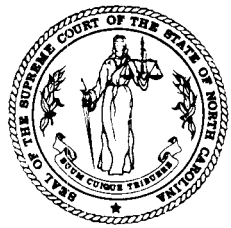
NORTH CAROLINA REPORTS

VOLUME 330

SUPREME COURT OF NORTH CAROLINA



3 OCTOBER 1991

31 JANUARY 1992

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1992

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THE SUPREME COURT
OF
NORTH CAROLINA

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*Appointed by Governor James G. Martin and sworn in 5 February 1992 to replace Harry C. Martin who retired 31 January 1992.

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1. Appointed Chief Judge of a new district 1 October 1991.
2. Appointed 5 September 1991 to replace Charles E. Rice who became Chief Judge.
3. Appointed 3 October 1991 to replace Stafford G. Bullock who became Chief Judge.
4. Sworn in 23 March 1992 to replace Richard M. Toomes who retired 31 December 1991.
5. Appointed 6 September 1991 to replace James A. Harrill, Jr. who became Chief Judge.
6. Appointed 3 January 1992 to replace Charles P. Ginn who resigned 31 March 1991.

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1. Sworn in 1 April 1992 to replace Rowell C. Cloninger, Jr. who retired 31 March 1992.

CASES REPORTED

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

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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 were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 8th day of November, 1991 and said persons have been issued certificates of this Board:

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Applied from the State of New York

RONALD FRANK BIANCHI ..... Winston-Salem
Applied from the State of Virginia

HENDERSON HILL ..... Raleigh
Applied from the District of Columbia

CHARLES VICTOR JORDAN ..... New York, New York
Applied from the State of New York

REED G. WILLIAMS ..... Asheville
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 19th day of November, 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 duly passed the examinations of the Board of Law Examiners as of the 20th day of December, 1991, and said person has been issued license certificate.

THOMAS DEAN DOMONOSKE ..... Carrboro

Given over my hand and seal of the Board of Law Examiners this the 2nd day of January, 1992.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 10th day of January, 1992 and said persons have been issued certificates of this Board:

JAY LLOYD GRYTDAHL ..... Charlotte
Applied from the State of Minnesota

SEMA E. LEDERMAN ..... Chapel Hill
Applied from the State of Alaska

MARTHA WILLIAMS ..... Asheville
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 17th day of January, 1992.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 17th day of January, 1992 and said persons have been issued certificates of this Board:

JULIA HATCHER BROWN ..... Rocky Mount
Applied from the State of Virginia
DAVID J. LEVY ..... Raleigh
Applied from the State of Pennsylvania
FRANCIS A. SUTHERLAND, JR. ..... Greensboro
Applied from the State of Virginia
TERENCE G. VANE, JR. ..... Charlotte
Applied from the State of Texas

Given over my hand and seal of the Board of Law Examiners this the 23rd day of January, 1992.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 28th day of February, 1992 and said persons have been issued certificates of this Board:

KAREN COCHRANE BROWN ..... Clifton Park, New York
Applied from the State of New York
DEBORAH ARMFIELD BUTLER ..... New York, New York
Applied from the State of New York
JOHN BERNARD CLAYTON ..... Pinehurst
Applied from the State of Michigan
M. DOUGLAS EISLER ..... West Chester, Pennsylvania
Applied from the State of Pennsylvania
DAVID P. FALLON ..... Sayville, New York
Applied from the State of New York
PAUL IRA KLEIN ..... Charlotte
Applied from the State of New York
JAMES MADISON MULLEN ..... Hickory
Applied from the State of Alaska

DAVID WAYNE O'BRYAN ..... Norfolk, Virginia
Applied from the State of Virginia
COREY ALAN WITZEL ..... Raleigh
Applied from the State of New York
THOMAS BRIAN YORK ..... Harrisburg, Pennsylvania
Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners this the 13th day of March, 1992.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 20th day of March, 1992 and said persons have been issued certificates of this Board:

RANDALL EUGENE APPLETON ..... Portsmouth, Virginia
Applied from the State of Virginia
NORMAN K. FENSTERMAKER ..... Kitty Hawk
Applied from the State of West Virginia
STUART NAMM ..... Stony Brook, New York
Applied from the State of New York
HERMAN FORTESCUE GREENE ..... Raleigh
Applied from the State of New York
CHARLES M. TIGHE ..... Old Saybrook, Connecticut
Applied from the State of Connecticut

Given over my hand and seal of the Board of Law Examiners this the 25th day of March, 1992.

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

STATE OF NORTH CAROLINA v. DWIGHT LAMONT ROBINSON

No. 586A87

(Filed 3 October 1991)

1. Constitutional Law § 287 (NCI4th)— right to counsel—denial of motion to remove—no error

The trial court did not err in a prosecution for murder, assault, and robbery by denying defendant's motion to remove his initial court-appointed attorneys where defendant alleged an inability to trust his counsel stemming from their decision to have him sent to Dorothea Dix Hospital for a pretrial forensic examination without his consent, resulting in a breakdown in communications. Defendant did not show ineffective assistance of counsel at trial or any impediment to the presentation of his defense caused by the forensic examination, and defendant was provided additional counsel with whom he was satisfied.

Am Jur 2d, Criminal Law § 982.

2. Jury § 6.3 (NCI3d)— jury voir dire—questions concerning racial discrimination—restricted—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for murder, assault, and robbery by restricting defendant's voir dire questions concerning racial bias where the court al-

lowed defendant to question each juror as to whether racial prejudice would interfere with his or her ability to render a fair and impartial verdict, as well as other general questions. Given the latitude which the trial court allowed defense counsel, the minimally intrusive rule in *Turner v. Murray*, 476 U.S. 28, and the broad discretion afforded trial courts in this area, it cannot be said that the trial court abused its discretion.

Am Jur 2d, Jury §§ 200, 202, 284.

3. Jury § 7.12 (NCI3d)— murder—voir dire—opposition to death penalty—challenges for cause

The trial court did not err in a murder prosecution by allowing the State to challenge for cause two jurors where one would automatically vote for life imprisonment because of opposition to the death penalty and the other indicated that she had personal views against the death penalty which would interfere with her ability to fairly consider both punishments.

Am Jur 2d, Jury § 289.

4. Jury § 7.14 (NCI3d)— voir dire—peremptory challenges—racial discrimination—no error

The trial court did not err in a prosecution for murder, assault, and robbery by allowing the State to peremptorily challenge black jurors where the State met its burden of coming forward with neutral, nonracial explanations for each peremptory challenge, including, among other factors, failure to reveal past criminal histories as required by the jury questionnaire, not admitting being acquainted with the State's chief investigator and witness, and previous testimony by a juror for her husband in a manslaughter case prosecuted by Guilford County prosecutors.

Am Jur 2d, Jury § 235.

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

5. Constitutional Law § 342 (NCI4th)— murder—conferences and discussions—absence of defendant—no prejudice

There was no prejudice in a prosecution for murder, assault and robbery from the absence of defendant during conferences and discussions where all but six of the conferences complained

of by defendant were bench conferences at which all five counsel conferred with the judge while the conferences were recorded by the court reporter. The six proceedings which were not bench conferences involved the *Batson* issue during jury selection and the court reporter was present at all times and recorded and transcribed the complete proceedings. The subjects of the conferences and discussions were either points of law, procedural matters, or administrative matters, none involved communication with the jury, and no witness gave testimony concerning defendant's guilt.

Am Jur 2d, Jury § 190; Trial § 226.

6. Criminal Law § 73.1 (NCI3d)— emptying of dumpster—hearsay—not plain error

There was no plain error in a prosecution for murder, assault and robbery in the admission of testimony from detectives that the dumpster in which physical evidence had allegedly been placed had been emptied prior to being searched by officers where defendant did not object to the testimony at trial and, assuming that the evidence was improperly admitted, it was not the key piece of evidence which convinced the jury of defendant's guilt.

Am Jur 2d, Evidence §§ 494, 1103.

7. Criminal Law § 60.5 (NCI3d)— fingerprints—explanation for absence—irrelevant—not prejudicial

There was no prejudice in a prosecution for murder, assault, and robbery from the admission of testimony by a fingerprint expert to the effect that he had discovered identifiable fingerprints in only three percent of the criminal cases in which he had been involved. The presence or absence of fingerprints at other crime scenes investigated by the witness is not relevant to the presence or absence of fingerprint evidence in this case; *State v. Holden*, 321 N.C. 125, concerned testimony which merely offered a scientific explanation of why fingerprints are sometimes not left behind after an object has been touched. However, there was no prejudice because defendant was placed at the scene by three eyewitnesses and this testimony does not create a reasonable possibility that a different result would have been reached. N.C.G.S. § 8C-1, Rule 401; N.C.G.S. § 15A-1443(a).

Am Jur 2d, Expert and Opinion Evidence §§ 279, 281, 284.

8. Criminal Law § 45.1 (NCI3d)— cross-racial identification—expert testimony—experiment not admitted

The trial court did not abuse its discretion by finding that an expert on perception and eyewitness identification had not given an opinion specific enough to support admission of testimony regarding an experiment where the witness expressed an opinion on cross identification; testified to the results of experiments in which white and black assailants came into his classroom, attacked him, and left the room; and the State objected to a question which related the result of an experiment involving the accuracy of eyewitness identifications when the assailant was not present in the lineup. For whatever reason, the witness never gave a specific opinion concerning the accuracy of eyewitness identification when the actual perpetrator is not in the lineup.

Am Jur 2d, Expert and Opinion Evidence § 278.

9. Criminal Law § 88.1 (NCI3d)— cross-examination—psychiatric report—no plain error

There was no plain error in a prosecution for murder, assault, and robbery where the court failed to act *ex mero motu* to prevent the State's cross-examination of Dr. Sciara concerning the contents of a psychiatric report prepared by the forensic staff at Dorothea Dix. The jury heard testimony from defendant that he was in another town on the night of the murder, testimony from an alibi witness corroborating defendant's testimony, and testimony from three eyewitnesses who placed defendant at the scene of the crime. The jury believed the eyewitnesses, and it is not probable that the jury would have reached a different verdict absent the State's cross-examination of Dr. Sciara.

Am Jur 2d, Evidence §§ 440, 1162, 1178.

10. Criminal Law § 66.3 (NCI3d)— pretrial identifications—photographic and live lineups—in-court identification not tainted

The trial court's conclusions in a prosecution for murder, assault, and robbery that pretrial identification procedures were not tainted and that the in-court identifications were based solely on the witnesses' observation of defendant at the time

of the crimes were supported by the findings, and defendant concedes that the findings are generally consistent with the evidence. Defendant did not raise at trial the contention that some of the persons in the lineup did not match the description given by the witnesses and there was no plain error.

Am Jur 2d, Evidence §§ 371, 371.8.

11. Homicide § 30 (NCI3d)— murder—failure to submit second degree—no error

The trial court did not err in a murder prosecution by failing to submit the issue of second degree murder where the State's evidence showed that defendant robbed a restaurant at night, ordered the victims to lie down, methodically aimed at and shot them, and there was no credible evidence to the contrary.

Am Jur 2d, Homicide § 530.

12. Criminal Law § 462 (NCI4th)— murder—prosecutor's arguments—no objection at trial—no denial of due process

The arguments of the prosecutors at a trial for murder, assault, and robbery were not so grossly improper as to constitute a denial of defendant's due process rights.

Am Jur 2d, Trial §§ 554, 705.

13. Criminal Law § 1352 (NCI4th)— murder—McKoy error—prejudicial

There was *McKoy* error in the sentencing proceeding in a murder prosecution where the court instructed the jury that any mitigating circumstances had to be found unanimously; the court submitted the mental age of the defendant as a mitigating circumstance; there was sufficient evidence to allow a reasonable juror to find that defendant's mental age was below normal; and the jury did not find that circumstance. The jury did not necessarily consider defendant's mental condition when deciding the mitigating circumstance that defendant was under the influence of drugs or alcohol or suffering from a mental condition which impaired his capacity because it could have found that circumstance based on the overwhelming evidence of defendant's regular drug use. Although the State contended that the evidence of guilt and aggravating circumstances was overwhelming, it cannot be said beyond a

reasonable doubt that no reasonable juror could have found the evidence credible, given it mitigating value, and concluded that life imprisonment was the appropriate punishment.

Am Jur 2d, Criminal Law § 600; Trial § 1113.

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

Justice MITCHELL concurring in part and dissenting in part.

Justice MEYER joins in this concurring and dissenting opinion.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a death sentence entered by *Ross, J.*, at the 17 August 1987 Criminal Session of Superior Court, GUILFORD County. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed by the Supreme Court on 27 November 1989. Heard in the Supreme Court 11 February 1991.

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

Sam J. Ervin, IV, for defendant.

FRYE, Justice.

On 17 March 1986, defendant was indicted for the first-degree murder of Robert Page and robbery with a dangerous weapon. On 6 April 1987, defendant was also indicted for two counts of assault with a deadly weapon with intent to kill inflicting serious injury upon Gene Hill and Tammy Cotner. The offenses were joined for trial. On 17 September 1987, the jury returned verdicts of guilty of first-degree murder on the basis of malice, premeditation and deliberation, and under the felony murder rule. The jury also found defendant guilty of robbery with a dangerous weapon, and guilty on both counts of assault with a deadly weapon with intent to kill inflicting serious injury. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended and the court, on 22 September 1987, imposed the sentence of death in the first-degree murder case. Defendant was also sentenced to forty years for the robbery with a dangerous weapon conviction, and

twenty years each for the two convictions of assault with a deadly weapon with intent to kill inflicting serious injury.

In a voluminous two-volume, 357-page brief, defendant contends that the trial court committed numerous errors entitling him to a new trial or in the alternative a new sentencing proceeding. We find no prejudicial error in defendant's trial, but conclude that defendant is entitled to a new sentencing proceeding in the murder case under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

The State's evidence presented at trial tended to show that Tammy Cotner and Gene Hill were employees of the Western Steer Steak House in High Point, North Carolina, where Robert Page was manager. On 2 March 1986, Cotner, Hill, and Page worked until the restaurant closed around 11:00 p.m. They were the last persons to leave the restaurant. After leaving the restaurant, Hill went to his car and started the engine, then went to talk to Cotner, who was standing next to her car which was parked at the back door of the restaurant. Page was locking the back door of the restaurant when two men approached him. One of the men walked over to Cotner and stuck a pistol to her side. Cotner identified this man in court as defendant.

Defendant escorted Cotner, Hill, and Page to the front door of the restaurant. Page was instructed to open the front door, and when everyone was inside the restaurant, they went to the fuse box where Page turned on the office lights. After the lights were turned on, everyone went to the back office where the safe was located. Defendant instructed Cotner to lie on the floor face up, and Hill was instructed to lie beside her on his stomach.

Defendant told Page to open the safe. Page attempted to open the safe, but was having difficulty, so defendant fired his pistol at Page twice, hitting him in the leg. When Page managed to get the safe open, defendant removed the money, then picked Page up by his shirt and dragged him to the back storage area. Defendant also forced Cotner and Hill to go to the back storage area and to lie on the floor.

The other man with defendant was armed with a shotgun, and told defendant, "Let's tie 'em up and put them in the freezer." Defendant responded, "Nah, man. We don't have time." Defendant then straddled Page, who was lying on his stomach, aimed his

gun at Page and shot him in the head. Next, defendant turned to Hill, aimed his gun at Hill's head, and shot him in the head. Finally, defendant straddled Cotner, shot her in the stomach and again in the back of her head. Both Hill and Cotner identified defendant in court as the man who shot them.

Defendant and his accomplice left the restaurant, got into Hill's car, and fled. They caught up with Thomas Wood, the man who had driven them to the Western Steer. Wood was attempting to drive away, but when defendant and his accomplice caught up with Wood they abandoned Hill's car and got into Wood's car. The three men drove to Maryland the following day. Five days later, Wood told his former employer, Guarad Crawford, about what had happened at the restaurant, and Crawford got in touch with the police. Officers in Maryland executed a search warrant for defendant's residence on 9 March 1986. Defendant was not found until 18 March 1986, and a SWAT team had to be used to remove defendant from his apartment where he had barricaded himself in a bedroom. Wood later testified in court that he had driven defendant and the accomplice to the Western Steer, but had not gone inside during the robbery.

Page died of a close-range gunshot wound to the head which went through his skull and destroyed his brain. Hill survived his injuries which consisted of a close-range bullet hole in the right side of the face and swelling of the tongue which blocked his air passages. Hill's face has marks of the powder burns, a bullet entry wound, and the bullet remained lodged in his head at the time of trial. Cotner suffered a bullet wound to her abdomen and another bullet passed below the base of her skull which penetrated her skin two inches in depth.

Defendant testified and denied ever going to the High Point Western Steer. Defendant also denied even knowing that someone had committed an armed robbery at the restaurant. According to defendant, on the night the robbery occurred, he was at a club in Thomasville, North Carolina, selling drugs. Defendant offered as an alibi witness the testimony of one of the club's patrons who testified that he had seen and purchased drugs from defendant at the club around the time that the crime was committed. Defendant also offered the testimony of the club's "bouncer" who testified that he saw defendant at the club between 8:30 p.m. and 9:00 p.m. on the night the crime was committed.

Defendant offered the testimony of Dr. Anthony Sciara, a psychologist who practices in Asheville, North Carolina. Dr. Sciara testified that he examined defendant and determined that defendant had a verbal I.Q. of 65, a performance I.Q. of 77, and a full scale I.Q. of 69. According to Dr. Sciara, defendant was functioning in a mentally retarded range of intellect with a full scale I.Q. that puts him "in the lowest two percent of the population." Dr. Sciara testified that defendant's "mental functioning is significantly below average. It would be my best estimate that he's functioning probably at around a fourth grade level. So, the level of his intellectual functioning is really significantly lower than what we would expect for an adult that was twenty-nine years old."

Defendant also offered the testimony of Dr. Spurgeon Cole, a psychologist at Clemson University, who presented expert testimony in the field of eyewitness identification. Dr. Cole testified that there are numerous factors which can influence the accuracy of eyewitness identification. For instance, Dr. Cole testified that "in situations where there is a weapon, for example, people tend to observe the weapon much more closely than they observe anything else." Dr. Cole also testified that "[c]ross racial identifications are more difficult to make and tend to decrease the accuracy in an eyewitness identification." The defendant is black; Cotner and Hill are white.

During the sentencing hearing, the State, in addition to relying upon the evidence admitted during the first stage of the trial, presented evidence that on 11 March 1983 defendant was convicted of robbery with a dangerous weapon in Maryland. The Maryland Court sentenced defendant to ten years in prison, with credit given for 291 days in pretrial confinement and the balance of the active sentence suspended subject to certain conditions.

Defendant offered evidence during the sentencing proceeding which tended to show that as a child his father had beaten him severely with extension cords, belts, and switches. Defendant's sister testified that their father would beat defendant for no reason when their father had been drinking. Defendant's sister also testified that at various times during defendant's adolescence, their parents would be unable to pay for the rent on the family's residence, and on such occasions, their parents would take their daughters with them, and they would leave defendant and his brother to

find their own place to stay. Dr. Sciara testified that defendant's school records indicated that he only completed the seventh grade.

Defendant offered additional evidence during his sentencing proceeding which tended to show that he is married and has two children. Defendant's sister testified that defendant was a good father and never exercised any violence toward his children. There was evidence that defendant's brother died a violent death which caused defendant to isolate himself from others. There was also evidence that defendant's father is a double amputee and has become mentally incompetent. Defendant's wife testified that defendant has a drug problem, and his drug addiction costs approximately $1,500 per week.

Additional evidence relevant to defendant's specific arguments will be discussed in this opinion as necessary for an understanding of the twenty-seven issues raised by defendant. We will address the issues raised in four categories: I. pretrial motions; II. jury selection; III. guilt-innocence phase; and IV. sentencing phase.

I.

PRETRIAL MOTIONS

[1] The first question we address is whether the trial court committed reversible error by denying defendant's request for the removal of his initial court-appointed counsel predicated upon irreconcilable differences between defendant and his attorneys on the grounds that the trial court's refusal constituted an abuse of discretion and deprived defendant of his right to effective assistance of counsel. We conclude that the trial court did not err.

Defendant was charged with first-degree murder and robbery with a dangerous weapon, and the grand jury returned bills of indictment on 17 March 1986. On 6 April 1987, the grand jury returned a bill of indictment against defendant for assault with a deadly weapon with intent to kill inflicting serious injury. Robert S. Boyan and James M. Green, Jr., were appointed to represent defendant. However, on 26 March 1987, Boyan and Green filed a motion for withdrawal by defense counsel, citing as the basis for this request "[t]hat at said time it [has become] readily apparent to counsel that defendant [does] not trust either or both of his appointed counsel; that defendant refused to cooperate in the preparation of his defense; and, that defendant was adamant that counsel not represent him at trial." On 31 March 1987, a hearing was

held before Judge DeRamus who denied Boyan's and Green's motion to withdraw. On 2 April 1987, Judge DeRamus entered an order appointing Avis Goodson as additional counsel for defendant.

Defendant contends that he did not trust his initial court-appointed attorneys and he therefore refused to cooperate with them. Defendant insists that his inability to trust Boyan and Green stemmed from their decision to have him sent to Dorothea Dix Hospital (Dorothea Dix) for a forensic examination without his consent. Defendant argues that he objected to his initial trial counsel having him sent to Dorothea Dix for a forensic evaluation because the procedure involved an interference with his personal autonomy, which is similar to an interference with a criminal defendant's basic right to determine his own plea, or whether to testify; therefore, his complaint was completely legitimate. Defendant cites *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), for this proposition. Defendant further contends that his attorneys violated his right to effective assistance of counsel. According to defendant, the resulting breakdown in communication was equally legitimate and constituted good cause for allowing Boyan and Green to withdraw; thus, the trial judge who refused to replace them under these circumstances abused his discretion.

The State contends that the tactical decision in the present case to obtain an order compelling defendant to submit to a forensic examination against his wishes well in advance of trial does not rise to the level of a fundamental conflict involving defendant's basic rights. We agree.

The appellate courts of this State have recognized four types of fundamental conflicts between attorney and client which include: counsel representing both co-defendants at trial, *State v. Leggett*, 61 N.C. App. 295, 300 S.E.2d 823 (1983); counsel attempting to prohibit defendant from testifying, *State v. Luker*, 65 N.C. App. 644, 310 S.E.2d 63 (1983), *rev'd on other grounds*, 311 N.C. 301, 316 S.E.2d 309 (1984); conflict over what plea to enter, *State v. Johnson*, 304 N.C. 680, 285 S.E.2d 792 (1982); and counsel conceding defendant's guilt, *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504, *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672. None of these fundamental conflicts exist in this case.

In the present case, defendant has not shown ineffective assistance of counsel at trial or any impediment to the presentation

of his defense caused by the forensic examination. Also, defendant was provided additional counsel, and defendant concedes that he was satisfied with Ms. Goodson as his counsel. Defendant has failed to show any prejudice to himself by the trial court's pretrial denial of Boyan's and Green's motion to withdraw. "In the absence of any substantial reason for the appointment of replacement counsel, an indigent must accept counsel appointed by the court, unless he wishes to present his own defense." *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981). We therefore reject defendant's contention that the trial court committed prejudicial error by refusing to allow his appointed counsel to withdraw.

II.

JURY SELECTION

[2] Defendant contends that the trial court erred by restricting his questions to prospective jurors during voir dire with respect to jurors' feelings about racial prejudice. Defendant contends that his trial counsel attempted to engage in an in-depth voir dire examination of prospective jurors concerning racial bias, and that this effort was understandable in light of the interracial nature of the crime.

The trial court allowed defendant to question prospective jurors as to whether racial prejudice would affect their ability to fairly and impartially determine defendant's guilt. The trial court also allowed defendant to ask certain questions of prospective white jurors concerning their associations with blacks in general, such as whether blacks had visited their homes, whether black people worked where they were employed, and whether blacks had attended school with them. However, the trial court sustained prosecution objections to such questions as:

> Do you feel like the presence of blacks in your neighborhood has lowered the value of your property or had any effect on it adversely at all?
>
> Have you ever seen any examples of discrimination in your place of work?
>
> Do you have any particular feeling about black people [from] your association [with] them?
>
> Do you think that racial discrimination exists in Guilford County?

Do you belong to any social club or political organization or church in which there are no black members?

Defendant contends that the questions permitted by the trial court would not have materially assisted defense counsel in exercising peremptory challenges because only an openly biased person would have answered the questions permitted by the trial court in the affirmative. Defendant argues that the questions permitted by the trial court would not elicit responses indicative of the more subtle forms of racial bias still present in our society. Therefore, defendant argues, the trial court's restriction upon defense counsel's ability to make inquiry into racial bias violated his rights under the sixth, eighth, and fourteenth amendments to the United States Constitution and Article 1, sections 19, 24, 26, and 27 of the North Carolina Constitution.

The State contends that the trial court properly limited defendant to relevant questions of potential jurors, and the trial court did not abuse its discretion in its control of voir dire. We agree.

In *Turner v. Murray*, 476 U.S. 28, 90 L. Ed. 2d 27 (1986), the United States Supreme 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. This rule, the Court announced, is "minimally intrusive," and the "trial judge retains discretion as to the *form and number of questions* on the subject, including the decision whether to question the venire individually or collectively." *Id.* at 37, 90 L. Ed. 2d at 37 (emphasis added).

In this case, the trial court allowed defendant to question each juror as to whether racial prejudice would interfere with his or her ability to render a fair and impartial verdict, as well as other general questions such as those mentioned above. It is worth noting that, in *Turner*, the question which the trial court had initially disallowed, and which the United States Supreme Court held proper, was: "Will these facts (that defendant is black and the victim is white) prejudice you against (the defendant) or affect your ability to render a fair and impartial verdict based solely on the evidence?" *Id.*

In North Carolina, it is well settled that the trial court has broad discretion in controlling the questioning of prospective jurors, and its decisions will be upheld absent a showing of abuse of discre-

tion. *State v. Laws*, 325 N.C. 81, 109, 381 S.E.2d 609, 625 (1989), *death sentence vacated*, --- U.S. ---, 108 L. Ed. 2d 603 (1990). "Regulation of the *manner and the extent* of inquiries on voir dire rests largely in the trial judge's discretion." *State v. Allen*, 322 N.C. 176, 189, 367 S.E.2d 626, 663 (1988) (emphasis added). A trial judge may be reversed for 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." *Id.*

Given the latitude which the trial court did allow defense counsel in this case, the United States Supreme Court's "minimally intrusive" rule in *Turner*, and the broad discretion afforded trial courts in this area, we cannot say that the trial court in this case abused its discretion.

[3] In the next issue raised by defendant, he contends that the trial court committed prejudicial error by allowing the State to challenge for cause certain jurors whose voir dire testimony, when viewed in context and in its entirety, failed to demonstrate that their personal views concerning the death penalty would prevent or substantially impair their ability to perform their duties in accordance with the trial court's instruction and their oaths. We disagree.

During the jury voir dire examination, counsel for both parties inquired into the ability of prospective jurors to render a capital sentencing decision on the basis of the evidence and the applicable law. The trial judge excused several prospective jurors because of the effect that their personal opinions concerning capital punishment would have upon their ability to decide the case on the basis of the law and the evidence. Defendant argues that two of the trial judge's rulings in this respect were erroneous.

The State contends that the two rulings to which defendant takes issue were proper. The State argues that the two jurors were properly removed for cause because both responded to questions in a manner revealing that their stated opposition to the death penalty would prevent or substantially impair the performance of their duties as jurors.

During the voir dire examination of the two prospective jurors at issue, when the first was asked by the trial judge if "[i]t automatically would be life imprisonment in your case because of your opposition to the death penalty?" the prospective juror replied,

"Yes." After indicating that she had personal views against the death penalty, the trial judge asked the second prospective juror, "[a]nd do you feel those personal views would interfere with your ability to fairly consider both punishments, life imprisonment and death?" She replied, "Yeh, it would."

The answers given by the prospective jurors at issue are similar to an answer given by a prospective juror in *State v. Quesinberry*, 325 N.C. 125, 139, 381 S.E.2d 681, 690 (1989), *death sentence vacated*, --- U.S. ---, 108 L. Ed. 2d 603 (1990), who answered that she would automatically vote for life imprisonment. This Court held that the prospective juror was properly removed for cause. *Id.* Again, in the present case, we find that the prospective jurors at issue were properly removed for cause. The answers given reveal that their beliefs would "prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their] instructions and [their] 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)). Thus, we reject defendant's argument that the trial judge erred in excusing the prospective jurors for cause.

[4] In defendant's next argument, he asserts that the trial court erred by allowing the State to peremptorily challenge black jurors on the basis of their race. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986); N.C. Const. art. I, § 26. Although the defendant in this case is black, as was the defendant in *Batson*, we note that the United States Supreme Court has recently held that a white defendant also has standing to assert an equal protection claim when a prosecutor uses peremptory challenges to exclude potential jurors "solely by reason of their race." *Powers v. Ohio*, --- U.S. ---, ---, 113 L. Ed. 2d 411, 424 (1991).

Borrowing from its Title VII jurisprudence, the Supreme Court in *Batson* set out a two-step process to determine whether a prosecutor has impermissibly used race to discriminate against potential jurors during jury selection. First, a criminal defendant must make out a prima facie case of discrimination by demonstrating that the prosecutor has exercised peremptory challenges to remove potential jurors solely because of their race and that this fact and other relevant circumstances raise an inference of discrimination. *Batson v. Kentucky*, 476 U.S. at 96, 90 L. Ed. 2d at 87-88, *as modified by Powers v. Ohio*, --- U.S. ---, 113 L. Ed. 2d 411. Once

a prima facie case is established, the burden shifts to the prosecutor to come forward with a nonracial, neutral explanation for the peremptory challenges. *Batson v. Kentucky*, 476 U.S. at 97, 90 L. Ed. 2d at 88. Consistent with Title VII case law, this Court has permitted a third step, allowing a defendant to introduce evidence that the State's explanations are a pretext. *State v. Greene*, 324 N.C. 238, 240, 376 S.E.2d 727, 728 (1989); *cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 36 L. Ed. 2d 668, 679 (1973).

In this case, defendant objected each time the State peremptorily challenged a black juror, and on each occasion the trial judge conducted a hearing in chambers during which the State voluntarily stated its reasons for each challenge. The trial court, on each occasion, denied defendant's objection. Prior to the jurors being sworn and impaneled, defendant made a motion to discharge the entire panel. At this point, the trial judge conducted an additional hearing and subsequently entered an order outlining his findings of fact and conclusions of law.

The trial court found that of ninety-nine potential jurors examined, eighty-one were white, eighteen were black. Of the eighty-one white jurors, thirty-six were excused for cause, six as being opposed to capital punishment, and sixteen by peremptory challenges of the defendant. Of the remaining twenty-three potential jurors, ten were peremptorily challenged by the State, eleven were seated as jurors and two were chosen as alternates. Thus, of the twenty-three white potential jurors available to the State, forty-three percent were peremptorily challenged.

The trial court found that of the eighteen potential black jurors, five were excused for cause, one by the consent of both parties and six as being opposed to capital punishment. Of the remaining six potential jurors, five were peremptorily challenged by the State and one was chosen as a juror. Thus, of the six black potential jurors available to the State, eighty-three percent were peremptorily challenged.

The trial court concluded that defendant had failed to make out a prima facie case of discrimination, but that even if the defendant were found to have met his initial burden, the State had articulated neutral explanations for its peremptory challenges. Defendant challenges both conclusions.

We find it unnecessary to address the trial court's conclusion that defendant failed to make a prima facie case of discrimination because in this case the State voluntarily proffered explanations for each peremptory challenge. Given that the purpose of the prima facie case is to shift the burden of going forward to the State, there is no need for us to examine whether defendant met his initial burden. *See United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989), *United States v. Woods*, 812 F.2d 1483, 1487 (4th Cir. 1987). We proceed, therefore, as if the prima facie case had been established.

In order to rebut a prima facie case of discrimination, the prosecution must "articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group." *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989). These reasons " 'need not rise to the level justifying exercise of a challenge for cause.' " *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990) (quoting *Batson v. Kentucky*, 476 U.S. at 97, 90 L. Ed. 2d at 88). "So 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, 64 (Mo. 1987) (en banc), *cert. denied*, 486 U.S. 1017, 100 L. Ed. 2d 217 (1988)). "Since the trial judge's findings . . . will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson v. Kentucky*, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21.

With these general guidelines in mind, we turn our attention to the State's reasons for peremptorily challenging each of the five black potential jurors.

J.B. was the first black prospective juror peremptorily challenged by the State. The district attorney gave the following reasons for challenging Ms. B.: that she did not pay attention during the court's instructions, and that she was a witness for her husband, who was convicted of manslaughter ten years ago in a case prosecuted by the Guilford County District Attorney's office. Because of this prior experience with the criminal justice system, the district attorney argued that Ms. B. would not be a fair and impartial juror.

The second black prospective juror peremptorily challenged was J.R. The district attorney gave the following reasons for rejecting Mr. R.: that he had been convicted of misdemeanor larceny in 1979 in Guilford County; that he was also convicted of larceny and a worthless check charge in 1980, but had failed to mention these convictions on his jury questionnaire; that he failed to comply with court orders on three separate occasions; that he fathered an illegitimate child, which the State argued exhibits some degree of irresponsibility toward the law; that he was a witness for a defendant in a trespass case; and that while the State was seeking a juror who had given some thought to capital punishment, Mr. R. stated that he had no personal feelings on the death penalty. After reciting his objections, the district attorney told the trial court that he did not believe Mr. R. would be "disposed to be a fair and impartial juror toward the State of North Carolina in this particular case."

Prospective juror E.N. was the third black juror peremptorily challenged by the State. The district attorney gave the following reasons for rejecting Mr. N.: that he was very active in his church as a trustee, president and chairman of various groups within the church, and that in the opinion of the district attorney, individuals who are very active within their church tend to be lenient, more favorable to the defendant and not likely to give the State a fair and impartial trial; that Mr. N. was "deceptive" in failing to disclose on his jury questionnaire that he had been convicted in 1977 for carrying in excess of one gallon of liquor, indicating to the district attorney that Mr. N. would not be a fair and impartial juror; and that Mr. N. had served on at least two civil juries, which could produce confusion over the appropriate burden of proof to be applied.

The fourth black prospective juror to be peremptorily challenged by the State was M.P. Ms. P. said she was not sure if she could consider the death penalty as a possible punishment for this case, and that she would vote for life imprisonment if it were an option. Defense counsel was able to rehabilitate her, and the State's challenge for cause was denied. Ms. P. also had been questioned recently as a suspect in a possible theft and forgery of a housing authority check by Detective McNeil, the State's chief investigator and witness in the case on trial. Yet, Ms. P. did not mention her knowledge of Detective McNeil when asked on her jury questionnaire whether she knew the named witnesses. The district attorney argued that Ms. P.'s failure to acknowledge Detec-

tive McNeil and the fact that she had been recently interviewed as a possible suspect in a felony "would limit her ability to be fair and impartial to the state."

Prospective juror J.K. was the final black juror peremptorily challenged by the State. The district attorney stated that Ms. K. was challenged because she had indicated on her jury questionnaire that she had never been a criminal defendant or a witness in a criminal case, despite convictions of driving under the influence in 1982 and a stop sign violation in 1983. The district attorney argued that this "deception" indicated that Ms. K. would not be a fair and impartial juror.

Defendant argues that after accepting the first black prospective juror available to the State, the district attorney peremptorily challenged every black potential juror not excused for cause. Defendant also argues that the State accepted some white veniremen with the same or similar backgrounds to black jurors who were excluded. For example, the defendant argues that the State accepted several white jurors who were active in their churches, yet excused Mr. N. for being active in his church.

While it is proper for a trial judge to consider whether similarly situated whites are accepted as jurors, defendant's approach in this case, like that taken by the defendant in *Porter*, "involves finding a single factor among several articulated by the prosecutor . . . and matching it to a passed juror who exhibited that same factor." *State v. Porter*, 326 N.C. at 501, 391 S.E.2d at 152. This approach "fails to address the factors as a totality which when considered together provide an image of a juror considered . . . undesirable by the State." *Id.*

When considered in this light, we believe the State has met its burden of coming forward with neutral, nonracial explanations for each peremptory challenge. Among other factors, three potential jurors failed to reveal past criminal histories as required by the jury questionnaire; a fourth juror did not admit she was acquainted with the State's chief investigator and witness; and a fifth juror had previously testified for her husband in a manslaughter case prosecuted by Guilford County prosecutors.

Defendant acknowledges in his brief that he did not introduce evidence to rebut the State's explanations. Although it is not necessary for the defendant to offer such rebuttal evidence in order

to prevail, we are unable, given the great deference owed the trial court in this type of challenge, to find the district attorney's nonracial explanations to be pretext. The defendant's *Batson* challenge is therefore denied.

III.

GUILT-INNOCENCE PHASE

[5] In defendant's next argument, he contends that the trial court committed prejudicial error by conducting motion hearings, legal arguments, *Batson* hearings, and other proceedings in his absence contrary to his unwaivable right of personal presence. Defendant contends that the trial court conducted approximately 110 separate proceedings in his absence during the trial. Defendant argues that it is well settled that an accused cannot waive his right to be present at every stage of his trial upon indictment charging him with a capital felony, and defendant cites *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990), to support his argument. Defendant also argues that to conduct any portion of a capital trial in the defendant's absence constitutes error of constitutional magnitude and constitutes prejudicial error.

The present case can be distinguished from *Smith*, because in the instant case, defendant's counsel was a part of each of the proceedings conducted out of defendant's presence. Also, unlike *Smith*, here the court reporter recorded and transcribed all of the conferences. Thus, this Court can review the transcript to determine whether any error was prejudicial. Nevertheless, as we stated in *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158 (1991):

> 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.

329 N.C. at 541, 407 S.E.2d at 163. After careful review of the record, we conclude that the State has met its burden by showing that defendant's absence from the conferences in this case was harmless beyond a reasonable doubt.

All but six of the conferences complained of by defendant were bench conferences at which all five counsel conferred with the judge while the conferences were being recorded by the court reporter. The six proceedings which were not bench conferences involved the *Batson* issue during jury selection. The court reporter was present at all times and recorded and transcribed the complete proceedings. The subjects of the conferences and discussions were either points of law, procedural matters, or administrative matters. None involved communication with the jury, and no witness gave testimony concerning defendant's guilt. Under the circumstances, we are satisfied that defendant's absence during the conferences and discussions did not prejudice defendant in any way. We thus find the error harmless beyond a reasonable doubt.

[6] In defendant's next argument, he contends that the trial court committed prejudicial error by permitting Detectives Grubb and McNeil to testify that the dumpster in which money bags and other physical evidence had allegedly been placed had been emptied prior to being searched by law enforcement officers. Defendant argues that the testimony of Detectives Grubb and McNeil concerning the emptying of the dumpster prior to their 8 March 1986 search contains no indication that either witness personally observed the emptying of that container, and was therefore inadmissible under Rule 602 of the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 602 (1988). Furthermore, defendant argues that the only reasonable inference permitted by their testimony is that an employee of the Thomasville Sanitation Department told the officers that the dumpster had been emptied between 2 March and 8 March 1986, and therefore the testimony was inadmissible hearsay. N.C.G.S. § 8C-1, Rule 801(c) (1988).

Defendant argues that this testimony was crucial because it provided an explanation as to why the evidence was not found in the dumpster. Police were led to the dumpster by Thomas Wood, who testified at trial that he had driven defendant to the Western

Steer the night of the crime. Without this evidence, defendant argues, Wood's credibility would have been seriously damaged.

The State contends, and defendant concedes, that defendant did not object to or make a motion to strike the testimony at trial. Thus, defendant waived his right to argue before an appellate court that the trial judge erred by allowing the evidence. N.C.R. App. P. 10(b)(1); N.C.G.S. § 15A-1446(a) (1988); N.C.G.S. § 8C-1, Rule 103(a)(1) (1988). Nevertheless, defendant contends that the failure of the trial judge to act *ex mero motu* to exclude the testimony should be considered by this Court under the "plain error" rule.

We find it unnecessary to address the merits of defendant's argument. Even assuming, *arguendo*, that the testimony at issue was improperly admitted, we do not believe defendant has met the heavy burden placed on him under the plain error rule.

Before granting a new trial to a defendant under the plain error rule, the appellate court must be convinced that absent the alleged error, a jury probably would have reached a different verdict. *State v. Mitchell*, 328 N.C. 705, 711, 403 S.E.2d 287, 290 (1991); *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983). The appellate court must determine that the error in question "tilted the scales" in favor of conviction. *State v. Short*, 322 N.C. 783, 790, 370 S.E.2d 351, 355 (1988).

> [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 be done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity, or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's findings that the defendant was guilty."

State v. Mitchell, 328 N.C. at 711, 403 S.E.2d at 290 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

We do not believe the testimony at issue "tilted the scales" in favor of conviction. The jury heard and saw the two survivors

of the attack identify defendant as the man who shot them and Page at point-blank range. The jury heard testimony from Wood that he (Wood) drove defendant to the steak house the night of the crime. The detectives' explanation as to why the money bags and other evidence were not found in a dumpster was not, we believe, the key piece of evidence which convinced the jury of defendant's guilt.

[7] Next, defendant argues that the trial court committed prejudicial error by refusing to sustain his objection to certain testimony by fingerprint expert witness Lyman Lance to the effect that he had discovered identifiable fingerprints in only three percent of the criminal cases in which he had been involved. The State inquired of Sergeant Lance, "based on your training and experience in latent fingerprint lifting, identification, and comparison, in what percentage of your cases have you been able to match positively a latent lifted print with a known print?" Defense counsel objected, and after a voir dire hearing, the trial judge allowed the testimony, stating that it would be within the witness' knowledge. Defendant argues that the testimony was irrelevant and its admission into evidence was prejudicial. We agree with defendant that this evidence, offered to explain the nonexistence of fingerprints at the crime scene, was irrelevant. However, we find it not prejudicial.

The State argues in its brief that many jurors are under a misapprehension that a defendant cannot be guilty unless his fingerprints are found at the scene of the crime. Therefore, according to the State, it elicited the testimony of Sergeant Lance in order to show that fingerprint matchups from a crime scene are the exception rather than the rule. The prosecutor, in explaining to the trial court the relevance of the testimony, said, "it goes to show the reason, in his opinion, for the nonexistence of a fact, that is, the nonexistence of a matching fingerprint."

Defendant argues that his fingerprints were not found at the crime scene, and the presence or absence of identifiable fingerprints at other crime scenes investigated by Sergeant Lance is not relevant to the presence or absence of fingerprint evidence in this case. We agree.

The fact that other defendants did not leave identifiable prints at other crimes scenes can be explained by a myriad of reasons. 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), relied on by the State

in this case, this Court upheld the testimony from a fingerprint expert that an individual does not always leave a latent print on an object. The fingerprint expert, when asked whether a person always leaves a latent fingerprint after touching an object, said: "No, an individual does not always leave latent fingerprints on an object when it[']s touched. It depends on the environment, object being touched and also the secretion of body fluids from the person against the object." *Id.* at 147, 362 S.E.2d at 528. This testimony merely offers a scientific explanation as to why fingerprints are sometimes not left behind after an object has been touched. This testimony, as defendant argues, explains the mechanics of fingerprinting.

North Carolina Rule of Evidence 401 provides:

> "Relevant evidence" means 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, Rule 401. While it may be helpful to the jury to understand general, scientific explanations regarding why a fingerprint may or may not be found at a crime scene, it is simply not relevant to the issues in this case that Sergeant Lance has found identifiable fingerprints in only three percent of the cases he has personally investigated. If this testimony is allowed, fingerprint experts might be asked the next logical question, *e.g.*, were the other cases in which fingerprints were not found similar to the case at hand? We decline to extend *Holden* to allow the testimony at issue in this case.

Although we find error in the admission of this testimony, we do not find the error prejudicial. Defendant was placed at the scene of the crime by three eyewitnesses. The fact that the State used this testimony to explain an absence of fingerprints does not create a "reasonable possibility" that a "different result would have been reached" had the evidence not been admitted. N.C.G.S. § 15A-1443(a) (1988).

[8] In defendant's next argument he contends that the trial court committed prejudicial error by sustaining the State's objection to testimony by witness Dr. Cole that ninety-one percent of the subjects in a particular identification experiment selected one of six black individuals as the perpetrator of a violent incident when

the actual perpetrator of that incident was not presented to the participants in the experimental identification. Defendant argues that he called Dr. Cole as a witness to attack the weight and credibility of the State's identification testimony, and because Dr. Cole had been found by the trial court to be an expert in the field of clinical psychology with emphasis in the area of perception and eyewitness identification, Dr. Cole should have been allowed to testify about the results of the experiment. The State contends that the testimony was not admissible because it concerns results of an experiment about which the witness had not given an opinion, and was therefore inadmissible hearsay.

Rule 703 of the North Carolina Rules of Evidence provides:

> The fact 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 subjects, the facts or data need not be admissible in evidence.

N.C.G.S. § 8C-1, Rule 703 (1986). This rule allows experts to rely on the opinions of other experts or upon facts or data not itself admissible as the basis of their own expert opinions. When a witness testifies to results of experiments after giving an opinion which was based on such experiments, such testimony is not hearsay because it is not offered for the truth of the matter, but to show the basis of the opinion. *State v. Jones*, 322 N.C. 406, 411-14, 368 S.E.2d 844, 846-48 (1988).

A review of the record reveals that Dr. Cole did express an opinion on "cross identification," *i.e.*, whites have a more difficult time identifying blacks than identifying other whites. After expressing this opinion, Dr. Cole was allowed to testify to the results of experiments in which white and black "assailants" came into his classroom at Clemson University, attacked him, and left the room. Dr. Cole told jurors that white students were able to identify the correct white assailant about eighty percent of the time, but were able to identify the correct black assailant only fifty to sixty-five percent of the time. The record, however, contains no opinion by Dr. Cole as to the accuracy of eyewitness identifications when the assailant is not present in the lineup. The question to which the State objected related to an experiment involving the accuracy of eyewitness identifications when the assailant was not present

in the lineup. The basis of the State's objection is this: If Dr. Cole had been allowed to give the results of this experiment, this evidence would have been admitted, not to show the basis of Dr. Cole's opinion, but to prove the inaccuracy of cross-racial identification when the assailant is not present in the lineup. Thus, the evidence would have been admitted to prove the truth of the matter asserted and, in this context, would be inadmissible hearsay.

If testimony regarding the results of this experiment had been admitted in order to rebut the State's eyewitness-identification testimony, its admission over the State's hearsay objection would have been clear error. If offered solely to show a basis for Dr. Cole's opinion that cross-racial identification is unreliable, the testimony would have been clearly admissible under Rule 703. Thus, the issue boils down to whether the trial court was correct in finding that Dr. Cole's opinion as to cross-racial identification was not specific enough to allow him to testify to the results of the experiment in question. We repeat that, for whatever reason, Dr. Cole never gave a specific opinion concerning the accuracy of eyewitness identification when the actual perpetrator is not in the lineup. We do not know whether Dr. Cole would have given such an opinion because the question was not asked, even on voir dire, after the hearsay objection was sustained. Although reasonable minds could differ, we do not believe the trial court abused its discretion in finding that Dr. Cole had not given an opinion specific enough to support admission of testimony regarding the experiment in question. Therefore, we reject defendant's argument.

[9] In defendant's next argument he contends that the trial court erred by failing to act *ex mero motu* to prevent the State's cross-examination of Dr. Sciara concerning the contents of a psychiatric report prepared by the forensic staff at Dorothea Dix without establishing that Dr. Sciara utilized this psychiatric report as part of the basis for the opinions to which he testified. Defendant argues that the State's cross-examination of Dr. Sciara relating to the Dorothea Dix report placed the observations and opinions of its authors before the jury when none of the members of the staff of the forensic unit at Dorothea Dix testified during the guilt-innocence phase of the trial. The State responds that Dr. Sciara testified that he had read the report, but that he disagreed with it; therefore, pursuant to North Carolina Rule of Evidence 705, it was not error for the prosecutor to cross-examine him concerning his rejection of the information contained in the report.

Defendant concedes that defense counsel failed to object at trial during the State's cross-examination of Dr. Sciara. Thus, we consider this assignment of error under the "plain error" standard. *State v. Mitchell*, 328 N.C. at 711, 403 S.E.2d at 290.

Defendant argues that the sole purpose of Dr. Sciara's testimony was to establish that deficiencies in defendant's ability to communicate facts resulted from a psychological condition rather than from fabrication. The State's success in attacking Dr. Sciara's testimony, defendant argues, created a substantial likelihood that the jury's failure to accept defendant's testimony rested heavily upon this attack upon Dr. Sciara's opinion.

Before granting a new trial to a defendant under the plain error rule, the appellate court must be convinced that absent the alleged error, the jury probably would have reached a different verdict. *Id.* We do not believe defendant has met this heavy burden. The jury heard testimony from defendant that he was in Thomasville, not High Point, on the night of the murder. The jury heard testimony from an alibi witness who testified that he had bought drugs from defendant in Thomasville around the time of the murder. The jury also heard testimony from three eyewitnesses who placed defendant at the scene of the crime. The jury believed the three eyewitnesses. We do not believe that absent the State's cross-examination of Dr. Sciara, the jury probably would have reached a different verdict. Having found that the defendant cannot satisfy the plain error standard, we find it unnecessary to reach the merits of defendant's argument.

[10] Next, defendant argues that the trial court committed prejudicial error by refusing to suppress the in-court identification testimony of Cotner and Hill on the grounds that these identifications were based upon impermissibly suggestive pretrial identification procedures which created a substantial likelihood of irreparable misidentification and that their pretrial identifications improperly tainted all subsequent in-court identifications. Defendant argues that the trial court incorrectly concluded that he waived his right to contest the identification testimony of Cotner and Hill by failing to file a written motion to suppress prior to trial. According to defendant, an oral suppression motion was proper in this case for two reasons. First, defendant contends that when the trial judge allowed his request for a physical lineup, the trial court stated that his trial counsel had the right to contest the State's identifica-

tion evidence by oral objection at the time any such testimony was proffered. Defendant further contends that the State did not object to this procedure. Second, defendant argues that he lacked a reasonable opportunity to file a written pretrial suppression motion. Defendant argues that the State did not provide him with copies of the descriptions given by Cotner and Hill to the police of the shorter man who perpetrated the crime until the day after the case was called for trial. Finally, defendant argues that several of the pictures in the photographic lineup did not match the descriptions given by Cotner or Hill. Therefore, defendant argues, the photographs were impermissibly suggestive.

The State responds that both Cotner and Hill were eyewitnesses to the crimes, as well as surviving victims, and each had the opportunity to view the defendant, who was not wearing a mask at the time of the crimes. The State contends that the evidence in this case supports the findings that both witnesses had ample opportunity to observe defendant at the time of the crimes and the pretrial identification procedures were not impermissibly suggestive. We agree.

Both witnesses were subjected to the following pretrial identification procedures: a photographic lineup shown to Cotner by Detectives Royal and McNeil on 11 March 1986 in which Cotner selected a photograph of defendant; a photographic lineup shown to Hill by Detective Royal on 11 March 1986, in which Hill selected defendant's photograph as looking like the person who shot him; and just prior to trial, some eighteen months after the crimes, counsel for defendant requested a live lineup procedure at which time both Cotner and Hill identified defendant as the perpetrator. At trial, during the testimony of Cotner and Hill, defense counsel objected to any in-court identification of defendant without counsel being given the opportunity for a voir dire to determine whether the identifications had been tainted by impermissible procedures. The trial judge heard arguments from both parties, at which time the State argued that defendant was procedurally barred from contesting the pretrial procedures pursuant to N.C.G.S. § 15A-975 because he failed to make a pretrial motion. The trial judge allowed voir dire hearings on the eyewitness identification.

At the conclusion of each of the voir dire hearings, the trial judge entered an order making extensive findings of fact and concluded that the pretrial identification procedures were in no way

suggestive or conducive to mistaken identification and that the witnesses' in-court identifications were of independent origin based solely on the observation of defendant at the time of the crimes. The findings of fact, defendant concedes, are generally consistent with the record evidence. The findings of fact made by the trial judge are supported by the evidence and are binding on this Court. *State v. Hunt*, 287 N.C. 360, 372, 215 S.E.2d 40, 48 (1975). These findings support the conclusions of law that the pretrial identification procedures were not tainted and that the in-court identifications were based solely on the witnesses' observation of defendant at the time of the crimes. Thus, the trial court did not err in denying defendant's motions to suppress the in-court identifications. *Id.* We need not address defendant's contention that some of the persons in the photographic lineup did not match the description given by Cotner and Hill because defendant did not raise this issue at the trial level. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). We conclude, however, that defendant is not entitled to any relief under the plain error standard. *State v. Mitchell*, 328 N.C. at 711, 403 S.E.2d at 290.

[11] In defendant's next argument, he contends that the trial court committed prejudicial error by failing to submit the issue of defendant's guilt of second-degree murder to the jury on the grounds that the issue of defendant being guilty of second-degree murder arose upon the evidence and that the trial court's failure to submit that issue created an impermissible risk that the jury relied upon an invalid statutory aggravating circumstance at the sentencing hearing. Defendant argues that the trial judge should have instructed on second-degree murder because of the evidence "of panic, the very short amount of time that we're talking about, and the general circumstances of stress as described by both victims." Defendant contends that N.C.G.S. § 15A-1232 requires a trial court to submit "the different permissible verdicts arising on the evidence . . . under proper instructions." Finally, defendant argues that in the event that the jury had not convicted him of first-degree murder on the basis of malice, premeditation, and deliberation, the trial court could not have submitted the underlying robbery as an aggravating circumstance at the sentencing hearing. *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980).

The State argues that there was no evidence showing a lack of premeditation, deliberation and intent to kill; thus, there was

no requirement to submit a second-degree murder verdict. We agree. In *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983), *overruled in part on other grounds, State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986), this Court held:

> 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.

307 N.C. at 293, 298 S.E.2d at 658. Defendant presented no evidence to negate premeditation, deliberation and intent to kill. The State's evidence showed that defendant robbed a restaurant at night, ordered the victims to lie down and then methodically aimed and shot them. This evidence is sufficient to show premeditation and deliberation. *See State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985); *State v. Bray*, 321 N.C. 663, 365 S.E.2d 571 (1988). There was no credible evidence to the contrary. Defendant's defenses were alibi, misidentification by the eyewitnesses, and lying by co-defendant Woods. Under these circumstances, we reject defendant's argument that the trial court erred by not instructing the jury on second degree murder.

[12] Next, defendant contends that the trial court committed prejudicial error by refusing to intervene *ex mero motu* during the prosecutors' arguments to the jury at the guilt-innocence phase of the trial and to preclude prosecutors from making arguments to the jury which were contrary to the evidence, abusive, misstated the applicable law, and infringed upon defendant's constitutional rights. Defendant argues that the prosecutors' arguments made repeated references to Page's suffering and went beyond permissible reminder of the rights of victims. Defendant further argues that the prosecutors repeatedly stepped outside their role as representatives of the State and asserted that they were, in fact, representing Page and other victims of crimes. Defendant also contends that the prosecutors improperly attacked his character.

The State calls attention to the fact that defendant did not object to the arguments about which he now complains. The State contends that all of the prosecutors' arguments were fully grounded in the evidence, that there was no impropriety in the arguments

by the prosecutors, and certainly no gross impropriety which would warrant a new trial.

Trial counsel is given wide latitude in the argument of hotly contested cases and they are permitted to argue the facts and evidence, all reasonable inferences from those facts, and the relevant law. Control of counsel's argument is largely left to the trial court's discretion. *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976); *State v. Whisenant*, 308 N.C. 791, 303 S.E.2d 784 (1983). "Where a defendant does not object at trial to an allegedly improper jury argument, 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). Upon review of the record, we conclude that the arguments of the prosecutors were not so grossly improper as to constitute a denial of defendant's due process rights. Thus, we find no reversible error.

IV.

SENTENCING PHASE

[13] In his next five arguments, defendant contends that the trial court committed several errors during his sentencing proceeding. Since we find defendant is entitled to a new sentencing proceeding under *McKoy*, we address only that issue.

The trial court instructed the jury both verbally and in writing that in order to find the existence of any mitigating circumstance, the jury's finding must be unanimous. In *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369, the United States Supreme Court held that such instructions in a capital case violated the eighth and fourteenth amendments of the federal Constitution. The State concedes *McKoy* error, but argues it was 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, 44, 394 S.E.2d 426, 433 (1990); N.C.G.S. § 15A-1443(b) (1988). We conclude the State has failed to meet its burden.

The trial court submitted and the jury unanimously found three aggravating circumstances: (1) defendant had been previously convicted of a felony involving the threat of violence to the person; (2) the murder was committed while defendant was engaged in

the commission of a robbery; and (3) the murder was part of a course of conduct in which the defendant engaged and that course of conduct included the commission by defendant of other crimes of violence against other persons. N.C.G.S. § 15A-2000(e)(3), (5), (11) (1988).

The trial court submitted nine possible mitigating circumstances to the jury. The jury unanimously found seven. It did not, however, find two: (1) that the mental age of the defendant at the time of the murder is a mitigating circumstance; and (2) any other circumstance or circumstances arising from the evidence which the jury deems to have mitigating value. Thus, when weighing the mitigating circumstances against the aggravating circumstances to determine if the latter were sufficiently substantial to call for the imposition of the death penalty, individual jurors did not include these two mitigating circumstances.

We need only address the "mental age" circumstance to resolve this issue. Although this circumstance is not listed in N.C.G.S. § 15A-2000(f), "our cases plainly indicate that the mentality of a defendant is generally relevant to sentencing and that it can, with supporting evidence, be properly considered in mitigation of a capital felony." *State v. Pinch*, 306 N.C. 1, 28, 292 S.E.2d 203, 224, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 1031 (1982), *overruled in part on other grounds, State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *overruled in part on other grounds, State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988); *see also State v. Fullwood*, 329 N.C. 233, 235, 404 S.E.2d 842, 843 (1991); *State v. Artis*, 325 N.C. 278, 313, 384 S.E.2d 470, 490 (1989), *death sentence vacated*, --- U.S. ---, 108 L. Ed. 2d 604 (1990).

The State suggests there was not enough evidence introduced to support a finding that defendant's mental age was "low" enough to be considered a mitigating circumstance. We disagree. Through the testimony of Dr. Sciara, a trained psychologist, defendant offered credible evidence that defendant was functioning in a mentally retarded range of intellect with an I.Q. that placed him in the lowest two percent of the population. Dr. Sciara, a clinical psychologist, testified at the sentencing proceeding that:

> Dwight Robinson is functioning in a mentally retarded range of intellect. He has a full scale I.Q. of 69. An I.Q. at that level would put him in the lowest two percent of the population. That is, out of every 100 people, 98 would be smarter

> than him, basically. At that level, he's functioning at about a fourth grade level, in terms of how he processes information, how he deals with facts, how he can use his intellect.

Although the State argues this testimony is contrary to that of a Dorothea Dix psychiatrist, we believe it is sufficient to allow a reasonable juror to find that the defendant's mental age is below normal.

The State further suggests that even if credible evidence existed to support this circumstance, the jury had already taken the defendant's mental age into account when it unanimously found the existence of a statutory circumstance submitted to the jury, *i.e.*, 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. N.C.G.S. § 15A-2000(f)(6) (1988).

The trial court gave the following instructions to the jury with regards to mitigating circumstance (f)(6):

> You would find this mitigating circumstance if you find that the defendant was under the influence of drugs or alcohol *or* suffering from a mental condition and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law . . . .

(Emphasis added.) Accordingly, the jury did not necessarily consider the defendant's mental condition when deciding the (f)(6) circumstance; rather, it could have found impaired capacity based solely on the overwhelming evidence of the defendant's regular drug usage. Where there is evidence to support a mitigating circumstance on either of two grounds, and the jury is so instructed, an appellate court should not speculate as to which ground served as the basis of the jury's finding.

Furthermore, as we recently said in *State v. Greene*, 329 N.C. 771, 408 S.E.2d 185 (1991), "[e]ach mitigating circumstance is a discrete circumstance. Each has its own meaning and effect." 329 N.C. at 776, 408 S.E.2d at 187. Although both circumstances under consideration in *Greene* were statutory, we believe the same reasoning applies in this case where one circumstance, impaired capacity, is statutory, and another circumstance, mental age, is nonstatutory.

Finally, the State suggests that the evidence of guilt and aggravating circumstances is so overwhelming in this case, that even

if there was credible evidence to support the mental age circumstance, no reasonable juror could balance the aggravating and mitigating circumstances and recommend life imprisonment instead of death. Again, we do not agree. As we said in *McKoy*, "it would be a rare case in which a *McKoy* error could be deemed harmless." *McKoy*, 327 N.C. at 44, 394 S.E.2d at 433. Since we began reviewing cases for *McKoy* error, the Court has found two such cases. *State v. Laws*, 328 N.C. 550, 402 S.E.2d 573 (1991) (individual polling of jurors disclosed unanimity of rejection of submitted mitigating circumstance); *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600 (1991) (jury found all fifteen mitigating circumstances submitted). The other twenty-six cases handed down by this Court as of 5 September 1991 have found the *McKoy* error not to be harmless beyond a reasonable doubt.[1] In each of these cases, the Court has found credible evidence supporting at least one submitted, but unfound mitigating circumstance. And in each of these cases, this Court has chosen not to usurp the jury function by weighing the mitigating circumstances against the aggravating circumstances ourselves in order to determine whether the defendant should live or die. As we stated in a recent case:

> 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."

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1. *State v. Greene*, 329 N.C. 771, 408 S.E.2d 185 (1991); *State v. Quick*, 329 N.C. 1, 504 S.E.2d 179 (1991) (Meyer, J., dissenting as to *McKoy* issue) (4-3); *State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991); *State v. Joyner*, 329 N.C. 211, 404 S.E.2d 653 (1991); *State v. Fullwood*, 329 N.C. 233, 404 S.E.2d 842 (1991); *State v. Cummings*, 329 N.C. 249, 404 S.E.2d 849 (1991); *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991) (Meyer, J., dissenting as to *McKoy* issue) (6-1); *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991); *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141 (1991); *State v. Wynne*, 329 N.C. 507, 406 S.E.2d 812 (1991) (Meyer, J., dissenting as to *McKoy* issue) (5-2); *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158 (1991); *State v. McPhail*, 329 N.C. 636, 406 S.E.2d 591 (1991); *State v. Lloyd*, 329 N.C. 662, 407 S.E.2d 218 (1991); *State v. Artis*, 329 N.C. 679, 406 S.E.2d 827; *State v. Green*, 329 N.C. 686, 406 S.E.2d 852 (1991); *State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991); *State v. Quesinberry*, 328 N.C. 288, 401 S.E.2d 632 (1991) (Meyer, J., dissenting) (5-2); *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991); *State v. Huff*, 328 N.C. 532, 402 S.E.2d 577 (1991); *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990); *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990); *State v. Sanders*, 327 N.C. 319, 395 S.E.2d 412 (1990); *State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402 (1990); *State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106 (1990); *State v. Sanderson*, 327 N.C. 397, 394 S.E.2d 803 (1990); *State v. Jones*, 327 N.C. 439, 396 S.E.2d 309 (1990).

> This function, we continue to believe, is solely for the trial jurors who hear the evidence and are properly instructed on the law.

State v. Lloyd, 329 N.C. 662, 668, 407 S.E.2d 218, 222 (1991). Although the mitigating circumstances under consideration in *Lloyd* were statutory, this Court has granted a new sentencing hearing when only nonstatutory circumstances were at issue. *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991) (new sentencing proceeding ordered even though the only mitigating circumstance not found by the jury was the "catch-all").

Given the testimony by defendant's expert witness, we cannot say beyond a reasonable doubt that no reasonable juror could have found this evidence to be credible and given it mitigating value. Furthermore, we cannot say beyond a reasonable doubt that no reasonable juror, upon weighing this circumstance along with the other mitigating circumstances, could have concluded that life imprisonment rather than death was the appropriate punishment. We conclude, therefore, that defendant is entitled to a new sentencing proceeding because the State has failed to meet its burden of satisfying this Court that the erroneous unanimity instructions were harmless beyond a reasonable doubt.

Defendant's remaining arguments relate to issues that defendant acknowledges have previously been decided by this Court contrary to his position. Nonetheless, he brings these arguments forward to preserve for further appellate review. Since we have previously decided those issues contrary to defendant's position, defendant's related arguments are overruled. *See State v. Smith*, 328 N.C. 99, 139, 400 S.E.2d 712, 735 (1991); *State v. Payne*, 327 N.C. 194, 210, 394 S.E.2d 158, 166 (1990), *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 1062 (1991).

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, Guilford County, for a new capital sentencing proceeding in the first-degree murder case.

For the reasons stated, we find no error in the robbery with a dangerous weapon conviction, and the assault with a deadly weapon with intent to kill inflicting serious injury convictions, but remand the murder conviction to the Superior Court, Guilford County, for

a new capital sentencing proceeding not inconsistent with this opinion or the opinion of the United States Supreme Court in *McKoy*.

No. 86CRS25055, robbery with a dangerous weapon—no error.

No. 87CRS20031, assault with a deadly weapon with intent to kill inflicting serious injury—no error.

No. 87CRS20032, assault with a deadly weapon with intent to kill inflicting serious injury—no error.

No. 86CRS25054, first-degree murder—guilt phase:—no error; sentencing phase: death sentence vacated; remanded for new capital sentencing proceeding.

Justice MITCHELL concurring in part and dissenting in part.

I concur in the result reached by the majority in its conclusion and holdings that the defendant's convictions for first-degree murder, robbery with a dangerous weapon and two counts of assault with a deadly weapon with intent to kill inflicting serious injury were without error. I dissent from that part of the decision of the majority vacating the death sentence entered against the defendant and remanding this case for a new capital sentencing proceeding.

I believe the majority is unwise to speculate by way of *obiter dictum* as to the circumstances under which testimony concerning experiments conducted by the defendant's witness, psychologist Spurgeon Cole, might be admissible to support an opinion formed by Cole, in his capacity as an expert in clinical psychology, concerning the reliability of eyewitness identification. As the majority points out, Cole never testified to having formed an opinion. No issue concerning what evidence might under various circumstances be admissible to support such an opinion is before this Court, and I decline to join in the speculation by the majority concerning such matters. Therefore, I concur only in the result reached by the majority in finding no error in the guilt-innocence phase of the defendant's trial.

More importantly, I disagree with the conclusion by the majority that the trial court's error in instructing the jurors they must be unanimous before finding any mitigating circumstance to exist was not harmless beyond a reasonable doubt. Therefore, I dissent

from the holding of the majority vacating the sentence of death and remanding this case for a new capital sentencing proceeding.

The State concedes that the trial court's instructions to the jury violated the Eighth and Fourteenth Amendments as construed in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). Since the error is of constitutional magnitude, the State must bear the burden of showing that it was harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990); N.C.G.S. § 15A-1443(b) (1988). Contrary to the majority, I believe that the State has borne that burden in the present case.

The majority concludes that the trial court's erroneous unanimity instruction may have prevented a juror from finding the "mental age of the defendant at the time of this murder" to be a mitigating circumstance. Even assuming *arguendo* that this is so, I do not believe the trial court's erroneous instruction was harmful to this defendant. The seven mitigating circumstances *unanimously found* by the jury in the present case included the mitigating circumstances that: (1) the "murder was committed while the defendant was under the influence of mental or emotional disturbance" and (2) "[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." It seems clear beyond any reasonable doubt that the jury gave the defendant the full benefit of any weight his evidence tending to show that he was of low intelligence and functioned at approximately a fourth grade level may have had, when the jury found the above two mitigating circumstances and weighed them in the defendant's favor. The jury would have been required to do no more with this evidence, even had the jury been given proper instructions and followed them. Therefore, I believe the majority errs in vacating the death sentence and awarding a new capital sentencing proceeding in this case on the ground that, absent the *McKoy* error, a juror may have found the "mental age of the defendant at the time of this murder" to be a mitigating circumstance and weighed it in favor of the defendant.

Justice MEYER joins in this concurring and dissenting opinion.

STATE OF NORTH CAROLINA v. ROWLAND ANDREW HEDGEPETH

No. 614A87

(Filed 3 October 1991)

1. **Homicide § 15.2 (NCI3d)— defendant's relationship with children and reconciliation attempts—exclusion harmless**

In a prosecution for the first degree murder of a man who was dating defendant's estranged wife, error, if any, in the court's exclusion of testimony by defendant's brother concerning defendant's good relationship with his children and his attempts to reconcile with his wife was harmless where the jury heard similar testimony by defendant; such evidence had little probative value on what happened at the time of the murder; there was plenary and convincing evidence of all elements of first degree murder, including premeditation and deliberation; and there was no reasonable possibility that the jury would have found defendant not guilty of first degree murder had it heard the excluded evidence. N.C.G.S. § 15A-1443(a).

Am Jur 2d, Homicide § 274.

2. **Homicide § 15.2 (NCI3d)— specific intent to kill—capability of defendant—expert testimony**

The trial court did not err in allowing an expert for the State to testify that defendant was capable of forming the specific intent to kill on the date of an alleged murder.

Am Jur 2d, Homicide §§ 395, 397.

3. **Homicide § 24.1 (NCI3d)— presumptions from use of deadly weapon—omission of "intentional" in instructions—no plain error**

While it was error for the trial court in a first degree murder case to omit the word "intentionally" before the word "killed" in its instructions permitting the jury to infer unlawfulness and malice from proof "that the defendant killed the victim with a deadly weapon," this omission did not rise to the level of plain error where the instructions, taken as a whole, made it clear that the killing of the victim must have been intentional in order for defendant to be convicted of first degree murder; all the evidence showed that the killing

was intentional as opposed to accidental; and the jury found an intentional killing by its verdict of guilty of first degree murder.

Am Jur 2d, Homicide §§ 265, 509.

4. **Homicide § 25.2 (NCI3d) — specific intent to kill — consideration of defendant's mental state — failure to instruct not plain error**

The trial court's failure to instruct the jury in a first degree murder case that it could consider defendant's mental or emotional condition on the issue of defendant's specific intent to kill his victim did not constitute plain error where the court's instructions did direct the jury to consider evidence of defendant's mental and emotional state on the elements of premeditation and deliberation; the jury found the existence of those elements beyond a reasonable doubt; and there can be little doubt that the jury would have found the existence of the specific intent to kill element had it been told to consider evidence of defendant's emotional state on that element.

Am Jur 2d, Homicide § 501.

5. **Assault and Battery § 32 (NCI4th) — felonious assault — peremptory instruction on serious injury — when permitted**

A trial court may peremptorily instruct the jury on the serious injury element of felonious assault, N.C.G.S. § 14-32, if the evidence is not conflicting and reasonable minds could not differ as to the serious nature of the victim's injuries.

Am Jur 2d, Assault and Battery § 48; Homicide § 579.

6. **Assault and Battery § 32 (NCI3d) — felonious assault — peremptory instruction on serious injury — sufficient evidence**

The trial court in a prosecution for felonious assault did not err in instructing the jury that a bullet wound that "enters the flesh and exits the flesh is a serious injury" where the defendant presented no evidence contradicting the State's evidence on the victim's injuries, and reasonable minds could not differ as to the seriousness of the victim's injuries where the evidence showed that a bullet ripped through the victim's ear mere inches from her skull, the victim required emergency room treatment for a gunshot wound, powder burns and lacera-

tions on her ear and hand, and the victim still suffered from daily ringing in her ear at the time of trial.

Am Jur 2d, Assault and Battery § 48; Homicide § 579.

7. Criminal Law § 1352 (NCI4th)— capital sentencing proceeding—McKoy error—death sentence vacated

There was prejudicial *McKoy* error in the sentencing phase of a first degree murder trial entitling a defendant who was sentenced to death to a new sentencing hearing where the court's instructions and the verdict form required the jury to find unanimously the existence of each of eleven submitted mitigating circumstances, two of which were statutory; the jury failed unanimously to find the existence of any of the mitigating circumstances submitted; and there was substantial evidence to support at least some, if not all, of the mitigating circumstances submitted.

Am Jur 2d, Criminal Law § 600; Trial § 1113.

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 judgment imposing death sentence entered by *Small, J.*, at the 26 October 1987 Criminal Session of Superior Court, HALIFAX County. Defendant's motion to bypass the Court of Appeals on his related assault conviction was allowed 13 January 1988. Heard in the Supreme Court 15 November 1989.

Lacy H. Thornburg, Attorney General, by Tiare B. Smiley, Special Deputy Attorney General, for the State.

Thomas K. Maher for defendant-appellant.

EXUM, Chief Justice.

On proper bills of indictment, defendant was tried and convicted of assault with a deadly weapon with intent to kill inflicting serious injury upon his estranged wife, Beverly Hedgepeth, and of first-degree murder of Richard Casey. Defendant was sentenced to death on the murder conviction and to twenty years imprisonment on the felonious assault conviction.

Defendant appeals, assigning numerous errors to all phases of his trial.

We find no error in defendant's murder conviction or in his conviction on the felonious assault charge. However, we vacate the sentence of death and remand to the trial court for a new capital sentencing proceeding pursuant to *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

I.

The State's evidence tends to show the following:

During the night of 12-13 February 1987 defendant's estranged wife, accompanied by Richard Casey and Dennis and Ruth Morgan, was at Howard Johnson's restaurant for breakfast. Defendant entered the restaurant and sat at a booth near the others. Seeing that defendant had a gun, Dennis Morgan went over and sat with him. Morgan, who had known defendant for years, believed defendant was "angry" and under the influence of alcohol. Referring to his estranged wife and Casey, defendant told Morgan that he "was going to kill both of them and he was going to kill himself." Defendant said "[t]hat son-of-a-bitch has had every woman in Roanoke Rapids, but he won't have her." Defendant balled up a pack of cigarettes and threw it toward the booth where his wife was seated, saying "[s]moke that cigarette bitch, it'll be your last one." He said to Morgan, "I've been thinking about this for seven months now."

Defendant told Morgan, "I love that woman." Defendant also said that Mrs. Hedgepeth had already caused one man to kill himself, referring to her first husband. Morgan told defendant Mrs. Hedgepeth's first husband had raped a child, and defendant became angrier because he had not been previously informed of this. Morgan repeatedly attempted to discourage defendant from shooting his wife and from committing suicide.

Defendant went over to the booth where his wife and Casey were sitting. Casey told defendant he wanted no trouble. Defendant responded, "Let me show you trouble" or "This is trouble." Defendant drew a pistol and fired at Casey. Defendant fired several more times at Casey and once at Mrs. Hedgepeth.

A police officer entered the restaurant and ordered defendant to freeze. Defendant threw out his gun, said "I quit," and was arrested.

Casey died from the effects of four gunshot wounds. Mrs. Hedgepeth suffered a gunshot wound to her left ear which was

closed with stitches. The ear has since caused problems, including pain and ringing.

Defendant's evidence tends to show the following:

Defendant suffered a serious head injury in 1976 when he fell from a second story window onto a concrete sidewalk. The accident altered his personality, rendering him less patient and more prone to act on impulse; it reduced his tolerance for alcohol.

Defendant testified as follows: Before 1976, he had been convicted of "engaging in an affray in public, simple assault, a few driving tickets, speeding or something like that, one public drunkenness, that's all." He had spent no time in prison before 1976. After his head injury in 1976, he was convicted of simple assaults, damage to personal property, damage to real property and drunk and disorderly conduct. He had never been convicted of any crime involving use of a knife or gun. Neither had he been convicted of a felony, although he did spend some time in prison at the Triangle Correctional Facility for a pre-sentence study. This study included psychiatric evaluation.

Each time he had been in trouble with the law, drinking was involved. He would successfully abstain from alcohol for long periods of time but occasionally suffered relapses.

While defendant and Mrs. Hedgepeth were separated they discussed reconciliation, and he maintained a close relationship with their son and his stepdaughter. Mrs. Hedgepeth told defendant she was dating other men and who they were. Defendant learned in late January 1987 that his wife was seeing Richard Casey.

On 12 February 1987 Mrs. Hedgepeth told defendant she was not going to reconcile with him. After she told defendant where she was going that night, defendant asked who she would be dating. She replied, "That's none of your business. If you want to see, you come see, but don't come anywhere near us."

After defendant entered Howard Johnson's restaurant and sat down, Morgan joined him and said defendant should not be there. Defendant replied that his wife had told him he could come to see who she was dating. Defendant, maintaining he still loved his wife, expressed his belief that she was seeing other men even before their separation. Morgan responded, "I know." This made defendant even angrier than he had initially been. Defendant got

"madder by the minute" because of these and other comments by Morgan.

Defendant also told Morgan about how his wife had laughed at him when he told her he was thinking about committing suicide. Morgan told defendant to think about his son. Defendant replied that he had been thinking about his son for seven months. Morgan explained that Beverly wasn't worth all this trouble.

Morgan asked defendant if he knew why Beverly's first husband had killed himself. According to Morgan, defendant's response was wrong. Morgan then told defendant that the first husband had sexually molested the couple's daughter. Defendant immediately flew into a rage at Beverly for not having told him the truth about her first marriage especially when, according to Mr. Morgan, many other people knew the reason.

Defendant got up from the booth and Morgan asked why defendant didn't just take "him" (Casey) outside. Defendant replied that he would bust Casey up a little if he got smart. Defendant then confronted his wife for lying to him about the sexual molestation. Casey told him to shut up and get out, and defendant responded that he was talking to his wife. Casey told defendant several times to leave, and refused to accompany him if he did, saying " 'I'm not going anywhere with you. Why don't you just shut up and go on. All you are is mouth.' "

Defendant started to leave but turned back. While looking toward Morgan, defendant saw Casey stand up. Defendant drew his gun and shot Casey. After firing several shots at Casey, defendant leaned into the booth and heard his wife scream, "I'm hit."

A police officer arrived on the scene and forced defendant to lie facedown on the floor of the restaurant. Defendant was still clicking off empty rounds of his gun. He testified that only then did he realize what he had done. He denied going into the restaurant in order to kill either his wife or Casey.

Dr. Stanley Preston Oakley testified that defendant's fall in 1976 caused persistent nerve damage and cerebral bleeding. This resulted in organic brain syndrome, which causes disorganized thinking and confusion. Several other doctors diagnosed defendant as having extreme difficulty in controlling his impulses due to the brain trauma. Dr. Oakley concluded that defendant's ability to con-

form his conduct to the requirements of the law was "definitely impaired" by the head injury at the time he shot Richard Casey.

The State presented rebuttal evidence, which tends to show the following:

After the shootings, defendant underwent testing at Dorothea Dix Hospital by Dr. Bob Rollins. Although Dr. Rollins did not dispute the possible effects of organic brain damage, he believed, based on tests he conducted on defendant, that defendant's impairment was minimal. Dr. Rollins believed the head injury exacerbated defendant's already poor judgment. Even though he thought defendant was intoxicated at the time of the shootings, Dr. Rollins believed that defendant could form the specific intent to kill. On cross-examination, Dr. Rollins testified that defendant was under the influence of a "mental or emotional disturbance" at the time of the shooting and that his "ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" was impaired.

At the close of all evidence, the trial court instructed the jury and submitted possible verdicts. On the murder charge, the trial court submitted alternatives of first-degree murder, second-degree murder, manslaughter, and not guilty. The jury found defendant guilty of first-degree murder. On the felonious assault charge, the trial court submitted alternatives of assault with a deadly weapon with intent to kill inflicting serious injury, assault with a deadly weapon inflicting serious injury, assault with a deadly weapon, and not guilty. The jury found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury.

The trial court then conducted a capital sentencing proceeding on defendant's first-degree murder conviction. After hearing evidence of both aggravating and mitigating circumstances, the jury found unanimously and beyond a reasonable doubt the only aggravating circumstance submitted to it: that the "murder [was] part of a course of conduct in which the defendant engaged . . . [which] included the commission by the defendant of crimes of violence against other persons."

The trial court also submitted eleven proposed mitigating circumstances to the jury with the instruction that the jury must find each mitigating circumstance unanimously. The jury did not unanimously find any of the eleven mitigating circumstances sub-

mitted. Having found no mitigating circumstances, the jury then found unanimously and beyond a reasonable doubt that the aggravating circumstance was sufficiently substantial to call for the death penalty; and it recommended a sentence of death which the trial court imposed.

The trial court also conducted a sentencing hearing on defendant's assault conviction. The trial court concluded that certain found aggravating factors outweighed certain found mitigating factors. The trial court sentenced defendant to the maximum term of twenty years imprisonment on the assault conviction.

II.

Because we are ordering a new sentencing hearing pursuant to *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), we need not address defendant's assignments of error regarding the jury selection proceedings, all of which relate to juror attitudes to the death penalty. We turn, therefore, to the guilt phase issues.

A.

[1] Defendant first contends the trial court erred in excluding his brother's testimony concerning defendant's relationship with his children and attempts to reconcile with his wife. The trial court excluded the following testimony by defendant's brother Billy, elicited on voir dire:

> It was as if both kids belonged to [defendant] and it was a lot of love there, and always a good relationship they had from the standpoint I wished I had kids of my own. They looked up to me as if they did to him. And it was a good relationship.

The trial court also excluded Billy's testimony, again elicited on voir dire, that, "[defendant] didn't change much after the separation other than he tried harder after the separation than he did before the separation to reconciliate the marriage, to bring things back together."

Assuming, without deciding, that the testimony should have been admitted, we must determine if its exclusion was harmless. Since the error, if any, in excluding this evidence, is not of constitutional dimension, the burden is on defendant to show a reasonable possibility that the jury would have reached a different result

had the evidence been admitted. N.C.G.S. § 15A-1443(a) (1977). Defendant has not carried this burden.

There is plenary and convincing evidence of all elements of first-degree murder, including premeditation and deliberation. This evidence centers on the events which occurred on the evening of the shootings. Evidence of defendant's good relations with his children and his earlier efforts at reconciliation with his wife has little probative value on what happened at the time of the shootings themselves. Further, defendant testified without contradiction about his desire for reconciliation and his relationship with his children. The jury was thus able to consider evidence of like import to that which was excluded. That the jury did so and nonetheless found defendant guilty of first-degree murder negates any reasonable possibility that the jury would have reached a different conclusion had it heard the excluded evidence. This assignment of error is therefore overruled.

B.

[2] Defendant next contends the trial court should have excluded the testimony of Dr. Rollins, an expert for the State, that defendant was capable of forming the specific intent to kill. Dr. Rollins testified:

> Q: What is your opinion as to whether or not the defendant on February 13th, 1987 based on your examinations and talking with him, what is your opinion as to whether or not he on February 13th, whether his mind and reason were so completely intoxicated and overthrown that he could not form a specific intent to kill[?]
>
> MR CRANFORD: Objection.
>
> COURT: Overruled.
>
> A: My opinion is that at that time Mr. Hedgepeth was intoxicated to some degree with alcohol. He was suffering from his basic personality problems, but it was my opinion that he wasn't so impaired that he was unable to form a specific intent.

There is no error in the admission of this testimony. *State v. Clark*, 324 N.C. 146, 159, 377 S.E.2d 54, 62 (1989) (Expert witness not precluded from testifying as to whether defendant able to formulate prerequisite intent.); *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988) ("[T]rial court properly allowed [psychiatric]

testimony that . . . defendant could not form the specific intent to kill . . . .").

C.

[3] Defendant next assigns as error the trial court's instructions to the jury concerning the inference of malice arising from defendant's use of a deadly weapon.

The trial court initially instructed the jury as follows:

> Now I instruct you that in order for you to find the defendant guilty of first degree murder, the State must prove six things beyond a reasonable doubt:
>
> First, the defendant intentionally and with malice killed Richard Casey with a deadly weapon.
>
> Malice means not only hatred, ill will, or spite, as it is ordinarily understood to mean—to be sure, that is malice—but malice also means that condition of the mind which prompts a person to take the life of another intentionally or to inflict intentionally serious bodily harm which proximately results in the victim's death without just cause, excuse, or justification. If the State proves beyond a reasonable doubt *that the defendant killed the victim with a deadly weapon* or intentionally inflicted a wound upon the deceased with a deadly weapon that proximately caused the death of Richard Casey, you may infer first, that the killing was unlawful, and second, that it was done with malice, but you are not compelled to do so. You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.
>
> A firearm such as a .22 caliber revolver which has been introduced into evidence in the trial of this case is a deadly weapon.
>
> Second, the State must prove that the defendant's acts was [sic] a proximate cause of the death of Richard Casey. A proximate cause is a real cause, a cause without which the death of Ricky Casey would not have occurred.
>
> Third, the State must prove the defendant intended to kill Richard Casey. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by cir-

cumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances.

Fourth, 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, 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.

(Emphasis added.)

After the jury had deliberated for some time it returned to request that the trial judge instruct it again concerning the elements of first- and second-degree murder. The trial court instructed as follows regarding first-degree murder:

Now I instruct you that in order for you to find the defendant guilty of first degree murder, the State must prove six things beyond a reasonable doubt:

Now I had to define self-defense because it is one of the six things, but it's the last one I'll mention.

The six things the State must prove beyond a reasonable doubt is [sic]:

First, the defendant intentionally and with malice killed the victim with a deadly weapon.

Second, the defendant's act was a proximate cause of the victim's death.

Third, the defendant intended to kill the victim.

Fourth, the defendant acted with premeditation.

Fifth, the defendant acted with deliberation.

And sixth, the defendant did not act in self-defense or that the defendant was the aggressor in bringing on the fight

with the intent to kill or with the intent to inflict serious bodily harm upon the deceased.

Now that is the bare bones minimum of the six elements. Now in the course of my instructions to you as I gave you each of those elements I supplemented my instructions by adding this as to the first element:

The defendant intentionally and with malice killed the victim with a deadly weapon.

I went on to instruct you initially; Malice not only means hatred, ill will, or spite, as it is ordinarily understood to mean—to be sure, that is malice—but malice also means the condition of the mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in the death of the victim without just cause, excuse or justification. If the State proves beyond a reasonable doubt *that the defendant killed the victim with a deadly weapon* or that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon that proximately caused the victim's death, you may infer first, that the killing was unlawful, and second, that it was done with malice, but you are not compelled to so infer. You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.

(Emphasis added.)

Defendant assigns error to the italicized portions of the above instructions. He argues that it was error for the trial court to omit the word "intentionally" before the word "killed" in each instance that the court instructed on the inference of malice. Defendant did not object at trial to these instructions. We review the alleged error, consequently, under the plain error doctrine.

It was error for the trial court to omit the word "intentionally," as defendant contends. "Upon a showing that there has been an intentional killing with a deadly weapon, the law permits the jury to infer that the homicide was committed with malice." *State v. Hutchins*, 303 N.C. 321, 346, 279 S.E.2d 788, 804 (1981); *accord*

State v. Patterson, 297 N.C. 247, 254 S.E.2d 604 (1979).[1] In *State v. Burrage*, 223 N.C. 129, 25 S.E.2d 393 (1943), defendant was convicted of first-degree murder and sentenced to death. The State's evidence was that defendant killed the victim by shooting her with a pistol. Defendant's evidence tended to show that he did not intend to kill the victim but that she was shot in a struggle over the pistol. This Court found reversible error in the trial court's instructions to the jury that malice could be presumed "from the use of a deadly weapon." The Court said, "The vice common to these instructions is the failure to instruct that it is the intentional killing of a human being with a deadly weapon which raises the presumption of malice. . . . [T]he law is well established in this state that the intentional killing of a human being with a deadly weapon implies malice, and, if nothing else appears, constitutes murder in the second degree." *Id.* at 133, 25 S.E.2d at 396.

We are confident that while the omission of the word "intentionally" at the places in the instruction about which defendant complains was error, it falls far short of rising to the level of plain error. Plain error arises

> in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

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1. While this Court has found no plain error, *State v. McCoy*, 320 N.C. 581, 359 S.E.2d 764 (1987), and no error, *State v. Forrest*, 321 N.C. 187, 362 S.E.2d 252 (1987), in instructions similar to the one at bar, the precise argument which defendant makes here was not made in those cases, and the Court did not consider the omission of the word "intentionally" in those cases as it might have affected the correctness of the instructions.

Here the instructions required the jury to find as an essential element of first-degree murder that defendant intentionally killed Richard Casey with a deadly weapon. The instructions, taken as a whole, make it clear that the killing of Casey must have been intentional in order for defendant to be convicted of first-degree murder. By its verdict of guilty of this crime the jury must have found an intentional killing. Essentially all the evidence, both that of the State and defendant, shows that the killing of Casey was intentional, as opposed to accidental. Had the error not been committed the outcome of the trial would have been the same. The error, therefore, had no probable impact on the jury's verdict. This assignment of error is overruled.

D.

[4] Defendant next assigns error to the trial court's instruction on the legal effect of his mental and emotional condition at the time of the shooting. During the instructions, the trial court told the jurors that:

> [y]ou may consider any or all of the evidence introduced relating to the mental and emotional condition of the defendant at the time of the shooting on the following issues: whether the defendant acted with premeditation at the time of the shooting; and whether the defendant acted with deliberation, that is in a cool state of mind at the time of the shooting.

Defendant did not object to the instruction at trial but raises the issue for the first time on appeal. The question, therefore, is whether the instruction amounted to plain error.

Defendant argues the instruction was erroneous because it did not permit the jury to consider defendant's mental or emotional condition on the issue of defendant's specific intent to kill his victim. He relies primarily on *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426. In *Rose*, the trial court refused to submit the defendant's requested jury instruction, supported by the evidence, that it "may consider the Defendant's mental condition in connection with his ability to form the specific intent to kill." *Id.* at 457, 373 S.E.2d at 428. We held that the trial court's failure to give the instruction was reversible error "in light of the centrality of the issue of defendant's state of mind . . . ." *Id.* at 458, 373 S.E.2d at 428.

In *Rose*, the defense was that defendant was either legally insane or, if sane, then mentally incapable of forming a specific

intent to kill and premeditating and deliberating. Because the issue of defendant's mental capacity was so crucial in *Rose*, we held that failure to submit the requested instruction was prejudicial error pursuant to the standard of review in N.C.G.S. § 15A-1443(a) (1977).

Since defendant did not request any particular instruction or object to the charge as given, we apply the "plain error" standard of review previously discussed. Under this standard, defendant must demonstrate that the defect in the jury instruction was so fundamental as to have had a probable impact on the guilty verdict. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378.

We are confident no plain error occurred in the challenged instruction. Unlike in *Rose*, the instructions here did direct the jury to consider evidence of defendant's mental state on the elements of premeditation and deliberation. The jury, nevertheless, found beyond a reasonable doubt the existence of these elements. There can be little doubt that had the jury been told to consider this evidence on the specific intent to kill element of the crime, it would have, nevertheless, found the existence of the element. The error complained of, therefore, was not fundamental to the fairness of the trial and had no probable impact on the jury's verdict.

E.

Defendant next assigns error to the peremptory instruction given by the trial court on the "serious injury" element of the felonious assault charge. Defendant argues that the trial court, in effect, directed a verdict for the State on this element of the offense. We find no merit in defendant's argument.

Based on the State's evidence, the trial court instructed the jury on assault with a deadly weapon with intent to kill inflicting serious injury, and several lesser included offenses. During the course of these instructions, the trial court told the jurors that a "serious injury" under N.C.G.S. § 14-32(a) is "such physical injury as causes great pain and suffering." During its deliberations, the jury returned to the courtroom and requested that the trial judge define serious injury. The court responded:

> When I was instructing you, I advised you that serious injury is such physical injury as causes great pain and suffering. In the case you are considering, I would instruct you that

a bullet wound which is through and through, that is enters the flesh and exits the flesh is a serious injury.[2]

(Emphasis added.) Defendant's objection to the charge was overruled. The jury returned to its deliberations and, approximately eight minutes later, decided on a verdict of guilty.

Defendant contends the highlighted portion of the instruction invades the province of the jury by requiring it to find that a shot passing through the victim's ear constitutes a serious injury. Although we have never directly addressed this issue, we find no error in what was effectively the trial court's peremptory instruction on the serious injury element of the crime.

Whether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions. *State v. James*, 321 N.C. 676, 365 S.E.2d 579 (1988). A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is serious. *State v. Owens*, 65 N.C. App. 107, 308 S.E.2d 494 (1983). Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury. *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978).

Although this Court has never considered whether the trial judge may peremptorily instruct the jury on the serious injury element of N.C.G.S. § 14-32,[3] the Court of Appeals has long upheld such peremptory instructions. *See State v. Owens*, 65 N.C. App. 107, 308 S.E.2d 494; *State v. Pettiford*, 60 N.C. App. 92, 298 S.E.2d 389 (1982); *State v. Springs*, 33 N.C. App. 61, 234 S.E.2d 193, *disc. rev. denied*, 293 N.C. 163, 236 S.E.2d 707 (1977); *State*

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2. The North Carolina pattern instructions on N.C.G.S. § 14-32(a) provides that "[s]erious injury may be defined 'as such physical injury as causes great pain and suffering.' . . . If there is evidence as to injuries which could not conceivably be considered anything but serious, the trial judge may instruct the jury as follows: '(Describe injury) would be a serious injury.' " N.C.P.I.—Crim. § 208.10 (repl. Oct. 1989). In the present case, the trial judge used essentially the same charge to the jurors.

3. "[W]hether the trial court may properly determine that an injury constitutes 'serious bodily injury' as a matter of law has not been settled by this Court." *State v. Kuplen*, 316 N.C. 387, 420, 343 S.E.2d 793, 811 (1986). The trial court in *Kuplen* had given a peremptory instruction that the injury under consideration was "serious" pursuant to a charge of first-degree rape under N.C.G.S. § 14-27. The defendant, however, failed to object and this Court found against him under the plain error standard. *Id.*

v. Davis, 33 N.C. App. 262, 234 S.E.2d 762 (1977). In *Pettiford*, the Court of Appeals said "we find support for [this] reasoning in the historical position taken by our appellate courts in deadly weapon cases, upholding the authority of our courts to classify weapons as deadly as a matter of law." 60 N.C. App. at 97, 298 S.E.2d at 392. This Court also likens the peremptory instruction on serious injury to the case where a trial court refuses to submit a lesser included charge not including the serious injury element. *State v. Hicks*, 241 N.C. 156, 84 S.E.2d 545 (1954); *State v. Williams*, 31 N.C. App. 111, 228 S.E.2d 668, *disc. rev. denied*, 291 N.C. 450, 230 S.E.2d 767 (1976).

[5] Accordingly, we find merit in the standard espoused in *Pettiford*. The *Pettiford* court held that a trial court may peremptorily instruct the jury on the serious injury element of N.C.G.S. § 14-32 if the evidence "is not conflicting and is such that reasonable minds could not differ as to the serious nature of the injuries inflicted." 60 N.C. App. at 97, 298 S.E.2d at 392.[4] We adopt this standard today. In the absence of conflicting evidence, a trial judge may instruct the jury that injuries to a victim are serious as a matter of law if reasonable minds could not differ as to their serious nature.

[6] Next, we must determine whether the facts of the present case support the trial court's peremptory instruction that Mrs. Hedgepeth's injuries were serious as a matter of law. Since defendant presented no evidence contradicting the State's evidence on Mrs. Hedgepeth's injuries, we need only consider whether reasonable minds could differ as to the seriousness of her injuries.

Beverly Hedgepeth testified that she was struck by a bullet which traveled through the thickness of her ear, causing a laceration requiring six or seven stitches to close. When she was taken to the emergency room for treatment she was covered in blood, some of which was hers and some of which was Casey's. She also had lacerations and burns behind her ear. Since the shooting, she has had daily trouble with ringing in the ear.

Dr. Elliott Mantahali testified that he treated Beverly Hedgepeth in the emergency room after she was shot. Her head was covered

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4. In a footnote to *Pettiford*, the majority opinion also noted that the trial court could, in appropriate circumstances, resolve this issue by simply refusing to submit a lesser included offense not including serious injury. 60 N.C. App. at 97, 298 S.E.2d at 392.

with blood. She had a laceration and powder burns on her left hand. Another laceration requiring stitches extended from the front of her ear to the back, through its thickness. There was also an abrasion in the back of the ear in the mastoid area.

We think that reasonable minds could not differ as to the seriousness of Mrs. Hedgepeth's physical injuries. A bullet ripped through her ear mere inches from her skull. She required emergency room treatment for a gunshot wound, powder burns and lacerations on her hand and head. Her testimony indicates that her physical injuries may have some permanency since she was still suffering from daily ringing in her ear at the time of trial. We overrule this assignment of error.

III.

[7] In the sentencing proceeding, we conclude there is reversible error in the trial court's jury instructions under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369. The trial court's instructions and the verdict form required the jury to find unanimously the existence of each of eleven submitted mitigating circumstances, two of which were statutory, the mental or emotional disturbance circumstance, N.C.G.S. § 15A-2000(f)(2), and the impaired capacity circumstance, N.C.G.S. § 15A-2000(f)(6). The jury failed to find unanimously any of the mitigating circumstances submitted. There was substantial evidence to support at least some, if not all, of the mitigating circumstances submitted to, but not unanimously found by, the jury, including those defined by statute. As we said in *State v. Jones*, 327 N.C. 439, 396 S.E.2d 309 (1990), "[o]ne or more jurors may have believed some or all of [the submitted] circumstances existed and that the non-statutory circumstances had mitigating value." *Id.* at 449, 396 S.E.2d at 315. Therefore, we cannot conclude beyond a reasonable doubt that the *McKoy* error was harmless.

IV.

In summary, we find no error in the guilt phase of defendant's trial for either the murder or the felonious assault conviction. For error in the sentencing proceeding on the first-degree murder conviction we remand for a new sentencing proceeding.

No. 87CRS775—first-degree murder: death sentence vacated; remanded for new capital sentencing proceeding.

No. 87CRS776—felonious assault: no error.

STATE OF NORTH CAROLINA v. JULIUS EDGAR MILLER

No. 115A91

(Filed 3 October 1991)

1. **Criminal Law § 73.2 (NCI3d)— residual exception to hearsay rule—failure to remember details—disagreement with officer's account—witnesses not "unavailable"**

Neither the fact that two State's witnesses failed to remember every detail of a killing nor the fact that they disagreed with an officer's account of their out-of-court statements rendered them "unavailable" as witnesses for purposes of the residual or "catchall" exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 804(a). It was thus error for the trial court to admit their hearsay out-of-court statements to the officer as substantive evidence under Rule 804.

Am Jur 2d, Evidence § 500.

2. **Criminal Law § 89.9 (NCI3d)— hearsay evidence admissible for impeachment—refusal to give limiting instruction—erroneous consideration as substantive evidence**

Even if hearsay statements by two State's witnesses to an officer were admissible for impeachment purposes under Rule of Evidence 607, the trial court's failure to give defendant's requested limiting instruction resulted in the evidence being erroneously considered by the jury as substantive evidence.

Am Jur 2d, Evidence § 500.

3. **Constitutional Law § 340 (NCI4th)— hearsay statements—right of confrontation not violated**

The admission of hearsay statements by two witnesses did not violate defendant's Sixth Amendment right of confron-

tation where both declarants testified at trial and were cross-examined by defendant.

Am Jur 2d, Constitutional Law § 849; Evidence § 500.

4. **Criminal Law § 73.1 (NCI3d) — hearsay statements — admission as substantive evidence — prejudicial error**

The trial court's error in admitting the out-of-court statements of defendant's two sons as substantive evidence under Rule 804(b)(5) was prejudicial to the defendant in this first degree murder trial where the statements of both sons contained accounts of how defendant pointed a gun at the victim repeatedly during an argument, stating "I ought to kill you"; the statements contained damaging accounts of how defendant stepped from the victim, pointed the gun at him and pulled the trigger; and the statements provided the only purported eyewitness accounts of such acts and statements by defendant and added strong evidence tending to show a premeditated and deliberate murder.

Am Jur 2d, Evidence § 500.

Justice WHICHARD dissenting.

Justice MEYER joins in this dissenting opinion.

THE defendant was indicted on 18 July 1989 for the murder of Larry Ford. He entered a plea of not guilty. He was tried by jury at the 30 October 1990 Criminal Session of Superior Court, RUTHERFORD County, before *Friday, J.* The defendant was found guilty of murder in the first degree and sentenced to life in prison. He appealed to the Supreme Court as a matter of right pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court on 10 September 1991.

Lacy H. Thornburg, Attorney General, by Valerie B. Spalding, Assistant Attorney General, for the State.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by James E. Ferguson, II, for the defendant-appellant.

MITCHELL, Justice.

The defendant, Julius Edgar Miller, seeks a new trial on the charge of first-degree murder, contending that the trial court erred

in admitting certain unsworn, out-of-court statements by witnesses who were available and testified at trial. We conclude that the defendant's contention has merit and that he must be granted a new trial.

The State's evidence tended to show that in July of 1989, the defendant and his wife Daisy had been separated for some years. They had four children; two daughters lived with Mrs. Miller, and two sons with the defendant. Mrs. Miller had been dating Larry Ford for about a year.

On the afternoon of 8 July 1989, the defendant went to Daisy Miller's house. He went into the bedroom where she was resting and began to "fuss" at her about her relationship with Ford. When Mrs. Miller received a telephone call from Ford, the defendant left.

Julius Tyrone Miller, the defendant's son, testified that during the summer of 1989, he was living with the defendant. Tyrone knew the victim, Larry Ford, because Ford was dating his mother, Daisy Miller. Tyrone went to Ford's house on 8 July 1989 to help Ford wash his car. When Tyrone arrived, Ford was waxing the car. Tyrone saw the defendant arrive at the house, argue with Ford and accuse Ford of ruining his family. The defendant then left in his truck, saying that he would return.

Tyrone further testified that five or ten minutes after leaving Ford's home, the defendant returned. Tyrone approached the defendant and saw a gun on the seat of his truck. Tyrone ran to Ford and advised him to go inside the house, but Ford refused. Tyrone then saw his brother Jason run from behind the defendant's truck. At this point, the defendant and Ford were arguing again. The defendant raised his gun twice, but Jason "hit" it away. The second time Jason did this, the defendant pushed him out of the way. Tyrone testified that he was standing on the other side of Ford when the defendant raised the gun again. Tyrone turned his head away so that the defendant would not shoot him, at which time Ford fell to the pavement. Jason then struggled with the defendant for the gun, while Tyrone broke into Ford's house to use the telephone. Tyrone called his mother and told her that the defendant had shot Ford. He then stopped his cousin on the street, and they transported Ford to the hospital.

The State questioned Tyrone at trial about a pre-trial statement he had made to Officer Roger Maxwell on 8 July 1989. Tyrone

testified that the officer wrote down what Tyrone told him, after which Tyrone looked it over. Tyrone told Maxwell that he had seen the defendant step back, aim the gun and then fire it at Ford. Tyrone testified that he told the prosecutor just before trial that the information he had given Officer Maxwell had been true, but then stated that it was not "what [he was] telling the jury." Tyrone testified that he could not remember the prosecutor asking him what the defendant had done after Ford was shot. He also testified that he "did not see [the defendant] when he cocked the rifle" and that the defendant did not cock the rifle. Tyrone further denied ever telling the prosecutor or Officer Maxwell that the defendant had cocked the rifle.

Jason Miller, the defendant's other son, testified that on 8 July 1989, he saw the defendant's truck pull up to Ford's house. He walked up the street toward the house and heard the defendant and Ford arguing about Daisy Miller. Jason testified that the defendant had a gun in his hand, but he was pointing it down. The defendant stood in the street close to Ford who was unarmed. Then the defendant raised the gun barrel and pointed it at Ford "like a finger." Jason pushed the gun barrel down several times. Jason testified that he did not know how the gun went off because he was "so scared." After the gun was fired, Jason immediately jerked it out of the defendant's hands and led him to his truck.

Upon further questioning by the State, Jason testified that he too had given a pre-trial statement to Officer Maxwell. He testified, however, that he did not know what he was saying when he gave that statement because he was "so scared." After the prosecutor showed Jason his statement, Jason admitted that, contrary to his trial testimony, he had told Officer Maxwell that he knew how the gun had fired; the defendant had held the gun down at his side, taken a couple of steps back, raised the gun, pointed it at Ford and pulled the trigger. Jason denied that he had ever told Officer Maxwell that, after the defendant shot Ford, the defendant cocked the gun and pointed it at Ford who had fallen to the ground. Jason admitted that he remembered going over his statement to Officer Maxwell with the prosecutor just before trial, but said that he could not remember any details of that meeting.

Juliette Surratt testified that the defendant was her uncle. On the afternoon of 8 July 1989, she was mowing the grass at Ford's house while Ford waxed his car. She saw the defendant

approach Ford and begin to argue with him. She testified that the defendant had a gun, but he did not point the barrel at Ford.

Officer Roger Maxwell of the Rutherfordton Police Department testified that on 8 July 1989 he arrived at the residence of Larry Ford at approximately 3:35 p.m., but no one was there. He found a .22 caliber Winchester rifle in the yard. He identified the rifle at trial. Officer Maxwell testified that a lever on the rifle was used to load the firing chamber prior to firing. After a round was fired, it was necessary to operate the lever again to eject the spent shell casing and load another round for firing. Officer Maxwell also testified that he found two spent .22 caliber shell casings in the street in front of the victim's home and one on the edge of the street.

Officer Maxwell testified that he had interviewed Tyrone and Jason Miller during the evening of 8 July 1989. He wrote down their respective accounts of the events they had witnessed. Maxwell then read the statements back to them aloud. He then instructed the boys to read the statements and initial and sign them only if they found them to be true. Over the defendant's objection, Officer Maxwell read the statements of Tyrone and Jason Miller to the jury.

Dr. Richard Landau was accepted and testified as an expert in the field of pathology. He testified that he had done an autopsy examination of the body of the victim Ford. Dr. Landau concluded that Ford's death was due to a gunshot wound to the head causing massive brain destruction.

Special Agent Eugene Bishop of the State Bureau of Investigation Crime Laboratory was accepted and testified as an expert in the field of firearms examination and identification. His opinion was that the bullet that killed the victim and two of the fired shell casings found at the crime scene all had been fired by the .22 caliber Winchester rifle Officer Maxwell had found there.

[1] By his first assignment of error, the defendant contends that the trial court erred in admitting the unsworn, out-of-court statements of Tyrone and Jason Miller as substantive evidence under Rule 804 of the North Carolina Rules of Evidence. The defendant argues that the trial court erred in admitting those statements under Rule 804, because the two witnesses had already testified and were never "unavailable" as witnesses within the meaning of that rule.

Rule 804(b)(5) encompasses one of the residual or "catch-all" exceptions to the hearsay rule. Rule 804(b)(5)—unlike Rule 803(24), which was not relied upon by the trial court or raised by the State—requires that the declarant be "unavailable" for a hearsay statement to be admitted. Rule 804(a) defines "unavailability as a witness" to include situations in which the declarant:

> (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
>
> (3) Testifies to a lack of memory of the subject matter of his statement; or
>
> (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.
>
> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

N.C.G.S. § 8C-1, Rule 804(a).

The trial court conducted voir dire examinations of both Tyrone and Jason Miller to determine whether they were "unavailable" under Rule 804(a). Both witnesses testified they remembered the incident in question. They testified that they remembered most of what they saw and had not had a complete failure of memory about the events. Under questioning by the prosecutor, both witnesses admitted, however, that they did not remember every single detail of the incident. Based on this testimony, the trial court ruled that the witnesses were "unavailable" and admitted their out-of-court statements to Officer Maxwell as substantive evidence under Rule 804(b)(5).

The facts sufficient to sustain a finding that a witness is "unavailable" within the meaning of Rule 804 will vary from case to case. *State v. Triplett*, 316 N.C. 1, 8, 340 S.E. 2d 736, 740 (1986). "If the witness is available to testify at trial, the 'necessity' of admitting his or her statements through the testimony of a 'hearsay' witness very often is greatly diminished if not obviated altogether." *State v. Fearing*, 315 N.C. 167, 171-72, 337 S.E. 2d 551, 554 (1985). *See State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985).

In the present case the witnesses were available to testify and, indeed, had already testified concerning the subject matter of the hearsay statements. In a similar case decided under the Federal Rules of Evidence, the United States Court of Appeals for the Fifth Circuit stated:

> The plaintiffs' second argument is that [the witness] was "partially unavailable" and that the [hearsay] testimony was therefore admissible under Federal Rule of Evidence 804(a)(3) because, although he testified at trial, he stated that "the specific dialogue of this conversation has faded with the years." . . . [The witness] did, however, remember the general subject matter discussed, and his lack of memory of the details is not sufficient to make the [hearsay] testimony admissible.

North Mississippi Communications, Inc. v. Jones, 792 F.2d 1330, 1336 (5th Cir. 1986). Although not binding precedent, we find that Court's reasoning persuasive in the present case.

Neither the fact that Tyrone and Jason Miller failed to remember every detail of the killing, nor the fact that they disagreed with Officer Maxwell's account of their out-of-court statements, was sufficient to render them "unavailable" as witnesses for the purposes of Rule 804(a). It was error to admit their hearsay statements as substantive evidence under that rule.

[2] The State argues on appeal that, at worst, the trial court admitted the statements under the wrong rule. *State v. McElrath*, 322 N.C. 1, 17, 366 S.E. 2d 442, 452 (1988). Specifically, the State contends that the statements were admissible for impeachment purposes under Rule 607. Rule 607 provides that: "The credibility of a witness may be attacked by any party, including the party calling him." N.C.G.S. § 8C-1, Rule 607. This Court has recognized that where the party calling a witness is genuinely surprised by the witness' change of his or her version of facts, impeachment

by prior inconsistent statements is proper. *State v. Hunt*, 324 N.C. 343, 350, 378 S.E. 2d 754, 758 (1989). However, it is well settled that in such situations the prior inconsistent statements may only be used to impeach the witness' credibility; they may not be admitted as substantive evidence. *State v. Hunt*, 324 N.C. at 350, 378 S.E. 2d at 758; *State v. Grady*, 73 N.C. App. 452, 456, 326 S.E. 2d 126, 129 (1985); 1 Brandis on North Carolina Evidence § 46 (1988).

In the present case, the defendant properly requested an instruction by the trial court that the pre-trial statements of the defendant's sons could be considered only for the purpose of impeaching their trial testimony. Thus, even if the evidence in question was admissible under Rule 607 for impeachment purposes, the trial court's failure to give the requested instruction resulted in the evidence being improperly considered by the jury as substantive evidence without any limitation; this constituted error.

[3] We must consider, then, whether the trial court's erroneous admission of the out-of-court statements of Tyrone and Jason Miller without any limiting instructions was prejudicial to the defendant. The defendant contends that his Sixth Amendment right of confrontation was denied by the admission of those statements. However, "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *California v. Green*, 399 U.S. 149, 158, 26 L. Ed. 2d 489, 497 (1970). In the present case, both declarants in question testified at trial and were in fact cross-examined by the defendant. Thus, no constitutional error occurred.

Since the trial court's error in admitting the out-of-court statements of Tyrone and Jason did not arise under the Constitution of the United States, we apply the standard of review prescribed by N.C.G.S. § 15A-1443(a). Under this standard, errors are prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (1988).

[4] In the present case, we are forced to conclude that the trial court's error in admitting the out-of-court statements as substantive evidence under Rule 804 was prejudicial. The pre-trial statements by the defendant's sons provided evidence of important facts, not supported by other direct evidence at trial, regarding premedita-

tion and deliberation. The pre-trial statements of both boys contained accounts of how the defendant pointed the gun at the victim repeatedly during their argument, stating "I ought to kill you." The statements also contained damaging accounts of how the defendant stepped back from the victim, pointed the gun at him and pulled the trigger. The pre-trial statements provided the only purported eyewitness accounts of such acts and statements by the defendant and added strong evidence tending to show a premeditated and deliberate murder. Thus, we are compelled to conclude that there is a "reasonable possibility" a different result would have been reached at trial had this error not occurred.

We conclude that the admission of the out-of-court statements under Rule 804(b)(5) as substantive evidence was prejudicial error which entitles the defendant to a new trial.

New trial.

Justice WHICHARD dissenting.

While I agree that it was error to admit the prior inconsistent statements as substantive evidence under Rule 804, I do not agree that their admission was harmful to defendant. Had the statements not been admitted, there is no reasonable possibility of a different outcome. N.C.G.S. § 15A-1443(a) (1988). The jury, which was instructed properly as to the only defense, that of accident, was equally likely to reject that defense with or without the inadmissible evidence.

The only evidence placed before the jury through the improperly admitted statements which would not otherwise have been before it is the following: the portion in which Tyrone reports that defendant said, "I ought to kill you," while he pointed the gun at Ford; the portions in which both boys described how defendant pushed Jason out of the way, took one step back, aimed the gun at Ford, and shot him in the head; and the portions in which both boys recounted that defendant then cocked the rifle again and pointed it toward the felled victim. To determine the harmfulness of this evidence, it must be considered in the context of the properly admitted, inculpatory evidence that supports the verdict. That evidence was as follows:

Daisy Miller, defendant's estranged wife, testified that shortly before the shooting, during an argument about her dating the vic-

tim, defendant told her, "You think you're going to be with him, but you're not."

Tyrone Miller, defendant's son, testified that after defendant accused Ford of ruining his family and taking his sons, and before he left in his truck, threatening to return as he left, defendant said to Tyrone, "I'm going to kill him [Ford]." Tyrone then testified that defendant returned, that Tyrone saw a gun in the truck, that defendant pulled the gun while asking Ford why he was ruining his family, and that defendant raised the gun again and *pushed Jason away when Jason hit at the gun.* Finally, Tyrone testified that when he called his mother after the shooting, he told her, "Dad shot Bogey [Ford]." All of this testimony was elicited properly without reference to Tyrone's pretrial statement.

When Tyrone stopped short of recounting how defendant aimed the gun, the State confronted him with the statement he made to the police the evening of the shooting. Though Tyrone denied saying certain things to the prosecutor, he admitted that he signed the statement as a true and accurate version of what he told the police and that he recently had reviewed the statement with the prosecutor. It was at this point that the erroneous (for substantive purposes) admission of the prior inconsistent statement occurred.

The State also properly elicited damaging testimony from Jason Miller, defendant's other son, before introducing his pretrial statement. Jason testified that he heard defendant arguing with the victim about Daisy and the family, that he saw a gun in defendant's hand, and that defendant pointed the gun like a finger at Ford. Jason also admitted reviewing his statement right before the trial.

Two other witnesses for the State testified that they saw defendant get out of the truck with a gun. One admitted she saw Jason and defendant struggling over the gun after the victim had been shot.

Officer Maxwell explained to the jury that to fire the gun in question, it first has to be cocked. Through Maxwell, the State also properly introduced defendant's statement, given on the night of the shooting, that he normally did not carry his rifle in his truck, and his spontaneous statement, "I did what I done, they can put me in the gas chamber or in the electric chair, but I'd do it again."

Considering the weight and consistency of the various witnesses' testimony, the evidence that the rifle could not have been fired without first being cocked, and defendant's own incriminating statements, I would hold that defendant has failed to meet his burden of showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C.G.S. § 15A-1443(a) (1988). Premeditation and deliberation are not ordinarily susceptible to proof by direct evidence and, therefore, must usually be proved by circumstantial evidence. *State v. Hamlet*, 312 N.C. 162, 170, 321 S.E.2d 837, 843 (1984). Given the ample circumstantial evidence leading almost inexorably to a conclusion that the killing was premeditated and deliberated, and given that the jury was properly instructed on the only defense—that of accident—and rejected it, I cannot agree that there is a reasonable possibility the jury would have reached a different verdict if it had not heard the statements of Tyrone and Jason.

Therefore, I respectfully dissent from the holding awarding a new trial.

Justice MEYER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. ELTON OZELL McLAUGHLIN

No. 637A84

(Filed 3 October 1991)

1. **Criminal Law § 1352 (NCI4th)— McKoy error—jury's negative answers to mitigating circumstances—unanimity not shown**

The fact that the jury in a capital sentencing proceeding was not instructed that failure to agree on a mitigating circumstance did not mean that the circumstance did not exist, when coupled with the court's instruction that the jury did not have to answer every issue but could leave any of them blank, did not show that the jury was unanimous in the two mitigating circumstances to which it answered "no" so as to render harmless *McKoy* error requiring unanimity on mitigating circumstances.

Am Jur 2d, Criminal Law § 600; Trial § 1113.

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

2. Criminal Law § 1361 (NCI4th)— capital case—impaired capacity mitigating circumstance—sufficiency of evidence

There was sufficient evidence for one or more jurors in a capital sentencing proceeding to find the mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired where there was evidence that defendant had an I.Q. of only 72, and that he had ingested marijuana, wine, beer and "two hits of acid" on the day he killed the victim.

Am Jur 2d, Criminal Law §§ 598, 599.

3. Criminal Law § 1356 (NCI4th)— mitigating circumstance—good character and reputation—sufficiency of evidence—McKoy error not harmless

There was sufficient evidence for one or more jurors in a capital sentencing proceeding to find the mitigating circumstance that defendant had a good character and reputation in the community where several witnesses testified to defendant's good character and reputation and related anecdotes of his acts of kindness and consideration for others. *McKoy* error with respect to this circumstance was not rendered harmless by contrary evidence of defendant's bad character, the jury's finding that defendant was a triple murderer, and the jury's findings as aggravating circumstances that defendant had previously been convicted of a felony involving violence to the person and that the murder in this case was a contract killing for pecuniary gain, since it cannot be said beyond a reasonable doubt that at least one of the jurors would not have found and given weight to this mitigating circumstance had the jury been properly instructed.

Am Jur 2d, Criminal Law §§ 598-600; Trial § 1113.

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

Justice MEYER dissenting.

Justices MITCHELL and WHICHARD join in this dissenting opinion.

ON remand by the United States Supreme Court, 494 U.S. ---, 108 L.Ed.2d 601 (1990), for further consideration in light of *McKoy v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 369 (1990). Heard on remand in the Supreme Court 11 April 1991.

Defendant was convicted of the first degree murders of James Elwell Worley, Shelia Denise Worley, and Psoma Wine Baggett. He was sentenced to life imprisonment for two of the murders and sentenced to death for the murder of James Worley. This Court found no error in the convictions and affirmed the sentences imposed. *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988).

Subsequently, the United States Supreme Court 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. ---, 108 L.Ed.2d 369. *McLaughlin v. North Carolina*, 494 U.S. ---, 108 L.Ed.2d 601. On 3 October 1990, this Court ordered the parties to file supplemental briefs addressing the *McKoy* issue.

The State's evidence showed that the defendant and Eddie Carson Robinson murdered James Elwell Worley in a contract killing for which Mr. Worley's wife was to pay them. Approximately one month later, they killed Mr. Worley's widow and her daughter to keep Mrs. Worley from talking to law enforcement officers.

The court submitted two aggravating circumstances to the jury which were whether the defendant had previously been convicted of a felony involving the use of violence to the person and whether the murder was committed for pecuniary gain. The jury answered in the affirmative as to both issues. Six mitigating circumstances were submitted to the jury. The jury answered in the affirmative to three of them which were that the defendant aided in the apprehension of another capital felon, that the defendant was of low mentality with an I.Q. of 72, and that the defendant had been employed for fourteen years and was a good worker. The jury answered "no" to the mitigating circumstance that 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 and answered "none" as to whether there were any other circumstances of mitigating value. The jury did not answer as to a mitigating circumstance that the defendant was a person of good character and reputation in the community.

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.

WEBB, Justice.

[1] The State concedes the jury charge in this case is in error under *McKoy* but it argues such error is harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). It says this is so because although the jury was instructed that it must be unanimous in order to find a mitigating circumstance, it was not instructed that failure to agree on a mitigating circumstance did not mean the circumstance did not exist. This, says the State, coupled with the fact that the court also instructed the jury that it did not have to answer every issue but could leave any of them blank, makes it apparent that the jury was unanimous in the two mitigating circumstances to which it answered "no."

This argument by the State is too speculative to convince us the jury was unanimous in answering no and none to the two mitigating circumstances. The jury was told it would have to be unanimous to answer affirmatively the issues as to mitigating circumstances and it could consider only those mitigating circumstances that it found unanimously. We presume the jury followed the instructions of the court. If it did, one or more of the jurors could have been convinced that a mitigating circumstance existed but did not consider it pursuant to the instructions of the court.

[2] In further argument that the error was harmless in this case, the State contends there was not sufficient evidence for the jury to find the 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. The State says the only evidence was the low I.Q. of the defendant and the use of drugs by the defendant shortly before the killing. The evidence showed that in addition to having a low I.Q., the defendant, on the day he killed Mr. Worley, had ingested marijuana, wine, beer and "two hits of acid." This evidence would support the finding of this mitigating circumstance. The jury could have found that a person who had ingested this quantity of drugs and alcohol had his judgment impaired and such impairment had affected his ability

to appreciate the criminality of his conduct. *State v. Sanderson*, 327 N.C. 397, 394 S.E.2d 803 (1990).

[3] The State concedes that there was some evidence to support a finding that the defendant had a good reputation in the community. It says the instruction in regard to this proffered mitigating circumstance was harmless. The State asks us to consider the aggravating circumstances found in comparison with this mitigating circumstance. It says the defendant in this case had been found by the jury to be a triple murderer. The jury found as one aggravating circumstance that the defendant had previously been convicted of a felony involving violence to the person. This was based on a crime in which the defendant killed a man and stole his automobile. The other aggravating circumstance found by the jury was that the murder in this case was for a pecuniary gain. This circumstance was based on the commission of a contract killing.

The State says that we can safely assume that testimony that the defendant's character and reputation was good would not offset the two substantial aggravating circumstances that were found. This is particularly so, says the State, when we consider other evidence of the defendant's character. The evidence was that the defendant when he was younger had shot his father while trying to shoot someone else, that he had left his daughter with his mother to raise and that he was having an affair with a married woman while still possessing a live-in girlfriend. The State says that this evidence as to the defendant's character and reputation kept the jury from giving any weight to testimony that the defendant's character and reputation were good.

There was certainly evidence that the defendant did not have a good character and reputation. There was evidence contra, however. Several witnesses testified to the defendant's good character and reputation and related anecdotes of his acts of kindness and consideration for others. The fact that the jury did not answer the issue as to this mitigating circumstance is some indication that the jury was divided with some wanting to answer in the affirmative. We cannot say that we are satisfied beyond a reasonable doubt that at least one of the jurors would not have used this mitigating circumstance to recommend life in prison if the jury had been properly instructed. *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990).

The State also argues that there was no evidence to support a finding of the "catch all" mitigating circumstance of any other circumstance of mitigating value. The defendant does not point us to any such evidence. Because we hold that error in regard to the other two mitigating circumstances requires a new sentencing proceeding, we do not discuss this mitigating circumstance. It may be submitted at a new sentencing proceeding if the evidence supports it.

For the reasons stated in this opinion, there must be a new sentencing proceeding.

Death sentence vacated; remanded for new sentencing proceeding.

Justice MEYER dissenting.

Defendant in this case is a triple murderer. He and Eddie Robinson murdered James Worley in a contract killing at the behest of Mrs. Worley and burned James Worley's body to conceal the crime. One month later, defendant killed Mrs. Worley to keep her from informing the police of the contract killing and also killed Mrs. Worley's four-year-old daughter. Mrs. Worley and the child were beaten and drowned. Defendant received the death penalty for the contract killing of Mr. Worley and life sentences for the murders of Mrs. Worley and the child. The State concedes that *McKoy* error is present in this case but contends that the error was harmless. I agree and therefore dissent from the majority opinion.

Because we are concerned with whether a *reasonable* juror might have found certain circumstances to have been mitigating in the absence of the erroneous *McKoy* instructions, it is appropriate to review the details of defendant's crime. The following summary is taken from our earlier opinion in this case:

> These three cases arise from a contract murder which spawned two further murders committed in an effort to eliminate witnesses and evade justice.
>
> James Elwell Worley was killed on 26 March 1984. Little more than a month later, on 29 April 1984, his wife, Shelia Denise Worley, and her daughter, Psoma Wine Baggett, were killed. The State's evidence tended to show the following events.

Sometime before 26 March 1984 defendant approached an acquaintance, Eddie Carson Robinson (who testified for the State at defendant's trial), about an offer defendant had received from Shelia Denise Worley to "take care of her husband" for between $3,000 and $5,000. Defendant offered to split the money with Robinson if Robinson would help him by driving a car. Robinson agreed to the scheme.

According to Robinson, the men were obliged to abandon their first attempt on James Worley's life, but two nights later, equipped with a .22-caliber rifle, a piece of pipe and a container of gasoline, they returned in defendant's car to Worley's house and parked on the dirt road. As the men approached Worley's house on foot, Robinson carried the rifle and defendant carried the pipe. They entered the house by the back door, went into a hallway and saw James Worley asleep in a bedroom. Defendant took the rifle from Robinson and in the presence of Worley's wife, Denise, shot Worley twice in the left chest from a distance of between two and three feet, killing him.

With Denise Worley's help, defendant and Robinson dressed Worley's corpse and placed it on the passenger seat of Worley's Volkswagen. With Robinson following in the Volkswagen, defendant drove away from the house in his own car. Eventually, both cars stopped on the side of the road. Robinson then poured the container of gasoline into the Volkswagen and onto Worley, and ignited it. At approximately 2:00 a.m. on 26 March 1984 the still burning Volkswagen was discovered. Although Worley's body was badly burned all over, it showed greater charring on the left side. Dr. Deborah L. Radische, a pathologist from the Office of the Chief Medical Examiner, testified that James Worley died from the gunshot wounds to his chest.

According to Robinson, after James Worley's death, defendant and Robinson were in contact, but the latter received no money for his part in the killing. The two men discussed the situation and the fact that, according to defendant, Denise Worley had been talking to the police. By Robinson's account, defendant was afraid that, because Denise Worley was a witness to the killing, she could put both men in the penitentiary.

On the afternoon of 29 April 1984, defendant and Robinson decided to kill Denise Worley that night. The men spent the

afternoon at defendant's trailer, smoking marijuana and drinking a little wine. Denise Worley visited the trailer, had a discussion with defendant and left. She returned that night, with her two children, four-year-old Psoma Wine Baggett and an infant. When Denise Worley arrived, Robinson was in the back bedroom, but he moved to the bathroom on defendant's instructions, where he picked up the iron pipe which defendant had instructed him to use in the killing. After defendant had turned off the lights and was holding Denise Worley in a romantic pose, Robinson crept out of the bathroom and twice hit her over the head with the pipe. According to Robinson, Denise Worley fell backwards into the hallway, whereupon defendant straddled her, grabbed her by the throat and dragged her to the bathroom. Defendant placed Denise Worley into the half-filled bathtub and held her head under water until she stopped struggling. The men then cleaned up the blood from the bathroom and hallway floors, removed Worley's body from the bathtub and placed it in the trunk of her car. They returned to the house to get the two children who were asleep and put them into Worley's car.

With Robinson driving Denise Worley's car and defendant driving his own, the two men drove to a field not far from a bridge at a place called White's Creek. As they opened the trunk of Worley's car, the four-year-old, Psoma Wine Baggett, awoke and got out of the car. Defendant told Robinson that they would have to get rid of the child because she could testify against them. When Psoma walked to the back of the car asking for her mother, defendant struck her twice with the iron pipe. Defendant then removed Denise Worley from the trunk of the car and put her in the passenger side. Psoma was put on the floor on the passenger side. As the child lay there, defendant gave the pipe to Robinson and told him to hit her. Robinson did so. Defendant drove his own car and Robinson drove Worley's car to the bridge. Robinson got out of Worley's car and let it roll down the embankment into the creek. Defendant then pulled Denise Worley halfway out of the car so that her head and torso were in the water. He threw Psoma several feet from the car into the water. As the men left the creek, Robinson could hear a crying sound. The infant was left in the car physically unharmed.

> Dr. John Butts, forensic pathologist and then-Associate Chief Medical Examiner for North Carolina, who performed the autopsy on Denise Worley, testified that in his opinion, Denise Worley had died as a result of drowning as well as trauma to the head, but that she was still alive when she entered the water. Dr. Deborah L. Radische testified that in her opinion, Psoma Wine Baggett died from the trauma to her head as well as drowning and, like her mother, she was still alive when she entered the water.
>
> . . . .
>
> The jury found defendant guilty of first-degree murder in all three cases. At the sentencing phase of the trial, defendant stipulated that he had previously been convicted of involuntary manslaughter and that the act involved the use of violence. Defendant then put on further evidence of his good character and reputation in the community, as well as his reputation for honesty. The State presented rebuttal evidence of defendant's bad reputation.

State v. McLaughlin, 323 N.C. 68, 77-79, 109, 372 S.E.2d 49, 57-58, 59 (1988).

We are here concerned only with the two mitigating circumstances that the jury failed to find, i.e., that defendant's capacity to appreciate the criminality of his acts or to conform his conduct to the requirements of law was impaired, and that defendant had been a person of good character and reputation in the community. Unlike the majority, I conclude that, upon the evidence presented, no reasonable juror would have found either of these circumstances to exist.

The evidence to support these two circumstances was, to say the least, sparse.

While defendant had already received the benefit of his low IQ in another mitigating circumstance found by the jury, that same evidence might, under proper circumstances, contribute to a finding that defendant's capacity to appreciate the criminality of his acts or to conform his conduct to the requirements of the law was impaired. Here, however, defendant's low IQ was never linked by any testimony to any impairment of his ability to appreciate the criminality of his acts or to conform his conduct to the law. The only other evidence that would have supported the circumstance

was the evidence of defendant's drinking and use of drugs. Despite defendant's testimony concerning his ingestion of marijuana, wine, beer, and two "hits" of acid on the day that Mr. Worley was murdered, neither McLaughlin nor any other witness testified that he was drunk, high, or impaired in any way. Further, the evidence belies any such notion. Defendant drove his vehicle all over the county without any problem, washed his car, fixed a meal, went to various hangouts and talked to people, including his codefendant, Eddie Robinson, with no problem whatever. He testified to performing a series of activities that would have been virtually impossible if he had been high on alcohol or drugs. At no time during the trial did defendant claim that the killing was in any way influenced by his alleged use of drugs. Because of the failure to link his ingestion of drugs and alcohol to any impairment, I question whether the circumstance should have been submitted at all. The Worley murder was preplanned and was carried out with great precision. Defendant and his accomplice, Robinson, had even made a trial run the night before the killing took place. I conclude that no reasonable juror would have found, upon the evidence presented, that defendant was unable to appreciate the criminality of his acts or to conform his conduct to the law.

With regard to the second mitigating circumstance that the jury failed to find, i.e., that defendant had a good character and reputation in the community, no *reasonable* juror could have found this circumstance to exist. Defendant in this case is a triple murderer. By defendant's own admission, he was previously convicted of a felony involving violence to the person. He agreed to and did kill one person for the pecuniary gain of $3,000 to $5,000 and executed Mrs. Worley and an innocent child to conceal his crime. It was only by the grace of God that Mrs. Worley's second child escaped death. His violent, criminal exploits in the instant case almost defy belief. Not sobered by the gruesomeness of his initial contract killing, wherein he first shot and killed Mr. Worley and later poured gas on and burned his body, defendant calculated a heinous plan to prevent law enforcement authorities from discovering his initial murder. Beguiling Mrs. Worley with romance, defendant allowed his coconspirator to bludgeon Mrs. Worley with a lead pipe. Defendant then dragged his victim by the throat to the bathtub, where he held her under water until she stopped struggling. Defendant, in order to avoid apprehension by the police, then determined that Mrs. Worley's defenseless four-year-old child needed to be executed.

Thereafter, while the child was innocently inquiring after its mother, defendant struck the child two times with the same lead pipe. Gruesomely, the bodies were laid side-by-side in the backseat of the car accomplice Robinson was driving. Still undeterred, and apparently hoping to make their horrible crimes appear as accidents, defendant and his accomplice sent the car containing the near-lifeless bodies careening down an embankment into the creek. When the car stopped partially in the water, defendant arranged Mrs. Worley's body in such a way that her head and torso were in the water. Defendant then threw the child, still alive, into the creek, where she drowned. The bodies were then left in the creek water to be discovered by authorities. It stretches credulity to believe that any *reasonable* juror would have found defendant to be a person of good character and reputation. Even if found to exist, no *reasonable* juror would ascribe to it any mitigating value under the facts of this case.

The aggravating circumstances relied upon for the imposition of the death penalty were amply supported by the evidence, the sentence was not imposed under the influence of any passion or prejudice or any other arbitrary factor, and it is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1988). I vote to affirm the sentence of death.

Justices MITCHELL and WHICHARD join in this dissenting opinion.

ELLEN TOMLINSON v. CAMEL CITY MOTORS, INC., JAMES ALBERT (BABE) JOHNSON, JR., BARCLAYS AMERICAN/FINANCIAL, INC., AND LAWYERS SURETY CORPORATION

No. 93PA91

(Filed 3 October 1991)

1. Automobiles and Other Vehicles § 161 (NCI4th)— dealer's fraudulent inducement of purchaser—trebled damages—amount of surety's liability

An automobile dealer's fraudulent inducement of plaintiff to purchase an automobile by falsely promising her that it would make the remaining installment payments on her trade-

in vehicle constituted a violation of N.C.G.S. § 20-294(4). Where plaintiff obtained a default judgment against the dealer for $3,459.72 for an unfair or deceptive act or practice under N.C.G.S. § 75-1.1 based on this fraudulent inducement, such amount was trebled under N.C.G.S. § 75-16, and plaintiff did not allege further actual damages that would transform the trebled portion of the award from a punitive to a compensatory award, the loss "suffered" by plaintiff within the meaning of N.C.G.S. § 20-288(e) was the total amount of the unpaid payments, $3,459.72, and the surety on the dealer's bond was thus liable under the statute only for that amount and was not liable for the trebled portion of the damages.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

2. Automobiles and Other Vehicles § 161 (NCI4th)— surety on dealer's bond—when liable for treble damages

The surety on an automobile dealer's bond may be liable to an injured consumer for treble damages where the consumer has lost a great deal more than the initial damages by spending extra money and time to gain a modicum of satisfaction, and the trebled portion of the award is seen as compensating the consumer for those losses rather than as punitive in nature. In that instance, the consumer would have "suffered" more than the initial damages within the meaning of N.C.G.S. § 20-288(e).

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

Justice WEBB concurring.

Justice MEYER joins in this concurring opinion.

Justice FRYE dissenting in part.

ON defendant Lawyers Surety Corporation's petition for discretionary review of a decision of the Court of Appeals, 101 N.C. App. 419, 399 S.E.2d 147 (1991), which affirmed the judgment of *Reingold, J.* (and denied plaintiff's motion as to sanctions), at the 7 February 1990 session of District Court, FORSYTH County. Heard in the Supreme Court on 12 September 1991.

Legal Aid Society of Northwest N.C., Inc., by Hazel M. Mack, for plaintiff-appellee.

Moore & Van Allen, by E.K. Powe and William E. Freeman, for defendant Lawyers Surety Corporation.

MARTIN, Justice.

This action was filed on 29 January 1988 by the plaintiff-appellant for actual damages, consequential damages, special damages, treble damages for unfair or deceptive acts or practices under N.C.G.S. § 75-1.1, and reasonable attorney fees. The defendant surety answered; however, the defendant car dealership failed to answer the complaint. Default judgment was entered on 23 October 1989 against the car dealership. The trial court awarded the plaintiff $3,459.72 in damages pursuant to N.C.G.S. § 75-1.1 which was trebled pursuant to N.C.G.S. § 75-16. The court also awarded the plaintiff $2,563.00 in attorney fees under N.C.G.S. § 75-16.1. To collect the award, the plaintiff moved for summary judgment against the dealer's surety for the $10,379.16 award. On 7 December 1989, the trial judge granted plaintiff's motion for summary judgment against the defendant surety for treble damages and attorney fees. The Court of Appeals affirmed. We affirm in part and reverse in part.

Plaintiff Tomlinson went to Camel City Motors to trade in her car for another vehicle. As part of the sale, Camel City Motors agreed to assume the payments on the car which the plaintiff was trading in. However, Camel City Motors failed to make such payments. Plaintiff filed suit against Camel City Motors and its surety, the defendant in the present appeal. The original complaint included a claim for unfair or deceptive acts or practices pursuant to N.C.G.S. § 75-1.1. The plaintiff moved for summary judgment against the surety to collect on the $15,000 bond posted by the defendant surety which is required by N.C.G.S. § 20-288(e). The statute states in part that both the motor vehicle dealer and its surety will be liable to any consumer who suffers a loss or damages by any act of the motor vehicle dealer that violates either article 12 or article 15 of chapter 20 of the General Statutes of North Carolina.

The plaintiff contends that because the surety did not appeal from the underlying judgment against the dealer, the surety should pay the entire award. The plaintiff further contends that the appeal of the judgment against the surety is a collateral attack on the

underlying judgment against the principal. We disagree. The principal suffered a default judgment for its failure to file a responsive pleading; the surety answered the complaint and was not in default. The surety concedes that the judgment must be paid and does not question the outcome of the underlying action. The surety contends, however, that it should not be required to pay the entire amount of the judgment. At the time that the default judgment was entered against its principal, the surety could raise only defenses concerning the substance of the claims. The defense of limitation of liability of the surety, provided for in N.C.G.S. § 20-288, was not relevant to the principal or the underlying action. The surety is entitled thereafter to assert N.C.G.S. § 20-288 in its own defense to plaintiff's claim.

Section 20-288(e) requires a motor vehicle dealer to post a bond in the principal sum of $15,000. The statute gives no further limitations. Section 20-288(e) provides that:

> Any purchaser of a motor vehicle who shall have *suffered* any loss or damage by any act of a motor vehicle dealer that constitutes a violation of this Article [Article 12] or Article 15 shall have the right to institute an action to recover against such motor vehicle dealer and the surety.

N.C.G.S. § 20-288(e) (1985) (emphasis added). The two hurdles that need to be overcome within this statute are 1) the dealer's violation of either article 12 or article 15 of chapter 20 of the General Statutes of North Carolina and 2) the suffering of damages or losses by the consumer.

The practice of fraud by an automobile dealer upon a purchaser is a violation of article 12. In *Triplett v. James*, 45 N.C. App. 96, 262 S.E.2d 374, *cert. denied*, 300 N.C. 202, 269 S.E.2d 621 (1980), the Court of Appeals ruled that N.C.G.S. § 20-294, which sets out the grounds for revocation or suspension of a dealer's license, does not enlarge the coverage of N.C.G.S. § 20-288(e) to parties other than a purchaser. 45 N.C. App. at 99, 262 S.E.2d at 376. Section 20-294(4) states that a license may be revoked "for willfully defrauding any retail buyer, to the buyer's damage, or any other person in the conduct of the licensee's business."

[1] Although a dealer may lose his license for defrauding any person in the conduct of his business, "the bond required by G.S. 20-288(e) is a source of indemnity to purchasers only." *NCNB v.*

Western Surety Co., 88 N.C. App. 705, 364 S.E.2d 675 (1988). To receive or retain a dealership license, the dealer must continually meet the requirements within N.C.G.S. § 20-294 including the requirement that the dealer not defraud consumers as specified in subsection (4). Otherwise, the dealer is in violation of article 12, chapter 20. Here, the dealer induced plaintiff to purchase a car and defrauded the purchaser by telling her that the dealer would make the remaining installment payments on the old car if the purchaser would trade it in with the dealer for another car, and these promised payments were not made. This fraudulent inducement by the dealer violated N.C.G.S. § 20-294(4).

Under N.C.G.S. § 20-288(e), the damages allowable are those that are "suffered." In the present case, the dealer did not pay the plaintiff's monthly car payments as required by their agreement. The total of the unpaid payments, $3,459.72, was the amount "suffered" by the plaintiff. She did not "suffer" further compensatory damages. We hold that under N.C.G.S. § 20-288 the surety is not liable for the trebled portion of damages. *See Darr v. Long*, 313 N.W.2d 215 (Neb. 1981).

[2] The nature of trebling under N.C.G.S. § 75-16 is to protect the consumer from unscrupulous businessmen who defraud the innocent out of money and property. The state legislature created a private cause of action with chapter 75. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981). Because the surety had no knowledge that the dealer was operating in a fraudulent manner, enforcing the exemplary and punitive damages against the surety would not produce the deterrent effect that is the purpose behind the statute. However, the purpose of this legislation was more than punitive. It was also meant to encourage private enforcement and provide a remedy for the aggrieved consumer. *Id.; Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 363 S.E.2d 643, *rev. denied*, 322 N.C. 113, 367 S.E.2d 917 (1988). In situations where the injured consumer has lost a great deal more than the initial damages by spending extra money and time to gain a modicum of satisfaction, the trebled portion of the award is seen as compensating the consumer for those losses rather than as punitive in nature. In that instance, trebling against the surety may be appropriate because the consumer would have "suffered" more than just the initial damages. Such is not the case here. The plaintiff has not alleged further actual damages that would transform the trebled portion of the award from a punitive to a compensatory award. The trebled amount

of $10,459.72 would allow the plaintiff to recover from the surety more than the damages she actually "suffered."

The plaintiff does not lose her original verdict; she still has a judgment by the trial court against Camel City Motors for $10,379.16. The surety is only liable for the actual damages of $3,459.72. The plaintiff may still go forward to collect the remaining $6,919.44 from Camel City Motors.

As to the issue of attorney fees, the surety in its brief to the Court of Appeals did not argue this question, nor was it decided by the Court of Appeals. Review by this Court of decisions of the Court of Appeals is to determine whether there is any error of law in the decision of the Court of Appeals, and the scope of review by the Supreme Court is limited to the issues properly presented for first review in the Court of Appeals. *State v. Freeman*, 308 N.C. 502, 302 S.E.2d 779 (1983); *State v. Hurst*, 304 N.C. 709, 285 S.E.2d 808 (1982); *Sales Co. v. Board of Transportation*, 292 N.C. 437, 233 S.E.2d 569 (1977). Having failed to present this issue to the Court of Appeals, the surety cannot now do so before this Court.

The cause is remanded to the Court of Appeals for further remand to the District Court, Forsyth County, for the entry of an amended judgment against the defendant, Lawyers Surety Corporation, in the amount of $3,459.72 with interest from 7 December 1989, attorney fees in the amount of $2,563.00 with interest from 7 December 1989, and the costs of the action.

The decision of the Court of Appeals is

Affirmed in part and reversed in part.

Justice WEBB concurring.

I concur with the result reached by the majority, but I believe the majority has said too much. N.C.G.S. § 20-288(e) provides in pertinent part:

> Any purchaser of a motor vehicle who shall have suffered any loss or damage by any act of a motor vehicle dealer that constitutes a violation of this Article [Article 12] or Article 15 shall have the right to institute an action to recover against such motor vehicle dealer and the surety.

The surety in this case has conceded the dealer violated Article 12 and that the surety is liable for damages under this Article. The surety does not concede it is liable for treble damages under Chapter 75 of the General Statutes and I believe the surety is right.

N.C.G.S. § 20-288(e) makes the surety liable for claims under Article 12. Article 12 does not provide for treble damages and the surety is not liable for them. In this case, the plaintiff has sued the dealer under Chapter 75 and procured a default judgment. N.C.G.S. § 20-288(e) does not make the surety liable on this claim. She should be limited in her remedy against the surety to her Article 12 claim.

I believe it is a mistake on the part of the majority to create and discuss a hypothetical case in which the majority says treble damages might be appropriate. I do not believe they would be appropriate in any Article 12 action because the statute does not provide for treble damages. More importantly, however, I do not believe we should decide something that is not before us.

Justice MEYER joins in this concurring opinion.

Justice FRYE dissenting in part.

I respectfully dissent from that part of the Court's opinion which holds the surety liable for only one-third of the judgment entered against the principal, Camel City Motors. For the reasons outlined below, I believe the surety is liable for the full damage award of $10,379.16.

It is hornbook law that a surety is one who is "primarily liable for the payment of the debt or the performance of the obligation of another." *Branch Banking & Trust Co. v. Creasy*, 301 N.C. 44, 52, 269 S.E.2d 117, 122 (1980). Having conceded it is the surety for defendant Camel City Motors, defendant Lawyers Surety Corporation (Lawyers Surety) is liable for the entire judgment unless it is somehow relieved of its duty by statute, contract or other legally enforceable limitation. The Court correctly points out that the only limitation of liability under N.C.G.S. § 20-288(e) is the $15,000 bond amount. Defendant Lawyers Surety does not argue any contract limitation.

