has been guilty of contributory negligence invokes the last clear chance or discovered peril doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him. [Citing 26 cases as authority]."

Clodfelter v. Carroll, 261 N.C. 630, 634-35, 135 S.E.2d 636, 638-39 (1964) (quoting *Wade v. Sausage Co.*, 239 N.C. 524, 525, 80 S.E.2d 150, 151 (1954)).

It is undisputed that plaintiff, a sixty-two-year-old woman with loss of right field vision in both eyes, placed herself in a position of helpless peril when she attempted to cross West Hill Avenue without benefit of traffic control signals or a marked pedestrian crosswalk. Though it appears that defendant did not actually know of plaintiff's presence in the roadway, " 'a motorist upon the highway does owe a duty to all other persons using the highway, including its shoulders, to maintain a lookout in the direction in which the motorist is traveling.' " *Watson v. White*, 309 N.C. 498, 505, 308

S.E.2d 268, 273 (1983) (quoting *Exum v. Boyles*, 272 N.C. 567, 576, 158 S.E.2d 845, 852-53 (1968)). Expert testimony indicated that automobile headlights would illuminate a person six feet off the side of the road from a distance of 150 feet. Thus, there is ample evidence from which the jury could determine that the second element of the *Clodfelter* test—that defendant-wife knew or by the exercise of reasonable care could have discovered plaintiff's perilous position—was met.

The primary focus of the trial court's ruling, and the thrust of Judge Lewis's dissent, was that evidence satisfying the third element of the *Clodfelter* test is absent. The trial court concluded that defendant-wife, once she became aware of plaintiff's presence, "did all she could." In dissent, Judge Lewis concluded that although "plaintiff may have had a last 'possible' chance to avoid injury, she did not have the last 'clear' chance." *VanCamp v. Burgner*, 99 N.C. App. 102, 106, 392 S.E.2d 453, 456 (1990) (Lewis, J., dissenting). The essence of this element, and the fundamental difference between a "last clear chance" and a "last possible chance," is that defendant must have "*the time and the means* to avoid the injury to the plaintiff by the exercise of reasonable care after she discovered or should have discovered plaintiff's perilous position." *Watson*, 309 N.C. at 505-06, 308 S.E.2d at 273 (emphasis added). The reasonableness of a defendant's opportunity to avoid doing injury must be determined on the particular facts of each case. *See Exum v. Boyles*, 272 N.C. at 575, 158 S.E.2d at 852.

In *Wanner v. Alsup*, 265 N.C. 308, 144 S.E.2d 18 (1965), this Court found sufficient evidence to take the issue of last clear chance to the jury where plaintiff, dressed in white, walked across the street without benefit of a pedestrian crosswalk. Plaintiff was visible to defendant from a distance of approximately 320 feet, defendant was traveling approximately thirty to thirty-five miles per hour, and the street was straight with unobstructed vision. The defendant in that case, as here, did not reduce his speed, sound the horn, apply the brakes, or turn his car in any manner whatsoever. *Id.* at 309, 312, 144 S.E.2d at 19, 21; *see also Earle v. Wyrick*, 286 N.C. 175, 209 S.E.2d 469 (1974) (sufficient evidence to support last clear chance where defendant had unobstructed view from several hundred feet, traveling twenty-five to thirty miles per hour, but did not see plaintiff until "a split second" before impact); *cf. Watson*, 309 N.C. 498, 308 S.E.2d 268 (no evidence of last clear chance where defendant is traveling forty miles per hour, sees

plaintiff only upon coming out of a curve, has only 1.28 seconds to react before impact, and only seventy-five feet in which to stop); *Battle v. Chavis*, 266 N.C. 778, 147 S.E.2d 387 (1966) (no evidence of last clear chance where defendant, traveling at thirty to thirty-five miles per hour, could not see plaintiff until within 130 feet; less than three seconds to react and stop).

In the light most favorable to plaintiff, the evidence here indicates that plaintiff was within defendant's clear line of sight for five seconds before the collision. Further, there is expert testimony that defendant had "ample" reaction time in which to see plaintiff and come to a complete stop, thereby avoiding harm to plaintiff. Thus, from plaintiff's evidence, a jury reasonably could infer both that defendant had the time and means to avoid the collision, and that defendant negligently failed to use the available time and means to avoid injury to plaintiff. Thus, we cannot conclude as a matter of law that plaintiff's evidence was insufficient to invoke the doctrine of last clear chance.

For the foregoing reasons, the decision of the Court of Appeals is

Affirmed.

Justice MEYER dissenting.

Believing that the plaintiff, who was contributorily negligent as a matter of law, has failed to make out a case of last clear chance, I respectfully dissent.

The plaintiff and her husband were employed to deliver newspapers. In the dark, early morning hours of a winter day, 16 December 1986, plaintiff's husband stopped his van in the right-hand lane of the highway across the street from plaintiff's residence. His vehicle was parked on the shoulder of the road with the wheels on the white line of the roadway. At this point on the highway, there are no signal lights or marked crossovers. Plaintiff is a sixty-two-year-old woman who, unfortunately, prior to this accident, suffered impaired vision and memory loss and, from moment to moment, forgot where she was. At trial, plaintiff's husband described her condition as follows:

A. She had an aneurysm.

Q. Could you explain that a little bit please?

A. Well, it's a supposedly congenital defect in an artery, in this case, in an artery in her brain that [in] 1970 broke, which was a stroke that she recovered from spontaneously, though it left her essentially in the condition she is now.

Q. Could you tell us what that is please?

A. Loss of vision to the right in both eyes, an area something like this that extends to the center vision. And from a visual shield chart, there's little holes here and there in that vision which is no peripheral vision at all to the right.

Q. How else has it affected Betsy?

A. And she has the short term memory loss. She is alert enough at any one given moment. I think of it as someone looking in life with a very small flashlight of their attention which when she's focused, she's all right. But a moment later, she, it's a continuity problem. Moment later focus some place else, and she forgets where she was a moment before.

Plaintiff's condition is further reflected in her husband's testimony describing what happened earlier in the morning, just prior to the accident:

A. We wake up about, little before six and fix breakfast, get dressed and all of that. And then about 6:30 as usual, this was a little bit later this morning, probably 6:35 maybe. And she is very methodical as she has to be to keep organized at all, and so she goes through a checklist.

Q. A checklist?

A. She's got it on the wall, her apron and her, when she calls a mumble book which is how she keeps track of things. She has a little book just like this and she writes everything. She puts that away in her back pocket, so on and lays out her raincoat and so on. And she was still doing that when I went out and started the car . . . .

Plaintiff's husband was unable to say whether his wife looked both ways before entering the highway, but he did testify that:

A. No, it would be very unusual if she just came right across. She has to pay more attention than most people just to do normal things.

Q. She has to pay?

A. If she had look down the road, she would have had to look so her left vision was looking down the road because she has no right vision in that direction.

. . . .

Q. Could you describe her speed of walk on that particular occasion?

A. Normal I think. Little old lady walking.

Plaintiff stepped from the curb without looking in either direction, crossed one lane of traffic, and had started across the other lane of traffic when she was struck by defendant-wife, who was traveling only twenty to twenty-five miles per hour.

Assuming, as all the parties to this action have, that the negligence of both parties is well established, I believe that plaintiff has failed to prove the last two elements necessary to invoke the doctrine of last clear chance:

> "(3) that the motorist had the *time and means* to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available *time and means* to avoid injury to the endangered pedestrian, and for that reason struck and injured him."

Clodfelter v. Carroll, 261 N.C. 630, 635, 135 S.E.2d 636, 639 (1964) (emphasis added) (quoting *Wade v. Sausage Co.*, 239 N.C. 524, 525, 80 S.E.2d 150, 151 (1954)), relied upon by the majority.

The majority says that the plaintiff placed herself "in a position of helpless peril when she attempted to cross [the roadway]." I take the position that the plaintiff's position was not perilous until she stepped into defendant-wife's lane of travel. Even if she had seen the plaintiff earlier, defendant-wife, going twenty to twenty-five miles per hour and not knowing or having any reason to anticipate that plaintiff was impaired visually and mentally, could not foresee that plaintiff would, without stopping or looking, step from a position of safety in the left lane directly into defendant's line of travel. Until the instant plaintiff stepped into defendant-wife's lane of traffic, defendant-wife, going at such a slow rate

of speed, could assume plaintiff would stop. At that point, the defendant-wife did not have even the two seconds the majority gives her to react. She reacted instantly upon seeing the plaintiff and swerved in an attempt to miss her.

The accident report, the physical evidence, and the testimony presented show that when defendant-wife first saw plaintiff in her headlights just before impact, she swerved in an attempt to avoid the plaintiff and show that, in fact, plaintiff was struck by the far right-hand fender of defendant's vehicle. Plaintiff's husband's testimony confirms this:

> Q. Okay. You skipped a part. She gets three quarters of the way across the road. Mrs. Burgner is coming in this direction.
>
> A. Right, and so as she said, she hit her on the right fender; and Betsy landed about here; and Mrs. Burgner was, I suppose as she swerved, I wasn't looking at her at that point, swerved to here; and I saw her car parked right here across the road.
>
> . . . .
>
> Q. Regardless of how far it was from the road, there was not room for Mrs. Burgner to miss Mrs. Vancamp by coming on the side of your van. She could not have gotten between the van?
>
> A. She would have hit her in the middle of the car and she would have properly [sic] swerve to the left because my wife was on the right fender.

The evidence of defendant-wife's speed at twenty to twenty-five miles per hour is undisputed in the evidence. The defendant-wife's testimony was that as soon as she saw the plaintiff in the road, she applied her brakes and turned to avoid the accident. This evidence is unrefuted by any evidence to the contrary. The trial judge, in allowing defendants' motion for directed verdict, said: "In this case as soon as she saw the plaintiff, she did all . . . she could . . . ." Neither the majority of the panel below nor the majority of this Court has made a convincing showing that defendant-wife here had either the *time* or the *means* to avoid the injury to the plaintiff.

While I am convinced that the majority has failed to demonstrate that plaintiff satisfied the third and fourth elements of the doctrine

of last clear chance, it may also be that the plaintiff has also failed to prove the second element:

> "(2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands . . . ."

Clodfelter v. Carroll, 261 N.C. at 634-35, 135 S.E.2d at 639 (quoting *Wade v. Sausage Co.*, 239 N.C. at 525, 80 S.E.2d at 151).

> If the defendant does not discover the plaintiff's situation, but merely might do so by proper vigilance, it is obvious that neither party can be said to have a "last clear" chance. The plaintiff is still in a position to escape, and his lack of attention continues up to the point of the accident, without the interval of superior opportunity of the defendant, which has been considered so important. The plaintiff may not reasonably demand of the defendant greater care for his own protection than that which he exercises himself. Accordingly, the nearly universal rule is that there can be no recovery.

Prosser and Keeton on Torts § 66, at 467 (5th ed. 1984) (footnotes omitted).

Although there may be evidence that plaintiff was within defendant-wife's line of sight and could have been seen for five seconds, there was no evidence that plaintiff was in a helpless, perilous position for five seconds. Plaintiff was not in a perilous position until she walked directly in front of defendant-wife's car. At that point, there was insufficient time and distance for any driver using reasonable care to avoid the impact.

The elements necessary to invoke the doctrine of last clear chance have not been demonstrated to exist in this case. I vote to reverse the decision of the Court of Appeals and to reinstate the judgment of the trial court.

Justices MITCHELL and MARTIN join in this dissenting opinion.

STATE OF NORTH CAROLINA v. DANNY FURMAN RICHARDSON

No. 345A90

(Filed 3 April 1991)

1. **Criminal Law § 35 (NCI3d)— rape, robbery, and murder— evidence of prior assault—offered to show guilt of another— not admissible**

The trial court did not err in a prosecution for robbery, rape and murder by excluding evidence that someone other than the victim had been attacked two months earlier in the hospital basement, where this attack occurred, by a black male attired similarly to the suspect in this case. The crimes were not similar because the earlier victim was not raped, there was no evidence that her attacker was attempting to rape her, the attacker's identity was not known, and there was no evidence that the man who grabbed the earlier victim also committed the offense against the victim here. N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Evidence § 441.

2. **Criminal Law § 66.11 (NCI3d)— out-of-court identification— procedure suggestive—no prejudice**

The trial court did not err in a prosecution for robbery, rape and murder by admitting out-of-court identifications by witnesses where the identification procedures the officers chose, coupled with their statements to two of the three witnesses that they had a suspect, were unduly suggestive, but the corrupting effect of the suggestive identification procedure was insufficient to tip the scales against defendant. None of the witnesses conferred with one another prior to viewing defendant, the witnesses had substantial opportunities to view defendant, the descriptions were substantially similar and were accurate, the witnesses indicated a higher than average degree of attention, the identifications were certain, and the identifications followed within three hours of the initial sightings.

Am Jur 2d, Evidence §§ 371, 371.4, 371.5, 372.

Admissibility of evidence of showup identification as affected by allegedly suggestive showup procedures. 39 ALR3d 791.

3. Homicide § 18.1 (NCI3d)— premeditation and deliberation— inference from strangulation—no error

The trial court did not err by allowing the prosecutor to argue that the jury could infer premeditation and deliberation from the strangulation of the victim. The jury may infer premeditation and deliberation from the circumstances of a killing, including strangulation.

Am Jur 2d, Homicide §§ 276, 439; Trial § 260.

4. Criminal Law § 685 (NCI4th)— request for special instructions not in writing—not timely

The trial court did not err in a rape prosecution by refusing to give defendant's requested instruction on serious personal injury where defendant made his request orally after the jury retired. Requests for special instructions should be submitted in writing at or before the jury instruction conference.

Am Jur 2d, Trial §§ 580, 582, 583.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment upon a jury verdict finding him guilty of first-degree murder entered by *Helms, J.*, at the 30 October 1989 session of Superior Court, UNION County. On 7 August 1990 this Court allowed defendant's motion to bypass the Court of Appeals as to judgments of life imprisonment entered upon his conviction of first-degree rape and ten years imprisonment entered upon his conviction of common law robbery. Heard in the Supreme Court 11 February 1991.

Lacy H. Thornburg, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Justice.

Defendant was indicted for the common law robbery, rape, and murder of Gladys Byrum. He pled not guilty and was tried (capitally on the murder charge) at the 30 October 1989 session of Superior Court, Union County. The jury returned verdicts of guilty of common law robbery, first-degree rape, and first-degree murder, finding both that the murder occurred during the commis-

sion of the felonies of rape and common law robbery and that it was committed with malice, premeditation and deliberation. The jury found aggravating circumstances and no mitigating circumstances, but nevertheless recommended life imprisonment for the murder conviction. The trial court sentenced defendant to two consecutive terms of life imprisonment for the first-degree murder and first-degree rape convictions and to a further consecutive ten-year term of imprisonment for the common law robbery conviction. We find no error.

Shortly after 6:15 a.m. on 3 May 1989, Paulette Maske, an employee of Union Memorial Hospital, went to see Gladys Byrum, the victim, at Byrum's work station, the sewing room in the hospital basement. The only door to the sewing room opens from the basement corridor near the elevators, and Maske found it propped open with a screwdriver rather than the usual doorstop. When she did not find the victim there but noticed that a sewing machine was running unattended, Maske turned off the machine and asked four times, "Are you doing all right this morning?" A voice that Maske testified was not the victim's responded "uh-huh" through the closed bathroom door at the end of the sewing room. Maske could see that the bathroom lights were not on and that the victim's purse was on top of the desk, which was unusual. Maske went to her office and commented to two co-workers that the voice she heard did not sound like the victim's. Approximately six minutes later, she and James Meadows left the nearby storeroom and walked toward the sewing room. They saw a black man with short hair and a "rattail"—wearing a blue jean jacket, black pants, dark rubber gloves, and dark tennis shoes—pushing a cart rapidly. Looking in the room, Maske saw the victim's leg, whereupon she alerted others. She saw an aerosol can, on which defendant's prints later were found, but did not see the victim's purse.

Hospital employee James Stokes testified that as he went to clock in at about 5:55 a.m., he passed defendant in the basement hallway. Other witnesses testified that the hall is well-lit by overhead fluorescent lights. A few minutes later Stokes saw defendant again for a period of about two or three minutes from a distance of about two feet. He noticed that defendant was holding black, elbow-length rubber gloves in his hand. Stokes also testified that the hallway was well-lit, and his description of defendant's clothing and hairstyle matched that of Maske.

Employee David Baskins testified that as he parked his truck coming to work that morning at 6:25 a.m., he noticed defendant running from the corner of the hospital building. When defendant looked in Baskins' direction, he quit running. Baskins testified that the natural lighting was adequate to enable him to see defendant. Baskins observed defendant from distances ranging from sixty-five yards to twenty yards. Baskins testified that defendant walked past before turning to look at him. His description of defendant's clothing comported with that of Stokes and Maske, and he testified that defendant was carrying a bag.

Officer Debbie Tetlow testified that she saw bloodstains on the bathroom wall, a silver and green aerosol can on which defendant's prints were found, a bracelet, and a woman's tennis shoe.

Officer Jerry Whitaker testified that he was patrolling the area around the hospital and observed Officer Deese talking to defendant, who wore a rattail. About fifteen minutes later, with defendant's permission, Whitaker took defendant to the hospital. At this time defendant was carrying a bag containing a jean jacket and black pants. The following day Whitaker found the victim's ring on the passenger side of his patrol car.

Officer Mitch Deese testified that at about 6:30 a.m. he received a call to assist investigating officers. He spotted defendant sporting a rattail and wearing jam shorts, a tee shirt, and tennis shoes, and he detained him briefly. Upon receiving information that the suspect had a rattail, Deese radioed that defendant might be the man sought. After Officer Whitaker took defendant to the hospital, Deese, with defendant's permission, looked in defendant's bag. The bag contained a jean jacket and black pants.

Nurse Sylvia O'Brian testified that she saw defendant in the emergency room at about 3:30 a.m. the day of the murder; she said he was waiting with the Polk family in connection with a drug overdose case.

The State's physical evidence was as follows: The samples recovered through rape kit procedures neither eliminated nor implicated defendant conclusively. Combings of the white victim's pubic hair yielded two Negroid hairs. The cause of death was strangulation by hand.

Defendant's evidence showed that he cut his hand at work on 2 May. He testified that he worked until 6:30 or 7:00 p.m.

that day, then visited friends before packing a bag at 3:15 a.m. to go to his girlfriend's house. After finding someone else there, defendant was en route to his aunt's house to spend the night when police stopped him near the hospital. Officer Jackson and several members of the Polk family (the family that Nurse O'Brian testified was waiting in the emergency room) testified that defendant was not waiting in the emergency room in the early morning.

[1] Defendant sought unsuccessfully to introduce evidence that on 3 March 1989 Sondra Melton was attacked in the hospital basement by a black male attired similarly to the suspect the hospital employees described here. Defendant argues that the trial court erred in excluding this evidence. He contends that under *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987), the evidence should have been admitted to show that someone else committed the crime.

In *Cotton* the Court concluded that Rule 404(b) applies both to the State and to the defendant, and that a defendant can "introduce evidence of very similar crimes of another, when such evidence tends to show that the other person committed the crime for which the defendant is on trial." *Cotton*, 318 N.C. at 666, 351 S.E.2d at 279. To be admissible, however, "such evidence must point directly to the guilt of another specific party and must tend both to implicate that other party and be inconsistent with the guilt of the defendant." *State v. Brewer*, 325 N.C. 550, 561, 386 S.E.2d 569, 575 (1989), *cert. denied*, --- U.S. ---, 109 L. Ed. 2d 541 (1990) (citing *Cotton*, 318 N.C. at 667, 351 S.E.2d at 279-80). To be admissible under Rule 401, the evidence must do more than simply raise conjecture or speculation. *Id.* at 561-62, 386 S.E.2d at 576. Rather, "[i]t must point directly to the guilt of the other party." *Cotton*, 318 N.C. at 667, 351 S.E.2d at 279.

The defendant in *Brewer* sought to introduce evidence that the passenger in a white, "Honda-type" automobile, rather than the defendant, fired shots into homes. At most this evidence established that a white Honda was in the vicinity at the time of the shootings. *Brewer*, 325 N.C. at 562, 386 S.E.2d at 576. The evidence was not admissible because "it fail[ed] to point to a specific other person as the perpetrator of the crime with which defendant [was] charged." *Id.* at 562, 386 S.E.2d at 575. In *Cotton*, by contrast, the identity of another was specific and all three crimes were identical; the attacker entered rear doors to homes and shouted

"Hey baby, how are you doing?" before assaulting the victims. *Cotton*, 318 N.C. at 665, 351 S.E.2d at 279.

Here, the crimes were not similar; Melton was not raped and there was no indication that her attacker was attempting to rape her. Further, the attacker's identity was not known. Last, there was no evidence to indicate that the man who grabbed Melton also committed the offense against the victim here two months later. On these facts, *Cotton* does not control and this assignment of error is overruled.

[2] Defendant next contends that identification testimony should have been excluded because the pre-trial identification procedures were unduly suggestive and created a substantial likelihood of misidentification.

> Both the United States Supreme Court and this Court have criticized the "practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup . . . ." . . . This Court has recognized that such a procedure, sometimes referred to as a "showup," may be "inherently suggestive" because the witness "would likely assume that the police had brought [him] to view persons whom they suspected might be the guilty parties."

State v. Oliver, 302 N.C. 28, 44-45, 274 S.E.2d 183, 194 (1981) (citations omitted).

In determining the admissibility of pre-trial identifications, the court first must determine whether the identification procedures were "unnecessarily suggestive." *Id.* at 45, 274 S.E.2d at 194. If the identification procedures were unnecessarily suggestive, the court then considers whether they "have created a likelihood of irreparable misidentification." *Id.* (citing *Neil v. Biggers*, 409 U.S. 188, 198, 34 L. Ed. 2d 401, 410 (1972)). This depends upon whether "under the totality of circumstances surrounding the crime itself 'the identification possesses sufficient aspects of reliability.' " *Id.* at 45, 274 S.E.2d at 195 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 106, 53 L. Ed. 2d 140, 149 (1977)). The totality of the circumstances test is a balancing test and includes the following factors:

1) The opportunity of the witness to view the criminal at the time of the crime;

2) the witness' degree of attention;

3) the accuracy of the witness' prior description;

4) the level of certainty demonstrated at the confrontation; and

5) the time between the crime and the confrontation.

. . . . Against these factors must be weighed the corrupting effect of the suggestive procedure itself.

State v. Pigott, 320 N.C. 96, 99-100, 357 S.E.2d 631, 634 (1987) (citing *Manson v. Brathwaite*, 432 U.S. at 114, 53 L. Ed. 2d at 154).

Here, approximately two to two-and-a-half hours after the attack employees Stokes, Maske, and Baskins identified defendant as the man they had seen earlier. During these identifications defendant was sitting alone or with uniformed personnel in the security office at the hospital. Before Stokes and Maske viewed defendant, investigating officers told the witnesses defendant was a suspect. Baskins went to the security room on his own initiative after being told "they had somebody up there." Baskins looked at defendant for about five minutes before identifying him as the man he had seen outside the hospital gate.

The identification procedures the officers chose, coupled with their statements to two of the three witnesses that "they had a suspect," were unduly suggestive. *See State v. Oliver*, 302 N.C. at 45, 274 S.E.2d at 194 (identification procedure unduly suggestive where officers told witness he "could see that man again" and let him view the defendant as the defendant stood alone in a room). Nevertheless, under the totality of the circumstances each witness's identification was sufficiently reliable to be admissible.

Maske saw defendant in the corridor outside the sewing room for about three to four seconds after her suspicions were aroused by the empty sewing room and the unfamiliar voice coming from the bathroom. Her description matched that of other witnesses, and she was unequivocal in her identification. The showup identification occurred about forty-five minutes after she observed defendant.

Stokes observed defendant for two or three minutes from a distance of two feet in the well-lit basement hallway; he and defendant spoke briefly. He saw defendant two hours later in the security room. Stokes then described what defendant looked like and what defendant had been wearing when he saw him earlier in the hallway. His description was consistent with Maske's, even though defend-

ant was clothed differently by this time. Stokes was certain in his identification.

Baskins observed defendant from distances ranging from sixty-five to twenty yards over the course of ten to fifteen minutes. Because (1) Baskins did not usually see people in that area of the hospital at that early hour, (2) defendant stopped running when he saw that Baskins was watching him, and (3) Baskins noticed that defendant was looking at him, Baskins paid attention to defendant. Baskins' description included clothing, the bag defendant carried, and his approximate height and weight. Before identifying defendant, Baskins looked at him for about five minutes "to be sure." Approximately two-and-a-half hours passed between the initial encounter and the identification in the security room.

Considering the totality of these circumstances, we conclude that the corrupting effect of the suggestive identification procedure was insufficient to tip the scales against defendant. None of the witnesses conferred with one another prior to viewing defendant. The witnesses had substantial opportunities to view defendant; the descriptions were substantially similar and were accurate; the witnesses indicated a higher than average degree of attention; identifications were certain; and the identifications followed within three hours of the initial sightings. Thus, the trial court did not err in admitting the out-of-court identifications.

[3] Defendant also contends the trial court erred in allowing portions of the prosecutor's argument. The relevant portions are:

> [PROSECUTOR]: . . . [T]he premeditation and deliberation . . . can come over any period of time, no matter how short. And, members of the jury, deliberation can also be inferred from the acts, from the use of excessive force, from brutal circumstances, and from the manner and means.
>
> Strangulation does not occur the State would contend to you by accident. You don't accident[al]ly strangle somebody. You might be able to accident[al]ly shoot somebody or accident[al]ly run them over with a car.
>
> [DEFENSE COUNSEL]: Objection to accident not—
>
> THE COURT: Overruled. Go ahead.
>
> [PROSECUTOR]: But manual strangulation takes an effort, takes a deliberate act, takes a premeditated act. It takes an act of thinking it out and doing it.

> Members of the jury, the State contends to you from the circumstances in this case you can find that premeditation and find that deliberation from the acts, and it's obvious from the acts here that this defendant was the aggressor.

Defendant argues that the prosecutor's statements impermissibly eliminated the State's burden to prove the elements of premeditation and deliberation by implying that the mere fact of death by strangulation supplied such proof. Because strangulation is not among the methods of killing expressly established by N.C.G.S. § 14-17 as murder in the first degree, the State must prove premeditation and deliberation. *See State v. Phillips*, 328 N.C. 1, 21, 399 S.E.2d 293, 303 (1991) ("Neither premeditation and deliberation nor intent to kill are elements of murder in the first degree when the homicide is perpetrated by [means enumerated in the statute, including] torture."); *State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781 (1986) (premeditation and deliberation "is not an element of . . . first-degree murder" when the murder is perpetrated by a means enumerated in the statute). "When the State relies on a theory of premeditation and deliberation for first-degree murder, it must prove as necessary elements of the crime that defendant premeditated and deliberated before killing the victim." *State v. Davis*, 325 N.C. 607, 628, 386 S.E.2d 418, 429 (1989), *cert. denied*, --- U.S. ---, 110 L. Ed. 2d 268 (1990).

However, because "premeditation and deliberation are processes of the mind, they are not ordinarily subject to direct proof but generally must be proved if at all by circumstantial evidence." *State v. Huffstetler*, 312 N.C. 92, 109, 322 S.E.2d 110, 121 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). The brutal manner of the killing and the nature of the victim's wounds are circumstances from which the jury can infer premeditation and deliberation. *State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986), *vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987). The jury may infer premeditation and deliberation from the circumstances of a killing, including that death was by strangulation. *State v. Davis*, 325 N.C. at 629, 386 S.E.2d at 429-30 (evidence that defendant assaulted and strangled victim sufficient to withstand motion to dismiss); *State v. Wilson*, 322 N.C. 117, 138-39, 367 S.E.2d 589, 601-02 (1988) (evidence that defendant tied and choked victim sufficient to withstand motion to dismiss); *State v. Vereen*, 312 N.C. 499, 515, 324 S.E.2d 250, 260, *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526 (1985) (evidence of a brutal attack,

sexual assault, and strangulation sufficient to support a finding of premeditation and deliberation); *State v. Strickland*, 307 N.C. 274, 295, 298 S.E.2d 645, 658 (1983) (sufficient evidence of premeditation and deliberation where victim was bound and died of strangulation).

Because the prosecutor was arguing that the jury could infer premeditation and deliberation from the circumstances and manner in which defendant killed the victim, the argument was not an incorrect statement of law, and the trial court did not err in overruling defendant's objection. Further, the trial court instructed:

> [N]either premeditation nor deliberation are usually subsceptible [sic] of direct proof. They may be proved by proof of circumstances from which they may be inferred, such as the brutal or vicious circumstances of the killing, and the manner in which or the means by which the killing was done.
>
> . . . .
>
> . . . [I]f you find from the evidence and beyond a reasonable doubt that on or about the alleged date, the defendant intentionally manually strangled Gladys Byrum and that this proximately caused her death and that the defendant intended to kill Gladys Byrum and that he acted with malice, after premeditation and with deliberation, it would be your duty to return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation.

This was a correct statement of the law. This assignment of error is overruled.

[4] Defendant finally contends the trial court erred in refusing to give his requested instruction that "with effect to first degree rape, serious personal injury be serious personal injury short of death." Defendant made his request orally after the jury retired. Requests for special instructions "should be submitted in writing to the trial judge at or before the jury instruction conference." Rule 21, General Rules of Practice for the Superior and District Courts. "A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict. . . ." N.C.R. App. P. 10(b)(2). Failure to request or object to instructions before the jury retires waives any objection to the instructions. *State v. Horner*, 310 N.C.

274, 283, 311 S.E.2d 281, 287 (1984); *see also State v. Hewitt*, 295 N.C. 640, 247 S.E.2d 886 (1978). This assignment of error is overruled.

No error.

STATE OF NORTH CAROLINA v. JEAN BULLARD BREWER

No. 158A90

(Filed 3 April 1991)

1. **Homicide § 15 (NCI3d)— murder—car parked on train crossing—testimony of engineer—not inherently incredible**

In a homicide prosecution in which defendant was alleged to have murdered her handicapped and epileptic daughter by leaving her automobile in front of an oncoming train, the trial court did not err by admitting the testimony of a pilot engineer of the train or by submitting the case to the jury even though defendant contended the evidence was contrary to reason and common experience and that the case should have been dismissed. There was evidence in the record that there were no curves in the tracks at the scene; it was reasonable to infer from the evidence that the headlight provided sufficient illumination of the crossing; the precision of the engineer's description was consistent with his eleven-year familiarity with the route; and defendant's own statements substantiate the engineer's testimony that defendant's car backed up after stopping on the tracks.

Am Jur 2d, Homicide § 425.

2. **Homicide § 21.5 (NCI3d)— murder—car left at train crossing—premeditation and deliberation**

The State presented substantial evidence of premeditation, deliberation, and intent to kill in a homicide prosecution in which defendant was alleged to have abandoned her handicapped and epileptic daughter in an automobile in front of an oncoming train where it could be inferred from the evidence that the burdens of caring for a mentally handicapped daughter became too much for defendant; the daughter's school principal testified that the bus driver was sometimes unable to leave

the daughter, Sherry, at home because there would be no one there to care for her; Sherry's natural father testified that he ceased providing financial support the previous summer because his business failed and he was in jail; there was evidence that defendant spent time devising a plan to kill Sherry; defendant drove home from a store by a different and longer route, crossing the railroad tracks at a point where there were no lights or crossbars; defendant said in her statement to police that she had the radio turned up loud and had either told Sherry to lock her door or had reached over and locked it herself; the train engineer's testimony implied that defendant centered the front seat of the automobile on the tracks and exited the automobile moments before the train struck; and the gear shift of the automobile was found to be in the parked position after the accident.

Am Jur 2d, Homicide § 439.

3. **Homicide § 21.5 (NCI3d)— murder—victim left in car in front of oncoming train—evidence of victim's handicap**

The evidence in a murder prosecution supported a finding that the victim was physically and mentally disabled and that defendant knew of her disability where defendant was alleged to have abandoned the victim in an automobile in front of an oncoming train; defendant argues, in effect, that the victim's failure to leave the car caused her death; the evidence shows that defendant herself told officers that the victim, Sherry, was not normal and could not take care of herself; Sherry's I.Q. ranged from thirty-seven to forty-seven and defendant testified on cross-examination that she had treated the sixteen-year-old Sherry as she would a five-year-old; Sherry attended special education classes all of her school years; defendant testified that Sherry could not care for herself and that she had to bathe and dress Sherry; and, despite testimony by Sherry's teacher that Sherry could get in and out of a seat belt, defendant said in her statement to police that Sherry could not get out of a seat belt.

Am Jur 2d, Homicide §§ 17, 425.

4. **Homicide § 30 (NCI3d)— murder—first degree murder—refusal to submit second degree murder—no error**

The trial court did not err in a first degree murder prosecution by refusing to submit second-degree murder where de-

fendant was alleged to have abandoned her handicapped daughter in front of an oncoming train; all of the evidence clearly supports the elements of premeditation and deliberation; there was no evidence of provocation by the deceased; there is evidence that defendant planned her crime while waiting at a convenience store; the fact that defendant got out of the car and left her daughter in the path of an oncoming train indicates defendant's intent to kill; and there was evidence of motive in that the burden of caring for her handicapped daughter had become too much for defendant.

Am Jur 2d, Homicide § 530.

ON appeal from judgment entered 17 August 1989 by *Farmer, J.*, at the 14 August 1989 Criminal Session of ROBESON County Superior Court. Appeal is pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 13 November 1990.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Justice.

Defendant was convicted of murder in the first degree of her daughter, Sherry Bullard. From a judgment of life imprisonment, defendant appealed. She contends that the trial court erred in failing to grant her motion to dismiss at the close of the evidence and by failing to submit second-degree murder to the jury. We hold that there was no error in defendant's trial.

At approximately 9:00 p.m. on 20 October 1988, defendant was driving her 1988 Beretta automobile with her daughter sitting beside her in the passenger seat. Sherry, then sixteen years old, was mentally handicapped and was epileptic. At the time of her death, she had been taking medications for seizures. On the evening of 20 October, defendant drove the automobile onto a rural railroad crossing. She centered the automobile on the train tracks as the train approached, so that the passenger side was facing the train. The defendant then left the car before the train struck the automobile, killing Sherry.

The defendant argues in her first assignment of error that the trial court erred by denying defendant's motion to dismiss at the close of the evidence because, according to defendant, there was insufficient evidence presented at trial from which the jury could find defendant guilty of murder in the first degree beyond a reasonable doubt.

When ruling upon a motion to dismiss, the trial court must determine whether, when considered in the light most favorable to the State, there is substantial evidence of each element of the offense. *E.g., State v. Forrest*, 321 N.C. 186, 362 S.E.2d 252 (1987). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981) (citations omitted).

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. N.C.G.S. § 14-17 (1989); *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991). In the instant case, the State was required to produce evidence sufficient to establish beyond a reasonable doubt that the defendant unlawfully killed her daughter with malice and with the specific intent to kill, committed after premeditation and deliberation. *E.g., State v. Bray*, 321 N.C. 663, 365 S.E.2d 571 (1988).

Defendant argues that the State's proof was insufficient to survive defendant's motion to dismiss in three respects: (1) The testimony of witness James Caulder was inherently incredible and therefore of no "significant" probative value; (2) even if Caulder's testimony were taken as true, the evidence most favorable to the State still supported no more than a suspicion or conjecture that defendant acted with the required mental state for murder in the first degree; and (3) the State failed to meet its burden of producing substantial evidence to support a finding by the jury that the victim was so disabled as to be unable to protect herself or that the defendant had knowledge of that alleged level of disability.

[1] We first examine the testimony of one of the State's witnesses, James Caulder, a pilot engineer of the train that struck the automobile. Defendant's contention is that particular details of Caulder's testimony concerning what he could see from the train as it approached the car were exaggerated and patently improbable. Defendant also argues that Caulder's testimony was the only evidence presented by the State establishing that defendant's failure to avoid

the collision was by design rather than by accident. Therefore, defendant concludes that because Caulder's testimony was inherently incredible and because it was the only evidence justifying submission of the case to the jury, the case should have been dismissed. *See, e.g., State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967).

Caulder had been an employee of CSX Railroad for twenty-two years and a locomotive engineer for twelve years at the time of the collision. The train involved in this case was en route from Wilmington to Hamlet, North Carolina, a run which Caulder had made on the average of twice a week for approximately eleven years. He estimated that the train's headlight could pick up objects a mile away. Caulder testified that on the evening of the accident when the train was about forty-three hundred to forty-five hundred feet from the crossing at which the collision occurred, Caulder saw a white Beretta automobile stopped at the crossing. When the train was about twenty-five hundred to three thousand feet from the crossing, the automobile proceeded onto the crossing at an extremely slow rate of speed and in such a way that the backseat or the rear portion of the car was centered in the middle of the railroad track. When the train was about twenty-three hundred or twenty-four hundred feet from the crossing the car backed up and centered the front seat in the center of the track. Caulder went on to testify that at this point he thought the driver of the car was playing chicken with the train. That is, someone driving onto the tracks and waiting until the last moment to drive off. Caulder continued to watch the car. At about seven hundred or eight hundred feet from the crossing, Caulder observed the driver's side door open; he then applied the train's emergency brakes. As he got closer to the car, he could observe the car's occupant. He described the girl as very rigid, with her head tilted back. She looked forward and never looked at the train. The train struck the car about ten seconds after the car door opened. Caulder testified that the car was on the tracks for approximately fifty to sixty seconds before the driver's door opened.

Defendant contends that Caulder's testimony was so contrary to reason and common experience that the trial judge should not have submitted the case to the jury. *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902. In *Miller*, a robbery victim got only a brief look at the perpetrator in a well-lit area at night from 286 feet away. The Court held that the distance was too great and the time too brief for a certain identification of a complete stranger

so as to justify submission to the jury. However, "[w]here there is a reasonable possibility of observation," the credibility of the witness is for the jury. *Id.* at 732, 154 S.E.2d at 906. Here, defendant argues the description and detail given by Caulder is even more improbable, given the distances, brief amount of time, and lack of lighting. The most important of Caulder's statements bearing on the intent element was the centering of the front seat of the car when the train was nearly a half mile away. Defendant contends that while Caulder may have been able to see the car at this distance, it is implausible to assume that he could identify the minute degree of movement he described.

We disagree with defendant's contention that it was physically impossible for Caulder to see what he claimed he saw. There was evidence in the record that there were no curves in the tracks at the scene, and it was reasonable to infer from the evidence that the headlight provided sufficient illumination of the crossing. The precision of Caulder's description is consistent with his eleven-year familiarity with the route. Finally, defendant's own statements substantiate Caulder's testimony that the car backed up after stopping on the tracks. Defendant testified on direct, "In my mind, it seemed like I was going backwards and forth." She also testified on direct that Sherry looked straight ahead as the train approached. Therefore, we hold that Caulder's testimony was not so inherently incredible as to require the judge to take the case from the jury.

[2] Defendant's next argument under her first assignment of error is that regardless of Caulder's credibility, the State's evidence was insufficient to prove premeditation and deliberation. Defendant argues that the evidence supports no more than a suspicion or conjecture that defendant's actions were due to anything more than fright or, at most, recklessness. Taking the evidence in the light most favorable to the State as we must in deciding whether there is substantial evidence of the crime charged, *e.g.*, *State v. Simpson*, 303 N.C. 439, 279 S.E.2d 542 (1981), we hold that the evidence was sufficient to support a conviction of first-degree murder. The mental elements are normally proven by circumstantial evidence, including defendant's behavior before and after the killing and the manner of the killing. *E.g.*, *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986).

It may be inferred from the evidence that the burdens of caring for a mentally handicapped daughter became too much for

defendant. Sherry's school principal testified that the bus driver was sometimes unable to leave Sherry at home because there would be no one there to care for her. Sherry's natural father testified that he ceased providing financial support the previous summer because his business failed and he was in jail. Moreover, there was evidence that defendant spent time devising a plan to kill Sherry. Witnesses testified that defendant sat in her car at a convenience store for about forty-five minutes before beginning the fateful trip home. Defendant testified that she had gone to the store to rent a movie, but discovered that she had left her purse at home. She sat in the car with her daughter debating what to do and waiting to use the public telephone. She finally headed home, taking a different and longer route home, crossing the tracks at a point where there were no lights or crossbars to warn Sherry of the danger. Defendant said in her statement to police that she had the radio turned up loud and had either told Sherry to lock her door or had reached over and locked it herself. Caulder's testimony implied that defendant centered the front seat of the car on the tracks and exited the automobile moments before the train struck. The gearshift of the automobile was found to be in the "park" position after the accident. We hold that the State presented substantial evidence of premeditation, deliberation, and intent to kill.

[3] Defendant further argues that the evidence failed to show that Sherry was, by reason of her handicap, unable to protect herself or that defendant had knowledge of such incapacity. The trial judge modified the pattern jury instruction for first-degree murder due to the unique nature of this case:

> First, that the defendant intentionally and with malice killed the victim, Sherry Maria Bullard, by intentionally leaving her car on the railroad tracks with her daughter, Sherry, in it, and further, that her daughter was a handicapped person physically and mentally disabled and not able to protect or defend herself, and that the defendant herself knew that.
>
> A handicapped person is a person who has a physical or mental disability such as mental retardation, or mental illness, or some other infirmity which would substantially impair that person[']s ability to defendant [sic] or protect herself.

Defendant argues that the instruction bears on both the issues of proximate cause and intent to kill. She argues that absent proof

that Sherry was not capable of exiting the car, it does not follow that defendant's action of leaving the car was the proximate cause of death. Defendant contends that the evidence proves that Sherry was not physically disabled because she was mainstreamed into regular physical education classes and had been taught in school how to get out of a car. In effect, defendant argues that Sherry's failure to leave the car caused her death.

The State argues, and we agree, that the evidence supports the conclusion that Sherry was unable to protect or defend herself against the train because of her physical and mental disabilities. Taken as a whole and in the light most favorable to the State, the evidence shows that defendant herself told officers that Sherry was not normal and could not take care of herself. Sherry's I.Q. ranged from thirty-seven to forty-seven and defendant testified on cross-examination that she treated Sherry as she would a five-year-old. Sherry attended special education classes all of her school years. Defendant testified that Sherry could not care for herself and that defendant had to bathe and dress Sherry. Despite testimony by Sherry's teacher that Sherry could get in and out of a seat belt, defendant said in her statement to police that Sherry could not get out of a seat belt. Contradictions in the evidence are for the jury to decide. *E.g., State v. Lowery*, 309 N.C. 763, 309 S.E.2d 232 (1983). Considering that part of the evidence *favorable* to the State, *State v. Simpson*, 303 N.C. 439, 279 S.E.2d 542, we hold that the evidence does support a finding that Sherry was physically and mentally disabled and that defendant knew of her disability.

[4] Defendant alleges in her second assignment of error that the trial court erred in denying her request for a jury instruction on second-degree murder. The court instructed on first-degree murder and involuntary manslaughter. Second-degree murder is an unlawful killing with malice, but without premeditation and deliberation. *E.g., State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983).

Intent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice. *State v. Lang*, 309 N.C. 512, 308 S.E.2d 317 (1983). Defendant argues that because there is insufficient evidence to show premeditation and deliberation, the evidence shows, at most, second-degree murder based on her intentional act of leaving the automobile. The evidence would thus permit a jury rationally to find the lesser offense of

second-degree murder. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983). A trial judge is no longer required to submit second-degree murder in all cases of alleged premeditated first-degree murders based on premeditation and deliberation. *Id.* The judge must submit the lesser offense if there is any evidence or inference to be deduced therefrom to show a lesser grade of murder; but where the evidence "is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged," the judge should not submit the lesser offense. *Id.* at 283, 298 S.E.2d at 652. The purpose of this rule is to eliminate compromise verdicts. *State v. Bullock*, 326 N.C. 253, 388 S.E.2d 81 (1990).

Defendant contends that the State's evidence of intent was contradicted by her statements that she loved her child. Moreover, defendant argues that a jury could reasonably infer that defendant was guilty of second-degree murder. She argues that the principles involved in cases of drunk drivers charged with second-degree murder, *see, e.g., State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984), are equally applicable to any driver operating a motor vehicle recklessly but without intent to kill. Standing alone, culpable negligence supports the submission of involuntary manslaughter. *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978). However, where the negligence also involves "danger to another [and] is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life," it will support second-degree murder. *Id.* at 582, 247 S.E.2d at 918 (quoting *State v. Trott*, 190 N.C. 674, 679, 130 S.E.2d 627, 629 (1925)).

We hold that the trial judge did not err by refusing to submit second-degree murder. Here, there is no evidence to sustain such a verdict. All of the evidence, direct and circumstantial, clearly supports the elements of premeditation and deliberation. There is no evidence of provocation by the deceased, while there is evidence that defendant planned her crime while waiting in the car at a convenience store. The fact that she got out of her car and left her daughter in the path of an oncoming train indicates defendant's intent to kill. As for motive, there was evidence that the burden of caring for her handicapped daughter became too much for defendant. Based on the overwhelming evidence of premeditation and deliberation, her intent to kill her daughter, and the lack of evidence to support second-degree murder, we hold that failure to submit second-degree murder was not error. *See State v. Bullock*, 326

N.C. 253, 388 S.E.2d 81. The court instructed on first-degree murder, for which there was substantial evidence, and involuntary manslaughter. On the theory of involuntary manslaughter, the jury could have reasonably concluded that defendant drove her car carelessly onto the railroad tracks, panicked, and failed to extricate Sherry from the car. However, there is no basis that would justify submission of second-degree murder.

Accordingly, we hold that in defendant's trial there was

No error.

STATE OF NORTH CAROLINA v. JERRY WAYNE TURNAGE

No. 441A90

(Filed 3 April 1991)

Homicide § 21.7 (NCI3d)— second degree murder—contention that shooting accidental—motion to dismiss denied

The State's evidence sufficiently contradicted defendant's claim of accident and the denial of his motion to dismiss a second degree murder charge was proper where, taking the evidence in the light most favorable to the State, a jury could reasonably infer that there was hostility and a history of violence between defendant and the victim; intent to commit murder and suicide could be inferred from defendant's question to his daughter about her future if something happened to himself and her mother; the only loaded weapon found on defendant's premises after the shooting had the safety on; the weapon involved in the killing was tested, the safety functioned properly, and the gun would not fire when struck against the floor or when a weight was dropped on it; defendant was a hunter, familiar with firearms, and handled them safely; the pathologist testified that the firearm was at least two feet from the victim's head when it discharged; the jury could infer from the evidence that defendant intentionally fired the weapon while he was standing and that the victim's hands were in a position parallel to the path of the bullet and not on the gun when it fired; the physical evidence contradicted defendant's claim of accident; and defendant admitted that he had had the trig-

ger end of the gun and said after the killing, "I have killed my wife."

Am Jur 2d, Homicide §§ 112, 272, 421, 425.

APPEAL by the State pursuant to N.C.G.S. § 7A-30(2) from a divided panel of the Court of Appeals, 100 N.C. App. 234, 395 S.E.2d 156 (1990), reversing the judgment of *Reid (David E.), J.*, sentencing defendant to twenty years imprisonment upon his conviction for second-degree murder by a jury at the 7 March 1989 Criminal Session of Superior Court, CRAVEN County. Heard in the Supreme Court 13 February 1991.

Lacy H. Thornburg, Attorney General, by James Peeler Smith, Special Deputy Attorney General, for the State-appellant.

David P. Voerman for the defendant-appellee.

MARTIN, Justice.

On 17 November 1988, Carolyn Bell Turnage died of a gunshot wound to the head. Her estranged husband, Jerry Wayne Turnage, was convicted of second-degree murder for her death. A divided panel of the Court of Appeals held that the State's evidence did not contradict defendant's extrajudicial exculpatory statements that the shooting was accidental and therefore reversed defendant's conviction. Judge Greene dissented, concluding that there was circumstantial evidence from which reasonable minds might conclude that defendant intended to kill his wife. *State v. Turnage*, 100 N.C. App. 234, 395 S.E.2d 156 (1990). The State appealed. We agree with the State's contention that there was sufficient evidence to contradict defendant's exculpatory statements and reverse the Court of Appeals.

The State's evidence tended to show that defendant and his wife separated in August 1988. Carolyn Turnage asked defendant to move out before Tiffany, his daughter from a previous marriage, came for an extended visit. Tiffany's presence had caused problems in the past, because Carolyn felt she had no authority to discipline Tiffany and defendant would not discipline her to Carolyn's satisfaction. One argument on that subject led to a physical confrontation between the couple. Defendant had adopted Carolyn Turnage's daughter, Tracy, when the couple married. When they separated, Tracy remained in the home, but visited her adoptive father at

his sister's home once or twice a week. She would usually go there after school or work and spend the night. Tracy was sixteen at the time of the trial. Defendant remained on good terms with his family until a few weeks before the shooting.

Charles Overly was a customer of Carolyn's at Raleigh Federal Savings Bank where she was office manager. Carolyn introduced him to defendant because both were interested in hunting. Overly became good friends with both defendant and his wife. He testified that about two weeks before the shooting, he saw defendant at a bar. Defendant told him that Carolyn was coming to the bar with her boyfriend and he wished that he had his gun. Later, Overly saw Carolyn at the bar with a group of people, and he talked with her. Defendant grabbed Overly's arm and said, "Don't mess with my wife." Overly also testified that defendant handled firearms in a safe manner.

About two weeks before Carolyn's death, defendant and his wife spent the day together and discussed reconciliation. Carolyn had a date for that evening, but tried to break it. When she could not reach her date, she drove to Goldsboro to tell him not to come to New Bern. Defendant telephoned her house every fifteen minutes until she returned around 12:30 a.m. The next morning, defendant came to the house about 7:00 a.m. Tracy Turnage testified at trial that she heard her mother's bedroom door slam shut and heard her mother scream. Tracy went into the bedroom and observed her father choking her mother. When she threatened to call the police, her father responded that the police could not come in time. Tracy then threatened to get her gun and told her parents that she was tired of them fighting. Defendant released Carolyn, apologized, and left the house.

The day before the shooting, Tracy spent the night with her father and her aunt, Sandra Hood, at Hood's trailer. While Tracy and defendant were watching a movie, defendant suddenly asked her what she would do if anything happened to him and her mother. When she joked that she would live with a friend, defendant responded that she could not do that. That evening, Tracy saw a handgun in a holster on the floor by the corner of the couch. Several weeks earlier, she had seen a handgun on her father's bed. On the morning of 17 November, Tracy got dressed and went to her mother's house. She and Carolyn fought over disciplinary measures, and Tracy became upset. Carolyn told Tracy that she

could stay home from school that morning. Carolyn then called defendant and asked him if he could repair their washing machine that morning while Tracy was at home. Carolyn instructed Tracy to call her at work if defendant took anything from the house. Defendant arrived at the house around 10:00 a.m. and repaired the washer. When he left, he took a collage of family pictures from the wall, saying that it was the only picture he had of his father. Tracy called and reported to her mother as requested. After defendant left the house, he went to the post office where he received a proposed separation agreement from Carolyn's attorney.

Carolyn Turnage asked to be excused from work for personal reasons at 10:30 a.m. Her boss testified that she had been crying, but was in control. Carolyn arrived at Sandra Hood's trailer around 11:00 a.m. That afternoon defendant gave this statement about the events that followed:

> I heard somebody knock at the door and my sister said it was Carolyn so I told her to let her in. She asked me could she talk to me in private. I said "Yeah, come on into my bedroom." We started arguing about her not keeping her word over the [separation] papers. She got mad and said she was going to take everything I had down to my last screw, my business, everything. My Dad's gun was laying on the bed and she said she was even going to take it, and grabbed it. I tried to grab it away from her and we stood up. About the same time I was trying to get the gun away from her she kicked me in the "nuts." She fell sideways when she kicked me and I fell backward and as I was falling backward I heard the gun go off. She was shot right beside the head. When I got up off the floor I ran over there and grabbed her. She was laying over there falling on my barbells, the bucket my phone is on and my bed. I hollered for my sister to call the ambulance, and then I tried to drag her to the truck to carry her to the emergency room. She was bleeding so bad. I run into the bathroom and grabbed a rag and put a compress on her head to try to stop the bleeding. I was hollering for my sister was the ambulance coming. She stopped breathing so I tried to give her a heart massage and mouth-to-mouth, but I didn't know what to do. I held the compress and I got telling her "Please don't die. Me and Tracy need you." I held the compress until the ambulance came.

Officers from the sheriff's department were met at the door of the trailer by Sandra Hood. She told them that her brother and his wife had been having trouble and his wife had been shot. They found defendant in the bedroom holding his wife's head. Defendant had blood around his mouth and on his hands. When emergency personnel arrived to transport Carolyn to the hospital, they discovered the gun under her body. Defendant gave a statement at the scene and signed the above written statement at the sheriff's office. He then agreed to participate in a re-enactment of the events surrounding the shooting. Crime Scene Investigator Terry Register played the part of Carolyn Turnage, with defendant telling her what to do. Defendant indicated that he and his wife sat at one end of the bed. The gun was nearby in a holster, partially covered by a white tee shirt. In demonstrating how his wife fell after being shot, he placed Register with her buttocks up against the windowsill and her head in the curtains. He did not at any time put her head against the barbells.

Defendant also demonstrated where he thought his arm was as the gun went off. He said that during the struggle, his wife had the holster and tee shirt end and he had the handle and trigger end of the gun. As he fell backwards, the gun was pointed up and to the right as it fired. Defendant thought that his arm hit a television set at the end of the bed as the gun went off. He then said he was unsure when the gun fired and did another demonstration. During the second demonstration, defendant stated that he was unsure if his arm hit the television. However, in both demonstrations, he held the gun up and to the right and placed Register against the sill and in the curtains. Defendant told the sheriff's investigator that he regularly kept loaded guns in the house with the safeties off.

Dr. Charles Garrett, the pathologist and medical examiner who performed the autopsy on Carolyn Turnage's body, testified that the gunshot wound to her head was clean with no powder residue, indicating that the gun was at least two feet away when fired. The bullet entered the left side of the head, entered the brain and travelled slightly forward from back to front and downward from left to right. A cut on her nose could have been caused by a fall on the barbells.

Michael Creasy, a forensic chemist for the State Bureau of Investigation, testified that the handwipings taken from Carolyn

Turnage revealed lead deposits, consistent with having been shot at rather than actually firing a gun, on the right palm, left palm, and the back of the left hand. There was no significant residue on the back of the right hand. He explained that the left hand would have been parallel to the muzzle of the gun and the right palm would have been turned toward the weapon. There was no residue on defendant's hands, but the test was done four hours after the shooting. Creasy testified that normal activities could remove residue. An SBI weapons expert tested the gun and determined that it would not fire with the safety on and did not misfire when struck against the floor or with a weight.

Physical evidence at the scene revealed bloodstains on the barbells, but no blood higher than the windowsill and no blood on the curtains. Other weapons found in the house were two shotguns, both of which were unloaded, and one rifle, which was loaded with the safety on. Defendant's answering machine tape was played in court, revealing an angry message from Carolyn regarding the picture defendant had taken from her house. Defendant had apparently not heard the message before the shooting. The State formulated the theory that Carolyn Turnage had been sitting down when she was shot and held her hands out in front of her in a defensive action. She fell off the bed, over the bucket with the phone on it, and onto the barbells.

Defendant put on evidence, but did not testify in his own behalf. His evidence tended to show the following. Defendant's brother testified that his father's handgun had once misfired while the safety was on, injuring his father in the leg. Sandra Hood corroborated defendant's account of Carolyn arriving at the trailer and asking to speak to the defendant in private. After the couple went into the bedroom, Hood went into the kitchen and heard nothing until the gun went off. As she headed toward the bedroom, defendant emerged and said, "Oh my God. I have killed my wife. It was an accident. Call an ambulance." In the bedroom, she heard defendant say, "Please don't die. I love you too much. I need you and Tracy needs you." Hood denied telling the sheriff that her brother and his wife were having trouble. She also testified that the handgun had fallen apart and defendant had it put back together before moving in with her. When asked about the choking incident, Hood related defendant's version of the story. He told her that Carolyn jumped on him during an argument and he threw her

on the bed and walked out. Tracy was watching and cursing at them both.

Thomas "Buzzy" Morris, defendant's best friend, testified that he had seen Carolyn physically attack defendant during arguments, but had never seen defendant strike her. He also testified that defendant kept loaded guns in his house. On cross, Morris testified that defendant admitted choking his wife during an argument. Defendant offered other character witnesses who testified as to his good reputation in the community.

