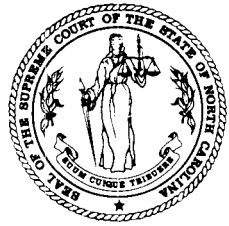
# NORTH CAROLINA REPORTS

## VOLUME 329

SUPREME COURT OF NORTH CAROLINA




12 JUNE 1991

5 SEPTEMBER 1991

RALEIGH
1992

CITE THIS VOLUME

329 N.C.

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# THE SUPREME COURT
# OF
# NORTH CAROLINA

*Chief Justice*

JAMES G. EXUM, JR.

*Associate Justices*

LOUIS B. MEYER
BURLEY B. MITCHELL, JR.
HARRY C. MARTIN
HENRY E. FRYE
JOHN WEBB
WILLIS P. WHICHARD

*Retired Chief Justices*

WILLIAM H. BOBBITT
SUSIE SHARP

*Retired Justices*

I. BEVERLY LAKE
J. FRANK HUSKINS
DAVID M. BRITT

*Clerk*

CHRISTIE SPEIR PRICE

*Librarian*

LOUISE H. STAFFORD

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*Assistant Director*

DALLAS A. CAMERON, JR.

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RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

# TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

## SUPERIOR COURT DIVISION

*First Division*

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 1 | THOMAS S. WATTS | Elizabeth City |
| 2 | WILLIAM C. GRIFFIN | Williamston |
| 3A | DAVID E. REID, JR. | Greenville |
| | WILTON RUSSELL DUKE, JR. | Greenville |
| 3B | HERBERT O. PHILLIPS III | Morehead City |
| 4A | HENRY L. STEVENS III | Kenansville |
| 4B | JAMES R. STRICKLAND | Jacksonville |
| 5 | NAPOLEON B. BAREFOOT | Wilmington |
| | ERNEST B. FULLWOOD | Wilmington |
| | GARY E. TRAWICK | Burgaw |
| 6A | RICHARD B. ALLSBROOK | Halifax |
| 6B | CY A. GRANT | Windsor |
| 7A | QUENTIN T. SUMNER | Rocky Mount |
| 7B-C | FRANK R. BROWN | Tarboro |
| | G. K. BUTTERFIELD, JR. | Wilson |
| 8A | JAMES D. LLEWELLYN | Kinston |
| 8B | PAUL MICHAEL WRIGHT | Goldsboro |

*Second Division*

| | | |
|---|---|---|
| 9 | ROBERT H. HOBGOOD | Louisburg |
| | HENRY W. HIGHT, JR. | Henderson |
| 10A-D | ROBERT L. FARMER | Raleigh |
| | HENRY V. BARNETTE, JR. | Raleigh |
| | DONALD W. STEPHENS | Raleigh |
| | GEORGE R. GREENE | Raleigh |
| | NARLEY L. CASHWELL | Raleigh |
| 11 | WILEY F. BOWEN | Dunn |
| | KNOX V. JENKINS | Four Oaks |
| 12A-C | COY E. BREWER, JR. | Fayetteville |
| | E. LYNN JOHNSON | Fayetteville |
| | GREGORY A. WEEKS | Fayetteville |
| | JACK A. THOMPSON | Fayetteville |
| 13 | GILES R. CLARK | Elizabethtown |
| | WILLIAM C. GORE, JR. | Whiteville |
| 14A-B | ANTHONY M. BRANNON | Durham |
| | J. MILTON READ, JR. | Durham |
| | ORLANDO F. HUDSON, JR. | Durham |
| | ALBERT LEON STANBACK, JR. | Durham |
| 15A | J. B. ALLEN, JR. | Burlington |
| 15B | F. GORDON BATTLE | Chapel Hill |
| 16A | B. CRAIG ELLIS | Laurinburg |
| 16B | JOE FREEMAN BRITT | Lumberton |
| | DEXTER BROOKS | Pembroke |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| | *Third Division* | |
| 17A | MELZER A. MORGAN, JR. | Wentworth |
| | PETER M. MCHUGH | Reidsville |
| 17B | JAMES M. LONG | Pilot Mountain |
| 18A-E | W. DOUGLAS ALBRIGHT | Greensboro |
| | THOMAS W. ROSS | Greensboro |
| | JOSEPH R. JOHN | Greensboro |
| | W. STEVEN ALLEN, SR. | Greensboro |
| | HOWARD R. GREESON, JR. | High Point |
| 19A | JAMES C. DAVIS | Concord |
| 19B | RUSSELL G. WALKER | Asheboro |
| 19C | THOMAS W. SEAY, JR. | Spencer |
| 20A | F. FETZER MILLS | Wadesboro |
| | JAMES M. WEBB | Southern Pines |
| 20B | WILLIAM H. HELMS | Monroe |
| 21A-D | JUDSON D. DERAMUS, JR. | Winston-Salem |
| | WILLIAM H. FREEMAN | Winston-Salem |
| | JAMES A. BEATY, JR. | Winston-Salem |
| | WILLIAM Z. WOOD, JR. | Winston-Salem |
| 22 | PRESTON CORNELIUS | Mooresville |
| | LESTER P. MARTIN, JR. | Mocksville |
| 23 | JULIUS A. ROUSSEAU, JR. | North Wilkesboro |
| | *Fourth Division* | |
| 24 | CHARLES C. LAMM, JR. | Boone |
| 25A | CLAUDE S. SITTON | Morganton |
| | BEVERLY T. BEAL | Lenoir |
| 25B | FORREST A. FERRELL | Hickory |
| 26A-C | ROBERT M. BURROUGHS | Charlotte |
| | CHASE BOONE SAUNDERS | Charlotte |
| | SHIRLEY L. FULTON | Charlotte |
| | ROBERT P. JOHNSTON | Charlotte |
| | JULIA V. JONES | Charlotte |
| | MARCUS L. JOHNSON | Charlotte |
| 27A | ROBERT W. KIRBY | Gastonia |
| | ROBERT E. GAINES | Gastonia |
| 27B | JOHN MULL GARDNER | Shelby |
| 28 | ROBERT D. LEWIS | Asheville |
| | C. WALTER ALLEN | Asheville |
| 29 | ZORO J. GUICE, JR. | Hendersonville |
| | LOTO GREENLEE CAVINESS | Marion |
| 30A | JAMES U. DOWNS, JR. | Franklin |
| 30B | JANET MARLENE HYATT | Waynesville |

## SPECIAL JUDGE

| | |
|---|---|
| MARVIN K. GRAY | Charlotte |

## EMERGENCY JUDGES

| | |
|---|---|
| HENRY A. MCKINNON, JR. | Lumberton |
| JOHN R. FRIDAY | Lincolnton |
| D. MARSH MCLELLAND | Graham |
| EDWARD K. WASHINGTON | High Point |
| L. BRADFORD TILLERY | Wilmington |
| HOLLIS M. OWENS, JR. | Rutherfordton |
| DARIUS B. HERRING, JR. | Fayetteville |

# DISTRICT COURT DIVISION

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 1 | GRAFTON G. BEAMAN (Chief) | Elizabeth City |
| | J. RICHARD PARKER | Manteo |
| | JANICE MCK. COLE | Hertford |
| 2 | HALLETT S. WARD (Chief) | Washington |
| | JAMES W. HARDISON | Williamston |
| | SAMUEL C. GRIMES | Washington |
| 3 | E. BURT AYCOCK, JR. (Chief) | Greenville |
| | JAMES E. RAGAN III | Oriental |
| | JAMES E. MARTIN | Grifton |
| | WILLIE LEE LUMPKIN III | Morehead City |
| | DAVID A. LEACH | Greenville |
| | GEORGE L. WAINWRIGHT, JR. | Morehead City |
| | JERRY F. WADDELL[1] | New Bern |
| 4 | KENNETH W. TURNER (Chief) | Rose Hill |
| | STEPHEN M. WILLIAMSON | Kenansville |
| | WILLIAM M. CAMERON, JR. | Jacksonville |
| | WAYNE G. KIMBLE, JR. | Jacksonville |
| | LEONARD W. THAGARD | Clinton |
| | PAUL A. HARDISON | Jacksonville |
| 5 | CHARLES E. RICE (Chief)[2] | Wrightsville Beach |
| | JACQUELINE MORRIS-GOODSON | Wilmington |
| | ELTON G. TUCKER | Wilmington |
| | JOHN W. SMITH II | Wilmington |
| | W. ALLEN COBB, JR. | Wilmington |
| 6A | NICHOLAS LONG (Chief) | Roanoke Rapids |
| | HAROLD P. MCCOY, JR. | Scotland Neck |
| 6B | ALFRED W. KWASIKPUI (Chief)[3] | Seaboard |
| | THOMAS R. J. NEWBERN[4] | Aulander |
| 7 | GEORGE M. BRITT (Chief) | Tarboro |
| | ALLEN W. HARRELL | Wilson |
| | ALBERT S. THOMAS, JR. | Wilson |
| | SARAH F. PATTERSON | Rocky Mount |
| | JOSEPH JOHN HARPER, JR. | Tarboro |
| | M. ALEXANDER BIGGS, JR. | Rocky Mount |
| 8 | JOHN PATRICK EXUM (Chief) | Kinston |
| | ARNOLD O. JONES | Goldsboro |
| | KENNETH R. ELLIS | Goldsboro |
| | RODNEY R. GOODMAN, JR. | Kinston |
| | JOSEPH E. SETZER, JR. | Goldsboro |
| 9 | CLAUDE W. ALLEN, JR. (Chief) | Oxford |
| | CHARLES W. WILKINSON, JR. | Oxford |
| | J. LARRY SENTER | Franklinton |
| | HERBERT W. LLOYD, JR. | Henderson |
| | PATTIE S. HARRISON[5] | Roxboro |
| 10 | STAFFORD G. BULLOCK (Chief)[6] | Raleigh |
| | RUSSELL G. SHERRILL III | Raleigh |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| | LOUIS W. PAYNE, JR. | Raleigh |
| | WILLIAM A. CREECH | Raleigh |
| | JOYCE A. HAMILTON | Raleigh |
| | FRED M. MORELOCK | Raleigh |
| | JERRY W. LEONARD | Raleigh |
| | DONALD W. OVERBY | Raleigh |
| | JAMES R. FULLWOOD | Raleigh |
| | ANNE B. SALISBURY | Raleigh |
| 11 | WILLIAM A. CHRISTIAN (Chief) | Sanford |
| | EDWARD H. MCCORMICK | Lillington |
| | O. HENRY WILLIS, JR. | Dunn |
| | TYSON Y. DOBSON, JR. | Smithfield |
| | SAMUEL S. STEPHENSON | Angier |
| | ALBERT A. CORBETT, JR. | Smithfield |
| 12 | SOL G. CHERRY (Chief) | Fayetteville |
| | ANNA ELIZABETH KEEVER | Fayetteville |
| | PATRICIA ANN TIMMONS-GOODSON | Fayetteville |
| | JOHN S. HAIR, JR. | Fayetteville |
| | JAMES F. AMMONS, JR. | Fayetteville |
| | ANDREW R. DEMPSTER | Fayetteville |
| 13 | D. JACK HOOKS, JR. (Chief) | Whiteville |
| | JERRY A. JOLLY | Tabor City |
| | DAVID G. WALL | Elizabethtown |
| | NAPOLEON B. BAREFOOT, JR. | Bolivia |
| 14 | KENNETH C. TITUS (Chief) | Durham |
| | DAVID Q. LABARRE | Durham |
| | RICHARD CHANEY | Durham |
| | CAROLYN D. JOHNSON | Durham |
| | WILLIAM Y. MANSON | Durham |
| 15A | JAMES KENT WASHBURN (Chief) | Burlington |
| | SPENCER B. ENNIS | Burlington |
| | ERNEST J. HARVIEL | Burlington |
| 15B | PATRICIA HUNT (Chief) | Chapel Hill |
| | STANLEY PEELE | Chapel Hill |
| | LOWRY M. BETTS | Pittsboro |
| 16A | WARREN L. PATE (Chief) | Raeford |
| | WILLIAM C. MCILWAIN | Wagram |
| 16B | CHARLES G. MCLEAN (Chief) | Lumberton |
| | HERBERT LEE RICHARDSON | Lumberton |
| | GARY M. LOCKLEAR | Pembroke |
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| 17A | ROBERT R. BLACKWELL (Chief) | Yanceyville |
| | PHILIP W. ALLEN | Yanceyville |
| | JANEICE B. TINDAL | Reidsville |
| 17B | JERRY CASH MARTIN (Chief) | Mount Airy |
| | CLARENCE W. CARTER | King |
| | OTIS M. OLIVER | Mount Airy |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 18 | J. Bruce Morton (Chief) | Greensboro |
| | William L. Daisy | Greensboro |
| | Edmund Lowe | High Point |
| | Sherry Fowler Alloway | Greensboro |
| | Lawrence C. McSwain | Greensboro |
| | William A. Vadem | Greensboro |
| | Thomas G. Foster, Jr. | Greensboro |
| | Joseph E. Turner | Greensboro |
| | Donald L. Boone | High Point |
| | Ben D. Haines | Greensboro |
| 19A | Adam C. Grant, Jr. (Chief) | Concord |
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| 19B | William M. Neely (Chief) | Asheboro |
| | Richard M. Toomes | Asheboro |
| | Vance B. Long | Asheboro |
| 19C | Frank M. Montgomery (Chief) | Salisbury |
| | Anna M. Wagoner | Salisbury |
| 20 | Donald R. Huffman (Chief) | Wadesboro |
| | Kenneth W. Honeycutt | Monroe |
| | Ronald W. Burris | Albemarle |
| | Michael Earle Beale | Pinehurst |
| | Tanya T. Wallace | Rockingham |
| | Susan C. Taylor | Albemarle |
| 21 | James A. Harrill, Jr. (Chief)[7] | Winston-Salem |
| | Robert Kason Keiger | Winston-Salem |
| | Roland Harris Hayes | Winston-Salem |
| | William B. Reingold | Winston-Salem |
| | Loretta Biggs | Kernersville |
| | Margaret L. Sharpe | Winston-Salem |
| 22 | Robert W. Johnson (Chief) | Statesville |
| | Samuel Allen Cathey | Statesville |
| | George Thomas Fuller | Lexington |
| | Kimberly T. Harbinson | Taylorsville |
| | James M. Honeycutt | Lexington |
| | Jessie A. Conley | Statesville |
| 23 | Samuel L. Osborne (Chief) | Wilkesboro |
| | Edgar B. Gregory | Wilkesboro |
| | Michael E. Helms | Wilkesboro |
| 24 | Robert Howard Lacey (Chief) | Newland |
| | Roy Alexander Lyerly | Banner Elk |
| | Charles Philip Ginn[8] | Boone |
| 25 | L. Oliver Noble, Jr. (Chief) | Hickory |
| | Timothy S. Kincaid | Newton |
| | Ronald E. Bogle | Hickory |
| | Jonathan L. Jones | Valdese |
| | Nancy L. Einstein | Lenoir |
| | Robert E. Hodges | Morganton |
| | Robert M. Brady | Lenoir |
| 26 | James E. Lanning (Chief) | Charlotte |
| | L. Stanley Brown | Charlotte |
| | William G. Jones | Charlotte |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| | DAPHENE L. CANTRELL | Charlotte |
| | WILLIAM H. SCARBOROUGH | Charlotte |
| | RESA L. HARRIS | Charlotte |
| | RICHARD ALEXANDER ELKINS | Charlotte |
| | MARILYN R. BISSELL | Charlotte |
| | RICHARD D. BONER | Charlotte |
| | H. WILLIAM CONSTANGY, JR. | Charlotte |
| | H. BRENT MCKNIGHT | Charlotte |
| | JANE V. HARPER | Charlotte |
| | FRITZ Y. MERCER, JR. | Charlotte |
| 27A | LAWRENCE B. LANGSON (Chief) | Gastonia |
| | TIMOTHY L. PATTI | Gastonia |
| | HARLEY B. GASTON, JR. | Belmont |
| | CATHERINE C. STEVENS | Gastonia |
| | DANIEL J. WALTON | Gastonia |
| 27B | GEORGE HAMRICK (Chief) | Shelby |
| | JAMES THOMAS BOWEN III | Lincolnton |
| | J. KEATON FONVIELLE | Shelby |
| | JAMES W. MORGAN | Shelby |
| 28 | EARL JUSTICE FOWLER, JR. (Chief) | Arden |
| | PETER L. RODA | Asheville |
| | GARY S. CASH | Asheville |
| | SHIRLEY H. BROWN | Asheville |
| | REBECCA B. KNIGHT | Asheville |
| 29 | THOMAS N. HIX (Chief) | Mill Spring |
| | STEVEN F. FRANKS | Hendersonville |
| | ROBERT S. CILLEY | Brevard |
| | D. FRED COATS | Nebo |
| 30 | JOHN J. SNOW (Chief) | Murphy |
| | DANNY E. DAVIS | Waynesville |
| | STEVEN J. BRYANT | Bryson City |

1. Appointed 1 August 1991 to replace H. Horton Roundtree who retired 31 May 1991.
2. Appointed Chief Judge 1 August 1991 to replace Gilbert H. Burnett who retired 31 July 1991.
3. Appointed Chief Judge 25 April 1991 to replace Robert E. Williford who retired 31 March 1991.
4. Appointed 10 May 1991 to replace Alfred W. Kwasikpui who became Chief Judge.
5. Appointed 7 July 1991 to replace Floyd B. McKissick, Sr. who died 28 April 1991.
6. Appointed Chief Judge 1 September 1991 to replace George F. Bason who retired 31 August 1991.
7. Appointed Chief Judge 1 September 1991 to replace Abner Alexander who retired 31 August 1991.
8. Resigned 31 March 1991.

# ATTORNEY GENERAL OF NORTH CAROLINA

*Attorney General*

## LACY H. THORNBURG

*Administrative Deputy Attorney General*
JOHN D. SIMMONS III

*Deputy Attorney General for Training and Standards*
PHILLIP J. LYONS

*Deputy Attorney General for Policy and Planning*
JANE P. GRAY

*Chief Deputy Attorney General*
ANDREW A. VANORE, JR.

*Senior Deputy Attorneys General*

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ANN REED DUNN
EUGENE A. SMITH
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*Special Deputy Attorneys General*

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ROBERT G. WEBB
JAMES A. WELLONS
THOMAS J. ZIKO

*Assistant Attorneys General*

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T. BYRON SMITH
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D. DAVID STEINBOCK, JR.
ELIZABETH STRICKLAND
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SYLVIA H. THIBAUT
JANE R. THOMPSON
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VICTORIA L. VOIGHT
JOHN C. WALDRUP
JOHN H. WATTERS
KATHLEEN M. WAYLETT
TERESA L. WHITE
THOMAS B. WOOD
THOMAS D. ZWEIGART

# DISTRICT ATTORNEYS

| DISTRICT | DISTRICT ATTORNEY | ADDRESS |
|---|---|---|
| 1 | H. P. Williams, Jr. | Elizabeth City |
| 2 | Mitchell D. Norton | Washington |
| 3A | Thomas D. Haigwood | Greenville |
| 3B | W. David McFadyen, Jr. | New Bern |
| 4 | William H. Andrews | Jacksonville |
| 5 | Jerry Lee Spivey | Wilmington |
| 6A | W. Robert Caudle II | Halifax |
| 6B | David H. Beard, Jr. | Murfreesboro |
| 7 | Howard S. Boney, Jr. | Tarboro |
| 8 | Donald M. Jacobs | Goldsboro |
| 9 | David R. Waters | Oxford |
| 10 | Colon Willoughby, Jr. | Raleigh |
| 11 | Thomas H. Locke | Smithfield |
| 12 | Edward W. Grannis, Jr. | Fayetteville |
| 13 | Rex Gore | Bolivia |
| 14 | Ronald L. Stephens | Durham |
| 15A | Steve A. Balog | Graham |
| 15B | Carl R. Fox | Pittsboro |
| 16A | Jean E. Powell | Raeford |
| 16B | J. Richard Townsend | Lumberton |
| 17A | Thurman B. Hampton | Wentworth |
| 17B | James L. Dellinger, Jr. | Dobson |
| 18 | Horace M. Kimel, Jr. | Greensboro |
| 19A | William D. Kenerly | Concord |
| 19B | Garland N. Yates | Asheboro |
| 20 | Carroll R. Lowder | Monroe |
| 21 | Thomas J. Keith | Winston-Salem |
| 22 | H. W. Zimmerman, Jr. | Lexington |
| 23 | Michael A. Ashburn | Wilkesboro |
| 24 | James T. Rusher | Boone |
| 25 | Robert E. Thomas | Newton |
| 26 | Peter S. Gilchrist III | Charlotte |
| 27A | Michael K. Lands | Gastonia |
| 27B | William Carlos Young | Shelby |
| 28 | Ronald L. Moore | Asheville |
| 29 | Alan C. Leonard | Rutherfordton |
| 30 | Charles W. Hipps | Waynesville |

# PUBLIC DEFENDERS

| DISTRICT | PUBLIC DEFENDER | ADDRESS |
|---|---|---|
| 3A | ROBERT L. SHOFFNER, JR. | Greenville |
| 3B | HENRY C. BOSHAMER | Beaufort |
| 12 | MARY ANN TALLY | Fayetteville |
| 14 | ROBERT BROWN, JR. | Durham |
| 15B | JAMES E. WILLIAMS, JR. | Carrboro |
| 16A | J. GRAHAM KING | Laurinburg |
| 16B | ANGUS B. THOMPSON | Lumberton |
| 18 | WALLACE C. HARRELSON | Greensboro |
| 26 | ISABEL S. DAY | Charlotte |
| 27 | ROWELL C. CLONINGER, JR. | Gastonia |
| 28 | J. ROBERT HUFSTADER | Asheville |

# 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

## GENERAL STATUTES CITED AND CONSTRUED



## RULES OF EVIDENCE 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

# RULES OF APPELLATE PROCEDURE 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 persons have been admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 2nd day of August, 1991 and said persons have been issued certificates of this Board:

DAVID ALLEN ANDERSON ..... Jacksonville
Applied from the District of Columbia
JOHN DAVIS BRYANT ..... Hendersonville
Applied from the State of New York
JOSEPH C. MCCARTY, III ..... Memphis, Tennessee
Applied from the State of Tennessee
JARED D. SIMMER ..... Pittsburgh, Pennsylvania
Applied from the State of Michigan
JOSEPH M. STAVOLA ..... Greensboro
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 16th day of August, 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 23rd day of August, 1991 and said persons have been issued license certificates.

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DUNCAN EARL ALFORD ..... Chapel Hill
JANE ELIZABETH AMMONS ..... Fayetteville
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| WILLIAM DORSEY YOUNG, IV | Cary |
| ERROL ZEIGER | Chapel Hill |

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 was admitted to the North Carolina Bar by comity by the Board of Law Examiners

on the 23rd day of August, 1991 and said person has been issued a certificate of this Board:

DEBRA DAWN ..... Pompano Beach, Florida
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 5th day of September, 1991.

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

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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 13th day of September, 1991 and said persons have been issued license certificates.

MAXINE EICHNER ..... Seattle, Washington
DAVID WILLIAM GOSSETT ..... Columbia, South Carolina
HUGH SCOTT OVERHOLT ..... Greenville
MARY MARGARET GOODMAN RICHARDS ..... Durham
NICHOLAS PARRISH ROBINSON ..... Atlanta, Georgia
ERIC S. STEIN ..... Chapel Hill
LINDY BODE AUCOIN ..... Greensboro
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PATRICIA WRIGHT HARVEY ..... Tarboro
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ANDREW FREDERICK LINDEMANN ..... Columbia, South Carolina
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TIMOTHY MARK SMITH ..... Charlotte
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CYNTHIA BOWERS TRIPP ..... Clayton
SAMUEL WAYNE WHITT ..... Raleigh

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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 20th day of September, 1991 and said persons have been issued license certificates.

JAMES RONALD ANSLEY ..... Raleigh
ROBERT ANTHONY BUZZARD ..... Buies Creek
TIMOTHY J. COLGAN ..... Raleigh
R. GARY KEITH ..... Charlotte
MARTIN JOSEPH KING ..... Greensboro
JOHN M. REAGLE ..... Durham

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 20th day of September, 1991 and said persons have been issued certificates of this Board:

ROBERT CLINTON CLARY, JR. ..... Lawrenceville, Virginia
Applied from the State of Virginia
GENE ALLEN DICKEY ..... Winston-Salem
Applied from the State of Minnesota
KEVIN EUGENE HECKART ..... Surf City
Applied from the State of Iowa
JAMES H. JEFFRIES, III ..... Greensboro
Applied from the District of Columbia
ELIZABETH BEATRICE KUONI ..... Greensboro
Applied from the State of Illinois
JEFFREY WEXLER MALICKSON ..... Charlotte
Applied from the District of Columbia

Given over my hand and seal of the Board of Law Examiners this the 30th day of September, 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 have been admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 11th day of October, 1991 and said persons have been issued certificates of this Board:

JEROME RAMEY ..... Wilson
Applied from the State of Missouri
TERRENCE DION DELEHANTY ..... Highland Beach, Florida
Applied from the State of Michigan

Given over my hand and seal of the Board of Law Examiners this the 14th day of October, 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 person has been admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 1st day of November, 1991 and said person has been issued a certificate of this Board:

JOHN F. SNYDER ..... Southport
Applied from the District of Columbia

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

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

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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 has been admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 1st day of November, 1991 and said person has been issued a certificate of this Board:

DIANA ARMATAGE JOHNSTON ..... Asheville
Applied from the State of Connecticut

Given over my hand and seal of the Board of Law Examiners this the 25th day of November, 1991.

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

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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 13th day of December, 1991 and said persons have been issued license certificates.

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

CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

## NORTH CAROLINA

AT

## RALEIGH

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STATE OF NORTH CAROLINA v. HAROLD VERNARD QUICK

No. 541A87

(Filed 12 June 1991)

**1. Jury § 7.11 (NCI3d)— first degree murder—jury selection—excusal for cause—opposition to death penalty**

The trial court did not err in a prosecution for first degree murder and robbery by excusing prospective jurors for cause or by allowing the State to excuse prospective jurors for cause where the court gave preliminary instructions and inquired about beliefs concerning the death penalty; one juror raised his hand and was questioned further; neither counsel for defendant nor counsel for the state had questions for that juror; the juror was excused for cause; two replacement jurors, in succession, declared an inability to follow North Carolina's capital sentencing law and were excused for cause; and the state excused eleven prospective jurors for cause based on their responses to death penalty questioning.

**Am Jur 2d, Jury §§ 289, 290.**

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

**2. Jury § 7.11 (NCI3d)— first degree murder—jury selection—right to rehabilitate juror**

There is no right to question or rehabilitate a juror in a capital case when the juror has expressed a clear and unequivocal refusal to impose the death penalty under all circumstances.

**Am Jur 2d, Jury §§ 201, 289, 290.**

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

**3. Jury § 7.11 (NCI3d)— first degree murder—jury selection—excusal for cause—procedure**

The trial court did not err during jury selection for a murder trial by allowing the State's challenges for cause without question, but on two occasions denying defendant's challenges for cause after an inquiry into whether the juror in question could follow the law as instructed. The record indicates that each of the State's challenges for cause based on the jurors' death penalty beliefs was proper, and in the two instances when the court inquired into the substance of defendant's challenges for cause, the court merely clarified and explained the law to a confused juror. Defendant was permitted to resume questioning in each instance and ultimately exercised peremptory challenges.

**Am Jur 2d, Jury §§ 289, 290.**

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

**4. Jury § 7.12 (NCI3d)— first degree murder—jury selection—facts under which juror would invoke death penalty—improper**

The court did not err in a murder prosecution by sustaining the State's objections to defendant's questions asking prospective jurors to describe the circumstances under which they would invoke the death penalty. Just as counsel may not stake out prospective jurors by positing facts and inquiring into their decision on those facts, neither may they seek to have a juror supply a hypothetical set of facts necessary to support a particular verdict. There was also no error in sustaining

an objection to defendant's question as to whether a prospective juror thought the death penalty should be invoked in most cases; although it does not have the same tendency to stake out a juror, it was unnecessary for the effective use of defendant's challenges.

**Am Jur 2d, Jury §§ 289, 290.**

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

5. **Jury § 6.3 (NCI3d)— first degree murder—jury selection—questions as to racial bias**

There was no violation of *Turner v. Murray*, 476 U.S. 28, in a first degree murder prosecution because the case involved neither an interracial crime nor a refusal by the trial court to allow defendant to question prospective jurors regarding racial bias.

**Am Jur 2d, Jury § 284.**

**Racial, religious, economic, social, or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on voir dire in criminal case. 54 ALR2d 1204.**

6. **Jury § 7.7 (NCI3d)— first degree murder—jury selection—challenge for cause—not renewed—not preserved for appeal**

The trial court did not err in a murder prosecution by denying defendant's challenge for cause to two prospective jurors where defendant did not renew his challenges for cause as required by N.C.G.S. § 15A-1214(h)(i). Furthermore there was no abuse of discretion in denying the challenges for cause where one juror, while first indicating that he would tend to believe a law enforcement officer before other witnesses, further indicated that he would consider a number of factors in determining the credibility of law enforcement officers and the other juror, while first indicating that he would invoke the death penalty solely on the basis of a conviction of first degree murder, indicated after an explanation of the law by the court that he would not automatically recommend a sentence of death and that he would follow the law and listen to the evidence in the penalty phase.

**Am Jur 2d, Jury §§ 285, 289, 290, 299.**

**7. Homicide § 21.5 (NCI3d)— first degree murder—sufficiency of evidence**

The trial court did not err in a first degree murder prosecution by denying defendant's motion to dismiss for insufficient evidence where the evidence indicated that defendant had the motive, opportunity, means and state of mind necessary to commit a first degree murder. The evidence was more than sufficient to allow a reasonable inference that defendant in fact committed the murder.

**Am Jur 2d, Homicide §§ 425, 426, 437, 440.**

**8. Criminal Law § 382 (NCI4th)— first degree murder—questioning of witness by judge—no error**

The trial court did not err in a first degree murder prosecution by questioning three State's witnesses where the court properly used its authority under N.C.G.S. § 8C-1, Rule 614(b) to question witnesses in order to clarify ambiguous testimony and to enable the court to rule on the admission of certain exhibits.

**Am Jur 2d, Trial § 88.**

**9. Homicide § 15 (NCI3d)— first degree murder—character of victim—no prejudicial error**

There was no prejudicial error in a first degree murder prosecution where the trial court admitted a witness's opinion as to the victim's reputation in the community before there was a challenge to the victim's character and when there was no evidence that the victim was the aggressor. Although the evidence against defendant was not overwhelming, exclusion of the testimony would not have likely changed the result.

**Am Jur 2d, Homicide §§ 301, 308.**

**10. Constitutional Law § 370 (NCI4th)— first degree murder—guilt phase—evidence of victim's character—no violation of constitutional rights**

There was no violation of a first degree murder defendant's rights under the Eighth Amendment to the United States Constitution from the admission during the guilt phase of a statement by one witness, unrelated to the victim, that the victim was a good man who helped people. There is no reasonable likelihood that this evidence created an unaccept-

able risk that the jury would arbitrarily and capriciously sentence defendant to death.

**Am Jur 2d, Homicide §§ 301, 308.**

**11. Criminal Law § 169.6 (NCI3d)— first degree murder—defendant's questions as to character of victim—excluded—no offer of proof**

A murder defendant's assignment of error to the exclusion of rebuttal evidence concerning the victim's good character was overruled where the record does not reveal what the witness's answer would have been.

**Am Jur 2d, Appeal and Error § 526; Evidence §§ 128-130; Homicide §§ 301, 302.**

**12. Homicide § 30 (NCI3d)— second degree murder—not submitted—no error**

The trial court did not err in a first degree murder prosecution by failing to submit defendant's requested instruction on second degree murder where there was no evidence that decedent was killed other than in the course of the commission of the felony of armed robbery.

**Am Jur 2d, Homicide § 530.**

**13. Criminal Law § 60.3 (NCI3d)— first degree murder—testimony of fingerprint expert—verification by another agent**

The trial court did not err during a first degree murder prosecution by allowing an SBI agent to testify that another agent had verified his identification of defendant's fingerprint. The trial court sustained defendant's objection and defendant did not move to strike the testimony, and there was no prejudice inasmuch as the witness gave his own uncontroverted opinion identifying the print. Moreover, it has been held in *State v. Jones*, 322 N.C. 406, that an SBI agent may tell the jury that another agent subsequently verified the match when testifying about standard SBI procedures. The challenged testimony is admissible to establish the basis for expert testimony, a nonhearsay purpose.

**Am Jur 2d, Expert and Opinion Evidence §§ 279, 280.**

**Fingerprints, palm prints, or bare footprints as evidence. 28 ALR2d 1115.**

**14. Criminal Law § 169 (NCI3d)— first degree murder—blood-stain on bicycle—admissible**

The trial court did not err in a first degree murder prosecution by denying defendant's pretrial motion to exclude evidence of a stain on a bicycle seized from defendant's residence. The court sustained defendant's objection, defendant failed to move to strike the testimony, defendant elicited similar evidence on cross-examination, and the same evidence came in later without objection.

**Am Jur 2d, Evidence § 425; Trial § 178.**

**15. Criminal Law § 1344 (NCI4th)— first degree murder—aggravating circumstances—especially heinous, atrocious, or cruel—evidence sufficient**

There was sufficient evidence at a sentencing hearing for first degree murder to support the submission of the especially heinous, atrocious, or cruel aggravating factor where defendant went to the victim's house when the victim was alone; the victim was a seventy-eight-year-old man who had undergone heart surgery and suffered a ruptured appendix; practically helpless, the victim temporarily fended off defendant's attack, but ultimately suffered seventeen stab wounds in the chest, abrasions on the face, bruises and lacerations around the mouth, and bruises and incisions on the forearm; seven or eight wounds extended through the heart and penetrated the left lung; two wounds went through the heart and into the right lung; and there was testimony that the victim could have lived up to ten minutes after sustaining the stab wounds.

**Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552, 554, 555.**

**16. Criminal Law § 1352 (NCI4th)— first degree murder—sentencing—McKoy error**

A first degree murder defendant was entitled to a new sentencing hearing under *State v. McKoy*, 327 N.C. 31, where the court instructed the jury to answer no to each mitigating circumstance that it failed to find unanimously. The error was prejudicial because the jury rejected five of the six mitigating factors submitted and the defendant presented substantial evidence in support of at least some of those mitigating circumstances.

**Am Jur 2d, Criminal Law § 600.**

**Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.**

Justice MEYER concurring in part and dissenting in part.

Justices MITCHELL and MARTIN join in this concurring and dissenting opinion.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Washington, J.*, at the 24 August 1987 Criminal Session of Superior Court, RICHMOND County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 10 December 1990.

*Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Special Deputy 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 first-degree murder on the basis of premeditation and deliberation and felony murder. He also was convicted of robbery with a dangerous weapon. The jury recommended that defendant be sentenced to death for the first-degree murder. The trial court imposed a sentence of death for the murder and arrested judgment on the robbery charge. We find no prejudicial error in the guilt phase of defendant's trial, but conclude that defendant is entitled to a new sentencing proceeding under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

Between 4:30 and 5:00 a.m. on Sunday, 5 April 1987, William Patterson left his house in Hamlet, North Carolina, to find a soft drink for his sick daughter who was complaining of thirst. Patterson went to a store where a vending machine normally was located and found that the machine had been moved. Because Patterson had been drinking, he went to Charlie Mack Quick's house instead of driving into Hamlet for the soft drink. Quick, who apparently was unrelated to defendant, lived two or three miles from Patterson. When Patterson got to Quick's house the lights were off, but the front door was open slightly. Quick did not respond to Patterson's

call and Patterson then saw Quick's arm "laying out on the floor." Patterson went to the police station and told the police he thought Quick had suffered a heart attack.

At about 6:00 a.m. Richmond County Deputy Sheriff Stokes arrived at Quick's house. He entered the house and discovered Quick's dead body on the floor, lying on a telephone that was off its receiver; Quick's billfold, containing personal papers but no cash, lay nearby.

State Bureau of Investigation Agent Snead found no sign of forced entry when he arrived at the victim's house at about 7:00 a.m. Agent Sweatt, who arrived at the crime scene later in the day, removed nine latent fingerprints from an ashtray found just a few feet from the victim's body. One fingerprint matched defendant's ring finger; none of the other fingerprints from the ashtray matched defendant's, and there were no other fingerprints of value in the house. Agent Snead found bicycle tracks outside the victim's house, but was unable to make a cast from the tracks. Snead testified, however, that the tracks found outside the victim's house had the same width and tread design as tracks found in the yard of Willis Bristoe.

The autopsy of the victim's body revealed seventeen stab wounds in the chest area and bruises on the forearm. In the medical examiner's opinion, the victim died from multiple stab wounds and the resulting loss of blood. The victim might have lived as long as ten minutes after the first stab, but it was impossible to say exactly how long he lived. The medical examiner testified that the depth of the wounds ranged from three and one-half to six inches and that the wounds could have been made by a pocketknife. The depth of the wounds was consistent with a single-edge knife blade approximately three and one-half inches long.

The victim was a seventy-eight-year-old disabled man who lived alone. His cousin, Gertha Mumfort, testified that she saw him several days each week and she knew he received two checks from the government in the mail, one on the first and one on the third day of each month. She also testified that the victim usually carried several one hundred dollar bills in his wallet. Mumfort testified that she last saw the victim on 3 April 1987.

Julian Hunsucker testified that between noon and 1:30 p.m. on 4 April 1987, the victim came to the neighborhood store where

Hunsucker worked. Hunsucker testified that the victim showed him $800.00 in one hundred dollar bills; the victim always carried money and never asked for credit at the store.

Patricia Sturgess, a part-time worker with the Department of Social Services, testified that she spoke on the telephone with the victim sometime between 5:30 and 6:00 p.m. on 4 April 1987. Sturgess testified that she heard other voices in the background but could not tell if they were male or female. Sturgess gave her opinion that at the time the victim did not sound normal. Mary Davis, the victim's daughter, received a busy signal when she attempted to call the victim at about 7:00 p.m. on 4 April 1987. Likewise, Willie Dawkins testified that the line was busy when he tried to call the victim between 7:00 and 7:30 p.m. on April 4th.

On 6 April 1987, police officers went to Karel Company, defendant's place of employment, to speak with him. Defendant voluntarily accompanied the officers to police headquarters. During an interrogation there, defendant said that on the day in question he had ridden a bicycle to a store around noon and later had gone to his cousin's house to play cards. Defendant said he had never been to the victim's house. During this interrogation, the police received a telephone call notifying them that defendant's fingerprint was on the ashtray found at the victim's house. The officers then arrested defendant.

Willis Bristoe testified that on the afternoon of Saturday, 4 April 1987, he went with defendant and several others to visit a friend. Bristoe testified that they returned to his house and that defendant left on his bicycle at about 5:00 p.m. Bristoe said that he loaned defendant eighty-four cents to buy cigarettes.

Verlie Williams testified that defendant, his girl friend, and his mother came to her home for a card game between 8:30 and 10:00 p.m. on Saturday, 4 April 1987. Defendant bought two beers and paid for them with a twenty dollar bill. Williams testified that defendant came back to her home the next morning, 5 April 1987, between 11:00 a.m. and noon, and bought three beers.

Boyd Goodman, a disc jockey at a local club, testified that he remembered seeing defendant playing cards on 3 April and 5 April. He also testified that defendant purchased a beer the evening of 5 April with a one hundred dollar bill.

James Patterson worked for Karel Company in April 1987. Patterson testified that he had known defendant for several years and that defendant had asked him to sharpen a knife during the week before the victim's death. The knife Patterson sharpened for defendant had two blades—one was three inches long; the other was two or two and one-half inches long. Patterson testified that many people carry such knives and that he had sharpened knives for others on previous occasions.

Harold McRae, who met defendant while they were both incarcerated, testified that defendant approached him while in jail and wanted to talk. McRae testified that defendant told him he killed a man. According to McRae, defendant said he rode his bicycle to the man's house around midnight. Defendant said he knocked on the door, then went inside looking for money. When the man inside recognized defendant, defendant stabbed him and took $1,300 and a gun. Defendant rode his bicycle home, and later buried the gun and knife. McRae also testified that defendant said he did not mean to kill the victim.

Defendant's evidence tended to show the following: Anthony Snyder, who was in jail with defendant and McRae, testified that he spoke with defendant every day they were incarcerated, and defendant never spoke about his case to anyone. Snyder also said McRae had been threatened with beatings by several of the prison guards.

James Davis testified that he saw defendant around 6:00 or 6:15 p.m. on 4 April. Davis said defendant was riding in his father's car with his brothers; Davis also said he saw a bicycle in the back of the car.

Charles Quick, defendant's brother, saw defendant on the evening of 3 April. Quick testified that defendant had a "little light roll" of money. Quick also testified that he saw defendant's bicycle with a flat tire on 4 April. Willis Bristoe corroborated the testimony regarding the bicycle's flat tire.

Harold Fisher testified that he saw the victim on the afternoon of 4 April. Fisher said the victim told him defendant had been to his house the previous night, but had not come inside. Gail Jackson, defendant's girl friend, also testified that she and defendant went to the victim's house on 3 April and that defendant

smoked a cigarette while they were there. Jackson testified that she gave defendant $150.00 on the first of April.

Defendant testified in his own behalf and denied killing the victim. Defendant said he was paid $53.00 on 3 April 1987. Later that evening, he and his girl friend visited several friends, including the victim. Defendant testified that he smoked a cigarette while at the victim's house. The next day he rode his brother's bicycle to see several people. During the day he noticed the tire was going flat. His brother came to pick him up and they took the bicycle home around 6:00 p.m. He stayed at home until about 11:30 p.m. the evening of 4 April, when he went to Verlie Williams' house to play cards.

Johnnie Quick, defendant's supervisor at Karel Company, testified that defendant was a "real good worker" with a good record of attendance. Terry Warner, a psychologist at Sandhills Mental Health Center, testified that defendant had an IQ of seventy-four (borderline range of intellectual functioning). This IQ made defendant less capable of making reasoned decisions and performing tasks requiring verbal behavior. In addition, defendant's substance abuse compromised the limited abilities he had. Warner testified that defendant tended to be impulsive as opposed to acting with thoughtful contemplation. Warner also testified that defendant knew the difference between right and wrong.

I

**[1]** Defendant's first assignment of error concerns the removal of prospective jurors following their responses to questions regarding the death penalty. Following a preliminary inquiry into prospective jurors' feelings about the death penalty, the trial court excused three jurors for cause. Likewise, the court allowed the State to excuse for cause eleven other prospective jurors upon the same grounds. Defendant contends that none of these prospective jurors was asked if he or she could set aside personal feelings about capital punishment and follow the law of North Carolina. Defendant contends that the trial court neither allowed him to examine these prospective jurors before their removal, nor undertook its own inquiry into the jurors' suitability to sit on the case. Yet, defendant argues, the court did attempt to rehabilitate two prospective jurors whom defendant sought to challenge for cause. Defendant thus argues that he is entitled to a new trial because prospective jurors

were excused for cause improperly and because the trial court was not evenhanded during jury selection.

The United States Supreme Court has described the standard for determining whether a prospective juror in a capital case has been excused improperly as "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his 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, 45, 65 L. Ed. 2d 581, 589 (1980)). *Witt* also stated that, in jury selection, "the quest is for jurors who will conscientiously apply the law and find the facts" and that "it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." *Id.* at 423, 83 L. Ed. 2d at 851. Finally, *Witt* noted that the *Adams* standard "does not require that a juror's bias be proved with 'unmistakable clarity,' " *id.* at 424, 83 L. Ed. 2d at 852, and that the trial judge's decision to excuse a juror is entitled to deference because "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 425-26, 83 L. Ed. 2d at 852.

Our review of the jury selection voir dire leads us to conclude that the trial court did not err in excusing three prospective jurors for cause. Nor did the court err in allowing the State to excuse eleven other prospective jurors for cause.

Before addressing prospective jurors individually, the trial court gave preliminary instructions describing the charges against defendant, the presumptions and burdens belonging to the parties, and the nature of the procedures to be followed in the trial. The court made certain the prospective jurors understood that this was a capital trial consisting of two stages and that during the sentencing stage, if reached, the jury would consider evidence of aggravating and mitigating circumstances before recommending a sentence. The court also asked the prospective jurors collectively if they would follow the law of North Carolina. All prospective jurors indicated that they understood the court's instructions and could follow the law. The court then asked:

> [D]o any of the members of this jury now have personal beliefs about the death penalty that are so strongly held that no matter what the evidence, no matter what the circumstances

> are proven to the jury, that you would be unable to vote for a recommendation of the death penalty even though you were satisfied beyond a reasonable doubt of the three things required by law that I have mentioned to you.

One juror raised his hand. The court, uncertain whether the jurors had understood the question, asked again:

> If this defendant is convicted by a jury, of which you are a part, of First Degree Murder, can and will you follow the law of North Carolina as to the sentence recommendation as the Court will explain to you, or because of your personal beliefs about the death penalty, would you be unable to vote for a recommendation of the death penalty even though you were satisfied beyond a reasonable doubt of the the three things required by law [the existence of aggravating circumstances that outweigh the mitigating circumstances and are sufficiently substantial to call for the imposition of the death penalty].

When potential juror ten again raised his hand, the court asked, "you are saying that you could not apply the law of North Carolina to this evidence, and if you . . . found this defendant guilty of Murder in the First Degree, under no circumstances could you vote for the death penalty; is that correct?" The juror answered: "That's correct." The court asked defense counsel and counsel for the State if they had questions for this juror; both responded negatively. The court then excused the juror for cause.

The clerk of court then called a replacement juror who also declared an inability to follow North Carolina's capital sentencing law. Defense counsel again had neither questions for the juror nor an objection to his excusal.

The court asked the next replacement juror, "As to the second phase of this trial then, do you say you could and would follow the law as to the imposition of the death penalty?" The juror responded: "No, sir." The court asked again: "You are saying that no matter what the law is, or how strong the evidence is, under no circumstances would you vote for the death penalty; is that what you are saying?" The juror answered: "Yes." The court then excused the juror without objection by defendant. These three jurors properly were excused by the court under the test in *Witt* described above.

During jury selection, the State excused for cause eleven prospective jurors based on their responses to death penalty questioning. As to nine of these prospective jurors, defendant failed to object. The Court in *Witt* indicated that failure of defense counsel to object to the removal of a prospective juror was a circumstance bearing directly on the question of whether the removal was proper. *Id.* at 431n.11, 83 L. Ed. 2d at 856n.11. Our review of the transcript leads us to conclude that, in fact, the removal of these prospective jurors was proper. In each instance where defendant failed to object, the prospective juror in question indicated that regardless of the facts or law he or she would not consider the death penalty. In one of the instances where defendant did object to the removal of a prospective juror, the juror responded that under no circumstances would she consider the death penalty, regardless of the facts or law. In the other instance where defendant objected, the juror stated: "There is no way I can sentence a person to death." The juror said she could not consider the death penalty no matter how aggravated the case was and regardless of the facts.

Though the trial court did not inquire expressly whether each juror's beliefs about the death penalty would "substantially impair the performance of his duties as a juror," the answers of each juror indicate such impairment. There is no indication in the record that any of the challenged jurors would have given different answers if the court had conducted a more detailed inquiry into their beliefs regarding the death penalty. *See State v. Reese*, 319 N.C. 110, 121, 353 S.E.2d 352, 358 (1987).

**[2]** Defendant also argues that the trial court erred by not giving him the opportunity to question or attempt to rehabilitate the challenged jurors. We have held consistently that there is no right to question or rehabilitate a juror in a capital case when the juror has expressed a clear and unequivocal refusal to impose the death penalty under all circumstances. *State v. Johnson*, 317 N.C. 343, 376, 346 S.E.2d 596, 614 (1986); *State v. Smith*, 291 N.C. 505, 526-27, 231 S.E.2d 663, 676-77 (1977); *State v. Bock*, 288 N.C. 145, 156, 217 S.E.2d 513, 520 (1975), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1209 (1976).

**[3]** Defendant's last argument under this assignment of error is that the trial court acted partially during jury selection by allowing the State's challenges for cause without question, yet on two occa-

sions denying defendant's challenges for cause after an inquiry into whether the juror in question could follow the law as he was instructed. Without doubt, the trial court must act impartially during a trial. *See, e.g., State v. Frazier*, 278 N.C. 458, 460, 180 S.E.2d 128, 130 (1971); N.C.G.S. § 15A-1232 (1988). As discussed above, the record indicates that each of the State's challenges for cause based on a juror's beliefs regarding the death penalty was proper, even absent inquiry by the trial court. In the two instances when the court inquired into the substance of defendant's challenges for cause, the court merely clarified and explained the law when the prospective juror was confused by the questioning. In each instance, defendant was permitted to resume questioning following the court's inquiry. Defendant ultimately exercised peremptory challenges to remove the two jurors he sought to challenge for cause. We conclude that the trial court properly conducted the jury selection so as to insure that both defendant and the State would have a fair and impartial jury. *See State v. Artis*, 325 N.C. 278, 295, 384 S.E.2d 470, 479 (1989), *vacated and remanded on other grounds*, --- U.S. ---, 108 L. Ed. 2d 604 (1990). Defendant is not entitled to relief under this assignment of error.

**[4]** Defendant's next assignment of error concerns the trial court's limitations on defendant's jury selection voir dire. During jury selection, the court apparently sustained the State's objection when defendant asked a prospective juror, "[u]nder what circumstances would you invoke the death penalty?" The court also sustained the State's objection when defendant sought to ask another prospective juror whether the death penalty should be imposed in most cases. Defendant contends that, by sustaining the State's objections to these questions, the court prevented defendant from using his challenges knowingly and intelligently, thereby denying his constitutional rights to a fair trial, due process of law, and the heightened degree of reliability demanded in capital cases.

We note first that "[t]he trial judge has broad discretion in supervising the selection of the jury to the end that both the state and defendant may receive a fair trial." *State v. Nelson*, 298 N.C. 573, 593, 260 S.E.2d 629, 644 (1979), *cert. denied sub nom. Jolly v. North Carolina*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980) (citing *State v. McKenna*, 289 N.C. 668, 224 S.E.2d 537, *death sentence vacated*, 429 U.S. 912, 50 L. Ed. 2d 278 (1976)). "Moreover, in order to establish reversible error, a defendant must show prejudice in addition to a clear abuse of discretion on the part of the

trial court." *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989).

We have held consistently that "[t]he trial court should not permit counsel to question prospective jurors as to the kind of verdict they would render or how they would be inclined to vote on a given state of facts." *State v. Bracey*, 303 N.C. 112, 119, 277 S.E.2d 390, 395 (1981); *see also State v. Parks*, 324 N.C. at 423, 378 S.E.2d at 787; *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980). Just as counsel may not "stake out" prospective jurors by positing certain facts and inquiring into their probable decision on those facts, neither may they seek to have a juror supply a hypothetical set of facts necessary to support a particular verdict. Thus, the court did not abuse its discretion by precluding defendant from asking a prospective juror to describe the circumstances under which he would invoke the death penalty.

Neither did the court commit reversible error by sustaining an objection to defendant's question whether a prospective juror thought the death penalty should be invoked in most cases. Though this question does not have the same tendency to stake out a juror to a particular position, it was unnecessary for the defendant's effective use of his challenges. Defendant was allowed to ask the prospective juror whether she believed the death penalty should automatically be invoked in first-degree murder cases. He also was able to ask about the degree to which the juror thought about or discussed the death penalty. Defendant ultimately exercised a peremptory challenge to remove this juror. Defendant is unable to show that the court's ruling was an abuse of discretion or that it prejudiced his ability to secure an impartial jury.

**[5]** Defendant also argues that the court's rulings violated the United States Supreme Court's decision in *Turner v. Murray*, 476 U.S. 28, 90 L. Ed. 2d 27 (1986). In *Turner*, the Court held that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Id.* at 36-37, 90 L. Ed. 2d at 37. This case involves neither an interracial crime nor a refusal by the trial court to allow defendant to question prospective jurors regarding racial bias. We find no special circumstance creating an unacceptable risk that defendant would receive the death penalty arbitrarily or capriciously. Defendant is not entitled to relief on this assignment of error.

**[6]** Defendant next assigns as error the trial court's denial of defendant's challenges for cause to prospective jurors Ballentine and Estridge. We note at the outset that defendant, by failing to renew his challenges for cause, has failed to comply with N.C.G.S. § 15A-1214(h) and (i). These provisions require that:

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;
>
> (2) Renewed his challenge as provided in subsection (i) of this section; and
>
> (3) Had his renewal motion denied as to the juror in question.
>
> (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
>
> (1) Had peremptorily challenged the juror; or
>
> (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

N.C.G.S. § 15A-1214(h), (i) (1988). Compliance with these provisions is a mandatory predicate to defendant's right to assert this argument on appeal. *State v. Sanders*, 317 N.C. 602, 608, 346 S.E.2d 451, 455 (1986). Thus, defendant has not preserved this issue for appellate review.

Further, the trial court's ruling on a challenge for cause will not be overturned absent abuse of discretion. *See State v. Kennedy*, 320 N.C. 20, 26, 357 S.E.2d 359, 363 (1987); *State v. Watson*, 281 N.C. 221, 227, 188 S.E.2d 289, 293, *cert. denied*, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972). Even if defendant had complied with the statute, he is not entitled to relief under this assignment because he has not shown an abuse of discretion.

Defendant sought to challenge prospective juror Ballentine for cause because Ballentine had served previously on a grand jury before which Captain Jarrell, one of the State's witnesses in this case, appeared as a witness. Ballentine also said at one point that

he "believe[d] he would" tend to believe an officer before other witnesses. Yet, in response to an almost identical question Ballentine said he "[would] have to consider it all" before deciding whether the testimony of a law enforcement officer would receive more weight than that of any other witness. Ballentine also said he did not know whether it would take more evidence from defendant to "overcome [his] belief of what the officer said."

Upon defendant's challenge for cause, the court inquired into whether Ballentine understood that he could believe all, part, or none of what a witness said; the court also reminded Ballentine of the law on reasonable doubt and the State's burden of proof. Satisfied that Ballentine would follow the law and not automatically give undue credence to testimony by officers, the court denied the challenge for cause. Defendant then asked Ballentine again whether he would give more weight to the testimony of an officer than to that of other witnesses. Ballentine's response was: "It's according to how it all comes about." Ballentine's answers indicated that he would consider a number of factors in determining the credibility of law enforcement officers. In light of those answers, there was no abuse of discretion in denying the challenge for cause as to prospective juror Ballentine.

Likewise, defendant challenged prospective juror Estridge because he indicated that he would invoke the death penalty even though the sole basis for the sentence was a conviction of first-degree murder. Yet, when defense counsel asked whether Estridge would consider any other verdict, Estridge replied: "I would give consideration to what the facts are in this case." When defendant challenged Estridge for cause, the court explained the difference between the guilt and penalty phases of the trial. The court then asked Estridge whether he would automatically vote for the death penalty if the jury found defendant guilty of first-degree murder. Estridge responded that he would not automatically recommend a sentence of death and that he would follow the law and listen to the evidence in the penalty phase. Defendant has failed to show an abuse of discretion by the trial court. This assignment of error is without merit.

II

**[7]** With respect to the guilt phase of the trial, defendant first assigns as error the trial court's denial of his motion to dismiss the first-degree murder charge for insufficiency of the evidence.

Defendant contends that there was insufficient evidence that it was he who killed the victim, that he killed with premeditation and deliberation, or that he killed while engaged in an armed robbery.

In *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991), we described the appropriate standard of review as follows:

> "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 determination 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).

*Id.* at 180-81, 400 S.E.2d at 415-16. "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." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (emphasis in original).

Under this standard, there was sufficient evidence that defendant killed the victim with premeditation and deliberation and during the course of an armed robbery. The State presented evidence of defendant's fingerprint on an ashtray found inside victim's house. Harold McRae testified that defendant approached him while they were in jail together and told him defendant had ridden a bicycle to the victim's house, gone inside looking for money, stabbed the

victim to death, taken approximately $1,300, and then left. The State also presented evidence that the size and shape of defendant's recently sharpened pocketknife was consistent with the victim's wounds.

When determining whether there is sufficient evidence that a killing was done with premeditation and deliberation, the court may consider several circumstances, including the following: (1) want of provocation on the part of the deceased; (2) the conduct and statements of defendant before and after the killing; (3) the dealing of lethal blows after the deceased has been felled and rendered helpless; (4) evidence that the killing was done in a brutal manner; and (5) the nature and number of the victim's wounds. *See State v. Vause*, 328 N.C. at 238, 400 S.E.2d at 62; *State v. Bullock*, 326 N.C. 253, 258, 388 S.E.2d 81, 84 (1990). These circumstances are present here. Harold McRae testified that defendant said he stabbed the victim when the victim recognized him. This testimony permitted a reasonable inference that defendant stabbed the victim to avoid identification rather than because he was provoked. The brutality of the killing is shown by the infliction of seventeen stab wounds on the victim and the testimony by Agent Snead that the walls of the victim's house were splattered with blood. The number of wounds permits a reasonable inference that the seventy-eight-year-old victim received lethal blows after being felled and rendered helpless. Agent Snead testified that when he interrogated defendant about the killing, defendant "acted like I was talking about the weather."

There was also sufficient evidence to show that the killing occurred during an armed robbery. The State introduced evidence that defendant was borrowing money, even very small amounts, from friends to pay for cigarettes and beer during the two days before the murder. There was evidence that it was common knowledge that the victim carried large amounts of money on his person, including one hundred dollar bills. There was evidence that the victim's billfold was empty when found at the murder scene and that defendant was in possession of a significant amount of money, including a one hundred dollar bill, the day after the murder. Finally, there was evidence that defendant possessed a knife consistent with the murder weapon and that defendant hid or buried the knife after commission of the crime.

Defendant argues that the evidence against him in this case is no stronger than that in other cases in which courts have dismissed charges. *See State v. Lee*, 294 N.C. 299, 240 S.E.2d 449 (1978); *State v. Chapman*, 293 N.C. 585, 238 S.E.2d 784 (1977); *State v. White*, 293 N.C. 91, 235 S.E.2d 55 (1977); *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971); *see also State v. Bell*, 65 N.C. App. 234, 309 S.E.2d 464 (1983), *aff'd per curiam*, 311 N.C. 299, 316 S.E.2d 72 (1984). In none of the cases cited was there evidence of a statement by the defendant admitting the act and providing details of the offense. This case is more like *State v. Ledford*, 315 N.C. 599, 340 S.E.2d 309 (1986). In *Ledford*, we rejected the defendant's challenge to the sufficiency of the evidence where there was evidence that the defendant's shoe matched a footprint at the murder scene, that cigarette butts taken from defendant's home were the same brand as cigarette butts found at the murder scene (the nonsmoking victim's bedroom), and that defendant possessed money at the time of his arrest that corresponded to the money missing from the victim's home. *See also State v. Stone*, 323 N.C. 447, 373 S.E.2d 430 (1988).

The evidence recited above indicates that defendant had the motive, opportunity, means, and state of mind necessary to commit first-degree murder. The evidence was more than sufficient to allow a reasonable inference that defendant in fact committed the murder. Therefore, defendant is not entitled to relief on this assignment of error.

**[8]** Defendant next contends that the trial court committed reversible error by questioning three of the State's witnesses in a manner that implicitly expressed an opinion about the case to the jury. Defendant argues that such questioning by the trial court violated his federal and state constitutional rights and entitles him to a new trial.

The trial court is permitted to "interrogate witnesses, whether called by itself or by a party," N.C.G.S. § 8C-1, Rule 614(b), but the court may not "express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1988); *see also* N.C.G.S. § 8C-1, Rule 614(b), commentary; N.C.G.S. § 1A-1, Rule 51(a) (1990). However, "[i]n fulfilling the duties of a trial judge to supervise and control the course of a trial so as to insure justice to all parties, the judge may question a witness in order to clarify confus-

ing or contradictory testimony." *State v. Ramey*, 318 N.C. 457, 464, 349 S.E.2d 566, 571 (1986).

During the first episode about which defendant complains, the court asked:

> THE COURT: Mr. Witness, let me clarify something for myself, at least.
>
> You talked about sharpening a knife. Did you sharpen one knife or two knives?
>
> WITNESS: For him?
>
> THE COURT: For him.
>
> WITNESS: I only sharpened one.
>
> THE COURT: Did that knife have one blade or two blades?
>
> WITNESS: It had two.
>
> THE COURT: It had two. One blade you referred to as being 2 or 2½ inches long; is that right?
>
> WITNESS: That's right.
>
> THE COURT: And the other blade you referred to as being maybe 3 inches long; is that right?
>
> WITNESS: Yes sir.

The court's express purpose in questioning as it did was to clarify whether the witness was referring to one knife with two blades or two knives with one blade each. In no way did the questioning express the court's opinion as to the evidence.

When Agent Snead testified on direct examination for the State regarding a photograph of tire impressions made at Willis Bristoe's house, the record shows the following exchange:

> MR. MEACHEM: Your Honor, the State would ask that the witness be allowed to step down and illustrate his testimony.
>
> THE COURT: What photographs are you referring to?
>
> MR. MEACHEM: Your Honor, the State is referring to the State's exhibits 15, 16, 17, and 18 that were just introduced.
>
> THE COURT: The Court will ask a question with regard to State's exhibit 18.

Mr. Witness, as to the photograph of the tire impression or prints, the photograph is the area of the Willis Bristoe residence. When was that photograph taken?

WITNESS: It was taken on the 5th of April, 1987.

THE COURT: The 5th of April?

WITNESS: Yes sir.

THE COURT: The same day that you observed impressions or tracks at the [victim's] home?

WITNESS: That's correct, Your Honor.

THE COURT: And the photograph marked as State's exhibit 18, as one looks at it in the lower right-hand corner there is some object. Do you know what that was?

WITNESS: I have no idea what that is.

THE COURT: It's a round object.

WITNESS: Yes sir. It has—

THE COURT: It appears to be a reddish brown color.

WITNESS: Yes sir.

Following defendant's objection to State's exhibit 18, the court instructed the jury that the photograph would be admitted solely to explain or illustrate the testimony of the witness. The court also instructed the jury that the parties had stipulated to the court that "with regard to the round or circular appearing reddish brown object in the lower corner of that photograph, the jury is instructed that that has no known significance to the question before the jury and the Court." It appears, then, that in questioning this witness the court was exercising its proper function in ruling on the admissibility of an exhibit. The court did not express an opinion about the evidence or the exhibit; in fact, the court went to considerable length to prevent improper testimony or speculation about the object in the photograph that was subject to the parties' stipulation.

The third episode of questioning by the court occurred following defendant's recross examination of Dr. Thorne, the medical examiner, as follows:

THE COURT: Dr. let me ask you one or two questions.

. . .

Q. If you assume that a person is standing erect, perpendicular to the floor—

A. Yes sir.

Q. —now, a knife wound, a stab wound can go straight in roughly parallel to the floor, it can go upwards or it can go downwards?

A. Yes.

Q. Did you make any determination as to the path of the wound that you observed or examined on the body of Charlie Mac Quick?

A. Yes, I did.

Q. What was your finding?

A. My summary of the wounds was that the tracks were from front to back. Predominately from the right to the left and down.

Q. And down?

A. Yes sir.

Q. You found . . . wounds ranging upwards then?

A. In my report all of them were predominately down.

Q. Do you have any way of determining the position of the body at the time the wounds were inflicted, whether it was standing up, sitting down or lying down, or anything else?

A. No sir. That would be impossible to do.

THE COURT: I have no further questions. If you gentlemen wish to ask additional questions, you may do so.

Here again, the court communicated no opinion about the evidence. It merely sought to clarify the procedures used during the autopsy and the actual findings regarding the range of the wounds. The court also allowed the parties to rebut or explore any new evidence that resulted from its questioning. Finally, in its instructions to the jury at the close of the guilt phase, the court said:

> The law, as indeed it should, does not allow the judge presiding over the trial to tell the jury what it should do, or how to think. I have no right to do that, and I would not attempt to tell you how to decide this case. That is your

sole duty and responsibility. You are the judges of the facts and you alone decide the issues for or against this defendant.

Our examination of the record leads us to conclude that the trial court did not question the State's witnesses in a manner that communicated to the jury the court's opinion about evidence in the case. Rather, the court properly used its authority under Rule 614(b) to question witnesses in order to clarify ambiguous testimony and to enable the court to rule on the admissibility of certain evidence and exhibits. We find no violation of defendant's state or federal constitutional rights. This assignment of error is without merit.

**[9]** Defendant next claims the trial court erred in overruling his objection to inadmissible evidence of the victim's good character and in preventing defendant from presenting rebuttal evidence that could have established a motive for persons other than defendant to kill the victim. On redirect examination, the prosecutor asked William Patterson, the neighbor who discovered the victim's body, if he knew the victim's "reputation in the community." Patterson answered "Yes" and defendant objected when the prosecutor sought to have Patterson describe the victim's reputation. The trial court overruled defendant's objection and Patterson said: "To me he was a good man. He helped everybody out around there." On recross examination, defense counsel questioned Patterson about the victim's willingness to have couples come to his house for drinks. The court sustained the State's objection, however, when defense counsel asked Patterson if the victim "didn't have a reputation of ruining marriages in the community?"

Defendant first argues that the court erred in allowing the State to present evidence of the victim's good character. We agree, but find the error harmless. Rule 404(a)(2) governs the admissibility of evidence concerning the character of the victim. The rule states:

> (a) Character evidence generally.—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> . . . .
>
> (2) Character of victim.—Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or

> evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor . . . .

N.C.G.S. § 8C-1, Rule 404(a)(2) (1988). Thus, the rule allows the prosecution to introduce evidence of a victim's character only to rebut defendant's evidence calling it into question. At the time of Patterson's testimony, there had been no challenge to the victim's character and there was no evidence that the victim was the aggressor. The admission of the witness's opinion as to the victim's reputation in the community was therefore error.

"The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987). Though the evidence against defendant was not overwhelming, we are convinced that exclusion of the witness's statement that the victim was a good man who helped people in the community would not likely have changed the result in this case. N.C.G.S. § 15A-1443(a) (1988).

**[10]** Defendant next argues that the admission of this evidence of the victim's good character violates his rights under the eighth amendment to the United States Constitution because it "is irrelevant to a capital sentencing decision, and . . . its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Booth v. Maryland*, 482 U.S. 496, 502-03, 96 L. Ed. 2d 440, 448 (1987). Likewise, under *South Carolina v. Gathers*, 490 U.S. 805, 104 L. Ed. 2d 876 (1989), evidence of the good qualities of a homicide victim in a capital sentencing proceeding is prohibited by the eighth amendment.

We conclude that the risks the Court found unacceptable in *Booth* and *Gathers* are not present here. In *Booth*, the Court found unconstitutional the admission of a victim impact statement during the sentencing phase of a capital trial. The statement contained relatively detailed descriptions of the effect of the crime on the victim and his family. The Court "reject[ed] the contention that the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics, are proper considerations in a capital case." *Booth*, 482 U.S. at 507, 96 L. Ed. 2d at 451. Here we have only an isolated statement during the guilt phase

by one witness, who was unrelated to the victim, that the victim was a good man and helped people. This does not present the dangers identified by the Court in *Booth*, where the victim-related evidence was far more extensive.

In *Gathers*, the Court upheld the decision of the Supreme Court of South Carolina that the prosecutor's " 'extensive comments to the jury [during closing argument] regarding the victim's character were unnecessary to an understanding of the circumstances of the crime[.]' " *Gathers*, 490 U.S. at 810, 104 L. Ed. 2d at 882 (quoting *State v. Gathers*, 295 S.C. 476, 484, 369 S.E.2d 140, 144 (1988)). Again, the solitary comment by one witness in this case that the victim was a good and helpful man is clearly different from the "extensive comments to the jury" by the prosecutor in *Gathers*. There is no reasonable likelihood that this evidence created an unacceptable risk that the jury would arbitrarily and capriciously sentence defendant to death.

The Fifth Circuit Court of Appeals recently found an eighth amendment violation under *Booth* upon the introduction of evidence that the victim was a "fine person" and "would do anything he could to help anybody anywhere." *Rushing v. Butler*, 868 F.2d 800 (5th Cir. 1989). *Rushing*, however, is distinguishable in that there was additional "emotionally charged and inflammatory evidence of [the victim's] admirable personal characteristics and the extent of emotional distress suffered by [the victim's] family and friends." *Id.* at 804. In *Rushing* live witnesses tearfully testified in a eulogistic manner quite different from the matter-of-fact declarative statement at issue here. We find no violation of defendant's eighth amendment rights.

**[11]** Defendant's last argument under this assignment of error is that the trial court, having allowed the State to introduce evidence of the victim's good character, should have allowed defendant to rebut with evidence of the victim's reputation for ruining marriages. Defendant argues that the evidence he sought to introduce on cross-examination of witness Patterson was relevant in that it revealed a motive for people other than defendant to kill the victim. Finally, defendant argues that the trial court, by sustaining the State's objection to questions about the victim's reputation, violated his sixth amendment right to present evidence in his defense. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 94 L. Ed. 2d 40, 56 (1987).

Assuming that defendant was entitled to question witness Patterson in an attempt to rebut the evidence of the victim's good character, defendant has failed to show prejudice in that the record does not reveal what the witness's answer would have been. *See State v. Faircloth*, 297 N.C. 100, 112, 253 S.E.2d 890, 897, *cert. denied*, 444 U.S. 874, 62 L. Ed. 2d 102 (1979); *State v. Banks*, 295 N.C. 399, 410, 245 S.E.2d 743, 750 (1978); *State v. Little*, 286 N.C. 185, 189, 209 S.E.2d 749, 753 (1974). Likewise, absent an offer of proof, we cannot determine whether the excluded evidence was specific enough to be relevant evidence that some other party had a motive to kill the victim. *See State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 279 (1987). This assignment of error is overruled.

**[12]** By his next assignment of error, defendant argues that he is entitled to a new trial because the trial court refused to submit his requested instruction on second-degree murder. In *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983), we held that

> [i]f 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 defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

*Id.* at 293, 298 S.E.2d at 658 (emphasis in original). Defendant argues that the testimony of Harold McRae, who was tendered by the State, that defendant did not mean to kill the victim negates the elements of premeditation, deliberation, and intent to kill, thereby supporting defendant's request for an instruction on second-degree murder.

Though McRae's testimony does tend to show absence of premeditation and deliberation, "where the law and the evidence justify the use of the felony murder rule, the State is not required to prove premeditation and deliberation . . . ." *State v. Rinck*, 303 N.C. 551, 565, 280 S.E.2d 912, 923 (1981). Further, as in *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976), in this case

> [a]ll of the evidence tended to show that the murder of [the victim] was perpetrated during the course of an armed robbery. Such a killing is murder in the first degree and the

trial judge was therefore not required to submit lesser included offenses to the jury for its consideration.

*Id.* at 346, 226 S.E.2d at 651. Stated another way, "[t]here is no evidence that decedent was killed other than in the course of the commission of the felony" of armed robbery. *State v. Rinck*, 303 N.C. at 565, 280 S.E.2d at 923. This assignment of error is without merit.

**[13]** Defendant next contends that he is entitled to a new trial because the trial court allowed SBI Agent Leonard, while testifying for the State, to introduce inadmissible hearsay. On direct examination, Leonard testified that he identified defendant's fingerprint on an ashtray found in the victim's home. Leonard also testified that, in accordance with SBI procedures, he asked Agent Duncan to verify the identification and that "[Duncan] agreed with the identification." At that point defendant objected and the trial court sustained the objection. Defendant argues that he is entitled to a new trial because Duncan's prejudicial opinion came in as substantive evidence for the truth of the matter asserted, *i.e.*, that the fingerprint matched defendant's, and not as the basis for Leonard's own expert opinion.

We reject this contention. First, where the trial court sustains defendant's objection, he has no grounds to except. *See State v. Sessoms*, 79 N.C. App. 444, 445, 339 S.E.2d 458, 459, *disc. rev. denied*, 316 N.C. 737, 345 S.E.2d 397 (1986) (no prejudice where defendant's objection was sustained). Second, defendant failed to move to strike the testimony he considered objectionable, thereby waiving his right to assert error on appeal. *State v. Adcock*, 310 N.C. 1, 19, 310 S.E.2d 587, 597-98 (1984); *see also State v. Battle*, 267 N.C. 513, 519-20, 148 S.E.2d 599, 604 (1966). Third, we fail to discern prejudice warranting a new trial inasmuch as Agent Leonard gave his own uncontroverted opinion identifying the print on the ashtray as defendant's. The subsequent statement by Leonard that Agent Duncan agreed with his conclusion does corroborate Leonard's testimony, but does not constitute reversible error, especially in light of the fact that the court sustained defendant's objection to the testimony.

Finally, we have held previously that an SBI agent, when testifying about standard SBI procedures for fingerprint identification, may tell the jury that another agent subsequently verified the match. *State v. Jones*, 322 N.C. 406, 368 S.E.2d 844 (1988).

In *Jones*, we stated that under the facts presented and Rule 703 "[t]he opinion of the other examiner . . . necessarily forms a part of the basis for the opinion to which the witness testified, and it clearly was reasonable for an expert in the field of fingerprint identification to rely upon such a procedure." *Id.* at 414, 368 S.E.2d at 848. *Cf. State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972) (new trial granted where nonexpert, defendant himself, forced to testify, over timely objection, as to results of his expert's fingerprint identification). Here, as in *Jones*, the witness testified as to the standard SBI procedures followed which led to his opinion that the fingerprint matched defendant's. Thus, in both *Jones* and this case, the challenged testimony was admissible for a nonhearsay purpose—to establish the basis for expert testimony. *Foster*, involving a nonexpert witness, lacked such a nonhearsay purpose. Defendant is not entitled to relief on this assignment of error.

**[14]** Defendant next assigns as error the trial court's denial of a pretrial motion to exclude evidence regarding the presence of a brownish-red stain on a bicycle seized from defendant's residence. Defendant also assigns as error the admission of testimony at trial that the brownish-red stain reacted positively to blood. Because the State presented no evidence that the blood was human blood, or that it was consistent with the blood of the victim, defendant argues that the evidence was both irrelevant and unfairly prejudicial.

During direct examination, Agent Sweatt testified as follows:

> A. I first found the bicycle in the living room area of [defendant's] residence. After inspecting the bicycle I found a brownish red stain on the left handlebar area of the bicycle. After completing a field test on that brownish red stain—
>
> [DEFENDANT]: Objection.
>
> THE COURT: Overruled.
>
> A. —the brownish red stain, I received a positive reaction to blood.

Defendant argued that the witness had not been qualified properly to give such an opinion about the stain. The court then sustained defendant's objection. Defendant, however, again failed to move that the testimony be stricken, thereby waiving his right to raise this issue on appeal. *See State v. Adcock*, 310 N.C. at 19, 310 S.E.2d at 597-98; *State v. Battle*, 267 N.C. at 519-20, 148 S.E.2d

at 604. Similarly, it was defendant, not the State, who subsequently raised the subject of the bloodstain during his cross-examination of Agent Sweatt. Finally, defendant made no objection to the testimony of David Spiddle. Spiddle, tendered without objection as an expert in forensic serology, testified as to the tests run on the stain and his conclusion that the stain was blood of undetermined origin. We note again that

> [t]he general rule is that when evidence is admitted over objection and the same evidence is thereafter admitted without objection, the benefit of the objection is lost. . . . The absence of a motion to strike or a request for curative instructions, coupled with the fact that defendant elicited evidence of the same or similar import on cross-examination, waived the benefit of the objection.

*State v. Smith*, 290 N.C. 148, 163, 226 S.E.2d 10, 19, *cert. denied*, 429 U.S. 932, 50 L. Ed. 2d 301 (1976) (citations omitted). Because (1) the court sustained defendant's objection, (2) defendant failed to move to strike the objectionable testimony, (3) defendant himself elicited similar evidence on cross-examination, and (4) the same evidence came in later without objection, this assignment of error is overruled.

III

**[15]** Defendant argues that he is entitled to a new sentencing proceeding because the evidence was insufficient to support the submission of the aggravating circumstance in N.C.G.S. § 15A-2000(e)(9)—that the murder was "especially heinous, atrocious, or cruel." We reject this contention.

"In determining if there is sufficient evidence to submit an aggravating circumstance to the jury, the trial judge must consider the evidence in the light most favorable to the State." *State v. Huff*, 325 N.C. 1, 55, 381 S.E.2d 635, 666 (1989), *vacated and remanded on other grounds*, --- U.S. ---, 111 L. Ed. 2d 777 (1990). Yet, "a finding that this aggravating circumstance exists is only permissible when the level of brutality involved exceeds that normally found in first degree murder or when the first degree murder in question was conscienceless, pitiless, or unnecessarily torturous to the victim." *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984).

The facts supporting the submission of this circumstance tend to show that defendant went to the victim's house when the victim was alone. The victim was a seventy-eight-year-old man who had undergone heart surgery and suffered a ruptured appendix. Practically helpless, the victim temporarily fended off defendant's attack, but ultimately suffered seventeen stab wounds in the chest area, abrasions on the face, bruises and lacerations around the mouth, and bruises and incisions on the forearm. Seven or eight wounds extended through the heart and penetrated the left lung; two wounds went through the heart and into the right lung. There was also testimony that the victim could have lived up to ten minutes after sustaining the stab wounds. Viewing these facts in the light most favorable to the State, we conclude that there was sufficient evidence to warrant submission of this aggravating circumstance to the jury. The facts demonstrate brutality exceeding that which is normally found in first-degree murder. *See State v. Lloyd*, 321 N.C. 301, 318-20, 364 S.E.2d 316, 327-28, *vacated and remanded on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988) (seventeen stab wounds, victim killed while alone, several defensive wounds, victim survived five to ten minutes; evidence held sufficient to support "especially heinous, atrocious, or cruel" circumstance).

**[16]** By his next assignment of error, defendant contends he is entitled to a new sentencing proceeding under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369. We agree.

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. *Id.* Our review of the record reveals, and the State does not disagree, that defendant's jury was so instructed. The trial court instructed the jury to answer "no" to each mitigating circumstance that it failed to find unanimously. The issue, then, is whether the *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).

The trial court submitted and the jury answered the mitigating circumstances as follows:

ISSUE TWO:

Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER Yes

. . . .

(1) The capacity of the defendant, Harold Vernard Quick, to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired?

ANSWER No

(2) That the defendant has been a good family member prior to his incarceration of April 1987, living with his family and conducting himself as a good family member and in a proper manner?

ANSWER No

(3) That the defendant expressed remorse at the death of Charlie Mac Quick to one person after the death of Mr. Quick?

ANSWER No

(4) That the defendant is a good worker and has good employment history with the Karel Company?

ANSWER No

(5) That the defendant is of subnormal intelligence with a history of the use of drugs which causes him to act impulsively and without good judgment?

ANSWER Yes

(6) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value?

ANSWER No

Thus, the jury, acting under the *McKoy* instruction, rejected five of the six mitigating circumstances submitted. In light of "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 this sentence to something less than death . . . it would be a rare case in which a *McKoy* error could be deemed harmless." *State v. McKoy*, 327 N.C. at 44, 394 S.E.2d at 433 (citation omitted). This is not the "rare case" contemplated by *McKoy*.

Defendant presented substantial evidence in support of at least some of the mitigating circumstances rejected by the jury. With respect to the first circumstance, Terry Warner, a psychologist at Sandhills Mental Health Center, testified that defendant's IQ placed him at the borderline range of intellectual functioning and that his low intelligence limited his "understanding of social rules and customs." In addition, Warner testified that defendant's history of substance abuse could "compromise the abilities he has." This testimony bears directly on the submitted statutory circumstance set forth in N.C.G.S. § 15A-2000(f)(6) and is not subsumed under the nonstatutory circumstance accepted by the jury that defendant's low intelligence and drug use caused him to act impulsively. Statutory circumstances such as this have mitigating value as a matter of law. *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).

There also was substantial evidence from which a reasonable juror could have found that defendant was a good worker with a good employment history at Karel Company. Defendant had worked at Karel Company for four or five months prior to his arrest and his supervisor described defendant as a "real good worker" who was on time, had a good attendance record, and was willing to do whatever tasks were assigned.

In light of this evidence, we cannot conclude beyond a reasonable doubt that the erroneous unanimity instruction did not preclude one or more jurors from considering in mitigation defendant's good work record or 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 that the jury, acting under proper instructions, would nevertheless have imposed the death penalty. "A single juror's vote could change the sentencing result from death to life imprisonment." *State v. Quesinberry*, 328 N.C. 288, 293, 401 S.E.2d

632, 634 (1991). Accordingly, defendant must receive a new sentencing proceeding.

Defendant's remaining assignments of error relate to issues that defendant recognizes have been decided by this Court contrary to his position, but which he nonetheless brings forward to preserve for further appellate review. These assignments of error are overruled.

Guilt phase: no error.

Sentencing phase: new sentencing proceeding.

Justice MEYER concurring in part and dissenting in part.

I agree with the majority's ruling in this case, that there was no error in the guilt phase of defendant's trial, and I therefore concur in that part of the majority's opinion.

I dissent from that portion of the majority's opinion which finds error in the sentencing phase of defendant's trial and orders a new sentencing proceeding. I find that any *McKoy* error which occurred in the sentencing phase of defendant's trial was harmless beyond a reasonable doubt.

The requirement that the jury find unanimously the statutory mitigating circumstance set forth in N.C.G.S. § 15A-2000(f)(6), "[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," was harmless beyond a reasonable doubt because no evidence of this circumstance was presented. Terry Warner, the psychologist, testified that defendant's reasoning ability was impaired because of his low intelligence and that defendant's use of drugs and alcohol, in his opinion, "would compromise the abilities that he has." The witness' testimony went only to the mitigating circumstance that was found: "That the defendant is of subnormal intelligence with a history of the use of drugs which causes him to act impulsively and without good judgment." The witness did *not* testify that substance abuse impaired his capacity to appreciate that his conduct was criminal or that defendant's ability to conform his conduct to the law *was impaired* by either the low intelligence or substance abuse. The testimony does not establish impaired capacity at the time of the testing or at the time of the murder that would mitigate the offense. There was absolutely no evidence

that defendant was using drugs or alcohol at the time of the murder. Indeed, defendant denied the offense altogether. Mr. Warner was asked only what effect alcohol or drugs "*would be*" on defendant. Thus, this case is distinguishable from *State v. Sanderson*, 327 N.C. 397, 394 S.E.2d 803 (1990), and other such cases, where there was testimony that defendant was using drugs *at the time of the offense*, and the Court found that there was some evidence of impaired capacity which could have been found by at least one juror. Such is not the case here.

Likewise, I find harmless beyond a reasonable doubt the *McKoy* error requiring the jury to unanimously find the nonstatutory mitigating circumstances. First, conceding that defendant was entitled to have the nonstatutory mitigating circumstance that he was a good worker submitted for the jury's consideration without the unanimity charge because there was substantial evidence to support it, in view of the horrible killing of the seventy-eight-year-old physically disabled victim, who lived alone, by the infliction of seventeen stab wounds, I easily conclude that no reasonable juror would have found this circumstance sufficiently mitigating to cause him to change his vote from death to life imprisonment.

While the majority does not discuss the matter, I conclude that the trial court erred in submitting the nonstatutory mitigating circumstance that defendant "was a good family man" or, if it was error, that it was harmless beyond a reasonable doubt because the record is absolutely devoid of any evidence to support it. The record merely shows that defendant lived with his family, though he was twenty-eight years of age.

Likewise, though the majority does not discuss it, I conclude that the trial judge erroneously submitted the nonstatutory mitigating circumstance that defendant expressed remorse over killing the victim. The record reflects only that he made a statement to a cellmate that he did not intend to kill the victim, and even this evidence was refuted by the medical evidence that the defendant stabbed the victim seventeen times.

Having further concluded that the death sentence was not imposed as a result of any passion or prejudice and that the death penalty was proportionate in this case, I vote to find no error not only in the guilt phase, but in the sentencing phase of defendant's trial as well, and to uphold the death penalty imposed by the trial court.

Justices MITCHELL and MARTIN join in this concurring and dissenting opinion.

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CONCERNED CITIZENS OF BRUNSWICK COUNTY TAXPAYERS ASSOCIATION, RAYMOND COPE AND ROYAL WILLIAMS v. STATE OF NORTH CAROLINA EX REL. S. THOMAS RHODES, SECRETARY OF THE DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT v. HOLDEN BEACH ENTERPRISES, INC.

No. 401PA89

(Filed 12 June 1991)

1. **Easements § 6.1 (NCI3d) -- prescriptive easement—substantial identity of easement—improper test applied by trial court**

In an action to determine whether an easement by prescription had been established by the public's use of a pathway along and across the shifting dunes of an area at Holden Beach, the trial court erred in failing to make any determination as to whether there was substantial identity of the easement claimed and erred in determining only that plaintiffs had failed to show the existence of a "single" or the "same" definite and specific line of travel for the prescriptive period.

**Am Jur 2d, Waters §§ 354, 391.**

2. **Easements § 6.1 (NCI3d) -- prescriptive easement—substantial identity of easement—factors to be considered—vulnerability of road to forces of nature**

In determining whether an easement has substantially retained its identity over time, factors which the fact finder may consider include the vulnerability of the road traveled due to forces of nature, and this is particularly pertinent where the easement claimed is across windswept, shifting sands which are subject to ocean storms, since, to require that there be no change, or at most only very slight change, in a road traveled by many for the prescriptive period over an area highly vulnerable to the forces of wind, shifting sand, ocean tide, flooding from ocean or sound, etc. would effectively bar the acquisition of a prescriptive easement in many locales of the coastal area of North Carolina.

**Am Jur 2d, Waters §§ 354, 391.**

**3. Easements § 6.1 (NCI3d)— prescriptive easement—public's access to beach—use continuous and uninterrupted**

The trial court erred in concluding that defendant interrupted the use of the pathway in question by the general public in a manner that caused that use not to be continuous and uninterrupted where the evidence tended to show that defendant put telephone poles, cables, and gates across the pathway, but as defendant's efforts to prevent unauthorized passage through the property increased, so did the acts of the public to assert its claim to the use of the roadway by disregarding, removing, and destroying the barricades; moreover, where the claim was by the public over the shifting sands of a barrier island seldom visited by anyone on a daily basis and particularly during times of bad weather, the use need only be more or less frequent according to the purpose and nature of the easement—to reach the inlet and seashore for fishing and recreational use—that is, often enough and with such regularity as to give the owner notice that the users were asserting a claim of right to use the route.

**Am Jur 2d, Waters §§ 354, 391.**

Justice MITCHELL dissenting.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 95 N.C. App. 38, 381 S.E.2d 810 (1989), which affirmed a judgment entered for defendant by *Briggs, J.*, at the 9 November 1987 Civil Session of Superior Court, BRUNSWICK County. Heard in the Supreme Court 12 April 1990.

*Maxwell & Hutson, P.A., by James B. Maxwell, for plaintiff-appellants; and Lacy H. Thornburg, Attorney General, by Daniel F. McLawhorn, Special Deputy Attorney General, and J. Allen Jernigan, Assistant Attorney General, for intervenor-plaintiff-appellant.*

*Murchison, Taylor, Kendrick, Gibson & Davenport, by Vaiden P. Kendrick and Barbara J. Sullivan, for defendant-appellee Holden Beach Enterprises.*

MEYER, Justice.

In this case, we once again face the question of whether there was sufficient evidence of the establishment of an easement by

prescription by the public's use of a pathway along and across the shifting dunes of an area on the Outer Banks of North Carolina. The area in question is privately owned but over the years has been crossed by the public seeking access to the ocean strand and inlet for fishing and recreation. A portion of the prescriptive easement sought to be established is alleged to be sufficiently similar to a road marled and paved some years later across the same lands such that the public has acquired a right to the use and enjoyment of that paved road. A collateral issue is whether the evidence supported the trial judge's conclusion that, from time to time, defendant had barred public use of the roadway so as to interrupt the continuity of the use over the period of time required to establish an easement by prescription. With regard to the issue of the sufficiency of the evidence of the establishment of an easement by prescription, we conclude that the trial judge employed an erroneous standard in reaching his determination that there was insufficient evidence. We also address the collateral issue regarding interruption of the public's continuity of use for the requisite period and conclude that the evidence does not support the trial judge's finding of fact and conclusion of law that defendant had successfully interrupted adverse use by the public so as to defeat the establishment of the easement by prescription. We remand this case for a new trial on the merits employing the proper standard as to the sufficiency of the evidence to establish an easement by prescription.

On 13 August 1986, plaintiffs Concerned Citizens of Brunswick County Taxpayers Association and two individuals initiated this action after defendant erected a guardhouse in July 1985 blocking public access over a roadway crossing defendant's property. Plaintiffs sought to have this roadway declared a public right-of-way by virtue of prescriptive use. In the alternative, plaintiffs alleged that defendant Holden Beach Enterprises, Inc., or its predecessor in interest, Holden Beach Realty Corporation, had dedicated the roadway to public use. The State of North Carolina, *ex rel.* S. Thomas Rhodes, Secretary of the Department of Natural Resources and Community Development, intervened in 1987 on the ground that it was the designated state agency authorized to manage public beach accessways under N.C.G.S. §§ 113A-134.1 and -134.2. The State did not assert the public trust doctrine as an independent means of acquiring rights to the road. The trial judge concluded at the end of defendant's evidence that the public held no prescrip-

tive easement in the road due to changes in the location of the path and interruptions of use during the prescriptive period. The judge also concluded that there had been no offer or acceptance of dedication of the roadway. The Court of Appeals affirmed in all respects, 95 N.C. App. 38, 381 S.E.2d 810, and we granted the plaintiff-appellants' petition to review the issue of the prescriptive easement. The acceptance and dedication issue is not before this Court for review.

The easement sought by the plaintiffs is over property located at the far western end of what is now Holden Beach. Holden Beach is a sandy barrier island made up largely of sand dunes and beach vegetation, lying on a generally east-west axis off the coast of North Carolina in Brunswick County. To the west of the island is Ocean Isle; to the east, Long Beach. The Atlantic Intracoastal Waterway separates the north shore of Holden Beach from the mainland. Lockwood Folly Inlet connects the Intracoastal Waterway to the Atlantic Ocean on the eastern shore of the island, and Shallotte Inlet offers passage to the ocean on the western shore. The road over which plaintiffs claim a public prescriptive easement is now known as "Ocean View Boulevard West" and is located within the Holden Beach West Subdivision.

Prior to the dredging of the Intracoastal Waterway in the early 1930s, Holden Beach was in fact two islands of roughly equal size. To the east lay Holden Beach, and to the west was Robinson's Beach. Separating the two near where the Holden Beach Fishing Pier now stands was an inlet known variously as Meares or Mary's Inlet. What is now the Intracoastal Waterway was formerly a creek, and a wooden bridge suitable for use by automobiles spanned that creek. It was by this bridge that the public could reach Holden Beach from the mainland. Testimony indicated that until Meares Inlet was filled with the tailings dredged from the Intracoastal Waterway project, Robinson's Beach was not accessible to automobile traffic. At the time of the project to construct the Intracoastal Waterway, the Holden family owned the original island of Holden Beach through a land grant received from Governor Dobbs in 1735. In exchange for land lost to the Intracoastal Waterway, the State granted the Holdens a covenant to provide access to Holden Beach in perpetuity. This access initially took the form of a two-car ferry, which the State eventually replaced with a bridge in 1953.

Until the early 1960s, the land on the far western end of what is now Holden Beach was owned jointly by two families, the Robinsons and the Bellamys. There were no houses or paved roads on the island during the 1920s and 1930s. In 1962, the Holden Beach Realty Corporation, predecessor to defendant Holden Beach Enterprises, Inc., purchased the tract of land now known as Holden Beach West Subdivision from the Robinson and Bellamy families. This tract extends approximately one mile east of the Shallotte Inlet and includes the entire western tip of the island. A significant physical feature of this property is a low-lying area approximately 2,000 feet long caused by overwash of the ocean from Hurricane Hazel in 1954 and which has been frequently overwashed since that time. The eastern end of the overwash lies approximately 1,400 feet from the eastern property line. From time to time, storm tides have reflooded the area, obliterating trails and destroying vegetation in the overwash.

Development on what is now Holden Beach began unmistakably in the 1940s when the State began a gradual process of paving an east-west road across the island. The road, which has since come to be known as "Ocean Boulevard," started at the ferry landing near Lockwood Folly Inlet and, by the time Hurricane Hazel struck the island in 1954, reached some distance past the Holden Beach Fishing Pier. By 1962, the paved road extended west approximately two and a half miles past the pier but fell short of the subdivision property line by some 2,880 feet, slightly over one-half mile. There existed at this point an area called "the west turn around," which people used to turn their cars around, to park their cars, and to gain both pedestrian and vehicular access to the beach. Not until 1982 or 1983 did the State pave the 2,880 foot segment of Ocean Boulevard running from the west turnaround to the boundary line of defendant's property. It is the extension from the end of Ocean Boulevard known as "Ocean View Boulevard West" over which the prescriptive easement is claimed.

During the years 1977 and 1978, defendant's predecessor in interest, Holden Beach Realty Corporation, laid a marl road from the boundary line west to within 1,700 or 1,800 feet of Shallotte Inlet, a distance of approximately 3,700 feet, or seven-tenths of a mile. The marl road followed precisely a road bulldozed by the same corporation a few years earlier. Defendant purchased the property and paved the marl road in 1985. The private developers paid all costs for the bulldozing, marling, and paving of the road.

It is access along and across this improved road, Ocean View Boulevard West, that is in question.

Prior to the time that the State paved Ocean Boulevard to the entrance of Holden Beach West, an unimproved road extended from the west turnaround, westwardly for approximately three-tenths of a mile to a campground. This unimproved road continued west through the campground to the subdivision boundary line. This state-maintained public road is now known as Ocean Boulevard and is not a subject of this dispute.

The evidence presented was in substantial conflict. The plaintiffs' evidence tended to show that, before the island was developed, fishermen, swimmers, picnickers, and others seeking recreation had used the west end of Holden Beach near the Shallotte Inlet freely, openly, and in an unrestricted manner. The public gained access to the area by vehicle and by foot along a pathway or road running through the island to the inlet. Mr. Harrell Paden further testified that he began going down to the end of the island in the late 1920s or early 1930s practically every weekend during the fishing season and camped there a week or two at a time. When asked to describe the road he used, Mr. Paden testified:

> It was a sand road behind the sand dune. At places it was good and hard, at places it was soft sand, so you got up a good speed before you got there to get across through that sand and got on down the beach where you was going. It was just a two rut road, just a regular old sand road.

Through the years, storms, hurricanes, winds, high water, and erosion have altered the configuration of the island and the course of the pathway. There was evidence to the effect that the newer marled and later paved extension of the public road, that portion known as Ocean View Boulevard West, generally follows the path the public used for more than thirty years prior to the construction of any road. Plaintiffs' evidence was to the effect that the public continued to use the extension of the road known as Ocean View Boulevard West after the western end of the island began to develop. There was also evidence to the effect that the Town of Holden Beach used the extension of the road for both fire and police vehicles, to collect garbage through its contractor, and for a public water line, fire hydrants, and street signs.

On the other hand, defendant's witnesses testified to the effect that the west end of the beach had the reputation of being private property, and although public use of the paths to the beach and sound increased over the years, attempts to curtail that use met with varying degrees of success, and most people gained access to the west end of the beach by going along the beach strand.

Loie J. Priddy, a registered land surveyor with the North Carolina Geodetic Survey, testified for the State, as an expert in coastal surveying and in the interpretation of aerial photography, that a 1966 aerial photograph indicated vehicular traffic east of the overwash area but found none through the overwash or west of it. He noted that there was evidence of storm damage to the overwash area that would have obliterated any track crossing that low-lying area. Priddy was able to discern from a 1968 aerial photograph a continuous trail extending from the property line through the overwash to a point some 1,000 feet west of the overwash. A 1969 aerial photograph revealed a track extending west through the overwash and going out the other side before ending as "meandering trails." Two separate aerial photographs taken in 1970 show the trail disappearing into the overwash and reappearing on the western side and finally ending in a series of random loops and trails.

Mr. Priddy examined an aerial photograph taken in 1972 and determined the presence of a trail extending from the subdivision property line through the Hurricane Hazel overwash area and ending in a maze of tracks. A 1976 aerial photograph presented by defendant depicted a trail extending from the property line eastward through the overwash area, ending in a series of looping trails. By reference to current tax maps of Holden Beach West, Priddy testified that the present location of Ocean View Boulevard West followed the same general route as the pathway apparent in the 1968 and later aerial photographs at least as far as the west end of the overwash area.

Comparing eight such aerial photographs of the area taken between 1962 and 1972, Mr. Priddy testified essentially that a definite, discernible pathway made by vehicles and foot traffic had existed since 1962 and followed the same route from Ocean View Boulevard West toward Shallotte Inlet.

When asked to fix the distance between the centerline of the current road and a point randomly chosen along the path, Priddy

determined that the corresponding point in the centerline of the paved road was sixty feet north of the trail as depicted in a 1970 Army Corps of Engineers topographic map. Other witnesses for the plaintiffs and for the defendant indicated that in more than one place the paved road digressed from the sand trails distances of up to two hundred feet. According to James Griffin, testifying for the defendant, the road was marled and paved according to plans made by a Raleigh consulting firm, without reference to existing trails. "[I]n some places [the road] crossed [the trails], some places it overlapped them, but most of the time it ran parallel to it and some distance off." When asked whether the road was along the same track in 1985 as it was when he used it over the roughly forty-year period since 1940, plaintiffs' witness Harrell Paden stated:

> [T]he road has been moved back the width of a building lot. It is still in the same general direction, same general location except for that. . . .
>
> . . . .
>
> . . . [The trail] wasn't absolutely straight because when you came to a sand dune—you are riding in a two wheel [drive] vehicle you don't go over the sand dune, you go around it. Therefore, the road wasn't absolutely straight as it is today. Today you look down there [and] the road is reasonably straight.

Mr. Paden testified that over the forty plus years prior to 1972, he, his friends, and other people had used the road freely and unimpeded to travel to the west end of Holden Beach. He stated that the road had been over the same general path during that entire time and that when a hurricane swept over it, a trail was reestablished in generally the same location.

Mr. Raymond Cope testified that, since the mid-1970s, he and his family frequently went through the overwash area, down the paths, and over the sand dunes to the western end of the island to gain access to Shallotte Inlet. These trips averaged about twice a month during the summer and also in the fall through about October. The paths always appeared to him to be in approximately the same location. When asked to compare the location of the presently paved road to the paths he had used since the mid-1970s, he testified: "It runs about the same, there is not much difference."

Kermit Coble, a former member of the Holden Beach Town Council, testified that he first came to Holden Beach in 1954, and since that time, he frequently visited Shallotte Inlet using the pathway which continued west after the paved road stopped. Coble testified that Ocean View Boulevard West was within one hundred feet of the pathway he had used to get to Shallotte Inlet.

In order to establish an easement by prescription, the claimant must meet the six criteria set out in *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985):

> "1. The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement.
>
> "2. The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears.
>
> "3. The use must be adverse, hostile, or under a claim of right. . . .
>
> "4. The use must be open and notorious. . . .
>
> "5. The adverse use must be continuous and uninterrupted for a period of twenty years. . . .
>
> "6. *There must be substantial identity of the easement claimed. . . .*"

*Id.* at 49-50, 326 S.E.2d at 610-11 (emphasis added) (quoting *Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900-01 (1974)).

**[1]** It is the last of these criteria, the question of the substantial identity of the easement, with which we first concern ourselves. Our review of the record and transcript makes clear that the trial judge made no determination whether there was a substantial identity of the easement claimed. The trial judge made no finding or conclusion as to substantial identity.

It appears from at least three of the trial judge's findings pertinent to the issue in question that he acted under a misapprehension of the law as to the standard by which he was to determine whether the public had acquired an easement by prescription:

53. No *single* path was used east of the overwash area (and within the Subdivision) for the required twenty years.

54. Any paths within the Subdivision existing prior to the road construction in 1978 were temporary in nature; curved around the shifting sand dunes, and were frequently obliterated by the processes of nature.

. . . .

57. Neither the members of plaintiff organization nor the general public have used the *same* definite and specific line of travel across defendant's property for the required twenty years.

(Emphasis added.) From these and other facts found, the trial court concluded that the public's use of the roadway "has not been confined to a *definite and specific line* of travel for twenty years" (emphasis added) and held that the plaintiffs had failed to establish a public easement by prescription.

Rather than applying the "substantial identity" test, the trial judge determined only that the plaintiffs had failed to show the existence of a "single" or the "same" definite and specific line of travel for the prescriptive period. In this, he erred. " 'Facts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light.' " *Helms v. Rea*, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973) (quoting *McGill v. Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939)), and cases cited therein.

It is true that, although the evidence may have supported findings to the contrary, the findings of fact of the trial judge are conclusive on appeal if supported by any competent evidence. *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). Moreover, it is the province of the fact finder to determine whether location of the disputed way deviates substantially over time so as to work an abandonment of that way. *West v. Slick*, 313 N.C. 33, 44-45, 326 S.E.2d 601, 608; *Potter v. Potter*, 251 N.C. 760, 766, 112 S.E.2d 569, 573 (1960). However, the findings of fact as well as the conclusions of law must address the criteria of the proper legal standard to be applied in this case.

**[2]** Whether changes in a traveled way are so great as to establish that there is no substantial identity of the way claimed is a question

for the trier of fact. Factors which the fact finder may consider in making this determination include the vulnerability of the road traveled due to forces of nature. This is particularly pertinent where the easement claimed is across windswept, shifting sands which are subject to ocean storms. To require that there be no change, or at most only very slight change, in a road traveled by many for the prescriptive period over an area highly vulnerable to the forces of wind, shifting sand, ocean tide, flooding from ocean or sound, etc., would effectively bar the acquisition of a prescriptive easement in many locales of the coastal area of our state. In the area of our Outer Banks, where in years past there were only paths or roads on and through shifting sands, that the way traveled must be confined to a definite and specific line is merely a requirement that there be a means to determine with reasonable specificity the location of the easement claimed. Requiring "substantial identity" of a definite and specific line gives the owner of the subservient land notice of not only the adverse claim, but the extent of it as well.

In *West*, we reversed the Court of Appeals' affirmance of a directed verdict concluding that plaintiffs' evidence failed to identify specific and definite lines or routes of use in two claimed easements. *West v. Slick*, 60 N.C. App. 345, 348, 299 S.E.2d 657, 660 (1983), *rev'd*, 313 N.C. 33, 326 S.E.2d 601 (1985). As is the case here, the easements claimed in *West* were over unimproved sand trails located behind the sand dune line of an island in the Outer Banks. In that case, there was evidence of deviation in the line of travel in particular spots by as much as three hundred feet. *West v. Slick*, 60 N.C. App. at 348, 299 S.E.2d at 660. Routes varied due to the effects of wind, rain, and tides on the beach. *Id.* An aerial photograph of the routes showed the routes "clearly visible in some areas while impossible to discern in others, but generally . . . pointed out." *Id.* at 349-50, 299 S.E.2d at 660. In places blowing sand obscured the tracks. Given the vulnerability of the sand road to the effects of nature, this Court determined that particular deviations could be viewed as "slight" and that such "deviation was not substantial." *West v. Slick*, 313 N.C. at 45, 326 S.E.2d at 608. As in *West*, the fact that there may have been deviations in the line of travel does not necessarily mean that there was no substantial identity of the easement claimed. Nor does evidence of several trails and points of access to the ocean foreshore, the inlet, or the sound mean that the fact finder

could not find there was substantial identity of the easement claimed. *Id.* at 43, 45, 326 S.E.2d at 607, 608.

Numerous other jurisdictions also take into account the character of the land over which one claims an easement when determining whether the easement has substantially retained its identity. In *State v. Hull*, 168 Neb. 805, 97 N.W.2d 535 (1959), variations from one hundred to two hundred feet to avoid sand blowouts, mudholes, and natural obstacles in a road through the sand hills of Nebraska did not preclude a jury finding that the road retained its substantial identity, given the inherent nature of the area crossed by it. *Id.* at 823, 97 N.W.2d at 547. In *Hull* the point of entrance had been continuous throughout the prescriptive period, the road had traversed the same general area, and any deviation in the road was caused by nature or by the landowner acting for his own convenience. Thus, the Nebraska court concluded that a jury could properly find substantial identity of the road based upon evidence of its origin, general location, course, and use. In *Nonken v. Bexar County*, 221 S.W.2d 370 (Tex. Civ. App. 1949, writ ref'd, n.r.e.), variations of up to thirty-five feet did not prevent a verdict in favor of an easement where the dirt road ran along a river bottom and would ordinarily vary some over the years as a result of rains and washouts. A 1986 Texas case applied this concept of rolling easements in the context of a beachfront public easement. *Feinman v. State*, 717 S.W.2d 106 (Tex. Ct. App. 1986, writ ref'd, n.r.e.). *Feinman* held that shifts occurring from time to time in the beach vegetation line due to storm action did not defeat establishment of a prescriptive public easement defined by the mean low-tide line on the ocean side of the beach strand and by the vegetation line on the landward side. *Id.* at 113; *see also Seaway Co. v. Attorney General*, 375 S.W.2d 923, 939 (Tex. Civ. App. 1964, writ ref'd, n.r.e.).

In the case now before us, evidence that the easement claimed had a dynamic quality due to the landscape over which it traveled would not require a finding that there was no substantial identity of the easement claimed. *See generally Weigel v. Cooper*, 245 Ark. 912, 436 S.W.2d 85 (1969); *Sturm v. Mau*, 209 Neb. 865, 312 N.W.2d 272 (1981); Annotation, *Acquisition of Right of Way by Prescription as Affected by Change of Location or Deviation During Prescriptive Period*, 80 A.L.R.2d 1095 (1961); Annotation, *Acquisition of Right of Way by Prescription as Affected by Change of Location or Deviation During Prescriptive Period*, 143 A.L.R. 1402 (1943).

The fact that the portion of the easement claimed, which was marled and then paved by defendant, varies slightly from the old pathway does not, in and of itself, defeat the claim of a prescriptive easement over that portion of the pathway. Changes made to suit the convenience of the owner of the subservient land during the prescriptive period do not destroy the identity of the road claimed. *See, e.g., Faulkner v. Hook*, 300 Mo. 135, 254 S.W. 48 (1923) (schoolchildren acquired prescriptive easement even though changes in path made by landowners during the prescriptive period); *Moravek v. Ocsody*, 456 S.W.2d 619 (Mo. Ct. App. 1970) (straightening and eventual paving of dirt wagon trail during prescriptive period did not defeat claim in present paved road); *Scott v. Weinheimer*, 140 Mont. 554, 374 P.2d 91 (1962) (location of road changed by roughly two hundred feet, after which time claimant followed new course without protest); *State v. Hull*, 168 Neb. 805, 97 N.W.2d 535 (eighty-five-foot change in location).

We must remand the case for a new trial because the trial court applied an incorrect standard in determining whether a path through the shifting dunes had been used by the public for the requisite period of time.

**[3]** Because the question will likely recur at the new trial, we now determine whether the trial court correctly concluded that defendant interrupted the use of the pathway in question by the general public in a manner that caused that use not to be continuous and uninterrupted.

Another of the six requirements in establishing a claim for a prescriptive easement is that the use be continuous and uninterrupted. *West v. Slick*, 313 N.C. at 50, 326 S.E.2d at 611. The trial judge found as a fact and concluded as a matter of law that defendant had interrupted the use of the easement claimed since at least 1962. We disagree. The evidence showed that defendant gradually escalated efforts to prevent unauthorized passage through the property. The evidence further shows, however, that as defendant's efforts escalated, so did the acts of the public to assert its claim to the use of the roadway by disregarding the barricades and, in fact, removing and in some cases destroying them. In 1960, defendant erected some forty or fifty "No Trespassing" signs. People who continued to use the pathway used the signposts for firewood. Sometime in the late 1960s or early 1970s, defendant placed a piece of telephone pole across the road. Members of the

public avoided the barrier by driving around either end of the pole, passing so often that their passage dug deep ditches. Witness Harrell Paden, who testified that he used the road in question from 1928 until 1985, also testified that no barriers had been placed on the road up through the 1960s; that the first barrier was an eight- to ten-foot piece of telephone pole placed across the road in 1972; that people drove around it, and it disappeared after several weeks; that two or three years later a gate and signs were put up, but they did not stop him, his friends, or other people from using the road; and that the number of people using the same road to reach the west end of the beach over the fifty-year period increased as the years went by.

Prior to the erection of a gate, defendant cut a pole in half, placed the halves on either side of the road as posts, and strung a twelve-foot padlocked cable between them. This cable eventually reached a length of two hundred feet in an ineffectual effort to stop the public from driving around either end of the cable. Later, in the late 1970s, defendant erected and locked two ten-foot-wide aluminum farm gates across the way. Witness Kermit Coble testified that when the farm gate and a cable with locks were put across the road, he observed "plenty of" traffic going around them such that "[t]hey dug out ditches around there getting around." In addition to the considerable testimony from several other witnesses that people drove around the farm gate, defendant's witness James Griffin testified to the effect that people actually destroyed the gates. When asked how many gates he replaced, he said:

> A. Went through about four or five right there.
>
> Q. How long did they stay up, sir?
>
> A. Different lengths of time, each until somebody got angry enough to push it down with a four-wheel drive or pull it lose [sic] or whatever. And then I'd go get another one, as a matter of fact, we started keeping one in stock more or less, to go down there and put back as they would be torn up.

Witness Raymond Cope testified that he started going down to Holden Beach in the mid-1970s and used the road in question until 1985; that over that period of time, the road stayed in the same location; that, in relationship to the present paved road, "there is not much difference"; and that in 1985, when he went to the beach, the road was barricaded and the guard tried to stop him:

> He would say that we couldn't go any further that this was private property and wanting us to turn around. We did, but what we would do, we would ignore him a couple of times, we wouldn't even stop, we would just keep right on going. I mean he would just stand there wanting us to stop, but we just kept going on through. And he would get our licenses [sic] number, you could tell he was writing our licenses [sic] number down. So, we went all the way down to the end, all the way down to the very end of the island, we would park down at the island and go out on the beach. We'd fish, shell hunt, just walk around, and when we came back out the same guard was there doing the same—looking at us giving us a real hard stare.

Mr. Cope further testified that the gate never stopped him or his family when they chose to go to the west end of the beach. On one occasion, he went down to the inlet on the road with ten to fifteen other cars after being threatened with arrest for trespassing.

The property owner's frustration at the failure of his efforts to stop the public's use of the roadway was apparent in the testimony given by an agent. "[W]hat does it take to keep somebody out of a place," defendant's agent, Mr. Griffin, asked. "[H]ave you got to set a tank up, a machine gun, or what[?]"

This evidence goes far beyond what this Court has required to establish the use as being "hostile," thus repelling any inference that it is permissive, or that the use be "open," thus giving notice to the owner that the use is adverse.

> "To establish that a use is 'hostile' rather than permissive, 'it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate.' [Citations omitted.] *A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right.*" *Dulin v. Faires*, [266 N.C. 257, 260-61, 145 S.E. 2d 873, 875 (1966)]. There must be some evidence accompanying the user which tends to show that the use is hostile in character and *tends to repel the inference that it is permissive and with the owner's consent.* . . .

> . . . The use must be open and notorious. "The term adverse user or possession implies a user or possession that is not only under a claim of right, but that it is *open and of such character that the true owner may have notice of the claim*; and this may be proven by circumstances as well as by direct evidence." *Snowden v. Bell*, 159 N.C. 497, 75 S.E. 721 (1912).

*Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900 (emphasis added).

The fact that the barricades placed by the defendant may have discouraged the use of the pathway by a few members of the public or even suspended its use very briefly by the entire public does not destroy the public's continuity of use for the period necessary to establish its right by prescriptive use. To effectively defeat a prescriptive right, an interruption of the use must be accompanied by some act of the owner which *prevents* the use of the easement. 2 *Thompson on Real Property* § 347, at 257 (1980). A "substantial" interruption during the period of use will defeat the plaintiffs' claim to the prescriptive easement. 28 C.J.S. *Easements* § 13, at 649 (1941).

While continuity of use by the public is essential, it need not be perpetual and unceasing.

> The "continuous" usage required of a claimant of an easement by prescription does not mean a perpetually unceasing use, but has been construed reasonably to depend on the nature of the easement asserted. *The continuity required is that the use be exercised more or less frequently, according to the purpose and nature of the easement.* It is necessary, however, that the use be often enough and with such regularity as to constitute notice to the potential servient owner that the user is asserting an easement.

P. Hetrick & J. McLaughlin, *Webster's Real Estate Law in North Carolina* § 321, at 390 (3d ed. 1988) (footnotes omitted) (emphasis added).

In the early case of *Williams v. Buchanan*, 23 N.C. (1 Ired.) 535 (1841), this Court held that the placing of fish traps in a river every year only during the fishing season for the purpose of catching fish constituted sufficiently "continuous" possession to pass title by adverse possession. In *Perry v. Williams*, 84 N.C. App.

527, 353 S.E.2d 226 (1987), our Court of Appeals held that use of a roadway during each growing season for at least forty years was sufficient, continuous, and uninterrupted use for purposes of establishing a prescriptive easement.

While it has been said that an interruption of the use "however briefly" destroys continuity of use[1] and this Court has noted that an interruption would be any act which would prevent the *full and free* enjoyment of the easement,[2] those statements must be understood in the context of the situation to which they have related. Most often, if not always, they have been made with regard to claims by individuals to a right-of-way or easement over the lands (generally farmlands or woodlands) of neighbors, in most cases to gain access to a public road. "What period of interruption . . . will defeat the acquisition of the right by prescription depends upon the nature of the right and the attendant circumstances." 2 *Thompson on Real Property* § 347, at 249-50 (1980). In a situation such as is under consideration here, where the claim is by the public over the shifting sands of a barrier island seldom visited by anyone on a daily basis and particularly during times of bad weather, the use need only be more or less frequent according to the purpose and nature of the easement, that is, often enough and with such regularity as to give the owner notice that the users are asserting a claim of right to use the route. Evidence of such use by the public could hardly be clearer than in the present case.

The "purpose and nature" of the easement here was to reach the inlet and seashore for fishing, bathing, and other recreational use. In this case, the public's use was " 'exercised more or less frequently, according to the purpose and nature of the easement.' " *Dickinson v. Pake*, 284 N.C. at 581, 201 S.E.2d at 901 (quoting J. Webster, *Real Estate in North Carolina* § 288 (1971)); *accord Godfrey v. Van Harris Realty, Inc.*, 72 N.C. App. 466, 325 S.E.2d 27 (1985) (requirement for easement by prescription that adverse use be continuous means that it must be exercised more or less frequently, according to the purpose and nature of the easement).

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1. *See* P. Hetrick & J. McLaughlin, *Webster's Real Estate Law in North Carolina* § 321 (3d ed. 1988).

2. *See Dickinson v. Pake*, 284 N.C. 576, 581, 201 S.E.2d 897, 901 (quoting *Ingraham v. Hough*, 46 N.C. (1 Jones) 39 (1853)).

Defendant contends that placing of the various barricades across the roadway for brief periods was sufficient to interrupt plaintiffs' use of the road. Ineffective interruptions will not prevent the use from ripening into an easement.

> An interruption to the enjoyment of a right before an easement by prescription has been acquired defeats the acquisition of it, *but the mere doing of acts on the land which renders the exercise of the claim less convenient does not necessarily have that effect.* It is as competent for one to acquire a prescriptive easement of a passway burdened with gates as to acquire one unburdened.

2 *Thompson on Real Property* § 347, at 249 (1980); *see Guerra v. Packard*, 236 Cal. App. 2d 272, 46 Cal. Rptr. 25 (1965) (a locked gate did not constitute an interference or interruption to plaintiffs' use of the roadway). Defendant's repeated protests, remonstrances, blockages, and other attempts to interfere with the use of the path, all of which failed, are the strongest kind of evidence of adverse use and have no significance as interruptions of the public's use.

> Ineffective protests or disregarded remonstrances only strengthen the evidence of adverse use . . . and have no significance as interruptions of the claimant's use.

3 *Powell on Real Property* ¶ 413, at 34-126 to -127 (1990); *see also Trustees of Forestgreen Est., 4th Addition v. Minton*, 510 S.W.2d 800, 803 (Mo. Ct. App. 1974) ("The unsuccessful efforts to block the roadway do not enervate plaintiffs' position that their use was uninterrupted, for, in fact, the barriers did not obstruct the use. Plaintiffs' actions in immediate removal of the barriers to avoid hampering of their use strengthens their argument of adverse, hostile use under claim of right.").

The evidence does not support the finding of fact and conclusion of law that defendant successfully interrupted adverse use by the public. Having concluded that the trial judge employed an erroneous standard in his determination that there was no definite and specific path and that his finding and conclusion with regard to interruption of the continuous use is not supported by the evidence, we conclude that plaintiffs were prejudiced by these errors.

When the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including

the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings. *Davis v. Davis*, 269 N.C. 120, 127, 152 S.E.2d 306, 312 (1967). We therefore vacate the judgment of Briggs, J., entered 12 November 1987 and the findings and conclusions contained therein and reverse the opinion of the Court of Appeals which affirmed that judgment. The case is remanded to the Court of Appeals with instructions to further remand to Superior Court, Brunswick County, for further proceedings not inconsistent with this opinion.

We note dicta in the Court of Appeals opinion to the effect that the public trust doctrine will not secure public access to a public beach across the land of a private property owner. *Concerned Citizens v. Holden Beach Enterprises*, 95 N.C. App. at 46, 381 S.E.2d at 815. As the statement was not necessary to the Court of Appeals opinion, nor is it clear that in its unqualified form the statement reflects the law of this state, we expressly disavow this comment.

Reversed and remanded.

Justice MITCHELL dissenting.

I believe that the majority errs in holding that the evidence failed to support the trial court's findings and conclusions to the effect that the defendant interrupted the plaintiffs' use of the road now known as Ocean View Boulevard West and, thereby, prevented the creation of an easement by prescription over that road. In my view, the evidence, even as summarized in the opinion of the majority, supported the trial court's findings and conclusions that the plaintiffs' use of the road was interrupted by the defendant and its predecessor in title on numerous occasions. Therefore, I am of the opinion that the trial court did not err in concluding that the plaintiffs held no prescriptive easement in the road, and that the Court of Appeals was correct in affirming the judgment of the trial court.

I note at the outset my agreement with the majority's view that by virtue of the limited nature of our order allowing discretionary review in this case, the questions of whether the defendant dedicated the road in question here to public use and whether any such dedication was accepted by the proper public authorities are not before us. Instead, we are faced only with issues to be

resolved in determining whether the plaintiffs have established a prescriptive easement. Even so, as these plaintiffs attempt to establish the right of the entire public to a prescriptive easement across the defendant's land, an argument can be made that, as a matter of law, the easement does not exist unless control of it has been accepted by properly constituted public authorities. *See, e.g., Chesson v. Jordan*, 224 N.C. 289, 29 S.E.2d 906 (1944). I find it unnecessary to consider or attempt to resolve any such question, however, as I believe that the trial court was correct in concluding that the plaintiffs' *adverse* use of the easement asserted was interrupted several times and did not continue without interruption for the required period of 20 years.

In the present case, the plaintiffs' evidence tended to show that the previous owners of the land on which Ocean View Boulevard West is now located permitted members of the public to cross their land at will until the 1960's. For example, the plaintiffs' witness Harrell Paden, a long-time Brunswick County resident, testified that he and his family crossed the land in question regularly from the 1930's through the 1950's, and were *allowed to do so by the owners*. Although the defendant offered evidence that its property had always had the reputation of being private property, the evidence tending to show that the former owners of the property *permitted* the public to cross it at will prior to 1960 was uncontroverted. Additionally, easements by prescription are not favored in the law. *Potts v. Burnett*, 301 N.C. 663, 273 S.E.2d 264 (1981). Thus, "[t]he law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears." *Dickinson v. Pake*, 284 N.C. 576, 580, 201 S.E.2d 897, 900 (1973). In light of the defendant's evidence, with no evidence to the contrary having been introduced, the trial court was required to find and conclude that any crossing of the defendant's property by the plaintiffs prior to 1960 was a mere *permissive* use which could not commence the 20-year period of adverse use required for the establishment of an easement by prescription. *Id.*

Based upon substantial competent evidence introduced at trial in the present case, the trial court found that Holden Beach Realty Corporation, the defendant's immediate predecessor in title, purchased the land now owned by the defendant in 1962. The trial court further found, *inter alia*:

7. Defendant, Holden Beach Enterprises, Inc., was incorporated in 1985 and in that same year acquired all the stock of Holden Beach Realty Corporation, [which] . . . was then dissolved and Holden Beach Enterprises, Inc., became the owner of all of its assets through said dissolution.

. . . .

35. In 1963 James Griffin, at the direction of Holden Beach Realty Corporation, personally placed a large log approximately 10 feet in length and one foot in diameter across the entrance to [what is now Ocean View Boulevard West] . . . to restrict unauthorized persons from entering the Subdivision; the log remained in place for *several months time.*

36. In the mid 1960's James Griffin at the direction of Holden Beach Realty Corporation placed a cable across the entrance of [what is now Ocean View Boulevard West] . . . secured by two posts and a lock; subsequently the cable was extended to the north and south along the eastern property line of the Subdivision; *the cable remained in place until 1972.*

37. In 1972 the cable was replaced by Holden Beach Realty Corporation with a farm gate that was secured by lock and key; the farm gate was replaced around 1975 with a second farm gate which *remained intact until around 1979*; the second farm gate was also secured by a lock and key.

38. Keys to the farm gates were issued to persons *allowed* on the Subdivision property by Holden Beach Realty Corporation; the keys were kept at the corporation sales office.

. . . .

40. In 1985 Holden Beach Enterprises, Inc., placed a guard booth at the entrance of the Subdivision in the middle of Ocean View Boulevard further restricting public access to the Subdivision; the guard booth has been manned by security guards employed by Holden Beach Enterprises, Inc., since 1985.

. . . .

55. Defendant and Holden Beach Realty Corporation *interrupted* the general public's use of the Subdivision property on numerous occasions since 1963 by erecting physical barriers across the

> entrance to the property; *said barriers remaining in place for substantial periods of time.*
>
> 56. The *physical barriers* placed at the entrance of the [what is now Ocean View Boulevard West] . . . by the Defendant and its predecessor in title *prevented* the *full and free* access of the public across the Subdivision property.

(Emphasis added.)

Based upon its findings of fact, the trial court concluded as a matter of law, *inter alia*:

> 5. Plaintiff's [sic] use and public use of Defendant's property has not been continuous for twenty years and Defendant has interrupted such use since 1963.
>
> . . . .
>
> 7. Plaintiff has failed to establish a right held by the general public to a prescriptive easement across Ocean View Boulevard [West] within the Subdivision.
>
> 8. Ocean View Boulevard [West] within the Subdivision is a private street.

Based on its findings and conclusions, the trial court adjudged and decreed that: "2. Ocean View Boulevard [West] within Holden Beach West Subdivision is declared to be a private right-of-way over which the public has acquired no prescriptive easement, nor any other rights."

As Professor Webster has noted:

> The requirement that an adverse user's usage of land must be "uninterrupted" for the prescriptive period in order to create an easement by prescription means that the evidence must show that the potential servient owner has not succeeded, either by threats or the construction of physical barriers, in causing a *discontinuance* of the use of the land. If the owner of the land blocks the usage of the land, *however briefly*, this destroys the continuity of usage required. While the erection of actual physical barriers preventing usage and the prosecution of a law suit to judgment will constitute "interruptions," mere ineffective protests or disregarded remonstrances should serve only to strengthen the evidence of adverse use

and should have no significance as interruptions of the easement claimant's use.

P. Hetrick and J. McLaughlin, *Webster's Real Estate Law in North Carolina* § 321 (3d ed. 1988) (footnotes omitted) (emphasis added). Stated more succinctly, "[a]n interruption to an easement for a right-of-way 'would be any act, done by the owner of the servient tenement which would prevent the *full and free* enjoyment of the easement. . . .'" *Dickinson v. Pake*, 284 N.C. at 581, 201 S.E.2d at 901 (emphasis added) (quoting *Ingraham v. Hough*, 46 N.C. 39, 44 (1853)).

The majority seems to conclude that the efforts of the defendant, Holden Beach Enterprises, Inc., and its immediate predecessor in title, Holden Beach Realty Corporation, amounted to nothing more than "ineffective protests" or "disregarded remonstrances" which were ignored by the plaintiffs. However, the evidence introduced at trial clearly supported the trial court's findings and conclusions to the effect that the physical barriers erected by the defendant prevented the full and free enjoyment of the easement by the plaintiffs by blocking access to it, however briefly.

The mere uncontroverted fact that the defendant placed cables and gates across the easement—acts which would block or "discontinue" public use sufficiently to be criminal if done in a public highway—permitted the trial court to properly find and conclude that the defendant had prevented the full and free enjoyment of the easement by the plaintiffs. *Ingraham v. Hough*, 46 N.C. 39, 44 (1853). In the present case, however, the defendant was not required to rely solely upon the placing of such barriers to show that it had interrupted the plaintiffs' prescriptive use of the easement. The facts as found by the trial court, which were supported by evidence, indicate that each of the barriers erected by the defendant or its immediate predecessor in title remained in place for several months or several years. The trial court could properly infer from such evidence that the barriers prevented the plaintiffs from using the easement, at least to the extent necessary to temporarily prevent the plaintiffs' full and free enjoyment of the easement; no more was required to support the trial court's conclusion that the defendant had interrupted the plaintiffs' use of the easement sufficiently to discontinue the 20-year measuring period required for establishing a prescriptive easement.

In fact, the plaintiffs' own witness, Harrell Paden, testified that, when he first came to the gate installed by the defendant in 1974 or 1975, he "turned around and went back." The plaintiffs' witness, Kermit Coble, testified that during the time the cable was across the easement, he only used the easement after friends got the key to the padlock from the owner—a permissive use. Further, there was direct testimony by Sidney Swartz that, as far back as 1964, the public could not get into the Holden Beach West area. Such evidence was more than sufficient to support the trial court's findings and conclusions.

It is true that one witness for the plaintiffs, Raymond Cope, who never went to the area in question before 1973 or 1974, testified that he and his family ignored the barriers which had been erected across the easement and also ignored the guard in the guard booth which was installed later. He also testified that on one occasion, he and others organized a protest and drove past the guard house despite the guard's efforts to stop them. Additional evidence for the plaintiffs tended to show that at times the gates erected across the easement had been knocked down and that there were tire paths around the various obstacles placed across the easement, which evidence would support an inference that some individuals were able to go onto the defendant's property. Such evidence, however, did not in any way preclude the trial court from making findings and conclusions to the effect that the defendant had interrupted and at least temporarily discontinued the plaintiffs' full and free use of the easement. The mere fact that some of the plaintiffs may have been able at times to break down or circumvent the physical barriers erected to prevent unauthorized persons from coming on the defendant's property--which is all the plaintiffs' evidence tended to show—did not prevent the trial court from properly making findings and conclusions to the effect that the defendant and its predecessor in interest had, on numerous occasions for varying periods of time, prevented the full and free enjoyment of the easement by the plaintiffs. Having made just such findings and conclusions, the trial court was required to adjudge, as it did, that "the public has acquired no prescriptive easement, nor any other rights."

For the foregoing reasons, I believe that the trial court did not err in concluding that the plaintiffs' use of the road in question was not continuous and uninterrupted and that the public held no prescriptive easement in the road. Therefore, I dissent and

vote to affirm the decision of the Court of Appeals, which affirmed the judgment of the trial court.

Justices WEBB and WHICHARD join in this dissenting opinion.

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STATE OF NORTH CAROLINA v. THOMAS LEE BONNEY

No. 38A89

(Filed 12 June 1991)

1. **Criminal Law § 525 (NCI4th)— murder—book in jury room—mistrial denied—no abuse of discretion**

The trial court did not abuse its discretion in a murder prosecution by denying defendant's motion for a mistrial where a book entitled "The Complete Jack the Ripper" was found in the jury room; the court examined the deputy who found the book and a juror out of the presence of the other members of the jury; the juror acknowledged that he had obtained the book earlier in the afternoon and had not begun to read it; the court instructed the juror that it might be better not to read that particular book while he was a juror in a murder trial; the juror stated that he had not considered that and that he had not discussed the book with the other jurors; and the court heard arguments and denied defendant's motion.

**Am Jur 2d, Trial § 1028.**

2. **Criminal Law § 531 (NCI4th)— murder trial—juror—television news—mistrial denied**

The trial court did not abuse its discretion in a murder prosecution by denying defendant's motion for a mistrial after an alternate juror reported that a juror had made a statement which indicated that he had been watching the news on television. The juror, when questioned in chambers, indicated that he lived in a trailer with thin walls and could hear the television even in the next room; he had not intentionally watched television news and had not discussed the present case with any members of the jury; he had left the room whenever he had heard the present trial mentioned; the trial court concluded that the juror had not been tainted by exposure to

news accounts, but granted defendant's motion to remove the juror out of an abundance of caution; and the court then denied defendant's motion for a mistrial.

**Am Jur 2d, Trial §§ 979-981, 1079, 1081.**

3. **Criminal Law § 543 (NCI4th)— murder—improper question by prosecutor—mistrial denied**

The trial court did not abuse its discretion in a murder prosecution by denying defendant's motion for a mistrial after the prosecutor asked a witness during cross-examination if he knew that defendant had a daughter with spina bifida whom defendant had deserted and there was then an outburst from defendant. The court ruled that the prosecutor's questions were improper and instructed the jury to disregard the questions, the witness's answers, and defendant's comments. It must be assumed that the jury followed the court's instructions.

**Am Jur 2d, Trial §§ 193, 919, 921.**

4. **Homicide § 15.2 (NCI3d)— murder—testimony that defendant did not love the victim—no prejudice**

There was no prejudice in a murder prosecution in allowing the victim's sixteen-year-old sister to testify that defendant, their father, did not love the victim. Assuming error, it is unlikely that the witness's one-word answer affected the result at trial in light of other extensive evidence tending to show that defendant had physically abused the victim in the past.

**Am Jur 2d, Homicide § 274.**

5. **Homicide § 21.5 (NCI3d)— murder—sufficiency of evidence**

The trial court did not err by denying defendant's motions to dismiss a first degree murder charge where the evidence tended to show that defendant was the last person seen with the victim while she was alive; defendant had physically abused her on prior occasions; defendant admitted to law enforcement officers that he had shot her and left her body lying along the road; defendant also stated that he had argued with the victim about letters he had found; he further acknowledged that he had his pistol hidden under his coat on the front seat at the time of the argument; he admitted that he continued to shoot the victim after the initial shot, although he main-

tained that she initially lunged for the weapon; defendant also admitted stripping the clothes from the victim's body before he left the scene; the autopsy report indicated that two gunshot wounds to the left forehead were fired only inches from the victim's head; the victim was shot a total of twenty-seven times; the wounds to the face and chest occurred before death, while wounds to the legs occurred after the victim died; and defendant made numerous false statements to authorities concerning the victim's disappearance.

**Am Jur 2d, Homicide §§ 425, 439.**

6. **Homicide § 7 (NCI3d); Criminal Law § 16 (NCI4th)— murder—insanity—M'Naghten Rule upheld**

The trial court did not err in a first degree murder prosecution by not allowing an expert witness to give evidence concerning defendant's insanity that would only be relevant if the M'Naghten Rule was abandoned.

**Am Jur 2d, Homicide §§ 114, 292, 406.**

7. **Homicide § 28.7 (NCI3d)— murder—insanity defense—requested instruction—given in substance**

The trial court did not err in a first degree murder prosecution by not giving defendant's requested instruction on the factors to be considered in determining whether defendant was legally insane. Assuming that defendant was entitled to the requested instruction, the instruction given essentially complied with that request.

**Am Jur 2d, Homicide § 515.**

8. **Criminal Law § 1344 (NCI4th)— murder—sentencing—especially heinous, atrocious or cruel aggravating factor—evidence sufficient**

The evidence in a first degree murder prosecution was sufficient to permit submission of the especially heinous, atrocious or cruel aggravating circumstance to the jury where the evidence taken in the light most favorable to the State tended to show an extremely brutal attack consisting of twenty-seven separate gunshot entrance wounds; two of the wounds to the left forehead had been inflicted from extremely close range; there were six gunshot wounds to the face, three to the neck, ten to the chest, and six to the legs; the wounds

to the face and chest occurred before the victim died, while the wounds to her legs were inflicted after she was dead; the number of wounds tended to show that defendant had to stop and reload the weapon at least twice while he was inflicting the wounds during his murderous attack on his daughter; and, while the evidence tended to show that the victim died in two to three minutes, the evidence also tended to show that she was alive and aware of her fate while many of the shots were being fired into her. N.C.G.S. § 15A-2000(e)(9).

**Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552, 554, 555.**

9. **Criminal Law § 1352 (NCI4th)— murder—sentencing—McKoy error**

A first degree murder defendant was entitled to a new sentencing hearing where the court instructed the jury that it was not to consider a circumstance in mitigation unless it unanimously found that the circumstance existed. The error was not harmless because defendant presented substantial evidence to support at least one of the mitigating factors submitted but not found.

**Am Jur 2d, Criminal Law § 600.**

**Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.**

10. **Criminal Law § 1009 (NCI4th)— murder—motion for appropriate relief—misconduct of jury**

The trial court did not err by denying a murder defendant's post-trial motion for appropriate relief where a reporter stated that a juror had told him that a female juror had said that she had been contacted during deliberations by telephone by someone claiming to know defendant who said that defendant's lack of memory was feigned, that defendant was street smart, and that the evidence of insanity and multiple personality was false; the juror testified at a hearing that he recalled testimony at trial that defendant was street smart but did not recall a female juror stating that she had been contacted by someone outside the courtroom; and another juror testified to the same effect, adding that whether defendant was street smart was discussed in the jury room. The court found and concluded that there was insufficient evidence of any juror

misconduct and the court's findings are supported by substantial evidence.

**Am Jur 2d, Trial §§ 1023, 1075, 1087, 1099, 1224, 1233, 1234.**

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a death sentence entered by *Wright, J.*, at the 17 October 1988 Criminal Session of Superior Court, CAMDEN County. Heard in the Supreme Court on 14 March 1991.

*Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Special Deputy Attorney General, for the State.*

*John W. Halstead, Jr. and John S. Morrison for the defendant-appellant.*

MITCHELL, Justice.

The defendant, Thomas Lee Bonney, was tried upon a proper bill of indictment charging him with the murder of his daughter, Kathy Bonney. The jury found the defendant guilty of first-degree murder on the theory of premeditation and deliberation. At the conclusion of a sentencing proceeding under N.C.G.S. § 15A-2000, the jury recommended and the trial court entered a sentence of death. On appeal, the defendant brings forward numerous assignments of error. We conclude that the defendant's trial and conviction were free from prejudical error. We further conclude, however, that prejudicial error during the sentencing proceeding in this case requires that the sentence of death be vacated and that this case be remanded to the Superior Court, Camden County, for a new capital sentencing proceeding.

The State's evidence at trial tended to show that around 7:00 p.m. on 21 November 1987, the defendant's daughter, Kathy Bonney, returned home from the grocery store with her mother, Dorothy Bonney, and her sister, Susan Bonney. When they entered the home, the defendant was talking on the telephone to a man named John. The defendant told Dorothy and Susan that he was going to take Kathy with him to look at a truck which was for sale.

After the defendant and Kathy left, Susan snuck out of the house and walked to a nearby 7-Eleven store where she observed them sitting in the car. The defendant and Kathy left together in the car soon thereafter. Approximately two hours later, the

defendant returned home and inquired as to Kathy's whereabouts, but no one in the family had seen her.

Later that night, Susan went outside and looked into the car where she observed blood on the seat. Susan told her mother about the blood and assumed that the defendant must have picked up a dead animal, but she never mentioned the blood to the defendant. Susan also returned to the 7-Eleven store that evening to look for Kathy. The defendant did not go out looking for Kathy that night.

On Sunday morning, 22 November 1987, the defendant went to the Chesapeake (Virginia) Police Department to report that his daughter, Kathy, was missing. The defendant said that on the previous evening he had gone to the 7-Eleven store with Kathy to meet a man who wanted to sell a Blazer. He added that Kathy knew the man and called him "John." The defendant said that the last time he saw his daughter was when she got into the Blazer with "John" at approximately 9:00 p.m. on 21 November 1987. The defendant stated that his daughter had stayed out all night once before. Officer Jeffrey Hardison noted that the defendant appeared nervous. Officer Hardison told the defendant that the police would wait twenty-four hours before filing a missing person report, due to Kathy's age.

On 22 November 1987, Wesley Lindquist drove his truck from Chesapeake, Virginia to the outskirts of Elizabeth City, North Carolina. After he turned around and headed back toward Virginia on Highway 17, Lindquist stopped near the Virginia-North Carolina state line along the Dismal Swamp Canal and stayed there a few hours. While walking along the canal, he looked down into a brush-filled and rocky embankment with very steep sides and saw the nude body of a female, later identified as that of Kathy Bonney. Lindquist then got in his truck and drove up the highway to call the police. It was around 3:00 p.m. when he called the police, and officers arrived in approximately fifteen minutes.

Sergeant Edward Lewis, a member of the Chesapeake Police Department dive-team, was called to the scene and arrived around 7:00 p.m. At the scene, he performed an evidence search. He described the body as appearing as though it had been dumped down the bank. He observed numerous wounds to the body including scratch marks. Also, there were small trees around the body and the limbs had bullet holes in them. Fibers from the small trees were observed in the victim's hair. There was also a bloody footprint or palm

print in the middle of the victim's chest. There were facial wounds to the victim's body, including a missing front tooth. A green sweater and a bloody undergarment or "teddy" with a ripped bottom were recovered from the water near the body. Also, there were marks on the wrists of the body similar to those left by handcuffs. No gun, shell casings or handcuffs were found in the area where the body was discovered. Officer Lewis opined that the body must have been dumped because no one could have carried it down the bank. No blood was found on the ground, although there was a moderate amount of blood on the victim's body.

At 6:42 p.m. on 22 November 1987, the defendant telephoned Vanessa Rogers, a dispatcher for the Chesapeake Police Department, and asked for Officer Hardison. The defendant said that he had discussed the filing of a missing person report with Hardison at an earlier time and that his daughter was still missing. Officer Anthony Perkins went to the defendant's home where he met with the defendant and took a missing person's report. The defendant stated that he had last seen Kathy at the 7-Eleven store where he took her to look at a truck. He said a man named John took Kathy for a test drive.

While at the defendant's residence, Officer Perkins received a call and, as a result, took Kathy's driver's license to the crime scene. At the crime scene, despite the aid of Kathy's driver's license, Detective Martin Williams was unable to make a positive identification of the victim. Later that evening, Detective Williams telephoned the defendant to ask if he could come to the defendant's home and get a photograph of Kathy. The defendant responded that it was too late, and the officer would have to wait until the next day.

On Monday, 23 November 1987, Detective Williams spoke with the defendant at his place of business. At that time, the defendant told the officer that Kathy had been dating John Hoskins, one of the defendant's former employees. The defendant had fired Hoskins about ten days earlier. The defendant then reported that he had been looking through Kathy's room and had found a letter in her diary. The letter was shocking to the defendant, and he described it as vulgar. In the letter, Kathy wrote of an affair with a married man and of a previous sexual relationship. The defendant appeared bothered when the officer kept the letter. The defendant repeated his version of what had happened at the 7-Eleven store on the

night Kathy disappeared. Later that evening, Detective Williams and other officers returned to the Bonney residence to dust Kathy's room for fingerprints.

Agent Malcolm McLeod of the SBI went with the defendant on 24 November 1987 looking for the Blazer. The defendant told McLeod that he and Kathy had driven a wrecker to the 7-Eleven store. The defendant also stated that he suspected his daughter had been having an affair with Hoskins. The defendant further stated that he had found a letter Kathy had written to John Hoskins and had given the letter to Detective Williams. During a search of Kathy's room on 24 November 1987, officers found some adult magazines and a pair of handcuffs in her closet.

On Wednesday, 25 November 1987, the body of the victim was identified as that of Kathy Bonney by matching the fingerprints of the body with those lifted from her room. When the defendant was told of this, he became extremely upset, began yelling and fell on the floor. As a result, paramedics were called to assist the defendant.

On Friday, 27 November 1987, Detective Robert Castelow of the Chesapeake Police Department spoke with the defendant. The defendant gave a description of the man named John for purposes of the preparation of a composite drawing. During the same evening, Detective Williams talked to the defendant about the incident with the Blazer. On this occasion, however, the defendant stated that he was driving his Chevrolet, not his wrecker, when he and Kathy went to the 7-Eleven store. The defendant also reported that his .22 caliber sawed-off rifle which had been stolen from his wrecker about the time John Hoskins had been fired.

On Monday, 30 November 1987, the defendant told Williams that he had sold his Chevrolet a few days earlier to a black man who worked at a junkyard. As a result, Williams began looking for the car.

Detective Williams next met with the defendant on Thursday, 3 December 1987, when the defendant came to the police station to view some photographs. Again, the defendant said he drove the Chevrolet to the 7-Eleven store and not the wrecker.

The defendant was interviewed again on Friday, 4 December 1987. The defendant was asked by Detective Williams if he owned a nine-shot .22 revolver. The defendant said he used to have one,

but he had sold it to a black man whose name he could not recall. The defendant then was asked if he had killed Kathy. The defendant denied the act and kept repeating that the officers were wrong. Also, he maintained that the photographs of the body at the crime scene were not photographs of his daughter.

On 10 December 1987, the defendant called Detective Williams and told him that he had found the Chevrolet at London Bridge Motors in Virginia Beach, Virginia. Later, the police arrived and seized the car.

On 1 February 1988, Detective Williams and SBI Agent Kevin McGinnis went to Indianapolis, Indiana, where the defendant had been arrested. Agent McGinnis interviewed the defendant after reading him his *Miranda* rights. During this conversation, the defendant said he had not been running. The defendant said he had left Chesapeake on 11 December 1987 and had been in several states. He said that on Friday, 20 November 1987, he had found copies of the letters Kathy had written to John Hoskins. On Saturday, 21 November 1987, he confronted her with this information while they were in the Chevrolet parked on the side of Highway 17. The defendant claimed that Kathy lunged for his gun, and it just went off. When asked if he had in fact shot Kathy, the defendant said he shot her while they were parked in the car. The defendant said that he had left her body along Highway 17 and then had driven home. The defendant further stated that "something snapped in his head" after he shot Kathy.

On 2 February 1988, Detective Williams and Agent McGinnis returned to the jail to take the defendant to North Carolina. While at the airport, the defendant repeated that he and Kathy had argued about the letters. The defendant stated that at the time he had his pistol under his coat on the front seat. He again claimed that Kathy had lunged for the pistol. Although he did not remember reloading or how many shots he fired, the defendant stated that he had continued to shoot Kathy. He thought she had screamed when she was first shot. The defendant said that he did not shoot Kathy and then drive to the scene, but that everything had taken place there. He also admitted that he had removed Kathy's clothes. He had carried the gun and extra bullets with him that night. The defendant stated that he had thrown his gun over a bridge and into the river at Battlefield Boulevard. He put the spent shell casings in the gas tank of the wrecker.

Dr. Lawrence S. Harris testified as an expert in forensic pathology. On 23 November 1987, he performed the autopsy on the body of Kathy Bonney. An external examination revealed multiple gunshot wounds. There were numerous scratches on the body which probably had been made by briers and brush. In Dr. Harris's opinion, some of the scratches were made before the victim's death, and others were made after death.

Dr. Harris noted that two of the gunshot wounds to the body were close together and had been inflicted from close range. Those two wounds were over the left forehead. The wounds were nearly parallel, and the bullets entered the brain cavity. The weapon was only inches from the head when these two shots were fired.

Six gunshot wounds to the victim's face resulted from shots fired from some distance and left no gunpowder residue or burning. One of these wounds broke teeth in the upper jaw. There were also three gunshot wounds to the neck. The bullets making those wounds traveled upward and into the brain. There was a group of ten gunshot entrance wounds to the chest. Seven of those were near the left breast, and four of them went through the heart. A group of six separate gunshot wounds went through the lower legs. Dr. Harris identified a total of twenty-seven separate gunshot entrance wounds to the victim's body. In his opinion, four or five of the gunshot wounds were made after death.

Dr. Harris estimated that the victim had lost two to three quarts of blood. From an examination of the photographs of the victim's body at the crime scene, Dr. Harris opined that the wounds to the chest occurred before the death. The cause of death was the multiple gunshot wounds to the chest and face. In Dr. Harris's opinion, the victim would have died in two to three minutes after the wounds had been inflicted. In his opinion, the two wounds to the head, eight wounds to the face, and ten wounds to the chest all occurred before death. The wounds to the legs occurred after death. Also, he opined the wounds to the face and head would have rendered Kathy unconscious almost immediately, and she would have felt no pain.

SBI Agent Lucy Milks testified as an expert in forensic serology. She examined the standard rape kit used in examining the body and found no evidence of sexual activity by the victim. Also, she examined the defendant's car and performed a field test which indicated that there was blood on the front passenger's seat. From

a cutting of the seat, she later determined that it was human blood and was consistent with Kathy Bonney's blood type. Also, blood found on the door handle of the passenger's door of the car and on the teddy was consistent with Kathy's blood type. SBI Agent John Bendure, found by the Court to be an expert in forensic fiber examination, testified that the teddy could have been the one worn by Kathy.

Agent Troy Hamlin, a forensic chemist with the SBI, also testified as an expert. He examined known head hair of the victim and found it to be consistent with hair removed from the rear and the trunk of the defendant's Chevrolet.

George Bess, an employee of Tabbs Auto Parts, testified that sometime near the end of 1987 or the beginning of 1988, he discovered .22 caliber shell casings in the gas tank of the wrecker that had belonged to the defendant at the time Kathy was killed. Detective James Eanes of the Chesapeake Police Department removed twenty-five spent shell casings and one live round from the wrecker at the direction of Mr. Bess.

SBI Agent Eugene Bishop testified as an expert in firearms examination. He testified that at least seven of the bullet fragments taken from the victim's body had been fired from one weapon. Also, he examined the twenty-five spent shell casings and one live round taken from the gas tank of the wrecker and concluded that all of the spent shell casings had been fired by the same gun that left the bullet fragments in the victim's body. In his opinion, the spent shell casings had been fired from a revolver rather than an automatic because there were no ejector marks on them. Thus, the casings had to have been removed from a revolver either by hand or by pushing a cylinder pin.

The defendant did not testify at trial but offered evidence in his own behalf. Dr. Paul Dell, found by the trial court to be an expert in clinical psychology, testified that he had conducted a series of interviews with the defendant beginning in July of 1988. He also had given the defendant a series of personality tests. Based on his examination of the defendant, Dr. Dell formed the opinion that the defendant suffered from multiple personality disorder, post-traumatic stress disorder and mixed personality disorder. His primary diagnosis was multiple personality disorder.

Dr. Dell testified that he had identified ten separate personalities of the defendant. Dr. Dell said that multiple personality disorder occurs in childhood and results from a severe childhood trauma. In the defendant's case, the trauma was the death of his maternal grandmother when the defendant was age ten. Dr. Dell identified the defendant's ten separate personalities by name as ". . . Tom, the host personality; Satan; Mamie; Demian; Viking; Tommy; Hitman; Preacher; Dad; and Kathy." Dr. Dell was able to identify these personalities by the use of hypnosis. He said that each separate personality had a function which enabled the defendant to cope with a trauma he had experienced. His interviews with the defendant were recorded on videotape. The tapes were admitted into evidence to illustrate Dr. Dell's testimony. According to Dr. Dell, the personality, Demian, was in control when the defendant shot Kathy, and Demian believed he was shooting the defendant's father who had abused him in childhood.

Dr. Dell testified that the defendant was suffering from multiple personality disorder and post-traumatic stress disorder on 21 November 1987. He believed that at the time Kathy was killed, the defendant was incapable of knowing the nature and quality of his actions. Further, the defendant could not distinguish right from wrong at the time Kathy was shot.

John McClung, the defendant's former business partner, testified that he had known the defendant for about fourteen years. He was also friends with Kathy. McClung described the defendant's history of poor memory. He also described the defendant's abrupt mood swings concerning the Bible and religion. He also mentioned the defendant's love-hate relationship with his father. McClung had never seen the defendant physically abuse any of his children. In his opinion, the defendant loved Kathy. McClung also testified that near the time of the offense, the defendant had not been acting normal or like one in his "right mind." On cross-examination, Mr. McClung acknowledged that Kathy had told him the defendant had hit her on prior occasions. Also, McClung admitted that he had stated previously that the defendant was "street wise" and that the defendant knew the difference between right and wrong.

In rebuttal, the prosecution presented Dr. Phillip Coons, who was found by the trial court to be an expert in clinical psychiatry, multiple personality disorder and hypnosis. Dr. Coons had reviewed approximately thirteen hours of the videotapes of the interviews

between the defendant and Dr. Dell, as well as the tests given by Dr. Dell. Although Dr. Coons did not interview the defendant and made no diagnosis of the defendant, he was critical of the methods used by Dr. Dell in reaching his conclusions. For example, he noted that Dr. Dell did not conduct a proper psychiatric interview before using hypnosis. He noted that Dr. Dell allowed the defendant to ramble and also asked the defendant leading questions. Also, in Dr. Coons's opinion, the death of a loved one was not a sufficient trauma to result in a multiple personality disorder. Additionally, Dr. Dell improperly suggested to the defendant that he might have other personalities, while the defendant was under hypnosis. Dr. Coons also stated that the symptoms of multiple personality disorder could be created by such hypnosis.

Dr. Bob Rollins, found by the court to be an expert in forensic psychiatry, was the attending physician while the defendant was at Dorothea Dix Hospital from 28 September 1988 to 14 October 1988. Based on his evaluation, Dr. Rollins testified that the defendant did have serious mental problems and provisionally diagnosed the defendant as having a multiple personality disorder. Although he found that at the time of the offense the defendant suffered from a disease of the mind and from defective reasoning, Dr. Rollins concluded that the defendant did know the nature and quality of his act and the difference between right and wrong.

Other pertinent facts are hereinafter set forth.

By his first assignment of error, the defendant contends the trial court erred by denying his motions for mistrial. During the trial proceedings, the defendant moved for a mistrial on three different occasions. We conclude that the trial court properly denied each of the defendant's motions for mistrial.

**[1]** The decision to grant or deny a mistrial rests within the sound discretion of the trial court. *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990). "A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *Id.*; N.C.G.S. § 15A-1061 (1988). Consequently, a trial court's decision concerning a motion for mistrial will not be disturbed on appeal unless there is a clear showing that the trial court abused its discretion. *Id.*

The defendant's first motion for a mistrial related to a book found in the jury room during the defendant's trial. The trial court informed counsel out of the presence of the jury that a book entitled "The Complete Jack the Ripper" had been found in the jury room. Thereafter, the defendant's counsel informed the trial court that a motion for mistrial would be made.

Later the same day, in open court but out of the presence of the other members of the jury, Juror George Johnson and Deputy Sheriff Virgil Williams were examined. With all parties and counsel present, the trial court examined Deputy Williams who explained that he had found the book in the jury room after lunch. Deputy Williams stated that he told Juror Johnson to keep the book on the table, to take it home at the end of the day and that he might choose a better book to read. Deputy Williams did not think any of the other jurors heard this conversation. Juror Johnson was also sworn and examined. He acknowledged that he had obtained the book from the library earlier in the afternoon, but stated that he had not started to read it yet. The trial court instructed Johnson that although he could read anything he wanted, it might be better not to read the particular book in question while he was a juror in a murder trial. Johnson stated that he had not even considered that fact. He also stated that he had not discussed anything in the book with the other jurors. After Johnson was excused, the trial court heard arguments and denied the defendant's motion. The trial court conducted a thorough inquiry into the circumstances in question and determined from the evidence before it that no juror had been improperly influenced. The defendant has failed to show that the trial court abused its discretion by denying his first motion for a mistrial.

**[2]** In another incident, the trial court and the parties were in chambers when they were informed by an alternate juror that Juror Johnson had made a statement to the other members of the jury which indicated that he had been watching the news on television. On the next day of court, the parties again met in chambers. The defendant's counsel requested that the trial court conduct a *voir dire*, moved for a mistrial, and also moved to remove Juror Johnson.

In chambers, the trial court questioned Johnson concerning whether he had watched the news. Johnson was then questioned by the defendant's counsel. Johnson explained that he lived in

a trailer and, because the walls were thin, he could hear the television even when he was in the bedroom. Johnson testified that he had not intentionally watched the television news and that he had not discussed the present case with any members of the jury. Johnson further stated that whenever he had heard the present trial mentioned he left the room. The trial court made findings and concluded that Juror Johnson had not been tainted by exposure to any news accounts. However, the trial court noted that it was granting the defendant's motion to remove Juror Johnson out of "an abundance of precaution." The trial court then denied the defendant's motion for mistrial. Since Juror Johnson was excused upon motion of the defendant, the defendant has failed to show that Johnson's exposure to news accounts deprived him of a fair trial or that the trial court abused its discretion by denying his motion for a mistrial.

**[3]** The third incident which led to a motion for a mistrial took place during the cross-examination of Dr. Dell as follows:

> [PROSECUTOR]—Dr. Dell, did you know that when he (the defendant) was in Texas he had another daughter?
>
> [DR. DELL]—No.
>
> [PROSECUTOR]—Did you know that he had a daughter named Debbie who had Spina Bifida?
>
> [DR. DELL]—No.
>
> [PROSECUTOR]—Did you know that he deserted her in a motel room?
>
> [DR. DELL]—No. I did not know that.
>
> MR. BONNEY: That's a lie. That's a lie.
>
> THE COURT: Okay. Take the jury out a minute, please.

The trial court then directed the defendant's counsel to take the defendant from the courtroom for a conference. After a recess, the defendant's counsel moved for a mistrial on the ground that the questions asked of Dr. Dell by the prosecutor assumed facts not in evidence. The prosecutor explained that he had a good faith basis for the questions based upon a report from a social services agency. The defendant then made a motion for a mistrial on the ground of the defendant's "outburst." After hearing arguments, the trial court ruled that the prosecutor's questions were improper

but denied the defendant's motions for a mistrial. After the jury returned, the trial court instructed that the questions by the prosecutor, Dr. Dell's answers and the comments by the defendant were to be disregarded. We must assume that the jury followed the trial court's instructions in this regard. Therefore, we conclude that the trial court did not abuse its discretion by denying the defendant's motions for mistrial in this situation.

For the foregoing reasons, we conclude that the trial court did not abuse its discretion by denying the defendant's motions for mistrial. Accordingly, this assignment of error is without merit.

**[4]** By his next assignment of error, the defendant contends that the trial court erred by allowing the defendant's sixteen-year-old daughter, Susan Bonney, to testify that the defendant did not love her sister, Kathy Bonney. During the direct examination of Susan Bonney, the prosecutor asked her whether, in her opinion, her father loved Kathy. Over objection, Susan testified, "No."

The defendant argues that there was no evidence having any tendency to show that Susan had any personal knowledge as to whether the defendant loved Kathy and that the trial court erred in admitting Susan's answer. Assuming, *arguendo*, that the trial court erred in this regard, we conclude that the defendant has failed to bear his burden under N.C.G.S. § 15A-1443(a) of showing prejudice. It is unlikely that Susan's one-word answer affected the result at trial, in light of the other extensive evidence tending to show that the defendant had often physically abused Kathy in the past. This assignment of error is overruled.

**[5]** The defendant next assigns as error the trial court's denial of his motions to dismiss the first-degree murder charge against him. The defendant made motions to dismiss at the close of the State's evidence and at the close of all of 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. N.C.G.S. § 15-173 (1983); *see State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987). Therefore, only the motion to dismiss at the close of all the evidence is before this Court. *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984).

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense

charged, and that the defendant is the perpetrator. *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." *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).

*State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). Further, 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.* at 237, 400 S.E.2d at 61. If there is substantial evidence of each element of the offense charged or lesser included offenses, the trial court must deny a defendant's motion to dismiss as to those charges supported by substantial evidence and submit them to the jury for its consideration; the weight and credibility of such evidence is a question reserved for the jury. *Id.* at 236-37, 400 S.E.2d at 61.

Murder in the first degree is the unlawful killing of another human being with malice and with premeditation and deliberation. N.C.G.S. § 14-17; *see Vause*, 328 N.C. at 238, 400 S.E.2d at 62. Premeditation and deliberation generally must be established by circumstantial evidence, because they ordinarily are not susceptible to proof by direct evidence. *Id.* "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 an intent to kill executed 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. Judge*, 308 N.C. 658, 661, 303 S.E.2d 817, 820 (1983). 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. *Vause*, 328 N.C. at 238, 400 S.E.2d at 62. 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 evidence in the present case tended to show that the defendant was the last person seen with Kathy while she was alive. On prior occasions, he had physically abused her. The defend-

ant admitted to law enforcement officers that he had shot Kathy and left her body along the road. The defendant also stated that he argued with Kathy about the letters he had found. He further acknowledged that at the time of the argument he had his pistol hidden under his coat on the front seat. Although he maintained that Kathy initially lunged for the weapon, the defendant admitted that he continued to shoot her after the initial shot. In addition, he admitted stripping the clothes from her body before he left the scene. The autopsy report indicated that two gunshot wounds to the left forehead were fired only inches from Kathy's head. Kathy was shot a total of twenty-seven times. The wounds to the face and chest occurred before death, while the wounds to the legs occurred after the victim had died. Prior to the discovery of Kathy's body, the defendant made numerous false statements to authorities concerning her disappearance. Taken in the light most favorable to the State, there was substantial evidence that the defendant killed Kathy with malice, premeditation and deliberation. The trial court did not err in denying the defendant's motion to dismiss at the conclusion of all of the evidence. This assignment of error is without merit.

**[6]** In his next assignment of error, the defendant contends the trial court erred by not allowing an expert witness to give opinion testimony concerning the defendant's "insanity." The defendant contends that the expert testimony in question would be relevant if the definition of insanity under North Carolina law were changed; however, he concedes that the testimony is irrelevant under current North Carolina law. In effect, the defendant is asking this Court to abandon the M'Naghten Rule, which we have adhered to for many years, in favor of another definition of insanity. Under that test of insanity as a defense to a criminal charge, a defendant is insane if, at the time of the crime, he was laboring under such a defect of reason from disease or deficiency of mind as to be incapable of knowing the nature and quality of his act or, if he did know this, of distinguishing between right and wrong in relation to such act. *State v. Evangelista*, 319 N.C. 152, 161, 353 S.E.2d 375, 382 (1987). On numerous occasions in the past, this Court has declined to adopt a different definition of "insanity." *E.g.*, *State v. Mancuso*, 321 N.C. 464, 470, 364 S.E.2d 359, 363 (1988). We find no reason to depart from past decisions of this Court regarding this issue; hence, we decline to abandon the M'Naghten Rule.

**[7]** By another assignment of error the defendant contends the trial court erred by failing to give his requested instruction concerning the factors to be considered in determining whether the defendant was legally insane. We disagree.

The requested instruction listed lack of provocation, threats and conduct by the defendant, excessive force, infliction of wounds after the victim was rendered helpless, the brutality of the act and the manner in which the murder was accomplished. The defendant argues that the trial court should have complied with his request by instructing the jury that it could consider those factors in order to "infer" insanity. Instead, the trial court instructed the jury that it was required to consider all of the evidence which had "any tendency to throw light on the mental condition of Thomas Bonney," and that it could consider all of the evidence admitted at trial relating to his mental condition. Assuming, *arguendo*, that the defendant was entitled to the instruction he requested, the instruction given by the trial court essentially complied with his request. The defendant was not entitled to an instruction using the exact words he requested. The substance of the defendant's request having been granted by the trial court in its instruction, there was no error. This assignment of error is without merit.

**[8]** By his next assignment of error, the defendant contends the evidence was insufficient to permit submission of the aggravating circumstance that the murder was "especially heinous, atrocious or cruel" to the jury for its consideration. N.C.G.S. § 15A-2000(e)(9) (1988). We disagree.

Although every murder may be characterized as heinous, atrocious, or cruel, our legislature has made it clear that this aggravating circumstance may be found only in cases in which the first-degree murder committed was *either* especially heinous, especially atrocious, *or* especially cruel. N.C.G.S. § 15A-2000(e)(9) (1988). For example, a finding that this statutory aggravating circumstance exists is permissible only when the level of brutality involved exceeds that normally found in first-degree murder or when the first-degree murder in question was conscienceless, pitiless or unnecessarily torturous to the victim. *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984). Further, this aggravating circumstance also may be found when the killing demonstrates an unusual depravity of mind on the part of the defendant, beyond

that normally present in first-degree murder. *State v. Stanley*, 310 N.C. 332, 345, 312 S.E.2d 393, 401 (1984).

In *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983), we identified two of the types of first-degree murders which would warrant the submission of the especially heinous, atrocious, or cruel aggravating circumstance to the jury. One type consists of killings which are physically agonizing for the victim or which are in some other way dehumanizing. Another consists of those killings which are less violent but involve the infliction of psychological torture—including placing the victim in agony, aware of but helpless to prevent impending death.

In determining whether the evidence is sufficient to support a finding of essential facts which in turn would support a determination that a murder was "especially heinous, atrocious, or cruel," the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984). The evidence in the instant case supported a finding that the level of brutality exceeded that normally found in first-degree murder cases and that it was pitiless and unnecessarily torturous to the victim. The evidence taken in the light most favorable to the State tended to show an extremely brutal attack consisting of twenty-seven separate gunshot entrance wounds. Two gunshot wounds to the left forehead had been inflicted from extremely close range. There were six gunshot wounds to the face, three gunshot wounds to the neck, ten gunshot wounds to the chest and six gunshot wounds to the legs. The wounds to the face and chest occurred before the victim died; whereas, the wounds to her legs were inflicted after she was already dead.

Furthermore, the evidence tended to show that the murder was exceptionally pitiless and involved the infliction of psychological torture. The number of wounds tended to show that the defendant had to stop and reload the weapon at least twice while he was inflicting the wounds during the course of his murderous attack on his daughter.

Evidence tended to show that Kathy probably died in two to three minutes after the wounds were inflicted and that the wounds to her head and face probably would have caused her to lose consciousness. However, taken in the light most favorable to the State, this evidence tended to show Kathy was alive and

aware of her fate while many of the shots were being fired into her. Hence, evidence tended to show during her last moments Kathy was aware of, but helpless to prevent, her impending death. In the present case, the evidence was sufficient to support the jury's finding of the aggravating circumstance that the first-degree murder was "especially heinous, atrocious, or cruel" beyond a reasonable doubt. N.C.G.S. § 15A-2000(c)(1) (1988) (for imposition of death sentence, aggravating circumstances must be found beyond a reasonable doubt). Therefore, this assignment of error is overruled.

**[9]** By his next assignment of error, the defendant contends the trial court erred in instructing the jury that in determining whether to recommend life imprisonment or death it was not to consider a circumstance in mitigation unless it unanimously found that it existed. As a result of this error, the State concedes that the defendant is entitled to a new sentencing proceeding. We agree.

Because the trial court required that the jury unanimously find any mitigating circumstance before that circumstance could be considered in the ultimate sentencing, the defendant's sentence runs afoul of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). The *McKoy* error here is not harmless because the defendant presented substantial evidence to support at least one of the mitigating circumstances submitted to but not found by the jury. For example, the jury failed to find unanimously as a mitigating circumstance 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. N.C.G.S. § 15A-2000(f)(6) (1988). There was evidence tending to support this circumstance. Dr. Robert L. Rollins, found by the trial court to be an expert in forensic psychiatry, testified *inter alia* that in his opinion the defendant's mental disorder impaired his ability to appreciate the criminality of his conduct and his ability to conform his behavior to the requirements of the law. One or more of the jurors may have believed this circumstance existed. Yet, the erroneous instructions prohibited these jurors from considering this circumstance because it was 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—but other jurors did not find—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. N.C.G.S. § 15A-1443; *see State v. McKoy*, 327 N.C. 31, 45, 394 S.E.2d 426, 434 (1990).

Therefore, we are required to vacate the sentence of death and remand this case to the Superior Court, Camden County, for a new capital sentencing proceeding. Our disposition on the *McKoy* issue makes it unnecessary for us to consider the other assignments of error concerning the defendant's capital sentencing proceeding.

By his next assignment of error, the defendant contends the trial court erred by denying his post-trial motions. However, we deem this assignment of error abandoned and decline to address it because the defendant has cited no reasonable authority in its support. N.C.R. App. P. 28(b)(5) (1991).

**[10]** By his final assignment of error, the defendant contends the trial court erred by denying his post-trial motion for appropriate relief. We disagree.

The defendant was sentenced on 30 November 1988. On 1 December 1988, he filed a motion for appropriate relief alleging jury misconduct. The motion arose due to information allegedly obtained by James Pate during post-verdict interviews with the jurors. Pate was a reporter for The Virginian-Pilot who had covered the trial. Pate *voluntarily* testified before the trial court concerning his "*off the record*" interview of Glenn Ward after the defendant's trial. Pate said Juror Ward had told him that during the jury's consideration of the defendant's case, a female juror had advised the other jurors that she had been contacted by telephone by an individual claiming to know the defendant. She had told the jurors that the individual said that the defendant's alleged lack of memory was feigned, that the defendant was "street smart" and that evidence of insanity and multiple personality was false. The trial court deferred any ruling on the defendant's motion until a later time.

On 17 January 1989, the trial court conducted a hearing on the defendant's motion. Juror Ward testified at the hearing and stated that he recalled testimony at trial that the defendant was "street smart." He testified that he did *not* recall a female juror stating that she had been contacted by someone outside the courtroom.

Juror George Huskey was called as a witness by the defendant. On direct examination by the defendant, Huskey was asked whether, during the jury's deliberations, any statements were made by any member of the jury that they had been contacted by someone

outside the courtroom claiming to know the defendant. Huskey replied that at some point during the trial someone described the defendant as being "street smart," but he thought that he had heard that statement in the courtroom. He then stated that whether the defendant was "street smart" was discussed in the jury room. He further testified that whoever brought the matter up in conversation did *not* say that they had been contacted outside the courtroom. On cross-examination, Mr. Huskey acknowledged that he recalled the defendant's business partner, John McClung, answering "yes" after being asked during his sworn testimony in open court whether the defendant was "street wise."

Based on the evidence, the trial court found and concluded that there was insufficient evidence of any jury misconduct to support the defendant's motion for appropriate relief. Therefore, the trial court denied the motion.

The determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal. *State v. Gilbert*, 47 N.C. App. 316, 319, 267 S.E.2d 378, 379 (1980). It has long been the rule that:

> In North Carolina, in instances when the contention was made by the defendant that the jury has been improperly influenced, it has been held that it must be shown that the jury was actually prejudiced against the defendant, to avail the defendant relief from the verdict, and the findings of the trial judge upon the evidence and facts are conclusive and not reviewable.

*State v. Hart*, 226 N.C. 200, 203, 37 S.E.2d 487, 489 (1946). In this case, the trial court examined the jurors about the alleged incident causing concern and found as a fact that there was no evidence which would support the allegation of jury misconduct. The trial court's findings are supported by substantial evidence and, in turn, support its conclusions and its order denying the defendant's motion. This assignment of error is without merit.

For the foregoing reasons, we conclude that the guilt phase of the defendant's trial was free from prejudicial error. However, the error in the capital sentencing proceeding requires that the death sentence be vacated and this case remanded to the Superior Court, Camden County, for a new capital sentencing proceeding.

Guilt phase: no error.

Death sentence vacated and case remanded for new capital sentencing proceeding.

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IN THE MATTER OF THE ALAMANCE COUNTY COURT FACILITIES

No. 191PA89

(Filed 12 June 1991)

1. **Courts § 3 (NCI4th)— inherent power defined**

A court's inherent power is that belonging to it by virtue of its being one of three separate, coordinate branches of government.

**Am Jur 2d, Courts §§ 78, 79.**

2. **Courts § 3 (NCI4th)— scope of inherent power**

Generally speaking, the scope of a court's inherent power is its authority to do all things that are reasonably necessary for the proper administration of justice.

**Am Jur 2d, Courts §§ 78, 79.**

3. **Courts § 3 (NCI4th)— scope of inherent power**

Just as the inherent power of the judiciary is plenary within its branch, it is curtailed by the constitutional definition of the judicial branch and the other branches of government.

**Am Jur 2d, Courts §§ 78, 79.**

4. **Courts § 3 (NCI4th)— inherent power—overlap with powers of legislature**

The scope of the inherent power of a court does not, in reality, always stop neatly short of explicit, exclusive powers granted to the legislature, but occasionally must be exercised in the area of overlap between branches.

**Am Jur 2d, Courts §§ 78, 79.**

5. **Courts § 3 (NCI4th)— inaction by legislative body—use of inherent power**

When inaction by those exercising legislative authority threatens fiscally to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably

necessary for the orderly and efficient exercise of the administration of justice.

**Am Jur 2d, Courts §§ 78, 79.**

6. **Courts § 3 (NCI4th); Counties § 20 (NCI4th)— provision of adequate court facilities—inherent power of court to order**

Although statutes obligating counties and cities to provide judicial facilities do not expressly pass the duty of providing adequate facilities to the court in case of default of local authorities, the court has the inherent authority to direct local authorities to perform that duty.

**Am Jur 2d, Courts §§ 78, 79.**

7. **Courts § 3 (NCI4th)— inherent power—proper administration of justice—limitations**

Even in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body, nor may it violate the constitutional rights of persons brought before its tribunals. Furthermore, doing what is reasonably necessary for the proper administration of justice means doing no more than is reasonably necessary.

**Am Jur 2d, Courts §§ 78, 79.**

8. **Courts § 3 (NCI4th)— inherent power—limitations**

The inherent power of the court is a tool to be utilized only where other means to rectify the threat to the judicial branch are unavailable or ineffectual, and its wielding must be no more forceful or invasive than the exigency of the circumstances requires.

**Am Jur 2d, Courts §§ 78, 79.**

9. **Courts § 3 (NCI4th)— inherent power—obeisance to established procedural methods—minimal encroachment upon legislative authority**

Beyond the definition of its powers imposed by the constitution, the court's judicious use of its inherent power to reach toward the public purse must recognize two critical limitations: (1) it must bow to established procedural methods where these provide an alternative to the extraordinary exercise of its inherent power; and (2) in the interests of the future harmony of the branches, the court in exercising that power must

minimize the encroachment upon those with legislative authority in appearance and fact.

**Am Jur 2d, Courts §§ 65, 78, 79.**

**Inherent power of court to compel appropriations or expenditure of funds for judicial purposes. 59 ALR3d 569.**

**10. Courts § 3 (NCI4th)— inherent power—obeisance to established procedural methods**

Obeisance to established procedural methods includes a respect for statutory remedies and constraints when those do not stand in the way of obtaining what is reasonably necessary for the proper administration of justice.

**Am Jur 2d, Courts §§ 78, 79.**

**11. Counties § 20 (NCI4th)— county commissioners—compelling adequate facilities—remedies not restricted to election and indictment**

Holdings in earlier cases restricting the means of compelling county commissioners to remedy inadequate public facilities to elections and indictment are explicitly overruled.

**Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 189, 547.**

**12. Mandamus § 2 (NCI3d)— ministerial duty—abuse of discretion**

Mandamus is the proper remedy to compel public officials to perform a purely ministerial duty imposed by law; it generally may not be invoked to review or control the acts of public officers respecting discretionary matters. However, mandamus will lie to review discretionary acts when the discretion appears to have been abused or the action taken arbitrarily, capriciously, or in disregard of law.

**Am Jur 2d, Mandamus § 315.**

**13. Counties § 20 (NCI4th); Courts § 3 (NCI4th)— inherent power—requiring provision of court facilities—means employed**

The means chosen by a court to compel county commissioners to furnish suitable court facilities is of critical importance to the question whether the court has unreasonably exercised its inherent power, for it signals the extent of the judiciary's intrusion on the county's legislative authority.

**Am Jur 2d, Courts §§ 78, 79; Municipal Corporations, Counties, and Other Political Subdivisions § 278.**

**14. Counties § 20 (NCI4th)— county commissioners—duty to provide judicial facilities—ministerial**

The statutory duty of county commissioners to provide judicial facilities is ministerial in all but the details of the exercise of such duty—the commissioners' interpretation of what is suitable or adequate.

**Am Jur 2d, Courts §§ 78, 79; Municipal Corporations, Counties, and Other Political Subdivisions § 278.**

**15. Counties § 20 (NCI4th); Mandamus § 2 (NCI3d)— county commissioners—failure to provide adequate court facilities—mandamus**

When a county commissioner has failed to exercise his ministerial duty to provide adequate court facilities, or when he has exercised his discretion in disregard of the law, the writ of mandamus may be employed to obtain an effective, timely remedy.

**Am Jur 2d, Mandamus § 315.**

**16. Counties § 20 (NCI4th); Courts § 3 (NCI4th); Mandamus § 2 (NCI3d)— county commissioners—ex parte order to provide judicial facilities—mandamus proper remedy**

An *ex parte* order requiring county commissioners immediately to take steps to provide specific judicial facilities in accord with their statutory obligations exceeded what was reasonably necessary for the proper administration of justice because the *ex parte* nature of the order overreached the minimal encroachment onto the powers of the legislative branch that must mark a court's judicious use of its inherent power, and the order's dictate regarding the precise location and specific minimum dimensions of what constituted "adequate" court facilities improperly divested the commissioners of discretionary decisions within their statutory duty. A more reasonable, less intrusive procedure would have been for the court, in the exercise of its inherent power, to summon the commissioners under an order to show cause why a writ of mandamus should not issue, which order would call attention to their statutory duty and their apparent failure to perform that duty. If after hearing it was determined that the commissioners had indeed

failed to perform their duty, the court could order the commissioners to submit a plan to the court within a reasonable time.

**Am Jur 2d, Mandamus § 315.**

**17. Courts § 3 (NCI4th) — inherent power — abridgment of substantive rights**

No procedure or practice of the courts, even those exercised pursuant to their inherent powers, may abridge a person's substantive rights.

**Am Jur 2d, Courts §§ 78, 79.**

**18. Counties § 20 (NCI4th); Constitutional Law § 108 (NCI4th) — provision of court facilities — order not binding on nonparties**

County commissioners are not bound by an order requiring them to provide specific judicial facilities where they were not parties to the action from which the order issued.

**Am Jur 2d, Courts § 105.**

ON certiorari pursuant to N.C. R. App. P. 21, to review the 5 May 1989 order entered by *Hight, J.*, at the 24-25 April Civil Session of ALAMANCE County, the General Court of Justice, Superior Court Division. Heard in the Supreme Court 11 December 1989.

*S.C. Kitchen, Alamance County Attorney, for petitioner-appellants.*

*Lacy H. Thornburg, Attorney General, by Henry T. Rosser, Special Deputy Attorney General, for the State, respondent-appellee.*

EXUM, Chief Justice.

Initiated by a hearing ordered by a superior court judge to inquire into the adequacy of the Alamance County court facilities, this case probes the scope of the court's inherent power to direct county commissioners to ameliorate such facilities and the proper means of effecting that end. We hold that such power exists, but that the order invoking it here is procedurally and substantively flawed: the commissioners against whom the order was directed were not made parties to the action, the order was *ex parte*, and it intruded on discretion that properly belonged to the commissioners.

I.

On 2 March 1989, the Honorable Henry W. Hight, Jr., Superior Court Judge Presiding in the County of Alamance, issued an order directing the Grand Jury to inspect the Alamance County jail and court facilities. The Grand Jury responded with a report finding numerous courthouse and jail defects and recommending that the 1924 courthouse be remodeled and converted to other uses, that a new courthouse be built, and that an existing courthouse annex be renovated and jail space expanded.

On 17 March 1989, Judge Hight issued an order reiterating the Grand Jury's conclusions and scheduling a hearing for 24 April 1989 "to make inquiry as to the adequacy of the Court facilities" in Alamance County. The judge appointed an attorney to represent the court and to present evidence at the hearing. The sheriff was directed to serve the five members of the Alamance County Board of County Commissioners with copies of the order and notice of the hearing. The notice informed the commissioners of their entitlement to be present, along with their attorneys, and to offer evidence or contentions regarding the adequacy of court facilities "to provide for the proper administration of justice in Alamance County."

Four commissioners filed motions to dismiss for insufficiency of process, for failure to join a necessary party and to name a real party in interest, for lack of subject matter jurisdiction; a motion for recusal; and a demand for a jury trial. In an order filed 4 April 1989, Judge Hight struck these motions, stating that the movants were not parties to the action and thus were without standing.

Notice of the hearing was succeeded by subpoenas issued by Judge Hight to each of the five commissioners before the hearing, ordering that they appear and testify on 24 April 1989.

Following the hearing, at which the commissioners were present but did not participate, Judge Hight issued an order based upon copious findings of fact enumerating the inadequacies of the physical facilities provided by Alamance County to the court system. The findings included citation to the statutory duties of the Clerk of Court to secure and preserve court documents, N.C.G.S. § 7A-109(a)(3), to statutory provisions requiring secrecy of grand jury proceedings, N.C.G.S. § 15A-623(e), to statutory requisites that counties in which a district court has been established provide

courtrooms and judicial facilities, N.C.G.S. § 7A-302, and to the open courts provision, Art. I, § 18 of the North Carolina Constitution—all of which were potentially violated by the condition of pertinent facilities in Alamance County. In addition, the findings stated that the right to a jury trial assured in Article I, §§ 24 and 25 of the N.C. Constitution was jeopardized where jury and grand jury deliberations were not dependably private and secure and that litigants' due process rights were similarly at risk for lack of areas where they could confer confidentially with their attorneys. The findings included an assessment of the volume and increase of court business over more than a decade; an accounting of total county revenues and fund balance at the close of the 1987-88 fiscal year, plus undesignated unreserved funds remaining in the fund as of April 1989; and stated minimum square footage requisites for Alamance County's various judicial facilities.

Finally, the findings stated that the failure of the county to provide adequate court facilities violated the constitutional limitation under Article IV, § 1, that the General Assembly "(and Alamance County as part of the State government which has been delegated the responsibility to provide court facilities)" was powerless to deprive the judicial department of any power or jurisdiction rightfully pertaining to it as a co-ordinate department of government.

The order asserted that the court's jurisdiction over the question of adequate court facilities was authorized not only in Article IV, § 12 of the N.C. Constitution, but through its inherent power "necessary for the existence of the Court, necessary to the orderly and efficient exercise of its jurisdiction, and necessary for this Court to do justice."

Based upon its findings of fact, the order concluded that the courtrooms and related judicial offices for Alamance County were "grossly inadequate, being in the large either obsolete, poorly designed, or nonexistent." The effects of such inadequacies included denying access to the handicapped and physically disabled, thwarting the effective assistance of counsel to litigants in violation of the law of the land, jeopardizing the right to trial by jury in civil and criminal cases, and causing delays in the prosecution and defense of civil cases. In addition, the lack of detention rooms constituted a clear and present danger to persons present at criminal judicial proceedings as well as to the public at large.

The order also resolved that the county was financially able to provide adequate judicial facilities and that it was the duty of the county acting through its commissioners to make these provisions.

The order's conclusions were followed by a "Recommendation" which took particular notice of the fact of "undesignated unreserved funds of $15,655,778.00 as of June 30, 1988," with which the commissioners could begin construction of a new courthouse. This recommendation recognized, however, that "[t]he decision of whether or not to construct a new Courthouse, as opposed to providing the courtrooms and related judicial facilities as required by law, is within the sound discretion of the County Commissioners."

Despite the precatory nature of its recommendations, the order culminated with the directive that the county, acting through its commissioners, immediately take steps to provide adequate facilities, first by providing adjacent additional facilities, for which minimum square footage was stated, and, second, by modifying the existing courthouse and annex for access to the handicapped. The order specified, *inter alia*,

> 2. That as a minimum, in addition to the present facilities in Alamance County, Alamance County must provide in close proximity to and adjacent to the present facilities the following:
>
> (a) One (1) Superior Court Courtroom of 1600 square feet, minimum, with two restrooms of 35 square feet, minimum;
>
> (b) One (1) Superior Court Jury Deliberation Room of 300 square feet, minimum;
>
> (c) One (1) Superior Court Court Reporter Room of 80 square feet, minimum;
>
> (d) One (1) Superior Court Judge's Chambers, consisting of conference area of 160 square feet, minimum, and toilet of 40 square feet, minimum;
>
> (e) One (1) Superior Court Detention Room of 140 square feet, minimum;
>
> (f) Two (2) Superior Court Attorney-Client Rooms of 100 square feet each, minimum;
>
> (g) One (1) Grand Jury Hearing Room of 450 square feet, minimum;

(h) One (1) Jury Pool Room of 1,000 square feet, minimum;

(i) One (1) public waiting room of 800 square feet, minimum;

(j) One (1) District Court Courtroom of 1300 square feet, minimum;

(k) One (1) District Court Jury Deliberation Room of 330 square feet, minimum, with two rest rooms of 35 square feet each, minimum;

(l) One (1) District Court Reporter Room of 80 square feet, minimum;

(m) One (1) District Court Judge's Chambers, consisting of conference area of 160 square feet, minimum, and toilet of 40 square feet, minimum;

(n) One (1) District Court Detention Room of 140 square feet, minimum;

(o) Two (2) District Court Attorney-Client Rooms of 100 square feet each, minimum;

(p) Hearing Room of 600 square feet, minimum, and anteroom of 175 square feet, minimum;

(q) Such additional space for the Clerk of Superior Court as is necessary to bring the total office space up to 6,840 square feet, minimum and located such that security of records can be provided;

(r) Adequate furniture for the appropriate use of the above.

3. That Alamance County acting by and through the Board of Commissioners for Alamance County must modify the existing Courthouse and Courthouse Annex facilities in order that the handicapped and physically disadvantaged have free and open access to court proceedings and the Clerk of Court's office.

The order required the Board of County Commissioners to file written response within thirty days, setting forth the actions the county intended to take in compliance with its mandate.

On 11 May 1989 this Court issued writs of supersedeas and certiorari upon petition by the members of the Board of Commissioners for Alamance County. We review the order in the exercise

of our general supervisory authority over the proceedings of the superior courts. N.C. Const. art. IV, § 12.

In their briefs appellants raise issues regarding the jurisdiction and the power of the trial court to initiate this action and to issue its order, as well as questions whether the order was binding on persons not parties to the action, whether the commissioners were entitled to a jury trial, and whether the trial judge initiating the matter should have recused himself from presiding over the hearing. These questions are subsumed in determining whether this case presents the circumstances under which a court's "inherent power" may be invoked and whether the superior court here followed proper procedures in its exercise of that power.

II.

The judicial power of this state is "vested in a Court for the Trial of Impeachments and a General Court of Justice," and the latter constitutes "a unified judicial system for purposes of jurisdiction, operation, and administration," and includes a Superior Court Division. N.C. Const. art. IV, §§ 1, 2. "The Superior Court, being a constitutional body, must be governed by the same law as this Court, and is under the same protection from legislative interference, so far at least as its inherent rights and powers are concerned, which are specially shielded by the Constitution against infringement." *Ex Parte McCown*, 139 N.C. 95, 107, 51 S.E. 957, 962 (1905).

**[1]** A court's inherent power is that belonging to it by virtue of its being one of three separate, coordinate branches of the government. *Id.* at 105-106, 51 S.E. at 961. For over a century this Court has recognized such powers as being plenary within the the judicial branch—neither limited by our constitution nor subject to abridgement by the legislature. *See, e.g., Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 695 (1987). In fact, the inherent power of the judicial department is expressly protected by the constitution: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government . . . ." N.C. Const. art. IV, § 1. *See Rencher v. Anderson*, 93 N.C. 105, 107 (1885) ("[This Court] and its jurisdiction are established by the Constitution—it has all the powers that by general principles appertain to such a court"); *Beard v. N.C. State Bar*, 320 N.C. at 129, 357 S.E.2d at 695 ("The inherent power of the

Court has not been limited by our constitution; to the contrary, the constitution protects such power"). Inherent powers are critical to the court's autonomy and to its functional existence: "If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes." *Ex Parte Schenck*, 65 N.C. 353, 366 (1871), quoted in *Ex Parte McCown*, 139 N.C. at 106, 51 S.E. at 961.

**[2]** Generally speaking, the scope of a court's inherent power is its "authority to do all things that are reasonably necessary for the proper administration of justice." *Beard v. N.C. State Bar*, 320 N.C. at 129, 357 S.E.2d at 696. *See Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 54, n.***, 274 A.2d 193, 198 n.9, *cert. denied, Tate v. Pennsylvania ex rel. Jamieson*, 402 U.S. 974, 29 L. Ed. 2d 138 (1971) (quoting *In re Surcharge of County Commissioners*, 12 Pa. Dist. & Co. R. 471: "That courts have inherent power to do all things that are reasonably necessary for the proper administration of their office within the scope of their jurisdiction is a well-settled principle of law."). This Court has upheld the application of the inherent powers doctrine to a wide range of circumstances, from dealing with its attorneys, *Gardner v. N.C. State Bar*, 316 N.C. 285, 341 S.E.2d 517 (1986), to punishing a party for contempt, *Ex Parte McCown*, 139 N.C. 95, 51 S.E. 957.

Typically, however, the exercise of inherent power by courts of this state has been limited to matters discretely within the judicial branch. *See, e.g., Crist v. Moffatt*, 326 N.C. 326, 337, 389 S.E.2d 41, 48 (1990) (Trial court's broad, inherent discretionary power includes control of course of trial so as to prevent injustice to any party); *In re Mental Health Center*, 42 N.C. App. 292, 296, 256 S.E.2d 818, 821, *cert. denied*, 298 N.C. 297, 259 S.E.2d 298 (1979) (in proceedings to determine whether disclosure of privileged information was necessary for proper administration of justice in criminal action, superior court has inherent power to assume jurisdiction and issue necessary process in order to fulfill its mission of administering justice efficiently and promptly). *See also* cases cited in *Beard v. N.C. State Bar*, 316 N.C. at 129, 357 S.E.2d at 695.

**[3]** Just as the inherent power of the judiciary is plenary within its branch, it is curtailed by the constitutional definition of the judicial branch and the other branches of government. Not only has the actual, practical exercise of inherent judicial power in this

state's jurisprudence been confined to distinctly judicial matters, but powers granted by the North Carolina Constitution to the legislative branch have led commentators to question the extent to which North Carolina courts can actually exercise such power, despite Article IV's broad grant to the judiciary of independence and plenary power over its branch. *See* Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1, 7 (1974). For example, the Constitution authorizes the General Assembly, not the judiciary, to provide for an administrative office of the courts to carry out constitutional provisions for the judiciary, N.C. Const. art. IV, § 15, and to set a schedule of court fees and costs and to regulate salaries and emoluments of all judicial officers. N.C. Const. art. IV, §§ 20, 21. The General Assembly has a constitutional role in the organization and administration of all but this Supreme Court, N.C. Const. art. IV, §§ 7, 9, 10, 12, as well as in the assignment and tenure of judges and justices under a variety of circumstances. *See* N.C. Const. art. IV, §§ 8, 9, 10, 17.

For purposes of reviewing the superior court order before us, two constitutional provisions that define the scope of the court's inherent power are particularly notable—the prohibition against drawing public money from state and local treasuries except by statutory authority, N.C. Const. art. V, § 7, and the exclusive grant of the power of taxation to the legislative branch, N.C. Const. art. V, § 2. These limitations have been scrupulously heeded by North Carolina courts. *See, e.g., State v. Davis*, 270 N.C. 1, 153 S.E.2d 749 (1967) (judgment ordering attorneys be paid from Indigent Defense Fund established by General Session Laws repugnant to N.C. Const. art. XIV, § 3 (now art. V, § 7(1)); *DeLoatch v. Beamon*, 252 N.C. 754, 757, 114 S.E.2d 711, 713 (1960) (power to levy taxes vests exclusively in the legislative branch of the government); *Gardner v. Retirement System*, 226 N.C. 465, 38 S.E.2d 314 (1946) (monies paid to state treasurer under state law become public funds which may be disbursed only in accordance with legislative authority). These constitutional provisions do not curtail the inherent power of the judiciary, plenary within its branch, but serve to delineate the boundary between the branches, beyond which each is powerless to act. "The courts have absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a coordinate branch of the government." *Person v. Watts*, 184 N.C. 499, 503, 115 S.E. 336, 339 (1922). "A defect of jurisdiction exists where a Superior Court of general

jurisdiction acts upon a subject which under the Constitution . . . is 'reserved to the exclusive consideration of a different . . . political tribunal.' In such cases the exercise of power is usurpation." *Henderson County v. Smyth*, 216 N.C. 421, 422, 5 S.E.2d 136, 137 (1939) (quoting *Burroughs v. McNeill*, 22 N.C. 297, 301 (1839)).