The Court, however, recognizes a well-established public policy exception to the general rule that a surety is liable for the debts

and obligations of its principal. Many courts have held, for obvious policy reasons, that a surety is not liable for punitive, exemplary or statutory penal damages. *See, e.g., Darr v. Long*, 313 N.W.2d 215 (Neb. 1981); *Butler v. United Pacific Ins. Co.*, 509 P.2d 1184 (Or. 1973). The Court today joins these courts because "enforcing the exemplary and punitive damages against the surety would not produce the deterrent effect that is the purpose behind the statute [N.C.G.S. § 75-16]." *Tomlinson v. Camel City Motors*, 330 N.C. 76, 408 S.E.2d 853. I do not disagree. The issue in this case, however, is whether the disputed portion of the damage award, *i.e.*, $6,919.44, is an award for exemplary and punitive damages, and therefore within the public policy exception. I do not believe it is, and therefore conclude that the surety is liable for the entire judgment entered against Camel City Motors.

Punitive damages have been consistently allowed in North Carolina "on the basis of its policy to punish *intentional* wrongdoing and deter others from similar behavior." *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 113, 229 S.E.2d 297, 301 (1976) (emphasis added). The trebling statute in this case, by contrast, requires no evil intent and is only partially punitive in nature. *Marshall v. Miller*, 302 N.C. 539, 546, 276 S.E.2d 397, 402 (1981). As the Court said in *Marshall*:

> To begin with, it is an oversimplification to characterize G.S. 75-16 as punitive. The statute is partially punitive in nature in that it clearly serves as a deterrent to future violations. But it is also remedial for other reasons, among them the fact that it encourages private enforcement and the fact that it provides a remedy for aggrieved parties. It is, in effect, a hybrid.

Id. See also Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 237, 259 S.E.2d 1, 6-7, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979) ("Having multiple objectives of which some are not penal in nature, the statute cannot be deemed a penal statute . . . ."). While noting that many of our sister states require a finding of intentional wrongdoing to trigger treble damages for unfair trade practices, such damages under N.C.G.S. § 75-16 are "automatic once a violation is shown." *Marshall v. Miller*, 302 N.C. at 547, 276 S.E.2d at 402. The intent of the actor is irrelevant under N.C.G.S. § 75-16. *Id.* at 548, 276 S.E.2d at 403. To treat N.C.G.S. § 75-16 as primarily a penal statute, and therefore within the public policy

exception to general surety principles, is, I believe, inconsistent with this Court's previous holdings.

The Court seizes upon the word "suffers" in N.C.G.S. § 20-288(e), and points to *Darr v. Long*, 313 N.W.2d 215, to support its holding that the surety is not liable for treble damages in this case. A careful reading of *Darr*, however, belies this conclusion.

In *Darr*, treble damages were assessed against a car dealer for rolling back the mileage on used cars. The judgment was entered pursuant to 15 U.S.C. § 1989, which mandates treble damages for anyone who, "with *intent* to defraud, violates any requirement imposed under this subchapter . . . ." *Darr v. Long*, 313 N.W.2d at 217; 15 U.S.C. § 1989 (1982) (emphasis added). The subchapter violated in *Darr* was 15 U.S.C. § 1984, which makes it illegal for anyone to reset or alter odometers with *intent* to change the mileage. *Id.*; 15 U.S.C. § 1984 (1982). Under Neb. Rev. Stat. § 60-1419, a motor vehicle dealer is required to furnish a surety bond to indemnify any person for "any loss suffered" because of fraudulent practices. *Darr v. Long*, 313 N.W.2d at 216; Neb. Rev. Stat. § 60-1419 (Reissue 1978). After reviewing federal case law, the Nebraska Supreme Court concluded that 15 U.S.C. § 1989 is designed to punish or deter fraudulent auto dealers and to reward customers for bringing suit. *Darr v. Long*, 313 N.W.2d at 220. Thus, the court held that the surety was not liable for treble damages because 15 U.S.C. § 1989 is not designed to compensate an injured party for a "loss suffered."

The statute at issue in this case, N.C.G.S. § 20-288(e), also speaks of loss "suffered." Thus, reasons the Court, the same result should follow in this case as in *Darr*. What the Court fails to recognize, however, is that the Nebraska statute in *Darr* was interpreted in light of a federal trebling statute which requires evil intent and is primarily punitive in nature. By contrast, N.C.G.S. § 75-16 does not require bad faith and is not primarily a penal statute.

To decide this case, we must interpret N.C.G.S. § 20-288(e) in light of the *automatic* trebling provision of N.C.G.S. § 75-16. When this is done, we come to the inescapable conclusion that the losses "suffered" by the plaintiff under N.C.G.S. § 20-288(e) in this case *equal* the entire amount of the judgment entered against Camel City Motors. The public policy exception relied on in *Darr* is simply not applicable to a situation such as this in which good faith is irrelevant and deterrence is not the overriding goal.

Having determined that this case does not fall within the public policy exception to general surety principles, I would hold Lawyers Surety liable for the full default judgment. I concur with all other portions of the Court's opinion.

STATE OF NORTH CAROLINA v. JACKIE ROBERT ANGEL

No. 505A90

(Filed 3 October 1991)

Criminal Law § 73.1 (NCI3d)— murder—threats made by defendant to victim—hearsay—no prejudice

There was no prejudicial error in a murder prosecution from the admission of testimony relating threats defendant made to the victim where, assuming that the hearsay statements were inadmissible, the weight of evidence against defendant was so overwhelming that there was no reasonable possibility of a different result had the inadmissible hearsay been excluded. Although defendant abandoned his claim of constitutional error, any such error was harmless beyond a reasonable doubt.

Am Jur 2d, Homicide §§ 316, 560.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Owens, J.*, at the 5 February 1990 Criminal Session of Superior Court, MACON County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 11 September 1991.

Lacy H. Thornburg, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Teresa A. McHugh, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Justice.

In a noncapital trial, defendant was convicted of the murder of his wife, Betsy Angel. Pursuant to N.C.G.S. § 7A-27(a) (1989), defendant appeals as a matter of right his conviction of first-degree

murder and sentence of life imprisonment. Defendant assigns as error the introduction into evidence of a number of allegedly hearsay statements. Assuming error *arguendo* in the admission of the statements, we conclude that the error was harmless.

The State's evidence tended to show that in February 1989, defendant sought treatment at Appalachian Hall, a substance abuse center. Defendant left Appalachian Hall in late February, two or three weeks before he killed Betsy Angel on Friday, 10 March 1989. At the time of the killing, defendant and the victim had been separated for six or seven months.

Steve Angel, defendant's brother, testified that he saw defendant at about 7:15 on the morning of the shooting. Steve Angel was driving to work when he passed defendant; defendant hit his brakes, turned around, and caught up with his brother. The two men pulled off the road and began talking. Steve Angel testified that defendant said "[h]e was going to go to Alaska, but he had some things he had to do before he went to Alaska. . . . He said that he had to kill Betsy before he went to Alaska. . . . and then he said, I might kill myself." Steve Angel testified that he tried to talk defendant into riding around with him for a while, but defendant just turned around, got back in his truck, and left. Defendant followed Steve Angel down the road briefly, but then turned his car around and drove back towards the Mashburn Branch Community where Betsy Angel lived. Steve Angel drove to work and informed the police of defendant's intentions; he then drove to his father's house where he called to warn Betsy.

At about 7:55 that morning Thelma Angel, defendant's sister-in-law and Betsy Angel's neighbor, phoned Betsy to warn her that she had seen defendant's truck in the yard. Thelma Angel testified that she watched as defendant got out of his truck, reached down to pick up something inside the cab, pulled down the tail of his coat, and walked to the deck at the rear of Betsy's house. Thereafter, Thelma's attempts to call Betsy's house resulted in a busy signal.

Travis Angel, the fifteen-year-old son of defendant and Betsy Angel, was at home with his mother the morning of 10 March 1989. Travis testified that he was dressing for school as he saw his father drive up to the house. He heard his father step onto the deck and begin talking to his mother. He described the scene as follows:

> [Betsy said p]eople who love people don't do this. . . . And they talked around for a little while, and [defendant] said, let me in. She goes, I don't think you need in. And he goes, let me in, and there was this pushing around, and then I heard her yell, Travis. . . . And so I just ran in there, and when I got to the steps, I heard a gun go off. And Mama came around the corner, and she was holding her side and said, he shot me. And Daddy came around the corner and he was holding a gun, and he—his eyes and stuff—you know, they were just like a glazed over look.

While defendant followed Betsy into the bedroom, Travis ran to the bathroom; then he ran upstairs to get his shotgun. Travis came back downstairs and met defendant at the foot of the stairs. Travis asked defendant to give up the gun, and defendant said, "[s]hoot me Travis, I'm crazy." Travis again asked for the gun, and defendant said he was leaving. Defendant then left, and Travis called for an ambulance and began administering cardiopulmonary resuscitation to his mother.

Dr. Michael B. Rohlfing, a forensic pathologist, testified that Betsy Angel died from loss of blood. His autopsy revealed that a single bullet entered the left back and exited above the left breast. The bullet penetrated the left lung and the upper vessel of the heart.

Defendant was arrested soon after the shooting. Police found a .38 caliber Smith and Wesson, snub-nosed, nickel-plated revolver in the cab of defendant's truck. The parties stipulated that the gun found in defendant's truck contained one spent cartridge and five live ones; they further stipulated that a bullet found in the wall of Betsy Angel's house matched the revolver found in defendant's possession.

The State introduced several statements made by defendant following his arrest. State Bureau of Investigation Agent Moody testified that defendant signed a written waiver of his rights and agreed to answer questions. According to Moody, "[defendant] could not deny that he had shot his wife and to quote his words, he said 'all I can say, is I done it.' " Defendant said that he and Betsy had been separated for about six months and "that he could not stand her running around with other men." Defendant said he woke up early on 10 March 1989, and then he drove to Richard Laughlin's house to get a .38 revolver that Laughlin kept in his

truck. Defendant then drove around until he met his brother, Steve Angel; the two brothers talked for a while by the side of the road. Moody further described defendant's statement as follows:

> [A]fter leaving Steve, he went to Betsy's house.
>
> . . . He said that he parked the truck and went up on to the porch and knocked at the sliding glass door. He said that after knocking at the door, Betsy came to the door and opened it. He said that he accused her of running around, and she told him that she'd do what she wanted to do. He said that after she told him that, that he drew the pistol from the waist band of his pants; that he had been carrying it in the back. And that when she saw the gun, she turned to run. He said as she turned to run from him, he shot her in the back.
>
> . . . He said that he just couldn't let her run away from him.

Moody testified:

> I asked him if the shooting was an accident. He said that it was not. He went on to say that he was not proud of what he had done, and I quoted him as saying, "that it would take a sorry man to do something like that."
>
> . . . .
>
> I asked him if he intended to kill her. He said that he did not have any intentions to kill her, and after pausing, added, "but maybe I did, I shouldn't have gotten that gun."

Several witnesses testified on defendant's behalf to the effect that defendant may have been insane at the time of the shooting. Joe Doster, a member of the Macon County Emergency Medical Service, testified that he saw defendant as the police brought him into the sheriff's office on 10 March 1989. Doster testified that defendant had a blank look on his face; he described defendant as looking like someone in shock.

Dr. Martin Youngelston, accepted by the court as an expert in forensic psychology, testified that defendant suffered from post-traumatic stress disorder. Dr. Youngelston opined that defendant had dissociated at the time of the shooting. He explained that "dissociation" means functioning in another frame of mind, another

level of consciousness. In such a condition defendant might not have been able to distinguish right from wrong.

Connie Ridley, defendant's sister, testified that defendant stayed with her for four days after his release on bond. Ridley testified that during that time defendant acted normally. One day, however, they talked about the shooting, and defendant came back later in the day in a rage and acting wild.

Lex Angel, defendant's father, testified that he went to defendant's house the day before the murder to do some work with defendant. At some point, defendant became upset with his father and punched him on the chin. The two men then started wrestling. Lex Angel testified that defendant had never raised a hand against him and that defendant "looked at me just like he was looking through me."

The State presented evidence in rebuttal of defendant's insanity defense. Dr. Patricio Lara and Dr. James Gross, both forensic psychiatrists, diagnosed defendant as suffering from alcohol dependence and an adjustment disorder with a depressed mood. Both disagreed with Dr. Youngelston's diagnosis of post-traumatic stress disorder, and both were of the opinion that defendant's ability to distinguish between right and wrong and to appreciate the nature and quality of his actions on the day of the killing was not impaired.

In addition to the evidence described above, the State elicited testimony from several witnesses regarding threats made by defendant to Betsy Angel in the days immediately preceding the murder. Defendant contends these statements are inadmissible hearsay.

The statements at issue are as follows: Sheriff Homer Holbrooks testified for the State that Betsy Angel told him on 8 March 1989 "that she was being harrassed [sic] by [defendant]" and that "he is calling me and saying tonight's the night." Holbrooks also testified that Betsy called him to ask when it was legal to shoot someone.

Rebecca Ledford testified that on 8 March 1989, Betsy Angel told her that "she [Betsy] was going to be dead before the day was over." Ledford also testified that Betsy spoke of defendant's threats and that Betsy had called the Sheriff's Department. In Ledford's presence, Betsy received a phone call from defendant on 8 March 1989. According to Ledford, Betsy said that defendant

told her "she [Betsy] didn't have as much pull in this town as she thought she did." Betsy said, "I'm not going to sit around and take the threats on my life lightly."

Carmella Pruitt also testified regarding several statements by Betsy Angel. Pruitt testified that Betsy said on 8 March 1989, "[defendant] called me at 6:00 this morning and told me to enjoy the sunrise, because I would never see another one." Pruitt also testified that Betsy Angel told her defendant had said he would shoot Betsy. According to Pruitt, Betsy said on 9 March 1989, "well, I saw the sun rise this morning" and "all he has is a shot gun, and I can see a shot gun coming. So I'll be O.K."

In her testimony at trial, Sonja Vanhook described similar statements by Betsy Angel. Vanhook testified, "[s]he told me that she was not supposed to see the sun come up" and "she also told me that he had a shotgun and there was no way he could hide it, that she would be able to see it." According to Vanhook, Betsy Angel said that defendant had been threatening her since Tuesday, 7 March 1989. Vanhook testified that she was afraid for Betsy Angel because "I had talked to my sister and knew that [defendant] had threatened [Betsy]."

Travis Angel testified that his mother, Betsy Angel, described to him on 9 March 1989, a conversation she had with defendant that day. According to Travis, his mother stopped to get gasoline and defendant pulled in behind her and told her she "had been in the cross hairs all day and that he didn't have—he couldn't shoot her."

Thelma Angel testified about a conversation with Betsy Angel on 9 March 1989, in which "[defendant] had told her on several occasions that her days were numbered. She said that he had told her that he had had her in his sightings but couldn't pull the trigger, but he would."

Clyde McCall also testified briefly that Thelma and Doug Angel told him defendant had been threatening Betsy Angel all week prior to the killing.

The State gave defendant written notice of its intent to use these statements made by Betsy Angel to the witnesses listed above. Before trial, the court conducted a hearing on the admissibility of the statements listed in the State's notice. The court ruled that Holbrooks' testimony was admissible under N.C.G.S. § 8C-1,

Rules 804(b)(5) and 803(1)-(3). The parties then argued briefly about the admissibility of the other statements listed in the State's notice, and the court overruled defendant's objection to their introduction at trial. When Holbrooks began testifying about the statements made by Betsy Angel, the court overruled defendant's objection. Later, in response to defendant's objection to the testimony of Rebecca Ledford, the court stated that it made "the same findings of fact and conclusions of law with reference to the statement to the testimony of Rebecca S. Ledford with regard to the statements made to her by the deceased, Betsy Angel . . . ." The court overruled defendant's subsequent objections to the testimony of Pruitt, Vanhook, Travis Angel, and Thelma Angel, without explanation. Defendant made no objection to the testimony of Clyde McCall.

Defendant argues that the hearsay statements described above were inadmissible under N.C.G.S. § 8C-1, Rules 804(b)(5) and 803(1)-(3). Assuming *arguendo* that defendant is correct, we nonetheless conclude that the admission of these statements was harmless.

" 'It is well established that the erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial.' " *State v. Faucette*, 326 N.C. 676, 687, 392 S.E.2d 71, 77 (1990) (quoting *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986)). To show prejudicial error resulting from a violation of the Rules of Evidence alone, absent a constitutional issue, 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 at the trial . . . ." N.C.G.S. § 15A-1443(a) (1988). When the error takes on a constitutional dimension, it 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).

Defendant argued to the trial court and assigned as error the introduction of inadmissible hearsay evidence in violation of both the Rules of Evidence and his state and federal constitutional rights to confront witnesses. In his brief and at oral argument, however, defendant argued only a violation of the Rules of Evidence. "Review [by this Court] is limited to questions . . . presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed

in a party's brief, are deemed abandoned." N.C.R. App. P. 28(a) (1991). Thus, defendant has abandoned his claim of constitutional violation and is entitled to a new trial only if he can demonstrate a 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).

We conclude that defendant is unable to carry his burden. The evidence that defendant caused the death of Betsy Angel by shooting her in the back with a .38 revolver was uncontroverted. Defendant acknowledges that the only contested issue was his state of mind at the time of the killing. If none of the challenged statements had been admitted, the jury still could have considered defendant's confession, as recounted in the testimony of Agent Moody, that he could not deny that he shot Betsy Angel. According to Moody, defendant said he had been separated from Betsy for several months and that he could not stand her "running around with other men." In his statement, defendant said that he awoke early on the morning of the killing and drove around for a while in a new truck he had bought the day before. Agent Moody testified that defendant said he drove to Richard Laughlin's house and took a .38 revolver and a box of shells from Laughlin's truck. Then, defendant drove to Mashburn Branch where Betsy lived. Defendant told Moody that he met his brother Steve on the way to Betsy's house.

Steve Angel's testimony corroborated defendant's confession. Steve testified that he saw defendant shortly before the killing and that defendant stated he was going to Alaska, but that he was going to kill Betsy first. Defendant previously had mentioned to Steve that he might be leaving town soon with a woman he met at Appalachian Hall. Soon after they met on 10 March 1989, Steve saw defendant driving away in the direction of Betsy's house. Neighbor Thelma Angel described defendant's actions upon his arrival at Betsy's house. She said defendant got out of his truck, reached down to pick up something from inside the cab, pulled down the tail of his coat, and then walked to the house.

The jury also had before it Travis Angel's testimony that he saw his mother and defendant arguing on the morning of the shooting. Travis testified that he ran downstairs when he heard his mother call his name. By the time he reached the foot of the stairs, Travis heard a gunshot and met his mother who was stagger-

ing around the corner. Travis then saw defendant holding the murder weapon, still smoking from its recent use.

Defendant's confession filled in details that Travis could not see. Defendant told Agent Moody he arrived at Betsy's house and went to the sliding glass door on the porch. He knocked and spoke with Betsy as she opened the door. He accused Betsy of running around, and she told him she would do what she wanted to do. Defendant then drew the pistol from the back waistband of his pants. When Betsy saw the gun, she turned to run away. Defendant told Moody that, as she turned, he shot her in the back. Defendant said to Moody that he just could not let Betsy run away from him. Defendant also told Moody the shooting was not an accident; he at first said that he did not intend to kill Betsy, but then he said "maybe I did, I shouldn't have gotten that gun."

Apart from the hearsay evidence of defendant's threats to Betsy Angel in the week before her death, there was substantial evidence that defendant formed the intent to kill and that he did so after premeditation and deliberation. Though defendant presented evidence that he may have suffered from post-traumatic stress disorder and that he may have "dissociated" at the time of the killing, this evidence was met by plenary, credible evidence by the State in rebuttal. The weight of the evidence against defendant is so overwhelming that we cannot conclude there was a reasonable possibility of a different result had the inadmissible hearsay been excluded. If defendant had not abandoned his claim of constitutional error, we would conclude beyond a reasonable doubt that any such error was harmless.

No error.

LOIS E. KOUFMAN v. JAMES A. KOUFMAN

No. 96A90

(Filed 3 October 1991)

1. Appeal and Error § 156 (NCI4th)— child support finding—no exception—binding on appeal

The Court of Appeals erred in a child support action by concluding that a finding of fact was not supported by the

evidence where plaintiff neither made exception to nor assigned as error that finding of fact. A finding is presumed to be supported by competent evidence and is binding on appeal where no exception is taken to the finding; furthermore, the scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal.

Am Jur 2d, Appeal and Error §§ 609, 635, 636.

2. **Divorce and Separation § 396 (NCI4th)— child support—finding as to needs—correct**

The trial court correctly calculated plaintiff wife's expenses, including fixed expenses, for a child attending boarding school where the court accepted in full the majority of the claimed expenses and adjusted only eleven of thirty-seven itemized expenses for the stated reason that the child was living outside of plaintiff's home all but seventy-one days a year. Those eleven expenses were not adjusted by a uniform percentage, but were carefully scrutinized and reduced individually. The court explained the reductions, and the plaintiff's affidavit of financial standing supported the court's methodology.

Am Jur 2d, Divorce and Separation §§ 1035, 1039, 1040, 1045.

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 97 N.C. App. 227, 388 S.E.2d 207 (1990), reversing an order entered by *Keiger, J.*, on 1 September 1988 in District Court, FORSYTH County. Heard in the Supreme Court 5 September 1990.

White and Crumpler, by Fred G. Crumpler, Jr.; G. Edgar Parker; Christopher L. Beal; Dudley A. Witt; and J. Matthew Dillon, for plaintiff-appellee.

Morrow, Alexander, Tash, Long & Black, by John F. Morrow and Clifton R. Long, Jr., for defendant-appellant.

EXUM, Chief Justice.

From an order modifying defendant's child support obligation, plaintiff appealed to the Court of Appeals. The Court of Appeals reversed this order and remanded the case for reinstatement of

the original child support order.* We now reverse the Court of Appeals' decision and reinstate the trial court's modification order.

Plaintiff wife and defendant husband were married on 16 August 1969. They had two children, Joseph Matthew Koufman, born 12 April 1972, and H. Clifford Koufman, born 11 June 1974. Plaintiff and defendant separated on 6 November 1985. At that time the family resided in Forsyth County and both children were attending Summit School, a private school in Forsyth County. On 6 February 1986 plaintiff filed a complaint in Forsyth District Court for divorce from bed and board, child custody, child support, and alimony.

On 24 October 1986 the parties signed a consent order providing as follows: (1) plaintiff was to be primary custodian of the children; (2) the children were to live with each parent fifty percent of the time; and (3) defendant was to pay plaintiff $3,333 a month in child support, for a total of $40,000 a year. The consent order included several findings of fact, notably the following:

> (12) The minor children are healthy, normal children, active in school and extracurricular activities. That the children have been attending and it is contemplated that they shall continue to attend private school. That the parties have made past expenditures for the health, education and maintenance of said children in excess of $3,000.00 per month.

The consent order further provided that defendant pay up to $10,000 per year for the children's private school expenses, and that any private school expenses over that amount would be paid equally by the parties.

Defendant complied with the consent order and paid the monthly child support as ordered through September 1987. At about that time, the older son Joseph was enrolled in Woodberry Forest, a boarding school costing $11,435 a year. Beginning in October 1987, defendant reduced his child support payments to plaintiff by $288.17 a month. Defendant explained that the adjustment reflected plaintiff's share of increased education expenses, including Joseph's new boarding school tuition and the younger child's tuition which had risen to $5,980 a year.

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* The trial court also ruled that defendant was not in contempt for failure to comply with the original support order. The Court of Appeals unanimously affirmed that ruling and this aspect of the Court of Appeals' decision is not before us and remains undisturbed.

Plaintiff on 21 October 1987 filed a motion in Forsyth District Court for defendant to appear and show cause why he should not be held in contempt for violating the terms of the 1986 consent order. Plaintiff contended that defendant had unilaterally enrolled Joseph in boarding school without plaintiff's consent to share the added expense. Defendant on 4 November 1987 filed a response and moved to reduce child support payments under the consent order on the grounds of a material change in circumstances.

During the recess of a hearing on both motions before Keiger, J., on 8 February 1988, the parties executed a "memorandum of judgment" providing *inter alia* that defendant's child support obligation be reduced to $1,000 a month per child; that defendant pay all private school expenses of the children; and that defendant be given credit against his child support obligation for any private school expenses exceeding $18,000 per year. The document, however, was not signed by the trial court and was not filed in court records. When plaintiff refused to sign a consent order making identical provisions, defendant moved that the trial court adopt the memorandum of judgment as a court order. The court denied that motion.

The trial court resumed the hearing on plaintiff's and defendant's respective motions on 24 August 1988 and held that defendant was not in contempt of court. In an order filed 6 September 1988 the trial court found as a fact that the parties stipulated it would be in Joseph's best interest to continue attending Woodberry Forest. The trial court denied plaintiff's motion to dismiss defendant's motion to modify the 1986 consent order and held that a material change of circumstances had occurred justifying a modification. The trial court reduced defendant's child support obligation to $1,700 per month, ordered defendant to pay all the children's education expenses, and ordered defendant to provide insurance and pay all the children's reasonable medical expenses.

N.C.G.S. § 50-13.7 provides that a child support order "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances . . . ." N.C.G.S. § 1A-1, Rule 52(a) provides that when a trial court sits as trier of fact, it must "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." In the case *sub judice* the trial court followed this procedure. In support of its order, the trial court entered eighteen detailed find-

ings of fact and four conclusions of law, demonstrating its thoughtful and meticulous consideration of the evidence.

[1] Only two factual findings by the trial court are at issue in this appeal: the trial court's finding of plaintiff's reasonable past expenses for the two children, and the trial court's calculation of plaintiff's reasonable current expenses for one of the children. A majority of the Court of Appeals concluded that (1) the trial court's finding of fact concerning past expenses was not supported by sufficient evidence and (2) the trial court erroneously calculated plaintiff's reasonable current expenses for the older child Joseph. Greene, J., dissented from the majority decision to reverse the modification order. The dissent concluded that the order was sufficiently supported by evidence and the trial court had properly calculated plaintiff's current expenses for Joseph. We conclude that the issue of the sufficiency of evidence to support the finding of past expenses has not been properly presented on appeal and should not have been addressed by the Court of Appeals. We agree with Judge Greene's position that the trial court's other challenged finding properly calculated plaintiff's reasonable current expenses for Joseph.

The trial court's order contained the following finding of fact:

> (2) In October of 1986, the plaintiff's net income was approximately $4,200 per year; that the defendant's gross income was approximately $135,000 per year; that the plaintiff's expenses in her home for the minor children were in excess of $3,000 per year [sic].

(The Court of Appeals assumed, and we agree, that the trial court intended the order to say "$3,000 per *month*" rather than "per *year*.")

The Court of Appeals concluded that the trial court erred in modifying the original child support order because the above finding, upon which the modification was in part based, was not supported by sufficient evidence. Although plaintiff excepted to and assigned as error several findings of fact by the trial court, plaintiff neither made exception to nor assigned as error finding of fact (2), quoted above. Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal. *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962); *Williams v. Williams*, 97 N.C. App. 118, 121, 387 S.E.2d 217, 219 (1990). Furthermore,

the scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal. N.C. R. App. P. 10(a); *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 313 N.C. 614, 649, 332 S.E.2d 397, 418-19 (1985), *rev'd on other grounds*, 476 U.S. 953, 90 L. Ed. 2d 943 (1986); *Durham v. Quincy Mutual Fire Ins. Co.*, 311 N.C. 361, 367, 317 S.E.2d 372, 377 (1984). The Court of Appeals erred in reversing the trial court on an issue not properly presented for appeal by exception or assignment of error.

[2] Plaintiff properly excepted and assigned error to the following finding of fact by the trial court:

> (10) At the present time, the plaintiff's expenses for the child Joseph are approximately $583 per month, not including medical insurance and room, board and tuition at Woodberry Forest; that the Court has calculated that amount by reviewing the financial affidavit of the plaintiff executed August 5, 1988; that the Court finds that said affidavit is substantially true and correct with the following exceptions:
>
> $50, not $150 for household and yard maintenance
> $10, not $30 for electricity
> $10, not $25 for gas, fuel, oil
> $1, not $4 for water
> $1, not $5 for cable
> $3, not $15 for household supplies
> $2, not $10 for newspapers and magazines
> $20, not $50 for recreation
> $6, not $16 for automobile insurance
> $5, not $15 for automobile gas
> $5, not $35 for automobile repairs
> $30, not $60 for food at home
>
> That the Court has reduced the plaintiff's expenses for Joseph for household and yard maintenance as the Court specifically finds that the plaintiff's total expenses for household and yard maintenance do not exceed the total sum of $150 per month; that furthermore, the Court has reduced the expenses listed for the rest and remainder of the beforementioned items due to the fact that the child only spends approximately 71 days per year in the homeplace of the plaintiff and, therefore, the

Court finds that the portion of said expenses attributable to said child should be reduced to the amount found herein.

A majority of the Court of Appeals panel, relying on *Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E.2d 116 (1979), held that the trial court's method of calculating plaintiff's expenses for Joseph was at least partly in error because the trial court reduced amounts for fixed expenses such as cable television and automobile insurance. *Gilmore* held that a trial court erred in ordering a one-third reduction in child support after one of three children provided for under the original order reached majority. Noting that the record reflected no evidence of actual reduction in the custodial parent's expenses for the children, the court held that "it is impermissible to presume that such child-oriented expenses are proportionally divisible. The presumption, if any is appropriate at all, would be to the contrary in light of the fixed and indivisible costs of providing a home, and the varying requirements of the children." *Id.* at 563, 257 S.E.2d at 118-19.

Gilmore does not control here. Here the trial court accepted in full the majority of the claimed expenses related to Joseph, including fixed expenses such as the house mortgage, homeowner's insurance, and property taxes. It adjusted only eleven of thirty-seven itemized expenses claimed by plaintiff for the stated reason that Joseph was living outside plaintiff's home all but seventy-one days a year. It did not adjust these eleven expenses by a uniform percentage, but carefully scrutinized and reduced each individually. The trial court explained why it reduced these expenses. For example, the trial court specifically found that plaintiff's entire yard maintenance expense did not exceed $150 per month, explaining why the court reduced Joseph's share of the expense from $150 to $50. Plaintiff's affidavit of financial standing, filed with the trial court on 5 August 1988 and referred to in the trial court's modification order, provided evidence to support the trial court's methodology employed in finding of fact (10) as to expenses relating to Joseph. The affidavit listed thirty-seven child-related expenses, including such items as transportation, dental, and food at home and away from home. For each item the affidavit allocated separate expense amounts for Joseph and the younger child Clifford. We conclude the trial court's calculation of plaintiff's current expenses for Joseph was without error.

For the foregoing reasons, the decision of the Court of Appeals is reversed and the trial court's order modifying defendant's support obligation is reinstated.

Reversed.

DAVID A. BARBEE v. THE HARFORD MUTUAL INSURANCE COMPANY

No. 587PA90

(Filed 3 October 1991)

Insurance §§ 92.1, 143 (NCI3d)— garagekeepers liability policy— exclusionary provisions—work product

The trial court correctly granted summary judgment for defendant insurance company in an action by a garage owner to recover damages paid to customers after his employees dropped foreign objects into cylinders while servicing automobiles. The insurance contract was intended to exclude damages due to plaintiff's negligent performance of business tasks.

Am Jur 2d, Automobile Insurance §§ 219-220.

Liability insurance of garages, motor vehicle repair shops and sales agencies, and the like. 93 ALR2d 1047.

ON discretionary review of the decision of the Court of Appeals, 100 N.C. App. 548, 397 S.E.2d 343 (1990), reversing summary judgment for the defendant entered by *Johnston, J.*, at the 18 January 1990 Session of District Court, MECKLENBURG County. Heard in the Supreme Court on 9 September 1991.

Wishart, Norris, Henninger & Pittman, P.A., by Kenneth R. Raynor, for the plaintiff-appellant.

Petree, Stockton & Robinson, by Richard E. Fay, for the defendant-appellee.

MITCHELL, Justice.

The issue before this Court is whether recovery of the damages sought by the plaintiff is precluded by the exclusionary provisions

of the comprehensive garagekeepers liability insurance policy issued by the defendant insurance company. We conclude that the exclusionary language of the policy prevents recovery of the damages sought by the plaintiff.

This case came before the trial court upon stipulated facts. The plaintiff operates a "Precision Tune" automobile repair shop in Charlotte. The defendant insurance company issued the plaintiff a garagekeepers insurance policy providing coverage during 1987. On 7 November 1987, employees of the plaintiff regauged and replaced the spark plugs of an automobile owned by a customer. While replacing the spark plugs, the plaintiff or his employees accidentally dropped a foreign object through an opening for a spark plug and into a cylinder of the engine. Later, when the automobile was operated, the foreign object damaged that cylinder.

On 21 November 1987, employees of the plaintiff regauged and replaced the spark plugs of an automobile owned by another customer. Again, employees of the plaintiff, while servicing the automobile, accidentally dropped a foreign object into an opening for a spark plug. When that automobile was operated, the foreign object damaged a cylinder.

The plaintiff demanded that the defendant insurance company provide coverage for any damages recovered from him by the owners of the automobiles. The defendant refused. The plaintiff subsequently reimbursed the two customers himself.

On 7 March 1988, the plaintiff brought this action against the defendant in the District Court, Mecklenburg County, seeking a declaration that the insurance policy covered the losses suffered by the plaintiff and seeking actual damages in an amount not less than $5,162.77. Both parties filed motions for summary judgment. The trial court granted summary judgment in favor of the defendant and denied the plaintiff's motion for summary judgment. The Court of Appeals, in an opinion filed 30 October 1990, found there was a genuine issue of material fact and reversed the trial court. We hold that the trial court was correct in granting summary judgment in favor of the defendant and, accordingly, we reverse the Court of Appeals.

On appeal the defendant argues that the Court of Appeals erred in concluding that there was a genuine issue of material fact as to whether the insurance policy issued by the defendant

covered the damages claimed by the plaintiff. The defendant focuses its argument on the exclusionary language of Part V of the policy which states:

> C. WE WILL NOT COVER—EXCLUSIONS.
>
> This insurance does not apply to:
>
> . . .
>
> 4. Faulty work you performed.

The defendant argues that this language excludes coverage of damages caused by the plaintiff's work product—the tune-ups and spark plug replacements performed by employees of the plaintiff. The plaintiff argues that the language does not exclude coverage of the damages he asserts. The policy language, according to the plaintiff, excludes coverage of a defective tune-up but includes coverage of damage to "other property," such as the cylinders of the automobiles in the present case.

The rules governing summary judgment are now familiar learning and we need not repeat them here. *Roy Burt Enterprises, Inc. v. Marsh*, 328 N.C. 262, 400 S.E.2d 425 (1991). Applying those rules, we disagree with the conclusion of the Court of Appeals that a genuine issue of material fact was presented in this case. Therefore, summary judgment was appropriate, and this Court will interpret the contract as a matter of law. *Duke v. Mutual Life Ins. Co.*, 286 N.C. 244, 210 S.E.2d 187 (1974); *Parker v. State Capital Life Ins. Co.*, 259 N.C. 115, 130 S.E.2d 36 (1963).

We find the insurance policy clear and unambiguous and interpret the policy as written and according to its plain meaning. *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 348 S.E.2d 794 (1986). We agree with the defendant's interpretation of the meaning of the exclusionary language of the insurance policy. The exclusionary clause precludes recovery of the damages sought by the plaintiff. Therefore, the defendant insurance company is not liable for these damages under the policy.

We have focused on the exact language of the policy in dispute and have found no North Carolina case interpreting this language. However, one decision by our Court of Appeals and certain decisions from other jurisdictions are helpful in this regard. In *Western World Ins. Co. v. Carrington*, 90 N.C. App. 520, 369 S.E.2d 128 (1988), our Court of Appeals interpreted a comprehensive liability

insurance policy issued to a subcontractor. The court spoke generally of the purposes behind a work product exclusionary clause in an insurance contract:

> Since the quality of the insured's work is a "business risk" which is solely within his own control, liability insurance generally does not provide coverage for claims arising out of the failure of the insured's product or work to meet the quality or specifications for which the insured may be liable as a matter of contract. . . . The cases interpreting this kind of exclusion recognize, as we do, that *liability insurance policies are not intended to be performance bonds.*

90 N.C. App. at 523, 369 S.E.2d at 130 (emphasis added) (citations omitted). With such points in mind, we interpret the exclusionary language of the insurance contract in dispute here as precluding any recovery by the plaintiff for damages caused by the negligent tune-ups and spark plug replacements by employees of the plaintiff.

We find support for our conclusion here in a decision of the Supreme Court of Mississippi interpreting a similar garagekeepers liability insurance policy. *State Auto. Mut. Ins. Co. v. Glover*, 253 Miss. 477, 176 So. 2d 256 (1965). In that case, a customer left an automobile at a garage for the repair of its carburetor. *Id.* at 479, 176 So. 2d at 256. During the repair, a piece of metal accidentally fell into a cylinder and damaged the engine after it was started. *Id.* at 479, 176 So. 2d at 256-57. The owner of the garage demanded that his insurance company cover the damage caused to the customer's automobile. *Id.* at 479, 176 So. 2d at 257. The insurance company refused. *Id.* The exact language of the exclusionary provision of the policy was, "This policy does not apply: . . . to injury or destruction of . . . work completed by or for the the named insured, out of which the accident arises." *Id.* at 480, 176 So. 2d at 257. The Court in that case held that the policy was not intended to cover damages occurring to a customer's automobile as a result of a mechanic's error or mistake. *Id.* at 482, 176 So. 2d at 258.

Similarly here, the contract language, although not identical to that in *Glover*, was intended to exclude damages due to the plaintiff's negligent performance of business tasks. The damage for which the plaintiff sought recovery was a direct result of the faulty work of his employees and comes within the exclusionary language of the policy. *See also Franks v. Guillotte*, 248 So. 2d

626 (La. Ct. App. 1971) (liability insurance policy excluded coverage of damages resulting from defective repair performed by employee of garage).

The plaintiff relies on a Texas case interpreting a garagekeepers liability insurance policy. *Travelers Ins. Co. v. Volentine*, 578 S.W.2d 501 (Tex. Civ. App. 1978). In *Volentine*, a customer brought his automobile into a garage for a valve job. *Id.* at 502. The customer claimed that because of the negligent repair by employees of the garage, the entire engine was destroyed. *Id.* at 502-03. The owner of the garage filed a claim under his garagekeepers liability insurance policy. *Id.* at 503. The insurance company denied coverage. *Id.* The Texas court distinguished between "property damage to work performed by or on behalf of the named insured" and damage to "other property resulting from the defective condition of the work." *Id.* at 503-04. The plaintiff here argues that, applying such a distinction in the present case, the cylinders are "other property" and, therefore, not within the exclusionary language of the insurance contract. For reasons previously stated, we do not find this argument persuasive. *Cf. Western World Ins. Co. v. Carrington*, 90 N.C. App. 520, 369 S.E.2d 128 (1988) (interpreting identical language, our Court of Appeals found the policy excluded coverage of damages resulting from defective work by the insured).

The decision of the Court of Appeals is reversed and this case is remanded to that court for further remand to the District Court, Mecklenburg County, for reinstatement of the order of summary judgment in favor of the defendant.

Reversed.

STATE OF NORTH CAROLINA v. ELWELL BARNES

No. 5A86

(Filed 3 October 1991)

1. Criminal Law § 1352 (NCI4th)— death sentences—McKoy error—new sentencing proceeding

Sentences of death for two first degree murders are vacated and the cases are remanded for resentencing because of *McKoy* error in the trial court's instructions requiring unanimity on

mitigating circumstances where substantial evidence supported mitigating circumstances submitted to but not found unanimously by the jury that defendant's participation in both murders was relatively minor, that he acted under the domination of another person, and that his low I.Q. impaired his ability to make judgments, and it cannot said beyond a reasonable doubt that the erroneous unanimity instruction did not preclude one or more jurors from considering in mitigation defendant's lesser and subordinate role in the two murders or his impaired mental abilities.

Am Jur 2d, Criminal Law § 600; Trial § 1113.

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

2. **Criminal Law § 1352 (NCI4th)— McKoy error—holdout juror—death sentence not arbitrary—life sentence not required**

Defendant failed to show that sentences of death were imposed under the influence of an arbitrary factor so as to require imposition of a sentence of life imprisonment under N.C.G.S. § 15A-2000(d)(2) where he showed that there was a holdout juror in the sentencing proceeding and that the death sentence recommendation could have been made because of the influence of the trial court's erroneous instruction requiring unanimity for finding mitigating circumstances on a jury eager to get home for the Christmas holidays.

Am Jur 2d, Criminal Law § 600; Trial § 1113.

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

ON remand by the United States Supreme Court, 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 12 September 1991.

Lacy H. Thornburg, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

Daniel W. Fouts, J. Alexander S. Barrett, and Amiel J. Rossabi for defendant appellant.

WHICHARD, Justice.

Defendant was convicted of the first-degree murders of Jackie Ransom and Larry Jones at the 18 November 1985 Session of Superior Court, Robeson County, and sentenced to death for each murder. On appeal, this Court affirmed the convictions and the death sentences. *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988).

Subsequently, the United States Supreme Court vacated the judgment and remanded the case to this Court for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *Barnes v. North Carolina*, 494 U.S. ---, 108 L. Ed. 2d 602 (1990). On 3 October 1990, this Court ordered the parties to file supplemental briefs addressing the *McKoy* issue. *State v. Barnes*, 327 N.C. 471, 397 S.E.2d 224 (1990).

The evidence supporting defendant's convictions and death sentences is summarized in this Court's prior opinion—*State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988)—and will not be repeated here except as necessary to discuss the question before us on remand from the United States Supreme Court.

In *McKoy v. North Carolina*, the United States Supreme Court held unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution jury instructions in capital proceedings which require juries to be unanimous in the finding of mitigating circumstances. *McKoy*, 494 U.S. 433, 108 L. Ed. 2d 369. Our review of the record reveals, and the State concedes, that the jury here was so instructed. Specifically, the trial court instructed the jury to answer each mitigating circumstance "no" if it did not find the circumstance unanimously. The State further conceded in oral argument that it was unable to distinguish this case from recent decisions of this Court which held *McKoy* error harmful and awarded new capital sentencing proceedings. *See, e.g., State v. Wynne*, 329 N.C. 507, 406 S.E.2d 812 (1991); *State v. Artis*, 329 N.C. 679, 406 S.E.2d 827 (1991). We agree; therefore, we vacate the sentence of death and order a new capital sentencing proceeding.

The trial court submitted four possible mitigating circumstances for each murder:

> 1) This murder was actually committed by Henry Lee Hunt and Elwell Barnes was only an accomplice in the murder and his participation in the murder was relatively minor.

2) Elwell Barnes acted under the domination of another person.

3) The defendant, Elwell Barnes, has an I.Q. of 68 which impairs his judgment and insight in everyday living.

4) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

The jury unanimously found circumstance (4), but rejected the other three.

The evidence relevant to the first mitigating circumstance not found—that the "murder was actually committed by Henry Lee Hunt and Elwell Barnes was only an accomplice in the murder and his participation was relatively minor"—came from the testimony of several witnesses at trial. This evidence consisted of testimony that Hunt said he killed Jackie Ransom; testimony from the only eyewitness that Hunt killed Jones, and Barnes mostly watched the whole episode; testimony from several witnesses that Hunt said he would kill Jones, bragged about killing Jones, and said he had to kill Jones because Jones would have saddled him with a life sentence; testimony that Hunt also bragged about killing Jackie Ransom and threatened to kill Rogers Locklear and Dottie Ransom if they did not pay *him* for the murder of Jackie Ransom; and testimony that, at all times, Hunt held the murder weapon.

Testimony at trial also supported the second rejected mitigating circumstance—that "Elwell Barnes acted under the domination of another person." There was testimony that each time Hunt and Barnes entered a car, Barnes always sat in back and Hunt in front; that Hunt ordered Barnes where to sit and Barnes complied; that Hunt told Barnes what to wear and not to wear, *e.g.*, to change his bloody clothes; that Hunt told Barnes not to use a shotgun on Larry Jones when it became apparent that Jones was not yet dead, Hunt finishing the job himself instead; and that Hunt tended to dominate everyone around him. During the sentencing phase, Dr. Robert Rollins testified that defendant is passive and is more a follower than a leader.

As to the third mitigating circumstance—"[t]hat Defendant, Elwell Barnes, has an I.Q. of 68 which impairs his ability to perform intellectual functions, and which impairs his judgment and insight in everyday living"—the evidence was uncontroverted that defendant has an I.Q. of 68, placing him in the borderline mental retardation range. As for his judgment abilities, defendant presented

evidence that he had to get instructions on how to dial information at a public telephone; that he was known by family and friends to have trouble controlling his own bodily functions; that he was unable to reason that he should dispose of blood-stained clothes and shoes and had to be told twice by Hunt to do so; and that he is illiterate.

Also relevant to the third mitigating circumstance was Dr. Leland Jones' testimony during the sentencing phase that defendant suffers from a chronic confusional state that could be due to organic brain disease or alcohol abuse. Dr. Jones also testified that he did not consider defendant's judgment or insight to be average.

Not submitted at the sentencing hearing, but argued by defendant as having mitigating value, are the circumstances that defendant did not have the capacity to appreciate the criminality of his actions, that the killings were committed while defendant was under the influence of mental or emotional disturbance, that defendant is a product of a deprived and socially deviant environment, that defendant has good character traits, and that defendant would make a good adjustment to prison life. Our disposition on the three mitigating circumstances submitted but not found makes it unnecessary for us to consider the effect of the erroneous instruction on these unsubmitted circumstances.

[1] Thus, the evidence presented at trial and during the sentencing proceeding supports reasonable inferences that defendant's participation in both murders was relatively minor, that he acted under the domination of another person, and that his low I.Q. impaired his ability to make judgments. *See State v. Payne*, 328 N.C. 377, 408, 402 S.E.2d 582, 600 (1991); *State v. Wynne*, 329 N.C. 507, 406 S.E.2d 812 (1991). Given the substantial evidence presented in support of these mitigating circumstances, 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 lesser and subordinate role in the two murders or his impaired mental abilities. *See State v. McNeil*, 327 N.C. 388, 394, 395 S.E.2d 106, 110 (1990), *cert. denied*, --- U.S. ---, 113 L. Ed. 2d 459 (1991). Neither can we say beyond a reasonable doubt that no juror would have voted for life imprisonment rather than death if proper instructions on the mitigating circumstances had been given. *See State v. Quesinberry*, 328 N.C. 288, 293, 401

S.E.2d 632, 634 (1991). This is especially so here in light of the fact that one juror held out, presumably unwilling to impose death sentences, for several hours. *See infra.*

In a factually similar case involving the same three mitigating circumstances, we held that the defendant was entitled to a new sentencing proceeding. *State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402 (1990).

[2] Defendant also argues that the sentences of death should be vacated and sentences of life imprisonment imposed pursuant to N.C.G.S. § 15A-2000(d)(2) because the potential for arbitrariness that this Court discussed in *McKoy* was realized in this case. This Court stated in *McKoy* that the erroneous jury instructions had the "*potential* for producing an arbitrary result." *State v. McKoy*, 327 N.C. 31, 43, 394 S.E.2d 426, 432-33 (1990). It concluded, however, "[t]here has been no showing here that the potential for arbitrariness, that is, one or more holdout jurors, was actually realized . . . ." *Id.*

There was a holdout juror in the case at bar. After three hours of deliberations, the jury returned deadlocked eleven-to-one on two occasions. At this point the trial court repeated that it would like the jury to have more time and raised the possibility that deliberations could be resumed the next day, Saturday, 21 December. Thirty-six minutes later the jury returned with a recommendation for sentences of death. According to defendant, the conjunction of the erroneous unanimity instruction and the fact that the jury was threatened with having to continue deliberations the Saturday before Christmas forced the one holdout juror to abandon whatever mitigating circumstance(s) he or she had found.

Defendant's argument is speculative at best. Under the express language of *McKoy*, defendant must show that the death penalty was "actually imposed 'under the influence of . . . [an] arbitrary factor.' " *Id.* All defendant has shown is that the recommendation could have been made because of the influence of the erroneous unanimity instruction on a jury anxious to get home for the holidays. Further, this situation, where one juror may have been willing to find mitigation, is the opposite of the situation we described in *McKoy*. In that situation, we pointed out the arbitrariness of allowing or requiring the imposition of the death penalty " 'where 1 juror was able to prevent the other 11 from giving effect to mitigating evidence.' " *Id.*, quoting *McKoy v. North Carolina*,

494 U.S. at ---, 108 L. Ed. 2d at 379. We find the argument here without merit.

For the reasons stated, we vacate the sentences of death and remand the case to the Superior Court, Robeson County, for a new capital sentencing proceeding.

Death sentence vacated. Remanded for new capital sentencing proceeding.

EUNICE HARMON RAGAN AND TERRY WALL, FOR THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, JANET BUTLER, FOR HERSELF AND ALL OTHERS SIMILARLY SITUATED, AND DONNELL S. KELLY, FOR HIMSELF AND ALL OTHERS SIMILARLY SITUATED v. THE COUNTY OF ALAMANCE, THE BOARD OF COMMISSIONERS FOR THE COUNTY OF ALAMANCE, AND W. B. TEAGUE, JR., JOSEPH P. BARBOUR, T. FRANK BENNETT, CARY D. ALLRED, AND LARRY W. SHARPE, ALL DULY ELECTED AND ACTING COMMISSIONERS OF AND FOR ALAMANCE COUNTY

No. 277PA90

(Filed 3 October 1991)

Courts § 3 (NCI4th); Counties § 20 (NCI4th)— provision of court facilities—writ of mandamus—proper parties

A superior court has the inherent power to issue a writ of mandamus to the County Commissioners requiring them to provide adequate court facilities. The County Commissioners are necessary parties, and there was no harm in making the Board of County Commissioners a party.

Am Jur 2d, Courts § 38; Mandamus § 315.

ON discretionary review of the decision of the Court of Appeals, 98 N.C. App. 636, 391 S.E.2d 825 (1990), vacating an order entered by *Read, J.*, in the Superior Court, ALAMANCE County on 20 July 1989 and remanding the case for further proceedings. Heard in the Supreme Court 14 February 1991.

This is an action by the plaintiffs seeking a mandatory injunction requiring the defendants to construct a new courthouse or to make extensive renovations to the courthouse in Alamance County. In their complaint, the plaintiffs alleged numerous deficiencies

in the Alamance County courthouse which they say prohibit fair trials in contravention of various statutory provisions and provisions of the Constitution of North Carolina. The superior court denied motions to dismiss for lack of personal jurisdiction over Alamance County and the Board of Commissioners of Alamance County, lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.

On appeal the Court of Appeals declined to rule, as argued by the defendants, that the County Commissioners were not the real parties in interest and that sovereign immunity barred an action against the County. The Court of Appeals held that it was in the discretion of the County Commissioners as to the type of courthouse facilities to be provided and a writ of mandamus could not be issued as to this discretionary matter. We allowed the plaintiffs' petition for discretionary review.

Latham, Wood, Hawkins & Carruthers, by James F. Latham and B. F. Wood, and Stern, Graham & Klepfer, by William A. Eagles, for plaintiff appellants.

S. C. Kitchen for County of Alamance and County Commissioners W. B. Teague, Jr., Joseph P. Barbour, Cary D. Allred, and Larry W. Sharpe, defendant appellees.

Elizabeth A. Hansen, Human Resources Attorney for County Commissioner T. Frank Bennett, defendant appellee.

WEBB, Justice.

This appeal brings forward the question of the jurisdiction of the superior court to issue a writ of mandamus ordering the County Commissioners of Alamance County to construct court facilities. We have determined most of the questions raised in this case in our opinion in *In re Alamance County Court Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991).

The Court of Appeals' opinion in this case was filed before our opinion in *Alamance* was filed. Relying on *Ward v. Commissioners*, 146 N.C. 534, 60 S.E. 418 (1908) and *Vaughn v. Commissioners*, 117 N.C. 429, 23 S.E. 354 (1895), the Court of Appeals held that a writ of mandamus did not lie to compel the County Commissioners to construct or repair courthouse facilities. In *Alamance*, we overruled *Ward* and *Vaughn* so far as they held there could not be a writ of mandamus to compel the construction

or repair of courthouse facilities. We now reverse the Court of Appeals, based on our decision in *Alamance*.

In *Alamance*, we held that a superior court has the inherent power to issue a writ of mandamus to the County Commissioners requiring them to provide adequate court facilities. In that case we delineated the procedural and substantive law governing the issuance of such a writ. On the remand of this case, any further proceedings will be governed by such procedural and substantive law.

The appellees also argue that neither the County Commissioners nor the Board of County Commissioners are proper parties to this action and that the County cannot be sued due to the doctrine of sovereign immunity. In *Alamance*, we held that the County Commissioners were necessary parties. In light of the fact that we held that the County Commissioners under certain circumstances were subject to a writ of mandamus to construct or repair courthouse facilities, the doctrine of sovereign immunity does not bar this action. Because we have held that the County Commissioners are necessary parties, there was no harm in making the Board of County Commissioners a party.

For the reasons stated in this opinion, we reverse and remand to the Court of Appeals for remand to the Superior Court of Alamance County for further proceedings consistent with this opinion.

Reversed and remanded.

ROGER STEVEN MAYHEW, EMPLOYEE-PLAINTIFF v. CHARLES JERRY HOWELL AND RONNIE C. CRAVEN, NON-INSURED EMPLOYER, AND/OR RYAN HOMES, INC., EMPLOYER, AND HOME INDEMNITY COMPANY, CARRIER, DEFENDANTS

No. 181A91

(Filed 3 October 1991)

APPEAL of right by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 102 N.C. App. 269, 401 S.E.2d 831 (1991), affirming the Opinion and Award of the Industrial Commission entered 7 February 1990. Heard in the Supreme Court 11 September 1991.

Harkey, Fletcher, Lambeth & Nystrom, by Philip D. Lambeth, for plaintiff-appellant.

Hedrick, Eatmon, Gardner & Kincheloe, by Mika Z. Savir, for defendant-appellees Ryan Homes and Home Indemnity Company.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA, EX REL. EMPLOYMENT SECURITY COMMISSION v. THELMA PARIS v. MARY D. EMMERSON

No. 132A91

(Filed 3 October 1991)

APPEAL by claimant-appellant Thelma Paris 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. 469, 400 S.E.2d 76 (1991), affirming the judgment of *Battle, J.*, at the 13 December 1989 session of Superior Court, ORANGE County. Heard in the Supreme Court on 11 September 1991.

C. Coleman Billingsley, Jr. for appellee Employment Security Commission of North Carolina.

North State Legal Services, Inc., by Carlene McNulty, for claimant-appellant Thelma Paris.

Long & Long, by Lunsford Long, for appellee Mary D. Emmerson.

PER CURIAM.

Affirmed.

S. F. McCOTTER & SONS, INC., A CORPORATION v. AMERICAN GUARANTY INSURANCE COMPANY, A CORPORATION

No. 30A91

(Filed 3 October 1991)

APPEAL of right by the defendant pursuant to N.C.G.S. § 7A-30(2) and on discretionary review of additional issues from the decision of a divided panel of the Court of Appeals, 101 N.C. App. 243, 399 S.E.2d 421 (1990), ordering a new trial as to damages only in regard to a judgment of *Phillips, J.*, at the 17 July 1989 Session of Superior Court, PAMLICO County. Heard in the Supreme Court 10 September 1991.

Henderson, Baxter & Alford, P.A., by B. Hunt Baxter, Jr., for the plaintiff appellee.

Mast, Morris, Schulz & Mast, P.A., by George B. Mast and Bradley N. Schulz, for the defendant appellant.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

BARNES v. EVANS

No. 220A89

Case below: 102 N.C.App. 428

Petition by plaintiffs pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 2 October 1991.

BURNS, DAY & PRESNELL v. LOWDER

No. 408P91

Case below: 103 N.C.App. 664

Petitions by defendants (W. Horace Lowder, Jeanne R. Lowder and Lois Lowder Hudson) for discretionary review pursuant to G.S. 7A-1 denied 2 October 1991.

COLSON & COLSON CONSTRUC. CO. v. MAULTSBY

No. 394P91

Case below: 103 N.C.App. 424

Petition by defendants for discretionary review (treated as a petition for writ of certiorari) pursuant to G.S. 7A-31 denied 2 October 1991. Motion by plaintiff to dismiss appeal dismissed as moot 2 October 1991.

CREWS v. N.C. DEPT. OF TRANSPORTATION

No. 351P91

Case below: 103 N.C.App. 372

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

DOE v. HOLT

No. 379PA91

Case below: 103 N.C.App. 516

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 2 October 1991.

EVERETT v. DUKE UNIVERSITY

No. 223P91

Case below: 102 N.C.App. 579

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

FRANKLIN COUNTY v. BURDICK

No. 374A91

Case below: 103 N.C.App. 496

Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 2 October 1991.

GOINS v. OAKLEY

No. 376P91

Case below: 103 N.C.App. 525

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

GRAVES v. LANGFORD

No. 303P91

Case below: 102 N.C.App. 582

Petition by defendants (Langford and High Point Black Caucus) for writ of certiorari to the North Carolina Court of Appeals denied 2 October 1991.

HILL v. JOHNSON

No. 328P91

Case below: 103 N.C.App. 389

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

IN RE ANNEXATION ORDINANCE OF NEWTON

No. 367P91

Case below: 103 N.C.App. 664

Motion by the respondent to dismiss appeal for lack of substantial constitutional question allowed 2 October 1991. Petition by White et al. for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

IN RE CAFIERO v. N.C. BOARD OF NURSING

No. 277P91

Case below: 102 N.C.App. 610

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

IN RE MOTOR FUELS AUDIT ASSESSMENT

No. 352P91

Case below: 103 N.C.App. 393

Motion by the Secretary of Revenue to dismiss appeal for lack of substantial constitutional question allowed 2 October 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

LOWDER v. ALL STAR MILLS

No. 365P91

Case below: 103 N.C.App. 500

Petition by defendant (W. Horace Lowder) for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

LOWDER v. ALL STAR MILLS

No. 368P91

Case below: 103 N.C.App. 525

Petitions by intervening defendant (Lois Lowder Hudson) and defendant (W. Horace Lowder) for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

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

LOWDER v. ALL STAR MILLS

No. 409P91

Case below: 103 N.C.App. 479

Petition by Jeanne Lowder for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

LOWDER v. LOWDER

No. 407P91

Case below: 103 N.C.App. 664

Petitions by defendants (W. Horace Lowder and Lois L. Hudson) for discretionary review pursuant to G.S. 7A-1 denied 2 October 1991.

MURRAY v. McCALL

No. 377P91

Case below: 103 N.C.App. 525

Petition by defendant (Stephenson) for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

NALLE CLINIC CO. v. PARKER

No. 94P91

Case below: 101 N.C.App. 341
329 N.C. 499

Petition by plaintiff for reconsideration of the petition for discretionary review dismissed 2 October 1991.

NATIONS v. NATIONS

No. 304P91

Case below: 102 N.C.App. 823
329 N.C. 789

Petition by defendant for reconsideration of the petition for discretionary review dismissed 2 October 1991.

NEELY v. N.C. STATE UNIVERSITY

No. 337P91

Case below: 103 N.C.App. 393

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

NEWELL v. NATIONWIDE MUT. INS. CO.

No. 282A91

Case below: 102 N.C.App. 622

Petition by defendant (Nationwide) pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 2 October 1991.

PENDERGRASS v. CARD CARE, INC.

No. 335PA91

Case below: 103 N.C.App. 526

Petition by plaintiffs pursuant to G.S. 7A-31 allowed 2 October 1991.

RICKENBACKER v. COFFEY

No. 348P91

Case below: 103 N.C.App. 352

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

ROGERS v. UNIVERSITY MOTOR INN

No. 369P91

Case below: 103 N.C.App. 456

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

ROWAN COUNTY BD. OF EDUCATION v. U. S. GYPSUM CO.

No. 339A91

Case below: 103 N.C.App. 288

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 2 October 1991.

SCHRIER v. K-MART CORP.

No. 274P91

Case below: 102 N.C.App. 823

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

STATE v. ALLEN

No. 249A91

Case below: 102 N.C.App. 598

Motion by the Attorney General to dismiss the appeal for failure to show a substantial constitutional question denied 2 October 1991.

STATE v. BUCKNER

No. 353P91

Case below: 103 N.C.App. 394

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

STATE v. HOOPER

No. 418P91

Case below: 103 N.C.App. 662

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

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

STATE v. MILLER

No. 354P91

Case below: 103 N.C.App. 394

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

STATE v. MOORE

No. 311P91

Case below: 103 N.C.App. 87

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

STATE v. NEUMANN

No. 261P91

Case below: 103 N.C.App. 172

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

STATE v. PHILLIPS

No. 355P91

Case below: 102 N.C.App. 824

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

STATE EX REL. COMR. OF INS. v. N.C. RATE BUREAU

No. 266PA91

Case below: 102 N.C.App. 824
329 N.C. 504

Petition by defendant for reconsideration of the petition for discretionary review dismissed 2 October 1991.

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

UNITED LABORATORIES, INC. v. KUYKENDALL

No. 243PA91

Case below: 102 N.C.App. 484

Petition by defendant (Share Corp.) for discretionary review pursuant to G.S. 7A-31 allowed 2 October 1991 with review limited to the following issues: (1) attorney fee awards under tortious interference claims and G.S. Ch. 75 claims, and (2) whether the findings of fact are sufficient to support the amount of attorney fees awarded in this case.

WALTON v. CARIGNAN

No. 338P91

Case below: 103 N.C.App. 364

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

WESTON v. CAROLINA MEDICORP, INC.

No. 225P91

Case below: 102 N.C.App. 370

Motion by the defendants to dismiss appeal for lack of substantial constitutional question allowed 2 October 1991. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

WHITE v. BAILEY & ASSOCIATES

No. 375P91

Case below: 103 N.C.App. 526

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1991.

LARRY GORDON BRAXTON v. ANCO ELECTRIC, INC.

No. 614PA90

(Filed 7 November 1991)

1. **Master and Servant § 89 (NCI3d)— employee injury—action against third-party subcontractor**

Under North Carolina law, an employee who is injured by the negligence of a third-party subcontractor may bring a negligence action against that subcontractor because such a subcontractor is deemed not to be a "statutory employer" of the plaintiff and therefore is not shielded from liability by the "exclusive remedy" bar of our workers' compensation statute.

Am Jur 2d, Workmen's Compensation § 77.

2. **Courts § 147 (NCI4th); Master and Servant § 87 (NCI3d)— employee injured in Virginia—North Carolina workers' compensation benefits—propriety of action against third-party subcontractor—application of North Carolina law**

The workers' compensation law of North Carolina rather than of Virginia governs the question of whether an employee injured in Virginia by the negligence of a third-party subcontractor may bring a negligence action against the subcontractor where all the parties are North Carolina residents, plaintiff's employment contract originated in North Carolina, and plaintiff received benefits pursuant to the North Carolina workers' compensation laws, since (1) plaintiff, as a North Carolina worker covered by its workers' compensation statute, is entitled to the protections afforded by our statute with regard to the question of whether he has traded away his right to sue in this situation in return for collecting workers' compensation benefits; (2) North Carolina's interests in implementing the protections afforded by our statute are paramount; and (3) applying the *renvoi* doctrine, a Virginia court would find that the law of North Carolina, under which plaintiff became covered by workers' compensation and under which he received benefits, would allow the suit against an allegedly negligent third-party tortfeasor. Therefore, plaintiff could bring a negligence action against the third-party subcontractor even though such an action would be barred under Virginia law.

Am Jur 2d, Conflict of Law § 4; Workmen's Compensation §§ 77, 86, 88.

Justice MEYER dissenting.

ON defendant Anco Electric, Inc.'s petition for discretionary review of the decision of the Court of Appeals, 100 N.C. App. 635, 397 S.E.2d 640 (1991), which reversed the judgment of *Bailey, J.*, granting the defendant's motion to dismiss under N.C. R. Civ. P. 12(b)(6), at the 17 November 1989 session of Superior Court, WAKE County. Heard in the Supreme Court on 14 October 1991.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by David H. Batten, for defendant-appellant.

Edelstein & Payne, by Steven R. Edelstein; and Patterson, Harkavy, Lawrence & Van Noppen, by Donnell Van Noppen, III, for plaintiff-appellee.

MARTIN, Justice.

The plaintiff, Larry Gordon Braxton, a resident of Raleigh, North Carolina brought this tort action against the defendant, Anco Electric, Inc., on 22 February 1989, alleging that defendant's negligence had proximately caused his injury on a construction site where he was working, and seeking punitive and compensatory damages.

Mr. Braxton was employed as a plumber's helper by Dubberly & Son Plumbing, a North Carolina corporation and a subcontractor of Bailey and Associates, Inc., another North Carolina corporation and general contractor engaged in the construction of the South Hampton Shopping Center in Franklin, Virginia. The defendant, also a North Carolina corporation, was an electrical subcontractor of Bailey and Associates, Inc. for this project.

The plaintiff alleged that as he climbed a ladder in a building on the construction site in Virginia, he came into contact with an electrical wire, sending an electrical shock through his body and causing him to fall. The plaintiff alleged that defendant negligently caused the electrical wire to become exposed and that defendant was negligent in the installation, inspection, and utilization of electrical equipment, and in its failure to give adequate warning for the protection of the plaintiff.

The plaintiff received workers' compensation benefits pursuant to the North Carolina Workers' Compensation Act for his injuries.

On defendant's motion pursuant to N.C. R. Civ. P. 12(b)(6), the trial court ruled that because Virginia substantive law bars actions against another subcontractor by an employee for injuries negligently caused by an employee of such subcontractor, the plaintiff's action was barred pursuant to the doctrine of *lex loci delicti commissi*. The Court of Appeals reversed, recognizing that Virginia law does bar such actions, but holding that North Carolina substantive law should apply because of overriding state interests and public policy reasons. We affirm, but for partially different and additional reasons.

[1] In the present case we begin with a common law tort action for the personal injury of a North Carolina citizen. Since the injury occurred in the course of the plaintiff's employment, we must look to statutory law on workers' compensation to see whether there exists any prohibition or bar to such suit. Under North Carolina law, we find that an employee who is injured by the negligence of a third-party subcontractor may bring a negligence action against that subcontractor because in interpreting our statute North Carolina courts have deemed such a subcontractor not to be a "statutory employer" of the plaintiff and therefore not shielded from liability by the "exclusive remedy bar" of our workers' compensation statute. *See Lewis v. Barnhill*, 267 N.C. 457, 148 S.E.2d 536 (1966); *Weaver v. Bennett*, 259 N.C. 16, 129 S.E.2d 610 (1963).

However, since the injury occurred in the Commonwealth of Virginia, the case presents a conflict of laws question as to which state's compensation law to apply in determining whether plaintiff's cause of action is barred. The conflict arises from the divergence between our statute and the Commonwealth of Virginia's workers' compensation statute, Code § 65.1-40, which extends the definition of "statutory employer" to include all subcontractors working under the general contractor's umbrella, thus shielding from liability a third-party tortfeasor such as the defendant in the present case.

Thus, this Court is faced with a novel question of first impression. The question is a threshold one of whether to apply Virginia's or North Carolina's compensation law in determining whether the action is statutorily barred. Under the law of Virginia, the action is barred; under the law of North Carolina, it is not. We do not hesitate in holding that as to the tort law controlling the rights

of the litigants in the lawsuit allowed by this decision, the long-established doctrine of *lex loci delicti commissi* applies, and Virginia law controls. *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988); *Henry v. Henry*, 291 N.C. 156, 229 S.E.2d 158 (1976); *Young v. R.R.*, 266 N.C. 458, 141 S.E.2d 278 (1965). But in regard to the "exclusive remedy bar" imposed by statute, we turn to our own statute for an answer.

[2] We hold that plaintiff, as a North Carolina worker covered by its workers' compensation statute, is entitled to the protections afforded by our statute with regard to the question of whether his cause of action is eliminated by a particular workers' compensation plan. The question we decide arises in the context of the "mutual concessions" inherent in the workers' compensation design wherein an employee trades off his common law right of recovery in tort for the assurance that any work-related injury, regardless of fault, will be compensated. In this regard we view plaintiff as a beneficiary of the particular bargain which North Carolina has struck between the rights of employees as potential plaintiffs seeking to recover in tort for work-related injuries and the rights of employers and third parties as potential tortfeasors seeking to escape liability by virtue of the blanket provision of compensation for such injuries. To determine whether the law says that plaintiff, in return for collecting workers' compensation benefits, has traded away his right to sue in this situation, we look to the law which guarantees his receipt of those benefits, which is the law of North Carolina.

Public policy considerations point to the same result. All the parties are North Carolina citizens; the plaintiff's contract of employment and the contracts giving rise to the workers' compensation coverage were signed here; and the plaintiff was receiving benefits under our workers' compensation statute. Under these circumstances, North Carolina's interests in implementing the protections afforded by our statute are paramount. Mr. Braxton's temporary presence in Virginia so as to carry out his employment contract does not strip him of the rights he otherwise enjoys under the North Carolina workers' compensation statute with regard to the breadth of our state's exclusive remedy bar on common law actions in tort.

Various courts when faced with conflict of laws questions arising from multistate workers' compensation situations with nonemployer tortfeasors have resolved them similarly. *See, e.g.*,

Hynes v. Indian Trails, Inc., 181 F.2d 668 (7th Cir. 1950); *Liberty Mutual Insurance Co. v. Goode Construction Co.*, 97 F. Supp. 316 (E.D. Va. 1951); *Miller v. Yellow Cab Co.*, 31 N.E.2d 406 (Ill. App. Ct. 1941).

Both parties argue *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 305 S.E.2d 528 (1983), in support of their causes. There we considered a conflict of laws question as to whether the workers' compensation law of North Carolina or Virginia, as the place of injury, would govern the issue of the third-party tortfeasor's ability to assert a *pro tanto* defense against the employer. In *Johns-Manville* this Court looked to the law of Virginia, but found that Virginia had no law controlling the issue. Therefore, rather than speculating on what law Virginia might adopt, this Court applied its own statutory law as to *pro tanto* defenses.

In contrast to *Johns-Manville*, the Supreme Court of Virginia has actually ruled on a case like the one at bar. Our holding is also consistent with that ruling. In *Solomon v. Call*, 166 S.E. 467 (Va. 1932), a traveling salesman from Pennsylvania was injured due to the negligence of certain third parties in an automobile accident while on assignment in Virginia. Mr. Solomon received workers' compensation benefits from Pennsylvania. The same conflict of laws arose between Virginia's bar of suits against third-party tortfeasors and Pennsylvania's adherence to common law in this regard. Although the accident occurred in Virginia, the Virginia court decided to apply Pennsylvania law and allow the claim, based on the facts that "[t]he plaintiff's employment was under a Pennsylvania contract, with a Pennsylvania employer and embraced within the terms of the Workmen's Compensation Act of that state. His contract of employment was entirely foreign to the state of Virginia and clearly outside of the Vriginia [sic] Workmen's Compensation Act." *Solomon v. Call*, 166 S.E. 467, 468 (Va.). The same is true in the present case. Moreover, here too,

> [N]ot being within the Virginia act and not having accepted an award thereunder, [the plaintiff] is not prohibited by the act nor by common law from maintaining his action for the injuries received against the negligent third person or persons responsible for them. He could not have obtained any of the benefits of the Virginia act, and he is not required to suffer and bear the prohibition of it. The prohibition of . . . the Virginia act does not apply to him.

Id. at 469.

Thus, the workers' compensation law of North Carolina governs the question of whether this action has been precluded by statute; it has not. The Court of Appeals was correct in reversing the judgment of the trial court dismissing the plaintiff's case.

We also arrive at the same conclusion when applying classic conflict of laws *renvoi*. *See generally* Rhoda S. Barish, *Renvoi and the Modern Approaches to Choice-of-Law*, 30 Am. U. L. Rev. 1049 (Summer 1981); Erwin N. Griswold, *Renvoi Revisited*, 51 Harv. L. Rev. 1165 (1938); David E. Seidelson, *The Americanization of Renvoi*, 7 Duq. L. Rev. 201 (1968-69).

We begin with the traditional doctrine of *lex loci delicti commissi*, which takes us to Virginia law. Taking into consideration the whole law of Virginia, including its conflict of laws jurisprudence, we inquire as to what Virginia's court of last resort would do when faced with the question of an injured employee's ability to sue a third-party tortfeasor in a case in which the injury occurred in one state but the employment contract(s), the residences of the parties, and the workers' compensation benefits were associated with another jurisdiction. To resolve this issue, Virginia's conflict of laws policy looks to the workers' compensation law of the state in which the plaintiff was covered by the act and in which he received benefits. *Solomon v. Call*, 166 S.E. 467 (Va.). In so doing, the Virginia court would find that in the present case, the law of North Carolina under which the plaintiff became covered by workers' compensation and under which he received benefits, would allow the suit against an allegedly negligent third-party tortfeasor. Applying *renvoi*, we hold that plaintiff stated a cause of action under N.C. R. Civ. P. 12(b)(6), and we affirm the decision of the Court of Appeals.

Affirmed.

Justice MEYER dissenting.

I dissent from the opinion of the majority.

It is undisputed that under the Virginia Workers' Compensation Act, an injured employee under the circumstances presented in this case is barred from suing a third party in tort for injuries deriving from employment. Va. Code Ann. § 65.1-40 (Michie 1987). However, it is equally clear that this state's Workers' Compensa-

tion Act does not bar such an action. N.C.G.S. § 97-10.2 (1985); *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886 (1953).

While conceding that, in terms of strict tort law, the doctrine of *lex loci delicti commissi* requires that the law of Virginia would control, the majority nevertheless concludes that, because the North Carolina workers' compensation law does not bar such an action, North Carolina law controls. The majority claims that this is so for two reasons. The first stems from the majority's perception of the expansive scope of our workers' compensation law. According to the majority, the North Carolina Workers' Compensation Act involves " 'mutual concessions' . . . wherein an employee trades off his common law right of recovery in tort for the assurance that any work-related injury . . . will be compensated." The majority reasons that because plaintiff has received benefits under the North Carolina Act, plaintiff is a "beneficiary" of North Carolina workers' compensation law. Second, according to the majority, "public policy considerations" require that North Carolina law, which does not expressly bar negligence actions against third-party subcontractors, controls because (1) all the parties are North Carolina citizens, (2) plaintiff's employment contract originated in North Carolina, and (3) plaintiff received benefits pursuant to North Carolina workers' compensation law. The majority thus concludes that the interests of North Carolina are "paramount."

While it is true that N.C.G.S. § 97-10.2 envisions a trade-off such as that recognized by the majority, this fact does not answer the conflict of laws question before the Court. The majority's assertion that plaintiff is a "beneficiary" of the trade-off merely restates the obvious—that North Carolina workers' compensation law allows plaintiff to recover benefits under the Act. The majority next points out that numerous circumstances pertain to North Carolina and that therefore North Carolina's interests are paramount in ensuring that its workers' rights under the Act be protected. Aside from being circular, this reasoning amounts to a bald, yet unstated, disavowal of our well-settled choice of laws doctrine.

This Court has long and consistently adhered to the rule of *lex loci*. Ironically, Justice Martin, author of the majority opinion, just recently voiced our continued allegiance to the doctrine.

> [U]nder North Carolina law, when the injury giving rise to a negligence . . . claim occurs in another state, the law of

> that state governs resolution of the substantive issues in the controversy.
>
> This Court has consistently adhered to the lex loci rule in tort actions. . . . We see no reason to abandon this well-settled rule at this time. It is an objective and convenient approach which continues to afford certainty, uniformity, and predictability of outcome in choice of law decisions.

Boudreau v. Baughman, 322 N.C. 331, 335-36, 368 S.E.2d 849, 854 (1988) (citations omitted). Today, notwithstanding our recent adherence to the rule, the majority appears to adopt what may be best categorized as a "most significant relationship" test, a view at marked variance with *lex loci*.[1] Using its new test, the majority is able to downplay the historic significance of the situs of the injury and correspondingly emphasize the significance of hitherto unheeded factors in the conflict of laws analysis. Such a *sub silentio* rejection of a well-settled doctrine of law can only lead to the uncertainty, lack of uniformity, and unpredictability contemplated by the *Boudreau* Court.

Lacking any certain precedent for this shift, and apparently loathe to acknowledge its disavowal of *lex loci*, the majority adopts a tortured reading of our decision in *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 305 S.E.2d 528 (1983). The *Leonard* Court, while affirming its adherence to *lex loci*, was faced with a very different set of facts than that with which we are faced today. There, plaintiff was injured in Virginia and obtained workers' compensation benefits under Virginia law. Subsequent to his death, his widow brought a third-party tort action in North Carolina against manufacturers of asbestos. In North Carolina, in a negligence action by an injured employee, the third-party tort-feasor can allege as a *pro tanto* defense the concurring negligence of the employer. *See* N.C.G.S. § 97-10.2 (1991). Virginia, however, had no law either permitting or denying such defenses under the circumstances. We therefore concluded that North Carolina law applied even though plaintiff received workers' compensation benefits from Virginia, stating that "in the absence of any Virginia law one way or the

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1. This test was first advanced by the American Law Institute in 1971. Gregory E. Smith, *Choice of Law in the United States*, 38 Hastings L.J. 1041, 1044-46 (1987). *See* Restatement (Second) Conflict of Laws §§ 6, 145(2), 146, 188(2) (1981). In 1976, this Court explicitly rejected an opportunity to adopt the Second Restatement approach. *See Henry v. Henry*, 291 N.C. 156, 163-64, 229 S.E.2d 158, 163 (1976).

other on this issue, the rule of *lex loci delicti commissi* does not apply." *Leonard*, 309 N.C. at 96, 305 S.E.2d at 352. Further, in a footnote, we offered that "even if Virginia law clearly prohibited an employer's negligence to be litigated for the limited purposes allowed under North Carolina law, . . . the governmental interests and public policy of our state would require us to abjure the *lex loci delicti commissi* rule." *Id.* at 96 n.1, 305 S.E.2d at 352 n.1.

Thus, upon close examination, *Leonard* provides scant support for the majority's stance. While the opinion did deviate from a strict application of *lex loci*, it did so in a context bereft of alternative state law. Therefore, in *Leonard*, there was no way that Virginia law could apply because the Virginia law did not speak to the issue. It was only because of the vacuum in Virginia law that North Carolina law was applied in that case. Moreover, the majority's contention that *Leonard* provides a public policy exception in choice of laws analysis lacks support in the law. The *Leonard* Court's assertion, contained in a footnote, concerned matters not implicated by the facts at bar and therefore amounted to nothing more than dictum, rendering the assertion worthless as precedential value. *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956).

I must also note my reservations concerning the majority's usage of the *renvoi* doctrine. It is indeed ironic that the majority rushes to embrace this anachronistic and much-criticized[2] doctrine, while at the same time renouncing the well-settled body of law surrounding *lex loci*. Surely the majority cannot escape the irony of its application of *renvoi* insofar as it reinforces the importance of the law of the situs, requiring as it does that Virginia's conflict of laws *policy* deserves deference, but not its *substantive law*. The majority places itself in the shoes of the Virginia court and prophesies that, because of plaintiff's eligibility for and receipt of North Carolina workers' compensation benefits, that court would apply North Carolina law rather than the law of Virginia. This convenient remission to North Carolina law by the majority cannot be taken as anything less than result-oriented.

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2. *See* Rhoda S. Barish, *Renvoi and the Modern Approaches to Choice of Law*, 30 Am. U. L. Rev. 1049, 1065-68 (1981); Albert A. Ehrenzweig, *Conflict of Laws* 336 (1962); Erwin S. Griswold, *Renvoi Revisited*, 51 Harv. L. Rev. 1165, 1167 n.8 (1938).

Finally, the position adopted by the majority is at odds with the traditional view of other American jurisdictions.[3]

For the foregoing reasons, I respectfully dissent from the opinion of the majority.

STATE OF NORTH CAROLINA v. MARY ANNA BARLOW

No. 146A91

(Filed 7 November 1991)

1. **Criminal Law § 76.10 (NCI3d)— voluntariness of confession— question of law—appellate review**

In determining whether a confession is voluntary, the trial judge must make findings of fact resolving all material conflicts in the evidence. Whether a trial court's findings support a conclusion that the confession was voluntarily made is, however, a question of law reviewable on appeal.

Am Jur 2d, Evidence § 590.

2. **Criminal Law § 75.5 (NCI3d)— confessions without Miranda warnings—admissibility of subsequent confession after warnings**

Assuming that defendant was entitled to Miranda warnings prior to making her first three statements to police officers, these three statements without the benefit of Miranda warnings were not coerced or made under circumstances calculated to undermine defendant's exercise of her free will and therefore did not taint the subsequent videotaped confession to murder by defendant following proper Miranda warnings where uncontradicted evidence showed that defendant confessed to the killing because she could no longer "live with the guilt," and evidence supported findings by the trial court that defendant, while at a hospital, agreed to go to the police station with an officer; the officer explained to defendant that she was not under arrest; once at the station, defendant was advised by a detective that she had a right to leave the police

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3. *See* Robert A. Leflar, *American Conflicts Law* 466 n.15 (4th ed. 1986); Restatement (Second) Conflict of Laws §§ 183-185 (1981); 81 Am. Jur. 2d *Workmen's Compensation* §§ 63, 86, 88 (1976 & Supp. 1991).

department and that she was not under arrest for any crime; after making an oral statement to the detective, defendant then detailed the events in a written statement on a form including language that the statement was made voluntarily and could be used against her in court; defendant then returned to her home and enjoyed complete liberty until she agreed to return to the police station three days later; defendant then made another statement admitting the killing and agreed to have her statement recorded on videotape; and defendant was given the Miranda warnings before her fourth statement was videotaped.

Am Jur 2d, Evidence §§ 555-557.

Admissibility of pretrial confession in criminal case—Supreme Court cases. 1 L. Ed. 2d 1735; 4 L. Ed. 2d 1833; 12 L. Ed. 2d 1340; 16 L. Ed. 2d 1294; 22 L. Ed. 2d 872.

APPEAL by the State as of right pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 103 N.C. App. 276, 405 S.E.2d 372 (1991), vacating the judgment of *Stevens, J.*, entered 17 November 1989 in Superior Court, ONSLOW County, and remanding the case to that court for further proceedings. Heard in the Supreme Court 14 October 1991.

Lacy H. Thornburg, Attorney General, by James Wallace, Jr., and Charles M. Hensey, Special Deputy Attorneys General, for the State-appellant.

Joseph E. Stroud, Jr., for defendant-appellee.

MEYER, Justice.

The sole issue presented on this appeal is whether the Fifth and Fourteenth Amendments of the United States Constitution mandated suppression of defendant's videotaped confession, made after she waived her *Miranda* rights, solely because the confession was preceded by incriminating statements made by defendant without the benefit of *Miranda* warnings. Assuming that the preceding statements were obtained in violation of the prophylactic rule established in *Miranda*, we conclude that the un-Mirandized statements were not coerced in violation of defendant's Fifth Amendment right against compulsory self-incrimination. Therefore, the trial court properly denied defendant's motion to suppress the subse-

quent confession given by defendant after she was properly Mirandized.

At 7:30 p.m., 14 April 1989, defendant accompanied her sister-in-law to Brynn Marr Hospital, a psychiatric facility located in Jacksonville, North Carolina. Upon entering the hospital, defendant met Ms. Pamela Chance, a registered nurse who was working with the hospital's telephone help-line. Defendant told Chance that her sister-in-law was having a problem. Upon Chance's recommendation, defendant took her sister-in-law to a detoxification facility.

Around 8:00 p.m., defendant returned to Brynn Marr to speak with Chance about defendant's own problems. Defendant, who was attending college at Coastal Carolina Community College, indicated that she lacked initiative in school, that she was having financial difficulties, that she did not want to work, and that she was concerned about losing government funding of her college education. Chance continued to talk with defendant to find out whether defendant was depressed and having thoughts of hurting herself or someone else. Defendant stated that she had hurt someone else, that she had killed a man by smothering him with a towel when he was very drunk and unable to resist. After speaking with her supervisor, Chance called the police. At no point did defendant attempt to leave.

Officer Kirk Newkirk, a Jacksonville police officer, arrived at the hospital shortly after Chance called the police. He spoke with Chance, who advised him of defendant's comments. Officer Newkirk telephoned his supervisor at the police station and then asked defendant whether she would accompany him to the police station "with the information she was giving." Defendant agreed. Officer Newkirk explained to defendant that she was not under arrest but that, due to departmental policies, he would have to handcuff her in order to transport her to the police station. Officer Newkirk handcuffed defendant, placed her in the front seat of the car, and drove to the police station. On the way to the station, defendant and Officer Newkirk discussed the fact that the police department's policy required that all persons riding in the police car must be handcuffed.

After arriving at the police station, Officer Newkirk removed the handcuffs and escorted defendant to an interview room, where he waited with defendant until Detective June Gelling arrived. While waiting for Detective Gelling, Officer Newkirk did not ques-

tion defendant about her statements, and defendant did not request to leave the station. Defendant did ask to go to the rest room, at which time Officer Newkirk found a female police officer to accompany defendant to the rest room.

Detective Gelling arrived approximately thirty to forty-five minutes later. Officer Newkirk left the station, and defendant was escorted to Detective Gelling's office. Detective Gelling told defendant that she was not under arrest and that she was free to leave at any time. Without giving any *Miranda* warnings, Detective Gelling began questioning defendant about the comments she had made to Chance at the hospital. Defendant spoke with Detective Gelling for over an hour. Defendant admitted that she had killed General Jackson Kellum on 7 July 1985 (defendant's first statement). At Detective Gelling's request, defendant made and signed a written statement detailing the events leading up to and resulting in the death of General Kellum (defendant's second statement). In the written statement, defendant indicated:

> I picked up a towel (I think it was brown) folded to the size of [General Kellum's] face. I covered his face and tightly held it down on his face. He started to struggle but I held it more tightly. When he stopped struggling, I looked at the watch on my right wrist. It was 3:17 p.m. but I held the towel down on his face another 5 mins. to make [sic] he was dead. . . . I have never told anyone anything about [killing General Kellum] until now because I was scared but now I realize that I can't live with the guilt.

After the interview, Detective Gelling informed defendant that she would be in touch, and defendant left the station.

At approximately 2:00 p.m. on 17 April 1989, Detective Gelling and Detective Shingleton, another detective of the Jacksonville Police Department, drove to defendant's residence and asked defendant if she would accompany them to the police station. Defendant agreed, and the three drove to the station. Upon arrival at the Jacksonville Police Department, defendant was introduced to Deputy Chief Delma Collins. Without the benefit of *Miranda* warnings, defendant made another oral statement, again admitting that she killed General Kellum (defendant's third statement).

Deputy Chief Collins then asked defendant if she would agree to have her statement recorded on videotape. Defendant agreed.

Detective Gelling and Deputy Chief Collins then escorted defendant to the station's videotape facilities. Prior to questioning, defendant was properly advised of her *Miranda* rights, which she waived orally, in a signed writing and on videotape. Upon questioning initiated by Deputy Chief Collins, defendant then made an inculpatory statement that was consistent with the previous statements, confessing that she killed General Kellum by means of smothering him with a towel (defendant's videotaped confession). Immediately after the videotaped interview, defendant was arrested and charged with first-degree murder.

Prior to trial, defendant filed a motion to suppress her statements made to Chance and to the police. After conducting a *voir dire* hearing, the trial court entered an order granting in part and denying in part defendant's motion to suppress. Specifically, the trial court concluded that defendant's statement to Chance was not subject to physician-patient, counselor-client, or social worker-client privilege and thus was admissible at trial. The trial court suppressed defendant's first three statements to the police—the oral and written statements made on 14 April 1989 and the first oral statement made on 17 April 1989—after finding that defendant was in custody and that *Miranda* warnings were not administered prior to these confessions. The trial court refused to suppress the videotaped confession, concluding that the videotaped confession was not tainted by the prior statements and that the videotaped confession "relates back to and is consistent with the statement made to Ms. Chance."

Following entry of the trial court's judgment, defendant filed a notice of appeal from the denial of defendant's suppression motion. Thereafter, defendant entered a plea of no contest to the lesser included offense of second-degree murder and was sentenced to twelve years' imprisonment.

On appeal, the Court of Appeals reversed and remanded this case to the trial court "to make the necessary findings and conclusions for [the Court of Appeals] to determine whether [each of defendant's first] . . . three . . . statements to the police officers were simply not properly Mirandaized [sic], or whether any of defendant's constitutional rights were violated." *State v. Barlow*, 102 N.C. App. 71, 76, 401 S.E.2d 368, 371 (1991). In response to a petition for discretionary review filed by the State, this Court, by order dated 2 May 1991, remanded this case to the Court of

Appeals for reconsideration in light of our recent opinion in *State v. Edgerton*, 328 N.C. 319, 401 S.E.2d 351 (1991). *State v. Barlow*, 328 N.C. 733, 404 S.E.2d 872 (1991). On remand, the majority of the Court of Appeals, with Judge Orr dissenting, reaffirmed its previous decision, holding:

> [T]he trial court was obliged to make a determination as to whether any of the three statements complained of were the result of a constitutional violation. While portions of the trial court's order would tend to indicate that the trial court believed the oral and written statements made to Detective Gelling were in fact voluntary, we continue to adhere to our original holding that this case must be remanded for further proceedings in light of the proper legal framework. The trial court's order under review here also does not contain sufficient findings for us to determine whether the trial court considered the oral statement made to Deputy Chief Collins (the third statement complained of) to even be a confession.

State v. Barlow, 103 N.C. App. 276, 278, 405 S.E.2d 372, 373-74 (1991).

The State contends that the Court of Appeals erred in reversing the trial court's judgment denying defendant's motion to suppress the videotaped confession. We agree and therefore reverse the decision of the Court of Appeals.

In *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222 (1985), the United States Supreme Court set forth the test for determining whether the Fifth Amendment requires suppression of a confession that is the fruit of an earlier statement obtained in violation of the prophylactic rule established in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, *reh'g denied sub nom. California v. Stewart*, 385 U.S. 890, 17 L. Ed. 2d 121 (1966). Like the case *sub judice*, *Elstad* involved a situation wherein the defendant made multiple incriminating statements. In *Elstad*, the defendant made one incriminating statement without benefit of *Miranda* warnings and subsequently made another statement after having been fully advised of and having waived his *Miranda* rights. Reasoning that "[t]he *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment," the Court concluded that a confession obtained in violation of *Miranda* does not require that the fruits of the statement "be discarded as inherently tainted." *Oregon v. Elstad*, 470 U.S. at 306-07, 84 L. Ed. 2d at 230-31. The Court explained:

> It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any *actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will*, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Id. at 309, 84 L. Ed. 2d at 232 (emphasis added). Thus, it is only where an earlier inadmissible confession is coerced or given under circumstances calculated to undermine the suspect's ability to exercise his or her free will that the Fifth Amendment mandates that fruits of the confession, such as the videotaped confession in this case, must be suppressed.

[1] We note at the outset that the Court of Appeals erred in remanding this case to the trial court for further findings. In *State v. Edgerton*, 86 N.C. App. 329, 357 S.E.2d 399 (1987), *rev'd*, 328 N.C. 319, 401 S.E.2d 351 (1991), the Court of Appeals, deciding a similar case, granted the defendant a new trial based on the fact that the trial court failed to "make findings of fact and determine if the prior confession was voluntary or involuntary and, if involuntary, whether the second confession was made under the same prior influence." *State v. Edgerton*, 86 N.C. App. at 335, 357 S.E.2d at 403. In an opinion filed 7 March 1991, we reversed the Court of Appeals, stating that "[e]ven if the defendant was in custody when questioned . . . there was no evidence that the questioning was coercive." *State v. Edgerton*, 328 N.C. at 321, 401 S.E.2d at 352. Implicit in our opinion in *Edgerton* was the conclusion that the question of the voluntariness of a confession is one of law, not of fact. *Accord State v. Richardson*, 316 N.C. 594, 600-01, 342 S.E.2d 823, 828 (1986). It is true that a trial judge, in determining whether a confession is voluntary, must make findings of fact resolving all material conflicts in the evidence. *Id.* at 600, 342 S.E.2d at 828. Whether a trial court's findings support a conclusion that the confession was voluntarily made is, however, a question of law properly reviewable on appeal. *Id.* at 600-01, 342 S.E.2d at 828.

The trial court in this case concluded that defendant was in custody and was subjected to interrogation, entitling defendant to *Miranda* warnings. The trial court therefore suppressed defendant's first three statements to the officers because the court concluded that these statements were obtained in violation of *Miranda.* The State has not contested the trial court's exclusion of these statements or the trial court's conclusion that defendant was entitled to *Miranda* warnings. As these issues have not been presented for review, we render no opinion as to whether defendant was subjected to custodial interrogation entitling her to *Miranda* warnings. *See* N.C. R. App. P. 10(a), 28 (limiting the scope of appellate review "to a consideration of those assignments of error set out in the record on appeal" and to questions presented in the parties' briefs).

[2] Assuming, *arguendo*, that defendant was entitled to *Miranda* warnings prior to making the first three statements to police officers, we conclude, as a matter of law, that these statements were not coerced or made under circumstances calculated to undermine defendant's exercise of her free will and therefore did not taint the subsequent confession given by defendant following proper *Miranda* warnings. The trial court found as facts that prior to making any statement to the police, defendant was told that she was not under arrest and that she was free to go at any time; that the statement signed by defendant on 14 April 1989 included language informing defendant that the statement could be used against her in court; that after making the 14 April 1989 statements, defendant returned to her home and enjoyed complete liberty until 17 April 1989; that during the period between 14 April 1989 and 17 April 1989, no law enforcement officer or any agent of the State contacted defendant; and that the 14 April 1989 statements were not induced by any threats, promises, inducements, or influence. These findings of fact were supported by competent evidence and are therefore conclusive on appeal. *State v. Gray*, 268 N.C. 69, 78-79, 150 S.E.2d 1, 8 (1966), *cert. denied*, 386 U.S. 911, 17 L. Ed. 2d 784 (1967).

In *Gray*, this Court set forth certain factors to be considered in determining the voluntariness of a confession. Among these factors are whether the defendant was in custody when he made the statement; the mental capacity of the defendant; and the presence of psychological coercion, physical torture, threats, or promises. *Id.* at 78, 150 S.E.2d at 8. However, voluntariness is determined in light of the totality of the circumstances surrounding the confes-

sion. *State v. Richardson*, 316 N.C. at 601, 342 S.E.2d at 829. The presence or absence of one or more of these factors is not determinative. *Id.*

In support of her argument that the unwarned statements were involuntarily coerced, defendant relies solely on the trial court's findings related to the court's conclusion that defendant was in custody at the time that she made the first three statements to the police. We find no merit in defendant's argument. Although custody is one factor that may properly be considered in determining the voluntariness of a confession, we do not find that the custodial situation involved in this case was inherently coercive. As found by the trial judge, defendant, while at the hospital, agreed to go to the police station with Officer Newkirk. Officer Newkirk explained to defendant that she was not under arrest. Once at the station, defendant was advised by Detective Gelling that she had a right to leave the police department and that she was not under arrest for any crime. After making an oral statement to Detective Gelling, defendant then detailed the events in a written statement on a form including the following language:

> I do hereby make this voluntary statement of my own free will and accord to Det[ective] J. Gelling of the Jacksonville Police Department.
>
> I make this statement in a sound and sober mind. No threats have been made to me nor any promises of a reward to obtain this statement. I have been informed that this statement can be used against me in the Court of Law.

In addition, other evidence, not recited in the trial court's findings, was presented at the suppression hearing indicating that defendant confessed to killing General Kellum because she could no longer "live with the guilt." Although this evidence was not contained in the trial court's findings, the evidence was uncontradicted and therefore may also be considered on appeal to support the trial court's conclusions. *See State v. Richardson*, 316 N.C. 594, 342 S.E.2d 823. Whatever the reason for defendant's decision to confess to the killing of General Kellum, we conclude that the incidents leading to defendant's unwarned statements do not establish that defendant's statements were the result of coercion.

Neither did the officers use defendant's first three statements to pressure defendant to submit to the videotaping of her confes-

sion. Based upon competent evidence, the trial court found that three days had passed between the time defendant made her first statement to the police and the time defendant was asked to return to the station on 17 April 1989. During that interval, defendant was at home. She was not threatened, coerced, or induced by promises made by the police; she freely agreed to accompany Detectives Gelling and Shingleton to the police station and subsequently consented to have her statement videotaped. Immediately before and during the videotaping, defendant was informed, in writing and orally, of her *Miranda* rights. Defendant acknowledged that she understood and waived each of those rights. The trial court's findings, supported by competent evidence, support the trial court's conclusion that defendant's videotaped confession was not rendered inadmissible by defendant's first three statements, made without benefit of *Miranda* warnings.

In summary, we conclude that defendant's statements to the police made without benefit of *Miranda* warnings were not coerced and were not given under circumstances calculated to undermine her ability to exercise her free will. The subsequent confession in question here, given after proper *Miranda* warnings, was knowingly and voluntarily given by defendant. Because the un-Mirandized statements were not obtained in violation of defendant's Fifth Amendment right against compulsory self-incrimination, they did not render defendant's subsequent Mirandized confession inadmissible. We reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Onslow County, with instructions to reinstate the judgment previously entered.

Reversed and remanded.

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

IN THE MATTER OF THE ESTATE OF CALVIN LANCASTER TROGDON

No. 77A91

(Filed 7 November 1991)

1. **Trial § 58.3 (NCI3d)— nonjury trial—conclusiveness of findings**

Where trial is by judge and not by jury, the trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. If different inferences may be drawn from the evidence, the trial judge determines which inferences shall be drawn and which shall be rejected, and findings of fact made by the court which resolve conflicts in the evidence are binding on appellate courts.

Am Jur 2d, Appeal and Error § 839.

2. **Executors and Administrators § 23 (NCI3d); Fornication and Adultery § 4 (NCI3d)— year's allowance—forfeiture for adultery—sufficient evidence of adultery**

There was sufficient evidence of opportunity and inclination to support the trial court's finding that respondent wife committed uncondoned adultery and is therefore barred from receiving a year's allowance pursuant to N.C.G.S. § 31A-1(a)(2) and (b)(4) where evidence was presented that respondent and decedent were married for a second time after decedent was severely injured in a motorcycle accident which left him a quadriplegic; despite decedent's medical condition, respondent voluntarily left the marital home and moved into an apartment; prior to leaving, respondent had started coming in at night later and later and gradually began remaining away from home for days at a time; while still married to decedent, respondent began living with another man; respondent told her son that she and the other man "couldn't see paying rent for two different apartments" and admitted that they were "living together"; respondent's cohabitation with the other man began at least two years prior to the husband's death and continued until the date of the hearing; respondent filed for an absolute divorce from decedent during this cohabitation; respondent invoked her fifth amendment privilege against self-incrimination when questioned about her relationship with the other man;

and respondent never refuted the serious allegation of adultery lodged against her.

Am Jur 2d, Descent and Distribution §§ 129, 133.

Adultery on part of surviving spouse as affecting marital rights in deceased spouse's estate. 13 ALR3d 486.

3. Evidence § 34.1 (NCI3d)— assertion of self-incrimination right— basis for inference by factfinder

The factfinder in a civil action may use a witness's invocation of his fifth amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him.

Am Jur 2d, Witnesses § 37.

APPEAL by the Administrator of the Estate of Calvin Lancaster Trogdon 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. 323, 399 S.E.2d 396 (1991), reversing a judgment entered 19 January 1990 by *Ross, J.*, in Superior Court, FORSYTH County. Heard in the Supreme Court 10 September 1991.

Morrow, Alexander, Tash, Long & Black, by C. R. Long, Jr., for petitioner-appellant.

Bailey & Thomas, by Wesley Bailey, David W. Bailey, Jr., and John R. Fonda, for respondent-appellee.

FRYE, Justice.

At issue in this case is whether there was sufficient evidence to support the trial court's finding that respondent-wife, Patricia McNulty Trogdon, committed adultery and is therefore barred from receiving a year's allowance pursuant to N.C.G.S. § 31A-1(a)(2). The evidence showed, *inter alia*, that respondent cohabited with a male for approximately three years and invoked her fifth amendment privilege against self-incrimination when questioned about the relationship with the cohabitant. The trial judge agreed with petitioner, Bradley Floyd Trogdon, the decedent's and respondent's son and the administrator of the estate, and found that the evidence supported a finding of adultery on the part of respondent. On respondent's appeal, the Court of Appeals reversed, holding that, while petitioner presented sufficient evidence to show opportunity

to commit adultery, petitioner failed to show inclination to commit adultery. We agree with the trial judge, however, and reverse the decision of the Court of Appeals.

The case arose in the following context:

Calvin Lancaster Trogdon died intestate on 17 April 1988. Bradley Floyd Trogdon, his son, qualified as administrator of his estate on 29 September 1988. Decedent's widow, Patricia McNulty Trogdon, applied for a spouse's year's allowance pursuant to N.C.G.S. § 30-15, which was allowed by the magistrate. Bradley Trogdon, as son and heir, appealed to the superior court pursuant to N.C.G.S. § 30-23, on the grounds that Mrs. Trogdon had forfeited her right to share in the property of her deceased husband. Following a hearing held on 1 December 1988, Judge Thomas W. Ross made findings of fact and conclusions of law and ordered that the assignment of the year's allowance be set aside. On Mrs. Trogdon's appeal, a divided panel of the Court of Appeals reversed. Bradley Trogdon appealed to this Court on the basis of the dissenting opinion.

I.

At the outset, we emphasize that we do not attempt to establish a brightline test for determining how much evidence is necessary to permit a jury or trial judge to infer adultery. We recognize that while a measure of certainty is required for guidance in deciding future cases of this genre, each of these cases will demand a fact-specific inquiry. It is precisely because of the uniqueness of each case that we specifically limit our holding to the facts of the case before us.

The testimony presented at trial tended to show the following undisputed facts. Patricia Trogdon and Calvin Trogdon were married for the second time on 14 June 1983. Prior to the marriage, Mr. Trogdon was severely injured in a motorcycle accident which left him a quadriplegic. After the marriage, the Trogdons moved into a home which was built to accommodate Mr. Trogdon's medical condition. Mrs. Trogdon left the marital home on 11 March 1985 and moved into an apartment in the Village Apartments. Prior to leaving the marital home, Mrs. Trogdon started coming in at night later and later and gradually began remaining away from home for days at a time. Shortly after the separation, Doug "Cookie" Winfrey, who lived in an apartment in the same complex, moved into the apartment with Mrs. Trogdon because, according to Mrs.

Trogdon, "[they] couldn't see paying rent for two different apartments." When called as an adverse witness to testify about this living arrangement, Mrs. Trogdon invoked her fifth amendment privilege against self-incrimination.

Mrs. Trogdon's son, Bradley, would occasionally visit his mother while she lived in the apartment with Mr. Winfrey. On one occasion, Mrs. Trogdon admitted to her son that she and Winfrey were "living together." A private detective testified that on 28 and 29 October 1987, he observed Mrs. Trogdon and Mr. Winfrey remain in the apartment throughout the night. On the morning of 28 October, Mr. Winfrey exited the apartment, started Mrs. Trogdon's car for her and then returned to the apartment. On the morning of 29 October, Mr. Winfrey and Mrs. Trogdon left the apartment together. Mrs. Trogdon filed an action for absolute divorce on 30 September 1987, and Mr. Trogdon filed an action for alimony on 2 November 1987. Mr. Trogdon died on 17 April 1988, prior to any judgment being entered in the divorce and alimony proceedings.

II.

N.C.G.S. § 31A-1 provides in pertinent part:

§ 31A-1. Acts barring rights of spouse.

(a) The following persons shall lose the rights specified in subsection (b) of this section:

. . . .

(2) A spouse who voluntarily separates from the other spouse and lives in adultery and such has not been condoned; or

(3) A spouse who wilfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death; . . .

. . . .

(b) The rights lost as specified in subsection (a) of this section shall be as follows:

. . . .

(4) All rights to any year's allowance in the personal property of the other spouse . . . .

N.C.G.S. § 31A-1 (1984). Section 31A-15 provides that "Chapter [31A is] to be broadly construed" so "that no person shall be allowed to profit by his [or her] own wrong."

We hold that respondent is barred from a year's allowance pursuant to subsections (a)(2) and (b)(4) of N.C.G.S. § 31A-1.

In the case *sub judice*, the trial judge made the following significant findings of fact:

> (4) The Court finds from the evidence presented that Patricia McNulty Trogdon has committed the following acts as specified in N.C.G.S. 31A-1(a), to wit: A spouse who voluntarily separates from the other spouse and lives in adultery and such has not been condoned; that the evidence did show that Patricia McNulty Trogdon and Calvin Lancaster Trogdon were lawfully married on or about the 14th day of June, 1983; that Patricia McNulty Trogdon did voluntarily separate from Calvin Lancaster Trogdon on or about the 11th day of March, 1985 and lived continuously separate and apart from the said Calvin Lancaster Trogdon until his death; that during the separation of the parties, Patricia McNulty Trogdon did reside and commit adultery with one Doug Winfrey a/k/a "Cookie"; and that said separation and adultery was [sic] not condoned by Calvin Lancaster Trogdon.

Based upon these and other findings, the trial judge concluded as a matter of law that Mrs. Trogdon "is barred by grounds pursuant to N.C.G.S. § 31A-1(a) and shall lose the right . . . to any year's allowance in the personal property of the decedent."

The Court of Appeals reversed the trial court on the basis that, aside from the extended cohabitation, there was no evidence of inclination to engage in adultery which could support an inference of adultery unless resort is made to suspicion and conjecture. *In re Estate of Trogdon*, 101 N.C. App. 323, 327, 399 S.E.2d 396, 398 (1991). We believe the Court of Appeals erred in reaching this conclusion.

[1] Where trial is by judge and not by jury, the trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, *even though the evidence might sustain findings to the contrary. Kirby Building Systems v. McNiel*, 327 N.C. 234, 242, 393 S.E.2d 827, 832 (1990) (citing *Williams v. Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975)). The trial judge acts as both judge and

jury and considers and weighs all the *competent* evidence before him. *Williams v. Ins. Co.*, 288 N.C. at 342, 218 S.E.2d at 371. If different inferences may be drawn from the evidence, the trial judge determines which inferences shall be drawn and which shall be rejected. *Id.* Findings of fact made by the court which resolve conflicts in the evidence are binding on appellate courts. *Id.* The logic behind this approach is clear. In this setting, the trial judge is better able than we at the appellate level to gauge the comportment of the parties throughout trial and to discern the sincerity of their responses to difficult questions. We believe this approach to be especially applicable to a case like this one in which a party, whose credibility is at issue, took the stand and refused to testify about an alleged adulterous relationship.

The evidence in this case clearly supports an inference of adultery as found by the trial court. Although contrary inferences might be drawn from the same evidence, we believe that this finding should be accorded a high degree of deference.

Adultery is nearly always proved by circumstantial evidence. 1 Robert E. Lee, *North Carolina Family Law* § 65 (4th ed. 1979). Circumstantial evidence "is often the only kind of evidence available, as misconduct of this sort is usually clandestine and secret." *Id.* Where adultery is sought to be proved by circumstantial evidence, resort to the opportunity and inclination doctrine is usually made. *Id.* Under this doctrine, adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations. *Id.*

In *Owens v. Owens*, 28 N.C. App. 713, 222 S.E.2d 704, *disc. rev. denied*, 290 N.C. 95, 225 S.E.2d 324 (1976), the North Carolina Court of Appeals warned against adopting broad rules to prove adultery. The court said:

> We consider it unwise to adopt general rules as to what will or will not constitute proof of adultery, but the determination must be made with reference to the facts of each case. In some cases evidence of opportunity and incriminating or improper circumstances,[1] without evidence of inclination or

1. The court in *Owens* cited Corpus Juris Secundum and American Jurisprudence for the following:

> adulterous disposition, may be such as to lead a just and reasonable [person] to the conclusion of adulterous intercourse.

Id. at 716, 222 S.E.2d at 706 (footnote added). In *Owens*, the plaintiff husband presented evidence that the defendant wife had been living with another man for two months, that each morning the man left the house about 8:00 a.m. and that the two of them had been seen buying clothes together. The Court of Appeals found this evidence sufficient to take the case to the jury on the issue of adultery.

In *Horney v. Horney*, 56 N.C. App. 725, 289 S.E.2d 868 (1982), the Court of Appeals expressed disapprobation for the holding in *Owens*. The court observed that there was no clear standard for determining the sufficiency of proof of adultery, and expressed concern that the absence of such a standard had resulted in "trial by suspicion and conjecture." *Id.* at 727, 289 S.E.2d at 869. The court criticized *Owens* as standing for the proposition that "opportunity alone may now be sufficient to support a jury verdict of adultery if the opportunity is great enough." *Id.* The court felt that "a more definite line must be drawn between permissible inference and mere conjecture." *Id.* Importantly, however, no such line was explicitly drawn in *Horney*. The relevant facts of *Horney* were that the defendant husband had a friendly relationship with another woman, that they were alone together on several occasions in the woman's office and on at least one occasion in her home, that she made phone calls to him when he was out of town on business, that the husband was often away from home on Saturday afternoons, and that during a period of reconciliation the husband refused to sleep with the wife and was often away in the evenings. The court found this evidence insufficient to go to the jury on the question of adultery. *Id.* at 728, 289 S.E.2d at 869. However, the court suggested in *dicta* that it might have reached a different result had there been evidence of other suspicious circumstances such as being together very late at night in state of undress, or

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> Both 27A C.J.S., Divorce, § 139(2)b and 24 Am. Jur. 2d, Divorce and Separation, § 369 substitute "adulterous disposition" for "inclination." In 27A C.J.S., *supra*, at 480, it is stated: "In absence of evidence of an adulterous inclination, proof of opportunity to commit adultery is not sufficient to establish the offense, *unless it occurs under incriminating circumstances.*"

Owens, 28 N.C. App. at 715, 222 S.E.2d at 705 (alteration in original).

evidence of feelings of love or affectionate behavior. *Id.* at 727, 289 S.E.2d at 869.

One of the more recent cases discussing this issue is *Wallace v. Wallace*, 70 N.C. App. 458, 319 S.E.2d 680 (1984), *disc. rev. denied*, 313 N.C. 336, 327 S.E.2d 900 (1985). In considering both *Owens* and *Horney*, the court in *Wallace* said that its comments in *Horney* concerning *Owens* "can only be regarded as placing *Owens* in the trial by 'suspicion and conjecture' category." *Id.* at 461, 319 S.E.2d at 82. The court observed further that the *dicta* in *Horney* still leaves far too much to conjecture. The court said:

> We cannot agree that in modern society, where adult persons follow widely diverse schedules of work and other activities throughout the day and night, that being alone together late at night is any more or less significant than being alone together at any other time . . . . We are persuaded that the "more definite line" needed to be drawn in adultery cases is to require that in order to establish adultery, the evidence, whether circumstantial or direct, must tend to show both opportunity and inclination to engage in sexual intercourse and that when the evidence shows no more than an opportunity, an issue of adultery should not be submitted.

Id. at 461-62, 319 S.E.2d at 683.

In *Wallace*, the plaintiff's evidence tended to show that the defendant left a farmhouse with a woman not his wife at 10:30 in the morning, entered the same motel that the woman later entered, drove with her to the airport and to a restaurant, remained overnight in the same motel and remained overnight in his condominium with the woman. The court held that this evidence supported an inference of opportunity but not inclination to engage in adulterous conduct.

In reviewing these cases, it becomes readily apparent that the general principles set forth in them regarding what will or will not constitute proof of adultery are conflicting and unsatisfactory. We believe this to be inevitable, however, given the fact-specific nature of these types of cases. In comparing the Court of Appeals decisions in *Owens*, *Horney*, and *Wallace*, we note that the language used by the court must be considered in light of the facts of each case. In *Owens*, there was clear evidence that the parties had lived together for two months. The evidence was

held sufficient to go to the jury. In *Horney* and *Wallace*, on the other hand, there was no evidence of living together or cohabitation—only suspicion and conjecture. In those cases the Court of Appeals found the evidence insufficient to go to the jury.

[2] We are satisfied that the evidence in the case *sub judice* amounts to more than suspicion and conjecture. While we expressly do not presume every male-female living together situation to be amorous, that fact, combined with several other factors in this case, permits a reasonable inference of adultery. As the Court of Appeals concluded, petitioner clearly presented sufficient evidence as to the opportunity prong of the test. Unlike the Court of Appeals, however, we believe that the evidence satisfies the inclination prong as well.

During the course of her second marriage to the decedent and despite his medical condition, which was known to respondent at the time of remarriage, Mrs. Trogdon voluntarily left the marital home and moved into the same apartment complex in which Cookie Winfrey lived. Petitioner's unrefuted evidence was that, prior to leaving, Mrs. Trogdon had started coming in at night later and later and gradually began remaining away from home for days at a time. While still married to decedent, Mrs. Trogdon began living with Cookie Winfrey. In explaining this living situation to her son, Mrs. Trogdon said that "[they] couldn't see paying rent for two different apartments." On one occasion, Mrs. Trogdon admitted that she and Winfrey were "living together." Much longer than the cohabitation in *Owens*, the cohabitation in the instant case was ongoing and lasted at least two years prior to the husband's death and continued until the date of the hearing. It was during this cohabitation that Mrs. Trogdon filed for absolute divorce from her husband. A few months later, while Mrs. Trogdon was still living with Mr. Winfrey, Mr. Trogdon died. Certainly, a reasonable person could construe these incriminating circumstances, in the context of this case, as showing an adulterous disposition on the part of Mrs. Trogdon.

[3] Perhaps the most telling evidence of inclination was spoken from the mouth of Mrs. Trogdon herself. When asked more than once about her relationship with Winfrey, Mrs. Trogdon responded, "No, I really refuse to answer on the grounds that I may incriminate myself." As Judge Whichard (now Justice) noted in *Federonko v. American Defender Life Ins. Co.*, 69 N.C. App. 655, 657-58, 318

S.E.2d 244, 246 (1984), the finder of fact in a civil cause may use a witness' invocation of his fifth amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him. *Id.* at 657-58, 318 S.E.2d at 246. Moreover, the Court of Appeals pointed out the following in *Gray v. Hoover*, 94 N.C. App. 724, 381 S.E.2d 472, *disc. rev. denied*, 325 N.C. 545, 385 S.E.2d 498 (1989):

> "Plaintiff's charge against defendant was adultery; if the evidence of so serious a charge was not true, the defendant had the opportunity to refute it. Whether the charge was true or not, the falsity of it was peculiarly within defendant's knowledge. The fact that [she] did not refute the damaging charge made by plaintiff, it may be that this was a silent admission of the charge made against [her]."

Id. at 729, 381 S.E.2d at 475 (quoting *Walker v. Walker*, 201 N.C. 183, 184, 159 S.E. 363, 364 (1931)). In the instant case, respondent never refuted the serious allegation of adultery lodged against her. Under the propositions stated above, her refusal to testify about the nature of her relationship with Cookie Winfrey and her failure to refute the charge of adultery logically give rise to an inference of adultery.

In weighing the evidence before him, the trial judge resolved the inferences in favor of the administrator and against the respondent, finding that she had committed adultery which had not been condoned by her husband. While contrary inferences might have been drawn from this same evidence, it was the trial judge's prerogative to determine which inferences should be drawn and which inferences should not be. *Williams v. Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371. His finding, which is supported by the evidence, is binding upon this Court. *Id.*

III.

In conclusion, we hold that the evidence supports the trial court's finding that Mrs. Trogdon voluntarily separated from her husband and lived in an uncondoned adulterous relationship with Cookie Winfrey. Therefore, the trial court properly set aside the year's allowance assigned to her from her deceased husband's estate pursuant to N.C.G.S. § 31A-1. This holding is in accord with section 31A-15 which provides that Chapter 31A "shall be construed broadly in order to effect the policy of this State that no person shall

be allowed to profit by his [or her] own wrong." N.C.G.S. § 31A-15 (1984). "To hold otherwise defies common sense in favor of a hypertechnical legal principle." *In re Estate of Trogdon*, 101 N.C. App. at 328, 399 S.E.2d at 399 (Cozort, J., dissenting).

For the reasons stated above, the decision of the Court of Appeals is reversed.

Reversed.

GARY W. SWINDELL AND WIFE, LILLIAN R. HARRIS SWINDELL v. THE FEDERAL NATIONAL MORTGAGE ASSOCIATION AND SKYLINE MORTGAGE CORPORATION

No. 70PA90

(Filed 7 November 1991)

1. Usury § 5 (NCI3d)— mortgage—late fee—forfeiture of fee

The Court of Appeals correctly held that a mortgage late payment charge was excessive in violation of N.C.G.S. § 24-10.1, and that defendants forfeited their right to collect late charges, but not their right to receive principal and interest. The note executed by plaintiffs contemplated interest for two separate transactions, the contract for a home loan and the cost of delayed loan payments. The four elements of usury are present with regard to the late payment penalty provision, and the penalty for charging usurious interest is forfeiture of the entire interest. When late charges are usurious, "the entire interest" can only signify any and all penalty fees for late payments. N.C.G.S. § 24-2.

Am Jur 2d, Interest and Usury §§ 238, 240, 241.

Validity and construction of provision imposing "late charge" or similar exaction for delay in making periodic payments on note, mortgage, or installment sale contract. 63 ALR3d 50.

2. Usury § 1.2 (NCI3d)— mortgage—late fee—savings clause—not effective

A usury savings clause in a mortgage did not shield a lender for charging usurious rates in its late fees. A lender cannot charge usurious rates with impunity by making that rate conditional upon its legality and relying upon the illegal rate's automatic rescission when discovered and challenged by the borrower.

Am Jur 2d, Interest and Usury §§ 238, 240, 241.

Validity and construction of provision imposing "late charge" or similar exaction for delay in making periodic payments on note, mortgage, or installment sale contract. 63 ALR3d 50.

3. Bills and Notes § 5 (NCI3d)— mortgage—rate reduced—not fraudulent

The reduction of a mortgage late fee was not a fraudulent alteration discharging plaintiffs from the contract under N.C.G.S. § 25-3-407. Where, as here, the alteration is a reduction in rate intended to comply with the law and which in fact inures to the advantage of the other party, the alteration cannot be said to be fraudulent.

Am Jur 2d, Alteration of Instruments §§ 8, 9, 30, 31.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous opinion of the Court of Appeals, 97 N.C. App. 126, 387 S.E.2d 220 (1990), affirming summary judgment for defendants entered on 13 April 1989 by *Snepp, J.*, in the Superior Court, MECKLENBURG County. Heard in the Supreme Court 9 October 1990.

Gary W. Swindell and Lillian R. Harris Swindell, plaintiff-appellants, pro se.

Alexander and Brown, by William G. Alexander, for defendant-appellees.

Margot Saunders, N.C. Legal Services Resource Center, and Mal Maynard, Legal Services of the Lower Cape Fear, for North Carolina Clients Council, amicus curiae.

EXUM, Chief Justice.

[1] The question central to this appeal is how the penalty for usury under N.C.G.S. § 24-2 applies to a late payment charge that exceeds the maximum rate permitted under N.C.G.S. § 24-10(e). We hold the statutory penalty for usury requires defendant to forfeit all late payment charges to which it might otherwise have been entitled under the terms of the loan, but defendant is not required to forfeit the interest due on the loan itself.

On 22 March 1985, plaintiffs executed an adjustable rate note secured by a deed of trust on a home for $112,500.00. The note was executed on a multistate Federal National Mortgage Association (FNMA) Uniform Instrument form, which included a provision for late payment charges. A late payment charge rate of five percent of the overdue payment of principal and interest was typed in a blank provided on the form. The preceding paragraph, entitled "Loan Charges," stated:

> If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (i) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (ii) any sums already collected from me which exceeded permitted limits will be refunded to me.

The FNMA purchased the note from the lender, Epic Mortgage Inc., in March 1985. Skyline Mortgage Corporation succeeded Epic as servicer of the loan. On 14 October 1987, Skyline sent plaintiffs notice of uncollected late charges. When Skyline discovered that the late payment penalty rate on plaintiffs' note exceeded the legal maximum under North Carolina law, it offered to reduce the rate to four percent, pursuant to the "Loan Charges" paragraph in the note. Defendants never collected a late payment penalty from plaintiffs.

Plaintiffs filed a complaint and an amended complaint for declaratory judgment, averring the five percent late charge was assessed on a payment not yet due, the charge was usurious under N.C.G.S. § 24-10.1, and reduction of that rate to four percent was fraudulent and a material alteration discharging plaintiffs from their obligations under the note. Plaintiffs sought a judgment declaring

the loan usurious, requiring defendant to forfeit all interest due under the note to FNMA or Skyline, or both, or, alternatively, discharging plaintiffs from the note pursuant to N.C.G.S. § 25-3-407. Plaintiffs further sought the court's application of N.C.G.S. § 24-2.1 and an award of all interest paid by them to any holder of the note from and after 22 March 1985 to the date of the court's order. Defendants, answering, denied the allegation that the late charge was usurious, added that plaintiff had refused Skyline's offer to change the rate to four percent, and requested the court to dismiss plaintiffs' complaints. Both plaintiffs and defendants subsequently filed motions for summary judgment.

The trial court granted defendants' motion for summary judgment and denied that of plaintiffs. The Court of Appeals affirmed in part and reversed in part, holding that the late payment charge was excessive in violation of N.C.G.S. § 24-10(e), but that the penalties of the usury statute, N.C.G.S. § 24-2, did not apply, for "the legislature did not intend for late charges to be considered interest." 97 N.C. App. at 129, 387 S.E.2d at 221. Because "public policy demands that there be something to discourage wrongful or erroneous late charges," 97 N.C. App. at 129, 387 S.E.2d at 222, the Court of Appeals imposed a penalty it considered consistent with the purpose of the usury statutes: defendants forfeited their right to collect late charges on the loan, but did not forfeit their right to receive principal and interest.

We agree with the holding of the Court of Appeals, but find authority for it in the statutes, as we must: "The entire subject of the rate of interest and penalties for usury rests in legislative discretion, and the courts have no power other than to interpret and execute the legislative will." *Smith v. Building and Loan Assn.*, 119 N.C. 249, 256, 26 S.E. 41, 42 (1896).

Chapter 24 of the General Statutes, entitled "Interest," governs a number of lending transactions for which it either states maximum interest rates or excepts the transaction from such statutory constraints. *See generally* N.C.G.S. §§ 24-1 through 24-16 (1986). Among the "transactions" governed by this chapter is a lender's charge for a borrower's late payment, for which the statute states a maximum rate:

> (a) Subject to the limitations contained in subsection (b) of this section, any lender may charge a party to a loan or extension of credit governed by the provisions of G.S. 24-1.1, 24-1.2,

or 24-1.1A a late payment charge as agreed upon by the parties in the loan contract.

(b) No lender may charge a late payment charge:

(1) In excess of four percent (4%) of the amount of the payment past due.

N.C.G.S. § 24-10.1 (1986). The predecessor statute, N.C.G.S. § 24-10(e), in effect at the time plaintiffs signed their note, was essentially identical.[1] The single statute in chapter 24 stating penalties for charges exceeding the maximum rates stipulated in its provisions provides, in pertinent part:

> The taking, receiving, reserving or charging a greater rate of interest than permitted by this chapter or other applicable law, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon.

N.C.G.S. § 24-2 (1986).

Plaintiffs argue that charging a five percent late penalty fee is usurious under N.C.G.S. § 24-2 and that defendants must accordingly forfeit all interest due under the note. Defendants counter that a late payment fee is not interest and that violation of N.C.G.S. § 24-10.1 consequently carries no penalty.

The forfeiture provisions of N.C.G.S. § 24-2 are "in the nature of a penalty intended to induce an observance of the statute, and it is the duty of the courts so to expound and apply the law as to carry out the legislative intent." *Moore v. Woodward*, 83 N.C. 531, 533 (1880). We are convinced that the General Assembly, which specified a maximum legal rate for late payment fees in N.C.G.S. § 24-10.1, considered such fees "interest" and intended to induce

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1. "Any lender may charge a party to a loan made under G.S. 24-1.1A, a late payment charge on any installment of principal, interest, or both in an amount not to exceed four percent (4%) of such installment. The charges authorized by this subsection may not be charged by a lender unless an installment is more than 15 days past due; provided, however, for the purposes of this subsection, a late payment charge may not be charged until an installment is more than 30 days past due where interest on such installment is paid in advance." N.C.G.S. § 24-10(e) (1983 Cum. Supp.) (repealed and replaced with N.C.G.S. § 24-10.1 by 1985 N.C. Sess. Laws ch. 755, § 2).

observance of that law through the penalty provisions of N.C.G.S. § 24-2.

Interest is the cost of "the hire of money." *Bank v. Hanner*, 268 N.C. 668, 673, 151 S.E.2d 579, 581 (1966). More generally, "interest is the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money." Black's Law Dictionary 729 (5th rev. ed. 1979). " 'Forbearance' means the contractual obligation of a lender or creditor to refrain for a given period of time from requiring the borrower or debtor to repay the loan or debt which is then due and payable." *Auto Supply v. Vick*, 303 N.C. 30, 39, 277 S.E.2d 360, 367 (1981). Just as a charge for a creditor's forbearance in the collection of a debt is interest, so a charge for a lender's forbearance in collecting a payment due is interest.

The note executed by plaintiffs in actuality contemplated interest for two separable monetary transactions. The more obvious transaction was the contract for a home loan exceeding $10,000, for which the parties were free to agree on any rate of interest. *See* N.C.G.S. § 24-1.1A(a) (1986). The second transaction contemplated was the cost of money retained—the delayed loan payment. A late payment fee has two purposes: to encourage the borrower to pay on time and to compensate the lender for the loss of use of the payment held for the period of the delay. In the latter use the late payment charge is interest, for it is compensation fixed by the parties for the detention of money or for the lender's forbearance in collecting the late payment.

"[A]ny charges made against [a borrower] in excess of the lawful rate of interest, whether called fines, charges, dues or interest are, in fact, interest and usurious." *Hollowell v. B. & L. Association*, 120 N.C. 286, 287, 26 S.E. 781, 781 (1897). In *Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976), a charge on a payment past due similar to that charged plaintiff here was deemed interest. In that case the Court of Appeals examined a "service charge" imposed upon an account resulting from the purchase of plumbing equipment. It concluded that the charge was "for plaintiff's forbearance in the collection of the debt at the end of the payment period; as such, the . . . service charge is interest." 30 N.C. App. at 280, 227 S.E.2d at 126. Because the service charge rate exceeded that permitted under N.C.G.S. § 24-11(a), limiting "interest, finance charges, or other fees" on the extension of credit

under an open-end or similar plan to one and one-half percent, the two percent "service charge" was held usurious. *See also Fisher v. Westinghouse Credit Corp.*, 760 S.W.2d 802, 807 (Tex. Ct. App. 1988) (assessing whether late payment usurious by calculating highest legal rate times monthly payment times number of days payment past due and terming overdue payment a "loan").

The elements of usury are a loan or forbearance of the collection of money, an understanding that the money owed will be paid, payment or an agreement to pay interest at a rate greater than allowed by law, and the lender's corrupt intent to receive more in interest than the legal rate permits for use of the money loaned. *Auto Supply v. Vick*, 303 N.C. at 37, 277 S.E.2d at 366; *Henderson v. Finance Company*, 273 N.C. 253, 263, 160 S.E.2d 39, 46 (1968).

> The corrupt intent required to constitute usury is simply the intentional charging of more for money lent than the law allows. Where the lender intentionally charges the borrower a greater rate of interest than the law allows and his purpose is clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown.

Kessing v. Mortgage Corp., 278 N.C. 523, 530, 180 S.E.2d 823, 827 (1971) (citations omitted).

These four elements are all present with regard to the late payment penalty provision in plaintiffs' note. First, there was a "loan" consisting in this context of the amount of principal and interest thereon due in the allegedly overdue payment. The note's scheduled repayment of principal and interest thereon indicated the parties' expectation that each payment would eventually be made. The note provided that a payment delayed more than fifteen days would be assessed late charges at five percent of the payment amount, a rate that exceeded the legally permissible rate. Corrupt intent was shown simply in imposing the usurious rate. "A profit, greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, . . . is a violation of the usury laws, it matters not what form or disguise it may assume." *Henderson v. Finance Co.*, 273 N.C. at 263, 160 S.E.2d at 46 (quoting *Doster v. English*, 152 N.C. 339, 341, 67 S.E. 754, 755 (1910)).

The penalty for charging usurious interest, whether or not it is collected, is the "forfeiture of the entire interest which the

. . . evidence of debt carries with it." N.C.G.S. § 24-2 (1986). In the restricted context of a late charge on a delayed payment, "forfeiture of . . . interest" in no way implicates the interest on the principal. When late charges are usurious, "the entire interest" can only signify any and all penalty fees for late payments. The penalty fee is "interest." It is compensation for the detention of money owed another, and all such compensation must be forfeited when its rate is usurious, as defined by the laws of this state.

[2] In addition, we hold that the "usury savings clause" stated in the note's "Loan Charges" paragraph cannot shield a lender from liability for charging usurious rates. The purpose of chapter 24 is to further "the paramount policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws." N.C.G.S. § 24-2.1 (1986). The usury statutes codify "the idea of protecting the borrower against the oppression of the lender." *Moore v. Woodward*, 83 N.C. 531, 533. The statute relieves the borrower of the necessity for expertise and vigilance regarding the legality of rates he must pay. That onus is placed instead on the lender, whose business it is to lend money for profit and who is thus in a better position than the borrower to know the law. A "usury savings clause," if valid, would shift the onus back onto the borrower, contravening statutory policy and depriving the borrower of the benefit of the statute's protection and penalties. "The nature and terms of the contract determine its character and purpose, and if usurious in itself it must be so understood to have been intended by the parties, and they cannot be heard to the contrary." *Burwell v. Burgwyn*, 100 N.C. 389, 392, 6 S.E. 409, 410 (1888). A lender cannot charge usurious rates with impunity by making that rate conditional upon its legality and relying upon the illegal rate's automatic rescission when discovered and challenged by the borrower.

[3] Plaintiffs argue that reducing the late charge rate pursuant to the "Loan Charges" paragraph was a material and fraudulent alteration discharging them from the contract under N.C.G.S. § 25-3-407. Although the reduction in rate is unquestionably material insofar as "it changes the contract of any party thereto in any respect," N.C.G.S. § 25-3-407(1), it was not fraudulent. For purposes of this provision, "fraud requires a dishonest and deceitful purpose to acquire more than one was entitled to under the note as signed by the makers rather than only a misguided purpose." *Thomas v. Osborn*, 13 Wash. App. 371, 377, 536 P.2d 8, 13 (1975). Where,

as here, the alteration is a reduction in rate intended to comply with the law and which in fact inures to the advantage of the other party, the alteration cannot be said to be fraudulent. "There is no discharge where . . . a change is made with a benevolent motive such as a desire to give the obligor the benefit of a lower interest rate." N.C.G.S. § 25-3-407 (1986) (Official Comment). Defendants' motives to bring their late fee rate into accord with North Carolina law were no doubt less "benevolent" than expedient, but there is no evidence in the record that fraudulent intent motivated the reduction.

We conclude it was the intent of the General Assembly to enforce late charges violating N.C.G.S. § 24-10.1 by the penalty provisions of N.C.G.S. § 24-2, which, under the facts of this case, require the lender's forfeit of all late charges to which it would otherwise be entitled under the terms of the loan. We accordingly hold the decision of the Court of Appeals is

Modified and affirmed.

STATE OF NORTH CAROLINA v. JERRY DOUGLAS CASE

No. 313A86

(Filed 7 November 1991)

Criminal Law § 1314 (NCI4th)— murder—aggravating circumstance—not submitted—error

A new trial was ordered in a homicide prosecution where defendant was tried for first degree murder; a plea bargain was entered during jury selection in which the State agreed to let defendant plead guilty to felony murder and to present evidence of only one aggravating factor, that the murder was especially heinous, atrocious or cruel. North Carolina's death penalty scheme would be arbitrary, and therefore unconstitutional, if the district attorney was permitted to exercise discretion as to when an aggravating circumstance supported by the evidence would or would not be submitted. Where there is no evidence of an aggravating circumstance, the prosecutor may so announce, but this announcement must be based upon a genuine lack of evidence of any aggravating circumstance.

Am Jur 2d, Criminal Law §§ 481, 487, 489; Homicide §§ 552, 554, 598, 599.

Justice MEYER concurring.

Justice MARTIN concurring.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the sentence of death entered by *Burroughs, J.*, at the 29 March 1986 Criminal Session of Superior Court, GASTON County. Heard in the Supreme Court 15 February 1990.

The defendant was tried for his life for first degree murder. While the jury was being selected, the defendant and his co-defendant Telina Harris Clontz, who was being tried with him, changed their pleas as a result of a plea bargain. As part of the plea bargain the defendant Clontz was allowed to plead guilty to second degree murder. The State agreed to let the defendant plead guilty to felony murder and agreed to present evidence of only one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) (1988).

The jury was then impaneled to determine whether the defendant would be punished by life in prison or by death. The evidence showed the defendant and Ms. Clontz kidnapped Franklin D. Gourlay, a taxi driver in Knoxville, Tennessee, and kept him a prisoner while they drove his taxicab to Gastonia, North Carolina. They rented a motel room in Gastonia and when Mr. Gourlay attempted to escape from the room the defendant hogtied Mr. Gourlay and stabbed him to death.

The jury found one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel. It found eleven mitigating circumstances. The jury did not find four mitigating circumstances which were submitted to it. The jury found that the aggravating circumstance was sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstances which it found. The court, upon the jury's recommendation, imposed the death penalty.

The defendant appealed.

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

Louis D. Bilionis for defendant appellant.

WEBB, Justice.

The defendant has made twenty-seven assignments of error. We shall discuss one of them.

The defendant argues under his first assignment of error that his guilty plea should be set aside and that he should be tried de novo on the guilt phase as well as the penalty phase of his trial. He says this is so because there was error in reaching the plea bargain by which he pled guilty. In this case, the prosecuting attorney agreed as part of a plea bargain in which the defendant agreed to plead guilty to first degree murder, that the State would present evidence of only one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel. There was also evidence of the aggravating circumstances that the defendant committed the murder while engaged in the commission of a kidnapping and that the defendant committed the murder for pecuniary gain. N.C.G.S. § 15A-2000(e)(5) and (6) (1988).

It was error for the State to agree not to submit aggravating circumstances which could be supported by the evidence. *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981); *State v. Jones*, 299 N.C. 298, 261 S.E.2d 860 (1980); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979). The decision as to whether a case of murder in the first degree should be tried as a capital case is not within the district attorney's discretion. *State v. Britt*, 320 N.C. 705, 360 S.E.2d 660 (1987). This is so in order to prevent capital sentencing from being irregular, inconsistent and arbitrary. If our law permitted the district attorney to exercise discretion as to when an aggravating circumstance supported by the evidence would or would not be submitted, our death penalty scheme would be arbitrary and, therefore, unconstitutional. Where there is no evidence of an aggravating circumstance, the prosecutor may so announce, but this announcement must be based upon a genuine lack of evidence of any aggravating circumstance. *See State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *vacated and remanded on other grounds*, 488 U.S. 807, 102 L.Ed.2d 18 (1988).

In order to protect the constitutionality of our capital sentencing system, we must order a new trial. At such a trial neither the State nor the defendant will be bound by the plea bargain previously made. *Santobello v. New York*, 404 U.S. 257, 30 L.Ed.2d 427 (1971).

We do not discuss other assignments of error because the questions raised under them may not recur at a new trial.

New trial.

Justice MEYER concurring.

I concur in all respects with the majority opinion. I write separately solely to express my personal view that it is only the violation of a significant public policy of this State that justifies the granting of a new trial and nothing else.

The brutality and psychological torment accompanying the murder of Franklin Gourlay was unusually cruel. Telina Harris Clontz and the defendant, reputedly her pimp, lured Mr. Gourlay, a cab driver they knew, to a motel in Knoxville, kidnapped him, and forced him at knife point to drive them in his taxi six hours to Gastonia. Once in Gastonia, he was held prisoner, hogtied, gagged, beaten, and subsequently stabbed to death execution-style. His body was found face down on the floor of a motel room, still hogtied. His hands were tied behind his back with drapery cord. His legs were pulled up behind him and tied to his hands with strips of bed sheet. A strip of sheet was tied around his neck and led back down to his hands. There was a piece of sheet folded inside his mouth and another piece tied around his head holding it in place. The victim's shirt was soaked with blood and wadded up around his shoulders. There was blood on the floor and vomit near his head.

In addition to bruises and abrasions on the victim's face, there were five stab wounds to the victim's back, one to the left chest, and one to the base of the neck. Two of the stab wounds punctured the left lung. These were the fatal wounds. The two stab wounds to the lung caused the lung to collapse and the other lung to fill with blood. The victim aspirated a great deal of blood. The actual cause of death was a combination of bleeding to death and suffocating on the blood he had breathed.

In Dr. Tracy's opinion, based on the direction of the wounds and the bloodstains, Mr. Gourlay was in a kneeling position when he was stabbed, and the assailant was behind the victim. The victim would have taken about five minutes to die after the fatal wounds were inflicted and would not have lost consciousness until the last half minute to full minute. Also, in the doctor's opinion, some of the wounds could have been intended to inflict pain. The evidence shows that the victim was left to bleed to death or drown in his own blood. In the doctor's opinion, neither death nor unconsciousness was immediate. The evidence also shows that after the victim died, or as he lay dying, defendant went to the liquor store and bought vodka, which he took back to the room and drank.

During jury selection, defendant changed his plea from "not guilty" to "guilty" in exchange for the State's limiting the theory by which he could be adjudicated guilty of first-degree murder to "felony murder," the State's dismissing the armed robbery charge against defendant, and the State's permitting Telina Harris Clontz to plead guilty to second-degree murder. The State further agreed to rely solely on N.C.G.S. § 15A-2000(e)(9) to aggravate this crime. Thereafter, a sentencing hearing was held, and on 29 March 1986, the jury returned a recommendation that the court sentence defendant to death.

The majority opinion concludes that the State's agreement not to submit aggravating circumstances supported by the evidence requires that we vacate the death sentence imposed and order a new trial. I agree.

The prosecution in a capital case has no power to withhold from the jury's consideration any aggravating circumstance that is supported by the evidence. *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981). Every aggravating circumstance that the evidence supports must be submitted for the jury's consideration in determining its recommendation as to whether the defendant will receive a sentence of life or death. *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *vacated and remanded on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18, *on remand*, 323 N.C. 622, 374 S.E.2d 277 (1988), *vacated and remanded*, --- U.S. ---, 108 L. Ed. 2d 601 (1990), *on remand*, 329 N.C. 662, 407 S.E.2d 218 (1991); *see also State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979) (trial judge must refuse to accept a negotiated plea calling for the State to withhold an aggravating circumstance supported by the evidence). It is only

where there is a genuine lack of evidence in the case to support an aggravating circumstance enumerated in N.C.G.S. § 15A-2000 that the prosecution may announce that a first-degree murder case will not be tried as a capital case.

Here, the prosecution was well aware that the evidence would have supported at least one additional aggravating circumstance—that the killing occurred in the perpetration of the felony of armed robbery—and bargained away the right to present that evidence.[1] As the majority opinion recognizes, if our law permitted the district attorney to exercise discretion as to when an aggravating circumstance supported by the evidence would or would not be submitted, our death penalty scheme would be arbitrary and, therefore, unconstitutional. The violation of so significant a public policy of this State demands that there be a new capital trial in this case.

It is not because the defendant was harmed by the deal he made with the district attorney that I vote for a new trial. In my view, the error was favorable to the defendant. A new trial is required for harm done to our system of justice and not for harm done to the defendant.

It is because I fear that this Court's approval of the exercise of the prosecutor's discretion in withholding from the jury's consideration one or more aggravating circumstances supported by the evidence will jeopardize the constitutionality of our death penalty plan, I vote with the majority to vacate the sentence of death and order a new trial at which neither the defendant nor the State is bound by the plea bargain previously made.

Justice MARTIN concurring.

I concur in the majority opinion and write to state additional reasons in support of the holding of the Court.

The rule of law concerning the inability of the prosecutor to withhold aggravating circumstances from the jury is for the

1. Because the State agreed, as part of the plea bargain entered, to rely only on the felony murder theory, with kidnapping as the underlying factor, evidence of that felony would not have been available as an aggravating circumstance. However, the number of stab wounds and the fact that they were administered to the victim's back at a time when he was hogtied and unable to defend himself would have supported the theory that the murder was premeditated and deliberated. If the case had been submitted on that theory, the perpetration of the kidnapping would have also been available as evidence of an aggravating circumstance.

benefit of the defendant. The statutes and case law are for the benefit of all defendants so that arbitrariness and capriciousness will not enter into the administration of the death penalty.

Further, N.C.G.S. § 15A-1021(b) states in substance that no person representing the State may bring improper pressure upon a defendant to induce a plea of guilty. The promise to withhold submitting aggravating circumstances to the jury was unlawful and was therefore improper. By making an unlawful promise to the defendant for the purpose of inducing him to plead guilty, the State brought improper pressure upon this defendant within the meaning of the statute. For that reason, the plea of guilty must be set aside.

It is also to be noted that although the prosecution did not submit any other aggravating circumstance to the jury, evidence of another aggravating circumstance was presented to the jury. In short, the State secured the benefit of defendant's plea of guilty and yet was able to present evidence to the jury of other aggravating facts. Thus, the promise made by the State was illusory at best.

STATE OF NORTH CAROLINA v. ROY WAYNE GILMORE, JR.

No. 4A89

(Filed 7 November 1991)

1. Criminal Law § 45 (NCI4th); Homicide § 21.5 (NCI3d)— murder—acting in concert—evidence sufficient

There was sufficient evidence in a homicide prosecution to support a finding that defendant acted in concert to kill his father where there was testimony that defendant had told an inmate that he had "masterminded" the killing of his father; the victim was injected with insulin at least twice; and defendant was in his father's home between the two injections. The killing took several hours and the jury could infer that defendant went to his father's home to make sure the killing was going as planned, that defendant was present during a part of the time the killing was consummated, and that defendant was in close proximity to the place where the injections were

administered and ready to aid his mother. If two or more persons act together with a common purpose to commit a crime, each of them who is actually or constructively present at the time the crime is committed is responsible for the acts of the others done in the commission of the crime.

Am Jur 2d, Criminal Law §§ 168, 172; Homicide §§ 27-29, 445.

2. **Criminal Law § 794 (NCI4th)— homicide—acting in concert —instructions**

The trial court did not err in a homicide prosecution by giving the Pattern Jury Instruction on acting in concert even though defendant contended that the instruction given was inadequate because there was little or no evidence that defendant was present when the murder was committed. There is a natural inference from the evidence that defendant was present to be sure that the murder was proceeding according to plan.

Am Jur 2d, Criminal Law §§ 168, 172; Homicide §§ 27-29, 507.

3. **Criminal Law § 819 (NCI4th)— homicide—interested witness instruction—no error**

There was no prejudicial error in failing to give defendant's requested instruction on interested witnesses where the court gave a correct instruction on interested witnesses. Assuming it was error not to give the requested instruction, it cannot be said that a different result would have been reached at trial.

Am Jur 2d, Homicide § 536.

4. **Criminal Law §§ 809, 423 (NCI4th)— homicide—requested instruction—defendant's failure to offer evidence—refused**

The trial court did not err in a murder prosecution by refusing defendant's requested instruction on his failure to offer evidence. A defendant's failure to testify creates no presumption against him, but the prosecutor may comment upon and the jury may consider the fact that a defendant did not offer evidence.

Am Jur 2d, Trial §§ 577, 590.

Justice MARTIN concurs in the result.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Bowen, J.*, at the 5 September 1988 Criminal Session of Superior Court, LEE County, upon a jury verdict of guilty of first degree murder. Heard in the Supreme Court 15 February 1991.

The defendant was tried for first degree murder. The evidence viewed in the light most favorable to the State showed that on 29 August 1986, the defendant's father received an overdose of insulin from which he died seven days later in the Duke Medical Center. Dr. Thomas Clark, a pathologist, testified that in his opinion the deceased had received an injection of insulin at approximately 5:00 p.m. on 29 August 1986 and another injection approximately ten to fourteen hours earlier.

There was evidence that the defendant's mother injected the decedent, who was her husband, with insulin on 29 August 1986. The back of the defendant's home faced the back of his father's home. A witness testified that if a person walked out the back door of the defendant's house he would be in the back yard of the victim's house. The defendant's "live-in girlfriend" testified that when she arose at 11:00 a.m. on 29 August 1986 the defendant was not at home. He came into the house a few minutes later and said he had been to his father's home to use the telephone. The defendant left his home again between 1:00 p.m. and 1:30 p.m. He returned in approximately one-half hour and told his girlfriend he had been to his father's house.

Kenneth R. Green testified that he became acquainted with the defendant while they were serving time at the Sanford Advancement Center in 1986. The defendant told Mr. Green that his father was "running around" on his mother and "it was going to get him killed." The defendant said, "[e]verything would be all right pretty soon, because he was going to come into some money."