Defendant also offered the testimony of an emergency room nurse, who testified that she had wiped the back of Carolyn Turnage's right hand with alcohol in order to start an I.V. On rebuttal, the State recalled Agent Creasy, who testified that wiping the victim's hand with alcohol would decrease the amount of lead particles, if there were any particles there. However, it was still his opinion that Carolyn's hands were in the path of the bullet when it was fired.

Defendant contends that the evidence is insufficient because the State's evidence is uncontradicted and exculpatory. We do not agree. Murder in the second degree is an unlawful killing with malice, but without premeditation and deliberation. *E.g., State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983). The evidence is sufficient to uphold a second-degree murder conviction under the facts of this case unless this Court can hold as a matter of law that defendant's version of the events eliminated all inferences of intentional firing of the weapon. *See State v. Jones*, 287 N.C. 84, 214 S.E.2d 24 (1975). This appeal turns on this Court's analysis of defendant's contention that his exculpatory statements were uncontradicted.

In reviewing a motion to dismiss, the evidence must be considered in the light most favorable to the State, giving the State every reasonable inference that may be drawn therefrom. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). Evidence presented by the defendant that is favorable to the State must be considered, but defendant's evidence unfavorable to the State may not be considered. *Id.* Where defendant's favorable evidence is not contradictory, it may be used to clarify the State's evidence. *Id.* When the State introduces uncontradicted exculpatory evidence in its case-in-chief, the State is bound by those statements, and defendant is entitled to a dismissal of the charges. *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972); *see also State v. Meadlock*, 95 N.C.

App. 146, 381 S.E.2d 805, *disc. rev. denied*, 325 N.C. 434, 384 S.E.2d 544 (1989). However, the State may show "that the facts concerning the homicide were different from what the defendant said about them." *Bolin*, 281 N.C. at 425, 189 S.E.2d at 241-42.

In *State v. Bright*, 237 N.C. 475, 75 S.E.2d 407 (1953), the defendant was convicted of manslaughter in the shooting death of his wife. Defendant admitted that his finger was on the trigger of the gun, but claimed that it discharged accidentally while he struggled for the gun with his wife. The evidence showed that the bullet entered just below the victim's left breast, travelled downward, and came out below her right hip. There were no powder burns around the wound or on the victim's body or clothing. This Court upheld defendant's conviction, noting that if there is any substantial evidence to support the State's case, then it is for the jury to decide whether the State has proved defendant's guilt beyond a reasonable doubt. The majority of the Court of Appeals distinguished *Bright*, because defendant in the instant case did not admit to having his finger on the trigger. In so doing, the Court of Appeals majority erred. While defendant did not admit that his finger was on the trigger, he did state that he had hold of the handle and trigger end of the gun. Furthermore, that was only one factor that was involved in *Bright*. In *Bright* this Court based its decision on multiple factors, including the path of the bullet, the absence of powder burns, and the admission that the defendant and victim were struggling. In the instant case, there was even more circumstantial and physical evidence contradicting defendant's statements.

Defendant's re-enactment of the killing significantly contradicts his prior statements to the officers. He first stated that his wife fell on his barbells; there was blood on the barbells. In the re-enactment, defendant placed his wife with her buttocks against the windowsill and her head in the curtains; no blood was found in the curtains. Defendant performed the re-enactment twice. At no time did he place the victim's head at the barbells. In both re-enactments, defendant had the gun held up but his wife falling backwards against the windowsill and the curtains. Thus, the exculpatory evidence is contradictory in substantial detail as to what happened.

Taking the evidence in the light most favorable to the State, a jury could reasonably infer that there was hostility and a history

of violence between defendant and the victim. From defendant's question to his daughter about her future if something happened to him and her mother, the jury could infer an intent to commit murder and suicide. The only loaded weapon found on defendant's premises after the shooting had the safety on. The weapon involved in the killing was tested, the safety functioned properly, and the gun would not fire when struck against the floor or when a weight was dropped on it. Defendant was a hunter, was familiar with firearms, and handled them safely. The pathologist testified that when the firearm was discharged, it was at least two feet from the victim's head. From this evidence and that of the path of the bullet, the absence of powder burns, and the presence of gunshot residue on the victim's hands, the jury could reasonably infer that defendant intentionally fired the weapon while he was standing and that the victim's hands were in a position parallel to the path of the bullet and not on the gun when it was fired. The physical evidence contradicts defendant's claim of an accident because it indicates that defendant was standing with the gun pointed downward, and that Carolyn turned her head away from defendant and held her hands in front of her in a defensive manner. The location of the blood on the barbells contradicted defendant's reenactment of the shooting. Moreover, defendant admitted that he had the trigger end of the gun and stated after the shooting, "I have killed my wife."

We hold that the State's evidence sufficiently contradicted defendant's claim of accident and the denial of the motion to dismiss was proper. The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. EVERETT RANDOLPH HUFF

No. 372A87

(Filed 3 April 1991)

Criminal Law § 1352 (NCI4th)— capital case—mitigating circumstances—McKoy error—prejudice

The trial court's instructions to the jury in the penalty phase of a first degree murder trial, taken as a whole, con-

stituted *McKoy* error where the court instructed the jury to answer each of the twenty-four mitigating circumstances submitted "no" if it did not unanimously find the circumstance by a preponderance of the evidence, the court gave two other instructions requiring unanimity on mitigating circumstances, the court instructed in the final mandate that the jury's decision must be unanimous as to each of the issues, and the "Issues and Recommendation" form directed the jury to answer "yes" to a mitigating circumstance only if the jurors found it unanimously to exist, notwithstanding the court also instructed the jury that any individual juror could consider a mitigating circumstance shown by defendant when the juror made his final recommendation as to defendant's sentence even if the circumstance had not been unanimously found by the jury. Furthermore, the State failed to demonstrate that this *McKoy* error was harmless beyond a reasonable doubt where defendant presented sufficient expert testimony to permit a reasonable juror to find the submitted impaired capacity mitigating circumstance set forth in N.C.G.S. § 15A-2000(f)(6) but the jury failed unanimously to find this mitigating circumstance.

Am Jur 2d, Criminal Law § 598; Homicide §§ 513, 548, 555.

ON remand from the United States Supreme Court, --- U.S. ---, 111 L. Ed. 2d 777 (1990), for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). Heard in the Supreme Court 12 February 1991.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Special Deputy Attorney General, for the State.

James R. Parish for defendant-appellant.

MEYER, Justice.

Defendant was convicted of the first-degree murder of his infant son, Crigger Huff, and of his mother-in-law, Gail Strickland. He received a sentence of death for the killing of his son and a sentence of life imprisonment for the killing of his mother-in-law. On defendant's direct appeal, this Court found no error in defendant's trial or sentencing proceeding and upheld the sentences imposed. *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989).

Subsequently, on 28 June 1990, the United States Supreme Court vacated the judgment of death and remanded the case to this Court "for further consideration in light of *McKoy v. North Carolina*." *Huff v. North Carolina*, --- U.S. ---, 111 L. Ed. 2d 777 (1990). On 3 October 1990, this Court ordered the parties to file supplemental briefs on the *McKoy* issue.

Except where necessary to develop and determine the issue presented to this Court on remand, we will not repeat the evidence supporting defendant's convictions and sentences, as that evidence is summarized in our prior opinion on defendant's direct appeal. *Huff*, 325 N.C. at 10-22, 381 S.E.2d at 640-47.

In *McKoy*, the United States Supreme Court held unconstitutional under the eighth and fourteenth amendments of the federal Constitution jury instructions directing that, in making the final determination of whether death or life imprisonment is imposed, no juror may consider any circumstance in mitigation of the offense unless the jury unanimously concludes that the circumstance has been proved. *McKoy*, 494 U.S. 433, 108 L. Ed. 2d 369. Our review of the record reveals that the jury here was so instructed. Specifically, the trial court instructed the jury to answer each mitigating circumstance "no" if it did not unanimously find the circumstance by a preponderance of the evidence. Thus, the issue is whether this *McKoy* error can be deemed harmless. *See State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990). "The error . . . is one of federal constitutional dimension, and the State has the burden to demonstrate its harmlessness beyond a reasonable doubt." *Id.*; N.C.G.S. § 15A-1443(b) (1988). On the record before us, we conclude that the State has not carried this burden.

The trial judge submitted and the jury answered the mitigating circumstances as follows:

ISSUE TWO:

Do you unanimously find from the evidence the existence of one of [sic] more of the following mitigating circumstances?

ANSWER Yes.

. . . .

(1) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

ANSWER Yes.

(2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

ANSWER No.

(3) The age of the defendant at the time of the crime.

ANSWER No.

(4) Defendant's immaturity or his limited mental capacity at the time of the commission of the offense significantly reduced his culpability for the offense.

ANSWER No.

(5) Defendant cooperated with law enforcement officer [sic] by making the statement of February 11, 1985.

ANSWER No.

(6) Defendant made the statement of February 11, 1985 voluntarily and at his own request.

ANSWER No.

(7) Defendant acknowledged his involvement in the deaths prior to his arrest to family members and law enforcement officers.

ANSWER No.

(8) Defendant loved his baby.

ANSWER No.

(9) Defendant cared for his baby.

ANSWER No.

(10) Defendant earned a GED while in prison.

ANSWER No.

(11) Defendant served his Country by serving in the U.S. Army for one and one-half (1½) years.

ANSWER No.

(12) Defendant is an adult child of an alcoholic parent.

ANSWER No.

(13) Defendant had a very unfortunate childhood and was a victim of child abuse.

ANSWER No.

(14) Defendant sought treatment for drug and alcohol problems at the local mental health center.

ANSWER No.

(15) Defendant has had gainful employment in the past.

ANSWER No.

(16) Defendant did a good job while working at the bowling alley snack bar.

ANSWER No.

(17) Defendant did a good job while working at the Pizza Parlor.

ANSWER No.

(18) Defendant has expressed remorse for his crimes.

ANSWER No.

(19) Defendant did not intend to inflict unnecessary pain or suffering on the victim.

ANSWER No.

(20) Defendant has a history of behavior disorder during his developmental years.

ANSWER No.

(21) Defendant suffers from low self-esteem and feelings of inadequancy [sic] and ineffectiveness.

ANSWER No.

(22) Defendant was under a great deal of stress at the time of the offenses.

ANSWER Yes.

(23) Defendant has suffered from depression since the time of the offense.

ANSWER No.

(24) Any other circumstance arising form [sic] the evidence which the jury deems to have mitigating value.

ANSWER No.

Thus, the jury unanimously found two mitigating circumstances and rejected twenty-two. While the relationship of the number of mitigating circumstances found to those rejected is not determinative of the effect of erroneous instructions, it is some indication of their influence upon the jurors to be weighed along with other indicators.

The State contends that the *McKoy* error in this case is harmless because the jury was specifically instructed that any individual juror could consider a mitigating circumstance shown by defendant even if the circumstance had not been unanimously found by the jury.

The record reflects that the trial court explained the fourth issue as follows:

> Issue Four is: "Do you unanimously find, beyond a reasonable doubt, that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty, when considered with the mitigating circumstance or circumstances found by you?["]
>
> In deciding this issue, you're not to consider the aggravating circumstances standing alone. *You must consider them in connection with any mitigating circumstances found by you, even if the jury has not found, unanimously, the existence of a certain proposed mitigating circumstance[;] if an individual juror believes that that mitigating circumstance has been proved by a preponderance of the evidence in a particular case, that*

juror may consider that mitigating circumstance in his evaluation on this fourth issue.

(Emphasis added.)

The State argues that, by the above additional instruction, each member of the jury was specifically told that he or she was not precluded from considering and giving effect to a mitigating circumstance which was shown by a preponderance of the evidence when the individual juror made his final recommendation as to defendant's sentence. Thus, the State argues, the constitutional principle established in *McKoy* was not violated in the present case. We disagree. The State relies upon language in this Court's opinion in *State v. Jones*, 327 N.C. 439, 396 S.E.2d 309 (1990), where it was stated:

> The *McKoy* error here is not harmless because defendant presented substantial evidence to support at least some of the significant mitigating circumstances submitted to but not unanimously found by the jury. One or more jurors may have believed some or all of these circumstances existed and that the nonstatutory circumstances had mitigating value. Yet, the erroneous instructions prohibited these jurors from considering the mitigating circumstances not unanimously found when the jury made its ultimate sentencing decision. *Had each juror been allowed to consider the circumstances that he or she believed to exist while engaging in the final weighing process*, we cannot say beyond a reasonable doubt that there would not have been a different result as to sentence.

Id. at 449-50, 396 S.E.2d at 315 (emphasis added). The State's reliance upon the emphasized language is misplaced. That language assumes proper and appropriate instructions from the trial judge to the jury that do not require unanimity as a prerequisite to allowing an individual juror to consider circumstances he or she believed to exist.

The verbal instruction given the jury as to issue four, to the effect that any individual juror could consider any mitigating circumstance as to that issue even if it was not found unanimously by the jury, does not stand in isolation. " '[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' " *State v. McNeil*, 327 N.C. 388, 392, 395 S.E.2d 106, 109 (1990) (quoting *Cupp v.*

Naughten, 414 U.S. 141, 146-47, 38 L. Ed. 2d 368, 373 (1973)); *see also Boyd v. United States*, 271 U.S. 104, 107, 70 L. Ed. 857, 859 (1926).

First, we note that the written "Issues and Recommendation as to Punishment" form, which the jurors had been handed individually to follow along as the verbal instructions were given, did not contain the alleged curative instruction, and it was never mentioned again by the trial judge. The written "Issues and Recommendation" form as to issue two directed the jury to answer "yes" to a mitigating circumstance only if the jurors unanimously found it to exist. As to the individual mitigating circumstances, the court instructed twenty-four times that the jurors must *unanimously* agree.

Again, as to issue two, the court instructed a twenty-fifth time:

> If you do *unanimously* find, by a preponderance of the evidence, you will so indicate by having your foreman write, "Yes," in the space after the mitigating circumstance on the Issues and Recommendation form. If you do not unanimously find this mitigating circumstance, by a preponderance of the evidence, you would so indicate by having your foreman write, "No," in that space.

(Emphasis added.)

Finally, the court instructed a twenty-sixth time:

> If you do not *unanimously* find by a preponderance of the evidence that at least one of these mitigating circumstances existed, and if you have so indicated by writing, "No," in the space after every one of them on that form, then you would answer Issue Two, "No," in that case.

(Emphasis added.) Further, the trial judge, in his mandate, instructed: "Again, your decision must be unanimous as to each of the issues and as to your recommendation in each of the cases."

We conclude that the instructions to the jury, taken as a whole, constitute *McKoy* error.

Further, we cannot conclude that such error was harmless by reason of insufficiency of the evidence to support any of the tendered mitigating circumstances not found by the jury. As previously indicated, twenty-four mitigating circumstances were submitted, but only two were found. The trial judge, finding uncon-

tradicted facts to support the existence of thirteen mitigating circumstances, gave peremptory instructions to the jury on these. The jury failed unanimously to find the existence of *any* of the circumstances upon which the court gave peremptory instruction.

The State did not brief or argue the issue of whether there was an insufficiency of the evidence to support one or more of the mitigating circumstances tendered but not found. Our detailed review of the evidence presented at trial convinces us that there was sufficient evidence to support one or more of them.

Dr. Brad Fisher, who was found by the court to be an expert in clinical psychology, testified at the sentencing phase that, in his opinion, defendant suffered from paranoid schizophrenia. He described the illness as a major thought disorder typified by delusions of grandiosity or persecution that the sufferer thinks to be true. He further testified that, in his opinion, "at the time of this crime, . . . [defendant] had severe limits in any ability to differentiate right and wrong in the areas where he had this deluded thinking—his mother-in-law, his son, his wife and their interconnections." This testimony went directly to the impairment contemplated and listed as mitigating circumstance number two.

Dr. Selwyn Rose, found by the court to be an expert in forensic psychiatry, testified that, based on his observation, in his opinion, defendant was unable, at the time of the crime, to understand the difference between right and wrong or to understand the nature and quality of his action. Dr. Rose concurred with Dr. Fisher that defendant was suffering from paranoid schizophrenia. Dr. Rose also testified that the condition was the most severe mental illness known and that it impairs the patient's judgment.

Dr. James C. Groce, a staff psychiatrist at Dorothea Dix Hospital and found by the court to be an expert in forensic psychiatry, also diagnosed defendant as a paranoid schizophrenic.

While this was not all the evidence pertinent to the tendered mitigating circumstance relating to defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, this evidence alone was sufficient to allow a reasonable juror examining defendant's behavior and mental problems to conclude that defendant's capacity to appreciate the criminality of his conduct was impaired.

In *State v. Sanders*, 327 N.C. 319, 395 S.E.2d 412 (1990), *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 782 (1991), two specified mitigating circumstances and the "catchall" circumstance were submitted to the jury. The jury unanimously found the mitigating circumstance that the murder was committed while the defendant was under the influence of a mental or emotional disturbance but failed to find unanimously that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired and failed to find unanimously the "catchall" circumstance. The *identical* two specified circumstances as well as the "catchall" circumstance were submitted to the jury in this case, and as in *Sanders*, the jury found only that the murder was committed while the defendant was under the influence of a mental or emotional disturbance. In *Sanders*, this Court vacated the sentence of death and ordered a new capital sentencing proceeding.

In light of the foregoing evidence, we cannot conclude beyond a reasonable doubt that the erroneous unanimity jury instruction did not preclude one or more jurors from considering in mitigation defendant's evidence of his diminished capacity to appreciate the criminality of his act or to conform his conduct to the requirements of the law. Nor can we conclude beyond a reasonable doubt that had such jurors been permitted, under proper instructions, to consider this circumstance, they would nevertheless have voted for the death penalty rather than life imprisonment. *See State v. Sanderson*, 327 N.C. 397, 403, 394 S.E.2d 803, 806 (1990). Because the circumstance in question is statutory, N.C.G.S. § 15A-2000(f)(6) (1988), it is presumed to have mitigating value if found. Given the evidence, we cannot conclude beyond a reasonable doubt that the constitutionally erroneous instruction did not prevent one or more jurors from finding the circumstance to exist, giving it mitigating value, and as a result, changing the recommendation of the jury from death to life imprisonment.

The sentence of death is vacated, and the case is remanded to the Superior Court, Cumberland County, for a new capital sentencing proceeding. *See State v. McNeil*, 327 N.C. 388, 397, 395 S.E.2d 106, 112. Our disposition on the impaired capacity circumstance makes it unnecessary for us to consider the effect of the constitutionally erroneous instructions on the other mitigating circumstances not found.

Death sentence vacated; remanded for new capital sentencing proceeding.

STATE OF NORTH CAROLINA v. JAMES FREDERICK STEVENSON

No. 304A90

(Filed 3 April 1991)

1. Homicide § 21.5 (NCI3d)— first degree murder—sufficient evidence of premeditation and deliberation

The State's evidence of both premeditation and deliberation was sufficient to support defendant's conviction of first degree murder where it tended to show that the victim had a date with defendant's estranged wife and was at her trailer; defendant had previously threatened to kill a person with whom his wife was involved; defendant left work early the evening of the killing and went to his wife's trailer; defendant stopped 300 yards from the trailer at the home of a neighbor and learned that a truck was parked at his wife's trailer; defendant took a pistol from his truck and walked on foot to the trailer, leaving the driveway at some point and cutting through a field to avoid detection; defendant dropped his keys in the grass in order to avoid detection; defendant entered the trailer through the unlocked back door, checked the bedrooms, and heard his wife's voice down the hall; defendant waited in the back of the trailer for about an hour and then entered the living room, turned on a lamp, and said, "There ain't going to be no wedding"; defendant shot the unarmed victim as he attempted to get up from a reclining position on a couch; defendant then shot the victim three more times after the victim had been rendered helpless by the first shot; defendant threatened to kill his wife and then himself; defendant tried to think of ways to conceal his crime; defendant moved the victim's truck to conceal it; defendant fled the scene to avoid arrest; and there was no evidence of provocation in that defendant and his wife were legally separated and both the victim and the wife were fully clothed when the attack occurred.

Am Jur 2d, Homicide § 439.

2. **Homicide § 32.1 (NCI3d)— first degree murder—failure to submit voluntary manslaughter—harmless error**

Assuming *arguendo* that the evidence supported submission of voluntary manslaughter, the trial court's refusal to give defendant's requested instruction on voluntary manslaughter was harmless error where the court instructed the jury on first degree murder and the lesser offense of second degree murder and the jury returned a verdict of guilty of first degree murder.

Am Jur 2d, Homicide § 530.

3. **Criminal Law § 86.5 (NCI3d)— cross-examination of defendant—specific acts of misconduct—absence of plain error**

Assuming *arguendo* that the prosecutor's cross-examination of a defendant on trial for murder about his prior use of marijuana and prior assaultive conduct, neither of which resulted in criminal charges, violated Rule of Evidence 608(b) which limits impeachment by specific instances of conduct to those acts which are probative of truthfulness or untruthfulness, the error was not so prejudicial as to require the trial judge to intervene *ex mero motu* given the overwhelming evidence of defendant's guilt.

Am Jur 2d, Witnesses §§ 524, 525.

4. **Homicide § 25.2 (NCI3d)— first degree murder—deliberation—instruction on absence of passion**

The trial court in a first degree murder case did not err in instructing the jury that the State need not prove the absence of passion or emotion in order for the jury to find that defendant acted with deliberation. The trial court's failure to instruct on voluntary manslaughter did not render erroneous the court's instructions on premeditation and deliberation and lack of passion.

Am Jur 2d, Homicide §§ 501, 525.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Ross, J.*, at the 26 February 1990 Criminal Session of Superior Court, WILKES County, upon a jury verdict of guilty of murder in the first degree. Heard in the Supreme Court on 11 March 1991.

Lacy H. Thornburg, Attorney General, by John H. Watters, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Justice.

Defendant was tried in a non-capital fashion and was found guilty of the murder of Lonnie Dean Hall. From a sentence of life imprisonment, defendant appeals. We hold that defendant's trial was free of prejudicial error.

Defendant and Donna Hooker Stevenson were married in 1984 and legally separated in June 1989. Donna continued to live with their two children in their trailer, while defendant moved in with his brother. Their marriage was filled with violence and infidelity. In early June of 1989, defendant observed his wife and a black male, Darren Marsh, together at a park. When defendant approached them, Marsh began to run. Defendant ordered Marsh to stop and fired a shot into the ground with his gun. At home, defendant threatened to kill his wife unless she killed Marsh. He forced her to write a note confessing to the killing and gave her a gun to effectuate the crime. Donna Stevenson went to Marsh and warned him about defendant. She gave Marsh the gun and told him to forget about the incident.

Donna had known the victim, Lonnie Hall, all her life. On 1 August 1989, they had their second date. That evening, Donna's sister kept her two children; Donna was alone when Hall arrived at the trailer around 7:30 p.m. The pair watched a video which lasted about two hours. During the movie, Donna heard the dog barking and she went to the back door to investigate. She saw no one outside, but she locked the back door anyway. The front door was already locked. After the movie ended, Donna and Lonnie listened to the stereo until around 11:00 p.m., when Donna needed to get ready to go to work. At 11:15 p.m., Donna sat up on the couch where she and Hall had been reclining. At that time, defendant entered the room, turned on a lamp, and said, "There ain't going to be no wedding." He shot Lonnie Hall in the chest as Hall attempted to get up. He fired three more times in rapid succession, hitting Hall in the chest and arms. Defendant turned to Donna and threatened to shoot her next. However, he changed his mind and asked her what he should do. He then threatened

to shoot himself, but Donna talked him out of it. Defendant suggested several ways to dispose of the victim's body, but Donna told him he should get some money from his brother and escape to Mexico.

Defendant gave Donna his .38 caliber pistol, which she unloaded and locked in the trunk of her car. Donna drove defendant to his truck which was parked at a neighbor's house. He instructed her to follow him in her vehicle to his brother's. She complied for a time, but then pulled off the road. Defendant did likewise and asked her if the victim was the Sheriff's brother. She lied to him and responded negatively. Donna pulled back onto the road in the opposite direction of which they had been driving. Defendant followed her until she pulled into the Elkin Police Department and went inside.

Defendant testified that he routinely stopped by his wife's trailer in the evenings to make sure she was awake and ready to go to work. On the evening of 1 August, he arrived at his neighbor's around 10:00 p.m. and walked to his trailer shortly thereafter. He did not know who owned the truck parked in the driveway, but believed that Darren Marsh was the man with his wife. He testified that he found the back door unlocked and he dropped his keys in the grass. When he entered the trailer, he heard voices and music on the radio. He heard Donna say, "I'm going to have them play that song at our wedding." Other evidence pertinent to this appeal will be discussed below.

[1] Defendant's first assignment of error alleges that the trial court erred in denying defendant's motion to dismiss the charge of murder in the first degree because the evidence was insufficient to prove deliberation. In reviewing the denial of a motion to dismiss for the sufficiency of the evidence, we must view the evidence in the light most favorable to the State, drawing all reasonable inferences therefrom. *E.g., State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). Substantial evidence must exist for every element of murder in the first degree in order to take the case to the jury. *E.g., State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980). "Substantial evidence" is that amount that "a reasonable mind might accept as adequate to support a conclusion." *Id.* at 78-79, 265 S.E.2d at 169 (citations omitted).

> Deliberation means an intent to kill carried out by the defendant in a cool state of blood in furtherance of a fixed design

> for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

State v. Gladden, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986) (citation omitted). Defendant contends that the evidence in this case did not allow a reasonable inference of deliberation indicating a specific intent to kill. We disagree.

Taken in the light most favorable to the State, the evidence shows the following:

(1) That defendant previously threatened to kill a person with whom his wife was involved.

(2) That the defendant left work early that evening claiming to be sick and went to his wife's trailer.

(3) That defendant stopped 300 yards from the trailer at the home of a neighbor, learned from this neighbor that a truck had pulled up at his wife's earlier and had not left.

(4) That defendant took his pistol from his truck and walked on foot to the trailer, leaving the driveway at some point and cutting through a field to avoid detection.

(5) That defendant dropped his keys in the grass in order to avoid detection.

(6) That defendant found the back door unlocked, entered, checked the bedrooms, and heard Donna's voice down the hall.

(7) That defendant waited in the back of the trailer for some length of time; eventually entered the living room; turned on the light; said, "There ain't going to be no wedding"; and three to five seconds later, shot Lonnie Hall four times in the chest and arms.

(8) That defendant threatened to kill his wife and then himself.

(9) That defendant tried to think of ways to conceal his crime.

(10) That defendant moved the victim's truck to conceal it.

(11) That defendant fled the scene to avoid arrest.

From this evidence, a reasonable juror could conclude that defendant premeditated *and* deliberated his crime. From Donna's testimony that she heard noises in the back over an hour before

the shooting and that she then locked the back door, the jury could conclude that defendant concealed himself in the trailer for a sufficient period to deliberate his actions. Moreover, defendant shot Hall while he was in a vulnerable position, unarmed and reclining upon a couch. Defendant's argument of provocation is without merit. Defendant and his wife were legally separated and both the victim and Donna were fully clothed when the attack occurred. Defendant did not find them in a sexually compromising position.

Defendant's reliance upon *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981), is misplaced. In *Corn* the victim entered defendant's house in an intoxicated state and argued with defendant. The victim provoked defendant by accusing him of being a homosexual. Corn also knew that the victim had a history of violence when intoxicated. The Court held that the State failed to show premeditation and deliberation, because the shooting was a sudden event, brought on, at least in part, by provocation from the victim. There was no previous history of violence or ill will between Corn and the victim, and defendant did not use excessive force or inflict lethal blows after the victim was felled. *Id.* We agree with the State that the instant case is distinguishable on its facts. The evidence recited above reveals that defendant waited in the trailer for about an hour before attacking the victim; this was no sudden attack provoked by the victim. Moreover, defendant shot the victim three times after the victim had been rendered helpless by the first shot. Accordingly, we overrule this assignment of error.

[2] We next examine the issue of whether the trial court erred in refusing to give defendant's requested instruction on voluntary manslaughter. This Court has already reconciled this issue contrary to defendant's contention. *State v. Judge*, 308 N.C. 658, 303 S.E.2d 817 (1983). Here, the court instructed the jury on murder in the first degree and murder in the second degree. Assuming *arguendo* that the evidence supported submission of voluntary manslaughter, failure to submit was not prejudicial error. *Id.* Jurors had the opportunity to convict on the lesser offense of murder in the second degree. "That they did not indicates their certainty of [defendant's] guilt of the greater offense." *State v. Freeman*, 275 N.C. 662, 668, 170 S.E.2d 461, 465 (1969). We hold that the court's failure to submit voluntary manslaughter was not prejudicial error.

[3] In defendant's third assignment of error he alleges that the trial court committed plain error in failing to prohibit the cross-

examination of the defendant regarding prior conduct. The plain error rule is applied only in rare cases where the error was so fundamental that it had a probable impact on the jury's verdict. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Defendant contends that the prosecutor's questions on cross-examination regarding prior use of marijuana and prior assaultive conduct, neither of which were the subjects of criminal charges, were so prejudicial as to amount to plain error. The first exchange which defendant assigns as error was as follows:

> Q: Now, as a matter of fact, this is the way you normally settled your arguments, wasn't it, with a firearm?
>
> A: No, sir.
>
> Q: In January of '88, didn't you shoot Mark McCain, your [sic], husband of your girl friend, in the leg?
>
> A: Mark McCain shot hisself.
>
> Q: Oh, he shot hisself?
>
> A: Yes, sir.

The second exchange occurred after the prosecutor asked defendant if he had been drinking or taking drugs the night of the shooting. Defendant responded negatively to both questions. The prosecutor continued:

> Q: You indicated that the last time you'd had any marijuana was about a year ago?
>
> A: Yeah, and I just took a draw [sic] then.

Defendant argues that these questions violated Rule 608(b) of the North Carolina Rules of Evidence which limits impeachment by specific instances of conduct to those acts which are probative of truthfulness or untruthfulness. N.C.G.S. § 8C-1, Rule 608(b) (1988). He contends that the evidence concerning a "draw" of marijuana and the prior shooting was so prejudicial that justice cannot have been done. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378. Assuming *arguendo* that the questions asked of defendant were erroneous, we hold that the error was not so prejudicial as to require the judge to intervene *ex mero motu*. *See id.* Given the overwhelming evidence of defendant's guilt, it is not probable that the jury would have returned a different verdict if the evidence had been excluded. N.C.G.S. § 15A-1443(a) (1988).

[4] Defendant's final assignment of error alleges that the trial court committed plain error in instructing the jury that the State need not prove the absence of passion in order to convict the defendant of murder in the first degree. Defendant argues that, given the amount of evidence relative to heat of passion and provocation, the instruction given misled the jury and distorted the law. This led to a diminution of the State's burden of proof on malice, by not requiring proof that defendant did not act in the heat of passion and by implying that emotion or passion was irrelevant to the charge on murder in the first degree. Defendant failed to object to this instruction at trial, thus necessitating the application of the plain error standard. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375.

The trial judge instructed the jury as follows:

> Fifth, the State must prove beyond a reasonable doubt that the Defendant acted with deliberation, which means that he acted while he was in a cool state of mind.
>
> This does not mean that there had to be a total absence of passion or emotion if the intent to kill was formed with a fixed purpose, not under influence of some suddenly aroused violent passion. It is immaterial that Defendant was in a state of passion or excited . . . when the intent was carried into effect.

This instruction is in accord with the pattern jury instruction. *See* N.C.P.I.—Crim. 206.13. Defendant argues that when the jury is instructed on deliberation in conformity with the pattern instruction *and* a subsequent instruction on voluntary manslaughter is given, the language is not misleading to the jury and there is no error. The pattern instruction on voluntary manslaughter clarifies the relevance of passion and emotion and explains the State's burden of disproving heat of passion.

The State argues, and we agree, that the instruction given was a correct statement of law on deliberation. *See, e.g., State v. Faust*, 254 N.C. 101, 118 S.E.2d 769, *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961). The instruction adequately explains that the killing need not have been committed with a complete lack of emotion; such a killing would be a rare one indeed. Furthermore, we find no unconstitutional burden shifting, such as that disapproved of in *Francis v. Franklin*, 471 U.S. 307, 85 L. Ed. 2d 344 (1985), and *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39

(1979). These cases involve the establishment of a mandatory presumption that relieved the prosecution of its burden of proving every element of the offense beyond a reasonable doubt. *Id.* We reject defendant's argument that the trial court's failure to submit voluntary manslaughter to the jury in some way rendered erroneous the court's instructions on premeditation and deliberation and lack of passion. Defendant has failed to show error, much less prejudicial error. This assignment of error is overruled.

We hold that in defendant's trial there was

No error.

STATE OF NORTH CAROLINA v. WAYNE ALAN LAWS

No. 653A85

(Filed 3 April 1991)

Criminal Law § 1352 (NCI4th)— murder—McKoy error—harmless

A *McKoy* error in the sentencing proceeding for a murder prosecution was harmless beyond a reasonable doubt where the jury was polled and there was unequivocal extrinsic evidence, both from the jury foreman's colloquy with the court and the individual jurors' answers, that the instruction did not prevent any juror's consideration of defendant's mitigating evidence.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 513, 555.

ON remand by the United States Supreme Court, 494 U.S. ---, 108 L. Ed. 2d 603 (1990), for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). Heard on remand in the Supreme Court 14 March 1991.

Lacy H. Thornburg, Attorney General, by Joan H. Byers, Special Deputy Attorney General, for the State.

Louis D. Bilionis for defendant appellant.

WHICHARD, Justice.

Defendant was convicted of the first-degree murders of Ronnie Waddell and James Kepley and was sentenced to death. This Court

found no error in the guilt or sentencing phases. *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989).

Subsequently, the United States Supreme Court vacated the judgment and remanded the case to this Court for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *Laws v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 603 (1990). On 13 November 1990 this Court ordered the parties to file supplemental briefs addressing the *McKoy* issue.

This Court's review of the record reveals, and the State concedes, that the jury here received the unanimity instruction found unconstitutional in *McKoy*. Specifically, the trial court instructed the jury to answer each mitigating circumstance "no" if it did not find the circumstance unanimously by a preponderance of the evidence. Thus, the sole issue is whether this is the "rare case in which a *McKoy* error could be deemed harmless." *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990). "The error . . . is one of federal constitutional dimension, and the State has the burden to demonstrate its harmlessness beyond a reasonable doubt." *Id.*; N.C.G.S. § 15A-1443(b) (1988). For the reasons stated below, we conclude that the State has carried this burden.

The State's evidence tended to show that defendant bludgeoned Ronnie Waddell and James Kepley to death with a claw hammer and left their bodies on a rural dirt road in Davidson County. Each victim suffered severe lacerations about the head and multiple skull fractures, including large shattered areas of the skull and round "punched out" holes in the skull about an inch in diameter. Pools of blood and pieces of flesh, hair, skull and brain matter surrounded the bodies.

Texford Watts testified that he and defendant had been drinking and had given the victims a ride. Defendant and both victims got out of the car to relieve themselves. Watts heard "licks being passed." He got out of the car and saw Kepley lying on the ground unconscious. Defendant was beating Waddell with his fists. When Watts told him to stop, defendant pushed Watts out of the way, opened the trunk with the keys he took out of the ignition, and removed a claw hammer. Using the hammer, defendant continued the beatings as the two men lay helpless on the ground.

Additional evidence supporting defendant's conviction and death sentence is summarized in our prior opinion—*State v. Laws*, 325 N.C. 81, 381 S.E.2d 609—and will not be repeated here.

The jury found two aggravating circumstances as to each murder: that the murder was especially heinous, atrocious, or cruel, and that the murder was part of a course of conduct which included commission of other crimes of violence against other persons. *Laws*, 325 N.C. at 95, 381 S.E.2d at 617. Submission of the especially heinous, atrocious, or cruel aggravating circumstance was "justified by the prolonged brutal attacks which were required to inflict Waddell's and Kepley's gruesome injuries and to produce the other gruesome evidence in this case." *Id.* at 115, 381 S.E.2d at 629. Defendant did not dispute submission of the course of conduct circumstance.

The trial court submitted five possible mitigating circumstances:

1) Wayne Alan Laws has not been previously convicted of a felony involving the use of or threatened use of violence to the person. . . .

2) . . . Wayne Alan Laws [has] been a good, dependable and responsible employee . . . .

3) . . . The capacity of Wayne Alan Laws to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired [by alcohol]. . . .

4) . . . Wayne Alan Laws has helped to support his family. . . .

5) . . . Any other circumstances arising from the evidence . . . .

The jury unanimously found circumstances (1) through (4) but rejected circumstance (5), the "catchall" circumstance. Defendant requested that several other statutory mitigating circumstances and one nonstatutory mitigating circumstance be submitted. We have determined that the trial court did not err in refusing to submit these circumstances, as there was no substantial evidence to support them. *Id.* at 110-13, 381 S.E.2d at 626-28.

Defendant asserts that the State has not met its burden of showing that the *McKoy* instruction was harmless beyond a reasonable doubt. He contends that had the jury not been given the constitutionally defective instruction, it might have found the catchall mitigating circumstance and reached a different sentencing

result. He suggests that the following evidence could support a finding of the catchall circumstance: (1) defendant cooperated with authorities by consenting to a search, signing a written waiver of his right to resist nontestimonial identification procedures, and waiving his Miranda rights; (2) there was some evidence that defendant and Texford Watts acted in concert; (3) defendant's premeditation and deliberation was brief; (4) the victims died quickly; (5) defendant did not attempt in his statements to deny blame for the killings; (6) defendant grew up in a poor, single-parent home; (7) defendant had a history of using drugs and drinking excessively; and (8) at work defendant was trustworthy, polite, and did not fight. Defendant also suggests that the jury might have found mitigation in his demeanor at trial.

> In *McKoy v. North Carolina*, the United States Supreme Court held unconstitutional under the eighth and fourteenth amendments of the federal constitution jury instructions directing that, in making the final determination of whether death or life imprisonment is imposed, no juror may consider any circumstance in mitigation of the offense unless the jury unanimously concludes that the circumstance has been proved.

State v. Quesinberry, 328 N.C. 288, 289, 401 S.E.2d 632, 633 (1991) (citing *McKoy*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990)). The concern expressed in the line of cases beginning with *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and continuing with *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988), and *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), is that the sentencer be allowed to consider mitigating circumstances in the sentencing phase of a capital case so as to ensure the grounds on which the penalty was determined. *See, e.g., Lockett*, 438 U.S. at 604-05, 57 L. Ed. 2d at 989-90; *Mills*, 486 U.S. at 376-78, 381, 100 L. Ed. 2d at 394-96, 398; *McKoy*, 494 U.S. at ---, 108 L. Ed. 2d at 380-81. The Court noted in *Mills*:

> There is, of course, no extrinsic evidence of what the jury in this case *actually thought*. We have before us only the verdict form and the judge's instructions. Our reading of those parts of the record leads us to conclude that there is at least a substantial risk that the jury was misinformed.

Mills v. Maryland, 486 U.S. at 381, 100 L. Ed. 2d at 398 (emphasis added).

Here, by contrast, unequivocal extrinsic evidence is present to establish "what the jury in this case actually thought." Unlike in *Mills*, the record presents the reviewing court with more than the verdict form and the judge's instructions. It details the following exchanges between the trial court, the jury foreman, and individual jurors concerning Issue II (mitigating circumstances) on the verdict form:

> THE CLERK: Issue two, Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances? Your answer is yes. Is this the unanimous verdict of the jury?
>
> FOREMAN ROBERTSON: Yes, ma'am.
>
> THE CLERK: Number one, Wayne Alan Laws has not been previously convicted of a felony involving the use of or threatened use of violence to the person. Your answer is yes. Is this the unanimous verdict of the jury?
>
> FOREMAN ROBERTSON: Yes, ma'am.

This pattern continued as to every mitigating circumstance found.

Regarding the "catchall," the only circumstance not found, the following exchange occurred:

> THE CLERK: Number five, Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value. Your answer is no. Is this the *unanimous verdict* of the jury? (Emphasis added.)
>
> FOREMAN ROBERTSON: Yes, ma'am.

The inquiry continued through the remaining issues on the jury form. The following then occurred:

> THE CLERK: Would the remaining jurors please stand. We, the jury, unanimously recommend that the defendant Wayne Alan Laws be sentenced to death. Is this your recommendation as to punishment, so say you all?
>
> (Jurors respond affirmatively.)

The following then occurred:

> THE COURT: Madam Clerk, you'll need to poll *each juror individually* as to their answers to the issues. . . .

. . . .

THE CLERK: . . . .

Soundra Goings. In . . . issue number two, yes; mitigating factor number one is yes; number two, yes; number three, yes; number four, yes; number five, no . . . . Your recommendation as to punishment is that the defendant Wayne Alan Laws be sentenced to death. *Are these your answers and your recommendation as to punishment*? (Emphasis added.)

JUROR GOINGS: Yes, ma'am.

THE CLERK: And do you still assent thereto?

JUROR GOINGS: Yes, ma'am.

The clerk polled each individual juror similarly, and each gave the same explicit affirmative responses.

The record thus establishes that the foreman expressly informed the court the jury was unanimous in rejecting the catchall mitigating circumstance. In addition, each member of the jury, when polled individually, expressly affirmed that his or her individual answer to that circumstance was "no." Each juror had an opportunity to express his or her difference with the finding of the jury, yet none did so. Rather, each expressly verified his or her individual concurrence. Extrinsic evidence in the record thus clearly establishes that each juror's decision was consistent with that of the whole.

Although an erroneous *McKoy* instruction may preclude a juror or jurors from considering a defendant's mitigating evidence, here the jurors' responses to the polling establish that in fact no such preclusion occurred. Because the record clearly establishes that no juror individually found defendant's evidence sufficiently substantial to support a finding of the catchall mitigating circumstance, we can conclude with confidence that the unconstitutional unanimity requirement did not preclude any juror from considering mitigating evidence. The "substantial risk that the jury was misinformed" which underlies *Mills* is not present here. *Mills v. Maryland*, 486 U.S. at 381, 100 L. Ed. 2d at 398.

We are aware that

[t]he decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public

> officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.

Mills v. Maryland, 486 U.S. at 384, 100 L. Ed. 2d at 399. We are satisfied, however, that this "high requirement of reliability" has been met in this case. We previously reviewed defendant's other assignments of error and concluded that the trial was without error. *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609. Even giving the most favorable reading to the relatively inconsequential evidence that defendant argues supports a finding of the catchall mitigating circumstance, the *McKoy* error here is harmless beyond a reasonable doubt because there is unequivocal extrinsic evidence, both from the jury foreman's colloquy with the court and the individual jurors' answers, that the instruction did not prevent any juror's consideration of defendant's mitigating evidence; rather, the jury was unanimous in rejecting the one mitigating circumstance that it failed to find.

Accordingly, the sentence of death is affirmed and the mandate of our prior opinion is reinstated. The case is remanded to the Superior Court, Davidson County, for further proceedings.

Death sentence affirmed, mandate reinstated, case remanded.

CITY OF NEW BERN, A NORTH CAROLINA MUNICIPAL CORPORATION v. THE NEW BERN-CRAVEN COUNTY BOARD OF EDUCATION, A BODY CORPORATE UNDER THE LAWS OF THE STATE OF NORTH CAROLINA; THE TRUSTEES OF CRAVEN COMMUNITY COLLEGE, A BODY CORPORATE UNDER THE LAWS OF THE STATE OF NORTH CAROLINA; CRAVEN REGIONAL MEDICAL AUTHORITY, A PUBLIC BODY AND A BODY CORPORATE AND POLITIC WHICH HAS ITS PRINCIPAL OFFICE AND PLACE OF BUSINESS IN THE CITY OF NEW BERN, CRAVEN COUNTY, NORTH CAROLINA; THE COUNTY OF CRAVEN, A BODY POLITIC AND CORPORATE UNDER THE LAWS OF THE STATE OF NORTH CAROLINA; AND LACY H. THORNBURG, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA

No. 157PA89

(Filed 3 April 1991)

Declaratory Judgment Actions § 7 (NCI4th)— justiciable controversy—change of status by legislation—unavoidable litigation

There was a justiciable controversy which could be determined by declaratory judgment where the City of New Bern sought to have held unconstitutional three chapters of the 1988 Session Laws which provided that Craven County would have the exclusive jurisdiction for the administration and enforcement of building codes and fire and safety codes applicable to the New Bern-Craven County Board of Education, the Craven Community College, and the Craven Regional Medical Center, all of which owned property within the city limits of New Bern. The plaintiff had the right to enforce the codes prior to the action by the General Assembly, the plaintiff's status was changed by the General Assembly, and the plaintiff may challenge this change of status by an action for a declaratory judgment. There is no impediment to be removed before court action could begin, as in prior cases in which litigation did not appear to be unavoidable.

Am Jur 2d, Declaratory Judgments §§ 33, 36, 37, 98.

Justice MITCHELL dissenting.

Justice MARTIN joins in this dissenting opinion.

ON discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of a judgment for defendants entered by *Reid, J.*, at the 28 December 1988 Session of Superior Court in CRAVEN County. Heard in the Supreme Court 16 November 1989.

This action was brought by the City of New Bern for a declaratory judgment. The City prayed that Chapter 805 of the 1986 Session Laws, Chapter 341 of the 1987 Session Laws, and Chapter 934 of the 1988 Session Laws be held unconstitutional. The three Chapters provide that Craven County shall have exclusive jurisdiction for the administration and enforcement of all laws and regulations relating to building codes, and fire and safety codes as they are legally applicable to the New Bern-Craven County Board of Education, the Craven Community College, and the Craven Regional Medical Center. Each of these three entities owns property within the city limits of New Bern. The plaintiff contends this legislation violates article II, section 24 and article XIV, section 3 of the Constitution of North Carolina.

After a hearing the superior court found that the City of New Bern had "no protected right to conduct inspections and enforce the State Building Fire and Safety Codes" and that absent such a vested right or obligation there is no real controversy. The court found there was no justiciable controversy and dismissed the action.

The plaintiffs appealed.

Ward, Ward, Willey & Ward, by A. D. Ward and Elizabeth Williams, for plaintiff appellant.

Sumrell, Sugg, Carmichael & Ashton, P.A., by James R. Sugg, for defendant appellee County of Craven.

Henderson, Baxter & Alford, P.A., by David S. Henderson, for defendant appellee New Bern-Craven County Board of Education.

Ward and Smith, P.A., by Susan K. Ellis and Kenneth R. Wooten, for defendant appellee Craven Community College.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Fred M. Carmichael and Rudolph A. Ashton, III, for defendant appellee Craven Regional Medical Authority.

WEBB, Justice.

The question brought to the Court by this appeal is whether the superior court had jurisdiction under the Declaratory Judgment Act, N.C.G.S. § 1-253 *et seq.*, to determine the validity of laws adopted by the General Assembly to provide that Craven County

shall administer building and safety codes inside the city limits of New Bern. N.C.G.S. § 1-254 provides in part:

> Any person interested under a deed, will, written contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

We have held that in order to invoke the provisions of the Declaratory Judgment Act there must be a justiciable controversy between the parties. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 347 S.E.2d 25 (1986); *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 323 S.E.2d 294 (1984); *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404 (1949).

In this case the plaintiff is attempting to have determined its rights or status as affected by three statutes. The plaintiff contests the validity of these statutes. This would appear to make the plaintiff's claim cognizable under N.C.G.S. § 1-254.

The defendants contend the plaintiff's claim is not cognizable because there is not a real controversy between the parties. They say that it is the prerogative of the State to confer the right to enforce building codes and fire and safety codes. This being so, say the defendants, the plaintiff does not have a vested right in the enforcement of the codes and without this right there cannot be a controversy. We do not believe the question of whether there is an actual controversy depends on the existence of a vested right. The plaintiff had the right to enforce the codes prior to the action by the General Assembly. This change in status may be determined under the Declaratory Judgment Act. *See Board of Health v. Comrs. of Nash*, 220 N.C. 140, 16 S.E.2d 677 (1941), in which this Court held that an act which gave the county commissioners the power to veto the appointment of a health officer by the county board of health could be challenged under the Declaratory Judgment Act. The controversy between the parties in this case is more than a mere difference of opinion as contended by the defendants. A right which previously belonged to the plaintiff has been removed. The plaintiff may challenge this removal.

The defendants would distinguish *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 360 S.E.2d 756 (1987), and *Board of*

Managers v. Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953), on the ground that a duty was imposed on the two municipalities in those cases. It is true that no duty was imposed on the plaintiff by the three acts in question in this case. That is not the test. The plaintiff's status was changed by the acts of the General Assembly. The plaintiff may challenge this change of status by an action for a declaratory judgment.

Finally the defendants, relying on *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 347 S.E.2d 25, *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 316 S.E.2d 59 (1984), and *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974), say that in order to invoke the Declaratory Judgment Act litigation must appear unavoidable, which is not so in this case. In each of these cases we said that to satisfy the jurisdictional requirements of an actual controversy, it is necessary that litigation appear unavoidable. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 589, 347 S.E.2d 25, 32; *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 232, 316 S.E.2d 59, 61; *Consumers Power v. Power Co.*, 285 N.C. 434, 450, 206 S.E.2d 178, 189. We have not as yet defined what is meant by "unavoidable." It cannot mean that there is no way in which litigation can be avoided. One party can always avoid litigation by not bringing an action or by not resisting his opponent's claim.

In *Gaston Bd.* the plaintiff Board of Realtors brought an action for a declaratory judgment to have the court determine whether it had conducted lawful disciplinary proceedings against one of its members. The evidence showed there was a good chance the member would not sue the Board but would abide by the decision and seek reinstatement. In *Sharpe* the plaintiffs brought an action for a declaratory judgment that they were not bound by a covenant not to compete with the defendant in the newspaper business. The evidence showed the plaintiffs had no immediate intention of entering business in competition with the defendant. In *Consumers Power* the City of Shelby entered into a contract with North Carolina Consumers Power, Inc. to build a plant for the generation of electric power for the City. The City and Consumers Power brought a declaratory judgment action against Duke Power Company. They alleged that Duke had committed itself to oppose the construction of the facilities and they prayed that the contract be declared valid. This Court said the complaint revealed that there was not a practical certainty that the plaintiffs had the capaci-

ty to perform the contract. This Court held that the superior court was correct in dismissing the action because there was not a justiciable controversy.

In the three cases, *Sharpe, Gaston Bd.*, and *Consumers Power*, in which we said that litigation did not appear to be unavoidable, there was an impediment to be removed before court action could be started. In this case there is no such impediment. The County contends it has the right to enforce certain laws. The City says the County does not have the right. This is a justiciable controversy which may be determined by a declaratory judgment action.

For the reasons stated in this opinion, we reverse and remand to the Superior Court of Craven County for further proceedings.

Reversed and remanded.

Justice MITCHELL dissenting.

In my view the trial court correctly dismissed this action for lack of jurisdiction due to the absence of a justiciable controversy. The plaintiff city brought this action under our Uniform Declaratory Judgment Act. N.C.G.S. §§ 1-253 to 267 (1983 & Cum. Supp. 1990). The existence of a justiciable or genuine controversy, existing at the time of the filing of the complaint, is a jurisdictional necessity for a claim brought under the Declaratory Judgment Act. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 347 S.E.2d 25 (1986). In order to establish the jurisdiction of the trial court in the present case, the plaintiff city was required to allege in its complaint all of the facts necessary to disclose the existence of an actual or real existing controversy between the parties to the action. *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 323 S.E.2d 294 (1984). The controversy must be more than mere difference of opinion or a threat or apprehension of litigation. *Gaston Board of Realtors, Inc. v. Harrison*, 311 N.C. 230, 316 S.E.2d 59 (1984). In order to confer jurisdiction under the Declaratory Judgment Act, the plaintiff must establish that litigation appears unavoidable. *Id.* The term "unavoidable" needs little interpretation or explanation; it means "not avoidable: incapable of being shunned or prevented: INEVITABLE." Webster's Third New International Dictionary 2483 (1976).

When the foregoing principles are applied to the present case, it is apparent that the trial court correctly concluded that the

plaintiff city had failed to show that a justiciable controversy existed at the time of the filing of its complaint. The pleadings failed to show more than a mere difference of opinion as to the validity of an act of the General Assembly placing certain administrative and enforcement responsibilities with regard to building codes with Craven County. The plaintiff city failed to set forth any specific legal right belonging to it which was affected by the challenged act. In fact, it is obvious that the act merely relieves the city of a burden. Further, the city did not allege that it planned to conduct inspections in violation of the act. Instead, the city merely alleged its "belief" that the act was null and void and its "belief" that the defendants contend otherwise. Nothing in the complaint filed by the plaintiff city suggests that litigation is "unavoidable." Therefore, the plaintiff city failed to establish a real existing controversy of the type required in order to vest jurisdiction in the trial court.

Writing for this Court more than forty years ago, Justice Ervin explained the limitations upon jurisdiction under the Declaratory Judgment Act as follows:

> There is much misunderstanding as to the object and scope of this legislation. Despite some notions to the contrary, it does not undertake to convert judicial tribunals into counselors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. (Citations omitted.) This observation may be stated in the vernacular in this wise: The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice.

Lide v. Mears, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949). As the complaint filed by the plaintiff city in the present case does not meet the jurisdictional requirement of establishing the existence of an actual case or controversy, by showing that litigation appears unavoidable, the plaintiff city is merely seeking an impermissible advisory opinion. In reversing the trial court in this case, the majority requires the trial court to allow the plaintiff city "to fish in judicial ponds for legal advice" and to give the plaintiff that advice in the form of an advisory opinion. As I believe this flies

in the face of long established and adhered to precedent, I respectfully dissent.

Justice MARTIN joins in this dissenting opinion.

CROWELL CONSTRUCTORS, INC. v. STATE OF NORTH CAROLINA, EX REL., WILLIAM W. COBEY, JR., SECRETARY, DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES

No. 394A90

(Filed 3 April 1991)

APPEAL by plaintiff from the decision of a divided panel of the Court of Appeals, 99 N.C. App. 431, 393 S.E.2d 312 (1990), reversing a judgment signed 15 August 1989 in Superior Court, CUMBERLAND County, by *Greene, J.* Heard in the Supreme Court 13 December 1990.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins, for plaintiff-appellant.

Lacy H. Thornburg, Attorney General, by Kathryn Jones Cooper, Assistant Attorney General, for defendant-appellee.

PER CURIAM.

Under Rule 3(a) of the Rules of Appellate Procedure, a party entitled by law to appeal from a judgment of superior court rendered in a civil action may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in a timely manner. This rule is jurisdictional. *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 301 S.E.2d 98 (1983). If the requirements of this rule are not met, the appeal must be dismissed. *Currin-Dillehay Building Supply, Inc. v. Frazier*, 100 N.C. App. 188, 394 S.E.2d 683 (1990). The appellant has the burden to see that all necessary papers are before the appellate court. *State v. Stubbs*, 265 N.C. 420, 144 S.E.2d 262 (1965). The notice of appeal must be contained in the record. *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971).

Since the record does not contain a notice of appeal in compliance with Rule 3, the Court of Appeals had no jurisdiction of

the appeal. The appeal should have been dismissed. Therefore, we vacate the decision of the Court of Appeals and remand to that court for dismissal of the appeal.

Vacated and remanded.

ROY DUDLEY SMITH v. JAMES ALBERT BOHLEN AND BETTY LOU HOLMQUIST BOHLEN

No. 410A89

(Filed 3 April 1991)

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30 from a decision by a divided panel of the Court of Appeals, 95 N.C. App. 347, 382 S.E.2d 812 (1989), finding no error in the judgment and verdict entered by *Morgan, J.*, at the 11 April 1988 Session of Superior Court, GUILFORD County. Heard in the Supreme Court 15 March 1990.

Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence, by Michael F. Curtis, for plaintiff-appellant.

Frazier, Frazier & Mahler, by Robert A. Franklin and James D. McKinney, for defendant-appellees.

PER CURIAM.

Affirmed.

CARSON v. MOODY

[328 N.C. 565 (1991)]

WAYNE CARSON, PLAINTIFF v. C. R. MOODY, JIMMY BERRY, AND W. C. NELSON, JR., D/B/A NELSON TRACTOR CO., DEFENDANTS

No. 430PA90

(Filed 3 April 1991)

ON defendants' petition for discretionary review of a decision of the Court of Appeals, 99 N.C. App. 724, 394 S.E.2d 194 (1990), which affirmed in part and reversed in part an order entered by *Strickland, J.*, in Superior Court, CHEROKEE County, on 5 September 1989. Heard in the Supreme Court 15 March 1991.