The question presented here is the validity of an order, ostensibly authorized by the issuing court's inherent power, which requires local officials to supply specific judicial facilities in accord with their statutory obligations, and which rests upon findings of fact and conclusions of law that analyze not only the exact extent and exigency of the need, but also the financial resources at the disposal of the officials. In addressing this issue, we must look freshly at the separation of powers provision in the North Carolina Constitution, with an eye to the actual constitutional, pragmatic, and philosophical limitations on the power granted therein.

**[4]** The scope of the inherent power of a court does not, in reality, always stop neatly short of explicit, exclusive powers granted to the legislature, but occasionally must be exercised in the area of overlap between branches. The North Carolina Constitution provides: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 4.[1] The perception of the separation of the three branches of government as inviolable, however, is an ideal not only unattainable but undesirable. An overlap of powers constitutes a check and preserves the tripartite balance, as two hundred years of constitutional commentary note. "Unless these [three branches of government] be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." *The Federalist* No. 48, at 308 (J. Madison) (Arlington House ed. 1966). This "constant check . . . preserv[ing] the mutual relations of one [branch] with the other . . . can be best accomplished, if not solely accomplished, by an occasional mixture of the powers

1. The earliest version of North Carolina's Constitution more realistically stated: "That the legislative, executive, and supreme judicial powers of government, *ought to be* forever separate and distinct from each other." (Emphasis added.) N.C. Const. Declaration of Rights § 4 (1776). *See* Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1, 8 (1974).

of each department with that of the others, while the separate existence, and constitutional independence of each are fully provided for." 2 J. Story, *Commentaries on the Constitution of the United States* 22 (1833). A contemporary view notes that this area of overlap is occupied not only by the doctrine of checks and its basis in maintaining the province of each power, but also by a functional component of pragmatic necessity—termed by some commentators "incidental powers"—whereby one branch exercises some activities usually belonging to one of the other two branches in order to fully and properly discharge its duties. C. Baar, *Separate But Subservient—Court Budgeting in the American States* 155 (1975).

Like the jealous checks by one branch upon the encroachments of another, which the Framers viewed positively as the basis for government's critical balance, a functional overlap of powers should facilitate the tasks of each branch. "[C]hecks and balances and functional differentiation can be evaluated on the basis of how effectively they contribute to the operational goals [of each branch]." *Id.* at 152. No less important to a functional balance of power is the notion of a working reciprocity and cooperativeness amongst the branches:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 96 L. Ed. 1153, 1199 (1952) (Jackson, J., concurring), quoted in *Matter of Salary of Juvenile Director*, 87 Wash. 2d 232, 243, 552 P.2d 163, 170 (1976).

In the realm of appropriations, some overlap of power between the legislative and the judicial branches is inevitable, for one branch is exclusively responsible for raising the funds that sustain the other and preserve its autonomy.[2] The danger this fiscal structure poses for the balance of power has long been recognized:

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2. The North Carolina Constitution authorizes the General Assembly to prescribe and regulate the fees, salaries, and emoluments of all judicial officers. N.C. Const. art. IV, §§ 20, 21. The General Statutes provide that "operating expenses of the Judicial Department shall be paid from State funds, out of appropriations for this purpose made by the General Assembly," N.C.G.S. § 7A-300(a) (1989), and that

> It is equally evident that the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

*The Federalist* No. 51, at 321 (J. Madison) (Arlington House ed.).

In order to preserve the independence of the judicial branch, courts in other states have exercised their inherent power even to seize purse strings otherwise held exclusively by the legislative branch, holding such intrusions justified by judicial self-preservation.[3] Typically, however, appellate courts have tempered language about broad inherent power endemic to the status of the judiciary as a co-equal branch of government with self-restraint regarding the reach into the public fisc.[4]

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a portion of the costs of court collected by the clerk of court must be remitted, as "facilities fees," to the local legislative unit providing judicial facilities. N.C.G.S. § 7A-302 (1989).

3. *See, e.g., State v. Davis*, 26 Nev. 373, 68 P. 689 (1902) (courts have inherent power to bind the state to pay for furnishings out of appropriated funds; a view to the contrary would be to concede to the legislature the power of a hostile body to destroy the judicial department); *Woods v. State*, 233 Ind. 320, 119 N.E.2d 558 (1954) (a court has the right and duty to order appropriations for purposes of remodeling jury quarters where the autonomy of its branch is jeopardized by decrepit facilities because the judiciary is an independent and equal branch of the government with powers coequal with its duties); *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193 (if the judiciary is in reality a coequal, independent branch of government, it possesses the inherent power not only to determine funds necessary for its own efficient and effective operation, but also, where funds are disallowed by the city council, to compel other branches to provide them). *See also O'Coins, Inc. v. Treasurer of County of Worcester*, 362 Mass. 507, 510, 287 N.E.2d 608, 612 (1972) ("We hold . . . that among the inherent powers possessed by every judge is the power to protect his court from impairment resulting from inadequate facilities or a lack of supplies or supporting personnel. To correct such an impairment, a judge may, even in the absence of a clearly applicable statute, obtain the required goods or services by appropriate means, including arranging himself for their purchase and ordering the responsible executive official to make payment.").

4. *E.g., Board of Com'rs v. Gwin*, 136 Ind. 562, 36 N.E. 237 (1893) (court's inherent power to order reconstruction arises out of and is restricted by absolute necessity; thus it was confined to repairs and other temporary means of protecting judicial functions); *State v. Pfeiffer*, 163 Ohio St. 149, 126 N.E.2d 57 (1955) (ordering ordinary facilities essential to the care and safeguarding of the free and untrammeled exercise of its functions was within the court's inherent power, but this does not apply merely in order to acquire more desirable space).

III.

**[5, 6]** We hold that when inaction by those exercising legislative authority threatens fiscally to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary for the "the orderly and efficient exercise of the administration of justice." *Beard v. N.C. State Bar*, 320 N.C. at 129, 357 S.E.2d at 696. Article V prohibits the judiciary from taking public monies without statutory authorization. But our statutes obligate counties and cities to provide physical facilities for the judicial system operating within their boundaries. N.C.G.S. § 7A-300(a)(11) (1989); N.C.G.S. § 7A-302 (1989). These facilities must be adequate to serve the functioning of the judiciary within the borders of those political subdivisions. Such adequacy necessarily includes safeguarding the constitutional rights of parties and ascertaining that parties' statutory rights—such as handicap access—are similarly protected. Although the statutes do not expressly pass the duty of providing adequate judicial facilities to the court in case of default of local authorities, the court has the inherent authority to direct local authorities to perform that duty.

**[7, 8]** The only constraints on this power are constitutional. Even in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body, nor may it violate the constitutional rights of persons brought before its tribunals. Furthermore, doing what is "reasonably necessary for the proper administration of justice" means doing *no more* than is reasonably necessary. The court's exercise of its inherent power must be responsible—even cautious—and in the "spirit of mutual cooperation" among the three branches. *O'Coins, Inc. v. Treasurer of County of Worcester*, 362 Mass. at 515, 287 N.E.2d at 615, quoted in *Webster Cty. Bd. of Sup'rs v. Flattery*, 268 N.W.2d 869, 874 (Iowa 1978).[5]

> The very genius of our tripartite Government is based upon the proper exercise of their respective powers together

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5. *See also, e.g., Gary City Court v. City of Gary*, 489 N.E.2d 511, 512-13 (Ind. 1986) (Funds sought through the exercise of mandate order must be necessary to maintain the court at a degree of efficiency to discharge its duties and neither extravagant, arbitrary nor unwarranted; presiding court must meet with the appropriate fiscal authorities before issuing a mandate order and must give due consideration to any adverse effect which the order would have on specific fiscal and other interests of the unit from which funds would come).

> with harmonious cooperation between the three independent Branches. However, if this cooperation breaks down, the Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed.

*Commonwealth ex rel. Carroll v. Tate*, 442 Pa. at 53, 274 A.2d at 197 (citations omitted). The inherent power of the court must be exercised with as much concern for its potential to usurp the powers of another branch as for the usurpation it is intended to correct. It is a tool to be utilized only where other means to rectify the threat to the judicial branch are unavailable or ineffectual, and its wielding must be no more forceful or invasive than the exigency of the circumstances requires.

> The very conception of inherent power carries with it the implication that its use is for occasions not provided for by established methods. . . . [Only w]hen [established] methods fail and the court shall determine that by observing them the assistance necessary for the due and effective exercise of its own functions cannot be had, or when an emergency arises which the established methods cannot or do not instantly meet, then and not till then does occasion arise for the exercise of the inherent power.

*State v. Sullivan*, 48 Mont. 320, 329, 137 P. 392, 395 (1913), quoted in *Webster Cty. Bd. of Sup'rs v. Flattery*, 268 N.W.2d 869, 874-75; *O'Coins, Inc. v. Treasurer of County of Worcester*, 362 Mass. at 516, 287 N.E.2d at 615; *Judges for Third Judicial Cir. v. County of Wayne*, 383 Mich. 10, 42-43, 172 N.W.2d 436, 450 (1969) (separate opinion by Adams, J.), *cert. denied, County of Wayne v. Judges for Third Judicial Circuit*, 405 U.S. 923, 30 L. Ed. 2d 794 (1972); *Leahey v. Farrell*, 362 Pa. 52, 59, 66 A.2d 577, 580 (1949).

**[9]** In exercising its power to do what is reasonably necessary for the proper administration of justice—in remedying the affront—a court must proceed with a cautious and cooperative spirit into those areas where its constitutional powers overlap with those of other branches. Beyond the definition of its powers imposed by the constitution, the court's judicious use of its inherent power to reach towards the public purse must recognize two critical limitations: first, it must bow to established procedural methods where these provide an alternative to the extraordinary exercise of its inherent power. Second, in the interests of the future harmony

of the branches, the court in exercising that power must minimize the encroachment upon those with legislative authority in appearance and in fact. This includes not only recognizing any explicit, constitutional rights and duties belonging uniquely to the other branch, but also seeking the least intrusive remedy.

**[10]** Obeisance to established procedural methods includes a respect for statutory remedies and constraints when these do not stand in the way of obtaining what is reasonably necessary for the proper administration of justice.[6] The superior court order before us noted that the failure of Alamance County to provide adequate court-related facilities violated statutory provisions requiring counties in which a district court has been established to provide "courtrooms and related judicial facilities (including furniture)." N.C.G.S. § 7A-302 (1989). The General Statutes provide a single remedy for this violation: the willful failure of a county commissioner to discharge the duties of his office is punishable as a misdemeanor, N.C.G.S. § 14-230 (1989). The inefficacy of this remedy is made apparent by reviewing the jurisprudence of this state arising under similar circumstances.

At the turn of this century, a number of cases presented the dilemma of challenges to commissioners in whose counties public facilities were in need of construction or repair. Repeatedly, this Court's response was to state that the court was neither empowered to assume the commissioners' duty and direct such action, nor to force the commissioners to act. This Court's reluctance to intervene sprang from its impracticable perception of the absoluteness of the separation of powers doctrine. "This Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the Government or upon the county authorities." *Broadnax v. Groom*, 64 N.C. 244, 250 (1870). The two solutions proposed by this Court to commissioner recalcitrance were nonremedial. First,

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6. *See, e.g., Committee, Marion Co. Bar Ass'n v. County of Marion*, 162 Ohio St. 345, 123 N.E.2d 521 (1954) (inherent power to require the furnishing of reasonable improvements that might be necessary to carry on important judicial functions did not include the installation of an elevator, particularly where statutes plainly provided that commissioners were permitted to consult their judgment as to whether and what kind of courthouse was needed); *Pena v. District Court of Second Jud. Dist.*, 681 P.2d 953 (Colo. 1984) (specific statute and administrative rules predicated that only the state supreme court through the chief judges of each district had the power to order such remodeling as air-conditioning).

there was the ballot box: "For the exercise of powers conferred by the Constitution, the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties." *Satterthwaite v. Commrs.*, 76 N.C. 153 (1877). Second, commissioners could be indicted for neglecting their statutory duty to erect and keep facilities in repair. *See State v. Leeper*, 146 N.C. 655, 61 S.E. 585 (1908). Means of compelling county commissioners to remedy inadequate court facilities *immediately* were absent, however, for although "the cost of a courthouse is a necessary expense to a county, . . . the exercise of the discretionary authority of the commissioners in providing in this case to meet it is not reviewable by the courts." *Vaughn v. Commissioners*, 117 N.C. 429, 435-36, 23 S.E. 354, 355 (1895). *See also Ward v. Commissioners*, 146 N.C. 534, 60 S.E. 418 (1908) (Mandamus will not lie to compel county commissioners to repair or build a courthouse because matter is discretionary; court can intervene only to punish for criminal abuse of duty); *Glenn v. Commissioners*, 139 N.C. 412, 52 S.E. 58 (1905) (Mandamus cannot issue commanding county commissioners to repair a bridge).

**[11]** In *Hickory v. Catawba County and School District v. Catawba County*, 206 N.C. 165, 173 S.E. 56 (1934), this Court held that remedy by indictment of commissioners remiss in their constitutional duty to provide for the maintenance of public schools in their county could not supersede remedy by mandamus: "a party must not only have an adequate legal remedy but one competent to afford relief on the particular subject-matter of his complaint. Punishment of the defendants would not provide the relief to which the plaintiffs are entitled." *Id.* at 174, 173 S.E. at 61. Similarly, this Court declared indictment inadequate but said mandamus would lie to compel the county, acting as an administrative agency of the legislature, to assume the indebtedness of a school district within its jurisdiction. *School District v. Alamance County*, 211 N.C. 213, 189 S.E. 873 (1937). These school district cases implicitly overruled holdings in the earlier cases that restricted remedies under similar circumstances to elections and indictment; we now reverse those earlier holdings explicitly.

The question remaining regarding the issue of the court's exercise of its inherent power is whether the remedy selected by the

Superior Court—an *ex parte*[7] order commanding county commissioners immediately to "take steps" to ameliorate certain judicial facilities—minimized the encroachment. Under the circumstances, was an *ex parte* order implicitly mandating the expenditure of public funds for judicial facilities "reasonably necessary for the proper administration of justice?"

Courts in other jurisdictions have attempted a panoply of remedial measures in exercising their inherent powers to compel the repair, refurbishing, or construction of court facilities by county commissioners. *Ex parte* orders like that before us mandating the appropriations for necessary court items or space occasionally have been approved on review.[8] Commentators have noted, however, that *ex parte* orders, like contempt proceedings, tend to appear arbitrary. J. Cratsley, *Inherent Power of the Courts* 27 (1980). *See also Matter of Salary of Juvenile Director*, 87 Wash. 2d at 249, 552 P.2d at 173 ("By in effect initiating and trying its own lawsuits, the judiciary's image of impartiality and the concomitant willingness of the public to accept its decisions as those of a fair and disinterested tribunal may be severely damaged."). The one-sided nature of both methods, in addition, bespeaks an arrogance that can further erode relations between the judiciary and those exercising legislative authority. This is particularly true of contempt proceedings, whose use under these circumstances has been careful and rare.[9] In appropriate situations, appellate courts have

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7. By definition, *ex parte* orders are made without notice to or contestation by the party adversely interested, Black's Law Dictionary 517 (rev. 5th ed. 1979). The Alamance County Commissioners were served with notice of the hearing and informed of their right to participate, but they were neither named nor recognized as parties to the proceeding. In their one-sided nature, therefore, both the hearing and the resulting order were *ex parte*.

8. *E.g.*, *Knuepfer v. Fawell*, 96 Ill. 2d 284, 449 N.E.2d 1312 (1983) (appropriation and remodeling of courtroom space where exigent circumstances clearly established); *State, etc. v. Superior Court of Marion Cty., Rm. No. 1.*, 264 Ind. 313, 316, 344 N.E.2d 61, 63 (1976) (issued under the authority of state statute assuring trial on the merits upon petition by affected officer); *Gary City Court v. City of Gary*, 489 N.E.2d 511 (city court has inherent power to issue mandate, but preferable to file independent action for mandate against municipal authorities in trial court of general jurisdiction). *But see Webster Cty. Bd. of Sup'rs v. Flattery*, 268 N.W.2d at 876 (better practice to make detailed fact-finding and proposed order, filed with show cause order, served with notice of hearing on those affected).

9. *See, e.g.*, *In re Board of Commissioners*, 4 N.C. App. 626, 167 S.E.2d 488 (1969) (order concluding that commissioners' refusal to comply with prior order directing them to provide "adequate" court facilities was contemptuous conduct

also sanctioned contract actions brought by suppliers against municipal or county officials. *E.g., Schmelzel v. Board of Com'rs.*, 16 Idaho 32, 100 P. 106 (1909). In addition, mandatory injunctions and writs of mandamus have been issued ordering officials to perform their constitutional or statutory duties. *See generally* J. Cratsley, *Inherent Power of the Courts* 26-28 (1980).

**[12]** Of all these remedies, the writ of mandamus has been the favored approach. *See, e.g., O'Coins, Inc. v. Treasurer of County of Worcester*, 362 Mass. at 517, 287 N.E.2d at 616 (enforcement by mandamus brought against county by supplier of tape recorder purchased by court as expense deemed reasonably necessary for the operation of the court preferable to contract action, petition in equity, or to *ex parte* order for payment of obligation so incurred). *See generally* Annot. "Inherent Power of Court to Compel Appropriation or Expenditure of Funds for Judicial Purposes," 59 A.L.R.3d § 2[b] 579 (1974). Mandamus is the proper remedy to compel public officials to perform a purely ministerial duty imposed by law; it generally may not be invoked to review or control the acts of public officers respecting discretionary matters. *Hospital v. Joint Committee*, 234 N.C. 673, 680, 68 S.E.2d 862, 867 (1952). However, mandamus will lie to review discretionary acts when the discretion appears to have been abused or the action taken arbitrarily, capriciously, or in disregard of law. *Ponder v. Joslin*, 262 N.C. 496, 138 S.E.2d 143 (1964); *Pue v. Hood*, 222 N.C. 310, 22 S.E.2d 896 (1942).

**[13]** The means chosen by a court to compel county commissioners to furnish suitable court facilities is of critical importance to the question whether the court has unreasonably exercised its inherent power, for it signals the extent of the judiciary's intrusion on the county's legislative authority. The efficacy of mandatory writs or injunctions, unlike *ex parte* orders and contempt proceedings, rests less on the expansive exercise of judicial power than on the statutory and constitutional duties of those against whom they are issued. Their use thus avoids to some extent the arrogance of power more palpable in an *ex parte* court order. Moreover, they compel the performance of the ministerial duty imposed by law, but give the

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was without effect because commissioners not advised they were to appear and show cause why they should not be held in contempt). *See also In re Norris*, 154 Ga. App. 173, 267 S.E.2d 788 (1980) (finding of contempt reversed because record did not evidence any disrespect by commissioners toward the superior court).

defaulting officials room to exercise discretionary decisions regarding how that duty may best be fulfilled. *See Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 386, 265 S.E.2d 890, 913, *disc. rev. denied*, 301 N.C. 94 (1980) (public officers may have both ministerial and discretionary duties).

**[14, 15]** Counties in which a district court has been established have an absolute statutory duty to provide judicial facilities. N.C.G.S. § 7A-302 (1989). In cities other than county seats where sessions of superior court are held, boards of commissioners are obligated by statute to provide "suitable" places for holding such sessions of court. N.C.G.S. § 7A-42(h) (1989). Such duties are ministerial in all but the details of their exercise—the commissioners' interpretation of what is "suitable," or adequate. In matters involving the exercise of discretion, mandamus will lie only to compel public officials to take action; ordinarily it will not require them to act in any particular way. *Hospital v. Joint Committee*, 234 N.C. at 680, 68 S.E.2d at 868. When an officer has failed to exercise his ministerial duty—under the facts of this case, to provide "adequate" court facilities—or when he has exercised his discretion in disregard of the law, the writ of mandamus may be employed to obtain an effective, timely remedy.

In *Vaughn v. Commissioners*, 117 N.C. 429, 23 S.E. 354 (1895), this Court was faced with the propriety of the trial court's refusal to enjoin commissioners from choosing one means of financing court facilities over another. Approval of the trial court's decision was couched strictly in terms of the separation of powers.

> It is absolutely essential to the administration of justice that a suitable courthouse and jail should be built at every county site in the State. It is within the province of the courts to determine what are necessary public buildings and what classes of expenditures fall within the definition of the necessary expenses of a municipal corporation. But, conceding as we do that the cost of erecting courthouses and jails, like that of building bridges and of constructing public roads, is one of the necessary expenses of a county, we have no authority vested in the commissioners of determining what kind of a courthouse is needed or what would be a reasonable limit to the cost.

*Id.* at 434, 23 S.E. at 355. It is as true today as it was a century ago that a court "has no authority vested in the commissioners"

either to perform their statutory duty of providing suitable court facilities or to exercise the discretionary choices within that duty. However, when it is reasonably necessary for the administration of justice, the court can exercise its inherent power to *compel* the commissioners to do both.

> [A] court of competent jurisdiction may determine in a proper proceeding whether a public official has acted capriciously or arbitrarily or in bad faith or in disregard of the law. And it may compel action in good faith in accord with the law. But when the jurisdiction of a court is properly invoked to review the action of a public official to determine whether he, in choosing one of two or more courses of action, abused his discretion, the court may not direct any particular course of action. It only decides whether the action of the public official was contrary to law or so patently in bad faith as to evidence arbitrary abuse of his right of choice. If the officer acted within the law and in good faith in the exercise of his best judgment, the court must decline to interfere even though it is convinced the official chose the wrong course of action. The right to err is one of the rights—and perhaps one of the weaknesses—of our democratic form of government.

*Burton v. Reidsville*, 243 N.C. 405, 407, 90 S.E.2d 700, 702-03 (1956) (citations omitted).

**[16]** Based upon its abundant findings of fact regarding the financial status of county coffers, the superior court order *sub judice* concluded that the County of Alamance was "financially able to provide courtrooms and judicial facilities." The order stopped short of ordering the commissioners to release funds for those purposes and of thus leaving the constitutional sphere of its inherent powers. Nevertheless, in form and in substance the order's attempted remedy went beyond requiring the Alamance County Commissioners to do their constitutional and statutory duty to provide court facilities. The *ex parte* nature of the order overreached the minimal encroachment onto the powers of the legislative branch that must mark a court's judicious use of its inherent power, and the order's dictate regarding the precise location and specific minimum dimensions of what constituted "adequate" court facilities improperly divested the commissioners of discretionary decisions within their statutory duty. A more reasonable, less intrusive procedure would have been for the court, in the exercise of its inherent power, to summon

the commissioners under an order to show cause why a writ of mandamus should not issue, which order would call attention to their statutory duty and their apparent failure to perform that duty. If after hearing it was determined that the commissioners had indeed failed to perform their duty, as the court determined in the case before us, the court could order the commissioners to respond with a plan—perhaps in consultation with such judicial personnel as the senior resident superior court judge, the chief district court judge, the district attorney, the clerk, or other judicial officials with administrative authority—to submit to the court within a reasonable time. Such a directive would be a judicious use of the court's inherent power without either seizing the unexercised discretion of a political subdivision of the legislative branch or obtruding into the constitutional hegemony of that branch.

We hold that the order *sub judice* exceeded what was reasonably necessary to the administration of justice under the circumstances of this case, and in so doing strained at the rational limits of the court's inherent power.

IV.

**[17]** By virtue of their being "a co-ordinate department of the government," N.C. Const. art IV, § 1, courts of this state are empowered "to issue in personam orders requiring public officials to act in compliance with their . . . public duties." *Orange County v. Dept. of Transportation*, 46 N.C. App. at 385, 265 S.E.2d at 913. No procedure or practice of the courts, however, even those exercised pursuant to their inherent powers, may abridge a person's substantive rights. *See* N.C. Const. art. IV, § 13(2). *See also Lowder v. Mills, Inc.*, 301 N.C. 561, 583, 273 S.E.2d 247, 260 (1980) (right to confront witnesses applicable to contempt proceedings); *Cotton Mills v. Local 578*, 251 N.C. 218, 228, 111 S.E.2d 457, 463 (1959) (law of the land guarantees one charged with contempt of court to confront and cross-examine witnesses), *cert. denied, Rose v. Harriett Cotton Mills*, 362 U.S. 941, 4 L. Ed. 2d 770 (1960).

**[18]** The commissioners were served with notice of the hearing and informed of their rights to be represented by an attorney and to present evidence. In response to motions filed by the commissioners, however, the court stated that the movants lacked standing, as they were not parties to the action. "[I]n order that there be a valid adjudication of a party's rights, the latter must be given

notice of the action and an opportunity to assert his defense, and he *must be a party to such proceeding.*" *In re Wilson*, 13 N.C. App. 151, 153, 185 S.E.2d 323, 325 (1971) (emphasis added) (quoting 2 Strong's N.C. Index 2d, *Constitutional Law* § 24). "[A]ny judgment which may be rendered in . . . [an] action will be wholly ineffectual as against [one] who is not a party to such action." *Scott v. Jordan*, 235 N.C. 244, 249, 69 S.E.2d 557, 561 (1952). The exercise of the court's inherent power to do what is reasonably necessary for the proper administration of justice must stop where constitutional guarantees of justice and fair play begin. "The law of the land clause . . . guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree." *In re Custody of Gupton*, 238 N.C. 303, 304, 77 S.E.2d 716, 717 (1953). "The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action, and, if it does not, such action is, in law, a nullity." *Burroughs v. McNeill*, 22 N.C. at 301. Such was the effect of the superior court order here.

Because the commissioners were not parties to the action from which the order issued, they are not bound by its mandates. Having so held, this Court need not address additional issues raised by petitioners.

We hold the order below, for all the reasons given, must be, and is

Vacated.

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STATE OF NORTH CAROLINA v. JAMES KEITH ROSS

No. 493A90

(Filed 12 June 1991)

1. **Homicide § 9 (NCI3d) — self-defense — court's directive to give written notice — statements to jury venire — absence of prejudice**

Neither the trial court's directive that defendant give written notice of his intent to assert self-defense in his trial for two murders nor the court's statement to the jury venire

that defendant intended to assert that defense violated defendant's state or federal constitutional rights or otherwise prejudiced him where defendant knew the State's case because defendant was being tried for a second time on the same charges; the trial court's directive provided the State with no new information about defendant's case; on many occasions prior to the trial defendant indicated to the prosecution and the court that self-defense likely would be an issue in the case, and defendant filed several motions designed to buttress this theory; and it is evident that defendant had planned to follow a self-defense strategy and that the court's statement to the jury did not force him to do so.

**Am Jur 2d, Homicide § 139.**

**2. Criminal Law § 86.2 (NCI3d)— prior convictions—testimony by defendant—door not opened to cross-examination**

Because the trial court denied defendant's motion in limine to exclude evidence regarding defendant's prior sodomy conviction, defendant did not "open the door" to cross-examination on that subject by testifying about the conviction on direct examination. A criminal defendant is permitted to enhance his credibility by testifying as to his criminal record.

**Am Jur 2d, Witnesses §§ 484, 497, 582.**

**3. Criminal Law § 86.2 (NCI3d)— prior convictions—impeachment of credibility**

The only legitimate purpose for introducing evidence of past convictions is to impeach the witness's credibility.

**Am Jur 2d, Witnesses § 581.**

**4. Criminal Law § 86.2 (NCI3d)— prior offenses more than ten years old—admission as harmless error**

The trial court erred in permitting the State to cross-examine defendant about a nineteen-year-old sodomy conviction under N.C.G.S. § 8C-1, Rule 609 in his trial for the murders of two teenage boys where the court failed to identify any fact or circumstance indicating that this evidence was probative of defendant's credibility. However, this error was harmless where there was substantial evidence of defendant's homosexuality, including evidence of homosexual acts with one victim, apart from that supplied by the sodomy conviction,

and the overwhelming evidence of defendant's guilt made it extremely unlikely that the jury relied on the evidence of the earlier conviction rather than the substantive evidence of guilt.

**Am Jur 2d, Witnesses § 577.**

**5. Criminal Law § 1185 (NCI4th)— aggravating factor—conviction in Virginia—no juvenile adjudication**

The trial court's finding that a 1970 sodomy conviction of defendant in Virginia was not a juvenile adjudication but that defendant was in fact tried as an adult so that the conviction could be used as an aggravating factor in sentencing defendant for two second degree murders was supported by the evidence, including the certified court record of the conviction and defendant's admission on cross-examination that he pled guilty to a felony violation of the laws of Virginia in 1970 and that judgment had been imposed on him including a probationary period of six years.

**Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 6, 14, 15.**

Justice MEYER concurring.

Justice MITCHELL joins in the concurring opinion.

APPEAL as of right by defendant 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. 207, 395 S.E.2d 148 (1990), affirming judgments imposing two consecutive sentences of life imprisonment entered by *Sitton, J.*, at the 13 March 1989 Criminal Session of Superior Court, MCDOWELL County, upon jury verdicts finding defendant guilty of two counts of second-degree murder. On 10 January 1991 this Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court 8 May 1991.

*Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant appellant.*

WHICHARD, Justice.

Defendant was indicted on two counts of first-degree murder for the deaths of Gary Floyd Bailey and Richard Buchanan. At defendant's first trial, the jury returned verdicts of guilty of first-degree murder, and defendant was sentenced to death on both counts. On appeal, this Court awarded a new trial. *State v. Ross*, 322 N.C. 261, 367 S.E.2d 889 (1988). At defendant's new trial, the jury returned verdicts of guilty of second-degree murder on both counts. The trial court imposed consecutive sentences of life imprisonment. A divided panel of the Court of Appeals found no error in the trial. *State v. Ross*, 100 N.C. App. 207, 395 S.E.2d 148 (1990). Defendant appealed as of right on the issue raised by the dissent. N.C.G.S. § 7A-30(2) (1989). We allowed defendant's petition for discretionary review of two additional issues. We now affirm the decision of the Court of Appeals.

The State presented evidence tending to show the following:

In January 1985, defendant was the caretaker and ranger at Camp Grimes, a Boy Scout retreat. Defendant lived alone in a house at the camp. While living at the camp, defendant received permission to build a grease pit near his home. Defendant built the pit with the help of Richard (Ricky) Buchanan.

Teddy Buckner testified that he stayed at Ricky Buchanan's house on 18 January 1985. Buckner went with Buchanan to defendant's house on that day. He waited outside while Buchanan visited defendant. After waiting for almost thirty minutes, Buckner went inside. When Buchanan asked Buckner if he wanted to engage in homosexual acts, he declined.

On 23 January 1985, Ricky Buchanan and Gary Bailey went to visit defendant at the Scout camp. When they did not return home that evening, Bailey's mother looked for but did not find them.

On 26 January 1985, the two boys' bodies were found buried in the grease pit approximately 130 feet from defendant's house. Autopsies revealed that Bailey suffered three gunshot wounds—one to his head near the left ear, one entering the back and exiting the chest, and one entering the abdomen. Buchanan suffered five gunshot wounds—one each in the back, arm, and abdomen, and two in the head. One of Buchanan's wounds was a contact wound, containing powder residue in the wound itself. The autopsies revealed no evidence of sexual molestation.

During a search of defendant's house, police discovered carpet stained with what could have been blood. They also found a .32 caliber pistol. Test results indicated that the gun seized from defendant's house was the gun that fired the bullets taken from the victims' bodies. Dried blood found on the pistol was consistent with Buchanan's blood and inconsistent with Bailey's. Human hair found on the pistol was consistent with Buchanan's, but not with defendant's or Bailey's.

The State also presented evidence that on 25 January 1985, defendant sought to match a carpet sample at a local furniture store. He also returned a carpet cleaner that he had rented the previous day.

Defendant testified as follows: He admitted consensual homosexual contact with Ricky Buchanan. On 23 January 1985, Buchanan and Bailey came to defendant's house. During a game of strip poker, defendant went to his kitchen and returned to find Bailey holding a .9 millimeter pistol and Buchanan brandishing an axe. The boys threatened to kill him. When the pistol did not fire, Buchanan grabbed it from Bailey and pulled the trigger. Defendant took this opportunity to get his .32 caliber pistol. Defendant told the boys to drop the gun, but they moved towards him and he fired. Defendant checked the boys' pulses and found that they were dead. He panicked and decided to bury the bodies in the grease pit. He also tried to clean the room.

A few days later, defendant voluntarily surrendered to police officers and gave them the .9 millimeter pistol. He also told the officers where the bodies were buried and where to find the .32 caliber pistol.

**[1]** Defendant argues he is entitled to a new trial because the trial court, during an informal pretrial conference, "directed defense counsel to prepare a statement affirmatively asserting a theory of self-defense." On the same day, after giving opening remarks and introducing counsel, the court explained to the jury venire the nature of the case. It described the charges against defendant, stated that defendant had pled not guilty, and said "[t]he defendant also has filed what is known as an affirmative defense alleging and asserting the defense of self defense . . . ."

Defendant did not object to the directive to file the statement or to the court's statement to the jury. He now argues that the

order and statement violated his federal and state constitutional rights to be free from self-incrimination, to have effective assistance of counsel, to rely upon the presumption of innocence, and to due process of law.

The directive that defendant give written notice of his intent to assert self-defense was not required by law. A criminal defendant is not generally required to give notice of defenses to be asserted at trial. In enacting N.C.G.S. § 15A-959, which requires notice of the defense of insanity, our General Assembly removed language that would have required notice of alibi as well. N.C.G.S. § 15A-959 (1988), Official Commentary. No other notice requirements appear.

While we find defendant's contention here without merit, we join the Court of Appeals in "strongly caution[ing] against such methods as standard practice without legislative enactment . . . ." *Ross*, 100 N.C. App. at 211, 395 S.E.2d at 150. As the Supreme Court of Arizona stated in rejecting an argument that the inherent power of the court allows it to provide for discovery beyond that expressed in the rules, "pretrial discovery by the State[ ] is fraught with constitutional problems. Each and every trial judge would be left to his own devices to determine where fair play in favor of the State ends and infringement on personal rights begins." *Moore v. State*, 105 Ariz. 510, 513, 467 P.2d 904, 907 (1970). Likewise,

> [i]n the area of prosecution discovery, in contrast to defense discovery, trial courts generally are prohibited from exercising their inherent power to require disclosure beyond that specifically noted in the discovery provision. Prosecution discovery is viewed as so controversial that the failure of the statute or court rule to specifically authorize a particular type of disclosure is taken as indicating the rulemakers did not intend to allow the prosecution such discovery.

2 LaFave & Israel, Criminal Procedure § 19.4, at 511 (1984) (footnote omitted). In *Richardson v. District Court, etc.*, 632 P.2d 595 (Colo. 1981), even though a rule granted broad power to the State for discovery from defendants, the trial court ordered discovery beyond the language of the rule. The reviewing court stated:

> The exclusion [in the statute] of non-expert witnesses' statements from prosecutorial discovery, far from being an oversight, reflects a purposeful decision to prevent the impairment of

> constitutional rights that arguably could result from a rule permitting the court to enlarge the categories of prosecutorial discovery on the basis of an *ad hoc* evaluation of each case.

*Id.* at 599; *see also People v. Williams*, 87 Ill.2d 161, 57 Ill. Dec. 589, 429 N.E.2d 487 (1981).

Such problems notwithstanding, we conclude that the directive and statements here were benign. The directive was less burdensome to defendant than the notice of alibi requirement imposed by Florida and approved in *Williams v. Florida*, 399 U.S. 78, 26 L. Ed. 2d 446 (1970). The Court there upheld a rule requiring defendant to provide the names and addresses of alibi witnesses. The requirement here did not involve the disclosure of defense witnesses or statements. Further, though the Court did not consider this factor, the Florida rule would have precluded testimony by unlisted witnesses as a sanction for violating the discovery rule. The court's directive here carried no such draconian consequence.

Other states since have enacted provisions requiring notice of a variety of defenses. *See, e.g.*, Ark. R. Crim. P. 18.3; Hawaii R. Crim. P. 16(c)(3); Ill. Ann. Stat. § 110A, ¶ 413(d). Following *Williams*, courts have upheld such provisions. *See, e.g., Radford v. Stewart*, 320 F. Supp. 826 (D. Mont. 1970), *aff'd*, 472 F.2d 1161 (9th Cir. 1973); *People v. District Court in & for County of Larimer*, 187 Colo. 333, 531 P.2d 626 (1975); *State v. Nelson*, 14 Wn. App. 658, 545 P.2d 36 (1975). The dissent in *Williams* stated that "[t]he rationale of [the] decision [was] in no way limited to alibi defenses . . . ." *Williams*, 399 U.S. at 114, 26 L. Ed. 2d at 484 (Black, J., dissenting).

Significantly, this case lacks the circumstances that led Justice Black to dissent in *Williams*. Justice Black took issue with one essential premise of the majority's decision—"that compelling a defendant to give notice of an alibi defense before trial is no different from requiring a defendant, after the State has produced the evidence against him at trial, to plead alibi before the jury retires to consider the case." *Id.* at 108, 26 L. Ed. 2d at 480. Justice Black stated:

> When a defendant is required to indicate whether he might plead alibi in advance of trial, he faces a vastly different decision from that faced by one who can wait until the State

> has presented the case against him before making up his mind. Before trial the defendant knows only what the State's case *might* be. Before trial there is no such thing as the "strength of the State's case"; there is only a range of possible cases. At that time there is no certainty as to what kind of case the State will ultimately be able to prove at trial.

*Id.* at 109, 26 L. Ed. 2d at 481 (Black, J., dissenting) (emphasis in original). Here, by contrast, defendant knew the State's case because he had been prosecuted on the charges before. In fact, as noted below, defendant altered his pretrial and trial strategies based on what he learned in his first trial. Though defendant could not assume the State's case would be unchanged, he had a better grasp of the necessity for a strong defense because of the prior trial.

Further, under the particular facts we fail to see how the directive harmed defendant. On many occasions prior to trial defendant indicated to the prosecution and the court that self-defense likely would be an issue in the case. During the first pretrial hearing on pending motions, he sought access to the juvenile records of the victims. When the court inquired into the relevancy of such records, defendant said they were relevant to the theory of self-defense. Later in the same hearing, defendant sought funds to hire an investigator who would provide information about the reputation and character of the victims in order to buttress "a possible self-defense theory on the part of [defendant]."

In addition, this case involves a second trial of defendant on the same charges. Both parties were aware of the evidence and tactics in the first trial. Thus, in preparing for this trial defendant could evaluate the State's case and correct tactical mistakes in the first trial. For example, in a second hearing on pretrial motions, defendant sought an ex parte hearing on the cause of death and "indicate[d] to the Court the first time it was tried on the issue of self-defense, on that issue, it was all blown up during opening statement and the defendant never took the stand and no evidence ever come [sic] out regarding the issue of self-defense." Thus, there were numerous other indications by defendant prior to trial that he intended to assert the defense of self-defense. The trial court's directive that defendant give formal written notice thereof thus provided the State with no new information about defendant's case; therefore, defendant was not prejudiced by this notice requirement.

Defendant also argues, however, that by telling the jury venire defendant intended to assert self-defense, the court essentially told the jury defendant admitted responsibility for the victims' deaths. Further, defendant contends the statement forced him to follow through with the defense, thereby prematurely foreclosing his right to elect not to testify or present evidence. We reject these contentions as well.

We are satisfied that defendant intended from the outset to assert this theory vigorously. As described above, during several pretrial hearings defendant attempted motions designed to buttress this theory. Further, it is apparent that defendant was acutely aware of his strategy during the first trial—including a "blown up" forecast of self-defense evidence followed by defendant's failure to testify or present any such evidence—and that trial's outcome—two convictions of first-degree murder and sentences of death—and that he sought to prevent such a failure of proof at this trial.

The fact that defendant did not object to the court's directive or statement to the jury venire indicates that the court's actions were consistent with defendant's intended trial strategy. Finally, it is salient that defendant told the jury in his opening statement:

> We expect that the evidence will show . . . those young men came over there with something in mind other than visiting [defendant]. They came over there intending to rob him or intending to kill . . . and rob him. . . . The only thing he could do is protect himself in self-defense and save his own life.

It is evident that defendant had planned to follow a self-defense strategy, and that the court's statement to the jury did not force him to do so.

If anything caused defendant to introduce evidence of self-defense, it was "the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts." *Williams*, 399 U.S. at 85, 26 L. Ed. 2d at 452. As the Court noted in *Williams*,

> [t]he defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. . . . That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination. The pressures generated

> by the State's evidence may be severe, but they do not vitiate the defendant's choice to present . . . [a] defense and witnesses to prove it . . . .

*Id.* at 83-84, 26 L. Ed. 2d at 451.

We conclude that, under the particular facts presented, neither the trial court's instruction that defendant give written notice of his intent to assert self-defense, nor its statement to the jury venire that defendant intended to assert that defense, violated his state or federal constitutional rights or otherwise prejudiced him. This assignment of error is overruled.

Defendant next contends that the trial court erred in denying his motion *in limine* to exclude evidence related to his 1970 Virginia conviction for sodomy. Defendant argues that this evidence was inadmissible under N.C.G.S. § 8C-1, Rule 609, and that he is entitled to a new trial. The Court of Appeals rejected this contention, holding that defendant waived his objection and "opened the door" to cross-examination regarding the nineteen-year-old conviction through his testimony as to the conviction on direct examination. *State v. Ross*, 100 N.C. App. at 213, 395 S.E.2d at 151. We disagree that defendant "opened the door," and we hold that the court erred in denying defendant's motion. We conclude, however, that the error was harmless.

**[2]** Because the trial court denied defendant's motion *in limine* to exclude evidence regarding defendant's prior sodomy conviction, defendant did not "open the door" to cross-examination on that subject by testifying about the conviction on direct examination. A criminal defendant is permitted to enhance his credibility by testifying as to his criminal record. *See State v. Dellinger*, 308 N.C. 288, 299, 302 S.E.2d 194, 200 (1983). As our Court of Appeals has stated:

> Ordinarily, when a defendant is not permitted to testify on direct examination regarding his prior criminal record and the prior record is elicited during cross-examination, the defendant sustains a double blow to his credibility—aside from the obvious effect of the prior conviction, defendant's credibility is hurt because the jury is left with the impression that the defendant tried to hide his criminal record and was not being entirely truthful. Allowing the defendant to testify on direct examination, rather than detracting from his credibility,

> may actually bolster his credibility because the jury may believe that the defendant is being completely open and straightforward and worthy of belief.

*State v. Hedgepeth*, 66 N.C. App. 390, 400, 310 S.E.2d 920, 925 (1984); *see also State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902, *disc. rev. denied*, 314 N.C. 546, 335 S.E.2d 318 (1985). A defendant would face an unfair dilemma if forced to choose between devastating cross-examination about a conviction and waiver of his right to appeal the denial of a pretrial motion.

Defendant argues that evidence of his 1970 conviction was inadmissible under Rule 609. Rule 609, in pertinent part, states:

> (a) General rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter.
>
> (b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

N.C.G.S. § 8C-1, Rule 609(a), (b) (1988).

Evidence of the prior conviction here would have been admissible under section (a) of Rule 609, if it stood alone. North Carolina's version of Rule 609(a) is more permissive than its federal counterpart in that its only limitation on evidence of a witness's convictions is that the crime be punishable by more than sixty days confinement. The federal rule requires (1) that the crime be punishable by death or imprisonment for more than one year, and that the court balance the probative weight of the evidence against its preju-

dicial effect, or (2) that the crime involve "dishonesty or false statement, regardless of the punishment." Fed. R. Evid. 609(a) (1987).

If, however, more than ten years has passed from the later of the witness's conviction or his release from confinement, section (b) of Rule 609 operates as an additional limitation. In that event, the court must determine that "in the interests of justice, . . . the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." N.C.G.S. § 8C-1, Rule 609(b). In contrast to our more permissive approach to the admission of evidence of crimes less than ten years old, our Rule 609(b) is identical to the federal rule. As stated in *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *vacated and remanded on other grounds*, --- U.S. ---, 108 L. Ed. 2d 604 (1990), "[a]n analysis of the legislative history . . . reveals that it rests upon a rebuttable presumption that prior convictions more than ten years old tend to be more prejudicial to a defendant's defense than probative of his general character for truthfulness, and that they should therefore not be admitted into evidence." *Id.* at 306-07, 384 S.E.2d at 486.

**[3]** In conducting this critical balancing process it is important to remember that the only legitimate purpose for introducing evidence of past convictions is to *impeach the witness's credibility. State v. Tucker*, 317 N.C. 532, 543, 346 S.E.2d 417, 423 (1986).

> Rule 609(b) is to be used for purposes of impeachment. The use of this rule is necessarily limited by that focus: it is to reveal *not the character of the witness, but his credibility.* Commentary on the use of impeachment generally, indicating, for example, that impeachment of a witness may be accomplished by "showing that the witness's character is bad," by, for example, "eliciting on cross-examination specific incidents of the witness's life tending to reflect upon his integrity or moral character," 1 Brandis on North Carolina Evidence 3d § 43 at 203, can have no justifiable application to the cross-examination of a criminal defendant. The only "legitimate purpose" for admitting a defendant's past convictions is to cast doubt upon his veracity; such convictions are not to "be considered as substantive evidence that he committed the crimes" for which he is presently on trial by characterizing him as "a bad man of a violent, criminal nature . . . clearly more

> likely to be guilty of the crime charged." *State v. Tucker*, 317 N.C. at 543, 346 S.E.2d at 423.

*State v. Carter*, 326 N.C. 243, 250, 388 S.E.2d 111, 116 (1990) (emphasis added).

> That Rule 609(b) requires a trial court to weigh the probative value of an old conviction against its tendency to prejudice the defendant reflects the same concern: when the witness is the accused, his past convictions should be offered for what they indicate about his credibility, not for what they indicate about his character.

*Id.* at 252, 388 S.E.2d at 117.

**[4]** The trial court described its analysis under Rule 609(b) as follows: "the Court finds that there is probative value and that in the interests of justice the ten-year rule is hereby waived and the Court would so order and allows the State to question the defendant in regard thereto." This finding describes no "specific facts and circumstances" indicating that the probative value of the conviction "substantially outweighs its prejudicial effect." N.C.G.S. § 8C-1, Rule 609(b).

In *Artis*, we found error in the trial court's admission of a prior conviction under Rule 609 upon findings that two aggravated assaults "have sufficient connection, supported by facts and circumstances, to outweigh any prejudicial effect." *State v. Artis*, 325 N.C. at 307, 384 S.E.2d at 486. The Court stated: "Specific facts and circumstances supporting the probative value of this evidence are neither apparent from the record nor recounted by the trial court. The trial court failed to comply with Rule 609 by identifying any fact or circumstance indicating that this evidence was probative of defendant's credibility." *Id.* The same holds true in this case. Likewise, in *Carter* the court committed error by

> singl[ing] out and permitt[ing] evidence that defendant had committed prior assaults because they involved the use of violence. The trial court's conclusory remark that the only purpose for admission through cross-examination would be to impeach the credibility or truthfulness of the defendant was not a "fact" or "circumstance" vouching for an appropriate balance of probative over prejudicial weight.

*State v. Carter*, 326 N.C. at 252, 388 S.E.2d at 117. We conclude, therefore, that admission of defendant's 1970 Virginia conviction for sodomy was error.

However, as in *Carter* and *Artis*, the error was harmless. Defendant contends that the evidence tended to cause the jury to convict him because of his sexual preferences. There was, however, substantial evidence of defendant's homosexuality apart from that supplied by the sodomy conviction. In addition, there was overwhelming evidence of defendant's guilt, making it extremely unlikely that the jury relied on the evidence of the earlier conviction rather than the substantive evidence of guilt. There is no reasonable possibility that a different result would have been reached at trial had the court excluded this prior conviction. N.C.G.S. § 15A-1443(a) (1988). This assignment of error is overruled.

**[5]** Defendant finally contends that the trial court erred in aggravating his sentence based upon the 1970 Virginia sodomy conviction. The presumptive term of imprisonment upon a conviction of second-degree murder is fifteen years. N.C.G.S. §§ 14-17 (1986), 15A-1340.4(f)(1) (1988). The trial court sentenced defendant to terms of life imprisonment for each of the two convictions for second-degree murder, based in part on defendant's "prior felony conviction in the State of Virginia in 1970." Defendant argues that the Virginia conviction was a juvenile disposition, the sentencing judgment was deferred, and the conviction itself was technically flawed.

The trial court may impose a sentence in excess of the presumptive sentence only if it finds the existence of an aggravating factor and concludes that the factors in aggravation outweigh the factors in mitigation. N.C.G.S. § 15A-1340.4(a), (b) (1988). One aggravating factor is that "[t]he defendant has a prior conviction . . . for criminal offenses punishable by more than 60 days' confinement. Such convictions include those occurring in North Carolina courts and courts of other states . . . ." N.C.G.S. § 15A-1340.4(a)(1)o. To serve as an aggravating factor, however, an out-of-state conviction must be treated as a conviction in the other state. *Id.*; *see also State v. Beal*, 311 N.C. 555, 319 S.E.2d 557 (1984). In Virginia, a juvenile adjudication is not denominated as a conviction and may not be used as a criminal conviction for any purpose. Va. Code Ann. § 16.1-179 (1975) (current version at § 16.1-308 (1988)). Thus, if the Virginia conviction was a juvenile adjudication, it was im-

proper for the trial court to consider it in aggravation of defendant's sentence.

In support of his argument that the Virginia conviction was a juvenile adjudication, defendant demonstrated to the court that he was seventeen years old at the time of the offense and eighteen years old at the time of his trial. In Virginia, a juvenile is "a person less than eighteen years of age." Va. Code Ann. § 16.1-141(3) (Cum. Supp. 1975). Defendant also pointed to the fact that the record of his offense came from a sealed file in a Virginia circuit court. In Virginia, records of juvenile proceedings, whether conducted in circuit court or juvenile court, are sealed. Va. Code Ann. § 16.1-162 (Cum. Supp. 1975).

The State countered with evidence tending to show that the earlier conviction was not a juvenile adjudication. The State offered defendant's own sworn testimony that he pled guilty to a felony violation of the laws of Virginia and that judgment had been imposed on him including a probationary period of six years. The State also offered a certified copy of the 1970 Virginia court record of his conviction. Proof of a prior conviction by a certified copy is expressly permitted by statute and constitutes *prima facie* evidence of the facts set out therein. N.C.G.S. § 15A-1340.4(e) (1988). The certified court record stated that defendant was indicted for the felony of sodomy, that he pled guilty, and that the court deferred the imposition of sentence on the condition that defendant "continue psychiatric and medical treatment." The court record also indicated that the court ordered that defendant be placed on probation for a period of six years.

Also, in Virginia a case involving a juvenile charged with an offense which would be "punishable by confinement in the penitentiary" may be removed from juvenile court and tried in circuit court as would a case involving an adult. Va. Code Ann. §§ 16.1-176(a), (e), 16.1-177.1 (Cum. Supp. 1975). If such a removal occurs, the case proceeds upon indictment, Va. Code Ann. § 16.1-176(e), rather than petition. Va. Code Ann. § 16.1-164 (Cum. Supp. 1975). The certified court record offered by the State to prove defendant's prior conviction stated that defendant was indicted for sodomy, an offense punishable by confinement for any term not less than three nor more than ten years. Va. Code Ann. § 18.1-212 (Cum. Supp. 1975).

The trial court made findings of fact, including the finding that defendant "waived his rights as a juvenile and was tried in the Circuit Court as an adult and was sentenced in the Circuit Court as an adult pursuant to 16.1-272 of the Code of the State of Virginia." The court then concluded that the Virginia conviction was not a juvenile adjudication.

A trial court's findings of fact, if supported by competent evidence, are binding upon a reviewing court. *See State v. Johnson*, 322 N.C. 288, 293, 367 S.E.2d 660, 663 (1988). Though no facts tend to indicate that defendant "waived" his rights as a juvenile, there is evidence supporting the trial court's finding that defendant was in fact tried as an adult.

Likewise, the contents of the certified court record, along with defendant's admission on cross-examination that "the Judge imposed a judgment . . . as a result of that guilty plea," constitute sufficient evidence to refute defendant's argument that no judgment was entered on the Virginia felony conviction.

Finally, defendant argues that "nothing in the record before the trial court or this Court suggests that the mandatory [jurisdictional] requirements of a transfer hearing or a written waiver were followed." We find nothing in the record to indicate that jurisdictional requirements were not met. Though the State bears the burden of proving by a preponderance of the evidence that the aggravating factor of a prior conviction exists, *State v. Canty*, 321 N.C. 520, 523, 364 S.E.2d 410, 413 (1988), the "State does not bear the burden of proving the validity of a plea of guilty in a prior criminal matter before it may be used to impeach the defendant or to aggravate his sentence." *State v. Smith*, 96 N.C. App. 235, 239, 385 S.E.2d 349, 351 (1989), *disc. rev. denied*, 326 N.C. 267, 389 S.E.2d 119 (1990). Defendant is not entitled to relief on this assignment of error.

For the foregoing reasons, we affirm the decision of the Court of Appeals.

Affirmed.

Justice MEYER concurring.

While I concur in the final result that the majority has reached, I disagree with the majority's ruling that the admission of the

prior conviction, though harmless, was error. I conclude that there was no error at all in the admission of the prior conviction.

I conclude that the trial court did not err in finding, pursuant to Rule 609(b), that the probative value in the admission of the prior conviction outweighed any prejudicial effect and in waiving the ten-year rule.

Rule 609(b) is limited to a consideration of the admission of evidence for the purpose of impeachment. The use of evidence of a criminal conviction is only admissible under this rule for casting doubt upon defendant's credibility or truthfulness. Admission of convictions older than ten years is permitted only when "the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." N.C.G.S. § 8C-1, Rule 609(b) (1988).

The district attorney prepared and served a written "Notice of Intent to Use Evidence of Conviction of Crimes More Than Ten Years Old" eleven days prior to the scheduled start of trial on 13 March 1989. The notice recited that it was made pursuant to N.C.G.S. § 8C-1, Rule 609(b), and it "begins with his conviction in Danville, Virginia 18th May, 1970." Defendant responded with a written "Motion to Prohibit Use of Evidence of Convictions of Crimes More Than Ten Years Old."

On the first day of trial, immediately before jury selection started, the presiding judge heard a series of motions. The final hearing pertained to the written motion to compel full discovery of all material about prior convictions in the possession of the district attorney. As the hearing progressed, it turned to inquiry as to which prior convictions could be mentioned during jury selection and which would be admissible into evidence for purposes of cross-examination at trial. Counsel for defendant objected to the use of a 1970 Virginia conviction.

Evidence was taken at the motions hearing. The first item presented was a certified copy of a document or documents from a Virginia court dated 18 May 1970. Subsequently, defendant was sworn and testified that he had been convicted in Virginia on 18 May 1970, while represented by counsel, of a felony of crime against nature by kidnapping a male child eleven years of age and forcing the child to take defendant's penis into his mouth. Defendant fur-

ther testified that the presiding judge in Virginia imposed judgment, put him under six years' probation, and ordered certain conditions as a condition of the probation.

At the conclusion of the hearing, Judge Sitton entered the following order in pertinent part:

> Let the record show that the Court finds that the defendant was convicted on May 18, 1970 with the benefit of his privately retained counsel, Mr. Kushner, in the State of Virginia, that that being a felonious conviction, the Court finds *that there is probative value* and that in the interests of justice the *ten-year rule is hereby waived* and the Court would so order and allows the State to question the defendant in regard thereto.

Defendant testified at trial before the jury. During direct examination, the following colloquy took place:

> Q Jim, did you have a conviction for any crime in the State of Virginia?
>
> A Yes, sir, I did.
>
> Q What was that for?
>
> A I don't remember the exact wording of the charge, but the circumstances were that I had given a boy a ride, and I believe he was eleven years old then. He appeared to me to be at the time to be older. I was sixteen at the time this happened. And I offered him money to give me oral sex, which he did.
>
> And some months later I was arrested and charged, I think, with abducting him and forcing him to perform oral sex on me.
>
> Q And you were convicted of that?
>
> A I plead [sic] guilty to that charge; yes, sir.
>
> Q You were sixteen years old?
>
> A I was sixteen when this happened. I was actually seventeen when I was charged and convicted of it.
>
> Q And what was the sentence, Jim?
>
> . . . .

A I think there was six years probation and I was under Court Order to get some psychiatric counseling.

The district attorney cross-examined defendant about the conviction at some length.

At the conclusion of defendant's trial, defendant was sentenced to two consecutive life sentences. The trial judge found as aggravating factors that defendant had been convicted of a felony in Virginia. The felony conviction was the Virginia felony of crime against nature described above.

The prosecution offered as evidence a certified copy of the record of conviction in Virginia and the earlier sworn testimony of defendant acknowledging that he had been convicted of and received a sentence for the crime described in the Virginia papers. Specific details of the Virginia incident were developed through sworn testimony. Evidence was presented to establish that defendant was seventeen years old when charged, eighteen years old when convicted, and that his file was sealed.

At the conclusion of sentencing, the trial judge entered the following order:

> Let the record show that . . . the Court having heard the evidence . . . makes the following findings of fact:
>
> That the defendant was born in the month of March, 1952;
>
> That he was charged with the offense of sodomy in the State of Virginia, an offense which was alleged to have occurred on June 20th, 1969 when the defendant was seventeen years of age;
>
> That a trial was conducted on the 18th day of May, 1970 in the Circuit Court of the State of Virginia;
>
> That the defendant having been tried by a jury and although having been seventeen years of age, that he thereby waived his rights as a juvenile and was tried in the Circuit Court as an adult and was sentenced in the Circuit Court as an adult pursuant to 16.1-272 of the Code of the State of Virginia;
>
> That the North Carolina Statutes; particularly Statute 15-A-1340(40) reads in part as follows concerning aggravating factors:

"The defendant has a prior conviction or convictions for criminal offenses punishable by more than sixty days confinement; such convictions include those occurring in North Carolina Courts and Courts of other States, the District of Columbia and the United States, provided that any crime for which the defendant was convicted in a jurisdiction other than North Carolina would have been a crime if committed in this State."

That the Court, having considered the decision of State versus Bill [sic] in the Supreme Court of this State, ruled that the offering of an offense from the State of Alabama was not admissible because the individual was treated as a juvenile.

Based upon the foregoing findings of fact, the Court concludes as a matter of law that this case differs from that of State versus Bill [sic] and the Court finds that the defendant in this case was treated as an adult, was sentenced as an adult and therefore does not merit the protection of secrecy and privacy as a juvenile in the State of Virginia or in North Carolina.

Although the trial judge did not specifically set out the facts and circumstances in support of the probative value of the prior conviction, this alone does not make it error. It is only when the facts and circumstances supporting the probative value of the evidence are not "apparent from the record" that its admission is error. *State v. Artis*, 325 N.C. 278, 307, 384 S.E.2d 470, 486 (1989), *vacated and remanded on other grounds*, --- U.S. ---, 108 L. Ed. 2d 604 (1990). Here, the record is replete with facts and circumstances showing the probative value of the evidence, including defendant's own testimony on direct examination that he pled guilty to the offense in 1970. Because of the particular nature and circumstances of the prior conviction, it is clear to me that its probative value far outweighs its prejudicial effect. It is up to the jury to decide how much weight to give defendant's testimony. Of course, the evidence is prejudicial—all impeachment is prejudicial. The incident in 1970 reflects upon the character of defendant and in doing so raises doubt as to the defendant's credibility. In the prior case, defendant was convicted of a felony involving a sexual offense with a male child eleven years old in that he forced the child to perform fellatio. In the case *sub judice*, defendant admitted to having a consensual homosexual relationship with one of the

boys that he murdered. Due to the similar sexual nature of the two cases, the jury could infer that defendant was not telling the truth regarding his alleged self-defense in the present incident and give less weight to his testimony.

I would affirm the trial court's holding that the prior conviction's probative value outweighed its prejudicial effect.

In addition, I find the majority's lengthy treatment of the question of whether defendant was a juvenile at the time of the commission of the prior crime and whether he "waived" his rights as a juvenile to be completely unnecessary and unwise. As the majority points out, the defendant *admitted* in his own sworn testimony that he had pled guilty to a *felony violation* of the laws of Virginia and that judgment had been imposed on him in 1970. As the majority also points out, under the laws of that state, a juvenile could be tried as an adult for the offense in question. Defendant's testimony is all that is necessary to support a finding that the 1970 conviction was not a juvenile adjudication. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983) (a defendant's own statement that he had been convicted of a prior crime punishable by more than sixty days is a sufficient method of proof).

In conclusion, while agreeing with the majority's final result, I cannot agree that the admission of defendant's prior conviction was error.

Justice MITCHELL joins in this concurring opinion.

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STATE OF NORTH CAROLINA v. DONNA JONES ARNOLD

No. 245A90

(Filed 12 June 1991)

**1. Homicide § 30 (NCI3d) — first degree murder charged — submission of second degree murder — insufficiency of evidence — prejudicial error**

The trial court erred in submitting murder in the second degree as a possible jury verdict where the evidence supported only a possible verdict of murder in the first degree, and such error was not harmless beyond a reasonable doubt, since

evidence that defendant procured, counseled, or commanded the principal to commit the crime was not overwhelming, nor was evidence as to causation overwhelming; and had not the inviting verdict of murder in the second degree been available to the jury, and its choice limited to guilty of murder in the first degree or not guilty, the verdict may well have been one of not guilty.

**Am Jur 2d, Homicide § 525.**

**2. Conspiracy § 31 (NCI4th)— conspiracy to commit murder—sufficiency of evidence**

The trial court did not err in failing to dismiss the charge of conspiracy to commit murder, since the conspiracy was complete upon the agreement between defendant and the principal, and it was not necessary for the jury to find that the object of the conspiracy was accomplished.

**Am Jur 2d, Conspiracy §§ 10, 15, 40; Homicide § 27.**

**3. Criminal Law § 45 (NCI3d)— experimental evidence—exclusion proper**

Even if the trial court erred by refusing to allow testimony concerning a witness's ability to produce photocopied letters like those introduced by the State, such error was not prejudicial to defendant, since there did not exist a reasonable possibility that a different outcome would have resulted absent the error in that defendant placed her theory before the jury during her own testimony, and the testimony prohibited by the court would merely have demonstrated that cutting, pasting, and photocopying letters is feasible, a proposition that would not be out of the ordinary juror's realm of experience.

**Am Jur 2d, Evidence § 825.**

**4. Criminal Law § 1177 (NCI4th)— aggravating factor—taking advantage of position of trust—husband and wife**

The trial court in a murder and conspiracy prosecution did not err in finding as an aggravating factor that defendant took advantage of a position of trust or confidence based on the fact that the victim and defendant were husband and wife. N.C.G.S. § 15A-1340.4(a)(1)(n).

**Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554.**

**5. Criminal Law § 1177 (NCI4th)— position of trust aggravating factor—extenuating relationship mitigating factor—no inconsistency**

The trial court's finding as an aggravating factor in sentencing defendant for conspiracy to murder her husband that defendant took advantage of a position of trust or confidence was not inconsistent with the court's finding as a mitigating factor that the relationship between defendant and the victim was an extenuating circumstance where the aggravating factor was based on the marital relationship and the mitigating factor was based on the victim's revelation that he had had a homosexual relationship with the principal murderer.

**Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554.**

Justice MEYER dissenting.

APPEAL by the State pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 98 N.C. App. 518, 392 S.E.2d 140 (1990), reversing in part the judgment of imprisonment entered by *Stevens, J.*, on 15 February 1988 in Superior Court, SAMPSON County. Defendant petitioned for, and this Court allowed, discretionary review of additional issues. Heard in the Supreme Court on 14 March 1991.

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

*Bass and Bryant, by Gerald L. Bass and John Walter Bryant, for the defendant-appellee/appellant.*

MARTIN, Justice.

Defendant was indicted for murder in the first degree and conspiracy to commit murder in the first degree for the stabbing death of her husband, Robert Daniel Arnold, Jr. Trial was held at the 15 February 1988 Criminal Session of Sampson County Superior Court before the Honorable Henry L. Stevens, III. On 16 March 1988, the jury returned guilty verdicts of conspiracy and murder in the second degree. Judge Stevens imposed consecutive sentences of fifteen years imprisonment for murder and ten years for conspiracy.[1] Defendant appealed to the Court of Ap-

1. We note that defendant was paroled 30 April 1991 after serving approximately three years of her prison sentences.

peals, which held that the trial court erred by submitting as a possible verdict murder in the second degree. The court affirmed the conspiracy conviction. The State appealed with respect to the murder charge, and defendant cross-appealed with respect to the conspiracy conviction. We agree with the decision of the Court of Appeals and therefore affirm.

On Wednesday, 18 July 1984, the lifeless body of Dan Arnold, Minister of Music at Immanuel Baptist Church in Clinton, was discovered by his wife, their children, and friends in the church parking lot. He had been stabbed and beaten about the head, and his wife's purse was found near his body. We note that this case received much publicity through television, radio, and newspaper accounts. Suspicion immediately focused on Carl Stuffel, a twenty-two-year-old barber who had lived with the Arnolds during the spring of 1984. Stuffel had learned his trade while in prison for breaking and entering. Stuffel admitted that he had taken drugs since he was a young boy and had engaged in numerous criminal activities over the years. Dan Arnold, who was commuting from Clinton to Wake Forest, N.C. to attend classes at Southeastern Baptist Seminary, met Stuffel on Valentine's Day of 1984 at the Valley Style Shop in Crabtree Valley Mall in Raleigh. Dan entered the shop with the owner's nephew and Stuffel cut his hair. Dan suggested that they have dinner together, and later that night the pair engaged in a homosexual relationship in a Raleigh motel. Stuffel told Dan about his problems with drugs and that he was currently charged with larceny of a firearm. Believing that he could help Stuffel with his problems, Dan eventually invited him to come live with his family at their home in Clinton, apparently before consulting with defendant. Defendant opposed Dan's decision because of Stuffel's criminal record, his involvement with drugs, and the possible effect his presence would have on the Arnolds' two young daughters. However, Dan persisted and took his family to meet Stuffel and his parents. Sometime after Easter of 1984, Stuffel moved into the Arnold home.

Defendant testified that just before Stuffel moved into their home, Dan asked her to allow Stuffel to impregnate her. Dan had had a vasectomy and he wished for Stuffel to be a substitute father. He also told his wife that Stuffel needed an ego boost and this would solve both problems. Defendant's negative reaction upset Dan and she finally agreed in order to calm him. Later, Dan decided that this idea was inappropriate. Shortly after Stuffel moved to

Clinton, defendant found a canceled check to a Raleigh motel. When she confronted Dan about it, he made up an explanation. That evening, he gave her a long letter to read while he and Stuffel took the babysitter home. In the letter, Dan confessed that he had been a homosexual since childhood, had had male lovers in every place they had lived, and had had a one-night affair with Stuffel. Defendant became very upset and left the house, driving around for several hours. Although she considered leaving Dan, she decided that she still loved him and that their relationship and family were worth saving. The next day, however, she and Stuffel began a sexual relationship.

Versions of defendant's relationship with Stuffel vary. Several months after the murder, defendant admitted to police that she had been involved with Stuffel briefly. She told them that he had encouraged her by saying that she had an opportunity to get even with her husband. She gave in to Stuffel on three occasions. At trial, defendant testified that Stuffel had raped her and then coerced her by threatening to expose Dan's bisexuality to the community and to harm her children. She did not tell investigators that she had been raped because she continued to feel threatened by Stuffel. Stuffel testified that the relationship was voluntary and had lasted several weeks. He also testified that he loved defendant deeply at that time.

After Dan's revelation, Stuffel began to belittle Dan at every opportunity. He also began to declare openly his love for Donna. On 18 May 1984, Dan went to his doctor for help with his nerves. He was tearful, crying, and suffering from low self-esteem. He told the doctor that he had seen his wife and Stuffel on the bed together; he worried that Carl was younger and better looking. The doctor prescribed a mild tranquilizer.

On 22 May, Stuffel asked Daniel Staten, a friend of Dan's, where he could obtain marijuana. Staten reported the conversation to Dan, who decided to evict Stuffel from his home. The Arnolds packed Stuffel's belongings and found a knife among his things. After telling Stuffel never to return, Dan took his family, along with Staten and his wife, to the beach. At Dan's request, Staten confronted defendant about her affair with Stuffel. Staten testified that she never responded and started crying.

In early June 1984, Stuffel was sick from drug use and called the Arnolds begging for help. They allowed him to come back

to Clinton briefly and, at his request, committed him to Dorothea Dix Hospital. The sheriff's deputy who drove Stuffel and the Arnolds to Dix testified that only Donna Arnold could control Stuffel. The Arnolds left for a week in the mountains, but wrote and called Stuffel frequently.

When they returned, the Arnolds visited Stuffel at Dix several times a week and took him out of the hospital on several occasions. Bill Dubrick, Stuffel's therapist, testified that at first he thought the physical contact he observed between Stuffel and the Arnolds was religious, but later realized that it was "a sexual feeling type thing." The staff at Dix had to ask them to stop touching because it was disruptive to the other patients. When discussing options for the future, Stuffel suggested that he could kill Dan. Stuffel brought this up repeatedly and Dan was warned about it. Dan told Dubrick that he would lose his position with his church if he did not end his relationship with Stuffel, but Dan said that he would rather move. Defendant found a resume dated 8 June 1984 in Dan's papers after his death.

On 5 July 1984, Stuffel asked permission to leave Dix on a weekend pass. Dan initially agreed that Stuffel could visit them in Clinton for the weekend, but he later called back to revoke his permission. Dan was hysterical because, he said, defendant had told him about her affair with Stuffel. The next day, Dan called again to give his permission for Stuffel to come for the weekend. However, the Dix staff decided not to allow the visit. That weekend, the Arnolds brought Stuffel's car and belongings to Raleigh and told him never to return to their home. Dubrick testified that Stuffel was depressed after their visit and was sure that defendant still loved him and wanted to be with him.

Jerald Tart testified under a limited grant of immunity. He had known Stuffel since high school, when the pair would burglarize homes and rob businesses together. Both eventually served prison terms for their crimes. Tart testified that while Stuffel was at Dix, he visited him there, but he had to use a false name because the staff feared that Tart might bring Stuffel drugs. On one of the visits, Stuffel asked Tart to kill Dan. Stuffel gave Tart a map and a key to the church, which Stuffel said that Donna had given him. Defendant was to send her husband back to the church to get her purse after choir practice on Wednesday night, 4 July 1984. Tart testified that he decided not to commit the murder

and he later returned the key to Stuffel. Tart met Stuffel and the Arnold family on Saturday, 7 July 1984, at the Hayes-Barton swimming pool in Raleigh. Tart testified that defendant asked him if he could help them with their problem. At that time, Dan was playing with the children out of earshot of Tart, Stuffel and defendant. When Tart responded that he did not think he could help them, Stuffel commented that he would like to drown Dan. Dix records indicate that the trip to the swimming pool actually occurred on 30 June 1984.

Stuffel testified that defendant initially approached him about killing Dan when they first took him out of Dix on a pass. He asked her to think about getting a divorce, but she responded that a divorce would be too difficult on the children. Her first suggestion was to have someone attack Dan at night while he was walking the dog. On her next visit, she brought a key to the church. Stuffel testified that Tart actually went to Clinton on 4 July but was unable to carry out the plan because there were police officers in the area. Defendant sent Dan back to the church as planned and later wanted to know what went wrong. A police officer testified that he saw Dan walking to the church on 4 July and that Dan told him that he was going to the church to take care of some business.

When Stuffel was discharged from Dix on 12 July 1984, he went to live with Jerald Tart and his family. He and Tart got jobs with Kip-Dell Homes, Inc. doing repair work on apartment complexes. Telephone records indicate that numerous phone calls were made between the Tart home and the Arnold home between 12 July and the murder on 18 July. Defendant initially told police that her husband had made and received the calls, but later admitted that she had talked with Stuffel during that period.

On 17 July 1984, Dan wrote a letter to a friend, Bill Poole, whose brother was an S.B.I. agent. In the letter, he asked Bill to deliver an enclosed letter to his brother; the letter contained a list of drug dealers, compiled by Stuffel. He asked Bill to forward the enclosed letter to his brother "to insure that Carl pays 'until it hurts' for what he has done to Donna and me." Dan wrote that Stuffel pressured defendant into a relationship after Dan told her about his past and she gave in to Stuffel three times, but had come to her senses. Dan said that he had once found them lying across the bed together. Dan said that he wished Stuffel were

dead and would kill him if he could get away with it. He asked Bill to contact a "special friend" to inform the drug dealers that Stuffel had become an informant. Stuffel had once told Dan that if these drug dealers ever found out he had revealed their identities, they would kill him. Dan closed by saying, "I want him dead and will not rest until he is."

On the day of Dan's death, 18 July, Staten went to Dan's office and told him he thought that he had seen Stuffel's car in Clinton. Dan was angry and frightened by the news. Dan told Staten that he wanted Stuffel out of the picture and he asked Staten to kill Stuffel. Staten turned him down, and Dan brought up the idea of contacting the list of drug dealers. Staten advised against it because he believed that Dan would be the one killed.

On the evening of 18 July 1984, the Arnolds attended the weekly service at their church and afterwards held choir practice. Along with Michelle Honeycutt, they sorted music and finally headed home around 9:30 p.m. Honeycutt and her daughter accompanied them so that Mrs. Honeycutt and defendant could practice the piano. During this session, defendant began to have trouble with her contact lenses. When she looked for her contact lens case, she discovered that she had left her purse at the church. She told her husband that she would go and get it, but he told her to continue practicing and he would retrieve it for her. According to Honeycutt, defendant told Dan that she did not really need her purse because she had what she needed at home. Nevertheless, Dan left the house about 10:15 p.m. and drove to the church, which was nearby. Thirty minutes later, defendant began to worry and called his office at the church, but received no response. Mrs. Honeycutt drove defendant and their children to the church in search of Dan. When they observed his body in the parking lot, defendant became upset, and Honeycutt drove to get help. When they returned to the scene, Honeycutt prevented defendant, who was hysterical, from going to Dan's body. According to Honeycutt, defendant later became calm as if in a state of shock.

Tart testified that he drove Stuffel to Clinton on the evening of 18 July. He parked his car in a shopping center parking lot; the Arnold residence was visible from this vantage point and the church was nearby. Stuffel got out of the car and left the area, while Tart went to McDonald's for something to eat. Tart returned to his car and watched high school girls until Stuffel returned

about an hour later. When Stuffel got in the car he had his shirt in his hands and had blood on his forearms and hands. A scuba diving knife was rolled up in the shirt. Stuffel told him that he and Dan had gotten into a fight and he wished it had not happened. They returned to Raleigh, stopping along the way to drop the clothes and the knife in a creek. Although Stuffel never confessed to Tart that he had killed Dan Arnold, he threatened that he would take Tart down with him if he told anyone about their activities. Tart told the police different stories about where they had been that night. One week after the murder, Tart's mother asked Stuffel to leave her home. It was not until 1987 that he related his version of the events in Clinton.

Carl Stuffel testified that Jerald Tart participated in the stabbing of Dan Arnold. He alleged that he talked with defendant on the day before the murder and she confirmed that she still wanted her husband dead. She also told him she would leave her purse at the church again. Defendant admitted that she talked with Stuffel that day and Stuffel wanted to come to Clinton on her birthday, 19 July. She refused because she did not want any controversy on her birthday. She told police in her written statement that she agreed for Stuffel to come to Clinton on Wednesday night, but testified at trial that Stuffel never said that he was definitely coming that evening.

Stuffel testified that he and Tart planned the crime together. Each had a scuba knife and Tart had a slap stick, a ten-inch long metal shank covered by leather. They waited in the bushes until Dan came back to the church. While he was inside retrieving the purse, they repositioned themselves closer to the building. Stuffel testified that when he first saw Dan, Tart was hitting him with the slap stick; Stuffel told Tart to hold Dan's head away from him because he could not bear to look at him. Stuffel drew his knife and looked away from Dan and Tart. When he looked back, the knife was in Dan's chest. After Dan fell to the ground, Tart cut Dan's neck on both sides to make sure that he was dead. The pair returned to Raleigh after disposing of their clothes and weapons. Blood was found on the floor of Tart's car on both the passenger's and driver's sides.

The medical examiner testified that Dan Arnold died as a result of multiple stab wounds. His throat had been slit on both sides and he had numerous superficial wounds in his back. There

was one deep stab wound to the chest. There were wounds to the head caused by a blunt instrument, which could have been caused by a slap stick similar to the one owned by Tart. The cause of death was the wounds on the neck and to the chest. At least one of the wounds to the neck was made while the victim was standing, as revealed by the large amount of blood on his pants.

On the morning of 19 July 1984, Stuffel called defendant to wish her a happy birthday. Mrs. Honeycutt listened in on the conversation. Defendant informed Stuffel that Dan had been murdered and Stuffel feigned surprise, but, according to Honeycutt, was not very convincing. Both defendant and Stuffel were questioned several times in the week following the murder. On 3 August 1984, defendant brought to police a handwritten statement of the events leading to her husband's death. She admitted a brief involvement with Stuffel, but did not mention rape. She wrote that she had lied about her husband's homosexuality in order to protect his reputation in the community. The police made no arrests and defendant moved with her daughters to Virginia.

In January 1987, Jerald Tart was charged with larceny of a safe. His mother, who in the past had participated in the criminal activities of Stuffel and her son, came forward with photocopies of letters and envelopes allegedly written by defendant to Stuffel. Mrs. Tart claimed to have found them among Stuffel's things while he was living at her home in 1984. On the advice of Joseph Dean, her lawyer, she returned them to Stuffel, who burned them. Jerald Tart testified that he did not know until 1987 that his mother copied the letters before returning them to Stuffel. Jerald was granted immunity for having driven Stuffel to Clinton and probation for the larceny charge in return for this information and his testimony at defendant's trial.

The letters expressed defendant's love for Stuffel and her hopes for the future. The most incriminating statement contained in the letters was as follows: "Words cannot fully express to you how anxious I am for Wed. to be here. I have real fears for your safety though. Our someday is so close." Defendant admitted that the handwriting appeared to be hers, but denied having written those letters. Her theory was that the letters were pieced together from legitimate letters she wrote to Stuffel and were copied to disguise the ruse.

After receiving these letters, police believed that they had sufficient evidence to proceed against defendant and Stuffel. They were both arrested in February 1987, nearly two and one-half years after the murder. Stuffel did not implicate defendant in the murder until the day his plea to murder in the second degree was entered; his sentencing was scheduled for after defendant's trial. He testified that while he was in prison he concluded that defendant had only used him to get rid of her husband and was having an affair with someone else at the time of their involvement.

Judge Stevens announced his intention to submit murder in the second degree as a possible verdict and explained that he did so out of fairness to defendant because Stuffel had negotiated a plea of guilty to murder in the second degree. Defendant's attorneys objected.

Defendant was prosecuted on the accessory before the fact theory[2] and therefore the State must prove, *inter alia*, that the principal, Carl Stuffel, committed murder in the second degree in order for defendant's conviction to stand. *See State v. Benton I*, 275 N.C. 378, 167 S.E.2d 775 (1969) (In the accessory's trial, guilt of the principal must be alleged and proved to the same degree of certainty as if he himself were on trial, that is, beyond a reasonable doubt.).

**[1]** Defendant contends that the trial court erred by submitting murder in the second degree as a possible jury verdict in violation of the rule in *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983), because there was no evidence which negated premeditation and deliberation. In *Strickland*, this Court held that a trial court is not required to submit lesser included offenses as possible jury verdicts where there is no evidence to support such lesser included offense. *Id.* at 291, 298 S.E.2d at 656. Favoring the evidentiary approach, the Court overruled *State v. Harris*, 290 N.C. 718, 228 S.E.2d 424 (1976), which required a trial judge to submit murder in the second degree whenever the State relied upon premeditation and deliberation in a murder charge. The Court noted that while guilt of murder in the first degree encompasses guilt of murder in the second degree, the trial judge was only required to sub-

2. This Court rejected the argument that there can be no accessory before the fact to murder in the second degree as a matter of law, because malice, which imports a specific intent, is an element of murder in any degree. *State v. Benton II*, 276 N.C. 641, 656, 174 S.E.2d 793, 803 (1970).

mit the lesser offense where "the evidence raises a question with respect to premeditation and deliberation or malice, either under the facts or as raised by defendant's defenses." *Strickland*, 307 N.C. at 283 n. 1, 298 S.E.2d at 652.

The *Strickland* Court noted the possible constitutional implications of the *Harris* rule, as set forward by the United States Supreme Court in *Hopper v. Evans*, 456 U.S. 605, 72 L. Ed. 2d 367 (1982). The defendant in *Hopper* was tried under an Alabama statute which was later declared unconstitutional because it precluded the submission of a lesser included offense in a capital case. *See Beck v. Alabama*, 447 U.S. 625, 65 L. Ed. 2d 392 (1980). In *Hopper*, the Court held that the defendant was not prejudiced by the failure to submit lesser offenses because all the evidence, including his own confessions and testimony, supported a theory of premeditation and deliberation, and there was no evidence to negate any element of murder in the first degree. Analyzing *Beck*, the Court stated:

> [D]ue process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence.

*Evans*, 456 U.S. at 611, 72 L. Ed. 2d at 373.

The State concedes that the trial court did not follow the *Strickland* rule, but argues that the error was favorable to the defendant. The State further contends that the judgment is supported by the evidence. We disagree. The evidence presented in this case clearly shows a premeditated and deliberated killing. Stuffel admitted that he waited for Dan Arnold at the church in order to mount a surprise attack. He used a scuba knife obtained specifically for this crime and stabbed the victim repeatedly. Moreover, there is no evidence to suggest that this murder occurred during a fight, other than Stuffel's purported statement to Jerald Tart, himself a likely participant. The record illustrates the previous difficulties between Stuffel and the victim, regarding not only Stuffel's relationship with defendant, but also his relationship with Dan and Stuffel's drug use. Finally, Stuffel disposed of the weapon, which indicates an intent to conceal the crime. *E.g., State v. Barts*, 316 N.C. 666, 687-88, 343 S.E.2d 828, 842 (1986) (circumstances from

which premeditation and deliberation can be inferred). We hold, therefore, that the trial court erred in submitting the possible verdict of murder in the second degree because the evidence supports only a possible verdict of murder in the first degree.

Our inquiry does not end with the determination that the court erred in this case. This Court has held that some errors of this type are not prejudicial to the defendant because had the jury not had the option of convicting on the lesser offense, it would likely have convicted on the greater offense, subjecting the defendant to harsher penalties. *See, e.g., State v. Vestal*, 283 N.C. 249, 195 S.E.2d 297, *cert. denied*, 414 U.S. 874, 38 L. Ed. 2d 114 (1973).

The Court of Appeals held, and we agree, that the appropriate standard for review in the case at bar is found in N.C.G.S. § 15A-1443(b), which provides that

> [a] violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

N.C.G.S. § 15A-1443(b) (1988). Where defendant is convicted upon a charge for which there is insufficient evidence, defendant's federal due process rights have been violated. *Thompson v. Louisville*, 362 U.S. 199, 4 L. Ed. 2d 654 (1960); *see also Hopper v. Evans*, 456 U.S. 605, 72 L. Ed. 2d 367; *Beck v. Alabama*, 447 U.S. 625, 65 L. Ed. 2d 392 (due process requires submission as possible verdicts *only* those lesser included offenses for which there is sufficient evidence). The State must therefore prove that the error was harmless beyond a reasonable doubt. Overwhelming evidence of defendant's guilt may render constitutional error harmless beyond a reasonable doubt. *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982).

We do not find the evidence to be overwhelming. In order to convict defendant for murder in the first degree as an accessory before the fact, the State must prove beyond a reasonable doubt that (1) the principal (Stuffel) committed murder in the first degree; (2) defendant was not present when the murder occurred; and (3) defendant procured, counseled or commanded Stuffel to commit the crime. *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982). In addition, it is necessary the defendant's act "caused or directly

contributed to the death of the victim." *State v. Brock*, 305 N.C. 532, 539, 290 S.E.2d 566, 571 (1982). There is little question that the first two elements have been satisfied. Evidence that defendant "counseled, procured or commanded" Stuffel was simply not overwhelming. *Id.* at 218, 297 S.E.2d at 577. The State's main witnesses were convicted felons who stood to benefit from their testimony against defendant. The letters which prompted the arrest of defendant were photocopies that did not surface until one of the participants in the crime was in further trouble with the law. Furthermore, defendant presented evidence that she did not insist that her husband return to the church to get her purse. Tart admitted that he saw television news accounts reporting that defendant sent the victim back to the church to retrieve her purse. We hold that the evidence as to this element of murder in the first degree as an accessory before the fact is less than overwhelming.

Moreover, evidence as to causation is not overwhelming. "Causation of a crime by an alleged accessory is not 'inherent' in the accessory's counsel, procurement, command or aid of the principal perpetrator." *State v. Davis*, 319 N.C. 620, 626, 356 S.E.2d 340, 344 (1987). Therefore, even if the evidence was overwhelming that defendant procured or counseled Stuffel to commit the crime, it is not readily apparent that said counsel caused Stuffel to commit the murder. Stuffel had a myriad of reasons for killing Dan Arnold. For example, Dan was plotting against Stuffel by revealing that Stuffel had become an informant against certain drug dealers, whom Dan hoped would kill Stuffel in retaliation. Stuffel's therapist indicated that during therapy sessions Stuffel came up with the idea to kill Dan as a solution to his problems and returned to this theme repeatedly. This occurred while Stuffel was at Dix, before the telephone conversations between defendant and Stuffel and before the letters were allegedly written by defendant to Stuffel. We conclude, therefore, that the evidence was not overwhelming because it could raise doubts in the minds of reasonable jurors.

Our conclusion is further demonstrated by the fact that the jury found defendant guilty of murder in the second degree, a charge which was not supported by the evidence. This verdict was also tantamount to a verdict of not guilty as to the capital charge. Had not the inviting verdict of murder in the second degree been available to the jury, and its choice limited to guilty of murder in the first degree or not guilty, the verdict may well have been one of not guilty. The State having failed to prove that the error

was harmless beyond a reasonable doubt, we hold that defendant was prejudiced by the trial court's error and her conviction for murder in the second degree was properly reversed.

**[2]** Defendant contends that the trial court erred in failing to grant her motion to dismiss the charge of conspiracy to commit murder, because there can be no conspiracy, as a matter of law, to commit murder in the second degree. She further alleges that the court committed plain error by failing to charge the jury that it could not find defendant guilty of both conspiracy and murder in the second degree.

Conspiracy, a common law offense, is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *E.g., State v. Littlejohn*, 264 N.C. 571, 142 S.E.2d 132 (1965). A conspiracy may be an implied understanding, rather than an express agreement. *State v. Smith*, 237 N.C. 1, 74 S.E.2d 291 (1953). Because the conspiracy is complete once the agreement is made, *e.g., State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975), subsequent commission and conviction of the substantive crime do not affect the conspiracy conviction. *Cf. State v. Guthrie*, 265 N.C. 659, 144 S.E.2d 891 (1965) (acquittal of conspiracy not inconsistent with conviction for substantive offense).

Defendant was indicted for conspiracy to commit murder in the first degree and convicted of conspiracy to commit murder. As conspiracy encompasses any unlawful act, the nature of the felony involved relates only to the severity of punishment which is the same for conspiracy to commit any murder. *See* N.C.G.S. § 14-2.4 (1988). The conspiracy was complete upon the agreement between defendant and Stuffel. It was not necessary for the jury to find that the object of the conspiracy was accomplished. *State v. Guthrie*, 265 N.C. 569, 144 S.E.2d 891. Therefore, we hold that there was no error in the failure of the trial court to dismiss the conspiracy charge. Likewise, defendant has failed to demonstrate plain error with regard to the jury instruction. In fact, she has made no argument at all in support of this issue. Accordingly, we overrule this assignment of error.

**[3]** We next examine defendant's argument that the trial court erred by refusing to allow testimony concerning an experiment or demonstration. Defendant attempted to offer the testimony of Osborne Wade, who had testified on defendant's behalf earlier in the trial. After listening to witnesses concerning the photocopied

letters, Wade went home and experimented with letters written by his wife, to determine if the letters offered by the State could have been manufactured by Jerald Tart or his mother. Wade would have testified that he could produce similar letters by using a copy machine. The court ruled that this demonstration would be too confusing and refused to permit Wade's testimony. The Court of Appeals held that the court committed error, but it was harmless because defendant was able to acquaint the jury with her theory that the letters had been manufactured through her own testimony. Defendant argues that the error could not be considered harmless because the State placed great emphasis on the letters. In fact, the discovery of the letters led to defendant's arrest in 1987.

Assuming, *arguendo*, that the trial court erred, we hold that the defendant was not prejudiced because there does not exist a reasonable possibility that a different outcome would have resulted absent the error. N.C.G.S. § 15A-1443(a) (1988); *e.g.*, *State v. Price*, 326 N.C. 56, 388 S.E.2d 84, *death sentence vacated*, --- U.S. ---, 112 L. Ed. 2d 7 (1990). Defendant placed her theory before the jury during her own testimony. The testimony prohibited by the court would merely have demonstrated that cutting, pasting, and photocopying letters is feasible, a proposition that would not be out of the ordinary juror's realm of experience. Accordingly, we overrule this assignment of error.

**[4]** Finally, we turn to defendant's contention that the trial court erred by finding that defendant took advantage of a position of trust or confidence as an aggravating factor. N.C.G.S. § 15A-1340.4(a)(1)(n) (1988). The court sentenced defendant to the maximum term of ten years on the conspiracy conviction, but did not aggravate the murder conviction. The presumptive term for conspiracy is three years. N.C.G.S. §§ 14-2.4(2); 15A-1340.4(f)(6) (1988). Defendant argues that the evidence does not support this aggravating factor, which is usually applied in cases where the victim is very young or mentally impaired. *See, e.g.*, *State v. Midyette*, 87 N.C. App. 199, 360 S.E.2d 507 (1987), *aff'd per curiam*, 322 N.C. 108, 366 S.E.2d 440 (1988).

In *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987), this Court addressed the issue of whether finding as aggravating factors that the victim was very young and that defendant took advantage of a position of trust or confidence was erroneous because based

on the same evidence. The Court held that there was no error, concluding that:

> [t]he aggravating factor that the defendant took advantage of a position of trust or confidence was grounded not in the youth of her child but more fundamentally in the child's dependence upon her. A finding of this aggravating factor depends no more on the youth of the victim than it does on the notion that confidence or trust in the defendant must repose consciously in the victim. Such a finding depends instead upon the existence of a relationship between the defendant and victim *generally conducive to reliance of one upon the other.*

*Id.* at 311, 354 S.E.2d at 218 (emphasis added). The Court of Appeals has upheld this factor where the murder victim was the defendant's best friend, *State v. Potts*, 65 N.C. App. 101, 308 S.E.2d 754 (1983), *disc. rev. denied*, 311 N.C. 406, 319 S.E.2d 278 (1984), and therefore we conclude that the husband-wife relationship permits the finding of this factor. In some marriage-related situations, finding this aggravating factor may be inappropriate. The evidence here suggests that Dan Arnold did not distrust his wife, but rather believed that she had "come to her senses" and ended her relationship with Stuffel. Therefore, we hold that the evidence supports the trial court's decision.

**[5]** In addition to the one aggravating factor, the court found five mitigating factors as follows:

> 1. The defendant has no record of criminal convictions.
>
> 2. The defendant was a passive participant in the commission of the offense.
>
> 3. The defendant acted under strong provocation.
>
> 4. The relationship between the defendant and the victim was an extenuating circumstance.
>
> 5. The defendant has been a person of good character and has had a good reputation in the community in which she lives.

Defendant argues that the finding that the relationship between the defendant and the victim was an extenuating circumstance was inconsistent with the aggravating factor found. The State argues, and we agree, that the evidence on which the mitigating factor is based was the victim's revelation that he was a homosexual

and had had an affair with Carl Stuffel. This evidence is separate from, and not in conflict with, the trust that the victim had for defendant. Therefore, the trial court did not err in finding the aggravating and mitigating factors.

Finally, we find no abuse of discretion in the balancing process between the one aggravating factor and the five mitigating factors. *See State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986). The only aggravating factor found was that the defendant violated a position of trust or confidence. Defendant concedes that it is not the number of factors found, but the nature of the factors that weigh in the balancing process. We agree with the State that the aggravating factor here, based on defendant's betrayal of the marital relationship, could weigh more heavily in the balance. *See State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983). Finding no abuse of discretion, we overrule defendant's assignment of error. Accordingly, the decision of the Court of Appeals is

Affirmed.

Justice MEYER dissenting.

I dissent from that portion of the majority's opinion which finds error in the guilt phase of defendant's trial on the basis that the evidence was not overwhelming as to whether defendant counseled, procured, or commanded Stuffel to murder her husband. I also disagree with the majority's holding that, even assuming that defendant did procure or counsel Stuffel, it is "not readily apparent that said counsel caused Stuffel to commit the murder."

The facts as outlined in the majority's opinion and in the record would support defendant's conviction for murder in the first degree as an accessory before the fact. Jerald Tart testified that while visiting Stuffel at Dix, Stuffel gave him a map and a key to the church, which Stuffel said defendant had given to him. Defendant was to send her husband, Dan, back to the church to get her purse after choir practice on Wednesday night, 4 July 1984. Tart testified that he decided not to commit the murder and later returned the key to Stuffel. Tart further testified that, on 7 July 1984, defendant asked him if he could help them with their problem.

Stuffel testified that defendant initially approached him about killing Dan. He asked her to consider a divorce, but she responded that a divorce would be too hard on the children. Her first sugges-

tion was to have someone attack Dan at night while he was walking the dog. On her next visit to Stuffel, she brought a key to the church. Stuffel testified that Tart actually went to Clinton on 4 July but was unable to carry out the plan because there were police officers in the area. Stuffel testified that he talked with defendant on the day before the murder, and she confirmed that she still wanted her husband dead. She also told him again that she would leave her purse at the church. Defendant told police in her written statement that she agreed for Stuffel to come to Clinton on Wednesday night, but testified at trial that Stuffel never said that he was definitely coming that evening.

Telephone records indicate that numerous phone calls were made between the Tart home, where Stuffel lived, and the Arnold home between 12 July and the murder on 18 July. Defendant eventually admitted that she had talked with Stuffel during that period.

On the evening of 18 July, the Arnolds attended the weekly service at their church and afterwards held choir practice. Michelle Honeycutt left the church with the Arnolds around 9:30 p.m. Mrs. Honeycutt and her daughter accompanied them so that Mrs. Honeycutt and defendant could practice the piano. Mrs. Honeycutt testified that during the session, defendant began to have trouble with her contact lenses. She discovered that she had left her purse at the church. Defendant went into the bedroom, got Dan up, and told him she had forgotten her purse. Defendant told her husband that she would go and get it, but he told her to continue practicing and he would retrieve it. Mrs. Honeycutt further testified that defendant told Dan that she did not really need her purse because she had "stuff" at home. Thirty minutes later, defendant, who seemed worried, called Dan's office at the church but did not get an answer. Defendant told Mrs. Honeycutt that she was going to the church to check on Dan. Mrs. Honeycutt replied that she would ride by, but defendant said, "No, you're not going over there by yourself either." Defendant suggested that they take a neighbor with them, but Mrs. Honeycutt dismissed the suggestion. Mrs. Honeycutt drove defendant and their children to the church, where they found Dan's body in the parking lot. Defendant's pocketbook was lying at Dan's feet.

The State introduced three copies of letters Stuffel received from defendant after he was released from Dix. Defendant admitted that the handwriting appeared to be hers, but denied having writ-

ten those letters. An SBI handwriting analysis revealed that there was a "high degree of belief" that the letters could have been written by defendant. Jerald Tart's mother had found the original letters among Stuffel's belongings while he was living at the Tart residence. She had taken them to Jerald's lawyer, who told her to return them to Stuffel. She made photocopies and returned the originals to Stuffel, who burned them. The first letter submitted reads:

> "Wed. Dearest Carl, on my way downtown, so thought I'd scribble a quick hello before I go. Please excuse fancy writing paper. I love you and hope your day is going well. Am so proud of you for going through the detox program and I pray that you will never again be troubled by drugs or alcohol again. Your body is too precious to ever be messed up again. I know you are happy to be breathing some good fresh air and I am really happy for you. Hope your job hunting will be successful. How I long to be near you Carl. Love always, Donna."

A second letter, in an envelope addressed to Carl E. Stuffel and dated 11 July 1984, reads:

> "Friday. Dear Carl: Hellow [sic]. Hope you are having a good day today. Have been thinking of you constantly. How is your new job? Do you have to travel far from Jerald's to go to work? *Words cannot fully express to you how anxious I am for Wed. to be here. I have real fears for your safety though." "Our some day is so close.* Please know that I love you with all my heart and want so very much for you to be happy. We will make a good team. Hope you are smiling. The girls and I miss you so much. All my love, Donna."

(Emphasis added.) The third exhibit submitted was a card in an envelope addressed to Carl E. Stuffel and dated 10 July 1984. A note at the top of the card is printed and reads:

> "They are telling you you are thought about just happens now and then [sic]. You come to mind in special ways time and time again."

The words, "time and time again," are underlined. The card continues, in handwriting:

"Carl, have a really great day and know that I am thinking of you and loving you in every way. Keep focusing on our some day. Love always, Donna."

As the majority noted, to support the third element of murder in the first degree as an accessory before the fact, the State must prove beyond a reasonable doubt that defendant procured, counseled, or commanded Stuffel to commit the murder. *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982). However, it is sufficient to prove the element if defendant advised and agreed or urged Stuffel or in some way aided Stuffel to commit the offense. *State v. Bass*, 255 N.C. 42, 120 S.E.2d 580 (1961); *see State v. Branch*, 288 N.C. 514, 220 S.E.2d 495 (1975), *cert. denied*, 433 U.S. 907, 53 L. Ed. 2d 1091 (1977); *State v. Benton*, 275 N.C. 378, 167 S.E.2d 775 (1969); *see also State v. Hewitt*, 33 N.C. App. 168, 234 S.E.2d 468 (1977) ("counsel" describes the offense of a person who, although not actually having committed the felonious act, by her will contributed to it); *State v. Sauls*, 29 N.C. App. 457, 224 S.E.2d 702, *rev'd on other grounds*, 291 N.C. 253, 230 S.E.2d 390 (1976) (an accessory before the fact is one who furnishes the means to carry out the crime, whose acts bring about the crime in connection with the perpetrator, or one who instigates it), *cert. denied*, 431 U.S. 916, 53 L. Ed. 2d 226 (1977).

There is plenary evidence in the record to support a finding that defendant advised, contributed, instigated, or, at a minimum, in some way aided Stuffel to commit the murder. Defendant first suggested that Dan be attacked while he was walking the dog at night. Later, she procured a key to the church where Dan was to be killed. Defendant and Stuffel agreed that she would leave her purse at the church after evening choir practice and use this as a ruse to get Dan to return to the church.

Furthermore, the majority concludes that even assuming the third element is satisfied, because a "myriad of reasons" existed for Stuffel to kill Dan Arnold, it is not "readily apparent" that defendant's "counsel" caused Stuffel to commit the killing. Possible multiple reasons for committing a murder do not preclude the finding that defendant did cause Stuffel to kill her husband. There is overwhelming evidence that defendant caused the chain of events that ultimately ended in Stuffel murdering her husband.

Having concluded that there was overwhelming evidence that defendant counseled or procured Stuffel to murder her husband

and that her acts caused Stuffel to commit the murder, I vote to find harmless error beyond a reasonable doubt in the guilt phase. This error was not prejudicial to the defendant because, had the jury not had the option of convicting on the lesser offense, it would have convicted on the greater offense, subjecting defendant to harsher penalties.

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STATE OF NORTH CAROLINA v. EARNEST BEARTHES

No. 494A89

(Filed 12 June 1991)

1. **Constitutional Law § 242 (NCI4th)— murder—psychiatrist's report revealed to prosecutor—motion for new psychiatrist**

The trial court did not err in a murder prosecution by denying defendant's motion to appoint a new independent psychiatrist. The requirements of *Ake v. Oklahoma*, 470 U.S. 68, were satisfied when defendant had access to an examination by a psychiatrist to determine whether defendant's state of mind at the time of the commission of the offense would support a defense and then to assist in evaluating, preparing and presenting that defense at trial. The fact that the district attorney received a copy of the report did not deny defendant his right of access to a competent psychiatrist for the purpose of assisting him in preparing his defense; the requirements of *Ake* were satisfied at the time the independent exam was conducted.

**Am Jur 2d, Criminal Law §§ 116, 719.**

**Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist. 85 ALR4th 19.**

2. **Criminal Law § 113 (NCI4th)— murder—discovery—information released two days prior to trial—no error**

The trial court did not err by denying defendant's motion to continue a murder prosecution because the State released discoverable information only two days prior to trial. Defense counsel only asserted that he required additional time to review and assimilate the material but failed to identify or articulate

any basis upon which any part of the recently provided discovery material necessitated additional investigation or preparation.

**Am Jur 2d, Depositions and Discovery §§ 422, 427.**

**3. Jury § 7.12 (NCI3d) — murder — jury selection — juror equivocal on death penalty — excused for cause**

The trial court did not err in a murder prosecution by excusing for cause a prospective juror who was equivocal on the death penalty. The response of the juror to questions of the state and the trial court revealed that his views about the death penalty would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Furthermore, defendant suffered no prejudice because he did not receive the death penalty.

**Am Jur 2d, Jury §§ 289, 290.**

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

**4. Jury § 6 (NCI3d) — murder — jury selection — voir dire examination of one juror by court — no error**

The trial court did not err in a murder prosecution by conducting an entire voir dire examination of a potential juror. The questioning was not improper because the inquiry by the trial court constituted neither an expression of opinion as to the guilt or innocence of the defendant nor a suggestion of alliance with the prosecution.

**Am Jur 2d, Jury §§ 198, 200.**

**5. Criminal Law § 43.4 (NCI3d) — murder — autopsy photos of victim — admissible**

The trial court did not err in a murder prosecution by admitting into evidence twelve autopsy pictures where the victim had been stabbed 34 times. The fact that photographs of a homicide victim are gory, gruesome, horrible, or revolting will not preclude admission so long as the photographs are used for illustrative purposes and are not excessive or repetitious.

**Am Jur 2d, Homicide §§ 417-419.**

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

**6. Homicide § 18.1 (NCI3d)-- murder—time required for death—admissible**

The trial court did not err in a murder prosecution by allowing the prosecution to repeatedly ask the medical examiner how long it would have taken the victim to die from each of her 23 life-threatening wounds when the medical examiner had already testified that the victim died within 3 to 5 minutes. The nature of wounds to a victim is a circumstance to be considered in determining whether a defendant acted after premeditation and deliberation.

**Am Jur 2d, Homicide § 439.**

**7. Criminal Law § 75.9 (NCI3d); Criminal Law § 86.6 (NCI3d)—murder—defendant's statement—admissible**

The trial court did not err in a murder prosecution by admitting a "clarifying statement" made by defendant after defendant had been informed of his rights and had informed the officer 3 times that "I'd better not say anything else." The trial court conducted a voir dire and concluded, among other things, that the officer did not initiate conversation or interrogation; defendant volunteered statements which were not the result of custodial interrogation and were not in response to any question by the officer; the officer asked defendant two clarifying questions after defendant made his statement; defendant made the statements knowingly and voluntarily; and defendant knowingly waived his right to remain silent. Defendant opened the door to the admission of prior inconsistent statements for the purpose of impeachment when he took the stand and testified that he had no recollection of events.

**Am Jur 2d, Evidence §§ 529, 543, 549.**

**8. Criminal Law § 113 (NCI4th)-- murder—discovery—statement by defendant—revealed two days before trial**

The trial court did not err in a murder prosecution by admitting a statement by defendant that "if I don't get my family back soon, something bad is going to happen" when the statement was not disclosed to defendant until two days before trial. The explanation by the district attorney and the voir dire testimony of the state's witness established that the

state was not aware of the statement on the Wednesday prior to the week of trial. Moreover, defendant failed to establish that the trial court abused its discretion in denying his motion to suppress; the sanctions provided in N.C.G.S. § 15A-910 are permissive, not mandatory. N.C.G.S. § 15A-903.

**Am Jur 2d, Depositions and Discovery §§ 421, 422, 427.**

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Albright, J.*, at the 22 May 1989 Criminal Session of Superior Court, ROWAN County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 12 February 1991.

*Lacy H. Thornburg, Attorney General, by Mary Jill Ledford, Assistant Attorney General, for the State.*

*R. Marshall Bickett, Jr., for defendant-appellant.*

MEYER, Justice.

On Wednesday afternoon, 2 September 1987, in front of at least four witnesses including two of defendant's children, defendant stabbed his estranged wife, Freddie Mae, thirty-four times, and she died as a result thereof. On 9 November 1987, defendant was indicted for first-degree murder pursuant to N.C.G.S. § 14-17. The case was tried before a jury at the 22 May 1989 Criminal Session of Superior Court, Rowan County. At defendant's capital trial, defendant was convicted of murder in the first degree. During the sentencing phase, the jury found that the seven mitigating circumstances found were insufficient to outweigh the one aggravating circumstance found but that the aggravating circumstance was not sufficiently substantial to call for the death penalty, and accordingly recommended a sentence of life imprisonment. The trial court, following the recommendation of the jury, sentenced defendant to life imprisonment for the murder of his wife.

The State's evidence tended to show the following: The defendant had been married to the victim, Freddie Mae Bearthes, since 1965, and there were seven children born of the marriage. Defendant and his wife separated in June 1987. On 1 September 1987, the victim spoke with Eric Perry, her daughter Avis' boyfriend, to plan a trip the following day to Fort Jackson, South Carolina, to attend Avis' graduation from "boot camp." They and Mrs. Bearthes' youngest son and daughter, ages nine and eleven, were

to drive in Perry's car. Mr. Perry testified that after talking with Mrs. Bearthes on 1 September to make arrangements for the trip, he called the defendant later that night. Mr. Perry asked the defendant if he was going to the graduation. Defendant answered affirmatively, stating that he and his family were planning to go. Mr. Perry advised defendant that Mrs. Bearthes and the two younger children were planning to go with Mr. Perry in his car and that Mrs. Bearthes did not want defendant to go with them. Mr. Perry further testified that he had a prior discussion regarding the graduation with defendant, and at that time the defendant had told Mr. Perry that he was "tired of this," that it had been going on long enough, and that if he did not get his family back soon, something bad was going to happen.

About 1:00 or 1:30 p.m. on 2 September 1987, Mr. Perry picked up Mrs. Bearthes and the two children from the home of the victim's sister. As they left, Mr. Perry noticed the defendant was following them in a station wagon. The defendant pulled up beside Perry's car, and the victim rolled down her window and told him they were on their way to the graduation. They proceeded toward the house of a Ms. Beck, where Mr. Perry was stopping to pick up a cake he had ordered.

Upon arrival at Ms. Beck's residence, defendant came up behind in his car and stopped about five or ten yards away. Mr. Perry went inside the house to get the cake. The defendant got out of the car and walked up to the driver's side of Mr. Perry's car. Mrs. Bearthes started to roll up the window on that side. She was able to get the window up halfway before the defendant reached in and unlocked the door. Then defendant took a knife from his pocket, got into the car, and started stabbing Mrs. Bearthes. The two children got out of the car. Mr. Perry, upon hearing screaming, ran outside and saw his car shaking back and forth. He saw the defendant in the driver's seat and saw that the defendant had a long knife and was stabbing Mrs. Bearthes. He tried to pull the defendant off of the victim but was unsuccessful. He tried to get Mrs. Bearthes out of the car, but the defendant had her pinned down and was stabbing her.

Defendant, holding the knife, got out of Perry's car and went to the station wagon and drove away. Defendant left the scene, returned to his home, and subsequently turned himself in at the Rowan County Sheriff's Department.

Defendant testified at trial that he "somewhat" remembered what happened on 2 September 1987. He testified that he got up that day and fed the animals and then loaded his car with various items that Avis had asked him to bring to her in South Carolina. He then went to school to pick up the children, but they were not there. Defendant stopped at an intersection on his way home and spotted Mr. Perry's car with Mrs. Bearthes and the two children as passengers. Defendant testified that he followed the car because he wanted to find out where they were going. While stopped at a red light, defendant asked his wife where they were going, but before she had a chance to respond, the light changed and both vehicles drove off. When Mr. Perry's car stopped at a house, defendant stopped behind it. Defendant called to Mr. Perry, who was going into the house, because he was curious about where they were going, and then went over to Mr. Perry's car. Defendant testified that the last he remembered, he had opened the door and was getting ready to get into or was getting into the car and that the next thing he remembered was driving down North Main Street in his car, headed towards home. Defendant did not remember stabbing his wife.

Defendant further testified that after he got into the station wagon, he noticed blood on his hands, but he decided to continue home. Once home, defendant asked his son, Gabriel, to take him to the sheriff's department because he figured he had done something wrong. He testified that he told someone at the sheriff's department that he might have committed an assault of some kind. He remembered two deputies taking him to the hospital and asked them about his wife because he was concerned that she might be hurt.

On appeal, defendant brings forward eight assignments of error. After a thorough review of the transcript, record, briefs, and oral arguments, we conclude that defendant received a fair trial free of prejudicial error and affirm his conviction and sentence.

I.

**[1]** Defendant first contends that the trial court erred in denying his motion to appoint a new, independent psychiatrist to examine the defendant for the purposes of determining if his state of mind at the time of the commission of the offense would support a defense and then to assist him in evaluating, preparing, and presenting that defense at trial. Defendant was examined by four mental health experts upon the order of the trial court: Dr. Mauney, a psychiatrist

previously at Dorothea Dix Hospital, for the purpose of determining competency to stand trial; Dr. Manoogian, a psychologist and director of Manoogian Psychological Associates, who examined the defendant to aid in preparation of the defense; Dr. Groce, a forensic and clinical psychiatrist at Dorothea Dix Hospital, for the purposes of an examination and of assisting defendant in evaluating, preparing, and presenting a defense; and Dr. Lara, a forensic psychiatrist at Dorothea Dix Hospital, for the purpose of determining the competency of the defendant to proceed to trial. Defendant argues that because Dr. Groce, the psychiatrist who had been appointed to determine defendant's state of mind at the time of the offense and to assist in his defense, mailed the results of his examination of defendant to the district attorney, defendant is entitled to another psychiatrist. We disagree. The United States Supreme Court, in *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), established a requirement that an indigent defendant be provided access by the state to a competent psychiatrist to determine whether his mental state at the time of the offense was such as would support an effective defense based on his mental condition and to assist in evaluation, preparation, and presentation of that defense. This requirement was satisfied by the trial court. Additionally, this Court has previously addressed and specifically rejected the very contention that defendant makes as to a defendant's entitlement to an independent, privately employed psychiatrist. *State v. Gambrell*, 318 N.C. 249, 347 S.E.2d 390 (1986).

During the pretrial hearing on defendant's motion questioning his capacity to proceed, Dr. Groce testified that he had concluded, after meeting with the defendant on five occasions, that the defendant had a mental illness, specifically, a mild adjustment disorder and a personality disorder which was not severe. Dr. Groce found the defendant's thought processes to be normal and coherent; he found no looseness of this thought process; the defendant was responsive and appropriate in his responses; there was no evidence of delusions or hallucinations; defendant appeared to be alert and well oriented; there was no evidence of a cognitive function impairment or any evidence of brain impairment in his mental status; and there was no evidence of psychosis or organic impairment of the brain. During the second interview, Dr. Groce informed the defendant that the examination would not be confidential because he was required to send a report to the court, including information discussed with him during the examination. The defendant did not

introduce at trial the report of the examination of defendant by Dr. Groce, nor did defense counsel call the psychiatrist as a witness in his defense. We hold that the trial court did not err in denying defendant's motion to appoint a new, independent psychiatrist because the *Ake* requirements were satisfied when defendant had *access* to an examination by Dr. Groce for the purposes of determining if defendant's state of mind at the time of the commission of the offense would support a defense and then of assisting him in evaluating, preparing, and presenting that defense at trial.

In addition, Dr. Manoogian did testify on behalf of the defendant that, at the request of defendant's counsel, he had examined the defendant on three occasions to assess any psychological issues relevant to defendant's case. He opined that when defendant stabbed his wife, his ability to exercise conscious control was impaired. Dr. Manoogian testified, however, on cross-examination, that defendant would be able to make plans and preparations for future events and had the ability to know the nature and quality of his acts.

The fact that the district attorney received a copy of Dr. Groce's report relating to his examination of defendant did not deny defendant his right to *access* to a competent psychiatrist for the purpose of assisting him in preparing his defense. Defendant's argument that he was entitled to a new psychiatrist because the State had access to Dr. Groce's report is unpersuasive because the requirements of *Ake* were satisfied at the time the independent examination was conducted. We find that the inadvertent mailing of the report to the district attorney after the examination was completed did not prejudice the defendant's access to a competent psychiatrist.

II.

**[2]** Defendant also contends that the trial court erred by denying his motion to continue his case because the State had released discoverable information only two days prior to trial. Thirty-four continuances had been granted by the trial court to the State because trials of other cases prevented the trial of this case. At a discovery hearing on 15 May 1989, the trial court set a discovery deadline of Wednesday, 17 May 1989, for the State. However, on Friday afternoon, 19 May, two days before trial, the State disclosed discovery of the victim's diary, statements by defendant to witness Eric Perry, and statements made by defendant to Officers Johnston and Barber.

During an inquiry of the defendant by the trial court as to why the discovery justified a continuance, counsel for defendant only argued that:

> [COUNSEL FOR DEFENDANT]: One of the things we hope to accomplish, as you said, to pin [the prosecution] down on the record to see what is going to happen. We felt that introduction of these three new statements two days before the trial was—we just didn't have time to assimilate what was in them and to—
>
> THE COURT: Well, I mean I just heard about them but I don't know—what else is there to assimilate?

Thereupon, the trial court entered an order denying the motion to continue, finding that the principal grounds advanced upon oral argument by the defendant were late disclosures by the State of defendant's statements to law enforcement officers and to Perry; that the statements were not lengthy and were rather straightforward; that the statements contained no matter that would justify continuing the case for the session; that the trial court perceived no discernible prejudice to the defendant which would result if the case was tried on schedule; and that the defendant had advanced no reason or grounds sufficient to compel a continuance, and thus concluding that there was no basis in fact or in law to justify continuing the case.

Defendant argues that fundamental fairness should dictate that a continuance was necessary for the defense to properly evaluate the newly discovered information. We disagree. Even when a motion to continue raises constitutional issues, the denial of the motion is grounds for a new trial only upon a showing by the defendant that the denial was erroneous and that his case was prejudiced as a result of the error. *State v. Branch*, 306 N.C. 101, 291 S.E.2d 653 (1982). A motion for a continuance should be supported by an affidavit showing sufficient grounds. *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984). The defendant must present *adequate* and *specific* circumstances of the case to support his claim of a constitutional violation. *Id.; State v. Harrill*, 289 N.C. 186, 221 S.E.2d 325 (1976).

In the case *sub judice*, defense counsel only asserted that he required additional time to review and "assimilate" the material but failed to identify or articulate any basis upon which any part

of the recently provided discovery necessitated additional investigation or preparation. We hold that the trial court properly denied the defendant's motion to continue because defendant failed to show that the content of the discovery provided to the defendant two days prior to trial was of such a nature as to require additional time for the preparation of his defense.

III.

**[3]** Defendant contends next that the trial court erred in excusing a prospective juror for cause when he was equivocal on whether he could vote to impose the death penalty. Defendant argues that jurors may be excused for cause only if they are unequivocally opposed to the death penalty or if they would "automatically" vote against capital punishment. Defendant submits that juror Truesdale, who would find it difficult to recommend the death penalty but "[could] uphold the law," should not have been excused for cause. We disagree.

It is well settled that where the answers of a prospective juror to questions of the prosecution or the trial court clearly disclose that his views would impair his ability to act in accordance with his instructions and his oath, such juror may be properly excused for cause. *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985); *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989), *sentence vacated on other grounds in light of McKoy*, --- U.S. ---, 108 L. Ed. 2d 756 (1990). Juror Truesdale stated that he did not believe in the death penalty and was against it based on religious beliefs; that he thought it would be impossible for him to return a verdict recommending the death penalty in the case; that he could not consider returning a verdict knowing that, pursuant to that verdict, the defendant would be sentenced to death; that he doubted he could do it under any circumstances; that he thought that he would automatically vote against the imposition of the death penalty based on his feelings and beliefs; that he did not think there were any circumstances under which he would vote to put the defendant to death; that given the choice between the death penalty and life imprisonment, he could never vote for the death penalty; and that when asked "Never?" the juror responded that he did not think so and that he thought that would be true no matter what the evidence showed.

We conclude that the responses of juror Truesdale to questions of the State and the trial court revealed that his views about

the death penalty would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Furthermore, because the defendant did not receive the death penalty, he did not suffer prejudice by the excusal of juror Truesdale for cause on that basis.

IV.

**[4]** Next, defendant contends that the trial court erred in conducting an entire voir dire examination of a potential alternate juror for the State. The only question asked by the prosecutor during the voir dire of prospective juror Morgan was, "Did you pass him, Your Honor?" The questioning of juror Morgan about which the defendant complains consists of the following:

> Q. [THE COURT:] You have been able to hear what has been said to these other jurors?
>
> A. Yes, sir.
>
> Q. Do you know anything in the world about this case?
>
> A. No, sir.
>
> Q. Do you know any of the lawyers?
>
> A. No, sir.
>
> Q. For either side?
>
> A. No.
>
> Q. Know the defendant?
>
> A. No, sir.
>
> Q. Did they call out any names as witnesses you know?
>
> A. No, sir.
>
> Q. Haven't read anything about it?
>
> A. No, sir.
>
> Q. Have an open mind about it?
>
> A. Yes, sir.
>
> Q. Know any reason in the world why you can't be fair and impartial?

A. No, sir.

Q. Let the chips fall where they will?

A. No, sir.

Q. You do know of a reason?

A. No.

Q. Do you have any conscientious objection to the death penalty?

A. No, sir.

THE COURT: Any other questions you want to ask this juror?

[STATE]: Did you pass him, Your Honor?

THE COURT: Well, he says he can be fair.

[STATE]: I will pass him.

THE COURT: What says the defendant to the juror.

We note that defendant did not object at trial to the examination of the juror by the trial court. Although defendant's failure to object at trial constitutes a waiver of the right to assert the alleged error on appeal, we elect to address this contention. The trial court did not question any potential juror for the defense, and defendant argues that the trial judge's unequal treatment of the prosecution and defense by conducting the entire questioning and selection of a juror in a capital case indirectly conveyed to the jury that the trial judge and the prosecution were "on the same side," and therefore, the defendant was prejudiced.

N.C.G.S. § 15A-1222 provides:

> The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury.

N.C.G.S. § 15A-1222 (1988); *see State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984) (the trial court is prevented from expressing any opinion in the presence of the jury on any question of fact to be decided by it during any stage of the trial); *State v. Guffey*, 39 N.C. App. 359, 361, 250 S.E.2d 96, 97 (1979) (a new trial is required if a statement by a trial judge expresses an opinion which goes to the "heart of the trial" and assumes the defendant's guilt).

A review of the record and circumstances in the instant case shows that the questioning of the prospective juror by the trial court did not constitute an opinion on any question of fact, or a statement expressing an opinion which went to the "heart of the trial" and did not assume the guilt of the defendant. We hold that the questioning by the trial court was not improper because the inquiry by the trial court constituted neither an expression of opinion as to the guilt or innocence of the defendant nor a suggestion of alliance with the prosecution.

V.

**[5]** By his fifth assignment of error, defendant contends that the trial court erred in admitting twelve pictures of the autopsy into evidence. Defendant admitted that the numerous knife wounds to the body were the cause of death and entered into a judicial admission to that effect. Defendant argues that pursuant to Rule 403 of the North Carolina Rules of Evidence the probative value of these photographs was substantially outweighed by the unfair prejudice. *See State v. Hennis*, 323 N.C. 279, 284, 373 S.E.2d 523, 526 (1988) ("when the use of photographs that have inflammatory potential is excessive or repetitious, the probative value of such evidence is eclipsed by its tendency to prejudice the jury"). Defendant submits that since he had stipulated to the cause of death and witnesses were available to testify as to the cause of death, the photographs lacked probative value, and the error resulting from the admission of the photographs requires a new trial. We disagree.

Photographs of a victim's body are not only admissible to illustrate testimony as to the cause of death, but also to illustrate, in a murder trial, testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree. *Id.; State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402 (1990). The fact that photographs of a homicide victim are gory, gruesome, horrible, or revolting will not preclude admission so long as the photographs are used for illustrative purposes and are not excessive or repetitious. *State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402. Whether the use of photographic evidence is more probative than prejudicial pursuant to Rule 403 and what constitutes an excessive number of photographs lies within the discretion of the trial court. *Id.; State v. Sledge*, 297 N.C. 227, 254 S.E.2d 579 (1979).

Defendant was charged with murder in the first degree. However, the jury was instructed on murder in both first and second degree. Dr. Thompson, a forensic pathologist who supervised the autopsy performed on Mrs. Bearthes, used the photographs for the purpose of illustrating his testimony. The photographs were received into evidence with a limiting instruction by the trial court that they were for the purpose of illustrating and explaining Dr. Thompson's testimony and were not substantive evidence. We find that these photographs served to illustrate testimony regarding the manner of the killing so as to prove circumstantially the elements of murder in the first degree. This assignment of error is without merit.

VI.

**[6]** Next, defendant contends that the trial court erred in allowing the medical examiner to testify as to the amount of time it would take the victim to die from each individual wound. The medical examiner testified that the deceased suffered twenty-three life-threatening wounds, all while she was alive, and that Mrs. Bearthes died from these wounds within a three- to five-minute period. The prosecutor was allowed to ask repeatedly how long it would have taken her to die from each individual wound. The medical examiner testified that one wound would have taken "ten to fifteen minutes," another "ten minutes," and one even up to "30 minutes." Defendant argues that since the medical examiner had previously testified that Mrs. Bearthes *had* died within five minutes, this additional hypothetical questioning would only tend to confuse the issues and to prejudice the defendant. We disagree.

Rule 702 of the North Carolina Rules of Evidence permits a witness properly qualified as an expert to testify in the form of an opinion when specialized knowledge will assist the trier of fact to determine a fact in issue. N.C.G.S. § 8C-1, Rule 702 (1988). In determining whether a defendant acted after premeditation and deliberation, the nature of wounds to a victim is a circumstance to be considered. *State v. Bray*, 321 N.C. 663, 365 S.E.2d 571 (1988). Dr. Thompson, associate chief medical examiner who supervised the performance of the autopsy on Mrs. Bearthes, testified that in the defendant's deadly assault, the defendant inflicted twenty-three major wounds, as well as numerous others, upon Mrs. Bearthes. We find that Dr. Thompson's opinions were within his area of expertise and that his opinions were relevant and appropriate to

show the number and severity of the wounds. We discern no merit in this assignment of error.

VII.

**[7]** Defendant contends that the trial court erred by admitting a "clarifying statement" which was obtained from the defendant through questioning after the defendant had been advised of his constitutional rights and had informed the officer, three times, that "I'd better not say anything else." Detective Johnston, after orally advising defendant of his rights, asked him questions concerning the knife and whether he had stabbed his wife. Defendant argues that admitting into evidence statements by defendant made while he was in custody, being interrogated, and when he had not waived his right to remain silent constituted error. We disagree.

Officer Johnston testified that he accompanied Mrs. Bearthes' body to the hospital on 2 September 1987. He was informed that defendant was being transported to the hospital and for him to stand by. When the defendant arrived at the emergency room, Officer Johnston read defendant his rights, and defendant answered affirmatively that he understood them. During voir dire of the officer, he testified that while he was at the emergency room, defendant started making statements about what happened and then he stated that "[he]'d better not say anything else." The officer did not ask defendant any questions at that time. After an hour, defendant started talking and made more statements about the events. The officer again asked no questions. Later, defendant made statements relative to his going to the sheriff's office earlier. At this point, the officer asked him what kind of knife defendant had used and where it was. Defendant responded that it was a straight knife like a small hunting knife and that it was in one of his cars. When another officer arrived, Officer Johnston relayed this information, and the defendant restated what had happened.

After voir dire, the trial judge entered an order in which he found that the defendant had been advised of his constitutional rights and that defendant had responded affirmatively when asked if he understood his rights; that Officer Johnston stood security over defendant in the emergency room; that Officer Johnston did not initiate conversation or interrogation at the time; that defendant was not under medication; that defendant, not in response to any question by the officer, volunteered statements which did not result from any custodial interrogation; that Officer Johnston

asked defendant two clarifying questions with respect to matters disclosed by defendant as to what kind of knife was used and where it was; that these were not asked by the officer until defendant had made his statement; that defendant ratified his statement to a second officer; that the statements were freely and voluntarily made; and that defendant knowingly waived his right to remain silent. Upon entry of the order, Officer Johnston continued to testify about the voluntary statements by defendant. We find that the statement that "[he]'d better not say anything else" coupled with the findings by the trial court did not constitute a violation of his constitutional rights.

The defendant, by taking the stand and testifying that he had no recollection of the events, opened the door to admission of the prior inconsistent statements for the purpose of impeachment of his testimony. *See State v. McQueen*, 324 N.C. 118, 377 S.E.2d 38 (1989). This Court stated:

> "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment."

*Id.* at 134-35, 377 S.E.2d at 48 (quoting *Harris v. New York*, 401 U.S. 222, 225-26, 28 L. Ed. 2d 1, 4-5 (1971)). Defendant testified on direct examination that he did not remember stabbing his wife and that he did not remember having a knife in his hand at all. The testimony of Officer Johnston as to prior inconsistent statements of the defendant was offered for the purpose of impeaching or rebutting that testimony. We find that defendant, by taking the stand and testifying that he had no recollection of these events, opened the door to admission of the prior inconsistent statements for the purpose of impeachment of his testimony.

VIII.

**[8]** Finally, defendant contends that the trial court erred by allowing into evidence testimony concerning the defendant's "threat"

to Eric Perry. On Friday, 19 May 1989, two days before trial, during an interview by the district attorney of State's witness Eric Perry, Perry for the first time disclosed that at some time prior to the date of the murder, the defendant had made the statement: "If I [defendant] don't get my family back soon, something bad is going to happen." The district attorney immediately contacted defense counsel by telephone and disclosed the existence of the statement. Defendant argues that pursuant to the discovery statute, N.C.G.S. § 15A-903 (1988), and because of noncompliance by the State with the discovery deadline imposed by the trial court, the statement containing the threat made by defendant to Eric Perry should not have been admitted. We disagree.

N.C.G.S. § 15A-903(a)(2) requires the State to disclose to the defendant the substance of any relevant statement made by the defendant which is in the possession of the State and the existence of which is known to the prosecutor. This subsection provides, in part:

> If the statement was made to a person other than a law-enforcement officer and if the statement is *then known to the State*, the State must divulge the substance of the statement no later than 12 o'clock noon, on Wednesday prior to the beginning of the week during which the case is calendared for trial.

N.C.G.S. § 15A-903(a)(2) (1988) (emphasis added). The language of the subsection requires disclosure of the substance of the statement if the statement is "then known to the State." In the instant case, the explanation by the district attorney, together with the testimony of State's witness Eric Perry on voir dire, established that the State was not aware of the statement on the Wednesday prior to the week of trial. We find that the statement does not come within the scope of N.C.G.S. § 15A-903(a)(2).

Additionally, the sanctions contained in N.C.G.S. § 15A-910 provide that:

> If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers *may*
>
> . . . .

(3) Prohibit the party from introducing evidence not disclosed

. . . .

N.C.G.S. § 15A-910 (1988) (emphasis added). These sanctions are permissive, not mandatory, and defendant has failed to establish that the trial court abused its discretion in denying his motion to suppress the testimony relating to defendant's statement. Therefore, this assignment of error is without merit.

We conclude that defendant received a fair trial free of prejudicial error and affirm his conviction and sentence.

No error.

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JOHN W. BROOKS v. HAROLD D. HACKNEY AND MARGARET B. HACKNEY

No. 590A90

(Filed 12 June 1991)

**1. Frauds, Statute of § 2.2 (NCI3d) — contract to convey realty — patently ambiguous description**

The description in a written agreement for the purchase and sale of twenty-five acres of a 113-acre tract was patently ambiguous where the northern boundary was described as "with the Whitehead line. Thence straight to road that goes by Plainfield Church and with the road to the church to include 25 acres in all" since this language fails adequately to specify where the parties intended to divert from the Whitehead line, and the closing line could be in any number of locations in order to include the 25 acres. Therefore, the contract fails for indefiniteness of description and is void under N.C.G.S. § 22-2.

**Am Jur 2d, Statute of Frauds §§ 322, 323.**

**2. Estoppel § 4.7 (NCI3d) — contract to purchase land — acceptance of benefits — estoppel to deny validity**

Plaintiff was estopped to deny the validity of a contract for the purchase and sale of twenty-five acres of land which contained a patently ambiguous description of the land to be conveyed where plaintiff made the payments required by the agreement for nearly eight years and, when requested to do

so by defendant, paid a prorated portion of the property taxes on defendants' 113-acre tract; although evidence as to plaintiff's use of the property was uncertain, plaintiff's regular payments effectively reserved the use of the land for plaintiff whether or not he exercised his rights, and defendants would reasonably have believed that they were precluded from selling or renting the property to someone else; and the indefiniteness of the closing boundary line in the description was alleviated by defendants' stipulation allowing plaintiff to select any closing boundary line of his choosing consistent with the other known points in the description which would cause the parcel to contain twenty-five acres.

**Am Jur 2d, Estoppel and Waiver § 81; Statute of Frauds § 569.**

Justice MARTIN dissenting.

APPEAL 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. 562, 397 S.E.2d 361 (1990), reversing the judgment of *Battle, J.*, entered at the 31 July 1989 Civil Session of Superior Court, CHATHAM County. Heard in the Supreme Court 11 March 1991.

*Law Firm of Wade Barber, by Wade Barber, for plaintiff-appellee.*

*Edwards & Atwater, by Phil S. Edwards, and Love & Wicker, by Dennis Wicker, for defendant-appellants.*

MEYER, Justice.

This case presents the questions of whether an agreement for the sale of real estate fails for indefiniteness of the description of the property and, if so, whether it will, nevertheless, be enforced on principles of equity.

An examination of the pleadings, affidavits, and depositions filed in support of the motions for summary judgment reveals the following: In 1979, defendant-sellers owned approximately 113 acres of land on the east side of Plainfield Church Road in Chatham County. Plaintiff and his now-deceased wife approached the defendants, and after walking with defendants around the perimeter of the 113-acre tract, plaintiff offered to buy twenty-five acres in

the south section of defendants' property. Defendants do not dispute that plaintiff anticipated buying the whole tract in twenty-five acre increments over time.

The defendants agreed to finance the purchase of the first twenty-five acres. On 17 February 1979, plaintiff, in his own handwriting, wrote the following on two separate sheets of paper without the assistance of defendants.

> 25 acres $43,750.00
>
> Beginning at a stone at Johnson Buckner's corner at Plainfield Church to a stone Burlow Johnson's corner due east. Thence north to Amick Andrews corner. *Thence with the Whitehead line. Thence straight to road that goes by Plainfield Church and with the road to the church to include 25 acres in all.*
>
> Paid $6,000 down payment and $400/month beginning March 1, 1979 with interest at the rate 12%

(Emphasis added.) Plaintiff and his wife signed one copy, defendants signed the other.

There is no dispute that the writings construed together formed an agreement between the parties. Plaintiff, however, contends that the writings are too indefinite to form a valid, binding contract for the sale of real estate. The writings generally describe the southernmost portion of defendants' larger tract, and defendants concede that the writings were the only agreement between the parties as to the boundaries of the twenty-five acre tract.

Separately, plaintiff paid defendants $50.00 per month to rent a house in the northern portion of the 113-acre tract owned by defendants. There is some dispute as to the extent that the plaintiff used the twenty-five acre tract that he allegedly contracted to purchase, but it is undisputed that defendants did not negotiate or transact to sell or rent the southernmost twenty-five acres of the property to others. While the southern portion of defendants' land consists of a hayfield, it is otherwise mostly wooded, and plaintiff's lack of use of the land, even if true, should not have affected defendants' reliance on the agreement.

While the interest rate stipulated in the agreement was later decreased to 11% for payments beginning 1 March 1979, plaintiff paid the down payment and for a period of eight years and four months made regular monthly payments of at least $400.00.

Moreover, when requested, plaintiff also paid a prorated portion of defendants' property taxes.

Plaintiff stopped making payments in June 1987 after the parties had negotiated for the purchase of additional portions of defendants' property and could not come to an agreement. Plaintiff then requested a deed and a survey, for which he offered to pay, for the twenty-five acres covered in the original agreement. Defendants objected to the survey being performed by the particular surveyor suggested by the plaintiff but contend they have always stood ready, willing, and able to convey the original twenty-five acres upon payment in full of the purchase price. Plaintiff, however, felt that an agreement could not be reached and purchased other property on 19 May 1987.

Plaintiff mailed defendants a letter dated 1 July 1987, repudiating the agreement and requesting the return of the $50,700 that he had already paid. At that time, approximately $21,000 was still owed pursuant to the terms of the writing.

After defendants refused to return the plaintiff's money, plaintiff filed suit on 20 October 1987. Plaintiff alleges (1) the agreement was void for failure to comply with the statute of frauds;[1] (2) since the agreement is void, the defendants have been unjustly enriched; and (3) alternatively, if a valid contract does exist, the defendants breached the contract by not tendering a deed, refusing to pay for a survey of the property, and later refusing to permit a survey of the property. Defendants filed an answer and counterclaim alleging, *inter alia*, that a valid contract existed, which created a security interest in the real property in favor of the defendants. More significantly, defendants amended their answer to assert the defense of estoppel and laches.

After the institution of this action, defendants hired the same surveyor, to whom they had previously objected, to survey the twenty-five acre tract. Using the writing, the surveyor determined that the northern boundary could be drawn in an infinite number

1. Plaintiff contends here that the writings are so indefinite in the description of the land as to violate the statute of frauds. In response, defendants contend that plaintiff's use of the statute of frauds to void the contract is an inappropriate "offensive" use of a statute which was intended to be used as a defensive vehicle only. However, as plaintiff notes, defendants counterclaimed, alleging that the contract is valid, thereby converting plaintiff's use of the statute of frauds to an affirmative defense.

of ways. Defendants then stipulated by affidavit filed with the court that plaintiff could locate the questioned boundary in any way that was consistent with other known points in the agreement—in essence giving plaintiff his choice of any number of ways the closing boundary line could be drawn.

After a hearing on motions for summary judgment filed by both parties, the trial court granted summary judgment for defendants, and plaintiff appealed.[2] The Court of Appeals reversed the trial court and held that the contract is patently ambiguous and therefore void and that defendants have been unjustly enriched. In dissent, Judge Phillips opined, among other things, that the plaintiff should be estopped from denying the existence of the agreement.

I.

**[1]** Plaintiff contends that no valid, written contract was ever formed in that the subject of the agreement was never agreed upon by the parties because the description of the property to be conveyed was indefinite. We agree.

As the trial court granted summary judgment in favor of defendants on their claim that a valid contract for the sale and purchase existed, we now address that issue. As a general matter, a contract must be sufficiently definite in order that a court may enforce it. *See Property Owners Assoc. v. Curran and Property Owners Assoc. v. Williams*, 55 N.C. App. 199, 284 S.E.2d 752 (1981), *disc. rev. denied*, 305 N.C. 302, 291 S.E.2d 151 (1982); *see generally* J. Calamari & J. Perillo, *The Law of Contracts* § 2-9 (3d ed. 1987). With regard to contracts for the purchase and sale of real property, this Court has said:

> The statute of frauds, G.S. 22-2, provides that "All contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith

2. We note that defendants, in their motion for summary judgment, merely alleged that plaintiff's complaint failed to state a cause of action. Defendants failed to assert a motion for summary judgment on their own counterclaim, which alleged that there was a valid contract. Nevertheless, summary judgment was appropriately entered by the trial court. Pursuant to Rule 56(c) of our Rules of Civil Procedure, "[s]ummary judgment, when appropriate, may be rendered against the moving party." N.C.G.S. § 1A-1, Rule 56(c) (1990).

. . . [.]" A memorandum or note is, in its very essence, an informal and imperfect instrument. *Phillips v. Hooker*, 62 N.C. 193. But it must contain expressly or by necessary implication the essential features of an agreement to sell. *Elliott v. Owen*, 244 N.C. 684, 94 S.E. 2d 833; *Keith v. Bailey*, 185 N.C. 262, 116 S.E. 729; *Hall v. Misenheimer*, 137 N.C. 183, 49 S.E. 104. It must contain a description of the land, the subject-matter of the contract, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. *Searcy v. Logan*, 226 N.C. 562, 39 S.E. 2d 593; *Timber Co. v. Yarbrough*, 179 N.C. 335, 102 S.E. 630; *Bateman v. Hopkins*, 157 N.C. 470, 73 S.E. 133; *Farmer v. Batts*, 83 N.C. 387. If the description is sufficiently definite for the court, with the aid of extrinsic evidence, to apply the description to the exact property intended to be sold, it is enough. *Lewis v. Murray*, 177 N.C. 17, 97 S.E. 750; *Simmons v. Spruill*, 56 N.C. 9.

The most specific and precise descriptions require some proof to complete the indentification [sic] of the property. More general descriptions require more. The only requisite in evaluating the written contract, as to the certainty of the thing described, is that there be no patent ambiguity in the description. *Norton v. Smith*, 179 N.C. 553, 103 S.E. 14. There is a patent ambiguity when the terms of the writing leave[ ] the subject of the contract, the land, in a state of absolute uncertainty, and refer to nothing extrinsic by which it might possibly be identified with certainty. *Gilbert v. Wright*, 195 N.C. 165, 141 S.E. 577; *Bryson v. McCoy*, 194 N.C. 91, 138 S.E. 420.

*Lane v. Coe*, 262 N.C. 8, 12-13, 136 S.E.2d 269, 272-73 (1964).

If the description set forth in the writing is uncertain in itself to locate the property, and refers to nothing extrinsic by which such uncertainty may be resolved, such ambiguity is said to be "patently" ambiguous. *Overton v. Boyce*, 289 N.C. 291, 221 S.E.2d 347 (1976). Parol evidence is not admitted to explain the patently ambiguous description. *Lane v. Coe*, 262 N.C. 8, 136 S.E.2d 269. In such case, the contract is held to be void.

Whether the ambiguity is a patent ambiguity is a question of law to be decided by the court. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

The language which creates the problem here is: "Thence with the Whitehead line. Thence straight to the road that goes by Plainfield Church and with the road to the church to include 25 acres in all." When one attempts to connect these points, this language fails adequately to specify where the parties intended the property line to divert from the Whitehead line, and thus the last call could be in any number of locations in order to include twenty-five acres. The last boundary line is therefore subject to a number of constructions, each with significant variations. The writings at issue here do not refer to anything extrinsic from which the description can be made more certain, and the description is patently ambiguous.

As we said in *Overton*:

> Parol evidence may not be introduced to remove a patent ambiguity since to do so would not be a use of such evidence to fit the description to the land but a use of such evidence to create a description by adding to the words of the instrument.

*Overton v. Boyce*, 289 N.C. at 294, 221 S.E.2d at 349.

We hold that the agreement for the conveyance of real property here is patently ambiguous and fails for indefiniteness.

II.

**[2]** Having determined that the written agreement fails for indefiniteness, we now consider whether, under the peculiar facts of this case, the plaintiff is estopped to take advantage of this fault.[3]

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3. The dissent misconstrues the nature of equitable estoppel present in this case. It sets out and distinguishes the elements of "estoppel by misrepresentation" and all but ignores the doctrine of "estoppel by acceptance of benefits" or what is sometimes referred to as quasi-estoppel. *Compare* 31 C.J.S. *Estoppel* §§ 59-106 (1964) (estoppel by misrepresentation) *with* 31 C.J.S. *Estoppel* §§ 107-129 (1964 & Cum. Supp. 1991) (quasi-estoppel). The latter form of estoppel is present in this case and was the basis of the estoppel in *Advertising, Inc. v. Harper*, 7 N.C. App. 501, 172 S.E.2d 793 (1973), which the dissent attempts to distinguish. *See also Harris v. Harris*, 50 N.C. App. 305, 274 S.E.2d 489, *disc. rev. denied*, 302 N.C. 397, 297 S.E.2d 351 (1981). As for the dissent's suggestion that the buyer in this case received "negligible" benefits from the contract because he has not received a deed, we note that a deed is not normally transferred in an installment land contract until the final payment is received. In addition, in such circumstances, the law normally grants buyers of real property who use the installment land contract method the right to an equitable mortgage or lien. Therefore, the dissent leaves the incorrect impression that the buyer received nothing here.

In an amendment to their answer and in their counterclaim, defendants pled the doctrine of estoppel. *See* N.C.G.S. § 1A-1, Rule 8(c) (1990). "The doctrine of estoppel rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result." *Thompson v. Soles*, 299 N.C. 484, 486, 263 S.E.2d 599, 602 (1980). Equity serves to moderate the unjust results that would follow from the unbending application of common law rules and statutes. It is well settled that "a party will not be allowed to accept benefits which arise from certain terms of a contract and at the same time deny the effect of other terms of the same agreement." *Advertising, Inc. v. Harper*, 7 N.C. App. 501, 505, 172 S.E.2d 793, 795 (1970) (lessee estopped to deny the validity of a lease because of insufficient description of the premises where he had paid the rent for seven months of a nine-year lease).

In this case, plaintiff made the payments required by the agreement for nearly eight years and, when requested to do so by the defendants, paid a prorated portion of the property taxes. Furthermore, defendants allege that plaintiff "used the land as he saw fit for almost eight years to raise hogs, cut firewood, and cut hay from the fields." Plaintiff responds that any use he made of the land was minimal and was with the permission of the defendants. Notwithstanding this uncertainty in the evidence as to the plaintiff's use of the property, the plaintiff's regular payments on this agreement effectively reserved the use of the land for the plaintiff whether he exercised his rights or not, and defendants would reasonably have believed that they were precluded from selling or renting the property to someone else. We hold that the defendants reasonably relied on the writing based on plaintiff's payments under the agreement. Therefore, plaintiff is estopped to deny that a valid agreement existed. The indefiniteness of the closing boundary line in the description of the land has been alleviated in this case. Defendants have stipulated to allowing plaintiff to select any closing boundary line of his choosing consistent with

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Finally, the dissent notes a lack of understanding of the disposition this Court makes of the appeal. We reverse the decision of the Court of Appeals because it found no contract to exist. While we find the written contract between the parties to be unenforceable by reason of the indefiniteness of the description of the property, this Court, on the basis of the theory of estoppel, found a valid agreement of purchase and sale to exist and properly reverses the decision of the Court of Appeals.

the other known points in the description which would cause the parcel to contain twenty-five acres.

Having held that plaintiff is estopped to deny that a valid agreement for the purchase and sale of the land existed, we need not address plaintiff's claim of unjust enrichment. Also, since it was not set out in the dissenting opinion as the basis for the dissent pursuant to Rule 16(b) of the North Carolina Rules of Appellate Procedure, we do not address plaintiff's claim of breach of contract.

Plaintiff, by this action, sought only the return of the amounts paid to defendants, and defendants, in their answer and counterclaim, sought only the recognition of a valid contract in defense of plaintiff's claim. Neither party demanded specific performance of the contract in question. In essence, Judge Battle found only that a valid contract for the purchase and sale of the land existed. His order on summary judgment both allowed defendants' motion for summary judgment and denied plaintiff's motion for summary judgment "without prejudice to the right of the plaintiff to seek enforcement of the contract for the purchase of the property in question."

We therefore remand this case to the Court of Appeals for further remand to the Superior Court, Chatham County, for reinstatement of the trial court's order of summary judgment in favor of defendants and for any further proceedings consistent with this opinion.

Reversed.

Justice MARTIN dissenting.

I agree with the majority opinion that the alleged contract in this case is void under the statute of frauds. N.C.G.S. § 22-2 (1986). However, I cannot agree with the majority that the plaintiff in this case must be estopped from "taking advantage of this fault."[1] *Brooks v. Hackney*, 329 N.C. 166, 404 S.E.2d 854 (1991).

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1. The majority's characterization of the alleged contract's voidness under the statute of frauds as a "fault" (evidently attributable to plaintiff) appears to stem from the fact that plaintiff handwrote the memoranda himself, and thus if anyone is to be blamed for the poor description, it should be plaintiff. However, when asked where the descriptions in the memoranda of 17 February 1979 came from, plaintiff testified that they were from a deed in *defendants'* chain of title:

There is no issue in this case concerning estoppel by deed. *See generally* 5 Strong's N.C. Index 3d *Estoppel* § 1 (1977). There is no deed directly involved in this case. Nor does the majority appear to analyze the case in terms of promissory estoppel. *See generally* Feinman, *Promissory Estoppel and Judicial Method*, 97 Harv. L. Rev. 678 (1984).

The majority's reliance upon the estoppel theory applied in *Advertising, Inc. v. Harper*, 7 N.C. App. 501, 172 S.E.2d 793 (1970), is misplaced. *Advertising* involved a situation where plaintiff's assignor, Capital Sign Service, Inc., and defendant entered into a lease for a term of nine years of two highway signs. With approval of defendant, Capital constructed and erected the highway signs, defendant paid seven months rent to plaintiff under the terms of the lease, "and [defendant] received benefits from the signs," even after he unilaterally stopped paying rent. *Id.* at 503-05, 172 S.E.2d at 794-95. When defendant stopped paying rent, plaintiff sued to recover damages for breach of the lease agreement. One of defendant's defenses was that the lease agreement was void because "the description of [the] personal property and the land upon which it purports to be located is so vague, uncertain and indefinite as to be not susceptible of identification. . . ." *Id.* at 500, 172 S.E.2d at 794. The Court of Appeals held:

> The contract has been fully and wholly executed by the lessor by constructing and erecting the highway signs according to the terms of the lease and the defendant, having accepted the benefit of these signs, will not now be heard to repudiate the validity of the lease for any uncertainty in the description of the premises.

*Id.* at 505, 172 S.E.2d at 795.

In the instant case, defendants, the vendors, have not executed the land sales contract by delivering a deed to plaintiff, and thus

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> Q. Did anyone dictate those descriptions to you?
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> A. I took them from the description of the property which they [the defendants] had a copy of—of the land formerly belonging to Luther Perrett.
>
> Q. Was that from the entire deed of the larger tract from which this twenty-five acres was being taken out?
>
> A. That was off of that deed.

Thus, the "fault," if any, may be equally borne by defendants.

plaintiff has received no benefit from the contract in that sense. In addition, while the record shows without contradiction that plaintiff paid $50 per month rent for a house on the northern part of the 113-acre tract, it is undisputed that this was a separate transaction unconnected with the purchase and sale of the twenty-five acre area at issue in this case. Further, although defendants allege that the "plaintiff used the land as he saw fit for the purpose of raising hogs, cutting firewood, and mowing hay," defendant Margaret Hackney herself testified that the field plaintiff mowed hay from was not within "the" twenty-five acres, and that she "gave" him use of the field. She further testified that she and her husband, the male defendant, also mowed hay from portions of the entire tract, including a large field they now contend was part of "the" twenty-five acres. The defendants also took wood (cedar posts) from portions of the entire tract. Plaintiff testified that he never kept hogs in any of the area now contended by the defendants as being "the" twenty-five acres.

Thus, the record does not unequivocally show that plaintiff ever used the area containing the alleged twenty-five acres in any exclusive manner, nor does it show that defendants considered any particular location to have been so dedicated for sale to plaintiff that defendants could not freely reap its benefits for their own use. This situation is a far cry from that in *Advertising*, where the landlord whose estoppel theory prevailed had constructed and erected highway signs for the benefit of defendant on an obviously designated piece of property. The "benefits" which plaintiff gleaned in the instant case, when weighed against his steady monthly payments to defendants ultimately in the amount of $50,700, are negligible. They do not support a conclusion that plaintiff should be estopped from recovering payments he made under a contract which this Court has declared void.

One might also consider whether the doctrine of equitable estoppel might apply to the instant facts. It does not. Equitable estoppel "arises when anyone, by his acts, representations, or admissions, *or by his silence when he ought to speak out*, intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." *Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 548, 206 S.E.2d 155, 159-60 (1974) (emphasis in original, quoting from *Boddie v. Bond*, 154 N.C. 359, 70 S.E. 824 (1911)).

In the instant case the party sought to be estopped, that is, the plaintiff, did not induce defendants to believe that any facts existed that did not actually exist. In the absence of any culpable behavior of the plaintiff, it is inappropriate to hold that plaintiff is estopped from denying the enforceability of a contract which is admittedly void under the statute of frauds. *Cf. Wachovia Bank v. Rubish*, 306 N.C. 417, 427, 293 S.E.2d 749, 756 (1982) ("proof of actual misrepresentation is essential" for equitable estoppel.).

As this Court has explained,

> [i]n determining whether the doctrine of estoppel applies in any given situation, the conduct of both parties must be weighed in the balances of equity and the party claiming the estoppel no less than the party sought to be estopped must conform to fixed standards of equity. As to these, the essential elements of an equitable estoppel as related to the party estopped are:
>
> > [¶] (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert;
> >
> > (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon;
> >
> > (3) knowledge, actual or constructive, of the real facts.
>
> [¶] As related to the party claiming the estoppel they are:
>
> > (1) lack of knowledge and the means of knowledge of the truth as to the facts in question;
> >
> > (2) reliance upon the conduct of the party sought to be estopped; and
> >
> > (3) action based thereon of such a character as to change his position prejudicially.

*Transit, Inc. v. Casualty Co.*, 285 N.C. at 549, 206 S.E.2d at 160 (citations omitted). The party claiming the estoppel must present *evidence* of these latter three elements in order to prevail under an estoppel theory. *Id.* In the instant case there is no evidence

whatsoever that plaintiff falsely represented to or concealed anything from the defendants. *A fortiori* there was also no evidence of plaintiff's intent to conceal anything. There is no evidence that the plaintiff had "knowledge, actual or constructive, of the real facts." Both plaintiff and defendants were aware of the problem with the description. There was no possible concealment on the part of any party with respect to this. Further, there is no evidence that the fact that the memorandum is void under the statute of frauds was either known by the plaintiff or concealed from the defendants prior to the Court of Appeals' holding below in this case. *See Brooks v. Hackney*, 100 N.C. App. 562, 397 S.E.2d 361 (1990).

Perhaps the majority is assuming that the defendants' reliance upon the validity of the contract is the basis for the estoppel. However, plaintiff did not conceal its lack of validity from the defendants. In fact, plaintiff himself believed that the contract was valid, and continued to make payments due thereunder. The fact that the contract was later declared void under the statute of frauds in no way can be used by the defendants to support an assertion that the plaintiff was misleading them by claiming that the contract was valid. Finally, again, there is no evidence in the record that the conduct of the plaintiff in concealing a material fact resulted in the defendants changing their position prejudicially. Defendants still have their land, which, according to defendants, has increased in value. If anything, it was the plaintiff whose position was changed prejudicially since he paid more than $50,000 to the defendants who conveyed nothing in return.

The majority's recitation of plaintiff's use of the land in the vicinity of an area where the alleged twenty-five acres might be carved out, again, is not supported by the record. Further, the majority's statement that defendants "would reasonably have believed that they were precluded from selling or renting the property to someone else" is also not supported by any of the pleadings or evidence of record in this case. Defendants in no way alleged or proved that they believed that they were precluded from selling or renting "the property"—whatever this indescribable tract was—to someone else. The record does show that they used this tract while plaintiff was making payments under the now-void contract. Defendants have further failed to show that they are materially prejudiced from receiving $50,700 from plaintiff and failing to deed him anything in exchange. If anything, in this case the equities run towards the plaintiff. Plaintiff in good faith made monthly

payments to defendants for some eight years, believing he would receive in exchange a valuable tract of land in Chatham County. Defendants refused to cooperate in ascertaining the location of this property, and plaintiff thereupon changed his position by buying and moving to another tract of land at a time when his wife was expecting a child.

Plaintiff cannot and should not be held to be equitably estopped from denying the validity of an admittedly void contract for the conveyance of real property in this case.[2] The contract is void, and the parties should be restored to the position in which they were before the memoranda were written. Plaintiff should receive back from the defendants his $50,700 plus interest and the defendants permitted to keep this land which, they admit, has increased in value since both the date of the contract and the date the suit was filed.

Finally, the disposition rendered by the majority opinion is enigmatic. The majority reverses the Court of Appeals' decision which held that the contract is void, and then remands the case ultimately to the trial court. The trial court had held that summary judgment was appropriate for defendants on the statute of frauds question, that is, it held that the contract was *not* void under the statute of frauds and that plaintiff could proceed "to seek enforcement of the contract"—a remedy not sought by the plaintiff in his pleadings. The majority opinion therefore is holding that although the contract is void the plaintiff may attempt to enforce the contract. As we have seen in the litigation of this case, and as the majority also recognizes however, the contract is not en-

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2. The majority's approach, as evidenced by its footnote, is a thinly veiled attempt under the guise of "quasi-estoppel" to allow the doctrine of part performance to be the basis for specifically performing an alleged contract which is void under the statute of frauds. However, this Court has firmly rejected the doctrine of part performance as a basis for estoppel. *Grantham v. Grantham*, 205 N.C. 363, 171 S.E. 331 (1933). The doctrine of part performance, or acceptance of benefit, or quasi-estoppel, has no place in the jurisprudence of North Carolina and will not displace the necessity of a writing. *Id.* The specific performance of an unenforceable agreement to convey real property on the basis of part performance would be the equivalent of a suppression of the statute of frauds. *Id. See also Duckett v. Harrison*, 235 N.C. 145, 69 S.E.2d 176 (1952).

Further, the paper writing in this case is unenforceable by whatever name, be it "land contract" or otherwise. Certainly the paper writing was not the typical installment land contract.

forceable because the description is inadequate for the drawing of a deed. To this mercurial result, I cannot concur.

Therefore, I dissent from the decision of the majority and vote to affirm the decision of the Court of Appeals.

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NORTHWESTERN FINANCIAL GROUP, INC. v. THE COUNTY OF GASTON; DAVID C. BEAM, PORTER McATEER, DAVID R. HOLLIFIELD, C. DAVID WARD, JR., CLAUDE CRAIN, MARY LOU CRAIG, JAMES S. FORRESTER, AS MEMBERS OF THE GASTON COUNTY BOARD OF COMMISSIONERS; THE GASTON PLANNING BOARD, AND WILLIAM M. PATRICK, JACK DILL, GEORGE M. MASON, DAVID E. WATTS, FRANCES SPRINGS, JOHN DYER, W. REGGIE HUNDLEY, AS MEMBERS OF THE GASTON COUNTY PLANNING BOARD

No. 307PA90

(Filed 12 June 1991)

1. **Municipal Corporations § 30.12 (NCI3d)— construction of mobile home park—ordinance in effect at time of application governing**

Plaintiff developer which applied for a construction permit under a county ordinance which prescribed the procedures for obtaining a construction and operating permit for a mobile home park had a right to have its application reviewed under the terms of the ordinance in effect at the time the application for the permit was made.

**Am Jur 2d, Mobile Homes, Trailer Parks, and Tourist Camps § 13; Zoning and Planning § 10.**

**Retroactive effect of zoning regulation, in absence of saving clause, on pending application for building permit. 50 ALR3d 596.**

**Validity and application of zoning regulations relating to mobile home or trailer parks. 42 ALR3d 598.**

2. **Municipal Corporations § 30.12 (NCI3d)— review of mobile home park plan—applicable ordinance—no waiver of right by developer**

Plaintiff developer did not waive or abandon its right to have its mobile home park plan reviewed under the ordinance in effect at the time the plan was submitted, since plaintiff submitted revised plans in response to modifications

recommended by a regulatory agency and proceeded in good faith and without excessive delay to comply with the requirements of the 1986 ordinance.

**Am Jur 2d, Mobile Homes, Trailer Parks, and Tourist Camps § 13; Zoning and Planning § 10.**

**Retroactive effect of zoning regulation, in absence of saving clause, on pending application for building permit. 50 ALR3d 596.**

**Validity and application of zoning regulations relating to mobile home or trailer parks. 42 ALR3d 598.**

3. **Municipal Corporations § 30.12 (NCI3d)— construction permit for mobile home park—no denial on basis of hazard to public welfare**

Defendant county's ordinance prescribing the procedures for obtaining a construction and operating permit for a mobile home park provided for a permit by right upon compliance with the terms of the ordinance, and such permit could not be denied on the basis that it was a hazard to the public welfare.

**Am Jur 2d, Mobile Homes, Trailer Parks, and Tourist Camps § 13.**

**Validity and application of zoning regulations relating to mobile home or trailer parks. 42 ALR3d 598.**

ON appeal as of right pursuant to N.C.G.S. § 7A-30(1) and on discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished opinion of the Court of Appeals, 98 N.C. App. 515, 391 S.E.2d 864 (1990), setting aside the judgment in favor of plaintiff entered by *Owens, J.*, in the Superior Court, GASTON County, on 19 December 1988. Heard in the Supreme Court 12 February 1991.

*Weinstein & Sturges, P.A., by T. LaFontine Odom, William H. Sturges, and Thomas L. Odom, Jr., for plaintiff-appellant.*

*Stott, Hollowell, Palmer & Windham, by Grady B. Stott and Aaron E. Bradshaw, for defendant-appellees.*

MEYER, Justice.

The issue which we must resolve in this case is whether the plaintiff-developer which applied for a construction permit under

a county ordinance that prescribed the procedures for obtaining a construction and operating permit of a mobile home park has a right to have its application reviewed under the terms of the ordinance in effect at the time the application for the permit was made. A second issue we must resolve is whether the plaintiff-developer's subsequent submission of revised plans for such mobile home park waived or abandoned any rights which might have vested pursuant to the filing of the original application and the consequences that result from such a determination.

Gaston County (hereinafter "the County") has no comprehensive zoning ordinance. Effective 1 July 1986, the Gaston County Board of Commissioners adopted an ordinance entitled "Mobile Home Park Ordinances" (hereinafter "the 1986 ordinance"), which prescribed a mandatory procedure for securing approval of mobile home parks and applied to any mobile home park proposed after its effective date. The Board of Commissioners revised the mobile home park ordinance effective 24 September 1987 (hereinafter "the 1987 ordinance"), decreasing the density allowed in mobile home parks and adding the requirement that all roads in mobile home parks be paved. This amended 24 September 1987 ordinance provided in pertinent part that "[t]he provisions of the Gaston County Mobile Home Park Ordinance Dated July 1, 1986, shall apply to those . . . plans . . . submitted to the Gaston County Division of Planning after July 1, 1986 and prior to the effective date of this ordinance."

The plaintiff, Northwestern Financial Group, Inc. (hereinafter "Northwestern"), submitted a plan for a mobile home park on 5 June 1987 (hereinafter "the first plan"). This plan provided for a total of 187 mobile home spaces. The plan was submitted to the proper reviewing agencies, and numerous deficiencies were pointed out. The plan came on before the 22 June 1987 regular meeting of the Gaston County Planning Board, and the consideration of the plan was tabled with the exception of preliminary conditional approval of the road layout. The motion which was adopted was "to conditionally approve the road design only, with the lot layout and sewage disposal being tabled until a later meeting." The Planning Board tabled consideration of the plan pending a determination by the State of North Carolina on the plaintiff's application for a sewage treatment plant.

By letter dated 24 June 1987, the administrator of the Division of Planning notified Northwestern that the Board's action was "con-

ditional approval on the road design only which would allow for the construction of roads in accordance with the approved plans having the following conditions met prior to construction." The letter also informed Northwestern that "[a]ny construction work conducted by your group prior to final approval by the Planning Board will be at your risk, and subject to change in accordance with consideration of requested information." The original plans submitted by the plaintiff called for individual septic tanks on each lot in the plaintiff's mobile home park. Subsequently, however, the Gaston County Health Department determined that the land was not suitable for septic tanks, and Northwestern proposed a change in its plans to use a package sewage treatment plant.

On 21 September 1987, three days prior to the effective date of the 1987 ordinance, Northwestern submitted a revised plan (hereinafter "the second plan"), which called for 244 spaces, or 57 more spaces than the first plan. It also contained a change in the road design to accommodate the additional spaces made possible by the use of a sewage treatment plant rather than individual lot septic tanks. The second plan was the last plan submitted prior to the effective date of the 1987 ordinance.

On 23 February 1988, well after adoption of the 1987 ordinance, Northwestern submitted a third set of plans (hereinafter "the third plan"). Based on suggestions by the Gaston County Soil and Water Conservation District, the third plan contained a total of 272 spaces, 28 more than the second plan. Upon initial review of this plan, Northwestern was notified that this plan constituted a major change in the second plan and would therefore have to be considered under the 1987 ordinance. This letter stated in pertinent part:

> With the road changes, and since the additional spaces were worked into the plan and not treated as an additional section to be reviewed under the September 1987 ordinance, the plans submitted on February 23, 1988 will be considered under the September 1987 ordinance. In a review of the plans under the guidelines of this ordinance, the plan is disapproved due to the space size not meeting the minimums set in the ordinance.

This third plan was withdrawn by Northwestern with the consent of the Planning Director.

On 2 March 1988, the plaintiff submitted its fourth set of plans (hereinafter "the fourth plan"), which increased the size of

the spaces and contained 244 spaces. The fourth plan, a revision of the second plan, was reviewed by the Division of Planning and underwent numerous reviews by the various consulting agencies, including the North Carolina Department of Transportation, the Gaston County Health Department, the Gaston County Inspection Department, the Gaston Soil and Water Conservation District, and the Gaston County Engineering Department. Under the 1986 ordinance, the consulting agencies review an applicant's plan for compliance with the agency's regulations and thereafter advise the Division of Planning of Gaston County of their approval, conditional approval, or disapproval of the proposed park plan.

The fourth plan submitted by Northwestern was originally scheduled for review by the Planning Board at its 25 April 1988 meeting. However, this meeting was continued at the request of Northwestern's attorney because all referring agency approval had not been obtained.

On 23 May 1988, the Planning Board met, and Northwestern's mobile home park plan was reviewed. As of that date, the consulting agencies had reported the following:

(a) The County Health Department reported that on 14 April 1988, Northwestern received a National Pollutant Discharge Elimination System permit ("NPDES permit") from the State of North Carolina for a package treatment plant for the mobile home park to discharge waste water. The wells for the water distribution system for the mobile home park had only recently been completed, and the Health Department had not completed a review of the water distribution system.

(b) On 15 April 1988, Northwestern received a North Carolina Department of Transportation driveway permit.

(c) On 5 May 1988, the Gaston County Inspection Department issued an erosion and sediment control grading permit to Northwestern.

(d) On 17 May 1988, the Gaston Soil and Water Conservation District recommended the mobile home park for conditional approval.

(e) In an undated document, the Gaston County Engineering Department approved the mobile home park plan.

(f) Donald Bailey, County Engineer, approved the flood plain designation.

As of 23 May 1988, Northwestern had obtained the foregoing approvals by all consulting agencies for this stage of development.

The Planning Board voted to disapprove the proposed park plans "due to the development being a hazard to the public welfare, and that any proposed plans would have to be in accordance with the September 23, 1987 Mobile Home Park Ordinance adopted by the Board of Commissioners."

On 15 June 1988, Northwestern attempted to submit a fifth set of plans for the mobile home park. This fifth set of plans called for 244 units and was presented over the signature of a registered engineer. The Division of Planning refused to accept these plans for consideration under the 1986 ordinance but offered to accept the plans for consideration under the 1987 ordinance. Northwestern did not wish to submit the plans under the 1987 ordinance; therefore, the plans were not accepted by the Division of Planning.

Northwestern appealed the Planning Board's action to the Board of Commissioners after the Planning Board refused to accept its mobile home park plan under the 1986 ordinance.

The Gaston County Board of Commissioners, at its 28 July 1988 meeting, affirmed the Planning Board's denial of the permit and ruled that future plans submitted by Northwestern must comply with the 1987 ordinance. Prior to Northwestern's application, Gaston County had never denied an application for a construction permit and had never considered the "general public welfare" when reviewing mobile home park applications.

On 26 August 1988, Northwestern filed this suit contending, among other things, that the actions by the Planning Board and County Commissioners were arbitrary and unwarranted and that the Planning Board's actions deprived it of equal protection under the law of the land clause of article I, section 19 of the North Carolina Constitution and the fourteenth amendment of the United States Constitution. Northwestern sought to require that its application be considered on the basis of the 1986 ordinance. It asked for a preliminary mandatory injunction for (1) the issuance of a conditional construction permit, (2) advice as to requirements necessary to receive a permanent construction permit, and (3) is-

suance of a permanent construction permit upon Northwestern's compliance with the above.

A preliminary mandatory injunction was granted to Northwestern on 22 September 1988 by Burroughs, J., who set the case for hearing at the 28 November 1988 civil term upon a motion for summary judgment to be filed within ten days of his order. In granting injunctions in favor of the plaintiff, Northwestern, the trial judge found that Gaston County's denial of the construction permit was an unconstitutional delegation of legislative power in violation of article II, section 1 of the North Carolina Constitution; was in violation of their own mobile home park ordinances; was improper because Northwestern was not given a fair hearing; and was a denial of due process and equal protection of the law in violation of article I, section 19 of the North Carolina Constitution and the fourteenth amendment of the United States Constitution. After a hearing on 28 November 1988 on Northwestern's motion for summary judgment, Owens, J., on 19 December 1988, entered a judgment in favor of Northwestern granting a permanent mandatory injunction against the County, requiring that a permit be issued upon compliance with the 1986 ordinance.

The Court of Appeals reversed and granted summary judgment for the County in an unpublished opinion which indicated that Northwestern's plan, submitted after the passage of the new ordinance, did not "relate back" to the plan submitted under the 1986 ordinance. After a petition for rehearing was denied, Northwestern filed a notice of appeal and a petition for discretionary review, which this Court granted on 29 August 1990.

I.

**[1]** We must first consider what, if any, rights Northwestern has in having its mobile home park application evaluated under the 1986 ordinance. The record indicates that the defendants reviewed Northwestern's plans under the 1986 version of the ordinance. Defendants contend that the 1987 ordinance applied and that even if the 1986 ordinance applied, Northwestern waived or abandoned its rights to review under that ordinance through the submission of revised plans.

The 1986 ordinance provides in pertinent part: "On or after July 1, 1986, these regulations shall govern each and every mobile home park or any addition or expansion of an existing mobile home

park, as defined by this ordinance . . . ." The later 1987 ordinance provides: "The provisions of the [1986 ordinance] shall apply to . . . plans . . . *submitted* to the Gaston County Division of Planning after July 1, 1986 and prior to the effective date of this ordinance." (Emphasis added.) The effective date of the new ordinance was 24 September 1987. The new ordinance unequivocally indicates that the 1986 ordinance applies to all plans *submitted* prior to 24 September 1987.

The record before us reveals that Northwestern's plan was reviewed under the provisions of the 1986 ordinance. Judge Burroughs found as a fact that the plan was reviewed under the 1986 ordinance, and the County did not except to this finding. The 23 May 1988 Planning Board minutes reveal that the plan being reviewed was the plan submitted 21 September 1987, which was prior to the effective date of the 1987 ordinance (24 September 1987).

> The Planning Director stated that the plan under review was the one submitted on September 21, 1987, as revised . . . .
>
> . . . .
>
> . . . Mr. Watts moved that the Board rescind the conditional approval of the park and to disapprove the proposed park plans due to the development being a hazard to the public welfare, and that any proposed plans would have to be in accordance with the September 23, 1987 Mobile Home Park Ordinance . . . .

By its very terms, the 1987 ordinance would not apply because, as we have previously noted, the 24 September 1987 ordinance provided that "[t]he provisions of the Gaston County Mobile Home Park Ordinance Dated July 1, 1986, shall apply to those . . . plans . . . submitted to the Gaston County Division of Planning after July 1, 1986 and prior to the effective date of this ordinance" (24 September 1987).

The Planning Board minutes of 28 September 1987 state that "the developers of Crowders Mountain MHP and Tryon MHP had submitted revised proposals . . . [and] that both plans were submitted prior to the new ordinance being effective and were being reviewed under the 1986 ordinance." The agencies that reviewed Northwestern's plan prior to the 23 May 1988 Planning Board

meeting are the ones enumerated under the 1986 ordinance, not the 1987 ordinance.

Indeed, the Gaston County Planning Director testified that the plan was reviewed under the 1986 ordinance. Furthermore, the reason the Planning Board disapproved the plan had nothing to do with its compliance or noncompliance with the 1986 ordinance. The plan was disapproved "due to the development being a hazard to the public welfare."

Clearly, Northwestern established a right of review under the 1986 ordinance with the submission of plans both on 5 June 1987 (the first plan) and on 21 September 1987 (the second plan)[1] unless that right was waived subsequent to those filings.

Since we hold that the 1986 ordinance applies to Northwestern's application and that Northwestern is entitled to a permit for the construction of the mobile home park in accord with Judge Owens' judgment of 19 December 1988, we need not address the issues Northwestern asserts based on the federal and state Constitutions.

II.

**[2]** Having decided that Northwestern is entitled to have its application reviewed under the 1986 ordinance, we must next determine whether Northwestern waived that right by affirmative acts, that is, by abandonment of the first plans through the submission of the other revised plans, or by a failure to act, that is, the passage of time.

The Court of Appeals held that the revised plans submitted after the enactment of the new ordinance did not "relate back" to plans submitted prior to the enactment of that ordinance. We do not agree. We conceive the issue to be not so much whether the plans relate back, as it is whether the submission of the subsequent revised plans in response to the requirements or recom-

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1. Defendants, in their brief to this Court, contend that Northwestern was not properly incorporated at the time of the submission of its application. The County contends that it was dealing with a nonentity at the time the first applications were filed, and therefore, Northwestern could not establish a right to review under the 1986 ordinance. However, the defendants filed no response to Northwestern's petition for discretionary review, and since that issue and others were not raised by the County in response to the plaintiff's petition for discretionary review, they were not preserved for review and are deemed abandoned pursuant to North Carolina Appellate Rules 15(d) and 16(a).

mendations of regulatory bodies resulted in a waiver or abandonment of Northwestern's right to review under the 1986 ordinance. The more pertinent inquiry as to whether such right is waived or abandoned is through examination of the question of whether the subsequent plans were made in a good faith effort to bring its application into compliance with the 1986 ordinance. We hold, based on the findings by the trial court, which are amply supported by the evidence, that Northwestern submitted the revised plans in response to the modifications recommended by a regulatory agency, proceeded in good faith to comply with the requirements of the 1986 ordinance, and did not waive or abandon its right to review under that ordinance. The revised plans were essentially a part of the normal give and take between the applicant and the regulatory authorities.

Defendants contend that the submission of the third plan, which contained an additional twenty-eight spaces, constituted a material change from the previous two plans submitted and indicated an abandonment by Northwestern of those earlier plans. We disagree. The third plan was merely a revision of the second plan based on suggestions from the Gaston County Soil and Water Conservation District and was subsequently withdrawn.

Defendants note that two of the applications submitted after the enactment of the new ordinance did not have an engineer's seal and that one of the plans submitted did not have an approval of the water system prior to its submission to the Planning Board as required by the 1986 ordinance.

Judge Burroughs found as a fact that the first plan was prepared by a licensed engineer, and this finding was not excepted to by the County. The 1986 ordinance was complied with. While it is true that a later revision, unknown to Northwestern, was not signed by a registered engineer, that omission was remedied when Northwestern later submitted the very same plan signed by a registered engineer, although it was not accepted by the County. Furthermore, as previously indicated, the lack of a proper signature had nothing to do with the reason expressed by the County for its disapproval. The minutes of the Planning Board of 23 May 1988 do not indicate that the matter was even discussed.

As to the lack of approval of the water system prior to its submission to the Planning Board, it is clear from the record before us that Gaston County's usual practice is to grant permits upon

condition that the approval be later obtained. The Director of the Planning Department testified that the usual procedure of the Planning Board is to grant construction permits prior to approval of the water system. The record reflects that this procedure was followed with regard to a number of other mobile home park plans considered and approved by the Planning Board. The reason for this practice is that the water system cannot be designed until wells are drilled, which occurs after the plans are approved. Judge Owens' order in this case requiring the issuance of a construction permit contemplates that the requirement of an approval of the water system will be satisfied as a condition subsequent to the issuance of the construction permit.

The 1986 ordinance contemplates that the County through the Planning Board and the reviewing agencies will tell the applicant what is needed to correct its application. Good faith efforts to comply with the recommendations of the reviewing agencies should not prejudice the applicant. There was no evidence of bad faith on the part of Northwestern in submitting revised plans or of an excessive delay in attempting to comply with the 1986 ordinance. We therefore hold that Northwestern did not waive or abandon its right to have its mobile home park plan reviewed under the ordinance in effect at the time the plan was submitted.

III.

**[3]** Defendants apparently concede, despite language in the ordinance to the contrary, that the plan could not properly be rejected on the basis that a permit would be "a hazard to the public welfare." We agree. We note the fact that Gaston County has no comprehensive zoning ordinance. Even where an overall zoning ordinance applies, we have held that an activity allowed within a designated zone may not be denied on the basis that it is a hazard to the public welfare. *See Woodhouse v. Board of Commissioners*, 299 N.C. 211, 216, 261 S.E.2d 882, 886 (1980) (quoting 3 A. Rathkopf, *Law of Zoning and Planning* 54-5 (1979)) (" 'The inclusion of the particular use in the ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district.' "); *In re Application of Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970) (municipality must limit review to facts and conditions detailed in the ordinance and may not deny a permit because it adversely affects the public interest).

In conclusion, upon Northwestern's application for a permit, the ordinance at issue here specifically granted it a right of review under the terms of the 1986 ordinance. We hold that Northwestern promptly proceeded in good faith to meet the requirements of the 1986 ordinance and did not waive or abandon its right of review under the terms of the 1986 ordinance pursuant to which its application was filed. Finally, the County's ordinance provides for a permit by right upon compliance with the terms of the ordinance, and such permit may not be denied on the basis that it is a hazard to the public welfare.

Thus, we reverse the Court of Appeals and remand this case to that court for further remand to the Superior Court, Gaston County, for reinstatement of the judgment entered by Owens, J., on 19 December 1988.

Reversed.

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STATE OF NORTH CAROLINA v. CALVIN FAYE TERRY

No. 236A89

(Filed 12 June 1991)

1. **Criminal Law § 162 (NCI3d)— admissibility of evidence—necessity for objection at trial**

Where defendant did not object at trial to any lack of proper authentication of photographs, he cannot on appeal assign error to the admissibility of the photographs on this ground.

**Am Jur 2d, Evidence § 788.**

2. **Criminal Law § 34.7 (NCI3d)— other wrongs or acts—defaced photographs—relevance to show malice and motive**

Evidence that defendant gave a murder victim defaced enlargements of photographs of the victim's wife four months before the victim was shot, considered with evidence that defendant returned the original photographs to the victim's wife just moments before the shooting, was relevant and admissible to show defendant's malice toward the victim and his wife, defendant's fixation on the victim's wife, and defendant's motive to kill the victim. The passage of four months did not render

the evidence irrelevant, and the probative value of this evidence to show malice was not outweighed by the potential for unfair prejudice. N.C.G.S. § 8C-1, Rules 403 and 404(b).

**Am Jur 2d, Evidence § 789; Homicide §§ 280, 283.**

3. **Homicide § 28.3 (NCI3d)— self-defense—aggressor instruction—supporting evidence**

The trial court's aggressor instruction on self-defense was supported by the testimony of the State's witnesses that defendant threatened the victim just seconds before shooting him—sufficiently close in time to the alleged crime to affect defendant's self-defense argument. Although defendant's testimony contradicted that of the State, the trial court properly allowed the jury to determine which testimony to believe.

**Am Jur 2d, Homicide §§ 519, 520.**

4. **Homicide § 25.2 (NCI3d)— premeditation and deliberation—brutal circumstances of killing—excessive force—instruction not plain error**

The trial court did not commit plain error in instructing jurors in a first degree murder prosecution that they could infer premeditation and deliberation from the "brutal or vicious circumstances of the killing" and from defendant's use of "grossly excessive force." Evidence that defendant fired a semi-automatic rifle, fully loaded with sixteen rounds, seven times at the victim, hitting his target twice, showed grossly excessive force. Assuming without deciding that the evidence did not support a "brutal or vicious" circumstance, such instruction did not constitute plain error in light of the other strong evidence of premeditation and deliberation.

**Am Jur 2d, Homicide § 501.**

APPEAL by defendant pursuant to N.C.G.S. § 7A-27, from a judgment imposing a sentence of life imprisonment entered by *Sitton, J.*, at the 1 March 1989 Criminal Session of Superior Court, RUTHERFORD County. Heard in the Supreme Court 13 March 1990.

*Lacy H. Thornburg, Attorney General, by Jane P. Gray, Special Deputy Attorney General, for the State.*

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

EXUM, Chief Justice.

Defendant was tried noncapitally on a proper bill of indictment charging him with first-degree murder. He assigns error to several aspects of his trial, including instructions to the jury concerning premeditation and deliberation. We find no reversible error in this or any other assignment.

I.

This case arises from the fatal shooting by defendant of his first cousin, Howard Greene, on 16 March 1988. Defendant contends he shot Mr. Greene in self-defense. The State's evidence at trial tended to show the following:

More than ten years ago, defendant had expressed a romantic interest in the victim's wife, Betty Greene. After defendant's wife died in January 1988, he increased his attention toward Mrs. Greene, buying her gifts including a watch that the victim returned to defendant. Defendant visited the Greene house often and followed Mrs. Greene to work almost every day, despite the Greenes' request that he leave them alone. On 5 November 1987 the Greenes went to the Rutherford County Sheriff's Department and showed deputies defaced photographs of Mrs. Greene that defendant had given to Mr. Greene. Mrs. Greene expressed fear that defendant would mutilate her face. The photographs appeared to be enlargements of three smaller photographs, one of which Mrs. Greene had given to defendant's wife and two of which had been missing from the Greenes' home.

In December 1987 Mr. Greene moved to his sister's house. Defendant did not visit the Greene house when Mrs. Greene was living there alone but continued to follow her to work. Because of her fear of defendant, Mrs. Greene would take someone with her, usually her grown daughter and her mother, to pick up the Greenes' foster child at Ellenboro School.

On 16 March 1988 Mrs. Greene, accompanied by her daughter and her mother, drove to the school to pick up her foster daughter. On the way there, she saw Mr. Greene in his car at a store on Highway 74 and stopped to talk to him. Defendant drove by and held up to his windshield the original photographs of Mrs. Greene.

Mrs. Greene arrived at the school at about 2:30 p.m. and parked to wait for her foster daughter. Defendant then arrived in a new

truck and parked beside Mrs. Greene's car facing in the opposite direction. His face was painted with red, yellow, and green stripes. He handed her the original photographs, saying "I don't need these anymore." He also told her she "could have prevented everything." Defendant then drove away. Mr. Greene drove up and parked beside his wife's car, behind her and to the left. Defendant returned and parked so that his car and Mr. Greene's were facing each other and about 15 to 20 feet apart. Mr. Greene stepped out of his car. Mrs. Greene was looking toward the school when she heard gunshots and turned around to see her husband lying on the pavement beside his car.

Nancy Ann Greene Skipper, the Greenes' adult daughter, was seated in the passenger's side of the back seat of her mother's car. After her father pulled up, she heard defendant say to him, "Come on, you son of a bitch, if you get out I'll shoot you." She saw her father step out of his car and defendant raise a gun and fire through the windshield of his truck. She saw her father fall back beside his car. She could not see whether her father was carrying a weapon.

Mary Millwood, Mrs. Greene's mother, was seated in the front passenger's seat of her daughter's car. When defendant drove up and saw Mr. Greene, Millwood saw defendant move his mouth, apparently saying, "Come on, you son of a bitch." She saw Mr. Greene step out of his car and stand beside it and saw defendant fire a gun several times from inside his truck. The night before, defendant had called Millwood and said, "I'm going to Hickory, Granny. I'm going to get a gun. I'm going to kill Howard tomorrow."

Robert Billingsley arrived at Ellenboro School to pick up his children at approximately 2:35 p.m. the day of the shooting. As he parked, he heard gunshots and saw Mr. Greene falling to the ground beside his car door. Billingsley then heard a motor starting and saw defendant back his truck away from the scene, turn and speed down a road. Billingsley ran to Mr. Greene and saw a knife lying by his feet.

Deputy Sheriff R. H. Epley arrived at the scene at 2:53 p.m. and found Greene's body beside his car. Three pocketknives were on the body and Greene's vehicle contained one knife in a sheath, an empty sheath, and some bullets.

An autopsy revealed that Greene sustained two .22 caliber gunshot wounds, one to the mouth and neck and a fatal wound to the chest. Police found two .22 caliber bullets in a nearby house and noticed what appeared to be two other bullet marks on the house. Police found seven spent .22 caliber cartridges in defendant's truck.

From December 1987 to within weeks of the shooting, defendant had threatened to shoot Greene. Defendant told Hazel Greene, the victim's sister-in-law, that Greene had caused him to spend his children's Christmas money by bringing him to court on an assault charge. Defendant also told her he had shown Greene a pair of Mrs. Greene's panties to aggravate him.

Cathy Mathis, Mrs. Greene's sister-in-law, saw defendant outside a store in Ellenboro two days before the shooting. Defendant said, "If somebody don't do something about Howard Greene, I'm going to kill him." Defendant showed Mathis the watch he had bought Mrs. Greene and told her that his truck and insurance proceeds would go to Mrs. Greene if anything happened to him.

Jean Harris saw defendant at approximately 1:45 p.m. on 16 March 1988, less than two hours before the shooting. Defendant showed her his new truck, and asked, "Have you seen what I've got inside?" Harris looked and saw a long gun on the seat.

Paul Honeycutt and Claron Morehead were working at Honeycutt's Grocery on 16 March 1988 when defendant stopped to buy gas just before 3 p.m. Defendant had colored paint on the sides of his face. Honeycutt asked defendant if he was wearing "war paint," and defendant responded, "yeah."

Defendant testified on his own behalf to the following:

Defendant was never in love with Betty Greene. He damaged the enlarged photographs of her when he accidentally spilled liquid bleach on them. Six months before the shooting, Mr. Greene began to threaten him, saying "you're dead meat" every time defendant would visit or telephone the Greene home. The day before the shooting, defendant saw a pistol lying in Mr. Greene's car. Mrs. Greene had told him that her husband was going to kill them both. Defendant knew that Mr. Greene carried knives.

On 16 March 1988 defendant planned to return originals of the photographs of Mrs. Greene and held them up to show her

that he had them as he passed her car on the highway. He stopped when he saw her at the school and offered them to her. Mr. Greene drove up, jumped out of his car and said, "Come over here, you're dead meat." Mr. Greene went back to his car and turned around toward defendant's truck a second time as though he were pulling the "handle" back on a gun. Defendant shot Mr. Greene in self-defense.

On cross-examination, defendant conceded he had pled guilty on 19 February 1988 to charges of threatening to kill Mr. Greene; assaulting Jerry Greene, Mr. Greene's son, with a deadly weapon; and intimidating a witness. Defendant denied making the threat on Mr. Greene's life and said he pled guilty because Mrs. Greene was upset about having to appear in court and "tell lies." Defendant admitted being convicted in November 1987 of communicating threats to Jerry Greene.

II.

Defendant first contends the trial court committed reversible error by admitting irrelevant and prejudicial evidence of defendant's character not proper for the jury's consideration under the North Carolina Rules of Evidence.

This assignment of error involves the propriety of introducing certain photographs and testimony about the photographs into evidence. The trial court, over objection, allowed Mrs. Greene to testify that she and her husband visited the Rutherford County Sheriff's Department on 5 November 1987 and showed a deputy enlarged photographs of her that had been defaced. The trial court sustained objection to evidence that the Greenes procured a warrant against defendant for communicating a threat against Mr. Greene but allowed admission of the photographs for the jury's perusal.

**[1]** Defendant contends the defaced photographs were not properly authenticated. Mrs. Greene identified the photographs as those defendant gave to Mr. Greene. Defendant did not object at trial to any lack of proper authentication; therefore he cannot on appeal assign error to the admissibility of the photographs on this ground. *State v. Baize*, 71 N.C. App. 521, 526, 323 S.E.2d 36, 39 (1984), *disc. rev. denied*, 313 N.C. 174, 326 S.E.2d 33 (1985); *State v. Covington*, 34 N.C. App. 457, 462, 238 S.E.2d 794, 798-99 (1977), *disc. rev. denied*, 294 N.C. 184, 241 S.E.2d 519 (1978).

**[2]** Defendant also contends the photographs and Mrs. Greene's testimony about them were inadmissible character evidence not properly related to the trial. Rule 404(b) of the North Carolina Rules of Evidence provides:

> 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).

Evidence that defendant had given Mr. Greene the defaced photographic enlargements tended to show defendant's malice toward the Greenes, defendant's fixation on Mrs. Greene, and defendant's motive to kill Mr. Greene. This evidence was relevant because it involved prior malicious behavior toward the very person defendant was accused of murdering. *Cf. State v. Spruill*, 320 N.C. 688, 693, 360 S.E.2d 667, 669 (1987) (in murder trial, evidence that defendant had assaulted victim in the past was admissible to prove malice). Evidence that defendant presented the defaced enlarged photographs to Mr. Greene some four months before the shooting, considered with evidence that defendant returned the original photographs to Mrs. Greene just moments before the shooting, tended to show that defendant harbored a bizarre preoccupation with the Greenes during the time between those events.

Defendant argues that because, according to the State's evidence, he gave the defaced photographs to Mr. Greene more than four months before the shooting, the evidence regarding the photographs was too remote to be relevant. We think the passage of four months did not render this evidence irrelevant. In *State v. Boyd*, 321 N.C. 574, 576, 364 S.E.2d 118, 119-20 (1988), we upheld the introduction of evidence that within twelve months before an alleged rape of a child in a bunk bed, defendant was found naked in the same bunk bed with another child. Both children had been left in defendant's custody. Evidence of the prior incident was admissible to show a common plan or intent to take sexual advantage of a child left in defendant's custody.

Defendant also contends the photographs and testimony regarding them were prohibited by Rule 403. We explained in *Boyd*

that "the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1. Rule 403." *Boyd*, 321 N.C. at 576, 364 S.E.2d at 119. The defaced photographs given to Mr. Greene by defendant, considered with the original photographs defendant gave to Mrs. Greene moments before the shooting, were important, highly probative evidence for the State. As we have already observed, this evidence tended to show defendant's hostility toward the victim and his bizarre preoccupation with the victim's wife during the four months immediately before the shooting. The probative value of this evidence to show malice was not outweighed by the potential for unfair prejudice. It was not admitted in violation of Rule 403.

This assignment of error is overruled.

**[3]** Defendant next contends he is entitled to a new trial because the trial court improperly instructed jurors that defendant could not be acquitted on the ground of self-defense if he was the aggressor in the fight in which he killed Mr. Greene. Defendant argues that the instruction was error because no evidence supported the theory that he provoked the fatal confrontation.

The trial court instructed jurors as follows:

> The defendant would not be guilty of any murder or manslaughter if he acted in self-defense as I have just defined it to be, and if he was not the aggressor in bringing on the fight, and did not use excessive force under the circumstances. If the defendant voluntarily and without provocation entered the fight, he would be considered the aggressor unless he thereafter attempted to abandon the fight and gave notice to the deceased that he was doing so.
>
> One enters a fight voluntarily if he uses toward his opponent abusive language, which considering all of the circumstances, is calculated and intended to bring on a fight.