Robert Wade Simms, an inmate of the North Carolina Department of Correction, testified that he met the defendant while both of them were inmates in the Lee County Jail. Mr. Simms testified further that the defendant told him he had "masterminded" the killing of his father. At first he and his mother planned to shoot his father with a pistol but because that would be too "messy" they decided to inject him with insulin. The defendant told Mr. Simms he was to receive $100,000.00 in life insurance proceeds from his father's death. Mr. Simms testified that the defendant

said his mother gave his father the first injection of insulin sometime during the night and he went to his father's house at approximately 12:00 noon to make sure his father was dead or almost dead. He said the reason insulin was used is because it is hard to trace. The defendant said that he disposed of the syringes.

The court submitted the first degree murder charge as to the defendant on the theory that he was acting in concert with his mother in the murder of his father. The jury found the defendant guilty of first degree murder. At a sentencing hearing one aggravating circumstance was submitted to the jury which was that the defendant committed the murder for pecuniary gain. The jury answered "no" to this issue and the defendant was sentenced to life in prison. The defendant appealed to this Court.

Lacy H. Thornburg, Attorney General, by William N. Farrell, Jr., Special Deputy Attorney General, for the State.

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

WEBB, Justice.

[1] The defendant argues under his first assignment of error that the case against him should have been dismissed because the evidence was not sufficient to support a finding by the jury that he acted in concert with his mother in the murder of his father. If two or more persons act together with a common purpose to commit a crime, each of them who is actually or constructively present at the time the crime is committed is responsible for the acts of the others done in the commission of the crime. *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979); *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 33 L.Ed.2d 761 (1972); *State v. Lovelace*, 272 N.C. 496, 158 S.E.2d 624 (1968).

The defendant argues that there is not sufficient evidence to show he was actually or constructively present when the injection was made to find that he acted in concert with his mother to murder his father. He says that all the evidence shows that he was at home in his bed when the fatal injection was made in the early morning hours of 29 August 1986. He argues further that there was no evidence that he communicated to his mother his intent to help her inject his father with the insulin.

The testimony of Mr. Simms, that the defendant told him he "masterminded" the killing of his father, supports a finding by the jury that the defendant communicated to his mother that he would help her when she injected her husband with insulin. There was evidence that the victim was injected at least twice, at 5:00 p.m. and approximately ten to fourteen hours earlier. The evidence showed that between these two injections the defendant was in his father's home twice. The jury could infer from this that the defendant went to his father's home to make sure the killing was going as planned. It took several hours to consummate the killing. The jury could infer that the defendant was actually present during a part of this time. The evidence would also permit an inference that when the defendant was in his own home he was in close proximity to the place where the injections were administered ready to aid his mother. This made him constructively present. *State v. Davis*, 301 N.C. 394, 271 S.E.2d 263 (1980). The defendant's first assignment of error is overruled.

[2] The defendant next contends there was error in the court's charge on acting in concert. The defendant requested a charge under which the court would instruct the jury that the defendant must have been present when the offense was committed. The court did not use this charge but charged from the Pattern Jury Instructions as follows:

> For a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit murder each of them is held responsible for the acts of the others done in the commission of the murder.

N.C.P.I. Crim. 202.10. The defendant concedes that this charge might be adequate in a case in which the evidence showed the defendant was actually present at the time the crime was committed. *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988); *State v. Williams*, 299 N.C. 652, 263 S.E.2d 774 (1980). The defendant contends it is not adequate in this case because there was little or no evidence that the defendant was present at the time the murder was committed.

We do not agree with the defendant's characterization of the evidence. The evidence shows the killing of the defendant's father occurred over a period of several hours. During this time the defendant was actually present in his father's home while his father

was dying. There is a natural inference from this evidence that the defendant was present to be sure the murder was proceeding according to the plan. When the defendant was in his own home he was in close enough proximity to the scene of the murder to be able to render assistance to his mother in committing the crime if needed. This made him constructively present. *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967); *State v. Sellers*, 266 N.C. 734, 147 S.E.2d 225 (1966); *State v. Wiggins*, 16 N.C. App. 527, 192 S.E.2d 680 (1972).

We have approved charges on acting in concert very similar to the charge in this case in *State v. Williams*, 299 N.C. 652, 658, 263 S.E.2d 774, 778, and in *State v. Joyner*, 297 N.C. 349, 358, 255 S.E.2d 390, 396. The evidence of the defendant's actual or constructive presence at the scene of the murder was sufficiently strong enough that a charge on this feature of the case was not necessary. This assignment of error is overruled.

[3] The defendant argues under his third assignment of error that it was prejudicial error not to give an instruction to the jury as to how to consider the testimony of interested witnesses. At the charge conference the defendant requested and the court agreed to give the following charge from the Pattern Jury Instructions:

> You may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness, you may take his interest into account. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

N.C.P.I. Crim. 104.20. The court did not give this charge. It charged as follows:

> You are the sole judges of the credibility of each witness. You decide for yourselves whether to believe the testimony of any witness. You may believe all, part or none of a witness's testimony, and in determining whether to believe any witness you should apply the same tests of truthfulness you apply in your everyday affairs.
>
> As applied to this trial, these tests may include the opportunity of the witness to see, to hear, to know, or remember the facts or occurrences about which he testified, the manner and appearance of the witness, any interest, bias or prejudice

the witness may have, the apparent understanding and fairness of the witness, whether the testimony is reasonable, and whether his testimony is consistent with other believable evidence in the case.

The victim's mother and several of his brothers and sisters testified for the State. They testified to the actions of the defendant's mother at times before the incident and while the victim was in the hospital. They testified as to episodes of sickness the victim had, that the defendant's mother wanted to remove the victim from the Duke University Hospital and return him to Sanford, that the defendant's mother tried to keep anyone from seeing the victim in the hospital unless she or the defendant was present, and that the defendant's mother was adamant that there be no autopsy. The defendant says that these witnesses were interested in the outcome of the case because they knew that under the slayer statute, N.C.G.S. § 31A-4 (1984), they would benefit from the victim's estate if his wife and son were convicted of murder. We note that only the decedent's mother will take his estate if the defendant and his mother are convicted of murder. N.C.G.S. § 29-15(3) (1984).

The defendant argues that because of the weakness of the evidence against him, this testimony by the members of the victim's family was crucial and it was prejudicial error not to give the requested instruction. The State argues that the instruction given in which the jury was told it could consider the interest of a witness when judging his testimony is not significantly different from the instruction requested, which says that the jury may take a witness' interest into account when considering his testimony.

Although the court did not give the interested witness instruction requested by the defendant, it did give a correct instruction on interested witnesses. Assuming it was error not to give the requested instruction, we cannot say that had the error not been committed a different result would have been reached at the trial. None of those who the defendant says were interested witnesses testified as to an essential element of the crime. Their testimony dealt with actions of the defendant's mother and not the defendant. We hold it was not prejudicial error to fail to give the requested instruction. N.C.G.S. § 15A-1443 (1988); *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981).

[4] The defendant finally contends there was error because of the court's refusal to give a requested instruction. During the charge conference, the defendant's attorney asked the court to give the charge from the Pattern Jury Instructions that no presumption against the defendant should be made because of his failure to testify, but to modify the instruction to say that no presumption should be made because the defendant did not offer evidence. The court refused to give this charge because it said the defendant had elicited evidence favorable to him through cross-examination. The defendant then withdrew his request for this instruction.

The defendant contends that the instruction he requested was a correct statement of the law as applied to the evidence and the court was required to give this charge. *See State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987). We hold the court did not commit error by refusing to give this charge. A defendant's failure to testify creates no presumption against him. N.C.G.S. § 8-54 (1986); *State v. Banks*, 322 N.C. 753, 370 S.E.2d 398 (1988). A defendant's failure to offer other evidence as to his innocence stands on a different footing, however. The jury may consider the fact that the defendant did not offer evidence and the prosecuting attorney may comment upon it in his jury argument. *State v. Mason*, 317 N.C. 283, 345 S.E.2d 195 (1986); *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986); *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982). It would have been error for the court to have charged as requested by the defendant. This assignment of error is overruled.

No error.

Justice MARTIN concurs in the result.

STATE OF NORTH CAROLINA v. JIMMY ARNESS RICHARDSON

No. 353PA90

(Filed 7 November 1991)

Constitutional Law § 342 (NCI4th)— right to be present at trial— absence for medical reasons—continuance denied—no error

The trial court did not err in a cocaine prosecution by denying defendant's motion for a continuance where the jury

was selected but not impaneled; defendant did not return the next morning, when the trial was to recommence; the trial judge continued the trial briefly; defense counsel was unable to contact defendant and told the judge that a courtroom spectator had seen defendant walking toward the courthouse and that defendant had a chronic back condition; the court requested that the Sheriff's Department dispatch a car to locate defendant, refused to continue the case, impaneled the jury and began the trial; defense counsel handed the judge a note from the clerk of court stating that a person identifying himself as a friend of defendant had phoned to say that he was taking defendant to the hospital because of back problems; the court denied defense counsel's requested continuance; defense counsel informed the judge at 2:00 p.m. that defendant had called the clerk to indicate that he was at the hospital seeking treatment for a sciatic nerve problem; the judge granted another brief recess, but defense counsel was unable to confirm that defendant was at the hospital and the district attorney stated that sheriff's deputies had reported seeing defendant at two other locations during the day; the court again denied a continuance and issued an order for defendant's arrest; defense counsel related at the end of the State's evidence that he would be unable to present any evidence because defendant was the only witness scheduled to testify; the jury was instructed and returned with a guilty verdict; defendant was brought into the courtroom after the verdict was returned and presented records showing that he had been treated for head injuries resulting from a fall, but the time of treatment was not noted; and the district attorney later noted that defendant did not seek treatment until 1:00 p.m. In noncapital felony trials, the right to confrontation is purely personal and may be waived by defendant; once trial has commenced, the burden is on the defendant to explain his or her absence. There was ample evidence to support the trial court's conclusion that defendant did not meet his burden and the court did not abuse its discretion in denying defense counsel's motions for a continuance.

Am Jur 2d, Continuance § 110; Criminal Law §§ 901, 903, 956, 957, 966.

Continuance of criminal case because of illness of accused. 66 ALR2d 232.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the unanimous decision of the Court of Appeals, 99 N.C. App. 496, 393 S.E.2d 333 (1990), setting aside judgments entered by *Friday, J.*, at the 17 April 1989 Criminal Session of Superior Court, HALIFAX County, and awarding defendant a new trial. Heard in the Supreme Court 16 October 1991.

Lacy H. Thornburg, Attorney General, by Robin W. Smith, Assistant Attorney General, and Daniel F. McLawhorn, Special Deputy Attorney General, for the State-appellant.

Robin E. Hudson for defendant-appellee.

MEYER, Justice.

On 20 February 1989, the Halifax County Grand Jury returned four indictments charging defendant with: (1) possession of more than one gram of cocaine, (2) possession of cocaine with intent to sell or deliver and sale and delivery of cocaine at 3:15 p.m. on 2 December 1988, (3) possession with intent to sell or deliver and sale and delivery of cocaine at 6:10 p.m. on 2 December 1988, and (4) maintaining a dwelling for the purpose of selling cocaine.

On 17 April 1989, with defendant and his counsel present, jurors for defendant's trial were selected but not impaneled. Although defendant had arrived at the proceeding late that day, defendant was specifically informed that he was to return the following morning at 9:30 a.m., when the trial was to recommence. Defendant failed to appear at the appointed time. The trial judge continued the trial briefly to allow defense counsel to locate the defendant. Defense counsel, unable to contact defendant, then told the judge that a courtroom spectator had seen defendant walking from his home toward the courthouse that morning. Defense counsel also told the court that only a few weeks earlier, defendant had been under medical care for a chronic back problem that limited his ability to do strenuous physical work. Counsel did not know how this condition would affect the defendant's capacity to appear, but objected to proceeding in his absence. The trial judge then requested that the Sheriff's Department dispatch a car to locate defendant.

The court refused to continue the case, impaneled the jury in the defendant's absence, and the trial recommenced at 10:00 a.m. During examination of the first witness, defense counsel handed

the trial judge a note from the Clerk of Court stating that a person identifying himself as a friend of defendant's had phoned at 10:10 a.m. to say that he was taking defendant to the hospital because of back problems. Counsel then requested a continuance to confirm this information. This request was denied, and the trial judge noted for the record that defendant had failed to contact either his counsel or the court directly and had ample opportunity to do so.

At 2:00 p.m., defense counsel informed the trial judge that defendant had called the Clerk's Office during the lunch recess and indicated that he was at Halifax Memorial Hospital seeking treatment for a sciatic nerve problem. The trial judge then granted defense counsel another brief recess to allow him to call the hospital and confirm defendant's whereabouts. Counsel was unable to confirm that defendant was at the hospital, and the district attorney informed the judge that sheriff's deputies had reported seeing defendant at two other locations during the day. Defense counsel again moved for a continuance. Subsequent to a bench conference, this motion was denied once again. The judge then issued an order for the defendant's arrest, stating, "It appears that [defendant] is playing tricks with the court."

At the close of the State's evidence, defense counsel related that he would be unable to present any evidence because defendant was the only witness scheduled to testify. The trial judge instructed the jury, and the jury returned less than an hour later, finding defendant guilty on all counts.

Sheriff's deputies brought defendant into court at 4:35 p.m., after the verdict had been returned. Defendant presented records showing that he had been treated at Halifax Memorial Hospital for head injuries resulting from a fall, but the time of treatment was not noted. The district attorney later noted that defendant did not seek treatment until 1:00 p.m. Defendant stated that he had been trying to communicate with the court, that he was not guilty, and that he wished to testify to that effect.

At trial, a detective with the Halifax County Sheriff's Department testified that he visited defendant's home at 3:15 p.m. on 2 December 1988 and asked if he could purchase two grams of cocaine. Defendant gave the detective a plastic bag containing 0.8 grams of cocaine in exchange for $180.00 in cash. The detective returned to defendant's residence at 6:10 p.m. and asked defendant if he could buy three grams of cocaine. Defendant gave the detec-

tive two plastic bags, later found to contain a total of 1.5 grams of cocaine, in exchange for $270.00 in cash.

The question before the Court is whether defendant's constitutional rights were infringed when the trial judge refused to grant defense counsel's motions to continue due to defendant's absence from his trial. It is well established that both the United States and North Carolina Constitutions provide criminal defendants the right to confront their accusers at trial. In particular, our state Constitution provides in pertinent part: "In all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony . . . ." N.C. Const. art. I, § 23.

In noncapital felony trials, this right to confrontation is purely personal in nature and may be waived by a defendant.[1] *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985); *State v. Hayes*, 291 N.C. 293, 296-97, 230 S.E.2d 146, 148 (1976); *State v. Moore*, 275 N.C. 198, 208, 166 S.E.2d 652, 659 (1969). A defendant's voluntary and unexplained absence from court subsequent to the commencement of trial constitutes such a waiver. *State v. Wilson*, 31 N.C. App. 323, 229 S.E.2d 314 (1976); *State v. Mulwee*, 27 N.C. App. 366, 219 S.E.2d 304 (1975). Once trial has commenced, the burden is on the defendant to explain his or her absence; if this burden is not met, waiver is to be inferred. *State v. Austin*, 75 N.C. App. 338, 330 S.E.2d 661 (1985); *State v. Stockton*, 13 N.C. App. 287, 185 S.E.2d 459 (1971).

Whether such a burden has been satisfied has been the subject of numerous appellate decisions. In *State v. Stockton*, 13 N.C. App. 287, 185 S.E.2d 459, for instance, defendant was present during the first day of his trial but failed to appear when the trial recommenced on the second day. Upon inquiry by the trial judge, defense counsel related that he had neither seen nor heard from defendant. Thereafter, the court concluded that defendant Stockton had due notice of the time that his trial was to recommence and that his absence amounted to a waiver. On appeal, the Court of Appeals agreed, concluding that the defendant voluntarily absented himself

1. As to capital defendants, this Court has held that this right may not be waived, requiring that the trial court ensure defendant's presence at trial. *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989); *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987). Because defendant was before the court on noncapital felony charges, his right to be present was waivable.

after his first day of trial and therefore waived his right to be present during the trial and rendering of the verdict. *Id.* at 292, 185 S.E.2d at 463. Findings of no error under similar circumstances have repeatedly been reached by this Court, as well as the Court of Appeals. *State v. Kelly*, 97 N.C. 404, 2 S.E. 185 (1887); *State v. Austin*, 75 N.C. App. 338, 330 S.E.2d 661 (1985); *State v. Potts*, 42 N.C. App. 357, 256 S.E.2d 497 (1979); *State v. Montgomery*, 33 N.C. App. 693, 236 S.E.2d 390, *disc. rev. denied and appeal dismissed*, 293 N.C. 256, 237 S.E.2d 258 (1977); *State v. Wilson*, 31 N.C. App. 323, 229 S.E.2d 314 (1976).

The granting or denial of a motion to continue is within the sound discretion of the trial judge, and this decision will not be disturbed absent an abuse of discretion. *State v. Ferebee*, 266 N.C. 606, 609, 146 S.E.2d 666, 668 (1966). Once trial begins, the burden is on the defendant to explain his absence. *State v. Austin*, 75 N.C. App. 338, 330 S.E.2d 661.

Here, it is clear that trial had begun before defendant absented himself. On 17 April 1989, the jury was selected in the presence of defendant and his counsel, and all parties involved were instructed to return on 18 April at 9:30 a.m. to resume trial. In this case, the trial began on 17 April, when the case was reached on the calendar and the jurors were called into the jury box for examination as to their qualifications. *Pratt v. Bishop*, 257 N.C. 486, 504, 126 S.E.2d 597, 610 (1962); *State v. Montgomery*, 33 N.C. App. 693, 236 S.E.2d 390. Therefore, it became incumbent upon defendant to explain his absence to the court's satisfaction. Contrary to the determination of the Court of Appeals, we find that there was ample evidence to support Judge Friday's conclusion that defendant did not meet his burden.

Central to this determination is the weight to be given uncorroborated explanatory statements provided to the court by third parties. Here, the defendant and the Court of Appeals place great emphasis upon the fact that an unidentified person stating that he was a friend of defendant's telephoned the Clerk to inform the court that defendant was absent due to "back problems." The trial court found that such contact, which was not made by defendant himself and which was untimely, did not suffice as an explanation. We agree that such an explanation did not satisfy defendant's burden and that therefore the trial court did not abuse its discretion.

Neither do the other facts attending this appeal reveal that Judge Friday abused his discretion in denying the continuances. Prior to the contact with the Clerk by the unidentified person claiming to be defendant's friend, the only possible explanation for defendant's absence was provided by defense counsel, who suggested that defendant's back problems might be the cause of his absence. This explanation, as counsel himself conceded, was mere speculation. Another possible explanation arose over the noon recess when defendant himself informed the Clerk by telephone that he was at the hospital seeking treatment for a sciatic nerve problem. At that point, the court granted leave to defense counsel to inquire into defendant's whereabouts. Counsel was unable to confirm that defendant was, in fact, at the hospital. Meanwhile, the court was informed that defendant had been seen at two other locations during the time he was supposed to be in court.

From the outset, when defendant was tardy for jury selection on 17 April, the court provided defense counsel ample opportunity to locate defendant, who himself was at all times aware of the time he was to be in court, and the court even dispatched the Sheriff's Department to assist in this endeavor. When these efforts proved unavailing, and still no satisfactory explanation was provided, the court acted properly in proceeding with trial.

Indeed, in the end, the court's decision to deny the motions to continue was vindicated by the inexplicable behavior of defendant himself. When defendant was brought into court in the company of sheriff's deputies at 4:35 p.m. on the day of verdict, he brought with him no evidence of any back or sciatic nerve problem, which he and his friend informed the Clerk's Office caused his absence and which defense counsel suggested as a possible explanation. Ultimately, the only explanation offered by defendant for his failure to appear for his trial was the following statement of his counsel:

> Your Honor, please, I ask for the record to show that Mr. Richardson is now in court for he is entitled to be here for the sentencing hearing as I understand the law. He has brought with him information showing that he was at the Halifax Memorial Hospital where he was treated by Dr. Bissram. No time is indicated but[ ] I understand that he suffered a fall[,] and head injuries were indicated. He was ordered to use ice packs and was released on the condition that he consult with his own doctor immediately. And he does have some type

> of prescription which was issued to him by . . . looks like Dr. Bissram.

This explanation was inconsistent with the information provided by defendant in both his friend's and his own personal telephone calls to the Clerk's Office. Moreover, the district attorney related that defendant's treatment did not occur until approximately 1:00 p.m., a time some three and one-half hours after defendant was to be in court.

In sum, the trial had begun, and defendant waived his right to be present during the remainder of the trial. The court did not abuse its discretion in denying motions for continuance made by defense counsel. As noted by this Court in *State v. Kelly*:

> It would savor of absurdity and positive injustice, when a party charged with crime thus flees, to allow him to take advantage of his own wrong, and obtain his discharge, or a new trial! . . . In such cases, if the defendant fly, . . . the court is not bound to stop the trial and discharge the jury, and thus give the defendant a new trial. To do so, would compromise the dignity of the court [and] trifle with the administration of justice . . . .

97 N.C. at 408, 2 S.E. at 187.

Denial of a motion to continue that raises a constitutional question may be grounds for a new trial only when a defendant shows that the denial was erroneous and that his case was prejudiced thereby. *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). Because we deem the trial court not to have been in error, we do not address the issue of possible prejudice to defendant stemming from his absence from trial.

We conclude that the Court of Appeals erred in granting defendant a new trial. The decision of the Court of Appeals is reversed, and the case is remanded to that court for further remand to the Superior Court, Halifax County, with instructions to reinstate the judgments previously entered.

Reversed and remanded.

VAL STEPHEN PIERSON, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF NORMA T. PIERSON v. JOHN R. BUYHER AND JEFFERSON NATIONAL LIFE INSURANCE COMPANY

No. 117A91

(Filed 7 November 1991)

1. **Insurance § 11 (NCI3d); Limitation of Actions § 4.2 (NCI3d) — life insurance — negligent advice by agent — statute of limitations**

An action by the beneficiary of a life insurance policy for negligent advice by an insurance agent to the purchaser of the policy was governed by the three-year limitation period of N.C.G.S. § 1-52(c) rather than the limitation period for professional malpractice set forth in N.C.G.S. § 1-15(c).

Am Jur 2d, Insurance §§ 138, 1750, 1751.

2. **Insurance § 11 (NCI3d); Limitation of Actions § 4.2 (NCI3d) — life insurance — permissible change of beneficiary — negligent advice by agent — accrual of action**

When a life insurance policy contains a provision permitting the policy owner freely to change the beneficiary, a cause of action by the policy beneficiary for negligent advice by an insurance agent to the purchaser of the policy accrues at the time of the insured's death rather than at the time of the alleged negligent advice.

Am Jur 2d, Insurance §§ 138, 1750, 1751.

APPEAL by defendant Jefferson National Life Insurance Company 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. 535, 400 S.E.2d 88 (1991), reversing a judgment entered 6 March 1990 by *Friday, J.*, in Superior Court, MACON County. Heard in the Supreme Court 11 September 1991.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Michelle Rippon, for plaintiff-appellee.

Gwynn G. Radeker for defendant-appellant.

Walter E. Brock, Jr., and Carolyn Sprinthall Knaut for North Carolina Association of Defense Attorneys, amicus curiae.

FRYE, Justice.

The issue in this case is a narrow one: When does a cause of action accrue for negligent advice of an insurance agent when the person bringing the suit is the beneficiary of the life insurance policy issued in reliance on that advice? More specifically, when does the cause of action accrue when the insurance policy contains a provision permitting the policy owner to freely change the beneficiary? The trial judge agreed with defendants that the cause of action accrued at the time of the alleged negligent advice and thus dismissed the suit pursuant to N.C.G.S. § 1-52. A motion for rehearing was denied by the trial judge on 14 March 1990. On appeal by plaintiff, the Court of Appeals reversed, concluding that the cause of action accrued at the death of the insured. We agree with the result reached by the Court of Appeals, but for different reasons. We therefore modify and affirm.

I.

On 22 August 1989, plaintiff, acting in his capacity as executor of his mother's estate and also as sole beneficiary of his mother's life insurance policy, filed a complaint alleging the following:

On 19 December 1985, plaintiff's mother, Norma T. Pierson, contracted with defendant Jefferson National Life Insurance Company ("Jefferson National"), through its agent, defendant John Buyher ("Buyher"),[1] for a life insurance policy in the amount of $400,000. Ms. Pierson told Buyher that the purpose of the policy was to provide liquidity to her estate. Plaintiff, Ms. Pierson's only surviving child, was named the beneficiary of the policy. Ms. Pierson was named owner of the policy. Ms. Pierson died on 16 November 1987. Because Ms. Pierson was named owner of the insurance policy, the policy proceeds were includable in her gross estate and subject to state and federal estate and inheritance taxes. These taxes amounted to $200,000.

Plaintiff alleges that Buyher knew or should have known of the tax consequences of naming Ms. Pierson owner of the insurance policy. Buyher, the complaint alleges, was negligent in that he failed to advise Ms. Pierson of these adverse tax consequences. Ms. Pierson, the complaint alleges, justifiably relied upon Buyher's

1. Buyher did not appeal the Court of Appeals' decision.

representations that the life insurance policy would afford liquidity to her estate in the full face amount of the policy.

Defendants answered by alleging, *inter alia*, that the cause of action accrued at the time of the alleged negligent advice, *i.e.*, at the time Ms. Pierson procured the policy, and therefore the action, filed more than three years later, was time barred. The trial judge agreed and dismissed the complaint.

II.

The Court of Appeals reversed, concluding that the cause of action accrued on 16 November 1987, the date of Ms. Pierson's death. Before reaching the statute of limitations issue, however, the court noted that the plaintiff had a cognizable legal action. *Pierson v. Buyher*, 101 N.C. App. at 536, 400 S.E.2d at 89 (citing *Bradley Freight Lines v. Pope, Flynn & Co.*, 42 N.C. App. 285, 256 S.E.2d 522, *disc. rev. denied*, 298 N.C. 295, 259 S.E.2d 299 (1979)). The court also noted that plaintiff could bring the action as policy beneficiary. *Id.* at 537, 400 S.E.2d at 90 (citing *Pierce v. American Defender Life Ins. Co.*, 62 N.C. App. 661, 303 S.E.2d 608 (1983)). Because the trial court dismissed the action as barred by the statute of limitations, we do not reach the merits of plaintiff's claim. We therefore assume, without deciding, that the Court of Appeals is correct that a beneficiary of a life insurance policy can bring an action for negligent advice of an insurance agent to the purchaser of the policy.

[1] The Court of Appeals, after deciding that plaintiff had alleged a valid cause of action, analogized this case to professional malpractice. Turning its attention to N.C.G.S. § 1-15(c), the statute of limitations for professional malpractice, the court held that defendants had a continuing duty to correct any negligent error they may have committed, a duty which extended to the day Ms. Pierson died. *Id.* at 538, 400 S.E.2d at 90.

We believe the Court of Appeals erred in analogizing this case to professional malpractice. In its answer to the original complaint, Jefferson National cited the three-year statute of limitations contained in N.C.G.S. § 1-52.[2] The trial judge, in dismissing the action, cited N.C.G.S. § 1-52. At oral argument before this Court,

2. Buyher, when pleading his statute of limitations defense, did not cite a specific statute.

plaintiff's attorney conceded that Buyher was not a professional and that plaintiff was not a client. The theory of the case, argued plaintiff's attorney, is one of negligent advice, not professional malpractice. We agree that this case does not involve professional malpractice, and that the appropriate statute of limitations is the three-year period of N.C.G.S. § 1-52(5). We therefore disavow the discussion of professional malpractice and N.C.G.S. § 1-15(c) in the Court of Appeals' opinion.

III.

[2] Assuming that plaintiff has stated a valid cause of action, the issue before this Court is when does the cause of action accrue for the *beneficiary* of this life insurance policy. We first note that an insurance policy is a contract and its provisions govern the rights and duties of the parties. *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1978). Surprisingly, the policy at issue in this case is not a part of the record. Plaintiff's argument, however, assumes that the policy includes a provision allowing the policy owner to freely change beneficiaries. Jefferson National does not argue otherwise, and we therefore proceed under that assumption.

Plaintiff argues that the cause of action arose at the time of Ms. Pierson's death because prior to that time his interest in the proceeds of the insurance policy had not vested. We agree. It is well settled that under a contract granting the policy owner the right to change beneficiaries, "the rights of a designated beneficiary do not vest until the death of the insured." *Id.* at 382, 348 S.E.2d at 797. The designated beneficiary has a "mere expectancy," *Harrison v. Winstead*, 251 N.C. 113, 117, 110 S.E.2d 903, 906 (1959), which cannot "ripen into a vested interest before the death of the insured." *Russell v. Owen*, 203 N.C. 262, 266, 165 S.E. 687, 689 (1932). "This is true, because the beneficiary whose right, under the policy, or certificate, may thus be taken away, has only a contingent interest therein, which will not vest until the death of the insured." *Wooten v. Grand United Order of Odd Fellows*, 176 N.C. 52, 56, 96 S.E. 654, 656 (1918).

Jefferson National argues that this case should be governed by the general rule outlined in *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957), *i.e.*, that the cause of action accrues at the time of the wrongful act without regard to when the harmful consequences are discovered. Thus, argues Jefferson National, the ac-

tionable wrong, if any, was committed at the time of the alleged negligent advice. Although we disagree with Jefferson National's conclusion, we agree that *Shearin* helps provide the answer to our question.

> In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises . . . .
>
> It is sufficient if nominal damages are recoverable for the breach or for the wrong, and it is unimportant that the actual or substantial damage is not discovered or does not occur until later. However, it is well settled that *when an act is not necessarily injurious or is not an invasion of the rights of another, and the act itself affords no cause of action, the statute of limitations begins to run against an action for consequential injuries resulting therefrom only from the time actual damage ensues.*

Shearin, 246 N.C. at 367, 98 S.E.2d at 511-12 (citations omitted) (emphasis added).

In this case, plaintiff had no more than an *expectancy* at the time his mother purchased the insurance policy, no more than the *possibility* of future injury. *Maybe* he would be the beneficiary of the insurance policy when his mother died. Maybe he wouldn't. *Maybe* there would be adverse tax consequences at the time of his mother's death. Maybe there wouldn't. *Maybe* he would suffer a monetary loss. Maybe he wouldn't.

Until a party has a real and vested interest in the subject matter of a lawsuit, an action will not lie. The United States Supreme Court faced a similar problem in *Peak v. United States*, 353 U.S. 43, 1 L. Ed. 2d 631 (1957). In *Peak*, petitioner instituted a suit in 1954 to recover under an insurance policy for the death of her son, the insured. Petitioner's son disappeared from his army unit in 1943, and under federal law, a presumption of death would arise upon the continued and unexplained absence of the insured for a period of seven years. *Id.* at 45, 1 L. Ed. 2d at 634. Respondent insurance company argued, *inter alia*, that petitioner's claim was founded on the insured's death in 1943 and was thus barred under the six-year statute of limitations. *Id.*

In rejecting respondent's argument, the Court said: "To compute the six-year limitation period from the date of death would

be to say that the beneficiary's right to recover had expired before she could have successfully prosecuted a lawsuit to enforce that right." *Id.* at 46, 1 L. Ed. 2d at 635. Our situation is similar. To adopt Jefferson National's argument would be to say that plaintiff's right to recover had expired before his rights under the insurance contract had even vested, *i.e.*, "before he could have successfully prosecuted a lawsuit to enforce that right." *Id.* We therefore hold that the cause of action in this case accrued on 16 November 1987, the date of Ms. Pierson's death.

As Justice Douglas said for the Court in *Peak*: "That seems to us to be the common sense of the matter; and common sense often makes good law." *Id.*

The decision of the Court of Appeals is modified and affirmed.

Modified and affirmed.

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

THE TRUSTEES OF THE L. C. WAGNER TRUST v. BARIUM SPRINGS HOME FOR CHILDREN, INC.; DAVIS HOSPITAL FOUNDATION, INC.; MITCHELL COMMUNITY COLLEGE; GARDNER-WEBB COLLEGE; JOSEPH FORESTER DAVIS; JOHN C. DAVIS; LOUIS M. DAVIS; PATRICIA DAVIS HINTON; MARY DAVIS BROYHILL (CRAIG); NELL DAVIS McCOY; GEORGE C. DAVIS; DAVIS HOSPITAL, INC.; OLIVIA BROWN THOMAS; H. BROWN KIMBALL AND JOHN H. GRAY III

No. 191A91

(Filed 7 November 1991)

APPEAL by defendant Barium Springs Home for Children, Inc. from the decision of a divided panel of the Court of Appeals, 102 N.C. App. 136, 401 S.E.2d 807 (1991), affirming in part and reversing in part a judgment by *Davis (James C.), J.*, signed 24 November 1989 and filed 28 November 1989 in Superior Court, IREDELL County. Heard in the Supreme Court 17 October 1991.

Womble Carlyle Sandridge & Rice, by Dewey W. Wells, Elizabeth L. Quick, and Mark E. Richardson, III, for defendant appellant Barium Springs Home for Children, Inc.

E. Bedford Cannon for defendant appellee Davis Hospital, Inc.

PER CURIAM.

For the reasons stated in the dissenting opinion by Greene, J., the decision of the Court of Appeals on the issue of constructive delivery of the undistributed income and capital gains is reversed. The case is remanded to the Court of Appeals for further remand to the Superior Court, Iredell County, for entry of a judgment consistent with the dissenting opinion in the Court of Appeals on the constructive delivery issue and otherwise consistent with the majority opinion in the Court of Appeals.

Reversed and remanded.

STATE OF NORTH CAROLINA v. MICHAEL LEON WASHINGTON

No. 244A91

(Filed 7 November 1991)

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 102 N.C. App. 535, 402 S.E.2d 851 (1991), finding no error in defendant's trial at the 30 April 1990 session of Superior Court, MECKLENBURG County, *Gaines, J.*, presiding. Heard in the Supreme Court 17 October 1991.

Lacy H. Thornburg, Attorney General, by Teresa L. White, Assistant Attorney General, for the State.

Isabel Scott Day, Public Defender, by Allen W. Boyer, Assistant Public Defender, for defendant-appellant.

PER CURIAM.

Defendant was convicted of felonious possession of cocaine with intent to sell, in violation of N.C.G.S. § 90-95, and sentenced to a prison term of three years. A majority of the Court of Appeals

panel concluded the trial court did not err in admitting certain statements made by defendant to law enforcement officers shortly before his arrest. Judge Greene, dissenting, concluded that these statements should have been excluded because they were taken in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Judge Greene further concluded that because of the erroneous admission of these statements, defendant was entitled to a new trial.

For the reasons stated in Judge Greene's dissenting opinion, the decision of the Court of Appeals is reversed; defendant's conviction is vacated; and the case is remanded to the Court of Appeals for further remand to the Superior Court, Mecklenburg County, for a new trial or for such other further proceedings as are not inconsistent with this decision.

Reversed and remanded.

IRVIN FRANK HILL v. HANES CORPORATION, AND AETNA LIFE & CASUALTY INSURANCE COMPANY

No. 178A91

(Filed 7 November 1991)

APPEAL by the plaintiff pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 102 N.C. App. 46, 401 S.E.2d 768 (1991), affirming an opinion and award of the North Carolina Industrial Commission. Heard in the Supreme Court on 15 October 1991.

William G. Pfefferkorn for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Nancy R. Hatch, for defendants-appellees.

PER CURIAM.

The decision of the Court of Appeals is affirmed.

Affirmed.

THOMAS J. MENNICUCCI v. N.C. DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY

No. 236A91

(Filed 7 November 1991)

APPEAL by the State of North Carolina pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 102 N.C. App. 823, 404 S.E.2d 368 (1991), which affirmed the order of the North Carolina Industrial Commission entered 1 August 1989. Heard in the Supreme Court 17 October 1991.

Robert G. Raynor, Jr. for plaintiff-appellee.

Lacy H. Thornburg, Attorney General, by D. Sigsbee Miller, Assistant Attorney General, and Victor H.E. Morgan, Jr., Assistant Attorney General, for the State.

PER CURIAM.

Affirmed.

CUSTOM MOLDERS, INC. v. ROPER CORPORATION

No. 161A91

(Filed 7 November 1991)

APPEAL 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, 101 N.C. App. 606, 401 S.E.2d 96 (1991), affirming the order of *Read, J.*, entered 8 February 1988 in the Superior Court, DURHAM County. Heard in the Supreme Court 15 October 1991.

Charles A. Bentley, Jr. and Associates, by Charles A. Bentley, Jr., and Gulley, Eakes, Volland and Calhoun, by Michael D. Calhoun and John L. Saxon, for plaintiff-appellee.

Poyner & Spruill, by J. Phil Carlton and Mary Beth Johnston, and Brown, Kirby & Bunch, by Charles Gordon Brown and M. LeAnn Nease, for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is affirmed for the reasons stated in the concurring opinion of Judge Wells.

Affirmed.

KEITH G. FINCH v. J. J. BARNES, JR.

No. 251A91

(Filed 7 November 1991)

APPEAL as of right by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 102 N.C. App. 733, 403 S.E.2d 552 (1991) (Greene, J., dissenting), reversing a judgment in favor of the defendant entered by *Brewer, J.*, at the 13 February 1990 Civil Session of Superior Court, HARNETT County. Heard in the Supreme Court 17 October 1991.

Bryan, Jones, Johnson & Snow, by James J. Johnson, for plaintiff appellant.

Barfield and Jenkins, P.A., by K. Douglas Barfield, for defendant appellee.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion by Greene, J. The cause is remanded to the Court of Appeals for further remand to the Superior Court, Harnett County, for reinstatement of the judgment for plaintiff.

Reversed and remanded.

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

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

No. 393PA91

Case below: 103 N.C.App. 629

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1991.

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

No. 012PA91

Case below: 103 N.C.App. 272

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1991.

BLEVINS v. TAYLOR

No. 350P91

Case below: 103 N.C.App. 346

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 6 November 1991.

BOYD v. L. G. DEWITT TRUCKING CO.

No. 366P91

Case below: 103 N.C.App. 396

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

CLEVENGER v. PRIDE TRIMBLE CORP.

No. 414P91

Case below: 103 N.C.App. 664

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

DOBO v. NEW HANOVER COUNTY BD. OF ADJUSTMENT

No. 416P91

Case below: 103 N.C.App. 664

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

DUNLEAVY v. YATES CONSTRUCTION CO.

No. 449PA91

Case below: 103 N.C.App. 804

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1991 for the limited purpose of entering the following order: the case is remanded to the Court of Appeals for reconsideration in light of *Woodson v. Rowland*, 329 NC 330 (1991).

GAMMON DESIGN/BUILD v.
DURFEY-HOOVER-BOWDEN INS. AGENCY

No. 415P91

Case below: 103 N.C.App. 525

Petition by defendant (SSS Electric) for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

GILL v. ERICKSON

No. 442P91

Case below: 103 N.C.App. 804

Petition by defendants (Gerald T. Erickson and wife, Monika O. Erickson) for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

GODWIN v. N.C. DEPT. OF TRANSPORTATION

No. 448P91

Case below: 104 N.C.App. 138

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

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

GREER v. PARSONS

No. 334PA91

Case below: 103 N.C.App. 463

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1991. Motion by plaintiff to dismiss petition denied 6 November 1991. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1991.

HILL v. PROFESSIONAL NURSES REGISTRY OF WINSTON-SALEM

No. 347P91

Case below: 103 N.C.App. 393

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

IN RE ANNEXATION ORDINANCE OF NEWTON

No. 367P91

Case below: 103 N.C.App. 664

Temporary stay dissolved 17 October 1991.

IN RE ELLER

No. 403A91

Case below: 103 N.C.App. 625

Petition by Greer for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 6 November 1991.

IN RE WALTERS

No. 371P91

Case below: 103 N.C.App. 525

Petition by Mary Cathy Terry Walters for discretionary review pursuant to G.S. 7A-31 denied 9 October 1991.

LINDSEY v. QUALEX, INC.

No. 412P91

Case below: 103 N.C.App. 585

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

LOWDER v. ALL STAR MILLS

No. 365P91

Case below: 103 N.C.App. 500

Petition by defendant (W. Horace Lowder) for writ of supersedeas and temporary stay denied 7 November 1991.

LOWDER v. ALL STAR MILLS

No. 365P91

Case below: 103 N.C.App. 500

Petition by defendant (W. Horace Lowder) for writ of certiorari to the North Carolina Court of Appeals pursuant to Rule 21 denied 6 November 1991.

LOWDER v. ALL STAR MILLS

No. 365P91

Petition by defendant (Douglas E. Lowder) for writ of certiorari to the Superior Court of Stanly County denied 6 November 1991.

LOWDER v. ALL STAR MILLS

No. 365P91

Case below: 103 N.C.App. 500

Petition by defendants (W. Horace Lowder, Lois L. Hudson and Billy Joe Hudson) for writ of certiorari to the North Carolina Court of Appeals pursuant to Rule 21 denied 6 November 1991. Petition by defendants (W. Horace Lowder, Lois L. Hudson and

Billy Joe Hudson) for writ of certiorari pursuant to Rule 2 denied 6 November 1991.

N.C. BAPTIST HOSPITALS v. FRANKLIN

No. 370P91

Case below: 103 N.C.App. 446

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

ODUM v. NATIONWIDE MUTUAL INS. CO.

No. 198P91

Case below: 101 N.C.App. 627
329 N.C. 499

Petition by defendant (Nationwide) for reconsideration of the petition for review dismissed 6 November 1991.

PEOPLE SAVINGS AND LOAN ASSN. v.
CITICORP ACCEPTANCE CO.

No. 439P91

Case below: 103 N.C.App. 762

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

PULLIAM v. CITY OF GREENSBORO

No. 441P91

Case below: 103 N.C.App. 748

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

SHORE v. ANDREWS

No. 401P91

Case below: 103 N.C.App. 665

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

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

STATE v. ALLEN

No. 319P91

Case below: 103 N.C.App. 394

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

STATE v. BOST

No. 324P91

Case below: 103 N.C.App. 390

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 November 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

STATE v. BROWN

No. 459P91

Case below: 104 N.C.App. 309

Petition by Attorney General for temporary stay allowed 21 October 1991.

STATE v. CAGLE

No. 314P91

Case below: 103 N.C.App. 526

Petition by defendant (Cagle) for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

STATE v. CASE

No. 313A86

Petition by defendant for writ of certiorari to the Superior Court, Gaston County, dismissed 6 November 1991.

STATE v. GWYN

No. 434P91

Case below: 103 N.C.App. 369

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

STATE v. JEUNE

No. 496A91

Case below: 104 N.C.App. 388

Petition by Attorney General for temporary stay allowed 12 November 1991.

STATE v. LOCKLEAR

No. 500P91

Case below: 104 N.C.App. 311

Petition by defendant for temporary stay allowed 15 November 1991 on the condition that the $150,000.00 secured bond remain in full force and effect.

STATE v. McDOUGALL

No. 86A81

Case below: 308 N.C. 1

Petition by defendant for writ of certiorari to review the Superior Court, Mecklenburg County, denied 15 October 1991.

STATE v. MONEYMAKER

No. 411P91

Case below: 103 N.C.App. 666

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

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

STATE v. PATTERSON

No. 325PA91

Case below: 103 N.C.App. 195

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1991; the Court will also consider whether admission of the sketches was error.

STATE v. TURNAGE

No. 441A90

Case below: 100 N.C.App. 234
328 N.C. 524

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 6 November 1991.

STATE v. WALKER

No. 402P91

Case below: 103 N.C.App. 666

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 November 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

STATE v. WHISNANT

No. 444P91

Case below: 103 N.C.App. 806

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 November 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

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

STATE v. YOUNG

No. 381P91

Case below: 103 N.C.App. 415

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 November 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1991.

STATE FARM MUTUAL AUTO. INS. CO. v. BLACKWELDER

No. 404PA91

Case below: 103 N.C.App. 656

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1991.

STATE OF NORTH CAROLINA v. LENWOOD EARL BUCHANAN

No. 317A89

(Filed 6 December 1991)

1. **Constitutional Law § 313 (NCI4th)— first degree murder—defendant's exercise of peremptory challenges—effective assistance of counsel**

A defendant in a prosecution for armed robbery and first degree murder was not denied effective assistance of counsel where defendant was allowed to decide not to exercise peremptory challenges to remove jurors his attorneys deemed unsuitable. The record reveals that defendant and his counsel conferred regarding which venirepersons to excuse, that defense counsel gave considerable deference to defendant's informed decisions with respect to the exercise of peremptory challenges, and that on four occasions counsel acquiesced when counsel and defendant reached an impasse with respect to the excusal of a particular venireperson.

Am Jur 2d, Jury § 236.

Adequacy of defense counsel's representation of criminal client regarding right to and incidents of jury trial. 3 ALR4th 601.

2. **Constitutional Law § 342 (NCI4th)— first degree murder—unrecorded bench conferences—federal constitutional right to be present—not violated**

Defendant's rights under the federal Constitution to be present at every stage of his trial were not violated by unrecorded bench conferences where the court did not hear evidence at any of the conferences in derogation of defendant's right to confrontation or cross-examination; it does not appear from the context that defendant's absence thwarted the fairness and justness of his trial; the conferences appear to have dealt with legal issues; no prejudice can be discerned from defendant's absence from the conferences; federal courts have treated such conferences as outside the scope of the trial for purposes of defendant's constitutional right to be present and have found waiver where, as here, defendant made no request to be present and no objection to his absence; and defendant's attorneys

were present at each of the conferences to represent and protect his interests.

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.

3. Constitutional Law § 342 (NCI4th)— first degree murder—unrecorded bench conferences—state constitutional right to be present—not violated

Defendant's right to be present at his trial under Article I, section 23 of the North Carolina Constitution was not violated by unrecorded bench conferences where defendant failed to demonstrate, and the record did not in any way suggest, that the bench conferences implicated defendant's confrontation rights or that his presence at the conferences would have had a reasonably substantial relation to his opportunity to defend. A defendant's state constitutional right to be present at all stages of his capital trial is not violated when, with defendant present in the courtroom, the trial court conducts bench conferences, even though unrecorded, with counsel for both parties. The defendant has a constitutional right to be present if the subject matter of the conference implicates defendant's confrontation rights, or is such that the defendant's presence would have a reasonably substantial relation to his opportunity to defend, and the burden is on the defendant to show the usefulness of his presence. Once a violation of the right is apparent, the burden shifts to the State to show that it is harmless beyond a reasonable doubt.

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.

4. Criminal Law § 914 (NCI4th)— first degree murder—death sentence—polling of jury

A first degree murder defendant was not sentenced in accordance with the requirements of N.C.G.S. § 15A-2000(b) and the case was remanded for a new sentencing proceeding where the trial court failed to poll the jury individually in

that the court questioned the jury by having jurors raise their hands if they agreed with the verdict on each issue. Defendant was not precluded from raising the issue on appeal by his failure to request an individual poll or to object to the court's method of polling because an individual poll in capital cases is statutorily mandated and is not dependent on defendant's request or motion.

Am Jur 2d, Criminal Law § 1016.

Accused's right to poll of jury. 49 ALR2d 619.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Allen (J.B.), J.*, at the 10 July 1989 Criminal Session of Superior Court, WAKE County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 15 October 1991.

Lacy H. Thornburg, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Justice.

Defendant was tried on indictments charging robbery with a dangerous weapon and the first-degree murder of Jerry Coombs. The jury convicted defendant of robbery with a dangerous weapon and first-degree felony murder based on the underlying robbery, but rejected the theory of murder by premeditation and deliberation. Because the robbery was the felony underlying the felony murder conviction, the trial court arrested judgment on the robbery conviction. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death. For the reasons discussed herein, we find no prejudicial error in the guilt phase of defendant's trial, but we conclude that defendant must receive a new sentencing proceeding.

The State presented the following evidence tending to show that defendant killed Jerry Coombs while robbing him in the parking lot of the Crabtree Boulevard Fast Fare in the early morning hours of 10 June 1988:

Melinda Coombs, the victim's wife, testified that she and her husband lived in Raleigh with their three children. In order to supplement their regular incomes, the couple acquired a daily newspaper route that required early morning deliveries to businesses along Route 1, including the Crabtree Fast Fare. Jerry Coombs made the deliveries, and Melinda handled the billing.

Melinda testified that Jerry left their house between 3:15 and 3:30 a.m. on Friday, 10 June 1988. Upon his failure to return home at the usual time, 5:30 a.m., Melinda began calling businesses along the route to determine whether Jerry had yet made deliveries. The last completed delivery was to the Crabtree Fast Fare.

Darryl Hatter, a Raleigh drywall subcontractor, testified that he stopped at the Crabtree Fast Fare at about 7:00 a.m. on 10 June 1988. After getting out of his car, Hatter noticed a man in a nearby car reclining in an awkward position. Hatter passed by the car and discovered that the man was not breathing and that there was a bloodstain where the man's hand rested near his midsection. Hatter went in the store and informed the manager, who then called the police.

The police investigation of the crime scene revealed two empty .25 caliber shell casings and an unfired shell inside the victim's car, an empty shell casing near the right front tire of the car, and a footprint impression in some nearby mud. The police also extracted a .25 caliber bullet from a bullet hole in the passenger-side door of the car. A trace evidence examination of the victim and his car produced orange-colored fibers that could have originated from the same source as fibers taken from the carpet in defendant's apartment, particles of grey foam rubber that could have originated from the same source as particles recovered from a blue running suit found in defendant's apartment, and a single hair originating from the head of a black individual (defendant is black).

Dr. Copeland's autopsy of the victim revealed two bullet wounds, one to the right knee and the other to the abdomen. The victim died as a result of bleeding from the aorta.

Anthony "Mingo" Gregg, defendant's neighbor in an apartment building at 425 Alston Street, testified that defendant said he was going to rob a man who had money bags. Defendant asked Gregg to go with him and "watch out" while defendant snatched the bags. The two men later asked Billy Cole to act as their driver.

Gregg testified that two days before the killing the three men went to the Crabtree Fast Fare to do the robbery, but that the intended victim left too quickly. The next day, defendant showed Gregg a small black gun and told him he would use it to shoot the man in the leg if he resisted the robbery. One day later, 10 June 1988, defendant knocked on Gregg's door at about 3:30 or 4:00 a.m., saying it was time to go. The two men met Cole and drove to a spot across from the Fast Fare. Defendant and Gregg walked across the street and waited beside the dumpster near the store.

Gregg testified that when they saw the victim get out of his car, defendant put a stocking over his head, pulled out the gun, and said he was going to shoot the victim in the leg so he could not chase them. Gregg testified that when defendant pulled out the gun, he (Gregg) started leaving the scene because he and Billy Cole did not want to be involved with the gun. As Gregg was walking away he heard defendant say: "Hold it, you know what it is." Gregg then heard two gunshots. He turned and saw defendant struggling with the victim through the open car window. Gregg ran back to the victim's car and told defendant it was time to leave. Gregg testified that he heard defendant say the money was underneath the victim and he wanted it. Gregg turned again to leave and then he heard another shot when he was about halfway back to the car.

Soon both men were back at Cole's car. Defendant said he thought he had killed the man and he had gotten only the victim's wallet, which contained ten dollars and some credit cards. The men drove back to the Alston Street apartments.

Gregg told his girlfriend and his brother that defendant shot a man at the convenience store. Gregg was arrested the next week, and he gave a statement to the police. Gregg's sneakers matched the footprints left in the mud near the victim's car. Gregg pled guilty to the second-degree murder and robbery of Jerry Coombs.

Alvin Edwards, a resident of the apartment house on Alston Street, testified that defendant had spoken to him prior to the robbery about his plan to commit the crime. Edwards also testified that "Mingo" Gregg told him they had committed the robbery and defendant had shot the victim.

Michelle McMickings, Gregg's girlfriend, testified that Gregg told her after the robbery that defendant had shot a man during the robbery. Crystal Freeman, defendant's girlfriend, testified that defendant awoke her in the early morning of 10 June 1988 and told her he thought he had killed someone. She testified that when she discovered she was missing a pair of stockings, defendant told her he had taken them.

Michael Gause testified that defendant offered to sell him a .25 caliber automatic pistol.

Defendant offered no evidence at the guilt phase of the trial, but defendant's sister, Amy Ross, testified in his behalf at the sentencing phase. Ross testified about her parents' divorce when defendant was very young. She also described defendant's educational background, work experience, and religious practices.

[1] In his first assignment of error, defendant contends that his federal and state constitutional rights to the assistance of counsel during a critical stage of his trial were violated when the trial court and defendant's attorneys allowed him to make the decision not to exercise peremptory challenges to remove jurors his attorneys deemed unsuitable. With respect to the jury selection process, the stipulated record on appeal reveals the following:

> During jury selection, defense counsel communicated to the defendant counsel's advice on whether or not each . . . venireperson passed by the state should be seated on the jury. Counsel vested in the defendant the final decision of whether to accept or peremptorily challenge each venireperson passed by the state. In each instance in which a peremptory challenge was exercised by the defense, counsel and the defendant concurred in the decision. In four instances . . . the defendant, against the advice of counsel, made the decision to accept venirepersons as seated jurors; but for counsel's conviction that the decision of who should be seated on the jury should be the capital defendant's, counsel would otherwise have peremptorily excused these four jurors.

We have rejected defendant's contention in the recent cases of *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991), and *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991). In *McDowell*, the Court found no violation of defendant's right to counsel where the record revealed 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." *Id.* at 380, 407 S.E.2d at 210. The Court held 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." *Id.* at 382, 407 S.E.2d at 210.

The Court in *McDowell* relied on the contemporaneous case of *Ali*, 329 N.C. 394, 407 S.E.2d 183. In *Ali*, the defendant claimed that "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." *Id.* at 402, 407 S.E.2d at 189. The Court concluded that "when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control . . . ." *Id.* at 404, 407 S.E.2d at 189. The Court also noted that "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." *Id.*

The record here reveals that defendant and his counsel conferred regarding which venirepersons to excuse and that defense counsel gave considerable deference to defendant's informed decisions with respect to the exercise of peremptory challenges. On four occasions counsel and defendant came to an impasse with respect to the excusal of a particular venireperson, and counsel acquiesced. This issue is controlled by *Ali*; therefore, defendant's assignment of error is overruled.

[2] Defendant next contends that the trial court violated his federal and state constitutional rights by conducting bench conferences with defense counsel and counsel for the State. Though present in the courtroom, defendant asserts that his absence from these conferences violated his constitutional right to be present at every stage of the proceeding. The trial court held eighteen such conferences during the course of the trial.

Under the federal constitution defendant derives his right to be present from the Confrontation Clause of the Sixth Amendment and from the Due Process Clause of the Fifth and Fourteenth Amendments. The Confrontation Clause provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. "One of the most basic of the rights guaranteed by the Confronta-

tion Clause is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338, 25 L. Ed. 2d 353, 356 (1970) (citing *Lewis v. United States*, 146 U.S. 370, 36 L. Ed. 2d 1011 (1892)). Through the Fourteenth Amendment these guarantees are required of the states as well. *Pointer v. Texas*, 380 U.S. 400, 13 L. Ed. 2d 923 (1965).

Beyond the right to presence under the Confrontation Clause, the Supreme Court

> ha[s] recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. In *Snyder v. Massachusetts*, 291 U.S. 97 (1934), the Court explained that a defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.

United States v. Gagnon, 470 U.S. 522, 526, 84 L. Ed. 2d 486, 490 (1985) (per curiam). *See also Faretta v. California*, 422 U.S. 806, 819 n.15, 45 L. Ed. 2d 562, 572-73 n.15 (1975).

Though an accused has the constitutional right to confront witnesses and other evidence against him, and the right to a "fair and just" hearing, the federal courts have typically upheld convictions arising from trials at which the court conducted conferences, at the bench or in chambers, in the accused's absence. These courts have denied relief on a number of grounds, including that the conferences are not a stage of the accused's trial within the meaning of the Constitution, that there was a waiver of the right through lack of objection or request to be present, that there was no prejudice to the defendant resulting from the conferences, and that the bench conference is a longstanding and necessary trial practice facilitating the smooth functioning of the court.

In *Rushen v. Spain*, 464 U.S. 114, 78 L. Ed. 2d 267 (1983) (per curiam), the trial court twice spoke off the record in chambers with a seated juror regarding the juror's recollection of facts related to the trial that might affect the juror's impartiality. The trial court concluded that the juror could remain impartial, but it failed to inform defendant of the *ex parte* communications. When defense

counsel subsequently learned of the communications, the court held a postconviction hearing regarding them. The court concluded that the *ex parte* communications lacked significance and that defendant suffered no prejudice. The Supreme Court assumed, without deciding, that the defendant's constitutional rights to presence and counsel were implicated, and held that such constitutional error was subject to harmless error analysis. *Id.* at 117-19 n.2, 78 L. Ed. 2d at 272-73 n.2. The Court concluded that the evidence produced at the postconviction hearing supported the trial court's decision that defendant suffered no prejudice. *Id.* at 120-21, 78 L. Ed. 2d at 274-75.

In *United States v. Gagnon*, 470 U.S. 522, 84 L. Ed. 2d 486, the trial court questioned a juror on the record in chambers, with defense counsel present, regarding whether defendant's actions during trial (sketching the juror's portraits while defendant was seated at counsel table) had prejudiced the juror against the defendant. In upholding the conviction, the Supreme Court stated:

> We think it clear that respondents' rights under the Fifth Amendment Due Process Clause were not violated by the *in camera* discussion with the juror. "[T]he mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication." *Rushen v. Spain*, 464 U.S. 114, 125-26, 78 L. Ed. 2d 267, 104 S. Ct. 453 (1983) (Stevens, J., concurring in judgment).
>
> . . . .
>
> In this case the presence of the four respondents and their four trial counsel at the *in camera* discussion was not required to ensure fundamental fairness or a "reasonably substantial . . . opportunity to defend against the charge." See [*Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 78 L. Ed. 674, 678]. . . . [T]he conference was not the sort of event which every defendant had a right personally to attend under the Fifth Amendment. Respondents could have done nothing

> had they been at the conference, nor would they have gained anything by attending.

Id. at 526-27, 84 L. Ed. 2d at 490.

The Court also addressed defendants' claim that their right to presence under Federal Rule of Criminal Procedure 43 was violated. The Court assumed that the Ninth Circuit Court of Appeals was correct in holding that the conference was a "stage of the trial" within the meaning of Rule 43, but it reversed the Court of Appeals on the grounds that defendants had waived their right under Rule 43 by failing to request attendance at the conference and by failing to object, before or after the conference, to their absence. *Id.* at 527-28, 84 L. Ed. 2d at 491.

Finally, in *Kentucky v. Stincer*, 482 U.S. 730, 96 L. Ed. 2d 631 (1987), the Court rejected defendant's Sixth and Fourteenth Amendment challenges to the trial court's decision to conduct a hearing on the competency of two child witnesses for the State outside the presence of defendant, but with defense counsel's participation. As to defendant's Sixth Amendment challenge, the Court emphasized the fact that no substantive testimony against defendant was received and that defendant had ample opportunity to cross-examine the witnesses when they took the stand. With respect to defendant's Fourteenth Amendment challenge, the Court concluded:

> Respondent has given no indication that his presence at the competency hearing in this case would have been useful in ensuring a more reliable determination as to whether the witnesses were competent to testify. He has presented no evidence that his relationship with the children, or his knowledge of facts regarding their background, could have assisted either his counsel or the judge in asking questions that would have resulted in a more assured determination of competency. On the record of this case, therefore, we cannot say that respondent's rights under the Due Process Clause of the Fourteenth Amendment were violated by his exclusion from the competency hearing.

Id. at 747, 96 L. Ed. 2d at 648.

Thus, the United States Supreme Court has addressed the question of whether defendant has a federal constitutional right to presence in terms of whether the conference at issue involves

either the receipt of evidence without an opportunity for cross-examination or the usefulness of defendant's presence in assuring fairness in the proceeding.

Other federal courts also have been reluctant to find a violation of defendant's constitutional right to presence. In *United States v. Vasquez*, 732 F.2d 846 (11th Cir. 1984) (per curiam), the court found no violation of the Sixth Amendment where the trial court excluded defendant from the courtroom during a bench conference with counsel called to discuss the prosecuting attorney's cross-examination. The court said:

> The right to be present at every stage of trial does not confer upon the defendant the right to be present at every conference at which a matter pertinent to the case is discussed, or even at every conference with the trial judge at which a matter relative to the case is discussed. . . . [W]e conclude that a bench conference, attended by appellant's counsel and called to discuss an evidentiary matter relative to appellant's own cross-examination, is not a critical stage of the trial proceedings at which appellant has a right to be present.

Id. at 848-49.

In *Cox v. United States*, 309 F.2d 614 (8th Cir. 1962), the defendant claimed a violation of the Fifth and Sixth Amendments and of Federal Rule of Criminal Procedure 43. In that case, the trial court heard testimony in chambers with all counsel present, but with defendant absent. The court said:

> It is clear from reading the record that this was a conference with the attorneys and was not a part of the actual trial before the jury. . . . Such conferences are usual trial procedure. . . .
>
> . . . .
>
> . . . It is not unusual for a judge to call counsel into chambers and discuss matters of evidence, the form of questions, instructions proposed, and other matters looking to a more orderly trial, without having a defendant present. . . . This conference was not a part of the trial within the meaning of rule 43.

> [Defendant] was not deprived of the substance of a fair trial in the holding of this conference in his absence.

Id. at 616.

In *United States v. Brown*, 571 F.2d 980 (6th Cir. 1978), in defendant's absence the trial court conferred with counsel regarding the excusal of prospective jurors. The court noted that its previous decisions had construed the right to be present under Rule 43 more broadly than the same right under the federal constitution. "An in-chambers conference concerning the dismissal of a juror, while a stage of the trial within the meaning of Rule 43(a) . . . is not a stage of the trial when the absence of the defendant would frustrate the fairness of the trial so long as counsel for the defendant is present." *Id.* at 987. The court found no constitutional violation and no prejudice to the defendant under Rule 43.

In *Deschenes v. United States*, 224 F.2d 688 (10th Cir. 1955), the court concluded:

> The final question is whether conferences of the court and counsel on questions of law at the bench or in chambers, out of hearing of the appellant and the jury, denied appellant his constitutional right to be present at every stage of the trial. In the first place, neither appellant nor his counsel made a specific request for appellant to be present at these conferences, and no complaint or objection was lodged to the practice. He therefore cannot complain of any possible prejudice. . . . Moreover it is settled law that the exclusion of a defendant and a jury from the courtroom during argument on a question of law does not violate defendant's constitutional right to be present at every step of the proceedings.

Id. at 693 (citations omitted). *See also United States v. Boone*, 759 F.2d 345, 347 (4th Cir.), *cert. denied*, 474 U.S. 861, 88 L. Ed. 2d 146 (1985); *United States v. Bascaro*, 742 F.2d 1335, 1349-50 (11th Cir. 1984); *In re Shriner*, 735 F.2d 1236, 1241 (11th Cir. 1984) ("no constitutional right to be present at the bench during conferences that involved purely legal matters"); *Egger v. United States*, 509 F.2d 745, 747-48 (9th Cir.), *cert. denied*, 423 U.S. 842, 46 L. Ed. 2d 61 (1975) ("defendant never asked to attend, nor was he prevented, he was in fact physically present throughout the trial which is all . . . the Sixth Amendment would seem to require. Any greater 'right to be present' was effectively waived by Egger's

failure to request it"); *United States v. Howell*, 514 F.2d 710, 714 (5th Cir.), *cert. denied*, 423 U.S. 914, 46 L. Ed. 2d 143 (1975); *United States v. Gregorio*, 497 F.2d 1253, 1256-60 (4th Cir.), *cert. denied*, 419 U.S. 1024, 42 L. Ed. 2d 298 (1974); *United States v. Williams*, 455 F.2d 361, 365 (9th Cir.), *cert. denied*, 409 U.S. 857, 34 L. Ed. 2d 102 (1972) (in bench conferences where defendant is in the courtroom but not present at the conference, the court is "entitled to rely on counsel's performance of his agency duties and assume appellant's absence from the bench was voluntary"); *United States v. Jorgenson*, 451 F.2d 516, 520-21 (10th Cir. 1971), *cert. denied*, 405 U.S. 922, 30 L. Ed. 2d 793 (1972); *United States v. Sinclair*, 438 F.2d 50, 52 (5th Cir. 1971); *Root v. Cunningham*, 344 F.2d 1, 3-5 (4th Cir.) (several cases cited which "found nothing wrong with the universal practice of judges and counsel discussing in conference proposed instructions out of the presence of defendants"), *cert. denied*, 382 U.S. 866, 15 L. Ed. 2d 104 (1965); *United States v. Cravatas*, 330 F. Supp. 91, 100 (D. Conn. 1971) ("Such conference [in chambers to discuss whether defendant's counsel would be admitted to practice before the court and whether the court would accept a nolo contendere plea] clearly was not a stage of the trial."); *Smith v. United States*, 277 F. Supp. 850, 860-63 (D. Md. 1967), *aff'd*, 401 F.2d 773 (4th Cir. 1968).

In the case at bar, twelve of the eighteen conferences occurred during jury selection and six occurred while the court was receiving evidence in the guilt phase of defendant's trial. Though none of the conferences are recorded, the context of the record shows that of the "jury selection" conferences, six preceded the excusal of prospective jurors by the trial court for cause with the express consent of counsel for defendant and for the State; two related to the scope of permissive questioning into a juror's views on capital punishment; and one appeared to relate to a request to have the trial court inform the prospective jurors that they should be thinking about their views on capital punishment, as they would be questioned about those views in jury selection. The content of three conferences is unclear, but the record indicates that no significant ruling resulted from any of these. With respect to each of the conferences in the evidentiary phase, it appears that the conferences related to legal arguments by counsel, motions, and administrative matters such as the timing of recesses.

In none of the conferences did the court hear evidence from witnesses in derogation of defendant's right to confrontation or

cross-examination. Neither does it appear from the context that defendant's presence would have had "a relation, reasonably substantial, to the fulness of his opportunity to defend," such that his absence thwarted the fairness and justness of his trial. *Snyder v. Massachusetts*, 291 U.S. 97, 105, 78 L. Ed. 674, 678 (1934). The conferences appear to have dealt with legal issues such as the scope of questions during voir dire of prospective jurors, the excusal of certain jurors for cause, the timing of recesses during the proceedings, and legal questions regarding the admissibility or use of certain evidence or exhibits. We can discern no prejudice from defendant's absence at these conferences.

Further, the vast weight of authority suggests that, on these facts, defendant's confrontation and due process rights under the federal Constitution were not violated by his absence from the bench conferences. Not only have federal courts treated such conferences as outside the scope of the trial for purposes of defendant's constitutional right to be present, but they also have found waiver where, as here, defendant made no request to be present and no objection to his absence. Defendant's attorneys were present at each of the conferences to represent and protect his interests. For the foregoing reasons, we conclude that defendant suffered no violation of his rights under the federal Constitution.

[3] Defendant also claims that these conferences violated his rights under Article I, Section 23, of the North Carolina Constitution. In *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *death sentence vacated*, --- U.S. ---, 111 L. Ed. 2d 777 (1990), this Court stated:

> We have interpreted th[is] state constitutional protection afforded the capital defendant as . . . guaranteeing the accused not only the right to be present at each and every stage of trial, but also providing that defendant's right to be present cannot be waived, and imposing on the trial court the duty to insure defendant's presence at trial.

Id. at 29, 381 S.E.2d at 651. The Court in *Huff* also held that a violation of defendant's right to presence is subject to harmless error review. *Id.* at 32-35, 381 S.E.2d at 653-55.

This Court has not ruled on whether a defendant's personal absence from a bench conference between the trial court and counsel for both parties during trial violates his constitutional right to presence. In *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569 (1982),

the Court rejected defendant's claim "that he was denied due process and the effective assistance of counsel when the trial court refused to order that bench conferences be recorded." *Id.* at 173, 293 S.E.2d at 583-84. The Court did not discuss the defendant's constitutional right to presence in *Brown*.

In *State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991), the Court rejected the defendant's argument that he was entitled to a new trial because the trial court conducted more than one hundred bench conferences with counsel at which defendant was not personally present. The Court reviewed the case under the harmless error standard: "After careful review of the record, we conclude that the State has met its burden by showing that defendant's absence from the conferences in this case was harmless beyond a reasonable doubt." *Id.* at 21, 409 S.E.2d at 299. Because all the bench conferences in *Robinson* were recorded, the Court had a record from which to conduct harmless error analysis. Thus, the Court did not address the precise question at issue here—whether, in a capital case with defendant present in the courtroom, bench conferences between the court and counsel violate Article I, Section 23, of the North Carolina Constitution, which guarantees the defendant's right to be present at all stages of his capital trial.

As a preliminary matter, it is not altogether apparent that a bench conference is truly a "stage" of the trial within the meaning and intent of the constitutional right to presence. Many courts, both state and federal, have taken the view that bench conferences primarily involve brief investigations into legal questions or matters of trial administration and thus are more accurately a "temporary suspension of the trial" rather than a stage of the trial itself. *See Brown v. State*, 272 Md. 450, 477, 325 A.2d 557, 571 (1974); *State v. Tumminello*, 16 Md. App. 421, 436-38, 298 A.2d 202, 210 (1972); *see also United States v. Boone*, 759 F.2d 345, 347 (4th Cir. 1985); *United States v. Brown*, 571 F.2d 980, 987 (6th Cir. 1978); *Egger v. United States*, 509 F.2d 745, 747-48 (9th Cir. 1975); *United States v. Sinclair*, 438 F.2d 50, 52 (5th Cir. 1971); *Cox v. United States*, 309 F.2d 614, 616 (8th Cir. 1962); *Wilson v. State*, 59 Wis.2d 269, 286-88, 208 N.W.2d 134, 143-44 (1973); *Palmer v. Commonwealth*, 143 Va. 592, 605-07, 130 S.E. 398, 402-03 (1925). In concluding that the conferences are not part of the actual trial, these courts often considered whether defendant's presence at the conference would have had a reasonably substantial relation to

his opportunity to defend himself—the often-articulated test for a due process violation of the federal constitutional right to presence.

A fair reading of our cases, however, suggests a broader interpretation of the word "stage" as it relates to defendant's state constitutional right to presence at all "stages" of his trial. In *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635, the Court noted:

> Although the United States Supreme Court has stated that the confrontation clause of the federal constitution guarantees each criminal defendant the fundamental right to personal presence at *all critical stages* of the trial, . . . our state constitutional right of confrontation has been interpreted as being broader in scope, guaranteeing the right of every accused to be present at *every stage* of his trial.

Id. at 29, 381 S.E.2d at 650-51 (emphasis in original).[1] Similarly, in *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158 (1991), the Court stated 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.' " *Id.* at 541, 407 S.E.2d at 163 (quoting *State v. Kelly*, 97 N.C. 404, 405, 2 S.E. 185, 185-86 (1887)).

Under the state constitution, defendant's actual presence is required throughout his trial, not just at particularly important junctures. For example, in *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987) (*Payne I*), the Court awarded a new trial due to a violation of defendant's right to presence when the trial court, during a jury recess, administered its admonitions in the jury room. Ordinarily, a time of jury recess would not be considered a stage of the trial, but it became one when the trial court addressed the jury with respect to the case in derogation of its duty " 'to see that [defendant] is actually present at *each and every step*

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1. The broader scope of the state constitutional right to presence is illustrated by the fact that the United States Supreme Court held in *Gagnon*, 470 U.S. 522, 84 L. Ed. 2d 486, that even though the trial court conducted an *in camera* discussion with a juror, "the mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right." *Id.* at 526, 84 L. Ed. 2d at 490. *But see Johnson v. Maryland*, 915 F.2d 892 (4th Cir. 1990) (*ex parte* communication between trial judge and juror held harmless error). Under our cases such a discussion would violate the state constitutional right to presence. *See, e.g., State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987).

taken in the progress of the trial.' " *Id.* at 139, 357 S.E.2d at 612 (quoting *State v. Jenkins*, 84 N.C. 812, 814 (1881)) (emphasis added). The Court also noted that the trial court's admonitions to the jury came at a critical stage of defendant's trial because defendant's presence at that time could have contributed to his ability to present a defense. *Id.* Thus, it appears that *Payne I* involved a federal, as well as a state, constitutional violation.

Upon Payne's second trial, the jury again sentenced him to death, and this Court again considered his claim of a violation of his right to presence. *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991) (*Payne II*). In *Payne II*, before defendant arrived at court on the second day of jury selection the trial court made preliminary inquiries of a new pool of prospective jurors. The Court noted that "[to] conduct *any portion* of a capital trial in the defendant's absence deprives the defendant of the right to be present" but it ultimately concluded that the violation of defendant's constitutional rights was harmless beyond a reasonable doubt. *Id.* at 388-90, 402 S.E.2d at 588-89 (emphasis added).

Likewise, in *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989), *cert. denied*, --- U.S. ---, 110 L. Ed. 2d 268 (1990), the Court treated as a "stage" of the trial the trial court's telephone conversations with a juror where defense counsel, but not defendant, was present. The Court found the error to be harmless beyond a reasonable doubt because of the presence of defense counsel and the trial court's "reiteration" of the content of the calls for the record. *Id.* at 627, 386 S.E.2d at 428. The Court also noted that, unlike in *Payne I*, though it occurred at a "stage" of defendant's trial, the conversation in *Davis* did not occur at a "critical stage" such that it bore a reasonably substantial relation to his ability to present a defense. *Id.* Thus, though for state constitutional purposes the Court assumed that the conversation came during a "stage" of defendant's trial, it did not occur at a "critical" stage for federal constitutional purposes.

Finally, in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985), it appears that "the trial judge recessed the court in order to conduct a voir dire hearing" but that defendant was not present for the hearing. *Id.* at 558, 324 S.E.2d at 245-46. Again, though the court was in recess, this Court implicitly treated the hearing as a "stage of the trial" for purposes of reviewing defendant's assertion that his right to be present had been violated.

The breadth of interpretation of what constitutes a "stage" in an accused's capital trial is not without limit, however. In *State v. Bowman*, 80 N.C. 432 (1879), the Court declined to extend a capital defendant's right to be present to include presence at the disinterment of the remains of the deceased. Neither has defendant's right to be present at all stages of his trial been extended so as to include a right to be present when the grand jury returns an indictment, *State v. Stanley*, 227 N.C. 650, 44 S.E.2d 196 (1947), when a pretrial motion for discovery is heard and defendant is represented by counsel, *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97 (1976), "during the argument of a motion for a new trial and similar motions," *State v. Dry*, 152 N.C. 813, 814, 67 S.E. 1000, 1001 (1910), *overruled on other grounds, State v. Huff*, 325 N.C. 1, 381 S.E.2d 635, or upon appeal of asserted legal errors in the trial, *State v. Jacobs*, 107 N.C. 772, 11 S.E. 962 (1890).

The development of our cases reveals that the essential characteristic of defendant's constitutional right to presence is just that, his actual presence during trial. "This Court has repeatedly held that nothing should be done prejudicial to the rights of a person on his trial for a capital felony unless he is actually present . . . ." *State v. Jacobs*, 107 N.C. 772, 779, 11 S.E. 962, 964 (1890). " 'Defendant's presence at his trial for a capital felony . . . is a matter of public as well as private concern. Public policy requires his attendance at such a trial.' " *State v. Huff*, 325 N.C. at 30, 381 S.E.2d at 651 (quoting *State v. Moore*, 275 N.C. 198, 209, 166 S.E.2d 652, 659 (1969)).

The first North Carolina case in which it appears that an accused asserted a violation of his right to presence was *State v. Craton*, 28 N.C. (6 Ired.) 165 (1845). In *Craton*, "the prisoner assigned as an error in the judgment that it does not appear by the record that the prisoner was personally present in court at the time of the trial and sentence passed." *Id.* at 168. Without expressly declaring that defendant had the right to be present, the Court held that there was sufficient evidence indicating that the accused was in fact present. *Id.* at 169.

In *State v. Blackwelder*, 61 N.C. (Phil. Law) 38 (1866), *overruled on other grounds, State v. Huff*, 325 N.C. 1, 381 S.E.2d 635, the Court noted that *Craton* did not expressly resolve the issue of whether an accused in fact had a right to be present during his trial, but it stated that "the implication in favor of the existence

of the right is so strong that we must regard it as equivalent to a positive decision." *Id.* at 39. The Court ordered a *venire de novo* because the record showed that: "Not being able to agree, the jury came into court at a late hour in the night . . . [and the trial court] 'again charged the jury in the absence of the prisoner and portion of his counsel.' " *Id.* at 39.

In *State v. Dry*, 152 N.C. 813, 67 S.E. 1000, with the trial court's permission one of two codefendants in a capital trial left the courtroom temporarily during jury selection. When the trial court realized it had mistakenly allowed a capital defendant to leave the courtroom during the trial, it inquired of counsel whether they intended to except due to the defendant's absence. Upon receiving an affirmative reply, the court ordered a mistrial. This Court treated the mistrial as entered properly, but rejected defendant's appeal of his denied motion for discharge. *See also State v. Beal*, 199 N.C. 278, 295-96, 154 S.E. 604, 614 (1930).

Within the last ten years, however, this Court has faced an increasing number of appeals involving an accused's constitutional right to presence in capital cases. Several of the recent cases involved factual situations very similar to those cases originally dealing with this constitutional right—that is, cases where the defendant himself is physically absent from the courtroom during trial proceedings.

For example, in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241, though defense counsel was present for a voir dire hearing on the admissibility of certain testimony, the defendant was personally absent. The Court acknowledged that the defendant's right to presence was implicated, but concluded that it had been implicitly waived and that any error was not prejudicial.[2] *Id.* at 558-60, 324 S.E.2d at 245-47. In *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635, defendant became so emotionally distraught upon the introduction of certain testimony that he was removed from the courtroom and the trial court allowed defense counsel's request to continue the proceeding in defendant's absence. However, the error of continuing the trial in defendant's absence was harmless because defense

2. Though defendant in *Braswell* was indicted for a capital offense, the State announced that it would not seek the death penalty due to a lack of any aggravating circumstance. Thus, the Court treated the case as noncapital in nature with the result that defendant's right to presence was waivable. *State v. Braswell*, 312 N.C. at 559, 324 S.E.2d at 246.

counsel was present and able to challenge the evidence being offered and the Court had a full record from which to review its admissibility. Further, there was no showing that, given his condition, defendant himself could have aided in defending against the witnesses' testimony. *Id.* at 35-36, 381 S.E.2d at 655. Likewise, in *Payne II*, 328 N.C. 377, 402 S.E.2d 582, the trial court began jury selection before defendant arrived at the courtroom. The Court concluded that this violated defendant's right to presence, but it ultimately held that the error was harmless because the available transcript showed that all the excused jurors "were either ineligible to serve or excused for manifestly unobjectionable reasons . . . ." *Id.* at 389, 402 S.E.2d at 589. The remaining jurors were still available for defendant's observation and consideration of whether he would choose to accept them.

It is clear, however, that as a practical matter not all of the proceedings in an accused's capital trial occur in the courtroom itself. Thus, in some of our recent cases we have found a violation of defendant's constitutional right to presence where the "stage of the trial" occurs not in the courtroom, but in the trial court's chambers or the jury room. For example, in *Payne I*, 320 N.C. 138, 357 S.E.2d 612, the trial court went into the jury room during a recess to give its admonitions to the jury. Neither defendant nor defense counsel was present, and there was no record of what transpired between the court and the jury; thus, the Court could not conclude that the error was harmless beyond a reasonable doubt. In *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *death sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), the trial court examined each of the jurors in chambers with respect to the possibility that a weekend newscast might have tainted his or her views on the case. Because there was a record of the examinations, however, the Court was able to conclude the error was harmless beyond a reasonable doubt. *Id.* at 222-23, 372 S.E.2d at 863-64. *See also State v. Artis*, 325 N.C. 278, 297-98, 384 S.E.2d 470, 480 (1989), *death sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990); *State v. Davis*, 325 N.C. 607, 626-27, 386 S.E.2d 418, 428-29.[3] *Accord State v. Brogden*, 329 N.C. 534, 540-42,

3. In one other similar case, *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989), *death sentence vacated*, --- U.S. ---, 108 L. Ed. 2d 603 (1990), defendant argued that his right to presence was violated when the trial court allegedly talked privately with jurors. The Court concluded that "no *ex parte* 'communications' in the sense argued for by the defendant actually took place, even though they may have been invited by the trial court." *Id.* at 96-97, 381 S.E.2d at 618.

407 S.E.2d 158, 163 (charge conference in chambers with counsel, but not defendant or a court reporter held harmless error because trial court subsequently reported the proposed instructions on the record and gave opportunity to be heard).

Thus, our cases indicate that the typical situation implicating an accused's constitutional right to presence occurs when the defendant himself is not actually present in the courtroom during the course of the trial proceedings. In certain other cases, however, the *locus* of the trial proceedings is not in the courtroom, but in the jury room or in the court's chambers. We have held that defendant has a right to be present at these proceedings as well. *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158; *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470; *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612; *see also State v. Laws*, 325 N.C. 81, 381 S.E.2d 609; *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418; *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855. Notwithstanding an accused's right to be present, certain violations of this right may be harmless if such appears from the record.

It is undisputed that defendant in this case was actually, personally present in the courtroom during all the bench conferences between the trial court and counsel. Thus, there is no violation of his constitutional right to presence, at least not under the traditional line of cases interpreting that right as requiring his "actual" presence. Recently, however, we have also found a violation of defendant's constitutional right to presence during the jury selection stage of the trial on facts showing that, though the defendant and his counsel are present in the courtroom at the time, the trial court excused prospective jurors as a result of private, unrecorded conversations at the bench. *See State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990); *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991). The same sort of unrecorded conversations occurred in *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183, but the Court found the error harmless beyond a reasonable doubt because it could determine the nature of the conversations from the trial court's explanations and the surrounding context of the record.

In these cases the fact of defendant's actual presence in the courtroom essentially was negated by the court's cloistered conversations with prospective jurors. The court's actions effectively prevented defendant's participation in the proceeding, either personally or through counsel, and they deprived him of any real

knowledge of what transpired. Further, the public interest in ensuring the appearance of fairness in capital trials was implicated by private discussions between the trial court and individual jurors which, without explanation, resulted in the excusal of jurors.

Though defendant himself did not attend the conferences in this case, we conclude that the trial court's bench conferences with defense counsel and counsel for the State did not violate defendant's state constitutional right to be present at all stages of his trial. As stated above, defendant was personally present in the courtroom during the conferences. Further, and perhaps more importantly, his actual presence was not negated by the trial court's actions. At each of the conferences defendant was represented by his attorneys. Defendant was able to observe the context of each conference and inquire of his attorneys at any time regarding its substance. Through his attorneys defendant had constructive knowledge of all that transpired. Following the conferences defense counsel had the opportunity and the responsibility to raise for the record any matters to which defendant took exception. At all times defendant had a first-hand source of information as to the matters discussed during a conference. It also is relevant that bench conferences typically concern legal matters with which an accused is likely unfamiliar and incapable of rendering meaningful assistance. Other conferences typically deal with administrative matters that are nonprejudicial to the fairness of defendant's trial. In addition, such conferences do not diminish the public interest associated with defendant's right to presence. Unlike the excusal of prospective jurors following *ex parte* communications, in this case defendant, through his attorneys, had every opportunity to inform the court of his position and to contest any action the court might have taken.

For the foregoing reasons, we hold that a defendant's state constitutional right to be present at all stages of his capital trial is not violated when, with defendant present in the courtroom, the trial court conducts bench conferences, even though unrecorded, with counsel for both parties. *See People v. Boraders*, 33 Mich. App. 340, 189 N.W.2d 837 (1971); *People v. Gillette*, 171 Cal. App. 2d 497, 341 P.2d 398 (1959), *cert. denied*, 363 U.S. 846, 4 L. Ed. 2d 1729 (1960); *People v. Baker*, 164 Cal. App. 2d 99, 330 P.2d 240 (1958), *cert. denied*, 359 U.S. 956, 3 L. Ed. 2d 763 (1959); *see generally* 3 Joseph G. Cook, *Constitutional Rights of the Accused* § 18:7, at 128-29 nn.2-3 (2d ed. 1986). If, however, the subject matter

of the conference implicates the defendant's confrontation rights, or is such that the defendant's presence would have a reasonably substantial relation to his opportunity to defend, the defendant would have a constitutional right to be present. *See United States v. Gagnon*, 470 U.S. at 536, 84 L. Ed. 2d at 490. The burden is on the defendant to show the usefulness of his presence in order to prove a violation of his right to presence. *See Kentucky v. Stincer*, 482 U.S. at 747, 96 L. Ed. 2d at 648. Once a violation of the right is apparent, the burden shifts to the State to show that it is harmless beyond a reasonable doubt. *State v. Huff*, 325 N.C. at 32-35, 381 S.E.2d at 653-55.

Defendant has failed to demonstrate, and the record does not in any way suggest, that the bench conferences here implicated defendant's confrontation rights or that his presence at the conferences would have had a reasonably substantial relation to his opportunity to defend. This assignment of error is thus overruled.

By his next assignment of error, defendant contends that his death sentence cannot be upheld because the trial court erroneously allowed the prosecutor to excuse a juror who was qualified to serve. Because we conclude that defendant is entitled to a new capital sentencing proceeding for reasons explained hereafter, we need not address this issue.

[4] Defendant contends he is entitled to a new capital sentencing proceeding because the trial court failed to comply with the statutory mandate for an individual poll of jurors upon the return of a death sentence. N.C.G.S. § 15A-2000(b) provides, in pertinent part:

> (b) Sentence Recommendation by the Jury.—The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

N.C.G.S. § 15A-2000(b) (1988).

The record of defendant's capital sentencing proceeding reveals that when the jury returned to the courtroom with its verdict, the trial court verified that the jury had reached a verdict and then directed the clerk to "take the verdict or the recommendation of the jury." The clerk read from the sentencing issues sheet the jury's findings of an aggravating circumstance, its rejection of all

mitigating circumstances, its finding that the aggravating circumstance was sufficiently substantial to warrant the death penalty, and its recommendation of the death penalty. The clerk concluded by asking the jury, "This is your recommendation, so say you all?" The transcript then states, "JURORS RESPOND IN THE AFFIRMATIVE." With respect to each of the queries on the issues and recommendation sheet the trial court then inquired of the jury foreman whether the jury's written response was accurate. The foreman verified each response. The trial court then polled the jury as follows:

> COURT: As to the other members of the jury, listen to this. I'm going to ask that you raise your hand if this is your answer to these issues and recommendations.
>
> Your foreman has answered issue number one, do you unanimously find from the evidence, and beyond a reasonable doubt, the existence of the one following aggravating circumstance? He has answered that "Yes." If that is your verdict, all twelve of you raise your right hand.
>
> Let the record show that all twelve members of the jury raised their hand.

The trial court followed the procedure described above for each of the sentencing issues and the jury's sentencing recommendation. Thus, the record affirmatively shows that the trial court, in questioning the jury collectively and having all members of the jury respond collectively, failed to meet the statutory mandate that the jury be polled *individually*.

Even before the statutory requirement of individual polling of the jury in capital cases, under North Carolina law a group inquiry of the jury was insufficient to satisfy a defendant's request for an individual poll. In *State v. Boger*, 202 N.C. 702, 163 S.E. 877 (1932), the defendant was tried for murder and convicted of manslaughter. Defense counsel requested the court to poll the jurors. The court then addressed the jury as follows: "All of you gentlemen of the jury who return a verdict of guilty of manslaughter, stand up." *Id.* at 703, 163 S.E. at 877. After all the jurors stood, defense counsel unsuccessfully requested the court to poll the jury "man for man." *Id.* In ordering a new trial, the Court said:

> In the instant case, the defendant was denied his right to have the jurors polled by the judge or under his direction. The request of the judge that all the jurors who returned

> a verdict of guilty of manslaughter in this case, stand up, was not a compliance with the demand of the defendant, made in apt time, that the jurors be polled, man for man. The defendant was entitled as a matter of right to know whether each juror assented to the verdict announced by the juror who undertook to answer for the jury, and to that end he had the right to insist that a specific question be addressed to and answered by each juror in open court, as to whether he assented to said verdict. To poll the jury means to ascertain by questions addressed to the jurors, individually, whether each juror assented and still assents to the verdict tendered to the court.

Id. at 704, 163 S.E. at 878. The trial court's direction to all the jurors in this case to signal agreement to the verdict by raising their right hand does no more to satisfy the statutory requirement of individual polling than did the "all stand" direction of the court following the defendant's request for polling in *Boger*.

The State argues that because defendant failed to request an individual poll and to object to the court's method of polling, he is precluded from raising the error on appeal. N.C.R. App. P. 10(b); N.C.G.S. § 15A-1446(d) (1988). It is true that the statutory right to a jury poll in a noncapital case may be waived. N.C.G.S. § 15A-1238 (1988); *State v. Black*, 328 N.C. 191, 197-98, 400 S.E.2d 398, 402-03 (1991). However, the right to a noncapital jury poll under N.C.G.S. § 15A-1238 arises "[u]pon the motion of any party . . . [and the poll] *may* be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict." N.C.G.S. § 15A-1238 (emphasis added). In contrast, the right to a jury poll in a capital case is not dependent upon the motion of a party. "Upon delivery of the sentence recommendation by the foreman of the jury, the jury *shall be individually polled* . . . ." N.C.G.S. § 15A-2000(b) (emphasis added). Clearly, in capital cases an individual jury poll is statutorily mandated and is not dependent upon defendant's request or motion. "When a trial court acts contrary to a statutory *mandate*, the error ordinarily is not waived by the defendant's failure to object at trial." *State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988); *see also State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

Defendant thus was not sentenced in accordance with the requirements of N.C.G.S. § 15A-2000(b), in that the trial court failed

to poll the jury individually. For that reason, he is entitled to a new sentencing proceeding. Accordingly, we need not address the remaining sentencing phase assignments of error.

For the reasons stated, we find no error in the guilt phase of defendant's capital trial, but remand for a new capital sentencing proceeding.

Guilt phase: No error.

Sentencing phase: New sentencing proceeding.

JAMES H. POU BAILEY, A. PILSTON GODWIN, HARRY L. UNDERWOOD, MELVIN T. MUNN, FRED BENSON, JAMES H. KLEU, JOSEPH GILMER BINKLEY, EULA G. BULLARD, MILDRED C. SEAWELL, EMILY B. JONES, SAMUEL T. ARRINGTON, JOHN W. CARTWRIGHT, DAVID L. BRITT, MATTIE E. LASSITER, PAUL LEE SALISBURY, JR., CHARLES S. MANOOCH, JR., ROY E. THOMPSON, AND CLYDE R. SHOOK, JOHN H. ALLEN, JESSE M. ALMON, EDWIN C. GUY, GEORGE SMITH, ERNEST P. CAIN, THOMAS DALE JOHNSON, BILLY A. BAKER, AND ROSALIE T. ADAMS, VICTOR ALDRIDGE, SR., CLIFTON A. ANDERSON, HELEN L. ANDREWS, CHARLES E. ARRINGTON, LILLIAN B. ARRINGTON, WILLIAM K. AUBRY, JR., W. PRESTON BARBER, JR., PARKER N. BARE, MARGARET H. BARKLEY, JACKIE D. BARRETT, JAMES B. BARRETT, ARTHUR C. BEAMON, FRANK M. BENDER, WILLIAM D. BERG, THOMAS W. BERRIER, PAULINE J. BLACKBURN, BRENDA W. BLANCHFIELD, ROBERT L. BLEVINS, ELIZABETH F. BOLICH, JUNIOUS L. BOST, ELLIE L. BOYLES, HENRY L. BRIDGES, LAWRENCE R. BRIDGES, CAREY H. BROADWELL, CHANCEL T. BROWN, JOAN W. BROWN, MARGARET M. BROWN, JOHN W. BUCHAN, EUNICE W. BULLARD, DEWEY L. BUTLER, McCAULEY C. BYRUM, GERTRUDE G. CAHOON, JOSEPH H. CALDER, CATHERINE N. CANN, DOROTHY T. CARMICHAEL, MAURICE O. CATON, ROBERT A. CAUDLE, MARGARET H. CHAPMAN, ODELL CHILDRESS, CARL L. CLARKE, EDWARD L. CLAY, SR., SHARI T. CLINE, SELMA C. CLODFELTER, HAROLD D. COLEY, MATALINE COLLETTE, ROBERTA M. COOK, ANNA L. COOPER, BERTIE R. COOPER, CHARLIE C. COOPER, CARLYLE C. CRAVEN, N. CHRISTEL C. CREWS, DONALD E. CURTIS, VIOLET H. DANIEL, MILDRED K. DAVIS, HOWARD DICKEY, JOHN B. DILLARD, ESTHER P. DUNCAN, T. J. DUNCAN, HELEN M. DUPREE, JOSEPH E. DUPREE, JESSE W. EDWARDS, CHARLES B. ELKS, DAN R. EMORY, CHARLES F. ENGLISH, MARTIN W. ERICSON, JAMES M. EUBANKS, JR., RUTH U. FARTHING, NELLIE D. FOUNTAIN, J. WARREN FRANKLIN, ZENNA H. FRANKLIN, EMMA LEE FURCHES, ALFRED H. GARNER, EVELYN C. GARRISON, FRED W. GENTRY, CATHERINE M. GILBERT, MEREDITH H. GILBERT, IVEY B. GORDON, IZORIA S. GORDON, LOUIS N. GOSSELIN, GLADYS P. GREEN,

CONSUELLA GREENWOOD, JOHN L. HAIRSTON, RUTH A. HAIRSTON, JAMES A. HAMMONS, SAMUEL L. HARMON, MARY J. HAUSER, ELMO F. HICKS, IDALIA O. HIGH, CARLEE F. HODGE, LUCY GREENE HUBBARD, HUGHES J. HUNT, KAY C. HURT, HAROLD D. ISENBERG, BEN M. ISENHOUR, MARY G. ISENHOUR, MARY P.H. JACKSON, LILLIAN K. JOHNSON, VIRGINIA P. JOHNSON, WALTER C. JOHNSON, JR., C. MYLES JONES, JOE E. JONES, JUNE R. JONES, ROBERT P. JONES, WALTER C. JOYCE, SR., ODELL M. KEARNEY, RUTH H. KESSLER, JOHN KIGER, VELMA D. KING, FRANCES S. KISER, JACOB KOOMEN, JR., DAVID T. LAMBERT, WALTON S. LATTA, TRUDIE J. LAWSON, CLARENCE T. LEINBACH, JR., WALTER G. LEMING, VIRGINIA P. LEWIS, YATES W. LOWE, JAMES A. LYERLY, HARRIETTE B. McCORMICK, L. JAMES McDANIEL, E. R. McKAY, HARRY B. McKEE, W. S. McKINNEY, DORIS W. McLAMB, JOSEPH T. McMILLIAN, JAMES F. MALCOLM, EDWARD G. MANNING, JAMES H. MARCH, ELZA VAN MARION, MARY H. MARTIN, LESTER G. MASENCUP, HELEN S. MAST, JAMES B. MAST, JR., MELVILLE L. MAUNEY, ROBERT A. MAYER, VIRGINIA H. MICKEY, NONA S. MILLER, RUTH MINICK, GROVER F. MINOR, CHARLES B. MIRACLE, JACK K. MOORE, LOLA T. MORETZ, LEO G. MORGAN, WILLIAM F. MORGAN, BRADY W. MULLINAX, SR., JOHN I. NICHOLS, LUCINDA L. NOWLIN, DONALD S. OVERCASH, DWIGHT W. PADGETT, CALVIN C. PEARCE, WILLIAM W. PEEK, GEORGE W. PEELER, MICHAEL PELECH, JUANITA B. PENN, DIANE S. PEOPLES, CHARLES B. PIERCE, EVELYN D. PIERCE, SYLVIA S. PINYAN, MILDRED R. POINDEXTER, WINNIE D. POTTS, LEVI GLEN POWELL, THOMAS C. PRATT, CHARLES W. RANKIN, RALPH L. RAY, PATSY M. REYNOLDS, MATTIE B. RICHARD, ELNA C. ROSE, FRANCES T. SACRINTY, EDNA G. SCALES, MELVIN J. SCALES, VALDA E. SCHMITT, WORTH G. SEATS, CHARLES SELLE, NELSON L. SHEAROUSE, CONRAD H. SHELTON, MARY L. SHELTON, ELIZABETH H. SHERMER, BLANCHE S. SHIPP, RALPH N. SHUE, FRANCIS C. SIMMONS, JOE L. SIMMONS, HAROLD E. SIMPSON, RICHARD H. SIMPSON, REUBEN E. SLADE, GARNET N. SMART, LENORA S. SMITH, LONNIE H. SMITH, MATTIE S. SMITH, PAUL M. SMITH, FRANCES J. SNOW, EULALIA T. SOLOMON, G. VANCE SOLOMON, LUCILE J. SPEAS, DAVID W. SPIVEY, CHARLES A. SPEED, CAROLINE G. SPENCER, THOMAS S. THOMPSON, ELLA BELLE TILLMAN, DORIS E. TUCKER, JUSTUS M. TUCKER, RUTH L. TUCKER, MARGARET M. TUGMAN, FRANK L. UPRIGHT, WALTER P. UPRIGHT, ELIZABETH W. WACKERHAGEN, MARTHA M. WALKER, NORMAN W. WALKER, RALPH B. WALKER, ELIZABETH G. WALLS, JEAN A. WATSON, SAMUEL S. WHEELER, CORA M. WHITEHEAD, DANIEL W. WILLIAMS, ELIZA S. WILLIAMS, HARRY LEE WILLIAMS, ELIZABETH L. WILSON, MARIAN B. WILSON, WILBUR G. WILSON, HOYT A. WISEMAN, VIRGINIA A. WISEMAN, ERNEST B. WOOD, SR., HOWARD L. WOOTERS, THOMAS S. WORSHAM, JACK D. ZIMMERMAN, AND KENNETH A. GRIFFIN, INDIVIDUALLY FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS-PLAINTIFFS v. STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE, HELEN A. POWERS INDIVIDUALLY, BETSY JUSTUS IN HER CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER,

HARLAN E. BOYLES, INDIVIDUALLY AND IN HIS CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, THE NORTH CAROLINA FIREMEN'S AND RESCUE WORKER'S PENSION FUND, LEGISLATIVE RETIREMENT SYSTEM, NATIONAL GUARD RETIREMENT SYSTEM, RETIREMENT SYSTEMS FOR COUNTIES, CITIES, AND TOWNS, RETIREMENT SYSTEM FOR TEACHERS AND STATE EMPLOYEES, SUPPLEMENTAL RETIREMENT INCOME ACT OF 1984, SEPARATE INSURANCE BENEFIT PLANS FOR STATE AND LOCAL GOVERNMENTAL LAW ENFORCEMENT OFFICERS, SHERIFF'S SUPPLEMENTAL PENSION FUND OF 1985, ANNUITIES FOR STATE EMPLOYEES, REGISTER OF DEEDS SUPPLEMENTAL PENSION FUND, UNIFORM CONSOLIDATED JUDICIAL RETIREMENT SYSTEM, AND PUBLIC EMPLOYEES BENEFITS SERVICES OF NORTH CAROLINA, FIREMAN'S SUPPLEMENTAL FUND (HICKORY), CHARLOTTE FIREFIGHTERS' RETIREMENT SYSTEM, OPTIONAL RETIREMENT PROGRAM FOR STATE INSTITUTIONS OF HIGHER EDUCATION, RESPONDENTS-DEFENDANTS

No. 105PA91

(Filed 6 December 1991)

1. **State § 4.2 (NCI3d)— action against Department of Revenue— sovereign immunity**

An action against the Department of Revenue is an action against the State, and the State cannot be sued without its permission.

Am Jur 2d, States, Territories, and Dependencies §§ 99, 104.

2. **Taxation § 38 (NCI3d)— challenge to tax as unlawful—statutory remedy**

When a tax is challenged as unlawful rather than excessive or incorrect, the appropriate remedy is to bring suit under N.C.G.S. § 105-267.

Am Jur 2d, State and Local Taxation §§ 1059, 1064, 1065.

3. **Taxation § 38.3 (NCI3d)— necessity for demand of refund**

A taxpayer with a valid defense to the enforcement of the collection of a tax must first pay the tax, then demand a refund of that tax within thirty days after payment. Only when the Secretary of Revenue fails to refund the tax within ninety days may the taxpayer sue the Secretary of Revenue for the amount demanded. N.C.G.S. § 105-267.

Am Jur 2d, State and Local Taxation § 609.

4. **Taxation § 38 (NCI3d)— class action for tax refund—individual compliance with statute**

Even when taxpayers are seeking a tax refund as a class, each member must individually satisfy the conditions precedent to suit mandated in N.C.G.S. § 105-267.

Am Jur 2d, Parties § 51; State and Local Taxation § 1074.

Propriety of class action in state courts to recover taxes. 10 ALR4th 655.

5. **Taxation § 38 (NCI3d)— class demand for refunds—insufficiency**

Plaintiffs' class demands for refunds of taxes collected because of the repealed exemption for vested participants in state and local government retirement plans were invalid for purposes of suing for refunds under N.C.G.S. § 105-267 where (1) the demands were not made before an action was instituted against the Secretary of Revenue as required by the statute, and (2) the demands failed to include information about individual taxpayers required by reasonable regulations adopted by the Secretary of Revenue.

Am Jur 2d, Parties § 51; State and Local Taxation § 1074.

Propriety of class action in state courts to recover taxes. 10 ALR4th 655.

6. **Taxation § 38.1 (NCI3d)— income taxes on pensions—injunctive relief unavailable**

Plaintiff taxpayers were precluded by N.C.G.S. § 105-267 from obtaining injunctive relief on constitutional grounds to prevent future collection of income taxes on state and local government retirement benefits since that statute bars courts absolutely from entertaining suits of any kind brought for the purpose of preventing the collection of any tax imposed in Subchapter I.

Am Jur 2d, State and Local Taxation §§ 508, 1116, 1117.

7. **Public Officers § 9 (NCI3d)— State Treasurer—Secretary of Revenue—compliance with tax statute—constitutionality of statute not determined—individual capacities—immunity from suit on constitutional grounds**

The State Treasurer and the Secretary of Revenue are entitled to immunity in their individual capacities from civil

liability on federal and state constitutional grounds for their compliance with the act repealing the income tax exemption for state and local government retirement benefits where the constitutionality of the repealing act has not yet been examined by federal courts or by the appellate courts of this state.

Am Jur 2d, State, Territories, and Dependencies §§ 99, 104; State and Local Taxation §§ 1059, 1063.

Justice MITCHELL concurring in part and dissenting in part.

ON discretionary review prior to determination by the Court of Appeals pursuant to N.C.G.S. § 7A-31 of an order of class certification entered on 31 December 1990 *nunc pro tunc* for 29 October 1990 and an order granting partial summary judgment for plaintiffs entered on 2 November 1990 by *Lake, J.*, presiding at the 29 October 1990 session of Superior Court, WAKE County. Heard in the Supreme Court 8 May 1991.

Womble, Carlyle, Sandridge & Rice, by G. Eugene Boyce, and Donald L. Smith; Wallace R. Young, Charles H. Taylor, and J. Frank Huskins, for plaintiff-appellees.

Lacy H. Thornburg, Attorney General, by Edwin M. Speas, Jr., Senior Deputy Attorney General, George W. Boylan, Special Deputy Attorney General, Norma S. Harrell, Special Deputy Attorney General, and Douglas A. Johnston, Assistant Attorney General, for defendant-appellants.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester and David C. Wright, III, for defendant-appellant Helen A. Powers.

EXUM, Chief Justice.

In this appeal class plaintiffs challenge the validity under the North Carolina Constitution of a repealed tax exemption for vested participants in state and local government retirement plans. We do not reach the constitutional issue because plaintiffs failed to comply with N.C.G.S. § 105-267, under which an arguably invalid tax can be challenged and remedial action taken. We therefore hold plaintiffs' claims for a refund of taxes collected because of

the repealed exemption and for an injunction prohibiting the collection of such taxes should have been dismissed.

I.

Like *Swanson v. State of North Carolina*, 329 N.C. 576, 407 S.E.2d 791 (1991), this case arose in the wake of *Davis v. Dept. of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891 (1989). In *Davis* the Supreme Court held a state statute exempting state employees' retirement benefits from taxation but not granting the same exemption to their federal counterparts violated the constitutional doctrine of intergovernmental tax immunity and 4 U.S.C. § 111. Under that statute the federal government "consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. § 111.

In response to *Davis*, the General Assembly repealed the income tax exemption for state and local retirement plans, 1989 Sess. Laws ch. 792, § 3.9 (hereinafter Chapter 792), and substituted a $4,000 annual exclusion for federal, state, and local government retirees. N.C.G.S. § 105-134.6 (1989). In *Swanson* this Court held that *Davis* did not apply retroactively to Chapter 792. Because the repealed statute was held to have been applicable until 28 March 1989, when *Davis* was decided, appellants—two classes of federal employees—were not entitled to refunds on taxes paid for tax years 1985 through 1989.

Class plaintiffs in this case are North Carolina state and local government employees whose retirement benefits vested on or before 12 August 1989, the ratification date of Chapter 792. Plaintiffs' complaint, filed 26 February 1990, named as defendants the State of North Carolina; the North Carolina Department of Revenue and the North Carolina Department of State Treasurer; Helen A. Powers, Secretary of the North Carolina Department of Revenue, in her individual and official capacities; Harlan E. Boyles, Treasurer of the State of North Carolina, in his individual and official capacities; and numerous state and local government retirement plans.

Plaintiffs allege their action is maintainable as a class action under N.C.G.S. § 1A-1, Rule 23: the class consists of "tens of thousands of people" whose identities are readily ascertainable from defendants' records, questions of law and fact critical to the action

are common to all members of the class, representatives' claims typify those of unnamed class members, and the relief sought would be effective and appropriate for all class members. The gravamen alleged is that under color of law defendant state officials engaged in a pattern, practice, or policy of unlawfully and unconstitutionally taxing plaintiffs' pension benefits and that defendant retirement plans violated assurances that plaintiffs' benefits would be exempt from North Carolina income tax. Plaintiffs' claims for relief rest on a number of legal theories,[1] and they seek two forms of relief: the refund of taxes paid on benefits exempted from such taxation prior to 12 August 1989, and an injunction against the future collection of such taxes.

In their answer defendants disclaim knowledge of whether plaintiffs' action is suitable as a class action. They deny engaging under color of law in a pattern, practice, or policy of unlawfully and unconstitutionally taxing plaintiffs' pension benefits. Defendants further deny any contract between defendants and plaintiffs that provided plaintiffs an exemption from income taxes or, alternatively, that defendants have ever impaired the obligations of any such contract.[2]

Pursuant to a superior court order for conditional class certification, letters dated 28 February, 26 March, 16 April, and 26 April 1990 were sent to Helen A. Powers, Secretary of the North

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1. The legal bases for plaintiffs' claims for relief include: breach of contract between plaintiffs and their governmental employers or pension plans; taking property in violation of due process and equal protection guarantees in the United States Constitution; and impairment of contractual obligations prohibited by Article I, Section 10 of the United States Constitution. In addition, plaintiffs allege that Chapter 792 violates numerous provisions of the North Carolina Constitution, including Article I, Section 16, in taxing acts previously done; Article I, Section 19, in violating guarantees to due process, equal protection, and against impairing obligations of contract; Article IV, Section 21, in diminishing the salaries of members of the judicial branch of government during their continuance in office; Article V, Section 5, in not stating the special object to which the levied tax is to be applied; and Article V, Section 6, in authorizing the use of retirement funds for purposes other than retirement benefits.

2. Defenses asserted in defendants' answer include: the sovereign immunity of the State of North Carolina; the qualified immunity of its officials; the unenforceability under the North Carolina Constitution, Article V, Section 2, of any contractual right to a tax exemption; plaintiffs' failure to pay taxes before suing to prevent their collection; and a bar by the statute of limitations of N.C.G.S. § 105-267 regarding recovery sought of taxes paid more than thirty days prior to the date of their refund demand.

Carolina Department of Revenue. Citing the authority of N.C.G.S. § 105-267, the letters demanded "a refund of all taxes on any pension, benefits, or monies received from any present or former retirement system of the State of North Carolina heretofore paid for the tax year 1989 by any named or unnamed class member." They were signed by individuals whose names are not among those of the named plaintiffs in this action. Similar letters, dated 16 and 26 April 1990, which made collective demands for refunds under N.C.G.S. § 147-84, were sent to Harlan E. Boyles, Treasurer of the State of North Carolina. Among the affidavits offered as exhibits, only one named plaintiff averred he had sent an individual demand for refund of those taxes alleged to be invalid by the class. Like the collective demand letters, the individual demand, dated 30 April 1990, postdated the filing date of plaintiffs' complaint.

An order of class certification was filed 31 December 1990, *nunc pro tunc* for 29 October 1990.

On 2 November 1990 the superior court granted partial summary judgment for plaintiffs on two grounds: the removal of income tax exemptions on pensions under Chapter 792 is a retroactive tax in violation of the North Carolina Constitution, Article I, Section 16, and it diminishes judges' salaries in violation of the North Carolina Constitution, Article IV, Section 21. The court ordered that plaintiffs should recover taxes paid on retirement benefits and enjoined defendants from further collection of these taxes. On 31 December 1990 the court granted summary judgment in favor of defendants Helen A. Powers and Harlan E. Boyles as to claims against them in their individual capacities. Plaintiffs and defendants each filed timely notice of appeal. On 4 March 1991 this Court allowed the parties' joint petition for discretionary review prior to determination by the Court of Appeals.

We hold the trial court erred in granting partial summary judgment for plaintiffs and in failing to grant summary judgment for defendants. Insofar as plaintiffs' complaint seeks a refund of 1989 taxes paid, it should have been dismissed for failure of plaintiffs to satisfy conditions precedent to such an action as required by N.C.G.S. § 105-267. Insofar as the complaint seeks injunctive relief to prevent the future collection of the challenged tax, it should have been dismissed because N.C.G.S. § 105-267 forecloses this kind of relief. We hold further that the trial court properly

granted summary judgment for defendants Secretary Powers and Treasurer Boyles in their individual capacities.

II.

Defendants contend plaintiffs failed to follow the procedures mandated by N.C.G.S. § 105-267 for the refund of an invalid tax. We agree.

[1] An action against the Department of Revenue is an action against the State, *Buchan v. Shaw*, 238 N.C. 522, 523, 78 S.E.2d 317, 317 (1953), and the State cannot be sued without its permission. *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. 495, 499, 8 S.E.2d 619, 621 (1940).

> When statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, and the remedies thus afforded are exclusive. The right to sue the State is a conditional right, and the terms prescribed by the Legislature are conditions precedent to the institution of the action.

Insurance Co. v. Gold, Commissioner of Insurance, 254 N.C. 168, 173, 118 S.E.2d 792, 795 (1961), *overruled on other grounds, Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976) (when State enters into valid contract, it implicitly consents to be sued for its breach thereof). *See also Kirkpatrick v. Currie, Comr. of Revenue*, 250 N.C. 213, 216, 108 S.E.2d 209, 211 (1959); *Duke v. Shaw, Comr. of Revenue*, 247 N.C. 236, 239, 100 S.E.2d 506, 508 (1957); *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. at 501, 8 S.E.2d at 622; *Rotan v. State*, 195 N.C. 291, 296, 141 S.E. 733, 735 (1928).

[2, 3] When a tax is challenged as unlawful rather than excessive or incorrect, the appropriate remedy is to bring suit under N.C.G.S. § 105-267. *Coca-Cola Co. v. Coble*, 293 N.C. 565, 568, 238 S.E.2d 780, 783 (1977). *See also Redevelopment Comm. v. Guilford County*, 274 N.C. 585, 589, 164 S.E.2d 476, 479 (1968). "[A] constitutional defense to a tax does not exempt a plaintiff from the mandatory procedure for challenging the tax set out in N.C.G.S. § 105-267." *47th Street Photo, Inc. v. Powers*, 100 N.C. App. 746, 749, 398 S.E.2d 52, 54 (1990), *disc. rev. denied*, 329 N.C. 268, 407 S.E.2d 835 (1991).

Section 105-267 provides:

> No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any

> tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2.

N.C.G.S. § 105-267 (1986). A taxpayer with "a valid defense to the enforcement of the collection of a tax" must first pay the tax, then demand a refund of that tax in writing within thirty days after payment. Only when the Secretary of Revenue fails to refund the tax within ninety days may the taxpayer sue the Secretary of Revenue for the amount demanded. Absent protest in the form of a demand for refund, a tax is voluntarily paid, and "voluntary payments of unconstitutional taxes are not refundable." *Coca-Cola Co. v. Coble*, 293 N.C. at 569, 238 S.E.2d at 783. The right to sue is a conditional right; the terms prescribed are conditions precedent to the institution of the action. Plaintiffs must allege and prove they demanded a refund within thirty days after payment. Failure to do so forfeits the right to sue. *Kirkpatrick v. Currin, Comr. of Revenue*, 250 N.C. at 216, 108 S.E.2d at 211; *Stenhouse v. Lynch*, 37 N.C. App. 280, 281, 245 S.E.2d 830, 831 (1978).

[4] Even when taxpayers are seeking a tax refund as a class,[3] the requisites of N.C.G.S. § 105-267 must be met. In *Stenhouse v. Lynch*, the Court of Appeals held that a class of plaintiffs who sought a refund of taxes on unemployment compensation were foreclosed by failure of any member of the class to make the requisite demand for refund. "[T]he taxes complained of cannot be recovered where paid voluntarily and without compulsion even though the taxes were levied unlawfully, in absence of demand for refund in compliance with the statute." 37 N.C. App. at 282, 245 S.E.2d at 831.

[5] In this case all class demand letters sent to the Secretary of Revenue *were preceded by* the filing of plaintiffs' complaint. Even the letter sent by the sole class member who averred he had individually demanded a refund was dated 30 April 1990—nearly two months *after* 26 February 1990, the filing date of plaintiffs' complaint. We hold that this failure to satisfy the condition precedent of N.C.G.S. § 105-267 that the taxpayer demand a refund *before* instituting an action against the Secretary of Revenue foreclosed plaintiffs' action.

Moreover, although N.C.G.S. § 105-267 does not expressly prohibit taxpayers from seeking refunds as a class, it includes no provision for a tax refund demand to be made either by taxpayers as a class or as represented by others. In this case, the Secretary rejected plaintiffs' class demands because, as she explained in her response of 26 April 1990,

> to constitute a valid demand for refund under G.S. 105-267, a taxpayer's request must include sufficient information to

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3. Under the circumstances of this case this Court need not decide whether a suit for a tax refund may be brought as a class action. Nevertheless, we note some support for this position in both the federal and North Carolina jurisprudence. *See Crow v. Citicorp Acceptance Co., Inc.*, 319 N.C. 274, 285, 354 S.E.2d 459, 467 (1987) ("When our General Assembly has wished to prevent class actions to enforce statutory claims for relief . . . , it has said so expressly and unequivocally[;] . . . the failure of the General Assembly to expressly prohibit class actions to enforce the statutes under which plaintiffs claim relief [indicates] that it intended to allow them for such purposes); *Gramling v. Maxwell*, 52 F.2d 256, 261 (D.C.N.C. 1931) (remedy of individual actions at law under the Revenue Act of North Carolina (Pub. L. 1931, ch. 427) for recovery of taxes paid under protest inadequate compared with class action under that act, which "eliminates so much useless and cumbersome litigation"). We emphasize, however, that when a class of taxpayers seeks to sue for a refund under N.C.G.S. § 105-267, each member must individually satisfy the conditions precedent to suit mandated in that statute.

> permit the Department to determine whether a refund may be made and, if so, in what amount. Such information would normally consist of the taxpayer's name and social security number, the year for which the tax was paid, the date on which the return was filed or the tax was paid, and the amount of state retirement income received by the taxpayer during the year.

The General Assembly did not prescribe the precise manner in which a demand for refund is to be made to the Secretary of Revenue. "This Court has held that under general authority to formulate regulations, an administrative agency of the State may prescribe by rule the procedure by which a right granted may be exercised." *Comr. of Insurance v. North Carolina Rate Bureau*, 300 N.C. 381, 403, 269 S.E.2d 547, 563, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). The Department of Revenue is an administrative agency of the State. *See* N.C.G.S. § 150B-2(1) (1987). "[W]e must expect the Legislature to legislate only so far as is reasonable and practical to do and we must leave to executive officers the authority to accomplish the legislative purpose, guided of course by proper standards." *Id.* at 402, 269 S.E.2d at 563.

Reasons for requiring that refund demands include the information identified by the Secretary of Revenue evidently spring from a concern for the stability of the fisc:

> Where protest has been interposed, the [taxing authority] is notified that it may be obliged to refund the taxes and is required to be prepared to meet that contingency. If no protest has been lodged, it is generally assumed that taxes paid can be retained to meet authorized public expenditures, and financial provision is not made for contingent refunds.

Conklin v. Town of Southampton, 141 A.D.2d 596, 598, 529 N.Y.S.2d 517, 519 (1988) (quoting *Mercury Mach. Importing Corp. v. City of New York*, 3 N.Y.2d 418, 426, 144 N.E.2d 400, 404, 165 N.Y.S.2d 517, 521 (1957)). The requirements for a valid demand stipulated by the Secretary of Revenue evince both good judgment and good faith, and under such circumstances this Court cannot interfere. "[C]ourts were not created or vested with the authority to act as supervisory agencies to control and direct the action of executive and administrative agencies or officials." *Comr. of Insurance v. North Carolina Rate Bureau*, 300 N.C. at 403, 269 S.E.2d at 563. We hold that plaintiffs' class demands for refunds followed neither

the letter of the statute nor the reasonable criteria required by the Secretary of Revenue and were properly rejected and deemed invalid for purposes of suing for refunds under N.C.G.S. § 105-267.[4]

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4. When class plaintiffs have attempted to challenge taxes by lawsuits in other states, appellate courts have generally held, as we have, that such suits cannot be maintained unless preceded by an individual notice, protest or demand. *See, e.g., Evans v. Arizona Dept. of Corrections*, 139 Ariz. 321, 678 P.2d 506 (Ariz. App. 1983) (legislature did not intend for class claim to satisfy statutory notice requirement, which must be satisfied by each individual or entity having contract or negligence claim against state); *Bozaich v. State*, 32 Cal. App. 3d 688, 108 Cal. Rptr. 392 (5 Dist. 1973) (if in inverse condemnation, tort, or breach of contract suits against state class claim is permitted in order to defeat time requirements for presentation of claims, such requirements would be meaningless); *Hoffman v. Colorado State Bd. of Assessment Appeals*, 683 P.2d 783 (Colo. 1984) (property tax assessment statute contemplates individualized treatment of claims rather than examination of general protest of class of plaintiffs; court therefore lacked jurisdiction to grant tax relief); *Aronson v. Commonwealth*, 401 Mass. 244, 516 N.E.2d 137 (1987) (where attempt is made to obtain refunds of substantial amounts of money on behalf of numerous unidentified taxpayers, the procedures of the administrative process should not be bypassed), *cert. denied*, 488 U.S. 818, 102 L. Ed. 2d 36 (1988); *Duffy v. Wetzler*, 148 Misc. 2d 459, 555 N.Y.S.2d 543 (N.Y. Sup. 1990) (commencement of action purportedly on behalf of all similarly situated taxpayers does not constitute appropriate indication of protest by each proposed member of class); *Gandolfi v. City of Yonkers*, 101 A.D.2d 188, 475 N.Y.S. 429 (N.Y.A.D. 2 Dept. 1984) (tax refund claim is personal to the taxpayer; only those who have filed an appropriate protest may obtain a tax refund), *appeal dismissed*, 62 N.Y.2d 882, 467 N.E.2d 529, 478 N.Y.S.2d 865, *and* 62 N.Y.2d 604, 467 N.E.2d 532, 478 N.Y.S.2d 1023, *order aff'd*, 62 N.Y.2d 995, 468 N.E.2d 699, 479 N.Y.S.2d 517 (1984). *See also Mervak v. Niagara Falls*, 101 Misc. 2d 68, 420 N.Y.S.2d 687 (N.Y. Sup. 1979) (class action precluded by statutory notice of claim requirements because claims did not occur contemporaneously and timeliness of notice of claims must be dealt with on case-by-case basis); *Salvaggio v. Houston Indep. School Dist.*, 709 S.W.2d 306 (Tex. App. Houston, 14th Dist. 1986) (class certification of taxpayers who had paid tax penalty properly denied where fact findings as to voluntariness of payment would be required, but properly granted to taxpayers against whom penalties had been assessed but not paid). *And see Lunsford v. United States*, 570 F.2d 221 (8th Cir. 1977) (class claim under FTCA did not adequately present the claims of unnamed class members because not all claimants identifiable, no authority asserted by non-named plaintiffs to be represented by claim of those named, and no sum certain stated with respect to class claim). *Cf. San Jose v. Superior Court*, 12 Cal. 3d 447, 115 Cal. Rptr. 797, 525 P.2d 701 (1974) (under statute providing that "claims shall be presented by the claimant or by a person acting on his behalf," class representative claim that included representative's name, address, date, occurrence, and amount claimed, plus "sufficient information to identify and make ascertainable the class itself" satisfies statutory precondition to inverse condemnation and nuisance suit against state); *Lattin v. Franchise Tax Bd.*, 75 Cal. App. 3d 377, 142 Cal. Rptr. 130 (1 Dist. 1977) (no jurisdiction to maintain class action when claim for refund made by class representatives only in their own behalf, yet complaint filed on behalf of putative class). *But see Andrew S. Arena, Inc. v. Superior Court*, 163 Ariz. 423, 788 P.2d 1174 (1990) (when identities and locations of class members discoverable, so as to allow

We hold, absent specific statutory authorization for class or representative tax refund demands, such demands are ineffectual to satisfy this condition precedent to legal action for a tax refund under N.C.G.S. § 105-267.

III.

[6] Neither is injunctive relief as to future collection of the challenged tax available to plaintiffs.

Section 105-267 begins: "No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter." N.C.G.S. § 105-267 (1986). The absolute prohibition against injunction to restrain the collection of any tax governed by Subchapter I, "Levy of Taxes," N.C.G.S. §§ 105-1 through 105-270 (1989), differs significantly from the conditional prohibition in Subchapter II, "Listing, Appraisal, and Assessment of Property and Collection of Taxes on Property," which provides:

> No court may enjoin the collection of any tax, the sale of any tax lien, or the sale of any property for nonpayment of any tax imposed under the authority of this Subchapter except upon a showing that the tax (or some part thereof) is illegal or levied for an illegal or unauthorized purpose.

N.C.G.S. § 105-379 (1989). The latter statute has been viewed as permitting an "equitable exception[ ]" to "the broad exclusionary language therein," *Enterprises, Inc. v. Dept. of Motor Vehicles*, 290 N.C. 450, 455, 226 S.E.2d 336, 339 (1976), an exception that is notably lacking from its counterpart in Subchapter I.

The appellate courts of this state have frequently reiterated "the general rule that there shall be no injunctive or declaratory relief to prevent the collection of a tax, *i.e.*, the taxpayer must pay the tax and bring suit for a refund." *Id. See also Oil Corp. v. Clayton, Comr. of Revenue*, 267 N.C. 15, 20, 147 S.E.2d 522, 526 (1966) (requiring the taxpayer to pay the amount of the disputed

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county to investigate claim and assess liability, class claim permissible); *Santa Barbara Optical Co. v. State Bd. of Equalization*, 47 Cal. App. 3d 244, 120 Cal. Rptr. 609 (2 Dist. 1975) (when statute does not require specific identification of each claimant in advance of complaint, "claimant" should be equated with class itself). *See generally* Annot. "State Class Action to Recover Taxes," 10 A.L.R.4th 655 (1981); Annot. "Maintenance of Class Action Against Governmental Entity as Affected by Requirement of Notice of Claim," 76 A.L.R.3d 1244 (1977).

tax and sue the State for its recovery, a method available to taxpayers since 1887, is the appropriate procedure for a taxpayer who seeks to test the constitutionality of a statute); *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. at 173-74, 118 S.E.2d at 792 (Declaratory Judgment Act has not been permitted to supplant or substitute for the specific statutory proceeding for testing the constitutionality of a tax statute); *47th Street Photo, Inc. v. Powers*, 100 N.C. App. at 748, 298 S.E.2d at 54 (requirement that the taxpayer pay the tax, then demand a refund "is the appropriate procedure for a taxpayer who seeks to test the constitutionality of a statute or its application to him").

Injunctive relief for the imposition of personal income taxes challenged on constitutional grounds has never been approved by our appellate courts. Our trial courts have properly enjoined the collection of taxes alleged to be constitutionally infirm only under the authority of statutes other than N.C.G.S. § 105-267. Thus, under statutes antedating the enactment of section 105-267 in the Revenue Act of 1939 (1939 N.C. Sess. Laws ch. 158, § 936) and its predecessor, 1931 N.C. Sess. Laws ch. 427, § 510, this Court held plaintiffs were entitled upon the pleadings to a perpetual injunction against the collection of unconstitutional town taxes. *Young v. Town of Henderson*, 76 N.C. 420, 424 (1877). And this Court has approved in principle injunctions against the collection of illegal, invalid, or unauthorized taxes under N.C.G.S. § 105-379 or N.C.G.S. § 105-406 (repealed by 1971 N.C. Sess. Laws ch. 806, § 3) or their common predecessor statutes. *See, e.g., Redevelopment Comm. v. Guilford County*, 274 N.C. 585, 588-89, 164 S.E.2d 476, 478-79 (1968) (collection of illegal or invalid tax—as distinguished from an erroneous tax—may be enjoined); *Wynn v. Trustees*, 255 N.C. 594, 599, 122 S.E.2d 404, 407 (1961) (injunction available to taxpayer when tax is challenged because illegal, invalid, or levied or assessed for unauthorized purpose); *Barbee v. Comrs. of Wake*, 210 N.C. 717, 719, 188 S.E. 314, 315 (1936) (unless otherwise provided by statute, injunction at the instance of a taxpayer is regarded as an appropriate remedy to resist the levy of an invalid assessment or to restrain the collection of an illegal tax). *See also Nicholson v. Education Assistance Authority*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969) ("A taxpayer, as such, may challenge, by suit for injunction, the constitutionality of a tax levied, or proposed to be levied, upon him for an illegal or unauthorized purpose.").

Section 105-267, by contrast, bars courts absolutely from entertaining suits of any kind brought for the purpose of preventing the collection of any tax imposed in Subchapter I. Since the taxes challenged by plaintiffs were Subchapter I taxes, we hold that the trial court erred in enjoining defendants from further collection of taxes paid on plaintiffs' retirement benefits. Under section 105-267 plaintiffs' remedies are restricted to a refund of any illegal, invalid, or unauthorized tax, but only if the prerequisites of that statute have been followed. This, as we have held, plaintiffs failed to do.

IV.

[7] Finally, plaintiffs appeal the trial court's order granting summary judgment for defendants Helen A. Powers, Secretary of the North Carolina Department of Revenue, and Harlan E. Boyles, Treasurer of the State of North Carolina, as to claims against them in their individual capacities.

In response to class refund demands sent to the Department of the Treasury, the Department of Justice conveyed the position of the State Treasurer: N.C.G.S. § 147-84 "simply sets forth the principle that whenever taxes have been by clerical error, misinterpretation of law, or otherwise, collected and paid into the state treasury in excess of the amount found legally due the state, the excess amount shall be refunded to the person entitled thereto. The determination of whether amounts are legally due and the determination of persons entitled thereto are not within the authority of the State Treasurer to make." Secretary Powers rejected plaintiffs' class demand because it lacked specific information necessary to identify the numbers of claimants and to ascertain amounts owed.

Plaintiffs alleged that, in rejecting their refund demands, defendants Powers and Boyles failed in their duties "to support and maintain the Constitution and laws of the United States and . . . of North Carolina," N.C. Const. art. VI, § 7, insofar as they refused to refund tax monies collected in derogation of federal and state constitutional provisions.[5]

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5. Plaintiffs alleged specifically that the refusal of both officials (1) "amounts to a taking of property without just compensation, is arbitrary and capricious, is a violation of due process and equal protection"; (2) impairs the obligations of contract under color of law in violation of the United States Constitution, Article I, Section 10; (3) violates due process and equal protection guarantees of the North Carolina Constitution; (4) violates state constitutional prohibitions against retroactive taxation, N.C. Const. art. I, § 16, and the diminution of judicial salaries during

Defendants answered and argue on appeal that Powers and Boyles acted "within the scope of their authority as officers of the State of North Carolina in the good faith belief that they were acting lawfully in the best interests of the State," and that they were thus entitled to the defenses of qualified immunity and the immunity of public officials. A public official is not liable for damages in an action brought under 42 U.S.C. § 1983 unless the conduct complained of "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982). "The right [allegedly violated by the official] must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful." *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986). *See also Anderson v. Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 531 (1987) (unlawfulness must be apparent in the light of pre-existing law); *Danenberger v. Johnson*, 821 F.2d 361, 365 (7th Cir. 1987) (to be "clearly established," the right allegedly violated "must be clearly recognized in existing case law.").

In *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991), the Fourth Circuit Court of Appeals held that Helen Powers was entitled to immunity from suit for collecting taxes from federal retirees over a four-year period preceding the Supreme Court's decision in *Davis v. Dept. of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891, and so allegedly violating the constitutional doctrine of intergovernmental tax immunity and the Public Salary Tax Act of 1939. *Swanson*, 937 F.2d at 966. The Fourth Circuit observed that "[l]egislative classifications . . . are presumed to be constitutional." *Swanson*, 937 F.2d at 969 (quoting *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 17, 101 L. Ed. 2d 1, 19 (1988)). "Rarely will a state official who simply enforces a presumptively valid statute thereby lose her immunity from suit." *Swanson*, 937 F.2d at 968. "[T]he greater the similarity of the existing case law to the situation at hand, the greater its guidance to a reasonable state official." *Id.* at 969. "The usual practice must . . . be that '[u]ntil judges say otherwise, state officers . . . have the power to carry forward the directives of the state legislature.'" *Id.* (quoting *Lemon v. Kurtzman*, 411 U.S. 192, 208, 36 L. Ed. 2d 151, 165 (1973)).

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continuance in office, N.C. Const. art. IV, § 21; (5) unconstitutionally levies a tax without stating the specific object to which the tax is to be applied, N.C. Const. art. V, § 5; and (6) unconstitutionally authorizes the use of retirement funds for purposes other than retirement benefits and purposes, N.C. Const. art. V, § 6.

We concur with and adopt the reasoning and conclusions of *Swanson* with regard to all claims against defendants Powers and Boyles grounded in the federal Constitution. Public officials are not seers. Although they may be "charged with the knowledge of constitutional developments, [they] are not required to predict the future course of constitutional law." *Swanson*, 937 F.2d at 968 (quoting *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989)). We will not hold public officials of this state to more perfect knowledge of the law than is apparent in appellate court reports. The constitutionality of Chapter 792 has not yet been examined either by federal courts or by the appellate courts of this state.[6] We hold that, absent the guidance of such opinions, defendants Powers and Boyles were entitled to immunity from civil liability for complying with a statute that was presumptively valid.

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6. Plaintiffs' assertion that Chapter 792 unconstitutionally impairs obligations of contract is supported, they contend, by *Mathews v. Board of Trustees of the Asheville Policeman's Pension and Disability Fund*, 96 N.C. App. 186, 385 S.E.2d 343 (1989), *disc. rev. denied*, 326 N.C. 364, 389 S.E.2d 814 (1990), and *Simpson v. North Carolina Local Governmental Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd*, 323 N.C. 362, 372 S.E.2d 559 (1988). In dicta the Court of Appeals in *Mathews* agreed with a Florida court "and every jurisdiction which has addressed the distinction between mandatory and voluntary participation [in a pension plan] . . . that 'benefits provided for employees under a voluntary pension or retirement plan created by an act of the legislature may not be modified or reduced by subsequent amendatory legislation for the reason that those electing to participate in such voluntary plans acquire vested rights of contract to the benefits provided therein upon acceptance of the plan which rights may not be impaired by subsequent amendments to the act.'" *Mathews*, 96 N.C. App. at 190, 385 S.E.2d at 345 (quoting *State v. City of Jacksonville Beach*, 142 So.2d 349, 353 (Fla. App. 1962), *aff'd*, 151 So.2d 430 (Fla. 1963)).

In *Simpson*, the Court of Appeals held the relationship between vested members of a government pension fund and the fund itself is contractual and that a statute that diminished an employees' calculated benefits impairs those contractual rights. Such impairment is not necessarily unconstitutional, however. "[S]tates may impair contracts in the exercise of their police power in order to protect the general interests of the commonwealth." *Simpson*, 88 N.C. App. at 224, 363 S.E.2d at 94. Impairment of contracts does not violate the Contract Clause when it is "reasonable and necessary to serve an important public purpose." *Id.* at 325, 363 S.E.2d at 94.

Although *Simpson* demonstrates that plaintiffs' impairment of contracts claim has some basis in state law, it also indicates that the question whether an act unconstitutionally impairs the right to contract violates the Contract Clause is one courts must resolve case by case. Under such circumstances, and cognizant that "[t]he power of taxation . . . shall never be surrendered, suspended, or contracted away," N.C. Const. art. V, § 2(1), Secretary Powers properly enforced Chapter 792 because the law in this regard was not "clearly established."

We draw parallel conclusions regarding plaintiffs' claims brought under the North Carolina Constitution. In this jurisdiction an official may be held liable when he acts maliciously or corruptly, when he acts beyond the scope of his duties, or when he fails to act at all. "As long as a public official lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability." *Smith v. State*, 289 at 331, 222 S.E.2d at 430.

The oath of office for both the Secretary of the North Carolina Department of Revenue and the Treasurer of North Carolina requires that the official "will support and maintain the Constitution and laws" of the nation and the state. N.C. Const. art. VI, § 7. Among the duties and obligations of the Secretary of Revenue is responsibility for all executive functions relative to revenue collection. N.C.G.S. § 143B-219 (1990). These include refunding taxes paid by taxpayers who have a valid defense to the collection of such taxes. N.C.G.S. § 105-267 (1989). The State Treasurer is similarly responsible for "the efficient and faithful exercise of the responsibilities of his office," N.C.G.S. § 147-68(e) (1987), including refunding taxes erroneously collected:

> Whenever taxes or other receipts of any kind are or have been by clerical error, misinterpretation of the law, or otherwise, collected and paid into the State treasury in excess of the amount found legally due the State, said excess amount shall be refunded to the person entitled thereto.

N.C.G.S. § 147-84 (1987).

The official duties of neither the Secretary of Revenue nor the Treasurer include responsibility to judge the constitutionality of the statutes authorizing and regulating their departmental functions. Like administrative boards, these offices "have only such authority as is properly conferred upon them by the Legislature. The question of constitutionality of a statute is for the judicial branch." *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. at 173, 118 S.E.2d at 796. *See also Oil Corp. v. Clayton Comr. of Revenue*, 267 N.C. at 20, 147 S.E.2d at 526 ("The law does not contemplate that administrative boards shall pass upon constitutional questions."). Although the Secretary of Revenue is authorized by N.C.G.S. § 105-266.1 to refund excessive or incorrect taxes paid by a taxpayer who applies for such refund according

to the statutory requisites of section 105-266.1, she is not authorized by that statute or by section 105-267 "to order the refund of an invalid or illegal tax, since questions of constitutionality are for the courts." *Coca-Cola Co. v. Coble*, 293 N.C. at 568, 238 S.E.2d at 783. Like section 105-266.1, authorization for the Treasurer to refund excess taxes under N.C.G.S. § 147-68(e) is limited to taxes erroneously paid and does not include those challenged as unconstitutional.

As we have held with reference to laws alleged to violate the federal Constitution, laws that officials bear a statutory and constitutional duty to uphold are presumptively valid, regardless of allegations that these laws violate provisions of the North Carolina Constitution. Challenges to such laws on constitutional grounds are for the courts alone to decide. Until our courts indicate otherwise, an official who enforces a law as a responsibility of the office is entitled to act on the presumption of validity and "to carry forward the directives of the state legislature" with impunity. We hold neither Secretary Powers nor Treasurer Boyles failed in or wrongfully performed a duty to enforce N.C.G.S. § 105-267 or N.C.G.S. § 147-68 in not refunding taxes paid under that Chapter.

For the reasons given, the trial court's entry of partial summary judgment for plaintiffs is reversed and the case remanded to the Superior Court, Wake County, for entry of summary judgment in favor of defendants. The trial court's entry of summary judgment in favor of Secretary Powers and Treasurer Boyles in their individual capacities is affirmed.

Reversed in part and remanded; affirmed in part.

Justice MITCHELL concurring in part and dissenting in part.

Like the majority, I believe that the trial court was correct in entering summary judgment for the defendants Powers and Boyles as to the claims made against them in their individual capacities. Therefore, I concur in Part IV of the opinion of the majority which affirms summary judgment entered by the trial court in favor of those two defendants.

I dissent from those parts of the opinion of the majority which (1) reverse the trial court's partial summary judgment for the plaintiffs and (2) remand this case to the Superior Court, Wake County, for entry of summary judgment in favor of the remaining defendants.

The majority concludes that the taxpayer-plaintiffs could not bring this suit because they failed to follow the procedures mandated by N.C.G.S. § 105-267 for the refund of an invalid tax. I do not agree.

Clearly, N.C.G.S. § 105-267 does not expressly preclude collective—as opposed to individual—demands for refunds of taxes. In my view, the terms "person" and "taxpayer" as used in that statute must be held to encompass both individual and collective taxpayers. N.C.G.S. § 12-3 (1990) (words importing the singular to be construed as including the plural unless inconsistent with the manifest intent of the General Assembly). *See Santa Barbara Optical Co. v. State Bd. of Equalization*, 47 Cal. App. 3d 244, 120 Cal. Rptr. 609 (2 Dist. 1975) (terms in a tax statute similar to N.C.G.S. § 105-267 held to include a class). Therefore, the plaintiffs could make a collective demand for a refund under the statute.

Further, I believe that the legislative purpose behind the demand requirement in the statute simply is to give the Department of Revenue fair notice of a possible obligation to refund taxes and an opportunity to prepare to meet that contingency. The essential requirements of the statute in this regard were complied with, in that the Department was given sufficient notice as to both the basis for the challenge to the legitimacy of the tax and the scope of the protesting class. *See Mercury Mach. Importing Corp. v. New York*, 3 N.Y.2d 418, 426, 144 N.E.2d 400, 404, 165 N.Y.S.2d 517, 521 (1957). Therefore, the trial court correctly held that the plaintiffs'

> demands constituted effective demand for refund on behalf of all named and unnamed class members and preserved their rights to claim and seek refunds of all monies unlawfully imposed and collected as a result of the enactment of 1989 Sess. Laws Ch. 792, which had the effect of removing an income exemption on benefits received or monies paid by virtue of State and Local Government Retirement plans or systems.

The trial court was correct in holding that the collective demand on behalf of the plaintiffs had sufficiently complied with any lawful conditions precedent to the bringing of an action such as that brought by these plaintiffs. Therefore, the majority errs in remanding this case for the entry of summary judgment for the defendants on these taxpayers' claims for refunds of taxes allegedly collected unlawfully and unconstitutionally.

Even assuming *arguendo* that these taxpayers failed to follow the procedures established in N.C.G.S. § 105-267 and the administrative regulations adopted pursuant thereto, I believe that they are entitled to proceed with this action against the defendants. Under the facts presented here, the taxpayers were not required to pursue their administrative remedies before bringing this suit. Failure to exhaust administrative remedies does not bar judicial action, when those administrative remedies are inadequate. *Orange County v. North Carolina Dept. of Transportation*, 46 N.C. App. 350, 376, 265 S.E.2d 890, 908, *disc. rev. denied*, 301 N.C. 94 (1980); Daye, North Carolina's New Administrative Procedure Act: An Interpretive Analysis, 53 N.C.L. Rev. 833, 907 (1975). The administrative rights and remedies provided by N.C.G.S. § 105-267 are inadequate in the situation presented by the facts of this case. *See Gramling v. Maxwell*, 52 F.2d 256, 260 (W.D.N.C. 1931) (administrative procedures provided by the statute held inadequate in case brought by over 400 individuals to enjoin enforcement of a license tax on the trucks of fruit and vegetable growers). Therefore, the taxpayer-plaintiffs were not required to exhaust the administrative remedies of N.C.G.S. § 105-267 before initiating this action.

Additionally, courts have not required that plaintiffs exhaust administrative remedies before bringing suit, where pursuing the administrative remedies would be futile. *State ex rel. Utilities Commission v. Southern Bell Tel. & Tel. Co.*, 93 N.C. App. 260, 268, 377 S.E.2d 772, 776 (1989), *rev'd on other grounds*, 326 N.C. 522, 391 S.E.2d 487 (1990); Daye, 53 N.C.L. Rev. at 907. Pursuing an administrative remedy is "futile" when it is useless to do so either as a legal or practical matter. *See Honig v. Doe*, 484 U.S. 305, 327, 98 L. Ed. 2d 686, 709 (1988). If there has ever been a case in which it would be futile for the plaintiffs to exhaust their administrative remedies before pursuing their remedies in court, this is that case.

Here, the Department of Revenue has announced that it will not grant the refunds sought by the taxpayer-plaintiffs. In fact, as the majority points out in its opinion, the defendants do not have the power to pass upon the constitutionality of the tax under challenge in this case because decisions as to the constitutionality of tax statutes are *exclusively* for the judiciary. Thus, it is clear beyond any reasonable doubt that requiring these taxpayers to jump through the procedural hoops adopted and applied by the

State bureaucracy under N.C.G.S. § 105-267 would be to force them to do an utterly vain and useless act, since the defendants are without authority to grant the relief requested. *See Murphy v. Greensboro*, 190 N.C. 268, 129 S.E. 614 (1925) (taxpayer not required to exhaust condition precedent before bringing suit to challenge tax); *Waddill v. Masten*, 172 N.C. 582, 90 S.E. 694 (1916) (taxpayers not required to follow statutory procedures for requesting tax refund before bringing suit). I believe that the common law doctrine of *lex neminem cogit ad vana seu inutilia peragenda*—the law compels no one to do vain or useless things—applies in this situation. *See* N.C.G.S. § 4-1 (1986). Therefore, I strenuously disagree with the majority's conclusion that the defendants are entitled to summary judgment in their favor because the taxpayer-plaintiffs have not, in the view of the majority, complied with the technical requirements of the statute—acts which clearly would be vain and useless in this case.

These taxpayers were entitled to institute and pursue this suit against the defendants. The majority errs in reversing the trial court's judgment to that effect and further errs in remanding this case for the entry of summary judgment for the defendants. Accordingly, I dissent from those parts of the opinion of the majority.

STATE OF NORTH CAROLINA v. CLAUDE DAVID TURNER, JR.

No. 587A88

(Filed 6 December 1991)

1. Evidence and Witnesses § 2993 (NCI4th)— void prior convictions—use for impeachment—harmless error

Assuming *arguendo* that defendant's prior convictions are void because he pled guilty to offenses with which he was not charged and that defense counsels' affidavit concerning their examination of court records was sufficient evidence to prove that fact, any error in allowing the prosecutor to impeach defendant with the prior void convictions in this prosecution for first degree murder was harmless beyond a reasonable doubt where the evidence of defendant's responsibility for the victim's death was overwhelming and uncontested, and it is

beyond doubt that the jury rejected defendant's defense of accident based on the strength of the State's case and not on the improper impeachment.

Am Jur 2d, Witnesses §§ 570, 576, 582, 586.

2. Homicide § 24.1 (NCI3d)— presumptions from use of deadly weapon—omission of "intentional" in instructions—harmless error

While it was error for the trial court in a first degree murder case to omit the word "intentionally" before the word "killed" in its instructions permitting the jury to infer unlawfulness and malice from proof "that the defendant killed [the victim] with a deadly weapon," this omission was harmless beyond a reasonable doubt where the court's instructions, taken as a whole, made it clear to the jury that it must find that defendant intentionally used a shotgun to cause the victim's death in order to find defendant guilty of first degree murder; the court's instructions required the jury to find unanimously and beyond a reasonable doubt that the shooting was not accidental in order to return a guilty verdict; and by finding defendant guilty of first degree murder, the jury rejected the defense of accident and, in fact, concluded that defendant's acts were intentional.

Am Jur 2d, Homicide §§ 498, 499, 509.