McLean & Dickson, P.A., by Russell L. McLean, III, for plaintiff.

Lacy H. Thornburg, Attorney General of North Carolina, by David F. Hoke, Assistant Attorney General, for defendant Moody.

Michael J. Bowers, Attorney General of Georgia, appearing pro hac vice, by Daryl A. Robinson, Senior Assistant Attorney General, and Eddie Snelling, Jr., Assistant Attorney General, for defendant Berry.

PER CURIAM.

Discretionary review improvidently allowed.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY v. RICHARD WEST

No. 586A90

(Filed 3 April 1991)

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-30 from a decision of a divided panel of the Court of Appeals, 100 N.C. App. 668, 397 S.E.2d 765 (1990), affirming an order of *Lewis (Robert), J.*, entered at the 23 October 1989 Civil Session of Superior Court, HAYWOOD County, directing a verdict for plaintiff at the close of all the evidence. Heard in the Supreme Court 14 March 1991.

Roberts Stevens & Cogburn, P.A., by Gwynn G. Radeker, for plaintiff-appellee.

Patla, Straus, Robinson & Moore, P.A., by Harold K. Bennett, for defendant-appellant.

PER CURIAM.

Affirmed.

WALTER G. RICKS AND WIFE, MARIE RICKS v. TOWN OF SELMA

No. 309PA90

(Filed 3 April 1991)

ON discretionary review of a unanimous decision of the Court of Appeals, 99 N.C. App. 82, 392 S.E.2d 437 (1990), affirming in part and reversing in part judgment entered by *Manning, J.*, on 10 April 1989 after hearing at the 6 March 1989 Civil Session of Superior Court, JOHNSTON County. Heard in the Supreme Court 12 March 1991.

Ashley and Ashley, by Emery D. Ashley, for plaintiff-appellee.

Spence & Spence, P.A., by Robert A. Spence, Sr., and E. Craig Jones, Jr., for defendant-appellant.

PER CURIAM.

Discretionary review improvidently allowed.

EDWARD F. WILKINSON, ADMINISTRATOR OF THE ESTATE OF PEGGY W. PITTMAN, DECEASED v. DR. CORAZON CRUZ

No. 548A90

(Filed 3 April 1991)

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 100 N.C. App. 420, 396 S.E.2d 811 (1990), which affirmed the judgment entered by *Hyatt, J.*, at the 31 July 1989 session of Superior Court, GASTON County. Heard in the Supreme Court 12 March 1991.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Douglas B. Abrams, and Karro, Sellers & Langson, by Seth H. Langson, for plaintiff-appellant.

Roberts Stevens & Cogburn, P.A., by Isaac N. Northup, Jr., for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is reversed upon the reasoning and authority of *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974). The verdict and judgment are vacated, and the case is remanded to the Court of Appeals for further remand to the Superior Court, Gaston County, for a new trial on all issues.

Reversed and remanded.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

ATLANTIC TOBACCO CO. v. HONEYCUTT

No. 36P91

Case below: 101 N.C.App. 161

Petition by defendant (Joseph B. Honeycutt) for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

BARBER v. BABCOCK & WILCOX CONSTRUCTION CO.

No. 131PA91

Case below: 98 N.C.App. 203

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 3 April 1991.

BELL ARTHUR WATER CORP. v.
N.C. DEPT. OF TRANSPORTATION

No. 76A91

Case below: 101 N.C.App. 305

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 3 April 1991.

BRITT v. BRITT

No. 438P90

Case below: 99 N.C.App. 773

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

BRITT v. SHARPE

No. 424P90

Case below: 99 N.C.App. 555

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

BROMHAL v. STOTT

No. 82P91

Case below: 101 N.C.App. 428

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

CHAPLAIN v. CHAPLAIN

No. 104P91

Case below: 101 N.C.App. 557

Petition by defendant (Elsie B. Chaplain) for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

CHRISALIS PROPERTIES, INC. v. SEPARATE QUARTERS, INC.

No. 50P91

Case below: 101 N.C.App. 81

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

DAVIS v. DENNIS LILLY CO.

No. 119A91

Case below: 101 N.C.App. 574

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 3 April 1991.

FEDERAL PAPER BOARD CO. v. KAMYR, INC.

No. 99P91

Case below: 101 N.C.App. 329

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

FERGUSON v. WILLIAMS

No. 80P91

Case below: 101 N.C.App. 265

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

FRYE v. KELLEY

No. 528A90

Case below: 100 N.C.App. 332

Appeal by defendant (John Bowen II) dismissed 3 April 1991.

GEORGE SHINN SPORTS, INC. v. BAHAKEL SPORTS, INC.

No. 486P90

Case below: 99 N.C.App. 481

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

GRIFFITHS v. STERLING

No. 406P90

Case below: 99 N.C.App. 582

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

INTEGON GENERAL INS. CORP. v.
UNIVERSAL UNDERWRITERS INS. CO.

No. 44P91

Case below: 101 N.C.App. 242

Petition by plaintiff (Integon) for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

JACKSON v. RYDER TRUCK RENTALS

No. 436P90

Case below: 99 N.C.App. 583

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

JENKINS v. RICHMOND COUNTY

No. 448P90

Case below: 99 N.C.App. 717

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

McEACHIN v. WAKE COUNTY BD. OF EDUCATION

No. 81P91

Case below: 101 N.C.App. 399

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

PALMER v. N.C. DEPT. OF
CRIME CONTROL & PUBLIC SAFETY

No. 98P91

Case below: 101 N.C.App. 572

Petition by defendant for writ of supersedeas denied 3 April 1991. Temporary stay dissolved 3 April 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

PEARSON v. MARLOWE

No. 101P91

Case below: 101 N.C.App. 430

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

RUSSELL v. RUSSELL

No. 78P91

Case below: 101 N.C.App. 284

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

STATE v. BARBOUR

No. 579P90

Case below: 100 N.C.App. 601

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

STATE v. COATS

No. 582P90

Case below: 100 N.C.App. 455

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 April 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991. Motion by George M. Anderson and Richard W. Rutherford to withdraw as counsel dismissed as moot 3 April 1991.

STATE v. COTTON

No. 147P91

Case below: 102 N.C.App. 93

Petition by defendant for writ of supersedeas and temporary stay denied 26 March 1991.

STATE v. CRONAN

No. 90P91

Case below: 100 N.C.App. 641

Petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed 3 April 1991 without prejudice to petitioner's right to file a motion for appropriate relief in superior court.

STATE v. CURETON

No. 70P91

Case below: 101 N.C.App. 432

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 April 1991.

STATE v. DAVIS

No. 49P91

Case below: 101 N.C.App. 1

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 April 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

STATE v. DORSETT

No. 592P90

Case below: 100 N.C.App. 601

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 April 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

STATE v. HARPER

No. 112P91

Case below: 101 N.C.App. 432

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 April 1991.

STATE v. LEGRANDE

No. 376P90

Case below: 99 N.C.App. 362

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

STATE v. MOOSE

No. 41P91

Case below: 101 N.C.App. 59

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

STATE v. PATTON

No. 121P91

Case below: 101 N.C.App. 575

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 April 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

STATE v. PICKETT

No. 114A91

Case below: 101 N.C.App. 576

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 April 1991.

STATE v. PIERCE

No. 135A91

Case below: 101 N.C.App. 576

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 April 1991.

STATE v. SIMPSON

No. 130P91

Case below: 101 N.C.App. 576

Petition by defendant for temporary stay allowed 18 March 1991 pending consideration and determination of the petition for discretionary review.

STATE v. SMART

No. 463P90

Case below: 99 N.C.App. 730

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

STATE v. WILLIAMS

No. 92P91

Case below: 100 N.C.App. 567

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals dismissed 3 April 1991.

STATE EX REL. ENVIR. MGMT. COMM. v.
HOUSE OF RAEFORD FARMS

No. 129P91

Case below: 101 N.C.App. 433

Petition by defendants for writ of supersedeas and temporary stay denied 3 April 1991. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

TAYLOR v. BOONE

No. 74P91

Case below: 101 N.C.App. 244

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

THOMAS v. OVERLAND EXPRESS, INC.

No. 43P91

Case below: 101 N.C.App. 90

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

TOMLINSON v. CAMEL CITY MOTORS

No. 93PA91

Case below: 101 N.C.App. 419

Petition by defendant (Lawyers Surety Corporation) for discretionary review pursuant to G.S. 7A-31 allowed 3 April 1991.

WARD v. ROY H. PARK BROADCASTING CO.

No. 127P91

Case below: 101 N.C.App. 576

Motion by defendants to dismiss appeal by plaintiff for lack of substantial constitutional question allowed 3 April 1991. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

WON, INC. v. FIDELITY SERVICE CORP.

No. 314P90

Case below: 98 N.C.App. 700

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 April 1991.

PETITION TO REHEAR

SMITH v. NATIONWIDE MUTUAL INS. CO.

No. 130A90

Case below: 328 N.C. 139

Petition by defendant to rehear pursuant to Appellate Rule 31 denied 3 April 1991.

THE HAJMM COMPANY v. HOUSE OF RAEFORD FARMS, INC.; E. MARVIN JOHNSON

No. 271A89

(Filed 2 May 1991)

1. **Evidence § 47 (NCI3d)— expert testimony on ultimate issues— erroneously admitted—not prejudicial**

There was no prejudicial error in an action arising from defendants' refusal to redeem a revolving fund certificate in the admission of expert testimony that there was a fiduciary relationship, that defendants breached their duty, and that the Raeford board abused its discretion. Whether there was a fiduciary relationship was the ultimate jural relationship at issue, whether the fiduciary duty was breached was the ultimate legal conclusion, and whether the board abused its discretion involved the satisfaction of the ultimate legal standard. The underlying factual components were the proper subject of expert opinion testimony, but the witness should not have been permitted to give his opinion on the existence of a fiduciary relationship, the breach of the relationship, and the abuse of discretion. However, admission of the testimony was harmless because other substantial admissible testimony, together with documentary evidence, was compelling in favor of plaintiff. N.C.G.S. § 8C-1, Rules 702 and 704.

Am Jur 2d, Securities Regulation—Federal §§ 35 et seq.; Securities Regulation—State §§ 11 et seq.

2. **Unfair Competition § 1 (NCI3d)— revolving fund certificate— failure to redeem—unfair practices not applicable**

The trial court properly granted a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of an unfair practices claim arising from the failure to redeem a revolving fund certificate. Revolving fund certificates are, in essence, corporate securities and N.C.G.S. § 75-1.1 does not apply to securities transactions. Securities transactions are pervasively regulated by other state statutes, federal statutes, and agencies, and securities transactions are related to the creation, transfer, or retirement of capital and are not business activities as that term is used in the Act.

Am Jur 2d, Securities Regulation—Federal §§ 35 et seq.; Securities Regulation—State §§ 11 et seq.

Justice MARTIN dissenting in part.

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from a decision by a divided panel of the Court of Appeals, 94 N.C. App. 1, 379 S.E.2d 868 (1989), finding no error in a verdict and judgment rendered at the 14 December 1987 session of Superior Court, SCOTLAND County, *Phillips, J.*, presiding. Defendants' petition for discretionary review was allowed as to an additional issue. Heard in the Supreme Court 13 December 1989.

Adams, McCullough & Beard, by William H. McCullough, Charles C. Meeker, and John J. Butler, for plaintiff-appellee.

Petree Stockton & Robinson, by G. Gray Wilson and R. Rand Tucker, for defendant-appellants.

EXUM, Chief Justice.

This is an action seeking compensatory, punitive and treble damages for breach of fiduciary duty, breach of corporate bylaws, and unfair or deceptive acts or practices in or affecting commerce (unfair practices) based on defendants' allegedly improper refusal to redeem a certain "revolving fund certificate" issued by the corporate defendant (Raeford) to plaintiff. The trial court dismissed the claim for unfair practices under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.[1] The other claims were tried before a jury,[2] which returned a verdict granting compensatory damages against both defendants and punitive damages against Raeford. From judgment entered on the verdict defendants appealed. Plaintiff appealed from the dismissal of its unfair practices claim.

The Court of Appeals found no error in the trial, but reversed the dismissal of plaintiff's unfair practices claim and remanded it for trial. Judge Greene dissented, believing that during the jury trial the court improperly admitted certain expert testimony to

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1. This claim was dismissed at the 4 August 1986 session of Superior Court, Scotland County, Hairston, J., presiding.

2. The trial was conducted at the 14 December 1987 session of Superior Court, Scotland County, Phillips, J., presiding.

the prejudice of defendants. Defendants' appeal to us is based on this dissent and raises the question of the admissibility of the expert testimony. We allowed in part defendants' petition for discretionary review to consider only the question whether the Court of Appeals correctly concluded that plaintiff stated a claim for unfair practices under N.C.G.S. § 75-1.1.

We conclude that the challenged expert testimony should not have been admitted but the error in admitting it was harmless. We also conclude that N.C.G.S. § 75-1.1 was not intended to apply to the transaction in question and plaintiff has not, therefore, stated a claim for unfair practices. We consequently modify and affirm in part and reverse in part the Court of Appeals' decision.

I.

Evidence at trial tends to show the following:

Plaintiff is a North Carolina limited partnership engaged in agricultural marketing. The partnership is composed of members of the Evans family from Laurinburg. HAJMM is an acronym formed from the first names of five Evans siblings—Hervey, Ann, John, McNair and Murphy.

Defendant Raeford is an incorporated North Carolina agricultural cooperative engaged in the business of processing turkeys and other poultry. Defendant Johnson is president and chairman of its board of directors. He runs the company. According to his testimony, "[t]he final decision is mine" with regard to Raeford's business.

Raeford was formed in 1975. It was capitalized in part when plaintiff and two other turkey producers sold to Raeford all their stock in Raeford Turkey Farms, Inc. (RTF). The other two selling turkey producers were Stone Brothers, Inc. (Stone Brothers), and Nash Johnson and Sons, Inc. (NJS). Defendant Johnson and his sisters own NJS, which provides over ninety percent of Raeford's turkeys.

As part of the consideration for selling their interests in RTF to Raeford, plaintiff and the other turkey producers received "Class B—Series 1975" revolving fund certificates issued by Raeford. The certificates became part of Raeford's capital structure and are shown as stockholder's equity on Raeford's balance sheet.

Plaintiff's certificate recites that plaintiff "has furnished $387,500 . . . in value to [Raeford]." The certificate also recites that it "shall bear no interest," is "junior and subordinate to all debts" of the company, is subject to the company's bylaws, which are incorporated by reference, and is "retirable in the sole discretion of the board of directors, either fully or on a pro rata basis." The certificate bears no maturity date.

An identical certificate was issued to Stone Brothers for its RTF stock. NJS received a certificate with like terms but with a face value of $750,000.

With regard to the revolving fund certificates, Raeford's bylaws provide in part: "Funds arising from the issue of such certificates shall be used for creating a revolving fund for the purpose of building up such an amount of capital as may be deemed necessary by the board of directors from time to time and for revolving such capital." The bylaws also provide that "[s]uch certificates shall be issued in annual series . . . and each series shall be retired fully or on a prorata basis, only at the discretion of the board . . . in the order of issuance by years as funds are available for that purpose."

During 1978 Raeford retired the revolving fund certificate originally issued to Stone Brothers but which Stone Brothers had by then transferred to FCX, Inc. No value was placed on the certificate when it was retired. This retirement was a component of Raeford's purchase of all interest FCX then held in Raeford and was shown on Raeford's books by discounting the certificate to zero value.

Some time later Raeford retired the NJS certificate. Retirement of this certificate was also shown on Raeford's books by discounting the certificate to zero value.

Plaintiff's certificate was not retired and continued to be carried on Raeford's books as part of Raeford's capital structure. In March 1986 plaintiff demanded payment on the certificate and Raeford refused.

According to plaintiff's evidence defendant Johnson told Hervey Evans that Raeford would never pay the certificate. Johnson told an attorney representing the Federal Land Bank, "[i]t's not bearing interest, so there's really no reason to pay it. It's sort of like owing money to yourself." According to defendant Johnson, Raeford

had refused to pay off the certificate because it "wasn't good business." He conceded he had said he might never pay the certificate.

Plaintiff's evidence also showed that Raeford had been profitable throughout the mid-1980's. For example, the fiscal year ending 31 May 1986 yielded Raeford $6.1 million in net income and brought its net worth to over $18 million. Raeford's net worth had been only $6.8 million in 1983.

As of 1986 Raeford had loaned $375,000 to Johnson and over $1.1 million to other businesses owned by the Johnson family. In fiscal year 1987 Raeford purchased a jet airplane for over $800,000. By the end of the year, Raeford held $3.4 million in outside securities and had $922,000 cash on hand. Despite these loans, purchases, and liquidity, defendant Raeford refused to retire plaintiff's $387,500 revolving fund certificate.

Defendants' evidence sought primarily to justify the refusal to pay plaintiff's revolving fund certificate.

At the close of the evidence, the trial court submitted issues to the jury and received the following answers:

1. Did the defendant, House of Raeford Farms, Inc., breach its bylaws by refusing to retire the revolving fund certificate of the plaintiff, HAJMM, in the reasonable exercise of its discretion?

Yes.

2. Did the defendant, House of Raeford Farms, Inc., breach its bylaws by retiring any of the revolving fund certificates in the same annual series as that of plaintiff, HAJMM, and refusing to retire that of the plaintiff, HAJMM?

Yes.

3. Do the defendants, E. Marvin Johnson and Raeford Farms, Inc., owe a fiduciary duty to the plaintiff, HAJMM?

Yes.

4. If so, was their refusal to retire HAJMM's revolving fund certificate an open, fair and honest transaction?

No.

5. In what month and year did the breach or violation occur?

March, 1986.

6. In your discretion what amount of punitive damages, if any, should be awarded to the plaintiff, HAJMM from the defendant E. Marvin Johnson?

None.

7. In your discretion, what amount of punitive damages, if any, should be awarded to the plaintiff, HAJMM from the defendant, House of Raeford Farms, Inc.?

$100,000.

Upon this verdict the trial court entered judgment ordering defendants, jointly and severally, to pay plaintiff $387,500 as compensatory damages and ordering defendant Raeford to pay plaintiff $100,000 in punitive damages.

On defendants' appeal a majority of the Court of Appeals panel found no error in the trial. Judge Greene dissented, believing that the trial court erred by allowing an expert witness to testify that Raeford's Board of Directors "abused its discretion" and that defendants owed plaintiff a "fiduciary duty," which they breached. Defendants appeal to us as of right on the basis of the dissent.

On plaintiff's appeal, the Court of Appeals reversed and vacated the trial court's order granting defendants' Rule 12(b)(6) motion to dismiss the unfair practices claim and remanded for trial on that issue.

We granted defendants' petition for discretionary review to consider only the unfair practices claim issue.

II.

[1] The first question we address is whether there was reversible error in the admission of certain expert testimony. The Court of Appeals concluded there was no error. We conclude there was error but that it was not so prejudicial as to warrant a new trial.

Dr. James Baarda was qualified as an expert witness on equity redemption by agricultural cooperatives. Defendants made timely objections to the following portions of his direct testimony:

Q: [By plaintiff's counsel] Based upon your experience and your review of the materials as to what you have previously testified and identified, do you have an opinion satisfactory to yourself, as to whether the Board of Directors of Raeford, abused their [sic] discretion in failing to redeem HAJMM's Class B Revolving Fund Certificate?

A: [By Dr. Baarda] Yes, I do have an opinion.

Q: What is that opinion?

A: [M]y opinion is that the Board of Directors did abuse its discretion in failing to redeem this equity.

* * * * *

Q: Do you have an opinion satisfactory to yourself, as to whether there was a fiduciary duty [owed] both by Raeford and the defendant, Marvin Johnson, to the HAJMM Company?

A: Yes, I do.

Q: What is that opinion?

A: In my opinion . . . there was such a relationship.

* * * * *

Q: Do you have an opinion satisfactory to yourself as to whether the fiduciary duty was breached?

A: Yes.

Q: What is that?

A: I believe that the fiduciary duty was breached.

* * * * *

Q: Do you have an opinion satisfactory to yourself, as to when the fiduciary duty was breached?

A: I believe it was breached when the Evans family made demand on the cooperative to pay it back, and the cooperative refused to do so.

Q: Do you have an opinion satisfactory to yourself as to whether this breach is continuous?

A: Yes, this, this is a continuing duty.

(Objections and objections to the line of questioning omitted.)

Defendants contend that Dr. Baarda should not have been permitted to give his opinion that they were plaintiff's fiduciaries, that they breached their fiduciary duties to plaintiff, or that Raeford's board abused its discretion by failing to redeem plaintiff's certificate. We agree with defendants.

To decide this issue, we first examine the Rules of Evidence and pertinent case law. We also discuss the policies underlying the admission or exclusion of certain types of opinion testimony.

Expert testimony is admissible under North Carolina Evidence Rule 702, which provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C.G.S. § 8C-1, Rule 702.

Under Rule 704 "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C.G.S. § 8C-1, Rule 704. Rule 704 comports with and codifies North Carolina's common law:

> [I]n determining whether expert . . . opinion is to be admitted into evidence the inquiry should be not whether it invades the province of the jury, but whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.

State v. Wilkerson, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978).

There are, nevertheless, limits on the admissibility of expert opinion testimony. The advisory committee note to Rule 704 states:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurance against the admission of opinions which would merely tell the jury what result to reach,

> somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria.

N.C.G.S. § 8C-1, Rule 704 advisory committee's note.

Our cases interpreting Rule 704 are to the same effect. "[U]nder the . . . rules of evidence, an expert may not testify that a particular legal conclusion or standard has or has not been met, at least where the standard is a legal term of art which carries a specific meaning not readily apparent to the witness." *State v. Ledford*, 315 N.C. 599, 617, 340 S.E.2d 309, 321 (1986) (error, but not prejudicial, to admit expert opinion that certain injuries were the "proximate cause" of death).

The distinction between legal standards and conclusions about which testimony may not be admitted, and ultimate facts about which testimony is admissible, is often difficult to draw. The advisory committee's note to Rule 704 gives a helpful example of the difference:

> [T]he question, "Did [the testator] have capacity to make a will?" would be excluded, while the question, "Did [the testator] have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

N.C.G.S. § 8C-1, Rule 704 advisory committee's notes. This example illustrates the kind of opinion testimony, expert or not, that should be excluded by the rules as well as the kind of testimony that should be admitted under them. The term " ' "[testamentary capacity]" is a conclusion which the law draws from certain facts as premises.' " *In re Will of Tatum*, 233 N.C. 723, 728, 65 S.E.2d 351, 354 (1951) (quoting *In re Will of Lomax*, 224 N.C. 459, 462, 31 S.E.2d 369, 370 (1944)). In the example given, opinion testimony would be allowed regarding the underlying *factual premises* the jury must consider in determining whether testamentary capacity exists, facts including the testator's ability to know the nature and extent of his property, to know the natural objects of his bounty, and to formulate a rational distribution scheme. Opinion testimony could not be offered on whether the *legal conclusion* that testamentary capacity existed should be drawn.

We have applied this distinction between a legal standard, or conclusion, and its factual premises in other contexts. In *State*

v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988), we held that it was reversible error for the trial court to exclude evidence offered by the defendant's expert that the "defendant's diminished mental capacity affected his ability to make and carry out plans." *Id.* at 246, 367 S.E.2d at 643. This testimony was directed to facts, even if regarded as ultimate facts, which were relevant to whether the legal conclusion that defendant premeditated and deliberated should be drawn. In *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988), we held that the trial court correctly excluded a psychiatrist's testimony that the defendant was incapable of "premeditation and deliberation" because the proffered evidence went to whether a legal conclusion should be drawn. *See also State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988). *See generally* Note, *Mental Impairment and Mens Rea: North Carolina Recognizes the Diminished Capacity Defense in State v. Shank and State v. Rose*, 67 N.C.L. Rev. 1293 (1989).

From the Rules of Evidence, the advisory committee's notes, case law, and commentaries, we discern two overriding reasons for excluding testimony which suggests whether legal conclusions should be drawn or whether legal standards are satisfied. The first is that such testimony invades not the province of the jury but "the province of the court to determine the applicable law and to instruct the jury as to that law." *F.A.A. v. Landy*, 705 F.2d 624, 632 (2d Cir. 1983), *cert. denied*, 464 U.S. 894, 78 L. Ed. 2d 232 (1983). It is for the court to explain to the jury the given legal standard or conclusion at issue and how it should be determined. To permit the expert to make this determination usurps the function of the judge. The second reason is that an expert is in no better position to conclude whether a legal standard has been satisfied or a legal conclusion should be drawn than is a jury which has been properly instructed on the standard or conclusion.

Ultimate jural relationships at issue are like legal standards and conclusions. It is improper to admit expert opinion testimony as to whether these relationships exist. "[W]here the legal relations growing out of the facts are in dispute, and the witness's words appear to describe the relations themselves, the same words may be objectionable." 1 H. Brandis, *Brandis on North Carolina Evidence* § 130 (3d ed. 1988). The expert may, however, give testimony regarding the existence of the underlying factual component of the relationship. The jury, after hearing the opinion testimony and

upon proper instructions from the court, is in as good a position as the expert to say whether the relationship exists.

We now turn to the legal standards and jural relationships in this case. A fiduciary relationship "may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Stone v. McClam*, 42 N.C. App. 393, 401, 257 S.E.2d 78, 83, *disc. rev. denied*, 298 N.C. 572, 261 S.E.2d 128 (1979) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). Business partners, for example, are each other's fiduciaries as a matter of law. *Casey v. Grantham*, 239 N.C. 121, 79 S.E.2d 735 (1954). In less clearly defined situations the question whether a fiduciary relationship exists is more open and depends ultimately on the circumstances. Courts have historically declined to offer a rigid definition of a fiduciary relationship in order to allow imposition of fiduciary duties where justified. *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896. Thus, the relationship can arise in a variety of circumstances, *id.*, and may stem from varied and unpredictable factors.

A qualified expert such as Dr. Baarda should be permitted under Evidence Rule 704 to give an expert opinion regarding the existence of these factors. For example, the expert witness may give an opinion that under the circumstances one party has reposed special confidence in another party, or that one party should act in good faith toward another party, or that one party must act with due regard to the interests of another party. However, the witness may not opine that a fiduciary relationship exists or has been breached. The trial judge should instruct the jury with regard to factors which give rise to the relationship. The jury so instructed is then in as good a position as the expert to consider the factors and determine whether the fiduciary relationship exists.

Likewise, the discretion vested in a board of directors arises from a variety of sources and circumstances, including statutes, corporate charters, bylaws, resolutions and agreements. Whether such discretion has been abused depends on numerous factors. One such factor prominent in the case before us was the availability of funds with which to retire plaintiff's certificate. Experts may give opinions regarding the existence of these underlying factors, such as, for example, the availability of funds, but they may not

opine whether a board abused its discretion. Again the trial court should instruct on the legal significance of the underlying factors to which testimony has been offered. The jury so instructed is then in as good a position as the expert to consider the factors before it and determine whether the abuse of discretion standard has been satisfied.

Applying the foregoing principles to Dr. Baarda's challenged testimony, we conclude that he should not have been permitted to give his opinion that there was a fiduciary relationship between plaintiff and defendants, that the defendants breached their fiduciary duty, and that the Raeford board abused its discretion. Whether there was a fiduciary relationship was the ultimate jural relationship at issue. Whether the fiduciary duty was breached was the ultimate legal conclusion, and whether the board abused its discretion involved the satisfaction or not of the ultimate legal standard. The jural relationship, the legal conclusion and the legal standard each have various underlying factual components, the existence of which were the proper subject of expert opinion testimony. The jury heard this fact-oriented testimony and, having been properly instructed on the legal significance of the underlying factual components, was in as good a position as the expert to determine whether the jural relationship existed, whether the legal conclusion should be drawn, and whether the legal standard was satisfied.

Though the Court of Appeals incorrectly determined that Dr. Baarda's challenged testimony was admissible, we conclude that its admission was harmless error. In civil cases, "[t]he burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby." *Board of Education v. Lamm*, 276 N.C. 487, 492, 173 S.E.2d 281, 285 (1970). Erroneous admission of evidence is not prejudicial when its import is established by other, admissible testimony, or where the erroneously admitted testimony is merely cumulative or corroborative. *Lamm*, 276 N.C. 487, 173 S.E.2d 281. To establish prejudice and be entitled to a new trial, the appellant must show there is a reasonable probability that he would have received a favorable verdict had the error not occurred. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E.2d 488 (1967); *Mayberry v. Coach Lines*, 260 N.C. 126, 131 S.E.2d 671 (1963).

Applying these principles, we conclude defendants have failed to establish that Dr. Baarda's inadmissible testimony was prejudicial.

The substantial admissible testimony of Dr. Baarda, Hervey Evans, and others, together with the documentary evidence, is compelling in favor of plaintiff on the existence of a fiduciary relationship, breach of fiduciary duty and abuse of discretion. It also provides a solid basis for the award of punitive damages.[3]

The jury's determination on the fiduciary relationship issue rested on substantial and compelling competent evidence that plaintiff placed special confidence and trust in defendants when it agreed to accept the revolving fund certificate in return for its interest in RTF and that, with regard to the certificate, plaintiff justifiably expected defendants to deal fairly. It rested also on the factual characteristics of the certificate itself, about which there is little or no dispute. The dispute regarding the certificate has revolved around the legal effect to be given its characteristics. Plaintiff has contended the certificate evidences enough of an equity interest in Raeford to lead as a matter of law to the creation of a fiduciary relation between the parties. Defendant has contended the certificate evidences merely a creditor-debtor relation out of which no fiduciary relation can arise. The Court of Appeals resolved these conflicting legal contentions favorably to plaintiff. We elected not to review this aspect of the Court of Appeals' opinion; it thus becomes the law of the case.

The upshot is that Dr. Baarda's conclusion that there was a fiduciary relation between the parties, standing alone, had little or nothing to do with the ultimate determination of this issue for plaintiff. This determination rested more directly on other competent and compelling evidence favorable to plaintiff and the legal effect of the revolving fund certificate's characteristics.

With regard to breach of fiduciary duty and abuse of discretion issues, there was also substantial and compelling evidence that defendant Raeford abused its discretion and that both defendants breached their fiduciary duties by not retiring the certificate.[4] Dr.

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3. We note the jury's answer to issue number 2 provides a sufficient, independent basis for sustaining the award of compensatory damages. Dr. Baarda's challenged testimony did not bear on this issue. We discuss its prejudicial effect nevertheless on the other issues because they are all intertwined with and may have affected the punitive damages award.

4. No issue specifically using the term "*breach* of fiduciary duties" was submitted to the jury. However, the jury was asked to determine whether defendants owed plaintiff a fiduciary duty. If the jury so found, it was then required to deter-

Baarda was properly determined by the trial court to be an expert in cooperative financing. He gave five guiding reasons for a cooperative to retire its revolving fund certificates at a given time and five reasons not to retire them. He testified that all five reasons favoring retirement were present in this case, and that none of the reasons against retirement were present.

Dr. Baarda testified, largely without contradiction, that of great importance to determinations about retirement of revolving fund certificates is the financial status of the cooperative. During the time plaintiff demanded that defendants retire plaintiff's certificate, Raeford was enjoying financial success. Raeford had enough financial wherewithal to loan over $1 million to defendant Johnson and his family's other businesses. It had the ability to make large purchases, such as a corporate jet. Raeford's net worth had increased from $6.8 million in 1983 to over $18 million by 31 May 1986. By the end of fiscal year 1987, Raeford had $3.4 million invested in outside securities and $922,000 cash on hand. Raeford's liquidity was extremely high. The evidence regarding Raeford's financial circumstances during the period in question was largely uncontradicted.

Defendants' evidence did not challenge plaintiff's version of Raeford's objective financial condition. It tended in more conclusory fashion to justify defendants' refusal to retire plaintiff's certificate. Even defendants' own expert, improperly as we have shown, gave his opinion that defendants' refusal to retire the certificate was not an "abuse of discretion."

Given this state of the evidence, we are confident the jury did not base its verdict on conflicting, conclusory and improperly admitted expert opinions regarding whether a legal standard had been satisfied, but rather based its verdict on the largely uncontradicted facts regarding Raeford's objective financial condition and its financial ability to retire plaintiff's certificate.

The state of the evidence is such that we are confident the challenged expert testimony had little bearing not only on the liability issues but also on the award of punitive damages. To make the award, the jury under the trial court's instruction must have

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mine whether defendants had engaged in an "open, fair and honest" transaction. Given the context of the issues, the latter question is the equivalent of asking the jury whether defendants had breached their fiduciary duties.

considered Raeford's conduct to be "outrageous." The jury was undoubtedly moved in plaintiff's favor by Johnson's testimony that after plaintiff made demand, Johnson and other Raeford directors, including Johnson family members, "had us a little meeting and decided that we didn't need to bother with it; it shouldn't be paid, it wasn't good business and we didn't do it." Johnson even acknowledged that he said he might never pay the certificate.

Defendants, therefore, have failed to establish a reasonable probability that the verdict would have been favorable to them had the error in admitting Dr. Baarda's challenged testimony not been committed. Because the error was harmless, we modify accordingly and affirm the decision of the Court of Appeals on this issue.

III.

[2] We now consider whether the trial court properly dismissed plaintiff's unfair practices claim under Civil Procedure Rule 12(b)(6). Plaintiff contends defendants' refusal to retire plaintiff's revolving fund certificate constitutes unfair practices under N.C.G.S. § 75-1.1 (the Act), entitling it to treble damages, N.C.G.S. § 75-16, and attorneys' fees, N.C.G.S. § 75-16.1. We disagree and conclude this claim was properly dismissed.

The Act provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75-1.1(a). The Act was clearly intended to benefit consumers, *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 343 S.E.2d 174 (1986), but its protections extend to businesses in appropriate contexts. *See United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988). Thus, plaintiff's status as a business partnership does not remove it from the Act's protection.

For plaintiff to be entitled to the Act's remedies, it must show that defendants' conduct falls within the statutory framework allowing recovery. Plaintiff must first establish that defendants' conduct was "in or affecting commerce" before the question of unfairness or deception arises. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

This rule requires the Court to interpret the word "commerce." The Act provides that "[f]or purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned

profession." N.C.G.S. § 75-1.1(b). Although this statutory definition of commerce is expansive, the Act is not intended to apply to all wrongs in a business setting. For instance, it does not cover employer-employee relations, *Buie v. Daniel International*, 56 N.C. App. 445, 289 S.E.2d 118, *disc. rev. denied*, 305 N.C. 759, 292 S.E.2d 574 (1982), or securities transactions, *Skinner v. E. F. Hutton & Co.*, 314 N.C. 267, 333 S.E.2d 236 (1985).

In *Skinner* we held that "securities transactions are beyond the scope of N.C.G.S. § 75-1.1." *Id.* at 275, 333 S.E.2d at 241. *Skinner* relies on *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162 (4th Cir. 1985). In *Lindner* the Fourth Circuit Court of Appeals concluded that the Act did not apply to securities transactions, in part because no court had interpreted the Federal Trade Commission Act, 15 U.S.C.A. § 45(a)(1), upon which N.C.G.S. § 75-1.1 was modeled, to apply to securities transactions. *Cf. Stephenson v. Paine Webber Jackson & Curtis, Inc.*, 839 F.2d 1095 (5th Cir. 1988) (construing similar provisions in Louisiana's statute as not providing coverage to securities transactions); *Spinner Corp. v. Princeville Development Corp.*, 849 F.2d 288 (9th Cir. 1988) (same result in construing similar provisions in Hawaii's statute).

Skinner and *Lindner* gave another reason for not applying the Act to securities transactions. This was that to extend the Act to securities transactions would create overlapping supervision, enforcement, and liability in this area, which is already pervasively regulated by state and federal statutes and agencies. The courts concluded there is enough legislative apparatus already in place to govern securities transactions without also applying the Act. *Cf. Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 248 S.E.2d 567 (1978), *disc. rev. denied*, 296 N.C. 583, 254 S.E.2d 32 (1979) (holding for similar, though not identical, reasons that commodities transactions are not covered by the Act).

These cases are pertinent because we believe revolving fund certificates are, in essence, corporate securities. Their purpose is to provide and maintain adequate capital for enterprises that issue them. Raeford's bylaws provide that the purpose of issuing the certificates was to "build up . . . capital." This is the same function served by issuing more conventional corporate securities. Our conclusion in *Skinner* that the Act does not apply to corporate securities should also extend to revolving fund certificates unless there is good reason to treat the certificates differently.

There is one important difference that bears consideration between this revolving fund certificate and more conventional corporate securities. According to the evidence, revolving fund certificates are not subject to the same extensive statutory provisions and administrative regulation that govern more conventional corporate securities. Federal involvement with a cooperative's issuance of revolving fund certificates is only incidental to the United States Department of Agriculture's other work. The USDA involvement is largely advisory rather than mandatory.

But pervasive regulation by other sources is not the only basis for refusing to apply the Act to securities transactions. Another reason is that the legislature simply did not intend for the trade, issuance and redemption of corporate securities or similar financial instruments to be transactions "in or affecting commerce" as those terms are used in N.C.G.S. § 75-1.1(a). Subsection (b) of this section of the Act defines the term "commerce" to mean "business activities." "Business activities" is a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized.

Issuance and redemption of securities are not in this sense business activities. The issuance of securities is an extraordinary event done for the purpose of raising capital in order that the enterprise can either be organized for the purpose of conducting its business activities or, if already a going concern, to enable it to continue its business activities. Subsequent transfer of securities merely works a change in ownership of the security itself. Again, this is not a business activity of the issuing enterprise. Similarly, retirement of the security by the issuing enterprise simply removes the security from the capital structure. Like issuance and transfer of the security, retirement is not a business activity which the issuing enterprise was organized to conduct.

Securities transactions are related to the creation, transfer, or retirement of capital. Unlike regular purchase and sale of goods, or whatever else the enterprise was organized to do, they are not "business activities" as that term is used in the Act. They are not, therefore, "in or affecting commerce," even under a reasonably broad interpretation of the legislative intent underlying these terms.

Revolving fund certificates are a cooperative's functional equivalent of traditional corporate securities. They are capital-raising devices. We conclude, therefore, that, like more conventional securities, issuance or redemption of revolving fund certificates are not "in or affecting commerce" and are not subject to the Act.

We reverse the Court of Appeals decision on this issue and reinstate the order of dismissal entered by the trial court.

IV.

In sum, we affirm, for different reasons, the result reached by the Court of Appeals in concluding there was no error in the trial. We reverse the Court of Appeals' reversal and vacation of the trial court's dismissal of plaintiff's unfair practices claim.

Modified and affirmed in part; reversed in part.

Justice MARTIN dissenting in part.

I respectfully dissent from the majority opinion on the issue of unfair commercial practices. I conclude that plaintiff has made out a claim sufficient to survive defendants' motion under Rule 12(b)(6).

As the majority points out, N.C.G.S. § 75-1.1 protects businesses as well as consumers. This Court has recognized that "unfair trade practices involving only businesses affect the consumer as well." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988); *see also Manufacturing Co. v. Manufacturing Co.*, 38 N.C. App. 393, 396, 248 S.E.2d 739, 742 (1978), *disc. rev. denied and cert. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979) ("G.S. 75-1.1(b) speaks in terms of declaring and providing civil means of maintaining ethical standards of dealings 'between persons engaged in business,' as well as between such persons and the consuming public").

As stated by the majority, it is the law of the case on this appeal that the certificate at issue represented an equity interest in Raeford and created a fiduciary relationship between the parties. It has been further established that defendants breached that fiduciary relationship when they did not act in an "open, fair and honest" manner when they refused to redeem plaintiff's certificate. There is no dispute that Raeford had the financial resources to easily redeem the certificate. The company "loaned" more than

a million dollars to Johnson, acquired an $800,000 airplane, and had a net income of $6.1 million in fiscal year 1986. Defendants do not attempt to refute the evidence of Raeford's ability to redeem the certificate.

The majority relies heavily upon cases involving securities transactions. However, these cases are inapposite, because they were decided upon the theory that securities transactions were *already* subject to extensive regulation under state and federal law, and the application of N.C.G.S. § 75-1.1 would subject such transactions to overlapping supervision and enforcement. *See, e.g., Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 333 S.E.2d 236 (1985) (citing *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162 (4th Cir. 1985)). The certificate at issue is only subject to "incidental" federal involvement of an advisory nature. Therefore, I am unable to conclude that the revolving fund securities in the instant case are essentially corporate securities.

The majority cites no authority, and our statute and cases provide none, to support its argument that "commerce" means only the "regular, day-to-day activities or affairs" of a business. The plain words of the statute state otherwise. The majority makes the startling argument that issuance of the certificates (which the majority now calls "securities") is for the purpose of raising capital to conduct its business activities and that this is not a "business activity" within the meaning of the statute. How can raising funds to operate a business not be a business activity?

Further, the majority argues that the repayment of debt incurred to operate Raeford was not a business activity. Certainly defendants did not treat their obligation arising on the certificates in a fair and honest businesslike manner. Finally, the majority returns to its argument that the certificates are really corporate securities after all. This entire analysis rings hollow.

The acquisition of capital in one form or another is the lifeblood today for business. By holding that the issuance and redemption of certificates, as in this case, are not within the protection of Chapter 75-1.1, the majority loses touch with the reality of the business world. Limiting the meaning of "business activities" to the day-to-day affairs of the business eliminates most of the raising of business capital from the protection of the statute. The most important area of business life is no longer subject to the Act,

but the sales of a baker, for example, remain. Surely this could not have been the intent of the legislature.

I disagree with the majority's conclusion that the legislature intended to include only day-to-day activities in its definition of "commerce" as "business activities." N.C.G.S. § 75-1.1(b) (1988). The statute in plain words says that "commerce" includes "all business activities." *Id.* No matter how one twists it, the issuance of the certificate and defendant's refusal to redeem it were business activities within the meaning of the Act.

Plaintiff has alleged that Nash Johnson, a principal of defendant, stated several times that defendant would never redeem plaintiff's revolving fund certificate; that defendant had failed to redeem plaintiff's certificate after demand; that defendant has sufficient unencumbered funds to redeem the certificate; and that defendant has redeemed the certificate of Nash Johnson in a greater amount than plaintiff's certificate. These allegations, together with the other allegations in plaintiff's complaint, are sufficient to state a cause of action under the statute based upon unfair and deceptive acts.

"Unfair" is a broader term than "deceptive." *Jennings Glass Co. v. Brummer*, 88 N.C. App. 44, 362 S.E.2d 578 (1987), *disc. rev. denied*, 321 N.C. 473, 364 S.E.2d 921 (1988). A practice is unfair when it offends public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981). An inequitable assertion of power or position may be an unfair act. *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 303 S.E.2d 565, *disc. rev. denied*, 309 N.C. 321, 307 S.E.2d 164 (1983).

Surely, it is unfair to redeem a principal's certificate and to refuse to redeem plaintiff's when defendant has ample cash resources to do so. This is especially true when the principal whose certificate was redeemed has publicly vowed never to redeem plaintiff's certificate unless he is forced to do so. Defendant's conduct toward plaintiff by refusing to refund plaintiff's certificate was immoral, unethical, oppressive, unscrupulous, substantially injurious, and arose out of a position of power defendant had over plaintiff with respect to the certificate.

Plaintiff's pleadings on the claim pursuant to N.C.G.S. § 75-1.1 are sufficient to withstand defendant's motion to dismiss. Except as above stated, I concur in the remainder of the majority opinion.

STATE OF NORTH CAROLINA v. ALBERT LEE LANE

No. 355A88

(Filed 2 May 1991)

1. **Homicide § 21.6 (NCI3d)— murder—aiding and abetting armed robbery—evidence sufficient**

The evidence taken as a whole was sufficient for the jury to find that defendant aided and abetted his brother in the commission of an armed robbery and that the homicide occurred during the commission of the armed robbery where the jury could reasonably infer from the evidence that defendant and his brother drove around to several convenience stores looking for a store to rob; the Handy Mart was chosen since it was near closing time when they arrived and there were few customers; the motive was to secure funds for defendant and his family; defendant served as a lookout for his brother; automotive fuses were left on the counter because defendant could not pay for them at that time; defendant left the scene of the crime and failed to communicate with the police or emergency personnel in order to avoid being charged; defendant was upset and threatened suicide because of his participation; and defendant parted with his black powder pistol only for the purpose of its use by his brother if necessary to complete the robbery or dispose of witnesses.

Am Jur 2d, Criminal Law § 167; Homicide §§ 28, 72, 263 et seq.

2. **Homicide § 21.5 (NCI3d)— murder—premeditation and deliberation—evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss the charge of murder in the first degree based on malice, premeditation and deliberation where the circumstantial evidence, taken as a whole, was sufficient to permit the jury to reasonably infer that defendant's brother murdered the victim with premeditation and deliberation and that defendant aided and abetted his brother in the commission of the crime.

Am Jur 2d, Criminal Law § 167; Homicide §§ 28, 72, 263 et seq.

3. Searches and Seizures § 13 (NCI3d)— weapon and ammunition voluntarily given officer—officer's refusal to return—not search and seizure

The trial court did not err in a murder prosecution by failing to suppress defendant's pistol, ammunition, and the results of testing done on them where defendant voluntarily unloaded the pistol and handed it and the ammunition to a police officer. Although defendant contends that the search and seizure occurred later, either when the officer turned the pistol and ammunition over to another officer, or when he declined to return it to defendant, the pistol and ammunition were already lawfully in the possession of the police officer and he was therefore not required to return it to the owner if there was probable cause to retain it. The facts before the officer in this case were sufficient to cause a person of reasonable caution to believe that the black powder pistol and ammunition might be useful as evidence of the murder of the victim.

Am Jur 2d, Searches and Seizures §§ 1 et seq.

4. Searches and Seizures § 4 (NCI3d)— black powder pistol—forensic testing—no constitutional violation

The trial court did not err in a homicide prosecution by failing to suppress the forensic testing on defendant's black powder pistol and ammunition. There is no constitutional violation in admitting tests performed on items lawfully seized without a warrant.

Am Jur 2d, Evidence § 818; Searches and Seizures § 105.

5. Criminal Law §§ 794, 796 (NCI4th)— homicide—instruction on acting in concert and aiding and abetting—no plain error

There was no plain error in a murder prosecution from the court's instruction on acting in concert and aiding or abetting where the evidence, viewed as a whole, was sufficient to permit the jury to infer that defendant and his brother acted together with a common purpose to commit at least the robbery, and that defendant aided and abetted his brother in the crime of first degree murder based on the felony murder rule. Even assuming error, the Supreme Court was not convinced that the jury would have reached another verdict absent the error.

Am Jur 2d, Criminal Law § 167; Homicide §§ 28, 72.

STATE v. LANE

[328 N.C. 598 (1991)]

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by *Wright, J.*, at the 21 April 1988 Criminal Session of Superior Court, WAYNE County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 14 May 1990.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant.

FRYE, Justice.

Defendant contends that the trial court committed three errors in his trial. First, defendant argues that the trial court erred in denying his motion to dismiss, contending that there was insufficient evidence to submit the case to the jury. Second, defendant contends that the trial court erred in denying his motion to suppress his pistol, ammunition, and the results of testing which established that defendant's pistol was the murder weapon; and third, defendant contends that the trial court's instructions to the jury on acting in concert and aiding and abetting allowed him to be convicted on theories unsupported by the evidence. We find no reversible error.

In a proper indictment, defendant was charged with the murder of Virginia Aileen Smith. The case was tried as a noncapital case, and defendant was convicted of first degree murder and sentenced to life imprisonment. The victim, an employee of a Handy Mart convenience store located on Highway 117 about three miles north of Mount Olive in Wayne County, was killed around 11:00 p.m. on 5 July 1987 while working at the store.

During trial, the State's evidence included testimony from three people who were at the Handy Mart around 10:50 to 10:55 on the evening of 5 July 1987. The State also presented testimony from three other people who arrived at the scene shortly after the murder and testimony from some of the officers who were called to the Handy Mart to investigate the murder. None of the State's witnesses were present when the robbery and homicide occurred. Several photographs were used at trial. Some of the photographs were of defendant's automobile, an Oldsmobile Cutlass,

and others were photographs of defendant's brother, Gordon Lane's automobile, an American Motors Hornet.

George Grady testified that he stopped at the Handy Mart about 10:50 p.m. on 5 July 1987 and went inside to make a purchase. When Grady drove up to the store, the victim was outside reading the day's totals from the gas pumps. The store normally closed at 11 p.m. Grady made his purchases, and as he left, a woman entered the store. This woman was identified as Doris Bryant who also testified at trial. Grady further testified that as he was driving out of the parking lot, he saw a "brownish-burgundy" or "burgundy-reddish" two-door automobile drive into the parking lot. Grady was not sure if the automobile was a Monte Carlo or a Cutlass, and he could not identify the man who got out of this automobile.

Ms. Bryant testified that she arrived at the Handy Mart about 10:50 on the evening of 5 July 1987. Ms. Bryant and her granddaughter, Jaquetta Stringfield, who also testified at trial, had come to the Handy Mart to purchase some soft drinks. Ms. Bryant testified that she did not recall seeing Mr. Grady at the store while she was there, but she did see a white male of medium height and build standing near a "brownish" automobile parked near the dumpster at the store. She testified that while she was inside the store, this man came into the store, turned around, and walked out. When she left the store some five minutes after she arrived, the man was again standing beside his automobile. Ms. Bryant testified that she did not see anyone else in the automobile with the man. This man got into his automobile, and as Ms. Bryant was leaving the parking lot, this man's automobile pulled out behind her and followed her until she reached Betty's Drugs which is approximately a five-minute drive from the Handy Mart. At that time, the man turned left and stopped following her automobile.

Ms. Stringfield, Ms. Bryant's granddaughter who was fifteen years old at the time of the incident, testified that she sat in her grandmother's automobile while her grandmother went into the Handy Mart on the evening of 5 July 1987. Ms. Stringfield testified that while her grandmother was in the Handy Mart, a white male went into the store and turned around and walked out. She also testified that she was able to observe that man as he was walking to his automobile because he passed within five or six feet of her automobile. After a voir dire hearing, Ms. Stringfield was allowed to testify that defendant was the man she saw walk

into the store, leave the store, and pass by her grandmother's automobile as he was walking back to his own automobile which Ms. Stringfield described as a "sort of tannish brown" two-door, medium-sized automobile. Ms. Stringfield also testified that this man got into the automobile and, with his bright lights on, followed her grandmother's automobile down the highway before turning at Betty's Drugs. Ms. Stringfield testified that she had picked defendant's photograph out of an array which was shown to her, but she was unable to identify two other photographs of defendant shown to her at another time.

Harry Simmons testified that he and his sister, Shirley Bowden, drove past the Handy Mart about 11:05 p.m. that evening and noticed a body on the pavement between the gas pumps and saw smoke lingering under the canopy over the gas pumps. At the time they drove by, an automobile pulled out of the Handy Mart parking lot. Mr. Simmons described this automobile as a small, two-door, two-toned tan American Motors Ambassador or Hornet. Mr. Simmons and his sister, who was driving, followed the automobile and tried to get close enough to get its license number. They were unable to get the license number because the tag was dirty. Ms. Bowden also testified at trial and gave a similar description of the automobile to that which her brother had given. Ms. Bowden identified State's exhibit number 2, a photograph of Gordon Lane's automobile, as similar to the automobile she had seen pull out of the Handy Mart parking lot.

Mr. Simmons and Ms. Bowden both testified that they only saw one person in the automobile they were following. Both testified that the driver, the only person they saw in the automobile, had long hair which fell at least to his neck. At trial, Ms. Bowden, after observing that defendant had a bald spot on the back of his head, testified that she did not see anything like a bald spot on the back of the driver's head.

Kevin Lane testified that he and his brother drove past the Handy Mart about 11:06 on the evening of 5 July 1987 and that they pulled into the parking lot and discovered the victim on the pavement. At that time, the victim was alive but unconscious. Mr. Lane called the police, and the police and rescue personnel arrived within a few minutes of his call.

Deputy Billy Anderson, who participated in the investigation at the Handy Mart, gave testimony about that investigation and

also testified that he and Sergeant Brogden answered a call on 26 July 1987 concerning a possible suicide threat. The two officers went into the house to talk with the individual who was allegedly threatening suicide, and Anderson watched as Brogden talked to the individual who was identified as defendant. Defendant, who was armed with a black powder pistol, gave the pistol to Brogden. This pistol was later identified as the murder weapon. Other testimony revealed that defendant had purchased the pistol during the week preceding 5 July 1987.

Further testimony showed that officers went to defendant's place of work on 30 July 1987 and asked him to come to the Sheriff's Department to answer some questions. Defendant went with the officers and made a statement in which he said that he had gone to the Handy Mart earlier in the evening of 5 July 1987 with a friend and had then driven to Nancy Anderson's house about 8:00 p.m. and remained there until the next morning.

Defendant was arrested on 31 July 1987 and gave the officers a second statement after his arrest. In this statement, defendant said that he was driving around alone and stopped in the Handy Mart to buy a drink. He said that he asked about a fuse because the taillights on his automobile were out, but he did not buy any fuses because he could not decide which kind he needed. Defendant then said that he left and went to another convenience store to play some arcade games.

Defendant made a third statement in which he claimed that he had given the black powder pistol to Charles Berkley, his half brother, and told him to put it under the driver's seat in defendant's automobile when he finished with the gun. Defendant, according to this statement, did not see the gun again until 6 July when he took it from under the seat of his automobile where he had told his half brother to put it.

The State also presented testimony to the effect that when the officers arrived at the Handy Mart the drawer beneath the cash register was open and no money was found in the drawer. On the counter was a box of fuses with one missing, and one fuse was on the counter. The manager of the Handy Mart testified that after examining the cash register tapes and considering normal operating procedures, she estimated about $280 was taken from the store on the evening of 5 July 1987.

At the close of the State's evidence, defendant's motion for nonsuit was denied. Defendant then testified in his own behalf at trial. During his testimony, defendant stated that he bought the pistol because he believed that it was an antique and because he collected knives and firearms. Defendant further testified that his brother Gordon had been present when he purchased the pistol and that his brother had fired the pistol. According to defendant, he spent much of the day on 5 July 1987 with his girlfriend Nancy Anderson and her son. He drove them home around 8:30 p.m. and drove back to his home, attempting to get home before it got dark because of the problems he had with his taillights. Defendant had trouble with his taillights shorting out, and he often had to put new fuses in the automobile. When he got home, defendant ate some doughnuts and started drinking beer. He drank two or three beers before he left the trailer with his brother Gordon later that evening. Defendant and his brother Gordon decided to go out to play video games, and they left together with Gordon driving his automobile, the American Motors Hornet. Defendant testified that he did not feel well when he left with Gordon because he had eaten the doughnuts and drunk the beer. The two brothers went to some places in Goldsboro to play video games and then drove to Mount Olive. They stopped at a convenience store in Mount Olive to play video games, but around 10:45 p.m. the manager told them it was time to leave because the store was closing. Defendant testified that he continued to drink beer during the evening and that Gordon continued to drive the entire evening.

Defendant testified that as they were on their way back to Goldsboro, Gordon said that he wanted to stop at the Handy Mart to talk with someone. They both went into the store, and defendant asked if they had any fuses. He brought a box to the counter and took one fuse out and set the box on the counter. While he was doing this, Gordon was talking to the cashier who was counting some money. After asking Gordon if these fuses were the right kind to go into defendant's automobile and finding out that they would not fit, defendant testified that he left the store and went back to the automobile. Gordon remained in the store. Defendant testified that he was feeling nauseated and that he sat down in the automobile, shut the door, and put his head between his legs because his head was spinning. He then vomited. While he was doing this, he heard his brother and the cashier "fussing." Defendant put his head back down between his knees, and he then heard

a shot. When he looked up, his brother was standing over the victim with the black powder pistol in his hand. Gordon got into the automobile and drove off so quickly that defendant was thrown to the floor of the automobile where he remained. Gordon told defendant that it was an accident and that he did not mean to do it. Defendant testified that as they drove back home, Gordon said that he would hurt defendant's family and defendant's girlfriend and her family if he said anything to anyone about what had happened. Defendant testified that he had lied in the statements he made to the officer because he was afraid of Gordon and wanted to protect his loved ones. Defendant also testified that he did not see his pistol again until the day he contemplated suicide, and on that day, 26 July 1987, he got the pistol out of Gordon's automobile.

Defendant presented evidence that his brother Gordon had been seen with the pistol in his possession some time after the murder on 5 July 1987 but before the pistol was taken from defendant on 26 July 1987. Salina Grim testified that Gordon had the pistol in his automobile when he came to her mother's residence and that he had taken the pistol out of the automobile, pointed it at her dog's head, and threatened to kill the dog.