The trial court restated these qualifications on the self-defense claim several times during instructions to the jury. Defendant did not object to the instruction at any time during trial. Defendant cannot obtain relief, therefore, without showing plain error. N.C. R. App. P. 10(b)(2); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375

(1983). We conclude that the trial court's instruction was proper even under the regular standard of error.

Defendant argues that the aggressor instruction on self- defense was improper because neither the State's evidence nor the defendant's evidence, considered independent of the other, supported the theories of both self-defense and aggression by defendant.

Defendant compares this case to *State v. Miller*, 223 N.C. 184, 25 S.E.2d 623 (1943). In *Miller* none of the evidence supported an aggressor instruction. The evidence showed that defendants and the victims traded blows in a fight that ceased a half hour before defendants fatally shot the victims. Defendants testified that after the fist fight they returned to their barn and were working there when the victims approached and began shooting, requiring defendants to return fire in self-defense. Witnesses for the State testified that the victims were walking through defendants' property when defendants, without provocation, shot them. This Court held that the trial court erred by instructing jurors that in order to act in self-defense, defendants had to have abandoned the earlier fight and notified the victims of their abandonment. This instruction in *Miller* was erroneous because the testimony of all parties showed that the fist fight was too remote in time from the shooting to impact on the self-defense theory.

This case differs from *Miller*. Here, the State's witnesses testified defendant threatened Mr. Greene just seconds before the shooting—sufficiently close in time to the alleged crime to affect defendant's self-defense argument. Defendant disputed this evidence, testifying that he shot Mr. Greene in self-defense after Mr. Greene provoked him. Although defendant's evidence does not support the aggressor instruction, the State's evidence supports it. By instructing jurors on the aggressor qualification, the trial court allowed the triers of fact to determine which testimony to believe. Not only was this not plain error, it was not error at all.

**[4]** Defendant next contends the trial court committed plain error by instructing jurors that they could infer premeditation and deliberation from the "brutal or vicious circumstances of the killing" and from defendant's use of "grossly excessive force."

The trial court instructed jurors as follows:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from

> which they may be inferred, such as lack of provocation by the victim, conduct of the defendant before, during and after the killing, threats and declarations of the defendant, use of grossly excessive force . . . . You may also consider brutal or vicious circumstances of the killing. You may also consider the manner in which or means by which the killing was done.

Defendant did not object to this instruction at trial. Any defect in the instruction, therefore, must rise to the level of plain error for defendant to be entitled to relief on appeal. N.C. R. App. P. (10)(b)(2); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

Defendant relies on *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975), a capital case in which we held it was prejudicial error to instruct jurors that they could infer premeditation and deliberation from the "dealing of lethal blows after the deceased has been felled and rendered helpless" and the "vicious and brutal slaying of a human being." In *Buchanan* the defendant, having found the victim and two others stealing firewood, told the victim to drop the wood if he did not want his brains blown out. As the victim dropped the wood, the defendant shot him once and told the others to leave if they did not want to be shot, too. The defendant then moved his truck to allow the victim's companions to transport him to a hospital. This Court held that the evidence did not suggest that the defendant had dealt lethal blows after the victim was felled and did not show a " 'vicious and brutal' killing in the sense those terms are usually employed." 287 N.C. at 422, 215 S.E.2d at 88. The evidence showed that the defendant and the victim had been friendly before the day of the shooting.*

Unlike *Buchanan* there is here evidence of defendant's use of grossly excessive force. He fired a semi-automatic rifle, fully loaded with sixteen rounds, seven times at the victim, hitting his target twice. This is enough to show grossly excessive force. *State v. Shepherd*, 288 N.C. 346, 218 S.E.2d 176 (1975) (grossly excessive

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* *Buchanan* was a capital case in which the Court noted the unassigned instructional error on its own motion:

> If this were not a capital case, then defendant's conviction would stand since we can find no error in the assignments brought forward. However, since this is a capital case, and in accord with the well-settled practice of this Court, we have elected to consider *ex mero motu* certain portions of the trial court's charge.

287 N.C. at 419, 215 S.E.2d at 87.

force shown by firing entire fourteen-round load of semi-automatic rifle at victim, four of which struck the victim in the back). Assuming without deciding that the evidence does not support a "brutal or vicious" circumstance instruction, and that such instruction was error, we are confident it did not rise to the level of plain error. "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. Stevenson*, 328 N.C. 542, 548, 400 S.E.2d 396, 399 (1991); *accord State v. Black*, 328 N.C. 191, 200-01, 400 S.E.2d 398, 404 (1991); *State v. Sanderson*, 327 N.C. 397, 403, 394 S.E.2d 803, 806 (1990); *Odom*, 307 N.C. at 661, 300 S.E.2d at 378.

There was a plethora of other evidence in this case which supported a reasonable inference of premeditation and deliberation. The night before the shooting, defendant told Mary Millwood that he was going to get a gun and kill Mr. Greene the following day. Two days before the shooting, defendant told Cathy Mathis he was going to kill Mr. Greene. Two or three weeks before the shooting, defendant told Hazel Greene that he would kill Mr. Greene. The day of the shooting, defendant pointed out the gun in the cab of his truck to Jean Harris. Less than an hour before the shooting, defendant wore stripes of colored paint on his face and acknowledged to Paul Honeycutt that it was "war paint." Even if the instruction regarding a brutal and vicious killing was error, because of the other strong evidence of premeditation and deliberation, it is not probable that without this instruction the jury would have reached a different verdict more favorable to defendant. Thus defendant cannot show plain error.

For the foregoing reasons, we find defendant's trial to have been fairly and properly conducted by the able trial judge. The result on appeal is

No error.

STATE OF NORTH CAROLINA v. WALTER WEDDINGTON

No. 346A90

(Filed 12 June 1991)

1. **Criminal Law § 496 (NCI4th)— testimony read during jury deliberations—no error**

The trial court in a first degree murder case did not err by permitting the complete testimony of the victim's daughter to be read to the jury during the course of its deliberations, since the entire jury was present during the foreman's request and the recitation of the testimony; the trial court stated three times that it was permitting the testimony to be read to the jury in the trial court's discretion; the court twice instructed the jury that it must remember and consider all of the evidence; the most damaging evidence against defendant was testimony concerning defendant's own statements and the physical evidence presented, not the testimony of the victim's daughter; and the court insured that defendant would not suffer any unfair prejudice when it had the testimony from both the direct and the cross-examinations of the witness read to the jury and properly instructed the jury to consider all the evidence presented. N.C.G.S. § 15A-1233(a).

**Am Jur 2d, Trial §§ 1025, 1041-1044.**

2. **Criminal Law § 868 (NCI4th)— jury request for instructions—more thorough instruction given than requested—no error**

The trial court did not err in failing to instruct the jury, in response to a juror's specific request for clarification, that the intent to kill essential to the offense of first degree murder must have existed at the time the act which caused death occurred, since the court determined that there was general confusion among the jurors about the elements of the crime charged and properly determined that repeating the pertinent portions of its instructions in their entirety would answer all the questions, and the trial court's additional instructions avoided giving undue prominence to any one of the questions or any part of the instructions. N.C.G.S. § 15A-1234.

**Am Jur 2d, Homicide §§ 496, 497, 499.**

APPEAL of right pursuant to N.C.G.S. § 7A-27 from judgment entered by *Sitton, J.*, in the Superior Court, MECKLENBURG County, on 31 October 1989, sentencing the defendant to life imprisonment for murder in the first degree. Submitted on 12 February 1991 without oral argument, by motion of the parties, pursuant to Rule 30(d) of the North Carolina Rules of Appellate Procedure.

*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 Constance H. Everhart, Assistant Appellate Defender, for defendant-appellant.*

MITCHELL, Justice.

The defendant was tried upon a true bill of indictment charging him with the murder of Irma Smith. 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 then 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 allowing the complete testimony of the State's key witness to be read to the jury during the course of its deliberations and by refusing to give certain jury instructions the defendant requested. We find no error.

The evidence adduced at trial tended to show that in August 1988, the defendant had been living with his girlfriend, Mary Barmore, for eight years. After meeting the victim, Irma Smith, who stated that she needed a place to live with her five children, the defendant agreed to allow her to live in one room of his house.

The State presented testimony from a Social Services worker and the victim's brother that Smith had been beaten badly during March of 1989. Her injuries included a "cauliflower" ear and a split earlobe.

The victim and her children lived at the defendant's home until 25 March 1989, when she came to the defendant's residence with two police officers in order to pick up her children. According to the officers, the victim was crying and had severe bruising

about her face and body. When the defendant came to the door, he said, "Move those goddamn police cars out of my driveway. Bitch, you brought the police here; you're a dead mother-f---er." He stated more than once that he was going to "kill that bitch." The officers were able to locate four of the victim's children and took them with the victim away from the defendant's house.

The victim was then taken to the magistrate's office, where a warrant was issued charging the defendant with assault. The defendant became aware of this assault charge prior to the victim's death. In addition, the defendant was the beneficiary of a life insurance policy insuring the life of the victim.

Kiki Smith, the victim's thirteen-year-old daughter, stated that on 15 April 1989, she was living with the defendant, her mother, three brothers and sisters, and Mary Barmore at the defendant's residence. On that day, she and her mother were in one room when the defendant arrived. The defendant called the victim into another room and an argument ensued. The defendant hit the victim with his fist, kicked her in the stomach and face, grabbed her by the hair, and threw her out the back door. Kiki heard two shots, after which the victim returned to the kitchen. The defendant began beating the victim again and took her back out of the house. Kiki heard two more shots and then heard no more sounds from her mother.

The defendant then dragged the victim's body into the house. He told Kiki and her brother to go to the store and buy some ammonia. When they returned, they ran water into the bathtub for the victim. Both the defendant and Barmore attempted to revive the victim. Finally, the defendant said, "I killed her, Mary; she's dead." He then put the victim in his car and left the residence.

At approximately 11:50 p.m., the defendant arrived at the emergency room of Charlotte Memorial Hospital. He told the security guard at the emergency room that the woman in the car had been shot and needed a nurse. The security guard observed that the victim had been shot in the right side of the head and was unconscious. After the security guard had called a nurse, the defendant returned to his car and left the hospital without identifying either himself or the victim. As he drove away, he passed a security guard who wrote down the vehicle's license tag number.

The nurse who examined the victim noticed a hole in the right side of her head and that her ear was missing. An emergency room physician also examined the victim. He noticed deep lacerations on her legs and arms, bruises to the upper parts of the body, and a large hole in her right ear. Her pupils were fixed and dilated, and her corneas were dry. The physician determined that the victim had been dead for two to four hours prior to the time she arrived at the hospital.

After leaving the hospital, the defendant went to the home of Doris and Erskine Thornwell. Ms. Thornwell had known the defendant for over twenty-five years. As the defendant arrived at the house, Mr. Thornwell was returning home from work. The defendant asked to speak with Ms. Thornwell. The defendant told the Thornwells, "I done killed Irma." He then showed them a gun, at which time Mr. Thornwell asked the defendant to leave. The Thornwells contacted the police shortly thereafter.

The defendant then went to Mattie Massey's home and had a drink with her boyfriend, Bert Potlow. The defendant told them, "I done killed that bitch; I done blowed her head off; I done blowed her brains out." He also told Massey, "I ought to blow your brains out." The defendant then showed them a gun, identifying it as the gun that he had "blowed the bitch's brains out with." The defendant then appeared to fall asleep or pass out, and Massey and Potlow left him in the house. They called the police, but the defendant had left by the time they returned to the house with the police.

Ultimately, the police located and arrested the defendant. A .38 caliber revolver was seized from the defendant's person, as well as a .25 caliber Baretta semi-automatic pistol. There were live rounds in the chamber of the .38 revolver, which was later determined to be the weapon used to kill the victim.

A search of the defendant's car revealed blood of the same type as the victim's. There was also blood on the front porch of the defendant's residence. Further, four spent casings, which had been fired from the defendant's .38 caliber revolver, were found at his home. In addition, a gunshot residue test indicated that the defendant had fired a gun recently.

The defendant contended that on the night the victim was killed, she engaged in a fight with a prostitute, which resulted

in bloody marks on the victim's face. After the fight, the victim went to the defendant's house. When the defendant saw the victim, he believed that she had been drinking, and he observed bruises on her forehead.

The victim then accompanied the defendant to a store. When they were returning from the store, they passed two prostitutes, and the victim became angry and began cursing. When the defendant stopped his car in front of his house, he reached under the front seat, pulled out a .38 caliber revolver and put it in his belt for protection as he left the car and entered his house. As the defendant got out of his vehicle, the victim got out of the car and yelled, "You should have let me kill the bitch." She approached the defendant and grabbed the gun from his belt. While they struggled, the defendant slipped, and the gun fired once. The victim fell to the ground. The defendant called for Mary Barmore to get a towel, and he wiped the victim's face. The victim was never taken back into the house.

The defendant decided to take the victim to the hospital. After arriving at the emergency room, the victim was taken inside. A security guard told the defendant to move his car. He moved the car to a parking lot and noticed he had lost his wallet. He then decided to return home to look for his wallet. On the way, he stopped at the Thornwells' house and told Doris Thornwell, "It's been an accident . . . Irma has gotten shot; I cannot believe . . . We was scuffling over a gun."

The defendant then went to Mattie Massey's house and told her boyfriend, Jimbo Potlow, that Irma had just gotten shot and that they had been struggling over a gun. He said that Potlow was intoxicated and that they had a drink together. Then for some reason, Massey and Potlow left the house, although the defendant remained. The defendant never showed a gun to Massey.

After leaving Massey's residence, the defendant returned home and asked Barmore if she had seen his wallet. He subsequently found the wallet in the yard.

Because he was unable to obtain any information about the victim's condition from the hospital, the defendant telephoned "Momma Gussey" Stanley, whom he thought of as his mother. He told her that there had been an accident and that he wanted her to go to the hospital with him because he could not learn

whether the victim was dead. As he left the house to go to Stanley's, he picked up the .25 caliber pistol which he was taking to her because she wanted it for protection. When he arrived at her house, the police arrested him and found the .25 automatic and the .38 revolver in his jacket pocket.

**[1]** In his first assignment of error, the defendant contends that the trial court erred by permitting the complete testimony of Kiki Smith to be read to the jury during the course of its deliberations. Specifically, he contends that this constituted an unbalanced presentation of part of the evidence.

After the jury retires for deliberation, the trial court is authorized, upon the jury's request, to allow requested parts of the testimony to be read to the jury. Our statute provides that:

> (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C.G.S. § 15A-1233(a) (1988). Whether to allow a jury's request that previously admitted testimony be read to it lies solely within the discretion of the trial court. *State v. Burgin*, 313 N.C. 404, 329 S.E.2d 653 (1985).

The statute, N.C.G.S. § 15A-1233(a), imposes two duties upon the trial court when it receives a request from the jury to review evidence. *State v. Ashe*, 314 N.C. 28, 34, 331 S.E.2d 652, 656 (1985). First, the trial court must have all jurors present in the courtroom. Second, the trial court must exercise its discretion in determining whether to permit the requested evidence to be read to the jury. *Id.; see State v. Lewis*, 321 N.C. 42, 361 S.E.2d 728 (1987).

The entire jury was present during the foreman's request and the recitation of the testimony. Therefore, there is no allegation that the court did not fulfill its first duty under N.C.G.S. § 15A-1233(a). In addition, the trial court three times stated that it was permitting the testimony to be read to the jury in the trial court's discretion.

Therefore, this case may be distinguished from those cases in which the trial court erroneously informed the jury that there was no procedure which permitted them to review testimony. *State v. Lang*, 301 N.C. 508, 272 S.E.2d 123 (1980). When the trial court states for the record that, in its discretion, it is allowing or denying a jury's request to review testimony, it is presumed that the trial court did so in accordance with N.C.G.S. § 15A-1233. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). In addition, the trial court must instruct the jury that it must remember and consider the rest of the evidence. *State v. Watkins*, 89 N.C. App. 599, 366 S.E.2d 876, *disc. rev. denied*, 323 N.C. 179, 373 S.E.2d 123 (1988).

Specifically, in response to the defendant's objection to the reading of Kiki Smith's testimony, the trial court stated: "Let the record show that WITHIN THE DISCRETION OF THE COURT, the Court OVERRULES THE OBJECTION and WITHIN THE DISCRETION OF THE COURT, permits the Court Reporter to re-read the testimony that is being requested be re-read by the jury." Then, with the entire jury and alternates present in the courtroom, the trial court told the jury:

> In regard to this request, Members of the jury, the Court, within its discretion, will ALLOW the testimony to be re-read to the jury. Before that is done, however, I instruct you that it is your duty, as jurors, to remember all of the testimony and all of the evidence.
>
> The fact that the Court has merely allowed you to hear a portion of the testimony, I will [sic] doing so, only in an effort to answer your request in regard to what you are seeking to hear.
>
> Again, you're to take all of the evidence into consideration in your deliberations.

At this point, the trial court reporter re-read several hours of Smith's testimony, on both direct and cross-examination.

At the conclusion of the reading and prior to the jury's resuming deliberations, the trial court again instructed the jury as follows: "Members of the jury, again, as I told you at the outset, the Court permitted that, within the Court's discretion, based upon your request. It is your duty to recall and consider all of the evidence in your deliberations." Therefore, the trial court properly instructed the jury in accordance with this Court's earlier decisions.

Alternatively, the defendant contends that even if the trial court exercised its discretion in permitting the jury to hear the requested testimony, it was an abuse of discretion so grossly prejudicial that it resulted in a violation of the defendant's constitutional rights. We disagree.

The fact that the trial court granted the jury's request that the testimony of a State's witness be read does not in and of itself constitute prejudicial error. *State v. Watkins*, 89 N.C. App. 599, 366 S.E.2d 876, *disc. rev. denied*, 323 N.C. 179, 373 S.E.2d 123 (1988). The defendant must show the trial court abused its discretion. To make the showing, the defendant must demonstrate that the trial court's action was "so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

Here, the most damaging evidence against the defendant was testimony concerning the defendant's own statements and the physical evidence presented. The defendant's statements shortly before the killing that he would kill the victim and his statements after the killing that, "I done killed the bitch. I done blowed her head off; I done blowed her brains out" were clear statements of intent. The location of four shell casings from the defendant's gun negated his contention that there was one accidental shot. The victim's blood found on the defendant's front porch negated his assertion that he moved the victim from the ground near the car immediately into the car. Finally, the physical evidence of the fatal wound inside the victim's ear belies the defendant's contention of an accidental shooting. Smith's testimony was not the sole evidence upon which the State relied to support its case for first-degree murder. Therefore, any contention that the reading of Smith's testimony in and of itself constituted prejudicial error is feckless.

In addition, the trial court insured that the defendant would not suffer any unfair prejudice when it had the testimony from both the direct and the cross-examinations of Smith read to the jury and properly instructed the jury to consider all the evidence presented. Fully half of the testimony read was from the defendant's cross-examination. During cross-examination, Smith had been impeached with prior inconsistent statements, as well as by the defendant's questioning her ability to observe what she contended she saw on the day of the murder. No unfair prejudice to the defendant resulted from the trial court's having Smith's entire

testimony read to the jury. The trial court did not abuse its discretion, and this assignment of error is overruled.

**[2]** The defendant next assigns as error the trial court's failure to instruct the jury, in response to a juror's specific request for clarification, that the intent to kill essential to the offense of first degree murder must have existed at the time the act which caused death occurred. One juror asked: "Does intent (or intentionally) have to exist at the exact moment of the action?" At trial, the defendant agreed that reinstructing the jury on all the elements of the offense was adequate. The defendant now contends, however, that the trial court should have responded that "the specific intent to kill necessary to support a conviction of first-degree murder must exist at the time the offense is committed."

The instructions given were in conformity with the defendant's assent and are not error. *State v. Herring*, 322 N.C. 733, 370 S.E.2d 363 (1988). The defendant will not be heard to complain on appeal when the trial court has instructed adequately on the law and in a manner requested by the defendant. Further, once the jury retires for deliberation, the trial court may give appropriate additional instructions in response to an inquiry made by the jury in open court. N.C.G.S. § 15A-1234 (1988). When the trial court gives such additional instructions, it may also give or repeat other instructions to avoid giving undue prominence to the additional instructions. *Id.*

The trial court is in the best position to determine whether further instructions will be needed to prevent an undue emphasis being placed on a particular portion of its instructions. *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986). The trial court is not required to frame its instructions with any greater particularity than is necessary to enable the jury to understand and apply the law to the evidence bearing upon the elements of the crime charged. *State v. Ward*, 300 N.C. 150, 266 S.E.2d 581 (1980).

Here, the questions asked the jurors indicated a general confusion about the elements of the crime charged, and the trial court properly determined that repeating the pertinent portions of its instructions in their entirety would answer all the questions. The trial court's additional instructions avoided giving undue prominence to any one of the questions or any part of the instructions. Therefore, the trial court did not err, and this assignment is without merit.

The defendant received a fair trial free of prejudicial error.

No error.

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STATE OF NORTH CAROLINA v. RICHARD WAYNE JOYNER

No. 226A89

(Filed 12 June 1991)

1. **Homicide § 21.5 (NCI3d)— murder—defendant's statement—premeditation and deliberation—sufficiency of evidence**

The trial court did not err in a murder prosecution by denying defendant's motion to dismiss based on an exculpatory statement showing lack of premeditation and deliberation where the statement in no way indicates that defendant was provoked to shoot or that his action was reflexive. The evidence shows that defendant prepared to shoot the victim by loading his gun and putting the safety on before he got out of his car; defendant removed the safety after the victim arrived, knowing that shells were chambered and ready to be fired; defendant was approximately thirty feet from the victim when the victim directed a flashlight beam at defendant's face; the victim and defendant exchanged no words and had no physical contact; and defendant's statement is a factual account devoid of any words indicating provocation or surprise.

**Am Jur 2d, Homicide § 439.**

2. **Assault and Battery § 83 (NCI4th)— secret assault—homicide by lying in wait—refusal to arrest assault judgment—error**

The trial court erred by refusing to arrest judgment on defendant's conviction for secret assault where defendant was also convicted of murder based on lying in wait. To provide additional punishment for the assault underlying the murder conviction would serve little purpose other than to augment paper work, trial time, and the potential for error in an already overburdened court system.

**Am Jur 2d, Assault and Battery § 56.**

**3. Criminal Law § 1352 (NCI4th) — murder — sentencing — McKoy error**

The trial court erred when sentencing defendant for murder by imposing a unanimity requirement for finding mitigating circumstances, and the error was not harmless because there was evidence to support at least some of the mitigating circumstances submitted but not found.

**Am Jur 2d, Criminal Law § 600.**

**Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.**

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Winberry, J.*, at the 15 May 1989 Criminal Session of Superior Court, NASH County, upon a jury verdict finding defendant guilty of first-degree murder. On 17 May 1990 this Court allowed defendant's motion to bypass the Court of Appeals on his related robbery with a dangerous weapon and secret assault charges. Heard in the Supreme Court 7 May 1991.

*Lacy H. Thornburg, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.*

*Ralph G. Willey, III, and Terry W. Alford for defendant appellant.*

WHICHARD, Justice.

Defendant was convicted of first-degree murder on the basis of premeditation and deliberation, felony murder, and lying in wait. He also was convicted of robbery with a dangerous weapon and secret assault. He was sentenced to death for the murder, to fourteen years imprisonment for the robbery (consecutive), and to six years imprisonment for the secret assault (concurrent). We find no error in the guilt phase of the murder trial. The State concedes, and we agree, that defendant is entitled to a new sentencing proceeding under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). We find no error in the robbery trial. We arrest judgment on the secret assault conviction.

The State's evidence tended to show that around 7:00 p.m. on 1 December 1988, Ray Narron heard two gunshots in rapid

succession. When he discovered that a shot had penetrated his air conditioner, he called the Nash County Sheriff's Department to report the shooting.

Deputy Mike Boone arrived at Narron's home, which is across the street from Harvey Lee Skinner's trailer, at 7:27 p.m. Boone took Narron's statement and drove to other residences to see if anyone had information about the shooting. When Boone turned into Skinner's driveway, he saw Skinner's body lying on its back. He determined that Skinner was dead and that he had been shot.

Investigator Dennis Honeycutt testified that Skinner's Ford Ranger truck was parked in the driveway, a set of keys was on the ground near Skinner's knee, and a cardboard shotgun wadding was about eleven inches from the keys. Investigators also found an unopened moneybag on the ground about nine feet from the victim's body. The bag contained $50.00 worth of food stamps and $769.00 in cash.

Investigators found three Federal twelve-gauge, triple-aught buckshot shell casings in the victim's yard. Two shells were approximately two feet apart and thirty feet from the victim's body. Investigators found the third shell eleven feet from the victim's body.

Deputy Boyce Varnell testified that on the morning after the shooting he went to Narron's Trailer Park across the road from the store the victim operated. As Varnell knocked on the door of a trailer, he heard two people running down the hall. When a woman let Varnell in the trailer, defendant and a man who said he was defendant's brother came out of the back of the trailer. Defendant told Varnell he had heard the victim arguing about money with some black men. Defendant said he had been at work at the Pepsi-Cola plant the night before and he owned a twelve-gauge shotgun. Varnell testified that when he examined the gun he noted a strong odor of gunpowder, indicating that the gun had been fired recently. He also found four triple-aught Federal shells.

State Bureau of Investigation Agent Michael Gavin testified that the murder weapon was a semi-automatic shotgun capable of discharging three shots in one and one-half seconds. He also testified that defendant's shotgun fired the shells found at the crime scene.

Deputy Milton Reams testified that defendant's supervisor said defendant had not been at work for a week. When Reams told

defendant the deputies knew he had not been honest with them, defendant confessed to shooting the victim. Reams read defendant's statement into evidence.

In the statement, defendant said he lived at the trailer park with his brother, Daniel Joyner, and Betty and Larry Whitbeck. Defendant said he had been thinking for a few days about robbing the victim but did not want to do so in a place where the victim could see him. When he left the trailer at 4:00 p.m. on 1 December 1988, he took his shotgun. During the day, defendant smoked about six or seven marijuana cigarettes. Defendant said after he decided at about 5:00 p.m. to rob the victim, he drove down a path behind the victim's trailer and loaded his gun. He went to the back of the victim's trailer and waited for about an hour and a half. When Skinner parked his Ranger and got out, defendant took the safety off and stepped around the corner. The victim shined a flashlight beam on defendant, and defendant shot him. Defendant said the victim fell to the ground after the second shot. Defendant shot him a third time, looked without success for the money, picked up the flashlight, and ran to his car. He drove around, smoked more marijuana, and threw the victim's flashlight in the woods before returning home.

Reams also testified that after making the confession, defendant accompanied deputies to the victim's trailer and retraced his actions of the previous night. With defendant's consent, the police photographed him during the demonstration.

Dr. Louis Levy, a forensic pathologist, testified that he noted thirty-five entry and exit wounds on the victim's body, mostly on the left side. There were some entrance wounds on the victim's back. He testified that the wounds resulted from several shotgun blasts and concluded that the wound to the left flank was the predominant cause of death. He also discovered a plastic shotgun wad under the victim's tee shirt and some wadding in the body. The wadding contained cloth fibers matching the fibers of the victim's shirt. In Levy's opinion, the presence of wadding beneath the victim's clothing and inside his body indicated that the shot transporting the wad was fired from a distance of about ten feet. The angle of the wound to the left flank was upwards, indicating that the body was on the ground when shot.

Defendant did not present evidence in the guilt phase.

GUILT PHASE

**[1]** Defendant assigns as error the trial court's denial of his motion to dismiss the charge of first-degree murder on the basis of malice, premeditation and deliberation. Defendant contends his statement shows he did not premeditate and deliberate before shooting the victim. He argues that his statement is exculpatory and that the State is bound by all exculpatory evidence contained in the statement not contradicted by other evidence.

Premeditation means thought before action, " 'for some length of time, however short.' " *State v. Biggs*, 292 N.C. 328, 337, 233 S.E.2d 512, 517 (1977) (quoting *State v. Reams*, 277 N.C. 391, 401, 178 S.E.2d 65, 71 (1970) ). Before a jury may consider the charge of first-degree murder based upon premeditation and deliberation, the State must present substantial evidence of each essential element of the offense and of defendant as the perpetrator. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

> The trial court in considering [motions to dismiss] is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. . . . The trial court's function is to test whether a *reasonable inference* of the defendant's guilt of the crime charged may be drawn from the evidence.

*Id.* at 99, 261 S.E.2d at 117 (citations omitted).

Whether an action is premeditated depends on whether thought preceded action, not the length of the thought. *State v. Britt*, 285 N.C. 256, 262, 204 S.E.2d 817, 822 (1974). Further, both premeditation and deliberation are mental processes generally proven by actions and circumstances surrounding the killing.

> Deliberation means an intent to kill executed 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. . . . Premeditation and deliberation refer to processes of the mind. They are not ordinarily subject to proof by direct evidence, but must generally be proved, if at all, by circumstantial evidence. . . . Among the 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 defendant 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. Williams*, 308 N.C. 47, 68-69, 301 S.E.2d 335, 348-49, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983) (citations omitted); *see also State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986).

It is well established that "[w]hen the State introduces into evidence a defendant's confession containing exculpatory statements which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by the exculpatory statements." *State v. Williams*, 308 N.C. at 66, 301 S.E.2d at 347. However, defendant's argument that his statement was exculpatory is incorrect. The statement in no way indicates that defendant was provoked to shoot or that his action was reflexive. Defendant gave the investigators the following account:

> When I took the safety off I stepped around the corner and Skinner turned a flashlight on me.
>
> Then I shot Skinner. Skinner did not say anything nor did I. Then I fired a second time. . . .
>
> . . . .
>
> Then I shot again and had taken three or four steps on the second shot. I walked closer because he scared me when he screamed. We did not speak on the second shot. He just screamed again.
>
> Skinner was still standing after the first shot. The second shot, Skinner hit the ground.

On the whole, the statement is a factual account devoid of any words indicating provocation or surprise. Indeed, the statement's only implication of a perception by defendant is his explanation that he advanced because Skinner "scared me when he screamed." However, Skinner did not scream until the second shot, the shot that felled him. The statement does not indicate in any way that defendant fired because of a spontaneous reaction or because he was provoked.

The evidence shows, instead, that defendant prepared to shoot the victim by loading his gun and putting on the safety before he got out of his car. After the victim arrived, defendant removed the safety, knowing that shells were chambered and ready to be fired. Defendant was approximately thirty feet from the victim when the victim directed a flashlight beam at defendant's face. The victim and defendant exchanged no words and had no physical contact.

These facts do not show legal provocation. *See State v. Williams*, 308 N.C. at 69, 301 S.E.2d at 349 (not legal provocation when one-hundred-year-old victim threw salt at defendant after defendant broke into her home). By defendant's own statement, he was not scared until he fired the second shot. Also, according to defendant's account and the physical evidence, the victim was lying on the ground when defendant shot a third time at close range. Certainly an unarmed victim hit twice by shotgun blasts and lying on his back has "been felled and rendered helpless," *id.*, when the assailant fires the third shot. The trial court did not err in submitting the charge of first-degree murder based upon premeditation and deliberation to the jury.

**[2]** Defendant next contends that, in light of his conviction for murder based on lying in wait, the trial court erred in refusing to arrest judgment on his conviction for secret assault. We agree. We do not ascribe to the legislature the intent to punish a defendant both for a secret assault and for a murder when the assault is the very act that underlies the conviction for first-degree murder by lying in wait. *See State v. Perry*, 305 N.C. 225, 234-37, 287 S.E.2d 810, 816-17 (1982).

"The intent of the Legislature controls the interpretation of a statute." *Id.* at 235, 287 S.E.2d at 816. We believe the purpose of the secret assault statute is to provide for the protection of society in cases of assault from ambush which do not result in the death of the victim, while the purpose of the murder by lying in wait statute is to provide for such protection in cases of assault from ambush which do result in the death of the victim. *See State v. Allison*, 298 N.C. 135, 147-48, 257 S.E.2d 417, 425 (1979). A defendant convicted of first-degree murder by lying in wait is sentenced either to death or to life imprisonment. N.C.G.S. § 14-17. To provide for additional punishment for the assault underlying the murder conviction would serve little purpose other than to augment paper

work, trial time, and the potential for error in an already overburdened court system. We do not believe the legislature, in enacting the secret assault and murder by lying in wait statutes, so intended, and we accordingly arrest the judgment entered upon the secret assault conviction.

SENTENCING PHASE

**[3]** 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).

After reviewing the record, we conclude that the trial court gave the unconstitutional *McKoy* instruction. Thus, unless the State demonstrates that the error was harmless beyond a reasonable doubt, defendant must have a new sentencing proceeding. *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 462; N.C.G.S. § 15A-1443(b) (1988). The trial court submitted eight possible mitigating circumstances and the jury, operating under the unanimity instruction, found only one. There was evidence to support at least some of the circumstances not found. The State does not deny that the unanimity requirement may have affected at least one juror's vote on at least some of the seven circumstances not found and thus affected the jury's sentencing recommendation. *See State v. Smith*, 328 N.C. 99, 138-39, 400 S.E.2d 712, 734-35 (1991); *State v. Brown*, 327 N.C. 1, 29-30, 394 S.E.2d 434, 451-52 (1990). Because we cannot conclude that the *McKoy* error was harmless, we order a new sentencing proceeding.

Case No. 88CRS15500, first-degree murder: Guilt phase, no error; sentencing phase, new sentencing proceeding.

Case No. 88CRS15501, robbery with a dangerous weapon: No error.

Case No. 88CRS15502, secret assault: Judgment arrested.

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MARY SWILLING v. WILLARD SWILLING

No. 379PA90

(Filed 12 June 1991)

1. **Evidence § 47 (NCI3d)— expert appraiser—appointed by court—appointment proper—compensation**

A real estate appraiser was properly appointed as an expert witness in an equitable distribution action, was properly permitted to testify, and was entitled to compensation where, even though the trial judge did not enter an order to show cause why an expert should not be appointed, the language of the order sufficiently put the parties on notice that the court would appoint an appraiser if the parties did not respond to the court with the name of a mutually acceptable appraiser within 48 hours. This was a show cause order within the meaning of N.C.G.S. § 8C-1, Rule 706(a).

**Am Jur 2d, Divorce and Separation §§ 587, 942.**

2. **Witnesses § 10 (NCI3d)— equitable distribution—court appointed appraiser—report supplied to defendant on morning of hearing—defendant to share costs**

A defendant in an equitable distribution action was required to pay half of a court appointed appraiser's fee even though he did not receive the report until the morning of the hearing where he did not show that he was prejudiced by not receiving a copy of the appraisal earlier. Defendant's attorney stated during the hearing that he had no objection to the witness giving testimony and he fully cross-examined the witness on his appraisal.

**Am Jur 2d, Divorce and Separation §§ 587, 942.**

**3. Appeal and Error § 177 (NCI4th)— equitable distribution—appeal—expert witness fee—authority of trial court**

An amended order of the trial court taxing a court appointed appraiser's fees as costs, entered after appeal was perfected, merely reiterated prior orders. Even if the amended order was void for lack of jurisdiction, the court's previous orders requiring each party to pay half still stand.

**Am Jur 2d, Divorce and Separation §§ 587, 942.**

**4. Witnesses § 10 (NCI3d)— court appointed appraiser—amount of fee—reasonable**

The amount of the fee the parties were ordered to pay to a court appointed appraiser in an equitable distribution action was held reasonable upon a review of his testimony. Because defendant had the opportunity at trial to examine the appraiser about the source of or justification for his fee and failed to do so, he waived his right to contend on appeal that the trial court erred by failing to make findings on these matters. N.C.G.S. § 8C-1, Rule 706(b).

**Am Jur 2d, Divorce and Separation §§ 587, 942.**

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 99 N.C. App. 551, 393 S.E.2d 303 (1990), reversing the order of equitable distribution entered by *Roda, J.*, filed on 2 June 1989 in District Court, BUNCOMBE County. Heard in the Supreme Court on 11 March 1991.

*No counsel contra.*

*Riddle, Kelly & Cagle, P.A., by E. Glenn Kelly, for defendant-appellant.*

MARTIN, Justice.

Plaintiff filed this action seeking a divorce, alimony, and an equitable distribution of marital property in the District Court, Buncombe County, on 5 August 1987. A judgment granting an absolute divorce was entered 10 May 1988, and after hearings before Roda, J., in February and March of 1989, an equitable distribution order was entered on 2 June 1989. Both plaintiff and defendant appealed to the Court of Appeals, which reversed the equitable distribution order. This Court granted defendant's petition for discre-

tionary review of the Court of Appeals' holding with respect to the appointment of a certain expert witness during the equitable distribution proceedings and the taxing of the witness's fees to the parties.

On 10 May 1988, the judgment for absolute divorce between plaintiff and defendant was entered in Buncombe County. The present equitable distribution cause of action was calendared several times for hearing during 1988, but it was continued each time. On 11 October 1988, an order was filed further continuing the case because of the illness of the defendant. This order, *inter alia*, appointed a receiver for the marital property, provided that defendant pay an alimony arrearage, ordered that each party disclose and deliver to the other party a copy of a recent tax return, and, particularly relevant to the instant appeal, ordered:

> 7. That an appraiser be appointed and that should Plaintiff and Defendant agree on an appraiser, the Court will appoint said appraiser; otherwise, if the Court has not heard from the parties within 48 hours from the date hereof, the Court will appoint an appraiser of its choice, which said appraiser shall be a duly qualified real estate [sic] and an MIA practicing in Buncombe County, North Carolina, and that said appraiser shall appraise all properties of the Plaintiff and Defendant and shall furnish a copy of the appraisal to the Plaintiff and the Defendant on or before November 1, 1988. That **J.R. Byerly** is hereby appointed to appraise the marital property, **his fees to be equally divided between the parties.**

The foregoing words in bold type were added in handwriting and were initialed, "G.S.C.," apparently indicating the initials of Gary S. Cash, the judge presiding who signed the order at its close with his full name.

On 22 February 1989, the equitable distribution matter came on for hearing in Buncombe County District Court with the Honorable Peter L. Roda, Judge Presiding. The first witness to testify was James R. Byerly, the appraiser appointed pursuant to the order partially reproduced above. Byerly was first examined by plaintiff's attorney, Wade Hall, followed by defendant's attorney, Robert Riddle. The court found Mr. Byerly to be an expert in the field of real estate appraisals. The following colloquy then occurred:

MR. RIDDLE: Judge, could we make this entry? I notice in the Court's order, the Court had specified that the court-appointed appraiser would be a member of the Institute of Appraisers, and I gather from what Mr. Byerly is saying that is not the case.

I certainly have no objection to Mr. Byerly giving testimony as an appraiser, but I would not want there to be any presumption that he is doing this pursuant to the Court's order and that he does not meet the requirements of the Court's order, apparently.

THE COURT: Well, he was appointed by the Court to appraise the property. I think at this late date I'll find that he is an expert, and Judge Cash specifically appointed him on October 11, 1988.

At the end of this discussion, Mr. Hall resumed questioning the witness, who proceeded to give his opinion about the value of various properties owned by the plaintiff and the defendant. Mr. Riddle followed with cross-examination during which he established that Mr. Byerly did not provide a copy of his appraisal report to Mr. Riddle until the morning of the hearing. After extensive re-direct and re-cross examination of this witness, the court ordered the appraiser's fee of $5,500 be paid "since he is a court-appointed appraiser." Defendant objected to the amount of the fee. The Court also remarked that Byerly would "have to get paid for today. He's been here four hours."

Subsequent to the hearing an equitable distribution order was filed on 2 June 1989. Plaintiff and defendant appealed. On 9 August 1989 Judge Roda entered an "Amended Order" requiring the parties to split equally a $5,750.00 fee to be paid to Mr. Byerly, an amount consisting of $250.00 for testifying during the hearing[1], and $5,500.00 for services rendered in appraising the properties. See N.C.G.S. §§ 7A-305(d) and 314 (1989).

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1. The trial court erroneously awarded Byerly the fee of $250.00 for testimony Byerly gave during the hearing itself. There is no evidence of record that Byerly testified pursuant to subpoena, and therefore he is not entitled to any fee for testimony given during the hearing. N.C.G.S. § 7A-314 (1989); *State v. Johnson*, 282 N.C. 1, 26-28, 191 S.E.2d 641, 658-59 (1972).

**[1]** Defendant-appellant first argues that because witness Byerly was improperly appointed under North Carolina Rule of Evidence 706(a), he should not have been permitted to testify, nor is he entitled to any compensation under Rule 706(b). N.C.G.S. Chapter 8C, Rule 706 (1988). This rule provides:

> Rule 706. Court appointed experts
>
> (a) *Appointment.*—The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.
>
> (b) *Compensation.*—Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

N.C.G.S. Chapter 8C, Rule 706 (1988).

Defendant argues, and the Court of Appeals agreed, that the trial judge did not enter an order to show cause why the expert witness should not be appointed; therefore, the expert was not properly appointed pursuant to Rule 706(a). We note that defendant did not object to the order appointing Mr. Byerly. Nevertheless, we hold that the language of the order of 11 October 1988 sufficiently put the parties on notice that the court would appoint an appraiser if the parties did not respond to the court with the name

of a mutually acceptable appraiser within forty-eight hours of 11 October 1988. This was a show cause order within the meaning of Rule 706(a). It follows that because Byerly was appointed in accord with Rule 706(a), he was properly allowed to testify and was entitled to reasonable compensation under Rule 706(b). *See also* N.C.G.S. § 6-1 (1986); N.C.G.S. § 7A-314(d) (1989). *Cf. City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E.2d 179 (1972).

**[2]** Defendant next argues that he should not have to pay any of Byerly's fee because Byerly failed to supply the defendant with his findings or a report of his appraisal until the morning of the hearing. Defendant argues that this belated delivery of his findings violated Rule 706(a) and the 11 October 1988 order requiring the appraiser to furnish a copy of his report to the plaintiff and defendant on or before 1 November 1988. *See United States v. Weathers*, 618 F.2d 663 (10th Cir.), *cert. denied*, 446 U.S. 956, 64 L. Ed. 2d 814 (1980) (stating that Federal Rule 706 is usually invoked before trial since there must be time for a hearing on an order to show cause, consent by the expert, notifying the expert of his duties, and findings to be communicated to the parties).

Defendant received the appraisal before the hearing began. By virtue of the 11 October order, defendant knew that Byerly was to supply him with a copy of the appraisal on or before 1 November 1988. There is no evidence that defendant moved for an order to compel Byerly to supply him with the appraisal report after this date came and went. There is no indication in the record that the defendant's failure to receive the appraisal report prior to the morning of the hearing in any way affected his ability to cross-examine this witness or to impeach his credibility. In fact, as mentioned above, defendant's attorney stated during the hearing that he "certainly had no objection to Mr. Byerly giving testimony as an appraiser." Defendant fully and completely cross-examined Byerly on his appraisal of the properties during the equitable distribution hearing. Therefore, we hold that defendant has failed to show that he was prejudiced by the failure to receive a copy of the appraisal before the morning of the hearing.

**[3]** Defendant next argues that the trial court had no authority to enter the amended order on 9 August 1989 which expressly taxed Byerly's witness fees as costs, with one-half payable by each party, for the reason that the parties had given notice of appeal

from the judgment on 2 June 1989, and therefore, the trial court had no jurisdiction to enter this order.

North Carolina General Statute § 1-294 provides in pertinent part that "[w]hen an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein . . . ." N.C.G.S. § 1-294 (1983). While an appeal is not perfected until it is actually docketed in the appellate division, a proper perfection relates back to the time of the giving of the notice of appeal, rendering any later orders or proceedings upon the judgment appealed from void for want of jurisdiction. *Lowder v. Mills, Inc.*, 301 N.C. 561, 581, 273 S.E.2d 247, 259 (1981) (vacating orders approving fees and expenses which orders were entered after notice of appeal was given). Although it is true that the parties duly perfected this appeal, and therefore the court's amended order of 9 August 1989 purporting to tax Byerly's fees to the parties would appear to be void, we note that this written order merely reiterated the court's prior orders of 11 October 1988 and 22 February 1989. As such, it is mere surplusage, and even if the 9 August order were void for lack of jurisdiction, the court's previous orders requiring each party to pay half of the compensation to be awarded to Byerly still stand.

**[4]** Finally, defendant contends that the amount of the witness fee was not "reasonable" within the meaning of Rule 706. Defendant contends that the trial court failed to make findings concerning (1) how much time Byerly spent in appraising the property; (2) Byerly's skills; (3) Byerly's hourly rate for appraisals; (4) the reasonableness of his hourly rate in comparison with other appraisers; and (5) what Byerly did. The hearing transcript reveals that at the time the court approved payment of Byerly's appraisal fee, the plaintiff's attorney asked the court the following:

> MR. HALL: I just wanted to know if Your Honor wanted to know at this time how much time he spent or anything of that nature. If Mr. Riddle wants to examine him as far as the bill is concerned. I just wanted to try to get that part of it out of the way. I realize we've got to pay half of it. We have no question about it. We're willing to pay our half, but I want to get it out before the Court at this time. So Mr. Byerly won't have to come back.

The court did not respond to this question directly. However, when Mr. Riddle, defendant's attorney, then proceeded to examine Byerly he failed to question him in any way with respect to the source of or justification for Byerly's appraisal fee. Because defendant had the opportunity to so examine the witness, we hold that he waived his right to contend on appeal that the trial court erred by failing to make findings on these matters. Upon review of all of Byerly's testimony during the hearing, we hold that the trial court properly ordered the parties to pay Byerly reasonable compensation in the amount of $5,500.00 for appraisal services as part of the costs. N.C.G.S. Chapter 8C, Rule 706(b) (1988).

The Court of Appeals erroneously held that the witness was not appointed in accord with N.C.G.S. Chapter 8C, Rule 706(a) and further erroneously held that the witness was entitled to a fee for testifying when not under subpoena. The Court of Appeals properly held that the trial court did not err in requiring the parties to pay reasonable compensation to the witness in the amount of $5,500.00 for services he rendered in appraising the marital property.

Affirmed in part, reversed in part.

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BARBARA ROGERS v. T.J.X. COMPANIES, INC. AND MICHAEL NOURSE

No. 32A91

(Filed 12 June 1991)

**False Imprisonment § 3 (NCI3d)– alleged shoplifting–false imprisonment–punitive damages proper**

There was sufficient evidence of outrageous conduct, in addition to that conduct constituting false imprisonment in an alleged shoplifting incident, to survive defendants' motion for summary judgment on the issue of punitive damages where such evidence tended to show that defendant Nourse, who identified himself as a store security officer, impersonated a police officer by using a badge of his own design; plaintiff was restrained against her will in the store security office for approximately one-half hour; plaintiff was badgered, insulted, and pressured to confess by defendant Nourse despite

her efforts to prove her innocence; plaintiff was frightened and upset and asked if she could leave; defendant unlawfully detained plaintiff after determining that no offense had been committed, N.C.G.S. § 15A-404(d) (1988); plaintiff was made to give up personal information including her driver's license number, telephone number, and social security number; and plaintiff was forced to sign a release of liability as a condition to her release from defendant Nourse's custody.

**Am Jur 2d, False Imprisonment §§ 141-144.**

**Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for false arrest or imprisonment. 93 ALR3d 1109.**

APPEAL by plaintiff 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. 99, 398 S.E.2d 610 (1990), reversing in part and affirming in part the entry of summary judgment in favor of defendants by *Hight, J.*, on 3 October 1989 in Superior Court, WAKE County. Heard in the Supreme Court on 8 April 1991.

*Toms, Reagan & Montgomery, by Frederic E. Toms and Charles H. Montgomery, for plaintiff-appellant.*

*Maupin, Taylor, Ellis & Adams, by Thomas W. Alexander and Sharon H. Spence, for defendant-appellees.*

MARTIN, Justice.

This action was filed on 12 August 1988 by the plaintiff for compensatory and punitive damages for false imprisonment and intentional infliction of emotional distress. Summary judgment for defendants was granted by Judge Henry W. Hight, Jr., on 3 October 1989. The Court of Appeals reversed the trial court on all claims except the punitive damages issue. Judge Phillips dissented in part, reasoning that the plaintiff's forecast of the evidence was sufficient to survive summary judgment with respect to punitive damages. The only issue before this Court is whether there is a genuine issue of material fact on the plaintiff's claim for punitive damages. We hold that the trial court erred in granting summary judgment for the defendants on that issue and therefore reverse the Court of Appeals.

The action arose out of events occurring on 17 July 1988 at the T.J. Maxx department store in Cary, North Carolina, owned by defendant T.J.X. Companies, Inc. Taken in the light most favorable to the plaintiff, as we must for summary judgment purposes, the evidence tends to show the following. Plaintiff entered T.J. Maxx, hereinafter "the store," about 4:30 P.M. shopping for linens. She wore bermuda shorts and a T-shirt and carried a pocketbook, approximately twelve inches by twelve inches. The purse contained two cosmetic bags, a wallet, two pens, a glasses' case, and a ziploc bag containing material and wallpaper samples. Plaintiff went first to the cosmetics area and then to the linens department. After leaving the linens department, she walked around a counter containing dishes and crystal and then left the store without making a purchase. Plaintiff never entered the lingerie department and never examined any items of lingerie.

As plaintiff exited the store, Michael Nourse stopped her, identified himself as a store security officer, and asked her to return to the store because he wished to talk with her about some merchandise. Nourse carried a badge of his own design and an identification card issued by the company; he showed these items to plaintiff. Plaintiff told him that he was making a mistake, but complied with his request and accompanied Nourse to his office at the back of the store. Plaintiff testified that she did not feel that she had a choice about accompanying Nourse because "he was the law of the store" and she had to obey him. On the way to the office, Nourse asked another store employee, Sheri Steffens, to join them and act as a witness.

Once inside the small office, plaintiff immediately dumped the contents of her purse onto the desk. Nourse told plaintiff to take a seat, but she refused, saying that this would not take long because she was a good customer and had not stolen anything. Nourse responded, "Good customers will steal," and again directed her to have a seat. Telling her he would soon return, he then left the office for five to fifteen minutes. Plaintiff testified that she believed that he might have gone to call the police, and she stepped out of the office to look for them. Seeing no one, she gathered up her belongings, but did not feel free to leave because Nourse had told her he would return. Steffens paged Nourse, who returned momentarily. He said to plaintiff, "Ma'am, all we want is our merchandise. What did you do with it? You were in our lingerie department." Plaintiff denied wrongdoing, again dumped her purse on

the desk, and told him that he must have seen her putting the packet of material samples into her purse. As she reached to gather her belongings, Nourse instructed her not to touch anything.

Nourse pulled down a clipboard hanging on the wall and showed her a card which said that the store employees had the right to detain her if they had reason to believe she had been shoplifting. Nourse repeatedly questioned plaintiff about the location of the missing merchandise as she tried to read the card. Plaintiff told him to "shut up" so that she could concentrate. Nourse remarked to Steffens, "Usually the dog that barks the loudest is guilty." Nourse then told plaintiff that he could call the police if she wanted them to settle it; that he could handcuff her to a chair; and that he would call the police and have them put her in jail. Plaintiff continued to deny the allegations and asked if he wanted her to take her clothes off to prove that she had not done anything, even though she was a very modest person. Steffens testified that plaintiff was very upset throughout the incident and that Nourse's attitude and demeanor toward plaintiff was sarcastic.

Nourse instructed plaintiff to sign two forms, one of which was a waiver of Miranda rights. The other form released T.J. Maxx from liability for any claims arising out of the incident. Neither of the papers had been filled out when plaintiff signed. Plaintiff testified that she signed the release form only because she believed that she would not be allowed to leave the store and go home if she did not sign it. Nourse refused to give plaintiff copies of the forms because it was not company policy. After signing the papers, plaintiff left the store and drove home. She had been in the security office approximately 35 minutes. About one-half hour after plaintiff left the store, Nourse announced to Steffens that he had found the missing merchandise, a beige brassiere.

Plaintiff's evidence showed that she became sick, nervous and upset as a result of the incident. She had difficulty sleeping and took sleeping pills for two weeks as prescribed by her doctor. In addition, she testified that she no longer went shopping because she felt as if someone was always looking over her shoulder.

False imprisonment is the illegal restraint of the person of any one against his or her will. *E.g., Hales v. McCrory-McLellan Corp.*, 260 N.C. 568, 133 S.E.2d 225 (1963). The tort may be committed by words or acts; therefore, actual force is not required. Restraint of the person is essential, whether by threats, express or implied,

or by conduct. *Id.* at 570, 133 S.E.2d at 227. The Court of Appeals held that plaintiff had established facts sufficient to support her claim for false imprisonment; however, the false imprisonment issue is not before us. The sole basis for the dissent was the issue of whether plaintiff's claim for punitive damages should survive summary judgment.

The purpose of punitive damages, sometimes denominated as exemplary damages or smart money, is two-fold: to punish the wrongdoing of the defendant and to deter others from engaging in similar conduct. *See generally* Ervin, *Punitive Damages in North Carolina*, 59 N.C.L. Rev. 1255 (1981). The tort in question must be accompanied by additional aggravating or outrageous conduct in order to justify the award of punitive damages. *Id.* at 1258-59; *see also Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976). To constitute outrageous behavior, there must exist evidence of " 'insult, indignity, malice, oppression or bad motive.' " *Hinson v. Dawson*, 244 N.C. 23, 27, 92 S.E.2d 393, 396 (1956) (quoting *Swinton v. Realty Co.*, 236 N.C. 723, 727, 73 S.E.2d 785, 788 (1953) ).

> Actual ill will or vindictiveness of purpose is not as a rule required[1]; and exemplary damages have been frequently awarded when the imprisonment was accompanied by circumstances of fraud, recklessness, wantonness, . . . bad faith, circumstances of oppression, . . . insult or outrage, willful injury, or a wrongful act without a reasonable excuse, . . . or in known violation of law.

35 C.J.S. *False Imprisonment* § 67 (1960); *see also Robinson v. Duszynski*, 36 N.C. App. 103, 243 S.E.2d 148 (1978) (aggravation shown where the wrong is done willfully or under circumstances of rudeness or oppression, or in a manner evincing a wanton and reckless disregard for plaintiff's rights). Willful conduct is done purposefully in violation of law, or knowingly of set purpose, or without yielding to reason. *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37 (1929). Wanton conduct is done wickedly or needless-

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1. In *Shugar v. Guill*, 304 N.C. 332, 283 S.E.2d 507 (1981), this Court held that where malice was relied upon as the requisite aggravating state of mind, actual or express malice, as demonstrated by personal ill will, must be proven. However, the tort involved in that case was not false imprisonment, but assault and battery. We need not address whether a finding of actual malice is necessary where the tort is false imprisonment because we find plenary evidence of the other possible states of mind to overcome defendant's motion for summary judgment.

ly, manifesting a reckless indifference to the rights of others. *Id.* at 191, 148 S.E. at 37-38; *see also Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 396-97 ("Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others").

Whether the evidence of outrageous conduct is sufficient to carry the issue of punitive damages to the jury is a question for the court. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E.2d 297. Punitive damages are recoverable only where the jury determines plaintiff is entitled to compensatory or nominal damages. *E.g., Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E.2d 761 (1968). However, if a punitive damage issue is submitted, the decision of whether punitive damages are warranted, and in what amount, is one for the jury in its discretion. *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964).

Defendants analogize *Ayscue v. Mullen*, 78 N.C. App. 145, 336 S.E.2d 863 (1985), a case in which a false imprisonment was accompanied by an assault and battery. In that case, the defendant store owners required customers who did not make a purchase to obtain a "no sale slip" before leaving each department. When two shoppers, who were apparently unaware of the store policy, attempted to leave the store without such a slip, defendant barred the door and refused to allow them to leave. When one plaintiff pushed one of the defendants in an attempt to leave, that defendant pushed her back to prevent her exit. The entire incident lasted about three to five minutes. The Court of Appeals held, without elaboration, that the facts in that case did not support the award of punitive damages by the jury. We find the analogy here unpersuasive. The assault and battery committed by defendant in *Ayscue* was precipitated by a similar assault and battery by the plaintiff. Further, that incident was considerably shorter than the detention in the instant case.

The rules governing summary judgment are now familiar learning, and we need not repeat them here. *Roy Burt Enterprises v. Marsh*, 328 N.C. 262, 400 S.E.2d 425 (1991). Taken in the light most favorable to the plaintiff, the evidence tends to show that (1) defendant Nourse impersonated a police officer by using a badge of his own design; (2) plaintiff was restrained against her will in the store security office for approximately one-half hour; (3) plaintiff was badgered, insulted and pressured to confess by defendant Nourse

despite her efforts to prove her innocence; (4) plaintiff was frightened and upset and asked if she could leave; (5) defendant unlawfully detained plaintiff after determination that no offense had been committed, N.C.G.S. § 15A-404(d) (1988); (6) plaintiff was made to give up personal information including her driver's license number, telephone number, and social security number; and (7) plaintiff was forced to sign a release of liability as a condition to her release from Nourse's custody. We are unable to conclude, as a matter of law, that these facts justify an order of summary judgment in the defendants' favor.

We hold that there was sufficient evidence of outrageous conduct, in addition to that conduct constituting the false imprisonment, to survive defendants' motion for summary judgment. Plaintiff's forecast of the evidence reveals both willful and wanton conduct on the part of Nourse, manifesting a reckless disregard for plaintiff's rights. Nourse continued to detain plaintiff even after it became obvious that she did not have the merchandise in her possession. *See Robinson v. Wieboldt Stores, Inc.*, 104 Ill. App. 3d 1021, 433 N.E.2d 1005 (1982). There is also plenary evidence of unnecessary insult and indignity heaped upon plaintiff by one with superior power and authority. Plaintiff was threatened with handcuffing and arrest. *See Hadler v. Rhyner*, 244 Wis. 448, 12 N.W.2d 693 (1944). That plaintiff was forced to sign a release is also evidence of aggravation. *See Trogdon v. Terry*, 172 N.C. 540, 90 S.E. 583 (1916). The evidence demonstrates sufficient aggravation of the tort of false imprisonment to survive defendants' motion for summary judgment on the punitive damages issue. Accordingly, we reverse in part the decision of the Court of Appeals and remand the case to them for further proceedings not inconsistent with this opinion.

Reversed in part and remanded.

STATE OF NORTH CAROLINA v. MICHAEL LEE FULLWOOD

No. 37A86

(Filed 12 June 1991)

1. **Criminal Law § 1352 (NCI4th)— unanimity required to find mitigating circumstance—instruction prejudicial error**

In light of the evidence that defendant's I.Q. score was on the borderline level between "low normal" intelligence and retarded, that defendant suffered from very low feelings of self-esteem and "inadequate personality," that defendant's ability to understand and be understood through words was severely limited, and that defendant was extremely upset at the time of the murder because his lover and his baby were going to leave him, the Supreme Court could not conclude beyond a reasonable doubt that the trial court's instruction that the jury must find unanimously any mitigating circumstance before it could be considered did not preclude one or more jurors from considering in mitigation the 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. N.C.G.S. § 15A-2000(f)(6).

**Am Jur 2d, Criminal Law § 600.**

**Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.**

2. **Criminal Law § 1360 (NCI4th)— diminished capacity to appreciate criminality of act—mitigating circumstance to be considered separately**

The Supreme Court declined to adopt the State's argument that evidence which supported the statutory mitigating circumstance of defendant's diminished capacity to appreciate the criminality of his act or to conform his conduct to the requirements of the law was "subsumed" in the jury's consideration of the mitigating circumstances found, and, as a result, that the failure to consider this statutory mitigating circumstance was harmless, since to adopt such reasoning would circumvent the clear mandate of the legislature that this mitigating circumstance be given some weight, if found to exist.

**Am Jur 2d, Criminal law §§ 154, 598, 599, 628; Homicide § 554.**

**Comment note—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.**

ON remand by the Supreme Court of the United States, 494 U.S. ---, 108 L. Ed. 2d 602 (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 of North Carolina on 10 April 1991.

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

*Malcolm Ray Hunter, Jr., Appellate Defender, for the defendant-appellant.*

MITCHELL, Justice.

The defendant was convicted of felonious breaking and entering and of the first degree murder of Deidre Waters. He was sentenced to a term of imprisonment for breaking and entering and to death for first degree murder. On appeal, this Court found no error in the defendant's trial or sentencing and upheld the sentences imposed. *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988). Subsequently, the Supreme Court of the United States 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). *State v. Fullwood*, 494 U.S. ---, 108 L. Ed. 2d 602 (1990). On 3 October 1990, we ordered the parties to file supplemental briefs addressing the effect, if any, of *McKoy* upon the present case.

The evidence supporting the defendant's conviction and death sentence is summarized in this Court's prior opinion. *Fullwood*, 323 N.C. 371, 373 S.E.2d 518. It will not be repeated here, except where necessary to discuss the question before us on remand.

**[1]** In *McKoy v. North Carolina*, the Supreme Court of the United States held unconstitutional—under the eighth and fourteenth amendments—jury instructions in a capital case directing that, in determining whether to impose a sentence of death or life imprisonment, no juror was to consider any circumstance in mitigation of the offense unless the jury unanimously found that the circumstance had been proved to exist. *McKoy*, 494 U.S. 433, 108 L. Ed. 2d 369. Our review of the record reveals that the jury

in the present case was so instructed. Specifically, the "Issues For Sentencing" form required the jury to be unanimous to find a mitigating circumstance. Issue Two on the form asked the jury: "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" The trial judge reinforced this written instruction by reading it to the jury. Thus, the sole 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 must conclude that the State has not carried its burden.

The trial court submitted eleven possible mitigating circumstances in writing, as follows:

(A) The murder was committed while the defendant was under the influence of a mental or emotional disturbance.

. . . .

(B) 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.

. . . .

(C) The age of the defendant at the time of the crime.

. . . .

(D) The defendant's immaturity or limited mental capacity at the time of the commission of the offense.

. . . .

(E) The defendant sought the assistance of vocational rehabilitation to prepare himself for better employment.

. . . .

(F) The defendant sought the assistance of the Human Resources Development Program of Asheville-Buncombe Technical College to prepare himself for better employment.

. . . .

(G) The defendant has tried to maintain employment.

. . . .

(H) The defendant has been a loving and devoted father to his daughter, Michelle.

. . . .

(I) The defendant has expressed remorse and sorrow for what he has done.

. . . .

(J) The offense was committed by means of a weapon or weapons acquired at the Hawks' residence and not taken there by the defendant.

. . . .

(K) Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value.

The jury found most of the mitigating circumstances submitted but rejected circumstances "(C)" and "(H)." The jury left the form blank after circumstances "(B)" and "(K)." We can only conclude that the answers left blank indicate that the jury was divided as to whether those mitigating circumstances existed. Therefore, the State must show that the constitutionally defective instructions which prevented any juror from considering the mitigating circumstances left blank was harmless beyond a reasonable doubt.

One of the mitigating circumstances left blank by the jury was the statutory mitigating circumstance that "the capacity of the defendant 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) (1988). Since the jurors disagreed as to whether this mitigating circumstance existed, we must determine whether it was supported by substantial evidence. *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990).

> 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).

*State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991); *accord State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982).

Our detailed review of the evidence reveals there was substantial evidence to support this statutory mitigating circumstance.

Dr. Brad Fisher, found by the trial court to be an expert in correctional clinical psychology, testified *inter alia* that the defendant had a full scale I.Q. of 80 and that such a score is on the borderline level between "low normal" intelligence and "retarded." Dr. Fisher also testified that the defendant suffered from very low feelings of self-esteem and "inadequate personality." Additional testimony was given by John Clement who was found by the court to be an expert in psychology. He stated that the defendant "was lacking in verbal abilities" and that defendant's ability to understand and be understood through words was severely limited. Mr. Clement further testified that the defendant was extremely upset at the time of the murder because his lover and his baby were going to leave him, and that this emotional anguish aggravated his already limited reasoning ability, low feelings of self-esteem and inadequate personality. In Clement's opinion, the stress from his poor relationship with his lover and child affected the defendant's limited intellectual resources to the extent that the defendant's judgment was very poor at the moment of the crime.

In light of the evidence adduced at trial, we cannot conclude beyond a reasonable doubt that the trial court's instruction that the jury must find unanimously any mitigating circumstance before it could be considered did not preclude one or more jurors from considering in mitigation the 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 nevertheless would 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).

**[2]** In support of its argument that the error was harmless, the State contends that the evidence which supports this statutory mitigating circumstance was fully weighed in favor of the defendant when the jury considered the mitigating circumstances it found to exist. For example, the State contends that evidence about the effect of the defendant's emotional stress on his ability to function was fully considered by the jury when it found and weighed the mitigating circumstance that the defendant was under the influence

of a mental or emotional disturbance at the time he committed the murder. Similarly, the State argues that the evidence about the defendant's low I.Q. was fully considered when the jury found the defendant's immaturity or limited mental capacity at the time of the commission of the offense to be a mitigating circumstance. The State contends that since all of the evidence in support of the unfound circumstance of impaired capacity was fully considered by the jury in weighing the mitigating circumstances found to exist, the erroneous instruction did not prejudice the defendant and was harmless. We disagree.

The circumstance in question is a statutory mitigating circumstance, N.C.G.S. § 15A-2000(f)(6), and, therefore, presumed to have mitigating value if found. *E.g., State v. Wilson*, 322 N.C. 117, 144, 367 S.E.2d 589, 605 (1988). The legislature thought this circumstance was significant enough to be listed specifically and, therefore, to be considered and weighed individually, despite the fact that the evidence supporting it might also support other submitted mitigating circumstances. Therefore, we decline to adopt the argument that evidence which supported this statutory mitigating circumstance was "subsumed" in the jury's consideration of the mitigating circumstances found and, as a result, that the failure to consider this statutory mitigating circumstance was harmless. To adopt such reasoning would circumvent the clear mandate of the legislature that this mitigating circumstance be given some weight, if found to exist. N.C.G.S. § 15A-2000(f)(6). Accordingly, we cannot say that the *McKoy* error in the present case was harmless beyond a reasonable doubt.

For the foregoing reasons, the sentence of death is vacated and this case is remanded to the Superior Court, Buncombe 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 of this case on the impaired capacity mitigating circumstance makes it unnecessary for us to consider the effect of the constitutionally erroneous instructions with regard to the other mitigating circumstances not found.

Death sentence vacated; remanded for new capital sentencing proceeding.

STATE OF NORTH CAROLINA v. BRENDA JOYCE NOBLES

No. 342PA90

(Filed 12 June 1991)

1. **Criminal Law § 1133 (NCI4th)— child abduction—aggravating factor—inducement of participation by another**

The trial court did not err in finding as an aggravating factor for felony child abduction that defendant induced another to participate as an accessory after the fact or in the commission of the offense itself where there was evidence that defendant was eager to get a baby; defendant went to a hospital and took a baby; and defendant carried the baby to a home for which she paid the rent and in which her daughter cared for the baby, telling people it was her mother's child. N.C.G.S. § 15A-1340.4(a)(1)a.

**Am Jur 2d, Abduction and Kidnapping § 34; Criminal Law §§ 598, 599.**

2. **Criminal Law § 1161 (NCI4th)— child abduction—age of victim as aggravating factor**

The trial court did not err in finding the age of the one-day-old victim as an aggravating factor for felony child abduction since the victim was more vulnerable than an older child would have been. N.C.G.S. § 15A-1340.4(a)(1)j.

**Am Jur 2d, Abduction and Kidnapping § 34; Criminal Law §§ 598, 599.**

3. **Criminal Law § 1127 (NCI4th)— child abduction—aggravating factor—child in hospital**

The trial court did not err in finding as a nonstatutory aggravating factor for felony child abduction that the victim was more vulnerable because he was in a hospital at the time of his abduction.

**Am Jur 2d, Abduction and Kidnapping § 34; Criminal Law §§ 598, 599.**

4. **Abduction or Enticement § 3 (NCI4th)— child abduction—instruction on guilty knowledge not required**

The trial court did not err in refusing to give defendant's requested instruction on guilty knowledge in this prosecution

for felony child abduction where defendant did not present any evidence to support a mistake of fact defense but contended only that the evidence would permit an inference that she committed the prohibited act without criminal intent. Even if defendant did not know that her conduct was criminal, she could still be found guilty if she knew she was doing all the acts constituting the elements of the crime.

**Am Jur 2d, Abduction and Kidnapping § 27.**

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision by the Court of Appeals, 99 N.C. App. 473, 393 S.E.2d 328 (1990), finding no error in the trial but remanding for a new sentencing hearing on a judgment entered by *DeRamus, J.*, at the 27 March 1989 Criminal Session of Superior Court, GUILFORD County. Heard in the Supreme Court 12 March 1991.

The defendant was tried for felony child abduction. N.C.G.S. § 14-41 (1986). The evidence for the State showed that on 19 June 1988 a baby was born in the High Point Memorial Hospital. On 20 June 1988 the baby was in his mother's room when the defendant, who was not an employee of the hospital, entered the room dressed as a nurse and told the mother she had to take the baby to be weighed. The defendant took the baby and left the premises of the hospital.

The defendant took the baby to a mobile home which she rented and which was occupied by her daughter, Sherry Slaydon, and Ms. Slaydon's two month old child. Ms. Slaydon requested of a neighbor that she buy a pacifier. The neighbor bought a pacifier and carried it to the mobile home in which Sherry Slaydon lived. When the neighbor entered the mobile home she saw two babies. Ms. Slaydon told the neighbor that her mother had given birth to one of the babies. Later that day Ms. Slaydon borrowed some scissors, vaseline, and alcohol from the neighbor.

The defendant and Ms. Slaydon then took the baby to a house in which the defendant was living with Zeke Owens. The baby was found in this house by officers of the High Point Police Department on 22 June 1989. When the baby was found his hair had been cut.

The defendant was convicted as charged. Felony child abduction is a Class G felony. The presumptive sentence for this felony

is 4½ years and the maximum sentence is 15 years. N.C.G.S. § 14-1.1 (1986); N.C.G.S. § 15A-1340.4(f)(5) (1988). The court found the following aggravating factors:

> 1. The Court finds as an aggravating factor that the defendant induced another to participate as an accessory after the fact to the offense, or in the commission of the offense itself.
>
> 2. The Court finds that the victim . . . was not just very young, as the statutory aggravating factor reads but was extremely young and because of such extreme youth was vulnerable by reason of physical and mental immaturity, and vulnerable by reason of location in a hospital at a young age, as a temporary residence, rather than a more permanent residence to which the public would not have as great an access, and as part of this finding, the Court is considering the fact that the defendant took advantage of this vulnerability.
>
> 3. As an additional finding in aggravation, nonstatutory, the Court finds that the defendant has suffered and continues to suffer from an abnormal mental condition or conditions that makes her significantly more dangerous to others than the great majority of the general public.

The court found five mitigating factors. It found the aggravating factors outweighed the mitigating factors and imposed a prison sentence of twelve years.

The Court of Appeals found no error in the trial but held that the aggravating factors found by the court were not supported by the evidence and were not proper as a matter of law. We granted the State's petition for discretionary review. We also granted the defendant's petition for discretionary review as to an issue in the guilt phase of the trial.

*Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Special Deputy Attorney General, for the State appellant.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor and Constance H. Everhart, Assistant Appellate Defenders, for the defendant appellant appellee.*

WEBB, Justice.

Appeal by the State

The State's appeal has brought to the Court a question as to whether certain aggravating factors were properly found. We note at the outset that the State petitioned for discretionary review as to only the first two aggravating factors which the Court of Appeals held it was error to find. The State did not petition for a review of the third aggravating factor which the Court of Appeals held was erroneously found. This holding by the Court of Appeals is not disturbed. We shall discuss the other aggravating factors with which the Court of Appeals dealt.

**[1]** The first aggravating factor found was that defendant induced another as an accessory after the fact or in the commission of the crime. This is a statutory aggravating factor. N.C.G.S. § 15A-1340.4(a)(1)a (1988). There is no dispute that the defendant's daughter was involved at least in concealing the baby after it was taken from the hospital. The defendant contends that this does not support a finding that she induced this participation. The defendant, relying on *State v. Gore*, 68 N.C. App. 305, 314 S.E.2d 300 (1984), and *State v. Setzer*, 61 N.C. App. 500, 301 S.E.2d 107, *disc. rev. denied*, 308 N.C. 680, 304 S.E.2d 760 (1983), argues that evidence that another person participated in the crime is not sufficient evidence that the defendant induced such participation. There is more evidence in this case than the participation of Ms. Slaydon in the crime. The evidence is that the defendant was anxious to get a baby. She went to the hospital and took the baby. She carried the baby to the home on which the defendant paid the rent and in which her daughter was living and her daughter cared for the baby, telling people it was her mother's child. The court could infer from this evidence that the idea for the crime originated with the defendant and she procured Ms. Slaydon's help in executing the crime. This would support the finding of the court. This is a statutory aggravating factor which must be considered by the court in imposing a sentence. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985). We hold it was not error for the superior court to find this aggravating factor and to consider it in imposing the sentence.

**[2]** The second aggravating factor dealt with the vulnerability of the victim because he was extremely young and because he was in a hospital. The victim's being very young is a statutory

aggravating factor. N.C.G.S. § 15A-1340.4(a)(1)j (1988). To find age as an aggravating factor there must be evidence that the victim was vulnerable because of his age. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986); *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983); *State v. Eason*, 67 N.C. App. 460, 313 S.E.2d 221, *aff'd*, 312 N.C. 320, 321 S.E.2d 881 (1984). We have said that in "cases . . . involving victims near the beginning or end of the age spectrum, the prosecution may establish vulnerability merely by relating the victim's age and the crime committed." *State v. Hines*, 314 N.C. 522, 526, 335 S.E.2d 6, 8 (1985). The victim could not have been much younger than was the victim in this case. He was more vulnerable than a child a few years older would have been.

The defendant argues that the age factor was not properly found because, although the victim was more vulnerable in this case than an older child would have been, this was not the reason the defendant abducted the child. The abduction, she says, was not caused by the child's vulnerability. It is not the cause of the taking which supports the aggravating factor. Whatever the motive, if the victim is more vulnerable because of age, this aggravates the crime.

**[3]** The court also found as an aggravating factor that the victim was more vulnerable because he was in a hospital at the time of his abduction. This is a nonstatutory aggravating factor. The defendant argues that to hold this is a proper aggravating factor would mean that every time an offense is committed against a person who is not in the safety of his home this aggravating factor could be found. The court may consider any aggravating factor that is proved by a preponderance of the evidence, and is reasonably related to the purposes of sentencing. N.C.G.S. § 15A-1340.4(a) (1988). Factors that increase the offender's culpability are related to the purposes of sentencing. N.C.G.S. § 15A-1340.4 (1978). *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983).

We hold that the increased vulnerability of the victim because of his being in a hospital makes this a proper aggravating factor. A person should be able to enter a hospital without feeling he has to be on guard against wrongdoers. In this case it was particularly egregious that the defendant disguised herself as a nurse and used this disguise to abduct the baby. The mother of the child had a right to rely on a person dressed as a nurse. This made the victim more vulnerable than he ordinarily would have

been and makes it a worse crime than if it had occurred under other circumstances. It is not only that the victim was away from the safety of his home that makes this a properly found aggravating factor.

The Defendant's Appeal

**[4]** The defendant has appealed, assigning error to the court's failure to charge the jury, as requested by the defendant, that in order to convict the defendant, the jury must find that she abducted the victim, knowing it was not her child. There is a common law principle that the existence of guilty knowledge on the part of the defendant is essential to criminality although it is not required by the statute in express terms. *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984); *State v. Welch*, 232 N.C. 77, 59 S.E.2d 199 (1950). The General Assembly may dispense with this requirement. *Poultry Co. v. Thomas*, 289 N.C. 7, 220 S.E.2d 536 (1975). The Court of Appeals applied this principle in *State v. Walker*, 35 N.C. App. 182, 241 S.E.2d 89 (1978), by granting a new trial in a child abduction case for failure of the court to charge that the jury should find the defendant not guilty if it should find the defendant mistakenly believed the child he took was his grandchild.

When specific intent is not an element of the crime, the court does not ordinarily have to charge on guilty knowledge. However, when the defendant introduces evidence of lack of guilty knowledge the court must charge on it. *State v. Elliott*, 232 N.C. 377, 61 S.E.2d 93 (1950).

The defendant concedes that she did not present any evidence to support a mistake of fact defense but she says "the inference that she committed the prohibited act without criminal intent plainly was raised by the evidence." This is not enough evidence to require a charge on guilty knowledge. If the defendant did not know that her conduct was criminal she still may be found guilty if she knew she was doing all the acts that constituted the elements of the crime. This assignment of error is overruled.

For the reasons stated in this opinion we affirm the holding of the Court of Appeals and remand to the Court of Appeals for remand to the Superior Court of Guilford County for further proceedings consistent with this opinion.

Affirmed.

STATE OF NORTH CAROLINA v. STEPHEN LOUIS MOORE

No. 511A90

(Filed 12 June 1991)

1. **Grand Jury § 3 (NCI3d) — selection of black foreman — standing of black defendant to challenge**

A black defendant has standing to object to the removal of a white foreman of the grand jury and the replacement of him with a black person on the ground that the new foreman was selected in a racially discriminatory manner in violation of Art. I, § 26 of the N. C. Constitution.

**Am Jur 2d, Grand Jury §§ 22, 24.**

2. **Grand Jury § 3.3 (NCI3d) — selection of black foreman — racial discrimination**

A black foreman of the grand jury was selected and appointed solely on the basis of race in violation of Art. I, § 26 of the N. C. Constitution where the black defendant moved to quash the indictment on the ground that the white foreman of the grand jury was selected in a racially discriminatory manner; the district attorney informed the presiding judge that no black person had ever been appointed foreman of the grand jury in the county and suggested that the white foreman be asked to resign and that a specific black grand juror be appointed as foreman; this was done by the judge; and the evidence shows that the person named as foreman was the only person suggested by the district attorney to the presiding judge.

**Am Jur 2d, Grand Jury §§ 4, 14, 22, 24.**

Justice WEBB dissenting.

APPEAL by the defendant pursuant to N.C.G.S. § 7A-30(2) and Rule 14 of the North Carolina Rules of Appellate Procedure from a decision of a divided panel of the Court of Appeals, 100 N.C. App. 217, 395 S.E.2d 434 (1990), finding no error in a judgment entered by *Morgan, J.*, at the 8 May 1989 Criminal Session of Superior Court, RUTHERFORD County, sentencing defendant to fifty years' imprisonment for murder in the second degree. Heard in the Supreme Court 8 May 1991.

*Lacy H. Thornburg, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.*

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

MARTIN, Justice.

The Court of Appeals found that the trial judge properly denied defendant's motion to quash the 5 October 1987 bill of indictment. We disagree and reverse the decision of the Court of Appeals.

Defendant was indicted 25 February 1985 on the charge of murder in the first degree of Louise Tate. On 7 July 1987, this Court filed its opinion in *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987), a case in which we held that racial discrimination in the selection of grand jury foremen violates article I, sections 19 and 26 of the North Carolina Constitution. In September 1987, defendant, who is black, moved to quash the indictment on grounds that the selection of the white foreman of the grand jury was accomplished in a racially discriminatory manner. When the *Cofield* opinion came to the district attorney's attention, he informed Judge Gudger that the foreman was a white person, that there were two black persons on the grand jury, and that no black person had ever been appointed foreman of the grand jury in Rutherford County. The district attorney suggested to Judge Gudger that the white foreman be requested to resign as foreman and that juror Wilkerson, a black, be appointed foreman. This was done.

A new bill of indictment, identical to the first in substance, was returned 5 October 1987. Defendant moved to quash that bill upon the grounds that the foreman was selected in a racially discriminatory manner. This motion was denied, and defendant was convicted of murder in the second degree. Upon appeal to the Court of Appeals, no error was found in the trial.

Because we resolve this appeal by determining the validity of the indictment, we do not find it necessary to recite the evidence concerning the substantive offense charged.

**[1]** At the threshold, the State argues that because defendant is black he has no standing to object to the removal of a white foreman of the grand jury and the replacement of him with a black person. While this argument might be relevant to an allegation of discrimination under the equal protection clause of our Con-

stitution, a question we do not resolve, it is irrelevant to the issue before us in the instant case. Here, we are applying article I, section 26 of our Constitution to the facts of this case. As we held in *State v. Cofield*:

> Article I, section 26 does more than protect individuals from unequal treatment. The people of North Carolina have declared in this provision that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice. They have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction. It must also be *perceived* to operate evenhandedly.
>
> . . . .
>
> . . . The effect of racial discrimination on the outcome of the proceedings is immaterial. Our state constitutional guarantees against racial discrimination in jury service are intended to protect values other than the reliability of the outcome of the proceedings. Central to these protections, as we have already noted, is the perception of evenhandedness in the administration of justice. Article I, section 26 in particular is intended to protect the integrity of the judicial system, not just the reliability of the conviction obtained in a particular case. The question, therefore, is not whether discrimination in the foreman selection process affected the outcome of the grand jury proceedings; rather, the question is whether there was racial discrimination in the selection of this officer at all.
>
> . . . The integrity of the judicial system is at stake in this situation, just as it is when the entire grand jury is selected in a discriminatory manner. Thus, if racial discrimination in the selection of the foreman can be demonstrated in this case, the proceedings against defendant were fatally flawed.

*Cofield*, 320 N.C. at 302-04, 357 S.E.2d at 625-27 (footnote omitted).

It matters not what the race of the grand jury foreman chosen might be. The issue is whether he was selected in a racially discriminatory manner. We conclude that defendant had standing

to raise this issue by his motion to quash the 5 October 1987 indictment.[1]

**[2]** In its brief and oral argument the State does not seriously argue that foreman Wilkerson was selected in a racially neutral process. The unchallenged evidence shows that Mr. Wilkerson was the only person suggested by the district attorney to the presiding judge, and that the judge selected and appointed him solely on the basis of race. It is true that the district attorney and Judge Gudger were attempting to correct the historical custom in Rutherford County of failing to appoint black persons as foremen of grand juries. Their motives were indeed pure, but their method was constitutionally erroneous.

Racial discrimination against blacks in the process of selecting a grand jury foreman cannot be corrected by the selection of a black person as foreman by a racially discriminatory method. Article I, section 26 of our Constitution mandates that the selection of a grand jury foreman be done in a racially neutral manner, that is, regardless of the race of the person selected. We hold that racial discrimination was evident in the selection of foreman Wilkerson for the reason that the selection procedure itself was not racially neutral. *See State v. Cofield*, 324 N.C. 452, 379 S.E.2d 834 (1989).

The State argues that any violation of defendant's equal protection constitutional rights was harmless beyond a reasonable doubt. We reject this argument. Having found error under article I, section 26 of the North Carolina Constitution, we do not find it necessary to discuss the State's harmless error argument with respect to equal protection violations. Although the State raises a harmless error issue concerning article I, section 26, it did not argue the issue in its brief. Even if such argument had been propounded, it would have been inappropriate. As set out above in this opinion, violations of article I, section 26 involve more than the reliability of the result of the proceedings. The integrity of the judicial system is at issue, and a harmless error analysis under these circumstances is inapposite.

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1. Although not necessary to, nor relied upon in, our resolution of this appeal, we note that the United States Supreme Court reached a similar result in holding that a white defendant had standing to challenge the excusal of black trial jurors for racially discriminatory reasons. *Powers v. Ohio*, --- U.S. ---, 112 L. Ed. 2d 411 (1991).

Our decision is based solely upon adequate and independent State constitutional grounds. *Michigan v. Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201 (1983). Therefore, we do not find it necessary to discuss or decide defendant's federal constitutional arguments. With this disposition of the appeal, we further find it unnecessary to discuss any of defendant's remaining assignments of error.

The indictment of 5 October 1987 is quashed, and the verdict and sentence vacated. The decision of the Court of Appeals is reversed. The State may reindict defendant. *State v. Cofield*, 320 N.C. at 309, 357 S.E.2d at 629.

Reversed.

Justice WEBB dissenting.

I dissent for the reasons stated in my dissenting opinion in *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987).

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STATE OF NORTH CAROLINA v. JERRY RAY CUMMINGS

No. 65A87

(Filed 12 June 1991)

**1. Criminal Law § 1352 (NCI4th) — murder — sentencing — McKoy error**

The trial court erred when sentencing defendant for murder by instructing the jury that its decisions as to mitigating circumstances must be unanimous. Based upon the evidence in the case, the Supreme Court could not conclude beyond a reasonable doubt that the constitutionally erroneous instruction did not prevent at least one juror from finding one of the submitted mitigating circumstances to exist, giving it mitigating value, and voting for life imprisonment rather than the death penalty.

**Am Jur 2d, Criminal Law § 600.**

**Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.**

**2. Criminal Law § 1360 (NCI4th)— murder—sentencing—mitigating factors—impaired capacity—evidence sufficient**

There was sufficient evidence of the mitigating factor of impaired capacity in a sentencing hearing for murder where all of the evidence in mitigation came from defendant and his family and no mental health specialist testified concerning any impairment by defendant. N.C.G.S. § 15A-2000(f)(6).

**Am Jur 2d, Criminal Law §§ 154, 598, 599, 628; Homicide § 554.**

**Comment Note—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.**

ON remand by the Supreme Court of the United States, 494 U.S. ---, 108 L. Ed. 2d 602 (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 of North Carolina 7 May 1991.

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

*North Carolina Resource Center, by Marshall Dayan, for defendant-appellant.*

FRYE, Justice.

Defendant was tried at the 19 January 1987 Special Session of Robeson County Superior Court and convicted of murder in the first degree. Upon the recommendation of the jury, defendant was sentenced to death. On appeal, this Court found no error in defendant's trial or sentencing and upheld the sentence imposed. *State v. Cummings*, 323 N.C. 181, 372 S.E.2d 541 (1988) (Exum, C.J., and Frye, J., dissenting as to sentence). However, the Supreme Court of the United States vacated the sentence of death 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). *Cummings v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 602 (1990). Subsequently, this Court ordered the parties to file supplemental briefs, limited to the question of whether there was error in the sentencing proceeding pursuant to *McKoy* and, if so, whether any such error can be found harmless beyond a reasonable doubt.

The evidence supporting the defendant's conviction and death sentence is summarized in this Court's prior opinion. *State v. Cummings*, 323 N.C. 181, 372 S.E.2d 541. We will discuss only those facts necessary for a complete consideration of the question before us on remand.

**[1]** The Supreme Court of the United States in *McKoy* held unconstitutional under the eighth and fourteenth amendments of the United States Constitution jury instructions in a capital case directing that, in determining whether to impose a sentence of death or life imprisonment, no juror is to consider any circumstance in mitigation of the offense unless the jury unanimously finds that the circumstance has been proven to exist. *McKoy*, 494 U.S. 433, 108 L. Ed. 2d 369. In the present case, the jury was instructed that its decisions as to mitigating circumstances must be unanimous, and the sentencing recommendation form expressly required jury unanimity to find and consider each mitigating circumstance. Issue Two of the sentencing recommendation form provided, "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" The State concedes that there was *McKoy* error, thus the only issue in this case is whether the error was harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990). Given its federal constitutional dimension, the State must demonstrate that the *McKoy* error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). We conclude that the State has not met its burden of proof.

The trial court submitted four possible mitigating circumstances under Issue Two as follows:

> (1) The capacity of the defendant, Jerry Ray Cummings, to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.
>
> (2) That the defendant, Jerry Ray Cummings, is remorseful for his participation in the killing of Jesse Ward.
>
> (3) That the defendant, Jerry Ray Cummings, suffers from the condition of alcoholism.
>
> (4) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

The jury failed to unanimously find any of the submitted mitigating circumstances. Thus, the individual jurors had no mitigating circumstances to weigh against the aggravating circumstance under Issue Three or to consider under Issue Four when determining whether the aggravating circumstance found was sufficiently substantial to call for the imposition of the death penalty.

Defendant contends that there were numerous mitigating circumstances which individual jurors could have found from the evidence offered at the guilt and penalty phases of the trial. Defendant further contends that the prosecutor exacerbated the *McKoy* error during his summation to the jury by emphasizing the requirement that the jury must unanimously find a mitigating circumstance before any individual juror could consider the mitigating evidence in determining the appropriate punishment.

Defendant offered evidence of several non-statutory mitigating circumstances. For example, defendant testified at the penalty phase of the trial and apologized to the victim's family. The jury had an opportunity to observe and assess defendant's demeanor and emotional condition during the entire trial. One or more jurors could have found that defendant's demeanor at trial showed regret and remorse. "[E]vidence is not only what [jurors] hear on the stand but [is also] what they witness in the courtroom." *State v. McNeil*, 327 N.C. 388, 396, 395 S.E.2d 106, 111 (1990) (quoting *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)). A review of the cold record is insufficient for this Court to fully assess the defendant's demeanor during the trial. Therefore, we cannot know the impact that defendant's testimony may have had on one or more jurors nor can we conclude beyond a reasonable doubt that the erroneous instructions did not affect at least one juror's vote.

Defendant's evidence tended to show that he had a third grade education and that he could not read or write. There was evidence that defendant was consistently employed when he was not incarcerated and that he helped to support his family. Defendant's work record while incarcerated showed that he was able to work unsupervised at the McCain Correctional Institution and that he was the only inmate who worked in the flower house. This Court cannot conclude that a reasonable juror might not have found at least one of these non-statutory circumstances under the catch-all

provision and given it some mitigating value as a basis for a sentence less than death.

Finally, there was evidence introduced which tended to show that defendant suffered from alcoholism. Defendant testified that he was an alcoholic, and his sister confirmed his condition. Defendant had unsuccessfully attempted treatment for his alcoholism. The evidence in this case demonstrated that defendant had consumed a large quantity of alcohol on the day of the offense and that he had suffered from alcoholism for a number of years. In light of such 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 either defendant's condition as an alcoholic or his alcohol intoxication on the day of the offense as diminishing his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. *See* N.C.G.S. § 15A-2000(f)(6) (1988); *State v. McNeil*, 327 N.C. at 395, 395 S.E.2d at 111. 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).

**[2]** In support of its argument that the error was harmless, the State contends that the evidence proffered in mitigation was too weak to support a finding under the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance. The State points out that no mental health specialist testified concerning any impairment by defendant, and all of the evidence in mitigation came solely from defendant and his family. It is true, as the State argues, that no mental health professional testified as to defendant's impairment on the day of the homicide. However, the lay testimony tended to show that on the day of the homicide defendant drank three cans of beer and that he and two others together consumed a fifth of vodka purchased after work on that afternoon. Defendant also testified that he could not say exactly what happened that day because he "was pretty well loaded." Taken together, the evidence was sufficient to support a finding of the (f)(6) mitigating circumstance. *See State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991).

**[1]** The State contends that given the paucity of evidence to show the existence of the statutory mitigating circumstance and the

lack of worth of the non-statutory mitigating evidence proffered, there is no reasonable possibility the *McKoy* error caused the jury to answer all the enumerated mitigating circumstances "no."

Since the capacity of a defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is a statutory mitigating circumstance, it is presumed to have mitigating value if found. N.C.G.S. § 15A-2000(f)(6); *State v. Wilson*, 322 N.C. 117, 144, 367 S.E.2d 589, 605 (1988). One juror's vote could change the defendant's sentencing result from death to life imprisonment. *State v. Brown*, 327 N.C. 1, 30, 394 S.E.2d 434, 452 (1990). Based upon the evidence in this case, we cannot conclude beyond a reasonable doubt that the constitutionally erroneous instruction did not prevent at least one juror from finding one of the submitted mitigating circumstances to exist, giving it mitigating value, and voting for life imprisonment rather than the death penalty.

For the foregoing reasons, the sentence of death is vacated and this case is remanded to the Superior Court, Robeson County, for a new capital sentencing proceeding. *See State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106.

Death sentence vacated; remanded for new capital sentencing proceeding.

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STATE OF NORTH CAROLINA v. JIMMY LEE JONES

No. 264A89

(Filed 12 June 1991)

**1. Criminal Law § 89.2 (NCI3d)— defendant's confession to detective—admissibility to corroborate witness's testimony**

A statement made by defendant to a detective that he had shot his wife was properly admitted to corroborate the testimony of a witness concerning a phone conversation he had had with defendant, since the statement recorded by the detective and the testimony of the witness both indicated that defendant said he had shot his wife at point blank range, and the fact that the statement included other matters not testified to by the witness about defendant's going home to

get his shotgun and about his inability "to take it anymore" was not prejudicial to defendant.

**Am Jur 2d, Evidence § 1134.**

**2. Criminal Law § 34.2 (NCI3d)— defendant's guilt of another offense—cumulative evidence—admission of evidence not prejudicial**

In a prosecution of defendant for the murder of his wife, erroneously admitted testimony that defendant had been charged with assaulting her on one occasion was cumulative to other evidence that defendant and his wife had a stormy marriage, and defendant failed to show that had the error not occurred, there was a reasonable possibility that a different result would have been reached.

**Am Jur 2d, Evidence §§ 256, 320.**

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Brewer, J.*, at the 27 February 1989 Criminal Session of Superior Court, ONSLOW County, upon a jury verdict of first degree murder. Heard in the Supreme Court 4 September 1990.

The defendant was tried in a non-capital trial for the murder of his wife. The evidence showed that on 13 August 1988 Gail Jones, the defendant's wife, was living in the home of Carol Byers. At approximately 10:00 p.m. on that date the police were called to the home in which the two women were residing. There was an altercation at the home involving the defendant, the defendant's wife, Carol Byers, and Robert Lee Sanders who had formerly had a relationship with Ms. Byers. The officers took Mr. Sanders into custody and advised the two women to have warrants issued for the defendant and Mr. Sanders. The two women went to the magistrate's office to have warrants issued.

As Ms. Byers was leaving her home she told Bruce Johnson, who was on the scene, to wait for her in her house. After the warrants were issued Gail Jones took Ms. Byers and her child to the hospital and drove alone to Ms. Byers' home. Mr. Johnson testified that while he was in the house he heard a car door slam and then the sound of a "female's heels" coming toward the house. He then heard Gail Jones say, "[o]h, no Jimmy," followed by the

sound of a gunshot. Mr. Johnson then left the house and the defendant entered it.

Robert Lee Sanders testified that after he was arrested he called the home of Carol Byers to ask her to sign his bond. The defendant answered the phone and told him he had shot his wife.

The officers went to the home of Carol Byers. The body of Gail Jones was lying on the ground in front of the house. The defendant came out of the house and said, "I admit it, I shot her, I'll spend the rest of my life in jail."

The jury convicted the defendant of first degree murder and he was sentenced to life in prison. The defendant appealed.

*Lacy H. Thornburg, Attorney General, by William N. Farrell, Jr., Special Deputy Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant appellant.*

WEBB, Justice.

**[1]** The defendant's first assignment of error deals with what he contends is hearsay testimony which was erroneously allowed under the guise of corroborating the testimony of a witness. On direct examination Robert Sanders testified as to his telephone conversation with the defendant in part as follows:

> Q. What happened after that? What was said after he said, this is me, Jimmy?
>
> A. He told me that he had just shot Gail and to get the police.
>
> . . . .
>
> Q. What else did he say to you before you gave them the phone?
>
> A. Well, I had asked him where was Carol and Ashley were they there and he said, no, and he said, please hurry up and get the police, he didn't know, she still may be alive and she was laying in the road, he shot her point blank.
>
> . . . .
>
> Q. And he told you he shot her point blank?
>
> A. Yes.
>
> . . . .

Q. Did he tell you anything about what he did before and after he shot Gail Jones?

A. No, he didn't.

Q. You don't recall?

A. I don't recall him mentioning anything.

Mack Whitney, a detective with the Onslow County Sheriff's Department, testified that Mr. Sanders had given him a statement. He identified what he said was a written verbatim account of the statement Mr. Sanders had made to him. This statement was received into evidence over the objection of the defendant for the purpose of corroborating the testimony of Mr. Sanders. In this statement Mr. Sanders purportedly told the detective that the defendant said to him on the telephone, "I can't take it, I went home, loaded my shotgun. I came back and I shot her, I shot her point blank."

The defendant argues that this statement which the detective testified Mr. Sanders gave to him did not corroborate the testimony of Mr. Sanders but contradicted it. He says the crucial question in the case was whether the gun was fired intentionally or accidentally. The only evidence that the gun was fired intentionally was provided by the testimony of Bruce Johnson, which was equivocal. He contends he was prejudiced by allowing the introduction of the statement which Mr. Whitney said Mr. Sanders made to him when the purported statement did not corroborate the testimony of Mr. Sanders.

A prior consistent statement of a witness is admissible to corroborate the testimony of the witness whether or not the witness has been impeached. *State v. Perry*, 298 N.C. 502, 259 S.E.2d 496 (1979). A prior statement of a witness may not be admitted if it is not consistent with the witness' testimony. *State v. Burton*, 322 N.C. 447, 368 S.E.2d 630 (1988).

In this case we cannot hold that testimony of Mr. Whitney as to what Mr. Sanders told him was so inconsistent with what Mr. Sanders told him that it should have been excluded. In the statement as recorded by Mr. Whitney, Mr. Sanders said the defendant told him he shot his wife at point blank range. Mr. Sanders testified to this. In the statement to which the defendant objected Mr. Whitney said that Mr. Sanders told him the defendant said,

"I went home, loaded my shotgun." Mr. Sanders testified that he did not recall that the defendant mentioned anything that he did before he shot Gail Jones. This could not have prejudiced the defendant, however. The evidence showed the defendant did not have the shotgun when he was at the house earlier and he had it when he was there at the time of the shooting. He had to go somewhere and return with a loaded shotgun. The other part of the evidence to which the defendant objects was the purported statement by the defendant "I can't take it." All the evidence showed the defendant was very distraught during the incident. This testimony could not have prejudiced the defendant.

The defendant's first assignment of error is overruled.

**[2]** The defendant's second assignment of error deals with questions asked of him on cross-examination. During cross-examination the defendant admitted he had previously been convicted of assaulting the deceased. He said he did not feel he had assaulted her. The following colloquy then occurred:

Q. Have you ever been investigated for assaulting her on another occasion?

A. Investigated?

Q. Yes, sir.

A. No, I've never been investigated.

Q. Well, have you ever been charged with assaulting her on another occasion?

MR. GURGANUS: Objection.

Q. He said he didn't assault her. I think it goes to the truthfulness.

COURT: Overruled.

Q. Have you ever assaulted her?

A. Yes.

Q. And did you not in fact back in March in 1987, March 18, 1987 you were charged with assault on a female of Gail Jones; is that correct, sir?

[A.] I can't remember, but I think so I was charged.

The defendant says it was error for the State to be allowed to ask the defendant whether he had been charged with assaulting his wife. In *State v. Williams*, 279 N.C. 663, 185 S.E.2d 174 (1971), we held it was error for the court to allow a question on cross-examination as to whether the witness had been charged with a crime. We held such testimony could not be used to impeach a witness. *See also* N.C.G.S. § 8C-1, Rule 609 (1983). It was error to allow the State to elicit this testimony that the defendant had been charged with assaulting his wife. The question is whether this error requires a new trial. If the defendant can show that had the error not occurred there is a reasonable possibility a different result would have been reached there must be a new trial. N.C.G.S. § 15A-1443(a) (1988). In this case there was substantial evidence that the marriage relationship of the defendant and his wife was a rocky one. He testified he had been convicted of assaulting her. There was other evidence of the stormy character of their marriage. This erroneously admitted testimony that he had been charged with assaulting her on one occasion was cumulative to other evidence of the type marriage the parties had. It could not have changed the jury's conclusion on this feature of the case. *State v. Carter*, 326 N.C. 243, 388 S.E.2d 111 (1990); *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986); *State v. Billups*, 301 N.C. 607, 272 S.E.2d 842 (1981).

The defendant's second assignment of error is overruled.

No error.

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STATE OF NORTH CAROLINA v. ERNEST PAUL McCARVER

No. 217A88

(Filed 12 June 1991)

**Constitutional Law § 344 (NCI4th)— excusal of jurors in capital case—private bench conferences—right of defendant to be present**

Defendant's right to be present at every stage of his trial was violated in a capital case by the trial court's excusal of prospective jurors as a result of private unrecorded bench conferences with those jurors. It could not be determined

whether this error was harmless beyond a reasonable doubt because no record was made of the conversations at the bench as required by N.C.G.S. § 15A-1241, and an affidavit made by the presiding judge three years after the trial was not a proper substitute for this statutory requirement. Art. I, § 23 of the N. C. Constitution.

**Am Jur 2d, Criminal Law §§ 901, 913; Trial § 1103.**

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Davis, J.*, at the 18 April 1988 Criminal Session of Superior Court, CABARRUS County, upon a jury verdict finding defendant guilty of first degree murder. This Court on 18 July 1990 allowed defendant's motion to bypass the Court of Appeals on the robbery with a dangerous weapon conviction. Heard in the Supreme Court 8 April 1991.

The defendant was tried for first degree murder and armed robbery. A special venire was ordered from Stanly County. The judge, after making a preliminary statement to the jury, told it he would consider excuses from prospective jurors. He said, "I will hear those excuses here at the bench, and I will turn the microphone off, and then I will determine whether or not you can be excused from this particular case." Nine jurors separately approached the bench. Neither the defendant nor his attorney were at the bench, and they could not hear what was said. After the conversations at the bench the court announced it would excuse two jurors because of their age and because their health was "not good." It excused four more jurors "for good cause shown." The jury panel was exhausted before a jury could be chosen and a new venire was drawn from Stanly County. The court followed the same procedure with this group by letting them individually come to the bench and make their excuses privately. It excused five of these jurors "in the discretion of the Court and for good cause shown."

The defendant was convicted of first degree murder and armed robbery. He received the death penalty for first degree murder and 40 years in prison for the conviction of armed robbery. The defendant appealed to this Court.

*Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Special Deputy Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant appellant.*

WEBB, Justice.

We hold that pursuant to *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990) and *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987), we are bound to order a new trial. In *Smith* we held it was prejudicial error for the court to excuse jurors after an unrecorded bench conference. We said, relying on the N.C. Const. art. I, § 23, *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989) and *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), that a defendant has the right, which may not be waived in a capital case, to be present at every stage of his trial, including the selection and impanelling of the jury.

Unless the State can show that this denial of the defendant's right to be present is harmless beyond a reasonable doubt there must be a new trial. *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991). In this case, as in *Smith*, there was no record made of the conversations at the bench and we are unable to determine whether the error was harmless beyond a reasonable doubt.

The State has made a motion to amend the record on appeal to include an affidavit made on 21 March 1991 by the judge who tried the case with his notes made at the trial. The judge explained in this affidavit why he excused the jurors. We do not believe this is helpful to the State. The court reporter did not record the bench conferences, as required by N.C.G.S. § 15A-1241. We will not substitute for this statutory requirement an affidavit made approximately three years after the event. The affidavit was not a part of the record made of the trial.

We do not discuss the defendant's other assignments of error as they may not recur at a new trial.

For errors made in the selection of the jury which found the defendant guilty of first degree murder and armed robbery there must be a new trial.

New trial.

JAMES EUGENE WILSON, JEANNETTE WILSON, BY HER GUARDIAN AD LITEM, RONALD J. SHORT, AND CHRISTOPHER WILSON, BY HIS GUARDIAN AD LITEM, RONALD J. SHORT v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 45PA89

(Filed 12 June 1991)

**Insurance § 87 (NCI3d)— automobile insurance—coverage of policyholder's spouse—prior opinion—reliance on improper statute withdrawn**

That part of the prior opinion in this case which relies upon the definition of "persons insured" in N.C.G.S. § 20-279.21(b)(3)b in determining that a driver was covered by an automobile liability policy as a spouse living in the household of the policyholder is withdrawn.

**Am Jur 2d, Automobile Insurance § 283.**

ON defendant-petitioner North Carolina Farm Bureau Mutual Insurance Company's petition for rehearing pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure. Reheard in the Supreme Court 15 March 1991.

*Hutchins, Tyndall, Doughton & Moore, by Richard Tyndall and Laurie L. Hutchins, for defendant State Farm Mutual Automobile Insurance Company.*

*Petree Stockton & Robinson, by Richard J. Keshian, for defendant-petitioner North Carolina Farm Bureau Mutual Insurance Company.*

PER CURIAM.

In this declaratory judgment action we held in *Wilson v. State Farm Mut. Auto. Ins. Co.*, 327 N.C. 419, 394 S.E.2d 807 (1990), that North Carolina Farm Bureau Mutual Insurance Company was liable to the plaintiff on a liability insurance policy it had issued to Fannie Porch Fields, the wife of Eddie Darrell Fields. Eddie Darrell Fields was driving his wife's automobile when he negligently injured the plaintiffs. The trial court submitted the issues of residence and lawful possession to the jury, and both issues were answered in the affirmative. This Court concluded that the evidence

was sufficient to support the jury finding that Eddie Darrell Fields was a resident of the same household as his wife at the time he was involved in the accident. We held that this made him a person insured under N.C.G.S. § 20-279.21(b)(3)b.

Farm Bureau petitioned for a rehearing "for the purpose of correcting a very specific and limited error of fact and law, rather than for the purpose of affecting the Court's ultimate conclusion." We allowed this petition on 8 November 1990.

On the rehearing of this matter, both Farm Bureau and State Farm contend that this Court erroneously relied upon the definition of "persons insured" in N.C.G.S. § 20-279.21(b)(3)[1] in determining that Fields was covered by the policy as a spouse living in the household of the policyholder. Farm Bureau was the appealing party to this Court from the Court of Appeals' affirmance of the trial court's determination that the evidence was sufficient to submit to the jury and support its verdict finding that Mr. Fields was a resident of the same household as his wife and was in lawful possession of her automobile. In its petition for rehearing, in its brief upon rehearing, and in oral argument before this Court, Farm Bureau admitted that it sought only to correct the Court's reliance on § 20-279.21(b)(3)b and not to affect this Court's ultimate conclusion. We treat Farm Bureau's position before this Court on rehearing as a waiver of any argument that the evidence was insufficient to support the jury's verdict. We withdraw that part of our opinion reported at 327 N.C. at 422-24, 394 S.E.2d at 809-11, which interprets N.C.G.S. § 20-279.21(b)(3)b, but we reaffirm the result reached in our original decision that Farm Bureau is liable for damages

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1. The reference to the statute found at 327 N.C. at 423, 394 S.E.2d at 810, is "N.C.G.S. § 20-279.21(b)(3)b." However, upon closer analysis, we are convinced that the paragraph cited is not a part of subpart b. of subdivision (3) which sets out certain provisions relating to uninsured motorist insurance which are by law made a part of the policy of bodily injury liability insurance even though not set out in the policy. The paragraph at issue is one of five paragraphs under subdivision (3) of subsection (b) relating to the requirements for uninsured motorist coverage to be offered in the owner's policy of liability insurance. We also note that three of these five paragraphs use the word "section" as follows: "Provided under this section . . ." in the first paragraph; "For the purpose of this section . . . " in the fourth paragraph; and "For purposes of this section . . ." in the fifth paragraph. While it would appear that the word "section" in each of these three paragraphs relates to subdivision (3) which relates to uninsured motorist coverage and not to the entire statute, it is clear that the entire statute needs to be rewritten by the General Assembly so as to avoid further confusion.

within its policy limits but not liable for payment in excess of its coverage. The remainder of our original decision reported at 327 N.C. 419, 394 S.E.2d 807, which reverses that part of the opinion of the Court of Appeals holding Farm Bureau liable for payment in excess of its coverage and remanding for further proceedings, remains undisturbed and authority as the law of the case.

The decision of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

Affirmed in part; reversed in part and remanded.

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STATE OF NORTH CAROLINA v. PHILLIP LEE ABSHER

No. 543PA90

(Filed 12 June 1991)

**Appeal and Error § 75 (NCI4th)— guilty plea—no right to appeal**

Defendant was not entitled to appeal as a matter of right from the judgment entered on his plea of guilty to operating a vehicle while impaired. N.C.G.S. §§ 15A-1444(e) and 7A-27(b).

**Am Jur 2d, Appeal and Error § 271.**

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the unpublished decision of the Court of Appeals, 100 N.C. App. 453, 396 S.E.2d 825 (1990), which vacated the judgment entered by *Martin (Lester P.), J.*, at the 27 October 1989 Special Session of Superior Court, WILKES County. Heard in the Supreme Court on 11 April 1991.

*Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.*

*Larry S. Moore; John E. Hall; Max F. Ferree; and Ferree, Cunningham & Gray, P.A., by William C. Gray, Jr., for defendant-appellee.*

PER CURIAM.

On 18 May 1989 defendant entered a plea of guilty to operating a motor vehicle while impaired. Thereafter, on 27 October 1989, judgment and sentence were entered pursuant to N.C.G.S. § 20-179. Defendant purported to appeal from this judgment to the Court of Appeals. In its brief to the Court of Appeals, and by way of a separate motion to dismiss, the State argued that defendant had no right to appellate review from the judgment and sentence imposed pursuant to his plea of guilty.

Upon entry of a judgment in superior court pursuant to a plea of guilty to a misdemeanor, defendant's right to appellate review is governed by N.C.G.S. §§ 15A-1444(e) and 7A-27(b). *See generally State v. Bolinger*, 320 N.C. 596, 359 S.E.2d 459 (1987). N.C.G.S. § 15A-1444(e), in pertinent part, provides:

> Except as provided in subsection (a1) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, . . . .

None of the exceptions mentioned in the statute apply in this case, and defendant is therefore not entitled to appeal as a matter of right from the judgment entered on his plea of guilty. *See State v. Hester*, 93 N.C. App. 594, 378 S.E.2d 553 (1989); *State v. Noll*, 88 N.C. App. 753, 364 S.E.2d 726 (1988).[1]

The Court of Appeals erred in failing to dismiss defendant's appeal. The decision of the Court of Appeals is vacated, and this cause is remanded to that court for an order dismissing defendant's appeal and reinstating the 27 October 1989 judgment of the superior court.

Vacated and remanded.

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1. While it is true that a defendant may challenge the jurisdiction of a trial court, such challenge may be made in the appellate division only if and when the case is properly pending before the appellate division.

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

BRAMLETT v. OVERNITE TRANSPORT

No. 215P91

Case below: 102 N.C.App. 77

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

BRAREN v. BRAREN

No. 125P91

Case below: 101 N.C.App. 722

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

BROYHILL v. AYCOCK & SPENCE

No. 214A91

Case below: 102 N.C.App. 382

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

BRYSON v. SULLIVAN

No. 168PA91

Case below: 102 N.C.App. 1

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1991.

CAROLINA TRUCK & BODY CO. v.
GENERAL MOTORS CORP.

No. 207P91

Case below: 102 N.C.App. 262

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 12 June 1991.

DAVIDSON ELECTRIC MEMBERSHIP CORP. v. CITY OF LEXINGTON

No. 197P91

Case below: 102 N.C.App. 351

Petition by plaintiff (NCEMC) for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

DAVIS v. TOWN OF SOUTHERN PINES

No. 142P91

Case below: 101 N.C.App. 570

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

DENTON v. PEACOCK

No. 208P91

Case below: 101 N.C.App. 574

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 12 June 1991.

DUNN v. PACIFIC EMPLOYERS INS. CO.

No. 139PA91

Case below: 101 N.C.App. 508

Motion by the defendant to dismiss appeal for lack of substantial constitutional question denied 12 June 1991. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1991.

ESTRIDGE v. FORD MOTOR CO.

No. 118P91

Case below: 101 N.C.App. 716

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 May 1991.

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

FERGUSON v. ASHEVILLE CONTRACTING CO.

No. 200P91

Case below: 102 N.C.App. 351

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

47TH STREET PHOTO, INC. v. POWERS

No. 20P91

Case below: 100 N.C.App. 746

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 12 June 1991. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

GALLBRONNER v. MASON

No. 144P91

Case below: 101 N.C.App. 362

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

GARDNER v. THOMASON

No. 184P91

Case below: 102 N.C.App. 351

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

GREER v. WATSON

No. 42P91

Case below: 101 N.C.App. 242
328 N.C. 731

Petition by defendant (Nationwide) to reconsider petition for discretionary review dismissed 12 June 1991. Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 June 1991.

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

HARRIS v. PROCTER & GAMBLE

No. 201P91

Case below: 102 N.C.App. 329

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

IN RE COBB

No. 224P91

Case below: 102 N.C.App. 466

Motion by the Board to dismiss appeal by Cobb for lack of substantial constitutional question allowed 12 June 1991. Petition by Cobb for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

IN RE HUGHES v. HUGHES

No. 72P91

Case below: 101 N.C.App. 430

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

IN RE SMITH

No. 103A91

Case below: 101 N.C.App. 430

Notice of appeal by Jean Lennon pursuant to G.S. 7A-30 dismissed 12 June 1991.

INVESTORS TITLE INS. CO. v. HERZIG

No. 28PA91

Case below: 101 N.C.App. 127

Petition by Partnership for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1991. Petition by defendant (Shelter) for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1991.

ISENHOUR v. ISENHOUR

No. 173P91

Case below: 102 N.C.App. 133

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

JOHNSON v. NEW HANOVER CO. BD. OF EDUCATION

No. 559P90

Case below: 100 N.C.App. 454

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

JORDAN v. BENEFIELD

No. 84P91

Case below: 101 N.C.App. 430

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

N.C. EASTERN MUN. POWER AGENCY v. WAKE COUNTY

No. 10P91

Case below: 100 N.C.App. 693

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 12 June 1991. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

OGLESBY v. S. E. NICHOLS, INC.

No. 154P91

Case below: 101 N.C.App. 676

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

ROBINSON v. MOSES H. CONE MEMORIAL HOSPITAL

No. 183A91

Case below: 102 N.C.App. 579

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 12 June 1991.

SIPPE v. SIPPE

No. 40P91

Case below: 101 N.C.App. 194

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991. Motion by plaintiff pursuant to Rules 37 and 2 denied 12 June 1991.

SMITH v. LUMBERTON CLINIC OF SURGERY

No. 597P90

Case below: 100 N.C.App. 601

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. BARBER

No. 217P91

Case below: 102 N.C.App. 580

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 June 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. BARRETT

No. 155P91

Case below: 101 N.C.App. 722

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 June 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

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

STATE v. BAXTER

No. 189P91

Case below: 102 N.C.App. 352

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. BRESSE

No. 165P91

Case below: 101 N.C.App. 519

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 June 1991.

STATE v. DAY

No. 216P91

Case below: 98 N.C.App. 515

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 June 1991.

STATE v. ELLERBEE

No. 212P91

Case below: 89 N.C.App. 723

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 June 1991.

STATE v. ESTES

No. 211P91

Case below: 101 N.C.App. 575

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 June 1991.

STATE v. FEIMSTER

No. 187P91

Case below: 102 N.C.App. 353

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. HICKS

No. 179P91

Case below: 102 N.C.App. 134

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. HINSON

No. 175P91

Case below: 102 N.C.App. 29

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 June 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. LEWIS

No. 140P91

Case below: 101 N.C.App. 575

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 June 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. MASSEY

No. 91P91

Case below: 100 N.C.App. 758

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

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

STATE v. McINNIS

No. 199P91

Case below: 102 N.C.App. 338

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. OXENDINE

No. 568P90

Case below: 100 N.C.App. 333

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 June 1991.

STATE v. PICKETT

No. 114A91

Case below: 101 N.C.App. 576

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 June 1991.

STATE v. QUINN

No. 138P91

Case below: 101 N.C.App. 576

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. RAWLINSON

No. 38P91

Case below: 101 N.C.App. 243

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 June 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. ROBERTSON

No. 34P91

Case below: 101 N.C.App. 243

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. RODMAN

No. 126P91

Case below: 101 N.C.App. 576

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. TAYLOR

No. 205P91

Case below: 102 N.C.App. 354

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. WHITE

No. 159P91

Case below: 101 N.C.App. 593

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 June 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

STATE v. WILLIAMS

No. 204P91

Case below: 102 N.C.App. 354

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 June 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

SUGGS v. SNOW HILL MILLING CO.

No. 585P90

Case below: 100 N.C.App. 527

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

THOMASON v. LONGLEY

No. 157P91

Case below: 101 N.C.App. 723

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

TRUSTEES OF WAGNER TRUST v. BARIUM SPRINGS HOME FOR CHILDREN

No. 191A91

Case below: 102 N.C.App. 136

Petition by defendant (Mitchell Community College) for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991. Petition by defendant (Gardner-Webb College) for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

WARBURTON v. INTERSTATE MILLING CO.

No. 151P91

Case below: 101 N.C.App. 723

Petition by carrier defendant (Constitution States) for discretionary review pursuant to G.S. 7A-31 denied 12 June 1991.

YATES v. NEW SOUTH PIZZA, LTD.

No. 176PA91

Case below: 102 N.C.App. 66

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1991.

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

PETITIONS TO REHEAR

BOCKWEG v. ANDERSON

No. 52PA90

Case below: 328 N.C. 436

Petition by several defendants to rehear pursuant to Appellate Rule 31 denied 12 June 1991.

VANCAMP v. BURGNER

No. 312A90

Case below: 328 N.C. 495

Petition by defendants to rehear pursuant to Appellate Rule 31 denied 12 June 1991.

STATE OF NORTH CAROLINA v. BARBARA T. STAGER

No. 212A89

(Filed 14 August 1991)

1. **Criminal Law § 34.4 (NCI3d)— similar crime—when admissible**

Evidence is admissible under Rule 404(b) of the N. C. Rules of Evidence if it is substantial evidence tending to support a reasonable finding *by the jury* that the defendant committed a similar act or crime and its probative value is not limited solely to tending to establish the defendant's propensity to commit a crime such as the crime charged.

**Am Jur 2d, Evidence §§ 320 et seq.**

2. **Criminal Law § 34.4 (NCI3d)— similar crime—when admissible**

Under Rule 404(b) a prior act or crime is "similar" if there are some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both. It is not necessary that the similarities between the two situations rise to the level of the unique and bizarre; rather, the similarities simply must tend to support a reasonable inference that the same person committed both the earlier and later acts.

**Am Jur 2d, Evidence §§ 298, 321.**

3. **Criminal Law § 34.7 (NCI3d)— murder of second husband—circumstances of first husband's death—admissibility to show motive, intent and absence of accident**

In a prosecution of defendant for the first degree murder of her second husband, evidence concerning the death of defendant's first husband was admissible under Rule 404(b) to show motive, intent, preparation, plan, knowledge, or absence of accident where the court found that evidence concerning the death of defendant's first husband, when taken with evidence concerning the second husband's death, tended to show that (1) each of defendant's husbands died as a result of a single gunshot wound; (2) the weapon in each case was a .25 caliber semi-automatic handgun; (3) both weapons were purchased for the defendant's protection; (4) both men were shot in the early morning hours; (5) defendant discovered both victims after their respective shootings; (6) defendant was the last

person in the immediate company of both victims; (7) both victims died in the bed that they shared with defendant; and (8) defendant benefited from life insurance proceeds resulting from both deaths.

**Am Jur 2d, Evidence §§ 321, 324-326.**

4. **Criminal Law § 34.4 (NCI3d)— similar crime ten years before —remoteness—probative value**

The death of defendant's first husband ten years before the death of her second husband was not so remote as to have lost its probative value in a prosecution of defendant for the first degree murder of her second husband.

**Am Jur 2d, Evidence § 330.**

5. **Criminal Law § 34.4 (NCI3d)— similar crime—twenty witnesses—no abuse of discretion**

The trial court did not abuse its discretion in permitting the State to introduce testimony by twenty witnesses in showing the circumstances of the death of defendant's first husband ten years before the death of her second husband, including testimony from the telephone operator who received the emergency call, rescue squad personnel, employees of insurance companies and the first husband's mother.

**Am Jur 2d, Evidence § 333; Trial § 136.**

6. **Homicide § 20.1 (NCI3d)— similar crime—photographs of body**

Photographs of the body of defendant's first husband were properly admitted in defendant's trial for the murder of her second husband for the limited purpose of illustrating witnesses' testimony as to where the body was found, the position of the body, and the location of the bullet wound.

**Am Jur 2d, Evidence §§ 787, 792.**

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

7. **Criminal Law § 34.7 (NCI3d)— murder of second husband—death of first husband—probative value outweighing prejudice**

The trial court did not err in concluding that the probative value of evidence of the circumstances of the death of defendant's first husband ten years earlier outweighed the danger of unfair prejudice in defendant's trial for first degree murder

of her second husband where the evidence was relevant and admissible to show intent, plan, knowledge, and absence of accident. N.C.G.S. § 8C-1, Rule 403.

**Am Jur 2d, Evidence § 330.**

8. **Criminal Law § 95.1 (NCI3d)— evidence competent for restricted purpose—failure to request limiting instruction**

Where defendant failed specifically to request or tender a limiting instruction at the time evidence was admitted, she is not entitled to have the trial court's failure to give a limiting instruction reviewed on appeal. N.C.G.S. § 8C-1, Rule 105.

**Am Jur 2d, Trial §§ 106, 577.**

9. **Criminal Law § 73.3 (NCI3d)— tape recording—admissibility to show state of mind**

In a first degree murder prosecution in which defendant claimed that the shooting of her husband was accidental, a tape recording made by the victim three days before his death was admissible under N.C.G.S. § 8C-1, Rule 803(3) as evidence tending to show the victim's state of mind where the victim's recorded statement tended to show that he was afraid of defendant, tended to disprove the normal, loving relationship that defendant contended existed between the two, tended to refute defendant's contention that the victim would have slept with defendant with a loaded and cocked semi-automatic pistol under his pillow, and thus tended to establish facts directly relevant to the issue of accident.

**Am Jur 2d, Evidence § 436.**

10. **Criminal Law § 70 (NCI3d)— authentication of tape recording**

Under N.C.G.S. § 8C-1, Rule 901, testimony as to accuracy based on personal knowledge is all that is required to authenticate a tape recording, and a recording so authenticated is admissible if it was legally obtained and contains otherwise competent evidence.

**Am Jur 2d, Evidence § 436.**

11. **Criminal Law § 70 (NCI3d)— authentication of tape recording**

The testimony of four witnesses, including a murder victim's parents and sister, that they recognized the voice on a tape recording as that of the victim was sufficient to meet

the State's burden of authentication of the tape recording. Testimony by other witnesses that the voice on the tape was not the victim's went to the weight and credibility of the evidence and not to its admissibility.

**Am Jur 2d, Evidence § 436.**

**12. Constitutional Law § 349 (NCI4th); Criminal Law § 73.3 (NCI3d)— hearsay evidence—state of mind exception—right of confrontation not denied**

The admission of a tape recording made by a murder victim shortly before his death did not violate defendant's rights to confrontation under the state or federal constitutions where the victim's statement was admissible under the state of mind exception to the hearsay rule.

**Am Jur 2d, Evidence § 436.**

**Admissibility in evidence of sound recording as affected by hearsay and best evidence rules. 58 ALR3d 598.**

**Federal constitutional right to confront witnesses—Supreme Court cases. 98 L. Ed. 2d 1115.**

**13. Criminal Law § 268 (NCI4th)— time to investigate tape recording—denial of continuance—no abuse of discretion**

The trial court did not abuse its discretion in denying defendant's pretrial and trial motions for continuance of a first degree murder case to give defendant time to make an investigation concerning a tape recording allegedly made by the victim and matters referred to on that recording where the State received the recording on 19 April 1989 and provided a copy to defendant the next day; on 24 April the court ordered that funds be provided to defendant for purposes of investigating the tape; on 1 May the court ordered the State to provide to defendant the date the tape was discovered and the names of the persons who discovered it; presentation of evidence commenced in defendant's trial on 8 May and the State offered the tape into evidence on 15 May; defendant produced eight witnesses who testified that the voice on the tape was not that of the victim; defendant also produced a witness from a pharmacy to testify concerning the victim's statement on the tape that he had gone to the pharmacy to have certain pills identified; and it thus appears that defendant had ample

time to discover and introduce evidence concerning the tape which was favorable to her case.

**Am Jur 2d, Evidence § 436.**

**14. Criminal Law § 162 (NCI3d)— failure to object to evidence—waiver of right to assign error**

Defendant's failure to object and her affirmative acquiescence in the admission of a videotape constituted a waiver of her right on appeal to assign as error the admission of the videotape and its use during the trial.

**Am Jur 2d, Evidence § 801.5.**

**Admissibility of videotape film in evidence in criminal trial. 60 ALR3d 333.**

**15. Homicide § 15 (NCI3d)— murder of husband—racial statement—telephone conversation with young male—absence of prejudice**

A defendant on trial for the murder of her husband was not prejudiced by testimony that she once said she might change her job because "she was afraid the black lady would get the job" as her supervisor where nothing related to race was at issue in the case and the statement was insignificant. Nor was defendant prejudiced by testimony that she telephoned a young male several weeks after her husband's death where her conversation with him tended to support her contention that the victim placed the gun with which he was killed under his pillow because he was afraid of someone breaking into the house.

**Am Jur 2d, Evidence § 650.**

**16. Homicide § 15.2 (NCI3d)— intent to see psychiatrist—absence of prejudice**

A defendant on trial for the murder of her husband was not prejudiced by testimony that defendant told a witness after her husband's death that she intended to start seeing a psychiatrist.

**Am Jur 2d, Evidence §§ 355, 363, 650.**

**17. Criminal Law § 169.3 (NCI3d)— admission of testimony—similar evidence by defendant—absence of prejudice**

Defendant was not prejudiced by a witness's testimony where defendant first injected the subject matter of such

testimony into the trial by introducing portions of a tape recording made by the victim before his death which contained matters about which the witness testified.

**Am Jur 2d, Evidence § 268.**

**18. Homicide § 15.2 (NCI3d)— murder of husband—calmness of defendant—giving away victim's clothing**

In a prosecution of defendant for the first degree murder of her husband, testimony that defendant was calm and not crying on the morning of the victim's death and that she gave away some of his clothing on the day after his funeral was admissible as opinion evidence on defendant's emotional state shortly after her husband was killed based on the witnesses' observations of her demeanor at that time.

**Am Jur 2d, Evidence § 366.**

**19. Homicide § 21.5 (NCI3d)— first degree murder—intent to kill—sufficiency of circumstantial evidence**

There was substantial circumstantial evidence to support a jury finding that defendant's shooting of her husband was not accidental but that she intentionally killed him after premeditation and deliberation where there was evidence tending to show that defendant had control of the weapon before she discharged it; the victim feared defendant due to her prior actions toward him; defendant gave inconsistent versions of the "accident" to the medical examiner and the police, and both of those versions were inconsistent with the physical evidence; defendant was the victim's sole insurance beneficiary and would receive a very substantial sum of money at his death; defendant needed money badly and had been borrowing money without the victim's knowledge and concealing that fact from him; and defendant's prior husband had died in a manner strikingly similar to the manner in which the victim died.

**Am Jur 2d, Evidence §§ 266, 1125.**

**Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial—state cases. 36 ALR4th 1046.**

**20. Criminal Law § 1352 (NCI4th)— mitigating circumstances—unanimity requirement—McKoy error not cured or harmless**

The trial court's unanimity requirement for mitigating circumstances set out in the second and third issues on the

verdict form and in the related oral instructions during the penalty phase of a first degree murder trial constituted *McKoy* error, and this error was not cured by the court's instruction relating to the fourth issue that any individual juror could consider a mitigating circumstance which he or she found to exist by a preponderance of the evidence when the juror made a final recommendation as to defendant's sentence even if the circumstance had not been unanimously found by the jury. Furthermore, the State failed to show that the *McKoy* error was harmless beyond a reasonable doubt where the jury failed unanimously to find the submitted fifth or "catchall" mitigating circumstance, and a juror reasonably might have found the "catchall" mitigating circumstance to exist based on evidence tending to show that defendant worked with numerous young people and acted like a mother to children other than her own, and that defendant cooperated with law enforcement officials in their investigation of the case and willingly complied with their request that she reenact on videotape her account of what happened on the day she killed her husband.

**Am Jur 2d, Evidence §§ 598, 628.**

**Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L. Ed. 2d 1001.**

Justice MEYER concurring in part and dissenting in part.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death upon the defendant's conviction for first-degree murder, entered by *Allen (J.B.), Jr., J.*, in Superior Court, LEE County, on 19 May 1989. Heard in the Supreme Court on 6 May 1991.

*Lacy H. Thornburg, Attorney General, by William N. Farrell, Jr., Special Deputy Attorney General, for the State.*

*Tharrington, Smith & Hargrove, by Roger W. Smith, Melissa H. Hill, Douglas A. Ruley, Daniel W. Clark, and Marcus W. Trathen, for defendant-appellant.*

MITCHELL, Justice.

The defendant was tried on a true bill of indictment at the 1 May 1989 Criminal Session of Superior Court, Lee County, and

was convicted of one count of murder in the first degree. The jury recommended and the trial court entered a sentence of death. On appeal, the defendant brings forth numerous assignments of error. We conclude that the guilt-innocence determination phase of the defendant's trial was free from prejudicial error. However, errors during the sentencing proceeding require that the sentence of death be vacated and that this case be remanded to the Superior Court for a new sentencing proceeding complying with the recent decision of the Supreme Court of the United States in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

The State's evidence in the present case tended to show that in the fall of 1978, the defendant and the victim, Allison Russell Stager III, met and began dating. On 17 March 1979, they were married.

On 1 February 1988, the defendant and Russell Stager resided in Durham. Jason and Brian Stager, the defendant's sons from her previous marriage, had been adopted by Russell approximately eight years earlier. Fourteen-year-old Jason lived with his parents.

At 6:08 a.m. on 1 February 1988, Jason Stager telephoned the 911 emergency operator from his home. Jason told the operator that his father had suffered a gunshot wound and that his mother had asked him to call for an ambulance. A volunteer unit from the Lebanon Fire Department (the "Lebanon First Responders"), an Emergency Medical Services unit, and three deputies from the Durham County Sheriff's Department were dispatched to the residence.

Douglas Griffin of the Lebanon First Responders was the first person to arrive. Jason Stager directed Griffin to a bedroom. The bedroom door was open approximately two inches. When the door opened, the light came on in the darkened bedroom and the defendant appeared at the door. Griffin recalled that she showed "a slight indication of crying but very little."

The defendant backed up and motioned toward the bed as Griffin entered. Russell Stager was lying with his left side on the right side of the bed. He was not lying "cleanly on his shoulder," but was turned slightly toward the pillow with his face in the pillow and his left eye somewhat covered by the pillow. There was a twelve to eighteen inch bloodstain on the pillow behind Russell's head, and blood was coming from his nose and mouth.

There also was blood on the hair on the back left side of his head. His body was normal in color, but his face was ashen and his eyes were rolled back in his head.

Griffin pivoted Russell so that his face would be out of the pillow and his breathing would be easier. As Griffin was taking the victim's blood pressure and pulse, Doug Wingate, another member of the Lebanon First Responders, entered the room and began to help. In the process of reading Russell's vital signs, they turned his head. This caused the pillow to shift around, thereby exposing a .25 caliber Beretta pistol. Beyond the pistol, and further underneath the pillow, lay a spent shell casing. Noticing that the hammer on the pistol was cocked, Griffin did not move the pistol. The defendant commented that she had already moved the pistol.

When Wingate asked the defendant what had happened, she said that the gun had discharged as she was pulling it out from under the pillow. She said that she had heard her son get up, and she had been trying to remove the gun in case her husband awoke and thought someone was in the house. The defendant told Wingate that they kept a gun because they had heard noises at night and were concerned about burglars.

The first law enforcement officer to arrive on the scene was Deputy Sheriff Clark Green. When he arrived shortly after 6:15 a.m., the defendant was sitting on the edge of the bed and had changed into blue jeans, a sweat shirt, and tennis shoes. Her appearance was neat. Deputy Green secured the area and, together with Deputy Sheriff Paul Ernest Hornbuckle, interviewed the defendant.

Before they began the questioning, the defendant repeatedly said, "I kept telling him about those damn guns." The officers asked the defendant for some general information such as the victim's full name and age, and she was able to answer their questions without difficulty. They asked her about the gun, and the defendant stated that her husband was "in a stage about guns" and occasionally slept with a pistol. At that time, the defendant's son Jason came up and she directed Jason to tell the officers "about him having these stages about guns, he carries guns in the cars, leaves them under the pillow, he is scared [sic] about somebody coming into the house." Both Jason and the defendant said that the victim occasionally slept with a gun under his pillow. Deputy Green asked the defendant if there were any marital problems, and she said no.

While the officers were questioning the defendant, one of the emergency medical technicians interrupted to ask if one of the officers would remove the gun from the bedroom. Deputy Hornbuckle removed the gun from beneath the pillow; the gun pointed toward the victim. The shell casing was also removed from under the edge of the pillow.

Michael Kevin Wilson, a member of the Lebanon First Responders and also an emergency medical technician with Durham County Hospital, arrived at the scene after Deputy Hornbuckle had removed the gun. When Wilson arrived, the defendant was standing in the bedroom to the left of the bed. The defendant became such a distraction to the medical personnel that they asked Deputy Hornbuckle to remove her from the room. The defendant repeatedly made statements such as "I'm scared of these things, my God I wish we didn't have them. . . . I wish he wouldn't have these things under there, I'm scared of guns, guns are not safe, you know, there are kids in the house." Wilson described the repetitious nature of these statements as like a "chant."

Wilson was a member of the same church as Barbara and Russell Stager and Russell's parents. After Russell was treated at the Stager residence and transported to Duke Medical Center, Wilson told the defendant that he would be happy to contact her husband's parents or their pastor and drive them to the hospital. The defendant responded that she did not want Russell's father called and told Wilson not to call anyone. Wilson testified that the defendant's response startled him. He later asked Douglas Griffin, the first person to arrive at the scene, to go home and immediately prepare a report concerning what he had observed at the scene that morning. Griffin's report indicated that the defendant had stated to the emergency medical personnel that her husband had been hearing sounds outside of the house during the night and had placed the pistol under his pillow. The next morning, upon hearing her son awake in the house, the defendant reached under the pillow to remove the pistol and it fired.

Phyllis Hunnicutt Cagle, secretary to the principal at Durham High School, testified that the defendant telephoned her at home around 7:00 a.m. on 1 February 1988. The defendant informed Cagle that the victim, a coach and teacher at the school, would not be at work that day. When Cagle asked the defendant if the victim was sick, the defendant hesitated and then said "yes."

Doris Stager, the mother of the victim, testified that she last saw her son alive on 31 January 1988, the day before his death. She recalled that after supper, while they were sitting around, the defendant asked Russell to move from a chair at the end of the couch to a chair sitting across from his mother. After he moved to the chair across from his mother, the defendant sat down on the floor beside the chair, reached up and held his hand. As the defendant reached up and grabbed Russell's hand, she looked directly at Doris. Russell did not respond to the defendant's display of affection.

On 1 February 1988, at approximately 8:45 a.m., Doris received a telephone call from the defendant's mother, Marva Terry. She told Doris that the victim was in the emergency room at Duke Hospital and that the defendant wanted Doris there. As Doris walked into the room at the hospital, the defendant began saying, "I'm sorry, I didn't mean to do it, forgive me." Russell Stager died around noon that day.

Doris Stager testified further that on 2 February 1988, she and her husband were at the funeral home assisting the defendant with the funeral arrangements when she heard the defendant speaking with the funeral director about drawing Social Security on the two boys. On 5 February, the defendant called Doris and informed her that she had been to the Veterans Administration. The defendant wanted to know if Russell had ever been in the regular Army. She said that she had been told that she could draw insurance only if Russell had been in the regular Army. Doris responded that he had been in the Army Reserves and the National Guard. On the following Tuesday, 9 February 1988, the defendant told Doris that she had given all of Russell's clothes to two churches. On 15 February 1988, the defendant and Doris had a conversation at Doris' home. The defendant again told Doris that the shooting was an accident and that she wanted forgiveness. The defendant also said that she was not going to be able to make her monthly house payment because it would take her entire salary to do so. The defendant also indicated that after she got insurance payments from the National Guard and the school where the victim had worked, she would be able to make the house payment.

Dr. Franklin Honkanen, a pathologist and Durham County Medical Examiner, was working at Duke University Medical Center on 1 February 1988. He testified that the defendant told him that

her husband kept a large number of guns in the house and that many of the guns had been loaded. She stated that they had been concerned over break-ins in the neighborhood. She said that the victim previously had slept with a pistol under the pillow. She had not liked this practice, however, and he had said he would not do it again. The defendant also told the doctor that on the morning of the shooting, she awakened around 6:00 a.m. and stretched out on her stomach. As her right hand reached underneath the victim's pillow, she felt something hard. As she pulled it out from under the pillow, she realized that it was a gun and started to get out of bed. The defendant stated that she was backing off of the bed when the gun fired, hitting the victim. Dr. Honkanen asked her if she knew approximately how far away from the victim she was when the victim was shot and whether she could describe how the gun discharged. The defendant replied that she did not know how the gun went off, but that it was in her hand and she thought she was somewhere at the edge of the bed, between three and five feet away from the victim.

The defendant told Dr. Honkanen that she was not yet standing when the gun discharged. She stated that she was not holding the gun up when it fired, but was dragging it across the bed. In response to Dr. Honkanen's question as to whether the victim usually slept with a gun, the defendant said that, although the victim usually did not sleep with a gun, he had slept with one on at least one prior occasion. The defendant stated that they had argued about this practice and that the victim had promised not to do it any more. The defendant stated that she was surprised that morning to find a gun under the pillow. As Dr. Honkanen was concluding his interview and expressing his condolences, the defendant stated that she thought the shooting was a terrible accident that she would have to live with.

Dr. Honkanen examined Russell at the hospital and found a single bullet wound approximately in the middle of the back of his head. The wound had been cleaned and sutured by that time, and a small circle of hair had been removed from around the wound. Dr. Honkanen did not see any powder deposits or any evidence of burning or singeing. He opined that there could have been powder marks around the wound if the weapon had been fired within a distance of eighteen inches, as well as burning or singeing if the weapon had been discharged within one foot.

R.D. Buchanan, Homicide Detective with the Durham County Sheriff's Department, testified that he learned of the victim's death at 12:45 p.m. on 1 February 1988. He met the defendant at her parents' home later that day. The defendant told Buchanan that she was in the bed that morning when the alarm clock went off in her son's room. She then reached over to her husband and felt an object underneath the pillow. As the defendant stuck her hand under the pillow and pulled the pistol out, she attempted to lift it and raise herself in the bed. At this point, the pistol discharged. The defendant stated that she had told her husband in the past not to place guns under the pillow, and that on this particular morning she did not know that the gun was there.

The defendant then went to her residence with Buchanan. They went into the bedroom, and the defendant demonstrated the positions that she and Russell were in when the gun discharged. Buchanan observed a shotgun in the corner of the bedroom while he and the defendant were there.

On 5 February 1988, Buchanan again spoke with the defendant. At that time, he asked the defendant if it would be possible to do a reenactment of the shooting. The defendant agreed to do the reenactment, which was preserved by means of video recording. After the reenactment was completed, the defendant told Buchanan that she kept asking herself why Russell would have kept a gun that was ready to fire under his pillow. In addition, the defendant stated that she did not know anything about guns and that she did not like guns. The defendant also inquired as to how the insurance company would know that the shooting was accidental.

On 15 February, the defendant called Buchanan and wanted to know about the pending listing on the death certificate. She wanted to know again if the case was closed out as accidental. The defendant informed Buchanan that the death certificate showed that the autopsy was complete.

Buchanan spoke with the defendant again on 5 April seeking information regarding the pistol used in the shooting. The defendant told Buchanan at that time that the gun had been purchased from a business in Durham. On 15 April, Buchanan and Agent Steve Myers of the State Bureau of Investigation interviewed the defendant at her residence. The defendant stated to the officers that she and Russell had purchased the pistol at least two years earlier. Initially, it had been purchased for the defendant's protec-

tion. However, she did not know how to use the pistol, and Russell had later moved it to an unknown location. The defendant said that her husband had done a lot of shooting and had been on the National Guard Pistol Team. She stated that she had accompanied her husband to an underground shooting range on one occasion and that she shot approximately two clips in the pistol he had that day. She also stated that she had never shot the .25 caliber pistol that killed her husband.

Buchanan also testified that the defendant said that she had a tremendous fear of guns. The defendant said she was unable to form an opinion as to whether the victim was careless with guns or not because she knew so little about them. She did say that Russell had told her not to point a gun at anyone unless she was going to use it, which she found funny since she did not know how to use a gun. In addition, the defendant told the officers that her husband had stated that he would confront and shoot anyone who broke into their house. The defendant found this statement odd because her husband was such a heavy sleeper who probably would not awaken if someone broke into the house. She also indicated that her husband occasionally slept with different weapons under his pillow.

The defendant told Buchanan that she had never purchased a .25 caliber pistol before. However, she also told Buchanan that her first husband had died from a pistol wound after she had purchased the pistol that killed him. Specifically, the defendant told Buchanan that Larry Ford, her first husband, had asked her to obtain a gun. She contacted her preacher and had him go with her to sign the gun permit. Another individual accompanied her to a gun shop to purchase the pistol. They then went out so that the defendant could practice shooting the gun. The defendant said that she had shot the pistol three to four times. Buchanan testified that the defendant said she believed that it was a "small .22 caliber pistol."

The defendant said that on the day that she purchased the gun, Larry Ford returned from a karate class in which he had been kicked in the groin. Because he was in some pain, the defendant decided to sleep on the couch. After falling asleep, she was awakened by a noise. When she went upstairs to check the source of the noise, she heard Larry gasping for breath. He had been shot by the gun that she had purchased earlier that day and was

lying on the bed. She stated that a medical examiner later told her that he could find no residue on Larry's hands and that he believed that Larry had dropped the gun causing it to fire accidentally.

Buchanan also testified that the defendant said that she was going to receive over $100,000 in life insurance proceeds as a result of Russell's death. In addition, she said that there was credit life insurance on Russell's life that would pay the balance owed on a vehicle once the defendant received the supplemental death certificate, as well as credit life insurance that would pay the balances owed on two other accounts.

The defendant also told Buchanan that she was not prepared for Russell's death. The two had prepared wills the year before, with Russell leaving property and checking accounts to the defendant. The defendant said that the only problems she and Russell had confronted were financial and that they had been through two very rough financial situations.

Master Sergeant Graham Lee of the North Carolina National Guard testified that Russell Stager was a sergeant in the National Guard and a member of his company's pistol team. In Sergeant Lee's opinion, Russell was an orderly, safe and cautious individual.

Dr. Thomas Clark, a forensic pathologist with the Office of the Chief Medical Examiner of North Carolina, conducted an autopsy on Russell on 3 February 1988. The victim had a gunshot wound to the back of his head. Dr. Clark determined from his examination and the recovery of metal fragments that the bullet involved was a small caliber copper-jacketed bullet consistent with firing from a .25 caliber pistol bullet. The point of entry was about the level of the ears just to the right of the midline of the back of the head. The bullet traveled forward, to the left and across the brain and hit the left side of the front part of the skull. The bullet then bounced back and was recovered from the front part of the brain.

Dr. Clark testified that there was no powder stippling in or around the wound. Based upon this lack of powder stippling or powder particles in or about the wound, Dr. Clark concluded that the gunshot that killed the victim had been fired from a distance of more than two feet from the victim. He concluded that if the victim was lying on his left side when he was shot, "the bullet would necessarily have come from above the midline part of the head."

Chris Wagoner, a former high school baseball player who had been coached by Russell Stager, testified that he received a telephone call from the defendant, Barbara Stager, on the day after Russell's funeral. She asked that he and some other players bring the victim's belongings from his office at school to the house. In addition, the defendant asked for assistance with some of the victim's personal belongings at their home. Wagoner took the items from Russell's office to the Stager home. He then removed the victim's clothes and belongings from the attic and placed them on a truck. These items were given to charity.

A.C. Webster, a sergeant in the Durham County Sheriff's Department, testified that he was in charge of firearms training, weapons, weapons maintenance and anything to do with specialized weapons in the Sheriff's Department. In connection with his duties and responsibilities, he attended several armory schools. At these schools, he learned how to work on weapons, as well as maintain and repair them. At Detective Buchanan's request, Sergeant Webster examined the .25 caliber Beretta pistol that killed Russell Stager. Sergeant Webster testified that the Beretta is a magazine fed .25 caliber semi-automatic pistol. If a semi-automatic pistol is fired, it will fire the round that is in the chamber, eject the spent casing and move another round from the magazine into the firing chamber. Such a pistol automatically cocks itself for the second round. The Beretta is equipped with a safety located near the rear of the weapon. When engaged, the safety will prevent the weapon from firing.

Sergeant Webster fired the Beretta a total of eight times. Each time he fired the weapon, he found that the spent shell casings ejected from the pistol traveled to the right and rear of the shooter. The safety on the grip had to be manually engaged. Both the safety and the weapon were functioning properly on the day that he tested the gun.

Eugene Bishop, a firearms examiner with the State Bureau of Investigation, testified that he also tested the Beretta. Bishop concluded that the bullet and bullet fragments taken from the victim's brain were fired from the Beretta pistol. In addition, he testified that the Beretta could be loaded in two ways: (1) by placing a live round in the chamber, closing the chamber, manually cocking the external hammer and pulling the trigger, or (2) by placing a loaded magazine in the weapon and pulling the slide back. Bishop

testified that in addition to the thumb safety on the grip, the Beretta had another type of safety which could be engaged by pulling back on the hammer a "quarter cock." He testified that it was difficult to push the thumb safety up into a full safety position, and that it took a definite movement to push that safety down or off so as to allow the pistol to fire.

Bishop also testified as to the ejection pattern of the Beretta. He found that most of the spent shell casings were ejected to the right rear of the shooter, but that on at least one occasion, the spent casing came straight back or back to the left. The spent casings would travel two to six feet when ejected from the gun. A trigger pull of four and one-half pounds of pressure was required before the weapon would fire. He also concluded that the Beretta was in proper working condition.

Special Agent Michael Creasy, a forensic chemist in the crime laboratory of the State Bureau of Investigation, testified that he had examined certain exhibits for gunshot residue in connection with the case. Specifically, he examined the mattress cover, the blanket, the sheets, and the pillowcases from the bed in which Russell Stager was killed. He examined those items in order to determine whether they bore any tears or burning that could be associated with the discharge of a gun. He testified that he would have expected to find singe marks or actual damage to the fabric if the gun had discharged within six inches of any of the items examined. His examination failed to reveal any such marks or burning that he could identify as being associated with the discharge of a firearm.

Sandra Biddle, the wife of a Durham High School coach, testified that she had known both Russell Stager and the defendant. She recalled a conversation she had with the defendant in October of 1987. The defendant told Biddle that the victim was teaching her how to shoot a small handgun for protection.

Gilly Boaz, a member of the National Guard between 1983 and 1988, testified that he and the victim shared an interest in handguns and were on the rifle team together. Boaz spent a lot of time with the victim when firearms were in use and observed that the victim safely handled firearms. Boaz could not recall an instance when the victim did not have the slide back on a semi-automatic pistol when it was not in use. Both Boaz and the victim

attended a pistol coaching course the year prior to the victim's death. Safety was the number one priority in this course.

Boaz also accompanied the victim and the defendant to an indoor pistol range at an armory in the fall of 1984. Boaz observed the defendant using one of the victim's pistols at that time. The pistol the defendant used on that occasion, a .22 caliber semi-automatic Ruger Mark 3, is in many respects similar to the .25 caliber Beretta used in the shooting of the victim. The only real difference between the two is that the Ruger Mark 3 is a target pistol, which the Beretta is not. Boaz saw the defendant fire the Ruger Mark 3 and hit the paper target, which he characterized as "no small feat." The defendant did not appear to be scared or uncomfortable firing the pistol.

Patty Boaz, Gilly's wife, testified that she too was at the firing range with her husband and the Stagers. At that time, the defendant told her that she did not like guns, although "the more she was with them the more she [be]came familiar or comfortable with them."

The State also presented evidence that the defendant was the sole beneficiary of more than $164,000 in life insurance proceeds resulting from her husband's death. Further, the defendant had been engaged in a pattern of borrowing money prior to the victim's death without the knowledge of the victim, including forging his name on loan applications as well as on a motor vehicle title in order to secure one of the loans. In order to keep this activity secret, the defendant had the bills mailed to her parents' home. This pattern of borrowing began in January of 1987 and concluded with a $10,000 loan obtained nine months later. After the defendant missed payments on a $10,000 bank loan, she began forging checks on her husband's accounts. When she missed the second payment, the bank informed the defendant that the victim would have to be contacted if she did not make the payment. The defendant asked the bank not to call her husband because they were having problems and another female was involved.

Alma Mae Smith testified that she notarized the victim's purported will around March of 1987. This purported will was notarized in the absence of the victim, after the defendant brought it to Smith at work and asked her to notarize the victim's signature. The defendant stated that she was asking Smith to notarize the will because Smith was familiar with the victim's handwriting. No

witnesses had signed the will, nor were there any witnesses to the will in the room at the time Smith notarized the will. However, when the will later was admitted to probate, the names of Mary Terry, Alton Terry, and Marva Terry appeared on the will.

Smith also testified that she went to the defendant's home on the night of the victim's death. She observed that the defendant "was very calm to have gone through what had happened during the day."

The State's evidence also tended to show that in December of 1988, Frederick Evans, a Durham High School student, found a cassette tape in a school locker room. Evans found the tape about twenty feet from the victim's office under one of the stalls in the locker room. Evans picked up the tape, took it home and gave it to his mother.

Evans' mother placed the cassette tape on her dresser, where it stayed until April 1989. In April 1989, Evans listened to the recording on tape for the first time. He recognized the victim's voice on the tape expressing serious concerns about the defendant's behavior. Evans and his mother listened to the tape and decided to turn it over to the police. The police received the tape from Evans and his mother on 18 April 1989.

The State also introduced evidence concerning the death of the defendant's first husband, Larry Ford. The State's evidence tended to show that shortly after midnight on 22 March 1978, emergency medical services personnel were called to the home of Larry Ford. Ford was dead when an ambulance arrived.

Robert Perry, an emergency medical technician, testified that he had occasion to go to a house in Trinity, North Carolina on 22 March 1978. He was accompanied by his partner, Jim Owens. When Perry and Owens arrived at the location, they were met in the kitchen by Barbara Ford (now the defendant Barbara Stager). She stated that her husband was upstairs and had been shot. She believed he was dead. Perry found Larry Ford lying on the bed with his eyes closed. He was dead. There were bloodstains on the front of his pajama top.

Perry turned back the bedding covering Ford and found the clip from a gun in the bed with Ford. The gun was lying on the right side of the bed near Ford's hip or waist area. Ford's right foot was hanging off the bed on the floor. There was a gunshot

entrance wound just to the right of the sternum along the line of Ford's nipple. Perry concluded that Ford had been dead for at least five minutes. Perry drew his conclusion from the skin temperature and color of the body and the fact that blood on the body had already dried.

After concluding that Ford was dead, Perry went downstairs and informed the defendant. He observed that the defendant was very calm and did not display any emotion that would correspond to the situation. The defendant volunteered something to the effect that Ford had bought her a gun for her protection, but she did not say anything else. Perry's observations at the scene led him to call the EMS Director because of the questionable circumstances of Ford's death.

Perry saw the box that the gun came in on top of a chest in Ford's bedroom. It had a small push rod with it, but there was no oil or rags. Perry and Owens diagrammed the room, including where Ford was lying and the location of the gunshot entrance wound. In addition, they bagged Ford's hands for the purpose of performing a gunshot residue test.

During the time Perry was on the premises that night, the defendant never came upstairs to the bedroom. At some point, the defendant told Perry that the reason she was downstairs and her husband was upstairs was because he had been struck in the groin at karate practice. She stated that he thought she might roll over and hurt him if she slept with him so she decided to sleep downstairs.

Jim Owens testified that when he and Perry arrived at the scene on 22 March 1978, he met the defendant. She stated that her husband, Larry Ford, had been shot and she thought he was dead. Owens testified that what always stuck in his mind about that night was that she "wasn't exactly very upset about the whole situation."

Owens' best recollection of the defendant's first statement was that: "[H]e had shot himself or accidentally shot himself, the gun went off." While Owens could not recall her exact words, he indicated that the defendant essentially said that Ford shot himself cleaning the gun and that she was pretty sure he was dead. These statements were made before the emergency medical technicians ever went upstairs.

In addition, Owens recalled that the defendant stated that the gun had been purchased at Ford's insistence a few days earlier for her protection. Owens observed the receipt for the gun, the gun case, and a little brush sitting on top of a dresser near the bed. He specifically recalled that the clip to the gun was somewhere beneath the covers. The last thing that Owens recalled was the defendant offering coffee or something to drink.

Larry Allen, a former deputy in the Randolph County Sheriff's Department, testified that he arrived at the Ford residence around midnight on 22 March 1978. The defendant told Allen that her husband had come from karate class where he had been kicked in the groin. She chose to sleep downstairs because he was uncomfortable. She said she heard a noise and went upstairs to the bedroom and saw Ford lying in bed gasping for breath. Apparently he had been shot.

Allen observed that the bed covers were turned back, but that they were not "messed up." A clip for a .25 caliber automatic pistol was lying in the bed. Also found in the bedroom was a receipt for the purchase of the .25 caliber automatic pistol found in the bed. The receipt was dated 21 March 1978 at 3:35 p.m.

Joseph E. Hoover, former Director of the Randolph County Ambulance Service, testified that he went to the Ford residence on 22 March 1978. Hoover, along with Allen, discovered that the .25 caliber automatic pistol found at the scene ejected shells to the right and back. Before Hoover left, the defendant told him that she had just made coffee and would be glad for him to have coffee with her.

Dr. Brad Randolph, a forensic pathologist, conducted an autopsy on the body of Larry Ford. He concluded that the cause of death was a gunshot wound to the chest which passed through the main artery from the heart to the lungs. In his opinion, Ford would have been conscious for one to two minutes and would have bled to death in ten to fifteen minutes.

John Bueheller, former Detective Lieutenant in charge of the Investigative Division of the Randolph County Sheriff's Department, testified that he took handwipings from Larry Ford for the purpose of performing a gunshot residue test to determine if Ford had fired a weapon. Michael Creasy, a forensic chemist with the State Bureau of Investigation, testified that he examined the hand-

wipings taken from Ford and conducted a gunshot residue test. No gunshot residue was present on Ford's hands, leading Creasy to conclude that Ford had not fired a weapon. However, when Creasy test fired the pistol found in Ford's bed, it left significantly high concentrations of gunshot residue.

Special Agent Eugene E. Bishop, a firearms examiner with the State Bureau of Investigation, testified that he tested the .25 caliber automatic pistol found with Larry Ford's body. When it was dropped from a distance of at least five feet on a tile floor, it would fire. When dropped from a distance of less than five feet, the pistol would not fire. Bishop did not believe that the gun would fire if dropped from five feet on a carpeted floor.

Doris Ford, Larry Ford's mother, testified that she arrived at the Ford residence around 3:00 a.m. on 22 March 1978. She lived only twenty minutes from the Ford residence, but arrived at the same time as the defendant's parents, who lived in Durham. On the day of Larry Ford's funeral, the defendant gave his clothes away.

Doris Stager testified that the defendant had told her that on the night of Ford's death, she was downstairs hanging up clothes. Ford was upstairs cleaning his gun when it accidentally fired.

Barbara Landrum, a former co-worker of the defendant, testified that approximately one week prior to Larry Ford's death the defendant told her that she had come home and found Ford in the bed with another woman. The defendant also said that she had been sleeping downstairs.

Frank Green, one of the defendant's co-workers during March 1978, testified that the defendant had asked him on 21 March 1978 if he would assist her in purchasing a handgun from a local gun shop. The defendant asked Green to advise her on what type of gun to purchase to carry in her pocketbook. She told Green that she wanted an automatic. Green recommended that she purchase a .25 caliber automatic. After the defendant purchased a .25 caliber automatic pistol, Green accompanied her to the edge of the county. Green spent fifteen to thirty minutes showing the defendant how to fire, load, and unload the gun. Green also demonstrated the normal safety steps. Green told the defendant to be careful even when the clip was out because the gun could fire with the clip

out if there was a bullet in the chamber. The defendant fired the pistol on that occasion.

Representatives from two insurance companies testified that the defendant received in excess of $46,000 in insurance proceeds as a result of Larry Ford's death. In addition, Ford's holographic will, filed for probate on 29 March 1978, devised the house and furnishings to the defendant. The house was valued at $40,000.

Additional evidence and other matters relevant to the defendant's specific assignments of error are addressed at other points in this opinion.

By an assignment of error, the defendant contends that the trial court committed reversible error by admitting evidence concerning the death of her first husband, Larry Ford. The defendant argues, *inter alia*, that the evidence concerning her first husband's death was not relevant to prove intent, lack of accident or a common plan or scheme. She further argues that any probative value of such evidence did not outweigh its prejudicial effect and that its admission violated her constitutional right to a fair trial. We find no error.

On 27 June 1988, the defendant filed a motion *in limine* to prohibit the State from presenting any evidence about the death of Larry Ford. After a hearing on 16 December 1988, the trial court denied the motion. The trial court deferred ruling on a later similar motion until the evidence was offered.

During the trial testimony of the State's witness Detective R.D. Buchanan, the State announced its intention to question Detective Buchanan about two conversations he had with the defendant concerning Ford's death. The trial court then conducted a *voir dire* hearing to determine whether the testimony was admissible. The defendant asked the trial court to exclude the testimony on the ground that any evidence regarding Ford's death was irrelevant and unduly prejudicial. The State argued that the testimony was admissible under N.C.G.S. § 8C-1, Rule 404(b) to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The trial court overruled the defendant's objection and admitted the evidence.

Detective Buchanan first described a conversation he had with the defendant on 5 February 1988--when he was at her home

to videotape her reenactment of the death of Russell Stager—as follows:

> Prior to the filming she stated to me she had not mentioned to me about her first husband being killed because she did not think it was important. . . . I told her that I was not looking into that incident but was trying to put together what happened in this particular incident.

Buchanan also testified that during a later interview of the defendant at her home on 15 April 1988, she told him that:

> In 1978 she was working for a real estate company in High Point. She had people follow her home several times. Larry, her husband at the time, had her to go see a man he knew about a gun. She stated that she always did everything Larry said to do. She contacted her preacher like Larry said and had him go with her to sign the gun permit. Frank, an employee at the real estate company where she worked, went with her to the gun shop to buy the gun. She and Frank then went somewhere behind an old farm house or an old house and shot the gun. She stated they were there around ten minutes at the most and she shot the gun three or four times. She thinks the gun was a small .22 caliber pistol.
>
> She stated that on the night of the day that she bought the gun, Larry came home from karate class and had been kicked in the crotch. Larry was a black belt in karate. Larry was in some pain so she decided to let Larry sleep in the bedroom and she would sleep on the couch. She stated that she went to sleep on the couch and she was awakened by a noise. She thought it was a figurine which had fallen off the wall and she went to check.
>
> She stated that she went up the stairs and heard Larry gasping for breath. Larry had been shot by the gun she had bought. She stated that he was lying on the bed. She later spoke with the medical examiner who stated that he could find no residue on Larry's hands and said that he felt that Larry had dropped the gun and it had accidentally went off.

Later in the State's case, the State announced its intention to offer more evidence regarding Ford's death. Once again, the defendant objected to the admission of the evidence. The trial court conducted a *voir dire* hearing and ruled that the evidence

was admissible under N.C.G.S. § 8C-1, Rule 404(b) to show intent, plan or preparation, or absence of accident. The State then introduced other evidence concerning Ford's death.

N.C.G.S. § 8C-1, Rule 404(b) provides:

> (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.

Rule 404(b) clearly provides that " 'evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused.' " *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990) (quoting *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986)).

This Court has defined "relevant evidence" as " 'evidence 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.' " *Id.* (quoting N.C.G.S. § 8C-1, Rule 401 (1988)). We have interpreted this definition broadly:

> "Evidence is relevant if it has *any* logical tendency to prove a fact at issue in a case, . . . and in a criminal case every circumstance calculated to throw *any* light upon the supposed crime is admissible and permissible. It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact."

*State v. Riddick*, 316 N.C. 127, 137, 340 S.E.2d 422, 428 (1986) (emphasis added) (quoting *State v. Arnold*, 284 N.C. 41, 47, 199 S.E.2d 423, 426 (1973)).

In *Coffey*, this Court stated that Rule 404(b) is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant

has the propensity or disposition to commit an offense of the nature of the crime charged." 326 N.C. at 278-79, 389 S.E.2d at 54.

> Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also "is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried."

*Id.* at 279, 389 S.E.2d at 54 (quoting *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)).

The trial court properly conducted a *voir dire* hearing to determine whether the evidence regarding the death of the defendant's first husband was offered pursuant to Rule 404(b), was of a type made admissible under that rule, and was relevant for some purpose other than showing the defendant's propensity for the type of conduct at issue. *See State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990); *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986). The trial court specifically made the required findings and conclusions in this case and ruled that the proffered evidence of the circumstances surrounding the death of Larry Ford, the defendant's first husband, was admissible under Rule 404(b) as evidence of intent, plan, preparation, or absence of accident.

**[1]** On appeal, we must determine, *inter alia*, whether there was substantial evidence tending to support a reasonable finding by the jury that the defendant committed the "similar act." *See Huddleston v. United States*, 485 U.S. 681, 99 L. Ed. 2d 771 (1988) (construing Fed. R. Evid. 404(b)). In *Huddleston*, the Supreme Court of the United States held that evidence may be admitted under Rule 404(b) of the Federal Rules of Evidence if there is sufficient evidence to support a jury finding that the defendant committed the similar act; no preliminary finding by the trial court that the defendant actually committed such an act is required. *Huddleston*, 485 U.S. at 687-88, 99 L. Ed. 2d at 781. We find the reasoning of *Huddleston* compelling and conclude that evidence is admissible under Rule 404(b) of the North Carolina Rules of Evidence if it is substantial evidence tending to support a reasonable finding *by the jury* that the defendant committed a similar act or crime and its probative value is not limited *solely* to tending to establish the defendant's propensity to commit a crime such as the crime

charged. *See State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990); *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990).

**[2]** Under Rule 404(b) a prior act or crime is "similar" if there are " 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both.' " *State v. Green*, 321 N.C. 594, 603, 365 S.E.2d 587, 593 (quoting *Riddick*, 316 N.C. at 133, 340 S.E.2d at 426), *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). However, it is not necessary that the similarities between the two situations "rise to the level of the unique and bizarre." *Id.* at 604, 365 S.E.2d at 593. Rather, the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts.

**[3]** In the case *sub judice*, substantial evidence was introduced tending to show the defendant made statements to various medical personnel and law enforcement officers concerning the circumstances surrounding the shooting of Russell Stager. The defendant affirmatively represented to those individuals that she had control of the weapon at the time of the shooting, but that the shooting was accidental. In addition, her statements and actions asserted or implied *inter alia* (1) that she did *not intentionally* shoot Russell Stager, (2) that she had *no knowledge* of guns or their operation and was afraid of guns, (3) that she had *no motive* to shoot her husband, (4) that she had *no plan* to shoot Russell, and (5) that she made *no preparation* to shoot her husband. Evidence concerning the death of the defendant's first husband, Larry Ford, and the surrounding circumstances was relevant evidence tending to disprove her assertions and to support findings contrary to those assertions. Therefore, that evidence was admissible under Rule 404(b) as evidence tending to show motive, intent, preparation, plan, knowledge or absence of accident. N.C.G.S. § 8C-1, Rule 404(b) (1986).

The defendant advances several arguments, however, in support of her assignment of error concerning the admission of evidence of Ford's death. First, the defendant argues that the Ford evidence is not relevant to prove intent or absence of accident. Evidence of similar acts may be offered to show that the act in dispute was not inadvertent, accidental or involuntary. McCormick on Evidence § 190 (3d ed. 1984). Where, as here, an accident is alleged, evidence of similar acts is more probative than in cases in which an accident is not alleged. The need for such proof is clear. "[I]n many situations, proof of absence of mistake or accident

has 'logical relevancy.' This is particularly true of evidence showing motive, intent, preparation, and design or plan." 1 Brandis on North Carolina Evidence § 92 (3d ed. 1988). Rule 404(b) evidence "may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from the conduct." *Huddleston*, 485 U.S. at 686, 99 L. Ed. 2d at 780.

The doctrine of chances demonstrates that the more often a defendant performs a certain act, the less likely it is that the defendant acted innocently. E. Imwinkelried, *Uncharged Misconduct Evidence* § 5:05 (1984).

> The recurrence or repetition of the act increases the likelihood of a mens rea or mind at fault. In isolation, it might be plausible that the defendant acted accidentally or innocently; a single act could easily be explained on that basis. However, in the context of other misdeeds, the defendant's act takes on an entirely different light. The fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual, or objectively improbable to be believed. The coincidence becomes telling evidence of mens rea.

*Id.* (footnotes omitted). *See* II Wigmore, *Evidence* § 302 (Chadbourn rev. 1979) (illustrating specific examples of the doctrine of chances).

After a *voir dire* hearing in the instant case, the trial court found that the challenged evidence tended to show "striking similarities" between the deaths of the defendant's husbands Larry Ford and Russell Stager. Specifically, the trial court found and concluded that "the evidence concerning the death of James Larry Ford and the striking similarities to the evidence concerning the death of Mr. Stager both being allegedly accidental killings would be evidence for the jury to say and determine to show [sic] whether or not there is proof of intent, of any plan or any preparation but more important the absence of any accidental killing." The trial court based its findings and conclusions in this regard upon specific findings that evidence concerning the death of Ford, when taken with the evidence concerning Russell Stager's death, tended to show, *inter alia*, that (1) each of the defendant's husbands had died as a result of a single gunshot wound, (2) the weapon in each case was a .25 caliber semi-automatic handgun, (3) both weapons were purchased for the defendant's protection, (4) both men were

shot in the early morning hours, (5) the defendant discovered both victims after their respective shootings, (6) the defendant was the last person in the immediate company of both victims, (7) both victims died in the bed that they shared with the defendant, and (8) the defendant benefited from life insurance proceeds resulting from both deaths. The trial court further found and concluded that the evidence concerning Ford's death was relevant and probative and that its probative value outweighed any danger of unfair prejudice. Accordingly, the trial court concluded that the evidence concerning Ford's death "should be allowed for the purpose of showing any proof of intent, any plan, any preparation or the absence of any accident involved in the shooting of Mr. Stager and . . . that it can be admitted."

In *State v. Smoak*, 213 N.C. 79, 195 S.E. 72 (1938), this Court held that evidence of previous poisonings was admissible to show scienter, intent and motive. In *Smoak*, the State introduced evidence to show similarities in the circumstances surrounding the deaths of the defendant's first two wives and those surrounding the death of his daughter, for which he was on trial. In each case, the defendant had procured insurance on the life of the victim, the victim died of poisoning, and the defendant attempted to collect the insurance immediately upon the victim's death. We held that the evidence as to the wives' deaths was admissible to show motive as well as knowledge of the effect of poison in the killing for which the defendant was on trial. *Id.* at 91, 195 S.E. at 80. *Accord People v. Gosden*, 6 Cal. 2d 14, 56 P.2d 211 (1936).

Similarly, in *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980), the admission of evidence concerning similar poisonings was held to be relevant and admissible to show knowledge, intent, motive, and the existence of a plan or scheme. "It is clear that evidence that a defendant committed other offenses is relevant to establish a defendant's knowledge of a given set of circumstances when such a set of circumstances is logically related not only to the crime the defendant is on trial for but also is logically related to the extraneous offense." *Id.* at 326, 259 S.E.2d at 528. The evidence of previous poisonings in *Barfield* was also relevant to show that the defendant had a specific intent in that the particular act was done intentionally rather than accidentally. *Id.* at 328, 259 S.E.2d at 529. In addition, the State may also introduce such evidence if it is relevant to establish a pattern of behavior on the part

of the defendant tending to show that the defendant acted pursuant to a particular motive. *Id.* at 328-29, 259 S.E.2d at 529. Finally, "[e]vidence of other offenses is admissible if it tends to show the existence of a plan or design to commit the offense charged, or to accomplish a goal of which the offense charged is a part or toward which it is a step." *Id.* at 329, 259 S.E.2d at 529. Essentially, there must be a "concurrence of common features." *Id.* at 329, 259 S.E.2d at 530.

In the case *sub judice*, evidence of the death of the defendant's first husband was admissible under Rule 404(b) for reasons similar to those stated and explained in *Smoak* and *Barfield*. The evidence concerning circumstances surrounding the death of Larry Ford was properly admitted as tending to show the defendant's knowledge and experience with the operation of and the potentially lethal effect of .25 caliber semi-automatic pistols. Further, the similarities in the shooting deaths of Larry Ford and Russell Stager were sufficient to tend to show intent. In addition, evidence that the defendant knew she would collect large sums of money following the deaths of both her husbands tends to establish a motive on her part. Finally, the jury could reasonably find a "concurrence of common features" from the evidence as to the similar manner in which each of the defendant's husbands died.

**[4]** The defendant contends, nevertheless, that the remoteness in time between the two incidents weighs heavily in favor of exclusion of evidence concerning Ford's death. Larry Ford died on 22 March 1978; Russell Stager died on 1 February 1988. Remoteness in time between an uncharged crime and a charged crime is more significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan. *Riddick*, 316 N.C. at 134, 340 S.E.2d at 427. In contrast, remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility. *See Smoak*, 213 N.C. at 93, 195 S.E. at 81. Here, the death of the defendant's first husband ten years before the death of her second was not so remote as to have lost its probative value.

**[5]** The defendant also argues in support of this assignment of error that the evidence the State presented regarding Larry Ford's death included unnecessary details. The defendant complains in

this regard that the State introduced testimony from twenty witnesses, including the telephone operator who received the emergency call, rescue squad personnel, employees of different insurance companies and Ford's mother.

Generally, "[a]ll relevant evidence is admissible." N.C.G.S. § 8C-1, Rule 402 (1988). The extent to which counsel may pursue a permissible line of inquiry in questioning witnesses is a matter left to the sound discretion of the trial court. *Cf. Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 (applying Rule 403). Here, we detect no abuse of that discretion by the trial court.

**[6]** In addition, the defendant complains of the admission of several photographs of Larry Ford's body. The photographs were used to illustrate certain witnesses' testimony as to where Ford was found, the position of his body, and the location of the bullet wound. This Court has held that such photographs may be introduced "so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). Here, the photographs were not used excessively or repetitiously. The trial court found that there were differences in each of the proffered photographs and that each would assist the witnesses for the purposes of illustrating and explaining testimony. In addition, the trial court instructed the jury that the photographs were only to be used to illustrate witnesses' testimony. The use of photographic evidence is within the trial court's sound discretion. *State v. Robinson*, 327 N.C. 346, 356, 395 S.E.2d 402, 408 (1990). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 357, 395 S.E.2d at 408. We conclude that the trial court did not abuse its discretion by allowing these photographs into evidence for the limited purpose of illustrating witnesses' testimony.

**[7]** Further, the defendant contends that the probative value of the evidence regarding Ford's death was outweighed by the danger of unfair prejudice and that the trial court was required to exclude it for that reason under Rule 403 of the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 403 (1988). Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court. *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. After conducting a *voir dire* hearing on the Ford evidence, the trial

court made extensive findings—previously discussed herein—and concluded that the probative value of the evidence outweighed any unfair prejudice to the defendant and that the evidence was admissible to show intent, plan, preparation or absence of accident. The defendant has not demonstrated any abuse of discretion and, therefore, the trial court's ruling will not be disturbed on appeal. *Robinson*, 327 N.C. at 357, 395 S.E.2d at 408.

**[8]** The defendant also argues that the defendant's statements to Detective Buchanan concerning the death of her first husband ten years earlier, even if admissible, were admitted for an improper purpose. After a *voir dire* hearing to determine whether the evidence was admissible, counsel for the defendant argued that, if this evidence was admitted, the trial court should state the purposes for which it was being admitted and instruct the jury that the evidence should be considered only for a limited purpose. After making findings of fact, the trial court ruled, outside of the presence of the jury, that:

> The Court does find from hearing motions in this matter that the defendant is contending that the death of Russell Stager resulted as a result of an accidental shooting and after hearing arguments from the counsel for the State and the defendant the Court is going to rule that this evidence from this Detective Buchanan as to statements made by Barbara Stager on February 5 and April 15, 1988, is in fact admitted into evidence over the strong objections of the defendant.

The defendant argues that, by its ruling, the trial court denied her request for limiting instructions to the jury concerning the purposes for which the evidence was being admitted. The defendant contends that the failure to give such limiting instructions was error.

The admission of evidence which is relevant and competent for a limited purpose will not be held error in the absence of a request by the defendant for a limiting instruction. *State v. Jones*, 322 N.C. 406, 368 S.E.2d 844 (1988). "Such an instruction is not required unless *specifically* requested by counsel." *State v. Chandler*, 324 N.C. 172, 182, 376 S.E.2d 728, 735 (1989) (emphasis added). Prior to the trial court's ruling during the *voir dire* hearing as to the admissibility of Buchanan's testimony, counsel for the defendant did say, "I think then I am entitled to an instruction to the jury . . ."; however, counsel never specifically requested such an instruction. At the end of the argument to the trial court

on this issue, defense counsel stated, "Again, if you disagree with me and you do decide . . . to allow this in, then I would ask Your Honor for an instruction which I have prepared but I think I'm getting ahead of myself right now." Defense counsel concluded his argument, without asking for a limiting instruction, by renewing his motion *in limine* to exclude evidence of the defendant's statements concerning the death of her first husband. Thereafter, the trial court made findings and conclusions and ruled that the evidence was admissible. The jury was then returned to the courtroom.

At no time after the trial court made its ruling and the jury was returned to the courtroom did the defendant request that the trial court give the jury a limiting instruction with regard to the evidence in question. The defendant, having failed to specifically request or tender a limiting instruction at the time the evidence was admitted, is not entitled to have the trial court's failure to give limiting instructions reviewed on appeal. *State v. Short*, 322 N.C. 783, 370 S.E.2d 351 (1988); *State v. Jones*, 322 N.C. 406, 368 S.E.2d 844 (1988); N.C.G.S. § 8C-1, Rule 105 (1986 & Cum. Supp. 1990).

Finally, in support of this assignment, the defendant argues that admission of the evidence of Larry Ford's death was unfairly prejudicial in that "the probative value of the evidence did not outweigh the danger of unfair prejudice." We do not agree.

Rule 404(b) provides that evidence of prior similar acts is properly admissible so long as it is used to prove something other than the defendant's propensity or disposition to engage in like conduct. The one exception to that general rule of admissibility applies when the *only* probative value of the evidence is to show the defendant's propensity or disposition to commit offenses of the type charged. *Coffey*, 326 N.C. at 279, 389 S.E.2d at 54. Here, the trial court ruled that the evidence of Larry Ford's death was relevant and admissible as evidence tending to show intent, plan, knowledge, and absence of accident. Certainly, the evidence was prejudicial to the defendant in the sense that any evidence probative of the State's case is always prejudicial to the defendant. *Id.* at 281, 389 S.E.2d at 56. The trial court did not abuse its discretion under the balancing test of Rule 403, however, in concluding in this case that the probative value of the Ford evidence outweighed any possible unfair prejudice. *See generally State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986); N.C.G.S. § 8C-1, Rule 403 (1986 & Cum. Supp. 1990).

The trial court did not err in the present case by admitting the evidence concerning the death of the defendant's first husband, Larry Ford. This assignment of error is without merit.

**[9]** By another assignment of error, the defendant contends that the trial court erred by allowing the State to introduce and play for the jury an audiotape. That tape purportedly was made by Russell Stager three days before he died and contained his private expressions of his fear of the defendant. The defendant complains that the audiotape was not properly authenticated and was not discovered until fourteen months after Russell's death. The remarks on the audiotape included the following:

> The last few nights, during sleep, Barbara has woke me up to give me some kind of medication. I have not taken it. Last night she woke me up and gave me what she said was two aspirin but, this was like 4:30 in the morning. She stood there to see if I took it. I did not take it. I placed it under the bed. She came back to check and make sure I had taken it saying she wanted something to drink from what I was drinking. This morning, she normally is up and gone by 7:00, today at 7:00 she was still in bed. She said that she was going to go to work at 8:00. Before I got up she was over around there on the side, acts like she was looking for what I supposedly took last night. Now this was the night of January the 28th, a Thursday night. So, she stayed there looking to see if I had taken the stuff this morning. I got it out of there although she was very . . . looking very close to see if I was trying to retrieve it. She made the comment that, "You didn't take . . . those aspirins that I gave you." I said, "Yeah, I did." Well, I took the two capsules to Eckerd's Pharmacy at Forrest Hills and they said that it was sleeping pills. Now, if I was already asleep at 4:30 in the morning, *why* would somebody wake me up to give me two sleeping pills.
>
> . . . .
>
> Barbara's second husband. The first one, I don't know what happened but according to his parents there was some foul play going on. He supposedly, accidentally shot himself in their bedroom with a pistol. Now, I have no idea what really went on, what really happened. She was there when it happened and so were the boys. My question is did her husband, Larry Ford, accidentally shoot himself.

(Break in tape—music)

. . . I'm just being paranoid about all this stuff. Sometimes I wonder.

(break in tape—music).

Back to Wednesday night, January the 27th. Barbara had given me something that was supposedly for sinuses and some uh . . . and some aspirin that was supposedly was Nuprin and about uh . . . 5:00 that morning I woke up and I was feeling terrible. I was hurting real bad around my eyes, my temples and I really wonder if what she gave me was sinus medicine and Nuprin. She also . . . I also had a real bad case of the cottonmouth. Even after all this, when she woke up and saw I was in Pain she actually tried to give me some more stuff which I wouldn't take.

What I would really . . . I really hope that I'm being paranoid about all this stuff that's going on but I really wonder.

(Break in tape—music)

This is uh . . . Russ Stager . . . uh . . . this is January 29th 1988, ten minutes of two.

The remaining portions of the audiotape were introduced by the defendant and contained the following:

Also at one time a few years ago I had to get a post office box because a lot of the mail coming to the house (bills and stuff) seemed to be disappearing when she got home first. Now, I've only got one key to this post office box. For the last couple of weeks every time I've turned around she's taken the key off the keyring and supposedly gone to check the mail herself. Now, a couple of months (December and January) I haven't even gotten the bill from Visa which she says she's called them and they said there's just been an uh . . . misunderstanding. I don't understand myself why a person wouldn't send the bill if they had been sending it for a year every month and not missing—why all of a sudden they would miss. Here my question is, why every time I turn around she is taking that key and running over there to check the post office box unless there's something in there she's trying to hide cause that's the reason I got the post office box to

start off with, so I would make sure I got all the mail and nothing got misplaced or destroyed.

Years ago her grandmother died. On the day of the funeral she supposedly had to go somewhere to do something. I took one of the cars to wash it. When I was coming back through after washing the car and getting it filled up, I saw our other car sitting at the county stadium out there in the parking lot all by itself, nobody around. So, I went across to the armory and sat in that parking lot waiting to see who came up. She came up with some guy. I couldn't see great but I did see that they were in the car making out and stuff like this. When I went over there in my car he took off and then she tried to put it off on me that uh . . . uh . . . I wasn't giving her affection and all this kind of stuff. Now, that's pretty strange, to be doing it on the day that they're gonna put your grandmother in the ground, in my opinion.

. . . .

When we lived on Falkirk Drive, numerous times policeman were coming over there supposedly to serve some kind of warrant on her for some bill she didn't pay. Now, that's uh . . . pretty tough considering that you're hiding that from your husband and everything which, it would be hard to hide from the law.

She also took money from WTIK when she worked there and didn't do with it what she was supposed to do with it. It was like payment but she never did the work, which I had to turn around and try and reimburse them for some of that.

Also, at uh . . . I think it's uh . . . one of the banks here in town that we tried to get a loan from knew her and because of that wouldn't even give the loan, wouldn't give me the reason why but would not give us the loan. The bank was NCNB over on uh . . . Duke Street. I still to this day don't know the reason, what she had done when she supposedly had worked there for a short time. But, her parents were sitting right in there with me and they wouldn't give us any . . . any answer why. Also at CCB and First Union at one time she had flip flopped some money that she supposedly had covered in the bank. But what she was doing was taking . . . writing a check from one bank, taking the money out

> of the other bank to cover that and vice versa which obviously is not work.
>
> Uh . . . jiggling this money back and forth was done for some car payments which really weren't being made and I had to come up with the money to pay the car off because the bank was ready to raise all kinds of cain.
>
> She supposedly signed my name on one of the bank cards . . . but really was not my name.

The State contends that the tape recording was admissible under N.C.G.S. § 8C-1, Rule 803(3), the state of mind exception to the hearsay rule. However, the defendant argues that the evidence did not tend to show her state of mind and that the victim's state of mind was irrelevant.

Rule 803 states in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . .

Evidence tending to show the victim's state of mind is admissible so long as the victim's state of mind is relevant to the case at hand. *State v. Meekins*, 326 N.C. 689, 695, 392 S.E.2d 346, 349 (1990). "Any evidence offered to shed light upon the crime charged should be admitted by the trial court." *Id.* at 695-96, 392 S.E.2d at 349.

Here, Russell Stager's recorded statement bears directly on his relationship with the defendant at about the time she was alleged to have killed him. Russell's statement tends to show that he was afraid of the defendant. It also tends to disprove the normal, loving relationship that the defendant contends existed between the two. Further, Russell's statement tends to refute any likelihood that he would have slept with the defendant with a loaded and cocked semi-automatic pistol under his pillow. The victim's statement, for example, that he would not take "medication" from the

defendant, tends to show something out of the ordinary in the marital relationship, especially given that he later took this "medication" to a pharmacy to ascertain what it was. In addition, the statement corroborates at least one motive for the murder—the defendant's borrowing money, without the victim's knowledge, which she could not repay.

The victim's recorded statement was relevant to refute the defendant's contention that the victim slept with a gun under his pillow on the night of his death, due to his fear of burglars. The victim's own recorded statement indicated that his preoccupation three days prior to his death was not fear of strangers; it was fear of the defendant. For the foregoing reasons, Russell Stager's state of mind at the time he recorded his statement tended to establish facts directly relevant to the issue of accident and to demonstrate a likelihood that his death was not an accident. The tape recording was admissible under Rule 803(3) as evidence tending to show the victim's state of mind.

The defendant also argues that even if the tape recording was admissible under Rule 803(3), its probative value was outweighed by the danger of unfair prejudice and, thus, its admission violated Rule 403. Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court. *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 54. Here, the defendant has not demonstrated any abuse of that discretion and, therefore, the trial court's ruling will not be disturbed on appeal.

The defendant also argues that the tape recording was inadmissible because it was not properly authenticated. Rule 901 of the North Carolina Rules of Evidence provides in part:

> (a) *General Provision.*—The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> . . . .
>
> (b) *Illustration.*—By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> . . . .

> (5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

N.C.G.S. § 8C-1, Rule 901 (1986 & Cum. Supp. 1990).

In *State v. Lynch*, 279 N.C. 1, 181 S.E.2d 561 (1971), and other cases decided prior to the adoption of the North Carolina Rules of Evidence, this Court applied a seven-pronged requirement for the admission of tape-recorded evidence. The requirements were:

> (1) That the recorded testimony was legally obtained and otherwise competent;
>
> (2) That the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded;
>
> (3) That the operator was competent and operated the machine properly;
>
> (4) The identity of the recorded voices;
>
> (5) The accuracy and authenticity of the recording;
>
> (6) That defendant's entire statement was recorded and no changes, additions, or deletions have since been made; and
>
> (7) The custody and manner in which the recording has been preserved since it was made.

*Id.* at 17, 181 S.E.2d at 571. *Accord, e.g., State v. Toomer*, 311 N.C. 183, 316 S.E.2d 66 (1984) (pre-Rules case). However, since the adoption of the Rules of Evidence, we have held the admission of a tape recording found by the side of a road to be proper. *State v. West*, 317 N.C. 219, 345 S.E.2d 186 (1986). The defendant's voice on the tape recording in *West*, making certain admissions, was identified by both the victim and her mother. Citing Rule 901, this Court held that the tape recording was properly authenticated. *Id.* at 229 n.3, 345 S.E.2d at 193 n.3.

**[10]** The seven-pronged test in *Lynch* has often been criticized. The Court of Criminal Appeals of Alabama, for example, has pointed out that the " 'seven-pronged test is now usually considered obsolete, even for sound recordings,' . . . and 'has been abandoned

in the better reasoned cases in favor of a rule holding that sound tapes like photographs are admissible when a witness testifies they are reliable representations of the subject sound.' " *Molina v. State*, 533 So. 2d 701, 712 (Ala. Crim. App. 1988) (citations omitted) (quoting C. Scott, *Photographic Evidence* § 1297 (Supp. 1987) ), *cert. denied*, 489 U.S. 1086, 103 L. Ed. 2d 851 (1989). We find it unnecessary, however, to weigh the merits of the seven-pronged test of *Lynch*. Instead, we conclude that the authentication requirements of Rule 901 have superseded and replaced the seven-pronged *Lynch* test. *See West*, 317 N.C. at 229-30, 345 S.E.2d at 193 (applying Rule 901 rather than the *Lynch* test). Under Rule 901, testimony as to accuracy based on personal knowledge is all that is required to authenticate a tape recording, and a recording so authenticated is admissible if it was legally obtained and contains otherwise competent evidence. 2 Brandis on North Carolina Evidence, § 195, at 132 (3d ed. 1988).

**[11]** Russell Stager's parents, his sister and a coach at Durham High School all testified that they recognized the voice on the tape as Russell's voice. A nineteen-year-old Sunday school student who had been taught by the victim joined Barbara Stager's cousin, son, brothers, sister-in-law and mother in testifying that the voice on the audiotape was not Russell Stager's. The testimony of the four witnesses that the tape recording contained the voice of Russell Stager was sufficient to meet the State's burden of authentication under Rule 901. The conflict in the evidence goes to the weight and credibility of the evidence not its admissibility.

**[12]** The defendant also contends that the admission of the tape recording violated her constitutional right to confrontation under both the sixth amendment to the Constitution of the United States and article I, section 23 of the Constitution of North Carolina. Both this Court and the Supreme Court of the United States have held, however, that statements falling within an exception to the general prohibition against hearsay may be admitted into evidence without violating a defendant's right to confrontation, if the evidence is reliable. *E.g.*, *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980); *State v. Porter*, 303 N.C. 680, 281 S.E.2d 377 (1981). Further, "a sufficient inference of reliability can be made 'without more' from the showing that the challenged evidence falls within 'a firmly rooted hearsay exception.' " *Porter*, 303 N.C. at 697 n.1, 281 S.E.2d at 388 n.1 (quoting *Ohio v. Roberts*, 448 U.S. at 66, 65 L. Ed. 2d at 608); *see State v. Faucette*, 326 N.C. 676, 392 S.E.2d 71 (1990).

The state of mind exception to the hearsay rule, one of the rules under which the victim's statement was admitted, is firmly rooted in North Carolina jurisprudence. *Faucette*, 326 N.C. at 684, 392 S.E.2d at 75; *see* 1 Brandis on North Carolina Evidence § 161 (3d ed. 1988). Therefore, there was no violation of the defendant's rights to confrontation under the state or federal constitutions in the instant case, and the defendant's argument is without merit.

**[13]** Finally, with regard to this assignment of error, the defendant contends that the trial court abused its discretion in denying her pretrial and trial motions for a continuance to make an investigation concerning the tape recording and matters referred to on that recording. "A motion for continuance is within the sound discretion of the trial court and reviewable upon appeal only for abuse of discretion." *State v. Gardner*, 322 N.C. 591, 594, 369 S.E.2d 593, 596 (1988). If the motion raises a constitutional issue, the trial court's action involves a question of law which is fully reviewable upon appeal. *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). "The denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial *only* upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *Id.*

Here, the defendant has alleged no abuse of discretion other than to assert that she simply did not have enough time to investigate the tape-recorded evidence. The record reflects that the State received the tape recording on or about 19 April 1989. On 20 April the State provided a copy of the tape recording to the defendant. On 24 April the trial court ordered that funds be provided to the defendant for purposes of investigating the tape recording. On 1 May the trial court ordered the State to provide the date the tape was discovered to the defendant and also to name the persons who discovered the tape. The defendant's case was called for trial at the 1 May 1989 Criminal Session of Superior Court, Lee County. A jury was selected, and presentation of evidence commenced on 8 May 1989. On 15 May the State offered the tape into evidence.