3. Homicide § 24.1 (NCI3d)— instruction—shotgun as deadly weapon

The trial court's instruction in a first degree murder case that "a sawed-off shotgun is a deadly weapon" was proper where defendant contended that the shooting was accidental but the jury, in fact, concluded that defendant intentionally caused the death of the victim through the use of the loaded shotgun.

Am Jur 2d, Homicide § 509.

4. Criminal Law § 537 (NCI4th)— emotional behavior of victim's family—no denial of fair trial

The trial court did not abuse its discretion by its actions, or inaction, with regard to emotional behavior by a murder victim's family and friends during defendant's trial for the murder where the court attempted to ameliorate prejudice

to defendant by having the witnesses moved out of the bar area and into the spectator area; the court left control of the family's behavior to the prosecuting attorney; and defendant never objected to the emotional displays, requested curative instructions, or moved for a mistrial.

Am Jur 2d, Criminal Law § 878; New Trial § 42; Trial §§ 205, 226.

***Emotional manifestations by victim or family of victim* during criminal trial as ground for reversal or new trial. 31 ALR4th 229.**

5. Criminal Law § 1352 (NCI4th)— McKoy error—new sentencing hearing

A defendant sentenced to death for first degree murder is entitled to a new sentencing hearing because of *McKoy* error in the trial court's instructions requiring unanimity for mitigating circumstances where there was evidence supporting four mitigating circumstances submitted to but not found unanimously by the jury.

Am Jur 2d, Criminal Law § 600; Homicide § 548; Trial § 1760.

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

6. Criminal Law § 1355 (NCI4th)— mitigating circumstance—no significant history of criminal activity—sufficiency of evidence

A reasonable juror in this first degree murder trial could have found as a mitigating circumstance that defendant had no significant history of prior criminal activity where evidence of defendant's adjudicated criminal activity consisted solely of the misdemeanor offenses of receiving stolen goods in 1981, larceny in 1984, and worthless check and assault with a deadly weapon in 1985; and evidence of defendant's unadjudicated criminal activity consisted of possession of marijuana and theft when defendant was a juvenile, the sale of marijuana to the victim which ultimately led to the fatal altercation, and possession of a sawed-off shotgun.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 553, 554.

7. Criminal Law § 1362 (NCI4th)— mitigating circumstance—age of defendant

A reasonable juror could have found defendant's age as a mitigating circumstance for first degree murder where the evidence showed that defendant was twenty-two years old at the time of the murder; defendant presented evidence that he had been neglected and abused as a youth, and that his home environment was very unstable due to his mother's erratic, sometimes alcoholic behavior and the lack of a male role model; and the jury unanimously found that defendant was "reared by a dysfunctional mother," that he "grew up in a situation in which there was a significant lack of stability and guidance," that he was emotionally abused and neglected as a child, and that he "did not have the benefit of a normal education as a child."

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 553, 554.

8. Criminal Law § 1363 (NCI4th)— mitigating circumstance—learning to read while incarcerated

The jury's findings as mitigating circumstances that defendant lacked the benefit of a normal education and that he can "function adequately and appropriately in a structured setting with proper guidance and discipline" did not foreclose the possibility that a reasonable juror could find additional mitigation from the uncontroverted fact that defendant learned to read while previously incarcerated.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 553, 554.

9. Criminal Law § 1363 (NCI4th)— catchall mitigating circumstance—sufficient evidence

There was substantial, credible evidence from which a reasonable juror could have found the catchall mitigating circumstance in a first degree murder case where defendant presented testimony that he "adjusted real well" to being in a foster home and that he went to school regularly, attended church, and made improvements in his social behavior, but that these improvements seemed to disappear when he resumed living with his mother.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 553, 554.

Justice MARTIN dissenting.

Justices MEYER and MITCHELL join in this 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 *Battle, J.*, at the 12 September 1988 Criminal Session of Superior Court, CUMBERLAND County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 11 September 1991.

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.

WHICHARD, Justice.

Defendant was tried on an indictment charging him with the first-degree murder of Ronnie Seiger. The jury returned a verdict finding defendant guilty of first-degree murder upon the theory of premeditation and deliberation. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court imposed the death penalty. For the reasons discussed herein, we conclude that the guilt phase of defendant's trial was free from prejudicial error, but that he is entitled to a new capital sentencing proceeding under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

The State presented evidence at trial tending to show that Ronnie Seiger (the victim) and Miles Nelson Raynor were seated in an automobile near Raynor's trailer when defendant walked up to the automobile with a sawed-off shotgun, demanded the payment of a debt from the victim, and then shot the victim in the head from close range. The victim died immediately.

Miles Raynor was the victim's cousin and the defendant's neighbor. Raynor testified that on 23 May 1987, he lived with his family in the same trailer park as defendant. On that day, he drove with the victim to a package store to make a purchase and then they went back to Raynor's trailer to pick up glasses and ice. As Raynor got back in the car with the glasses, he saw Mary Sikora walking through the trailer park in their direction. She stopped briefly at defendant's trailer, and then proceeded

towards Raynor and the victim. Sikora walked up to the driver's side of the car and began speaking with Raynor. Defendant came out from his trailer and walked around the front of the car to the passenger side where the victim sat. Raynor testified that defendant then began "hollering" at the victim, "Where is my [expletive] money, man? I want my [expletive] ten dollars." The victim responded, "I haven't got it man. I'm broke right now." Immediately afterwards, according to Raynor, there was an explosion which caused the victim to slump over in the seat. The gunshot that killed the victim splattered Raynor and Mary Sikora with blood, skull fragments, and brain matter.

Mary Sikora testified that she knew defendant and the victim. She knew the victim had been at defendant's trailer prior to the shooting and that defendant had spoken about the victim on three or four occasions in the months preceding the killing. On these occasions defendant had said things like, "Heads are going to roll if I don't get my money" and "I'm going to get him, I'll get my money." Sikora also heard defendant tell the victim's cousin, Harlan Raynor, "Tell your cousin I want my ten dollars, . . . because heads will roll if I don't get my money." Defendant told Sikora's boyfriend, David Adams, the same thing.

On 23 May 1987, Sikora went to the trailer park to help a friend wash a car. As she walked through the trailer park, she saw Miles Raynor getting into his car. She also passed by defendant's trailer, at which point defendant came to the edge of his trailer and asked her if the boy in the car with Raynor was the one who owed him ten dollars. Sikora testified that she could not tell at first who else was in the car, but when she saw that it was Ronnie Seiger, she nodded her head "yes" to defendant. Defendant followed her as she made her way to Raynor's car. According to Sikora, defendant went to the passenger side window of the car, where the victim sat, and said in a loud voice, "Boy, where is my ten dollars you owe me?" The victim patted his legs and said, "Man, I'm broke right now. I ain't got ten dollars." Defendant then said, "Boy, I want my ten dollars or I'm going to blow your [expletive] brains out." Defendant then "slapped" his hands together and there was a loud explosion that killed the victim and covered Sikora and Raynor with blood and brain tissue.

Nora Jean Towery conducted a yard sale in the trailer park on the day of the shooting. She saw the confrontation between

defendant and the victim at the car, and she corroborated the account given by Miles Raynor and Mary Sikora.

Harlan Raynor, Miles' brother and a cousin of the victim, testified that defendant asked about the victim several times in the two weeks preceding the shooting. Defendant asked when the victim would be back around, and said, "Well, he'd better come around pretty soon or I'm going to start getting a little ill." Two days before the shooting, defendant told Harlan he was going to get even with the victim and that "some heads were going to roll" because the victim owed a debt to him. Tammy Horne, an acquaintance of Harlan Raynor, corroborated Harlan's account of the conversation.

David Adams testified that he knew both defendant and the victim. During several conversations within the three months prior to the shooting, defendant told Adams he would "get Ronnie" and he was "going to blow [the victim's] head off." Adams said defendant told him the source of the ten dollar debt from the victim was the victim's failure to pay defendant for some marijuana.

Defendant turned himself in to law enforcement officers within hours of the shooting. He also took them to the place where he had hidden the shotgun. The murder weapon was a single action, single barrel, sawed-off twelve gauge shotgun. In order to fire the gun, the hammer had to be cocked and the trigger had to be pulled back fully. The weapon had a trigger pull of two and one-half pounds, but its internal safety, or hammer block, did not function reliably. The normal trigger pull for such a gun is approximately seven pounds. On recross-examination, the State's expert testified that the weakness of the mainspring caused the gun to fire unreliably and was probably also the cause of the light trigger pull.

Defendant testified in his own behalf. He stated that he had met the victim approximately two months before the shooting when Harlan Raynor and the victim came to defendant's trailer to buy marijuana. The victim gave defendant half of the money for the marijuana and said he would owe the balance ($10.00). About one month after the marijuana transaction, defendant saw the victim at a nearby convenience store. Cursing, the victim came towards defendant's car; when defendant got out of the car, the two men fought. The victim was a large man and he struck defendant in

the head, knocked him to the ground, and kicked him. Only after a friend intervened did defendant escape.

Defendant testified that the murder weapon actually belonged to another resident of the trailer park and that he was keeping the gun for the other resident in order to keep it away from the resident's alcoholic roommate. Defendant placed the gun in a compartment in a footstool in his living room; he did not know the gun was loaded, and he did not remove it before the day he shot the victim.

Defendant did not go to work on 23 May 1987; instead, he went fishing and stayed around his house. That afternoon defendant saw Miles Raynor drive up in his car. Defendant decided he would ask about the money the victim owed him. Defendant testified that he put the sawed-off shotgun in his pocket because he knew Miles Raynor and the victim could be violent. Defendant spoke briefly with Mary Sikora as she passed, then he walked over to Raynor's car. Defendant then "asked [the victim] if he had my money, and—I asked him if he had my ten dollars. And he said, no, he didn't. And I asked him if he had any intentions of paying me, and he said, yes, but he was broke right then." Defendant testified:

> I thought that he had the money; and I reached in my back pocket and pulled the gun out, to scare him. . . . When I pulled the gun out, I may or may not have pulled the [hammer] back, I'm not quite sure, but . . . it just happened so fast. All of a sudden the—I brought the gun up and the gun went off.

Because he was scared, defendant ran away from the scene. Defendant testified that he had not meant to kill the victim, that he knew that he had done wrong, and that he was sorry. Joseph Ivy and Danny Hedgepeth both testified that defendant told them shortly after the shooting that it was accidental.

The jury deliberated for thirteen minutes before returning a verdict of guilty of first-degree murder. In the sentencing phase, the State presented evidence supporting the aggravating circumstance that defendant "knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person." The jury found this aggravating circumstance. Defendant presented substan-

tial mitigating evidence from which the jury found twelve of the sixteen submitted mitigating circumstances.

[1] By his first assignment of error defendant contends that the trial court improperly allowed the prosecuting attorney to impeach him during cross-examination with three purported prior convictions. Defendant asserts that the prior convictions were in fact void for lack of jurisdiction.

Prior to trial defendant moved to prohibit the State from using for any purpose the three convictions at issue—(1) a 1981 misdemeanor conviction for receiving stolen goods, (2) a 1985 conviction for assault with a deadly weapon, and (3) a 1985 worthless check conviction. Defendant attached to his motion an affidavit by his attorneys stating that they had personally examined all the documents in the case files for each of the three purported convictions. In the affidavit the attorneys informed the trial court of the nature of the warrant upon which defendant had been charged in each case and the actual plea that ensued. The prosecuting attorney opposed defendant's motion on the grounds that it was not the proper time for defendant to attempt to set aside those convictions. The trial court denied defendant's motion. Before testifying, defendant renewed his objection to the trial court's ruling on the purported convictions. The State ultimately cross-examined defendant with the purported convictions.

As to each of the three convictions listed above, defendant argues that the trial court that received his guilty plea lacked jurisdiction because in each instance the offense to which he pled guilty was not a lesser included offense of the offense with which he was charged. In 1981, defendant pled guilty to a misdemeanor offense of receiving stolen goods, yet he was charged in that case with breaking or entering and larceny. Receiving stolen goods is not a lesser included offense of larceny—*State v. Brady*, 237 N.C. 675, 677-78, 75 S.E.2d 791, 792-93 (1953); *State v. Burnette*, 22 N.C. App. 29, 31, 205 S.E.2d 357, 358 (1974)—and it has no elements in common with breaking or entering. *See* Benjamin B. Sendor, *North Carolina Crimes: A Guidebook on the Elements of Crime* 111-13, 161-62 (3d ed. 1985). In 1985, defendant pled guilty to assault with a deadly weapon, but he was charged with the offense of discharging a firearm into an occupied motor vehicle. The former offense is not included within the latter. *State v. Bland*, 34 N.C. App. 384, 386, 238 S.E.2d 199, 201 (1977), *disc. rev. denied*, 294

N.C. 183, 241 S.E.2d 518 (1978). In 1985, defendant also pled guilty to passing a worthless check, yet he was charged with uttering a forged check. These two offenses contain different elements. *See* Sendor, *supra* at 182-86, 195-97.

Thus, in each case defendant pled guilty to an offense with which he was not charged. According to defendant, the convictions are therefore void because "[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966) (quoting 42 C.J.S., Indictments and Informations, § 1). Further, defendant argues that collateral attack of the prior void convictions is proper because "[a]n order is void *ab initio* . . . when it is issued by a court that does not have jurisdiction. Such an order is a nullity and may be attacked either directly or collaterally, or may simply be ignored." *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986).

Finally, defendant argues that the use of the void convictions to impeach him was error of constitutional magnitude. Where a defendant is impeached with evidence of prior convictions obtained in derogation of defendant's right to counsel, our Court of Appeals has stated: "The use of prior void convictions for purposes of impeachment of a criminal defendant deprives him of due process where their use might well have influenced the outcome of the case." *State v. Vincent*, 35 N.C. App. 369, 373, 241 S.E.2d 390, 393 (1978) (citing *Loper v. Beto*, 405 U.S. 473, 31 L. Ed. 2d 374 (1972)); *see also State v. Atkinson*, 39 N.C. App. 575, 251 S.E.2d 677 (1979).

In response, the State argues that defendant bears the burden of proving that the prior convictions were void. *See State v. Smith*, 96 N.C. App. 235, 385 S.E.2d 349 (1989), *disc. rev. denied*, 326 N.C. 267, 389 S.E.2d 119 (1990) (defendant has burden of showing prior guilty pleas invalid as involuntary or unknowing); *see also* N.C.G.S. § 15A-980(c) (1988) (defendant has burden of proving conviction's invalidity due to right to counsel violation). The State contends that defendant has failed to meet his burden because the only evidence before the trial court pertaining to the validity of the prior convictions was defense counsels' affidavit concerning their examination of court records. Defendant did not offer the

court files or certified copies in support of his contentions. The State argues that we should not hold that defendant has met his evidentiary burden, especially in light of *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983) (prosecuting attorney's representations of defendant's prior convictions, standing alone, do not prove the convictions for purposes of Fair Sentencing Act aggravation); *State v. Payne*, 327 N.C. 194, 393 S.E.2d 158 (1990), *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 1062 (1991) (defense attorney's affidavit as to race of peremptorily challenged juror insufficient to support challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986)); and *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991) (trial court's affidavit insufficient to show harmless error from unrecorded conversations with jurors excluded by the court).

Assuming *arguendo* that the convictions at issue are void and that defense counsels' affidavit is sufficient evidence to prove that fact, we conclude that any error in allowing impeachment with the prior void convictions was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). The evidence of defendant's responsibility for the victim's death is overwhelming and uncontested. His defense was primarily "accident," in that he contended that he never intended to kill the victim. That the jury rejected this defense based on the strength of the State's case, and not on the improper impeachment of defendant, is beyond doubt.

The State presented numerous witnesses who testified that in the months and weeks preceding the shooting defendant had stated with respect to the victim that "heads were going to roll" if he did not get his money, that he was going to "get" the victim, and that he was "going to blow [the victim's] head off." Mary Sikora, who was standing just a few feet away from defendant when he approached the victim, testified that she heard defendant say, "I want my ten dollars or I'm going to blow your [expletive] brains out." Further, it is uncontradicted that defendant approached the victim with a sawed-off, single-action shotgun that would not fire unless defendant cocked the hammer and pulled back the trigger. The State impeached defendant not only with the three allegedly void convictions, but also with a previous larceny conviction, the fact that defendant sold drugs, the fact that he possessed an illegal sawed-off shotgun, and the fact that the statements he made to police after the shooting were substantially different from the testimony he offered at trial. The jury deliberated for only thirteen minutes; it is exceedingly unlikely that the mention of the prior

convictions at issue here affected its deliberations in any material respect. For the foregoing reasons, defendant is not entitled to relief under this assignment of error.

[2] Next, defendant contends that the trial court erred by instructing the jury during the guilt phase of the trial that it could infer the malice element of first-degree murder simply by finding that defendant killed the victim with a deadly weapon. In so doing, defendant contends the court unconstitutionally allowed the jury to find an essential element of first-degree murder, malice, without regard to whether the State had proven an intentional killing.

The trial court instructed in conformity with the North Carolina Pattern Jury Instructions as follows:

> I now charge you that for you to find the defendant guilty of first degree murder, the State must prove five things beyond a reasonable doubt as follows:
>
> First, that the defendant intentionally and with malice killed Ronald M. Seiger, Jr., with a deadly weapon. 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 bodily harm which proximately results in his death without just cause, excuse or justification.
>
> If the State proves beyond a reasonable doubt that the defendant *killed Ronald Seiger with a deadly weapon or intentionally inflicted a wound upon him with a deadly weapon* that proximately caused his death, you may infer, first, that the killing was unlawful and, second, that it was done with malice, but you are not compelled to do so. You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. (Emphasis added.)
>
> I instruct you that a sawed-off shotgun is a deadly weapon.

See N.C.P.I. Crim. 206.13.

In *State v. Hedgepeth*, 330 N.C. 38, 408 S.E.2d 309 (1991), we held that virtually identical instructions constituted error (but not plain error) because they omitted the word "intentionally" before the word "killed" in the above italicized language. In contrast to

Hedgepeth, defendant here did object to the erroneous instruction. In determining the harmfulness of the error we consider the challenged portion of the instructions in light of the entire charge. *See State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984). Assuming *arguendo* that defendant is correct in arguing that the standard for constitutional error applies, *i.e.*, that the State must prove the error harmless beyond a reasonable doubt, N.C.G.S. § 15A-1443(b) (1988), we conclude that the error was in fact harmless.

First, given the trial court's instructions as a whole there is no reasonable possibility that the jury interpreted the challenged instruction to allow it to infer malice regardless of whether defendant intentionally used the shotgun to kill the victim. As the instructions show, the first element of the State's case was to prove that "the defendant intentionally and with malice killed [the victim] with a deadly weapon." The court instructed the jury that malice meant "the condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm." Immediately thereafter, the court gave the erroneous instruction. Near the close of its instructions, the court returned to the subject of the State's burden to prove the essential elements of first-degree murder, stating, "I charge you that if you find from the evidence beyond a reasonable doubt that . . . the defendant . . . *intentionally killed [the victim] with a deadly weapon* thereby proximately causing his death." (Emphasis added.) Thus, the court repeatedly demanded of the jury, as a prerequisite to a verdict of guilty of first-degree murder, that it find that defendant intentionally used the shotgun to cause the victim's death. *See State v. Hedgepeth*, 330 N.C. at 51, 409 S.E.2d at 316-17.

Second, the trial court in this case gave accurate instructions on accident. The court instructed:

> Now, members of the jury, where evidence is offered that tends to show that the victim's death was accidental, and you find that the killing was in fact accidental, the defendant would not be guilty of any crime, even though his acts were responsible for the victim's death.
>
> A killing is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence. A killing cannot be premeditated or intentional or culpably negligent if it was the result of an accident.

> When the defendant asserts that the victim's death was the result of an accident, he is in effect denying the existence of those facts which the State must prove beyond a reasonable doubt in order to convict him. Therefore, the burden is on the State to prove those essential facts, and in so doing, disprove the defendant's assertion of accidental death. The State must satisfy you beyond a reasonable doubt that the victim's death was not accidental before you may return a verdict of guilty of any crime.

The trial court's instructions to the jury required it to find unanimously and beyond a reasonable doubt that the shooting was not accidental. In convicting defendant of first-degree murder, the jury so concluded. It also concluded that defendant shot the victim with the specific intent to kill, and that he did so after premeditation and deliberation. Defendant's assertion that the trial court's instructions allowed the jury to find malice without an intentional act on defendant's part is meritless.

It is settled law that " '[w]here the death of a human being is the result of accident or misadventure, in the true meaning of the term, no criminal responsibility attaches to the act of the slayer.' " *State v. Phillips*, 264 N.C. 508, 512, 142 S.E.2d 337, 340 (1965) (quoting *State v. Faust*, 254 N.C. 101, 112, 118 S.E.2d 769, 776 (1961)); *see also State v. Jones*, 287 N.C. 84, 100, 214 S.E.2d 24, 35 (1975); *State v. Withers*, 271 N.C. 364, 369, 156 S.E.2d 733, 737 (1967); *State v. McLawhorn*, 270 N.C. 622, 628, 155 S.E.2d 198, 203 (1967). The defense of accident "is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another. . . . It is not an affirmative defense, but acts to negate the *mens rea* element of homicide." *State v. Lytton*, 319 N.C. 422, 425-26, 355 S.E.2d 485, 487 (1987).

By rejecting the defense of accident, the jury in fact concluded that defendant's acts were intentional. The evidence was uncontradicted that the killing was perpetrated by the use of a firearm. This, in turn, gave rise to the permissible inference that the killing was unlawful and committed with malice. *See State v. Forrest*, 321 N.C. 186, 191, 362 S.E.2d 252, 255 (1987). Defendant's "accident" defense does not operate to rebut the inference of malice so as to reduce the homicide from murder to manslaughter; to the contrary, as stated above, it operates to remove criminal responsibility

entirely. *See State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337. Defendant does not contend that there was evidence that the killing was done in self-defense or in the heat of passion upon sudden provocation such as would rebut the inference. *See State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982). Thus, the jury properly was allowed to draw the inference of malice as instructed by the trial court.

[3] Because we conclude that the jury in fact concluded that defendant intentionally caused the death of the victim through the use of the loaded shotgun, the trial court's instruction that "a sawed-off shotgun is a deadly weapon" was proper as well. *See State v. Gordon*, 241 N.C. 356, 358-59, 85 S.E.2d 322, 324 (1955). "An instrument which is likely to produce death or great bodily harm under the circumstances of its use is properly denominated a deadly weapon." *State v. Joyner*, 295 N.C. 55, 64, 243 S.E.2d 367, 373 (1978). Defendant is not entitled to relief under these assignments of error. We do, however, suggest that the pattern instructions be amended in light of *Hedgepeth* and this decision.

[4] By his next assignment of error, defendant contends that the trial court made insufficient efforts to protect his constitutional right to an impartial jury from the prejudicial impact of the emotional behavior of the victim's loved ones who were present during the trial. Just before the State presented rebuttal evidence, the trial court noted openly its concern with the emotional displays, stating to the prosecuting attorney:

> COURT: Let me say this. I have been a little bit concerned with the people over here. I certainly understand the situation.
>
> [PROSECUTING ATTORNEY]: I'll have a talk with them.
>
> COURT: About their leaving and some display of emotion and so on. I'm inclined to think it might be best when we have the final jury arguments if they sat back out in the courtroom.

During the State's rebuttal, the witnesses were seated in the first row of the spectator section. Before closing arguments, the court had them moved to the second row of the spectator section. Immediately before the return of the verdict, the court again spoke with the prosecuting attorney:

> [PROSECUTING ATTORNEY]: I also had a conversation about the emotional aspect of the case with the victim's friends and

family and have asked them if they can't contain themselves to please leave the courtroom and to remain out.

COURT: Well, I appreciate that. Of course, we all understand how they feel about it. It's perfectly natural to feel the way they do.

[PROSECUTING ATTORNEY]: Yes, sir.

COURT: But we appreciate that.

[PROSECUTING ATTORNEY]: Thank you, judge.

COURT: I do want to warn them that when the jury does return a verdict, to please be very careful not to say anything or anything of that kind to—here in the courtroom to any of the jurors or anything of that kind.

The transcript does not indicate, however, that defendant ever objected to the emotional displays, requested curative instructions, or moved for a mistrial. In *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988), when the State called as a witness the victim's widow, the bailiff informed the court that she was unable to testify then because she was crying. The court took a brief recess and sent the jury to the jury room with instructions not to speak about the case and to keep an open mind. This Court noted that defendant did not request a curative instruction or move for a mistrial, and it rejected defendant's argument that he was denied a fair and impartial trial. It said:

> The trial court witnessed the incident and was in a position to gauge its effect on the jury. . . . "Aside from defendant's failure to request a curative instruction, such an instruction may well have highlighted the witness's emotional state; indeed it is possible that the defense attorney declined to request a curative instruction because of the likelihood that it would emphasize the witness's outburst."

Id. at 359, 368 S.E.2d at 383-84 (quoting *State v. Blackstock*, 314 N.C. 232, 245, 333 S.E.2d 245, 253 (1985)).

In *Blackstock*, defendant moved for a mistrial after a prosecuting witness became hysterical during the jury instructions. The trial court ordered the bailiff to remove the witness from the courtroom, then it resumed instructing the jury. This Court held that the trial court did not abuse its discretion in denying a mistrial.

"A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Blackstock*, 314 N.C. at 243-44, 333 S.E.2d at 252.

Similarly, in *State v. McGuire*, 297 N.C. 69, 254 S.E.2d 165, *cert. denied*, 444 U.S. 943, 62 L. Ed. 2d 310 (1979), the Court found no abuse of discretion where the trial court denied two defendants' motions for severance and mistrial where a third codefendant made "numerous outbursts" during the course of the trial. The Court stated:

> "When such an incident involving an unexpected emotional outburst occurs, the judge must act promptly and decisively to restore order and to erase any bias or prejudice which may have been aroused. Whether it is possible to accomplish this in a particular case is a question necessarily first addressed to the sound discretion of the trial judge. 'Not every disruptive event occurring during the course of trial requires the court automatically to declare a mistrial,' and if in the sound discretion of the trial judge it is possible despite the untoward event, to preserve defendant's basic right to receive a fair trial before an unbiased jury, then the motion for mistrial should be denied. On appeal, the decision of the trial judge in this regard is entitled to the greatest respect. He is present while the events unfold and is in a position to know far better than the printed record can ever reflect just how far the jury may have been influenced by the events occurring during the trial and whether it has been possible to erase the prejudicial effect of some emotional outburst. Therefore, unless his ruling is clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal."

Id. at 75, 254 S.E.2d at 169-70 (quoting *State v. Sorrels*, 33 N.C. App. 374, 376-77, 235 S.E.2d 70, 72, *cert. denied*, 293 N.C. 257, 237 S.E.2d 539 (1977)).

We find no abuse of discretion on the facts of this case as well. No single outburst such as in *Blackstock*, or "numerous outbursts" as in *McGuire*, occurred here. Rather, the emotional displays in this case were constant factors during the trial. Though the cumulative effect may have been prejudicial to defendant, we cannot conclude that the trial court's actions, or inaction, constituted a manifest abuse of discretion. The court was aware of the potential

prejudice to defendant, and it took steps to ameliorate it by having the witnesses moved out of the bar area and into the spectator area. Just as defense counsel likely was unwilling to object openly to the emotional behavior for fear of calling attention to it or alienating the jury, the trial court may have concluded that the better course was to leave control of the family's behavior to the prosecuting attorney.

The unfortunate reality of a capital trial includes both the grief and anguish of those the victim has left behind and the awesome uncertainty as to the accused's fate. It is the trial court's responsibility to keep these powerful emotions in check in order to assure an impartial jury and a fair trial. Only in rare and obvious instances of unmitigated and unfair prejudice, however, will the exercise of, or failure to exercise, that responsibility result in a finding of an abuse of discretion. This is not such a case. Defendant's assignment of error is overruled.

[5] Defendant next contends that he is entitled to a new capital sentencing proceeding because the trial court instructed the jury that it must be unanimous in order to find the existence of any mitigating circumstance offered by defendant. In *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), the United States Supreme Court held such an instruction to be unconstitutional. Our review of the record reveals that the unanimity instructions held erroneous in *McKoy* were given here. The State acknowledges that the instructions violated *McKoy*, but argues that the error was harmless. Because the error is of constitutional dimension, the State bears the burden of showing that it was harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990); N.C.G.S. § 15A-1443(b) (1988). We conclude that the State has failed to meet its burden.

The trial court submitted and the jury found only one aggravating circumstance—"the defendant knowingly create[d] a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person." *See* N.C.G.S. § 15A-2000(e)(10) (1988). This circumstance was supported by evidence that defendant fired a sawed-off shotgun into an automobile occupied by the victim and Miles Raynor, with Mary Sikora standing in dangerously close proximity.

The trial court submitted sixteen possible mitigating circumstances to the jury, and the jury unanimously found twelve.

It rejected the following four mitigating circumstances: (1) that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (2) the defendant's age at the time of the offense, N.C.G.S. § 15A-2000(f)(7); (3) that defendant learned to read on his own in jail; and (4) any other circumstance or circumstances arising from the evidence which the jury deems to have mitigating value, N.C.G.S. § 15A-2000(f)(9).

[6] There was evidence from which members of the jury could have found each of these circumstances. The record before the jury of defendant's adjudicated criminal activity consisted solely of misdemeanor offenses: receiving stolen goods in 1981, larceny in 1984, and worthless check and assault with a deadly weapon in 1985. There also was evidence of unadjudicated criminal activity—possession of marijuana and an incident of theft when defendant was a juvenile, the sale of marijuana to the victim which ultimately led to the fatal altercation, and possession of a sawed-off shotgun. The State contends that no reasonable person could have found this mitigating circumstance to exist. We disagree. As in *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (1988), *death penalty vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990):

> We do not suggest that the evidence in the present case would support a finding of *no* history of prior criminal activity. N.C.G.S. § 15A-2000(b) does not require such evidence before the mitigating circumstance must be submitted for the jury's consideration. Rather, the statute places upon the trial court the duty to determine whether the evidence will support a reasonable finding of the mitigating circumstance of "no *significant* history of prior criminal activity." In the case at bar, the trial court was required to consider the evidence of the defendant's [seven alcohol-related] misdemeanor convictions in conjunction with his [two] twenty-year-old felony convictions to determine whether his record as a whole would support a reasonable jury finding of the mitigating circumstance . . . . The trial court correctly concluded that the evidence in this case would support such a finding.

Id. at 312-13, 364 S.E.2d at 324 (emphasis in original). This Court, in a subsequent hearing of the case, ordered a new sentencing proceeding because of the operation of the erroneous *McKoy* instruction on the jury's consideration of the "no significant history

of prior criminal activity" mitigating circumstance. *State v. Lloyd*, 329 N.C. 662, 668, 407 S.E.2d 218, 222 (1991).

Certain aspects of *Lloyd* are distinguishable from this case, for example, the remoteness of the felony convictions and the nonviolent, though dangerous, alcohol-related misdemeanors. Here, the defendant's criminal activity is not so remote, but, unlike in *Lloyd*, it does not include felony convictions. We have upheld the submission of this mitigating circumstance on records of criminal activity as great or greater than defendant's here. *See State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, --- U.S. ---, 113 L. Ed. 2d 459 (1991) (conviction for voluntary manslaughter); *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988) (conviction of second-degree kidnapping, evidence of drug storage on the defendant's premises, and involvement in felonious breaking or entering and larceny); *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985) (convictions on six counts each of felonious breaking or entering and felonious larceny, five counts of armed robbery, and one count of felonious assault), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds*, 321 N.C. 570, 364 S.E.2d 373 (1988). In light of these cases, we cannot conclude that the trial court here erred in submitting this circumstance, as a reasonable juror could find it to exist.

[7] As for defendant's age, we have said that, "Any hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances." *State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983) (quoting with express approval *Giles v. State*, 261 Ark. 413, 421, 549 S.W.2d 479, 483, *cert. denied*, 434 U.S. 894 (1977)). Defendant was twenty-two years old at the time of the shooting. He presented evidence that he had been neglected and abused as a youth, and that his home environment was very unstable due to his mother's erratic, sometimes alcoholic behavior and the lack of a male role model. In fact, the jury unanimously found that defendant was "reared by a dysfunctional mother," that he "grew up in a situation in which there was a significant lack of stability and guidance," that he was emotionally abused and neglected as a child, and that he "did not have the benefit of a normal education as a child." All these circumstances, in conjunction with his actual age of twenty-two, could have permitted a reasonable juror to find this statutory mitigating circumstance. Further, the fact that certain "found"

mitigating circumstances might bear on the persuasiveness of another circumstance under consideration does not mean that the latter necessarily is subsumed under the former.

The jury was not required to accept this circumstance. There was evidence that defendant had married and that he maintained employment during the year before the shooting. Further, the evidence of his prior criminal activity could have convinced some jurors that defendant was mature beyond his years. Yet, these are facts that each juror should have been permitted to evaluate individually in considering this mitigating circumstance. We conclude that it was proper to submit this circumstance in that a reasonable juror could have accepted the evidence of defendant's age as having mitigating value. *See State v. Williams*, 305 N.C. 656, 663, 292 S.E.2d 243, 249, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982) (jury found this circumstance where the defendant was twenty-four at the time of the murder, and where he had maintained gainful employment since he was a teenager); *cf. State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986) (no prejudicial error to refuse to submit the defendant's age as a mitigating circumstance in light of two witnesses' conclusory statements that the defendant was emotionally immature and other evidence of his apparently normal physical and intellectual development).

[8] The evidence was uncontradicted with regard to the third submitted, but rejected, mitigating circumstance, that defendant learned to read while previously incarcerated. In fact, the trial court instructed the jury to that effect. Again, though this circumstance is related to other circumstances that the jury found unanimously, it was not subsumed by the other circumstances. That the jury found mitigation in the circumstances that defendant lacked the benefit of a normal education and that he can "function adequately and appropriately in a structured setting with proper guidance and discipline" does not foreclose the possibility that a reasonable juror could find additional mitigation from the uncontroverted fact that defendant had made significant efforts to improve himself while previously incarcerated. Because of the erroneous *McKoy* instruction, "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." *State v. Stager*,

329 N.C. 278, 327, 406 S.E.2d 876, 904 (1991) (new sentencing proceeding required where jury unanimously found all four submitted mitigating circumstances, but rejected "catchall" circumstance).

[9] Finally, as in *Stager*, the jury here rejected the "catchall" circumstance—"any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value." *See* N.C.G.S. § 15A-2000(f)(9). There was substantial, credible evidence from which a reasonable juror could have found this circumstance. Defendant presented testimony from his foster parents that he "adjusted real well" to being in the foster home. Defendant went to school regularly, attended church, and made improvements in his social behavior. These improvements seemed to disappear, however, when he resumed living with his mother.

In light of the evidence supporting the rejected mitigating circumstances, we are unable to conclude that the State has carried its burden of proving that the erroneous *McKoy* instruction was harmless beyond a reasonable doubt. Therefore, defendant must receive a new capital sentencing proceeding. Because defendant's remaining assignments of error relate to issues and matters that are uncertain to recur upon resentencing, we decline to address them.

For the reasons stated, we find no prejudicial error in the guilt phase of defendant's capital trial, but remand for a new capital sentencing proceeding under *McKoy*.

Guilt phase: No error.

Sentencing phase: New sentencing proceeding.

Justice MARTIN dissenting.

I concur in the holding by the majority that there is no error in the guilt phase of defendant's trial and conviction. However, I dissent from the holding of the majority that the *McKoy* error entitles the defendant to a new sentencing proceeding.

The State concedes that the unanimity instructions violated the mandate of *State v. McKoy*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), but it argues that the error was harmless. The majority finds that the error was prejudicial; I cannot concur in that decision. Of course, the State has the burden of showing that the error is harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988).

In this case the trial court submitted sixteen possible mitigating circumstances to the jury, and the jury unanimously found twelve of the mitigating circumstances submitted and rejected four of them. The first of these is that the defendant had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1) (1988). Without a detailed recitation of the evidence, it does show that since the age of sixteen the defendant had been convicted of or pled guilty to receiving stolen goods, larceny, assault with a deadly weapon, and issuing a worthless check. There was also evidence of other criminal activity, such as, possession of a sawed-off shotgun, dealing in drugs, stealing, and possession of marijuana. Each of these convictions and other criminal activity constitute significant prior criminal activity on the part of the defendant. The meaning of "significant" is that the activity is likely to have influence or effect upon the determination by the jury of its recommended sentence. *State v. Wilson*, 322 N.C. 117, 147, 367 S.E.2d 589, 609 (1988) (Martin, J., concurring). Surely, the jury would be affected in its deliberations and determination of whether to recommend the death sentence by this series of prior convictions and criminal conduct on the part of the defendant. These are not the kind of activities that a jury would be likely to find completely irrelevant on the issue of sentencing. Therefore, no reasonable juror would have found an absence of significant history of prior criminal activity under the evidence of this case. It is clear that if the error in the *McKoy* instructions in this case had been absent the result would have been the same.

Likewise, as to the non-statutory mitigating circumstance that the defendant learned to read on his own while in jail, even if found by the jury or a juror, it would not, in my opinion, have resulted in a change in the jury's recommendation. The evidence is contradictory in this case as to whether the defendant learned to read in jail, and if so, when he went through this educational process. He testified that he read the statements that he gave the officer before he signed them. He also argued that he learned to read in jail during 1981 and 1984, when he was arrested and convicted of other crimes which was, of course, prior to the killing in this case. I do not see how the defendant's culpability for this crime is lessened because the defendant learned to read in jail serving time for other crimes before this crime was committed. Further, the jury found in mitigation that the defendant lacked the benefit of a normal education, and that he can function ade-

quately and appropriately in a structured setting with prior guidance and discipline. This is indeed a slender reed upon which to rely in striking down the jury's recommendation as to the appropriate penalty of this shotgun killing witnessed by two eyewitnesses who testified for the State.

As to the mitigating circumstance of the defendant's age at the time of the offense, N.C.G.S. § 15A-2000(f)(7), the defendant was twenty-two years and six months of age. This Court held in *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986), that there was no hard and fast rule as to what age could be considered by the jury as such mitigating circumstance. Rather, this evidence had to be considered along with all of the other evidence in the case in determining whether it had any mitigating value. In the *Johnson* case this Court found that it was not error to fail to submit this circumstance to the jury even though there was testimony that the defendant was an immature person for his age based upon the fact that he was a bed wetter, that he lacked emotional stability, and that he was fired from his first employment. I find the evidence in the present appeal to be much less persuasive than that in *Johnson*. Here, defendant's intelligence level was in the low average range, he was employed, and he was an excellent worker. It appears beyond a reasonable doubt that, even if this mitigating circumstance had been found by the jury, it would not have changed any juror's mind as to the recommendation. I find it to be harmless beyond a reasonable doubt.

As to the catchall mitigating circumstance, defendant argued such things as his showing a positive response while in the custody of foster parents, that his juvenile drug abuse was permitted by his mother, that he was deprived of an opportunity to learn societal values, and that the social service and court system failed to respond to his situation. These facts were already concluded and subsumed in other factors submitted to the jury, such as, that the defendant was reared by a dysfunctional mother, that he grew up in a situation with no stability or guidance, that he was emotionally abused and neglected as a child, that he can function adequately in a structured setting of proper guidance, that he has a father and foster parent who love him, and that he did not have the benefit of a normal education as a child. All of these mitigating factors were found by the jury. It appears that the factors now argued by the defendant under the catchall were all included and subsumed in the specific mitigating circumstances

which the jury found. Therefore, it appears beyond a reasonable doubt that there was no error with respect to the catchall. N.C.G.S. § 15A-2000(f)(9) (1988).

In light of the uncontested evidence as to the brutal and uncalled for murder in this case, evidently over a $10.00 debt that the victim allegedly owed to the defendant in payment for drugs, no reasonable juror would have returned a different recommendation had there been no *McKoy* error. I find that the *McKoy* error here is indeed harmless beyond any reasonable doubt.

I vote that the jury's recommendation of the death sentence be affirmed.

Justices MEYER and MITCHELL *join in this dissenting opinion.*

STATE OF NORTH CAROLINA v. VERNON DALE GARNER

No. 532A90

(Filed 6 December 1991)

1. **Evidence and Witnesses § 1008 (NCI4th)— hearsay—notice of intent to offer—objection waived**

A defendant in a murder prosecution waived any right to bring forward on appeal the adequacy and timeliness of a notice of the State's intent to offer hearsay testimony where defendant made no motion to continue based on insufficiency or untimeliness of the notice, did not assert that he was surprised by the evidence, did not argue this point when the judge asked if he wished to be heard further on his objection to the testimony, and admitted in an exchange with the judge that the notice was sufficient. N.C.G.S. § 8C-1, Rule 804(b)(5); N.C.R. App. P. 10(b)(1).

Am Jur 2d, Evidence §§ 493, 1103.

2. **Evidence and Witnesses §§ 1009, 1011 (NCI4th)— hearsay—findings sufficient**

The trial court did not err by admitting hearsay testimony in a prosecution arising from a murder where the court found, on the issue of probativeness, that the declarant, the victim, was unavailable, that the statements were evidence of a material

fact, and that the statements were more probative on the fact than any other evidence which the State could procure through reasonable efforts. While the trial judge's findings of fact did not specifically provide that the evidence was not covered by any other exception found in Rule 804, the error was not prejudicial because the State offered the evidence under N.C.G.S. § 8C-1, Rule 804(b)(5), did not argue at trial that any other exception applied, and defendant's attorney based his argument on the fact that this evidence was not covered under any hearsay exception.

Am Jur 2d, Evidence § 496.

3. **Evidence and Witnesses § 1009 (NCI4th)— hearsay—equivalent guarantees of trustworthiness**

The trial court did not err in a prosecution arising from a murder by finding and concluding that the victim's statements as contained in hearsay testimony possessed sufficient circumstantial guarantees of trustworthiness to be admitted under N.C.G.S. § 8C-1, Rule 804(b)(5) where the declarant, the victim, was deceased and unavailable for cross-examination; the underlying events were clearly within the personal knowledge of the victim because they related to the immediate relationship between the victim and defendant; the statements were made to the victim's brother, who was living in the home and had heard numerous conversations consistent with the victim's statement to her brother about her relationship with defendant; and the victim did not recant her statements.

Am Jur 2d, Evidence §§ 496, 516.

4. **Evidence and Witnesses § 735 (NCI4th)— murder—victim's statements—hearsay—other evidence**

There was no prejudice in a prosecution arising from a murder where the court admitted testimony from the victim's brother about the victim's statements to defendant, but the evidence was already before the jury in substance. N.C.G.S. § 15A-1443(a).

Am Jur 2d, Evidence §§ 496, 516.

5. Evidence and Witnesses § 1006 (NCI4th)— hearsay—residual exception—admissible

The trial court did not err in a prosecution arising from a murder by admitting under N.C.G.S. § 8C-1, Rule 804(b)(5) testimony regarding a statement by the victim to defendant.

Am Jur 2d, Evidence §§ 496, 516.

6. Evidence and Witnesses § 735 (NCI4th)— murder—hearsay—no prejudice

There was no prejudice in a prosecution arising from a murder where the court admitted testimony that the victim had told the witness that defendant had called the victim a name on the telephone. Assuming that the statement was offered to prove the truth of the matter asserted, there was no prejudice because the immediately preceding testimony was that defendant and the victim had been "cussing and fussing to each other," and the statement at issue merely fleshed out the witness's previous statement.

Am Jur 2d, Evidence §§ 496, 516.

7. Evidence and Witnesses §§ 2987, 3018 (NCI4th)— prior convictions—defendant required to read from warrants

There was no prejudicial error in a prosecution arising from a murder where the prosecutor was allowed to delve into the details of three prior convictions, two of them involving assaults against the victim, and defendant was required to read from the underlying arrest warrants. Defendant put his character in evidence by testifying in detail about himself and his relationship with the victim, painting a picture of himself as a level-headed, peaceful individual who consistently fended off verbal and physical attacks from the victim. It was therefore proper for the prosecutor to cross-examine defendant concerning this trait of character by eliciting details of the prior assaults. While the better practice is to limit cross-examination of prior instances of conduct to leading questions concerning the conduct itself, rather than requiring defendant to read to the jury the accusations contained in an arrest warrant, defendant here can show no harm because the same details could have been elicited through proper leading questions. N.C.G.S. § 8C-1, Rules 609(a), 404, and 405.

Am Jur 2d, Witnesses §§ 525, 526.

8. Evidence and Witnesses § 2797 (NCI4th)— cross-examinations—insulting—discretion of court

There was no abuse of discretion in a prosecution arising from a murder where the court permitted the prosecutor to repeatedly ask defendant on cross-examination why he could remember some details about the incident but could not remember shooting into the end of the trailer.

Am Jur 2d, Witnesses §§ 468, 471, 472.

9. Burglary and Unlawful Breakings § 165 (NCI4th)— first degree burglary—misdemeanor breaking or entering not submitted

The trial court did not err in a first degree burglary prosecution by refusing to submit to the jury a possible verdict of misdemeanor breaking or entering where there was no evidence to support misdemeanor breaking or entering. If the State's evidence is believed, defendant is guilty of first-degree burglary, and if defendant's evidence is believed, he is not guilty of burglary, misdemeanor breaking or entering, or any other crime.

Am Jur 2d, Burglary § 67; Trial § 1432.

10. Kidnapping § 1.2 (NCI3d)— felony murder—burglary—underlying kidnapping—instructions supported by evidence

There was sufficient evidence in a prosecution for kidnapping and burglary to support instructions which permitted the jury to find that defendant committed the kidnapping for the purpose of terrorizing the victim or that defendant did not release the victim in a safe place where the evidence, viewed in the light most favorable to the State, shows that defendant forced his way into the trailer and forced the victim to accompany him against her will; one witness testified that from fifteen to thirty to forty-five minutes elapsed between the time the victim left the trailer and when the first shot was heard; the victim was hollering and screaming for the defendant to leave her alone as defendant faced the victim in the parking lot; some time elapsed before defendant fired the first shot; defendant cocked, breached, or loaded his gun and struck the victim in the mouth with the butt of the shotgun and then across the face with the barrel end, knocking her to the ground; defendant then fired a shotgun blast into the victim as he held her ankle in one hand and the shotgun in

the other; and his actions indicated a conscious disregard for the victim and her safety rather than a conscious act to assure that his victim was released in a safe place in that, after firing a shotgun blast into her body at close range, he walked to his vehicle, fired a shell into the trailer, and drove off, shouting, "You can come and get her now. She's yours."

Am Jur 2d, Abduction and Kidnapping § 32; Burglary § 45.

11. Homicide § 4.2 (NCI3d)— felony murder—kidnapping—murder—no error

The trial court was not required in a felony murder prosecution to instruct the jury that it must find the kidnapping to be separate and apart from the murder where the facts of the case do not raise the possibility that defendant could be convicted twice for the same act.

Am Jur 2d, Abduction and Kidnapping §§ 9, 10, 28; Criminal Law §§ 266-268, 277, 279; Homicide §§ 183, 190, 482.

12. Homicide § 25.2 (NCI3d)— first degree murder—premeditation and deliberation—evidence sufficient

There was sufficient evidence to support a jury instruction on grossly excessive force or infliction of lethal wounds as circumstances from which premeditation and deliberation could be inferred in a first degree murder prosecution where there was testimony that defendant struck the victim with the butt of a shotgun and then struck her in the face with the barrel end, knocking her to the ground; defendant then grabbed her ankle with his left hand; and the gun discharged.

Am Jur 2d, Homicide § 439.

13. Criminal Law § 751 (NCI4th)— reasonable doubt—highest legal aim instruction—not confusing

There was no possibility that the trial judge confused jurors concerning the reasonable doubt standard where the judge gave the jurors the highest legal aim pattern instruction, but also repeated the reasonable doubt instruction throughout the jury charge. Although defendant argued that the instruction improperly shifted the focus from determining guilt beyond a reasonable doubt to determining the truth, when construed as a whole no reasonable juror could have been misled.

Am Jur 2d, Homicide § 510.

14. Indictment and Warrant § 7 (NCI3d) — burglary — joinder with first degree murder — indictment waivable

Defendant could properly waive indictment as to a non-capital felony of first degree burglary joined with first degree murder where he was first indicted for first degree burglary with the intent to commit murder alleged as the only felonious intent; the prosecutor subsequently filed a superseding information in the burglary charge alleging the additional felonious intent of kidnapping; defendant signed a waiver of indictment; and the court instructed the jury on the burglary charge only on the theory that defendant intended to commit kidnapping. Joinder of the burglary charge with the capital crime of murder, for which indictment may not be waived, did not transform the burglary charge into a capital case as that term is used in N.C.G.S. § 15A-642(b).

Am Jur 2d, Indictments and Informations §§ 221, 223, 301.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing life imprisonment entered by *Allen (J.B.), J.*, at the 1 January 1990 Criminal Session of Superior Court, ALAMANCE County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments allowed by the Supreme Court 4 January 1991. Heard in the Supreme Court 6 May 1991.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.

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

FRYE, Justice.

On 8 May 1989, an Alamance County grand jury indicted defendant for first-degree murder and first-degree kidnapping of Debbie Leigh Mills Brown. The grand jury, on the same day, also indicted defendant for discharging a firearm into occupied property, first-degree burglary of Charles Steven Barbour's mobile home, assault by pointing a gun on David B. Sperling and Barbour, and communicating threats to Barbour. On 22 December 1989, the State drafted a superseding information as to the first-degree burglary and first-degree kidnapping, and defendant signed a waiver of indictment

on both charges and agreed as to those two charges to be tried upon the information. These informations were filed on 27 December 1989.

Defendant entered a plea of not guilty to all the charges, and the jury convicted defendant of all the charges. After a sentencing proceeding held pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment for the murder conviction. The trial judge found aggravating and mitigating factors in the burglary case and arrested judgment in the kidnapping case. Defendant received a life sentence for the first-degree murder, a consecutive life sentence for the burglary, a consecutive three-year sentence for discharging a firearm, and a concurrent six-month sentence for the assaults and communicating threats convictions. Defendant appeals his conviction for first-degree murder to this Court as a matter of right, and on 4 January 1991, this Court granted defendant's motion to bypass the Court of Appeals on his appeal of the noncapital convictions.

In his appeal defendant raises eleven issues. We find that defendant's trial was free of prejudicial error.

Defendant and the victim met in 1981 and lived together "off and on" until the victim's death in April 1989. About a month prior to the victim's death, defendant and the victim were living together in a home with their child Natasha, who was born in 1983, and with the victim's two children from a previous marriage. Defendant moved out of their home in March 1989 and moved into his mother's mobile home. However, defendant did not move all of his possessions out of the house he had shared with the victim and continued to spend some nights there with her after he moved out of the home. On 9 April 1989, Barry Mills, Jr., the victim's brother, moved into the home she and defendant had shared.

Mills testified that when he was living with the victim during the week of April 9-14 defendant called the victim many times on the telephone, and they argued during the conversations. Over defendant's objection, Mills further testified that the victim told him "that she wished that Vernon Garner would leave her alone, that the relationship as far as she was concerned had . . . ended, and that she just wanted to be left alone by him so that she could do what she had to do for herself and her life and for her children." Mills related, over defendant's objection, that on 14 April he and the victim had taken defendant's daughter to spend the

weekend with defendant and that the victim told defendant "that she did not wish to talk with him."

After leaving their daughter Natasha with defendant at his mother's home, the victim and her brother went to the Party Time Lounge about 7:20 p.m. on 14 April. The victim would on occasion work as a waitress at the Party Time Lounge which was owned by Barbour. While the victim was at the lounge, defendant called and asked Barbour if he could speak with the victim. Defendant testified that he called the victim to tell her that their daughter was sick and that the victim told him that she would talk to him later when the lounge closed.

After the lounge closed, about 2 a.m. on the morning of 15 April, Barbour, David Sperling, Jennifer Shatterly, and the victim went to Barbour's mobile home which was beside the lounge. Barbour cooked a meal for the group while the other three talked. The telephone rang, Barbour answered it, and defendant asked to speak to the victim. Barbour testified, over defendant's objection, that the victim came to the telephone and told defendant "to leave her alone and not call her anymore."

After the group finished eating, Barbour, Sperling, and the victim remained seated at the kitchen table, and Shatterly fell asleep on the living room couch. Barbour, Sperling, and Shatterly all testified that defendant, holding a sawed-off .410 shotgun, came in the front door of the mobile home without knocking and asked the victim to go outside with him. Barbour testified that defendant told Barbour and Sperling to get on the floor or he would kill them. Barbour further testified that the victim resisted going with defendant and told him that she was not going with him, but defendant grabbed the victim's arm and "sort of half way threw her out the door." Barbour testified that after defendant and the victim left the mobile home, he went to his bedroom and got a gun and told Sperling to call 911. After Barbour heard a shot, he looked out of the window of the mobile home and saw defendant and the victim standing next to each other in the center of the parking lot located between his mobile home and the Party Time Lounge. Barbour opened the front door of the mobile home and saw that defendant and the victim were still talking in the parking lot. Barbour saw the victim move toward defendant and saw defendant hit the victim in the mouth and face with the shotgun. She fell to the ground. According to Barbour, defendant reached down and

grabbed the victim's ankle, the victim reached up, and the gun fired. Barbour testified that after the shot was fired, defendant walked toward the mobile home and, as he was reloading his shotgun, he told Barbour that Barbour could have the victim. Barbour got down on the floor of the mobile home when he realized that defendant was getting ready to fire the shotgun. A shot was fired through a window into the mobile home. After Barbour heard defendant walking away, he went out to assist the victim and saw defendant driving away.

A sheriff's deputy and an ambulance arrived shortly after defendant left. The victim told the officer that her stomach was hurting, and when the officer asked the victim if she had been shot, the victim replied, "No." The ambulance took the victim to the hospital where she died about thirty minutes later as a result of a gunshot wound to her upper abdomen which caused massive internal bleeding.

Defendant testified that he left his mother's home about 2 a.m. that night and went to the victim's house to look for her to tell her about their sick child. Defendant found that the victim was not at her home, but he saw her car in the parking lot at the Party Time Lounge which was next to Barbour's mobile home. Defendant testified that he had his shotgun with him because he had received a threatening telephone call in early April warning him to leave the victim alone.

Defendant testified that after seeing the victim's car near Barbour's mobile home, he got his shotgun and walked up to the door of the mobile home. According to defendant, he knocked on the door and Barbour told him to come inside. Defendant said that the victim asked him what he was doing there, and he told her that he wanted to talk with her and asked her to go outside with him. Defendant testified that he kept the shotgun pointed at the ground and did not threaten Barbour or Sperling or tell them to get on the floor. Defendant further testified that the victim willingly went outside with him to the parking lot and that he did not grab her or push her out of the door.

When they got outside, defendant said that the victim began pushing and hollering at him and that she suddenly grabbed his shotgun. Defendant explained that the first shot was fired accidentally when he was trying to move the shotgun away from the victim and they both fell over a telephone pole used in the parking

lot to mark the spaces. According to defendant, the second shot was fired when the victim again reached for the shotgun and defendant pulled back, accidentally discharging the gun. Defendant testified that the victim did not act like she had been hit and he decided that she was not interested in talking so he decided to leave and walked back to his truck. Defendant further testified that he did not know that the victim had been shot until he was arrested and that he did not remember firing the gun a third time into Barbour's mobile home.

[1] Defendant's first issue concerns certain hearsay statements admitted under North Carolina Rule of Evidence 804(b)(5) during the testimony of the victim's brother Mills. On 27 December 1989, the State served defendant with notice that the State intended to offer the victim's hearsay statements to Mills into evidence. Specifically, the notice provided that the State intended to introduce the victim's statements to Mills that defendant had been calling her and defendant was harassing and bothering her through these telephone calls. Defendant contends that the State's notice was inadequate and that the admission of this testimony did not meet the requirements set out in *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986).

North Carolina Rule of Evidence 804(b)(5) provides as follows:

> 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.

N.C.G.S. § 8C-1, Rule 804(b)(5) (1988). *Triplett* sets out a six-part test for the admission of hearsay testimony under Rule 804(b)(5).

After examination of the transcript, which shows the detailed findings and conclusions made by the trial judge prior to admitting Mills' testimony, we find no reversible error.

Under the *Triplett* test, the trial judge must first "determine that the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars." 316 N.C. at 9, 340 S.E.2d at 741. As noted above, it is not disputed that on 27 December 1989, three working days before the trial was scheduled to begin, the State served notice of its intent to use this testimony. Defendant contends that the notice was inadequate because it only stated that Mills would testify that the victim told him that defendant had been calling her and that he was harassing her and bothering her through these telephone calls. According to defendant, this notice did not contain any details, substance, or particulars of the statement the State actually introduced into evidence in Mills' testimony. Defendant also contends that the notice was untimely. However, defendant made no motion to continue based on insufficiency or untimeliness of the notice and did not assert that he was surprised by the evidence. Nor did he argue this point when the trial judge asked if he wished to be heard further on his objection to the testimony.

A review of the transcript reveals that defendant admitted that the notice was sufficient. The following exchange took place between defendant's attorney and the trial judge:

> COURT: So you—you do acknowledge that you got notice pursuant to 804 that the State intended to use this hear—use this statement of—as Mr. Mills stating what Debbie Brown told him?
>
> MR. MONROE: Just a moment and I'll—If I could see that? Yes, sir.
>
> COURT: All right. So for—the State did serve you notice pursuant to 804(b)(5) that they intended to use this—statement. Do you wish to be heard further?
>
> MR. MONROE: No, Sir,

Under these circumstances, we conclude that defendant's failure, after invitation from the bench, to restate his objection or further argue the adequacy and timeliness of the notice waives any right to bring this issue forward on appeal. N.C.R. App. P. 10(b)(1).

[2] Defendant also contends that Mills' testimony was not properly admitted because the trial judge failed to make findings of fact about the probativeness of the statement. *Triplett* requires that the trial judge must consider whether the evidence is more probative on the point than any other evidence which could be produced through reasonable efforts. 316 N.C. at 9, 340 S.E.2d at 741. Prior to the admission of this evidence, the trial judge conducted a voir dire hearing and made findings of fact in keeping with the requirements set out in *Triplett* and concluded that the testimony was admissible. On the issue of probativeness, the trial judge found that the declarant—the victim—was unavailable, that the statements were evidence of a material fact, and that the statement was more probative on the fact than any other evidence which the State could procure through reasonable efforts. We conclude that the trial judge's conclusions were stated with sufficient detail and were adequately supported by the evidence. The declarant, the deceased victim, was unavailable. In such a case, according to *Triplett*, the necessity for the use of hearsay testimony is greater than in cases involving Rule 803(24) where the declarant does not have to be unavailable. Thus, the inquiry "may be less strenuous" in Rule 804(b)(5) cases such as this one than in Rule 803(24) cases. *Id.*

Defendant also contends that the trial judge failed to conclude whether the hearsay was specifically covered elsewhere. *Triplett* does require that the trial judge "determine that the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4)." *Id.* While the trial judge's findings of fact did not specifically provide that the evidence was not covered by any other exception found in Rule 804, the State offered the evidence under Rule 804(b)(5) and did not argue at trial that any other exception applied. Furthermore, defendant's attorney made the following argument in his objection to this testimony:

> MR. MONROE: It's hearsay, if your Honor please. Again, we submit, not covered by any exception . . . . Not covered specifically under 803 exception or 804 exception, if your Honor please.

Thus, defendant's attorney based his argument on the fact that this evidence was not covered under any hearsay objection. Even assuming that the trial court erred by failing to meet this requirement of *Triplett* by not specifically finding that this evidence was not covered by any other exception, the error was not prejudicial since defendant's attorney specifically argued that the evidence

was not covered by any other exception and the State offered it under the catchall and made no argument that the evidence was admissible under any other exception.

[3] Defendant also contends that the trial court's conclusion that the statements possessed equivalent circumstantial guarantees of trustworthiness is erroneous as a matter of law. As the basis for this argument, defendant argues that the victim's statements were unreliable because they were uncorroborated and because the victim effectively recanted them by all her acts and deeds. In *Triplett* this Court set out some factors which are to be considered in determining whether a hearsay statement admitted under Rule 804(b)(5) possesses sufficient indicia of trustworthiness. The factors are:

> (1) assurances of the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant recanted the statement; and (4) the practical availability of the declarant at trial for meaningful cross-examination.[1]

Id. at 10-11, 340 S.E.2d at 741-42 (quoting *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985) (footnote added). We have no difficulty with the fourth factor because the declarant, the victim in this case, is deceased and therefore not available for cross-examination.

An assessment of the remaining three factors suggests that the trial court correctly admitted the victim's statements as revealed in Mills' testimony: (1) the underlying events were clearly within the personal knowledge of the victim because they related to the immediate relationship between the victim and defendant, the father of her child; (2) the statements were made to the victim's brother, Mills, who was living in the home and had heard numerous conversations between the victim and defendant—conversations which were consistent with the victim's statement to Mills about the nature of her relationship with defendant; and (3) the victim did not recant her statements. Defendant argues that by continuing to call him for assistance with the children and by continuing to

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1. In *State v. Nichols*, 321 N.C. 616, 624, 365 S.E.2d 561, 566 (1988), the fourth factor is reworded as follows: "(4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability." Significantly, this rewording clarifies the purpose of this factor, which is to encourage trial courts to assess the reason for the declarant's unavailability.

associate with him, the victim effectively recanted her statement that she wished that defendant would leave her alone. However, these actions do not prove recantation, but are a part of the circumstances to be weighed in determining whether the statements are likely to be true. Based on our assessment of these factors in the instant case, we hold that the trial court did not err in finding and concluding that the victim's statement as contained in Mills' testimony possessed sufficient circumstantial guarantees of trustworthiness to be admitted under Rule 804(b)(5).

[4] Defendant further argues that the trial judge erred in admitting Mills' testimony about the victim's statements to defendant on 14 April that she did not want to talk to defendant and that she was just delivering their daughter. Defendant asserts that this statement was hearsay and not admissible under any exception and that the trial court's summary evidentiary ruling was erroneous as a matter of law. We conclude that this evidence was in substance already before the jury from the testimony which Mills had given concerning the relationship between the victim and defendant. Thus, any error in admitting the victim's statement of 14 April was not prejudicial since there is no reasonable possibility a jury would have reached a different result had the court excluded this evidence. N.C.G.S. § 15A-1443(a) (1988); *see also State v. Faucette*, 326 N.C. 676, 687-88, 392 S.E.2d 71, 77 (1990).

[5] Defendant's second issue involves the testimony of witness Barbour concerning a statement made by the victim while talking to defendant on the telephone in Barbour's presence shortly before the murder. Barbour testified that the victim told defendant "to leave her alone and not call her anymore." Following a voir dire hearing, the trial court concluded that the statement was trustworthy, material, not covered elsewhere, that it was more probative than any other competent evidence available, and that the State had satisfied Rule 804(b)(5)'s unavailability, notice, and interest of justice requirements. Defendant makes essentially the same arguments regarding the admission of this statement as the arguments made in reference to issue one. We conclude, for the same reasons stated in our analysis of issue one, that the trial judge did not err in admitting witness Barbour's testimony regarding the statement made by the victim to defendant.

[6] In his third issue, defendant contends that the trial court erred by permitting Jennifer Shatterly to testify regarding a state-

ment made to her by the victim on the night of the murder. Shatterly testified that while she was in the room in Barbour's trailer, she heard the victim talking to defendant on the telephone, that the victim was cussing, and "[t]hey were fussing to each other." Immediately following the telephone call, the victim told Shatterly that defendant had called the victim a "slutty whore." Defendant contends this testimony was inadmissible hearsay because it concerned an out-of-court statement offered in evidence to prove the truth of the matter asserted.

While we are not convinced that either the statement from defendant to the victim or the statement from the victim to the witness was offered for the truth of the matter asserted, assuming *arguendo* that defendant is correct, we find admission of the statement not prejudicial. Immediately preceding this testimony, there was testimony from the witness that the defendant and victim were "[cussing] . . . and fussing to each other." The statement at issue merely fleshed out the witness' previous statement. We do not believe defendant has met his burden of showing that but for the admission of this statement there is a reasonable possibility the jury would have reached a different verdict. N.C.G.S. § 15A-1443(a).

[7] Defendant's fourth argument is that he is entitled to a new trial because the trial court erroneously allowed the prosecutor to delve into details of three prior convictions: two involving assaults against the victim; one involving an assault against David Overman. Defendant also complains that the trial court erred by allowing the prosecutor to require defendant to read from the underlying arrest warrants. While it may have been improper to require defendant to read from the arrest warrants, we hold that the *substance* of the testimony was admissible.

On cross-examination, defendant was questioned in detail about two assault convictions against the victim during 1985. Specifically, defendant was required to read from the two arrest warrants involving these convictions. One of the warrants charged defendant with "striking her about the mouth and nose and left eye with his hand"; the other warrant with "hitting her with his fist causing her to seek emergency treatment requiring stitches to her mouth." Defendant also testified on cross-examination that he had pled guilty to assault in 1989 for inflicting serious injury upon Mr. Overman. The prosecutor handed defendant the underlying arrest warrant

in that case and asked defendant, "Weren't you accused of using a lock-blade knife to assault and inflict serious injury upon David Overman?" After defendant's objection was overruled, the prosecutor continued: "By cutting him on his face, chest, and back, opening wounds [requiring] approximately 100 stitches to close at the Alamance County Hospital of Burlington?" Over objections, defendant responded: "That's what this states."

Defendant argues that requiring him to read from the underlying arrest warrants violates this Court's holding in *State v. Williams*, 279 N.C. 663, 185 S.E.2d 174 (1971), that a defendant may not be impeached with *accusations* of other crimes. Defendant also argues that the State's questions exceeded the scope of proper inquiry under North Carolina Rule of Evidence 609(a).

The State argues that, on direct examination, defendant acknowledged pleading guilty to two charges of assaulting the victim. On cross-examination, defendant even volunteered his version of the events surrounding one of these two assaults. Defendant also testified on direct examination concerning his general good character and devotion to his wife and child, suggesting that the victim was the troublemaker in their relationship. Defendant also testified that he received an honorable discharge from the armed services and once rescued a man by pulling him from a fire. As the State argues in its brief, defendant's testimony "portrays himself as the calm, cool headed, and nonbelligerent individual and Debbie as the hotheaded troublemaker." Thus, argues the State, the prosecutor was free to impeach defendant's good character evidence by going into details of the prior assaults.

Admissibility of prior convictions to impeach the credibility of a witness is governed by North Carolina Rule of Evidence 609(a):

> (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.

N.C.G.S. § 8C-1, Rule 609(a) (1988). Questions concerning these convictions must be confined, however, to a "limited inquiry into the time and place of conviction and the punishment imposed." *State v. Finch*, 293 N.C. 132, 141, 235 S.E.2d 819, 825 (1977). Although *Finch* is a pre-Rules case, its limitations on inquiries concerning

prior convictions are consistent with Rule 609(a). Thus, the prosecutor's questions regarding defendant's prior convictions, limited to time, place and punishment, were proper under Rule 609(a) for purposes of impeachment. Defendant is correct, however, that the prosecutor's questions went beyond these limited *Finch* inquiries; nevertheless, we hold that these additional inquiries were proper under Rules 404(a)(1) and 405(a).

Rule 404 reads, in pertinent part:

> (a) *Character evidence generally*—Evidence of a person's character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) *Character of accused*—Evidence of a pertinent trait of his character offered by an accused, or the prosecutor to rebut the same . . . .

N.C.G.S. § 8C-1, Rule 404 (1988).

Rule 405 reads, in pertinent part:

> (a) *Reputation or opinion*—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. *On cross-examination, inquiry is allowable into relevant specific instances of conduct* . . . .

N.C.G.S. § 8C-1, Rule 405 (1988) (emphasis added).

Rule 404 is a limited codification of the long-established principle that once a defendant in a criminal case "puts his character in evidence," the prosecution may offer evidence of a defendant's bad character. *State v. Gappins*, 320 N.C. 64, 69-70, 357 S.E.2d 654, 658; *see also* 1 Henry Brandis Jr., *Brandis on North Carolina Evidence* § 104 (3d ed. 1988). As stated in *Gappins*, however, Rule 404(a)(1) limits the admission of character evidence to "pertinent traits" of character. *Id.* Rule 405, in contrast to the common law, specifically allows the prosecutor to cross-examine a witness concerning relevant, specific instances of conduct. *Id.* at 70, 357 S.E.2d at 658.

In this case, defendant "put his character in evidence" during direct examination by testifying in detail about himself and his relationship with the victim. Specifically, defendant painted a picture of himself as a level-headed, peaceful individual who constantly

was fending off verbal and physical attacks from the victim. It was therefore proper for the prosecutor to cross-examine defendant concerning this "pertinent" trait of character. We hold that the trial court did not err by allowing the prosecutor to elicit details of the prior assaults to rebut defendant's direct testimony.

Our holding is also consistent with two other well-established principles of law. The first principle is expressed in a pre-Rule case, *State v. Albert*, 303 N.C. 173, 277 S.E.2d 439 (1981), as follows:

> [T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially. (Citations omitted.)

Id. at 177, 277 S.E.2d at 441. The second is explained by this Court in *State v. Warren*, 327 N.C. 364, 395 S.E.2d 116 (1990):

> Generally, much latitude is given counsel on cross-examination to test matters related by a witness on direct examination. *State v. Burgin*, 313 N.C. 404, 329 S.E.2d 653 (1985). The scope of cross-examination is subject to two limitations: (1) the discretion of the trial court; and (2) the questions offered must be asked in good faith. *State v. Dawson*, 302 N.C. 581, 585, 276 S.E.2d 348, 351 (1981). Furthermore, the questions of the State on cross-examination are deemed proper unless the record discloses that the questions were asked in bad faith. *Id.* at 586, 276 S.E.2d at 352.

Id. at 373, 395 S.E.2d at 121-22.

Defendant also argues that the trial judge erred by allowing the prosecutor to require defendant to read from the arrest warrants. Defendant cites *State v. Williams*, 279 N.C. 663, 185 S.E.2d 174, to support his argument. In *Williams*, the defendant was impeached by evidence that he had been indicted for crimes other than the one for which he was on trial. Here, defendant had admitted pleading guilty to the crimes prior to being questioned about the arrest warrants. Nevertheless, we believe that the better practice is to limit cross-examination of prior instances of conduct to leading questions concerning the conduct itself, rather than requiring a defendant to read to the jury the accusations contained in

an arrest warrant. In any event, because the same details could have been elicited through proper leading questions, the defendant here can show no harm.

[8] Defendant's fifth argument is that he is entitled to a new trial because the trial court permitted the prosecutor to conduct what defendant terms an insulting cross-examination. On direct examination, defendant was asked whether or not he remembered firing into the mobile home, and defendant answered, "I don't remember." On cross-examination, as defendant explained how he entered Barbour's mobile home, the district attorney repeatedly asked, over numerous objections, why defendant could remember some details about the incident but could not remember "shooting into the end of the trailer[.]" Given the broad discretion accorded the trial court in the control of the scope and the course of cross-examination, we find no abuse of discretion. *See generally State v. Warren*, 327 N.C. 364, 395 S.E.2d 116.

[9] Defendant's sixth contention is that he is entitled to a new trial in the first-degree burglary case because the trial court refused to submit to the jury a possible verdict of misdemeanor breaking or entering. Defendant asserts that the evidence shows that he had no felonious intent when he entered the mobile home, only that he wanted to talk to the victim. Defendant specifically denied that he had any intent to restrain, kill, terrorize, or harm the victim in any way when he went to the trailer, and insists that his entry was consensual. The trial court denied defendant's request to submit to the jury the lesser included offense instruction of misdemeanor breaking or entering and instead instructed the jury that it could find defendant guilty of first-degree burglary or not guilty. We conclude that the trial court's instructions were not erroneous.

Defendant's reliance on the following cases as supporting his contention that the lesser included offense of misdemeanor breaking or entering should have been submitted in this case is misplaced since there was no evidence of misdemeanor breaking or entering. *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985) (no error in not submitting lesser included offenses of first-degree rape since the defendant's statement did not amount to a denial of penetration *and* there was *no evidence* to support a lesser included offense; also, no error in not submitting misdemeanor breaking or entering where defendant's statement did not create a conflict as to whether

defendant intended to commit a felony when he entered the victim's mobile home); *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983) (no error in not submitting second-degree murder where *no evidence* to support it); *State v. Jones*, 304 N.C. 323, 283 S.E.2d 483 (1981) (no error not to submit second-degree rape or second-degree sexual offense even though evidence was conflicting on the presence of a shotgun since there was *no evidence* defendant used any force other than the shotgun); *State v. Drumgold*, 297 N.C. 267, 254 S.E.2d 531 (1979) (new trial granted in first-degree rape case because the trial court failed to submit lesser included offense of second-degree rape where evidence was conflicting as to whether the defendant had a gun on date of offense and *defendant presented evidence* from which the jury could have found that victim submitted out of fear or duress).

A well-established principle of law is that a trial judge must instruct the jury as to a lesser-included offense of the crime charged when there is evidence from which the jury could find that the defendant committed the lesser offense. *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976). When any evidence presented at trial would permit the jury to convict defendant of the lesser included offense, the trial court must instruct the jury regarding the lesser included offense. Failure to so instruct the jury constitutes reversible error not cured by a verdict of guilty of the offense charged. *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986). The key to submission of a lesser included offense is whether there is evidence to support it. *State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991); *State v. Arnold*, 329 N.C. 128, 404 S.E.2d 822 (1991).

Here, there was no evidence to support misdemeanor breaking or entering. The State's evidence tended to show that defendant forcibly entered the dwelling house of another, while persons were in actual occupation of the dwelling, in the nighttime, with the intent to commit a felony therein. If the State's evidence is believed, defendant is guilty of first-degree burglary. Defendant's evidence tended to show that he knocked on the door, entered the mobile home with permission of the occupant of the dwelling, and that the victim voluntarily accompanied him outside. If defendant's evidence is believed, he is not guilty of burglary, misdemeanor breaking or entering, or any other crime. Thus, the trial judge correctly instructed the jury that it could find defendant guilty of first-degree burglary or not guilty. There was no error in failing

to submit a possible verdict of misdemeanor breaking or entering since there was no evidence to support this offense.

[10] Defendant's seventh issue involves the trial court's instructions to the jury on theories of guilt in the felony murder and burglary cases. Specifically, defendant argues that there was no evidence to support the trial court's instructions that defendant committed the underlying kidnapping felony for the purpose of terrorizing the victim or that defendant did not release the victim in a safe place. Under the court's instructions, the jury could find defendant guilty of first-degree burglary if it found that defendant broke and entered the mobile home with the intent to commit the crime of kidnapping. Kidnapping was also the underlying felony in the charge of first-degree murder based on the felony murder rule. Thus, instructions which permitted the jury to find that defendant committed the kidnapping for the purpose of terrorizing the victim or that defendant did not release the victim in a safe place would constitute error if unsupported by the evidence. We conclude that the evidence supports both jury instructions.

Defendant contends that there was no evidence that he kidnapped the victim for the purpose of terrorizing her or that he had an intent to do so at the time he broke and entered the mobile home. The evidence, when viewed in the light most favorable to the State, clearly belies defendant's contention. The evidence showed, *inter alia*, that defendant forced his way into the trailer and forced the victim at gunpoint to accompany him against her will. One witness testified that from fifteen to thirty to forty-five minutes elapsed between the time the victim left the trailer and when the first shot was heard. According to Charles Barbour, as defendant faced the victim in the parking lot, the victim was hollering and screaming for him to leave her alone. Some time elapsed before defendant fired the first shot. Defendant cocked, breached, or loaded his gun and struck the victim in the mouth with the butt of the shotgun and then across the face with the barrel end, knocking her to the ground. He then fired a shotgun blast into the victim as he held the victim's ankle in one hand and the shotgun in the other. Reasonable jurors could find that defendant kidnapped the victim for the purpose of terrorizing her.

Defendant further argues that the evidence fails to show that he did not release the victim in a safe place. We disagree. In *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983), this Court

held that the release in a safe place portion of the statute required a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety. *Id.* at 262, 307 S.E.2d at 351. Here, defendant removed the victim from the trailer while holding a shotgun. He fired a shotgun blast into her body at close range, while discussing their relationship in the empty lounge parking lot in the early morning hours. He then walked to his vehicle, on the way firing a third shell into the trailer, and drove off, shouting, "You can come and get her now. She's yours." These actions do not indicate a conscious act on the part of the defendant to assure that his victim was released in a safe place. To the contrary, his actions demonstrate a conscious disregard for the victim and her safety. Thus, the evidence supports the trial court's instructions on this element of the offense.

[11] In defendant's eighth issue, he argues essentially that the trial judge erred by not instructing the jury that in order to convict the defendant of kidnapping, the jury must find that the removal of the victim from the trailer was "a separate, complete act, independent of and apart from the murder." N.C.P.I.—Crim. 210.25 (1990). Because kidnapping was the underlying felony which supported both the felony-murder and first-degree burglary convictions, defendant argues that he is entitled to a new trial in each case.

Defendant bases his argument on this Court's reasoning in *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986). In *Prevette*, the victim died from suffocation after being bound and gagged. The Court held that it was improper to convict the defendant of both kidnapping and murder because the "restraint essential to the kidnapping conviction was an inherent and inevitable feature of this particular murder." *Id.* at 157, 345 S.E.2d at 165. The Court vacated the kidnapping conviction because to convict the defendant of murder and kidnapping would implicate defendant's double jeopardy rights. *Id.* at 158, 345 S.E.2d at 166.

Our case is clearly distinguishable. Here, the kidnapping charge was premised on the victim being removed from the mobile home. The victim's removal from the mobile home preceded the murder. Simply stated, defendant could have easily killed the victim in the mobile home, but instead removed her at gunpoint to the parking lot prior to the killing. Unlike *Prevette*, the removal of the victim in this case was not an inherent and inevitable feature of the murder.

Based on the facts of this case, therefore, the trial judge was not required to instruct the jury that it must find the kidnapping to be separate and apart from the murder. The facts of this case, unlike *Prevette*, do not raise the possibility that defendant could be convicted twice for the same act.

[12] We find defendant's ninth issue, that the trial court erroneously instructed the jury on theories of guilt that were not supported by the evidence, to be without merit. The trial court instructed the jury that it could infer the first-degree murder elements of premeditation and deliberation from the following circumstances:

> Neither premeditation nor deliberation is usually susceptible of direct proof. They may be proved by proof of circumstances from which they may be inferred, such as the lack of provocation by the victim, conduct of the defendant before, during, and after the killing, threats and declarations, use of grossly excessive force, infliction of lethal wounds after the victim is felled, brutal or vicious circumstances of the killing, or manner in which or means by which the killing was done.

Defendant contends that the instruction was improper because there was "absolutely no evidence" to support a finding that defendant used grossly excessive force or inflicted lethal wounds after the victim was felled.

It is well settled that instructions are not improper if based upon "some reasonable view of the evidence." *State v. Buchanan*, 287 N.C. 408, 421, 215 S.E.2d 80, 88 (1975). *See also State v. Zuniga*, 320 N.C. 233, 262, 357 S.E.2d 898, 917 (1987) (instruction proper if supported by competent evidence). Charles Stephen Barbour testified that he saw defendant strike the victim with the butt of the shotgun followed by a strike to her face with the barrel end. The blows knocked her to the ground. After the victim fell, defendant grabbed her left ankle with his left hand, and the gun discharged. We believe that such action, involving a killing by a shotgun blast so close to the victim, constitutes grossly excessive force. Given this testimony, we conclude that there was competent evidence to support the instruction.

[13] In his tenth issue, defendant argues that he is entitled to a new trial because the trial court's "highest legal aim" jury instruc-

tion was erroneous as a matter of law. We find this position to be meritless. The trial court instructed the jury verbatim from the pattern instruction as follows:

> Now, ladies and gentlemen, the highest aim of every legal contest is the ascertainment of the truth. Somewhere within the facts of every case the truth abides, and where truth is, justice steps in garbed in its robes and tips the scales. In this case you have no friend to reward, you have no enemy to punish, you have no anger to appease, or sorrow to assuage. Yours is the solemn duty to let your verdict speak the everlasting truth.

Defendant contends this instruction permitted the jurors to convict him without proof beyond a reasonable doubt, which effectively deprived him of the presumption of innocence. Defendant argues that if the State fails to prove the defendant guilty beyond a reasonable doubt, the "truth" is irrelevant. According to defendant, this instruction improperly shifted the jury's focus from determining guilt beyond a reasonable doubt to determining the truth.

Judge Allen's instructions came verbatim from the criminal Pattern Jury Instructions. *See* N.C.P.I.—Crim. 101.36. Prior to that instruction, as part of his charge, Judge Allen instructed that "[t]he State must prove to you that the defendant is guilty beyond a reasonable doubt." The court then defined "reasonable." Moreover, Judge Allen repeated the reasonable doubt standard throughout the jury charge. Clearly, the record is replete with the trial court's instructions to the jury on reasonable doubt. When construed as a whole, no reasonable juror would have been misled. *See State v. Bailey*, 280 N.C. 264, 185 S.E.2d 683, *cert. denied*, 409 U.S. 948, 34 L. Ed. 2d 218 (1972). We conclude that defendant establishes no possibility that the trial judge confused the jurors concerning the reasonable doubt standard, and we reject his assignment of error.

[14] Defendant's final contention is that he is entitled to a new trial in the burglary case because he could not waive indictment, and the trial court instructed the jury on a theory not charged in the indictment. Defendant argues in support of this contention that on 3 May 1989 he was indicted for first-degree burglary with the intent to commit murder as the only felonious intent alleged. On 22 December 1989, the prosecutor filed a superseding information in the burglary charge alleging the additional felonious intent

to commit kidnapping. Defendant signed a waiver of indictment on the information, and during instructions on the burglary charge, the only theory the trial court submitted to the jury was that defendant intended to commit kidnapping. Defendant notes that an indictment may not be waived in a capital case. N.C.G.S. § 15A-642(b) (1988). He argues that if he could not waive indictment on the burglary charge because this was a "capital case," the trial court's submission of the kidnapping theory was not supported by the indictment, and he is entitled to a new trial.

We do not agree with defendant's assertion that the burglary charge was a "capital case." Joinder of the burglary charge for trial with the capital crime of murder in the first degree did not transform the burglary charge into a capital case as that term is used in N.C.G.S. § 15A-642(b). While some errors made in a trial where capital and noncapital charges are tried jointly may require a new trial on all charges, *see State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988), this does not turn a noncapital felony into a capital case in which indictment cannot be waived. Indictment or waiver occurs before trial and is a distinct, separate, and independent event in each case. If the legislature had intended to apply the no-waiver-of-indictment rule to noncapital felonies joined with a capital felony, it could easily have done so by adding that circumstance to the other circumstances in which a defendant may not waive an indictment. The legislature did not do so. As the State points out, "the nature of the capital charge requires the conscience of the community to consider a formal accusation of such against the defendant prior to trial." Here, defendant's interest in a noncapital charge is sufficiently protected without instituting a no-waiver-of-indictment rule, and the statute plainly provides otherwise. Because defendant could properly waive indictment as to the noncapital felony of first-degree burglary, this assignment of error is without merit.

For all of the above reasons, we conclude that defendant's trial was free of prejudicial error, and a new trial is not warranted.

No error.

STATE OF NORTH CAROLINA v. OTIS REGINALD LYONS

No. 186A91

(Filed 6 December 1991)

Assault and Battery § 86 (NCI4th); Criminal Law § 904 (NCI4th)—secret assault—two victims—disjunctive instructions—denial of unanimous verdict

The trial court's disjunctive instructions in a prosecution for malicious assault in a secret manner with a deadly weapon with intent to kill which permitted the jury to return a guilty verdict if it found that defendant committed each element of the offense "upon Douglas Jones and/or Preston Jones" resulted in an uncertain and thus defective guilty verdict in violation of defendant's constitutional right to a unanimous verdict since the gravamen of the offense of maliciously assaulting in a secret manner is the assaulting of a particular individual in that manner; the jury could have returned a verdict of guilty without all twelve jurors agreeing that defendant assaulted a particular individual; and an examination of the whole of the trial does not lead to the conclusion that any ambiguity raised by the flawed instructions was removed. Art. I, § 24 of the N. C. Constitution.

Am Jur 2d, Assault and Battery §§ 18, 107; Trial § 1753.

Justice MEYER dissenting.

Justices MITCHELL and WEBB join in this dissenting opinion.

APPEAL by the State pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 102 N.C. App. 174, 401 S.E.2d 776 (1991), which reversed a judgment of imprisonment entered by *Hudson, J.*, at the 27 November 1989 Criminal Session of Superior Court, DURHAM County, upon a jury verdict finding defendant guilty of secret assault, and which ordered a new trial. Heard in the Supreme Court 12 November 1991.

Lacy H. Thornburg, Attorney General, by Charles J. Murray, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by M. Patricia DeVine, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Justice.

On 1 May 1989 defendant was indicted on counts of malicious assault in a secret manner with a deadly weapon with intent to kill, assault with a deadly weapon, conspiracy to commit the offense of assault with a deadly weapon with intent to kill inflicting serious injury, and two counts of assault with a deadly weapon with intent to kill inflicting serious injury. On 2 October 1989, without prejudice to the State, Judge Britt granted defendant's motion to dismiss the charges for denial of a speedy trial under the Speedy Trial Act, former N.C.G.S. § 15A-701 *et seq.* On 16 October 1989, defendant was reindicted on the same charges. On 27 November 1989, defendant was tried and found guilty on all charges except the two counts of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court imposed a sentence of twenty years for the secret assault. The other assault charge and the conspiracy charge were consolidated and the court imposed a sentence of ten years to commence at the expiration of the twenty-year sentence.

Defendant appealed to the Court of Appeals, which awarded a new trial because the trial court erred in its instructions on the charge of secret assault. Judge Cozort dissented, and the State exercised its right to appeal based on the dissent. N.C.G.S. § 7A-30(2) (1989). The only issue is whether the instructions on secret assault resulted in a fatally uncertain verdict. We conclude that they did, and we thus affirm the Court of Appeals.

The offenses charged arose from incidents in the late evening and early morning hours of 18-19 March 1989. That evening, a North Carolina Central University (NCCU) fraternity was holding a party at an establishment called the Klubb in Durham. A passing car almost hit Danny McKay while he was standing outside the nightclub with a fraternity brother. The car stopped, defendant got out, and he approached McKay, telling him to "get the fuck out of the street." When McKay's fraternity brother responded to defendant, defendant pointed his hand in the fraternity brother's face, and the brother knocked it away.

Defendant then turned to his partner in the car and asked for his gun. A "very large handgun" was handed to defendant, who held it up to McKay's head while saying "now, what's up" and slapping McKay with his free hand. McKay did not respond, and defendant re-entered the car and drove off.

McKay then re-entered the club and reported the incident to off-duty police officers who were working as security guards for the club. When defendant entered the club about ten minutes later, McKay approached him and struck him, beginning a fight between the two men. The fight was broken up and defendant was escorted outside by the security guards while McKay and his fraternity brothers were retained inside. During questioning by the security guards, defendant pointed at McKay and said, "That's okay, wait, I'm going to burn you; I'm going to burn you." Another witness testified that she heard defendant say, "I'm going to get you, man, I'm going to get you, I want you; I'm going to get you." The guards kept McKay and his fraternity brothers at the club until defendant had left. McKay did not see defendant again that night.

A few minutes later, McKay and approximately ten fraternity brothers left the club and walked down the street. Suddenly they heard shots. Two to six shots were fired. McKay was not hit, but two of his fraternity brothers, Douglas Jones and Preston Jones, were wounded.

Defendant's girlfriend, Lynette Osborne, testified that she and a friend, Toni Lowery, were standing outside the club when defendant left after his fight with McKay. Defendant, whose shirt was bloody, said, "[T]hey jumped me, they got me." About this time, defendant's friends, Tim Little and Wallace Daye, also appeared outside the club. Daye went into the club, then came back out and said to defendant, "I've seen 'em . . . I seen who they is." Osborne, Lowery, and defendant then walked to the parking lot and got in defendant's car. A few minutes later, Daye approached the car, opened the door, and said, "Here they come Bop (defendant's nickname), we're fixing to get them." Little said, "I'm going to burn them, Bop, I'm going to burn them." According to Osborne, defendant replied that it was not worth it. Osborne then saw Daye loading a gun. She jumped from the car and saw Little hiding some distance away. Osborne testified that Little fired his gun twice and Daye fired his once, but defendant did not shoot anyone.

Another witness, Tonya Weaver, testified that she was at the club that night and was walking with a friend a short distance ahead of the fraternity brothers as they left the club. Weaver saw defendant, Little, and Daye running from the parking lot. They ran past her, defendant "brisked" her, and she saw a silver

handle, which appeared to be a gun handle, sticking from defendant's jacket pocket. The three men jumped into some nearby bushes. The fraternity brothers approached and "[t]hey walked right into the gunshots." Weaver heard approximately five gunshots, and she was able to see the flashes of more than two guns as they fired.

A police officer testified that he responded to a call reporting a disturbance at the club. After checking the gunshot victims, he learned from another officer that a car in the parking lot was believed to be that of the people who did the shooting. When officers checked inside the car, they found two pieces of paper bearing defendant's name, as well as a .45-caliber automatic handgun on the rear passenger floorboard.

Defendant offered evidence, including his own testimony, tending to show that McKay provoked the initial confrontation in front of the club, though defendant admitted threatening McKay with a gun and slapping him. After the first confrontation with McKay, defendant said he went somewhere and had approximately nine mixed drinks before returning to the Klubb. He had two guns in his car, his own and one belonging to Little. Defendant testified that he told Daye not to "burn" McKay and his fraternity brothers, as Daye was threatening to, because "they gonna think I did it." While defendant testified that he actually did not see who did the shooting, several of defendant's witnesses stated that Little and Daye fired the shots.

Little testified that neither defendant nor Daye was involved in the shooting, that he, Little, ran down off the parking deck toward the crowd of fraternity brothers with two men other than defendant or Daye, and that he, Little, fired the only three shots fired. The State attempted to impeach Little by questioning him about his close friendship with defendant.

The only issue is whether the instructions in a disjunctive form on the charge of maliciously assaulting in a secret manner were fatally ambiguous, thereby resulting in an uncertain verdict in violation of defendant's right to a unanimous verdict. N.C. Const. art. I, § 24; N.C.G.S. § 15A-1237(b) (1988). The portion of the indictment pertinent to the instructions reads as follows:

> The . . . defendant . . . unlawfully, willfully and feloniously did in a secret manner maliciously commit an assault and battery with a deadly weapon, a handgun, upon Douglas Jones

and Preston Jones by waylaying or otherwise with intent to kill inflicting serious bodily injury. [Emphasis added.]

In contrast to the conjunctive form of the indictment, the trial court instructed the jury as follows:

> Now, I charge for you to find the defendant guilty of malicious assault and battery in a secret manner with a deadly weapon with the intent to kill, the State must prove five things beyond a reasonable doubt.
>
> First, that the defendant committed an assault and battery upon Douglas Jones *and/or* Preston Jones by intentionally shooting him with a handgun.
>
> Second, that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. Once again, a handgun is a deadly weapon.
>
> Third, that the defendant committed the assault and battery upon Douglas Jones *and/or* Preston Jones in a secret manner. The assault and battery would be in a secret manner if Douglas Jones *and/or* Preston Jones was unaware of the defendant's intent to commit the assault and battery until it was too late to defend himself.
>
> Fourth, that the defendant had the intent to kill Douglas Jones *and/or* Preston Jones.
>
> And fifth, that the defendant acted maliciously. That is with ill-will, hatred or animosity towards Douglas Jones *and/or* Preston Jones. [Emphasis added.]

The Court of Appeals majority held that under *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), the disjunctive instructions resulted in an ambiguous and uncertain verdict in violation of defendant's right to be convicted by a unanimous jury. Judge Cozort, dissenting, argued that *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), rather than *Diaz*, controls. We agree with the majority in the Court of Appeals.

There is a critical difference between the lines of cases represented by *Diaz* and *Hartness*. The former line establishes that a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because

it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. The latter line establishes that if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied. The instructions here fall into the *Diaz* line, in which a disjunctive instruction leads to an ambiguous verdict.

The defendant in *Diaz* was charged with trafficking in marijuana in violation of the following statute:

> Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds (avoirdupois) of marijuana shall be guilty of a felony, which felony shall be known as "trafficking in marijuana" . . . .

N.C.G.S. § 90-95(h)(1) (1990). As in the case at bar, the instructions were in the disjunctive, namely, whether the defendant "knowingly possessed or knowingly transported" marijuana. *Diaz*, 317 N.C. at 553, 346 S.E.2d at 493-94. We held that the instructions deprived the defendant of his right to be convicted by a unanimous jury. We first noted that the sale, manufacture, delivery, transportation, and possession of fifty pounds or more of marijuana are separate trafficking offenses for which a defendant may be separately convicted and punished. *Id.* at 554, 346 S.E.2d at 494. We then reasoned that by instructing the jury as it did the trial court submitted two possible crimes to the jury, of either or both of which, due to the disjunctive instruction, the jury could have found the defendant guilty. *Id.* We concluded that it was impossible to determine whether the jurors unanimously found that the defendant possessed the drugs, transported them, both possessed and transported, or whether some jurors found that the defendant possessed and some found that he transported. *Id.*

Diaz was one in a line of cases which establishes that a verdict of guilty following submission to the jury in the disjunctive of two or more possible crimes in a single issue is ambiguous and fatally defective. *Id.* at 553, 346 S.E.2d at 494; *State v. McLamb*, 313 N.C. 572, 577, 330 S.E.2d 476, 480 (1985); *State v. Albarty*, 238 N.C. 130, 133, 76 S.E.2d 381, 383 (1953). In *Albarty*, the defendant was charged under N.C.G.S. § 14-291.1, which made it a misdemeanor to "sell, barter or cause to be sold or bartered, any ticket . . . in any lottery . . . ." The Court held that "barter" and "sell" as used in the statute are not synonymous, and that an accused

may violate the statute in any of four ways: 1) by selling; 2) by bartering; 3) by causing another to sell; or 4) by causing another to barter. *Albarty*, 238 N.C. at 132, 76 S.E.2d at 383. Because the criminal complaint was drawn in the disjunctive, the verdict was invalid for uncertainty in failing to be sufficiently definite and specific in identifying the crime of which the defendant was convicted. *Id.* at 133, 76 S.E.2d at 383.

Similarly, in *McLamb* we held that a verdict that the defendant "feloniously did sell *or* deliver" cocaine is "fatally defective and ambiguous." *McLamb*, 313 N.C. at 577, 330 S.E.2d at 480. We did so because sale and delivery are distinct and separate offenses. *Id.* (citing *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976)). Indeed, the State conceded the point and did not even seek review of that portion of the Court of Appeals decision. *Id.*

In *McLamb*, the defendant, too, made a concession, which leads into the *Hartness* line of cases. He also was charged with *possession* with intent to "sell or deliver." Cognizant of the Court's then recent opinion in *State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985), he conceded that the portion of the indictment charging him with the possession crime was not fatally ambiguous. *Id.*

Creason, which preceded *Hartness* by five years, interpreted N.C.G.S. § 90-95(a)(1), which makes it unlawful for anyone "[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance . . . ." N.C.G.S. § 90-95(a)(1) (1990). The Court held that the intent of the legislature in drafting this statute was twofold: "(1) to prevent the manufacture of controlled substances, and (2) to prevent the transfer of controlled substances from one person to another." *Creason*, 313 N.C. at 129, 326 S.E.2d at 28. The transfer which the legislature sought to prevent could be accomplished by either a sale or a delivery; thus, in the context of this statute, the possession of narcotics with the intent to "sell or deliver" is one offense. *Id.* The Court therefore concluded that "sell" and "deliver" are synonymous within the intent of this legislation, as the gist of the offense is possession with the intent to transfer the contraband. *Id.* at 130, 326 S.E.2d at 28; *cf. State v. Moore*, 327 N.C. 378, 382-83, 395 S.E.2d 124, 127 (1990) (while recognizing that "sell" and "deliver" are not synonymous, the Court held that the gravamen of the offense at issue was the transfer of the drug; unanimity concerns thus were not implicated by the method of transfer). Because the defendant

was faced with only *one* offense—possession of LSD with intent to sell or deliver—the Court held that the disjunctive phrasing of the verdict was not improper and the verdict did not lack unanimity. *Creason*, 313 N.C. at 130-31, 326 S.E.2d at 29.

While holding that possession with intent to sell or deliver is one offense, the Court reiterated that the sale and delivery of narcotics are separate offenses. *Id.* at 129, 326 S.E.2d at 28. It found that the grammatical construction of section 90-95(a)(1) supported its conclusion that intent to transfer is the gravamen of the offense of possession with intent to transfer. That construction sets off "sell or deliver" by commas to form *a* phrase that modifies the required intent. *Id.* at 129-30, 326 S.E.2d at 28.

In *Hartness*, the defendant was charged with taking indecent liberties with children. A person is guilty of this offense if he

> [w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire . . . .

N.C.G.S. § 14-202.1(a)(1) (1986). The instructions were:

> An indecent liberty is an immoral, improper, or indecent touching or act by the defendant upon the child, or an inducement by the defendant of an immoral or indecent touching by the child.

Hartness, 326 N.C. at 563, 391 S.E.2d at 178. One of the child victims testified that the defendant both touched him and made him touch the defendant. The defendant contended that the disjunctive instructions of the trial court rendered the verdict potentially nonunanimous, as the jury could have split on which sexual misconduct took place. We rejected the defendant's contention and declined to apply the *Diaz* analysis to instructions given in indecent liberties cases.

The reasoning of *Diaz* is misapplied in an indecent liberties case, we said, because unlike the trafficking statute at issue in *Diaz*, which listed activities in the disjunctive, each of which is a discrete criminal offense, the indecent liberties statute simply proscribes " 'any immoral, improper, or indecent liberties.' " *Hartness*, 326 N.C. at 564-65, 391 S.E.2d at 179. Under that statute, even if some jurors found that the defendant engaged in one kind of sexual misconduct, while others found that he engaged in another,

"the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of 'any immoral, improper, or indecent liberties.' " *Id.* at 565, 391 S.E.2d at 179.

As in *Creason*, which we cited in *Hartness*, we found that the gravamen of the offense at issue was its *intent*—the performing of some sexual act with a child " 'for the purpose of arousing or gratifying sexual desire.' " *Id.* at 567, 391 S.E.2d at 180. As in *Creason*, we held that the particular act performed (in *Creason* the sale or delivery) was immaterial because the evil the legislature sought to prevent was the taking of any kind of sexual liberties with a child in order to arouse or gratify sexual desire. *Id.*

In *Hartness*, the Court expressly recognized a line of cases, in which *Hartness* and *Creason* fall, "in which a single wrong is established by a finding of various alternative elements." *Id.* at 566, 391 S.E.2d at 180. The Court contrasted that line with the line represented by *Diaz*, in which the risk of nonunanimous verdicts arises when instructions are given in the disjunctive because the statutes at issue list activities, all of which are discrete criminal offenses. *Hartness*, 326 N.C. at 564-65, 391 S.E.2d at 179.

The other case the Court expressly placed in the *Hartness* line is *Jones v. All American Life Ins. Co.*, 312 N.C. 725, 325 S.E.2d 237 (1985). In that case we held that submission of a disjunctive issue of whether the plaintiff killed or procured the killing of an insured in an action on a life insurance policy did not prevent a unanimous verdict. We so held because it was clear from the instructions that all twelve jurors had to find that the plaintiff participated in the insured's death by one or the other alternative means by which the plaintiff would be barred from recovery of the insurance proceeds under the common law "slayer" doctrine. *Jones*, 312 N.C. at 738, 325 S.E.2d at 244. We reasoned that "[b]ecause plaintiff's participation in the killing of the insured by either of the two alternatives bars her from recovering . . . , it is only necessary that the jury agree unanimously that she so participated." *Id.*

Having carefully reviewed the two lines of cases, we conclude that the *Diaz* rather than the *Hartness* analysis applies here. As in *Diaz*, the trial court in this case instructed the jury disjunctively, permitting consideration in one issue of two possible crimes for which defendant could be separately convicted and punished: (1) a malicious secret assault on Douglas Jones, and (2) a malicious

secret assault on Preston Jones. In fact, the "and/or" instructions permitted four possible verdicts—1) guilty of assault on Douglas Jones; 2) guilty of assault on Preston Jones; 3) guilty of assault on both; or 4) guilty of assault on Douglas in the view of some jurors, while guilty of assault on Preston in the view of others.

The instructions thus were fatally ambiguous because the jury could have returned a verdict of guilty without all twelve jurors agreeing that defendant assaulted a particular individual. For example, six jurors could have found that defendant secretly assaulted Douglas Jones while the other six found that defendant assaulted Preston Jones. Because it is impossible to determine what the jury found and whether the verdict was unanimous, we hold that the instructions resulted in an uncertain and thus defective verdict in violation of defendant's constitutional right to be convicted by a unanimous jury.

Further, the gravamen of the offense of maliciously assaulting in a secret manner is the assaulting of a particular individual in that manner. In contrast, the gravamen of the offenses discussed in the *Hartness-Creason* line of cases—the taking of indecent liberties with children for the purpose of arousing or gratifying sexual desire and the possession of drugs with the intent to place them into commerce by transferring them through either sale or delivery—is the intent or purpose of the defendant. *Hartness*, 326 N.C. at 567, 391 S.E.2d at 180; *Creason*, 313 N.C. at 129, 326 S.E.2d at 28. Not only is the particular conduct not the gravamen of the offense, but it is only one of alternative ways to establish a single wrong. *Hartness*, 326 N.C. at 566, 391 S.E.2d at 180; *Creason*, 313 N.C. at 129-30, 326 S.E.2d at 28; *Jones*, 312 N.C. at 738, 325 S.E.2d at 244. The disjunctive instructions in *Diaz* and in the case at bar were fatally defective because they would allow a jury to return a verdict of guilty for a single offense if the jury found that the defendant committed either of two underlying acts, either of which is in itself a separate crime.

The Court noted in *Diaz* that the submission of instructions in the disjunctive will not always render a resulting verdict fatally ambiguous. In some cases, "[a]n examination of the verdict, the charge, the initial instructions by the trial judge to the jury . . . , and the evidence may remove any ambiguity created by the charge." *Diaz*, 317 N.C. at 554, 346 S.E.2d at 494. An example is *State v. Foust*, 311 N.C. 351, 317 S.E.2d 385 (1982), *overruled*

by State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986), *revived by State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990).[1]

The indictment in *Foust* charged the defendant with unlawfully engaging in a sexual act with the victim, without specifying which act was performed. The State's evidence tended to show the commission of anal intercourse and fellatio. The trial court instructed the jury that the first element the State had to prove was that a sexual act occurred, which the trial court defined as "oral sex or anal sex." The trial court went on to stress the necessity of unanimity.

While this Court agreed with the defendant that it appeared from the disjunctive instructions that the jury could have convicted him without being unanimous as to what sex act(s) he performed, it held that the whole of the instructions

> obviously required a verdict of not guilty if all twelve jurors were not satisfied beyond a reasonable doubt that the defendant participated in either fellatio or anal intercourse, or both. We believe the evidence amply sustains a conviction for either or both offenses. Nothing in the record indicates any confusion, misunderstanding or disagreement among the jury members regarding the unanimity of the verdict. The convincing inference is that the jury unanimously agreed that defendant engaged in both oral and anal sex.

Foust, 311 N.C. at 360, 317 S.E.2d at 390. In *Foust*, therefore, the Court concluded that any ambiguity created by the disjunctive charge was removed.

The case at bar does not permit the same conclusion. Unlike the evidence in *Foust*, which provided a clear basis for concluding that the jurors agreed that defendant engaged in both oral and anal sex, the evidence here is sketchy and unclear. No one testified that he or she actually saw defendant fire into the crowd; the strongest evidence against defendant was the testimony of Tonya Weaver, who said she saw a gun handle emerging from defendant's

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1. *Foust* was temporarily overruled in *Diaz*, 317 N.C. at 555, 346 S.E.2d at 495, because the Court saw it as inconsistent with the *Diaz* result. Later, however, the Court revived *Foust*. *Hartness*, 326 N.C. at 565-66, 391 S.E.2d at 179-80. It is now clear that *Foust* is not at variance with *Diaz*, but is one of those cases alluded to therein in which an overall examination of the trial reveals that any ambiguity created by the flawed instructions is removed.

pocket and saw flashes from more than two guns. Countering her testimony was testimony from defendant, his girlfriend, and Little, who confessed to firing all the shots. The shooting occurred late at night in a crowd scene. No direct evidence established that defendant in fact shot both victims. Clearly, this is not the kind of exceptional case where an examination of the whole of the trial leads to a conclusion that any ambiguity raised by the flawed instructions is removed.

Our holding that the disjunctive instructions here were fatally defective is further grounded in the statute defendant is charged with violating. It provides:

> If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill *such other person*, notwithstanding *the person* so assaulted may have been conscious of the presence of his adversary, he shall be punished as a Class F felon.

N.C.G.S. § 14-31 (1986) (emphasis added). If the language of the statute was merely that a person is guilty of this crime if he "maliciously commit[s] an assault and battery upon *another*," the State might have a stronger argument. The statute specifies, however, that a person has to assault another "with intent to kill *such other person*," and it refers explicitly to "*the person* so assaulted." This language is clearly indicative of legislative intent that to find a defendant guilty of this offense, the jury must find unanimously that he committed the assault on a particular individual.

For the reasons stated, we affirm the decision of the Court of Appeals, which reverses the judgment of the trial court on the secret assault charge and remands the case to the Superior Court, Durham County, for a new trial on that charge.

Affirmed.

Justice MEYER dissenting.

I dissent from the majority opinion because I do not agree that the trial court's instructions on the charge of malicious assault in a secret manner with a deadly weapon ("secret assault") rendered the jury's verdict fatally ambiguous. The majority seems to lose sight of the fact that there was no question whatsoever of the

identity of the two victims and that *both* were wounded. The mere possibility that some jurors may have found defendant guilty based on a belief that one of the victims was shot and other jurors may have found him guilty based on a belief that the other victim was shot does not affect the unanimity of the jury's decision that defendant committed a secret assault. Moreover, the evidence presented at defendant's trial clearly rebuts the possibility that the trial court's instructions, even if error, may have resulted in a nonunanimous verdict. Because the jury unanimously found defendant guilty of secret assault, the majority errs in concluding that defendant is entitled to a new trial.

I.

In our recent opinion in *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), this Court held that it was not error to instruct the jury disjunctively as to various alternative acts, either of which would establish an element of the offense charged. Although some of the jurors may find the defendant guilty based on their belief that the defendant committed act *A* and some may base their vote of guilty on the defendant's participation in act *B*, such alternative findings do not render the jury's verdict nonunanimous as long as the alternative acts found establish an element of the offense and do not, in and of themselves, constitute a separate offense.

As the majority opinion illustrates, it is often a difficult task to determine when alternative acts constitute separate offenses, rendering a guilty verdict fatally ambiguous, or merely establish an element of the offense charged. In order to make such a determination, the Court must examine the statute proscribing the alleged conduct and the legislature's intent in proscribing the conduct. Where, as in *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), the statute enumerates several proscribed activities as discrete criminal offenses, a jury verdict based on the different activities does not meet the requirement that a conviction be based on a unanimous jury verdict. *Hartness*, 326 N.C. at 564, 391 S.E.2d at 179; *see Diaz*, 317 N.C. 545, 346 S.E.2d 488. Where, however, a defendant is convicted of one offense based on a statute that proscribes a single wrong that may be proved by evidence of the commission of any one of a number of acts, the unanimity requirement is met as long as each of the jurors concludes that the defendant committed one or more acts satisfying the elements of the

single proscribed offense. *Hartness*, 326 N.C. at 566-67, 391 S.E.2d at 180.

As in *Hartness*, the defendant in this case was convicted under a statute proscribing a single offense that may be established by a finding of any one of several alternative acts. Defendant was indicted, tried, and convicted for violating N.C.G.S. § 14-31. This statute provides that a person is guilty of a Class F felony if he "in a secret manner maliciously commit[s] an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person." N.C.G.S. § 14-31 (1986). In *State v. Hill*, 287 N.C. 207, 214 S.E.2d 67 (1975), we set forth the following five elements, the proof of which is required to support a conviction for secret assault as proscribed by N.C.G.S. § 14-31: "(1) secret manner; (2) malice; (3) assault and battery; (4) deadly weapon; and (5) intent to kill." *Id.* at 216-17, 214 S.E.2d at 74.

Just as in *Hartness*, wherein we concluded that the offense of indecent liberties may be proved by several different acts, a violation of N.C.G.S. § 14-31 may be proved by showing an assault and battery upon one or more victims. In *Hartness*, we concluded that it was immaterial that the jurors may have differed as to which specific sexual act they believed the defendant to have committed as long as all of the jurors found that the defendant had committed a sexual act. We stated:

> The risk of a nonunanimous verdict does not arise in cases such as the one at bar because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive . . . .
>
> . . . .
>
> . . . Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial.

Hartness, 326 N.C. at 564, 567, 391 S.E.2d at 179, 180.

The *Hartness* reasoning applies equally well here. The gravamen of the offense of secret assault is that an assault is committed in a secret manner and with intent to kill another person. *See* N.C.G.S. § 14-31 (1986). The identity of the victim of a secret assault is immaterial. That jurors may disagree upon the victim's identity

would not affect the unanimity of the jury's decision that defendant committed the assault for which he was tried and convicted.

The majority errs in concluding that "the *Diaz* rather than the *Hartness* analysis applies" to this case. *Diaz* involved a drug trafficking statute that proscribed the sale, manufacture, delivery, transportation, and possession of marijuana. The trial court instructed the jury that it could find defendant guilty of trafficking in marijuana if it found that defendant had either "knowingly possessed or knowingly transported marijuana." *Diaz*, 317 N.C. at 553, 346 S.E.2d at 493-94. After noting that the statute expressly provided that the alternative acts of selling, manufacturing, delivering, transporting, and possessing marijuana *each constituted separate trafficking offenses*, we held that the specified acts could not be submitted as alternative acts to prove a charge of trafficking in marijuana. *Id.* at 554, 346 S.E.2d at 494. In *Hartness*, decided four years after *Diaz*, we revived a line of cases overruled by *Diaz*, thereby limiting the *Diaz* holding to those cases involving statutes proscribing several enumerated acts *as separate offenses*.

To apply *Diaz* to the case at bar ignores the very intent and purpose of N.C.G.S. § 14-31. Unlike the trafficking statute at issue in *Diaz*, N.C.G.S. § 14-31 does not proscribe numerous activities, each of which constitutes a separate offense. As noted earlier, the gravamen of the offense of secret assault is that an assault is committed in a secret manner and with intent to kill another person. The mere fact that the jurors in this case may have disagreed as to the identity of the victim of defendant's assault is immaterial because each juror found that defendant had committed a secret assault upon another person.

II.

Furthermore, even if I agreed with the majority that the assault upon the two victims in this case constituted separate offenses that could not be submitted as alternative bases to support a conviction of secret assault, I could not agree with the majority's conclusion that a nonunanimous verdict may have resulted in this case. Any error in the trial court's instructions must be considered harmless when viewed in light of the evidence presented at defendant's trial. *See State v. Diaz*, 317 N.C. at 554, 346 S.E.2d at 494 (recognizing that the evidence in a particular case may remove any ambiguity created by an instruction charging crimes in the disjunctive).

It is important to note that in this case the evidence of record reveals that there was *no question concerning the identity of the victims or that each was shot* as a result of a secret assault. Evidence presented by the State showed that the two victims were walking with approximately nine other people when they were shot without warning. Several witnesses, including several friends of defendant's, also testified that they saw the shooting spree during which the victims were injured.

None of the evidence presented by defendant would have supported a finding that defendant assaulted only one of the two victims. Defendant did not deny his involvement in the events leading up to the shooting. In fact, defendant testified that he had been involved in a fight with Danny McKay, a fraternity brother of the victims, earlier in the evening on which the victims were shot and that he had pulled a gun on McKay and slapped him. Defendant further admitted that he was present at the time of the shooting. Defendant did not deny assaulting one victim while admitting participation in the assault of the other. Rather, defendant's defense theory rested solely on testimony that he and his friends provided. Based on this testimony, defendant claimed that he did not participate in the actual shooting that injured the victims. It is evident that the jury disbelieved defendant's evidence because it unanimously rejected the evidence by its verdict finding defendant "Guilty of Maliciously Assaulting in a Secret Manner."

Had the trial court instructed the jury that a verdict of guilty must be supported by a finding that defendant committed a secret assault upon both Douglas Jones *and* Preston Jones, the outcome of this case would have been the same. The uncontradicted and manifestly credible evidence showed that both Douglas Jones and Preston Jones were victims of an assault and battery committed in a secret manner. Having concluded that defendant participated in the shooting spree that resulted in the injuries suffered by both victims, the jury could only have reasonably concluded that defendant was guilty of a secret assault upon both of the victims.

Ample evidence was presented at defendant's trial to support a jury finding as to each of the elements of the crime of secret assault. Based upon this evidence, the jury returned a verdict finding defendant guilty of secret assault. I find it beyond all reason and logic to conclude, as does the majority, that the mere fact that two persons were victimized by defendant's assault requires

reversal of defendant's conviction. For these reasons, I dissent from the majority opinion and vote to reverse the decision of the Court of Appeals and remand this case for reinstatement of the judgment of the trial court.

Justices MITCHELL and WEBB join in this dissenting opinion.

J. REX DAVIS v. THE DENNIS LILLY COMPANY (FORMERLY BROWER COMPANY), HAROLD F. BROWER AND HORACE A. BROWER

No. 119A91

(Filed 6 December 1991)

1. Master and Servant § 8.1 (NCI3d)— employment contract— compensation—summary judgment improper

Summary judgment was inappropriately entered for defendants where plaintiff was hired as operations manager for what is now The Dennis Lilly Company; plaintiff and defendants entered in 1985 an employment and option to purchase agreement which specified a fixed salary and an accrued percentage compensation (APC); early in 1987, defendants offered plaintiff a salary raise in exchange for his option rights and release of the APC in any year in which plaintiff did not work for defendants for the entire year; plaintiff refused the offer and was terminated; negotiations between defendants and The Dennis Lilly Company began several months after the termination and resulted in a merger of the corporation into the Lilly Company; plaintiff demanded payment of 25% of the sale proceeds in excess of $2 million under Section 5.07 of the agreement, which plaintiff contends entitles him to payment if the stock or assets of the corporation are sold within one year after termination of his employment; and defendants refused, claiming that plaintiff had not satisfied a precondition in Section 5.01 because he had not remained in continuous employment with the corporation through the time of the offer. A question of material fact exists as to the meaning and intent of the parties with respect to Sections 5.01 and 5.07.

Am Jur 2d, Master and Servant §§ 74, 81, 82, 84.

2. Master and Servant § 8.1 (NCI3d)— employment contract—compensation—evidence sufficient for jury

There was sufficient evidence to survive defendants' motions for directed verdict and judgment notwithstanding the verdict on the issue of underpayment of accrued percentage compensation (APC) where defendants contended that their accountant had followed generally accepted accounting principles in calculating the APC, but never challenged the competency of plaintiff's expert to testify as an expert that defendants' accountant had not complied with generally accepted accounting principles.

Am Jur 2d, Master and Servant §§ 74, 84.

3. Master and Servant § 9 (NCI3d)— termination of employment—accrued percentage compensation

The correct amount was awarded in the trial court for accrued percentage compensation (APC) in an action to determine, in part, plaintiff's compensation following the termination of his employment where defendants contended that the amount due was $8,882.12, rather than the $62,860.35 awarded, because the APC for the last year was required by N.C.G.S. § 95-25.7 and Section 2.02 of the employment agreement to be paid in cash upon termination, and was calculable at the time of termination by using a method different from earlier years. Even though the APC was "due and payable" upon plaintiff's termination, it could not be paid under the terms of the contract until it could be calculated in accordance with generally accepted accounting principles; therefore, under Section 2.02 of the agreement and N.C.G.S. § 95-25.7, the calculation is placed at a later date.

Am Jur 2d, Master and Servant § 81.

Chief Justice EXUM dissenting in part and concurring in part.

Justice MEYER dissenting.

Justice MITCHELL joins in this dissenting opinion.

APPEAL of right pursuant to N.C.G.S. § 7A-30(2) and petition for discretionary review pursuant to N.C.G.S. § 7A-31 by the plaintiff of the decision of a divided panel of the Court of Appeals,

101 N.C. App. 574, 400 S.E.2d 779 (1991), which reversed in part, affirmed in part, and remanded the judgment of *Albright, J.*, at the 11 December 1989 Civil Session of Superior Court, GUILFORD County. Heard in the Supreme Court on 15 October 1991.

Schoch, Schoch and Schoch, by Arch Schoch, Jr., for plaintiff-appellant.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr. and Michael D. Holt, for defendant-appellee.

MARTIN, Justice.

This is a civil action seeking money damages for breach of two provisions of a contract of employment with option to purchase. The trial judge granted summary judgment in favor of all defendants on the issue of whether plaintiff was entitled under the contract to 25% of the proceeds of the sale of Brower Company in excess of $2 million if the company were sold within one year of Davis's separation from the corporation. The trial judge also granted summary judgment in favor of the defendants on the issue of reformation of the contract. The third issue concerning an agreement to pay plaintiff an accrued percentage of the corporation's net income was tried by jury, which found in Davis's favor and awarded him $62,860.36. Both parties appealed. The Court of Appeals affirmed the trial court's entries of summary judgment with Judge Cozort dissenting, and, in effect, vacated the trial court's entry of judgment in favor of plaintiff for $62,860.36 and remanded the cause for entry of judgment for only $8,882.12. We reverse the decision of the Court of Appeals on the summary judgments and remand the case for trial on these issues. We also reverse the Court of Appeals on Davis's entitlement to recover additional accrued percentage compensation beyond the admitted underpayment of $8,882.12 and reinstate the trial court's judgment of $62,860.36.

J. Rex Davis was hired by the Browers as operations manager for Brower Company (now Dennis Lilly Company). Davis and the defendants entered an employment and option to purchase agreement on 1 March 1985. The agreement specified that Davis would receive $30,000 a year fixed salary and accrued percentage compensation ("APC"). The APC was to be calculated by applying a specified sliding percentage formula to the corporation's net income before interest expense and income tax. The APC would accrue instead

of being paid immediately to Davis. Payment of the APC would occur as specified in section 2.02 of the agreement on Davis's termination, death or the sale or transfer of the majority of the issued and outstanding common stock of the corporation.

The agreement in section 2.02 states that:

> Corporation agrees to accrue for the benefit of Davis . . . an additional sum . . . equal to a percentage of the Income Before Interest Expense and Income Tax of the Corporation as follows:

Corporation's Income Before Interest Expense and Income Tax	Davis's Percentage
-0- - $100,000	15%
$100,001 - $200,000	14%
$200,001 - $300,000	13%
$300,001 - $400,000	12%
$400,001 - $500,000	11%
Over $500,000	10%

> The Income Before Interest Expense and Income Tax of the Corporation for the purposes of computing Davis's Accrued Percentage Compensation under the provisions of this Agreement, shall be determined by the independent accounting firm regularly employed by the Corporation in accordance with generally accepted accounting principles. Such computation of Income Before Interest Expense and Income Tax and of Davis's Accrued Percentage Compensation, made in the manner herein provided, shall be final and binding upon the Corporation and Davis.
>
> The Accrued Percentage Compensation shall be accrued by the Corporation and shall be due and payable to Davis in cash upon the occurrence of the earliest of the following events:
>
> (a) termination of Davis's employment with the Corporation for whatever reason;
>
> . . . .
>
> (c) a sale or transfer of a majority of the issued and outstanding common stock of the Corporation by Harold F. Brower and Horace A. Brower . . . or a sale by the Corporation of

substantially all of its assets to a buyer group that does not include Davis.

Davis began work on 1 March 1985. From fiscal years 1985 through 1987, Davis worked for the defendants 122 days in 1985, 365 days in 1986, and 228 days in 1987. To determine Davis's APC for fiscal year 1985, the defendants' accountant chose to prorate the number of days he believed Davis worked that year (90 days) over the appropriate income figure for the entire fiscal year before interest expense and income taxes. However, Davis worked 122 days. He was paid $22,086.35 instead of the correct amount of $30,968.47. This is the undisputed underpayment of $8,882.12. In fiscal year 1986, Davis's APC amounted to $87,281.00.

Early in 1987, the defendants offered Davis a salary raise of $2,400 per year in exchange for his option rights and release of the defendants for the APC for any year in which Davis did not work for the defendants the entire year. On 3 February 1987, Davis refused the offer. Davis was terminated 13 February 1987. In a letter dated 27 February 1987, Davis advised the defendants not to take any actions that would prejudice his option rights under Article III of the agreement.

When the defendants' accountant calculated Davis's APC for 1987, he used a different method of calculation than that used in 1985 and 1986. In 1985 and 1986, plaintiff's APC was calculated using the corporation's year end income; however, in 1987, the accountant used the income that had actually been received on the company books as of 31 January 1987 and prorated one-half of February's accrued compensation based on income received in the first seven months of fiscal year 1987. This different method of calculation resulted in an APC of $10,480.44.

Negotiations between the defendants and Dennis Lilly Company began several months after Davis's termination. On 4 September 1987, an agreement was executed between Lilly and the defendants, causing the corporation to be merged into Lilly Company. Davis demanded, pursuant to section 5.07 of the agreement, payment of 25% of the sale proceeds in excess of $2 million. The defendants refused Davis's demand, saying Davis did not satisfy the precondition for asserting such right set out in section 5.07 of the agreement because he had not remained in continuous employment with the corporation through the time of the offer from Lilly Company. Other facts pertinent to this appeal will be discussed below.

[1] The rules governing motions for summary judgment are now familiar learning, and it would serve no useful purpose to repeat them here. *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355 (1985). A concise statement of the rules appears in *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 376 S.E.2d 425 (1989). We first address the issue of whether the Court of Appeals erred in affirming the entries of summary judgment for the defendants by the trial court.

Section 5.07 of the agreement provides that:

> In the event that the shares of stock of the Corporation or the assets and liabilities of the Corporation are transferred to the bona fide purchaser, then Davis, in consideration of his services to the Corporation, shall be paid a portion of the proceeds from such sale equal to twenty-five percent (25%) of the total proceeds of such sale in excess of $2,000,000. Provided, however, anything to the contrary notwithstanding, Davis shall receive the payment stated in this section only if either (a) he is still in the employment of Brower, or (b) the stock or assets of the Corporation are sold within one year after termination of his employment with Brower. Payment of the portion of the proceeds to Davis as provided in this section shall be made in cash at the closing of the purchase.

Davis contends as a matter of law that the agreement provides that he is entitled to the payment described in section 5.07 as a result of the September 1987 sale of Brower Company. Where the contractual language is plain and unambiguous, a contract is to be construed as a whole with each clause and word being considered with reference to its other provisions. *See generally Yates v. Brown*, 275 N.C. 634, 170 S.E.2d 477 (1969); *Robbins v. C.W. Myers Trading Post, Inc.*, 253 N.C. 474, 117 S.E.2d 438 (1960). While Article V of the contract is captioned "Right of First Refusal," section 6.05 states:

> The captions or headings of the paragraphs in this Agreement are inserted and included solely for convenience and shall not be considered or given any effect in construing the provisions hereof if any question of intent should arise.

Therefore, considering each clause in light of all other clauses in the agreement, all sections of Article V are not necessarily related to the right of first refusal. The sale of the corporation

to Lilly Corporation was within one year of Davis's termination on 13 February 1987. Section 5.07 provides that, even though Davis separated from the corporation, he is still entitled to receive 25% of the proceeds in excess of $2 million paid by Lilly for the corporation. Davis contends that there is nothing to the contrary within this section or any other section in the contract. He also contends that there are no further requirements pertaining to the sale to a third party. Davis also argues that the written agreement manifests the intent of the parties that Davis will share in the proceeds of the sale.

The defendants contend, however, that section 5.01 gives two further restrictions to Davis's right of first refusal and right to the sale proceeds. Section 5.01 states that:

> If after March 1, 1987 and provided Davis remains in the continuous employment of Brower the Shareholders shall receive a bona fide offer . . . and the Shareholders or the Corporation are willing to accept such bona fide offer, then such Shareholders or the Corporation shall make the offer to transfer described herein.

The defendants, therefore, contend that Davis would receive payment of sale proceeds only if (1) a third party makes a bona fide offer to purchase after 1 March 1987 as provided in section 5.01 of the agreement; (2) the offer is made during Davis's employment with the Corporation as required in section 5.01 of the agreement; and (3) the offer leads to a sale during Davis's employment with the corporation or within one year after his termination as provided for in section 5.07 of the agreement. The defendants argue that Davis fails to meet the second requirement of continuing employment.

The agreement provides that Davis must be employed when a bona fide offer is made before he can have the right of first refusal.

> 5.01 *Receipt of Bona Fide Offer.* . . . [P]rovided Davis remains in the continuous employment of Brower[,] the Shareholders shall receive a bona fide offer to purchase all of the shares . . . and the Shareholders . . . are willing to accept such bona fide offer, then such Shareholders . . . shall make the offer to transfer described herein.
>
> 5.02 *Offer By Shareholders or Corporation.* The offer shall be given to Davis . . . to transfer all of the shares [to Davis]

> . . . at the same purchase price and upon the same payment terms as the transfer the Shareholders or Corporation proposes to make [to the bona fide purchaser].

Under defendants' contention, if Davis must be employed when the offer is made, then that portion of section 5.07 which states that Davis would share in the sale price, even if it occurs within one year after termination of employment, would be rendered meaningless. Davis cannot be both employed for the purpose of first refusal and unemployed as contemplated in section 5.07, unless the offer is made just prior to his termination. The sale from the offer might not occur within the year after termination. Also, Davis's termination occurred before the 1 March 1987 date. This negates the possibility of Davis exercising his right of first refusal as he was terminated before he could exercise that right.

A question of material fact exists as to the meaning of and the intent of the parties with respect to sections 5.01 and 5.07. Therefore, a genuine issue of material fact exists to be decided by a jury and the entry of summary judgment was inappropriate. *Broadway v. Blythe Industries, Inc.*, 313 N.C. 150, 326 S.E.2d 266 (1985); *Bone International, Inc. v. Brooks*, 304 N.C. 371, 283 S.E.2d 518 (1981); *White v. Bowers*, 101 N.C. App. 646, 400 S.E.2d 760 (1991).

Because we reverse the summary judgment entered for defendants, it is not necessary for this Court to discuss the second issue of the appeal as to the allegations of mutual mistake of the parties and the possible reformation of the agreement. We further note that this issue is not properly before this Court for review, N.C. R. App. P. 16(a), (b), it not being a basis for the dissenting opinion in the Court of Appeals nor before this Court pursuant to N.C.G.S. § 7A-31.

[2] Under his third issue on appeal, Davis contends that he was entitled to recover additional APC beyond the admitted underpayment of $8,882.12. Section 2.02 requires that the APC was to be determined by "generally accepted accounting principles" and was "due and payable to Davis . . . upon . . . termination of Davis's employment . . . or a sale . . . of the Corporation." The term "generally accepted accounting principles" is a term of art in the accounting profession. It is well established that where some of the terms in a contract are words of art which require the evidence of experts to explain them, the jury, of necessity, must pass on their meaning. *Lumber Co. v. Construction Co.*, 249 N.C. 680, 107

S.E.2d 538 (1959); *Silverthorn v. Fowle*, 49 N.C. (4 Jones) 362 (1857); *Electric Co. v. Newspaper, Inc.*, 22 N.C. App. 519, 207 S.E.2d 323, *cert. denied*, 285 N.C. 757, 209 S.E.2d 280 (1974). Davis's expert in accounting practices, George Breslow, testified to the meaning of the term "generally accepted accounting principles," stating:

> Generally accepted accounting principles, as they are applied, represents, or means that you should follow a method consistently throughout the circumstances that you're required to prepare your computation or prepare financial statements, and what have you, unless there is a substantial error in the way that you may have started out . . . .
>
> . . . .
>
> Consistency for accounting reporting means preparing and preparation of the financial statements and the accounting records that go into the preparation of financial statements that are prepared on a consistent basis for certain key financial circumstances are treated the same each time.

He also testified to its application to the present case and his opinion that the defendants' accountant had not complied with these principles, thereby miscalculating Davis's APC for 1987.

> [T]he year in which he was terminated, I feel that using a monthly basis, not only did the accounting records of the corporation apparently not have sufficient timeliness to prepare computation during the year, but I think it does not—I think it is a definite departure from generally accepted accounting principles in that it is inconsistent to then go to a fraction of so many months to 12 months. . . . [W]hen Mr. Clark chose a method in the beginning which was reasonable, he should have stayed with that method at the end . . . .
>
> Now, in that regard, I think that there was a departure from consistency which would in a sense be a contradiction of generally accepted accounting principles.

Defendants' motion for directed verdict and judgment notwithstanding the verdict was denied by the trial court. Defendant contends that this was error. The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. *Kelly v. International Harvester Co.*, 278

N.C. 153, 179 S.E.2d 396 (1971). When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, *Smith v. Voncannon*, 283 N.C. 656, 197 S.E.2d 524 (1973), or to present a question for the jury. *In re Housing Authority*, 235 N.C. 463, 70 S.E.2d 500 (1952). Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions. *Snider v. Dickens*, 293 N.C. 356, 237 S.E.2d 832 (1977); N.C.G.S. § 1A-1, Rule 50(a), (b) (1990).

While the defendants contend that their accountant had followed generally accepted accounting principles, the defendants never challenged Davis's expert's competency to testify as an expert. They failed to impeach his credibility. The defendants' argument goes to the weight of the evidence presented, failing to withdraw the issue from the jury. It is for the jury to weigh all the evidence and make its decision concerning the meaning of the term "generally accepted accounting principles." That is precisely what the jury did at trial when it awarded Davis in excess of $62,000 in APC. We hold that there was sufficient evidence to survive defendants' motions for directed verdict and judgment notwithstanding the verdict.

[3] The defendants concede that Davis is owed $8,882.12 in APC payments, but only for the underpayment for fiscal year 1985. They argue that Davis should receive nothing more for fiscal year 1987's APC because the contract states in section 2.02 that the APC is due and payable in cash "upon" Davis's termination. This interpretation, the defendants argue, is required by N.C.G.S. § 95-25.7 which states:

> Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs . . . .

Defendants contend that the calculation for the APC for fiscal year 1987 was calculable at the time of Davis's termination, but only by using a method different than that used for the years 1985 and 1986. Using a different method of calculation, the corpora-

tion was able to pay Davis as the defendants alleged is required in N.C.G.S. § 95-25.7.

Defendants' reliance on N.C.G.S. § 95-25.7 is misplaced. This statute inures to the benefit of the plaintiff. The statute sets a time when wages are to be paid after employment is discontinued. Wages based on bonuses, commissions or other forms of calculation, such as APCs, shall be paid on the payday after they are first calculable. The APC could not be calculable using generally accepted accounting principles until the close of fiscal year 1987 because generally accepted accounting principles require such calculations be done consistently from year to year. Defendants' attempt to calculate the APC before the end of fiscal year 1987 could not arrive at a correct APC within the meaning of "generally accepted accounting principles."

At trial, the defendants' accountant testified that when faced for the first time with adopting a method for computing the relevant income base for determining Davis's APC for the partial year 1985, he conferred with defendant Harold Brower and the corporation's attorney who had drafted the agreement. The accountant proposed the method of calculation which was approved and authorized by both Brower and the attorney. If a party under a contract has a choice thereunder of alternative obligations and elects one, his subsequent obligation remains under that alternative. A breach may occur if such method is not subsequently followed to the same extent as if the contract had originally provided for the performance to be completed by that alternative alone. *Arnold v. Arnold*, 17 N.C. (2 Dev. Eq.) 467 (1833); 17A C.J.S. *Contracts* § 455 (1963). Although the agreement did not specify any method by which to calculate the APC, the defendants, by approving and authorizing their accountant to use a specific method of calculation for the 1985 partial year APC, elected that method of calculation. The defendants were thereby obligated in 1986 and 1987 to follow the same method in which to determine Davis's APC.

Section 2.02 made the initial computation chosen for Davis's APC by the defendant's accountant binding for the calculation of APCs for subsequent partial years of service to the corporation. Davis's expert testified that generally accepted accounting principles required the calculation to be consistent.

The contract states that the APC is due and payable on Davis's termination. Even though the APC was "due and payable" upon

Davis's termination, it could not be paid under the terms of the contract until it could be calculated in accordance with generally accepted accounting principles. Therefore, under section 2.02 of the agreement and N.C.G.S. § 95-25.7, the calculation is placed at a later date so that the intent of the parties can be carried out and the calculation can be made in a consistent method in accord with generally accepted accounting principles.

The decision of the Court of Appeals affirming summary judgment is reversed. The decision of the Court of Appeals vacating the jury verdict for plaintiff is reversed. This cause is remanded to the Court of Appeals for further remand to the Superior Court, Guilford County for reinstatement of the jury award of $62,860.36 for plaintiff, and for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Chief Justice EXUM dissenting in part and concurring in part.

For the reasons stated in part I of Justice Meyer's dissenting opinion, I likewise dissent from that part of the majority opinion which reverses the Court of Appeals' decision affirming the trial court's entry of summary judgment for defendants on plaintiff's claim that he was entitled to share in the proceeds of the sale of the corporation.

I concur in that part of the majority opinion which reinstates the jury verdict for plaintiff.

Justice MEYER dissenting.

I disagree with the majority's conclusion that the agreement at issue in this case presents a genuine issue of material fact concerning plaintiff's rights upon transfer of the corporation. Moreover, I do not agree that there is sufficient evidence to support the jury's finding that plaintiff is entitled to any additional accrued percentage compensation beyond the amount the parties stipulated as due. Therefore, I dissent from the majority opinion and vote to affirm the decision of the Court of Appeals.

I.

A review of the agreement, in its entirety, reveals that the agreement was carefully drafted to define several agreements be-

tween the parties. Following an explanation of plaintiff's duties and term of employment set forth in Article I, the agreement contains provisions detailing plaintiff's right to compensation (Article II), granting plaintiff an option to purchase the corporation (Article III), restricting the sale of the corporation's stock (Article IV), granting plaintiff a right of first refusal (Article V), and outlining miscellaneous agreements concerning such items as modification and enforcement of the agreement (Article VI).

Article V, the portion disputed in this case, is similarly organized to define the parties' agreement clearly. This article, entitled "Right of First Refusal," begins with section 5.01, which provides:

> 5.01 *Receipt of Bona Fide Offer.* If after March 1, 1987 and provided Davis remains in the continuous employment of Brower the Shareholders shall receive a bona fide offer to purchase all of the shares of stock of the Corporation or the Corporation shall receive a bona fide offer to purchase all of the assets and assume all of the liabilities of the Corporation, and the Shareholders or the Corporation are willing to accept such bona fide offer, then such Shareholders or the Corporation shall make the offer to transfer described herein.

Under this section, two prerequisites must be met before the corporation is obligated to offer to sell the corporation to plaintiff. First, the shareholders of the corporation must receive a bona fide purchase offer, acceptable to the corporation or its shareholders. Second, plaintiff must have been employed at the time the offer was received by the corporation's shareholders. Only if these requirements are met is the corporation required to offer to transfer the corporation's stock or assets and liabilities to plaintiff.

The remaining provisions of Article V similarly deal with plaintiff's right of first refusal. Section 5.02 explains the manner and method in which the corporation is to make the offer to plaintiff, and sections 5.03 through 5.05 describe what will occur if plaintiff accepts the corporation's offer. The procedure to be taken upon plaintiff's rejection of the offer is outlined in sections 5.06 and 5.07. These sections provide:

> 5.06 *Transfer After Offer.* If the stock or assets of the Corporation are not purchased by Davis as provided in this Article, then the shareholders or the Corporation shall, for a period of six (6) months thereafter, be free to transfer the

shares or assets to the prospective purchaser, upon the terms disclosed in the offer given to Davis pursuant to section 5.02 of this Agreement.

5.07 *Payment to Davis.* In the event that the shares of stock of the Corporation or the assets and liabilities of the Corporation are transferred to the bona fide purchaser, then Davis, in consideration of his services to the Corporation, shall be paid a portion of the proceeds from such sale equal to twenty-five percent (25%) of the total proceeds of such sale in excess of $2,000,000. Provided, however, anything to the contrary notwithstanding, Davis shall receive the payment stated in this section only if either (a) he is still in the employment of Brower, or (b) the stock or assets of the Corporation are sold within one year after termination of his employment with Brower. Payment of the portion of the proceeds to Davis as provided in this section shall be made in cash at the closing of the purchase.

Nothing in Article V in any way suggests that plaintiff is entitled to any rights independent of the right of first refusal.

By focusing on the second sentence contained within section 5.07, the majority concludes that the agreement may be interpreted to entitle plaintiff to share in the proceeds of a sale of the corporation as long as the sale is consummated during plaintiff's employment with the corporation or within a year following the termination of plaintiff's employment with the corporation. This conclusion disregards the cardinal principle that a contract must be construed as a whole and not by placing undue emphasis on isolated provisions. *See Lattimore v. Fisher's Food Shoppe, Inc.*, 313 N.C. 467, 329 S.E.2d 346 (1985); *Dixie Container Corp. v. Dale*, 273 N.C. 624, 160 S.E.2d 708 (1968).

The language of the agreement plainly and unambiguously provides that plaintiff is entitled to share in the proceeds of a sale of the corporation only if (1) the corporation receives a bona fide purchase offer acceptable to the corporation or its shareholders while plaintiff is employed by the corporation; (2) the corporation makes a written offer to transfer to plaintiff the corporation's stock or assets and liabilities on the same terms as set forth in the bona fide offer; (3) plaintiff rejects the corporation's offer; and (4) the corporation consummates a sale pursuant to the bona fide pur-

chase offer while plaintiff is still employed with the corporation or within a year after termination of plaintiff's employment.

Moreover, the plain and unambiguous language of section 5.07 provides that plaintiff is entitled to share in the proceeds of a sale of the corporation "[i]n the event that the shares of stock of the Corporation or the assets and liabilities of the Corporation are transferred to the bona fide purchaser." This section necessarily contemplates that the corporation made an offer to plaintiff, pursuant to the right of first refusal, and that plaintiff rejected the offer, thereby permitting the corporation to make a transfer to the bona fide purchaser. It is only by focusing on the second sentence, in isolation from the remainder of the agreement, that the majority is able to reach a different conclusion.

The majority apparently accepts plaintiff's argument that the clause "[p]rovided, however, anything to the contrary notwithstanding" indicates that the language following the clause is a departure from or contrary to that expressed previously and thus may be interpreted as vesting in plaintiff a right, independent of the right of first refusal, to share in the proceeds of a sale of the corporation. This interpretation completely ignores the plain meaning of the beginning of the clause, "[p]rovided, however." As noted by several authorities, "provided" is a word used to indicate that the language following is a limitation on that previously stated. *See Black's Law Dictionary* at 1224 (6th ed. 1990) (stating that "provided" is a "word used in introducing a proviso"—a condition, stipulation, or limitation); *Webster's Third New International Dictionary* at 1827 (1966) (defining "provided" as "on condition that," "with the understanding," or "if only"). It is clear that the entire phrase, read alone and within the context of the remainder of section 5.07, indicates that the language following this clause is departing from the remainder of section 5.07 by further limiting plaintiff's right to share in the proceeds of a sale of the corporation.

The majority, however, rejects the plain and unambiguous language of section 5.07 that entitles plaintiff to share in the proceeds of a sale of the corporation only if (1) plaintiff is employed at the time the corporation receives the bona fide offer, and (2) the sale of the corporation's stock or assets and liabilities is consummated during plaintiff's employment or within a year following the termination of plaintiff's employment. The majority states, "[plaintiff] cannot be both employed for the purpose of first refusal and

unemployed as contemplated in section 5.07, unless the offer is made just prior to his termination." I submit that the plain and unambiguous language of section 5.07 expressly requires that plaintiff be employed by the corporation at the time the bona fide offer is received. By discarding the plain and unambiguous language of this section merely because the majority finds it unrealistic that the parties would include such a condition, the majority dismisses our cardinal principles of contract construction and thus grievously errs. Moreover, this provision is not beyond contemplation as suggested by the majority. It is quite logical that section 5.07 was drafted for the purpose of protecting plaintiff's employment. Had the agreement instead provided that plaintiff would be entitled to share in the proceeds of a sale of the corporation only if plaintiff were employed both at the time the bona fide offer was received and at the time the sale was consummated, then the corporation would have been able to prevent plaintiff from sharing in the proceeds by merely terminating plaintiff's employment. As written, however, the agreement removes this incentive to terminate plaintiff's employment upon receipt of a bona fide offer acceptable to the corporation or its shareholders.

I conclude that plaintiff is not entitled to any share of the proceeds of the sale of the corporation. In its unpublished decision below, *Davis v. Dennis Lilly Co.*, 101 N.C. App. 574, 400 S.E.2d 779 (1991), the Court of Appeals correctly noted that plaintiff "would be entitled to 25% of the sale proceeds in excess of $2 million if, (1) after 1 March 1987 while he was in the continued employment of the Brower Company a bona fide offer to purchase was received"; and (2) a sale occurred either while plaintiff was still employed with the Brower Company or within one year of the termination of plaintiff's employment with the Brower Company. "[B]ecause the bona fide offer of the Dennis Lilly Company to purchase the Brower Company was not received while [plaintiff] was employed with the Brower Company, but was received some 'two or three months after [plaintiff] left [their employment],' " plaintiff is not entitled to recover a portion of the sale proceeds.

II.

The majority also errs by concluding that sufficient evidence was presented to support the jury's award to plaintiff of $62,860.36 in accrued percentage compensation. The evidence presented at trial, viewed in the light most favorable to plaintiff, establishes

that plaintiff is not entitled to additional accrued percentage compensation for fiscal year 1987.

As noted by the majority, the agreement at issue in this case plainly and unambiguously provides that accrued percentage compensation ("APC") is to be calculated according to "generally accepted accounting principles" and becomes "due and payable to [plaintiff] . . . upon . . . termination of [plaintiff's] employment . . . or a sale . . . of the Corporation." Since APC became "due and payable" upon the date plaintiff's employment was terminated, the APC could properly be calculated only by using the income figures available at the time plaintiff's employment was terminated.

At trial, plaintiff's expert opined that the method used to calculate plaintiff's 1987 APC was different from the method used to calculate plaintiff's 1985 APC and that this "departure from consistency . . . would in a sense be a contradiction of generally accepted accounting principles." Relying on this testimony, the majority concludes that there was sufficient evidence to support a finding that plaintiff's APC was not properly calculated in accordance with generally accepted accounting principles.

Although I agree with the majority that the agreement required plaintiff's APC to be calculated in accordance with generally accepted accounting principles, I do not agree that sufficient evidence was presented to show that the 1987 APC calculations were in violation of generally accepted accounting principles. Upon cross-examination, plaintiff's accounting expert conceded that the express provisions of the agreement required that the corporation pay plaintiff the APC upon termination. When asked whether generally accepted accounting principles permit an accountant to disregard the express terms of a written contract, plaintiff's expert replied:

> A. Oh, no.
>
> . . . .
>
> Q. What you are saying is that as an accountant you are not entitled to deviate from the written terms of the contract?
>
> A. That is correct.

Upon further questioning concerning the APC due plaintiff for fiscal year 1987, plaintiff's expert indicated that there was no way, absent a mutual agreement not present in this case, that the corporation could have waited until the fiscal year-end to pay plaintiff

the APC due for 1987. According to the express, unambiguous provisions of the agreement, the corporation was obligated to pay plaintiff his accrued percentage compensation on the date that plaintiff's employment was terminated. Had the corporation's accountant waited until year-end to calculate and pay plaintiff the accrued percentage compensation, he would have put the corporation in breach of its agreement and, according to plaintiff's expert, would have violated generally accepted accounting principles.

Based upon the plain and unambiguous language of the agreement, I conclude that plaintiff is not entitled to share in the proceeds of the sale of the corporation. I also conclude that there was insufficient evidence to support the jury's finding that plaintiff is entitled to additional APC for fiscal year 1987. For these reasons, I dissent from the majority opinion and vote to affirm the Court of Appeals.

Justice MITCHELL joins in this dissenting opinion.

JAMES LEONARD BAKER, JR. v. JAMES G. MARTIN, IN HIS CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA; LACY H. THORNBURG, IN HIS CAPACITY AS ATTORNEY GENERAL WITH THE STATE OF NORTH CAROLINA; AND J. TODD BAILEY, IN HIS CAPACITY AS PRESIDENT OF THE 24TH JUDICIAL DISTRICT BAR

No. 246PA91

(Filed 6 December 1991)

1. Constitutional Law § 50 (NCI4th)— standing to challenge constitutionality of statute

Plaintiff showed sufficient injury to give him standing to challenge the constitutionality of the statute requiring appointees to vacancies in the office of district court judge to be members of the same political party as the vacating judge where the record shows that plaintiff went to a meeting of a District Bar Association at which nominees to fill a vacancy were selected but that he was not considered because of his political party affiliation.