Defendant's sister, Sheila Lane, testified that after court one day while the trial was proceeding, Gordon, who still lived with Sheila and their mother, admitted that he, not defendant, had killed the victim. Gordon, who had previously attended the trial daily, then disappeared although he had been subpoenaed to testify for his brother.[1] Gordon's mother testified that she had also heard Gordon admit that he had killed the victim.

The case was submitted to the jury for possible verdicts of guilty of first degree murder based on malice, premeditation and deliberation and under the felony murder rule, second degree murder, or not guilty. The jury returned a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation and on the basis of the felony murder rule. From a sentence of life imprisonment, defendant appeals contending that the evidence was insufficient to carry the case to the jury.

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1. The record shows that on 22 April 1988, the day after defendant was convicted, a warrant was issued for Gordon Lane, defendant's brother, charging him with first degree murder in the death of Virginia Smith. Gordon Lane was indicted on 13 June 1988. On 15 August 1988, he pled no contest to second degree murder and was sentenced to fifteen years in prison.

[1] After the denial of his motion to dismiss at the close of the State's evidence, defendant proceeded to offer evidence, thereby waiving his motion to dismiss at the close of the State's evidence. *State v. Saunders*, 317 N.C. 308, 347 S.E.2d 212 (1986); *State v. Leonard*, 300 N.C. 223, 266 S.E.2d 631 (1980). We, therefore, consider only defendant's motion to dismiss made at the close of all the evidence. *Id.*

"[T]o overcome a motion for nonsuit and justify a conviction of the defendant, the State must offer evidence from which it can be reasonably inferred (1) that deceased died by virtue of a criminal act, and (2) that the act was committed by the defendant." *State v. Lee*, 294 N.C. 299, 302, 240 S.E.2d 449, 451 (1978) (citations omitted). The motion is not properly denied unless there is substantial evidence of all material elements of the crime. *State v. Furr*, 292 N.C. 711, 715, 235 S.E.2d 193, 196, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977) (citations omitted). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1984); *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984).

Upon a motion to dismiss, "the trial court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence." *State v. Saunders*, 317 N.C. 308, 312, 345 S.E.2d 212, 215 (citing *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370). "Defendant's evidence rebutting the inference of guilt may be considered only insofar as it explains or clarifies evidence offered by the state or is not inconsistent with the state's evidence." *State v. Furr*, 292 N.C. at 715, 235 S.E.2d at 196. In considering the dismissal motion the trial court is only concerned with sufficiency of the evidence to carry the case to the jury and not its weight. *State v. Mercer*, 317 N.C. 87, 96, 343 S.E.2d 885, 890 (1986).

There is no contention that the victim did not die by virtue of a criminal act. We therefore consider first whether the evidence was sufficient to identify defendant as the perpetrator. Since no one saw defendant actually commit either the robbery or the homicide, the legal question is whether the circumstantial evidence is sufficient to permit a reasonable inference that this defendant committed the offense charged.

> The test of sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both. (Citations omitted.) When the motion . . . calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. (Citations omitted.) In passing on the motion, evidence favorable to the State is to be considered as a whole in order to determine its sufficiency. This is especially true when the evidence is circumstantial since one bit of such evidence will rarely point to a defendant's guilt. (Citations omitted.)

State v. Mercer, 317 N.C. at 97, 343 S.E.2d at 891 (quoting *State v. Powell*, 299 N.C. 95, 98-99, 261 S.E.2d 114, 117-18 (1980)).

Taken in the light most favorable to the State, the evidence tended to show the following: On the evening of 5 July 1987 defendant and his brother Gordon, while drinking and riding in Gordon's automobile, drove to several different convenience stores beginning at approximately 8:30 p.m.; the last stop was the Handy Mart store on Highway 117; it was near closing time and there were few customers. There was also evidence that when defendant arrived at the convenience store a customer was in the store, left, and defendant followed her for some distance. The jury could reasonably infer that defendant followed the customer to determine if there were any potential witnesses and since it appeared that the potential witness did not acknowledge defendant's presence in any way, there was no need to continue to pursue her. Defendant's family moved around from place to place because they were unable to pay rent, and at the time of the murder and robbery were living with defendant at his mobile home. Defendant's brother Gordon's first automobile payment was due on 5 July and his automobile would possibly be repossessed as had happened in the past with other automobiles. A few days prior to the robbery defendant purchased the murder weapon with a partial cash payment, the remainder to be paid later. Defendant's automobile was in constant need of fuses, but he left the fuses on the counter when he left the store. Defendant was at the store at the time of the shooting and saw the clerk lying on the ground immediately thereafter. Defendant, with his brother, left the scene immediately

after the shooting, leaving the wounded clerk lying on the ground, apparently seriously injured. The murder weapon belonged to defendant and was in his possession both before and a few weeks after the shooting; and when the murder weapon was retrieved from defendant, he was threatening suicide.

From the evidence the jury could reasonably infer: that on 5 July 1987 defendant and his brother drove around to several different convenience stores looking for a store to rob and that the Handy Mart was chosen for the robbery since when they arrived it was near closing time and there were few customers; the motive for the robbery was to secure funds for himself and for his family; that defendant served as a lookout for his brother; that the fuses were left on the counter because defendant could not pay for them at that time; that defendant left the scene of the crime and failed to communicate with police or emergency personnel in order to avoid being charged with a crime; that defendant was upset and threatened suicide because of his participation in the robbery and resulting homicide; and that defendant parted with his pistol only for the purpose of its use by his brother if necessary to complete the robbery or dispose of witnesses. We hold that the evidence taken as a whole was sufficient for the jury to find that defendant aided and abetted his brother in the commission of armed robbery and that the homicide occurred during the commission of the armed robbery. A murder committed in the perpetration or attempt to perpetrate the felony of armed robbery is murder in the first degree. *State v. Chavis*, 231 N.C. 307, 56 S.E.2d 678 (1949). The circumstantial evidence permits a reasonable inference that this defendant was a perpetrator of the felony of armed robbery. The evidence was therefore sufficient to identify defendant as the perpetrator of the crime of murder in the first degree based on the felony murder rule.

[2] We next consider whether the evidence was sufficient to survive the motion to dismiss on the charge of first degree murder based on premeditation and deliberation. First degree murder is the "unlawful killing of another with malice and with premeditation and deliberation." *State v. Saunders*, 317 N.C. at 312, 345 S.E.2d at 215 (quoting *State v. Calloway*, 305 N.C. 747, 751, 291 S.E.2d 622, 625 (1982)). "Premeditation means that the act was thought out beforehand for some length of time, however short .... Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an

unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation . . . ." *State v. Bullock*, 326 N.C. 253, 257, 388 S.E.2d 81, 88 (1990); *see also State v. Saunders*, 317 N.C. 308, 345 S.E.2d 212. "Ordinarily, premeditation and deliberation must be proved by circumstantial evidence." *State v. Saunders*, 317 N.C. at 312, 345 S.E.2d at 215. Circumstantial evidence is "evidence that is applied indirectly 'by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred.' " *State v. Thorpe*, 326 N.C. 451, 455, 393 S.E.2d 311, 313 (1990) (quoting 1 Brandis on North Carolina Evidence 3d § 76 (1988)).

Circumstances to be considered in determining whether a killing was done with premeditation and deliberation include:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of defendant before and after the killing; (3) threats and declarations of defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; and (5) evidence that the killing was done in a brutal manner.

State v. Saunders, 317 N.C. at 313, 345 S.E.2d at 215.

The evidence, considered in the light most favorable to the State, discloses that the trial judge properly denied defendant's motion. There is no evidence of provocation by the deceased. There is evidence that defendant's conduct before the killing appeared to be that of a person "casing a job," preparing to commit a robbery, and since he was armed, anticipating a possible homicide. Defendant testified that he and Gordon had driven to several convenience stores on the day of the robbery and shooting, that they stopped at the Handy Mart at closing time, that no other customers were in the store, and that he saw the victim follow Gordon out of the store arguing with him, heard a noise, then saw the victim on the ground, and immediately left the scene. Defendant also stated that while his brother was in the store, defendant was sick and waited in the automobile. It is reasonable to infer that defendant was serving as a lookout for the robbery. Evidence of defendant's conduct before and after the killing raises an inference that defendant cased the store, followed a customer to possibly eliminate potential witnesses, returned to the store, and participated with his brother in the robbery and resulting homicide.

Declarations of defendant before and during the course of the robbery and homicide permit a reasonable inference that defendant was in need of money. Defendant's girlfriend testified that a couple of days prior to the robbery defendant purchased the murder weapon partially on credit. She also testified that he was in constant need of fuses for his automobile. In addition to her testimony, defendant testified that he went to the store for fuses but left them on the counter. A jury might reasonably infer that he left them there because he did not have the money to pay for them. There was also testimony that defendant continually helped his family members financially. On 5 July defendant's brother did not have the money to make the first payment on his automobile. Defendant spent the day with his brother driving to several convenience stores, arriving at the Handy Mart store near closing time. A robbery and homicide occurred immediately thereafter. Witness Bryant saw no indications that the store had been robbed earlier. It is therefore reasonable to infer that the robbery and homicide occurred after Ms. Bryant left, and since defendant admitted being at the store at closing, it is reasonable to infer that he was also present at the time of the homicide.

There was no evidence of threats, ill-will, or previous difficulty between the parties, but that is not unusual in robbery-murder cases. The evidence does show that the victim was killed in a brutal manner by a shot at close range to the head, and that her death was not instant.

We conclude that the circumstantial evidence in this case, taken as a whole, was sufficient to permit the jury to reasonably infer that defendant's brother murdered the victim with premeditation and deliberation and that defendant aided and abetted his brother in the commission of the crime. One who aids and abets another in the commission of murder is guilty as a principal. *State v. Dawson*, 272 N.C. 535, 129 S.E.2d 1 (1967). The other elements of murder being clearly present, the judge did not err in denying defendant's motion to dismiss the charge of murder in the first degree based on malice, premeditation and deliberation made at the close of all the evidence.

[3] On the second issue the question is whether the trial court erred by failing to suppress defendant's pistol, ammunition, and results of testing done on them. Defendant contends that this evidence was seized as a result of violations of his fourth amend-

ment rights. However, the evidence shows that defendant voluntarily unloaded the pistol and handed the pistol and the ammunition to the police officer. There is certainly no search and seizure in the constitutional sense under such circumstances. "When the evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures." *State v. Reams*, 277 N.C. 391, 396, 178 S.E.2d 65, 68 (1970), *cert. denied*, 404 U.S. 840 (1971); *see also State v. Small*, 293 N.C. 646, 239 S.E.2d 429 (1977) (defendant's clothes given to police by his mother—not an unreasonable search and seizure).

Defendant contends, however, that the search and seizure violation occurred later, either when the officer turned the pistol and ammunition over to another officer for investigative purposes or when the officer later declined to return the pistol and ammunition to defendant at his request. However, since the pistol and ammunition were already lawfully in the possession of the police officer he was not required to return it to the owner if there is probable cause to retain it. Probable cause arises when facts before an officer would "warrant a [person] of reasonable caution" in the belief that an object may be useful as evidence of a crime. *Carroll v. United States*, 267 U.S. 132, 162, 69 L. Ed. 543, 555 (1925). Officer Anderson learned that a detective was investigating a homicide committed with a black powder weapon. Defendant's pistol was a black powder weapon. Both sides agree that a black powder pistol is not a common weapon. The State offered testimony that the officer did not know how to unload the weapon, and defendant testified that he purchased the weapon because he thought it was an antique. Defendant was in possession of the weapon when the officers arrived to investigate defendant's threatened suicide and defendant appeared to be thoroughly familiar with it. The facts before Officer Anderson were sufficient to cause a person of reasonable caution to believe that the black powder pistol and the ammunition might be useful as evidence of the murder of the victim in this case. Under these circumstances, it was not a violation of defendant's fourth amendment rights to retain both the weapon and the ammunition.

[4] Defendant's contention that the trial court erred by failing to suppress the forensic testing on defendant's pistol and ammunition which established that his black powder pistol was the murder weapon is without merit. Admitting into evidence results of tests

performed on items lawfully seized without a warrant is not a constitutional violation. *United States v. Edwards*, 415 U.S. 800, 39 L. Ed. 2d 771 (1974). We reject defendant's second contention.

[5] On the third issue, defendant contends that the trial court's instructions to the jury on acting in concert and aiding and abetting allowed him to be convicted on theories unsupported by the evidence. The trial judge gave the following instructions:

> And I charge you on the legal concept of acting in concert. For a person to be guilty of a crime it is not necessary that he himself, such as Albert Lane, do all the acts necessary to constitute the crime. If two or more people, such as the two brothers Albert and Gordon Lane, act together with a common purpose to commit robbery or murder in the first or second degree, each of them is held responsible for the acts of the other done in commission of the murder.
>
> . . . .
>
> Also another similar doctrine of the law but yet distinguished is the doctrine of aiding and abetting, a felony. Now, a person may be guilty of murder in the first degree or murder in the second degree although he personally does not do any of the acts necessary to constitute the murder. A person who aids and abets another to commit murder in the first or second degree is also guilty of that crime. You must clearly understand that if he does aid and abet, he is guilty of murder in the first or second degree just as if he had personally done all the acts necessary to constitute that crime.

Since defendant did not object to these instructions at trial, we consider this assignment under the plain error rule. "Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Joplin*, 318 N.C. 126, 132, 347 S.E.2d 421, 425 (1986) (citations omitted). The test for plain error "places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection." *Id.*

Defendant contends that there was no evidence to support either acting in concert or aiding and abetting. Since the jury convicted defendant of murder in the first degree based on malice, premeditation and deliberation, and based on the felony murder

rule, defendant's contention must be rejected if, without the instructions, the jury would nevertheless have convicted defendant of first degree murder under either theory. We find the evidence, when viewed as a whole, sufficient to permit the jury to infer that defendant and his brother acted together with a common purpose to commit, at least, the robbery and that defendant aided and abetted his brother in the commission of the crime of murder in the first degree based on the felony murder rule. Thus, even assuming error arguendo, we are not convinced that absent the alleged error the jury probably would have reached a verdict other than murder in the first degree. Therefore, defendant has failed to meet his burden of showing error under the plain error rule, and this contention is also rejected.

We conclude that defendant has had a fair trial, free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. ALFRED RAY VANCE

No. 202PA90

(Filed 2 May 1991)

1. **Common Law § 1 (NCI4th)— effective parts of common law**

So much of the common law as has not been abrogated or repealed by statute or become obsolete is in full force and effect in this state pursuant to N.C.G.S. § 4-1. The "common law" referred to in § 4-1 is the common law of England as of the date of the signing of the Declaration of Independence.

Am Jur 2d, Common Law §§ 7, 16, 17.

2. **Homicide § 1.1 (NCI3d)— year and a day rule—prospective abrogation**

The common law "year and a day" rule has become "obsolete" within the meaning of that term in N.C.G.S. § 4-1 and is no longer part of the common law of North Carolina for any purpose. However, prohibitions against *ex post facto* laws embodied in the Fifth and Fourteenth Amendments to

the U. S. Constitution require that this decision abolishing the year and a day rule be given prospective effect only.

Am Jur 2d, Common Law §§ 16, 17; Constitutional Law §§ 634 et seq.; Homicide § 14.

3. **Homicide § 1.1 (NCI3d)— year and a day rule—applicable to first and second degree murders**

The year and a day rule has been applied equally to all murders which, for purposes of punishment only, are divided into first degree murders and second degree murders.

Am Jur 2d, Homicide § 14.

4. **Homicide § 21.7 (NCI3d)— year and a day rule—second degree murder conviction vacated—judgment for involuntary manslaughter**

Defendant could not be convicted of second degree murder where the uncontroverted evidence showed that the victim died more than a year and a day after an injury was inflicted upon him by defendant. Since the year and a day rule was inapplicable to involuntary manslaughter cases, and the jury, in finding defendant guilty of second degree murder, necessarily had to find facts establishing the lesser included offense of involuntary manslaughter, the case will be remanded for judgment as upon a verdict of guilty of involuntary manslaughter.

Am Jur 2d, Homicide §§ 14, 53, 56 et seq.

Homicide as affected by lapse of time between injury and death. 60 ALR3d 1323.

Justice MARTIN dissenting in part.

ON discretionary review, pursuant to N.C.G.S. § 7A-31, of the decision of the Court of Appeals, 98 N.C. App. 105, 390 S.E.2d 165 (1990), which found no error in the trial of the defendant or in the judgment for second degree murder entered on 2 February 1988 by *Freeman, J.*, in the Superior Court, FORSYTH County. Heard in the Supreme Court on 14 February 1991.

Lacy H. Thornburg, Attorney General, by Linda Anne Morris, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, and Constance Everhart, Assistant Appellate Defender, for the defendant-appellant.

MITCHELL, Justice.

The central issue before this Court on appeal is whether the trial court erred in denying the defendant's motion to dismiss the charge upon which he was tried for second degree murder; his motion to dismiss was based on the common law year and a day rule. Although today we prospectively abrogate the year and a day rule, we conclude that the trial court erred and that the decision of the Court of Appeals finding no error must be reversed. We further conclude that the judgment against the defendant for second degree murder must be vacated and this case remanded for judgment as upon a verdict for involuntary manslaughter.

The State's evidence tended to show that the defendant drank beer with friends at a Winston-Salem bar from 5:00 p.m. until shortly before midnight on 10 March 1987. During that period, the defendant was seen drinking at least four beers. He then drove with a friend from the bar to the friend's home, approximately a mile and a half from the bar. The defendant started to take his other passenger, Bobby Caddell, home.

Shortly after midnight, Lanny Lee Bradley and his wife were traveling west on Union Cross Road in a pickup truck. The car driven by the defendant crossed over into the oncoming lane of traffic, where the car struck the Bradleys with such force that it split in half and its front section traveled 170 feet after impact. Union Cross Road is a rural, paved highway running east and west with a posted speed limit of fifty-five miles per hour.

Bobby Caddell's body was found lying in the westbound lane of the road. Mrs. Bradley was buried under wreckage from the collision, and she was barely breathing. She was later pronounced dead at the scene of the accident. Lanny Lee Bradley was pinned in his truck, having difficulty breathing. He was given emergency treatment at the accident scene and transported to the hospital.

Deputy L. E. Gordon of the Forsyth County Sheriff's Department arrived shortly after the collision. He went to the front section of the defendant's car, which was overturned with the defendant inside. Deputy Gordon removed the defendant from the car. The defendant had sustained injuries to his head and knees and had a strong smell of alcohol on his breath. Gordon then went to determine if he could assist the Bradleys. When Gordon turned around, the defendant was gone.

Meanwhile, the defendant had hitched a ride from two individuals who detected a strong odor of alcohol on his breath. They took him to his mother's home. Shortly after 1:00 a.m., the defendant was taken from his mother's home by ambulance to the hospital. When questioned about what had caused his injuries, the defendant stated, "I guess because I had a wreck." The results of a test performed on blood drawn from the defendant at 2:29 a.m. showed an alcohol content of 0.104 grams per 100 milliliters of blood.

Lanny Lee Bradley experienced a severe head injury as a result of the collision with the defendant. In addition to a tube placed in his windpipe to enable him to breathe, he received intravenous fluids to raise his blood pressure. A CAT scan, done at the hospital, showed severe swelling of his brain.

Lanny Lee Bradley remained totally unconscious in the intensive care neurological ward for four months, completely dependent upon life support systems. He was moved from intensive care when his vital signs stabilized. Occasionally, he would open his eyes and appear to look around, but he never regained consciousness beyond that point. While hospitalized, he was connected to a ventilator for oxygen and was given fluid intravenously. He was also given medication to prevent any seizures due to the head injury. On 3 May 1988, he died from respiratory failure and bacterial pneumonia—both of which related to his head injury.

At trial, the jury returned a verdict finding the defendant guilty of the second degree murder of Lanny Lee Bradley. The trial court entered judgment on that verdict and sentenced the defendant to a twenty-year term of imprisonment.

On appeal to the Court of Appeals, the defendant contended, *inter alia*, that the murder charge against him should have been dismissed under the common law "year and a day" rule because uncontroverted evidence showed that Bradley had died fourteen months after the collision. The Court of Appeals rejected the defendant's contention and held that his trial was free from prejudicial error. On 27 July 1990, this Court allowed the defendant's petition for discretionary review, limited to the issue of the applicability of the year and a day rule.

[1] Before addressing the defendant's assignment of error, a review of the history of the "year and a day" rule is helpful. Our General

Assembly has declared that so much of the common law as has not been abrogated or repealed by statute or become obsolete is in full force and effect in this state. N.C.G.S. § 4-1 (1986); *see, e.g., State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991); *Martin v. Thornburg*, 320 N.C. 533, 359 S.E.2d 472 (1987); *McMichael v. Proctor*, 243 N.C. 479, 91 S.E.2d 231 (1956); *State v. Hampton*, 210 N.C. 283, 186 S.E. 251 (1936). The "common law" referred to in N.C.G.S. § 4-1 is the common law of England as of the date of the signing of the Declaration of Independence. *Buckom*, 328 N.C. 313, 401 S.E.2d 362; *Hall v. Post*, 323 N.C. 259, 372 S.E.2d 711 (1988); *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971).

Under the common law of England, a killing was not murder unless the death of the victim occurred within a year and a day of the act inflicting injury. 4 W. Blackstone, *Commentaries* *197; *see* H. Broom, *Commentaries on the Common Law* *935 (1856). Otherwise, the loss of life would be attributed to natural causes rather than the distant act inflicting injury. R. Perkins & R. Boyce, *Criminal Law* 46 (3d ed. 1982). This requirement envisioned that the death must be shown to be "sufficiently connected with the act." 3 W. Holdsworth, *A History of English Law* 315 (3d ed. 1923).

Our research discloses that the origins of the rule are generally traced to the thirteenth century. The statute which may have led to the evolution of the rule reads as follows:

> An Appeal of Murther . . . . (4) It is provided also, that no Appeal shall be abated so soon as they have been heretofore; but if the appellor declare the Deed, the Year, the Day, the Hour, the Time of the King, and the Town where the Deed was done, and with what Weapon he was slain, the Appeal shall stand in Effect, (5) and shall not be abated for Default of fresh Suit, if the Party shall sue within the Year and the Day after the Deed done.

Statutes of Gloucester, 6 Edw. I, c. IX (1278); *see State v. Hefler*, 310 N.C. 135, 310 S.E.2d 310 (1984). The year and a day time period which found its way into the criminal law may have been "connected with the fact that it was the length of time within which the relatives" of the victim could bring the "appeal of death" they were entitled to bring as private citizens. 3 W. Holdsworth, *supra*, at 315; *see State v. Hefler*, 310 N.C. 135, 310 S.E.2d 310 (1984). *But cf. United States v. Jackson*, 528 A.2d 1211 (D.C. 1987)

("Since the origins and purposes of the rule are obscure, we cannot say with certainty why the rule came into existence."). The appeal of death or "appeal of Murther" recognized by the ancient common law and referred to in the Statutes of Gloucester "was a private and vindictive process by an interested party . . . which grew out of the old Germanic custom of 'weregild', or compensation for the death." *Commonwealth v. Ladd*, 402 Pa. 164, 167, 166 A.2d 501, 503 (1960). It is notable that appeals of death, rather than prosecutions for murder, were contemplated under the Statutes of Gloucester. *Id.* It appears that only Coke, among the commentators on the common law of England, states that "the rule is said to run from the death both in public prosecutions for murder and in private appeals of death." *Id.* at 167-68, 166 A.2d at 503. As applied in American courts, however, the year and a day rule generally has been viewed to have applied in public prosecutions and to have "operated like an ordinary statute of limitations." *Commonwealth v. Lewis*, 381 Mass. 411, 413, 409 N.E.2d 771, 772 (1980), *cert. denied*, 450 U.S. 929, 67 L. Ed. 2d 360 (1981). *But see People v. Mudd*, 154 Ill. App. 3d 808, 812, 507 N.E.2d 869, 872 (1987) ("[T]he 'year and a day rule' did not operate in the nature of a statute of limitations barring prosecution. So long as the death occurred within the specified time frame, it was then presumed the blow or injury caused the death for purposes of a homicide prosecution."). There is some "suggestion that the rule was intended to simply soften the old brutal law regarding homicides." *Lewis*, 381 Mass. at 414, 409 N.E.2d at 773. There is also support for the proposition that the rule was created by judges due to the uncertainty of medical science in determining the cause of death when the death occurs so long after the injury. *See Hefler*, 310 N.C. at 140, 310 S.E.2d at 313; W. LaFave & A. Scott, *Criminal Law* § 3.12(i) (2d ed. 1986).

The common law year and a day rule, as it has been applied in murder cases in North Carolina, was first stated by this Court in *State v. Orrell*, 12 N.C. (1 Dev.) 139 (1826). There, we said that "if death did not take place within a year and a day of the time of receiving the wound, the law draws the conclusion that it was not the cause of death; and neither the court nor jury can draw a contrary one. . . . For if death happened beyond that time, the law would presume that it proceeded from some other cause than the wound." *Id.* at 141. Subsequently, the validity of the rule has been recognized by this Court in five murder cases.

State v. Pate, 121 N.C. 659, 28 S.E. 354 (1897); *State v. Morgan*, 85 N.C. 581 (1881); *State v. Haney*, 67 N.C. 467 (1872); *State v. Baker*, 46 N.C. (1 Jones) 267 (1854); *State v. Shepherd*, 30 N.C. (8 Ired.) 195 (1847).

In *Hefler*, we refused to apply the year and a day rule to involuntary manslaughter cases but expressly left open the issue of whether it should continue to apply in murder cases. 310 N.C. at 141, 310 S.E.2d at 313. There, in a scholarly opinion by Justice Martin, we took judicial notice of significant advances in both medical science and crime detection, as well as the fact that these advances have resulted in sophisticated medical tests, analyses, and diagnoses that allow positive evidence to be presented to a jury on questions of causation in criminal prosecutions. *Hefler*, 310 N.C. at 140, 310 S.E.2d at 313.

[2] We now conclude that, whether we choose to view the year and a day rule as derived from limitations placed upon appeals of death by ancient law or as arising from concerns about the limitations of medical science, any rationale for the rule is anachronistic today. Therefore, we conclude that the year and a day rule has become "obsolete," within the meaning of that term as used in N.C.G.S. § 4-1, and declare that the rule is no longer part of the common law of North Carolina for any purpose. In so doing, we follow the clear modern trend in other jurisdictions to abrogate the rule. W. LaFave & A. Scott, *Criminal Law* 299 (2d ed. 1986); R. Perkins & R. Boyce, *Criminal Law* 47 (3d ed. 1982); *see United States v. Jackson*, 528 A.2d 1211, 1220 (D.C. 1987) ("Since the origin and rationale for the year and a day rule are hazy, and the generally acknowledged reason for the rule now appears highly suspect, we deem judicial abolition of the judicially-created rule appropriate."); *Commonwealth v. Lewis*, 381 Mass. 411, 418, 409 N.E.2d 771, 775 (1980) (footnote omitted) ("We share the view that the rule is no longer supportable in reason, and that its relegation to the shades of history may be accomplished by court decision."), *cert. denied*, 450 U.S. 929, 67 L. Ed. 2d 360 (1981); *People v. Stevenson*, 416 Mich. 383, 394, 331 N.W.2d 143, 147 (1982) ("rule has outlived its usefulness"); *State v. Sandridge*, 5 Ohio Op. 419, 421, 365 N.E.2d 898, 899 (1977) ("Today, the retention of the 'year and a day rule' is clearly an anachronism."); *State v. Hudson*, 56 Or. App. 462, 642 P.2d 331 (1982) ("rule is no longer applicable"); *Commonwealth v. Ladd*, 402 Pa. 164, 173, 166 A.2d 501, 506 (1960) ("There is now no more reason for a rule of a

year and a day than there is for one of a hundred days or a thousand and one nights."); *State v. Pine*, 524 A.2d 1104, 1107 (R.I. 1987) ("[T]he long life of the rule may result from the infrequency with which the issue has been raised. Courts, therefore have not been given the opportunity to address it."); *State v. Edwards*, 104 Wash. 2d 63, 69, 701 P.2d 508, 511 (1985) ("Medical science has progressed to such a degree it makes little sense to have a rule which requires death to occur within a particular time to resolve issues of causation."). *But see State v. Minster*, 302 Md. 240, 245, 486 A.2d 1197, 1199 (1985) ("[W]e believe it is the legislature which should mandate any change in the rule, if indeed any change is appropriate.").

The defendant recognizes that this Court may abrogate the common law year and a day rule, but argues that we may do so only prospectively. He contends that any change in the application of the rule would amount to an unconstitutional *ex post facto* law, if applied to his case. Both our state and federal constitutions forbid the enactment of *ex post facto* laws. U.S. Const. art. I, § 10; N.C. Const. art. I, § 16. Since its earliest decisions, the Supreme Court of the United States has defined an *ex post facto* law as one which (1) makes an action criminal which was done before the passing of the law and which was innocent when done, (2) aggravates a crime or makes it greater than when it was committed, (3) allows imposition of a different or greater punishment than was permitted when the crime was committed, or (4) alters the legal rules of evidence to permit different or less testimony to convict the offender than was required at the time the offense was committed. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648, 650 (1798). That Court has also stated that "two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29, 67 L. Ed. 2d 17, 23 (1981).

Although the *ex post facto* clauses are directed specifically at legislative action, the Supreme Court of the United States has held that the fifth and fourteenth amendments to the Constitution of the United States also forbid retroactive application of an unforeseeable judicial modification of criminal law, to the disadvantage of the defendant. *Marks v. United States*, 430 U.S. 188, 191-92, 51 L. Ed. 2d 260, 264-65 (1977); *Bouie v. City of Columbia*, 378

U.S. 347, 355, 12 L. Ed. 2d 894, 900 (1964); *accord State v. Waddell*, 282 N.C. 431, 446, 194 S.E.2d 19, 29 (1973) ("[T]he constitutional ban against the retroactive increase of punishment for a crime applies as well against judicial action having the same effect."). *But see State v. Cooper*, 304 N.C. 701, 705, 286 S.E.2d 102, 104 (1982) ("Decisions are presumed to operate retroactively, and overruling decisions are given solely prospective application only when there is compelling reason to do so."); *State v. Rivens*, 299 N.C. 385, 392, 261 S.E.2d 867, 871 (1980) (citation omitted) ("There is no violation of the *ex post facto* clause in the United States Constitution when a decision is applied retroactively because the clause applies to legislative and not judicial action. . . . A party has no vested right in a decision of this Court.").

Although not a controlling consideration, we note that of the six courts which since 1960 have judicially abolished the year and a day rule, five have given their decisions prospective effect only. *United States v. Jackson*, 528 A.2d 1211 (D.C. 1987); *Commonwealth v. Lewis*, 381 Mass. 411, 409 N.E.2d 771 (1980), *cert. denied*, 450 U.S. 929, 67 L. Ed. 2d 360 (1981); *People v. Stevenson*, 416 Mich. 383, 331 N.W.2d 143 (1982); *State v. Young*, 77 N.J. 245, 390 A.2d 556 (1978); *State v. Pine*, 524 A.2d 1104 (R.I. 1987). *Contra Commonwealth v. Ladd*, 402 Pa. 164, 166 A.2d 501 (1960) (abrogation of rule applied retroactively). We conclude that the prohibitions against *ex post facto* laws embodied in the fifth and fourteenth amendments to the Constitution of the United States require that we give this decision abolishing the year and a day rule prospective effect only. As a result, the defendant's conviction for second degree murder must be deemed to be error.

[3, 4] In *Orrell*, the first case in which this Court applied the year and a day rule, it was held that where the death of the deceased occurred more than a year and a day after the defendant shot him, the defendant could not be held guilty of the murder of the deceased. 12 N.C. (1 Dev.) at 141. When *Orrell* was decided in 1826, no degrees of murder were known to the law. Prior to 1893, the common law definition of murder applied and simply made *all* intentional and unlawful killings of human beings with malice aforethought, express or implied, murder. *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982); *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899). In 1893, the General Assembly enacted 1893 N.C. Pub. Laws ch. 85, the terms of which are now embodied in N.C.G.S. § 14-17. That statute classifies murders as either first

or second degree, but *only* for purposes of assigning punishment; it does not define or redefine the crime of murder. *Davis*, 305 N.C. at 422-23, 290 S.E.2d at 588; *State v. Streeton*, 231 N.C. 301, 305, 56 S.E.2d 649, 652 (1949). It is well settled that when a statute addresses a crime known at common law without otherwise defining it, the common law definition of the crime applies. *Buckom*, 328 N.C. 313, 401 S.E.2d 362; *State v. Roberts*, 286 N.C. 265, 210 S.E.2d 396 (1974); *State v. Ingland*, 278 N.C. 42, 178 S.E.2d 577 (1971). This Court has often held that, as N.C.G.S. § 14-17 does not define the crime of murder, the definition of that crime remains the same as it was at common law when *Orrell* was decided. *E.g.*, *Davis*, 305 N.C. at 422-23, 290 S.E.2d at 588; *Streeton*, 231 N.C. at 305, 56 S.E.2d at 652. That common law definition of any intentional and unlawful killing of a human being with malice aforethought, express or implied, as murder includes all murders now divided by the statute into first and second degree murder for purposes of punishment. *State v. Smith*, 221 N.C. 278, 289-90, 20 S.E.2d 313, 320-21 (1940). Therefore, the year and a day rule applied to the crime of murder in *Orrell* applied equally to all murders which, for purposes of punishment *only*, are today divided into first degree murders and second degree murders. In fact, this Court noted in one of its earliest reported cases on the subject of the year and a day rule as applied in North Carolina that: "Unless the death occurs within the year and day after the stroke [inflicted on the victim by the defendant], *there is no felonious killing.*" *State v. Baker*, 46 N.C. (1 Jones) 267, 273 (1854) (emphasis added). Accordingly, under our prior cases, the defendant could not be found guilty of murder in the present case, as the victim died more than a year and a day after the injury was inflicted upon him by the defendant.

To apply today's decision abrogating the year and a day rule to permit the defendant to be convicted of murder in the present case would, at the very least, permit his conviction upon less evidence than would have been required to convict him of that crime at the time the victim died and would, for that reason, violate the principles preventing the application of *ex post facto* laws. *Calder*, 3 U.S. (3 Dall.) at 390, 1 L. Ed. at 650. Retroactive application of our decision today, so as to uphold the judgment for murder in the present case, clearly would be to apply this decision to events occurring before this decision and severely disadvantage the defendant; to do so would violate the principle emanating from

the fifth and fourteenth amendments to the Constitution of the United States forbidding retroactive application of an unforeseeable judicial modification of criminal law. *Marks*, 430 U.S. at 191-92, 51 L. Ed. 2d at 264-65; *Bouie*, 378 U.S. at 355, 12 L. Ed. 2d at 900. Therefore, the judgment against the defendant for second degree murder must be vacated.

At the time the defendant struck the victim in the present case and at the time the victim died, however, we had made it clear that the year and a day rule would not be applied to involuntary manslaughter cases. *Hefler*, 310 N.C. at 141, 310 S.E.2d at 313. Therefore, the defendant concedes that the rule would not have prevented his being convicted and sentenced for involuntary manslaughter. In the present case, the trial court submitted possible verdicts finding the defendant guilty of second degree murder, guilty of the lesser included offense of involuntary manslaughter or not guilty. The jury convicted the defendant of second degree murder, and the judgment for second degree murder which we hold must be vacated was entered upon that verdict. In finding the defendant guilty of second degree murder, however, the jury necessarily had to find facts establishing the lesser included offense of involuntary manslaughter. *See State v. Greene*, 314 N.C. 649, 336 S.E.2d 87 (1985). Hence, leaving the jury's verdict undisturbed but recognizing it for what it is, this case will be remanded for judgment as upon a verdict of guilty of involuntary manslaughter. *See State v. Freeman*, 307 N.C. 445, 298 S.E.2d 376 (1983); *State v. Dawkins*, 305 N.C. 289, 287 S.E.2d 885 (1982); *State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979).

The decision of the Court of Appeals finding no error in the trial and judgment against the defendant for second degree murder is reversed. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Forsyth County, with instructions that the Superior Court vacate the judgment for second degree murder and enter a judgment against the defendant as upon a verdict finding him guilty of involuntary manslaughter, giving him credit upon the new commitment for any time heretofore served under the judgment and commitment for second degree murder.

Reversed and remanded with instructions.

Justice MARTIN dissenting in part.

I concur in the majority's holding that the "year and a day" rule is no longer useful in the administration of justice in North Carolina and abrogation of the rule prospectively.

However, I dissent from the holding in this case which applies the "year and a day" rule to the charge of murder in the second degree against defendant Vance.

The indictment in this case positively shows that it is only a charge of murder in the second degree. The indictment reads: "Indictment Second Degree Murder." Further, the agreed record on appeal recites that defendant was tried and convicted on the charge of murder in the second degree. Even the arrest warrant was on charge of murder in the second degree. This is not a case where defendant was charged with murder in the first degree and convicted of murder in the second degree. Vance was never charged with murder in the first degree.

It is not appropriate to extend the "year and a day" rule to charges of murder in the second degree. The reasoning of this unanimous Court in *State v. Hefler*, 310 N.C. 135, 310 S.E.2d 310 (1984), applies most cogently to the instant case, and the reader is referred to that opinion for a full discussion of the rule. *See also* Note, *Criminal Law—Homicide—Death Resulting More Than a Year and a Day After Assault*, 40 N.C.L. Rev. 327 (1962).

As stated in *Hefler*, the six cases mentioning the rule all involved sentences of death. Only in *State v. Orrell*, 12 N.C. 139 (1826), was the judgment of death arrested. This Court has never applied the rule to a charge of murder in the second degree. This is the first case in North Carolina in which a defendant has argued that the rule should be applied to a charge of murder in the second degree.

The reason for applying the rule to murder cases where the defendant's life is at stake is that under those circumstances the rule of law ought to be certain. With the uncertainty as to the cause of death because of the long lapse of time between the infliction of the wound and death, the law applied a definite rule in cases in which the defendant's life was at stake; if the death occurred more than a year and a day after the infliction of the wound, defendant could not be prosecuted on the charge involving the death penalty. *See State v. Hefler*, 310 N.C. 135, 310 S.E.2d 310

(1984); 3 Coke, Institutes 53 (1817); *see State v. Brown*, 21 Md. App. 91, 318 A.2d 257 (1974).

These reasons do not exist in the present appeal where the defendant was only charged and convicted of murder in the second degree. N.C.G.S. § 14-17 defines murder in the second degree and establishes it as a class C felony for the purposes of punishment. N.C.G.S. § 14-17 (1986) (entitled "Murder in the first and second degree defined; punishment."). A class C felony is punishable by imprisonment up to fifty years or by life imprisonment. N.C.G.S. § 14-1.1 (1986). In fact, defendant received a sentence of imprisonment for twenty years.

Under N.C.G.S. § 14-17 murder in the second degree has been construed to be the unlawful killing of a human being with malice. *State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983); *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889 (1963). Malice "aforethought" is not an element of murder in the second degree. *State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393 (1971); *State v. McGee*, 47 N.C. App. 280, 267 S.E.2d 67, *cert. denied*, 301 N.C. 101, 273 S.E.2d 306 (1980).

The majority properly addresses the issue of retroactivity concerning the abolition of the rule. However, the majority does not discuss why the rule is applied in this case of murder in the second degree.

> When a court is abolishing a rule of law, it is submitted that the proper exercise of judicial power should be explained and supported by broad policies concerning the criminal law . . .

State v. Brown, 21 Md. App. 91, 96, 318 A.2d 257, 261 (1974) (quoting from Note, *The Abolition of the Year and a Day Rule: Commonwealth v. Ladd*, 65 Dick. L. Rev. 166, 169 (1961)). The majority fails to cite any case or authority holding that the "year and a day" rule is applicable to a charge of murder in the second degree—and with good reason. The majority will stand alone in applying the rule to murder in the second degree.

The majority does not articulate, nor do I find, any convincing reason to extend the "year and a day" rule to this case of murder in the second degree where the defendant's life was never at stake. I dissent from this holding of the majority.

STATE OF NORTH CAROLINA v. JERRY DALE ERLEWINE

No. 398A90

(Filed 2 May 1991)

1. **Criminal Law § 421 (NCI4th)— prosecutors' closing arguments—objection sustained and jury instructed**

The trial court in a prosecution for murder, burglary, robbery, and assault cured any error that may have been present in certain of the prosecutors' closing arguments by sustaining defendant's objections and instructing the jury to disregard those arguments. It must be assumed that the jury heeded the instructions and did not consider the arguments to the defendant's prejudice.

Am Jur 2d, Trial § 317.

2. **Criminal Law § 425 (NCI4th)— prosecutors' closing arguments—failure of defendant to contradict the State's evidence**

The prosecutors' closing arguments in a trial for murder, burglary, robbery, and assault were fair and proper commentary on the defendant's failure to present any evidence where the record shows that the prosecutors never commented directly on the defendant's failure to testify or suggested that the defendant should have or even could have taken the witness stand. The State may not comment upon defendant's failure to testify, but may draw the jury's attention to the failure of the defendant to produce exculpatory evidence or evidence to contradict the State's case.

Am Jur 2d, Trial §§ 237-244.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify. 14 ALR3d 723.

3. **Criminal Law § 444 (NCI4th)— prosecutor's closing argument—personal opinion**

The District Attorney did not express a personal opinion regarding the guilt of defendant in a prosecution for murder, burglary, robbery, and assault, but merely asked the jury to find facts and to draw permissible inferences based upon substantial competent evidence introduced during trial.

Am Jur 2d, Trial § 261.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused—modern state cases. 88 ALR3d 449.

4. Criminal Law § 446 (NCI4th)— prosecutor's closing arguments —*community sentiment*

Although the prosecutor in a trial for murder, burglary, robbery, and assault improperly encouraged the jury to follow his view of the sentiment of the community rather than the evidence, the law and their own views in acting as a voice and conscience of the community, there was no prejudice because the trial court promptly sustained the defendant's objections and instructed the jury on more than one occasion when the District Attorney made similar statements, and the evidence against defendant was overwhelming. The State must not ask the jury to lend an ear to the community; however, encouraging the jury to act as the voice and conscience of the community is proper. District Attorneys are cautioned to pay strict attention to the line between proper and improper arguments concerning the jury's relationship to the State and community.

Am Jur 2d, Trial §§ 225, 226, 317.

5. Criminal Law § 794 (NCI4th)— acting in concert—instruction proper

There was no error in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury in instructing the jury on acting in concert where the defendant failed to object to the trial court's instructions. It is only necessary that there be a common purpose to commit a crime; it is not strictly necessary that the defendant share the intent or purpose to commit the particular crime actually committed.

Am Jur 2d, Criminal Law §§ 168 et seq.; Trial § 724.

6. Criminal Law § 1178 (NCI4th)— aggravating factor—position of trust or confidence—drug dealer and customer—erroneous

The trial court erred in finding in aggravation when sentencing defendant for burglary that defendant took advantage of a position of trust or confidence where that finding was

based on evidence that defendant was a regular cocaine customer of the victim. N.C.G.S. § 15A-1340.4(a)(1)n (1988).

Am Jur 2d, Criminal Law §§ 598, 599.

7. **Criminal Law § 1135 (NCI4th)— assault—aggravating factor—inducement and position of leadership**

The trial court did not err when sentencing defendant for assault with a deadly weapon with intent to kill inflicting serious injury by finding in aggravation that defendant induced others to commit the crime and that he occupied a position of leadership or dominance over the other participants. The evidence that defendant initially invited Lynch to accompany him to carry out his criminal plan, together with his direction to Lynch to "take care" of Cox, supports the finding that defendant induced Lynch to commit the assault upon Cox, and separate evidence that defendant directed Lynch to take Cox to the bedroom and to tie her up supports the finding that defendant occupied a position of leadership during the assault upon Cox.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL as of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment for first degree murder, entered by *Long, J.*, on 7 December 1989, in Superior Court, GUILFORD County. On 17 August 1990, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on his appeal from additional judgments imposing sentences of less than life imprisonment. Heard in the Supreme Court on 13 March 1991.

Lacy H. Thornburg, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by M. Patricia Devine and Constance H. Everhardt, Assistant Appellate Defenders, for the defendant-appellant.

MITCHELL, Justice.

The defendant, Jerry Dale Erlewine, was tried upon proper bills of indictment charging him with the armed robbery and murder of David Lee Carlisle, first degree burglary of Carlisle's residence, armed robbery of Patricia Ann Cox and assault upon Cox with

a deadly weapon with intent to kill inflicting serious injury. The jury found the defendant guilty of first degree murder on theories of premeditation and deliberation and felony murder, and also returned verdicts finding him guilty of first degree burglary, two counts of robbery with a firearm, and assault with a deadly weapon with intent to kill inflicting serious injury. After a sentencing proceeding under N.C.G.S. § 15A-2000, the jury recommended life imprisonment for the first degree murder conviction. The trial court sentenced the defendant to life imprisonment for the murder and to consecutive prison terms of forty-six years for the first degree burglary, thirty-six years for each count of armed robbery, and twenty years for assault with a deadly weapon with intent to kill inflicting serious injury.

On appeal, the defendant brings forward four assignments of error. First, he contends that the prosecutors committed gross improprieties during their closing arguments which deprived him of a fair trial. Second, he argues that the trial court committed plain error in its instructions to the jury on acting in concert and assault with a deadly weapon with intent to kill inflicting serious injury. Third, he maintains he is entitled to a new sentencing hearing on the charge of first degree burglary because the evidence of the aggravating factor that he "took advantage of a position of trust or confidence to commit the offense" was insufficient as a matter of law. Finally, he contends that with regard to the assault charge, the trial court erroneously used the same evidence to support two aggravating factors. We find no error in the guilt phase of the trial, but we remand for new sentencing on the first degree burglary charge.

The State's evidence tended to show that during October 1988, David Carlisle and Patricia Cox lived together in a mobile home on a dirt road in Mount Airy. Shelley Massey and Tina Simmons Kittle lived together in a mobile home at the end of the same dirt road. Carlisle and Cox sold cocaine at their mobile home, and the defendant regularly purchased cocaine there.

Around mid-October 1988, the defendant told Shelley Massey that he was going to rob Carlisle. On the 23rd or 24th of October 1988, the defendant also told Tina Simmons Kittle that he was going to rob Carlisle. The defendant had made similar statements on at least ten other occasions. Sometime after the defendant made

the threats on the 23rd or 24th of October, Massey and Kittle warned Cox and Carlisle to be leery of the defendant.

On the evening of 25 October 1988, the defendant and Joey Lynch injected cocaine. Lynch then drove the defendant to Lenore Foster's mobile home where all three injected cocaine. After they had injected the cocaine, the defendant told the others that he knew where they could get more cocaine and asked whether either of them had a gun. Lynch provided Foster's shotgun and one shell. The defendant and Lynch then drove Foster's truck to Pilot Mountain where the defendant entered Kenny Olievy's house and exited with a sawed-off double-barreled shotgun. The defendant and Lynch agreed to go to Carlisle's house, induce Carlisle to open the door by knocking, then burst in and demand Carlisle's money and cocaine.

Around midnight, the defendant and Lynch parked near Tina Kittle's mobile home, then walked to Carlisle's mobile home with guns in hand. The defendant knocked on the door, but he received no response. He then went to the back window, knocked and told someone inside that he had the money that he owed. Carlisle opened the door, and the defendant and Lynch entered the mobile home. The defendant offered to barter his gun for cocaine. Carlisle then examined the gun, but he rejected the offer. At this point, Carlisle's telephone rang. Patricia Cox answered on a telephone in the bedroom. Tina Kittle was calling to speak to Carlisle. When Carlisle left the room to answer the telephone, the defendant told Lynch that he was going to shoot Carlisle when he came back into the room and that he did not want to leave any witnesses. The defendant also told Lynch to take care of Cox and the defendant would take care of Carlisle. Lynch suggested that defendant wait until after they got the cocaine.

When Carlisle returned, he and the defendant began arguing about the money the defendant owed him. Lynch then stood, pointed his gun at Carlisle and demanded Carlisle's cocaine and money. As their voices grew louder, Patricia Cox entered the living room. The defendant and Lynch each held a gun aimed at Carlisle. As Cox entered the room, Lynch aimed his gun at her and told her to sit down. The defendant demanded Carlisle's cocaine, and Lynch demanded money. Cox led Lynch to the bathroom where the cocaine was hidden in a "Crown Royal" duffle bag inside a heating vent. Lynch held his gun barrel against Cox's neck as they walked through the mobile home. The "Crown Royal" bag contained about an ounce

of cocaine, some marijuana, a small scale and a spoon. Lynch demanded Cox's purse, and she gave it to him. The purse contained about $2,000.

The defendant and Lynch directed Carlisle and Cox at gunpoint to the bedroom. They forced Cox and Carlisle to lie on the bed on their backs. The defendant bound Carlisle's hands together with a leather belt. He told Lynch to tie up Cox, but Lynch was unable to find anything with which to tie her. During this time, Carlisle was saying, "Don't hurt her. You don't have to do this." The defendant then nodded toward Lynch, Cox raised her hand to her face, and Lynch shot her. As Carlisle stood up to protest, the defendant pulled one trigger of Olievy's double-barreled shotgun, but it did not fire. The defendant struck Carlisle in the back of the head with the gun barrel, and Lynch struck Carlisle on the stomach with his gun. The defendant then pulled the other trigger, and the resulting gun blast hit Carlisle in the face and sent him to the floor. The defendant and Lynch ran from the mobile home carrying the "Crown Royal" bag, the purse, Carlisle's wallet and their guns.

Cox remained conscious and called the police. The gun blast had penetrated her left hand and left eye, tearing away part of her face and blowing out six teeth. Carlisle was dead at the scene. He was killed by the shotgun wound to his face.

On 26 October 1988, Leila Dickson, Lynch's sister, took Lynch and the defendant out of town where they dumped two duffle bags near Belews Creek. Dickson then drove to Winston-Salem where she left the defendant. On 29 October 1988, the defendant was arrested in Winston-Salem.

The defendant did not present any evidence.

[1] By his first assignment of error, the defendant contends that during their closing arguments, District Attorney H. Dean Bowman and Assistant District Attorney James C. Yeatts III improperly invoked community sentiment, expressed their personal opinions on the defendant's guilt and on the credibility of witnesses, improperly commented upon the defendant's failure to testify, his not guilty plea, the presumption of innocence and the role of the defense counsel, and abused the defendant personally. The defendant contends that such arguments constituted gross improprieties and deprived him of a fair trial. We disagree.

We have repeatedly held that arguments of counsel are left largely to the control and discretion of the trial court and that counsel will be allowed wide latitude in the argument of hotly contested cases. *E.g., State v. Shank*, 327 N.C. 405, 407, 394 S.E.2d 811, 813 (1990). As to several of the arguments at issue, the trial court sustained objections by defense counsel and instructed the jury not to consider those arguments. We must assume the jury heeded the instructions and did not consider the arguments to the defendant's prejudice. *North Carolina State Highway Com. v. Pearce*, 261 N.C. 760, 763, 136 S.E.2d 71, 73 (1964). Hence, by sustaining the objections and instructing the jury to disregard those arguments, the trial court cured any error that may have been present in those arguments. *State v. Small*, 328 N.C. 175, 185-86, 400 S.E.2d 413, 418 (1991); *State v. Woods*, 307 N.C. 213, 222, 297 S.E.2d 574, 579 (1982). Therefore, we will not address those arguments in this opinion.

[2] In other arguments at issue, Assistant District Attorney Yeatts said, in his portion of the State's closing argument,

> Using those same tests what really has this case been for the number of days that the State of North Carolina has presented uncontradicted evidence? Uncontradicted. There is a lot of difference between denying and contradicting. That evidence is uncontradicted.

District Attorney Bowman emphasized a similar theme in his closing argument:

> One thing is, however, for certain in this case. Excuse me. Whatever they argue and whatever they contend it's going to have to be the State of North Carolina's case that they're talking about, isn't it? For obvious reasons.
>
> [DEFENSE COUNSEL]: Objection.
>
> [MR. BOWMAN]: Because the State's case is uncontradicted.
>
> [THE COURT]: Overruled.
>
> [MR. BOWMAN]: There is a big difference in denying and contradicting. You can see me stand right here and kick this podium over, and I can deny it from now on, can't I?
>
> [DEFENSE COUNSEL]: Objection.

[THE COURT]: Overruled.

[MR. BOWMAN]: There is a huge difference between denying and contradicting. The defendant would like nothing better than for you to forget all the uncontradicted and sworn testimony that you heard here in the past week.

. . . .

[MR. BOWMAN]: If you think about it and think through it there is not one scintilla of evidence to contradict anything, any testimony or any exhibits presented by the State in this case. There is not one. Think about that when you go back there and deliberate.

The defendant contends that by arguing that the State's evidence was uncontradicted, the prosecutors were improperly commenting on the defendant's exercise of his right not to testify. The record belies that argument. The record shows that the prosecutors never commented directly on the defendant's failure to testify or suggested that the defendant should have or even could have taken the witness stand. Thus, the prosecutors' arguments were fair and proper commentary on the defendant's failure to present any evidence. *State v. Tilley*, 292 N.C. 132, 143, 232 S.E.2d 433, 441 (1977). The State may not comment upon the defendant's failure to testify but may draw the jury's attention to the failure of the defendant to produce exculpatory evidence or evidence to contradict the State's case. *Id.*

[3] The defendant also contends that District Attorney Bowman injected his personal opinion in his closing argument by stating:

> What else would you have the State do? I don't know what it is. Evidence is as clear as I know how to make it clear what the truth is in this case. The defendant's guilty of burglary, guilty of two armed robberies. Under the theory of acting in concert, he's guilty of blowing that woman's face off. And beyond all that he's guilty of first degree murder.

Such remarks were proper, given the evidence introduced in this case. District Attorney Bowman was not expressing a personal opinion regarding the guilt of the defendant, but merely asking the jury to find facts and draw permissible inferences based upon substantial competent evidence—most of it eyewitness testimony by Cox, the surviving victim—introduced during the trial.

[4] The defendant also contends the prosecutors improperly invoked community sentiment in their closing arguments. For example, addressing evidence that the defendant was under the influence of cocaine when the crimes at issue were committed, District Attorney Bowman said,

> Do you think he would care if that were the reason you cut him loose? Certainly not. He'd be just as happy on the other side of that door for that reason as any other. Now, that's one thing probably, I contend, that *the people of the State of North Carolina and certainly the people of Surry County are sick and tired of.*

(Emphasis added.) The defendant contends the District Attorney was asking the jury to heed public sentiment and to appease community outrage by convicting the defendant; such an argument would be improper. The State must not ask the jury "to lend an ear to the community rather than a voice." *State v. Scott*, 314 N.C. 309, 312, 333 S.E.2d 296, 298 (1985) (quoting *Prado v. State*, 626 S.W.2d 775, 776 (Tex. Crim. 1982)). However, encouraging the jury to act as the voice and conscience of the community is proper and is one of the very reasons for the establishment of the jury system. *Id.* at 311-12, 333 S.E.2d at 298.

The argument by District Attorney Bowman, which is quoted above, crossed the line into impropriety by encouraging the jury to follow his view of the sentiment of the community rather than the evidence, the law and their own views in acting as the voice and conscience of the community. District Attorneys would be wise to remember that jurors are the community, for purposes of the trial, and they will know without assistance what the "community is sick and tired of."

Although the trial court erred in overruling the defendant's objection to the District Attorney's argument, we conclude that the error does not warrant a new trial. On more than one occasion, when the District Attorney made similar statements, the trial court promptly sustained the defendant's objections and instructed the jury that it was not to consider such arguments. In light of those actions by the trial court, and considering the overwhelming evidence against the defendant in the present case, we conclude that the improper argument by District Attorney Bowman could not have affected the outcome in this case. Therefore, the trial court's lapse into error in this instance was not prejudicial to the defendant.

We caution our District Attorneys, however, to pay strict attention to our prior efforts to draw the line between proper and improper arguments concerning the jury's relationship to the state and community. *E.g., Scott*, 314 N.C. 309, 333 S.E.2d 296.

[5] The defendant next contends that the trial court committed plain error in its instructions to the jury on acting in concert and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court gave the following instruction regarding the theory of acting in concert:

> Now, members of the jury, I instruct you that you should be aware of the law which provides that for a person to be guilty of a crime it is not necessary that he himself do all the acts necessary to constitute that crime. If two or more persons act together *with a common purpose to commit a crime* each of them is held responsible for the acts of the others done in the commission of that crime. This is known in the law as acting in concert.