The record reflects that the defendant produced eight witnesses who testified that the voice on the tape recording was not that of the victim. The defendant also produced a witness from Eckerd's Pharmacy at Forest Hills who testified concerning whether the victim had come into the pharmacy to have certain pills identified.

These facts tend to demonstrate that the defendant had ample time to discover and introduce evidence concerning the tape which was favorable to her case. The defendant has not shown how a continuance would have helped her in any way and has failed to show any abuse of discretion by the trial court.

For the foregoing reasons, we conclude that the trial court properly admitted the tape recording as evidence at trial. This assignment of error is overruled.

**[14]** By another assignment of error, the defendant argues that the trial court erred in admitting the defendant's videotaped reenactment of the shooting of her husband. We disagree.

The defendant did not object at trial to the admission of the videotape, despite being specifically asked by the trial court.

> THE COURT: Well, do you oppose [the videotape] being introduced into evidence?
>
> MR. COTTER: No, sir.
>
> THE COURT: [The videotape] is introduced into evidence without any objections of the defendant.

The defendant's failure to object constitutes a waiver of her right on appeal to assign as error the admission of the videotape and its use during the trial. *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983); N.C.R. App. P. 10(b). The defendant knowingly waived any rights she may have had in this regard by affirmatively acquiescing to the admission of the videotape as evidence. This assignment of error is overruled.

By other assignments of error, the defendant contends that the trial court erred by admitting evidence tending to show that the defendant was racially prejudiced, that the defendant lied to her husband about a matter unrelated to the facts in issue, that the defendant intended to consult a psychiatrist after her husband's death, and that the defendant telephoned a young male several weeks after her husband's death. The defendant contends that this evidence was irrelevant and prejudicial. We disagree.

**[15]** Specifically, the defendant complains of Doris Stager's testimony that the defendant once said that she might change her job because "she was afraid the black lady would get the job" as her boss. Taken in context, this statement was only part

of a conversation Doris was recounting during which the defendant went over and sat next to the victim on the day before the shooting. The statement complained of was insignificant, particularly because nothing related to race was at issue in this case.

The defendant also complains about testimony concerning a telephone call she made to Chris Wagoner, a young male the victim coached. Wagoner testified that two to three weeks after the victim's death, the defendant telephoned him. She told him that she was upset because someone had parked a motorcycle in her front yard and she thought someone was running around the house. The defendant argues that the jury could find the call evidence of "suggestive behavior toward young males." A more likely inference is that the call tended to show that the victim had a legitimate fear that someone was prowling around the house. Such an inference would lend credibility to the defendant's contention that the victim placed the gun under the pillow because he was afraid of someone breaking into the house. Assuming error *arguendo*, this testimony was not prejudicial to the defendant.

**[16]** In addition, the defendant complains of testimony by Doris Stager, the defendant's mother, about a conversation she had with the defendant a week after the victim's death. The defendant told Doris that she intended to start seeing a psychiatrist, but not the same psychiatrist that Doris had suggested the defendant see a few years earlier. The defendant merely argues that this testimony implicates the defendant's mental health. The most likely interpretation of this evidence is that it shows that the defendant would be seeking help to deal with the death of her husband. Assuming error *arguendo*, this testimony was not prejudicial to the defendant.

**[17]** Finally, the defendant complains of the testimony of Harry Welch, the manager of WTIK radio station. Welch testified about a conversation he had had with Russell Stager in the fall of 1982. Welch testified that he told the victim that the defendant owed the radio station almost $3,000 in unearned commissions and that she had not been employed there in months. Welch testified that the victim became "very emotional and teary-eyed" when he learned that his wife was no longer working at the station. The defendant first injected the subject matter of Welch's testimony into the trial by introducing portions of the tape recording made by the victim before his death which contained matters about which Welch

testified. Thus, assuming error *arguendo*, the defendant was not prejudiced by the admission of the evidence complained of.

**[18]** By other assignments of error, the defendant contends that the trial court erred by admitting testimony that the defendant was calm on the morning of the victim's death and that she gave away some of his clothing on the day after his funeral. We disagree.

Opinion evidence as to the demeanor of a criminal defendant is admissible into evidence. *See State v. Moore*, 276 N.C. 142, 171 S.E.2d 453 (1970). The rule has been stated as follows:

> "The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence.
>
> "A witness may say that a man appeared intoxicated or angry or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase, 'matter of fact,' as used in the law of evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expression, his conversation—a series of things—go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact, as if he testified, from evidence presented to his eyes, to the color of a person's hair, or any other physical fact of like nature."

*State v. Leak*, 156 N.C. 643, 647, 72 S.E. 567, 568 (1911) (quoting J. McKelvey, Handbook of the Law of Evidence § 132 (rev. 2d ed. 1907)). This Court has consistently held that "'[t]he emotion displayed by a person on a given occasion is a proper subject for opinion testimony.'" *State v. Gallagher*, 313 N.C. 132, 136, 326 S.E.2d 873, 878 (1985) (quoting *State v. Looney*, 294 N.C. 1, 14, 240 S.E.2d 612, 619 (1978)).

Here, the testimony that the defendant was calm and was not crying described her emotional state shortly after her husband was killed, based upon the witnesses' observations of her demeanor at that time. Such evidence, and the evidence that the defendant disposed of her husband's personal effects the day after his funeral,

amounted to evidence tending to shed light upon the circumstances surrounding the killing in this case and, thus, are relevant and admissible. N.C.G.S. § 8C-1, Rules 401 and 402 (1988).

**[19]** By another assignment of error, the defendant argues that the trial court erred by denying the defendant's motion to dismiss because the State's evidence was not sufficient to support a verdict convicting the defendant of the first-degree murder of Russell Stager. We disagree.

As we have stated previously,

> 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).

*State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). In addition, the trial court must consider such evidence in the light most favorable to the State when passing upon a defendant's motion to dismiss, allowing the State the benefit of every reasonable inference. *Id.* at 237, 400 S.E.2d at 61. "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." *Id.* When a motion to dismiss calls into question the sufficiency of circumstantial evidence, the central issue for the trial court is "whether a reasonable inference of the defendant's guilt may be drawn from the circumstances." *Id.*

In 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." *Id.* at 237, 400 S.E.2d at 62. 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 (1986); *see Vause*, 328 N.C. at 238, 400 S.E.2d at 62. "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.* Generally, premeditation and deliberation are 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)).

The defendant argues that the evidence introduced at her trial would support no reasonable finding but that she killed her husband accidentally. She contends that the State has failed to prove that she had the requisite intent when the victim was shot. Therefore, she contends that there was no substantial evidence tending to show that the defendant's action in killing Russell Stager was intentional, premeditated or deliberated. We do not agree.

There was evidence tending to show that the defendant had control of the weapon before she discharged it, killing the victim. There was also evidence tending to show that the victim feared the defendant due to her prior actions toward him. Other evidence tended to show that the defendant gave inconsistent versions of the "accident" to Dr. Franklin Honkanen and the police, and that both of those versions were inconsistent with the physical evidence. Additionally, there was substantial evidence of motive, in the form of evidence that the defendant was the victim's sole beneficiary and would receive a very substantial sum of money at his death, that she needed money badly, and that she had been borrowing money without the victim's knowledge and concealing that fact from him. Further, the defendant's first husband had died in a manner strikingly similar to the manner in which the victim died. The trial court did not err in concluding that there was substantial circumstantial evidence tending to show that the defendant intentionally killed the victim with malice after premeditation and deliberation. Therefore the trial court did not err in denying the defendant's motion to dismiss, and this assignment of error is without merit.

**[20]** By another assignment of error, the defendant argues that during the capital sentencing proceeding in her case, the trial court

committed reversible constitutional error in violation of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), by instructing the jury that it must unanimously find the existence of a mitigating circumstance before any juror could consider that circumstance in a capital sentencing decision. The State concedes that the unanimity instruction concerning mitigating circumstances was constitutionally defective under *McKoy*, but argues that the error was harmless. We disagree.

During the capital sentencing proceeding conducted at the conclusion of the defendant's trial, the trial court gave the jury a printed form to use in recording and returning its recommendations as to punishment. The form was entitled "Issues and Recommendation as to Punishment" and contained four sections labeled "Issue One" through "Issue Four."

Issue One on the form was: "Do you *unanimously* find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?" (Emphasis added.) The trial court submitted only one aggravating circumstance for the jury's consideration, "whether this murder was committed for pecuniary gain?" The jury found this aggravating circumstance to exist.

Issue Two on the form was: "Do you *unanimously* find from the evidence the existence of one or more of the following mitigating circumstances?" (Emphasis added.) The trial court submitted five possible mitigating circumstances as follows:

(1) The defendant has raised two fine children?

. . . .

(2) The defendant is an active and helpful church member?

. . . .

(3) The defendant is and has been a good friend to many people?

. . . .

(4) The defendant has no significant criminal record?

. . . .

(5) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

The jury found circumstances one through four to exist. The jury rejected the fifth or "catchall" mitigating circumstance.

Issue Three on the form was: "Do you *unanimously* find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstances found by you." (Emphasis added.) The jury answered in the affirmative.

Issue Four read: "Do you *unanimously* find beyond a reasonable doubt that the aggravating circumstance found by you is sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? When making this final balance in the fourth issue *each juror* may consider *any* circumstances in mitigation that *the juror determined to exist* by the preponderance of the evidence *whether or not* that circumstance is *found to exist unanimously* by the jury in Issue 2." (Emphasis added.) The jury answered this issue in the affirmative and, thereafter, recommended that the defendant be sentenced to death.

The defendant first assigns as error that Issue Two and Issue Three on the form, and the related sentencing instructions given by the trial court, contained *McKoy* error. The State concedes that the unanimity instructions concerning mitigating circumstances set out in Issue Two and Issue Three and related oral instructions were virtually identical to the instructions found defective in *McKoy*.

In *McKoy*, the Supreme Court of the United States held unconstitutional our requirement that in capital cases jurors must unanimously agree upon the existence of a mitigating circumstance before considering it during sentencing deliberations. *See State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106, *cert. denied*, --- U.S. ---, 113 L. Ed. 2d 459 (1990). As the State concedes in the case *sub judice*, the trial court instructed the jury here in the same manner found unconstitutional in *McKoy*.

The State having conceded *McKoy* error, the sole remaining issue is whether this *McKoy* error may be deemed harmless. *See State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990). As the *McKoy* errors in the oral jury instructions and the written "Issues and Recommendations as to Punishment" form were of constitutional magnitude, "[t]he burden is upon the state to demonstrate beyond a reasonable doubt, that the error was harmless." N.C.G.S.

§ 15A-1443(b) (1988); *see McNeil*, 327 N.C. at 394, 395 S.E.2d at 111. On the record before us, we are forced to conclude that the State has not carried this burden.

The trial court submitted five possible mitigating circumstances: (1) that "the defendant has raised two fine children"; (2) that "the defendant is an active and helpful church member"; (3) that "the defendant is and has been a good friend to many people"; (4) that "the defendant has no significant criminal record"; and (5) any "other [mitigating] circumstance or circumstances" or "catchall" mitigating circumstance.

The jury found the first four possible mitigating circumstances to exist. Thus, if substantial evidence was introduced at trial to support a finding of any other mitigating circumstance under the "catchall," it would be difficult to say that the *McKoy* error was harmless. This is so because the erroneous unanimity requirement may have precluded a juror from weighing a circumstance which that particular juror found to exist, and thereafter concluding that all of the mitigating circumstances considered together outweighed the aggravating circumstance. *See McNeil*, 327 N.C. at 394, 395 S.E.2d at 110.

Our review of the record reveals substantial evidence from which a juror reasonably might have found the fifth or "catchall" statutory mitigating circumstance submitted to exist. For example, substantial evidence tended to show that the defendant worked with numerous young people and acted like a mother to children other than her own. Carol Galloway, a member of the defendant's church congregation, testified that the defendant would often babysit for her. The defendant would take Galloway's son to McDonald's to get a Happy Meal, buy him toys and take him to the park. Gretta Burch, a student at Wake Forest University, testified that the defendant was "like a second mom." In addition, Burch testified that the defendant had written her letters while she was away at school and that she could depend on the defendant for advice.

Further, substantial evidence tended to show that the defendant cooperated with law enforcement officials in their investigation of this case and willingly complied with all their requests. The defendant willingly reenacted on videotape her account of what happened on the day she killed her husband.

Given the evidence, we cannot conclude beyond a reasonable doubt that the constitutional error committed did not prevent one

or more of the jurors from finding the "catchall" statutory mitigating circumstance to exist and giving it mitigating value. As a result, we are unable to say beyond a reasonable doubt, particularly in light of the mitigating circumstances actually found, that an error preventing a juror from finding an additional mitigating circumstance in this case did not prevent the jury from recommending life imprisonment rather than death. *See State v. Huff*, 328 N.C. 532, 541, 402 S.E.2d 577, 582 (1991).

The State also argues that even though *McKoy* error occurred in Issues Two and Three, any error was cured by the trial court's modification to the written and oral instructions pertaining to Issue Four. The record reflects that the trial court gave an oral instruction explaining the fourth issue on the form given the jury as follows:

> In deciding this case you are not to consider the aggravating circumstances standing alone. You must consider them in connection with mitigating circumstances found by you. Again, when making this final balance in the fourth issue, each juror may consider any circumstance in mitigation that that juror determined to exist whether or not that circumstance is found to exist unanimously by the jury in issue two.

The State argues that, by the 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 he or she found to be shown by a preponderance of the evidence when making a recommendation as to the defendant's sentence. Thus the State contends that any *McKoy* error was harmless due to the curative instructions connected with Issue Four. We disagree for reasons substantially similar to those set forth in *Huff*, wherein we rejected a nearly identical argument. *Huff*, 328 N.C. at 541, 402 S.E.2d at 582.

The oral explanation and written modification to Issue Four, even assuming they were understood by the jury to carry the meaning now given them by the State, did not stand in isolation. " '[A] single instruction to a jury, does not stand in artificial isolation, but must be viewed in the context of the overall charge.' " *McNeil*, 327 N.C. at 392, 395 S.E.2d at 109 (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). The word "unanimously" or its derivatives were used no less than twenty-three times. We simply cannot conclude beyond a reasonable

doubt that the erroneous unanimity instructions given in this case did not preclude one or more jurors from finding and considering in mitigation "any other circumstances." *Huff*, 328 N.C. at 541, 402 S.E.2d at 582. Nor can we conclude beyond a reasonable doubt that had such jurors been permitted under proper instructions to consider this circumstance, they nevertheless would have voted for the death penalty rather than life imprisonment. *Id.*

For the foregoing reasons, we hold that the guilt-innocence determination phase of the defendant's trial was free from prejudicial error. However, the sentence of death must be and is vacated, and this case is remanded to the Superior Court, Lee County, for a new capital sentencing proceeding.

Guilt phase: No error. Death sentence vacated and case remanded for new capital sentencing proceeding.

Justice MEYER concurring in part, dissenting in part.

I concur in the majority's opinion as to the guilt phase, but I dissent as to the majority's conclusion that there was error in the sentencing phase requiring a new sentencing proceeding. While I concede the presence of *McKoy* error, I cannot agree with the majority's conclusion that the record reveals substantial evidence from which a juror reasonably might have found the fifth or "catch-all" statutory mitigating circumstance. I am convinced that the *McKoy* error in this case was harmless beyond a reasonable doubt.

The trial court submitted to the jury one aggravating and five mitigating circumstances. The jury unanimously found the aggravating circumstance that the murder was committed for pecuniary gain. It also unanimously found four of the five mitigating circumstances: (1) "defendant has raised two fine children," (2) "defendant is an active and helpful church member," (3) "defendant is and has been a good friend to many people," and (4) "defendant has no significant criminal record." The jury did not unanimously find the existence of the final mitigating circumstance submitted, the catchall: "[a]ny other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value."

The majority finds that there was substantial evidence from which a juror might reasonably have found the "catchall" mitigating circumstance. I disagree. In order to find harmless error, this Court must find beyond a reasonable doubt that no different result would

have been reached if the individual jurors had been permitted to consider mitigating circumstances not unanimously found. *State v. Quesinberry*, 328 N.C. 288, 294, 401 S.E.2d 632, 635 (1991) (Meyer, J., dissenting). The burden is on the State to prove beyond a reasonable doubt that the jury would nonetheless have recommended death even if each individual juror had been allowed to consider all of the mitigating circumstances which he or she individually found to be present. *Id.*

My review of the evidence in this case reveals that there was little or no evidence presented to the jury by which a reasonable juror could find the "catchall" mitigating circumstance.

Defendant cites the following as possible mitigating circumstances which the jury, if properly instructed, could have found: (a) she educated, encouraged, and worked with numerous young people and acted as a mother toward children besides her own; (b) she worked most of her life to contribute to the support of her family; (c) she cooperated with state officials in investigating the case and willingly complied with their requests; and (d) she participated in charitable and community activities outside her church.

A. *Acted as a mother to other children.*

The majority, in support of this circumstance, notes that a member of defendant's church testified that defendant would often babysit for her and take her son to McDonald's and buy him toys. Additionally, a student testified that defendant had written her letters and would give her advice. This testimony tended to support no other mitigating circumstance than one which the jury found to exist, i.e., that "defendant is and has been a good friend to many people."

B. *Worked most of her life to support her family.*

A review of the record reveals that there is no evidence that defendant worked most of her life and contributed to her family's support. The evidence, in fact, shows to the contrary that defendant was continuously borrowing money.

C. *Cooperation with state officials.*

Here, the majority notes that defendant cooperated with law enforcement officials in their investigation and willingly complied by reenacting on videotape her account of what happened on the

day she killed her husband. Although defendant did voluntarily speak with law enforcement officials and cooperated in the videotaped reenactment, the evidence strongly suggests that her purpose in doing so was to mislead them as to the facts surrounding the murder.

D. *Charitable and community activities outside church.*

The record does reveal that defendant was an "active and helpful church member," a mitigating circumstance which the jury found to exist. There is no evidence in the record to suggest that defendant engaged in charitable and community activities outside of church.

Simply put, I find no evidence from which a juror reasonably might have found any of these four or any other mitigating circumstances to exist which might have been considered in the catchall. While I concede that *McKoy* error occurred during the sentencing proceeding, it was harmless beyond a reasonable doubt. I find no other error in the sentencing proceeding. The death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor and is not disproportionate to the sentence imposed in similar cases. I vote to affirm the sentence of death.

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SUSIE MAE WOODSON, ADMINISTRATOR OF THE ESTATE OF THOMAS ALFORD SPROUSE, DECEASED v. NEAL MORRIS ROWLAND; MORRIS ROWLAND UTILITY, INC.; DAVIDSON & JONES, INC.; AND PINNACLE ONE ASSOCIATES, A NORTH CAROLINA PARTNERSHIP

No. 584A88

(Filed 14 August 1991)

**1. Master and Servant § 87 (NCI3d) — workers' compensation — trench cave-in — intentional tort — workers' compensation not exclusive**

The trial court erred in a wrongful death action by granting summary judgment for a subcontractor whose employee was killed when a trench collapsed. When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate, may pursue a

civil action against the employer. Such misconduct is tantamount to an intentional tort which is not barred by the exclusivity provisions of the Workers' Compensation Act, and is also the result of an accident under the Act, so that workers' compensation claims may also be pursued, but there may be only one recovery. The substantially certain standard satisfies the Act's purposes of providing trade-offs to competing interests and balancing those interests, while serving as a deterrent to intentional wrongdoing and promoting safety in the workplace. N.C.G.S. § 97-9, N.C.G.S. § 97-10.1.

**Am Jur 2d, Negligence §§ 286-289; Workmen's Compensation §§ 50, 52, 55, 73.**

2. **Master and Servant § 87 (NCI3d)— workers' compensation—trench cave-in—civil action against employer**

The trial court erred in a wrongful death action by granting summary judgment for defendant subcontractor, Morris Rowland Utility, where plaintiff's deceased was an employee of defendant subcontractor; the deceased died when a trench collapsed; plaintiff filed this civil action, then filed a workers' compensation action to meet the filing deadline, but requested that the case not be heard until the completion of this action; the Industrial Commission complied with that request and plaintiff has received no benefits under the Workers' Compensation Act; and the trial court granted all defendants' motions for summary judgment. Morris Rowland's knowledge and prior disregard of dangers associated with trenching; his presence at the site and opportunity to observe the hazards; his direction to proceed without the required safety procedures; Craig's experienced opinion that the trench was unsafe; and Rees' scientific soil analysis all converge to make plaintiff's evidentiary forecast sufficient to survive Rowland Utility's motions for summary judgment.

**Am Jur 2d, Negligence §§ 286-289; Summary Judgment §§ 26, 27; Workmen's Compensation §§ 50, 52, 55, 73.**

3. **Master and Servant § 87 (NCI3d)— workers' compensation—trench cave-in—individual liability of employer**

The trial court erred in a wrongful death action arising from a trench cave-in by granting summary judgment for defendant Morris Rowland in his individual capacity. Morris

Rowland may be held individually liable on the same basis as Rowland Utility.

**Am Jur 2d, Corporations §§ 1877, 2166.**

4. **Master and Servant § 87 (NCI3d)— workers' compensation—trench cave-in—civil action simultaneously pursued**

A plaintiff in a wrongful death action arising from a trench cave-in could simultaneously pursue her workers' compensation claim because the injury to her intestate was the result of an "accident" as that term is used in the Act. She may elect between these remedies, but is not required to do so, and is in any event entitled to only one recovery.

**Am Jur 2d, Workmen's Compensation §§ 50, 52, 55, 73.**

5. **Master and Servant § 19 (NCI3d)— trench cave-in—employee of subcontractor killed—liability of contractor**

The trial court erred by granting summary judgment for a contractor in a wrongful death action arising from the death of a subcontractor's employee in a trench cave-in. One who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others; in determining whether the trenching process which killed plaintiff's decedent was inherently dangerous, the focus is on the particular trench being dug and the pertinent circumstances surrounding the digging. Plaintiff's forecast of evidence was sufficient to survive summary judgment on whether the particular trench in question was inherently dangerous and on whether Davidson & Jones knew of the circumstances.

**Am Jur 2d, Independent Contractors §§ 37, 41; Negligence §§ 312 et seq.; Summary Judgment §§ 26, 27.**

6. **Master and Servant § 19 (NCI3d)— trench cave-in—employee of subcontractor killed—liability of developer**

The trial court correctly granted summary judgment for the developer, Pinnacle One, in a wrongful death action arising from the death of a subcontractor's employee in a trench cave-in. There is nothing in the forecast of evidence indicating that Pinnacle One or any of its representatives knew or should have known that Davidson & Jones had hired Rowland Utility, knew of the trenching activity in which plaintiff's intestate

was engaged or the dangerous propensities of the particular trench in question, or had any knowledge or expertise regarding safety practices in the construction industry generally or in trenching particularly.

**Am Jur 2d, Building and Construction Contracts § 135; Independent Contractors § 24.**

**7. Master and Servant § 19 (NCI3d)— trench cave-in—employee of subcontractor killed—liability of contractor for hiring incompetent subcontractor**

The trial court did not err by granting summary judgment for defendant contractor on a claim for negligently selecting and retaining the subcontractor in a wrongful death action arising from the death of an employee of the subcontractor in a trench cave-in. Even if recovery under this theory is available, plaintiff's forecast of evidence was insufficient to survive summary judgment because plaintiff would be unable at trial to establish any lack of due care on the part of the contractor in hiring the subcontractor and, even if what the contractor knew by the end of the day on Saturday, the day before the cave-in, was sufficient to put it on notice that the subcontractor was incompetent or unqualified, it had no reasonable opportunity thereafter to discharge the subcontractor before the trench cave-in occurred.

**Am Jur 2d, Building and Construction Contracts § 135; Summary Judgment §§ 26, 27.**

Justice MITCHELL concurring in part and dissenting in part.

Justice MEYER joins in this concurring and dissenting opinion.

APPEAL pursuant to N.C.G.S. § 7A-30 from a decision by a divided panel of the Court of Appeals, 92 N.C. App. 38, 373 S.E.2d 674 (1988), affirming summary judgments entered in favor of all defendants by *Barnette, J.*, on 14 September 1987, 16 September 1987, 9 November 1987, and 9 December 1987, in Superior Court, DURHAM County. Plaintiff's petition for discretionary review pursuant to N.C.G.S. § 7A-31 as to issues not addressed in Judge Phillips' dissent was allowed 9 February 1989. Heard in the Supreme Court 12 September 1989.

*Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith and Bryan E. Lessley; and John T. Manning for plaintiff-appellant.*

*Poe, Hoof & Reinhardt, by J. Bruce Hoof; and Poyner & Spruill, by John L. Shaw, for defendant-appellees Neal Morris Rowland and Morris Rowland Utility, Inc.*

*Smith Helms Mulliss & Moore, by J. Donald Cowan, Jr., and L.D. Simmons, II, for defendant-appellee Davidson & Jones, Inc.*

*Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by David H. Batten, for defendant-appellee Pinnacle One Associates.*

EXUM, Chief Justice.

This is a wrongful death action arising from a work-related trench cave-in which killed Thomas Alfred Sprouse on Sunday, 4 August 1985. Plaintiff is the administrator of Sprouse's estate. The principal question is whether the exclusivity provisions of the Workers' Compensation Act limit plaintiff's remedies to those provided by the Act. The courts below concluded plaintiff was so limited in her choice of remedies. We disagree. Other issues in the case concern the viability of certain theories of liability plaintiff asserts: the nondelegability of duties of safety owed to plaintiff's intestate, and the negligent hiring and retention of a subcontractor.

I.

Defendant Pinnacle One Associates ("Pinnacle One") was the developer on a construction project for IBM in Research Triangle Park. It retained defendant Davidson & Jones, Inc. ("Davidson & Jones") as general contractor. One aspect of the project required construction of a sanitary sewer line on Chin Page Road in Durham County. Davidson & Jones hired defendant Morris Rowland Utility, Inc. ("Rowland Utility" or "employer") to dig the line. Defendant Neal Morris Rowland ("Morris Rowland") has at all relevant times been the president and sole shareholder of Rowland Utility. Decedent Thomas Sprouse was Rowland Utility's employee.

On defendants' motions for summary judgment, plaintiff's forecast of evidence tends to show the following:

On Saturday, 3 August 1985, workers from both Rowland Utility and Davidson & Jones were digging trenches to lay sewer lines. The Chin Page Road project required two separate trenches.

Although Rowland Utility was hired to dig both, in the interest of time a Davidson & Jones crew provided men to work in one of the trench sites.

Because the trenches were not sloped, shored, or braced, and did not have a trench box, Lynn Craig, the Davidson & Jones foreman, refused to let his men work in them. The Occupational Safety and Health Act of North Carolina ("OSHANC") and the rules promulgated thereunder required such safety precautions for the trenches in question. N.C.G.S. § 95-136(g); 13 N.C. Admin. Code 7E .1400 *et seq.; cf.* 29 C.F.R. § 1926.650-.653. Because of the soil conditions and geography, Craig believed that a trench box was the best means of ensuring his workers' safety. Morris Rowland procured a trench box for Craig and the Davidson & Jones crew, which commenced work inside the trench after receiving the safety device on the morning of Saturday, 3 August. Morris Rowland did not acquire a trench box for his own crew.

Charles Greene, a member of the Davidson & Jones crew, was operating a backhoe at the Rowland Utility site that Saturday. Craig checked on the site's progress several times. Morris Rowland asked Craig if he could put a Rowland Utility man on the job because he believed that Greene was not operating the backhoe fast enough. Several times Craig denied these requests. Once, Craig operated the machinery himself for a few minutes and concluded that Greene's progress had been adequate. In his deposition, Craig testified that by the end of the day the sides of the Rowland Utility trench were not being adequately sloped, and that it "could have been a little safer." At that point, the trench construction violated OSHANC regulations.[1]

On Sunday, 4 August, the Davidson & Jones crew did not work, and its trench box lay idle. However, the Rowland Utility crew reported to the site to continue digging its trench. A Rowland Utility man, rather than Greene, was now operating the backhoe. Morris Rowland and project supervisor, Elmer Fry, discussed whether to use the trench box in their ditch. They decided not to use it, indicating in deposition that they had believed the soil was packed hard enough so the trench would not cave in.

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1. Rowland Utility had been cited four times in the previous six and a half years for violating regulations governing trenching safety procedures.

A backhoe worked in front of decedent Sprouse and his co-workers, who were laying pipe inside the freshly dug trench. A piece of heavy machinery called a front-end loader drove along the edge of the ditch and followed their progress, dumping loads of gravel onto the newly laid pipe. Workers tamped the gravel using a device similar to a jackhammer. Sprouse was the closest person in the trench to the front-end loader.

At about 9:30 a.m. one side of the trench collapsed, completely burying Sprouse and burying the man closest to him up to his armpits. The partially buried man was Alan Fry, son of project supervisor Elmer Fry. The workers pulled Alan Fry out of the trench, and Morris Rowland took him to the hospital.

Morris Rowland did not return to the site for several hours after the cave-in. The remaining workers continued to dig Sprouse out. They refused several offers of help given by Jennifer Spencer, a security guard for another company, who was then on duty and who volunteered to call a rescue squad. By the time the workers had finished digging Sprouse out, he was dead.

The trench was approximately fourteen feet deep and four feet wide with vertical sides at the point of the cave-in. Craig, who saw the site later and commented on a photograph of it at his deposition, stated that the trench was being sloped less than it had been at the end of the previous day's work. He characterized it as "unsafe" and stated that he "would never put a man in it."

Pursuant to N.C.G.S. § 28A-18-2, plaintiff filed civil suits against Rowland Utility; Morris Rowland in his individual capacity; Davidson & Jones; and Pinnacle One Associates. In July 1987, plaintiff filed a Workers' Compensation claim to meet the filing deadline for compensation claims. In order to avoid a judicial ruling that she had elected a workers' compensation remedy inconsistent with the civil remedies she presently seeks, plaintiff specifically requested that the Industrial Commission not hear her case until completion of this action. The Commission has complied with her request, and plaintiff has received no benefits under the Workers' Compensation Act.

In the civil actions before us, the trial court granted all defendants' motions for summary judgment; and the Court of Appeals affirmed, with Judge Phillips concurring in part and dissenting in part. Plaintiff appealed of right on the basis of Judge Phillips'

dissent, and we granted her petition for discretionary review as to additional issues. We now affirm in part and reverse in part.

II.

[1] We first decide whether the forecast of evidence is sufficient to survive Rowland Utility's and Morris Rowland's motions for summary judgment, which are based on the ground that Sprouse's death was caused only by "accident" under the Workers' Compensation Act ("the Act"). If the death can only be considered accidental, defendants' summary judgment motions were properly allowed because Sprouse's death would fall within the Act's exclusive coverage, and no other remedies than those provided in the Act are available to plaintiff either against his employer, *Hicks v. Guilford County*, 267 N.C. 364, 148 S.E.2d 240 (1966), or a co-worker, *Strickland v. King*, 293 N.C. 731, 239 S.E.2d 243 (1977). On the other hand, if the forecast of evidence is sufficient to show that Sprouse's death was the result of an intentional tort committed by his employer, then summary judgment was improperly allowed on the ground stated, because the employer's intentional tort will support a civil action. *See Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), and cases cited therein.

We conclude, for reasons given below, that the forecast of evidence is sufficient for plaintiff to survive defendants' motions for summary judgment because: (1) it tends to show that Sprouse's death was the result of intentional conduct by his employer which the employer knew was substantially certain to cause serious injury or death; and (2) this conduct is tantamount to an intentional tort committed by the employer. We conclude, further, that plaintiff may pursue simultaneously her workers' compensation claim and her civil action without being required to elect between them because the forecast of evidence tends to show that: (1) Sprouse's death was the result of both an "accident" under the Act and an intentional tort; and (2) the Act's exclusivity provision does not shield the employer from civil liability for an intentional tort. Plaintiff is, of course, entitled to but one recovery.

A.

Section 97-9 of the Workers' Compensation Act provides:

> *Every employer* subject to the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such

> security remains in force, he or those conducting his business *shall only be liable to any employee for personal injury or death by accident to the extent and manner herein specified.*

N.C.G.S. § 97-9 (1985) (emphasis added).

> Section 97-10.1 provides:
>
> If the employee and the employer are subject to and have complied with the provisions of this Article, then *the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer* at common law or otherwise on account of such injury or death.

N.C.G.S. § 97-10.1 (1985) (emphasis added).

We interpret the Act according to well-established principles of statutory construction. The primary principle is to ensure that the purpose of the legislature is accomplished. *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 403 S.E.2d 291 (1991); *Hunt v. Reinsurance Facility*, 302 N.C. 274, 275 S.E.2d 399 (1981). To further this aim, the Court accords words undefined in the statute their plain meaning as long as it is reasonable to do so. *Electric Supply Co.*, 328 N.C. 651, 403 S.E.2d 291; *Burgess v. Your House of Raleigh*, 326 N.C. 205, 388 S.E.2d 134 (1990). Ambiguous or unclear terms are read consistently with overriding legislative purpose. *In re Banks*, 295 N.C. 236, 244 S.E.2d 386 (1978).

The Act seeks to balance competing interests and implement trade-offs between the rights of employees and their employers. It provides for an injured employee's certain and sure recovery without having to prove employer negligence or face affirmative defenses such as contributory negligence and the fellow servant rule. *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244. In return the Act limits the amount of recovery available for work-related injuries and removes the employee's right to pursue potentially larger damage awards in civil actions. *Id.* at 712, 325 S.E.2d at 246-47 (citing 1 A. Larson, *The Law of Workmen's Compensation* § 2.20 (1984) ). "[W]hile the employer assumes a new liability without fault he is relieved of the prospect of large damage verdicts." 2A A. Larson *The Law of Workmen's Compensation* § 65.11 (1989) (hereinafter "Larson"). Notwithstanding these important trade-offs, the legislature did not intend to relieve employers of civil liability

for intentional torts which result in injury or death to employees. In such cases the injury or death is considered to be both by accident, for which the employee or personal representative may pursue a compensation claim under the Act, and the result of an intentional tort, for which a civil action against the employer may be maintained. *See Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244, and cases cited therein.

In *Pleasant*, which involved co-employee liability for recklessly operating a motor vehicle, we concluded that "injury to another resulting from willful, wanton and reckless negligence should also be treated as an intentional injury for purposes of our Workers' Compensation Act." 312 N.C. at 715, 325 S.E.2d at 248. The *Pleasant* Court expressly refused to consider whether the same rationale would apply to employer misconduct. *Id.* at 717, 325 S.E.2d at 250. Nonetheless, *Pleasant* equated willful, wanton and reckless misconduct with intentional injury for Workers' Compensation purposes.

The plaintiff in *Barrino v. Radiator Specialty Co.*, 315 N.C. 500, 340 S.E.2d 295 (1986), urged us to extend the *Pleasant* rationale to injuries caused by an *employer's* willful and wanton misconduct. The plaintiff, administrator of the estate of the deceased employee, alleged in part that the decedent died as a result of severe burns and other injuries caused by an explosion and fire in the employer's plant. On the employer's motion for summary judgment, the plaintiff's forecast of evidence, which included the allegations of the complaint, tended to show as follows: the employer utilized ignitable concentrations of flammable gasses and volatile flammable liquids at its plant, violated OSHANC regulations in the use of these substances, covered meters and turned off alarms designed to detect and warn of dangerous levels of explosive gasses and vapors—all of which resulted in the explosion and fire which caused the employee's death.

A majority of this Court in *Barrino* refused to extend the *Pleasant* rationale to employer conduct, but only two of the four majority justices expressed the view that the plaintiff's injuries were solely by accident and that the remedies provided by the Act were exclusive. These two justices relied in part on *Freeman v. SCM Corporation*, 311 N.C. 294, 316 S.E.2d 81 (1984), a *per curiam* opinion which concluded that a complaint alleging injuries caused by the willful and wanton negligence of an employer should

be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure because exclusive jurisdiction rested under the Workers' Compensation Act with the Industrial Commission.

The other two justices in the *Barrino* majority concurred on the ground that the plaintiff, having accepted workers' compensation benefits, was thereby barred from bringing a civil suit. *Barrino*, 315 N.C. at 514-15, 340 S.E.2d at 304 (Billings, J., concurring).

The three remaining justices dissented on the ground that the plaintiff's forecast of evidence was sufficient to raise a genuine issue of material fact as to whether the defendant-employer's conduct "embodies a degree of culpability beyond negligence" so as to allow the plaintiff to maintain a civil action. *Id.* at 521, 340 S.E.2d at 307 (Martin, J., dissenting). Believing the plaintiff's forecast of evidence was sufficient to survive summary judgment on the question of whether the employer was guilty of an intentional tort, the *Barrino* dissenters said:

> As Prosser states: "Intent is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does." W. Prosser, *Handbook of the Law of Torts* § 8 (4th ed. 1971). *Accord* Restatement (Second) of Torts § 8A and comment b (1965). The death of Lora Ann Barrino [the employee] . . . was, at the very least, "substantially certain" to occur given defendants' deliberate failure to observe even basic safety laws.

*Id.* at 518, 340 S.E.2d at 305 (Martin, J., dissenting). As discussed in a subsequent portion of this opinion, the dissenters also concluded that the plaintiff was not put to an election of remedies. They thus would have allowed the plaintiff's common law intentional tort claim to proceed to trial on the theory that the defendant intentionally engaged in conduct knowing it was substantially certain to cause serious injury or death. They would also have allowed the plaintiff to pursue both a workers' compensation claim and a civil action.

Today we adopt the views of the *Barrino* dissent. We hold that when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct,

that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act. Because, as also discussed in a subsequent portion of this opinion, the injury or death caused by such misconduct is nonetheless the result of an accident under the Act, workers' compensation claims may also be pursued. There may, however, only be one recovery. We believe this holding conforms with general legal principles and is true to the legislative intent when considered in light of the Act's underlying purposes.

Our holding is consistent with general concepts of tort liability outside the workers' compensation context. The gradations of tortious conduct can best be understood as a continuum. The most aggravated conduct is where the actor actually intends the probable consequences of his conduct. One who intentionally engages in conduct knowing that particular results are substantially certain to follow also intends the results for purposes of tort liability. Restatement (Second) of Torts § 8A and comment b (1965) (hereinafter "Rest. 2d of Torts"). "[I]ntent is broader than a desire to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does." W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 8, at 35 (5th ed. 1984) (hereinafter "Prosser"). This is the doctrine of "constructive intent." "As the probability that a [certain] consequence will follow decreases, and becomes less than substantially certain, the actor's conduct loses the character of intent, and becomes mere recklessness. . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence." Rest. 2d of Torts § 8A, comment b.

Prosser discusses the tortious conduct continuum:

> Lying between intent to do harm, which . . . includes proceeding with knowledge that the harm is substantially certain to occur, and the mere unreasonable risk of harm to another involved in ordinary negligence, there is a penumbra of what has been called "quasi-intent." To this area, the words "willful," "wanton," or "reckless," are customarily applied; and sometimes, in a single sentence, all three.

Prosser § 34, at 212 (footnotes omitted).

In North Carolina we follow, applying our own terminology, the basic rules discussed in the Restatement and Prosser. We have recognized the doctrine of "constructive intent" and have generally applied it where willful and wanton conduct is present. For a full, scholarly discussion of this doctrine, *see Pleasant*, 312 N.C. 710, 325 S.E.2d 244. This discussion in *Pleasant* makes clear that an actual intent to cause injury is not a necessary element of an intentional tort generally, nor is it required for intentional tort claims based on work-related injuries.

Though the reasons in *Pleasant* for holding co-employees civilly liable for injuries caused by willful and wanton misconduct are sound, it is also in keeping with the statutory workers' compensation trade-offs to require that civil actions against employers be grounded on more aggravated conduct than actions against co-employees. Co-employees do not finance or otherwise directly participate in workers' compensation programs; employers, on the other hand, do. N.C.G.S. § 97-93 (1985). This distinction alone justifies the higher "substantial certainty" threshold for civil recovery against employers.

The substantial certainty standard satisfies the Act's purposes of providing trade-offs to competing interests and balancing these interests, while serving as a deterrent to intentional wrongdoing and promoting safety in the workplace. N.C.G.S. § 95-126(b)(2) (1985).

Other jurisdictions which have considered how egregious employer misconduct must be in order to justify a worker's civil recovery against the employer extraneous to workers' compensation statutes have reached different results. Some require that the employer actually intend to harm the worker, as in a classic assault and battery suit. *See, e.g., Griffin v. George's, Inc.*, 267 Ark. 91, 589 S.W.2d 24 (1979); *see generally* 2A Larson § 68.13 and cases cited therein. Others require the employer's misconduct to be willful and wanton.[2] *See, e.g., Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907 (1978). Still others require intentional conduct which the employer knows is "substantially certain" to cause injury or death. *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981); *Beauchamp v. Dow Chemical Co.*, 427 Mich. 1, 398 N.W.2d 882 (1986); *Jones v. VIP Development Co.*, 15 Ohio St. 3d 90, 472

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2. For a good discussion of the meaning of willful and wanton negligence, see *Pleasant*, 312 N.C. at 714-15, 325 S.E.2d at 247-48.

N.E.2d 1046 (1984); *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982); *VerBouwens v. Hamm Wood Products*, 334 N.W.2d 874 (S.D. 1983).

It is true that some of the cases adopting the willful and wanton misconduct or substantial certainty standard have been modified by statute. Legislation enacted in Michigan modified the decision in *Beauchamp v. Dow Chemical Co.*, 427 Mich. 1, 398 N.W.2d 882. The legislation provides:

> The only exception [to the exclusivity of workers' compensation] is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. *An employer shall be deemed to have intended to injure if the employer has actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.*

Mich. Comp. Laws § 418.131 (Supp. 1990) (emphasis added).

Effective in 1986, the Ohio legislature amended its workers' compensation law in an apparent response to cases such as *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572, and *Jones v. VIP Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046. The Ohio statutory amendments provide for civil recovery outside workers' compensation for acts "committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur." 41 Ohio Rev. Code Ann. § 4121.80 (1990). Although the Ohio amendments equate substantial certainty with the "deliberate intent to cause an employee to suffer injury . . . or death," *id.*, they also treat certain unsafe acts as if they were done with the intent to injure another.

While generally moving away from the willful and wanton misconduct standard enunciated in *Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907, and toward a standard requiring "deliberate intention to injure," W. Va. Code § 23-4-2 (1983), the West Virginia legislature has set out an important exception. The exception allows plaintiffs to recover outside workers' compensation where the employer is aware that there is a high degree of risk of serious harm, and that the conditions creating the risk violate specific safety statutes. *Id.*

On the basis of these kinds of statutory modifications, Rowland Utility urges us to conclude that the willful and wanton misconduct

and substantial certainty standards should be rejected as inconsistent with the legislative purpose of North Carolina's Workers' Compensation Act. We do not read the statutory modifications of judicial decisions in other jurisdictions to repudiate the standards adopted in those decisions. The statutory modifications seem more to narrow the application of, rather than to abolish, these standards. The Michigan legislature provided that "an employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." Mich. Comp. Laws § 418.131 (Supp. 1990). This amounts only to a rejection of the substantiality aspect of the substantial certainty standard. The Ohio and West Virginia legislatures essentially redefined what employer conduct will allow tort recovery. These legislative modifications confirm, rather than reject, the proposition that, in those states, actual intent to injure is not required in order for an employer to be civilly liable outside workers' compensation statutes.

At least two other states, Louisiana and South Dakota, continue to apply the substantial certainty standard adopted by their judiciaries, *Bazley v. Tortorich*, 397 So. 2d 475 (La.); *VerBouwens v. Hamm Wood Products*, 334 N.W.2d 874 (S.D.), without legislative modification.

Thus, both courts and legislatures in a fair number of other jurisdictions have rejected the proposition that actual intent to harm is required for an employer's conduct to be actionable in tort and not protected by the exclusivity provisions of workers' compensation. Our adoption of the substantial certainty standard does the same.

B.

**[2]** We now apply the substantial certainty standard to the facts. We emphasize that in a summary judgment proceeding, the forecast of evidence and all reasonable inferences must be taken in the light most favorable to the non-moving party. *Wilkes County Vocational Workshop v. United Sleep*, 321 N.C. 735, 365 S.E.2d 292 (1988).

A corporation can act only through its agents, which include its corporate officers. *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 130 S.E.2d 281 (1963). For purposes of this appeal plaintiff has forecast sufficient evidence that at all relevant times Morris Rowland as chief executive officer was exercising corporate authori-

ty in directing the trenching operations. We thus examine Morris Rowland's conduct and attribute it to his principal, Rowland Utility. If plaintiff's forecast of evidence is sufficient to show that there is a genuine issue of material fact as to whether Morris Rowland's conduct satisfies the substantial certainty standard, then plaintiff is entitled to take her case against Rowland Utility to trial.

We conclude that plaintiff's forecast of evidence is sufficient to raise such a material issue of fact against Rowland Utility. Agronomist James Rees, offered as an expert in soil and environmental analysis, submitted an affidavit on the status of the soil where the cave-in occurred. He stated:

> Based on my review of the physical conditions existent at the time of the trench collapse, as nearly as they can be determined, and on the nature and physical conditions of the surface and subsurface materials, my conclusion is that the trench as constructed by Morris Rowland Utility, Inc. consisting of sheer, vertical walls approximately fourteen feet deep, had an exceedingly high probability of failure, and the trench was substantially certain to fail.

From this evidence, a reasonable juror could determine that upon placing a man in this trench serious injury or death as a result of a cave-in was a substantial certainty rather than an unforeseeable event, mere possibility, or even substantial probability.

There is also evidence to indicate that Morris Rowland knew of this substantial certainty. Neither we, nor later the jury, need accept his characterization of his state of mind at face value. Other evidence is available from which his state of mind can be inferred. *See, e.g., Waste Management of Carolinas, Inc. v. Peerless*, 315 N.C. 688, 700 n.6, 340 S.E.2d 374, 383 n.6 (1986) (recurrent evidence of "accidental" toxic emissions allows inference that they were intentional). There is evidence that Morris Rowland was capable of discerning extremely hazardous ditches. His career had been excavating different kinds of soil. He knew the attendant risks. He had been cited at least four times in six and one-half years immediately preceding this incident for violating multiple safety regulations governing trenching procedures. He was aware of safety regulations designed to protect trench diggers from serious injury or death. He knew he was not following these regulations in digging the trench in question.

Davidson & Jones foreman Lynn Craig testified that the trench at point of collapse was "unsafe" and that he would "never put a man in it" without a trench box or other precautions. Craig was an experienced construction worker with knowledge about soil composition and the dangers associated with deep-ditch trenching. His emphatic indication that the trench was unsafe could lead reasonable jurors to conclude that Morris Rowland, who was also at the trench and equally capable of observing its dangerous tendencies, shared Craig's knowledge and disregarded the substantial certainty of a cave-in resulting in serious injury or death. Rowland's attempts to rush Greene the previous day and his commencement of hasty, unsafe procedures, including his failure to use the available trench box, would offer the jury a motive for his conduct-swift completion of the project, whatever the risk.

Morris Rowland's knowledge and prior disregard of dangers associated with trenching; his presence at the site and opportunity to observe the hazards; his direction to proceed without the required safety procedures; Craig's experienced opinion that the trench was unsafe; and Rees' scientific soil analysis converge to make plaintiff's evidentiary forecast sufficient to survive Rowland Utility's motion for summary judgment.

We reject Rowland Utility's reasons for concluding to the contrary. Rowland Utility contends that no reasonable business person would knowingly engage in conduct that is substantially certain to cause a trench cave-in because of the significant delay in work and additional cost that such an event would cause. This argument is more properly directed toward the jury at trial rather than to the Court on summary judgment.

At least one court has indicated that a trench cave-in may satisfy the substantial certainty standard. In *Beauchamp v. Dow Chemical Co.*, 427 Mich. 1, 398 N.W.2d 882, the Michigan Supreme Court discussed the trench cave-in case of *Serna v. Statewide Contractors*, 6 Ariz. App. 12, 429 P.2d 504 (1967). The *Beauchamp* Court indicated that the failure to observe trenching safety procedures and the resulting cave-in discussed in *Serna* would likely have presented a valid claim had the *Serna* court applied the substantial certainty standard. *Beauchamp*, 427 Mich. at 23, 398 N.W.2d at 892.

Rowland Utility also argues that its placing Alan Fry, son of project supervisor Elmer Fry, into the trench with the ac-

quiescence of Elmer Fry is inconsistent with Rowland Utility's knowledge that a cave-in was a substantial certainty. The argument is that Elmer Fry would never have agreed to put his son in the trench had he appreciated the danger and that since Elmer Fry did not appreciate the danger, neither did Morris Rowland. Again, this is an argument more properly directed to the jury, which on all the evidence can determine whether the state of Morris Rowland's knowledge and appreciation of the risk was more like Elmer Fry's on the one hand or Lynn Craig's on the other.

C.

**[3]** Plaintiff next asks us to hold that the forecast of evidence is sufficient to survive Morris Rowland's motion for summary judgment in his individual capacity. She contends that the forecast of evidence at least raises a genuine issue of material fact as to whether Morris Rowland was acting as her decedent's co-employee and is, therefore, liable under *Pleasant* for willful and wanton misconduct. Morris Rowland contends that since the forecast of evidence shows without contradiction that he is president and sole shareholder of Rowland Utility, he cannot be held liable individually as a co-employee of the decedent. He must, rather, be treated as the "alter ego" of the corporation itself.

Since the evidentiary forecast shows that Morris Rowland was at all material times the president and sole shareholder of Rowland Utility, and was acting in furtherance of corporate business, we conclude that any individual liability on his part must be based on the same standard as that applied to the corporation. A number of jurisdictions have held that where corporate employers could not be held civilly liable because of the exclusivity provisions of workers' compensation acts, neither could corporate officers and directors acting in their capacities as such. *See, e.g., Simmons First National Bank v. Thompson*, 285 Ark. 275, 686 S.W.2d 415 (1985); *Zurich Insurance Co. v. Scofi*, 366 So. 2d 1193 (Fla. Dist. Ct. App.), *cert. denied*, 378 So. 2d 348 (Fla. 1979); *Athas v. Hill*, 300 Md. 133, 476 A.2d 710 (1984); *Kruse v. Schieve*, 61 Wis. 2d 421, 213 N.W.2d 64 (1973). The import of these holdings is that, in the workers' compensation context, corporate officers and directors are treated the same as their corporate employer vis-a-vis application of the exclusivity principle. Following this reasoning, we hold that Morris Rowland may be held individually liable on

the same basis as Rowland Utility. His liability, like that of the corporation, must be determined under the substantial certainty standard.

Our holding is consistent with the principle that agents of corporations and the corporations themselves may both be held liable for the agent's torts committed in the course and scope of the agency relationship under the doctrine of *respondeat superior. See, e.g., Mills v. Mills*, 230 N.C. 286, 52 S.E.2d 915 (1949).

Since plaintiff's forecast of evidence tending to establish Rowland Utility's liability is dependent on the actions of Morris Rowland, and since this forecast is sufficient to survive Rowland Utility's motion for summary judgment, it is *a fortiori* sufficient to survive Morris Rowland's motion for summary judgment.

D.

**[4]** Although, for the reasons stated, plaintiff may continue to pursue her civil action, we also conclude she is not barred from simultaneously pursuing her workers' compensation claim because the injury to her intestate was the result of an "accident" as that term is used in the Act. A claimant may, but is not required to, elect between these remedies but, in any event, is entitled to but one recovery.

"Accident" under the Act means "(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." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E.2d 109, 110-11 (1962); *see Rhinehart v. Market*, 271 N.C. 586, 157 S.E.2d 1 (1967). Because employees do not expect to suffer intentional torts committed against them while on the job, such injuries are "unlooked for and untoward events . . . not expected or designed by the injured employee," *Harding*, 256 N.C. at 428, 124 S.E.2d at 110-11. The employee may treat these injuries as accidental and accept workers' compensation benefits. *See Pleasant*, 312 N.C. 710, 325 S.E.2d 244, and cases cited therein; *Warner v. Leder*, 234 N.C. 727, 69 S.E.2d 6 (1952); *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982) (cited with approval in *Pleasant*).

While plaintiff has pursued her civil suit, she has received no benefits for accidental injury under the Act. Thus, there is not the election of remedies problem presented in *Barrino*.

Nonetheless, insofar as *Barrino; Wesley v. Lea*, 252 N.C. 540, 114 S.E.2d 350 (1960); and *Warner v. Leder*, 234 N.C. 727, 19 S.E.2d 6 (1952),[3] can be read to hold that simultaneous pursuit of civil and workers' compensation remedies are inherently inconsistent and an election of remedies is required, these cases are overruled.

From the standpoint of the injured party, an injury intentionally inflicted by another can nonetheless at the same time be an "unlooked for and untoward event . . . not expected or designed by the injured employee." *Harding*, 256 N.C. at 428, 124 S.E.2d at 110. It is, therefore, not inherently inconsistent to assert that an injury caused by the same conduct was both the result of an accident, giving rise to the remedies provided by the Act, and an intentional tort, making the exclusivity provision of the Act unavailable to bar a civil action.

Allowing an injured worker to pursue both avenues to relief does not run afoul of the goal of the election doctrine, which is to prevent double redress of a single wrong. *Smith v. Oil Corp.*, 239 N.C. 360, 79 S.E.2d 880 (1954). Although the worker may pursue both statutory and common law remedies, the worker ultimately is entitled to only one recovery. Double recovery should be avoided by requiring the claimant who recovers civilly against his employer to reimburse the workers' compensation carrier to the extent the carrier paid workers' compensation benefits, or by permitting the carrier to become subrogated to the claimant's civil claim to the extent of benefits paid.

As the *Barrino* dissent points out:

> The result thus obtained would be a more equitable one than forcing an employee who believes in good faith that he was injured by the intentional misconduct of his employer to forego his compensation claim in order to maintain his common law claim. An injured employee having financial difficulties would be likely to accept workers' compensation benefits and forego a valid tort claim because he would have no real alternative. Such a policy would not serve to discourage intentional employer misconduct. Finally, the doctrine of election of remedies presupposes a "choice" between one or more inconsistent remedies. *NASCAR, Inc. v. Midkiff*, 246 N.C. 409, 98 S.E.2d 468 (1957).

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3. *Wesley* and *Warner* have already been partially overruled by *Pleasant*.

> An employee in severe economic straits who makes a decision based solely on the exigencies of his immediate situation cannot be considered as having freely "chosen" one remedy over another.

*Barrino*, 315 N.C. at 522, 340 S.E.2d at 308 (Martin, J., dissenting).

III.

We next decide whether plaintiff may proceed to trial against Davidson & Jones and Pinnacle One on her claims that they breached nondelegable duties of safety owed to plaintiff's decedent. We hold plaintiff may take her case against Davidson & Jones to trial, but summary judgment was properly allowed on her claim against Pinnacle One.

A.

**[5]** Generally, one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work. *Mack v. Marshall Field & Co.*, 218 N.C. 697, 12 S.E.2d 235 (1940). Plaintiff can recover neither from Davidson & Jones nor from Pinnacle One unless the circumstances surrounding the trench cave-in place her claim within an exception to this general rule.

Plaintiff contends her action falls within such an exception. She argues that Davidson & Jones and Pinnacle One breached nondelegable duties of safety owed to decedent because the trenching project was an "inherently dangerous activity" and these defendants failed to take adequate measures to correct Rowland Utility's poor safety practices.

In considering this argument, it is necessary to clarify what types of activities fall under particular rules governing liability. We consider ultrahazardous activities, inherently dangerous activities, and activities that are neither.

The most commonly recognized example of an ultrahazardous activity is blasting. *Insurance Co. v. Blythe Brothers*, 260 N.C. 69, 131 S.E.2d 900 (1963). Parties whose blasting proximately causes injury are held strictly liable for damages, *id.*, largely because reasonable care cannot eliminate the risk of serious harm. *See* Rest. 2d of Torts § 520; *cf.* Restatement of Torts § 520. Because these activities are extremely dangerous, they must "pay their

own way," C. Daye and M. Morris, *North Carolina Law of Torts*, § 20.40, at 355 (1991) ("Daye"), and the parties who are responsible must bear the cost regardless of whether they have been negligent. North Carolina courts have not yet recognized as ultrahazardous any activities other than blasting. *Id.*

The likelihood of serious harm arising from inherently dangerous activities is less than that associated with ultrahazardous activities, and proper safety procedures can substantially eliminate the danger. Unlike ultrahazardous activities, inherently dangerous activities are susceptible to effective risk control through the use of adequate safety precautions. *Evans v. Rockingham Homes, Inc.*, 220 N.C. 253, 17 S.E.2d 125 (1941). The mere fact that an activity can be done safely upon compliance with such procedures does not, for purposes of establishing liability, alter its fundamental characteristic of being inherently dangerous. Rather, taking the necessary safety precautions can demonstrate reasonable care protecting the responsible party from liability under a negligence standard. Liability for injuries caused by such activities is not strict, but is based on negligence. *Dockery v. World of Mirth Shows, Inc.*, 264 N.C. 406, 142 S.E.2d 29 (1965). The reason for imposing a negligence standard for liability resulting from inherently dangerous activities is that exercise of reasonable care can control the risk, and the responsible parties will not be held liable unless they have caused injury by failing to do so.

Our case law distinguishes between ultrahazardous activities, inherently dangerous activities, and those that are safe unless performed negligently:

> The courts have found no universal rule of application by which they may abstractly draw a line of classification in every case between work which is inherently dangerous and that which is not. The subject must not be confused with concepts of *hazardous employment*, usually involving a high degree of danger, since here we are dealing with danger which manifests itself to the general public. It is not essential, to come under the rule, that the work should involve a major hazard. It is sufficient if there is a recognizable and substantial *danger inherent in the work*, as distinguished from a *danger collaterally created* by the independent negligence of the contractor, which latter might take place on a job itself involving no inherent danger.

*Evans*, 220 N.C. at 258-59, 17 S.E.2d at 128 (emphasis added). When considering whether an activity is inherently dangerous, "[m]ere liability to injury is not the test, as injuries may result in any kind of work where it is carelessly done, although with proper care it is not especially hazardous." *Vogh v. F.C. Geer Co.*, 171 N.C. 672, 676, 88 S.E. 874, 876 (1916). "There is an obvious difference between committing work to a contractor to be executed, from which if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted." *Greer v. Construction Co.*, 190 N.C. 632, 637, 130 S.E. 739, 743 (1925).

One who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others:

> "The liability of the employer rests upon the ground that mischievious [sic] consequences will arise from the work to be done unless precautionary measures are adopted, and the duty to see that these precautionary measures are adopted rests upon the employer, and he cannot escape liability by entrusting this duty to another as an 'independent contractor' to perform." *Thomas v. Lumber Co.*, 153 N. C., 351, 69 S. E., 275.

*Evans*, 220 N.C. at 259, 17 S.E.2d at 128-29. The party that employs the independent contractor has a continuing responsibility to ensure that adequate safety precautions are taken. *Dockery v. World of Mirth Shows, Inc.*, 264 N.C. 406, 142 S.E.2d 29.

The rule imposing liability on one who employs an independent contractor applies "whether [the activity] involves an appreciable and foreseeable danger to the workers employed or to the public generally." *Evans*, 220 N.C. at 260, 17 S.E.2d at 129. The employer's liability for breach of this duty "is direct and not derivative since public policy fixes him with a nondelegable duty to see that the precautions are taken." *Dockery*, 264 N.C. at 410, 142 S.E.2d at 32; *Evans*, 220 N.C. at 259, 17 S.E.2d at 129.

Imposition of this nondelegable duty of safety reflects "the policy judgment that certain obligations are of such importance that employers should not be able to escape liability merely by hiring others to perform them." Daye, § 23.31, at 393 (citing *Royal v. Dodd*, 177 N.C. 206, 209-11, 98 S.E. 599, 600-02 (1919) ). By holding both an employer and its independent contractor responsible for

injuries that may result from inherently dangerous activities, there is a greater likelihood that the safety precautions necessary to substantially eliminate the danger will be followed.

The dissent suggests that activities are either inherently dangerous or not as a matter of law. We agree that in some cases such a determination can, as a matter of law, be made. For example, *Evans* held as a matter of law that maintaining an open trench in a heavily populated area is inherently dangerous from the standpoint of the public, and the landowner who hired an independent contractor could be held liable for the injuries of a child who fell into the trench negligently left open by the independent contractor. *Evans*, 220 N.C. 253, 17 S.E.2d 125. *Greer v. Construction Co.*, 190 N.C. 632, 130 S.E. 739, held that blasting is inherently dangerous, an early approach to imposing liability for injuries caused by blasting and only later changed by adoption of the majority strict liability standard in *Insurance Co. v. Blythe Brothers*, 260 N.C. 69, 131 S.E.2d 900. *Peters v. Carolina Cotton & Woolen Mills, Inc.*, 199 N.C. 753, 155 S.E. 867 (1930), held that installing electrical wires is an inherently dangerous activity, calling for proper safety precautions such as insulation.

Similarly, this Court has held as a matter of law that certain activities resulting in injury are not inherently dangerous. These activities include sign erection, *Brown v. Texas Co.*, 237 N.C. 738, 76 S.E.2d 45 (1953), and generally, building construction. *Vogh v. F.C. Geer Co.*, 171 N.C. 672, 88 S.E. 874.

Despite the fact that some activities are always inherently dangerous while others may never be, unlike the dissenters, we do not believe every act can be defined as inherently dangerous or not, regardless of the attendant circumstances. Though bright-line rules are beneficial where appropriate, their usefulness can be limited. "The life of the law has not been logic: it has been experience. . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." O. W. Holmes, Jr., *The Common Law*, Lecture 1, at 1 (1881).

*Evans*, 220 N.C. 253, 17 S.E.2d 125, reflects that bright-line rules and mathematical precision are not always compatible with discerning whether an activity is inherently dangerous. While holding as a matter of law that digging a trench in a heavily populated

area is inherently dangerous, *Evans* nonetheless recognized that digging the same trench in a different locale would not be:

> [T]o dig a drain ditch in a pasture, far from human habitation, certainly would not be considered dangerous; but an excavation of that character a yard wide and three and one-half feet deep in a thickly populated area, where many persons have and exercise the right to be, is, we think, if left without adequate precautions, too obviously dangerous to be debatable.

*Evans*, 220 N.C. at 260-61, 17 S.E.2d at 130. Particular trenching situations, which lie between the two examples given in *Evans*, appropriately require a jury to decide the inherently dangerous issue.

Courts considering the inherent danger of putting a man in a deep trench have reached conflicting results. Some have held it not to be inherently dangerous, *see, e.g., Cummings v. Hoosier Marine Properties, Inc.*, 173 Ind. App. 372, 363 N.E.2d 1266 (1977), while others have held the question is for the jury. *See, e.g., Smith v. Inter-City Telephone Co.*, 559 S.W.2d 518 (Mo. 1977) (en banc). We think the latter approach is the better reasoned.

This Court has addressed the danger of trenching on a case-by-case basis. In *Darden v. Lassiter*, 198 N.C. 427, 152 S.E. 32 (1930), plaintiff's intestate was killed when an incompletely shored trench in which he was working collapsed. Plaintiff sued his employer, alleging breach of duty to provide a safe workplace. In an opinion by Chief Justice Stacy, the Court said:

> Whether "fine grading" in the bottom of a trench . . . is dangerous . . . would seem to depend upon a variety of circumstances. In some cases, it might be entirely safe; in others, not. The size and dimensions of the trench might affect it. The character of the soil would certainly have some influence. . . . [T]he moisture in the ground . . . might render such work more or less safe, or more or less hazardous. The state of the weather or the season of the year might have something to do with it. But all of these are matters of fact, about which there may be conflicting evidence, as in the instant case, calling for determination by a jury.

*Id.* at 429, 152 S.E. at 33-34; *accord Harper v. Murray Construction Co.*, 200 N.C. 47, 156 S.E. 137 (1930). In *Barnhardt v. Concord*, 213 N.C. 364, 196 S.E. 310 (1938), an unshored trench on a city street collapsed, killing the plaintiff's intestate who was working

in the trench. The intestate was employed by the Emergency Relief Administration (ERA), an independent contractor with the City of Concord. In a prior proceeding before the Industrial Commission, the plaintiff's claim was dismissed on the ground that the deceased was not an employee of the City. The civil action was likewise dismissed on the ground that the intestate was neither an employee of the City nor of the ERA. In dictum, the Court suggested that the Industrial Commission "could have heard the case against defendants on the 'intrinsically dangerous' doctrine and held jurisdiction, but this they did not do." *Id.* at 366, 196 S.E. at 311.

Literature issued by the Department of Labor, Division of Occupational Safety and Health, bears out our view that trenching can be inherently dangerous:

> Two primary reasons account for the occurrence of deaths and injuries in trenching and excavation sites: (1) The walls of the trench in which employees are working are not sloped, shored, sheeted, braced or otherwise supported in accordance with North Carolina Occupational Safety and Health Standards and (2) there is not adequate means for the employees to exit the trench.

P. McCain and D. Johnston, *An Introductory Guide to the 1989 OSHA Excavations Standard* at ix ("Excavation Guide"). This pamphlet recounts case histories in which people were seriously injured or killed when OSHANC safety procedures were not observed.[4] *Id.* The pattern is that a worker goes into a deep trench and is injured or killed by a cave-in. Had precautions required by the nature of the trench been taken, the injury or death would not likely have occurred. As these situations show, it may be inherently dangerous to put a man in a deep trench, but following certain safety precautions will substantially eliminate the risk and allow parties responsible under the doctrine of nondelegable duties of safety to avoid liability.

The Department of Labor literature and OSHANC regulations also show that the danger of trenching should be considered on a case-by-case basis. Numerous factors, including soil characteristics, vibrations, surface encumbrances, water conditions, and depth, contribute to how dangerous a trench is. *Excavation Guide.* For exam-

4. One of the case histories involves the death of Thomas Sprouse, the decedent in this case. *Id.*

ple, digging in stable rock does not require safety precautions such as shoring or sloping, whereas digging in more porous soil would. *Id.*; N.C.G.S. § 95-136(g); 13 N.C. Admin. Code 7E.1400, *et seq.*; *cf.* 29 C.F.R. § 1926.650-.653. Because different statutory procedures are required under different conditions, trenching may be inherently dangerous in some situations, requiring numerous precautions, and not inherently dangerous in other situations.

In determining whether the trenching process which killed Thomas Sprouse was inherently dangerous, the focus is not on some abstract activity called "trenching." The focus is on the particular trench being dug and the pertinent circumstances surrounding the digging. It must be shown that because of these circumstances, the digging of the trench itself presents "a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor." *Evans*, 220 N.C. at 259, 17 S.E.2d at 128.

We conclude the forecast of evidence is sufficient to survive summary judgment on the question of whether the trenching in this case was "inherently dangerous."

Davidson & Jones' foreman Lynn Craig stated that the trench at point of collapse was "unsafe" and that on the evening before it "could have been safer." Agronomist James Rees stated in his affidavit that

> the trench . . . consisting of sheer, vertical walls approximately fourteen feet deep, had an exceedingly high probability of failure, and the trench was substantially certain to fail. The trench collapse, in my opinion, was caused by the verticality and depth of the walls under the conditions then existent, given nature of the soil and parent materials and the natural and mechanical forces acting on the walls.

This forecast of evidence is sufficient to survive summary judgment on whether the particular trench in question was inherently dangerous, requiring special safety precautions to render it safe.

B.

If the jury finds that the trenching in question here was or had become at the time of the cave-in an inherently dangerous activity, then Davidson & Jones, if it knew of the circumstances creating the danger, cannot escape liability by merely relying on

the legal ground that Rowland Utility was an independent contractor. Rather, it would have a nondelegable duty to exercise due care to see that plaintiff's intestate was provided a safe place in which to work and proper safeguards against any dangers as might be incident to the work. *Greer v. Construction Co.*, 190 N.C. 632, 130 S.E. 739; *cf. Brown v. Texas Co.*, 237 N.C. 738, 76 S.E.2d 45. If Davidson & Jones did not exercise such care to ensure safety, it is liable.

Plaintiff's forecast of evidence on the issue of Davidson & Jones' negligence is sufficient to survive summary judgment. This forecast tends to show as follows: Davidson & Jones knew on Saturday, 3 August, that the trench in which plaintiff was working was unsafe in that it was not being properly sloped, shored, or braced, and that a trench box was not being used. It knew these precautions were required by OSHANC for the safety of the workers. Craig had asked Morris Rowland to procure a trench box for the Davidson & Jones crew. Knowing of the dangers associated with the Rowland Utility ditch, Davidson & Jones did not itself act to ameliorate the dangers.

That Craig did not view the ditch on Sunday, 4 August, the day of the collapse, does not alter our conclusion that plaintiff's forecast is sufficient to survive summary judgment. Davidson & Jones' duty to exercise due care in providing a safe work place for plaintiff's intestate was nondelegable and on-going. According to plaintiff's forecast, Davidson & Jones knew at all material times preceding the cave-in that Rowland Utility was not following standard, regulatory safety procedures. Davidson & Jones had a continuing duty of due care toward plaintiff's intestate during this entire time, and plaintiff's forecast of evidence tends to show a breach of this duty. It is therefore sufficient to survive summary judgment.

C.

**[6]** Plaintiff also seeks to hold Pinnacle One liable on a theory of breach of a nondelegable duty to her intestate to provide him with a safe working environment. Pinnacle One was the developer on this project, in which capacity it hired Davidson & Jones as general contractor. We need not decide whether Pinnacle One, like Davidson & Jones, owed a nondelegable duty to plaintiff's intestate. Assuming that it did, we find nothing in the forecast of evidence to show that such a duty was breached by Pinnacle One. There is nothing in the forecast indicating that Pinnacle One

or any of its representatives knew or should have known that Davidson & Jones had hired Rowland Utility, much less of the trenching activity in which plaintiff's intestate was engaged or the dangerous propensities of the particular trench in question. There is no forecast that Pinnacle One had any knowledge or expertise regarding safety practices in the construction industry generally or in trenching particularly. So far as the forecast of evidence shows, Pinnacle One justifiably relied entirely on the expertise of its general contractor Davidson & Jones.

IV.

**[7]** Plaintiff next seeks to hold the general contractor Davidson & Jones liable for negligently selecting and retaining Rowland Utility as its subcontractor. We conclude plaintiff's forecast of evidence is insufficient to survive summary judgment on these theories, assuming they are available to an employee of the subcontractor, a question which we do not here decide.

So far as our law has developed in this area, it may be stated as follows: An employee injured by the negligence of an incompetent or unqualified fellow employee may recover against the employer of both on the theory that the employer negligently hired, or after hiring, negligently retained the incompetent fellow employee. *Pleasants v. Barnes*, 221 N.C. 173, 19 S.E.2d 627 (1942); *Walters v. Durham Lumber Co.*, 163 N.C. 536, 80 S.E. 49 (1913); *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). A third party not contractually related to and injured by an incompetent or unqualified independent contractor may proceed against one who employed the independent contractor on the theory that the selection was negligently made. *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972).

We have not yet considered whether an injured employee of the incompetent or unqualified independent contractor can obtain relief from the party who negligently hired or retained the independent contractor. However, we need not decide here this question because our conclusion is that even if such theories are available to plaintiff, whose intestate was an employee of Rowland Utility, the forecast of evidence is insufficient to survive summary judgment.

This forecast tends to show as follows: Davidson & Jones had worked with Rowland Utility on approximately seventeen prior

occasions, leading several Davidson & Jones supervisors to believe that Rowland Utility was a competent contractor which exercised adequate safety procedures. None of the supervisors knew that Rowland Utility had received OSHANC citations. Nothing indicated to Davidson & Jones that Rowland Utility was "incompetent" or "unqualified." Because of its past direct experience with Rowland Utility, Davidson & Jones did not investigate Rowland Utility's safety record. Had Davidson & Jones investigated, it would have discovered Rowland Utility's numerous OSHANC violations.

Under these circumstances, we conclude plaintiff will be unable at trial to establish any lack of due care on the part of Davidson & Jones in hiring Rowland Utility. Plaintiff has referred us to no case, and our research has revealed none, which establishes a duty to investigate a licensed subcontractor's safety record when the contractor has had a substantial positive and safe prior working relationship with the subcontractor.

With regard to the theory that Davidson & Jones negligently retained Rowland Utility after learning of its alleged malfeasances, the forecast of evidence tends to show as follows: Davidson & Jones knew on Saturday, 3 August, that Rowland Utility was neither using a trench box, nor shoring, bracing, nor sloping the trench as well as Davidson & Jones would have liked and OSHANC required. Craig said that the trench "could have been safer." There is some evidence that the walls of the trench were vertical by the end of the day on Saturday, in itself an unsafe condition. The quality of the safety procedures further deteriorated as work progressed on Sunday. Having no one on site, Davidson & Jones did not know of this deterioration. The cave-in occurred at 9:30 that morning.

We hold this forecast of evidence insufficient to survive Davidson & Jones' motion for summary judgment on plaintiff's negligent retention claim. Once a contractee knows or should know that an independent contractor is incompetent or unqualified to do the work for which he was hired, the contractee, in order to be found liable on the theory that he negligently retained the independent contractor, must have had a reasonable opportunity to discharge the independent contractor. What constitutes a reasonable opportunity depends on the circumstances. They include the gravity of the risk posed, the contractee's own ability to correct the situation, the difficulty, if any, of replacing the independent contractor,

the time needed to investigate the events in question, the contractee's potential exposure to liability for breach of contract in the event the discharge is not justified, and the contractee's reasonable reliance on the independent contractor ultimately fulfilling his responsibilities.

Applying these considerations to the facts, we hold the forecast of evidence insufficient to survive Davidson & Jones' motion for summary judgment on plaintiff's negligent retention claim. Even if what Davidson & Jones knew by the end of the day on Saturday, the day before the cave-in, was enough to put it on notice that Rowland Utility was incompetent or unqualified, Davidson & Jones had no reasonable opportunity thereafter to discharge Rowland Utility before the trench cave-in occurred. Rowland Utility could not have been discharged at will. It had a contractual relationship with Davidson & Jones. Assuming that Rowland Utility's conduct on Saturday could have put it in breach of the provisions in its contract with Davidson & Jones requiring compliance with OSHANC regulations, Davidson & Jones nevertheless needed to consider and weigh this circumstance. It needed a reasonable time to reflect on the likelihood of its liability in the event a precipitous discharge of Rowland Utility could constitute a breach of contract on its part. This is not the kind of decision that can reasonably be made without some opportunity for careful reflection. On the facts before us Davidson & Jones did not have that opportunity.

V.

In conclusion, and for the reasons given, we reverse the Court of Appeals' decision insofar as it affirms summary judgments in favor of Rowland Utility and Morris Rowland, and in favor of Davidson & Jones on plaintiff's claim for breach of nondelegable duty of safety, and we remand for further proceedings against these defendants consistent with our opinion. We affirm the Court of Appeals' decision insofar as it allows summary judgments in favor of Pinnacle One, and in favor of Davidson & Jones on the negligent hiring and retention claims.

The result is

Affirmed in part; reversed in part; remanded.

Justice MITCHELL concurring in part and dissenting in part.

I concur in Part III D of the majority opinion holding that summary judgment was properly entered in favor of the defendant Pinnacle One Associates, Inc. I also concur in Part IV of the majority opinion holding that summary judgment was properly entered in favor of the defendant Davidson & Jones, Inc. with regard to the plaintiff's claim against that defendant for negligently selecting and retaining Morris Rowland Utility, Inc. as its subcontractor.

I dissent from Parts III A, B and C of the majority opinion in which the majority holds that the plaintiff may proceed to trial against Davidson & Jones, Inc. on the theory that it breached a non-delegable duty of safety owed to the plaintiff's decedent. The majority appears to recognize that Davidson & Jones, Inc. did not retain the right to control the manner in which the independent contractor it employed performed the work in question here. Therefore, the majority acknowledges that the plaintiff cannot recover from Davidson & Jones, Inc. on this theory, unless the plaintiff can show that her claim falls within an exception to the general rule prohibiting recovery against one who employs an independent contractor and does not retain the right to control the manner in which it performs the work to be done. In finding such an exception here, the majority relies upon the rule that one who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others. The majority concludes that under the circumstances presented in this case, a jury could reasonably find that the trenching involved was an inherently dangerous activity for which Davidson & Jones, Inc. could not delegate its duty to provide for the safety of the plaintiff's decedent. I do not agree.

An activity is either inherently dangerous or it is not. If an activity may be conducted in an entirely safe manner when ordinary safety precautions are taken but may be hazardous if performed in a negligent manner, it is not an "inherently dangerous" activity in my view. *See* Black's Law Dictionary 782 (6th ed. 1990). Here, the record reveals and the majority concedes that the trenching activity leading to the cave-in which killed the plaintiff's decedent could have been performed safely if ordinary safety precautions, such as sloping the shoulders of the trench or the use of a trench box, had been employed. Therefore, it would seem to follow *ipso*

*facto* that the trenching was not inherently dangerous. For that reason, I dissent from the majority's conclusion that this claim by the plaintiff may be found to fall within an exception to the general rule that an employer is not liable for its independent contractor's negligence where, as here, it has not retained the right to control the manner in which the work undertaken is to be performed. I would affirm the holding of the Court of Appeals that the trial court properly entered summary judgment for the defendant Davidson & Jones, Inc. with regard to this claim for relief.

Finally, for reasons fully set forth in the thoughtful opinion of Judge Eagles (Judge Parker concurring) in the Court of Appeals, I dissent from Part II of the opinion of the majority of this Court. *Woodson v. Rowland*, 92 N.C. App. 38, 40-42, 373 S.E.2d 674, 675-77 (1988). In Part II, the majority holds that the exclusivity provision of the North Carolina Workers' Compensation Act, N.C.G.S. § 97-10.1, does not apply here and that the plaintiff may recover in a civil action against the defendants Morris Rowland and Morris Rowland Utility, Inc. for conduct substantially certain to cause injury. Although I concede that the majority's holding represents reasonable and perhaps desirable social policy, I must agree with the Court of Appeals that to give an employee, in addition to the rights available under our Workers' Compensation Act, a right to bring a civil action "against his employer, even for gross, willful and wanton negligence, would skew the balance of interests inherent in [the] . . . Act. Changes in the Act's delicate balance of interests is more properly a legislative prerogative than a judicial function." *Id.* at 42, 373 S.E.2d at 677. *See generally Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985) (describing the Act's balance of interests between employers and employees). Therefore, I would affirm the holding of the Court of Appeals that the trial court properly entered summary judgment for the defendants Morris Rowland and Morris Rowland Utility, Inc.

Justice MEYER joins in this concurring and dissenting opinion.

STATE OF NORTH CAROLINA v. JAMES COURTNEY McDOWELL

No. 417A88

(Filed 14 August 1991)

1. **Constitutional Law § 42 (NCI3d)— capital trial—single counsel privately retained—additional counsel not appointed—no error**

The trial court did not err by not appointing additional counsel pursuant to N.C.G.S. § 7A-450(b1) in a first degree murder trial where the court had found that defendant was indigent and appointed counsel, defendant's family retained an attorney, the court allowed the appointed counsel to withdraw, defendant explicitly accepted the retained attorney as the counsel of his own choosing, and the retained attorney represented defendant alone from that point. Defendant was not indigent within the meaning of N.C.G.S. § 7A-450(a) from that point and was not entitled to the appointment of assistant counsel.

**Am Jur 2d, Criminal Law §§ 976 et seq.**

**Determination of indigency of accused entitling him to appointment of counsel. 51 ALR3d 1108.**

2. **Criminal Law § 175 (NCI4th)— murder—insanity—notice withdrawn—inquiry sufficient**

The trial court in a murder prosecution conducted a sufficient inquiry of both defendant and his lawyer, prior to jury selection and after the close of defendant's evidence, to determine that the decision to withdraw the notice of defendant's intention to present an insanity defense was knowingly concurred in by defendant.

**Am Jur 2d, Criminal Law §§ 65 et seq.**

3. **Searches and Seizures § 14 (NCI4th)— search of apartment—consent by roommate—voluntary and intelligent**

The trial court did not err in a first degree murder prosecution by denying defendant's motion to suppress a search of his apartment and a shell casing seized from the apartment where no one was home when police arrived at defendant's apartment with the arrest warrant for defendant; the officers identified themselves when Karen Curtis arrived at the apartment, told her that they had a warrant for defendant's arrest,

and requested permission to search the apartment, but stated that she had the right to refuse; Curtis signed and dated the permission form and said she understood it after a detective read it to her; Curtis told the officers that defendant had the key but that a window was raised and they could take the screen off the window; the shell casing was found in the bedroom after officers gained entry; the apartment was listed in Curtis' name and she lived there and paid the rent and utilities from her welfare check; defendant was listed on the utilities form as her roommate; there was only one bedroom and only one closet, in which their clothes were commingled; and there was evidence that Curtis was mentally retarded and did not have the will to disagree with someone in authority. The evidence supported the findings, which supported the conclusions, that Curtis freely, knowingly, intelligently, willingly, and voluntarily gave consent to the search of the apartment; that she was not just submitting to authority; and that the officers acted in good faith without any knowledge of any mental limitations Curtis might have.

**Am Jur 2d, Search and Seizure § 100.**

4. **Jury § 7.12 (NCI3d)— murder—jury selection—opposition to death penalty**

The trial court did not err during voir dire in a murder prosecution by excusing a juror for cause based on his stated opposition to the death penalty where the juror's answers clearly show that he could not follow the law or the instructions of the trial court if to do so would result in a death sentence.

**Am Jur 2d, Jury §§ 289, 290.**

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

5. **Jury § 7.9 (NCI3d)— murder—jury selection—opinion expressed—dismissal proper**

The trial court did not err in a first degree murder prosecution by excusing a juror for cause where the juror stated that he had read about the killing soon after it happened and again on the day before jury selection, and he denied having formed an opinion but stated that the way in which

the defense was planning to operate struck him as unusual. The juror thus expressed an opinion that was possibly prejudicial to defendant and the trial court's action in excusing the juror did not amount to an abuse of discretion.

**Am Jur 2d, Jury § 303.**

**6. Jury § 6 (NCI3d)— murder—jury selection—independent judgment of counsel**

The trial court did not err in a first degree murder prosecution by allowing defendant input into the voir dire decision making process. Although defense counsel took defendant's feelings into consideration, he did not abdicate his role as effective counsel and defendant was not denied effective assistance of counsel.

**Am Jur 2d, Criminal Law §§ 984 et seq.; Jury §§ 195 et seq.**

**7. Constitutional Law § 308 (NCI4th)— murder—insanity defense—decision not to present—defendant's input**

There was no error in a first degree murder prosecution where defense counsel gave notice on the first day of trial that he intended to introduce expert testimony on whether defendant had the requisite mens rea for the crime, but did not present such evidence and requested that the court inquire into and put on the record defendant's desires. That inquiry did not reveal that the attorney was forgoing his responsibility in determining whether to present psychiatric evidence but only that there was agreement between defendant and his attorney.

**Am Jur 2d, Attorneys at Law §§ 147, 149-151.**

**8. Criminal Law § 89.3 (NCI3d)— prior statement of witness—additional material—admissible**

The trial court did not err in a first degree murder prosecution by allowing a witness's prior statement to be read to the jury where that statement contained additional material not testified to by the witness at trial. The statement did not contradict the trial testimony and was consistent with and strengthened the events testified to at trial.

**Am Jur 2d, Witnesses §§ 641 et seq.**

**9. Constitutional Law § 309 (NCI4th)— murder—attorney's concession of guilt—not ineffective assistance of counsel**

Defendant in a first degree murder prosecution was not denied the effective assistance of counsel when counsel made concessions regarding guilt where the trial court informed defendant of the need for his authorization and was told on the record that counsel and defendant had discussed the arguments; the trial court gave defendant instructions on an unobtrusive way to stop any argument which went beyond the scope of defendant's grant of authority; defendant expressly stated after the argument that the attorney had said what he had wished him to say; and the attempt by defense counsel to admit matters demonstrably proved but to negate the one charge that would be the foundation for the aggravating circumstance during the sentencing phase was reasonable trial strategy.

**Am Jur 2d, Criminal Law §§ 984 et seq.**

**When is attorney's representation of criminal defendant so deficient as to constitute denial of federal constitutional right to effective assistance of counsel—Supreme Court cases. 83 L. Ed. 2d 112.**

**10. Homicide § 25.2 (NCI3d)— murder—instructions—premeditation and deliberation**

The trial court did not err in its instructions to the jury on premeditation and deliberation during a murder prosecution where the court listed the evidentiary factors from which the jury could infer premeditation and deliberation to include lack of provocation, infliction of lethal wounds after the victim was made helpless, and grossly excessive force, and there was sufficient evidence to support submitting each of those factors.

**Am Jur 2d, Homicide § 501.**

**Modern status of the rules requiring "aforethought," "deliberation," or "premeditation" as elements of murder in the first degree. 18 ALR4th 961.**

**11. Robbery § 4.7 (NCI3d)— attempted armed robbery—evidence insufficient**

The trial court erred by denying defendant's motion to dismiss a charge of attempted armed robbery due to insuffi-

cient evidence where the evidence supported only the theory that defendant was attempting to prove his manhood but was insufficient to support a reasonable inference of defendant's guilt of armed robbery.

**Am Jur 2d, Criminal Law §§ 512, 513, 517; Robbery §§ 62-67, 85-89; Trial § 436.**

**12. Criminal Law § 1339 (NCI4th)— murder—sentencing—aggravating factor—attempted armed robbery**

A sentence of death for a first degree murder was vacated where the sole aggravating factor submitted to the jury was that the murder was committed while defendant was engaged in an attempt to commit armed robbery and there was insufficient evidence to support defendant's conviction for attempted armed robbery.

**Am Jur 2d, Criminal Law §§ 609, 628.**

**Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like—post-Gregg cases. 67 ALR4th 755.**

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

Justice MITCHELL concurring in part and dissenting in part.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Brannon, J.*, at the 8 August 1988 Criminal Session of Superior Court, DURHAM County. Defendant's motion to bypass the Court of Appeals as to his convictions of discharging a firearm into occupied property and attempted robbery with a dangerous weapon was allowed by this Court on 5 January 1990. Heard in the Supreme Court 10 April 1991.

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

*Malcolm Ray Hunter, Jr., Appellate Defender, and Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.*

MEYER, Justice.

Defendant was indicted for the murder of Mrs. Doris Gillie and was tried capitally at the 8 August 1988 Criminal Session of Superior Court, Durham County. The jury found defendant guilty of first-degree murder on the theories of premeditation and deliberation and of felony murder, guilty of discharging a firearm into occupied property, and guilty of attempted robbery with a dangerous weapon. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of death for the murder conviction. On 25 August 1988, the trial court sentenced defendant to death in accordance with the jury's recommendation for the murder. Defendant was also sentenced to consecutive terms of ten years for discharging a firearm into occupied property and forty years for attempted robbery with a dangerous weapon.

Defendant brings forward numerous assignments of error relating to both phases of his trial. After a careful consideration of these assignments, as well as the transcript, record, briefs, and oral argument, we find no error in the guilt determination phase of defendant's capital trial; however, we find that the trial court erred in denying defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon, and we therefore vacate the judgment as to this conviction. As this is the basis for the only aggravating circumstance found by the jury in the capital sentencing phase, we must also vacate the sentence of death and impose a life sentence.

The evidence presented by the State tended to show that in the late afternoon of Wednesday, 19 August 1987, two teenagers, Eric Jeffrey and Lee Percell, met with defendant, who had just moved into the neighborhood with his pregnant girlfriend, Karen Curtis. Percell, Jeffrey, and defendant talked for a while and then decided to go to the store to buy some beer or wine. Defendant first went to his house to get some change, and then the men started to walk to the store. After making their purchases, the three men stopped at several houses on the way back, including the Parker residence. There, Jeffrey testified, two people were fighting with each other on the porch. Defendant went onto the porch to see what was going on and recognized one of the occupants, Patricia Parker, from school. He started "coming on strong" to her. Defendant then showed her and her brother a large pistol

which he was carrying in a gym bag. He put the gun away and left with Percell and Jeffrey.

The men then continued on to the "Greenhouse," a group home, to talk to some of the residents. Defendant pulled up his shirt and revealed a pistol in his waistband. After questioning, defendant told one of the residents, Erica Joyner, that the gun was real. Ms. Joyner took the gun and handed it to Percell. Ms. Joyner testified that Percell said the pistol was his and that Percell put the pistol in his pants before they left. After the weapon had been shown to the young women, they went back inside the house. Jeffrey and Percell walked off, and defendant caught up with them. While walking, according to Jeffrey, defendant asked Jeffrey and Percell if they were "down to make money."[1] When Jeffrey replied no, defendant called him a "pussy" and a "chicken." Jeffrey said he could be that. Percell started laughing; as defendant waved the pistol in Jeffrey's face, defendant demanded to know why Percell was laughing. Defendant then left the two and walked toward the Durham Gospel Center. Jeffrey testified that, about five minutes after defendant left them, they heard the sound of shots.

After the Wednesday night prayer service at the Gospel Center, Mrs. Doris Gillie had sent her two children home with some friends. Mrs. Gillie stayed later to talk to some friends and went to the parking lot at about 8:45 p.m. on 19 August 1987. Another attendee, Eddie Sarvis, went to the parking lot at the same time. As he left the parking lot, Mr. Sarvis saw Mrs. Gillie's headlights behind him. He heard a shot just as he pulled out of the lot. He thought Mrs. Gillie's car had misfired and continued to leave. As he turned the corner, he heard three more quick shots, and then he backed up. He saw two persons running down the street. Mr. Sarvis went back toward the church and saw Mrs. Gillie's car still in the lot. He drove into the lot and then saw that Mrs. Gillie's window was shattered. He sent his sister, who was with him, for help.

Mr. Sarvis attempted to assist Mrs. Gillie, who was wounded but still in the car with her seat belt on. The car was in park with the doors locked. Mr. Sarvis reached through the shattered window, opened the door, and attempted to remove Mrs. Gillie,

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1. In a pretrial written statement to his lawyer which was admitted into evidence but limited to corroboration, Jeffrey said further that defendant had also stated, "He was going to get him some money even if he had to burn somebody."

who was trying to talk, from the vehicle. Before being removed from the vehicle, Mrs. Gillie lapsed into unconsciousness. Mr. Sarvis attempted CPR until the ambulance arrived. Without regaining consciousness, Mrs. Gillie died shortly after arriving at the hospital as the result of two gunshot wounds. The forensic pathologist recovered a .38-caliber slug from her body during the autopsy. He noticed no powder burns on her clothes.

Meanwhile, Jeffrey and Percell had gone back to Percell's home and were sitting on the front porch when defendant came up. Defendant told them he had shot someone and "had to kill them." Later that evening, defendant ran into them again and told them not to tell anyone what he had done.

Crime scene investigators found several bullet holes in the interior of the vehicle consistent with the shots being fired into the vehicle through the driver's window and in a downward angle. Skid marks and broken glass suggested that Mrs. Gillie had moved the vehicle in an attempt to escape. Her pocketbook was found unopened on the front passenger seat. Her body was between the purse and the shattered driver's window.

Later, the police, with the consent of Karen Curtis, searched the home she shared with defendant. The police found a shell casing in a closet. Additionally, the police obtained a .38-caliber pistol in a "mock takedown."[2] The ballistics expert opined that the slug recovered from Mrs. Gillie's body, as well as the shell casing, had been shot from the recovered .38-caliber pistol. However, the expert could not say the cartridge casing was from the Gillie murder.

On 20 August 1987, defendant was arrested and gave a statement denying involvement in the killing. After learning from the police that Erica Joyner had told them about his waving the pistol around, he admitted that he had shot the gun at the urging of Percell and Jeffrey but claimed that he did not mean to shoot Mrs. Gillie. The State was allowed to offer, over objection, a statement that defendant made thereafter: "You see, I'm going to get a psychiatrist. I'm going to beat you. You see, I've told you what

2. Detective Smith testified that the pistol had been in the possession of Lee Percell. In the "mock takedown" procedure, the police enlisted the aid of an acquaintance of Percell, who borrowed the pistol under some pretense. The detective pretended to arrest this man, and then seized the pistol after pretending to search his vehicle.

you want to hear but with a psychiatrist, I'll beat you. Now, take me to jail."

While incarcerated in Durham County jail, a fellow detainee, Richard Bradshaw, overheard defendant and another inmate talking. The inmate asked defendant if he had shot the woman he was charged with killing. Defendant replied that "he had burned her and that . . . if it hadn't been for some bitch seeing him earlier that day, he wouldn't be in jail, seen him with the gun." Defendant also stated that the police would not be able to locate the gun.

Defendant presented evidence through Lee Percell and his attorney to show that while defendant, in fact, announced his intent to "burn" someone, he did not mention robbery. Percell's attorney testified that Percell had consistently said that defendant had stated that he was going to "burn somebody" but that defendant had said nothing about robbery. No psychological or psychiatric evidence was presented at the guilt phase of the trial.

At the sentencing phase, the State relied on its guilt phase evidence to prove the aggravating factor of attempted robbery with a dangerous weapon. Defendant's evidence focused on his mental condition. Defendant presented mitigating evidence through his father; Brad Fisher, a clinical psychologist; and William Hussey, a former counselor at a rehabilitation program that defendant had attended.

## PRETRIAL ISSUES

### I.

**[1]** Defendant contends that the trial court erred in allowing the capital case against him to proceed without the appointment of additional counsel to assist him and that this violated the mandate of N.C.G.S. § 7A-450(b1). We disagree. On 21 August 1987, defendant appeared in District Court, Durham County, where the court found that defendant was indigent and "not financially able to provide the necessary expenses of legal representation." The court appointed one attorney, E.C. Harris, to represent defendant. Later, attorney Harris moved to withdraw as counsel for defendant on the grounds that attorney Tim Oates had been retained by defendant's family to represent defendant. On 5 October 1987, the court allowed Harris' motion to withdraw. From that time forward, attorney Oates alone represented defendant.

On 22 March 1988, defendant appeared in court, represented by Mr. Oates, as the case was calendared for trial in Superior Court, Durham County. During this proceeding, the district attorney raised the issue of defendant's representation, and the following exchange occurred:

> [STATE]: I want to address one other situation. Mr. Oates has made an appearance as counsel of record and during the course of the preliminary proceedings in this matter there was a questions [sic] as to who would be representing Mr. McDowell. He, my impressions is [sic], has been retained by Mr. McDowell's family to represent Mr. McDowell.
>
> MR. OATES: That's correct.
>
> [STATE]: Since this is a capital case, quite honestly, I want the record to reflect that . . . he is Mr. McDowell's choice and because [General Statutes chapter] 7A, as the Court knows, allows proceedings for indigents in which there is also additional counsel situation available, I would like for the record to reflect before we get too far along what the status is and where we are.
>
> COURT: Let me ask the defendant, Mr. McDowell. Mr. McDowell, *is Mr. Oates seated with you at the table your attorney in the trial of this case*?
>
> MR. MCDOWELL: *Yes, sir.*
>
> COURT: Are you satisfied with him? The State's attorney indicated that your family retained Mr. Oates and *you consider him retained for you and you accept him as your lawyer*?
>
> MCDOWELL: *Yes, I do.*
>
> COURT: Thank you.
>
> [STATE]: Your Honor, I think he probably is otherwise indigent because of his situation and I take it by this that he is waiving any additional counsel because of his indigent status and Mr. Oates is his counsel of record.
>
> [COURT]: Do you understand, Mr. McDowell, and I will ask you the same question. You may be indigent and cannot afford a lawyer yourself. *Mr. Oates is your attorney and he is retained by your family to represent you[,] that you waive any other rights that you may have to an additional court*

*appointed lawyer and you accept Mr. Oates as your attorney, is that correct?*

MR. MCDOWELL: *Yes, sir.*

(Emphasis added.)

On appeal, defendant assigns as error the failure to appoint additional counsel on his behalf in a timely manner. N.C.G.S. § 7A-450(b1) specifically provides that "[a]n *indigent* person indicted for murder may not be tried where the State is seeking the death penalty without an assistant counsel being appointed in a timely manner." (Emphasis added.) This Court has noted that this section was passed due to a "special concern for the adequacy of legal services received by indicted indigents." *State v. Hucks*, 323 N.C. 574, 577, 374 S.E.2d 240, 242 (1988). The right to the appointment of additional counsel for indigent defendants in capital cases is statutory, not constitutional. *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988). An indigent person for whom the State must provide counsel is defined as one "who is financially *unable to secure legal representation* and to provide all other necessary expenses of representation." N.C.G.S. § 7A-450(a) (1989) (emphasis added). The trial court makes the final determination of indigency, and this may be determined or redetermined by the court at any stage of the proceeding at which an indigent is entitled to representation. N.C.G.S. § 7A-450(c) (1989).

Here, defendant was found indigent by the trial court on 21 August 1987 and was subsequently represented by court-appointed counsel E.C. Harris. However, by the 22 March 1988 proceeding, defendant had obtained private counsel, attorney Oates, retained by members of his family, and E.C. Harris had been allowed to withdraw as court-appointed counsel. During the pretrial proceeding, defendant explicitly accepted attorney Oates as his counsel of his own choosing. We hold that from this point on in the pretrial proceeding, defendant was not an indigent within the meaning of N.C.G.S. § 7A-450(a), as he had, through his family, secured private representation and therefore was not entitled to the appointment of assistant counsel.

II.

**[2]** Defendant contends that the trial court erred in not conducting an inquiry to determine whether defendant had voluntarily and intelligently withdrawn his notice of intent to present an insanity

defense. We disagree. On the first day of trial, defense counsel, pursuant to N.C.G.S. § 15A-959, filed a notice of intention to present an insanity defense. Shortly before jury selection, defense counsel informed the court that he had decided not to rely on the insanity defense, and the following discussion took place:

> [COURT:] . . . I need to tell the jury if [insanity] is to be presented as an affirmative defense, and I wanted to talk to your client about it up one side and down the other.
>
> [DEFENSE COUNSEL]: We have. We have, Judge.
>
> COURT: The defendant is nodding his head, yes.
>
> [DEFENSE COUNSEL]: Judge, I have talked to his parents. I have talked with his psychiatrist in the past, psychologists. I have talked with experts in the Willie M field, and at this time I am informing [the district attorney], Judge, that we are not at this stage of the proceedings, the trial itself, [going to] put in an insanity defense.
>
> COURT: If not now, when?
>
> [DEFENSE COUNSEL]: Well, your Honor, if he's convicted not as an insanity defense, but obviously it is a mitigating factor, but there are a lot of things that will show up at that time if it comes to that stage, Judge.
>
> COURT: Okay.
>
> [DISTRICT ATTORNEY]: It is my impression that he is withdrawing the notice that was filed.
>
> COURT: Insanity, of course, is an absolute defense. If the jury finds insanity, they find the person not guilty by reason of insanity.
>
> [DEFENSE COUNSEL]: But Mr. McDowell, his parents, like I said, and the people that I have talked with, I do not feel that we could convince the jury of that, Judge.
>
> COURT: And, of course, the burden of proof is on the defendant, not beyond a reasonable doubt, but simply to the satisfaction of the jury, but, nevertheless, it is a major strategic decision.
>
> [DEFENSE COUNSEL]: And a very difficult decision in this case, Judge.

COURT: I know, but you have talked it over with your client in detail and with his family?

[DEFENSE COUNSEL]: Yes, sir.

COURT: *And he has made the decision. He does not want to present that affirmative defense.*

[DEFENSE COUNSEL]: *Is that correct?* (Asks [defendant])

[DEFENDANT]: *Yes, sir.*

[DEFENSE COUNSEL]: He says, yes, your Honor.

(Emphasis added.) Additionally, after the presentation of all evidence, but before the defense rested, the court, out of the presence of the jury, again made inquiry of defendant to make certain that defendant continued to agree to his pretrial decision not to present further evidence of various psychiatric witnesses, and he said he did.

A claim of insanity is an affirmative defense to a crime and does not require a formal inquiry as set forth in N.C.G.S. § 15A-1022, even when a defendant decides to waive his right to plead not guilty. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985). We find that the record reflects sufficient inquiry by the trial court, both prior to jury selection and after the close of defendant's evidence, of both defendant and his lawyer, to determine that the decision to withdraw the notice of his intention to present an insanity defense was knowingly concurred in by defendant.

III.

**[3]** Defendant further contends that the trial court erred in denying defendant's motion to suppress the search of his apartment and improperly admitted into evidence the shell casing seized from the apartment which he shared with Karen Curtis. We disagree.

N.C.G.S. § 15A-222(3) provides that the consent needed to justify a search and seizure may be given "[b]y a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of [the] premises." *State v. Moore*, 316 N.C. 328, 333-34, 341 S.E.2d 733, 737 (1986). The record reflects that the apartment was listed in Karen Curtis' name. She lived there and paid the rent and utilities from her welfare check. Defendant was listed on the utilities form as her roommate. There was only one bedroom, which she shared with defendant, and only one closet, in which their clothes were commingled. Defense counsel conceded

during *voir dire* that Curtis "had an equal right in that apartment," but he asserts that the search was not based upon lawful consent because Curtis did not have sufficient mental ability to voluntarily consent to the search. We find that Curtis possessed common authority with defendant over the searched premises.

When the validity of a consent to search is questioned, the trial court must conduct a *voir dire* hearing to determine if the consent was voluntarily given. *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983). "Consent" is defined as "a statement to the officer, made voluntarily and in accordance with requirements of G.S. 15A-222, giving the officer permission to make a search." N.C.G.S. § 15A-221(b) (1988). In determining whether a consent to search is "voluntary" or a product of duress or coercion, express or implied, the trial court looks to the totality of the circumstances. *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982).

Here, the trial court conducted an extensive *voir dire* and heard testimony concerning the events surrounding the signing of the consent form. The trial judge found as facts the following: When the police arrived at the apartment with the arrest warrant for defendant, no one was home. When Karen Curtis arrived at the apartment, the officers identified themselves, told her they had a warrant for defendant's arrest, and requested permission to search the apartment but stated that she had the right to refuse. After Detective Smith read Curtis the form for permission to search without a search warrant, she signed and dated it and said she understood it. Curtis told the officers that defendant had the key but that a window was raised and they could take the screen off the window. After gaining entry into the house, the officers and Curtis went into the bedroom, where the shell casing was found in the closet. Curtis then made a written statement to Detective Smith which included the prior day's activities and that she fully and freely and with complete understanding consented to the search.

The trial court also found that Curtis, a twenty-two-year-old woman who is mentally retarded, dropped out of high school in the twelfth grade but can write her own name and can read to some extent. The court further found that she continues to have legal custody of her child and has never been declared legally incompetent.

Defendant presented testimony during the *voir dire* hearing from Mary Ann Rowe, Curtis' social worker, which tended to show that Curtis is mentally retarded. Rowe stated that Curtis may have been able to understand if an officer told her that she had a right to not let him in the apartment, but that she "responds favorably to any authority" and that she does not have the will to disagree with someone in authority. Rowe also stated that Curtis is very "exploitable by others, and needs protection."

This Court has held that a person's subnormal mental capacity is but *one factor* to be considered in determining whether a knowing and intelligent waiver of rights has been made. *See State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685. Despite the testimony cited by defendant as indicative of Curtis' limited mental abilities, there is sufficient evidence in the record that she understood the nature and consequences of her action in signing the form and that she voluntarily consented.

The trial court concluded that Karen Curtis freely, knowingly, intelligently, willingly, and voluntarily gave consent to the search of the apartment; that she was not just submitting to authority; and that the officers acted in good faith without any knowledge of any possible mental limitations that Karen Curtis might have. We find that the trial court's findings of facts are supported by *voir dire* testimony and that these findings fully support the legal conclusion that Karen Curtis' consent to the search was voluntarily and intelligently given, free from any duress or coercion. We hold that the trial court correctly ruled that the spent shell casing seized pursuant to the search was admissible.

## JURY SELECTION ISSUES

## IV.

**[4]** Defendant next contends that the trial court erred in excusing juror Lennie for cause based on his stated opposition to the death penalty. During the trial court's initial statements to three jurors during *voir dire*, juror Lennie interjected the following:

> I read something in the newspaper relating to the facts of this case that seemed to indicate . . . that I might not be acceptible [sic]. I don't believe in either an individual's or a society's rights to kill someone in the death penalty.

Thereafter, the court specifically directed the following question to the jurors:

> Is there anything about capital punishment which is one of the two that the jury is to consider in phase two, the death penalty, that is such that any of you feel that you could perhaps not give both sides the same fair trial and fair consideration on that issue?

Juror Lennie raised his hand. The court asked the juror his thoughts on this issue. Juror Lennie responded:

> Well, sir, as far back as I can remember I have not believed in the death penalty. I just think that is something that should not be imposed upon another person.

The trial court then directed the following questions to juror Lennie:

> COURT: And, Mr. Lennie, how about you, sir? Do you believe that you could simply automatically vote against the imposition of the death penalty without regard to the evidence that might be developed at the trial itself?
>
> MR. LENNIE: *I can't conceive of a circumstance where I would vote for the death penalty.*
>
> . . . .
>
> [COURT:] So I take it that as far as you're concerned that you feel that you would automatically vote for the imposition of the death penalty without any regard to any evidence that might be developed at this trial?
>
> MR. LENNIE: Yes, sir.

(Emphasis added.) While the answer to the last question by the court, containing an obvious *lapsus linguae*, implies that juror Lennie would automatically vote *for* the death penalty, when read with the previous questions, it is obviously understood that juror Lennie would be *un*able to vote *for* the death penalty. Without objection, juror Lennie was excused. Defendant argues that there was an insufficient showing that juror Lennie could not follow the law of North Carolina regarding the death penalty.

In *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985), the United States Supreme Court held that a prospective juror may be removed for cause due to his views about the death penalty if those views would " 'prevent or substantially impair the perform-

ance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* at 424, 83 L. Ed. 2d at 851 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1989)); *see also State v. Price*, 326 N.C. 56, 388 S.E.2d 84, *vacated on other grounds*, --- U.S. ---, 112 L. Ed. 2d 7 (1990).

In the case *sub judice*, juror Lennie explicitly stated that he could not conceive of a circumstance in which he would vote for the death penalty. We find that juror Lennie's answers clearly show that he could not follow the law or instructions of the trial court if to do so would result in a death sentence. We hold that the trial court did not err in excusing juror Lennie for cause.

V.

**[5]** Defendant contends that the trial court erred in excusing prospective juror Smith *ex mero motu* without any showing that juror Smith was not qualified. During *voir dire*, the trial court asked prospective juror Smith some preliminary questions concerning his knowledge of the case. *See* N.C.G.S. § 15A-1214(b) (1988). Juror Smith stated that he had read about the killing soon after it happened, and again on the day before jury selection. When asked by the trial judge whether he had formed an opinion as to the guilt or innocence of the defendant, juror Smith denied having formed an opinion but stated: "The one thing that strikes me was about the way the defense was planning to operate struck me as unusual, that there was some change. I read that part and that just struck me as unusual, but as to guilt or innocence, no. That was my feeling. It was just unusual." After his statement, juror Smith stated he could put out of his mind what he had read about the case. The trial court excused juror Smith after the questioning without objection from either party.

Because the trial judge has the opportunity to see and hear a juror and closely observe his demeanor on *voir dire* and to make findings based on the juror's credibility and demeanor, he has discretion to ultimately determine whether the juror could be fair and impartial. *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987). A trial judge may, in the exercise of his own discretion, excuse a juror even without challenge from either party. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), *vacated in part on other grounds*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). A trial judge's decision as to a juror's competency to serve is not subject to reversal

absent a showing of abuse of discretion. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

Here, juror Smith stated that, from what he read, the way in which the defense was planning to operate struck him as unusual. Thus, juror Smith expressed an opinion that was possibly prejudicial to defendant. We find that the trial court's action in excusing juror Smith did not amount to an abuse of discretion and therefore was not error.

VI.

**[6]** Defendant further contends that the trial court erred in allowing defendant himself to make the decision to pass juror Carr and to strike juror Covington and in not requiring defense counsel to exercise judgment independent of defendant's decision in jury selection. Defendant argues that because he was unprepared to represent himself and the trial court made no inquiry regarding this decision, a new trial is required. We disagree.

Tactical decisions at trial, other than the right to testify and plead, are generally left to attorney discretion. *Brown v. Dixon*, 891 F.2d 490 (4th Cir. 1989), *cert. denied*, --- U.S. ---, 109 L. Ed. 2d 545 (1990); *State v. Luker*, 65 N.C. App. 644, 649, 310 S.E.2d 63, 66 (1983), *aff'd as to error, reversed as to harmlessness of error*, 311 N.C. 301, 316 S.E.2d 309 (1984) ("[W]hether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer . . . ."). However, this does not mean that the client has no input into tactical decisions. *See Clanton v. Bair*, 826 F.2d 1354 (4th Cir. 1987) (trial counsel was found to have performed effectively when he gave a seemingly lucid client great deference in deciding whether to have psychiatric evaluation), *cert. denied*, 484 U.S. 1036, 98 L. Ed. 2d 779 (1988). In a case filed today, *State v. El Amin Ahmad Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991), this Court, after a complete analysis of defendant's sixth amendment right to counsel, concluded that where defense counsel allowed defendant to make a decision not to peremptorily challenge a juror, against the recommendations of both his attorneys, the client's wishes must control. Contrary to *El Amin Ahmad Ali*, in the case *sub judice*, the record reveals that counsel and defendant were not in conflict as to whether to pass or strike these jurors, but simply that defense counsel gave deference to his client's wishes.

In the matter now before the Court, the questions asked of juror Carr revealed that he knew the prosecutor in high school but not well; that he was middle aged, attended church, and worked at Burroughs Wellcome; and that he would consider either life imprisonment or the death penalty, depending on the circumstances of the crime, but that he would have to listen to all of the evidence. After defense counsel passed juror Carr because his client liked him as a prospective juror, the trial court asked defendant the following:

> [COURT:] Your lawyer has advised you that while he has [the] right to simply make that decision[,] he has told me, as I understand it, that he is going to pay great attention and consult with you as to each and every juror, and I've noticed him doing that, and so your wishes will be followed pretty much since this is your trial. Is that pretty much correct?
>
> MR. McDOWELL: Yes, sir.

Here, defendant acknowledged that his attorney had the right to make the decision regarding jury selection. We find that defense counsel, simply by consulting with defendant regarding potential jurors, did not relinquish his authority as "attorney" but merely gave deference to his client's wishes in making his tactical decision to pass juror Carr.

Defendant also complains that defense counsel simply excused another juror, Covington, without questioning her. Defense counsel stated that he was excusing the juror because defendant's family had some reservations about this juror. Defense counsel further remarked that defendant was "emphatic" about excusing juror Covington, although it would be defendant's last peremptory challenge. The decision not to question juror Covington does not show a failure to act as counsel, as the State had already extensively questioned the juror. The questions posed by the State were sufficient to give defense counsel enough information to make an informed decision. We find that defense counsel acted within the range of competent counsel in excusing the juror without questioning her.

In both instances, defendant has failed to show that defense counsel was ineffective in giving deference to defendant's wishes during jury selection. Although defense counsel took defendant's feelings into consideration, he did not abdicate his role as effective

counsel. We find that the trial court did not err in permitting defendant to give input into the *voir dire* decision-making process and that defendant was not denied effective assistance of counsel. *Cf. State v. El Amin Ahmad Ali*, 329 N.C. 394, 407 S.E.2d 183 (defendant not denied effective assistance of counsel where defendant made a decision to accept a juror, against the recommendations of both his counsel); *State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645 (1990) (not prejudicial error, if error at all, to allow a criminal defendant to call a witness over the recommendation of his attorney). This assignment of error is without merit.

GUILT PHASE ISSUES

VII.

**[7]** Defendant contends that the trial court erred in allowing him personally to make the decision whether to present any psychiatric evidence at the guilt phase. We disagree. Defense counsel gave notice on the first day of trial that he intended to introduce expert testimony on whether defendant had the requisite *mens rea* for the crimes. Dr. Brad Fisher, a clinical psychologist, was available to testify for defendant and to present evidence on the issue. After reviewing the expert's testimony presented at the sentencing proceeding, defendant argues that the evidence would have cast doubt during the guilt phase as to whether defendant formed the intent to kill after premeditation and deliberation.

At the close of defendant's evidence at the guilt phase, the question arose as to whether defendant would present any psychiatric "defense." Defense counsel addressed the court:

> Your Honor, *at this time that is the extent of our evidence.* I would like to, at this time, request the court . . . obviously the defendant at this time has a choice to take the stand on his own behalf. And I would like the Court to inquire and put on the record what he's indicated to me his desires are which are not to take the stand *and not to put on any further evidence.*

(Emphasis added.) The trial court then addressed defendant personally:

> COURT: And as to the offering of other evidence besides yourself, your lawyer has talked to you about that?
>
> A: Yes, sir, he has.

COURT: All right. There has . . . some mention has been made on a pretrial basis according to . . . made aware by your lawyer that you have seen various psychiatrists in connection with possible testimony in this case. And the possibility that they might offer evidence which might be pertinent or relevant on Phase One as well as Phase Two. You're [sic] lawyer has gone over that with you, right?

A: Yes, sir.

COURT: And he's told you the pros and cons of that decision too, is that correct?

A: Yes, sir, he has.

COURT: Has that all been explained in the presence of your parents too?

A: Yes, sir. In the presence of my parents and without my parents. So, I understand what he was talking about.

COURT: And what decisions do you want to make, sir, in regards to calling any other witnesses other than the two that have testified? Do you want any other witnesses to testify here for you in this guilt or innocence phase?

A: Well, I know that there would be a physician that would testify for me. So, he was one but my attorney I don't think he has anybody else.

COURT: I want to make sure you don't misunderstand me.

A: Not in this phase.

COURT: Okay. This phase . . . deals with guilt or innocence.

A: Yes, sir.

COURT: Phase Two if reached deals with life or death. You heard me explain that to all prospective jurors at great length when we had jury selection.

A: Yes, sir, I did.

COURT: And this phase right here deals with guilt or innocence. It's your own choice that your lawyer will not call a psychiatrist or any other witnesses for you in this phase we're in right now.

A: Yes, sir. That is correct.

It is undisputed that the type of defense to present and the number of witnesses to call is a matter of trial tactics, and the responsibility for these decisions rests ultimately with defense counsel. *See Jones v. Barnes*, 463 U.S. 745, 77 L. Ed. 2d 987 (1983); *Brown v. Dixon*, 891 F.2d 490 (4th Cir.). Prior to the trial court's inquiry of defendant, defense counsel stated, "at this time that is the extent of our evidence." The record indicates that counsel had made the determination not to call any psychiatric witnesses and then requested that the court enter into the record that defendant knew of his right to testify and present further witnesses. We find that this inquiry did not reveal that the attorney was forgoing his responsibility in determining whether to present psychiatric evidence but only that there was agreement between defendant and his attorney.

VIII.

**[8]** Defendant next contends that the trial court erred in allowing a witness' statement to be read to the jury since the statement contained additional material not testified to by the witness at trial. We disagree. In his testimony at trial, the witness, Eric Jeffrey, said defendant asked if Jeffrey and Percell "were down to make money," to which Mr. Jeffrey replied, "No. No." The State asked if defendant had not said something else before walking off. Mr. Jeffrey denied that he did, except to call them "chicken." The State then called Mr. Falcone, Mr. Jeffrey's attorney. The trial court allowed Mr. Falcone to read to the jury a statement that he took from Mr. Jeffrey concerning the killing. In this statement, Mr. Jeffrey had stated that defendant had also "said he was going to get him some money even if he had to burn somebody."

This Court has previously held that prior statements of a witness can be admitted as corroborative evidence if they tend to add weight or credibility to the witness' trial testimony. *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990); *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986). New information contained within the witness' prior statement, but not referred to in his trial testimony, may also be admitted as corroborative evidence if it tends to add weight or credibility to that testimony. *Id.* However, the State cannot introduce prior statements which "actually directly contradicted . . . sworn testimony." *State v. Burton*, 322 N.C. 447, 451, 368 S.E.2d 630, 632 (1988). The witness' trial testimony that defendant had said nothing else after calling him "chicken," when the pretrial

statement detailed the additional comment, is not the type of contradiction that would render the pretrial statement inadmissible. *Cf. State v. Howard*, 320 N.C. 718, 360 S.E.2d 790 (1987). We find that witness Jeffrey's statement to his attorney did not contradict his trial testimony and was consistent with and strengthened the events testified to at trial. We hold that the trial court did not err by allowing the statement to be read to the jury by Jeffrey's attorney.

IX.

**[9]** Defendant contends that he was denied the effective assistance of counsel when his attorney conceded his guilt to the jury. We disagree and find that the inquiry conducted by the trial court and counsel on the record with defendant was sufficiently specific to meet the requirements set forth in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). When defense counsel was about to make his closing argument at the guilt phase, the trial court addressed defendant:

> Now, you have entered a plea of not guilty in this case. Do you understand that?
>
> [DEFENDANT]: Yes, sir.
>
> COURT: Now, under the case law your lawyer cannot argue to this jury anything other than flat not guilty unless you specifically authorize him to say something else. In other words, if it is your secret hope that they convict you of second degree murder and not first degree murder, if it's your secret hope that something else will happen other than flat not guilty, you're going to have to specifically authorize your lawyer to argue that to the jury.
>
> Because unless you specifically authorize it, he can only argue to this jury that they should turn you loose on everything across the board. The case law squarely says that . . . pleading guilty, in other words, without you filling in a transcript of plea, for him to argue anything by way of a lesser included offense to this jury. I don't care what you do, I care less, but it's going to be on the record whatever decision you want to make about your lawyers [sic] argument.
>
> Do you understand all the things I told you?
>
> [DEFENDANT:] Yes, sir.

[DEFENSE COUNSEL]: I will review it with him again, Judge.

COURT: And what's more, *if, during your lawyers [sic] argument, you find he's exceeding his authority from you, you better raise your hand and I'll stop him and I'll send the jury out so we can make sure the only arguments to the jury is [sic] within the authority you granted.*

The court then informed defense counsel that "unless I hear otherwise from him, unless he raises his hand, I'm going to assume that whatever you say to this jury is what he's authorized you to say."

During his argument, defense counsel admitted that defendant shot Mrs. Gillie. He then conceded that defendant intentionally fired into an occupied vehicle. Defense counsel argued that defendant's statement is that he "shot in the car, didn't realize the woman was there or hit her and [he] kept shooting." He continued to argue that defendant shot the pistol in order to show his "manhood." Defendant now argues that although the lawyer, at one point, argued that the correct punishment should be involuntary manslaughter, he conceded all the elements of first-degree murder on two theories.

After the argument in which certain concessions were made, the court asked defendant:

I need to inquire of the defendant. Did your lawyer argue to the jury what you wanted him to argue?

[DEFENDANT]: Yes, sir, he did.

COURT: Did he say anything to the jury[,] anything you didn't want him to tell or didn't authorize him to [do]?

[DEFENDANT]: No, sir, he didn't.

This Court has held that any concession of a client's guilt absent a consent by defendant to do so constitutes ineffective assistance of counsel *per se*. *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (relying on *Earl Wayne Wiley v. Sowders*, 647 F.2d 642 (6th Cir.), *cert. denied*, 454 U.S. 1091, 70 L. Ed. 2d 630 (1981)). In a subsequent opinion in *Elmer Lee Wiley v. Sowders*, 669 F.2d 386 (6th Cir. 1982), the Sixth Circuit Court of Appeals clarified its earlier holding, concluding that "an on-the-record inquiry by the trial court to determine whether a criminal defendant has consented to an admission of guilt during closing arguments represents the preferred practice. But we did not hold in *Wiley*, [647 F.2d

642,] and we do not now hold, that due process requires such a practice." 669 F.2d at 389. This Court has previously declined to set out what constitutes an acceptable consent by a defendant in this context. However, we have remanded a case to the superior court for an evidentiary hearing for the sole purpose of determining whether defendant *knowingly consented* to trial counsel's concessions of defendant's guilt to the jury. *State v. Thomas*, 327 N.C. 630, 397 S.E.2d 79 (1990).

In the case *sub judice*, the trial court informed defendant of the need for his authorization and was told on the record that counsel and defendant had discussed the arguments. The trial court then gave defendant instructions on an unobtrusive way to stop any argument which went beyond the scope of defendant's grant of authority. Finally, after the argument, defendant expressly stated that the attorney had said what he had wished him to say. We find that defendant's consent to his attorney's argument was in compliance with the requirements of *Harbison*.

Where a knowing consent to such an argument has been demonstrated, as in the case at bar, the issue concerning ineffective assistance of counsel should be examined pursuant to the normal ineffectiveness standard set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984), and *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). The circumstances of this case indicate that the attempt by defense counsel to admit matters demonstrably proved but to negate the one charge that would be the foundation for the aggravating circumstance during the sentencing phase was reasonable trial strategy. Here, defendant admitted in a voluntary pretrial statement that he fired the shots which killed Mrs. Gillie. Defendant stated he did not intend to hurt anyone, but the "accident" claim in his admission was contradicted by the evidence. To negate the attempted armed robbery charge, defense counsel was forced to call a witness who stated defendant intended to "burn" someone to prove his manhood but had said nothing about robbery. Given these facts, it is arguable that defense counsel made a strategically reasonable argument.

Defense counsel admitted that "we came in this courtroom and pled not guilty as a procedural matter" and went on to state "[w]e've not tried to deceive you or play the shell game with you or try to say someone else did it." Counsel admitted that defend-

ant's "evidence shows you that, in fact, [defendant] did, in fact, go to the back of the Gospel Center . . . and shot Doris Gillie." He also stated, "I'm not going to stand up here and argue . . . [that] you can't find from the facts presented in this court, [that] you shouldn't find[,] that [defendant] shot into that occupied vehicle." He noted that, if defendant's statement were believed, "he's guilty of manslaughter." Defense counsel noted other evidence and said, *if believed*, "then I guess you can find first degree murder." We find that the argument was a reasonable tactical decision by defense counsel and hold that defense counsel was not ineffective when he, with defendant's consent, conceded defendant's guilt to particular aspects of the crimes.

X.

**[10]** Defendant contends that the trial court erred in its instructions to the jury on premeditation and deliberation because the instruction allowed the jury to convict defendant on theories not supported by the evidence. We disagree. The court listed the evidentiary factors from which the jury could infer premeditation and deliberation to include lack of provocation, infliction of lethal wounds after the victim was made helpless, and grossly excessive force.

Each factor upon which the jury is instructed as circumstantial proof of premeditation and deliberation must be supported by competent evidence. *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). However, this Court has held that the appropriate standard for review for unobjected-to instructions, as in the case at bar, is plain error. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983). We find that, when viewed in the light most favorable to the State, there is sufficient evidence to support submitting each of these factors.

First, as to the evidence on the lack of provocation, the record does not reflect any showing whatsoever of provocation by Mrs. Gillie. Defendant's admission concerning shooting this stranger did not suggest that she was in any way argumentative or confrontational. *See State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986), *vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987). Second, the evidence showing that one shot, then a series of three shots, fired into a vehicle while Mrs. Gillie sat, strapped into the driver's seat, is sufficient to show the infliction of lethal blows after the victim was killed or rendered helpless. *State v. Barbour*, 295 N.C. 66, 243 S.E.2d 380 (1978). Finally, the evidence is con-

sistent with excessive brutality in firing a disabling shot into the victim and then, as she slumped defenseless, shooting at her three more times, striking her at least once. *State v. Forrest*, 321 N.C. 186, 362 S.E.2d 252 (1987). We hold that the trial court correctly instructed on premeditation and deliberation.

XI.

**[11]** Defendant contends that the trial court erred in denying his motion to dismiss the charge of attempted armed robbery due to the insufficiency of the evidence. We agree and therefore vacate the conviction of attempted robbery with a dangerous weapon.

The motion to dismiss must be allowed unless there is substantial evidence of each element of the crime charged. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984). Attempted armed robbery is the unlawful attempted taking of personal property from another by use of a firearm or other dangerous weapon. *See State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986). The evidence must be viewed in the light most favorable to the State, and the State is entitled to every reasonable inference that is drawn therefrom. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). However, "[e]vidence is not substantial if it arouses only a suspicion about the fact to be proved, even if the suspicion is strong." *State v. Reese*, 319 N.C. 110, 139, 353 S.E.2d 352, 368 (1987).

The State relies upon the testimony of Eric Jeffrey and Lee Percell, both of whom were also charged in connection with these crimes, to support the attempted armed robbery charge. Both of these witnesses testified to defendant's possession of the pistol. However, the evidence of defendant's intent provided by these witnesses is insufficient to support a reasonable inference of attempted armed robbery. In a pretrial written statement to his lawyer which was admitted into evidence for corroborative purposes, Jeffrey said that defendant had stated, "He was going to get him some money even if he had to burn somebody." According to Mr. Jeffrey at trial, defendant only asked him and Percell if they were "down to make money." When Jeffrey replied no, defendant called him a "pussy" and a "chicken." Jeffrey said he could be that. Percell started laughing; as defendant waved the pistol in Jeffrey's face, defendant demanded to know why Percell was

laughing. Jeffrey's testimony about "money" was contradicted by Mr. Percell, who testified that defendant had stated he was going to "burn" somebody but said nothing about robbery. Additionally, Mrs. Gillie's purse was left undisturbed on the front seat of her car, which tends to contradict the State's theory that defendant killed Mrs. Gillie in an unsuccessful attempt to take her purse. Even viewing the evidence in the light most favorable to the State, the evidence only supports the theory that defendant was attempting to prove his manhood but is insufficient to support a reasonable inference of defendant's guilt of armed robbery. We find that the record is insufficient to show more than a suspicion that defendant attempted to rob Mrs. Gillie. We hold that the trial court erred in denying defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon and therefore vacate this conviction.

## PENALTY PHASE ISSUE

## XII.

**[12]** Finally, we address defendant's contention that the trial court erred in submitting the aggravating circumstance in the capital sentencing phase that the killing was committed during an attempt to commit a robbery with a dangerous weapon. We agree and must therefore vacate the sentence of death and impose a sentence of life imprisonment.

The sole aggravating circumstance submitted to the jury during the sentencing phase was that the murder "was committed while defendant was engaged in an attempt to commit robbery with a dangerous weapon." Because there was insufficient evidence to support defendant's conviction for attempted armed robbery, we find that there was insufficient evidence to support this aggravating circumstance. The sentence of death shall be vacated and a sentence of life imprisonment imposed in lieu thereof, where, as in the case *sub judice*, the record does not support the jury's findings of any aggravating circumstance upon which the sentencing court based its sentence of death. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984).

In conclusion, we find no error in defendant's conviction of discharging a firearm into occupied property or in defendant's conviction of first-degree murder. Judgment is vacated in the attempted robbery with a dangerous weapon conviction. Additionally, the

death sentence is vacated, and defendant is hereby sentenced to imprisonment in the State's prison for the remainder of his natural life. Defendant is entitled to credit for days spent in confinement prior to the date of this judgment. The Clerk of Superior Court, Durham County, shall issue a commitment accordingly.

87CRS20386, discharging a firearm into occupied property: No error;

88CRS18602, attempted robbery with a dangerous weapon: Vacated;

87CRS20381, first-degree murder: Guilt-innocence determination phase: No error; Sentencing phase: Death sentence vacated and sentence of life imprisonment imposed.

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

Justice MITCHELL concurring in part and dissenting in part.

I concur in the majority's conclusions and holdings that the convictions of the defendant for murder in the first degree and for discharging a firearm into occupied property were without error.

I dissent from Part XI of the opinion of the majority, in which it concludes that the trial court erred in denying the defendant's motion to dismiss the charge of attempted armed robbery and from the holding of the majority vacating the defendant's conviction for that offense. I believe that the evidence to support the defendant's conviction for attempted armed robbery was substantial and that the trial court properly denied his motion to dismiss.

Where there is substantial evidence of each element of the offense charged and that the defendant is the perpetrator, the trial court must deny the defendant's motion to dismiss the charge for insufficiency of evidence. *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991).

> 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).

*Id.*, 405 S.E.2d at 154 (quoting *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)).

Evidence was introduced in the present case tending to show that the defendant confessed to shooting and killing the victim, Doris Gillie. The majority concludes, however, that there was no substantial evidence tending to show that the defendant did so during an attempted armed robbery. I do not agree.

The evidence at trial tended to show that Lee Percell and Eric Jeffrey were with the defendant shortly before the victim was killed on the evening of 19 August 1987. The defendant had been showing his pistol to the residents of a group home, and Jeffrey and Percell had walked away. The defendant caught up with them and engaged them in conversation. Jeffrey testified at trial that the defendant asked him and Percell if they were "down to make money." When Jeffrey said "no," the defendant called him "chicken" and otherwise verbally abused him. Percell testified that during the same conversation, the defendant stated he was going to "burn" somebody. The evidence further tended to show that the defendant concluded his conversation with the two men and walked toward the Durham Gospel Center. About five minutes later, the two men heard the sound of gunshots.

The evidence also tended to show that the victim, Doris Gillie, had stayed behind after evening prayer service at the Durham Gospel Center to talk with other congregants. She left later and went to her car in the parking lot. Another congregant, Eddie Sarvis, went to the parking lot at the same time as the victim. As Sarvis left the parking lot, he saw the victim's headlights behind him. He heard a shot, which he mistook for the victim's car misfiring, and continued to drive away. He then heard three more shots in quick succession, however, and immediately returned to the parking lot. He found the victim in the driver's seat of her car fatally wounded. The doors were locked, and the transmission indicator revealed that the car was still in the "park" position. Sarvis was able to reach through the shattered window by the driver's seat and unlock and open the door. The victim lapsed into unconsciousness and died shortly after she was taken to a nearby hospital. An officer who arrived at the scene after the murder found the victim's

purse on the front seat of her car, but he was able to find it there in the dark only by the use of a flashlight.

I believe that the foregoing evidence would support reasonable inferences by the jury to the effect that, after his statements to Jeffrey and Percell as to whether they wanted to "make" money and that he was going to "burn" someone, the defendant carried through on his stated intent. A jury could reasonably find that he then went directly to the Durham Gospel Center and attempted to rob the first departing congregant he came upon.

The fact that after the murder the victim's purse was found in her car by an officer using a flashlight was some evidence tending to support the view that the defendant did not intend to rob her. However, a "trial court is *not* required to determine that the evidence excluded every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss." *State v. Powell*, 299 N.C. 95, 101, 261 S.E.2d 114, 118 (1980). Substantial evidence tended to support a reasonable finding—not a mere suspicion—that the defendant shot and killed the victim while attempting to satisfy his expressly stated desires to "make" money and to "burn" someone. The evidence also tended to support findings that he fled before completing the robbery he was attempting because he found the driver's side door of the car locked, could not see the purse on the seat, but could see Eddie Sarvis coming to assist the victim. In fact, such findings would seem more reasonable to me than the only reasonable findings to the contrary—that the defendant simply strolled into a church parking lot after evening prayer service, shot and killed one congregant previously unknown to him, and then left the scene.

The foregoing evidence was substantial evidence tending to show that the defendant attempted an armed robbery of the victim; other evidence may have tended to show that he did not. However, "contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. . . ." *Id.* at 99, 261 S.E.2d at 117. Instead, it must be remembered that:

> When the motion . . . calls into question the sufficiency of . . . 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.

*Id.*, 261 S.E.2d 117 (emphasis added) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)). Here, there was substantial evidence tending to show that the defendant killed his victim while attempting an armed robbery. Therefore, the trial court was correct in submitting that evidence to the jury to determine what it actually proved or failed to prove—a question of fact exclusively for the jury. The trial court did not err in denying the defendant's motion to dismiss the charge of attempted armed robbery for insufficiency of evidence.

For the foregoing reasons, I also dissent from Part XII of the opinion of the majority, in which the majority concludes that, due to the insufficiency of evidence to support a conviction for attempted armed robbery, the evidence also was insufficient to support the aggravating circumstance that the capital felony was committed while the defendant was engaged in an attempt to commit robbery. N.C.G.S. § 15A-2000(e)(5) (1988). Accordingly, I further dissent from the majority's holding that, since no other aggravating circumstance was submitted to the jury or supported by evidence, the sentence of death against the defendant must be vacated and a sentence of life imprisonment imposed.

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STATE OF NORTH CAROLINA v. EL AMIN AHMAD ALI

No. 107A88

(Filed 14 August 1991)

**1. Constitutional Law § 313 (NCI4th)— attorneys' advice to exercise peremptory challenge—defendant allowed to refuse—effective assistance of counsel**

Defendant was not denied effective assistance of counsel where the trial court and defendant's attorneys allowed him to make the decision not to peremptorily challenge a juror his attorneys had wanted to remove, since defendant was fully informed but he wished to accept the juror anyway; in accord with the principal-agent nature of the attorney-client relationship, the client's wishes had to control; and the attorney made a record of the circumstances, her advice to defendant, reasons for the advice, defendant's decision, and the conclusion reached.

**Am Jur 2d, Criminal Law §§ 967 et seq.**

**Adequacy of defense counsel's representation of criminal client regarding right to and incidents of jury trial. 3 ALR4th 601.**

**2. Constitutional Law § 344 (NCI4th)— bench conferences with prospective jurors—jurors excused—defendant's right to be present not violated**

The trial court's conduct in excusing two prospective jurors did not deprive defendant of his constitutional right to be present at every stage of the proceeding where the trial court reconstructed the substance of bench conferences with the prospective jurors for the record and, before ruling, gave defendant an opportunity to be heard; in each instance defendant did not make further inquiry as to the verbatim context of the conversation and did not object to the trial court's action, even though specifically given the opportunity to do both; and with defendant present his counsel consented to the jurors being deferred or excused.

**Am Jur 2d, Criminal Law §§ 908, 909, 914.**

**3. Jury § 6.4 (NCI3d)— capital punishment as deterrent—question not allowed during jury selection—no error**

The trial court did not err during jury selection by preventing defendant from asking all prospective jurors if they believed that capital punishment was a deterrent to crime, since neither defendant nor the State can introduce evidence or argue the effect, if any, of the death penalty on the commission of crimes by others.

**Am Jur 2d, Jury §§ 202, 203, 289.**

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

**4. Criminal Law § 73.2 (NCI3d)— murder victim's statements to pastor—admissible hearsay**

Statements by a murder victim to her pastor were not inadmissible under the hearsay rule, since the pastor-parishioner relationship is recognized as one attended by trust and confidence; there was plenary evidence that the victim's motivations for speaking with the witness were concern for her own

safety and the need for advice as to how to deal with defendant; and the circumstances and the nature of the information the victim related to the witness caused the trial court to conclude that the victim's statements possessed sufficient guarantees of trustworthiness. N.C.G.S. § 8C-1, Rule 804.

**Am Jur 2d, Evidence § 496; Homicide § 330.**

5. **Criminal Law § 73.2 (NCI3d)— murder victim's statements to friend—trustworthiness—admissible hearsay**

Statements by a murder victim to her friend were sufficiently reliable and trustworthy to be admitted as an exception to the hearsay rule where the victim and the witness had a close relationship and talked to each other on numerous occasions regarding many subjects; the particular conversation in question was a confidential one which the victim asked the witness not to share with anyone; the victim had personal knowledge of the events she related to the witness; her motivation was fear of defendant; the statement to the witness was virtually identical to the one the victim gave to her pastor; and information in the victim's statement was subsequently corroborated by defendant's statements to police. Moreover, notice of the statement given to defendant eleven days before trial, though it did not include all of the victim's statements as described by the witness at trial, was sufficient to inform defendant of the substance of the victim's statements and thereby to afford defendant a fair opportunity to meet the State's evidence.

**Am Jur 2d, Evidence § 496; Homicide § 330.**

6. **Appeal and Error § 359 (NCI4th); Criminal Law § 463 (NCI4th)— jury argument based on photo—failure to include photo in record—error not shown**

Defendant did not show that the trial court in a murder prosecution committed reversible error when it failed to intervene *ex mero motu* during the prosecutor's closing argument, since defendant did not bring forward in the record on appeal a photograph on which part of the allegedly improper argument was based, and other evidence supported the prosecutor's arguments that the female victim watched her husband die and that defendant watched both victims as he emptied his gun.

**Am Jur 2d, Trial § 219.**

**7. Criminal Law § 433 (NCI4th)— jury argument—defendant referred to as animal—no prejudicial error**

Defendant failed to show prejudicial error in the trial court's overruling of his objection to the prosecutor's reference to defendant as an "animal," since the prosecutor made one isolated remark, and the evidence of defendant's guilt was overwhelming.

**Am Jur 2d, Trial §§ 274, 304.**

**Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88 ALR4th 8.**

**8. Criminal Law § 53.1 (NCI3d)— first degree murder—medical examiner's opinion—admissibility**

The trial court in a murder prosecution did not err by allowing the prosecutor to elicit from the medical examiner his opinion that one of the shots fired into one victim's body had been inflicted after the victim had fallen, and any question as to movement of the body or failure to preserve the integrity of the crime scene went to the weight to be given the pathologist's opinion, not its admissibility.

**Am Jur 2d, Homicide §§ 398 et seq.**

**9. Homicide § 18.1 (NCI3d)— pain of murder victim—admissibility of testimony**

In a first degree murder prosecution the trial court did not err by admitting over defendant's objections expert and lay testimony concerning the pain experienced by the female victim during her last moments of life, since such evidence was admissible to establish that defendant acted with malice, premeditation and deliberation, and to show the trustworthiness of the victim's statement to police immediately after the shooting in which she named her assailant.

**Am Jur 2d, Homicide §§ 263 et seq.**

**10. Criminal Law § 1352 (NCI4th)— mitigating circumstances—unanimous finding required—prejudicial error**

The trial court erred in instructing the jury that it must find unanimously the existence of a mitigating circumstance before any juror could consider that circumstance during the capital sentencing proceeding, and there was no merit to the

State's argument that the error was harmless, since substantial evidence was introduced from which a juror reasonably might have found several of the possible mitigating circumstances submitted to exist and to be mitigating.

**Am Jur 2d, Trial §§ 888-894.**

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death, entered by *Allen (J.B., Jr.), J.*, in the Superior Court, ALAMANCE County, on 29 February 1988. Heard in the Supreme Court on 9 April 1991.

*Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, 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 on two bills of indictment at the 15 February 1988 Criminal Session of Superior Court, Alamance County, and was convicted of two counts of murder in the first degree. The jury recommended and the trial court entered sentences of death. On appeal, the defendant brings forward numerous assignments of error. We conclude that the defendant's trial and convictions were free from prejudicial error. However, due to the recent decision of the Supreme Court of the United States in the case of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), we are forced to hold that errors during the sentencing proceeding in this case require that the sentences of death be vacated and that this case be remanded to the Superior Court for a new capital sentencing proceeding.

The State's evidence at trial tended to show that on 23 June 1987, the defendant was living with Pauline and Hebron Clark Dickens, Jr., his aunt and uncle, in Burlington, North Carolina. During the late afternoon or evening of 23 June, the defendant began to talk "nasty" to Pauline, prompting her to leave the room. She went to her bedroom, where she lay down to take a nap. Sensing the presence of another person in the room, Pauline turned over to discover the defendant standing in the room with his penis erect. She fled from the house, screaming at the defendant and telling him he had to leave.

After the defendant had gone, Pauline called her pastor, Reverend Jean Moore, and asked her to come to the Dickens residence. Pauline called another individual, Rejean Williams, to pick up Reverend Moore and drive her to the Dickens home. In the presence of both Reverend Moore and Williams, Pauline recounted the episode of the defendant's sexual advance earlier that evening. Reverend Moore asked if the defendant had a gun. Pauline went to the defendant's room, retrieved his briefcase and opened it in the presence of Reverend Moore and Williams. The briefcase did not contain the defendant's gun.

Pauline then left for work with Reverend Moore and Williams following her. When Reverend Moore left Pauline at Alamance Memorial to begin her third-shift job, she asked Pauline to telephone her the next morning when she got off work.

After leaving Pauline at the hospital and dropping off Reverend Moore, Williams went to look for the defendant. She located him at approximately midnight. The defendant asked Williams if she had spoken with Pauline, and Williams responded that she had. When the defendant asked if she had believed Pauline, Williams answered that she had not heard both sides. After she made this statement, the defendant said that if he had to go down, Pauline would go down with him.

At some time following his conversation with Williams, the defendant returned to the Dickens residence. He parked his car approximately two blocks away, took his .32 caliber pistol from the glove compartment, and walked to the residence. When the defendant arrived at the residence, no one else was present. He entered the home, hid himself in his cousin's vacant bedroom, and waited. Approximately thirty to forty-five minutes later, Hebron Dickens arrived home from work, came inside and went to bed. The defendant continued to conceal himself.

While still at work, the next morning, Pauline approached Carol Harris, a co-worker and nurse in the adult psychiatry section of the hospital. Pauline told her about the defendant's sexual advance the previous evening. Pauline also told Harris that the defendant had called her aunt and told her that he and Pauline had been sleeping together. Harris stated, "Pauline, you know he didn't call her and say that." Pauline responded, "[O]h, yes he did."

Harris told Pauline not to go home. Pauline replied that she felt she would be safe at home because, although the defendant had a key to the door, there was another lock on the door that the defendant would be unable to unlock. At the end of their conversation, Pauline asked Harris to telephone the police if she did not hear from Pauline by 11:00 a.m.

After Pauline returned home, she began discussing the episode of the defendant's sexual advance with Hebron. In his initial statement to the police, the defendant said that upon hearing this discussion, he walked down the hallway into the living room and shot his aunt and uncle.

Following his initial oral statement, the defendant agreed to review the events again, and to have his statement recorded on audio tape. In his taped statement, the defendant again admitted that he had made a sexual advance towards his aunt, but he also said that the two had been engaging in sexual intercourse for years. He said, however, that as they were engaged in sexual intercourse on 23 June 1987, Pauline suddenly told him to get out. The defendant called Pauline later, and she told him that she was going to reveal their relationship to her pastor and to her husband. Pauline also told the defendant that she had called an aunt in Philadelphia and told her of their relationship. The defendant then called the aunt and learned that Pauline had misrepresented the matter.

The defendant said that he then returned to the house and hid, to insure that Pauline would tell Hebron the truth. Pauline discovered the defendant when she came in to open a window in the bedroom where he was hiding. The defendant said he jumped out from behind the bed, shot his Aunt Pauline and followed her down the hall to the living room. There, the defendant shot his Uncle Hebron who yelled, "No," as he turned toward the defendant.

The defendant left the Dickens residence approximately five minutes after the shootings. Before doing so, he emptied the spent cartridge casings from his pistol, dropping one on the floor. He drove to Hillsborough, where he disposed of the gun. After thinking about the situation, he decided to go to the police station. Before going to the police station, however, the defendant stopped at Kentucky Fried Chicken and had lunch.

Meanwhile, Pauline had called the Alamance County Central Communications 911 emergency number and reported that she had been shot by her nephew. Police and emergency medical personnel were dispatched to the Dickens residence. When the police arrived, the victims were lying side by side on the living room floor. Pauline was still alive, but Hebron exhibited no sign of life. While being transported from the house to the hospital by ambulance, Pauline told Officer Patrick Daly that she had been shot by Amin Ali, who was her nephew. Shortly after arriving at the hospital, Pauline died.

An autopsy report revealed that Pauline had been shot twice. One projectile had hit her central chest area, passed through her heart and lungs and lodged in her back. There was a second wound on the right side of Pauline's body, caused by a bullet which had not damaged any vital organs.

The autopsy performed on Hebron revealed that he had been shot three times. One projectile had struck the center of his chest and passed through his heart and lungs. A second projectile had entered the right side of Hebron's body, passed through his heart and liver, and exited at a point next to the entrance wound made by the projectile which had hit him in the chest. The path and location of the second projectile were consistent with that wound having been inflicted while Hebron was lying on the floor. The third projectile had entered Hebron's left arm and passed through his chest.

The residence was photographed and processed. When Hebron's body was removed, police found a projectile underneath his body immediately below the area where his face and neck had been resting. In addition, the defendant's pistol was recovered from the location where the defendant said he had thrown it away. A ballistics expert testified that both the projectile found under Hebron's body and the one removed from his body had been fired from the defendant's pistol. Further, both projectiles removed from Pauline and the shell casing found on the living room floor had been fired from the defendant's pistol.

The defendant did not offer any evidence at the guilt-innocence determination phase of his trial. The jury found the defendant guilty of first-degree murder based on the theory of premeditation and deliberation as well as the theory of murder committed by lying in wait. A capital sentencing proceeding was then conducted,

at the end of which the jury recommended a sentence of death for each murder. The trial court entered judgments sentencing the defendant to death.

Additional evidence and other matters relevant to the defendant's specific assignments of error are addressed at other points in this opinion.

**[1]** In his first assignment of error, the defendant contends that he was denied the right to counsel at a critical stage of his trial when the trial court and his attorneys allowed him to make the decision not to peremptorily challenge a juror his attorneys had wanted to remove. The defendant grounds this claim solely upon a discussion between one of his lawyers and the trial court after both the defendant and the State had finished questioning prospective juror Paul Terrell. From the transcript, it appears that at the conclusion of the questioning of Terrell, an off-the-record bench conference was held. Thereafter, the following exchange took place.

> THE COURT: All right. Let the record show that Mr. Terrell is outside of the courtroom. Ms. Jordan, at the bench conference you indicated that you wanted to be heard on the record.
>
> MS. JORDAN: Yes, Your Honor. We would like to have the record reflect that the defendant, Mr. El Amin Ali [sic] wishes to accept this juror in the panel of 12 to hear his case and that this is the desire of the defendant over the—against the recommendations of both his counsel, Dan Monroe and myself.
>
> THE COURT: Now, speaking for the defendant, Ms. Jordan, do you accept juror Paul Terrell to sit on this case?
>
> MS. JORDAN: Speaking for the defendant, we accept him to sit on the case.
>
> THE COURT: All right. Let the record show that both the State and the defendant has [sic] passed and accepted Paul Terrell and he becomes Juror number 4.

Based upon this colloquy, the defendant claims the trial court denied him his right to assistance of counsel by allowing him, rather than his lawyers, to make the final decision regarding whether Terrell would be seated as a juror. We disagree.

The right to counsel in a serious criminal prosecution is guaranteed by the sixth amendment to the Constitution of the United States. *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981); *State v. Thacker*, 301 N.C. 348, 271 S.E.2d 252 (1980). The attorney-client relationship

> rests on principles of agency, and not guardian and ward. While an attorney has implied authority to make stipulations and decisions in the management or prosecution of an action, such authority is usually limited to matters of procedure, and, in the absence of special authority, ordinarily a stipulation operating as a surrender of a substantial right of the client will not be upheld.

*State v. Barley*, 240 N.C. 253, 255, 81 S.E.2d 772, 773 (1954). The attorney is bound to comply with her client's lawful instructions, "and her actions are restricted to the scope of the authority conferred." *People v. Wilkerson*, 123 Ill. App. 3d 527, 532, 463 N.E.2d 139, 143-44 (1984). "No person can be compelled to take the advice of his attorney." *State v. Franklin*, 714 S.W.2d 252, 261 (Tenn.) (citing *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975)), *appeal dismissed*, 479 U.S. 979, 93 L. Ed. 2d 569 (1986).

The American Bar Association Standards for Criminal Justice, although not binding authority, are of interest here and provide that:

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:
>
> (i) what plea to enter;
>
> (ii) whether to waive jury trial; and
>
> (iii) whether to testify in his or her own behalf.
>
> (b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.
>
> (c) If a disagreement on significant matters of tactics or strategy arises between the lawyer and the client, the lawyer should make a record of the circumstances, the lawyer's advice

> and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

The American Bar Association's Standards for Criminal Justice Standard 4-5.2 (2d ed. 1980). Our Court of Appeals has held that tactical decisions, such as which witnesses to call, "whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer. . . ." *State v. Luker*, 65 N.C. App. 644, 649, 310 S.E.2d 63, 66 (1983), *aff'd as to error, rev'd as to harmlessness of error*, 311 N.C. 301, 316 S.E.2d 309 (1984). However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship. In such situations, however, defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached.

In the discussion between the trial court and counsel for the defendant quoted above, Ms. Jordan made just such a record of the disagreement between the defendant and his attorneys. We conclude that her actions were proper, and that the defendant was not denied effective assistance of counsel. *Cf. State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645 (1990) (It was not prejudicial, if error at all, to allow a criminal defendant to call a witness over the recommendation of his attorney.), *disc. rev. denied*, 328 N.C. 574, 403 S.E.2d 516 (1991). This assignment of error is without merit.

**[2]** In his next assignment of error, the defendant contends that the trial court's conduct in excusing two prospective jurors violated the sixth amendment to the Constitution of the United States and article I, § 23 of the Constitution of North Carolina. Specifically, the defendant complains of the following:

> THE COURT: Approach the bench. (An off-the-record discussion was had at the bench with the Court and a prospective juror present.)
>
> THE COURT: Mr. Balog and Ms. Jordan, he has an excuse not to be excused but to be deferred and I am inclined to defer him to another session. Do you want to be heard?
>
> MR. BALOG: No.

MR. MONROE: No.

THE COURT: Robert Melvin Hicks has good cause to be deferred and without any objection from the State and *without any objection from the counsel for the defendant*, I will defer him to a later session and you tell him what he needs to do.

All right. Do I understand that a Ms. Harris needed to see me?

MS. HARRIS: Yes.

THE COURT: Would you approach the bench? (An off-the-record discussion was had at the bench between the Court and a prospective juror.)

THE COURT: Mr. Balog, Mr. Harviel, Mr. Monroe, Ms. Jordan, this lady here, Ms. Harris is moving to Virginia Friday of this week. I am inclined to go ahead and excuse her. Do you want to be heard Mr. Balog?

MR. BALOG: No, sir.

MR. MONROE: No, sir.

THE COURT: I will excuse you and let the record show that Jean Harris is being excused *without any objections of the State or the defendant.*

(Emphasis added.) The defendant argues that these exchanges at the bench constituted reversible error because they deprived the defendant of his constitutional right to be present at every stage of the proceeding. We disagree.

In *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990), relying upon cases such as *State v. Blackwelder*, 61 N.C. 38 (1866), this Court held that the trial court's removal of three jurors on the basis of private conversations with each at the bench constituted reversible error under article I, § 23 of the Constitution of North Carolina. In *Smith*, the nature of the conversations could not be determined from the record. Further, the trial court did not attempt to reconstruct the conversations for the record or give reasons for excusing the prospective jurors, other than to announce that they were excused in the trial court's discretion.

In contrast, here, the trial court reconstructed the substance of the bench conferences with the prospective jurors for the record

and, before ruling, gave the defendant an opportunity to be heard. In each instance, the defendant did not make further inquiry as to the verbatim context of the conversation and did not object to the trial court's action, even though specifically given the opportunity to do both. The defendant—while present and represented by counsel—was afforded ample opportunity to have the trial court develop a more extensive record, but elected not to do so. With the defendant present, his counsel consented to these jurors being deferred or excused. This assignment of error is without merit.

**[3]** By his next assignment of error, the defendant contends that the trial court committed reversible constitutional error during jury selection by preventing the defendant from asking all prospective jurors if they believed that capital punishment was a deterrent to crime. We disagree.

It is well established that both the defendant and the State have the right to question prospective jurors as to their views concerning capital punishment in order to insure a fair and impartial verdict. *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985); *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1983). This right is not unlimited. The trial court is vested with broad discretion to control the extent and manner of such an inquiry, and its decisions will not be disturbed on appeal absent a showing of an abuse of that discretion. *Adcock*, 310 N.C. at 10, 310 S.E.2d at 593.

Generally, whether capital punishment has a deterrent effect is not a proper line of inquiry in a capital case. *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983). Further, this Court has held that "*evidence* concerning the death penalty's deterrent effect is irrelevant to the jury sentencing determination." *Id.* at 215, 302 S.E.2d at 155 (citing *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979)). This Court later stated that "*Kirkley* stands for the proposition that neither the defendant nor the State can introduce evidence or argue the effect, if any, of the death penalty on the commission of crimes by others." *State v. Zuniga*, 320 N.C. 233, 269, 357 S.E.2d 898, 920, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). Therefore, the trial court did not err in preventing counsel for the defendant from injecting that issue into this capital prosecution. This assignment of error is without merit.

In his next assignment of error, the defendant argues that the hearsay testimony of Reverend Jean Moore and Carol Harris, concerning statements made by Pauline Dickens before her death,

was improperly admitted into evidence under N.C.G.S. § 8C-1, Rule 804(b)(5) (1988). We find no error.

N.C.G.S. § 8C-1, Rule 804, provides in relevant part:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

Rule 804(a)(4) defines "unavailability as a witness" to include a situation in which the declarant "[i]s unable to be present or to testify at the hearing because of death . . . ."

In *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986), this Court established guidelines for the admission of hearsay testimony under Rule 804(b)(5). First, the trial court must find that the declarant is unavailable before commencing the six-part inquiry prescribed by this Court in *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). Where, as here, the declarant is dead, the trial court's determination of unavailability "must be supported by a finding that the declarant is dead, which finding in turn must be supported by evidence of death." *Triplett*, 316 N.C. at 8, 340 S.E.2d at 740.

Once the trial court determines the declarant is unavailable, it must proceed with the six-part inquiry prescribed by *Smith*. Specifically, the trial court must determine

(1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;

(2) That the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4);

(3) That the statement possesses "equivalent circumstantial guarantees of trustworthiness";

(4) That the proffered statement is offered as evidence of a material fact;

(5) Whether the hearsay is "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means"; and

(6) Whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence."

*Triplett*, 316 N.C. at 9, 340 S.E.2d at 741 (quoting N.C.G.S. § 8C-1, Rule 804(b)(5) ); *see Smith*, 315 N.C. at 92-96, 337 S.E.2d at 844-46.

**[4]** The defendant argues that Pauline Dickens' statements to Reverend Moore lacked sufficient guarantees of trustworthiness under part three of the *Triplett* analysis. Specifically, the defendant argues that the trial court erroneously focused on the relationship between Pauline and Reverend Moore, rather than the relationship between Pauline and the defendant. In its order, the trial court found that Pauline and Reverend Moore had known each other through Reverend Moore's church for at least eight months, during which time Pauline's attendance had increased. In addition, the trial court found that when Pauline called Reverend Moore on the evening of 23 June 1987, Pauline was upset, needed to talk, and asked that Reverend Moore come to the Dickens home. The trial court also found that a pastor-parishioner relationship had existed between Reverend Moore and Pauline. Based upon its findings, the trial court concluded that Pauline's statements to Reverend Moore possessed sufficient guarantees of trustworthiness.

The pastor-parishioner relationship is recognized as one attended by trust and confidence. There was plenary evidence that Pauline's motivations for speaking with Reverend Moore were concern for her own safety and the need for advice as to how to deal with the defendant. The circumstances and the nature of the information

Pauline related to Reverend Moore caused the trial court to conclude that Pauline's statements possessed sufficient guarantees of trustworthiness. The trial court made no error in its findings and conclusions.

**[5]** The defendant also argues that Pauline's statements to Carol Harris lacked sufficient guarantees of trustworthiness and that the State failed to provide adequate notice of Harris' hearsay testimony. Again, the defendant specifically argues that the trial court erroneously focused on the relationship between Pauline and Harris, rather than the relationship between Pauline and the defendant. In its order, the trial court found that Harris was a close friend of Pauline, that they talked to each other on numerous occasions regarding many subjects, that they had known each other for nine to ten months, and that they worked in the same department in the hospital and had become good friends. In addition, the trial court found that on the morning of 24 June 1987, Pauline told Harris "I have got to tell you something." Thereafter, they had a private and confidential conversation at the nurses' station. Pauline was scared and nervous and was talking to her good friend in confidence. Pauline told her of an incident that had occurred the night before concerning the defendant, and Pauline was afraid. The trial court also found that Pauline told Harris that if she did not hear from Pauline by 11:00 a.m., she was to contact the police. Further, the trial court found that Pauline did not want Harris to tell anyone else about their conversation. Based upon its findings, the trial court concluded that Pauline's statement to Harris possessed sufficient guarantees of trustworthiness.

We conclude that the evidence before the trial court supported its findings, which in turn supported its conclusion. Ample evidence of the reliability and trustworthiness of Pauline's statements was introduced. Pauline had personal knowledge of the defendant's sexual advance, her motivation was her fear of the defendant, and the statement to Harris was virtually identical to the one she gave to Reverend Moore. Moreover, the statement is further corroborated by the fact that Pauline told Harris that the defendant had called Pauline's aunt and said that he and Pauline had been sleeping together. In the defendant's own statement, he admitted calling the aunt and telling her this story. Pauline could not have known this fact unless she too had spoken with her aunt. The corroboration of this fact by the defendant's own statement, in conjunction with the other factors discussed above, gives Pauline's

statements to Harris the "ring of truth." We agree with the trial court's conclusion that this statement possessed sufficient guarantees of trustworthiness.

With regard to the adequacy of notice provided by the State regarding Harris' testimony, the defendant complains that the purported statements of Pauline provided by the prosecutor did not include the detail developed in Harris' testimony. In *Triplett*, this Court discussed the notice requirement of Rule 804(b)(5). There, we stated that the notice requirement should be construed "somewhat flexibly, in light of the express policy of providing a party with a fair opportunity to meet the proffered evidence." 316 N.C. at 13-14, 340 S.E.2d at 743. The central inquiry is whether the notice gives the opposing party a fair opportunity to meet the evidence.

The defendant does not argue that he was unable to meet the evidence, only that the notice did not include all of Pauline's statements as described by Harris at trial. Specifically, the defendant argues that the notice did not include the following information concerning Pauline's statements to Harris: (1) Pauline said she was lying in bed on her stomach praying for the defendant's "filthy mind"; (2) Pauline said she struck at the defendant and told him that she would kill him; (3) Pauline said that the defendant had called her aunt and had told the aunt that he and Pauline had been sleeping together; (4) Pauline said she thought that the safest place for her would be at work that night; (5) Pauline said that she had called Reverend Moore and that Moore had followed her to work; and (6) Pauline said that the defendant still had a key to her house, but that there was an additional lock on her door which he could not unlock. The trial court ruled that except for testimony concerning the defendant's having been "written up" at work, the notice touched on all of Harris' testimony.

The record shows that the notice was sufficient to inform the defendant of the substance of Pauline's statements and, thereby, to afford the defendant a fair opportunity to meet the State's evidence. The notice was served on 4 February 1988; the trial did not begin until 15 February 1988. In addition, the defendant had a private investigator who interviewed the witness. Under these circumstances, the notice was sufficient. This assignment of error is without merit.

**[6]** In his next assignment of error, the defendant argues that the trial court committed reversible error when it failed to in-

tervene *ex mero motu* during the prosecutor's closing argument in order to prevent and correct arguments which the defendant claims were speculative and outside the record. Further, the defendant claims prejudicial error resulted when the trial court overruled the defendant's objection to the prosecutor's reference to the defendant as an "animal."

It is well settled that prosecutors are granted wide latitude in the scope of their arguments. *State v. Zuniga*, 320 N.C. 233, 252, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987); *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975). So long as the prosecutor's argument is "consistent with the record and does not travel into the fields of conjecture or personal opinion," it is not improper. *Zuniga*, 320 N.C. at 253, 357 S.E.2d at 911; *State v. Craig*, 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). The trial court is required to intervene only "where the prosecutor's argument affects the right of the defendant to a fair trial." *Zuniga*, 320 N.C. at 253, 357 S.E.2d at 911; *State v. Harris*, 308 N.C. 159, 301 S.E.2d 91 (1983). Where the defendant fails to object to the prosecutor's argument, "the standard of review is whether such argument was so prejudicial and grossly improper as to require corrective action by the trial judge *ex mero motu.*" *State v. James*, 322 N.C. 320, 324, 367 S.E.2d 669, 672 (1988).

The defendant argues that the following was not supported by the evidence:

> Mr. Dickens is still alive. How do you know that? You see, Mr. Dickens was alive after Mrs. Dickens made the phone call that you heard the tape recording and he managed to turn his head and put his hand towards his wife. How do we know that? *His hand is lying on the telephone when he is found and when Mrs. Dickens is found* after that phone call that you heard the tape recording of, after you heard what Mrs. Dickens said, Mr. Dickens was still alive and husband and wife were nearly face to face and *she watched him die and [the defendant] at some point emptied the shells of his gun as he watched.*

(Emphasis added.) The defendant first argues that assuming a photograph introduced as evidence shows Hebron's body with one hand on the telephone on the floor and would support an inference of conscious movement after Pauline had called the police, there

is no testimony or other evidence that his hand was on the telephone at the time of the initial entry of the officers. "Where the record is silent on a particular point, the action of the trial court will be presumed correct." *State v. James*, 321 N.C. 676, 686, 365 S.E.2d 579, 585 (1988). Here, the photograph relied upon by the prosecutor during his argument and referred to on appeal by the defendant was not brought forward with the record on appeal. Therefore, we are unable to review this exhibit in order to determine if it supported the inference raised in the prosecutor's argument. The defendant has failed to bring forward a record sufficient to allow proper review of this issue and has failed to overcome the presumption of correctness at trial.

In addition, the defendant argues that the prosecutor's arguments that Pauline watched Hebron die and that the defendant watched both victims as he emptied his gun were completely speculative. The defendant argues that there is no indication in the evidence of when Hebron actually died, except the medical examiner's testimony that the three wound tracks through the heart and lungs, each independently capable of causing death, "would cause rapid, immediate bleeding into the space around the heart and into the cavity the lungs lie in and rapidly cause failure of the heart and death." Further, the defendant contends that there was no evidence concerning the victims' consciousness or level of awareness after the shootings, except for Pauline's telephone call to the authorities, her moaning and raising up without actually speaking upon the initial entry of the officers into the Dickens home, and her utterances to an officer immediately after having been placed in the ambulance. The defendant argues that from such evidence, any argument that Pauline was conscious at the time of her husband's death or that Hebron was aware that the defendant was emptying his gun was completely speculative. We disagree.

The prosecutor's argument that Hebron lived for some period of time is supported by the evidence. A significant amount of blood was found beneath Hebron's body, permitting an inference that his heart continued to pump blood after the shooting and that he survived for some period of time following infliction of the gunshot wounds. In addition, the fact that Pauline had the presence of mind to reach the telephone, dial the correct number, give her name, name her nephew as her assailant, and give her correct address and location to the authorities would support a reasonable

inference that she was aware of what was going on around her as she and her husband lay dying on the floor. Finally, in his own statement, the defendant said he stayed in the house for approximately five minutes during which time he unloaded the empty casings from his weapon. Therefore, it would be reasonable to infer that at some point before he left the house, the defendant looked over at the victims as they lay shot and dying on the floor.

The prosecutor's argument contained logical inferences drawn from the evidence. Clearly, the argument was not so prejudicial and grossly improper as to require the trial court to intervene *ex mero motu*, and the trial court did not err by failing to do so.

**[7]** The defendant also argues that the trial court erred in overruling his objection to the following portion of the prosecutor's closing argument:

> So, she goes in the house. She thinks she has reached a safe haven. I am in the sanctity of my home. I have thrown him out. He will honor that. I told him to leave. He left. He knows I mean business. I am safe.
>
> Can you imagine the horror, ladies and gentlemen, when she goes home, she locks that door, she thinks she has locked the *animal* out.
>
> MR. MONROE: Object, Your Honor.
>
> THE COURT: Overruled.

(Emphasis added.) This Court has indicated that it "does not condone comparisons of criminal defendants to members of the animal kingdom." *State v. Hamlet*, 312 N.C. 162, 173, 321 S.E.2d 837, 845 (1984); *see State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971). However, assuming *arguendo* that the "animal" comparison was error, the defendant nevertheless must show that such error was prejudicial. N.C.G.S. § 15A-1443(a) (1988). To do so, the defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached. . . ." *State v. Gardner*, 316 N.C. 605, 613, 342 S.E.2d 872, 878 (1986). Given the isolated nature of this remark in the present case, we conclude that its effect could only have been *de minimus*. The defendant has failed to make the required showing of prejudice, and this assignment of error is without merit.

**[8]** In his next assignment of error, the defendant contends that the trial court erred by allowing the prosecutor to elicit from the medical examiner his opinion that one of the shots fired into Hebron's body had been inflicted after Hebron had fallen. Specifically, the defendant assigns as error the following colloquy:

> Q Doctor Butts, assuming that the jury should find that Mr. Hebron Dickens was found—body was found generally face down, also assuming that a bullet was found under his body, do you have an opinion as to the position of Mr. Dickens when he was shot?
>
> MS. JORDAN: Objection
>
> MR. MONROE: Objection.
>
> THE COURT: Do you have an opinion, Doctor?
>
> A I can't answer the question phrased that way. I would not have an opinion.
>
> Q (By Mr. Harviel) Doctor Butts, do you have an opinion satisfactory to yourself, if assuming that the jury should find that Mr. Dickens was found face down and that a bullet was discovered under his body in the general position of his neck or upper chest, do you have an opinion satisfactory to yourself within a reasonable degree of medical certainty as to the position of Mr. Dickens' body when he was shot and the relationship to the gun that shot the bullet?
>
> MR. MONROE: Objection.
>
> MS. JORDAN: Objection.
>
> THE COURT: Do you have an opinion?
>
> A Yes, sir.
>
> Q (By Mr. Harviel) And what is that opinion?
>
> MR. MONROE: Objection.
>
> MS. JORDAN: Objection.
>
> TRIAL COURT: Overruled. You may give your opinion.
>
> A In relation to the wound I have labeled number two, the bullet that caused that wound would have exited from the front part of his body. If that—if a bullet was found in that

location on the floor, that would be consistent with him being lying down at the time that particular wound was inflicted, if, in fact, that bullet was the bullet that entered in the right side.

MR. MONROE: Move to strike.

THE COURT: Motion denied.

The defendant argues that the medical examiner's testimony was based on a fact not in evidence—the location of the victim's body when the victim was found. Specifically, the defendant argues that since medical personnel may have moved Hebron's body and altered the original location of the projectile found under it, no reasonable opinion could have been drawn from the body location as depicted in the crime scene photographs. We disagree.

N.C.G.S. § 8C-1, Rule 703 provides that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Under N.C.G.S. § 8C-1, Rule 705, the defendant may require the expert to disclose the particular facts or data underlying his opinion. Here, the pathologist did not give a conclusive opinion that Hebron was lying on the floor when "gunshot wound number two" was inflicted. He only stated that if the projectile found under Hebron's body had caused "gunshot wound number two" and exited the front of the body, "that would be consistent with him being lying down at the time that particular wound was inflicted." This testimony is supported by the evidence. Police personnel found a projectile underneath Hebron's body in the neck or facial area. All the other projectiles were found in the victims' bodies.

The projectile which caused the wound described as "gunshot wound number two" had exited the front of the body right beside the entrance wound to the chest labeled "gunshot wound number one." The pathologist concluded that the projectile "traveled forwards, upwards, and from the right side to the left side. . . ." The opinion given by the pathologist was properly admitted in light of the evidence introduced at trial. Further, any question as to movement of the body or failure to preserve the integrity

of the crime scene goes to the weight to be given the pathologist's opinion, not its admissibility. This assignment of error is without merit.

**[9]** In his next assignment of error, the defendant contends that the trial court erred by admitting, over the defendant's objections, expert and lay testimony concerning the pain experienced by Pauline Dickens during her last moments of life. Specifically, the defendant argues that testimony of the officer who rode to the hospital in the ambulance with Pauline was improper. That testimony was as follows:

> Q All right, now, while you were with Mrs. Dickens in the ambulance on the way to the hospital, state whether or not she appeared to be in pain?
>
> MR. MONROE: We object to that.
>
> THE COURT: Overruled.
>
> A Yes, sir. She seemed to be in a great deal of pain.
>
> MR. MONROE: Move to strike that answer.
>
> THE COURT: Motion denied.
>
> Q . . . What do you base that opinion on?
>
> MR. MONROE: Objection.
>
> THE COURT: Overruled.
>
> A Basically, by the tone of her voice, the actions she was making in the ambulance.
>
> MR. MONROE: Move to strike.
>
> THE COURT: Motion denied.
>
> Q . . . What was she doing in the ambulance?
>
> A She was calling out for the rescue people to help her on several occasions. She was yelling, moaning, if you will.
>
> MR. MONROE: Move to strike.
>
> THE COURT: Motion denied.
>
> MR. BALOG: Nothing further.

In addition, the defendant objects to the fact that the State elicited testimony over the defendant's objection from the medical examiner that Pauline's wounds would have been painful. The defendant argues that all evidence concerning pain experienced by the victims was irrelevant to any issue of fact in either phase of his trial and, thus, inadmissible. We disagree.

This Court has identified several factors which are relevant in determining whether a killing was done with premeditation and deliberation. *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991). Included among these factors is the conduct of the defendant before and after the killing. *Id.* at 238, 400 S.E.2d at 62. The defendant stated that he stayed in the house for more than five minutes after the shootings. The evidence tended to show that Pauline was alive during that time and that she was able to telephone for help later. In addition, on the way to the hospital, she was moaning and calling out for help. A reasonable inference may be drawn from this evidence that the defendant watched Pauline suffer in pain as she lay on the floor, yet he did nothing to help her. Such an inference would tend to establish that the defendant acted with malice, premeditation and deliberation. *See State v. Drayton*, 323 N.C. 585, 374 S.E.2d 262 (1988); *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986).

In addition, N.C.G.S. § 8C-1, Rule 803(2)—the excited utterance exception to the rule against hearsay—allows the admission of out-of-court statements relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition. Pauline's statement to the officer wherein she named the defendant as her assailant was admitted pursuant to Rule 803(2). Evidence that Pauline suffered great pain at the time the statement was made was clearly relevant to the trustworthiness of the statement. Since the defendant objected to the introduction of Pauline's statement, made shortly before she died, that the defendant had shot her, the State was entitled to introduce evidence of the conditions under which the statement was made to establish its trustworthiness. This assignment of error is without merit.

**[10]** In his next assignment of error, the defendant argues that the trial court committed reversible constitutional error in violation of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), by instructing the jury that it must find unanimously the existence

of a mitigating circumstance before any juror could consider that circumstance during the capital sentencing proceeding. The State concedes that the unanimity instruction concerning mitigating circumstances was constitutionally defective under *McKoy*, but argues that the error was harmless.

The State having conceded that a *McKoy* unanimity error occurred in this case, the sole issue is whether that error may be deemed harmless. *See State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990). Because the *McKoy* error in the jury instructions was of constitutional magnitude, " '[t]he burden is on the State to demonstrate, beyond a reasonable doubt, that the error was harmless.' " *State v. McNeil*, 327 N.C. 388, 394, 395 S.E.2d 106, 111 (quoting N.C.G.S. § 15A-1443(b) (1988)), *cert. denied*, --- U.S. ---, 113 L. Ed. 2d 459 (1991). On the record before us, we are forced to conclude that the State has not carried this burden.

The trial court submitted nine possible mitigating circumstances for the jury's consideration:

> (1) This murder was committed while the defendant was under the influence of mental or emotional disturbance.
>
> . . . .
>
> (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.
>
> . . . .
>
> (3) Prior to arrest or to [sic] an early stage of the criminal process, the Defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.
>
> . . . .
>
> (4) The Defendant has been a person of good character or has had a good reputation.
>
> . . . .
>
> (5) The violent nature of the crime for which the Defendant has been convicted is out of character and inconsistent with prior conduct of the Defendant.
>
> . . . .

(6) The Defendant has shown a willingness to assume responsibility for his conduct and has shown remorse over the death of the victim.

. . . .

(7) The Defendant has engaged in work which provides direct assistance to people.

. . . .

(8) The Defendant, since his incarceration, has shown himself to be a person who could adjust well to prison life and be of service to other prisoners.

. . . .

(9) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

Of these nine possible mitigating circumstances, the jury found only one as to each murder—that prior to arrest or at an early stage in the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.

Our review of the record reveals that substantial evidence was introduced from which a juror reasonably might have found several of the possible mitigating circumstances submitted to exist and to be mitigating. Therefore, we may not hold that the trial court's error was harmless.

The fourth possible mitigating circumstance submitted was that the defendant "has been a person of good character or has had a good reputation." The testimony of eleven witnesses supported its submission. Linda Lynch, a radiology technologist, testified to the defendant's polite and calm demeanor as an orderly in her department at Alamance Memorial Hospital. Another radiology department employee, Masoud Ghiassi, also testified to the defendant's polite and gentle manner. Lynette Corbin, another radiology department employee testified that patients commented on the defendant's demeanor, and that the defendant's reputation in the hospital was one of kindness. Judy Rivenbark, assistant chief technologist in the radiology department testified that the defendant was always very cooperative, pleasant and mannerly, and that the defendant was well thought of by other employees. Stella Cheek,

a supervisor in the psychiatric unit at the hospital, the department to which the defendant transferred from radiology, testified that the defendant always seemed to be "reaching for higher." In addition, Carol Wilson, the radiology department administrator, testified to the caring the defendant showed in working with patients, as well as to the polite and courteous manner the defendant demonstrated in working with staff members.

Dr. Mohammed Bhatti testified to the defendant's respectful manner with patients and to the defendant's high reputation within the local Muslim community. Similarly, Nazeale Abdul-Hakeen testified that the defendant had been welcome in Hakeen's mosque because of his pleasant, gentle demeanor and his kindness. Christopher Watkins, a Burlington attorney who represented the defendant in a divorce action, testified that even in circumstances which would anger or upset the usual client, the defendant remained courteous, kind and understanding. Patsy Bird, operator of a group home in which the defendant had been employed part time, testified that the defendant was a polite, cooperative, and caring person who seemed to be trying to get ahead by taking on part-time employment in addition to his regular work. Even in jail, according to Deputy William Folks, the defendant never raised his voice or said anything out of place. Based upon this evidence, we are unable to say beyond a reasonable doubt that no juror reasonably could have found that the defendant was a person of good character or that the defendant had had a good reputation.

The fifth possible mitigating circumstance was that the defendant's character and prior conduct were inconsistent with the violent crime for which the defendant had been convicted. Ten witnesses testified that the crimes were a radical departure from the defendant's usual behavior and character. Given such evidence, we are unable to say beyond a reasonable doubt that no juror reasonably could have found this circumstance to exist and to be mitigating.

The sixth possible mitigating circumstance was that "[t]he Defendant has shown a willingness to assume responsibility for his conduct and has shown remorse over the death of the victim." During his interrogation by the police after surrendering himself on the day of the shooting, the defendant expressed regret and sorrow for what he had done. Hakeen, who visited the defendant in jail, testified that it was obvious that the defendant was sorry

for what he had done and that he accepted responsibility for his actions. In addition, Masoud Ghiassi visited the defendant in jail and also testified to his remorse. Masoud's wife, Shaheen Ghiassi, testified that in letters the defendant had written to the Ghiassis after his incarceration, he had expressed hope that God would forgive him for his actions. Given such evidence, we are unable to say that no juror reasonably could have found this circumstance to exist and to be mitigating.

The seventh possible mitigating circumstance was that "[t]he Defendant has engaged in work which provides direct assistance to people." That the defendant had done work which provided direct assistance to people obviously was supported by the evidence of his employment in two departments of the hospital and in the group home. A rational juror could have found mitigating value in the defendant's choice of employment in jobs which provided direct assistance to others. *Cf. McNeil*, 327 N.C. at 395, 395 S.E.2d at 111 (juror reasonably might have deemed evidence that defendant "had been a good and useful employee" for construction company mitigating). We are unable to say beyond a reasonable doubt that no juror reasonably could have found this circumstance to exist and to be mitigating.

The eighth possible mitigating circumstance was that "[t]he Defendant, since his incarceration, has shown himself to be a person who could adjust well to prison life and be of service to other prisoners." Deputy Folks testified that the defendant had adjusted to incarceration in the local jail and had been a model prisoner. In addition, Hakeen, who did volunteer work with the Department of Correction and had worked for a number of years in its facilities, testified that in his opinion the defendant would be a positive influence on other inmates. Further, Masoud Ghiassi testified that the defendant had expressed a desire to be of service to the prison community. Given such evidence, we are unable to say beyond a reasonable doubt that no juror reasonably could have found this circumstance to exist and to be mitigating.

The remaining possible mitigating circumstances not found were statutory mitigating circumstances. The first of these, that the "murder was committed while the defendant was under the influence of mental or emotional disturbance," was submitted pursuant to N.C.G.S. § 15A-2000(f)(2). The whole of the evidence indicated that the defendant was not a person given to emotional displays.

However, the State's evidence tended to show that when Pauline ordered the defendant away from her house, he was crying and saying he had no place to go. Later the same evening, according to the testimony of the State's witness Rejean Williams, the defendant was not his usual calm self; he spoke nervously. Nor was he neat as he usually was; instead, his clothes were disheveled. A rational juror could have determined that such testimony, along with evidence of the defendant's inability to express to the interrogating officers why he had shot the victims, and his anger at the time of the shooting indicated the influence of a mental or emotional disturbance upon his actions.

The final possible mitigating circumstance submitted to the jury was whether there was "[a]ny circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value." N.C.G.S. § 15A-2000(f)(9) (1988). The defendant argues that, among other circumstances in mitigation, one or more jurors could have found that the defendant's decision not to reload the gun and continue shooting his aunt and uncle, his continued adherence to his religious faith following his arrest and incarceration, his honesty in his dealings with attorney Christopher Watkins, his having attained a G.E.D. and some additional training at a technical college, and his cooperation with investigating officers all had mitigating value. Given the evidence adduced at trial at the sentencing proceeding, we cannot say beyond a reasonable doubt that no juror reasonably could have found this circumstance to exist.

For the foregoing reasons, we are unable to say that the *McKoy* error in the instructions in the present case was harmless beyond a reasonable doubt. Accordingly, the defendant's sentences of death must be vacated, and the defendant must receive a new sentencing proceeding.

In conclusion, we hold that the guilt-innocence determination phase of the defendant's trial was free from prejudicial error. However, the sentences of death are vacated and this case is remanded to the Superior Court, Alamance County, for a new capital sentencing proceeding as to both convictions for first-degree murder. *See McNeil*, 327 N.C. 388, 395 S.E.2d 106.

Guilt phase: No error. Death sentence vacated and case remanded for new capital sentencing proceeding.

STATE OF NORTH CAROLINA v. JAMES EDWARD THOMAS

No. 455A87

(Filed 14 August 1991)

1. **Jury § 7.14 (NCI3d)— murder—jury selection—peremptory challenges—no racial motivation**

Defendant in a murder and sexual offense prosecution was not entitled to a new trial based on the prosecutor's peremptory challenges against prospective black jurors where the trial court did not make a prima facie finding of discrimination but nevertheless required the prosecutor to explain each peremptory challenge of a black person. The United States Supreme Court has held that the issue of the prima facie case is moot where the prosecutor offers racially neutral explanations for his peremptory challenges and the court finds them to be true and not pretextual. Great deference is accorded the trial court's decision on the ultimate question of the prosecutor's discriminatory intent in peremptorily challenging jurors.

**Am Jur 2d, Jury §§ 173-176, 237.**

2. **Jury § 7.14 (NCI3d)— murder—jury selection—peremptory challenges of black prospective jurors—no state constitutional violation**

The peremptory removal of black prospective jurors in a murder and sexual offense prosecution did not violate Article I, Section 26 of the Constitution of North Carolina.

**Am Jur 2d, Jury §§ 173-176, 237.**

3. **Rape and Allied Offenses § 5 (NCI3d); Homicide § 21.6 (NCI3d)— first degree sexual offense—felony murder—sufficiency of the evidence**

The trial court did not err by denying defendant's motion to dismiss charges of first degree sexual offense and felony murder where the victim may have been dead when the sexual offense occurred. It is unnecessary to decide whether the victim was alive when the offense was committed because the sexual act was committed during a continuous transaction that began when the victim was alive.

**Am Jur 2d, Rape § 41.**

**4. Searches and Seizures § 4 (NCI3d)— nontestimonial identification order—no warrant—admissible**

The trial court did not err in a prosecution for first degree sexual offense and murder by admitting evidence of defendant's fingernails, pubic hair, teeth, saliva, and lips obtained pursuant to a nontestimonial identification order because that evidence was properly obtained while defendant was in police custody. Obtaining a blood sample pursuant to the same order, without a search warrant, was harmless error beyond a reasonable doubt because, in addition to other incriminating evidence, defendant admitted being at the crime scene, passing out during an argument with the victim, awaking to find her dead, and leaving traces of his blood in the room.

**Am Jur 2d, Rape § 61.**

**Physical examination or exhibition of, or tests upon, suspect or accused, as violating rights guaranteed by Federal Constitution—Federal cases. 16 L.Ed.2d 1331, 22 L.Ed.2d 909.**

**5. Constitutional Law § 309 (NCI4th)— murder and sexual offense—concession of guilt—not ineffective assistance of counsel**

Defendant was not denied effective assistance of counsel in a prosecution for murder and sexual offense where defendant's counsel conceded to the jury that defendant had committed second-degree murder and had completed at least one element of the sexual offense. The trial court found on supporting evidence that defendant consented orally and in writing to counsel's strategy to admit his guilt to a charge of second-degree murder and nothing in the record contradicts that finding. The trial court also concluded that defense counsel never conceded defendant's guilt of a sexual offense and, for jurors to convict defendant under the trial court's instructions, they had to reject defense counsel's view of the facts.

**Am Jur 2d, Criminal Law §§ 967 et seq.**

**6. Rape and Allied Offenses § 6 (NCI3d)— sexual offense—requested instruction that victim must be alive—denied—no error**

The trial court did not err in a prosecution for first degree sexual offense and murder by denying defendant's requested instruction that the jurors had to first find that the victim was alive when sexually assaulted in order to find defendant guilty of the sexual offense. The requested instruction was

not a correct statement of North Carolina law, and the North Carolina Supreme Court has previously applied the continuous transaction doctrine to a sequence of sexual offense and murder.

**Am Jur 2d, Rape § 108.**

**7. Criminal Law § 1352 (NCI4th) — murder — sentencing — McKoy error**

A sentence of death in a first-degree murder prosecution was vacated and the case remanded for a new sentencing hearing where the trial court instructed the jury to find any mitigating circumstances unanimously and to reject those not unanimously found to exist. The error was prejudicial because defendant's testimony could support a reasonable inference that defendant was under the influence of heroin at the time of the crime and that his ability to appreciate the criminality of his conduct or to conform his conduct to the law was impaired. The circumstance is statutory and therefore deemed to have mitigating value.

**Am Jur 2d, Trial §§ 888-894.**

Justice MEYER did not participate in the decision of this case.

APPEAL pursuant to N.C.G.S. § 7A-27 from judgments imposing a death sentence upon conviction of first-degree murder (86CRS043829) and a mandatory life sentence upon conviction of first-degree sexual offense (86CRS044695). Judgments entered at the 6 July 1987 Criminal Session of Superior Court, WAKE County, *Farmer, J.*, presiding. Execution stayed 24 August 1987 pending defendant's appeal. Heard in the Supreme Court 11 May 1989. Findings on remand entered 21 March 1991 by *Cashwell, J.*, and filed with this Court on 15 May 1991.

*Lacy H. Thornburg, Attorney General, by J. Michael Carpenter, Special Deputy Attorney General, for the State.*

*Thomas F. Moffitt for defendant-appellant.*

EXUM, Chief Justice.

Defendant raises the following issues in his assignments of error in the guilt phase of his trial: (1) whether the prosecutor peremptorily challenged potential jurors solely on the basis of race;

(2) whether the evidence was sufficient to support defendant's convictions for felony sex offense and first-degree felony murder; (3) whether the trial court committed reversible error in admitting nontestimonial evidence taken without a search warrant; (4) whether certain concessions by defense counsel of defendant's guilt before the trial jury deprived defendant of his right to counsel; and (5) whether the trial court committed reversible error in refusing to instruct jurors about sexual assault as an afterthought to murder. 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:

In the early afternoon of 14 June 1986, the body of Teresa Ann West was discovered at the Sir Walter Tourist Home in Raleigh. Her body was scratched and bruised, and injuries appearing to be human bite marks were found on her breasts. A telephone receiver was found inserted in her vagina. A forensic specialist performed an autopsy and estimated the victim, manager of the Tourist Home, died sometime around midnight the night before. The expert testified that the victim had been strangled both manually and with pantyhose used as a garrote and that the telephone receiver probably was inserted in the victim's vagina after she was dead.

Defendant had lived at the Tourist Home for approximately five months before moving to his girlfriend's apartment in Cary, North Carolina, in June 1986. On the night of 13 June 1986 a roommate, Eddie Corley, let defendant use his car, a 1985 blue Monte Carlo. Defendant said he was going out to buy beer. At 10:55 that night a Raleigh police officer cited defendant for speeding on a road leading into Raleigh from Cary. One resident of the Tourist Home recalled seeing an unfamiliar blue car in the boardinghouse's driveway at approximately 11:30 p.m.

Defendant's girlfriend, Sandy Jordan, testified that defendant returned to their Cary apartment at 6 a.m. on 14 June. Defendant and Jordan were called to the police station at 8 p.m., and defendant requested that Jordan call his brother-in-law and ask him to hide the shirt defendant had worn the night before. Defendant himself later telephoned his stepbrother and told him to hide

the shirt because it had heroin on it. When the stepbrother hid the shirt he noticed a bloodstain on the collar. Defendant and Jordan returned to their apartment with detectives at about 11 p.m. The police asked defendant for the clothing he wore on 13 June, and defendant gave detectives the wrong shirt and pants. When detectives realized defendant had given them the wrong clothes, they obtained a search warrant for the apartment, returned there, and found the correct clothing.

The State presented several forensic experts who testified about physical evidence obtained from the crime scene and from defendant's clothing tending to place defendant in the victim's apartment on the night of her murder. Defendant's palm print was found inside the bathtub, which had been scrubbed clean the morning before West's death. The print of defendant's left little finger was found on the back of the telephone base, and the print of his left palm was found on the inside of the victim's bedroom door. Fibers found under the victim's fingernails, on her body, and on the bedsheets matched fibers from the shirt defendant wore the night the victim was killed. Fibers from the victim's bathmat were found on defendant's shirt and the victim's nightshirt. Feathers consistent with the victim's pillow were found on her torso and on defendant's shirt. Carpet fibers from the car defendant drove on 13 and 14 June were found on the victim's nightshirt.

The State also compared evidence from the crime scene with physiological evidence obtained from defendant's person. Police obtained samples of defendant's blood, hair, fingernails, teeth, and lips in a procedure following a nontestimonial identification order served on defendant the day after his arrest. A serologist testified that blood on a piece of tissue found in the victim's apartment was consistent with the defendant's blood. An expert in forensic hair analysis testified that hair consistent with defendant's was found in the victim's pubic hair and on a sheet underneath the body. An expert in forensic odontology who examined injuries on the victim's breasts and took dental impressions from the defendant offered his opinion that the injuries were bite marks left by defendant's teeth.

Defendant testified that he and the victim became friends after he moved into the Tourist Home in early 1986. He then moved to Cary to live with Jordan. On the night of Friday, 13 June 1987, defendant borrowed Corley's blue Monte Carlo and drove to the

boardinghouse to visit West. She let him in her apartment and said she had obtained heroin for him. After visiting Raleigh taverns in an unsuccessful attempt to find cocaine to use with the heroin, defendant returned to West's room. West gave defendant a syringe filled with heroin and he injected it into his arm. He then became nauseous and crawled into the bathroom and vomited. He dabbed the injection wound on his arm with some tissue. When defendant returned to West's bedroom, she asked him to have sex with her. He declined, saying he loved his girlfriend and was physically incapable of sex because of the heroin. West gave him some pills she said would keep him conscious, and he dissolved them and injected them. West then threatened to telephone a friend who was a law enforcement officer and report that defendant was wanted by police in California. West picked up the telephone receiver and pointed it at defendant. He stood up from the floor and asked if she was serious about having him arrested. She said she was. Defendant's next recollection was waking up at 4:45 a.m. or 5:44 a.m. and finding West dead. He placed a pillow over her face, collected his belongings, and ran from her room. He drove back to Cary, went to bed and got up to go to work later that morning.

Defendant also presented expert testimony tending to contradict the State's evidence matching defendant's dental impressions to the injuries found on the victim's breasts.

The jury found defendant guilty of first-degree murder both by premeditation and deliberation and under the felony murder rule, and guilty of first-degree sexual offense. The jury found defendant not guilty of common-law robbery and not guilty of larceny.