Am Jur 2d, Constitutional Law §§ 188-191.

2. **Judges § 4 (NCI3d)— district court judges—appointment to fill vacancy—same political party—constitutionality of statute**

The provision of N.C.G.S. § 7A-142 requiring a person appointed to fill a vacancy in the office of district court judge to be a member of the same political party as the vacating judge does not violate Art. VI, § 6 or Art. VI, § 8 of the N. C. Constitution, since § 6 applies only to eligibility for election to office and not to eligibility for appointment to an elective office, and the statement of specific grounds for disqualification from office set forth in § 8 does not imply the exclusion of other grounds for disqualification.

Am Jur 2d, Judges § 239.

3. **Judges § 4 (NCI3d)— district court judges—appointment to fill vacancy—same political party—constitutionality of statute**

The provision of N.C.G.S. § 7A-142 requiring a person appointed to fill a vacancy in the office of district court judge to be a member of the same political party as the vacating judge does not violate Art. IV, § 10 of the N. C. Constitution, providing that vacancies on the district court bench shall be filled "in a manner prescribed by law," and Art. IV, § 19 of the N. C. Constitution, providing for appointments by the Governor to fill vacancies, since § 10 contemplates implementing legislation for such appointments, and § 19 does not govern exclusively the appointment of district court judges.

Am Jur 2d, Judges § 239.

Justice MITCHELL dissenting.

Chief Justice EXUM and Justice MARTIN join in this dissenting opinion.

Justice MARTIN dissenting.

Chief Justice EXUM and Justice MITCHELL 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 an order granting summary judgment in favor of defendants, signed by *Guice, J.*, out of court, session and county by consent of the parties and entered in the Superior Court, WATAUGA County on 9 May 1991. Heard in the Supreme Court 9 September 1991.

The plaintiff appeals from the entry of summary judgment in favor of the defendants upholding the constitutionality of N.C.G.S. § 7A-142. On 29 March 1991 the Honorable Phillip Ginn, a member of the Democratic Party, resigned his office as district court judge in the Twenty-fourth Judicial District. Defendant J. Todd Bailey, president of the Twenty-fourth Judicial District Bar, called a meeting pursuant to N.C.G.S. § 7A-142 to nominate three candidates for Judge Ginn's vacant seat.

Mr. Bailey announced at the meeting that pursuant to N.C.G.S. § 7A-142, only members of the Democratic Party would be considered as candidates. The plaintiff (a member of the Republican Party) brought this action to have N.C.G.S. § 7A-142 declared unconstitutional insofar as it prevented him from being considered as a candidate for district court judge. The superior court denied the plaintiff's motion for summary judgment and allowed the defendants' motion for summary judgment.

The plaintiff appealed.

Petree, Stockton & Robinson, by William F. Maready and G. Gray Wilson, for plaintiff appellant.

Lacy H. Thornburg, Attorney General, by Isham B. Hudson, Jr., Senior Deputy Attorney General and David Roy Blackwell, Special Deputy Attorney General, for defendant appellees.

WEBB, Justice.

[1] The first question presented in this appeal is whether the plaintiff has standing to bring this action. The defendants, relying on *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 168 S.E.2d 401 (1969) and *Watkins v. Wilson*, 255 N.C. 510, 121 S.E.2d 861 (1961), *cert. denied*, 370 U.S. 46, 8 L.Ed.2d 398 (1962), argue that the plaintiff has not been injured by the action of the defendants in this case, and for this reason the plaintiff does not have standing to bring the action. The record shows that the plaintiff went to the meeting of the Twenty-fourth District Bar Association at which the nominees were selected. He was not considered because of his political party affiliation. This is a showing of sufficient injury to the plaintiff so that he has standing to bring this action.

[2] The plaintiff contends that N.C.G.S. § 7A-142, which governs the appointment of persons to fill the unexpired terms of district

court judges, violates the Constitution of North Carolina. N.C.G.S. § 7A-142 provides in pertinent part:

> A vacancy in the office of district judge shall be filled for the unexpired term by appointment of the Governor from nominations submitted by the bar of the judicial district. . . . If the district court judge was elected as the nominee of a political party, then the district bar shall submit to the Governor the names of three persons who are residents of the district court district who are duly authorized to practice law in the district and who are members of the same political party as the vacating judge[.]

The plaintiff contends that certain provisions of the North Carolina Constitution set the qualifications for appointment to the office of district court judge and, by placing the additional qualification on candidates that they be members of the same political party as the vacating judge, N.C.G.S. § 7A-142 violates the Constitution.

The plaintiff relies on N.C. Const. art. VI, § 6 which provides:

Sec. 6. Eligibility to elective office.

> Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office.

The plaintiff says that he is a qualified voter who is 21 years of age and no other provision of the Constitution disqualifies him from office. He says that he is eligible under this section of the Constitution to be appointed district court judge and that the General Assembly by requiring that appointees be members of a certain political party has unconstitutionally added a qualification for the office of district court judge.

In determining the constitutionality of a statute we are guided by the following principle: "[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967), *quoting Assurance Co. v. Gold, Comr. of Insurance*, 249 N.C. 461, 463, 106 S.E.2d 875, 876 (1959). *See also Mitchell v. Financing Authority*, 273 N.C. 137, 159 S.E.2d 745 (1968); *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967); *Ramsey v. Veterans Commission*, 261

N.C. 645, 135 S.E.2d 659 (1964). This is a rule of law which binds us in deciding this case.

The appellant contends, and the minority agrees, that N.C. Const. art. VI, § 6 applies to both appointments and elections to office. They say that except as the Constitution provides otherwise, and there are no such provisions in this case, this section makes the plaintiff eligible for the office of district court judge and the General Assembly cannot add another qualification. They base this contention on the heading to the section which says "[e]ligibility to elective office." They contend that this includes both election to office and appointment to the office.

We do not believe the heading to N.C. Const. art. VI, § 6 makes the meaning of the section so clear that the unconstitutionality of N.C.G.S. § 7A-142 can be determined beyond a reasonable doubt. The plain words of the section deal with the eligibility "for election by the people to office." The plaintiff and the dissenters would have us interpret this language, because of the heading, to say that it deals with a class of office called "elective office[s]" rather than a process called "election to office." This distorts the plain meaning of the words used in this section.

The dissent's interpretation which attributes the overriding meaning of the section to the heading requires manipulation of the actual text. Only by emphasizing the term "elective" as found in the heading can this section of the Constitution be read as referring to a whole class of offices as opposed to referring to what makes one eligible for "election to office." In order to make clear the interpretation advanced by the dissent, N.C. Const. art. VI, § 6 should be amended to read as follows: "[e]very qualified voter in North Carolina . . . shall be eligible for [elective office]." Such an amendment would require changing "election" to "elective" and deleting the words "by the people." If, as the dissent proposes, this section is to apply both to elections to office and appointments to elective office, the words "by the people" are unnecessary. A gubernatorial appointment requires no participation "by the people." However, the words "by the people" are very much a part of the section, and they make it clear the section refers to the process of election.

N.C. Const. art. VI, § 6 should not be read as referring to elective office generally, because such a construction creates an inconsistency between § 6 of art. VI, and § 2 of the same article.

As noted above, § 6 states that "[e]very qualified voter . . . shall be eligible. . . ." Under § 2, however, a qualified voter must have "resided in the State of North Carolina for one year and in the precinct, ward, or other election district for 30 days *next preceding an election*. . . ." N.C. Const. art. VI, § 2 (emphasis added). Under the dissent's view, one must only be a qualified voter to be eligible for appointment to an elective office. Yet, because the appointment could occur at any time, the language in § 2 requiring residency for thirty days "next preceding an election" is uncertain of application. Section 2 and § 6 are perfectly consistent and understandable if each is regarded as referring to an "election to office." But, in some cases it could be impossible to determine, prior to an election, if a nominee for appointment to an elective office meets the residency requirement.

The history of N.C. Const. art. VI, § 6 supports the conclusion that it is meant to refer to an "election to office" situation rather than to appointment to an "elective office." In 1913, this provision in the Constitution was found in art. VI, § 7, and it read as follows: "[e]very voter in North Carolina, except as in this article disqualified, shall be eligible to office. . . ." In *Spruill v. Bateman*, 162 N.C. 588, 77 S.E. 768 (1913), this Court held unconstitutional under this section a statute which prevented a person not an attorney from taking office as a recorder's court judge after he had been elected. Since that time the section was amended to read as it currently does, with reference to "qualified voter" and stating that the eligibility is for "election by the people to office." Clearly the scope of this section was narrowed by the amendment so that it applies only to election to office. The section is not affected by N.C.G.S. § 7A-142.

Even if we concede that N.C. Const. art. VI, § 6 is ambiguous, in that the italicized heading is broader than the body of the section, allegiance to the most basic principle of constitutional interpretation demands that the Court not take the extraordinary step of declaring N.C.G.S. § 7A-142 unconstitutional. It certainly is not *clear* that the General Assembly has overstepped its constitutional authority.

> Since our earliest cases applying the power of judicial review under the Constitution of North Carolina . . . we have indicated that great deference will be paid to acts of the legislature—the agent of the people for enacting laws. This

> Court has always indicated that it will not lightly assume that an act of the legislature violates the will of the people of North Carolina as expressed by them in their Constitution and that we will find acts of the legislature repugnant to the Constitution only "if the repugnance do really exist and is plain."

State ex rel. Martin v. Preston, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) (citation omitted).

Justice Mitchell, in his dissent, argues that even if the majority is correct in its interpretation of N.C. Const. art. VI, § 6, N.C.G.S. § 7A-142 is still unconstitutional because it offends N.C. Const. art. VI, § 8. Justice Mitchell argues that the framers, by enunciating three disqualifications for office in N.C. Const. art. VI, § 8, meant to exclude all other disqualifications for office, whether the office be elective or appointive. To bolster his argument, Justice Mitchell summons forth the doctrine of *expressio unius est exclusio alterius*, *i.e.*, the expression of one thing is the exclusion of another. As stated by Justice Mitchell, "under the doctrine of *expressio unius est exclusio alterius*, the expression of specific disqualifications *implies* the exclusion of any other disqualifications." *Baker v. Martin*, 330 N.C. at 343, 410 S.E.2d at 896 (Mitchell, J., dissenting) (emphasis added).

This doctrine is a commonly used tool of *statutory* construction, but the dissent fails to cite any North Carolina case in which it has been utilized to interpret our Constitution. While many tools of statutory construction are appropriate for and consistent with constitutional interpretation, we have found no North Carolina case in which this doctrine has been used to interpret our Constitution. Perhaps this dearth of authority can be attributed to the fact that this doctrine flies directly in the face of one of the underlying principles of North Carolina constitutional law. As Justice Mitchell himself stated for the Court in *Preston*:

> [I]t is firmly established that our State Constitution is not a grant of power. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961). All power which is not *expressly limited* by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution. *Id. See Lassiter v. Board of Education*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958); *Airport Authority v. Johnson*, 226 N.C. 1, 8, 36 S.E.2d 803, 809 (1946).

Preston, 325 N.C. at 448-49, 385 S.E.2d at 478 (emphasis added); *see generally Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 647, 360 S.E.2d 756, 761 (1987) (outlining scope of judicial review of challenge to the constitutionality of legislation enacted by the General Assembly).

This fundamental concept, that a state constitution acts as a limitation, rather than a grant of power, is certainly not unique to North Carolina. The California Court of Appeal, for example, recently reviewed the basic principles of California constitutional law as set out in previous decisions of the California Supreme Court. The following passage from that opinion could serve just as easily as a primer for North Carolina constitutional law:

> Unlike the federal Constitution, which is a grant of power to Congress, the California [North Carolina] Constitution is a limitation or restriction on the powers of the Legislature. Thus, the courts do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited. Further, "[i]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used." Consequently, the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms. In other words, the doctrine of *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of another thing) is inapplicable.

County of Fresno v. State of California, 268 Cal. Rptr. 266, 270 (Cal. App. 5 Dist. 1990) (citations omitted), *judgment aff'd*, 53 Cal. 3d 482, 808 P.2d 235, 280 Cal. Rptr. 92 (1991); *see also Eberle v. Nielson*, 78 Idaho 572, 578, 306 P.2d 1083, 1086 (1957) ("the rule of *expressio unius est exclusio alterius* has no application to the provisions of our State Constitution"); *County Board of Education v. Taxpayers and Citizens*, 276 Ala. 472, 478, 163 So.2d 629, 634 (1964) ("The power of the legislature except as limited by constitutional provisions is as plenary as that of the British Parliament."). Unless the Constitution *expressly* or by *necessary implication* restricts the actions of the legislative branch, the General Assembly

is free to implement legislation as long as that legislation does not offend some specific constitutional provision.

Applying this general principle of constitutional interpretation to our case, we note that N.C. Const. art. VI, § 6 does expressly limit disqualifications to office for those who are elected by the people to those disqualifications set out in the Constitution. However, no provision of the Constitution so limits disqualifications to office for those who are appointed, whether the appointment be for a purely appointive office or to fill the unexpired term of an elective office. The wording of N.C. Const. art. VI, § 8 also does not *necessarily* imply that additional disqualifications cannot be added by the General Assembly for those persons not elected by the people. Instead, N.C. Const. art. VI, § 8 merely enumerates three disqualifications, one of which applies only to offices filled by election by the people.[1] Had the framers wanted to limit the disqualifications to those outlined in N.C. Const. art. VI, § 8 and other constitutional provisions, they could have done so easily by rewriting the first sentence in N.C. Const. art. VI, § 8 to read: "Unless otherwise provided for in this Constitution, only the following persons shall be disqualified for office: . . . ."

Furthermore, if one were to take Justice Mitchell's argument to its logical conclusion, it would invalidate a host of appointive positions throughout all three branches of state government. This is true because N.C. Const. art. VI, § 8 deals with *all* offices, not just those in the judicial branch. Thus, Justice Mitchell's view, if accepted by the Court, would invalidate appointments to fill vacant seats in the General Assembly. N.C.G.S. § 163-11(d) (1991) (vacancies must be filled by someone from the same political party).

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1. N.C. Const. art. VI, § 8 reads: "*Disqualifications of office.* The following persons shall be disqualified for office:

First, any person who shall deny the being of Almighty God.

Second, with respect to any office that is filled by election by the people, any person who is not qualified to vote in an election for that office.

Third, any person who has been adjudged guilty of treason or any other felony against this State or the United States, or any person who had been adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, or any person who has been adjudged guilty of corruption or malpractice in any office, or any person who has been removed by impeachment from any office, and who has not been restored to the right of citizenship in the manner prescribed by law."

Notary public appointments likewise would become unconstitutional. N.C.G.S. § 10A-4 (1991) (those wishing to be appointed notaries public must complete a course of study). Finally, to adopt Justice Mitchell's view would call into question the numerous appointments to the various state licensing boards, such as the Board of Barber Examiners and Board of Cosmetic Art Examiners, all of which require specific qualifications for appointment not included in the Constitution.

[3] The plaintiff also relies on N.C. Const. art. IV, § 10 and § 19. N.C. Const. art. IV, § 10 provides in part:

> The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. . . . Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law.

N.C. Const. art. IV, § 19 provides in part:

> Unless otherwise provided in this Article, all vacancies occurring in the offices provided for by this Article shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 30 days after the vacancy occurs, when elections shall be held to fill the offices.

The plaintiff says N.C. Const. art. IV, § 10 provides for the creation of district courts and that vacancies on the district court bench shall be filled "in a manner prescribed by law." He contends that N.C. Const. art. IV, § 19 prescribes the manner in which district court judges are appointed and nowhere in this section does it say that a person must be of a certain political party to be eligible for appointment as a district court judge. The plaintiff says it is unconstitutional to add such a qualification.

The phrase "in a manner prescribed by law" appears in two places in N.C. Const. art. IV, § 10. It appears in that part of the section providing for the election of judges and that part of the section providing for the appointment of judges. It follows that the identical words used in the same section must have an identical meaning. It is clear that as applied to the election of

judges the phrase "in a manner prescribed by law" means that the General Assembly must play some part. The complicated procedure governing elections is not set forth in the Constitution. If the phrase has the same meaning in dealing with the appointment of judges, it means the General Assembly has some part to play. N.C. Const. art. IV, § 19 does not govern exclusively the appointment of district court judges.

The General Assembly in this case has chosen to protect the mandate of the previous election by providing that the appointed judge should be of the same political party as his or her predecessor. In *Rivera-Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 72 L.Ed.2d 628 (1982), the United States Supreme Court held it did not violate the United States Constitution for Puerto Rico to protect the mandate of the people by requiring a legislator to be of the same political party as his or her deceased predecessor. That case is different from this case in that it involved the interpretation of the United States Constitution and we are interpreting the Constitution of North Carolina. It also dealt with a legislative appointment and we are dealing with a judicial appointment. However, it does illustrate that the protection of the mandate of an election is a legitimate concern.

We hold that the General Assembly may require that in the interim appointment of a district court judge preference must be given to a member of the same political party as the vacating judge. In this state judges are elected in partisan elections. We may not like this method and the plaintiff refers in his brief to some efforts by members of this Court and others to move away from political partisanship in the selection of judges. We take notice of the fact that to date these efforts have been unsuccessful. The people, through our Constitution, have opted for election of judges. As long as this is the policy, we are bound by it. We, as a Court, cannot set the policy.

The plaintiff relies on *Starbuck v. Havelock*, 252 N.C. 176, 113 S.E.2d 278 (1960); *Cole v. Sanders*, 174 N.C. 112, 93 S.E. 476 (1917); *Spruill v. Bateman*, 162 N.C. 588, 77 S.E. 768; and *State of N.C. by the At. Gen'l, Hargrove, ex rel. Lee v. Dunn*, 73 N.C. 595 (1875), for the proposition that qualifications for holding office may not be added to those found in the Constitution. These cases deal with elections to offices and are not applicable to this case. This case deals with an appointment to office. We do not in this

case hold that the plaintiff is not qualified to hold the office of district court judge. He can run in the next election and, if successful, he can hold the office. We hold in this case that because he is not of the same political party as the departing judge, the General Assembly may provide that he may not be considered by the Twenty-fourth District Bar as a candidate for appointment.

The minority says, "[u]nder the majority's view of this section, one not eligible under its terms could be appointed, but not elected to public office." We do not speculate on this hypothetical. N.C. Const. art. IV, § 22 prevents the appointment of one who is not licensed to practice law in the courts of this state. We quote former Chief Justice Walter Clark when it was suggested that the General Assembly could make people eligible for office who were not qualified voters. Chief Justice Clark said "[i]t may be, therefore, that the General Assembly of this State could make eligible to office those who are not voters, as to which we express no opinion. The Constitution contains no prohibition, in terms, as to this." *Spruill v. Bateman*, 162 N.C. 588, 592, 77 S.E. 768, 769.

Affirmed.

Justice MITCHELL dissenting.

Only by focusing upon a single one-sentence section of one article of the Constitution of North Carolina—without proper regard for other sections of that Constitution—is the majority able to conclude that the challenged provision of N.C.G.S. § 7A-142 is constitutionally valid. As Justice Martin has demonstrated in his dissenting opinion in which the Chief Justice and I have joined, the majority errs in its view that Section 6 of Article VI of the Constitution of North Carolina applies only to "elections by the people to office." Even if it is assumed *arguendo* that the majority is correct in this interpretation of Section 6, however, the majority still errs in concluding that the legislature has constitutional authority to adopt disqualifications for state office which disqualify otherwise qualified persons who are not members of a particular political party.

In their Constitution, the people of North Carolina have established an integrated and comprehensive set of disqualifications for state office. In Section 8 of Article VI of the Constitution of North Carolina, entitled "Disqualifications for office," the people of North Carolina have declared that certain classes of "persons

shall be disqualified for [state] office." Section 8 expressly disqualifies from holding elective state office, for example, those not qualified to vote in an election for the office they seek to fill. Section 8 also mandates, *inter alia*, that those who have been adjudged guilty of treason, of any other felony, or of corruption or malpractice in office shall be disqualified from holding *any* state office—by election or appointment.

By adopting the integrated and comprehensive list of disqualifications contained in Section 8, the people of North Carolina precluded any other disqualifications. This is so because, under the doctrine of *expressio unius est exclusio alterius*, the expression of specific disqualifications implies the exclusion of any other disqualifications. *See Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 407 S.E.2d 819 (1991); *Lemons v. Old Hickory Council*, 322 N.C. 271, 367 S.E.2d 655 (1988); *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 354 S.E.2d 495 (1987). Although the doctrine should not be applied blindly in cases of state constitutional interpretation, it does have a proper place in such cases. *E.g., Attorney General of Canada v. Tysowski*, 118 Idaho 737, 739, 800 P.2d 133, 135 (Idaho Ct. App. 1990) (doctrine applies in state constitutional interpretation); *State ex rel. Millsap v. Lozano*, 692 S.W.2d 470, 475 (Tex. Crim. App. 1985) (applying doctrine to hold that state constitutional grounds for disqualification of judges are the *exclusive* grounds). *See Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) ("Questions of constitutional construction are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments. . . ."). I believe that the statement of specific grounds for disqualifications from office contained in the Constitution of North Carolina must be held to necessarily imply the exclusion of other grounds for disqualification, such as disqualification due to membership in a particular political party.

In any event, until today I had thought it well established—and that a majority of this Court understood, beyond any reasonable doubt—that the legislature cannot add to the disqualifications from state office prescribed in the Constitution of North Carolina. *See, e.g., Cole v. Sanders*, 174 N.C. 112, 93 S.E.2d 476 (1917) (Clark, C.J., concurring). Certainly, the people of North Carolina have understood this fundamental principle; therefore, when the people decided to disqualify those not authorized to practice law from *election or appointment* to this Court or the other courts of the state, they recognized that they could add such disqualification

only by an amendment to the Constitution of North Carolina. *See* N.C. Const. art. IV, § 22 (adopted by vote of the people at the election held 4 November 1980).

The people of North Carolina have not included a provision in their Constitution disqualifying any person from holding any state office—whether attained by election or appointment—because he or she is not a member of a particular political party. Nor have the people seen fit to give a majority of the legislature or of this Court the authority to create any such partisan political disqualification. The legislature has exceeded its constitutional authority by attempting to adopt such a partisan political disqualification as a part of N.C.G.S. § 7A-142, and the majority of this Court errs in upholding the legislature's unconstitutional act.

For the foregoing reasons, I dissent from the opinion and holding of the majority.

Chief Justice EXUM and Justice MARTIN join in this dissenting opinion.

Justice MARTIN dissenting.

I conclude that N.C.G.S. § 7A-142, in part, violates our Constitution; therefore, I dissent from the majority opinion.

The majority is correct in holding that this plaintiff had standing to bring this action challenging the constitutionality of N.C.G.S. § 7A-142.

The majority falls into error when it holds that North Carolina Constitution article VI, section 6 deals only with election to office. The section reads in its entirety:

Sec. 6. Eligibility to elective office.

> Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office.

N.C. Const. art. VI, § 6.

This section of our Constitution establishes the qualifications that a person must possess in order to hold an elective office in North Carolina. These qualifications apply no matter how a person initially obtains the office, by election or by appointment. It

is undisputed that the office of district court judge is an elective office. N.C. Const. art. IV, § 10 (District Judges shall be elected).

In interpreting our Constitution, this Court has held that every provision of the constitution is significant. It is supreme and none of its provisions can be disregarded, ignored or broken in whole or in part. Nor can any coordinate branch of government add to it or assume power not conferred by it. *State v. Patterson*, 98 N.C. 660 (1887); 5 Strong's N.C. Index 4th *Constitutional Law* § 1 (1990). Thus, this Court cannot disregard that portion of article VI, section 6 reading "Eligibility to elective office," which establishes that the section controls eligibility to elective office and is not, as the majority states, limited to "election to office." Our attorney general has interpreted article VI, section 6 to establish the qualifications for "elective office"; thus, a deputy sheriff need not reside in the county in which he serves. Opinion of Attorney General to Sheriff John H. Stockard, 41 Op. N.C. Att'y Gen. 754 (1972). A person must be eligible to hold an elective office under article VI, section 6, regardless of whether he is elected or appointed to the office. One not eligible under this section can neither be appointed nor elected to public office. Under the majority's view of this section, one not eligible under its terms could be appointed, but not elected to public office. This would be an absurd result and one not contemplated by the framers of this section.

The majority's interpretation of our Constitution leads to the incongruous result of limiting constitutional disqualifications to office for only those "who are elected by the people," and not those appointed to office. This would allow different qualifications for judges for the same office depending upon whether the judge was elected or appointed. Surely, this is contrary to the genius of the people in framing this article of our Constitution.

Article VI, section 8 sets forth the constitutional disqualifications for office, none of which affect plaintiff herein.

The legislature cannot add to the constitutional disqualifications or qualifications for public office. *Cole v. Sanders*, 174 N.C. 112, 93 S.E. 476 (1917) (Clark, C.J., concurring); *State v. Knight*, 169 N.C. 333, 85 S.E. 418 (1915) (Women could not vote, therefore not eligible to elective office); *State v. Bateman*, 162 N.C. 588, 77 S.E. 768 (1913); *Lee v. Dunn*, 73 N.C. 595 (1875).

In *Bateman*, the legislature in establishing a recorder's court for Plymouth in Washington County required that the recorder, an elective office, be a "licensed attorney at law." This Court held that this was an additional disqualification for office and violated article VI, section 7 (now section 6) of the State Constitution. The purpose of section 6 and its predecessor was to prevent the legislature from disqualifying additional persons from holding elective office. *Accord Lee v. Dunn*, 73 N.C. 595 (1875).

Thus, the legislature had no authority to establish as an additional disqualification for the elective office of district court judge that the person appointed is other than a member of the same political party as the vacating judge. In so doing, the legislature violated article VI, sections 6 and 8 of our Constitution, and that portion of N.C.G.S. § 7A-142 is null and void. The remainder of the statute is unaffected. *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E.2d 1 (1966).

While it may be a rational goal of government to "protect the mandate" of a previous election, this cannot be achieved in a manner which affronts specific constitutional provisions. In developing the argument of "protecting the mandate" of an election, the majority relies upon *Rivera-Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 72 L. Ed. 2d 628 (1982). As the majority opinion concedes, this case is not helpful to the analysis of the issues before this Court. *Rivera* is concerned with the interpretation of the federal constitution and adds nothing to our task of construing provisions of our State Constitution that have no analogue in the federal charter. The legislature's effort to "protect the mandate" cannot withstand constitutional scrutiny.

The majority's argument that "in a manner prescribed by law" must be interpreted the same in every instance that it appears is answered by the majority's opinion itself. True it is, as stated by the majority, the Constitution does not contain the "complicated procedure governing elections" of judicial officers. So, the election of judges "in a manner prescribed by law" does involve implementing legislation.

However, the "manner prescribed by law" for the filling of vacancies in the office of district judge is contained in article IV, section 19 of the Constitution itself: "[V]acancies occurring in the offices provided for by this Article shall be filled by appointment of the Governor . . . ." This is a clear, complete, and detailed

manner of filling judicial vacancies for the office of district judge. No implementing legislation is required; the General Assembly has no part to play in the filling of vacancies in the office of district judge.

For these reasons, I vote to hold that the clause of N.C.G.S. § 7A-142 "who are members of the same political party as the vacating judge" violates article VI, sections 6 and 8 of the State Constitution and is null and void.

Plaintiff is entitled to the entry of summary judgment in his favor.

Chief Justice EXUM and Justice MITCHELL join in this dissenting opinion.

STATE OF NORTH CAROLINA v. TONY LAMONT FAISON

No. 18A91

(Filed 6 December 1991)

1. **Evidence and Witnesses § 264 (NCI4th)— "first aggressor" exception—peacefulness of victim—plain meaning**

The plain meaning of the "first aggressor" exception of Rule of Evidence 404(a)(2) is abundantly clear: if a defendant presents evidence that the victim was the first aggressor in the confrontation which led to the victim's death, the State can offer evidence of the victim's peacefulness. N.C.G.S. § 8C-1, Rule 404(a)(2).

Am Jur 2d, Evidence §§ 339-342; Homicide §§ 308, 309.

Right of prosecution, in homicide case, to introduce evidence in rebuttal to show good, quiet, and peaceable character of deceased. 34 ALR2d 451.

2. **Evidence and Witnesses § 264 (NCI4th)— victim's forcing of oral sex—first aggressor—evidence of victim's peacefulness**

Defendant's evidence that a murder victim forced him at gunpoint to perform oral sex triggered the "first aggressor" exception of Rule 404(a)(2) so that the State could introduce evidence that the victim was a peaceful man.

Am Jur 2d, Evidence §§ 339-342; Homicide §§ 308, 309.

Right of prosecution, in homicide case, to introduce evidence in rebuttal to show good, quiet, and peaceable character of deceased. 34 ALR2d 451.

3. **Evidence and Witnesses § 264 (NCI4th)— peacefulness of victim—first aggressor evidence as prerequisite**

The State cannot introduce evidence of a murder victim's peacefulness until after defendant has put forward evidence that the victim was the first aggressor. Therefore, the trial court erred by allowing the State to introduce evidence in its case-in-chief that a murder victim had a reputation for peacefulness, but defendant was not prejudiced by this error where defendant's entire defense was based on his testimony that the victim was the aggressor, and the State thus would have properly been allowed during rebuttal to introduce its evidence that the victim had a reputation for peacefulness.

Am Jur 2d, Evidence §§ 339-342; Homicide §§ 308, 309.

Right of prosecution, in homicide case, to introduce evidence in rebuttal to show good, quiet, and peaceable character of deceased. 34 ALR2d 451.

4. **Evidence and Witnesses § 263 (NCI4th)— modification of toothbrush in jail—irrelevancy—improper character evidence—admission as harmless error**

A toothbrush with a piece of metal attached to the end and testimony by a prison guard that this modified toothbrush was made by defendant while in jail awaiting trial and would be considered a weapon under prison regulations should have been excluded as irrelevant under Rule of Evidence 402 or as improper character evidence under Rule of Evidence 404. However, defendant failed to show that he was prejudiced by the admission of this evidence. N.C.G.S. § 8C-1, Rules 402 and 404.

Am Jur 2d, Evidence §§ 339-341; Homicide §§ 298, 299; Witnesses § 564.

5. **Robbery § 4.3 (NCI3d)— armed robbery—sufficiency of evidence—property not taken as afterthought**

The State's evidence did not show that defendant took the victim's property only as an "afterthought" following the

victim's death but was sufficient to support defendant's conviction of armed robbery where it tended to show that defendant was short on cash; immediately after passing the victim's house, he stated that the victim owed him money and he was going after it; the victim was struck more than thirty times with an ax that was kept outside his house in the carport; the house was ransacked; and items belonging to the victim were stolen. Furthermore, it was immaterial whether the intent was formed before or after force was used upon the victim provided the theft and force were aspects of a single transaction.

Am Jur 2d, Robbery §§ 14, 16, 19, 23.

6. Robbery § 4.3 (NCI3d)— armed robbery—conviction not based on taking of own property

There was no possibility that defendant was convicted of armed robbery on the basis of a taking of his own property because (1) there was evidence that defendant had pawned his television set with the victim and the set was not found at the victim's house, (2) the prosecutor stated during his closing argument that he believed defendant had taken the television from the house but had hidden it when it became too heavy to carry, and (3) the trial judge used the word "property" in the instructions to describe the items defendant was accused of taking, where the prosecutor was merely responding to defendant's contention that someone else had ransacked the victim's house and stolen items which defendant denied taking; the prosecutor specifically mentioned items which defendant admitted taking, i.e., a revolver and watch belonging to the victim, when discussing with the jury the elements necessary to prove armed robbery; the prosecutor also told the jury that a defendant can only be convicted of armed robbery for taking property to which he is not entitled; and the trial judge's instructions were replete with references to the fact that defendant could not be convicted of armed robbery unless he took property "that he was not entitled to take."

Am Jur 2d, Robbery §§ 16, 19.

7. Evidence and Witnesses § 3098 (NCI4th); Extradition § 1 (NCI3d)— resistance of extradition—cross-examination of defendant—admissibility for impeachment

The prosecutor's cross-examination of defendant as to whether he had fought extradition from Pennsylvania from

December 1988 until March 1989 was properly permitted to impeach defendant's testimony concerning the reason for his flight to Pennsylvania and did not burden defendant's due process right to resist extradition where defendant testified that he went to Pennsylvania only to resettle his family and not to evade arrest for murder and armed robbery, and defendant first broached the subject of his extradition when he testified on direct examination that he had an extradition hearing in Philadelphia with the assistance of counsel.

Am Jur 2d, Evidence §§ 280-282, 1128.

8. **Homicide § 25.2 (NCI3d)— premeditation and deliberation— lack of provocation—instruction not plain error**

Assuming *arguendo* that there was error in the trial court's instruction, to which defendant failed to object at trial, that the jury could infer premeditation and deliberation from, among other things, "the lack of provocation by the victim," defendant failed to meet the heavy burden placed on him under the plain error rule to show that, absent the error, the jury probably would have reached a different verdict.

Am Jur 2d, Homicide §§ 498, 501.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by *Reid, J.*, at the 10 July 1989 Criminal Session of Superior Court, DUPLIN County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgment allowed by the Supreme Court 29 January 1991. Heard in the Supreme Court 17 October 1991.

Lacy H. Thornburg, Attorney General, by Steven E. Bryant, Special Deputy Attorney General, and H. Jefferson Powell, Special Counsel to the Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

On 12 December 1988, defendant was indicted by a Duplin County grand jury for the first-degree murder of Joseph Allen "John Henry" Rivenbark (John Henry). On 22 June 1989, another Duplin County grand jury indicted defendant for robbery with a

dangerous weapon, specifically charging him with using an axe to rob John Henry of a .22-caliber revolver, wallet, wristwatch and gold wedding band. Defendant pleaded not guilty. On 24 July 1989, a jury returned verdicts of guilty of first-degree murder (on theories of both felony murder and premeditation and deliberation) and robbery with a dangerous weapon (armed robbery). After the jury was unable to reach a unanimous verdict with respect to sentencing on the murder conviction, defendant was sentenced by Judge Reid to life imprisonment. Defendant was also sentenced to a consecutive twenty-year prison term on the armed robbery charge.

Defendant argues that he is entitled to a new trial because of errors committed by the trial judge. We find no prejudicial error and therefore conclude that defendant is not entitled to a new trial.

I.

The question before the Duplin County jury which convicted defendant of first-degree murder and armed robbery was not *whether* defendant killed John Henry with an axe and took some of his property. The question was *why*. Defendant admits killing John Henry. Defendant also admits taking three firearms, including the .22-caliber revolver, and a wristwatch which belonged to John Henry; he denies taking the wallet and ring. The ultimate question for the jury was whether to believe the State's explanation that defendant murdered John Henry with premeditation and deliberation in the course of committing armed robbery or to accept defendant's explanation that he killed John Henry in self-defense and took the property to raise money to relocate his family.

The State, through its evidence presented at trial, painted the following picture:

On the evening of Thursday, 3 November 1988, defendant visited several "drink houses" in Greenevers. He was short on cash, to the point of having to borrow one dollar for a shot of whiskey. Around 8 p.m. defendant accepted a ride from Marilyn Murphy and Bud Matthews, who were leaving the drink house on their way home to Wallace. Defendant told them he was going to work at the N & W grocery store in Wallace. After going about a quarter of a mile, they passed by John Henry's house, and defendant asked the driver to stop. Ms. Murphy testified that defendant said, "that

MF owes me $80 and I'm going after it." Ms. Murphy, when pressed by the prosecutor, said defendant used the full word m..... f..... Mr. Matthews testified that defendant said, "this son of a bitch owes me $80. He's going to pay me." Defendant got out of the car. Mr. Matthews and Ms. Murphy continued on their way.

On Sunday, 6 November 1988, John Henry's body was found. He had been struck with an axe at least thirty times, according to the testimony of Dr. Thomas Clark who performed the autopsy. Dr. Clark testified that it appeared likely that at least five blows were struck to the back of the head and two additional blows to the back itself. The injuries were of two types, Dr. Clark testified, blunt force and chopping.

Four witnesses, including John Henry's brother and brother-in-law, testified that John Henry owned an axe, but they had never seen it inside the house. Instead, they testified, the axe was kept outside under the carport.

Duplin County Sheriff's Deputy W.E. Ramsey testified that he and an SBI agent "processed" the homicide location. Deputy Ramsey testified that the house was "turned upside down," with drawers pulled out and clothing and boxes littering the floors. Deputy Ramsey also testified that the ignition switches of two vehicles outside John Henry's house had been damaged.

Richard Honeycutt, owner of Honeycutt's Pawn Shop, testified that a man identifying himself as defendant pawned a gold wedding band on 7 November 1988.

The State also presented evidence that defendant quit his job on 6 November 1988, attempted to sublet his apartment, and then moved with his wife and children to Philadelphia.

Defendant testified in his own behalf and told the following story:

On the night John Henry was killed, defendant accepted a ride from Ms. Murphy and Mr. Matthews. Once they got started, however, Mr. Matthews told defendant that they were not going to Wallace. Defendant then asked to get out of the car, figuring he would walk to John Henry's house and ask him for a ride home. Defendant told Ms. Murphy and Mr. Matthews that John Henry owed him a favor, and that John Henry owed him some money. Defendant denied making the statements attributed to him by Ms. Murphy or Mr. Matthews. Defendant testified that the

last time he had seen John Henry, he (defendant) had helped him with something in the yard, and that defendant thought John Henry might repay the favor by giving him a ride home to Wallace.

Defendant testified that John Henry did not want to drive to Wallace that night because he had been drinking; however, he told defendant that he could spend the night. Defendant agreed and the two men drank some beer. Defendant then went to sleep on the couch.

According to defendant's testimony, he was awakened a few hours later by John Henry, who was standing over him with a gun, wearing only his underwear and tee shirt. John Henry threatened to kill him if he (defendant) did not perform oral sex on him. Defendant said he was scared for his life and so did as he was told. John Henry then told defendant to go into the bedroom and drop his pants. When they got to the bedroom, defendant testified that he panicked, knocked the gun out of John Henry's hand and a fight ensued. Defendant ran from the bedroom and John Henry followed, threatening to kill him. Defendant testified that he was scared and grabbed an axe that was near the door. Defendant swung the axe at John Henry, hoping to hit him with the blunt end, but realized that he had struck him with the sharp end. John Henry then went bleeding into the bathroom, looked at defendant and lunged at him. Defendant hit him several more times.

Defendant testified that he panicked and decided to move his family to Philadelphia where his wife's family lived. Defendant explained that he took three firearms and a watch to raise money for the trip. He denied, however, taking the wallet or ring, ransacking the house or damaging the ignition switches. Defendant also testified that he pawned his own wedding ring, which he had recently purchased. Defendant had not told his wife about the wedding ring because she did not like jewelry and would have forced him to get rid of it.

Defendant testified that after moving with his family to Philadelphia, he got a job fixing houses and also worked part time delivering Christmas trees. On 7 December 1988, after learning that police were looking for him, defendant turned himself in to Philadelphia police. Defendant was extradited to North Carolina to stand trial.

Defendant argues on appeal that errors committed by the trial judge entitle him to a new trial on the murder and armed robbery convictions. Defendant assigns four errors. Each will be discussed in turn, with additional facts provided as necessary.

II.

In his first assignment of error, defendant argues that the trial court erred by: (1) allowing the State to present in its case-in-chief testimony from seven witnesses that John Henry was a peaceful man; and (2) allowing the State to introduce what defendant believes to be evidence of defendant's violent character.

Defendant suggests that evidence as to John Henry's peaceful character was improperly admitted pursuant to the "first aggressor" exception to North Carolina Rule of Evidence 404(a)(2) because that exception is generally used in the "traditional self-defense case," not in sexual assault cases. Defendant's argument is wholly without merit.

North Carolina Rule of Evidence 404(a) states:

> *Character evidence generally*—Evidence of a person's character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character of accused—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
>
> (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;
>
> (3) Character of witness—Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

N.C.G.S. § 8C-1, Rule 404(a) (1988).

[1] Defendant argues that the "first aggressor" exception is generally used where there is evidence of a fight and the question is who started the fight. Regardless of how this exception is *generally* used, the plain meaning of the "first aggressor" exception is abundantly clear: if a defendant presents evidence that the victim was

the first aggressor in the confrontation which led to the victim's death, the State can offer evidence of the victim's peacefulness.

[2] In this case, defendant claimed that John Henry forced him at gunpoint to perform oral sex. This obviously triggers the "first aggressor" exception.

Even if the "first aggressor" rule applies, defendant argues, the trial court erred by allowing the State to introduce its evidence of peacefulness in its case-in-chief, instead of in rebuttal as required by the rule. We agree, but conclude that the error was not prejudicial.

The State concedes that under this Court's case law, decided prior to the adoption of the Rules of Evidence, the State could not introduce evidence of a victim's peacefulness until *after* the defendant had introduced evidence of the victim's violent character. *State v. Champion*, 222 N.C. 160, 161, 22 S.E.2d 232, 233 (1942). *Champion*, however, dealt with the common law rule that a defendant pleading self-defense could introduce "evidence as to the general character of the deceased as a violent and dangerous man . . . ." *Id.* Only after a defendant had introduced such *general character evidence* could the State offer rebuttal evidence concerning "the general reputation of the deceased for peace and quiet." *Id.* Thus, prior to the adoption of Rule 404(a)(2), the State could not introduce rebuttal evidence *any* time a defendant in a homicide case claimed the victim was the first aggressor. *See* 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 106, at 466 n.68 (3d ed. 1988).

Although Rule 404(a)(2) adds the "first aggressor" exception to the general rule prohibiting character evidence, Professor Brandis states that "[u]nder the (new) rule, as under prior case law, the State may not, in a homicide case, introduce evidence of the victim's peaceful character except in rebuttal." *Id.* The State, however, refers this Court to another noted commentator who concludes under the parallel federal rule that the State can introduce such evidence in its case-in-chief "once it is somehow established to an acceptable level of probability that the defendant, as part of his case, will offer evidence that the victim was the first aggressor." 1 John H. Wigmore, *Evidence* § 63, at 1370 n.5 (Peter Tillers rev. 1983). The State invites this Court to adopt the Wigmore approach and uphold the trial court's ruling in this case because defendant's counsel told jurors during his opening statement that the evidence

would show that John Henry initiated the confrontation which led to his death.

[3] We agree with Professor Brandis and hold true to our prior case law that the State cannot introduce evidence of the victim's peacefulness until after defendant has put forward evidence that the victim was the first aggressor. *See Champion*, 222 N.C. at 161, 22 S.E.2d at 233. We believe this is consistent with the plain meaning of Rule 404(a)(2), which states that the prosecution can introduce evidence of peacefulness "to rebut *evidence* that the victim was the first aggressor." N.C.G.S. § 8C-1, Rule 404(a)(2) (emphasis added). Opening statements by attorneys are not evidence. *State v. Lewis*, 321 N.C. 42, 49, 361 S.E.2d 728, 733 (1987). Therefore, the prosecution should have waited until rebuttal to introduce its evidence concerning the peacefulness of John Henry. We conclude, therefore, that the trial court erred by allowing the State to introduce evidence in its case-in-chief that John Henry had a reputation for peacefulness.

We hold, however, that this error did not prejudice defendant in this case. Defendant's entire defense was based on his testimony that John Henry was the first aggressor. Thus, the State would have been allowed during rebuttal to introduce its evidence that John Henry had a reputation for peacefulness. Because the same evidence would have been admissible later in the trial, defendant cannot demonstrate a reasonable possibility that a different result would have been reached had the evidence been excluded during the State's case-in-chief. N.C.G.S. § 15A-1443(a) (1988).

[4] Defendant also argues in the same assignment of error that the trial judge erred by allowing into evidence a toothbrush with a piece of metal can attached to the end, and testimony by a prison guard that defendant made this "weapon" while in jail awaiting trial. This evidence, argues defendant, was introduced in an effort to characterize defendant as a violent person and is inadmissible under Rule 404. Again, we hold that the trial judge erred, but that the error was not prejudicial.

A prison guard testified that he confiscated from defendant a toothbrush with a piece of metal can attached to the end. The guard testified that the modified toothbrush would be considered a weapon under prison regulations. On cross-examination, the guard said that defendant told him the toothbrush was used to cut card-

board boxes for drawings, and that he (the guard) had never seen defendant use the toothbrush as a weapon.

A trustee at the jail also testified about the toothbrush. The trustee said that he reported the toothbrush to prison authorities. On cross-examination, the trustee said that defendant told him the toothbrush was used to cut a cardboard box to mount a drawing he made for his wife. The trustee testified that he saw the drawing that was mounted, and that he had never seen defendant use the toothbrush in an attempt to hurt anyone.

The State concedes the toothbrush evidence was arguably inadmissible, but for different reasons than those cited by defendant. The State argues that the toothbrush was part of a larger package of evidence that the prosecution hoped to introduce under Rule 801(d)(A) (admissions by a party opponent). That evidence would have "amounted to an admission and acknowledgment of guilt," according to the State's brief. However, in response to objections by defendant's counsel at trial, the trial judge held two *voir dire* hearings and excluded all the evidence the prosecutor wished to introduce, except the toothbrush, the metal can used to modify the toothbrush, and the testimony concerning the toothbrush. The State acknowledges that given the trial court's decision to exclude most of the evidence, the toothbrush and accompanying testimony were arguably irrelevant and thus not admissible under Rule 402 (irrelevant evidence inadmissible).

We conclude that the toothbrush and accompanying testimony should have been excluded under Rule 404 or Rule 402. However, given the substance of the testimony, the cross-examination of both witnesses, and the other evidence presented at trial, we do not believe defendant has carried his burden under N.C.G.S. § 15A-1443(a) of proving that, but for the evidence in question, there was a reasonable possibility that a different result would have been reached. *See State v. Groves*, 324 N.C. 360, 372, 378 S.E.2d 763, 771 (1989) (assuming error under Rule 404(b), defendant not prejudiced by evidence that he possessed a knife, set a fire, and made threats while in jail awaiting trial for murder). Thus, the error was not prejudicial.

In his next assignment of error, defendant argues that the trial court erred by denying his motion to dismiss the armed robbery charge because: (1) there was insufficient evidence to allow the charge to go to the jury; and (2) it was probable that the

jury convicted defendant for taking his own property. We hold the trial court did not err by denying the motion to dismiss.

The rules governing motions to dismiss in criminal cases are well settled and familiar. *State v. Vause*, 328 N.C. 231, 236-37, 400 S.E.2d 57, 61 (1991); *State v. Earnhardt*, 307 N.C. 62, 65-68, 296 S.E.2d 649, 651-53 (1982); *State v. Powell*, 299 N.C. 95, 98-99, 261 S.E.2d 114, 117 (1980). When a defendant moves for dismissal, the trial judge must determine whether there is "substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the crime." *Vause*, 328 N.C. at 236, 400 S.E.2d at 61. The term "substantial evidence" is deceptive because, as interpreted by this Court in the context of a motion to dismiss, it is interchangeable with "more than a scintilla of evidence." *Earnhardt*, 307 N.C. at 66, 296 S.E.2d at 652. Thus, the true test of whether to grant a motion to dismiss is whether the evidence, considered in the light most favorable to the State, is "existing and real, not just seeming or imaginary." *Id.* If the evidence will permit a reasonable inference that the defendant is guilty of the crime charged, the trial judge should allow the case to go to the jury. *Vause*, 328 N.C. at 237, 400 S.E.2d at 61. This is true whether the evidence is direct, circumstantial or both. *Id.*

[5] Armed robbery under N.C.G.S. § 14-87 consists of the following essential elements:

> (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened.

State v. Small, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991). "The gist of the offense is not the taking but the taking by force or putting in fear." *State v. Powell*, 299 N.C. 95, 102, 261 S.E.2d 114, 119 (1980). Defendant argues that he took John Henry's property as an "afterthought" and that there is no more than a "suspicion" that he intended to commit armed robbery. Defendant cites *Powell* to support his argument. In *Powell*, the defendant was charged with first-degree murder, first-degree rape and armed robbery. This Court concluded that the "arrangement of the victim's body and the physical evidence indicate she was murdered during an act of rape. We believe that even construing the evidence in a light most favorable to the State, it indicates only that defendant took the objects as an afterthought after the victim had died." *Id.*

This case is distinguishable from *Powell*. Here, the State presented evidence which showed that: (1) defendant was short on cash; (2) immediately after passing John Henry's house, he stated in no uncertain terms that the "m..... f..... owes me $80 and I'm going after it"; (3) John Henry was struck more than 30 times with an axe that was kept outside in the carport; (4) the house was ransacked; and (5) items were stolen. Defendant does not deny killing John Henry or taking three firearms and a watch, but claims he killed John Henry in self-defense and took the items to finance the relocation of his family. We hold that this evidence, when viewed in the light most favorable to the State, is sufficient to "permit a *reasonable inference* that the defendant is guilty of the crime charged." *Vause*, 328 N.C. at 237, 400 S.E.2d at 61. Furthermore, it is immaterial whether the intent was formed before or after force was used upon the victim, provided that the theft and force are aspects of a single transaction. *See State v. Green*, 321 N.C. 594, 365 S.E.2d 587, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988).

[6] Defendant also argues that the trial judge erred by not dismissing the armed robbery charge because of the possibility that the jury convicted him of taking his own property. Defendant's argument is based on the following: (1) there was evidence presented at trial that defendant had "pawned" his television set with John Henry, and that the television was not found at the house; (2) during his closing argument, the prosecutor said that he believed the defendant had taken the television from the house, but had hidden it someplace when it became too heavy to carry; and (3) the trial judge, when instructing the jury on the crime of armed robbery, used the word "property" to describe the items the defendant was accused of taking. Thus, argues defendant, the jury may have believed that he took the pistol and watch as an afterthought, but nevertheless convicted him for taking his own television set, property to which he was entitled. We disagree.

The prosecutor's statement referred to by defendant was made in the context of arguing that defendant's testimony was not credible. The prosecutor was attempting to respond to defendant's suggestion that someone else had ransacked John Henry's house and stolen those items which defendant denied taking. It was in this context that the prosecutor suggested that the missing television set was taken by defendant. However, when discussing with the jury the elements necessary to prove armed robbery, the prosecutor

specifically mentioned only the items which defendant admitting taking, *i.e.*, the revolver and watch. In addition, the prosecutor told the jury that a defendant can only be convicted of armed robbery for taking property to which he is not entitled.

Similarly, the judge's instructions to the jury were replete with references to the fact that the defendant could not be convicted of armed robbery unless he took property "that he was not entitled to take." While in hindsight it might have been better for the trial judge to specifically name the items in question instead of using the general word "property," we believe that in the context of the entire jury charge, it was perfectly clear that defendant could be convicted of armed robbery only for taking property to which he was not entitled.

[7] In his next assignment of error, defendant argues that the trial judge erred by allowing the prosecutor to cross-examine him about his efforts to resist extradition from Pennsylvania to North Carolina. Defendant argues that he has a federal due process right to resist extradition and that the State's cross-examination somehow burdened that right or punished defendant for exercising that right. The State responds that defendant has no constitutional right to resist extradition, and that the prosecutor's questions were intended to undermine defendant's credibility.

Assuming defendant has a due process right to have North Carolina establish the legitimacy of its charge against him, we fail to see how this right was burdened or how defendant was punished by the State's cross-examination at trial. A review of the record reveals that it was *defendant* who brought up the subject of extradition during his testimony explaining why he left North Carolina. Defendant, on direct examination, told the jury that he had anticipated his arrest and therefore decided to move his wife and children to Philadelphia. It was this desire to resettle his family, not a desire to evade arrest, which caused him to leave the state, according to defendant. In fact, when notified that North Carolina police were in Philadelphia looking for him, defendant testified that he called Philadelphia police and turned himself in. It was in this context that defendant's attorney asked defendant whether he and his court-appointed attorney in Philadelphia had waived extradition or had, instead, gone through a hearing. Defendant responded that he had a hearing prior to his extradition. On cross-examination, the prosecutor asked defendant whether he had

voluntarily come back to North Carolina or whether he had fought extradition from December 1988 until March 1989. It is this question about which defendant now complains.

We agree with the State that the prosecutor had a right to impeach defendant's testimony concerning his flight to Philadelphia and subsequent return to North Carolina. Defendant's ability to fight his extradition prior to trial obviously was not "burdened" in the least by questions asked during trial. In fact, by his own testimony, defendant acknowledged that he had an extradition hearing in Philadelphia with the assistance of counsel. He also was not "punished" for his decision to fight extradition. It was *defendant* who broached the subject; it was *defendant* who opened the door for cross-examination. A testifying defendant is subject to impeachment by cross-examination generally to the same extent as any other witness. *State v. Lester*, 289 N.C. 239, 245, 221 S.E.2d 268, 272 (1976). We hold that the trial court did not err in allowing the cross-examination in question.

[8] In defendant's final assignment of error, he argues that the trial court erred by instructing the jury that it could infer premeditation and deliberation from, among other things, the lack of provocation by the victim. Defendant argues in his brief that the instruction in this case allowed jurors to find premeditation and deliberation on a theory not supported by the evidence. Defendant spent virtually all his time at oral argument, however, arguing that this instruction, whether given in this case or any other first-degree murder case, is faulty because it: (1) impermissibly shifts the burden of proof to the defendant, requiring him to come forward with evidence of provocation in order to rebut an inference of lack of provocation; and (2) may result in jury confusion in that it does not specify what type of provocation is at issue, *i.e.*, "legal provocation," which reduces murder to manslaughter, or "ordinary provocation," which reduces first-degree murder to second-degree murder.

Defendant concedes that he did not object to this instruction at trial and therefore may not assign it as error. N.C. R. App. P. 10(b)(2). Nevertheless, he asks this Court to consider the merits of his argument under the "plain error" rule. N.C. R. App. P. 10(c)(4). In order to prevail under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different verdict. *State v. Robinson*, 330 N.C. 1, 22, 409 S.E.2d 288, 300

(1991). Even assuming, *arguendo*, that there was error in this instruction, defendant cannot meet this heavy burden.[1]

Defendant objects to one clause of one sentence in a long and detailed set of jury instructions. The portion of the jury charge objected to by defendant is the underlined clause in the following excerpt of the jury charge:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred such as the lack of provocation by the victim, conduct of the defendant before, during or after the killing, threats and declarations of the defendant, use of grossly excessive force, infliction of lethal wounds after the victim has fell [sic], brutal or vicious circumstances of the killing, or the manner which or means by which the killing was done . . . .

The jury was also instructed separately concerning the definitions of premeditation and deliberation.

After the jury instructions were delivered, jurors were instructed to choose among the following verdicts: (1) guilty of first-degree murder on the basis of *both* felony murder and malice, premeditation and deliberation; (2) guilty of first-degree murder on the basis of felony murder only; (3) guilty of first-degree murder on the basis of malice, premeditation and deliberation only; (4) guilty of second-degree murder; (5) guilty of voluntary manslaughter; and (6) not guilty.

This case, in essence, boiled down to whether jurors believed defendant's version of what happened the night of 3 November 1988, or whether they believed the State's version of events. The State's evidence, as presented at trial, could reasonably lead jurors

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1. Defendant, at oral argument, noted that the jury charge to which he objects is based almost verbatim on the North Carolina Pattern Jury Instructions. N.C.P.I.—Crim. 206.10 (1989). Because this jury instruction is used in many first-degree murder cases, defendant urged this Court to address the merits of his argument even if we decided this issue against him on the basis of the plain error rule. Specifically, defendant asked this Court to invoke its supervisory powers to strike the "lack of provocation" instruction from the Pattern Jury Instructions. We note that defendant's presentation at oral argument was based heavily on his Memorandum of Additional Authority. *See* N.C. R. App. P. 28(g) (newly discovered authority may be cited, but not discussed or analyzed). We decline defendant's invitation to reach out beyond this case to decide an issue not fully briefed.

to conclude that defendant killed John Henry with premeditation and deliberation while committing an armed robbery. In fact, jurors specifically rejected verdicts of second-degree murder and voluntary manslaughter. Defendant has not demonstrated that, absent the underlined phrase in the jury charge outlined above, the jury probably would have reached a different verdict. We hold that defendant cannot meet his burden under the plain error rule. *See Robinson*, 330 N.C. at 22, 409 S.E.2d at 300.

In sum, we find no prejudicial error in defendant's trial for first-degree murder and armed robbery and therefore uphold both convictions.

No error.

MICHAEL KEITH BRASWELL, ADMINISTRATOR OF THE ESTATE OF LILLIE STANCIL BRASWELL, DECEASED v. BILLY R. BRASWELL AND RALPH L. TYSON, SHERIFF OF PITT COUNTY

No. 225A90

(Filed 6 December 1991)

1. **Public Officers § 10 (NCI3d)— public duty doctrine—expressly adopted**

The public duty doctrine, with its exceptions, is adopted. A municipality and its agents act for the benefit of the public and there is no liability for the failure to furnish police protection to specific individuals. There are two exceptions: where there is a special relationship between the injured party and the police; and when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.

Am Jur 2d, Sheriffs, Police, and Constables § 94.

Personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker. 41 ALR3d 700.

2. Sheriffs and Constables § 4 (NCI3d)— domestic violence by deputy sheriff—failure of sheriff to protect victim—directed verdict for sheriff

The trial court properly granted a directed verdict for defendant sheriff in an action for damages from the sheriff's allegedly negligent failure to protect a decedent from a domestic assault by a deputy sheriff where plaintiff relied upon the special duty exception to the public duty doctrine and the only promise arguably specific enough to trigger the exception to the public duty doctrine was the sheriff's alleged promise to see that the victim got to and from work safely, but it was conceded that the victim was not driving to or from work when she was killed.

Am Jur 2d, Sheriffs, Police, and Constables § 94.

Personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker. 41 ALR3d 700.

3. Sheriffs and Constables § 4 (NCI3d)— domestic violence by deputy sheriff—negligent supervision and retention—directed verdict for defendant

The trial court did not err by granting a directed verdict for defendant in an action for negligent supervision and retention of a deputy sheriff who killed his wife and then shot himself. The untoward behavior at issue here occurred outside the workplace and while the transgressor was off duty, circumstances indisputably allowing the employer lesser control; the deputy was known as stable and even tempered, with the exception of the domestic dispute with his wife; there is no indication in the record that the emotionally charged relationship spilled over into the deputy's work or that his official capacity would in any way be used to further his tortious conduct; and it cannot be said as a matter of law that plaintiff has overcome by the greater weight of the evidence the presumption favoring the sheriff's proper retention and supervision of his employee. The theory of imputing liability to an employer solely on the basis of an employee using a chattel of the master is not recognized; moreover, even if it were recognized, the chattel of the master theory is not satisfied under the facts of this case. Finally, it seems clear

that nothing the sheriff did or failed to do was a proximate cause of the victim's death.

Am Jur 2d, Sheriffs, Police, and Constables § 150.

4. **Evidence and Witnesses §§ 298, 1009 (NCI4th)— domestic violence by deputy—action against sheriff—evidence not admissible**

The trial court did not err in an action against a sheriff arising from the killing by a deputy of the deputy's wife by not permitting plaintiff, the son, to testify about prior acts of violence and threats by his father towards his mother, or about the sheriff's conversations with and assurances to his mother. The court found that plaintiff had a pecuniary interest in the outcome of the proceedings and may have been prejudiced, which would more than offset any inherent trustworthiness of the evidence, and plaintiff put forth no reason why the trial court's decision was an abuse of discretion.

Am Jur 2d, Witnesses §§ 108, 109.

5. **Evidence and Witnesses § 2148 (NCI4th)— domestic violence by deputy—action against sheriff—expert testimony—not admissible**

The trial court did not err in an action against a sheriff arising from the killing of a deputy's wife by the deputy by excluding expert opinions that inaction by defendant contributed to the victim's death, that the investigation of the victim's death was inadequate, and that there was information available to defendant that the deputy was unfit to carry a gun. The testimony of the criminologist would not have assisted the jury in determining whether the inaction of the defendant significantly contributed to the victim's death, and the testimony of the psychologist was excluded on the grounds of relevancy because much of the evidence concerned prior violence, which the trial judge had already found to be inadmissible. Furthermore, the jury was in as good a position as the expert to determine whether there was sufficient data concerning the deputy's fitness to carry a gun.

Am Jur 2d, Expert and Opinion Evidence §§ 41-44.

6. Evidence and Witnesses § 300 (NCI4th)— domestic violence by deputy—action against sheriff—prior acts of violence—not admissible

The trial court did not err by excluding prior acts of violence in an action against a sheriff for negligent supervision and retention of a deputy who killed his wife in a domestic dispute. The acts in question were too remote in time to be relevant to defendant's knowledge of the deputy's current dangerous propensities, and the letters were unopened prior to the victim's death and therefore not probative of defendant's knowledge.

Am Jur 2d, Evidence §§ 298, 303; Sheriffs, Police, and Constables § 150.

ON discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal 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. 231, 390 S.E.2d 752 (1990), affirming in part and reversing in part the judgment of *Smith (Donald L.), J.*, dated 8 October 1987 in Superior Court, PITT County. Heard in the Supreme Court 14 February 1991.

Law Offices of Marvin Blount, Jr., by Marvin Blount, Jr., and Joseph T. Edwards, for plaintiff-appellant and -appellee.

Womble Carlyle Sandridge & Rice, by Richard T. Rice and J. Daniel McNatt, for defendant-appellant and -appellee Tyson.

MEYER, Justice.

This lawsuit arose out of the murder of Lillie Stancil Braswell by her estranged husband, Deputy Sheriff Billy R. Braswell. On the morning of 27 September 1982, a passing motorist found the body of Lillie Braswell on Chinquapin Road near Farmville, North Carolina. The parties stipulated that Lillie, age thirty-nine, died as a result of gunshot wounds inflicted by Billy Braswell, who had served for thirteen years as a deputy sheriff for defendant, Pitt County Sheriff Ralph Tyson. Plaintiff, the son of Lillie and Billy Braswell and the administrator of Lillie's estate, sued both his father and Sheriff Tyson. A voluntary dismissal was taken with respect to defendant Billy Braswell. Plaintiff proceeded to trial on two negligence claims against Sheriff Tyson, negligent failure to protect and negligent supervision and retention of Deputy

Braswell, but directed verdict was granted in defendant Tyson's favor at the close of plaintiff's evidence.

Plaintiff appealed to the Court of Appeals, which found no error with respect to the dismissal of the negligent supervision and retention claim but held that the trial court erred in dismissing the claim against defendant Tyson on the issue of negligent failure to protect. Judge Greene dissented from that portion of the majority's opinion affirming the trial court's directed verdict for defendant on the negligent supervision and retention claim. Plaintiff appeals to this Court as of right by reason of the dissenting opinion. Additionally, defendant Tyson filed a petition for discretionary review, requesting review of whether the Court of Appeals was correct in its determination that the trial court erred in directing verdict for defendant as to the failure to protect claim and further requesting that we review whether the trial court erred in admitting hearsay statements not covered by any hearsay exception. This petition was allowed 27 July 1990.

In reviewing the grant of directed verdict for defendant, we must consider the evidence in the light most favorable to the plaintiff, resolving contradictions and discrepancies in his favor. *Sharp v. Wyse*, 317 N.C. 694, 346 S.E.2d 485 (1986). Moreover, plaintiff's evidence must be taken as true, and he is entitled to every reasonable inference to be drawn from the evidence. *Id.* The question presented on appeal is whether the evidence, taken in the light most favorable to plaintiff, was sufficient to take the case to the jury. *Hitchcock v. Cullerton*, 82 N.C. App. 296, 297, 346 S.E.2d 215, 217 (1986). Erroneously admitted evidence must be considered in ruling upon a motion for directed verdict. *Koury v. Follo*, 272 N.C. 366, 158 S.E.2d 548 (1968). Where the evidence is sufficient to support all the elements of plaintiff's claim, defendant's motion for directed verdict should be denied.

In the light most favorable to the plaintiff, the evidence tends to show the following. On Wednesday evening, 22 September 1982, Lillie Braswell moved out of the home that she shared with her husband. That morning she met with Sheriff Tyson and related her fears that Billy would kill her if she remained in the home. His behavior had become more irregular, and he had recently spent much time staring at her while tapping three envelopes on his knee. When Lillie told Billy she was leaving, he told her that neither of them was going anywhere and that if he could not have

her, nobody could. Sheriff Tyson related to Lillie that if she discovered the contents of the envelopes, she should let him know. That afternoon, Lillie called Tyson from her place of work to inform him that she had located the envelopes. She informed Sheriff Tyson of the "gist" of the letters. At about this time, Tyson also dispatched two deputies to check on Billy. Both reported that Billy appeared neither homicidal nor suicidal.

While moving out of her house, Lillie discovered the three letters Billy had been tapping on his knee; one was addressed to their son, Mike. The letter read, in pertinent part, as follows:

> Well Mike by now you already know what has happen[ed]. . . .
>
> . . . .
>
> . . . All I can say is son I loved your mother, and I just couldn't stand to see her leave me. . . .
>
> I just hope Mike that you didn't have to see this mess. But if you did, please put it out of your mind. And please don't ever go back to this house again, it'll only hurt you more.
>
> Mike get Jimmy to help you with the property settlement, he knows what to do. . . .
>
> . . . .
>
> Please, Mike don't hold this against me. I know it's the worst thing any one can do, but I feel there is a reason for doing this. I just need the rest, and I couldn't go alone. . . .
>
> . . . .
>
> Mike there is one thing I would like for you to make sure it is done. I would like very much for me and Lillie [to] be placed side by side, along with Granddaddy in Wilson. There might be some talk about that, but please be sure that we are placed beside each other. . . .
>
> . . . .
>
> . . . And Mike I'm sorry for doing this to you, but I just can't see any other way. I just love Lillie to [sic] much to see her leave me.

The other envelopes, unopened at Lillie's death, were addressed to Billy's brother and to Deputy Sheriff Brooks Oakley, Billy's friend and co-worker.

Lillie spent Wednesday, Thursday, and Friday nights with a friend, Marguerite Taylor, in Greenville. Taylor called Sheriff Tyson on Wednesday because she was concerned about being involved in a domestic dispute. Tyson told her that he believed it would be a good idea for Lillie to stay with her, that he would keep Lillie's whereabouts confidential, and that Taylor should call if she needed him.

Lillie spent Saturday night with her best friend, Lila Joyner. Lila helped Lillie remove more of her clothes from the house. Lillie told her that she showed the letters she found to Sheriff Tyson, and he told her that Billy would not harm her.

On Sunday, the day before her death, Lillie spent the night with another friend, Hilda Joyner. Hilda testified that Lillie talked about moving to another part of the country but thought that Billy had sources and could track her down wherever she went. According to Hilda Joyner, Sheriff Tyson told Lillie that "he would see she got back and forth to work safely . . . [and] that his men would be keeping an eye on her." Hilda testified that the promise was as much a promise to keep an eye on Billy as a promise to watch Lillie, "that he was to . . . watch out for her . . . [and] make sure Billy . . . didn't bother Lillie." When Lillie left for work on Monday morning, she said that she was going to be all right and that she was going to get things straightened out.

When Lillie arrived at work in Greenville on Monday, 27 September 1982, she telephoned her attorney, who agreed to meet with her at his office in Farmville. She took with her the three letters and a copy of the separation agreement Billy's attorney had written. Lillie never arrived in Farmville. After her body was discovered at approximately 11:30 a.m., deputies began searching for Billy. They located him at his house in Farmville, sitting in a recliner with two gunshot wounds to his chest. Billy asked the officers at the scene to let him die. Parked in the carport outside the home was the silver sheriff's department vehicle Billy had been driving while his regularly assigned brown sheriff's vehicle was being repaired. The driver's door of the car was open. One revolver was in the car, and another revolver was inside the house.

Billy Braswell survived the attempted suicide and was tried, convicted, and sentenced to life imprisonment for the murder of his wife.

At trial, Sheriff Tyson testified that Lillie told him that Billy had beaten her five years earlier and had threatened her with a firearm, and that he had heard about the incidents shortly after they happened. Lillie also told him that Billy had put a gun to her head several years earlier. There were no records in Billy's personnel file concerning these incidents. Sheriff Tyson testified that Lillie never actually showed him the contents of the letter from Billy to his son Mike, but only told him the gist of it. She also related Billy's statement, "If I can't have you, nobody is going to have you." He sent Deputy Harris to talk with Billy, and Harris told Sheriff Tyson that, in his opinion, Lillie and Billy were just having marital problems. Sheriff Tyson denied making any promises to protect Lillie and testified that he told Lillie she would have to file the appropriate legal papers before he could take steps to protect her.

A criminologist testified that Sheriff Tyson's inaction violated the standards and procedures of the law enforcement profession; that where there is any hint that an officer might abuse the vast amount of power with which he or she is vested, for example, the power to carry concealed weapons, the supervisor should undertake a thorough investigation and talk with the individual personally; and that should the investigation reveal the necessity of suspension or dismissal, the supervisor should take such action immediately. A clinical psychologist testified that Billy's letter to Mike indicated both suicidal and homicidal intentions and that Billy was clearly a danger to himself and others prior to Lillie's death.

[1] The first issue for review involves Sheriff Tyson's alleged negligent failure to protect Lillie Braswell. Defendant argues that the Court of Appeals erroneously reversed the trial court's order of directed verdict in his favor in the plaintiff's claim that Sheriff Tyson had negligently failed to protect Lillie Braswell. We agree.

The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. *Coleman v. Cooper*, 89 N.C. App. 188, 193, 366 S.E.2d 2, 6, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988). This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelm-

ing burden of liability for failure to prevent every criminal act. *Id.*

> The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources . . . should be allocated and without predictable limits.

Riss v. City of New York, 22 N.Y.2d 579, 581-82, 240 N.E.2d 860, 860-61, 293 N.Y.S.2d 897, 898 (1968); *accord Cuffy v. City of New York*, 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372 (1987).

While this policy is a necessary and reasonable limit on liability, exceptions exist to prevent inevitable inequities to certain individuals. There are two generally recognized exceptions to the public duty doctrine: (1) where there is a special relationship between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) "when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered." *Coleman v. Cooper*, 89 N.C. App. at 194, 366 S.E.2d at 6; *see also Martin v. Mondie*, 94 N.C. App. 750, 752-53, 381 S.E.2d 481, 483 (1989). Although we have not heretofore adopted the doctrine with its exceptions, we do so now.

[2] Plaintiff in the instant case relies upon the "special duty" exception as a basis for liability. To make out such a prima facie case, plaintiff must show that an actual promise was made by the police to create a special duty, that this promise was reasonably relied upon by plaintiff, and that this reliance was causally related to the injury ultimately suffered by plaintiff.

Defendant first contends that the alleged promises were not of the type that create a special duty. Plaintiff's evidence tended to show that Sheriff Tyson stated that Billy would not harm Lillie and that his men would be keeping an eye on her, and promised only that Lillie would get to and from work safely. Defendant argues that these statements, if made, were general words of com-

fort and assurance, commonly offered by law enforcement officers in situations involving domestic problems, and that such promises were merely gratuitous and hence not sufficient to constitute an actual promise of safety. We agree.

Although plaintiff's evidence was that Sheriff Tyson indicated to Lillie that he thought she would be safe, there is absolutely no evidence tending to indicate that he expressly or impliedly promised her protection at any time other than when she was driving to and from work. Even taking the evidence in the light most favorable to nonmovant plaintiff, as we must, we find no evidence of a promise made by Sheriff Tyson which would warrant a special duty that would encompass protection on a full-time basis. The only promise arguably specific enough to trigger the exception to the public duty doctrine was Tyson's alleged promise to see that Lillie got to and from work safely. It is conceded by all parties that Lillie Braswell was not driving to or from work when she was killed; she was driving to her attorney's office at 11:00 a.m. Her midday trip to perform this personal errand during working hours had nothing to do with her commuting to and from work and hence was outside the scope of protection arguably promised by Sheriff Tyson.

Thus, even if there were a promise to provide protection while traveling to and from work, Lillie's alleged reliance on Tyson's promise cannot in any way be considered to have caused her death. *See Kanoy v. Hinshaw*, 273 N.C. 418, 426, 160 S.E.2d 296, 302 (1968).

In sum, the "special duty" exception to the general rule against liability of law enforcement officers for criminal acts of others is a very narrow one; it should be applied only when the promise, reliance, and causation are manifestly present. *See Cuffy v. City of New York*, 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372. In the instant case, the facts do not suffice to make a claim for negligent failure to protect under the "special duty" exception.

[3] We next examine the plaintiff's argument that the trial court erred by dismissing his claim for negligent supervision and retention. In essence, plaintiff contends that Sheriff Tyson was negligent in continuing to retain Billy Braswell in his employ and in failing to properly supervise Braswell after learning of Braswell's erratic behavior. We agree with the trial court and the majority in the Court of Appeals that this claim is not viable, given the evidence here.

Our courts in the past have acknowledged the existence of a cause of action for negligent supervision and retention. In *O'Connor v. Corbett Lumber Corp.*, it was noted that:

> [E]mployers have been held independently liable under the doctrine of negligent hiring or retention of incompetent or unfit employees. There the theory of liability is that the employer's negligence is a wrong to third persons, entirely independent of the employer's liability under the doctrine of *respondeat superior*.

84 N.C. App. 178, 182-83, 352 S.E.2d 267, 270-71 (1987) (citation omitted); *see also Wegner v. Delicatessen*, 270 N.C. 62, 65-66, 153 S.E.2d 804, 807 (1967); *Pleasants v. Barnes*, 221 N.C. 173, 177, 19 S.E.2d 627, 629 (1942); *Shorter v. Cotton Mills*, 198 N.C. 27, 30, 150 S.E. 499, 500 (1929); *Walters v. Lumber Co.*, 163 N.C. 536, 541-42, 80 S.E. 49, 51-52 (1913); *Lamb v. Littman*, 128 N.C. 361, 363-64, 38 S.E. 911, 911-12 (1901); *Hogan v. Forsyth Country Club*, 79 N.C. App. 483, 494, 340 S.E.2d 116, 123-24, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). In such actions,

> the presumption is that the master has properly performed his duty in selecting his servants, and before responsibility for negligence of a servant, proximately causing injury to plaintiff . . . can be fixed on the master, it must be established by the greater weight of the evidence, the burden being on the plaintiff, that he has been injured by reason of carelessness or negligence . . . and that the master has been negligent in employing or retaining such incompetent servant, after knowledge of the fact, either actual or constructive.

Pleasants v. Barnes, 221 N.C. at 177, 19 S.E.2d at 629.

With the exceptions of *Lamb* and *Hogan*, in none of the cases cited above was the cause of action allowed. Significantly, both *Lamb* and *Hogan* involved well-known and certain, ongoing foreseeable harms occurring on the employer's premises while the employee was on duty. In *Lamb*, a case decided in 1901, the Court reversed a nonsuit in which an employer was sued for hiring and retaining as a supervisor an individual widely known to be surly, violent, and ill-tempered toward children. There, the employee pushed to the floor and injured a ten-year-old boy who was working as a mill floor-sweeper. In so deciding, the Court attached special importance to the fact that the employer hired and retained such

a person to serve in the capacity of supervisor, a position inevitably involving interaction with the children who worked in the mill, and responsibility for the care and control of others. *Lamb*, 128 N.C. at 363, 38 S.E. at 911-12.

Similarly, in *Hogan*, the court deemed plaintiff's forecast of evidence sufficient to maintain her claim that her employer was liable for the negligent retention and supervision of plaintiff's co-worker, who repeatedly sexually harassed her at work. The manager had been repeatedly informed by plaintiff of the activity and failed to intercede. The court held that it was a jury question whether defendant, through its manager, failed to exercise reasonable care over its supervisory personnel to prevent the behavior directed toward the plaintiff. *Hogan*, 79 N.C. App. at 492, 340 S.E.2d at 122.

The instant case does not involve such facts. Unlike *Hogan* and *Lamb*, the untoward behavior at issue here occurred outside the workplace and while the transgressor was off duty, circumstances indisputably allowing the employer lesser control. Moreover, with the exception of the domestic dispute with his wife Lillie, Billy Braswell was otherwise known as stable and even-tempered. There is no indication in the record that the Braswells' emotionally charged relationship spilled over into Mr. Braswell's work as a law enforcement officer or that his official capacity would in any way be used to further his tortious conduct. Finally, we cannot say as a matter of law that plaintiff has overcome by the greater weight of the evidence the presumption favoring Sheriff Tyson's proper retention and supervision of his employee Billy Braswell.

Judge Greene, partly concurring and partly dissenting, concluded that the trial court erred in its determination that plaintiff failed to make out a prima facie case of negligent supervision. In reaching his conclusion that plaintiff presented evidence sufficient to support a claim of negligent supervision, Judge Greene attached great importance to the Restatement (Second) of Torts § 317. This section provides:

> § 317. Duty of Master to Control Conduct of Servant
>
> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

A review of our pertinent case law reveals no support for the application of this particular section of the Restatement. We find no case in which liability has been imputed to an employer solely on the basis of an employee "using a chattel of the master." We decline to recognize this theory of liability in the situation presented in this case. Moreover, even if we were to recognize this theory, we do not find that the "using a chattel of the master" theory is satisfied under the facts of this case. The evidence taken in the light most favorable to the plaintiff will not support a reasonable finding that "using a chattel of the master" caused Lillie Braswell's death. No one saw Lillie's husband, Deputy Sheriff Billy Braswell, kill her. Lillie was found shot to death beside her car on Chinquapin Road in Pitt County, several miles from the Braswell home. Shortly after discovering Lillie's body, law enforcement officials discovered a sheriff's department vehicle, which had been temporarily assigned to Deputy Braswell, parked in the carport outside the Braswell home. A Colt revolver containing six empty shell casings and a necktie with a hole in it were in the vehicle. There is no evidence that the sheriff's department vehicle in question was anywhere near the scene of Lillie Braswell's murder. Moreover, there is no evidence that the vehicle was equipped with a blue light or siren, making very tenuous any argument that some coercive influence of Braswell's law enforcement status was at play.

The evidence tends to show that after discovering the vehicle, law enforcement officials entered the Braswell home. They found a Smith and Wesson revolver containing one empty shell casing on the floor of the den and discovered Deputy Braswell sitting

in a chair in the house with two bullet wounds to his chest. There was no ballistics evidence or evidence of any other nature tending to show that either of the pistols found was used in the murder of Lillie Braswell, that either pistol had been provided to Braswell by Sheriff Tyson or the sheriff's department, or that the department required Braswell to carry weapons while off duty.

Finally, it seems clear that nothing Sheriff Tyson did or failed to do was a proximate cause of Lillie Braswell's death. Tyson instructed two deputy sheriffs to speak with Braswell and check on his mental condition. They reported that Braswell was experiencing marital problems but otherwise appeared normal. Sheriff Tyson himself spoke with Braswell and inquired whether he needed some time off. Braswell informed Tyson that he needed no time off, and Tyson concluded that Braswell was stable. Finally, and perhaps most significantly, in addition to being Sheriff Tyson's employee, Deputy Braswell was Lillie Braswell's husband. All of the evidence tends to show that he had firmly made up his mind to kill her and was willing to, and in fact intended to, give up his own life in the process. That being so clearly the case, there simply was little Sheriff Tyson could have done, acting within the constraints placed upon him by law, to prevent the killing in this case. Indeed, Braswell would have had the same access to his own weapons or another vehicle regardless of any action by Sheriff Tyson. It is a sad but certain fact that some individuals commit despicable acts for which neither society at large nor any individual other than those committing the acts should be held legally accountable. This is such a case.

We next examine the evidentiary issues brought forward by plaintiff.

[4] Plaintiff alleges that the trial court erred in excluding certain evidence that would have further supported his claims. First, he contends that the court improperly limited his own testimony concerning defendant's promises to protect Lillie and failed to allow him to make a proper offer of proof under the residual exception to the hearsay rule to preserve the record on appeal. The trial court found that plaintiff had a pecuniary interest in the outcome of the proceedings, and therefore, he may have been biased or prejudiced, which would more than offset any inherent trustworthiness of the evidence. Plaintiff was not permitted to testify about prior acts of violence and threats by his father towards his mother

or about Sheriff Tyson's conversations with and assurances to his mother. Plaintiff puts forth no reason why the trial court's decision was an abuse of discretion, other than that the testimony would have supported his claim. We find no abuse of discretion and overrule this assignment of error. *See State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985).

[5] Plaintiff next argues that the trial court erred by excluding expert opinions that would have been helpful to the jury. The North Carolina Rules of Evidence allow the admission of expert opinion testimony if it will assist the trier of fact in understanding the evidence or determining a fact in issue. N.C.G.S. § 8C-1, Rule 702 (1988). Plaintiff contends that the trial court erred by preventing his expert criminologist from testifying that the inaction of the defendant contributed significantly to Lillie's death and that if defendant had taken the appropriate measures, there was a substantial probability that her death would not have occurred. The court also prohibited the expert psychologist from testifying that the defendant's investigation of Lillie's complaint was inadequate and that there was information available to the defendant that Deputy Braswell was unfit to carry a gun.

The determination of the admissibility of expert testimony is within the sound discretion of the trial judge and will not be disturbed on appeal absent abuse of discretion. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). When the jury is in as good a position as the expert to determine an issue, the expert's testimony is properly excludable because it is not helpful to the jury. *Id.* The evidence here reveals that the testimony of the criminologist would not have assisted the jury in determining whether the inaction of the defendant significantly contributed to Lillie's death and was properly excluded. Moreover, the testimony of the psychologist was excluded on the grounds of relevancy. Much of the testimony concerned prior violence, which the trial judge had already found to be inadmissible. Furthermore, the jury was in as good a position as the expert to determine whether there was sufficient data indicating Billy's fitness to carry a gun. We find no abuse of discretion in the trial court's exclusion of this testimony.

[6] Finally, plaintiff argues that the trial court erred in failing to admit evidence of prior acts of violence that would further support his claim for negligent supervision and retention. Plaintiff contends that the evidence would have established actual or con-

structive knowledge of Billy's violent propensities. The court excluded the testimony of various witnesses and unopened letters found in Billy's desk and Lillie's purse after the murder. The acts in question were too remote in time to be relevant to defendant's knowledge of Billy's current dangerous propensities. The letters that were excluded were unopened prior to Lillie's death and, therefore, were not probative evidence of defendant Tyson's knowledge. Accordingly, we find no abuse of discretion and therefore overrule this assignment of error.

Because we find in favor of defendant, we do not address defendant's evidentiary issues raised on discretionary review.

The decision of the Court of Appeals is affirmed in part, reversed in part, and the case is remanded to the Court of Appeals for further remand to Superior Court, Pitt County, for reinstatement of that court's judgment.

Affirmed in part and reversed in part and remanded.

IN THE MATTER OF THE ESTATE OF LAWRENCE NORTON, DECEASED

No. 252PA91

(Filed 6 December 1991)

Wills § 7 (NCI3d)— valid codicil—typewritten pages attached thereto—no incorporation by reference

The evidence was insufficient for the jury to find that a legally executed two-page codicil incorporated by reference six typewritten pages attached thereto, each of which were signed on the bottom by the decedent but which contained no witness signatures, where the evidence showed that the six-page document was in existence at the time the codicil was executed, but it also showed that, while decedent had the codicil stapled to the six-page document designated as "LAST WILL AND TESTAMENT OF LAWRENCE NORTON" and inserted the document in an envelope that had typed on the outside "WILL OF LAWRENCE NORTON AND CODICIL OF LAWRENCE NORTON," decedent had executed numerous wills prior to his death, and there was no reference within the

codicil itself clearly designating the six-page document as the "will" to which the codicil referred.

Am Jur 2d, Wills §§ 199-202, 204, 205.

Justice MARTIN dissenting.

Chief Justice EXUM and Justice FRYE join in this dissenting opinion.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished opinion of the Court of Appeals affirming an order of *Brooks, J.*, entered 15 February 1989 in Superior Court, SCOTLAND County. Heard in the Supreme Court 15 November 1991.

Leath, Bynum, Kitchin & Neal, P.A., by Henry L. Kitchin and Stephan R. Futrell, for Teab Norton, propounder-appellant.

Etheridge, Moser, Garner and Bruner, P.A., by Kennieth S. Etheridge and William F. Moser, for Betty Williams and Mary Langley, respondent-appellees administratrices.

McLean, Stacy, Henry & McLean, by Everett L. Henry, for respondent-appellees remaining heirs of Lawrence Norton.

MEYER, Justice.

This litigation arises out of an effort by propounder Teab Norton to have a paper writing probated in solemn form as the last will and testament of his father, Lawrence Norton, who died on 15 January 1987. The writing sought to be probated is a document consisting of a legal cover sheet and eight sheets of paper. The first page of the document following the legal cover is entitled "LAST WILL AND TESTAMENT OF LAWRENCE NORTON." Its first paragraph provides:

> I, LAWRENCE NORTON, of Scotland County, North Carolina, do hereby revoke all wills and codicils heretofore made by me, and do hereby make, publish, and declare this my last will and testament in manner and form as follows . . . .

The successive paragraphs, among other things, direct the payment of testator's debts, make certain monetary bequests, and devise specified real properties. The dispositions conclude at the bottom of the sixth page, in mid-sentence of a metes and bounds description of a real property devise. These first six pages are stapled to

the flap of the legal cover sheet. The pages do not bear the signatures of any witnesses or a notary public, nor does a date appear, but in the lower right-hand side of each of the six pages is the signature of the testator.

The seventh page of the document is entitled "CODICIL TO LAST WILL AND TESTAMENT OF LAWRENCE NORTON." It states:

> I, LAWRENCE NORTON, of Scotland County, North Carolina, do hereby will, devise, and bequeath to my son, Alton Norton, the following tract of land with the stipulation that it is not to be sold for a period of ten (10) years . . . .

After the metes and bounds description of the property comes the following language:

> IN TESTIMONY WHEREOF, I, the said Lawrence Norton, have signed this typewritten page and the following Certificate of Self-Proven Codicil to my Will which together constitutes this Codicil to my Last Will and Testament and do hereunto set my hand and seal this 17th day of September, 1984.

Beneath this paragraph, Mr. Norton's mark and the signatures of two witnesses appear. Self-proving language, the signatures of a notary and two witnesses, and Mr. Norton's mark are found on the final page. These last two pages are stapled together, and the second page is stapled to the cover sheet, thereby adhering the codicil to the six aforementioned pages. The envelope containing these pages has printed on it "Will" and then the typewritten words "OF LAWRENCE NORTON AND CODICIL TO WILL OF LAWRENCE NORTON."

Propounder's evidence tended to show the following. On 17 September 1984, decedent had Ms. Blanche Blackwelder, now deceased, type the two-page document entitled "CODICIL TO THE LAST WILL AND TESTAMENT OF LAWRENCE NORTON." That same day, Ms. Blackwelder and a co-worker witnessed the notary public guiding the decedent's hand to make his mark on the document. Decedent had suffered a stroke and needed assistance.

Dorinda Wells, decedent's granddaughter, testified that in September 1984 she had accompanied decedent to Ms. Blackwelder's "to have something typed up requesting that Alton Norton would receive the pond." Decedent later asked Ms. Wells to "staple the ones that he received from Ms. Blanch[e] [Blackwelder] to the copy

of his will" and said that "they had to be attached to the will if they were to be any good." Ms. Wells complied with the request and testified that the document at issue here was the same as the one she stapled together under decedent's direction.

Shirley Stone, former legal secretary for Walter Cashwell, a Laurinburg attorney, testified on deposition that she knew decedent as a regular client of Mr. Cashwell and had seen and notarized decedent's signature on a number of occasions. In particular, she testified that she had typed the aforementioned "LAST WILL AND TESTAMENT OF LAWRENCE NORTON," that the six pages now in existence were the same ones she had typed, and that the signature at the bottom of each of the six pages was that of decedent. Further, Ms. Stone testified that she had prepared a number of different wills for the deceased but that she did not remember when she had prepared the other wills relative to the six-page document at issue here.

C. Whitfield Gibson, the Clerk of Court of Scotland County, testified that soon after decedent's death he inventoried decedent's safe-deposit box at First Union Bank in Gibson, North Carolina. Therein was a brown envelope with no writing on it, inside of which was a white envelope designated "WILL OF LAWRENCE NORTON AND CODICIL TO THE WILL OF LAWRENCE NORTON" that contained the eight-page document propounded as decedent's last will and testament. Clerk Gibson also found another writing within the brown envelope, a two-page document in a white legal cover designated "CODICIL TO WILL OF LAWRENCE NORTON." This document was properly executed 14 February 1975 and begins in mid-sentence. No reference to a specific will or other paper writing is made in the document.[1]

Ms. Vashti Freeman, formerly with the Gibson Branch of the First Union Bank, testified that decedent had rented a safe-deposit box there and further testified as to the bank's procedures regarding access to safe-deposit boxes. A ledger card admitted into evidence shows decedent's signature beside the dates 10 February 1975 and 14 February 1975. Accompanying an entry for 18 April 1984 is an "X" on the signature line; typed next to the "X" are the words "customer had a stroke." Ms. Freeman testified that she had typed

1. Propounder abandoned his attempt to probate the 14 February writing; therefore, it is unnecessary to discuss that document at length.

this explanation and that no one other than decedent had access to the box. The ledger card showed that decedent accessed his box on 12 September 1984 and again at 10:30 a.m. on 17 September 1984, the date that the codicil propounded as part of decedent's will was executed. The bank's ledger card shows 17 September 1984 to be the last time decedent accessed the box. The final ledger entry is 30 January 1986 and is signed by Clerk Gibson, Ms. Freeman, and attorney Edward H. Johnston, Jr.

At the close of propounder's evidence, respondents moved for a directed verdict. This motion was denied. Respondents informed the trial court that they were not offering evidence and renewed their motion for a directed verdict. Propounder also moved for a directed verdict. Both motions were denied. The trial court submitted the following issues to the jury:

> ISSUE # 1
>
> Was the two-page paper writing dated September 17, 1984, executed by Lawrence Norton according to the formalities of law required to make a valid last will and testament or a valid codicil to a last will and testament?
>
> . . . .
>
> ISSUE # 2
>
> Were the first six (6) pages of Propounder's Exhibit Number 3 incorporated by reference by Lawrence Norton into the paper writing dated September 17, 1984 so as to constitute one document propounded by Teab Norton?
>
> . . . .
>
> ISSUE # 3
>
> Is the eight-page document identified as Propounder's Exhibit Number 3 and every part thereof the Last Will and Testament of Lawrence Norton?

The jury found in favor of the propounder on each of the issues. After the jury returned its verdict, respondents moved for judgment notwithstanding the verdict as to issues two and three. The trial court granted this motion and entered judgment in favor of respondents.

On appeal, the Court of Appeals unanimously affirmed the trial court. The court did not address the judgment regarding issue number one, as respondents moved for judgment regarding only issues two and three. The court concluded that the first six typewritten pages propounded as decedent's last will and testament, although designated as such, do not constitute a legally valid will because of the lack of witness signatures. Further, while the two-page codicil is valid, as evidenced by the jury's unchallenged determination in issue one, the codicil fails to adequately identify the attached six pages so as to effectuate a valid incorporation by reference. Therefore, propounder's claims on appeal were denied.

The sole question before this Court is whether the Court of Appeals erred in affirming the trial court's decision to award judgment notwithstanding the verdict in favor of respondents because propounder failed to satisfy the legal requirements of testamentary incorporation by reference[2] or otherwise prove that the eight-page document as a whole constituted the final testamentary instrument of Lawrence Norton. We conclude that the Court of Appeals did not err, and we affirm its unanimous decision.

The documents at issue in this case are susceptible of numerous potential interpretations. The six-page document may possibly be conceived as a validly attested will. *See* N.C.G.S. § 31-3.3 (1984). However, we agree with the Court of Appeals that the stapled pages at issue here cannot constitute a legally valid will. Although decedent's signature on each page suggests that at some time these six pages may have been part of an attested will, the lack of witnesses' signatures vitiates this prospect. The question, therefore, turns on whether the properly executed 1984 codicil gives life to the six pages at issue through incorporation by reference.

N.C.G.S. § 31-5.8 provides in pertinent part: "No will or any part thereof, which shall be in any manner revoked, can be revived otherwise than by a reexecution thereof, *or by the execution of another will in which the revoked will or part thereof is incorporated by reference.*" N.C.G.S. § 31-5.8 (1984) (emphasis added).[3]

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2. For an edifying student treatment of this doctrine, see Willis P. Whichard, Note, *Wills—Incorporation by Reference—Invalid Instruments*, 42 N.C. L. Rev. 493 (1964).

3. The legislature amended N.C.G.S. § 31-5.8 effective 1 October 1991, making the new terms of the statute applicable to the will of any person dying on or after that date. The changes made were not substantive, and because decedent

Here, there is no evidence that the six pages were reexecuted. However, for purposes of statutory construction, a valid codicil is considered to be a "will." N.C.G.S. § 12-3(9) (1986).

The requirements for an incorporation by reference were articulated by this Court in *Watson v. Hinson*, 162 N.C. 72, 77 S.E. 1089 (1913):

> It is well recognized in this State that a will, properly executed, may so refer to another unattested will or other written paper or document as to incorporate the defective instrument and make the same a part of the perfect will, *the conditions being that the paper referred to shall be in existence at the time the second will be executed, and the reference to it shall be in terms so clear and distinct that from a perusal of the second will, or with the aid of parol or other proper testimony, full assurance is given that the identity of the extrinsic paper has been correctly ascertained.*

Id. at 79-80, 77 S.E. at 1092 (emphasis added); *see also Siler v. Dorsett*, 108 N.C. 301, 302, 12 S.E. 986, 987 (1891) ("[S]uch paper must be described and identified with such particularity as to designate and clearly show, and so that the court can certainly see, what paper is meant to be made part of the will."); *Chambers v. McDaniel*, 28 N.C. (6 Ired.) 226, 229 (1845) ("[T]he instrument referred to must be so described as to manifest distinctly what the paper is that is meant to be incorporated, and in such a way that the Court can be under no mistake . . . ."). Therefore, the essential inquiry here is whether there is: (1) reliable evidence that the six pages were in existence at the time of the codicil and (2) a "clear and distinct" reference in the codicil itself, or otherwise, such as to provide "full assurance" that the six pages were intended to be incorporated in the testamentary wishes of decedent Lawrence Norton.

Because this issue comes to the Court as a question of whether judgment notwithstanding the verdict was justifiably rendered, we must determine whether the evidence, taken in the light most favorable to propounder, as a matter of law permits an inference in propounder's favor. *In re Will of Mucci*, 287 N.C. 26, 213 S.E.2d 207 (1975). The evidence tends to show the following. At some

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in the instant case died on 15 January 1986, well before the effective date of the new statute, the new terms of the statute do not come into play.

unspecified time prior to 17 September 1984, Lawrence Norton signed each page of a document designated as his "LAST WILL AND TESTAMENT," of which only six pages now remain. No date appears on this document and the signatures of neither witnesses nor a notary appear. On 17 September 1984, decedent Norton legally executed a codicil which, in addition to devising certain property to his son Alton Norton, contained the following language:

> IN TESTIMONY WHEREOF, I, the said Lawrence Norton, have signed this typewritten page and the following Certificate of Self-Proven Codicil to my Will which together constitutes this Codicil to my Last Will and Testament and do hereunto set my hand and seal this 17th day of September, 1984.

Dorinda Wells, decedent's granddaughter, testified that decedent had asked her to staple the codicil to "the copy of his will," as he believed that otherwise the documents would not be "any good." Ms. Wells complied with this request. Shirley Stone testified that at some unspecified time during 1970-1977, she had typed the decedent's "LAST WILL," of which six pages now remain and are now attached to the codicil. Ms. Stone also testified that she had typed a number of other wills for decedent but that she could not remember when they were prepared relative to the six-page document.

On the basis of this evidence, it is apparent that sufficient evidence exists to satisfy the first *Watson* requirement that the extrinsic document be in existence at the time of the creation of the codicil. Ms. Stone testified that during the period she worked for decedent's attorney, 1970-1977, she had typed the six-page document pursuant to her employer's instructions. Further, she testified that the signature contained on the pages was that of decedent Lawrence Norton. Given that the document was typed before 1977 and that decedent's signature was on the pages at least before 17 September 1984, because as of that date Mr. Norton could no longer inscribe his name, the propounder offered sufficient evidence to satisfy the first prong of the *Watson* test. *Watson*, 162 N.C. at 79-80, 77 S.E. at 1092.

However, as to the second *Watson* requirement (that "the reference . . . be in terms so clear and distinct that . . . full assurance" is provided that the six-page document was intended to be incorporated, *id.*), we conclude that propounder's claim fails. While decedent had the codicil stapled to the document designated as "his will" and inserted the documents in an envelope that had

typed on the outside "WILL OF LAWRENCE NORTON AND CODICIL OF LAWRENCE NORTON," there exists no reference within the codicil itself that is "in terms clear and distinct" designating the six pages as the document to be incorporated. In *Watson*, we held that a properly executed document, such as the 1984 codicil here, can incorporate another document that is, for whatever reason, defective. *Id.* However, it is critical that the extrinsic document be adequately identified so as to give "full assurance" that it was the document to be incorporated. We agree with propounder that it is not dispositive that there is no proof that the six pages were physically present at the time of the execution of the 1984 codicil. Nevertheless, without adequate reference derived from the codicil itself or other evidentiary sources, a reviewing court cannot be assured that the decedent intended to incorporate the extrinsic document. The testimony of Ms. Stone established that decedent executed numerous wills prior to his death. This assertion is supported by an examination of the decedent's safe-deposit box, which itself contained a witnessed codicil dated 14 February 1975 that begins in mid-sentence and to which no reference is made in any of the other documents at issue. In the face of this evidence and the fact that the codicil provides no reference to the six pages, we cannot have the "full assurance" that the six pages attached to the codicil were intended by decedent to be incorporated.

The cases propounder offers in support of his position in no way alter our confidence in the outcome we reach today. In *Siler v. Dorsett*, 108 N.C. 300, 12 S.E. 986 (1891), the Court construed a will that devised a tract of testator's land to the testator's nephews "upon the *terms and conditions* more fully set forth and explained in a written agreement between myself and [their father] . . . of even date with these presents." *Id.* at 301, 12 S.E. at 986. The Court concluded that the will referred to the document distinctly enough to incorporate it by reference. Significantly, however, the Court in that case was concerned that there was no such document in evidence, not whether it was adequately described. In the instant case, the question is precisely whether the extrinsic document is adequately described. The other case offered by propounder, *Godwin v. Trust Co.*, 259 N.C. 520, 131 S.E.2d 456 (1963), is likewise inapposite. There, a trust agreement that was executed by husband and wife on the same day that they executed their wills, which left their estates to the trustee for disposition as outlined in the trust agreement, was found by the Court to be adequately incor-

porated by reference into each of their wills, although the trust agreement was improperly executed. Thus, the Court was not faced with a matter of clear identification, but rather with whether the invalidity of the trust vitiated the incorporation.

Finally, we feel obliged to address propounder's contention that the Court of Appeals' decision, and by extension our decision today, is unduly mechanical and therefore disserves the central tenet of will construction, namely, to give effect to the testator's intent. *See Pittman v. Thomas*, 307 N.C. 485, 492, 299 S.E.2d 207, 211 (1983). In particular, propounder contends that the strict application of our statutory law as to formal execution of a will is not at issue because there exists here a legally valid codicil. We believe that this misstates the question. The question is not whether the codicil was validly executed; rather, we must ask whether there was an effective incorporation by reference. In answering this question in the negative, we perceive no reason that the same strict rules as to the execution of a will or codicil should not be equally applicable to the doctrine of incorporation by reference. *See Alexander v. Johnston*, 171 N.C. 468, 470, 88 S.E. 785, 786 (1916) ("The right to dispose of property by will is statutory and can only be exercised by following the requirements of the statute." (Citation omitted.)). Because the two requirements of *Watson* have not been met, we are compelled to conclude that the evidence is insufficient as a matter of law to justify the jury's verdict in propounder's favor, and we therefore affirm the Court of Appeals. *Beal v. Supply Co.*, 36 N.C. App. 505, 507, 244 S.E.2d 463, 465 (1978).

Affirmed.

Justice MARTIN dissenting.

I respectfully dissent. It has been the law of North Carolina for more than one hundred years that

> It is well recognized in this State that a will, properly executed, may so refer to another unattested will or other written paper or document as to incorporate the defective instrument and make the same a part of the perfect will, the conditions being that the paper referred to shall be in existence at the time the second will be executed, and the reference to it shall be in terms so clear and distinct that from a perusal of the second will, or with the aid of parol or other proper testimony, full

> assurance is given that the identity of the extrinsic paper has been correctly ascertained. The principle is sometimes referred to as "The doctrine of incorporation by reference," . . . .

Watson v. Hinson, 162 N.C. 72, 79-80, 77 S.E. 1089, 1092 (1913).

The evidence in this case supports the finding of each of the requirements as set out in the *Hinson* opinion for the incorporation of the six typewritten pages as a part of the will of Lawrence Norton. The two-page codicil is a valid testamentary document, the Court of Appeals so held. No one has appealed from that holding. Under N.C.G.S. § 12-3(9), a codicil can be treated as a will. Therefore, documents can be incorporated by reference into a codicil. This is true whether they are attached or not. Further, N.C.G.S. § 31-5.8 provides that a will can be revived through an incorporation by reference. A duly executed codicil may incorporate a paper in the form of a will which was never properly executed as a will. *Watson v. Hinson*, 162 N.C. at 72, 77 S.E. at 1089. The conditions are that (1) the paper to be incorporated must be in existence at the time of the execution of the incorporating will and (2) the reference to the extraneous document must be in terms so clear and distinct that from a perusal of the second will or with the aid of parol or other proper testimony full assurance is given that the identity of the extrinsic paper has been correctly ascertained.

There is no argument but that the six typewritten pages were in existence at the time that the codicil was executed. No one disputes this point, and the evidence is overwhelming that the six-page document was prepared prior to 1977, and the codicil was executed in 1984.

I now turn my attention to whether the six-page document is sufficiently referred to in the codicil under the facts and circumstances of this case. The codicil refers to itself as a "Codicil to [Norton's] Last Will and Testament." The question is what is the will to which the testator so refers. The propounder argues that the "will" has to mean the will found and attached to the codicil; this seems reasonable to me. Under the facts of this case the six pages were stapled to a lightweight cardboard legal cover together with the two-page codicil. The legal cover had the title: "Will of Lawrence Norton and Codicil to the Will of Lawrence Norton." The stapled papers were inside another legal envelope which bore the same inscription. The evidence further shows that the testator presented the two-page codicil and the six-page docu-

ment to his granddaughter and asked her to staple them together. He told his granddaughter that the six pages had to be attached to the will "if they were to be any good." This could only mean that he intended the entire eight pages to be his will. At that time he was clearheaded and deliberate in his intention to incorporate the six pages into his will. Thereafter, Norton took the papers to his bank and placed them in his lock box. The lock box was not re-opened until after Norton's death.

The trial judge erred in entering judgment notwithstanding the verdict. Judgment notwithstanding the verdict should not be imposed unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Bryant v. Nationwide Mut. Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985); *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977). In looking at the parol evidence and the extrinsic document, it is apparent beyond any misapprehension that the testator intended that the entire eight pages be his last will and testament. The stapling of the six-page document to the duly executed codicil and the testimony as to the facts and circumstances surrounding the stapling of the documents and the placing of them in the safety deposit box of the testator give full assurance as to the identity of the extrinsic paper being incorporated.

The actions of the testator with respect to the incorporation by reference of the six-page typewritten document to his two-page codicil was done in accordance with *Hinson*, 162 N.C. 72, 77 S.E. 1089, and there was evidence sufficient to submit this issue to the jury. The jury found in favor of the propounder. I conclude that the trial judge erred in entering the judgment notwithstanding the verdict and that the Court of Appeals subsequently erred in affirming this action. My vote is to reverse the Court of Appeals and reinstate the verdict of the jury.

Chief Justice EXUM and Justice FRYE join in this dissenting opinion.

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

J. HENSLEY, JR., RICHARD M. HERIOT, DORIS T. AND NOVIS S. HERRING, VIRGINIA R. HILDEBRAND, MOZELLE L. HINSHAW, HERMAN J. HIPPS, RUFUS M. HODGIN, DONALD R. HOFFMAN, CHARLES K. HOFFMEYER, MARY R. HOLLAND, EDGAR P. HOLT, RAY HOMESLEY, NED A. HOOD, ROBERT H. HOOD, STEPHEN W. HOPKINS, CLYDE L. HOWARD, JR., KEVIN G. HUGHES, HARVEY R. HURST, SAM P. HYATT, JOHN L. IRBY, MATTIE B. IVES, FRANCIS JACOBS, RICHARD L. JARRETT, JACQUELINE M. JENNINGS, WOODROW W. JONES, DONALD L. JORGENSON, KENNETH R. JOSEPH, PATSIE W. JOSEPH, EVERETTE R. KELLER, BERNARD J. KELLEY, WILSON P. KEMP, HOWARD LEE KERR, MARGARET C. KERR, WILLIAM S. KETNER, DAVID L.G. KING, THOMAS M. KING, JR., EVELYN W. KINNEY, JOHN E. KIRK, PAUL E. KIRKLAND, SR., RAYMOND B. KLEBER, GEORGE M. KNOBL, JR., WILLIAM F. KNOPF, MAX V. KREBS, WILLIAM J. KUHN, JR., JAMES M. LANGSTON, JR., JANE W. LANGSTON, ELMER L. LASHUA, JOHN L. LATHAM, DANIEL M. LAUDERBACK, AUGUST R. LAWRENCE, FREIDA H. AND NORWOOD P. LEWIS, HENRY G. AND DOROTHY J. LILES, WALTER E. LINTHICUM, PHYLLIS V. LIPPARD, GEORGE LOTT, ROBERT P. LUCAS, ALLEN M. MABE, THOMAS S. MACELUCH, WILLIAM F. MARCUSON, JR., WARNER G. MAUPIN, LYLTON E. MAXWELL, OLIVER A. MAYS, ANDREW G. MAYSE, SAMUEL S. McCACHREN, ELIZABETH S. McCASKILL, ELIZABETH G. McDONALD, CLYDE W. McKIRK, DONALD D. McGUIRE, NORMAN H. McLAUGHLIN, DOY K. McPHAIL, WILLIAM RAY MEDLIN, JR., ERNEST E. MILLER, MARGARET H. MILLER, EDGAR N. MILLINGTON, HAROLD J. MITCHENER, EUGENE E. MOODY, DOROTHY C. MOORE, JAMES C. MOORE, JR., LUCIE E. MOORMAN, ROBERT M. MOOSE, JACK B. MORRIS, REGENA E. MORRISON, STANLEY B. MORSE, WOODFORD T. MOSELEY, GEORGE R. MUSE, R.J. NETTLES, THOMAS G. NEWPORT, JOHN E. NITSCHE, ALFRED P. NORWOOD, JOHNNIE M. OCHOA, ELVIN E. OGLESBY, OLIVER G. OJA, RUSSELL E. OLSON, LLOYD A. OSBORNE, PAUL B. OSGOOD, WILLIAM C. PAGE, LEE R. PARAMORE, LEWIS W. PATE, CHARLES R. PATTON, VERNON J. PEEBLES, W.W. PEGUES, MARY E. AND JOHN D. PENN, ELLIOTTE T. PERKINS, JR., WILLIAM H. PERRY, JR., PAUL J. PHILLIPPI, RICHARD L. PHILLIPS, RUBY A. PHILLIPS, FRANK J. PIAZZA, SR., DALLAS PICKARD, JR., GEORGE A. PINTER, EDWARD W. PIPER, FREDERICK H. PLESS, R.F. HOKE POLLOCK, JR., LEWINGTON S. PONDER, ELBERT Y. POOLE, JENNETTE C. POOLE, MARTHA BOYCE POTEAT, EDWIN H. PRICE, CHARLES R. PUGH, DANIEL J. QUESENBERRY, MILTON H. QUINN, LOUISE M. RABBINO, THOMAS M. RAMSEY, JACK G. RAY, MARSHALL G. RAY, HAZEL S. REDMON, GEORGE R. REINHART, III, ANNIE E. RENKEL, MADGE O. REYNOLDS, FRANKLIN E. RICHARDSON, JR., ALLEN W. RIGSBY, GEORGE M. ROBERTS, JENNINGS B. ROBINSON, JAMES P. ROTH, PHIFER P. ROTHMAN, HAROLD E. RUBLE, HILDA H. RULTENBERG, DONALD E. RUSSELL, GEORGE W. SABO, LYLE E. SAMSON, ROBERT L. SCHEER, FREDERICK L. SCHUERMAN, SR., ROBERT J. SCHULLERY, ELWOOD M. SHAULIS, ROBERT T. SHERIDAN, STANLEY T. SHIPLEY, CHARLES B. SHIVELY, CHARLES A. AND RUTH M. SHUE, JR., ELSIE N. AND FREDERICK E. SIMMONS, MARY B. SIMPSON, MANUEL F. SIVERIO, JOSEPH A. SIZOO, EVELYN S. SMITH,

GEORGE B. SMITH, JAMES A. SMITH, JAMES E. SMITH, JAMES P. SMITH, JOE F. SMITH, PERCY H. SMITH, JOSEPH L. SOMMER, RAY H. SPANGLER, JAMES A. SPRANKLE, WILEY L. STANDIFER, JR., JAMES W. STARBUCK, GERTRUDE D. STARLING, STACY J. STARLING, HENRY C. STEED, JR., ROY C. STEELEY, ARTHUR L. STEWART, BURLENA J. STEWART, JOHN R. STEWART, JR., GEORGE W. STILLWAY, RITA M. STILLWAY, HAROLD E. STONE, CLYDE DALTON STOWE, HARRY H. STRUNK, E.C. STUMPF, THOMAS A. SUMMEY, JR., ELLIS G. SUMNER, LEO B. AND MILDRED Y. SUMNER, MARGARET K. SWINK, JAMES E. SYKES, OLIVER B. TALBERT, JAMES D. TERRELL, CLYDE E. AND EMOGENE M. THOMPSON, FRED L. TRACY, ROCCO H. TROMBELLO, JOHN G. TRUITT, JR., WILLIAM H. TURK, JAMES T. VANCE, FRANCES A. VANDEN, GEORGE W. VANDEN, ETHEL D. VANHORN, EDWARD J. VAUGHN, EDWARD VENKLER, ROY L. VICK, SR., KERMIT J. VINSON, MYRTLE H. VINSON, WILLIAM E. WADE, FLOYD H. WALDROP, WANDA E. WALLACE, ROLAND J. WEBER, GRACE F. WEINER, LONA C. WEISNER, LAWRENCE O. WELCH, PAUL B. WELCH, JR., GEORGE L. WESTERLIND, WILLIAM B. WHITE, T.M. WHITTINGTON, JR., GEORGE W. WILKINS, ROBERT S. WILLIAMS, JR., WILLIAM C. WILLIAMS, WINTON H. WILLIAMS, HAROLD P. WILLIAMSON, EDNA MAE WILSON, ROBERT GRAVES WILSON, JR., ERNEST G. WINSTEAD, PETER S. WONDOLOWSKI, ROBERT V. WOOD, MAYNARD B. AND EVELYN W. WOODBURY, JACK R. WORLEY, JOHN T. WORRELL, GEORGE T. WORRELL, GEORGE E. YALE, JR., AND WILLIAM P. YARBOROUGH, INDIVIDUALLY FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, CLASS A PLAINTIFFS, CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER AND PAUL H. TURNEY, INDIVIDUALLY AND FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, CLASS B PLAINTIFFS v. THE STATE OF NORTH CAROLINA, HELEN A. POWERS, INDIVIDUALLY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE AND HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA, DEFENDANTS

No. 64PA91

(Filed 6 December 1991)

1. Rules of Civil Procedure § 56 (NCI4th)— motion for partial summary judgment—order granting summary judgment not limited

An order entered by the trial court passed on all claims where the motion and the order were entitled partial summary judgment, but the order recited that there was no genuine issue of material fact and that plaintiffs were entitled to judgment as a matter of law, ordered a refund of taxes to both

classes of plaintiffs, and did not limit the order to claims under the United States Constitution.

Am Jur 2d, Summary Judgment § 41.

2. Constitutional Law § 99 (NCI4th)— taxation of pensions—retired state employees and National Guard members—law of the land

The exemption from taxation of the pensions of retired state employees and the pay of National Guard members has a rational relationship to the provision of pensions and payment, which are valid state objectives, and the granting of those exemptions does not violate the law of the land clause of N.C. Const. art. I, § 19.

Am Jur 2d, State and Local Taxation §§ 475, 508.

3. Constitutional Law §§ 28, 92 (NCI4th)— taxation of pensions—retired state employees and National Guard members—no violation of equal protection

The providing of compensation for retired state employees and members of the National Guard is a legitimate governmental interest and the exemption of a part or all of that compensation from taxation has some relation to that governmental interest. Those exemptions do not violate the equal protection clause of N.C. Const. art I, § 19, or art. V, § 2.

Am Jur 2d, Pensions and Retirement Funds §§ 1604-1606; State and Local Taxation §§ 475, 508.

4. Constitutional Law § 137 (NCI4th)— taxation of pensions—state prohibition on retrospective taxation—no violation

A tax imposed on the pensions of federal retirees did not violate the prohibition in N.C. Const. art. I, § 16 on retrospective taxation of acts previously done. The taxes were imposed on income received in the years the taxes were collected; the fact that the pensions of the federal retirees were based on wages previously earned does not make the tax retrospective.

Am Jur 2d, State and Local Taxation §§ 475, 508.

Chief Justice EXUM dissenting.

Justice MITCHELL dissenting.

Justice FRYE joins in this dissenting opinion.

HEARING on order granting plaintiffs' motion to rehear the opinion rendered in this case at 329 N.C. 576, 407 S.E.2d 791 (1991).

Charles H. Taylor and Womble, Carlyle, Sandridge & Rice, by G. Eugene Boyce, Donald L. Smith, Jasper L. Cummings, Jr., Wallace R. Young, Jr., and Michael J. Newman, for plaintiff appellees.

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] We have granted the plaintiffs' petition for rehearing in order to answer some of the claims made by the plaintiffs in the petition. The plaintiffs say, in their petition for rehearing, that the matter passed on in superior court was a motion for partial summary judgment which dealt only with claims under the Constitution of the United States. They say that they have alleged claims under the Constitution of North Carolina which have not been determined in the superior court and ask that the case be remanded to determine those claims.

We hold that the order entered by the superior court from which the appeal was taken was not for partial summary judgment. It was entitled motion for partial summary judgment but the motion said:

> Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Plaintiffs move this Court to enter an order granting summary judgment in favor of Class A Plaintiffs on their claims for refunds of taxes unlawfully collected from them for tax years 1985 through 1988 and in favor of Class B Plaintiffs on their claims for refunds of taxes unlawfully collected from them for tax years 1986 through 1989.

Nowhere in this motion do the plaintiffs limit it to their claims under the United States Constitution. The order granting the motion is entitled "Partial Summary Judgment" but it does not limit the order to claims under the United States Constitution. After reciting that there is no genuine issue of a material fact and that the plaintiffs are entitled to judgment as a matter of law, the superior court ordered a refund of taxes to both classes of plaintiffs. If we were to say the order should be limited to either federal or state claims, there is no way of determining from the motion or the order to which type of claim it should be limited. We hold the superior court passed on all claims. The State in its brief argues all the claims.

Both classes of plaintiffs alleged that the collection of the taxes deprived them of due process and equal protection of the laws guaranteed them by N.C. Const. art. I, § 19, as well as the constitutional right to uniformity in taxation guaranteed to them by N.C. Const. art. V, § 2, and the right against the taxing of acts previously done guaranteed by N.C. Const. art. I, § 16.

[2] In order to withstand a challenge to an act of the General Assembly on the ground it violates the law of the land clause of N.C. Const. art. I, § 19, which is comparable to the due process clause of the federal Constitution, the act of the General Assembly must have a rational relation to a valid state objective. *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976). The provision of pensions for retired state employees and the payment to members of the National Guard are valid state objectives. The exemption from taxation for these two remunerations has a rational relation to each of them. The granting of these exemptions does not violate the law of the land clause of N.C. Const. art. I, § 19.

[3] We are not certain that N.C. Const. art. V, § 2 has any application to this case. It deals principally with taxation of property. Its only reference to income taxes is contained in the following sentence, "[t]he rate of tax on incomes shall not in any case exceed ten percent, and there shall be allowed personal exemptions and deductions so that only net incomes are taxed." N.C. Const. art. V, § 2(6).

Assuming N.C. Const. art. V, § 2 applies, we believe the resolution of whether it prohibits the tax on the plaintiffs in this case presents the same question as is presented by the equal protection clause of N.C. Const. art. I, § 19. The General Assembly created

a class composed of retired state employees and a class composed of members of the National Guard. Each of these classes received favorable treatment under the income tax laws of this state. The question is whether these two classifications are reasonable and not arbitrary. Neither class of plaintiffs is a suspect class and the test as to arbitrariness is whether the distinctions drawn for retired state employees and members of the National Guard bear some relationship to a conceivable legitimate governmental interest. *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980); *Leonard v. Maxwell, Comr. of Revenue*, 216 N.C. 89, 3 S.E.2d 316, *app. dismd.*, 308 U.S. 516, 84 L.Ed. 439 (1939). The providing of compensation for retired state employees and members of the National Guard is a legitimate governmental interest. The exemption of a part or all of this compensation from taxation has some relation to this governmental interest. These exemptions do not violate the equal protection clause of N.C. Const. art. I, § 19, or art. V, § 2.

[4] The plaintiffs also contend that the tax imposed on them violates N.C. Const. art. I, § 16, which provides in part: "[n]o law taxing retrospectively . . . acts previously done shall be enacted." The taxes on the Class B plaintiffs were imposed on income in the years it was received. It was not imposed on acts previously done.

The taxes imposed on federal retirees were not taxes on acts previously done. The taxes were imposed on income which was received in the years the taxes were collected. The fact that the pensions of the federal retirees were based on wages previously earned does not make the tax retrospective. A statute is not unconstitutionally retroactive merely because it operates on facts which were in existence before its enactment. *See Smith v. American and Efird Mills*, 305 N.C. 507, 290 S.E.2d 634 (1982) and *Wood v. Stevens and Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979).

With the addition of this opinion, we reaffirm the opinion previously entered. We reverse and remand to the Superior Court, Wake County for the entry of judgment dismissing the action.

Reversed and remanded.

Chief Justice EXUM dissenting.

I joined in Justice Mitchell's original dissenting opinion because I think, and continue to think, that *Davis v. Michigan Dept. of*

Treasury, 489 U.S. 803, 103 L. Ed. 2d 891 (1989), is retroactive and plaintiffs are entitled to its benefits. That was the only issue addressed by the majority in its original opinion.

On plaintiffs' petition for rehearing the majority has elected to address certain state constitutional issues which plaintiffs contend were never ruled on by the trial court. It is not clear from the record on appeal that the state constitutional issues were addressed and decided by the trial court. If the trial court determined the case solely on the basis of the retroactivity of *Davis*, its order would not necessarily have been written differently. The trial court would have necessarily considered the state constitutional claims only if it had rejected plaintiffs' federal law claims. It is clear that the state law claims were neither briefed nor argued by plaintiffs on the original appeal. Neither side addressed these points in its oral presentation to the Court. Under these circumstances I think it inappropriate for the Court to address them now on plaintiffs' petition for rehearing.

I would either remand the case for determination of the state constitutional questions as plaintiffs have prayed or order a reargument and new briefing on the state constitutional issues.

I take this opportunity also to say that I have real doubt as to whether plaintiffs have followed proper statutory procedures and it may be that, ultimately, their claims will be barred on procedural grounds. *See Bailey v. State of North Carolina*, 330 N.C. 227, 410 S.E.2d 462 (1991). Since the majority has not chosen to address this aspect of the case, I, too, will leave it for another day.

Justice MITCHELL dissenting.

For reasons fully explained in my dissent from the previous decision and opinion of the majority of this Court in this case, I continue to believe that *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891 (1989) is fully retroactive and that the taxpayer-plaintiffs are entitled to its benefits. *Swanson v. State of North Carolina*, 329 N.C. 576, 586-89, 407 S.E.2d 791, 796-97 (1991) (Mitchell, J., dissenting, joined by Exum, C.J., and Frye, J.). For that reason, I continue to dissent from the result reached by the majority.

Justice FRYE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. RICKY LYNN CANADY

No. 278A90

(Filed 6 December 1991)

1. **Criminal Law § 1095 (NCI4th)— sentencing—aggravating factor—assertion of prosecutor**

The trial court erred when sentencing defendant for burglary and larceny by relying on the statement of the prosecutor in finding the aggravating factor of prior convictions. A defendant's silence while the prosecuting attorney makes a statement does not support an inference that the defendant consented to the statement, and the argument by defendant's attorney that the things with which he was charged in this case are not consistent with his past involvements should not be taken as a consent to the making of the statement by the prosecuting attorney.

Am Jur 2d, Criminal Law §§ 598, 599.

2. **Appeal and Error § 147 (NCI4th)— aggravating factor—unsupported statement of prosecutor—no objection to statement or to finding—question preserved for appeal**

A burglary and larceny defendant could raise on appeal the reliance of the court on the statement of the prosecuting attorney as to prior convictions even though defendant did not object to the statement at the time it was made or object to the finding of the aggravating factor of prior convictions when it was made. This is not a question of the admission of evidence and, assuming that Appellate Rule 10 requires an exception to be made to the finding of an aggravating factor, defendant has complied with the rule. Subsection (b)(1) of App. R. 10 does not have any application to this case. The defendant did not want the court to find the aggravating factor and the court knew or should have known it. This is sufficient to support an assignment of error; it is not necessary to implicate N.C.G.S. § 15A-1446(d)(5).

Am Jur 2d, Appeal and Error §§ 545, 624; Criminal Law §§ 598, 599; Habitual Criminals and Subsequent Offenders § 32.

Justice MEYER dissenting.

Justice WHICHARD dissenting.

Justice MITCHELL joins in this dissenting opinion.

APPEAL 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. 189, 392 S.E.2d 457 (1990), finding no error in a judgment of *Greene, J.*, at the 27 March 1989 session of Superior Court, ROBESON County. Heard in the Supreme Court 12 November 1990.

The defendant was convicted of second degree burglary and felonious larceny. At the sentencing hearing, the prosecuting attorney told the court that the defendant had prior convictions of felonious possession of marijuana, felonious possession of LSD, discharging a firearm into an occupied motor vehicle and escape from the Department of Corrections. There was no other evidence of prior convictions of the defendant.

The court found one aggravating factor, that the defendant had prior convictions for criminal offenses punishable by more than 60 days' confinement. No mitigating factors were found. The court enhanced the sentence to more than the presumptive sentence for both crimes.

Lacy H. Thornburg, Attorney General, by J. Charles Waldrup, Assistant Attorney General, for the State.

Arnold Locklear for defendant appellant.

WEBB, Justice.

[1] The defendant argues, under his only assignment of error, that it was error for the court to rely on the statement of the prosecuting attorney in finding the aggravating factor. We believe this argument has merit.

"Under the Fair Sentencing Act, a trial court may not find an aggravating factor where the only evidence to support it is the prosecutor's mere assertion that the factor exists." *State v. Swimm*, 316 N.C. 24, 32, 340 S.E.2d 65, 70-71 (1986); *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983). Pursuant to this rule, the defendant is entitled to a new sentencing hearing.

The State argues that the defendant seemed to concede the accuracy of the statements by the prosecuting attorney. *See State v. Mullican*, 329 N.C. 683, 406 S.E.2d 854 (1991). It bases this argu-

ment on the statement of the attorney for the defendant at the sentencing hearing in which he said, "[t]hese charges and convictions now against him are out of character and not consistent with what he's been involved in the past." This statement is too equivocal to serve as an admission by the defendant to prior convictions.

Justice Whichard, in his dissent, argues that by remaining silent when the prosecutor was making the statement and by attempting to distinguish his past misconduct from the charges presently against him, defendant implicitly stipulated to the accuracy of the prior convictions. We made it clear in *Mullican* that the statement by the prosecuting attorney that he would summarize the evidence with the permission of the defendant was an invitation to the defendant to object if he had not consented. *Id.* at 686, 406 S.E.2d at 855. There was not such an invitation in this case. We do not feel that a defendant's silence while the prosecuting attorney makes a statement should support an inference that the defendant consented to the statement. Nor do we feel that the argument by the defendant's attorney, that the things with which he was charged in this case are not consistent with his past involvements, should be taken as a consent to the making of the statement by the prosecuting attorney. Rightly or wrongly, the court was considering the matters about which the prosecuting attorney had spoken and the defendant had the right to argue the matters without being held to have admitted them.

[2] The State contends that the defendant cannot complain because he did not object to the statement of the prosecuting attorney at the time it was made. This is not a question of the admission of evidence. As *Swimm* and *Thompson* make clear, a statement of the prosecutor is not sufficient evidence to support the finding of an aggravating factor although there is no objection to the statement.

Finally, the State argues that the defendant cannot appeal the finding of the aggravating factor because he did not object to it when the finding was made. The State relies on *State v. Bradley*, 91 N.C. App. 559, 373 S.E.2d 130 (1988), *disc. rev. denied*, 324 N.C. 114, 377 S.E.2d 238 (1989). In that case, the Court of Appeals held that the defendant could not appeal from the finding of an aggravating factor because he did not object to the finding pursuant to N.C. R. App. P. 10(b)(2). Rule 10(b)(2), at the time *Bradley* was decided and at the time the sentence was entered

in this case, contained a sentence which said, "[a] separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error." This sentence has now been deleted from Rule 10(b)(2) effective as to all judgments entered after 1 July 1989.

Assuming Rule 10 requires an exception to be made to the finding of an aggravating factor, we hold the defendant has complied with the Rule. At the time of sentencing the judge said, "[f]or the record, the Court did take into consideration two previous felony convictions, possession of marijuana and LSD, and a charge of escape from the department of corrections." The defendant marked an exception to this statement and made it the subject of an assignment of error. This was sufficient to preserve the question for appellate review.

Justice Meyer in his dissent relies on Rule 10(b)(1) of the Rules of Appellate Procedure and argues that an objection to the finding of the aggravating factor should have been made at the time the factor was found. We note that the State in its brief does not rely on Rule 10(b)(1) which says:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

This subsection of the rule does not have any application to this case. It is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal. The purpose of the rule is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal. *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976); *State v. Isom*, 52 N.C. App. 331, 278 S.E.2d 327, *disc. rev. denied*, 303 N.C. 548, 281 S.E.2d 398 (1981). If we did not

have this rule, a party could allow evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assign error to them if the strategy does not work. That is not present in this case. The defendant did not want the court to find the aggravating factor and the court knew or should have known it. This is sufficient to support an assignment of error.

State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983), is not authority for this case. There was language in that case to the effect that a party may not go through the record or the transcript and insert exceptions. None of the exceptions in that case dealt with findings of fact in the judgment.

Justice Whichard, in his dissent, argues that pursuant to N.C.G.S. § 15A-1446(d)(5) an appeal may be taken although no objection was made to the finding of the aggravating factor. He bases this argument on the wording of the statute which says, "insufficiency of the evidence as a matter of law 'may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.' "

We might agree with Justice Whichard if we had to go so far as to implicate N.C.G.S. § 15A-1446(d)(5). We do not believe it is necessary to rely on this section because we have held that Rule 10(b)(1) does not apply to this case. We base this holding on our knowledge of the way our judicial system works. As we understand the dissent by Justice Meyer, he would require a party to object to any finding of fact in a judgment at the time the finding of fact is made. This would be a near impossibility in many cases in which the court renders a judgment at some time after the trial is concluded. We do not believe it was the intention of Rule 10(b)(1) to impose such a requirement. We shall not require that after a trial is completed and a judge is preparing a judgment or making findings of aggravating factors in a criminal case, that a party object as each fact or factor is found in order to preserve the question for appeal.

Assuming, as the dissent contends, that the defendant should have objected to the finding of the aggravating factor when it was found, we hold that he did so. The defendant argued at the sentencing hearing that he be sentenced to the "statutory minimums." This should have alerted the court to the fact the defendant did not want it to find the aggravating factor.

This case is remanded to the Court of Appeals for further remand to the Superior Court, Robeson County for a new sentencing hearing.

Reversed and remanded.

Justice MEYER dissenting.

I agree with the majority that a prosecutor's statements concerning a defendant's prior convictions are not sufficient evidence to support a trial court's finding of the prior convictions aggravating factor, N.C.G.S. § 15A-1340.4(a)(1)(o) (Supp. 1991). However, I do not agree that defendant has properly preserved for appeal the issue of whether his sentence was supported by sufficient evidence. By failing to object or otherwise note his opposition to the trial court's finding during the course of the trial proceedings, it is my opinion that defendant waived his right to appeal this issue, and I therefore dissent from the majority opinion.

Defendant concedes that he waived objection to the competency of the prosecutor's statement as an acceptable method of proving defendant's prior convictions. However, defendant contends that according to N.C.G.S. § 15A-1446(d)(5), he is still entitled to assert on appeal the insufficiency of the prosecutor's statements to prove his prior convictions. *See State v. Mack*, 87 N.C. App. 24, 359 S.E.2d 485 (1987), *disc. rev. denied*, 321 N.C. 477, 364 S.E.2d 663 (1988). I disagree.

On its face, N.C.G.S. § 15A-1446(d)(5) would appear to allow defendant to appeal the issue of whether his sentence was supported by sufficient evidence. N.C.G.S. § 15A-1446(d)(5) provides that insufficiency of the evidence as a matter of law "may be the subject of appellate review even though no objection, exception or motion has been made in the trial division." N.C.G.S. § 15A-1446(d)(5) (1988). However, this statute, inasmuch as it permits appeal where no objection, exception or motion has been made, directly conflicts with North Carolina Rule of Appellate Procedure 10(b)(1).

As we have previously noted, Rule 10(b) "is a rule of appellate practice and procedure, promulgated by the Supreme Court pursuant to its exclusive authority under the Constitution of North Carolina, Article IV, Section 13(2)." *State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983). We have consistently held

that where, as here, a legislative enactment conflicts with a rule promulgated pursuant to this Court's exclusive constitutional authority, the statute is unconstitutional and must fail. *State v. Spaugh*, 321 N.C. 550, 364 S.E.2d 368 (1988); *State v. Stocks*, 319 N.C. 437, 355 S.E.2d 492 (1987); *State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983); *State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981). To the extent that N.C.G.S. § 15A-1446(d)(5) conflicts with Rule 10(b)(1), it is unconstitutional.

The former version of North Carolina Rule of Appellate Procedure 10(b)(2), applicable to the case at bar,[1] requires that a party assigning error to a trial court's findings of fact must make a separate exception in the record on appeal for each finding that is to be assigned as error. N.C. R. App. P. 10(b)(2) (1989) (amended 1988 effective for all judgments entered in the trial division on or after 1 July 1989). Acting on the assumption that such an exception was required in this case, the majority concludes that defendant complied with the Rules of Appellate Procedure because defendant, following entry of judgment by the trial court, "marked an exception" to the trial court's finding of prior convictions in the transcript of the proceedings.

What the majority fails to recognize, however, is that Rule 10(b)(1) further limits this Court's appellate review to exceptions which have been *properly preserved* for review. The former Rule 10(b)(1) provided in part:

> Any exception which was properly preserved for review by action of counsel *taken during the course of proceedings in the trial tribunal* by objection noted or which by rule or law was deemed preserved or taken without any such action, may be . . . made the basis of an assignment of error.

N.C. R. App. P. 10(b)(1) (1989) (emphasis added) (amended 1988 effective for all judgments entered in the trial division on or after 1 July 1989). In 1988, Rule 10 was amended to put an end to the formality of marking exceptions in the transcript of the proceedings as formerly required by Rule 10(b)(2). Accordingly, the language of the former Rule 10(b)(2), requiring that the record

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1. Rule 10 was amended 8 December 1988, "effective for all judgments of the trial division entered on or after July 1, 1989." In this case, judgment was entered by the trial division on 6 April 1989. Therefore, the former version of Rule 10 governs defendant's appeal.

on appeal reflect a separate exception for each finding of fact assigned as error, was deleted from the current version of Rule 10(b)(2). The deletion of this language from Rule 10(b)(2), however, does not obviate the need for objection to be made during the trial as required by Rule 10(b)(1). Like the former Rule 10(b)(1), the current version of Rule 10(b)(1) also requires that a party challenge a trial court's findings in order to assign such findings as error on appeal. Rule 10(b)(1), currently in force, provides:

> In order to preserve a question for appellate review, a party must have presented *to the trial court* a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review *by action of counsel taken during the course of proceedings in the trial tribunal* by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

N.C. R. App. P. 10(b)(1) (emphasis added).

In *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983), we were called upon to decide whether a defendant's post-trial insertion of the notation "exception" throughout the transcript properly preserved the alleged errors for appellate review. After examining the language of the former Rule 10 and its official commentary, we noted that "Rule 10 functions as an important vehicle to insure that errors are not 'built into' the record, thereby causing unnecessary appellate review." *Id.* at 334, 307 S.E.2d at 311. We disapproved of the defendant's practice of noting exceptions and held:

> A party may not, after trial and judgment, comb through the transcript of the proceedings and randomly insert an exception notation in disregard of the mandates of Rule 10(b).
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> . . . Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review; that is, that an exception, "by rule or law was deemed preserved or taken without any such action," or that the alleged error constitutes plain error.

Id. at 335, 307 S.E.2d at 312.

The majority today discards our longstanding rules of appellate procedure and declares that Rule 10(b)(1) "does not have any application to this case. It is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal." Rule 10(b)(1) cannot be so blithely disregarded, however. Rule 10 does not concern merely matters of "trial strategy" as suggested by the majority. Rather, it is a procedural rule that applies to all appeals, thereby limiting the scope of appellate review to assignments of error that have been properly preserved by objection or challenge made during trial proceedings. N.C. R. App. P. 10(a), (b). It is a mandatory rule, "deemed essential to the protection of . . . the due administration of justice. . . . [I]t is our duty to rigidly adhere to it after it is adopted, and enforce it impartially as to all cases coming under its operation." *Cooper v. Comrs.*, 184 N.C. 615, 616, 113 S.E. 569, 569 (1922).[2]

In an attempt to bolster its erroneous conclusion that Rule 10(b)(1) is inapplicable to this case, the majority conjures up a hypothetical situation inapposite to the facts before this Court. The majority asserts that Rule 10(b)(1) was not intended to require a defendant to object to a trial court's findings of aggravating factors, as such would not be possible where the "[trial] court renders a judgment at some time after the trial is concluded." In such a scenario (not present here) and assuming the party was not served with a draft of the proposed order, we might be presented with the exceptional case where Rule 10(b)(1) would not require an objection at trial, as an exception or assignment of error would be "deemed preserved or taken without any . . . action" taken at trial. *See* N.C. R. App. P. 10(b)(1) (language contained in both the former and current versions).

The instant case, however, is not a situation where the court reserved judgment until a later date and thereafter rendered its judgment out of session. The majority seems to imply that the preparation of the judgment and the affixing of the trial judge's signature are not actions "taken during the course of proceedings in the trial tribunal." This is clearly wrong. In this case, the trial court entered its judgment sentencing defendant to twenty years'

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2. At one point, the majority opinion notes that the State did not rely on Rule 10(b)(1) in its brief. This, however, is immaterial since Rule 10(b)(1) is a rule of appellate procedure limiting the scope of this Court's review.

imprisonment during the trial proceedings, on the record, in open court, when defendant and his attorney were present. Despite the fact that the sentence imposed by the court exceeded the presumptive sentence, defendant did not object. Upon the prosecutor's request, the court conducted an unrecorded bench conference, following which the trial judge stated, "[f]or the record, the Court did take into consideration two previous felony convictions, possession of marijuana and LSD, and a charge of escape from the department of corrections." Again, defendant and his counsel remained silent.

The majority further suggests that defendant complied with Rule 10(b)(1) by arguing at the sentencing hearing that he should be sentenced to the "statutory minimums." I disagree. The record in this case shows that the prosecuting attorney requested that the trial court impose a "sentence greater than the presumptive" term based upon an argument that defendant's prior convictions constituted an aggravating factor. Defendant's argument, on the other hand, was a general plea for mercy. Suggesting that his prior convictions were not of the same character as the offenses for which he was being sentenced, defendant merely requested the court "to consider the statutory minimums that would apply and that can apply." Defendant's argument neither alerted the trial court of any asserted error nor provided the court with an opportunity to correct the error, and thus did not constitute an objection within the meaning of Rule 10(b)(1). *See State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983).

Contrary to the majority's conclusion, the defendant in this case failed to preserve his exception for appellate review during the course of the trial proceedings when the judgment was prepared and signed. Defendant did not at any time object to the prosecutor's statement or object to or otherwise indicate his opposition to the trial court's finding during the trial proceedings. Rather, defendant waited until after judgment had been entered and the transcript of the trial had been prepared and only then inserted into the transcript a handwritten notation of "Exception No. Five" to the trial court's finding that defendant had previously been convicted of felonious possession of marijuana and LSD and escape from the Department of Correction. As we concluded in *Oliver*, defendant's subsequent insertion of a notation of "exception" did not properly preserve this exception for appellate review.

Having failed to object to or otherwise challenge the trial court's finding, defendant assumed the burden of "alert[ing] the appellate court that no action was taken by counsel at the trial level, and . . . establish[ing] his right to review by asserting in what manner the exception is preserved by rule or law or . . . how the error amounted to a plain error or defect affecting a substantial right which may be noticed although not brought to the attention of the trial court." *Oliver*, 309 N.C. at 335, 307 S.E.2d at 312.

Other than N.C.G.S. § 15A-1446(d)(5), defendant has failed to give any reason why this Court should review the error assigned. Although this statute would appear to permit defendant to appeal the sufficiency of the evidence to support his sentence, this statute directly conflicts with North Carolina Rule 10(b) and thus is unconstitutional.

Because defendant failed to object to the district attorney's statement of defendant's prior offenses and because he has failed to show that an exception to the trial court's finding has been preserved by rule or law or that the trial court's finding constituted plain error, the trial court's finding is conclusive on appeal. *State v. Perry*, 316 N.C. 87, 107, 340 S.E.2d 450, 462 (1986); *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982). The trial court's findings support the sentence imposed by the trial court, and therefore defendant's assignment of error should be overruled. For these reasons, I dissent from the majority opinion and vote to affirm the decision of the Court of Appeals.

Justice WHICHARD dissenting.

I believe defendant, through counsel, admitted or implicitly stipulated to the existence of his prior criminal record as presented to the court by the prosecuting attorney and that this was sufficient to support the trial court's finding of the "prior convictions" aggravating factor.

In this case the prosecuting attorney opened the sentencing phase by saying, "Your Honor, first of all, I would like to present to the Court facts of a prior criminal record of the Defendant." He then told the court that the defendant had prior convictions of felonious possession of marijuana, felonious possession of LSD, discharging a firearm into an occupied motor vehicle, and escape

from the Department of Corrections. At no point during the prosecuting attorney's sentencing phase presentation of the prior criminal record did defendant object or protest. When defense counsel rose to make his argument, he stated that "[t]hese charges and convictions now against [defendant] are out of character and not consistent with what he's been involved in in the past. . . . *[Y]es, he's had problems with the drugs*, but we don't have anything other than that . . . ." (Emphasis added.) I disagree with the majority's conclusion that defense counsel's statement "is too equivocal to serve as an admission by the defendant to prior convictions." *State v. Canady*, 330 N.C. 398, 399, 410 S.E.2d 875, 876-77 (1991).

The statement at issue here is less equivocal than statements in other cases in which we have upheld the trial court's finding of an aggravating or mitigating factor. In *State v. Albert*, 312 N.C. 567, 324 S.E.2d 233 (1985), we held that the trial court erred in failing to find as a mitigating factor that the defendant had no record of criminal convictions. In *Albert*, the defendant's attorney asserted that the defendant had "no record at all in her lifetime" and had "never been in court before" except as a juror. We noted that, standing alone, those statements would not have been sufficient to meet defendant's burden of persuasion on the mitigating factor. *Id.* at 579, 324 S.E.2d at 241. However, we also noted that the trial court asked the prosecutor whether any of the three defendants in the case had a prior criminal record, to which the prosecutor replied, "only Mr. Dearen." We concluded that the trial court erred in rejecting the mitigating factor because "the State appears to have stipulated that neither the defendant Mills nor the defendant Albert had a criminal record . . . ." *Id.* at 579-80, 324 S.E.2d at 241.

Similarly, in *State v. Mullican*, 329 N.C. 683, 406 S.E.2d 854 (1991), the prosecutor opened the sentencing proceeding by stating "[w]ith the permission of the Court and the Defense, I will summarize what the State's evidence will show." Without objection or complaint by the defendant, the prosecutor then described the evidence that ultimately supported the aggravating factor found by the court. In presenting the defendant's evidence relating to sentencing, defense counsel described the circumstances of the crime and stated, "Of course that is not any excuse for his doing this. He told the Officer that he was sorry, sorry for committing the offense. . . ." *Id.* at 684, 406 S.E.2d at 855. Our Court of Appeals held in *Mullican* that "defense counsel admitted the correctness

of [the prosecutor's] summary in his own statement to the court." *State v. Mullican*, 95 N.C. App. 27, 29, 381 S.E.2d 847, 848 (1989). On appeal, this Court stated, "We cannot say the Court of Appeals was wrong . . . ." *Mullican*, 329 N.C. at 685, 406 S.E.2d at 855. Thus, we left undisturbed the Court of Appeals' conclusion that defense counsel's statement constituted an admission that was sufficient to support the aggravating factor in question. We went on to say that, even if the statement was not an admission, the defendant "stipulated that the prosecuting attorney could state the evidence." *Id.*

Finally, in *State v. Brewer*, 89 N.C. App. 431, 366 S.E.2d 580, *cert. denied*, 322 N.C. 482, 370 S.E.2d 229 (1988), we find the following:

> At the sentencing hearing, the prosecutor stated that in 1974 defendant was convicted of larceny and received a four year sentence as a committed youthful offender; that in 1977 defendant was convicted of felonious assault for which he received a ten year sentence as a regular youthful offender. In response to the prosecutor's remarks, defense counsel stated:
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> > MR. PRICE: Your Honor, Mr. Brewer last worked in April or May of 1986 for a contractor in roofing work. He has a G.E.D. and is 28-years-old. He has been living with his father and step-mother. I would emphasis [sic], Your Honor, that his record indicates no convictions for almost 10 years. We would ask for leniency.
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> > . . . .
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> Considering the State's remarks about defendant's record of convictions and defense counsel's immediate response that he would like to emphasize to the court that defendant's record "indicates no convictions for almost 10 years," we find and so hold that defense counsel was referring to the record of convictions the State had just referenced. From the full context of the remarks we find that no reasonable inferences to the contrary can be drawn. Defense counsel's response is tantamount to an admission or a stipulated fact that defendant has the convictions so represented by the State.

Id. at 435-36, 366 S.E.2d at 583.

In this case, the prosecutor's description of the prior convictions, combined with defense counsel's express acknowledgement

of the prior "problems," are at least the equivalent of the exchanges held to be sufficient to prove the aggravating or mitigating factors in *Albert*, *Mullican*, and *Brewer*. Thus, I would affirm the Court of Appeals.

While I agree with the result he would reach, I decline to join Justice Meyer's dissent because I discern no contradiction between N.C.G.S. § 15A-1446(d)(5) and North Carolina Rule of Appellate Procedure 10(b)(1). As Justice Meyer notes, the applicable language of Rule 10(b)(1) states:

> Any . . . question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted[,] *or which by rule or law was deemed preserved or taken without any such action*, may be . . . made the basis of an assignment of error . . . .

N.C.R. App. P. 10(b)(1) (1989) (emphasis added). The Meyer dissent focuses on the rule's requirement of an objection or action by counsel during the proceedings and concludes that defendant has failed to show why this Court should review the error assigned. I believe, however, that had defendant not admitted or implicitly stipulated to his criminal record, this issue would have been preserved for appellate review. As the Meyer dissent notes, N.C.G.S. § 15A-1446(d)(5) provides that "insufficiency of the evidence as a matter of law 'may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.' " *State v. Canady*, 330 N.C. 398, 403, 410 S.E.2d 875, 879 (Meyer, J., dissenting). Clearly, this statutory provision is a "rule or law" permitted by Rule 10(b)(1) which deems defendant's exception to the trial court's ruling to be preserved within the meaning and intent of the rule.