(Emphasis added.) The trial court also instructed the jury on the elements of assault with a deadly weapon with intent to kill inflicting serious injury as follows:

> I instruct you that for you to find the defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury the State must prove four things beyond a reasonable doubt. First, that the defendant *or someone with whom he was acting in concert assaulted Patricia Ann Cox by intentionally shooting her.*
>
> Second, that the assault was by use of a deadly weapon.
>
> . . . .
>
> Thirdly, the state must prove beyond a reasonable doubt that the assault was committed with the specific intent to kill Patricia Ann Cox.
>
> And fourth, that such assault did, in fact, inflict serious injury. . . .
>
> So, members of the jury, as to this charge if you find from the evidence beyond a reasonable doubt that on or about the date in question *the defendant or someone with whom he was acting in concert intentionally shot Patricia Ann Cox*

> *with a shotgun with the specific intent to kill her*, and that the shooting did seriously injure her, or did inflict serious injuries, then it would be your duty to return a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury.

(Emphasis added.)

The defendant contends that the trial court's instructions permitted the jury to find him guilty of assault with a deadly weapon with intent to kill inflicting serious injury if the jury found that his accomplice, Joey Lynch, but not the defendant, had the specific intent to kill Cox. The defendant argues that the instructions thereby erroneously relieved the State of its burden to prove that the defendant had the required *mens rea* to commit the crime. We disagree.

First, we must point out that the defendant failed to object to the trial court's instructions; therefore, our review is limited to review for plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

We have emphasized that:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. at 660, 300 S.E.2d at 378 (quoting with approval *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). Before deciding that an error by the trial court amounts to plain error, the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). In other words, the appellate court

must determine that the error in question "tilted the scales" and caused the jury to convict the defendant. *Id.*

In the case at hand, our review of the instructions complained of reveals no error and certainly no plain error. The theory of acting in concert, as properly defined by the trial court, requires a common purpose to commit a crime. *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979). Thus, before the jury could apply the law of acting in concert to convict the defendant of the crime of assault with a deadly weapon with intent to kill inflicting serious injury, it had to find that the defendant and Lynch had a common purpose to commit *a* crime; it is not strictly necessary, however, that the defendant share the intent or purpose to commit the particular crime actually committed. Instead, the correct statement of the law is found in trial court instructions which we have held in a prior case to be without error:

> [I]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."

State v. Westbrook, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972). Viewed in the light of this correct statement of the law of acting in concert, the trial court's instructions in the present case contained neither error nor plain error.

[6] By his next assignment of error, the defendant contends he is entitled to a new sentencing hearing on the charge of first degree burglary because the State's evidence of the aggravating factor that he "took advantage of a position of trust or confidence to commit the offense" was insufficient as a matter of law. We agree.

The presumptive term for the Class C felony of first degree burglary is fifteen years, but the trial court sentenced the defendant to a prison term of forty-six years for this offense. In sentencing the defendant for this offense, the trial court found as an aggravating factor that the defendant "took advantage of a position of trust or confidence to commit the offense." *See* N.C.G.S. § 15A-1340.4(a)(1)n (1988).

At the sentencing hearing, the defendant testified that he had been to Carlisle's home on numerous occasions and was one of Carlisle's regular cocaine customers. Carlisle trusted the defendant to the point of selling him cocaine on credit at times. The State contends that this evidence supports the trial court's finding that the defendant took advantage of a position of trust or confidence in committing the offense. Although such evidence certainly demonstrates an unusually close relationship between the defendant and the victim, we conclude that their relationship simply did not put the defendant in the type of "position of trust or confidence" envisioned by the legislature in establishing the aggravating factor set forth in N.C.G.S. § 15A-1340.4(a)(1)(n). To apply that aggravating factor to an ongoing criminal conspiracy between a drug dealer and his customer would give the aggravating factor an application so broad that it would retain little meaning. Thus, we conclude that the trial court erred in finding that aggravating factor in the present case. Accordingly, the sentence entered on the first degree burglary judgment must be vacated and the defendant must receive a new sentencing hearing on that conviction.

[7] Finally, we turn to the defendant's assignment of error regarding the sentence he received for assault with a deadly weapon with intent to kill inflicting serious injury. The trial court found as factors in aggravation of that crime that the defendant induced others to commit the crime *and* that he occupied a position of leadership or dominance over the other participants in the commission of the offense. N.C.G.S. § 15A-1340.4(a)(1)(a). The defendant argues that the trial court erred by finding the two aggravating factors because the evidence indicating that the defendant induced Joey Lynch to commit the assault on Patricia Cox was the same evidence which indicated the defendant led or dominated Lynch in the commission of the offense. We disagree.

This Court has upheld the division of the aggravating factor set forth in N.C.G.S. § 15A-1340.4(a)(1)(a) into two aggravating factors, so long as there is separate evidence to support each. *State v. Miller*, 315 N.C. 773, 781-82, 340 S.E.2d 290, 295 (1986). In the case at hand, the evidence that the defendant initially invited Lynch to accompany him to carry out his criminal plan that evening, together with his direction to Lynch to "take care" of Cox, supports the trial court's finding that the defendant induced Lynch to commit the assault upon Cox. Separate evidence that the defendant directed Lynch to take Cox to the bedroom and to tie her up, which were

the last activities in preparation for shooting Cox, supports the trial court's finding that the defendant occupied a position of leadership during the assault upon Cox. Separate evidence supports the trial court's finding of each factor; therefore, this assignment of error is without merit.

For the foregoing reasons, we conclude that the guilt phase of the defendant's trial was free of prejudicial error, but that the sentence imposed for first degree burglary must be vacated, and the defendant must be resentenced for that conviction only.

First Degree Murder, Armed Robbery (2 counts), Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Bodily Injury—Surry County Case Nos. 88CRS5692, 5694, 5695, 5696—no error.

First Degree Burglary—Surry County Case No. 88CRS5693—Guilt Phase, no error; sentence vacated and remanded for resentencing.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 121 GEORGE R. GREENE, RESPONDENT

No. 289A89

(Filed 2 May 1991)

1. **Judges § 7 (NCI3d)— judicial disciplinary proceeding—due process—access to investigative files**

Due process did not require that the respondent in a judicial disciplinary proceeding have open access to the Judicial Standards Commission's investigative files.

Am Jur 2d, Judges §§ 18-20, 50.

2. **Judges § 7 (NCI3d)— judicial disciplinary proceeding—consideration of evidence in files—failure of record to support contention**

Defendant's contention that the Judicial Standards Commission considered evidence in its files not revealed to respondent and was thus not a fair and impartial tribunal was not supported by the record since (1) the record shows only

that the Commission's recommendation was based solely on its findings contained in its order and its conclusions drawn from those findings, and (2) the Supreme Court rather than the Commission decides whether respondent's conduct is deserving of censure, and the only conduct of which the Supreme Court has knowledge is that revealed by the evidence before the Commission which formed the basis of its recommendation.

Am Jur 2d, Judges §§ 18-20, 50.

3. **Judges § 7 (NCI3d)— censure of judge—conduct prejudicial to administration of justice**

A superior court judge is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute for the following conduct which occurred while he was a district court judge: (1) while presiding over a prosecution for assault on a female, respondent told the victim that she would ruin her children's lives if she did not reconcile with defendant, referred to a battered women's assistance group whose representative was present in court in support of the victim as a one-sided, man-hating bunch of females and pack of she-dogs, and polled the courtroom spectators as to how many of them had little spats during their marriages; and (2) while presiding over the trial of a defendant charged with speeding on Rock Quarry Road in Wake County, respondent stated that he also speeds on the same road by driving fifty-two miles per hour in a forty-five miles per hour zone, and while presiding over other speeding trials respondent routinely admitted that he drove fifty-two miles per hour in forty-five miles per hour zones and sixty-five miles per hour in fifty-five miles per hour zones and counseled defendants charged with speeding that they should restrict their speeding violations to those limits in order to avoid apprehension and conviction.

Am Jur 2d, Judges §§ 18-20, 50.

THIS matter is before the Court upon a recommendation of the Judicial Standards Commission that respondent, George R. Greene, a judge of the General Court of Justice, Superior Court Division,[1] be censured for conduct prejudicial to the administra-

1. At all times material to the proceedings in this matter, Judge Greene was a judge in the District Court Division, Tenth Judicial District. Judge Greene was

tion of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376 and which violates Canons 2A, 3A(2) and 3A(3) of the North Carolina Code of Judicial Conduct. Heard in the Supreme Court 15 November 1989.

Bailey & Dixon, by Wright T. Dixon, Jr., and Alan J. Miles, for respondent-appellant.

Lacy H. Thornburg, Attorney General, by James J. Coman, Senior Deputy Attorney General, Special Counsel to the Judicial Standards Commission.

PER CURIAM.

Respondent urges this Court to reject the Judicial Standards Commission's (Commission) recommendation. He argues (1) the proceedings against him should be dismissed because they denied him procedural due process; (2) the Commission's factual findings are not supported by clear and convincing evidence, and (3) the findings do not support the Commission's conclusions.

The proceedings against respondent occurred as follows:

After advising respondent by confidential notice dated 4 January 1988 that it had ordered a preliminary investigation to determine whether formal proceedings should be instituted against him, the Commission, on 7 October 1988, concluded that formal proceedings should be instituted and served Notice of Complaint and a verified complaint upon respondent on 16 October 1988.

The complaint alleged that respondent, while presiding over a criminal session of Wake County District Court on 16 October 1987, heard a case which involved a charge of assault on a female. The complaint alleged:

> The respondent criticized the victim's decision not to reconcile with the defendant and implied that the assault was justified and deserved. The respondent also made derogatory remarks about Interact, the battered women's assistance group whose representative was present in court in support of the victim, including the comment that they were "a one-sided man-hating bunch of females." Following the trial, the respondent ap-

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elected judge in the Superior Court Division in the 1988 General Election and began serving in that capacity on 1 January 1989.

proached where the victim and the Interact representative were standing in the hall. The respondent grinned at . . . the victim in the case, and asked if she forgave him. He then told [the victim] in the presence of the Interact representative that once his wife had slapped him and that he had "laid her on the floor and did not have any more problems from her."

Respondent answered these allegations by denying his conduct was prejudicial to the administration of justice because:

A. The attempted counseling to the prosecuting witness was given after hearing the evidence and finding the defendant "guilty." That his opinion remains that in light of the evidence, the two children of the parties and the obvious pregnancy of the prosecuting witness, a joint working out of their difficulties was the best course for *all* of the involved parties.

B. The remarks about "Interact" persons were made outside Court and as a result of and in response to their previous disruption in the Courtroom and the proceedings before Respondent by representatives of that group. Further, to the attempts by those same representatives to influence Respondent's decision and invade his impartiality by improper pressure tactics. Finally, to the interference, after Court, in his attempt to mitigate any personally perceived prejudice by the prosecuting witness.

C. Respondent made a good faith and sincere attempt to ameliorate any hostility with the prosecuting witness Myra Sheffield by asking her if she forgave him for any misunderstanding which may have occurred in the Courtroom.

The complaint also alleged:

(c) While presiding over a criminal session of Wake County District Court on 24 February 1988, the respondent engaged in a conversation with a defendant who was charged with speeding on Rock Quarry Road in Wake County. The respondent admitted during the conversation in open court that a defendant who was charged with speeding on Rock Quarry Road that the respondent drives the same route at 52 miles per hour, which is in excess of the posted speed limit of 45 miles per hour.

Respondent answered this allegation by admitting having made the statement attributed to him but denying it was conduct prejudicial to the administration of justice because:

A. Respondent was merely attempting to make the point to the particular Defendant that reality is that police policy allows drivers some leeway with regard to speed limits on certain roads. Respondent routinely tells this to defendants who appear in his Courtroom charged with speeding. Respondent knows that the police also give defendants who are speeding a few miles over the limit a warning. Respondent attempts to impress upon Defendants that speeding in excess of the leeway allowed by the police becomes a serious offense.

B. Respondent did not mean to imply by his statement that he approved of driving in substantial excess of the posted speed limit.

By letter dated 23 November 1988 respondent's counsel requested Special Counsel for the Commission, Mr. James Coman, to furnish the following items:

1. A list of witnesses you expect to call to testify before the Commission against Judge Greene and a summary of what you expect their testimony to be;

2. Copies of any written statements or complaints made to the Commission or its investigators as a part of this inquiry;

3. Copies of any transcription of oral statements made to the Commission or its investigators as part of this inquiry;

4. Any letters, statements, or complaints filed by any individual with the Commission concerning Judge Greene which might have lead [sic] to the initiation of this inquiry; and

5. Copies of any investigative reports submitted by any person utilized by the Commission to conduct this inquiry.

Mr. Coman replied on 3 January 1989. Mr. Coman's letter advised respondent's counsel of the names of witnesses expected to be called against respondent and gave a detailed summary of the testimony each witness was expected to give. The letter advised that "investigative reports . . . are considered confidential and are not made available unless such information is presented

at the hearing." The letter noted that exculpatory material known by Special Counsel had been made available by advising respondent's counsel regarding certain people "they may want to speak with or people who do not support the contentions of the witnesses to be presented . . . in furtherance of the complaint."

By letter dated 10 January 1989 to Judge Gerald Arnold, Commission Chairman, respondent's counsel expressed dissatisfaction with the discovery procedures of the Commission and requested that the Chairman "order the Special Counsel to adopt an 'open file' policy on discovery." Respondent complained that Commission's Special Counsel, Mr. Coman, had asserted the "confidentiality" of the proceedings as grounds for denying access to all of the Commission's investigative files.

After a meeting of respondent's counsel, Commission Special Counsel, and Judge Arnold in Judge Arnold's office on 15 February 1989, Judge Arnold advised respondent's counsel by letter dated 17 February 1989 that he had personally reviewed the report and the letter response of Special Counsel. He concluded the response was reasonable. He denied respondent's counsel's request that he order Special Counsel to disclose all material in the investigative file.

On 16 March 1989 respondent's counsel moved to dismiss the complaint "for failure of the Special Counsel to comply with reasonable requests for discovery."[2]

Formal hearing after notice before the Commission was conducted on 2 June 1989. Evidence for the Commission tended to show as follows:

On 16 October 1987 respondent presided over a trial involving a charge of assault on a female against the husband of the prosecuting witness. A representative of Interact, a counseling service for persons in violent marriages or domestic situations, was present in court with the victim. Respondent made certain remarks concerning Interact. One witness recalled these remarks as accusing Interact of being "anti-man or man-hater or something like that . . . ." Another witness, the representative from Interact, testified that respondent "lectured the victim." This witness made contemporaneous handwritten notes of respondent's remarks made, she

2. No action on this motion by the Commission appears of record. By implication at least the motion was denied.

said, in the courtroom. She later used these contemporaneous notes to draft a letter of complaint to the Judicial Standards Commission after which she destroyed the handwritten notes.

Using her letter to the Commission to refresh her recollection, this witness testified that respondent told the prosecuting witness that she shouldn't have anything to do with Interact and "Interact was a one-sided, man-hating bunch of females, a pack of she-dogs." The witness said respondent told the prosecuting witness that "she was being selfish not to go back [to her husband] and that she would ruin her children's lives." Respondent said, "You really haven't been hit that much. You deserve to be hit. How is a man supposed to react?"

There was other testimony that respondent polled the persons in the courtroom to see how many had "had little spats in their marriages."

After the proceeding in court was completed, the Interact witness and the prosecuting witness came into contact with respondent outside the courtroom. According to these witnesses respondent told them that his wife had once slapped him and "he had laid her on the floor and had never had any problems from her since." Respondent then asked the assault victim to forgive him, and she replied negatively.

On 24 February 1988, while hearing an alleged speeding violation, which had occurred on Rock Quarry Road, respondent remarked, "Now, you know everybody speeds . . . . Everybody drives fifty-five miles an hour on Rock Quarry Road. And do you know how I know that everybody drives fifty-five miles an hour on Rock Quarry Road? Because I drive fifty-five miles an hour on Rock Quarry Road."

Respondent testified in his own behalf and offered corroborative witnesses. His testimony tended to show as follows:

In the assault case respondent was concerned because he thought there were persons in the courtroom supporting the prosecuting witness who were trying to influence his decision and judgment in the matter. Respondent "got mad." He admitted making the remark about having slapped his wife down, but said that this was an exaggerated version of what actually happened. Respondent said, "And if I lost it, I lost it. But I did the best that I could under the circumstances sitting as judge and jury." Respondent

recalled that he was not directing his "she-dogs" remark to Interact or any other particular group. He had no knowledge of Interact at the time and did not know there were Interact representatives in the courtroom. He said, "My recollection is that I said if men got into an argument they would argue, might even sometimes fight, but sooner or later they would forget about it, go on and be friends. Women are just the opposite. They get in an argument, they act like a bunch of she-dogs, something of that effect. I never referred to any particular group as being she-dogs. I said women in general. It was a general comment. It might not have been in good taste, but that's what I recall saying."

Regarding his comments concerning speed limit violations, respondent testified his experience had been that officers in traffic cases ordinarily do not issue citations unless the motorist is speeding ten miles or more over the posted speed limit and "that's common knowledge all over Wake County." Respondent said, "In my effort to educate the public on how not to get speeding tickets, I have consistently said I've locked my cruise control on fifty-two miles an hour in a forty-five zone. I speed—I drive thirty-five in a thirty-five and twenty-five in a twenty-five. On the open highway where the speed limit is fifty-five I never exceed sixty-two. I have done it repeatedly, repeatedly, repeatedly; and I won't deny it. But I have never said that I sped fifty-five on Rock Quarry Road. That is that lady's version, the way she wanted to give it to you. I did not say that, I categorically deny it."

After the hearing the Commission notified respondent that it had determined to file a recommendation with the Supreme Court of North Carolina. On 28 June 1989 the Commission served its formal recommendation on respondent.

The Commission recommends to the Court that respondent be censured. In support of this recommendation the Commission advised the Court that it found the following facts on clear and convincing evidence:

> (a) The respondent demeaned the dignity and integrity of the proceedings before him and his judicial office when during proceedings in open court in an assault on a female case, *State v. Sheffield*, Wake County file number 87CR50908, over which he presided on 16 October 1987, he embarassed [sic] and humiliated the seven-months' pregnant victim of the assault by telling her she would ruin her children's lives if she did

not reconcile with her estranged husband, she deserved to be hit, and she had not been hit that much; he referred in a derogatory manner to the representative of the support group who was with the victim and the support group itself, which he later came to know was Interact, as a one-sided, man-hating bunch of females and a pack of she-dogs; and he polled the courtroom spectators as to how many of them had little spats during their marriages.

(b) While presiding over the 24 February 1988 criminal session of Wake County District Court, the respondent admitted in open court during a conversation with a defendant charged with speeding on Rock Quarry Road in Wake County that he also speeds on the same road by driving 52 miles per hour in a 45 miles per hour zone. Furthermore, the respondent routinely admitted in open court while presiding over other district court criminal sessions that he broke the law by driving 52 miles per hour in 45 miles per hour zones and 62 miles per hour in 55 miles per hour zones and routinely counselled defendants appearing before him charged with speeding and others present in the courtroom that they should restrict their speeding violations to these limits in order to avoid apprehension and conviction.

The Commission concluded respondent's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376 and which violates Canons 2A, 3A(2), and 3A(3) of the North Carolina Code of Judicial Conduct.

Respondent continues to press his claim here that the proceedings before the Commission denied him due process of law. He makes two arguments: First, the Commission failed to provide respondent adequate prehearing discovery because it denied respondent open and full access to the Commission's investigative files. Second, the Commission itself was not a fair and impartial tribunal.

We conclude respondent was afforded due process in these proceedings. We make this conclusion in light of the nature of a judicial disciplinary proceeding begun before the Commission. Such proceeding "is neither criminal nor civil in nature. It is an inquiry into the conduct of a judicial officer, the purpose of which is not primarily to punish any individual but to maintain due and

proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of judges." *In re Crutchfield*, 289 N.C. 597, 602, 223 S.E.2d 822, 825 (1975). "Albeit serious, censure and removal are not to be regarded as punishment but as the legal consequences attached to adjudged judicial misconduct or unfitness." *In re Nowell*, 293 N.C. 235, 241, 237 S.E.2d 246, 251 (1977).

We agree with respondent, nevertheless, that in judicial disciplinary proceedings begun before the Judicial Standards Commission a judge is entitled

> to a hearing which meets the basic requirements of due process. [Citation omitted.] "The Commission's procedures are required to meet constitutional due process standards since a judge's interest in continuing in public office is an individual interest of sufficient importance to warrant constitutional protection against deprivation." *In re Hanson*, 532 P.2d 303, 305 (Alas. 1975); *In re Haggerty*, 257 La. 1, 241 So.2d 469 (1970).

Id. at 241-42, 237 S.E.2d at 251. The Law of the Land Clause in the North Carolina Constitution "guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing . . . . Where the claim or defense turns upon a factual adjudication, the constitutional right of the litigant to an adequate and fair hearing requires that he be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it." *In re Custody of Gupton*, 238 N.C. 303, 304, 77 S.E.2d 716, 717-18 (1953) (judgment in custody action vacated when presiding judge determined facts in part on the basis of unrevealed evidence gathered "in secret from undisclosed sources" without party's knowledge or that of his counsel) (citations omitted).

[1] Here respondent was accorded an adequate and fair hearing, was apprised of all material evidence received and relied on by the Commission and given opportunity to test, explain and rebut it. Respondent has referred us to no authority, and we know of none, for the proposition that due process requires a respondent judge in a judicial disciplinary proceeding to have open access to the Commission's investigative files. Respondent concedes that neither the Administrative Procedure Act, N.C.G.S. § 150B-1, *et seq.*, nor the North Carolina Rules of Civil Procedure, N.C.G.S. § 1A-1, apply to proceedings before the Judicial Standards Commission. Indeed, due process does not mandate open access to the

prosecution's files even in criminal cases. *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976); *cf. State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972).

[2] Respondent's contention that the Commission itself was not a fair and impartial tribunal is based on his assertion that the Commission was aware of, and either biased by or used against him, certain evidence in its files which was not revealed to respondent. In support of this contention respondent relies on the following colloquy between respondent and Special Counsel:

> Q. When you talked with the investigators for the Commission, did you make any analogy or reference as to what you thought this was all about?
>
> A. Uh-huh (yes), I did.
>
> Q. And do you think that that analogy is a valid assessment of what this is all about, Judge Greene?
>
> A. There is room for me to think so, but I would not categorically say yes.
>
> Mr. Coman: No further questions.

Respondent argues that whatever analogy was referred to by Special Counsel must have been known to the Commission yet not revealed to respondent. We reject this argument. It is based on speculation and is not supported by the record. Responding to this argument, the Commission moved the Court to be permitted to amend the record on appeal so as to include its entire investigative report for *in camera* inspection by the Court. Respondent resists this motion and prays that it be denied. The Court has elected to deny the motion.

We cannot sustain this argument of respondent for two reasons: First, we do not know what the mysterious analogy was, whether the Commission knew of it, and if it knew of it, whether the analogy affected its decision. So far as the record reveals the Commission's recommendation was based solely on its findings contained in its order and its conclusions drawn from those findings. Second, it is not the Commission but this Court which decides whether respondent's conduct is deserving of censure. The only conduct with which we are concerned and of which we have knowledge is that revealed by the evidence before the Commission which formed the basis of its recommendation.

[3] Respondent next contends the findings of the Commission are not supported by clear and convincing evidence and that its findings do not support its conclusions or its recommendation.

While there is some evidence to support all the Commission's findings, we conclude the finding that respondent told the prosecuting witness in the assault case that she deserved to be hit and had not been hit that much is not supported by clear and convincing evidence. We reject this finding. We conclude the other findings of the Commission are supported by clear and convincing evidence, and we adopt them as our own. *See In re Nowell*, 293 N.C. 235, 237 S.E.2d 246. Respondent's answer to the complaint does not deny that he made the remarks the complaint attributed to him, and the thrust of his testimony before the Commission is not to deny many of the remarks attributed to him by the complaining witnesses and found by the Commission to have been made. His testimony seems to be directed primarily toward making his remarks seem less egregious in light of respondent's version of his motives and the context in which the remarks were made. That respondent's motives might have been pure does not necessarily detract from the egregious effect of his remarks on others. "Whether the conduct of a judge may be characterized as prejudicial to the administration of justice which brings the judicial office into disrepute depends not so much on the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers." *In re Crutchfield*, 289 N.C. 597, 223 S.E.2d 822.

Canon 2A of the North Carolina Code of Judicial Conduct provides "[a] judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(3) provides in part: "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity."

We agree with the conclusion of the Commission that respondent's conduct which we have concluded has been proved by clear and convincing evidence violated both of these canons and that it was conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

Now, therefore, it is ordered by the Supreme Court of North Carolina, in conference, that respondent, Judge George R. Greene, be, and he is hereby, censured by this Court for the conduct determined by the Court to be conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Justices MITCHELL and FRYE did not participate in the consideration or decision of this case.

ELECTRIC SUPPLY CO. OF DURHAM, INC. v. SWAIN ELECTRICAL CO., INC., DAVIDSON AND JONES CONSTRUCTION COMPANY, AND WINSTONS VENTURE I, A NORTH CAROLINA PARTNERSHIP

No. 181PA90

(Filed 2 May 1991)

1. **Laborers' and Materialmen's Liens § 3 (NCI3d)— tiered subcontractors—subrogation to contractor's real property lien**

In light of the plain language of the statutory provisions, their structure, and the policy sought to be achieved by the legislature, N.C.G.S. § 44A-23 provides first, second and third tier subcontractors a separate right of subrogation to the contractor's lien on the real property distinct from the lien on funds contained in N.C.G.S. § 44A-18.

Am Jur 2d, Mechanics' Liens §§ 17-25, 67, 70, 263 et seq.

2. **Statutes § 5.6 (NCI3d)— legislative intent—legislative committee records—commentaries in General Statutes**

In determining legislative intent, the appellate court does not look to the record of the internal deliberations of committees of the legislature considering proposed legislation. Even commentaries printed with the General Statutes, which were not enacted into law by the legislature, are not treated as binding authority.

Am Jur 2d, Mechanics' Liens §§ 17-25; Statutes §§ 169 et seq.

3. Laborers' and Materialmen's Liens § 3 (NCI3d)— subcontractor—subrogation to contractor's real property lien

A subcontractor may assert whatever lien the contractor who dealt with the owner has against the owner's real property relating to the project. Therefore, even if the owner has specifically paid the contractor for the labor or the materials supplied by the specific unpaid subcontractor who is claiming the lien, that subcontractor retains a right of subrogation, to the extent of his claim, to whatever lien rights the contractor otherwise has in the project. However, until the subcontractor commences the action, the contractor may prejudice the subcontractor's rights through waiver of the lien or acceptance of payment.

Am Jur 2d, Mechanics' Liens §§ 67, 70, 263 et seq., 296.

Justice MARTIN dissenting.

Justice WEBB joins in this dissenting opinion.

ON discretionary review of a decision of the Court of Appeals, 97 N.C. App. 479, 389 S.E.2d 128 (1990), reversing a judgment entered by *Battle, J.*, in the Superior Court, DURHAM County, on 23 February 1989, declaring that the plaintiff had no claim against defendants by way of lien or subrogation and remanding the case to the trial division. Heard in the Supreme Court 12 December 1990.

Pulley, Watson, King & Hofler, P.A., by R. Hayes Hofler and Michael J. O'Foghludha, for plaintiff-appellee.

Manning, Fulton & Skinner, by John I. Mabe, Jr., for defendant-appellants Davidson and Jones Const. Co. and Winstons Venture I.

Johnston, Taylor, Allison & Hord, by James W. Allison and Greg C. Ahlum, for Carolinas AGC, Inc., amicus curiae.

Weinstein & Sturges, P.A., by L. Holmes Eleazer, Jr., and Fenton T. Erwin, Jr., for American Subcontractors Association, Inc., amicus curiae.

MEYER, Justice.

In 1986, defendant-appellant Winstons Venture I (hereinafter the "Owner") hired defendant-appellant Davidson and Jones Con-

struction Company (hereinafter the "Contractor") to build a Comfort Inn motel in Durham. The Contractor in turn hired Swain Electrical Co., Inc. (hereinafter the "First-tier Subcontractor"), to install electrical systems in the project. The First-tier Subcontractor subcontracted with the plaintiff-appellee, Electric Supply Co. of Durham, Inc. (hereinafter the "Second-tier Subcontractor"), to supply electrical materials for incorporation into the construction project. *See generally* N.C.G.S. § 44A-17 (1989) (statutory definitions).

Beginning 9 December 1986 and continuing through 5 May 1987, the Second-tier Subcontractor supplied materials to the First-tier Subcontractor valued at $20,718.11, for which no payment was ever received. Meanwhile, due to the First-tier Subcontractor's failure to perform its obligations with the Contractor, disputes arose between the Contractor and the First-tier Subcontractor. On 18 May 1987, having not received payment for the materials supplied, the Second-tier Subcontractor filed and served on all defendants a notice of claim of lien and a claim of lien in the amount of $20,718.11. *See* N.C.G.S. §§ 44A-12, -19 (1989). At that same time, the First-tier Subcontractor abandoned the job. The First-tier Subcontractor was owed no money by the Contractor for work related to the Comfort Inn project. In fact, the Contractor has a claim against the First-tier Subcontractor (who at the time of trial was under the jurisdiction of the United States Bankruptcy Court) for breach of contract.

Finally, on 2 October 1987, the plaintiff Second-tier Subcontractor commenced enforcement of its claim of lien by filing suit as required by statute within 180 days of the Contractor's[1] last furnishing of materials. *See* N.C.G.S. § 44A-13 (1989). Plaintiff filed this suit claiming any and all liens to which it is entitled under N.C.G.S. ch. 44A. On that same day, the Contractor posted a bond pursuant to N.C.G.S. § 44A-16(6), thereby canceling certain of plaintiff's liens.

The Contractor completed the project in late 1987 and sometime thereafter received a final payment from the Owner.

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1. Since plaintiff's only viable claim is by way of subrogation to the Contractor's rights, it is the Contractor's actions which are the pertinent inquiry here. *See* N.C.G.S. § 44A-23 (1989). The record and briefs of the parties address only the dates materials were last furnished by the Second-tier Subcontractor. It can be assumed in this case that as long as the Second-tier Subcontractor was furnishing materials for the job, they were being furnished on behalf of the Contractor.

The trial court held that the plaintiff Second-tier Subcontractor's lien was limited to amounts owed by the Contractor to the First-tier Subcontractor at the time the plaintiff filed its lien, effectively denying plaintiff any relief. The Court of Appeals reversed, holding that N.C.G.S. § 44A-23 provides first-, second-, and third-tier subcontractors a right of subrogation to the lien of the contractor who dealt with the owner, regardless of any lien on funds. We agree.

The matter under review is the proper statutory interpretation of portions of article 2 of chapter 44A of the North Carolina General Statutes entitled "Statutory Liens on Real Property." The relevant statutory provisions at issue are N.C.G.S. §§ 44A-18 and -23.

N.C.G.S. § 44A-18 provides:

§ 44A-18. Grant of lien; subrogation; perfection.

. . . .

(2) A second tier subcontractor who furnished labor or materials at the site of the improvement shall be *entitled to a lien upon funds* which are owed to the first tier subcontractor with whom the second tier subcontractor dealt and which arise out of the improvement on which the second tier subcontractor worked or furnished materials. A second tier subcontractor, to the extent of his lien provided in this subdivision, shall also be entitled to be subrogated to the lien of the first tier subcontractor with whom he dealt provided for in subdivision (1) and shall be entitled to perfect it by notice to the extent of his claim.

N.C.G.S. § 44A-18(2) (1989) (emphasis added). Since nothing was owed to the First-tier Subcontractor at or after the time that the Second-tier Subcontractor filed its lien claim, it is undisputed that, on the facts here, the Second-tier Subcontractor has no lien rights upon funds under N.C.G.S. § 44A-18.

N.C.G.S. § 44A-23 provides:

§ 44A-23. Contractor's lien; subrogation rights of subcontractor.

A first, second or third tier subcontractor, who gives notice as provided in this Article, may, *to the extent of his claim, enforce the lien of the contractor* created by Part 1 of Article

> 2 of this Chapter. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12. Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

N.C.G.S. § 44A-23 (1989) (emphasis added).

I.

[1] The first issue that we must decide is whether the General Assembly, in adopting N.C.G.S. §§ 44A-17 to -23 in 1971, intended to carry forward in N.C.G.S. § 44A-23 the previously well-settled right of a subcontractor to a lien by subrogation to the lien rights of the contractor in the real property.[2] Again, it is undisputed that N.C.G.S. § 44A-18 granted a new lien right to the subcontractor on certain *funds* and provided the subcontractor a right of subrogation to the rights of the contractor in specific circumstances. *See* N.C.G.S. § 44A-18(2), (3), (6) (1989). After examining the entire statutory scheme, we hold that the legislative intent was to continue the subcontractor's separate right in N.C.G.S. § 44A-23 to a lien by subrogation to the contractor's lien on the real property created by N.C.G.S. § 44A-8 (the contractor's lien).

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2. From 1880 until 1971, essentially the following statute was in effect:

> **§ 44-6. Lien given subcontractors, etc., on real estate.**—*All subcontractors and laborers* who are employed to furnish or who do furnish labor or material for the building, repairing or altering any house or other improvement on real estate, *have a lien on said house and real estate* for the amount of such labor done or material furnished, which lien shall be preferred to the mechanic's lien now provided by law, when notice thereof shall be given as hereinafter provided which may be enforced as other liens in this chapter and in chapter 44A, except where it is otherwise provided; *but the sum total of all the liens due subcontractors and materialmen shall not exceed the amount due the original contractor at the time of notice given.*

N.C.G.S. § 44-6 (Supp. 1969), *repealed by* 1971 N.C. Sess. Laws ch. 880, § 2 (effective 1 October 1971) (emphasis added).

This Court consistently construed this mandate to allow the subcontractor a right of subrogation to the lien of the contractor who dealt with the owner, regardless of whether funds were owed to the party with whom the subcontractor dealt. *Powder Co. v. Denton*, 176 N.C. 426, 432-33, 97 S.E. 372, 374-75 (1919); *Brick Co. v. Pulley*, 168 N.C. 371, 375, 84 S.E. 513, 514 (1915); *Powell v. Lumber Co.*, 168 N.C. 632, 638, 84 S.E. 1032, 1035 (1915); *see also Supply Co. v. Motor Lodge*, 277 N.C. 312, 316, 177 S.E.2d 392, 394 (1970).

In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. *Hunt v. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981). Legislative purpose is first ascertained from the plain words of the statute. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Moreover, we are guided by the structure of the statute and certain canons of statutory construction. *See, e.g., Media, Inc. v. McDowell County*, 304 N.C. 427, 430-31, 284 S.E.2d 457, 461 (1981) ("statutes dealing with the same subject matter must be construed *in pari materia*"); *Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) ("It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage"). Courts also ascertain legislative intent from the policy objectives behind a statute's passage "and the consequences which would follow from a construction one way or another." *Campbell v. Church*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979). "A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975). An analysis utilizing the plain language of the statute and the canons of construction must be done in a manner which harmonizes with the underlying reason and purpose of the statute. *See In re Hardy*, 294 N.C. 90, 96, 240 S.E.2d 367, 372 (1978).

When, after analyzing the text, structure, and policy of the statute, we are still in doubt as to legislative intent, we also examine the history of the legislation in question. *See Cab Co. v. Charlotte*, 234 N.C. 572, 576, 68 S.E.2d 433, 436 (1951). Changes made by the legislature to statutory structure and language are indicative of a change in legislative intent and therefore provide some weight in our analysis. *Id.* *Amicus* for Carolinas AGC, Inc., urges this Court to consider an attachment to the minutes of a House Committee on Judiciary III meeting held on 11 June *1985* as evidence of the legislature's intent in *1971*. House Bill 1144, to which the minutes refer, is entitled "An Act to Clarify Filing Requirements for a Claim of Statutory Lien by a Subcontractor Dealing with One Other than the Owner of the Property." 1985 N.C. Sess. Laws ch. 702. A memorandum, written by the attorney who drafted the 1985 amendments to the statute contained in the bill, was attached to the minutes and may have been discussed

in the meeting of the House Committee. The memorandum purports to describe the complete statutory scheme of N.C.G.S. §§ 44A-17 to -23 and suggests a legislative intent consistent with *amicus'* argument.

[2] In determining legislative intent, this Court does not look to the record of the internal deliberations of committees of the legislature considering proposed legislation. Indeed, we have declared affidavits of members of the legislature who adopted statutes in question not to be competent evidence of the purpose and intended construction of the legislation.

> While the cardinal principle of statutory construction is that the words of the statute must be given the meaning which will carry out the intent of the Legislature, that intent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied. Testimony, even by members of the Legislature which adopted the statute, as to its purpose and the construction intended to be given by the Legislature to its terms, is not competent evidence upon which the court can make its determination as to the meaning of the statutory provision.

Milk Commission v. Food Stores, 270 N.C. 323, 332-33, 154 S.E.2d 548, 555 (1967).

Even the commentaries printed with the North Carolina General Statutes, which were not enacted into law by the General Assembly, are not treated as binding authority by this Court. *See State v. Hosey*, 318 N.C. 330, 337-38 n.2, 348 S.E.2d 805, 809-10 n.2 (1986); *State v. Kim*, 318 N.C. 614, 620 n.3, 350 S.E.2d 347, 351 n.3 (1986). Even if we were willing to consider the attachment to the legislative committee proceedings in question, and we are not, we would be unpersuaded that the memorandum, submitted nearly fourteen years after the passage of the statute under review, would be sufficiently persuasive to overturn what, prior to 1971, was a well-settled right of the subcontractor of subrogation to the contractor's lien.

Plaintiff argues that a plain reading of the language of N.C.G.S. § 44A-23 creates a separate lien for tiered subcontractors on the real property by way of subrogation. One must focus on the language of the statute which indicates that the tiered subcontractor "may, *to the extent of his claim, enforce the lien of the contractor* created

by Part 1 of Article 2 of this Chapter." N.C.G.S. § 44A-23 (1989) (emphasis added).

Defendants and *amicus* Carolinas AGC, Inc., contend that the language "to the extent of his claim" does not create an alternate lien on the real property in favor of the tiered subcontractor, but rather, "the extent of [the subcontractor's] claim" means the extent of the subcontractor's lien *against funds*, as provided for by N.C.G.S. § 44A-18. Defendants essentially argue that had the legislature intended a separate lien by subrogation in N.C.G.S. § 44A-23, it would have said so explicitly.

The plain reading of the statute is not dispositive, and we therefore turn to an analysis of the structure of the statute to ascertain legislative intent. Plaintiff notes that N.C.G.S. §§ 44A-18 and 44A-23 were both grouped by the legislature under article 2, part 2 of chapter 44A. Part 2 is entitled "Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner." Plaintiff argues that such a statutory structure evinces a legislative intent that N.C.G.S. §§ 44A-18 and 44A-23 create *separate* liens available to certain tiered subcontractors.

In construing the statutory provisions *in pari materia*, defendants and *amicus* make a number of compelling arguments. Essentially, defendants' position is that the legislature intended the "to the extent of his claim" language of N.C.G.S. § 44A-23 to be dependent upon the existence of a lien on *funds* created in N.C.G.S. § 44A-18. First, they point out that a subcontractor's right of subrogation is expressly articulated only in N.C.G.S. § 44A-18 and note that N.C.G.S. § 44A-18(6) refers to N.C.G.S. § 44A-23 when it provides: "The subrogation rights of a first, second, or third tier subcontractor to the lien of the contractor created by Part 1 of Article 2 of this Chapter are perfected as provided in G.S. 44A-23." Defendants' and *amicus*' argument is that N.C.G.S. § 44A-23 only established a *means to perfect the lien* created in N.C.G.S. § 44A-18. Defendants infer significance from the legislature's use of the language "entitle[ment] to a lien" in section 44A-18(2) and contrast it with the language "to the extent of his claim" in section 44A-23. We note further that the legislature used the phrase "extent of his claim" in N.C.G.S. § 44A-18(2) and (3) to describe the subcontractor's lien by subrogation to the rights of parties ahead of it. In that context, consistent with defendants' interpretation of N.C.G.S. § 44A-23, the extent of the claim was restricted to the subcontrac-

tor's lien on funds. However persuasive, the arguments are not decisive here, and we now turn to an analysis of policy objectives.

In considering the policy objectives that the legislators sought to achieve in enacting the statute, we note that a constitutional mandate is directly on point. The North Carolina Constitution states:

> The General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor.

N.C. Const. art. X, § 3. An adequate lien is intended to foster the construction industry, which operates largely on credit. Suppliers, including architects and surveyors, among many others, provide labor and materials to contractors and subcontractors who perform their portion of the work on a project. Since the contractor or subcontractor is generally not paid until the job, or a portion of it, is completed (and is probably unable to pay until it, in turn, is paid), their suppliers extend labor and materials to them on credit. An adequate lien is necessary to encourage responsible extensions of credit, which are necessary to the health of the construction industry. *See, e.g., Carolina Builders Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 229, 324 S.E.2d 626, 629, *cert. denied*, 313 N.C. 597, 330 S.E.2d 606 (1985); *Miller v. Lemon Tree Inn*, 39 N.C. App. 133, 140, 249 S.E.2d 836, 841 (1978).

Plaintiff argues that defendants' construction of the statute would abrogate the purpose of the constitutional mandate requiring an "adequate lien." We note that the constitutional mandate specifically refers to a lien on the "*subject-matter* of [the subcontractor's] labor" (emphasis added) and contrast it with defendants' interpretation of legislative intent, which creates a lien system based largely on *funds*. Moreover, plaintiff contends that the General Assembly enacted N.C.G.S. § 44A-18 to provide *additional* protection to subcontractors by establishing a lien on funds for a subcontractor, *even if the contractor had specifically agreed with the owner not to place any lien on the owner's property*, thereby circumventing the lien created by N.C.G.S. § 44A-23. *See, e.g., Con Co. v. Wilson Acres Apts.*, 56 N.C. App. 661, 663, 289 S.E.2d 633, 635, *cert. denied*, 306 N.C. 382, 294 S.E.2d 206 (1982); *Mace v. Construction Corp.*, 48 N.C. App. 297, 303-04, 269 S.E.2d 191, 194-95 (1980).

Defendants and *amicus* point out that while the owner's property is subject to sale in a lien enforcement under N.C.G.S.

§ 44A-23, construction contracts, as a standard practice, call for the contractor who deals directly with the owner to indemnify the owner. This means that, as a practical matter, such contractor essentially bears the economic burden that arises when the first-tier subcontractor abandons the project while owing monies to lower-tiered subcontractors. They further argue that if such contractors required their first-tier subcontractors to post payment bonds, the costs of construction would rise and small subcontractors would be driven from the industry.

Plaintiff and *amicus* American Subcontractors Association, Inc., respond that the burden of a defaulting first-tier subcontractor is better borne by the contractor who hired it. Moreover, by exercising greater supervisory responsibility over the first-tier subcontractor, the contractor who dealt directly with the owner can avert or at least minimize losses. If such contractor requires additional assurances, he can require payment bonds. *See* N.C.G.S. § 44A-26 (1989). Together, plaintiff and *amicus* note that better supervision by such contractors and the relatively infrequent occurrence of a first-tier subcontractor becoming insolvent during construction will minimize the need for payment bonds, which concededly increase the costs of construction. In addition, we note that the use of lien waivers, used other than in anticipation of and in consideration for the awarding of a contract, may also minimize liability by contractors who deal with the owner. *See* N.C.G.S. § 44A-12(f) (1989).

We hold that, in light of the plain language of the statutory provisions, their structure, and more importantly, the policy sought to be achieved by the legislature, N.C.G.S. § 44A-23 provides first-, second-, and third-tier subcontractors a separate right of subrogation to the lien of the contractor who deals with the owner, distinct from the rights contained in N.C.G.S. § 44A-18.

II.

[3] Having established that the subcontractor has a separate lien right by way of subrogation to the contractor's lien on the real estate, we must next examine the extent of the lien that plaintiff asserts. The contractor's lien is described in N.C.G.S. § 44A-8, found in part 1 of article 2, entitled "Liens of Mechanics, Laborers and Materialmen *Dealing with Owner*." (Emphasis added.) It provides:

§ 44A-8. Mechanics', laborers' and materialmen's lien; persons entitled to lien.

Any person who performs or furnishes labor or professional design or surveying services or furnishes materials pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have *a lien on such real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished pursuant to such contract.*

N.C.G.S. § 44A-8 (1989) (emphasis added).

In construing the subcontractor's subrogated interest to the contractor's lien, we first hold that, in light of the policy behind the passage of N.C.G.S. § 44A-23, the subcontractor may assert whatever lien that the contractor who dealt with the owner has against the owner's real property relating to the project. *See Powell v. Lumber Co.*, 168 N.C. 632, 638, 84 S.E. 1032, 1035 (1915). Therefore, even if the owner has specifically paid the contractor for the labor or materials supplied by the specific unpaid subcontractor who is claiming the lien, that subcontractor retains a right of subrogation, to the extent of his claim, to whatever lien rights the contractor otherwise has in the project. However, N.C.G.S. § 44A-23 also provides that:

> Upon the filing of the notice and claim of lien and the commencement of the action [by the subcontractor], no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

N.C.G.S. § 44A-23 (1989). As a result, until the subcontractor commences the action, the clear statutory language indicates that the contractor may prejudice the subcontractor's rights through waiver of the lien or acceptance of payment. *See Mace v. Construction Corp.*, 48 N.C. App. 297, 303, 269 S.E.2d 191, 195; *see generally* Urban & Miles, *Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority*, 12 Wake Forest L. Rev. 283, 376 (1976).

In conclusion, we note that plaintiff has not established a lien on *funds* paid by the Owner to the Contractor. A lien on the *real property* by way of subrogation may or may not exist, depending upon the timing of the Owner's final payment to the Contractor

relative to the commencement of this action. The record is unclear as to the timing of this final payment. We therefore affirm the decision of the Court of Appeals and remand to that court for further remand to the Superior Court, Durham County, for a determination of this issue and a full determination of this case consistent with this opinion.

Affirmed.

Justice MARTIN dissenting.

I respectfully dissent from the majority opinion. The question to be decided is whether a second tier subcontractor is entitled to perfect a lien against the owner of real property under N.C.G.S. § 44A-23 when both the owner and the general contractor, prior to receiving the second tier subcontractor's notice of claim of lien, have fully discharged all of their obligations to the first tier subcontractor, including payment of debts due for labor and the materials furnished by the second tier subcontractor. The majority has allowed such a lien; in so doing, the majority has erred.

Mechanics' liens on real property in this State are governed by Article 2 of Chapter 44A of the General Statutes. There are two categories. The first concerns those liens arising from claims based upon direct dealing between the owner of the property and the party claiming the lien. The second concerns the claims of lien by parties who did not deal directly with the owner of the real property. The instant appeal is concerned with the rights of a second tier subcontractor who did not deal directly with the owner, but contracted solely with a first tier subcontractor.

Fundamental to a subcontractor's right to a lien is whether he has given timely written notice of a claim of lien directly to the owner of the real property, to the general contractor, and to any subcontractor superior to him in the chain of construction. N.C.G.S. §§ 44A-18, -19, -20, and -23 (1989). This actual written notice is the cornerstone of a subcontractor's lien rights. Until the owner receives notice of a claim of lien from a subcontractor, the owner is free to disburse funds to the general contractor. Likewise, until the general contractor receives notice of a claim of lien from a subcontractor of a given tier, he is free to disburse funds to higher tiered subcontractors. If a notice of claim of lien is provided by a subcontractor, and the owner, contractor, or higher

tiered subcontractor ignores the notice of claim of lien, that obligor must pay twice for the same material or labor, once to the party to whom he paid funds after receiving the notice and again to the unpaid subcontractor lien claimant.

Thus, it is clear that the purpose of the adoption of Chapter 44A of the General Statutes was to establish a tiered lien system for subcontractors, thereby limiting a subcontractor's lien rights to those of the parties above him. If, at the time the owner receives notice of the second tier subcontractor's lien claim the owner no longer owes any funds to the general contractor, then no funds are in the possession of the owner to which such subcontractor's lien can attach. The subcontractor's lien rights are limited to the rights of the parties above him. *See Mace v. Construction Corp.*, 48 N.C. App. 297, 269 S.E.2d 191 (1980); *Builders Supply v. Bedros*, 32 N.C. App. 209, 231 S.E.2d 199 (1977).

However, if a second tier subcontractor has a lien upon funds owed by the owner to the general contractor, the second tier subcontractor is also entitled to a lien upon the owner's real property to the extent of his lien. If the owner pays the general contractor after the owner receives the second tier subcontractor's notice of claim against the funds, the owner may also be required to pay the subcontractor. N.C.G.S. § 44A-20 (1989).

In some circumstances, a first, second, or third tier subcontractor may also be entitled to a lien against the real property of the owner by subrogation if the owner refuses to pay for the labor and materials furnished by the subcontractor. N.C.G.S. § 44A-23 instructs how such subcontractor may by subrogation perfect the lien rights of the general contractor against the owner's real property should an owner become insolvent or refuse to pay the general contractor. In order to perfect such a lien against the property of the owner the subcontractor must have established a lien upon the funds owed by the owner to the general contractor. Then, he must (a) perfect his subrogated lien against the owner's real property by serving upon all persons above him in the construction chain his notice of claim of lien against the funds, (b) file with the appropriate clerk of the superior court a claim of lien against the real property along with a notice of his claim of lien against the funds, and (c) commence a lien enforcement lawsuit. *See* N.C.G.S. § 44A-23 (1989). Like all liens created by Part 2 of Article 2 of Chapter 44A, the subcontractor's subrogation to

the general contractor's lien rights against the land of the owner is dependent upon the existence of an underlying claim of lien upon the funds owed to the party above him and with whom he contracted. This is apparent from the plain meaning of N.C.G.S. § 44A-23 wherein it is stated that "[a] first, second or third tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor . . . ." N.C.G.S. § 44A-23 (1989). The manner of such enforcement is detailed in the section. The key to establishing the claim is the phrase "to the extent of his claim." *Id.* In the instant case, the second tier subcontractor was unable to establish any claim upon the funds of the first tier subcontractor because there were no funds available for that purpose.

Even if it is assumed that N.C.G.S. § 44A-23 on its face is not clear, any reasonable interpretation of the statute discloses that it is necessary for the second tier subcontractor to establish its claim on funds before he can establish a lien on the owner's real property by subrogation.

It is an accepted method of determining the intent of the legislature to examine any legislative history available concerning the legislation in question. *See, e.g., Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990) (Meyer, J.); *Hunt v. Reinsurance Facility*, 302 N.C. 274, 295, 275 S.E.2d 399, 409-10 (1981) ("We find especially pertinent, in considering the intent of our Legislature, this statement [of the North Carolina Legislative Research Commission *Report to the 1979 General Assembly of North Carolina, Insurance Laws*, at 12-13] to the 1979 General Assembly commenting on the 1977 insurance law amendments: . . ."); *Greene v. Town of Valdese*, 306 N.C. 79, 83-84, 291 S.E.2d 630, 633 (1982) (relying upon *Report of the Municipal Government Study Commission* to determine legislative intent behind statutory scheme recommended by the *Report* and subsequently adopted by the Legislature). *Cf. generally* Stafford, "North Carolina Legislative History," 38 *N.C. State Bar Quarterly* 22 (Winter 1991).

The legislative history of N.C.G.S. § 44A-23 discloses that in 1985 the General Assembly ratified an amendment to the lien law contained in House Bill 1144. *An Act to Clarify Filing Requirements for a Claim of Statutory Lien By a Subcontractor Dealing With One Other than the Owner of the Property*, 1985 N.C. Sess. Laws ch. 702. This session law was later codified, in pertinent part, in

N.C.G.S. § 44A-23. In a hearing on this bill before the Judiciary III Committee, Representative Boyd explained that the bill clarified the method of filing a notice of claim of lien for a subcontractor, and then recognized Martha Harris, a staff attorney for the North Carolina Legislative Services Office, who had drafted the bill, and who was present to explain the bill further. *Minutes, North Carolina House Committee on Judiciary III dated June 11, 1985* ("Rep. Boyd recognized Martha Harris who had drafted [House Bill 1144] to explain it further. A copy of this explanation is attached."). Ms. Harris spoke to the committee and filed with it a written explanation of the bill. The pertinent parts of this memo read:

> RE: House Bill 1144
>
> > Note: This discussion focuses on three parties: the landowner, the contractor with whom he dealt, and the subcontractor who dealt with the contractor. The rules that apply to the subcontractor will apply, with some procedural complications, to second and third tier subcontractors as well.
>
> House Bill 1144 clarifies the effect of a subcontractor's filing a notice of a claim of lien against a property owner with whom he has not dealt directly. Under current law, a subcontractor can perfect a lien against the owner's real property at any time, even before the work has been done or after the owner has paid the debt in full. The bill provides that, like a contractor who has dealt directly with the property owner, a subcontractor may not perfect a lien against the property unless the owner owes money for the work performed.
>
> . . .
>
> Part 2 of Article 2 of Chapter 44A creates several different types of liens in favor of subcontractors who have not dealt with the owner of the property. First, a subcontractor has a lien on funds owed by the contractor with whom he dealt for the improvement on which the subcontractor worked. This lien is perfected by giving notice of the lien to the landowner who owes or will owe the funds to the contractor with whom the subcontractor dealt. This notice may be filed at any time whether or not payment of the funds is yet due.
>
> The subcontractor may enforce this lien on funds by enforcing the lien of the contractor who dealt directly with the owner against the property. Thus, the lien of the subcontractor against

> funds owed to the contractor creates a second lien, against the owner's property. Unlike the lien in favor of the contractor, however, this lien can be perfected at any time whether or not the work has been performed and whether or not the owner owes anything for the work. By filing the notice of lien, the subcontractor can create a cloud on the owner's title at any time. In practice, many subcontractors file this notice whenever they begin work on a new project.
>
> House Bill 1144 would provide that the notice of lien filed by the subcontractor perfects the subcontractor's lien against any funds owed to the contractor but does not perfect a lien against the landowner's property. A subcontractor could only perfect the lien against the owner's property in the same way as a contractor: by filing a claim of lien after the owner's obligation to the contractor become mature. The lien would then relate back to the time the subcontractor first furnished labor or materials at the site.

Memorandum dated May 28, 1985 To Representative Boyd from Martha Harris, Staff Attorney Re: House Bill 1144.

It is to be noted that the above legislative history is related to the 1985 amendments to N.C.G.S. §§ 44A-19, -20, -18(b), and -23. The amendment to section 23 reads:

> Sec. 4. G.S. 44A-23 is amended by adding after the second sentence of that section a new sentence to read: "The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12."

1985 N.C. Sess. Laws ch. 702, § 4.

So it is clear that the above legislative history explained the legislative intent as to the meaning of section 23, and other parts of the lien statute, as amended by the 1985 legislature, not the meaning of section 23 as of 1971 as argued by the majority. The statute under review is not the 1971 version of N.C.G.S. § 44A-23, but the 1985 amended statute. The legislative history above stated is most relevant in determining the intent of the legislature. *Milk Commission v. Food Stores*, 270 N.C. 323, 154 S.E.2d 548 (1967).

This legislative history clearly demonstrates that N.C.G.S. § 44A-23 requires that a subcontractor perfect his claim of lien against the funds due the person with whom he contracted before

he can establish a lien by subrogation against the real property of the owner. If the majority's interpretation of N.C.G.S. § 44A-23 were correct, there would be no logical need for the tiered lien system contained in Chapter 44A.

The correct interpretation of N.C.G.S. § 44A-23 is also supported by case law reported since the adoption of the present tiered lien scheme in 1971. In *Builders Supply v. Bedros*, 32 N.C. App. 209, 231 S.E.2d 199, the Court of Appeals held that if the general contractor had been paid or had released its claim of lien before its subcontractor asserted a lien on funds owed to the general contractor there was nothing for the subcontractor to place a lien on, and no lien could be established against the land of the owner by the subcontractor. *Mace v. Construction Corp.*, 48 N.C. App. 297, 269 S.E.2d 191, holds that where a general contractor had expressly waived its right to claim a lien, the subcontractor had no right to a lien on the real property of the owner pursuant to N.C.G.S. § 44A-23. *But cf.* N.C.G.S. § 44A-12(f) (1989).