At the sentencing proceeding following defendant's conviction for first-degree murder, the State introduced evidence that defendant had pleaded guilty and served a prison term in California for armed robbery. Defendant called friends, family members, and a guard from a prison where he was previously incarcerated to testify about his good character. Defendant then testified that he had abused drugs since his stepfather introduced him to marijuana at age twelve. He said he committed the armed robbery in California to pay off cocaine debts. He expressed remorse for the victim's death but did not admit killing her. On cross-examination defendant admitted he was angry with the victim when she threatened to call police about outstanding California arrest warrants.

The trial court submitted four aggravating circumstances for the jury's consideration: (1) defendant had been previously convicted of a felony involving the use or threat of violence to another person; (2) the murder was committed while defendant was engaged in a sexual offense; (3) the murder was committed to disrupt or hinder the enforcement of laws; and (4) the murder was especially heinous, atrocious, or cruel. The jury found the first three to be aggravating circumstances.

The trial court submitted nine mitigating circumstances for the jury's consideration. The jury unanimously found three of these circumstances but did not find six others, including that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

The jury unanimously found that the aggravating circumstances outweighed the mitigating circumstances and recommended the death sentence.

## II. GUILT PHASE

### A.

**[1]** Defendant contends he is entitled to a new trial because the prosecutor violated his state and federal constitutional rights by peremptorily challenging prospective jurors solely on the basis of ra ce. Article I, Section 26 of the Constitution of North Carolina prohibits racially based peremptory challenges. *State v. Crandell*, 322 N.C. 487, 501, 369 S.E.2d 579, 587 (1988). The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution also prohibits such discrimination. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). Defendant further contends the prosecutor's peremptory challenges against prospective black jurors violated his rights under the Sixth and Eighth Amendments of the United States Constitution and Article I, Section 24 of the Constitution of North Carolina.[1]

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1. Since arguments were heard in this case, the United States Supreme Court has held that the Sixth Amendment does not apply to protect criminal defendants from racially discriminatory peremptory challenges by the State. *Holland v. Illinois*, 493 U.S. 474, 107 L. Ed. 2d 905 (1990). Although defendant mentions the Eighth Amendment to the United States Constitution as well as Article I, Sections 19 and 24 of the Constitution of North Carolina in his assignment of error to the prosecutor's peremptory challenges, defendant makes no separate argument based on these latter provisions and does not explain how they might apply here. Therefore any contention based on these provisions is deemed abandoned. N.C. R. App. P. 28(a).

At the start of jury selection defense counsel renewed a pretrial motion to prohibit the prosecution from peremptorily challenging any black person. The trial court deferred ruling on the motion until the prosecutor peremptorily challenged a black person. The prosecution challenged Juror 4, who was black, giving as his reason that she had read about the case and might have formed an opinion about it. The trial court ruled that the State had not challenged Juror 4 on account of race, did not purposely discriminate on the basis of race, and that excusing Juror 4 did not violate the Equal Protection Clause of the Fourteenth Amendment. This procedure was repeated each time the prosecutor peremptorily challenged a black person. The prosecutor peremptorily challenged a total of seven blacks, in each instance stating a reason unrelated to race. The trial court allowed each challenge, in each instance ruling that no discrimination had occurred. At the conclusion of jury selection, the trial court entered an order including findings of fact in regard to each of the prosecutor's peremptory challenges to blacks and a conclusion that as a matter of law there was no purposeful racial discrimination by the prosecutor in jury selection. The order stated that the trial court did not determine that defendant had made a prima facie showing of discrimination but the trial court nevertheless required the prosecutor to explain each peremptory challenge of a black person.

The trial court's findings of fact stated that the prosecutor peremptorily challenged black venirepersons for the following reasons: one had read about the case; one was young and unmarried, and not as stable and mature as the State preferred; one had never before thought about the death penalty and appeared evasive; one was young and stated that serving on the jury would work hardship on his job because he traveled a lot; one felt that drug use was a mitigating circumstance; one would not convict defendant without an eyewitness to the crime and proof by the State beyond a shadow of a doubt; and one felt the use of drugs would be an excuse.

Defendant contends the trial court erred in failing to determine that he had made a prima facie showing of racial discrimination. The United States Supreme Court recently held that where the prosecutor offers racially neutral explanations for his peremptory challenges and the trial court finds them to be true and not pretextual, the issue of the prima facie case is moot. *Hernandez v. New York*, --- U.S. ---, 114 L. Ed. 2d 395, 405 (1991). Therefore, the only remaining issue is whether the trial court erred in ruling

that defendant failed to meet his ultimate burden of showing purposeful racial discrimination.

This Court has identified several factors in addition to the prosecutor's explanations that may be relevant to the issue of racial discrimination in peremptory challenges. The defendant's race, the victim's race, and the race of key witnesses may suggest whether the case is susceptible to racially discriminatory jury selection. *State v. Smith*, 328 N.C. 99, 120, 400 S.E.2d 712, 724 (1991); *see State v. Crandell*, 322 N.C. 487, 502, 369 S.E.2d 579, 588 (1988). Also relevant are questions and statements by the prosecutor during jury selection which tend to support or refute a showing of discrimination. *Smith*, 328 N.C. at 121, 400 S.E.2d at 724-25 (1991); *State v. Robbins*, 319 N.C. 465, 489, 356 S.E.2d 279, 293 (1987). Also indicative of racial discrimination is the prosecution's "use of a disproportionate number of peremptory challenges to strike black jurors in a single case." *Robbins*, 319 N.C. at 490-91, 356 S.E.2d at 294. On the other hand, one factor tending to refute a showing of discrimination is the State's acceptance of black jurors. *State v. Smith*, 328 N.C. at 121, 400 S.E.2d at 726.

That defendant here is black and the victim was white gives support to defendant's contentions, because a case involving different races provides a motive for racially discriminatory peremptory challenges. The record reveals no question or statement by the prosecutor during jury selection that suggests any discriminatory intent. Defendant urges this Court to consider as a factor that the prosecution peremptorily challenged blacks at a proportionately higher rate than whites. Of eight black members of the venire not excused for cause, the prosecutor peremptorily challenged seven. Of thirty-seven white members of the venire not excused for cause, the prosecutor peremptorily challenged eight. Another circumstance, however, tends to refute a showing of purposeful discrimination. The first venireperson whom the prosecutor accepted for the jury was black.

Defendant for the first time on appeal contends the prosecutor's racially neutral explanations for peremptory challenges against blacks were pretextual. This Court has held that a prosecutor's racially neutral explanations for peremptory challenges must be "clear and reasonably specific" and "related to the particular case to be tried." *State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990). The specificity of the prosecutor's challenges and their relevance to

this trial are shown by the trial court's findings of fact. Defendant challenges the credibility of those explanations, however, noting that white members of the venire who revealed some of the same characteristics cited in those explanations were nevertheless seated on the jury. This argument falls short of showing discrimination in a practice as complex as jury selection, which we have recognized is "more art than science" and in which "[r]arely will a single factor control the decision-making process." *Id.* Therefore, "[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)).

In *Batson* the Supreme Court accorded great deference to the trial court's decision on the ultimate question of the prosecutor's discriminatory intent in peremptorily challenging jurors. 476 U.S. at 98, n.21, 90 L. Ed. 2d at 89, n.21. Just recently in *Hernandez v. New York*, the Court reiterated this extremely deferential standard:

> Deference to the trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding will "largely turn on evaluation of credibility." . . . In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "particularly within a trial judge's province."

*Hernandez*, --- U.S at ---, 114 L. Ed. 2d at 409. The Court in *Hernandez* specifically held that it would not overturn the trial court's finding on the issue of discriminatory intent "unless convinced that its determination was clearly erroneous." *Id.* at ---, 114 L. Ed. 2d at 412.

**[2]** We must address separately defendant's contention that racial discrimination in peremptory challenges of jurors violated his rights under Article I, Section 26 of the Constitution of North Carolina. Article I, Section 26 provides: "No juror shall be excluded from

jury service on account of sex, race, color, religion, or national origin." The same reasoning supporting the United States Supreme Court's deferential standard of review in *Batson* and *Hernandez* also counsels this Court, in our evaluation of the state constitutional issue, to yield great deference to the trial court's ruling that no purposeful discrimination occurred in this case. We therefore conclude that the peremptory removal of black prospective jurors in this case did not violate the state Constitution.

In light of all the relevant circumstances, we affirm the trial court's ruling that no purposeful racial discrimination occurred in the peremptory challenges of black jurors in this case. This ruling was supported by the trial court's findings of fact, which in turn were supported by the record. It is not enough for defendant to raise the mere possibility of discrimination. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 528 (1985), *quoted in Hernandez*, --- U.S. at ---, 114 L. Ed. 2d at 412.

This assignment of error is overruled.

B.

**[3]** Defendant contends the trial court erred in denying his motions to dismiss at the close of the State's evidence and again at the close of all the evidence the charges of first-degree sexual offense and first-degree felony murder because the evidence was as a matter of law insufficient to establish each element of those offenses. For the reasons discussed below, we disagree.

A defendant's motion for dismissal is properly denied if the trial court determines there is substantial evidence of (1) each element of the charge or of a lesser included offense and of (2) defendant's being the perpetrator. *State v. Mercer*, 317 N.C. 87, 96, 343 S.E.2d 885, 890 (1986). If the evidence is sufficient merely to raise a suspicion or conjecture as to any element of the offense, even if the suspicion is strong, the motion to dismiss should be allowed. *Id.* The evidence is to be examined in the light most favorable to the State. "The trial court's function is to test whether a *reasonable inference* of the defendant's guilt of the crime charged may be drawn from the evidence." *Id.* at 97, 343 S.E.2d at 891. The constitutional minimum standard required for due process is whether "*any* rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573 (1979), *quoted in State v. Earnhardt*, 307 N.C. 62, 66-67 n.1, 296 S.E.2d 649, 652 n.1 (1982).

A first-degree sexual offense as defined in N.C.G.S. § 14-27.4 includes a sexual act "[w]ith another person by force and against the will of the other person, and . . . employ[ing] or display[ing] a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon." The term "by force" does not necessarily mean physical force, but also means fear, fright, or duress. *State v. Locklear*, 304 N.C. 534, 284 S.E.2d 500 (1981). The term "against the will" requires that the offense be committed without the victim's consent, and a lack of consent is an essential element of sexual offense where the victim is an adult and not physically or mentally handicapped. *State v. Booher*, 305 N.C. 554, 290 S.E.2d 561 (1982). The term "sexual act" is defined in N.C.G.S. § 14-27.1(4) as "cunnilingus, fellatio, analingus, or anal intercourse," or "the penetration, however slight, by any object into the genital or anal opening of another person's body." Bites to the breast do not fall within this definition.

According to the State's evidence, the victim was alive when her breasts were bitten but probably was dead when the telephone was inserted in her vagina. Dr. Page Hudson, who examined the victim's body in his role as Chief Medical Examiner for North Carolina, testified that in his opinion, "it was somewhat more probable that she was dead than alive" when the telephone was inserted in her vagina. Dr. Hudson said he could not be certain whether she was dead or alive at that time, "but to me the medical aspects of the evidence were a little more for her being dead at the time she received that."

In the case *sub judice* it is unnecessary for us to decide whether the evidence was sufficient to allow a reasonable inference that the victim was alive when the sexual offense as defined in our statutes was committed. Because the sexual act was committed during a continuous transaction that began when the victim was alive, we conclude the evidence was sufficient to support defendant's conviction for first-degree sexual offense. This Court, on numerous occasions, has held that to support convictions for a felony offense and related felony murder, all that is required is that the elements of the underlying offense and the murder occur

in a time frame that can be perceived as a single transaction. This principle is well illustrated by the case of *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985), which the trial court below specifically relied upon in ruling on the nonsuit motion. In *Fields*, this Court set forth the test:

> A killing is committed in the perpetration or attempted perpetration of a felony for purposes of the felony-murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction.

*Id.* at 197, 337 S.E.2d at 522 (quoting *State v. Hutchins*, 303 N.C. 321, 345, 279 S.E.2d 788, 803 (1981)).

Defendant in *Fields* stated that he took the murder victim's shotgun only as an afterthought and after the victim was dead. He argued that his intent to steal only arose after the killing and that a corpse is incapable of possessing personal property. In rejecting this, this Court stated:

> To accept defendant's argument would be to say that the use of force that leaves its victim alive to be dispossessed falls under N.C.G.S. 14-87, whereas the use of force that leaves him dead puts the robbery beyond the statute's reach. That the victim is already dead when his possessions are taken has not previously been an impediment in this jurisdiction to the defendant's conviction for armed robbery. *See, e.g., State v. Webb*, 309 N.C. 549, 308 S.E. 2d 252 (1983). All that is required is that the elements of armed robbery occur under circumstances and in a time frame that can be perceived as a single transaction. When, as here, the death and the taking are so connected as to form a continuous chain of events, a taking from the body of the dead victim is a taking "from the person." *See* 67 Am. Jur. 2d *Robbery* § 14 at 65 (1985).

*Id.* at 201-02, 337 S.E.2d at 524-25 (footnotes omitted).

This Court has for many years applied the same doctrine to sexual offense and murder occurring in a continuous chain of events. In *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), we upheld defendant's conviction for first-degree murder committed during the perpetration of sexual offense—repeatedly forcing a mop handle into a woman's

vagina after beating her, resulting in her death. We held as follows: "It is immaterial whether the felony occurred prior to or immediately after the killing so long as it is part of a series of incidents which form one continuous transaction." *Id.* at 67, 301 S.E.2d at 348.

Because there is sufficient evidence to support the inference that the victim here was strangled and subjected to a sexual offense within an uninterrupted period of time, and because breast bite marks were inflicted, according to Dr. Hudson, prior to her death, and because of the overwhelming fiber evidence obtained from the victim's body, an inference arises that her death occurred pursuant to a continuous sexual assault. While the first-degree sexual offense (the insertion of the receiver into her vagina) could have occurred before or after the victim's death, clearly, it occurred near the time of the victim's final demise during a continuous transaction.

The precise timing of the insertion of the telephone receiver into the victim's vagina is irrelevant if it occurred during a continuous transaction. All of the evidence clearly suggests that the sexual offense and the death of the victim were "so connected as to form a continuous chain of events." *Fields*, 315 N.C. at 202, 337 S.E.2d at 525.

In the case of *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980), which defendant cites, defendant was charged with armed robbery, first-degree rape, and first-degree murder in the perpetration of first-degree rape. Although this Court found, under the facts of that case, that there was a sufficient break in the causal chain to justify the dismissal of the armed robbery charge, the Court sustained the felony murder based on the first-degree rape. This holding was based on evidence from the autopsy which showed that the bruises to the victim's vagina occurred within a half hour or within a few minutes *after her death*. Thus, *Powell* held that defendant's motion to dismiss the charge of first-degree murder (relying on the rape) was properly denied. *Id.*

In summary, defendant's motion to dismiss here was properly denied in that there was sufficient evidence that the sexual offense for which defendant was convicted was committed in conjunction with the murder as part of a continuous chain of events, forming one continuous transaction.

For the same reasons as stated above, the trial court also properly denied defendant's motion to dismiss the charge of first-degree felony murder.

C.

**[4]** Defendant contends he is entitled to a new trial because the trial court erroneously admitted nontestimonial evidence—samples of defendant's blood, hair, saliva, fingernails, and molds of his teeth, lips, and fingernails—taken by police without a search warrant. Because defendant testified under direct examination that he was at the scene of the crime and also testified that he sustained a bleeding wound to his arm, we conclude that any error in admitting evidence of his blood sample was harmless beyond a reasonable doubt.

The day following defendant's arrest, Superior Court Judge Donald W. Stephens granted a request by the prosecutor for a nontestimonial identification order providing that defendant, who was in police custody, be taken to the state's Chief Medical Examiner for identification procedures. The medical examiner took samples of defendant's head and pubic hair, blood, saliva, and fingernails. The examiner also made molds of defendant's teeth, lips, and fingernails, and took photographs of defendant's mouth and teeth.

Before trial, defense counsel moved to suppress the evidence on grounds that the state and federal constitutions require police to obtain a search warrant based on probable cause before taking blood and other personal identification samples of a defendant already in custody. Superior Court Judge Donald L. Smith denied the motion, relying on the "good-faith exception" recognized in *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986). Judge Smith questioned the application of that exception, however, because *Welch* involved police reliance on a search warrant requiring probable cause, while the instant case involved police reliance on a nontestimonial identification order requiring a lesser standard of belief than probable cause.

Thereafter, the prosecutor obtained a search warrant authorizing the Chief Medical Examiner's office to obtain the same personal identification evidence from defendant again. Defendant resisted service of that warrant and for reasons not revealed in the record, the warrant was never executed. The prosecutor therefore relied on the nontestimonial identification order when he introduced the evidence at trial.

During direct examination in the guilt phase of his trial, defendant testified that he had visited the victim in her room the night of her death. He testified that he injected heroin and sustained a bleeding wound to his arm, to which he applied a small piece of tissue paper from the victim's bathroom. He further testified that he blacked out and later awoke to discover the victim was dead.

In *State v. Carter*, 322 N.C. 709, 724, 370 S.E.2d 553, 562 (1988), this Court held that there is no good-faith exception under the state constitution to the requirement that a search warrant be obtained before a blood sample may be taken from a defendant. The Court in *Carter* noted that taking a sample of blood is a particularly intrusive search, and that a defendant's blood type is constant and therefore not susceptible to spoilage or dissipation over the passage of time. With respect to the taking of defendant's blood, this case involves the same procedural error identified in *Carter*—police acted in reliance upon a nontestimonial identification order when a warrant was required. Because this error violated defendant's constitutional rights, he is entitled to relief unless we determine the error was harmless beyond a reasonable doubt.

Unlike defendant in *Carter*, defendant here has admitted to being at the crime scene. He testified that he passed out during an argument with the victim and awoke to find her dead. He also admitted leaving traces of his blood in her room. In light of this and other evidence incriminating defendant in the victim's death, the trial court's error in admitting evidence obtained under the nontestimonial identification order was harmless beyond a reasonable doubt.

The trial court committed no error in admitting evidence of defendant's fingernails, pubic hair, teeth, saliva, and lips, because that evidence was properly obtained while defendant was in police custody. *State v. Irick*, 291 N.C. 480, 490, 231 S.E.2d 833, 840 (1977).

D.

**[5]** The next assignment of error presents defendant's contention that he was denied his Sixth Amendment right to effective assistance of counsel when defense counsel, without defendant's consent, conceded to the jury that defendant had committed second-degree murder and had completed at least one element of the sexual offense.

The test for ineffective assistance of counsel is the same under both the federal and state Constitutions. *State v. Braswell*, 312

N.C. 553, 324 S.E.2d 241 (1985). A defendant is entitled to relief if he can show both (1) that his counsel's performance fell below an objective standard of reasonableness, and (2) that his counsel's deficient representation was so serious as to deprive him of a fair trial.

During arguments to the jury, defense counsel, apparently as a matter of trial strategy, conceded that defendant was guilty of second-degree murder and that defendant had inserted the telephone receiver into the victim's vagina. Defense counsel stated to the trial court at a bench conference that defendant had authorized the admission of guilt to second-degree murder. Defendant on appeal denies he consented. After oral arguments were heard on this appeal, we ordered this case be remanded to the Superior Court, Wake County, for an evidentiary hearing to determine whether defendant in fact consented. *State v. Thomas*, 327 N.C. 630, 397 S.E.2d 79 (1990).

Following a hearing at the 28 January 1991 Criminal Session of Wake County Superior Court, the Honorable Narley L. Cashwell entered an order concluding as a matter of law that defendant freely, voluntarily, intelligently, and understandingly consented to his counsel's plan to admit his guilt of second-degree murder. The order also concluded as a matter of law that defendant did not consent to defense counsel's admission that he had committed a sexual act upon the victim's body. The order concluded ultimately, however, that in light of evidence that the victim was dead when assaulted and defense counsel's argument that therefore no sexual offense occurred, the admission did not concede defendant's guilt to the sexual offense charge and thus did not deprive defendant of a fair trial on that charge.

Judge Cashwell included in his order several detailed findings of fact, including the following: On a number of occasions, and with great frequency in the days immediately before the trial, defense counsel discussed with defendant the possible strategy of conceding guilt to second-degree murder, and conceding guilt to a sexual act after the victim was dead, but arguing that because the victim was dead when the sexual act occurred, defendant did not commit a sexual offense. One of two defense attorneys, co-counsel Johnny Gaskins, recommended this strategy to defendant, while lead counsel C. Dick Heidgerd advised against it. Defendant

agreed with Gaskins' strategy orally and signed a paper writing, prepared by both attorneys, to establish a record of his consent as follows:

> I, James Edward Thomas, authorize my attorneys, C.D. Heidgerd and Johnny S. Gaskins, to admit to the jury that I killed Teresa Anne West with malice but without premeditation and deliberation. My attorneys may ask the jury to convict me of second degree murder.
>
> I have talked with my attorneys about admitting to the jury that I am guilty of second degree murder and I understand the consequences.

The paper writing was dated 6 July 1987, the day defendant's trial began. After the writing was signed, jury selection began.

In *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), we held that ineffective assistance of counsel, in violation of the defendant's Sixth Amendment right to counsel, was established where defense counsel, without the defendant's consent, admitted the defendant's guilt, and recommended that jurors convict him of manslaughter rather than first-degree murder or find him not guilty. In that case, however, the State did not contest the defendant's assertion that he had not consented to his attorney's admission.

Here, the trial court has found on supporting evidence that defendant consented orally and in writing to counsel's strategy to admit his guilt to a charge of second-degree murder. Nothing in the record contradicts that finding. That finding supports the trial court's conclusion that defendant knowingly consented to the admission of his guilt on the second-degree murder charge.

The trial court also concluded that defense counsel never conceded defendant's guilt of a sexual offense. This conclusion was based on evidence in the trial record that the victim was likely dead when the sexual act occurred and defense counsel's argument that his client could not have committed a sexual offense against a corpse. For the following reasons, we agree with the trial court's conclusion.

In his closing argument to the jury regarding the sexual offense charge, defense counsel Johnny Gaskins made the following statements:

> Don't let me mislead you to think that I in any way condone what occurred in the relationship in respect to the sexual assault. . . .
>
> Again, let me tell you that I don't in any way condone what James Thomas did in that respect . . . .
>
> In fact, it is illegal to do exactly what Dr. Hudson described to you was done in this case, that is, to insert the telephone receiver into her vagina after she was dead. . . . It is the crime of . . . desecrating the body of the person that is dead.

Mr. Gaskins also stated clearly to jurors that the State had not charged defendant with the offense of desecrating a corpse.

In arguing to the jury about the felony murder rule, Mr. Gaskins also anticipated the continuous transaction doctrine, which we cited above in holding that the evidence supports defendant's conviction of first-degree sexual offense and felony murder. Mr. Gaskins argued as follows:

> In order to prove that James Thomas is guilty of First Degree Murder on [the felony murder] theory, the State must prove that he was—he was there with the intent to commit a felony which was inherently dangerous to human life.
>
> Not that he killed her and that he then committed some felony, . . . but that he was there for the purpose of committing the felony, and that during the commission of the felony that Teresa West was killed. . . .
>
> If you find that James Thomas was there, exactly as he says, and that in response to what Teresa West said . . . he suddenly started strangling her and he killed her, and . . . after having strangled her that he then committed a sexual offense, then you have two separate things . . . .
>
> If those things occurred they occurred after she was dead *and are not so interrelated so as to bring this case within the Felony Murder Rule.* . . .
>
> I submit to you that the State has not proven that the felony and that the murder was [sic] so interrelated as to take this case out of the realm of Second Degree Murder.

Following defense counsel's argument, the prosecutor argued that jurors could infer from the evidence that all of defendant's actions in the victim's room comprised a single, continuous chain of events sufficiently linking the strangulation and the sexual act to support convictions for sexual offense and felony murder. The prosecutor disputed defense counsel's argument that no such factual inference could be drawn from the evidence. The trial court's instructions to jurors addressed this disputed issue of fact:

> [I]t makes no difference whether the intent to commit . . . a sexual offense was formulated before the use of force or after it, *so long as the elements of . . . sexual offense occur under circumstances and in a time frame that you find to be a single transaction.*
>
> *That is, that the death and the . . . sexual offense was [sic] so connected as to form a continuous chain of events.*

The trial court did not instruct jurors that defense counsel's concession about defendant committing the sexual act constituted an admission of guilt to the sex offense charge.

For jurors to convict defendant under the trial court's instructions, they had to reject defense counsel's view of the facts. Unlike defense counsel in *Harbison*, who admitted his client's guilt and asked the jury to return a verdict of guilty of manslaughter, a lesser included offense on which defendant could have been convicted, defense counsel here did not admit defendant's guilt to first-degree sexual offense or to any lesser included offense. Rather, defense counsel held the State to its burden of proof on one element of the sexual offense charge: the issue of a continuous chain of events beginning while the victim was alive.

Because defense counsel did not admit defendant's guilt to the sexual offense of which he stood accused, defendant was not deprived of a fair trial. This assignment of error is overruled.

E.

**[6]** Defendant finally assigns error to the trial court's refusal to instruct jurors that defendant could not be found guilty of sexual offense if he committed the sexual act merely as an afterthought to killing the victim. For the following reasons, we find no reversible error.

Before the trial court instructed the jury, defendant requested the trial court to give an instruction that to find defendant guilty of sexual offense, jurors first had to find the victim was alive when sexually assaulted. The requested instruction stated:

> A crucial element of the crime of sexual offense is that a sex act must have been done against the person's will. The purpose of the law is to protect persons from physical abuse. The law cannot protect a person from physical abuse who is not alive.
>
> As such, the State must prove to you beyond a reasonable doubt that the victim was alive at the time of the sexual act in order to prove that the crime was against the person's will. If you do not so find that the victim was alive, then James Edward Thomas would only be guilty of desecrating the human remains of the victim.

The trial court instead instructed jurors, as quoted in our discussion of the immediately preceding assignment of error, that to convict defendant of sexual offense, they had to find that the killing and sexual act occurred "under circumstances and in a time frame that you find to be a single transaction." The trial court also required jurors to find that the death and sexual offense were "so connected as to form a continuous chain of events." Defendant objected to this instruction, arguing that the continuous transaction doctrine did not apply in sexual assault cases. The trial court overruled that objection.

"If a party requests an instruction which is a correct statement of the law and is supported by the evidence, the court must give the instruction at least in substance." *State v. Fullwood*, 323 N.C. 371, 390, 373 S.E.2d 518, 529 (1988) (citation omitted). "It need not give the instruction exactly as the party requests, however." *Id.*

Defendant's requested instruction was not a correct statement of North Carolina law. The legislature has not written into statute, nor has this Court ever ruled that to support a conviction for sexual offense, the State must prove that the victim was alive at the time of the sexual act. Additionally, this Court has previously applied the continuous transaction doctrine to a sequence of sexual offense and murder. *State v. Williams*, 308 N.C. 47, 67, 301 S.E.2d 335, 348, discussed earlier in this opinion, upheld defendant's conviction for felony murder during the commission of a sexual offense

without regard to whether the death or sexual offense occurred first. Under that decision, defendant's requested instruction here was erroneous and therefore the trial court properly rejected it. This assignment of error is overruled.

## III. SENTENCING PHASE

We now turn to capital sentencing issues.

**[7]** At the sentencing proceeding the trial court submitted nine mitigating circumstances for the jury's consideration. The jury unanimously found three of these circumstances to exist but failed to find six others, including the statutory mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired. N.C.G.S. § 15A-2000(f)(6) (1988 & Cum. Supp. 1990).

The trial court instructed the jury to find any mitigating circumstances unanimously and to reject those not unanimously found to exist. 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, 395 S.E.2d 106 (1990).

Defendant testified in his sentencing proceeding about his habitual abuse of drugs including LSD, cocaine, and heroin. Defendant began using drugs at age twelve, when he smoked marijuana belonging to his stepfather. At age 14 he was taking barbiturates and LSD. Defendant moved out on his own while still a teenager and lived in a "drug house" where people bought and used drugs. By age 20 defendant had fathered two children and robbed a fast food restaurant to pay a debt for cocaine. Defendant's father, James Mangum, testified that defendant lived with him just before moving to the Tourist Home and was smoking marijuana at that time.

When defendant lived at the Tourist Home, he fell in love with Sandy Jordan and promised to quit using drugs. On 13 June 1987, the night of the murder, defendant broke that promise and injected heroin into his arm at the Tourist Home, according to his testimony. That testimony was corroborated by a piece of tissue paper with defendant's blood on it found in the victim's room. Defendant testified that after injecting the drug in the victim's

room he became disoriented and blacked out, awaking later to find the victim dead.

Defendant's testimony could support a reasonable inference that defendant was under the influence of heroin 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. We cannot say beyond a reasonable doubt that absent the unanimity instruction no juror could have found the existence of this mitigating circumstance, 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 improper instructions on this mitigating circumstance were prejudicial because the circumstance is statutory and, therefore, deemed to have mitigating value. *State v. Quesinberry*, 328 N.C. 288, 293, 401 S.E.2d 632, 634 (1991); *State v. Pinch*, 306 N.C. 1, 27, 292 S.E.2d 203, 224 (1982).

We therefore vacate the sentence of death and remand to Superior Court, Wake County, for a new sentencing proceeding in the first-degree murder case.

For the reasons stated above, we find no error in the sexual offense case and remand the murder case to the Superior Court, Wake County, for a new sentencing proceeding not inconsistent with this opinion or the opinion of the United States Supreme Court in *McKoy*.

First-Degree Murder 86CRS043829—No error in guilt determination. New sentencing proceeding.

First-Degree Sexual Offense 86CRS044695—No error.

Justice MEYER did not participate in the decision of this case.

CHAMPS CONVENIENCE STORES, INC. AND COMMERCIAL UNION INSURANCE COMPANY v. UNITED CHEMICAL COMPANY, INC.

No. 350A90

(Filed 14 August 1991)

1. **Sales § 22 (NCI3d)— ordinary negligence or product liability negligence—contributory negligence applicable**

Whether this action is one based on ordinary negligence or a products liability action based on a theory of negligence, contributory negligence is applicable as a defense. N.C.G.S. § 99B-4(1) and (3) merely codify the doctrine of contributory negligence in products liability actions.

**Am Jur 2d, Products Liability §§ 908, 931.**

2. **Sales § 22.2 (NCI3d)— products liability action—contributory negligence—proposed instruction incorrect**

The trial court did not err in failing to give defendant's proposed instruction on contributory negligence in a products liability action where the proposed instruction did not correctly state the law of contributory negligence in such an action because it failed to instruct the jury on the requirement that the instructions or warnings on the product must be adequate and failed to instruct the jury that it is to consider whether plaintiff exercised reasonable care even though failing to read the instructions or warnings. Furthermore, whether the action was one based on ordinary negligence or was a products liability action based on negligence, the instructions given by the court accurately reflected the law of contributory negligence as applicable to this case. N.C.G.S. § 99B-4(1).

**Am Jur 2d, Products Liability § 945.**

3. **Sales § 22.2 (NCI3d)— failure to read label and instructions—no contributory negligence as matter of law**

The evidence did not disclose contributory negligence as a matter of law by the manager of plaintiff's store in failing to read the label on a product delivered by defendant before mopping it onto the floor of plaintiff's store but presented a question for the jury on that issue where it tended to show that plaintiff's manager ordered Dust Command, a dust control cleaner, from defendant by telephone; during their telephone

conversation, defendant's employee gave plaintiff's manager correct instructions for Dust Command; when the product arrived, plaintiff's manager checked the invoice which indicated that she was receiving Dust Command; the product actually delivered by defendant was Carbo-Solv, a carburetor cleaner; the product arrived in a five-gallon container as defendant's employee had described over the telephone; plaintiff's manager admitted that she did not look at the label on the container or read the instructions before applying the product; and plaintiff's manager further admitted that had she read the instructions she would not have applied the product. Whether plaintiff's manager could reasonably rely on the instructions given over the telephone and on the invoice was a jury question.

**Am Jur 2d, Products Liability §§ 928, 962.**

**4. Witnesses § 8 (NCI3d)— cross-examination—term used on direct examination**

Where a witness testified on direct examination by defendant that plaintiff did not have a license to operate a meat market but continued to operate a meat market in a store it bought as an existing facility, plaintiff was properly allowed to inquire about this testimony on cross-examination in order to have the witness explain what he meant when he referred to operation of the meat market as an "existing facility."

**Am Jur 2d, Witnesses §§ 464 et seq.**

**5. Actions and Proceedings § 13 (NCI4th); Damages § 41 (NCI4th)— lost profits—absence of business license**

Plaintiff was not prevented from recovering lost profits from the operation of a meat market in its grocery store which was closed as a result of defendant's negligence even though no license to operate the meat market was ever issued in plaintiff's name, since the failure to obtain a business license is not a valid defense to a tort action. Therefore, plaintiff was not required to separate profits derived from the operation of the meat market from profits derived from the operation of the rest of the grocery store in order to prove the lost profits with reasonable certainty.

**Am Jur 2d, Products Liability § 970.**

6. **Damages § 41 (NCI4th) — note payments as damages — no double recovery**

Although note payments made by plaintiff while its grocery store was closed as a result of defendant's negligence were not specifically denominated as "note payments" under the expense column of plaintiff's income statement when computing lost profits, plaintiff's recovery of the note payments as a separate item of damages did not constitute a double recovery where amortization and depreciation expenses for goodwill and equipment which were deducted as expenses in arriving at lost profits reflected the component parts of the note payments.

**Am Jur 2d, Products Liability § 970.**

7. **Damages § 41 (NCI4th) — tort action — overhead expenses as damages**

Reasonable overhead expenses for rent and note payments made by plaintiff while its grocery store was closed for repairs as a result of defendant's negligence could be recovered as damages by plaintiff along with its lost profits in its tort action against defendant.

**Am Jur 2d, Products Liability § 970.**

8. **Damages § 161 (NCI4th) — mitigation of damages — failure to give requested instruction — no error**

The trial court did not err in failing to give defendant's requested instruction on mitigation of damages where the substance of the requested instruction was given when the court charged the jury that "the law allows plaintiff to be compensated for a reasonable period of time that Miller's Grocery needed to be closed to make necessary repairs."

**Am Jur 2d, Products Liability § 970.**

Justice MEYER concurring.

ON appeal and writ of certiorari to review the decision of a divided panel of the Court of Appeals, 99 N.C. App. 275, 392 S.E.2d 761 (1990), both reversing an order entered by *Lamm, J.*, on 6 February 1989 in the Superior Court, BUNCOMBE County, denying defendant's motion for a directed verdict and remanding the case for entry of a directed verdict for defendant. Heard in the Supreme Court 11 March 1991.

*Roberts Stevens & Cogburn, P.A., by Isaac N. Northup, Jr., for plaintiff-appellants and -appellees.*

*Morris, Bell & Morris, by William C. Morris, III, for defendant-appellant and -appellee.*

FRYE, Justice.

In this appeal we consider whether the Court of Appeals erred in determining that this action is a products liability action and thus covered by the provisions of N.C.G.S. § 99B and in determining that plaintiff's employee, under the facts of this case, was contributorily negligent as a matter of law. Defendant also raises five issues on cross-appeal dealing with jury instructions and the amount of damages awarded plaintiff. We conclude that the jury instructions given in this case make it unnecessary to decide whether the provisions of § 99B, more specifically the defenses found in § 99B-4, apply to the facts of this case, and we further conclude that the Court of Appeals erred in its determination that plaintiff's employee was contributorily negligent as a matter of law. We also conclude that none of the issues raised by defendant on cross-appeal have any merit.

Plaintiff Champs Convenience Stores, Inc., operated a small grocery store called Miller's Grocery. Plaintiff purchased Miller's Grocery on 8 May 1987 and in July 1987 hired Marta Sprinkle to manage the operation of the store. In August 1987, Sprinkle told Jim Hanvey, the president of plaintiff corporation, that she was having trouble keeping dust off the merchandise in the store. Hanvey told her to call defendant United Chemicals Company, Inc.

When Sprinkle called defendant on 31 August 1987, she spoke with an employee, Bill Robinson, and told him that she needed something to put on the wood floors of the grocery store to control the dust. According to Sprinkle's testimony at trial, "I told him that my bossman said it was 'dust-something or other,' and that was all I knew." Robinson, after inquiring if she was calling from Miller's Grocery, told her that defendant had sold a product known as Dust Command to the previous owners. Sprinkle asked Robinson what size container it came in, and he replied that it came in both one-gallon and five-gallon containers. Robinson, after asking when the product had last been applied, suggested that Sprinkle purchase a five-gallon container.

Sprinkle asked Robinson how to apply the Dust Command. He told her that she would have to close the store to put it down, but she could put it down after the store closed that evening, and the store could be reopened the next morning as usual. He also told her that she needed to apply the product with old mops because she would have to throw the mops away after using them to apply the product. When Sprinkle asked if she needed a special bucket to use, Robinson replied that she could just open the container the product came in and apply it directly from that container. He also suggested that she not wring out the mops because she should not get the product on her hands.

About thirty minutes after Sprinkle called defendant, a delivery person arrived at Miller's Grocery with a five-gallon black bucket. The delivery person told Sprinkle that he was from United Chemical and that he had brought the Dust Command she ordered. Sprinkle asked him to put it down in the corner so that it would not be in the way of the customers, and she asked him a question about the product. The delivery person looked at the bucket and told her that he could not answer her question. He then gave her the invoice; she looked at the invoice, signed it, and paid him. The invoice, presented as an exhibit at trial, listed the product delivered as Dust Command.

After closing the store at the usual time that evening, Sprinkle and Steve Creaseman, another employee of the store, began to apply the product which had been delivered that day. Sprinkle admitted at trial that she never read the label of the product which was delivered and did not know that the product she was using was actually Carbo-Solv which defendant had mistakenly delivered in place of the Dust Command Sprinkle had ordered. Sprinkle did not read the directions and warnings on the label until she was asked to read the label during a deposition. During the deposition, she also admitted that she would not have applied the Carbo-Solv to the floor of the grocery store if she had known what it was.

As Sprinkle and Creaseman were applying the contents of the bucket, they noticed that it had a strong, unpleasant odor, and they commented to each other about the odor but continued to apply the product. When she arrived the next morning to open the store, Sprinkle noticed that the unpleasant odor was still present in the store. The other workers and the customers at the

store complained about the odor. Several customers who purchased food from the grocery store that day returned the food because it contained the same odor as the store, and they did not want to eat it. The next day, 2 September 1987, the store was closed, and the North Carolina Department of Agriculture issued an embargo for the contents of the store, which meant that the merchandise in the store could not be sold or moved until the matter was resolved. About one-half of the contents of the store were salvageable, and the remaining merchandise had to be thrown away because it was unsafe for consumption as a result of the exposure to the fumes from the Carbo-Solv. Plaintiff began the process of cleaning up the store so that it could be reopened, and this clean up continued until the store was sold in July 1988.

Plaintiff filed a complaint on 10 December 1987 alleging that defendant negligently delivered a toxic chemical, Carbo-Solv, to plaintiff and represented to plaintiff that the product was suitable for cleaning the floors of Miller's Grocery. A jury trial was held in Buncombe County Superior Court beginning on 17 January 1989, and the case was tried as a negligence action. At trial, in addition to the evidence already discussed above, plaintiff presented evidence of damages in the form of lost profits during the clean up period and ongoing expenses incurred by Miller's Grocery while the store was closed for the clean up. Three issues were submitted to the jury, and the jury, finding that defendant was negligent and plaintiff's employee was not contributorily negligent, awarded plaintiff $148,000 in damages. Judgment was entered on 19 January 1989 and was filed on 23 January 1989. On 24 January 1989, defendant moved for judgment notwithstanding the verdict and alternatively for a new trial. Both of these motions were denied, and defendant filed notice of appeal on 31 January 1989.

The Court of Appeals reversed the judgment of the trial court, reversed the denial of defendant's motion for directed verdict, and remanded the case for entry of a directed verdict in favor of defendant. *Champs Convenience Stores, Inc. v. United Chemical Co., Inc.*, 99 N.C. App. 275, 392 S.E.2d 761 (1990). Plaintiff gave notice of appeal to this Court based on the dissent of Judge Lewis. Defendant also filed with this Court a petition for writ of certiorari as to additional issues raised at the Court of Appeals but not addressed by the Court of Appeals in its opinion because of its decision in favor of defendant. On 8 November 1990, this Court granted defendant's petition for review of these additional issues.

Although not briefed by the parties, plaintiff raised the issue during oral argument as to whether the Court of Appeals correctly concluded that this was a products liability action. However, we find that a decision on this issue is not necessary to the resolution of this appeal. The first issue is more properly framed as whether the jury instructions given by the trial judge on contributory negligence were accurate. Defendant contends that the instructions should reflect the defense codified in the Products Liability Act at N.C.G.S. § 99B-4(1). We conclude that even if this action is a products liability action, the instructions which the trial court gave in essence reflect the defense found in § 99B-4(1). Thus, it is unnecessary to determine if § 99B applies to this action.

**[1]** Section 99B-4 provides in part:

> No manufacturer or seller shall be held liable in any product liability action if:
>
> (1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; . . .
>
> . . . .
>
> (3) The claimant failed to exercise reasonable care under the circumstances in his use of the product, and such failure was a proximate cause of the occurrence that caused the injury or damage to the claimant.

N.C.G.S. § 99B-4 (1989). This Court has previously addressed the issue of whether the General Assembly, in enacting § 99B, adopted the doctrine of strict liability in products liability actions in this State, and we concluded that § 99B was not a strict liability statute. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 678, 268 S.E.2d 504, 510 (1980) (cause of action arose before § 99B took effect). Thus, whether this action is one based on ordinary negligence, as the trial court determined, or a products liability action based on a theory of negligence, as the Court of Appeals determined, contributory negligence is still applicable as a defense. *Id.* at 672, 268 S.E.2d at 506. Section 99B-4(1) and (3) merely codify the doctrine of contributory negligence as it applies in actions brought under

§ 99B. *See id.* at 678, 268 S.E.2d at 510 (concluding that § 99B-4(3) is a codification of contributory negligence in a products liability action), and *Lee v. Crest Chemical Co.*, 583 F. Supp. 131 (M.D.N.C. 1984) (concluding that § 99B-4(1) is a codification of contributory negligence in a products liability action). In addition to codifying the general doctrine of contributory negligence, § 99B-4 sets out or explains more specialized fact patterns which would amount to contributory negligence in a products liability action.

**[2]** Defendant requested that the following instruction on contributory negligence be given:

> On this issue, the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, that the damage suffered by the plaintiffs was a proximate result of the negligence of the plaintiff Champs Convenience Stores, Inc.
>
> Members of the jury, you will note that I have just used the terms "negligence" and "proximate cause." These terms have the same legal meanings as I have previously given you with respect to the first issue. The law imposes a duty upon the plaintiff Champs Convenience Stores, Inc. to use ordinary care to protect itself, as well as others, from injury. A breach of that duty is called negligence and a breach occurs when a party fails to use ordinary care to protect itself and others from injury.
>
> Ordinary care means that duty of care which a reasonable and prudent person or party would use under the same or similar circumstances.
>
> Therefore, if you should find from the evidence, and by its greater weight, that the plaintiff Champs Convenience Stores, Inc. failed to read the label on the product Carbo-Solv and failed to note the directions as to its use and the warnings printed thereon and that such failure or failures were a proximate cause of any damage which the plaintiffs sustained, if any they did sustain, then and in that event, you would answer this issue "yes" in favor of the defendant. If you do not so find, you would answer this issue "no."

Defendant contends in its cross-appeal that the trial court should have given these instructions because they correctly state the defenses contained in § 99B-4. More specifically, defendant claims

that the law in this matter, based on § 99B-4(1), is that failure to read and take heed of information provided with a product is a bar to the plaintiff's recovery if this failure was the proximate cause of the damage. We conclude that defendant's proposed jury instruction does not fully state the law in that it fails to instruct the jury on the requirement that the instructions or warnings on the product must be adequate and it fails to instruct the jury that it is to consider whether plaintiff exercised reasonable care even though failing to read the instructions or warnings. *See* N.C.G.S. § 99B-4(1) (1989) (if "the use . . . was contrary to any express and *adequate* instructions or warnings . . . if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings") (emphasis added). Therefore, if the instructions themselves were not adequate or if the plaintiff did not read the instructions but the jury determined that plaintiff still exercised reasonable care, the jury should not find contributory negligence on the part of plaintiff. Thus, defendant's proposed instruction did not correctly state the law on contributory negligence in a products liability action.

The trial judge gave the following instruction on the issue of contributory negligence:

> On this issue the burden of proof is on the defendant, meaning that the defendant must prove, by the greater weight of the evidence, that the plaintiffs' manager was negligent and that such negligence was a proximate cause of plaintiffs' own property damage. The test of what is negligence, as I have already defined and explained it, is the same for a plaintiff as for a defendant, and when the plaintiffs' employee's negligence concurs with the negligence of the defendant in proximately causing the plaintiffs' property damage, it is called contributory negligence. If the plaintiffs' employee's negligence was a proximate cause of and therefore contributed to plaintiffs' property damage, plaintiffs cannot recover. In this case the defendant contends and the plaintiffs deny that the manager of Miller's Grocery was negligent in that she failed to read the label on the product that was delivered before applying it to the floor. The defendant further contends and the plaintiffs deny that her negligence was a proximate cause of and contributed to the plaintiffs' damage. I instruct you that contributory negligence is not to be presumed from the mere fact of injury or damage.

> Finally as to this contributory negligence issue on which the defendant has the burden of proof, if you find, by the greater weight of the evidence, that at the time in question the manager of Miller's Grocery was negligent in the way which I have just explained to you, and that such negligence was a proximate cause of and contributed to the plaintiffs' damage, then it would be your duty to answer this issue "yes" in favor of the defendant. On the other hand, if, considering all of the evidence, you fail to find such negligence or proximate cause, then it would be your duty to answer this issue "no" in favor of the plaintiffs.

We conclude that the instruction which the trial judge gave regarding plaintiff's employee's contributory negligence more correctly states the law of contributory negligence than defendant's proposed instruction whether the action is an ordinary negligence action or whether it is a products liability action based on negligence. Contributory negligence has been defined as

> the breach of the duty of the plaintiff to exercise due care for his own safety in respect of the occurrence about which he complains, and if his failure to exercise due care for his own safety is one of the proximate contributing causes of his injury, it will bar recovery.

*Holderfield v. Rummage Brothers Trucking Co.*, 232 N.C. 623, 625, 61 S.E.2d 904, 906 (1950). The instruction which was given accurately reflects the law of contributory negligence as defined above. The instruction explained to the jury that defendant contended that Sprinkle's failure to read the label before she applied the product amounted to contributory negligence and that this contributory negligence was the proximate cause of the plaintiff's damage. Furthermore, this instruction accurately reflected the codified version of contributory negligence as found in § 99B-4(1).[1]

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1. We note that the jury instruction on contributory negligence does not mention whether the instructions or warnings on the container were "adequate" as is mentioned in § 99B-4(1). Defendant does not raise this issue, and the instruction submitted by defendant did not instruct the jury to address whether the instructions or warnings on the container were adequate. However, the failure to instruct the jury as to whether these instructions or warnings were adequate would work in the defendant's favor since the defendant would be responsible for providing adequate instructions or warnings on the container and the jury was not told to focus on this responsibility; the jury was only instructed to focus on the contributory negligence of plaintiff's employee.

Therefore, whether the action was one based on ordinary negligence or was a products liability action based on negligence, the instructions which were given to the jury accurately reflect the law of contributory negligence as applicable to this case.

**[3]** Plaintiff next raises the issue of whether the Court of Appeals erred in concluding that plaintiff was contributorily negligent as a matter of law and remanding the case for the imposition of a directed verdict in favor of defendant. The issue of contributory negligence is ordinarily a question for the jury rather than an issue to be decided as a matter of law. *See Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 395 S.E.2d 112 (1990). Contributory negligence was submitted to the jury, and the jury found for the plaintiff on this issue. We conclude that under the evidence in this case the issue of contributory negligence is for the jury in that there are questions of fact to be decided, and we reverse the Court of Appeals' holding to the contrary.

The testimony in this case was that Sprinkle asked Robinson, defendant's employee, for instructions on how to use the Dust Command she had just ordered. During their telephone conversation, Robinson gave Sprinkle the correct instructions for the use of Dust Command. When the product arrived, Sprinkle checked the invoice which indicated that she was receiving Dust Command. Sprinkle was not familiar with Dust Command, but the product which arrived was in a five-gallon container, just as Robinson had described to her over the telephone. Sprinkle admitted that she did not look at the label on the container before she began applying the product and did not read the instructions. She further admitted that had she read the instructions she would not have applied the product. Nevertheless, we conclude that the evidence was insufficient to require the court to find contributory negligence as a matter of law. It was for the jury to decide whether Sprinkle's failure to read the label on the product amounted to contributory negligence in light of the fact that defendant delivered the wrong product, that Robinson had given her complete instructions on the use of Dust Command during their telephone conversation, and that the invoice indicated that the product delivered was Dust Command. Whether Sprinkle could reasonably rely on the instructions given over the telephone and on the invoice is a jury question, and the trial court properly submitted the question to the jury. The jury having answered this question in favor of the plaintiff, the trial court did not err in entering judgment on the verdict

or in denying defendant's motion for judgment notwithstanding the verdict. Thus, we reverse the Court of Appeals' holding to the contrary.

Defendant's next issue concerns the testimony of Stephen Bradley who was employed by the Buncombe County Health Department which had jurisdiction over the meat markets in Buncombe County such as the market operating at Miller's Grocery. Bradley, who was called by defendant, testified on direct examination that plaintiff did not have a license to operate a meat market. Bradley further testified on direct examination that after plaintiff bought Miller's Grocery the meat market located in the store continued to operate as an existing facility. On cross-examination, plaintiff asked Bradley:

> Q. Now, as an existing facility, isn't it true that, in your opinion, Miller's Grocery was able to continue operating as a meat market because, even though Mr. Hanvey was now operating it, it remained an existing facility?
>
> MR. MORRIS, III: Objection. That's not the law, your honor.
>
> COURT: Overruled
>
> Q. Isn't that correct?
>
> A. As far as I understand it, it was an existing facility and it would be allowed to continue to operate uninterrupted as long as it was in operation.

Defendant contends that this testimony on cross-examination was improper because it allowed "Bradley to relate to the jury his misinterpretation of the meat market rules." Defendant further claims that since the meat market was operating without a license as required by the rules governing the sanitation of meat markets, the meat market was an illegal operation and plaintiff could not recover any lost profits from its operation, which according to Hanvey's testimony was what made Miller's Grocery profitable.

**[4]** The general rule is that where one party introduces evidence on direct examination, the other party is allowed to ask questions about that evidence on cross-examination to explain or rebut the testimony. *Highfill v. Parrish*, 247 N.C. 389, 100 S.E.2d 840 (1957). The original testimony about Miller's Grocery operating as an existing facility without a license to operate a meat market came during direct examination by defendant. Thus, plaintiff is allowed

to inquire about this testimony on cross-examination in order to have the witness explain what he meant during direct examination when he referred to Miller's Grocery as an existing facility even though plaintiff did not have a license issued in its name. Thus, it was not error to allow this testimony on cross-examination.

**[5]** Defendant also contends that the trial court should not have allowed evidence of plaintiff's lost profits because they were not proven with reasonable certainty. Defendant bases this argument on its contention that plaintiff could not recover the lost profits based on what the meat market would have brought in because the meat market was operating illegally since it did not have the proper license. Defendant claims that the evidence presented on the issue of lost profits did not provide the jury with a means of distinguishing between the profits derived from the operation of the meat market and the profits derived from the operation of the rest of the grocery store. We conclude that the fact that plaintiff did not have a license to operate the meat market does not mean that it cannot collect lost profits from the meat market operation, and therefore plaintiff was not required to separate the profits derived from the operation of the meat market from the profits derived from the operation of the rest of the grocery store in order to prove the lost profits with reasonable certainty.

While we find no North Carolina case which has directly addressed the issue of whether the failure to obtain a business license is a defense to a tort action, other jurisdictions have addressed this specific question. The majority rule is that the failure to obtain a business license is not a valid defense to a tort action. Annot. "Failure to Obtain Occupational or Business License or Permit as Defense to Tort Action," 13 A.L.R.2d 157 (1949). The lead case for this annotation is *Mueller v. Burchfield*, 359 Mo. 876, 224 S.W.2d 87 (1949), which involved a tort action based on fraud. Plaintiffs in *Mueller* purchased eggs from defendant who represented to plaintiff that the eggs were fresh and marketable. Plaintiffs were purchasing the eggs for resale; however, the eggs were not fresh, and plaintiffs lost money when they tried to resell the eggs. *Mueller v. Burchfield*, 359 Mo. at 878, 224 S.W.2d at 87. Defendant raised as a defense the fact that plaintiffs did not have a state license required for selling, dealing, or trading in eggs. *Id.* at 878, 224 S.W.2d at 88.

Plaintiffs in *Mueller* won a verdict at the trial court level, but the Court of Appeals reversed the judgment for plaintiffs. *Mueller v. Burchfield*, 218 S.W.2d 180 (Mo. App. 1949). The Missouri Supreme Court reversed the Court of Appeals because it had applied an incorrect rule of law. The Court of Appeals had applied a rule of contract law which states that " 'it is incumbent on a person whose right to recover on a contract is dependent on his having been licensed to plead and prove' that he complied with the requirements of the license laws." *Mueller v. Burchfield*, 359 Mo. at 878, 224 S.W.2d at 88. The Missouri Supreme Court, noting that the action before them was a tort action and not a contract action, concluded that the rule of contracts should not be applied in a tort action. *Id.* According to the court, the reason for denying relief where the plaintiff does not have the proper license in a contract action is because the court will not aid a person in enforcing a contract which he had no right to make. However, in a tort action, that reasoning "is not justified or for the public good." *Id.* at 879, 224 S.W.2d at 88. The court goes on to set out the general rule as "a defendant is not permitted in a tort action to say he is not liable because the plaintiff at the time the injury was inflicted was performing an illegal act." *Id.*

While there is authority contrary to the rule stated in *Mueller*, *see Sherman v. Fall River Iron Works, Co.*, 87 Mass. (5 Allen) 213 (1862) (plaintiff owned livery stable in violation of the law and could not recover damages for an injury to his business caused by the escape of gas through the ground and into his well water), we conclude that the majority rule is more appropriate in the present situation, and we apply it in this case. In the instant case, Bradley testified that plaintiff had been allowed to continue selling meat from Miller's Grocery as an existing facility even though plaintiff did not have a license issued in its name to sell meat at the market. Furthermore, this lack of a license had no bearing upon the loss plaintiff suffered as a result of what the jury found to be negligence on the part of defendant.

In support of its argument that plaintiff should not be allowed to recover lost profits since plaintiff did not have a license to operate the meat market, defendant cites *Gibbs v. United Mine Workers*, 343 F.2d 609 (6th Cir.), *rev'd on other grounds*, 383 U.S. 715, 16 L. Ed. 2d 218 (1966). However, *Gibbs*, which was an action for impairment of contract and involved lost profits on a hauling contract, did not involve a situation where plaintiff needed a license

to operate the hauling business. Rather, it was a situation where to fulfill the contract, plaintiff would have to violate the axle weight limits set out in the statutes. *Id.* at 618. Thus, *Gibbs* is not analogous to the present case.

While, as mentioned above, we find no North Carolina cases which have answered this issue, we do find support for the majority rule in dicta found in *Patterson v. Southern Railway Co.*, 214 N.C. 38, 198 S.E. 364 (1938). In *Patterson* plaintiff sued for recovery of damages to his business of hauling gasoline and kerosene. *Id.* at 39, 198 S.E. at 365. The defense to this action was that plaintiff was engaged in an illegal business and that there should be no recovery as a result. This Court concluded that under the facts of *Patterson*, plaintiff's recovery was not barred. The Court pointed out that plaintiff's hauling operation did not require a privilege license and even if it had required a license, defendants would have had no stronger defense because

> the trend of authority on this subject is to the effect that when a person engages in a business without procuring a license which the State requires for the privilege, he incurs the penalties which the statutes pertaining to the license provide, and none other. The matter rests between him and the licensing authorities, and the fact that the business is carried on without license is ordinarily not available as a defense by a third party in a suit growing out of liability incurred in the course of the business, or in relation thereto.

*Id.* at 45, 198 S.E. at 368 (citing 31 C.J., page 259, section 137).

We conclude that the rationale of the majority rule, as stated in the annotation and as set out in *Patterson* is applicable to the present situation, and plaintiff is not prevented from recovering lost profits from the operation of the meat market even though no license to operate the meat market was ever issued in plaintiff's name. Since plaintiff is allowed to recover lost profits from the operation of the meat market, defendant's argument that the damages were not proven with reasonable certainty has no basis, and the trial court did not err in allowing the figures reflecting the lost profits from the entire operation of Miller's Grocery, including but not specifying what profits were attributable to the operation of the meat market, into evidence at trial.

Defendant's next issue on cross-appeal is whether the trial court erred in refusing to give defendant's requested instruction that plaintiff's note and rent payments made during the clean up operation could not be claimed as damages. Defendant contends that allowing plaintiff to recover the note payments is essentially allowing plaintiff a double recovery in that these payments were not deducted from revenues when computing lost profits. Defendant claims that the note payments should have been deducted as expenses in computing lost profits and that allowing plaintiff to not deduct the payments as an expense and then allowing plaintiff to recover the amount as a separate element of damages is a double recovery. Defendant further claims that the note and rent payments are not collectable as separate items of damage in this action because they are classified as overhead which, according to defendant, is not an item of damage in a tort case.

**[6]** We first address defendant's contention that the note payments were not properly deducted as expenses when computing the lost profits. We note that the rent payments were clearly denominated as "rent" on the expenses portion of the income statement, which was introduced as evidence at trial, and these payments were deducted as expenses when computing lost profits. Defendant is correct that the income statement did not include a specific category denominated as "note payments" under the expense column. However, Michael Smith, the certified public accountant who prepared the income statement at issue here and who testified at trial as an expert for plaintiff, gave a complete explanation during his testimony as to why the note payments were not deducted as an expense. During cross-examination, the following exchange took place between Smith and defendant's counsel:

> Q. Why do you say that the portion of the note payments that's attributable to the principal, why is that not a proper expense?
>
> A. Because it's reducing the note itself, and that note has been allocated between some of the items that you mentioned[:] good will, the purchase of inventory, the purchase of equipment. And so the good will is being amortized over a sixty-month period, the depreciation is being amortized—the equipment is being depreciated over a seven-year straight-line method, which in effect you wind up getting a deduction for those note repayments because you've

> got a corresponding liability at the time that the business was acquired.

Smith had already testified that he used generally accepted accounting procedures when he performed the tasks required for preparing the reports presented at trial, which would include the income statement. Smith further testified that both amortization expenses which were for the amortization of good will and depreciation expenses for the equipment cost acquired when the business was purchased were deducted as expenses from the gross profits along with the other expenses in arriving at the net income figure which was used to compute lost profits. Thus, we conclude, as Smith testified at trial, that the amortization and depreciation expenses which were deducted as expenses in arriving at lost profits reflect the component parts of the note payments, and therefore there was no double recovery as asserted by defendant.

**[7]** In addition to claiming that plaintiff is receiving a double recovery by being allowed to collect for the rent and note payments made while the building was being repaired, defendant contends that note payments and rent payments are indirect costs of doing business, or overhead, and that overhead can be an element of damages in a contract case but not in a tort case. Defendant claims to have found no North Carolina cases allowing overhead as an item of damage in a tort case.

In a tort action the general rule in North Carolina is that a plaintiff is "entitled to recover an amount sufficient to compensate . . . for all pecuniary losses sustained . . . which are the natural and probable result of the wrongful act and which . . . are shown with reasonable certainty by the evidence." *Huff v. Thornton*, 287 N.C. 1, 8, 213 S.E.2d 198, 204 (1975) (plaintiffs allowed to recover for damage to their home as well as for loss of use of their home while it was under repair from the damage sustained when defendants' trucks struck the residence). The focus of recovery of damages in a tort action is whether the consequences were the natural and probable result of the wrong which is different from the focus in contract actions which is whether the consequences were within the legal contemplation of the parties. *Steffan v. Meiselman*, 223 N.C. 154, 25 S.E.2d 626 (1943). Thus, the scope of the recovery of damages in a tort action is more liberal than recovery in a contract action. *Id.*

While we, as defendant indicated, find no cases in North Carolina which specifically address the issue of whether overhead can be an item of damage in a tort case, we also find no authority which indicates that plaintiff is not entitled to recover as damages reasonable overhead expenses such as the amount spent for rent of the building and the amount paid on the mortgage while the building was under repair and plaintiff was not able to operate the business. As a result of defendant's negligence in sending the Carbo-Solv rather than the Dust Command, plaintiff was unable to operate the business to bring in the money necessary to pay these items yet these expenses accrued despite plaintiff's inability to operate the business. We conclude that these expenses were the natural and probable result of defendant's negligence and can be recovered along with plaintiff's lost profits. As noted earlier, this does not amount to a double recovery.

**[8]** Defendant's final issue on cross-appeal is whether the trial court erroneously refused to instruct the jury as defendant requested on mitigation of damages. Defendant requested the following instruction:

> Ladies and gentlemen of the jury, the Court charges you that a party injured by the negligence of another is required to use ordinary care to see that his injury is cured and that his damages are eliminated or ended as soon as reasonably possible under existing circumstances. He must use reasonable effort to keep the harmful consequences of his injury to a minimum if he can do so by reasonable diligence. A party is not permitted to recover for damages that he could have avoided by using a means that a reasonably prudent person would have used to cure his injury and alleviate his damages.

The trial judge gave the following instruction: "The law allows the plaintiff to be compensated for a reasonable period of time that Miller's Grocery needed to be closed to make necessary repairs." The trial judge "is not required to charge the jury in the precise language of the request so long as the substance of the request is included in the language." *King v. Higgins*, 272 N.C. 267, 270, 158 S.E.2d 67, 69 (1967) (per curiam). We conclude that the trial judge did not err in failing to give defendant's proposed instruction on mitigation of damages in that the trial judge in substance gave the proposed instruction.

For the reasons stated above, we reverse the Court of Appeals and remand the case to that court for further remand to the trial court for reinstatement of the judgment in favor of plaintiff.

Reversed and remanded.

Justice MEYER concurring.

While I concur in the final result reached by the majority, I disagree with its reasoning in reaching that decision. The case at bar is not a product liability action and was correctly tried as an ordinary negligence action. Defendant failed in his duty to deliver the proper product about which he had given instruction as to its use, and this alone, not a defect in the product, resulted in damage to plaintiff.

N.C.G.S. § 99B-2(a) of the North Carolina Products Liability Act states as follows:

> No product liability action, except for an action for breach of express warranty, shall be commenced or maintained against any seller when the product was acquired and sold by the seller in a sealed container or when the product was acquired and sold by the seller under circumstances in which the seller was afforded no reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the *existence of the condition complained of*, unless the seller damaged or mishandled the product while in his possession; provided, that the provisions of this section shall not apply if the manufacturer of the product is not subject to the jurisdiction of the courts of this State or if such manufacturer has been judicially declared insolvent.

N.C.G.S. § 99B-2(a) (1989) (emphasis added).

N.C.G.S. § 1-50(6) provides the statute of repose for actions to which chapter 99B applies. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982). This section provides that:

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged *defect* or any *failure* in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

N.C.G.S. § 1-50(6) (1983) (emphasis added).

When these two statutes are read *in pari materia*, it becomes clear that the intention of the legislature in enacting chapter 99B was to protect buyers of *defective* products. Since "condition" is not defined in N.C.G.S. § 99B-2(a), it is necessary to interpret the legislative meaning by referring to related statutes. Section 1-50(6) refers to a defect in the product itself or the product's failing in its specific purpose. Using the language of N.C.G.S. § 1-50(6) to analyze the meaning of the words "existence of conditions complained of" in N.C.G.S. § 99B-2(a), it becomes apparent that the "condition" must be a "defect or failure in relation to a product" for a product liability action to be brought under chapter 99B. In the case *sub judice*, the product itself was neither defective nor did it fail in its purpose. Rather, the defendant's delivery of the wrong product was the cause of the harm to the plaintiff.

The defendant instructed the manager of the plaintiff's store on the use of the product "Dust Command," which would help remove dust from the plaintiff's premises. However, upon promise to deliver "Dust Command," the defendant negligently delivered "Carbo Solv," a carburetor cleaner. When the plaintiff's manager received the misdelivered product, she followed the directions given by the defendant as to the use of the requested dust control cleaner. The plaintiff suffered damages as a result of the delivery of the carburetor cleaner. Because there was no statutorily required defective "condition" of the carburetor cleaner that caused the damages, no product liability action should have been allowed.

Admittedly, N.C.G.S. § 99B-1(3) defines a product liability action as including

> any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, *selling*, advertising, packaging or labeling of any product.

N.C.G.S. § 99B-1(3) (1989) (emphasis added).

Although the act of "selling" may provide a cause of action under chapter 99B, this act does not automatically make it a product liability claim. "It is well settled . . . that in interpreting the meaning of a statute, all parts of a single statute will be read and construed as a whole to carry out the legislative intent." *Martin*

*v. Thornburg*, 320 N.C. 533, 547, 359 S.E.2d 472, 480 (1987). Reading the above-quoted statutes together, it is clear that in order to have a cause of action under chapter 99B, there must be a "defective" product. The action before us is simply not a "product liability action." It is an ordinary negligence action, and it was correctly tried as such in the trial division.

Prior to the enactment of chapter 99B, this Court recognized the principle that the product must be defective in order to sustain a cause of action. This Court stated that, " '[t]he necessity of proving defectiveness of the product applies no matter what theory governs the particular action.' " *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 243, 210 S.E.2d 181, 186 (1974) (quoting 63 Am. Jur. 2d, *Product Liability* § 9 (1972)). The Court of Appeals has also held that for a plaintiff to recover damages, he must show a defect in the product. *Sutton v. Major Products Co.*, 91 N.C. App. 610, 372 S.E.2d 897 (1988). In *Sutton*, the plaintiff failed to show that a "potato whitener" was *defective* when it left the defendant's plant, and the Court of Appeals affirmed summary judgment in favor of the defendant.

This case was correctly tried as an ordinary negligence action, and it is for that reason I vote to remand this case to the trial court for reinstatement of its judgment.

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STATE OF NORTH CAROLINA v. JONATHAN LOUIS CRAWFORD

No. 443A89

(Filed 14 August 1991)

**1. Criminal Law § 50.1 (NCI3d) — expert testimony — voluntariness of water consumption**

Testimony by an expert in pediatric critical care medicine that the amount of water consumed by the victim would not voluntarily be taken by a six-year-old boy was a proper subject matter for an expert opinion. N.C.G.S. § 8C-1, Rule 702.

**Am Jur 2d, Homicide § 398.**

**2. Criminal Law § 50.1 (NCI3d)— expert testimony on ultimate issue**

Testimony by an expert witness was not inadmissible because it encompassed the ultimate issue to be decided by the trier of fact. N.C.G.S. § 8C-1, Rule 704.

**Am Jur 2d, Homicide § 398.**

**3. Criminal Law § 50.1 (NCI3d)— expert testimony—voluntariness of water consumption—victim threatened or coerced**

Expert opinion testimony that the six-year-old victim would not "voluntarily" drink the quantity of water which he consumed and that the victim was "threatened" or "coerced" did not contain legal terms of art not readily apparent to the witness so as to render the testimony inadmissible, since the common, everyday meanings of those terms are consistent with the legal definitions. Furthermore, the admission of the expert testimony was not prejudicial to defendant where defendant admitted at trial that he coerced the child victim to drink the water to "flush out his system."

**Am Jur 2d, Homicide § 398.**

**4. Homicide § 25.1 (NCI3d)— murder by torture—instruction on malice not required**

The trial court did not err in not specifically instructing upon malice as a prerequisite to a finding of murder by torture since the commission of torture implies the requisite malice, and a separate showing of malice is not necessary.

**Am Jur 2d, Homicide §§ 267, 269, 500.**

**5. Homicide § 21.6 (NCI3d)— first degree murder by torture—sufficiency of evidence of torture**

The State presented adequate evidence of torture to support defendant's conviction of the first degree murder of his girlfriend's six-year-old child by torture where the evidence tended to show that the child died as a result of water intoxication after defendant had coerced him to drink large quantities of water; the jury could infer an intent to cause the child grievous pain from defendant's pattern of using extraordinary disciplinary methods to punish and humiliate the child for disobeying rules; expert testimony was presented that the child's stomach was distended to accommodate large quantities

of water and that this is very painful; evidence showed that the child vomited dozens of times as he was urged to drink more and more water; other testimony indicated that the fluid that filled the child's lungs would have created a sensation similar to suffocation and that the swelling of his brain resulting from the ingestion of water created a tremendous headache, which culminated in a scream followed by blindness; and there was adequate evidence for the jury to find that defendant's acts in this instance were for the purpose of punishment.

**Am Jur 2d, Homicide § 85.**

**What constitutes murder by torture. 83 ALR3d 1222.**

**6. Criminal Law § 21.5 (NCI3d)— first degree murder—sufficient evidence of premeditation and deliberation**

The evidence was sufficient to support the trial judge's instructions on first degree murder with premeditation and deliberation where it tended to show that the six-year-old son of defendant's girlfriend died as a result of water intoxication after he was coerced by defendant to drink large quantities of water; previous ill will by defendant toward the child victim was shown through testimony of defendant's pattern of extraordinary disciplinary procedures intended to oppress and humiliate the victim; the manner of killing, which involved the painful ingestion of large quantities of water over a period of two to three hours, indicates a particularly brutal method of killing; and evidence indicated that the victim suffered from bruises to his head and buttocks possibly inflicted during this same period of time.

**Am Jur 2d, Homicide §§ 85, 433, 438, 439.**

**7. Homicide § 25.1 (NCI3d)— first degree murder by torture—instruction defining torture**

The trial court's instruction that torture is "the course of conduct by one or more persons which intentionally inflicts grievous pain and suffering upon another . . . " adequately defined torture for purposes of first degree murder. The instruction was not deficient in failing to require that the pain be inflicted for pain's sake or for the torturer's own sake.

**Am Jur 2d, Homicide §§ 48, 499.**

**8. Homicide § 4.1 (NCI3d)— murder by torture—statute not unconstitutionally vague**

In light of the common understanding of what defines torture, the murder by torture statute is not unconstitutionally vague and puts a reasonable person on notice of what is forbidden. N.C.G.S. § 14-17.

**Am Jur 2d, Homicide § 48.**

**9. Criminal Law § 33.2 (NCI3d)— murder of child by torture—grandmother's advice to mother—irrelevancy**

In a prosecution of defendant for the murder by torture of his girlfriend's six-year-old son by coercing him to drink large quantities of water over a short period of time, testimony that the child's grandmother told the mother to watch the child and give him plenty of fluids was irrelevant and inadmissible to support defendant's defense that he was administering a "home remedy" and was not punishing the child where there was no evidence that the mother conveyed this advice to defendant.

**Am Jur 2d, Homicide § 270.**

**10. Criminal Law § 34.7 (NCI3d)— murder by torture—prior disciplinary acts—competency to show intent, motive, common plan, absence of accident**

In a prosecution of defendant for first degree murder by torture of his girlfriend's six-year-old son by coercing the child to drink large quantities of water as a punishment for disobeying a rule, evidence describing prior extraordinary disciplinary techniques carried out by defendant against the child during the year preceding the child's death was properly admitted for the limited purpose of showing intent, motive, common plan and absence of mistake or accident. Furthermore, the trial court did not abuse its discretion in admitting this evidence as being more probative than prejudicial. N.C.G.S. § 8C-1, Rules 403, 404(b).

**Am Jur 2d, Homicide §§ 298, 316.**

**11. Homicide § 25.2 (NCI3d)— premeditation and deliberation—inference from manner of killing—instruction supported by evidence**

The trial court did not err in instructing the jury that premeditation and deliberation could be inferred from the means

or manner of the killing where there was evidence that defendant coerced the six-year-old victim to drink water until he died, despite observing the child's repeated vomiting and complaints of headaches, since this evidence was ample to support premeditation and deliberation through circumstantial evidence of the means or manner of the killing.

**Am Jur 2d, Homicide § 501.**

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Hight, J.*, at the 24 April 1989 Criminal Session of Superior Court, ALAMANCE County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 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 Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.*

MEYER, Justice.

In 1988, six-year-old Christopher West lived with his mother, Angela West, his younger brother, Shaun, and his sister, Sara, in a Burlington apartment. Defendant, Angela West's boyfriend, moved in with them in September of that year. On 1 October 1988, Christopher awoke early and broke a house rule by taking food from the kitchen without permission. The State produced evidence at trial that showed defendant had developed a pattern of using extraordinary disciplinary methods intended to punish and humiliate Christopher for disobeying rules. On the following day, Christopher awoke with a minor rash, which defendant attributed to sherbet Christopher had eaten. Defendant attempted to "flush out [Christopher's] system" by coercing him to drink large quantities of water over the next two to three hours. Christopher complained, but defendant continued to coerce him to drink. Finally, the water intake caused Christopher to scream, convulse, and lose his eyesight. After being taken to the hospital unconscious, where he was diagnosed as suffering from water intoxication, Christopher was pronounced brain dead and was removed from a respirator the next day. A jury found defendant guilty of first-degree murder and of felony child abuse. After a sentencing hearing and upon its finding of no aggravating circumstances, the jury recommended

a sentence of life imprisonment. The trial court sentenced defendant to life imprisonment for first-degree murder and arrested judgment on the conviction for felony child abuse. We find no error.

The State's evidence tended to show the following. In the spring of 1987, defendant and Angela West met through a mutual friend and, by the summer, were dating regularly. After defendant left his job in February 1988, he spent more time with Angela West and soon began to fill the role of disciplinarian of the children as well.

The State introduced testimony describing a number of incidents involving extraordinary disciplinary methods to show by circumstantial evidence an absence of mistake and an intent by defendant to punish Christopher on 2 October 1988. Defendant testified that certain of his disciplinary techniques were inappropriate but contends that they were done in good faith, and in any event, he agreed to stop using inappropriate disciplinary measures after meeting with an investigator from the Department of Social Services (DSS) in May of 1988.

Testimony as to defendant's disciplinary techniques was as follows. In the late winter of 1988, at Angela West's request, defendant punished Christopher for allegedly starting a fire in nearby woods. Defendant affixed a sign around Christopher's neck which read, "I sat [sic] the woods on fire, and I lied to my mama." Christopher was required to stand outside with the sign around his neck for between ten and twenty minutes and to recite aloud the words on the sign. When Christopher would try to go back into the apartment, defendant would push him back outside.

Defendant testified to paddling the children on the soles of their feet in order to conceal bruising, to giving the children cold showers "to cool them down" when "they were in an excited state," to putting hot sauce on their tongues, and to washing their mouths out with soap. The latter two disciplinary methods were to prevent "lying and cussing." Other testimony indicated that Christopher had such a physical reaction to the soap used that his mouth "puffed up."

Additionally, a neighbor testified that in the late spring or early summer of 1988, she saw Christopher wearing a diaper, carrying a baby bottle, and crying. When asked at the time why

Christopher was wearing a diaper, defendant responded that "he was being punished, because he was a sissy."

One of Angela West's friends, who visited the apartment frequently, testified that she saw Christopher disciplined on more than one occasion by being required to stand in the corner. When Christopher cried, defendant would taunt him by saying, "Look at the baby. Chris is a little baby."

Another witness testified that defendant asked her if she had ever seen anyone drink hot sauce before. Christopher cried and screamed in fright when defendant said this; then, as the visitor left, she heard Christopher screaming, crying, and saying it was "hot" as defendant poured the hot sauce into a glass. Another witness testified that defendant had told her that Christopher learned from humiliation.

Defendant's extraordinary punishment procedures were not limited to Christopher. Evidence presented at trial indicated that Sara had been forced to sleep in a urine-soaked bed, which was "his way of teaching [her] not to wet the bed," and in another instance, defendant put Sara's urine-soaked underwear on her head. When these instances of punishment occurred, Sara was two or three years old. Finally, a witness testified that in the summer of 1988, defendant forced Shaun to stand with his face up against a tree in the park. A school counselor testified that defendant told her that he was on a "mission" to help Angela West with disciplinary problems. Defendant denies that he made such a statement.

DSS began an investigation of the West family on 9 May 1988. A DSS investigator visited the West home, where defendant stated that Christopher was a bully and needed discipline. Defendant related a number of his disciplinary methods to the investigator, who reported defendant to the police. He was arrested in June for misdemeanor child abuse of the West children. However, on 2 August 1988, those charges were dismissed.

West entered a service agreement on 16 May 1988 with DSS. The agreement in this instance provided that defendant would have no contact with any of the West children. The agreement expired in August 1988 and was not renewed. Defendant was asked to submit to a mental health evaluation, due to the misdemeanor child abuse charges against him, but did not do so on the advice

of his attorney. Christopher, however, was examined by a pediatrician, who found no indication of mental instability or mental illness.

Defendant moved in with the West family in September while still unemployed and looked after Christopher's brother Shaun. Shaun had been removed from kindergarten, defendant contends, to prevent him from being expelled. There were at least two meetings at approximately that same time with DSS in which the agency continued to press, to no avail, for removal of the children from the home.

On 1 October 1988, while Angela West was at work and defendant was home alone with the three children, defendant discovered that biscuits were missing from the kitchen and confronted Shaun and Christopher about breaking the house rule that forbade them from going downstairs to the kitchen before an adult was awake to accompany them. Shaun admitted breaking the rule and implicated Christopher. Defendant spanked the boys on the buttocks and required them to stand in the corner. When Angela West returned home, the children were still standing in the corner, having been spanked a second time for not standing quietly. At that time, West and defendant noted a mild rash or reddish mark on Christopher's forehead and face. West restricted the boys to their room for the day.

The next morning, defendant awoke late. After following defendant downstairs, Shaun told defendant that Christopher had vomited during the night at least twice. Defendant noted that Christopher's rash was worse. Upon learning that Christopher had eaten sherbet on the previous morning, defendant concluded that Christopher had food poisoning. West wanted to take Christopher to the hospital, but defendant convinced her otherwise. Defendant testified that he was afraid to take Christopher to the hospital for fear that he would be accused of child abuse, and the children would be taken away.

Defendant suggested to West that the best course to take would be to "flush out [Christopher's] system." Defendant urged Christopher to drink large quantities of water. Christopher vomited dozens of times on the couch, in the bathroom, and in a bucket placed nearby. Nonetheless, defendant continued to ply him with water, despite Christopher's complaining of a headache and of sleepiness. In all, during this treatment Christopher ingested a large quantity of water (defendant testified on one occasion three

pitchers and on another to four or five quarts; one physician testified "a little bit more than four quarts"; and another physician estimated "eight to nine quarts"). Finally, Christopher screamed loudly. His eyes widened, and he began convulsing. He fell to the floor and exclaimed that he could not see.

Angela West ran next door to a phone, and a neighbor called for an ambulance. Defendant took Christopher to the hospital, although an ambulance arrived within minutes after his departure. A witness testified that defendant stopped for several minutes at an intersection on the way to the hospital.

At the hospital, Christopher experienced two more seizures, his condition deteriorated, and he was transferred to Duke University Medical Center. The next day, Christopher was pronounced brain dead and was disconnected from a respirator. Although not the cause of death, an autopsy revealed recent bruising to Christopher's head, thigh, and buttocks, some of which, an expert testified, were not of the type that result from normal childhood activity. When police officers searched the West apartment, they found, on the coffee table in the living room near where Christopher drank the water, among other things, a half-filled pitcher of water, a bottle of hydrogen peroxide, a bottle of "Safety Bowl, non-acid restroom and bowl cleaner," and an empty bottle of Lysol toilet bowl cleaner.

The defense introduced evidence to show an absence of intent to harm Christopher.

On cross-examination of a pathologist called by the State, defendant elicited testimony that death by water intoxication is a rare cause of death. The doctor testified that this was the first case of water intoxication with which he had direct experience.

Defendant testified in his own behalf that after he met with DSS, he agreed to stop using the disciplinary measures that DSS considered inappropriate. Defendant further testified that the sherbet that Christopher had eaten had been in the freezer for several weeks. He thought that Christopher's rash and slight fever were a result of food poisoning caused by the sherbet and that was why he told Christopher to drink water. Defendant stated that Christopher only drank three pitchers of water and that when Christopher appeared to have a convulsion, he immediately took him to the hospital. He explained that he stopped his vehicle on

the side of the road on the way to the hospital to check for Christopher's pulse and to buckle seat belts on both of them. Defendant testified that the purpose of giving Christopher the water was not to punish him but rather was a "mistaken effort to treat him."

A Burlington pediatrician testified that he had examined the West children in May of 1988 and had found no evidence that they were physically abused.

The case was tried as a capital case, and the jury returned a verdict finding defendant guilty of felony child abuse and of first-degree murder by means of torture and by premeditation and deliberation. Following a sentencing proceeding, the jury declined to find the only aggravating circumstance submitted, that the murder was especially heinous, atrocious, or cruel. The trial court sentenced defendant to life imprisonment for first-degree murder and arrested judgment on the conviction for felony child abuse.

The State's theories on both the charges of felony child abuse and of first-degree murder by means of torture and by premeditation and deliberation were that defendant forced Christopher to consume the large quantity of water to punish and ultimately kill Christopher for having eaten sherbet without permission. The defense contended that defendant forced Christopher to drink the water to "flush out his system," and therefore Christopher's death was an accident or, at most, involuntary manslaughter. Consequently, an ultimate issue in the case was defendant's intent to torture and kill Christopher.

As alternative theories, defendant contends that there was insufficient evidence presented of premeditation and deliberation and of murder by torture and that the trial court's instructions on murder by torture were inadequate.

I.

As defendant's first assignment of error, he contends that the trial court erred in allowing certain expert testimony by a witness qualified as an expert in pediatric critical care medicine. The State responds by noting that the testimony was relevant to show the nature of the injury that caused Christopher's death. The allegedly improper testimony is as follows:

> Q. Doctor Boyd, based on the history you obtained, your examination of Christopher West, and his course while in the

hospital at Duke University Medical Center, do you have an opinion whether Christopher's condition on arrival at Duke University Medical Center was the result of an intentional physical injury?

[DEFENSE ATTORNEY]: OBJECTION.

COURT: OVERRULED

A. I do.

Q. What is that opinion?

A. It's my opinion, based on the factors you mentioned in the question, and on my knowledge of the amount of water that would be necessary to cause the serum sodium to get to that level, and on my knowledge of the normal behavioral activities of a six year old boy, that this amount of water would not be voluntarily taken by a six year old, and, therefore, would be forced upon him in some manner, of threat, or coercion, or something of that nature.

Defendant argues, first, that "there was an insufficient foundation for the doctor's testimony" or, in effect, that the evidence was an improper subject matter for expert opinion; second, that it encompassed the ultimate issue of the case; and third, that it was testimony which "utilized several legal terms and concepts."

**[1]** As to the allegation that the doctor's opinion lacked a proper foundation and was an improper subject matter for expert opinion, defendant contends that expert testimony as to the "normal behavioral activities of a six year old boy" was not helpful to the jury because such knowledge is based on common experience, and expert opinion testimony was unnecessary to assist the jury. In considering the adequacy of the subject matter for the expert's testimony here, we note a statutory provision directly on point. It 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 (1988). The qualification of a witness as an expert is normally left to the sound discretion of the trial

judge. *State v. Combs*, 200 N.C. 671, 158 S.E. 252 (1931). The subject matter of the expert testimony must merely be such that it would be helpful to the fact finder. Our Court of Appeals has noted that:

> "It seems abundantly clear that, despite occasional technical roadblocks erected by the 'rule' against invading the jury's province and by notions about the jury's sublime capacity to draw its own inferences, there can be expert testimony upon practically any facet of human knowledge and experience." Stansbury's N. C. Evidence, Subject Matter of Expert Testimony, § 134, p. 438.

*State v. Raines*, 29 N.C. App. 303, 307, 224 S.E.2d 232, 234, *disc. rev. denied*, 290 N.C. 311, 225 S.E.2d 832 (1976); *see generally* 1 Brandis on North Carolina Evidence § 134 (3d ed. 1988). Here, the witness, qualified as an expert in pediatric critical care medicine, could relate the sensations that a six-year-old boy would feel after drinking such a large quantity of water, which, under normal conditions, would have signaled him to stop drinking. We hold that the trial court did not err in allowing the expert's testimony.

**[2]** As to defendant's contention that the testimony encompassed the ultimate issue to be decided by the trier of fact, we first note the provisions of the applicable evidentiary rule. Rule 704 provides that "[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 (1988). Consistent with the language of the statute, we have previously held that an expert's testimony may embrace the ultimate issue to be decided by the trier of fact. *State v. Shank*, 322 N.C. 243, 249, 367 S.E.2d 639, 643 (1988) (expert testimony "as to whether a defendant had the capacity to make and carry out plans, or was under the influence of mental or emotional disturbance . . . relates to an ultimate issue to be decided by the trier of fact" and should have been admitted). However, the Court has held that expert testimony as to a " 'legal conclusion . . . [is inadmissible] at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness.' " *State v. Rose*, 323 N.C. 455, 459, 373 S.E.2d 426, 429 (1988) (quoting *State v. Smith*, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985) ). Having determined that the testimony relating to the ultimate issue is not objectionable, we now address defendant's contention that the expert's testimony "utilized several legal terms and concepts" to

determine if the testimony contained legal terms of art not readily apparent to the witness.

**[3]** Defendant makes essentially two arguments. First, he contends that the fact that Christopher could not "voluntarily" drink this quantity of water is the same as a finding that the defendant was legally responsible for Christopher drinking the water and therefore legally responsible for Christopher's death. Second, defendant argues that testimony that Christopher was "threatened" or "coerced" is an opinion that a legal standard had been met. We disagree. The terms "voluntary," "threatened," and "coerced" have no specific technical legal meanings as they were used here and are not "words of art" as are such terms as "premeditation and deliberation" or "proximate cause." *Rose*, 323 N.C. at 460, 373 S.E.2d at 429 ("Premeditation and deliberation are legal terms of art."); *State v. Ledford*, 315 N.C. 599, 617, 340 S.E.2d 309, 321 (1986) ("proximate cause" is a legal term of art); *see also State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). In this case, the common, everyday meaning of the terms is consistent with the legal definition. Moreover, we note again that defendant admits that he coerced Christopher to drink the water, intending to make him throw up. Expert testimony as to whether Christopher's acts were "voluntary," "threatened," or "coerced" only confirms what defendant admits, that is, that he coerced Christopher to drink. The testimony in question was properly admitted here.

We note further that the defendant, at trial and in his brief to this Court, admitted that he coerced Christopher to drink the water to "flush out his system." Therefore, even assuming, *arguendo*, that the admission of the expert's testimony was error, there is no reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988).

II.

**[4]** Defendant next contends that the trial court erred in not specifically instructing upon malice as a prerequisite to a finding of murder by torture. Moreover, defendant argues that, even if malice were not required, the evidence did not show that defendant caused Christopher great pain. Defendant also contends that there was inadequate evidence to support the theory of premeditation and deliberation.

MURDER BY TORTURE

The trial court instructed the jury on murder by torture as follows:

> Now, I charge that for you to find the defendant guilty of first degree murder by means or [sic] torture, the state must prove two things beyond a reasonable doubt.
>
> First, that the defendant intentionally tortured the victim.
>
> Torture is the course of conduct by one or more persons which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure.
>
> Course of conduct, is the pattern of the same or similar acts, repeated over a period of time, however short, which established that there existed in the mind of the defendant a plan, scheme, system or design to inflict cruel suffering upon another.
>
> Intent is a mental attitude which is seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.
>
> Second, the state must prove that the torture was a proximate cause of the victim's death.
>
> A proximate cause is a real cause, a cause without which the victim's death would not have occurred.
>
> . . . .
>
> Now, members of the jury, bearing in mind that the burden of proof rests upon the state to establish the guilty [sic] of the defendant beyond a reasonable doubt, I charge that if you find from the evidence that the killing of the deceased was accidental, that is, that the victim's death was brought about by an unknown cause, or that it was from an unusual or unexpected event from a known cause, and you also find that the killing of the deceased was unintentional, that at the time of the homicide the defendant was engaged in the performance of a lawful act, without any intention to do harm,

> and that he was not culpably negligent, if you find these to be the facts, remembering that the burden is upon the state, then I charge that the killing of the deceased was a homicide by misadventure, and if you so find, it would be your duty to render a verdict of not guilty as to this defendant.

Noting that the trial court did not instruct on malice, defendant contends that a specific finding of malice is required for murder by torture. Since malice was not specifically found by the jury in defendant's conviction of murder by torture, defendant contends that his conviction should be reversed. We disagree.

Murder by torture is classified in N.C.G.S. § 14-17 as first-degree murder. That statute provides as follows:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, *torture*, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000 . . . .

N.C.G.S. § 14-17 (Cum. Supp. 1990) (emphasis added). The statute, on its face, makes no reference to a showing of malice. Since murder is not defined by the statute, we follow the general rule that where a statutory term is undefined, we employ the common law definition. N.C.G.S. § 4-1 (1986).

Common law murder has been defined as "any intentional and unlawful killing of a human being with malice aforethought, express or implied." *State v. Vance*, 328 N.C. 613, 622, 403 S.E.2d 495, 501 (1991). This Court has determined that when the homicide was perpetrated by means of torture, there is no requirement of a showing of intent to kill. *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

> We . . . now hold that premeditation and deliberation is not an element of the crime of first-degree murder perpetrated by means of poison, lying in wait, imprisonment, starving, or *torture*. Likewise, a specific intent to kill is equally irrelevant

> when the homicide is perpetrated by means of poison, lying in wait, imprisonment, starving, or *torture*; and we hold that an intent to kill is not an element of first-degree murder where the homicide is carried out by one of these methods.

*Id.* at 203, 344 S.E.2d at 781 (emphasis added).

With regard to the next requirement, malice, as it is ordinarily understood, means not only hatred, ill will, or spite, but also that condition of mind which prompts a person to take the life of another intentionally, without just cause, excuse, or justification, or to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of a sense of social duty, and a callous disregard for human life. *State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984); *State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982); *State v. Jenkins*, 300 N.C. 578, 268 S.E.2d 458 (1980). We have held that malice in the case of felony murder is "transferred" when the underlying felony is committed. In *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986), we stated:

> The felony-murder rule is a rule of ancient application under which there is a fictional transfer of the malice which plays a part in the underlying felony to the unintended homicide so that the homicide is deemed committed with malice.
>
> . . . .
>
> In the typical case of felony-murder, there is no malice in "fact", express or implied; the malice is implied by the "law". What is involved is an intended felony and an unintended homicide. The malice which plays a part in the commission of the felony is transferred by the law to the homicide. As a result of the fictional transfer, the homicide is deemed committed with malice; and a homicide with malice is common law murder.
>
> 2 Wharton's Criminal Law § 145 (1979).

*Id.* at 456-57, 340 S.E.2d at 710; *accord State v. Womble*, 292 N.C. 455, 233 S.E.2d 534 (1977). Murder by torture is analogous to felony murder in that malice may be implied by the very act of torturing the victim. Torture is a dangerous activity of such reckless disregard for human life that, like felony murder, malice is implied by the law. The commission of torture implies the requisite malice, and a separate showing of malice is not necessary.

**[5]** By this assignment of error, defendant also contends that the State did not present adequate evidence of torture. The record indicates otherwise. Torture was defined by the trial court in pertinent part as "the course of conduct by one . . . which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure." We note first that, based on the evidence of a pattern of extraordinary disciplinary methods, the jury could have inferred an intent to cause Christopher grievous pain. There was also adequate evidence of "grievous pain and suffering." Through expert testimony, evidence was presented that Christopher's stomach was distended to accommodate large quantities of water and that this "is very painful." Moreover, Christopher vomited "dozens" of times as he was urged to drink more and more water. Other testimony indicated that the fluid that filled Christopher's lungs would have created a sensation similar to suffocation and that the swelling of his brain that resulted from the ingestion of water created a tremendous headache, which culminated in a scream, followed by blindness. Lastly, based on defendant's past pattern of punishing Christopher, there was adequate evidence for the jury to find that defendant's acts were for the purpose of punishment. We hold here that the State presented adequate evidence of torture.

MURDER WITH PREMEDITATION AND DELIBERATION

**[6]** Defendant also contends that the State failed to present sufficient evidence of premeditation and deliberation to submit an instruction to the jury. We disagree. The trial court instructed the jury on first-degree murder, with premeditation and deliberation, as follows:

> Now, I charge that for you to find the defendant guilty of first degree murder with malice, with premeditation and deliberation, the state must prove five things, beyond a reasonable doubt.
>
> First: That the defendant intentionally and with malice, killed the victim.
>
> Malice means not only hatred, ill will or spite as it is ordinarily understood. To be sure, that is malice. But, it also means the condition of mind which prompts a person to take the life of another intentionally, or to intentionally inflict serious

injury upon another, which proximately results in his death, without just cause, excuse or justification.

Second: The state must prove that the defendant's act was a proximate cause of the victim's death.

A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

Third: The state must prove that the defendant intended to kill the victim.

Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the defendant's act, the manner in which it was made, the conduct of the parties, and other relevant circumstances.

Fourth: The state must prove that the defendant acted with premeditation. That is, that he formed the intent to kill the victim over some period of time, however short, before he acted.

Fifth: 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 the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion, or excited when the intent was carried into effect.

Neither premeditation, nor deliberation are usually susceptible of direct proof. They may be proven by proof of circumstances from which they may be inferred, such as the conduct of the defendant, before, during and after the killing, and the manner in which, or means by which the killing was done.

Premeditation has been defined as some thought beforehand, for some length of time, however short. *State v. Biggs*, 292 N.C. 328, 233 S.E.2d 512 (1977). Premeditation need not be for a particular amount of time. *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980). Deliberation is the intention to kill, executed in a cool state of blood in furtherance of a fixed design, to gratify a feeling of revenge or to accomplish some unlawful purpose. *Id.* Premedita-

tion and deliberation must generally be proved by circumstantial evidence, since they are processes of the mind and are seldom proved by direct evidence. *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975). Certain relevant circumstances which tend to show premeditation and deliberation are "ill-will or previous difficulty between the parties; . . . the dealing of lethal blows after the deceased has been felled and rendered helpless; and . . . evidence that the killing was done in a brutal manner." *State v. Williams*, 308 N.C. 47, 69, 301 S.E.2d 335, 349, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983).

In this case, there is ample evidence to support the instructions on murder with premeditation and deliberation. Previous ill will by defendant toward Christopher was shown through testimony of extraordinary disciplinary procedures intended to oppress and humiliate Christopher. The manner of killing, which involved the painful ingestion of large quantities of water over a two- to three-hour period, indicates a particularly brutal method of killing. In addition, evidence indicated that Christopher suffered from bruises to the head and buttocks, possibly inflicted during this two- to three-hour period. For the above reasons, the evidence is sufficient to support the trial judge's instructions on first-degree murder with premeditation and deliberation.

III.

**[7]** Having previously determined that malice is implied in a finding of torture in a crime of murder by torture, we must now determine if the instructions given on torture in this case were adequate. Defendant argues that the trial judge's instructions did not properly define the crime of torture. We disagree. The trial judge defined torture as

> the course of conduct by one or more persons which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure.
>
> Course of conduct, is the pattern of the same or similar acts, repeated over a period of time, however short, which established that there existed in the mind of the defendant a plan, scheme, system or design to inflict cruel suffering upon another.

Defendant contends that the instructions given did not properly define the crime of torture and that the acts he committed were

not envisioned by the legislature as punishable as first-degree murder. Defendant notes that corporal punishment is a widely used form of disciplining children. Additionally, defendant argues that the instructions do not require that the torturer inflict pain for pain's sake. Defendant faults the present instructions as not *requiring* that the pain be inflicted for pain's sake or for the torturer's own sake.

By finding a course of conduct and the intentional infliction of grievous pain and cruel suffering resulting in death, the jury has satisfied the statutory and constitutional requirements. The instructions given by the trial judge adequately defined torture for purposes of first-degree murder.

IV.

**[8]** Defendant next contends that the torture statute is unconstitutionally vague. We do not find it so. Essentially, defendant argues that a reasonable person of ordinary intelligence would not be on notice that his conduct was a crime.

A common understanding of torture would put a person of ordinary understanding on notice that coercing a six-year-old to drink quart after quart of water over a two- to three-hour period, despite his vomiting dozens of times and complaining of headaches, would constitute torture for purposes of the murder statute. The trial judge's instructions, defendant argues, would encompass even legal corporal punishment if the punishment caused death. In response to defendant's argument, the State notes that, by its very definition, a "lawful" punishment cannot be a punishment, carried out over a period of time, that is intended to inflict *grievous* pain and cruel suffering. Such punishment would be unlawful punishment, and if death results, it is punishable as first-degree murder.

We hold that in light of the common understanding of what defines torture, the statute is not unconstitutionally vague and puts a reasonable person on notice of what is forbidden. *See, e.g., State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981).

V.

**[9]** Defendant next contends that the exclusion of certain testimony denied him his federal and state constitutional right to present a defense. Defendant sought to allow the testimony of Judy Clayton, who is Angela West's mother and the grandmother of Christopher.

After a voir dire of Ms. Clayton's proposed testimony, it was apparent that she would have testified that she told her daughter to watch Christopher and to give him plenty of fluids. Defendant contends that this testimony was relevant to show the theory of his defense, that defendant was administering a "home remedy" and was not punishing Christopher. The State objected on the grounds that the testimony was irrelevant and hearsay. We agree that the testimony was properly excluded. There was no evidence that Angela West conveyed this advice to defendant, and it was therefore irrelevant. Having upheld the trial court's discretion as to the testimony's lack of relevancy, we need not address the issue of hearsay.

VI.

**[10]** Defendant next contends that testimony of prior instances of defendant's punishing and disciplining Christopher was irrelevant as being too remote and dissimilar and, even if admissible for a relevant purpose, was highly prejudicial evidence of defendant's character and propensity to commit the crime for which he was charged. We do not agree. As previously indicated, the State introduced a great deal of evidence describing prior disciplinary techniques carried out by defendant against Christopher. The trial court gave the following limiting instructions as to this evidence:

> Evidence has been received tending to show that the defendant used disciplinary techniques through May 9, 1988, which were deemed inappropriate by the Department of Social Services. This evidence was received solely for the purpose of showing that the defendant had a motive for the commission of the crime charged in this case, that the defendant had the intent, which is a necessary element of the crime charged, in this case, that there existed in the mind of the defendant a plan, scheme, system or design, involving the crime charged in this case, the absence of mistake, and the absence of accident.
>
> If you believe this evidence, you may consider [it], but only for the limited purpose for which it was received.

The State contends that circumstantial evidence of defendant's intent was appropriate and highly relevant and not too remote or dissimilar. We agree. The acts took place during the year preceding Christopher's death and are sufficiently similar to the coerced consumption of large quantities of water in that they were devious

methods used by the defendant to punish Angela West's children, including Christopher, and demonstrate methods used by defendant to exert control over the children. Defendant's intent is generally determined by circumstantial evidence, and such testimony is highly probative of defendant's intent here. Moreover, motive and common plan are also highly relevant to this case, as is absence of mistake. We therefore hold that the testimony was admissible for these relevant purposes.

Having found that the evidence is admissible for a proper Rule 404(b) purpose, we now address whether the prejudicial effect of the testimony outweighed its probative value. *See* N.C.G.S. § 8C-1, Rule 403 (1988). Absent an abuse of discretion, matters of weighing Rule 403 prejudice are in the sound discretion of the trial judge. *State v. Schultz*, 88 N.C. App. 197, 362 S.E.2d 853 (1987), *aff'd*, 322 N.C. 467, 368 S.E.2d 386 (1988). We note that the trial court conducted a voir dire indicating a careful consideration of the prejudicial impact of the testimony. Furthermore, the previously indicated limiting instructions were also given. Based on the record before us, we find no abuse of the trial court's discretion in admitting the evidence as being more probative than prejudicial.

VII.

**[11]** Defendant finally contends that the medical evidence indicated that death was not foreseeable from defendant's conduct. Defendant argues that the trial court's instructions to the jury, to which defendant did not object, that the jury could infer premeditation and deliberation from the means or manner of the killing, constituted prejudicial error in violation of defendant's state and federal constitutional rights. As we have often stated, premeditation and deliberation are not susceptible to direct proof and therefore must be inferred from circumstantial evidence. One factor from which premeditation may be inferred is the means or manner of the killing. *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975). Essentially, defendant requests that we find as a matter of law that coercing a six-year-old to drink water until he dies cannot evince premeditation and deliberation because no reasonable juror could so find. We disagree. In this case, defendant, over a two- to three-hour period, continued to coerce Christopher to drink water, despite observing Christopher's repeated vomiting and complaints of headaches. The evidence presented in this case, as previously stated,

is ample to support premeditation and deliberation through circumstantial evidence of the means or manner of the killing.

In summary, we hold that defendant received a fair trial, free of prejudicial error, before an impartial judge and jury. The convictions upon which the sentence is based are supported by the evidence.

No error.

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SHARON R. COOK v. BANKERS LIFE AND CASUALTY COMPANY, AN ILLINOIS CORPORATION AND JOHN EILERS

No. 409PA89

(Filed 14 August 1991)

1. **Appeal and Error § 87 (NCI4th)— action against insurance company and agent—dismissal of claim against company—interlocutory appeal—possibility of inconsistent verdicts**

In an action to recover against an insurance company and its agent where plaintiff alleged breach of contract on the part of defendant insurance company, breach of contract by defendant agent for failure to procure a policy of insurance on her husband's life, negligence by the agent in failing to procure the policy, fraudulent misrepresentations to plaintiff by defendant insurance company through its agent, negligence by defendant company through its agent in supplying false information and advice, unfair and deceptive trade practices by defendant company, and bad faith and wanton action by defendant company, an order dismissing the case as to defendant company was interlocutory but affected a substantial right of plaintiff which she would lose if it was not corrected before a final judgment was entered, since there was a possibility of inconsistent verdicts if the claims against both defendants were tried separately in that some of the issues in the claims against both defendants were identical; the questions raised by plaintiff's claims against the two defendants were not covered by defendant agent's cross claim against defendant company; and defendant company would not be estopped from relitigating issues tried between plaintiff and defendant agent.

**Am Jur 2d, Appeal and Error § 859.**

**2. Insurance § 12 (NCI3d)— married person's right to insure spouse—spouse's consent not required**

N.C.G.S. § 52-3 allows a married person to insure the life of his or her spouse, and it does not provide that such a person must have the consent of the spouse to do so.

**Am Jur 2d, Insurance §§ 530, 531, 975.**

Justice MEYER concurring in result.

ON plaintiff and defendant Eilers' petitions for discretionary review of the decision of the Court of Appeals dismissing their appeals from orders entered by *Owens, J.*, on 23 May 1989 in the Superior Court, BUNCOMBE County. Heard in the Supreme Court 12 April 1990.

This is an action by the plaintiff against the defendant insurance company and its agent. The plaintiff alleged that she had procured a life insurance policy on her husband's life with the defendant insurance company through its agent John Eilers. She alleged further that it was a policy that provided for double indemnity for accidental death. The plaintiff's husband was killed in an accident and the defendant insurance company had refused to pay for its liability under the policy.

The plaintiff asserted seven claims in the alternative. These were (1) breach of contract on the part of the defendant insurance company, (2) breach of contract on the part of the defendant Eilers for his failure to procure an insurance policy for the plaintiff as he had contracted to do, (3) negligence on the part of the defendant Eilers in not procuring the policy and not properly advising the plaintiff, (4) fraudulent misrepresentations to the plaintiff by the defendant insurance company through its agent Eilers, (5) negligence on the part of the defendant insurance company through its agent Eilers in supplying false information and advice, (6) unfair and deceptive trade practices by the defendant insurance company through its agent Eilers, and (7) bad faith and wanton action by the defendant insurance company entitling the plaintiff to punitive damages. The defendant filed answers denying the pertinent allegations. The defendant Eilers cross claimed against Bankers Life, alleging that if he had acted wrongfully it was caused by the negligence of Bankers Life in not properly training him or because of Bankers Life's breach of contract to train him properly.

Each of the defendants made a motion for summary judgment. The papers filed showed, in the light most favorable to the plaintiff,

that the plaintiff met with Mr. Eilers, an agent of Bankers Life, to discuss the purchase of insurance. The plaintiff told Mr. Eilers that she wanted an insurance policy on the life of her husband but her husband did not believe in life insurance and would not procure a policy. Mr. Eilers testified at a deposition hearing that he filled out an application for a life insurance policy and the plaintiff signed it. The plaintiff testified she did not remember signing it. The plaintiff paid two months premiums. Mr. Eilers told the plaintiff the policy was then in effect.

When Mr. Eilers showed the application to an "entry level manager" at the defendant insurance company's office in Asheville the manager told him the application would not be accepted by the company because the plaintiff's husband had not signed it. Mr. Eilers told the manager that the plaintiff's husband would not sign it because he was opposed to life insurance. The manager then told Mr. Eilers to sign it for Mr. Cook. Mr. Eilers signed Mr. Cook's name to the application and delivered it to the branch manager.

The plaintiff's husband was killed in an accident approximately three weeks after the application for the life insurance policy was submitted. The defendant Bankers Life refused to pay on the policy and refunded the premiums.

The superior court granted the motion for summary judgment on behalf of the defendant Bankers Life and denied Mr. Eilers' motion for summary judgment. The Court of Appeals dismissed the appeals of the plaintiff and Mr. Eilers. We allowed petitions for discretionary review by both parties.

*Shuford, Best, Rowe, Brondyke & Wolcott, by James Gary Rowe and Patricia L. Arcuri, for plaintiff appellant.*

*Hendrick, Zotian, Cocklereece & Robinson, by William A. Blancato, for defendant appellant John Eilers.*

*Roberts, Stevens & Cogburn, P.A., by Elizabeth M. Warren, for defendant appellee Bankers Life and Casualty Company.*

WEBB, Justice.

*Plaintiff's Appeal*

**[1]** We shall treat first the plaintiff's appeal. The granting of summary judgment in favor of the defendant Bankers Life did

not finally determine all the claims in this case and was thus an interlocutory order. In order for an interlocutory order to be appealable it must deprive the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

The plaintiff relies on *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982). In that case the plaintiff sued a hockey player and his team for an alleged assault on the plaintiff during a hockey match. The plaintiff in the same action sued the manufacturer of the mouthpiece the plaintiff was wearing at the time of the assault for negligent manufacture and breach of warranty. The superior court granted summary judgment for the manufacturer. We held the plaintiff had a right of immediate appeal because of the possibility of inconsistent verdicts if the case against the hockey player and his team was tried first and the case against the manufacturer was tried after an appeal.

We agree with the plaintiff that there is a possibility of inconsistent verdicts in this case if the claims are tried separately. Some of the issues in the claims against both defendants are identical. Her claims against both defendants include the issues of whether the consent of her husband was necessary when the application was submitted to the insurance company, whether Mr. Eilers was an agent of Bankers Life with authority to bind Bankers Life, and whether the conduct of Mr. Eilers and the manager for Bankers Life amounts to a waiver or estops the defendants from requiring the consent of the insured. There could be different verdicts on these issues if they are tried separately. Pursuant to *Bernick*, we hold that the order dismissing the case as to Bankers Life affected a substantial right of the plaintiff which she will lose if it is not corrected before a final judgment is entered.

Defendant Bankers Life contends there is not a possibility of inconsistent verdicts. It says this is so because it is still in the case by way of Mr. Eilers' cross claim against it. Bankers Life says this means the jury will have an opportunity to decide any question of its liability. Mr. Eilers has cross claimed for indemnity from Bankers Life based on its negligence in training him and breach of contract to train him. The questions raised by the plaintiff's claims against the two defendants are not covered by this cross claim.

Bankers Life also contends there is no possibility of inconsistent verdicts because of the doctrine of collateral estoppel. Relying on *McInnis v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986), Bankers Life says it will not be able to relitigate any issues determined at a trial between plaintiff and Mr. Eilers. We do not believe Bankers Life would be estopped under *McInnis* from relitigating issues tried between the plaintiff and Mr. Eilers. Justice Frye, writing for the Court in *McInnis*, said it was not necessary for an estoppel that all parties in a case to have been parties in the case from which the estoppel arose. He was careful to say, however, that the party to be estopped must have been a party to the previous case with a chance to litigate the issues for which the estoppel is pleaded. Bankers Life would not have a chance to litigate the issues in a trial between the plaintiff and Mr. Eilers if the action against it is dismissed. It would not be estopped to litigate these issues against the plaintiff at another trial.

We reverse the order of the Court of Appeals which dismissed the plaintiff's appeal.

**[2]** We consider next the question of whether summary judgment was properly entered for Bankers Life. In the order granting summary judgment the court did not give any reason other than that the motion was well founded. In its motion for summary judgment Bankers Life gave as its reason that "Mr. Everett Cook never consented to issuance of a life insurance policy on his life." In their briefs the parties treat only the question of the requirement under the law of this state that a husband consent before his wife may have his life insured. We shall address this question only.

We hold it was error to grant the motion for summary judgment by Bankers Life. We base this holding on the plain words of N.C.G.S. § 52-3 which says:

> Any married person in his or her own name, or in the name of a trustee with his assent, may cause to be insured for any definite time the life of his or her spouse, for his or her sole and separate use, and may dispose of the interest in the same by will.

This section has been in effect for more than one hundred years to give wives the right to insure the lives of their husbands. *See* Rev. s. 2099 and C.S., s. 2512. In 1965 it was revised to give husbands the right to insure the lives of their wives. *See* 1965

S.L., c. 878, s. 1. This is the first case which has interpreted the section.

This section does not create in a wife an insurable interest in the life of her husband. She has such an interest without the benefit of the section. *See Chavis v. Insurance Co.*, 251 N.C. 849, 112 S.E.2d 574 (1960); *Heilig v. Insurance Co.*, 222 N.C. 231, 22 S.E.2d 429 (1942); *Webb v. Insurance Co.*, 216 N.C. 10, 3 S.E.2d 428 (1939). In order for the section to have any meaning, the section must give a wife something in addition to her rights under the common law. We believe it gives wives the right to insure their husbands' lives without their consent. The statute allows a married person to insure the life of his or her spouse and it does not provide that such a person must have the consent of the spouse to do so. We do not believe we should add this requirement to the statute.

In *Manufacturing Co. v. McCormick*, 175 N.C. 277, 95 S.E. 555 (1918), we held that it was necessary to have the consent of an insured although the person applying for a life insurance policy had an insurable interest in the insured's life. This case did not involve life insurance on a spouse and N.C.G.S. § 52-3 (1984) was not implicated.

We hold it was error to grant Bankers Life's motion for summary judgment on the ground that Mrs. Cook could not insure her husband's life without his consent.

*John Eilers' Appeal*

The defendant John Eilers has appealed from the order denying his motion for summary judgment. Ordinarily such an appeal should be dismissed. *Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979). In this case Mr. Eilers argues, as does the plaintiff in her appeal, that the issues are so intertwined that there is a substantial likelihood of inconsistent verdicts if the cases are tried separately. This threat no longer exists in light of our ruling on the plaintiff's appeal. We affirm the order of the Court of Appeals dismissing Mr. Eilers' appeal. We note that Mr. Eilers wanted to argue on appeal that he was not liable to the plaintiff because a life insurance policy may not be issued without the consent of the insured. We have decided this question in the plaintiff's appeal.

Affirmed in part; reversed and remanded in part.

Justice MEYER concurring in result.

I concur in the result reached in the opinion of the majority. I am unable to concur in some of the reasoning which the majority employs to reach that result, and I write separately solely for the purpose of explaining my position in that regard.

In explaining its interpretation of N.C.G.S. § 52-3 and its predecessors, N.C. Rev. Code § 2099 and N.C. Consol. Stat. § 2512, the majority says: "In order for the section to have any meaning, the section must give a wife something in addition to her rights under the common law. We believe it gives wives the right to insure their husbands' lives without their consent." I am unable to agree with those two statements because, as every lawyer knows, the legislature frequently enacts a statute which simply codifies existing common law, without any change whatsoever to the common law it codifies. I believe that is precisely the case with N.C.G.S. § 52-3 and its predecessors because, at common law, wives and husbands had an insurable interest in the lives of each other, and that insurable interest was not dependent upon the consent of the insured spouse.

I doubt that the majority would seriously question the right at common law of even a divorced person to insure the life of the former spouse who will not consent thereto, where the former spouse is obligated by judgment of the court to pay alimony or child support, so long as that obligation exists. *See* 2 J. Appleman, *Insurance Law and Practice* § 802 (1966); 43 Am. Jur. 2d *Insurance* § 978 (1982).

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

ABLE OUTDOOR ADVERTISING v. HARRELSON

No. 316P91

Case below: 103 N.C.App. 392

Petition by defendant for writ of supersedeas and temporary stay denied 24 July 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 July 1991.

AMOS v. OAKDALE KNITTING CO.

No. 278A91

Case below: 102 N.C.App. 782

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 14 August 1991.

BAKER CONSTRUCTION CO. v. PHILLIPS

No. 273PA91

Case below: 102 N.C.App. 822

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 14 August 1991.

CITY OF FAYETTEVILLE v. E & J INVESTMENTS, INC.

No. 283P91

Case below: 102 N.C.App. 822

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

COBB v. ROCKY MOUNT BOARD OF EDUCATION

No. 269A91

Case below: 102 N.C.App. 681

Petition by defendant for temporary stay allowed 1 July 1991.

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

DYER v. STATE

No. 227PA91

Case below: 102 N.C.App. 480

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 14 August 1991.

ELLIS v. VESPOINT

No. 262P91

Case below: 102 N.C.App. 739

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

GIBBONS v. CIT GROUP/SALES FINANCING

No. 96P91

Case below: 101 N.C.App. 502

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

GUILFORD CO. PLANNING AND DEV. DEPT. v. SIMMONS

No. 185P91

Case below: 102 N.C.App. 325

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

HAWKINS v. HAWKINS

No. 141PA91

Case below: 101 N.C.App. 529

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 14 August 1991.

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

HUGGARD v. WAKE COUNTY HOSPITAL SYSTEM

No. 280PA91

Case below: 102 N.C.App. 773

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 14 August 1991.

IN RE BUNTON

No. 228PA91

Case below: 102 N.C.App. 579

Petition by Jay Walter Bunton for discretionary review pursuant to G.S. 7A-31 allowed 14 August 1991.

IN RE ESTATE OF NORTON

No. 252PA91

Case below: 102 N.C.App. 823

Petition by Teab Norton for discretionary review pursuant to G.S. 7A-31 allowed 14 August 1991.

KIMZAY WINSTON-SALEM, INC. v. JESTER

No. 257P91

Case below: 103 N.C.App. 77

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

MANNING v. FLETCHER

No. 229PA91

Case below: 102 N.C.App. 392

Petition by defendant (Insurance Company) for discretionary review pursuant to G.S. 7A-31 allowed 14 August 1991.

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

MATTHEWS v. N. C. DEPT. OF CORRECTION

No. 81P90

Case below: 97 N.C.App. 142
326 N.C. 483
326 N.C. 597

Motion by plaintiff to reconsider petition for discretionary review dismissed 14 August 1991.

METRIC CONSTRUCTORS, INC. v.
INDUSTRIAL RISK INSURERS

No. 180A91

Case below: 102 N.C.App. 59

Petition by defendant (Insurers) for discretionary review pursuant to G.S. 7A-31 allowed 14 August 1991.

MORGAN v. MUSSELWHITE

No. 71P91

Case below: 101 N.C.App. 390

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

MOZINGO v. PITT COUNTY MEMORIAL HOSPITAL

No. 162A91

Case below: 101 N.C.App. 578

Petition by defendant (Kazior) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 14 August 1991.

MYOKINETEX, INC. v. MXI GROUP, INC.

No. 279P91

Case below: 102 N.C.App. 823

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

NALLE CLINIC CO. v. PARKER

No. 94P91

Case below: 101 N.C.App. 341

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

NCNB v. ROYSTER

No. 268P91

Case below: 102 N.C.App. 823

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

NISBET v. NISBET

No. 193P91

Case below: 102 N.C.App. 232

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

ODUM v. NATIONWIDE MUTUAL INS. CO.

No. 198P91

Case below: 101 N.C.App. 627

Petition by defendant (Nationwide) for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

PALMER v. FIREMAN'S FUND INS. CO.

No. 336P91

Case below: 103 N.C.App. 393

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

PHILLIPS v. PHILLIPS

No. 245P91

Case below: 102 N.C.App. 582

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 14 August 1991.

POPE v. POPE

No. 312P91

Case below: 103 N.C.App. 173

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

PRICE v. WALKER

No. 221P91

Case below: 102 N.C.App. 352

Petition by plaintiffs (Russell and Judy Price) for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

REED v. ABRAHAMSON

No. 230PA91

Case below: 102 N.C.App. 318

Petition by defendants (Abrahamsons) for discretionary review pursuant to G.S. 7A-31 allowed 14 August 1991. Petition by defendants (Karen Barwick and Robert Leonard Barwick, Sr.) for discretionary review pursuant to G.S. 7A-31 allowed 14 August 1991.

STATE v. BARLOW

No. 146P91

Case below: 102 N.C.App. 71

Petition by Attorney General for writ of supersedeas and temporary stay denied 3 July 1991. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 3 July 1991.

STATE v. CAGLE

No. 314P91

Case below: 103 N.C.App. 526

Petitions by defendants (Cagle and Tritt) for writ of supersedeas and temporary stay denied 22 July 1991.

STATE v. CARROLL

No. 160P91

Case below: 101 N.C.App. 691

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

STATE v. CARTER

No. 290P91

Case below: 103 N.C.App. 171

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

STATE v. COTTON

No. 147P91

Case below: 102 N.C.App. 93

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 August 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

STATE v. DEAN

No. 242P91

Case below: 102 N.C.App. 582

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

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

STATE v. INMAN

No. 258P91

Case below: 102 N.C.App. 824

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 August 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

STATE v. MONTGOMERY

No. 293P91

Case below: 103 N.C.App. 171

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 August 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

STATE v. MYERS

No. 284P91

Case below: 102 N.C.App. 824

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 August 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

STATE v. NORFLEET

No. 292P91

Case below: 103 N.C.App. 172

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 August 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

STATE v. PARKS

No. 202A91

Case below: 102 N.C.App. 354

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question denied 14 August 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

STATE v. SHAW

No. 299P91

Case below: 103 N.C.App. 268

Petition by Attorney General for writ of supersedeas and temporary stay denied 8 July 1991. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

STATE v. SPELLER

No. 272P91

Case below: 102 N.C.App. 697

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 August 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

STATE v. WETHERINGTON

No. 285P91

Case below: 102 N.C.App. 824

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 August 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

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

STATE v. WILLIAMS

No. 270P91

Case below: 102 N.C.App. 824

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 August 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

STATE v. WOODARD

No. 271P91

Case below: 102 N.C.App. 687

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 August 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

STATE EX REL. COMR. OF INS. v. N.C. RATE BUREAU

No. 266PA91

Case below: 102 N.C.App. 824

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 14 August 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

TRAVCO HOTELS v. PIEDMONT NATURAL GAS CO.

No. 281A91

Case below: 102 N.C.App. 659

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 14 August 1991.

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

TURNER v. DUKE UNIVERSITY

No. 97P91

Case below: 101 N.C.App. 276

Petition by defendant (Duke University) for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

TYNDALL v. WALTER KIDDE CO.

No. 259P91

Case below: 102 N.C.App. 726

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

U. S. FIRE INS. CO. v. SOUTHEAST AIRMOTIVE CORP.

No. 213P91

Case below: 102 N.C.App. 470

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

WACHOVIA BANK AND TRUST CO. v. TOMS

No. 241P91

Case below: 102 N.C.App. 582

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

WARD v. McDONALD

No. 302P91

Case below: 100 N.C.App. 359

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 14 August 1991.

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

WATKINS v. WATKINS

No. 222P91

Case below: 102 N.C.App. 582

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

WEST END III LIMITED PARTNERS v. LAMB

No. 226P91

Case below: 102 N.C.App. 458

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

YARBOROUGH v. BRITT

No. 326P91

Case below: 103 N.C.App. 395

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 14 August 1991.

STATE OF NORTH CAROLINA v. CARL SMILEY WYNNE

No. 541A88

(Filed 14 August 1991)

**1. Jury § 7.11 (NCI3d)— death penalty views—excusal for cause**

A juror was properly excused for cause because of his death penalty views where the juror stated that he could not recommend the death penalty under any circumstances.

**Am Jur 2d, Jury § 289.**

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

**2. Jury §§ 7.8, 7.10 (NCI3d)— excusal for cause—emotional juror—working with defendant's mother**

One juror was properly excused for cause in a first degree murder trial because of her inability to sit through the trial without becoming emotional, and a second juror was properly excused for cause because she had worked with defendant's mother for many years and would find it difficult to continue to do so if the jury imposed the death penalty.

**Am Jur 2d, Jury §§ 271, 281.**

**3. Criminal Law § 33.2 (NCI3d); Homicide § 17 (NCI3d)— racist sign—attendance at Klan rally—admissibility to show motive**

Testimony in this prosecution of a white defendant for first degree murder of a black victim that a sign over the door of the mobile home in which defendant lived asserted that blacks were not allowed there and pictured a Confederate flag and that defendant attended a Klan march after the killing was relevant and admissible to show motive where no evidence other than race was presented as to why the attack on the victim began. Moreover, defendant waived his right to appellate review of the admission of evidence pertaining to the sign and Confederate flag when a photograph of the outside of the mobile home, in which the sign was visible, was introduced without objection.

**Am Jur 2d, Homicide §§ 280, 440.**

4. **Homicide § 15 (NCI3d)— evidence that victim was slow, retarded, honest and polite—competency**

Evidence that the victim was "slow" or "retarded" and that he was honest and polite was properly admitted during the guilt phase of this first degree murder trial. Cases pertaining to victim impact statements are inapposite to this evidence because they involved only penalty phase evidence and arguments.

**Am Jur 2d, Homicide §§ 301, 554.**

5. **Homicide § 20.1 (NCI3d)— color photographs and slides—decomposition of body**

The trial court did not abuse its discretion in allowing the State to present three color photographs and four color slides picturing the murder victim's body and in allowing testimony concerning the decomposition of the body.

**Am Jur 2d, Homicide §§ 417, 419.**

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

6. **Homicide § 28.6 (NCI3d)— first degree murder—defense of voluntary intoxication—instruction not required**

The evidence in a first degree murder trial failed to show that defendant was utterly incapable of premeditating and deliberating the killing so as to require the trial court to give defendant's requested instruction on voluntary intoxication where the evidence revealed only that defendant and his companions consumed two fifths of liquor and smoked marijuana prior to the killing; defendant presented no definitive evidence regarding the amount of alcohol he consumed; and defendant was able to give police a detailed account of the crime days after it occurred.

**Am Jur 2d, Homicide §§ 127-129, 133.**

**Modern status of the rules as to voluntary intoxication as defense to criminal charge. 8 ALR3d 1236.**

**7. Criminal Law § 65 (NCI3d)— testimony that victim appeared frightened—admissibility**

Testimony that the victim was shaking and appeared frightened prior to his death was relevant and admissible in this first degree murder trial.

**Am Jur 2d, Homicide § 320.**

**8. Conspiracy § 5.1 (NCI3d); Criminal Law § 79 (NCI3d)— statement by defendant or another—evidence of conspiracy—admissibility against defendant**

Even though a witness did not know whether defendant or another man told a murder victim to "bring his black ass on" and defendant and the other man were not charged with criminal conspiracy or tried jointly for the murder, the statement was admissible against defendant where defendant's own confession established a conspiracy between defendant and the other man to kill the victim.

**Am Jur 2d, Conspiracy §§ 43, 44.**

**9. Criminal Law § 74.2 (NCI3d)— codefendant's statement—reference to "we"—harmless error**

Assuming that a detective's testimony concerning a codefendant's statements referring to where "we" left the body was erroneously admitted in defendant's trial for first degree murder, such error was harmless where the trial court eventually struck all testimony concerning the codefendant's statements about what defendant said and did, and where the statement corroborated defendant's subsequently admitted confession in which defendant stated that he and the codefendant dumped the body where it was found.

**Am Jur 2d, Evidence § 539.**

**10. Criminal Law § 74 (NCI3d)— defendant's statement concerning capital punishment—admissibility to show circumstances of confession**

Statements made by defendant to law officers during interrogation in a murder case to the effect that he did not care if he received capital punishment were relevant to the circumstances surrounding defendant's confession and admis-

sible to show that he understood the nature of the interrogation at the time he made the confession.

**Am Jur 2d, Evidence §§ 545, 549.**

**11. Criminal Law § 34.7 (NCI3d)— condition of probation—corroboration of confession as to motive**

Testimony by defendant's probation officer that a condition of defendant's probation was that he commit no criminal offense was admissible to corroborate defendant's confession that the reason he killed the victim was to avoid identification after his initial assault on the victim because he feared that his probation would be revoked and he would return to jail.

**Am Jur 2d, Evidence §§ 530, 1136.**

**12. Criminal Law § 101 (NCI4th)— defendant's statements to witness—failure to provide timely discovery—allowance of testimony by witness**

Although the trial court found that incriminating statements made by defendant to a codefendant's mother were not disclosed to defendant until two days after they should have been disclosed pursuant to N.C.G.S. § 15A-903(a)(2), the trial court did not err by permitting this witness to testify about the statements where the court limited her testimony to what was already in evidence and previously provided in discovery, the substance of defendant's statements to the witness was substantially the same as his confession to police, and it is unlikely that knowledge of defendant's additional confession to the witness would have significantly affected defense strategy.

**Am Jur 2d, Depositions and Discovery §§ 428, 431.**

**13. Criminal Law § 554 (NCI4th)— loading victim into vehicle—testimony struck—mistrial not required**

The trial court properly denied defendant's motion for a mistrial in a first degree murder case when an officer testified that defendant told another officer that the victim was loaded into a vehicle and the trial court struck this testimony on the basis that defendant had not made such a statement where similar evidence placing the victim in a codefendant's truck after defendant's assault on him was introduced through other witnesses.

**Am Jur 2d, Trial § 127.**

**14. Criminal Law § 75.11 (NCI3d)— custodial interrogation—waiver of right to counsel**

Assuming arguendo that defendant's Sixth Amendment right to counsel attached when an arrest warrant was served upon him, defendant waived his Sixth Amendment right to counsel before he was questioned by officers where the record shows that an officer told defendant he was being questioned about a specific murder and that he could receive the death penalty; the officer read defendant his *Miranda* rights; as each right was read to him, defendant said that he understood it; defendant specifically said that he understood that he had the right to have a lawyer present while he was being questioned and further stated that he did not wish a lawyer to be present; the officer then read the waiver of rights form to defendant; defendant read the rights form and the waiver of counsel form; and defendant then stated that he understood his rights and the waiver, initialed each of the rights, and signed his name to the waiver of counsel form.

**Am Jur 2d, Criminal Law §§ 793, 794, 797.**

**15. Criminal Law § 468 (NCI4th)— jury argument—reference to jurors by name—no impropriety**

The trial court did not commit plain error in allowing the prosecutor in her closing argument to refer to the jurors by name in asking each of the jurors to have no doubt about defendant's guilt of first degree murder.

**Am Jur 2d, Trial § 232.**

**Prejudicial effect of counsel's addressing individually or by name particular juror during argument. 55 ALR2d 1198.**

**16. Criminal Law § 1352 (NCI4th)— death penalty—McKoy error—remand for resentencing**

A sentence of death for first degree murder was vacated and remanded for *McKoy* error in the trial court's instructions requiring unanimity on mitigating circumstances where the jury failed unanimously to find the statutory impaired capacity mitigating circumstance, and a juror reasonably might have found this circumstance to exist on the basis of evidence that defendant had suffered from an alcohol problem for some time; he consumed alcohol and smoked marijuana shortly before the

murder; and defendant had been examined for psychological problems by a mental health professional as recently as 1986.

**Am Jur 2d, Criminal Law § 628.**

**Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.**

Justice MEYER concurring in part and dissenting in part.

Justice MITCHELL joins in this concurring and dissenting opinion.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment sentencing him to death for conviction of murder in the first degree, entered by *Allsbrook, J.*, at the 24 October 1988 Criminal Session of Superior Court, HALIFAX County. Heard in the Supreme Court 8 April 1991.

*Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda Anne Morris, Assistant Attorney General, for the State.*

*Richard B. Glazier for the defendant-appellant.*

MARTIN, Justice.

Defendant was convicted of murder in the first degree and kidnapping and was sentenced to death. Our review of the record reveals no error in the guilt phase of defendant's trial. We vacate the sentence of death and remand for a new sentencing proceeding on the conviction of murder in the first degree.

The victim, Aaron Parker, was a mentally retarded black male, who lived with his family near Roanoke Rapids, North Carolina. On the evening of 21 April 1988, Aaron left home at 7:30 p.m. to cut the grass at the home of a neighbor, Louise Heustess. Aaron's sister testified that Aaron appeared to have been drinking prior to leaving home.

On 21 April, defendant and his girlfriend, Debbie Willey, together with John Wright and his girlfriend, all of whom were white, lived at a rented mobile home near Ms. Heustess's house. A sign above the mobile home door admonished that black people were not allowed in the mobile home and pictured a Confederate flag. Inside the mobile home, Wright kept a snake in an aquarium.

Phillip Rook testified that he drove to Wright's mobile home about 7:30 p.m. on 21 April. While Rook was there, defendant got into a fight with Jimmy Nowell and then smoked marijuana with him and a group of others. Later, Aaron Parker arrived at the mobile home and offered to buy beer. At some point during the evening, Wright showed Aaron his six-foot boa constrictor. Aaron was afraid of the snake and left the mobile home when Wright took it out of the aquarium. Rook took Aaron to a country store, but Aaron was unable to purchase beer because he did not have enough money. Rook told Aaron that it was not a good idea for Aaron to return to the mobile home because nobody wanted him there.

Cathy Daniels, owner of the country store, corroborated Rook's story that Aaron had attempted to purchase beer late that evening. When Aaron returned the beer to the cooler, Rook told him that the others would be angry and "you know what's gone happen." The pair left, but Aaron came back and tried to buy a single beer which Daniels refused to sell to him because she believed that he was already intoxicated before Rook left the scene.

Rook testified that he left Aaron at the store and returned to Wright's mobile home alone. Aaron returned to the mobile home on foot. Debbie Willey beat Aaron with a four-foot-long stick, and defendant knocked him out the door. Aaron laid out in the yard for a period of time.

Wright's neighbors testified that they saw Aaron in the company of defendant and Wright on the evening of 21 April. They also heard noises coming from the mobile home that sounded like people falling. Eva Whitaker testified that after midnight, she passed a truck occupied by two white males and Aaron Parker. Aaron was seated between the two white men and had his mouth open. Whitaker did not see Aaron make any movements.

John Wright's mother, Norma Wright, testified that on 24 April 1988, defendant came to her home looking for John. Defendant told her that he had killed a black man. Defendant said that Debbie had beaten the man across the legs with a stick, and that he had killed the man to avoid identification as a participant in the assault, which was a violation of his parole and would send him back to prison.

On 27 April 1988, defendant made a statement to law enforcement officers. Defendant admitted to stabbing Aaron Parker once in the chest after dumping his body in the area where it was found. Defendant said that he knocked the victim off the porch of the mobile home and then beat him before he and John Wright dumped him near a field. Defendant admitted that he killed the man because he was on probation and would have to go back to jail if he were convicted of assault. Other facts pertinent to this appeal will be discussed below.

*Jury Selection Issue*

Defendant alleges in his first assignment of error that the trial court erred by excusing three jurors for cause due to their statements regarding their ability to consider capital punishment. The proper standard for determining whether a potential juror may be excused for cause based on his or her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his 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, 45, 65 L. Ed. 2d 581, 589 (1980)).

**[1]** Of the three jurors challenged for cause cited by defendant, only one was excused solely for his views on the death penalty. Juror Jones stated, when asked, that he could not recommend the death penalty under any circumstances. Under the standard set forth in *Wainwright v. Witt*, it is clear that juror Jones's beliefs regarding capital punishment would substantially impair his performance as a juror. 469 U.S. at 424, 83 L. Ed. 2d at 851-52.

**[2]** The other two excusals for cause challenged by defendant involved factors in addition to the jurors' views on the death penalty. Juror Foots repeatedly stated that she was too emotional to sit through the trial and began crying during her voir dire examination. She also stated that she did not believe that she could impose the death penalty. After stating that her sympathies for both the victim's family and the defendant would interfere with her ability to hear the case, Foots was excused for cause. The record reveals that Foots was excused primarily for her inability to sit through the trial without becoming emotional. We find no abuse of discretion in her excusal. *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359. Likewise, we find no abuse in the excusal of juror Conwell, who had worked with defendant's mother for twelve to thirteen

years. *Id.* Conwell stated that he would find it difficult to continue working with defendant's mother if the jury imposed the death penalty and that this consideration would interfere with his ability to consider the case. This assignment of error is overruled.

*Guilt Phase Issues*

**[3]** Defendant next contends that the court erred in permitting the State to introduce evidence from the crime scene which indicated that defendant was a racist. Defendant filed a motion in limine requesting that the court bar the introduction of, or any reference to, the Confederate flag found at Wright's mobile home and a noose found near the flag. The motion also requested that the State refrain from reference to defendant's alleged participation in a Ku Klux Klan rally. The trial court did not rule on the motion, but cautioned the District Attorney against injecting race as an issue in the trial without prior notice to defendant. Defendant complains that a witness was allowed to testify about a sign over the door of Wright's mobile home asserting that blacks were not allowed there and picturing a rebel flag. Another witness testified that he had seen defendant at a Klan march after the killing. Defendant alleges that this evidence was not relevant within the meaning of Rule 401 of the North Carolina Rules of Evidence.

Relevant evidence is evidence 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, R. 401 (1988). Evidence having any logical tendency to prove a fact in issue is relevant. *State v. Whiteside*, 325 N.C. 389, 383 S.E.2d 911 (1989). Evidence of ill will between defendant and the victim is admissible as tending to show, *inter alia*, motive. *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983). Although defendant stated that he killed the victim in order to avoid further incarceration for the assault, this explanation does not reveal why the attack began. No evidence other than race, as to why Aaron Parker was singled out for abuse, appears from the record. This evidence is clearly relevant. *Id.*

Moreover, defendant waived his right to appellate review of the admission of the evidence pertaining to the sign and Confederate flag at Wright's mobile home. A photograph of the outside of the mobile home, in which the sign was visible, was introduced without objection. Defendant later objected to the witness displaying the photograph to the jury. Failure to make a timely objection at trial

amounts to a waiver of the right to assert error on appeal. N.C.G.S. § 15A-1446 (1988). This assignment of error is overruled.

**[4]** In his third assignment of error, defendant argues that the trial court erred by allowing testimony about the mental capacity and character of the victim. During the guilt phase, various witnesses testified that Aaron was "slow" or "retarded" and that he was honest and polite. Defendant contends that the introduction of this evidence during the guilt phase of the trial violates the prohibition against victim impact statements of *Booth v. Maryland*, 482 U.S. 496, 96 L. Ed. 2d 440 (1987). *Booth* has recently been overruled in *Payne v. Tennessee*, --- U.S. ---, --- L. Ed. 2d --- (1991). However, these cases are inapposite to the case at bar because only penalty phase evidence and arguments were at issue in *Booth* and *Payne*. Here, the evidence was presented at the guilt phase, but was also argued at the penalty phase. Defendant does not argue that the evidence presented was not competent at the guilt phase of the proceedings. We hold that the evidence was properly admitted. Because we have granted defendant a new sentencing hearing, we do not address the remainder of his contentions with respect to the penalty phase. Accordingly, we overrule this assignment of error.

**[5]** Defendant next contends that the trial court erred by denying his motion to exclude photographs of the victim, by allowing the State to show photographs and project color slides on a wall in the courtroom, and by allowing testimony concerning the decomposition of the body. The State presented three color photographs and four color slides picturing the victim's body and allowed testimony about the condition of the body when found, including the fact that it was infested with maggots.

The admissibility of photographs is subject to Rule 403 of the North Carolina Rules of Evidence, which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, R. 403 (1988). Whether photographic evidence is admissible is within the sound discretion of the trial court. *State v. Sledge*, 297 N.C. 227, 254 S.E.2d 579 (1979). Generally, the fact

that a photograph of a murder victim is gruesome or gory does not render it inadmissible if it is otherwise competent. *State v. Harris*, 323 N.C. 112, 371 S.E.2d 689 (1988). Even where a body is in advanced stages of decomposition and the cause of death and identity of the victim are uncontroverted, photographs may be exhibited showing the condition of the body and its location when found. *Id.* In *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988), this Court held that a trial judge should "examine both the content and the manner in which photographic evidence is used and . . . scrutinize the totality of circumstances composing that presentation." *Id.* at 285, 372 S.E.2d at 527.

We find no abuse of discretion in the admission of the photographs in the case at bar. We cannot say that the trial court's ruling was so manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985). There is no evidence that the three photographs and four slides were used excessively or solely to arouse the passions of the jury. *State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988). Accordingly, we overrule this assignment of error.

**[6]** We next examine defendant's contention that the trial court erred in failing to instruct the jury, as requested, on the defense of voluntary intoxication. Defendant argues that substantial evidence was presented "which would support a conclusion by the judge that [defendant] was so intoxicated that he could not form a deliberate and premeditated intent to kill." *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). However, before submitting an instruction on voluntary intoxication, the trial judge must conclude that the defendant was "utterly incapable" of forming the necessary intent. *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987).

In the instant case, the evidence reveals that defendant *and his companions* consumed two fifths of liquor and smoked marijuana prior to the killing. As defendant concedes, the evidence of his intoxication is not overwhelming. He presented no definitive evidence regarding the amount of alcohol he consumed. Days after the murder, he was able to give police a detailed account of the crime. The evidence fails to show that defendant was utterly incapable of premeditating and deliberating the killing. *State v. Mash*, 323 N.C. 339, 372 S.E.2d 532. This assignment of error is without merit and is overruled.

**[7]** Defendant contends that the trial court erred by permitting various witnesses to testify that the victim was shaking and appeared frightened prior to his death. Defendant argues that such testimony was improper opinion under Rule 701 of the North Carolina Rules of Evidence. The State argues that the testimony was properly admissible to prove the victim's then existing state of mind. N.C.G.S. § 8C-1, R. 803(3) (1988). The testimony concerned the victim's fear, both shortly after being with defendant and while in the defendant's presence. We hold that this evidence was relevant, more probative than prejudicial, and therefore admissible. *See State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990) (shortly before murder, victim was nervous and upset, with fear in her voice).

**[8]** In his next assignment of error, defendant argues that the trial court erred by allowing a witness to testify that she saw the victim running down the road with defendant and John Wright behind him and heard the victim say "Let me go man." Moreover, the witness testified that one of them told Aaron to "bring his black ass on." Defendant contends that because the witness could not tell who had spoken the words, the statement was inadmissible. He argues that if John Wright, whose case was not joined with defendant's, made the statement, then it was inadmissible hearsay.

We hold that the trial court did not err in admitting the statement. Where the State establishes a prima facie case of a conspiracy, independent of the declaration it seeks to admit, statements of co-conspirators are admissible, *State v. Nichols*, 321 N.C. 616, 365 S.E.2d 561 (1988), even if the co-conspirators are not charged with criminal conspiracy. *State v. Albert*, 312 N.C. 567, 324 S.E.2d 233 (1985). Defendant admitted in his confession that he and John Wright took the victim to a field after assaulting him. Defendant told Wright that he had to get rid of the victim to escape further incarceration and that he would take the blame for the crime. Defendant's own confession establishes a conspiracy to kill the victim, and therefore the statement, even if made by John Wright, is admissible against defendant. *State v. Nichols*, 321 N.C. 616, 365 S.E.2d 561. Defendant's assignment of error is overruled.

**[9]** We next examine defendant's contention that the trial court erred in denying his motion for a mistrial following the testimony of W.H. Wheeler, the detective who investigated the crime. Wheeler testified that John Wright led him to the area where they eventually discovered the victim's body. Wright pointed to an area and

said, "This is where we left the body." Wheeler then testified that Wright was referring to himself and the defendant when making that statement. Defendant's objection to this testimony was overruled. Later, the court sustained objections to testimony concerning Wright's statements about what defendant said and did. Defendant's motion for a mistrial, based on the references to "we," was denied on the basis that the defendant's own statement was substantially the same as Wright's. Wheeler, in fact, testified about defendant's confession shortly after recounting Wright's statement.

Assuming, *arguendo*, Wright's statement was erroneously admitted, we hold that the error was not prejudicial. Where improperly admitted evidence merely corroborates testimony from other witnesses, we have found the error harmless. *State v. Payne*, 312 N.C. 647, 325 S.E.2d 205 (1985). Here, the evidence was presented to explain how the body was discovered. The trial court eventually struck the references to the defendant and his conduct. Defendant's statement was then presented. In the confession, defendant stated that he and Wright dumped the victim's body in the area where it was found, which corroborated Wright's statement. We find no reasonable possibility that the jury would have reached a different result absent Wheeler's testimony. *See* N.C.G.S. § 15A-1443(a) (1988).

**[10]** Defendant further contends that the trial court erred in admitting statements he made to law enforcement officers to the effect that he did not care if he received capital punishment. Defendant argues that this evidence is irrelevant to the State's case for murder in the first degree. Even if relevant, he alleges, the statement is inadmissible under Rule 403 of the North Carolina Rules of Evidence because its weak probative value is outweighed by the danger of unfair prejudice to defendant. N.C.G.S. § 8C-1, R. 403 (1988).

The State argues, and we agree, that the statement pertains to defendant's state of mind at the time of the confession and is highly relevant. Defendant argued, prior to trial, that he was under the influence of alcohol and drugs at the time he made the confession and therefore did not understand the nature of the interrogation. Wheeler testified that he advised defendant of his rights and informed him that he was charged with murder in the first degree, an offense for which he could receive the death sentence. Defendant's motion to suppress the confession was denied, but the jury was instructed to consider the circumstances surrounding

the confession in determining the weight, if any, to give to it. Defendant's statement is clearly relevant to the circumstances surrounding the confession.

Moreover, defendant has waived his right to review on appeal because he failed to renew his objection when the statement was subsequently repeated by the witness. Any benefit of the prior objection was lost by defendant's failure to renew the objection. *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990). This assignment of error is overruled.

**[11]** Defendant next argues that the trial court committed reversible error in overruling his objection to the testimony of his probation officer, William Graham. Graham testified that he was defendant's probation officer and that a condition of defendant's probation was that he commit no criminal offenses. Defendant contends that this testimony had little relevance and amounted to cumulative evidence emphasizing defendant's prior criminal record, which was unduly prejudicial.

In his confession, defendant stated that the reason he killed Aaron Parker was to avoid identification in the initial assault. He feared that his probation would be revoked and he would return to jail. Graham did not testify about the nature of the crime for which defendant was originally jailed. We find no error in this testimony because it corroborates defendant's confession as to motive and was limited to the conditions of his parole and defendant's awareness of those conditions. *See State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985) (importance of corroborating defendant's confession in order to verify the trustworthiness of the confession itself). This assignment of error is without merit.

**[12]** We turn next to defendant's contention that the trial court improperly admitted the testimony of Norma Wright. Defendant alleges that he was not provided timely discovery of the statements he allegedly made to Ms. Wright. North Carolina General Statute § 15A-903(a)(2) requires the State to divulge

> the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, . . . the existence of which is known to the prosecutor or becomes known to him prior to . . . trial.

N.C.G.S. § 15A-903(a)(2) (1988). The statute requires disclosure of statements then known to the State by noon on the Wednesday prior to the beginning of the week during which the case is calendared for trial. *Id.* Here, the State became aware of the statement on the Saturday prior to the week the trial began, but did not disclose the statement until the following Wednesday. Defendant argues that the intent of the statute clearly requires immediate disclosure when new evidence comes to light after the Wednesday disclosure deadline. Although the trial judge agreed that the State should have revealed the substance of the statement two days earlier, he determined that it contained substantially the same information provided in statements disclosed earlier in discovery. The court allowed the State to present Ms. Wright as a witness two days later, but limited her testimony to what was already in evidence and previously provided in discovery.

Sanctions for failure to make timely discovery are within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. *State v. Herring*, 322 N.C. 733, 370 S.E.2d 363 (1988). We find no abuse of discretion here. The substance of defendant's statement to Ms. Wright was substantially the same as his confession to police, other than his implication of Ms. Wright's son. Defendant did not request a delay to prepare for cross-examination. It is unlikely that knowledge of defendant's additional confession to Ms. Wright would have significantly affected defense strategy. This assignment of error is overruled.

**[13]** Defendant alleges that the trial court erred in not granting defendant's motion for a mistrial where Sam Sledge, a law enforcement officer, testified to a statement allegedly made by defendant. Sledge testified that defendant told W.H. Wheeler that he knocked Aaron off the porch of the mobile home. Sledge added that after the fight, the victim was loaded into a vehicle. Defendant objected on the basis that he never made the statement about loading the victim into a vehicle. The court sustained the objection and struck the testimony from the record, but denied defendant's motion for a mistrial. Defendant argues that mistrial was required because the testimony was irreparably prejudicial and was of such a nature that it would render a fair and impartial trial all but impossible under the law. *See State v. McCraw*, 300 N.C. 610, 268 S.E.2d 173 (1980); N.C.G.S. § 15A-1061 (1988).

The granting of a motion for mistrial is within the sound discretion of the trial judge and is reviewable only upon a showing of abuse of discretion. *State v. Craig*, 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). The State argues that the trial court cured any error by sustaining the objection, striking the phrase, and cautioning the jury not to consider the testimony. We hold that defendant has not shown irreparable prejudice justifying a mistrial because similar evidence placing the victim in Wright's truck after the assault was introduced through other witnesses. This assignment of error is without merit.

We next examine defendant's contention that the trial court erred in denying his motion to suppress his confession because the confession was not voluntarily made and was taken in violation of his right to counsel. On the voluntariness issue, defense counsel makes no argument, but requests that this Court review the record in light of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967). This approach is inappropriate in this situation because *Anders* requires certain procedural safeguards not followed here and generally applies only where counsel believes the whole appeal is without merit. *Id.* However, we have reviewed the record on this issue, and we hold that the trial court did not err in ruling that the confession was voluntarily made. Where the findings of fact support the conclusions of law, such findings and conclusions are binding upon us on appeal. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983).

**[14]** Defendant argues that the confession was taken in violation of his constitutional right to counsel. U.S. Const. amend. VI. An arrest warrant was issued by a Halifax County magistrate on 26 April 1988, and defendant was arrested the next day. Defendant contends that his sixth amendment right to counsel attached at the time of arrest. In *Brewer v. Williams*, 430 U.S. 387, 51 L. Ed. 2d 424, *reh'g denied*, 431 U.S. 925, 53 L. Ed. 2d 240 (1977), the United States Supreme Court held that the right to counsel attaches when adversary judicial proceedings are initiated against a suspect, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." 430 U.S. at 398, 51 L. Ed. 2d at 436 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417 (1972)). Defendant contends that a formal charge within the meaning of *Williams* was initiated when the magistrate

found probable cause and issued an arrest warrant. He argues, therefore, that the questioning that occurred on 27 April was a "critical stage" of the proceedings against him to which the sixth amendment right to counsel applied. *Kirby v. Illinois*, 406 U.S. at 690, 32 L. Ed. 2d at 418.

Assuming *arguendo* that defendant's sixth amendment right to counsel attached when the arrest warrant was served upon him, we hold that defendant waived his sixth amendment right to counsel before he was questioned by the officers.

The transcript shows that when the officers arrived at his mother's house, he was on the front porch. His parents were also there. When the officers arrested defendant pursuant to the warrant, they did not attempt to talk with him about the case. Debbie Willey, who was with defendant when he was arrested, was also taken into custody. Defendant was taken to the sheriff's department.

Detectives Wheeler and Sledge first talked with Debbie Willey and then defendant. Before advising defendant of his *Miranda* rights, Detective Wheeler told defendant he was being questioned about the murder of Aaron Parker and that he could receive the death penalty. Wheeler read defendant his *Miranda* rights. As each was read to him, defendant said that he understood it. Defendant specifically said that he understood that he had the right to have a lawyer present while he was being questioned. He also stated, "I do not wish a lawyer to be here. I'm going to tell the truth." The officer then read the waiver of rights form to defendant. Defendant read the rights form and the waiver of counsel form. He stated that he understood his rights and the waiver, and then he initialed each of the rights "CSW" and signed his name to the waiver of counsel form.

Defendant then gave the officer a statement about the crime. Eventually, he told the officers that he did not want to say anything else until he talked with a lawyer.

The officers testified that defendant appeared normal during the interview and that they did not smell any alcohol on him. He did not appear to be sleepy, angry or upset, but was cooperative and appeared to be mentally alert. In the opinion of the witnesses, defendant was not under the influence of drugs or alcohol; his speech was clear and understandable. Defendant did not appear to be in fear.

The defendant produced conflicting evidence as to the amount of alcohol he had consumed and whether he was under the influence of intoxicants at the time of the interview.

Upon the evidence presented, the trial judge made the necessary findings as appear of record. The evidence concerning whether defendant was so intoxicated that he was unable to make a voluntary and knowledgeable confession was reconciled by the trial judge against the defendant. The trial judge's conclusions of law were supported by the findngs of fact which in turn were supported by the evidence.

We hold the trial judge's denial of defendant's motion to suppress was not error. *See State v. Williams*, 308 N.C. 47, 301 S.E.2d 335 (1983) (Where findings of fact are supported by evidence and such findings support the conclusions of law found by the trial court, they are binding upon appeal.).

**[15]** Defendant further contends that the trial court committed plain error in allowing the prosecutor to refer to the jurors by name in her closing guilt phase argument and, subsequently, failing to instruct the jury to disregard such references. In her closing argument, the assistant district attorney argued the evidence and urged the jury to find a unanimous verdict of guilty of murder in the first degree, on both the felony murder theory and premeditation and deliberation. She then continued as follows:

> Have no doubt Miss Pearson, Mr. Faison; y'all have no doubt, Mrs. Barnes, Mrs. White, Mr. Tillery, Ms. Jones, Mrs. Baggett, Mr. Lewis; have no doubt, Mrs. Biggs, Mrs. Williams, Mrs. Patton; and if you, if you are at some point impanelled to deliberate, have no doubt Mrs. Lewis, have no doubt Mrs. Long, Ms. Silver, return a verdict of guilty in the first degree of kidnapping, and murder.

Defendant urges this Court to apply the principles enunciated in *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In *Holden*, we held that in the penalty phase, the trial court properly sustained the State's objection to defense counsel's argument asking each juror individually to spare defendant's life. *Holden*, 321 N.C. at 163, 362 S.E.2d at 537. That argument was improper because "it asked each individual juror to decide defendant's fate on an emotional basis . . . and in disregard of the jurors' duty to deliberate with the entire jury

toward the end of reaching a unanimous verdict." *Id.* In the instant case, the prosecutor merely asked the individual jurors to have no doubt, not to disregard their duty to deliberate together and reach a unanimous verdict. The rule in *Holden* was not violated. We hold that there was no plain error in the prosecutor's argument.

With regard to the sufficiency of the evidence, defense counsel asks this Court to review the record and decide the issue in accordance with *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493. Again, we find this approach inappropriate, but we have considered the issue. After a thorough review of the record on appeal, including the transcript and briefs, we hold that there was sufficient evidence to submit the issues to the jury. Accordingly, we overrule this assignment of error. In the guilt phase of the trial, we find no prejudicial error.

*Penalty Phase Issues*

**[16]** In the penalty phase, the trial court instructed the jury that it must unanimously find each mitigating circumstance before considering that circumstance in the ultimate sentencing decision. This 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). This error requires this Court to order a new sentencing proceeding unless the State can demonstrate beyond a reasonable doubt that the error was harmless. *State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106 (1990); *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426. In this case, the State concedes *McKoy* error, but argues that the error was harmless beyond a reasonable doubt.

This Court has recognized the constitutional importance of preserving the ability of the jury to consider, under proper instructions, all of the evidence that could reasonably mitigate the sentence in a capital case to something less than death. *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426. In the instant case, the jury found the following two aggravating circumstances: that the murder was committed for the purpose of avoiding a lawful arrest and that the murder was committed while defendant was engaged in the commission of the crime of kidnapping. The following five mitigating circumstances were submitted to the jury:

(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.

ANSWER No

(2) Any of the following circumstance or circumstances arising from the evidence which you find to have mitigating value:

a. The defendant voluntarily called deputies when he learned of the warrant for the capital offense against him.

ANSWER Yes

b. The defendant voluntarily and peacefully surrendered himself to law enforcement officials.

ANSWER Yes

c. The death of a childhood companion and the heart attack of his father created a sense of isolation and despair with the Defendant.

ANSWER No

3. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ANSWER No

As in *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991), we need to examine only the mitigating circumstance of impaired capacity on the part of the defendant, N.C.G.S. § 15A-2000(f)(6) (1988), because there was evidence tending to support this circumstance. Defendant had suffered from an apparent alcohol problem for some time before the commission of this crime. There was evidence introduced in the penalty phase that shortly before the murder of Aaron Parker defendant had consumed alcohol and smoked marijuana. Additionally, there was evidence that defendant, at least as recently as 1986, had been examined for psychological problems by a mental health professional, Dr. Alford, of the Halifax Mental Health Department. This evidence could support a reasonable inference that defendant had psychological problems, 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 requirements of the law was impaired. *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582.

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 prejudice from the improper instructions on this mitigating circumstance is manifest because this circumstance is statutory and, therefore, is deemed to have mitigating value. *Id.*

*Preservation Issues*

The defendant raises ten additional issues which he concedes have been recently decided against him by this Court. They are:

1. The bill of indictment was fatally defective because it fails to allege premeditation and deliberation.

2. The death penalty statute is unconstitutional as being vague, overbroad, and imposed in a discriminatory manner.

3. Death qualification of the jury violated defendant's constitutional rights to an impartial jury.

4. The court erred in failing to require the prosecution to disclose the aggravating circumstances on which it intended to rely.

5. The court erred by allowing the prosecutor to use peremptory challenges on the basis of the juror's opposition to the death penalty.

6. The court erred in overruling defendant's objections concerning the use of the aggravating factor that the killing was committed while the defendant was engaged in the commission of a kidnapping.

7. The court instructed the jury that defendant had the burden of proving mitigating circumstances to the satisfaction of the jury.

8. The court's instructions which placed defendant in jeopardy of his life if the jury determined that the mitigation was insufficient to outweigh the aggravation constitute error.

9. The instruction that the jury had a duty to return a recommendation of death, if it found the aggravating circumstances in the light of the mitigating circumstances were sufficiently substantial to call for the imposition of the death penalty, constitutes error.

10. The trial court erred in sentencing defendant to die because the sentence was not supported by the evidence, and the sentence

was recommended under the influence of passion, prejudice, and other arbitrary factors.

Defense counsel with commendable candor concedes that these issues were raised merely to give this Court an opportunity to reexamine our previous holdings, and if we adhere to those holdings, to preserve the issues for later review by the federal courts. Having considered the arguments made by the defendant on these issues, we find that defendant has failed to provide the Court with any compelling reason to depart from our prior holdings. Therefore, these assignments of error are overruled.

We find no error in the guilt phase. Having found prejudicial *McKoy* error, we therefore vacate the sentence of death and remand this case to the Superior Court, Halifax County for a new capital sentencing proceeding.

Guilt phase: No error.

Penalty phase: Death sentence vacated and case remanded for new capital sentencing proceeding.

Justice MEYER concurring in part, dissenting in part.

I concur in the majority's opinion as to the guilt phase, but I dissent as to the majority's conclusion that there was error in the sentencing phase requiring a new sentencing proceeding. While I concede the presence of *McKoy* error, I question whether defendant properly preserved his *McKoy* issue for review by this Court, and even assuming that he did, I am convinced that the error was harmless beyond a reasonable doubt.

The trial court submitted to the jury two aggravating circumstances. The jury unanimously found that the murder was committed for the purpose of avoiding a lawful arrest and that the murder was committed while defendant was engaged in the commission of the crime of first-degree kidnapping.

The court also submitted five mitigating circumstances, and the jury unanimously found that "defendant voluntarily called deputies when he learned of the warrant for the capital offense against him" and that "defendant voluntarily and peacefully surrendered himself to law enforcement officials." The jury did not unanimously find the existence of the other three mitigating cir-

cumstances: "[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," "the death of a childhood companion and the heart attack of his father created a sense of isolation and despair with the defendant," or the catchall, "any other circumstance or circumstances arising from the evidence which you the jury deemed to have mitigating value."

The trial court instructed the jury at sentencing that unanimity would be required concerning the determination of aggravating circumstances under Issue One, mitigating circumstances under Issue Two, and the weighing of these issues under Issue Three. On Issue Four, the court correctly instructed the jury as follows:

> In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances present from the evidence. *Even if you, the jury, has not found unanimously the existence of a certain proposed mitigating circumstance, if an individual juror believes that a mitigating circumstance has been proved by a preponderance of the evidence in this case, that juror may consider that mitigating circumstance in his evaluation of whether the aggravating factors are sufficiently substantial to call for the imposition of the death penalty. . . .* You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances present from the evidence. *Again, each individual juror in making this determination, may consider any mitigating factor he believes proved by a preponderance of the evidence, whether or not the mitigating factor was found by the jury unanimously to exist.* 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 issues, "yes." If you are not so satisfied or have a reasonable doubt, it would be your duty to answer the issues, "no."

(Emphasis added.)

The State does not dispute that error occurred in the jury instruction for Issue Three; the issue is whether the error is prejudicial.

Defendant registered no objection at trial to the trial court's instructions. While this Court has adopted a special rule for certain instances of *McKoy* error in which a defendant is not required to object to unanimity instructions, the special rule does not apply to the instant case. The special rule applies "[a]t least for all trials conducted after *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), and before *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988)." *State v. Sanderson*, 327 N.C. 397, 404, 394 S.E.2d 803, 806 (1990). The error in this case occurred five months after *Mills v. Maryland. Mills* was filed 6 June 1988, and this trial began over four months later on 24 October 1988. The court's instructions to the jury during the penalty phase of the trial occurred on 8 and 9 November 1988, five months after *Mills* was handed down.

Where a defendant fails to object to jury instructions at trial, this Court will review the challenged instructions under the plain error doctrine. *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *judgment vacated on other grounds*, --- U.S. ---, 111 L. Ed. 2d 777 (1990). Under that doctrine, the Court's review is limited only to "exceptional" cases containing "fundamental" error.

> "[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' . . . ."

*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. 1982) (footnotes omitted) (citations omitted) ).

Assuming, *arguendo*, however, that defendant was not required to object at trial and that the issue is preserved, I disagree with the majority and conclude that the *McKoy* error was harmless, even under the less demanding standard of review. Where an objection is properly preserved for appeal, in order to find harmless error, this Court must find beyond a reasonable doubt that no different result would have been reached if the individual jurors had been permitted to consider mitigating circumstances not

unanimously found. *State v. Quesinberry*, 328 N.C. 288, 294, 401 S.E.2d 632, 635 (1991) (Meyer, J., dissenting) (citing cases). The burden is on the State to prove beyond a reasonable doubt that the jury would nonetheless have recommended death even if each individual juror had been allowed to consider all of the mitigating circumstances which he or she individually found to be present. *Id.*

Under the facts of this particular case, I am convinced beyond a reasonable doubt that the jury would have recommended the sentence of death even if the individual jurors had considered the three mitigating circumstances not unanimously found. A review of the record indicates that there was no evidence presented to the jury by which a reasonable juror could find any of the mitigating circumstances that the jury did not unanimously find to exist. *Id.* at 294-95, 401 S.E.2d at 635 (citing *State v. McKoy*, 327 N.C. 31, 44 n.4, 394 S.E.2d 426, 433 n.4 (1990)).

CIRCUMSTANCE: IMPAIRED CAPACITY

The majority concludes that there was adequate evidence to support this circumstance such that a reasonable juror might have found that mitigating circumstance in the absence of a unanimity requirement. I disagree. The evidence of impairment is sparse, attenuated, and completely unconvincing, and no reasonable juror would have found this circumstance to exist even had the jury been correctly instructed.

Defendant's evidence of impairment involves his statement that "they" had consumed two fifths of vodka and had smoked some marijuana without any indication whatsoever as to the amount defendant consumed. There was also testimony by defendant's mother that defendant had undergone two psychological evaluations, one when defendant was approximately ten years old and another in 1986. Although it was not disclosed to the jury, there was an indication during a voir dire that the 1986 evaluation was ordered as a result of a first-degree burglary charge. The only evidence before the jury with regard to the 1986 psychological evaluation was that Dr. Alford of Halifax Mental Health examined defendant on 29 May 1986, and there was no evidence whatsoever before the jury as to the reason for the examination or its result. I conclude that it is questionable if there was sufficient evidence of diminished capacity to even submit the issue to the jury. The mere fact that it was submitted and rejected will not support a finding of prejudicial error.

Defendant in this case tormented his victim with a snake, beat him, compelled him to buy alcohol, kidnapped him, and stabbed him. Under the facts of this case, no reasonable juror could determine that defendant was impaired.

CIRCUMSTANCE: DEATH OF A FRIEND AND HEART ATTACK OF FATHER TEN YEARS EARLIER

The evidence is undisputed that defendant had a friend to die and that his father had a heart attack some ten years before this offense was committed. His father, however, was alive and in the courtroom, and it is difficult to conceive of how either of these events had any effect on defendant's killing of a retarded black male. Defendant's mother testified as follows:

> When Horace died, Carl drew inside of hisself (sic) and he felt like the world was against him and when his father had the heart attack, which wasn't but a couple of years later, it seemed to take his father away from him and he just didn't understand what was going on in the world.

Defendant's mother further testified that defendant cried at the Halifax County jail on 26 August 1988. I conclude that this evidence does not support a finding that defendant suffered from any unusual sense of isolation and despair, and nothing about this evidence reduces the culpability of the senseless murder of Aaron Parker. Simply because the trial court submitted this issue to the jury at defendant's request does not indicate that there is any possible mitigating value to this testimony. No reasonable juror could find this to have mitigating value.

CIRCUMSTANCE: CATCHALL

On appeal, defendant contends that there are three circumstances which could have been found under the "catchall." Defendant notes that his age, his alleged alcohol problem, and his limited criminal record are possible mitigating circumstances which the jury, if properly instructed, could have found.

A. *Defendant's age at the time offense occurred.*

Defendant was apparently twenty years old at the time he murdered Aaron Parker. Although the court specifically asked trial counsel if they wanted this circumstance submitted to the jury, they declined and therefore waived any right to have this matter submitted to the jury. However, defendant's attorney did argue

to the jury, over objection, that young people make mistakes and that defendant should be forgiven. In this case, defendant had been out on his own caring for himself, was living with his girlfriend, and was apparently working. He had been involved with the law and charged with several criminal offenses. The evidence shows defendant's physical and intellectual development and level of experience to be normal. Especially in light of the fact that defendant's counsel objected to the matter being placed in writing before the jury, no reasonable juror could have found this to have mitigating value, and age should not have been submitted to the jury. *See State v. Johnson*, 317 N.C. 343, 393-94, 346 S.E.2d 596, 623-24 (1986).

B. *Defendant's alleged alcohol problem.*

While there is a great deal of discussion in the record in this case about drinking, there is very little testimony of defendant's alleged "alcohol problem." Veronica Wynne testified that her brother drank many times, but "they didn't really drink that much for mama and daddy's sake." More importantly, defendant's alleged "alcohol problem" was not specifically submitted to the jury as a factor in mitigation, and defendant on appeal cites no testimony to support his contention that the jury, if properly instructed, could have found an "alcohol problem" to exist or that, if found, it would have had mitigating value. No reasonable juror could have found any mitigating value to the sparse testimony of alcohol abuse.

C. *Defendant's prior criminal record.*

Defendant specifically requested that the judge not submit the circumstance of no significant history of prior criminal activity. The reason for this request is obvious, as the State entered into the record the following criminal charges:

1. first-degree burglary,
2. felonious larceny (two counts),
3. felony breaking and entering a motor vehicle,
4. felony breaking and entering a motor vehicle,
5. wanton injury and destroying real property,
6. disorderly conduct,
7. simple assault,

8. having an unregistered vehicle,

9. having an expired inspection sticker,

10. possession of drug paraphernalia.

It is absurd to think that the jury, under proper instructions, could find in mitigation a circumstance that defendant successfully concealed from them. The fact that defendant kept his criminal record out of evidence during the sentencing proceeding should not be the source of prejudicial error in this case.

While I concede that *McKoy* error occurred during the sentencing proceeding, it is questionable whether it was properly preserved for review; and, in any event, it was harmless beyond a reasonable doubt. I find no other error in the sentencing proceeding and vote to affirm the sentence of death.

Justice MITCHELL joins in this concurring and dissenting opinion.

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STATE OF NORTH CAROLINA v. DONALD REX BROGDEN

No. 412A88

(Filed 14 August 1991)

**1. Criminal Law § 686 (NCI4th); Constitutional Law § 342 (NCI4th)— jury instructions—informal meeting in chambers improper—error not prejudicial**

The trial court's error in a capital case in conducting an informal meeting in chambers to discuss the jury instructions, outside the presence of defendant, prior to the formal charge conference held in open court, was harmless beyond a reasonable doubt where, after the informal meeting was held, the entire matter was entered into the record in open court, in the presence of defendant, where both counsel for the State and for defendant made their legal arguments and took exceptions.

**Am Jur 2d, Criminal Law § 916.**

**Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys, during argument on question of law. 85 ALR2d 1111.**

**2. Homicide § 25.2 (NCI3d)— premeditation and deliberation— sufficiency of evidence**

There was no merit to defendant's contention that the evidence did not reasonably support the conclusions that "lethal blows were struck after the victim was felled and rendered helpless" or that "grossly excessive force" was used, and the trial court therefore did not commit reversible error by permitting the jury to find premeditation and deliberation, where the physical evidence suggested that the lethal blow came after the victim had been shot twice previously and was on the floor of the store; defendant's wife testified that there was a "pause" between shots; and three shots fired at close range, the last while the victim lay helpless on the floor, would support a finding of use of grossly excessive force.

**Am Jur 2d, Homicide § 439.**

**3. Robbery § 4.3 (NCI3d)— robbery with dangerous weapon— sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for robbery with a dangerous weapon where it tended to show that neither defendant nor his wife was employed at the time of the crime; defendant had paid only part of his rent prior to the murder, but on the day after the murder paid the balance due in five, ten, and twenty dollar bills; approximately one hour before deceased's body was found in his store there was about $200 in currency in the cash drawer; when his body was discovered the cash drawer was open, but it contained less than twenty dollars; and deceased had been shot three times by the defendant.

**Am Jur 2d, Robbery § 62.**

**4. Jury § 7.4 (NCI3d)— race of jurors—failure to establish—no showing of discrimination**

By failing to elicit from the jurors by means of questioning or other proper evidence the race of each juror, defendant failed to carry his burden of establishing an adequate record for appellate review with regard to his claim of discrimination in the exercise of peremptory challenges.

**Am Jur 2d, Jury § 217.**

**5. Jury § 7.14 (NCI3d)— jurors hesitant about capital punishment—peremptory challenges allowable**

The trial court did not err in allowing the district attorney to peremptorily challenge certain jurors solely because they were "hesitant" about imposing capital punishment.

**Am Jur 2d, Jury §§ 237, 289, 290.**

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

**6. Criminal Law § 775 (NCI4th)— voluntary intoxication—request for instruction properly denied**

The trial court properly denied defendant's request for an instruction on voluntary intoxication where the record showed that defendant was able to drive a car, fire the murder weapon, hit the victim with all three shots, recognize the gravity of what he had done, and flee the scene; and the evidence thus did not satisfy defendant's burden of proving that he was so completely intoxicated as to render him incapable of forming a deliberated and premeditated purpose to kill.

**Am Jur 2d, Criminal Law § 54; Homicide §§ 127-130.**

**Modern status of the rules as to voluntary intoxication as defense to criminal charge. 8 ALR3d 1236.**

**7. Criminal Law §§ 434, 439, 463 (NCI4th)— jury argument—no gross impropriety**

Five statements made by the district attorney during his closing argument with regard to the credibility of defendant's wife, the order in which the fatal shots were fired, defendant's failure to refute ballistics testimony, defendant's prior criminal record, and defendant's robbery of the victim because he had no source of income did not rise to the level of gross impropriety which would have warranted intervention *ex mero motu* by the trial court.

**Am Jur 2d, Trial §§ 218, 244, 269.**

**8. Criminal Law § 1352 (NCI4th)— mitigating circumstances—unanimous finding required—prejudicial error**

The trial court erred in requiring that the jury unanimously find mitigating circumstances, and the court's oral modi-

fication of the written instructions was insufficient to correct the error; furthermore, such error was prejudicial where the jury failed unanimously to find any of the mitigating circumstances submitted; there was evidence sufficient to support the mitigating circumstance that defendant was under the influence of mental or emotional disturbance when the murder was committed; and this circumstance was statutory and therefore presumed to have mitigating value.

**Am Jur 2d, Criminal Law § 628.**

**Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.**

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Stevens (Henry L., III), J.*, at the 8 August 1988 Criminal Session of Superior Court, DUPLIN County. Defendant's motion to bypass the Court of Appeals as to his conviction of robbery with a dangerous weapon was allowed by this Court on 15 February 1990. Heard in the Supreme Court 8 May 1991.

*Lacy H. Thornburg, Attorney General, by John H. Watters, Assistant Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellant.*

MEYER, Justice.

Defendant was indicted for the murder of John Robert Walker and was tried capitally at the 8 August 1988 Criminal Session of Superior Court, Duplin County. The jury found defendant guilty of first-degree murder on the theories of premeditation and deliberation and felony murder and guilty of robbery with a dangerous weapon. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of death for the murder conviction, and on 24 August 1988, the trial court sentenced defendant to death in accordance with the jury's recommendation. Defendant was also sentenced to a consecutive term of forty years for robbery with a dangerous weapon.

Defendant brings forward numerous assignments of error relating to the guilt and sentencing phases of his trial. After a careful consideration of these assignments, as well as the transcript,

record, briefs, and oral argument, we find no error in the guilt phase of defendant's trial. The decision of the United States Supreme Court 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.

The evidence presented by the State at trial tended to show that on 7 March 1988, John Robert Walker owned and operated a country store in rural Duplin County. That afternoon, about 2:00 p.m., Dennis Davis, a salesman who stopped in at the store on his route every other Monday, entered the store and noticed the cash register open but saw no one. He called for Mr. Walker six or seven times and then went outside and called again. He looked through the window and saw Walker's body on the floor at the end of the counter. Davis then drove a short distance to find an area resident to call the police. Upon returning to the store, Davis determined that Mr. Walker was dead.

Police officers arrived and noted that there was a trail of blood behind the counter leading to the body and that there were visible wounds on the right side of the body, on the left cheek, and in the area of his left shirt pocket. Mrs. Walker testified that approximately $200.00 was missing from the cash box. Two lead slugs were found at the scene, and another was recovered from Walker's body during an autopsy. Medical evidence revealed that the death resulted from the bullet which caused the wound in the cheek and then followed a path downward from left to right, lacerating the carotid artery, causing Walker to bleed to death internally.

Defendant and his wife were married in 1987. They had lived in Alabama for some time, but then moved to North Carolina where they stayed with defendant's mother. Later, they moved into a mobile home in Princeton, Johnston County, where the rent was $250.00, due on the first of each month. In January and February of 1988, defendant bought two guns from a firearms store and routinely carried one of the guns with him in a shoulder holster or in his pants. Defendant's wife even took a photograph of defendant wearing a pistol in a shoulder holster, which was later identified as appearing to be the murder weapon. During this time, neither defendant nor his wife was employed. Defendant and his wife had no income, and defendant had been drinking heavily seven

days a week. By 7 March, defendant had only paid $100.00 toward the rent due for March.

On 7 March 1988, defendant started drinking early that morning. He and his wife decided to drive to visit his mother but did not stop at her house because a strange car was in the driveway. Instead, they drove to a liquor store in the area and purchased some Beam's Choice for defendant and later got a six-pack of beer at a convenience store. They drove to the Beautancus area of Duplin County, past Walker's store, where defendant's aunt, Dora Bell, lived. They went to Mrs. Bell's house about 1:00 p.m. and rang the doorbell but left before she could answer the door. Defendant and his wife then went back to Walker's store and parked beside a telephone booth. Defendant's wife attempted to call defendant's mother but got a busy signal. She got back into the car and told defendant that she wanted a soft drink. Defendant and his wife entered the store together. He went to the back of the store, and she stayed around the "drink box."

About 1:45 p.m., John Watson, a state bridge maintenance worker, came into the store and made a purchase. He only stayed in the store a few minutes, but he did notice defendant and his wife inside the store. While in the store, defendant's wife got a soft drink, corn chips, and cookies. She approached the counter where Mr. Walker was standing and told him that defendant would pay for the food because her purse was in the car. She then went outside and heard three shots, each separated by a pause. Shortly thereafter, defendant came out of the store and told her, "[L]et's get out of here." Defendant was "white in the face" and appeared nervous. Defendant then drove back to Princeton. As he drove, defendant laid his gun on the front seat of the car. The gun appeared to be the gun later identified as the murder weapon. Defendant and his wife arrived back at the mobile home about 2:30 p.m.

The day after the murder, defendant paid his landlord the balance due on the rent in cash consisting of five-, ten-, and twenty-dollar bills. On 9 March, an S.B.I. agent searched defendant's mobile home and automobile and found two weapons. Officers testified that the two slugs found in the store and the one taken from Mr. Walker's body were fired from the revolver found under the mattress in defendant's bedroom.

Defendant presented evidence during the guilt phase that when he and his wife bought the weapons, one of the guns was for

his wife. She had taken the gun outside and, with the firearm dealer's help, test fired it while at the store. Another witness testified that he saw defendant's wife fire the weapon and that she could shoot as well as defendant.

Evidence presented at the sentencing phase will be discussed under Issue VIII as needed.

GUILT PHASE ISSUES

I.

**[1]** Defendant contends that the trial court erred in conducting a guilt phase charge conference in an informal, in-chambers meeting, outside the presence of defendant and the court reporter, prior to the formal charge conference held in open court. We disagree.

At the close of evidence at the guilt phase, an informal meeting between the trial judge and counsel for the State and defendant was conducted in chambers. There is no affirmative indication in the record whether defendant was present. The parties then returned to the courtroom, and the respective requests for jury instructions and possible verdicts were put into the record. At the conclusion of the formal charge conference in open court, the trial court asked the parties, on two separate occasions, whether there was anything the parties wanted to add to the record. After receiving a negative response after the first inquiry and no response after the second, the following discussion took place:

> THE COURT: All right. Anything further?
>
> MR. ANDREWS: No, sir.
>
> MR. PHILLIPS: No, sir.
>
> MR. SMITH: No, sir.
>
> THE COURT: If there is anything further now, let's get it in the record. I want to be absolutely fair about this thing. If there is anything, let's get it in here.
>
> All right. Mr. Court Reporter seems like everybody is satisfied with the charge with those exceptions which we have recorded.
>
> Am I correct, Gentlemen?
>
> MR. PHILLIPS: Yes, your Honor.

MR. SMITH: Yes, your Honor.

THE COURT: And the possible verdicts to be submitted to the jury. How say the State, Mr. Solicitor?

MR. ANDREWS: Your Honor, we contend those are the proper verdicts to be submitted.

THE COURT: I believe in that respect, I think the defendant agrees?

MR. PHILLIPS: Yes, sir.

MR. SMITH: Yes, sir.

THE COURT: That's it. Thank you, Gentlemen.

Counsel for each side had an opportunity to be heard concerning jury instructions and possible verdicts and to take exception to any ruling that was adverse to his position.

It is well settled that a defendant charged with capital murder "has the right to be, and must be, personally present at all times in the course of his trial, when anything is done or said affecting him as to the charge against him . . . , in any material respect." *State v. Kelly*, 97 N.C. 404, 405, 2 S.E. 185, 185-86 (1887). Article I, section 23 of the North Carolina Constitution guarantees a criminal defendant the right to be present at *every stage* of his trial. *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *judgment vacated on other grounds*, --- U.S. ---, 111 L. Ed. 2d 777 (1990). Our state Constitution provides a broader right than the federal Constitution and mandates that a defendant's presence cannot be waived. *See State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991).

However, error caused by the absence of the defendant at some portion of his capital trial does not require automatic reversal. This Court has adopted the "harmless error" analysis in cases where a defendant is absent during a portion of his capital trial. *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635. The State has the burden of establishing that the error was harmless beyond a reasonable doubt. *Id.; State v. Payne*, 328 N.C. 377, 402 S.E.2d 582.

This Court, under similar circumstances, found harmless error where a charge conference was held out of the presence of defendant and was not recorded, but where defendant was represented by counsel at the conference and the trial court subsequently reported the proposed instructions on the record and gave counsel an oppor-

tunity to be heard. *State v. Wise*, 326 N.C. 421, 390 S.E.2d 142 (defendant was charged with two counts of first-degree rape), *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 113 (1990). In the capital case *sub judice*, an informal meeting was held in chambers with the attorneys to discuss the jury instructions. Then the entire matter was entered into the record in open court, in the presence of defendant, where both counsel for the State and for defendant made their legal arguments and took exceptions. We find that the error in conducting an informal meeting in chambers to discuss the jury instructions, outside the presence of defendant, prior to the formal charge conference held in open court, was harmless beyond a reasonable doubt.

II.

**[2]** Defendant next contends that the trial court committed reversible error by permitting the jury to find premeditation and deliberation on the basis of a theory not supported by the evidence. Defendant argues that the evidence did not reasonably support the conclusion that "lethal blows were struck after the victim was felled and rendered helpless" or that "grossly excessive force" was used. We disagree.

This Court has recognized that there might be more than one plausible explanation to any given set of facts. *State v. Griffin*, 288 N.C. 437, 219 S.E.2d 48 (1975), *judgment vacated on other grounds*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). In *Griffin*, the defendant objected to the jury being instructed that it might consider lethal blows inflicted after the victim had been felled. The evidence in *Griffin* was that the victim had suffered two separate bullet wounds. This Court noted that "[c]ertainly one explanation of the bullet wound in the back of the head is that it was fired after the deceased was shot the first time [to the front of his neck] and had fallen to the ground." *Id.* at 447, 219 S.E.2d at 55.

Here, the victim, Mr. Walker, was found dead, lying at the end of the store counter, face down on his left side, in a pool of blood four or five feet in diameter. A blood trail behind the counter led from the cash register to where the body was found. Visible wounds to the body included gunshot wounds to Mr. Walker's left cheek, left shirt pocket, and left side just above the belt. Two spent bullets were found on the floor of the store. The third spent bullet was removed from the right neck or upper chest area during the autopsy of the body. The bullet had originally entered his

left cheek, then passed through the cheek tissue, through the cheek bone into the lower mouth, and down into the neck area after lacerating the carotid artery. The medical examiner testified that the path of the bullet was from Mr. Walker's left to his right side, downward and slightly back. The path of the bullet combined with the entrance wound in the left cheek and its resting place near the collarbone suggest that the lethal blow came after Mr. Walker had been shot twice previously and was on the floor of the store.

In addition to the State's presentation of physical evidence to support the "felled victim" theory, it is also supported by the testimony of defendant's wife that there was a "pause" between shots. *State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653 ("the 'felled victim' theory of premeditation and deliberation is that when numerous wounds are inflicted, the defendant has the opportunity to premeditate and deliberate from one shot to the next"), *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987).

Defendant also alleges error in the trial court's instructions to the jury in that they could consider the "use of grossly excessive force" in determining whether defendant killed the victim with premeditation and deliberation. This Court has held that two shots at close range were sufficient to support consideration of the "use of grossly excessive force." *State v. Griffin*, 288 N.C. 437, 219 S.E.2d 430.

In the case *sub judice*, three shots were fired from a .38-caliber pistol, and all three shots struck the victim. The physical evidence indicates that one of the shots, the last and fatal one, was fired as Mr. Walker lay helpless on the ground. We find that the record contains plenary evidence from which a jury could properly find premeditation and deliberation beyond a reasonable doubt and hold that the trial court did not err in its instruction.

III.

**[3]** Defendant next assigns error in the trial court's denial of his motion to dismiss, at the close of all the evidence, the charge of robbery with a dangerous weapon. We disagree. Defendant argues that the State offered no direct evidence that defendant took anything from Mr. Walker.

The motion to dismiss must be allowed unless there is substantial evidence of each element of the crime charged. *State v. Brown*,

310 N.C. 563, 313 S.E.2d 585 (1984). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986). The evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable inference. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982).

In North Carolina, robbery with a dangerous weapon is the taking of personal property from another by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened. *State v. Porter*, 303 N.C. 680, 281 S.E.2d 377 (1981). Defendant alleges that the State failed in its proof on the element that personal property was taken. The record indicates that in March of 1988, neither defendant nor his wife was employed. Their rent of $250.00 was due on 1 March. By 7 March, defendant had paid only $100.00 toward the amount due. On 8 March, the day after the murder, defendant paid his landlord the remaining $150.00 in cash consisting of five-, ten- and twenty-dollar bills.

The wife of the deceased, Annie Walker, testified that the store always started the day with $60.00 in currency in the cash drawer. This amount would consist of twenty one-dollar bills, two tens, and four fives. On 7 March, Mrs. Walker worked at the store until approximately 1:00 p.m., and there was about $200.00 in currency in the drawer when she left. When Dennis Davis arrived at the store at 2:00 p.m. and found Mr. Walker's body on the floor, the cash drawer was open. The special agent that arrived at the store to process the crime scene found the cash drawer open, and the *only* money in the drawer was eight one-dollar bills and coins, for a total of $19.35.

We find that the evidence, when viewed in the light most favorable to the State, is sufficient to properly withstand defendant's motion to dismiss. We hold that the trial court did not err in denying defendant's motion to dismiss the charge of robbery with a dangerous weapon. This assignment of error is without merit.

IV.

**[4]** Defendant further contends that the trial court erred in holding that the principles of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), did not apply to this case and that defendant had established a prima facie case of discrimination. We note that,

notwithstanding the trial court's ruling on whether defendant had standing to assert a *Batson* challenge, defendant has failed to provide an adequate record regarding the race of the jurors, both those accepted and those rejected, and has therefore waived any such objection.

This Court has previously made clear that

> the burden is on a criminal defendant who alleges racial discrimination in the selection of the jury to establish an inference of purposeful discrimination. The defendant must provide the appellate court with an *adequate record* from which to determine whether jurors were improperly excused by peremptory challenges at trial. *Statements of counsel alone are insufficient to support a finding of discriminatory use of peremptory challenges.*

*State v. Mitchell*, 321 N.C. 650, 654, 375 S.E.2d 554, 556 (1988) (emphasis added) (citing *Jackson v. Housing Authority*, 321 N.C. 584, 585, 364 S.E.2d 416, 417 (1988)).

We have also previously stated:

> Although [having the *court reporter* note the race of every potential juror] *might* have preserved a proper record from which an appellate court could determine if any potential jurors were challenged solely on the basis of race, we find it *inappropriate*. To have a court reporter note the race of every potential juror examined would require a reporter alone to make that determination without the benefit of questioning by counsel or any other evidence that might tend to establish the prospective juror's race. *The court reporter, however, is in no better position to determine the race of each prospective juror than the defendant, the court, or counsel.* An individual's race is not always easily discernible, and the potential for error by a court reporter acting alone is great. . . .
>
> If a defendant in cases such as this believes a prospective juror to be of a particular race, he can bring this fact to the trial court's attention and ensure that it is made a part of the record. Further, if there is any question as to the prospective juror's race, *this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence*, as opposed to leaving the issue to the court reporter who may not make counsel aware of the doubt. In the present

> case the defendant did not avail himself of this opportunity . . . .
>
> . . . .
>
> . . . Thus, the defendant has failed to demonstrate that the prosecutor exercised peremptory challenges solely to remove members of any particular race from the jury.

*Mitchell*, 321 N.C. at 655-56, 375 S.E.2d at 557-58 (emphasis added), *quoted in State v. Payne*, 327 N.C. 194, 199, 394 S.E.2d 158, 160 (1990), *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 1062 (1991).

We further held in *Payne* that an affidavit submitted by defense counsel "contained only the perceptions of one of the defendant's lawyers concerning the races of those excused—perceptions no more adequate than the court reporter's or the clerk's would have been, as we recognized in *Mitchell.*" *State v. Payne*, 327 N.C. at 200, 394 S.E.2d at 161.

In the case *sub judice*, defendant's discussion with the court regarding record keeping of each juror's race, the following exchange ensued:

> [DEFENSE COUNSEL:] . . . The jury proceedings are being transcribed by the reported [sic]. We simply [ask to] be allowed to place in the record as far as the State's pre-emptory [sic] challenges that is to race and sex of each of the jurors that were pre-emptory [sic] challenges.
>
> COURT: I have no problem with that. . . .
>
> . . . .
>
> COURT: . . . [T]he Court has no problem with the nose count as it were as to the sex and to the race of the particular jury [sic] which has been excused pre-emptory [sic] by the State of North Carolina.

In spite of the foregoing exchange, however, the only records of the potential jurors' race preserved for appellate review are the subjective impressions of defendant's counsel and notations made by the court reporter of her subjective impressions with regard to race. We conclude that defendant, in failing to elicit from the jurors by means of questioning or other proper evidence the race of each juror, has failed to carry his burden of establishing an adequate record for appellate review.

V.

**[5]** As defendant's next assignment of error, he contends that the trial court erred in allowing the district attorney to peremptorily challenge certain jurors solely because they were "hesitant" about imposing capital punishment. The district attorney volunteered that he had peremptorily challenged six jurors solely because they were hesitant about the death penalty and had challenged two others in part because they were hesitant about imposing the death penalty. Defendant's assignment of error is without merit.

This Court has previously rejected defendant's argument and has held that "prosecutors may 'take into account the concerns expressed about capital punishment by prospective jurors, or any other factor, in exercising peremptory challenges.' " *State v. Robbins*, 319 N.C. 465, 494, 356 S.E.2d 279, 297 (quoting *Brown v. North Carolina*, 479 U.S. 940, 940, 93 L. Ed. 2d 373, 374 (1986) (O'Connor, J., concurring) ), *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). We have stated further that it was not error under either the United States Constitution or the North Carolina Constitution "for the prosecution to use its peremptory challenges to excuse veniremen who had qualms about the death penalty," even though a juror could not have been excused for cause because of those concerns. *State v. Allen*, 323 N.C. 208, 222, 372 S.E.2d 855, 863 (1988), *judgment vacated on other grounds*, --- U.S. ---, 108 L. Ed. 2d 601 (1990); *see State v. Artis*, 325 N.C. 278, 337, 384 S.E.2d 470, 504 (1989) ("[I]t is neither constitutionally nor otherwise improper to use peremptory challenges to strike veniremen who have voiced some qualms about imposing the death penalty."), *judgment vacated on other grounds*, --- U.S. ---, 108 L. Ed. 2d 604 (1990). We hold that this issue has previously been decided adversely to defendant and find no error.

VI.

**[6]** Defendant next contends that the trial court erred in denying defendant's request for a jury instruction on voluntary intoxication because the requested instruction was supported by the evidence. We disagree and hold that the trial court properly denied defendant's request for an instruction on voluntary intoxication.

This Court has previously held:

> A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consump-

> tion of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, of his intoxication. Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. He must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.

*State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988).

In the case *sub judice*, defendant's wife testified that defendant drank every day. She stated that "[h]e drank more than three or four [mixed drinks of liquor] a day. If he set [sic] up all night, he would drink all night." On the morning of the murder, defendant consumed "maybe three or four" drinks before leaving the house. After leaving the house, defendant drove himself and his wife to visit his mother. After stopping at two different places for whiskey and a six-pack of beer, they arrived at defendant's aunt's house. After getting no answer, defendant drank two and a half cans of beer as they drove around and stopped at a wooded area to urinate. They then drove to Mr. Walker's store, arriving at approximately 1:45 p.m. After the shots were fired in the store, defendant returned to the car and told his wife, "[L]et's get out of here."