For the foregoing reasons, I dissent and vote to affirm the Court of Appeals.

Justice MITCHELL joins in this dissenting opinion.

HARRY C. MARTIN AND EUGENE H. PHILLIPS v. THE STATE OF NORTH CAROLINA

No. 422PA91

(Filed 6 December 1991)

1. **Judges § 8 (NCI3d)— appellate justices and judges—retirement at age seventy-two—constitutionality of statute**

The statute requiring appellate division justices and judges to retire at age seventy-two, N.C.G.S. § 7A-4.20, does not unconstitutionally nullify the right of a justice or judge to the eight-year term provided by Art. IV, § 16 of the N. C. Constitution, since (1) the 1972 amendment to Art. IV, § 8 of the N. C. Constitution, providing that the General Assembly shall prescribe maximum age limits "for service" as a justice or judge, evinces an intent to empower the legislature to render particular justices or judges ineligible for active service because of age notwithstanding that time may remain in their terms of office; and (2) N.C.G.S. § 7A-4.20 was enacted by the General Assembly to become effective only if the 1972 amendment to Art. IV, § 8 was approved by the people, and the ratification of this amendment by the people with such knowledge indicates the intent of the people to empower the legislature to enact this statute notwithstanding the limitations which otherwise would have been imposed on the legislature by the eight-year term provision in Art. IV, § 16.

Am Jur 2d, Judges § 17; Public Officers and Employees §§ 181, 182.

Mandatory retirement of public officer or employee based on age. 81 ALR3d 811.

2. **Judges § 8 (NCI3d)— appellate justices and judges—retirement at age seventy-two—constitutionality of statute**

The statute requiring appellate justices and judges to retire at age seventy-two, N.C.G.S. § 7A-4.20, does not violate the "equal right to vote" or a fundamental right to candidacy under the equal protection clause of Art. I, § 19 of the N. C. Constitution since the statute was not only authorized but mandated by the people when they ratified the 1972 amendment to Art. IV, § 8 of the N. C. Constitution, and the statute thus did not violate other more general, substantive provisions

of the very constitution which, in Art. IV, § 8, expressly and specifically mandated its enactment.

Am Jur 2d, Judges § 17; Public Officers and Employees §§ 181, 182.

Mandatory retirement of public officer or employee based on age. 81 ALR3d 811.

ON discretionary review prior to a determination by the Court of Appeals, pursuant to Rule 15(a) of the North Carolina Rules of Appellate Procedure and N.C.G.S. § 7A-31(b), of a declaratory judgment and dismissal of plaintiffs' complaint by *Jenkins, J.*, in Superior Court, WAKE County, on 20 August 1991. Plaintiff Phillips appealed. Heard in the Supreme Court on 14 November 1991.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Charles F. Blanchard; and J. Wilson Parker, for plaintiff-appellant Judge Phillips.

Lacy H. Thornburg, Attorney General, by Andrew A. Vanore, Jr., Chief Deputy Attorney General, and Norma S. Harrell, Special Deputy Attorney General, for the State.

EXUM, Chief Justice.

Plaintiff Martin,[1] an associate justice of the North Carolina Supreme Court, and plaintiff Phillips, a judge of the North Carolina Court of Appeals at the time suit was filed, brought this action seeking a declaration of their rights under Article IV, Section 16 of the North Carolina Constitution and N.C.G.S. § 7A-4.20. Article IV, Section 16 provides for an eight-year term of office for justices and judges of the appellate and superior court divisions of the General Court of Justice. N.C.G.S. § 7A-4.20 requires appellate judges to retire at age seventy-two. Alleging they would reach this age before the end of their respective eight-year terms, plaintiffs contended the statute, insofar as it required them to retire before the end of their terms, unconstitutionally infringed upon their right under Article IV, Section 16 to serve full, eight-year terms. They sought a declaration that, despite the statute, they

1. Plaintiff Martin participated in the trial court proceedings. He did not join in the appeal or the petition for review prior to determination by the Court of Appeals. He is not a party to the proceedings before us.

were entitled to serve out their terms. They also contended the statute violated other provisions of the North Carolina Constitution.

Article IV, Section 8 of our Constitution, as amended in 1972, requires the General Assembly to prescribe mandatory age limits for service in our state's judiciary. The trial court, declaring that N.C.G.S. § 7A-4.20 was a constitutional exercise of legislative authority pursuant to Article IV, Section 8, dismissed plaintiffs' complaint. Judge Phillips appealed and petitioned this Court for discretionary review prior to a determination of the Court of Appeals. We allowed the petition.

The question presented is whether N.C.G.S. § 7A-4.20, insofar as it requires justices and judges in the appellate division to retire from office at age seventy-two and before they have completed the terms for which they have been elected, violates the North Carolina Constitution. We conclude that it does not and affirm the trial court's judgment.

I.

The facts are stipulated:

Associate Justice Martin was last elected in November 1986. His term of office began on 1 January 1987. He was born on 13 January 1920 and will be seventy-two years old on 13 January 1992. Judge Phillips was last elected in November 1990. His term of office began on 1 January 1991. Judge Phillips was born on 5 September 1919 and reached seventy-two years of age on 5 September 1991. Under N.C.G.S. § 7A-4.20 Justice Martin must retire by 31 January 1992. Judge Phillips, having already reached age seventy-two, left the bench on 30 September 1991.

General Statute § 7A-4.20 states in pertinent part that:

> No justice or judge of the appellate division of the General Court of Justice may continue in office beyond the last day of the month in which he attains his seventy-second birthday . . . .

This statute was enacted by the General Assembly in 1971 to become effective only if an amendment to Article IV, Section 8 of the Constitution proposed by the General Assembly was approved by the people. 1971 N.C. Sess. Laws ch. 508, § 5. Before the proposed amendment, Article IV, Section 8, entitled "Retirement of Justices and Judges," provided in part that "[t]he General

Assembly shall provide by general law for the retirement of Justices and Judges of the General Court of Justice . . . ." At the general election of 7 November 1972 the people ratified the proposed amendment. The amendment added a second sentence to Section 8. The sentence was: "The General Assembly shall also prescribe maximum age limits for service as a Justice or Judge." With the people's ratification of this amendment N.C.G.S. § 7A-4.20, as enacted, became law on 3 January 1973.

In substance, Article IV, Section 16 has been a part of the state Constitution since 1868. In its present form it is entitled "Terms of office and election of Justices of the Supreme Court, Judges of the Court of Appeals, and Judges of the Superior Court." Section 16 states:

> Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court shall be elected by the qualified voters and *shall hold office for terms of eight years* and until their successors are elected and qualified.

(Emphasis added.)

II.

[1] Judge Phillips first argues that N.C.G.S. § 7A-4.20 may not shorten his eight-year term because such abrogation would nullify the explicit right to such a term granted to justices and judges under Article IV, Section 16. The validity of this argument depends, of course, on the meaning of Article IV, Section 8, which, as amended in 1972, requires the General Assembly to impose an age limit beyond which justices and judges cannot actively serve. If Section 8 authorizes the General Assembly to impose the age limit even in the middle of a term, the argument must fail. If, on the other hand, Section 8 authorizes the General Assembly to impose the age limit subject to completion of a term, the argument succeeds. The question is, therefore, what does Section 8 mean? This question is resolved by inquiry into what the people intended when they adopted the amendment to Section 8 in 1972.

This Court has stated:

> The will of the people as expressed in the Constitution is the supreme law of the land. In searching for this will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest

> purposes of the instrument. The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected.

State v. Emery, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) (citations omitted). In order to determine the will of the people in ratifying the amendment to Section 8, and therefore to assess the constitutionality of N.C.G.S. § 7A-4.20, we "are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments." *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953); *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989).

First, we must give meaning to the plain language of the amendment. "In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used we will not search for a meaning elsewhere." *State ex rel. Martin* at 449, 385 S.E.2d at 478. As we will demonstrate, we find support for our decision elsewhere; however, we think the language of the amendment itself is a sufficient basis for the result we reach.

The language employed in the amendment to Section 8 is a clear indication of the people's intent to empower the legislature to interrupt judicial terms of office with an age limit on active service. The amendment states: "The General Assembly shall also prescribe the maximum age limits *for service* as a Justice or Judge." (Emphasis added.) The word, "service," in its ordinary meaning, refers to "the performance of work commanded or paid for by another." Webster's Third New International Dictionary 2075 (1971). The word, "service," thus relates to acts personal to a given individual. Thus the words, "for service," as used in the amendment to Article IV, Section 8 refer exclusively to the time during which an individual justice or judge is eligible to *serve* notwithstanding the length of his or her term of office. The words, "for service," as used in Article IV, Section 8, therefore, evince an intent to empower the legislature to render particular justices or judges ineligible for active service because of age notwithstanding that time may remain in their terms of office.

We find further evidence of the people's intent in ratifying the amendment to Article IV, Section 8, in the General Assembly's enactment of N.C.G.S. § 7A-4.20, conditioned upon the people's approval of the constitutional amendment. The legislature is em-

powered to draft and enact a statute prior to, and conditioned upon, the adoption of a constitutional provision. *In re Martin*, 295 N.C. 291, 300, 245 S.E.2d 766, 771 (1978). *In re Martin* dealt with an amendment to Article IV, Section 17(2), which was ratified by the people at the same time, and in conjunction with, the amendment at issue today. The amendment to Section 17(2) conferred authority on the legislature to provide a procedure, in addition to impeachment, for the removal of justices and judges. Prior to, and conditioned upon, ratification of the amendment, the General Assembly had enacted N.C.G.S. § 7A-376 which conferred upon the Supreme Court original jurisdiction to censure or remove justices or judges.

In upholding the constitutionality of N.C.G.S. § 7A-376, we stated:

> [t]*he people of this State ratified the proposed amendment to Article IV with knowledge that ratification would make effective legislation . . . not elsewhere constitutionally authorized.* Further, since this legislation is not inconsistent with the express language of Article IV, Section 17(2), and does not in any way enlarge or diminish the powers granted to this Court . . . by Article IV, Section 12, *we are of the opinion that ratification of the amendment carried with it an expression of the will of the people that the Constitution be amended so as to empower the Legislature* to confer upon this Court original jurisdiction over the censure and removal of judges.

Id. at 300, 245 S.E.2d at 771-72 (emphasis added).

As in *In Re Martin*, the people ratified the amendment to Article IV, Section 8 with knowledge that N.C.G.S. § 7A-4.20 would take effect upon their doing so. Their ratification of the constitutional amendment with such knowledge is strongly indicative of the people's intent to empower the legislature to enact this statute notwithstanding the limitations which otherwise would have been imposed on the legislature by the eight-year term provision in Article IV, Section 16.

III.

[2] Judge Phillips' second and third arguments are based on claims involving infringements to what he considers fundamental rights guaranteed under Article I, Section 19 of our state Constitution,

which states in part: "No person shall be deprived of the equal protection of the laws . . . ."

First, Judge Phillips contends that N.C.G.S. § 7A-4.20 violates his and his supporters' "equal right to vote," which the equal protection provision guarantees, *White v. Pate*, 308 N.C. 759, 304 S.E.2d 199 (1983), by effectively diluting their voting strength as compared to the voting strength of those voting for his opponent. He argues that, because of his age and its resulting impact on his term in office, he and his voters had less than one-tenth the voting impact of his opponent's supporters in the November 1990 General Election. He relies on this Court's statement in *White* that " 'a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.' " *Id.* at 768, 304 S.E.2d at 205 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336, 31 L. Ed. 2d 274, 280 (1972)). In *White*, we held that "Article I, § 19 of the Constitution guarantees the 'equal right to vote' guaranteed by the Constitution of the United States." *Id.* at 769, 304 S.E.2d at 205.

Judge Phillips next contends that the age limit for judicial service found in N.C.G.S. § 7A-4.20 unconstitutionally infringes upon what he asserts should be a fundamental right to candidacy for public office. Judge Phillips would have us adopt the position taken by the Supreme Court of the State of Washington in *Sorenson v. City of Bellingham*, 80 Wash. 2d 547, 496 P.2d 512 (1972). In *Sorenson* the Washington Supreme Court recognized a fundamental right to candidacy under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[2] Judge Phillips, acknowledging that the United States Supreme Court is unlikely to uphold the *Sorenson* court's position on this new fundamental right, urges, nevertheless, that we adopt it under Article I, Section 19.

The answer to these arguments, of course, is that N.C.G.S. § 7A-4.20 was, as we have demonstrated, not only authorized but

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2. This is a position which has been urged by many legal commentators. See Michael A. Bragg, Note, *Adams v. Askew: The Right to Vote and the Right to Be a Candidate—Analogous or Incongruous Rights?*, 33 Wash. & Lee L. Rev. 243 (1976); Dennis W. Arrow, *The Dimensions of Newly Emergent Quasi-Fundamental Rights to Political Candidacy*, 6 Okla. City U. L. Rev. 1 (1981); Sarah A. Biety, Note, *Ballot-Access Restrictions and the First Amendment Status of the Right to Candidacy: Anderson v. Celebrezze*, 17 Creighton L. Rev. 187 (1983).

mandated by the people when they ratified the 1972 amendment to Article IV, Section 8 of our Constitution. One provision of the constitution cannot be in violation of another. It follows, therefore, that the statute did not violate other more general, substantive provisions of the very constitution which, in another provision, expressly and specifically mandated its enactment.

For the foregoing reasons, we hold that N.C.G.S. § 7A-4.20 is a valid and constitutional exercise of legislative authority.

The decision of the superior court is, therefore,

Affirmed.

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

STATE OF NORTH CAROLINA v. STEVIE OXENDINE

No. 591PA87

(Filed 6 December 1991)

1. **Criminal Law § 460 (NCI4th)— murder—closing argument—permissible inference**

The prosecutor's argument in a murder prosecution that the deceased was afraid of the defendant, that she had been the victim of physical threats and torture, and on one occasion had been beaten with a shoe was a proper argument where there was testimony that the defendant had hit the deceased with a shoe and had beaten and threatened her. This would support an inference that she was afraid of him.

Am Jur 2d, Homicide § 463; Trial § 260.

2. **Criminal Law § 460 (NCI4th)— murder—closing argument—not grossly improper**

A prosecutor's closing argument in a murder prosecution was not so grossly improper as to require the trial court to intervene *ex mero motu* where the prosecutor argued that the deceased was working to get enough money to have the lights turned back on and that defendant blew her head off.

There was evidence that defendant and his wife had argued over the light bill, but no evidence that the electricity had been turned off, and there was evidence that defendant shot her in the head, but no evidence that he shot her head off.

Am Jur 2d, Homicide § 463; Trial § 260.

3. **Criminal Law § 460 (NCI4th)— murder—closing argument—deceased's feelings**

The prosecutor's closing argument in a murder prosecution was not so grossly improper as to require intervention *ex mero motu* where the prosecutor argued that the deceased had said "I'd rather be dead than live another night in that house with him" after the court had excluded testimony to that effect at trial. The prosecuting attorney may have exaggerated the deceased's feelings, but it is a reasonable inference that she did not want to live any longer with the defendant.

Am Jur 2d, Homicide § 463; Trial §§ 253, 260.

4. **Criminal Law § 468 (NCI4th)— murder—closing argument—attitude of defendant toward victim**

The prosecutor's argument in a murder prosecution that defendant had for the victim a possessive, clinging, hating love which caused him to kill her was proper.

Am Jur 2d, Homicide § 463; Trial § 218.

5. **Criminal Law § 460 (NCI4th)— murder—closing argument—defendant's self-inflicted wound**

The prosecutor properly argued in a murder trial that defendant did not intend to kill himself when he shot himself in the stomach after shooting the victim in the head, and that he shot himself and wrote a letter to create sympathy for himself. There was testimony by a witness that she saw defendant pointing the pistol towards the area of his stomach, and the evidence was undisputed that the wound of the defendant's wife was fatal and that the wound of defendant was not fatal. This would support the inference that defendant did not intend to kill himself, and, if that be the case, it could be inferred that the letter was written to create sympathy.

Am Jur 2d, Homicide § 463; Trial § 260.

ON writ of certiorari to review a judgment imposing a life sentence by *Britt, J.*, at the 9 September 1986 Criminal Session of Superior Court, ROBESON County, upon a jury verdict of guilty of first degree murder. Heard in the Supreme Court 14 February 1991.

The defendant was tried for the first degree murder of his wife. The prosecuting attorney announced before the trial commenced that there was not sufficient evidence to seek the death penalty. The defendant was not tried for his life.

The State's evidence tended to show that the marriage of the defendant and his wife had deteriorated. Linda Sue Locklear, the deceased's first cousin, testified that the defendant called her and told her his wife had left him. The defendant asked Ms. Locklear to call his wife and ask her to return to him. Ms. Locklear testified she had seen the defendant threaten his wife many times, including a threat to drag her behind his car and to maim her so that no one else would want her. She testified that on one occasion the defendant came to her house to get his wife. The defendant told his wife, on that occasion, that she belonged to him and he would take her home with him. He tried to pick her up and put her in his car against her will.

Brenda Gail Butler testified that she was the twin sister of the deceased. She testified that the defendant came to her home a few days before the deceased was killed and said his wife "told me to get back across the field." Mrs. Butler testified that the defendant then said, "there was gonna be a lot more people hurt, worse than he was hurtin. . . . And when [they] found them, they was gonna be found together." She also testified she had heard the defendant threaten his wife many times.

Wilbur Lee Butler, the husband of Brenda Gail Butler, testified that the defendant came to his house the day before the defendant's wife was killed. Mr. Butler testified that the defendant told him he had been waiting a week for his wife to come home. Mr. Butler told the defendant to give his wife a little more time and she would come back to him. The defendant told him he could not wait another twenty-four hours.

Jamie Oxendine, the defendant's fourteen year old son, testified he had heard his father threaten to kill his mother a "bunch" of times. He testified that he heard his father threaten his mother

when they were arguing about the light bill. On one occasion, his father hit his mother with her tennis shoe hard enough to leave a bruise.

There was further evidence that the defendant borrowed a pistol and shot his wife to death in the parking lot of her place of employment, after which he shot himself. The wound of the defendant was not fatal. A letter from the defendant written to Mr. and Mrs. Butler before the shooting was introduced into evidence. In this letter the defendant said he loved his wife very much and could not live without her. He intimated he would kill his wife and commit suicide.

The jury found the defendant guilty of first degree murder and he was sentenced to life in prison. The defendant appealed.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by M. Patricia Devine, Assistant Appellate Defender, for defendant appellant.

WEBB, Justice.

The defendant's only assignment of error deals with the prosecuting attorney's argument to the jury, which the defendant contends "exceeded the bounds of the relevant statutes in ways sufficiently numerous and egregious to infringe on defendant's right to a fair trial at the hands of an unprejudiced jury." *See* N.C.G.S. § 15A-1230 (1988). The defendant objected to only one part of the argument of the prosecuting attorney. For those parts of the argument to which he did not object and now assigns error, we must review them to determine whether they were so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error. *State v. Jones*, 317 N.C. 487, 346 S.E.2d 657 (1986).

[1] The prosecutor argued to the jury that the deceased was afraid of the defendant, that she had been the victim of physical threats and torture and on one occasion she had been beaten with a shoe. The defendant says this was an improper argument. There was testimony that the defendant had hit the deceased with a shoe. There was also testimony that the defendant had beaten the deceased and had threatened her. This would support an inference

that she was afraid of him. This argument was properly made. *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986).

[2] The defendant also argues that it was improper for the prosecuting attorney to argue that the deceased was working because she was "trying to get enough money to get the lights cut back on" and "he got out [of the truck] in the most cowardly way and went over there and put a gun straight to her head and blew her head off." There was evidence that the defendant and his wife had argued over the light bill, although there was not evidence that the electricity had been cut off. There was evidence that the defendant had left his truck and walked over to his wife and shot her in the head, although there was not evidence that he had shot her head off. There was no objection to these arguments and they were not so grossly improper that the court should have intervened *ex mero motu*.

[3] The defendant next contends it was error for the prosecuting attorney to argue that the defendant's wife had said "I'd rather be dead than live another night in that house with him." The court had excluded testimony to this effect at the trial. Again there was no objection to this argument by the defense attorney. The prosecuting attorney may have exaggerated the deceased's feelings, but it is a reasonable inference that she did not want to live any longer with the defendant. This statement was not so grossly improper that the court should have intervened *ex mero motu*.

[4] The defendant next says that in arguing the element of malice in the law of homicide, the prosecuting attorney made "a dangerous and unauthorized detour into psychology and/or religion for impressionable jurors." The prosecuting attorney argued to the jury that the attitude of the defendant towards his wife, which included "meanness, hate, possessiveness, wanting to control, wanting to stifle another human being, wanting to own her, wanting to make sure no one else has her," constituted malice. He then argued that in biblical times the Greeks had more than one word for love. There was agape which was a selfless love which makes one look out for his fellow man. There was eros which was love based on the physical attraction of a woman for a man. The prosecuting attorney argued there could be a dark side to this type of love and cause a man to lose his normal judgment. He argued that this could develop into "possessive, clinging, hating love." The pros-

ecuting attorney said this was the type love the defendant had for his wife and it caused him to kill her.

The defendant did not object to this argument. We hold it was not erroneous. The qualities which the prosecuting attorney said constituted malice were examples of matters that would be hatred or ill will, which is malice under the law of homicide. *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889 (1963). The argument as to eros as a type of love that has a dark side and can cause a person to kill was based on common knowledge and experience. It was a proper argument.

[5] In his last argument, the defendant says that the prosecuting attorney invited the jury to speculate on the motive of the defendant in inflicting a wound on himself. This is the only part of the State's argument to the jury to which the defendant objected.

The prosecuting attorney argued to the jury that the defendant did not intend to kill himself. He argued that the defendant shot his wife in the head, knowing a wound so inflicted would be fatal, and then shot himself in the stomach. If he had intended to kill himself, he would have shot himself in the head. The defendant's shooting himself, said the prosecuting attorney, was intended to create sympathy as was the letter he wrote to Mr. and Mrs. Butler. The defendant argues there was no evidence that the defendant shot himself in the stomach and that "the reasonable inference to be drawn from the [letter was] that he intended to kill both himself and his wife."

As to the defendant's argument that there was no evidence that the defendant shot himself in the stomach, there was testimony by a witness that she saw the defendant pointing the pistol towards the area of his stomach. The evidence was undisputed that the wound of the defendant's wife was fatal and the wound of the defendant was not. This would support the inference for which the prosecuting attorney argued, that the defendant did not intend to kill himself. If this be the case, it could be inferred the letter was written by the defendant to create sympathy for himself. We hold that this was a proper argument.

The defendant's assignment of error is overruled.

No error.

STATE OF NORTH CAROLINA v. MICHAEL LYNN HUNT

No. 547A90

(Filed 6 December 1991)

Homicide § 21.5 (NCI3d)— first degree murder—premeditation and deliberation—sufficient evidence

There was sufficient evidence of premeditation and deliberation to support defendant's conviction for first degree murder where the evidence, including defendant's statement to the police, tended to show that after the victim had pushed defendant down, the victim started up a hill and away from defendant; defendant got up, took his pistol out of his pocket, took aim, and shot the victim; defendant shot the victim two more times while the victim was falling backward to the ground; defendant later told an officer that he shot the victim because he was angry at the victim for pushing him down; following the shooting, defendant left the victim to die without attempting to obtain assistance for him; defendant disposed of his gun by throwing it into a river; defendant drove to the victim's home one and a half hours after he killed the victim; and defendant told the victim's wife that he had dropped the victim off at "the projects" earlier and was supposed to meet the victim at his home.

Am Jur 2d, Homicide §§ 425, 428, 439.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Clark, J.*, at 16 July 1990 Criminal Session of Superior Court, ROBESON County, upon a jury verdict of guilty of first degree murder. Heard in the Supreme Court 15 November 1991.

The defendant was tried for his life for first degree murder. The evidence viewed in the light most favorable to the State, including the defendant's statement to the police, showed that on 6 December 1989 after receiving their paychecks, the defendant and the deceased drove to a dirt road, Rural Paved Road 1164, to pick up an "eightball of cocaine." Defendant had supposedly told the deceased that a man, Buddy Roll, was going to pick up some cocaine and that if Roll did, then he would put it beside

a tree on a dirt road beside the canal for the defendant and the deceased.

After they could not find the cocaine, the defendant said the deceased became angry, called the defendant names and pushed the defendant down. As the deceased started up the hill towards the car, the defendant got up, took his pistol out of his coat pocket, and fired it at the deceased. He told the police that he shot one time, and as the deceased was falling back, he fired at the deceased two more times. The defendant left and went to his sister's house. It was about 7:45 p.m. when the defendant shot the deceased.

The defendant stated that he stayed at his sister's house until 9:30 p.m. when he went to the deceased's home. On the way, he threw his pistol off the bridge at the river. He told the deceased's wife that he had dropped the deceased off at "the projects" earlier and was supposed to meet him there. After the defendant and Mrs. Smith smoked some cocaine, the defendant returned to his sister's house. The defendant told the police that he shot the deceased because he became angry at the deceased for pushing him down.

The next day, the deceased's body was found near a canal near Rural Paved Road 1164 in Robeson County. He had died as a result of two gunshot wounds through the back and one gunshot wound to the head. When the defendant was questioned by the police that day, he only told them that he had dropped the deceased off at "the projects" and that he was supposed to meet him later at the deceased's home. On 8 December 1989, the defendant made a statement to the police admitting he had shot the deceased.

The defendant's trial testimony was substantially the same as his original statement. He testified that the deceased had wanted to buy his pistol but that he had refused to sell it. He further testified that the deceased had pushed him down "real hard" onto the ground, cursed and yelled at him, charged at him like a bull, and pushed him in the stomach where the defendant had had an operation. His mind then went blank and the next thing he knew he had shot the deceased three times.

The defendant appealed to this Court.

Lacy H. Thornburg, Attorney General, by Mary Jill Ledford, Assistant Attorney General, for the State.

Omar Saleem and Gayla G. Biggs, Assistant Public Defenders, for defendant appellant.

WEBB, Justice.

The defendant argues that the case against him should have been dismissed because the evidence was not sufficient to support a jury verdict of first degree murder based upon premeditation and deliberation. The intentional and unlawful killing of a human being with malice and with premeditation and deliberation is first degree murder. *State v. Fleming*, 296 N.C. 559, 251 S.E.2d 430 (1979); N.C.G.S. § 14-17 (1989). Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation; it is sufficient if the process of premeditation occurred at any point prior to the killing. *State v. Brown*, 315 N.C. 40, 58, 337 S.E.2d 808, 822 (1985), *cert. denied*, 476 U.S. 1165, 90 L.Ed.2d 733 (1986). 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. *Id.*

An unlawful killing is deliberate and premeditated if done as part of a fixed design to kill, notwithstanding the fact that the defendant was angry or emotional at the time, unless such anger or emotion was strong enough to disturb the defendant's ability to reason. *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 338 (1986). The requirement of a "cool state of blood" does not require that the defendant be calm or tranquil. *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980). The phrase "cool state of blood" means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason. *State v. Brown*, 315 N.C. at 58, 337 S.E.2d at 822.

In this case, there was sufficient evidence that the killing was premeditated and deliberate. The evidence, including the defendant's statement to the police, tends to show that the defendant formed a fixed design for revenge against the deceased. After the defendant was pushed down by the deceased, the victim started

up the hill and away from the defendant. The defendant got up, took his pistol out of his pocket, took aim, and shot the victim. He continued to shoot the victim while the victim was falling backward to the ground. Later, the defendant told Officer Patterson that he shot the victim because he became angry at the victim for pushing him down.

This evidence tends to show that there was ample time for the defendant to formulate the intent to kill the victim, that he possessed the requisite intent, and that he carried out that intent. This Court, in *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985), held that there was ample time for the defendant to formulate an intent to kill when the defendant did not shoot the victim immediately upon learning of the victim's presence. Instead, the defendant waited until the victim turned away before he drew his gun and told the victim to "hold it." As the victim turned back around, the defendant shot the victim five times. *State v. Fields*, 315 N.C. at 200, 337 S.E.2d at 524.

The fact that the victim was fleeing, that the defendant shot him in the back, and that the defendant shot the victim three times is further evidence of premeditation and deliberation. This Court has held that the nature and number of the victim's wounds is a circumstance from which an inference of premeditation and deliberation can be drawn. *State v. Bullard*, 312 N.C. 129, 161, 322 S.E.2d 370, 388 (1984).

There is no evidence of provocation by the deceased sufficient to disturb the defendant's ability to reason. "The defendant was not operating under the influence of overwhelming fear or passion, but with a cool, deliberate state of mind." *State v. Fields*, 315 N.C. at 201, 337 S.E.2d at 524. Following the murder, the defendant left the deceased to die without attempting to obtain assistance for the deceased. The defendant still possessed the cool and deliberate presence of mind when he disposed of the murder weapon, and lied to the deceased's wife about the deceased's whereabouts in an attempt to cover up the crime.

Evidence of the defendant's conduct and statements before and after the killing may be considered in determining whether a killing was with premeditation and deliberation. *State v. Brown*, 315 N.C. at 59, 337 S.E.2d at 823. Here, the defendant drove to the deceased's house one and a half hours after he killed the deceased. He lied to the deceased's wife about the deceased's

whereabouts. He told her he had dropped the deceased off at "the projects" and had planned to meet the deceased at the deceased's home later. This evidence is another circumstance from which premeditation or deliberation can be inferred.

State v. Corn, 303 N.C. 293, 278 S.E.2d 221 (1981), upon which the defendant relies, is distinguishable from this case. In that case the decedent entered the defendant's home in a highly intoxicated state, approached the sofa on which the defendant was lying and insulted the defendant. The defendant immediately jumped from the sofa, picked up his rifle which was near the sofa and shot the deceased several times in the chest. The entire incident lasted only a few seconds. We held that the evidence did not show that the defendant acted with a fixed design or that he had sufficient time to weigh the consequences of his action. For this reason, there was not sufficient evidence of premeditation or deliberation to be submitted to the jury. In this case, there was evidence that the actions of the deceased had so angered the defendant that he formed the intention to kill the deceased and carried out this plan. The deceased was moving away from the defendant and there was sufficient time for the defendant to weigh the consequences of his act.

We hold that there was sufficient evidence of premeditation and deliberation to support the defendant's conviction for first degree murder.

No error.

CITY OF CONCORD v. ALL OWNERS OF TAXABLE PROPERTY WITHIN THE CITY OF CONCORD AND ALL CITIZENS RESIDING IN THE CITY OF CONCORD

No. 307PA91

(Filed 6 December 1991)

Municipal Corporations § 39.3 (NCI3d)— refunding bonds—in excess of outstanding bonds—not unconstitutional

The plain words of the Constitution of North Carolina allow the General Assembly to provide for the issuance of refunding bonds. No requirement that the refunding indebtedness

be less than or equal to the outstanding indebtedness appears in the Constitution. However, N.C. Const. art V, § 4 limits the incurring of such debt so that the funds received can be used only to retire an existing debt, and N.C.G.S. § 159-78 also restricts the amount of debt which may be incurred by the issuance of refunding bonds so that the proceeds from the refunding bonds may not exceed an amount necessary to pay an existing indebtedness. N.C.G.S. § 159-72.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 656-659; Public Securities and Obligations §§ 261-263, 267.

ON discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of an order granting summary judgment in favor of plaintiff, entered by *Davis (James C.), J.*, in Superior Court, CABARRUS County on 27 June 1991. Heard in the Supreme Court 15 November 1991.

The plaintiff brought this action under N.C.G.S. § 159-74 seeking a determination of the validity of certain bonds it proposes to issue. On 4 June 1984 the voters of the City of Concord approved the issuance of general obligation bonds in the amount of $20,000,000. On 2 October 1984 the City sold general obligation bonds in the amount of $8,305,000 pursuant to this authorization. The average interest cost on these bonds is 10.04%.

It is possible for the City to save a substantial amount in interest costs if it issues bonds on which the interest rates are lower than the interest rates on the outstanding bonds and retires the outstanding bonds. The outstanding bonds cannot be called until 1 April 1994, however, and in order to take advantage of the present favorable interest rates, which might not be available in 1994, the City proposes to issue the refunding bonds at this time.

The money realized from the sale of the refunding bonds will be placed in escrow and the interest from this escrow account will be used to pay the interest on the now outstanding bonds until the bonds can be called. The interest on an amount placed in escrow equal to the amount of the outstanding bonds will not be enough to pay the interest on the outstanding bonds because of the fall in interest rates since the bonds were issued. In order to generate enough funds to be placed in escrow to pay the interest on the outstanding bonds, the City proposes to issue refunding

bonds in an amount larger than the face amount of the outstanding bonds. It is this proposal to issue refunding bonds in an amount larger than the presently outstanding bonds which the defendants contend violates the Constitution of North Carolina.

The superior court granted the plaintiff's motion for summary judgment. The defendants appealed.

Parker, Poe, Adams & Bernstein, by Charles C. Meeker and Blair Levin, and Johnson, Belo & Plummer, by Gordon L. Belo, for plaintiff appellee.

Critz, Black & Rogers, P.A., by William F. Rogers, Jr. and Robert M. Critz, for defendant appellants.

Douglas A. Johnston, Assistant Attorney General, for Attorney General of the State of North Carolina, amicus curiae.

James B. Blackburn, III, General Counsel, for North Carolina Association of County Commissioners, and S. Ellis Hankins, General Counsel, for North Carolina League of Municipalities, amicus curiae.

WEBB, Justice.

N.C.G.S. § 159-72 and N.C.G.S. § 159-78 allow municipalities to issue general obligation refunding bonds in an amount greater than the bonds to be refunded without a vote of the people. The only question involved in this appeal is whether these sections violate N.C. Const. art. V, § 4, which provides in pertinent part:

> (2) *Authorized purposes; two-thirds limitation.* The General Assembly shall have no power to authorize any county, city or town, special district, or other unit of local government to contract debts secured by a pledge of its faith and credit unless approved by a majority of the qualified voters of the unit who vote thereon, except for the following purposes:
>
> (a) to fund or refund a valid existing debt[.]

The City contends that the plain words of subsection (2)(a), quoted above, create an exception to the constitutional prohibition against creating a debt secured by the faith and credit of the City without a vote of the people. Defendants contend that by allowing the issuance of refunding bonds in an amount in excess of the face amount of the outstanding bonds, the City will create more of

a debt than the debt to be retired. The defendants say that this creates a new debt and is proscribed by N.C. Const. art. V, § 4.

Statutes enacted by the General Assembly are presumed to be constitutional. *Wayne County Citizens Assn. v. Wayne County Bd. of Comrs.*, 328 N.C. 24, 29, 399 S.E.2d 311, 314 (1991). A statute will not be declared unconstitutional unless its unconstitutionality is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground. *Ramsey v. Veterans Commission*, 261 N.C. 645, 135 S.E.2d 659 (1964). The North Carolina Constitution is a restriction on the power of the General Assembly and enactments of the General Assembly not forbidden therein will not be declared unconstitutional. *In re Housing Bonds*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982).

We hold that the plain words of the Constitution of North Carolina allow the General Assembly to provide for the issuance of refunding bonds in this case. The exception created by subsection (2)(a) simply and clearly states that voter approval is not required if the municipality's purpose for contracting the debt is to refund a valid existing debt. No requirement that the refunding indebtedness be less than or equal to the outstanding indebtedness appears in the Constitution and we decline to impose one.

The defendants, relying on cases from other jurisdictions, contend that N.C. Const. art. V, § 4 authorizes the issuance of refunding bonds without a vote of the people only for the purpose of refunding a valid existing debt and may not exceed the outstanding principal amount of the valid existing debt. We base our decision in this case on the wording of our Constitution. The cases from the other jurisdictions do not apply. We can find nothing in our Constitution that so limits the General Assembly in authorizing municipalities to issue bonds. If it creates a new debt, as argued by the defendants, it is a debt authorized by the Constitution and the General Assembly.

The incurring of debt as the City proposes to do in this case is not unlimited. N.C. Const. art. V, § 4 limits the incurring of such debt so that the funds received can be used only to retire an existing debt. N.C.G.S. § 159-78 also restricts the amount of debt which may be incurred by the issuance of refunding bonds so that the proceeds from the refunding bonds may not exceed an amount necessary to pay an existing indebtedness.

This opinion is consistent with *Bank v. Bryson City*, 213 N.C. 165, 195 S.E. 398 (1938) and *Bolich v. Winston-Salem*, 202 N.C. 786, 164 S.E. 361 (1932). Although the issue raised in this case was not discussed in either of those cases, both of those cases approved the issuance of refunding bonds on which the payments were larger than the amounts of indebtedness to be retired.

For the reasons stated in this opinion, the judgment of the superior court is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. BOBBY JEFFREY MONROE

No. 192A91

(Filed 6 December 1991)

1. **Appeal and Error § 22 (NCI4th)— dissenting opinion in Court of Appeals—same result as majority—appeal treated as petition for certiorari**

Assuming *arguendo* that the dissenting opinion in the Court of Appeals does not constitute a "dissent" entitling the State to appeal to the Supreme Court as a matter of right under N.C.G.S. § 7A-30(2) because that opinion reaches the same result as that reached by the majority, the State's notice of appeal is treated as a petition for a writ of certiorari and is allowed in the exercise of the Supreme Court's supervisory powers over the courts of this state.

Am Jur 2d, Appeal and Error §§ 901, 902; Certiorari §§ 6, 10.

2. **Appeal and Error § 21 (NCI4th)— motion for appropriate relief—no decision in Court of Appeals—review by Supreme Court**

Where the Court of Appeals erroneously declined to review the merits of the superior court's grant of a new trial in a criminal case on the ground of newly discovered evidence, the action of the Court of Appeals was not a "decision . . . upon review" within the meaning of N.C.G.S. § 7A-28, and that statute thus does not prohibit the Supreme Court

from reaching and deciding the issue of whether the State, under N.C.G.S. § 15A-1445, may appeal a superior court order granting a criminal defendant a new trial on the ground of newly discovered evidence.

Am Jur 2d, Appeal and Error §§ 901, 902.

3. Appeal and Error § 81 (NCI4th)— newly discovered evidence— new trial granted—right of State to appeal

The State has the right under N.C.G.S. § 15A-1445 to immediately appeal a superior court order granting a criminal defendant a new trial on the ground of newly discovered evidence without regard to whether such superior court order is interlocutory in nature.

Am Jur 2d, Appeal and Error §§ 123, 124.

ON writ of certiorari to review the decision of the Court of Appeals, 102 N.C. App. 567, 402 S.E.2d 850 (1991), dismissing as interlocutory the State's appeal from an order entered in Superior Court, ROBESON County, on 21 March 1990, by *Brewer, J.*, awarding the defendant a new trial on the ground of newly discovered evidence. Heard in the Supreme Court on 15 October 1991.

Lacy H. Thornburg, Attorney General, by Valerie B. Spalding, Associate Attorney General, for the State.

Cabell J. Regan for the defendant-appellee.

MITCHELL, Justice.

The issue before the Court is whether the State has the right to immediately appeal a superior court order granting a criminal defendant a new trial on the ground of newly discovered evidence. We hold that the State has the right to immediate appellate review of the superior court's order in such situations.

The defendant was convicted of robbery with a dangerous weapon at the 21 June 1989 Criminal Session of Superior Court, Robeson County. Six months later, on 19 December 1989, the defendant filed a motion for appropriate relief, pursuant to N.C.G.S. § 15A-1415(b)(6), based on the existence of newly discovered evidence. The defendant contended that ballistic tests conducted by the Federal Bureau of Investigation after the defendant's trial would show that the gun the State presented at trial was not the gun actually

used in the robbery for which the defendant had been convicted. After a hearing, the superior court granted the defendant a new trial on the ground of newly discovered evidence. The State, pursuant to N.C.G.S. § 15A-1445(a)(2), appealed to the Court of Appeals. A divided panel of the Court of Appeals dismissed the State's appeal on the ground that it was interlocutory and declined to review the superior court's order on the merits. Judge Cozort filed a dissenting opinion in the Court of Appeals expressing his view that the Court of Appeals should reach the merits of the case and should affirm the order of the trial court. The State filed a purported appeal of right to this Court, pursuant to N.C.G.S. § 7A-30(2), based on the dissent in the Court of Appeals.

[1] The defendant contends here that since the dissenting opinion in the Court of Appeals reaches the same result as that reached by the majority, it does not constitute a "dissent" entitling the State to appeal to this Court as a matter of right under N.C.G.S. § 7A-30(2). We assume *arguendo* that the defendant is correct. However, exercising this Court's supervisory powers over the courts of this state, we treat the State's notice of appeal as a petition for a writ of certiorari to review the decision of the Court of Appeals, and we allow that petition. N.C. R. App. P. 2. *See also* N.C.G.S. § 7A-33 (1989).

[2] The defendant further argues that N.C.G.S. § 7A-28 bars this Court from reviewing this case. That statute states in pertinent part that, "*Decisions* of the Court of Appeals *upon review* of motions for appropriate relief listed in G.S. 15A-1415(b) are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise." N.C.G.S. § 7A-28(a) (1989) (emphasis added). However, the Court of Appeals erroneously declined to review the merits of the superior court's grant of a new trial in the present case. Therefore, the action of the Court of Appeals in this case was not a "decision . . . upon review" within the meaning of N.C.G.S. § 7A-28. As a result, that statute is not an impediment to this Court's reaching and deciding the issue of whether the State, under N.C.G.S. § 15A-1445, may appeal a superior court order granting a criminal defendant a new trial on the ground of newly discovered evidence.

[3] Ordinarily, the State has no right to appeal from a judgment in favor of a defendant in a criminal case, unless such right has been granted by statute. *State v. Elkerson*, 304 N.C. 658, 669,

285 S.E.2d 784, 791 (1982); *State v. Ward*, 46 N.C. App. 200, 202, 264 S.E.2d 737, 738-39 (1980). By statute the State clearly has been granted the right to appeal a superior court order awarding a defendant a new trial on the ground of newly discovered evidence. N.C.G.S. § 15A-1445(a)(2) (1988). That statute states in pertinent part, "Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division: . . . (2) Upon the granting of a motion for a new trial on the ground of newly discovered evidence or newly available evidence but only on questions of law." *Id.* As a general rule, the appellate courts will not review interlocutory orders entered by a superior court in a criminal case. *State v. Henry*, 318 N.C. 408, 409, 348 S.E.2d 593, 593 (1986). Here, however, the statute grants the State an absolute right to appellate review of a superior court order granting defendant a new trial on the ground of newly discovered evidence without regard to whether such superior court order is interlocutory in nature.

The State filed an appeal with the Court of Appeals in the present case. That court erroneously dismissed the State's appeal on the ground that it was interlocutory. As a result, the majority in the Court of Appeals failed to review the merits of the State's appeal. For the reasons previously discussed in this opinion, we vacate the decision of the Court of Appeals and remand this case to that court for consideration and decision of the issue brought before it by the State's appeal of right—whether the grant of a new trial by the superior court on the ground of newly discovered evidence was proper.

Vacated and remanded.

IN THE MATTERS OF MINORS M.B. AND A.B., JUVENILES

No. 228PA91

(Filed 6 December 1991)

ON discretionary review of an unpublished opinion of the Court of Appeals, 102 N.C. App. 579, 403 S.E.2d 613 (1991), affirming in part, reversing in part, and remanding a joint disposition order entered by *Lyerly, J.*, in the District Court, MITCHELL County, on 19 March 1990. Heard in the Supreme Court 14 November 1991.

Hal G. Harrison, P.A., by Hal G. Harrison, for petitioner-appellee Mitchell County Department of Social Services.

Watson and Hunt, P.A., by Charlie A. Hunt, Jr., for respondent-appellant father.

PER CURIAM.

Discretionary review improvidently allowed.

RAY R. BROYHILL v. AYCOCK & SPENCE, A NORTH CAROLINA PARTNERSHIP; AND W. MARK SPENCE, INDIVIDUALLY

No. 214A91

(Filed 6 December 1991)

APPEAL by the plaintiff pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 102 N.C. App. 382, 402 S.E.2d 167 (1991), reversing the judgment entered 29 March 1990 by *Watts, J.*, in Superior Court, DARE County. Heard in the Supreme Court on 14 November 1991.

Jeffrey L. Miller for the plaintiff-appellant.

Hornthal, Riley, Ellis & Maland, by M. H. Hood Ellis, for the defendant-appellees.

PER CURIAM.

Affirmed.

METRIC CONSTRUCTORS, INC. v. INDUSTRIAL RISK INSURERS AND CAPITAL STOCK COMPANIES

No. 180A91

(Filed 6 December 1991)

ON appeal by the plaintiff from a divided panel of the Court of Appeals and petition for discretionary review by Industrial Risk Insurers of the decision of the Court of Appeals, 102 N.C. App. 59, 401 S.E.2d 126 (1991), vacating and remanding the judgment of *Booker, J.*, at the 21 February 1990 session of Superior Court, FORSYTH County. Heard in the Supreme Court on 14 November 1991.

Bell, Davis & Pitt P.A., by Joseph T. Carruthers and Howell A. Burkhalter, for plaintiff-appellant/appellee.

Dean & Gibson, by Rodney A. Dean and Michael G. Gibson, for defendant-appellee/appellant.

PER CURIAM.

Affirmed.

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

ALBRITTON v. N.C. DEPT. OF TRANSPORTATION

No. 473P91

Case below: 104 N.C.App. 138

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

ANDERS v. HYUNDAI MOTOR AMERICA CORP.

No. 455P91

Case below: 104 N.C.App. 61

Petition by defendant (Hyundai Motor America Corp.) for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

BRANCH BANKING & TRUST CO. v. BIGGERSTAFF

No. 463P91

Case below: 104 N.C.App. 138

Petition by defendant (Girodano) for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

CROWELL v. MCCASKILL

No. 469P91

Case below: 104 N.C.App. 138

Petition by defendant (Dorothy G. McCaskill) for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

EVERS v. PENDER COUNTY BD. OF EDUCATION

No. 453A91

Case below: 104 N.C.App. 1

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 5 December 1991.

FRYE v. KELLEY

No. 470A91

Case below: 104 N.C.App. 138

Appeal by defendants (Kelley and Bowen) pursuant to G.S. 7A-30 dismissed 5 December 1991.

GOLDSTON v. AMERICAN MOTORS CORP.

No. 461P91

Case below: 104 N.C.App. 138

Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 5 December 1991. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

GRAY v. SMALL

No. 483A91

Case below: 104 N.C.App. 222

Motion by defendant to dismiss appeal denied 5 December 1991.

HALEY v. HALEY

No. 467P91

Case below: 104 N.C.App. 139

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

HULL v. OLDHAM

No. 450P91

Case below: 104 N.C.App. 29

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

MCFADDEN v. MCFADDEN

No. 472P91

Case below: 104 N.C.App. 139

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

MURRAY v. MCCALL

No. 377P91

Case below: 103 N.C.App. 525
330 N.C. 119

Petition by defendant (Stephenson) for reconsideration of petition for discretionary review dismissed 5 December 1991.

NUCOR CORP. v. GENERAL BEARING CORP.

No. 378PA91

Case below: 103 N.C.App. 518

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 December 1991.

SHAW v. BURTON

No. 468P91

Case below: 104 N.C.App. 113

Petitions by plaintiffs and defendant (Margaret Foster Knight) for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

SLATE v. MARION

No. 476P91

Case below: 104 N.C.App. 132

Petition by defendants (Shropshires) for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

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

STATE v. ANDREWS

No. 177P91

Case below: 102 N.C.App. 133

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 December 1991.

STATE v. BROOKS

No. 475PA91

Case below: 104 N.C.App. 139

Petition by defendant (James Anthony Davis) for discretionary review pursuant to G.S. 7A-31 allowed 5 December 1991.

STATE v. BROWN

No. 459PA91

Case below: 104 N.C.App. 309

Petition by Attorney General for writ of supersedeas allowed 5 December 1991. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed and defendant's motion to bring forward additional issues allowed 5 December 1991.

STATE v. FAISON

No. 521P91

Case below: 104 N.C.App. 554

Petition by defendant for temporary stay allowed 26 November 1991.

STATE v. GORDON

No. 520P91

Case below: 104 N.C.App. 455

Petition by Attorney General for writ of supersedeas and temporary stay denied 26 November 1991. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

STATE v. GROSS

No. 466P91

Case below: 104 N.C.App. 97

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

STATE v. HARGROVE

No. 493P91

Case below: 104 N.C.App. 194

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 December 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

STATE v. LOCKLEAR

No. 500P91

Case below: 104 N.C.App. 311

Temporary stay dissolved 5 December 1991. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

STATE v. McLEOD

No. 503P91

Case below: 104 N.C.App. 309

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

STATE v. MORSE

No. 465P91

Case below: 104 N.C.App. 140

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1991.

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

UNITED SERVICES AUTO. ASSN. v.
UNIVERSAL UNDERWRITERS INS. CO.

No. 506PA91

Case below: 104 N.C.App. 206

Petition by defendant (Universal Underwriters Ins. Co.) for discretionary review pursuant to G.S. 7A-31 allowed 5 December 1991.

PETITION TO REHEAR

SWANSON v. STATE OF NORTH CAROLINA

No. 64PA91

Case below: 329 N.C. 576

Petition by plaintiffs to rehear pursuant to Appellate Rule 31 allowed 5 December 1991.

STATE OF NORTH CAROLINA v. LEONARD BALDWIN

No. 574A90

(Filed 10 January 1992)

1. **Criminal Law § 1352 (NCI4th) — capital sentencing — mitigating circumstances — state constitution — right to unanimous verdict**

A murder defendant did not suffer any prejudice as a result of the denial of his motion to prohibit the State from seeking the death penalty where defendant was tried capitally but received a sentence of life imprisonment upon the jury's recommendation. Although defendant contended that North Carolina's capital sentencing pattern jury instructions, which authorize consideration of mitigating circumstances found by one or more jurors, deprive criminal defendants of the right to a unanimous jury verdict, neither article I, section 24 nor any other provision of the North Carolina Constitution requires that a defendant's sentence be based upon a unanimous recommendation of a jury.

Am Jur 2d, Criminal Law §§ 598-600; Homicide § 548; Trial §§ 1754, 1760.

2. **Evidence and Witnesses § 90 (NCI4th) — defendant's statements to psychologist — basis of opinion — prejudicial effect — excluded**

The trial court did not err in a murder prosecution by prohibiting defendant's psychologist from testifying concerning the statements made by defendant during his interviews with the psychologist. Although defendant contended that defendant's hearsay statements were admissible as the facts or data underlying the expert's opinion testimony, the trial court determined that the probative value of defendant's statements was substantially outweighed by the prejudicial effect of such statements. Given that defendant had not yet produced any substantive evidence concerning the matters raised in his statement, it cannot be said that the trial court abused its discretion in excluding the evidence due to possible juror confusion.

Am Jur 2d, Expert and Opinion Evidence §§ 228-230, 240.

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludable as hearsay — state cases. 89 ALR4th 456.

3. Evidence and Witnesses § 2174 (NCI4th)— defendant's statements to psychologist—excluded basis of opinion—defendant not forced to testify

A defendant in a murder prosecution was not forced to testify by the exclusion of statements made by defendant to the psychologist because the psychologist was permitted to testify concerning his evaluation of defendant, the opinions and conclusions reached as a result of the evaluation, and the facts and data upon which he relied in making his determinations. The substance of defendant's statements was not necessary to explain the testimony.

Am Jur 2d, Criminal Law § 936; Expert and Opinion Evidence §§ 228-230, 240.

4. Evidence and Witnesses § 90 (NCI4th)— murder—defendant's statements to psychologist excluded—psychologist's opinion of confession

The exclusion of a murder defendant's statements to his psychologist did not deprive defendant of an expert witness in psychological testing and evaluation where the court permitted defense counsel to question the psychologist concerning his determinations of defendant's intellectual ability, problem solving abilities, and pattern of relationships. The court's ruling merely prohibited the expert from disclosing the substance of defendant's hearsay statements and from giving an opinion as to the validity or completeness of defendant's confession.

Am Jur 2d, Expert and Opinion Evidence §§ 41, 228-230, 240.

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludable as hearsay—state cases. 89 ALR4th 456.

5. Evidence and Witnesses § 2152 (NCI4th)— murder—psychologist's opinion that confession incomplete—excluded

The trial court did not err by excluding a psychologist's proposed testimony regarding the completeness or validity of a murder defendant's confession. The psychologist was permitted to relate extensive findings from which the jury could have inferred that defendant's confession was incomplete, inaccurate, or invalid.

Am Jur 2d, Expert and Opinion Evidence § 240.

6. Evidence and Witnesses § 2302 (NCI4th)— murder—state of mind—psychologist's opinion—not admitted—no prejudice

There was no prejudice in a murder prosecution where the court refused to permit a psychologist to give an opinion as to defendant's state of mind at the time of the shooting. State of mind evidence was presented and defendant failed to make an offer of proof.

Am Jur 2d, Expert and Opinion Evidence § 359; Homicide §§ 395, 406.

7. Homicide § 28.6 (NCI3d)— murder by lying in wait—voluntary intoxication—refusal to instruct—no error

Voluntary intoxication is irrelevant to a charge of first degree murder by lying in wait, a crime that does not require a finding of specific intent, because voluntary intoxication may only be considered as a defense in specific intent crimes.

Am Jur 2d, Homicide §§ 49, 127-129, 498, 517.

Modern status of rules as to voluntary intoxication as defense to criminal charge. 8 ALR3d 1236.

8. Homicide § 28.6 (NCI3d)— murder—voluntary intoxication—refusal to instruct—no error

The evidence was insufficient to support an instruction on voluntary intoxication where the only evidence concerning defendant's alcohol and drug consumption was elicited from defendant on cross-examination by the State and the evidence presented in the case was insufficient to show that defendant was so intoxicated that he was incapable of forming the intent necessary to commit first degree premeditated and deliberated murder.

Am Jur 2d, Homicide §§ 498, 517.

Modern status of rules as to voluntary intoxication as defense to criminal charge. 8 ALR3d 1236.

9. Homicide § 25 (NCI4th)— murder—instruction on lying in wait—no error

The trial court did not err in a homicide prosecution by instructing the jury on murder by lying in wait where the evidence showed that defendant armed himself with a .357

magnum, went to the victim's home and hid in a closet within the victim's bedroom, and fired three shots and killed the victim when he opened the closet door.

Am Jur 2d, Homicide §§ 49, 534.

10. Homicide § 28.1 (NCI4th)— murder—imperfect self-defense—instruction not given—no error

The trial court did not err by refusing to instruct the jury on imperfect self-defense in a homicide prosecution where the uncontradicted evidence shows that the events leading to the shooting were initiated by defendant with murderous intent; defendant, by his own testimony, armed himself, went to the victim's house, and hid in the closet for the purpose of killing the victim; and defendant testified that he received $300 for the killing and was supposed to have received $40,000.

Am Jur 2d, Homicide § 519.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Gaines, J.*, at the 23 July 1990 Criminal Session of Superior Court, MECKLENBURG County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his conviction of conspiracy to commit murder was allowed by this Court on 4 January 1991. Heard in the Supreme Court 15 November 1991.

Lacy H. Thornburg, Attorney General, by Tiare B. Smiley, Special Deputy Attorney General, for the State.

Jean B. Lawson for defendant-appellant.

MEYER, Justice.

Defendant was indicted for the murder and conspiracy to commit the murder of Roosevelt Bates and was tried capitally at the 23 July 1990 Criminal Session of Superior Court, Mecklenburg County. The jury returned verdicts finding defendant guilty of conspiracy to commit murder and first-degree murder on the theories of premeditated and deliberated murder and murder perpetrated by lying in wait. Following a sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury determined that the sixteen mitigating circumstances found were sufficient to outweigh the

one aggravating circumstance found 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 Bates and imposed a consecutive sentence of ten years' imprisonment for the conspiracy conviction.

On appeal, defendant brings forward numerous assignments of error. After a thorough review of the transcript of the proceedings, record on appeal, briefs, and oral arguments, we conclude that defendant received a fair trial free of prejudicial error, and we therefore affirm his convictions and sentences.

The evidence presented by the State at trial tended to show that Roosevelt Bates was the victim of a contract killing—that he was killed by defendant for money at the behest of the victim's girlfriend, Doretha Weathers, and pursuant to a plan devised by defendant and Weathers. According to the State's evidence, defendant was approached by his friend, Darwin Mobley, on 3 August 1989. Mobley said that he knew a woman who wanted defendant "to do something for her." Defendant agreed to go with Mobley to see the woman, and the two went to an apartment shared by Weathers and Bates. Weathers told defendant her name was Doretha and asked defendant if he would kill someone for $2,000. Defendant asked "who," and Weathers replied that she wanted her boyfriend killed. Defendant told Weathers that he would have to think about it and that he would "get back up with her." Defendant and Mobley then left. Mobley asked defendant if he was going to do it, and defendant replied, "I'll think about it."

At approximately 7:30 or 8:00 p.m. that evening, defendant was awakened at his home by Mobley. Mobley told defendant that a gun could be obtained from Jay Jones. Defendant and Mobley then walked toward Jones' house. Jones met them and said that he had only one bullet. Mobley asked Baldwin if he could do it with one bullet, and defendant said "No." Defendant, Mobley, and Jones then proceeded to Jones' house where Jones retrieved a .357 magnum, and the three then walked back to Mobley's home. They remained at Mobley's apartment until approximately 9:30 p.m. when they walked outside to watch a fight in the parking lot. Mobley left and returned a short time later with three bullets. Mobley took the gun, which already had one bullet in it, loaded three more bullets into the gun, and handed it to defendant.

At 9:55 p.m., defendant, carrying the loaded gun, walked with Mobley and Jones to Weathers' apartment. Defendant told Weathers that he had never shot anyone before. Weathers responded, "Don't worry, this is my third person I've done like this. . . . Third Boyfriend." Defendant and Weathers then walked into the apartment. Weathers escorted defendant to a bedroom, opened the closet door, and told defendant to get into the closet. Weathers told defendant that she would tell her boyfriend to get the sewing machine out of the closet and that when he came, defendant should shoot him. Defendant stepped into the closet and stood waiting, with his arms extended, pointing the gun at the closet door. About thirty seconds later, the bedroom light was turned on. The closet doors opened, and defendant saw Bates. Defendant aimed the gun and fired three shots, killing Bates. Weathers then rushed into the room and told defendant that he should leave and that she would pay him the next day.

After the shooting, defendant hid the gun in the woods and walked to Mobley's apartment. He told Mobley that he had shot the man and that he was going to turn himself in. Mobley told defendant that it would be "dumb" to do that and suggested that defendant go home. After defendant returned home, Jones came to defendant's house looking for the gun. Defendant retrieved the gun from the woods and handed it to Jones. At Jones' request, defendant gave Jones some alcohol which Jones used to clean the gun.

The next day, defendant went with Jones to Mobley's apartment. Mobley left and returned with a bag containing approximately $1,500.00. Mobley reached into the bag, handed defendant $300.00, and told defendant that Weathers would pay him the rest of the money later.

On 23 August 1989, defendant was arrested and questioned about the shooting. Initially, defendant denied any knowledge of the shooting and claimed that he had been across town at the time of the shooting. In response to being told that he had been implicated in the shooting, defendant stated, "Okay, I'll tell you about it."

Defendant then gave a statement, which was reduced to written form and signed by defendant, detailing the events of 3 August 1989. This statement was admitted into evidence at defendant's trial and, together with an out-of-court identification made by Weathers, served as the State's primary evidence against defendant.

Other evidence presented by the State included testimony concerning the investigation of the Bates' shooting. According to the testimony of two police officers, Bates' body was discovered lying face forward in the closet of a bedroom in his home. His "left arm was bent slightly near the upper portion of his body. His right arm was extended up and above his head into the closet area." A search of the victim's pockets revealed approximately $1,000.00 in cash, and in his right front pants pocket a small caliber pistol was found "down deep in the pocket" with the money on top. An autopsy of Bates' body established that he died as a result of two gunshot wounds to the upper left chest. One additional bullet was removed from the ceiling of the bedroom in which Bates' body was found.

A firearms examiner testified that he test-fired a .357 magnum that the police recovered from Jones. He stated that the trigger pull on the .357 magnum was normal—it was not a "hair trigger." He further testified that the two bullets recovered from Bates' body were of a different manufacture from the bullet recovered from the ceiling but all three had been fired by the .357 magnum obtained from Jones.

Throughout the trial, defense counsel proceeded on the theory that defendant was mentally incapable of planning and executing a plan of murder. Dr. Daniel Biber, an expert in psychological evaluations and testing, testified that he had performed a psychological evaluation of defendant in July 1990. Dr. Biber testified that his evaluation of defendant revealed that defendant thinks very concretely; that due to his inability to think things out, defendant is intellectually unable to plan future courses of behavior or evaluate alternatives; that defendant tends to take direction from others and is easily led by and dependent upon others; and that defendant is "easily lead [sic] in an interview" and may when making a statement or answer give an incomplete response.

Defendant testified that Mobley asked defendant if he would "kill somebody for $40,000.00" but that he never agreed to kill anyone. Defendant claimed that he went to the home of Bates and Weathers because he was scared that Weathers would have him killed. Defendant testified, "[Jones] told me that if I didn't kill the guy that Ms. Weathers would have somebody to kill me." Defendant also stated that on the day of the shooting "this boy named Donald Young approached me and put a small revolver

to my side and pulled the trigger twice. . . . That made me think that that Lady was serious about having me killed if I didn't kill Mr. Bates."

In order to corroborate defendant's testimony of the alleged threat by Young, defense counsel also presented testimony of Mobley. Mobley testified that he saw Young threaten defendant by pointing a gun at him. However, on cross-examination, Mobley further stated that at the time of the threat, Young "said something about [defendant] messing with [Young's] nephews and talking about [Young]." This was the only evidence presented to explain Young's action and it in no way connected the threat made by Young to Weathers.

Defendant further testified that Weathers led him into the closet and told him "to stand in the closet until the bedroom light come [sic] on and that would be him and for me to shoot him." Defendant testified that he was scared and that when the door opened he was surprised. Up until that moment, defendant stated, he had not known whom he was supposed to shoot. When he saw Bates, he recognized him and did not intend to shoot him. Defendant also claimed that he saw a gun handle sticking out of Bates' pocket and that he fired two shots as Bates reached for the gun in his pocket.

Based on testimony elicited from defendant, Dr. Biber, and other witnesses, defense counsel argued to the jury that defendant was a "pawn" in a conspiracy to kill Bates; that he never agreed to and never intended to kill Bates; that he feared for his life; that he was scared to tell Weathers that he would not kill Bates; and that when the closet door opened defendant wanted out of the closet and did not know how to get out, that his act of shooting was a simple reaction "to what he believed was an imminent threat of danger to himself."

I.

[1] Defendant first contends that the trial court erred in denying his motion to prohibit the State from seeking the death penalty. Defendant argues that North Carolina's capital sentencing pattern jury instructions, which authorize consideration of mitigating circumstances found by one or more jurors, deprive criminal defendants of the right to a unanimous jury verdict as required by Article I, Section 24 of the North Carolina Constitution. We disagree.

Article I, Section 24 provides that "[n]o person shall be *convicted* of any crime but by the unanimous verdict of a jury in

open court." (Emphasis added.) This section, as its plain language states, applies to the determination of a defendant's guilt of the crime charged. A defendant cannot be convicted except upon a unanimous jury verdict "as to every essential element of the crime charged." *State v. Denning*, 316 N.C. 523, 524, 342 S.E.2d 855, 856 (1986).

Never has this Court construed Article I, Section 24 or any other provision of the North Carolina Constitution as requiring that a defendant's *sentence* be based upon a unanimous recommendation of a jury.[1] In fact, we expressly rejected this claim in *State v. Denning*, 316 N.C. 523, 342 S.E.2d 855. In *Denning*, the defendant, convicted of driving while impaired, contended that a trial judge's consideration of prior convictions as aggravating factors violated his constitutional right to a trial by jury. We disagreed, holding that aggravating factors are not elements of the offense charged and that "their consideration for purposes of sentencing is . . . not susceptible to constitutional challenge based upon either the sixth amendment right to a jury trial or article I, section 24 of the North Carolina Constitution." *Id.* at 524, 342 S.E.2d at 856.

Our opinion in *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990), also demonstrates that our Constitution does not require that mitigating circumstances be unanimously found by the jury. In *McKoy*, we were faced with the question of whether North Carolina's capital sentencing statute was invalidated by the United States Supreme Court's decision in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). McKoy argued that the unanimity instructions held unconstitutional in *McKoy v. North Carolina* were required by N.C.G.S. § 15A-2000. After analyzing our prior opinions, N.C.G.S. § 15A-2000, and Article I, Section 24 of our Constitution, we concluded that North Carolina's prior instructions, which required a unanimous finding of mitigating circumstances, were judicially approved based on "the interest of 'consistency and fairness' " and were not constitutionally or statutorily required. *State v. McKoy*, 327 N.C. at 38, 394 S.E.2d at 430.

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1. In *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), we stated that "a verdict of death in a capital case must be by unanimous vote of the twelve jurors." *Id.* at 218, 302 S.E.2d at 156 (citing *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979)). We note, however, that our holding in *Cherry* and our subsequent statement in *Kirkley* concerned the sentencing procedure established by the legislature in N.C.G.S. § 15A-2000. Neither of these cases in any way intimated that the unanimity required in a jury's sentencing recommendation is constitutionally mandated.

Moreover, even assuming *arguendo* that Article I, Section 24 requires that a jury's sentencing recommendation be supported by unanimous findings of mitigating circumstances, we fail to see how defendant suffered any prejudice as a result of the denial of his motion to prohibit the State from seeking the death penalty. Defendant was tried and convicted of first-degree murder. Although tried capitally, defendant was not sentenced to death but received a sentence of life imprisonment upon the jury's recommendation. Had defendant been tried noncapitally and convicted of first-degree murder, he nevertheless would have received a sentence of life imprisonment. *See* N.C.G.S. § 14-17 (Supp. 1991). Therefore, even assuming error *arguendo* and further that it was of constitutional magnitude under the North Carolina Constitution, any such error was harmless under the particular facts of this case.

II.

Defendant also assigns as error several rulings made by the trial court concerning testimony that defense counsel sought to elicit from defendant's expert psychologist, Dr. Daniel Biber. After Dr. Biber was tendered and accepted as an expert in psychological evaluations and testing, defense counsel sought to question Dr. Biber as to his opinion of defendant's state of mind at the time of the killing. The court held a voir dire during which Dr. Biber testified that he had personally interviewed defendant on three occasions and that during the interviews, defendant recounted the sequence of events surrounding the shooting. Dr. Biber further indicated that it was his opinion that the confession given by defendant to the police was inaccurate and that defendant shot the victim out of fear and in an attempt to protect himself from the victim.

Based upon Dr. Biber's voir dire testimony, the trial court found as facts that Dr. Biber was retained by defense counsel to make a psychological diagnosis of defendant "in three areas, a) intellectual ability, b) problem solving ability, and c) Defendant's pattern of relating to people (i.e., was he a leader or a follower)." The court ordered that Dr. Biber could testify as to his opinion concerning defendant's intellectual ability, problem-solving ability, and pattern of relating to other people and could state that his opinions, conclusions, and diagnoses were based on interviews with defendant. The court further ordered, however, that Dr. Biber could not testify concerning the substance of "any self-serving, exculpatory statements made to him by the Defendant during [the] interviews"

"unless or until the Defendant has testified in this matter with regards to matters related to those statements made to the Doctor."

[2] Defendant first argues that the trial court erred in prohibiting defendant's psychologist from testifying concerning the statements made by defendant during his interviews with the psychologist. Defendant apparently asserts that defendant's hearsay statements were the facts or data underlying the expert's opinion testimony and were therefore admissible under N.C. R. Evid. 705. We find no merit in defendant's argument.

Rule 705 does not, as defendant contends, make the bases for an expert's opinion automatically admissible. This rule, entitled "Disclosure of facts or data underlying expert opinion," merely provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. *The expert may in any event be required to disclose the underlying facts or data on cross-examination.* There shall be no requirement that expert testimony be in response to a hypothetical question.

N.C. R. Evid. 705 (emphasis added). As noted in the official commentary, the primary purpose of this rule was to enable an "expert to give his opinion without prior disclosure of the underlying facts unless an adverse party requests otherwise." N.C. R. Evid. 705 official commentary. Only if an adverse party requests disclosure must the trial court require the expert to disclose the underlying facts of his opinion. Rule 611 vests the trial court with authority to "exercise reasonable control over the mode and order" of interrogation and presentation of the evidence. N.C. R. Evid. 611. Whether or not to exclude relevant but prejudicial evidence is a matter within the sound discretion of the trial court. *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986); *see* N.C. R. Evid. 403. Such a decision " 'may be reversed for abuse of discretion only upon a showing that [the trial court's] ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.' " *Penley*, 318 N.C. at 41, 347 S.E.2d at 789 (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

We find that the trial court's decision to exclude the evidence of defendant's hearsay statements was amply supported by reason and constituted a proper exercise of the trial court's discretion. As noted by the trial court, the statements made by defendant to his psychologist were self-serving, exculpatory statements raising matters relating to several defenses, including self-defense, coercion, intimidation, and duress. At the time that defendant sought to elicit this information from his psychologist, there had been no evidence presented to establish any of these defenses. The court determined that the hearsay statements would be probative for the purpose of "showing how the Psychologist formed his opinion" and properly weighed the probative value against the prejudicial effect of defendant's statements. The court determined that "the probative value of [defendant's statements] is substantially outweighed by the prejudicial effect of such statements in that they raise issues likely to confuse the Jury and are not reasonably necessary for an explanation by the Physician of the basis for his conclusions relating to the three areas of his investigation." After considering the alternative of giving a limiting instruction, the court concluded that "any limiting instruction by the Court to the Jury concerning such matters cannot reasonably be expected to exclude such matters from the Jury's deliberation of the issues in this case." Given that defendant had not yet produced any substantive evidence concerning the matters raised in his statement, we cannot say that the trial court abused its discretion in excluding the evidence due to possible juror confusion. *See* N.C. R. Evid. 403 (vesting the trial court with discretion to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury").

[3] We further reject defendant's argument that this ruling "forced the defense to put the defendant on the stand to justify the expert conclusions of the psychologist." The trial court's ruling expressly permitted defendant's psychologist to testify concerning his evaluation of defendant and the opinions and conclusions reached as a result of the evaluation. With the exception of the substance of defendant's hearsay statements, the psychologist was further permitted to testify concerning the facts and data upon which he relied in making his determinations. The substance of defendant's statements was not necessary to explain the psychologist's testimony, and therefore the exclusion of this hearsay evidence could not

have forced defendant to take the stand to support the expert's conclusions.

[4] Defendant further argues that the exclusion of defendant's statements to his psychologist "precluded the defense from using an expert witness in psychological testing and evaluation to show that the defendant's confession was grossly incomplete by virtue of his limited and impaired intellectual functioning." We disagree. The record in this case quite clearly shows that the trial court permitted defense counsel to question the psychologist concerning his determinations of defendant's intellectual ability, problem-solving abilities, and pattern of relationships. The trial court's ruling merely prohibited the expert from disclosing the substance of defendant's hearsay statements and from giving an opinion as to the validity or completeness of defendant's confession.

As noted above, the trial court properly exercised the discretion afforded it under Rule 403 when it refused to permit the psychologist to testify to the substance of defendant's hearsay statements.

[5] With regard to the trial court's exclusion of the proffered expert opinion that defendant's confession was "grossly incomplete," we find no error. "Although an expert's opinion testimony is not objectionable merely because it embraces an ultimate issue, it must be of assistance to the trier of fact in order to be admissible." *State v. Jackson*, 320 N.C. 452, 459-60, 358 S.E.2d 679, 683 (1987); *see also* 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 126 (3d ed. 1988). Where an expert's opinion testimony concerns matters with which the expert has no special knowledge, skill, experience, training, or education, the opinion would not be of assistance to the trier of fact, and the evidence is properly excluded. *See State v. Jackson*, 320 N.C. 452, 358 S.E.2d 679. The jurors in this case heard the evidence concerning defendant's alleged inability to give complete statements or answers, and they were in as good a position as Dr. Biber to determine whether defendant's confession to the police was "grossly incomplete."

In the case *sub judice*, the record reveals that the trial court properly limited the psychologist's testimony to the subjects of his psychological evaluation of defendant. The trial court did not preclude defendant from presenting evidence that defendant's statement to the police was inaccurate or incomplete. The record shows that the trial court ruled that the psychologist would not be permit-

ted "to testify to his opinion as to the validity of any confession or whether that confession contains all the things that he thinks ought to be in it or not." From this portion of the transcript, it becomes apparent that the trial court's ruling merely prohibited the psychologist from giving an opinion as to the legal validity of defendant's confession. This ruling was a correct application of our well-established rule prohibiting expert opinion testimony concerning matters that require legal interpretations. *See State v. Ledford*, 315 N.C. 599, 617, 340 S.E.2d 309, 320 (1986) (stating that "an expert may not testify that a particular legal conclusion or standard has or has not been met, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness"); *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985).

Moreover, although limited to the subject matter of his evaluation, the psychologist was permitted to relate extensive findings from which the jury could have inferred that defendant's confession was incomplete, inaccurate, or invalid. Following the trial court's ruling, the psychologist testified that he had administered tests to determine defendant's IQ; that on the verbal IQ test, which measures a person's ability to respond orally to questions, defendant obtained a rating of 84, within the sixteenth percentile; that the testing revealed that defendant's "overall IQ was an 80," or within the ninth percentile; and that defendant's IQ level was characterized as "dull normal intelligence" or "borderline retardation." The psychologist further testified that his evaluation of defendant revealed that defendant's limited intellectual abilities inhibited his ability to respond to questioning:

> [Defendant] can in a situation like giving information fail to mention stuff that might be germane either because he hasn't thought of it at the moment or it hasn't been triggered. He is easily lead [sic] in an interview. . . .
>
> . . . .
>
> . . . It is very possible that a statement he would give or answers he would give would be incomplete.

Although this evidence was elicited following defendant's testimony, there is nothing in the record to suggest that the trial court conditioned the admissibility of this testimony on defendant's testifying. We conclude that the trial court did not err in excluding Dr. Biber's

proposed testimony as to the completeness or validity of defendant's confession.

[6] Defendant further argues that the trial court erred in refusing to permit the psychologist to give an opinion as to defendant's state of mind at the time of the shooting. We agree with defendant that expert opinion testimony concerning a defendant's state of mind is admissible to negate the first-degree murder elements of premeditation and deliberation. *See State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). However, we conclude that defendant has failed to establish that the trial court's ruling constituted prejudicial error.

The record in this case reveals three instances where defendant sought to elicit from the psychologist testimony concerning defendant's state of mind at the time of the shooting. On the first occasion, the psychologist responded that defendant told him "[h]e was fearful, scared for his life at that moment." The trial court sustained the State's objection to this question and instructed the jury to disregard the psychologist's response. On the two other occasions that defense counsel attempted to offer evidence of defendant's state of mind, the trial court sustained the State's objections prior to the psychologist's response. At no point did defense counsel seek to make an offer of proof to preserve the substance of the excluded testimony.

After examining the record as a whole, we conclude that defendant has failed to show that the trial court's ruling precluded him from presenting evidence of his state of mind. In support of defendant's theory that he "did not have the ability to plan" the murder, the psychologist testified on direct examination that defendant is unable to "initiate significant action on his own. He is likely to be very . . . group dependent . . . . In other words, it is very easy for him to be swept along in group behavior." In addition, Dr. Biber testified that it was his opinion "that [defendant] was incapable of functioning independently in planning" or carrying out a plan of murder.

Furthermore, the record reveals that the psychologist testified concerning defendant's state of mind prior to and at the time of the shooting. Dr. Biber testified that defendant stated that prior to going into the victim's apartment, someone put a gun in his side; that defendant perceived this as a warning and feared "that if he did not go through with [the killing] that he himself would

become [the] victim." Based on statements made by defendant, the psychologist was also allowed to testify that immediately before the shooting, defendant saw the victim, who was a "big black man" weighing approximately three hundred pounds; that defendant and the victim stared at each other for a moment; that defendant thought the victim was reaching for a weapon; and that defendant shot in order "to get away, not to kill." In light of the state of mind evidence presented and due to defendant's failure to make an offer of proof showing that he was precluded from presenting additional evidence of his state of mind, we are unable to conclude that the trial court's ruling constituted prejudicial error.[2] We therefore overrule this assignment of error.

III.

In his next assignment of error, defendant contends that the trial court erred in refusing to instruct the jury on the defense of voluntary intoxication. Because defendant was convicted of first-degree murder by premeditation and deliberation and first-degree murder perpetrated by lying in wait, we address the applicability of this defense as to each crime.

A.

[7] Defendant argues that the defense of intoxication is relevant to a charge of first-degree murder perpetrated by lying in wait because it negates any intent to kill and intent to lie in wait. However, we have previously held "that a specific intent to kill is not an element of the crime of first-degree murder by lying in wait" and that evidence of intoxication is not relevant in this regard. *State v. Leroux*, 326 N.C. 368, 377-78, 390 S.E.2d 314, 321, *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 155 (1990); *see also State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). We further reject defendant's argument that murder by lying in wait requires an intent to lie in wait that may be negated by a showing of voluntary intoxication. As demonstrated by our prior opinions, lying in wait is a physical act. *State v. Allison*, 298 N.C. 135, 147-48, 257 S.E.2d 417, 425

2. Because we conclude that defendant has failed to show that he was precluded from presenting any state of mind evidence in defense of the charge of first-degree premeditated and deliberated murder, we do not address the question of whether the trial court's ruling should be deemed harmless as a result of defendant's conviction of first-degree murder perpetrated by lying in wait.

(1979) (stating that a person "who watches and waits in ambush for his victim is most certainly lying in wait"); *see, e.g., State v. Leroux*, 326 N.C. 368, 390 S.E.2d 314 (sneaking around a dark golf course constitutes lying in wait); *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1 (waiting outside window for victim to bend down constitutes lying in wait). Like poison, imprisonment, starving, and torture—the other physical acts specified in N.C.G.S. § 14-17—lying in wait is a method employed to kill. *State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781 (1986). It does not require a finding of any specific intent. Because voluntary intoxication may only be considered as a defense to specific intent crimes, *State v. McLaughlin*, 286 N.C. 597, 606, 213 S.E.2d 238, 244 (1975), *sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976), it is therefore irrelevant to a charge of first-degree murder by lying in wait, a crime that does not require a finding of specific intent.

B.

[8] It is well established that "specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder, and a showing of legal intoxication to the jury's satisfaction will mitigate the offense to murder in the second degree." *McLaughlin*, 286 N.C. at 606, 213 S.E.2d at 244. However, it is equally well established that an instruction on voluntary intoxication is not required in every case in which a defendant claims that he killed a person after consuming intoxicating beverages or controlled substances. *See, e.g., State v. Strickland*, 321 N.C. 31, 361 S.E.2d 882 (1987); *State v. McLaughlin*, 286 N.C. 597, 213 S.E.2d 238; *State v. Doss*, 279 N.C. 413, 183 S.E.2d 671 (1971), *sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 762, *on remand*, 281 N.C. 751, 191 S.E.2d 70 (1972). In order to support a defense of voluntary intoxication, substantial evidence must be presented to show that at the time of the killing the defendant was so intoxicated that he was " 'utterly incapable of forming a deliberate and premeditated purpose to kill.' " *Strickland*, 321 N.C. at 41, 361 S.E.2d at 888 (quoting *State v. Medley*, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978)). In the absence of evidence of intoxication to this degree, the court is not required to charge the jury on the defense of voluntary intoxication. *Id.*

The State asserts that defendant did not produce sufficient evidence to support an instruction on voluntary intoxication. We agree. At no point during the trial did defense counsel introduce

or seek to introduce any evidence to establish that defendant was so intoxicated that he was unable to form the intent necessary to commit first-degree premeditated and deliberated murder. The only evidence concerning defendant's alcohol and drug consumption was elicited from defendant on cross-examination by the State. This evidence, viewed in the light most favorable to defendant, shows only that at some time during the afternoon on 3 August 1989, defendant went to a neighbor's house, drank "about five or six" beers, and smoked marijuana and cocaine with three of his friends. When further questioned by the prosecutor, defendant stated that he had no idea how much marijuana or cocaine he had smoked that day. It was apparently after this that defendant and Mobley walked to Jones' house, obtained a .357 magnum and one bullet from Jones, and walked back to Mobley's house. Defendant testified that he (and apparently Jones) "sat in [Mobley's] house for a long period of time and [Mobley] went to get some more bullets." It was not until 10:00 p.m. that evening that the shooting occurred. When questioned concerning his state of intoxication at the time he entered the victim's home, defendant replied, "I wasn't high. I was coming down off of it."

We conclude that the evidence presented in this case—that defendant drank "about five or six" beers and consumed an indeterminate amount of marijuana and cocaine at some time earlier in the day—was insufficient to show that defendant was so intoxicated that he was incapable of forming the intent necessary to commit first-degree premeditated and deliberated murder. We therefore overrule this assignment of error.

IV.

[9] Next, defendant contends that the trial court erred in instructing the jury on first-degree murder perpetrated by lying in wait. Defendant argues that murder by lying in wait "presupposes premeditation and deliberation" and a "specific intent to kill or commit some grave bodily injury," neither of which were supported by the evidence presented at defendant's trial.

In *State v. Leroux*, 326 N.C. 368, 390 S.E.2d 314, we expressly rejected this argument and concluded that "[p]remeditation and deliberation are not elements of the crime of first-degree murder perpetrated by means of lying in wait, nor is a specific intent to kill." *Id.* at 375, 390 S.E.2d at 320. "Murder perpetrated by lying in wait 'refers to a killing where the assassin has stationed

himself or is lying in ambush for a private attack upon his victim.' " *Id.* (quoting *State v. Allison*, 298 N.C. 135, 147, 257 S.E.2d 417, 425).

The circumstances of this case fall within the definition of murder perpetrated by lying in wait. The evidence presented at trial showed that defendant armed himself with a .357 magnum, went to the victim's home, and hid in a closet within the victim's bedroom. When the victim opened the closet door, defendant fired three shots and killed the victim. This evidence was sufficient to convince a jury beyond a reasonable doubt that defendant was guilty of murder perpetrated by lying in wait. We therefore conclude that the trial court did not err in instructing the jury on this charge.

V.

[10] Finally, defendant contends that the trial court erred in refusing to instruct the jury on imperfect self-defense. In support of his contention, defendant asserts that the evidence shows that he went to the victim's home out of fear that the victim's girlfriend would have him killed if he did not kill the victim and that he shot the victim, not to kill him but because he feared the victim.

As noted in *State v. Norman*, 324 N.C. 253, 378 S.E.2d 8 (1989):

> Our law . . . recognizes an *imperfect* right of self-defense in certain circumstances, including, for example, when the defendant is the initial aggressor, but without intent to kill or to seriously injure the decedent, and the decedent escalates the confrontation to a point where it reasonably appears to the defendant to be necessary to kill the decedent to save [himself] from imminent death or great bodily harm.

Id. at 259, 378 S.E.2d at 12. A defendant is entitled to an instruction on imperfect self-defense if the evidence, viewed in the light most favorable to him, shows that (1) he instigated the confrontation without murderous intent; (2) he believed it was necessary to kill his adversary in order to save himself from death or great bodily harm; and (3) "defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness." *State v. Bush*, 307 N.C. 152, 158-59, 297 S.E.2d 563, 568 (1982).

Applying the foregoing principles of law to the present case, we find that the evidence, taken in the light most favorable to

defendant, does not entitle defendant to an instruction on imperfect self-defense. The uncontradicted evidence shows that the events leading to the shooting were initiated by defendant with murderous intent. By his own testimony, defendant admitted that he armed himself, went to the victim's house, and hid in the closet for the purpose of killing the victim. Upon cross-examination, defendant testified that he received $300.00 for the killing and that he was supposed to have received $40,000. Defendant's argument that he decided to kill the victim because he feared he would be killed by the victim's girlfriend is of no avail. At best, this evidence supports a finding of duress or coercion, neither of which justify or excuse the intentional killing of another. *See State v. Brock*, 305 N.C. 532, 541, 290 S.E.2d 566, 572 (1982) (" '[T]hough a man may be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder, for he ought rather to die himself than escape by the murder of an innocent.' " (quoting *State v. Dowell*, 106 N.C. 722, 726, 11 S.E. 525, 526 (1890))).

We conclude that defendant received a fair trial, free of prejudicial error.

No error.

THE NEWS AND OBSERVER PUBLISHING COMPANY, INC.; THE NORTH CAROLINA FIRST AMENDMENT FOUNDATION, INC.; AND THE NORTH CAROLINA PRESS ASSOCIATION v. SAMUEL H. POOLE; DEAN W. COLVARD; C. C. CAMERON; WILLIAM A. KLOPMAN AND HELLON SENTER

No. 269PA90

(Filed 10 January 1992)

1. State § 1.2 (NCI3d)— Public Records Law—SBI reports of Poole Commission

When the SBI submitted its investigative reports to the Poole Commission, which had been appointed by the president of the University of North Carolina system of higher education to investigate and report on alleged improprieties in the men's basketball program at N.C. State University, the reports lost

their N.C.G.S. § 114-15 exemption from the Public Records Law and became Commission records subject to disclosure under the Public Records Law to the same extent as other Commission records.

Am Jur 2d, Records and Recording Laws §§ 46.15, 46.16, 46.19.

2. Appeal and Error § 147 (NCI4th)— preserving question for review

Defendants properly preserved for appeal the issue of whether SBI reports to the Poole Commission were exempt from public disclosure under N.C.G.S. § 126-22, which provides that certain "personnel file information" gathered by state agencies concerning their employees or applicants for employment is exempt from the Public Records Law, where defendants in their answer asserted a sixth defense that "the Commission's records contain confidential personnel records protected from public inspection under N.C. Gen. Stat. § 126-22," and defendants assigned error to the trial court's failure to find and conclude that information from state employee personnel records should be excluded from its disclosure order. N.C. R. App. P. 10(c)(1).

Am Jur 2d, Appeal and Error §§ 545, 600.

3. State § 1.2 (NCI3d)— Public Records Law—personnel file exception

In order for personnel information about state employees or applicants for employment to be exempted from disclosure under the Public Records Law by N.C.G.S. § 126-22, it must meet two requirements: (1) it must have been gathered by an individual's employer (including the Office of State Personnel) or considered in an individual's application for employment; and (2) the information must relate to at least one of the enumerated activities by the employer with respect to the individual employee or applicant for employment.

Am Jur 2d, Records and Recording Laws § 46.19.

What constitutes personal matters exempt from disclosure by invasion of privacy exemption under state freedom of information act. 26 ALR4th 666.

4. State § 1.2 (NCI3d)— Public Records Law—personnel information given to SBI and Poole Commission

Personnel information about state employees first gathered by the employing state agency or the Office of State Personnel and turned over to the SBI and the Poole Commission during the investigation of the men's basketball program at N.C. State University remains protected from disclosure under the Public Records Law by N.C.G.S. § 126-22 because of the language "wherever located and in whatever form" in that statute.

Am Jur 2d, Records and Recording Laws § 46.19.

5. State § 1.2 (NCI3d)— Public Records Law—agency not subject to Open Meetings Law—no exemption for minutes

There is no exemption from the Public Records Law for the minutes of meetings of an agency not subject to the Open Meetings Law.

Am Jur 2d, Administrative Law § 229; Records and Recording Laws §§ 46.15, 46.19.

6. State § 1.2 (NCI3d)— Public Records Law—minutes of executive sessions—exception in Open Meetings Law—inapplicable to Poole Commission

Minutes of the Poole Commission's meetings were not excepted from the Public Records Law by the provision of the Open Meetings Law permitting minutes of an executive session to be withheld from public inspection if such inspection "would frustrate the purpose of the executive session," N.C.G.S. § 143-318.11(d), because the Commission was not a "public body" subject to the Open Meetings Law. Furthermore, public inspection of the minutes will not frustrate the Commission's proceedings where, at the time plaintiffs sought the minutes, the Commission had completed its investigation of the men's basketball program at N.C. State University and had reported to the UNC system's chief executive officer; the Commission's findings and recommendations had been relayed to the UNC Board of Governors; and no further action or disposition by any higher ranking university officer was pending.

Am Jur 2d, Administrative Law § 229; Records and Recording Laws §§ 46.15, 46.19.

7. State § 1.2 (NCI3d)— Public Meetings Law—attorney-client privilege

Only those portions of the minutes of the Poole Commission's meetings revealing written communications from counsel to the Commission are excepted from disclosure under the Public Records Law attorney-client privilege provided in N.C.G.S. § 132-1.1.

Am Jur 2d, Records and Recording Laws § 46.19.

8. State § 1.2 (NCI3d)— Public Records Law—minutes of Poole Commission—personnel records exception inapplicable

Minutes of meetings of the Poole Commission were not exempt from disclosure as public records by N.C.G.S. § 126-22, the statute exempting from the Public Records Law certain personnel information gathered by state agencies concerning their employees or applicants for employment, because the Commission was not the employer of any state employees questioned or mentioned in the meeting minutes.

Am Jur 2d, Records and Recording Laws § 46.19.

What constitutes personal matters exempt from disclosure by invasion of privacy exemption under state freedom of information act. 26 ALR4th 666.

9. State § 1.2 (NCI3d)— Public Records Law—no deliberative process privilege or preliminary draft exceptions

No "deliberative process privilege" exception to the Public Records Law will be recognized as a matter of public policy to exempt from public inspection preliminary draft reports prepared by members of the Poole Commission and submitted to the president of the UNC system of higher education. Nor is it necessary to infer a "preliminary draft" exception to the Public Records Law to prevent the legislature from intruding into the decision-making processes of other government branches in violation of Art. I, § 6 of the N.C. Constitution.

Am Jur 2d, Records and Recording Laws § 46.15.

What are "records" of agency which must be made available under state freedom of information act. 27 ALR4th 680.

10. Pleadings § 34 (NCI3d) — Public Records Law — Poole Commission records — denial of amendment to add Attorney General as defendant

The trial court did not abuse its discretion in the denial of plaintiffs' motion to amend their complaint to add the Attorney General as a defendant in this action under the Public Records Law to compel the disclosure of documents made or received by the Poole Commission in its investigation of the men's basketball program at N.C. State University where plaintiffs moved to amend three months after obtaining new information from deposition testimony and only three days before the action was scheduled for hearing; plaintiffs were not prejudiced because they prevailed in their action to enforce the Public Records Law; and plaintiffs' contention that, had the motion been allowed, they could have obtained an injunction prohibiting the Attorney General from further assigning the SBI to conduct an unauthorized investigation for the Poole Commission was speculative at best.

Am Jur 2d, Parties §§ 182, 183, 190, 200; Records and Recording Laws § 46.15.

ON discretionary review prior to a determination by the Court of Appeals, pursuant to N.C.G.S. § 7A-31, from a judgment entered by *Barnette, J.*, at the 18 April 1990 Civil Session of Superior Court, WAKE County, ordering defendants to disclose documents for public inspection. Defendants appeal. Plaintiffs cross-appeal the trial court's denial of a motion to amend their complaint. Heard in the Supreme Court 12 November 1990.

Everett, Gaskins, Hancock & Stevens, by Hugh Stevens, for plaintiff-appellees.

Lacy H. Thornburg, Attorney General, by Andrew A. Vanore, Jr., Chief Deputy Attorney General, and K. D. Sturgis, Assistant Attorney General, for defendant-appellants.

EXUM, Chief Justice.

This action is brought under the Public Records Law, N.C.G.S. Chapter 132, and seeks to compel defendants to disclose for public

inspection certain written materials.[1] These materials were compiled on behalf of a commission appointed by the president of the University of North Carolina system of higher education. The Commission's purpose was to investigate and report on certain alleged improprieties relating to the men's basketball team at North Carolina State University (NCSU), one of the system's component universities. Defendant Poole was chairman of the Commission, which became popularly known as the "Poole Commission," and which we will refer to as the Commission. Defendants Colvard, Cameron and Klopman were members of the Commission; and defendant Senter assisted the Commission in its work.

The records sought to be disclosed are investigative reports prepared for the Commission by special agents of the State Bureau of Investigation (SBI), Commission minutes, and draft reports prepared by individual Commission members.

Defendants concede that the Commission is a state agency and that the records sought, except for the investigative SBI reports, are public records as these terms are defined by the Public Records Law, N.C.G.S. § 132-1 (1991).[2] They resist disclosure, nevertheless, on the ground that the records sought, other than the SBI reports, are protected by certain statutory and public policy exceptions to the Public Records Law. They contend the SBI reports were not public records because of the exemption to the Public Records Law contained in N.C.G.S. § 114-15. The trial court concluded none of the statutes relied on by defendants protects the records from disclosure. It ordered disclosure of all the records. The question before us is the correctness of this decision. We conclude the decision is essentially correct but needs modification. We, therefore, modify and affirm the trial court's judgment. We affirm the trial court's denial of plaintiffs' motion to amend their complaint.

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1. N.C.G.S. § 132-9 provides, in part, "Any person who is denied access to public records for purposes of inspection, examination or copying may apply to the appropriate division of the General Court of Justice for an order compelling disclosure, and the court shall have jurisdiction to issue such orders."

2. N.C.G.S. § 132-1 defines public records as follows:

> "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.

I.

The facts are essentially not in dispute. In January 1989 C.D. Spangler, Jr., President of the University of North Carolina system of higher education (UNC) appointed the Commission members named above. The Commission, using SBI agents, conducted its investigation between January and August 1989.

On 26 July 1989 Frank A. Daniels, Jr., publisher of *The News and Observer*, wrote Spangler requesting that all documents made or received by the Poole Commission be made available for public inspection as provided by the Public Records Law. Spangler responded that he did not possess the records and referred Daniels to Poole. Daniels wrote to Poole requesting disclosure of the documents. Poole, through Chief Deputy Attorney General Andrew A. Vanore, counsel for the Commission, declined to disclose any of the documents. On 23 October 1989 defendant Poole did disclose his preliminary report.

On 23 October 1989 plaintiffs filed the action now before us, alleging in a verified complaint that defendants' refusal to permit access to the documents in question violated Section 6 of Public Records Law, N.C.G.S. § 132-6 (1991).[3] Plaintiffs prayed that the trial court order defendants to make the documents available for inspection and copying, as provided by that statute.

Defendants opposed the requested order, pleading in answer several statutory exceptions to the Public Records Law: N.C.G.S. § 114-15 (SBI records); N.C.G.S. § 126-22 (1987) (state employee personnel records); N.C.G.S. § 132-1.1 (1991) (attorney communications); and N.C.G.S. § 143-318.11(d) (Supp. 1991) (part of the Open Meetings Law). Defendants also pleaded certain "public policy" considerations in defense of their refusal to disclose.

On 2 May 1990 plaintiffs moved to amend their complaint to add Lacy H. Thornburg, Attorney General of North Carolina, as a defendant. The motion was denied.

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3. N.C.G.S. § 132-6 provides, in part:

> Every person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law.

At the hearing on the merits the trial court considered the pleadings, depositions, affidavits, and exhibits. Based upon these materials the trial court made extensive findings of fact and conclusions of law. The pertinent facts found together with certain other undisputed pertinent facts of record will be summarized in our discussion of the legal issues brought forward on appeal.

II.

Defendants first contend the trial court erroneously concluded that the SBI investigative reports were public records. For the reasons explained below, we hold the SBI investigative reports became public records subject to the Public Records Law when the SBI submitted them to and they became a part of the records of the Commission.

A.

During its organizational meetings the Commission determined it would need assistance in conducting its investigation. After much discussion and consultation with counsel, the Commission ultimately decided to employ SBI special agents to assist its investigation. Upon the Commission's request, the Attorney General directed the SBI to assign agents to assist the Commission. The SBI assigned three agents.

The SBI agents interviewed approximately 160 people and summarized the interviews in written reports which, with attachments, they submitted to the Commission. After the agents submitted their reports, William Dowdy, chief investigative agent for the SBI, who worked on the investigation, forwarded copies of all the materials gathered and produced by the agents to Wake County District Attorney C. Colon Willoughby in the event they might contain evidence of criminal misconduct. Willoughby concluded the information did not merit criminal prosecution.

Commission members treated the SBI reports and attachments as confidential. Near the investigation's end, however, two UNC officials who were not on the Commission, University Vice Presidents Arthur Padilla and Raymond Dawson, were allowed to review all Commission records, including the investigative reports. Poole, as custodian of the records, allowed the inspection.

B.

The Public Records Law, N.C.G.S. § 132-6, provides:

> Every person having custody of public records shall permit them to be inspected and examined at reasonable times and . . . shall furnish certified copies thereof on payment of fees prescribed by law.

Defendants claim this provision has no application to the SBI investigative reports because N.C.G.S. § 114-15 provides in part:

> All records and evidence collected and compiled by the Director of the Bureau and his assistants shall not be considered public records within the meaning of G.S. § 132-1, and following . . . .

The trial court concluded that the Commission's investigation, although conducted by SBI agents, was not of a type specifically authorized by section 114-15. The trial court then held:

> The provision of G.S. 114-15 concerning the non-public status of "records and evidence collected and compiled" by the S.B.I. is directed primarily toward the records of criminal investigations, and in any event extends no further than the records of investigations which are specifically authorized by G.S. 114-15. Therefore, since the investigation in question was not specifically authorized by G.S. 114-15, or by any other statutory provision, the records compiled on behalf of the Commission by the S.B.I. agents do not fall under the exemption, and are public records as defined by G.S. 132.1. Accordingly, they must be disclosed.

[1] We do not reach the question whether the SBI investigation was authorized. We hold, simply, that whether the investigation was authorized or not, when the SBI submitted its investigative reports to the Commission, they became Commission records. As such they are subject to the Public Records Law and must be disclosed to the same extent that other Commission materials must be disclosed under that law.

In *News & Observer v. State ex rel. Starling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984), this Court held that N.C.G.S. § 114-15 exempted from the Public Records Law records of a criminal investigation conducted by the SBI at the request of a district attorney. The records sought there resulted from an investigation

expressly authorized by section 114-15. Plaintiffs attempt to distinguish *Starling*. They argue that the scope of the exemptive provision in section 114-15 does not reach the investigative materials sought in the case *sub judice*, because these materials are not the product of an investigation enumerated or authorized by section 114-15. Plaintiffs further argue that even if the exemption extended to records of all SBI investigations authorized by statute, it would not extend to the materials here, because the SBI investigation on behalf of the Commission was not expressly authorized by any statute. The trial court agreed with these arguments. We think *Starling* is distinguishable, but for other reasons.

Plaintiffs do not seek disclosure of investigative reports in the possession of the SBI. They seek disclosure of copies of such reports in the possession of the Commission. The issue before us is whether these reports which have become Commission records continue to be exempt from the Public Records Law pursuant to section 114-15. We conclude that they do not.

To extend the statutory exemption to SBI investigative reports which have been placed in the public domain is like unringing a bell—a practical impossibility. When such reports become part of the records of a public agency subject to the Public Records Act, they are protected only to the extent that agency's records are protected. When the SBI investigative reports here became Commission records, they, as Commission records, ceased to be protected by section 114-15. They became subject to disclosure under the Public Records Law to the same extent as other Commission records.

The legislature knows how to extend the scope of protection of confidential records beyond the confines of the agency which maintains them. N.C.G.S. § 126-22, which provides that certain personnel information about state employees is not subject to public inspection, includes the clause "wherever located and in whatever form." Where the legislature has not included such broad protection for SBI records in section 114-15, we will not engraft it.[4]

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4. The legislature also can protect SBI records outside the SBI's possession by so providing in statutes governing records of other agencies. For example, N.C.G.S. § 7A-377, which authorizes the SBI to assist in investigations for the Judicial Standards Commission, provides that such investigative materials are confidential.

The legislature's mandate for open government supports our holding. By enacting the Public Records Law, "the legislature intended to provide that, as a general rule, the public would have liberal access to public records." *Starling*, 312 N.C. at 281, 322 S.E.2d at 137. The Court of Appeals has also noted the broad acceptance of this policy.

> "[G]ood public policy is said to require liberality in the right to examine public records." 66 Am. Jur. 2d, *Records and Recording Laws*, § 12 at 349 (1973). "While some degree of confidentiality is necessary for government to operate effectively, the general rule in the American political system must be that the affairs of government be subject to public scrutiny." Comment [*Public Access to Government-Held Records: A Neglected Right in North Carolina*], 55 N.C.L. Rev. 1187, 1188 (1977).

Advance Publications, Inc. v. Elizabeth City, 53 N.C. App. 504, 506, 281 S.E.2d 69, 70-71 (1981).

C.

Defendants also contend the SBI reports and attached documents obtained from university records and elsewhere are protected from public inspection under N.C.G.S. § 126-22, which exempts from the Public Records Law certain information about a state employee gathered by his or her employer.

[2] Plaintiffs contend defendants failed to preserve this issue for appeal. We disagree. In their answer defendants asserted a sixth defense that "the Commission's records contain confidential personnel records protected from public inspection under N.C. Gen. Stat. §§ 126-22." The trial court's order made no reference to this defense. Defendants assigned error to "[t]he trial court's failure to find and conclude that State employee personnel records, including information gathered which relates to charges against a state officer or employee or to such person's demotion, termination or other personnel action, should be excluded from its disclosure order." North Carolina Rule of Appellate Procedure 10 was amended effective 1 July 1989 to delete the requirement that assignments of error be supported by exceptions. The Rule now provides that an assignment of error is sufficient "if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references."

N.C. R. App. P. 10(c)(1). Defendants' assignment of error Number Nineteen satisfies these requirements. This issue was properly presented to the trial court and preserved for appeal; therefore, we will consider it.

[3] Chapter 126, Article 7 of the General Statutes is titled "The Privacy of State Employee Personnel Records." Neither this Court nor the Court of Appeals has had occasion previously to apply this statute. Section 126-22 provides in pertinent part:

> Personnel files of State employees, former State employees, or applicants for State employment shall not be subject to inspection and examination as authorized by G.S. 132-6. For purposes of this Article, a personnel file consists of any information gathered by the department, division, bureau, commission, council, or other agency subject to Article 7 of this Chapter which employs an individual, or considered an individual's application for employment, or by the office of State Personnel, and which information relates to the individual's application, selection or nonselection, promotions, demotions, transfers, leave, salary, suspension, performance evaluation forms, disciplinary actions, and termination of employment wherever located and in whatever form.

Under the plain meaning of the statutory language, any information satisfying the definition of "personnel file" is excepted from the Public Records Law. In order for personnel information to be protected by section 126-22, it must meet two requirements: (1) it must have been gathered by an individual's employer (including the Office of State Personnel) or considered in an individual's application for employment; and (2) the information must relate to at least one of the enumerated activities by the employer with respect to the individual employee or applicant for employment.

The state employees who were the subject of SBI reports and Poole Commission meetings were employed by NCSU. Under section 126-22, only personnel information about those employees gathered by the employing state agency is exempt from public inspection under section 126-22. In the case of the individuals investigated, neither the Poole Commission nor the SBI was the employing state agency. Unless, therefore, the information gathered by the SBI for the Commission was first gathered by the employing state agency or the Office of State Personnel, it is not exempt

under section 126-22 and is subject to disclosure under the Public Records Law.

[4] Personnel information first gathered by the employing state agency or the Office of State Personnel and turned over to the SBI and the Poole Commission remains protected because of the language "wherever located and in whatever form" in section 126-22. On remand the trial court must examine the documents *in camera* to decide if any part of them falls within the statutory "personnel file" definition so as to be protected.

III.

Defendants next assign error to the trial court's ruling that minutes of the Poole Commission's meetings are public records. Defendants contend the minutes are excepted from the Public Records Law because the meetings were lawfully closed to the public. Defendants also contend the minutes are protected because they contain privileged "deliberative process" communications, discussions of individual state employee personnel matters, and attorney-client communications.

A.

The trial court took notice of the parties' stipulation that the Poole Commission was not a "public body" as defined by the Open Meetings Law, N.C.G.S. § 143-318.10 (Supp. 1991), so that the Commission lawfully closed its meetings to the public. However, the trial court held that the minutes of those same meetings are public records as defined in N.C.G.S. § 132-1 and are subject to disclosure under the Public Records Law.

Section 132-1 defines "public records" as documentary material "made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." The statute defines subject agencies and subdivisions as "every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government." N.C.G.S. § 132.1.

Defendants have admitted that with the exception of the SBI investigative reports, all documents made or received by the Poole Commission are public records within the literal meaning of N.C.G.S.

§ 132-1. Also, defendants have not assigned error to the trial court's ruling that the Poole Commission, the UNC Board of Governors, the UNC administration, the Attorney General, and the SBI are all "public agencies" within the scope of section 132-1.

N.C.G.S. § 143-318.10, commonly known as the Open Meetings Law, provides for public access to the proceedings of public bodies. The definition of a "public body" under this statute is narrower than the definition of "public agency" under the Public Records Law. A "public body" is defined in section 143-318.10(b) as a political entity, composed of two or more members, which (1) is authorized to exercise one of several enumerated governmental functions, and (2) was established by one of several enumerated devices: the State Constitution, a legislative enactment, a resolution pursuant to statutory procedure, a local ordinance or resolution, or an executive order of the Governor or comparable action by a State office or department head as defined in other North Carolina statutes. Defendants and plaintiffs have stipulated that the Poole Commission was not a "public body" under the statute because it was not established by any of the means enumerated in section 143-318.10(b)(2).

[5] Defendants first argue that the Public Records Law does not apply to minutes from meetings of an agency not subject to the Open Meetings Law. Defendants cite no authority to support this proposition. We decline to create such a broad exception to the Public Records Law where the legislature has not elected to do so. The Public Records Law and the Open Meetings Law are discrete statutes, each designed to promote in a different way openness in government. There is no suggestion in either statute that an agency not subject to one is, *ipso facto*, exempt from the other.

[6] Defendants argue in the alternative that minutes of the Commission's meetings are excepted from the Public Records Law by the following provision in the Open Meetings Law:

> Minutes of Executive Session—
>
> Notwithstanding the provisions of G.S. 132-6, minutes and other records made of an executive session may be withheld from public inspection so long as public inspection would frustrate the purpose of the executive session.

N.C.G.S. § 143-318.11(d) (Supp. 1991). Other provisions in section 143-318.11 help define what meetings are executive sessions pro-

tected by section 143-318.11(d). Section 143-318.11(a) provides that a "public body may hold an executive session and exclude the public" for several, specifically defined purposes, including:

> (5) To consult with an attorney, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.[5]
>
> . . . .
>
> (8) To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of a public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge or grievance by or against a public officer or employee.

Defendants argue that because consultations with counsel and discussion of personnel matters by a "public body" would fall within the executive session exceptions quoted above, minutes from Commission meetings containing such material should likewise be excepted from public inspection, even though the minutes are not from a meeting of a "public body" covered by the Open Meetings Law.

The trial court examined the minutes sought here and first concluded that had the Poole Commission been subject to the Open Meetings Law, it could not have held executive sessions under sections 143-318.11(a)(5) or (8). The trial court further held that considering the contents of the minutes and the other materials that it was ordering disclosed, the minutes did not meet the threshold test of section 143-318.11(d), because "public inspection of the minutes at this time would not frustrate the purpose of the executive session even if G.S. 143-318.11(a) did apply."

We affirm the trial court ruling on the ground, simply, that the Commission was not subject to nor governed by the Open Meetings Law. Not being burdened by this law's provisions, the Commission is not entitled to its benefits.

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5. This subsection was amended in 1991, after the appeal in this case, to allow privileged consultation with an attorney "employed or retained to represent the public body, to the extent that confidentiality is required in order to preserve the attorney-client privilege between the attorney and the public body." N.C.G.S. § 143-318.11(a)(5) (1991).

We agree, nevertheless, with the trial court's second reason for rejecting defendants' arguments based on the Open Meetings Law.

The legislature's intent in enacting the Open Meetings Law is made clear in section 143-318.9, titled "Public policy," which provides:

> Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly.

Section 143-318.11 sets forth specific exceptions to the general rule that the public be allowed access to government meetings. Section 143-318.11(d) also provides an exception to the Public Records Law for minutes, which would ordinarily be public records, "so long as public inspection would frustrate the purpose of the executive session." This standard requires consideration of time and content factors, allowing courts to tailor the scope of statutory protection in each case. Courts should ensure that the exception to the disclosure requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the Public Records Law and the Open Meetings Law.

The Commission had completed its work and disbanded at the time plaintiffs filed this action. The nature and purpose of the meetings at issue are relevant in determining the extent of protection, if any, provided in section 143-318.11(d) for minutes of proceedings that are no longer ongoing. This Commission met to conduct an administrative investigation, to suggest solutions to problems it discovered in athletics and academics, and to help restore the integrity of a public university. At the time plaintiffs sought the minutes, the Commission had completed its proceedings and had reported to Spangler, the university system's chief executive officer. Also, Spangler had relayed the Commission's findings and recommendations to the UNC Board of Governors. No further action or disposition by any higher ranking university officer was pending. By then the Commission's work, or any results depending on that work, could not have been compromised by public inspection of the minutes.

Defendants contend that if minutes revealing the deliberative processes of public agencies are not permanently excepted from the Public Records Law, knowledge by the agencies that public scrutiny may occur will chill free and frank decision-making. While we recognize this policy argument, we must yield to the decision of the General Assembly, which enacted several specific exceptions to the Public Records Law, none of which permanently protects a deliberative process like that of the Commission after the process has ceased.[6]

We therefore affirm the trial court's ruling that section 143-318.11(d) does not authorize defendants to withhold Commission minutes.

B.

Defendants next contend the minutes are exempt from disclosure because they contain privileged attorney-client communications and discussions of individual state personnel matters. Plaintiffs contend defendants failed to preserve these issues for appeal. We disagree for the same reasons discussed in Part II concerning the issue of state employee personnel records. Just as defendants properly preserved that issue, they also preserved the attorney-client privilege issue.[7] Therefore, we will consider both issues.

[7] The Public Records Law provides only one exception to its mandate of public access to public records: written statements to a public agency, by any attorney serving the government agency,

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6. Defendants argue that this "absurd interpretation" will outlaw the use of wastebaskets in state government, because N.C.G.S. § 132-3 makes disposing of public records a misdemeanor. This argument overlooks section 132-3, which refers state agencies to N.C.G.S. § 121-5 for procedures allowing the disposal of records having no value to the government or the public. That section allows state agencies to submit to the Department of Cultural Resources an inventory of records and a schedule for disposing of certain documents. Once such a schedule is approved, "destruction or disposal of records in accordance with its provisions shall be deemed to have met the requirements of G.S. 121-5(b)." N.C.G.S. § 121-5(c) (1986).

7. In their answer to plaintiffs' complaint filed with the trial court, defendants asserted in the seventh defense that during its meetings the Commission "had privileged communications with counsel." Following the trial court's order, defendants filed assignments of error at the conclusion of the record on appeal. Assignment Number Eighteen assigns error to "[t]he trial court's failure to find and conclude that the S.B.I. records and evidence, the minutes of closed meetings, and the draft reports are protected from disclosure under the Public Records Law by deliberative process, investigative, and attorney client privilege."

made within the scope of the attorney-client relationship. N.C.G.S. § 132-1.1 (1991). The statute provides that even those communications shall become public records subject to disclosure three years after the communication was received by the public agency. *Id.*[8]

Although the Public Records Law does not provide an exception for records of statements by a public agency to its attorney in the scope of the attorney-client relationship, defendants contend that such statements lie at the heart of the attorney-client privilege. Confidential communications between attorney and client, from either one to the other, are protected by the traditional attorney-client privilege mandated by common law. *E.g., State v. Tate*, 294 N.C. 189, 193, 239 S.E.2d 821, 824 (1978). So far this Court has not recognized an attorney-client privilege for public entity clients, and it is unclear whether the traditional privilege should be so extended. Lory A. Barsdate, *Attorney-Client Privilege for the Government Entity*, 97 Yale L.J. 1725, 1734 (1988). Most courts that have applied such a privilege have not considered its origin but have merely assumed it exists. *E.g., Hearn v. Rhay*, 68 F.R.D. 574, 579 (E.D. Wash. 1975); *People ex rel. Department of Pub. Works v. Glen Arms Estate, Inc.*, 230 Cal. App. 2d 841, 854, 41 Cal. Rptr. 303, 310 (1964).

We need not decide here whether public agencies in North Carolina enjoy the traditional attorney-client privilege in all contexts. That issue is not before us. In the context of what such agencies must disclose pursuant to the Public Records Law, the

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8. N.C.G.S. § 132-1.1 provides as follows:

> Public records, as defined in G.S. 132-1, shall not include written communications (and copies thereof) to any public board, council, commission or other governmental body of the State or of any county, municipality or other political subdivision or unit of government, made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body, concerning any claim against or on behalf of the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected. Such written communication and copies thereof shall not be open to public inspection, examination or copying unless specifically made public by the governmental body receiving such written communications; provided, however, that such written communications and copies thereof shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission, or other governmental body.

statute itself defines the scope of the privilege. *See* note 8. Under this definition only those portions of the Poole Commission meeting minutes revealing written communications from counsel to the Commission are excepted from disclosure under the Public Records Law.

The trial court did not squarely address defendants' claim of attorney-client privilege. The trial court concluded, rather, that the Open Meetings Law exception, N.C.G.S. §§ 143-318.11(d) and 143-318.11(a)(5), to the Public Records Law, which allows a public body to go into executive session to consult with its attorney, would not apply to any of the Poole Commission minutes, which the trial court had inspected *in camera.*

The trial court erred in not further considering whether the minutes were protected by the Public Records Law attorney-client privilege provided in section 132-1.1 On remand the trial court must determine whether that provision protects any portions of any of the Commission minutes.

[8] We now turn to defendants' contention that minutes of the Commission's meetings are exempt from disclosure under N.C.G.S. § 126-22. As discussed in Part II, that statute provides that certain personnel information gathered by state agencies concerning their employees or applicants for employment is exempt from the Public Records Law. The Poole Commission was not the employer of any state employees questioned or mentioned in the meeting minutes. Therefore, as we explained in Part II, the minutes do not meet the definition of "personnel file" information set forth in section 126-22 because the information was not "gathered" by the employer state agency. Because the minutes do not fall within the statutory definition of "personnel file," they are not protected by the statute.

IV.

[9] Finally, defendants contend the trial court erred in ordering the disclosure under the Public Records Law of draft reports that two Commission members wrote at the conclusion of the investigation and submitted to President Spangler. Defendants base this assignment of error on their argument that a public policy exception to the Public Records Law should be recognized in the form of a "deliberative process privilege" and that this privilege should protect preliminary draft reports prepared by members of the Commission and submitted to President Spangler. Defendants cite decisions from other jurisdictions in which courts have held preliminary

documents exempt from public inspection. *Ernest & Mary Hayward Weir Foundation v. United States*, 508 F.2d 894 (2d Cir. 1974); *Wilson v. Freedom of Information Com'n*, 181 Conn. 324, 435 A.2d 353 (1980); *Lopez v. Fitzgerald*, 76 Ill. 2d 107, 390 N.E.2d 835 (1979); *Kottschade v. Lundberg*, 280 Minn. 501, 160 N.W.2d 135 (1968); *Sanchez v. Board of Regents*, 82 N.M. 672, 486 P.2d 608 (1971).

The relevant statutes in those jurisdictions, however, differ significantly from North Carolina's Public Records Law. Those decisions are, therefore, not persuasive. Our statute contains no deliberative process privilege exception. Whether one should be made is a question for the legislature, not the Court.

Defendants also argue that we must infer a "preliminary draft" exception to the Public Records Law to prevent the legislature from intruding into the decision-making processes of other government branches, in violation of the separation of powers provision in Article I, Section 6 of the North Carolina Constitution. Defendants have cited no controlling authority in support of this assignment of error, and failed to cite or rely on the state Constitution when they raised this argument before the trial court. The only decision cited by defendants bearing on the separation of powers doctrine, *State ex rel. Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982), involved two branches of government interfacing with each other. That decision is inapposite here. The Public Records Law allows intrusion not by the legislature, or any other branch of government, but by the public. A policy of open government does not infringe on the independence of governmental branches. Statutes affecting other branches of government do not automatically raise separation of powers problems.

We, therefore, affirm the trial court's ruling that the draft reports of individual Commission members are subject to disclosure under the Public Records Law.

V.

[10] Plaintiffs cross-assign as error the trial court's denial of their motion to amend their complaint to add the Attorney General as a defendant. Plaintiffs allege the Attorney General assigned SBI agents to conduct an investigation not authorized by law for the purpose of circumventing the Public Records Law. The trial court's ruling was prejudicial error, plaintiffs contend, because it precluded plaintiffs from seeking an appropriate remedy, such as an injunction

prohibiting further unauthorized deployment of the SBI, and because without the Attorney General as a defendant plaintiffs were unable to discover information in support of their claim that the unauthorized investigation was conducted for an improper purpose.

On 2 March 1990, three days before this action was heard by the trial court, plaintiffs filed the motion to amend. The motion stated that the claims against the Attorney General arose from new information obtained from depositions taken on 29 November 1989. Defendants responded that plaintiffs had unduly delayed filing their motion and had no basis in law to seek the amendment. In denying plaintiffs' motion to amend, the trial court concluded that justice did not require the amendment because the issue of whether the Attorney General exceeded statutory authority was properly raised by the original pleadings.

Rule 15(a) of the North Carolina Rules of Civil Procedure provides that once an action has been placed on the trial calendar, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." As defendants note, a motion to amend is left to the discretion of the trial court, and its decision will not be disturbed on appeal absent a clear showing of abuse of discretion. *Smith v. McRary*, 306 N.C. 664, 671, 295 S.E.2d 444, 448 (1982); *Patrick v. Williams*, 102 N.C. App. 355, 360, 402 S.E.2d 452, 455 (1991).

Among proper reasons for denying a motion to amend are undue delay by the moving party and unfair prejudice to the non-moving party. *Patrick v. Williams*, 102 N.C. App. at 360, 402 S.E.2d at 455. Plaintiffs here moved to amend their complaint three months after obtaining new information from deposition testimony, and three days before the action was scheduled for hearing. Although the trial court did not reach the issue of delay and possible prejudice to defendants, the circumstances would have supported a denial of plaintiffs' motion on those grounds.

Furthermore, we agree with the trial court's reasoning that denying the motion to amend caused no prejudice to plaintiffs. Plaintiffs have prevailed in their action to enforce the Public Records Law. They have offered no argument why, if they prevailed in compelling disclosure under the law, they would be prejudiced by not gaining access to additional evidence supporting the same result. Their contention that, had the motion to amend been allowed, they

could have obtained an injunction prohibiting the Attorney General from further deploying the SBI without authority is speculative at best. At the time the action was filed, and certainly at the time of the motion to amend, an injunction was unnecessary, because there was no chance that the Attorney General would assign the SBI to further assist the Poole Commission, a body which months before had completed its work and disbanded.

Plaintiffs have not shown an abuse of discretion by the trial court in denying their motion to amend. This assignment of error is overruled.

CONCLUSION

In conclusion, we hold that in the absence of clear statutory exemption or exception, documents falling within the definition of "public records" in the Public Records Law must be made available for public inspection. Copies of SBI investigative reports submitted to the Poole Commission are beyond the exemption contained in section 114-15 and are protected from public inspection only to the extent that other Poole Commission records are so protected. Documents not falling within the definition of the "personnel file" exception in N.C.G.S. § 126-22, because they are not gathered by the employer or for the reasons enumerated, are not protected by that statute. Minutes of the Poole Commission's meetings are not excepted from the Public Records Law under N.C.G.S. § 143-318.11 because the Commission was not subject to that statute and public inspection of the minutes will not frustrate the Commission's proceedings. Finally, with respect to any protection from disclosure provided by the attorney-client privilege, only written communications to a public agency by its attorney are excepted from public inspection under the circumstances set out in N.C.G.S. § 132-1.1. We refuse to engraft upon our Public Records Law exceptions based on common-law privileges, such as a "deliberative process privilege," to protect items otherwise subject to disclosure.

For the reasons stated, except for the trial court's failure to address and apply the exception in N.C.G.S. § 132-1.1 for attorney communications and the exception in N.C.G.S. § 126-22 relating to state personnel records, we affirm the trial court's order requiring disclosure of the materials in question. We remand the matter to the trial court with directions to apply these Public Records Law exceptions to the materials in question and to exclude any

materials protected by them from its order requiring disclosure.[9] Pending the trial court's disposition on remand, the materials in question will remain sealed.

Modified and affirmed. Remanded.

EMBREE CONSTRUCTION GROUP, INC. v. RAFCOR, INC., UNITED CAROLINA BANK, ANTHONY J. SAPIENZA, RONALD THOMAS TEDESCO AND FREDERICK ANTHONY OCCHINO

No. 132A90

(Filed 10 January 1992)

1. Quasi Contracts and Restitution § 1.2 (NCI3d)— construction loan—denial of final payments—unjust enrichment

Plaintiff's complaint was sufficient to state a claim for relief in the form of an equitable lien based upon unjust enrichment where plaintiff alleged that it was a construction contractor who entered into a contract with Rafcor for the construction of a restaurant; Rafcor entered into a construction loan agreement with United Carolina Bank; plaintiff periodically submitted applications for project payments to Rafcor which UCB paid directly to plaintiff from the construction loan; plaintiff's last two applications for payment after completion of the restaurant were not paid; the loan was not in default when plaintiff notified UCB of the outstanding debt and requested that the remainder of the fund be disbursed; and UCB nevertheless retained and refused to disburse the $70,000 remaining in the loan fund to plaintiff and was unjustly enriched because it received all the security for which it had bargained (a completely constructed building) while refusing to pay the $70,000. The circumstances of this case are not among those for which Chapter 44A provides statutory remedies.

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9. This directive does not mean that we believe any portion of the records sought is protected by these statutory exceptions to the Public Records Law. We examined the documents under seal only to the extent necessary to review the trial court's rulings. A more detailed review of the evidence in light of this opinion is more properly the work of the trial court.

Am Jur 2d, Restitution and Implied Contracts §§ 4, 8, 153.

2. Contracts § 189 (NCI4th)— construction loan—final payments not made—tortious interference with contract

It was sufficient, under the liberal concept of notice pleading, for plaintiff to allege the existence of a valid contract between itself and Rafcor entitling plaintiff to payment from a construction loan fund, that defendant Tedesco and Occhino knew of this contract and intentionally induced Rafcor not to perform in their own interest to avoid further liability under their personal guarantees, and that in so doing they acted without justification to plaintiff's detriment. These allegations give sufficient notice of the events on which the claim is based to enable defendants to respond and prepare for trial and are sufficient to satisfy the substantive elements of the claim of tortious interference with contract.

Am Jur 2d, Interference §§ 41, 44.

Liability for procuring breach of contract. 26 ALR2d 1227.

ON appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 97 N.C. App. 418, 388 S.E.2d 604 (1990), reversing orders entered on 3 February 1989 and 13 February 1989 by *Snepp, J.*, allowing defendants' motions to dismiss at the 1 February 1989 session of Superior Court, MECKLENBURG County. Heard in the Supreme Court 11 October 1990.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, Jr., and Timothy E. Cupp, for plaintiff-appellant.

Petree, Stockton & Robinson, by Jackson N. Steele and B. David Carson, for defendant-appellee United Carolina Bank.

Casstevens, Hanner, Gunter & Gordon, P.A., by Marc R. Gordon, for defendant-appellees Tedesco and Occhino.

EXUM, Chief Justice.

In this appeal we examine the sufficiency of a complaint to state a claim regarding two issues: (1) whether a contractor who

alleges it satisfactorily completed the construction project is entitled to equitable relief in order to reach the balance of loan funds withheld by a construction lender, and (2) whether officers and directors of the owner corporation with which he contracted to build the project tortiously interfered with that contract by thwarting final payment. In accord with the attitude of liberal construction that notice pleading inspires, we hold plaintiff alleged facts sufficient to state both claims.

I.

In a complaint filed 17 November 1988, plaintiff, a construction contractor, alleges it entered into a contract with defendant Rafcor on 20 October 1987 to supply labor and materials for the construction of a restaurant in Mecklenburg County. Plaintiff alleges its work was completed according to the plans and specifications prescribed by the contract and that Rafcor owes plaintiff a balance of $110,383, including $32,973 for extra work and delay claims. Plaintiff alleges Rafcor has refused its demand to pay this amount.

Plaintiff further alleges Rafcor entered into a construction loan agreement with United Carolina Bank (UCB) in which UCB was "obliged to advance to Rafcor the sum of $942,500 to be used specifically for the construction of the project." Rafcor's note to this effect was secured by a deed of trust on the project. Throughout construction plaintiff periodically submitted applications for progress payments to Rafcor, which UCB paid directly to plaintiff from Rafcor's construction loan. Rafcor occupied the building in February 1988, and plaintiff completed its work in March 1988. Plaintiff's last two applications for payment after completion of the restaurant in March were not paid. By letter dated 8 July 1988 plaintiff notified UCB of the sum due and requested that the funds remaining in the construction loan be disbursed to plaintiff. Plaintiff alleges Rafcor's loan was not in default when plaintiff notified UCB as to the outstanding debt and requested that the remainder of the fund be disbursed. UCB nevertheless retained and refused to disburse the $70,000 remaining in the loan fund to plaintiff. Plaintiff alleges UCB has received all the security for which it bargained with Rafcor—a completely constructed building—and because it has refused to pay the $70,000 remaining in the loan fund, UCB has been unjustly enriched at plaintiff's expense.

Plaintiff alleges in addition that defendants Tedesco and Occhino, officers and directors of Rafcor who personally guaranteed Rafcor's note with UCB, intentionally induced Rafcor not to make further draws from UCB in order to limit their personal liability to UCB.

The superior court allowed motions to dismiss filed by UCB and by Tedesco and Occhino. A divided panel of the Court of Appeals reversed. The majority deemed plaintiff's claim against UCB as an equitable lien on the construction loan balance, reasoning plaintiff was entitled to equitable relief because it had completed construction in reliance on the disbursal of the fund when the owner was not in default. The majority also reversed the superior court's dismissal of plaintiff's claim against defendants Tedesco and Occhino. Noting that the right of officers and directors to interfere with the contracts of their corporation is limited, the Court of Appeals held that plaintiff's complaint stated facts sufficient to support its allegation that the individual defendants' acts had been in their own interest and adverse to that of their firm, thus exposing them to individual liability for an individual tort. 97 N.C. App. at 423, 388 S.E.2d at 607-08.

The dissent observed that no occasion for equitable intervention by the courts arises when a remedy at law is available and opined that under the circumstances of this case plaintiff's remedies are limited to the lien procedures of N.C.G.S. §§ 44A-7 through 44A-23. Because "the creditor possesses an interest only to the extent of the amount disbursed," UCB was not unjustly enriched. 97 N.C. App. at 424, 388 S.E.2d at 608 (Greene, J., dissenting). "Any value of the building in excess of that amount, presumably the value added by the contractor for which the contractor was not paid, cannot be considered a windfall for the creditor since the creditor has no interest in that value." *Id.* The dissent also disagreed with the majority regarding plaintiff's allegations of tortious interference with contract by defendants Tedesco and Occhino, indicating plaintiff had failed to allege that the defendants' acts were adverse to Rafcor's interests.

II.

[1] On motion to dismiss a complaint for failure to state a claim, the complaint's factual allegations are taken as true. The court must determine whether the complaint alleges the substantive elements of a legally recognized claim and whether it gives sufficient notice of the events that produced the claim to enable the

adverse party to prepare for trial. *Peoples Security Life Ins. Co. v. Hicks*, 322 N.C. 216, 218, 367 S.E.2d 647, 648-49, *reh'g denied*, 322 N.C. 486, 370 S.E.2d 227 (1988). "A complaint should not be dismissed under Rule 12(b)(6) 'unless it affirmatively appears that the plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim.' " *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 298 S.E.2d 751, 755 (1985) (quoting *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E.2d 611, 613 (1979)). In practice, "[t]he system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Ladd v. Estate of Kellenberger*, 314 N.C. at 481, 298 S.E.2d at 755.

Plaintiff's allegations that UCB retained the balance of the construction loan despite plaintiff's completion of the project underlie its claim that UCB has been unjustly enriched and that the balance of the loan fund constitutes a "trust fund" on which plaintiff has an equitable lien.

The court's equitable intervention is obviated when an adequate remedy at law is available to the plaintiff, as the dissent correctly notes. "[E]quity will not lend its aid in any case where the party seeking it has a full and complete remedy at law." *Insurance Co. v. Guilford County*, 225 N.C. 293, 300, 34 S.E.2d 430, 434 (1945). Thus when the remedy of foreclosure is available, a plaintiff cannot rely upon a restitution theory to recover the balance of a promissory note secured by a deed of trust. *Id.* at 301, 34 S.E.2d at 434. And restitution is not available on a claim of unjust enrichment for a subcontractor who failed to utilize the remedies of Chapter 44A when these would have given him adequate relief. *Jones Cooling & Heating v. Booth*, 99 N.C. App. 757, 394 S.E.2d 292 (1990), *disc. rev. denied*, 328 N.C. 732, 404 S.E.2d 869 (1991).

As alleged,[1] however, the circumstances of this case are not among those for which Chapter 44A supplies a remedy. Section 44A-8 provides, in pertinent part:

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1. Reasons why the remedies of Chapter 44A would not satisfy a claim against Rafcor for the remainder of the construction fund are not articulated in plaintiff's complaint. In its brief UCB argues plaintiff filed a claim of lien on 1 July 1988 but failed to perfect the lien within 180 days. Had plaintiff perfected its claim, it could have forced a sale of the improved property and thus "would have been protected to the extent intended by Chapter 44A." Plaintiff responds that because UCB's mortgage interest was superior to plaintiff's lien, plaintiff's interest was cut off, virtually obliterating any likelihood plaintiff would collect either the $110,383

> Any person who performs or furnishes labor or . . . materials pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this article, have a lien on such real property to secure payment of all debts owing for labor done or . . . material furnished pursuant to such contract.

N.C.G.S. § 44A-8 (1989). The purpose of this lien statute is to protect the interest of the contractor, laborer or materialman. *See, e.g., Carolina Builders Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 324 S.E.2d 626, *disc. rev. denied*, 313 N.C. 597, 330 S.E.2d 606 (1985). "[T]he materialman, rather than the mortgagee, should have the benefit of materials that go into the property and give it value." *Id.* at 229, 324 S.E.2d at 629. The lien statute requires contractors and subcontractors to whom a debt is owed for work done or material supplied to file a claim of lien within 120 days of the last furnishing of labor or materials to the site of the improvement. The lien must be perfected by filing suit within 180 days of last furnishing. N.C.G.S. § 44A-13 (1989). The lien secures the right of the claimant to amounts earned whether or not the funds are due or the claimant's job is complete. *See* N.C.G.S. §§ 44A-8, 44A-18(5) (1989). Absent express or implied contract, however, the statutory lien is unavailable. N.C.G.S. § 44A-8 (1989). *See, e.g., Air Conditioning v. Douglass*, 241 N.C. 170, 174, 84 S.E.2d 828, 832 (1954); *Investors, Inc. v. Berry*, 32 N.C. App. 642, 647, 234 S.E.2d 6, 9 (1977); *Wilson Elec. Co. v. Robinson*, 15 N.C. App. 201, 189 S.E.2d 758 (1972). Thus Chapter 44A does not provide relief for the contractor or subcontractor, in privity of contract with only the insolvent owner, who seeks payment from construction loan funds held by the lender. Notably, however, Chapter 44A does not expressly bar equitable relief to this end. *Cf.* Cal. Civ. Code § 3264 (West 1974).

Commentators, too, have observed that the statutory remedies of Chapter 44A include no relief "against the construction lender or the funds in his hands." William H. Higgins, *Construction Lending—General Contractor v. Lender*, 54 N.C. L. Rev. 952, 954

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it was owed or the $70,000 remaining in the loan fund. UCB did in fact foreclose on the property on 30 December 1988, effectively cutting off any subordinate liens. In addition, the contract between plaintiff and Rafcor stated final payment would not become due until all liens arising out of the contract were released.

(1976) [hereinafter Higgins]. The remedies available under Chapter 44A are "often of no practical value" for the very reasons plaintiff here seeks equitable relief. *Id.* at 953. When a contractor's lien is subordinate to a construction loan mortgage, as here, or to prior encumbrances such as a purchase money mortgage, any lien on the owner's property or its improvements is worthless when the owner is insolvent. *Id.* at 954 n.10. *Cf. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 324 S.E.2d 626 (when construction loan deed of trust is recorded prior to purchase money deed of trust and materialman's lien antedates both, lien takes precedence). *See also* Edmund T. Urban and James W. Miles, Jr., *Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement, and Priority*, 12 Wake Forest L. Rev. 283, 349 (1976) [hereinafter Urban and Miles].

In other jurisdictions, attempts made to reach construction funds remaining with the lender under equitable assignment, third party beneficiary, and trust fund theories have been generally unsuccessful. Higgins at 954 n.12. *See also* Edmund T. Urban, *Future Advances Lending*, 13 Wake Forest L. Rev. 297, 343 n.281 (1977) [hereinafter Urban]. *E.g., Gordon Building Corp. v. Gibraltar Sav. & Loan Ass'n*, 247 Cal. App. 2d 1, 55 Cal. Rptr. 884 (Cal. Ct. App. 2d Dist. 1966) (contractor seeking equitable lien on construction loan proceeds did not state a cause of action based on third-party beneficiary theory nor facts sufficient to support theory of reliance). Federal cases, however, have held that contractors can sue as third-party beneficiaries of building loan agreements on projects where funding is insured by the Department of Housing and Urban Development (HUD). *See, e.g., Spring Const. Co. v. Harris*, 562 F.2d 933 (4th Cir. 1977); *Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370 (D.C. Cir. 1976); *Bennett Constr. Co. v. Allen Gardens, Inc.*, 433 F. Supp. 825 (W.D. Mo. 1977); *American Fidelity Fire Ins. Co. v. Construcciones Werl, Inc.*, 407 F. Supp. 164 (D.V.I. 1975); *Travelers Indem. Co. v. First Nat'l State Bank*, 328 F. Supp. 208 (D.N.J. 1971).

Attempts to obtain relief in the form of an equitable lien based on a theory of detrimental reliance or unjust enrichment have been more fruitful, most notably in California[2] and Florida. *E.g.*,

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2. Controversy wrought by the liberal application of the equitable lien by California courts, *see, e.g.*, Lefcoe & Shaffer, *Construction Lending and the Equitable Lien*, 40 S. Cal. L. Rev. 439 (1967), inspired an amendment to the California lien

Pacific Ready Cut Homes v. Title Ins. & Trust Co., 216 Cal. 447, 14 P.2d 510 (1932) (per curiam) (lender who had received more valuable security in form of completed building not justified in withholding funds intended to pay for plaintiff's performance, upon which latter had relied); *Smith v. Anglo-California Trust Co.*, 205 Cal. 496, 271 P. 898 (1928) (owner's and lender's conduct induced lien claimant to rely upon construction loan fund); *Miller v. Mountain View Sav. & Loan Ass'n*, 238 Cal. App. 2d 644, 661, 48 Cal. Rptr. 278, 290 (Cal. Ct. App. 1 Dist. 1965) (plumber's work done in reliance on fund; lender not justified in withholding money intended to pay for work where received benefit of worker's performance); *Swinerton & Walberg Co. v. Union Bank*, 25 Cal. App. 3d 259, 101 Cal. Rptr. 665 (Cal. Ct. App. 2d Dist. 1972) (general contractor induced by and who relied upon construction loan proceeds entitled to equitable lien when lender has received benefit of claimant's full performance); *Doud Lumber Co. v. Guaranty Sav. & Loan Ass'n*, 254 Cal. App. 2d 585, 60 Cal. Rptr. 94 (Cal. Ct. App. 1 Dist. 1967) (supplier entitled to equitable lien on construction loan fund when induced by lender to rely upon fund for payment); *McBain v. Santa Clara Sav. & Loan Ass'n*, 241 Cal. App. 2d 829, 51 Cal. Rptr. 78 (Cal. Ct. App. 1 Dist. 1966) (equitable lien based on subcontractors' reliance on loan fund; unjust enrichment need not be proven); *Hayward Lumber & Invest. Co. v. Coast Federal Sav. & Loan Ass'n*, 47 Cal. App. 2d 211, 117 P.2d 682 (Cal. Ct. App. 2d Dist. 1941) (owners and lenders estopped to withhold construction funds, on which claimants entitled to equitable lien); *Peninsular Supply Co. v. C.B. Day Realty*, 423 So. 2d 500 (Fla. Dist. Ct. App. 1982) (lien law not intended to permit unjust enrichment, thus subcontractor who failed to perfect statutory lien entitled to equitable lien on construction loan balance); *Blosam Contractors, Inc. v. Republic Mortgage Investors*, 353 So. 2d 1225 (Fla. Dist. Ct. App. 1977), *cert. denied*, 359 So. 2d 1218 (Fla. 1978) (when lender unjustly enriched by realizing on its security without dis-

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statute, Cal. Civ. Code § 3264 (West 1974), which bars any equitable relief outside the contract or the statute. *See Boyd v. Lovesee Lumber Co. v. Western Pacific Financial Corp.*, 44 Cal. App. 3d 460, 465, 118 Cal. Rptr. 699, 701 (4th Dist. 1975). California's unique stop-notice statute nevertheless provides a remedy for contractors or subcontractors against a lender wrongfully withholding construction loan funds by enjoining further disbursements. *See* Cal. Civ. Code §§ 3156-3172 (West 1974). The stop-notice procedures provide a means by which funds held by a lender can be garnished, and such garnishment survives any foreclosure. *See Connelly Development, Inc. v. Superior Court*, 17 Cal. 3d 803, 553 P.2d 637, 132 Cal. Rptr. 477 (1976).

bursing balance of loan proceeds, equitable lien should have been granted); *Morgen-Oswood & Associates, Inc. v. Continental Mortgage Investors*, 323 So. 2d 684 (Fla. Dist. Ct. App. 1975), *cert. dismissed*, 342 So. 2d 1100 (Fla. 1977) (general contractor entitled to equitable lien against undisbursed construction loan proceeds because lender unjustly enriched to that extent).

When unjust enrichment underlies an equitable lien, some courts have considered completion of the plaintiff's work—or of the project itself—critical. In *Urban Systems Development Corp. v. NCNB Mortgage Corp.*, 513 F.2d 1304 (4th Cir. 1975), the Fourth Circuit held a general contractor could not reach undisbursed funds held by two construction lenders in part because "neither institution had received the security for which it had bargained." *Id.* at 1305. *See also Pioneer Plumbing Supply Co. v. Southwest Sav. & Loan Ass'n*, 102 Ariz. 258, 428 P.2d 115 (1967) (plumbers not entitled to equitable lien on loan proceeds when project not completed); *Morgen-Oswood and Associates, Inc. v. Continental Mortgage Investors*, 323 So. 2d 684 (mortgage lender unjustly enriched by enjoying benefit of the security—a completed hotel—in addition to retaining some funds owed the contractor). *See generally* Urban at 342; Daniel E. Feld, Annotation, *Building and Construction Contracts: Contractor's Equitable Lien Upon Percentage of Funds Withheld by Contractee or Lender*, 54 A.L.R.3d 848 (1973).

Plaintiff avers that by UCB's refusal to disburse the monies remaining in the construction loan fund, coupled with its receipt of all the security for which it bargained in the form of a completed building, UCB was unjustly enriched. We agree. As of completion of the building in March 1988, UCB had received all the security for which it had bargained with Rafcor. UCB's subsequent refusal to release the balance of the construction loan caused it to be unjustly enriched at the expense of plaintiff.[3]

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3. This situation differs markedly from that in which the lender has disbursed all loan funds to the borrower, who diverts the funds to purposes other than paying contractors. *See* Lefcoe & Shaffer, *Construction Lending and the Equitable Lien*, 40 S. Cal. L. Rev. 444 (1967) (if funds disbursed once already, lender not unjustly enriched); Urban and Miles at 350 ("[T]here is justification for the [equitable lien] doctrine's application when the contractor has completed performance, the entire project itself is completed, and the lender forecloses, becoming the owner of the completed project seeking to retain undisbursed funds. But there is little justification for the doctrine's application when the lender has made a disbursement for all labor or materials furnished up through foreclosure without any knowledge of any unpaid claims, and funds are diverted from the project by the borrower.

"A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56, *reh'g denied*, 323 N.C. 370, 373 S.E.2d 540 (1988) (quoting the Restatement of Restitution § 1 (1937)). "A person entitled to restitution is entitled, in an appropriate case, to a remedy by a proceeding in equity." Restatement of Restitution § 160 introductory note (1937). Such remedies include decrees establishing and enforcing a constructive trust upon property, a constructive lien upon property, or the plaintiff's subrogation to the position of another against the defendant. *Id.* An equitable lien arises "[w]here property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched." Restatement of Restitution § 161 (1937). "Where the equitable lien is on a fund, for example a bank deposit, it is enforced by a direction to pay the claimant out of the fund." *Id.*

Several federal courts considering suits by contractors involved in building projects whose loans were insured by HUD have held retainages and construction loan balances generally constitute an identifiable *res* upon which an equitable lien may be attached. In *Spring Const. Co. v. Harris*, 562 F.2d 933, the Fourth Circuit held HUD would be unjustly enriched, despite selling the project at a loss, if plaintiff was not compensated for the work it expended in enhancing the value of the project. The court said the balance of construction loan proceeds and retainages intended to compensate the plaintiff constituted an identifiable *res* upon which an equitable lien could attach. In *Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370, the Court of Appeals for the District of Columbia Circuit similarly held undisbursed mortgage proceeds created by a holdback constituted an identifiable *res* upon which an equitable lien could be placed to avoid unjust enrichment of HUD from services rendered by plaintiff. *See also, e.g., Bennett Constr. Co. v. Allen Gardens, Inc.*, 433 F. Supp. 825 (final contract draw and holdback retainages specifically designated as part of total sum due plaintiff constitute identifiable *res* upon which equitable lien may attach); *F.W. Eversley & Co. v. East New York Non-Profit H.D.F.C., Inc.*, 409 F. Supp. 791 (S.D.N.Y. 1976) (no-asset, non-profit organizations' building loan agreements insured by HUD; escrow

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In that instance, application of the doctrine results in the inequity of the lender having to in effect pay twice for the same thing. Any application of the doctrine, therefore, should be restricted to obvious cases of unjust enrichment.").

funds and retainages constitute identifiable *res* upon which to place equitable lien). *But see Falls Riverway Realty, Inc. v. City of Niagara Falls*, 754 F.2d 49, 55 (2d Cir. 1985) (declining to follow "vague formulation" of *Trans-Bay Engineers* in order to find plaintiff's claims "rooted in . . . equitable rights generated by HUD's course of activities pursuant to federal statutes").

Accepting as true plaintiff's allegations that as of March 1988 it completed the project but was refused its applications for payment from the balance of the construction loan fund held by UCB, we hold plaintiff's complaint was sufficient to state a claim for relief in the form of an equitable lien based upon UCB's unjust enrichment.

III.

[2] Plaintiff also alleges defendants Tedesco and Occhino, who personally guaranteed Rafcor's note with UCB, had actual knowledge of Rafcor's obligations to pay plaintiff for amounts due under the contract, that they intentionally induced Rafcor not to pay amounts requested in plaintiff's last two applications for payment nor to request UCB to draw funds from the construction loan fund to pay plaintiff, and in so doing "acted without justification and in their own interest to avoid further liability to UCB under their guarantees." Plaintiff alleges these facts support a claim for tortious interference with contract.

The Court of Appeals held plaintiff alleged all the elements of that tort. It surmised the trial court granted defendants' motion to dismiss under the mistaken impression that the element that defendants had acted without justification "[could not] be established since defendants, as officers and directors of the contracting corporation, had the right and duty to act for the company in regard to its contracts and other business." 97 N.C. App. at 423, 388 S.E.2d at 607. The majority noted that the right of officers or directors to interfere with the contracts of their corporation is limited: the officer or director may be liable when the tort is individual and distinguishable from acts on the corporations' behalf or when the officer's or director's acts "are performed in his own interest and adverse to that of his firm." *Id.* at 423, 388 S.E.2d at 607 (quoting *Wilson v. McClenny*, 262 N.C. 121, 133-34, 136 S.E.2d 569, 578 (1964)).

The dissent considered plaintiff's allegations incomplete for failure to add that the acts of defendants Tedesco and Occhino had been "adverse" to the interests of their firm.

The elements of tortious interference with contract are:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff.

United Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). *See also Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 220, 367 S.E.2d 647, 649-50 (1988); *Wilson v. McClenny*, 262 N.C. at 132, 136 S.E.2d at 577-78; *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954), *reh'g dismissed*, 242 N.C. 123, 86 S.E.2d 916 (1955).

Whether an actor's conduct is justified depends upon "the circumstances surrounding the interference, the actor's motive or conduct, the interests sought to be advanced, the social interest in protecting the freedom of action of the actor[,] and the contractual interests of the other party." *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. at 221, 367 S.E.2d at 650. Generally speaking, interference with contract is justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant, an outsider, are competitors. *Id.* at 221-22, 367 S.E.2d at 650.

In the context of interference with contract by an insider, however, the element that the defendant acted without justification is potentially vitiated by the defendant's corporate position. Officers, directors, shareholders, and other corporate fiduciaries have "a qualified privilege to interfere with contractual relations between the corporation and a third party." *Wilson v. McClenny*, 262 N.C. at 133, 136 S.E.2d at 578. "The acts of a corporate officer in inducing his company to sever contractual relations with a third party are presumed to have been done in the interest of the corporation." *Id.* at 133-34, 136 S.E.2d at 578.

The privilege, however, is qualified, not absolute; the presumption that an officer's acts are in the corporation's interest and thus justified is overcome when the means or the officer's motives are improper. *See id.* at 133, 136 S.E.2d at 578. "The better rule,

which is apparently followed by most courts, does not grant absolute protection to corporate directors. In short, those who act for their *own* benefit may be held personally liable." Alfred Avins, *Liability for Inducing a Corporation to Breach its Contract*, 43 Cornell L.Q. 55, 58 (1957) [hereinafter Avins]. Our conclusion that a plaintiff states the fourth element of the claim of tortious interference with contract when he alleges facts supporting the allegation that the individual defendants' actions were in their personal interest is supported by three reasons:

First, the qualified privilege of officers and directors to interfere with the corporation's contracts rests upon the assumption that their actions are "in good faith and for the best interests of their corporation." *Wilson v. McClenny*, 262 N.C. at 133, 136 S.E.2d at 578 (quoting Avins at 65). The question of "good faith" is one of fact to be resolved by the jury and cannot be resolved on a motion to dismiss. *L & H Inv., Ltd. v. Belvey Corp.*, 444 F. Supp. 1321, 1325 (W.D.N.C. 1978). Therefore, insofar as the element "without justification" evokes inquiry into defendants' motives, it is enough to allege, as plaintiff did, that the action was done "in their own interest to avoid liability to UCB for their [personal] guarantees."

Second, it is unreasonable to require the plaintiff to negate in its pleadings facts that more properly support a defense. One California appellate court, reciting elements of tortious interference with contract similar to those recognized in North Carolina,[4] has held: "Unless it appears on the face of the complaint that a defendant's conduct was justified, justification is an affirmative defense." *Freed v. Manchester Serv., Inc.*, 165 Cal. App. 2d 186, 190, 331 P.2d 689, 691 (1958). "Whether or not [defendants] were privileged to cause the corporation to discontinue its relations with plaintiffs . . . is a matter of defense, to be decided by a resolution of the factual issues presumptively involved. Their right, if any, to such privilege, does not affirmatively appear on the face of the complaint." *Id.* (quoting *Collins v. Vickter Manor, Inc.*, 47 Cal. 2d 875,

4. "[T]he allegations necessary in order for the complaint to withstand a general demurrer [are:] the existence of a valid contract; that the defendant had knowledge of the existence of the contract and intended to induce a breach thereof; that the contract was in fact breached resulting in injury to plaintiff; and the breach and resulting injury must have been proximately caused by defendant's unjustified or wrongful conduct." *Freed v. Manchester Serv., Inc.*, 165 Cal. App. 2d 186, 189, 331 P.2d 689, 691 (1958) (citations omitted).

883, 306 P.2d 783, 788 (1957)). In the context of tortious interference with contract, the proper place in the pleadings for allegations of qualified privilege is in defendant's answer, as it is when a plaintiff alleges slander. When a complaint alleging slander "falls short of describing an occasion of qualified privilege," and when privilege applies at all, "the facts upon which it may be predicated must be specifically pleaded by way of affirmative defense in defendant's answer." *Presnell v. Pell*, 298 N.C. 715, 720, 260 S.E.2d 611, 614. Therefore, insofar as questions regarding the scope of defendants' privilege are evoked by the allegation that defendants acted "without justification," plaintiff's complaint need not address such questions in order to withstand a motion to dismiss for failure to state a claim.

Third, notice pleading and its corollary, the liberal construction of complaints, supports our view that plaintiff adequately stated the claim's fourth element. "Under the notice theory of pleading, a statement of a claim is adequate if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand its nature and basis and to file a responsive pleading." *Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 321 N.C. 435, 442, 364 S.E.2d 380, 384 (1988). The complaint must allege the *substantive* elements of a legally recognized claim and give sufficient notice of the events that produced the claim to enable the adverse party to prepare for trial. *Peoples Security Life Ins. Co. v. Hicks*, 322 N.C. at 218, 367 S.E.2d at 648-49. The rule of liberal construction of complaints "generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Ladd v. Estate of Kellenberger*, 314 N.C. at 481, 334 S.E.2d at 755 (quoting *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970)).

A complaint alleging corporate insiders tortiously interfered with plaintiff's contract with their corporation does not thereby disclose an insurmountable bar to recovery, for the insiders' privilege is qualified, not absolute. Because privilege is qualified, presumption of privilege does not nullify the element that defendants allegedly acted without justification, as the trial court apparently assumed. In order to state that element, the plaintiff must allege facts demonstrating that defendants' actions were not prompted by "legitimate business purposes."

We hold it was sufficient, under the liberal concept of notice pleading, for plaintiff to allege the existence of a valid contract between itself and Rafcor entitling plaintiff to payment from the construction loan fund, that defendants Tedesco and Occhino knew of this contract and intentionally induced Rafcor not to perform "in their own interest to avoid further liability to UCB under their [personal] guarantees," and that in so doing they acted without justification to plaintiff's detriment. These allegations give sufficient notice of the events on which the claim is based to enable defendants to respond and prepare for trial and are "sufficient to satisfy the substantive elements of the claim" of tortious interference with contract. *Privette v. University of North Carolina*, 96 N.C. App. 124, 138, 385 S.E.2d 185, 193 (1989); *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 448, 368 S.E.2d 892, 893, *disc. rev. denied and appeal dismissed*, 323 N.C. 366, 373 S.E.2d 547 (1988).

We further hold the Court of Appeals properly reversed orders of the superior court dismissing plaintiff's complaint against defendants UCB and Tedesco and Occhino. The decision of the Court of Appeals is accordingly

Modified and affirmed.

STATE OF NORTH CAROLINA v. HENRY LEE HUNT

No. 5A86

(Filed 10 January 1992)

1. Criminal Law § 1352 (NCI4th) — McKoy error — harmless error analysis

A *McKoy* error in a capital sentencing proceeding is subject to harmless error analysis.

Am Jur 2d, Criminal Law § 600; Homicide § 548; Trial § 1754.

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

2. Criminal Law § 1363 (NCI4th)— capital sentencing proceeding—solicitation of murder by others—no mitigating value

The fact that others solicited defendant's killing of the first victim had no mitigating value in this sentencing proceeding for two first degree murders where defendant was hired to kill the first victim and killed the second victim to eliminate him as a witness to the first killing; defendant was the dominant actor in the actual killings and the most culpable of all the parties involved; there was evidence that defendant thought little of taking a human life, threatened to kill those who hired him if he was not paid within a certain time, and attempted to arrange the murder of a witness to the second killing; and the jury found as aggravating circumstances that defendant had previously been convicted of a felony involving the threat of violence to the person, that the first murder was committed for pecuniary gain, and that the second murder was committed to avoid or prevent a lawful arrest.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554; Trial § 1760.

3. Criminal Law § 1363 (NCI4th)— capital sentencing proceeding—recanted confession by codefendant's brother—no mitigating value

Recanted statements by a codefendant's brother that he killed one victim during an argument and in self-defense could not have been found by a reasonable juror to have mitigating value in this capital sentencing proceeding where all the evidence tended to show that the codefendant's brother falsely confessed to the killing to protect his brother, and it is clear that the jury disbelieved this evidence because it unanimously rejected this evidence by its guilt phase verdict.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554; Trial § 1760.

4. Criminal Law § 1363 (NCI4th)— capital sentencing proceeding—absence of psychological torment or physical torture—no mitigating value

No reasonable juror could have found the absence of evidence that either victim was psychologically tormented or physically tortured before they died to have mitigating value in this capital sentencing proceeding since the mere absence

of evidence to establish an aggravating circumstance does not present a mitigating one; there were no details that would legitimately warrant a reasonable juror in finding the absence of psychological torment in the killing of the first victim; and the evidence contradicts such a contention as to the second killing in that the evidence firmly established that the second victim lived for some time between being shot in the car and being shot on the ground, and it would be pure speculation to argue that this victim did not overhear defendant and the codefendant arguing over how to finish him off as he lay there begging.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554; Trial § 1760.

5. **Criminal Law § 1361 (NCI4th)— capital sentencing proceeding—impaired capacity mitigating circumstance—intoxication—insufficient evidence**

No reasonable juror could have found as a mitigating circumstance for two first degree murders that defendant was a heavy drinker and had consumed a large amount of alcohol during the weekend of the murders and that his alcohol consumption impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law where there was no evidence that defendant drank any alcoholic beverages before the first murder; the evidence showed that on the day the second victim was killed defendant and two others consumed less that one-half of a fifth of whiskey; there was no evidence as to how much of this whiskey defendant actually consumed; and there was thus nothing in the record which would permit the jury to speculate as to the effect that defendant's alcohol consumption had on his abilities.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554; Trial § 1760.

6. **Criminal Law § 1363 (NCI4th)— capital sentencing proceeding—mitigating circumstance—uneducated and poor defendant—insufficient evidence**

No reasonable juror could have found as a mitigating circumstance for two first degree murders that defendant was an uneducated man with a background of poverty and disadvantage where no evidence to this effect was presented by

any party, and the record does not indicate that the jury ever heard defendant utter a word during the entire trial.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554; Trial § 1760.

7. **Criminal Law § 1363 (NCI4th)— capital sentencing proceeding—regret or remorse as mitigating circumstance—insufficient evidence**

No reasonable juror could have found as a mitigating circumstance for two first degree murders that defendant was regretful and remorseful for the murders based on observations of defendant's demeanor where defendant did not take the stand, did not present any evidence at the penalty phase, and did not argue his demeanor to the jury; and all the evidence and references to defendant's demeanor in the record indicate that he was not regretful or remorseful and that he had told a witness that he was not sorry that he had killed the second victim.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554; Trial § 1760.

8. **Criminal Law § 1352 (NCI3d)— capital sentencing proceeding—harmlessness of McKoy error**

A *McKoy* error in a capital sentencing proceeding was harmless beyond a reasonable doubt where only the "catchall" mitigating circumstance was submitted to and not found by the jury, and there was no mitigating evidence offered or arising from the evidence presented which would support a finding of this mitigating circumstance.

Am Jur 2d, Criminal Law § 600; Homicide § 548; Trial § 1754.

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

ON remand by the United States Supreme Court, 494 U.S. 1022, 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 12 September 1991.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the State.

D. Stuart Meiklejohn for defendant-appellant.

MEYER, Justice.

Defendant was convicted of the first-degree murders of Jackie Ray Ransom and Larry Jones and was sentenced to two death sentences. After oral arguments were heard by this Court but before we rendered an opinion, we entered an order directing the State and defendant to file supplemental briefs addressing the effect, if any, of the decision of the United States Supreme Court in *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988). *State v. Hunt*, 322 N.C. 474, 370 S.E.2d 239 (1988). This Court found no error in either the guilt or sentencing phases of defendant's trial. *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988).

Subsequently, the United States Supreme Court vacated the judgment and remanded the case to this Court for further consideration in light of its decision in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369. *Hunt v. North Carolina*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990). On 3 October 1990, this Court ordered the parties to file supplemental briefs addressing the *McKoy* issue. *State v. Hunt*, 327 N.C. 476, 397 S.E.2d 229 (1990).

Our review of the record on appeal reveals, and the State concedes, that the unanimity instructions that the jury received with regard to mitigating circumstances are virtually identical to the instructions found unconstitutional in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369. Specifically, the trial court instructed the jury to answer each mitigating circumstance "no" if it did not find the circumstance unanimously.

The sole issue presented on this appeal is whether the *McKoy* error was harmless in this case. As we have previously noted, *McKoy* error "is one of federal constitutional dimension, and the State has the burden to demonstrate its harmlessness beyond a reasonable doubt." *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990) (relying on N.C.G.S. § 15A-1443(b) (1988)). For the reasons stated below, we conclude that the State has succeeded in carrying its burden, and we affirm defendant's sentences of death.

Defendant, together with his codefendant, Elwell Barnes, was tried and convicted of the murders and conspiracies to murder

Jackie Ransom and Larry Jones in a contract and witness elimination killing and was sentenced to two death sentences for the murders and to terms of years for the two conspiracies. The evidence supporting defendant's convictions and sentences is set forth in our previous opinion, *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400, and is only briefly summarized here.

Defendant Henry Lee Hunt, Elwell Barnes, and A.R. Barnes were tried for the murder and conspiracy to commit the murder of Jackie Ransom. In the same trial, defendant and Elwell Barnes were tried for the murder and conspiracy to commit the murder of Larry Jones.

Evidence at defendant's trial tended to show that Dottie Locklear Ransom had first married Rogers Locklear. Locklear was a construction worker and often worked out of town for several days at a time. Dottie began seeing Jackie Ransom while Locklear was out of town. She eventually married him, although she never divorced Locklear.

In July 1984, Dottie asked Locklear about the possibility of insuring Ransom's life and then having him killed. She purchased a $25,000 life insurance policy and asked Locklear to find a hit man to kill Ransom. Locklear asked his brother Harry, but Harry refused and told Locklear that if he wanted a hit man, he should see A.R. Barnes.

In August, Locklear met A.R. Barnes and, after some negotiation, Locklear and Dottie agreed to pay A.R. Barnes $2,000 to kill Jackie Ransom. A.R. Barnes said, "If I don't kill him, . . . I'll get it done."

On 8 September, Locklear went to A.R. Barnes' house, did not see him, but saw his brother, Elwell "Babe" Barnes. Elwell Barnes asked Locklear if he could take his brother's place and kill Ransom for the same compensation Locklear had promised his brother. Locklear replied that it was up to him. Elwell Barnes then told Locklear to drive him to defendant's home. Elwell Barnes talked with defendant privately for about ten minutes. Defendant told Locklear, "I got the gun. . . . Me and Babe can get the job done." After Locklear pointed out Jackie Ransom, defendant told Locklear to get Dottie and take her to a place where there would be witnesses. Ransom was killed that night, and his body was placed in a shallow grave where it was found the next day.

The morning after Ransom was killed, Bernice Cummings, who lived with defendant at his mobile home, asked Elwell Barnes where he and defendant had been the night before. Elwell Barnes replied that defendant had killed Jackie Ransom.

Later that day, defendant told Locklear, "I killed Jackie last night." He said he wanted his money in thirty days and threatened to kill both Dottie and Locklear if he did not get it.

The next day, defendant was informed that Larry Jones had been speaking with the authorities about Ransom's death. He told Elwell Barnes that "Jones was running his mouth" and that he would "put a stop to his damn mouth." A few days later, defendant also told Bernice Cummings that he was going to "kill that water-headed, ratting son-of-a-bitch Larry Jones" and wanted to get a shovel so he could "bury him where he never could be found." Again, defendant stated that Jones had been running his mouth. Defendant obtained a shovel and a shotgun and then told Aganora, defendant's sister who lived with Larry Jones, and Cummings that he was going to kill Larry Jones because Jones knew he killed Jackie Ransom.

Later that day, defendant and Elwell Barnes were riding in an automobile driven by Jerome Ratley when they picked up Jones. Defendant told Ratley to turn onto a dirt road and instructed him to stop the car and turn the lights off. Then, defendant turned around and shot Jones in the chest several times. Defendant said, "You don't eat no more cheese for no damn body else. I'll meet you in heaven or hell, one." Defendant then pulled Jones out of the car, and Elwell Barnes got the shotgun from the trunk. Jones started mumbling "Mule, Mule, Mule," referring to defendant. Elwell Barnes pointed the shotgun at Jones' head. Defendant said, "Don't shoot him with the shotgun," and shot Ransom with the pistol several more times. Elwell Barnes kept a lookout while defendant and Ratley dragged Jones' body into the woods about a hundred yards and buried him in a shallow grave.

On 16 September, defendant told Cummings that he had carried Larry Jones to where he would never be found.

Defendant gave the pistol to his son-in-law after the murders. While in jail, defendant told his son-in-law that he had killed Ransom and Jones. He also told him to get rid of the gun and to get

his brother to "get rid of the black guy," meaning Jerome Ratley, because "[h]e's the one that can hurt me most."

At the close of all the evidence, the trial court granted a mistrial as to A.R. Barnes. The jury returned verdicts of guilty on all counts as to defendant and Elwell Barnes. The trial court then conducted a sentencing proceeding pursuant to N.C.G.S. § 15A-2000.

During the sentencing proceeding, the State, in addition to relying upon the evidence admitted during the guilt phase of defendant's trial, presented evidence showing that defendant had previously been convicted of four felony charges. This evidence was presented through the testimony of Sue Gaines, Deputy Clerk of Superior Court, Robeson County. Three of these prior convictions were for armed robbery, and the fourth was for conspiracy to dynamite a dwelling.

Defendant presented no evidence during the sentencing phase. He did not cross-examine State's witness Ms. Gaines or any of the witnesses that his codefendant, Elwell Barnes, tendered during his presentation of mitigating evidence.

On the Issues and Recommendation forms, the trial court submitted two aggravating circumstances as to each murder. In the murder of Jackie Ransom, the jury was asked the following:

> (1) Had Henry Lee Hunt been previously convicted of a felony involving the threat of violence to the person? [N.C.G.S. § 15A-2000(e)(3).]
>
> . . . .
>
> (2) Was this murder committed for pecuniary gain? [N.C.G.S. § 15A-2000(e)(6).]

The jury answered "yes" to both questions. In the murder of Larry Jones, the jury was asked the following:

> (1) Had Henry Lee Hunt been previously convicted of a felony involving the threat of violence to the person? [N.C.G.S. § 15A-2000(e)(3).]
>
> . . . .

(2) Was this murder committed for the purpose of avoiding or preventing a lawful arrest? [N.C.G.S. § 15A-2000(e)(4).]

Again, the jury answered "yes" to both questions.

Under Issue Two of each punishment recommendation form, the trial court submitted only the "catchall" mitigating circumstance, which read: "Any circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value." In each case against defendant, the jury responded "no" to Issue Two, indicating that it found no evidence of mitigating value.

As a result of these findings and after concluding that the aggravating circumstances were sufficiently substantial to call for the death penalty, the jury recommended that defendant be sentenced to death in each case. The trial court entered judgment accordingly, sentencing defendant to two death sentences.

On his appeal to this Court, defendant argues: I. the unanimity instruction regarding mitigating circumstances was constitutionally defective under *McKoy*; and II. the unconstitutional unanimity instruction cannot be regarded as harmless error because A. harmless error analysis is inapplicable to *McKoy* error, and B. the State cannot prove beyond a reasonable doubt that the error was harmless because, though defendant presented no evidence at the sentencing phase, there was evidence to support the catchall mitigating circumstance which the jury failed to find.

I.

The State concedes that the instruction concerning the unanimity requirement for mitigating circumstances given by the trial court in this case was virtually identical to the one found constitutionally defective in *McKoy*. We so conclude and find that the instructions in that regard were erroneous.

II.

The question we must address is whether that error was harmless beyond a reasonable doubt. The State contends that defendant's failure to present any evidence to challenge the substantial evidence proffered by the State in support of the aggravating circumstances submitted and defendant's failure to present any evidence in mitigation, coupled with the language of the catchall mitigating circumstance submitted, requiring that any such cir-

cumstance be one "arising from the evidence," renders the erroneous unanimity instruction harmless. We agree.

A.

[1] Defendant first contends that harmless error analysis is inapplicable to the unanimity instruction found to be constitutionally erroneous in *McKoy*. This Court has specifically held to the contrary in *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990). *See also State v. Laws*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 174 (1991), *reh'g denied*, --- U.S. ---, 116 L. Ed. 2d 648 (1991); *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600 (1991).

B.

Defendant contends that had the jury not been given the constitutionally defective unanimity instruction, it might have answered "yes" to the catchall mitigating circumstance and therefore might have reached a different result in its sentencing recommendation. Defendant suggests that the following evidence could support a finding by one or more jurors of the catchall circumstance: (1) the fact that persons other than the defendant were instigators of the crime; (2) the fact that the jury was told that A.R. Barnes had confessed to killing Jackie Ransom, although it was also told that he had retracted that confession; (3) the fact that there was no evidence that defendant psychologically tormented or physically tortured the victims before they died; (4) the fact that defendant was a heavy drinker and had consumed a quantity of alcohol during the weekend the murders were committed; (5) the fact that it was obvious to the jury that defendant was an uneducated man, who had a background of poverty and disadvantage; and (6) the fact that although defendant presented no evidence, the jury could observe his demeanor and gather that defendant showed regret and remorse.

We now address the evidence with regard to those contentions seriatim:

1.

[2] Although the evidence in this case showed that the murder of Jackie Ransom was instigated by Locklear and Dottie, this evidence pales in comparison to the evidence concerning defendant's involvement in these and other murders. In viewing the

evidence presented by the State in both phases of defendant's trial, it becomes clear that defendant was a hired assassin, a contract killer. It took only a ten-minute conversation with Elwell Barnes the day before the murders and the promised payment of $2,000 to persuade defendant to kill Ransom. He carried out the terms of his contract, killing Ransom with a shot to the head, and later killed Larry Jones to eliminate Jones as a potential witness to the Ransom murder.

The murder of Larry Jones was also very revealing of defendant's reprehensible character. When defendant learned that "Jones was running his mouth" about the Ransom murder, he responded by declaring that he was "going to put a stop to his damn mouth." Several days later, defendant went to get a shovel with which to dig a grave for Jones; he told Cummings that he was going to "kill that water-headed, ratting son-of-a-bitch Larry Jones." When defendant shot Jones several times, he said to Jones, "You don't eat no more cheese for no damn body else. I'll meet you in heaven or hell, one."

The evidence of defendant's callous attitude was not confined to these two murders. The jury also heard at trial evidence that defendant thought little of the taking of a human life. Locklear testified that prior to the Ransom murder, he had asked defendant why he carried a brown glove in his pocket. Defendant replied, "If you had killed as many men as I had [sic], you would have a brown glove in your pocket, too; wouldn't he Babe." There was also evidence that defendant, after killing Ransom, threatened to kill Locklear and Dottie if he did not receive the money he had been promised within one month. After his arrest, while he was being held in Central Prison awaiting trial, defendant attempted to make arrangements to eliminate another potential witness. Defendant told his son-in-law, Jim Freeman, to get a message to defendant's brother, Wilbert, to "get rid of the black guy" (Jerome Ratley) because Ratley was the only one who could really hurt him at trial. From this evidence, defendant's penchant for killing was made obvious to the jury.

The evidence in this case clearly established defendant's culpability for the murders of Ransom and Jones. The morning after defendant killed Ransom, Elwell Barnes told defendant's girlfriend, Bernice Cummings, that he and defendant had killed Ransom the night before. That same morning, defendant reported

the same information to Locklear. The jury heard three witnesses (Cummings, Locklear, and Freeman) testify that Hunt admitted killing Ransom. Two of these witnesses had a close relationship with defendant. Ratley, an eyewitness to the killing of Jones, also testified that he saw defendant fire several shots at Jones; that he, at defendant's command, helped pull Jones out of the car; that he watched defendant fire several more shots at Jones; and that they then dragged Jones' body into the woods to be buried. In addition, defendant's .25-caliber Beretta, which he gave to Freeman to get rid of after the murders, was linked by a ballistics expert to the projectiles removed from both victims. Simply put, the evidence of defendant's guilt in this case is overwhelming.

While the chain of evidence in this case makes it clear that, with respect to the Ransom killing, Locklear and Dottie were the instigators of the plot to kill Jackie Ransom, defendant was the dominant actor in the actual killings and clearly the most culpable of all the parties involved. The fact that others solicited defendant's act but did not participate in the killings has no mitigating value under the facts of this case. Considering defendant's dangerous character, his willingness to kill not only the party he contracted to kill, but also to kill others in order to eliminate probable witnesses, as well as the aggravating circumstances found by the jury and the lack of mitigating value of the fact that others solicited the killing of Ransom, we are entirely satisfied that no reasonable juror would have recommended a life sentence based upon such a mitigating circumstance. We are fortified in our conclusion by our experience that in the overwhelming majority of cases involving contract killings, juries returned recommendations of death. *State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402 (1990); *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990); *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990); *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 330 N.C. 66, 408 S.E.2d 732 (1991). *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986), seems to be the sole exception, but there the jury unanimously found two mitigating circumstances—that Lowery's capacity to conform his conduct to the requirements of the law was impaired and the catchall mitigating circumstance.

2.

[3] We find no merit in defendant's contention that A.R. Barnes' recanted statements that he killed Ransom might have been found by a reasonable juror to have mitigating value. During the guilt phase, defendant presented evidence through Lumberton Police Detective Mike Stogner and State Bureau of Investigation Agent Lee Sampson that tended to show that on 27 September 1984, A.R. Barnes, brother of Elwell Barnes, gave two statements to the police, in which he stated that he had killed Ransom. In the first statement, he said he shot Ransom during an argument, and in the second statement, he said he shot Ransom in self-defense. The following day, he recanted both statements, explaining that he was trying to protect his brother, codefendant Elwell Barnes. The recantation evidence was brought out at trial by counsel for A.R. Barnes as well as by the prosecutor. Defendant merely introduced the statements of A.R. Barnes. No other evidence presented by defendant during the guilt phase corroborated A.R. Barnes' statements. All the evidence tended to show that A.R. Barnes falsely confessed to killing Ransom to protect his brother, Elwell. The statements were clearly false and of no evidentiary value. It is also clear that the jury disbelieved this evidence because it unanimously rejected the evidence by its guilt phase verdict. No further evidence having been presented at the sentencing proceeding concerning these statements, no reasonable juror could have found A.R. Barnes' recanted statements to be of mitigating value.

3.

[4] Defendant contends that jurors might have found mitigating value in the fact that there was "no evidence that either Jackie Ransom or Larry Jones [was] psychologically tormented or physically tortured before they died." Essentially, defendant contends that the absence of such an aggravating circumstance could, in fact, be mitigating. We reject any such notion. The mere absence of evidence to establish an aggravating circumstance does not present a mitigating one. *See State v. Brown*, 306 N.C. 151, 179, 293 S.E.2d 569, 587, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982). Moreover, here, as to the Ransom killing, there are no details that would legitimately warrant a reasonable juror in finding the absence of psychological torment. As to the Jones killing, the evidence contradicts such a contention. After Jones was shot several times

in the car, defendant had Ratley assist him in pulling the victim out of the car. As Jones lay on the ground, Ratley heard him plead, "Mule, Mule, Mule," referring to defendant. Elwell Barnes yelled to defendant that Jones was not dead yet, and Elwell Barnes pointed a shotgun at Jones' head. Defendant then knocked the shotgun away and told Elwell Barnes not to shoot Jones with the shotgun. Defendant got the pistol and emptied it into Jones. It would be pure speculation to argue that Jones did or did not overhear defendant and Elwell Barnes arguing over how to finish him off as he lay there begging; but it was firmly established that he lived for some time between being shot in the car and being shot on the ground. What physical or psychological pain or torment he suffered during that time no one knows. Based on the evidence presented, we conclude that the mitigating circumstance suggested by defendant is, at best, speculative and would have had no impact on the jury's recommendation.

4.

[5] Defendant next contends that one or more jurors might have found as a circumstance in mitigation that he was a heavy drinker and had consumed a large amount of alcohol during the weekend he murdered Ransom and Jones. He suggests that a reasonable juror might have found that his alcohol consumption somehow impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. We find nothing in the record before us to legitimately support this suggested mitigating circumstance. While there was some evidence tending to show that defendant drank some whiskey on the day of the Jones murder, it does not suggest that he was a "heavy drinker." Nor does the evidence support a finding of impaired capacity. Rather, the evidence shows only that on the day Jones was killed, a fifth of whiskey was being passed around in the car in which defendant, Cummings, and Ashley Hammonds were riding. When the group got back to Fayetteville, they were joined by Ratley and Elwell Barnes at a mobile home belonging to defendant and Cummings. There, Cummings accused Hammonds of having drunk more than half of the bottle and declared, "The rest of it is mine." This would tend to indicate that together Cummings, Barnes, and defendant consumed less than one-half of the fifth. There is a dearth of evidence as to how much of this whiskey defendant actually consumed, and thus nothing in the record would permit us or a jury to speculate as to the effect that defendant's

alcohol consumption had on his abilities. As to the Ransom murder, there is no evidence whatsoever that defendant drank any alcoholic beverages beforehand. We find this contention meritless.

5.

[6] Defendant suggests that "it was doubtless apparent" to the jury that defendant was an uneducated man with a background of poverty and disadvantage. Defendant acknowledges that no evidence to this effect was presented by any party. The record does not indicate that the jury ever heard defendant utter a word during the entire trial. It would be pure speculation as to what a juror or jurors might have perceived about defendant, as there is nothing at all in the record to support such a conclusion.

6.

[7] Defendant's final suggestion is that, although defendant presented no evidence, one or more jurors could have concluded solely from observing defendant's demeanor that defendant was regretful and remorseful for the murders of Ransom and Jones. Defendant does not direct our attention to any item of evidence or refer to anything in the record from which a juror could assess any attitudes of regret or remorse by defendant. Defendant did not take the stand, did not present any evidence at the penalty phase, and did not argue his demeanor to the jury. We find in the record only two possible, oblique references to defendant's demeanor, and neither is favorable to defendant.

The prosecutor, in his penalty phase argument, said:

> Did you see any remorse in this case? Have you seen any contrition? Have you seen any tears for Jackie? Have you seen any regrets? Quite the contrary, from [defendant], you have seen just the opposite. Bernice [Cummings] out in the hall way, "Are you sorry you did it . . . to my cousin, Larry [Jones]? No, that God damn son-of-a-bitch ratting on me," or words to that effect. Contrition? Regrets? No sorrow. No pain. Just going through the motions. No humanity demonstrated in this case.

The prosecutor's reference to a conversation between defendant and Cummings was based on Cummings' direct testimony at the guilt phase. From Cummings' testimony, it appears that at some time after the murders, she accompanied defendant to the court-

house for defendant's trial on some unrelated drug charges. While defendant was waiting to see if he could get his case continued, he and Cummings had a conversation outside the courthouse. Cummings asked defendant if he was sorry for killing Jones, to which he responded, "Hell no, the sorry ratting son-of-a-bitch supposed [sic] to be dead." Defendant continued by saying he buried "the sorry son-of-a-bitch" where he would never be found. Because all the evidence and references of record show defendant was not regretful or remorseful, no reasonable juror would have found that he was.

[8] We said in *McKoy*, "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. However, we suggested in a footnote in *McKoy* two categories of cases that could be candidates for a successful argument that a *McKoy* error was harmless: a case in which there was little or no mitigating evidence proffered, or a case in which the jury found the existence of all proposed mitigating circumstances but nonetheless imposed the death penalty. In the more than thirty *McKoy* cases that this Court has considered as of its December 1991 session, in only one has the Court determined that the error was harmless beyond a reasonable doubt for the reasons we anticipated in *McKoy*. *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600 (in which the jury found all fifteen mitigating circumstances submitted). In only one other case have we found the *McKoy* error to be harmless, and that case involved yet another category. *State v. Laws*, 328 N.C. 550, 402 S.E.2d 573 (in which the individual polling of jurors disclosed unanimity of rejection of submitted mitigating circumstances).

We conclude that the case at bar is one of those rare cases we anticipated in *McKoy* wherein the error is harmless because there is little or no mitigating evidence offered or arising from the evidence presented. Here, defendant offered no evidence during the sentencing phase of his trial. He did not cross-examine the State's witness who presented the evidence of defendant's prior felony convictions (evidence supporting one of the two aggravating circumstances found in each case by the jury), and he did not cross-examine any of codefendant Barnes' witnesses during their presentation of Barnes' mitigating evidence.

We find in the evidence suggested by defendant nothing that a juror could reasonably find to be mitigating, and further our

thorough review of all the evidence presented discloses no such evidence. Even giving the most favorable reading to the relatively inconsequential evidence that defendant contends supports a finding of the catchall mitigating circumstance, we conclude that the *McKoy* error here is harmless beyond a reasonable doubt.

We have previously reviewed defendant's other assignments of error on his direct appeal and concluded that the trial was without error. *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400.

Accordingly, the sentences of death are affirmed, and the mandate of our prior opinion is reinstated. The case is remanded to the Superior Court, Robeson County, for further proceedings.

Death sentences affirmed; mandate reinstated; case remanded.

STATE OF NORTH CAROLINA v. GEORGIA JACKSON TORRES

No. 316A90

(Filed 10 January 1992)

1. **Evidence and Witnesses § 1349 (NCI4th)— voluntariness of confession—findings of fact—appellate review**

A trial court's findings of fact following a voir dire hearing on the voluntariness of a confession are conclusive on appeal if supported by competent evidence even though the evidence is conflicting.

Am Jur 2d, Evidence § 590.

2. **Evidence and Witnesses § 1240 (NCI4th)— inquiry about attorney—defendant in custody**

Defendant was in custody for *Miranda* purposes at the time she inquired of a deputy sheriff and the sheriff about her need for an attorney where defendant was escorted to the sheriff's department in a patrol car by a deputy sheriff shortly after her husband was shot; although defendant's friends and family had some access to her while she awaited interrogation, she was under constant police supervision from the moment she arrived at the sheriff's department; she was in the sheriff's department conference room with a deputy sheriff

from 7:00 p.m. until 10:00 p.m.; the deputy testified on voir dire that he would have detained defendant had she attempted to leave; at some point during this time, defendant was informed that her husband had died; around 10:00 p.m., defendant went to the sheriff's office, where she was told that she would be interviewed by a deputy sheriff and an SBI agent; there is no evidence to indicate that defendant was ever told she was free to leave; and defendant inquired of the deputy and the sheriff about her need for an attorney at times during the evening prior to her interrogation.

Am Jur 2d, Evidence §§ 545, 555.

3. **Evidence and Witnesses § 1252 (NCI4th)— impending interrogation—invocation of right to counsel**

Defendant could invoke her right to have counsel present during her impending interrogation even though she was not being actively questioned at the time she inquired about an attorney.

Am Jur 2d, Evidence § 556.

4. **Evidence and Witnesses § 1252 (NCI4th)— invocation of right to counsel**

There are no "magic words" which must be uttered in order to invoke one's right to counsel. The crucial determination is whether the person has indicated "in any manner" a desire to have the help of an attorney during custodial interrogation. In deciding whether a person has invoked his or her right to counsel, a court must look not only at the words spoken but the context in which they are spoken as well.

Am Jur 2d, Evidence § 555.

What constitutes assertion of right to counsel following Miranda warnings—state cases. 83 ALR4th 443.

5. **Evidence and Witnesses § 1252 (NCI3d)— ambiguous invocation of right to counsel—cessation of interrogation**

When faced with an ambiguous invocation of counsel, interrogation must immediately cease except for narrow questions designed to clarify the person's true intent.

Am Jur 2d, Evidence § 555.

What constitutes assertion of right to counsel following Miranda warnings—state cases. 83 ALR4th 443.

6. Evidence and Witnesses § 1252 (NCI3d)— inquiry about need for attorney—invocation of right to counsel

Defendant invoked her right to counsel when she inquired of sheriff's officials whether she needed an attorney. Thus, any statement made by her in the absence of counsel following police-initiated custodial interrogation is presumed involuntary and therefore inadmissible as substantive evidence even though she was subsequently read her *Miranda* rights and executed a waiver.

Am Jur 2d, Evidence § 555.

What constitutes assertion of right to counsel following Miranda warnings—state cases. 83 ALR4th 443.

7. Criminal Law § 1166 (NCI4th)— aggravating factor—mental infirmity—intoxication of victim

There is no requirement that a court must find the aggravating factor that the victim was mentally infirm if the victim was intoxicated and the defendant knew it. Rather, the gravamen of the mental or physical infirmity aggravating factor is vulnerability, and this factor is properly found if the evidence shows that the victim was targeted because of a mental or physical infirmity or that the defendant took advantage of the infirmity.

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1760.

Justice MARTIN concurring.

APPEAL 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. 364, 393 S.E.2d 535 (1990), finding no error in defendant's conviction of murder in the second degree before *Strickland, J.*, at the 10 October 1988 Criminal Session of Superior Court, BEAUFORT County. Discretionary review as to additional issues allowed by the Supreme Court 5 December 1990. Heard in the Supreme Court 9 September 1991.

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

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

Michelle F. Robertson, for North Carolina Association of Women Attorneys, amicus curiae.

FRYE, Justice.

While in police custody awaiting questioning about the shooting death of her twenty-nine-year-old husband, defendant asked sheriff officials whether she needed an attorney. She was told she did not. A short time later, defendant was read her *Miranda* rights and agreed to make a statement. The statement, in which defendant confessed to shooting her husband, was introduced at trial over defendant's objection. Defendant now petitions this Court for a new trial, arguing that the trial court erred by admitting the statement.

The issue presented is whether defendant invoked her right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation, thus triggering the prophylactic rules enunciated in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981). We hold that defendant did invoke her right to counsel and that her statement was improperly admitted into evidence. We therefore reverse the Court of Appeals' decision and remand for a new trial.

I.

Defendant was indicted on 14 March 1988 by a Beaufort County Grand Jury for the murder of her husband, Florentino "Tino" Torres. At the beginning of the trial, the State announced it was proceeding on a charge of second-degree murder.

Undisputed evidence presented at defendant's trial and sentencing hearing demonstrates that Georgia Jackson Torres, a thirty-nine-year-old nursing home dietician, was an abused and battered spouse. According to testimony from psychiatrist Sharon Willingham, defendant had been stabbed, slapped, choked, kicked, thrown against furniture, and threatened—both physically and verbally—during her sixteen-month marriage to Tino Torres. All episodes of abuse occurred when Mr. Torres was intoxicated. Dr. Willingham, Medical Director of the Craven County Regional Medical Center Psychiatric Unit, testified that defendant "meets all the qualifications for the

battered spouse syndrome," a clinically recognized syndrome in which the victim is subjected to numerous episodes of abuse by the victim's spouse.

Defendant's statement to police, the backbone of the State's case, was read to the jury by State Bureau of Investigation Agent Lewis Young. According to the statement:

Defendant and Mr. Torres had an argument on the evening of 27 February 1988. He slept away from home and called the next morning, telling defendant that he would drop by their house later that day to pick up his clothes. Mr. Torres had been drinking when he arrived at their house in rural Beaufort County in the early evening on 28 February 1988. He became abusive, kicking a box of clothes, pouring cologne on a dresser and pushing defendant against the dresser and the wall. Defendant's three children were watching from another room, and at one point Mr. Torres pushed defendant's daughter Lisa. A few moments later, when it appeared that Mr. Torres was again moving toward Lisa, defendant picked up a metal baseball bat and swung it at Mr. Torres, who snatched the bat from her hands. Defendant told her husband that she could not take any more abuse and wanted him to leave. He stepped toward her and she retreated into her son's room. She then picked up a semi-automatic .22-caliber rifle which her daughter had brought to the house that morning. Defendant told her husband that she was afraid he was going to beat her; she begged him to leave, but he only laughed and continued toward her. He reached over the rifle and swung at her with his right fist. Defendant fired one shot, hitting Mr. Torres. He kept coming at her, and she fired two more shots.

In other testimony, Dr. Stan Harris testified that there were *five* gunshot wounds. Dr. Harris, who performed the autopsy, said the fatal bullet entered about three inches to the left of the middle of the victim's back below the rib cage. Dr. Harris testified that it was possible this wound might have been inflicted while Mr. Torres was lying on the floor. Dr. Harris also testified that, judging from the amount of alcohol in his blood, Mr. Torres was intoxicated at the time of his death.

On 13 October 1988, the jury returned a verdict of guilty of second-degree murder. After finding aggravating and mitigating factors, Judge Strickland sentenced defendant to thirty years in prison, double the fifteen-year presumptive sentence. The Court

of Appeals, by a 2-1 vote, upheld the conviction and sentence. *State v. Torres*, 99 N.C. App. 364, 393 S.E.2d 535 (1990) (Parker, J., concurring in result and Greene, J., dissenting). Defendant appeals to this Court as of right based on Judge Greene's dissent. We also allowed discretionary review of three issues relating to defendant's sentence.

II.

[1] Prior to the admission of defendant's statement, the trial judge held an extensive voir dire hearing. Much of the testimony was contradictory. Following the hearing, Judge Strickland made twenty-three findings of fact. The following five findings are particularly pertinent to our inquiry:

> 4. That on the evening of February 28th, 1988, the defendant, Georgia Jackson Torres, was at her residence, this being after the death of one Florentine [sic] Conteras Torress [sic], and that several deputy sheriffs had arrived at said premises; Deputy Sheriff Sykes made inquiry about what happened the night before and that subsequently Deputy Sheriff Joe Sykes transported the defendant, Georgin [sic] Ann Torres, along with defendant's close friend, Brenda Purser, to the Sheriff's Department in the City of Washington.
>
> . . . .
>
> 7. That before the interview of the defendant by S.B.I. Agent Lewis Young and Deputy Sheriff Donald Deese, the defendant was in the conference room of the Sheriff's Department in the company of Deputy Sheriff Sykes and was subsequently in the office of Sheriff Sheppard.
>
> 8. That her children were in and out and at the point where the defendant made inquiry about an attorney she was advised that she did not need one at that time.
>
> 9. That the defendant had not been placed under arrest during any such inquiry.
>
> . . . .
>
> 12. That while the defendant was in Sheriff Sheppard's office she was advised that Officer Donald Deese and S.B.I. Agent Lewis Young would question her and she asked if somebody could be with her stating that she wanted Charlie Purser and Brenda Purser to be with her and that was arranged; that

> thereafter S.B.I. Agent Lewis Young and Deputy Sheriff Donald Deese went to Sheriff Sheppard's office to begin the interview with the defendant . . . .

A trial court's findings of fact following a voir dire hearing on the voluntariness of a confession are conclusive on appeal if supported by competent evidence in the record. *State v. Massey*, 316 N.C. 558, 573, 342 S.E.2d 811, 820 (1986). This is so even though the evidence is conflicting. *Id.* (citing *State v. Jackson*, 308 N.C. 549, 569, 304 S.E.2d 134, 145 (1983)).

We hold that there is competent evidence in the record to support each of the preceding findings of fact. Specifically, as to the key finding that defendant "made inquiry about an attorney," there was testimony by two witnesses that defendant asked Sheriff Sheppard whether she needed an attorney and testimony by one witness that defendant also asked the same question of Deputy Sykes.

Defendant's friend, Brenda Purser, testified: "Georgianna asked [Sheriff] Nelson [Sheppard] did she need a lawyer and he told her no that it was best right now to cooperate and tell the truth and that they had been friends for a long time." Mrs. Purser further testified that defendant even asked Sheriff Sheppard about a specific attorney by name, James R. Vosburgh of Washington, N.C. Mrs. Purser's husband, Charlie, also testified that he was present when defendant asked the sheriff whether she needed an attorney. Mr. Purser testified that the sheriff said, "she didn't need a lawyer right then."

Mrs. Purser also testified that while she and defendant were in the conference room with Deputy Sykes, defendant asked Deputy Sykes whether she needed an attorney. In fact, according to Mrs. Purser's testimony, Deputy Sykes gave Mrs. Purser a telephone book to look up attorney Vosburgh's telephone number. Mrs. Purser never made the telephone call, however. "I went to pick up the phone," testified Mrs. Purser, "and that's when he [Deputy Sykes] told her she didn't need a lawyer right now."

III.

The United States Supreme Court, in one of its more recent explorations of Fifth Amendment jurisprudence, noted that the landmark case of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, "established a number of prophylactic rights designed to counteract the 'inherently compelling pressures' of custodial interrogation, including the right to have counsel present." *McNeil v.*

Wisconsin, --- U.S. ---, 115 L. Ed. 2d 158, 167 (1991). *See also Minnick v. Mississippi*, --- U.S. ---, 112 L. Ed. 2d 489, 494 (1990) ("To protect the privilege against self-incrimination guaranteed by the Fifth Amendment, we have held that the police must terminate interrogation of an accused in custody if the accused requests the assistance of counsel.").

In *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, the Court "established a second layer of prophylaxis for the *Miranda* right to counsel." *McNeil*, --- U.S. at ---, 115 L. Ed. 2d at 167. This "second layer" provides that:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with police.

Edwards, 451 U.S. at 484-85, 68 L. Ed. 2d at 386. This rigid prophylactic rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *McNeil*, --- U.S. at ---, 115 L. Ed. 2d at 168 (quoting *Michigan v. Harvey*, 494 U.S. 344, 350, 108 L. Ed. 2d 293, 302 (1990)). "If police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." *McNeil*, --- U.S. at ---, 115 L. Ed. 2d at 167-68. Furthermore, it matters not whether the subsequent police-initiated contact is conducted in good faith by officers unaware that the defendant had previously invoked her right to counsel. *Arizona v. Roberson*, 486 U.S. 675, 687-88, 100 L. Ed. 2d 704, 717 (1988). The burden is on the police officer to determine whether the accused has invoked her right to counsel. *Id.*

IV.

The State argues that defendant's statement was properly admitted into evidence at trial because: (1) *Miranda* protections

only attach when an accused is (a) in custody and (b) actively under interrogation; in this case, the State argues, defendant was neither in custody nor being questioned at the time she asked about an attorney; and (2) even if her *Miranda* rights had attached, defendant's inquiries concerning whether she needed an attorney were not invocations of her right to have an attorney present during custodial interrogation.

[2] The State's first argument is that defendant was not in custody at the time she asked about an attorney and therefore *Miranda* simply does not apply. We disagree.

We first note that, although the trial judge made a finding of fact that defendant was not under arrest at the time she asked about counsel, there was no finding as to whether defendant was in custody. The absence of such a finding, however, does not prevent this Court from examining the record and determining whether defendant was in custody. *State v. Davis*, 305 N.C. 400, 414-15, 290 S.E.2d 574, 583 (1982) (determination of whether a defendant is in custody for *Miranda* purposes "requires an application of fixed rules of law and results in a conclusion of law and not a finding of fact.").

It is well settled that the test for whether a person is "in custody" for *Miranda* purposes is whether a reasonable person in the suspect's position would feel free to leave or compelled to stay. *State v. Smith*, 317 N.C. 100, 104, 343 S.E.2d 518, 520 (1986); *State v. Jackson*, 308 N.C. 549, 576-77, 304 S.E.2d 134, 149 (1983); *Davis*, 305 N.C. at 410, 290 S.E.2d at 581; *see also Berkemer v. McCarty*, 468 U.S. 420, 442, 82 L. Ed. 2d 317, 336 (1984); *Oregon v. Mathiason*, 429 U.S. 492, 494-95, 50 L. Ed. 2d 714, 719 (1977). This objective test must necessarily be applied on a case-by-case basis, taking into account the facts and circumstances surrounding each case.

In the present case, the following facts are undisputed: defendant was escorted to the sheriff's department in a patrol car by Deputy Sykes shortly after her husband was shot. Although defendant's friends and family had some access to her while she awaited interrogation, defendant was under constant police supervision from the moment she arrived at the sheriff's department. From 7 p.m. until 10 p.m., she was in the sheriff's department conference room with Deputy Sykes, who testified on voir dire that he would have detained her had she attempted to leave. At some point during

this time, defendant was informed that her husband had died. Around 10 p.m., defendant went to Sheriff Sheppard's office, where she was told that she would be interviewed by Deputy Sheriff Deese and S.B.I. Agent Young. Questioning began at 10:35 p.m. and lasted until 12:40 a.m. There is no evidence to suggest that defendant was ever told she was free to leave.

We believe that a reasonable person, knowing she had just shot her spouse, having been escorted to the sheriff's department by a sheriff's deputy, kept under constant police supervision and never informed that she was free to leave, would not feel free to get up and go. On the contrary, a reasonable person in defendant's position would feel compelled to stay. We hold defendant was in custody at the time she inquired about an attorney.

[3] Next, the State argues that defendant could not have invoked her right to counsel because she was not being questioned at the time she inquired about an attorney. The State correctly states the facts, but misstates the law. It is true that neither Deputy Sykes nor Sheriff Sheppard was actively questioning defendant at the time she asked about counsel. That, however, does not mean defendant was forbidden from invoking her right to have counsel present during her impending interrogation.

The Supreme Court addressed this very issue in *Miranda*. If defendant "at any stage of the process" indicates her desire to consult with counsel, all questioning must cease. *Miranda*, 384 U.S. at 444-45, 16 L. Ed. 2d at 707. Later in the same opinion, the Court was more specific:

> An individual need not make a pre-interrogation request for a lawyer. *While such request affirmatively secures his right to have one*, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we have delineated have been given.

Miranda, 384 U.S. at 470, 16 L. Ed. 2d at 721 (emphasis added). Thus, although an individual cannot *waive* her right to counsel prior to receiving *Miranda* warnings, a suspect in custody can certainly *assert* her right to have counsel present during her impending interrogation prior to *Miranda* warnings and the actual onset of questioning. *See State v. Collins*, 122 Wis. 2d 320, 329, 363 N.W.2d 229, 233 (App. 1984) (suspect, taken into custody at his

home, invoked his right to have counsel present during his impending interrogation, although request for counsel came prior to *Miranda* warnings and onset of questioning).

The State cites *McNeil v. Wisconsin*, --- U.S. ---, 115 L. Ed. 2d 158, in support of its argument that a person cannot "anticipatorily invoke" her right to counsel. In *McNeil*, the Court noted in a footnote that it had never held that a person could "invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation . . . .'" *McNeil*, --- U.S. at --- n.3, 115 L. Ed. 2d at 171 n.3. The examples of "anticipatory invocation" cited by the Court in that same footnote, however, make clear that the Court had in mind situations in which a person was not in custody at the time of her invocation. Accordingly, the Court suggested that a person may not be permitted to invoke her right to counsel at a preliminary hearing or "by a letter prior to arrest, or indeed even prior to identification as a suspect." *Id.*

These situations are, of course, far removed from the situation at hand, in which defendant was in custody at the sheriff's department awaiting interrogation. It would make little sense to require a defendant already in custody to wait until the onset of questioning or the recitation of her *Miranda* rights before being permitted to invoke her right to counsel. We therefore hold that defendant in this case could invoke her right to have counsel present during her impending interrogation, even though she was not being actively questioned at the time she inquired about an attorney.

[4] Finally, the State argues that even if defendant's *Miranda* rights had attached, defendant did not invoke her right to counsel when she asked sheriff's officials whether she needed an attorney. The State suggests that in order for someone to invoke her right to counsel, the invocation must always be precise and unequivocal. We disagree. Such a narrow approach is neither supported by Supreme Court precedent nor sound policy considerations.[1]

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1. The State cites *State v. McQueen*, 324 N.C. 118, 377 S.E.2d 38 (1989), for the proposition that a defendant must "plainly invoke" her right to counsel. *McQueen* involved a complicated fact pattern in which the defendant apparently invoked his right to counsel, then volunteered statements to police, was re-*Mirandized*, invoked his right to counsel again, and finally volunteered additional statements. *McQueen*, 324 N.C. at 127-32, 377 S.E.2d at 43-46. Although there is language in *McQueen* to support the State's position, *McQueen*, 324 N.C. at 132, 377 S.E.2d at 46, we believe the Court's attention was focused primarily on whether the defendant had, on two separate occasions, volunteered statements after invoking

Chief Justice Warren, writing for the Court in *Miranda*, stated that when a person "indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda*, 384 U.S. at 444-45, 16 L. Ed. 2d at 707 (emphasis added). Two decades later, Chief Justice Rehnquist, writing for the Court in *Connecticut v. Barrett*, 479 U.S. 523, 93 L. Ed. 2d 920 (1987), reiterated the "settled approach . . . [that] requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel." *Id.* at 529, 93 L. Ed. 2d at 928 (quoting *Michigan v. Jackson*, 475 U.S. 625, 633, 89 L. Ed. 2d 631, 640 (1986)). *See also People v. Fish*, 660 P.2d 505, 509 (Colo. 1983) ("A request for counsel need not be sophisticated or in a legally proper form."); *People v. Randall*, 1 Cal. 3d 948, 955, 464 P.2d 114, 118, 83 Cal. Rptr. 658, 662 (1970) ("To strictly limit the manner in which a suspect may assert the privilege, or to demand that it be invoked with unmistakable clarity (resolving any ambiguity against the defendant) would subvert *Miranda*'s prophylactic intent.").

There are no "magic words" which must be uttered in order to invoke one's right to counsel. The crucial determination is whether the person has indicated "in any manner" a desire to have the help of an attorney during custodial interrogation. To require precise and exact language to invoke one's right to counsel would undermine *Miranda* by working to the disadvantage of those who arguably need its protections the most: the uneducated and those unfamiliar with the criminal justice system. *See Randall*, 1 Cal. 3d at 955, 464 P.2d at 118, 83 Cal. Rptr. at 662. In deciding whether a person has invoked her right to counsel, therefore, a court must look not only at the words spoken, but the context in which they are spoken as well.

Turning then to the facts of this case, the trial judge found that defendant was taken to the sheriff's department by Deputy Sykes shortly after her husband was shot. She was placed in a conference room where she stayed for three hours in the company of Deputy Sykes. Around 10 p.m., defendant went to Sheriff Sheppard's office where she was told that she would be interrogated by a deputy sheriff and an S.B.I. agent. The trial judge found

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his right to counsel. We do not believe, as the State suggests, that the Court in *McQueen* explicitly held that a defendant's invocation of counsel must always be plain and unequivocal.

that at some point in the evening, defendant "made inquiry about an attorney . . . [and] was advised that she did not need one at that time." It is not clear from this finding of fact exactly when this inquiry was made; however, witnesses testified that defendant actually made two such inquiries: one to Deputy Sykes, another to Sheriff Sheppard. Based on these facts, we believe defendant indicated a desire, on at least one occasion, to have the help of an attorney during police interrogation. *See State v. Lampe*, 119 Wis. 2d 206, 217, 349 N.W.2d 677, 683 (1984) ("It is apparent that, in the face of the direct question, 'Do you think I ought to have an attorney,' the *Miranda* rule should have triggered an immediate cessation of the conversation even had there not been previous requests for a lawyer."); *People v. Alexander*, 79 Mich. App. 495, 498, 261 N.W.2d 63, 64 (1977), *cert. denied*, 436 U.S. 958, 57 L. Ed. 2d 1123 (1979) (trial court did not err by finding that defendant invoked his right to counsel by asking police whether he should have an attorney); *People v. Superior Court of Mono County*, 15 Cal. 3d 729, 736, 542 P.2d 1390, 1395, 125 Cal. Rptr. 798, 803, (1975), *cert. denied*, 429 U.S. 816, 50 L. Ed. 2d 76 (1976) (defendants' question to police, "Do you think we need an attorney," constitutes "ample evidence" that defendants invoked their Fifth Amendment right to counsel); *but see Ruffin v. U.S.*, 524 A.2d 685, 701 (D.C. App. 1987) (limited questions permitted to clarify defendant's intent where court found defendant's inquiry as to whether he needed an attorney to be "equivocal").

[5] We recognize that some courts have found, on the facts of a particular case, a question such as "Do you think I need an attorney" to be equivocal or ambiguous. *E.g.*, *Ruffin*, 524 A.2d at 700; *Russell v. Texas*, 727 S.W.2d 573, 575-76 (Tex. Crim. App.), *cert. denied*, 484 U.S. 856, 98 L. Ed. 2d 119 (1987). The Supreme Court has expressly left unresolved the question of what is the appropriate response to an ambiguous invocation of counsel. *Barrett*, 479 U.S. at 529 n.3, 93 L. Ed. 2d at 928 n.3; *Smith v. Illinois*, 469 U.S. 91, 96-97 & n.3, 83 L. Ed. 2d 488, 494 & n.3 (1984). The majority rule, however, appears to be that, when faced with an ambiguous invocation of counsel, interrogation must immediately cease except for narrow questions designed to clarify the person's true intent. *E.g.*, *Crawford v. State*, 580 A.2d 571, 576-77 (Del. 1990); *Towne v. Dugger*, 899 F.2d 1104, 1107 (11th Cir.), *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 546 (1990). Under this rule, therefore, even if defendant's invocation in this case is termed ambiguous,

the result remains the same. The officers clearly did not seek to clarify defendant's intent; instead, they dissuaded defendant from exercising her right to have an attorney present during interrogation. Under these circumstances, we must resolve any ambiguity in favor of the individual. *See Towne*, 899 F.2d at 1110 ("because [defendant] made an equivocal request for an attorney that was never clarified, and [defendant] did not initiate further interrogation, the confession was obtained in violation of his Fifth Amendment rights.").

[6] We therefore hold that defendant invoked her right to counsel when she inquired of sheriff's officials whether she needed an attorney. Thus, any statement made by her in the absence of counsel following police-initiated custodial interrogation "is presumed involuntary and therefore inadmissible as substantive evidence at trial." *McNeil*, --- U.S. at ---, 115 L. Ed. 2d at 167-68. This is true even where, as in this case, the suspect subsequently is read her *Miranda* rights and executes a waiver. *Edwards*, 451 U.S. at 484, 68 L. Ed. 2d at 386. Because defendant's confession was erroneously introduced into evidence against her, she is entitled to a new trial.

[7] In view of the fact that defendant gets a new trial, it is unnecessary to address in detail all of the alleged sentencing errors. However, we do find it necessary to disavow the following language from the Court of Appeals' decision: "Where, as here, the preponderance of the evidence shows that the victim was intoxicated and the defendant knew it, the trial court *must* find that the victim was mentally infirmed [sic] at the time he was killed." *Torres*, 99 N.C. App. at 372, 393 S.E.2d at 540 (emphasis added). This is an incorrect statement of the law.

The gravamen of the "mental or physical infirmity" aggravating factor is vulnerability. *State v. Drayton*, 321 N.C. 512, 514, 364 S.E.2d 121, 122 (1988). "If the evidence shows the victim was targeted because of a physical [or mental] infirmity or that the defendant took advantage of the infirmity, the aggravating factor is properly found." *Id.* There is, therefore, no *requirement* that a court *must* find this aggravating factor if the victim was intoxicated and the defendant knew it. We also take note that, as pointed out in an amicus curiae brief by the North Carolina Association of Women Attorneys, it may be particularly inappropriate to find this aggravating factor in cases involving battered spouse syndrome because

of the overwhelming evidence that abusive spouses routinely use alcohol as a facilitator of aggression.

For the above-stated reasons, the decision of the Court of Appeals is reversed and this case is remanded for a new trial.

Reversed and remanded.

Justice MARTIN concurring.

I agree with and join in the well-reasoned opinion of the majority. I write separately to give additional support for the majority's holding that the trial court violated fundamental rights of the defendant in admitting her statement into evidence. My concurrence is based solely upon adequate and independent state constitutional grounds. *Michigan v. Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201 (1983); *Jackson v. Housing Authority of High Point*, 321 N.C. 584, 364 S.E.2d 416 (1988).

Article I, section 23 of the Constitution of North Carolina provides that

> In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witnesses fees of the defense, unless found guilty.

In the present case, evidence incriminating the defendant in the form of a confession was offered by the State at trial. The issue presented by her appeal is whether her right not to be compelled to give self-incriminating evidence was violated, rendering the confession inadmissible. In resolving this issue, it is necessary to ascertain whether essential procedural safeguards of the right not to give self-incriminating evidence were enforced and to examine the facts and circumstances surrounding the obtaining of the confession on 28 February 1988.[1]

Article I, section 23 of our Constitution grants a panoply of rights to persons charged with crimes. Most of these rights may

1. North Carolina's strong policy in support of the right to be free not to give self-incriminating evidence is illustrated in N.C.G.S. § 15A-602 which provides: "Except when he is accompanied by his counsel, the judge must inform the defendant of his right to remain silent and that anything he says may be used against him."

be invoked when a person is actually charged with crime.[2] However, in regard to the right not to be compelled to give self-incriminating evidence, this Court recognized over one hundred years ago: "The fair interpretation of this clause seems to be to secure one who is *or may be* accused of crime, from making any compulsory revelations which may be given in evidence against him on his trial for the offence [sic]." *LaFontaine v. Southern Underwriters*, 83 N.C. 132, 138 (1880); *see also State v. Eason*, 328 N.C. 409, 402 S.E.2d 813 (1991).

> [O]pinions of this Court make it clear that [under the U.S. Constitution,] when the State seeks to offer in evidence a defendant's in-custody statements, made in response to police interrogation and in the absence of counsel, the State must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel.

State v. Biggs, 289 N.C. 522, 531, 223 S.E.2d 371, 377 (1976).

Similarly, when the State seeks to offer a defendant's in-custody statements made in response to police interrogation in the absence of counsel, our Constitution also requires, at a minimum, such an affirmative showing by the State that the defendant was fully informed of his rights, and that he knowingly and intelligently waived his right to counsel.

I first address what is required by our state Constitution in order to fully inform a defendant of his rights. Our cases often refer to the procedural safeguards required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), as the source of the requirement that law enforcement officers inform defendants of their federal constitutional rights. I conclude today that article I, section 23 also requires that, at the onset of custodial interrogation, a defendant must be informed of and given an opportunity to acknowledge understanding of these same rights. I adopt the holding in *Miranda*:

> Prior to any questioning, the [accused] person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained

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2. The rights to be informed of the accusation and confront accusers, for example, presuppose being charged with a crime before they may be exercised.

> or appointed. The defendant may waive effectuation of these rights, provided that waiver is made voluntarily, knowingly and intelligently.

Miranda, 384 U.S. at 444, 16 L. Ed. 2d at 706-707.

I agree with the majority's analysis of the facts and conclusion that from her arrival at 7:00 P.M. on 28 February 1988 and throughout that evening at the sheriff's department building in Washington, North Carolina, Georgia Torres was in the custody of police officials and awaiting or undergoing interrogation. Accordingly, the procedural safeguards required by article I, section 23 to protect her from being compelled to give self-incriminating evidence should have been observed. These include being allowed to exercise, without interference, the right to counsel during such interrogation.[3]

I conclude that prior to making the confession, the defendant's words and actions were tantamount to an invocation of her right to counsel. Again, I adopt the language of *Miranda*: "If, however, [the accused person] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda*, 384 U.S at 444-445, 16 L. Ed. 2d at 707. Applying article I, section 23 to the facts of this case, once a defendant has invoked her right to counsel all questioning must cease and police cannot reinitiate interrogation of the accused unless an attorney is present. (*Cf. Edwards v. Arizona*, 451 U.S. 477, 484-485, 68 L. Ed. 2d 378, 386 (1981)) ("[H]aving [invoked his right to counsel, an accused] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication . . . with the police."); *Minnick v. Mississippi*, --- U.S. ---, ---,

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3. Prior to its repeal by the legislature in anticipation of the adoption of the new Criminal Procedure Act, North Carolina had a statute based on article I, section 23, which provided in part as follows:

> Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this State with or without warrant, it shall be the duty of the officer making the arrest . . . to permit the person so arrested to communicate with counsel and friends *immediately, and the right of such person to communicate with counsel . . . shall not be denied.*

State v. Hill, 277 N.C. at 552, 178 S.E.2d at 465 (quoting N.C.G.S. § 15-47 (1937)). Although repealed, the rights enunciated in the statute are constitutional rights springing from article I, section 23; the repeal of an implementing statute in no way abrogates these rights.

112 L. Ed. 2d 489, 498 (1990) ("[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.").

Here, rather than abandoning the interrogation when the defendant invoked her right to counsel, the officials dissuaded her from telephoning an attorney. This violated the defendant's rights under our Constitution and rendered her subsequent confession inadmissible.

Another route to the same conclusion is to analyze the defendant's alleged waiver of the right to counsel. The State argues that no matter what came before, at the point just prior to the onset of questioning the defendant was read her *Miranda* rights, and she waived them. In order to determine whether the State has met its burden of showing that a defendant knowingly and intelligently waived right to counsel, courts must look beneath the recitals of rights by law enforcement officers to the conditions under which the defendant heard and responded to those recitals.

Here, as in *State v. Pruitt*,

> [T]here was plenary evidence that the procedural safeguards required by the *Miranda* decision were recited by the officers and that the defendant signed a waiver stating that [s]he understood [her] constitutional rights, including [her] right to counsel. Even so, the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly made. The fact that the technical procedural requirements of *Miranda* are demonstrated by the prosecution does not, however, standing alone, control the question of whether a confession was voluntarily and understandingly made. The answer to this question must be found from a consideration of the entire record. *Davis v. North Carolina*, 384 U.S. 737, 16 L. Ed. 2d 895 (1966).

Pruitt, 286 N.C. 442, 454, 212 S.E.2d 92, 100 (1975) (citations omitted); *State v. White*, 291 N.C. 118, 229 S.E.2d 152 (1976); *State v. Silver*, 286 N.C. 709, 213 S.E.2d 247 (1975).

This Court has held that "[t]he admission of an incriminating statement is rendered incompetent by any circumstance indicating coercion of involuntary action. The totality of circumstances under which the statement is made should be considered when passing

on admissibility." *State v. Steptoe*, 296 N.C. 711, 716, 252 S.E.2d 707, 710 (1979) (citing *State v. Guffey*, 261 N.C. 322, 134 S.E.2d 619 (1964)).

Careful scrutiny of the circumstances in the present case leads to the conclusion that the defendant was induced to waive her constitutional rights involuntarily. The defendant had no criminal record; her prior contact with law enforcement was as a complaining witness against her husband when she had found it necessary to take out a warrant for his arrest after he stabbed her in the hand with a knife, which was but one of many acts of violence defendant had suffered as a battered spouse.

The defendant was taken into custody at about 6:45 P.M. At 10:30 P.M. when the investigators read the defendant her *Miranda* rights, she was in a state of grief, having been through an emotionally traumatic ordeal and having just minutes earlier learned of the death of her husband. The defendant was emotionally upset and wept periodically throughout the evening. According to the testimony of the defendant's daughter, Angela Torres Smith (known as "Cammie"), when she informed the defendant that Tino had died, the defendant collapsed on the floor, too upset for her daughter to be able to pick her up. Cammie went on to say that Sheriff Sheppard bent down and picked the defendant up with her and said, "Georgia, we've been friends for a long time. You're going to have to get yourself together and trust me. We have to go through this." Cammie's comment on this was, "[T]hat's what happened, and I believed him and I agreed with him also . . . [I]n other words I thought it would be best if she'd go ahead and answer his questions because he said he was a friend of hers and I trusted him so we did not worry."

Twice during the evening in police custody the defendant had looked to others around her for advice as to whether she ought to contact an attorney for assistance in dealing with her predicament. One of those she questioned was her "friend" Nelson Sheppard, the sheriff of Beaufort County, whom she had known for fifteen years. The defendant inquired of Sheriff Sheppard whether at that time she ought to have with her an attorney who would assert her rights and protect her interests. She trusted the sheriff. According to the testimony of the defendant's friend Ms. Purser, the sheriff put his hand on the defendant's shoulder and said that she did not need an attorney then; he said that it was best to

cooperate and tell the truth and reminded her that they had been friends for a long time. Sheriff Sheppard's response to Ms. Torres' inquiry was to console her, to urge her to steel herself to get through the difficulty facing her, to admonish her to tell the truth, and to advise her that an attorney was not needed at that time.

Had it not been for this circumstance of long acquaintance and trust between the sheriff and the defendant, she might have taken his response for what it was: a misplaced and unsound piece of legal advice. This advice served to prevent the defendant from maintaining the right that was hers under our Constitution: the right not to be compelled to give self-incriminating evidence. Under these conditions, the sheriff's response to the defendant's inquiry about an attorney was coercive. In my view, his response induced the defendant to waive her right to counsel and to make the confession which was used against her at trial.

I therefore hold that, within the meaning of article I, section 23 of our State Constitution, the defendant's waiver and subsequent confession were involuntarily made; thus the confession was inadmissible. Accordingly, the trial judge's conclusion of law at the *voir dire* that none of the defendant's state constitutional rights were violated by her detention, interrogation or statements is erroneous because it is not supported by competent evidence in the record.

I do not find it necessary to discuss all of the alleged sentencing errors. However, I also concur in the majority's disavowal of the trial court's error regarding the aggravating factor of "mental or physical infirmity."

STATE OF NORTH CAROLINA v. CALVIN ANTONIO BONNER AND RONALD WAYNE WITHERSPOON

No. 83A91
No. 85A91

(Filed 10 January 1992)

Homicide § 21.6 (NCI3d) — felony murder — killing by officer resisting defendants — judgment vacated

The trial court erred by denying defendants' motions to withdraw their pleas of guilty of first-degree murder based

on the deaths of two co-felons at the hands of an officer during an armed robbery. Although defendants engaged in reckless and dangerous conduct, neither they nor their accomplices committed the fatal act; instead, an officer, an adversary to defendants and their accomplices, was responsible for the deaths. Thus, under the rule of *State v. Oxendine*, 187 N.C. 658, there can be no criminal liability for felony murder in this case.

Am Jur 2d, Homicide §§ 24, 46, 134, 135.

APPEAL of right pursuant to N.C.G.S. §§ 7A-27(a) and 15A-1444(e) from judgments entered by *Freeman, J.*, at the 10 December 1990 Criminal Session of Superior Court, FORSYTH County, sentencing defendants to imprisonment for life upon their pleas of guilty to charges of first-degree murder. Heard in the Supreme Court 12 September 1991.

Lacy H. Thornburg, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.

Danny R. Ferguson for defendant-appellant Bonner.

Richard D. Ramsey and Thomas G. Taylor for defendant-appellant Witherspoon.

WHICHARD, Justice.

On 29 May 1990, defendants undertook, along with Gregory Gainey and El'Ricko Stewart, to rob the Steamboat Restaurant in Winston-Salem, North Carolina. In an attempt to thwart the robbery, Dallas Pruitt, an off-duty police officer acting as a security guard for the restaurant, shot and killed Gainey and Stewart. Following indictment, defendants pled guilty to, among other charges, two counts of first-degree murder for the deaths of their coconspirators.

The issue is not whether these defendants may escape altogether criminal liability for their participation in the events of 29 May 1990; instead, the narrow issue is whether the common law theory of felony murder, as preserved in N.C.G.S. § 14-17, will be extended to cover situations such as this, so that cofelons may be charged with first-degree murder as a result of the deaths of their accomplices at the hands of an adversary to the crimes. Based on longstanding precedent from this Court, and in accordance with the overwhelming majority of jurisdictions that have addressed

this issue, we hold that there is no felony murder liability on the facts of this case.

Defendants were indicted on two counts of first-degree murder for the deaths of two cofelons arising out of the armed robbery of the Steamboat Restaurant in Winston-Salem. Each defendant filed a motion to dismiss the murder charges, alleging that the felony murder rule is inapplicable to the facts underlying the deaths. Following denial of these motions, defendants each pled guilty to two counts of first-degree murder and the underlying felony of armed robbery, one count of conspiracy to commit armed robbery, one count of assault with a deadly weapon with intent to kill inflicting serious injury, and several additional counts of armed robbery unrelated to the felony murder charges.

As to both defendants, the trial court consolidated for judgment the two counts of first-degree murder, each defendant receiving a sentence of life imprisonment. The trial court arrested judgment on the underlying armed robbery charges, but sentenced each defendant to a forty-year term of imprisonment, to commence at the end of the life sentence for murder, for the remaining counts of armed robbery and conspiracy to commit armed robbery. In addition, the trial court ordered twenty-year sentences for each defendant, to commence at the end of the forty-year sentences, for the assault charges.

On 10 December 1990, each defendant filed a motion to withdraw his pleas of guilty to the two counts of first-degree murder. The trial court denied these motions, and each defendant appealed.

The facts underlying the pleas of guilty to first-degree felony murder are not in dispute. Around 9:00 p.m. on the evening of 29 May 1990, El'Ricko Stewart and Gregory Gainey, armed and dressed in black "Ninja" outfits, came in the front entrance on the east side of the Steamboat Restaurant. Sergeant Dallas Pruitt, an off-duty officer with the Winston-Salem Police Department who was working as the restaurant's security guard, was seated in the area near the main cash register. When Stewart entered the restaurant he saw Sergeant Pruitt and shot him in the chest. The force of the gunshot knocked Pruitt to the ground. Pruitt then tried to draw his revolver and Stewart fired a second shot, striking Pruitt in the right arm. Though seriously injured, Pruitt was able to fire a deadly shot into Stewart, his assailant.

Gregory Gainey, dressed and armed similarly to Stewart, then approached Sergeant Pruitt. Pruitt fired one shot which struck Gainey, but Gainey continued his approach. Pruitt then fired a second shot, and Gainey fell to the floor near his feet.

While Sergeant Pruitt defended the main entrance of the restaurant, in the process fatally wounding his assailants, defendants went to the west or "take-out" entrance on the other side of the restaurant. Though Pruitt never saw defendants, they were armed and dressed in similar fashion to their cofelons, Gainey and Stewart. Defendants forced their way to the "take-out" register, took $334.38, and fled.

Each defendant gave the police a written statement admitting his participation in the planned armed robbery and confirming the planned participation of Stewart and Gainey. Autopsy reports revealed that Stewart and Gainey died as a result of the gunshots fired by Sergeant Pruitt.

Defendants assign as error the trial court's denial of their motions to withdraw their pleas on the grounds that there was no factual basis to support the convictions for first-degree felony murder. We hold that this assignment of error has merit.

The resolution of this issue is controlled by the principles enunciated in *State v. Oxendine*, 187 N.C. 658, 122 S.E. 568 (1924). In *Oxendine*, three men—Walter Oxendine, Clarence Oxendine, and Dock Wilkins—feloniously instigated a violent altercation with Proctor Locklear. The altercation escalated to gunplay, and Robert Wilkins, an armed bystander, was killed as a result of a shot fired by Proctor Locklear. The trial court gave an instruction that permitted the jury to convict Walter Oxendine of manslaughter regardless of whether the fatal shot was fired by Oxendine or his accomplices, or by Proctor Locklear. In reversing the conviction of manslaughter, this Court said:

> It is unquestionably the law that where two or more persons conspire or confederate together or among themselves to commit a felony, each is criminally responsible for every crime committed by his coconspirators in furtherance of the original conspiracy, and which naturally or reasonably might have been anticipated as a result therefrom. And in the instant case, if the deceased had been killed by a shot from Walter Oxendine's pistol, each and every one of his confederates would

> have been equally responsible with him for the homicide. But Walter Oxendine and Proctor Locklear were not acting in concert; they were adversaries; and it is the general rule of law that a person may not be held criminally responsible for a killing unless the homicide were either actually or constructively committed by him; and in order to be his act, it must be committed by his own hand, or by some one acting in concert with him, or in furtherance of a common design or purpose.

Id. at 661, 122 S.E. at 570. Thus, the Court stated the general principle of accomplice liability and noted that had defendant Walter Oxendine, his accomplice, or his agent fired the fatal shot, there would be no question that all the participants would be responsible for the homicide. However, the general rule did not apply on the facts of *Oxendine* because Proctor Locklear, Oxendine's adversary, fired the deadly round. Therefore, the Court noted that a different general rule applied, *i.e.*, that criminal responsibility for a homicide is dependent on proof that the defendant or his agent did the killing. Because, as the Court said, "Walter Oxendine and Proctor Locklear were not acting in concert; they were adversaries," the instruction allowing defendant Walter Oxendine's conviction was fatally flawed and he was entitled to a new trial. *Id.*

As an example of the general rule applicable under the facts of *Oxendine*, the Court quoted the following from *Butler et al. v. The People*, 125 Ill. 641, 645, 18 N.E. 338, 339 (1888): " 'Where the criminal liability arises from the act of another, it must appear that the act was done in furtherance of the common design or in prosecution of the common purpose for which the parties were assembled or conspired together.' " *Id.* In *Butler*, the court reversed a conviction for manslaughter where the defendant, along with several others, resisted arrest for disturbing the peace and in the process the village marshal drew his revolver and accidentally shot a bystander. The court in *Butler* also said:

> It would be a strange rule of law, indeed, to hold a man liable for a crime which he did not commit, which he did not advise, and which was committed without his knowledge or assent, express or implied; and yet, if the conviction in this case is to be sustained, it can only be done by the sanction of such a doctrine.

Butler et al. v. The People, 125 Ill. at 646, 18 N.E. at 340.

In further illustrating its rationale for reversing Walter Oxendine's manslaughter conviction, the Court in *Oxendine* described the following hypothetical:

> Suppose, instead of killing an innocent bystander, Proctor Locklear had killed Dock Wilkins, one of his assailants, would the law, under these circumstances, hold the surviving assailants or confederates . . . criminally responsible for the homicide? We think not. Each took his own chance of being injured or killed by Proctor Locklear when the three made a common assault upon him. They would be responsible for what they did themselves, and such consequences as might naturally flow from their acts and conduct; but they never advised, encouraged or assented to the acts of Proctor Locklear, nor did they combine with him to do any unlawful act, nor did they, in any manner, assent to anything he did, and hence they could not be responsible for his conduct towards the deceased.

State v. Oxendine, 187 N.C. at 662, 122 S.E. at 570. The Court's hypothetical is directly on point with the facts in the case at bar. As in the *Oxendine* hypothetical, the defendants here were aggressors who created a dangerous situation leading to a deadly response by Sergeant Pruitt. Though the hypothetical in *Oxendine* is technically dicta and does not bind the Court in this case, the reasoning apparent in the resolution of the hypothetical discloses the basis for the Court's holding on the actual facts of *Oxendine*.

Additionally, the Court cited two other cases in *Oxendine* that reveal the logic behind its decision. Immediately following the hypothetical discussed above, the Court cited *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905). The defendant in *Moore* sought to rob John Young who, in self-defense and defense of his house, accidentally shot and killed Anderson Young, an innocent bystander. The court in *Moore* said:

> Here the homicide was not committed by the conspirators, either in the pursuance of the conspiracy or at all; but it was the result of action on the part of John Young, the proprietor of the house, in opposition to the conspiracy, and entirely contrary to the wishes and hopes of the conspirators. In order that one may be guilty of homicide, the act must be done by him actually or constructively, and that cannot be, unless the crime be committed by his own hand, or by the hands of some one acting in concert with him, or in furtherance

> of a common object or purpose. The defendants can in no sense be said to have aided or abetted John Young, for he was firing at them; and to hold them responsible criminally for the accidental death of a bystander, growing out of his bad aim, would be carrying the rule of criminal responsibility for the acts of others beyond all reason.

Id. at 99-100, 88 S.W. at 1086. With evident disdain, the court went on to say that such a rule would also mean that a defendant would be criminally responsible for the death of his cofelon at the hands of an opponent. "The illustration carried to this extreme," the court concluded, "exposes the unsoundness of the [State's] position." *Id.* at 101, 88 S.W. at 1086.

Similarly, the Court in *Oxendine* discussed with approval the treatment of a hypothetical by the court in *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 544 (1863). In that hypothetical the Supreme Judicial Court of Massachusetts disavowed criminal liability for homicide on the part of a burglar when a homeowner acting in defense accidentally kills another occupant of the unlawfully entered house. *State v. Oxendine*, 187 N.C. at 662, 122 S.E. at 570.

In light of its language, the reasoning behind its hypothetical, and the citation of authority in *Oxendine*, there can be no doubt that the rule of *Oxendine* requires reversal of the convictions here. There, the Court reversed the conviction for manslaughter because the trial court's instructions permitted conviction where an adversary, not an accomplice, committed the deadly act. Here, though defendants engaged in reckless and dangerous conduct, neither they nor their accomplices committed the fatal act. Instead, Sergeant Pruitt, an adversary to defendants and their accomplices, was responsible for the deaths of Stewart and Gainey. Pruitt was not the agent of defendants, nor did he act in concert with them in a manner that furthered a common design or purpose. On the contrary, his every action was in direct opposition to the criminal scheme in which defendants and their accomplices were engaged. Thus, under the rule of *Oxendine* there can be no criminal liability for felony murder in this case.

The rule established in *Oxendine* is consistent with the prevailing rule in the overwhelming majority of states in this country—that "for a defendant to be held guilty of murder, it is necessary that the act of killing be that of the defendant, and for the act to be his, it is necessary that it be committed by him or by someone

acting in concert with him." Erwin S. Barbre, Annotation, *Criminal Liability Where Act of Killing Is Done By One Resisting Felony or Other Unlawful Act Committed by Defendant*, 56 A.L.R.3d 239, § 2 at 242 (1974); *see also* Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 7.5, at 217 (1986) ("[I]t is now generally accepted that there is no felony-murder liability when one of the felons is shot and killed by the victim, a police officer, or a bystander."). *See, e.g., Wilson v. State*, 188 Ark. 846, 850-52, 68 S.W.2d 100, 101-02 (1934) (adopting agency theory, but holding it does not apply where felon uses victim as a "shield"); *People v. Antick*, 15 Cal.3d 79, 87, 539 P.2d 43, 48 (1975), *superseded by constitutional amendment on another point, People v. Castro*, 38 Cal.3d 301, 696 P.2d 111 (1985); *People v. Washington*, 62 Cal.2d 777, 781-82, 402 P.2d 130, 133-34 (1965) (Traynor, C.J.) ("[t]o invoke the felony-murder doctrine when the killing is not committed by the defendant or by his accomplice could lead to absurd results," describing fact situation almost identical to that here); *Alvarez, Jr. v. Dist. Ct.*, 186 Colo. 37, 525 P.2d 1131 (1974) (no felony murder liability under statute where robbery victim is mistakenly killed by police officer); *Weick v. State*, 420 A.2d 159, 162-63 (Del. Supr. 1980) (no felony murder liability under statute when accomplice is killed by robbery victim); *State v. Crane*, 247 Ga. 779, 780, 279 S.E.2d 695, 696 (1981) (no felony murder under statute when accomplice is killed by burglarized homeowner); *People v. Morris*, 1 Ill. App.3d 566, 570, 274 N.E.2d 898, 901 (1971), and *People v. Hudson*, 6 Ill. App.3d 1062, 1064-65, 287 N.E.2d 41, 43 (1972) (no felony murder liability when accomplice killed by felony victim); *Commonwealth v. Moore*, 121 Ky. 97, 100-02, 88 S.W. 1085, 1086-87 (1905) (no felony murder liability when robbery victim kills bystander while opposing robbery; contrary result "would be carrying the rule of criminal responsibility for the acts of others beyond all reason"); *State v. Garner*, 238 La. 563, 586-87, 115 So.2d 855, 864 (1959) (no felony murder liability when bar patron accidentally kills bystander while defending bartender against felonious assault); *Commonwealth v. Balliro*, 349 Mass. 505, 515, 209 N.E.2d 308, 314 (1965) (felon cannot be held liable for death of any person killed by someone resisting commission of the felony); *People v. Austin*, 370 Mich. 12, 32-33, 120 N.W.2d 766, 775 (1963) (no felony murder liability when accomplice killed by robbery victim); *Sheriff Clark County v. Hicks*, 89 Nev. 78, 82, 506 P.2d 766, 768 (1973) (no felony murder liability when victim of attempted murder kills accomplice; "[t]he killing in such an instance is done, not in the perpetration of,

or an attempt to perpetrate, a crime, but rather in an attempt to thwart the felony"); *State v. Canola*, 73 N.J. 206, 226, 374 A.2d 20, 30 (1977) (no felony murder liability when robbery victim kills accomplice); *People v. Wood*, 8 N.Y.2d 48, 54, 167 N.E.2d 736, 737-39 (1960) (no felony murder liability when robbery victim shoots accomplice); *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 223-37, 261 A.2d 550, 555-60 (1970) (overruling prior case law, adopts agency theory to deny felony murder liability when police officer kills another police officer during attempt to arrest robbers); *Commonwealth v. Redline*, 391 Pa. 486, 508-09, 137 A.2d 472, 482-83 (1958) (overruling prior case law, adopts agency theory to deny felony murder liability when victim kills accomplice); *State v. Severs*, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988) (no felony murder liability when larceny victim kills accomplice); *State v. Hansen*, 734 P.2d 421, 427 (Utah 1986) (felony murder statute limited to death of a person "other than a party"; no felony murder when accomplice killed by opponent of felony); *Wooden v. Commonwealth*, 222 Va. 758, 761-65, 284 S.E.2d 811, 814-16 (1981) (no felony murder liability when robbery victim shoots accomplice).

In one of the cases cited above, *State v. Canola*, 73 N.J. 206, 374 A.2d 20, defendant was convicted of felony murder when the robbery victim shot and killed one of defendant's cofelons. The court noted:

> Conventional formulations of the felony murder rule would not seem to encompass liability in this case. As stated by Blackstone about the time of the American Revolution, the rule was: "[I]f one intends to do another felony, and undesignedly kills a man, this also is murder." . . . A recent study of the early formulations of the felony murder rule by such authorities as Lord Coke, Foster and Blackstone and of later ones by Judge Stephen and Justice Holmes concluded that they were concerned solely with situations where the felon or a confederate did the actual killing. . . . [I]t has been observed that the English courts never applied the felony murder rule to hold a felon guilty of the death of his co-felon at the hands of the intended victim.

Id. at 208-09, 374 A.2d at 21 (citations omitted). The court further noted:

> It is clearly the majority view throughout the country that, at least in theory, the doctrine of felony murder does

> not extend to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful enterprise. . . . This rule is sometimes rationalized on the "agency" theory of felony murder.
>
> A contrary view, which would attach liability under the felony murder rule for *any* death proximately resulting from the unlawful activity—even the death of a co-felon—notwithstanding the killing was by one resisting the crime, does not seem to have the present allegiance of any court.

Id. at 211-12, 374 A.2d at 23 (emphasis in original, footnote and citations omitted).[1] In construing its felony murder statute, the court then concluded:

> [I]t appears to us regressive to extend the application of the felony murder rule beyond its classic common-law limitation to acts by the felon and his accomplices, to lethal acts of third persons not in furtherance of the felonious scheme.

Id. at 226, 374 A.2d at 30. *See also* Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50, 50 (1956) (expansion of the felony murder rule, as urged here, is "socially unwise and . . . based on reasoning not free from substantial analytic and historical errors").

Several appellate courts have noted the "justifiability" of a victim's lethal response as a factor foreclosing the presence of an "unlawful act" required under felony murder statutes. *See People v. Antick*, 15 Cal.3d 79, 91, 539 P.2d 43, 50. As stated by the Supreme Court of Pennsylvania in a case with similar facts:

> In the present instance, the victim of the homicide was one of the robbers who, while resisting apprehension in his effort to escape, was shot and killed by a policeman in the performance of his duty. Thus, the homicide was justifiable and, ob-

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1. The court in *Canola* perhaps overstated the dearth of authority supporting the "proximate cause" theory. Two states, Missouri and Florida, appear to follow the minority "proximate cause" theory. *See Mikenas v. State*, 367 So.2d 606 (Fla. 1978) (express language of state statute makes every participant in a felony guilty of second-degree felony murder when someone is killed "by a person other than the person engaged in the . . . felony"); *State v. Baker*, 607 S.W.2d 153 (Mo. 1980) ("proximate cause" theory extended to case where accomplice is killed by opponent of the felony).

> viously, could not be availed of, on any rational legal theory, to support a charge of murder. How can anyone, no matter how much of an outlaw he may be, have a criminal charge lodged against him for the consequences of the lawful conduct of another person? The mere statement of the question carries with it its own answer.

Commonwealth v. Redline, 391 Pa. at 509, 137 A.2d at 483. *See also People v. Austin*, 370 Mich. at 25, 120 N.W.2d at 771-72 (following *Redline*).

The State argues that for purposes of deterrence we should expand application of the felony murder rule to include cases such as these. Deterrence is a laudable objective of all aspects of the criminal law, but the proposition that criminal offenders not deterred by well-established and proper application of the felony murder rule will be deterred by the markedly broader version urged here is dubious at best.

> [W]here it is sought to increase the deterrent force of a punishment, it is usually accepted as wiser to strike at the harm intended by the criminal rather than at the greater harm possibly flowing from his act which was neither intended nor desired by him; that is to say, for the situations before us, to increase penalties on felonies—particularly armed felonies—wherever retaliatory force can be foreseen, rather than on the relatively rarer occasions when the greater harm eventuates.

Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50, 67. Likewise, "Justice Oliver Wendell Holmes, in *The Common Law*, argued that the wise policy is not to punish the fortuity, but rather to impose severe penalties on those types of criminal activity which experience has demonstrated carry a high degree of risk to human life." *Commonwealth ex rel. Smith v. Myers*, 438 Pa. at 227, 261 A.2d at 554 (citing Oliver W. Holmes, Jr., *The Common Law* 59 (1881)).

Finally, even if we overruled *Oxendine* and expanded the scope of our felony murder rule as the State suggests, we could not uphold these defendants' convictions. Such an expansion of the scope of criminal liability, applied retroactively, would appear to violate defendants' rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. *See Marks v. United States*, 430 U.S. 188, 191-92, 51 L. Ed. 2d

260, 264-65 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 355, 12 L. Ed. 2d 894, 900 (1964); *see also State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991). While the General Assembly could effectively overrule *Oxendine* and impose criminal responsibility for murder under the facts presented, it could only do so prospectively, and the task is properly left to it. "[E]xtension of the felony-murder rule beyond its common law limitation to acts by the felon and his accomplice, to include the legal actions of those not acting in pursuance of the felonious scheme, is an appropriate action for the legislature[,] . . . not the courts." *State v. Severs*, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988).

For the foregoing reasons, we conclude that the trial court erred in denying defendants' motions to withdraw their pleas of guilty of first-degree felony murder. Therefore, we reverse, and remand the causes to the Superior Court, Forsyth County, with instructions to vacate the judgments entered upon defendants' pleas of guilty of first-degree felony murder. Nothing else appearing, our reversal of the felony murder convictions, which apparently prompted arrest of judgment on the underlying armed robbery charges to which defendants pled guilty, removes the legal impediment to entry of judgment and sentence on those charges. *State v. Pakulski*, 326 N.C. 434, 390 S.E.2d 129 (1990).

Reversed and remanded.

STATE OF NORTH CAROLINA v. PATRICK HESTER

No. 362A91

(Filed 10 January 1992)

1. Evidence and Witnesses § 1246 (NCI4th)— murder—confession—16 year old defendant—failure to contact parent or guardian

There was no prejudicial error in a murder prosecution where the trial court precluded inquiry into why the police failed to contact defendant's parent or guardian prior to the interrogation of the sixteen year old defendant. The police fully complied with N.C.G.S. § 7A-595(a), which requires that juveniles in custody be advised of their right to have a parent

or guardian present during questioning, and the failure of the trial court to admit this testimony was clearly harmless.

Am Jur 2d, Evidence § 574.

Voluntariness and admissibility of minor's confession. 87 ALR2d 624.

2. Evidence and Witnesses § 2516 (NCI4th)— murder—interrogation notes—one officer testifying as to another's perceptions—not admissible

The trial court did not err in a murder prosecution by sustaining the State's objections to a series of questions by defense counsel as to why the witness's interrogation notes differed from those of another officer. The witness was not competent to state why the other officer perceived what he did. Furthermore, defendant was allowed to fully explore other discrepancies between the accounts of the two officers. N.C.G.S. § 8C-1, Rule 602.

Am Jur 2d, Evidence § 596.

3. Evidence and Witnesses § 1208 (NCI4th)— murder—confession—admissible—surrounding circumstances—also admissible

The trial court erred in a murder prosecution by sustaining the State's objections to the questions asked of an officer regarding police department policy as to the taking of suspects' statements and his own experience with written, signed, sound-recorded, and videotaped statements. While admissibility is for determination by the judge unassisted by the jury, credibility and weight are for determination by the jury unassisted by the judge. Defense counsel's questions were legitimate and were directed toward eliciting evidence relevant to the credibility and weight of defendant's alleged statement. Moreover, there was a reasonable possibility that a different result would have been reached had the error not been committed. N.C.G.S. § 8C-1, Rule 104(e); N.C.G.S. § 15A-1443(a).

Am Jur 2d, Evidence §§ 526, 532, 534.

4. Evidence and Witnesses § 694 (NCI4th)— evidence excluded—no offer of proof—obvious significance

The fact that defendant did not make an offer of proof was not determinative where the witness was pointedly asked about his own and the department's policies and practices

regarding the taking of statements and the jury would have been provided with a valuable basis on which to evaluate the trustworthiness of defendant's alleged statement. The significance of the witness's answers is obvious from the record.

Am Jur 2d, Trial §§ 440, 441, 443, 446, 447.

Justice MITCHELL dissenting.

Justice WEBB joins in this dissenting opinion.

APPEAL as of right by the defendant, pursuant to N.C.G.S. § 7A-27(a), from a judgment imposing a sentence of life imprisonment for first-degree murder, entered by *Hight, J.*, at the 23 April 1990 Criminal Session of Superior Court, VANCE County. Heard in the Supreme Court 11 December 1991.

Lacy H. Thornburg, Attorney General, by Jane R. Garvey, Assistant Attorney General, for the State.

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

MEYER, Justice.

On 2 January 1990, the grand jury of Vance County indicted defendant for first-degree murder. The case was tried noncapitally at the 23 April 1990 Criminal Session of the Superior Court, Vance County. The jury found the defendant guilty, and he was sentenced to a term of life imprisonment.

At trial, the evidence tended to show the following. On 10 December 1989, at approximately 8:15 p.m., Henderson police responded to a call at a Fast Fare convenience store in Henderson. The call originated with Edwin Bowen, Jr., who upon finding the front door of the store locked, looked inside and saw a great deal of blood and signs of a struggle. Mr. Bowen testified that after notifying the police he continued to observe the interior of the store, where he saw a young black individual moving about inside the rear office. Upon their arrival, the police discovered that the store's front door was locked and observed a large quantity of blood on the floor. Shortly thereafter, a white female covered in blood and naked from the waist down emerged from the rear office and unsuccessfully struggled toward the front door. The officers kicked in the door to gain entrance. The victim, later identified

as Lynn Stainback, died en route to the hospital. The autopsy revealed four stab wounds: one to the chest, one to the abdomen, and two to the back. All of the wounds were consistent with a dagger-type hunting knife found lying on the floor of the store. The chest wound was determined to be the cause of death. No evidence of rape was detected.

Defendant, a sixteen-year-old black youth, became a suspect on 11 December 1989. On that day, defendant was taken to the Henderson police station and subjected to noncustodial interrogation. Defendant allegedly made an oral inculpatory statement in the presence of law enforcement authorities that afternoon. This alleged statement of 11 December was the subject of a motion to suppress prior to trial, and a voir dire was conducted in the absence of the jury. At voir dire, Henderson policeman Robinson testified that he and State Bureau of Investigation Agent Sims informed defendant that he was a suspect in the killing, relating that several witnesses placed him at the store minutes before the murder occurred, and, using a juvenile interrogation sheet, advised defendant of his *Miranda* rights. Robinson testified that defendant said that he understood his rights and that defendant wanted Agent Sims to leave the room so that defendant could speak with Robinson alone. Sims left the room and defendant thereafter confessed to the murder. Robinson further testified that he then told defendant to stop talking, that he inquired whether defendant wanted his parents or others present, that defendant replied "no," and that the interrogation continued after Agent Sims rejoined them. Robinson did not ask defendant to sign a written statement and did not tape-record the interrogation. Agent Sims testified to a similar factual scenario.

Defendant testified on voir dire that he and his friend, Troy Person, were taken to the police station on 11 December. Upon arrival, Person requested to be present during the interrogation of defendant but Robinson refused. Robinson commenced the interrogation by telling defendant that someone saw him kill Stainback and asking defendant when he would admit his guilt. Sims then left the room on his own initiative, and Robinson continued to assert that defendant killed Stainback and urge defendant to confess. Defendant responded that he was not involved. Robinson read defendant his *Miranda* rights, and defendant signed a waiver form. Robinson then asked a series of questions to which defendant did not respond. Person again asked to be present and Robinson again

refused. Defendant specifically denied making the inculpatory statement that Robinson testified defendant had made.

Troy Person testified on voir dire that he was sitting outside the interrogation room and that he could hear the discussions because the door was ajar. According to Person, Robinson kept telling defendant that "you know you killed her" and that defendant kept responding that he "didn't kill her." After the interrogation, defendant told Person and others that he "ain't admitted nothing."

At the conclusion of the voir dire, the trial court ruled that the alleged statement was admissible. When before the jury, Robinson provided similar testimony, adding that defendant steadfastly denied any involvement in the crime at the outset of the interrogation. On direct examination, Robinson was asked by defense counsel about the circumstances surrounding the interrogation. Defense counsel first asked why defendant's parent or guardian was not notified of the imminent interrogation. The trial court sustained the State's objection, and Robinson testified on an offer of proof that he proceeded to the Police Department without making any such contact. Defense counsel also asked Robinson why his written notes of the interrogation varied from Officer Sims' written notes of the same interrogation, and the court sustained the State's objection. When Robinson related that it was department policy "[m]ost of the time" not to have defendants sign statements, defense counsel asked what cases do not "fall into 'most of the time.' " The trial court sustained the State's objection. Defense counsel then asked Robinson whether a defendant had ever signed a confession in one of his cases, and the court sustained the State's objection. In response to an inquiry by defense counsel, Robinson stated that he "seldom" sound-recorded interrogations. Defense counsel further inquired whether that was department policy, and the court again sustained the State's objection. Finally, counsel asked Robinson whether he had ever videotaped an interrogation, and the court sustained the State's objection.

The central question before this Court is whether the trial court acted properly in sustaining the State's objections to the various questions asked of Officer Robinson regarding the circumstances surrounding the alleged statement of defendant.

[1] Defendant first claims that the court erroneously precluded defense counsel inquiry into why the police failed to contact defendant's parent or guardian prior to the interrogation of the defendant,

a sixteen-year-old. We find no merit in this claim. The record shows that during defendant's offer of proof on voir dire, Robinson testified that he specifically asked the defendant whether he wanted to have a parent, guardian, or custodian present during questioning. Defendant responded that he did not wish that a parent, guardian, or other person be present. On this basis, we conclude that the police fully complied with N.C.G.S. § 7A-595(a) (requiring that juveniles in custody must be advised of their right to have a parent or guardian present during questioning) and that the failure of the trial court to admit such testimony, even if error, was clearly harmless.

[2] Defendant also contends that the trial court erred when it sustained the State's objections to a series of questions by defense counsel as to why Officer Robinson's notes of the interrogation of the defendant differed from those of Agent Sims. The trial court first sustained the State's objection to defense counsel's question of Officer Robinson regarding why the respective "perceptions" differed insofar as Robinson believed that defendant appeared to speak in normal tones, while Sims testified that defendant appeared nervous. We conclude that the trial court acted properly in excluding Robinson's response as Robinson was not competent to state why Sims perceived what he did. N.C.G.S. § 8C-1, Rule 602 (1988). Therefore, this claim is without merit.

Further, defendant was allowed to fully explore other discrepancies between the accounts of Sims and Robinson. Defense counsel asked Robinson why his notes differed from those of Sims regarding whether defendant denied having been at the Fast Fare and riding a ten-speed bicycle on the evening of the killing. The court sustained the State's objection to this inquiry. A review of the record, however, reveals that the court's ruling, even if error, was harmless. Robinson testified that "for some reason" he had omitted these facts from his notes but that in fact defendant had denied both that he had been at the Fast Fare and that he had been riding a ten-speed bicycle on the evening of the killing. Robinson further testified that with the exception of such omissions, "in general it's the same report; same information." Therefore, any possible error by the trial court was cured by Robinson's testimony on the matter.

[3] Defendant also contends that the trial court erred when it sustained the State's objections to the questions asked of Officer

Robinson regarding police department policy as to the taking of suspects' statements and his own experience with written, signed, sound-recorded, and videotaped statements. We agree that the court erred in excluding this testimony for the following reasons.

As a threshold matter, it is beyond dispute that the trial court was empowered to make the preliminary determination regarding the admissibility of defendant's alleged statement.[1] However, in the wake of this determination, defendant retained the right "to introduce before the jury evidence relevant to [the statement's] weight or credibility." N.C.G.S. § 8C-1, Rule 104(e) (1988). "Admissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge." *State v. Walker*, 266 N.C. 269, 273, 145 S.E.2d 833, 836 (1966).

A similar question was before this Court in *State v. Sanchez*, 328 N.C. 247, 400 S.E.2d 421 (1991). There, defendant called to the stand a forensic clinical psychologist who testified about defendant's limited intelligence and dependent personality traits. The trial court, however, prohibited the expert from stating his opinion regarding defendant's understanding of the *Miranda* warnings he was given prior to providing police with a confession. We concluded that the trial court erred in excluding the testimony as it concerned defendant's mental condition and hence the weight and credit the jury should lend his confession. "Testimony of this type is clearly admissible as evidence of the surrounding circumstances under which the statements were made. In order for a jury to adequately evaluate the credibility and weight of confessions, [it] must hear all the competent evidence of the surrounding circumstances." *Id.* at 251-52, 400 S.E.2d at 424 (citation omitted).

We find the reasoning in *Sanchez*, and its construction of N.C.G.S. § 8C-1, Rule 104(e), controlling in the instant case. Defense counsel's questions to Officer Robinson regarding policy and practice as to the taking of statements were legitimate and were directed toward eliciting evidence relevant to the credibility and weight of defendant's alleged statement. The questions went to the vital issues of the manner in which Robinson obtained the alleged state-

1. Defendant did not argue at trial or in his briefs or arguments before this Court that error occurred pursuant to Rule 104(b), and we do not address that question here. N.C.G.S. § 15A-1446(b) (1988).

ment and the circumstances attending the making of the statement. At trial, the State introduced evidence intended to convince the jury of the two officers' credibility. Defendant, on the other hand, contended that he never made the statement and tried unsuccessfully to elicit evidence as to why the alleged statement was never signed, sound-recorded, or videotaped in order to discredit the State's position. Department policy and Robinson's past practices and policies regarding taking signed statements and recording interrogations were relevant to the crucial issue of whether defendant did in fact make a statement. If defendant could have shown that Robinson employed signed or recorded statements in the past, defendant potentially could have highlighted Robinson's failure to do so here. On the other hand, if defendant could have shown that Robinson never obtained signed or recorded statements, defendant possibly could have pointed to poor police practices by Robinson as to such vital matters. Under either scenario, the testimony was potentially material to the jury's determination. In short, the testimony excluded by the trial court concerned important "surrounding circumstances" critical to the jury's determination.

Moreover, we conclude as a matter of law that there was "a reasonable possibility that, had the error . . . not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (1988). The evidence presented at trial as to defendant's guilt was far from conclusive. There were no eyewitnesses to defendant's alleged involvement in the killing. The practices of the police themselves subsequent to their arrival at the murder scene raise questions. No officers watched the rear of the store for at least twenty minutes after the police arrived, and the police did not know whether anyone left by the store's rear door after their arrival. Nor, for that matter, were hair and fiber samples from the victim's lower body clothes analyzed, or scrapings taken for analysis from the victim's fingernails.

Further, the forensic tests actually conducted by law enforcement officials were inconclusive. The bicycle defendant allegedly rode the night of the killing was found not to have any blood on it, and while the soles of defendant's tennis shoes were consistent with many imprints found in the store, no blood was detected on the shoes. "Chemical indications" of blood were discovered on defendant's shoelaces, but no typing analysis was done on the substance. Defendant's latent fingerprint was detected on the front door lock of the store in a blood-like substance, but tests were

inconclusive as to whether the substance was in fact blood. Finally, no prints of defendant were discovered on the alleged murder weapon, the knife, and no other fingerprints or palmprints in the store belonged to defendant.

Given the inconclusiveness of the evidence, the alleged statement made by defendant on 11 December assumed central importance to the State's case. We therefore are unable to say that prejudice did not occur as a result of the trial court's erroneous ruling.

[4] Finally, we do not deem it fatal that defense counsel failed to make offers of proof at trial as to what Officer Robinson would have said regarding what department policy was with respect to the various procedures and his own experiences with inculpatory statements. Ordinarily, where the evidence is excluded, the record must show " 'the essential content or substance of the witness's testimony' " before we can determine whether the exclusion prejudiced defendant. *State v. Satterfield*, 300 N.C. 621, 628, 268 S.E.2d 510, 515-16 (1980) (quoting *Currence v. Hardin*, 296 N.C. 95, 100, 249 S.E.2d 387, 390 (1978)). "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985); *see also* N.C.G.S. § 8C-1, Rule 103(a)(2) (1988); N.C.G.S. § 15A-1446(a) (1988).

While defense counsel made no offers of proof, we believe the "essential content" of the excluded testimony and its significance are obvious. Officer Robinson was pointedly asked about his own and the department's policies and practices regarding the taking of statements. His responses would have addressed these important circumstances attending the interrogation, and their significance "is obvious from the record." As discussed above, information related to the policies and practices was critical to the jury's decision-making. Whatever Robinson's answers, the jury would have been provided with a valuable basis on which to evaluate the trustworthiness of defendant's alleged statement. The issues of credibility surrounding the alleged statement were central to the jury's weighing of the significance of the statement. Under the particular facts of this case, the fact that defense counsel failed to make offers of proof is not determinative.

Because we grant defendant a new trial upon our determination that the trial court improperly excluded Officer Robinson's responses to questions by defense counsel, we do not address defendant's other assignments of error. The judgment entered by the Superior Court, Vance County, adjudging defendant guilty of first-degree murder and imposing a sentence of life imprisonment is hereby vacated and this case is remanded to that court for a new trial.

New trial.

Justice MITCHELL dissenting.

The majority concludes that the trial court committed reversible error by sustaining the State's objections to certain questions the defendant asked of Lieutenant R. T. Robinson concerning the circumstances leading up to and surrounding the defendant's confession. Some of the questions had already been answered or were answered at subsequent points in the examination of Robinson by the defendant. Assuming the trial court erred in sustaining the objections to other questions, such errors were harmless.

The majority concludes error was committed when, after Robinson had testified that it was department policy "most of the time" not to have defendants sign statements, the trial court sustained an objection to the defendant's question as to what cases did not "fall into 'most of the time.' " The transcript of the trial reveals, however, that at several points the defendant had already made full inquiry and received full answers from Robinson concerning this matter. Robinson had fully testified that it was not a procedure or policy of his department to have defendants who made statements give written statements and sign them, but that it was departmental policy to have at least two people present when a defendant made a statement. That policy was followed in this case. Robinson testified further that: "When we do require a statement to be signed is when there is a co-defendant. When the defendant is going to testify against another person in court, we do require him to sign a statement." The question as to which the trial court sustained the objection had already been asked and answered, and the trial court did not err by sustaining the objection to the repetitious question.

I agree with the majority that the trial court erred in sustaining objections to the defendant's questions concerning departmental policy with regard to the making of sound-recordings or videotapes of interrogations of suspects. However, Robinson was permitted to testify that his department "very seldom" made sound-recordings of such interrogations. In my view, the trial court's action in sustaining objections to questions concerning departmental policy with regard to the making of sound-recordings and videotapes of interrogations was harmless. The testimony of Lieutenant Robinson before the jury clearly indicated that no such steps were taken in this case, and the defendant had full advantage of any inferences adverse to the State which could be drawn from that fact. Therefore, there is no reasonable possibility that the trial court's rulings in this one narrow area of inquiry affected the result at trial, and any error in this regard was harmless. N.C.G.S. § 15A-1443(a) (1988).

Finally, the majority errs to the extent it rests its holding in this case upon the authority of *State v. Sanchez*, 328 N.C. 247, 400 S.E.2d 421 (1991). As the majority's own analysis of *Sanchez* clearly demonstrates, that case is only remotely similar to the present case and certainly is not controlling here.

I dissent from the decision of the majority which awards this defendant a new trial.

Justice WEBB joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. DOUGLAS PAUL OLSON

No. 283PA90

(Filed 10 January 1992)

1. Criminal Law § 616 (NCI4th) — motion for dismissal — substantial evidence test

On a defendant's motion for dismissal, the trial court must 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. What constitutes substantial evidence is a question of law for the court. Substantial

evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

Am Jur 2d, Criminal Law § 512.

2. Criminal Law § 607 (NCI4th)— motion to dismiss—consideration of evidence

In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom. Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal.

Am Jur 2d, Criminal Law § 512.

3. Homicide § 4 (NCI3d)— first degree murder defined

Murder in the first degree is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation.

Am Jur 2d, Homicide §§ 45, 50-52.

4. Homicide § 4.3 (NCI3d)— premeditation and deliberation defined

Premeditation means the perpetrator thought out the act beforehand for some period of time, however short, but no particular amount of time is necessary. Deliberation means the perpetrator carried out an intent to kill in a cool state of blood and not under the influence of a violent passion or sufficient legal provocation. In this context, the term "cool state of blood" does not mean the perpetrator was devoid of passion or emotion.

Am Jur 2d, Homicide § 52.

5. Homicide § 18 (NCI3d)— premeditation and deliberation—circumstances considered

Some of the circumstances from which premeditation and deliberation may be implied are (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows

after the deceased has been felled and rendered helpless, and (7) the nature and number of the victim's wounds.

Am Jur 2d, Homicide § 52.

6. **Homicide § 21.5 (NCI3d) — first degree murder — premeditation and deliberation — sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of first degree murder on the theory of premeditation and deliberation where it tended to show that defendant broke and entered the victim's house; in the course of rummaging through the victim's belongings, defendant found a .22 caliber revolver and set it out within his reach; when the victim arrived home early from work, defendant picked up the revolver, came out of the bedroom, moved through the hall toward the front door, and fired six shots into the victim's body; and defendant admitted in his statements to officers that he kept shooting at the deceased as he fell.

Am Jur 2d, Homicide § 439.

7. **Robbery § 1.1 (NCI3d) — armed robbery — threat or use of deadly weapon — continuous transaction**

To be found guilty of robbery with a dangerous weapon, the defendant's threatened use or use of a dangerous weapon must precede or be concomitant with the taking, or be so joined by time and circumstance as to be part of one continuous transaction. Where a continuous transaction occurs, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial.

Am Jur 2d, Robbery § 5.

8. **Robbery § 4.3 (NCI3d) — armed robbery — sufficiency of evidence**

The State introduced substantial evidence of defendant's guilt of robbery with a dangerous weapon where such evidence tended to show that defendant broke into the victim's residence and collected a number of items such as a pair of binoculars and four long guns, normally stored under a bed, which he placed near the front door on a chair in preparation for their removal; the victim's gold wedding band and a silver-coated penny which belonged to the victim were discovered in a pillowcase in the possession of defendant after his arrest; and in the process of escaping from the victim's home and removing

these items from the victim's possession, defendant fatally shot the victim with a .22 caliber handgun. This evidence was sufficient to support a reasonable finding that defendant's use of the gun was so joined by time and circumstances to the taking as to make the use of the gun and the taking parts of one continuous transaction.

Am Jur 2d, Robbery § 5.

9. Criminal Law § 468 (NCI4th)— first degree murder—jury argument—request for conviction based on premeditation and deliberation

The prosecutor's jury arguments in this first degree murder case that he would prefer that the jury find defendant not guilty and turn him loose rather than find him guilty of second degree murder, that he did not want the jury "to have to come down to any watered-down theory like felony murder theory," and that the jury should not find defendant guilty of "less than cold-blooded premeditated deliberated murder" were not inflammatory but were proper arguments urging the jury to return a conviction for first degree murder based on premeditation and deliberation. In any event, they were not so grossly improper as to require the trial court to intervene *ex mero motu*.

Am Jur 2d, Homicide §§ 463, 464.

ON a writ of certiorari to review judgments entered on 8 January 1987 by *Beaty, J.*, in Superior Court, MCDOWELL County. Heard in the Supreme Court 17 October 1991.

Lacy H. Thornburg, Attorney General, by Valerie B. Spalding, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by M. Patricia Devine, Assistant Appellate Defender, for defendant-appellant.

MITCHELL, Justice.

The defendant was tried upon proper indictments charging him with the offenses of murder in the first degree, robbery with a dangerous weapon, felonious larceny and two counts of felonious breaking or entering. The jury found the defendant guilty of all offenses as charged. At the conclusion of a capital sentencing proceeding, the jury recommended a sentence of life imprisonment

be entered for the conviction of murder in the first degree. The trial court imposed a life sentence for that offense pursuant to the jury's recommendation. The trial court also entered judgments sentencing the defendant to terms of imprisonment for the other offenses for which he had been convicted. The defendant failed to perfect his appeal in a timely manner. On 29 October 1990, this Court entered an order allowing the defendant's petition for a writ of certiorari to review the judgments entered by the trial court.

The defendant brings forward three assignments of error. First, he contends the trial court erred by denying his motion to dismiss the charge of first-degree murder to the extent that it was based on the theory of premeditation and deliberation. Second, he argues the trial court erred by denying his motion to dismiss the charge of robbery with a dangerous weapon and by denying his motion to dismiss the charge of first-degree murder to the extent that it was based on the underlying felony of robbery with a dangerous weapon. Finally, he maintains the trial court erred by not intervening *ex mero motu* to censor improper jury arguments of the prosecutor. We conclude that the defendant's assignments of error are without merit.

The State's evidence tended to show that Jan Suttles and her husband James Suttles had lived at the same address in Old Fort, North Carolina, for approximately twelve years. On the morning of 19 September 1986, James Suttles left for work between 6:30 a.m. and 6:40 a.m. Jan Suttles testified that she received a call at work that day advising her to return home, at which time she found out her husband had been shot. She went home and noted that the rear window to the den was torn open and broken. Several items were missing from the house, including James Suttles' gold chain, his watch and his grandfather's knife, as well as his wedding band and some of her rings.

Tommy Ellison testified that he lived in Old Fort, about three-quarters of a mile from the Suttles residence. On 19 September 1986, he and his wife came home at about 7:30 p.m. When he opened the front door, he saw mud on the floor that had not been there when he left. He closed the door and called the police. He then went to the back of the house, where he discovered that the glass in the back door was broken out and a .12 gauge shotgun and a metal box containing personal papers were missing.

Sam Porter testified that on 19 September 1986 he was rebuilding a back porch of a house approximately 200 feet from the Suttles residence. He saw the defendant running away from the Suttles residence. The defendant was dressed in blue jeans and a T-shirt and came within ten feet of Porter. The defendant did a "double take" when he saw Porter, but then kept on running until he was out of sight.

SBI Special Agent Bruce Jarvis testified that he received a call to go to Old Fort at approximately 4:25 p.m. on 19 September 1986. On his way to Old Fort, Agent Jarvis drove on Interstate 40 where he noticed a hitchhiker. The man was wearing jeans and a pullover shirt and had bushy brown hair. When Agent Jarvis arrived at the Suttles residence, he was given a general description of the suspected perpetrator. The description fit the hitchhiker he had seen on Interstate 40. Jarvis immediately drove back to Interstate 40 where he found the hitchhiker he had seen earlier; the hitchhiker was the defendant, Douglas Paul Olson.

Upon inquiry, the defendant gave Agent Jarvis a false name and date of birth. The defendant agreed to accompany Agent Jarvis to the police department. He was carrying a pillowcase which was placed in the back of Agent Jarvis' car. Agent Jarvis noticed that the defendant's jeans and hiking boots were wet. At the police department, the defendant insisted he knew nothing of any crime that had been committed. When Agent Jarvis mentioned that the defendant might be photographed or placed in a lineup, the defendant became "aggressively nervous." Agent Jarvis read the defendant his *Miranda* rights and, thereafter, the defendant gave two statements.

In his first statement, the defendant said that he had hitchhiked as far as the Old Fort exit on Interstate 40. He walked off the Interstate and sat down to drink a bottle of wine. Then he walked back towards Old Fort with the intention of breaking into "something" because he needed money. He described breaking into the Suttles residence and rummaging through drawers and closets. He laid three or four long guns on a chair in the living room. He found a .22 caliber revolver in a drawer next to a bed. He also found pennies, some loose and some in a bag. The defendant stated that he then heard the front door open. He grabbed the revolver, walked around the corner from the bedroom, and started shooting at the man in the front doorway. He fired several times.

When the man fell, the defendant dropped the gun and ran out the back door of the house. The defendant stated that he had not actually taken anything from the Suttles residence.

The defendant made a second statement, which was similar to the first in most respects. He again denied having removed any items from the Suttles residence. However, Agent Jarvis inventoried the items in the defendant's pillowcase, which included James Suttles' wedding band and a silver-coated penny. Jan Suttles identified these items at trial as belonging to her husband.

Mika Elliot testified that he was the SBI mobile crime laboratory operator for the Western District of North Carolina. On 19 September 1986, he went to the Old Fort police department where he conducted a gunshot residue test upon the defendant's hands. The results were consistent with the defendant having fired a gun. Agent Elliot then went to the crime scene at the Suttles residence. During his examination, he found one spent projectile from a .22 caliber handgun in the living room, lying behind a chair. Agent Elliot testified that the projectiles taken from James Suttles body were also from a .22 caliber handgun.

Deputy Sheriff Gene Patrick testified that he investigated the break-in and larceny at the Ellison residence on 19 September 1986. He testified that when he spoke with the defendant, the defendant stated that he had broken into the Ellison residence after he had shot James Suttles. The defendant told Deputy Patrick that he had broken the glass in the door, entered the residence, and taken a loaded shotgun and a metal box. He blew open the box with the shotgun. Then he reloaded the shotgun intending to shoot himself, but he could not bring himself to do so. The defendant took Deputy Patrick to the spot on Interstate 40 where he had left the gun and the metal box. At trial, Tommy Ellison identified both the gun and the metal box as having been taken from his home.

Dr. James Bowen testified that he was the regional medical examiner. He performed an autopsy on the body of James Suttles on 20 September 1986. Dr. Bowen discovered a total of six gunshot wounds and recovered four bullets. The gunshot wounds were to the head, the shoulder, the chest, the wrist and the hand. In Dr. Bowen's opinion, two of the wounds would have been fatal. Dr. Bowen testified that James Suttles had probably died within about

five minutes, though he would not have been rendered unconscious immediately.

At the close of the State's evidence, and again at the close of all the evidence, the defendant moved to dismiss the charge of first-degree murder to the extent that it was based on the theory of premeditation and deliberation. The motions were denied. The defendant argues that it was error for the trial court to deny these motions because there was no substantial evidence to support a reasonable inference of premeditation and deliberation.

[1, 2] On a defendant's motion for dismissal, the trial court must 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. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). What constitutes substantial evidence is a question of law for the court. *Id.* To be "substantial," evidence must be existing and real, not just "seeming or imaginary." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Vause*, 328 N.C. at 236, 400 S.E.2d at 61. In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *Id.*

[3, 4] "Murder in the first degree is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Hamlet*, 312 N.C. 162, 169, 321 S.E.2d 837, 842 (1984). Premeditation means the perpetrator thought out the act beforehand for some period of time, however short, but no particular amount of time is necessary. *Id.* Deliberation means the perpetrator carried out an intent to kill in a cool state of blood and not under the influence of a violent passion or sufficient legal provocation. *Id.* at 170, 321 S.E.2d at 842-43. In this context, the term "cool state of blood" does not mean the perpetrator was devoid of passion or 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.*

[5] Premeditation and deliberation are mental processes which are ordinarily not susceptible to proof by direct evidence. In a majority of cases, they must be proved by circumstantial evidence. Some of the circumstances from which premeditation and deliberation may be implied are (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds. *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693 (1986).

[6] In the present case, there was evidence showing an absence of provocation on the part of the deceased; the evidence tended to show that the defendant shot James Suttles without warning as Suttles entered his home when returning from work. The defendant argues that the early return of the deceased from work so startled and panicked the defendant as to result in the "actual provocation" of the killing. We find this argument without merit. The evidence tended to show that in the course of rummaging through the deceased's belongings, the defendant found a .22 caliber revolver and set it out within his reach. When the deceased arrived home early from work, the defendant picked up the revolver, came out of the bedroom, moved through the hall towards the front door, and fired six shots into the deceased's body. In his statement to law enforcement officers, the defendant admitted that he kept on shooting at the deceased until the gun was empty, and that the victim fell as the defendant was shooting. The defendant then proceeded to leave the Suttles residence and break into the Ellisons' house on the way back to Interstate 40. Such evidence was substantial evidence tending to show that the defendant was acting in a cool state of blood after premeditation and deliberation.

Also, the evidence tended to show that the defendant dealt lethal blows after his victim had been felled and rendered helpless. Dr. Bowen testified that there were six gunshot wounds to the head, the shoulder, the chest, the wrist and the hand. Two of the wounds were fatal in nature. He also testified that James Suttles probably lived for about five minutes after the shooting. The defendant admitted in his statements to officers that he kept

shooting at the deceased as he fell. This evidence, standing alone, constituted substantial evidence tending to show premeditation and deliberation. *State v. Fisher*, 318 N.C. 512, 518, 350 S.E.2d 334, 338 (1986). Therefore, the trial court did not err in denying the defendant's motion to dismiss the murder charge to the extent that it was based on the theory of premeditation and deliberation.

The defendant next contends that it was reversible error for the trial court to deny his motion to dismiss the charge of robbery with a dangerous weapon and to deny his motion to dismiss the charge of first-degree murder to the extent it was based on the underlying felony of robbery with a dangerous weapon. We note at the outset that the defendant was convicted of first-degree murder only on the theory of premeditation and deliberation. Therefore, even if the evidence of robbery with a dangerous weapon had been insufficient to support the submission of the felony murder theory to the jury, prejudicial error would not have resulted. As the jury did not find the defendant guilty of any charges based on a felony murder theory, any possible error in its submission to the jury would be harmless. *State v. Green*, 321 N.C. 594, 606, 365 S.E.2d 587, 594, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988).

[7] Under N.C.G.S. § 14-87(a), robbery with a dangerous weapon is: "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Beatty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982). To be found guilty of robbery with a dangerous weapon, the defendant's threatened use or use of a dangerous weapon must precede or be concomitant with the taking, or be so joined by time and circumstances with the taking as to be part of one continuous transaction. *State v. Hope*, 317 N.C. 302, 306, 345 S.E.2d 361, 364 (1986). Where a continuous transaction occurs, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial. *Green*, 321 N.C. at 605, 365 S.E.2d at 594.

[8] Applying the foregoing principles to the case *sub judice*, we conclude that the State introduced substantial evidence of the defendant's guilt of robbery with a dangerous weapon. The evidence tended to show that the defendant broke into the Suttles residence and collected a number of items such as a pair of binoculars and four long guns, normally stored under a bed, which he placed near

the front door on a chair in preparation for their removal. Also, the victim's gold wedding band and a silver-coated penny which belonged to the victim were discovered in a pillowcase in the possession of the defendant after his arrest. In the process of escaping from the victim's home and removing these items from the victim's possession, the defendant used a .22 caliber handgun and fatally wounded James Suttles. This evidence was sufficient to support a reasonable finding that the defendant's use of the gun was so joined by time and circumstances to the taking as to make the use of the gun and the taking parts of one continuous transaction.

The defendant argues that this case is similar to *State v. Richardson*, 308 N.C. 470, 302 S.E.2d 799 (1983). In *Richardson*, the undisputed evidence showed that an altercation ensued between the defendant and the victim, during which the defendant struck the victim with a stick. The victim threw his duffel bag, which contained his wallet, at the defendant in an effort to protect himself during the fight. The evidence conclusively showed that the defendant did not have the intent at that time to deprive the victim of his property. It was only later, after the victim had left the scene, that the defendant discovered the victim's wallet as he rummaged through the duffel bag. We indicated that the use of a dangerous weapon by the defendant in *Richardson* was separate and distinct from the taking of the victim's property and that they were not parts of one continuous transaction. The facts in the present case are not similar in any meaningful way to those presented in *Richardson*. Therefore, the defendant's motions to dismiss the charge of robbery with a dangerous weapon and of first-degree murder based on the underlying felony of robbery with a dangerous weapon were properly denied by the trial court.

[9] Finally, the defendant maintains that the prosecutor made prejudicial statements during his final argument at the guilt-innocence determination phase which require a new trial. These statements were not objected to at trial. Therefore, our review is limited to the narrow question of whether the prosecutor's statements were so grossly improper as to require the trial judge to correct them *ex mero motu*. *State v. Hamlet*, 312 N.C. 162, 172, 321 S.E.2d 837, 844 (1984); *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 defendant takes exception to statements advanced by the prosecutor during closing arguments concerning the possible ver-

dicts the jury could reach in the present case. He argues that these statements were inflammatory and improperly influenced the jurors in their deliberations. In support of this contention, he points to the prosecutor's statement to the jury that "before you find Mr. Olson guilty of any second degree murder, I'd rather you just come out here and find him not guilty and turn him loose and let the deputy sheriff put him back on Interstate 40 to go his merry way." The prosecutor further stated that he did not want the jury "to have to come down to any watered-down theory like felony murder theory." The prosecutor indicated that the jury should not find the defendant guilty of "less than cold-blooded premeditated deliberated murder."

It is well settled that counsel is given wide latitude in arguing to the jury and may argue facts which have been presented at trial as well as any reasonable inferences which may be drawn from them. *Hamlet*, 312 N.C. at 172, 321 S.E.2d at 844. Further, it is proper during jury argument for the prosecutor to ask for the highest degree of conviction and the most severe punishment available. *Id.* at 174, 321 S.E.2d at 845; *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979). In the present case, the prosecutor urged the jury to return a conviction for murder in the first degree based on premeditation and deliberation. His statements in this regard were within the discretion afforded him during jury argument. *See State v. Rogers*, 323 N.C. 658, 374 S.E.2d 852 (1989). Certainly, they were not so grossly improper as to require the trial court to intervene *ex mero motu*.

The defendant received a fair trial free of prejudicial error.

No error.

DOROTHY L. M. POTTER v. THE HOMESTEAD PRESERVATION ASSOCIATION, HERMAN I. BRETAN, AND WILLIAM BRETAN

No. 146A90

(Filed 10 January 1992)

1. **Appeal and Error § 422 (NCI4th)— appellee's presentation of additional questions—purpose of Rule 28(c)**

The purpose of N.C. R. App. P. 28(c) is to permit an appellee who obtains relief at trial to seek a new trial because of trial errors material to the claim upon which relief was granted in lieu of having judgment n.o.v. entered on appeal when such relief is sought by the appellant. Therefore, plaintiff could invoke Rule 28(c) only if she were arguing trial error material to her *quantum meruit* claim which she successfully prosecuted at trial but could not invoke that rule on her claim for breach of contract which she lost in the trial court.

Am Jur 2d, Appeal and Error §§ 184, 185.

2. **Appeal and Error § 32 (NCI4th)— consideration of question by Supreme Court—suspension of appellate rule—exercise of supervisory jurisdiction**

Although plaintiff appellee failed to cross-assign as error pursuant to N.C. R. App. P. 10(d) the trial court's entry of a directed verdict for defendants on her claim for breach of an oral partnership agreement to develop land, the Supreme Court invoked Appellate Procedure Rule 2 and exercised its supervisory power over the trial divisions to consider whether plaintiff is entitled to a new trial on her breach of contract claim where the record reflects that plaintiff's contract claim was dismissed because the trial court erroneously assumed, as did plaintiff, that plaintiff was barred by the statute of frauds from recovering on that claim, and without that erroneous assumption plaintiff would have been entitled to pursue at trial her remedies under the law of partnership.

Am Jur 2d, Courts §§ 111, 116, 117.

3. **Partnership § 1.1 (NCI3d)— showing partnership by conduct**

Even without proof of an express agreement to form a partnership, a voluntary association of partners may be shown by their conduct.

Am Jur 2d, Partnership § 205.

4. **Partnership § 1.1 (NCI3d); Frauds, Statute of § 6.1 (NCI3d)— oral partnership agreement—land development—statute of frauds inapplicable**

An oral partnership agreement to develop and sell real property is not within the statute of frauds.

Am Jur 2d, Partnership § 98.

5. **Partnership § 1.2 (NCI3d)— oral partnership agreement to develop land—breach of contract—sufficiency of evidence**

Plaintiff's evidence was sufficient for the jury to find that plaintiff and defendants entered into an oral partnership agreement to develop and sell land and that defendants breached this agreement where it tended to show that plaintiff and defendants agreed to develop two tracts of land as partners; each partner was to own a one-fourth interest in the tracts and profits from the sales; one tract was sold and the proceeds were divided on this basis; plaintiff performed various services to enhance, manage and market both tracts; plaintiff expected no remuneration for these tasks because her rendering of these services was her contribution to the partnership; and defendants refused to share with plaintiff the profits from the sale of the second tract.

Am Jur 2d, Partnership § 233.

6. **Partnership § 3 (NCI3d)— oral partnership—recovery of share of profits—remedies**

A copartner may pursue any appropriate legal or equitable remedy to recover his proportionate share of the profits of an oral partnership. These remedies include an action for breach of contract or dissolution, winding up, and distribution of partnership assets under North Carolina's Uniform Partnership Act. In the event remedies under the law fail to give relief, a partner may be entitled to pursue a partnership interest through such remedies in equity as an equitable lien based upon fraud or an equitable trust based upon unjust enrichment.

Am Jur 2d, Partnership §§ 560 et seq.

7. Partnership § 3 (NCI3d); Quasi Contracts and Restitution § 1.1 (NCI3d)— contributions to partnership—express contract—quantum meruit

A partner who can establish an oral partnership agreement governing real property is not entitled to recover in *quantum meruit* but is limited to remedies afforded under partnership law. Should plaintiff fail to prove the existence of an express contract, he or she is not foreclosed from recovery in *quantum meruit* if a contract can be implied and the reasonable value of plaintiff's services can be drawn from the evidence.

Am Jur 2d, Partnership §§ 560, 571.

ON appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 97 N.C. App. 454, 389 S.E.2d 146 (1990), finding no error in an order entered out of session by consent on 29 December 1988 by *Briggs, J.*, following trial during the 31 October 1988 session of Superior Court, YANCEY County. Heard in the Supreme Court 11 December 1990.

Norris and Peterson, P.A., by Staunton Norris and Allen J. Peterson, for defendant-appellants.

Moore, Lindsay & True, by Stephen P. Lindsay, for plaintiff-appellee.

EXUM, Chief Justice.

The principal issue presented in this appeal is whether a partner who can establish an oral partnership agreement governing real property is entitled to recovery in *quantum meruit* for her contributions to the partnership. We hold that she is not. Her remedies are limited to those afforded her under partnership law.

This is an action for breach of a partnership agreement allegedly governing two tracts of land and, in the alternative, recovery in *quantum meruit*. As to one tract the trial court entered a directed verdict against plaintiff but submitted her *quantum meruit* claim to the jury. We conclude (1) the trial court erred in directing a verdict against plaintiff; (2) plaintiff's claim for breach of the partnership agreement should have been submitted to the jury; and (3) if plaintiff can establish the partnership agreement and its breach

for the fact finder, she may not rely on the doctrine of *quantum meruit.*

In a complaint filed 28 August 1987 plaintiff alleges an oral partnership agreement with defendants to develop two tracts of land in Yancey County, one consisting of 400 acres, the other of 700 acres. Among plaintiff's claims for relief are breach of contract (the partnership agreement) and recovery in *quantum meruit* for services rendered in locating, developing, and marketing both tracts.

At trial, plaintiff presented evidence tending to show the following:

In 1971 plaintiff, who held an option to buy both tracts, agreed with defendants Herman and William Bretan to develop both tracts on a partnership basis. A fourth partner, Milton Wind, was subsequently included in the partnership. Each partner was to own one-fourth interest in the property and profits from sales. Each had particular responsibilities: Herman Bretan was to handle the "legal part," William Bretan and plaintiff were to market lots or "memberships," and Mr. Wind was to provide capital. In April 1971 both parcels were sold to Caisse Corporation, represented to plaintiff as defendants' "holding company."

The 400-acre parcel was sold on 16 November 1983 by Caisse Corporation for $260,000. Three of the partners—plaintiff, William Bretan, and Mr. Wind—met on 31 December 1983 to discuss the division of the sales proceeds. From the sales proceeds William Bretan deducted $52,000 to pay off the mortgage; $68,000 to "repay" Herman Bretan; $35,000 to restore a house on the 700-acre tract; and $10,000 for a timber cruise. William Bretan was to get $25,000 as a bonus for selling the land, and $40,000 was retained in a "war chest" for any legal fees incurred regarding the remaining property. This accounting left $10,000 for each of the three partners present at the meeting.

The 700-acre parcel was transferred in March 1972 to Homestead Preservation Association, a nonprofit corporation formed in 1971 by Herman Bretan. The partnership agreed to divide the acreage into 100 one-acre lots; the remainder was to be roads and common area. Plaintiff was titular president. Proceeds from the sale of the lots or "memberships" were deposited into "The Dorothy Potter Trust Account," to which plaintiff had no access. Plaintiff alleges she spent six to seven months every spring and summer over

the next twelve years showing, promoting, developing, and improving the 700-acre tract and its buildings, but was never compensated therefor.

In addition, plaintiff testified she wrote to the Bretans on 20 June 1984 as president of the Association, requesting a meeting be called and a full accounting be given of the property and its funds. On 24 August 1984 she again wrote, asking for a list of Association members and their mailing addresses and stating that, as president, she was calling for an annual meeting to be held after Thanksgiving. By letter dated 27 August 1984, Herman Bretan informed plaintiff she had been relieved of the office of president by vote of the board of directors and that she had been removed as director of the Association by action of the membership.

The trial court entered directed verdicts in favor of defendant Homestead Preservation Association and in favor of the individual defendants on all plaintiff's claims except those based on breach of contract regarding the 400-acre parcel and *quantum meruit* regarding the 700-acre piece. Restricted to consideration of these two claims, the jury found the Bretans had breached a contract under which plaintiff was to receive one-fourth of the net profits from the sale of the 400-acre tract, entitling her to $12,500. It found in addition that she had rendered valuable services to the individual defendants relative to the 700-acre tract, for which she was entitled to recover $200,000. The trial court entered judgment accordingly, but allowed defendant's motion for a remittitur of the $200,000, reducing it to $110,000 because the award was contrary to the trial court's instructions that lost profits could not be considered on that claim.

The Court of Appeals held, first, defendants had failed to raise at trial or to make the subject of an assignment of error their contention that plaintiff's services with regard to the 700-acre tract had necessarily been for the benefit of the tract owner, the Association, rather than for them personally. Thus the issue was not properly before the appellate court, N.C. R. App. P. 10(b). The Court of Appeals nonetheless concluded that the argument was meritless because plaintiff's evidence tended to support her allegations that the Association was in effect the *alter ego* of defendants and that services rendered regarding the property, which "defendants now treat . . . as their own," benefited them. 97 N.C. App. at 460, 389 S.E.2d at 149. Second, plaintiff's claims were not barred by

the statute of limitations because her cause of action accrued on 27 August 1984, when she was notified by Herman Bretan that her association with the Bretans was terminated. Third, the evidence supported the jury's verdict for $12,500 lost profits from the sale of the 400-acre tract, and "would support one much higher" since William Bretan's accounting erroneously included unauthorized deductions. *Id.* at 460, 389 S.E.2d at 150. Fourth, the evidence "well supported" the $110,000 award for plaintiff's services and responsibilities on behalf of the Association, even though the evidence included no estimations of the numbers of days and hours worked nor of the monetary value of the services performed, because plaintiff's "services and responsibilities were limited only by the calendar and should be paid on that basis." *Id.* at 461, 389 S.E.2d at 150.

> The law does not require courts or jurors to be oblivious to what is commonly known by others, and it is a matter of common knowledge that the nation has a minimum wage law; that virtually no one, including the unskilled, works for less than that; that any kind of regular service performed over a long period of time has substantial value; and that reliable managerial, caretaking and promotional services requiring constancy, initiative, judgment, and the ability to deal with and direct others is several times more valuable still.

Id.

Judge Greene, concurring in part and dissenting in part, disagreed only with the award based on *quantum meruit*, opining plaintiff's evidence of the reasonable value of her services "consisted of extremely general statements about the nature of the services and of a time period during which they allegedly occurred." *Id.* at 463, 389 S.E.2d at 151. Plaintiff offered no evidence as to her skill, knowledge, the time spent, or the customary rate of compensation for such services. The dissent specifically rejected supplanting such proof with "common knowledge" of such facts as the minimum wage law. In addition, plaintiff failed to offer evidence that her services were "accepted and appropriated" by the defendants. *Id.*

The only question before us is the propriety of the *quantum meruit* award, which the Court of Appeals affirmed by divided vote.

In her brief before this Court plaintiff argues that the evidence supports a partnership agreement between herself and the Bretans

and that her claim for relief based on breach of contract regarding the 700-acre parcel was erroneously dismissed by the trial court. Plaintiff objected to the trial court's refusal to submit this issue to the jury, but she did not appeal from the verdict and judgment because it was favorable to her.

Without taking an appeal, a plaintiff is nevertheless entitled to "cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order or other determination from which appeal has been taken." N.C. R. App. P. 10(d). Plaintiff now argues the trial court erroneously entered a directed verdict on her breach of contract claim regarding the 700-acre parcel, but she failed to cross-assign error to that determination. The scope of this Court's review is confined to consideration of the assignments of error set out in the record on appeal. N.C. R. App. P. 10(a).

[1] Plaintiff proposes that the proper theory of recovery under the circumstances of this case is an equitable trust to prevent defendants' unjust enrichment. Plaintiff invokes N.C. R. App. P. 28(c), as authorization for her argument that, despite having made no cross-assignments of error, she is entitled to a new trial on the issue of damages, based on this theory of recovery.

Rule 28(c) provides, in pertinent part:

> Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant.

N.C. R. App. P. 28(c).

Under the circumstances of this case, Rule 28(c) would apply only to those claims upon which plaintiff has prevailed in the trial court. Appellate review of the dismissal of a claim is preserved by cross-assignment of error under N.C. R. App. P. 10(d). The purpose of cross-assignments of error is "[to protect] appellees who have been deprived in the trial court of an alternative basis in law on which their favorable judgment could be supported, and who face the possibility that on appeal prejudicial error will be found in the ground on which their judgment was actually based."

State v. Wise, 326 N.C. 421, 428, 390 S.E.2d 142, 146 (1990) (quoting *Carawan v. Tate*, 304 N.C. 696, 701, 286 S.E.2d 99, 102 (1982). The purpose of Rule 28(c) is to permit an appellee who obtains relief at trial to seek a new trial because of trial errors material to the claim upon which relief was granted in lieu of having judgment n.o.v. entered on appeal when such relief is sought by the appellant. Here, plaintiff could invoke Rule 28(c) only if she were arguing trial error material to her *quantum meruit* claim which she successfully prosecuted at trial. She may not invoke that rule on a claim for breach of contract which she lost in the trial court.

[2] Nevertheless, this Court may suspend the requirements of any of the Rules of Appellate Procedure, including Rule 10(d), to prevent manifest injustice to a party. N.C. R. App. P. 2. Here, the record reflects plaintiff's contract claim regarding the 700-acre tract was dismissed because the trial court erroneously assumed, as did plaintiff, that plaintiff was barred by the statute of frauds from recovering on that claim. But for this erroneous assumption plaintiff would have been entitled to pursue at trial her remedies under the law of partnership. We conclude this case calls for the invocation of Appellate Procedure Rule 2 and the exercise of this Court's supervisory power over the trial divisions. N.C. Const. art. IV, § 12(1). We consider, therefore, whether plaintiff is entitled to a new trial on her breach of contract claim. We conclude that she is.

[3] "A contract, express or implied, is essential to the formation of a partnership." *Eggleston v. Eggleston*, 228 N.C. 668, 674, 47 S.E.2d 243, 247 (1948) (quoting 40 Am. Jur. *Partnership* § 20 (1942)). "A partnership may be formed by an oral agreement." *Campbell v. Miller*, 274 N.C. 143, 149, 161 S.E.2d 546, 550 (1968). Even without proof of an express agreement to form a partnership, a voluntary association of partners may be shown by their conduct. *Eggleston v. Eggleston*, 228 N.C. at 674, 47 S.E.2d at 247. A finding that a partnership exists "may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such."

> [A] course of dealing between the parties of sufficient significance and duration . . . along with other proof of the fact [may] be admitted as evidence tending to establish the fact of partnership, provided it has sufficient substance and definiteness

> to evince the essentials of the legal concept, including, of course, the necessary intent.

Id.

[4] Property acquired by purchase or otherwise on account of the partnership is partnership property, as is property acquired with partnership funds, unless a contrary intention appears. N.C.G.S. § 59-38(a), (b) (1989). Partnership property may be held and conveyed by fewer than all partners. *See* N.C.G.S. § 59-40 (1989). A partner's interest in partnership assets—including real property—is a personal property interest. N.C.G.S. § 59-56 (1989); *Bright v. Williams*, 245 N.C. 648, 651, 97 S.E.2d 247, 250 (1957). As such, it is not subject to the statute of frauds.

> [T]he general rule supported by the great preponderance of the authorities on the subject is that a parol partnership agreement or joint enterprise entered into by two or more persons for the express purpose of carrying on the business of purchasing and selling real estate, or interests therein, for speculation, the profits to be divided among the parties, is not within the statute of frauds relating to the sale of land or an interest in lands. In other words, such an agreement may be entered into, become effectual, and be enforced although not in writing.

72 Am. Jur. 2d *Statute of Frauds* § 73 (1974). *Cf. Ludwig v. Walter*, 75 N.C. App. 584, 331 S.E.2d 177 (1985) (when land is owned individually by one *entering* the partnership, that property cannot become a partnership asset absent some written agreement sufficient to satisfy the statute of frauds).

[5] Plaintiff presented evidence as to the formation and provisions of an oral partnership agreement and of partnership conduct—including the division of proceeds from the sale of the 400-acre parcel—corroborating that agreement. This evidence was buttressed, in addition, by plaintiff's, Mr. Wind's, and others' testimony detailing the services plaintiff performed to enhance, manage, and market both tracts. Plaintiff also testified she expected no remuneration for these tasks because her rendering these services was her contribution to the partnership. That such contributions are not monetary or that she did not hold a deed to either tract is immaterial to plaintiff's status as partner.

> [I]t is not necessary to a partnership that property or capital involved in it should belong in common to the parties to the contract. On the contrary, a familiar type of partnership . . . occurs where the services of the one party is balanced against the capital furnished by the other; and the statement that the property must be held in common before plaintiff can recover is error.

Eggleston v. Eggleston, 228 N.C. at 677, 47 S.E.2d at 249.

We hold the evidence and the law support plaintiff's allegation that she was a partner holding a one-fourth interest in the 700-acre tract of land and that this theory of the case should have been submitted to the jury.

[6] Under the rule that a parol partnership agreement is enforceable, a "copartner or joint venturer may pursue any appropriate legal or equitable remedy to recover his proportionate share of the profits of such undertaking," 72 Am. Jur. 2d *Statute of Frauds* § 73 (1974). These remedies may include an action for breach of contract or dissolution, winding up, and distribution of partnership assets under North Carolina's Uniform Partnership Act. *See generally* N.C.G.S. §§ 59-59 through -73 (1989); *Bright v. Williams*, 245 N.C. at 651, 97 S.E.2d at 250. In the event remedies under the law fail to give relief, a partner may be entitled to pursue a partnership interest through such remedies in equity as an equitable lien based upon fraud or an equitable trust based upon unjust enrichment. *See, e.g., Lewis v. Boling*, 42 N.C. App. 597, 257 S.E.2d 486 (1979) (plaintiff partner's evidence sufficient to show grounds for imposing constructive trust on conveyed partnership property). The partner's right to such equitable remedies, however, "does not exist for any practical purpose until the affairs of the partnership have to be wound up, or the share of a partner has to be ascertained. Such a lien based on fraud does not come into existence until actual dissolution occurs." *Wolfe v. Hewes*, 41 N.C. App. 88, 91, 254 S.E.2d 204, 206 (1979) (citation omitted). In other words, plaintiff must pursue her legal remedies first.

Quantum meruit, a measure of recovery for the reasonable value of material and services rendered by the plaintiff, is an equitable remedy based upon a contract implied in law. *Thormer v. Lexington Mail Order Co.*, 241 N.C. 249, 252, 85 S.E.2d 140, 143 (1954). *Quantum meruit* is not an appropriate remedy when the plaintiff has alleged an express, oral contract.