Public policy dictates that the party who has the ability to protect himself from loss should do so, and if he fails to so act in his own behalf it is not appropriate to require an innocent party to pay twice in order to make the negligent party whole. So here, where the second tier subcontractor fails to properly file his claim of lien against funds owed to the first tier subcontractor or the general contractor it would be inequitable to require the owner or the general contractor to again pay the amount claimed by the plaintiff, that sum having already been paid to the defaulting first tier subcontractor. Plaintiff here delayed some five months, from December until May, before giving notice of its unpaid claim. The law as well as equity protects the general contractor and owner in this instance and does not require either to again pay in order to benefit the negligent second tier subcontractor.

For these reasons, the majority opinion erred in allowing the second tier subcontractor to perfect a lien against the owner when the second tier subcontractor had not complied with N.C.G.S. § 44A-18 and had failed to file notice of its claim against funds in a timely fashion to protect its own interest. In short, the majority has simply amended the statute to allow the plaintiff to recover in this instance. This creates both confusion and error in the law, works an inequity upon the landowner and general contractor in

this case, and establishes a rule of law that will be injurious to contractors and the construction industry generally in North Carolina.

Justice WEBB joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. DANIEL McKINNON

No. 327A90

(Filed 2 May 1991)

1. **Criminal Law § 34.4 (NCI3d)— evidence of another offense— relevancy for rebuttal—admissible for "other purposes"**

Testimony by defendant's girlfriend giving details of defendant's assault on her on the morning of 18 August was relevant in a prosecution of defendant for a rape and murder on the night of 18 August to rebut or contradict the inference that defendant was referring to the altercation with his girlfriend rather than to the rape and murder of the victim when he told a witness the night of 18 August that he had "beat this girl." Therefore, the testimony did not show only that defendant had a violent propensity toward women but was properly admitted for "other purposes" under N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 298.

2. **Jury § 7.9 (NCI3d)— potential juror—bias in favor of law officers—challenge for cause**

The trial court did not abuse its discretion in denying defendant's challenge for cause of a potential juror on the basis that he might assign more credibility to law enforcement officers than to other witnesses where the juror's responses during voir dire indicated that he would not automatically give enhanced credence to testimony by any particular class of witnesses but that certain factors in a witness's background, such as training or experience, would affect the credibility of that witness.

Am Jur 2d, Jury § 285.

3. Jury § 7.9 (NCI3d)— potential juror—challenge for cause—requirement that defendant present evidence

The trial court did not abuse its discretion in refusing to excuse for cause a potential juror who agreed with a statement during voir dire that she would require defendant to present evidence in his defense where, immediately following that response, the juror asked that the question be repeated and she ultimately agreed three times that if the State did not meet its burden of proof she could find defendant not guilty even though he presented no witnesses in his behalf.

Am Jur 2d, Jury § 204.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Ellis, J.*, at the 18 September 1989 Criminal Session of Superior Court, ROBESON County, upon a jury verdict finding defendant guilty of first-degree murder. Calendared for argument in the Supreme Court 9 April 1991; decided on the briefs without oral argument pursuant to N.C.R. App. P. 30(d).

Lacy H. Thornburg, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Justice.

Defendant was tried capitally and convicted of first-degree felony murder on the theory that the killing was committed during the course of second-degree rape and second-degree sex offense. Following defendant's sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended life imprisonment and the trial court entered judgment accordingly. Defendant appeals his conviction of first-degree murder as a matter of right. N.C.G.S. § 7A-27(a) (1989). We hold that defendant's trial was free of prejudicial error.

The State's evidence tended to show that on the evening of 18 August 1987, eighteen-year-old Tammie Michelle Martin left her grandmother's house to go to the store for a snack. Martin's grandmother, Lillie McKenneth, testified that Martin called around 10:00 p.m. to say she was on her way home, but she never arrived. Reginald McDougald testified that between 9:30 and 10:00 p.m.

that evening he was riding his bicycle on Martin Luther King (MLK) Drive and he saw Martin walking south towards Lumbee Homes. McDougald testified that Martin told him she was going to Shannon McDuffie's house in Lumbee Homes. McDuffie testified that Martin arrived at her house around 9:45 p.m., visited briefly, called her grandmother to say she was on her way home, unsuccessfully tried to call her boyfriend, and then left at approximately 10:30 p.m.

At approximately 11:12 or 11:13 p.m. on 18 August, Vincent McCall was driving to pick up his brother, Phillip White, from work at the Pizza Hut. On the way McCall saw defendant at the corner of Oregon Street and MLK Drive. Defendant asked McCall for a ride and McCall agreed. McCall testified that defendant was sweating and seemed to be in a "hysterical" state. According to McCall, defendant got into the car and said: "Vince, I beat this girl. I beat her bad. I beat her bad. I don't know what got into me. I beat her bad, Vince. I'm going to have an assault charge on me tomorrow." When they arrived at the Pizza Hut, Phillip White brought some water out for defendant to drink. On the way back home, McCall began to admonish his brother that alcohol and drugs would lead to trouble. In a joking manner defendant agreed, telling White that drinking could cause a person not to know what he was doing. Then defendant stated: "I did something tonight. I shocked myself."

On 19 August 1987, Lillie McKenneth and Tommy Moody, Tammie Martin's boyfriend, reported her disappearance to the police. At approximately 2:00 p.m. that day Tommy McNeil, one of McKenneth's neighbors, discovered Tammie's body among overgrown weeds and high grass on a vacant lot about one block from McKenneth's home. The victim was clothed only in tennis shoes and socks. The police found a "lock blade" knife with a four-inch blade and assorted articles of clothing scattered in the grass on the lot. An autopsy of the victim showed that the cause of death was acute subdural hemorrhage on the surface of the brain caused by trauma to the head. The victim suffered, in addition, five fractured ribs on the left side, fractures of both sides of the lower jaw, bruising of the scalp, multiple superficial scratches and bruises on the face, neck, chest, and around the eyes. There was evidence of vaginal intercourse and indications of forcible anal intercourse.

On 21 August 1987, police questioned defendant regarding both an alleged assault on his girlfriend, Patricia Lewis, and the death of Tammie Martin. During that interview, defendant indicated that he had spent the morning of 18 August at the public library and then had lunch at the soup kitchen. From there, defendant went to Weaver's Court Apartments and eventually started arguing with his girlfriend. According to defendant, the argument culminated with Lewis slapping defendant and striking him with a wine bottle. Defendant said he struck Lewis during the argument in self-defense. Afterwards, defendant played basketball at the recreation center until about 4:30 p.m., visited with a cousin at Lumbee Homes until around 2:00 a.m., and then walked home.

Also during the interview, defendant told SBI agent James Bowman that he knew the victim and that they had had sexual relations approximately three times during the summer. Defendant said the victim had a boyfriend and she did not want him to know that she and defendant had been seeing each other.

During a subsequent interview on 22 August 1987, defendant said he had been drinking beer and wine on and off on the day of the victim's death. At about 9:30 p.m., defendant saw the victim near MLK Drive talking with some friends. Defendant said "[h]ello" and the victim was friendly, saying she wanted to see him later. Defendant said that about ten or fifteen minutes later he and the victim were walking together discussing the problems they had with her boyfriend and his girlfriend. They then walked out into the garden on the vacant lot owned by Tommy McNeil and began playing and wrestling. According to defendant, they undressed and had sex. Subsequently, they resumed their conversation but began to argue. The victim slapped defendant in the face, he grabbed her, and they wrestled for five or six minutes. Defendant said he did not hit the victim. Eventually they stopped wrestling; the victim said she had to go home and began to get dressed. Defendant dressed and left, walking back towards MLK Drive where he met Vince McCall a few minutes later.

For the defendant, Aldo McRae testified that he saw the victim between 10:30 and 11:00 p.m. on the evening of 18 August. McRae testified that the victim said she was on her way home. McRae also testified that after seeing the victim, he encountered Dwight Bowden in the vicinity of Fred's Supermarket. Bowden was "talking crazy," saying "you can kill somebody" and that he knew a place

no one could find. Later that night McRae was jogging in the vicinity of the vacant lot where McKenneth's neighbor found the victim's body. On three separate occasions that evening McRae saw a blue Oldsmobile circling the area. McRae had previously seen Barry Robinson driving that car. The next day McRae saw both Robinson and Bowden at the recreation center shooting basketball. Robinson had what appeared to be fresh scratches or scars on his face, and he moved to stand behind McRae each time police drove by the area.

Three other witnesses testified on defendant's behalf. Defendant did not testify.

[1] Defendant first assigns as error the introduction by the State of testimony from Patricia Lewis regarding the incident on 18 August 1987, in which defendant allegedly assaulted Lewis. The police first took defendant into custody on 21 August 1987 for questioning on the alleged assault on Lewis. Following this interrogation, they arrested defendant and charged him with this assault.

Prior to defendant's trial for the murder of Tammie Martin, defendant made a motion *in limine* to prohibit the State from introducing evidence of the assault charge or the circumstances surrounding it. The trial court denied defendant's pretrial motion without prejudice to defendant's right to raise the issue at trial. When Lewis was called to testify regarding the details of defendant's alleged assault on 18 August, the trial court overruled defendant's objection and denied his motion to strike the testimony. Defendant argues that evidence of the prior alleged assault was not relevant and that any probative value was outweighed by its prejudicial effect. N.C.G.S. § 8C-1, Rules 402, 403, 404(b) (1988).

The challenged testimony was essentially as follows: At about 11:00 or 11:30 a.m. on 18 August 1987, Lewis walked with defendant and Dorothy Page from her apartment to the store to buy some wine. On the way to the store, defendant told Lewis he did not want her to be afraid of him and he would not do anything to her. On the way back, defendant jumped at Lewis to see if she was scared of him. Defendant again told her he would not hurt her, but then he hit Lewis and she fell in the street. Defendant then picked up Lewis by the neck and began hitting her in the head with the wine bottle. Lewis eventually ran away and called an ambulance. When the ambulance arrived to assist Lewis, she saw defendant walking down the sidewalk and noticed he had changed

clothes. Later that day, Lewis saw defendant at the hospital. Defendant approached Lewis, but left when Lewis reported defendant's presence to hospital personnel.

Defendant challenges the relevancy of Lewis's testimony, arguing that it tends to prove only that defendant has a violent propensity towards women. If so, the evidence would violate North Carolina Rule of Evidence 404, which states:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1988).

The evidence at issue here, however, was "admissible for other purposes" in that Lewis's testimony served to clarify the ambiguity in defendant's statement to Vince McCall that he "beat this girl." On at least two occasions during defendant's trial the jury could have inferred that when defendant told McCall he "beat this girl," he was referring to the altercation between defendant and Patricia Lewis, not to the rape and murder of the victim here.

First, during defense counsel's cross-examination of McCall the following exchange took place:

> Q. Now, when Danny was talking about the girl, he was talking about his girlfriend, Patricia Lewis; is that correct?
>
> A. I have no idea who he was talking about, because he never stated a name.
>
> Q. Didn't he mention his girlfriend?
>
> A. No, he did not.

Although the questions by defense counsel did not constitute evidence, they did suggest to the jury that defendant's incriminating statement referred to the incident with Lewis, not to the killing of Tammie Martin. A defendant's cross-examination of a State's witness can open the door for the State to introduce evidence in rebuttal. *State v. Albert*, 312 N.C. 567, 578, 324 S.E.2d 233,

239-40 (1985); *State v. Pruitt*, 301 N.C. 683, 686-87, 273 S.E.2d 264, 267 (1981).

Second, on direct examination by the State, SBI agent Bowman testified from the notes of his interview with defendant as follows: "He [defendant] said that about ten or fifteen minutes after he left the garden he met up with Vince McCall and they rode around. He said that he told Vince about hitting his girlfriend, Patricia, earlier in the day . . . ." The State, having introduced a statement by defendant containing exculpatory material, is bound by that material unless it is contradicted or rebutted. *State v. Rook*, 304 N.C. 201, 227-28, 283 S.E.2d 732, 748 (1981) (quoting *State v. Carter*, 254 N.C. 475, 479, 119 S.E.2d 461, 464 (1961)), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982); *State v. Johnson*, 261 N.C. 727, 730, 136 S.E.2d 84, 86 (1964) (per curiam). The details of Lewis's testimony were relevant to rebut or contradict the inference that defendant was referring to Lewis when he said "I beat this girl." Lewis's testimony highlighted the differences between the two incidents, showing especially that defendant allegedly assaulted her in the morning, that defendant's demeanor was relatively calm thereafter, and that the assault was nonsexual in nature. In light of Lewis's testimony, the jury reasonably could infer that defendant, in a "hysterical state" shortly after an aggressive sexual encounter with Tammie Martin, was referring to Martin rather than Lewis when he confided to Vince McCall that he "beat this girl." Thus, the challenged testimony was relevant and properly was admitted "for other purposes" under Rule 404(b).

Defendant argues that even if Lewis's testimony was relevant, its "probative value [was] substantially outweighed by the danger of unfair prejudice . . . ." N.C.G.S. § 8C-1, Rule 403 (1988). Application of Rule 403 to exclude relevant evidence is within the discretion of the trial court. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). The transcript of Lewis's testimony reveals that the trial court carefully limited the proffered testimony to serve the purpose of rebuttal. When the State's questions exceeded the scope of rebuttal, the court repeatedly sustained defense counsel's objections. We conclude that the trial court did not abuse its discretion and that defendant is not entitled to relief on this assignment of error.

Defendant next assigns as error the trial court's refusal to dismiss potential jurors John Oliver and Carmen Hayes for cause.

The trial court denied defendant's pretrial motion to increase the number of peremptory challenges available to defendant. During jury selection defendant sought to challenge for cause potential juror Oliver on the basis that his responses to questioning indicated he might assign more credibility to law enforcement officers than to other witnesses. The trial court denied the challenge for cause and defendant exercised a peremptory challenge to remove Oliver. After exhausting his remaining peremptories, defendant sought to challenge for cause potential juror Hayes on the basis of conflicting responses regarding her ability to presume the innocence of defendant and to hold the State to its burden of proof that defendant was guilty beyond a reasonable doubt. The trial court denied the challenge for cause and denied defendant's subsequent motion for additional peremptories. Hayes ultimately sat on defendant's jury.

The trial court's rulings on challenges for cause are discretionary and will not ordinarily be disturbed on appeal. *See State v. Kennedy*, 320 N.C. 20, 26, 357 S.E.2d 359, 363 (1987); *State v. Taylor*, 304 N.C. 249, 267, 283 S.E.2d 761, 773 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983). Defendant exercised the peremptory challenges he was entitled to by statute. N.C.G.S. § 15A-1217(a)(1) (1988); *see also State v. Johnson*, 298 N.C. 355, 363, 259 S.E.2d 752, 758 (1979) (defendant has no right to greater than the statutory number of peremptories).

[2] Counsel for defendant sought to challenge for cause potential juror Oliver after the following exchange:

> [Q.] In this case you're going to have testimony from people who are involved in law enforcement and people who are not, such as every day people who work and don't have any experience in the courtroom. My question to you is: Do you think that you would give more weight or tend to believe the testimony of a police officer more so than you would the testimony of Mr. Daniel McKinnon or any other witness who is not involved in law enforcement?
>
> [A.] To be honest with you, that would be hard to answer right now. There is always the possibility you might would.
>
> [Q.] So it is not an automatic thing that you would just believe a person because he's in law enforcement? Is that what you're saying?

[A.] Not really.

[Q.] Well, would you think that you would tend to believe a police officer more so than any other type of witness?

[A.] Possibly, to be honest with you. I'm saying due to the fact that he's supposed to be trained.

[Q.] You're saying just because you think a police officer, by their profession or training in investigation and law enforcement—

[A.] I'm saying possibly in that relation. I'm trying to be honest with you.

Later, counsel for defendant returned to this subject:

[Q.] Earlier, Mr. Oliver, you indicated that you might tend to favor the testimony of law enforcement officers. Is that still your position?

[A.] Maybe we misunderstood each other. I say I might.

[Q.] You might?

[A.] But I — I believe a man can spot the truth if you look for it. That's what I'm saying. I don't think anything is an automatic.

[Q.] Yes, sir.

[A.] That's what I'm trying to say.

[Q.] You think because of their training they are more believable than other witnesses, because of their training and experience?

[A.] Not necessarily so. What I am saying is that perhaps so.

Oliver's responses during voir dire indicated that he would not automatically give enhanced credence to testimony by any particular class of witness. Rather, certain factors in the witness's background, such as training or experience, would affect the credibility of that witness. This case is therefore not controlled by *State v. Lee*, 292 N.C. 617, 234 S.E.2d 574 (1977). In *Lee* this Court ordered a new trial where the trial court declined to excuse for cause a potential juror who admitted there was a possibility she would give more credence to the testimony of law enforcement officials. The Court stated: "Under the particular circumstances

of this case, we do not believe that juror Norvell could qualify as a disinterested and impartial juror." *Id.* at 625, 234 S.E.2d at 579. The circumstances that gave the Court concern in *Lee* were the witness's close relationship with several local police officers who might be testifying in the case, and the fact that her husband was a member of the local police department. In this case, there was no such significant relationship between potential juror Oliver and the testifying officers. The Court in *Lee* also took special notice of the fact that the only time Norvell said she could be fair and impartial was in response to direct questioning by the trial court. *Id.* Nothing in Oliver's responses indicated that he was partial or biased. *Cf. State v. Kennedy*, 320 N.C. at 27-28, 357 S.E.2d at 364 (potential juror excused after admitting that experience in Korea could affect ability to be fair or impartial). The trial court did not abuse its discretion in refusing to excuse potential juror Oliver for cause.

[3] Next, defendant argues that the trial court should have allowed his challenge for cause of juror Hayes after she gave conflicting and ambiguous responses to questions about whether she would hold the State to its burden of proof. The transcript of Hayes' voir dire indicates some confusion on her part during questioning, including agreement with a statement that she would require defendant to present evidence in his defense. Immediately following that response, however, she asked that the question be repeated. Hayes ultimately agreed three times that if the State did not meet its burden of proof she could find defendant not guilty even though he presented no witnesses in his behalf. The final exchange between Hayes and defense counsel was as follows:

> [Q.] You wouldn't have that in the back of your mind the fact that he didn't testify or call any witnesses?
>
> [A.] No, sir.
>
> [Q.] That wouldn't be of any concern? If it would, just tell us.
>
> [A.] No, sir, not if the State couldn't prove it.
>
> [Q.] Okay. And that's irregardless [sic] of whether he testifies or puts on any evidence?
>
> [A.] Yes, sir.

The responses of juror Hayes indicated that she would be able to hold the State to its burden of proof without requiring defendant

to present evidence; therefore, the trial court did not abuse its discretion in refusing to excuse her for cause. Defendant is not entitled to relief on this assignment of error.

For the foregoing reasons, we conclude that defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. ARTIBA DETROY HARRISON

No. 542A90

(Filed 2 May 1991)

1. **Criminal Law § 89.5 (NCI3d)— murder—prior statement of witness—admissible**

The trial court did not err in a homicide prosecution by admitting the out-of-court statement of the witness Leslie Miller to police where the accounts of the shooting in the out-of-court statement and at trial were substantially the same, notwithstanding minor inconsistencies, so that the statement tended to strengthen and add credibility to the witness's trial testimony. The mere fact that a prior statement contains additional facts is not sufficient grounds to exclude the statement. The differences in the testimony were not prejudicial.

Am Jur 2d, Evidence §§ 1148 et seq.

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case—modern state cases. 30 ALR4th 414.

2. **Criminal Law § 89.4 (NCI3d)— murder—prior inconsistent statement—admission not prejudicial**

There was no prejudicial error in a homicide prosecution in the admission of the out-of-court statement of the witness Frazier to a policeman where defendant did not object at trial, so that plain error analysis applies; the statement differed from and went considerably beyond Frazier's in-court testimony; the in-court testimony of the witness Reid established the same facts as Frazier's out-of-court statement; and Reid's

testimony undermined defendant's self-defense theory as much or more than Frazier's statement.

Am Jur 2d, Evidence §§ 1148 et seq.

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case—modern state cases. 30 ALR4th 414.

3. Criminal Law § 830 (NCI4th)— murder—accomplice instruction—refused

The trial court did not err in a homicide prosecution by refusing to give a requested instruction on accomplice testimony where the evidence was insufficient to support the instruction and an instruction given adequately informed the jury that it could give heightened scrutiny to the testimony of Reid and Frazier, the alleged accomplices.

Am Jur 2d, Trial §§ 589, 592.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Downs, J.*, at the 14 May 1990 session of Superior Court, MECKLENBURG County. Calendared for argument in the Supreme Court 8 April 1991; decided on the briefs without oral argument pursuant to N.C.R. App. P. 30(d).

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

Malcolm Ray Hunter, Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Justice.

Defendant was indicted for the first-degree murder of Tony Lamont Jackson. He pled not guilty and was tried noncapitally. The jury returned a verdict of guilty of first-degree murder. The trial court sentenced defendant to life imprisonment, and defendant appealed. For the reasons stated herein, we find no error.

The State's evidence tended to show that defendant, who was called "Detroit," and Antonio "Tonio" Frazier were repairing a house and moving furniture on the afternoon of 17 October 1989. Defendant's brown knapsack containing his black waist bag was

near the front door or on the front porch of the house in which the men were working. The waist bag contained some personal items. While the men were working, the victim sat on the porch, and David "Twin" Reid, Frazier's friend, came out of the alley. Frazier and Reid were talking when defendant asked them to join him and the victim in looking for "some dude with some shades" who had taken drugs from defendant's bag. The four drove in a beige car to Pamlico Street, where the victim said the person with "shades" lived.

Defendant stopped the car, got out, pointed a silver-colored pistol at the victim, and told him to get out of the car. Reid and Frazier also got out and stood by the car. The victim and defendant walked into the bushes, and defendant continued to ask the victim, "Where [is] my stuff at?" The victim denied knowing what defendant was talking about, then denied taking defendant's "stuff." Defendant was holding the gun by his side at this time. Frazier testified that defendant said, "Tell [the victim] I'm not going to do nothing to him." The victim and defendant began to scuffle, and Frazier ran to grab the gun when it dropped to the ground. Frazier said he would not shoot the victim and suggested that the victim tell defendant who took the possessions in the bag. Reid testified that Frazier said, "I shoot him. I shoot him." Frazier then gave the gun back to defendant and returned to stand by the car.

Reid testified that defendant then pointed the gun at the victim a second time and continued asking where defendant's "stuff" was. When the victim turned to run, defendant fired a shot. Reid and Frazier ran, hearing three or four additional shots as they fled. Frazier testified that prior to the shooting the victim put his hands down by his pockets and took a step away from defendant.

The victim died from gunshot wounds to the head and chest. An autopsy produced no evidence that the wounds were inflicted at close range. The medical examiner described the victim's wounds as follows, while pointing to the locations on the prosecuting attorney's back: "The gunshot wound to the shoulder was at the top of the shoulder close to the left base of the neck right about here. And the gunshot wound to the head was on the right posterior scalp approximately here." The examiner later described the gunshot entry points as "on the right posterior scalp" and "over the left shoulder." The left shoulder entry wound "proceeded toward the center of the body toward the heart area and caused injury

to the left lung and the esophagus . . . and to the pulmonary vein on the right, which is a large vein adjacent to the heart draining blood into the heart."

Leslie Miller testified that the evening after the shooting defendant told her he had shot a person named Tony. Defendant informed Miller that Tony yelled "[d]on't shoot!" before defendant shot him. Defendant showed Miller a silver pistol but told her he had thrown away or buried the weapon with which he shot the victim.

Defendant's evidence tended to show that the victim asked defendant for money, and defendant refused to give it to him. Later, defendant noticed that his backpack was open and his black waist bag containing a gold cable chain and medallion and some money was missing. The victim said a person with "shades" had been in the area and had taken the bag. Defendant testified that he realized the victim was lying to him when the four men arrived at Pamlico Street. During the discussion, defendant told the victim: "I ain't going to shoot you, man. I don't know what you're worried about. I ain't going to shoot you." Defendant testified that when the victim turned away from him, defendant saw the victim reaching for something chrome colored. Thinking the victim was reaching for a pistol, defendant shot him. Defendant put the small pistol he saw on the ground by the victim in defendant's pocket. He then left. On his way home, defendant threw his own gun in a creek. Defendant denied discussing the incident with Miller.

[1] Defendant assigns as error the admission of Leslie Miller's statement to the police on 19 October 1989, and Frazier's statement to the police on 22 October 1989. He contends the statements, which were admitted for corroboration, should have been excluded because they did not corroborate Miller's and Frazier's in-court testimony and because they presented unduly prejudicial evidence.

A witness's prior consistent statements may be admitted to corroborate the witness's courtroom testimony. *State v. Holden*, 321 N.C. 125, 143, 362 S.E.2d 513, 526 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). "Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980). Prior statements admitted for corroborative purposes are not to be received as substantive evidence. *State v. Stills*, 310 N.C. 410, 415, 312 S.E.2d 443, 447 (1984). "[I]f

the previous statements offered in corroboration are generally consistent with the witness' testimony, slight variations between them will not render the statements inadmissible. Such variations affect only the credibility of the evidence which is always for the jury." *State v. Brooks*, 260 N.C. 186, 189, 132 S.E.2d 354, 357 (1963); *see also State v. Adcock*, 310 N.C. 1, 17, 310 S.E.2d 587, 597 (1984); *State v. Corbett*, 307 N.C. 169, 181, 297 S.E.2d 553, 561 (1982). *Brooks* imposes a "threshold test of substantial similarity." *State v. Rogers*, 299 N.C. at 601, 264 S.E.2d at 92. In a noncapital case, where portions of a statement corroborate and other portions are incompetent because they do not corroborate, the defendant must specifically object to the incompetent portions. *Brooks*, 260 N.C. at 189, 132 S.E.2d at 357. *Cf. State v. Warren*, 289 N.C. 551, 558, 223 S.E.2d 317, 322 (1976) (capital case in which Court noted the error *ex mero motu* and awarded a new trial).

In some cases, this Court has found error in the admission of statements when the content went far beyond the witness's in-court testimony. For example, in *State v. Warren*, a witness testified that the defendant told the witness the defendant and another man had decided to rob the victim and the two were armed with a knife and a board. The trial court admitted as corroborating evidence an SBI agent's testimony regarding the witness's prior statement to the agent. In the prior statement, the witness said the defendant planned to rob and kill the victim and to kill another man. This Court held that to admit the prior statement was error because the statement went far beyond the testimony at trial, disclosing who struck each blow, the existence of a plan to kill another, and evidence of premeditation and deliberation. *Warren*, 289 N.C. at 556-58, 223 S.E.2d at 320-22.

Similarly, where a witness testified that she did not know how the fire in a house started, the trial court erred in admitting the witness's prior statement that defendant started the fire. *State v. Moore*, 300 N.C. 694, 268 S.E.2d 196 (1980). In *State v. Stills*, 310 N.C. 410, 312 S.E.2d 443, the Court held that a prior statement that the victim had "suck[ed]" defendant was inconsistent with and noncorroborative of testimony that the victim had "fondled" defendant.

However, a statement that merely contains additional facts is not automatically barred. For example, the trial court properly admitted a victim's prior statement of previous sexual abuse, even

though the statement contained facts in addition to those to which the victim testified, because the statement "tended to strengthen and add credibility to [the victim's] trial testimony." *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986).

Also, in *State v. Rogers*, 299 N.C. 597, 264 S.E.2d 89, a witness testified that he saw defendant pull the victim out of a car, heard someone say "don't throw that boy in that cold-ass water," and heard a splash. The witness testified that darkness prevented him from seeing what happened when the defendant and the victim were outside the car. This Court held that the trial court did not err in admitting the witness's prior statement to a detective that the witness saw defendant throw the victim off the bridge. The Court reasoned:

> A careful comparison of the testimony of the detective with that offered by the witness Moore indicates that the two are *substantially the same account* of the activities which occurred . . . . This same analysis clearly shows that the [detective's] testimony . . . goes beyond that of Moore in one important respect: At no time did Moore testify that he actually saw defendant throw [the victim] over the side of the bridge. However, the clear implication of Moore's testimony is that defendant did precisely that act. *That Moore did not mention one act which was clearly a component of a series of interrelated acts does not in any way serve to abridge the probative force of the rest of his testimony.*

Id. at 601, 264 S.E.2d at 92 (emphasis added).

Here, Miller's statement recounted her conversation with defendant the evening after the shooting. According to Miller's statement, defendant shot the victim in the back when the victim "would not tell him nothing." Miller's account of the conversation made no mention of the victim reaching for a chrome-colored object. Miller told the police:

> Tony [the victim] tried to fight [the defendant] and gave him a hassel [sic]. Tony would not tell him nothing, Detroit said he shot the guy one time in the back. Antonio [Frazier] said let me burn him man, Detroit told Antonio no. Twin, David [Reid] kept begging him not to kill Tony.
>
> This is when Detroit said he shot Tony again in the back and David and Antonio ran. Then he said he shot him in the

head. He didn't say where in the head but he said he blew his brains out.

. . . .

Detroit was there trying to make me scared . . . .

. . . .

[Detroit] has tried to talk to me within the last month. I made him leave cause he made me afraid, I couldn't sleep this morning . . . .

At trial, defendant objected to introduction of Miller's statement, but the trial court overruled the objection and instructed the jury to consider the statement for corroborative purposes only.

The trial court did not err in admitting the statement for corroborative purposes because, notwithstanding the minor inconsistencies between the prior statement and Miller's testimony at trial, the accounts of the shooting were substantially the same. Thus, the statements tended to strengthen and add credibility to Miller's trial testimony.

Further, as noted above, the mere fact that a prior statement contains additional facts is not sufficient grounds to exclude the statement. Here, Miller's prior statement differed from her trial testimony on three points: (1) her statement was that Reid pled for the victim's life; at trial, she testified that the victim pled for his life; (2) her statement indicated that defendant identified the lost item as "dope"; at trial, she testified that she did not know what was taken; (3) the statement included the number and location of the shots; at trial, she said defendant did not tell her this information. Except for the statements that the shots were to the back, these minor inconsistencies are the type of "slight variations" contemplated by the Court in *Brooks* which do not render the statements inadmissible; they affect the credibility, not the admissibility, of the evidence. *State v. Brooks*, 260 N.C. at 189, 132 S.E.2d at 357. Additionally, the information germane to the differences noted above was not unduly prejudicial. Whether it was Reid or the victim who pled for the victim's life is irrelevant to defendant's self-defense theory, which was his sole defense. That the missing possession in question was drugs rather than unknown likewise has no bearing on a self-defense theory. This information,

too, was before the jury as substantive evidence through Reid's testimony.

The statements that the shots were to the victim's back were relevant to defendant's self-defense theory and thus constituted a material inconsistency. It was undisputed that defendant shot the victim, however, and it was equally undisputed that the victim's wounds were rear entry. The medical examiner, without objection, described the wounds by pointing to locations on the prosecuting attorney's back. He described the head wound as "on the right posterior scalp." He described the shoulder wound as "close to the left base of the neck" and accounted for the path of the bullet in a manner that could only describe a rear entry wound. In light of this uncontroverted medical evidence, Miller's description in her prior statement of the locale of the shots could not have prejudiced defendant.

[2] As to the admission of Frazier's out-of-court statement, defendant did not object when a policeman read the statement to the jury; thus, plain error analysis applies. *State v. Walker*, 316 N.C. 33, 38, 340 S.E.2d 80, 83 (1986); N.C.R. App. P. 10(c)(4) (1990). "Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. at 39, 340 S.E.2d at 83.

Frazier's prior statement included the following account:

> I got the gun and was going to throw it but didn't. Detroit [*i.e.*, defendant] got up and then Tony [*i.e.*, the victim] got up. Tony kept on saying, "Don't do it. Don't do it." I gave the gun back to Detroit; and he said, "I'm not going to shoot you."
>
> Tony turned away from Detroit and tried to run. Detroit pointed the gun at Tony and shot one time. I heard Tony holler, "Oh!" and then saw Tony on his knees crawling behind a tree. I saw Detroit run over to Tony and shoot him again. I started to run and heard a third shot but didn't see Detroit shoot him this time. Twin [*i.e.*, Reid] and I ran, and I fell two times. I saw Detroit go back to the car as I was running.

At trial, Frazier testified regarding the events after he returned the gun to defendant:

Q: What, if anything, did Detroit do with the gun at that point?

A: Well, when I gave it back to him, they started talking again; and then I moved away from them and stood beside Twin again.

Q: At some point did Tony run?

A: Well, when I looked back over there again—me and Twin was saying something to each other. When I looked back over there, Tony had dropped like this and turned around. And then I heard a shot and I looked and then he was hollering and I ran.

. . . .

Q: . . . [W]here was Tony when you saw the defendant pointing the gun after the shot?

A: He was still by the same spot, but he had moved. He had took about a couple of steps . . . .

Frazier's statement differs from and goes considerably beyond his in-court testimony. In so doing, it undermines defendant's self-defense theory. Thus, to admit the statement was error. However, the error is not such that the jury probably would have reached a different result had the evidence been excluded because Reid's testimony was substantially similar to Frazier's and undermined defendant's self-defense theory equally if not more so. Reid testified:

Q: What, if anything, did the defendant do once he got the gun back from Antonio?

A: He pointed it at [Tony].

. . . .

Q: What, if anything, did Tony Jackson do?

A: He tried to run.

Q: What do you mean he tried to run?

A: He tried to run through the bushes.

Q: Was he running in a direction towards the defendant or away from the defendant?

A: Away from the defendant.

Q: And what, if anything, did the defendant do when Tony Jackson tried to run?

A: I heard a gunshot.

. . . .

Q: In what direction were you looking when you heard this gunshot?

A: Right towards him.

. . . .

Q: And in what direction was the gun pointing?

A: Like where Tony was running to.

Because Reid's in-court testimony established the same facts contained in Frazier's out-of-court statement, the erroneous admission of Frazier's statement is of insufficient magnitude for this Court to conclude that without the error the jury would have reached a different result. Under the plain error standard, the error does not warrant a new trial.

[3] Defendant's final contention is that the trial court erred in refusing to give an instruction on accomplice testimony so that the jury would scrutinize closely Frazier's and Reid's evidence. The court granted defendant's request for an interested-witness instruction but did not give the instruction on accomplice testimony because the evidence did not support it.

A trial court must give all requested instructions supported by the evidence.

> When instructing the jury, the trial court has the duty to . . . "declare and explain the law arising on the evidence." . . . Although a trial judge is not required to give requested instructions verbatim, he is required to give the requested instruction at least in substance if it is a correct statement of the law and supported by the evidence.

State v. Corn, 307 N.C. 79, 86, 296 S.E.2d 261, 266 (1982) (citations omitted). Where the evidence indicates that a witness was an accessory before the fact, the jury should be instructed to scrutinize the witness's testimony. *State v. Spicer*, 285 N.C. 274, 284-85, 204 S.E.2d 641, 648 (1974).

Here, however, the evidence was insufficient to support an instruction on accomplice testimony. The evidence showed that

Reid and Frazier were talking at the house when defendant and the victim asked them to go find a "dude with shades." En route to Pamlico Street, the four did not talk much. Defendant told Reid and Frazier he and the victim were looking for someone else, and defendant testified that he did not conclude that the victim was lying until they got to Pamlico Street. Thus, there is no evidence that before going or while en route to Pamlico Street, defendant plotted with Frazier and Reid to kill the victim.

Once the four stopped on Pamlico Street, Reid and Frazier remained by the car. No evidence indicates that Frazier knew defendant was going to shoot the victim. To the contrary, defendant told Frazier to tell the victim nothing would happen. Clearly, Reid was not an accomplice; the evidence shows, instead, that he pled for the victim's life.

The only evidence arguably supporting an accomplice instruction is Frazier's statements, "I shoot him. I shoot him," and "let me burn him man." However, in light of the evidence viewed as a whole, these statements do not support an instruction on accomplice testimony. There is no evidence that Frazier and defendant at any time discussed killing the victim. Further, Frazier testified:

> I told [Tony] . . . , "Tell [defendant] what he want to know," like that, "so we can go."
>
> . . . .
>
> I told him I wasn't going to shoot him.
>
> [I gave the gun back to Detroit] [b]ecause I ain't having nothing to do with it. And I thought it was, you know, a joke.

Given the context, Frazier's statements "I shoot him" and "let me burn him man" appear intended to convince the victim to return defendant's possessions. They would not, taken in context, sustain a charge against Frazier for being an accomplice.

In addition, the trial court instructed the jury that it "may find that some witness or witnesses are interested in the outcome of this trial. In deciding whether or not to believe such witnesses, [jurors] may take his or their interest into account." This instruction adequately informed the jury that it could give heightened scrutiny

to Reid's and Frazier's testimony. This assignment of error is overruled.

No error.

DAVID M. LYNN AND WIFE, LORNA L. LYNN v. OVERLOOK DEVELOPMENT, A JOINT VENTURE; ROGER L. JONES AND WIFE, MYRA E. JONES; MARSHALL N. KANNER; CITY OF ASHEVILLE, A MUNICIPAL CORPORATION; J. R. SMITH; MARK RUMFELT; WIND-IN-THE-OAKS HOMEOWNERS ASSOCIATION, INC., A NORTH CAROLINA CORPORATION; JOE C. SWICEGOOD, SR. AND WIFE, DOROTHY C. SWICEGOOD; GARLAND L. NORTON; JOE P. EBLEN AND WIFE, ROBERTA S. EBLEN; BEN KANNER AND WIFE, SYLVIA KANNER; GARY PHILLIPS AND WIFE, DEBBY PHILLIPS; DEAN J. SCHRANZ AND WIFE, MARGIE SCHRANZ; REBECCA M. PRESSLEY; MICHAEL D. BRANDSON AND STEVIE A. SALIDO; JOSEPH CARR SWICEGOOD, JR.; J. DEAN DEWEESE, JR.; B. PAUL GOODMAN; KEITH J. DUNN; DEBRA M. LEATHERWOOD; BENJAMIN BIBER AND WIFE, ENGLISH W. BIBER; ROBERTA HORVATH; ROBERT C. NEWTON, JR.; ROBERT M. SMITH AND WIFE, SANDY SMITH; PAUL E. GILSDORF AND WIFE, LAURA L. GILSDORF; PAUL A. ROBICHAUD; TERRENCE W. BURT; SOUTHEASTERN SAVINGS AND LOAN COMPANY, A NORTH CAROLINA CORPORATION; DAVID E. MATNEY, III, TRUSTEE; KENNETH M. MICHALOVE, WILHELMINA B. BRATTON, MARY LLOYD FRANK, RUSSELL M. MARTIN, NORMA T. PRICE AND ROBERT YORK, MEMBERS OF THE ASHEVILLE CITY COUNCIL IN THEIR OFFICIAL CAPACITIES; AND W. LOUIS BISSETTE, JR., MAYOR OF THE CITY OF ASHEVILLE IN HIS OFFICIAL CAPACITY

No. 204PA90

(Filed 2 May 1991)

Municipal Corporations § 10 (NCI3d)— purchase of uninhabitable townhouse unit—acts and omissions of city building inspector—occupancy as intervening cause of damages

Plaintiffs' damages from their purchase of a new townhouse unit that was unfit for habitation were not proximately caused by a city building inspector's alleged violations of N.C.G.S. §§ 160A-417, -420, and -423 and State Building Code sections 105.4(f), 105.6, and 105.10 by his issuance of a building permit to an unlicensed contractor, his failure to observe Building Code violations in construction of the unit, and his failure to issue a certificate of compliance or notify plaintiffs of Building Code violations because plaintiffs' election to take title and assume occupancy of the townhouse in violation of the law

before the building inspector had an opportunity to make the final inspection and issue a certificate of compliance constituted an intervening, independent cause of plaintiffs' damages. Therefore, the trial court did not err in allowing defendants' Rule 12(b)(6) motion to dismiss plaintiffs' claim against defendant city based on defendant building inspector's willful and wanton conduct.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 221.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 98 N.C. App. 75, 389 S.E.2d 609 (1990), affirming in part and reversing in part an order entered by *Lamm, J.*, on 10 May 1989, after hearing at the 1 May 1989 Civil Session of Superior Court, BUNCOMBE County. Heard in the Supreme Court 11 December 1990.

Charles R. Brewer for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, by Tyrus V. Dahl, Jr., Ellen M. Gregg, and Lawrence Egerton, for defendant-appellees the City of Asheville and J.R. Smith.

North Carolina Academy of Trial Lawyers, by Michael K. Curtis, amicus curiae.

North Carolina Association of County Commissioners, by James Blackburn, General Counsel, and North Carolina League of Municipalities, by Ellis Hankins, amici curiae.

MEYER, Justice.

After this Court's review of the record, our appraisal of the facts found in the complaint and exhibits differs somewhat from the facts stated in the opinion of the Court of Appeals. This action arises out of a contract for the purchase and sale of a new townhouse unit which plaintiffs entered into with Overlook Development (not a party to this appeal) on 22 February 1985. Plaintiffs allege that the relevant building permits were issued by J.R. Smith, a City of Asheville building inspector, to Overlook Development in December 1984 but that plaintiffs did not obtain title to the unit until 23 August 1985. Plaintiffs further allege that on 23 August 1985, an employee of the Building Inspections Department of the City of Asheville telephoned a representative of Carolina Power

& Light Company, informed the company that a final inspection of plaintiffs' unit had been done, and authorized the power company to hook up the electricity to the building.

Plaintiffs immediately assumed occupancy upon completion of the unit's construction in August 1985. No certificate of compliance, as required by N.C.G.S. § 160A-423 and section 105.10 of the North Carolina State Building Code ("Building Code") as a precondition for legal occupancy, was ever issued as to plaintiffs' unit. However, an inspection was conducted by J.R. Smith during August 1985 after the plaintiffs moved in, but Smith did not issue a certificate of compliance, inform plaintiffs of any problems with the construction, or inform them that they were occupying the unit in violation of N.C.G.S. § 160A-423.

After plaintiffs moved into their new home in August, they discovered numerous defects in the construction and workmanship of their unit in violation of the Building Code, as well as problems with grading, drainage, and driveway pavement failure. These defects were the subject of a later condemnation proceeding brought by the City of Asheville ("City") against plaintiffs on 5 December 1988 and 18 January 1989, resulting in a determination that plaintiffs' unit was unfit for human habitation and an order to demolish the unit at the plaintiffs' expense.

On 6 March 1989, plaintiffs filed their verified complaint, alleging eleven causes of action, seeking relief against numerous defendants (forty-six) on a variety of theories of recovery. Relevant to this appeal, plaintiffs allege that the City, through its agents, had a duty to inspect the unit and that defendants' failure to inspect and/or order correction of the alleged Building Code violations was a proximate cause of plaintiffs' damages. Plaintiffs sought compensatory and punitive damages against defendants City of Asheville and City Building Inspector J.R. Smith, in both his official and individual capacities, for his alleged acts and omissions pertaining to the inspection of the townhouse unit.

Prior to answering, these defendants filed a motion to dismiss plaintiffs' claim pursuant to N.C.R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Following a hearing on these motions, the trial court entered its order on 10 May 1990, allowing defendants' motions as to all claims against these defendants, except those against J.R. Smith in his individual capacity for compensatory and punitive damages arising out of his al-

leged willful, wanton, unlawful, culpable, and/or reckless conduct outside the scope of his duties as a city employee.

The Court of Appeals reversed the trial court's dismissal of plaintiffs' claim for compensatory damages against the City "predicated on allegations of inspector Smith's willful and wanton conduct" and affirmed the order in all other respects. *Lynn v. Overlook Development*, 98 N.C. App. 75, 80, 389 S.E.2d 609, 613 (1990). On 26 July 1990, this Court granted plaintiffs' petition for discretionary review.

A motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure presents the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory. *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E.2d 743 (1986). The complaint must be construed liberally, and the court should not dismiss the complaint unless it appears that the plaintiffs could not prove any set of facts in support of their claim which would entitle them to relief. *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 367 S.E.2d 647, *reh'g denied*, 322 N.C. 486, 370 S.E.2d 227 (1988).

In this connection, we have examined the applicable statutes, the Building Code, and the trial court record. Plaintiffs allege that City Building Inspector Smith was negligent under the standards set forth at N.C.G.S. §§ 160A-411 to -425 and Building Code sec. 105 in that he improperly issued a building permit to Overlook Development (which did not hold a valid general contractor's license); failed to observe code violations in the construction of the unit; or alternatively, having observed such violations, failed to take appropriate remedial measures, including notifying plaintiffs and revoking the building permit. Plaintiffs contend that these allegations are sufficient to withstand the defendants' motion to dismiss pursuant to Rule 12(b)(6). Since plaintiffs have premised their right to recover upon the violation of N.C.G.S. §§ 160A-417, -420, and -423 and Building Code secs. 105.4(f), 105.6, and 105.10, we must first determine whether the statute complained of is a safety statute and whether plaintiffs belong to the class of persons for whose protection and benefit the statute and the Building Code were enacted.

N.C.G.S. § 160A-411 requires that cities in North Carolina, by one of several authorized methods, perform the duties and respon-

sibilities listed in N.C.G.S. § 160A-412, including enforcing state and local laws relating to the construction of buildings, installation of facilities, and maintenance of buildings. N.C.G.S. § 160A-411 (1982). These duties and responsibilities include issuing or denying permits, making any necessary inspections, and issuing or denying certificates of compliance. N.C.G.S. § 160A-412 (1982). No permits are to be issued unless the work is to be performed by a duly licensed contractor when any provision of a statute or ordinance so requires. N.C.G.S. § 160A-417 (1982). As the work pursuant to a permit progresses, city building inspectors make as many inspections of the work as may be necessary to satisfy them that it is being done according to all applicable laws and all terms of the permit. N.C.G.S. § 160A-420 (1982). The permit holder is required to give the inspector timely notice when the work is ready for the required inspections. North Carolina State Building Code sec. 105.6(b) (1978). The final step in this statutory scheme is N.C.G.S. § 160A-423, which provides, *inter alia*, that no completed building shall be occupied until a certificate of compliance is issued pursuant to a final inspection stating that the structure complies with all applicable state and local laws. When the building inspector finds any defects or finds that the building has not been constructed in accordance with applicable state and local laws, he is to notify the owner or occupant. N.C.G.S. § 160A-425 (1982).

The pertinent sections of the Building Code provide as follows:

105.4—APPLICATION FOR PERMIT

. . . .

(f) Where the General Statutes require a licensed contractor for certain types of construction, no permit shall be issued for such construction except in compliance with these statutes.

. . . .

105.6—INSPECTIONS REQUIRED

(a) As the work covered by permit progresses, local inspectors shall make as many inspections thereof as necessary to satisfy them that the work is being done in accordance with this Code, any other applicable State and local laws, and the terms of the permit.

(b) When required, the Inspection Department shall make at least the following inspections of all work being performed

under the permit and shall either approve that portion of the construction as completed or shall notify the permit holder or his agent wherein the same fails to comply with the law. The permit holder or his agent shall give timely notice to the Inspection Department when the work for these inspections are [sic] ready:

. . . .

Final Inspection: To be made after the building or structure is completed and ready for occupancy.

(c) Work shall not proceed on any part of a building or structure beyond the point indicated for each inspection described in subsection (b) above until written approval has been received from the [I]nspection [D]epartment.

. . . .

105.10—CERTIFICATES OF COMPLIANCE

(a) At the conclusion of all work done under a permit, the appropriate inspector or inspectors shall make a final inspection, and if they find the completed work complies with this Code and all other applicable State and local laws and with the terms of the permits, the Inspection Department shall issue a certificate of compliance.

(b) No new building or structure or part thereof may be occupied . . . until the Inspection Department has issued a certificate of compliance.

. . . .

(d) Occupying a building or structure in violation of this section shall constitute a misdemeanor.

North Carolina State Building Code (1978).

The statutes and the sections of the Building Code in question are silent as to the legislative purpose and as to the class of persons for whose benefit they were enacted. In such a case, the application of the subject statutes and sections of the Building Code to the plaintiffs, invoking their protection, must be determined from a careful consideration of the provisions of the statutes and the Building Code and of the ends they were manifestly intended to accomplish. In the interpretation and construction of statutes, it is a primary

rule that the intention of the legislature should be ascertained and given effect. *McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988). The enabling statute which calls for the institution of a State Building Code Council and the North Carolina Residential Building Code specifically addresses protection of the interests of the public, and provides, in part:

> All regulations contained in the North Carolina State Building Code shall have a reasonable and substantial connection with the *public health, safety, morals, or general welfare*, and their provisions shall be construed liberally to those ends.

N.C.G.S. § 143-138(c) (1986) (emphasis added). It appears that one of the specific purposes of N.C.G.S. §§ 160A-411 to -425 is to promote the safety of the general public. *See also State v. Walker*, 265 N.C. 482, 484, 144 S.E.2d 419, 421 (1965) ("It is within the police power of the General Assembly and of a city, when authorized, to establish minimum standards, materials, designs, and construction of buildings for the safety of the occupants, their neighbors, and the public at large"); *Jackson v. Housing Authority of High Point*, 73 N.C. App. 363, 326 S.E.2d 295 (1985) (the purpose of N.C.G.S. § 160A-425 is to *protect the lives and limbs* of *occupants* of the buildings), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986). The language of the Building Code suggests that the particular provisions of the Code pertinent here are safety regulations. The intent of the Building Code is evident in its stated purpose to promote the "public health, safety, morals, or general welfare." North Carolina State Building Code sec. 101.2 (1978).

It is unclear, however, whether these particular plaintiffs as *purchasers* are within the class intended to be protected by the statutes and whether the harm resulting from Smith's alleged acts or omissions is the specific type of harm which the statutes were intended to prevent. Assuming, without deciding the issue, that a city building inspector owes a statutory duty to these particular plaintiffs as purchasers, the plaintiffs' complaint fails to state a claim upon which relief can be granted against the City. The trial court did not err in dismissing plaintiffs' complaint in that, as a matter of law, the acts or omissions of City Building Inspector Smith did not cause the damages of which these plaintiffs complain, that is, their purchase of a house that was unfit for habitation.

The plaintiffs contend that defendants were negligent *per se* because they violated the provisions of N.C.G.S. §§ 160A-417, -420,

and -423 and Building Code sec. 105 relating to permits, inspections, and the certificate of compliance. Although the violation of a statute which imposes a duty upon the city building inspector in order to promote the safety of the public, including the plaintiffs, may be negligence *per se, such negligence is actionable only if it is the proximate cause of injury to the plaintiff. Ratliff v. Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966); *see also Bell v. Page*, 271 N.C. 396, 156 S.E.2d 711 (1967). Proximate cause has been defined as "a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and *without which the injuries would not have occurred*, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed." *Adams v. Mills*, 312 N.C. 181, 192, 322 S.E.2d 164, 171 (1984) (emphasis added); *accord Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E.2d 559 (1984); *Adams v. Board of Education*, 248 N.C. 506, 103 S.E.2d 854 (1958).

Plaintiffs allege violations of N.C.G.S. § 160A-417 and Building Code sec. 105.4(f) in that the city building inspector improperly issued a building permit to Overlook Development, which did not hold a valid general contractor's license. However, even assuming the action of issuing the permit by the city building inspector in December 1984 was negligent, the transaction was between the city building inspector and Overlook Development. The contract for the purchase and sale was not entered into between Overlook Development and the plaintiffs until 22 February 1985, and plaintiffs allege that the title to the townhouse unit did not pass to them until 23 August 1985.

As to the plaintiffs' allegation that the city building inspector failed to observe violations of the Building Code pursuant to N.C.G.S. § 160A-420 and Building Code sec. 105.6, the statute only requires that the building inspector make inspections of work in progress when "necessary." The statute and the Building Code contemplate that the permit holder or his agent will notify the inspection department that the work for the necessary inspections is ready. Plaintiffs have not alleged that the city building inspector was notified or that he failed to make any "necessary" inspections. Finally, plaintiffs allege that defendants failed to issue a certificate of compliance or failed to notify them of Building Code violations pursuant to N.C.G.S. § 160A-423 and Building Code sec. 105.10. However, we

do not find that plaintiffs' allegations state a claim upon which relief can be granted. Plaintiffs assumed occupancy in August 1985, in violation of N.C.G.S. § 160A-423 and Building Code sec. 105.10, before the city building inspector was requested to conduct the final inspection and had an opportunity to issue or deny the certificate of compliance.

As we have noted, plaintiffs elected to take title and assume occupancy of the townhouse in violation of the law before the building inspector had opportunity to make final inspection and issue a certificate of compliance. This act was an intervening, independent cause of plaintiffs' damages. Therefore, the acts or omissions by the city building inspector did not proximately cause the plaintiffs' damages.

We hold that the alleged violations of N.C.G.S. §§ 160A-417, -420, and -423 and North Carolina State Building Code secs. 105.4(f), 105.6, and 105.10 by defendants City Building Inspector J.R. Smith and the City of Asheville were not the proximate cause of the injury to the plaintiffs. Therefore, the trial court did not err in allowing defendants' motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure with respect to plaintiffs' claim against the City predicated on Inspector J.R. Smith's willful and wanton conduct. We reverse that part of the Court of Appeals' decision which holds that the trial court erred in dismissing plaintiffs' complaint against the City with respect to the inspector's willful and wanton conduct. In all other respects, the Court of Appeals' opinion is affirmed.

Affirmed in part, reversed in part.

STATE OF NORTH CAROLINA v. LISA REBECCA JOSEY

No. 117A89

(Filed 2 May 1991)

1. Criminal Law § 1120 (NCI4th) — possession of stolen property — aggravating factor — victim seriously injured

The trial court did not err when sentencing defendant for possession of stolen property by finding in aggravation

that defendant received this property as a result of a crime in which defendant participated and in which the victim received serious injuries. N.C.G.S. § 15A-1340.4(a) and N.C.G.S. § 15A-1340.3 do not require that factors which increase the defendant's culpability be a part of the actions which constitute the crime in order to be aggravating factors. Moreover, although defendant contended that evidence of how the property was obtained could not be used to find the aggravating factor because knowledge by defendant that the property was stolen was an element of the crime to which defendant pled guilty, the injuries sustained by the victim are not an element of possession of stolen property.

Am Jur 2d, Criminal Law §§ 598, 599.

2. **Criminal Law § 1120 (NCI4th)— possession of stolen property—aggravating factor—victim injured in robbery—knowledge of injury**

The trial court did not err when sentencing defendant for possession of stolen property by finding in aggravation that the victim was seriously injured even though defendant contended that the evidence did not show that she knew that the victim was injured. There is a likelihood of violence in a common law robbery and a person taking part in a common law robbery as an accomplice can be held responsible for any violence which ensues.

Am Jur 2d, Criminal Law §§ 598, 599.

3. **Criminal Law § 1099 (NCI4th)— possession of stolen property—aggravating factor—involvement in robbery—no error**

The trial court did not err when sentencing defendant for possession of stolen property by using her involvement in the robbery to enhance her sentence where she had plea bargained for the dismissal of the common law robbery charge. There was sufficient evidence to have convicted defendant of common law robbery.

Am Jur 2d, Criminal Law §§ 598, 599.

4. **Criminal Law § 83 (NCI3d)— possession of stolen property—sentencing—testimony of husband compelled against wife—error**

The trial court erred in the sentencing hearing for possession of stolen property by compelling defendant's husband to

testify as to a conversation with his wife shortly before the robbery. N.C.G.S. § 8-57.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL as of right by the State pursuant to N.C.G.S. § 7A-30(2) and on discretionary review by petition of the defendant to an unpublished opinion by a divided panel of the Court of Appeals, 92 N.C. App. 757, 377 S.E.2d 825 (1989), vacating a sentence by *Brannon, J.*, at the 14 December 1987 Criminal Session of Superior Court, ORANGE County. Heard in the Supreme Court 14 November 1989.

The defendant Lisa Rebecca Josey pled guilty to one count of possession of stolen property and two counts of uttering a forged instrument. Her plea was entered pursuant to a plea bargain under which a charge of common law robbery against her was dismissed and the State agreed to take no stance as to sentencing. The defendant's husband Ernest Marvin Josey pled guilty to common law robbery and credit card theft. The charges against them grew from the same incident and the cases were consolidated for sentencing hearings over the objection of the defendant.

The evidence at the sentencing hearing showed that Ruth Baldwin was walking on a sidewalk in Chapel Hill when Ernest Josey, the defendant's husband, knocked her down and took her purse. As a result of the struggle, Ms. Baldwin lost five teeth and suffered injury to her jaw. Ernest Josey ran to an automobile which his wife was driving and the two of them went to their home where they emptied the purse. Lisa Josey later cashed forged checks which came from the purse.