The record shows that defendant was able to drive a car, fire the murder weapon, and hit the victim with all three shots. After killing his victim, defendant was able to recognize the gravity of what he had done and flee the scene.[1] We find that the evidence presented during the guilt phase of the trial did not satisfy defendant's burden of proving that he was so completely intoxicated as to render him incapable of forming a deliberated and premeditated purpose to kill. We hold that the evidence was insufficient to support an instruction on voluntary intoxication. This assignment of error is without merit.

VII.

**[7]** In defendant's next assignment of error, he contends that the district attorney allegedly made five improper statements during

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1. Defendant notes that he testified during the *sentencing phase* of the trial that he had consumed five or six drinks that morning and they were having an effect on him. However, since this testimony was not presented to the trial court when it made its ruling in the *guilt phase*, it is not relevant to this assignment of error.

his closing argument. From the outset, we note that defendant made no objection at trial. We have previously stated that "it is only reversible error for the trial judge not to intervene *ex mero motu* where the argument is so grossly improper as to be a denial of due process." *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). We hold that none of the following arguments, which defendant contends were improper, rise to the level of being "grossly improper."

Defendant first argues that the district attorney improperly vouched for the credibility of witness Jean Brogden, defendant's wife. However, an examination of the record reflects that the district attorney told the jurors that they should believe her because her testimony was corroborated and was against her penal interest. We find that the district attorney's argument in that context is not improper.

Defendant next alleges that the district attorney's contentions about the order in which the fatal shots were fired and the position of the victim's body were improperly admitted. In his closing argument, the district attorney contended that the first shot was fired at the victim's heart, the second to the victim's stomach, and the third to the victim's face when the victim was helpless. The State responds that the district attorney's argument was based on the evidence and reasonable inferences to be drawn from that evidence. It is well settled that:

> Argument of counsel is largely within the control and discretion of the trial judge. Counsel must be allowed wide latitude in the argument of hotly contested cases. Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom.

*State v. Lynch*, 300 N.C. 534, 551, 268 S.E.2d 161, 171 (1980).

It is reasonable to infer from the physical evidence presented in this case that the shot to the victim's left cheek was the final, fatal shot, administered after the victim was felled and in a position of helplessness. The medical examiner testified that the path of the bullet was from the left to the right, downward, and slightly back. We find that the evidence in this case is sufficient to support the reasonable inference of the order of shots and the position

of the victim's body during the killing, and we hold there was no error.

Defendant also objects to the district attorney's reference to defendant's failure to refute ballistics testimony by noting that defendant had received advance notice and could have contested the evidence if it were not true. The State's ballistics report, which defendant did not refute, showed that the three bullets recovered from the victim were fired from defendant's gun. Defendant contends that such an argument is "beyond the record." We disagree. The State may properly bring the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State to the jury's attention in its closing argument. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). In its closing argument, the State may argue the law and the facts and all reasonable inferences to be drawn from those facts. *State v. Lynch*, 300 N.C. 534, 268 S.E.2d 161.

Defendant also objects to a statement made by the district attorney suggesting to the jury that defendant had a prior criminal record. In attempting to impeach the testimony of defendant's wife, defendant presented the testimony of a firearms dealer but noted that the dealer was limited in what he could say because "he might have some problems. That's where that 5th Amendment comes from." In his closing argument, the district attorney referred to the firearms dealer's testimony and said:

> Of course, you heard their own witness, the gun man, who, as [defendant's attorney] said, is in sort of a bind. By the way, he did [not] really explain that—why he is in sort of a bind.
>
> He's a licenced [sic] firearm dealer. What type people can't you sell guns to? You figure that out.

We agree that the statement appears to be an improper suggestion as to defendant's prior criminal record. However, assuming, *arguendo*, that the statement was improper, it was not so egregious as to be grossly improper and warrant intervention *ex mero motu* by the trial court. Defendant's right to a fair trial was not compromised by this one remark, as there was ample evidence on which the jury could have based its verdict.

Finally, defendant argues that the district attorney improperly suggested in his closing argument that defendant robbed the victim

because he had no other source of income. He contends that the statement was made in bad faith because the State was aware that defendant had received $2,000 by forging checks from his mother's account, and the presence of these additional funds undercuts the State's theory of defendant's motive for the robbery. We disagree and find no error.

The evidence indicated that defendant and his wife were unemployed and that money was so short that they could not pay their rent in full. In addition, the evidence that defendant forged checks worth $2,000 was not addressed until the sentencing phase and therefore is not relevant to the district attorney's knowledge of the source of the income during the guilt phase of the trial, when he made the statement. We find that these five statements made by the district attorney during his closing argument do not rise to the level of gross impropriety that would have warranted intervention *ex mero motu* by the trial court.

SENTENCING PHASE ISSUE

VIII.

**[8]** Defendant contends that the trial court's sentencing instructions, considered in their totality, violate *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, *on remand*, 327 N.C. 31, 394 S.E.2d 426 (1990). We agree. The State responds that the trial court orally modified the written instructions on Issues Three and Four such that there was no error, and even assuming error, it was harmless beyond a reasonable doubt.

The trial court submitted and the jury unanimously found the aggravating circumstances 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 that the murder had been "committed for pecuniary gain," N.C.G.S. § 15A-2000(e)(6) (1988). The trial court submitted but the jury failed to find *any* of the mitigating circumstances as follows:

ISSUE TWO:

DO YOU UNANIMOUSLY FIND FROM THE EVIDENCE THE EXISTENCE OF ONE OR MORE OF THE FOLLOWING MITIGATING CIRCUMSTANCES?

ANSWER: No.

. . . .

(1) This murder was committed while the defendant was under the influence of mental or emotional disturbance.

ANSWER: No.

(2) This murder was actually committed by another person and the defendant was only an accessory to the murder and his participation in the murder was relatively minor.

ANSWER: No.

(3) 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.

(4) You should also consider the following circumstances arising from the evidence which you find have mitigating value.

. . . .

(4-a) The defendant was reared by hard-working parents as one of three children and worked to help out the family while at home.

ANSWER: No.

(4-b) The defendant graduated from North Duplin High School.

ANSWER: No.

(4-c) The defendant was a loving and caring step-father and showed natural love and affection for his step-son, Jason.

ANSWER: No.

(4-d) The defendant has expressed remorse and concern for the death of John Robert Walker and he is repentant.

ANSWER: No.

(4-e) The defendant has expressed remorse and concern for the family and friends of John Robert Walker.

ANSWER: No.

(4-f) The defendant has adjusted well to prison life and has not violated any of the rules and regulations relating to behavior of inmates since his incarceration on March 9, 1988.

ANSWER: No.

(4-g) The defendant loved and respected his mother, and helped provide her financial assistance while growing up; and the defendant had a good relationship with his brothers.

ANSWER: No.

(4-h) The defendant's father committed suicide requiring the defendant to assume primary responsibilities at an early age in life.

ANSWER: No.

(4-i) The defendant's first wife, who[m] he loved dearly, died of cancer.

ANSWER: No.

(4-j) The defendant, after his father's suicide, worked to keep the family business successful.

ANSWER: No.

(5) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ANSWER: No.

In *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369, the United States Supreme Court held unconstitutional our requirement that in capital cases jurors must unanimously agree upon the existence of a mitigating circumstance before considering it during the sentencing phase. Our review of the record reveals that the jury here was repeatedly so instructed. The jury answered "no" to each of fourteen mitigating circumstances submitted. In both the oral and written instructions on Issue Two, the court instructed the jury that it must be unanimous to find a mitigating

circumstance, and if it were not unanimous, it should answer the mitigating circumstance "no." 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, 395 S.E.2d 106 (1990), *cert. denied*, --- U.S. ---, 113 L. Ed. 2d 459 (1991). Thus, the issue becomes whether the *McKoy* error in this case can be deemed harmless beyond a reasonable doubt.

The State contends that there was no *McKoy* error because the jury was specifically instructed orally, on Issues Three and Four, that any individual juror could consider a circumstance in mitigation shown by defendant even if the circumstance had not been found unanimously by the jury in Issue Two. The record reflects that the trial court explained the third and fourth issues as follows:

> Now, *Issue Three*: Do you *unanimously* find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstances [sic] or circumstances found by you?
>
> . . . .
>
> *Furthermore, in deciding this issue, any individual juror may consider any circumstance, or circumstances, arising from the evidence which that juror deems to have mitigating value, irrespective of whether or not such circumstance has been unanimously found to exist.*
>
> If you *unanimously* find beyond a reasonable doubt that the mitigating circumstances found by you are insufficient to outweigh the aggravating circumstances found by you, you would answer Issue Three, "yes".
>
> . . . .
>
> Now *Issue Four*: 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 answering Issue Four, none of you is precluded from considering anything in mitigation that you find to exist, even if that mitigating circumstance was not unanimously agreed upon.*

. . . .

*Again, when making this final balance, each of you may individually consider any circumstance in mitigation that you determine to exist, regardless of whether or not that circumstance was found unanimously to exist. That is to say, that in deciding Issue Four, any individual juror may consider any circumstance or circumstances arising from the evidence which that juror deems to have mitigating value, irrespective of whether or not such circumstance has been unanimously found to exist.*

(Emphasis added.)

The State notes that the additional oral instructions repeatedly admonished the jurors that in the initial balancing of Issue Three and the final balancing of Issue Four, they could individually consider and give effect to circumstances in mitigation which they found to exist, regardless of whether they were unanimously found in Issue Two. Thus, the State argues that the *McKoy* constitutional principle was not violated in the present case. We disagree.

While the oral instructions given by the trial court on Issues Three and Four attempted to correct the error, the written "Issues and Recommendation as to Punishment" form, which the jurors had been handed individually to follow as the verbal instructions were given, did not contain the alleged curative instruction. The form provided:

ISSUE THREE:

DO YOU *UNANIMOUSLY* FIND BEYOND A REASONABLE DOUBT THAT THE MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND BY YOU IS, OR ARE, INSUFFICIENT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND BY YOU?

. . . .

ISSUE FOUR:

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?

(Emphasis added.) When both the written and oral instructions are considered in their totality, there is a "reasonable possibility" that the instructions could have been understood to mean that jurors, in answering Issues Two, Three, and Four, could only consider in mitigation those mitigating circumstances found unanimously by the jury. *See State v. Huff*, 328 N.C. 532, 402 S.E.2d 577 (1991). We conclude that the instructions to the jury, taken as a whole, constitute *McKoy* error.

Further, having determined that the instructions to the jury constituted *McKoy* error, 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. Fourteen mitigating circumstances were submitted, including three which are statutory, but not one was found by the jury. Neither defendant nor the State briefed the question of whether the evidence might have been sufficient to support one or more of the mitigating circumstances tendered but not found. Our detailed review of the record reveals that the evidence presented at trial was sufficient to support one or more of these mitigating circumstances submitted.

On this appeal, we need focus only on the mitigating circumstance that defendant was under the influence of mental or emotional disturbance when the murder was committed. N.C.G.S. § 15A-2000(f)(2) (1988). There was evidence tending to support this circumstance. As previously noted, defendant testified, during the sentencing phase, that he had consumed five to six drinks of liquor on the morning in question. In addition, defendant's wife testified that defendant had drunk two to three cans of beer while they were driving around. Defendant further stated that the alcohol was having an effect on him. More importantly, defendant's wife also testified that defendant was explosive and subject to mood swings in which he would become enraged and threaten her.

We cannot say beyond a reasonable doubt that, absent the erroneous unanimity instructions provided to the jury in written form, no juror could have found the existence of this mitigating circumstance and, weighing it against the aggravating circumstances, could have changed the recommendation of the jury from death

to life imprisonment. The potential prejudice from improper instructions on the mental or emotional disturbance mitigating circumstance is considerable because the circumstance is statutory and is therefore presumed to have mitigating value. *State v. Huff*, 328 N.C. 532, 402 S.E.2d 577; *State v. Quesinberry*, 328 N.C. 288, 401 S.E.2d 632 (1991).

In conclusion, we find no error in the guilt phase of defendant's capital trial; however, we find *McKoy* error in the sentencing phase. We therefore vacate the sentence of death and remand the case to Superior Court, Duplin County, for a new capital sentencing proceeding in the first-degree murder case.

For the reasons given, we find no error in the robbery with a dangerous weapon conviction but remand the murder conviction to the Superior Court, Duplin County, for a new capital sentencing proceeding not inconsistent with this opinion or the opinion of the United States Supreme Court in *McKoy*.

No. 88CRS933, robbery with a dangerous weapon—No error.

No. 88CRS932, first-degree murder—guilt phase: No error; sentencing phase: death sentence vacated; remanded for new capital sentencing proceeding.

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STATE OF NORTH CAROLINA v. JOSEPH DAVID ANNADALE

No. 351A90

(Filed 14 August 1991)

**1. Homicide § 30 (NCI3d)— first degree murder—refusal to instruct on second degree murder—no error**

The trial court did not err in a murder prosecution by refusing defendant's request to instruct the jury on second degree murder. A defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the State's evidence but not all of it.

**Am Jur 2d, Homicide § 530.**

**2. Homicide § 21.5 (NCI4th)— murder—motions to dismiss—corpus delicti rule—evidence sufficient**

The trial court did not err by denying defendant's motions to dismiss in a murder prosecution where the opinion of the medical examiner, together with the testimony of other witnesses, clearly establishes a death by criminal agency and meets the requirements of the *corpus delicti* rule.

**Am Jur 2d, Homicide §§ 432, 433.**

**3. Criminal Law § 66.17 (NCI3d); Witnesses § 7 (NCI3d)—murder—in-court identification by victim's son—not tainted**

The trial court did not err in a first degree murder prosecution by allowing the in-court identification of defendant by the victim's son where defendant contended that the in-court identification was tainted by the unnecessarily suggestive statements of a therapist who hypnotized the witness and law enforcement officers who always referred to the picture of defendant as "Joe." The trial judge's findings, supported by competent evidence, clearly show that the witness knew defendant before he was subjected to hypnosis and that the identification was reliable. Assuming that it was error to relate in sequence the events surrounding the disappearance of the victim, defendant was not prejudiced because there was no reasonable possibility that a different result would have been reached at trial had the alleged error not been committed.

**Am Jur 2d, Evidence §§ 831, 1143.**

**4. Criminal Law § 35 (NCI3d)— murder—rumor concerning victim's disappearance—not admissible**

The trial court did not err in a murder prosecution by refusing to allow defendant to question a witness about a man who had come to the witness's store and told him that the victim had been involved with drug dealers, that there was a contract out on her, and that he knew where she was and could get her back for a reward. The proffered evidence consisted of the testimony of a witness concerning statements by an unidentified person, the evidence constitutes hearsay not within any exception, the evidence does not implicate any particular person as the perpetrator, and it is not inconsistent with defendant's guilt.

**Am Jur 2d, Homicide § 329.**

**5. Criminal Law § 51.1 (NCI3d) — murder — testimony of medical examiner — admissible**

The testimony of the medical examiner as to the cause of death was admissible in a murder prosecution despite defendant's contention that the medical examiner was in no better position than the jury to render an opinion. The witness serves as the state's Chief Medical Examiner; he was accepted as an expert in forensic pathology and was allowed to testify as an expert; he was well qualified as a forensic pathologist to provide testimony which was within his area of expertise and helpful to the jurors; and he was subject to thorough cross-examination by defendant concerning his testimony and any apparent discrepancies therein.

**Am Jur 2d, Homicide § 398.**

**6. Criminal Law § 35 (NCI3d) — murder — testimony that offense committed by another — not admissible**

The trial court did not err in a murder prosecution by refusing to permit an assistant district attorney to testify regarding the details of a crime for which a State's witness had been convicted where the evidence was offered to show that the witness rather than defendant committed the crimes for which defendant was being tried. There was nothing so unique about the crimes committed by the witness that one would conclude that the same person must have committed the crimes for which defendant was being prosecuted, and the evidence did not tend to show that a specific person other than defendant committed the crimes in question.

**Am Jur 2d, Homicide § 296.**

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Albright, J.*, at the 11 September 1989 Criminal Session of Superior Court, ORANGE County, upon a jury verdict of guilty of first degree murder. Heard in the Supreme Court 13 February 1991.

*Lacy H. Thornburg, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.*

*J. Kirk Osborn and W. David Lloyd for defendant.*

FRYE, Justice.

Defendant was indicted on 6 February 1989 for the murder of Mary Kathryn Ennis and was indicted on 7 August 1989 for first-degree kidnapping of Ms. Ennis. The case was tried capitally. The jury found defendant guilty of first-degree kidnapping and first-degree murder on the basis of felony murder and premeditation and deliberation. A separate sentencing proceeding was held pursuant to N.C.G.S. § 15A-2000 (1988). Following a jury verdict recommending a sentence of life imprisonment for the murder, Judge Albright arrested judgment in the first-degree kidnapping case and imposed a life sentence to run at the expiration of the sentence defendant was presently serving. Defendant appealed to this Court, presenting six questions for our review. We find no reversible error.

The evidence presented at trial tended to show that at approximately 6:45 a.m. on 5 November 1986, Mary Ennis' son, Andy Evans, who was five years old at the time, awakened and discovered that he was at home alone. Andy became frightened and called his grandfather. Mr. Ennis, Andy's grandfather, proceeded immediately to Ms. Ennis' mobile home. After arriving at his daughter's home, Mr. Ennis and Andy then drove to the Ice Cream Churn to see David Smudski, Ms. Ennis' boyfriend. Smudski told Mr. Ennis that he had not seen Ms. Ennis; so Mr. Ennis left and took Andy to school.

Smudski left to go to Ms. Ennis' mobile home shortly after Mr. Ennis left his store. On the way he noticed Ms. Ennis' car on the side of Lawrence Road. He went to Ms. Ennis' trailer and telephoned the sheriff. Smudski then returned to Ms. Ennis' car, met the sheriff's deputy, and informed him of the situation.

Winona Harris and her husband lived across the road from Ms. Ennis' trailer. In October of 1986, defendant moved in with Mr. and Mrs. Harris. Every morning when Mrs. Harris arose she could see Ms. Ennis' porch light shining through her kitchen window. According to Mrs. Harris, Ms. Ennis' porch light and bathroom light burned twenty-four hours a day. However, on the morning of 5 November 1986, Mrs. Harris noticed that there were no lights on in Ms. Ennis' trailer. Mrs. Harris testified that she got out of bed around 3:30 a.m. on 5 November to awaken her husband and to get things ready for him to leave for work. She further testified that just as she turned a light on inside her trailer, defend-

ant entered stating that he had just run a Mexican man out of the back yard. Defendant told Mrs. Harris that he had spent the night outside so that he would not awaken Mr. Harris by entering the trailer so late.

Deputy Bobby Collins first interviewed defendant concerning Ms. Ennis' disappearance on or about 7 November 1986. During the interview, defendant told Deputy Collins that on 4 November 1986, he left work around 5:00 p.m., went to the Hillsborough Prison Unit to check on his work release checks, and then returned to the Harris' trailer. Defendant also told Deputy Collins that later in the evening he drove to Mebane or Burlington looking for a friend, then returned to Hillsborough and drove around town. According to defendant, during the time he was gone he was drinking beer and taking valium. Defendant stated that when he returned to the trailer it was late and he did not want to awaken Mr. Harris so he slept in his car until he was awakened by rain hitting the car. Defendant also told Deputy Collins that when he awakened he saw a Mexican man standing at the rear of the Harris' residence so he got out of the car and chased the man, but was unable to catch him. Defendant went inside after Mrs. Harris turned lights on inside the trailer. Deputy Collins contacted defendant on several other occasions to ask questions concerning Ms. Ennis' disappearance.

In March 1987, defendant began living with Shelby Riddle. On 27 June 1987, Riddle went to the Orange County Sheriff's Department and reported that defendant had assaulted her with a gun and threatened to kill her. Riddle would not take out a warrant against defendant, but the Sheriff's Department took out a felonious assault warrant against defendant based upon the information obtained from Riddle.

While at the Sheriff's Department, Riddle told the sheriff that defendant told her while they were doing an "eight-ball" of cocaine that he killed Ms. Ennis. Riddle also told the sheriff that defendant stated that he chopped up Ms. Ennis' body with a shovel, put her in a plastic bag and buried her. Riddle then told the sheriff that a week after defendant confessed to her, he borrowed her car to move Ms. Ennis' body because he was afraid she was going to be dug up.

Lynn Stevens, a friend of Riddle, testified that Riddle told her that defendant would awaken at night because he would dream of Ms. Ennis. Stevens testified that after defendant attacked Riddle,

Riddle changed the story to say defendant actually sat down and told her the story. Stevens further testified that Riddle told her to tell the police that on the evening of 4 November 1986, Stevens saw two people standing by Ms. Ennis' car on the side of Lawrence Road. Stevens told the police that the woman had dark short hair and the man had long dark hair. Subsequently, Stevens told defense counsel the same story in Riddle's presence, but when she was alone with counsel, she told him that she had lied. Stevens admitted that on the evening in question, she observed Ms. Ennis' car only. Stevens testified that while Riddle was living with defendant, she was having a relationship with another man, and Riddle spoke frequently of the reward money offered in this case. Stevens also stated during the trial that Riddle had threatened her about her testimony. On cross-examination Stevens admitted that she had not related this story to the sheriff's deputies, even when she spoke to them out of Riddle's presence.

On 10 July 1987, defendant was arrested on charges taken out by the Orange County Sheriff's Department concerning his alleged assault on Riddle. On 20 July 1987, Robert Webster, who was jailed in a cell adjoining defendant's, sent a message to the jailer that he wanted to speak with Major Truelove, an officer with the Orange County Sheriff's Department. Webster reported to Truelove that either defendant had done something awfully wrong or he was seriously disturbed, and defendant could not sleep at night because he had nightmares and was mad at Truelove. Webster also informed Truelove that defendant said he might as well go ahead and admit that he killed the girl so that Truelove would leave him alone.

On 31 July 1987, Orange County Sheriff's deputies showed Andy Evans a photographic line-up that consisted of six pictures, one of which was a picture of defendant. Andy selected a picture of defendant out of the photographic array as a person he recognized. The deputies called Andy's therapist, Dr. Barbara Hawk, and scheduled a meeting with her for another photographic identification procedure. Dr. Hawk had been working with Andy in an attempt to help him work out his emotions regarding the loss of his mother. Dr. Hawk was also working with the Orange County Sheriff's Department in an attempt to get information from Andy concerning the disappearance of his mother. During the next photographic line-up, referring to the picture of defendant, Andy stated that defendant had come over to his trailer the night of

4 November 1986. Andy told Dr. Hawk that his mother had an argument with the man in the picture because the man did not want Ms. Ennis to date other men. Andy thought that the defendant's name was Mike or Steve.

On 1 February 1988, Dr. Hawk, the Orange County Sheriff's deputies and Andy viewed a video taped line-up containing six men, one of whom was defendant. The tape was viewed twice. Portions of the video tape had the six men reading from a transcript. Defendant was number three in the line-up. Andy was asked if number three was the man who was in his trailer and he responded, "that looks like the man; I think his name is Mike; you said his name is Joe."

Prior to the trial, a voir dire hearing was held on the permissibility of Andy making an in-court identification of defendant. During voir dire, Andy stated that the name Joe Annadale was first mentioned to him by either Lt. Collins or Major Truelove before the photographic line-up procedure. Also, during voir dire, it was determined that on 17 August 1987, Andy was shown ten or eleven individual photographs, and he was asked to separate the pictures into three piles: persons he knew, persons he maybe knew, and persons he did not know. Andy first put the picture of defendant in the "knew" pile, but later put it in the "maybe knew" pile. Additionally, during the video line-up on 1 February 1988, Andy identified one other person in the line-up, a Durham police officer, as a person who had been to his mother's trailer in a white truck.

Testimony at the voir dire hearing revealed that on 4 March 1988, Andy was put into a hypnotic trance by Dr. Shirley Sanders, a nationally recognized expert in hypnosis, in an effort to bypass emotional blocks that interfere with retrieval of memory in order to gain more information from Andy about the disappearance of his mother. According to Dr. Hawk, this session was the first time Andy had used the name Joe in his identification of the man who argued with his mother on 4 November 1986, and this was the first time Andy could relate the events surrounding his mother's disappearance in sequence.

The trial judge denied defendant's Motion to Suppress Andy's in-court identification of defendant as being the man he saw in his trailer the night of 4 November 1986. Over the objection of defendant, Andy was permitted to make the in-court identification

of defendant. Andy also testified that on 4 November 1986, he and his mother drove over to Smudski's house and left a note on the door for Smudski about him dating other women. Andy testified that he could tell that his mother was angry by the way she acted, and on that evening his mother told him that if she was not home in the morning when he woke up, she would be at Smudski's house.

On 25 May 1988, Wendell Strickland, the State's chief witness, was sentenced to fifty years in prison for second-degree kidnapping, second-degree rape, second-degree sexual offense, common law robbery, and assault upon a female. Defendant's counsel, during cross-examination, attempted to elicit from Strickland details of these crimes, and Strickland invoked his Fifth Amendment privilege against self-incrimination. Defense counsel then attempted to make an offer of proof through the testimony of Tom Murphy, the assistant district attorney who prosecuted Strickland. This offer of proof was denied.

Strickland met defendant sometime after 7 July 1988, when defendant entered Central Prison. According to Strickland, defendant told him that he was hired to "off" Ms. Ennis for $5,200. Strickland testified that Ms. Ennis' boyfriend, a cocaine supplier from Florida, gave defendant a key to Ms. Ennis' trailer. Strickland further testified that defendant said that he entered the trailer, went to Ms. Ennis' bedroom, and put a washcloth over her mouth. He allowed her to look in on her son, then he left the trailer with Ms. Ennis and she drove him in her car to a remote area. Defendant told Ms. Ennis that he was not going to kill her; they exited the car, and defendant took Ms. Ennis into the woods. Defendant tried to choke her to death, but being unable to do so, he cut her throat. Strickland also testified that defendant drew a map on a concrete podium on the prison basketball court of the location of Ms. Ennis' body, and after defendant erased the map by scratching it out, Strickland went to Bible class and reproduced the map in a composition book.

Carmello Mangione, also an inmate at Central Prison, testified that on or about 8 August 1988, he and Strickland obtained some artane and marijuana, and during that evening defendant used the drugs with them. Mangione provided basically the same information as Strickland concerning defendant's confession. However, according to Mangione, after defendant told his story, he left the cell block for a while and returned to find defendant drawing a

map for Strickland. Mangione testified that after defendant drew the map, Strickland folded it and placed it on the bed, but defendant later threw it on the floor. Mangione further testified that when the three of them got ready to leave, Strickland picked up the map, smoothed it out, and kept it. Mangione testified that both he and Strickland went to Tracy Porter, a prison official, and told him about the information regarding the missing woman.

On 13 September 1988, Strickland met with Truelove and District Attorney Carl Fox to discuss what defendant allegedly told him. During the meeting, Strickland would only say that he had information as to the exact location of Ms. Ennis' body. Strickland would not tell Truelove and Fox anything until he was assured that he would be released from prison and that he would get the reward money.

On 31 October 1988, Wayne Eads, Strickland's attorney, wrote to Fox regarding negotiating an agreement for Strickland in exchange for Strickland's testimony concerning the disappearance of Ms. Ennis. In his letter, Eads represented that Strickland's testimony concerning this case "was received by him directly from the perpetrator prior to his [Strickland's] arrest, conviction and imprisonment and did not arise in any way from a jailhouse or prison conversation or gossip."

On 9 January 1989, using a map provided by Strickland, Orange County law enforcement officers and SBI agents began searching for Ms. Ennis' body, and when they found human remains in the area, they immediately called in Dr. John Butts of the State's Medical Examiner's Office to make an inspection and collect various remains in the area. While at the scene, Dr. Butts found a human skull, a small cluster of bones consisting of vertebrae, backbones and rib bones, a portion of the sacrum, and hip bones. Dr. Butts collected the bones, carried them to Chapel Hill, cleaned them and examined them for evidence of injury, abnormality, or changes. Dr. Butts detected considerable animal damage to the hip bones and located no jawbone, collarbone or shoulder blades.

Dr. Butts testified that in his opinion, the bones belonged to a relatively young white female. Dr. Butts consulted with the Orange County Sheriff's Department concerning possible identities, then he obtained medical records, including x-rays and dental records of Ms. Ennis. Assisted by Dr. William Webster, a forensic odontologist, Dr. Butts compared postmortem x-rays of the teeth and

skull with antemortem x-rays known to be from Ms. Ennis. The doctors compared dental records of Ms. Ennis' known fillings or restorations with those fillings and restorations visible in the remaining teeth. Dr. Butts found numerous points of identity and similarity, which included tooth restorations as well as skull bone patterns. According to Dr. Butts, x-rays of bone contain characteristics that are unique for that particular person, and one can determine the identity of a skull or other bone by comparing an x-ray of that material with x-rays taken of a living person. Dr. Butts testified that in this case, the pattern of the sella turcica, a little spot in the middle of the skull which contains the pituitary gland, matched, as did the skeletal pattern in an area containing some of the sinuses. In Dr. Butts' opinion, the remains he collected in the Orange County field were those of Ms. Ennis.

Defendant offered expert testimony through Dr. Thomas David, a forensic odontologist. Dr. David testified that the American Board of Forensic Odontologists has essentially three categories of identification with one special category: positive identification, possible identification, exclusion, and a special category when there is not enough evidence to render any opinion one way or the other. Dr. David reviewed the same antemortem and postmortem x-rays and overlays used by Dr. Butts and Dr. Webster. Dr. David testified that Dr. Webster apparently knew beforehand that he was attempting to identify the remains as those of Ms. Ennis, and therefore his identification was not done blindly with no knowledge of whom he was attempting to identify. Dr. David testified that the postmortem x-rays prepared by Dr. Webster were of insufficient quality to tell the exact configuration of the restorations. Dr. David also testified that better quality x-rays and additional types of x-rays could have been prepared which would have made the identification process indisputable. According to Dr. David, the identification fell into the category of possible identification, meaning that there are consistent features between the antemortem evidence and the postmortem evidence but the amount and/or quality of evidence is insufficient to establish a positive identification.

Defendant did not testify before the jury.

**[1]** The first question we address is whether the trial court erred in refusing defendant's request to instruct the jury on second-degree murder. Defendant contends that if he did in fact kill Ms. Ennis, but acted without premeditation or without deliberation,

and did not commit the murder during the perpetration of the felony of kidnapping, he would be guilty of second-degree murder. Defendant further contends that "[t]he sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). According to defendant, there was evidence from which a reasonable juror could conclude that Ms. Ennis left her home voluntarily and went to Smudski's home in an effort to settle a lovers' quarrel. Defendant further argues that a reasonable juror could conclude from the testimony that defendant had been drinking and taking valium and that he could not have formed the intent to premeditate or deliberate, each being necessary elements of first-degree murder. Finally, defendant contends that all of the State's evidence relating to proof of intent, malice, premeditation, deliberation, and specific intent to kill was either circumstantial or presented through the testimony of interested witnesses, such as Mangione and Strickland.

The State contends that the trial judge properly charged the jury concerning first-degree murder alone, based upon premeditation and deliberation as well as upon the theory of felony murder. The State contends that the evidence does not support a second-degree murder instruction.

Although second-degree murder is a lesser included offense of premeditated and deliberate first-degree murder, a trial court does not have to submit a verdict of second-degree murder to the jury unless it is supported by the evidence. *State v. Stevenson*, 327 N.C. 259, 263, 393 S.E.2d 527, 529 (1990). This Court in *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983), *overruled on other grounds, State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986), held:

> We emphasize again that although it is for the jury to determine, from the evidence, whether a killing was done with premeditation and deliberation, the mere possibility of a negative finding does not, in every case, assume that defendant could be guilty of a lesser offense. Where the evidence belies anything other than a premeditated and deliberate killing, a jury's failure to find all the elements to support a verdict of guilty of first degree murder must inevitably lead to the conclusion that

> the jury disbelieved the State's evidence and that defendant is not guilty. The determinative factor is what the State's evidence tends to prove. 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 defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

*State v. Strickland*, 307 N.C. at 293, 298 S.E.2d at 657-58.

In this case, the testimony of Mangione and Strickland supports only a first-degree murder instruction. Both Mangione and Strickland testified that defendant told them that he kidnapped Ms. Ennis and ultimately killed her by choking her first and then cutting her throat. Police officers located the remains of Ms. Ennis' body utilizing a map reproduced by Strickland after it was initially drawn for him by defendant. There was no evidence that the homicide was committed without premeditation and deliberation. Defendant's argument seems to be based on the theory that the jurors may accept a portion of the State's evidence, yet reject other portions of its evidence, thus the State would fail to prove each element of first-degree murder. A defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the State's evidence but not all of it. *State v. Brewer*, 325 N.C. 550, 576, 386 S.E.2d 569, 584 (1989), *cert. denied*, --- U.S. ---, 109 L. Ed. 2d 541 (1990). The evidence in this case belies anything other than a premeditated and deliberate murder. Thus, the trial judge properly refused to instruct on second-degree murder.

**[2]** In defendant's second argument, he contends that the trial court erred in denying his motions to dismiss made at the close of the State's evidence and again at the close of all the evidence. Defendant contends that under the *corpus delicti* rule, a conviction cannot be sustained on a naked, extrajudicial confession which shows that a crime was committed by someone though not necessarily by the defendant. *State v. Green*, 295 N.C. 244, 244 S.E.2d 742 (1978). Defendant further contends that North Carolina law is settled that for the purpose of analyzing the rule of *corpus delicti*, confessions and admissions are considered synonymous. *State v. Franklin*, 327 N.C. 162, 393 S.E.2d 781 (1990). Therefore, according

to defendant, his statements made to Collins, Riddle, Webster, Mangione and Strickland and offered against him at trial must be considered under the *corpus delicti* rule.

"Our long-established rule of *corpus delicti* stands for the proposition that if there is corroborative evidence, independent of the incriminating statements, defendant may be found guilty of the crime charged." *Id.* at 173, 393 S.E.2d at 788. The evidence presented by the State complies with the requirements of the *corpus delicti* rule. The State offered the testimony of three persons who were in jail with defendant as well as the testimony of the State's Chief Medical Examiner, Dr. Butts. Dr. Butts explained to the jury his field observations and laboratory examinations of the human remains found in the field near Hillsborough, North Carolina. Dr. Butts identified the skull as that of Ms. Ennis and expressed the opinion that Ms. Ennis died as the result of violence or injury trauma, an external cause, rather than from natural disease. On cross-examination, Dr. Butts stated that the information provided to the Sheriff's Department by the informant appeared consistent with the results of his examination and nothing appeared inconsistent with his findings. Dr. Butts also testified that in his opinion, the evidence was not consistent with suicide because of "[t]he location that the remains were found; the circumstances under which the individual disappeared; the age of the individual; the absence of, for instance, any clothing, jewelry, other things associated with remains. All of these indicated to me that her death came at the hands of some other individual."

Dr. Butts' testimony establishes the *corpus delicti*. "Evidence of corpus delicti coupled with the testimony of a cell mate relating inculpatory statements made by the defendant is sufficient to support a conviction." *State v. Franklin*, 327 N.C. at 174, 393 S.E.2d at 788 (citing *State v. King*, 326 N.C. 662, 675, 392 S.E.2d 609, 617 (1990)). Thus, we conclude that Dr. Butts' opinion testimony, together with the testimony of other witnesses, clearly establishes a death by criminal agency and meets the requirements of the *corpus delicti* rule. Therefore, this assignment of error is rejected.

**[3]** Next, defendant contends that the trial court erred by allowing the in-court identification of defendant by the victim's son, Andy, because the in-court identification was tainted by the unnecessarily suggestive statements of his therapist and law enforcement officers who always referred to the picture of defendant as "Joe." Defend-

ant notes that through hypnosis, Andy, for the first time, used the name "Joe" to identify defendant's picture that he had previously referred to as "Steve" or "Mike," and Andy was also for the first time able to put all the events surrounding his mother's disappearance in sequence. According to defendant, under the guidelines of *State v. Peoples*, 311 N.C. 515, 319 S.E.2d 177 (1984), he is entitled to a new trial.

Hypnotically refreshed testimony is inadmissible in judicial proceedings. *State v. Peoples*, 311 N.C. at 533, 319 S.E.2d at 187. Nevertheless, in *Peoples* this Court stated, "[o]ur rule of inadmissibility does not, however, render all testimony of a previously hypnotized witness inadmissible. A person who has been hypnotized may testify as to facts which he related before the hypnotic session." *Id.* at 533, 319 S.E.2d at 188.

In this case, an investigator met with Andy on 31 July 1987, and Andy viewed a photographic line-up and identified the defendant's picture as the person who argued with his mother on the evening she disappeared. The investigator asked Andy the color of the person's eyes that he had identified, and Andy replied that the man has green eyes. Defendant has green eyes. The photographs viewed by Andy were all black and white photographs of white males approximately the same age, with similar hairstyles and facial hair. The investigator never told Andy the names of any of the persons in the photographs. Also, on 31 July 1987, Andy viewed the same photographic lineup in the presence of his therapist, Dr. Hawk. Again, Andy identified defendant's photograph and stated that he was the man that his mother argued with concerning her dating other men. Andy underwent hypnosis in March 1988. Thus, his identification of defendant occurred prior to the hypnotic session.

Prior to admitting the in-court identification of defendant by Andy, the trial court conducted a voir dire hearing on defendant's Motion to Suppress such identification testimony. The trial judge made detailed findings of fact, including a finding that the witness' in-court identification was "of independent origin based upon the witness's knowledge of the defendant from having seen him prior to the time of the disappearance of his mother in his yard and in his trailer, and further having seen defendant in the witness's own trailer on the night his mother disappeared during an argument." The trial judge concluded that Andy's in-court identification of defendant "is of independent origin and is not tainted by any

out-of-court photographic procedure which was impermissively suggestive, nor is said identification tainted by any 'hypnotic suggestion.' " The critical issue here is the reliability of the in-court identification of defendant, by whatever name he may be called. The trial judge's findings, supported by competent evidence, clearly show that Andy knew defendant before he was subjected to hypnosis and that the identification was reliable. Thus, the testimony was not inadmissible under *Peoples*.

Assuming, *arguendo*, that it was error to permit Andy to relate in sequence the events surrounding the disappearance of his mother, defendant was not prejudiced thereby. Andy had previously related the same information to Dr. Hawk, although not in sequence. On two occasions prior to hypnosis, Andy identified defendant as the man who argued with his mother the night she disappeared. Moreover, the State presented three witnesses other than Andy who testified concerning defendant's inculpatory statements to them. Thus, the alleged error was not prejudicial since there is no reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial. *State v. Hunt*, 325 N.C. 187, 193, 381 S.E.2d 453, 457 (1989).

**[4]** In defendant's next argument, he contends that the trial judge erred in refusing to allow him to question Smudski about what the trial judge called the "Rambo" declarations. The "Rambo" declarations consisted of information allegedly obtained by Smudski from an unknown man that he nicknamed "Rambo."

During a voir dire hearing, the trial judge allowed defendant to make an offer of proof concerning the information "Rambo" allegedly related to Smudski. Smudski told SBI agents that a white male nicknamed "Rambo" came into his store one day and brought up the topic of Ms. Ennis because of a missing persons poster Smudski had posted. Smudski also told the SBI agents that "Rambo" claimed to know where Ms. Ennis was located and that he would get her back for Smudski in exchange for Smudski getting the reward money for him. According to Smudski, "Rambo" also told him that Ms. Ennis was involved with some drug dealers and there was a contract out on her. Defendant contends that the evidence appeared relevant and was proffered for the non-hearsay purpose of showing that within three months of Ms. Ennis' disappearance, there was an existing rumor that her boyfriend was a cocaine supplier from Florida; that the boyfriend and Ms. Ennis owed money

on a cocaine debt; and that there was a contract out on Ms. Ennis due to the debts. Defendant further contends that these facts were unusual and closely paralleled the testimony of Strickland and Mangione. Defendant attempted to present this evidence to bolster his defense that either Strickland himself committed these crimes, or he gained enough information from Smudski or through his other efforts, so that he could lead law enforcement officers to the remains and hence obtain significant rewards in the form of money and freedom. Defendant argues that in a very close case in which there is only circumstantial evidence identifying the defendant, to the exclusion of others, as the perpetrator, proffered evidence tending to implicate another and to be inconsistent with defendant's guilt is admissible. *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988).

The State objected to allowing this testimony into evidence. The trial judge sustained the State's objection. 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 (1986). The State argues that in this case, the proffered evidence possesses no relevancy and the trial judge properly excluded the testimony. We agree.

We do not agree with defendant that *McElrath* is controlling. The facts in the present case are distinguishable from those in *McElrath*. In *McElrath*, this Court held that it was error for the trial judge to refuse to admit a map found among the victim's personal papers showing the area surrounding the defendant's summer home, with notations indicating that the defendant, with others, planned a larceny. *State v. McElrath*, 322 N.C. at 14, 366 S.E.2d at 449. The Court found that the map and notations, together with other evidence offered, could indicate that the victim suffered a falling out with his co-conspirators which resulted in his death at their hands and not at the hands of the defendant. *Id.* at 11-13, 366 S.E.2d at 448-50. In the present case, the proffered evidence consists of the testimony of a witness concerning statements by an unidentified person. The evidence constitutes hearsay not within any hearsay exception. Here, defendant seeks to place before the jury evidence of a mere rumor purportedly circulating in Orange County concerning Ms. Ennis' disappearance. The evidence does not implicate any particular person as the perpetrator of the crime

and is not inconsistent with defendant's guilt. Thus, the trial court did not err in rejecting this testimony.

**[5]** Next, defendant contends that the trial judge erred in allowing Dr. Butts to give opinion evidence as to the cause of Ms. Ennis' death and other matters. Over defendant's objection, Dr. Butts was permitted to give his opinion: 1) that the bones that were found appeared to be lying on top of the ground, rather than having been buried; 2) that a hole in the skull was the result of some blunt trauma; 3) that it is not uncommon for remains to be carried off by animals; 4) that Ms. Ennis' death was the result of violence or injury trauma, external causes, rather than from natural disease; and 5) as to the length of time a person would live if his or her throat was cut. Defendant contends that Dr. Butts' autopsy report simply stated that the bones he found were consistent with a young to middle age individual; were consistent with a female sex; were consistent with a white racial background; were insufficient to determine stature; and showed no obvious gunshot wounds, knife cuts or other trauma that could be excluded from animal injury. Defendant also contends that Dr. Butts admitted that he listed as the cause of death on the autopsy report an "incision of the throat" which was based upon information he received from the Orange County Sheriff's Department. Thus, defendant contends that under these facts, Dr. Butts was in no better position to render opinions as to each of the five areas than were the individual jurors.

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 (1988). Dr. Butts serves as the State's Chief Medical Examiner. He was accepted as an expert in forensic pathology and was allowed to testify as an expert witness. As a forensic pathologist, Dr. Butts was well qualified to provide testimony which was within his area of expertise and helpful to the jurors. Dr. Butts was subject to thorough cross-examination by defendant concerning his testimony, and any apparent discrepancies therein. The trial judge did not err in permitting Dr. Butts to give his opinion as to the cause of the victim's death.

**[6]** In defendant's final argument, he contends that the trial court erred in refusing to permit Tom Murphy, an Assistant District Attorney for Wake County, to testify before the jury regarding

the details of the crimes for which Murphy prosecuted Wendell Strickland in May of 1988. The evidence was offered in an attempt to show that Strickland rather than defendant committed the crimes for which defendant was being tried.

On voir dire, Murphy testified that he prosecuted Strickland for second-degree rape, second-degree sex offense, first-degree kidnapping, common law robbery, and assault on a female in May of 1988. The evidence in that case disclosed that Strickland kidnapped his victim from Crabtree Valley Mall in Raleigh in January 1988, drove her in her car to a rural area in Johnston County where he raped her and committed a sex offense upon her. At the close of the voir dire testimony, Judge Albright determined that the incidents referred to in the testimony were not sufficiently similar to the crimes for which defendant was being tried and were too remote in time to be more probative than prejudicial under N.C.G.S. § 8C-1, Rule 403 (1988). Judge Albright further determined that the probative value, if any, that this testimony might have was substantially outweighed by the danger of unfair prejudice. Judge Albright also expressed his opinion that the present case is factually distinguishable from the circumstances giving rise to this Court's opinion in *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 257 (1987).

In *Cotton*, this Court held that the trial court erred in refusing to admit certain evidence of crimes committed by a person other than the defendant. The evidence of the other crimes appeared close in time, place, and circumstance to the charged offense. This Court stated:

> The evidence excluded here showed that within a few hours during the same night, three homes in close proximity were broken into and the female occupants sexually assaulted. The *modus operandi* in each case was very similar. From this evidence, the jury reasonably could have concluded that the three attacks were committed by the same person. The excluded evidence also tended to show that a specific person other than the defendant committed one of the very similar break-ins and assaults. Further, nothing in evidence tended to show that any of the three break-ins and attacks were committed by more than a single individual. The excluded evidence therefore tended to show that the same person committed all of the similar crimes in the neighborhood in question on

that night and that the person was someone other than defendant.

*State v. Cotton*, 318 N.C. at 667, 351 S.E.2d at 280.

We agree with Judge Albright that the present case is factually distinguishable from *Cotton*.

There was nothing so unique about the circumstances surrounding the crimes committed by Strickland that one would conclude that the same person must have committed the crimes for which defendant was being prosecuted. On the contrary, factual dissimilarities abound. Strickland kidnapped a stranger, and defendant kidnapped an acquaintance. Strickland raped and sexually assaulted his victim, while defendant murdered his victim. Strickland's crimes were committed in Wake and Johnston Counties, and defendant's crimes were committed in Orange County. Strickland's offenses were committed in January of 1988, and defendant's offenses were committed in November of 1986, some fourteen months earlier.

Unlike the circumstances in *Cotton*, the evidence in this case does not tend to show that a specific person other than defendant committed the crimes in question. Evidence of the guilt of one other than the defendant is admissible if it points directly to the guilt of another specific party and tends both to implicate that other party and be inconsistent with the guilt of the defendant. *State v. Brewer*, 325 N.C. 550, 386 S.E.2d 569. Nothing in the proffered evidence points directly to Strickland as the perpetrator of the offenses for which defendant was being tried; nor is the evidence inconsistent with the guilt of defendant. The evidence in the present case creates a mere inference or conjecture regarding guilt of another and therefore was properly excluded. *See State v. Simpson*, 327 N.C. 178, 393 S.E.2d 771 (1990). Thus, we find no error or abuse of discretion in the trial judge's decision to exclude the evidence.

We conclude that defendant has had a fair trial, free of prejudicial error.

No error.

NORMAN W. SWANSON, HENRY F. MURRAY, CARL L. WHITNEY, WILLIAM E. NICHOLSON, III, CHARLES A. DANCY, MELVIN F. EYERMAN, IRA N. SCHWARZ, JOHN L. POWELL, JR., GALINA ELWORTH, DONALD V. WALLACE, WILLIAM E. DENTON, ROBERT A. NISBET, WALTER J. BARTNIKOWSKI, RALPH P. HUNT, MARION B. ZOLLICOFFER, WILLIAM H. TALBERT, BILLY CLARK, WALLACE M. DAVIS, GRADY L. STRANGE, HAMILTON M. HOWE, MARY L. PRITCHARD, ROBERT B. CAMPBELL, BROWNING ADAMS, PRITCHARD G. ADAMS, WILLIAM H. ADAMS, EDWARD H. AND FLOSSIE P. ALLEN, JOSEPH A. ALLEN, RACHEL C. ALLRED, HELEN L. AND LEO I. ANCTIL, RONALD E. ANDERSON, CLARENCE P. ARMSTRONG, CARROLL W. AUSTIN, F. L. AUSTIN, JR., DONALD P. BAHR, PAUL BALLUS, CHARLES D. BARKER, SR., WALTER E. BARKHOUSE, EDWARD C. BARRET, JAMES L. BAXTER, RUSSELL W. BEARD, BERNARD L. BEATTY, RICHARD K. BELL, LEO E. BENADE, SHERMAN W. BETTS, JOSEPH H. BETZ, ROBERT L. BLEVINS, FRANKLIN M. BLUNT, TIMOTHY C. BOLICK, MARGARET C. BOONE, HENRY A. BOTKIN, ALEX BOURDAS, OLA MAY (TATE) BOVENDER, EUGENE A. BOWEN, LAVAUNE K. BREDA, MARLOWE G. BREDA, TROND G. BREKKE, LAURA B. BRENDLE, MILLARD BRIDGERS, CLARENCE M. BRIDGES, DORIS K. BRIDGES, CYRUS H. BROOKS, JR., DANIEL R. BROWN, K.A. BROWN, WILLIAM D. BROWN, BETTY P. BULLOCK, ROBERT S. BULLOCK, FINDLEY BURNS, JR., RAY G. BURRELL, RICHARD E. BUSH, JAMES M. BYRNE, NORMAN L. CARLTON, MATTHEW E. CARMEAN, FRANK CATES, J. CRAWFORD CATON, HARRY E. CHAMBERLAIN, VINCENT H. CHASE, PAUL F. CHAVEZ, WOODROW H. CHILDRESS, JOHN G. CHURCH, HERMAN L. CLANTON, ROBERT L. CLARKE, CHARLES C. CLAUSEN, SR., DENNIS E. CLECKNER, STEVE P. CLEMENIC, LACY W. COATES, RUCIA A. COBB, JAMES A. CODDINGTON, CATHERYN S. COLEY, LAURA K. CONDER, JAMES C. CONINE, MARSHALL G. COOPER, ASBURY COWARD, III, NEWTON P. COX, RUTH A. COX, BURNETTE E. CREASMAN, THOMAS J. CULKIN, HAZEL B. CURLEE, MILTON L. DAIL, BEATRICE G. DAVIS, BERNLEY S. DAVIS, DONALD M. DAVIS, ESSIE M. DAVIS, GEORGE E. DAVIS, ROBERT J. DAVIS, CLIFFORD H. DAWSON, CALVIN F. DEAN, ORIEN G. DEAN, JR., JACK M. DEATON, VIOLET B. DEITMARING, ARLEN J. DEVITO, JOHN E. DEVLYN, SARA E. DEVLYN, JOY E. DICKINSON, MRS. LEROY B. DICKINSON, JAMES E. DIFFEE, DELBERT R. DILLON, MARGARET H. DOPF, RAYMOND E. DOPF, LEROY M. DUFFY, CHARLES F. DUPONT, BOBBY R. EASON, DAVID EDMISTEN, CARL L. EFFLER, JOHN H. ELDER, JR., JOHN R. ELLIS, MANFORD G. FARR, RITA FESTO, JOHN J. FILAN, ANGELO A. FLORENTINO, ROBERT W. FOLDEN, OSCAR F. FOWLER, MELVIN W. FRITZ, WALTON E. FULCHER, ROBERT C. FULLER, WALTER E. FULLER, FRANK W. FURCHES, NORMAN CARL GADDIS, MARSHALL L. GADDY, THOMAS B. GARDINER, ROBERT F. GEISSLER, WILLIAM E. GENTNER, JR., THOMAS P. GINN, ROBERT W. GOODMAN, JOHN R. GORDON, BERNICE C. GRANDY, JR., STEVEN W. GRANDY, ROBERT J. GREEN, MICHAEL R. GREESON, JAMES H. GRIFFIN, THOMAS M. GROOME, JR., JAMES W. GROSS, ARTHUR S. GUNDERSON, HERT L. HANCOCK, JR., JAMES M. HARDIN, C. LEE HARRIS, HOWARD W. HARRIS, PAUL H. HARVEY, ROLAND R. HATCHER, HENRY S. HEFFLEY, JR., CARROLL A. HEFNER, CLARENCE

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No. 64PA91

(Filed 14 August 1991)

**1. Taxation § 28.4 (NCI3d)— income tax—exemption of state employee pensions—taxation of federal employee pensions—unconstitutionality—nonretroactivity of U. S. Supreme Court decision**

Applying the three-prong test of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296 (1971), the decision of the U. S. Supreme Court in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891 (1989), holding unconstitutional a scheme of taxation exempting the pensions of retired state

employees from state taxation while not exempting pensions of retired federal employees similarly situated, is not to be applied retroactively. Therefore, plaintiff federal pensioners and federal military personnel are not entitled to a refund of state taxes they paid on federal pensions and military pay prior to the *Davis* decision when retirement benefits for state employees were exempt from state taxation and there was a $1,500 deduction for National Guard compensation.

**Am Jur 2d, State and Local Taxation §§ 508, 608, 609.**

**2. Taxation § 28.4 (NCI3d)— taxes on federal pensions—right to refund—nonretroactivity of U. S. Supreme Court case—sufficiency of pleading and presenting to superior court**

If the *Chevron* rule of nonretroactivity is an affirmative defense which must be pled in plaintiffs' action for refund of state taxes paid on federal pensions, defendants properly pled this defense by alleging that plaintiffs are not entitled to retroactive relief under *Davis v. Michigan Dept. of Treasury.* If the rule of *Chevron* is part of the law governing the right of plaintiffs to a refund and not a new matter which must be pled as an affirmative defense, defendants sufficiently argued it to the superior court when they argued that plaintiffs are not entitled to a refund.

**Am Jur 2d, State and Local Taxation §§ 508, 608, 609.**

**3. Taxation § 28.4 (NCI3d)— federal pensions—refusal to refund taxes—no waiver by State**

The State did not waive its right to refuse to refund taxes paid by plaintiffs on federal pensions by making refunds to other federal pensioners. N. C. Const. art. V, § 2(1).

**Am Jur 2d, State and Local Taxation §§ 508, 608, 609.**

**4. Taxation § 28.4 (NCI3d)— taxes on federal pensions—no statutory right to refund**

Plaintiffs are not entitled to refunds of taxes paid on federal pensions under statutes allowing them to sue for refunds because the decision of *Davis v. Michigan Dept. of Treasury* will not be applied retroactively, and the taxes were thus not improperly collected.

**Am Jur 2d, State and Local Taxation §§ 508, 608, 609.**

Justice MITCHELL dissenting.

Chief Justice EXUM and Justice FRYE join in this dissenting opinion.

ON discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of orders entered by *Currin, J.*, on 17 August 1990, 3 October 1990 and 31 December 1990 in Superior Court, WAKE County. Heard in the Supreme Court 7 May 1991.

This is an action by the plaintiffs for the refund of certain taxes paid by them prior to the decision of the United States Supreme Court in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 103 L.Ed.2d 891 (1989). Prior to this decision by the United States Supreme Court, which was filed on 28 March 1989, the pensions of retired employees of the State of North Carolina had been since 1941 exempt from income taxes imposed by the State. Retired federal government employees were exempted from payment of taxes on the first $3,000.00 on their pension benefits. There was no exemption for those who were beneficiaries of private pensions. Beginning in 1979 the first $1,500.00 of pay for members of the National Guard was excluded from taxation. In 1989 this was changed so that members of the National Guard received a $1,500.00 deduction. No comparable benefit was conferred on members of the federal armed forces.

Twenty-three states in 1989 exempted retired state employees from the payment of income taxes on the pension benefits paid to them in a manner similar to the tax scheme of North Carolina. In *Davis* the United States Supreme Court held that such a tax scheme violates 4 U.S.C. § 111 and is unconstitutional.

Following *Davis* the General Assembly of this state took several actions. First it repealed the tax exemption for the retirement benefits of state employees retroactive to 1 January 1989 and created a $4,000 exclusion for the retirement benefits of both state and federal employees. N.C.G.S. § 105-134.6(b) (1989). Second, it authorized federal retirees to claim a tax credit for taxes paid in 1988 on their federal pensions. N.C.G.S. § 105-151.20 (1989). Third, it repealed the $1,500.00 deduction for National Guard compensation. 1989 N.C. Sess. Laws, ch. 1002 (1990).

On 17 August 1990 Judge Currin issued an order certifying this as a class action consisting of two different classes: (1) federal pensioners who were denominated the Class A plaintiffs and (2) federal military personnel who were denominated the Class B plaintiffs. On 3 October 1990 Judge Currin allowed the plaintiffs' motion for partial summary judgment and ordered the State to refund

to the Class A plaintiffs income taxes paid on their federal retirement benefits for tax years 1985 through 1988. Judge Currin ordered the State to refund to the Class B plaintiffs all income taxes they had paid for the years 1986 through 1989 as a result of their not being afforded the $1,500.00 exemption which was given to the members of the National Guard. On 18 October 1990 the defendants gave notice of appeal. On 31 December 1990 Judge Currin issued what was denominated an order supplementing the order for partial summary judgment in which he ordered that interest be paid on the refunds from 15 April following the taxable year for which the tax was paid. He also ordered other things not pertinent to this appeal.

The defendants appealed.

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*Lacy H. Thornburg, Attorney General, by Andrew A. Vanore, Jr., Chief Deputy Attorney General, Edwin M. Speas, Jr., Senior Deputy Attorney General, Thomas F. Moffitt, Special Deputy Attorney General, Marilyn R. Mudge, Assistant Attorney General, and Douglas A. Johnston, Assistant Attorney General, for the State appellant.*

*Robinson, Bradshaw and Hinson, P.A., by John R. Wester and David C. Wright III, for defendant appellant Helen A. Powers.*

WEBB, Justice.

**[1]** The first question posed by this appeal is whether the rule of *Davis* is to be applied retroactively. If it is not applied retroactively the defendants are not liable for refunds to the plaintiffs for taxes paid before *Davis* was decided on 28 March 1989 on federal pensions or military pay. It is a federal question as to whether the rule is to be applied retroactively. The United States Supreme Court has recognized that in some cases it would be inequitable to apply newly announced rules retroactively if prior to the enunciation of the rules parties had reasonably relied on certain principles in ordering their affairs. In such a case the rule is not applied retroactively.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.Ed.2d 296 (1971), the United States Supreme Court held that a rule should

not be applied retroactively and said that in making this determination three factors should be considered as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

*Id.* at 106-107, 30 L.Ed.2d at 306.

In applying *Chevron* to this case we are helped by decisions in Virginia and South Carolina as well as an opinion by the United States Court of Appeals for the Fourth Circuit. *Harper v. Virginia Dept. of Taxation*, 241 Va. 232, 401 S.E.2d 868 (1991); *Bass v. State*, 302 S.C. 250, 395 S.E.2d 171 (1990); *Swanson v. Powers*, No. 90-1110, filed 25 June 1991. In fact situations very similar to the facts of this case the highest courts of Virginia and South Carolina held that *Davis* should not be applied retroactively. In *Swanson* some of the plaintiffs in this case brought a class action against the defendant Powers under 42 U.S.C. § 1983 seeking to hold her personally liable for the $140,000,000.00 they claimed they had overpaid in taxes. The Fourth Circuit Court of Appeals ordered that the case against the defendant Powers be dismissed on the ground she could not reasonably have foreseen the decision in *Davis* and was immune from being sued.

We examine initially the first prong of *Chevron*. *Davis* did not overrule a case but it was a case of first impression. The question then is whether its resolution was clearly foreshadowed. The exemption of state employees from taxation of their pensions had been in effect since 1941. This taxing scheme had received no challenge in court from anyone prior to the decision in *Davis*. Twenty-three states, including North Carolina, had similar plans. If the decision of *Davis* had been clearly foreshadowed we do not

believe so many states would have adopted such plans. The Fourth Circuit Court of Appeals said "how the intergovernmental tax immunity doctrine and 4 U.S.C. § 111 applied to North Carolina's revenue statutes was anything but clearly established prior to *Davis*." We agree with the highest courts in Virginia and South Carolina as well as the Fourth Circuit Court of Appeals that the decision of *Davis* was not clearly foreshadowed. This satisfies the first prong of *Chevron*.

As to the second prong of *Chevron* the General Assembly has repealed the provisions of our tax system at which *Davis* was aimed. The retroactive application of *Davis* will have no effect on the operation of the principle which *Davis* would advance. The second prong of *Chevron* is satisfied.

As to the third prong of *Chevron* we can take judicial notice of the fact that this State is in dire financial straits. The refunds of taxes, as asked by the plaintiffs, will cost the State approximately $140,000,000.00. This would require a further increase in taxes or a further cut in services by the State. We believe the State acted reasonably under the law as it was then understood when it exempted the benefits of state pensioners from income tax and it excluded part of the pay of National Guardsmen. It would be inequitable to require the State to refund the taxes paid by federal pensioners and military personnel. This satisfies the third prong of *Davis*.

The plaintiffs contend that *James B. Beam Co. v. Georgia*, No. 89-680, filed 20 June 1991, and *American Trucking Assns. v. Smith*, --- U.S. ---, 110 L.Ed.2d 148 (1990), require that *Davis* be applied retroactively. *Beam* involved an action for the refund of taxes paid on alcoholic beverages to the State of Georgia. The United States Supreme Court had held that a similar Hawaiian tax statute violated the Commerce Clause of the United States Constitution. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 82 L.Ed.2d 200 (1984). The United States Supreme Court held in *Beam* that the rule of *Bacchus* should be applied retroactively. In a plurality opinion Justice Souter said that because the judgment in *Bacchus* applied retroactively in that case, *stare decisis* required that it be so applied in all similar cases. For this reason *Chevron* did not apply in *Beam*. The rule of *Chevron* was not otherwise altered by Justice Souter's opinion and four other Justices affirmed their belief in the viability of the rule of *Chevron*.

This case is distinguishable from *Beam* in that the Court in *Davis* did not pass on the question of retroactivity. Michigan conceded that a refund was appropriate and the United States Supreme Court was not faced with the question of the retroactivity of the rule. In order for a case to be precedent for another case the court in the first case must pass on the issue presented in the second case. *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 97 L.Ed. 54 (1952); *United States v. Mitchell*, 271 U.S. 9, 70 L.Ed. 799 (1926). The question of retroactivity was not determined in *Davis* and it may be determined in this case.

*American Trucking* dealt with the constitutionality of taxes imposed on trucks by the State of Arkansas. In a plurality opinion the United States Supreme Court held that pursuant to the rule of *Chevron, American Trucking Assns. v. Scheiner*, 483 U.S. 266, 97 L.Ed.2d 226 (1987), which held unconstitutional a similar tax by the State of Pennsylvania should not be given retroactive effect. Four justices dissented. In the dissenting opinion it was said that the Arkansas taxpayers were entitled to have the statute imposing the tax held to be unconstitutional. They said that the remedies to be granted depended on state law which had to comply with the United States Constitution. One justice concurred in an opinion which was not favorable to the application of the *Chevron* rule.

We might conclude from *American Trucking* that a majority of the Supreme Court is moving away from the nonretroactive application of constitutional decisions. We do not believe we should so conclude. In *Beam* the Court had an opportunity to say that the rule of *Chevron* should no longer be applied in civil cases and declined to do so. We do not believe we should anticipate a change in the law by the United States Supreme Court, but should adhere to the opinions as they are now written. We believe we have done so.

We are aware that the United States Supreme Court has vacated the judgments in the Virginia and South Carolina cases of *Harper* and *Bass* and remanded for further consideration in light of *Beam*. We believe *Beam* is clearly distinguishable from this case.

**[2]** The plaintiffs argue that the defendants did not plead the *Chevron* rule as an affirmative defense and did not argue it in the superior court. For these reasons, say the plaintiffs, the defendants cannot ask this Court to apply the rule.

An affirmative defense normally consists of new matter which the pleader contends will avoid the adverse party's claim regardless of whether the facts alleged by the adverse party may be proved. N.C.G.S. § 1A-1, Rule 8(c) (1990). *Roberts v. Heffner*, 51 N.C. App. 646, 277 S.E.2d 446 (1981). It may be that rather than new matter constituting an affirmative defense the rule of *Chevron* is simply a part of the body of law governing the determination as to whether the plaintiffs are entitled to a refund.

We do not have to determine whether the rule of *Chevron* must be pled as an affirmative defense. If it is necessary the defendants did so in their ninth defense which was as follows:

> Retrospective relief is inappropriate for the reason that the acts complained of were performed in conformity with law as it then existed and the funds sought to be recovered were expended in the performance of governmental functions for the benefit of the citizens of this State, including plaintiffs.

By pleading no retroactive relief under *Davis* the defendants invoked the rule of *Chevron*.

The plaintiffs, relying on *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990), *State v. Madric*, 328 N.C. 223, 400 S.E.2d 31 (1991), and *Greene v. Spivey*, 236 N.C. 435, 73 S.E.2d 488 (1953), also say that the defendants did not argue the rule of *Chevron* in the superior court and for that reason cannot argue it on appeal. If the rule of *Chevron* is part of the law governing the right of plaintiffs to a refund and not new matter which must be pled as an affirmative defense the defendants argued it to the superior court when they argued the plaintiffs were not entitled to a refund. If it is new matter which must be pled the defendants sufficiently alerted the superior court to this new matter by their ninth defense.

**[3]** The plaintiffs also argue that the defendants have waived the right not to apply *Davis* retroactively because refunds have been made to some federal pensioners. They say that by intentionally making some refunds they have waived the right to assert the *Chevron* defense on appeal. N.C. Const. art. V, § 2(1) provides:

> The 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.

It is very difficult under this section for the State to waive its right to collect taxes. In *Henderson v. Gill, Comr. of Revenue*, 229 N.C. 313, 49 S.E.2d 754 (1948), an agent of the Revenue Department advised the taxpayer how sales taxes were to be reported for the sale of floral products. The taxpayer reported his taxes as he had been advised to do by the agent. The taxpayer was assessed for additional taxes. He asserted that the State was estopped from claiming these additional taxes because he had relied on the agent's instruction and had not collected sales taxes from customers as he could have done if he had been properly instructed by the agent. This Court held that the State was not estopped. We said, "the State cannot, by the conduct of its agents be estopped from collecting taxes lawfully imposed and remaining unpaid." *Id.* at 316, 49 S.E.2d at 756.

We hold that the State has not waived its right to refuse a refund of these taxes.

**[4]** The plaintiffs argue that regardless of whether the *Chevron* test is applied they are entitled to refunds under our statutes that allow them to sue for refunds. A refund under our statutes might be appropriate if the taxes were improperly collected. If *Davis* is applied only prospectively under *Chevron* the taxes were properly collected and no refund is due under our statutes or otherwise.

We have held that *Davis* does not apply retroactively. For that reason the plaintiffs are not entitled to refunds and we do not consider the question of whether this case was properly held to be a class action. We also do not consider what remedies would be available to the plaintiffs in the event *Davis* should be held to apply retroactively and whether such remedies comply with due process of law. *See McKesson v. Division of Alc. Bev.*, --- U.S. ---, 110 L.Ed.2d 17 (1990).

For the reasons stated in this opinion we reverse and remand to the Superior Court of Wake County for the entry of a judgment dismissing the action.

Reversed and remanded.

Justice MITCHELL dissenting.

I am convinced that the rule announced by the Supreme Court of the United States in *Davis v. Michigan Dept. of Treasury*, 489

U.S. 803, 103 L. Ed. 2d 891 (1989) must be applied retroactively, and that the majority errs in holding to the contrary. In *Davis*, the Supreme Court held that a scheme of taxation, exempting the pensions of retired state employees from state taxation while not exempting pensions of retired federal employees similarly situated, violates 4 U.S.C. § 111 and the constitutional doctrine of intergovernmental tax immunity. I believe that decision is fully retroactive and is the controlling precedent which must be applied in this case.

Assuming *arguendo* that the *Chevron* test is still valid, three factors must be considered in determining whether a constitutional ruling by the Supreme Court of the United States in a civil case will be applied retroactively. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107, 30 L. Ed. 2d 296, 306 (1971). In the present case, all of those factors weigh in favor of retroactive application of *Davis*.

The first factor to be considered under *Chevron* is whether the decision to be applied has established "a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." *Id.* at 106, 30 L. Ed. 2d at 306. Clearly, the Supreme Court's decision in *Davis* did not overrule any past precedent. Further, the majority in *Davis* seems to have felt that its holding there—that imposing state taxes upon the pensions of federal retirees but not upon the pensions of similarly situated state retirees was unconstitutional—had been clearly foreshadowed under the constitutional doctrine of intergovernmental tax immunity. *See Davis*, 489 U.S. 803, 103 L. Ed. 2d 891.

The second factor under *Chevron* requires a consideration of the prior history of the rule announced by the Supreme Court, its purpose and effect, and whether retroactive application will further or retard the operation of the rule. *Chevron*, 404 U.S. 106-107, 30 L. Ed. 2d 306. Unlike my colleagues, I believe that retroactive application of the rule announced in *Davis* will further the operation of that rule. Surely, requiring the State to return money it has collected from one class of taxpayers in a discriminatory and unconstitutional manner will further the operation of the rule announced in *Davis* declaring that the very conduct engaged in by the State violates the Constitution of the United States.

The third and final factor to be considered under *Chevron* is whether retroactive application of the Supreme Court decision in question will produce "inequitable results." *Id.* at 107, 30

L. Ed. 2d at 306. As to this factor, my colleagues take judicial notice of the fact that the State of North Carolina is currently experiencing hard financial times. For that reason, they conclude that it would be "inequitable" to require the State to refund the taxes it has unconstitutionally taken from the plaintiffs under color of state law.

I am unable to see the "inequity" involved in requiring the State to return any money it has unconstitutionally taken from the plaintiffs. In my view, the fact that the State is experiencing financial difficulties has little to do with whether it would be inequitable to require the State to refund the plaintiffs' money. Nothing in the record before us indicates that the plaintiffs, federal pensioners and military personnel, are experiencing any less financial difficulties than the State of North Carolina. Further, unlike the State, the plaintiffs do not have the power of taxation at their disposal when attempting to deal with their financial difficulties. There simply is nothing "inequitable" or wrong about ordering that the State not pick a taxpayer's pocket or in requiring it to return the money when it is caught doing so. I believe it is entirely equitable and just to apply the rule announced in *Davis* retroactively so as to require that the State return any taxes it has unconstitutionally collected from the plaintiffs.

For the foregoing reasons, I believe that all three factors to be considered under the *Chevron* test weigh heavily in favor of the plaintiffs and against the defendants. Therefore, if the *Chevron* test is still valid, *Davis* must be applied retroactively.

I note, however, that the continuing viability of the *Chevron* test has been brought into question by the decision of the Supreme Court of the United States in *James B. Beam Co. v. Georgia*, --- U.S. ---, --- L. Ed. 2d --- (1991). Nevertheless, I am convinced that, even if the *Chevron* test has been abandoned, the rule announced in *Davis* must be given fully retroactive application for whichever of the several reasons set forth by the various Justices in *Beam* ultimately prevails in the Supreme Court of the United States. *See generally, Beam, id.*

The plaintiffs here must receive the full benefit of the rule set forth in *Davis*, just as the plaintiffs in that case did. Therefore, I believe that the plaintiff taxpayers are entitled to have the Constitution of the United States, as interpreted by the Supreme Court

of the United States in *Davis*, applied to this case. I respectfully dissent from the decision of the majority to the contrary.

Chief Justice EXUM and Justice FRYE join in this dissenting opinion.

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STATE OF NORTH CAROLINA v. FREDRICK CAMACHO

No. 226PA90

(Filed 14 August 1991)

1. **District Attorneys § 1 (NCI4th)— conflict of interest—order that district attorney request prosecution by attorney general—error**

The trial court exceeded its authority by ordering the District Attorney to request that the Attorney General prosecute the charges against defendant where a member of his staff had previously been employed by the Public Defender's office during defendant's first trial. The district attorneys of the state are independent constitutional officers, and it is apparent that our Constitution and statutes give the district attorneys of the state the exclusive discretion and authority to determine when to request the prosecution of any individual case by the special prosecution division. North Carolina Constitution, article IV, section 18; N.C.G.S. § 114-11.6.

**Am Jur 2d, Prosecuting Attorneys § 32.**

2. **Attorney General § 15 (NCI4th)— Attorney General ordered to prosecute—error**

The trial court exceeded its authority in a murder and burglary prosecution by ordering that the Attorney General's office immediately assume prosecution of the case. The General Assembly made it clear that the special prosecution division is to participate in criminal prosecutions only if the Attorney General approves in his sole discretion as an independent constitutional officer.

**Am Jur 2d, Attorney General §§ 13, 27.**

**3. Courts § 3 (NCI4th)— order that District Attorney withdraw from case—authority exceeded**

The trial court exceeded its authority in a prosecution for murder and burglary by ordering that the District Attorney and his entire staff withdraw from the case because a member of the staff had worked on the Public Defender's staff during defendant's first trial. Any order tending to infringe upon the constitutional powers and duties of an elected district attorney must be drawn as narrowly as possible and this order does not meet that standard.

**Am Jur 2d, Prosecuting Attorneys § 32.**

**4. District Attorneys § 4 (NCI4th)— conflict of interest—disqualification—definition of conflict**

The trial court exceeded its authority by ordering that the District Attorney and his entire staff withdraw from a murder and burglary prosecution because a member of his staff had worked for the Public Defender's office during defendant's first trial. It is apparent that the trial court ordered the District Attorney's office to withdraw solely on the ground that there was a possibility that an impression of conflict of interest might arise at some future time. A prosecutor may not be disqualified from prosecuting a criminal action unless and until the trial court determines that an actual conflict of interest exists; in this context, an actual conflict is demonstrated when a District Attorney or a member of his staff has previously represented the defendant with regard to the charges to be prosecuted and, as a result of the former attorney-client relationship, obtained confidential information which may be used to the defendant's detriment. Even then, any order of disqualification ordinarily should be directed only to the individual prosecutors exposed to the information.

**Am Jur 2d, Prosecuting Attorneys § 32.**

**Disqualification of prosecuting attorney on account of relationship with accused. 31 ALR2d 953.**

ON writ of certiorari to review a pretrial order entered by *Gray, J.*, at the 12 March 1990 Criminal Session of Superior Court, MECKLENBURG County. Heard in the Supreme Court on 13 March 1991.

*Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Special Deputy Attorney General, for the State-petitioner.*

*Isabel Scott Day, Public Defender, Twenty-Sixth Judicial District, and Jean B. Lawson for the defendant-respondent.*

MITCHELL, Justice.

The defendant, Fredrick Camacho, was indicted by the Grand Jury of Mecklenburg County on 17 March 1986 for the murder of Rhonda Leonard Price and for burglary. The charges were joined for trial, and the defendant was initially brought to trial at the 11 May 1987 Criminal Session of Superior Court, Mecklenburg County. That trial was terminated on 22 May 1987 by an order declaring a mistrial due to juror misconduct.

During preparations for a retrial of the charges against the defendant, motions were heard at the 12 March 1990 Criminal Session of Superior Court, Mecklenburg County. Those motions included a motion by the defendant that the Honorable Peter S. Gilchrist III, District Attorney of the Twenty-Sixth Prosecutorial District, and his entire staff be disqualified from the prosecution of the defendant upon the murder and burglary charges here in question.

In support of his motion, the defendant called as a witness Assistant District Attorney Gretchen Shappert. She testified that she had been employed as an assistant district attorney since September 1988. Previously, she had been employed as an assistant public defender by the Public Defender of the Twenty-Sixth District from March 1983 to September 1988. She was so employed during the spring of 1987 when others in the Public Defender's Office represented the defendant during his first trial on the charges involved here. She had done some work with other attorneys concerning a motion by the defendant alleging ineffective assistance of counsel. However, she had never seen any of the files concerning the defendant while she was with the Public Defender's Office. Although she recalled hearing others in the Public Defender's Office discuss the defendant's case, she had no recollection of the details of those conversations.

Ms. Shappert had neither been assigned to nor had any involvement with the merits of the defendant's case during her employment with the District Attorney's Office. Further, she had never revealed any information concerning the defendant's case to any

member of the District Attorney's Office, except to inform the District Attorney of the extent of her prior involvement—or lack of involvement—with the case while with the Public Defender's Office.

Ms. Shappert testified that after the defendant filed his motion to disqualify the District Attorney's Office, the District Attorney contacted her and asked her whether she had been involved with the defendant's case when she worked in the Public Defender's Office. She then told the District Attorney that she had been aware of the case and had done some legal research in connection with a motion alleging ineffective assistance of counsel, but that she had no recollection of the trial strategy employed. Further, she stated that "it was not a case I was assigned to and it was not a case that I had worked on." Ms. Shappert had no other conversations with the District Attorney or any member of his staff concerning the defendant.

At the conclusion of the hearing on the defendant's motion to disqualify the members of the District Attorney's Office, the trial court, based upon substantial competent evidence, orally entered its findings, conclusions and order as follows:

> That, Ms. Shappert was in the Public Defender's Office at the time of the preparation for and the trial of the first case, or the first trial involving this Defendant;
>
> That, subsequent to that, Ms. Shappert became [sic] to be with the District Attorney's Office during the course of the preparation for the second trial of the case;
>
> That, Ms. Shappert did participate in the argument of a motion, the Defendant's Motion for Ineffective Assistance of Counsel, while in the Public Defender's Office, but . . . that she did not have any contact, directly or indirectly, with the merits of the case in the connection of the preparation of that motion;
>
> That, while Ms. Shappert's present memory is that she obtained no confidential information about the Defendant's case while in the Public Defender's Office nor has she communicated any information of a confidential nature to the District Attorney's Office since being in the District Attorney's Office, her memory *may* be refreshed on some future occasion before

or during the second trial, and she *may* inadvertently disclose such information to the District Attorney's Office.

In view of that, the Court orders, and *in order to avoid even the possibility or impression of any conflict of interest*, the Court directs that the District Attorney's Office immediately withdraw from the case; that the District Attorney's Office, including Ms. Shappert, have no further participation, either directly or indirectly, with the case; that the Attorney General's Office be contacted immediately by the District Attorney's Office for representation of the State in the matter; and that the Attorney General's Office shall immediately assume the prosecution of the case.

(Emphasis added.) The State's petition for a writ of certiorari to obtain appellate review of the trial court's order was allowed by this Court.

I.

**[1]** We first consider whether the trial court exceeded its authority by ordering the District Attorney to request that the Attorney General prosecute the charges against the defendant. We conclude that this part of the order exceeded the trial court's authority.

The several District Attorneys of the State are independent constitutional officers, elected in their districts by the qualified voters thereof, and their special duties are prescribed by the Constitution of North Carolina and by statutes. *NAACP v. Eure*, 245 N.C. 331, 95 S.E.2d 893 (1957); *State v. Loesch*, 237 N.C. 611, 75 S.E.2d 654 (1953); *State v. McAfee*, 189 N.C. 320, 127 S.E. 204 (1925). Our Constitution expressly provides that: "The District Attorney *shall* . . . be responsible for the *prosecution* on behalf of the State of *all* criminal actions in the Superior Courts of his district. . . ." N.C. Const. art. IV, § 18 (emphasis added). The clear mandate of that provision is that the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State. *Loesch*, 237 N.C. 611, 75 S.E.2d 654. *Cf.*, N.C.G.S. § 7A-61 (1989) (District Attorney shall prosecute all criminal actions in the superior and district courts).

However, the elected District Attorney may, in his or her discretion and where otherwise permitted by law, delegate the prosecutorial function to others. For example, where the District Attorney consents to the employment of a private prosecutor and

continues in charge of the prosecution, the trial court may permit such a private prosecutor to appear for the State. *State v. Best*, 280 N.C. 413, 417, 186 S.E.2d 1, 4 (1972). The discretion to permit private prosecutors to appear when the District Attorney consents "has existed in our courts from their incipiency." *Id.* at 416, 186 S.E.2d at 3.

More to the point here, N.C.G.S. § 114-11.6 authorizes the several elected District Attorneys of the State to permit the Special Prosecution Division of the Office of the Attorney General to prosecute individual criminal cases in their prosecutorial districts. *See State v. Felts*, 79 N.C. App. 205, 210, 339 S.E.2d 99, 101, *disc. rev. denied*, 316 N.C. 555, 344 S.E.2d 11 (1986). When that statute is read *in pari materia* with article IV, section 18, of the Constitution of North Carolina, it is apparent that our Constitution and statutes give the District Attorneys of the State the exclusive discretion and authority to determine whether to request—and thus permit—the prosecution of any individual case by the Special Prosecution Division. *See Loesch*, 237 N.C. 611, 75 S.E.2d 654; *Felts*, 79 N.C. App. at 210, 339 S.E.2d at 101-102. Therefore, the trial court exceeded its authority and invaded the province of an independent constitutional officer in this case when it ordered the District Attorney to request that the Attorney General prosecute this defendant.

II.

**[2]** We next consider whether the trial court exceeded its authority by ordering "that the Attorney General's Office shall immediately assume the prosecution of the case." We conclude that the trial court exceeded its authority.

Like the several District Attorneys of the State, the Attorney General of North Carolina is an independent constitutional officer. *Eure*, 245 N.C. at 336, 95 S.E.2d at 897. Article III, section 7, of the Constitution of North Carolina provides that there shall be an Attorney General and further provides that the duties of that office shall be those prescribed by law. N.C.G.S. § 114-11.6 created a Special Prosecution Division within the Office of the Attorney General and provided that it could *prosecute* criminal cases, but *only if requested* to do so by the appropriate District Attorney. *Cf.* N.C.G.S. § 114-2(4) (1987 & 1990 Cum. Supp.) (Attorney General to *advise* prosecutors, *when requested by them*); N.C.G.S. § 114-2(1) (1987 & 1990 Cum. Supp.) (Attorney General

directed to *appear* in causes or matters in which the State has an interest, but given no authority to *prosecute* criminal cases upon own motion). In passing N.C.G.S. § 114-11.6, however, the General Assembly made it clear that even upon a proper request and authorization by a District Attorney, the Special Prosecution Division is to participate in criminal prosecutions *only if* the Attorney General, in his *sole* discretion as an independent constitutional officer, approves. The trial court exceeded its authority when it ordered that "the Attorney General's Office shall immediately assume the prosecution of the case."

III.

**[3]** We turn finally to the broader question raised here—whether the trial court exceeded its authority by ordering that "in order to avoid even the possibility or impression of any conflict of interest," the District Attorney and his entire staff must "withdraw from the case" and "have no further participation either directly or indirectly" with regard to the case. We conclude that the trial court exceeded its authority in several respects by entering this part of its order.

A.

First, the trial court exceeded its authority when it ordered that the District Attorney's Office *have no further participation*, either directly or indirectly, with regard to the defendant's case. Even if a District Attorney, due to having previously represented the defendant, has received confidential information which will be detrimental to the defendant in the case to be prosecuted, an order directing that the District Attorney have "no participation" in the defendant's case would be highly suspect. Again, it must be remembered that the elected District Attorneys of North Carolina are constitutional officers of the State whose duties and responsibilities are in large part constitutionally and statutorily mandated. The courts of this State, including this Court, must, at the very least, make every possible effort to avoid unnecessarily interfering with the District Attorneys in their performance of such duties. *See generally Eure*, 245 N.C. 331, 95 S.E.2d 893. Therefore, any order tending to infringe upon the constitutional powers and duties of an elected District Attorney must be drawn as narrowly as possible. *Id.* The order in the present case directing that the District Attorney and his entire staff have "no further participation, either directly or indirectly" with regard to the defendant's case clearly

does not meet this standard and unnecessarily restricts a State official engaging in constitutional duties.

Two hypothetical examples will suffice to reveal the overreaching nature of this part of the trial court's order. First, the defendant here is charged by indictment with, *inter alia*, a capital crime. The several District Attorneys of the State are charged and entrusted with the duty of presenting indictments to the grand juries of the State. *State v. Cole*, 294 N.C. 304, 240 S.E.2d 355 (1978); *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952); N.C.G.S. §§ 15A-641, -644 (1988). *See Eure*, 245 N.C. 331, 95 S.E.2d 893; N.C. Const. art. IV, § 18. In capital cases such as this, a defendant may not waive the requirement of a proper indictment. N.C. Const. art. I, § 22; N.C.G.S. § 15A-642(b) (1988). Even in capital cases, however, an initial indictment occasionally will be incomplete or defective in some manner. In such cases, superseding indictments must be submitted. *See* N.C.G.S. § 15A-646 (1988). Even if a District Attorney had an actual conflict of interests and possessed information harmful to a defendant as a result of having previously represented him, an order prohibiting that District Attorney from presenting the required superseding indictment would exceed any steps necessary to protect the interests of the defendant or the courts. Such an order would unnecessarily interfere with the District Attorney's performance of constitutional and statutory duties, which only the District Attorney or his or her lawful designees may perform. Here, the trial court entered just such an unnecessarily all-encompassing order in a case in which the uncontroverted evidence tended to show—and the trial court found and concluded—that the District Attorney's Office had no actual conflict of interests.

Another hypothetical example also demonstrates the overbreadth of the order. In some cases in which a District Attorney has an actual conflict of interests which will require that he or she withdraw from the prosecution of a particular charge against a defendant, the District Attorney may elect—for reasons such as the imminent conviction of the defendant on unrelated charges—to dismiss the charge giving rise to the conflict. The District Attorney can in such situations avoid uselessly putting the State to the additional expense involved in having the Special Prosecution Division prosecute the defendant in the case in which the District Attorney has the conflict. An order prohibiting the District Attorney—the constitutional state official charged with making such decisions—from even dismissing charges sweeps much too broadly.

That part of the trial court's order directing that the District Attorney and his staff have "no further participation, either directly or indirectly" concerning the defendant's case interfered unnecessarily with a constitutional officer in the performance of his duties and exceeded the trial court's authority. *See Eure*, 245 N.C. 331, 95 S.E.2d 893.

B.

**[4]** Next, it is apparent from the wording of the order that the trial court ordered the District Attorney's Office to withdraw from this case solely upon the ground that there was a *possibility* that an *impression* of a conflict of interests might arise at some *future* time. This is made even more clear by the fact that, prior to that part of its order directing that the entire staff of the District Attorney's Office withdraw, the trial court gave a complete summary of the uncontroverted testimony. The trial court noted that the testimony tended to show that Assistant District Attorney Shappert had not had "any contact, directly or indirectly, with the merits of the case in connection with the preparation of" the defendant's motion alleging ineffective assistance of counsel. Further, the trial court also noted that the testimony tended to show that Ms. Shappert "obtained no confidential information about the defendant's case while in the Public Defender's Office nor has she communicated any information of a confidential nature to the District Attorney's Office. . . ." For reasons which follow, we conclude that the trial court erred by ordering that the District Attorney and his staff withdraw from this case solely because their prosecution of the defendant might create an appearance of a conflict of interests.

The issue of disqualification of a prosecutor's office due to one member's prior representation of a defendant has been addressed by the courts of other jurisdictions. Some jurisdictions follow a per se rule of disqualification. *See generally*, Annotation, *Disqualification of Prosecuting Attorney on Account of Relationship With Accused*, 31 ALR 3d 953 (1970 & Supp. 1990). Under such a per se rule, an entire prosecutor's staff is disqualified if one member previously represented the defendant on the charges to be tried, even though that member has neither acquired confidential information about the defendant nor betrayed any confidences. *E.g.*, *State v. Chambers*, 86 N.M. 383, 524 P.2d 999 (Ct. App. 1974), *cert. denied*, 86 N.M. 372, 524 P.2d 988 (1974). Most of the opinions

applying a per se rule of disqualification, however, share at least two weaknesses; they mandate disqualification of a prosecutor's office solely upon an "appearance of impropriety" with no analysis of the facts before the court, and they fail to recognize any distinction between lawyers engaged in private practice and prosecutors engaged in constitutionally and statutorily mandated duties on behalf of the public. *E.g., State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (1972); *People v. Stevens*, 642 P.2d 39 (Colo. Ct. App. 1981); *State v. Chambers*, 86 N.M. 383, 524 P.2d 999; *People v. Shinkle*, 51 N.Y.2d 417, 415 N.E.2d 909, 434 N.Y.S.2d 918 (1980). We conclude that such opinions applying a per se rule are unpersuasive.

Better reasoned decisions from other jurisdictions apply a different rule. Courts in those jurisdictions do not view the mere fact that a prosecutor once represented the defendant as establishing the existence of a conflict of interests or as requiring disqualification of an entire prosecutor's office. Rather than apply an all-encompassing draconian rule automatically disqualifying a prosecutor's staff from performing the duties of public office, those courts consider whether the prosecutor who formerly represented the defendant obtained any confidential information as a result of that representation and, if so, whether it has been or is likely to be used to the detriment of the defendant. *See, e.g., Upton v. State*, 257 Ark. 424, 516 S.W.2d 904 (1974); *State v. Jones*, 180 Conn. 443, 429 A.2d 936 (1980), *overruled on other grounds, State v. Powell*, 186 Conn. 547, 442 A.2d 939 (1982), *cert. denied*, 459 U.S. 838, 74 L. Ed. 2d 80 (1982); *Thompson v. State*, 246 So. 2d 760 (Fla. 1971); *Summit v. Mudd*, 679 S.W.2d 225 (Ky. 1984); *State v. Bell*, 346 So. 2d 1090 (La. 1977); *Young v. State*, 297 Md. 286, 465 A.2d 1149 (1983); *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982); *State v. Cline*, 122 R.I. 297, 405 A.2d 1192 (1979); *State v. Miner*, 128 Vt. 55, 258 A.2d 815 (1969). *Accord United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981), *cert. denied*, 455 U.S. 945, 71 L. Ed. 2d 658 (1982).

In *State v. Cline*, the Supreme Court of Rhode Island rejected the notion that an entire prosecutor's office should be disqualified in order to avoid a mere appearance of impropriety. *Cline*, 122 R.I. at 322, 405 A.2d at 1205. That Court took note of the obvious fact that even if the entire prosecutor's office should be disqualified and special counsel appointed to prosecute, it still "would be necessary to trust to the integrity of the lawyers in question to obey that which would have been their obligation in any event

to avoid the revealing of confidences made by the client to his former attorney." *Id.*, 405 A.2d at 1206. More directly to the point, the Rhode Island Court took the position that:

> [T]ransferring responsibility from one office to another, or the appointment of a special prosecutor, provides a purported remedy which is more cosmetic than substantial. Essentially the question is whether defendant has been in any way prejudiced by virtue of the imparting of knowledge from his former counsel to anyone involved in his prosecution.

*Id.* at 325, 405 A.2d at 1207. We agree.

We also agree with the Supreme Court of Connecticut that a mere appearance of impropriety will not support an order disqualifying an entire prosecutor's office. *Jones*, 180 Conn. at 452-53, 429 A.2d at 941, *overruled on other grounds*, 186 Conn. 547, 442 A.2d 939. We share the view of that Court that:

> It can be argued that withdrawal of the entire law firm, here the entire state's attorney's office, when the slightest chance of betrayal of confidential communications exists might better preserve the integrity of the judicial system. But a rule this broad would result in many unnecessary withdrawals, limit mobility in the legal profession, and restrict the state in the assignment of counsel where no breach of confidentiality has in fact occurred.

*Id.* at 456-57, 429 A.2d at 942-43. More importantly, in states such as ours, District Attorneys are elected officials whose duty to prosecute is expressly mandated by constitutional provisions. Court orders requiring them to withdraw absent an actual conflict of interests unnecessarily interfere with their performance of that constitutionally mandated duty. Such orders unnecessarily disrupt the system established by our Constitution.

Many courts have recognized that: "There is, of course, quite a difference in the relationship between law partners and associates in private law firms and lawyers representing their government." *United States v. Caggiano*, 660 F.2d 184, 190 (6th Cir. 1981), *cert. denied*, 455 U.S. 945, 71 L. Ed. 2d 658 (1982). Thus, in *United States v. Goot*, 894 F.2d 231 (7th Cir. 1990), *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 22 (1990), the Court declined to apply any per se rule requiring disqualification of the United States Attorney's Office where the United States Attorney had previously represented

the defendant. The defendant had moved to disqualify the entire United States Attorney's Office from the prosecution of his case on the grounds that otherwise his fifth amendment right to due process and sixth amendment right to counsel would be violated. Faced with evidence that the United States Attorney had recused himself from the case, had appointed one of his assistants as "Acting United States Attorney" with regard to the case and had not communicated any confidential information to the assistant, the United States District Court concluded that disqualification of the entire United States Attorney's Office would not be proper.

On appeal, the United States Court of Appeals for the Seventh Circuit noted that: "In deciding questions of disqualification we balance the respective interests of the defendant, the government, and the public." *Id.* at 236. Specifically, that Court reasoned that:

> [The defendant] has a fundamental interest in his fifth amendment right not to be deprived of liberty without due process of law and in his sixth amendment right to counsel. The government has an interest in fulfilling its public protection function. To that end the convenience of utilizing the office situated in the *locus criminis* is not lightly to be discarded. Furthermore, the government has a legitimate interest in attracting qualified lawyers to its service.

*Id.* (citations omitted). Upon balancing those interests, the Court concluded that the measures employed by the government had sufficiently screened the United States Attorney from the prosecution of the defendant "so that each and every particular interest of [the defendant], the government, and the public was met." *Id.* at 237. Accordingly, the Court affirmed the District Court's denial of the defendant's motion to disqualify the entire United States Attorney's Office from the prosecution of that case.

Contrary to the defendant's arguments, we conclude that the balancing test applied in *Goot* satisfies the requirements of the fifth and sixth amendments to the Constitution of the United States and article I, sections 19 and 23 of the Constitution of North Carolina. Further, that balancing test is constitutionally preferable to the per se disqualification rule applied in some jurisdictions which results in unnecessary interference with constitutional officers in the performance of their constitutional and statutory duties.

We agree with the conclusion reached in a well-researched and clearly reasoned decision by the highest court of Maryland that:

> [T]he mere appearance of impropriety is not of itself sufficient to warrant disqualification of an entire State's Attorney's office, based upon one member's prior representation of a defendant presently under prosecution. Where disqualification is sought, the trial court must make inquiry as to whether the defendant's former counsel participated in the prosecution of the case or divulged any confidential information to other prosecutors.

*Young v. State*, 297 Md. at 297, 465 A.2d at 1155. We hold that a prosecutor may not be disqualified from prosecuting a criminal action in this State unless and until the trial court determines that an actual conflict of interests exists. In this context, an "actual conflict of interests" is demonstrated where a District Attorney or a member of his or her staff has previously represented the defendant with regard to the charges to be prosecuted and, as a result of that former attorney-client relationship, the prosecution has obtained confidential information which may be used to the defendant's detriment at trial. Even then, however, any order of disqualification ordinarily should be directed only to individual prosecutors who have been exposed to such information. *See generally Goot*, 894 F.2d 231.

We recognize that a reasonable argument can be made to the effect that a prosecutor's conflicts of interests work to the detriment of the prosecution and not to the detriment of defendants. *Cf., Holloway v. Arkansas*, 435 U.S. 475, 490, 55 L. Ed. 2d 426, 438 (1978) (where attorney in a criminal case represents those with conflicting interests and attempts to refrain from using information gathered in confidence, "the evil . . . is in what the advocate finds himself compelled to *refrain* from doing. . . ."). We further recognize that a strong argument has been put forward to the effect that trial courts under systems such as ours do not have the authority to disqualify a District Attorney from performing his constitutional duty to prosecute criminal cases, as to do so amounts to removing an elected constitutional officer from office without following the constitutionally and statutorily required procedures for doing so. *E.g., State ex rel. Eidson v. Edwards*, 793 S.W. 2d 1 (Tex. Crim. App. 1990) (en banc) (White, J., in an opinion for the Court expressing the view of 4 of 9 Judges). Nevertheless,

we conclude that where a trial court has found "an actual conflict of interests" as that term has been defined in this opinion, the trial court may disqualify the prosecutor having the conflict from participating in the prosecution of a defendant's case and order that prosecutor not to reveal information which might be harmful to the defendant.

All of the evidence before the trial court in the present case tended to show, however, that no actual conflict of interests existed on the part of any member of the District Attorney's Office, and the trial court's order clearly reflects that it found that no such conflict existed. Therefore, the trial court exceeded its authority, based on the evidence before it at the time it considered the defendant's motion, by ordering that the District Attorney's Office withdraw from the prosecution of the charges against the defendant.

IV.

We are confident that the trial court acted with the noblest of motives when it entered its order in this case. However, no matter how laudable the objective, a court may not issue orders which exceed its lawful authority. *State v. Gravette*, 327 N.C. 114, 393 S.E.2d 865 (1990).

For the foregoing reasons, we conclude that the trial court exceeded its authority by ordering the District Attorney's Office to withdraw from the prosecution of the defendant because an appearance of impropriety might arise at some future time. Further, the trial court exceeded its authority by ordering the District Attorney to request that the Attorney General's Office undertake the prosecution and by ordering the Attorney General's Office to assume responsibility for the prosecution of the case against the defendant. Accordingly, the order of the trial court is vacated, and this case is remanded to the Superior Court, Mecklenburg County, for further proceedings not inconsistent with this opinion.

Vacated and remanded.

**SPROLES v. GREENE**

[329 N.C. 603 (1991)]

CAROLYN M. SPROLES AND HUSBAND, CHARLES B. SPROLES v. DAVID REED GREENE, TRAVELERS INDEMNITY INSURANCE COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY

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JAMES A. PHILLIPS AND WIFE, RITA L. PHILLIPS v. DAVID REED GREENE, TRAVELERS INDEMNITY INSURANCE COMPANY AND AETNA CASUALTY & SURETY COMPANY

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CAROLYN M. SPROLES AND HUSBAND, CHARLES B. SPROLES v. TRAVELERS INDEMNITY COMPANY OF AMERICA, UNITED STATES FIDELITY AND GUARANTY COMPANY AND THE AETNA CASUALTY & SURETY COMPANY

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CAROLYN M. SPROLES AND HUSBAND, CHARLES B. SPROLES v. INTEGON GENERAL INSURANCE CORPORATION

No. 482PA90

(Filed 14 August 1991)

1. **Insurance § 87.1 (NCI3d)— automobile liability insurance— employees of corporation not named insureds**

Employees of a corporation are not included as named insureds for purposes of underinsured motorist coverage when only the corporation is listed as the named insured on an automobile liability insurance policy, since a corporation is a legal entity which is separate from its employees.

**Am Jur 2d, Automobile Insurance §§ 246, 316.**

2. **Insurance § 69 (NCI3d)— underinsured motorist coverage— employees injured on business trip—vehicle not owned by employer—no coverage**

The Court of Appeals was correct in affirming the trial court's determination that plaintiffs were not covered by their employer's underinsured motorist coverage under its Aetna policy, since plaintiffs were class two insureds; class two insureds were afforded UIM coverage under the terms of the policy only when they were injured while occupying a "vehicle to which the policy applie[d]," that is, a vehicle owned by the employer; and plaintiffs in this case were injured while on company business but while in a vehicle belonging to one other than their employer.

**Am Jur 2d, Automobile Insurance §§ 311, 314.**

**3. Insurance § 110.1 (NCI3d)— automobile liability insurance— prejudgment interest—insurer not required to pay**

The Court of Appeals erred in concluding that defendant liability insurer was required to pay prejudgment interest in addition to its limit of liability under the policy, since the insurer, pursuant to the language of the policy, agreed to pay only the costs of the defense, which would include attorney fees, deposition expenses, and subpoena and witness fees, but defendant did not agree to pay "all costs taxed against the insured" which would include prejudgment interest.

**Am Jur 2d, Automobile Insurance § 428.**

**4. Insurance § 110.1 (NCI3d)— automobile liability insurance— postjudgment interest on amounts in excess of policy limits— insurer not required to pay**

The Court of Appeals erred in concluding that the provision in defendant liability insurer's policy governing the payment of postjudgment interest conflicted with N.C.G.S. § 24-5 and was therefore without effect, since that statute was not part of the Financial Responsibility Act and therefore was not "written" into the liability policy as a matter of law, and there was no provision in the Financial Responsibility Act requiring a liability insurer to pay postjudgment interest on amounts in excess of its policy limits even though such interest might properly be taxed against the insured.

**Am Jur 2d, Automobile Insurance § 428.**

**Liability insurer's liability for interest and costs on excess of judgment over policy limit. 76 ALR2d 983.**

**5. Insurance § 110.1 (NCI3d)— insurer's responsibility for postjudgment interest—offer to pay on day verdict returned— responsibility for interest tolled**

Defendant liability insurer's "offer to pay" its policy limits made on the same day that the verdict was returned was sufficient under the terms of the policy to toll the insurer's responsibility for postjudgment interest even though the actual payment was not made until thirteen days later.

**Am Jur 2d, Automobile Insurance § 428.**

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

**SPROLES v. GREENE**

[329 N.C. 603 (1991)]

ON discretionary review of the decision of the Court of Appeals, 100 N.C. App. 96, 394 S.E.2d 691 (1990), affirming in part and reversing in part an order entered by *Lamm, J.*, in the Superior Court, MITCHELL County, on 5 February 1988. Heard in the Supreme Court 10 April 1991.

*Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Roy W. Davis, Jr., and Michelle Rippon, for plaintiff appellants-appellees Sproles.*

*Patla, Straus, Robinson & Moore, by Harold K. Bennett, for plaintiff-appellants Phillips.*

*Roberts, Stevens & Cogburn, P.A., by Steven D. Cogburn and W. O. Brazil, III, for defendant-appellant Integon General Insurance Corporation.*

*Weinstein & Sturges, P.A., by Cynthia Stakias, for defendant-appellee The Aetna Casualty & Surety Company, Inc.*

*Manning, Fulton & Skinner, by John B. McMillian, for National Association of Independent Insurers and North Carolina Farm Bureau Mutual Insurance Company; Moore & Van Allen, by George M. Teague, for Insurance Guaranty Association and Alliance of American Insurers, amici curiae.*

FRYE, Justice.

In this appeal plaintiffs contend that the Court of Appeals erred in determining that they were not covered by underinsured motorist (UIM) coverage provided by defendant Aetna Casualty and Surety Company (Aetna) to plaintiffs' employer Lakeview Nursery and Garden Center, Inc. (Lakeview). Defendant Integon General Insurance Corporation (Integon) contends that the Court of Appeals erred in determining that Integon was obligated to pay prejudgment and postjudgment interest on $750,000, the entire amount of damages awarded to plaintiff Carolyn Sproles as a result of the negligence of defendant David Reed Greene, who is insured by defendant Integon. We conclude that the Court of Appeals was correct in its determination that plaintiffs were not covered by Lakeview's UIM coverage. We further conclude that the Court of Appeals did err in determining that Integon is liable for additional prejudgment and postjudgment interest.

On 27 January 1984, while returning from a business trip, plaintiffs Carolyn Sproles, Rita Phillips, and James A. Phillips, who were all employed by Lakeview, were injured in a collision with defendant David Reed Greene. Greene's automobile, a 1971 Chevrolet, ran into the rear of the 1983 GMC van in which plaintiffs were riding and caused plaintiffs' van to run off the highway and turn over several times. Sproles suffered extensive injuries from the collision which led to her permanent, total disability.

At the time of the accident, Greene was insured under a liability policy issued by defendant Integon. This policy had a liability limit of $25,000 per person and $50,000 per accident. The van in which plaintiffs were riding was owned by Avery County Recapping Company, Inc., rather than by their employer Lakeview. However, Lakeview had a liability insurance policy with Aetna which provided UIM coverage of $100,000.

On 3 June 1986, plaintiff Sproles and her husband Charles Sproles filed suit against Greene, among others, alleging that he was responsible for the accident and claiming damages for Ms. Sproles' injuries and damages for loss of consortium on behalf of Mr. Sproles. Judgment was entered on behalf of the Sproles against Greene in the amount of $750,000 for Ms. Sproles and $200,000 for Mr. Sproles. On 20 January, both Rita and James Phillips filed suit against Greene and others claiming damages for the injuries they had sustained in the accident. At the time of this appeal no judgment had been entered against defendant Greene on behalf of the Phillips.

On 26 January 1987, the Sproles filed a declaratory judgment action against, among others, defendant Aetna requesting adjudication of whether Ms. Sproles was covered by the UIM policy Aetna had issued to Ms. Sproles' employer Lakeview. All parties moved for summary judgment.

On 30 July 1987, Integon paid into the Clerk of Court the $25,000 it was liable for under the terms of Greene's policy and also paid $2,312.36 in interest. On 26 October 1987, the Sproles filed an action against Integon, Greene's insurer, claiming interest on the full amount of the judgment against Greene from the date the suit was filed until payment was tendered. Integon denied liability for interest on the entire amount, and the Sproles moved for summary judgment.

The actions filed by the Sproles and the Phillips were consolidated for a hearing. On 16 February 1988, Judge Lamm entered a judgment which, among other things, dismissed the Sproles' and the Phillips' claims against Aetna for UIM coverage under Lakeview's policy. The trial judge further determined that Integon was not obligated to pay prejudgment and postjudgment interest on the full amount of the Sproles' judgment against Greene or the full amount of any judgment that the Phillips might obtain against Greene. He therefore dismissed the Sproles' claims against Integon for prejudgment and postjudgment interest on the entire $750,000 judgment finding that Integon owed the Sproles nothing more.

The Sproles appealed the dismissal of their claims against Aetna and Integon to the Court of Appeals. The Phillips appealed the dismissal as to Aetna. The Court of Appeals affirmed the trial court's order dismissing the claims against Aetna but concluded that the trial court erred in its determination that Integon was not liable for prejudgment and postjudgment interest on the entire $750,000 judgment entered against Greene, Integon's insured. *Sproles v. Greene*, 100 N.C. App. 96, 394 S.E.2d 691 (1990). Integon and the Sproles and the Phillips filed petitions for discretionary review with this Court, and these petitions were granted on 10 January 1991.

**[1]** We will address plaintiffs' appeal first and then address defendant Integon's appeal. Plaintiffs' appeal raises the threshold issue of whether employees of a corporation are included as named insureds when only the corporation is listed as the named insured on the automobile liability insurance policy. Plaintiffs contend that Lakeview's UIM coverage under a policy issued by defendant Aetna should cover Ms. Sproles and the Phillips as if they were named insureds because they were employees of Lakeview and were on a business trip when injured. According to plaintiffs, when the corporation is the named insured, the employees of the corporation should be treated as named insureds or as "family" of the named insured for the purposes of UIM coverage in part because a corporation cannot sustain bodily injury. Plaintiffs point out that the purpose of UIM coverage is to protect people who sustain bodily injuries from underinsured drivers and since the corporate entity is the named insured, if its employees are not also provided UIM coverage afforded to named insureds under the terms of the policy, the policy would essentially not provide any UIM coverage since the corporation cannot sustain bodily injury. To answer this issue, we

must turn first to the language of the policy itself and then to the statutory language of N.C.G.S. § 20-279.21(b)(3).

As noted earlier, Lakeview had a liability policy of automobile insurance with Aetna. The policy is labeled as a "Business Auto Policy," and the named insured is "Lakeview Nursery & Garden Center, Inc." Under "Part I — Words and Phrases with Special Meaning," the terms "you" and "your" are defined to be "the person or organization shown as the named insured in ITEM ONE of the declarations." Thus, where the word "you" is found in the policy, it refers to Lakeview, and Lakeview, a corporation, is the only named insured in the policy.

For the purposes of UIM coverage, N.C.G.S. § 20-279.21(b)(3) provides the following definition of "persons insured":

> the named insured and, while resident of the same household, the spouse of any such 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 or persons in lawful possession of such motor vehicle.

N.C.G.S. § 20-279.21(b)(3) (1989). This section of the statute essentially

> 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.

*Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 143, 400 S.E.2d 44, 47 (1991) (quoting *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 554, 340 S.E.2d 127, 129 (1986) ). Thus, according to the statute, the named insured, in this case Lakeview, and the spouse and relatives of the named insured while living in the same household with the named insured are class one insureds and are covered for purposes of UIM coverage "while in a motor vehicle or otherwise." N.C.G.S. § 20-279.21(b)(3) (1989). Class one insureds have UIM coverage even if they are not in a "covered vehicle" when injured. All other persons are class two insureds and are only covered while using "the motor vehicle to which the policy applies." *Id.*

We find no case law in North Carolina which addresses whether the employees of a corporation should also be treated as named insureds and thus class one insureds for the purposes of UIM coverage when only the corporation is listed as the named insured; however, this Court has previously concluded that a corporation is a legal entity which is distinct from its shareholders. *Troy Lumber Co. v. Hunt*, 251 N.C. 624, 112 S.E.2d 132 (1960). Likewise, a corporation is an entity which is separate from its employees. Since a corporation is a legal entity distinct from its employees and thus cannot have a "spouse or other relatives," and since Lakeview the corporation is the named insured in the Aetna policy, we conclude that the plaintiffs as employees of the corporation Lakeview are not named insureds by the terms of the Aetna policy and therefore are not class one insureds under the statute for the purposes of UIM coverage.

When the Minnesota Supreme Court was presented with the same argument plaintiffs present in the present case, that court concluded that the fact that the corporate entity could not sustain bodily injury does not mean that the entire UIM portion of the policy was a nullity because the UIM coverage did protect persons who were occupying an insured highway vehicle. *Kaysen v. Federal Ins. Co.*, 268 N.W.2d 920, 924 (Minn. 1978). The court further concluded that the policy terms listing the corporation as the named insured were not ambiguous and did not include corporate officers and their spouses. *Id.* Since the terms of the policy were not ambiguous, the court refused to rewrite them to include the corporate officer and his wife as named insureds so that they would be covered while pedestrians and not in a vehicle covered by the policy. *Id.* Likewise, in the present case, the terms of the policy as to who are named insureds are not ambiguous. Although under the terms of the policy the corporation is the only named insured and thus the only class one insured and therefore the class one insured under the policy cannot sustain bodily injury, the UIM coverage of the policy does have effect because it provides protection to employees of the corporation who would receive coverage as class two insureds when they are using a vehicle which is covered under the terms of the policy. Therefore, the fact that the corporation is the named insured and the only class one insured under the terms of the UIM portion of the policy does not mean that the terms of the policy should be judicially interpreted to mandate that employees of the corporation should be treated as class one

insureds. We note that if we were to hold that employees of the corporation are named insureds, then the spouses and relatives of such employees, if living in the same household, would also become class one insureds and therefore covered for UIM purposes even where the insured vehicle is not involved in the insured's injuries.

**[2]** Since plaintiffs in the present case are not class one insureds and since they were using the van with the consent of the named insured, Lakeview, plaintiffs are classified as class two insureds under the statute. Thus, in order to have UIM coverage under Lakeview's policy with Aetna, plaintiffs would have to be injured while "in a motor vehicle to which the policy applies." N.C.G.S. § 20-179.21(b)(3) (1989). Under Item Two, which is entitled "Schedule of Coverage and Covered Autos," the Aetna policy provides UIM coverage. However, under the category of "Covered Autos," we find the number "2" and are referred to Item Three for a description of the types of automobiles covered under the UIM coverage of Lakeview's policy. Number "2" provides that the covered automobile is "Owned Autos Only" with the following explanation: "Only those autos you own . . . . This includes those autos whose ownership you acquire after the policy begins." Thus, the only automobiles covered under the UIM coverage in Lakeview's policy with Aetna are those automobiles owned by the named insured which in this case is the corporation Lakeview. When plaintiffs were injured, they were riding in a van which was owned by Avery County Recapping Company, Inc., and not by their employer Lakeview. Since plaintiffs are class two insureds and since class two insureds are only afforded UIM coverage under the terms of the policy when they are injured while occupying a "vehicle to which the policy applies," we conclude that the Court of Appeals was correct in affirming the trial court's determination that plaintiffs are not covered by Lakeview's UIM coverage under its Aetna policy.

**[3]** We now address defendant Integon's appeal concerning its liability for the payment of prejudgment and postjudgment interest on the full amount of the judgment against its insured, Greene. We first consider the issue of prejudgment interest. The Court of Appeals rejected the trial court's conclusion that Integon was not obligated to pay prejudgment interest on that portion of the $750,000 judgment against Greene which exceeded Integon's limit of liability under the policy. Under the policy, Greene had $25,000

in liability coverage, and Integon further agreed in the policy that, in addition to the $25,000 limit of liability, it would pay "all defense costs we incur." Integon contends that the Court of Appeals erred in its conclusion that prejudgment interest is a "defense cost within the meaning of the Integon policy." We agree.

Citing to *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985), the Court of Appeals concluded that "[p]rejudgment interest, provided for by G.S. 24-5, is a 'cost' within the meaning of an insurance contract." *Sproles v. Greene*, 100 N.C. App. at 103, 394 S.E.2d at 691. However, this holding in *Lowe* is not applicable to the present case. In *Lowe*, after determining that N.C.G.S. § 24-5 does not violate due process as provided under the fourteenth amendment, this Court examined the relevant language of the policy in question in that case. *Lowe v. Tarble*, 313 N.C. at 461-63, 329 S.E.2d at 651. The policy at issue in *Lowe* provided that the insurance company would

> [p]ay all expenses incurred by the company, *all costs* taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;

*Id.* (emphasis in the original). This Court concluded that "all costs" included prejudgment interest. *Id.* at 464, 329 S.E.2d at 651.

In the present case, the language of the Integon policy is different from the language of the policy in *Lowe*. Integon's policy provides that, in addition to the policy limits, "we will pay all *defense costs* we incur." (Emphasis added.) The promise to pay "all defense costs" in the Integon policy is quite different from the promise to pay "all costs taxed against the insured" as found in the policy under consideration in *Lowe*. *Lowe* clearly decided that "all costs taxed against the insured" as used in the policy included prejudgment interest because that is a cost taxed against the insured. However, the phrase "all defense costs we incur" is not as broad. "Defense costs" refer to costs associated with the process of defending a claim such as attorney fees, deposition expenses, and court costs including such items as subpoena and witness fees. *See* Annot. "Allocation of Defense Costs Between Primary and Excess Insurance Carriers," 19 A.L.R.4th 107 (1983). Thus, under the language of the policy in the present case, Integon has agreed to pay, in excess of its liability limits, only the costs of

defense and not all costs taxed against the insured, and *Lowe* is not controlling. Furthermore, we find no other provision in the Integon policy in which it agrees to pay prejudgment interest in addition to its limit of liability; nor do we find any statutory provision requiring a liability insurance carrier to pay prejudgment interest in addition to its limit of liability under the policy. Therefore, we conclude that the Court of Appeals erred in its conclusion that Integon was required to pay Ms. Sproles prejudgment interest on the entire amount of the judgment.

**[4]** Integon next contends that the Court of Appeals erred in concluding that Integon owed postjudgment interest on Ms. Sproles' $750,000 judgment and in concluding that Integon's oral offer to pay its policy limit did not toll Integon's liability for postjudgment interest. On the day the jury verdict was returned, Integon orally offered in open court to pay its policy limit and costs to the plaintiff; however, Integon did not pay this amount into the court until thirteen days later. Integon claims that under the language of its policy, it must only pay postjudgment interest on $25,000, its limit of liability under the policy, from the time of judgment until Integon offered to pay the $25,000 on the day the verdict was returned. Thus, in this case, Integon would owe no postjudgment interest since it offered to pay the full amount of its liability on the day the verdict was returned.

The supplementary payments provision of the Integon policy in question provides:

> In addition to our limit of liability, we will pay on behalf of a covered person:
>
> . . . .
>
> (3) Interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for this coverage.

The relevant statute governing the accrual of prejudgment and postjudgment interest provides in part:

> In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied.

N.C.G.S. § 24-5 (Cum. Supp. 1990).

The Court of Appeals concluded that the provision in the Integon policy governing the payment of postjudgment interest "conflicts with G.S. § 24-5 and is therefore without effect." *Sproles v. Greene*, 100 N.C. App. at 104, 394 S.E.2d at 691. The Court of Appeals further concluded that this action must be remanded and that "the costs against Greene must be retaxed to include interest on Mrs. Sproles' judgment until the date its policy limits were paid into court." *Id.* at 105, 394 S.E.2d at 691.[1]

Integon contends that the Court of Appeals erred in concluding that the limitations as to the conditions under which Integon would pay interest are not enforceable because the limitations conflict with N.C.G.S. § 24-5. We agree. As authority for its conclusion, the Court of Appeals cited *Nationwide Mutual Insurance Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977). In *Chantos* this Court concluded, "[t]he provisions of the Financial Responsibility Act are 'written' into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail." *Id.* at 441, 238 S.E.2d at 604 (citations omitted). However, as Integon points out, § 24-5 is not a part of the Financial Responsibility Act. Therefore, *Chantos* does not provide authority for the proposition that § 24-5 must be written into every automobile liability insurance policy, and we find no authority for this proposition. Furthermore, we find no provision in the Financial Responsibility Act requiring a liability insurer to pay postjudgment interest on amounts in excess of its policy limits even though such interest may properly be taxed against the insured. When coverage provided in the policy is in addition to the mandatory statutory requirements, the additional coverage is not subject to the statutory provisions in the Financial Responsibility Act. N.C.G.S. § 20-279.21(g) (1989). Thus, the additional coverage is governed by the terms of the policy, and we must look to the language of the policy to see whether Integon is obligated to pay postjudgment interest taxed against its insured.

**[5]** As indicated above, the language of the policy provides for payment of postjudgment interest from the time judgment is entered until the time the insurance company "offers to pay" the part of the judgment which does not exceed its limit of liability. Thus,

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1. We note that the question before the Court is not what costs must be taxed against the defendant Greene but what costs must be paid by the insurer Integon in addition to the policy limits.

we must determine what is meant by the term "offer to pay" as it is used in context in this supplementary payments provision of a liability insurance policy. We find no cases in North Carolina which have addressed this specific issue. However, in *Farmers Alliance Mut. Ins. Co. v. Bethel*, 812 F.2d 412 (8th Cir. 1987) (per curiam), the court considered a provision in a policy of liability insurance which is identical to the provision in the present case. In *Bethel*, the insurer had made several offers to pay its policy limits before judgment and did not make a postjudgment offer to pay until five weeks after the judgment. *Id.* at 413. The court stated, "Well before it was involuntarily required to defend its insured . . . appellee made a standing offer to pay the full policy limits. Its offers were refused through no fault of the insurer." *Id.* The court held that the insurer's "many good faith offers to pay the full policy limits satisfied the supplementary payments provision and precluded any obligation for postjudgment interest." *Id.*

In *Insurance Co. of Pennsylvania v. Giles*, 196 Ga. App. 271, 395 S.E.2d 833 (1990), the Georgia Court of Appeals was faced with the application of an identical provision. Agreeing "with the reasoning and the result reached by the court" in *Bethel*, the *Giles* court concluded that the insurer's offer to pay the entire limits before judgment was effective to toll its liability for postjudgment interest. The Georgia court noted that the purpose of this "supplementary payments" provision in the policy "is to assure that [the injured party] will quickly receive the primary amount the insurer is obligated to pay under the policy after judgment. It does this by making it expensive for the insurer to delay." *Id.* at 273, 395 S.E.2d at 835. In *Giles*, as in *Bethel*, the insurer offered to pay the limit of its liability prior to the judgment, and the court concluded therefore that the "delay-preventing benefit provided for in the policy's supplementary payments section is inapplicable." *Id.* at 274, 395 S.E.2d at 836.

In the present case, the record shows that Integon, prior to judgment, made an offer to pay its policy limits conditioned on plaintiffs' release of Greene, and Integon's attorney, who was representing defendant Greene, made an unconditional offer at the end of the trial to pay the full amount of Integon's liability under its policy with Greene. We conclude that Integon's "offer to pay" made on the same day that the verdict was returned was sufficient, under the terms of Integon's policy with Greene, to toll Integon's responsibility for postjudgment interest even though the actual

payment was not made until thirteen days later. Thus, the Court of Appeals erred in determining that Integon must pay postjudgment interest on the $750,000 judgment.

For the reasons stated above, we affirm the Court of Appeals as to the action involving Aetna and reverse the Court of Appeals as to the action involving Integon. We remand that portion of the action relating to the award of prejudgment and postjudgment interest to the Court of Appeals for remand to the trial court for further proceedings not inconsistent with this opinion on the issue of prejudgment and postjudgment interest.

Affirmed in part; reversed in part; and remanded in part.

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

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GRANVILLE COUNTY BOARD OF COMMISSIONERS v. NORTH CAROLINA HAZARDOUS WASTE MANAGEMENT COMMISSION

No. 478PA90

(Filed 14 August 1991)

1. **Appeal and Error § 173 (NCI4th) — siting of hazardous waste facility — injunction prohibiting — appeal moot**

An appeal from a preliminary injunction enjoining the Hazardous Waste Commission from taking further action with respect to siting a hazardous waste facility at a site in Granville County was moot where the site had since been downgraded and was no longer considered a suitable site, and the State had since been expelled from the regional agreement which had established a mandatory schedule of milestone dates for North Carolina to establish a hazardous waste treatment facility.

**Am Jur 2d, Appeal and Error §§ 761-763.**

2. **Administrative Law § 52 (NCI4th) — siting of hazardous waste facility — preliminary injunction — no justiciable issue**

The trial court erred in entering an order enjoining the Hazardous Waste Commission from further efforts in its investigation and site selection process with regard to a Gran-

ville County site because there is no justiciable issue and no genuine controversy between the parties unless and until the Commission makes a final site selection decision. The issuance of the preliminary injunction at the very first step in the administrative decision making process interfered with the exercise of discretion and judgment on the part of an important administrative agency in performing a function mandated by the legislature; in matters of this nature, which seek solutions to extremely urgent problems where the solutions are essential to protect the public health and safety, the courts should be reluctant to interfere until the administrative decision has been finalized.

**Am Jur 2d, Administrative Law § 583.**

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

ON discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of an order of *Hobgood (Robert H.), J.*, entered 19 June 1990 preliminarily enjoining the defendant Commission from taking further action with respect to siting a hazardous waste facility at the Henderson 8 site in GRANVILLE County. Heard in the Supreme Court 6 May 1991.

*Tharrington, Smith & Hargrove, by Michael Crowell, and Watkins, Finch & Hopper, by William L. Hopper, for plaintiff-appellee.*

*Lacy H. Thornburg, Attorney General, by Edwin M. Speas, Senior Deputy Attorney General, Tiare B. Smiley, Special Deputy Attorney General, and Yvonne C. Bailey, Associate Attorney General, for defendant-appellant.*

MEYER, Justice.

The North Carolina Hazardous Waste Management Commission (hereinafter "the Commission") is a state agency created by the General Assembly with powers defined in N.C.G.S. § 130B-7, including, *inter alia*, the power to site, design, finance, construct, and operate authorized hazardous waste facilities. N.C.G.S. § 130B-6 (1989). The Granville County Board of Commissioners (hereinafter "the County"), on 11 June 1990, initiated this action against the Commission seeking a temporary restraining order and a preliminary

and a permanent injunction to enjoin the Commission from siting a hazardous waste treatment facility on a parcel of land in Granville County referred to as the "Henderson 8" site, which the Commission had preliminarily identified as one of two "suitable" sites for further evaluation pursuant to N.C.G.S. § 130B-11. The County's demand for injunctive relief and its request for a declaratory judgment contained in its complaint were premised on allegations that the Commission had violated N.C.G.S. § 130A-294(c)(8), (h)(4), and (h)(5) and its own administrative rules, 4 NCAC 18 .0200, which prohibit the Commission from siting a hazardous waste facility within twenty-five miles of a polychlorinated biphenyl (PCB) landfill facility.

An *ex parte* temporary restraining order was issued by Judge Hobgood on 11 June 1990. However, the Commission filed a motion to dissolve the temporary order, and it was dissolved by Judge Hobgood on 14 June 1990.

A hearing on the County's motion for preliminary injunction was held on 18 and 19 June 1990. Upon the conclusion of the evidence and arguments of counsel, Judge Hobgood entered a preliminary injunction in open court on 19 June 1990, which was subsequently reduced to writing and filed 5 July 1990. The injunction prohibits the Commission, its servants, agents, commission members, and proposed site operator from taking any further actions, including entry onto the land, with respect to the siting of a hazardous waste facility at the Henderson 8 location in Granville County.

The preliminary injunction was based on the trial court's determination that the SARA Capacity Assurance Regional Agreement (hereinafter "the Regional Agreement") regarding the disposal and management of hazardous waste entered into by Governor James G. Martin and the governors of the States of Alabama, Kentucky, South Carolina, and Tennessee, which was approved and codified by the General Assembly at N.C.G.S. § 130B-24, violates article I, section 6 of the North Carolina Constitution. The constitutionality of the Regional Agreement had not been argued by the parties in any pleading or argument but was raised *ex mero motu* by the trial court, citing its inherent authority.

In the order, the trial court certified that "this ruling concerns a substantial right, a constitutional ruling on separation of powers by a State trial court, and is immediately appealable." On 21 June

1990, the Commission filed with the Court of Appeals a petition for writ of supersedeas under Rule 23 and a motion for temporary stay; a temporary stay was entered by the Court of Appeals. On 5 July 1990, the Court of Appeals issued an order dissolving the temporary stay and dismissing the Commission's petition for supersedeas. The Commission filed written notice of appeal to the Court of Appeals on 9 July 1990 and a renewed petition for writ of supersedeas under Rule 23 and alternative petition for writ of certiorari on 10 July 1990. On 27 July 1990, the Court of Appeals allowed the Commission's petition for writ of supersedeas and stayed the trial court's preliminary injunction pending disposition of the appeal. The alternative petition for writ of certiorari was referred to the panel to which the case was assigned. A petition for writ of supersedeas filed by the County with this Court (originally case number 395P90) was denied 31 August 1990, and a petition for writ of certiorari to review the order of the Court of Appeals was denied 25 September 1990. A petition for discretionary review prior to determination by the Court of Appeals, filed by the Commission, was allowed by this Court on 10 January 1991. We conclude that the case is now moot, and we vacate the preliminary injunction and dismiss the action. However, in the public interest, we proceed to address the question of whether there was a justiciable issue before the trial court and conclude that there was not.

I.

Recognizing the inadequacy of facilities for the disposal of hazardous waste in the state and the consequences of the failure to have adequate facilities for that purpose, the General Assembly, after lengthy studies, enacted the North Carolina Hazardous Waste Management Commission Act of 1989 (hereinafter "the Act") on 30 May 1989. The Act is codified in chapter 130B of the North Carolina General Statutes. Among the legislative findings appearing in the Act itself are that "the safe management of hazardous waste, and particularly the *timely establishment of adequate facilities* for the treatment and disposal of hazardous waste, is one of the *most urgent problems* facing North Carolina"; that "[t]he safe management of hazardous waste is *essential to protect public health and safety and the environment* and to continued economic growth"; and that "the most practical approach to hazardous waste management . . . is through a regional approach." N.C.G.S. § 130B-3 (1989) (emphasis added).

The General Assembly created the Commission and charged it with achieving the following purposes:

> It is the purpose of this Chapter to provide for the siting, construction, and operation of hazardous waste facilities to the end that hazardous waste may be treated or disposed of in the most cost-effective manner, while protecting public health and safety and the environment. It is the purpose of this Chapter to promote a regional approach to hazardous waste management. It is the purpose of this Chapter to provide a mechanism to assess the need for hazardous waste treatment and disposal in this State and in the region, to determine the scope and capacity of hazardous waste facilities needed in this State in order that North Carolina is in a position to assume its fair share in the management of hazardous waste so that the benefits and burdens of hazardous waste management are equitably shared by all states, and to cause to come into existence such facilities as are needed. It is the purpose of this Chapter to promote interstate agreements for the management of hazardous waste which will assure access to hazardous waste facilities on a regional basis. It is the purpose of this Chapter to encourage the development of hazardous waste facilities which are needed in this State through the efforts of private enterprise. It is the purpose of this Chapter to create a commission to assist private enterprise with the development of needed hazardous waste facilities through the performance of those tasks which private enterprise is unable to undertake or accomplish. It is the purpose of this Chapter to authorize the Commission, when authorized by the Governor, to site, design, finance, construct, operate, oversee, acquire, hold, sell, lease, or convey needed hazardous waste facilities to the extent that private enterprise fails to provide such facilities.

N.C.G.S. § 130B-4 para. 1 (1989).

North Carolina joined the SARA Capacity Assurance Regional Agreement previously entered into by Alabama, Kentucky, South Carolina, and Tennessee. The Governor signed the Regional Agreement on 8 November 1989, and a special session of the General Assembly ratified this action and incorporated the Regional Agreement into the General Statutes on 7 December 1989. N.C.G.S. § 130B-24 (Cum. Supp. 1990).

The Regional Agreement requires North Carolina to construct and operate a hazardous waste treatment facility consisting of an incinerator and thermal treatment unit, a solvent distillation and recovery unit, and a residuals management unit. The Regional Agreement establishes a milestone schedule for the siting, construction, and operation of this facility. These milestones are:

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|---|---|
| Site Selection | May 1990 |
| Part B Permit Submitted | December 1990 |
| Part B Permit Issued and Construction Begun With No Adverse Litigation Pending | July 1991 |
| Facility Operational | December 1991 |

The Regional Agreement provides that "[i]f at any time North Carolina is unable to meet the milestone dates set forth in the attached tables, North Carolina will be eliminated automatically from the agreement."

The Commission began its work by adopting regulations consistent with statutory obligations and requirements for the siting of a facility. These regulations and other Commission actions embody a comprehensive and orderly site selection process to determine suitable sites. The entire state was considered in the site selection process. Through the application of the criteria established by law to geological and other data obtained from state and federal agencies, the Commission ultimately identified eighteen sites for further study. Based upon further consideration, the Commission determined, on 1 May 1990, that two sites warranted on-site evaluation: a site in Rowan and Iredell Counties and a site in Granville County (Henderson 8). The Commission was also giving further consideration to state-owned property.

The Commission was about to begin the on-site evaluation process when this action was filed on 11 June 1990. In addition to the instant litigation, a whole series of lawsuits was filed against the Commission in superior and district courts which resulted in temporary restraining orders and preliminary injunctions attempting to prevent the Commission from doing on-site testing, holding public meetings, or taking other necessary actions to select a preferred site.

After the original briefs were filed in this case, the Commission filed a supplemental statement of facts and suggested that the issues presented by the case were now moot. This Court directed the parties to brief the mootness issue. After thoroughly reviewing the record on appeal, the briefs, the supplemental briefs, and the arguments of counsel, we conclude that the case is indeed moot, and we address that question at the outset.

**[1]** Since this litigation was initiated in June 1990, a number of significant events have occurred which render the case moot. When the petition for discretionary review was filed with this Court, the Commission was seeking to meet the mandate of a five-state Regional Agreement to find a site for a hazardous waste facility and have a permit application submitted by the end of 1990. The Henderson 8 site was one of two privately owned parcels identified by the Commission as finalists for the facility; however, the trial court had preliminarily enjoined further consideration of this site because the Regional Agreement violated the separation of powers provisions of the state Constitution. In its petition for discretionary review, the Commission argued that the upcoming milestone date, the importance of the Regional Agreement, and the potential application of the trial court's constitutional decision to other cases justified this Court's intervention.

On 2 October 1990, some months after this lawsuit was initiated, the Commission adopted a resolution downgrading Henderson 8 and the Rowan-Iredell site from their status as "suitable" sites and placing them back in the status of "potentially acceptable/high priority" along with sixteen other sites. In this same resolution, the Commission selected the Umstead State Farm Unit in Granville County as a "suitable" site and indicated its intent to focus on state-owned land.

On 4 December 1990, the Commission selected the Umstead Farm site as the "preferred" site pursuant to N.C.G.S. § 130B-11. However, in order to obtain fee simple title to the land as required by N.C.G.S. § 130B-11(e), the Commission was required by N.C.G.S. §§ 146-28 and -29 to obtain fee simple title from the Council of State. On 13 December 1990, the Council of State declined to transfer fee simple title of the Umstead Farm to the Commission.

Based on these circumstances, the Commission again filed a motion to dismiss this and all of the other site selection cases pending before Judge Battle on the basis of nonjusticiability. Rather

than making a decision on the motion, which was opposed by all plaintiffs, Judge Battle entered an order that removed this case and all of the other cases from all active and ready calendars and closed the case files.

In addition to halting further action by the Commission to evaluate its preferred site and to begin preparing the required environmental permit applications, the decision by the Council of State also affected the state's compliance with the Regional Agreement. The Regional Agreement, which is the basis of the preliminary injunction in this appeal, expressly provided that "[i]f at any time North Carolina is unable to meet the milestone dates set forth in the attached tables, North Carolina will be eliminated automatically from the agreement." The December 1990 milestone date required the Commission to submit its Part B environmental permit application for the proposed facility by December 1990. The Commission failed to meet that deadline, and on 17 December 1990, South Carolina Governor Campbell informed Governor Martin that North Carolina would soon be eliminated from the agreement and that South Carolina would ban hazardous waste coming from North Carolina. On 4 January 1991, Governor Campbell informed President George Bush that North Carolina had been automatically eliminated from the agreement. Thus, North Carolina has been expelled from the Regional Agreement. Since the expulsion, the General Assembly has taken no action.

> When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.

*Parent-Teacher Assoc. v. Bd. of Education*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969). Because the Henderson 8 site has been downgraded and is no longer considered a "suitable" site and the state has been expelled from the Regional Agreement, we conclude that the case is now moot.

We therefore will vacate the order of Hobgood, J., entered 19 June 1990, preliminarily enjoining the Commission from taking further action with respect to siting a hazardous waste facility at the Henderson 8 site in Granville County, and dismiss the case.

II.

While the General Assembly found that the most practical approach to meeting the state's hazardous waste management needs was through a regional approach, it charged the Commission with the responsibility to site and construct authorized hazardous waste facilities regardless of the existence of a Regional Agreement. N.C.G.S. § 130B-7 (1989). The Commission remains under a continuing obligation to carry out the statutory mandate of chapter 130B of the General Statutes to site, construct, and operate authorized hazardous waste facilities. Although it evades review in this particular case because of the mootness doctrine, this appeal raises one issue which is important to the Commission, and to the State and its people. "Even if moot, . . . this Court may, if it chooses, consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989); *see also Leak v. High Point City Council*, 25 N.C. App. 394, 213 S.E.2d 386 (1975). Because the process of siting hazardous waste facilities involves the public interest and deserves prompt resolution in view of its general importance, we elect to address it.

**[2]** In this and other similar cases where the issue was addressed, the Commission has raised the question of the jurisdiction of the lower court to intervene in the middle of an administrative decision-making process and to enjoin a state agency from taking the steps necessary to reach a final decision on the selection of a site for a hazardous waste facility. The Commission argues that the courts should not become prematurely involved in the administrative process and interfere in a decision-making process by the Commission which has not yet culminated in a final agency decision. Because of the multi-step decision-making process under which the Commission is operating, it is important that this Court give guidance to the lower courts as to their proper and timely role. We now, therefore, address the issue.

Under chapter 130B of the General Statutes and the Commission's rules and regulations, site selection is a three-step process. A final site selection decision cannot be made by the Commission until a site is formally designated as a "suitable" site, then as a "preferred" site, and then it is "permitted" by the various federal and state environmental regulatory agencies. Each of these steps involves an additional, stringent evaluation of the proposed site

and the accumulation of increasingly specific geological and other information about the site. All stages of the process require public hearings, and an environmental impact statement must be prepared as part of the permitting process. Until a permit is issued, the Commission cannot make its final site selection decision.

This litigation was commenced at the very first stage of the Commission's administrative decision-making process, upon its selection of two "suitable" sites which were to receive additional site-specific geological evaluation. As of the date this action was commenced on 11 June 1990, the Commission had made no final determination of a location for the waste management facility. Several additional steps remained before the Commission could finally choose a site, condemn property, and begin construction. The steps preliminary to final site selection primarily consisted of the on-site evaluation of Henderson 8, the Rowan-Iredell site, and state-owned property to determine if those sites are in fact suitable; the selection of a preferred and alternate site; and the submission of permit applications for construction and operation to state and federal environmental agencies. These additional steps would have likely required many months, and may or may not have resulted in final selection of Henderson 8.

The issuance of the preliminary injunction in the case at bar at the very first step in the administrative decision-making process interfered with the exercise of discretion and judgment on the part of an important administrative agency in performing a function mandated by the legislature, that being the evaluation and selection of a final site for a hazardous waste facility.

Our legislature has determined that the management of hazardous waste is *essential* to protect the public health, safety, and environment and that the *timely* establishment of a hazardous waste facility is one of the *most urgent* problems facing North Carolina. N.C.G.S. § 130B-3 (1989). In matters of this nature which seek solutions to extremely urgent problems, where the solutions are essential to protect the public health and safety, the courts should be reluctant to interfere until the administrative decision has been finalized. Here, as we have previously noted, a final site selection decision cannot be made by the Commission until a permit is issued. In order to issue a permit, the site must first be formally designated as a "suitable" site, then as a "preferred" site, and then it is "permitted" by the various federal and state environmental

regulatory agencies after extensive public hearings and the preparation of an environmental impact statement.

In *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960), this Court observed:

> As succinctly stated by *Devin, C. J.*, in *Williamston v. R. R.*, 236 N.C. 271, 72 S.E. 2d 609 [1952]: "Courts will not undertake to control the exercise of discretion and judgment on the part of the members of a commission in performing the functions of a State agency." When discretionary authority is vested in such commission, the court has no power to substitute its discretion for that of the commission; and, in the absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority, the court has no power to intervene. *Sanders v. Smithfield*, 221 N.C. 166, 19 S.E. 2d 630 [1942]; *Mullen v. Louisburg*, 225 N.C. 53, 33 S.E. 2d 484 [1945], and cases cited. For a full exposition of this well established principle of law, see opinion of *Barnhill, C. J.*, in *Burton v. Reidsville*, 243 N.C. 405, 407, 90 S.E. 2d 700 [1956].

*Id.* at 811-12, 115 S.E.2d at 24-25; *see also Elmore v. Lanier*, 270 N.C. 674, 678, 155 S.E.2d 114, 116 (1967) ("To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies."); *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 387, 265 S.E.2d 890, 914 (if federal approval for location of highway is not obtained, challenge to location "must be dismissed for want of ripeness"), *disc. rev. denied*, 301 N.C. 94 (1980).

Unless and until the Commission makes a final site selection decision, there is no justiciable issue and no genuine controversy between the parties. "When no genuine controversy presently exists between the parties," the courts cannot and should not intervene. *Angell v. City of Raleigh*, 267 N.C. 387, 391, 148 S.E.2d 233, 236 (1966); *see also Gaston Board of Realtors v. Harrison*, 311 N.C. 230, 234-35, 316 S.E.2d 59, 62 (1984). The rule applies with special force to prevent the premature litigation of constitutional issues. *City of Greensboro v. Wall*, 247 N.C. 516, 520, 101 S.E.2d 413, 416-17 (1958).

We conclude that the Hazardous Waste Management Commission may not be preliminarily enjoined in its process of site selec-

tion until the permitting process has been completed and the final site selection has been made. We thus conclude that, at the time the preliminary injunction was issued in this case, there was no justiciable issue, and the complaint failed to state a claim. The trial court erred in entering the order of 19 June 1990 enjoining the Commission, its members, servants, and proposed site operator from conducting further efforts in its investigation and site selection process with regard to the Henderson 8 site. Said order is vacated, and this action, being moot, is hereby dismissed.

Vacated and dismissed.

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

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M. S. HATCHER AND WIFE, BETTY M. HATCHER v. EARL G. ROSE AND WIFE, BONNIE H. ROSE

No. 171PA90

(Filed 14 August 1991)

**Payment § 5 (NCI3d)— mortgage note—silence as to prepayment—right to prepay**

The law of North Carolina prior to the enactment of N.C.G.S. § 24-2.4 permitted the prepayment of a promissory note executed for the purchase of real estate when the note was silent as to prepayment.

**Am Jur 2d, Mortgages § 397.**

ON discretionary review of the decision of the Court of Appeals, 97 N.C. App. 652, 389 S.E.2d 442 (1990), reversing the judgment entered in favor of defendants by *Wallace, J.*, on 7 April 1989 in the District Court, RICHMOND County, and awarding summary judgment for plaintiffs. Heard in the Supreme Court 14 November 1990.

*Page, Page & Webb, by John T. Page, Jr., for plaintiff-appellees.*

*Leath, Bynum, Kitchin & Neal, P.A., by Henry L. Kitchin and Stephan R. Futrell, for defendant-appellants.*

FRYE, Justice.

In this appeal, defendants present us with the issue of whether prepayment is allowed on a promissory note executed for the purchase of real estate when the note does not by specific language either prohibit or permit prepayment. We answer this question in the affirmative and reverse the Court of Appeals' decision directing summary judgment for plaintiffs.

Defendants Earl G. Rose and Bonnie H. Rose, who are husband and wife, purchased real property for the sum of $70,000 from the plaintiffs, M. S. Hatcher and Betty M. Hatcher, who are also husband and wife. Defendants executed a promissory note on 7 July 1983 in favor of plaintiffs. The note was in the amount of $70,000 plus interest at the rate of nine percent (9%) per annum and was secured by a deed of trust on the subject property which consisted of two tracts of real property in the Beverly Hills Subdivision in Richmond County, North Carolina. The first payment on the note was due on 1 August 1983 in the amount of $629.81. The remaining payments of $629.81 were due on the first day of each successive month until the note was paid in full. Defendants' attorney, using a 1977 North Carolina Bar Association Form No. 5A, prepared the deed of trust securing the note. The deed of trust provided: "The final due date for payment of said promissory note, if not sooner paid, is July 1, 2003."

Defendants alleged in their answer that they notified plaintiffs in writing in February 1988 that they wanted to pay off the remaining balance of the principal of the note and interest due at that time because they had secured alternate financing for the amount due plaintiffs. Plaintiffs indicated that they would refuse to accept payment of the remaining balance. Defendants made each monthly installment through 1 March 1988 and tendered full payment of the outstanding balance and interest in the amount of $63,601.21 on 11 May 1988. Plaintiffs refused this tender and brought this action on 27 September 1988, asking only for recovery of the installments which were unpaid at the time of this action, the payments for April, May, June, July, August, and September of 1988. In defense, defendants asserted that the instruments in this transaction did not expressly contain any restriction against prepayment and that defendants were entitled to prepay this obligation and have the deed of trust cancelled of record.

Both parties moved for summary judgment, and the trial judge, in a judgment filed 7 April 1989, granted summary judgment in favor of defendants. In the judgment, the trial judge concluded that defendants were entitled to prepay the note and directed plaintiffs to mark the promissory note "Paid and Fully Satisfied" upon defendants' payment of $63,601.21. The Court of Appeals reversed and remanded the case to the trial court for entry of judgment for plaintiffs. *Hatcher v. Rose*, 97 N.C. App. 652, 655, 389 S.E.2d 442, 444 (1990). We allowed defendants' petition for discretionary review on 13 June 1990.

Defendants contend that at common law there was a presumption of a right of prepayment when the note was silent. Plaintiffs contend that the Court of Appeals was correct in its conclusion that at common law the debtor could not compel the creditor to accept prepayment when the note was silent. *Id.* at 654, 389 S.E.2d at 443. Unfortunately the common law in North Carolina on this matter is not clear, and we must now determine whether defendants have the right to prepay the note and have their land released from the deed of trust when the note is silent as to that right.

As a starting point, we turn to the law as it exists today in our General Statutes and then look backward to determine how the law evolved to its present state. In 1985, the North Carolina General Assembly enacted N.C.G.S. § 24-2.4 which provides:

> A borrower may prepay a loan in whole or in part without penalty where the loan instrument does not explicitly state the borrower's rights with respect to prepayment or where the provisions for prepayment are not in accordance with law.

N.C.G.S. § 24-2.4 (1986). Under the provisions of this statute, clearly defendants have both the right to prepay this note and the right to prepay without paying a penalty. However, this statute is not applicable in the present case because the note was signed before the effective date of this statute.

In concluding that summary judgment was appropriate for plaintiffs because defendants had no right of prepayment, the Court of Appeals cited two cases, *Barbour v. Carteret County*, 255 N.C. 177, 120 S.E.2d 448 (1961), and *Smithwick v. Whitley*, 152 N.C. 366, 67 S.E. 914 (1910), as authority. *Hatcher v. Rose*, 97 N.C. at 653-54, 389 S.E.2d at 443. The Court of Appeals

acknowledged that neither case is on point but concluded that *Barbour* is analogous. *Id.* at 653, 389 S.E.2d at 443. We disagree.

*Barbour* involved the prepayment of county bonds rather than prepayment of a note secured by a deed of trust. This point alone is enough to distinguish *Barbour* from the present case because municipal bonds and a promissory note secured by real estate are different instruments which by their nature serve different purposes. However, we also find that the language in *Barbour*, which is quoted by the Court of Appeals, is inapplicable in the present situation. From *Barbour*, the Court of Appeals quotes the following, "a debtor cannot compel his creditor to accept payment before maturity except upon terms stipulated." *Id.* (quoting *Barbour v. Carteret County*, 255 N.C. at 181, 120 S.E.2d at 451). For this proposition, *Barbour* cited *Bell Bakeries, Inc. v. Jefferson Standard Life Ins. Co.*, 245 N.C. 408, 96 S.E.2d 408 (1957).

*Bell Bakeries* involved a note which expressly permitted prepayment and also provided for a penalty if the debtor chose to prepay. The note provided that the creditor could charge the debtor an additional amount as a penalty for prepayment. *Id.* at 418, 96 S.E.2d at 410. The plaintiff in *Bell Bakeries* paid the penalty and then brought the action to recover the money which it had paid, claiming that it paid the money as a result of duress. *Id.* This Court concluded, "This provision was legal and plaintiff could not elect to repay the entire loan without complying with this provision." *Id.*

Unlike the present case where the note is silent as to prepayment, *Bell Bakeries* clearly provided for prepayment. Thus, the language, "except upon terms stipulated," found in *Barbour* with a cite to *Bell Bakeries* cannot stand for the proposition that prepayment is not allowed unless specifically provided for in the note since *Bell Bakeries* did not involve a situation where the note was silent on prepayment. *Bell Bakeries* held that if the agreement includes a provision for payment of a penalty for prepayment, the debtor must pay that penalty and the penalty can be legally enforced. *Bell Bakeries* did not answer the question of whether a right to prepayment exists when the note is silent as to that right. The words, "except upon terms stipulated," clearly refer to the terms provided for the penalty upon prepayment and not to whether there is a right to prepayment when the note is silent on that point. Thus, the language in *Barbour*, quoted by the Court of Appeals as support for the proposition that there is no right to prepay

except where the note specifically provides for it, does not stand for that proposition.

The Court of Appeals also cited *Smithwick* for the statement that a creditor is "not required by law to accept payment of the unmatured notes before maturity or to surrender the mortgage." *Smithwick v. Whitley*, 152 N.C. at 369, 67 S.E. at 915. *Smithwick* is not on point because *Smithwick* was an action for usury. *Id.* In *Smithwick*, plaintiff gave defendant ten different notes which matured each January for ten consecutive years. Plaintiff wanted to pay off some of the notes early, and defendant agreed to accept the early payment but told plaintiff he would only accept the prepayment if plaintiff made an additional payment equaling the amount of interest on each note if it had not been paid early. *Id.* at 366-67, 67 S.E. at 914. Plaintiff made the additional payment and then sued defendant for usury. *Smithwick* is different from the present case because the creditor in *Smithwick*, unlike plaintiffs in the present case, agreed to accept prepayment and thus *Smithwick* did not involve a resolution of the issue of whether a right to prepayment existed if the note was silent. Furthermore, *Smithwick* does not cite any legal authority for the statement which the Court of Appeals quoted from *Smithwick*.

The Court of Appeals stated, "based upon *Barbour* . . . and the language in *Smithwick* . . . we hold that at common law there was no right to compel the creditor to accept prepayment of a debt where the contract was silent as to prepayment." *Hatcher v. Rose*, 97 N.C. App. at 654, 389 S.E.2d at 443. Plaintiffs likewise contend that *Barbour*, *Smithwick*, and *Bell Bakeries* all stand for the proposition that the common law in North Carolina had no presumption of a right to prepay when the note was silent. We do not read *Barbour*, *Smithwick*, and *Bell Bakeries* as supporting the proposition that the common law in North Carolina does not allow prepayment when the note is silent on the matter. Furthermore, we find no other cases in North Carolina which directly address the issue of whether the common law provided for prepayment in the absence of a specific provision allowing prepayment. Ordinarily where this Court has not clearly stated what the common law on a particular matter is, we would look to the common law of England as it existed at the time of the signing of the Declaration of Independence. N.C.G.S. § 4-1 (1986); *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971). However, the status of the common law of England as it existed at the

time of the adoption of the Declaration of Independence appears to be the subject of debate among the authorities.

Defendants direct us to an article which includes a detailed analysis of the common law rules of prepayment and which states:

> For the past one hundred and fifty years legal scholarship has assumed that a borrower's inability to prepay mortgage indebtedness without the lender's consent was a principle embedded in the common law since its early beginnings. A reexamination of the leading cases and commentaries, however, reveals that this assumption is unjustified.

Alexander, *Mortgage Prepayment: The Trial of Common Sense*, 72 Cornell L. Rev. 288, 289 (1987). After an analysis of common law as it evolved in England and was adopted in the United States, the author concludes, "Contrary to traditional wisdom, the common law prior to 1825 did not clearly deny the debtor the right to prepay his mortgage." *Id.* at 308. This article appears to cast doubt on the commonly held belief that the common law inherited from England did not allow prepayment of the note when the note was silent on the right of prepayment.

Since it is apparent that this Court has not yet determined whether the common law right of prepayment exists in North Carolina and since the status of the common law in England at the time of the adoption of the Declaration of Independence is uncertain, we must look elsewhere to determine whether a right to prepay existed in this state prior to the enactment of N.C.G.S. § 24-2.4. Based on legislative enactments regulating prepayment penalties, the practice and procedure followed in this state at the time of this note, a learned treatise on North Carolina property law, and case law and statutes in other jurisdictions, we conclude that there is a right of prepayment when the note is silent as to that right.

On 21 June 1967, the General Assembly enacted chapter 852 which added a new section to Chapter 24 of the General Statutes to be designated N.C.G.S. § 24-10. This act established a maximum rate of interest for loans secured by real estate. The act also provided:

> Any loan made pursuant to the provisions of this Section may be prepaid in part or in full, after 30 days notice to the lender, with a maximum prepayment penalty of one per cent (1%) of the outstanding principal balance at any time within one

year after the first payment on principal, and thereafter, there shall be no prepayment penalty.

1967 N.C. Sess. Laws ch. 852, § 1.

In 1969, this statute was replaced by a new § 24-10 entitled "Maximum fees on loans secured by real property." This statute differentiates between loans where the principal amount is less than $300,000 and is secured by real property, and other loans, and limits the fees or discounts that a lender may charge in connection with such loans. Subsection (b) provides:

> Any loan made under G.S. 24-1.1 in an original principal amount of one hundred thousand dollars ($100,000) or less may be prepaid in part or in full after thirty (30) days notice to the lender, with a maximum prepayment fee of two per cent (2%) of the outstanding balance at any time within three (3) years after the first payment of principal and thereafter there shall be no prepayment fee provided that there shall be no prepayment fee charged or received in connection with any repayment of a construction loan and except as herein provided, any lender and any borrower may agree on any terms as to prepayment of a loan.

1969 N.C. Sess. Laws ch. 1303, § 6.

The loans covered under N.C.G.S. § 24-10 are loans made under N.C.G.S. § 24-1.1 which is entitled "Contract rates." *See* N.C.G.S. § 24-10 (1986). In 1969, the General Assembly amended a portion of § 24-1.1 to set a maximum interest rate for nonbusiness real estate loans. *See* 1969 N.C. Sess. Laws ch. 1303, § 1. However, in 1973 the General Assembly enacted chapter 1119 which added N.C.G.S. § 24-1.1a to Chapter 24. This statute was entitled "Contract rates on home mortgage loans" and provided:

> Notwithstanding any other provision of this Chapter or any other provision of law, such contract shall provide that no prepayment penalties shall be charged to any party with respect to any such first mortgage home loan.

1973 N.C. Sess. Laws ch. 1119, § 1. This statute was amended by the 1975 session of the General Assembly to provide:

> No prepayment fees shall be contracted by the borrower and lender with respect to any home loan secured by a first mortgage or first deed of trust where the principal amount

> borrowed is one hundred thousand dollars ($100,000) or less. The provisions of G.S. 24-10(b) relating to prepayment fees shall apply to home loans secured by a first mortgage or first deed of trust where the principal amount borrowed is in excess of one hundred thousand dollars ($100,000).

1975 N.C. Sess. Laws ch. 260, § 1. The current version of that provision of the statute, as amended by 1977 N.C. Sess. Laws ch. 542, § 1, and effective on 13 June 1977, provides:

> No prepayment fees shall be contracted by the borrower and lender with respect to any home loan where the principal amount borrowed is one hundred thousand dollars ($100,000) or less; otherwise a lender and a borrower may agree on any terms as to the prepayment of a home loan.

N.C.G.S. § 24-1.1A(b) (Cum. Supp. 1990).

These legislative enactments strongly suggest a recognition by the General Assembly of a right on the part of the debtor to pay off his mortgage debt at any time subject only to reasonable restrictions made known to the debtor. In 1967, the legislature enacted restrictions in § 24-10 which applied to all loans governed by § 24-1.1 and then in 1973 enacted restrictions in § 24-1.1A specifically targeted for home mortgage loans. Finally in 1985, the General Assembly enacted § 24-2.4 providing for prepayment without penalty for any loan where the loan instrument is silent on the right of prepayment. The earlier statutes, § 24-10 and § 24-1.1A, both appear to be based on the presumption that a debtor had the right of prepayment, and these statutes were enacted to limit the amount of prepayment fees that could be charged if the debtor decided to pay off the loan early. Thus, these statutes provide a strong indication that the General Assembly recognized that the debtor had the right of prepayment unless that right was contracted away and that the debtor needed protection from overly burdensome prepayment fees.

When this note and deed of trust were prepared and signed, the attorney representing defendants at that time used a standard North Carolina Bar Association form for the deed of trust which provides the date for the final payment "if not sooner paid," at least alluding to the fact that prepayment was possible. *But see Kruse v. Planer*, 288 N.W.2d 12 (Minn. 1979) (holding that the term, "if not sooner paid," in the contract for sale of real property

did not authorize prepayment). When the trial judge ruled on this case, she considered, without objection from plaintiffs, the testimony of the attorney who represented defendants at that time and who had prepared the note and the deed of trust. In the testimony, the attorney reported that plaintiff Mr. Hatcher asked him if the papers were made so that defendants could not prepay the note. The attorney responded that he had used the regular deed of trust form and did not think that a provision not allowing prepayment was enforceable. Indeed, at the time this transaction took place, a well respected treatise on North Carolina property law contained the following statement, "[a] mortgagor is entitled to pay off his mortgage debt and to have his land released from the security at any time and returned to him free, clear, and unencumbered." P. Hetrick, *Webster's Real Estate Law in North Carolina* § 284 (1981). This statement of the law was in the original edition of the treatise, *see* J. Webster, *Real Estate Law in North Carolina* § 255 (1971), and was not changed until the authors cited to the Court of Appeals' holding in this case that the common law did not provide for a right of prepayment when the note was silent on the matter. P. Hetrick and J. McLaughlin, *Webster's Real Estate Law in North Carolina* § 284 (Cum. Supp. 1990). Neither the 1971 nor 1988 editions provided any citation of authority to support the statement of the law about the right of prepayment, but as evidenced by the response the attorney made to plaintiff when questioned about defendants' right to prepayment, apparently some practitioners thought that the mortgagor had a right to prepayment. That practitioners believed that the mortgagor had a right to prepayment appears to be in keeping with the strong indication in the statutes as noted above that the General Assembly recognized that the right of prepayment was the rule in this state.

We also note that at least one other jurisdiction has legislatively codified the mortgagor's right to prepay. Florida passed a statute which provides:

> Any note which is silent as to the right of the obligor to prepay the note in advance of the stated maturity date may be prepaid in full by the obligor or his successor in interest without penalty.

Fla. Stat. § 697.06 (1987).

Two other states have in recent years judicially established the mortgagor's right of prepayment when the note is silent. *Skyles*

*v. Burge*, 789 S.W.2d 116 (Mo. Ct. App. 1990) (concluding that a relevant statute on prepayment penalties establishes a maximum allowable prepayment penalty when the note is silent and grants the right to prepay without penalty after five years); *Mahoney v. Furches*, 503 Pa. 60, 468 A.2d 458 (1983) (concluding that not allowing a presumption of a right of prepayment when the note is silent would be an unlawful restraint on alienation). Other jurisdictions have determined that the common law did not allow a right of prepayment when the note was silent. *See, e.g., Arthur v. Burkich*, 131 A.D.2d 105, 520 N.Y.S.2d 638 (3d Dept. 1987) (stating the common law rule from the early nineteenth century that a mortgagor had no right to prepay his mortgage without a prepayment clause included in the mortgage or contrary statutory authority).

Obviously the jurisdictions have treated this issue differently. However, after considering the acts of the General Assembly, specifically N.C.G.S. § 24-10 and § 24-1.1A, we conclude that, prior to the effective date of N.C.G.S. § 24-2.4, and with respect to notes secured by real estate which are silent as to a right of prepayment, the statement in *Webster's* prior to 1990 that a mortgagor is allowed to pay off his mortgage at any time was correct. We conclude that the law of North Carolina prior to the enactment of N.C.G.S. § 24-2.4 was that the mortgagor had the right of prepayment when the note was silent. We apply this rule to the present case and therefore reverse the holding of the Court of Appeals directing summary judgment for the plaintiffs. The trial court's entry of summary judgment for defendants will be reinstated.

Defendants raise two additional issues on appeal, but since we conclude that defendants have the right of prepayment in this case, we find it unnecessary to discuss these other issues in that they were merely alternative arguments in support of the right to prepayment in this action.

Reversed.

STATE OF NORTH CAROLINA v. FREDERICK WAYNE McPHAIL

No. 189A89

(Filed 14 August 1991)

1. **Constitutional Law § 313 (NCI4th); Appeal and Error § 147 (NCI4th)— effective assistance of counsel—issue raised for first time on appeal**

Defendant could not contend for the first time on appeal that allowing his expert to be called and to testify as a witness for the State violated his sixth amendment right to effective assistance of counsel; however, even if it were error to allow defendant's expert to testify as a witness for the State, such error would not be prejudicial, since the testimony of defendant's expert tended primarily to be repetitive of the otherwise uncontradicted testimony by the State's expert.

**Am Jur 2d, Appeal and Error § 545.**

2. **Homicide § 21.5 (NCI3d)— first degree murder—malice, premeditation and deliberation—sufficiency of evidence**

Evidence was sufficient to show that defendant killed the victim with malice, premeditation and deliberation, and the trial court did not err in submitting the charge of first degree murder to the jury on that theory where the evidence tended to show that the victim was shot while lying face down on the floor, his legs wrapped with an electric cord; he died of a gunshot wound to the middle of his back which went directly to and through his heart; the bullet entry wound was a contact wound, meaning that the gun was pressed against the victim's back when fired; the weapon which defendant admitted using and which killed the victim would not fire unless the trigger was pulled; and defendant admitted that he knew the gun had to be cocked to be fired and that there was no other safety on the gun, that he rendered the victim helpless by making him lie face down on the floor and tying his legs with a cord, that he made the plan to rob the store when he saw the victim there alone, that he took the loaded gun with him and planned to use it in the robbery, that he told the victim not to move, and that he intentionally pressed the gun firmly against the victim's back.

**Am Jur 2d, Homicide § 439.**

**3. Criminal Law § 747 (NCI4th)— defendant's confession—jury instructions proper—instructions given as requested**

Any error of the trial court in stating during its jury instructions that there was evidence tending to show that defendant confessed that he had committed the crime charged was not prejudicial, since the instruction was taken verbatim from the N. C. Criminal Pattern Jury Instructions, and the instruction was made pursuant to defendant's specific request.

**Am Jur 2d, Trial § 811.**

**4. Criminal Law § 1352 (NCI4th)— mitigating circumstances—unanimous finding required—prejudicial error**

The trial court erred in requiring that the jury not find a mitigating circumstance unless it found unanimously that the circumstance existed, and such error was prejudicial where the jury failed unanimously to find the existence of any mitigating circumstance, and defendant presented substantial evidence from which one or more jurors may have believed that one or more of those circumstances existed, including that defendant had served in the New York State National Guard and had been discharged honorably; defendant offered no resistance upon his arrest in New Jersey; defendant made a voluntary confession to law enforcement officers; and defendant voluntarily waived extradition and returned to North Carolina.

**Am Jur 2d, Criminal Law § 628.**

**Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.**

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment and sentence of death entered by *Grant, J.*, at the 10 April 1989 Criminal Session of Superior Court, NEW HANOVER County. Heard in the Supreme Court on 7 May 1991.

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

*Harry H. Harkins, Jr., for the defendant-appellant.*

MITCHELL, Justice.

The defendant was indicted for the murder of Jon Matthew Mason and was tried capitally on that murder charge at the 10

April 1989 Criminal Session of Superior Court, New Hanover County. The jury found the defendant guilty of first-degree murder on the theories of premeditation and deliberation and felony murder. After a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court entered a sentence of death. On appeal, we conclude that the defendant's trial and conviction were free from prejudicial error. However, under the recent decision of the Supreme Court of the United States in the case of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), the State concedes that the sentence of death entered against the defendant must be vacated and this case remanded to the Superior Court for a new capital sentencing proceeding.

The State's evidence tended to show that nineteen-year-old Jon Matthew Mason was working as a clerk in a store in Wilmington on 27 April 1988. At approximately 7:00 p.m., Mason's mother and father came by the store to bring him dinner and then left. At 9:05 p.m., Michael Smith, a former employee of the store, came to the store to visit and found Jon Matthew Mason's body lying face down on the floor behind the counter. An extension cord was wrapped loosely around Mason's legs. The police and the manager of the store were called. The manager discovered that approximately $200.00 was missing from the cash register.

An autopsy revealed a gunshot wound to Mason's back about fifteen inches from the top of his head. The bullet had passed through Mason's body and come to rest in the soft tissue of his chest. The medical examiner testified that Mason had died as a result of massive internal bleeding caused by the gunshot wound. In his opinion, Mason did not die immediately but probably became unconscious after approximately a minute as a result of the injury. The medical examiner also noted that the wound was red and burned, which indicated that the muzzle of the gun was in hard contact with the skin when the gun was fired.

Wade Davidson testified that he had worked with the defendant at Greentree Inn in early 1988 and had shared an apartment with the defendant in April 1988. Davidson testified that he had stolen a .38 caliber Derringer from a room at the Greentree Inn and subsequently sold it to the defendant for $30.00. He also had accompanied the defendant when the defendant purchased a box of .38 caliber hollow-point bullets for the gun. In addition, he had practiced firing the gun with the defendant.

On the night Mason was killed, 27 April 1988, the defendant came home around 10:00 p.m. and asked Davidson for a ride out of the state. Davidson saw that the defendant had the .38 caliber Derringer, and he asked the defendant if he had used the gun. The defendant responded, "Yes, and watched the blood spurt out." The defendant then bought a knapsack from JoAnn Williams, Davidson's girlfriend, for $20.00. The defendant stated that he would not return and left on foot with his belongings in the knapsack.

The defendant hitchhiked to Moorestown, New Jersey, where his brother, James McPhail, lived. On the way there, he telephoned his brother, Bill McPhail, in Lockport, New York, and gave him some information concerning the crime. On 2 May 1988, Bill McPhail telephoned the Wilmington Police Department and reported that the defendant had committed a robbery and murder in Wilmington. Bill also called his brother James to give him the same information. When the defendant arrived at James McPhail's residence, James called the Moorestown Police Department and requested that officers come to his residence to talk with the defendant about a shooting in Wilmington, North Carolina. The Moorestown Police Department then contacted the Wilmington Police Department and confirmed that the defendant was a suspect in a homicide. The Moorestown police entered James McPhail's residence and took the defendant into custody. They also seized the knapsack which contained a .38 caliber Derringer, approximately thirty .38 caliber hollow-point bullets and two spent shell casings.

North Carolina officers went to New Jersey on 13 May 1988 and brought the defendant, who had waived extradition, back to North Carolina for trial. On 25 July 1988, the defendant asked to make a statement about the crime to police with his attorneys present. In the resulting videotaped interview, the defendant confessed to the armed robbery and the killing of Jon Matthew Mason during the robbery. The defendant maintained, however, that the gun went off by accident as he was "jabbing" Mason. At trial, the State introduced the videotape as evidence.

Robert W. Murphy, a firearms expert with the Federal Bureau of Investigation, compared the bullet removed from the victim's body with the gun seized from the defendant's knapsack. He determined that the bullet had been fired from that gun. He also testified that the gun would not fire unless the trigger was pulled. He tested the weapon and found that it took between four and four

and one-quarter pounds of pressure to pull the trigger once the hammer was cocked. In his opinion, the gun would not fire unless the trigger was pulled; merely pushing the rear of the gun would not cause it to fire, even if the hammer was cocked.

Frank G. Satterfield, Jr., another firearms expert, also examined the gun. He testified that it took five pounds of pressure to pull the trigger. He too opined that the weapon functioned properly.

The defendant presented no evidence at the guilt-innocence determination phase of his trial.

**[1]** By his first assignment of error, the defendant contends the trial court erred in allowing the State to call the defendant's firearms expert as a witness for the State. The defendant argues that allowing the State to introduce the testimony of this witness violated his sixth amendment right to effective assistance of counsel.

Prior to trial, the indigent defendant obtained an order granting him $500.00 to hire a ballistics expert "to examine the .38 Derringer, to look at its firing mechanisms, working conditions, to test its trigger pressure and to make a written report of his findings to the defendant's attorney and, if requested, to testify at trial on the defendant's behalf." The defendant hired Frank G. Satterfield, Jr., a former SBI agent. Satterfield examined and tested the murder weapon at the SBI laboratory in the presence of SBI Agent James Lightner who had the weapon in his custody. As a result of his examination, Satterfield determined that the gun was functioning properly, that five pounds of pressure on the trigger was needed to fire the gun and that the trigger had to be pulled before the gun would fire. Satterfield discussed his findings with the defendant's counsel, who decided not to call Satterfield as a witness or otherwise use his findings. The State called Satterfield as a witness at trial, and he testified concerning his examination of the gun and the opinion he had reached as a result of his examination.

Prior to Satterfield being called as a witness, the defendant objected on the ground that allowing his own expert to testify for the State would violate his due process rights under the fourteenth amendment. The trial court overruled that objection.

On appeal, the defendant now contends for the first time that allowing his expert to be called and to testify as a witness for

the State violated his sixth amendment right to effective assistance of counsel. Having failed to challenge the admission of the evidence in question on this ground during the trial, the defendant will not be allowed to do so for the first time on his appeal to this Court. *State v. Moore*, 316 N.C. 328, 341 S.E.2d 733 (1986); *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335 (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); *State v. Hunter*, 305 N.C. 106, 286 S.E.2d 535 (1982); App. R. 10(b)(1). We specifically reject the defendant's assignment of error for that reason.

Even if we were to reach and decide the issue the defendant seeks to present by this assignment, however, he would not be entitled to relief. Assuming *arguendo* that the trial court committed constitutional error in this capital case by allowing the defendant's firearms expert to be called and to testify as a witness for the State, the error was harmless beyond a reasonable doubt. In this case, the State's firearms expert, Robert Murphy, testified that the gun that killed the victim would not fire unless the trigger was pulled and that it took four and one-quarter pounds of pressure to pull the trigger. Later, after being called by the State, the defendant's firearms expert, Frank Satterfield, testified that the gun would not fire unless the trigger was pulled and that it took five pounds of pressure to pull the trigger. Any variance between the testimony given at trial by the two experts clearly was *de minimis*. Since the testimony of the defendant's expert tended primarily to be repetitive of the otherwise uncontradicted testimony by the State's expert—that the gun would not fire unless the trigger was pulled and that it took four and one-quarter pounds of pressure to pull the trigger—the defendant was not prejudiced by the testimony of his firearms expert.

**[2]** The defendant next assigns as error the trial court's denial of his motion to dismiss the first-degree murder charge. Specifically, the defendant argues here that the trial court erred by submitting the charge of first-degree murder to the jury on the theory of premeditation and deliberation. In support of this assignment, the defendant contends that the evidence introduced at trial would not support any reasonable finding other than that the victim was accidentally killed. Therefore, he argues that no substantial evidence was introduced tending to show that he killed Jon Matthew Mason intentionally after premeditation and deliberation. We disagree.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense charged and that the defendant is the perpetrator. *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." *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).

*State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). Further, 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.* at 237, 400 S.E.2d at 61. If there is substantial evidence of each element of the offense charged or lesser included offenses, the trial court must deny a defendant's motion to dismiss as to those charges supported by substantial evidence and submit them to the jury for its consideration; the weight and credibility of such evidence is a question reserved for the jury. *Id.* at 236-37, 400 S.E.2d at 61.

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 (1986); *see Vause*, 328 N.C. at 238, 400 S.E.2d at 62. Premeditation and deliberation generally must be established by circumstantial evidence because they ordinarily are not susceptible to proof by direct evidence. *Id.* "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.* 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 evidence in the present case tended to show that Jon Matthew Mason was shot while lying face down on the floor, his legs wrapped with an electric cord. He died of a gunshot wound to the middle of his back which went directly to and through his

heart. The bullet entry wound was a contact wound, meaning that the gun was pressed against the victim's back when fired. The weapon which the defendant admitted using and which killed the victim would not fire unless the trigger was pulled.

Furthermore, in his videotaped confession, the defendant admitted that (1) he knew the gun had to be cocked to be fired and that there was no other safety on the gun, (2) he rendered Jon Matthew Mason helpless by making him lie face down on the floor and tying his legs with a cord, (3) he made the plan to rob the store when he saw Mason there alone, (4) he took the loaded gun with him and planned to use it in the robbery, (5) he told Mason not to move and Mason did not move, and (6) he intentionally pressed the gun firmly against Mason's back. There was also testimony by the defendant's roommate that the defendant told him he had fired the gun and "watched the blood spurt out."

Taken in the light most favorable to the State, there was substantial evidence that the defendant killed Jon Matthew Mason with malice, premeditation and deliberation. The trial court did not err in submitting the charge of first-degree murder to the jury on that theory. This assignment of error is without merit.

**[3]** The defendant next contends that the trial court erred by stating during its instructions to the jury that there was evidence tending to show that the defendant confessed that he had committed the crime charged. At trial, pursuant to the defendant's specific request during the charge conference, the trial court read North Carolina Criminal Pattern Jury Instruction 104.70 verbatim as follows:

> There is evidence which tends to show that the defendant confessed that he committed the crime charged in this case. If you find that the defendant made that confession, then you should consider all of the circumstances under which it was made in determining whether it was a truthful confession and the weight you will give to it.

The defendant made no request for modification of the pattern jury instruction; in fact, he specifically requested the exact language of the charge that was given. A criminal defendant will not be heard to complain of a jury instruction given in response to his own request. *State v. Cook*, 263 N.C. 730, 140 S.E.2d 305 (1965); *State v. Plowden*, 65 N.C. App. 408, 308 S.E.2d 918 (1983). Since

he asked for the exact instruction that he now contends was prejudicial, any error was invited error. Therefore, this assignment is without merit and is overruled.

By his next assignment of error, the defendant contends that the trial court erred in admitting testimony from the victim's father. Prior to trial, the defendant made a motion *in limine* to prohibit the testimony of Carl Mason, the victim's father. At a pretrial hearing, the trial court denied the motion. The defendant contends that the testimony was irrelevant and had no purpose other than to incite sympathy for the victim and his family. We disagree.

Carl Mason testified that on 27 April 1988 at approximately 7:00 p.m., he went with his wife to the store where their son worked and took him his dinner. Carl Mason gave his son's age, height and weight and described the lighting conditions of the store. His testimony tended to show, first, that the victim was alive when the defendant shot him. *See State v. Beale*, 324 N.C. 87, 90, 376 S.E.2d 1, 2 (1989). His testimony was also relevant to show who the victim was, where he was during the commission of the crime and why he was there. The trial court did not err in denying the defendant's motion to exclude this testimony. This assignment of error is without merit.

We conclude that the guilt-innocence determination phase of the defendant's trial was free of prejudicial error. Accordingly, we turn to the defendant's assignments of error relating to his capital sentencing proceeding.

**[4]** By his next assignment of error, the defendant contends the trial court erred in instructing the jury that when determining whether to recommend life imprisonment or death, it was not to consider a circumstance in mitigation unless it unanimously found that it existed. The State concedes that this instruction was erroneous and that, on the particular facts of this case, the defendant is entitled to a new capital sentencing proceeding. We agree.

Because the trial court required that the jury unanimously find any mitigating circumstance before that circumstance could be considered in its ultimate sentencing recommendation, the trial court's instruction violated the principles of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). The *McKoy* error here is not harmless because the defendant presented substantial evi-

dence to support at least some of the twenty-three mitigating circumstances submitted to, but not found by, the jury.

Among the submitted circumstances were (1) the defendant had served in the New York State National Guard and had been discharged honorably, (2) the defendant offered no resistance upon his arrest in New Jersey, (3) the defendant made a voluntary confession to law enforcement officers, and (4) the defendant voluntarily waived extradition and returned to North Carolina. One or more of the jurors may have believed that one or more of those circumstances existed. Yet, the trial court's instructions prohibited any juror from finding and considering any such circumstances because they were not unanimously found by the jury. Had each juror been allowed to consider the circumstances that he or she believed to exist and to be mitigating—but that other jurors did not find—we cannot say beyond a reasonable doubt that there would not have been a different jury recommendation as to the sentence to be imposed. N.C.G.S. § 15A-1443 (1988); *see State v. McKoy*, 327 N.C. 31, 45, 394 S.E.2d 426, 434 (1990). Therefore, we are required to vacate the sentence of death and remand this case to the Superior Court, New Hanover County, for a new capital sentencing proceeding. Our holding in this regard makes it unnecessary for us to consider the other assignments of error concerning the defendant's capital sentencing proceeding.

For the foregoing reasons, we hold that the guilt-innocence determination phase of the defendant's trial was free from prejudicial error. However, the sentence of death is vacated and this case remanded to the Superior Court, New Hanover County, for a new capital sentencing proceeding.

Guilt phase: No error.

Death sentence vacated and case remanded for new capital sentencing proceeding.

RARITAN RIVER STEEL CO. v. CHERRY, BEKAERT & HOLLAND, A GENERAL PARTNERSHIP; GARY J. WOLFE; S. DONALD BLANTON; HERMAN O. COLEMAN; C. CLINE COMER; W. DOUGLAS SERRISS; JOE R. NANTZ; CLARENCE EUGENE WILLIAMS, SR.; PRESTON CLARK; HOWARD J. KIES; HARRACE M. ROLNICK; PETER A. CAPRISE; JERRY P. FOX; ERIC C. PRESSLEY; R. TURNER RIVENBARK; WAYNE COMSTOCK; TONY W. WARFFORD; WIT BROWN; LOUIS EDDIE DUTTON; WILLIAM LANIER, JR.; DAVID WHALEY; T. ERNEST SIEVELKORN; JAMES LANEY; HAROLD B. HENDERSON; ALBRY SHAW; J. ARLEY ROWE, JR.; WILLIAM BLANKENSHIP; ROBERT HOLMAN; DON HOLLAND; ANTHONY G. CAMPAS; JOHN COMPTON; DONALD LEONARD; MICHAEL NEWHOUSE; CHARLES WEATHERSBY; WALLACE PERMENTER; CLYDE FUSSELL; WAYNE BUSEY; JERRY LLOYD; DAVID BOLTON; JOHN CORDELL; RALPH DAVIS; HARRY STOLTE, JR.; CHARLES BROWN; WAYNE GRIER; HARRY GRIGGS, JR.; RALPH HAROLD; FRANCES KOGER; KENNETH LITTON, JR.; CHARLES YOUNG; BOBBY BLACK; WILLIAM FLURRY; JACK MOODY; RUDOLF OHME, JR.; E.A. THOMAS, JR.; RAYMOND WARCO; E.C. BLACKBURN; ANTHONY MORRIS; W.H. PETERSON; J. DOMINQUEZ; ROBERT HARTER; LLOYD BRAMMER; HENRY COLBRETH; PATRICK CALLEN; W.H. HUFF; JEFFRY McCLANATHAN; RICHARD ROBERTS; WILBURN ROBERTSON; GEORGE TORNWALL; AND ROBERT WHITE, PARTNERS

No. 15A91

(Filed 14 August 1991)

**Accountants § 20 (NCI4th)— audited financial statement—liability to third party—summary judgment for defendants**

The trial court correctly granted summary judgment for defendant acccountants in an action by a third-party creditor which relied upon a report of a 1981 financial statement prepared by defendants in extending credit to a company which subsequently entered bankruptcy. Both IMC, the company audited, and the accounting firm testified that there was no intent to benefit unsecured trade creditors; plaintiff was not aware that the audit was being performed; the partner in charge of the audit testified that IMC had not informed the accounting firm of any intention to provide copies of the audited financial statement to trade creditors; the accounting firm did not have knowledge that the audited financial statements would be provided to Dun & Bradstreet; testimony of IMC's chief financial officer indicated that it was IMC's policy at that time not to distribute financial statements to trade creditors; only one trade creditor received a copy of the 1981 financial statements; the contract between IMC and the accounting firm never

designated plaintiff as an intended beneficiary of the contract; the accounting firm's services were rendered directly to IMC and not to plaintiff; and plaintiff never saw a copy of the 1981 financial statement. Based upon the entire record, the plaintiff was not an intended third-party beneficiary of the contract between the audited company and the accounting firm.

**Am Jur 2d, Accountants § 19.**

**Liability of public accountant to third parties. 46 ALR3d 979.**

APPEAL as of right 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. 1, 398 S.E.2d 889 (1990), reversing the judgment of *Sanders, J.*, issued 8 November 1989, *nunc pro tunc* to 27 October 1989, in Superior Court, MECKLENBURG County. Heard in the Supreme Court 9 April 1991.

*Grier and Grier, P.A., by Joseph W. Grier, III, and J. Cameron Furr, Jr., for plaintiff-appellee.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James G. Billings, Mark A. Ash, and Michael D. Hill, for defendant-appellants.*

MEYER, Justice.

The issue we are presented with in this case is whether a trade creditor to a closely held corporation is a third-party beneficiary to the corporation's contract with an accounting firm for the performance of an audit. The accounting firm agreed to perform an audit "in conformity with generally accepted auditing standards," and furnished the audit to the corporation. The trade creditor did not see the audit but reviewed a summary of it published in a Dun & Bradstreet report, which apparently overstated the corporation's actual financial position. Allegedly on the basis of the Dun & Bradstreet summary of the audit, the trade creditor extended additional open credit to the corporation, which later filed for bankruptcy. Much of the trade credit was subsequently discharged in the bankruptcy proceeding. The trade creditor sued the defendant auditing firm for damages alleging, *inter alia*, that it was a third-party beneficiary of the auditing contract. The trial court granted

summary judgment for the defendants. The Court of Appeals reversed the entry of summary judgment for the defendants. We now reverse the decision of the Court of Appeals and remand the case for reinstatement of the trial court's order of summary judgment for the defendants.

Cherry, Bekaert & Holland and its partners (hereinafter the "accounting firm"), defendants herein, signed an engagement letter dated 22 June 1981 with Intercontinental Metals Corporation (hereinafter "IMC"). IMC is a holding company which, on 30 September 1981, had five shareholders, some of whom were officers of the company. The engagement letter provided:

> We will examine the consolidated balance sheets of Intercontinental Metals Corporation and Intercontinental Metals Trading Corporation at September 30, 1981 and the related consolidated statements of earnings, retained earnings, and changes in financial position for the year then ended, for the purpose of expressing an unqualified opinion on the fairness of the presentation of these financial statements in conformity with generally accepted accounting principles applied on a consistent basis. If we discover that we cannot issue an unqualified opinion, we will discuss the reasons with you before submitting a different kind of report. . . .
>
> As you know, management has the primary responsibility for properly recording transactions in the records, for safeguarding assets and for preparing accurate financial statements. Our basic audit function is to add reliability to those financial statements.
>
> Our examination will be conducted in accordance with generally accepted auditing standards.

Raritan River Steel Company, the plaintiff herein, sold raw steel and was a major trade creditor of IMC. In January 1982, IMC had a $1.5 million line of credit with plaintiff, which had obtained copies of IMC's audited financial statements for the years 1978 and 1979 prepared by the accounting firm but did not have access to the audited statements for 1981, the year in question.

In January 1982, the accounting firm issued a qualified opinion concerning IMC's financial statements for the period ending 30 September 1981 (the 1981 financial statements), which indicated uncertainty as to the outcome of a $20 million dispute with a foreign

supplier. Although the plaintiff asked IMC twice for a copy of IMC's 1981 financial statements, once in February and again in April or May of 1982, its latter request was expressly denied. However, in February 1982, IMC, as was its previous policy, allowed Dun & Bradstreet to review its audited financial statements in IMC's offices. The ensuing summary reports published by Dun & Bradstreet in April and May of 1982 provided in pertinent part as follows:

| | Fiscal Consolidated Sep 30 1979 | Fiscal Consolidated Sep 30 1980 | Fiscal Consolidated Sep 30 1981 |
|---|---|---|---|
| | . . . . | | |
| Worth | 3,129,325 | 4,693,000 | 6,359,369 |
| | . . . . | | |

> Submitted FEB 25 1982 by Wilburn V Robinson, V Pres & Treas. Prepared from statement(s) by Accountant: Cherry, Bekaert & Holland, CPA.
>
> ACCOUNTANTS OPINION: "Accountants indicate that the figures of Sep 30 1981 present fairly the financial position of the company in conformity with accepted accounting principles subject to the following qualifications or exceptions: the ultimate outcome of a dispute with a foreign supplier is not presently determinable."

The Dun & Bradstreet report, which also contained other summarized financial information, was the only access that plaintiff had to IMC's 1981 financial statements. After reviewing the Dun & Bradstreet report, and allegedly in reliance on IMC's financial condition as reported therein, the plaintiff extended additional open credit to IMC in excess of its previously established limit of $1.5 million.

In December 1982, IMC filed for bankruptcy protection. At that time, plaintiff was owed $2.2 million by IMC. From the bankruptcy proceedings, the plaintiff received only $511,143.60 and argues that the financial statements, if properly prepared, should have indicated a substantial negative net worth for IMC on 30 September 1981.

The procedural history of this case is as follows. The plaintiff filed suit in Superior Court, Mecklenburg County, on 13 February

1985, alleging two theories of recovery. First, it contends that the accounting firm "failed to use the ordinary, usual and reasonable standard of care and competence exercised by members of the accounting profession . . . and were grossly negligent and careless in failing to protect the interests of IMC and of its creditors, in violation of a duty owed to IMC, plaintiff and other creditors." By its second theory, the plaintiff contends that it is a third-party beneficiary to the contract between the accounting firm and IMC and is entitled to recover for damages that were sustained as a result of the breach of that contract. On 9 May 1985, the trial court granted the defendants' motion to dismiss both claims for failure to state a claim upon which relief can be granted. The Court of Appeals reversed the trial court. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 79 N.C. App. 81, 339 S.E.2d 62 (1986) ("*Raritan I*"). On appeal, this Court reversed the Court of Appeals, effectively holding that the plaintiff had not stated a claim for relief on its negligence theory, but declined to review the plaintiff's claim on its contract theory. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988). On remand, the trial court granted summary judgment for the defendants on the plaintiff's contract claim on 8 November 1989, *nunc pro tunc* to 27 October 1989. The Court of Appeals again reversed, with Judge Duncan dissenting. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 101 N.C. App. 1, 398 S.E.2d 889 (1990) ("*Raritan II*"). The defendants appeal to this Court as of right from the dissenting opinion.

In this case, we are reviewing the trial court's grant of a motion for summary judgment in favor of the defendants. Summary judgment is only proper where there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (1990). On appellate review of the order for summary judgment, we take the evidence in the light most favorable to the nonmoving party. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986). After reviewing the forecast of evidence in the record, and for the reasons that follow, we agree with the trial court that there is no genuine issue of material fact present in this case and hold that the plaintiff was not an intended third-party beneficiary of the contract between the accounting firm and IMC.

This Court has said the following about the rights of a third party to recover under a contract:

> North Carolina recognizes the right of a third-party benficiary [sic] to sue for breach of a contract executed for his benefit. *Vogel v. Supply Co.*, 277 N.C. 119, 177 S.E. 2d 273 (1970); *American Trust Co. v. Catawba Sales & Processing Co.*, 242 N.C. 370, 88 S.E. 2d 233 (1955); *Boone v. Boone*, 217 N.C. 722, 9 S.E. 2d 383 (1940). Ordinarily " 'the determining factor as to the rights of a third-party beneficiary is the intention of the parties who actually made the contract. The real test is said to be whether the contracting parties intended that a third party should receive a benefit which might be enforced in the courts.' 17 Am. Jur. 2d, *Contracts* § 304. It is not sufficient that the contract does benefit him if in fact it was not intended for his direct benefit." *Vogel v. Supply Co.*, *supra*, 277 N.C. at 128, 177 S.E. 2d at 279.

*Snyder v. Freeman*, 300 N.C. 204, 220, 266 S.E.2d 593, 603-04 (1980).

This Court has adopted the analysis of the Restatement (Second) of Contracts for purposes of determining "whether a beneficiary of an agreement made by others has a right of action on that agreement." *Snyder*, 300 N.C. at 221, 266 S.E.2d at 604 (using identical 1973 version of Restatement); *see also Vogel v. Supply Co. and Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E.2d 273 (1970).

The Restatement (Second) of Contracts provides as follows:

> § 302. Intended and Incidental Beneficiaries
>
> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts § 302 (1981).

The Restatement (Second) recognizes only two types of beneficiaries—intended and incidental—but a review of the comment to the Restatement indicates that the drafters intended to retain the distinction between creditor and donee beneficiaries. "The type of beneficiary covered by Subsection (1)(a) is often referred to as a 'creditor beneficiary,' " while the type of beneficiary covered by subsection (1)(b) "is often referred to as a 'donee beneficiary.' " *Id.* comments b, c. The drafters note that a donee beneficiary need not be the object of a "gift" but might also be the intended beneficiary of a "right." *Id.* reporter's note. If no intent to benefit is found, then the beneficiary is considered an incidental beneficiary, and no recovery is available.

Having established that intent to benefit is the determining factor, we must consider the nature of the evidence which is admissible to prove intent. The Court, in determining the parties' intentions, should consider circumstances surrounding the transaction as well as the actual language of the contract. *Id.; see also Bolton Corp. v. State of North Carolina*, 95 N.C. App. 596, 383 S.E.2d 671 (1989), *disc. rev. denied*, 326 N.C. 47, 389 S.E.2d 85 (1990). We further note that " '[w]hen a third party seeks enforcement of a contract made between other parties, the contract must be construed strictly against the party seeking enforcement.' " *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 34, 351 S.E.2d 786, 791 (1987) (quoting *Lane v. Surety Co.*, 48 N.C. App. 634, 638, 269 S.E.2d 711, 714 (1980), *disc. rev. denied*, 302 N.C. 219, 276 S.E.2d 916 (1981)).

In a leading North Carolina case involving a third-party beneficiary claim, this Court held that the plaintiff had adequately stated a claim that an agreement by certain officers, directors, and shareholders (promisors) to invest capital in a corporation (promisee) was for the intended benefit of the plaintiff creditor. The closely held corporation owed the plaintiff, a former employee of the corporation, for a loan she had made to it as well as for back pay plus interest. *Snyder v. Freeman*, 300 N.C. 204, 266 S.E.2d 593. In *Snyder*, we allowed the plaintiff, creditor of the corporation, to prove that the shareholders, officers, and directors of the corporation made an implied promise to the corporation that if the corporation would issue a certain number of shares of stock, the promisors would provide an infusion of capital for the plaintiff's benefit. The Court stated:

> The agreement is tantamount to a promise by the signatories, *to cause the corporation* to issue the stock, to receive the capital, and to pay plaintiff, among other creditors, out of the proceeds. The corporation was both plaintiff's debtor and, by implication, promisee of the agreements designed to retire the debt. The signatories caused the corporation to issue its stock and accept the capital; but they failed to cause it to pay plaintiff.

*Id.* at 222, 266 S.E.2d at 604. The Court cited the Restatement (Second) of Contracts and held that "plaintiff's allegations are sufficient to permit her to prove that she is a creditor beneficiary." *Snyder*, 300 N.C. at 221, 266 S.E.2d at 604.

Here, the plaintiff contends that it is a subsection 302(1)(b) beneficiary or donee beneficiary. The Restatement indicates that to identify a third-party donee beneficiary, we must consider the "intention of the parties and . . . [whether] the promisee intends to give the beneficiary the benefit of the promised performance." Restatement (Second) of Contracts § 302 (1981).

On the facts of this case, we note that both IMC and the accounting firm testified that there was no intent to benefit unsecured trade creditors by the contract with the accounting firm. The plaintiff was not even aware that the audit was being performed. The accounting firm's partner in charge of the IMC audit testified that at the time of the contract of 22 June 1981 and thereafter, IMC had neither informed the accounting firm of any intention to provide copies of the audited financial statement to trade creditors nor did the accounting firm have knowledge that the audited financial statements would be provided to Dun & Bradstreet. Testimony of IMC's chief financial officer indicates that it was IMC's policy in 1981 and 1982 not to distribute financial statements to trade creditors. In fact, the record indicates that only one trade creditor received a copy of IMC's 1981 financial statements.

In further considering whether the parties intended to benefit the plaintiff, we note first of all that the contract between IMC and the accounting firm never designated the plaintiff as an intended beneficiary of that contract. While we are aware that this factor alone is not dispositive, it adds weight to our analysis. Restatement (Second) of Contracts § 308 (1981). In addition, as the 150 to 200 copies of the financial statements were delivered to IMC, the accounting firm's services were rendered directly to IMC in

this case and not to the plaintiff. The plaintiff never even saw a copy of the 1981 financial statement. In sum, the evidence here was insufficient to show that "recognition of a right to performance in the beneficiary [was] appropriate to effectuate the intention of the parties." Restatement (Second) of Contracts § 302(1) (1981). We hold as a matter of law that based on an examination of the entire record in this case, the plaintiff, Raritan River Steel Company, was not an intended third-party beneficiary of the contract between IMC and the accounting firm.

Having determined that there was no intent to benefit the plaintiff, we need not reach the defendants' contention that, assuming an intention to benefit is recognized, the alleged breach of contract was not the cause of plaintiff Raritan's damages.

In summary, we reverse the Court of Appeals' decision that the plaintiff stated a claim for breach of a contract to which it was a third-party beneficiary. This case is remanded to the Court of Appeals for further remand to the Superior Court, Mecklenburg County, for reinstatement of the order for summary judgment for defendants.

Reversed and remanded.

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STATE OF NORTH CAROLINA v. DOUGLAS WAYNE MORGAN

No. 425PA89

(Filed 14 August 1991)

**1. Conspiracy § 13 (NCI4th)— criminal conspiracy defined**

A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner.

**Am Jur 2d, Conspiracy § 2.**

**2. Conspiracy § 16 (NCI4th)— criminal conspiracy—implied agreement**

In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual,

implied understanding will suffice. Nor is it necessary that the unlawful act be completed.

**Am Jur 2d, Conspiracy §§ 10, 15.**

3. **Conspiracy § 5.1 (NCI3d)— admissibility of acts of co-conspirator**

Once a conspiracy has been shown to exist, the acts of a co-conspirator done in furtherance of a common, illegal design are admissible in evidence against all.

**Am Jur 2d, Conspiracy § 46.**

4. **Narcotics § 3 (NCI3d)— intent to sell or deliver—inference from quantity and packaging**

A jury can reasonably infer from the amount of the controlled substance found within a defendant's constructive or actual possession and from the manner of its packaging an intent to transfer, sell, or deliver that substance.

**Am Jur 2d, Drugs, Narcotics, and Poisons § 45.**

5. **Narcotics § 3 (NCI3d)— intent to sell or deliver—inference from quantity alone**

The mere quantity of a controlled substance alone may suffice to support the inference of an intent to transfer, sell or deliver.

**Am Jur 2d, Drugs, Narcotics, and Poisons § 45.**

6. **Narcotics § 4 (NCI3d)— conspiracy to possess within intent to sell or deliver—inference of intent from quantity—sufficiency of evidence**

Evidence that a witness expressly agreed to obtain one ounce, or 28.3 grams, of cocaine for defendant and that it was the intention of both that defendant possess that amount was sufficient to support defendant's conviction of conspiracy to possess cocaine with intent to sell or deliver. The ounce of cocaine that defendant conspired to possess was a substantial amount and more than an individual would possess for his personal use, and this quantity alone was thus sufficient to support the inference that defendant intended to deliver or sell the cocaine to be obtained for him by the witness.

**Am Jur 2d, Drugs, Narcotics, and Poisons §§ 45, 47.**

**7. Criminal Law § 34.7 (NCI3d)— evidence of other cocaine transactions—admissibility to show intent and motive**

Evidence of defendant's earlier cocaine transactions with a co-conspirator was admissible to show his intent and motive in a prosecution for conspiracy to possess cocaine with intent to sell or deliver. Furthermore, the trial court did not err in finding that the probative value of this evidence outweighed its prejudicial effect. N.C.G.S. § 8C-1, Rules 403, 404(b).

**Am Jur 2d, Evidence §§ 321, 324, 325.**

ON the State's petition for discretionary review, pursuant to N.C.G.S. § 7A-31, of a unanimous decision of the Court of Appeals, 95 N.C. App. 639, 383 S.E.2d 452 (1989), reversing judgment entered by *Gardner, J.*, at the 22 August 1988 Criminal Session of Superior Court, JACKSON County. Heard in the Supreme Court 12 April 1990.

*Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State, appellant.*

*Smith, Bonfoey & Queen, by Frank G. Queen, for defendant-appellee.*

EXUM, Chief Justice.

Defendant was found guilty upon an indictment for Conspiracy to Possess Cocaine with Intent to Sell or Deliver, N.C.G.S. § 90-98 (1990). A unanimous panel of the Court of Appeals reversed, holding that there was no evidence in the record of defendant's intent to deliver or sell. We reverse, holding that such intent may be inferred from evidence of the quantity of the controlled substance involved in this case. Addressing another issue preserved by defendant's appeal but not addressed by the Court of Appeals, we conclude there was no error in the admission at trial of evidence of defendant's prior crimes.

The Court of Appeals noted that defendant had failed to move for dismissal at the close of the evidence. Although N.C. R. App. P. 10(b)(3) states that such failure prohibits a defendant from challenging the sufficiency of the evidence on appeal, the Court of Appeals chose to suspend that rule in the interests of justice pursuant to N.C. R. App. P. 2 and to review the sufficiency of the evidence.

Evidence presented by the State included the testimony of Kirby Queen, an employee of Gold City Amusement Park, which

was owned by defendant's father and managed by defendant during the summer of 1987. Queen testified that he had sold cocaine to defendant on four occasions between the months of May and July of that year. On each of the first three occasions defendant had purchased an "eight-ball," weighing one-eighth of an ounce or three and one-half grams. On the fourth occasion defendant purchased two "eight-balls." Queen said that a single "eight-ball" usually costs between $250 and $300; two "eight-balls" cost between $400 and $450. On each of these four occasions, Queen testified, defendant had paid him before he bought and delivered the cocaine to defendant.

Queen testified that in October 1987 defendant told him he was going on a trip to Florida and wanted to take some cocaine with him. Queen told defendant that he could get "pretty much for a low price," and the two decided upon an ounce, which Queen said he could probably get for $900. The next week Queen received a telephone call around 4 p.m. from defendant, who asked "Could you do that for me?" Queen responded that he could and arranged to come by defendant's house later that evening. Later at defendant's house, Queen went into a back bedroom with defendant, where defendant counted out forty-five twenty-dollar bills. Queen stated that defendant told him to "Do him some good, get the stuff, get the cocaine for him." Queen told defendant that he would be back with the cocaine that evening.

Queen went outside, showed the money to his waiting companions Brian Hughes and Scott Taylor, and said, "Let's go get us an ounce." The three drove to Cullowhee where they obtained three-quarters of an ounce of cocaine with the $900. Queen testified that before they headed back to deliver the cocaine to defendant they each "did a line," which meant snorting about a quarter of a gram altogether. Queen said he intended to supplement the cocaine with manitol to bring the weight up to the full ounce he had promised to defendant.

The three then headed towards Taylor's house, because Taylor expressed discomfort about being around so much cocaine. On the way, however, they were apprehended by officers, who seized the cocaine and arrested all three.

Taylor also testified, generally corroborating Queen; but Taylor said that he had heard no conversation between Queen and defendant or between Queen and Hughes because he had been in the back seat of the car listening to loud music.

Defendant testified he had never bought cocaine from Queen. He said Queen stopped by his house on 6 October 1987 to pick up a $90 advance on his pay, which defendant had noted on Queen's time card for that date.

The Court of Appeals construed this evidence as indicating that the "possession . . . with intent to sell or deliver," to which defendant and Queen had conspired, was delivery to defendant himself. Such an offense would have been "theoretically impossible" because " 'intent to deliver' means intent to deliver to 'another,' not to receive delivery." 95 N.C. App. at 641, 383 S.E.2d at 453 (citing *State v. Creason*, 313 N.C. 122, 131, 326 S.E.2d 24, 29 (1985)).

In this construction of the offense and in concluding that "[t]here is no theory of prosecution according to which this defendant can be convicted for the crime with which he is charged," *id.* at 641, 383 S.E.2d at 454, the Court of Appeals erred. Taking the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference to be drawn therefrom, substantial evidence as to each element of the offense charged is apparent from the record and transcript of defendant's trial. *See State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

**[1-3]** A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984). In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice. *Id.* Nor is it necessary that the unlawful act be completed. "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *State v. Bindyke*, 288 N.C. 608, 616, 220 S.E.2d 521, 526 (1975). Once a conspiracy has been shown to exist, the acts of a co-conspirator done in furtherance of a common, illegal design are admissible in evidence against all. *Id.*

Queen expressly agreed to obtain one ounce of cocaine for defendant, and it was the intention of both that defendant possess that amount. Although Queen succeeded in obtaining somewhat less than three-quarters of an ounce, this was a quantity that, considering the evidence of defendant's prior purchases and usage by Queen and his accomplices, a jury could conclude was considerably more than what might have been intended for personal use.

**[4]** A jury can reasonably infer from the amount of the controlled substance found within a defendant's constructive or actual possession and from the manner of its packaging an intent to transfer, sell, or deliver that substance. *See, e.g., State v. Williams*, 307 N.C. 452, 298 S.E.2d 372 (1983) (presence of material normally used for packaging); *State v. Baxter*, 285 N.C. 735, 208 S.E.2d 696 (1974) (amount of marijuana found, its packaging, and presence of packaging materials); *State v. Rich*, 87 N.C. App. 380, 361 S.E.2d 321 (1987) (twenty grams cocaine plus packaging paraphernalia); *State v. Casey*, 59 N.C. App. 99, 296 S.E.2d 473 (1982) (possession of over 25,000 individually wrapped dosage units of LSD); *State v. Mitchell*, 27 N.C. App. 313, 219 S.E.2d 295 (1975) (possession of considerable inventory of marijuana plus other seized, "suspicious" items), *cert. denied*, 289 N.C. 301, 222 S.E.2d 701 (1976). *See also State v. James*, 81 N.C. App. 91, 344 S.E.2d 77 (1986) (cocaine of small quantity packaged in multiple envelopes); *State v. Williams*, 71 N.C. App. 136, 321 S.E.2d 561 (1984) (less than one ounce marijuana packaged in seventeen small bags); *State v. Francum*, 39 N.C. App. 429, 250 S.E.2d 705 (1979) (quantity of LSD unspecified, but found in plastic bags inside larger plastic bags).

**[5]** The mere quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell or deliver. In *State v. Thobourne*, 59 N.C. App. 584, 297 S.E.2d 774 (1982), *disapproved on other grounds, State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983), the court held that three pounds and forty-one pounds of marijuana found in the motel rooms of the defendant and a codefendant, respectively, plus insurance receipts bearing names of both were evidence sufficient to support an inference of possession with intent to sell or deliver marijuana. In *State v. Cloninger*, 37 N.C. App. 22, 245 S.E.2d 192 (1978), the defendant's possession of nearly six pounds of marijuana was held to constitute evidence of his intent to sell, although the possession of .10 ounce of hashish failed to support an analogous inference. *Cf. State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265 (evidence insufficient to support an inference that defendant intended to transfer where only seven ounces of marijuana seized and officers testified as to the absence of any packaging paraphernalia related to rolling or weighing), *cert. denied*, 293 N.C. 592, 241 S.E.2d 513 (1977).

In discussing what quantity of controlled substance might suffice alone to support the inference that a defendant intended to transfer it to others, this Court has construed N.C.G.S. § 90-98

*in pari materia* with other provisions of the Controlled Substances Act, N.C.G.S. §§ 90-86 through 90-113.8 (1990), particularly those provisions governing trafficking under N.C.G.S. § 90-95 (1990). In *Williams* we noted that the amount of contraband seized "was over two-thirds the amount required to support a conviction of the crime of 'trafficking in . . . heroin,'" a fact satisfying the Court that the amount seized was "a substantial amount and was more than an individual would possess for his personal consumption." *Williams*, 307 N.C. at 457, 298 S.E.2d at 376.

**[6]** The evidence, taken in the light most favorable to the State, tended to show that defendant had requested Queen to provide him with one ounce of cocaine, or 28.3 grams. It was Queen's intention to supplement with manitol the three-quarters of an ounce of cocaine he had been able to obtain in order to make the full ounce. The General Assembly has determined that twenty-eight grams of cocaine evinces an intent to distribute that drug on a large scale. N.C.G.S. § 90-95(h)(3) (1990). *See also State v. Proctor*, 58 N.C. App. 631, 635, 294 S.E.2d 240, 243, *cert. denied*, 306 N.C. 749, 295 S.E.2d 484 (1982), *cert. denied*, 459 U.S. 1172, 74 L. Ed. 2d 1016 (1983). As in *Williams*, we are satisfied that the full ounce defendant had conspired with Mr. Queen to possess "was a substantial amount and was more than an individual would possess for his personal consumption." *Williams*, 307 N.C. at 457, 298 S.E.2d at 376. This quantity alone, therefore, was sufficient evidence to support the inference that defendant intended to deliver or sell the cocaine to be obtained for him by Queen.

Having reversed the judgment of the trial court on the issue of the sufficiency of the evidence, the Court of Appeals found it unnecessary to address the second of defendant's issues on appeal—whether the trial court erred in admitting evidence that Queen obtained cocaine for defendant on other occasions. We address that issue here:

**[7]** During Queen's testimony that he had sold cocaine to defendant on at least four occasions during the summer of 1987, defendant objected on grounds of N.C.G.S. § 8C-1, Rule 404(b) (1988), whereby evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person or to show he acted in conformity therewith. Defendant contends that the trial court erred in finding that such evidence was being offered for such purposes as proof of defendant's motive and intent, *id.*, and in determining under N.C.G.S.

§ 8C-1, Rule 403, that the probative value of this evidence outweighed its potential for prejudice.

This Court has held that "a careful reading of Rule 404(b) clearly shows [that] evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988) (quoting *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986) ). Ultimately, the test for determining the admissibility of evidence of such other offenses is "whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *Id. See also State v. Cotton*, 318 N.C. 663, 665, 351 S.E.2d 277, 279 (1987).

The similarity and proximity of defendant's cocaine purchases from Queen earlier in the summer of 1987 to the conspiracy in October to commit the same offense on a larger scale cannot be seriously questioned: the trial court consequently did not err in concluding this evidence was admissible.

Balancing the probative value of this evidence against its potential for prejudice was within the discretion of the trial court. *E.g., State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986). A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985).

We hold that the trial court correctly concluded that evidence of defendant's earlier cocaine transactions with Queen was admissible to show his intent and motive with regard to the conspiracy with which he was subsequently charged, and that the court's determination that the probative value of this particular evidence outweighed its prejudicial effect was well within its sound discretion.

In summary we reverse the Court of Appeals on the issue of the sufficiency of the evidence and conclude there is no error in the trial leading to defendant's conviction and sentence. The verdict and judgment of the trial court is hereby reinstated.

Reversed. No error.

STATE OF NORTH CAROLINA v. OSCAR LLOYD

No. 577A85

(Filed 14 August 1991)

**Criminal Law § 1352 (NCI4th)— murder—sentencing—McKoy error—not harmless**

A death sentence in a murder prosecution was vacated where the court erroneously required the jury to find the existence of any mitigating circumstance unanimously and there was evidence supporting a mitigating circumstance submitted but not found. Although the jury was polled, the trial court asked questions only of the foreman and the jury as a whole, questions were addressed to individual jurors only as to the final sentencing decision, and the questions did not inquire and the answers did not reveal whether the jury's rejection of the mitigating circumstances was unanimous. Even though the State contended that the error was harmless because the jury would have voted to sentence defendant to death anyway due to the atrocity of the crime and the aggravating circumstances, it is not the Supreme Court's function to surmise how jurors might have weighed the aggravating and mitigating evidence.

**Am Jur 2d, Criminal Law § 628.**

**Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.**

ON remand from the Supreme Court of the United States. Heard in the Supreme Court 15 March 1991.

*Lacy H. Thornburg, Attorney General, by William N. Farrell, Jr., Special Deputy Attorney General, for the State.*

*Ann B. Petersen for defendant-appellant.*

EXUM, Chief Justice.

Defendant, after being convicted of the first-degree murder of Burton Cornwell, was sentenced to death.* On defendant's appeal

* Defendant was also convicted of the armed robbery of Cornwell and sentenced to fourteen years' imprisonment for this crime.

this Court found no error in either the guilt determination proceeding or the capital sentencing proceeding. *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (1988) (*Lloyd I*).

On 3 October 1988 the Supreme Court of the United States vacated our judgment and remanded the case to us for further consideration in light of *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988). *Lloyd v. North Carolina*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988). Subsequently, this Court, relying on *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *vacated and remanded sub nom., McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), reinstated its earlier mandate. *State v. Lloyd*, 323 N.C. 622, 374 S.E.2d 277 (1988).

On 19 March 1990 the Supreme Court of the United States granted defendant's second petition for writ of certiorari, vacated our second judgment, and again remanded the case to us for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990) (*McKoy*). *Lloyd v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 601 (1990).

We again heard the case on supplemental briefs ordered by the Court and directed to the questions of whether under *McKoy* there was error in the sentencing proceeding and, if so, whether the error was harmless. We now conclude there was reversible *McKoy* error, entitling defendant to a new capital sentencing proceeding.

The evidence is adequately summarized in *Lloyd I* and will not be repeated here, except as necessary for our consideration of the *McKoy* issue.

In *McKoy* the United States Supreme Court held unconstitutional capital sentencing jury instructions which required the jury to find the existence of a mitigating circumstance unanimously in order for any individual juror to consider that circumstance or evidence supporting it when determining the defendant's sentence. Reasoning from earlier decisions in *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988), the *McKoy* Court concluded that under the Eighth and Fourteenth Amendments, no individual juror can be precluded by such a unanimity requirement from taking into account in the jury's final sentencing decision any circumstance that

the individual juror might conclude mitigates a defendant's capital crime.

As in *McKoy*, the instructions here, the State concedes, require the jury to find unanimously the existence of a mitigating circumstance before individual jurors could consider that circumstance or evidence supporting it in the final sentencing decision. The only issue needing discussion is whether this instructional error is harmless. Because of the constitutional dimensions of the error, the State has the burden of demonstrating that it is harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990). We conclude the State has failed to carry this burden.

The jury found unanimously as aggravating circumstances that the murder was committed while defendant was engaged in or was attempting to engage in a robbery with a dangerous weapon and that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(5) and (9) (1988). Eight mitigating circumstances were submitted to the jury. The jury found four to exist:

> 1. Since the arrest of the defendant for the offenses before you, the defendant has shown no tendencies of violence toward others.
>
> 2. Since the arrest of the defendant he has abided by the rules and regulations of the Cherokee County Jail.
>
> 3. That the defendant has adapted well to life as a prisoner.
>
> 4. That the defendant has suffered from episodic alcohol abuse since 1973.

The jury did not find the following four proposed mitigating circumstances, the first of which is listed in the capital sentencing statute, N.C.G.S. § 15A-2000(f)(1):

> 1. The defendant has no significant history of prior criminal offenses;
>
> 2. That the defendant had been a loving and affectionate son to his mother;
>
> 3. That the defendant had been a loving and affectionate father to his son; [and]
>
> 4. Any other circumstances arising from the evidence which the jury deems to have mitigating value.

After balancing the two aggravating circumstances found against the mitigating circumstances found, the jury concluded that defendant should be sentenced to death.

Upon return of its sentencing verdict in open court, the jury was polled about each answer it entered on the verdict form, including the mitigating circumstances not found. The polling procedure as to each mitigating circumstance was:

> THE COURT: Mr. Foreman, sir, how says the jury as to Issue Number One . . . "The defendant has no significant history of prior criminal offenses."
>
> How says the jury, sir?
>
> THE FOREMAN: No, your Honor.
>
> THE COURT: Members of the jury, your foreman has returned in open court a verdict of "No" as to question number one . . . was "No" your verdict and so say all of you?
>
> (All indicated affirmatively.)

The jury answered similarly the trial court's questions about all four proposed mitigating circumstances not found.

The State contends the jury foreman's responses and the jury panel's affirmations during the polling process demonstrate that the jury unanimously rejected these four mitigating circumstances. Therefore, the State maintains, no juror was prevented during the final sentencing decision from considering evidence which he or she believed to have mitigating value, making the *McKoy* error harmless.

Where a post-verdict poll in a capital sentencing proceeding demonstrates that the jury unanimously rejected unfound mitigating circumstances, a *McKoy* error as to those circumstances is harmless. *State v. Laws*, 328 N.C. 550, 402 S.E.2d 573 (1991). In *Laws* the jury unanimously found the first four mitigating circumstances submitted to exist, but rejected the fifth and last, "catchall" circumstance. Upon return of the sentencing verdict in open court, the jurors were polled. As to the "catchall" circumstance, the court noted the following exchange:

> 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 in *Laws* opinion.]

FOREMAN ROBERTSON: Yes ma'am.

Each individual juror was then polled as follows:

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 . . . be sentenced to death. *Are these your answers and your recommendation as to punishment?* [Emphasis added in *Laws* opinion.]

JUROR GOINGS: Yes, ma'am.

THE CLERK: And do you still assent thereto?

JUROR GOINGS: Yes, ma'am.

*Id.* at 554-55, 402 S.E.2d at 576. Each juror gave the same affirmative responses as juror Goings. Based on these facts, this Court reasoned:

> *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 [a pro-

posed mitigating circumstance], we can conclude with confidence that the unconstitutional unanimity requirement did not preclude any juror from considering mitigating evidence.

*Id.* at 555, 402 S.E.2d at 576-77 (emphasis added).

The polling in the case at bar differs from that in *Laws*. Here, as to the mitigating circumstances, the trial court polled the jury by asking questions only of its foreman and the jury panel as a whole. Only as to the final sentencing decision were questions addressed to individual jurors. More importantly, the polling questions did not inquire and neither the foreman's nor the panel's answers reveal whether the jury's rejection of the mitigating circumstances was unanimous. Under the trial court's jury instructions, which were erroneous under *McKoy*, the jury could have rejected a mitigating circumstance if it either (1) could not unanimously vote "yes," or (2) unanimously voted "no." The poll was not specific enough to distinguish between unanimous and nonunanimous "no" verdicts on the unfound mitigating circumstances. When the trial court asked, "Was 'No' your verdict and so say you all?" on the mitigating circumstances, the panel's affirmative response acknowledged only that the negative verdict was a correct account of the jury's action on the issue, an action which itself was based on the erroneous unanimity instruction.

Because the jury's rejection of the mitigating circumstances was not shown to be unanimous by the post-verdict poll, the poll itself does not render the *McKoy* error harmless.

The State next argues that the *McKoy* error is harmless because even if one or more jurors had been permitted to find and consider the unfound mitigating circumstances, they would still have voted to sentence defendant to death, given the atrocity of the crime and the aggravating circumstances found. Any reasonable juror, the State contends, who balanced the aggravating circumstances found against all the mitigating evidence adduced would have concluded that death was the appropriate punishment. The *McKoy* instructional error, therefore, had no impact on the final sentencing decision and should be considered harmless beyond a reasonable doubt.

This Court, in the *McKoy* error cases, has not inquired as to how individual jurors might have balanced the aggravating and mitigating evidence to resolve the harmlessness issue. On this issue,

our only inquiry has been whether the evidence is such that one or more jurors could reasonably have found a statutory mitigating circumstance to exist. Where we have concluded there is such evidence, unless there is in the record something, such as a *Laws* poll, by which we can determine that the mitigating circumstance was unanimously rejected, we have consistently held *McKoy* error to be not harmless and the defendant entitled to a new capital sentencing proceeding. *See, e.g., State v. Jones*, 327 N.C. 439, 396 S.E.2d 309 (1990); *State v. Sanderson*, 327 N.C. 397, 394 S.E.2d 803 (1990); *State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, --- U.S. ---, 113 L. Ed. 2d 459 (1991); *State v. Sanders*, 327 N.C. 319, 395 S.E.2d 412 (1990); *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990); *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990). We have not thought it our function, in resolving the harmlessness issue, to surmise how one or more jurors might weigh the aggravating and mitigating evidence, which is capsulized in the form of individually submitted "circumstances." This function, we continue to believe, is solely for the trial jurors who hear the evidence and are properly instructed on the law.

We now turn to the evidence supporting those mitigating circumstances submitted but not found. There was evidence supporting the submitted but not found statutory mitigating circumstance that defendant had "no significant history of prior criminal activity." N.C.G.S. § 15A-2000. In our initial consideration of this case, *Lloyd I*, we held, after exhaustive analysis, that the trial court did not err in submitting over defendant's objection that mitigating circumstance to the jury. We concluded that the evidence of defendant's prior criminal activity was such that a jury could reasonably find this circumstance to exist.

Because the evidence here was such that one or more reasonable jurors could find that defendant had no significant history of prior criminal activity, a statutory mitigating circumstance, we conclude, in keeping with our precedents, that the State has not shown beyond a reasonable doubt that the *McKoy* error was harmless. We therefore vacate the sentence of death and remand to Superior Court, Cherokee County, for a new capital sentencing proceeding.

Death sentence vacated; remanded for new capital sentencing proceeding.

MARTHA SUE SNEAD v. ANGELIA MARIE FOXX AND JAMES EDWARD PAYNE

No. 490PA89

(Filed 14 August 1991)

**1. Actions and Proceedings § 18 (NCI4th); Process § 3.2 (NCI3d) — discontinuance of action — issue raised and decided in trial court**

The issue of whether this action was discontinued for failure to comply with the provisions of Rule 4(d) was both presented to and decided by the trial court where defendant's motion to dismiss stated that there had been a discontinuance of the action as to this defendant and that defendant pleads the failure of plaintiff to comply with the provisions of Rule 4, Rules of Civil Procedure; the order of the trial court granting defendant's motion to dismiss specifically concluded that "there has been a discontinuance of this action" and that the action against this defendant is barred by the three-year statute of limitations; and in concluding that there has been a "discontinuance" of the action, the trial court was obviously referring to Rule 4(d), which requires endorsement of the original, unserved summons and alias and pluries summonses, and Rule 4(e), which states the consequence for failure to follow Rule 4(d), since "discontinuance" is a term of art whose only application in the context of service of process is to an action that must cease for failure of the party to comply with Rule 4(d).

**Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 45.**

**2. Actions and Proceedings § 18 (NCI4th); Process § 3.2 (NCI3d) — summons unserved — absence of endorsement or alias and pluries summonses — action discontinued**

Plaintiff's action was discontinued ninety days after the date the original summons was issued where the original summons was returned unserved and plaintiff did not secure an endorsement upon the original summons for an extension of time to complete service of process and did not obtain alias or pluries summonses, but instead attempted service of process by publication. Therefore, plaintiff's action was barred by the three-year statute of limitations where the complaint was filed and the original summons was issued exactly three years after the accident in question.

**Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 45; Process §§ 82, 119.**

**3. Rules of Civil Procedure § 4.1 (NCI3d)— service of process by publication—mailing copies to defendant's last known address**

When service of process is attempted by publication, the better practice is that a plaintiff mail copies of the summons and notice by publication to the defendant's last known address or to any other address where the defendant might reasonably be found or from which the notice might reasonably be forwarded to the defendant.

**Am Jur 2d, Process § 262.**

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 95 N.C. App. 723, 384 S.E.2d 57 (1989), reversing order entered by *Mills, J.*, at the 13 June 1988 Session of Superior Court, GUILFORD County. Heard in the Supreme Court 17 May 1990.

*Rumsey & Oakley, by Donald E. Rumsey, Jr., and Joel N. Oakley, for plaintiff-appellant.*

*Henson, Henson, Bayliss & Sue, by A. Robinson Hassell and Perry C. Henson, for defendant-appellee Foxx.*

EXUM, Chief Justice.

Defendant Foxx's motion to dismiss was granted by the trial court for plaintiff's failure properly to obtain service of process. The Court of Appeals reversed. That court did not consider whether the action had been discontinued, concluding that this issue had not been properly raised. We reverse the Court of Appeals' decision.

On or about 16 July 1984 plaintiff was injured when the car in which she was a passenger collided with one owned by defendant Payne and driven by defendant Foxx. On 16 June 1987 plaintiff filed complaint against both defendants. Civil summonses were issued against both defendants the same day. Defendant Payne was personally served on 18 June 1987, but the summons issued to defendant Foxx was returned on 17 June 1987. It included the notation that a Mr. Williamson had lived for over one year at the address to which the summons had been directed and that he did not know defendant Foxx.

The summons addressed to defendant Foxx was neither subsequently endorsed nor were alias or pluries summonses issued.

Plaintiff arranged for notice of service to be published for three consecutive weeks in two Greensboro papers, beginning 16 September 1987. The affidavit of service by publication filed by plaintiff's attorney on 12 November 1987 stated, *inter alia*, that a summons and complaint had been issued against defendant Foxx; that personal service had been unsuccessfully attempted at 2610 Phillips Avenue, Greensboro, 27405, the last known address of defendant Foxx and that still listed by the N.C. Department of Motor Vehicles as her address; that the attorney had inquired fruitlessly as to defendant Foxx's whereabouts; and that plaintiff had therefore attempted service by publication in the locality of the accident and that of defendant Foxx's last known address.

Defendant Foxx filed answer on 1 December 1987, averring *inter alia* that the affidavit filed by plaintiff's attorney had not complied with N.C. R. Civ. P. Rule 4 and that there had been a discontinuance of the action as to defendant Foxx. Defendant Foxx further pleaded the three-year statute of limitations as a bar to any recovery by plaintiff in this action.

The trial court's order dismissing plaintiff's action against Foxx was based upon the following reasoning:

> [I]t appearing to the Court from the pleadings in this case and other documents in the court file and arguments of counsel for the parties and the affidavit of the attorney for plaintiff and the legal principles applicable to this case for service of summons by publication, and it appearing to the court from the affidavit of counsel that the last known address of the defendant Angelia Marie Foxx was 2610 Phillips Avenue, Greensboro, North Carolina 27405, and the Court being of the opinion that the plaintiff did not comply with Rule 4(j), Rules of Civil Procedure, or GS § 1-75.10(2) and failed to mail the defendant Angelia Marie Foxx notice of service of process by publication or of mailing to the defendant a copy of the summons and the complaint and the Court being of the opinion that service of process on the defendant by publication was deficient and that there has been a discontinuance of this action and that the action against the Defendant Angel[i]a Marie Foxx is barred by the three-year statute of limitation.

The order concluded:

> [I]t is . . . ORDERED, ADJUDGED AND DECREED that the motion of the defendant Angelia Marie Foxx for the entry of an order that there has been a discontinuance of this action shall be and the same is hereby allowed; and it is further ordered that the action against Angelia Marie Foxx is barred by the three-year statute of limitations and the action against Angelia Marie Foxx shall be and the same is hereby dismissed.

A unanimous panel of the Court of Appeals reversed. That court did not address whether the trial court had erred in holding that plaintiff's action had been discontinued because it concluded this issue had not been raised in the trial court. The appellate court treated the failure of plaintiff's attorney to mail a copy of the notice of service of process by publication to defendant Foxx as the sole basis for the trial court's dismissal of the action against her. The court held that under N.C. R. Civ. P. Rule 4(j1) "there no longer exists an obligation to mail a copy of the 'notice of service of process by publication' to an address where the party sought no longer resides." 95 N.C. App. at 728, 384 S.E.2d at 60.

Rule 4(d) includes the requirement that

> When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:
>
> (1) The plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Return of the summons so endorsed shall be in the same manner as the original process. Such endorsement may be secured within 90 days after the issuance of summons or the date of the last prior endorsement, or
>
> (2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

N.C.G.S. § 1A-1, Rule 4(d) (1990).

**[1]** We disagree with the Court of Appeals' conclusion that the discontinuance issue was not raised in the trial court. The record reflects that defendant Foxx's motion to dismiss stated "there has been a discontinuance of the action as to the defendant Angelia Marie Foxx and the defendant Angelia Marie Foxx pleads the failure of the plaintiff to comply with the provisions of Rule 4, Rules of Civil Procedure." The civil summons filed on 16 June 1987 was not endorsed nor were alias or pluries summonses issued subsequently. The order of the trial court granting defendant Foxx's motion to dismiss specifically concluded "there has been a discontinuance of this action and that the action against defendant Angelia Marie Foxx is barred by the three-year statute of limitation."

In concluding that there had been a "discontinuance of the action," the trial court did not cite pertinent subsections of Rule 4. There is no question, however, that the court was referring to Rule 4(d), which requires endorsement of the original, unserved summons and alias and pluries summonses, and Rule 4(e), which states the consequence of discontinuance for failure to follow Rule 4(d). "Discontinuance" is a term of art whose only application in the context of service of process is to an action that must cease for failure of the party to comply with Rule 4(d). (A new action may be filed, but the date for purposes of the statute of limitations is that of the later filing. *See* Rule 4(e).) The court's subsequent reference to Rule 4(j1) was clearly a second, separate ground for dismissing plaintiff's action against defendant Foxx, whereby the court concluded that service of process had been "deficient."

Patently, the issue of discontinuance for failure to comply with the provisions of Rule 4(d) was both presented and decided by the trial court, was properly before the Court of Appeals, and has now been properly put to this Court in defendant Foxx's petition for discretionary review. Rule 4 subsequently provides for discontinuance of the action when this provision has not been complied with:

> (e) . . . When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the

action shall be deemed to have commenced on the date of such issuance or endorsement.

N.C.G.S. § 1A-1, Rule 4(e) (1990).

**[2]** In *Sink v. Easter*, 284 N.C. 555, 202 S.E.2d 138 (1974), as in this case, the plaintiff, presented with the return of her summons unserved, failed to continue her action "by securing an endorsement upon the original summons for an extension of time within which to complete service of process, Rule 4(d)(1), and did not sue out an alias or pluries summons returnable in the same manner as the original process pursuant to Rule 4(d)(2)." *Id.* at 561, 202 S.E.2d at 143. The plaintiff's action was consequently discontinued ninety days after the date the original summons was issued. In *Sink*, service by publication, had it been in accord with the Rules of Civil Procedure, "could not and did not revive the action." *Id.*

Based upon the record before us, which is on all fours with *Sink*, we hold the trial court did not err in ruling that plaintiff's action was barred by the statute of limitations as a consequence of being discontinued, and in accordingly granting defendant Foxx's motion to dismiss.

**[3]** Having so held, we need not consider and express no opinion on the determination by the Court of Appeals that under Rule 4 a plaintiff under the circumstances here was not required to mail notice of service by publication to the party sought to be served.[1] Like the Court of Appeals, we simply caution the Bar

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1. Rule 4(j1) provides, in pertinent part:

> A party that cannot with due diligence be served by personal delivery or registered or certified mail may be served by publication. [S]ervice of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending. If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

N.C.G.S. § 1A-1, Rule 4(j1) (1990).

that, when service of process is attempted by publication, the better practice is

> that a plaintiff mail copies of the summons and notice by publication to the defendant's last known address or to any other address where the defendant might reasonably be found or from which the notice might reasonably be forwarded to the defendant. "As every practicing attorney and law-enforcement officer knows, there are among certain classes those persons who would feel an obligation to forward or deliver a letter to one being sought, but who would feel an obligation to give a lawyer or a deputy sheriff no information whatever as to the whereabouts of the one sought."

*Snead v. Foxx*, 95 N.C. App. at 727-28, 384 S.E.2d at 60 (quoting *Harrison v. Harvey*, 265 N.C. 243, 255-56, 143 S.E.2d 593, 602 (1965)).

We hold that the judgment of the Court of Appeals is

Reversed.

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IN RE: LOWER CAPE FEAR WATER AND SEWER AUTHORITY, AND THE COUNTY OF BRUNSWICK

No. 427PA89

(Filed 14 August 1991)

**Sanitary Districts § 2 (NCI3d)— water and sewer authority— different rates—contribution to building**

The Lower Cape Fear Water and Sewer Authority could grant Brunswick County a different water rate than that charged other members based on the substantial difference between the position of the County vis-a-vis the Authority and the position of the other members. The Authority would not have become viable without the contributions made by Brunswick County, including a loan of $5,653,200 which made it possible for the Authority to obtain $8,000,000 in grants, and paying the operating and administrative expenses of the Authority from October 1984 until July of 1987.

**Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 574.**

ON discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of a declaratory judgment for Lower Cape Fear Water and Sewer Authority entered by *Stevens, J.*, on 25 July 1989 in Superior Court, NEW HANOVER County. Heard in the Supreme Court 11 April 1990.

This is an action for a declaratory judgment in which Brunswick County and the Lower Cape Fear Water and Sewer Authority joined, asking for a declaration of the rights of the parties pursuant to certain contracts they had made.

The parties stipulated to the following facts. The Authority is a public instrumentality formed pursuant to N.C.G.S. § 162A-1, *et seq.* to provide water for its members. The members of the Authority are the City of Wilmington and the Counties of New Hanover, Bladen, Columbus, Pender and Brunswick.

The Authority was organized to supply water for all its members and large industrial users of water. In 1982, when the construction of the Authority's facilities was commenced, Brunswick County was the only member of the Authority which contributed to the financing of this construction. The County advanced $5,653,200 to the Authority to help finance the projects. This advance was from funds the County had received from the issuance of general obligation bonds. The Authority and the County at that time entered into an agreement under which the Authority agreed to charge a sufficient amount for the water it supplied to service these bonds and to pay such money to the County. This advance to the Authority enabled it to obtain grants totaling $8,000,000 from the United States Economic Development Administration and from the State of North Carolina. It was also agreed that if the Authority acquired or constructed any improvements that in the opinion of the County did not directly or indirectly benefit the County, the County would not be required to pay that portion of any rate that relates to the cost of any improvement unless it consented to do so.

The facilities of the Authority were completed in 1984. The County had not completed its water treatment plant at that time and was not able to take any water from the Authority. The County paid to the Authority sufficient sums to maintain its facilities until the County completed its plant and began taking water from the Authority.

At the present time Brunswick County is the only member of the Authority which receives water from it. The City of Wilmington and two industries have asked the Authority to expand its distribution system to include them. The City of Wilmington and the industries propose to contribute $3,800,000 to pay for the expansion and the Authority proposes to issue $4,100,000 in revenue bonds for the expansion. The County has notified the Authority that it will not agree to pay as part of its rate any sum for debt service on the Authority bonds to finance the expansion unless the Authority will renegotiate the rate the County is paying the Authority.

The parties brought this action to have the court determine their rights and duties under the agreement. The superior court declared void the part of the agreements between the parties which allowed the County to refuse to pay any part of a rate which in the opinion of the County was to be used for construction which does not benefit the County.

The County appealed.

*Alfred P. Carlton, Jr., for appellant County of Brunswick.*

*Hogue, Hill, Jones, Nash & Lynch, by William O. J. Lynch, for appellee Lower Cape Fear Water and Sewer Authority.*

WEBB, Justice.

The County has not assigned error to the holding of the superior court that declared void the provisions of the contract which say the County is not required to pay a rate based on capital improvements which in the opinion of the County do not benefit the County. The County's only assignment of error is the court's failure to find that on the facts of this case the Authority may legally discriminate in water rates and thus charge the County less than rates it charges other customers.

The Authority is not subject to the Act governing public utilities. N.C.G.S. § 62-3(23)(d) (1989). It is subject to the common law rule that it cannot charge rates that would constitute an unwarranted discrimination among the parties it was formed to serve. *Paper Co. v. Sanitary District*, 232 N.C. 421, 61 S.E.2d 378 (1950).

The parties agree that there can be a differential in rates if the circumstances justify it. The question posed by this appeal is whether the facts of the case justify a different rate to the County.

The County says the Authority may grant it a different rate from the rates given other customers. It says this is so because it advanced $5,653,200 to the Authority to help construct the facilities of the Authority and because it paid to the Authority sufficient sums to maintain the facilities after the facilities were complete and before the County was in a position to take water from the Authority. No other members of the Authority made a contribution which made the Authority viable.

The Authority says there is not a sufficient reason to differentiate in the rates charged the County and other customers. It says that the $5,653,200 which the County advanced to the Authority was not a gift but a loan. The County issued general obligation bonds to acquire this money it advanced to the Authority and the Authority is obligated to charge a sufficient rate to service these bonds and pay such sums to the County. For this reason, says the Authority, the County has not made a contribution to the Authority sufficient to justify a difference in rates. It is true that the Authority is obligated to repay the $5,653,200 advanced to it by the County. Nevertheless this grant contribution enabled the Authority to receive other grants totaling $8,000,000. This sum of money enabled the Authority to build its facilities and commence operation. This is a substantial contribution.

The Authority, relying on *Dale v. Morganton*, 270 N.C. 567, 155 S.E.2d 136 (1967), says that its common law duty not to discriminate is the same as for public utilities. It says that based on *Utilities Com. v. Mead Corp.*, 238 N.C. 451, 78 S.E.2d 290 (1953), it cannot give the County a different rate from its other customers. In that case we held that the Aluminum Corporation of America, which owned all the stock of Nantahala Power and Light Company, could not receive a preferential rate in relation to other customers without proving some distinctive fact that justifies the preference. Assuming cases involving utility rates are precedent for determining rates charged by the Authority in this case, *Mead* does not govern this case. Nantahala was a public utility owned by Alcoa. We held that a wholly owned utility could not discriminate in rates between its parent company and other customers. In this case the County does not own the Authority. It has made a substantial contribution to the Authority which puts it in a position different from other members.

The Authority also argues that the fact that the County paid the operation and maintenance expenses for the Authority from October 1984 until the County started receiving water does not entitle the Commission to grant the County a different rate. The Authority says the County received full value for this contribution by having water available when the County was ready to take it. Whatever benefit this was for the County it was also a benefit to the Authority which enabled the Authority to continue in business.

We hold that the Authority may grant the County a different rate on the water it receives from the Authority. The Authority could not have become viable if Brunswick County had not made the contributions that it made. It lent the Authority $5,653,200. Because of this loan the Authority was able to obtain grants totaling $8,000,000 from the United States Economic Development Administration and the State of North Carolina. The County paid the operating and administrative expenses of the Authority from October 1984 until July 1987. These were substantial contributions to the Authority without which it would not have been able to begin its operation or stay in business. Based on this substantial difference between the position of the County vis-a-vis the Authority and the position of the other members, the Authority does have the right to charge a rate to the County different from the rate it charges other members.

Reversed and remanded.

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STATE OF NORTH CAROLINA v. ROSCOE ARTIS

No. 504A84

(Filed 14 August 1991)

**Criminal Law § 1352 (NCI4th)— death sentence—McKoy error—harmlessness not shown**

A *McKoy* error in a capital sentencing proceeding in which defendant was sentenced to death was not shown to be harmless beyond a reasonable doubt where the verdict form shows only that the jury unanimously found "one or more" mitigating circumstances to exist; substantial evidence supported each of the six specified mitigating circumstances submitted; and

one submitted circumstance was deemed by statute to have mitigating value and the others were such that a juror could reasonably find them to have mitigating value. Therefore, defendant's sentence of death is vacated and the case is remanded for a new capital sentencing proceeding.

**Am Jur 2d, Criminal Law § 628.**

**Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.**

ON remand from the Supreme Court of the United States. Heard in the Supreme Court on 12 March 1991.

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

*Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for the defendant-appellant.*

EXUM, Chief Justice.

Defendant was convicted of the rape and first-degree murder of Joann Brockman and sentenced to death. On defendant's appeal, we found no error in either the guilt proceeding or the capital sentencing proceeding against defendant. *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989) (*Artis I*). On 19 March 1990 the United States Supreme Court granted defendant's petition for writ of certiorari, vacated our judgment and remanded to this Court for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *Artis v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 604 (1990).

On remand, we denied defendant's motion for the imposition of a life sentence, ordered supplemental briefs limited to the questions of whether, under *McKoy*, there was error in defendant's capital sentencing proceeding and, if so, whether the error was harmless. The case was heard on the supplemental briefs. We now conclude there was reversible *McKoy* error, and we vacate the death sentence and remand for a new capital sentencing proceeding.

The evidence is summarized in *Artis I*. We will not repeat it here except as necessary for an understanding of the *McKoy* issues.

In *McKoy* the United States Supreme Court held unconstitutional under the Eighth and Fourteenth Amendments of the federal Constitution jury instructions in capital sentencing proceedings which require juries to be unanimous in the finding of mitigating circumstances. Reasoning from its decisions in *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988), the *McKoy* Court concluded that each individual juror should be permitted to take into account in the final sentence determination any circumstance that the individual juror determines to exist which is supported by evidence and which could reasonably mitigate the capital crime.

Here the State concedes, and we agree, that defendant's jury was erroneously instructed contrary to the dictates of *McKoy*. The only issue meriting discussion is whether the *McKoy* error was harmless. Because the error is of constitutional dimension the State bears the burden of demonstrating its harmlessness beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990).

The trial court submitted to the sentencing jury seven circumstances it deemed to be mitigating and supported by the evidence:

> (1) The capacity of Roscoe Artis to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.
>
> (2) The defendant, Roscoe Artis, is bordering on mild mental retardation with a full scale intelligence quotient of 67.
>
> (3) Roscoe Artis is an illegitimate child and experienced less than normal relationships with his mother and father.
>
> (4) Roscoe Artis was gainfully employed on October 22, 1983.
>
> (5) Roscoe Artis has done prior good works.
>
> (6) Roscoe Artis in his formative years was subjected to abuse by his family.
>
> (7) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

Under the instructions and verdict form submitted to the jury, it was not required to, and did not, give its findings as to each mitigating circumstance. All we know from the verdict form is

that the jury unanimously found one or more of the mitigating circumstances to exist.

Faced with this same situation in *State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, --- U.S. ---, 113 L. Ed. 2d 459 (1991), we concluded that a *McKoy* error could not be shown to be harmless if there was substantial evidence to support two or more of the mitigating circumstances submitted and a juror could reasonably find that the circumstances did in fact mitigate the crime. We said:

> Given the verdict forms used in this case, it is impossible for this Court to determine which, if any, of the . . . specifically worded mitigating circumstances the jury found to exist. Nor can we determine which, if any, 'other (mitigating) circumstance or circumstances' the jury found to exist under the . . . 'catchall' circumstance . . . . We only know that the jury found 'one or more' mitigating circumstances to exist . . . . Thus, if substantial evidence was introduced at trial to support any two or more mitigating circumstances, the *McKoy* error has not been shown to be harmless, because the erroneous unanimity requirement may have precluded a juror from considering a circumstance which he or she thought had been established by evidence and was mitigating but which the jury did not unanimously find.

*Id.* at 394, 395 S.E.2d at 110. After determining in *McNeil* that there was substantial evidence to support each of the submitted mitigating circumstances and that a juror could reasonably find each to have mitigating value, we held that defendant was entitled to a new capital sentencing hearing.

In the instant case there is substantial evidence to support each of the submitted mitigating circumstances. One was by statute deemed to have mitigating value and the others were such that a juror could reasonably find them to have mitigating value. *McNeil*, therefore, controls the harmlessness issue favorably to defendant.

Regarding defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law and his mental retardation, the evidence was: On the day of the murder defendant was "high . . . from beer" and "drunk." Defendant's IQ was 67, which placed him in the upper range of mentally retarded individuals. Such evidence is "sufficient to allow

a reasonable juror examining defendant's behavior, mental problems, and intelligence to conclude that defendant's capacity was impaired." *State v. Sanders*, 327 N.C. 319, 344, 395 S.E.2d 412, 428 (1990). It is, of course, also sufficient to support the mental retardation mitigating circumstance. *State v. Sanders*, 327 N.C. 319, 395 S.E.2d 412; *State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106; *State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402 (1990).

Substantial evidence also supports the other specified mitigating circumstances submitted. Family members testified defendant was an illegitimate child who had little, if any, relationship with his natural parents. Others testified defendant during his childhood had been abused by family members who beat him and let him go hungry. There was testimony that defendant had been employed at Lumbee Farms, was a steady worker, did chores around the house, provided financial support to pay household expenses and helped his neighbors and the elderly in the area.

We find this case indistinguishable in principle from *McNeil* on the harmlessness issue. As in *McNeil*, defendant's death sentence is vacated and the case is remanded to Superior Court, Robeson County, for a new capital sentencing proceeding.

Death sentence vacated; remanded for a new capital sentencing proceeding.

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STATE OF NORTH CAROLINA v. THOMAS NOLEN MULLICAN

No. 379A89

(Filed 14 August 1991)

**Criminal Law § 1095 (NCI4th)— aggravating factor—evidence—statement by prosecutor—stipulation**

There was no error in sentencing defendant for attempted first degree sexual offense as a part of a plea bargain where the prosecutor summarized the State's evidence. The prosecutor's statement that he would summarize the State's evidence with the permission of the defendant was an invitation to the defendant to object if he had not consented; defendant did not do so; defendant then said he too would like to present his evidence with the consent of the State; and the defendant's

attorney made a statement consistent with the statement of the prosecuting attorney and concluded with a statement which was very nearly an admission of what the State was trying to prove. The statement of the prosecuting attorney with the statement of defendant's attorney shows that there was a stipulation that the prosecuting attorney could state what the evidence would show.

**Am Jur 2d, Criminal Law §§ 598, 599.**

APPEAL by the defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 95 N.C. App. 27, 381 S.E.2d 847 (1989), affirming a judgment of *Morgan, J.*, entered at the 21 March 1988 session of Superior Court, GUILFORD County. Heard in the Supreme Court 14 March 1990.

The defendant pled guilty to a charge reduced to attempted first degree sexual offense as part of a plea bargain in which the State dismissed a charge of taking indecent liberties with a child. At the sentencing hearing the prosecutor said, "[w]ith the permission of the Court and the Defense, I will summarize what the State's evidence will show." Neither the defendant nor his attorney said anything at that time. The prosecutor said the State's evidence would show that the defendant put his penis in the mouth of a five year old child who was living in his home.

The defendant's attorney then said, "[i]f it please the Court, I too would [not] like to delay our being heard and would present our evidence to the Court with the permission of the State." The defendant's attorney then gave a summary of the defendant's evidence which is in part as follows:

> And evidently he lived there with his mother and sister would leave her child there and his mother would be there and his sister would go off and be gone for long periods of time, and sometimes she would not come home after work. And his mother might go and see some neighbors and come back later and sometimes later and later, and it was pretty much evident that he was stuck with care of the child. Of course that is not any excuse for his doing this. He told the Officer he was sorry, sorry for committing the offense. . . .

The court found as aggravating factors that the defendant took advantage of a position of trust or confidence to commit the offense

and there was present the element of the greater offense of first degree sexual offense to the lesser included offense to which the defendant pled guilty. The court found three mitigating factors. The court found that the aggravating factors outweighed the mitigating factors and sentenced the defendant to fourteen years in prison which was more than the presumptive sentence.

The defendant appealed. The Court of Appeals affirmed with one judge dissenting and the defendant appealed to this Court.

*Lacy H. Thornburg, Attorney General, by David Gordon, Assistant Attorney General, for the State.*

*Frederick G. Lind, Assistant Public Defender, for defendant appellant.*

WEBB, Justice.

The question on this appeal is whether there was sufficient evidence to support the finding of the aggravating factors. We have held that a statement by the prosecuting attorney is not sufficient standing alone to find an aggravating factor. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983). If opposing counsel stipulates to a statement it may be used to support the finding of an aggravating factor. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

The defendant contends that the only evidence to support the finding of the aggravating factors in this case was the unsupported statement of the prosecuting attorney and the defendant did not stipulate to this statement. The Court of Appeals held that it was not necessary to find there was a stipulation. It held the statement by the defendant's attorney constituted an admission as to the things with which the defendant was charged.

We cannot say the Court of Appeals was wrong, but if it were, we hold that the record shows the defendant stipulated that the prosecuting attorney could state the evidence. The defendant relies on *State v. Toomer*, 311 N.C. 183, 316 S.E.2d 66 (1984), which dealt with the authentication of a transcript of a tape recording so that it could be offered into evidence during a trial. We held that a statement by the defendant's attorney that he stipulated "it is a tape" and the officer was reading from it was not sufficient to prove the matters necessary to authenticate a transcript of a tape for introduction into evidence.

*Toomer* does not govern this case. It is not necessary in order to stipulate that the prosecuting attorney can state the evidence to stipulate to all the things necessary to authenticate a transcript of a tape recording for admission into evidence. It is only necessary to stipulate that the prosecuting attorney may make a statement as to what the evidence would show. The question in this case is whether the defendant did so. We hold that he did.

When the prosecuting attorney said he would summarize the State's evidence with the permission of the defendant, this was an invitation to the defendant to object if he had not consented. He did not do so. The defendant then said he too would like to present his evidence with the consent of the State. We can infer from this that the defendant had consented to the prosecuting attorney's making the statement. The defendant's attorney then made a statement which was consistent with the statement of the prosecuting attorney and concluded it by saying, "[o]f course that is not any excuse for his doing this." This is very nearly an admission of what the State was attempting to prove. We hold that the statement of the prosecuting attorney considered with the statement of the defendant's attorney shows that there was a stipulation that the prosecuting attorney could state what the evidence would show.

Affirmed.

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STATE OF NORTH CAROLINA v. HARVEY LEE GREEN, JR.

No. 385A84

(Filed 14 August 1991)

**1. Criminal Law § 131 (NCI4th)— guilty plea—waiver of right to challenge indictment on constitutional grounds**

By pleading guilty to two charges of first degree murder, defendant waived his right to challenge the bills of indictment on the ground that there was racial discrimination in the selection of the foreman of the grand jury which returned the bills of indictment against him.

**Am Jur 2d, Criminal Law § 490.**

**2. Constitutional Law § 376 (NCI4th)— death penalty—racial discrimination—statistical studies**

Defendant could not establish a prima facie case of racial discrimination in the application of the death penalty under the Eighth and Fourteenth Amendments to the U. S. Constitution by statistical studies on the imposition of the death penalty. Nor did defendant make a prima facie showing that the manner in which our death penalty statute is enforced violates Art. I, § 19 of the N. C. Constitution where the statistical studies offered by defendant do not relate specifically to North Carolina or to the district in which defendant was tried.

**Am Jur 2d, Criminal Law § 594.**

**Racial discrimination in punishment for crime. 40 ALR3d 227.**

APPEAL by the defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death imposed by *Watts, J.*, at the 11 June 1984 Session of Superior Court, PITT County. Heard in the Supreme Court 11 February 1988; additional arguments heard 22 August 1988.

The defendant pled guilty to two counts of first degree murder and two counts of common law robbery. He was tried by a jury as to punishment and the jury recommended that he be sentenced to death on both the murder charges. Two death sentences were imposed and the defendant appealed. We remanded the case for a hearing as to whether the defendant's rights had been violated because of racial discrimination in selecting the jury contrary to *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986). A hearing was held in Superior Court, Pitt County, at which it was found that there was no racial discrimination in the selection of the jury. The case was then returned to this Court. We remanded the case for a second time for a further hearing on the *Batson* issue. The superior court made further and more detailed findings of fact and again found no *Batson* error. The case was again returned to this Court. The State then filed a motion in which it conceded there was prejudicial error under *McKoy v. North Carolina*, 494 U.S. 433, 108 L.Ed.2d 369 (1990), and moved for a new sentencing hearing.

*Lacy H. Thornburg, Attorney General, by James J. Coman, Senior Deputy Attorney General, Joan H. Byers, Special Deputy Attorney General, William N. Farrell, Jr., Special Deputy Attorney General, and Barry S. McNeill, Assistant Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, and Louis D. Bilionis, Assistant Appellate Defender, for defendant appellant.*

*E. Ann Christian and Robert E. Zaytoun for North Carolina Academy of Trial Lawyers, amicus curiae.*

*John A. Dusenbury, Jr., for North Carolina Association of Black Lawyers, amicus curiae.*

WEBB, Justice.

The defendant has made 23 assignments of error. The subjects most of these assignments of error cover should not recur at a new sentencing hearing and we shall not discuss them. We shall discuss two separate assignments of error under each of which the defendant contends the bills of indictment against him should be quashed on constitutional grounds.

**[1]** The defendant first says that there was racial discrimination in the selection of the foreman of the grand jury which returned the bills against him. He contends this violates the rule of *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987), and the Constitution of North Carolina. With certain exceptions not applicable to this case a defendant who pleads guilty waives his right to challenge the plea on constitutional grounds. *State v. Reynolds*, 298 N.C. 380, 259 S.E.2d 843 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed.2d 795 (1980). The defendant, by pleading guilty, waived any right he had under *Cofield*. This assignment of error is overruled.

**[2]** The defendant also contends that the manner in which our death penalty statute, N.C.G.S. § 15A-2000 (1988), is enforced violates the equal protection clauses of U.S. Const. amend. XIV and N.C. Const. art. I, § 19. He also contends it violates the U.S. Const. amend. VIII, which amendment proscribes cruel and unusual punishment. The defendant bases this argument on two statistical studies of the imposition of the death penalty. One of these studies was conducted by Professors Samuel Gross and Robert Mauro and is published as Gross and Mauro, *Patterns of Death: An Analysis*

*of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 Stan. L. Rev. 27 (1984). The other study was made by Professors Barry Nakell and K. Hardy, *The Arbitrariness of the Death Penalty* (1987). The studies show that a person is more likely to be executed if the murder victim is white and the chance is more likely yet if the defendant is black.

Although the defendant has pled guilty he still faces a trial in which he may receive the death penalty. We shall consider this assignment of error which is directed at the way the death penalty is imposed.

The United States Supreme Court held in *McCleskey v. Kemp*, 481 U.S. 279, 95 L.Ed.2d 262 (1987), that general statistical studies of the operation of the death penalty in a given jurisdiction cannot alone establish a prima facie case of racial discrimination of the death penalty in a particular case tried in that jurisdiction under U.S. Const. amend. VIII or U.S. Const. amend. XIV. The studies which the defendant offered in this case are no more particularized than those offered in *McCleskey*. We are bound by *McCleskey* to hold the defendant cannot show a violation of his rights under the eighth and fourteenth amendments by these statistical studies.

The defendant argues that nevertheless he has made a prima facie showing that his rights under N.C. Const. art. I, § 19 were violated. Because the statistical studies offered by the defendant do not relate specifically to North Carolina or to the district in which the defendant was tried, we hold that the defendant has failed to make a prima facie showing that the defendant's rights were violated under the North Carolina Constitution. This assignment of error is overruled.

We agree with the State and the defendant that there was prejudicial error pursuant to *McKoy*. For this reason the defendant must have a new sentencing hearing and we so order.

New sentencing hearing.

Justice MITCHELL concurs in the result.

HELEN BARNES AND WILLIAM G. BARNES, JR. v. NORMAN L. HARDY, JR., ELLA FLEMING HARDY AND UNITED STATES FIDELITY & GUARANTY COMPANY

No. 223A90

(Filed 14 August 1991)

**Insurance § 110.1 (NCI3d)— prejudgment interest beyond policy limits—insurer not required to pay**

Defendant insurer was not required to pay prejudgment interest beyond its policy limits, since the insurer, pursuant to the language of the policy, agreed to pay "all defense costs we incur," and that did not include prejudgment interest.

**Am Jur 2d, Automobile Insurance § 428.**

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. 381, 390 S.E.2d 758 (1990), affirming a declaratory judgment entered by *Phillips, J.*, on 6 February 1989 in Superior Court, PITT County. Heard in the Supreme Court 12 November 1990.

*Taft, Taft & Haigler, by Mark R. Morano, for plaintiff-appellants.*

*Gaylord, Singleton, McNally, Strickland & Snyder, by Danny D. McNally, for defendant-appellees.*

EXUM, Chief Justice.

Plaintiff Helen Barnes was injured in a collision with the insured defendants Hardy. Plaintiffs filed suit and defendant insurer, United States Fidelity & Guaranty Company ("USF&G"), offered $49,900 in settlement. The liability limit on the policy was $50,000, and coverage included "all defense costs we incur."

Plaintiffs eventually accepted $50,000 from defendant insurer, but the parties could not agree on whether USF&G was responsible for prejudgment interest in excess of its liability limits. They submitted to a declaratory judgment action in which the trial court held USF&G was not liable for such interest.

Plaintiffs appealed to the Court of Appeals, which affirmed over Judge Cozort's dissent. Plaintiffs appealed to us as of right.

Today in *Sproles v. Greene*, 329 N.C. 603, 407 S.E.2d 497 (1991), we considered another insurance policy in which the insurer promised to pay, in addition to the policy limits, " 'all defense costs we incur.' " *Id.* at 611, 407 S.E.2d at 501. In determining that the term "defense costs" does not embrace prejudgment interest beyond policy limits, we distinguished *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985). *Lowe* held the term "all costs taxed against the insured" to include such prejudgment interest. Reading "defense costs" more narrowly than "all costs," we concluded in *Sproles* that the policy did not require the insurer to pay prejudgment interest beyond the policy limits.

*Sproles* controls the decision in this case. The policy terms denoting coverage of defense costs here are identical to those in *Sproles*. We therefore follow *Sproles* and affirm the decision of the Court of Appeals.

Affirmed.

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ANTHONY MAURICE BEATTY, BY AND THROUGH HIS GUARDIAN AD LITEM, NANCY BEATTY v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, BILLY CHEEKS AND THOMAS BRIDGES

No. 444PA90

(Filed 14 August 1991)

ON discretionary review pursuant to N.C.G.S. § 7A-31(a) of a decision of the Court of Appeals, 99 N.C. App. 753, 394 S.E.2d 242 (1990), affirming an order granting summary judgment to defendants Board of Education and Thomas Bridges, entered by *Snepp, J.*, on 14 August 1989 in Superior Court, MECKLENBURG County. Heard in the Supreme Court 15 March 1991.

*Karro, Sellers, Langson & Gorelick, by C. Murphy Archibald and Seth H. Langson, for plaintiff appellant.*

*Weinstein & Sturges, P.A., by Judith A. Starrett and Hugh B. Campbell, Jr., for defendant appellee.*

PER CURIAM.

Discretionary review improvidently allowed.

IN THE MATTER OF THE ADOPTION OF P.E.P.

No. 509A90

(Filed 5 September 1991)

1. **Adoption or Placement for Adoption § 2 (NCI4th)— payment of natural mother's expenses—statutory violation**

The intent of N.C.G.S. § 48-37 is to prevent the buying and selling of babies. This statute is violated if the adopting parents and their attorney make funds available to bring the biological mother into the state for the purpose of facilitating an adoption, to support the mother through the date of birth, and to return the mother to her home state.

**Am Jur 2d, Adoption § 13.**

2. **Adoption or Placement for Adoption § 2 (NCI4th)— payment of natural mother's expenses—statutory violation**

Adopting parents and their attorney violated N.C.G.S. § 48-37 where the attorney used his own funds and funds given to him by the adopting parents in the following manner: he paid transportation expenses of $379 for the mother and her two children to come to North Carolina; he paid $300 per month for food and shelter for the mother and her children while they were in North Carolina; he gave the mother approximately $35 per week for three months; he provided the mother with transportation while she was in North Carolina; he hired and paid a $500 retainer fee for a Michigan lawyer to help the mother in two lawsuits pending in Michigan; he paid $300 for an airplane ticket for one of the children to return to Michigan; he paid some of the mother's medical expenses; he paid $3,266 for a six-month lease for an apartment for the mother when she returned to Michigan; he paid $279 for the mother's flight back to Michigan; and he sent the mother $1,500 once she returned to Michigan.

**Am Jur 2d, Adoption § 13.**

3. **Adoption or Placement for Adoption § 43 (NCI4th)— statutory violations and other irregularities—interlocutory decree set aside**

Statutory violations, together with other irregularities, require that an interlocutory adoption decree be set aside and that the adoption proceeding be dismissed where the adopt-

ing parents and their attorney violated N.C.G.S. § 48-37 by providing the mother with complete financial support prior to and immediately after the birth of the child; the attorney erroneously advised the out-of-state expectant mother that she needed to be in the same state as the adopting parents if the adoption was to take place when he knew or should have known that N.C.G.S. § 48-3 permits adoption irrespective of the place of birth or residence of the child; the attorney failed to serve the putative father with legal notice in Michigan after learning that he was asserting that he was the father of the unborn child, and the publication of notice to the putative father in an Orange County, North Carolina newspaper was inadequate notice under N.C.G.S. § 1A-1, Rule 4(j1); and it is unlikely that social services personnel would have suggested issuance of the interlocutory decree prior to the expiration of the normal 90-day period for revocation of consent to adoption if they had known that there was a claim by an out-of-state putative father, and the mother's attempted withdrawal of her consent to adoption within the 90-day period would have been timely.

**Am Jur 2d, Adoption §§ 26, 46, 50, 51.**

**Comment Note—Right of natural parent to withdraw valid consent to adoption of child. 74 ALR3d 421.**

**Necessity of securing consent of parents of illegitimate child to its adoption. 51 ALR2d 497.**

Justice WEBB 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, 100 N.C. App. 191, 395 S.E.2d 133 (1990), affirming a judgment entered 25 May 1989 by *Ellis, J.*, in Superior Court, ORANGE County. Heard in the Supreme Court 13 March 1991.

*Levine and Stewart, by Donna Ambler Davis, for appellants.*

*Coleman, Bernholz, Bernholz, Gledhill & Hargrave, by G. Nicholas Herman, for appellees.*

*Heidi G. Chapman, for North Carolina Association of Women Attorneys, amicus curiae.*

FRYE, Justice.

We are again faced with making a difficult decision concerning the adoption of a newborn child. This action involves the natural parents' attempt to set aside an Interlocutory Decree of Adoption, to prevent the entry of a Final Order of Adoption, to dismiss the Petition for Adoption, and to regain custody of their son, P.E.P. The trial judge denied all relief, and the Court of Appeals affirmed with one judge dissenting.

Procedurally the case arose in the following manner. On 13 September 1988, defendants, Mr. and Mrs. PEP (the PEPs), filed a Petition for Adoption in the Superior Court, Orange County. On 17 November 1988, an interlocutory decree allowing the adoption by the defendants was entered. On 27 December 1988, the plaintiffs, Pamela Rogers (Rogers) and William Rowe (Rowe), filed and served a notice of motion for relief from the interlocutory decree, pursuant to N.C.R. Civ. P. 60(b)(6), together with supporting affidavits, on the grounds of insufficiency of process, fraud, undue influence, and duress. Following action by the clerk of superior court as to various matters, the entire action was removed from the clerk and placed on the superior court trial calendar.

On 8 May 1989, plaintiffs filed and served a notice of amended motion and an amended motion for relief from the interlocutory decree pursuant to Rule 15(a) and Rule 24(a) of the North Carolina Rules of Civil Procedure. On the same day, defendants filed and served a motion for hearings to be closed and for change in caption, a motion in limine, and a response to plaintiffs' Rule 60(b)(6) motion. The motion for hearings to be closed and for change in caption was granted and the plaintiffs' amendment to their Rule 60(b)(6) motion was allowed. Plaintiffs were also permitted to intervene in the adoption proceeding and to request relief from the interlocutory decree. The hearing was held before Judge Ellis.

On 25 May 1989, Judge Ellis entered the final order of the trial court, denying plaintiffs' motion for relief from the interlocutory decree, and plaintiffs appealed. The Court of Appeals affirmed the trial court's judgment. Judge Duncan dissented, and plaintiffs appealed to this Court as a matter of right based on the dissenting opinion. *In the Matter of the Adoption of P.E.P.*, 100 N.C. App. 191, 395 S.E.2d 133 (1990).

The evidence presented by the plaintiffs at the hearing before Judge Ellis tended to show that Rogers and Rowe are the biological parents of P.E.P. P.E.P. was conceived in December of 1987, while Rogers was living with Rowe in Michigan. Rogers and Rowe were not married to each other at the time of P.E.P.'s conception or birth.

In late 1987, Rogers became friends with Sheryl Piccirillo (Piccirillo), and Piccirillo introduced Rogers to an organization known as "The Way International" (the Way). In February of 1988, Rogers began working with Piccirillo cleaning houses and began spending most of her time with Piccirillo. Rogers soon became distanced from persons who did not believe in the Way. She no longer saw her former friends and did not spend much time with her mother.

Piccirillo convinced Rogers that Rowe was cheating on her and that he was questioning whether he was the father of her unborn child. On 28 May 1988, Rogers moved from Rowe's house and moved in with her mother. She did not leave any information with Rowe as to where she had moved. Rowe called Rogers' mother, Rogers' ex-husband, and Piccirillo trying to find out where Rogers was living, but no one would give him any information. On 31 May 1988, Rowe contacted an attorney in Michigan, Richard Spruit (Spruit), and arranged to meet with him three days later to try to find Rogers. Rowe soon found out that Rogers was at her mother's house because on one occasion when he telephoned Rogers' mother, Rogers answered the telephone.

After leaving Rowe, Rogers contemplated placing P.E.P. for adoption. Rogers discussed the possibility of adoption with Piccirillo, and Piccirillo told Rogers that the Way had a lot of people who would like to adopt a child. Piccirillo called a member of the Way to let him know of the possible adoption and that person contacted the PEPs who lived in North Carolina. The PEPs then employed an attorney, Douglas Hargrave (Hargrave), a follower of the Way living in Hillsborough, North Carolina, to handle the possible adoption. The PEPs agreed to pay Hargrave $3,500 to assist them in the adoption proceeding. Hargrave called Piccirillo and told her that he wanted to meet with Rogers.

Hargrave flew to Michigan and met with Rogers and Piccirillo on 4 June 1988. During this meeting, according to Rogers, Hargrave took Rogers and Piccirillo to lunch and told Rogers that "[she] had to be in the same state as the adoptive parents" if she was going to place her child for adoption. Hargrave testified that he

"told [Rogers] if she wanted to place the baby in North Carolina, I figured she'd have to come to North Carolina." Rogers also testified that she informed Hargrave during the meeting that Rowe was the father of her unborn child. Hargrave testified that Rogers did tell him that she had been living with Rowe, but when he asked her if Rowe was the baby's father, "she just really didn't really want to talk about that and sort of lowered her voice and said no."

One week later, on 11 June 1988, a process server tried to serve a summons on Rogers at her mother's house. Rogers testified that she called Hargrave and told him about the process server, and Hargrave arranged and paid for Rogers and her two children to fly to North Carolina the next day. However, according to Hargrave's testimony, he arranged and paid for Rogers' transportation to North Carolina, not to help her avoid the process server, but because she wanted to leave Michigan before her family and friends found out about her pregnancy. Rogers also testified that at the time the trip was arranged, she had no intention of remaining in North Carolina.

On 12 June 1988, Hargrave met Rogers and her children at the Raleigh-Durham Airport and took them to his house where they remained for two days. On their third day in North Carolina, Hargrave arranged for Rogers and her children to move in with Laura Smith (Smith), another follower of the Way. Rogers lived with Smith until after the baby was born and never paid for her accommodations. Hargrave testified that he used his personal funds and funds from the PEPs to pay Smith and to provide funds for Rogers.

Rogers testified that no one in her family knew where she was while she was in North Carolina. However, her mother had Hargrave's telephone number and address in case she wanted to contact Rogers. While staying in North Carolina, Rogers' days were spent only with followers of the Way. She would read books from the Way given to her by Smith, and Smith would play the Way's teaching tapes and music tapes every day. Smith also discussed the philosophy of the Way with Rogers.

In early August 1988, Rogers' ex-husband threatened to bring a custody suit against Rogers because she had taken their daughter, Crystal, out of Michigan and he was unable to visit with his child. Hargrave retained Nanna Carpenter (Carpenter), a lawyer in

Michigan, to handle the matter for Rogers. Hargrave paid Carpenter's $500 retainer out of his personal funds, and he was not reimbursed. Crystal was sent back to Michigan before the birth of P.E.P.; Hargrave paid her airfare, and Mr. PEP reimbursed him.

On 29 August 1988, Rogers met with Jane Maskey (Maskey), a social worker for the Orange County Department of Social Services. Maskey had handled adoptions exclusively for the last fourteen years. Hargrave's office had arranged the meeting, and prior to the interview with Maskey, according to Rogers, Hargrave counseled her on what to say. Maskey was allowed to testify at trial as an expert in adoption procedures in North Carolina. Maskey testified that when she met with Rogers she told her that "it's illegal for any money to change hands with a private adoption. I asked her how she was supporting herself; and she said that her family was helping her to support herself." Maskey also testified that the interview was approximately thirty-five minutes, shorter than her usual interviews because Rogers "was having contractions and she was uncomfortable. And I didn't think it was the appropriate time to give counseling or anything else."

Rogers had not met the PEPs prior to the birth of her child. Hargrave told Rogers that she could meet the adoptive parents, but he advised against meeting them. Hargrave also did not permit Rogers to attend the local Twig meetings, the weekly gatherings of the local followers of the Way, because the PEPs attended the meetings. The PEPs had been involved with the Way since 1974.

Hargrave transported Rogers to the hospital, and P.E.P. was born on 9 September 1988, at North Carolina Memorial Hospital (Hospital) in Chapel Hill. On 10 September 1988, a nurse brought P.E.P. to Rogers, and according to Rogers, she "only spent about two minutes with [the baby] because I felt like [Hargrave] was mad at me; and I did not want him mad at me." Rogers signed a release form prepared by Hargrave and left the Hospital. A nurse delivered the baby to the PEPs. Rogers testified that Hargrave had told her that "it was his experience that the mother should not see the child because it's too hard on the mother; and you should only stay in the hospital like a day because it's best just to go home and start your life again."

On 12 September 1988, Janet Dutton (Dutton), a member of Hargrave's law firm, met with Rogers because someone from the Hospital had called Hargrave's office and stated that Rogers did

not complete the proper procedure when she left the Hospital on 10 September. The birth certificate had not been signed, and Rogers had not met with a hospital case worker. Rogers returned to the Hospital with Dutton, signed the birth certificate, and met with Gloria Rentrope (Rentrope), a case worker for the Hospital. Rentrope testified that she deviated from hospital procedure and authorized the release of P.E.P. to the adoptive parents at the Hospital on 10 September because of Hargrave's special arrangements with the Hospital's legal department. On 12 September, Rentrope talked with Rogers for fifteen or twenty minutes about the trauma and process of giving up a baby for adoption. Rentrope testified she felt uncomfortable about the short period of time that she had to talk with Rogers and the fact that her first interview with Rogers was after the baby had been delivered to the adopting parents.

Following Rogers' meeting with Rentrope, Rogers and her son, Benjamin Rowe, flew back to Michigan on the same day. Hargrave paid the airfare. Two or three weeks after Rogers returned to Michigan, she told Piccirillo that she wanted her baby back. Rogers had received a notice that Spruit, Rowe's attorney, had scheduled depositions of Rogers to try to find the baby. Rogers then made airline reservations to return to North Carolina. On the day that she was to leave for North Carolina, Piccirillo and her husband went over to Rogers' apartment and called Hargrave. Rogers and Hargrave talked on the telephone for at least an hour. According to Rogers, Hargrave and Piccirillo assured her "that something would happen to [Rowe]" if he continued to search for the baby. After talking with Hargrave, Rogers decided not to return to North Carolina.

On 27 September 1988, Hargrave wrote a letter to Spruit stating that he was aware that Rowe was asserting that he was the father of P.E.P. In the letter, Hargrave asked whether Spruit would accept service on behalf of Rowe of the notice of the filing of a petition for adoption. On 4 October 1988, Spruit sent a letter to Hargrave stating, "As of the present time, [Rowe] is certain that he is the father of this child, and he will not voluntarily consent to the adoption." Spruit did not accept service on behalf of Rowe, and Hargrave did not have Rowe personally served or served by certified mail with notice of the adoption proceeding.

On 5, 12, and 19 October 1988, Hargrave caused to be published a Notice of Service of Process by Publication in *The News of*

*Orange County*, a Hillsborough, North Carolina, newspaper. On 15 November 1988, Hargrave signed and filed an Affidavit of Service of Process by Publication in Orange County Superior Court. The affidavit stated that "the natural father of [the child] after due diligence cannot be served within this state in the manner prescribed in Rule 4J of the North Carolina Rules of Civil Procedure."

In late November or early December 1988, Rogers was at Piccirillo's house watching the "Geraldo Rivera Show." The theme of the show was religious and dangerous cults, and the Way was portrayed on the show as being a dangerous cult. Rogers became frightened and confused, and she went home and called the cult awareness hotline telephone number that was given on the show. According to Rogers, the guests on the television show stated that followers of the Way were trained to bear arms and to deal in mind control.

Rogers testified that she called Hargrave the day after the television show to ascertain the status of the adoption and told him that she wanted to stop the adoption. Rogers then called the Orange County Clerk's Office and was informed that the interlocutory decree had been entered on 17 November 1988. On 27 December 1988, Rogers and Rowe filed a motion for relief from the interlocutory decree on grounds that fraud had been committed upon her and that she had signed the consent to adoption under undue influence and duress. Other facts will be addressed as necessary.

The issue presented in this case is whether the violation of N.C.G.S. § 48-37 by the adoptive parents and their attorney, together with the numerous other irregularities in this case, makes the adoption proceeding invalid.

In his final order on 25 May 1989, Judge Ellis made sixty-two findings of fact, and plaintiffs excepted to fifteen of them. We will address finding of fact 59. The trial judge found as follows:

> (59) There have been defects in the adoption procedures in that Rogers was provided by the [PEPs] and Hargrave with funds for her transportation to North Carolina from Michigan, and from North Carolina back to Michigan, for her support while she was in North Carolina, and with money for an apartment in Michigan after the birth of the child. Rogers willingly

accepted this support. The child was not placed for adoption in order to receive this support or any other compensation.

There was plenary evidence to support finding of fact No. 59.

N.C.G.S. § 48-37[1] provides in pertinent part:

> No person, agency, association, corporation, institution, society or other organization . . . shall offer or give, charge or accept any fee, compensation, consideration or thing of value for receiving or placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption . . . .

There are no North Carolina cases which interpret N.C.G.S. § 48-37; however on 5 August 1975, an Attorney General's opinion, reported at 45 N.C.A.G. 24, clearly expressed the view that N.C.G.S. § 48-37 is intended to govern situations such as the one we are now faced with in the present case. In the Attorney General's opinion, the Director of the Department of Social Services asked:

> Under Chapter 335 of the 1975 Session Laws, effective July 1, 1975, prohibiting the buying and selling of children for adoption, may prospective adoptive parents pay the transportation expenses to North Carolina as well as all medical costs incident to the birth of the child of an expectant mother residing in another state who is considering placing her baby for adoption with this couple?

The Attorney General responded:

> In our opinion the type of arrangement contemplated in this case is clearly violative of the provisions of Section 1 of Chapter 335. Is there any real doubt that the prospective adoptive parents are offering or giving compensation, consideration or a thing of value to the expectant mother for receiving her child for adoption? We think not.

45 N.C.A.G. 24 (1975).

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1. We note that the General Assembly amended N.C.G.S. § 48-37 to provide that the adoptive parents may pay the reasonable and actual medical expenses incurred by the biological mother incident to the birth of the child provided that the adoptive parents disclose in the petition for adoption the amount of such payments and represent that there were no gifts or payments or promises to give anything of value such as is prohibited by this section. 1991 N.C. Sess. Laws ch. 335. This amendment does not apply to this case.

**[1]** The legislative intent of N.C.G.S. § 48-37 is to prevent the buying and selling of babies. In finding of fact 59, the trial judge found that the child was not placed for adoption in order to receive the support provided by the adopting parents and their attorney or any other compensation. In finding that the child was not placed for adoption in order to receive the support, the trial judge placed emphasis solely on the motive of the biological mother. However, emphasis should also be placed on the motives of the adopting parents and their attorney. If the adopting parents and their attorney, as here, make the funds available for the purpose of bringing the biological mother into the state for the purpose of facilitating the adoption, including supporting her and the child through the date of birth and returning the mother to her home state, then such actions constitute a violation of the statute. As stated by the Attorney General's opinion, "Is there any doubt that the prospective adopting parents are offering or giving compensation, consideration or a thing of value to the expectant mother for receiving her child for adoption? We think not." Hargrave and the PEPs violated N.C.G.S. § 48-37 by providing Rogers with complete financial support prior to and immediately after the birth of P.E.P.

**[2]** There was evidence which showed that Hargrave paid for the transportation of Rogers and her two children to North Carolina which amounted to $379; that he paid $300 per month for food and shelter for Rogers and her children while they were in North Carolina; that he gave Rogers approximately $35 per week for three months; that he provided Rogers with transportation while she was in North Carolina; that he hired and paid a $500 retainer fee for a Michigan lawyer to help Rogers in two lawsuits pending in Michigan; that he paid approximately $300 for an airplane ticket so that Rogers' daughter could return to Michigan before the birth of P.E.P.; that he paid some of Rogers' medical expenses; that he paid $3,266 for a six-month lease for an apartment for Rogers when she returned to Michigan; that he paid $279 for Rogers' flight back to Michigan; and that he sent Rogers $1,500 once she returned to Michigan. Hargrave admitted that he used his personal money and funds given to him by the PEPs to take care of Rogers' expenses.

**[3]** Although Hargrave or the PEPs may not have purchased Rogers' unborn child, the evidence would support an inference that this was done. Rogers became totally financially dependent on Hargrave after moving to North Carolina. There is substantial

evidence that Rogers received over $7,000 from Hargrave and the PEPs during and immediately following her pregnancy. Thus, we conclude that the actions of the adopting parents, through their attorney, contributed to a defective adoption proceeding.

In addition to the violation of N.C.G.S. § 48-37, there is also evidence which shows that other adoption statutes were either ignored or violated. For example, evidence was presented which showed that Hargrave suggested to Rogers that she needed to be in the same state as the adoptive parents if the adoption was to take place. Plaintiffs contend that the sole purpose of removing Rogers from Michigan was to seclude her from Rowe, her family, and her friends, and to make her totally dependent upon the support of Hargrave and the PEPs, thereby clouding Rogers' opportunity and ability to clearly contemplate and voluntarily decide whether to place her child for adoption. N.C.G.S. § 48-3 provides, "Any minor child, irrespective of place of birth or place of residence, and whether or not a citizen of the United States, may be adopted in accordance with the provisions of this Chapter." N.C.G.S. § 48-3 (1984 & Cum. Supp. 1990). Regardless of Hargrave's motive for advising Rogers to move to North Carolina, the relevant statute makes it clear that a birth mother does not have to give birth to her child in the state in which the adoptive parents reside. As an attorney handling a private placement adoption, Hargrave knew or should have known of this statute, prior to advising an out-of-state expectant mother to move to North Carolina.

The evidence also shows that Hargrave did not follow the North Carolina Rules of Civil Procedure. For example, Hargrave failed to serve Rowe with legal notice in Michigan after finding out that Rowe was asserting he was the father of Rogers' unborn child. Instead, Hargrave attempted to provide Rowe with notice of the pending adoption proceeding by publishing a legal notice in a local Orange County, North Carolina, newspaper. N.C.G.S. § 1A-1, Rule 4(j1), provides in pertinent part:

> A party that cannot with due diligence be served by personal delivery or registered or certified mail may be served by publication . . . . [S]ervice of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising . . . and circulated in the area where the party to be served is believed by the serving party to be located . . . .

N.C.G.S. § 1A-1, Rule 4(j1) (1990). Hargrave knew that Rowe resided in Michigan, not in North Carolina; therefore, the publication of notice in an Orange County, North Carolina, newspaper was inadequate notice under the statute. This was not a mere technicality—had social services personnel known that there was a claim by an out-of-state putative father, it is unlikely that they would have suggested issuance of the interlocutory decree prior to the expiration of the normal 90-day period for revocation of the consent to adoption. Thus, the mother's attempted withdrawal of her consent to adoption within the 90-day period after signing the consent and prior to the issuance of the interlocutory decree would have been timely.

In Judge Duncan's dissent, she stated:

> In its best light, the record in this case shows a consistent and apparently deliberate failure to adhere to the laws of this State, a failure the courts should not sanction by any remote implication. By upholding this adoption, we necessarily reward a circumvention of the law, and, from that, I dissent.
>
> . . . .
>
> I agree that procedural defects should not outweigh the best interests of the child. The procedural irregularities in this case, however, seem purposeful, and designed to facilitate—as indeed happened—a "quick" and irrevocable adoption. Rogers may not be the victim of fraud, and any single procedural aberration, looked at in isolation, may not appear to be sufficient to void the adoption. When *viewed together*, however, the defects in this case are substantial and serious enough that we set a dangerous precedent by holding that this adoption may stand in spite of them. For public-policy reasons, to say to future parties that the courts of North Carolina will not endorse conduct that suggests a child was purchased, I would reverse the order of the trial judge.

*In re Adoption of P.E.P.*, 100 N.C. App. at 206-07, 395 S.E.2d at 141-42 (emphasis in original). We agree with Judge Duncan's dissent in this case. The actions taken by Hargrave representing the adopting parents in effectuating this private adoption were totally unacceptable. This case involves more than the resolution of the issues between the parties, important as they may be. The

integrity of the judicial system is at stake, and this Court declines to place its imprimatur upon this fatally flawed adoption proceeding.

We think it appropriate to call attention to the following statement of Justice Seawell in *In re Holder*, 218 N.C. 136, 141-42, 10 S.E.2d 620, 623 (1940):

> Considering the nature and great importance of the adoption of children into the home and family in comparison with most other transactions of life, it seems to us amazing that so little regard is often paid to the vital necessity of legality. The necessary steps are easy to understand and easy to observe, and only a fair degree of attention at the right time will serve to prevent frustration, disappointment and heartbreak.

*Id.*

The procedural safeguards provided in the adoption statutes are not mere window dressing—they serve to protect the interests of the parties, the child, and the public. We hold that the statutory violations, together with numerous other irregularities, under the circumstances of this case require that the interlocutory decree be set aside and the adoption proceeding dismissed, subject only to the provisions of N.C.G.S. § 48-20(c).[2]

Reversed and remanded.

Justice WEBB dissenting.

The majority ignores the overarching purpose of Chapter 48 and exalts form over substance in its application of the statutes therein. I am convinced that the majority of the Court of Appeals correctly applied the relevant law consistent with legislative intent and adhered to the proper scope of appellate review of the trial court's findings.

The controlling, salient consideration in adoption cases is the interest of the child. As expressed by the General Assembly,

> [t]he primary purpose of this Chapter is to protect children from unnecessary separation from parents who might give them good homes and loving care, . . . and to protect them from

2. Contrary to dissenting opinion filed herewith, we do not decide the question of custody of the child. *See* N.C.G.S. § 48-20(c).

> interference, long after they have become properly adjusted in their adoptive homes[,] by biological parents who may have some legal claim because of a defect in the adoption procedure. . . . The secondary purpose of this Chapter is . . . to prevent later disturbance of [the adoptive parents'] relationship to the child by biological parents whose legal rights have not been fully protected.

N.C.G.S. § 48-1(1), (2) (1984). The Legislature also expressly provided that "[w]hen the interests of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this Chapter should be liberally construed." N.C.G.S. § 48-1(3) (1984).

In cases involving adoption issues, wide discretion is afforded the trial court, *see In re Spinks*, 32 N.C. App. 422, 428, 232 S.E.2d 479, 483 (1977), because the trial court, having the opportunity to observe the parties and evaluate the evidence, can decide what outcome is in the child's best interest. *White v. White*, 90 N.C. App. 553, 557, 369 S.E.2d 92, 97 (1988). When parties appeal from such a determination, the trial court's findings of fact are binding on the appellate court if there is evidence to support the findings. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252-53 (1984).

In determining whether to set aside the interlocutory decree, the trial court made findings of fact. The findings pertaining to the individuals, rather than to the procedural provisions of Chapter 48, should be given the most weight in determining whether living with Rowe and Rogers or with the PEPs is in the child's best interest.

The trial court found that Rogers and Rowe were not married at the time of the action and that the two

> have had a difficult relationship. Rogers decided to move from their joint residence and took their child, Benjamin, with her. Rowe tried to find her and tried to serve a summons on her in a court action. Rogers left . . . her whereabouts secret from him while she was in North Carolina. After she returned to Michigan, they engaged in a court action over Benjamin until they reached the aforementioned consent order.

The trial court also noted that the couple began cohabitating again in December 1988, when this action was filed. Further, the court found as fact that although Rowe instituted an action to legitimize Benjamin, the order did not mention the child who is the subject

of this action. The court also noted that Rowe's assertions of paternity and Rogers' assertions (made *after* entry of the interlocutory decree) were the only evidence that he is the biological father, and that prior to entry of the decree Rogers claimed that Rowe was not the father.

In contrast, the trial court found as fact that Mr. PEP earns $46,000 in his employment with the United States Environmental Protection Agency; Mrs. PEP stays at home with the child; that "the child is being well cared for by the" PEPs; that the PEPs "are fit and proper persons to have the care, custody, and control of the minor child"; and that "it is in the best interest of the minor child to remain in the care, custody and control of" the PEPs.

Based on these findings of fact, the trial court concluded that to uphold the interlocutory decree and to remain with the PEPs was in the minor child's best interest. My review of the record reveals that these findings are supported by competent evidence. Whether Rowe is the father is not certain, as the biological mother took different positions on this point at different times. Further, Rowe and Rogers cannot be said to have a stable home in which to raise the minor child; the couple argued for many months over legitimization of Benjamin before signing a consent decree, and Rogers moved from the couple's residence for seven months in the year preceding this action.

Notably, at the time the trial court made its findings of fact, the PEPs had had custody of the minor child for almost nine months. In that time, the PEPs fed, clothed, and cared for the child. The PEPs are the only parents this minor child knows. It defies reason to conclude that it is in the child's best interest now, when he is three years old, to remove him from his home, where he is well cared for, and place him with two individuals who have an obviously difficult relationship.

The majority opinion focuses not on the best interest of the child but on the purported violations of three statutes and concludes that "the statutory violations, together with numerous other irregularities, under the circumstances of this case require that the interlocutory decree be set aside." The majority cites N.C.G.S. § 48-3(a) (1990), which states that a child need not be born in this state to be adopted here, and asserts that the attorney, Hargrave, violated this statute. The majority blatantly misapplies the statute, however; the statute merely provides that a child may be adopted

here, regardless of state of birth. It follows, then, that a *violation* of this statute would occur only if an agency or a trial court prevented an adoption because the child was not born in this state. Hargrave misstated the law, but the uncontradicted evidence is that he thought Rogers in fact had to give birth in North Carolina. Clearly, misstating the law does not constitute a violation of N.C.G.S. § 48-3(a).

Another statute cited is N.C.G.S. § 1A-1, Rule 4(j1) (1990), the process provision in North Carolina Rules of Civil Procedure. As noted above, Rogers at different times gave conflicting information about the biological father's identity. If Rowe is not the father, he has no right to notice in any form.

Assuming, arguendo, that Rowe is the father, on the facts of this case a technical violation of N.C.G.S. § 1A-1, Rule 4(j1) is not of such compelling import as to justify removing the minor child from his home.

The majority writes that "Spruit [Rowe's attorney] did not accept service on behalf of Rowe." In this the majority misreads the record. The trial court in its findings of fact stated the following:

> On September 27, 1988, Hargrave wrote to Richard Spruit, Rowe's Michigan attorney, advising him that Hargrave was handling the adoption of the child, and that Hargrave had received information that Rowe has asserted that he was the father and that Pamela Rogers denied it. Hargrave indicated that he wished to serve Rowe with notice of the Petition for Adoption, and *enclosed a copy of the notice of service of process by publication*, a Denial of Paternity form and a Waiver of Rights to the Child form. (Emphasis added.)
>
> Hargrave asked Spruit if he would accept service, and if not, that he would have to serve Rowe by means of the Sheriff.
>
> On October 4, 1988, Spruit wrote Hargrave confirming receipt of the September 27, 1988 letter, and indicated that he had forwarded the information to Rowe and would respond in the future. Spruit indicated in the letter that "as of the present time, [Rowe] is certain that he is the father of the child, and will not voluntarily consent to the adoption."
>
> There is no further contact between Hargrave and Rowe until Rowe intervened in this matter. Rowe was aware of the adoption proceeding in North Craolina [sic].

These findings, which are supported by competent evidence, indicate that Rowe received notice. The record does not indicate whether Hargrave's correspondence with Spruit was by certified or registered mail, the manner of dispatch mentioned in Rule 4. There also is no evidence to indicate that Hargrave had access to Rowe's address. Spruit never informed Hargrave that Spruit would not accept service of process on behalf of Rowe; quite to the contrary, Spruit informed Hargrave that he was sending the documents (including notice of service by publication) to Rowe and that Spruit would contact Hargrave to convey Rowe's "position in this matter." In any event, Rowe had actual notice of the proceedings. In using the failure to conform to the notice provisions as one of the three crucial legs upon which its opinion rests, the majority "truly exalt[s] form over substance." *Power Co. v. Winebarger*, 300 N.C. 57, 68, 265 S.E.2d 227, 234 (1980). Where the fundamental consideration is the best interest of the child, and where actual notice exists, the prophylactic function of N.C.G.S. § 1A-1 vis-a-vis rights of potentially affected individuals does not justify removing the minor child from his home.

The third statute the majority emphasized prohibits compensation to parties involved in an adoption or, more simply stated, buying babies. The majority asserts that the trial court must look to the motives of the adopting parents and their attorney, rather than the motive of the mother.

N.C.G.S. § 48-37 provides that "[n]o person . . . shall offer or give, charge or *accept* any fee, compensation, consideration or thing of value for receiving or placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption. . . ." N.C.G.S. § 48-37 (1984) (emphasis added). The provision explicitly applies both to persons who give and who accept anything of value for receiving or placing a child for adoption. Thus, its application is bilateral, and the majority errs in suggesting that the focus should be only on the motives of the PEPs and their attorney. Notably, the statute makes no mention of motive. The prohibition clearly applies to someone in Rogers' position just as certainly as to someone in the PEPs' or Hargrave's position. In this case, it appears that both parties have violated this statutory provision. The General Assembly has provided that anyone violating the statute is guilty of a misdemeanor. Setting aside an adoption decree is not among the sanctions the Legislature ordered.

Given the bilateral nature of the violations, the proceeding was tainted on both sides. Thus, as required by Chapter 48, the compelling consideration of the best interests of the child must be determinative. I conclude that, while the conduct of Rogers, Hargrave, and the PEPs is reprehensible, the minor child's interest will be best served by allowing the child to remain in the PEPs' home. As of this writing, the child is three years old. To uproot him and separate him from his adoptive parents to place him with his biological mother, who also violated the statute by accepting the support, is nonsensical.

For the foregoing reasons, I vote to uphold the interlocutory decree.

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STATE OF NORTH CAROLINA v. WILLIAM E. TUCKER

No. 415A88

(Filed 5 September 1991)

1. **Criminal Law § 113 (NCI4th)— murder—discovery—failure to comply—sanctions refused**

The trial court did not abuse its discretion by denying sanctions for alleged discovery violations by the State in a murder prosecution where a discovery order was entered and defendant objected at trial to the introduction of evidence that he considered to have been withheld from him in violation of the discovery order. There was no element of unfair surprise in defendant's being belatedly apprised of the serology and fingerprint test results; there was no evidence of bad faith on the part of the State in its compliance with the trial court's discovery order; and close examination of the forensic evidence belies defendant's contention that the evidence could have eroded the credibility of a State's witness and provided an inference that he, not defendant, had murdered the victim.

**Am Jur 2d, Depositions and Discovery §§ 426, 427.**

2. **Constitutional Law § 252 (NCI4th)— murder—motion for appointment of expert—denied—no error**

The trial court did not err in a murder prosecution by denying defendant's motion for appointment of a hair, blood,

and fingerprint expert where the trial court properly concluded that the matter subject to expert testimony was not likely to be a significant factor in the defense and that defendant did not make a showing of particularized need.

**Am Jur 2d, Criminal Law § 719.**

**Right of indigent defendant in state criminal case to assistance of fingerprint expert. 72 ALR4th 874.**

**Right of indigent defendant in criminal case to aid of state by appointment of investigator or expert. 34 ALR3d 1256.**

3. **Criminal Law § 55.1 (NCI3d)— nontestimonial identification order—witness's hair—denied**

The trial court in a murder prosecution properly denied defendant's motion for a nontestimonial identification order for samples of a witness's hair. Although N.C.G.S. § 15A-281 enables a defendant to request that a nontestimonial identification order be conducted upon himself, no statute gives a defendant the right to request such an order directed against potential witnesses or any other individual.

**Am Jur 2d, Depositions and Discovery §§ 403, 447, 449.5.**

4. **Homicide § 30 (NCI3d)— first degree murder—no instruction on lesser offense—no error**

The trial court did not err in a first degree murder prosecution by failing to instruct the jury on second degree murder where there was no evidence to support a verdict of second degree murder. The evidence to which defendant points was evidence of defendant's innocence of homicide or evidence which, in light of all the evidence, tends to reinforce the proposition that the killing was premeditated and deliberated.

**Am Jur 2d, Homicide § 530.**

5. **Criminal Law § 46.1 (NCI3d)— flight—evidence sufficient—instruction properly given**

The trial court did not err in a murder prosecution by giving an instruction on flight where the jury heard evidence that defendant had shaved off a beard and mustache within two days of the murder, that police began looking for him two months later, and that he was not found until three years after the murder, in Texas. It was for the jury to decide

whether the facts supported the State's contention that defendant had fled.

**Am Jur 2d, Evidence §§ 228, 280, 281, 1128.**

6. **Criminal Law § 728 (NCI4th)— murder—instructions—balance of contentions—no error**

The trial court did not err in its instructions in a murder prosecution by not stating defendant's contentions on flight because defendant did not request such an instruction and there was no evidence offered by defendant on his absence explaining it other than as flight. If defendant wished the court to give his contention, it was his duty to say what it was and request it.

**Am Jur 2d, Evidence § 228; Trial §§ 1081, 1333-1335.**

7. **Criminal Law § 60.5 (NCI3d)— fingerprints—sufficiency of evidence to support instruction**

The trial court did not err in its instruction on fingerprints in a murder prosecution where the evidence of defendant's fingerprints was pertinent to the credibility of the witnesses who testified against him.

**Am Jur 2d, Evidence § 1144.**

8. **Criminal Law § 1215 (NCI4th)— armed robbery—mitigating factors—lack of criminal record—not found—no error**

The trial court did not err when sentencing defendant for armed robbery in a prosecution for murder and armed robbery by failing to find in mitigation that defendant had no criminal record where the State had introduced at the capital sentencing proceeding the testimony of a Connecticut police officer that defendant had been convicted in that state of two armed robberies but the court struck the testimony because the documentation was defective; no other evidence of defendant's criminal record was presented by the State or by defendant; and the jury found as a mitigating circumstance that defendant had no significant history of prior criminal conduct. A trial court imposing a sentence under the statutes governing felony sentencing is not required to find the same mitigating factors found by the jury in the capital case, and the burden of proving a mitigating factor is upon defendant alone.

**Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552, 554.**

**9. Criminal Law § 1135 (NCI4th)— armed robbery—aggravating factors—position of leadership—inducement of others—evidence of both sufficient**

The trial court did not err when sentencing defendant for armed robbery by finding as two separate aggravating factors that defendant occupied a position of leadership and that he induced others to commit crimes. Defendant induced criminal action by his accomplices and assumed a position of leadership at different times, and those circumstances were supported by different actions and expressions.

**Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552, 554.**

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a conviction of murder in the first degree and a judgment imposing a sentence of life imprisonment entered by *Lamm, J.*, at the 16 May 1988 Criminal Session of Superior Court, CATAWBA County. Motion to bypass Court of Appeals as to defendant's armed robbery conviction and sentence allowed 19 December 1988. Heard in the Supreme Court 9 October 1989.

*Lacy H. Thornburg, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.*

EXUM, Chief Justice.

Defendant was indicted on 6 August 1984 for the first-degree murder of Melissa Rowe and on 2 December of the following year for robbery with a dangerous weapon perpetrated at the same time as the murder. After defendant's conviction by a jury of both crimes, a capital sentencing proceeding was conducted. The jury recommended and the trial court imposed a sentence of life imprisonment in the murder case. The trial court sentenced defendant to a consecutive term of forty years' imprisonment for the armed robbery. Our review of the record of defendant's trial reveals that it was conducted without reversible error.

I.

Evidence presented by the State tended to show that the following events took place in Catawba County on Easter weekend 1984:

Shortly before midnight on 21 April 1984, Catawba County Sheriff's officers found the body of Melissa Rowe in the bedroom of a mobile home. An autopsy later revealed that the victim had suffered multiple lacerations from a knife. The pathologist identified one laceration across the throat as the probable cause of her death.

On Friday evening, 20 April 1984, Randy Setzer, Barry Shuemaker, and defendant, among others, consumed cocaine throughout the night. At approximately 7:30 a.m. Saturday, Carolyn Raper drove defendant and Setzer to the trailer where the victim resided. Initially, Setzer entered alone to buy cocaine, but when the victim began having convulsions, Setzer called Raper and defendant to come in. Eventually Rowe revived sufficiently to bring a large bag of cocaine from the bedroom and to parcel out a small portion, which she gave to Setzer. Raper drove Setzer and defendant to a motel room occupied by Tony Isenhowr.*

Shuemaker introduced Isenhowr to defendant Saturday evening in the motel parking lot. The three went to Rowe's mobile home, where Isenhowr entered with defendant. Defendant bought a gram of cocaine from Rowe. The three drove to a rest area, where they injected the cocaine. Isenhowr heard defendant say that "he may have to hurt her." Isenhowr protested but was reassured by the others, and the three went back to Rowe's mobile home.

When they arrived—around 10:30 p.m.—Isenhowr again accompanied defendant into the mobile home. Shuemaker remained in the car with the engine running. Rowe came to the door and told Shuemaker to come in too, for she was on the phone. When she hung up, she invited the three to "free base" cocaine with her. Presently, after talking prices and quantities, defendant, picking up a butcher knife, followed Rowe into the bedroom. After twenty or thirty seconds a commotion broke out, and the victim hollered, "No, don't, no, don't." Shuemaker went out the front door. Isenhowr followed, but was hit at the door by a bag of cocaine thrown by defendant, who told him to take it to the car. Bending down to pick up the bag, Isenhowr saw defendant "swinging at Miss Rowe and hitting her" with a knife. She was bleeding from wounds in her face and saying "no, don't, stop it, don't do this,

* This name is spelled "Isenhour" in the parties' briefs and "Isenhowr" in the transcript. We adopt the transcript spelling.

just take it, they'll kill you." Isenhowr went to the car, where he and Shuemaker waited for ten or fifteen minutes. Defendant came out, holding up his bloody hands and arms. At defendant's direction, Isenhowr let defendant into the car trunk. He then drove to a mobile home belonging to Terry Barry, with whom defendant had been staying, and got a change of clothes. Remarking on the blood on defendant as he emerged from the trunk, Isenhowr asked what had happened. Defendant answered: "The bitch wouldn't shut up so I cut her fucking throat, I shut her up." Defendant washed off in a lake and changed clothes. Isenhowr, Shuemaker, Barry, and defendant drove to a pull-off, burned the bloody clothes, and then drove to Isenhowr's motel room, where they injected more cocaine and divided the cocaine they had taken from Rowe.

An SBI Special Agent removed the interior and exterior doorknobs of Rowe's mobile home and sent them to the lab for processing. He had observed what tests later proved to be a smear of the victim's blood on the knob. He chose not to lift the prints he perceived on one of the knobs in the event they had been made in blood.

Latent prints corresponding to those of defendant were found on a soda pop can and bottle found in Rowe's mobile home and on a glass from the bedroom where her body was found. Two latent prints on the interior doorknob were Isenhowr's; nothing corresponding to defendant's prints was on either the interior or exterior doorknob.

II.

**[1]** Defendant first argues that the trial court erroneously denied his pretrial motion for an expert in fingerprint, hair, and blood analysis and for a nontestimonial identification order to obtain the hair of Shuemaker. This argument is closely related to defendant's contention that the trial court erred in refusing to issue sanctions against the State for discovery violations.

Within a week of the victim's death, hair samples from the crime scene and the interior and exterior doorknobs were submitted to the State Bureau of Investigation for analysis. Beyond identifying the blood on the doorknob and other stained items as being consistent with that of the victim, the report deferred further analysis, particularly of the hair samples, for a time when known samples from one or more suspects would be available. The record

does not reflect when this report was released to the office of the district attorney; but a follow-up report, dated 16 May 1988, finding no match between the crime scene hair samples and samples from Isenhowr, was not delivered to the SBI supervisor until 18 May 1988. Defendant was given both reports the same day.

Defendant had first moved on 15 October 1987 for an order allowing him to inspect the physical evidence in the State's custody and to review test analyses. The trial court deferred ruling on the motion until the State had had an opportunity to examine the file and to decide whether to permit open file discovery.

In response to a 15 February 1988 motion to dismiss alleging the State's failure to provide discovery, the State sent defendant a letter the next day granting him open file discovery.

On 23 February 1988 the trial court noted that the prior order had not compelled discovery, but had deferred ruling on the matter. The court then denied defendant's motion to dismiss, entering a full order of discovery in response to defendant's 15 October 1987 motion. The order directed the district attorney

> [to] permit the defendant through counsel to inspect and copy or photograph any relevant written or recorded statements made by the defendant or copies thereof within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may be known to the pro[s]ecutor and . . . to divulge knowledge, [in] written or recorded form the substance of any oral statement relevant to the subject matter of the case made by the defendant regardless of to whom the statement was made within the possession, custody, control of the state the existence of which is known to the prosecutor or become[s] known to him prior to or during the course of trial . . . ; the prosecutor further and is herein ordered to permit the defendant, through his attorneys, to inspect and copy or photograph books, papers, documents, photographs, mechanical or electronic recordings, buildings and places or any other crime scene tangible objects which are within the possession, custody, or control of the state and which are material to the preparation of his defense or intended for use by the state as evidence at the trial or were obtained from or belonged to defendant.

The order required the State to allow defendant similarly to examine the evidence of physical or mental tests or experiments performed in connection with the case, and to be in compliance with its provisions within ten days. The court told defendant that he could have no more than the statute required regarding the statements of the State's witnesses—a copy when the witness testified. To the State's expression of concern that certain lab tests were not yet complete and their results might not be known within ten days, the court responded: "If you've got it, you've got . . . to give it to him." The court subsequently admonished defendant, "This is a two-way street. This doesn't require you to sit back and have him come to you. I have ordered precisely what the statute allows. Gives you an opportunity to see and copy. They're under no obligation to provide you with a thing."

Defendant next moved on 7 April 1988 for an expert to review hair, blood, and fingerprint evidence and to dismiss or continue the action. These motions and a 9 April motion for a nontestimonial identification order for Shuemaker's hair were denied 16 May 1988. The court refused to order funds for an expert, "finding that the defendant has not cited any particularized need." In addition, the court intimated that defendant, who had known about the nature of the evidence at least since December 1987, had been dilatory in not presenting the motion for an expert to the court before 7 April.

Much later in the trial, defendant again twice objected to the introduction of evidence that he considered to have been withheld from him in violation of the discovery order. His objections were overruled.

Discovery procedures are authorized by article 48, chapter 15A of the General Statutes. The purpose of these procedures is to protect the defendant from unfair surprise. *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990), *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 1062 (1991); *State v. Alston*, 307 N.C. 321, 331, 298 S.E.2d 631, 639 (1983). Whether a party has complied with discovery and what sanctions, if any, should be imposed are questions addressed to the sound discretion of the trial court. *State v. Weeks*, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988). "[The] discretionary rulings of the trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the state in its noncompliance with the discovery requirements." *State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d

41, 49 (1986). "The choice of which sanction to apply, if any, rests in the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion." *State v. Gladden*, 315 N.C. 398, 412, 340 S.E.2d 673, 682, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

The record and transcript of defendant's trial bear no indication that the trial court abused its discretion in refusing to dismiss or continue the action. First, there was no element of unfair surprise in defendant's being belatedly apprised of the serology and fingerprint test results. Defendant had been allowed funding for a private investigator to help him prepare his defense on 26 October 1987, and he had known about the general nature of the forensic evidence since December of that year. Although defendant received these test results just before the jury was to be impaneled, there was nothing unfairly surprising about their contents, for the results were not in the least inculpatory.

Second, there is no evidence of bad faith on the part of the State in its compliance with the trial court's discovery order of 23 February 1988. When the order was issued, the State explained that it did not yet have the results of laboratory tests. When the hair sample test results became available, they were delivered to defendant within two days of their release by SBI technicians. We conclude that the trial court's refusal to issue discovery sanctions was based upon a reasonable appraisal of the facts before it. We perceive no abuse of the trial court's discretion in denying sanctions for alleged discovery violations.

Third, defendant invites this Court to speculate that the blood on the doorknob was the substance into which Isenhowr's fingerprints had been impressed, evidence which suggests that Isenhowr had left the trailer after the doorknob had been smeared with the victim's blood. Defendant argues that this could have eroded Isenhowr's credibility at trial and provides an inference that it had been he, not defendant, who had murdered Rowe.

Close examination of the forensic evidence belies these contentions. The State's fingerprint expert testified that latent fingerprints left in blood are difficult to obtain with fingerprint powder, but the only difficulty she had removing Isenhowr's prints was due solely to the rounded shape of the knob. The SBI Special Agent who seized the knob testified "the blood smear was in one location, and the fingerprint and the latent impressions were in another location."

**[2]** We hold also that the trial court did not err in denying defendant's motion for appointment of a hair, blood, and fingerprint expert. The trial court observed that, although the reports of latent fingerprint comparisons showed similarity to defendant's prints, the blood and hair reports had revealed no evidence linking defendant to the crimes charged and that it was the State's intention to introduce the testimony of witnesses who had been present during the perpetration of those offenses. The trial court concluded

> that . . . defendant . . . has made no showing of a particularized need for such assistance, that the matters subject to expert testimony are likely to be significant factors in his defense, that he will be deprived of a fair trial without such expert assistance, or that there is a reasonable likelihood that such expert assistance will materially assist him in the preparation of his defense.

These conclusions accurately articulate the requisite showing for an indigent defendant to charge the costs of expert assistance to the State. The statutory requirement that the State provide an indigent defendant with the "necessary expenses of representation," N.C.G.S. § 7A-450(b) (1989), includes the assistance of experts only upon a showing that a defendant will be deprived of a fair trial without such assistance or that there is a reasonable likelihood that it will materially assist him in the preparation of his defense. *E.g., State v. Johnson*, 317 N.C. 193, 198, 344 S.E.2d 775, 778 (1986). *See also* N.C.G.S. § 7A-454 (1989) (trial court has discretion to approve a fee for services of expert witnesses testifying for an indigent defendant).

The right to the assistance of a state-funded expert is rooted in the Fourteenth Amendment's guarantee of fundamental fairness and the principle that an indigent defendant must be given a fair opportunity to present his defense. *Ake v. Oklahoma*, 470 U.S. 68, 76, 84 L. Ed. 2d 53, 61 (1985). The Supreme Court in *Ake* held that a defendant is entitled to such assistance when he has made "a preliminary showing" that the matter calling for expert assistance "is likely to be a significant factor at trial." *Id.* at 74, 84 L. Ed. 2d at 60. Our cases interpreting *Ake* have consistently reiterated that defendant's "*ex parte* threshold showing" must reveal that the matter subject to expert testimony is "likely to be a significant factor" in the defense. *State v. Moore*, 321 N.C. at 344, 364 S.E.2d at 656-57 (quoting *Ake*, 470 U.S. at 82, 84 L. Ed. 2d

at 60). "[U]nless the defendant 'makes a threshold showing of specific necessity for the assistance of the expert' requested," an expert need not be provided. *State v. Moore*, 321 N.C. 327, 335, 364 S.E.2d 648, 652 (1988) (quoting *State v. Penley*, 318 N.C. 30, 51, 347 S.E.2d 783, 795 (1986)). Whether the showing has been made must be judged by the circumstances known to the trial court at the time defendant's request is made. *State v. Moore*, 321 N.C. at 344, 364 S.E.2d at 657.

Unlike cases in which evidence linking the defendant to the offense was entirely circumstantial and one important circumstance was inculpatory fingerprints, *e.g.*, *State v. Bridges*, 325 N.C. 529, 385 S.E.2d 337 (1989); *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648, the case against defendant here was based largely on eyewitness testimony, a fact noted in the trial court's order. Under these circumstances, the trial court properly concluded that the matter subject to expert testimony was not likely to be a "significant factor" in the defense. *State v. Moore*, 321 N.C. at 344, 364 S.E.2d at 657.

In addition, the trial court stated in its order that defendant had made no showing of a "particularized need" for the assistance of a fingerprint expert. Defendant's written motion was conclusory, stating only that the State intended to offer fingerprint and blood identification evidence and that examination by his own experts was "essential to the preparation of an adequate defense." Like "undeveloped assertions that the requested assistance would be beneficial," *State v. Hickey*, 317 N.C. 457, 469, 346 S.E.2d 646, 654 (1986) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 323, n.1, 86 L. Ed. 2d 231, 236, n.1 (1985)), undeveloped assertions that the requested assistance would be "essential" to preparing an adequate defense fall short of the required "threshold showing of specific necessity" for expert assistance.

In presenting this motion orally at the 16 May 1988 hearing, defendant added that the assistance of experts was necessary to impeach the testimony of Isenhowr and Shuemaker because "the State's version will be the testimony essentially of the two co-defendants against [defendant], the question of whether these were in fact the fingerprints of [defendant] and [Isenhowr] and their various locations, [and] the age of the fingerprints, for example, would be critical to the jury in determining who[m] to believe in this case."

We have held that "[m]ere hope or suspicion" of the availability of certain evidence that might erode the State's case or buttress

a defense will not suffice to satisfy the requirement that defendant demonstrate a threshold showing of specific necessity for expert assistance. *State v. Tatum*, 291 N.C. 73, 82, 229 S.E.2d 562, 568 (1976). Nor will a "general desire to search for possible evidence which might be of use in impeaching" a key witness for the State suffice as a "significant factor" in the defense so as to justify the appointment of an expert. *State v. Hickey*, 317 N.C. at 469, 346 S.E.2d at 654.

We hold that, under this Court's interpretation of the rights of an indigent defendant under the federal and North Carolina Constitutions and under the laws of this State, the trial court correctly concluded that defendant had failed to make the requisite showing of need for a hair, blood, and fingerprint expert.

**[3]** Defendant's assignments of error concerning the trial court's refusal to issue a nontestimonial identification order for samples of Shuemaker's hair are likewise without merit. In support of this motion defendant had stated that "[a] positive comparison [of the hair at the crime scene] with Isenhowr['s] or Shuemaker's hair would show they are not telling the truth" and that such a comparison would show that one of them had killed the victim and that defendant was innocent. Among its stated reasons for denying defendant's motion for this nontestimonial order, the trial court concluded not only that defendant's logic was "faulty" in this reasoning, but also that defendant had made "no further showing of any particularized need for the nontestimonial identification procedures."

A judge may issue a nontestimonial identification order upon the request of a prosecutor. N.C.G.S. § 15A-271 (1988). The order is a creature of, and its issuance strictly regulated by, statute. This statute is among those codified in article 14 of chapter 15A, which this Court has noted "applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial." *State v. Welch*, 316 N.C. 578, 585, 342 S.E.2d 789, 793 (1986) (quoting *State v. Irick*, 291 N.C. 480, 490, 231 S.E.2d 833, 840 (1977)). A prosecutor requesting such an order must present an affidavit showing probable cause to believe an offense punishable for more than one year has been committed, reasonable grounds to suspect that the person named or described in the affidavit committed the offense, and that the results of specific procedures will be of material aid

in determining whether the person named in the affidavit committed the offense. N.C.G.S. § 15A-273 (1988).

Although the applicable statute enables a defendant to request that a nontestimonial identification order be conducted upon himself if this will aid materially in determining whether he committed the offense, N.C.G.S. § 15A-281 (1988), no statute gives a defendant the right to request such an order directed against potential witnesses against him or against any other individual. One good reason for the absence of such a provision is its potential for such abuse as intimidating witnesses. *See, e.g., State v. Clontz*, 305 N.C. 116, 119-20, 286 S.E.2d 793, 795 (1982); *State v. Looney*, 294 N.C. 1, 28, 240 S.E.2d 612, 627 (1978).

We hold the trial court properly denied defendant's motion for a nontestimonial identification order directed against the witness Shuemaker, not for the reasons it stated, but because there is no statute or other authorization for such an order.

III.

Defendant raises three issues regarding the trial court's instructions to the jury.

**[4]** First, defendant contends the trial court erred in failing to instruct the jury on second-degree murder. The State prosecuted defendant on theories of premeditated and deliberated murder and felony murder, and he was convicted of first degree murder on both theories.

The trial court is required to instruct on a lesser included offense only when there is *evidence* to support a verdict finding the defendant guilty of such lesser offense. When no evidence supports a lesser included offense, the trial court has no duty to instruct the jury on such offenses. *E.g., State v. Hickey*, 317 N.C. at 470, 346 S.E.2d at 655.

We find no evidence in the record to support a verdict of second-degree murder. The fingerprint and blood smear on the doorknob did not provide such evidence, even though defendant continues to speculate here, as he argued to the jury, that they *might* have demonstrated that Isenhowr, not defendant, actually killed Rowe. Even if such evidence tends, as defendant argues, to exculpate him, this is evidence not of second-degree murder

but of defendant's innocence of homicide other than on a felony murder theory.

Defendant next suggests that his statement, "The bitch wouldn't shut up so I cut her fucking throat," is evidence the killing was not premeditated or deliberated and his intent to kill was formed in the heat of his struggle with the victim. *See, e.g., State v. Misenheimer*, 304 N.C. 108, 113-14, 282 S.E.2d 791, 795-96 (1981).

In light of all the evidence presented, we conclude this statement by defendant is insufficient to support a verdict of second-degree murder. Shuemaker testified that defendant picked up a butcher knife from the counter as he followed the victim into her bedroom. Isenhowr testified that he saw defendant "strike" the victim once in the head. Defendant's exclamation when considered with this evidence tends to reinforce the proposition that the killing was cold and calculated, premeditated and deliberated, and done with the required specific intent to kill.

**[5]** The second jury instruction with which defendant takes issue was the trial court's charge that "evidence of flight, considered with other facts and circumstances, may be considered . . . in determining whether [these] amount to admission or show a consciousness of guilt." Defendant contends there was no direct evidence that he "fled" to Texas, where he was apprehended more than three years after the stabbing. He adds that the trial court failed to balance the State's contentions on flight with defendant's contentions and the instruction amounted to an expression of opinion by the trial court about the case.

Defendant's argument regarding the trial court's instruction on flight is meritless. The jury heard evidence that defendant had shaved off a beard and mustache within two days of the murder, that police began looking for him two months later, and that he was not found until three years after the murder—in Texas. "[F]light from a crime shortly after its commission is admissible as evidence of guilt," *State v. Self*, 280 N.C. 665, 672, 187 S.E.2d 93, 97 (1972), and a trial court may properly instruct on flight "[s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after the commission of the crime charged," *State v. Greene*, 321 N.C. 594, 607, 365 S.E.2d 587, 595 (quoting *State v. Irick*, 291 N.C. at 494, 231 S.E.2d at 842), *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). We hold the record in this case includes such evidence.

Moreover, it was for the jury to decide whether these facts, taken together with other facts and circumstances, supported the State's contention that defendant had fled. The trial court appropriately told the jury it could consider evidence of flight. The court accurately identified the contention that defendant had fled as that of the State.

**[6]** Nor is the statement of a valid contention based on competent evidence an expression of judicial opinion. *State v. Virgil*, 276 N.C. 217, 230, 172 S.E.2d 28, 36 (1970). The trial court is not required by N.C.G.S. § 15A-1232 nor was it required by the predecessor statute, N.C.G.S. § 1-180, to state the contentions of the litigants. *State v. Dietz*, 289 N.C. 488, 499, 223 S.E.2d 357, 364 (1976). The trial court bears an implicit duty only "to give equal stress to the State and defendant in a criminal action," a requisite repealed by 1977 N.C. Sess. Laws ch. 711, § 1, but nonetheless still "imposed on the judge by general requirements of fairness to the parties." N.C.G.S. § 15A-1232 official commentary (1988). *See State v. Hewett*, 295 N.C. 640, 643-44, 247 S.E.2d 886, 888 (1978).

In this case the trial court did not state defendant's contentions regarding his absence because there was no evidence offered by defendant explaining it as other than flight, and defendant did not request such an instruction. In a bench conference regarding the court's intended instructions, defendant merely objected to the State's interpretation of his absence from this jurisdiction as flight; he offered no alternative explanation for that absence and did not request that the jury be instructed regarding such an explanation. If defendant wished the court to give his contention under those circumstances, it was his duty to say what it was and request it. *State v. Self*, 280 N.C. at 672, 187 S.E.2d at 97.

The instructions on flight were proper and revealed neither trial court bias nor opinion about the case. *Id.* at 673, 187 S.E.2d at 98.

**[7]** Third, defendant assigns error to this portion of the trial court's instruction regarding his fingerprints:

> [I]f you find beyond a reasonable doubt that fingerprints corresponding to those of the defendant were lifted from the scene of the alleged crime, whether or not you find that they were impressed at the time the crimes were committed you may, nevertheless, consider this evidence as it may bear on the truthfulness of a witness together with all other facts

> and circumstances bearing upon that witness' truthfulness in deciding whether you will believe or disbelieve that witness' testimony at this trial.

Defendant avers that if the jury believed his fingerprints were left on the first of the three occasions he visited the victim's trailer, then the evidence would have been irrelevant and an instruction thereon improper.

On the contrary, if the jury believed that defendant's fingerprints were left from his first visit, this would have reflected on the credibility of Raper's testimony. If it believed they were left from defendant's second visit, this would have reflected upon the credibility of the testimony of Isenhowr. If the jury believed the fingerprints were left from defendant's last visit, they bore upon the credibility of both accomplices. Evidence of defendant's fingerprints—whether they were left at any of these three visits to the trailer in which the victim lived—was pertinent regarding the credibility of any of the witnesses who testified against him.

Defendant's arguments on appeal regarding the trial court's instructions on fingerprints appear to be grounded in cases in which circumstantial evidence linking a fingerprint to the corpus delicti was held to be insufficient to withstand a motion for nonsuit. *See, e.g., State v. Palmer*, 230 N.C. 205, 52 S.E.2d 908 (1949). The question before us is the admissibility of fingerprint evidence for corroboration purposes.

> It is well established that evidence of the correspondence of fingerprints given by an expert is admissible on the question of identity. The admissibility of such evidence is consistent with the rule of relevance which permits the introduction of any evidence which "has any logical tendency, however slight, to prove a fact at issue in the case."

*State v. Banks*, 295 N.C. 399, 411-12, 245 S.E.2d 743, 751-52 (1978). Because fingerprint evidence is relevant and thus admissible to corroborate the testimony of a prosecuting witness, we hold that this instruction, like that on flight, was a correct statement of the law and was supported by evidence before the jury.

IV.

**[8]** With regard to his sentence for robbery with a dangerous weapon, defendant first contends that the trial court erred in failing

to find as a mitigating factor that defendant had no criminal record, N.C.G.S. § 15A-1340.4(a)(2)a (1988).

Under the provisions governing felony sentencing applicable to the circumstances of this case, the sentencing court may consider any aggravating or mitigating factors found to be "proved by the preponderance of the evidence, and . . . reasonably related to the purposes of sentencing." N.C.G.S. § 15A-1340.4(a) (1989). It is error for the trial court not to find a particular mitigating factor when evidence supporting it is "uncontradicted, substantial, and there is no reason to doubt its credibility." *State v. Daniel*, 319 N.C. 308, 312, 354 S.E.2d 216, 218 (1987) (quoting *State v. Jones*, 309 N.C. 214, 218-19, 306 S.E.2d 451, 454 (1983)). The burden is on defendant to prove the existence of a mitigating factor by a preponderance of the evidence. *E.g.*, *State v. Canty*, 321 N.C. 520, 523, 364 S.E.2d 410, 413 (1988).

In the capital sentencing proceeding, the State introduced the testimony of a Connecticut police officer that defendant had been convicted in that state of two armed robberies as proof of the aggravating circumstance that defendant had prior convictions for felonies involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3) (1988). Because documentation of this criminal history was defective, the trial court struck the officer's testimony and instructed the jury to disregard it. No other evidence of defendant's criminal record was presented, either by the State or by defendant himself. The jury's recommendation as to punishment in the capital phase of defendant's trial included finding as a mitigating circumstance that defendant had no significant history of prior criminal activity.

Imposing a sentence for armed robbery exceeding the statutory presumptive term, the trial court did not find the analogous mitigating factor under the felony sentencing statutes, N.C.G.S. § 15A-1340.4(a)(1)o (1988).

The trial court did not err. A trial court imposing a sentence under the statutes governing felony sentencing is not required to find the same mitigating factors found by the jury in the sentencing phase of the capital case. *State v. Avery*, 315 N.C. 1, 36-37, 337 S.E.2d 786, 806 (1985). The sentencing court must find a mitigating factor when the evidence is uncontradicted, substantial, and manifestly credible. *State v. Holden*, 321 N.C. 689, 695, 365 S.E.2d 626, 629 (1988). The burden of proving a mitigating factor is upon defend-

ant alone, however, and this he must do by a preponderance of the evidence. *E.g., State v. Parker*, 315 N.C. 249, 255, 337 S.E.2d 497, 500 (1985). Given defendant's failure to carry his burden of persuasion, we hold that the decision of the trial court not to consider defendant's criminal record as a factor in mitigation of his sentence was proper.

**[9]** Second, defendant contends that the trial court erred in finding as two separate aggravating factors that defendant occupied a position of leadership and that he induced others to commit crimes. *See* N.C.G.S. § 15A-1340.4(a)(1)a (1988). This Court has held that both the fact that a defendant induced others to commit a crime *and* his position of leadership may be found as separate, independent factors in aggravation of his sentence "so long as there is separate evidence to support each." *State v. Erlewine*, 328 N.C. 626, 638, 403 S.E.2d 280, 287 (1991). Both Isenhowr and Shuemaker testified that it was defendant who proposed that the three go to the victim's trailer in order to steal her cocaine, evidence that supports the trial court's finding that defendant induced others to participate in that offense. Both Shuemaker and Isenhowr testified in addition that defendant entered with Isenhowr, leaving Shuemaker in the car until the victim invited him in, then initiated and completed the actual theft and murder, supported in only minor ways by his accomplices, whose actions he directed throughout the crime and its aftermath. Defendant induced criminal action by his accomplices and assumed a position of leadership in the enterprise at separate times, and these circumstances were each supported by different actions and expressions preserved in the record. The trial court therefore properly considered and found both prongs of this statutory aggravating factor.

For the foregoing reasons we hold that both the guilt and noncapital sentencing phases of defendant's trial were conducted without error.

No error.

CALEY EUGENE ALBERTI AND LINDA HAGGINS ALBERTI v. MANUFACTURED HOMES, INC., D/B/A AAA MOBILE HOMES AND BRIGADIER HOMES, INC.

No. 371PA89

(Filed 5 September 1991)

1. **Uniform Commercial Code § 23 (NCI3d)— mobile home—revocation of acceptance against manufacturer—no contractual relationship**

Plaintiffs were not entitled to revoke acceptance of a mobile home against the manufacturer where there was no direct contractual relationship between the parties. Except in the case of self-propelled vehicles for which the statute expressly provides otherwise, the existence of a direct contractual relationship between buyer and seller is generally a prerequisite to the right of a buyer to revoke acceptance against the seller. N.C.G.S. § 25-2-608.

**Am Jur 2d, Sales § 1195.**

2. **Sales § 8 (NCI3d)— mobile home sale—breach of warranty—action against manufacturer**

Plaintiffs could pursue a breach of warranty claim against a manufacturer where the manufacturer made representations concerning the flooring in its homes to the seller in a conference held for the purpose of highlighting the attributes of its products and enabling the seller to pass the information along to consumers to induce purchases of the homes. Furthermore, the breach of warranty issue was sufficiently presented to the jury. N.C.G.S. § 25-2-313.

**Am Jur 2d, Sales §§ 724, 733.**

3. **Uniform Commercial Code § 26 (NCI3d)— mobile home—breach of warranty—damages—difference in value**

The trial court erred in an action for breach of warranty arising from the sale of a mobile home by awarding damages which amounted to an estimate of the cost of repairs, rather than the difference between the value of the mobile home as warranted and its value as accepted. The facts tending to show liability were not so entwined with those tending

to show damages that defendant would be prejudiced by having the damages issue tried alone.

**Am Jur 2d, Sales §§ 1299, 1303.**

4. **Appeal and Error § 422 (NCI4th)— notice of appeal—affirmative relief sought—no appellant's brief—questions not preserved**

Plaintiffs did not preserve for appellate review issues regarding attorney fees, treble damages, and the award of interest where they gave a proper notice of appeal, did not file an appellant's brief within the time allowed, and attempted to argue the issues in their appellee's brief. Plaintiffs were not entitled to cross-assign error in their appellee's brief on these issues because they were seeking affirmative relief in the appellate division rather than arguing an alternative basis in law for supporting the judgment. N.C. Rules of App. P. 10(d).

**Am Jur 2d, Appeal and Error §§ 650, 665, 698.**

Justice MEYER concurring in part and dissenting in part.

Justice MITCHELL joins in the concurring and dissenting opinion.

ON discretionary review of a unanimous decision by the Court of Appeals, 94 N.C. App. 754, 381 S.E.2d 478 (1989), reversing in part and affirming in part judgment entered on 3 March 1988, and vacating an amendment to the judgment entered on 9 June 1988, by *Barefoot, J.*, in Superior Court, NEW HANOVER County. Heard in the Supreme Court 11 April 1990.

*Poisson, Barnhill & Britt, by James R. Sugg, Jr., for plaintiff-appellants.*

*Murchison, Taylor, Kendrick, Gibson & Davenport, by Vaiden P. Kendrick and John L. Coble, for defendant-appellee Brigadier Homes, Inc.*

EXUM, Chief Justice.

Plaintiffs, who are consumers, purchased from defendant retailer a mobile home produced by defendant manufacturer. The floor of the home did not conform to certain representations made about it. We must consider what remedies, if any, are available to plain-

tiffs under the Uniform Commercial Code against defendant manufacturer, with whom plaintiffs had no direct dealings. We conclude plaintiffs have a remedy for breach of warranty made by the manufacturer, but the remedy of revocation of acceptance against the manufacturer is unavailable.

I.

Evidence at trial tends to show the following:

Plaintiffs were interested in purchasing a mobile home from defendant AAA Mobile Homes, a retailer ("AAA" or "the retailer"). They emphasized to AAA's branch manager Lowell Bockert that they desired plywood flooring because they had previously had trouble with particle board flooring. Bockert assured them that the double wide Caprice model manufactured by defendant Brigadier ("Brigadier" or "the manufacturer") had flooring made of a new material called "Novadeck" which was a waterproof, tongue-and-grooved plywood thicker and stronger than particle board. While Bockert was showing Mr. Alberti the Caprice home, they tried to examine the flooring to ascertain its type but could not get the carpet up without damaging it. Rather than calling in a serviceman to check the floor, plaintiffs trusted Bockert's representations about it. In August 1984, they purchased the Brigadier Caprice home from AAA for $32,600, making a $10,000 down payment and financing the balance of the purchase price through CIT Financial Services. Plaintiffs received a one-year manufacturer's limited warranty covering defects in material and workmanship.

At trial, Bockert claimed to base his representations about the unit's flooring on information given him some time earlier by Brigadier's sales representative Donald Phillips. Phillips allegedly described the Novadeck flooring system during a conference, when he highlighted the attributes of Brigadier merchandise so that AAA could pass along this information to customers and thereby facilitate sales of Brigadier products. Several witnesses corroborated Bockert's testimony that Phillips made these representations to him.

At trial, Phillips admitted having met with Bockert, but denied representing to him that the Caprice's floor was made of Novadeck; that it was stronger or thicker than particle board; or that it was waterproof.

Shortly after occupying their new Brigadier Caprice home in 1984, plaintiffs discovered their hot water heater was leaking. A

service representative from Brigadier examined the area and told plaintiffs that the flooring was made out of particle board. Because of water damage to the utility room floor, a washing machine leg fell through. Plaintiffs also claimed to discover over thirty other defects.

After discussing problems about their home several times with agents of the retailer AAA and the manufacturer Brigadier, plaintiffs on 25 April 1985 gave both AAA and Brigadier notice that they were revoking acceptance of the mobile home. They subsequently filed suit, seeking to enforce this revocation and to recover damages for breach of warranty. Plaintiffs later amended their complaint, seeking treble damages for unfair and deceptive acts or practices in or affecting commerce under Chapter 75 of the North Carolina General Statutes.

During trial plaintiffs negotiated a settlement with the retailer AAA and dismissed it from the case. The trial court submitted two issues about Brigadier's liability to the jury:

> 1. Did the defendant, Brigadier Homes, Inc., represent that the mobile home contained Nova Deck flooring?
>
> ANSWER: Yes
>
> 2. Did the plaintiffs give proper notice of revocation of acceptance of the mobile home to the defendant, Brigadier Homes, Inc.?
>
> ANSWER: Yes

The trial court then entered judgment on the verdict. The judgment recited:

> Pursuant to the jury verdict set forth above and the stipulations entered into between the parties and the instructions of the judge presiding with regard to the meaning of the two factual issues submitted to the jury:
>
> It is hereby ADJUDGED, ORDERED and DECREED that the plaintiff have and recover of the defendant, Brigadier Homes, Inc., the sum of $12,184.00 (Twelve Thousand One Hundred Eighty-Four Dollars and No/100) as restitution and that the plaintiff's [sic] were entitled to revoke and did revoke the mobile home purchase contract.
>
> It is further ADJUDGED, ORDERED and DECREED that the plaintiff have and recover of the defendant, Brigadier Homes,

Inc., the sum of $1,500.00 (One Thousand Five Hundred Dollars and NO/100) as an award of treble damages for a violation by the defendant, Brigadier Homes, Inc., of N.C.G.S. 75-1.1, in that the defendant falsely represented the flooring in the mobile home sold to the plaintiffs which misrepresentation resulted in damages to plaintiffs in the amount of $500.00 (Five Hundred Dollars and NO/100).

It is further ADJUDGED, ORDERED and DECREED that the plaintiffs have and recover of the defendant, Brigadier Homes, Inc., interest at the rate of 8% (eight percent) from September 1, 1984, the date Plaintiff's [sic] first learned of the breach, until the judgment herein provided is paid.

The amount of damages to be awarded was not submitted to the jury but was determined pursuant to certain stipulations by the parties. The revocation of acceptance award—$12,148.00 "as restitution"—appears to have been computed by the trial court as a return of plaintiffs' payments, offsetting depreciation and fair rental expenses. Regarding the $1500 treble damages award for Brigadier's false representation, the $500 base amount appears to rely at least in part on the estimated cost of repairing the hole in the floor.

On 9 June 1988, the trial court granted in part defendant's motion to amend the judgment by awarding interest only from the date of judgment. It also ordered that plaintiffs return the home to Brigadier on receipt of the payment "in restitution."

Brigadier appealed to the Court of Appeals, which reversed in part, affirmed in part, and vacated the amendment to the judgment. It held that plaintiffs were not entitled to revoke acceptance against Brigadier because the two parties were not in a contractual relationship. The Court of Appeals also concluded there was no breach of warranty issue presented at trial and that plaintiff could not rely on this theory to uphold the entire judgment. The Court of Appeals treated Brigadier's false representations about the nature of the floor as being only a violation of N.C.G.S. § 75-1.1. It affirmed the judgment's award of treble damages for that violation. We granted plaintiffs' petition for discretionary review to consider whether they are entitled to revoke acceptance against defendant manufacturer and whether they are entitled to relief grounded on a breach of warranty by the manufacturer.

## II.

**[1]** Plaintiffs first argue that the Court of Appeals erred in holding they were not entitled to revoke acceptance against defendant Brigadier. Brigadier contends that because it never entered into a contractual relationship with plaintiffs, revocation of acceptance is not an available remedy against it. We agree with Brigadier and affirm the Court of Appeals decision on this issue.

Because the sale of a mobile home is a "transaction in goods," it is subject to Article 2 of North Carolina's version of the Uniform Commercial Code (hereinafter "UCC"). N.C.G.S. § 25-2-102 (1986). We must construe the UCC to determine the rights of the parties.

The primary goal of statutory construction is to arrive at legislative intent. *Electric Supply Co. v. Swain Electric Co.*, 328 N.C. 651, 403 S.E.2d 291 (1991); *Hunt v. Reinsurance Facility*, 302 N.C. 274, 275 S.E.2d 399 (1981). Legislative intent may be inferred from the nature and purpose of the statute and the consequences which would follow, respectively, from various constructions. *In re Kirkman*, 302 N.C. 164, 273 S.E.2d 712 (1981); *Campbell v. Church*, 298 N.C. 476, 259 S.E.2d 558 (1979). Under the doctrine of *expressio unius est exclusio alterius*, a statute's expression of specific exceptions implies the exclusion of other exceptions. *Morrison v. Sears, Roebuck*, 319 N.C. 298, 354 S.E.2d 495 (1987).

Bearing in mind these canons of statutory construction, we now turn to Article 2 to determine whether the legislature intended that ultimate consumers be able to revoke their acceptance of goods against remote manufacturers with whom they have no contractual relationship. Article 2 defines acceptance of goods:

> (1) Acceptance of goods occurs when the *buyer*
>
> (a) after a reasonable opportunity to inspect the goods signifies to the *seller* that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
>
> (b) fails to make an effective rejection . . . but such acceptance does not occur until the *buyer* has had a reasonable opportunity to inspect them; or
>
> (c) does any act inconsistent with the *seller's* ownership; but if such act is wrongful as against the *seller* it is an acceptance only if ratified by him.

N.C.G.S. § 25-2-606 (1986) (citations omitted) (emphasis added). Article 2 also governs the circumstances in which a purchaser who has accepted goods may revoke that acceptance:

> (1) The *buyer* may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the *seller's* assurances.
>
> (2) 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 (1986) (emphasis added). If the buyer properly exercises the right to revoke acceptance, he is entitled to recover so much of the purchase price as has been paid, as well as to other relief provided by statute. N.C.G.S. § 25-2-711 (1986).

The manner in which the statutes governing acceptance and revocation of acceptance use the terms "buyer" and "seller" indicates that the existence of a buyer-seller relationship is a prerequisite to the buyer's ability to revoke acceptance. We must determine whether the legislature intended to include within the term "seller" a manufacturer of goods who has not dealt directly with a buyer that seeks to revoke acceptance, but whose product was sold to the buyer by an intermediate retailer.

We rely on the definitions the UCC provides. A "buyer" is "a person[1] who buys or contracts to buy goods." N.C.G.S. § 25-2-103(1)(a) (1986). A "seller" is:

> *a person who sells* or contracts to sell *goods. Any manufacturer of self-propelled motor vehicles*, as defined in [N.C.G.S.

1. The statutory definition of "person" applies, of course, to business entities. N.C.G.S. § 25-1-201(30) (1986).

§ 20-4.01,[2]] *is also a "seller"* with respect to buyers of its product to whom it makes an express warranty, *notwithstanding any lack of privity* between them, for purposes of *all rights and remedies* available to buyers under this Article.

N.C.G.S. § 25-2-103(1)(d) (1986) (emphasis added).

In determining whether remote manufacturers are generally "sellers" against whom a consumer may revoke acceptance, the legislature's inclusions and omissions in its definition of "seller" are instructive as to its intent. Under N.C.G.S. § 25-2-103(1)(d), an automobile manufacturer who issues an express warranty to buyers of its product is a "seller" under Article 2 for *all* rights and remedies available to buyers, including revocation of acceptance, whether or not it is in a direct contractual relationship with the ultimate purchaser of its vehicle. This appears to be an exception to the general statutory rule regarding who is a seller and who is a buyer. Under the doctrine of *expressio unius est exclusio alterius*, the mention of such a specific exception to the statutory rule implies that the legislature intended to exclude other exceptions. *Morrison v. Sears, Roebuck*, 319 N.C. 298, 354 S.E.2d 495. Thus, manufacturers of products other than self-propelled motor vehicles who are not in a direct contractual relationship with ultimate purchasers are, by implication, not "sellers" against whom purchasers may revoke acceptance.

Moreover, an examination of the consequences resulting from revocation of acceptance leads us to believe the legislature did not intend the remedy to be available against a remote manufacturer. Return of the purchase price to the buyer and, as is often the case, return of the goods to the seller is a type of exchange uniquely suited to situations involving parties in direct contractual relationships and is intended to effectuate restoration of the *status quo ante* to these parties.[3] *See, e.g., Gasque v. Mooers Motor Car*

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2. N.C.G.S. § 20-4.01 provides definitions for terms used in Chapter 20 of the North Carolina General Statutes, governing motor vehicles.

3. Tender of the goods back to the seller is not required in order for revocation of acceptance to be effective because notice is sufficient. *Roy Burt Enterprises v. Marsh*, 328 N.C. 262, 400 S.E.2d 425 (1991); *Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972); 4 Anderson on the Uniform Commercial Code § 2-608:32 (3d ed. 1983) ("Anderson"). However, ultimately returning the goods is appropriate in many situations and restores the parties to their pre-contract positions, consistent with the goals of revocation of acceptance. *See Gasque v. Mooers Motor Car Com-*

*Company*, 227 Va. 154, 313 S.E.2d 384 (1984); *Seeking v. Jimmy GMC of Tucson, Inc.*, 130 Ariz. 596, 638 P.2d 210 (1981). These remedial procedures are not well suited to situations where the parties do not deal directly with each other. Where there is no direct dealing between the parties, revocation of acceptance would not restore the *status quo ante*; it would, instead, require a manufacturer to refund a purchase price it had not received in exchange for a product it did not sell to the revoking party.

Limiting revocation of acceptance to parties who deal directly with each other is consistent with the approach taken by most other courts that have considered the question. *See, e.g., Andover Air Limited Partnership v. Piper Aircraft Corp. v. Kladstrup*, 7 U.C.C. Rep. Serv. 2d 1494 (D. Mass. 1989), and cases cited therein; *Gasque*, 227 Va. 154, 313 S.E.2d 384; *Seeking*, 130 Ariz. 596, 638 P.2d 210. *But see Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (1977) (holding that liberal administration of code remedies allows automobile buyers to revoke acceptance against manufacturers).

For the foregoing reasons, we hold that, except in the case of self-propelled vehicles for which the statute expressly provides otherwise, the existence of a direct contractual relationship between buyer and seller is generally a prerequisite to the right of a buyer to revoke acceptance against the seller.[4] Under this rule, plaintiffs are not entitled to revoke acceptance against defendant Brigadier. The double wide home is not a self-propelled motor vehicle. Brigadier did not sell it to plaintiffs. Plaintiffs did not compensate Brigadier for it. There were no negotiations and there was no direct contractual relationship between these parties. We affirm the decision of the Court of Appeals on this issue.

III.

**[2]** We now consider whether plaintiffs are entitled to damages from Brigadier for breach of warranty. We conclude that they are.

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*pany*, 227 Va. 154, 313 S.E.2d 384 (1984); *Seeking v. Jimmy GMC of Tucson, Inc.*, 130 Ariz. 596, 638 P.2d 210 (1981). Other courses of action may be appropriate in some circumstances. *See* N.C.G.S. §§ 25-2-608(3), -603 to -604, -706, -711.

4. This may sometimes include the manufacturer, such as where the buyer has some direct dealings with the manufacturer, bypassing the seller from whom he ultimately purchases. In this or similar situations, the ultimate purchaser may be able to revoke acceptance against the manufacturer. Anderson, § 2-608:10.

N.C.G.S. § 25-2-313 (1986) provides:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

Though at first blush use of the terms "buyer" and "seller" in N.C.G.S. § 25-2-313 seems to restrict the warranty remedy to parties who are in a direct contractual relationship, as in the case of revocation of acceptance, the official commentary to this particular statute indicates otherwise. Comment 2 states:

> Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances. . . . The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

N.C.G.S. § 25-2-313, comment 2. Thus, the words "buyer" and "seller" as used in N.C.G.S. § 25-2-313 are not intended to be restrictive; they are shorthand descriptions of the most common situation which give rise to warranties and "offer useful guidance in dealing with further cases as they arise." *Id.*

Consistent with comment 2, our case law has recognized that a direct contractual relationship in the sale of the product itself is not a prerequisite to recovery for breach of express warranty against the manufacturer. *Kinlaw v. Long Manufacturing*, 298 N.C. 494, 259 S.E.2d 552 (1979). In *Kinlaw*, we concluded that the buyer of goods from a retailer could recover against the manufacturer

for breach of a written manufacturer's warranty directed to the ultimate consumer. We now conclude that the same result should follow where a manufacturer's oral representations made directly to a retailer are intended to be communicated to remote buyers to induce them to buy a product.

Here, plaintiffs' evidence tended to show Brigadier made oral representations that the mobile home's flooring was made of Novadeck, a waterproof, tongue-and-grooved plywood stronger than particle board. The jury found accordingly. Brigadier made these representations to AAA in a conference held for the purpose of highlighting the attributes of its products and enabling AAA to pass this information along to consumers to induce purchases of Brigadier homes. Because Brigadier intended its express oral representations to its retailer to be passed on to and induce ultimate consumers to buy Brigadier's product, plaintiffs, as ultimate consumers induced by the representations to buy the product, can, under the principles laid down in *Kinlaw*, pursue against Brigadier a breach of warranty claim grounded on the representations.

The Court of Appeals concluded the breach of warranty issue was neither presented to the jury nor properly preserved for appeal. We are satisfied the record reveals otherwise. A breach of warranty issue was submitted to the jury, which answered it affirmatively in favor of plaintiffs. The trial court charged the jury as follows:

> The first issue is, *"Did the defendant, Brigadier Homes, Inc., represent that the mobile home contained Nova deck flooring?"* Now, the burden on this issue, members of the jury, is on the plaintiff to satisfy you by the greater weight of the evidence that the defendant expressly warranted that the flooring was Nova decking. A contract for the pre-sale of goods may include a representation that the goods possessed certain characteristics. Such a representation is called a "warranty." Warranties may be created by the express words used by the parties to the sale and such warranties are called "express warranties." A breach occurs when the goods fail in any respect to conform to the express warranty given to the seller [sic]. That is, the goods do not conform to the affirmation of fact or promise made by the seller to the buyer which relate to the goods and becomes part of the basis of the bargain between them. Finally, as to this issue on which the plaintiff has the

> burden of proof, if you find by the greater weight of the evidence that the warranty was breached, then you will answer the issue "yes." On the other hand, if you fail to so find, then you would answer the issue "no."

(Emphasis added; capitals in the original changed to lower case.)

The highlighted issue identified at the beginning of the charge and placed on the verdict sheet was sufficient, when taken in the context of the instruction, to constitute a breach of warranty issue.

IV.

**[3]** We now turn to the question of damages. In warranty actions, the measure of damages is generally the difference between the value of the goods as accepted and the value as warranted. N.C.G.S. § 25-2-714. The UCC allows courts to utilize other measures for damages if justified by the circumstances, *id.*, and recovery of special damages is appropriate if it is within the contemplation of the parties. *Id.; see also* N.C.G.S. § 25-2-714, official comment and North Carolina comment. If there is error in determining damages, a new trial may be awarded on that issue alone, provided the question of liability is not so entwined with that of damages as to render unfair a trial limited solely to damages. *Housing, Inc. v. Weaver*, 305 N.C. 428, 290 S.E.2d 642 (1982); *Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 234 S.E.2d 605 (1977).

The statutory measure of damages was not followed here. Rather than being based on the difference between the value of the mobile home as warranted, *i.e.* with the Novadeck flooring, and its value as accepted, *i.e.* with the particle board flooring, the $500 award amounted to an estimate of the cost of repairing a hole in the floor.

Consequently, we vacate the $500 award entered by the trial court for breach of warranty and trebled under Chapter 75 and remand for a new trial only on the question of damages. The facts tending to show liability were not so entwined with those tending to show damages that defendant would be prejudiced by having the damages issue tried alone. The issue of Brigadier's representations and the circumstances under which they were made was fully and fairly litigated. It need not be relitigated in order to determine the appropriate measure of breach of warranty damages—the difference in value between the goods as accepted and as warranted.

There has been no appeal from the trial court's decision that Brigadier's misrepresentations amounted to a violation of Chapter 75 and that damages awarded for the misrepresentations should be trebled as provided by this chapter. This decision, therefore, becomes the law of the case and will govern at the retrial.

V.

**[4]** Plaintiffs next ask us to address other issues regarding attorneys' fees, treble damages, and the award of interest. We decline to do so.

Plaintiffs gave proper notice of appeal on these issues but did not file an appellant's brief within the time allowed under Rule 13 of the North Carolina Rules of Appellate Procedure. Rather, they attempted to argue the issues in their appellee's brief. The Court of Appeals, therefore, correctly held that plaintiffs had failed to preserve any of these questions for its review, and we affirm this decision.

Because on these issues plaintiffs are seeking affirmative relief in the appellate division rather than simply arguing an alternative basis in law for supporting the judgment, they are not entitled to cross-assign error in their appellee's brief. N.C. R. App. P. 10(d). To have properly raised these issues plaintiffs should have filed, but did not file, an appellant's brief.

VI. SUMMARY

In conclusion, we affirm the decision of the Court of Appeals as to the revocation of acceptance claim and reverse it as to the breach of warranty claim. We vacate the award of damages. We remand to the Court of Appeals for further remand to Superior Court, New Hanover County, for a new trial limited solely to the question of plaintiffs' damages for breach of warranty. The amount of that award is to be trebled under Chapter 75.

Affirmed in part; reversed in part; vacated in part; and remanded.

Justice MEYER concurring in part and dissenting in part.

I agree with the majority's conclusion that, under the peculiar facts of this case, sufficient privity exists to extend warranty liability to the defendant manufacturer, Brigadier Homes, Inc. However,

while I concur in the result, I write separately to distance myself from what I consider to be the majority's excessively broad construction of the law in the area of manufacturer liability for verbal express warranties passed on to remote purchasers.

Only recently has this State deviated from the historic strict adherence to the privity requirement.[1] In *Kinlaw v. Long Manufacturing*, 298 N.C. 494, 259 S.E.2d 552 (1979), this Court saw fit to dilute the privity requirement in written express warranty cases wherein the manufacturer is sued by a remote purchaser. *Kinlaw* was an action by the purchaser of a farm tractor against the manufacturer to recover for breach of a written express warranty contained in the owner's manual. The Court held that the existence of the written warranty, intended to reach the ultimate purchaser, sufficed to allow the purchaser to sue the manufacturer, despite the lack of an actual direct contractual relationship.

In deciding to extend liability to the manufacturer, the *Kinlaw* majority acknowledged that North Carolina's allegiance to the principle of privity has, "at best, wavered." *Id.* at 497, 259 S.E.2d at 555. Indeed, prior to *Kinlaw*, privity was required in all warranty instances with the exception of those written warranties addressed to the ultimate consumer pertaining to "sales of goods, intended for human consumption, in sealed packages prepared by the manufacturer and having labels with representations to consumers inscribed thereon." *Service Co. v. Sales Co.*, 261 N.C. 660, 668, 136 S.E.2d 56, 62-63 (1964). Somewhat later, the exception to the privity requirement was extended to include insecticides contained in sealed containers with warnings on the label that reached the ultimate consumer. *See Byrd v. Rubber Co.*, 11 N.C. App. 297, 300, 181 S.E.2d 227, 228 (1971). As it concerned a tractor (as opposed to goods in sealed packages), *Kinlaw* itself extended the "assault on the citadel" of privity beyond the above circumscribed categories in which there was a strong public interest in ensuring manufacturer accountability for defective goods.[2]

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1. This deviation is not without precedent. *See Terry v. Bottling Co.*, 263 N.C. 1, 3, 138 S.E.2d 753, 754 (1964) (Sharp, J., later C.J., concurring); Marc A. Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 Stan. L. Rev. 974 (1966); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791 (1966).

2. Citing *Simpson v. Oil Co.*, 217 N.C. 542, 8 S.E.2d 813 (1940), a case involving a manufacturer's express warranty on the label of a spray insecticide that the product was nonpoisonous to humans, the *Kinlaw* majority offhandedly observed

My purpose here is not to quarrel with the outcome of *Kinlaw*; indeed, in a mass consumer market, consumers should be able to rely on written representations by remote manufacturers addressed to ultimate consumers that provide a basis for the ultimate bargain. *See Kinlaw*, 298 N.C. at 501, 259 S.E.2d at 557 (quoting with approval *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612, 615-16 (Ohio 1958) (" 'Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers . . . .' ")). To this end, manufacturers should not be able to hide behind the privity requirement when they launch defective goods into the marketplace and consumers rely on express representations of quality made by the manufacturer to induce sales.

My concern is that today the majority once again makes an abrupt, *sub silentio* alteration in the evolving common law in this area. To date, all instances in which the privity requirement has been abrogated have involved *written* express warranties addressed to ultimate consumers. *See, e.g., Kinlaw*, 298 N.C. 494, 259 S.E.2d 552; *Corprew v. Chemical Corp.*, 271 N.C. 485, 157 S.E.2d 98 (1967); *Service Co. v. Sales Co.*, 261 N.C. 660, 136 S.E.2d 56; *Simpson v. Oil Co.*, 217 N.C. 542, 8 S.E.2d 813 (1940). Today, as in *Kinlaw*, the Court, without elaboration, extends the lines of assault against the citadel of privity. Henceforth, privity will not be necessary when *oral* representations are made by a manufacturer directly to a retailer intended to be communicated to remote buyers to induce them to buy a product. In a sense, the existence of a written warranty mitigates the attenuation of the relationship between remote buyers and manufacturers. My concern is that the justified and well-known premise of vertical privity, namely, to ensure that a valid, ascertainable relationship exists between commercial litigants prior to imposing liability, is being unduly vitiated.

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that the *Kinlaw* decision "simply reaffirm[ed] the vitality" of the Court's prior case law regarding privity. *Kinlaw*, 298 N.C. at 500, 259 S.E.2d at 557. In retrospect, however, it is apparent that the decision amounted to something more than a reaffirmation; *Kinlaw extended* the privity exception to allow recovery against manufacturers for breach of written warranties pertaining to all sorts of goods directed to the ultimate consumer. *See* Beth H. Daniel, Note, *Products Liability: No Privity Requirement If Express Warranty Addressed to the Ultimate Consumer*, 16 Wake Forest L. Rev. 857, 868-70 (1980).

Under the peculiar facts of this case, however, this extension arguably is justified. Brigadier Homes knowingly made an explicit warranty to its retailer, specifically so that the retailer would pass it on to the ultimate purchaser to serve as a sales inducement. It would be inequitable to allow Brigadier Homes to avoid liability under such circumstances. The privity requirement between remote buyers and manufacturers based on oral representations given by manufacturers should be abrogated only when such representations are explicit and are clearly intended to be passed on to prospective purchasers to induce the ultimate sale.

Finally, I dissent from that portion of the decision that remands this case for a new trial only on the question of damages, with instructions that whatever amount the jury returns be automatically trebled. The question of liability, in my view, is here inextricably intertwined with the question of damages, causing prejudice to defendant if only the damages issue is to be relitigated. *Housing, Inc. v. Weaver*, 305 N.C. 428, 290 S.E.2d 642 (1982). The issues presented to the jury at trial, and indeed defendant's entire litigation strategy, were the result of intensive negotiations occurring at the precharge conference. As the majority has noted, the correct statutory measure of damages was not followed by the trial court. It is obvious, however, from the record before this Court that the parties and the trial judge agreed, with regard to the breach of warranty issue, that the amount of the damages would be the cost of the repairs (generously rounded from $358.00 to $500.00), trebled. That explains why only one issue, that is, whether the misrepresentation was made by the manufacturer, was submitted to the jury. The majority's remand for reconsideration of the damages issue alone, with instructions that the amount returned by the jury be trebled, is inequitable under the peculiar facts of this case.

The case should be remanded to be retried upon the issues customarily submitted in chapter 75 actions of this type as well as the damages issue. I vote to remand for a new trial on all issues.

Justice MITCHELL joins in this concurring and dissenting opinion.

IN RE DOE

[329 N.C. 743 (1991)]

IN THE MATTER OF WILLIAM DOE[1]

No. 434PA88

(Filed 5 September 1991)

**1. Infants § 20 (NCI3d)— juvenile delinquent—requirement of specific sexual offender treatment—insufficient treatment—denial of conditional release—authority of district court**

The district court had statutory authority to order the Division of Youth Services to give specific sexual offender treatment to a juvenile found delinquent because of sex offenses when such treatment was available. The district court also had statutory authority to deny the conditional release of the juvenile as requested by the Division of Youth Services because the juvenile had not received sufficient treatment to predict success of the juvenile or safety of the community and to order necessary psychological treatment through a community-based program simultaneously with the juvenile's continued commitment.

**Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 16, 33.**

**2. Constitutional Law § 12 (NCI4th)— Separation of Powers Clause—order within court's inherent power**

There is no violation of the Separation of Powers Clause of the North Carolina Constitution when a court issues an order within its inherent power to do what is reasonably necessary within the scope of its constitutional and statutory jurisdiction. N. C. Const. art. I, § 4.

**Am Jur 2d, Constitutional Law § 307.**

**3. Constitutional Law § 12 (NCI4th); Infants § 20 (NCI3d)—juvenile commitment—order of sexual offender treatment—denial of conditional release—no violation of Separation of Powers Clause**

There was no violation of the Separation of Powers Clause of the North Carolina Constitution when the district court, exercising its exclusive original jurisdiction, issued an order

1. In compliance with the confidentiality requirements of N.C.G.S. § 7A-675(g), the caption and all references to the juvenile avoid revealing his true name.

for a juvenile's commitment to the Division of Youth Services which included the dispositional directive that the juvenile be given sexual offender treatment, and issued a subsequent order denying the juvenile's conditional release as requested by the Division of Youth Services because he had not been given such treatment.

**Am Jur 2d, Constitutional Law § 307; Juvenile Courts and Delinquent and Dependent Children §§ 16, 33.**

**4. State § 4.2 (NCI3d); Infants § 20 (NCI3d)— juvenile delinquent—denial of DYS request for conditional release—no violation of sovereign immunity doctrine**

The district court's order denying a juvenile's conditional release as requested by the Division of Youth Services because the juvenile had not been given sexual offender treatment as mandated by the commitment order did not violate the doctrine of sovereign immunity.

**Am Jur 2d, Juvenile Court and Delinquent and Dependent Children § 33.**

ON writ of certiorari to review an order entered by *Titus, J.*, on 19 July 1988 in District Court, DURHAM County, prior to determination by the North Carolina Court of Appeals. Heard in the Supreme Court 15 February 1990.

*Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, and Jeffrey R. Ellinger, for the State-appellee.*

*Lacy H. Thornburg, Attorney General, by John R. Corne, Assistant Attorney General, for appellant Division of Youth Services, Department of Human Resources.*

EXUM, Chief Justice.

In this case we consider the judiciary's power to order the Department of Human Resources, Division of Youth Services (DYS) to give sex offender treatment to an adolescent found delinquent because of sex offenses and subsequently to deny the conditional release of that adolescent because treatment had not been in compliance with that mandate. We conclude that both orders were within the court's statutory authority.

I.

On 9 November 1987, the District Court in Durham County issued a Juvenile Disposition and Commitment Order, which stated the court's findings that the juvenile, fifteen, had "unlawfully, wilfully and feloniously commit[ted] the abominable and detestable crime against nature" with his eight-year-old sister, that he had "engaged in a repeated pattern of sexually assaultive behavior over the past several years," that he had been "previously hospitalized and [had] received out-patient counseling for these problems," and that this sexually assaultive conduct had been repeated shortly after discharge from the out-patient program, "indicating previous therapy [had been] ineffective." The court found in addition that the juvenile was at that time "a danger to himself and the community" and would continue to be such "unless appropriate treatment" was provided, and that, because of the seriousness of the offense and the continued pattern of sexually assaultive behavior and consequent need for secure residential treatment, there was no community-based alternative to commitment. The court ordered that:

> [the juvenile] be committed to the Department of Human Resources, Youth Services, for an indefinite period of time; that he shall not be released prior to receiving therapy for sexual offenders; that this placement be reviewed in 90 days; that he remain in the Durham County Youth Home until transported to the appropriate school.

On 7 June 1988, the same court, stating it had become aware that DYS intended the imminent release of William from its custody, issued an *ex parte* order. The order provided that "[the juvenile] not be released from the custody of [DYS] pending a hearing to determine the appropriateness of his return to the community."[2]

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2. The order's text included remarks that its conclusion was based upon the following observations:

> "It appearing to the Court that previously attempted psychiatric hospitalizations have not effectively altered the juvenile's sexually assaultive behavior, and that treatment for sexual offenders for the juvenile is absolutely necessary to prevent the juvenile from being a danger to the community; and
>
> "It appearing to the Court that the commitment order dated November 9, 1987 mandated therapy for sexual offenders based upon a repetitive pattern of sexually assaultive behavior; and
>
> "It not having been demonstrated that any treatment specifically designed for sexual offenders has been undertaken as required by said order."

On 8 July 1988 the Chief of Juvenile Support Services filed a Motion for Review, detailing reasons why the juvenile should be released from DYS custody. These included averments that William had participated and made "great progress" in a "specific, intensive," individual treatment program for his problem; that he "had made considerable progress" in the school's "mainstreaming" program (whereby through good conduct students earn points towards achieving a status making them eligible for release); and he had successfully participated in a vocational rehabilitation program. The motion noted that "the Division has provided William . . . with all the programs and services available in training school consistent with his needs," and that funding to expand services for juvenile sex offenders had been requested and denied by the legislature during its 1988 session.

In the hearing that followed on 19 July 1988, the court heard the testimony from, among others, Michael O'Toole, the psychologist who had counseled William during his period of commitment at the Stonewall Jackson School, and from Dr. Richard Rumer, a clinical psychologist at Duke Medical Center, who had evaluated William on 28 October 1987, shortly before his commitment, and again on 18 May 1988, in anticipation of his release.

The court's written order noted the positive testimony of O'Toole in finding William had successfully completed the school's "mainstreaming" program, and it found William had received individual therapy at Stonewall Jackson for aggressive sexual behavior. More notable, however, were the court's findings of fact based on the testimony of Dr. Rumer, who concluded from his May evaluation of William that there was a moderate risk William's sexually aggressive behavior would recur. The court restated Dr. Rumer's recommendation that William participate in a community treatment program for sexual offenders, but that this was not an appropriate alternative unless there were a "secure backup in the event of failure or lack of cooperation by the juvenile."

The court also noted it had never been informed by DYS pursuant to N.C.G.S. § 7A-665, that the agency was unable to provide services required by the commitment order—to wit, "treatment for sexual offenders prior to release and review of the placement," and requesting alternative disposition. Citing its statutory authority under N.C.G.S. § 7A-652(g) for retaining jurisdiction over the juvenile, the court denied the conditional release of William.

The court's verbal order at the hearing's close stated more clearly that its intention in its initial commitment order had "not [been] . . . to require[ ] DYS to set up the program which I know they have not gotten the funds for. . . . My request was that he be provided treatment for sexual offenders. That can be through individual consultation." The court added that N.C.G.S. § 7A-647(3) "allows, and even requires a judge . . . in any case to order examination by an expert to determine the needs of the child. And if they found the needs of the child require psychiatric or psychological treatment, to order that."[3]

The court also clarified its rationale for denying William's conditional release from training school: First, the court had "never received any notification or request for modification that [appropriate] treatment [for sexual offenders] was not available and could not be available." Second, the court recognized its "statutory obligation . . . and the purpose behind the Juvenile Code . . . to develop a disposition in each juvenile case that reflects consideration of the facts," as well as its statutory mandate to protect the public. The court referred specifically to Dr. Rumer's testimony concerning William's potential for recidivism.[4] Moreover, the court did not find "the mainstream program to have been appropriate in William's case" because the "target population" of very young boys, whom William had formerly abused while baby-sitting, was not present at the training school.[5] Third, Dr. Rumer's testimony supported the court's observation that "there are community resources that are available now which were never available before."[6]

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3. The court acknowledged that, because William was in training school, it could not require his parents to comply with its order to provide specific, sexual offender treatment; it therefore directed its order at DYS, as "another responsible person, to provide what . . . is recognized as absolutely necessary for William to prevent recidivism." *See* N.C.G.S. § 7A-647(3) (1989).

4. Dr. Rumer testified William "had made gains in treatment, but that treatment was not complete," and he expressed his concern about William's "moderate risk for reoffending."

5. Dr. Rumer testified: "From my understanding of the situation at Stonewall Jackson [S]chool, [William] had not had much access to much younger children. So the kind of acid test of how he does around much younger children and not in a highly structured situation has not occurred yet."

6. The court commented that it served on the board of the Community Based Alternative Fund and thus knew about a grant to establish an out-patient program for sexual offenders. The program would be run by Dr. Rumer, who testified at the hearing that William was a candidate for the program. The only stated

At the hearing's close, the court summarized what its intentions had been in its initial commitment order and in its *ex parte* order:

> [T]he Court does not find the mainstream program to have been appropriate in William's case. The problems were specifically addressed by the Court in the original order. I never heard that he could not get what was recommended by the Court, and I do not now believe that he has received what was recommended by the Court.
>
> I'm not saying set up a specific program, but I am saying do some things to help William a little further.

Following denial of its motion for review seeking William's conditional release, DYS petitioned the Court of Appeals for a writ of certiorari to review the court's orders. The writ was denied. This Court allowed DYS's subsequent petition for a writ of certiorari and ordered bypass of the Court of Appeals to review the trial court's order of 19 July 1988.

II.

**[1]** DYS first contends that the district court lacked subject matter jurisdiction and exceeded its statutory authority in its 19 July 1988 order, which DYS understood to require a specific type of therapy as a condition of William's release.

The North Carolina Juvenile Code patently provides for jurisdiction to lie exclusively in the district court between the stages of allegation and the final release of a juvenile. The district court has "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent, undisciplined, abused, neglected, or dependent," N.C.G.S. § 7A-523 (1989), and the court retains jurisdiction over such a juvenile "until terminated by order of the court or until he reaches his eighteenth birthday." N.C.G.S. § 7A-524 (1989).[7] "Commitment of a juvenile to the Division of Youth Serv-

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impediment to William's participation was Dr. Rumer's concern that there be the ability for "rapid access back to secured custody," an improbability unless William were to break the law, according to the court, because of delays caused by district court scheduling.

7. William turned eighteen on 18 August 1990. At that age the Juvenile Court no longer has jurisdiction, *see* N.C.G.S. § 7A-524 (1989), and a final release from DYS custody is available. Our decision in this case as applied to William is therefore

ices does not terminate the court's continuing jurisdiction rights over the juvenile . . . . Commitment of a juvenile to the Division of Youth Services transfers only physical custody of the juvenile to the Division." N.C.G.S. § 7A-652(g) (1989).

Although the Code authorizes the Director of DYS to decide whether conditional release or final discharge is appropriate, N.C.G.S. § 7A-655 (1989), and to initiate prerelease planning, N.C.G.S. § 7A-654 (1989), the court's jurisdiction is ongoing. The Director is required to notify the judge who ordered commitment about prerelease plans, N.C.G.S. § 7A-654(1) (1989), and to provide the court with a copy of the terms of the juvenile's conditional release. N.C.G.S. § 7A-655(1) (1989). The court's jurisdiction terminates only by its own order or by the juvenile's reaching the age of eighteen. *See* N.C.G.S. § 7A-524 (1989). "[A] juvenile who is on conditional release and under the aftercare supervision of the court counselor" also remains under the court's jurisdiction, and the court may conduct "[p]roceedings to determine whether [the] juvenile . . . has violated the terms of his conditional release established by the Division of Youth Services." N.C.G.S. § 7A-523(a)(2) (1989).

The Juvenile Code mandates that, in the court's exercise of its exclusive jurisdiction over a juvenile determined to be delinquent, "the judge shall select the least restrictive disposition both in terms of kind and duration, that is appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile." N.C.G.S. § 7A-646 (1989). The judge is free, however, to choose among dispositional alternatives for a delinquent juvenile, and to "combine applicable alternatives when he finds such disposition to be in the best interest of the juvenile." N.C.G.S. § 7A-647. *See also In re Groves*, 93 N.C. App. 34, 37, 376 S.E.2d 481, 483 (1989). Flexibility in determining dispositions was one of the aims of the General Assembly in drafting the Juvenile Code. *See In re Brownlee*, 301 N.C. 532, 550, 272 S.E.2d 861, 872 (1981). These statutory dispositional alternatives include committing the juvenile to DYS, N.C.G.S. § 7A-649(10) (1989); but the court is not thereby deprived of jurisdiction and of exercising its discretion in determining dispositional alternatives. *See* N.C.G.S. §§ 7A-524, -647 (1989). The court may,

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moot; however, the issues in this case concern the relative scope of statutory authority of the district court and the DYS, a controversy that is likely to recur. *See In re Swindell*, 326 N.C. 473, 474-75, 390 S.E.2d 134, 135 (1990).

for example, "suspend imposition of a more severe, statutorily permissible disposition," N.C.G.S. § 7A-649(1), such as commitment to DYS custody, and order a conditional release from commitment, or "order the juvenile to a community-based program . . . or to a professional treatment program." N.C.G.S. § 7A-649(6) (1989).

The judge who "finds the juvenile to be in need of . . . psychiatric [or] psychological . . . treatment [may] allow the parent or other responsible persons to arrange for care." N.C.G.S. § 7A-647(3) (1989). But where the parent declines or is unable to make such arrangements, "the judge may order the needed treatment." N.C.G.S. § 7A-647(3) (1989). Given the straightforward intent expressed in the Juvenile Code that the committing court retain jurisdiction over a juvenile, a common-sense reading of this provision is that it authorizes the district court to permit the DYS, as the "person" responsible for a juvenile in its custody, to arrange for psychological counseling for sexual offenders. When the agency, as custodian, fails to make such arrangements, the court is authorized by statute to "order the needed treatment." The onus is clearly on the DYS to alert the court whenever it finds "that any juvenile committed to [its] care is not suitable for its program." N.C.G.S. § 7A-665 (1989). Under such circumstances, the Director "may make a motion in the cause so that the judge may make an alternative disposition." N.C.G.S. § 7A-665 (1989).

This Court has held that the statutory authority of district courts does not extend so far as "to order the state, through the Division of Youth Services, to develop and implement specific treatment programs and facilities for juveniles." *In re Swindell*, 326 N.C. at 475, 390 S.E.2d at 136. *See also In re Wharton*, 305 N.C. 565, 573, 290 S.E.2d 688, 693 (1982). The Court of Appeals has similarly held that, even though the district court's order "carefully, and quite properly, avoided dictating any specific program for [the delinquent juvenile], [when] the record indicate[d] that no suitable program existed[,] . . . the order's practical effect was to require creation of a new program and a resultant reallocation of school resources." *In re Jackson*, 84 N.C. App. 167, 173, 352 S.E.2d 449, 453-54 (1982).

The case before us is different on its facts. The court's initial commitment order did not reflect in its findings of fact that programs for juvenile sexual offenders did not exist. Nor did the court order that such programs be developed or implemented. To

the contrary, it noted that William had been treated specifically for his sexually assaultive behavior in both in-patient and out-patient programs. Because William's pattern of sexual abuse, including his abuse of his sister, had occurred shortly after discharge from hospitalization, the court concluded that neither program had been effective either in remedying William's problem or in protecting the community from him. Consequently, in accordance with N.C.G.S. § 7A-652(a), the court ordered commitment as well as further therapy for sexual offenders.

The district court's order of 19 July 1988 was similarly within its statutory authority. The district court found that, despite individual counseling and the successful completion of the mainstream program at the training school, William had "not received sufficient treatment to predict success of the juvenile or safety to the community," were he to be conditionally released. The court found in addition that a community-based alternative treatment program, which had been recommended for William by Dr. Rumer, would not be available to William "without a secure backup in the event of failure or lack of cooperation by the juvenile." We hold the district court was authorized continually to oversee DYS's plans for William's release and that it exercised its oversight within the bounds of its authorization. Rather than accept at face value DYS's appraisal based upon William's successful participation in irrelevant DYS programs and his partial progress in overcoming his sexual abuse problem, the court, in accord with the Juvenile Code's purpose and directives, assessed the juvenile's remaining needs and the importance of protecting the community as its basis for disapproving William's conditional release. *See* N.C.G.S. § 7A-516(3), -652(g) (1989). Further, we hold the court was authorized by law to devise alternative dispositions for such delinquent juveniles, including ordering necessary psychological treatment through an established community-based program simultaneous with William's continued commitment. *See generally* N.C.G.S. §§ 7A-647, -649 (1989).

III.

DYS next argues that in denying William's conditional release and in directing DYS to provide a specific type of therapy, the district court's order of 19 July 1988 violated the Separation of Powers Clause of the Constitution of North Carolina. This provides: "The legislative, executive, and supreme judicial powers of the

State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 4.

By virtue of being one of three, separate, coordinate branches of the government, the courts have the inherent power and authority to do what is reasonably necessary for the proper administration of justice within the scope of their jurisdiction. *In re Court Facilities*, 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991); *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 54, n.***, 274 A.2d 193, 198 n.9, *cert. denied, Tate v. Pennsylvania ex rel. Jamieson*, 402 U.S. 974, 29 L. Ed. 2d 138 (1971). We have already noted that the jurisdiction of the court extends over a juvenile determined to be delinquent until terminated by the court's own order or by the juvenile's reaching the age of eighteen. *See* N.C.G.S. § 7A-524 (1989). We have held here that ordering DYS to provide specific treatment for sexual offenders for such a juvenile in its custody, when such treatment is available, is within the scope of the court's statutory authority. The question whether the order violated the Separation of Powers Clause, however, requires a view of what this provision means in light of the Constitution as a whole and the statutes pertinent to this case passed under its aegis.

This Court recently observed that "[t]he perception of the separation of the three branches of government as inviolable . . . is an ideal not only unattainable but undesirable. An overlap of powers constitutes a check and preserves the tripartite balance." *In re Court Facilities*, 329 N.C. at 96, 405 S.E.2d at 131. The North Carolina Constitution itself includes provisions in which the powers of the branches overlap. *See* N.C. Const. art. IV §§ 7-10, 12, 15, 17. *See also In re Court Facilities*, 329 N.C. at 95, 405 S.E.2d at 130. "No less important to a functional balance of power is the notion of a working reciprocity and cooperativeness amongst the branches." *Id.* at 97, 405 S.E.2d at 131. A court must wield its inherent power and exercise its statutory authority judiciously. *See id.* at 100, 405 S.E.2d at 133. It "must proceed with a cautious and cooperative spirit into those areas where its constitutional powers overlap with those of other branches." *Id.* When there is overlap, a court in exercising its constitutional powers must, "in the interests of the future harmony of the branches, . . . minimize the encroachment" upon the other branch in appearance and in fact. *Id.* at 101, 405 S.E.2d at 133. The court's reach into the public fisc, for example, even when authorized by statute, must reflect self-restraint and consideration of the entire fabric of the Code

and of community resources. For example, "in invoking the authority [of N.C.G.S. § 7A-647 and -649] to charge the cost of care to the county, the courts must be sensitive not only to the proper placement of the child. The courts must also consider what is in the best interest of the state in the utilization of its resources and those of its inferior components." *In re Brownlee*, 301 N.C. at 554, 272 S.E.2d at 874. *See generally In re Swindell*, 326 N.C. 473, 390 S.E.2d 134; *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688; *In re Jackson*, 84 N.C. App. 167, 352 S.E.2d 449.

The principle of cooperation is of critical importance in assessing a challenge to government action like that before us based upon the Separation of Powers Clause. Necessary, functional overlap of two of the three separate, coordinate branches of government has been drafted directly into the Juvenile Code by the third, the legislative branch. The Code combines and coordinates the custodial and administrative role of DYS as an executive agency with the continuing jurisdiction and supervisory role of the district court. *See, e.g.*, N.C.G.S. §§ 7A-654, -655 (1989) (requiring written notification of prerelease planning and conditional release decision to committing court); N.C.G.S. § 7A-530 (1989) (mandating establishment of intake services by the Chief Court Counselor, "under the direction of the Administrator of Juvenile Services, . . . to determine whether facts alleged constitute a delinquent . . . offense within the jurisdiction of the court."); *compare* N.C.G.S. § 7A-649(1) (1989) (authorizing court conditionally to suspend imposition of more severe disposition) *with* N.C.G.S. §§ 7A-654 through -655 (conditional release process by DYS with notice to court).

A challenge by DYS, an executive agency, to the district court because of a perceived violation of the Separation of Powers Clause is particularly misplaced in this instance, where the governing statutes themselves dictate that the branches work together. Such coordination of the efforts of each branch must be in a "spirit of mutual cooperation" for the rehabilitation of the delinquent juvenile and for the protection of the community. *See In re Court Facilities*, 329 N.C. at 99, 405 S.E.2d at 132 (quoting *O'Coins, Inc. v. Treasurer of County of Worcester*, 362 Mass. 507, 515, 287 N.E.2d 608, 615 (1972)). This Court has noted that the Juvenile Code reflects the General Assembly's aim not only "to introduce greater flexibility in the juvenile system of the state," but also to "establish a continuity of care that begins when the child is arrested and continues through and beyond his incarceration until all reasonable steps

have been taken to assure his rehabilitation." *In re Brownlee*, 301 N.C. at 550-51, 272 S.E.2d at 872 (quoting *As the Twig Is Bent*, report of the Penal System Study Commission of the North Carolina Bar Association). "[C]hecks and balances and functional differentiation can be evaluated on the basis of how effectively they contribute to the operational goals [of each branch]." *In Re Court Facilities*, 329 N.C. at 97, 405 S.E.2d at 131 (quoting C. Barr, *Separate But Subservient—Court Budgeting in the American States* (1975) ). Given the structure of the Code, which interweaves the responsibilities of each branch in seeking common ends, overnice concerns about the separation of powers as a question of a precise division of labor are bootless.

**[2, 3]** We hold that there is no violation of the Separation of Powers Clause of the North Carolina Constitution when a court issues an order within its inherent power to do what is reasonably necessary within the scope of its constitutional and statutory jurisdiction. And we hold that there was no violation of the Separation of Powers Clause of the North Carolina Constitution when the district court, exercising its exclusive, original jurisdiction, issued the order for William's commitment and the order denying William's conditional release as requested by DYS, both of which included dispositional directives regarding William's needs for specialized sexual offender treatment.

IV.

**[4]** Finally, DYS contends that the district court's order of 19 July 1988 violates the doctrine of sovereign immunity.

> [T]he sovereign cannot be sued in its own courts or in any other without its consent and permission. . . . An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State.

*Electric Co. v. Turner*, 275 N.C. 493, 498, 168 S.E.2d 385, 389 (1969).

DYS is an agency of the State of North Carolina, created by statute. *See* N.C.G.S. §§ 134A-1 through -39 (1986), 143B-138 (1990). But the order of 19 July 1988 entered under the district court's statutory authority cannot be characterized either as an injunction, *see Electric Co. v. Turner*, 275 N.C. at 498, 168 S.E.2d at 389, or a suit. Instead, the order was an exercise of the court's statutory mandate to *oversee* disposition of juveniles determined

to be delinquent and thereby order the court's continuing jurisdiction. The court's power and authority to intervene in the release plans of the agency are indisputably incorporated into the Juvenile Code. The Code anticipates such judicial intervention as an aspect of its ongoing, supervisory role over the disposition of delinquent juveniles.

The order of the District Court, Durham County, is, therefore,

Affirmed.

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STATE OF NORTH CAROLINA v. WILLIAM AUNDRA ALFORD

No. 361A89

(Filed 5 September 1991)

1. **Homicide § 21.5 (NCI3d) — first degree murder — premeditation and deliberation — evidence sufficient**

The trial court did not err in a first degree murder prosecution by denying defendant's motion to dismiss the charge based on premeditation and deliberation for insufficient evidence where there was plenary evidence of premeditation and deliberation and substantial evidence from which the jury could infer that defendant was the sole perpetrator of the murder.

**Am Jur 2d, Homicide § 439.**

2. **Homicide § 21.6 (NCI3d) — felony murder — evidence sufficient**

The evidence was sufficient to support defendant's conviction for first degree murder based on felony murder where the evidence was sufficient to show that the killing occurred during the perpetration of a robbery and sufficient for the jury to infer that it was defendant who alone perpetrated the murder while robbing his victim.

**Am Jur 2d, Homicide §§ 435, 442.**

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a conviction of murder in the first degree and a judgment imposing a sentence of life imprisonment entered by *Friday, J.*, at the 22

May 1989 criminal session of the Superior Court, ROBESON County. Heard in the Supreme Court 6 September 1990.

*Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.*

EXUM, Chief Justice.

Following trial as a capital case, defendant was found guilty of murder in the first degree based upon theories of premeditation and deliberation and felony murder. After a capital sentencing hearing, he was sentenced to life imprisonment. The single issue before this Court is whether the evidence was sufficient to support the jury's verdict on either theory. We determine that it was sufficient on both theories.

I.

Evidence presented by the State included the testimony of numerous witnesses and the narrative of a recorded interview of defendant by investigating officers. This evidence tended to show as follows:

During the spring and summer of 1987, defendant had been employed by David Younts, Jr., to mow grass at the latter's home and at his oil business. Defendant worked at the business premises between 2 o'clock and 5 o'clock on Saturday, 11 July 1987. Both defendant and Younts were still there when Mrs. Younts left work around 5 p.m.

Around 9:15 p.m. on 11 July 1987, Mrs. Younts returned home from Fayetteville, where she had been babysitting her grandchildren. She observed the light was on in an unoccupied upstairs bedroom and her husband was not watching television in the den. She went upstairs and found her husband lying on the floor of their bedroom, holding a gun. She noticed a gun case sticking out of an open dresser drawer, but nothing else in the room appeared to be disturbed. Mrs. Younts immediately went back downstairs and called the emergency number. Later that evening she noticed that a glass bowl by the telephone, ordinarily full of coins, was empty.

Both rescue squad personnel and police officers responded to Mrs. Younts' call. Investigators observed the doors to both the

master bedroom and a bedroom across the hall were open and blood was spattered across the wall, a television stand and the dresser and mirror in the master bedroom. Mr. Younts was lying in front of the television with one foot against the stand. Several wounds were apparent on the side of his head. An autopsy revealed several lacerations on his head, including one behind the ear that had penetrated his skull. A bone chip was missing from that portion of his skull. The wound, which could have rendered the victim unconscious, must have been caused by a blow from a blunt object. Although this blow might eventually have caused death, the immediate cause of death was the bullet from a single gunshot wound, which entered the left ear canal and lodged in the right base of the skull. Which wound was first inflicted could not be determined.

The gun recovered from the victim's hand and identified as belonging to the victim had no identifiable fingerprints but his own. The victim kept the gun, loaded, in the second or third drawer of a dresser in the master bedroom. A metal shoe repair stand, located under a crib in the unoccupied bedroom across from the master bedroom, bore dark stains determined to have been caused by blood consistent with the victim's blood in type. The stand ordinarily had been stored in the basement. Bloody leather gloves and a bloody shirt were also found in the spare bedroom, but tests comparing these bloodstains to the victim's blood type were inconclusive.

The victim collected "anything antique," including old currency, musical instruments, and guns. He collected "old coins, silver dollars and Kennedy halves that were real silver," as well as two-dollar bills and silver certificates. His coin collection, which he kept in the bedroom closet, was discovered missing the day after he died. His billfold, which emergency medical personnel had removed from his pocket and placed in a dresser drawer, contained only one dollar. He habitually carried much more cash in his billfold.

Defendant visited Desmond Edwards, his girlfriend's brother, around 9:30 p.m. on 11 July 1987. He exhibited a "wet" roll of $100 bills and some two-dollar bills and gave Edwards ten dollars' worth of silver half-dollars. Defendant gave his girlfriend's sister, Belinda, some half-dollars. After defendant had distributed the coins, Edwards, defendant, a cousin, and "a dude named Charlie" drove to Burger King, where defendant treated everyone to food, paid for with "dollars." The four then drove to South Carolina to "party"

at a club, where defendant again paid for everything. They returned to Lumberton at 5 a.m. and went to a restaurant at a mall, where defendant again paid for food for everyone with silver currency.

Desmond Edwards saw defendant with a car for the first time on the Monday after July 11th. Defendant told Desmond he had bought the car with a check he got through the housing authority, where defendant was working. Defendant, after test-driving a Mercury Cougar at Benton's Used Cars on Monday afternoon, 13 July 1987, returned after dinner time and purchased it for $1,000 in what one employee described as "red-looking" bills.

One week after Younts' death, defendant drove by the Younts' house with companions and asked if they wanted to go in. Defendant told them there were "some old drums and guitars" in the basement, as well as "a lot of antique stuff."

Officers who conducted a consensual search of defendant's car on 3 August 1987 found a silver money clip, identified as being a souvenir the Younts had brought back from Mexico; a knife, a coin wrapper, and a wallet—all identified as having belonged to the victim. A ring, also identified as the victim's, was pawned by defendant on 17 July 1987.

Defendant's pretrial statement to investigators was offered against him at trial. According to this statement, defendant met a black male named "Johnny" at approximately 6 p.m. on 11 July 1987, when he left Younts' business premises. Johnny wanted to go to Younts' house and rob him. The two arrived at Younts' residence at approximately 6:30 or 7 p.m. Johnny had a revolver. The plan was for Johnny to go inside and wait for Younts to get home. Defendant was to remain outside as a lookout and to whistle if anyone came. Defendant saw Younts arrive home and go in the back door. Ten or fifteen minutes passed, and defendant heard a gunshot. After another ten or fifteen minutes, Johnny emerged from the house with a handful of bloody money, a pocketful of jewelry and a paper bag containing rolls of coins. Johnny gave defendant approximately $1,200 in one-hundred dollar bills, the bag of coins, an envelope containing several two-dollar bills and a silver money clip. Johnny kept approximately $2,000 and all the jewelry. Defendant took his bills to the river and washed the blood off. He swam across the river and walked to his girlfriend's house. Johnny told defendant he left the gun in Mr. Younts' hand to make his death look like suicide. Defendant spent his $1,200 on

a car and things at the mall and gave everyone at his girlfriend's house some of the silver coins. Defendant denied ever having been in the Younts house.

Defendant was served with a search warrant at the Robeson County Jail on 3 August 1987. The warrant named the items being sought, including a pair of white knit shoes. When told what was wanted, defendant said, "these ain't the shoes I wore when the crime was done. They were nowhere around."

Following his interrogation by police officers, defendant pointed out "Johnny's" picture in their high school yearbook as that of Johnny Thompson. Thompson was located and interrogated. At defendant's trial Thompson testified he knew defendant from high school only because defendant had talked to his cousin from time to time. He denied he and defendant were friends, and he denied having ever seen defendant socially or for any other reason on 11 July 1987. On the evening of 11 July he had been with a close friend. The friend and Thompson's mother corroborated Thompson's testimony.

II.

**[1]** Defendant's motion at the close of evidence to dismiss the charge of murder in the first degree for insufficiency of the evidence was denied. Defendant's motion following the jury instructions that the felony murder theory of guilt be withdrawn from the jury's consideration was also denied. Defendant assigns error to these rulings.