In sentencing the defendant for the possession of stolen property, the court found in mitigation that the defendant had no record of criminal convictions. It found as an aggravating factor that "[d]efendant seriously injured the victim Ruth Baldwin, from whom this credit card had been taken, by her conduct of either aiding and abetting or acting in concert with Ernest Josey, in the robbery and assault upon Ruth Baldwin." The court found the aggravating factor outweighed the mitigating factor and sentenced the defendant to seven years in prison. The presumptive sentence for this offense is three years. In the two uttering cases the court imposed the presumptive sentence of two years. All the sentences were to be served consecutively.

The Court of Appeals held that it was error to find as an aggravating factor that the defendant seriously injured Ruth Baldwin and remanded for a new sentencing hearing. There was a dissenting opinion and the State appealed as a matter of right. We allowed the defendant's petition for discretionary review to determine whether the defendant's husband could be compelled to testify to certain transactions between the two of them.

Lacy H. Thornburg, Attorney General, by Elisha H. Bunting, Jr., Special Deputy Attorney General, and D. Sigsbee Miller, Assistant Attorney General, for the State appellant.

George P. Doyle for defendant appellant and appellee.

WEBB, Justice.

[1] The first question brought to the Court by this appeal involves the propriety of an aggravating factor found by the superior court. The Court of Appeals held that it was error for the superior court to find as an aggravating factor that the defendant seriously injured Ruth Baldwin. The Court of Appeals, relying on *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983), held that in order to properly find an aggravating factor from an offense which has been dismissed, the factor must be transactionally related to the offense for which the defendant is being sentenced. The Court of Appeals held that to be transactionally related to the offense for which the defendant is being sentenced, the aggravating factor must be functionally associated with such an offense; that is that the aggravating factor is not a constituent element of the offense but rather is associated with it. The Court of Appeals held that based on this test, inflicting serious injury is not transactionally related to the possession of stolen property.

In determining whether an aggravating factor is properly found, we look to the statute. N.C.G.S. § 15A-1340.3 provides:

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

N.C.G.S. § 15A-1340.4(a) provides in part:

> In imposing a prison term, the judge . . . may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating or mitigating factors are set forth herein[.]

N.C.G.S. § 15A-1340.4(a) provides a judge may consider aggravating factors "that are reasonably related to the purposes of sentencing." N.C.G.S. § 15A-1340.3 provides that "factors that may . . . increase the offender's culpability" may be taken into account as part of the "purposes of sentencing." As we read these two statutes they do not require that factors which increase the defendant's culpability be a part of the actions which constitute the crime in order to be aggravating factors. The defendant pled guilty to possession of stolen property. She received this property as the result of a crime in which she participated and in which the victim received serious injuries. Under the statute this increased her culpability. This aggravating factor was properly found by the superior court.

Our holding in this case is consistent with *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673; *State v. Brewer*, 321 N.C. 284, 362 S.E.2d 261 (1987); and *State v. Taylor*, 322 N.C. 280, 367 S.E.2d 664 (1988), upon which the defendant relies. In *Melton* and *Brewer* we held that the sentence upon a plea of second degree murder could be enhanced by a finding in aggravation that the killing was with premeditation and deliberation. We held that premeditation and deliberation in each case was transactionally related to the crime. We did not say that to be transactionally related the aggravating factors must be "functionally associated with the underlying act on which the admitted offense is based." In *Taylor* we held a sentence for first degree burglary could be enhanced by the aggravating factor that the defendant was armed with a deadly weapon at the time of the crime. There was no discussion as to whether the aggravating factor was transactionally related to the crime.

The defendant also argues that one element of the possession of stolen property is knowledge by the defendant that the property was stolen. This being an element of the crime to which the defendant pled guilty, the defendant argues evidence of how the property was obtained may not be used to find an aggravating factor. *State v. Raines*, 319 N.C. 258, 354 S.E.2d 486 (1987); *State v. Blackwelder*,

309 N.C. 410, 306 S.E.2d 783 (1983); *State v. Abdullah*, 309 N.C. 63, 306 S.E.2d 100 (1983). The injury sustained by Ruth Baldwin is not an element of the possession of stolen property. *See State v. Davis*, 302 N.C. 370, 275 S.E.2d 491 (1981), for the elements of possession of stolen property. The evidence of injury to Ms. Baldwin was properly considered.

[2] The defendant also argues that the evidence shows she did not know that Ruth Baldwin was injured. She says, relying on *State v. Baynard*, 79 N.C. App. 559, 339 S.E.2d 810 (1986), that the evidence did not support the finding of the aggravating factor that she seriously injured Ruth Baldwin. In *Baynard* the defendant was convicted of attempting to obtain a controlled substance by fraud and forgery. The evidence showed that after the defendant was unable to get a forged prescription filled, as she left the drugstore with her husband a policeman stopped them. Her husband drew a pistol and fired at the policeman who returned the fire. The policeman was wounded and the husband was killed. The superior court found as an aggravating factor that the defendant, while attempting to commit the crime, was accompanied by an armed person who shot an officer in an attempt to help the defendant escape, and the defendant knew her accomplice was armed. The Court of Appeals found that there was no evidence the defendant knew her husband was armed or that he intended to use a weapon.

The defendant argues that there was no evidence that she knew anyone would be injured in the robbery and under *Baynard* the aggravating factor was not properly found. *Baynard* is distinguishable from this case. In a common law robbery there is a likelihood of violence. In an attempt to obtain a controlled substance by fraud or forgery there is not. When a person takes part in a common law robbery as an accomplice he or she can be held responsible for any violence which ensues.

[3] The defendant also argues that when she plea bargained so that the common law robbery charge was dismissed, the State should not be allowed to use her involvement in the robbery to enhance her sentence in another case. She distinguishes *Melton* by saying that in *Melton* and in all the cases upon which it relies, there was a real possibility the defendant would be found guilty on the charge which was dismissed. In this case, says the defendant, there would not have been sufficient evidence to convict her on the common law robbery charge. In *Melton*, says the defendant,

the dismissal was of some benefit to the defendant. In this case it was not. We believe there was sufficient evidence to have convicted the defendant of common law robbery.

We hold that the aggravating factor was properly found.

[4] The defendant next assigns error to what she says was her husband's being compelled to testify against her in violation of N.C.G.S. § 8-57. When Ernest Marvin Josey was testifying the presiding judge questioned him as to a conversation between him and his wife shortly before the robbery. Ernest Josey testified that the idea for the robbery originated with his wife and that she told him to get out of the automobile and take Ms. Baldwin's purse. Although the defendant did not object to these questions her exceptions to questions asked by the court are automatically preserved. N.C.G.S. § 15A-1446(d)(11) (1988).

N.C.G.S. § 8-57 provides in part:

> (b) The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action or grand jury proceedings, except that the spouse of the defendant shall be both competent and compellable to so testify:
>
> (1) In a prosecution for bigamy or criminal cohabitation, to prove the fact of marriage and facts tending to show the absence of divorce or annulment;
>
> (2) In a prosecution for assaulting or communicating a threat to the other spouse;
>
> (3) In a prosecution for trespass in or upon the separate lands or residence of the other spouse when living separate and apart from each other by mutual consent or court order;
>
> (4) In a prosecution for abandonment of or failure to provide support for the other spouse or their child;
>
> (5) In a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any illegitimate or adopted or foster child of either spouse.

(c) No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage.

Prior to *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981), our rule was that a person was not competent to testify against his or her spouse. *State v. Waters*, 308 N.C. 348, 302 S.E.2d 188 (1983); *State v. Suits*, 296 N.C. 553, 251 S.E.2d 607 (1979); *State v. Alford*, 274 N.C. 125, 161 S.E.2d 575 (1968); 1 Brandis, North Carolina Evidence § 59, at 286 (3rd ed. 1988). N.C.G.S. § 8-57 at the time *Freeman* was decided provided that with certain exceptions, not applicable to this case, the statute did not "render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding." We made it clear in *Freeman*, 302 N.C. 591, 594, 276 S.E.2d 450, 452, that N.C.G.S. § 8-57 is not a legislative declaration of the law which cannot be changed by us but it is a declaration that, with some exceptions, the common law rule or spousal privilege applies. We have the power to change the common law rule.

In *Freeman* we held that a wife was competent to testify against her husband as to what she had observed at the time of the alleged crime. The General Assembly then changed N.C.G.S. § 8-57 to provide that the spouse of a defendant may be competent but not compellable to testify against the defendant in a criminal action.

This assignment of error brings to this Court the question of whether the defendant husband may be compelled to testify as to a conversation he had with his wife a few minutes before the crime was committed. Among the reasons given for the privilege against testifying against a spouse is the maintaining of peace between the marriage partners and avoiding the moral repugnance of forcing one spouse to condemn a lifelong partner. *See Adverse Marital Testimony in North Carolina Criminal Actions*, 60 N.C.L. Rev. 874 (1982).

The State does not dispute that the testimony of the defendant's husband was compelled. Nor does the State contend that we should change the rule that a person is not compellable to testify against a spouse as to confidential communications. The State contends that the conversation between the defendant and her spouse was not a confidential communication.

We do not reach the question of confidentiality. We held in *Freeman* that a person who wants to testify against his or her spouse is competent to do so. We did not alter that part of the rule which says a person may not be compelled to testify against a spouse. In this case the defendant's husband was compelled to testify against her. That violated the rule. The testimony in this case does not fall within any of the exceptions listed in N.C.G.S. § 8-57 allowing compelled testimony. We do not pass on the question of whether the conversation between defendant and her husband was a confidential communication.

We note that the Court of Appeals vacated a recommendation in the judgment that the defendant pay restitution as a condition of work release or parole. The State did not appeal from this part of the Court of Appeals' opinion and it is not disturbed by this opinion.

For reasons different from the Court of Appeals we affirm its decision vacating the sentence and remanding to the superior court for a new sentencing hearing.

Affirmed.

STATE OF NORTH CAROLINA v. ROBERT NORTHROP MITCHELL, JR.

No. 26A90

(Filed 2 May 1991)

Criminal Law § 62 (NCI3d)— homicide—reference to lie detector test—no plain error

There was no plain error in a prosecution for murder and conspiracy to murder where two witnesses referred to polygraph tests. There was no mention of the results of the test of one witness, which was done for investigative purposes, and the apparent effect of another witness's admission that he had failed the polygraph test would be to cast doubt upon his veracity as a witness for the State. The results of polygraph testing have been held inadmissible, but the mere mention of polygraph testing does not necessitate appellate relief and

the rule that polygraph evidence is no longer admissible does not affect the use of the polygraph for investigatory purposes.

Am Jur 2d, Evidence § 831; Witnesses § 435.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Manning, J.*, at the 17 August 1989 Criminal Session of Superior Court, ANSON County, upon a jury verdict of guilty of first degree murder and conspiracy. Heard in the Supreme Court 10 April 1991.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Hal F. Askins, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

Defendant was indicted on 23 January 1989 for conspiracy to commit murder and the 16 October 1988 murder of John Clark Jones. The cases were tried together as noncapital cases. On 17 August 1989, the jury returned a verdict finding defendant guilty of conspiracy to commit murder and murder in the first degree. The court imposed a life sentence, the offenses having been consolidated for the purpose of judgment. Defendant appealed, and his motion to bypass the North Carolina Court of Appeals on the conspiracy conviction was allowed by this Court on 12 September 1990.

The State's evidence tended to show that defendant, Robert Northrop Mitchell, Jr., and Karen Jones, wife of the deceased, had an extramarital affair beginning in early 1987 and lasting approximately one year. In late August 1988, defendant met Dennis Davis for the first time, and defendant told Davis that he wanted John Jones "knocked off," because he was dating John Jones' wife. Davis quoted defendant a price of $10,000 for killing Jones, but defendant said that he could only pay $4,700. Davis told defendant that he and David Watts would get back in touch with him.

Defendant called Davis on several occasions following the initial meeting to finalize the agreement and work out the details concerning the killing of John Jones. Around midnight on 15 October 1988, Ms. Connie Singletary, Davis' girlfriend, went to Mr.

Jones' house and told him that she was having automobile trouble and needed his help. Mr. Jones got dressed and he and Ms. Singletary left in his truck. When they arrived at Ms. Singletary's automobile, she got out of the truck and drove off in her automobile. As Mr. Jones got out of his truck, Davis shot him. Jones got back into the truck and Davis shot him again through the driver's window. Davis then threw a jar of gasoline into the truck and ignited it.

On 16 October 1988, Anson County Sheriff's Detective Dave Johnson and Jay Tilley, a State Bureau of Investigation (SBI) agent, discovered a burned body in a burned pickup truck at the intersection of Rural Paved Road 1228 and Rural Paved Road 1240 in Anson County. The truck was registered to Jones Tire Company, which was owned and operated by the deceased, John Clark Jones. Two shotgun shells were found in the area and there were several projectile holes in the hood, left sideview mirror, and right door of the truck.

An autopsy was performed on the body and it was determined to be the body of John Jones. The autopsy showed that the victim's body contained six buckshot type shotgun pellets and several smaller fragments of metal. It was the opinion of the forensic pathologist that the cause of John Jones' death was a shotgun wound, specifically buckshot to the head, neck and chest.

Prior to the homicide, defendant paid Davis $1,500 in cash and gave him a saddle worth approximately $1,200. The day after the murder, defendant called Davis and told him that he had heard about the killing on the news. Defendant thought that he might be a prime suspect, so he wanted Davis to wait for the rest of the money. About one week later, defendant and Davis met and defendant gave Davis either $1,000 or $1,500 as partial payment for killing Jones. Defendant met with Davis on another occasion after 30 October 1988 and gave Davis an additional $1,000.

One or two weeks prior to the week of 15 October 1988, defendant told Walker Harrington McCollum, a co-worker, that he needed him to "cover" some money for him in the amount of about $2,000. After becoming aware of the death of John Jones, McCollum had a conversation with defendant who told him to stick to his story about the money. Two SBI agents interviewed McCollum a week later and he told them that he got money from defendant to pay child support. However, McCollum's mother told the SBI agents that she had given McCollum the money for the support payments

and court cost. McCollum then confessed that he had not received any money from defendant and agreed to cooperate with the investigation.

On 19 January 1989, McCollum agreed to wear a recording device and went to defendant's house at about 8:30 p.m. on that night. Defendant again told McCollum to stick to his story. The next day, while wearing the recording device, McCollum talked with defendant and defendant told him that he was not worried about Dennis Davis talking, but he was concerned about Davis' wife, the former Ms. Connie Singletary.[1]

Defendant offered no evidence. The jury convicted defendant of first degree murder and conspiracy to commit murder.

Defendant contends that the trial court committed plain error by failing to strike testimony concerning the results of polygraph testing. Defendant complains that evidence that McCollum had failed a polygraph test, when considered with evidence implying that Karen Jones had passed a polygraph test, injected an unacceptable degree of unreliability into the trial and was likely a factor in the jury's verdict, thus entitling him to a new trial.

With reference to McCollum, the initial monitored and recorded conversation between McCollum and defendant, which was played in open court, began as follows:

> MCCOLLUM: Boy, what in the hell are you doing?
>
> MITCHELL: What you say?
>
> MCCOLLUM: Chicken, them [expletive] been back to the house . . . . I got off work and they was there. They coming down hard, Cat. They been down there, they been to Mama's, wanted to know what she had done with the money that she borrowed the day I went to court. I don't know what the hell I'm going to do. Trying to say David, David is trying to say that I'm the one that carried you down there and set it up, and Cat, you know.
>
> MITCHELL: I don't believe David said that. I swear I don't.

1. Davis married Ms. Singletary a few weeks after the homicide, believing that this would prevent her from testifying against him.

MCCOLLUM: Man, [expletive], man that ain't right to start with you know.

MITCHELL: Well, I know that.

MCCOLLUM: But, you know, I don't know what in the hell —I don't know what is coming up. They are talking about the grand jury because I failed my damned polygraph. Wanting to get the grand jury, trying to throw it up to me. I don't know if they are trying to scare me or what.

The monitored and recorded conversation between the two men on the next day contained reference not only to McCollum, but also to defendant having taken a polygraph test. The conversation was as follows:

MCCOLLUM: Well, I'm gone, Cat. I just wanted to know and you in on—

MITCHELL: They going to know we talked. What the hell? [Expletive], if they talk to you or they talk to me I will tell them you told me about going to take the test and all.

MCCOLLUM: The polygraph and all?

MITCHELL: Uh-huh.

MCCOLLUM: Boy, they throwed that [expletive] in—

MITCHELL: Just tell them — just tell them, [expletive], that I apologized to you for having to go through all that [expletive]. (Inaudible.) I heard that a good while and then they ain't said a [expletive] word about it. Well, they did. The last thing they said about it, asked me would I be willing to take another one. I said, yes. I told the truth on the first one and I'll tell it on the next one.

On cross-examination by defense counsel, Karen Jones testified as follows:

Q. You have also talked with the SBI, have you not?

A. Yes.

Q. And the SBI accused you of being involved in this, did they not?

A. No.

Q. Didn't you tell Mr. Mitchell that they were telling you that you were involved?

A. I took a polygraph.

In response to questions by the court Mrs. Jones further testified as follows:

THE COURT: How long after your husband's death did you come under suspicion or believe you were under suspicion as far as the SBI was concerned and the sheriff's department?

A. How soon?

THE COURT: When did they start questioning you so you felt they thought you were involved in your husband's death? How soon after the funeral?

A. I took a polygraph that week.

THE COURT: The first week?

A. Yes.

THE COURT: Did they continue to question you after that?

A. Yes.

THE COURT: How long after you took the polygraph and they continued to question you did they start sending you back to Robby Mitchell with things that were not exactly correct, telling you to tell him information that you knew was not correct?

A. About a week.

THE COURT: Did all this occur right after the death?

A. I think so. I took the polygraph right after that.

The State contends that it presented direct evidence at trial that established that Dennis Davis was hired by defendant to commit the murder in question and that Davis killed John Jones. Neither the State nor defendant offered any evidence to the contrary. The State argues that the evidence complained of by defendant merely involved statements of peripheral witnesses and did not have any effect upon the outcome of the trial. We are inclined to agree.

Defendant did not object to any of the above testimony and made no motion to strike. Thus, we consider this assignment of error under the "plain error" rule or standard. Before granting a new trial to a defendant under the plain error rule or standard, the appellate court must be convinced that absent the alleged error, the jury probably would have reached a different verdict. *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. at 740-41, 303 S.E.2d at 806-07, quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982).

The results of polygraph testing have been held inadmissible in North Carolina even where the parties stipulate to their admissibility. *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983); *State v. Jackson*, 287 N.C. 470, 215 S.E.2d 123 (1975). However, the mere mention of polygraph testing does not necessitate appellate relief. *See State v. Harris*, 323 N.C. 112, 371 S.E.2d 689 (1988).

In the instant case, there was no mention of the results of Karen Jones' polygraph test, which was done for investigative purposes. Also, the trial court's inquiry of Karen Jones seems to have been an attempt by the trial judge to establish a time frame as to when certain acts occurred. This Court held in *Grier* that polygraph evidence is no longer admissible in any trial; however, the rule does not affect the use of the polygraph for investigatory purposes. *State v. Grier*, 307 N.C. at 645, 300 S.E.2d at 361. The limited testimony concerning the investigatory polygraph of Karen Jones, even if erroneously admitted, did not affect the jury verdict.

With reference to McCollum's admission that he failed the polygraph test, we fail to see how the admission prejudiced defendant. The apparent effect of McCollum's admission would be to cast doubt upon his veracity as a witness for the State, thus weakening, rather than strengthening, the State's case against defendant. In any event, considering the evidence in its entirety and assuming error arguendo, we are not convinced, absent the alleged error, that the jury probably would have reached a different verdict. Thus, plain error has not been shown.

We conclude that defendant's trial was free of prejudicial error.

No error.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 132, STAFFORD G. BULLOCK

No. 426A90

(Filed 2 May 1991)

Judges § 7 (NCI3d)— censure of judge—conduct prejudicial to administration of justice

A district court judge was censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office in disrepute based on the following conduct: respondent judge ordered the detention of an attorney who declined to give a reason for his motion to withdraw as counsel for the defendant in a criminal case and to make a recommendation concerning defendant's eligibility for the first offender's program on the ground that to do so would require him to reveal confidential information in violation of the attorney-client privilege; when the attorney again declined to make a recommendation after being detained for forty-five minutes, respondent informed the attorney in open court that in the future he would accept no recommendations from him, would grant him no continuances, would not appoint him to represent indigent defendants, and would require his clients to plead guilty or not guilty as charged; during a recess, respondent discussed the matter with an experienced attorney who called respondent's attention to the adverse impact respondent's directives would have on the attorney's ability to

practice law; and thereafter, despite the expressions of concern about respondent's directives, respondent again addressed himself to the attorney in open court in front of all those present and stated that the matter had gotten out of hand but that everything he had said earlier regarding recommendations, continuances, indigent appointments, and pleas still applied.

Am Jur 2d, Judges §§ 18-20, 50.

THIS matter is before the Court upon a recommendation by the Judicial Standards Commission, filed with the Court on 23 August 1990, that Judge Stafford G. Bullock, a Judge of the General Court of Justice, District Court Division, Tenth Judicial District of the State of North Carolina, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Heard in the Supreme Court 11 February 1991.

Lacy H. Thornburg, Attorney General, by James J. Coman, Senior Deputy Attorney General, and R. Dawn Gibbs, Assistant Attorney General, for the Judicial Standards Commission.

Womble Carlyle Sandridge & Rice, by Donald L. Smith; Bass & Bryant, by Gerald L. Bass; and Theresa A. N. Glover, Duke University School of Law, for Respondent.

PER CURIAM.

The Judicial Standards Commission (Commission) notified Judge Stafford G. Bullock on 12 April 1989 that it had ordered a preliminary investigation to determine whether formal proceedings under Commission Rule 7 should be instituted against him. The subject matter of the investigation included allegations that during the course of proceedings in open court in *State v. Coble*, Wake County File No. 89 CR 10254, over which Judge Bullock, respondent, presided on 13 March 1989, Judge Bullock wrongfully ordered the detention of the defendant's attorney, Richard N. Gusler, and threatened him when, in the course of representing his client and in response to questions from Judge Bullock, Mr. Gusler refused in good faith on ethical grounds to give Judge Bullock a reason for his motion to withdraw as counsel for defendant and to make a recommendation concerning defendant's eligibility for a diversion program.

Special Counsel for the Commission filed a complaint on 20 November 1989. Respondent answered the complaint and prayed that the action be dismissed and that no recommendation of discipline be forwarded to the North Carolina Supreme Court as provided by N.C.G.S. § 7A-377, the Code of Judicial Conduct and the Rules of the Judicial Standards Commission.

On 28 March 1990, Judge Bullock was given notice in accordance with Rule 10 of the Commission that a formal hearing concerning the charge alleged against him would be conducted. On 29 June 1990, respondent was accorded a plenary hearing before six members of the Commission on the charges contained in the complaint. The Commission's evidence was presented by James J. Coman, Senior Deputy Attorney General, and respondent was represented by his counsel Donald L. Smith, Gerald L. Bass, and Theresa A. N. Glover. After hearing the evidence, the Commission concluded on the basis of clear and convincing evidence that the conduct of respondent constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute and his actions violated Canons 2A, 3A(1), and 3A(3) of the North Carolina Code of Judicial Conduct. The findings upon which the Commission based its conclusion are found in paragraph 9 of its Recommendation and are as follows:

> The respondent presided over the 13 March 1989 criminal session of Wake County District Court at which the case of *State v. Thomas Franklin Coble*, Wake County file number 89 CR 10254, was calendared for the morning session of court. Due to the absence of the defendant's attorney, Richard N. Gusler, the case was held open to the afternoon session of court with the consent of the state's witnesses.
>
> When the case was called for trial that afternoon, Gusler was present and conferred with his client prior to trial while other cases on the afternoon docket were being heard. Following this conference, Gusler, acting quite properly and as required by the Rules of Professional Conduct applicable to an attorney in the circumstances in which Gusler found himself, made an oral motion before the respondent asking that he be allowed to withdraw as counsel due to a conflict with defendant Coble.
>
> The respondent inquired several times as to the basis for the motion, and Gusler consistently responded that he could

not reply because to do so would require him to reveal confidential information in violation of the attorney-client privilege. The respondent then asked defendant Coble the same question, and defendant told the respondent that he wanted to go into the first offender's program. Upon hearing this, the respondent asked Gusler for a recommendation concerning Coble's participation in this program. Again acting in accordance with the Rules of Professional Conduct, Gusler declined to make a recommendation, advising the respondent that to do so would require him to reveal information protected by the attorney-client privilege.

Although the respondent normally does not ask a defendant's attorney for such a recommendation and does not even sign the deferred prosecution agreement executed in connection with a defendant's participation in the first offender's program because he feels a defendant's participation is a matter to be determined by the district attorney's representative, the program's personnel, and the defendant, the respondent repeated his request several times, asking for at least a "yes" or "no" answer. Gusler continued to decline to answer on the same grounds, at one point asking the respondent to trust his judgment and finally indicating that the respondent should do what he had to do.

Notwithstanding the fact that Gusler at no time had been rude or disrespectful in his responses to the respondent's inquiries, the respondent directed the courtroom bailiff to take Gusler into custody. The bailiff escorted Gusler into the adjoining jury room where he remained in custody for approximately forty-five (45) minutes. At no time prior to or after his detention order did the respondent ever use the word contempt, indicate to Gusler that he was in contempt or his behavior was contemptuous, or make any other attempt to comply with the requirements of Chapter 5A of the North Carolina General Statutes relating to contempt proceedings. In fact, the respondent deliberately and consciously chose not to use contempt proceedings.

Subsequently, the respondent had the bailiff return Gusler to the courtroom. The respondent again asked for a recommendation from Gusler, and Gusler once again respectfully declined to answer. At that point, in lieu of initiating contempt pro-

ceedings, the respondent unequivocally and emphatically informed Gusler in open court that in the future the respondent would accept no recommendations from him, would not grant him any continuances, would not appoint him to represent indigent defendants, and would require his clients to plead guilty or not guilty as charged.

When Gusler expressed concern about the fairness of the respondent's directives to his future clients, the respondent replied "so be it." The respondent then denied the motion to withdraw and directed Gusler to remain in the courtroom while defendant Coble was sent to be interviewed for the first offender's program.

The respondent recessed into chambers at which time attorney Joe Cheshire, acting at the request of Gusler and with the respondent's consent, discussed the matter with the respondent in terms of a hypothetical case identical to Gusler's situation with defendant Coble. Attorney Cheshire went through the ethical rules applicable to attorneys in such a case, explained the dilemma Gusler faced even in providing a "yes" or "no" answer to the respondent's request for a recommendation, and discussed the adverse impact respondent's directive would have on Gusler's ability to practice law and his reputation among other judges, lawyers, and clients.

The respondent reconvened court and placed defendant Coble in the first offender's program. Thereafter, despite Gusler's and attorney Cheshire's expressions of concern about the respondent's directives, the respondent again addressed himself to Gusler in open court in front of all those present and stated that the matter had gotten out of hand but that everything he had said earlier regarding recommendations, continuances, indigent appointments, and pleas still applied.

Following this incident between the respondent and Gusler, newspaper reports of which he had read, Judge George Bason, Chief District Court Judge of the Tenth Judicial District, issued an administrative order on 16 March 1990. In light of the directives the respondent had issued to Gusler, Judge Bason felt that such an order was necessary to provide relief and protection for Gusler and his clients and for the proper administration of the court system.

Based upon these findings of fact and conclusion of law, the Commission recommended that the Supreme Court of North Carolina censure the respondent. On 11 September 1990, respondent petitioned this Court for a hearing on the Commission's recommendation for censure, and prayed that the recommendation of the Commission be rejected, that no discipline be imposed, and for such other relief as is just and proper.

A proceeding before the Judicial Standards Commission is "an inquiry into the conduct of one exercising judicial power . . . . Its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice." *In Re Nowell*, 293 N.C. 235, 241, 237 S.E.2d 246, 250 (1977). The recommendations of the Commission are not binding upon the Supreme Court, and this Court must consider all the evidence and exercise its independent judgment as to whether it should censure the respondent, remove him from office, or decline to do either. *In re Martin*, 295 N.C. 291, 301, 245 S.E.2d 766, 772 (1978).

We have carefully examined the evidence presented to the Commission and the arguments of counsel related thereto. We conclude that the findings made by the Commission in paragraph 9 are supported by clear and convincing evidence. *See In Re Kivett*, 309 N.C. 635, 309 S.E.2d 442 (1983). We agree with the Commission that the actions of the respondent constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute. We also agree with the Commission's conclusion that respondent's actions violate Canon 2A of the North Carolina Code of Judicial Conduct. Under the circumstances, we find it unnecessary to determine whether respondent's conduct may also violate Canons 3A(1) and 3A(3).

After respondent denied the attorney's motion to withdraw, he directed the attorney to remain in the courtroom while the defendant was sent to another room to be interviewed for the first offender's program. During a recess, respondent discussed the matter with an experienced attorney who called respondent's attention to the adverse impact respondent's directives would have on the attorney's ability to practice law. Thereafter, despite the expressions of concern about the respondent's directives, the respondent again addressed himself to the attorney in open court in front of all those present and stated that the matter had gotten out of hand but that everything he had said earlier regarding

recommendations, continuances, indigent appointments, and pleas still applied.

> Not every intemperate outburst of a judge, especially when it is an isolated, single event, occurring in the privacy of the judge's office and brought on by what the judge might reasonably have perceived to be some provocation, amounts to conduct deserving of discipline. To rule otherwise would be asking judges to be more than they can be; it would be asking them to be more than human.

In re Bullock, 324 N.C. 320, 322, 377 S.E.2d 743, 744 (1989). Here, however, the respondent's actions in open court, after having sufficient time for reflection, went beyond that which should reasonably be expected of an impartial member of the judiciary. Therefore, rather than promoting public confidence in the integrity and impartiality of the judiciary, this conduct, under the circumstances, was sufficiently egregious to amount to conduct prejudicial to the administration of justice that brings the judicial office in disrepute within the meaning of N.C.G.S. § 7A-376.

For the reasons herein stated, we conclude that the respondent's actions in the case of *State v. Coble*, Wake County File No. 89 CR 10254, constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. For this conduct, respondent merits censure.

Now, therefore, it is ordered by the Supreme Court of North Carolina, in Conference, that the respondent, Judge Stafford G. Bullock, be, and he is hereby, censured by this Court for the conduct determined herein to be conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 137, W. TERRY SHERRILL, RESPONDENT

No. 607A90

(Filed 2 May 1991)

1. **Judges § 7 (NCI3d) — resignation — jurisdiction of Judicial Standards Commission**

The resignation of respondent judge from his judicial office did not deprive the Judicial Standards Commission or the Supreme Court of jurisdiction where the Commission had notified the judge prior to his resignation that formal proceedings had been instituted against him and he had been served personally with that notice and a copy of the verified complaint. Moreover, the disciplinary proceeding did not become moot by reason of the resignation because the Court was still required to determine whether the additional sanctions specified by N.C.G.S. § 7A-376 were to be imposed.

Am Jur 2d, Judges §§ 17, 50.

2. **Judges § 7 (NCI3d) — willful misconduct — drug abuse — removal from office**

The Judicial Standards Commission's findings of fact concerning respondent's drug use were supported by the findings stipulated to by the respondent, and the Supreme Court concluded and adjudged that the respondent's conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute, for which he should be removed from office, disqualified from holding further office, and rendered ineligible for retirement benefits. N.C.G.S. § 7A-376 (1989).

Am Jur 2d, Judges §§ 18-20, 50.

PROCEEDING before the Supreme Court upon the recommendation of the North Carolina Judicial Standards Commission that the respondent, W. Terry Sherrill, a judge of the General Court of Justice, Superior Court Division, be removed from office as provided by N.C.G.S. § 7A-376.

PER CURIAM.

The issue before this Court, as a result of the recommendation of the North Carolina Judicial Standards Commission (hereinafter "Commission"), concerns whether certain conduct by the respondent, W. Terry Sherrill, was willful misconduct in office or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," within the meaning of N.C.G.S. § 7A-376, justifying his removal from office with the resulting statutory disqualification from receiving retirement benefits and holding further judicial office. Neither the Commission nor the respondent submitted briefs to this Court addressing that issue.

The facts giving rise to the Commission's recommendation that the respondent be removed from office are not in dispute. The Commission, meeting in Raleigh on 30 November 1990, considered the case against the respondent based upon the complaint previously filed by the Special Counsel for the Commission and the respondent's answer. Findings of fact were stipulated to by the respondent, his counsel and the Special Counsel for the Commission, as follows:

> 2. The Respondent, W. Terry Sherrill, was a judge of the General Court of Justice, Superior Court Division, Twenty-sixth Judicial District, on March 10, 1990, when the Respondent possessed marijuana, cocaine, and drug paraphernalia, in violation of N.C.G.S. §§ 90-95(a)(3) and 90-113.22. The Respondent was arrested for these offenses at approximately 10:30 p.m. on March 10, 1990 by Officer M. D. Hager of the Charlotte Police Department, while the Respondent was seated in his personal vehicle in front of 1827 Wilmore Drive, Charlotte, North Carolina.
>
> 3. On March 15, 1990, the Judicial Standards Commission notified the Respondent that it had ordered a preliminary investigation of the alleged misconduct on his part. At the time of this notification, the Respondent was still a Superior Court Judge and as such was subject to the Canons of the North Carolina Code of Judicial Conduct, the laws of the State of North Carolina, and the provisions of the oath of office for a Superior Court Judge set forth in the North Carolina General Statutes, Chapter 11.
>
> 4. That on March 19, 1990, the Respondent was placed in a Deferred Prosecution Program for the offenses arising

out of his arrest on March 10, 1990 for misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, and felony possession of cocaine. The Deferred Prosecution Program was to be one year in duration and required the Respondent to:

(a) Tender an immediate resignation as a Superior Court Judge;

(b) Tender his law license to the State Bar;

(c) Submit to and complete drug treatment as recommended.

5. On July 6, 1990, the Respondent notified Ms. Tonda B. Wilde, Director of Criminal Justice Services, TASC (Treatment Alternatives to Street Crimes) that he had tested positive for cocaine use by his then employer. A subsequent test administered by TASC to the Respondent on July 16, 1990 indicated he tested positive for cocaine on that day also.

6. On July 30, 1990, the Mecklenburg County Grand Jury indicted the Respondent for felony possession of cocaine, possession of drug paraphernalia and possession of marijuana.

7. On August 13, 1990, the Respondent entered a plea of guilty to all charges and received a one year active sentence.

The Commission concluded "that the actions of the respondent constitute willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute and his actions violate Canons 1 and 2A of the North Carolina Code of Judicial Conduct, the laws of the State of North Carolina, and his oath of office." Based upon the stipulated findings of fact and its conclusions relating thereto, the Commission, on 12 December 1990, recommended "that the Supreme Court remove the respondent and disqualify him from holding further judicial office."

[1] We first note that the respondent tendered his resignation from his judicial office on 19 March 1990. However, the tender of his resignation did not deprive the Commission or this Court of jurisdiction. Prior to the respondent's tender of his resignation, the Commission had notified him that formal proceedings had been instituted against him, and he had been served personally with that notice and a copy of the verified complaint specifying the charges against him. Therefore, the Commission and this Court

retained jurisdiction over the respondent and the charges against him. *In re Hunt*, 308 N.C. 328, 302 S.E.2d 235 (1983); *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978), *cert. denied*, 442 U.S. 92, 61 L. Ed. 2d 297 (1979). We further note that the issues raised in this disciplinary proceeding have not become moot by reason of the respondent's tender of his resignation. *Peoples*, 296 N.C. at 151, 250 S.E.2d at 914. This Court is still required to decide whether the respondent's conduct merits his removal from office in order to determine whether the additional sanctions specified in N.C.G.S. § 7A-376 are to be imposed. *Id.*

[2] Turning to the issues presented by the Commission's recommendation, this Court concludes that the Commission's findings of fact were supported by the findings of fact stipulated to by the respondent. Therefore, we accept the Commission's findings and adopt them as our own. Based upon those findings and the recommendation of the Commission, we conclude and adjudge that the respondent's conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute, for which he should be removed from office. Therefore, it is ordered by the Supreme Court of North Carolina, in conference, that the respondent, W. Terry Sherrill, be, and he is hereby, officially removed from office as a judge of the General Court of Justice, Superior Court Division. As a consequence of his removal from office, the respondent, W. Terry Sherrill, is disqualified by statute from holding further judicial office and is ineligible for retirement benefits. N.C.G.S. § 7A-376 (1989).

BARRY B. KEMPSON, ATTORNEY-IN-FACT FOR MARY A. BLOOMER, PETITIONER-APPELLEE v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT-APPELLANT

No. 570PA90

(Filed 2 May 1991)

Appeal and Error § 551 (NCI4th)— evenly divided Court—decision affirmed without precedential value

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the

remaining six justices are equally divided, the decision of the Court of Appeals is left undisturbed and stands without precedential value.

Am Jur 2d, Appeal and Error § 902.

ON discretionary review of a unanimous decision of the Court of Appeals, 100 N.C. App. 482, 397 S.E.2d 314 (1990), affirming order entered by *Lewis, J.*, at the 6 November 1989 Session of Superior Court, BUNCOMBE County. Heard in the Supreme Court 10 April 1991.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by R. Walton Davis, III, for petitioner-appellee.

Lacy H. Thornburg, Attorney General, by Jane T. Friedensen, Assistant Attorney General, for respondent-appellant.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, and N.C. Legal Services Resource Center, Inc., by Pam Silberman, amici curiae.

PER CURIAM.

Justice Martin recused and took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm, and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g., Bruce v. Memorial Mission Hospital*, 325 N.C. 541, 385 S.E.2d 144 (1989); *Hochheiser v. N.C. Dept. of Transportation*, 321 N.C. 117, 361 S.E.2d 562 (1987); *Shields v. Bobby Murray Chevrolet*, 300 N.C. 366, 266 S.E.2d 658 (1980); *State v. Johnson*, 286 N.C. 331, 210 S.E.2d 260 (1974).

Affirmed.

STATE OF NORTH CAROLINA v. JIMMY LEE RANDOLPH

No. 606A90

(Filed 2 May 1991)

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Wright, J.*, at the 13 August 1990 Criminal Session of Superior Court, WASHINGTON County. Calendared for argument in the Supreme Court 11 March 1991; determined on the briefs without oral argument pursuant to N.C.R. App. P. 30(d).

Lacy H. Thornburg, Attorney General, by Elizabeth G. McCrodden, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for defendant.

FRYE, Justice.

On 12 March 1990, the Washington County Grand Jury indicted defendant for the murder of Lynette Woods. The case was tried noncapitally at the 13 August 1990 Criminal Session of Superior Court, Washington County.

The evidence tended to show that defendant and the victim had lived together and defendant was the father of the victim's three-month-old child. A few weeks before the victim's death, she moved out of defendant's home, moved in with her mother, and began seeing Arthur "Bunk" Williams, an old family friend. Defendant told Williams that he did not like Williams seeing the victim and that defendant was "either going to straighten [the victim] up or kill her one."

On 27 February 1990, defendant and Thurman Brooks met between three and four o'clock in the afternoon at "the block" which was the corner of Fourth and Madison Streets in Plymouth. Brooks testified that he and defendant stayed in that area for the rest of the day, leaving only a few times to get more wine. According to Brooks, both he and defendant consumed large quantities of wine and smoked some cocaine, but neither of them became intoxicated. During the time they were together, defendant told Brooks and others who were present that he was angry and was going to kill somebody. Defendant also took Brooks to Carrie Brown's

Motel where defendant lived, and he showed Brooks that he had packed his clothes. When Brooks asked why defendant's clothes were packed, defendant replied that if he got into trouble he would already have his clothes packed and was ready to turn himself in. Brooks stayed with defendant until about 9:30 or 10 p.m. when Brooks left to go home.

On the evening of 27 February 1990, the victim went to work at the Little Man Restaurant located at the intersection of Highway 64 and Monroe Street, just a few blocks from both defendant's residence and the Plymouth Police Department. Defendant came to the restaurant for a few minutes around 8:30 that evening, had a brief conversation with the victim, and left. The restaurant closed at 11 p.m., and Williams came to pick up the victim from work. Williams was waiting for the victim in the parking lot when he saw defendant walk toward the restaurant. Defendant walked to the restaurant's drive-through window, knocked on the window, and asked one of the other employees to tell the victim to meet him at the back door of the restaurant. Defendant then turned and walked toward the back of the building. The victim met defendant at the back door of the building.

None of the restaurant's employees saw defendant shoot the victim, but several testified to hearing a noise like a "pop" or a "boom" and seeing the victim fall to the floor. No one testified to seeing defendant leave the area after they heard the shot fired. The victim died sometime after 11 p.m. on 27 February 1990 as a result of a shotgun wound to her left chest.

Defendant arrived at the Plymouth Police Department about 11:23 p.m. that evening. He was carrying a tote bag full of clothes, and his right hand was bleeding. Defendant told Phyllis Waterfield, the police dispatcher who was the only person present at the time, "I'm Jimmy Lee Randolph and I just shot Lynette Woods at the Little Man." Waterfield then called Sergeant R. D. McKimmey, who was investigating at the scene of the crime, and told him to return to the station.

McKimmey returned to the station and took defendant into custody. In response to McKimmey's questions, defendant said that he had shot the victim with a sawed-off shotgun using a number six shell and that he fired the gun from a distance of three to five feet. Defendant was advised of his rights and made a statement after signing a waiver. In the statement, defendant said that he

and the victim had been arguing over their baby who was born prematurely because of the victim's drug use. He said that he had gone to the Little Man Restaurant earlier in the evening to talk with the victim about the way the child was being raised and who was keeping the child. Defendant then stated that he left the restaurant and went to get the shotgun. He returned to the restaurant later and shot the victim. After he shot her, he left the area, threw the shotgun down somewhere along the railroad tracks, went to his residence to get his clothes and then to the police station to turn himself in.

The weapon was found several days later about fifteen feet from the railroad tracks and about one hundred and fifty yards from the back door of the Little Man Restaurant. Special Agent Eugene Bishop with the State Bureau of Investigation performed the ballistics testing on the weapon. He testified at trial that the number six pellets recovered from the floor of the restaurant and from the victim's body were consistent with the number six shell inside the weapon. Mr. Bishop further testified that when he test fired the weapon that he had to wear a glove because the particular type of ammunition used in the gun would cause the user's hand to be caught in the gun's locking mechanism when the gun was fired.

Defendant presented no evidence at trial. At the conclusion of the evidence, defendant made a motion to dismiss, but the trial court denied this motion. The jury was instructed on first-degree murder, and the trial court denied defendant's motion to have a second-degree murder instruction given to the jury. The jury found defendant guilty of first-degree murder, and the trial judge entered judgment on 16 August 1990, imposing a sentence of life imprisonment.

Defendant gave notice of appeal in open court, and the trial judge ordered that defendant be allowed to appeal as an indigent. The Appellate Defender was assigned to represent defendant in his appeal to this Court. In the brief filed in this Court, defense counsel stated that after repeated and close examination of the record, extensive review of relevant law, and consultation with fellow counsel, she was unable to identify an issue with sufficient merit to support a meaningful argument for relief on appeal. In accordance with *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), the brief filed by defense counsel discussed two possible assignments of error "that might arguably support the appeal."

Id. at 744, 18 L. Ed. 2d at 498. Defense counsel requested that this Court conduct a full examination of the record for error, and she submitted to defendant a copy of her brief, copies of the transcript and record, and a letter notifying defendant of his right to submit a brief to this Court on his own behalf in accordance with *Anders*. Defendant did not file his own brief with this Court.

Upon our thorough review of the transcript, record, and briefs, this Court finds no error warranting reversal of defendant's conviction or modification of his sentence. For this reason, we find no error in defendant's trial or sentencing.

No error.

CAROLYN A. WALKER v. MONUMENTAL GENERAL INSURANCE COMPANY

No. 21A91

(Filed 2 May 1991)

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, reported at 101 N.C. App. 244, 399 S.E.2d 420 (1990), affirming a judgment for plaintiff entered by *Allen (C. Walter), J.*, on 3 November 1989 in Superior Court, BUNCOMBE County. Calendared for argument in the Supreme Court 9 April 1991; decided on the briefs without oral arguments pursuant to N.C.R. App. P. 30(d).

Roberts Stevens & Cogburn, P.A., by Steven D. Cogburn and W. O. Brazil, III, for plaintiff appellee.

Womble Carlyle Sandridge & Rice, by F. Lane Williamson, for defendant appellant.

PER CURIAM.

Affirmed.

ESTELLA DURHAM v. JOSEPH E. HALE AND WIFE, ROBBIE M. HALE

No. 33A91

(Filed 2 May 1991)

APPEAL as of right by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 101 N.C. App. 204, 398 S.E.2d 911 (1990), affirming a judgment in favor of plaintiff in the amount of $4,746.25 entered by *Cherry, J.*, at the 16 January 1990 Civil Session of District Court, CUMBERLAND County. Heard in the Supreme Court 8 April 1991.

Downing & David, by Harold D. Downing, for plaintiff-appellee.

Barrington, Herndon & Raisig, P.A., by Carl A. Barrington, Jr., and Paul A. Raisig, Jr., for defendant-appellants.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion of Wynn, J. The case is remanded to the Court of Appeals for further remand to the Superior Court, Cumberland County, with instructions to vacate the judgment entered by the trial court and to enter a judgment consistent with this opinion.

Reversed and remanded.

BILLIE M. HARTSELL v. GENE W. HARTSELL

No. 405A90

(Filed 2 May 1991)

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from a divided panel of the Court of Appeals, 99 N.C. App. 380, 393 S.E.2d 570 (1990), affirming the order of *Johnston (Robert P.), J.*, at the 13 December 1988 Session of District Court, MECKLENBURG County. Heard in the Supreme Court 9 April 1991.

James, McElroy and Diehl, P.A., by William K. Diehl, Jr. and Barbara J. Hellenschmidt, for plaintiff appellee.

Douglas E. Brafford for defendant appellant.

PER CURIAM.

Affirmed.

NORMAN L. POLK v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 287PA90

(Filed 2 May 1991)

Appeal and Error § 551 (NCI4th)— evenly divided Court—decision affirmed without precedential value

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six justices are equally divided, the decision of the superior court is left undisturbed and stands without precedential value.

Am Jur 2d, Appeal and Error § 902.

ON discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of summary judgment for plaintiff entered by *Grant, J.*, at the 21 May 1990 Session of Superior Court, EDGECOMBE County. Heard in the Supreme Court 13 November 1990.

Connor, Bunn, Rogerson & Woodard, P.A., by James F. Rogerson, for plaintiff-appellee.

Poyner & Spruill, by George L. Simpson, III, for defendant-appellant.

PER CURIAM.

Chief Justice Exum took no part in the consideration or decision of this case. The remaining members of this Court were equally divided with three members voting to affirm the decision of the Superior Court and three members voting to reverse. Therefore, the decision of the Superior Court is left undisturbed and stands without precedential value. *See State v. Johnson*, 286 N.C. 331, 210 S.E.2d 260 (1974).

Affirmed.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

CUSTOM MOLDERS, INC. v. ROPER CORP.

No. 161A91

Case below: 101 N.C.App. 606

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 2 May 1991.

GREER v. WATSON

No. 42P91

Case below: 101 N.C.App. 242

Petition by defendant (Nationwide) for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

HENDERSON v. LeBAUER

No. 136P91

Case below: 101 N.C.App. 255

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

IN RE ANSEL v. COMR. OF MOTOR VEHICLES

No. 133P91

Case below: 101 N.C.App. 574

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

INTEGON GENERAL INS. CORP. v.
UNIVERSAL UNDERWRITERS INS. CO.

No. 45P91

Case Below: 101 N.C.App. 243

Petition by plaintiff (Integon) for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

JOHNSON v. IBM

No. 186P90

Case below: 97 N.C.App. 493
327 N.C. 429

Motion by plaintiff for reconsideration of petition for discretionary review denied 2 May 1991.

JONES COOLING & HEATING v. BOOTH

No. 510P90

Case below: 99 N.C.App. 757

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

LAUGHINGHOUSE v. STATE EX REL.
PORTS RAILWAY COMM.

No. 79P91

Case below: 101 N.C.App. 375

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

LUTZ v. LUTZ

No. 100P91

Case below: 101 N.C.App. 298

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

N.C. FARM BUREAU MUT. INS. CO. v. STOX

No. 124A91

Case below: 101 N.C.App. 671

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 May 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. BARLOW

No. 146PA91

Case below: 102 N.C.App. 71

Motion by the Attorney General for temporary stay allowed 22 March 1991 pending consideration and determination of the petition for discretionary review. Stay dissolved and petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 2 May 1991 for the limited purpose of entering the following order: the case is remanded to the Court of Appeals for reconsideration in light of *State v. Edgerton*, 328 N.C. 319 (1991).

STATE v. BOWLES

No. 137P91

Case below: 101 N.C.App. 575

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

STATE v. BRYANT

No. 169P91

Case below: 102 N.C.App. 134

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 May 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

STATE v. DRDAK

No. 107PA91

Case below: 101 N.C.App. 659

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 2 May 1991. Petition by Attorney General for writ of supersedeas allowed 2 May 1991.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. GREGORY

No. 111P91

Case below: 101 N.C.App. 723

Stay dissolved and petition by defendant for writ of supersedeas denied 2 May 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

STATE v. McCRAE

No. 156P91

Case below: 99 N.C.App. 774

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 May 1991.

STATE v. SIMPSON

No. 130P91

Case below: 101 N.C.App. 576

Stay dissolved and petition by defendant for writ of supersedeas denied 2 May 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

STATE v. VEGA

No. 134P91

Case below: 101 N.C.App. 576

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

TOWNSEND v. HARRIS

No. 143P91

Case below: 102 N.C.App. 131

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 2 May 1991. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

TRIANGLE BEVERAGE CO. v. ALLBEV, INC.

No. 120P91

Case below: 101 N.C.App. 244

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 2 May 1991.

YOUNG v. STEWART

No. 102P91

Case below: 101 N.C.App. 312

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

PETITIONS TO REHEAR

KIRKMAN v. WILSON

No. 242A90

Case below: 328 N.C. 309

Petitions by plaintiffs and defendants to rehear pursuant to Rule 31 denied 2 May 1991.

STATE v. WHITTLE

No. 164PA90

Case below: 328 N.C. 456

Petition by plaintiffs to rehear pursuant to Rule 31 denied 2 May 1991.

APPENDIXES

PRESENTATION OF
JUSTICE COPELAND PORTRAIT

INTERSTATE PRACTICE
OF LAW

CEREMONY FOR THE PRESENTATION OF THE PORTRAIT OF FORMER ASSOCIATE JUSTICE JAMES WILLIAM COPELAND

On October 26, 1990, at 11:00 a.m., the Supreme Court of North Carolina convened for the purpose of receiving the portrait of the Honorable James William Copeland, former Associate Justice of the Supreme Court of North Carolina.

Upon the opening of Court on the morning of October 26, 1990, the Clerk of the Supreme Court sounded the gavel and announced:

> "The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of North Carolina."

All persons in the Courtroom rose, and upon the members of the Court reaching their respective places on the bench, the Clerk announced:

> "Oyez, Oyez, Oyez—The Supreme Court of North Carolina is now sitting in ceremonial occasion for the presentation of the portrait of former Associate Justice James William Copeland. God save the State and this Honorable Court."

The Clerk and the audience were then seated.

Chief Justice James G. Exum, Jr., welcomed official and personal guests of the Court, and invited Rev. Owen Fitzgerald to offer the invocation.

> The Court is convened this morning in ceremonial session for the presentation of the portrait of one of its former members, the Honorable J. William Copeland.
>
> We are happy to see so many of Justice Copeland's family, friends and professional colleagues here with us this morning. The Court is particularly pleased to welcome former Chief Justice Susie Sharp and former Governors Jim Hunt and Bob Scott. We also welcome back to these halls former Justices Beverly Lake, Frank Huskins, David Britt and Phil Carlton and our venerable former Clerk, the Honorable Adrian Newton. We welcome Chief Judge Fred Hedrick of the Court of Appeals and Court of Appeals Judges Gerald Arnold, Hugh Wells, Jack Cozort and Jack Lewis. We are honored to have with us Federal Judges Frank Dupree and Frank Bullock. We are certainly honored this morning with the presence of the venerable former

Secretary of State Thad Eure. We welcome all our distinguished guests, public servants and friends of Justice Copeland.

INVOCATION BY THE REVEREND OWEN FITZGERALD

Almighty God, who in Your providence has made us citizens of a land great in privilege and abundant in opportunity, we give you thanks for the country which we love and which we are called in our generation to serve. We thank You for the ideals of faith and freedom which have brought millions to these shores, and for those who through the generations have striven to maintain principles of justice, liberty, fidelity and integrity. Make us today worthy of and true to the best of our past, eager for a still larger future, and, above all, faithful to our calling.

On this occasion, we remember with affection and honor with appreciation the life and career of one whose commitment to the highest levels of integrity were evident throughout his life. The principles by which he lived in his home, his church and community were evidenced in his service to this State in the Legislative, Administrative, and Judicial branches of government. He served this State with distinction in so many ways, but most especially through years of service on this bench.

May your blessings be upon this high court and this occasion on which we celebrate the memory of William Copeland. Amen.

Chief Justice Exum then recognized the special guest who would address the Court, the Honorable Joseph Branch, Retired Chief Justice of the Supreme Court of North Carolina.

It is a real privilege for me now to call on a truly great North Carolinian to make the memorial address of presentation. He needs no introduction. He has been a great lawyer, a great legislator, a friend and counselor to Governors, a judge's Judge, and a former Chief Justice of this court. I counted it an honor to have served with him on this Court for eleven years. He is my former boss, a friend of everyone in this room and almost everyone in North Carolina, former Chief Justice Joseph Branch.

REMARKS BY THE HONORABLE JOSEPH BRANCH,
RETIRED CHIEF JUSTICE OF THE SUPREME COURT
OF NORTH CAROLINA,
UPON THE PRESENTATION TO THE COURT
OF THE PORTRAIT OF JAMES WILLIAM COPELAND

Thank you, Chief Justice.

If it please the Court, it was my privilege to have enjoyed one course in a classroom of Dr. N.Y. Gulley, the founder of the Wake Forest College, now Wake Forest University, Law School. He once said to us, and I quote: "Young gentlemen, never make excuses about a speech you are about to deliver." However, I feel that this occasion requires an explanation of my presence before this great Court.

Senator Terry Sanford had agreed to speak on this occasion, and it was entirely proper that he be the speaker, since he was the person who appointed Justice J. William Copeland to the Superior Court bench and to the office of Legislative Counsel, to the Budget Bureau, and to several other important places. And it was proper that he be here to speak in his behalf. His appointment to the Court initiated a long and distinguished judicial career, which has brought him to the bench that you now occupy. Senator Sanford found it impossible to be here today to fulfill the duties that he'd been requested to perform because of the stress and demands of the budget dilemma that we are all so familiar with. And he notified the Copeland family on Wednesday afternoon of his situation.

I recognize my inability to do justice to my old friend J. William Copeland in the time frame given, particularly when I stand in the place of a former Governor, a present United States Senator, and a former President of Duke University. Even so, I am honored that the family of Justice Copeland has given me the opportunity to take part in the presentation of his portrait to this Court.

Justice James William Copeland was born in Woodland, North Carolina, in Northampton County on June 16, 1914. And I might digress for a moment to say that only the Roanoke River separated my home county and the home county of Justice Copeland. His parents were Luther Clifton Copeland and Nora Benthall Copeland. His father was a farmer and merchant who enjoyed extensive land holdings in Northampton County. Justice Copeland had in his family, or has, a sister, Louise E. Threewitts, who now lives in Littleton, and a brother, Luther Clifton Copeland, Jr., a resident of Woodland, North Carolina.

Justice Copeland, upon his graduation from Woodland High School, entered college at Guilford, where he earned an A.B. degree in 1934. He then entered the University of North Carolina Law School, and there received his juris doctor degree, with honors, in 1937. During his law school days, he was honored by being made Associate Editor of the North Carolina Law Review. Upon his graduation and after having passed the bar and being licensed,

he returned to his home in Woodland, where he began the practice of law. The people of Woodland very quickly recognized his knowledge and ability in the science of government and elected him Mayor of Woodland.