In measuring the sufficiency of the evidence, the reviewing 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 therefrom. *E.g., State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986). A case is properly submitted to the jury when "there is any evidence that tends to prove the fact in issue or that reasonably supports a logical and legitimate deduction as to the existence of that fact." *State v. Artis*, 325 N.C. 278, 301, 384 S.E.2d 470, 483 (1989), *vacated on other grounds*, --- U.S. ---, 108 L. Ed. 2d 604 (1990). If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as its perpetrator, the motion to dismiss should be allowed. *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). If the record discloses substan-

tial evidence of each essential element constituting the offense for which the accused was tried and that defendant was the perpetrator of that offense, then the trial court's denial of a motion to dismiss for evidentiary insufficiency should be affirmed. *State v. Lynch*, 327 N.C. at 215, 393 S.E.2d at 814; *State v. Artis*, 325 N.C. at 301, 384 S.E.2d at 482. " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as sufficient to support a conclusion." *State v. Artis*, 325 N.C. at 301, 384 S.E.2d at 483 (quoting *State v. Corn*, 303 N.C. 293, 296, 278 S.E.2d 221, 223 (1981)).

When a defendant is tried for murder in the first degree based upon premeditation and deliberation, substantial evidence must be before the jury that defendant killed his victim with malice, premeditation, and deliberation. *State v. Artis*, 325 N.C. at 302, 384 S.E.2d at 483; *State v. Corn*, 303 N.C. at 296, 278 S.E.2d at 223. "The intentional use of a deadly weapon gives rise to the presumption that the killing was unlawful and that it was done with malice. A pistol is a deadly weapon *per se*." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). "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. Brown*, 315 N.C. 40, 58, 337 S.E.2d 808, 822 (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). "Because premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence, they usually must be proved by circumstantial evidence." *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); *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).

"Generally speaking, circumstantial evidence is evidence of a fact from which other facts may be logically and reasonably deduced." *Phelps v. Winston-Salem*, 272 N.C. 24, 28, 157 S.E.2d 719, 722 (1967).

When as here the motion to dismiss puts into question the sufficiency of circumstantial evidence, the court must decide

> whether a reasonable inference of the defendant's guilt may be drawn from the circumstances shown. If so the jury must then decide whether the facts establish beyond a reasonable doubt that the defendant is actually guilty.

*State v. Lynch*, 327 N.C. at 216, 393 S.E.2d at 814 (quoting *State v. Triplett*, 316 N.C. 1, 5, 340 S.E.2d 736, 739 (1986)). This Court has recognized several circumstances that may indicate a killing was effected with premeditation and deliberation. *See, e.g., State v. Small*, 328 N.C. at 181-82, 400 S.E.2d at 416; *State v. Davis*, 325 N.C. at 628-29, 386 S.E.2d at 429; *State v. Jackson*, 317 N.C. at 23, 343 S.E.2d at 827; *State v. Bullard*, 312 N.C. at 161, 322 S.E.2d at 388. Those presented by the evidence in this case are the absence of provocation by the deceased, lethal blows dealt after the victim had been felled and rendered helpless, the nature and number of the victim's wounds, and the conduct and statements of the defendant after the killing.

There was plenary evidence in this case of malice, premeditation, and deliberation. That the metal shoe repair box had been stored in the basement and was found upstairs stained with the victim's blood permits an inference that the perpetrator entered the basement, scanned its contents, seized the box, and mounted the stairs with the intention of using the box as a weapon. The position of the victim's body on the floor in front of the television set in the master bedroom and the absence of signs of physical struggle permit an inference that the perpetrator approached the victim unperceived and unprovoked and hit him about the head with the shoe stand, inflicting at least one blow sufficiently deep to cause unconsciousness. From the foregoing and the gunshot wound into the victim's left ear canal, causing death, it is reasonable to infer that the gunshot wound was inflicted after the victim was felled and unconscious. The perpetrator's subsequent search through the room was evident in the gaping dresser drawers and missing coins and jewelry.

We also conclude that there was substantial evidence from which the jury could infer that defendant was the sole perpetrator of the murder.

The credibility of the witnesses, the weight of the testimony, and conflicts in the evidence are matters for the jury to consider and pass upon. *See Atkins v. Moye*, 277 N.C. 179, 186, 176 S.E.2d

789, 794 (1970); *Will of Bergeron*, 196 N.C. 649, 653, 146 S.E. 571, 573 (1929).

If the jury believed Johnny Thompson's testimony, corroborated by his friend and his mother, that he had not been with defendant at any time on 11 July 1987, then all other evidence points directly to defendant as the perpetrator of the robbery and murder. He was seen in possession of notable quantities of silver currency and rare two-dollar bills, as well as a "roll" of hundred-dollar bills. He spent money liberally over the two days after the murder, including buying a car for the first time. The car was purchased not only with cash, but with bills the salesperson described as "red-looking." Defendant possessed shortly after the murder various personal items belonging to the victim. Although these possessions were consistent with defendant's pretrial statement describing Johnny Thompson as the perpetrator who shared his booty with defendant, the jury was free to disbelieve this statement in light of Thompson's testimony and to accept Thompson's testimony as the truth. "Any contradictions or discrepancies in the evidence are for resolution by the jury." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The State is not bound by a pretrial, exculpatory statement of a defendant which it offers into evidence if there is other evidence in the case tending to show otherwise. *State v. Wheeler*, 321 N.C. 725, 728, 365 S.E.2d 609, 611 (1988); *State v. Primes*, 314 N.C. 202, 216-17, 333 S.E.2d 278, 287 (1985).

Further evidence that defendant himself was the perpetrator of the murder was the testimony that he knew the contents of the Younts basement and suggested to his girlfriend's brothers only a week after the murder that they go in to see the guitars and drums and "antique stuff."

We conclude that, "[e]ven if each of these circumstances standing alone would be insufficient to raise more than a mere suspicion of defendant's guilt, all the circumstances taken together are clearly sufficient to permit the jury to find beyond a reasonable doubt that defendant perpetrated the murder, and that he did so with premeditation and deliberation." *State v. Lynch*, 327 N.C. at 216-17, 393 S.E.2d at 815 (citations omitted). We hold that, viewed in the light most favorable to the State, the evidence was sufficient to withstand defendant's motion to dismiss the charge of murder based on premeditation and deliberation because it was substantial as

to each element of the offense as well as to the identity of the perpetrator.

**[2]** When a defendant is tried for murder in the first degree on the basis of felony murder, substantial evidence must be before the jury that the victim was killed "in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." N.C.G.S. § 14-17 (1986).

Defendant notes that the trial court did not instruct the jury on acting in concert; and, he argues, the evidence was insufficient to support a felony murder except on an acting in concert theory. Therefore, he says, the trial court erred in denying his motion made after the jury instructions to withdraw the felony murder theory of guilt from the jury's consideration. Having determined the evidence was sufficient to support defendant's guilt of murder in the first degree on a theory of premeditation and deliberation, we need not address this argument. The verdict convicting defendant on that theory alone is fully sufficient to support the judgment of the trial court.

We are nevertheless confident that the evidence was amply sufficient to support defendant's conviction of first-degree murder on a felony murder theory. Defendant's pretrial statement is sufficient to show that the killing occurred during the perpetration of a robbery. *See State v. Wooten*, 295 N.C. 378, 385, 245 S.E.2d 699, 704 (1978). But in the absence of an instruction on acting in concert, "the State had to satisfy the jury that each defendant committed every element in the [charged] offense in order to obtain a conviction for all . . . defendants." *State v. Cox*, 303 N.C. 75, 86, 277 S.E.2d 376, 383 (1981).

The evidence, as we have shown, is such that the jury could reasonably infer it was defendant, not Thompson, who alone perpetrated the offense of murder while engaged in robbing his victim.

For the reasons stated, we find in defendant's trial

No error.

STATE OF NORTH CAROLINA v. RONALD JUNIOR COTTON

No. 460A90

(Filed 5 September 1991)

**Criminal Law §§ 39, 85.2 (NCI3d)— misconduct toward co-employees—competency for rebuttal—race and ages of co-employees—harmless error**

In this prosecution for two rapes, two burglaries and two sexual offenses, the State was properly allowed to rebut testimony by defendant's employer that defendant was a good employee by questioning the employer about defendant's misconduct toward waitresses at the employer's restaurant by touching various parts of their bodies and telling them dirty jokes. Assuming that the ages and race of the waitresses was irrelevant to rebut evidence that defendant was a good employee, the admission of testimony that defendant particularly bothered two white waitresses of approximately the same ages as the victims was harmless error since it cannot be said that a different result would have been reached at trial had this testimony not been admitted. Moreover, the trial court did not abuse its discretion in finding that the danger of unfair prejudice did not substantially outweigh the probative value of this testimony.

**Am Jur 2d, Evidence §§ 340, 344.**

Justice FRYE dissenting.

Chief Justice EXUM joins in this dissenting opinion.

APPEAL as of right by defendant 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. 615, 394 S.E.2d 456 (1990), affirming judgment imposing life in prison plus fifty-four years entered by *McLelland, J.*, at the 9 November 1987 Session of Superior Court, ALAMANCE County. Heard in the Supreme Court 11 March 1991.

The defendant was convicted of first degree burglary, first degree rape, and first degree sexual offense. This Court ordered a new trial in *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987), because of the exclusion of evidence that another rape had occurred under similar circumstances and there was evidence that another person had committed the other rape.

When the case was returned for trial the defendant was indicted for the other rape and attending crimes. The cases were consolidated for trial. The defendant was tried for two charges of first degree rape, two charges of first degree burglary, and two charges of first degree sexual offense. Two women testified at the trial. Each of them testified that the defendant broke into her house, raped her, and committed other sexual offenses in the early morning of 29 July 1984. The defendant was found guilty of first degree rape, second degree rape, first degree sexual offense, second degree sexual offense, and two charges of first degree burglary.

The Court of Appeals found no error with one judge dissenting. The defendant appealed to this Court.

*Lacy H. Thornburg, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, for defendant appellant.*

WEBB, Justice.

The dissent in the Court of Appeals and the argument of the defendant on this appeal deal with testimony elicited by the State on redirect examination of a witness for the State. The State called the defendant's employer who operated a seafood restaurant. On cross-examination the employer was asked if the defendant was a good employee. The employer answered in the affirmative. On redirect examination the following colloquy occurred:

> Q. Mr. Byrum, Mr. Moseley asked you previously about whether or not Mr. Cotton was a good employee of yours; is that correct?
>
> A. Yes, sir.
>
> Q. Now, during the time that Mr. Cotton was in your employ, did you have occasion to personally witness any problems with Mr. Cotton, while he was working for you?
>
> A. Well, the one problem was with the waitress [sic]; it wasn't with doing his job.
>
> Q. What kind of problem was it with the waitresses, Mr. Byrum?
>
> A. He was always messing with them.

Q. How do you mean, "messing with them" Mr. Byrum?

A. Touching them.

Q. Touching them where?

A. On their shoulders, and their bodies, and their rears, and telling dirty jokes.

. . . .

Q. All right; and how old were the waitresses, Mr. Byrum?

A. They usually run like high school up to 50, 55.

Q. So, well, in particular, at the time that he was working for you, you had waitresses there between the ages of what, would you say?

A. 18 and 55.

Q. And, in particular, the waitresses that you—that he was touching on the rear end and touching on the shoulder; how old were they?

A. Between the same ages; it was not just—

A. It was not just one waitress; it was just about all of 'em.

. . . .

Q. And did that also pertain to all of the waitresses, and not just one or two?

A. Well, it was two, more than anybody else.

Q. All right, and do you recall the ages of those two waitresses?

A. One was like 18; and one was 47, I believe.

. . . .

Q. What was the race of these waitresses?

A. White.

The Court of Appeals, relying on *State v. Albert*, 303 N.C. 173, 277 S.E.2d 431 (1981), and *State v. Fultz*, 92 N.C. App. 80, 373 S.E.2d 445 (1988), held that when the defendant elicited testimony on the cross-examination of his employer that he was a good employee, the State was entitled to rebut this testimony by

demonstrating his weakness as an employee by showing his misconduct with the waitresses. The Court of Appeals held that the superior court went too far and committed error when it allowed testimony as to the ages and race of the waitresses as this testimony was irrelevant in rebutting evidence that he was a good employee. The Court of Appeals held this was harmless error in light of the strong evidence against the defendant and his own equivocal testimony. Judge Johnson dissented on the ground that the evidence was not as strong as the majority contended and there was a reasonable possibility that this erroneously admitted testimony could have contributed to the conviction.

In this Court the defendant argues that the evidence against the defendant was not strong and the erroneous admission of evidence that the defendant had been offensive to women of the same age and race as the victims was prejudicial. He also argues that, assuming the testimony of his conduct with the waitresses had some probative value, it should have been excluded pursuant to N.C.G.S. § 8C-1, Rule 403.

Assuming it was error to admit testimony as to the ages and race of the waitresses, we agree with the Court of Appeals that the defendant has not demonstrated he was prejudiced by this testimony. In order to show that erroneously admitted testimony is prejudicial, the defendant must show that had it not been admitted there is a reasonable possibility a different result would have been reached at the trial. *State v. Martin*, 322 N.C. 229, 367 S.E.2d 618 (1988); *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981); N.C.G.S. § 15A-1443 (1988). The Court of Appeals held that the evidence against the defendant was so strong there was not a reasonable possibility that a different result would have been reached at the trial. We place our holding on a different ground.

We begin our analysis by noting that the State was properly allowed to question the defendant's employer about the defendant's peccadilloes on the job after his employer had testified he was a good worker. *State v. Albert*, 303 N.C. 173, 277 S.E.2d 431. The thrust of the dissent and the defendant's argument in this Court is that by identifying two of the waitresses on whom the defendant made improper advances as white that this could have inflamed the jury because the defendant, a black, was being tried for raping two white women. We note that the defendant's employer in his testimony did not limit the defendant's molestations to the

two white waitresses. He testified, "[i]t was not just one waitress, it was just about all of 'em" and "[w]ell, it was two, more than anybody else."

From the testimony of defendant's employer we can conclude the defendant had bothered virtually all the waitresses and particularly two white ones. We can assume the race of the two waitresses was irrelevant to rebut otherwise proper testimony and should not have been admitted. Irrelevant testimony is not always prejudicial. In this case the prejudicial effect of this testimony should have been slight. It was to the effect that the defendant bothered all the waitresses and in particular two white waitresses. We cannot say it has been demonstrated that had this testimony not been admitted a different result would have been reached at the trial. We hold the admission of this testimony was harmless error.

The defendant also contends that the admission of this testimony violated N.C.G.S. § 8C-1, Rule 403 which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Under this rule the court can exclude relevant evidence if the danger of unfair prejudice substantially outweighs its probative value. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). Whether to exclude evidence under this section is a matter within the discretion of the trial judge. *State v. Schultz*, 88 N.C. App. 197, 362 S.E.2d 853 (1987), *aff'd*, 322 N.C. 467, 368 S.E.2d 386 (1988).

The defendant argues that whether he was a good worker is collateral at best. He says that to allow testimony of his actions with women, under the guise of proving he was not a good employee, allows very damaging testimony which has little probative value in the case.

A new trial will be ordered for an abuse of discretion in not excluding testimony pursuant to Rule 403 only upon a showing that the "ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986), *quoting*, *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986). We cannot say that under this test it was error for the court not to exclude this

testimony. The defendant elicited testimony that he was a good employee. The court allowed the State to elicit testimony to rebut this evidence. We cannot hold this was not the result of a reasoned decision.

This assignment of error is overruled.

Affirmed.

Justice FRYE dissenting.

I disagree with the majority's conclusion that the testimony about defendant's behavior towards the two waitresses at work was not so prejudicial as to require a new trial. The majority assumes that it was error to admit the testimony of defendant's employer because the race of the two waitresses was irrelevant to rebut otherwise proper testimony and then concludes that the admission of this testimony was harmless error. I agree with the Court of Appeals' conclusion that "the *ages* and the *race* of the waitresses was not relevant to rebutting the defendant's evidence that he was a good employee." *State v. Cotton*, 99 N.C. App. 615, 394 S.E.2d 456 (1990) (emphases added). However, I agree with Judge Johnson's dissent in the Court of Appeals that this error was not harmless because the evidence of defendant's guilt in this case is not so overwhelming as to remove any reasonable possibility that if this testimony had not come in, a different result would have been reached at trial.

A review of the evidence in this case is crucial to a resolution of this issue since we must determine if the error was prejudicial. The majority opinion sets out the relevant testimony given by defendant's employer concerning defendant's behavior as exhibited towards two specific waitresses while he was working at the restaurant. That testimony reveals the employer testified that while defendant "messed" with all the waitresses, "it was two more than anybody else." "Messing" with the waitresses consisted of defendant's touching these two waitresses on various parts of their bodies, telling them dirty jokes, and talking about sex. The two waitresses who were the targets of defendant's actions were eighteen and forty-seven years old, and both were white. The victims in the present case were ages twenty-two and forty-one, and both were white.

The evidence concerning defendant's identity is less than overwhelming. As Judge Johnson points out in his dissent:

> First, as to victim one, the evidence also tended to show that she was nearsighted and was not wearing her glasses during the attack upon her, and the only illumination in the room was from a street lamp filtering through her blinds; that during the time her assailant was in her presence he made efforts to keep her from seeing his face; that upon viewing a photographic lineup on 31 July containing six photos, one of which was of defendant, she initially chose two pictures from the array, one of which depicted defendant. After examining those two pictures for a number of minutes, she told the investigating officer that defendant's photo "looks most like him." On 8 August, she viewed a physical lineup consisting of seven men. Defendant was the only participant whose picture had been among those in the photographic array. Again, the victim was instructed to choose the one that looked the most like her assailant. After viewing the participants for a while, she told the officer that it was between participants numbers four and five. She then stated that number five, defendant, "looks the most like him."

*State v. Cotton*, 99 N.C. App. at 624-25, 394 S.E.2d at 461 (Johnson, J., dissenting). Furthermore, the physical evidence gathered at this victim's home, semen stains on her bed sheets, was inconsistent with defendant's blood type.

> As to the second victim, the evidence also tended to show that on the two occasions that the assailant entered her house he directed the beam of a flashlight in her face; that other than the flashlight beam the only source of light in the house was from a television set which was not on when her attacker entered the second time. On 31 July, the second victim viewed the same photographic lineup of six photos, including defendant's photo, that the first victim had viewed. Likewise, she was told to pick out the photo of the individual who most resembled her assailant. She failed to pick out anyone from this array. When she viewed the physical lineup on 8 August 1984, and picked out a Kenneth Watkins as her attacker, she thereafter asked the officer conducting the lineup if she had picked out the right person. On cross-examination she stated that she tried to pick out the right man, but had made a mistake.

*State v. Cotton*, 99 N.C. App. at 624, 394 S.E.2d at 461 (Johnson, J., dissenting). In addition, the second victim was present at the first trial but did not indicate until shortly before the second trial, some three and one-half years after the incident, that she could identify defendant as her assailant.

As with the first victim, the physical evidence gathered at the scene of the second incident was inconsistent with defendant's blood type. At the home of the second victim, the officers recovered a pair of the victim's panties which had semen stains, and these stains were inconsistent with defendant's blood type. The evidence at the second victim's home indicated that the assailant had broken an outside light on the porch when breaking into the home, and the police gathered a sample of fresh blood found on the storm door at the victim's home. This blood sample was likewise inconsistent with defendant's blood type. Thus, there was no evidence gained from the laboratory testing of the samples collected at the scene of either incident linking defendant with these two attacks.

Under the circumstances, I conclude that there is a reasonable possibility that, had the error not occurred, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988). Thus, I find the error prejudicial.

Chief Justice EXUM joins in this dissenting opinion.

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STATE OF NORTH CAROLINA v. GARY DEAN GREENE

No. 456A87

(Filed 5 September 1991)

**1. Criminal Law § 1352 (NCI4th) — murder — sentencing — McKoy error — prejudicial**

Requiring unanimity in finding the mitigating circumstance of mental or emotional disturbance when sentencing defendant for murder was prejudicial error because there was substantial evidence to support that circumstance in addition to defendant's alcohol use, which is relevant only to impaired capacity. The jury's rejection of the impaired capacity circumstance after considering the same evidence did not render the *McKoy* error

on the mental or emotional disturbance circumstance harmless because each mitigating circumstance is discrete, with its own meaning and effect. Furthermore, the jury's consideration of defendant's alcohol use on a nonstatutory mitigating circumstance which it unanimously found did not make the *McKoy* error on the mental and emotional disturbance mitigating circumstance harmless because defendant's alcohol use was only part of the evidence offered in support of this circumstance and this circumstance is listed in the capital sentencing statute and has therefore been deemed by the legislature to have mitigating value.

**Am Jur 2d, Homicide §§ 548, 553, 555.**

**Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.**

**2. Criminal Law § 1357 (NCI4th) — murder — sentencing — mental or emotional disturbance — provocation**

There was evidence in a capital sentencing proceeding of the mitigating circumstance of mental or emotional disturbance, even if *State v. Irwin*, 304 N.C. 93, required some sort of provocation as a prerequisite to submission of that circumstance. Although some provocation will almost always be present when defendant suffers from a mental or emotional circumstance contemplated by N.C.G.S. § 15A-2000(f)(2), the language in *Irwin* concerning provocation was dictum.

**Am Jur 2d, Homicide §§ 554, 555.**

ON remand from the Supreme Court of the United States. Heard in the Supreme Court 14 February 1991.

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

*Malcolm R. Hunter, Jr., Appellate Defender, by Marshall Dayan, Assistant Appellate Defender, for the defendant-appellant.*

EXUM, Chief Justice.

Defendant was convicted of the first-degree murder of his father and sentenced to death. On appeal this Court found no error in either the guilt determination proceeding or the capital sentencing proceeding. *State v. Greene*, 324 N.C. 1, 376 S.E.2d 430 (1989)

(*Greene I*). Subsequently, the Supreme Court of the United States granted defendant's petition for writ of certiorari, vacated our judgment, and remanded the case to us for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *Greene v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 603 (1990).

After denying defendant's motion to remand the case to superior court for the imposition of a sentence of life imprisonment, we heard the case on supplemental briefs ordered by the Court and directed to the questions whether there was *McKoy* error in defendant's sentencing proceeding and, if so, whether the error was harmless. After considering the supplemental briefs and further argument, we conclude defendant's sentencing proceeding was marred by reversible *McKoy* error. We therefore vacate the death sentence and remand for a new capital sentencing proceeding.

Our opinion in *Greene I* summarizes the evidence. We will not repeat it here except as necessary for an understanding of the *McKoy* issues.

In *McKoy* the United States Supreme Court held unconstitutional under the Eighth and Fourteenth Amendments of the federal Constitution jury instructions in capital sentencing proceedings which require juries to be unanimous in the finding of mitigating circumstances. Reasoning from its decisions in *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988), the *McKoy* Court concluded that each individual juror should be permitted to take into account in the final sentence determination any circumstance that juror determines to exist which is supported by evidence and which could reasonably mitigate the capital crime.

Here the State concedes, and we agree, that defendant's jury was erroneously instructed contrary to the dictates of *McKoy*. The only issue meriting discussion is whether the *McKoy* error is harmless. Because the error is of constitutional dimension, the State bears the burden of demonstrating that it was harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990); N.C.G.S. § 15A-1443(b) (1988).

The jury answered the mitigating circumstances submitted as follows:

1. Was this murder committed while the defendant was under the influence of a mental or emotional disturbance?

NO—Not unanimous.

2. Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law impaired?

NO—The jury was unanimous—His capacity was not impaired.

3. Did the defendant's intelligence quotient (I.Q.) of 81, place him in the lowest ten percent of the population?

YES—Unanimous.

4. Was the defendant a model prisoner in the Caldwell County jail while awaiting trial?

YES—Unanimous.

5. Was the defendant a person of good behavior except for when he was drinking alcohol?

YES—Unanimous.

6. Did the defendant have a good relationship with the deceased prior to May 1, 1986?

NO—Not unanimous.

7. Is there any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value?

YES—Unanimous.

It is apparent from these answers that one or more jurors would have concluded that mitigating circumstances one and six existed and would have weighed these circumstances in making the ultimate sentencing decision had not the erroneous unanimity instruction precluded the juror, or jurors, from doing so. We conclude, for the reasons given below, that the *McKoy* error as to circumstance one was not harmless and that, because of it, defendant must be given a new capital sentencing hearing. We need not further consider the error as it relates to mitigating circumstance six.

**[1]** The State first contends the error was harmless as to circumstance one, the mental or emotional disturbance circumstance, because of the insubstantiality of the evidence supporting it. The State argues this circumstance is supported only by evidence of defendant's alcohol use, which may be properly considered only in support of circumstances two and five. *See State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981) (evidence of alcohol use relevant only to impaired capacity, not mental or emotional disturbance, circumstance).

We think there was substantial evidence, in addition to defendant's alcohol use, to support the statutory mental or emotional disturbance mitigating circumstance. The prosecution offered evidence that this murder was motivated by defendant's anger toward his father grounded in defendant's fear that his father would disinherit him. The State offered evidence of the victim's statements disparaging defendant to show that there was ill will between defendant and his father and that his father did, indeed, intend to disinherit defendant "if he didn't straighten up." Defendant's evidence at the sentencing proceeding was that he suffered from organic brain damage which resulted in his having poor judgment and a lack of impulse control. Dr. Harold Haas, a psychologist, who after examining and testing defendant diagnosed his brain damage, testified that this dysfunction "rendered [defendant] an individual who has relative little foresight . . . and on impulse he does whatever his emotions kind of command at the time. . . . He gets carried away by his emotions . . . ." Dr. Haas testified that "once [defendant] is aroused, he acts quickly to do something whether that was wise or unwise. He might be carried away by his feelings." According to Dr. Haas, defendant's condition would be exacerbated by alcohol consumption. There was evidence that defendant had been drinking beer on the day his father was murdered. Dr. Haas testified if defendant were "aroused, say with anger or provoked with frustration, and got into an argument, . . . he might very well lose control and do something violent that could be quite disturbing."

Next, the State argues the *McKoy* error as to the mental or emotional disturbance mitigating circumstance was harmless because the jury considered the same evidence supporting this circumstance under mitigating circumstance two, the impaired capacity circumstance, which the jury unanimously rejected.

That the same evidence supporting the mental or emotional disturbance circumstance was considered by the jury on the rejected impaired capacity circumstance does not render the *McKoy* error on the former circumstance harmless. Each mitigating circumstance is a discrete circumstance. Each has its own meaning and effect. It would not be inconsistent for one or more jurors, considering the same evidence in support of both circumstances, to find that defendant was mentally or emotionally disturbed but that his capacity to appreciate his conduct's criminality or to conform his conduct to law was not impaired.

That the jury considered evidence of defendant's alcohol use on nonstatutory mitigating circumstance five, which it unanimously found favorably to defendant, does not make the *McKoy* error on the mental and emotional disturbance mitigating circumstance harmless. The reasons are, first, defendant's alcohol use, as we have shown, was only part of the evidence offered in support of this circumstance and, second, this circumstance, being listed in the capital sentencing statute, has been deemed by the legislature to have mitigating value.

We find *State v. Fullwood*, 329 N.C. 233, 404 S.E.2d 842 (1991), controlling on the harmlessness issue. There, although the jury found seven of ten mitigating circumstances favorably to defendant, including the mental or emotional disturbance circumstance, because of a lack of unanimity it failed to find the impaired capacity mitigating circumstance. We concluded that the *McKoy* error with regard to this unfound circumstance was not harmless, saying:

> The circumstance in question is a statutory mitigating circumstance, N.C.G.S. § 15A-2000(f)(6), and therefore, presumed to have mitigating value if found. *E.g.*, *State v. Wilson*, 322 N.C. 117, 144, 367 S.E.2d 589, 605 (1988). The legislature thought this circumstance was significant enough to be listed specifically and, therefore, to be considered and weighed individually, despite the fact that the evidence supporting it might also support other submitted mitigating circumstances. Therefore, we decline to adopt the argument that evidence which supported this statutory mitigating circumstance was "subsumed" in the jury's consideration of the mitigating circumstances found and as a result, that the failure to consider this statutory mitigating circumstance was harmless. To adopt such reasoning would circumvent the clear mandate of the legislature that

> this mitigating circumstance be given some weight, if found to exist. N.C.G.S. § 15A-2000(f)(6). Accordingly, we cannot say that the *McKoy* error in the present case was harmless beyond a reasonable doubt.

*Id.* at 238, 404 S.E.2d at 845.

**[2]** Finally, the State argues that the mental or emotional disturbance mitigator should only be considered where there is evidence of some provocation of the defendant which is sufficient to bring on the disturbance. It relies on the following language from *State v. Irwin*:

> The North Carolina death penalty statute is substantially similar to the American Law Institute Model Penal Code. We find the Code's commentary as to the pertinent mitigating factors helpful. According to the commentary, the provisions for mental or emotional disturbance deals [sic] with imperfect provocation; that situation where such disturbance is not subject to reasonable explanation as would reduce a first-degree murder charge to second-degree murder or manslaughter, but may be weighed against imposition of the death penalty.

304 N.C. at 105, 282 S.E.2d at 447.

Even if *Irwin* requires some sort of provocation of defendant as a prerequisite to submission of the mental or emotional mitigating circumstance, there is, as we have shown, evidence of it here. The provocation contemplated in *Irwin* is not that ordinarily thought of as sufficient to reduce the homicide to a lesser degree, such as from first- to second-degree murder or from second-degree murder to manslaughter. It is merely that factor or factors which helped motivate an abnormally susceptible defendant to commit murder, but which a person of normal mental and emotional stability would likely have resolved without such disastrous results. Here it was defendant's anger brought on by his father's indications that defendant might be disinherited. In *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988), *death sentence vacated*, 494 U.S. ---, 108 L. Ed. 2d 602 (1990), it was a "love-affair angle." Other emotional disturbance cases provide similar examples. *See, e.g., State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989) (defendant, believing his wife unfaithful and planning divorce, murdered mother-in-law and child), *death sentence vacated*, --- U.S. ---, 111 L. Ed. 2d 777 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991); *State v. Sanders*,

327 N.C. 319, 395 S.E.2d 412 (1990) (defendant, fearing he was being watched by someone, murdered acquaintance), *cert. denied*, 498 U.S. ---, 112 L. Ed. 2d 782 (1991); *State v. Jones*, 327 N.C. 439, 396 S.E.2d 309 (1990) (defendant's girlfriend, pregnant with his child, broke off relationship; defendant abused controlled substances and murdered bystander during armed robbery).

Although some provocation of the sort described will almost always be present where defendant suffers from a mental or emotional disturbance contemplated by N.C.G.S. § 15A-2000(f)(2) (1981), we do not read *Irwin* to *hold* that it is a prerequisite to *submission* of this mitigating circumstance.

The question in *Irwin* to which the language relied on by the State was addressed was not whether the mental or emotional disturbance circumstance should have been submitted. The question was whether the trial judge erred in failing to review the evidence of defendant's intoxication from alcohol and Tuinol, a central nervous system depressant, when he instructed on the circumstance. Both the impaired capacity and the mental or emotional disturbance mitigating circumstances were submitted to the jury. As summarized in the opinion, the principal evidence of both was apparently defendant's voluntary intoxication; and defendant's experts related this evidence to the impaired capacity mitigating circumstance. The trial court reviewed this evidence in instructing on the impaired capacity, but not the mental or emotional disturbance, circumstance. The Court said that voluntary intoxication, by alcohol or drugs, "is not within the meaning of a mental or emotional disturbance . . . [and insofar as] it affects defendant's ability to understand and to control his actions . . . is properly considered under the provision for impaired capacity . . . ." *Irwin*, 304 N.C. at 106, 282 S.E.2d at 447-48.

On this reasoning, the Court held the failure of the trial court to relate the evidence of defendant's intoxication to the mental or emotional disturbance circumstance was not error. The language in *Irwin* concerning provocation, being unnecessary to that holding, was dictum.

For the reasons given, we vacate the sentence of death and remand to Superior Court, Caldwell County, for a new capital sentencing proceeding.

Death sentence vacated; remanded for new capital sentencing proceeding.

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JAMES ROY HALL, T/D/B/A ROY HALL CONSTRUCTION COMPANY v. MAX W. SIMMONS AND WIFE, CANDICE L. SIMMONS

No. 386PA89

(Filed 5 September 1991)

**Contractors § 14 (NCI4th) — license expiration during construction — recovery for labor and materials before invalidation**

A contractor whose license expires during construction is "duly licensed" for purposes of recovering for materials purchased and work performed so long as his license is "valid." The period of validity extends from initial licensing or renewal through the 60-day period following 31 December, and a contractor may recover for expenditures for labor and materials made within that period of validity. When a contractor fails to renew his license within the 60-day period, his license is thenceforth invalid, and he may not recover for any expenditures made during its invalidity. Therefore, the trial court properly permitted plaintiff contractor to recover for labor and materials furnished during the period between expiration of his license on 31 December and its invalidity sixty days later. N.C.G.S. § 87-10 (1989).

**Am Jur 2d, Building and Construction Contracts § 130.**

**Failure of building and construction artisan or contractor to procure business or occupational license as affecting enforceability of contract or right of recovery for work done — modern cases. 44 ALR4th 271.**

ON defendants' petition for a writ of certiorari pursuant to Rule 21 to review judgment for plaintiff entered out of term on 18 January 1989 by *Ferrell, J.*, presiding at the 9 January 1989 session of Superior Court, CATAWBA County. Heard in the Supreme Court 14 March 1990.

*Rudisill & Brackett, P.A., by H. Kent Crowe and J. Richardson Rudisill, Jr., for plaintiff-appellee.*

*Patrick, Harper & Dixon, by Donald R. Fuller, Jr., and Ransdell, Ransdell & Cline, by J. Frank Huskins, for defendant-appellant.*

EXUM, Chief Justice.

The question before us is whether a contractor whose license expires during construction and is not renewed within the sixty days preceding invalidation pursuant to N.C.G.S. § 87-10[1] may recover the costs of materials and labor supplied during that period. We hold that he may.

In his complaint plaintiff alleged he had entered into an agreement with defendants on 24 June 1985 to provide labor and materials and to construct a residence for cost plus ten percent. Estimated cost was $74,000. Plaintiff alleged he had initiated construction 18 June 1985 and in every respect had complied with the terms of his agreement with defendants. An attached claim of lien stated in addition that plaintiff had last furnished labor and materials on 7 February 1986. Plaintiff alleged that over the early course of construction defendants had paid him $48,000. He sued for the balance of $56,371.23 allegedly owed.

Defendants moved to dismiss under Rule 12(b)(6), asserting *inter alia* that plaintiff had failed to state a claim upon which relief could be granted respecting labor, services, and material furnished after 31 December 1985 because plaintiff was not in the business of a general contractor after that date, his license having expired.

Defendants' answer and counterclaim alleged a breach of contract and consequential damages from plaintiff's failure to construct according to plans and in a workmanlike manner. Defendants alleged the Construction Agreement, which was attached, was a fixed price contract for $74,000 with changes and extras at cost plus ten percent. Plaintiff responded with a motion to dismiss the counterclaim.

The trial court denied the parties' motions to dismiss and denied defendants' motion for partial summary judgment, concluding

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1. The pertinent portions of this statute are set out *infra* at p. 782.

that genuine issues of material fact remained as to plaintiff's right to recover for labor and materials furnished after 31 December 1985.

At trial plaintiff's evidence tended to show as follows:

Between June 1985 and February 1986 he expended $94,247.24 for labor, materials, and subcontractors' work. Plaintiff's contractor's license, which expired on 31 December 1985, was not renewed on that date or within sixty days thereafter. The North Carolina Licensing Board for General Contractors received plaintiff's application for license renewal on 14 April 1986 and renewed it.

At the close of plaintiff's evidence defendants' motion for a directed verdict on plaintiff's claims for labor and materials furnished after 31 December 1985 was denied. When renewed at the close of all the evidence, the motion was likewise denied.

The trial court also denied defendants' request for a jury issue as to what amount, if any, the contract price should be reduced because of costs attributed to labor and materials furnished after 31 December 1985. It denied as well a requested instruction that plaintiff could not recover for labor and materials furnished after that date.

Issues were submitted to and answered by the jury as follows:

1. Has the plaintiff, Roy Hall, fully performed his obligations arising out of the contract?

Answer: No.

2. Has the plaintiff, Roy Hall, substantially performed his obligations arising out of the contract?

Answer: Yes.

3. What amount is the plaintiff, Roy Hall[,] entitled to recover of the defendants for the amount arising out of the contract?

Answer: [$]103,671.96.

4. In what amount, if any, have the defendants, Simmons, been damaged by the failure, if any, of the plaintiff, Roy Hall, to fully perform his obligations arising out of the contract?

Answer: [$]3,000.00.

The trial court's judgment, after giving credit to defendants for $3,000 damages and for $48,000 already paid, was for plaintiff

in the amount of $52,671.96 plus interest from 7 February 1986 until paid. Defendants' motion for judgment notwithstanding the verdict and various other motions for relief from the judgment were all denied.

The Court of Appeals dismissed defendants' appeal on 18 August 1989 for failure to file the proposed record on appeal within 150 days of notice of appeal, as required by N.C. R. App. P. Rule 12(a) prior to amendment effective 1 July 1989.[2] This Court granted defendants' petition for writ of certiorari on 5 October 1989 to review the merits of the case.

The statute at issue, which governs the examination and licensing of contractors, provides that a contractor's

> [c]ertificate of license shall expire on the thirty-first day of December following the issuance or renewal and shall become invalid 60 days from that date unless renewed, subject to the approval of the Board. Renewals may be effected any time during the month of January without reexamination, by the payment of a fee to the secretary of the Board . . . . Renewal applications received by the Board after January shall be accompanied by a late payment of ten dollars ($10.00) for each month or part after January. After a lapse of two years no renewal shall be effected and the applicant shall fulfill all requirements of a new applicant as set forth in this section.

N.C.G.S. § 87-10 (1989).

In *Brady v. Fulghum*, 309 N.C. 580, 308 S.E.2d 327 (1983), this Court construed the predecessor to this section, which was identical to the current statute except for this sentence: "Certificate of license shall expire on the thirty-first day of December following the issuance or renewal and shall become invalid *on that day* unless renewed, subject to the approval of the Board." N.C.G.S. § 87-10 (1981) (emphasis added). We recognized the legislative purpose of this statute "to guarantee 'skill, training and ability to accomplish such construction in a safe and workmanlike fashion,' " *Brady*, 309 N.C. at 584, 308 S.E.2d at 330 (quoting *Arnold Construc-*

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2. The parties' individual proposed records on appeal were mutually unacceptable. These proposals and ensuing objections caused the delay and resulted in the parties' request that the trial court settle the record on appeal. An order settling the record was filed 14 August 1989.

*tion Company, Inc. v. Arizona Board of Regents*, 109 Ariz. 495, 498, 512 P.2d 1229, 1232 (1973)), and "to protect members of the general public without regard to the impact upon individual contractors." *Id.* (quoting *Urbatec v. Yuma County*, 614 F.2d 1216, 1218 (9th Cir.) (applying Arizona law), *cert. denied*, 449 U.S. 841, 66 L. Ed. 2d 49 (1980)). We accordingly adopted a "bright line" rule requiring strict compliance with the licensing provisions of N.C.G.S. §§ 87-1 through 87-114. *See Sample v. Morgan*, 311 N.C. 717, 723, 319 S.E.2d 607, 611 (1984). *Brady* stated that if a contractor's license expires during construction "he may recover for only the work performed while he was duly licensed. If, in that situation, the contractor renews his license during construction, he may recover for work performed before expiration and after renewal." *Brady v. Fulghum*, 309 N.C. at 586, 308 S.E.2d at 332.

Under *Brady* a contractor is *not* "duly licensed" after expiration (which under the provision then in effect coincided with the license's invalidity), but is again "duly licensed" after renewal. He is entitled to no recovery for labor and materials expended during the period between the two events.

In *Sample v. Morgan*, 311 N.C. 717, 319 S.E.2d 607, we followed the "bright line" rule of *Brady* in holding a contractor is entitled to recover only up to the amount authorized by his license classification. 311 N.C. at 722, 319 S.E.2d at 611. For materials and labor supplied in excess of that ceiling, the contractor is without legal remedy, for once he exceeds the allowable limit of his license, he is acting in violation of N.C.G.S. § 87-10. *Id.* at 723, 319 S.E.2d at 611. The Court of Appeals came to an analogous conclusion under the predecessor statute regarding facts very similar to those now before us. In *Sartin v. Carter and Carter v. Sartin*, 76 N.C. App. 278, 332 S.E.2d 521 (1985), that court held a contractor whose license was valid when construction was initiated on 10 October 1978 but lapsed on 31 December 1978 when he failed to renew it was entitled only to those amounts paid him between those two dates: "for all work performed while he was licensed." 76 N.C. App. at 282, 332 S.E.2d at 524.

Since *Brady* and *Sartin*, the legislature amended N.C.G.S. § 87-10 by session laws stating simply: "The third sentence of the last paragraph of G.S. 87-10 is amended by deleting the words 'shall become invalid on that day' and substituting 'shall become invalid 60 days from that date.'" 1985 N.C. Sess. Laws ch. 630,

§ 3. The amendment effected a significant change from a provision that a contractor's license would expire *and* become invalid on the same day—"on the thirty first day of December . . . unless renewed"—to one inserting a sixty-day period between expiration on that date and invalidation. *Compare* N.C.G.S. § 87-10 (1981) *with* N.C.G.S. § 87-10 (1989).

The question posed by the application of the amended statute to the facts before us is the effect of that sixty-day period on the rule stated in *Brady* and applied in *Sartin* otherwise barring a contractor whose license has expired from recovering for expenditures made after expiration and before renewal.

The rules of statutory construction require presumptions that the legislature inserted every part of a provision for a purpose and that no part is redundant. *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975). "[S]ignificance and effect should, if possible, . . . be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word." *Id.* Expiration and invalidity were synonymous under the predecessor statute as construed by *Brady* because, under that statute, they were simultaneous. As amended, however, the words have different meaning and different effect.

Read in its entirety, N.C.G.S. § 87-10 appears to permit renewal of an expired, but not yet invalid, license without penalty in January and with a $10 penalty fee in February. Thereafter the license is invalid but may be renewed *and* validated by the payment of $10 per month for every month of expiration after January, up to two years. After two years, the license is unrenewable, and the contractor must seek a license as a new applicant. The revised statute makes a purposeful distinction between a contractor whose license has expired and one whose license is invalid. The former is a statutory consequence: all contractors' licenses expire on 31 December of each year. The latter is a consequence of contractor inaction: if no attempt to renew is made within sixty days of expiration, the license is invalid, without legal effect. Given this deliberate distinction between expiration and invalidation, it is apparent that the legislature wished to allow a window of time beyond the expiration date of 31 December in which a contractor in the midst of construction could hold, renew, and retain a legally efficacious license with no legally recognizable hiatus in his status as "licensed contractor."

We hold, therefore, that a contractor whose license expires during construction is "duly licensed" for purposes of recovering for materials purchased and work performed so long as his license is "valid." The period of validity extends from initial licensing or renewal *through* the sixty-day period following 31 December. *See* N.C.G.S. § 87-10 (1989). A contractor may recover for expenditures for labor and materials made within that period of validity. When a contractor fails to renew his license within the sixty-day period, however, his license is thenceforth invalid, and he may not recover for any expenditures made during its invalidity. Under such circumstances, the *Brady* rule still applies with the following modification: if a contractor's license has expired *and* become invalid, he may not recover for any expenditures made after the sixty-day "window" of validity until he renews (and in so doing revalidates) his license.

The trial court did not err in permitting plaintiff to recover for labor and material furnished during the period between expiration of his license and its invalidity sixty days later.

No error.

BROWN v. TRUCK INS. EXCHANGE

No. 291P91

Case below: 103 N.C.App. 59

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

CASSADA v. CASSADA

No. 313P91

Case below: 103 N.C.App. 129

Petition by defendants (Cassada) for writ of certiorari to the North Carolina Court of Appeals denied 4 September 1991.

CATES v. WILSON

No. 206P91

Case below: 101 N.C.App. 722

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

CHAMBERS v. N.C. MEMORIAL HOSPITAL

No. 297P91

Case below: 103 N.C.App. 170

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 4 September 1991. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

COLEMAN v. COOPER

No. 298P91

Case below: 102 N.C.App. 650

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

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

EDMUNDSON v. MORTON

No. 333PA91

Case below: 103 N.C.App. 253

Petition by several defendants for writ of certiorari to the North Carolina Court of Appeals allowed 4 September 1991.

EDWARDS v. EDWARDS

No. 295P91

Case below: 102 N.C.App. 706

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

EVANS v. AT&T TECHNOLOGIES

No. 294PA91

Case below: 103 N.C.App. 45

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 September 1991.

FIELDS v. SHEA

No. 296P91

Case below: 103 N.C.App. 172

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

GARRETT v. OVERMAN

No. 329P91

Case below: 103 N.C.App. 259

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

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

GRIGG v. LESTER

No. 196P91

Case below: 102 N.C.App. 332

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

HARRIS v. MILLER

No. 345A91

Case below: 103 N.C.App. 312

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 4 September 1991.

HARRIS v. NATIONWIDE MUT. INS. CO.

No. 305A91

Case below: 103 N.C.App. 101

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 4 September 1991.

HART v. IVEY

No. 265A91

Case below: 102 N.C.App. 583

Petition by plaintiffs and third-party plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 4 September 1991.

IN RE ANNEXATION ORDINANCE OF NEWTON

No. 367P91

Case below: 103 N.C.App. 664

Petition by petitioner (White, et al.) for temporary stay allowed 22 August 1991.

IN RE MATTHEW N.

No. 349A91

Case below: 103 N.C.App. 393

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 September 1991.

JENNINGS v. CABARRUS PLASTICS, INC.

No. 327P91

Case below: 103 N.C.App. 389

Petition by defendant (Cabarrus Plastics, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

JOHNSTON COUNTY v. R. N. ROUSE & CO.

No. 308PA91

Case below: 103 N.C.App. 173

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 September 1991.

KIDLA v. GRAINGER

No. 309P91

Case below: 103 N.C.App. 173

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

NATIONS v. NATIONS

No. 304P91

Case below: 102 N.C.App. 823

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

RUDISILL v. RUDISILL

No. 194P91

Case below: 102 N.C.App. 280

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

RUNYON v. PALEY

No. 306A91

Case below: 103 N.C.App. 208

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 4 September 1991.

STATE v. BOYKIN

No. 203P91

Case below: 102 N.C.App. 352

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 September 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

STATE v. COOPER

No. 380P91

Case below: 103 N.C.App. 665

Petition by Attorney General for writ of supersedeas and temporary stay denied 29 August 1991.

STATE v. ESTES

No. 211P91

Case below: 101 N.C.App. 575
329 N.C. 272

Petition by defendant to rehear petition for writ of certiorari dismissed 4 September 1991.

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

STATE v. HARRIS

No. 310P91

Case below: 103 N.C.App. 394

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

STATE v. KELLAM

No. 289P91

Case below: 103 N.C.App. 171

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

STATE v. LYONS

No. 186A91

Case below: 102 N.C.App. 174

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 4 September 1991.

STATE v. McDANIELS

No. 331A91

Case below: 103 N.C.App. 175

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 4 September 1991.

STATE v. STEWARD

No. 240A91

Case below: 102 N.C.App. 582

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 19 August 1991.

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

STATE v. THOMAS

No. 323P91

Case below: 103 N.C.App. 264

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

STATE v. WILLIAMS

No. 360P91

Case below: 103 N.C.App. 394

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 September 1991. Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 4 September 1991.

WHITE v. FLUOR-DANIEL

No. 322P91

Case below: 103 N.C.App. 392

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 September 1991.

# APPENDIXES

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ORDER ADOPTING RULES OF
MEDIATED SETTLEMENT CONFERENCES

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ORDER AMENDING THE GENERAL RULE OF PRACTICE
RELATED TO SUMMARY JURY PROCEEDINGS
TO ADD A NEW RULE 23
AND THE CORRESPONDING COMMENT

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AMENDMENTS TO RULES GOVERNING
ADMISSION TO PRACTICE OF LAW

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AMENDMENTS TO BAR RULES RELATING TO
STANDING COMMITTEES OF THE COUNCIL

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AMENDMENTS TO BAR RULES RELATING
TO INTERSTATE PRACTICE OF LAW

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AMENDMENTS TO BAR RULES RELATING TO
DISCIPLINE AND DISBARMENT OF ATTORNEYS

## IN THE SUPREME COURT OF NORTH CAROLINA

## ORDER ADOPTING RULES OF MEDIATED SETTLEMENT CONFERENCES

*WHEREAS*, the North Carolina General Assembly recently enacted Chapter 207 of the 1991 Session Laws which amends Chapter 7A of the General Statutes by adding a new section 7A-38, and

*WHEREAS*, new section 7A-38 provides a means for establishing a pilot program of mediated settlement conferences in superior court civil actions, and

*WHEREAS*, G.S. 7A-38(d) enables this Court to implement the new section 7A-38 by adopting rules concerning said mediated conferences,

*NOW, THEREFORE*, pursuant to G.S. 7A-38(d), the Supreme Court of North Carolina, in conference, does hereby officially adopt the following rules concerning mediated settlement conferences in superior court civil actions.

Adopted by the Court in conference the 2nd day of October, 1991.

WHICHARD, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of October, 1991.

CHRISTIE SPEIR PRICE
Clerk of the Supreme Court

## RULES IMPLEMENTING COURT ORDERED MEDIATED SETTLEMENT CONFERENCES

### RULE 1. ORDER FOR MEDIATED SETTLEMENT CONFERENCE

(a) Order by Senior Resident Superior Court Judge. The Senior Resident Superior Court Judge of any district, or part thereof, authorized to participate in the mediated settlement conference program may, by written order, require parties and their representatives to attend a pre-trial mediated settlement conference in any civil action except habeas corpus proceedings or other actions for extraordinary writs;

(b) Content of Order. The court's order shall (1) require the mediated settlement conference be held in the case, (2) establish a deadline for the completion of the conference, (3) make a tentative appointment of a mediator certified under the Rules of the Supreme Court, (4) state the rate of compensation of the tentatively appointed mediator, (5) state clearly that the parties have the right to select their own mediator as provided by Rule 2, and (6) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on a form prepared and distributed by the Administrative Office of the Courts.

(c) Motion to Dispense with or Defer Mediated Settlement Conference. A party may move, within 10 days after the court's order, to dispense with or defer the conference. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

(d) Petition for Court Ordered Mediated Settlement Conference. In cases not ordered to mediated settlement conference, any or all parties may petition the Senior Resident Superior Court Judge to order such a conference. Such motion shall state the reasons why the order shall be allowed and shall be served on non-moving parties. Objections may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge

shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(e) Exemption from Mediated Settlement Conference. In order to evaluate the pilot program of mediated settlement conferences, the Senior Resident Superior Court Judge shall exempt from such conferences a random sample of cases so as to create a control group to be used for comparative analysis.

RULE 2. APPOINTMENT OF MEDIATOR

(a) By Agreement of Parties. The parties may stipulate to a mediator within 14 days after the court's order. The mediator selected shall be either:

(1) A certified mediator; or

(2) A mediator who does not meet the certification requirements of these rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate all or some of the issues in the action. Notice of such agreement shall be given to the court and to the mediator named by the court in its order.

Notification to Court. Within 7 days after the parties select a mediator by agreement, the Plaintiff, or the Plaintiff's attorney, shall notify the court and the mediator tentatively named by the court of the name, address and telephone number of the mediator selected by agreement. Notification to the court shall also include a statement of the training and experience or certification of the mediator selected. The order shall be on a form prepared and distributed by the Administrative Office of the Courts.

(b) Appointment by Judge. The Senior Resident Superior Court Judge shall appoint mediators certified pursuant to these rules who have made known to said Judge that they would like to be considered for appointment within the district in which the action is pending. The mediator shall be appointed by such procedures as may be adopted by administrative order of the Senior Resident Superior Court Judge in the district in which the action is pending.

Only mediators who have agreed to mediate indigent cases without pay shall be appointed.

(c) Disqualification of Mediator. Any party may move a Resident or Presiding Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, an order shall be entered appointing a replacement mediator pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED CONFERENCE

(a) Where Conference is to be Held. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice to all attorneys and unrepresented parties of the time and location of the conference.

(b) When Conference is to be Held. Except for good cause found by the Senior Resident Court Judge, the mediated settlement conference shall begin no earlier than 120 days after the filing of the last required pleading and no later than 60 days after the court's order. It shall be completed within 30 days after it has begun.

(c) Recesses. The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(d) The Mediated Settlement Conference is not to Delay Other Proceedings. It shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, REPRESENTATIVES, AND ATTORNEYS

(a) Attendance. The following persons shall physically attend a mediated settlement conference:

(1) All individual parties; or an officer, director or employee having authority to settle the claim for a corporate party; or in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and to recommend settlement to the appropriate decision making body of the agency; and

(2) The party's counsel of record, if any; and

(3) For any insured party against whom a claim is made, a representative of the insurance carrier who is not such carrier's outside counsel and who has full authority to settle the claim.

(b) Finalizing Agreement. Upon reaching agreement, the parties shall reduce the agreement to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(c) Payment of Mediator's Fee. The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND

If a person fails to attend a duly ordered mediated settlement conference without good cause, a Resident or Presiding Judge may impose upon the party or his principal any lawful sanction, including but not limited to the payment of attorneys fees, mediator fees and expenses incurred by persons attending the conference; contempt; or any other sanction authorized by Rule 37(b) of the Rules of Civil Procedure.

## RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

(a) Authority of Mediator. The mediator shall at all times be in control of the conference and the procedures to be followed.

(b) Duties. The mediator shall define and describe the following to the parties at the beginning of the conference:

(1) The process of mediation.

(2) The differences between mediation and other forms of conflict resolution.

(3) The costs of the mediated settlement conference.

(4) The facts that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement.

(5) The circumstances under which the mediator may meet alone with either of the parties or with any other person.

(6) Whether and under what conditions communications with the mediator will be held in confidence during the conference.

(7) The inadmissibility of conduct and statements as provided by Rule 408 of the Evidence Code.

(8) The duties and responsibilities of the mediator and the parties.

(9) The fact that any agreement reached will be reached by mutual consent of the parties.

(c) Private Consultation. The mediator may meet and consult privately with any party or parties or their counsel during the conference.

(d) Disclosure. The mediator has a duty to be impartial and to advise all parties of any circumstances bearing on possible bias, prejudice or partiality.

(e) Declaring Impasse. It is the duty of the mediator to timely determine when mediation is not viable, that an impasse exists, or that mediation should end.

(f) Reporting Results of Conference. The mediator shall report to the court in writing whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. The Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program on forms provided by it.

RULE 7. COMPENSATION OF THE MEDIATOR.

(a) By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(b) By Court Order. When the mediator is appointed by the court, the mediator shall be compensated by the parties at an hourly rate set by the Senior Resident Superior Court Judge for all court appointed mediators in the district, upon consultation with the Administrative Office of the Courts.

(c) Indigent Cases. No party found to be indigent by the court for the purposes of these rules shall be required to pay a court appointed mediator. Any party may apply to the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of its obligation to pay its share of the mediator's compensation.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. The Judge may take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

(d) Payment of Compensation by Parties. Unless otherwise agreed to by the parties or ordered by the court, costs of the mediated settlement conference shall be paid: one share by the plaintiffs, one share by the defendants and one share by third-party defendants. Parties obligated to

pay a share of the costs shall pay them equally. Payment shall be due upon completion of the conference.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Administrative Office of the Courts may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person must:

(a) Have completed a minimum of 40 hours in a Trial Court Mediation Training Program certified by the Administrative Office of the Courts; and

(b) Be a member in good standing of the North Carolina State Bar and have at least five years of experience as a judge, practicing attorney, law professor, or mediator, or equivalent experience; and

(c) Observe two civil trial court mediated settlement conferences conducted by a mediator certified either in the State of North Carolina or in any other state with comparable certification requirements to those outlined in these rules; and

(d) Demonstrate familiarity with the statutes, rules, and practice governing mediated settlement conferences in North Carolina; and

(e) Be of good moral character and adhere to any ethical standards hereafter adopted by this Court; and

(f) Submit proof of qualifications set out in this section on a form provided by the Administrative Office of the Courts; and

(g) Pay all administrative fees established by the Administrative Office of the Courts.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Director of the Administrative Office of the Courts that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator.

## RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

(a) Certified training programs for mediators of Superior Court civil actions shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Standards of conduct for mediators;

(4) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(5) Demonstrations of mediated settlement conferences; and

(6) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(7) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

(b) A training program must be certified by the Director of the Administrative Office of the Courts before attendance at such program may be used for compliance with Rule 8(a). Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Director of the Administrative Office of the Courts if they are in substantial compliance with the standards set forth in this rule.

(c) Payment of all administrative fees must be made prior to certification.

RULE 10. LOCAL RULE MAKING

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these rules is authorized to publish local rules implementing mediated settlement conferences not inconsistent with these rules and G.S. 7A-38.

## ORDER AMENDING THE GENERAL RULE OF PRACTICE RELATED TO SUMMARY JURY PROCEEDINGS TO ADD A NEW RULE 23 AND THE CORRESPONDING COMMENT

Pursuant to the authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are amended by the adoption of a new Rule 23, to read as follows:

> The senior resident superior court judge of any superior court district or a presiding judge unless prohibited by local rule may upon joint motion or consent of all parties order the use of a summary jury upon good cause shown and upon such terms and conditions as justice may require. The order shall describe the terms and conditions proposed for the summary jury proceeding. Such terms and conditions may include: (1) a provision as to the binding or non-binding nature of the summary jury proceeding; (2) variations in the method for selecting jurors; (3) limitations on the amount of time provided for argument and the presentation of witnesses; (4) limitations on the method or manner of presentation of evidence; (5) appointment of a referee to preside over the summary jury trial; (6) setting the date for conducting the summary jury trial; (7) approval of a settlement agreement contingent upon the outcome of the summary jury proceeding; or (8) such other matters as would in the opinion of the court contribute to the fair and efficient resolution of the dispute. The court shall maintain jurisdiction over the case, and may, where appropriate, rule on pending motions.

The following comment to the new Rule 23 of the General Rules of Practice shall accompany the Rule:

> The summary jury trial is a dispute resolution technique pioneered in the federal courts in the early 1980s. Pursuant to reports of its success as a settlement tool, the North Carolina Supreme Court in 1987 authorized the use of summary jury trials in three judicial districts on an experimental basis. Since that time, a number of summary jury trials have been conducted.
>
> In May, 1991, a report prepared by the Private Adjudication Center detailed the North Carolina state courts' experience with the summary jury trial. That report noted that a number of variations in the summary jury trial process had been used successfully. The report concluded with a number of recommendations subsequently endorsed by the Dispute Resolution

Committee of the North Carolina Bar Association. One of the recommendations was that the North Carolina Supreme Court adopt a General Rule of Practice authorizing the use of summary jury trials throughout the state.

Pursuant to that recommendation, this General Rule provides for the use of summary jury trials based upon the voluntary agreement of the parties, manifested by way of a joint motion to the court. The rule further provides that the authority to approve the request lies with the senior resident superior court judge for the county or judicial district in which the action is pending (or a presiding judge unless prohibited by local rule). The request shall be approved if the court finds that it is in the interest of justice for good cause shown. In this context, good cause relates to a judicial determination that the use of a summary jury trial represents a fair and efficient method for pursuing settlement of the dispute.

The Rule does *not* authorize a court to mandate the use of a summary jury trial. Nothing in the rule, however, prohibits a judge or other court administrator from raising the possibility of using a summary jury trial with the parties during a pre-trial conference or other event and explaining the possible benefits of the process.

The summary jury trials conducted to date in North Carolina have employed a number of innovative techniques. These variations, many of which are detailed in the above-referenced report, have ranged from variations on the methods used to select a jury to limitations on the manner in which evidence is presented. In other cases, the parties have requested that the court appoint a referee to preside over the summary jury proceeding. In addition, the parties in several summary jury trials have agreed that the results would be binding, sometimes pursuant to a "high/low agreement" that limits both parties' risk of an aberrant result. The Rule specifically provides that the court has the power to authorize these practices in appropriate cases.

Adopted by the Court in Conference this 14th day of August, 1991. This amendment, along with the commentary thereto, shall

be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals.

WHICHARD, J.
For the Court

*WITNESS* my hand and the Seal of the Supreme Court of North Carolina, this the 10th day of September, 1991.

CHRISTIE SPEIR PRICE
Clerk of the Supreme Court

## AMENDMENTS TO RULES GOVERNING ADMISSION TO PRACTICE OF LAW

The following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at its regular quarterly meeting on July 12, 1991.

BE IT RESOLVED that Rules .0103, .0202(2), .0202(3), .0206, .0403, .0502, and .1301 of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appear in 289 N.C. 742 and as amended in 293 N.C. 759, 295 N.C. 747, 296 N.C. 746, 304 N.C. 746, 306 N.C. 793, 307 N.C. 707, 310 N.C. 753, 312 N.C. 838, and 326 N.C. 809 be amended as shown by the RESOLUTION of the Board of Law Examiners attached hereto.

**RESOLUTION**

WHEREAS, the Board of Law Examiners of the State of North Carolina held a meeting in its offices in the N.C. State Bar Building, 208 Fayetteville Street Mall, Raleigh, North Carolina, on June 7, 1991; and

WHEREAS, at this meeting, the Board considered amendments to Rules .0103, .0202, .0206, .0403, .0502 and .1301 of the Rules Governing Admission to the Practice of Law in the State of North Carolina; and,

WHEREAS, on motion by Stephen R. Burch, seconded by Richard S. Jones, Jr., it was RESOLVED that Rules .0103, .0202, .0206, .0403, .0502 and .1301 in the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended to read as follows:

.0103 MEMBERSHIP

The Board of Law Examiners of the State of North Carolina consists of eleven members of the N.C. Bar elected by the Council of the North Carolina State Bar. One member of said Board is elected by the Board to serve as chairman for such period as the Board may determine. The Board also employs an Executive ~~secretary~~ *Director* to enable the Board to perform its duties promptly and properly. The Executive ~~secretary~~, *Director* in addition to performing the administrative functions of the positions, may act as attorney for the Board.

.0202 DEFINITIONS

(2) The term "secretary" as used in this chapter refers to the Executive ~~Secretary~~ *Director* of the Board of Law Examiners of the State of North Carolina.

(3) As used in these rules, the word "filing" or "filed" shall mean received in the office of the Board of Law Examiners. *Except that applications placed in the United States mail properly addressed to the Board of Law Examiners and bearing sufficient first class postage and postmarked by the United States Postal Service on or before a deadline date will be considered as having been timely filed if all required fees are included in the mailing. Mailings which are postmarked after a deadline or which if postmarked on or before a deadline and do not include required fees or which include a check in payment of required fees which is not honored due to insufficient funds will not be considered as timely filed.*

.0206 NONPAYMENT OF FEES

~~Failure to pay the fees as required by these rules shall result in a denial of the application to take the North Carolina Bar Examination. All checks payable to the Board for any fees which are not honored upon presentment shall be returned to the applicant who shall, with ten (10) days following the receipt thereof, pay to the Board in cash, cashier's check, certified check or money order, any fees payable to the Board.~~ *Failure to pay the application fees required by these rules shall cause the application not to be deemed filed. If the check payable for the application fee is not honored due to insufficient funds, the application will not be deemed timely filed and will have to be refiled.*

.0403 FILING DEADLINES

(1) Applications shall be filed and received by the secretary at the offices of the Board ~~not later than 5:00 p.m. Eastern Standard Time~~ *on or before* the second Tuesday in January immediately preceding the date of the July written bar examination and ~~not later than 5:00 p.m. Eastern Daylight Savings Time~~, *on or before* the second Tuesday in October immediately preceding the date of the February written bar examination.

(2) Upon payment of a late filing fee of $150 (in addition to all other fees required by these rules), an applicant may file a late application with the Board ~~not later than 5:00 p.m. Eastern Standard Time~~, on *or before* the second Tuesday in March immediately preceding the July written bar examination and ~~not later than 5:00 p.m. Eastern Standard Time~~, on *or before* the first Tuesday in November immediately preceding the February written bar examination.

(3) Any applicant who has aptly filed an application to stand the February written bar examination may make application to take the immediately following July bar examination by filing a Supplemental Application with the secretary of the Board ~~not later than 5:00 p.m., Eastern Daylight Savings time~~, on *or before* the first Tuesday in May immediately preceding the July written bar examination.

.0502 REQUIREMENTS FOR COMITY APPLICANTS

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, ~~immigrating or who has heretofore immigrated to North~~

~~Carolina from such jurisdiction~~, upon written application may, in the discretion of the Board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

.1301 INTERIM PERMIT FOR COMITY APPLICANTS
Delete

NOW, THEREFORE BE IT RESOLVED by unanimous vote of the Board of Law Examiners of the State of North Carolina that Rules .0103, .0202, .0206, .0403, .0502 and .1301 of the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended to read as set out above; and that the action of this Board be certified to the Council of the North Carolina State Bar and to the North Carolina Supreme Court for approval.

Enacted at a regularly scheduled meeting of the Board of Law Examiners of the State of North Carolina on June 7, 1991.

Given over my hand and seal of the Board of Law Examiners this the 17th day of June, 1991.

FRED P. PARKER III
Executive Director

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at its meeting on July 12, 1991, and the amendments as certified were duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 25th day of July, 1991.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina 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 14th day of August, 1991.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina 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 14th day of August, 1991.

WHICHARD, J.
For the Court

## AMENDMENTS TO BAR RULES RELATING TO STANDING COMMITTEES OF THE COUNCIL

The following amendment to the Rules, Regulations, and Certification of Organization was duly adopted by the Council of the North Carolina State Bar at its July 12, 1991, quarterly meeting.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council, be amended by adding a new paragraph o. and thereby create a standing committee known as "Legal Assistance for Military Personnel" (LAMP) as follows:

> o. Legal Assistance for Military Personnel (LAMP). A committee of at least four councilors and nine non-councilors to serve as a liaison group with lawyers serving military personnel in North Carolina. The purpose is to give improved legal service to military personnel and dependents stationed in North Carolina; to assist armed forces legal assistance officers with matters of North Carolina law; to provide representation for service personnel in the civilian courts of this state; and provide a referral service for legal officers needing advice and assistance.

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 was duly adopted by the Council of the North Carolina State Bar at its meeting on July 12, 1991, and the amendment as certified was duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 25th day of July, 1991.

B. E. JAMES
Secretary

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 is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 14th day of August, 1991.

JAMES G. EXUM
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 it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 14th day of August, 1991.

WHICHARD, J.
For the Court

The following amendment to the Rules, Regulations, and Certification of Organization was duly adopted by the Council of the North Carolina State Bar at its October 18, 1991, quarterly meeting.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council, be amended by adding a new paragraph p. and thereby create a standing committee known as the "Disaster Response Committee" as follows:

> p. Disaster Response Committee. A committee of not less than five councilors and non-councilors who will implement the Disaster Response Plan as adopted by the Council of the North Carolina State Bar. The purpose of the Disaster Response Committee is to provide for standing representatives of the North Carolina State Bar who will implement a disaster response plan and provide publicity and on-site representation to ensure that legal representation is available to victims of disasters and to prevent the improper solicitation of victims by attorneys at law or individuals acting on behalf of attorneys.

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 was duly adopted by the Council of the North Carolina State Bar at its meeting on October 18, 1991, and the amendment as certified was duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 7th day of November, 1991.

B. E. JAMES
Secretary

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 is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of December, 1991.

JAMES G. EXUM
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 it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 5th day of December, 1991.

WHICHARD, J.
For the Court

## DISASTER RESPONSE PLAN OF THE NORTH CAROLINA STATE BAR

I. THE DISASTER RESPONSE TEAM

A. The Disaster Response Team should be made up of the following:

1. President of the State Bar of North Carolina or in the event the President is unavailable, the President-Elect;

2. The Counsel, or his/her designee;

3. Director of Communications, or his/her designee;

4. President of the Young Lawyers Division of the North Carolina Bar Association ("YLD") or his/her designee;

5. Other persons, such as the applicable local bar president(s), appointed by the President as appropriate and necessary for response in each individual situation.

B. Implementation of the Disaster Response Plan shall be the decision of the President or President-Elect.

C. The Council, or his/her designee, shall be the coordinator of the Disaster Response Team ("Coordinator"). If the President or President-Elect is unavailable to decide whether to implement the Disaster Response Plan for a particular event, then and only then shall the Coordinator be authorized to make the decision to implement the Disaster Response Plan.

D. It shall be the responsibility of the Coordinator to conduct annual educational programs regarding the Disaster Response Plan.

II. GENERAL POLICY AND OBJECTIVES

A. Rapid response

1. It is essential that the State Bar establish an awareness and sensitivity to disaster situations.

2. The disaster response plan will be disseminated through the publications of the State Bar and continuing legal education programs.

3. The disaster response team shall be properly trained to respond to initial inquiries and appear at the site.

4. The disaster response team will provide victims and/or their families with written materials when requested.

B. Effective mobilization of resources

1. An appropriate press release shall be prepared and disseminated.

2. The Coordinator shall confirm the individuals who will make up the disaster response team.

3. Individual assignments of responsibilities shall be made to members of the team by the Coordinator.

4. The Coordinator shall arrange for the State Bar to be represented at any Victims' Assistance Center established at the disaster site. The Coordinator will request the YLD to assist the State Bar by providing additional staffing.

5. The Coordinator shall contact the local District Attorney(s) and request that he/she prosecute any per-

sons engaging in the unauthorized practice of law (N.C.G.S. 84-2.1, 84-4, 84-7 and 84-8); improper solicitation (N.C.G.S. 84-38); division of fees (N.C.G.S. 84-38); and/or the common law crime of barratry (frequently stirring up suits and quarrels between persons).

C. Publicity

1. It is important to focus on the fact that disaster response is a public *service* effort.
2. The disaster response team shall ensure approval and dissemination of an even-handed press release.
3. The Director of Communications will be utilized for press contacts.
4. It is important to ensure that the press release indicates that the State Bar is a resource designed to assist victims, *if requested.*

D. On-site representation

1. It is normally desirable for the disaster response team to arrive at the site of the disaster as soon as possible.
2. Only the President or President-Elect or their designee will conduct press interviews on behalf of the State Bar.
3. The availability of State Bar at the site of the disaster should be made known to victims.
4. The disaster response team shall establish a liaison with the State Emergency Management Division, Red Cross, Salvation Army, and other such organizations to provide assistance to victims and furnish written materials to these organizations.
5. It is crucial that the State Bar not become identified with either side of any potential controversy.
6. All members of the disaster response team must avoid making comments on the merits of claims that may arise from the disaster.

E. Dissemination of information to affected individuals

1. The team shall emphasize in all public statements that the State Bar's major and only legitimate concern is for those persons affected by the disaster and the public interest.

2. The State Bar's role is limited to monitoring compliance with its Disciplinary Rules, to requesting reports of any violation needing investigation, and to informing victims of rules concerning client solicitation.

III. REPORT ON RESULTS

A. The Coordinator will convene as soon as possible a meeting to be attended by as many groups as were involved in the disaster to obtain input regarding the effectiveness of the Plan in that particular disaster.

B. The Coordinator shall prepare a written report of all that occurred at the site of the disaster.

C. The written report shall be submitted to the Council of the State Bar as well as other involved organizations.

ADOPTED AT THE MEETING OF THE COUNCIL OF THE NORTH CAROLINA STATE BAR ON OCTOBER 18, 1991.

## INTERSTATE PRACTICE OF LAW

AMENDMENTS
TO

THE BYLAWS OF THE CERTIFICATE OF ORGANIZATION OF THE NORTH CAROLINA STATE BAR DULY ADOPTED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR AT ITS QUARTERLY MEETING ON JULY 12, 1991.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article II, Section 2.1 of the Bylaws, as approved by the Supreme Court on December 8, 1982, 328 N.C. 747, be and the same is hereby amended:

1) Rewrite Section 2.1(2) to read as follows:

"There shall be filed with the registration statement a notarized statement, which can be included in Section 2.1(3), of the filing law firm by a member who is licensed in North Carolina certifying 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."

2) Amend Section 2.1(4) by striking the figure $90.00 and insert in its place the figure $500.00.

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Bylaws of the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its meeting on July 12, 1991, and the amendments as certified were duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 25th day of July, 1991.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Bylaws of the Certificate of Organization 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 14th day of August, 1991.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Bylaws of the Certificate of Organization 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 14th day of August, 1991.

WHICHARD, J.
For the Court

# AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR RELATING TO DISCIPLINE AND DISBARMENT OF ATTORNEYS

The Rules and Regulations of the North Carolina State Bar relating to the Disciplinary Procedures were originally approved by the Supreme Court of North Carolina on the 4th day of November, 1975, as appears in 288 N.C. 743, and reprinted in full with the several amendments in 310 N.C. 794.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX be amended by rewriting the same as appears in the attached certified rule printed in full. BE IT FURTHER RESOLVED that the Council requests that these rules as rewritten be printed in full in the Supreme Court Reports.

## ARTICLE VI

Section 5. Standing Committees of the Council

. . .

c. Committee on Grievances

The grievance committee will consist of not less than fifteen members, one of whom will be designated as chairperson. At least one vice-chairperson will be designated. The committee will have as members at least three councilors from each of the judicial divisions of the state. The grievance committee will have the powers and duties set forth in Article IX of these rules, and will report on the status of grievances, investigations and complaints at regular or special meetings of the council as the executive committee may direct.

## ARTICLE IX

### Discipline and Disbarment of Attorneys

### Determination of Disability

1. General Provisions

Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts and the legal profession. The fact that certain misconduct has remained unchallenged when done by others, or when done at other times or that it has not been made the subject of earlier disciplinary proceedings will not be a defense to any charge of misconduct by a member.

2. Proceeding for Discipline

A. The procedure to discipline members of the bar of this state will be in accordance with the provisions hereinafter set forth.

B. District bars will not conduct separate proceedings to discipline members of the bar but will assist and cooperate with the North Carolina State Bar in reporting and investigating matters of alleged misconduct on the part of its members.

C. Concurrent Jurisdiction of State Bar and Courts

1. The Council of the North Carolina State Bar is vested, as an agency of the state, with the control of the

discipline, disbarment and restoration of attorneys practicing law in this state.

2. The courts of this state have inherent authority to take disciplinary action against attorneys practicing therein, even in relation to matters not pending in the court exercising disciplinary authority.

3. The authority of the North Carolina State Bar and the courts to discipline attorneys is separate and distinct, the North Carolina State Bar having derived its jurisdiction by legislative act and the courts from the inherent power of the courts themselves.

4. Neither the North Carolina State Bar nor the courts are authorized or empowered to act for or in the name of the other, and the disciplinary action taken by either entity should be clearly delineated as to the source or basis for the action being taken.

5. It is the position of the North Carolina State Bar that no trial court has the authority to preempt a North Carolina State Bar disciplinary proceeding with a pending civil or criminal court proceeding involving attorney conduct, or to dismiss a disciplinary proceeding pending before the North Carolina State Bar.

6. Whenever the North Carolina State Bar learns that a court has initiated an inquiry or proceeding regarding alleged improper or unethical conduct of an attorney, the North Carolina State Bar may defer to the court and stay its own proceeding pending completion of the court's inquiry or proceeding. Upon request, the North Carolina State Bar will assist in the court's inquiry or proceeding.

7. If the North Carolina State Bar finds probable cause and institutes disciplinary proceedings against an attorney for conduct which subsequently becomes an issue in a criminal or civil proceeding, the court may, in its discretion, defer its inquiry pending the completion of the North Carolina State Bar's proceedings.

8. Upon the filing of a complaint by the North Carolina State Bar, the North Carolina State Bar will send a copy of the complaint to the chief resident superior court judge and to all superior court judges regularly

assigned to the district in which the attorney maintains his or her law office. The North Carolina State Bar will send a copy of the complaint to the district attorney in the district in which the attorney maintains a law office if the complaint alleges criminal activity by the attorney.

9. The North Carolina State Bar will encourage judges to contact the North Carolina State Bar to determine the status of any relevant complaints filed against an attorney before the court takes disciplinary action against the attorney.

3. Definitions

Subject to additional definitions contained in other provisions of this chapter, the following words and phrases, when used in this article, will have, unless the context clearly indicates otherwise, the meanings given to them in this section:

A. Admonition: a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.

B. Appellate division: the appellate division of the general court of justice.

C. Censure: a written form of discipline more serious than a reprimand issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession or a member of the public, but the misconduct does not require suspension of the attorney's license.

D. Certificate of conviction: a certified copy of any judgment wherein a member of the North Carolina State Bar is convicted of a criminal offense.

E. Chairperson of the grievance committee: councilor appointed to serve as chairperson of the grievance committee of the North Carolina State Bar.

F. Commission: the Disciplinary Hearing Commission of the North Carolina State Bar.

G. Commission chairperson: the chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar.

H. Complaint or complaining witness: any person who has complained of the conduct of any member of the North Carolina State Bar to the North Carolina State Bar.

I. Complaint: a formal pleading filed in the name of the North Carolina State Bar with the commission against a member of the North Carolina State Bar after a finding of probable cause.

J. Consolidation of cases: a hearing by a hearing committee of multiple charges, whether related or unrelated in substance, brought against one defendant.

K. Council: the Council of the North Carolina State Bar.

L. Councilor: a member of the Council of the North Carolina State Bar.

M. Counsel: the counsel of the North Carolina State Bar appointed by the council.

N. Court or courts of this state: a court authorized and established by the constitution or laws of the state of North Carolina.

O. Defendant: a member of the North Carolina State Bar against whom a finding of probable cause has been made.

P. Disabled or disability: a mental or physical condition which significantly impairs the professional judgment, performance, or competence of an attorney.

Q. Grievance: alleged misconduct.

R. Grievance committee: the grievance committee of the North Carolina State Bar.

S. Hearing committee: a hearing committee designated under subsection 14(D).

T. Illicit drug: any controlled substance as defined in the North Carolina Controlled Substances Act, section 5, chapter 90, of the North Carolina General Statutes, or its successor, which is used or possessed without a prescription or in violation of the laws of this state or the United States.

U. Incapacity or incapacitated: condition determined in a judicial proceeding under the laws of this or any other jurisdiction that an attorney is mentally defective, an inebriate, mentally disordered, or incompetent from want

of understanding to manage his or her own affairs by reason of the excessive use of intoxicants, drugs, or other cause.

V. Investigation: the gathering of information with respect to alleged misconduct, alleged disability, or a petition for reinstatement.

W. Investigator: any person designated to assist in the investigation of alleged misconduct or facts pertinent to a petition for reinstatement.

X. Letter of caution: communication from the grievance committee to an attorney stating that the past conduct of the attorney, while not the basis for discipline, is unprofessional or not in accord with accepted professional practice.

Y. Letter of notice: a communication to a respondent setting forth the substance of a grievance.

Z. Letter of warning: written communication from the grievance committee or the commission to an attorney stating that past conduct of the attorney, while not the basis for discipline, is an unintentional, minor, or technical violation of the Rules of Professional Conduct and may be the basis for discipline if continued or repeated.

AA. Member: a member of the North Carolina State Bar.

BB. Office of the Counsel: the office and staff maintained by the counsel of the North Carolina State Bar.

CC. Office of the Secretary: the office and staff maintained by the secretary-treasurer of the North Carolina State Bar.

DD. PALS Committee: Positive Action for Lawyers Committee of the North Carolina State Bar.

EE. Party: after a complaint has been filed, the North Carolina State Bar as plaintiff or the member as defendant.

FF. Plaintiff: after a complaint has been filed, the North Carolina State Bar.

GG. Preliminary hearing: hearing by the grievance committee to determine whether probable cause exists.

HH. Probable cause: a finding by the grievance committee that there is reasonable cause to believe that a member of

the North Carolina State Bar is guilty of misconduct justifying disciplinary action.

II. Reprimand: a written form of discipline more serious than an admonition issued in cases in which a defendant has violated one or more provisions of the Rules of Professional Conduct and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure.

JJ. Respondent: a member of the North Carolina State Bar who has been accused of misconduct or whose conduct is under investigation, but as to which conduct there has not yet been a determination of whether probable cause exists.

KK. Secretary: the secretary-treasurer of the North Carolina State Bar.

LL. Serious crime: the commission of, attempt to commit, conspiracy to commit, solicitation or subornation of any felony or any crime that involves false swearing, misrepresentation, deceit, extortion, theft, bribery, embezzlement, false pretenses, fraud, interference with the judicial or political process, larceny, misappropriation of funds or property, overthrow of the government, perjury, willful failure to file a tax return, or any other offense involving moral turpitude or showing professional unfitness.

MM. Supreme Court: the Supreme Court of North Carolina.

NN. Will: when used in these rules, means a direction or order which is mandatory or obligatory.

4. State Bar Council: Powers and Duties in Discipline and Disability Matters

The Council of the North Carolina State Bar will have the power and duty:

A. to supervise and conduct disciplinary proceedings in accordance with the provisions hereinafter set forth.

B. to appoint members of the commission as provided by statute.

C. to appoint a counsel. The counsel will serve at the pleasure of the council. The counsel will be a member of the

North Carolina State Bar but will not be permitted to engage in the private practice of law.

D. to order the transfer of a member to disability inactive status when such member has been judicially declared incompetent or has been involuntarily committed to institutional care because of incompetence or disability.

E. to accept or reject the surrender of the license to practice law of any member of the North Carolina State Bar.

F. to order the disbarment of any member whose resignation is accepted or to refer the matter of discipline to the commission for hearing and determination.

G. to review the report of any hearing committee upon a petition for reinstatement of a disbarred attorney and to make final determination as to whether the license will be restored.

5. Chairperson of the Grievance Committee: Powers and Duties

A. The chairperson of the grievance committee will have the power and duty:

1. to supervise the activities of the counsel.

2. to recommend to the grievance committee that an investigation be initiated.

3. to recommend to the grievance committee that a grievance be dismissed.

4. to direct a letter of notice to a respondent.

5. to issue, at the direction and in the name of the grievance committee, a letter of caution, letter of warning, an admonition, a reprimand, or a censure to a member.

6. to notify a respondent that a grievance has been dismissed, and to notify the complainant in accordance with section 21(C).

7. to call meetings of the grievance committee.

8. to issue subpoenas in the name of the North Carolina State Bar or direct the secretary to issue such subpoenas.

9. to administer or direct the administration of oaths or affirmations to witnesses.

10. to sign complaints and petitions in the name of the North Carolina State Bar.

11. to determine whether proceedings should be instituted to activate a suspension which has been stayed.

12. to enter orders of reciprocal discipline in the name of the grievance committee.

13. to direct the counsel to institute proceedings in the appropriate forum to determine if an attorney is in violation of an order of the grievance committee, the commission, or the council.

14. to rule on requests for reconsideration of decisions of the grievance committee regarding grievances.

15. to tax costs of the disciplinary procedures against any defendant against whom the grievance committee imposes discipline, including a minimum administrative cost of $50.

B. The president, vice-chairperson or senior council member of the grievance committee may perform the functions of the chairperson of the grievance committee in any matter when the chairperson is absent or disqualified.

6. Grievance Committee: Powers and Duties

The grievance committee will have the power and duty:

A. to direct the counsel to investigate any alleged misconduct or disability of a member of the North Carolina State Bar coming to its attention.

B. to hold preliminary hearings, find probable cause and direct that complaints be filed.

C. to dismiss grievances upon a finding of no probable cause.

D. to issue a letter of caution to a respondent in cases wherein misconduct is not established but the activities of the respondent are unprofessional or not in accord with accepted professional practice. The letter of caution will recommend that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified.

E. to issue a letter of warning to a respondent in cases wherein no probable cause is found but it is determined by the grievance committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct. The letter of warning will advise the attorney that he or she may be subject to discipline if such conduct is continued or repeated. The warning will specify in one or more ways the conduct or practice for which the respondent is being warned. A copy of the letter of warning will be maintained in the office of the counsel for three years subject to the confidentiality provisions of section 29.

F. to issue an admonition in cases wherein the defendant has committed a minor violation of the Rules of Professional Conduct.

G. to issue a reprimand wherein the defendant has violated one or more provisions of the Rules of Professional Conduct, and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure.

H. to issue a censure in cases wherein the defendant has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the defendant's license.

I. to direct that a petition be filed seeking a determination whether a member of the North Carolina State Bar is disabled.

J. to include in any order of admonition, reprimand, or censure a provision requiring the defendant to complete a reasonable amount of continuing legal education in addition to the minimum amount required by the North Carolina Supreme Court.

7. Counsel: Powers and Duties

The counsel will have the power and duty:

A. to investigate all matters involving alleged misconduct whether initiated by the filing of a grievance or otherwise.

B. to recommend to the chairperson of the grievance committee that a matter be dismissed, that a letter of caution, or a letter of warning be issued, or that the grievance committee hold a preliminary hearing.

C. to prosecute all disciplinary proceedings before the grievance committee, hearing committees and the courts.

D. to represent the North Carolina State Bar in any trial, hearing, or other proceeding concerned with the alleged disability of a member.

E. to appear on behalf of the North Carolina State Bar at hearings conducted by the grievance committee, hearing committees, or any other agency or court concerning any motion or other matter arising out of a disciplinary or disability proceeding.

F. to appear at hearings conducted with respect to petitions for reinstatement of license by suspended or disbarred attorneys or by attorneys transferred to disability inactive status, to cross-examine witnesses testifying in support of such petitions and to present evidence, if any, in opposition to such petitions.

G. to employ such deputy counsel, investigators and other administrative personnel in such numbers as the council may authorize.

H. to maintain permanent records of all matters processed and of the disposition of such matters.

I. to perform such other duties as the council may direct.

J. after a finding of probable cause by the grievance committee, to designate the particular violations of the Rules of Professional Conduct to be alleged in a formal complaint filed with the commission.

K. to file amendments to complaints and petitions arising out of the same transactions or occurrences as the allegations in the original complaints or petitions, in the name of the North Carolina State Bar with the prior approval of the chairperson of the grievance committee.

L. after a complaint is filed with the commission, to dismiss any or all claims in the complaint or to negotiate and recommend consent orders of discipline to the hearing committee.

8. Chairperson of the Hearing Commission: Powers and Duties

A. The chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar will have the power and duty:

1. to receive complaints alleging misconduct and petitions alleging the disability of a member filed by the counsel; petitions requesting reinstatement of license by members who have been involuntarily transferred to disability inactive status, suspended, or disbarred; motions seeking the activation of suspensions which have been stayed; and proposed consent orders of disbarment.

2. to assign three members of the commission, consisting of two members of the North Carolina State Bar and one nonlawyer to hear complaints, petitions, motions, and posthearing motions pursuant to section 14(Z). The chairperson will designate one of the attorney members as chairperson of the hearing committee. No committee member who hears a disciplinary matter may serve on the committee which hears the attorney's reinstatement petition. The chairperson of the commission may designate himself or herself to serve as one of the attorney members of any hearing committee and will be chairperson of any hearing committee on which he or she serves. Posthearing motions filed pursuant to section 14(Z) will be considered by the same hearing committee assigned to the original trial proceeding. Hearing committee members who are ineligible or unable to serve for any reason will be replaced with members selected by the commission chairperson.

3. to set the time and place for the hearing on each complaint or petition.

4. to subpoena witnesses and compel their attendance and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. The chairperson may designate the secretary to issue such subpoenas.

5. to consolidate, in his or her discretion for hearing, two or more cases in which a subsequent complaint or complaints have been served upon a defendant within ninety days of the date of service of the first or a preceding complaint.

6. to enter orders disbarring members by consent.

B. The vice-chairperson of the disciplinary hearing commission may perform the function of the chairperson in any matter when the chairperson is absent or disqualified.

9. Hearing Committee: Powers and Duties

Hearing committees of the Disciplinary Hearing Commission of the North Carolina State Bar will have the following powers and duties:

A. to hold hearings on complaints alleging misconduct, or petitions seeking a determination of disability or reinstatement, or motions seeking the activation of suspensions which have been stayed.

B. to enter orders regarding discovery and other procedures in connection with such hearings, including, in disability matters, the examination of a member by such qualified medical experts as the committee will designate.

C. to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Subpoenas will be issued by the chairperson of the hearing committee in the name of the commission. The chairperson may direct the secretary to issue such subpoenas.

D. to administer or direct the administration of oaths or affirmations to witnesses at hearings.

E. to make findings of fact and conclusions of law.

F. to enter orders dismissing complaints in matters before the committee.

G. to enter orders of discipline against or letters of warning to defendants in matters before the committee.

H. to tax costs of the disciplinary procedures against any defendant against whom discipline is imposed, provided, however, that such costs will not include the compensation of any member of the council, committees, or agencies of the North Carolina State Bar.

I. to enter orders transferring a member to disability inactive status.

J. to report to the council its findings of fact and recommendations after hearings on petitions for reinstatement of disbarred attorneys.

K. to grant or deny petitions of attorneys seeking transfer from disability inactive status to active status.

L. to enter orders reinstating suspended attorneys or denying reinstatement. An order denying reinstatement may include additional sanctions in the event violations of the petitioner's order of suspension are found.

M. to enter orders activating suspensions which have been stayed or continuing the stays of such suspensions.

10. Secretary: Powers and Duties in Discipline and Disability Matters

The secretary will have the following powers and duties in regard to discipline and disability procedures:

A. to receive grievances for transmittal to the counsel, to receive complaints and petitions for transmittal to the commission chairperson, and to receive affidavits of surrender of license for transmittal to the council.

B. to issue summonses and subpoenas when so directed by the president, the chairperson of the grievance committee, the chairperson of the commission, or the chairperson of any hearing committee.

C. to maintain a record and file of all grievances not dismissed by the grievance committee.

D. to perform all necessary ministerial acts normally performed by the clerk of the superior court in complaints filed before the commission.

E. to enter orders of reinstatement where petitions for reinstatement of suspended attorneys are unopposed by the counsel.

F. to dismiss reinstatement petitions based on the petitioner's failure to comply with the rules governing the provision and transmittal of the record of reinstatement proceedings.

G. to determine the amount of costs assessed in disciplinary proceedings by the commission.

11. Grievances: Form and Filing

A. A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the counsel. The counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose. Such standard forms will be available from the counsel, secretary, and the offices of the clerks of court in this state. Grievances reduced to writing on such standard forms will be transmitted by the complainant to the secretary.

B. Upon the direction of the council or the grievance committee the counsel will investigate such conduct of any member as may be specified by the council or grievance committee.

C. The counsel may investigate any matter coming to the attention of the counsel involving alleged misconduct of a member upon receiving authorization from the chairperson of the grievance committee. If the counsel receives information that a member has used or is using illicit drugs, the counsel will follow the provisions of section 30.

12. Investigations: Initial Determination

A. Subject to the policy supervision of the council and the control of the chairperson of the grievance committee, the counsel, or other personnel under the authority of the counsel, will investigate the grievance and submit to the chairperson of the grievance committee a report detailing the findings of the investigation.

B. As soon as practicable after the receipt of the initial or any interim report of the counsel concerning any grievance, the chairperson of the grievance committee may: (1) treat the report as a final report; (2) direct the counsel to conduct further investigation, including contacting the respondent in writing or otherwise; or (3) send a letter of notice to the respondent.

C. If a letter of notice is sent to the respondent, it will be by certified mail and will direct that a response be made within fifteen days of receipt of the letter of notice. Such response will be a full and fair disclosure of all

the facts and circumstances pertaining to the alleged misconduct.

D. After a response to a letter of notice is received, the counsel may conduct further investigation or terminate the investigation, subject to the control of the chairperson of the grievance committee.

E. For reasonable cause, the chairperson of the grievance committee may issue subpoenas to compel the attendance of witnesses, including the respondent, for examination concerning the grievance and may compel the production of books, papers, and other documents or writings deemed necessary or material to the inquiry. Each subpoena will be issued by the chairperson of the grievance committee, or by the secretary at the direction of the chairperson. The counsel, deputy counsel, investigator, or any members of the grievance committee designated by the chairperson may examine any such witness under oath or otherwise.

F. As soon as practicable after the receipt of the final report of the counsel or the termination of an investigation, the chairperson will convene the grievance committee to consider the grievance.

G. The investigation into the conduct of an attorney will not be abated by the failure of the complainant to sign a grievance, settlement, compromise, or restitution.

13. Proceedings Before the Grievance Committee

A. The grievance committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. In its discretion, the grievance committee may find probable cause regardless of whether the respondent has been served with a written letter of notice.

B. The chairperson of the grievance committee will have the power to administer oaths and affirmations.

C. The chairperson will keep a record of the grievance committee's determination concerning each grievance and file the record with the secretary.

D. The chairperson will have the power to subpoena witnesses, to compel their attendance, and compel the production of books, papers, and other documents deemed necessary

or material to any preliminary hearing. The chairperson may designate the secretary to issue such subpoenas.

E. The counsel and deputy counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the committee is in session and deliberating, but no persons other than members may be present while the committee is voting.

F. The results of any deliberation by the grievance committee will be disclosed to the counsel and the secretary for use in the performance of their duties. Otherwise, a member of the committee, the staff of the North Carolina State Bar, any interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the committee only when so directed by the committee or a court of record.

G. At any preliminary hearing held by the grievance committee, a quorum of one-half of the members will be required to conduct any business. Affirmative vote of a majority of members present will be necessary to find that probable cause exists. The chairperson will not be counted for quorum purposes and will be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

H. If probable cause is found and the committee determines that a hearing is necessary, the chairperson will direct the counsel to prepare and file a complaint against the defendant. If the committee finds probable cause but determines that no hearing is necessary, it will direct the counsel to prepare for the chairperson's signature an admonition, reprimand, or censure. If no probable cause is found, the grievance will be dismissed or dismissed with a letter of warning or a letter of caution.

I. If no probable cause is found but it is determined by the grievance committee that the conduct of the respondent is unprofessional or not in accord with accepted professional practice, the committee may issue a letter of caution to the respondent recommending that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified.

J. Letters of warning

1. If no probable cause is found but it is determined by the grievance committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct, the committee may issue a letter of warning to the respondent. The letter of warning will advise the respondent that he or she may be subject to discipline if such conduct is continued or repeated. The letter will specify in one or more ways the conduct or practice for which the respondent is being warned. The letter of warning will not constitute discipline of the respondent.

2. A copy of the letter of warning will be maintained in the office of the counsel for three years. If relevant, a copy of the letter of warning may be offered into evidence in any proceeding filed against the respondent before the commission within three years after the letter of warning is issued to the respondent. In every case filed against the respondent before the commission within three years after the letter of warning is issued to the respondent, the letter of warning may be introduced into evidence as an aggravating factor concerning the issue of what disciplinary sanction should be imposed. A copy of the letter of warning may be disclosed to the grievance committee if another grievance is filed against the respondent within three years after the letter of warning is issued to the respondent.

3. A copy of the letter of warning will be served upon the respondent as provided in rule 4 of the North Carolina Rules of Civil Procedure. Within fifteen days after service the respondent may refuse the letter of warning and request a hearing before the commission to determine whether a violation of the Rules of Professional Conduct has occurred. Such refusal and request will be in writing, addressed to the grievance committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If a refusal and request are not served within fifteen days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An

extension of time may be granted by the chairperson of the grievance committee for good cause shown.

4. In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent for a hearing pursuant to section 14.

K. Admonitions and Reprimands

1. If probable cause is found but it is determined by the grievance committee that a complaint and hearing are not warranted, the committee may issue an admonition or reprimand to the defendant, depending upon the seriousness of the violation of the Rules of Professional Conduct. A record of such admonition or reprimand will be maintained in the office of the secretary.

2. A copy of the admonition or reprimand will be served upon the defendant as provided in rule 4 of the Rules of Civil Procedure.

3. Within fifteen days after service the defendant may refuse the admonition or reprimand and request a hearing before the commission. Such refusal and request will be in writing, addressed to the grievance committee, and served upon the secretary by certified mail, return receipt requested. The refusal will state that the admonition or reprimand is refused.

4. In cases in which the defendant refuses an admonition or reprimand, the counsel will prepare and file a complaint against the defendant pursuant to section 14. If a refusal and request are not served upon the secretary within fifteen days after service upon the defendant of the admonition or reprimand, the admonition or reprimand will be deemed accepted by the defendant. An extension of time may be granted by the chairperson of the grievance committee for good cause shown.

L. Censures

1. If probable cause is found and the grievance committee determines that the defendant has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or significant potential harm to a client, the administration of justice, the profes-

sion, or a member of the public, but the misconduct does not require suspension of the defendant's license, the committee will issue a notice of proposed censure and a proposed censure to the defendant.

2. A copy of the notice and the proposed censure will be served upon the defendant as provided in G.S. 1A-1, rule 4. The defendant must be advised that he or she may accept the censure within fifteen days after service upon him or her or a formal complaint will be filed before the commission.

3. The defendant's acceptance must be in writing, addressed to the grievance committee, and served on the secretary by certified mail, return receipt requested. Once the censure is accepted by the defendant, the discipline becomes public and must be filed as provided by section 23(A)(3).

4. If the defendant does not accept the censure, the counsel will file a complaint against the defendant pursuant to section 14.

M. Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the grievance committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chairperson of the grievance committee.

Section 14. Formal Hearing

A. Complaints will be filed with the secretary. The secretary will cause a summons and a copy of the complaint to be served upon the defendant and thereafter a copy of the complaint will be delivered to the chairperson of the commission, informing the chairperson of the date service on the defendant was effected.

B. Service of complaints and other documents or papers will be accomplished as set forth in rule 4 of the Rules of Civil Procedure.

C. Complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.

D. Within fourteen days of the receipt of return of service of a complaint by the secretary, the chairperson of the

commission will designate a hearing committee from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing committee. Such notice will also contain the time and place determined by the chairperson for the hearing to commence. The commencement of the hearing will be initially scheduled not less than sixty nor more than ninety days from the date of service of the complaint upon the defendant, unless one or more subsequent complaints have been served on the defendant within ninety days from the date of service of the first or a preceding complaint. When one or more subsequent complaints have been served on the defendant within ninety days from the date of service of the first or a preceding complaint, the chairperson of the commission may consolidate the cases for hearing, and the hearing will be initially scheduled not less than sixty nor more than ninety days from the date of service of the last complaint upon the defendant.

E. Within twenty days after the service of the complaint, unless further time is allowed by the chairperson of the hearing committee upon good cause shown, the defendant will file an answer to the complaint with the secretary and will serve a copy on the counsel.

F. Failure to file an answer admitting, denying or explaining the complaint, or asserting the grounds for failing to do so, within the time limited or extended, will be grounds for entry of the defendant's default and in such case the allegations contained in the complaint will be deemed admitted. The secretary will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise. The counsel may thereupon apply to the hearing committee for a default order imposing discipline, and the hearing committee will thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate. The hearing committee may, in its discretion, hear such additional evidence as it deems necessary prior to entering the order of discipline. For good cause shown, the hearing committee may set aside the secretary's entry of default. After an order imposing discipline has been entered by the hearing committee upon the defendant's default, the hearing committee may set

aside the order in accordance with rule 60(b) of the North Carolina Rules of Civil Procedure.

G. Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended for good cause shown by the chairperson of the hearing committee. The chairperson of the hearing committee may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

H. The parties may meet by mutual consent prior to the hearing on the complaint to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing committee. If the committee rejects a proposed settlement, another hearing committee must be empaneled to try the case, unless all parties consent to proceed with the original committee.

I. At the discretion of the chairperson of the hearing committee, a conference may be ordered before the date set for commencement of the hearing, and upon five days notice to the parties, for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the committee designated by its chairperson. At any conference which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment, the possibility of the following:

1. the simplification of the issues.

2. the exchange of exhibits proposed to be offered in evidence.

3. the stipulation of facts not remaining in dispute or the authenticity of documents.

4. the limitation of the number of witnesses.

5. the discovery or production of data.

6. such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

J. The chairperson of the hearing committee, without consulting the other committee members, may hear and dispose of all pretrial motions except motions the granting of which would result in dismissal of the charges or final judgment for either party. All motions which could result in dismissal of the charges or final judgment for either party will be decided by a majority of the members of the hearing committee. Any pretrial motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing committee.

K. The initial hearing date as set by the chairperson in accordance with subsection (D) may be reset by the chairperson, and said initial hearing or reset hearing may be continued by the chairperson of the hearing committee for good cause shown.

L. After a hearing has commenced, no continuances other than an adjournment from day to day will be granted, except to await the filing of a controlling decision of an appellate court, by consent of all parties, or where extreme hardship would result in the absence of a continuance.

M. The defendant will appear in person before the hearing committee at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing committee may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of the defendant. The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either of the parties. The defendant may be represented by counsel, who will enter an appearance.

N. Pleadings and proceedings before a hearing committee will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein.

O. Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing by the secretary within the time limits, if any, for such filing. The date of receipt by the secretary and not the date of deposit in the mails is determinative.

P. All papers presented to the commission for filing will be on letter size paper (8½ x 11 inches) with the exception of exhibits. The secretary will require a party to refile any paper that does not conform to this size.

Q. When a defendant appears in his or her own behalf in a proceeding the defendant will file with the secretary, with proof of delivery of a copy to the counsel, an address at which any notice or other written communication required to be served upon the defendant may be sent, if such address differs from that last reported to the secretary by the defendant.

R. When a defendant is represented by counsel in a proceeding, counsel will file with the secretary, with proof of delivery of a copy to the counsel, a written notice of such appearance which will state his or her name, address and telephone number, the name and address of the defendant on whose behalf he or she appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the counsel of record for such defendant at the stated address of the counsel in lieu of transmission to the defendant.

S. The hearing committee will have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Such process will be issued in the name of the committee by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. Both parties have the right to invoke the powers of the committee with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

T. In any hearing admissibility of evidence will be governed by the rules of evidence applicable in the superior court of the state at the time of the hearing. The chairperson of the hearing committee will rule on the admissibility of evidence, subject to the right of any member of the hearing committee to question the ruling. If a member of the hearing committee challenges a ruling relating to admissibility of evidence, the question will be decided by majority vote of the hearing committee.

U. If the hearing committee finds that the charges of misconduct are not established by clear, cogent, and convincing evidence, it will enter an order dismissing the complaint. If the hearing committee finds that the charges of misconduct are established by clear, cogent, and convincing evidence, the hearing committee will enter an order for discipline. In either instance, the committee will file an order which will include the committee's findings of fact and conclusions of law.

V. The secretary will ensure that a complete record is made of the evidence received during the course of all hearings before the commission as provided by G.S. 7A-95 for trials in the superior court. The secretary will preserve the record and the pleadings, exhibits, and briefs of the parties.

W. If the charges of misconduct are established, the hearing committee will then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this state or any other jurisdiction and any evidence in aggravation or mitigation of the offense.

1. The hearing committee may consider aggravating factors in imposing discipline in any disciplinary case including the following factors:

   a. prior disciplinary offenses;

   b. dishonest or selfish motive;

   c. a pattern of misconduct;

   d. multiple offenses;

   e. bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;

f. submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

g. refusal to acknowledge wrongful nature of conduct;

h. vulnerability of victim;

i. substantial experience in the practice of law;

j. indifference to making restitution;

k. issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint.

2. The hearing committee may consider mitigating factors in imposing discipline in any disciplinary case including the following factors:

a. absence of a prior disciplinary record;

b. absence of a dishonest or selfish motive;

c. personal or emotional problems;

d. timely good faith efforts to make restitution or to rectify consequences of misconduct;

e. full and free disclosure to the hearing committee or cooperative attitude toward proceedings;

f. inexperience in the practice of law;

g. character or reputation;

h. physical or mental disability or impairment.

X. In any case in which a period of suspension is stayed upon compliance by the defendant with conditions, the commission will retain jurisdiction of the matter until all conditions are satisfied. If, during the period the stay is in effect, the counsel receives information tending to show that a condition has been violated, the counsel may, with the consent of the chairperson of the grievance committee, file a motion in the cause with the secretary specifying the violation and seeking an order requiring the defendant to show cause why the stay should not be lifted and the suspension activated for violation of the condition. The counsel will also serve a copy of any such motion upon the defendant. The secretary will promptly trans-

mit the motion to the chairperson of the commission who, if he or she enters an order to show cause, will appoint a hearing committee as provided in section 8(A)(2), appointing the members of the hearing committee that originally heard the matter wherever practicable. The chairperson of the commission will also schedule a time and a place for a hearing and notify the counsel and the defendant of the composition of the hearing committee and the time and place for the hearing. After such a hearing, the hearing committee may enter an order lifting the stay and activating the suspension, or any portion thereof, and taxing the defendant with the costs, if it finds that the North Carolina State Bar has proven, by the greater weight of the evidence, that the defendant has violated a condition. If the hearing committee finds that the North Carolina State Bar has not carried its burden, then it will enter an order continuing the stay. In any event, the hearing committee will include in its order findings of fact and conclusions of law in support of its decision.

Y. All reports and orders of the hearing committee will be signed by the members of the committee or by the chairperson of the committee on behalf of the committee and will be filed with the secretary. The copy to the defendant will be served by certified mail, return receipt requested. If the defendant's copy is returned as unclaimed or undeliverable, then service will be as provided in rule 4 of the North Carolina Rules of Civil Procedure.

Z. Posttrial Motions

1. Consent Orders After Trial

a. At any time after a disciplinary hearing and prior to the execution of the committee's final order pursuant to subsection Y, the committee may, with the consent of the parties, amend its decision regarding the findings of fact, conclusions of law, or the disciplinary sanction imposed.

2. New Trials and Amendment of Judgments

a. As provided in subsection (b) below, following a disciplinary hearing before the commission, either party may request a new trial or amendment of the hearing committee's final order, based on any

of the grounds set out in rule 59 of the North Carolina Rules of Civil Procedure.

b. A motion for a new trial or amendment of judgment will be served, in writing, on the chairperson of the hearing committee which heard the disciplinary case no later than twenty days after service of the final order of discipline upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

c. The opposing party will have twenty days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

d. The hearing committee may rule on the motion based on the parties' written submissions or may, in its discretion, permit the parties to present oral argument.

3. Relief from Judgment or Order

a. Following a disciplinary proceeding before the commission, either party may file a motion for relief from the final judgment or order, based on any of the grounds set out in rule 60 of the North Carolina Rules of Civil Procedure.

b. Motions made under section 14(Z)(3) will be made no later than one year after the effective date of the order from which relief is sought. Motions pursuant to this section will be heard and decided in the same manner as motions submitted pursuant to section 14(Z)(2.

4. Effect of Filing Motion

The filing of a motion under section 14(Z)(2) or (3) will not automatically stay or otherwise affect the effective date of an order of the commission.

Section 15. Effect of a Finding of Guilt in any Criminal Case

A. Any member convicted of or sentenced for the commission of a serious crime in any state or federal court, whether such a conviction or judgment results from a plea of guilty, no contest, or nolo contendere or from a verdict after

trial, will, upon the conviction or judgment becoming final by affirmation on appeal or failure to perfect an appeal within the time allowed, be suspended from the practice of law as set out in section 15(D).

B. A certificate of the conviction of an attorney for any crime or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.

C. Upon the receipt of a certificate of conviction of a member of a serious crime, or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court the grievance committee, at its next meeting following notification of the conviction, will authorize the filing of a complaint if one is not pending. In the hearing on such complaint the sole issue to be determined will be the extent of the final discipline to be imposed. No hearing based solely upon a certificate of conviction will commence until all appeals from the conviction are concluded.

D. Upon the receipt of a certificate of conviction of a member of a serious crime, or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court, the commission chairperson will enter an order suspending the member, pending the disposition of the disciplinary proceeding against the member before the commission. The provisions of section 24(C) will apply to the suspension.

E. Upon the receipt of a certificate of conviction of a member or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court for a crime not constituting a serious crime, the grievance committee will take whatever action, including the filing of a complaint, it may deem appropriate.

Section 16. Reciprocal Discipline

A. All members who have been disciplined in any state or federal court for professional misconduct will inform the secretary of such action in writing no later than thirty days after entry of the order of discipline.

B. Except as provided in subsection (C) below, reciprocal discipline will be administered as follows:

1. Upon receipt of a certified copy of an order demonstrating that a member has been disciplined in another jurisdiction, state or federal, the grievance committee will forthwith issue a notice directed to the member containing a copy of the order from the other jurisdiction and an order directing that the member inform the committee within thirty days from service of the notice of any claim by the member that the imposition of the identical discipline in this state would be unwarranted and the reasons therefor. This notice is to be served on the member in accordance with the provisions of rule 4 of the North Carolina Rules of Civil Procedure.

2. In the event the discipline imposed in the other jurisdiction has been stayed, any reciprocal discipline imposed in this state will be deferred until such stay expires.

3. Upon the expiration of thirty days from service of the notice issued pursuant to the provisions of section 16(B)(1) above, the chairperson of the grievance committee will impose the identical discipline unless the member demonstrates:

   a. that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

   b. there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the grievance committee could not, consistent with its duty, accept as final the conclusion on that subject; or

   c. that the imposition of the same discipline would result in grave injustice.

4. Where the grievance committee determines that any of the elements listed in section 16(B)(3) exist, the committee will dismiss the case or direct that a complaint be filed.

5. In the event the elements listed in section 16(B)(3) are found not to exist, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct

will establish the misconduct for purposes of reciprocal discipline.

C. Reciprocal discipline with certain federal courts will be administered as follows:

1. Upon receipt of a certified copy of an order demonstrating that a member has been disciplined in a United States District Court in North Carolina, in the United States Fourth Circuit Court of Appeals, or in the United States Supreme Court, the chairperson of the grievance committee will forthwith issue a notice directed to the member. The notice will contain a copy of the order from the court and an order directing the member to inform the committee within ten days from service of the notice whether the member will accept reciprocal discipline which is substantially similar to that imposed by the federal court. This notice is to be served on the member in accordance with the provisions of rule 4 of the North Carolina Rules of Civil Procedure. The member will have thirty days from service of the notice to file a written challenge with the committee on the grounds that the imposition of discipline by the North Carolina State Bar would be unwarranted because the facts found in the federal disciplinary proceeding do not involve conduct which violates the North Carolina Rules of Professional Conduct. If the member notifies the North Carolina State Bar within ten days after service of the notice that he or she accepts reciprocal discipline which is substantially similar to that imposed by the federal court, substantially similar discipline will be ordered as provided in section 16(C)(2) and will run concurrently with the discipline ordered by the federal court.

2. If the member notifies the North Carolina State Bar of his or her acceptance of reciprocal discipline as provided in section 16(C)(1), the chairperson of the grievance committee will execute an order of discipline which is of a type permitted by these rules and which is substantially similar to that ordered by the federal court and will cause said order to be served upon the member.

3. If the discipline imposed by the federal court has been stayed, any reciprocal discipline imposed by the North

Carolina State Bar will be deferred until such stay expires.

4. Upon the expiration of thirty days from service of the notice issued pursuant to the provisions of section 16(C)(1) above, the chairperson of the grievance committee will enter an order of reciprocal discipline imposing substantially similar discipline of a type permitted by these rules to be effective throughout North Carolina unless the member requests a hearing before the grievance committee and at such hearing:

   a. the member demonstrates that the facts found in the federal disciplinary proceeding did not involve conduct which violates the North Carolina Rules of Professional Conduct, in which event the case will be dismissed; or

   b. the grievance committee determines that the discipline imposed by the federal court is not of a type described in section 23(A) of these rules and, therefore, cannot be imposed by the North Carolina State Bar, in which event the grievance committee may dismiss the case or direct that a complaint be filed in the commission.

5. All findings of fact in the federal disciplinary proceeding will be binding upon the North Carolina State Bar and the member.

6. Discipline imposed by any other federal court will be administered as provided in section 16(B) herein.

D. If the member fails to accept reciprocal discipline as provided in section 16(C) above or if a hearing is held before the grievance committee under either section 16(B) or 16(C) above and the committee orders the imposition of reciprocal discipline, such discipline will run from the date of service of the final order of the chairperson of the grievance committee unless the committee expressly provides otherwise.

Section 17. Surrender of License While Under Investigation

A. A member who is the subject of an investigation into allegations of misconduct, but against whom no formal complaint has been filed before the commission may tender his or her license to practice by delivering to the secretary

for transmittal to the council an affidavit stating that the member desires to resign and that:

1. the resignation is freely and voluntarily rendered; is not the result of coercion or duress; and the member is fully aware of the implications of submitting the resignation;

2. the member is aware that there is presently pending an investigation or other proceedings regarding allegations that the member has been guilty of misconduct, the nature of which will specifically be set forth;

3. the member acknowledges that the material facts upon which the grievance is predicated are true; and

4. the resignation is being submitted because the member knows that if charges were predicated upon the misconduct under investigation, the member could not successfully defend against them.

B. The council may accept a member's resignation only if the affidavit required under section 17(A) above satisfies the requirements stated therein, and the member has provided to the North Carolina State Bar all documents and financial records required to be kept pursuant to the Rules of Professional Conduct and requested by the counsel. If the council accepts a member's resignation it will enter an order disbarring the member. The order of disbarment is effective on the date the council accepts the member's resignation.

C. The order disbarring the member and the affidavit required under section 17(A) above are matters of public record.

D. If a defendant against whom a formal complaint has been filed wishes to consent to disbarment, the defendant may do so by filing an affidavit with the chairperson of the commission. If the chairperson determines that the affidavit meets the requirements set out above, the chairperson will accept the surrender and issue an order of disbarment. The order of disbarment becomes effective 30 days after service of the order upon the defendant. If the affidavit does not meet the requirements set out above, the consent to disbarment will not be accepted and the disciplinary complaint will be heard pursuant to section 14.

E. After a member tenders his or her license or consents to disbarment under this section the member may not undertake any new legal matters. The member may complete any legal matters which were pending on the date of the tender of the affidavit or consent to disbarment which can be completed within 30 days. The member has 30 days from the date on which the member tenders the affidavit of surrender or consent to disbarment in which to comply with all of the duties set out in section 24.

Section 18. Disability Hearings

A. Disability Proceedings Where Member Involuntarily Committed or Judicially Declared Incompetent

Where a member of the North Carolina State Bar has been judicially declared incapacitated or mentally ill under the provisions of chapter 122C of the General Statutes or similar laws of any jurisdiction, the secretary, upon proper proof of the fact, will enter an order transferring the member to disability inactive status effective immediately and for an indefinite period until further order of the commission. A copy of the order will be served upon the member, the member's guardian, or the director of the institution to which the member has been committed.

B. Disability Proceedings Initiated by the North Carolina State Bar

1. When the North Carolina State Bar obtains evidence that a member has become disabled, the grievance committee will conduct a hearing in a manner that will conform as nearly as is possible to the procedures set forth in section 13. The grievance committee will determine whether there is probable cause to believe that the member is disabled within the meaning of section 3(P). If the committee finds probable cause, a petition alleging disability will be filed in the name of the North Carolina State Bar by the counsel and signed by the chairperson of the grievance committee.

2. Whenever the counsel files a petition alleging the disability of a member, the chairperson of the commission will appoint a hearing committee as provided in sections 8(A)(2) and 14(D) to determine whether such member is disabled. The hearing committee will conduct a hearing on the petition in the same manner

as a disciplinary proceeding under section 14. The hearing will be open to the public.

3. The hearing committee may require the member to undergo psychiatric, physical, or other medical examination or testing by qualified medical experts selected by the hearing committee.

4. In any proceeding seeking a transfer to disability inactive status under this section, the North Carolina State Bar will have the burden of proving by clear, cogent, and convincing evidence that the member is disabled within the meaning of section 3(P).

5. The hearing committee may appoint an attorney to represent the member in a disability proceeding, if the hearing committee concludes that justice so requires.

6. If the hearing committee finds that the member is disabled, the committee will enter an order transferring the member to disability inactive status. The order of transfer will become effective immediately. A copy of the order will be served upon the member or the member's guardian or attorney.

C. Disability Proceedings Where Defendant Alleges Disability in Disciplinary Proceeding

1. If, during the course of a disciplinary proceeding, the defendant contends that he or she is disabled within the meaning of section 3(P), the disciplinary proceeding will be stayed pending a determination by the hearing committee whether such disability exists. The defendant will be immediately transferred to disability inactive status pending the conclusion of the disability hearing.

2. The hearing committee scheduled to hear the disciplinary charges will hold the disability proceeding pursuant to sections 8(A) and 14(D). The hearing will be conducted pursuant to the procedures outlined in section 18(B).

3. If the hearing committee concludes that the defendant is disabled, the disciplinary proceeding will be stayed as long as the defendant remains in disability inactive status. If thereafter, the defendant is returned to ac-

tive status by the commission, the disciplinary proceeding will be rescheduled.

4. If the hearing committee determines that the defendant is not disabled, the chairperson of the hearing committee will set a date for resumption of the disciplinary proceeding.

D. Disability Hearings Initiated by a Hearing Committee

1. If, during the pendency of a disciplinary proceeding a majority of the members of the hearing committee find reason to believe that the defendant is disabled, the committee will enter an order staying the disciplinary proceeding until the question of disability can be determined by the committee in accordance with the procedures set out in section 18(B)(2)-(6).

2. If the hearing committee determines that the defendant is not disabled, the chairperson of the hearing committee will set a date for resumption of the disciplinary proceeding.

3. If the hearing committee determines that the defendant is disabled, the disciplinary proceeding will be stayed as long as the defendant remains in disability inactive status. If the defendant is returned to active status by the commission, the disciplinary proceeding will be rescheduled by the chairperson of the commission.

E. Fees and Costs

The hearing committee may direct the member to pay the costs of the disability proceeding, including the cost of any medical examination and the fees of any attorney appointed to represent the member.

F. Preservation of Evidence

In any case in which disciplinary proceedings against a defendant have been stayed by reason of the defendant's disability, counsel may continue to investigate allegations of misconduct and may seek orders from the chairperson of the commission to preserve evidence of any alleged professional misconduct by the disabled defendant, including orders which permit the taking of depositions. The chairperson may order appointment of counsel to

represent the disabled defendant when necessary to protect the interests of the disabled defendant.

Section 19. Enforcement of Powers

In addition to the other powers contained herein, in proceedings before any committee or subcommittee of the grievance committee or the commission, if any person refuses to respond to a subpoena, refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, refuses to obey any order in aid of discovery, or refuses to obey any lawful order of the committee contained in its decision rendered after hearing, the counsel or secretary may apply to the appropriate court for an order directing that person to comply by taking the requisite action.

Section 20. Notice to Member of Action and Dismissal

In every disciplinary case wherein the respondent has received a letter of notice and the grievance has been dismissed, the respondent will be notified of the dismissal by a letter by the chairperson of the grievance committee. The chairperson will have discretion to give similar notice to the respondent in cases wherein a letter of notice has not been issued but the chairperson deems such notice to be appropriate.

Section 21. Notice to Complainant

A. If the grievance committee finds probable cause and imposes discipline, the chairperson of the grievance committee will notify the complainant of the action of the committee.

B. If the grievance committee finds probable cause and refers the matter to the commission, the chairperson of the grievance committee will advise the complainant that the grievance has been received and considered and has been referred to the commission for hearing.

C. If final action on a grievance is taken by the grievance committee in the form of a letter of caution or letter of warning or was dismissed, the chairperson of the grievance committee will advise the complainant that following its deliberations, the committee did not find probable cause to justify imposing discipline and dismissed the grievance.

Section 22. Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies, or is Transferred to Disability Inactive Status

A. Whenever a member of the North Carolina State Bar has been transferred to disability inactive status, disappears, or dies and no partner, personal representative, or other party capable of conducting the attorney's affairs is known to exist, the senior resident judge of the superior court in the district of the member's most recent address on file with the North Carolina State Bar, if it is in this state, will be requested by the secretary to appoint an attorney or attorneys to inventory the files of the member and to take action to protect the interests of the member and his or her clients.

B. Any member so appointed will not be permitted to disclose any information contained in any files inventoried without the consent of the client to whom such files relate except as necessary to carry out the order of the court which appointed the attorney to make such inventory.

Section 23. Imposition of Discipline: Findings of Incapacity or Disability: Notice to Courts

A. Upon the final determination of a disciplinary proceeding wherein discipline is imposed, one of the following actions will be taken:

1. Admonition. An admonition will be prepared by the chairperson of the grievance committee or the chairperson of the hearing committee depending upon the agency ordering the admonition. The admonition will be served upon the defendant. The admonition will not be recorded in the judgment docket of the North Carolina State Bar. Where the admonition is imposed by the grievance committee, the complainant will be notified that the defendant has been admonished, but will not be entitled to a copy of the admonition. An order of admonition imposed by the commission will be a public document.

2. Reprimand. The chairperson of the grievance committee or chairperson of the hearing committee depending upon the body ordering the discipline, will file an order of reprimand with the secretary, who will record the

order on the judgment docket of the North Carolina State Bar and will forward a copy to the complainant.

3. Censure, suspension, or disbarment. The chairperson of the hearing committee will file the order of censure, suspension, or disbarment with the secretary, who will record the order on the judgment docket of the North Carolina State Bar and will forward a copy to the complainant. The secretary will also cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the defendant's last known address. A copy of the order of censure, suspension, or disbarment will also be sent to the clerk of the superior court in any county where the defendant maintains an office, to the North Carolina Court of Appeals, to the North Carolina Supreme Court, to the United States District Courts in North Carolina, to the Fourth Circuit Court of Appeals, and to the United States Supreme Court. Orders of censure imposed by the grievance committee will be filed by the committee chairperson with the secretary. Notice of the censure will be given to the complainant and to the courts in the same manner as orders of censure imposed by the commission.

B. Upon the final determination of incapacity or disability, the chairperson of the hearing committee or the secretary, depending upon the agency entering the order, will file with the secretary a copy of the order transferring the member to disability inactive status. The secretary will cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the disabled member's last address on file with the North Carolina State Bar and will forward a copy of the order to the courts referred to in section 23(A)(3).

Section 24. Obligations of Disbarred or Suspended Attorneys

A. A disbarred or suspended member of the North Carolina State Bar will promptly notify by certified mail, return receipt requested, all clients being represented in pending matters of the disbarment or suspension, the reasons for the disbarment or suspension, and consequent inability of the member to act as an attorney after the effective date of disbarment or suspension and will advise such clients to seek legal advice elsewhere. The disbarred or

suspended attorney will take reasonable steps to avoid foreseeable prejudice to the rights of his or her clients, including promptly delivering all file materials and property to which the clients are entitled to the clients or the clients' substituted attorney. No disbarred or suspended attorney will transfer active client files containing confidential information or property to another attorney, nor may another attorney receive such files or property, without prior written permission from the client.

B. The disbarred or suspended member will withdraw from all pending administrative or litigation matters before the effective date of the suspension or disbarment and will follow all applicable laws and disciplinary rules regarding the manner of withdrawal.

C. In cases not governed by section 17, orders imposing suspension or disbarment will be effective thirty days after being served upon the defendant. In such cases, after entry of the disbarment or suspension order, the disbarred or suspended attorney will not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, between the entry date of the order and its effective date, the member may complete, on behalf of any client, matters which were pending on the entry date and which can be completed before the effective date of the order.

D. Within ten days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney will file with the secretary an affidavit showing that he or she has fully complied with the provisions of the order, with the provisions of this section, and with the provisions of all other state, federal, and administrative jurisdictions to which he or she is admitted to practice. The affidavit will also set forth the residence or other address of the disbarred or suspended member to which communications may thereafter be directed.

E. The disbarred or suspended member will keep and maintain records of the various steps taken under this section so that, upon any subsequent proceeding, proof of compliance with this section and with the disbarment or suspension order will be available. Proof of compliance with this section will be a condition precedent to consideration of any petition for reinstatement.

F. A suspended or disbarred attorney who fails to comply with sections 24(A) through 24(E) above may be subject to an action for contempt instituted by the appropriate authority. Failure to comply with the requirements of section 24(A) will be grounds for appointment of counsel pursuant to section 22.

Section 25. Reinstatement

A. After disbarment:

1. No person who has been disbarred may have his or her license restored but upon order of the council after the filing of a verified petition for reinstatement and the holding of a hearing before a hearing committee as provided herein. No such hearing will commence until security for the costs of such hearing has been deposited with the secretary in an amount not to exceed $500.

2. No disbarred attorney may petition for reinstatement until the expiration of at least five years from the effective date of the disbarment.

3. The petitioner will have the burden of proving by clear, cogent, and convincing evidence that:

a. not more than six months or less than sixty days before filing the petition for reinstatement, a notice of intent to seek reinstatement has been published by the petitioner in an official publication of the North Carolina State Bar. The notice will inform members of the Bar about the application for reinstatement and will request that all interested individuals file notice of their opposition or concurrence with the secretary within sixty days after the date of publication;

b. not more than six months or less than sixty days before filing the petition for reinstatement, the petitioner has notified the complainant(s) in the disciplinary proceeding which led to the lawyer's disbarment of the notice of intent to seek reinstatement. The notice will specify that each complainant has sixty days from the date of publication in which to raise objections or support the lawyer's petition;

c. the petitioner has reformed and presently possesses the moral qualifications required for admission to practice law in this state taking into account the gravity of the misconduct which resulted in the order of disbarment;

d. permitting the petitioner to resume the practice of law within the state will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest, taking into account the gravity of the misconduct which resulted in the order of disbarment;

e. the petitioner's citizenship has been restored if the petitioner has been convicted of or sentenced for the commission of a felony;

f. the petitioner has complied with section 24 of these rules;

g. the petitioner has complied with all applicable orders of the commission and the council;

h. the petitioner has complied with the orders and judgments of any court relating to the matters resulting in the disbarment;

i. the petitioner has not engaged in the unauthorized practice of law during the period of disbarment;

j. the petitioner has not engaged in any conduct during the period of disbarment constituting grounds for discipline under G.S. 84-28(b); and

k. the petitioner understands the current Rules of Professional Conduct.

4. Petitions filed less than seven years after disbarment:

a. If less than seven years have elapsed between the effective date of the disbarment and the filing date of the petition for reinstatement, the petitioner will also have the burden of proving by clear, cogent, and convincing evidence that the petitioner has the competency and learning in the law required to practice law in this state.

b. Factors which may be considered in deciding the issue of competency include:

1. experience in the practice of law;

2. areas of expertise;

3. certification of expertise;

4. participation in continuing legal education programs in each of the three years immediately preceding the petition date;

5. participation in continuing legal education programs in ethics and professional responsibility for each of the three years preceding the petition date;

6. certification by three attorneys who are familiar with the petitioner's present knowledge of the law that the petitioner is competent to engage in the practice of law;

7. the attainment of a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners and taken voluntarily by the petitioner.

c. The factors listed in section 25(A)(4)(b) are provided by way of example only. The petitioner's satisfaction of one or all of these factors creates no presumption that the petitioner has met the burden of proof established by this section.

5. If seven years or more have elapsed between the effective date of disbarment and the filing of the petition for reinstatement, reinstatement will be conditioned upon the petitioner's attaining a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners.

6. Verified petitions for reinstatement of disbarred attorneys will be filed with the secretary. Upon receipt of the petition, the secretary will transmit the petition to the chairperson of the commission and serve a copy on the counsel. The chairperson will within fourteen days appoint a hearing committee as provided in section 8(A)(2) and schedule a time and place for a hearing to take place within sixty to ninety days after the filing of the petition with the secretary. The chairper-

son will notify the counsel and the petitioner of the composition of the hearing committee and the time and place of the hearing, which will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the Rules of Evidence applicable in superior court.

7. As soon as possible after the conclusion of the hearing, the hearing committee will file a report containing its findings, conclusions, and recommendations with the secretary. This report will be promptly transmitted to the council.

8. Record to the Council

   a. The petitioner will provide a record of the proceedings before the hearing committee, including a legible copy of the complete transcript, all exhibits introduced into evidence, and all pleadings, motions, and orders, unless the petitioner and the counsel agree in writing to shorten the record. The petitioner will provide the record to the counsel not later than ninety days after the hearing before the hearing committee, unless an extension of time is granted by the secretary for good cause shown. Any agreement regarding the record will be in writing and will be included in the record transmitted to the council.

   b. The petitioner will transmit a copy of the record to each member of the council no later than thirty days before the council meeting at which the petition is to be considered.

   c. The petitioner will bear the costs of transcribing, copying, and transmitting the record to the council.

   d. If the petitioner fails to comply with any of the subsections of section 25(A)(8), the counsel may petition the secretary to dismiss the petition.

9. The council will review the report of the hearing committee and the record and determine whether, and upon what conditions, the petitioner will be reinstated.

10. No person who has been disbarred and has unsuccessfully petitioned for reinstatement may reapply until the

expiration of one year from the date of the last order denying reinstatement.

B. After suspension

1. No attorney who has been suspended may have his or her license restored but upon order of the commission or the secretary after the filing of a verified petition as provided herein.

2. No attorney who has been suspended is eligible for reinstatement until the expiration of the period of suspension and, in no event, until thirty days have elapsed from the date of filing the petition for reinstatement. Petitions for reinstatement may be filed no sooner than ninety days prior to the expiration of the period of suspension.

3. Any suspended attorney seeking reinstatement must file a verified petition with the secretary, a copy of which the secretary will transmit to the counsel. The petitioner must have satisfied the following requirements to be eligible for reinstatement, and will set forth facts demonstrating the following in the petition:

   a. compliance with section 24 of the rules;

   b. compliance with all applicable orders of the commission and the council;

   c. abstention from the unauthorized practice of law during the period of suspension;

   d. attainment of a passing grade on a regularly scheduled North Carolina bar examination, if the suspended attorney applies for reinstatement of his or her license more than seven years after the effective date of the suspension; and

   e. abstention from conduct during the period of suspension constituting grounds for discipline under G.S. 84-28(b).

4. The counsel will conduct any necessary investigation regarding the compliance of the petitioner with the requirements set forth in section 25(B)(3), and the counsel may file a response to the petition with the secretary prior to the date the petitioner is first eligible for

reinstatement. The counsel will serve a copy of any response filed upon the petitioner.

5. If the counsel does not file a response to the petition before the date the petitioner is first eligible for reinstatement, then the secretary will issue an order of reinstatement.

6. If the counsel files a timely response to the petition, such response must set forth specific objections supported by factual allegations sufficient to put the petitioner on notice of the events at issue.

7. The secretary will, upon the filing of a response to the petition, refer the matter to the chairperson of the commission. The chairperson will within fourteen days appoint a hearing committee as provided in section 8(A)(2), schedule a time and place for a hearing, and notify the counsel and the petitioner of the composition of the hearing committee and the time and place of the hearing. The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the Rules of Evidence applicable in superior court.

8. The hearing committee will determine whether the petitioner's license should be reinstated and enter an appropriate order which may include additional sanctions in the event violations of the petitioner's order of suspension are found. In any event, the hearing committee must include in its order findings of fact and conclusions of law in support of its decision and tax such costs as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition against the petitioner.

C. After transfer to disability inactive status:

1. No member of the North Carolina State Bar transferred to disability inactive status may resume active status until reinstated by order of the commission. Any member transferred to disability inactive status will be entitled to apply to the commission for reinstatement to active status once a year or at such shorter intervals as are stated in the order transferring the member to disability inactive status or any modification thereof.

2. Petitions for reinstatement by members transferred to disability inactive status will be filed with the secretary. Upon receipt of the petition the secretary will refer the petition to the commission chairperson. The chairperson will appoint a hearing committee as provided in sections 8(A)(2) and 14(D). A hearing will be conducted pursuant to the procedures set out in section 14.

3. The member will have the burden of proving by clear, cogent, and convincing evidence that he or she is no longer disabled within the meaning of section 3(P) and that he or she is fit to resume the practice of law.

4. Within ten days of filing the petition for reinstatement, the member will provide the secretary with a list of the name and address of every psychiatrist, psychologist, physician, hospital, and other health care provider by whom or in which the member has been examined or treated or sought treatment while disabled. At the same time, the member will also furnish to the secretary a written consent to release all information and records relating to the disability.

5. Where a member has been transferred to disability inactive status based solely upon a judicial finding of incapacity, and thereafter a court of competent jurisdiction enters an order adjudicating that the member's incapacity has ended, the chairperson of the commission will enter an order returning the member to active status upon receipt of a certified copy of the court's order. Entry of the order will not preclude the North Carolina State Bar from bringing an action pursuant to section 18 to determine whether the member is disabled.

6. The hearing committee may direct the member to pay the costs of the reinstatement hearing, including the cost of any medical examination ordered by the committee.

Section 26. Address of Record

Except where otherwise specified, any provision herein for notice to a respondent, member, petitioner, or a defendant will be deemed satisfied by appropriate correspondence addressed to

that attorney by mail to the last address maintained by the North Carolina State Bar.

Section 27. Disqualification Due to Interest

No member of the council or hearing commission will participate in any disciplinary matter involving the member, any partner, or associate in the practice of law of the member, or in which the member has a personal interest.

Section 28. Trust Accounts: Audit

A. For reasonable cause, the chairperson of the grievance committee is empowered to issue an investigative subpoena to a member compelling the production of any records required to be kept relative to the handling of client funds and property by the Rules of Professional Conduct for inspection, copying, or audit by the counsel or the counsel's staff. For the purposes of this rule, any of the following will constitute reasonable cause:

1. any sworn statement of grievance received by the North Carolina State Bar alleging facts which, if true, would constitute misconduct in the handling of a client's funds or property;

2. any facts coming to the attention of the North Carolina State Bar, whether through random review as contemplated by section 28(B) or otherwise, which if true, would constitute a probable violation of any provision of the Rules of Professional Conduct concerning the handling of client funds or property; or

3. any finding of probable cause, indictment, or conviction relative to a criminal charge involving moral turpitude.

The grounds supporting the issuance of any such subpoena will be set forth upon the face of the subpoena.

B. The chairperson of the grievance committee may randomly issue investigative subpoenas to members compelling the production of any records required to be kept relative to the handling of client funds or property by the Rules of Professional Conduct for inspection by the counsel or the counsel's staff to determine compliance with the procedures and record-keeping requirements established by the Rules of Professional Conduct. Any such subpoena will disclose upon its face its random character and con-

tain a verification of the secretary that it was issued in accordance with the procedures referred to above. No member will be subject to random selection under this section more than once in three years.

C. No subpoena issued pursuant to this rule may compel production within five days of service.

D. The Rules of Evidence applicable in the superior courts of the state will govern the use of any material subpoenaed pursuant to this rule in any hearing before the commission.

E. No assertion of attorney-client privilege or confidentiality will prevent an inspection or audit of a trust account as provided in this rule.

Section 29. Confidentiality

A. Except as otherwise provided in this Article and G.S. 84-28(f), all proceedings involving allegations of misconduct by or alleged disability of a member will remain confidential until:

1. a complaint against a member has been filed with the secretary after a finding by the grievance committee that there is probable cause to believe that the member is guilty of misconduct justifying disciplinary action or is disabled;

2. the member requests that the matter be made public prior to the filing of a complaint;

3. the investigation is predicated upon conviction of the member of or sentencing for a crime;

4. a petition or action is filed in the general courts of justice; or

5. the member files an affidavit of surrender of license.

B. The previous issuance of a letter of warning, formerly known as a letter of admonition, or an admonition to a member may be revealed in any subsequent disciplinary proceeding.

C. This provision will not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, to other jurisdictions investigating qualifications for admission to practice, or to law enforcement agencies investigating qualifica-

tions for government employment or allegations of criminal conduct by attorneys. In addition, the secretary will transmit notice of all public discipline imposed and transfers to disability inactive status to the National Discipline Data Bank maintained by the American Bar Association. The secretary may also transmit any relevant information to the Client Security Fund Board of Trustees to assist the Board in determining losses caused by dishonest conduct of members of the North Carolina State Bar.

Section 30. Disciplinary Amnesty in Illicit Drug Use Cases

A. The North Carolina State Bar will not treat as a grievance information that a member has used or is using illicit drugs except as provided in sections 30(C), (D), and (E). The information will be provided to the chairperson of the positive action for lawyers committee (PALS).

B. If the PALS committee concludes after investigation that a member has used or is using an illicit drug and the member participates with the PALS committee and successfully complies with any prescribed course of treatment, whether or not the initial referral to the PALS committee came from the North Carolina State Bar, the member will not be disciplined by the North Carolina State Bar for illicit drug use occurring prior to the prescribed course of treatment.

C. If a member under section 30(B) fails to cooperate with the PALS committee or fails to successfully complete any treatment prescribed for the member's illicit drug use, the chairperson of the PALS committee will report such failure to participate in or complete the PALS program to the chairperson of the grievance committee. The chairperson of the grievance committee will then treat the information originally received as a grievance.

D. A member charged with a crime relating to the use or possession of illicit drugs will not be entitled to amnesty from discipline by the North Carolina State Bar relating to the illicit drug use or possession.

E. If the North Carolina State Bar receives information that a member has used or is using illicit drugs and that the member has violated some other provision of the Rules of Professional Conduct, the information regarding the member's alleged illicit drug use will be referred to the

chairperson of the PALS committee pursuant to section 30(A). The information regarding the member's alleged additional misconduct will be reported to the chairperson of the grievance committee.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its meeting on October 18, 1991, and the amendments as certified were duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 7th day of November, 1991.

B. E. JAMES
Secretary

After examining the foregoing amendments 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 5th day of December, 1991.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments 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 5th day of December, 1991.

WHICHARD, J.
For the Court

# ANALYTICAL INDEX

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# 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

## ABDUCTION OR ENTICEMENT

**§ 3 (NCI4th). Defenses; consent of parent**

The trial court did not err in refusing to give defendant's requested instruction on guilty knowledge in a prosecution for felony child abduction where defendant did not present any evidence to support a mistake of fact defense. *S. v. Nobles*, 239.

## ACCOUNTANTS

**§ 20 (NCI4th). Liability to third party for negligent misrepresentation**

The trial court correctly granted summary judgment for defendant accountants in an action by a third-party creditor which relied upon a report of a 1981 financial statement prepared by defendants in extending credit to a company which subsequently entered bankruptcy. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 646.

## ACTIONS AND PROCEEDINGS

**§ 13 (NCI4th). Plaintiff's wrongful act related to collateral matter**

Plaintiff was not prevented from recovering lost profits from the operation of a meat market in its grocery store which was closed as a result of defendant's negligence even though no license to operate the meat market was ever issued in plaintiff's name. *Champs Convenience Stores v. United Chemical Co.*, 446.

**§ 18 (NCI4th). Discontinuance of action; commencement on revival of summons**

The issue of whether this action was discontinued for failure to comply with the provisions of Rule 4(d) was both presented to and decided by the trial court. *Snead v. Foxx*, 669.

Plaintiff's action was discontinued ninety days after the date the original summons was issued where the original summons was returned unserved and plaintiff did not secure an endorsement upon the original summons and did not obtain alias or pluries summonses, but instead attempted service of process by publication. *Ibid.*

## ADMINISTRATIVE LAW AND PROCEDURE

**§ 52 (NCI4th). Exhaustion of administrative remedies**

The trial court erred in entering an order enjoining the Hazardous Waste Commission from further efforts in its investigation and site selection process with regard to a Granville County site because there is no justiciable issue and no genuine controversy between the parties unless and until the Commission makes a final site selection decision. *Granville Co. Bd. of Comrs. v. N.C. Hazardous Waste Management Comm.*, 615.

## ADOPTION OR PLACEMENT FOR ADOPTION

**§ 2 (NCI4th). Prohibition against compensation or advertising for adoption**

Adopting parents and their attorney violated G.S. 48-37 where the attorney used his own funds and funds given to him by the adopting parents to bring the biological mother into the state for the purpose of facilitating an adoption, to support the mother through the date of birth, and to return the mother to her home state. *In re Adoption of P.E.P.*, 692.

## ADOPTION OR PLACEMENT FOR ADOPTION — Continued

**§ 43 (NCI4th). Modification or rescission of decree**

Statutory violations, together with other irregularities, require that an interlocutory adoption decree be set aside and that the adoption proceeding be dismissed where the adopting parents and their attorney violated G.S. 48-37 by providing the mother with complete financial support prior to and immediately after the birth of the child; the attorney erroneously advised the out-of-state expectant mother that she needed to be in the same state as the adopting parents if adoption was to take place; and the publication of notice to the putative father in an Orange County, N. C. newspaper was inadequate notice. *In re Adoption of P.E.P.*, 692.

## APPEAL AND ERROR

**§ 75 (NCI4th). Appeal by defendant entering plea of guilty**

Defendant was not entitled to appeal as a matter of right from the judgment entered on his plea of guilty to operating a vehicle while impaired. *S. v. Absher*, 264.

**§ 87 (NCI4th). Other interlocutory orders in civil actions**

Plaintiff had a right of immediate appeal of an order allowing defendant life insurance company's motion for summary judgment where plaintiff brought this action against the insurance company and its agent and there is a possibility of inconsistent verdicts if the claims against both defendants are tried separately. *Cook v. Bankers Life and Casualty Co.*, 488.

**§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection or motion**

Defendant could not contend for the first time on appeal that allowing his expert to testify as a witness for the State violated his Sixth Amendment right to the effective assistance of counsel. *S. v. McPhail*, 636.

**§ 173 (NCI4th). Questions involving restraining orders or injunctions**

An appeal from a preliminary injunction enjoining the Hazardous Waste Commission from taking further action with respect to siting a hazardous waste facility in Granville County was moot. *Granville Co. Bd. of Comrs. v. N.C. Hazardous Waste Management Comm.*, 615.

**§ 177 (NCI4th). Effect of appeal on power of trial court; domestic cases**

An amended order of the trial court taxing a court appointed appraiser's fee as costs, entered after appeal was perfected, merely reiterated prior orders which were still valid even if the amended order was void for lack of jurisdiction. *Swilling v. Swilling*, 219.

**§ 359 (NCI4th). Omission of necessary part of record; matters relating to evidence, witnesses**

Defendant failed to show that the trial court committed reversible error when it failed to intervene *ex mero motu* during the prosecutor's closing argument where defendant did not bring forward in the record on appeal a photograph on which part of the argument was based. *S. v. Ali*, 394.

**§ 422 (NCI4th). Appellee's brief; presentation of additional questions**

Plaintiffs were not entitled to cross-assign error in their brief on certain issues because they were seeking affirmative relief in the appellate division rather than arguing an alternative basis in law for supporting the judgment. *Alberti v. Manufactured Homes, Inc.*, 727.

## ASSAULT AND BATTERY

**§ 83 (NCI4th). Secret assault generally**

The trial court erred by refusing to arrest judgment on defendant's conviction for secret assault where defendant was also convicted of murder based on lying in wait. *S. v. Joyner*, 211.

## ATTORNEY GENERAL

**§ 15 (NCI4th). Special prosecutors**

The trial court exceeded its authority in a murder and burglary prosecution by ordering that the Attorney General's office immediately assume prosecution of the case. *S. v. Camacho*, 589.

## CONSPIRACY

**§ 5.1 (NCI3d). Admissibility of acts and statements of coconspirators**

A statement made by either defendant or another man to a murder victim was admissible against defendant where defendant's own confession established a conspiracy between defendant and the other man to kill the victim even though defendant and the other man were not charged with criminal conspiracy or tried jointly. *S. v. Wynne*, 507.

Once a conspiracy has been shown to exist, the acts of a co-conspirator done in furtherance of a common illegal design are admissible against all the co-conspirators. *S. v. Morgan*, 654.

**§ 13 (NCI4th). Elements of criminal conspiracy generally**

A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. *S. v. Morgan*, 654.

**§ 16 (NCI4th). No express agreement required**

The State need not prove an express agreement in order to prove conspiracy, nor is it necessary that the unlawful act be completed. *S. v. Morgan*, 654.

**§ 31 (NCI4th). Conspiracy to murder**

Defendant could be convicted of conspiracy to commit murder although the substantive offense for which defendant was convicted was second degree murder. *S. v. Arnold*, 128.

## CONSTITUTIONAL LAW

**§ 12 (NCI4th). Separation of powers, generally**

There was no violation of the Separation of Powers Clause of the N. C. Constitution when the district court ordered the Division of Youth Services to give sexual offender treatment to a juvenile found delinquent because of sex offenses and subsequently denied the conditional release of that delinquent because treatment had not been made in compliance with that mandate. *In re Doe*, 743.

**§ 42 (NCI3d). What constitutes indigency**

The trial court did not err by not appointing individual additional counsel in a first degree murder trial where the court had found that defendant was indigent and appointed counsel, defendant's family retained private counsel, the court allowed appointed counsel to withdraw, and the retained attorney represented defendant alone from that point. *S. v. McDowell*, 363.

to do what is reasonably necessary for the orderly and efficient exercise of the administration of justice. *In re Alamance County Court Facilities*, 84.

Although statutes obligating counties and cities to provide judicial facilities do not expressly pass the duty of providing adequate facilities to the court in case of default of local authorities, the court has the inherent authority to direct local authorities to perform that duty. *Ibid.*

An ex parte order requiring county commissioners immediately to take steps to provide specific judicial facilities in accord with their statutory obligations exceeded what was reasonably necessary for the proper administration of justice; a more reasonable, less intrusive procedure would have been for the court to summon the commissioners under an order to show cause why a writ of mandamus should not issue requiring the commissioners to submit a plan for adequate court facilities. *Ibid.*

No procedure or practice of the courts, even those exercised pursuant to their inherent powers, may abridge a person's substantive rights. *Ibid.*

County commissioners are not bound by an order requiring them to provide specific judicial facilities where they were not parties to the action from which the order issued. *Ibid.*

The trial court exceeded its authority in a prosecution for murder and burglary by ordering that the District Attorney and his entire staff withdraw from the case because a member of the staff had worked on the Public Defender's staff during defendant's first trial. *S. v. Camacho*, 589.

## CRIMINAL LAW

**§ 21.5 (NCI3d). Sufficiency of evidence of guilt of first degree murder**

The evidence was sufficient to support the trial judge's instructions on first degree murder with premeditation and deliberation of a child who died as a result of water intoxication after he was coerced by defendant to drink large quantities of water. *S. v. Crawford*, 466.

**§ 33.2 (NCI3d). Relevancy of evidence as to motive, knowledge, or intent**

Testimony that the grandmother of a child who died from water intoxication told the child's mother to give him plenty of fluids was irrelevant and inadmissible to support defendant's defense that he was administering a "home remedy" in coercing the child to drink large quantities of water and was not punishing the child. *S. v. Crawford*, 466.

Testimony in a murder trial that a sign over the door of the mobile home in which defendant lived asserted that blacks were not allowed there and pictured a Confederate flag and that defendant attended a Klan march after the killing was relevant and admissible to show motive. *S. v. Wynne*, 507.

**§ 34.2 (NCI3d). Admission of inadmissible evidence of other offenses as harmless error**

Erroneously admitted testimony that defendant had been charged with assaulting his wife on an occasion prior to her murder was cumulative to other evidence that defendant and his wife had a stormy marriage and was not prejudicial. *S. v. Jones*, 254.

**CRIMINAL LAW — Continued**

**§ 34.4 (NCI3d). Admissibility of evidence of other offenses**

Evidence is admissible under Rule of Evidence 404(b) if it is substantial evidence tending to support a reasonable finding by the jury that defendant committed a similar act or crime and its probative value is not limited solely to tending to establish defendant's propensity to commit a crime such as the crime charged. *S. v. Stager*, 278.

The death of defendant's first husband ten years before the death of her second husband was not so remote as to have lost its probative value in a prosecution of defendant for the murder of her second husband. *Ibid.*

The trial court did not abuse its discretion in permitting the State to introduce testimony by twenty witnesses in showing the circumstances of the death of defendant's first husband ten years before the death of her second husband. *Ibid.*

**§ 34.7 (NCI3d). Admissibility of evidence of other offenses to show knowledge or intent; animus, motive, malice, premeditation or deliberation**

Evidence that defendant gave a murder victim defaced enlargements of photographs of the victim's wife four months before the victim was shot, considered with evidence that defendant returned the original photographs to the victim's wife just moments before the shooting, was relevant and admissible to show defendant's malice toward the victim and his wife, defendant's fixation on the victim's wife, and defendant's motive to kill the victim. *S. v. Terry*, 191.

In a prosecution of defendant for the first degree murder of her second husband, evidence concerning the death of defendant's first husband was admissible to show motive, intent, preparation, plan, knowledge, or absence of accident. *S. v. Stager*, 278.

In a prosecution of defendant for first degree murder by torture of his girlfriend's six-year-old son by coercing the child to drink large quantities of water as a punishment for disobeying a rule, evidence describing prior extraordinary disciplinary techniques carried out by defendant against the child during the year preceding the child's death was properly admitted to show intent, motive, common plan and absence of mistake or accident. *S. v. Crawford*, 466.

Testimony by defendant's probation officer that a condition of defendant's probation was that he commit no criminal offense was admissible to corroborate defendant's confession that he killed the victim after assaulting him because he feared his probation would be revoked and he would return to jail. *S. v. Wynne*, 507.

Evidence of defendant's earlier cocaine transactions with a coconspirator was admissible to show his intent and motive in a prosecution for conspiracy to possess cocaine with intent to sell or deliver. *S. v. Morgan*, 654.

**§ 35 (NCI3d). Evidence that offense was committed by another, or that defendant was framed**

The trial court did not err in a murder prosecution by refusing to allow defendant to question a witness about a man who had come to the witness's store and given him information about the victim. *S. v. Annadale*, 557.

The trial court did not err in a murder prosecution by refusing to permit an assistant district attorney to testify regarding the details of a crime for which a State's witness had been convicted where the evidence was offered to show that the witness rather than defendant committed the crimes for which defendant was being tried. *Ibid.*

**§ 39 (NCI3d). Evidence in rebuttal of facts brought out by adverse party**

In a prosecution for two rapes, burglaries, and sexual offenses, the State was properly allowed to rebut testimony by defendant's employer that defendant was a good employee by questioning the employer about defendant's misconduct toward waitresses at the employer's restaurant by touching various parts of their bodies and telling them dirty jokes; assuming that the ages and race of the waitresses was irrelevant to rebut evidence that defendant was a good employee, the admission of testimony that defendant particularly bothered two white waitresses of approximately the same ages as the victims was harmless error. *S. v. Cotton*, 764.

**§ 43.4 (NCI3d). Gruesome, inflammatory or otherwise prejudicial photographs**

The trial court did not err in a murder prosecution by admitting into evidence twelve autopsy pictures where the victim had been stabbed 34 times. *S. v. Bearthes*, 149.

**§ 45 (NCI3d). Experimental evidence**

Even if the trial court erred by refusing to allow testimony concerning a witness's ability to produce photocopied letters like those introduced by the State, such error was not prejudicial to defendant. *S. v. Arnold*, 128.

**§ 46.1 (NCI3d). Flight of defendant as implied admission; competency and sufficiency of evidence**

The trial court did not err in a murder prosecution by giving an instruction on flight. *S. v. Tucker*, 709.

**§ 50.1 (NCI3d). Admissibility of opinion testimony; opinion of expert**

Testimony by an expert in pediatric critical care medicine that the amount of water consumed by the victim would not voluntarily be taken by a six-year-old was a proper subject matter for an expert opinion. *S. v. Crawford*, 466.

Testimony by an expert witness was not inadmissible because it encompassed the ultimate issue to be decided by the trier of fact. *Ibid.*

Expert opinion testimony that the child victim would not "voluntarily" drink the quantity of water which he consumed and that the victim was "threatened" or "coerced" did not contain legal terms of art not readily apparent to the witness so as to render the testimony inadmissible. *Ibid.*

**§ 51.1 (NCI3d). Qualification of experts; showing required; sufficiency**

The testimony of the medical examiner as to the cause of death was admissible in a murder prosecution despite defendant's contention that the medical examiner was in no better position than the jury to render an opinion. *S. v. Annadale*, 557.

**§ 53.1 (NCI3d). Medical testimony as to cause and circumstances of death**

A medical examiner was properly permitted to state his opinion that one of the shots fired into one victim's body had been inflicted after the victim had fallen. *S. v. Ali*, 394.

**§ 55.1 (NCI3d). Other tests**

The trial court in a murder prosecution properly denied defendant's motion for a nontestimonial identification order for samples of a witness's hair. *S. v. Tucker*, 709.

## CRIMINAL LAW — Continued

**§ 60.3 (NCI3d). Fingerprint; qualification and testimony of expert**

The trial court did not err during a first degree murder prosecution by allowing an SBI agent to testify that another agent had verified his identification of defendant's fingerprint. *S. v. Quick*, 1.

**§ 60.5 (NCI3d). Evidence in regard to fingerprints and bare footprints; competency and sufficiency of evidence**

The trial court did not err in its instructions on fingerprints in a murder prosecution where the evidence was pertinent to the credibility of witnesses testifying against defendant. *S. v. Tucker*, 709.

**§ 65 (NCI3d). Evidence as to emotional state**

Testimony that the victim was shaking and appeared frightened prior to his death was relevant in a murder trial. *S. v. Wynne*, 507.

**§ 66.17 (NCI3d). Sufficiency**

The trial court did not err in a first degree murder prosecution by allowing the in-court identification of defendant by the victim's son where defendant contended that the in-court identification was tainted by the unnecessarily suggestive statements of a therapist who hypnotized the witness and by law enforcement officers who always referred to the picture of defendant by his name. *S. v. Annadale*, 557.

**§ 70 (NCI3d). Tape recordings**

Testimony as to accuracy based on personal knowledge is all that is required to authenticate a tape recording, and the testimony of four witnesses that they recognized the voice on a tape recording as that of the victim was sufficient to meet the State's burden of authentication. *S. v. Stager*, 278.

**§ 73.2 (NCI3d). Statements not within hearsay rule**

Statements by a murder victim to her pastor were not inadmissible under the hearsay rule where the court found that the victim's statements possessed sufficient guarantees of trustworthiness. *S. v. Ali*, 394.

Statements by a murder victim to her friend were sufficiently reliable and trustworthy to be admitted as an exception to the hearsay rule, and notice of the statement given to defendant eleven days before trial was sufficient to inform defendant of the substance of the victim's statements and to afford defendant a fair opportunity to meet the State's evidence. *Ibid.*

**§ 73.3 (NCI3d). Hearsay statements showing state of mind**

A tape recording made by a murder victim three days before his death was admissible under Rule of Evidence 803(3) as evidence tending to show the victim's state of mind. *S. v. Stager*, 278.

The admission of a tape recording made by a murder victim shortly before his death did not violate defendant's right to confrontation where the victim's statement was admissible under the state of mind exception to the hearsay rule. *Ibid.*

**§ 74 (NCI3d). Confessions generally**

Statements by defendant to law officers during interrogation in a murder case that he did not care if he received capital punishment were relevant to the circumstances surrounding defendant's confession and admissible to show that he understood the nature of the interrogation. *S. v. Wynne*, 507.

**§ 74.2 (NCI3d). Confession by, or implicating, codefendant**

Assuming that a detective's testimony concerning a codefendant's statements referring to where "we" left the body was erroneously admitted in a murder trial, such error was harmless where the court struck all testimony concerning the codefendant's statements about what defendant said and did, and where the statement corroborated defendant's admitted confession. *S. v. Wynne*, 507.

**§ 75.9 (NCI3d). Volunteered and spontaneous statements**

The trial court did not err in a murder prosecution by admitting a clarifying statement made by defendant after he had been informed of his rights and had informed the officer that he had better not say anything else. *S. v. Bearthes*, 149.

**§ 75.11 (NCI3d). Waiver of constitutional rights at interrogation; sufficiency of waiver**

Assuming arguendo that defendant's Sixth Amendment right to counsel attached when an arrest warrant was served upon him, defendant waived his Sixth Amendment right to counsel before he was questioned by officers. *S. v. Wynne*, 507.

**§ 79 (NCI3d). Acts and declarations of companions, codefendants and coconspirators generally**

A statement made either by defendant or another man to a murder victim was admissible against defendant where defendant's own confession established a conspiracy between defendant and the other man to kill the victim even though defendant and the other man were not charged with criminal conspiracy or tried jointly. *S. v. Wynne*, 507.

**§ 86.2 (NCI3d). Credibility of defendant and interested parties; prior convictions generally**

Because the trial court denied defendant's motion in limine to exclude evidence regarding defendant's prior sodomy conviction, defendant did not "open the door" to cross-examination on that subject by testifying about the conviction on direct examination. *S. v. Ross*, 108.

The only legitimate purpose for introducing evidence of past convictions is to impeach the witness's credibility. *Ibid.*

The trial court erred in permitting the State to cross-examine defendant about a nineteen-year-old sodomy conviction under Rule 609 in his trial for the murders of two teenage boys where the court failed to identify any fact or circumstance indicating that this evidence was probative of defendant's credibility, but this error was harmless. *Ibid.*

**§ 86.6 (NCI3d). Impeachment of defendant; prior statements**

Defendant in a murder prosecution opened the door to admission of prior inconsistent statements for the purpose of impeachment when he took the stand and testified that he had no recollection of events. *S. v. Bearthes*, 149.

**§ 89.2 (NCI3d). Credibility of witnesses; corroboration**

A statement made by defendant to a detective that he had shot his wife was properly admitted to corroborate the testimony of a witness concerning a phone conversation he had had with defendant, and the fact that the statement included other matters not testified to by the witness about defendant's going home to get his shotgun and about his inability "to take it anymore" was not prejudicial to defendant. *S. v. Jones*, 254.

**CRIMINAL LAW — Continued**

that he was so completely intoxicated as to render him incapable of forming a deliberated and premeditated purpose to kill. *S. v. Brogden*, 534.

**§ 868 (NCI4th). Repetition of instructions relating to other features of case**

The trial court did not err in failing to instruct the jury, in response to a juror's specific request for clarification, that the intent to kill essential to the offense of first degree murder must have existed at the time the act which caused death occurred where the court repeated the pertinent portions of its instructions in their entirety. *S. v. Weddington*, 202.

**§ 1009 (NCI4th). New trial; conduct of or affecting jury**

The trial court did not err by denying a murder defendant's post-trial motion for appropriate relief where a reporter stated that a juror had told him that a female juror had said that she had been contacted during deliberations by someone claiming to know defendant. *S. v. Bonney*, 61.

**§ 1095 (NCI4th). Proof of aggravating factor; mere assertion by prosecutor**

There was no error in sentencing defendant for attempted first degree sexual offense as a part of a plea bargain where the prosecutor summarized the State's evidence. *S. v. Mullican*, 683.

**§ 1127 (NCI4th). Conduct or condition of victim as aggravating circumstance**

The trial court did not err in finding as a nonstatutory aggravating factor for felony child abduction that the victim was more vulnerable because he was in a hospital at the time of his abduction. *S. v. Nobles*, 239.

**§ 1133 (NCI4th). Position of leadership or inducement of others to participate as aggravating factor generally; facts indicative of defendant's role**

The trial court did not err in finding as an aggravating factor for felony child abduction that defendant induced another to participate as an accessory after the fact or in the commission of the offense itself. *S. v. Nobles*, 239.

**§ 1135 (NCI4th). Severability of leadership and inducement aggravating factors**

The trial court did not err when sentencing defendant for armed robbery by finding as two separate aggravating factors that defendant occupied a position of leadership and trust and that he induced others to commit crimes. *S. v. Tucker*, 709.

**§ 1161 (NCI4th). Age of young victim as aggravating circumstance**

The trial court did not err in finding the age of the one-day-old victim as an aggravating factor for felony child abduction. *S. v. Nobles*, 239.

**§ 1177 (NCI4th). Position of trust or confidence aggravating factor generally**

The trial court did not err in finding as an aggravating factor for conspiracy to commit murder that defendant took advantage of a position of trust or confidence based on the fact that the victim and defendant were husband and wife. *S. v. Arnold*, 128.

The trial court's finding as an aggravating factor in sentencing defendant for conspiracy to murder her husband that defendant took advantage of a position of trust or confidence was not inconsistent with the court's finding as a mitigating factor that the relationship between defendant and the victim was extenuating where the aggravating factor was based on the marital relationship and the mitigating factor was based on the victim's revelation that he had had a homosexual relationship with the principal murderer. *Ibid.*

**CRIMINAL LAW — Continued**

to find the fifth or "catchall" mitigating circumstance and a juror reasonably might have found this circumstance to exist based on the evidence. *S. v. Stager*, 278.

The trial court committed prejudicial error in instructing the jury that it must find unanimously the existence of a mitigating circumstance before any juror could consider that circumstance during the capital sentencing proceeding. *S. v. Ali*, 394.

A sentence of death in a first degree murder prosecution was vacated and the case remanded for a new sentencing hearing where the trial court instructed the jury to find any mitigating circumstances unanimously and to reject those not unanimously found to exist and the error was prejudicial. *S. v. Thomas*, 423.

A sentence of death for first degree murder was vacated and remanded for *McKoy* error in the trial court's instructions requiring unanimity on mitigating circumstances where there was evidence from which the statutory impaired capacity mitigating circumstance could have been found. *S. v. Wynne*, 507.

A *McKoy* error in a capital sentencing proceeding in which defendant was sentenced to death was not shown to be harmless where the verdict form shows only that the jury unanimously found "one or more" mitigating circumstances to exist and substantial evidence supported each of the six specified mitigating circumstances submitted. *S. v. Artis*, 679.

The trial court's *McKoy* error in requiring unanimity on mitigating circumstances was prejudicial where the jury failed unanimously to find the existence of any mitigating circumstance but defendant presented substantial evidence from which one or more jurors may have believed that one or more of those circumstances existed. *S. v. McPhail*, 636.

The trial court's *McKoy* error in requiring unanimity on mitigating circumstances was not cured by the court's oral instructions; furthermore, this error was prejudicial where the jury failed unanimously to find any of the mitigating circumstances submitted and there was evidence sufficient to support the statutory mental or emotional disturbance mitigating circumstance. *S. v. Brogden*, 534.

A death sentence in a murder prosecution was vacated where the court erroneously required the jury to find the existence of any mitigating circumstance unanimously and there was evidence supporting a mitigating circumstance submitted but not found. *S. v. Lloyd*, 662.

Requiring unanimity in finding the mitigating circumstance of mental or emotional disturbance when sentencing defendant for murder was prejudicial error because there was substantial evidence to support that circumstance in addition to defendant's alcohol use, and the jury's decision on other mitigating circumstances on the same evidence did not render this error harmless. *S. v. Greene*, 771.

**§ 1357 (NCI4th). Mental or emotional disturbance; instructions**

There was evidence in a capital sentencing proceeding of the mitigating circumstance of mental or emotional disturbance; language in a prior case requiring provocation was dictum. *S. v. Greene*, 771.

**§ 1360 (NCI4th). Capital sentencing; mitigating circumstances; impaired capacity of defendant**

The Supreme Court declined to adopt the State's argument that evidence which supported the statutory impaired capacity mitigating circumstance was subsumed in the jury's consideration of the mitigating circumstances found so that

## EASEMENTS — Continued

In determining whether an easement has substantially retained its identity over time, factors to be concerned include the vulnerability of the road traveled due to forces of nature, particularly where the easement claimed is across wind-swept, shifting sands which are subject to ocean storms. *Ibid.*

The trial court erred in concluding that defendant interrupted the use of a pathway by the general public in a manner that caused that use not to be continuous and uninterrupted by putting telephone poles, cables, and gates across the pathway. *Ibid.*

## ESTOPPEL

**§ 4.7 (NCI3d). Equitable estoppel; sufficiency of evidence**

Plaintiff was estopped to deny the validity of a contract for the purchase and sale of twenty-five acres of a 113 acre tract of land which contained a patently ambiguous description of the land to be conveyed where plaintiff made the payments required by the agreement for nearly eight years and paid a prorated portion of the property taxes on the 113 acre tract. *Brooks v. Hackney*, 166.

## EVIDENCE

**§ 47 (NCI3d). Expert testimony in general**

A real estate appraiser was properly appointed as an expert witness in an equitable distribution action, was properly permitted to testify, and was entitled to compensation where the language of the order was a show cause order within the meaning of the statute. *Swilling v. Swilling*, 219.

## FALSE IMPRISONMENT

**§ 3 (NCI3d). Damages**

There was sufficient evidence of outrageous conduct, in addition to that conduct constituting false imprisonment in an alleged shoplifting incident, to survive defendants' motion for summary judgment on the issue of punitive damages. *Rogers v. T.J.X. Companies*, 226.

## FRAUDS, STATUTE OF

**§ 2.2 (NCI3d). Memorandum held insufficient to take contract out of statute of frauds**

The description in a written agreement for the purchase and sale of twenty-five acres of a 113 acre tract was patently ambiguous where the northern boundary was described as "with the Whitehead line. Thence straight to road that goes by Plainfield Church and with the road to the church to include 25 acres in all" since the closing line could be in any number of locations in order to include the 25 acres. *Brooks v. Hackney*, 166.

## GRAND JURY

**§ 3 (NCI3d). Challenge to composition or foreman of grand jury generally**

A black defendant has standing to object to the removal of a white foreman of the grand jury and the replacement of him with a black person on the ground that the new foreman was selected in a racially discriminatory manner. *S. v. Moore*, 245.

## GRAND JURY — Continued

**§ 3.3 (NCI3d). Sufficiency of evidence of racial discrimination**

A black foreman of the grand jury was selected and appointed solely on the basis of race in violation of Art. I, § 26 of the N. C. Constitution after the removal of the white foreman. *S. v. Moore*, 245.

## HOMICIDE

**§ 4.1 (NCI3d). Murder by lying in wait, poisoning, and torture**

The murder by torture statute is not unconstitutionally vague. *S. v. Crawford*, 466.

**§ 7 (NCI3d). Insanity**

The trial court did not err in a first degree murder prosecution by not allowing an expert witness to give evidence concerning defendant's insanity. *S. v. Bonney*, 61.

**§ 9 (NCI3d). Self-defense; generally**

Neither the trial court's directive that defendant give written notice of his intent to assert self-defense in his trial for two murders nor the court's statement to the jury venire that defendant intended to assert that defense violated defendant's state or federal constitutional rights or otherwise prejudiced him. *S. v. Ross*, 108.

**§ 15 (NCI3d). Relevancy and competency of evidence in general**

There was no prejudicial error in a first degree murder prosecution where the trial court admitted a witness's opinion as to the victim's reputation in the community before there was a challenge to the victim's character and when there was no evidence that the victim was the aggressor. *S. v. Quick*, 1.

A defendant on trial for the murder of her husband was not prejudiced by testimony that she once made a statement showing racial prejudice or by testimony that she telephoned a young male several weeks after her husband's death. *S. v. Stager*, 278.

Evidence that the victim was "slow" or "retarded" and that he was honest and polite was properly admitted during the guilt phase of a first degree murder trial. *S. v. Wynne*, 507.

**§ 15.2 (NCI3d). Competency of evidence of defendant's mental condition; malice**

There was no prejudice in a murder prosecution in allowing the victim's sixteen-year-old sister to testify that defendant, their father, did not love the victim. *S. v. Bonney*, 61.

A defendant on trial for the murder of her husband was not prejudiced by testimony that she told a witness after her husband's death that she intended to start seeing a psychiatrist. *S. v. Stager*, 278.

Testimony that defendant was calm and not crying on the morning of her husband's death and that she gave away some of his clothing on the day after his funeral was admissible as opinion evidence on defendant's emotional state shortly after her husband was killed. *Ibid.*

**§ 17 (NCI3d). Evidence of intent and motive**

Testimony in a murder prosecution that a sign over the door of the mobile home in which defendant lived asserted that blacks were not allowed there and pictured a Confederate flag and that defendant attended a Klan march after the killing was relevant and admissible to show motive. *S. v. Wynne*, 507.

**HOMICIDE -- Continued**

**§ 18.1 (NCI3d). Particular circumstances showing premeditation and deliberation**

The trial court did not err in a murder prosecution by allowing the prosecutor to repeatedly ask the medical examiner how long it would have taken the victim to die from each of her 23 life threatening wounds when the witness had already testified that the victim died within 3 to 5 minutes. *S. v. Bearthes*, 149.

Expert and lay testimony concerning the pain experienced by the female victim during her last moments of life was admissible to establish that defendant acted with malice, premeditation and deliberation and to show the trustworthiness of the victim's statement to police immediately after the shooting in which she named her assailant. *S. v. Ali*, 394.

**§ 20.1 (NCI3d). Admissibility of photographs**

Photographs of the body of defendant's first husband were properly admitted in defendant's trial for the murder of her second husband to illustrate testimony as to where the body was found, the position of the body, and the location of the bullet wound. *S. v. Stager*, 278.

The trial court did not err in allowing the State to present three color photographs and four color slides picturing the murder victim's body and in allowing testimony concerning the decomposition of the body. *S. v. Wynne*, 507.

**§ 21.5 (NCI3d). Sufficiency of evidence of guilt of first degree murder**

The trial court did not err in a first degree murder prosecution by denying defendant's motion to dismiss for insufficient evidence where the evidence indicated that defendant had the motive, opportunity, means and state of mind necessary to commit a first degree murder. *S. v. Quick*, 1.

The trial court did not err by denying defendant's motions to dismiss a first degree murder charge. *S. v. Bonney*, 61.

The trial court did not err in a murder prosecution by denying defendant's motion to dismiss based on an exculpatory statement showing lack of premeditation and deliberation where the statement in no way indicated that defendant was provoked to shoot or that his action was reflexive. *S. v. Joyner*, 211.

There was substantial circumstantial evidence to support a jury finding that defendant's shooting of her husband was not accidental but that she intentionally killed him after premeditation and deliberation. *S. v. Stager*, 278.

The trial court did not err by denying defendant's motions to dismiss in a murder prosecution where the opinion of the medical examiner, with the testimony of other witnesses, clearly meets the requirements of the corpus delicti rule. *S. v. Annadale*, 557.

The evidence was sufficient for the jury to find that defendant killed the victim with malice, premeditation and deliberation while the victim was lying face down on a store floor with an electrical cord wrapped around his legs. *S. v. McPhail*, 636.

The trial court did not err in a first degree murder prosecution by denying defendant's motion to dismiss the charge based on premeditation and deliberation for insufficient evidence. *S. v. Alford*, 755.

**§ 21.6 (NCI3d). Sufficiency of evidence of homicide by poisoning or lying in wait or in perpetration of felony**

The trial court did not err by denying defendant's motion to dismiss charges of felony murder and first degree sexual offense where the victim may have been dead when the sexual offense occurred. *S. v. Thomas*, 423.

**HOMICIDE — Continued**

The State presented adequate evidence of torture by coercing the child victim to drink large quantities of water until he died to support defendant's conviction of the first degree murder of the child by torture. *S. v. Crawford*, 466.

The evidence was sufficient to support defendant's conviction for first degree murder based on felony murder. *S. v. Alford*, 755.

**§ 25.1 (NCI3d). Instructions on first degree murder; felony murder rule; torture**

The trial court did not err in not specifically instructing upon malice as a prerequisite to a finding of murder by torture since the commission of torture implies the requisite malice. *S. v. Crawford*, 466.

The trial court's instruction that torture is "the course of conduct by one or more persons which intentionally inflicts grievous pain and suffering upon another" adequately defined torture for purposes of first degree murder. *Ibid.*

**§ 25.2 (NCI3d). Instructions on premeditation and deliberation**

The trial court did not commit plain error in instructing jurors in a first degree murder prosecution that they could infer premeditation and deliberation from the "brutal or vicious circumstances of the killing" and from defendant's use of "grossly excessive force." *S. v. Terry*, 191.

The trial court did not err in its instructions to the jury on premeditation and deliberation during a murder prosecution. *S. v. McDowell*, 363.

The trial court did not err in instructing the jury that premeditation and deliberation could be inferred from the means or manner of the killing where there was evidence that defendant coerced the child victim to drink water until he died. *S. v. Crawford*, 466.

The evidence was sufficient to support the trial court's instructions permitting the jury to find premeditation and deliberation based on the rendering of lethal blows after the victim was felled and rendered helpless or on the use of grossly excessive force. *S. v. Brogden*, 534.

**§ 28.3 (NCI3d). Self-defense; aggression or provocation by defendant; use of excessive force**

The trial court's aggressor instruction on self-defense was supported by the testimony of the State's witnesses that defendant threatened the victim just seconds before shooting him. *S. v. Terry*, 191.

**§ 28.6 (NCI3d). Instructions on defense of intoxication**

The evidence in a first degree murder trial failed to show that defendant was utterly incapable of premeditating and deliberating the killing so as to require the trial court to give defendant's requested instruction on voluntary intoxication. *S. v. Wynne*, 507.

**§ 28.7 (NCI3d). Instructions; defense of insanity**

The trial court did not err in a first degree murder prosecution by not giving defendant's requested instruction on the factors to be considered in determining whether defendant was legally insane. *S. v. Bonney*, 61.

**§ 30 (NCI3d). Submission of guilt of lesser degrees of the crime**

The trial court did not err in a first degree murder prosecution by failing to submit defendant's requested instruction on second degree murder. *S. v. Quick*, 1.

**HOMICIDE -- Continued**

The trial court committed prejudicial error in submitting second degree as a possible jury verdict where the evidence supported only a possible verdict of first degree murder. *S. v. Arnold*, 128.

The trial court did not err in a murder prosecution by refusing defendant's request to instruct the jury on second degree murder. *S. v. Annadale*, 557.

The trial court did not err in a first degree murder prosecution by failing to instruct the jury on second degree murder where there was no evidence to support a verdict of second degree murder. *S. v. Tucker*, 709.

## INFANTS

**§ 20 (NCI3d). Juvenile judgments and orders; dispositional alternatives**

The district court had statutory authority to order the Division of Youth Services to give specific sexual offender treatment to a juvenile found delinquent because of sex offenses when such treatment was available and to deny conditional release of the juvenile as requested by the Division of Youth Services because the juvenile had not received sufficient treatment. *In re Doe*, 743.

There was no violation of the Separation of Powers Clause of the N. C. Constitution when the district court ordered the Division of Youth Services to give sexual offender treatment to a juvenile found delinquent because of sex offenses and subsequently denied the conditional release of that juvenile because treatment had not been in compliance with that mandate. *Ibid.*

The district court's order denying a juvenile's conditional release as requested by the Division of Youth Services because the juvenile had not been given sexual offender treatment as mandated by the commitment order did not violate the doctrine of sovereign immunity. *Ibid.*

## INSURANCE

**§ 12 (NCI3d). Insurable interest in life of another**

G.S. 52-3 allows a married person to insure the life of his or her spouse without the consent of the spouse. *Cook v. Bankers Life and Casualty Co.*, 488.

**§ 69 (NCI3d). Protection against injury from uninsured or underinsured motorists generally**

Plaintiffs were not entitled to underinsured motorist coverage under their corporate employer's automobile liability policy where they were injured while on company business but while in a vehicle belonging to one other than their employer. *Sproles v. Greene*, 603.

**§ 87 (NCI3d). "Omnibus" clause; drivers insured**

That part of the prior opinion in this case which relies upon the definition of "persons insured" in G.S. 20-279.21(b)(3)b in determining that a driver was covered by an automobile liability policy as a spouse living in the household of the policyholder is withdrawn. *Wilson v. State Farm Mut. Ins. Co.*, 262.

**§ 87.1 (NCI3d). Additional insureds under automobile policy generally; children of insured**

Employees of a corporation were not included as named insureds for purposes of underinsured motorist coverage when only the corporation is listed as the named insured on an automobile liability insurance policy. *Sproles v. Greene*, 603.

## INSURANCE — Continued

**§ 110.1 (NCI3d). Liability for costs and interest**

Defendant liability insurer was not required to pay prejudgment interest in addition to its liability under the policy where it agreed to pay only the costs of the defense, which would include attorney fees, deposition expenses, and subpoena and witness fees, but did not agree to pay all costs taxed against the insured which would include prejudgment interest. *Sproles v. Greene*, 603.

A provision in defendant liability insurer's policy governing the payment of postjudgment interest on amounts in excess of its policy limits did not conflict with G.S. 24-5. *Ibid.*

Defendant liability insurer's "offer to pay" its policy limits made on the same day that the verdict was returned was sufficient under the terms of the policy to toll the insurer's responsibility for postjudgment interest even though the actual payment was not made until thirteen days later. *Ibid.*

Defendant insurer was not required to pay prejudgment interest beyond its policy limits where the insurer agreed under the policy to pay "all defense costs we incur." *Barnes v. Hardy*, 690.

## JURY

**§ 6 (NCI3d). Voir dire; generally; practice and procedure**

The trial court did not err in a murder prosecution by conducting an entire voir dire of a potential juror. *S. v. Bearthes*, 149.

The trial court did not err in a first degree murder prosecution by allowing defendant input into the voir dire decision making process. *S. v. McDowell*, 363.

**§ 6.3 (NCI3d). Voir dire; propriety and scope of examination generally**

There was no violation of *Turner v. Murray*, 476 U.S. 28, in a first degree murder prosecution because the case involved neither an interracial crime nor a refusal by the trial court to allow defendant to question prospective jurors regarding racial bias. *S. v. Quick*, 1.

**§ 6.4 (NCI3d). Questions as to belief in capital punishment**

The trial court did not err in preventing defendant from asking all prospective jurors if they believed that capital punishment was a deterrent to crime. *S. v. Ali*, 394.

**§ 7.4 (NCI3d). Sufficiency of evidence of racial discrimination**

By failing to elicit from the jurors by questioning or other proper evidence the race of each juror, defendant failed to establish an adequate record for appellate review with regard to his claim of discrimination in the exercise of peremptory challenges. *S. v. Brogden*, 534.

**§ 7.7 (NCI3d). Challenges of cause; waiver of right to challenge**

The trial court did not err in a murder prosecution by denying defendant's challenge for cause to two prospective jurors where defendant did not renew his challenges. *S. v. Quick*, 1.

**§ 7.8 (NCI3d). Particular grounds for challenge and disqualification**

A juror was properly excused for cause in a first degree murder trial because of her inability to sit through the trial without becoming emotional. *S. v. Wynne*, 507.

**§ 7.9 (NCI3d). Challenges for cause; prejudice and bias; preconceived opinions**

The trial court did not err in a first degree murder prosecution by excusing a juror for cause where the juror stated that the way in which the defense was planning to operate struck him as unusual. *S. v. McDowell*, 363.

**§ 7.10 (NCI3d). Family relationship; social, business and professional relationships**

A juror was properly excused for cause in a first degree murder trial because she had worked with defendant's mother for many years and would find it difficult to continue to do so if the jury imposed the death penalty. *S. v. Wynne*, 507.

**§ 7.11 (NCI3d). Scruples against, or belief in, capital punishment**

The trial court did not err in a prosecution for first degree murder and robbery by excusing prospective jurors for cause or by allowing the State to excuse prospective jurors for cause. *S. v. Quick*, 1.

There is no right to question or rehabilitate a juror in a capital case when the juror has expressed a clear and unequivocal refusal to impose the death penalty under all circumstances. *Ibid.*

The trial court did not err during jury selection for a murder trial by allowing the State's challenges for cause without question, but denying two of defendant's challenges for cause after an inquiry into whether the juror in question could follow the law as instructed. *Ibid.*

A jury was properly excused for cause because of his death penalty views. *S. v. Wynne*, 507.

**§ 7.12 (NCI3d). What constitutes disqualifying scruples or beliefs**

The trial court did not err in a murder prosecution by sustaining the State's objections to defendant's questions asking prospective jurors to describe the circumstances under which they would invoke the death penalty. *S. v. Quick*, 1.

The trial court did not err in a murder prosecution by excusing for cause a prospective juror who was equivocal on the death penalty. *S. v. Bearthes*, 149.

The trial court did not err during voir dire in a murder prosecution by excusing a juror for cause based on his stated opposition to the death penalty. *S. v. McDowell*, 363.

**§ 7.14 (NCI3d). Peremptory challenges; manner, order, and time of exercising a challenge**

Defendant in a murder and sexual offense prosecution was not entitled to a new trial based on the prosecutor's peremptory challenges against prospective black jurors where the trial court did not make a prima facie finding of discrimination but nevertheless required the prosecution to explain each peremptory challenge of a black person. *S. v. Thomas*, 423.

The peremptory removal of black prospective jurors in a murder and sexual offense prosecution did not violate the North Carolina Constitution. *Ibid.*

The trial court did not err in allowing the district attorney to peremptorily challenge certain jurors solely because they were "hesitant" about imposing capital punishment. *S. v. Brogden*, 534.

## MANDAMUS

**§ 2 (NCI3d). Ministerial or discretionary duty**

When a county commissioner has failed to exercise his ministerial duty to provide adequate court facilities, or when he has exercised his discretion in disregard of the law, the writ of mandamus may be employed to obtain an effective, timely remedy. *In re Alamance County Court Facilities*, 84.

An ex parte order requiring county commissioners immediately to take steps to provide specific judicial facilities in accord with their statutory obligations exceeded what was reasonably necessary for the proper administration of justice; a more reasonable, less intrusive procedure would have been for the court to summon the commissioners under an order to show cause why a writ of mandamus should not issue requiring the commissioners to submit a plan for adequate court facilities. *Ibid.*

## MASTER AND SERVANT

**§ 19 (NCI3d). Liability of contractee or main contractor to employees of independent contractor**

The trial court erred by granting summary judgment for a contractor in a wrongful death action arising from the death of a subcontractor's employee in a trench cave-in; one who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others. *Woodson v. Rowland*, 330.

The trial court correctly granted summary judgment for a developer in a wrongful death action arising from the death of a subcontractor's employee in a trench cave-in. *Ibid.*

The trial court did not err by granting summary judgment for defendant contractor on a claim for negligently selecting and retaining the subcontractor in a wrongful death action arising from the death of an employee of the subcontractor in a trench cave-in. *Ibid.*

**§ 87 (NCI3d). Claim under Compensation Act as precluding common law action**

The trial court erred in a wrongful death action by granting summary judgment for a subcontractor whose employee was killed when a trench collapsed; when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed, that employee or his or her personal estate may pursue a civil action against the employer. *Woodson v. Rowland*, 330.

The trial court erred in a wrongful death action by granting summary judgment for defendant subcontractor in an action arising from a trench cave-in. *Ibid.*

Plaintiff in a wrongful death action arising from a trench cave-in could simultaneously pursue her workers' compensation claim because the injury to her intestate was the result of an accident as that term is used in the Act. *Ibid.*

## MUNICIPAL CORPORATIONS

**§ 30.12 (NCI3d). Zoning ordinances; mobile homes**

Plaintiff developer which applied for a construction permit under a county ordinance which prescribed procedures for obtaining a construction and operating permit for a mobile home park had a right to have its application reviewed under

## MUNICIPAL CORPORATIONS — Continued

the terms of the ordinance in effect at the time the application for the permit was made. *Northwestern Financial Group v. County of Gaston*, 180.

Plaintiff developer did not waive or abandon its right to have its mobile home park plan reviewed under the ordinance in effect at the time the plan was submitted when plaintiff submitted revised plans in response to modifications recommended by a regulatory agency and proceeded to comply with the requirements of the original ordinance. *Ibid.*

A construction and operating permit for a mobile home park could not be denied on the basis that it was a hazard to the public welfare. *Ibid.*

## NARCOTICS

**§ 3 (NCI3d). Presumptions and burden of proof; actual and constructive possession**

The mere quantity of a controlled substance alone may suffice to support the inference of an intent to transfer, sell or deliver. *S. v. Morgan*, 654.

**§ 4 (NCI3d). Sufficiency of evidence and nonsuit; cases where evidence was sufficient**

Evidence that a witness expressly agreed to obtain one ounce of cocaine for defendant was sufficient to support defendant's conviction of conspiracy to possess cocaine with intent to sell or deliver. *S. v. Morgan*, 654.

## PAYMENT

**§ 5 (NCI3d). Prepayment**

The law of North Carolina prior to the enactment of G.S. 24-2.4 permitted the prepayment of a promissory note executed for the purchase of real estate when the note was silent as to prepayment. *Hatcher v. Rose*, 626.

## PROCESS

**§ 3.2 (NCI3d). Discontinuance of action**

The issue of whether this action was discontinued for failure to comply with the provisions of Rule 4(d) was both presented to and decided by the trial court. *Snead v. Foxx*, 669.

Plaintiff's action was discontinued ninety days after the date the original summons was issued where the original summons was returned unserved and plaintiff did not secure an endorsement upon the original summons and did not obtain alias or pluries summonses, but instead attempted service of process by publication. *Ibid.*

## RAPE AND ALLIED OFFENSES

**§ 5 (NCI3d). Sufficiency of evidence and nonsuit**

The trial court did not err by denying defendant's motion to dismiss charges of first degree sexual offense and felony murder where the victim may have been dead when the sexual offense occurred. *S. v. Thomas*, 423.

**§ 6 (NCI3d). Instructions**

The trial court did not err in a prosecution for first degree sexual offense and murder by denying defendant's requested instruction that the jurors had to

## SANITARY DISTRICTS

**§ 2 (NCI3d). Powers and functions**

The Lower Cape Fear Water and Sewer Authority could grant Brunswick County a different water rate than that charged other members of the Authority based on the substantial difference between the position of the county vis-a-vis Authority and the position of the other members. *In re Lower Cape Fear Water and Sewer Authority*, 675.

## SEARCHES AND SEIZURES

**§ 4 (NCI3d). Particular methods of search; physical examination or test**

The trial court did not err in a prosecution for first degree sexual offense and murder by admitting evidence of defendant's fingernails, pubic hair, teeth, saliva, and lips obtained pursuant to a nontestimonial identification order where the evidence was obtained while defendant was in police custody; obtaining a blood sample pursuant to the same order, without a warrant, was harmless error. *S. v. Thomas*, 423.

**§ 14 (NCI3d). Voluntary, free and intelligent consent**

The trial court did not err in a first degree murder prosecution by denying defendant's motion to suppress a search of his apartment and a shell casing seized from the apartment where defendant's roommate gave her consent to the search. *S. v. McDowell*, 363.

## STATE

**§ 4.2 (NCI3d). Sovereign immunity; particular actions**

The district court's order denying a juvenile's conditional release as requested by the Division of Youth Services because the juvenile had not been given sexual offender treatment as mandated by the commitment order did not violate the doctrine of sovereign immunity. *In re Doe*, 743.

## TAXATION

**§ 28.4 (NCI3d). Refunds of individual income taxes**

The U. S. Supreme Court decision holding unconstitutional a scheme of taxation exempting the pension of retired state employees from state taxation while not exempting pensions of retired federal employees is not to be applied retroactively, and plaintiff federal pensioners are thus not entitled to a refund of state taxes they paid on federal pensions prior to the decision. *Swanson v. State of North Carolina*, 576.

The state did not waive its right to refuse to refund taxes paid by plaintiffs on federal pensions by making refunds to other federal pensioners. *Ibid.*

## UNIFORM COMMERCIAL CODE

**§ 23 (NCI3d). Right to revoke acceptance of goods**

Plaintiffs were not entitled to revoke acceptance of a mobile home against the manufacturer where there was no direct contractual relationship between the parties. *Alberti v. Manufactured Homes, Inc.*, 727.

## UNIFORM COMMERCIAL CODE — Continued

**§ 26 (NCI3d). Remedies; measure of damages**

The trial court erred in an action for breach of warranty arising from the sale of a mobile home by awarding damages which amounted to an estimate of the cost of repairs rather than the difference between the value of the mobile home as warranted and its value as accepted. *Alberti v. Manufactured Homes, Inc.*, 727.

## WITNESSES

**§ 7 (NCI3d). Refreshing memory**

The trial court did not err in a first degree murder prosecution by allowing the in-court identification of defendant by the victim's son where defendant contended that the in-court identification was tainted by the unnecessarily suggestive statements of a therapist who hypnotized the witness and law enforcement officers who always referred to the picture of defendant by defendant's name. *S. v. Annadale*, 557.

**§ 8 (NCI3d). Cross-examination**

Plaintiff was properly allowed to cross-examine a witness as to what he meant when he referred to the continued operation of a meat market as an "existing facility." *Champs Convenience Stores v. United Chemical Co.*, 446.

**§ 10 (NCI3d). Attendance, production of documents, and compensation**

A defendant in an equitable distribution action was required to pay half of a court appointed appraiser's fee even though he did not receive the report until the morning of the hearing where he did not show prejudice. *Swilling v. Swilling*, 219.

The amount of the fee the parties were ordered to pay to a court appointed appraiser in an equitable distribution action was held reasonable upon a review of his testimony. *Ibid.*

# WORD AND PHRASE INDEX

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