It was not long after his return to Woodland that young lawyer Copeland, who we all know had an ability to look around and discover things that others could not find, discovered a young lady by the name of Nancy Hall Sawyer, from Elizabeth City, who was teaching school in nearby Rich Square. He immediately, in company with many other young men, began to pay court to her. I have heard from the family that when William would come in the front, she would put one out the back door and kept a continuous chain going. I don't know whether that's true or not. But somewhat. This was one of the wisest moves . . .

Chief Justice Exum interrupting: Be careful now, Joe. This is the Supreme Court!

. . . This was one of the wisest moves of his life. And one of the happiest days of his life came to pass when they were married in October of 1941.

Judge Copeland entered the Navy in 1942, commissioned as an Ensign. He served in the North and South Pacific from 1943 to 1945. And he was then transferred to the Sixth Naval District, Charleston, South Carolina, where he served in the Judge Advocate General's court martials from 1945 until his discharge with honor in 1946, with the rank of Lieutenant, Senior Grade.

Upon his release from the service, Justice Copeland returned to eastern Carolina and opened an office in the practice of law in Murfreesboro, North Carolina. Shortly after his return to the practice of law, he was again recognized and then was named Mayor of Murfreesboro.

He then was elected to the North Carolina Senate by the people of his district in 1951 and served them well in that capacity through 1959. While serving in the Senate, he was also chosen as a delegate to the 1956 Democratic Convention in Chicago. And I might digress another moment to say that I joined him in that trip, and it was one of the finest occasions of my life. We were chaperoned by Emmett Winslow and Hathaway Cross, so you know we were okay.

Governor Terry Sanford named Justice Copeland as his legislative counsel for the 1961 session of the North Carolina General Assembly.

I lived in nearby Halifax County, and we started to practice about the same time and our paths often crossed. And I was not at all surprised to observe his remarkable success in the political field because he was a gregarious man, who actually enjoyed being a part of the political process and its intricate inner workings and in its battlefield. His genius was that he genuinely liked people.

It is noticeable, too, that Governor Sanford again appeared and appointed Justice Copeland a Special Superior Court Judge, and he was reappointed to that position by Governor Dan K. Moore in 1966. During his tenure on the trial bench, he held court in eighty-eight counties. And I am inclined to believe that this was the happiest time of his life because it gave him the opportunity to travel throughout North Carolina, to know and associate with lawyers and leaders in the various courts and communities.

Thereafter, Justice Copeland ran for and was elected to the North Carolina Supreme Court in the general election of 1974, and served with distinction in that Court until his retirement in 1985. During his service as an Associate Justice of this Court, he wrote two hundred five opinions, beginning in volume 286 at page 422 and ending in volume 310 at page 259. His opinions reflected not only a knowledge of the law, but an understanding of the people and litigants who were involved.

Judge Copeland was a member of the American Bar Association, the North Carolina Bar Association, the American Judicature Society, and was a member of the North Carolina Bar Council from 1954 through 1957.

Not all of his energy, however, was devoted to the law and government. He was an active member of the Murfreesboro Methodist Church and was a Mason and a Shriner. He was an avid student of history and genealogy, particularly eastern Carolina types. And he even found time to contribute a scholarly article to the State magazine concerning the impeachment trial of reconstruction Governor William W. Holden in 1871. He was also an ardent supporter of the University of North Carolina Law School and Guilford College, and it was Guilford College that rewarded him for his support with its Distinguished Alumni Award.

I suppose that everyone who has served on an appellate court may have had a somewhat different perspective in their voting and writing than other people. I believe that Justice Copeland was a realist and sought the right result. I know many of you have heard him ask, "What is the bottom line?" To him, the bottom

line was what more often judges refer to as what is equity and what is right.

I have noticed the genius of the man was that he liked people. The heart of the man was his love for his family, as born to his marriage to Nancy, three children: Emily, James W. Jr., and Buxton; there are two grandchildren: Christopher Copeland and Natalie Copeland.

As this portrait is presented to the Court in the presence of his family and friends, we recognize the life of an able lawyer, trial judge, Justice of the Supreme Court, public servant, Naval officer in the time of war, loving husband, father, and grandfather. The hallmark of his life was his love for people and public service. He was, indeed, North Carolina's happy warrior.

Thank you.

The Chief Justice announced the unveiling of the portrait by Miss Natalie Sawyer Copeland and Mr. Christopher Copeland, grandchildren of Justice Copeland.

UNVEILING OF PORTRAIT

The Chief Justice then recognized the artist, Dean Paulis, and made his remarks accepting the portrait:

> Thank you, Chief Justice Branch, for those eloquent and perceptive remarks. They will, of course, be spread upon the minutes of this Court.
>
> I would just like to add that Justice Copeland was a good and loyal friend of mine. We served together for eight years on the Superior Court, and fifteen years ago this coming January the third, we were sworn in together as members of this Court. He was a man whom I enjoyed and admired. I have greatly missed him and am glad to have his portrait here nearby. It will serve to remind me of the many good years and good times that we had, working and playing together. The Court is pleased to accept the portrait. We are grateful to the family, Nancy, Emily, Buck, and James, for it. It will be hung shortly, in an appropriate place in these halls.

The Clerk then escorted the Copeland family to their places in the receiving line. Members of the Supreme Court, official guests of the Court, and special friends proceeded through the receiving line until all had so proceeded. The ceremony was thereupon concluded.

* * * *

TRIBUTE BY THE HONORABLE TERRY SANFORD
UNITED STATES SENATOR
UPON THE PRESENTATION TO THE COURT
OF THE PORTRAIT OF JAMES WILLIAM COPELAND

Justice William Copeland was highly respected by the members of the Bar who practiced before this Supreme Court during the decade he served. He had always well prepared himself with the facts and the law, and his questions were pointedly considerate, and courteous. His decisions were thoughtful, insightful. For many generations to come law students will be educated by the clarity of his explanations of the law in his decisions, and judges will be facilitated in explaining the law to juries. Justice Copeland was recognized as a scholar.

I think it is fair to say he loved the law and revered the Court. I think that he found his years on the Supreme Court satisfying, but I am sure that he found his thirteen years as a Superior Court Judge among the most exciting experiences of his eventful life. He held Court in eighty-five of our one hundred counties. He knew and considered as his friends, and they in turn considered him a friend, all the Sheriffs, the other Courthouse officials, and most of the lawyers across the State. He was an excellent trial judge, fair and impartial, neither too severe nor too lenient, but compassionate or stern as the situation required, blending dignity with humor, always considerate of the participants in the Court drama, from juror to litigants to defendants and Court officers, as well as spectators.

He played a special part in my life as the skillful and experienced Legislative Counsel to the Governor during my first legislative session. He guided through an ambitious program for educational improvement, for Court reform, and economic development. We had scores of items on our legislative agenda, and he kept them all moving, corralling votes and engaging allies, and at the end of our first year we calculated that we had accomplished 110 percent of our objectives. That is William Copeland's legislative record.

Prior to that we served as colleagues in the North Carolina State Senate, where his long experience was of tremendous guidance to a new legislator.

A product of the University of North Carolina Law School, where he graduated with honors; and a graduate of Guilford College, where he had gone from high school in Murfreesboro, William Copeland had thousands of friends across the State. He knew them

all, cared about them all, recognized them all. I count as one of the great blessings and joys of my life that he and I were friends.

His portrait will hang in these Supreme Court halls as a reminder to future generations of William Copeland's fidelity, commitment and service to the people of the State of North Carolina.

INTERSTATE PRACTICE OF LAW

The following amendment to the Rules, Regulations and the Certificate of Organization of the North Carolina State Bar is duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 16, 1982.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article II, Section 2 of the Certificate of Organization and Rules of the North Carolina State Bar, as appears in 205 NC 855 and as amended in 221 NC 583 and 275 NC 705 is hereby amended by adding a new section 2.1 to read as follows:

§ 2.1 INTERSTATE PRACTICE OF LAW

No law firm or professional corporation having among its constituent partners or employees attorneys who are not licensed to practice law in North Carolina or having as its partner a law firm or professional corporation which has among its constituent partners, shareholders or employees attorneys who are not licensed to practice law in North Carolina may do business in North Carolina without first having obtained a certificate of registration. The Secretary of the North Carolina State Bar shall issue such a certificate upon satisfaction of the following conditions precedent:

(1) There shall be filed with the Secretary of the North Carolina State Bar a registration statement disclosing:

(a) all names used to identify the filing law firm or professional corporation;

(b) addresses of all offices maintained by the filing law firm or professional corporation;

(c) the name and address of any law firm or professional corporation with which the filing law firm or professional corporation is in partnership and the name and address of such partnership;

(d) the name and address of each attorney who is a partner, shareholder or employee of the filing law firm or professional corporation or who is a partner, shareholder or employee of a law firm or professional corporation with which the filing law firm or professional corporation is in partnership;

(e) the relationship of each attorney identified in (d) above to the filing law firm or professional corporation;

(f) the states to which each attorney identified in (d) above is admitted to practice law.

(2) There shall be filed with the registration statement certificates showing that each attorney identified in (1)(d) above who is not licensed to practice law in North Carolina is a member in good standing of each state bar to which he had been admitted. Such certificates must bear the seal of the state agency or court of last resort which is responsible for regulating the legal profession in the issuing state.

(3) There shall be filed with the registration statement a notarized statement of the filing law firm or professional corporation affirming that each attorney identified in (1)(d) above who is not licensed to practice law in North Carolina will govern his personal and professional conduct with respect to legal matters arising from North Carolina in accordance with the Code of Professional Responsibility of the North Carolina State Bar.

(4) There shall be submitted with each registration statement and supporting documentation a registration fee of $90.00 as administrative cost.

A certificate of registration shall remain effective until January 1 following the date of filing and may be renewed annually by the Secretary of the North Carolina State Bar upon the filing of an updated registration statement which satisfies the requirements set forth above and the submission of the registration fee.

This rule shall not be construed to confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar has been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting, unanimously adopt said amendment to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of July, 1982.

s/B. E. James
B. E. JAMES, Secretary
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of December, 1982.

s/JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 8th day of December, 1982.

s/MARTIN, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d and 4th.

TOPICS COVERED IN THIS INDEX

ANIMALS, LIVESTOCK, OR POULTRY

§ 11 (NCI4th). Injuries caused by horses and mules

The trial court erred in directing a verdict for defendants in a negligence action arising from defendant's horse kicking plaintiff's son where the gravamen of plaintiff's complaint was not keeping a dangerous animal, but that defendants encouraged the two children to play with the horse while unsupervised. *Williams v. Tysinger*, 55.

It cannot be said as a matter of law that plaintiff was contributorily negligent in allowing her sons to play with a horse unattended. *Ibid.*

APPEAL AND ERROR

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion

Defendant did not object at trial to a ruling finding child witnesses competent and was precluded from attacking that ruling on appeal. *S. v. Phillips*, 1.

A contention in a murder and arson prosecution that the officer serving a search warrant failed to comply with statutory requirements was not preserved for appellate review where nothing in the record indicates that the trial court had the question before it. *S. v. Eason*, 409.

§ 167 (NCI4th). Advisory opinions

The Court of Appeals erred by treating plaintiffs' appeal as a petition for certiorari where a decision on this record would constitute an advisory opinion on abstract questions. *Kirkman v. Wilson*, 309.

§ 551 (NCI4th). Precedential effect of affirmance where justices evenly divided

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six justices are equally divided, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *Kempson v. N.C. Dept. of Human Resources*, 722.

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six justices are equally divided, the decision of the superior court is left undisturbed and stands without precedential value. *Polk v. N.C. Farm Bureau Mut. Ins. Co.*, 730.

ARREST AND BAIL

§ 39 (NCI3d). Particular probable cause showings

A murder and arson defendant's statement did not result from an unlawful seizure of his person where there was sufficient probable cause to support the warrant upon which he was arrested. *S. v. Eason*, 409.

§ 63 (NCI4th). Probable cause; identification of suspect by victims and bystanders

The circumstances surrounding defendant's arrest, when combined with a victim's description of the person who robbed and shot the two victims as "a black male wearing blue jeans and a blue shirt," established probable cause for the warrantless arrest of defendant. *S. v. Smith*, 99.

ARSON AND OTHER BURNINGS

§ 25 (NCI4th). Sufficiency of evidence for jury generally

The trial court did not err by denying defendant's motion to dismiss at the close of all the evidence where there was evidence that the victim was alive at the moment when the mobile home was set on fire, so that the mobile home was occupied at the time it burned. *S. v. Eason*, 409.

ASSAULT AND BATTERY

§ 26 (NCI4th). Sufficiency of evidence; where weapon is a firearm

The State presented substantial evidence that defendant was one of the perpetrators of an assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Black*, 191.

AUTOMOBILES AND OTHER VEHICLES

§ 570 (NCI4th). Last clear chance; persons crossing road

It could not be concluded as a matter of law that plaintiff's evidence was insufficient to invoke the doctrine of last clear chance. *VanCamp v. Burgner*, 495.

COMMON LAW

§ 1 (NCI4th). Generally

So much of the common law as has not been abrogated or repealed by statute or become obsolete is in full force and effect in this state pursuant to G.S. 4-1. *S. v. Buckom*, 313; *S. v. Vance*, 613.

CONSTITUTIONAL LAW

§ 28 (NCI4th). Power of taxation

A contract under which a news program with commercial advertising was supplied to public schools by a private company did not violate the North Carolina constitutional provision providing that the power of taxation shall be used for public purposes only. *S. v. Whittle Communications*, 456.

§ 202 (NCI4th). Former jeopardy; kidnapping and murder

Defendant waived the issue of double jeopardy in the entering of judgments against him for murder and kidnapping by not raising any double jeopardy issue at trial. *S. v. Madric*, 223.

§ 252 (NCI4th). Discovery; miscellaneous

The trial court did not err in a prosecution for murder and arson by denying defendant's motion for funds to hire a private investigator. *S. v. Eason*, 409.

§ 340 (NCI4th). Right of confrontation generally

Defendant's constitutional right of confrontation was not violated by the admission of a witness's testimony that his wife heard a kidnapping and rape victim ask "Are you going to shoot me, too?" where the testimony was used merely to show that the statement had been made and its effect on the witness. *S. v. Roper*, 337.

CONSTITUTIONAL LAW — Continued

§ 344 (NCI4th). Presence of defendant at voir dire

There was no prejudicial error in a first degree murder prosecution where the trial court began the second day of jury selection before defendant was present in court. *S. v. Payne*, 377.

Defendant was not denied his right to be present at every stage of his trial because the trial judge supplemented the jury venire with persons who had been sitting in an adjoining courtroom and those jurors had already been sworn by another judge. *S. v. Roper*, 337.

§ 346 (NCI4th). Right to call witnesses and present evidence generally

The trial court's denial of funds for an investigator to help locate a witness to the shooting of the deceased was not an abuse of discretion or a violation of defendant's constitutional rights to compulsory process and due process. *S. v. Roper*, 337.

§ 347 (NCI4th). Right to present evidence; continuances

In examining the denial of a motion for a continuance for error under either the federal or state constitutions, the courts balance the private interest that will be affected and the risk of erroneous deprivation of that interest through the procedures used against the government interest in fiscal and administrative efficiency. *S. v. Roper*, 337.

The trial court's denial of defendant's motion for a continuance because a witness to the shooting of the deceased could not be located was not an abuse of discretion and did not deny defendant's rights to compulsory process and due process. *Ibid.*

§ 349 (NCI4th). Right to present evidence; cross-examination of witnesses

Defendant's constitutional right of confrontation was not violated by the admission of a deputy sheriff's hearsay testimony that a murder victim told him the day he died that defendant had threatened his life and had threatened to rape a second victim where the hearsay statements possessed indicia of reliability. *S. v. Roper*, 337.

§ 354 (NCI4th). Self-incrimination; when privilege may be invoked

The trial court did not err in a noncapital prosecution for murder and arson by refusing to require defendant's mother to answer questions during a voir dire hearing on a motion to suppress after she invoked her Fifth Amendment privilege against self-incrimination. *S. v. Eason*, 409.

COSTS

§ 36 (NCI4th). Attorney's fees; nonjusticiable cases

In deciding a motion for attorney fees under G.S. 6-21.5, the trial court is required to evaluate whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue. *Sunamerica Financial Corp. v. Bonham*, 254.

The trial court properly awarded attorney fees to defendant under G.S. 6-21.5 on the basis that there was no justiciable issue where plaintiff's complaint adequately pled the existence of a debt between the parties, defendant's answer pled the statute of limitations as a defense, it should have been apparent to plaintiff that the complaint no longer contained a justiciable issue, and instead of seeking dismissal

COSTS — Continued

of the case, plaintiff opposed defendant's motion for summary judgment with evidence that would not toll the statute of limitations. *Ibid.*

COUNTIES

§ 6.2 (NCI3d). Fiscal management; expenditure of funds

The statute authorizing local governments to finance the construction of improvements on real property by installment contracts that create a security interest in the improvements and real property without a vote of the people is constitutional. *Wayne County Citizens Assn. v. Wayne County Bd. of Comrs.*, 24.

A county board of commissioners complied with the provisions of G.S. 160A-20 in entering an installment purchase contract for court, administrative and jail buildings. *Ibid.*

COURTS

§ 5 (NCI4th). Subject matter jurisdiction generally

The trial court's error in dismissing a complaint for lack of subject matter jurisdiction was harmless where the court correctly adjudicated the issues before it. *S. v. Whittle Communications*, 456.

§ 135 (NCI4th). Conflict of laws; matters involving federal property

The Onslow County Superior Court did not have jurisdiction to try a person as an adult for murders he allegedly committed as a juvenile at the Camp Lejeune military reservation. *S. v. Smith*, 161.

CRIMINAL LAW

§ 11 (NCI4th). Definition of offense; effect of vagueness or uncertainty

When a statute punishes a crime known at common law without defining its elements, the common law controls. *S. v. Buckom*, 313.

§ 17 (NCI4th). Presumption of sanity

The trial court did not err by instructing the jury that everyone is presumed sane and that soundness of mind is a natural and normal condition of people. *S. v. Thompson*, 477.

§ 34.4 (NCI3d). Admissibility of evidence of other offenses

The trial court did not err in a prosecution for murder and felony child abuse by admitting testimony from former foster children of defendants regarding child abuse occurrences taking place in Chicago one or two years prior to the present crimes. *S. v. Phillips*, 1.

Testimony by defendant's girlfriend giving details of defendant's assault on her on the morning of 18 August was relevant in a prosecution of defendant for a rape and murder on the night of 18 August to rebut the inference that defendant was referring to the altercation with his girlfriend rather than to the rape and murder of the victim when he told a witness the night of 18 August that he had "beat this girl," and the testimony was properly admitted for "other purposes" under Rule of Evidence 404(b). *S. v. McKinnon*, 668.

§ 66.11 (NCI3d). Identification; confrontation at scene of crime or arrest

The trial court did not err by admitting out-of-court identifications by witnesses where the identification procedures, coupled with the statements of officers, were unduly suggestive, but the corrupting effect was insufficient to tip the scales against defendant. *S. v. Richardson*, 505.

§ 68 (NCI3d). Other evidence of identity

The trial court did not err in a prosecution for murder and arson by allowing the State to introduce the victim's left little finger. *S. v. Eason*, 409.

§ 73 (NCI3d). Hearsay testimony in general

The trial court did not err in a prosecution for murder and arson by permitting testimony about a statement defendant made in a letter to the witness after he was arrested and placed in jail even though the letters had disappeared. *S. v. Eason*, 409.

§ 73.2 (NCI3d). Statements not within hearsay rule

Testimony by a witness that, after he and his wife were awakened by a gunshot and he had called the sheriff's department, his wife heard a rape and kidnapping victim ask, "Are you going to shoot me, too?" was not inadmissible hearsay but was relevant and properly admitted for the limited purpose of showing that a statement was made which caused the witness to call the sheriff's department a second time. *S. v. Roper*, 337.

Testimony by a deputy sheriff that a murder victim told him the day he died that defendant had threatened his life and threatened to rape a second victim was admissible under the residual exception to the hearsay rule. *Ibid.*

§ 75 (NCI3d). Admissibility in general; test of voluntariness

The trial court did not err by denying defendant's motion to suppress a statement where the court made proper findings, there was competent evidence to support the findings, and the findings supported the conclusion that he voluntarily gave his statement. *S. v. Madric*, 223.

§ 75 (NCI4th). Change of venue generally

There was no prejudice in a prosecution for murder, kidnapping, and armed robbery in the trial court's excluding from defendant's change of venue hearing opinion testimony on whether defendant could receive a fair trial in Rockingham County. *S. v. Madric*, 223.

§ 75.2 (NCI3d). Confessions; effect of promises or threats or other statements of officers

Defendant's confession to the sheriff was not involuntary because the sheriff told defendant that the Bible encouraged truth telling, that telling the truth would help with the judge and prosecutor, and that he could get the electric chair where the trial court found, based upon the sheriff's testimony, that no promises were made to defendant, and the totality of the circumstances permitted the conclusion that the confession was voluntary. *S. v. Smith*, 99.

§ 75.3 (NCI3d). Effect of confronting defendant with statements of others or with evidence

The trial court did not err in a murder and arson prosecution by denying defendant's motion to suppress his statement on the basis of mental duress where

defendant raised the issue of evidence against him and an officer answered truthfully. *S. v. Eason*, 409.

§ 75.8 (NCI3d). Requirement that defendant be warned of constitutional rights; warning before resumption of interrogation

The trial court did not err in finding that *Miranda* warnings given to defendant prior to his first interrogation by police officers had not grown stale at the time of his second interrogation by the sheriff and in concluding that defendant's statements to the sheriff and the fruits of those statements were not inadmissible because defendant was not given renewed *Miranda* warnings prior to the second interrogation. *S. v. Smith*, 99.

§ 75.9 (NCI3d). Volunteered and spontaneous statements

The trial court did not err by admitting into evidence a confession made by defendant to a deputy sheriff where the deputy attempted to advise defendant of his constitutional rights but defendant spontaneously began making a statement and the deputy could not stop him; earlier questioning by another deputy did not taint the subsequent confession even if defendant was in custody during the first questioning because there was no evidence that the prior questioning was coercive. *S. v. Edgerton*, 319.

§ 75.11 (NCI3d). Waiver of constitutional rights; sufficiency of waiver

There was no merit to a murder and arson defendant's contention that his refusal to sign a waiver was tantamount to invoking his right to counsel and to remain silent. *S. v. Eason*, 409.

§ 75.14 (NCI3d). Defendant's mental capacity to confess or waive rights; generally; insanity; retardation

The trial court erred in refusing to permit a forensic clinical psychologist to state his opinion that defendant did not understand the *Miranda* warnings given by police before he allegedly waived his rights and confessed. *S. v. Sanchez*, 247.

§ 75.15 (NCI3d). Defendant's mental capacity to confess or waive rights; intoxication

The trial court did not err in a murder and arson prosecution by denying defendant's motion to suppress a statement made while hung over. *S. v. Eason*, 409.

§ 76 (NCI4th). Motion for change of venue; prejudice, pretrial publicity or inability to receive fair trial

There was no prejudicial error in a prosecution for murder and armed robbery in the denial of defendant's motion for a change of venue due to pretrial publicity, even though the trial court misstated the applicable standard in making its ruling. *S. v. Small*, 175.

§ 76.5 (NCI3d). Voir dire hearing; findings of fact generally; necessity for findings

The trial court was not required to make findings regarding the sheriff's statement to defendant that he could tell the judge and district attorney that defendant had cooperated where the sheriff's testimony that he made the statement was uncontradicted and the statement did not render defendant's confession involuntary, and although there was a material conflict in the evidence as to whether the sheriff made statements or promises about which defendant testified, the trial court's finding that no promises were made to defendant was, in essence, a finding that the promises about which defendant testified were never made. *S. v. Smith*, 99.

CRIMINAL LAW — Continued

§ 91 (NCI4th). Preliminary or probable cause hearing generally

There was no error in trying a defendant for murder and arson without a probable cause hearing where defendant was indicted by a grand jury. *S. v. Eason*, 409.

§ 95 (NCI3d). Admission of evidence competent for restricted purpose

The trial court did not err in allowing a witness to testify about religious statements made by a murder victim during the ambulance ride to the hospital where the court correctly instructed the jury that this testimony was before it only to show the consciousness of the victim at that time. *S. v. Smith*, 99.

§ 102.5 (NCI3d). Conduct in examining or cross-examining defendant and other witnesses; improper questions

Defendant was not prejudiced by the prosecutor's improper questions as to whether a murder victim was able to make peace with the Lord before he died where the court properly sustained objections to those questions, and the improper questions were not persistently repeated. *S. v. Smith*, 99.

§ 106 (NCI4th). Discovery proceedings; statements of State's witnesses

Defendant in a prosecution for murder and felony child abuse had no right to pretrial interviews with children who were witnesses to the alleged child abuse without the witnesses' consent. *S. v. Phillips*, 1.

§ 107 (NCI4th). Information not subject to disclosure by defendant; generally

The trial court in a prosecution for murder and felony child abuse acted properly in not reviewing records and not reversing another judge's order sealing for appellate review records pertaining to three child witnesses and the victim. *S. v. Phillips*, 1.

§ 169.6 (NCI3d). Harmless and prejudicial error in admission or exclusion of evidence; exclusion

There is no prejudicial error and no abuse of discretion in a prosecution for murder and felony child abuse in the court's refusal to permit certain offers of proof. *S. v. Phillips*, 1.

§ 356 (NCI4th). Trial; placing defendant in custody

The court in a murder and arson prosecution did not abuse its discretion by having defendant taken into custody while his trial was in progress. *S. v. Eason*, 409.

§ 361 (NCI4th). Conduct and duties of judge generally

There was no abuse of discretion in a first degree murder prosecution where the court allowed the prosecutor to seat members of the victim's family behind the prosecution table and within the bar of the courtroom. *S. v. Payne*, 377.

§ 412 (NCI4th). Opening statements

There was no prosecutorial misconduct in a murder prosecution from the prosecutor's forecast during voir dire that it might consider evidence of an especially heinous, atrocious or cruel killing when the judge decided at sentencing not to submit that factor. *S. v. Payne*, 377.

§ 413 (NCI4th). Order of argument generally

The trial court did not err by denying defendant the opportunity to open and close the final arguments because he bore the burden of proving insanity. *S. v. Thompson*, 477.

§ 621 (NCI4th). Circumstantial evidence

If a motion to dismiss calls into question the sufficiency of circumstantial evidence, the issue for the court is whether a reasonable inference of the defendant's guilt may be drawn from the circumstances. *S. v. Vause*, 231.

§ 685 (NCI4th). Tender of written instruction; request for instructions

The trial judge did not err by failing to instruct on one defendant's decision not to testify or by failing to give other special instructions which were not requested until after the jury had retired. *S. v. Phillips*, 1.

The trial court did not err in a rape prosecution by refusing to give defendant's requested instruction on serious personal injury where defendant made his request orally after the jury retired. *S v. Richardson*, 505.

§ 767 (NCI4th). Instruction on burden and sufficiency of proof of insanity defense

The trial court's instruction on insanity did not violate due process by shifting the burden of proof on the mens rea element of first degree murder or the scienter elements of burglary and armed robbery. *S. v. Thompson*, 477.

§ 771 (NCI4th). Properly refused instructions on insanity

The trial court did not err by refusing to give defendant's requested instruction on "knowing the nature and quality of the act." *S. v. Thompson*, 477.

§ 793 (NCI4th). Instruction as to acting in concert generally

The correct portion of defendant's requested instructions on acting in concert as it relates to insanity was given in substance. *S. v. Thompson*, 477.

§ 794 (NCI4th). Instructions as to acting in concert appropriate under the evidence

There was no plain error in a prosecution arising from an armed robbery in giving the jury an instruction to the effect that defendant could be convicted of felonious assault upon a theory of acting in concert. *S. v. Black*, 191.

There was no plain error in a murder prosecution from the court's instruction on acting in concert where the evidence reviewed as a whole was sufficient to permit the jury to infer that defendant and his brother acted together with a common purpose to commit at least the robbery. *S. v. Lane*, 598.

There was no error in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury in instructing the jury on acting in concert; it is only necessary that there be a common purpose to commit a crime, it is not necessary that defendant share the intent to commit the crime actually committed. *S. v. Erlewine*, 626.

§ 796 (NCI4th). Instruction as to aiding and abetting generally

There was no plain error in a murder prosecution from the court's instruction on aiding and abetting where the evidence viewed as a whole was sufficient to permit the jury to infer that defendant aided and abetted his brother in a first degree murder based on the felony murder rule. *S. v. Lane*, 598.

§ 830 (NCI4th). Instructions; accomplices

The trial court did not err in a homicide prosecution by refusing to give a requested instruction on accomplice testimony where the evidence was insufficient to support the instruction. *S. v. Harrison*, 678.

defendant had responded to his victim's request for help by telling him that "if he didn't die, he would shoot him again" was admissible in the penalty phase of a first degree murder trial to prove the circumstances of the crime for which defendant had been convicted. *Ibid.*

Testimony by an eyewitness to a prior killing to which defendant pled guilty to voluntary manslaughter that defendant went to his car and returned with a gun to shoot the victim and testimony by defendant's stepniece that defendant actually raped her in 1985 although he pled guilty to attempted rape was admissible in the penalty phase of a first degree murder trial to prove the circumstances of the crimes for which defendant had been convicted. *Ibid.*

§ 1347 (NCI4th). Aggravating circumstance; murder as course of conduct

The statutory course of conduct aggravating circumstance for first degree murder is not unconstitutionally vague and overbroad on its face or as applied in this case. *S. v. Roper*, 337.

§ 1352 (NCI4th). Consideration of mitigating circumstances in capital case; unanimous decision

The State failed to demonstrate that the trial court's erroneous instruction imposing a unanimity requirement for finding mitigating circumstances in a capital sentencing proceeding was harmless error, and a sentence of death imposed on defendant must be set aside and the case remanded for a new sentencing proceeding. *S. v. Smith*, 99.

The State failed to demonstrate that the trial court's erroneous instruction requiring unanimity on mitigating circumstances in a capital sentencing proceeding was harmless beyond a reasonable doubt, and a sentence of death imposed on defendant for first degree murder is vacated and the case is remanded for a new capital sentencing proceeding, where the jury failed unanimously to find the submitted impaired capacity mitigating circumstance but the evidence was sufficient to permit one or more jurors to find this circumstance. *S. v. Quesinberry*, 288.

Any error by the trial court in requiring the jury to unanimously find a mitigating circumstance before it could be considered in defendant's favor in a capital case was harmless where the jury found all of the mitigating circumstances presented by defendant and submitted to the jury. *S. v. Roper*, 337.

The trial court's instructions to the jury in the penalty phase of a first degree murder trial, taken as a whole, constituted *McKoy* error, and the State failed to demonstrate that this error was harmless beyond a reasonable doubt where defendant presented sufficient expert testimony to permit a reasonable juror to find the submitted impaired capacity mitigating circumstance but the jury failed unanimously to find this circumstance. *S. v. Huff*, 532.

A death sentence was vacated and remanded for an erroneous unanimity instruction under *State v. McKoy*. *S. v. Payne*, 377.

A *McKoy* error in the sentencing proceeding for a murder prosecution was harmless. *S. v. Laws*, 550.

§ 1355 (NCI4th). Mitigating circumstances in capital case; lack of prior criminal activity

Testimony by a witness that defendant raped her and threatened to rape and kill her daughter just three months prior to the murder, kidnapping and rape in question was admissible in response to defendant's request that the court

consider the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. *S. v. Roper*, 337.

§ 1373 (NCI4th). Death penalty held not excessive or disproportionate

A sentence of death imposed on defendant for a first degree murder committed in order to allow defendant to rape another victim was not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and defendant. *S. v. Roper*, 337.

DECLARATORY JUDGMENT ACTIONS

§ 7 (NCI4th). Requirement of actual justiciable controversy

There was a justiciable controversy which could be determined by declaratory judgment where the City sought to have held unconstitutional statutes providing that the county would have the exclusive jurisdiction for the administration and enforcement of building codes and fire safety codes applicable to the Board of Education, the Community College, and the Regional Medical Center. *City of New Bern v. New Bern-Craven Co. Bd. of Ed.*, 557.

EVIDENCE

§ 47 (NCI3d). Expert testimony in general; as invasion of province of jury

There was no prejudicial error in an action arising from defendants' refusal to redeem a revolving fund certificate in the admission of expert testimony that there was a fiduciary relationship, that defendants breached their duty, and that the Raeford Board abused its discretion because there was other substantial admissible testimony and documentary evidence which was compelling in favor of plaintiff. *HAJMM Co. v. House of Raeford Farms*, 578.

FRAUD

§ 12.1 (NCI3d). Sufficiency of evidence

The trial court did not err by granting a builder's motion for summary judgment as to allegations of fraud arising from the sale of a house where plaintiffs produced no evidence that defendant made any false representation as to a material or existing fact. *Johnson v. Beverly-Hanks & Assoc.*, 202.

The trial court did not err by granting summary judgment for the seller of a house on claims of fraud arising from the sale where plaintiffs produced evidence of a misrepresentation but did not bring forth any evidence tending to show that the seller knowingly made false representations with intent to deceive the plaintiffs. *Ibid.*

The trial court erred in granting summary judgment for a realtor and her agency on claims for fraud arising from the sale of a house where the record showed that plaintiffs discussed with the realtor numerous times the need to have an independent inspection of the house and there was evidence that the realtor at a minimum aided in engaging an inspector who was hired because he had inspected the house before. *Ibid.*

GAS

§ 1 (NCI3d). Regulation

The Utilities Commission did not act arbitrarily and capriciously in failing to require a natural gas company to establish an additional industrial rate schedule based on the cost of No. 6 fuel oil. *State ex rel. Utilities Comm. v. Carolina Utility Customers Assoc.*, 37.

§ 1.1 (NCI3d). Reasonableness of classification of customers

Different rates of return adopted for the various classes of customers of a natural gas company did not unreasonably discriminate against industrial customers. *State ex rel. Utilities Comm. v. Carolina Utility Customers Assoc.*, 37.

A rate schedule which permits a natural gas company to earn the same profit margin for transporting customer owned gas as it would have earned had it sold the gas under its rate schedules is not unjust or unreasonably discriminatory. *Ibid.*

GRAND JURY

§ 3.3 (NCI3d). Sufficiency of evidence of racial discrimination

The trial court did not err by determining that the State had rebutted defendant's prima facie case of racial discrimination in the selection of the grand jury foreman. *S. v. Phillips*, 1.

HOMICIDE

§ 1.1 (NCI3d). Whether injuries inflicted caused death

The common law year and a day rule has become "obsolete" within the meaning of that term in G.S. 4-1 and will no longer be a part of the common law of North Carolina for any purpose. *S. v. Vance*, 613.

§ 4.3 (NCI3d). First degree murder; premeditation and deliberation

One may deliberate, may premeditate and may intend to kill after premeditation and deliberation although prompted and to a large extent controlled by passion at the time. *S. v. Vause*, 231.

§ 15 (NCI3d). Relevancy and competency of evidence in general

The trial court did not err by admitting the testimony of a train engineer in a homicide prosecution even though defendant contended the evidence was contrary to reason and common experience and that the case should have been dismissed. *S. v. Brewer*, 515.

§ 18 (NCI3d). Evidence of premeditation and deliberation

The trial court did not err in the retrial of a murder by sustaining objections to questions to a mental health expert specifically asking whether defendant had the ability to premeditate the killing. *S. v. Mash*, 61.

§ 18.1 (NCI3d). Particular circumstances showing premeditation and deliberation

There was sufficient evidence to support a conviction for first degree murder where, although there was undisputed evidence that defendant had been drinking, the State's evidence was sufficient for a rational juror to find the existence of premeditation and deliberation. *S. v. Mash*, 61.

Testimony by a store owner that she saw an associate of defendant in the store talking to a meat department employee the day before a robbery-murder at the store and that she noticed the associate because he had once threatened

HOMICIDE — Continued

Defendant could not be convicted of second degree murder where the uncontroverted evidence showed that the victim died more than a year and a day after an injury was inflicted upon him by defendant, and the case will be remanded for judgment as upon a verdict of guilty of involuntary manslaughter. *S. v. Vance*, 613.

§ 24.1 (NCI3d). Defendant's burden of meeting or overcoming presumption of malice

The trial court did not err in a murder prosecution by refusing defendant's requested jury instruction on the use of a deadly weapon, malice and premeditation and deliberation. *S. v. Thompson*, 477.

§ 25 (NCI3d). Instructions on first degree murder; generally

There was no prejudicial error in a prosecution for murder and felony child abuse where the trial court did not initially include in its instructions a definition of torture, but properly gave a definition which did not include premeditation and deliberation when requested by the jury. *S. v. Phillips*, 1.

§ 25.2 (NCI3d). Instructions on premeditation and deliberation

The court's instructions on intent to kill, premeditation and deliberation, and mental capacity to form a specific intent or to premeditate or deliberate included the substance of instructions requested by defendant and were sufficient. *S. v. Vause*, 231.

The evidence supported the trial court's instruction that premeditation and deliberation could be inferred from a brutal and vicious killing, the use of grossly excessive force under the circumstances, or the infliction of lethal wounds after the victim was felled. *S. v. Smith*, 99.

The trial court in a first degree murder case did not err in instructing the jury that the State need not prove the absence of passion or emotion in order for the jury to find that defendant acted with deliberation. *S. v. Stevenson*, 542.

§ 30 (NCI3d). Submission of guilt of lesser degrees of the crime

The trial court did not err in a murder prosecution by failing to submit possible verdicts of second degree murder, voluntary manslaughter and involuntary manslaughter. *S. v. Eason*, 409.

The trial court did not err in a first degree murder prosecution by refusing to submit second degree murder. *S. v. Brewer*, 515.

§ 30.3 (NCI3d). Guilt of manslaughter; involuntary manslaughter

The trial court did not err in a prosecution for murder and felony child abuse by refusing to submit a verdict of involuntary manslaughter. *S. v. Phillips*, 1.

§ 31 (NCI3d). Verdict generally; specifying degree of crime

There was no error in a prosecution for murder where the trial court indicated on the verdict sheet that defendants could be found guilty of first degree murder based upon premeditation and deliberation or torture or both. *S. v. Phillips*, 1.

§ 32.1 (NCI3d). Appeal and review; harmless or prejudicial error and cure by verdict

Any error by the trial court's refusal to give defendant's requested instruction on voluntary manslaughter was harmless where the court instructed on first degree murder and the lesser offense of second degree murder and the jury returned a verdict of guilty of first degree murder. *S. v. Stevenson*, 542.

INFANTS

§ 17 (NCI3d). Confessions and other forms of self incrimination

There was no prejudicial error in a prosecution of a juvenile as an adult for murder and armed robbery from the failure to make statutory findings to establish that defendant knowingly, willingly and understandingly waived his rights when making his post-arrest statements. *S. v. Small*, 175.

INSURANCE

§ 69 (NCI3d). Protection against injury by uninsured or unknown motorist generally

The Superior Court correctly concluded in a wrongful death action arising from an automobile accident that the underinsured motorist coverages provided in two separate automobile policies could be aggregated or stacked. *Smith v. Nationwide Mutual Ins. Co.*, 139.

JUDGES

§ 7 (NCI3d). Misconduct in office; proceedings before Judicial Standards Commission

Due process did not require that the respondent in a judicial disciplinary proceeding have open access to the Judicial Standards Commission's investigative files. *In re Greene*, 639.

Defendant's contention that the Judicial Standards Commission considered evidence in its files not revealed to respondent and was thus not a fair and impartial tribunal was not supported by the record. *Ibid.*

A superior court judge was censured by the Supreme Court for conduct which occurred while he was a district court judge based on his reference to a women's group which was supporting a female assault victim as a man-hating bunch of females and pack of she-dogs and statements in various trials for speeding in which he admitted that he often drove seven miles per hour over the speed limit and counseled defendants to restrict their speeding violations to that limit in order to avoid being charged with speeding. *Ibid.*

A district court judge was censured by the Supreme Court based on his conduct in ordering the detention of an attorney who declined to give a reason for his motion to withdraw as counsel in a criminal case and to make a recommendation concerning defendant's eligibility for the first offender's program on the ground that to do so would require him to reveal confidential information in violation of the attorney-client privilege; his statements to the attorney in open court that in the future he would accept no recommendations from him, would grant him no continuances, would not appoint him to represent indigent defendants, and would require his clients to plead guilty or not guilty as charged; and his later statements to the attorney in open court that the matter had gotten out of hand but that everything he had said earlier regarding recommendations, continuances, indigent appointments, and pleas still applied. *In re Bullock*, 712.

The resignation of respondent judge from his judicial office did not deprive the Judicial Standards Commission or the Supreme Court of jurisdiction. *In re Sherrill*, 719.

The Judicial Standards Commission's findings of fact concerning respondent's drug use were supported by the findings stipulated by the respondent and the respondent's conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the office into disrepute. *Ibid.*

JURY

§ 6 (NCI3d). Voir dire generally; practice and procedure

The trial court did not err in a prosecution arising from a murder, armed robbery, and assault by denying defendant's motion to dismiss all prospective jurors who had heard one juror say "my wife and my child were assaulted by a black man with a deadly weapon." *S. v. Black*, 191.

There was no prejudicial error during jury selection for a murder from the prosecutor's reference to certain aggravating circumstances upon which the State ultimately did not rely. *S. v. Payne*, 377.

§ 6.3 (NCI3d). Propriety and scope of voir dire examination generally

The trial court did not unduly restrict defendant's jury voir dire by not allowing defendant to ask certain jurors who had already indicated their ability to be fair and impartial about their degree of certainty as to their impartiality and sustaining objections to questions regarding jurors' difficulty considering expert mental health testimony and their personal experiences with alcohol. *S. v. Mash*, 61.

The trial court in a first degree murder case did not abuse its discretion in allowing the district attorney to ask potential jurors whether the fact that they could observe defendant in the courtroom each day would cause them to have sympathy toward defendant and not toward the victim. *S. v. Smith*, 99.

The trial court did not abuse its discretion in permitting the district attorney to inform prospective jurors during jury selection that the mitigating circumstance of age might be met if the person was sixteen, seventeen, or eighteen years old since this was not an attempt to "stake out" jurors to a particular test for this mitigating circumstance. *Ibid.*

The district attorney did not impermissibly limit the range of mitigating circumstances for first degree murder when he described such circumstances during jury selection as those which "make a murder not so bad." *Ibid.*

The trial court did not err in permitting the district attorney to ask prospective jurors whether they understood that "we must be fair to the defendant and be fair also to the people of North Carolina and the victim's family." *Ibid.*

Defendant was not prejudiced by the district attorney's erroneous statement during jury selection that jurors could give mitigating circumstances no weight at all where defendant is being awarded a new sentencing proceeding on other grounds. *Ibid.*

The trial judge did not err by sustaining objections to questions by defense counsel that reasonably could be perceived as staking out jurors to a position that would have them giving more credibility to an expert witness than to other witnesses. *Ibid.*

The trial court did not err during jury selection in a murder prosecution by allowing defense counsel to question in detail only those individual jurors who responded positively to questions of the whole panel and who seemed to favor the death penalty. *S. v. Payne*, 377.

§ 6.4 (NCI3d). Questions as to belief in capital punishment

The trial court did not err in permitting the district attorney to ask prospective jurors whether they were "strong enough to recommend the death penalty." *S. v. Smith*, 99.

The trial judge did not deny defendant his right to question prospective jurors about their death penalty views when he sustained the State's objection to defense counsel's question as to whether prospective jurors would recommend a life sentence

LABORERS' AND MATERIALMEN'S LIENS

§ 3 (NCI3d). Lien of subcontractor or material furnishers; recovery against owner

G.S. 44A-23 provides first, second and third tier subcontractors a separate right of subrogation to the contractor's lien on the real property distinct from the lien on funds contained in G.S. 44A-18. *Electric Supply Co. v. Swain Electrical Co.*, 651.

A subcontractor may assert whatever lien the contractor who dealt with the owner has against the owner's real property relating to the project, and even if the owner has specifically paid the contractor for the labor or materials supplied by the specific unpaid subcontractor who is claiming the lien, that subcontractor retains a right of subrogation, to the extent of his claim, to whatever lien rights the contractor otherwise has in the project. *Ibid.*

LARCENY

§ 7.5 (NCI3d). Sufficiency of evidence of aiding and abetting; larceny from the person; larceny by trick

Evidence that defendant took money from a cash register while it was being operated by a store clerk was sufficient to support his conviction for larceny from the person. *S. v. Buckom*, 313.

§ 8 (NCI3d). Instructions generally

The trial court in a prosecution for felonious larceny from the person did not err in failing to submit to the jury a possible verdict for the lesser offense of misdemeanor larceny. *S. v. Buckom*, 313.

MASTER AND SERVANT

§ 67 (NCI3d). Heart disease, heart failure, and strokes

The Industrial Commission properly concluded in a workers' compensation action that decedent's heart attack was not the result of an accident arising out of and in the course of his employment. *Cody v. Snider Lumber Co.*, 67.

MUNICIPAL CORPORATIONS

§ 10 (NCI3d). Civil liability of municipal officers and agents

Plaintiffs' damages from their purchase of a new townhouse unit that was unfit for habitation were not proximately caused by a city building inspector's alleged violations of statutory and State Building Code provisions because plaintiffs' election to take title and assume occupancy of the townhouse in violation of the law before the building inspector had an opportunity to make the final inspection and issue a certificate of compliance constituted an intervening, independent cause of plaintiffs' damages. *Lynn v. Overlook Development*, 689.

§ 38 (NCI3d). Power of municipality to appropriate, expend, and allocate revenue

The statute authorizing local governments to finance the construction of improvements on real property by installment contracts that create a security interest in the improvements and real property without a vote of the people is constitutional. *Wayne County Citizens Assn. v. Wayne County Bd. of Comrs.*, 24.

A county board of commissioners complied with the provisions of G.S. 160A-20 in entering an installment purchase contract for court, administrative and jail buildings. *Ibid.*

NEGLIGENCE

§ 6.1 (NCI3d). Application of doctrine of res ipsa loquitur

In an action to recover for injuries sustained by plaintiff when a large speaker fell on her knee while she was dancing at defendant's nightclub, plaintiff's evidence was insufficient to permit her recovery under a res ipsa loquitur theory because it established that a band playing at the nightclub had primary control and management responsibilities over the speaker and that the speaker was thus not in the exclusive control of defendant. *Shadkhoo v. Shilo East Farms*, 47.

PARENT AND CHILD

§ 2.2 (NCI3d). Child abuse

A finding that a child suffered from battered child syndrome permits an inference that such injuries were inflicted by a caretaker, but such inference is not mandatory and the burden remains on the State. *S. v. Phillips*, 1.

The trial court did not err in a prosecution for murder and felony child abuse by allowing a child abuse victim to testify that defendants had previously chained him to a pole in their basement in Chicago. *Ibid.*

The trial court did not err in a prosecution for felony child abuse and murder by refusing to submit a verdict of misdemeanor child abuse. *Ibid.*

The trial court did not err in a prosecution for felony child abuse by defining a serious physical injury as "such physical injury as causes great pain and suffering." *Ibid.*

The trial court did not err or abuse its discretion in a prosecution for murder and felony child abuse by refusing to set aside the verdict, grant a judgment notwithstanding the verdict, a mistrial, or new trial where the evidence was sufficient. *Ibid.*

RAPE AND ALLIED OFFENSES

§ 5 (NCI3d). Sufficiency of evidence and nonsuit

The State's evidence was sufficient to allow the jury to consider two first degree rapes and two first degree sexual offenses allegedly committed by defendant on his three-year-old stepdaughter between 1 and 29 February 1988 and between 1 and 31 March 1988. *S. v. Everett*, 72.

ROBBERY

§ 4.3 (NCI3d). Armed robbery cases where evidence held sufficient

The State presented substantial evidence that defendant was one of the perpetrators of an armed robbery. *S. v. Black*, 191.

The State presented substantial evidence of armed robbery. *S. v. Small*, 175.

RULES OF CIVIL PROCEDURE

§ 41.1 (NCI3d). Voluntary dismissal; dismissal without prejudice

A plaintiff who stipulates to a voluntary dismissal, without prejudice, of a timely filed action in a federal court sitting in diversity jurisdiction and applying North Carolina substantive law, and who refiles the action in a North Carolina state court, may invoke the one-year savings provision in G.S. 1A-1, Rule 41. *Bockweg v. Anderson*, 436.

RULES OF CIVIL PROCEDURE — Continued

§ 58 (NCI3d). Entry of judgment

Plaintiff's written notice of appeal on 6 April 1989 in a child custody action was timely where entry of judgment occurred on 6 April 1989, the date the court adopted the proposed order and findings submitted by the prevailing party, rather than on 17 January 1989, when the court merely announced in open court its decision regarding custody. *Stachlowski v. Stach*, 276.

SCHOOLS

§ 1 (NCI3d). Establishment, maintenance, and supervision in general

The trial court did not err by declaring that a contract under which a news program with commercial advertising was provided to schools did not violate public policy. *S. v. Whittle Communications*, 456.

§ 2 (NCI3d). Fees and tuition

A contract under which a news program with commercial advertising was provided to schools did not violate the provision of the North Carolina Constitution which provides for a general and uniform system of free public schools. *S. v. Whittle Communications*, 456.

§ 4.1 (NCI3d). Powers and duties in general

The trial court did not err by holding that a temporary rule adopted by the State Board of Education was not binding because the General Assembly placed the procurement and selection of supplementary instructional materials under the control of local school boards. *S. v. Whittle Communications*, 456.

SEARCHES AND SEIZURES

§ 4 (NCI3d). Particular methods of search; physical examination or tests

The trial court did not err in a homicide prosecution by failing to suppress the forensic testing on defendant's black powder pistol and ammunition. *S. v. Lane*, 598.

§ 13 (NCI3d). Search and seizure by consent

The trial court did not err in a murder prosecution by failing to suppress defendant's pistol, ammunition and the results of testing done on them where defendant voluntarily unloaded the pistol and handed it and the ammunition to a police officer, who later declined to return it to defendant. *S. v. Lane*, 598.

§ 14 (NCI4th). Voluntary, free, and intelligent consent

The trial court did not err by denying defendant's motion to suppress evidence seized from his mobile home where the trial court made proper findings, there was competent evidence supporting the findings, and the findings supported the conclusion that defendant's consent to the search was voluntarily given. *S. v. Madric*, 223.

§ 21 (NCI3d). Application for warrant; hearsay; tips from informers

A "track record" is only one method by which a confidential source of information can be shown to be reliable for purposes of establishing probable cause. *S. v. Riggs*, 213.

There was a substantial basis for a magistrate's determination that probable cause existed to issue a search warrant where the warrant named and identified the informant. *S. v. Eason*, 409.

SEARCHES AND SEIZURES — Continued

§ 24 (NCI3d). Cases where evidence is sufficient to show probable cause; information from informers

An officer's statement in an affidavit to obtain a search warrant that one informant used to purchase marijuana was reliable in that the information he had given in the past had been found to be true and exact was sufficient to establish that informant's reliability, and the affidavit was not materially inaccurate because the officer testified at a pretrial suppression hearing that he had mistakenly represented that the informant was reliable where this testimony was based on the officer's incorrect subjective belief that the term "reliable" was applicable in drug cases only to persons who had made at least two prior controlled purchases of illegal drugs. *S. v. Riggs*, 213.

Evidence that two controlled purchases of marijuana, one only 48 hours earlier, were made by persons who had entered defendants' driveway established probable cause for the issuance of a warrant authorizing a search of defendants' residence which the driveway served. *Ibid.*

§ 36 (NCI3d). Scope of search incident to arrest; clothing and personal effects

The trial court did not err in a murder prosecution by denying defendant's motion to suppress clothing seized from him several hours after his arrest. *S. v. Payne*, 377.

The clothing of a first degree murder defendant was not taken as a result of an unnecessary delay in defendant's appearance before a magistrate. *Ibid.*

§ 43 (NCI3d). Motions to suppress evidence

The trial court in a prosecution for murder and felony child abuse did not err by quashing subpoenas issued to two children ordering them to appear and testify at a hearing on defendant's motion to suppress evidence seized pursuant to a search warrant. *S. v. Phillips*, 1.

The trial court did not err in admitting evidence seized during a search of defendant's residence where defendant made only a general objection and motion to strike at trial that failed to state any legal or factual basis for the objection, and defendant never made a motion to suppress and never requested a voir dire. *S. v. Roper*, 337.

STATUTES

§ 5.6 (NCI3d). Ambiguous provisions; aids applicable to construction

An appellate court will not look to the record of the internal deliberations of committees of the legislature considering proposed legislative intent, and commentaries printed with the General Statutes are not treated as binding authority on legislative intent. *Electric Supply Co. v. Swain Electrical Co.*, 651.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices, in general

The trial court did not err by granting a builder's motion for summary judgment as to allegations of unfair or deceptive trade practices arising from the sale of a house where no facts were presented by plaintiff to show any immoral, oppressive, unscrupulous, or deceptive conduct on the part of this defendant. *Johnson v. Beverly-Hanks & Assoc.*, 202.

UNFAIR COMPETITION — Continued

The trial court erred in granting summary judgment for a realtor and her agency on claims for unfair or deceptive trade practices arising from the sale of a house where the record showed that plaintiffs discussed with the realtor numerous times the need to have an independent inspection of the house and there was evidence that the realtor at a minimum aided in engaging an inspector who was hired because he had inspected the house before. *Ibid.*

The Court of Appeals decision that the sale of two lots at auction with a faulty description was not in or affecting commerce was reversed. *Bhatti v. Buckland*, 240.

The trial court properly granted a Rule 12(b)(6) dismissal of an unfair practices claim arising from the failure to redeem a revolving fund certificate. *HAJMM Co. v. House of Raeford Farms*, 578.

UNIFORM COMMERCIAL CODE

§ 23 (NCI3d). Right to revoke acceptance of goods

The trial court erred by granting plaintiff's motion for summary judgment in an action on an unpaid account where there were genuine issues of material fact with respect to whether there was a revocation of acceptance. *Roy Burt Enterprises v. Marsh*, 262.

UTILITIES COMMISSION

§ 4 (NCI3d). Practice and procedure

The Utilities Commission could properly receive and consider an exhibit filed after the close of a rate hearing subject to the right of the utility to have the hearing reopened for cross-examination and rebuttal, and the utility's failure to demand that the hearing be reopened constituted a waiver of this right. *State ex rel. Utilities Comm. v. Carolina Water Service*, 299.

§ 32 (NCI3d). Property included in rate base

Evidence of a utility's failure to require subdivision developers or a prior owner to provide the capital for water and sewer plant expansions could be considered by the Utilities Commission in determining the amount of plant expansion to be included in the rate base. *State ex rel. Utilities Comm. v. Carolina Water Service*, 299.

§ 34 (NCI3d). Property not in use at end of test period

When a utility has asked that costs for post test year use of plant expansions be included in the rate base, the Utilities Commission may under G.S. 62-133(c) require the utility to show matching revenues and costs. *State ex rel. Utilities Comm. v. Carolina Water Service*, 299.

§ 35 (NCI3d). Overadequate facilities

The evidence supported a finding by the Utilities Commission that only a portion of defendant utility's investment in an elevated water storage tank in a subdivision was used and useful and should be included in the rate base. *State ex rel. Utilities Comm. v. Carolina Water Service*, 299.

The evidence supported findings by the Utilities Commission that only 30% of the cost of the expansion of a sewage treatment plant in a subdivision in Carteret County was used and useful and should be included in defendant utility's rate

base and that none of the expansion of a sewage treatment plant in Mecklenburg County was used and useful and should be included in the rate base. *Ibid.*

The Utilities Commission did not use two mutually exclusive rate making theories when it held that sewage treatment plants constituted excess capacity and also that it would not consider a part of the plants used and useful after the test period because there was no evidence of revenues or costs matched with the plants during that period. *Ibid.*

WITNESSES

§ 1.1 (NCI3d). Competency of witness; mental capacity

The trial court did not err in a prosecution for murder and felony child abuse by denying defendant's motions for independent psychiatric evaluations of the child witnesses. *S. v. Phillips*, 1.

§ 1.2 (NCI3d). Competency of witness; age; children as witnesses

The trial court did not err in a murder and arson prosecution by allowing a nine-year-old to testify even though the trial court did not make a specific finding as to whether the child was capable of expressing herself concerning the matter to which she was to testify. *S. v. Eason*, 409.

WORD AND PHRASE INDEX

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