[7] Should plaintiff be able to establish for the fact finder the existence of a partnership agreement with reference to the 700-acre tract, she has adequate legal remedies under the law of partnership. In that event she would be precluded from invoking the equitable doctrine of *quantum meruit*. Should she fail to prove the existence of an express contract, she is not foreclosed from recovery in *quantum meruit* if a contract can be implied and the reasonable value of her services can be drawn from the evidence. *E.g.*, *Flying Service v. Martin*, 233 N.C. 17, 20, 62 S.E.2d 528, 530 (1950) ("One may sue on an express contract and recover on an implied contract unless the allegation is such as to mislead the defendant.").

The trial court erred in entering a directed verdict for defendant on plaintiff's claim for breach of the partnership agreement with regard to the 700-acre tract. That claim should have been submitted to the jury for determination. If the jury determines there was a partnership agreement as plaintiff has alleged and offered evidence to prove and that defendants breached the agreement, plaintiff would be entitled to all the relief the law of partnership allows. We accordingly reverse the Court of Appeals decision insofar as it affirmed the *quantum meruit* award, vacate the trial court's judgment on plaintiff's *quantum meruit* award, and remand the case to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. WILL WILLIAMS

No. 141A90

(Filed 10 January 1992)

1. Criminal Law § 477 (NCI4th)— jury misconduct—adequately investigated

The trial court adequately investigated a report of jury misconduct where it was alleged that a juror who was eventually seated had stated that defendant deserved the death penalty; both the trial court and defendant questioned the potential juror to whom the statement was allegedly made; defense counsel appeared satisfied with the investigation and

himself recognized that the allegation serving as the basis of the inquiry was double hearsay; the defendant made no motion for further investigation; and the trial court's findings are supported by substantial evidence and support its conclusions.

Am Jur 2d, Trial §§ 1637-1640, 1646.

2. **Burglary and Unlawful Breakings § 101 (NCI4th)— breaking or entering with intent to commit murder—evidence of intent sufficient**

The evidence was sufficient to support a guilty verdict for breaking or entering with the intent to commit murder where there was substantial evidence of defendant's intent to murder the victim at the time of the breaking or entering in that defendant shot and killed the victim. The jury may find the defendant's intent at the time of the breaking or entering from his subsequent acts.

Am Jur 2d, Burglary § 52.

3. **Burglary and Unlawful Breakings § 99 (NCI4th)— breaking or entering—lack of consent—evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss a felony murder charge which was based on breaking or entering with felonious intent where defendant contended that the State failed to show that he acted without the consent of the owner when he entered the residence. The evidence tended to show that defendant broke down the locked front door to gain entry into the house, and that evidence alone was sufficient to support a finding of a lack of consent. However, the evidence further showed that defendant's estranged wife, who was living in the house, specifically told defendant that she did not want to talk to him and that she did not open the locked door. Although defendant speculated that the owner may have given defendant consent as she left the scene and defendant arrived, no evidence was presented to support that argument and the State need not disprove every possibility that could exonerate defendant.

Am Jur 2d, Burglary § 64.5; Homicide §§ 35, 46, 72.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by

Grant, J., at the 6 October 1989 Criminal Session of Superior Court, BERTIE County, upon a jury verdict of guilty of first- degree murder. On 22 April 1991 the Supreme Court granted the defendant's motion to bypass the Court of Appeals on his appeals from related assault and breaking or entering convictions. Heard in the Supreme Court on 14 October 1991.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

On proper bills of indictment, the defendant was tried and convicted of the first-degree murder of Michael Bazemore on the basis of the felony murder rule (N.C.G.S. § 14-17), assault with a deadly weapon with the intent to kill inflicting serious injury on Delores Bazemore (N.C.G.S. § 14-32(a)), breaking or entering with the intent to commit murder, and breaking or entering with the intent to commit an assault with a deadly weapon inflicting serious bodily injury (N.C.G.S. § 14-54(a)). Having concluded that no evidence tended to show any aggravating circumstance, the trial court sentenced the defendant to life imprisonment for the first-degree murder. The trial court sentenced the defendant to a consecutive term of twenty years for the assault but arrested judgment on the convictions of breaking or entering.

The defendant appealed, assigning three principal errors to his trial. We find no error.

The State's evidence tended to show that on 3 January 1989, the defendant began beating Delores Faye Bazemore, his girlfriend of six years, striking her numerous times in the back and stomach. The defendant continued to beat Delores that evening until he had to leave for work around 4:00 a.m. Thereafter, Delores also went to work but called her sister to come and get her about 9:00 a.m. On the 3rd or 4th of January, Delores moved into the home of her mother, Wilma Bazemore, at 710 Ghent Street, in Roper, North Carolina. Delores' daughter, Lavern Speller, and her brother, Michael Bazemore, also lived there.

During the next week, the defendant called Delores numerous times to ask if she was coming back to him. Delores told the

defendant that she was not coming back and did not want to see him again. On 12 January, the defendant called Delores and said, "It's raining. I don't have to go to work today. Do you want me to pick you up?" Delores responded, "No. Will, I told you. It's over." The defendant replied, "That's what you think."

Savanna Ganor testified that about 9:00 a.m. on 12 January, the defendant came to her house on Ghent Street near the Bazemore residence. The defendant asked if she had seen Michael Bazemore. Ms. Ganor replied that she had not. The defendant then left.

Later that morning, around 10:30 a.m., the defendant came to the Bazemore residence. Delores and her daughter Lavern were sitting in the living room in the front of the house. Lavern first noticed the defendant in the driveway. She told her mother and then went to her bedroom. The defendant came to the front door which was locked. Without opening the door, Delores asked the defendant, "What do you want?" The defendant said, "I want to talk to you." Delores replied, "No, you don't, because I already told you I didn't want to talk to you any more. Didn't I tell you I didn't want you up here around Vern, being drinking?" The defendant said, "That's all right." The defendant turned to walk away but then said, "I've got something for you."

Delores went into the kitchen to telephone the police. While on the telephone, she heard a crash. The defendant broke down the front door and entered the house with a pistol in his hand. At this time, Michael Bazemore was in the kitchen. Delores went into the bathroom and closed the door. Michael said to the defendant, "Man, what are you doing? Don't do that. Stop. Leave." The defendant attempted to push Michael out of the way. The gun the defendant held was fired once or twice. Michael groaned, walked into the bedroom, and fell to his knees.

The defendant then shouted for Delores. He pushed open the door to the bathroom where Delores was hiding. The defendant said to Delores, "Didn't I tell you that if you ever leave me and don't come back, I would kill you?" The defendant then shot Delores four times. After the shooting stopped, Delores was able to stand. She called her sister who then called the police.

Michael Bazemore died at the scene. An autopsy revealed that the cause of death was a gunshot wound to the heart. Delores was treated for four gunshot wounds. Two bullets were removed

from her head. One bullet remains behind her left ear and another in her left arm. The single bullet removed from Michael's body and the two bullets removed from Delores were fired from the .32 caliber pistol the defendant used in the assault.

The defendant presented no evidence.

[1] The defendant argues under his first assignment of error that the trial court erred by not adequately investigating a report of jury misconduct. Due process requires that a defendant have "a panel of impartial, 'indifferent' jurors." *State v. Rutherford*, 70 N.C. App. 674, 677, 320 S.E.2d 916, 919, *disc. rev. denied*, 313 N.C. 335, 327 S.E.2d 897 (1985) (quoting *Irvin v. Dowd*, 366 U.S. 717, 6 L. Ed. 2d 751 (1961)). The trial court has the duty to insure that jurors for the case being tried remain impartial and uninfluenced by outside persons. *Id.* at 677, 320 S.E.2d at 919. The trial court also has the responsibility to make such investigations as may be appropriate, including examination of jurors when warranted, to determine whether misconduct has occurred and, if so, whether such conduct has resulted in prejudice to the defendant. *State v. Drake*, 31 N.C. App. 187, 191, 229 S.E.2d 51, 54 (1976). The trial court's determination must be made on the facts and circumstances of the particular case. *Id.* at 190, 229 S.E.2d at 54. "The determination of the existence and effect of juror misconduct is primarily for the trial court whose decision will be given great weight on appeal." *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991).

The defendant in the present case alleged that juror Limuel Capehart who was eventually seated had stated to Vince McGee, a prospective juror who was eventually excused, that the defendant deserved the death penalty. The defendant alleged this before the trial court during jury selection. The defendant contended that juror Anthony Best talked to McGee who said that he had heard Capehart say that the defendant deserved the death penalty. The trial court called Vince McGee, who had already been excused from jury service, back to the courthouse. Both the trial court and defense counsel questioned McGee about his alleged conversation with Capehart. McGee denied that he heard juror Capehart state that the defendant deserved the death penalty. McGee said that the only conversation he had regarding the trial occurred after he was excused. In that conversation, he told Best that he had been excused because of his religious convictions. The trial

court found that no conversation occurred between McGee and Capehart and, therefore, there was no basis for the defendant's allegation of jury misconduct.

In the present case, the trial court conducted a thorough investigation. Both the trial court and defense counsel questioned McGee. Defense counsel appeared satisfied with the investigation of the trial court and himself recognized that the allegation serving as the basis of the inquiry was double hearsay and was, thus, tenuous at best. The defendant made no motion for further inquiry after the examination of McGee. The trial court's findings are supported by substantial evidence and, in turn, support its conclusions. We conclude that the trial court did not err. *See State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991); *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987); *O'Berry v. Perry*, 266 N.C. 77, 145 S.E.2d 321 (1965). The defendant's first assignment of error is without merit.

[2] In his second assignment of error, the defendant contends that the evidence was insufficient to support the jury's verdict of guilty on the charge of breaking or entering the Bazemore residence with the intent to commit murder. 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. *Bonney*, 329 N.C. at 76-77, 405 S.E.2d at 154.

> 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. at 77, 405 S.E.2d at 154 (quoting *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). Furthermore, 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.* 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.*

The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. N.C.G.S. § 14-54(a) (1986). The breaking or entering must be without the consent of the owner or occupant. *State v. Boone*, 297 N.C. 652, 658, 256 S.E.2d 683, 687 (1979). The defendant argues that the trial court's instructions on the charge of breaking or entering with the intent to commit murder allowed the jury to convict if at the time of the breaking or entering the defendant had the intent to murder Michael Bazemore. The defendant argues that there was not substantial evidence supporting this theory of conviction. We conclude, however, that there was substantial evidence of the defendant's intent to murder Michael at the time of the breaking or entering.

The criminal intent of the defendant at the time of breaking or entering may be inferred from the acts he committed subsequent to his breaking or entering the building. *State v. Wilson*, 315 N.C. 157, 162-63, 337 S.E.2d 470, 474 (1985); *State v. Joyner*, 301 N.C. 18, 30, 269 S.E.2d 125, 133 (1980). In other words, the jury may find the defendant's intent at the time of the breaking or entering from his subsequent acts. *Wilson*, 315 N.C. at 163, 337 S.E.2d at 474. *See also State v. Gray*, 322 N.C. 457, 461, 368 S.E.2d 627, 629 (1988) (and citations listed therein).

In *Wilson*, the defendant argued that the evidence was insufficient to support the charge of felonious breaking or entering with the intent to commit larceny. *Wilson*, 315 N.C. at 162, 337 S.E.2d at 474. The defendant in *Wilson* argued that he entered the house with the intent to commit rape, not larceny as charged in the indictment. *Id.* This Court concluded that the acts the defendant committed after he entered the house were substantial evidence of his intent to commit those acts at the time he broke into and entered the home. *Id.* at 163, 337 S.E.2d at 474. We also concluded that when a defendant unlawfully entered a home and committed two crimes therein, the jury should not be precluded from finding that he entered with the dual purpose of committing both of those crimes. *Id.*

Similarly, in the present case, the defendant argues that there was no evidence to support the theory that he entered with the intent to kill Michael. The fact that the defendant shot and killed Michael was substantial evidence that the defendant broke or entered the Bazemore residence with the intent to do so. Therefore, the

evidence was sufficient to support the guilty verdict for breaking or entering with the intent to commit murder. This assignment of error is without merit.

[3] The defendant finally assigns error to the trial court's denial of his motion to dismiss the murder charge, to the extent it was based on the theory of felony murder, because the State's evidence was insufficient to support a conviction for the underlying felony of breaking or entering with felonious intent. The defendant argues in support of this assignment that the State failed to show that he acted without the consent of the owner when he entered the Bazemore residence. In order to convict of breaking or entering, the State must prove lack of consent by the owner or occupant of the building entered. *Boone*, 297 N.C. at 659, 256 S.E.2d at 687. The indictment alleged that the owner of the residence was Wilma Bazemore. The State presented no direct testimony by Wilma Bazemore at trial to show that she had not consented to the defendant's entry into the residence. We conclude, however, that in the present case the State presented substantial evidence that the defendant lacked consent to enter the Bazemore residence.

In *State v. Sanders*, 280 N.C. 81, 185 S.E.2d 158 (1971), the defendant assigned error to the trial court's refusal to dismiss all charges because the evidence was insufficient to prove burglary. *Id.* at 84, 185 S.E.2d at 161. The defendant contended that the State's evidence failed to show that the defendant did not have permission to be in the building. *Id.* In that case, the janitor discovered the defendant and his accomplice while they were attempting to break into a safe in a building at night after it was closed. *Id.* at 85, 185 S.E.2d at 161. Two glass shop windows were broken, which allowed the defendants to enter the building. *Id.* This Court stated, "Nothing in the evidence warrants finding defendant had permission to enter the building." *Id.*

Similarly in the case at bar, the defendant contends that the State did not prove that he lacked consent of the owner or occupant to enter the Bazemore residence. However, evidence tended to show that the defendant broke down the locked front door to gain entry into the house. This evidence alone was sufficient to support a finding that the defendant lacked consent to enter the residence. Furthermore, the evidence tended to show that Delores Bazemore specifically told the defendant she did not want to talk to him and that she did not open the locked front door. We conclude

that the evidence of the breaking down of the locked front door of the residence was substantial evidence that the defendant lacked consent to enter. Therefore, the trial court did not err in its denial of the defendant's motion.

The defendant also contends that Wilma Bazemore, the owner of the residence alleged in the indictment, possibly gave the defendant consent to enter the house. Wilma apparently left for work at approximately the same time the defendant arrived at the Bazemore residence on the morning of 12 January. No evidence was presented to support the defendant's speculative argument. The State need not disprove every possibility that could exonerate the defendant. *State v. Bunn*, 79 N.C. App. 480, 481, 339 S.E.2d 673, 674 (1986). The State need only present substantial evidence of the defendant's guilt. *Id. See State v. Stephens*, 244 N.C. 380, 93 S.E.2d 431 (1956). This assignment of error is without merit.

For the reasons stated, we find no error in the convictions of first degree murder, assault with a deadly weapon with the intent to kill inflicting serious bodily injury, breaking or entering with intent to commit murder, and breaking or entering with the intent to commit an assault with a deadly weapon inflicting serious bodily injury. The defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. ROBERT JOSEPH DRDAK

No. 107PA91

(Filed 10 January 1992)

1. **Evidence and Witnesses § 2671 (NCI4th) — unconscious driver — blood test at hospital — physician-patient privilege**

Evidence as to a DWI defendant's blood alcohol level was admissible where the blood alcohol level was revealed in a blood test performed while the unconscious defendant was being treated at a hospital, the district attorney filed a motion to compel disclosure of the defendant's medical records, the records were ordered disclosed, and defendant objected but

did not appeal. The Court noted that the physician-patient privilege is entirely a creature of statute and that such information may be disclosed under N.C.G.S. § 8-53 if in the opinion of the trial judge disclosure is necessary to the proper administration of justice.

Am Jur 2d, Automobiles and Highway Traffic §§ 377, 378.

Admissibility in criminal case of blood alcohol test where blood was taken from unconscious driver. 72 ALR3d 375.

2. Automobiles and Other Vehicles § 813 (NCI4th)— DWI—unconscious driver—blood test—admissible

The trial court did not err in denying a DWI defendant's motion to suppress the results of a blood test where the blood for the test was drawn at a hospital while he was unconscious. Other competent evidence of defendant's blood alcohol level is admissible under N.C.G.S. § 20-139.1(a), in addition to that obtained from chemical analysis pursuant to N.C.G.S. § 20-16.2 and N.C.G.S. § 20-139.1. The evidence here meets the requirements necessary to provide a proper foundation for the admission of the blood alcohol test results, and none of defendant's constitutional rights have been violated because his constitutional arguments rest on the flawed contention that the State is limited to evidence of blood alcohol concentration procured in accordance with the procedures of N.C.G.S. § 20-16.2.

Am Jur 2d, Automobiles and Highway Traffic §§ 375-377.

3. Evidence and Witnesses § 2064 (NCI4th)— DWI—witnesses at scene of accident—opinion of impairment

There was no error in a DWI prosecution concerning testimony from lay witnesses as to whether defendant was impaired by the consumption of alcohol where the court instructed the jury to disregard that testimony.

Am Jur 2d, Automobiles and Highway Traffic § 376.

4. Automobiles and Other Vehicles § 813 (NCI4th)— DWI—cross-examination of officer—blood test requirements

The trial court did not err in a DWI prosecution involving a blood test by not allowing defendant to cross-examine an officer concerning the requirements of N.C.G.S. § 20-139.1(b) where the court properly determined that the testimony in question was admissible as other competent evidence pursuant

to statute and that the requirements of chemical analysis under N.C.G.S. § 20-139.1(b) were irrelevant to this case.

Am Jur 2d, Automobiles and Highway Traffic §§ 377, 380.

ON discretionary review of the decision of the Court of Appeals, 101 N.C. App. 659, 400 S.E.2d 773 (1991), reversing the judgment of *Allen (W. Steven), J.*, entered on 15 November 1989 and ordering a new trial in the Superior Court, FORSYTH County. Heard in the Supreme Court on 16 October 1991.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.

D. Blake Yokley and Donald K. Tisdale for defendant-appellee.

MARTIN, Justice.

The dispositive issue on this appeal is whether the Court of Appeals erred in reversing the trial court's order denying defendant's motion to suppress the medical records of defendant that showed his blood alcohol level to be 0.178. We hold that the court did so err and, therefore, reverse the decision of the Court of Appeals.

The evidence offered by the State showed that on 14 February 1989 at 5:00 p.m. the defendant, Robert Drdak, met a fellow Federal Bureau of Investigation agent, at Shober's Restaurant in Winston-Salem. They each drank a beer while discussing a case and then made plans to meet for dinner at 7:30 p.m. The defendant arrived for dinner at the fellow agent's home at 7:30 p.m. in a black 1985 Chevrolet Monte Carlo. Between 7:30 and 10:00 p.m., the defendant drank two scotch and waters before dinner, a portion of a glass of wine with dinner and a glass of cognac after dinner. Around 10:00 p.m. the defendant left driving the Monte Carlo in which he had arrived.

That same evening, Terry Austin and John Allgood were meeting with Judith Kay in her home at 360 Staffordshire Road. About 10:05 p.m. they heard a "dull thump" and went outside to investigate. Although it was dark they discovered that a vehicle had struck a tree across the street. Ms. Austin moved her car and shined her headlights toward the passenger side of the wrecked car. She opened the passenger door of the wrecked vehicle and found the defendant unconscious and lying on his right side on

the front seat. Ms. Austin reached in and supported the defendant's head until help arrived about twenty minutes later.

After notifying the police of the crash, Ms. Kay joined Ms. Austin outside to aid the defendant. Both Ms. Austin and Ms. Kay were in close proximity to the defendant, and each noticed a moderate odor of alcohol on his breath.

Scott Emerson, an emergency medical technician employed with Forsyth County Medical Services, responded to Judith Kay's call and arrived at the collision scene at 10:18 p.m. While Mr. Emerson examined the defendant for injuries he detected a moderate odor of alcohol on his breath.

Officer Lichtenhan arrived at the collision scene at about 10:35 p.m. His report indicated that on the night of the collision road conditions were dry, that the road surface was of coarse asphalt with no painted center lines, that there were no tire marks on the surface leading to the defendant's vehicle, that from his recollection there were no restrictions regarding parking on the street, and that the speed limit in that area was 35 miles per hour. Officer Lichtenhan was informed that the defendant had been transported to Forsyth Memorial Hospital by emergency personnel.

Following his investigation at the crash scene, Officer Lichtenhan proceeded to the emergency room of the hospital, arriving around 11:40 p.m. He observed that the defendant was seriously injured and detected a slight odor of alcohol about him. Officer Lichtenhan stated in his report that the defendant had been drinking, but he was unable to form an opinion that the defendant was impaired. He did not order a blood sample to be analyzed for blood alcohol content.

Officer Lichtenhan returned to the hospital on 21 February 1989 to interview the defendant. Mr. Drdak stated that he could not recall the collision, but knew he had not been wearing his seat belt because it was broken.

Dr. Daniel Sayers attended to the defendant upon his arrival at the Forsyth Memorial Hospital emergency room and ordered a routine series of laboratory tests including one for blood ethanol level. Jo Annette Matthews, a phlebotomist employed by Forsyth Memorial Hospital laboratory, received the request that blood samples be taken from the defendant. She drew blood samples from the defendant between 10:50 and 11:00 p.m. using an iodine

prep that contained no ethanol alcohol. She delivered the samples to the appropriate laboratory for testing.

Kathleen Thore, a medical technologist with the Forsyth Memorial Hospital laboratory, analyzed the defendant's blood on 14 February 1989. The defendant's blood alcohol concentration result was 0.178 grams per milliliter of blood. Pursuant to hospital procedure, the results were recorded, and the blood samples were discarded after seven days.

On 22 February 1989, the Winston-Salem Journal reported the blood alcohol content of the defendant's blood. This information was obtained by the newspaper without the district attorney's knowledge or consent. On 1 March 1989 the district attorney filed a motion to compel disclosure of the defendant's medical records.

The following facts were stipulated by the State and counsel for the defendant for the purposes of the defendant's pretrial motion to suppress the laboratory results:

(1) On 21 February 1989 the defendant refused to release any medical records to the police.

(2) Neither Forsyth Memorial Hospital or its agents authorized the release of the defendant's blood tests.

(3) On 22 February 1989, the Winston-Salem Journal reported that "confidential hospital records" in their possession indicated that FBI Agent Robert Drdak was driving while impaired with a blood alcohol content of 0.178 grams per milliliter of blood.

[1] We hold that the evidence as to defendant's blood alcohol level was admissible. On 1 March 1989, the district attorney filed a motion to compel disclosure of defendant's medical records. This motion was heard at a plenary hearing on 9 March 1989, and the records were ordered disclosed to the State. Although defendant objected, he did not appeal this order. Therefore, the evidence as to defendant's blood alcohol level was properly in the possession of the State.

It is to be noted that the physician-patient privilege has no common law predecessor and is entirely a creature of statute. *State v. Martin*, 182 N.C. 846, 109 S.E. 74 (1921). N.C.G.S. § 8-53 sets forth the procedure to compel disclosure of information which ordinarily is protected by the doctor-patient privilege. Such information may be disclosed by order of the court if in the opinion of

the trial judge disclosure is necessary to the proper administration of justice. This decision is one made in the discretion of the trial judge, and the defendant must show an abuse of discretion in order to successfully challenge the ruling. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

The defendant urges us to hold that disclosure pursuant to N.C.G.S. § 8-53 should only be allowed in more serious cases such as involuntary manslaughter. We reject this invitation and adhere to our previous rulings that it is a matter in the trial judge's discretion whether to allow disclosure pursuant to the statute.

[2] The Court of Appeals held that the trial judge erred in denying defendant's motion to suppress because the blood test was not performed according to the procedure authorized under N.C.G.S. §§ 20-16.2 and 20-139.1. This contention of the defendant flies squarely in the face of the plain reading of the statute, N.C.G.S. § 20-139.1(a), which states: "This section does not limit the introduction of other competent evidence as to a defendant's alcohol concentration, including other chemical tests." This statute allows other competent evidence of a defendant's blood alcohol level in addition to that obtained from chemical analysis pursuant to N.C.G.S. §§ 20-16.2 and 20-139.1.

For the results of the blood test in the present case to be admissible, the State must produce evidence as to a proper foundation to sustain its admissibility. The State showed that the hospital's blood alcohol test was performed less than an hour after the defendant's car crashed into the tree, that an experienced phlebotomist withdrew the blood sample under routine procedure pursuant to the doctor's orders, and that a trained laboratory technician analyzed the blood sample using a Dupont Automatic Clinical Analyzer which was capable of testing either whole blood or serum. The result was 0.178 grams per milliliter of blood. The result was recorded and relayed to the attending physician by computer screen in order to assist him in his determination of appropriate treatment of the defendant. The results of the test were made a part of the medical records of the hospital in the defendant's case. This evidence meets the requirements necessary to provide a proper foundation for the admission of the blood alcohol test results. *Robinson v. Ins. Co.*, 255 N.C. 669, 122 S.E.2d 801 (1961). This Court has held such results admissible in other cases prior to the adoption of the implied consent statute. *E.g.*, *State v. Collins*, 247 N.C. 244, 100 S.E.2d

489 (1957); *State v. Moore*, 245 N.C. 158, 95 S.E.2d 548 (1956); *State v. Willard*, 241 N.C. 259, 84 S.E.2d 899 (1954).

The language allowing "other competent evidence" as to a suspect's blood alcohol level has been in the statute since it was first enacted and is a part of the amended statute which will take effect 1 January 1993.

The Court of Appeals relied upon *State v. Bailey*, 76 N.C. App. 610, 334 S.E.2d 266 (1985), for the proposition that the State must meet the requirements of N.C.G.S. § 20-139.1 prior to the admission of any blood alcohol test results. In *Bailey* the hospital refused to withdraw blood at the request of a law enforcement officer. The officer obtained a search warrant and seized a blood sample from the hospital. It is arguable whether *Bailey* addresses the issue upon which the Court of Appeals relied in its opinion in the present case. Insofar as *Bailey* is inconsistent with the opinion of this Court, it is overruled. We hold that the evidence was properly admitted by the trial judge.

The defendant brings forward several issues that were argued before the Court of Appeals, but were not discussed by that court. We find no merit in any of these arguments. Defendant argues that the admission of this evidence violated his due process rights under the United States Constitution and under article I, sections 19 and 23 of the North Carolina Constitution. First, the defendant argues that he was denied his physician-patient privilege. This argument has been resolved adversely to the defendant as set forth above. Second, by using the results of the blood alcohol test by the hospital, the State has avoided the necessity of a finding of probable cause by the arresting officer before a chemical test can be ordered as required by N.C.G.S. § 20-16.2(a). As discussed above, it is the holding of this Court that the obtaining of the blood alcohol test results in this case was not controlled by N.C.G.S. § 20-16.2(a) and did not have to comply with that statute because the test in question is "other competent evidence" as allowed by N.C.G.S. § 20-139.1. Third, the defendant argues that the destruction of the blood sample by the hospital prior to his arrest violated his right of confrontation under article I, section 23 of the North Carolina Constitution. The blood sample was not destroyed by the State, but by the hospital in the regular course of its hospital procedures. The State cannot be held responsible for the actions of the hospital in this respect. Unless a defendant can show bad

faith on the part of the police, failure to preserve potentially useful evidence by the State does not constitute a denial of due process. *See Arizona v. Youngblood*, 488 U.S. 51, 102 L. Ed. 2d 281 (1988). The defendant has failed to show any such bad faith on the part of the State or police in this case.

Basically, the defendant's constitutional arguments must fail because of defendant's flawed contention that the State is limited to evidence of blood alcohol concentration which was procured in accordance with the procedures of N.C.G.S. § 20-16.2. This defective argument results from the failure of the defendant to recognize the "other competent evidence" clause provided in N.C.G.S. § 20-139.1(a). We hold that none of the constitutional rights of the defendant have been violated.

[3] Next, the defendant argues that testimony by lay witnesses as to their opinion concerning whether the defendant was impaired by the consumption of alcohol when observed by the witnesses at the scene of the collision was improperly admitted. However, our review of the transcript indicates that no such opinion testimony was admitted. The testimony of Judith Kay regarding her opinion that the defendant was drunk was stricken from the record, and the court instructed the jurors that they should not consider that testimony. The same is true as to the testimony of Scott Emerson. Further the testimony of Judith Kay, "looks like you have a DWI on your hands," was stricken by the trial judge, and the jury was instructed to disregard that testimony. When a court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured. *State v. Smith*, 301 N.C. 695, 272 S.E.2d 852 (1972). We find no merit in these arguments by the defendant.

[4] Finally, the defendant argues that the trial judge should have allowed him to cross-examine the police officer concerning the requirements of N.C.G.S. § 20-139.1(b). In this respect, the defendant was attempting to get before the jury that the hospital lab blood test did not meet the requirements of N.C.G.S. § 20-139.1(b). The trial judge properly determined that the requirements of chemical analysis under N.C.G.S. § 20-139.1(b) were irrelevant to this case. This is so because the testimony in question in this case was admissible as "other competent evidence" pursuant to the statute. There is no merit to this assignment of error.

In conclusion, it is the holding of this Court that the hospital's evidence of the defendant's blood alcohol concentration was admissible in this case. This evidence was admissible under the "other competent evidence" exception contained in N.C.G.S. § 20-139.1, and it is not necessary for the admission of such "other competent evidence" that it be obtained in accordance with N.C.G.S. § 20-16.2. The decision of the Court of Appeals is

Reversed.

JEAN L. SIKES v. JAMES M. SIKES

No. 282A90

(Filed 10 January 1992)

1. **Divorce and Separation § 392 (NCI4th) — interim child support order — permanent retroactive order**

A district court may enter an interim order for child support in which it contemplates entering a permanent order at a later time and may at such later time enter an order retroactive to the earlier order which requires larger child support payments than originally required. Since the time the permanent order was entered was the first time a determination on the merits of the issue of child support was made, no showing of an emergency situation or change of circumstances was necessary and the statute prohibiting the modification of past due child support payments did not come into play. N.C.G.S. § 50-13.1.

Am Jur 2d, Divorce and Separation §§ 1035, 1052.

2. **Divorce and Separation § 392 (NCI4th) — interim child support order — subsequent permanent order — retroactive payment for special education**

Where the court entered an interim order for child support which contemplated entry of a permanent order at a later time, the permanent order could properly require defendant to pay retroactively a portion of the costs for special education received by one of the children.

Am Jur 2d, Divorce and Separation § 1045.

3. Divorce and Separation § 554 (NCI4th)— child support—attorney fees—refusal to provide adequate support

Although the evidence showed that defendant had paid the amount of child support that he had been ordered to pay by an interim order, the court's finding that he had refused to provide adequate child support was supported by evidence that defendant refused to pay the amount set by the court as adequate until he was ordered to do so by the court.

Am Jur 2d, Divorce and Separation § 1056.

Justice MITCHELL dissenting.

Justices MARTIN and MEYER join in this dissenting opinion.

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, 98 N.C. App. 610, 391 S.E.2d 855 (1990), affirming an order of *Leonard, J.*, entered on 6 February 1989 in District Court, WAKE County. Heard in the Supreme Court 15 November 1990.

This is an appeal by the defendant from a decision of the Court of Appeals which held that the district court did not err in entering an order for retroactive child support. The parties to this action had been married but are now divorced. Four children were born to the marriage.

On 21 August 1986 the plaintiff brought an action for custody of the children and for child support. The defendant filed an answer, and the matter came on for hearing in October of 1986 in Wake County District Court before Judge L. W. Payne. The record does not disclose the contents of that hearing. In January of 1987, Judge Payne sent notice to the parties' attorneys that an order was due and should be presented to the court by 20 February 1987. On 23 February 1987 Judge Payne ordered counsel to appear in court to report the status of the case and the reason for the order not having been drafted. Thereafter, counsel met in chambers with Judge Payne, who signed an interim order on 10 March 1987 as follows:

> Upon a conference in Chambers with Counsel for the Plaintiff and the Defendant, on March 6, 1987, and upon representations that the custody of the two minor children Derick Brendon Sikes and Warren James Sikes will be transferred to the Plaintiff, the undersigned Judge of the District Court of Wake Coun-

ty, North Carolina, is of the opinion that an Interim Order regarding custody and support of the two minor sons of the parties, Derick Brendon Sikes and Warren James Sikes, should be entered, pending further negotiations and possible agreement between the parties on certain matters.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED:

1. That upon entry of this order, the Defendant shall physically transfer custody of the two minor sons to the Plaintiff.

2. The Defendant, by consent, shall pay to the Plaintiff for the support and maintenance of the two minor children, the sum of $200 per month per child, commencing with the entry of this Order for March, 1987, and a like sum on or before the 10th day of each and every month thereafter until an agreement between the parties with respect to an appropriate level of child support can be reached, or absent such agreement, until further Orders of this Court. The said monthly amount specified herein shall be without preference or prejudice as to a subsequent determination of an appropriate level of child support.

3. The parties and their respective Counsel are instructed to immediately negotiate and diligently attempt to reach an agreement with respect to an appropriate level of monthly child support, an apportionment of unreimbursed hospital, medical and dental expenses, and an apportionment of the expenses of psychological counseling currently being provided by Ms. Rosie Zeigler.

4. In the absence of such agreement, and upon motion of either party, this Court will make such determination of child support and apportionment of hospital, medical, dental, and psychological expenses on March 20, 1987, based upon the financial circumstances at that time and enter an Order.

The parties again failed to come to an agreement on the issue of child support. A hearing was held on 22 October 1987 before Judge Jerry W. Leonard. At the close of the second day of testimony, the matter had not concluded and was continued. Hearing of the case was not resumed until 5 January 1988, when the hearing was concluded. The trial court received evidence concerning the parties' respective present incomes and expenses, actual past and

present expenses of the children, the youngest son's educational needs, and other evidence. On 2 March 1989, Judge Leonard entered an order making findings and conclusions and ordering the defendant (1) to pay child support in the amount of $300.00 per month per child, (2) to pay $4,600.00 in back child support dating from March 1987, (3) to provide insurance coverage for the parties' children and be responsible for all costs of medical and dental care not covered by insurance, (4) to contribute to the private school expenses incurred for the youngest son from March 1987 through completion of the school year in 1988, and (5) to pay a portion of the plaintiff's attorney's fees. The defendant appealed.

The Court of Appeals affirmed the order of the district court with one judge dissenting. The defendant appealed to this Court.

Donald H. Soloman, P.A., for plaintiff appellee.

Ragsdale, Kirschbaum, Nanney, Sokol & Heidgerd, P.A., by William L. Ragsdale, C. D. Heidgerd, and Connie E. Carrigan, for defendant appellant.

WEBB, Justice.

[1] The question posed by this appeal is whether a district court may enter an interim order for child support in which it contemplates entering a permanent order at a later time and at such later time enter an order retroactive to the earlier order which requires larger child support payments than originally required. We hold that a district court may do so.

It is clear from reading Judge Payne's order that the order was not intended to determine the issue of child support. It set an amount of child support which was consented to by the parties in contemplation of setting a different amount if the parties could agree upon such an amount and if they could not agree, child support would be set by the court after a hearing. We hold that this was within the court's jurisdiction.

The defendant argues that he paid all he was required to pay under the order of 10 March 1987 and he cannot be ordered to pay more. The defendant relies on N.C.G.S. § 50-13.10 which provides in part as follows:

> (a) Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason[.]

The defendant argues that pursuant to this section, when each payment he has made became due it vested and could not be modified. The defendant also relies on *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963), for the proposition that a court may not order an increase in child support retroactively without some evidence of an emergency situation and on *Ellenberger v. Ellenberger*, 63 N.C. App. 721, 306 S.E.2d 190, *reversed in part; affirmed in part*, 309 N.C. 631, 308 S.E.2d 714 (1983), for the proposition that there must be a showing of a change in circumstances before child support payments may be changed. Neither *Fuchs*, *Ellenberger* nor N.C.G.S. § 50-13.10 are applicable to this case. We agree with the Court of Appeals that at the time the order of Judge Leonard was entered in March of 1989, it was the first time a determination on the merits of the issue of child support was made. The amount of child support was fixed at this time. No showing of an emergency situation or a change in circumstances as required by *Fuchs* and *Ellenberger* was necessary. Until a final order was entered as to child support N.C.G.S. § 50-13.10 did not come into play.

The defendant also argues that the district court ordered him to pay arrearages which it could not do. He says an arrearage in child support is an amount of child support which is overdue and unpaid, which is not the case in this action. We agree with the Court of Appeals that reference in the order to arrearages was a misnomer which did not prejudice the defendant.

[2] The defendant also argues that it was error to order him to pay a portion of the costs for special education for one child of the parties. There was evidence that one of the children of the parties suffered with a mild mental retardation and needed special education in a private school. The court ordered the defendant to pay in part for the special education which the child had received.

The defendant argues that for the same reasons the court could not order him to increase his child support payments retroactively, it could not order him to pay retroactively for this special education. We agree with the defendant that the same principles apply to the order for retroactive child support and the order to pay for the special education the child had received. For that reason, it was not error for the court to order the defendant to pay for the special education.

[3] The defendant next contends that it was error to require him to pay a part of the plaintiff's attorney fees. He argues that pursuant to N.C.G.S. § 50-13.6, when an action involves only child support the court must find as facts that (1) a party is acting in good faith, (2) has insufficient means to defray the expense of the suit, and (3) the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action. *See Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980). The court made findings of fact which would support the award of attorney fees to the plaintiff. The defendant argues that there was not evidence to support a finding of fact that he had refused to provide adequate child support because the evidence showed he had paid the amount of child support that he had been ordered to pay. It is undisputed in this case that the defendant refused to pay the amount set by the court as adequate until he was ordered to do so by the court. This supports this finding of fact.

The defendant also argues that before ordering him to pay attorney fees the court should have made some finding as to his ability to pay. He cites no authority for this proposition. The court made extensive findings of fact as to the income and expenses of both parties. These findings of fact demonstrate that the defendant has the ability to pay as ordered by the court.

The decision of the Court of Appeals is affirmed.

Affirmed.

Justice MITCHELL dissenting.

I believe the Court of Appeals erred in affirming the trial court's order directing that the defendant pay "past-due" child support of $100 per month per child for two children from March 1987 to March 1989. The applicable statute expressly provides that: "Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or *otherwise modified in any way for any reason* in this State or any other state. . . ." N.C.G.S. § 50-13.10(a) (1987) (emphasis added). Other courts which have considered the issue have disallowed retroactive modification of court-ordered child support. *See* Emile F. Short, Annotation, *Retrospective Increase in Allowance for Alimony, Separate Maintenance, or Support*, 52 A.L.R.3d 156 (1973). Our statute,

N.C.G.S. § 50-13.10, requires the same result. Further, even before the most recent modification of that statute, North Carolina law provided that where, as here, parties have entered into a consent order providing for the custody and support of their children, any modification of such order must be based upon a showing of substantial change in circumstances affecting the welfare of the children. *Woncik v. Woncik*, 82 N.C. App. 244, 346 S.E.2d 277 (1986). No such showing or finding of a substantial change was made in this case.

Further, the defendant in the present case paid each child support payment as it became due and vested. When the trial court entered its order modifying the defendant's obligation for child support, it was faced with a situation in which neither any arrearages nor any past-due child support payments were involved. The defendant had fully complied with the earlier order for child support and had made each child support payment when it became due and vested. Therefore, the trial court was without authority to retroactively modify its earlier order of child support. *See id.; see generally Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

I believe the Court of Appeals also erred in affirming the trial court's award of attorney's fees in this case. Before a trial court may award attorney's fees in a support action, there must be evidence and the court must find that the party ordered to furnish support refused to provide support which was adequate under the circumstances at the time the action was instituted. *Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980); N.C.G.S. § 50-13.6 (1987). Here, the trial court failed to find the amount of support which was adequate at the time the action was instituted. At the time this action was instituted, the defendant had all of the children of his marriage to the plaintiff in his care and custody. No evidence tends to show that the defendant failed to provide adequate support or that he had any obligation to pay the plaintiff any amount for child support at the time the action was instituted. Therefore, the trial court erred in ordering the defendant to pay the plaintiff's attorney's fees.

For the foregoing reasons, I dissent from the decision of the majority affirming the decision of the Court of Appeals.

Justices MEYER and MARTIN join in this dissenting opinion.

McGLADREY, HENDRICKSON & PULLEN, A PARTNERSHIP (FORMERLY A. M. PULLEN & CO.) v. SYNTEK FINANCE CORPORATION (FORMERLY THE WASHINGTON GROUP, INCORPORATED)

No. 184A90

(Filed 10 January 1992)

Costs § 37 (NCI4th)— action to require dividend—attorney fees—shareholder entitled to recover

The trial court erred by denying plaintiff's motion to require defendant to pay its attorney fees where defendant had paid a dividend to all other preferred stockholders but contended that plaintiff had released any claim to a dividend in the settlement of a prior action, plaintiff sought to have defendant pay the dividend to it, the Court of Appeals ordered on appeal that summary judgment be entered for plaintiff, and plaintiff moved for attorney fees. Plaintiff is entitled to attorney fees under the plain language of N.C.G.S. § 55-50(k), which was in effect when this action was filed. That subsection does not say it is limited to actions brought under section 50 and indeed refers to any action, which would include actions other than those brought under section 50. Although the new Business Corporation Act provides that shareholders may recover attorney fees only in actions brought under Chapter 55, a legislative change in a statute is not persuasive as to the meaning of a statute when the meaning is clear from reading the plain language of the statute.

Am Jur 2d, Costs § 30.

Justice MARTIN dissenting.

Chief Justice EXUM and Justice MEYER join in this dissenting opinion.

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, 98 N.C. App. 151, 389 S.E.2d 636 (1990), reversing the judgment of *Martin (Lester P.), J.*, entered at the 7 August 1989 session of Superior Court, GUILFORD County. Heard in the Supreme Court 8 October 1990.

This case brings to the Court a question as to whether a corporation may be required to pay an attorney's fee to a plaintiff

who has brought an action which required the corporation to pay dividends to the plaintiff. The plaintiff had rendered services as an accountant to The Washington Group, Inc., a predecessor to the defendant. The Washington Group went into bankruptcy and the plaintiff filed a claim for its accounting services. The plaintiff received for its claim preferred stock in the defendant as part of a reorganization in the bankruptcy.

Two actions were filed in federal court against the plaintiff and the defendant in which the plaintiffs in that action alleged malfeasance on the part of the plaintiff in this action in matters leading to the bankruptcy of The Washington Group. Syntek cross-claimed against Pullen for failure to provide proper accounting services. The parties in those actions settled the two cases and releases were executed by all parties.

In this action, the plaintiff sought to have the defendant pay a dividend to the plaintiff on the preferred stock the plaintiff owned in the defendant. The defendant had paid a dividend to all other preferred stockholders but it contended the plaintiff had released any claim to a dividend by the release it had signed in the federal court actions. The superior court granted a motion for summary judgment for the defendant. The Court of Appeals reversed and ordered that summary judgment be entered for the plaintiff, requiring the defendant to pay the dividend. *McGladrey, Hendrickson & Pullen v. Syntek Finance Corp.*, 92 N.C. App. 708, 375 S.E.2d 689, *rev. denied*, 324 N.C. 433, 379 S.E.2d 243 (1989).

The plaintiff made a motion that the defendant be required to pay plaintiff's attorney fees, which motion was denied by the superior court. The Court of Appeals reversed and the defendant appealed to this Court.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Reid L. Phillips and Jeffrey A. Batts, for plaintiff appellee.

Petree, Stockton & Robinson, by Norwood Robinson, Robert J. Lawing and Jane C. Jackson, for defendant appellant.

WEBB, Justice.

The determination of this case depends on the application of N.C.G.S. § 55-50(k), in effect when this action was filed, which provided in part:

> Any action by a shareholder to compel the payment of dividends may be brought against the directors, or against the corporation with or without joining the directors as parties. The shareholder bringing such action shall be entitled, in the event that the court orders the payment of a dividend, to recover from the corporation all reasonable expenses, including attorney's fees, incurred in maintaining such action.

We affirm the Court of Appeals. The plaintiff is entitled to recover its attorney's fees under the plain language of this section of the statute. When the language of a statute is clear and unambiguous, judicial construction is unnecessary and its plain and definite meaning controls. *Food House, Inc. v. Coble, Sec. of Revenue*, 289 N.C. 123, 221 S.E.2d 297 (1976). The plaintiff is a shareholder who brought an action to compel the payment of dividends. The court ordered the payment of the dividends and under the plain language of this section the plaintiff is entitled to recover reasonable attorney's fees.

The defendant argues that this is not an action to "compel the payment of dividends" within the meaning of former section 50(k) and no attorney's fees should be allowed. The defendant says that the former N.C.G.S. § 55-50 provided for the circumstances under which a corporation could be compelled to pay dividends and this action was not brought pursuant to such requirements of section 50. The defendant argues that subsection 50(k) applies only to actions brought pursuant to section 50 to compel the payment of dividends. We do not believe we should read this restriction into subsection 50(k). The subsection does not say it is limited to actions brought under section 50 and indeed it refers to "any action" which would include actions other than those brought under section 50.

The defendant contends that the new Business Corporation Act, which became effective 1 July 1990, offers compelling evidence that the former N.C.G.S. § 55-50(k) authorizes the award of attorney's fees only in actions brought pursuant to N.C.G.S. § 55-50. N.C.G.S. § 55-6-40(h) is the reenactment of former subsection 50(k) and it provides that shareholders may recover attorney's fees only in actions brought under Chapter 55. We do not believe a legislative change in a statute is persuasive as to the meaning of a statute whose meaning is clear from reading the plain language of the statute.

The defendant argues that there was never any dispute about the propriety of its payment of dividends. Dividends were properly declared and paid to other stockholders. The question, says the defendant, involved the mutual releases in the federal court cases and whether the plaintiff had released its right to a dividend. Whatever defense was interposed in this case to the payment of a dividend, the action of the plaintiff was to compel the payment of a dividend.

The decision of the Court of Appeals is affirmed.

Affirmed.

Justice MARTIN dissenting.

I respectfully dissent from the majority's opinion. This action was not brought by the plaintiff to compel the payment of dividends within the meaning of N.C.G.S. § 55-50(k). In its complaint, plaintiff alleges: "4. On or about July 10, 1984, the Board of Directors of Syntek Finance declared and paid a dividend of $.25 per share of Preferred A stock." Defendant in its answer admits the allegations of paragraph four. Thus, it has been judicially determined that defendant paid the dividend at issue. The only issue is whether defendant should have paid the dividend upon the shares owned by plaintiff. The disagreement between the parties arose by virtue of the 31 August 1984 mutual release executed between the plaintiff and the defendant in which the parties released each other from all claims, liabilities, demands, actions, causes of action of any kind or character. Defendant plead this release in bar of the action that the plaintiff have and recover of the defendant damages representing the failure to distribute the dividend to plaintiff based upon plaintiff's ownership of shares.

I conclude that the statute is only for the purpose of requiring a corporation to declare and/or pay a dividend to a class of shareholders when the corporation has wrongfully failed to do so. The statute is not for the purpose of requiring the corporation to pay an individual person a dividend, but only to require the corporation to pay a dividend to all of its stockholders. The reasoning behind allowing the plaintiff in such case to recover all reasonable expenses including attorney's fees incurred in maintaining such an action, is to enable stockholders to pursue their rights to have a dividend declared and paid without fear of being liable for large

expenses and attorney's fees. The individual who brings an action on behalf of all similarly situated to have a dividend paid should not bear the full expense of maintaining such an action that is for the benefit of all shareholders. It is equitable under those circumstances that the plaintiff be reimbursed for his reasonable expenses including his attorney's fees; this the statute seeks to do.

However, these reasons are not applicable to a dispute between a shareholder and a corporation regarding whether this particular shareholder should receive payment of a dividend declared and paid by the corporation to all of its other shareholders. That is an individual dispute between the individual shareholder and the corporation, and the shareholders in general will not receive any benefit from such action. In that instance, it is neither reasonable nor equitable to apply this statute to allow reasonable attorney's fees. It is also to be noted that in N.C.G.S. § 55-50(k) the party bringing the action is entitled to recover from the corporation "all reasonable expenses," not being limited to attorney's fees. "All reasonable expenses" is a much broader phrase than "costs." It is proper for all reasonable expenses to be paid to a person bringing an action on behalf of all shareholders in order to have a dividend paid, but it would not be appropriate to allow an individual plaintiff to recover all reasonable expenses where he is suing the corporation to receive payment of a dividend which has already been declared by the corporation. That case is simply an ordinary lawsuit.

As stated by Chief Judge Hedrick in his dissent to the Court of Appeals' opinion, this action was brought to recover a debt owed to the plaintiff by the defendant. The dividend had already been paid by the defendant. This case was merely a dispute between an individual shareholder and the corporation and was not a suit brought to compel the declaration and payment of a dividend for the benefit of all shareholders. *See, e.g., Dowd v. Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964) (suit brought by stockholder for failure of the board of directors to declare and pay a dividend from the corporation's earnings).

The majority falls into error when it construes this lawsuit to be one "to compel the payment of dividends" within the meaning of the statute. The dividend as admitted by both plaintiff and defendant had already been paid before this action was instituted; therefore, the action cannot be one to compel the payment of a dividend. Plaintiff's action is truly an action against the corporation

for a debt that it contends is owed to it for the corporation's failure to distribute to the plaintiff its share of the dividends. The allowance of "all reasonable expenses, including attorney's fees, incurred in maintaining such action" is not appropriate under the facts of this case. It was not the intent of the legislature in enacting N.C.G.S. § 55-50(k) to require corporations to pay "all reasonable expenses, including attorney's fees" for actions brought by an individual shareholder over a dispute with the corporation on whether he is entitled to share in a dividend paid by the corporation. These disputes are personal and are ordinary differences of opinion between parties. North Carolina corporations should not be burdened with paying all reasonable expenses and attorney's fees in cases of this type.

For the reasons stated, I vote to reverse the Court of Appeals and reinstate the decision of the trial judge.

Chief Justice EXUM and Justice MEYER join in this dissenting opinion.

STATE OF NORTH CAROLINA v. ELIJAH STEWARD, JR.

No. 240A91

(Filed 10 January 1992)

Narcotics § 1.3 (NCI3d) — trafficking by possession and by transportation — separate offenses

Defendant could properly be convicted and sentenced for both trafficking in cocaine by possession and trafficking in cocaine by transportation when the same cocaine was involved in both offenses.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 16, 40.

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 102 N.C. App. 582, 403 S.E.2d 613 (1991), finding no error in defendant's trial at the 26 March 1990 Criminal Session of Superior Court, CUMBERLAND County, *Ellis, J.*, presiding. Heard in the Supreme Court 11 December 1991.

Lacy H. Thornburg, Attorney General, by Clarence J. DelForge, III, Assistant Attorney General, for the State.

Malcolm R. Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

Defendant was convicted of trafficking in cocaine by possession and trafficking in cocaine by transportation, in violation of N.C.G.S. § 90-95(h)(3), and sentenced to two consecutive seven-year terms of imprisonment. The same cocaine was involved in both offenses. A majority of the Court of Appeals panel, Chief Judge Hedrick and Judge Wells, concluded there was no error in the trial or in the imposition of consecutive sentences, relying for the latter point on *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986). Judge Eagles, dissenting in part, concluded that under *State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990), defendant could not be convicted of nor sentenced for but one crime.

The majority of the Court of Appeals correctly held that *Perry* governs the sentencing issue and that, under it, defendant could be convicted of and sentenced for two different crimes. The decision of the Court of Appeals is, therefore,

Affirmed.

CLAIRE CLUGH v. LAKEWOOD MANOR AND TRAVELERS INSURANCE COMPANY

No. 256A91

(Filed 10 January 1992)

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 102 N.C. App. 757, 403 S.E.2d 534 (1991), affirming an opinion and award entered 16 April 1990 by the Industrial Commission. Heard in the Supreme Court on 10 December 1991.

Waymon L. Morris, P.A., by Waymon L. Morris, for the plaintiff-appellee.

Roberts Stevens & Cogburn, P.A., by Louise Critz Root, for the defendant-appellants.

PER CURIAM.

For the reasons set forth in the dissenting opinion by Greene, J., the decision of the Court of Appeals is reversed.

Reversed.

JOHN HUGGARD, ADMINISTRATOR OF THE ESTATE OF BOBBY L. BROWN, DECEASED v. WAKE COUNTY HOSPITAL SYSTEM, INC., DOUGLAS T. MILLER, WARREN NEWTON, MICHELE HUMLAN, DAVID L. INGRAM, MURTHY G. K. MANNE AND DOE TWO THROUGH DOE TEN

No. 280PA91
(Filed 10 January 1992)

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 102 N.C. App. 772, 403 S.E.2d 568 (1991), affirming an order entered by *Bailey, J.*, in the Superior Court, WAKE County, on 14 February 1990. Heard in the Supreme Court 12 December 1991.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., and Kenneth B. Oettinger, for plaintiff-appellant.

Young, Moore, Henderson & Alvis, P.A., by Joseph W. Williford and Josephine R. Darden, for defendant-appellee Manne.

PER CURIAM.

Affirmed.

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

BARTON v. BARTON

No. 507P91

Case below: 104 N.C.App. 310

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

CENTURY 21 v. DAVIS

No. 464P91

Case below: 104 N.C.App. 119

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

CORRELL v. DIVISION OF SOCIAL SERVICES

No. 406PA91

Case below: 103 N.C.App. 562

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 9 January 1992.

DOYLE v. SOUTHEASTERN GLASS LAMINATES

No. 535A91

Case below: 104 N.C.App. 326

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 9 January 1992.

FERRELL v. DEPT. OF TRANSPORTATION

No. 452A91

Case below: 104 N.C.App. 42

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 9 January 1992.

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

GOODWIN v. INVESTORS LIFE INS. CO. OF NORTH AMERICA

No. 474PA91

Case below: 104 N.C.App. 138

Petition by defendant (Investors Life Insurance Company of North America) for discretionary review pursuant to G.S. 7A-31 allowed 9 January 1992.

HAUGHN v. FIRST-CITIZENS BANK & TRUST CO.

No. 414P90

Case below: 99 N.C.App. 582

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 9 January 1992.

IN RE ESTATE OF TUCCI

No. 495PA91

Case below: 104 N.C.App. 142

Petition by Estate of Tucci for discretionary review pursuant to G.S. 7A-31 allowed 9 January 1992.

IN RE FINNICAN

No. 519P91

Case below: 104 N.C.App. 157

Motion by guardian ad litem (Gillespie) and petitioner appellee to dismiss appeal by intervenor for lack of a substantial constitutional question allowed 9 January 1992. Petition by intervenor for writ of certiorari to the North Carolina Court of Appeals denied 9 January 1992. Notice of appeal by petitioner appellant dismissed 9 January 1992. Petition by petitioner appellant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

IN RE NAKELL

No. 003P92

Case below: 104 N.C.App. 638

Petition by Barry Nakell for temporary stay allowed 6 January 1992 pending action on timely filed petition for discretionary review.

ISBEY v. COOPER COMPANIES, INC.

No. 443P91

Case below: 103 N.C.App. 774

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

MACCLEMENTS v. LAFONE

No. 494P91

Case below: 104 N.C.App. 179

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

MARANTZ PIANO v. KINCAID

No. 552P91

Case below: 104 N.C.App. 802

Petition by defendant (Kincaid Enterprises, Inc.) for temporary stay allowed 23 December 1991.

PERNELL v. PIEDMONT CIRCUITS

No. 505P91

Case below: 104 N.C.App. 289

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

PIERCE v. ALLEN CONSTRUCTION

No. 410P90

Case below: 99 N.C.App. 583

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 February 1992.

STATE v. CHEE

No. 471P91

Case below: 104 N.C.App. 139

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 9 January 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

STATE v. COX

No. 429P91

Case below: 103 N.C.App. 805

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

STATE v. DAVY

No. 456P91

Case below: 104 N.C.App. 137

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 9 January 1992.

STATE v. FAISON

No. 521PA91

Case below: 104 N.C.App. 554

Petition by defendant for writ of supersedeas allowed 9 January 1992. Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 9 January 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 9 January 1992.

STATE v. FOSTER

No. 491P91

Case below: 104 N.C.App. 309

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

STATE v. GLENN

No. 454P91

Case below: 104 N.C.App. 140

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

STATE v. GOODMAN

No. 477P91

Case below: 104 N.C.App. 309

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

STATE v. HEMBY

No. 482PA91

Case below: 104 N.C.App. 140

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals allowed 9 January 1992.

STATE v. HUDSON

No. 413P91

Case below: 103 N.C.App. 708

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

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

STATE v. JEUNE

No. 496A91

Case below: 104 N.C.App. 388

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 9 January 1992.

STATE v. MATTHEWS

No. 440P91

Case below: 103 N.C.App. 805

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 9 January 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

STATE v. POINDEXTER

No. 513P91

Case below: 104 N.C.App. 260

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

STATE v. ROBERTS

No. 517P91

Case below: 104 N.C.App. 311

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 9 January 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

STATE v. SMITH

No. 124A81

Prior opinion: 305 N.C. 691

Upon consideration of the petition filed by Attorney General in this matter for a writ of certiorari to review the Superior Court, Halifax County, the following order was entered and is hereby certified to the Superior Court of that County: believing that this Court has already fully addressed all the issues it can properly address within the limits of its appellate jurisdiction, the petition of the State is denied without prejudice to the State's right to seek appellate review in the federal system of the order of the U.S. District Court, Eastern District of North Carolina, entered 14 August 1991. By order of the Court in conference, this the 14th day of November 1991.

STATE v. STONE

No. 524P91

Case below: 104 N.C.App. 448

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

STATE v. WILLIAMS

No. 405P91

Case below: 103 N.C.App. 666

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

STATE v. ZUNIGA

No. 156A85

Case below: Superior Court

Petition by defendant for writ of certiorari to the Superior Court, Davidson County, allowed 9 January 1992.

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

STATE EX REL. UTILITIES COMM. v.
CAROLINA UTILITY CUST. ASSN.

No. 492P91

Case below: 104 N.C.App. 216

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

TOMS v. LAWYERS MUT. LIABILITY INS. CO.

No. 523P91

Case below: 104 N.C.App. 88

Petition by defendant (Lawyers Mutual Liability Insurance Company) for writ of certiorari to the North Carolina Court of Appeals denied 9 January 1992.

WALTZ v. WAKE COUNTY BD. OF EDUCATION

No. 515P91

Case below: 104 N.C.App. 302

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 January 1992.

STATE OF NORTH CAROLINA v. CLAUDE ALGUSTIS FELTON, JR.

No. 247A91

(Filed 27 January 1992)

1. Constitutional Law § 224 (NCI4th)— murder—prior mistrial—no double jeopardy

The trial court did not err by denying a murder defendant's motion to dismiss for former jeopardy where defendant's first trial ended in a mistrial after the jury could not reach a verdict. Although defendant contended that there was no manifest necessity for the order of mistrial in the first trial, the court's decision to declare a mistrial is discretionary and there was no abuse of discretion here. Even if the trial court's prefatory description of the motivating factors leading to its order of mistrial did not amount to a finding of fact as mandated by N.C.G.S. § 15A-1064, any such error is clearly harmless as the record here reveals ample factual support for the mistrial order.

Am Jur 2d, Criminal Law §§ 303, 307.

2. Criminal Law § 572 (NCI4th)— murder—mistrial—request to modify verdict form denied

The trial court did not erroneously declare a mistrial in defendant's previous trial for murder, so that his current motion to dismiss for former jeopardy was properly denied, where the jury in the first trial returned to the courtroom without a verdict, defendant requested submission of modified verdict forms which would have permitted the jury to express its agreement as to a verdict on either of the murder charges including a possible jury agreement to reject a verdict of first-degree murder, and the court rejected those requests. There is no indication that the jury had in fact reached agreement as to any issue or that the jurors were confused by the verdict forms before them, and it cannot be said that the court abused its discretion.

Am Jur 2d, Criminal Law § 303.

3. Evidence and Witnesses § 2052 (NCI4th)— murder—identity—opinion of witness

The trial court did not err in a murder prosecution by admitting testimony on redirect from a witness who was the

daughter of one victim and the sister of the other that she felt that defendant was responsible for the deaths of the victims because he was the only person who could have had a key to the apartment. Defendant's questions dealing with the exculpatory portions of the witness's statements to investigating officers opened the door for the State to inquire about other portions of the statements inculpating defendant; it is permissible on redirect examination to ask questions designed to clarify the witness's testimony on cross-examination, even if the resulting testimony would have been inadmissible otherwise.

Am Jur 2d, Evidence § 1143; Homicide §§ 272, 278.

4. Evidence and Witnesses § 1113 (NCI4th)— murder—deaf-mute defendant—statements to officer through interpreter—officer's testimony admissible

The trial court did not err in a murder prosecution by admitting an SBI agent's testimony regarding defendant's responses during interrogation where defendant was a deaf mute, he was interrogated with the aid of an interpreter, and the interpreter was not required to take the stand. Defendant makes no argument that the interpreter was not qualified or competent, there is no hint of a motive on her part to shift suspicion to the accused or to misrepresent defendant's responses during translation, defendant has never indicated that the SBI agent's account of defendant's responses was incorrect in any respect, and nothing in the record indicates dissatisfaction with the interpreter's performance or impartiality. The mere fact that an interpreter is selected by law enforcement officers, or is employed by a law enforcement agency, is insufficient to remove the presumption of agency that arises when an accused accepts the benefit of the proffered translation to make a voluntary statement. The SBI agent's testimony regarding defendant's responses during the interrogation, as translated to him by the duly qualified interpreter, was proper because it fell within the exception to the hearsay rule for admissions of a party opponent made through defendant's agent, the interpreter. N.C.G.S. § 8B-2(d).

Am Jur 2d, Evidence § 501; Trial § 233.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter. 12 ALR4th 1016.

5. Evidence and Witnesses § 1482 (NCI4th)— murder—bullets recovered near defendant's home—admissible

The trial court did not err in a murder prosecution by allowing the State to present evidence regarding four bullets recovered from a discarded water heater near defendant's home. The significant similarities between the bullets found near defendant's house and the bullet that killed the victim circumstantially connect defendant to the murders, and it could not be concluded that there was unfair prejudice to defendant substantially outweighing the probative value of the evidence.

Am Jur 2d, Evidence §§ 771, 774, 775; Homicide §§ 409, 414.

6. Evidence and Witnesses § 2555 (NCI4th)— deaf-mute defendant—statements to witness—competence to understand

The trial court did not err by allowing a witness in a murder prosecution to testify about statements the deaf-mute defendant made to her. The trial court conducted a voir dire to discover the nature of the statements and the witness's ability to understand defendant and there was sufficient evidence of her ability to communicate with defendant to establish her as a competent witness capable of understanding and recounting his communications to her.

Am Jur 2d, Evidence §§ 501, 592, 593.

***Criminal trial of deaf, mute, or blind person.* 80 ALR2d 1084.**

7. Evidence and Witnesses §§ 1113, 650 (NCI4th)— murder—statements to witness—admissions of party opponent—failure to make findings

There was no error in a murder prosecution in the admission of statements made by defendant to the witness where the statements were admissions excluded from the hearsay rule by N.C.G.S. § 8C-1, Rule 801(d). Defendant's objection is not properly characterized as a motion to suppress within the meaning of N.C.G.S. § 15A-977, so that the failure of the

trial court to make findings of fact under that statute is of no moment.

Am Jur 2d, Evidence §§ 526, 542, 543, 582, 583.

8. **Evidence and Witnesses § 1006 (NCI4th)— murder—statements of victim—hearsay—residual exception**

The trial court in a murder prosecution did not err by admitting hearsay statements attributed to one of the victims where the court, for each of the seven witnesses, described the statements at issue and announced on the record its findings and conclusions as to the adequacy of notice, the unavailability of the declarant, the inadmissibility of the statements under other Rule 804 exceptions, the circumstances guaranteeing the reliability or truthfulness of the declarant's statement, the material issues as to which the statements were especially probative, and the fact that in its opinion the statements' admission was in the interests of justice. The trial court's findings supporting the trustworthiness of the statements are sufficient to withstand constitutional challenge as well.

Am Jur 2d, Evidence § 496.

Uniform Evidence Rule 803(24): the residual hearsay exception. 51 ALR4th 999.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing two consecutive sentences of life imprisonment entered by *Grant, J.*, at the 20 August 1990 Criminal Session of Superior Court, CHOWAN County, upon a jury verdict finding defendant guilty of one count of first-degree murder and one count of second-degree murder. Heard in the Supreme Court 12 November 1991.

Lacy H. Thornburg, Attorney General, by Valerie B. Spalding, Assistant Attorney General, for the State.

W. T. Culpepper, III, and Samuel Bobbitt Dixon for defendant appellant.

WHICHARD, Justice.

On 3 October 1988, defendant was indicted on two counts of first-degree murder for the deaths of Sarah Jones and her daughter, Falinda Brooks. Defendant's first capital trial for the murders, with

Judge Brown presiding at the 22 January 1990 Criminal Session of Superior Court, Chowan County, ended in a mistrial. Defendant's second capital trial commenced before a jury at the 20 August 1990 Criminal Session of Superior Court, Chowan County, with Judge Grant presiding. On 31 August 1990, the jury returned verdicts of guilty of first-degree murder for the death of Sarah Jones and second-degree murder for the death of Falinda Brooks. After a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant receive a life sentence for the first-degree murder charge. The trial court then sentenced defendant to two consecutive terms of life imprisonment. Defendant appealed his first-degree murder conviction as of right and on 2 July 1991, we allowed his motion to bypass the Court of Appeals as to the second-degree murder conviction. We conclude that defendant received a fair trial, free from prejudicial error.

The State presented evidence tending to show the following: Toya Jones was the twelve-year-old sister of Falinda Brooks and the daughter of Sarah Jones. Toya lived with her mother and sister in an apartment at One Davis Place, in Edenton, North Carolina. Toya spent the weekend of 27 August 1988 with her grandmother, but she returned home the morning of Sunday, 28 August. Upon returning home, Toya discovered that the front and back doors were locked. When no one responded to her knocking on the doors, Toya went to a neighbor's house. The neighbor, Evette Williams, returned with Toya to her mother's house, but again they received no answer to repeated knocks on the door. Toya testified that she then looked through one of the front windows and saw her mother lying on the couch and her sister Falinda lying on the floor in the front room. Sarah Jones was wearing a nightgown and Falinda Brooks was wearing a t-shirt and panties; both Sarah and Falinda were bloody. Toya and Evette asked that someone call the police and then they went back to Evette's house.

Toya also testified that she had seen defendant at her mother's apartment previously. She testified that he once had a key to the apartment, but that he had returned it. Toya also said that defendant carried in his pocket a silver gun and a black knife.

Dr. Leibert Devine, the medical examiner for Chowan County, testified that he examined the bodies of Sarah Jones and Falinda Brooks at the murder scene. His examination revealed that the victims had been dead for several hours. There was a large amount

of blood beneath Sarah Jones' body on the couch. Dr. Devine found several stab wounds in the front of Jones' chest and one defensive stab wound on her left arm. Dr. Devine testified that the cause of death was a knife wound to the lung or heart cavity. Dr. Devine testified that Falinda Brooks' face was bruised and swollen. There was a large amount of blood beneath her head and a laceration to the scalp. Brooks' eyes were swollen up to four times the normal size, which indicated that she had received a major trauma to the head such as a contact gunshot wound. Dr. Devine testified that in his opinion Jones and Brooks were killed between midnight and 6:00 a.m. on the morning of 28 August 1988.

Dr. Page Hudson, a regional forensic pathologist, testified that Sarah Jones suffered injuries to her head and knife wounds to the chest, back, and arms. Dr. Hudson testified that Jones' skull was caved in and that her brain was bruised. The injury to her skull was consistent with a blunt force wound inflicted by a glass bottle. Dr. Hudson also testified that he found a gunshot wound above Falinda Brooks' hairline. He determined that the bullet causing this wound went through Brooks' head and brain and was the cause of death. Dr. Hudson recovered the .25 caliber bullet from Brooks' brain.

Chief Williams of the Edenton Police Department testified that he discovered a broken soft drink bottle near Sarah Jones' foot and an unbroken bottle on the floor near Falinda Brooks. State Bureau of Investigation Special Agent Ransome testified that when Jones' body was taken from the apartment, he discovered a .25 caliber shell casing in the crease of the couch where Jones lay.

Agent Ransome also testified that he saw defendant on Sunday evening, 28 August, and asked him for the clothes he had been wearing the previous night. Ransome identified in court a pair of blue jeans, a gray and black Harley-Davidson t-shirt, and a black t-shirt. Ransome testified that when he saw defendant on 28 August, defendant had a fresh scar on his right temple which appeared to have been bleeding. Ransome also testified that a bone-handled pocketknife in a brown case and a white shirt with dark stains were taken from defendant's residence; the white shirt was found underneath the mobile home. Additionally, investigators removed four bullets from an old water heater in the yard behind defendant's residence.

Agent Dennis Honeycutt testified that he examined defendant's car and discovered blood on the steering wheel, the driver's side arm rest, and the inside door handle. SBI Agent David Spittle, an expert in forensic serology, reported the presence of blood on the pocket and front of the leg areas of defendant's jeans. SBI Agent John Bendure, testifying as an expert in the field of fiber identification and comparison, said that red fibers found on defendant's clothing and car could have originated from the same source as red fibers found in the carpet in the victims' apartment. Bendure also testified that yellow fibers found on Jones' body and the couch on which she was found could have come from the same source as yellow fibers found on defendant's jeans. In addition, cotton and polyester fibers found on the victims could have originated from defendant's t-shirts.

SBI Special Agent Ricky Navarro testified as an expert in the field of latent evidence and fingerprint identification. Agent Navarro testified that he found in the victims' kitchen a latent palm print matching defendant's right palm. He also found defendant's left palm print on the interior of the back door to the apartment. Agent Navarro further testified that he found in the living room a bloody latent fingerprint matching defendant's right index finger.

SBI Special Agent Eugene Bishop testified as an expert in the field of forensic firearm identification. Bishop testified that the bullet recovered from Falinda Brooks' head was a .25 caliber bullet manufactured by CCI and that it had rifling characteristics of six lands and grooves with a right-hand twist. Bishop said that the four bullets recovered from the water heater behind defendant's trailer were .25 caliber CCI bullets and they all exhibited the same rifling characteristics as the one that killed Brooks. Bishop was unable to determine if all the bullets had been fired from the same gun.

Connie Jernigan testified for the State that she had known defendant for about eight years and that she had dated him for about a year in 1988. Jernigan testified that she had seen defendant with a silver-colored .25 caliber pistol. She also said that she had seen defendant's knife and that every time he left his house he had both the gun and knife with him. Jernigan testified that she saw defendant at a lounge in Hertford, North Carolina, at about 10:00 p.m. on Saturday evening, the 27th of August. Though defend-

ant is a deaf mute, Jernigan could communicate with him because he had taught her hand signals. Jernigan and defendant went to two clubs together and then separated sometime before midnight. Jernigan testified that she saw defendant later that evening when he came to Jernigan's aunt's house, where she was staying. Still later, about 4:15 a.m., Jernigan was at another bar when she saw defendant. She testified that defendant seemed upset at the time and he had two fresh scratches on his face and blood on his wrist. Defendant demonstrated to Jernigan that he had been in a fight. Jernigan testified that although defendant had both his gun and knife earlier in the evening, when she saw him at 4:15 a.m., he had neither. Two days later, Jernigan saw defendant again and asked him about his gun and knife. According to Jernigan, defendant responded that he was smart and had thrown them away. Defendant threatened Jernigan with violence if she talked to the police.

In addition to the evidence described above, the State called several witnesses to testify about the nature of defendant's relationship with the victims. This testimony is the subject of one of defendant's assignments of error and will be described in more detail below. The bulk of the testimony, however, described defendant's jealous behavior and rough treatment, including physical brutality and threats, of Sarah Jones.

The State also presented evidence of Agent Ransome's interview with defendant, with the assistance of a certified interpreter, on 28 August. Through the interpreter, defendant told Agent Ransome that he was with Connie Jernigan from 9:30 p.m. on Saturday, 27 August until midnight. Defendant said that he drove around between midnight and 6:00 a.m. and then returned home. Defendant said that he received the scratch on his forehead from working on his car.

Defendant did not testify in his own behalf, but he presented evidence tending to show the following: George Everette, owner of a nightclub in Hertford, North Carolina, testified that he had known defendant for about seventeen years. Everette testified that he saw defendant at his club from approximately 9:30 p.m. until midnight on Saturday evening, 27 August. He testified that defendant returned to the club at 12:30 a.m. and stayed there until 1:45 a.m. Everette said that he saw defendant again later that evening, between 2:15 a.m. and 2:30 a.m., at another club.

Defendant presented several other witnesses in support of his alibi defense. Gina White testified at defendant's first trial and the jury in this trial heard her previous testimony that she saw defendant at midnight and at 3:30 a.m. on the night of the killings. Erma Harris testified that she saw defendant at 9:30 p.m., at 11:00 p.m., at 3:00 a.m., and at 3:45 a.m. on the night in question. Daisy Cebollero testified that defendant gave her a ride from Hertford to Edenton at approximately 4:25 a.m. on 28 August. Vicki Harrell testified that defendant came to her house and brought breakfast to her between 5:00 and 5:30 a.m. on 28 August.

Defendant's father, Claude Felton, Sr., testified that defendant worked on his car on 27 August 1988. On that day, defendant showed his father a cut on his head that resulted from working on the car.

Additional facts will be discussed as necessary for a proper resolution of the issues raised by defendant.

[1] Defendant first assigns as error the trial court's refusal to grant his motion to dismiss, offered prior to the commencement of defendant's second trial, on the basis of former jeopardy. Defendant argues that (1) there was no manifest necessity for the order of mistrial entered at his first trial, and (2) the trial court erred in refusing to modify the verdict form and give additional jury instructions prior to declaring a mistrial at the first trial. We disagree.

The prohibition against double jeopardy is a fundamental principle of the common law of North Carolina and it is "viewed as an integral part of the 'law of the land' guarantees currently contained in article I, section 19 of the Constitution of North Carolina." *State v. Lachat*, 317 N.C. 73, 82, 343 S.E.2d 872, 877 (1986). The Fifth Amendment of the United States Constitution provides similar protections. *Arizona v. Washington*, 434 U.S. 497, 54 L. Ed. 2d 717 (1978).

Defendant is correct that "[u]nder the common law of this State . . . a trial court in a capital case has no authority to discharge the jury without [his] consent and hold [him] for a second trial, absent a showing of 'manifest necessity' for a mistrial." *State v. Lachat*, 317 N.C. at 82-83, 343 S.E.2d at 877. Other, statutory bases for declaring a mistrial are found in N.C.G.S. §§ 15A-1061 to -1063. "[W]here the order of mistrial has been improperly entered over

a defendant's objection, defendant's motion for dismissal at a subsequent trial on the same charges must be granted." *State v. Odom*, 316 N.C. 306, 310, 341 S.E.2d 332, 334 (1986). Further, our cases and statutes require a trial court, when declaring a mistrial, " 'to find the facts and set them out in the record, so that [the] conclusion as to the matter of law arising from the facts may be reviewed by this Court.' " *State v. Lachat*, 317 N.C. at 83, 343 S.E.2d at 877 (quoting *State v. Jefferson*, 66 N.C. 309 (1872)); *see also* N.C.G.S. § 15A-1064 (1988).

The decision to grant a mistrial, however, lies within the sound discretion of the trial court. *State v. Pakulski*, 319 N.C. 562, 568, 356 S.E.2d 319, 323 (1987); *see also Arizona v. Washington*, 434 U.S. 497, 54 L. Ed. 2d 717. Our cases describe a deadlocked or "hung" jury as a paradigmatic example of manifest necessity requiring the declaration of a mistrial. *State v. Odom*, 316 N.C. at 310, 341 S.E.2d at 334; *see also United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L. Ed. 165 (1824). Similarly, under our statutes a court may declare a mistrial where "[i]t appears there is no reasonable probability of the jury's agreement upon a verdict." N.C.G.S. § 15A-1063(2) (1988); *see also* N.C.G.S. § 15A-1235(d) (1988). Thus, the prohibition against double jeopardy does not prevent the second trial of an accused when his previous trial ended in a hung jury.

The transcript of defendant's first trial reveals the following facts and circumstances leading to the trial court's declaration of mistrial: The jury first retired to deliberate at 1:38 p.m. on 30 January 1990, and it returned without having reached a verdict at 4:47 p.m. The jury reconvened at 9:30 a.m. on 31 January 1990, but the trial court ordered a recess until 6 February 1990 due to the death of a juror's spouse. The jury finally resumed its deliberations at 9:30 a.m. on 6 February. At 11:35 a.m., the jury returned to the courtroom and the following exchange occurred:

> THE COURT: Mr. Foreman, the jury knocked on the door to the jury. I'll ask you first and just wait until I finish the question and answer the question either yes or no, has the jury arrived at a verdict in either of the cases?
>
> THE FOREMAN: No, sir.
>
> THE COURT: What purpose did the jury knock on the jury room door?

THE FOREMAN: We have I think reached the point that no one wants to change their mind.

The court then reinstructed the jury and asked it to retire and continue its deliberations. At this point defense counsel unsuccessfully requested additional instructions and the submission to the jury of a modified verdict form. The jury deliberated from 11:39 a.m. until 12:30 p.m., at which point the court again addressed the jury as follows:

THE COURT: Mr. Eliot, I take it the jury has not arrived at verdicts?

THE FOREMAN: We have not Your Honor.

THE COURT: Let me ask you, do you feel the jury is making any progress since the last time you went to the jury room?

THE FOREMAN: No, sir. We haven't moved at all.

THE COURT: Do you feel if I allow you to continue deliberating any further that there's any reasonable possibility that you will be able to resolve your differences?

THE FOREMAN: In my opinion, I don't think there would be but I would hate to take that on myself to say for sure.

THE COURT: Are there any members of the jury who feel that if you were allowed to deliberate further that there is some possibility that you could allow your differences?

THE FOREMAN: They were given that opportunity, sir.

THE COURT: All right. You can have a seat. The Court, having been advised by the foreman that the jury has been unable to arrive at verdicts, that in his opinion any further deliberations would not serve a useful purpose and in his opinion the jury would not be able to arrive at verdicts in the cases. If there's any member of the jury that feels that that is not correct, I want you to let me know at this time. All right. The Court, having been so advised, will withdraw juror number five, Mr. Eliot, and declare a mistrial in each of the cases.

At that point, defense counsel renewed his request for additional instructions and objected to the order of mistrial. The trial court then entered a judgment of mistrial in which it essentially repeated the facts described in the last quoted paragraph above.

We disagree with defendant's argument that the above described facts and circumstances do not reveal a manifest necessity for declaring a mistrial on the grounds that the jury was deadlocked. As noted above, the trial court's decision to declare a mistrial is discretionary. There was no abuse of discretion here. The court made its decision to declare a mistrial only after it instructed the jury members, upon first discovering their initial inability to reach agreement, on their duty to make diligent efforts to resolve differences of opinion. When the jury again returned to the courtroom, the trial court inquired of the foreman whether any progress had been made and whether the foreman believed there was a reasonable possibility that continued deliberations would resolve the differences. *Cf. State v. Odom*, 316 N.C. at 311, 341 S.E.2d at 335 (court's improper order of mistrial did not refer to any evidence supporting a conclusion jury not likely to agree at some later point). The court then inquired twice as to whether the other jury members were in agreement that continued deliberations would be fruitless. The foreman indicated that the other members of the jury already had been given a chance to request continued deliberations, and when the trial court addressed the other members of the jury directly on this point, no one expressed a desire to continue deliberating. By then the jury had deliberated for more than six hours over a period of two days.

The trial court's discretion to declare a mistrial is constrained, however, by the requirement that it set out the facts underlying its decision in order to allow proper review upon appeal. In this case, the trial court declared the mistrial only after stating for the record the basis therefor—"having been advised . . . that the jury has been unable to arrive at verdicts, [and] that . . . any further deliberations would not serve a useful purpose and . . . the jury would not be able to arrive at verdicts . . . ." In substantial compliance with N.C.G.S. § 15A-1064, the trial court in this instance set out a sufficient factual basis for its order of mistrial.

Even if the trial court's prefatory description of the motivating factors leading to its order of mistrial did not amount to a "finding of fact" as mandated by N.C.G.S. § 15A-1064, any such error is clearly harmless as the record here reveals ample factual support for the mistrial order. *See State v. White*, 85 N.C. App. 81, 354 S.E.2d 324 (1987), *aff'd*, 322 N.C. 506, 369 S.E.2d 813 (1988); *see also State v. Johnson*, 60 N.C. App. 369, 299 S.E.2d 237, *disc. rev. denied*, 308 N.C. 679, 304 S.E.2d 759 (1983). In *State v. Pakulski*,

319 N.C. 562, 356 S.E.2d 319, the trial court failed to make findings in support of its mistrial declaration. This Court, without expressly denominating as error the violation of N.C.G.S. § 15A-1064, found no double jeopardy violation because "[j]ury deadlock [was] certainly apparent in the record" of that trial. *Id.* at 570, 356 S.E.2d at 324. The Court in *Pakulski* must have reached the result it did via harmless error analysis, as there was no discussion ameliorating the obvious statutory violation. As in *Pakulski*, the record here is replete with evidence that the jury was truly unable to reach a unanimous agreement upon a verdict; defendant therefore is not entitled to relief on this assignment of error.

[2] Defendant also argues that the trial court erroneously declared the mistrial because it rejected defendant's request to modify the verdict forms submitted to the jury and to give additional instructions. At defendant's first trial, the court instructed the jury to return "one of the following verdicts in each of the cases. Guilty of first degree murder, guilty of second degree murder or not guilty." The verdict forms submitted to the jury required the foreman to check one of the three verdicts upon which the jury agreed—guilty of first-degree murder, or guilty of second-degree murder, or not guilty.

Defendant's jury deliberated for over three hours on 30 January 1990, and over two hours on 6 February 1990. After the jury's initial return to the courtroom without a verdict on 6 February, defendant argued to the trial court that perhaps the jury had agreed on a verdict of not guilty to the charges of first-degree murder, but that it was unable to agree whether the verdict should be guilty of second-degree murder or not guilty. Defendant thus requested submission of modified verdict forms as follows:

FIRST ISSUE

(1) a. _____ Guilty of first degree murder; or
b. _____ Not guilty of first degree murder.

SECOND ISSUE

(2) a. _____ Guilty of second degree murder; or
b. _____ Not guilty of second degree murder.

Defendant argues that his proposed instructions and modified verdict form would have permitted the jury to express its agreement,

if any, as to a verdict on either of the murder charges, thereby obviating any "manifest necessity" for declaring a mistrial. Further, if the jury had agreed to reject a verdict of guilty of first-degree murder, then the modified verdict form would allow expression of that fact and protect the defendant from a subsequent trial on that charge. Defendant argues that the trial court abused its discretion in rejecting his requests.

We find no abuse of the trial court's discretion. The instructions and verdict forms given to the jury were accurate and in accordance with the law. There is no indication that the jury had in fact reached agreement as to any issue or that the jurors were confused by the verdict forms before them. In fact, the trial court instructed the jury that it was to consider the charge of second-degree murder only if it unanimously agreed to acquit on first-degree murder. The jury foreman's indications that the jury was unable to reach agreement, therefore, are some evidence that the jury remained deadlocked on the charge of first-degree murder. Defendant's speculation that perhaps the jury already had ruled out the possibility of a first-degree murder verdict is not supported by facts in the record; thus, we cannot say the trial court abused its discretion in refusing to give additional instructions or to modify the verdict forms. In a slightly different context, we declined to adopt the New Mexico rule requiring trial courts to submit verdict forms to determine if a jury has voted unanimously for acquittal on any of the included offenses in a case. *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78 (1982) (defendant unsuccessfully sought implied acquittal on first-degree murder charge where foreman indicated jury was deadlocked seven to five in favor of verdict of guilty of second-degree murder). Defendant is not entitled to relief under this assignment of error.

[3] Defendant next contends the trial court erred in overruling his objection to certain testimony of Toya Jones, the daughter of one victim and sister of the other. Defendant argues that Jones' testimony amounted to impermissible lay opinion on the ultimate issue in the case, defendant's identity as the murderer. Defendant says that Jones' testimony was not helpful to the jury and was not admissible under N.C.G.S. § 8C-1, Rules 701 and 704.

The trial court did not err in allowing this testimony. The context in which the disputed testimony arose is as follows: During the State's direct examination Jones testified that she had seen

defendant at her mother's apartment on several occasions and that defendant once had a key to the apartment, but that he had returned it some time prior to the murders. Defense counsel then cross-examined Jones extensively with statements she had given to officers investigating the crimes. During that cross-examination, defense counsel asked Jones whether she had told the officers "that [she] had no idea as to who would have wanted to hurt [her] mother and sister." Jones answered this question: "Yes." Defense counsel also asked whether Jones had told Special Agent Ransome that defendant once had a key to the apartment, but that he had returned it to Jones' grandmother. On redirect examination, over defendant's objection, the trial court permitted Jones' affirmative reply to the following question by the State: "Do you recall telling Agent Wooten that you felt [defendant] was responsible for the deaths of your mother and your sister because [defendant] was the only person who could have had a key to the apartment?"

Jones' response to the State's question on redirect examination was not impermissible lay opinion testimony embracing an ultimate issue in the case. Instead, defendant's questions dealing with the exculpatory portions of Jones' statements to investigating officers opened the door for the State to inquire about other portions of the statements inculpating defendant. It is permissible on redirect examination to ask questions designed to clarify the witness' testimony on cross-examination, even if the resulting testimony would have been inadmissible otherwise. *State v. Gappins*, 320 N.C. 64, 67, 357 S.E.2d 654, 657 (1987); *State v. Williams*, 315 N.C. 310, 320, 338 S.E.2d 75, 82 (1986). This assignment of error is without merit.

[4] Defendant next brings forward an issue of first impression in this state—whether a law enforcement officer who interrogates a suspect with the aid of an interpreter may testify at trial regarding the suspect's responses, unintelligible to the officer without benefit of interpretation, even though the interpreter herself does not testify. We conclude that he may.

On Sunday, 28 August 1988, Special Agent Ransome interviewed defendant, a deaf mute, with the aid of Kathy Beetham, an interpreter procured for defendant pursuant to N.C.G.S. § 8B-2(d). The State called Ransome at trial to testify as to defendant's statements during that interview. Defendant objected to this

testimony on the grounds that Ransome was not qualified to interpret defendant's nonverbal communications and that the proper procedure would be to have Ransome testify as to the questions he propounded to the interpreter, then to have the interpreter testify as to the translation of each question to defendant and defendant's response to her. The trial court conducted a voir dire hearing on defendant's objection, but ultimately allowed Agent Ransome to testify without requiring the interpreter to take the stand.

Ransome's testimony regarding defendant's interpreted responses to his questions included several important details, including: a description of the clothes defendant was wearing on the night in question; defendant was with Connie Jernigan on the night in question; defendant drove around from 12:00 a.m. until 6:00 a.m., when he finally went home; defendant tried to get a gun permit previously and he had once bought a .22 Magnum gun which the police had taken from him some time ago; before giving them to Agent Ransome, defendant had washed the clothes he was wearing on the night in question; he received the scratch on his head by working on his car; and several other statements describing defendant's whereabouts on the night in question.

There is a division of authority on this question. Several courts have prohibited an officer's in-court testimony, which relates a third party's translation of an accused's responses to interrogation, because it contains two levels of hearsay. The modern trend, however, is in favor of admitting evidence of this type, primarily on the theory that the interpreter is an agent of the accused. *Compare United States v. Nazemian*, 948 F.2d 522 (9th Cir. 1991); *United States v. Lopez*, 937 F.2d 716 (2d Cir. 1991); *United States v. Koskerides*, 877 F.2d 1129 (2d Cir. 1989); *United States v. Alvarez*, 755 F.2d 830 (11th Cir.), *cert. denied*, 474 U.S. 905, 88 L. Ed. 2d 235 (1985); *United States v. Da Silva*, 725 F.2d 828 (2d Cir. 1983); *United States v. Belton*, 761 F.2d 1 (1st Cir. 1985); *People v. Torres*, 213 Cal. App. 3d 1248, 262 Cal. Rptr. 323 (1989); *Chao v. State*, 478 So. 2d 30 (Fla. 1985); *People v. Romero*, 78 N.Y.2d 355, 575 N.Y.S.2d 802, 581 N.E.2d 1048 (1991); *State v. Letterman*, 47 Or. App. 1145, 616 P.2d 505 (1980), *aff'd*, 291 Or. 3, 627 P.2d 484 (1981); and *State v. Robles*, 157 Wis. 2d 55, 458 N.W.2d 818 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 883, 470 N.W.2d 900 (1991), *with Indian Fred v. State*, 36 Ariz. 48, 282 P. 930 (1929); *State v. Fong Loon*, 29 Idaho 248, 158 P. 233 (1916); *Garcia v. State*, 159 Neb. 571,

68 N.W.2d 151 (1955); *State v. Terline*, 23 R.I. 530, 51 A. 204 (1902); *Boyd v. State*, 78 Tex. Crim. 28, 180 S.W. 230 (1915); and *State v. Huynh*, 49 Wash. App. 192, 742 P.2d 160 (1987).

In *Robles*, the Wisconsin Court of Appeals noted:

> The majority view holds that a defendant's statements made to an interpreter which, in turn, are relayed to an interrogator are not barred by the hearsay rule when the interrogator testifies. These cases reason that the interpreter, in effect, becomes that defendant's agent; hence the translation is attributable to the defendant as his own admission.

State v. Robles, 157 Wis. 2d at 61-62, 458 N.W.2d at 821. Alternatively, at least one court viewed the "attribution of an agency as an artifice . . . [in cases] where the interpreter has been selected by prosecutorial forces investigating the defendant's participation in a crime," yet nonetheless admitted the evidence because the interrogator's hearsay testimony possessed "circumstantial guarantees of trustworthiness." *State v. Terrazas*, 162 Ariz. 357, 360 n.3, 783 P.2d 803, 806 n.3 (1989); *see also* Romualdo P. Eclavea, Annotation, *Admissibility of Testimony Concerning Extrajudicial Statements Made to, or in Presence of, Witness Through an Interpreter*, 12 A.L.R.4th 1016, 1020 (1982); 29 Am. Jur. 2d *Evidence* § 501 (1967).

The scope of the agency theory generally is stated as follows:

> The agency theory applies to statements made through an interpreter unless circumstances are present which would negate the presumption of agency. Factors tending to refute such an inference include a substantial possibility that the interpreter had a motive to misrepresent, such as an interest in shifting suspicion to the accused and away from the interpreter, or a lack of capacity or demonstrated incompetence on the part of the translator. "Where, however, there is no motive to mislead and no reason to believe the translation is inaccurate, the agency relationship may properly be found to exist. In those circumstances the translator is no more than a 'language conduit,' . . . and a testimonial identity [exists] between declarant and translator. . . ."

People v. Torres, 213 Cal. App. 3d 1257, 1258-59, 262 Cal. Rptr. 323, 327-28 (1989) (quoting *United States v. Da Silva*, 725 F.2d at 831-32) (citations and footnote omitted); *see also* 4 Jack B. Wein-

stein & Margaret A. Berger, *Evidence*, ¶ 801(d)(2)(C)[01], at 801-279 (1991).

Defendant makes no argument that the interpreter, Kathy Beetham, was not qualified or competent. In fact, the record reveals that at trial defense counsel stipulated to Beetham's qualifications. Further, there is no hint of a motive on her part to "shift suspicion to the accused" or to misrepresent defendant's responses during translation. *Cf. People v. Romera*, 575 N.Y.S.2d 802, 78 N.Y.2d 355, 581 N.E.2d 1048 (court notes precedential support for admitting testimony in instances such as this, but concludes on facts of that case there *was* reason to believe the interpreter, an informant whose compensation depended on the success of the prosecution, had a motive to shift suspicion to the accused). Additionally, we discern no prejudice to defendant as his argument, both at trial and on appeal, is merely that the better practice is to have the interpreter testify in addition to the interrogating officer. Though we are inclined to agree that such a procedure is preferable,[1] we note that defendant has never indicated, by way of objection at trial or argument on appeal, that Agent Ransome's account of defendant's responses to interrogation was incorrect in any respect.

Although defendant did not himself select the interpreter for the interview, nothing in the record indicates dissatisfaction with Ms. Beetham's performance or impartiality. The mere fact that an interpreter is selected by law enforcement officers, or is employed by a law enforcement agency, is insufficient to remove the presumption of agency that arises when an accused accepts the benefit of the proffered translation to make a voluntary statement. This rule is a necessary corollary to N.C.G.S. § 8B-2(d), which provides that:

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1. In *Chao v. State*, 453 So. 2d 878 (Fla. App. 1984), the Florida Court of Appeals stated in a footnote that the translator's testimony at trial that he accurately translated the interrogation at issue was "not a required predicate" to admission of the interrogator's testimony about the interrogation. *Id.* at 880 n.4. The Supreme Court of Florida did not address this footnote in its opinion affirming the defendant's conviction. *Chao v. State*, 478 So. 2d 30. We note, however, that in several of the cases following the "agency" rule the interpreter has testified at trial, at least so far as to confirm the accuracy of the translation. *See, e.g., State v. Letterman*, 47 Or. App. 1145, 616 P.2d 505; *State v. Spivey*, 755 S.W.2d 361 (Mo. App. 1988); *People v. Torres*, 213 Cal. App. 3d 1248, 262 Cal. Rptr. 323. In the case at bar, the interpreter did not testify, but she was present and interpreted for defendant at the trial.

> If a deaf person is arrested for an alleged violation of criminal law of the State . . . the arresting officer shall immediately procure a qualified interpreter from the appropriate court for any interrogation, warning, notification of rights, arraignment, bail hearing or other preliminary proceeding . . . . No answer, statement or admission taken from the deaf person without a qualified interpreter present and functioning is admissible in court for any purpose.

N.C.G.S. § 8B-2(d) (1991).

In *Torres*, the Supreme Court of California found an agency relationship even where the defendant's interpreter was a law enforcement colleague of the interrogating officer.

> The fact that the interpreter is a law enforcement officer or other employee of government does not prevent the interpreter from acting as the declarant's agent, even as here where the declarant is being investigated by law enforcement. Moreover, the fact that the interpreter was selected by only one of the parties . . . does not negate an agency relationship. If the declarant knowingly and willingly uses the services of an interpreter selected by another, the interpreter is " 'deemed to act for both parties, and the statements made by the [declarant] consequently [become] original evidence the same as if the [declarant] had himself first selected the interpreter.' "

People v. Torres, 213 Cal. App. 3d 1257, 1259, 262 Cal. Rptr. 323, 329 (quoting *State v. Letterman*, 47 Or. App. 1145, 616 P.2d 505, 508) (citations and footnote omitted).

Thus, we conclude that Agent Ransome's testimony regarding defendant's responses during interrogation, as translated to him by the duly qualified interpreter, was proper because it fell within the exception to the hearsay rule for admissions of a party opponent made through defendant's agent, the interpreter. Defendant is therefore entitled to no relief on this assignment of error.

[5] Defendant next contends the trial court erred in allowing the State to present evidence regarding four bullets recovered from a discarded water heater near defendant's home. SBI Agent Bishop, testifying as an expert in the area of forensic firearm identification, described the four bullets and compared them to the .25 caliber bullet recovered from Falinda Brooks' head. According to Bishop, all the bullets were .25 caliber bullets, manufactured by CCI, with

rifling characteristics of six lands and grooves with a right-hand twist. Though the bullets could have been fired from the same gun, Bishop could not conclude that they actually were fired from the same gun. Bishop also testified that CCI bullets commonly are sold and that many different kinds of .25 caliber guns could produce the rifling characteristics exhibited by these bullets. Defendant contends that this evidence should have been excluded because it was irrelevant and unfairly prejudicial.

Under our rules of evidence, unless otherwise provided, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1988). " 'Relevant evidence' means 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, Rule 401 (1988). In criminal cases, " '[E]very circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury.' " *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) (quoting *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020, 16 L. Ed. 2d 1044 (1966)).

The autopsy of Falinda Brooks revealed that the .25 caliber bullet lodged in her brain was the cause of her death. Agent Bishop testified that the bullet recovered from Brooks' head was manufactured by CCI and had rifling characteristics of six lands and grooves with a right-hand twist. The proffered testimony about the presence in a water heater behind defendant's house of four .25 caliber CCI bullets with rifling characteristics matching the lethal bullet is clearly relevant as circumstantial evidence linking defendant to evidence directly related to the crime. The lack of evidence that defendant actually fired the bullets into the water heater, the uncertain length of time the bullets had been in the water heater, the popularity of CCI bullets, and the fact that several types of .25 caliber guns could have produced the rifling characteristics at issue, impact the weight of the evidence, not its admissibility.

Defendant also argues that the prejudicial effect of this evidence substantially outweighed its probative impact and that the trial court should have excluded it under N.C.G.S. § 8C-1, Rule 403. The decision to exclude relevant evidence under Rule 403 lies within the trial court's discretion. *State v. Mason*, 315 N.C. 724, 340 S.E.2d

430 (1986). As noted above, the significant similarities between the bullets found near defendant's house and the bullet that killed Falinda Brooks circumstantially connect defendant to the murders. We cannot conclude that there was unfair prejudice to defendant substantially outweighing the probative value of this evidence, such that the trial court abused its discretion in allowing its admission.

[6] Defendant next contends that the trial court erred in allowing State's witness Connie Jernigan to testify about defendant's statements to her, without sufficient evidence that Jernigan was competent and capable of understanding defendant's communications. Defendant also contends that Jernigan's testimony amounted to inadmissible hearsay because it lacked circumstantial guarantees of trustworthiness equivalent to those implicit in the recognized exceptions to the hearsay rule. Finally, defendant argues that the trial court erred in failing to make findings of fact as required under N.C.G.S. § 15A-977(f). These arguments are without merit.

Before allowing Jernigan to testify regarding defendant's statements, the trial court conducted a voir dire to discover the nature of the statements and Jernigan's ability to understand defendant. Jernigan testified that she had known defendant for eight years prior to the murders and that she had been "going" with him for about a year prior to that time. Jernigan testified that she was able to communicate with defendant, that she would ask him questions and he would give appropriate answers. Though she never had formal training in interpreting sign language, for two or three months prior to the murders defendant had been teaching her that skill. According to Jernigan, defendant could read lips and he would explain things for her in writing when she had trouble understanding sign language or his hand gestures. This was sufficient evidence of Jernigan's ability to communicate with defendant to establish her as a competent witness capable of understanding and recounting his communications to her.

[7] Having established Jernigan as a witness competent to understand and communicate with defendant, there is no hearsay problem with her testimony regarding defendant's incriminating statements to her. Defendant's statements to Jernigan were admissions excluded from the hearsay rule by N.C.G.S. § 8C-1, Rule 801(d). Further, defendant's objection to Jernigan's testimony is not properly characterized as a motion to suppress within the meaning of N.C.G.S. § 15A-977; therefore, the failure of the trial court to make findings

of fact under that statute is of no moment. As stated above, there was abundant evidence of the witness' competency to testify regarding defendant's communications to her. These assignments of error are overruled.

[8] By his next assignment of error, defendant complains of the admission under Rule 804(b)(5) of hearsay statements attributed to one of the victims, Sarah Jones. The State presented seven witnesses at trial who testified that Jones told them about certain acts and threats towards her by the defendant, including: threats of violence to Jones if she ever ended her relationship with defendant; the fact of their argumentative, troubled relationship and ultimate break-up; a physical threat with a hatchet when defendant drove with Jones down an isolated country road; an incident during an argument between Jones and defendant in which defendant struck Jones on the bare foot with a handgun; defendant's jealousy of Jones' attention and her fear of him; an incident in which defendant tied Jones to a tree and she escaped; and an incident in which defendant pushed Jones down a stairwell at work. Defendant argues that the circumstances surrounding this hearsay evidence do not have sufficient guarantees of trustworthiness to warrant introduction under Rule 804(b)(5), and that its admission at trial violated his state and federal rights to confrontation of witnesses. We disagree.

The residual hearsay exception for instances in which the declarant is unavailable, Rule 804(b)(5), provides:

> (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.

N.C.G.S. § 8C-1, Rule 804(b)(5) (1988).

In *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986), this Court articulated the guidelines for admission of hearsay testimony under the provisions of Rule 804(b)(5). Initially, the trial court must determine that the declarant is unavailable; here, the trial court found that Sarah Jones died on 28 August 1988. Following this determination, the trial court must conduct a six-step inquiry to 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 interests of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence."

State v. Ali, 329 N.C. 394, 408, 407 S.E.2d 183, 191-92 (1991) (citing *State v. Triplett*, 316 N.C. at 9, 340 S.E.2d at 741). In conducting this analysis,

> [t]he trial court is required to make both findings of fact and conclusions of law on the issues of trustworthiness and probativeness, because they embody the two-prong constitutional test for the admission of hearsay under the confrontation clause, i.e., necessity and trustworthiness. On the other four issues, the trial court must make conclusions of law and give its analysis.

> We will find reversible error only if the findings are not supported by competent evidence, or if the law was erroneously applied.

State v. Deanes, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989) (citations omitted).

Defendant's argument is that the trial court's findings failed to show sufficient guarantees of trustworthiness. In evaluating the trial court's findings and conclusions on this step in the inquiry under Rule 804(b)(5), we have held that:

> [I]n weighing the "circumstantial guarantees of trustworthiness" of a hearsay statement . . . the trial judge must consider among other factors (1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination. . . . Also pertinent to this inquiry are factors such as the nature and character of the statement and the relationship of the parties.

State v. Triplett, 316 N.C. at 10-11, 340 S.E.2d at 742 (citations omitted). In this case, the trial court considered these factors in making its ruling.

As to each witness, the trial court reviewed the voir dire testimony and made particularized findings, including findings that all the statements were within Jones' personal knowledge and that she never recanted any of the statements. According to the trial court's findings, each of the witnesses was a close friend or relative whom Jones saw almost every day, and in whom she confided regarding the details of her relationship with defendant. The trial court appropriately considered the relationship between the declarant, Sarah Jones, and each of the witnesses. *See State v. Ali*, 329 N.C. at 409, 407 S.E.2d at 192. Further, each of the trial court's findings was supported by competent evidence in the record.

The trial court made substantial efforts to follow the guidelines set forth in *Triplett* for all steps of the inquiry. For each of the seven witnesses the court described the statements at issue and announced on the record its findings and conclusions as to the adequacy of notice, the unavailability of the declarant, the inad-

missibility of the statements under other Rule 804 exceptions, the circumstances guaranteeing the reliability or truthfulness of the declarant's statement, the material issues as to which the statements were especially probative, and the fact that in its opinion the statements' admission was in the interests of justice.[2] As we stated in *Smith*:

> By setting out in the record his analysis of the admissibility of hearsay testimony pursuant to the requirements of Rule 803(24) as set forth above, the trial judge will necessarily undertake the serious consideration and careful determination contemplated by the drafters of the Evidence Code. This thoughtful analysis will greatly aid in assuring that only necessary, probative, material, and trustworthy hearsay evidence will be admitted under this residual exception and will provide a sound framework for meaningful appellate review.

State v. Smith, 315 N.C. at 96-97, 337 S.E.2d at 847. The care exercised here by the trial court in evaluating the trustworthiness of this testimony is apparent as much in its decision to exclude other witnesses' hearsay testimony as in its findings and conclusions admitting these witnesses' testimony.

The United States Supreme Court has stated that the residual hearsay exception is not a "firmly rooted" exception for Confrontation Clause purposes. *Idaho v. Wright*, --- U.S. ---, ---, 111 L. Ed. 2d 638, 653 (1991). However, "even if certain hearsay evidence does not fall within 'a firmly rooted hearsay exception' and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.' " *Lee v. Illinois*, 476 U.S. 530, 543-44, 90

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2. We note, however, that even though the trial court's brief description of the issues as to which the hearsay statements were probative was sufficient on the facts of this case, the better practice is to follow the commands of *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985)—"The [probativeness] requirement imposes the obligation of a dual inquiry: were the proponent's efforts to procure more probative evidence diligent, and is the statement more probative on the point than other evidence that the proponent could reasonably procure?" *Id.* at 95, 337 S.E.2d at 846 (describing the analysis required for admission of hearsay evidence under N.C.G.S. § 8C-1, Rule 803(24), the residual exception where the declarant is present at trial). Under *Smith*, *Triplett*, and *Deanes*, the need for particular findings on probativeness equals the need for findings on a hearsay statement's trustworthiness.

L. Ed. 2d 514, 527-28 (1986). On the facts of this case we conclude that the trial court's findings supporting the trustworthiness of these statements are sufficient to withstand constitutional challenge as well. Defendant's assignments of error are overruled.

For the foregoing reasons, we conclude that defendant received a fair trial, free from prejudicial error.

No error.

JAMES M. BRYSON, II, AND LOIS I. BRYSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JAMES P. BRYSON v. RACHEL B. SULLIVAN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MILLIE P. BRYSON

No. 168PA91

(Filed 27 January 1992)

1. **Rules of Civil Procedure § 11 (NCI3d)— sanctions—voluntary dismissal with prejudice**

The trial court was not deprived of jurisdiction to determine the appropriateness of Rule 11 sanctions by the plaintiffs' filing of a voluntary dismissal with prejudice. N.C.G.S. § 1A-1, Rule 11.

Am Jur 2d, Damages § 615; Dismissal, Discontinuance, and Nonsuit §§ 14, 39, 40.

2. **Rules of Civil Procedure § 11 (NCI3d)— sanctions—certifications by signer of pleading**

According to Rule 11, the signer of a pleading certifies that the pleading is (1) well grounded in fact; (2) warranted by existing law "or a good faith argument for the extension, modification, or reversal of existing law" (legal sufficiency); and (3) not interposed for any improper purpose. A breach of the certification as to any one of these three prongs is a violation of the rule.

Am Jur 2d, Damages §§ 615, 616; Pleading §§ 26, 339.

3. Rules of Civil Procedure § 11 (NCI3d)— sanctions—legal sufficiency prong—reasonable inquiry by client

The Court of Appeals erred in stating that, in the absence of proof that a reasonable person in the client's position would have been aware of the Rule 11 legal deficiencies, the attorney should bear sole responsibility for submitting a pleading or motion not warranted by law, since Rule 11 explicitly holds a represented party who has signed the document subject to sanctions when the document is found to violate that rule. Moreover, the relevant inquiry is not whether a reasonable person in the client's position would have been aware of the legal deficiencies, but whether the client made a reasonable inquiry to determine the legal sufficiency of the document.

Am Jur 2d, Attorneys at Law § 149; Damages §§ 615, 616; Pleading § 26.

4. Rules of Civil Procedure § 11 (NCI3d)— sanctions—responsibility for improper purpose violations

The Court of Appeals erred in stating, "Generally, since the lawyer exercises primary control over the litigation, the responsibility for improper purpose violations should rest with the lawyer," since parties as well as attorneys may be subject to sanctions for violations of the improper purpose prong of Rule 11. Furthermore, both are subject to an objective standard to determine the existence of such an improper purpose.

Am Jur 2d, Attorneys at Law § 149; Costs § 30; Damages §§ 615, 616; Pleading § 26.

5. Rules of Civil Procedure § 11 (NCI3d)— sanctions—pleading warranted by existing law—responsive pleadings not considered

In determining whether a pleading was warranted by existing law at the time it was signed, the court must look at the face of the pleading and must not read it in conjunction with responsive pleadings.

Am Jur 2d, Pleading § 4.

6. Rules of Civil Procedure § 11 (NCI3d)— sanctions—legal sufficiency prong of Rule 11—continuing duty to analyze pleading not required

Whether a document complies with the legal sufficiency prong of Rule 11 is determined as of the time it was signed.

Therefore, the implication in *Tittle v. Case*, 101 N.C. App. 346, 399 S.E.2d 373, that the legal sufficiency prong imposes a continuing duty to analyze the basis for a pleading is disapproved.

Am Jur 2d, Pleading §§ 4, 26, 339.

7. **Rules of Civil Procedure § 11 (NCI3d)— failure to dismiss—legal sufficiency prong inapplicable—sanctions under another prong or rule**

The statement in *Tittle v. Case*, 101 N.C. App. 346, 399 S.E.2d 373, based on the legal sufficiency prong of Rule 11, that, "In some circumstances . . . the failure to dismiss a case when irrefutable evidence has come to [one's] attention that the case is meritless may require sanctions pursuant to Rule 11" is disapproved because subsequently filed documents cannot impose a duty on counsel or a party under the legal sufficiency prong of Rule 11 to seek dismissal. However, once responsive pleadings or other papers are filed and the case has become meritless, failure to dismiss or further prosecution of the action may result in sanctions either under the improper purpose prong of Rule 11, under other rules, or pursuant to the inherent power of the court.

Am Jur 2d, Pleading §§ 26, 125.

8. **Costs § 36 (NCI4th)— attorney fees—nonjusticiable cases—consideration of responsive pleadings**

It is appropriate in N.C.G.S. § 6-21.5 cases to read the questionable pleading with responsive pleadings to determine whether there exists a justiciable controversy.

Am Jur 2d, Pleading §§ 26, 125.

9. **Rules of Civil Procedure § 11 (NCI3d)— sanctions—legal sufficiency of pleading—two-part analysis**

In determining when to make an award under Rule 11 on the ground that a pleading is not warranted by existing law, the court should look first to the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law.

Am Jur 2d, Pleading § 26.

10. Rules of Civil Procedure § 11 (NCI3d)— sanctions—legal sufficiency of pleading—reasonable inquiry by litigants

Represented parties, like their counsel, will be held to an objective standard of reasonable inquiry into the legal sufficiency of their claim. If, given the knowledge and information which can be imputed to a party, a reasonable person under the same or similar circumstances would have terminated his or her inquiry and formed the belief that the claim was warranted under existing law, then the party's inquiry will be deemed objectively reasonable.

Am Jur 2d, Pleading § 26; Damages §§ 615, 616.

11. Rules of Civil Procedure § 11 (NCI3d)— sanctions—good faith reliance on advice of counsel

In determining whether plaintiffs relied in good faith on the advice of counsel regarding the merits of their claim, "good faith" means honesty of intention and freedom from knowledge of circumstances which ought to have put them upon inquiry.

Am Jur 2d, Pleading § 26; Damages §§ 615, 616.

12. Rules of Civil Procedure § 11 (NCI3d)— sanctions—legal sufficiency of pleading —good faith reliance on counsel—reasonable belief

Plaintiffs' good faith reliance on the advice of their attorneys that their claims against an administratrix in her representative and individual capacities were warranted under the law was sufficient to establish an objectively reasonable belief in the validity of their claims. The trial court's finding that plaintiffs acted in good faith upon the advice of counsel was supported by the evidence, and the trial court properly denied defendants' motions for sanctions under the legal sufficiency prong of Rule 11, where the evidence tended to show that the female plaintiff was told by counsel that plaintiffs had grounds for filing a lawsuit against defendant; various anticipated defenses were discussed with the female plaintiff, including a consent judgment in a prior action; and the consent judgment was not considered by counsel to be a bar to plaintiffs' claims in this case.

Am Jur 2d, Pleading § 26; Damages §§ 615, 616.

13. Rules of Civil Procedure § 11 (NCI3d)— reliance on counsel—sanctions based on improper purpose

Reliance on the advice of counsel does not preclude Rule 11 sanctions based upon improper purpose.

Am Jur 2d, Pleading § 26; Damages §§ 615, 616.

14. Rules of Civil Procedure § 11 (NCI3d)— sanctions—improper purpose—separate from legal or factual sufficiency

The Court of Appeals erred in holding that the filing of a complaint cannot be for an improper purpose unless the complaint failed either the legal or factual certification requirement of Rule 11, since the improper purpose prong of Rule 11 is separate and distinct from the legal and factual sufficiency requirements.

Am Jur 2d, Pleading § 26; Damages §§ 615, 616.

15. Rules of Civil Procedure § 11 (NCI3d)— sanctions—improper purpose—insufficient evidence

The evidence was insufficient to show that plaintiffs' complaint against defendant administratrix in her representative and individual capacities was filed for the improper purpose of harassing defendant, causing delay in the estate proceedings, and needlessly increasing the costs of the litigation, and the trial court did not err in denying sanctions against plaintiffs under the improper purpose prong of Rule 11.

Am Jur 2d, Pleading § 26; Damages §§ 615, 616.

16. Costs § 36 (NCI4th)— nonjusticiable claims—attorney fees—jurisdiction after voluntary dismissal

The trial court was not deprived of jurisdiction to determine the appropriateness of attorney fees under N.C.G.S. § 6-21.5 by plaintiffs' filing of a voluntary dismissal with prejudice. Even if the dismissal had been without prejudice, defendant would still have been the "prevailing party" for N.C.G.S. § 6-21.5 purposes. *Kohn v. Mug-A-Bug*, 94 N.C. App. 594, 380 S.E.2d 548, holding that attorney fees could not be awarded under N.C.G.S. § 6-21.5 after plaintiffs took a voluntary dismissal without prejudice because there was no adjudication on the merits and thus no "prevailing party," is overruled.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 39.

17. Costs § 36 (NCI4th)— nonjusticiable claims—no persistence in litigation—attorney fees denied

Where a consent decree and other defenses raised in defendant's answer rendered nonjusticiable all the claims alleged in plaintiffs' complaint, and plaintiffs voluntarily dismissed with prejudice their action some seven weeks after the defenses were asserted without having pursued the litigation further during those intervening weeks, plaintiffs cannot be said to have persisted in litigating the case after a point where they should reasonably have become aware that their complaint no longer contained a justiciable issue, and the trial court properly denied defendant's request for attorney fees under N.C.G.S. § 6-21.5.

Am Jur 2d, Costs § 72; Damages §§ 615, 616; Dismissal, Discontinuance, and Nonsuit § 39.

Attorneys' fees: obduracy as basis for state-court award. 49 ALR4th 825.

18. Costs § 36 (NCI4th)— nonjusticiable claims—attorney fees—counsel not liable

N.C.G.S. § 6-21.5 does not authorize the court to require counsel to pay attorney fees to the prevailing party.

Am Jur 2d, Costs § 30.

Attorney's liability under state law for opposing party's counsel fees. 56 ALR4th 486.

ON petition for discretionary review by plaintiffs pursuant to N.C.G.S. § 7A-31 from a decision of the Court of Appeals, 102 N.C. App. 1, 401 S.E.2d 645 (1991), reversing an order filed 24 May 1990 by *Allen (W. Steven), J.*, Superior Court, RANDOLPH County, and remanding for further findings consistent therewith. Heard in the Supreme Court 13 November 1991.

Moser, Schmidly, Mason & Wells, by Stephen S. Schmidly; John N. Ogburn, Jr., for plaintiff-appellants.

Wyatt Early Harris Wheeler & Hauser, by William E. Wheeler, for defendant-appellees.

J. Wilson Parker for amicus curiae North Carolina Academy of Trial Lawyers.

MARTIN, Justice.

This case considers the propriety of sanctions under N.C. R. Civ. P. 11(a) and attorneys' fees under N.C.G.S. § 6-21.5 for alleged violations by the plaintiffs regarding certain claims in an estate case. The evidence before the trial court revealed the following relevant facts. Defendant Rachel B. Sullivan (Rachel) is the daughter of Millie P. Bryson (Millie). Plaintiff James M. Bryson, II (Marc) is the grandson of Millie and the son of James P. Bryson (James) and Lois I. Bryson (Lois). James died in December 1986; Lois was appointed administratrix of his estate. Millie suffered a stroke in August 1983. From September 1983 to February 1987 she lived with and was cared for by James (until his death), Lois, and Marc. From February 1987 to May 1989 Millie was cared for by Rachel.

On 26 June 1987, Millie filed a claim against Marc and Lois, individually and as administratrix of James's estate, and others alleging that they had misappropriated and converted her property. Millie was declared incompetent on 16 December 1987, and Rachel was appointed her general guardian. Millie's claim was eventually settled on 24 April 1989 with the execution of a consent decree. The parties executing the consent decree were Rachel, as guardian for Millie, Lois, individually and as administratrix of James's estate, and Marc. McNeill Smith was the attorney for Marc and Lois in her individual capacity and in her capacity as administratrix of James's estate.

The consent decree provided in pertinent part:

> 6. Any and all other claims, actions or causes of action which any of the parties might have had or might have against any of the other parties have been fully compromised, adjusted and settled; no party has admitted or been adjudged of any wrongdoing or fault on account of any matters alleged or which might have been alleged in the Complaint or Answer; and neither the plaintiff, her guardian or successor guardian, her representative or estate, nor any of the defendants, his or her representatives, successors or assigns, individually or in any capacity, shall recover anything further of any other party on account of anything occurring before the date of this judgment.

Millie died intestate on 10 May 1989, and Rachel was appointed administratrix of her estate. On 2 June 1989, Rachel sought and received from the Clerk of Superior Court of Randolph County an order allowing $14,400.00 as reimbursement to her for "room, board and transportation" she provided to Millie from December 1987 through May 1989. On 5 October 1989, Lois as administratrix of James's estate and Marc petitioned the Clerk of Superior Court of Randolph County to set aside the award to Rachel. The clerk denied the petition.

On 22 November 1989, Marc and Lois in her individual capacity and in her capacity as administratrix of James's estate filed a claim against Millie's estate for services rendered to Millie from September 1983 through February 1987. Rachel in her capacity as administratrix of Millie's estate denied this claim.

Some short time before 22 February 1990, McNeill Smith advised Lois that

> there was [sic] elements in . . . [the 24 April 1989 consent order] which [had been] breached on the other side. One of the principal ones being the [petition seeking reimbursement for room, board and transportation provided for Millie filed by Rachel in Randolph County contrary to the provisions of the consent judgment] . . . .

McNeill Smith further advised Lois:

> So, if you're going to do anything, though . . . you've got to file it within the three months because the statute is very clear that the Superior Court is the place to consider the validity of the claim and you've got some guidance, take it and you ought to do it and you ought not to let the 3 months go by. But I might very well be a witness.

McNeill Smith called Jack Ogburn, an attorney in Randolph County, who agreed to file the complaint that is reviewed in this opinion, and he did so on 22 February 1990. The complaint sought to recover: (1) for services allegedly rendered to Millie; (2) for alleged breach of fiduciary duty and self-dealing on the part of Rachel in allowing prematurely and without adequate proof the claim made by Rachel herself in her individual capacity for reimbursement for services rendered to Millie; and (3) for attorneys' fees and costs under N.C.G.S. § 28A-19-18 because of (a) Rachel's refusal to refer the plaintiffs'

claim to a panel as allowed by N.C.G.S. § 28A-19-15 and (b) her self-dealing. The complaint was signed by Marc and Lois.

On 12 March 1990, Rachel in her individual capacity and in her capacity as administratrix of Millie's estate filed an answer and pled among other things the statute of limitations, the release contained in the 24 April 1989 consent decree, and res judicata. Rachel's answer also included a motion for sanctions pursuant to Rule 11. Specifically, Rachel alleged:

> 68. Plaintiffs' complaint was signed and verified in violation of Rule 11 . . . in that it was knowingly filed and served in the face of obvious defenses in bar of plaintiffs' claims of which plaintiffs and their counsel had prior actual notice and which notice was a matter of public record . . . .
>
> . . . .
>
> 70. Plaintiffs' complaint . . . was interposed for no other purpose than to harass defendant, cause unnecessary delay in the administration of the estate of Millie P. Bryson . . . and [has] needlessly increased the cost of the administration of the estate . . . , resulting in loss to the estate and its beneficiaries.
>
> 71. Defendant is entitled to have the Court impose sanctions upon plaintiffs for violation of Rule 11 . . . by way of expenses incurred in defending this action and matters related thereto.

Rachel further requested in her answer an award for reasonable attorneys' fees pursuant to N.C.G.S. § 6-21.5. Specifically, she alleged:

> 73. Plaintiffs' complaint completely fails to raise any justiciable issue of law or fact. As a result, defendant is entitled to an award of reasonable attorneys fees assessed against plaintiffs pursuant to N.C. Gen. Stat. § 6-21.5.

On 30 April 1990, pursuant to N.C.G.S. § 1A-1, Rule 41(a), the plaintiffs voluntarily dismissed their action with prejudice.

In an order dated 22 May 1990, the trial court denied the motions for sanctions and attorneys' fees. The trial court's findings of fact included the following:

36. At the hearing, Defendant's [sic] counsel admitted that the Defendants sought sanctions upon and attorneys fees from the Brysons and not their attorneys.

. . . .

38. The Brysons filed this lawsuit in good faith and after diligent inquiry of counsel.

The trial court entered the following pertinent conclusions of law:

1. Plaintiffs [sic] voluntary dismissal of their action does not relieve this Court of its duty to consider the Rule 11 and attorneys [sic] fees Motions on the merits.

. . . .

14. Plaintiffs have at all times relied on the advice of competent counsel in pursuing their claims and their causes have been well grounded in fact and law.

The defendants appealed to the Court of Appeals the trial court's denial of their requests for sanctions under N.C.G.S. § 1A-1, Rule 11(a) and for attorneys' fees under N.C.G.S. § 6-21.5. The Court of Appeals reversed and remanded. The plaintiffs' petition for discretionary review was allowed by this Court on 12 June 1990.

[1] We affirm the Court of Appeals' holding that the trial court was not deprived of jurisdiction to determine the appropriateness of sanctions under Rule 11 by the plaintiffs filing a voluntary dismissal with prejudice pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1). Dismissal does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated. *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 L. Ed. 2d 359 (1990).

For this purpose, it is not relevant whether the dismissal was with or without prejudice.

> Rule 41(a)(1) does not codify any policy that the plaintiff's right to . . . dismissal also secures the right to file baseless papers . . . . If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to 'stop, think and investigate more carefully before serving and filing

papers.' Amendments to Rules, 97 F.R.D. 165, 192 (1983) (citations omitted).

Cooter & Gell, 496 U.S. at ---, 110 L. Ed. 2d at 377. *Accord Corcoran v. Columbia Broadcasting Sys., Inc.*, 121 F.2d 575, 576 (9th Cir. 1941).

In this opinion we review the following principal issues:

I. Whether litigants who rely in good faith upon advice of counsel concerning the legal basis for their claims may be subject to sanctions if it is determined that their pleading violates the legal sufficiency requirement of N.C.G.S. § 1-1A, Rule 11(a);

II. Whether under the facts of this case, the litigants may be subject to sanctions under N.C.G.S. § 1-1A, Rule 11(a) for interposing their claims for an improper purpose; and

III. Whether under the facts of this case, attorneys' fees should be awarded against the litigants under N.C.G.S. § 6-21.5.

Before considering the issues as related to the particular facts of this case, a review of certain principles governing the interpretation of Rule 11 and section 6-21.5 is not inappropriate.

N.C.G.S. § 1A-1, Rule 11(a) provides:

Rule 11. Signing and Verification of Pleadings.

(a) *Signing by Attorney.*—Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the atten-

> tion of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

[2] According to Rule 11, the signer certifies that three distinct things are true: the pleading is (1) well grounded in fact; (2) warranted by existing law, "or a good faith argument for the extension, modification, or reversal of existing law" (legal sufficiency); and (3) not interposed for any improper purpose. A breach of the certification as to any one of these three prongs is a violation of the Rule. At issue here are the "warranted by existing law" and "improper purpose" prongs.

Since the North Carolina rule is identical in most relevant respects to the federal rule, "[d]ecisions under the federal rules are . . . pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules." *Turner v. Duke University*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (citing *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970)).

The Rule requires the signature of an attorney of record or *pro se* litigant on all pleadings, motions, or other papers; represented parties are not required to sign filed documents unless another rule so requires. If a pleading is signed in violation of the Rule, "the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction." N.C.G.S. § 1A-1, Rule 11(a) (1986).

[3] In this case the Court of Appeals stated the law regarding the standard to be applied to represented parties under a Rule 11 challenge pursuant to the legal prong as follows:

> In the absence of proof that a reasonable person in the client's position would have been aware of the Rule 11 legal deficiencies, "the attorney should bear sole responsibility for submitting a pleading or motion not warranted by law in violation of Rule 11." . . . "The rationale behind this is that the attorney and not the client should bear the sanction for filing papers which violate Rule 11 by being unsupported by existing law . . . ."

Bryson v. Sullivan, 102 N.C. App. 1, 9, 401 S.E.2d 645, 652 (1991) (citations omitted). This statement was error: the language of Rule 11 explicitly holds a represented party who, as here, has signed the document subject to sanctions when the document is found to violate the Rule. *Business Guides v. Chromatic Communications Enter., Inc.*, 498 U.S. ---, 112 L. Ed. 2d 1140 (1991). Moreover, the relevant inquiry is not whether a reasonable person in the client's position would have been aware of the legal deficiencies, but whether the client made a reasonable inquiry to determine the legal sufficiency of the document.

[4] The Court of Appeals erred similarly in stating the law regarding the improper purpose prong of the rule in saying, "Generally, since the lawyer exercises primary control over the litigation, the responsibility for improper purpose violations should rest with the lawyer." *Bryson*, 102 N.C. App. at 10, 401 S.E.2d at 652. Parties, as well as attorneys, may be subject to sanctions for violations of the improper purpose prong of Rule 11. Further, both are subject to an objective standard to determine the existence of such an improper purpose. *Turner v. Duke University*, 325 N.C. at 164, 381 S.E.2d at 713.

[5] Another interpretative issue is what the trial court should review in deciding whether a pleading is warranted by existing law. We hold that reference should be made to the document itself, and the reasonableness of the belief that it is warranted by existing law should be judged as of the time the document was signed. Responsive pleadings are not to be considered. *See Cooter & Gell*, 496 U.S. 384, 110 L. Ed. 2d 359, 375 (violation of the Rule is complete when paper is signed); *Sheets v. Yahama Motors Corp., U.S.A.*, 891 F.2d 533, 536 (5th Cir. 1990); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 874 (5th Cir. 1988) ("Like a snapshot, Rule 11 review focuses upon the instant when the picture is taken—when the signature is placed on the document."); *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986) ("Limiting the application of rule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule."), *cert. denied*, 480 U.S. 918, 94 L. Ed. 2d 689 (1987). *Cf. Sunamerica v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991) (N.C.G.S. § 6-21.5 permits the trial court to look at responsive pleadings).

We therefore hold that in determining whether a pleading was warranted by existing law at the time it was signed the court

must look at the face of the pleading and must not read it in conjunction with responsive pleadings, as the Court of Appeals erroneously held in this case and in other Rule 11 opinions. *E.g.*, *Higgins v. Patton*, 102 N.C. App. 301, 306, 401 S.E.2d 854, 857; *dePasquale v. O'Rahilly*, 102 N.C. App. 240, 246, 401 S.E.2d 827, 830 (1991) (paradoxically reading the complaint in conjunction with the responsive pleadings to determine its "*facial*" plausibility).

[6] In *Tittle v. Case*, 101 N.C. App. 346, 399 S.E.2d 373 (1991), the Court of Appeals held that Rule 11 imposes "a continuing duty to analyze the basis for a pleading, motion, or other paper signed pursuant to the rule and withdraw it when it becomes apparent, or should become apparent, that the pleading, motion, or other paper no longer comports with the rule." *Id.* at 349, 399 S.E.2d at 375. As the Court of Appeals said in *Tittle*,

> The federal courts have reached differing conclusions in analyzing this question, however. Some courts have focused on the language of the rule, which speaks to the signing of pleadings, motions, and other papers, and determined that the only inquiry is whether the [signer] acted with objective reasonableness at the time of the signing. *See Oliveri v. Thompson*, 803 F.2d 1265 (2nd Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987). Other courts have focused on the apparent purpose of the rule as a policing mechanism and a desire not to undercut its full force in imposing a continuing duty. *See Herron v. Jupiter Transp. Co.*, 858 F.2d 332 (6th Cir.1988).

Tittle, 101 N.C. App. at 349, 399 S.E.2d at 375.

The text of the Rule requires that whether the document complies with the legal sufficiency prong of the Rule is determined as of the time it was signed. Therefore, we reject the inference in *Tittle* that under the legal sufficiency prong "the Court's analysis in *Turner* [*v. Duke University*, 325 N.C. 152, 381 S.E.2d 706] must be seen as at least impliedly recognizing that such a [continuing] duty exists under our own Rule 11." *Tittle*, 101 N.C. App. at 349, 399 S.E.2d at 375.[1]

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1. It is true that in *Turner* we found Rule 11 violations in the defendant's failure to adequately comply with a discovery order and in the noticing and taking of two depositions. Sanctions were nonetheless based on the signing of pleadings and "other papers" i.e., a 2 July 1987 letter from counsel for Duke that listed

[7] We also disavow *Tittle's* statement based on the legal sufficiency prong of Rule 11 that, "In some circumstances . . . the failure to dismiss a case when irrefutable evidence has come to [one's] attention that the case is meritless may require sanctions pursuant to Rule 11." 101 N.C. App. at 350, 399 S.E.2d at 375.[2] In light of our holding that subsequent papers will not be considered in evaluating the validity of a certification, we hold that subsequently filed documents cannot impose a duty on counsel or a party under the legal sufficiency prong of the Rule to seek dismissal. However, once responsive pleadings or other papers are filed and the case has become meritless, failure to dismiss or further prosecution of the action may result in sanctions either under the improper purpose prong of the Rule, or under other rules, or pursuant to the inherent power of the court. *See Chambers v. Nasco, Inc.*, --- U.S. ---, 115 L. Ed. 2d 27 (1991).

In accord with our interpretation are *Corporation of the Presiding Bishop v. Assoc. Contractors*, 877 F.2d 938, 942-43 (11th Cir. 1989), *cert. denied*, 493 U.S. 1079, 107 L. Ed. 2d 1038 (1990); *Cunningham v. County of Los Angeles*, 879 F.2d 481, 490 (9th Cir. 1988), *cert. denied*, 493 U.S. 1035, 107 L. Ed. 2d 773 (1990); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 874 (5th Cir. 1988); *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 621 (8th Cir. 1987); *Hamer v. County of Lake*, 819 F.2d 1362, 1370 n. 15 (7th Cir. 1987), *cert. denied*, 493 U.S. 849, 107 L. Ed. 2d 104 (1989); *Pantry Queen Foods v. Lifschultz Fast Freight*, 809 F.2d 451, 454 (7th Cir. 1987); *Andrews v. Bible*, 812 S.W.2d 284 (Tenn. 1991). Wright and Miller note that *Thomas* brought the Fifth Circuit

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the name, but not the address of Dr. Havard, Duke's expert witness, which was factually misleading and in violation of the court's 6 August 1986 order and the deposition notices themselves that fell under Rule 11's prohibition against causing unnecessary delay and needless increase in litigation costs. Violations in *Turner* were considered under both the legal sufficiency prong and the improper purpose prong of the Rule. Likewise, in *Shook v. Shook*, 95 N.C. App. 578, 383 S.E.2d 405 (1989), *disc. rev. denied*, 326 N.C. 50, 389 S.E.2d 94 (1990), "the consistent use of inflated figures in a complaint [for spousal support], *after opportunity to amend*, was sufficient to support an award of sanctions," *Tittle*, 101 N.C. App. at 350, 399 S.E.2d at 375, because the complaint was not "well-grounded in fact" as the Rule requires it to be. The word "consistent" as used there was meant to denote consistency in assertions made throughout the amended pleading, not persistence in perpetrating ungrounded facts.

2. The situation in which one has an *improper purpose* in continuing litigation after subsequent developments in the case render it meritless requires sanctions under Rule 11, but such sanctions are not under the legal sufficiency prong of the Rule.

into harmony with other circuits in holding that Rule 11 imposes no continuing duty to conform past pleadings to new events. 2A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1332 (1990).

The legal question of whether a client whose counsel signs a pleading that violates Rule 11 but who does not himself sign the challenged pleading may be subject to sanctions under Rule 11 is not an issue arising on this appeal. The record shows that both of the plaintiffs signed the complaint. The authorities are divided on this question. We do not determine the question in this case, especially when counsel have not had an opportunity to brief and argue the question upon a record in which the issue is properly presented to this Court. We thus leave this question to another day.[3]

Finally, in reviewing the actions of the trial court in applying Rule 11, the appellate court is guided by the familiar rules for appellate review in which

> the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner, 325 N.C. at 165, 381 S.E.2d at 714.

We now discuss the defendants' second statutory argument which was made under N.C.G.S. § 6-21.5. According to the statute,

> In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.

N.C.G.S. § 6-21.5 (1984).

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3. In this connection, the Advisory Committee on the Federal Rules of Civil Procedure has recently proposed sweeping amendments to Rule 11 which, if adopted, would substantially affect this issue. *See Standing Committee on Rules of Practice and Procedure Proposed Rule 11*, 61 Miss. L.J. 55 (1991).

In the prior proceedings in this case, proper care has not been taken to differentiate between the application of N.C.G.S. § 6-21.5 and Rule 11. While the language and to some extent the purposes of the two are similar, they operate in very different ways.

[8] The case of *Sunamerica*, 328 N.C. 254, 400 S.E.2d 435, clarifies these differences. Sunamerica argued that an attorneys' fee was improperly ordered because at the time of the filing of the complaint a justiciable controversy had properly been alleged, and it was not until the defendant pled the statute of limitations as a defense that the controversy could conceivably have been considered meritless. However, we held that under N.C.G.S. § 6-21.5, the party against whom attorneys' fees are being considered has "a continuing duty to review the appropriateness of persisting in litigating a claim which [is] alleged [to lack a justiciable issue]." *Sunamerica*, 328 N.C. at 258, 400 S.E.2d at 438. Accordingly, it is appropriate in N.C.G.S. § 6-21.5 cases to read the questionable pleading *with* responsive pleadings to determine whether there exists a justiciable controversy.[4]

Comparing the texts and our jurisprudence of Rule 11 with § 6-21.5, it is clear that Rule 11 allows sanctions for the certification of a court paper that violates the Rule and therefore only the challenged pleading itself is considered. In contrast, N.C.G.S. § 6-21.5 requires review of all relevant pleadings and documents in determining whether attorneys' fees should be awarded.

I.

Turning now to the issues before this Court, we consider whether litigants who rely in good faith upon advice of counsel concerning the legal basis for their claim may have sanctions imposed against them under the legal sufficiency prong of Rule 11 if it is determined that the pleading violates the Rule. Within

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4. It is instructive for purposes of this opinion to take notice of footnote 1 in the *Sunamerica* opinion, which comments on the ability of a responsive pleading to convert a previously adequate pleading into one containing a *nonjusticiable* controversy:

> This [ability] may be contrasted with the standard applied under N.C.R.Civ.P. 11. *Cf., e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 2455, 110 L.Ed.2d 359, 375 (1990) ("[T]he 'violation of [federal] Rule 11 is complete when the paper is filed,' " quoting *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir.1987)).

Sunamerica, 328 N.C. at 257, 400 S.E.2d at 437 (alteration in original).

the mushrooming area of Rule 11 law, relatively few cases have arisen in which sanctions are sought against litigants, as opposed to attorneys, because of allegedly insufficient legal claims.

[9] In determining when to make an award under Rule 11 on the ground that a pleading is not warranted by existing law, we adopt the two-part analysis Judge Greene used in the case *sub judice*. *See also* Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 17(B)(1) at 94-95 (Supp. 1991). This approach looks first to the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of "whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law." *dePasquale*, 102 N.C. App. at 246, 401 S.E.2d at 830.

Thus, the first question is whether the pleading, a complaint in this case, was warranted by existing law as of the time it was signed. As discussed above, the Court of Appeals erred in framing this question by asking whether the complaint *when read in conjunction with the answer* was legally sufficient. Consequently, the conclusion reached by the Court of Appeals is erroneous.

The trial court concluded that on its face the complaint, filed by Lois and Marc Bryson for compensation for services they provided to Millie Bryson and self-dealing on Rachel Sullivan's part, was well-grounded in law. For the purposes of this appeal, we do not need to decide whether that conclusion was sound. Assuming *arguendo* that the complaint is a legally defective pleading, we move on to consider whether "to the best of [Lois and Marc's] knowledge, information, and belief formed after reasonable inquiry the pleading was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." N.C.G.S. § 1-1A, Rule 11(a) (1986).

[10] The first question, then, is what would suffice as a "reasonable inquiry" by Marc and Lois into the legal sufficiency of the claim. We note that represented parties, like their counsel, will be held to an objective standard of reasonable inquiry. *Business Guides*, --- U.S. at ---, 112 L. Ed. 2d at 1159. If, given the knowledge and information which can be imputed to a party, a reasonable person under the same or similar circumstances would have terminated his or her inquiry and formed the belief that the claim

was warranted under existing law, then the party's inquiry will be deemed objectively reasonable.

[11] The next question is what "good faith" means in this context. *Black's Law Dictionary* 693 (6th ed. 1990) defines good faith as "honesty of intention, and freedom from knowledge of circumstances which ought to put [one] upon inquiry." We adopt this general definition for Rule 11 purposes. If in a Rule 11 hearing the court finds, for example, that a client failed to disclose a material fact to counsel, good faith reliance on the attorney's opinion regarding the merits of the case cannot be established.

[12] Here, the trial court found as a fact that the parties "acted in good faith and upon the advice of counsel." We hold that finding to be supported by a sufficiency of the evidence. Lois Bryson was told by counsel that she had grounds for filing a lawsuit, and various anticipated defenses were discussed with her, including, *inter alia*, the consent judgment, which was not considered by counsel to be a bar to plaintiffs' claims against Millie's estate. The Court of Appeals upheld the finding but deemed it insufficient to establish an objectively reasonable belief in the legal validity of the claims. This was error; we reverse the Court of Appeals on this point. We hold that the good faith reliance of Lois and Marc Bryson, as represented parties, on their attorneys' advice that their claims were warranted under the law is sufficient to establish an objectively reasonable belief in the legal validity of their claims.

Further, defendants have failed to show that the Brysons were not acting in good faith in their reliance on their attorneys. While it is clear from the record that the Brysons and their attorneys were aware at the outset of the consent judgment, it is also certain that the attorneys' advice as to the validity of the claims took the consent judgment into consideration. The attorneys opined that the lawsuit was meritorious despite the consent judgment. This evidence supports the finding that the reliance of the Brysons was in good faith.

We therefore hold that the trial judge properly denied the motion for sanctions under Rule 11.

II.

Next, we consider the propriety of levying Rule 11 sanctions against the Brysons for allegedly interposing their claims for an "improper purpose." This question was not raised directly in the

petition for discretionary review, but because it is intrinsic to the resolution of the case and we find error in its treatment by the Court of Appeals, we address it.

We affirm the Court of Appeals' holding that whether a pleading, motion or other paper was filed for an improper purpose must be reviewed under an objective standard. *Turner*, 325 N.C. at 164, 381 S.E.2d at 713. Here, the burden was on the defendant to prove the existence of such improper purpose.

As the Court of Appeals wrote,

> Here the trial court entered no specific conclusions of law on improper purpose, concluding only that "plaintiffs at all times relied on advice of counsel." The trial court apparently determined that reliance on counsel precluded an order of sanctions based upon improper purpose. This was an incorrect assumption. . . . Therefore, as this conclusion is inadequate to support the order that defendants were not entitled to sanctions for improper purpose, we vacate the trial court's order.

Bryson, 102 N.C. App. at 14, 401 S.E.2d at 655.

[13] We agree with the Court of Appeals on this point. Whereas a represented party may rely on his attorney's advice as to the legal sufficiency of his claims, he will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents, or cause them unnecessary cost or delay. *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, --- U.S. ---, 113 L. Ed. 2d 669 (1991).

[14] However, we disagree with the Court of Appeals' further holding that unless the complaint failed either the legal or factual certification requirement of Rule 11 its filing "cannot be for an improper purpose." *Bryson*, 102 N.C. App. at 14, 401 S.E.2d 655. This is erroneous. Accordingly, we disavow the recent reaffirmations of that notion in *In re Finnican*, 104 N.C. App. 157, 163, 408 S.E.2d 742, 746 (1991) and *Higgins*, 102 N.C. App. 301, 306, 401 S.E.2d 854, 857. The improper purpose prong of Rule 11 is separate and distinct from the factual and legal sufficiency requirements. Certification under the Rule includes three things: That the subject person has read the document, that he or she believes it to be well-grounded in fact and law, "*and* that it is not interposed for any improper purpose." N.C. R. Civ. P. 11(a) (emphasis added).

This question whether the service or filing of a pleading, motion or other paper for an improper purpose violates the Rule, even if the paper is well-grounded in fact and law, has been the subject of discord among the federal circuits which have addressed it. *Cf., e.g., Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1130 (5th Cir. 1987) and *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir. 1986). However, we conclude that our resolution of the issue is the better-reasoned rule. *See generally* Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 13(C) at 184 (1989); 2(A) *Moore's Federal Practice* § 11.02(4) (1991).

[15] Although the trial judge did not make an express conclusion that sanctions were not proper under the improper purpose prong of Rule 11, he did deny the motion for sanctions. As a basis for their motion for sanctions, defendants specifically alleged that the complaint was filed for the improper purpose of harassing defendants, causing delay in the estate proceedings, and needlessly increasing the costs of litigation. Thus, the trial judge, of necessity, denied sanctions on this prong of Rule 11. From our review of the evidence before the trial judge at the hearing on the motion for sanctions, we conclude that the evidence was insufficient to sustain sanctions under this requirement of Rule 11.

Therefore, for the reasons stated, we reverse the Court of Appeals' vacating of the trial court's order denying sanctions under the improper purpose prong of Rule 11.

III.

[16] Finally, we address the argument that attorneys' fees should be awarded to the defendants under N.C.G.S. § 6-21.5. We hold that jurisdiction remains with the court even after dismissal to decide a post-dismissal motion pursuant to this statute, just as we did in the Rule 11 context. Again, even if the dismissal had been without prejudice, Rachel Sullivan would still have been the "prevailing party" for N.C.G.S. § 6-21.5 purposes.[5]

The rule that governs the attorneys' fees issue here was first set forth in *Sunamerica*, 328 N.C. 254, 400 S.E.2d 435. The issue

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5. In so holding, we overrule *Kohn v. Mug-A-Bug*, 94 N.C. App. 594, 380 S.E.2d 548 (1989), which held that attorneys' fees could not be awarded under N.C.G.S. § 6-21.5 after plaintiffs took a voluntary dismissal without prejudice because there was no adjudication on the merits and thus no "prevailing party."

in *Sunamerica* was whether the trial court erred in awarding attorneys' fees where it found a complete absence of a justiciable issue. Sunamerica Financial Corporation persisted in pursuing the litigation after it was faced with the insurmountable defense of the statute of limitations.

[17] On the facts of the instant case, the consent decree signed by Lois and Marc and other defenses raised in Rachel's answer of 12 March 1990 rendered nonjusticiable all of the claims alleged in plaintiffs' complaint. On 30 April 1990, prior to Judge Allen's summary judgment ruling, Lois and Marc filed a voluntary dismissal with prejudice. Unlike *Sunamerica*, there is no indication in this record that the plaintiffs took any further affirmative action in regard to the lawsuit between the time they received the defendants' answer and the time of the hearing on defendants' summary judgment motion.

We therefore hold that, having dismissed the case some seven weeks after the defenses were asserted and having not pursued the litigation further during those intervening weeks, the Brysons cannot be said to have "persisted in litigating the case after a point where [they] should reasonably have become aware that the pleading [they] filed no longer contained a justiciable issue." *Sunamerica*, 328 N.C. at 258, 400 S.E.2d at 438.

Consequently, we reverse the Court of Appeals' holding as to this issue and affirm the trial court's denial of attorneys' fees under N.C.G.S. § 6-21.5.

[18] We note that the Court of Appeals held that "[w]here appropriate, the trial court may assess the awarded attorney fees against the losing party's attorney," *Bryson*, 102 N.C. App. at 15, 401 S.E.2d at 656, although it also declared, "N.C.G.S. § 6-21.5 does not specify whether it is the losing party or his attorney or both who may be ordered to pay the attorney fees." 102 N.C. App. at 15, 401 S.E.2d at 655. The statute and cases interpreting it reveal no instance in which an attorney has been ordered to pay the prevailing party's attorneys' fees thereunder. The language of the statute, unlike the text of Rule 11, refers in every instance to the "party" without any hint of including counsel in that term. "Because statutes awarding an attorney's fee to the prevailing party are in derogation of the common law, N.C.G.S. § 6-21.5 must be strictly construed." *Sunamerica*, 328 N.C. at 257, 400 S.E.2d at 437. We therefore hold that N.C.G.S. § 6-21.5 does not authorize

the court to require counsel to pay attorneys' fees to the prevailing party.[6]

In summary, on Issue I we hold that litigants who rely in good faith on advice of counsel as to the legal plausibility of their claims are not subject to sanctions under the legal sufficiency prong of N.C.G.S. § 1-1A, Rule 11(a) and reverse the Court of Appeals' order of remand to the trial court.

On Issue II we reverse the Court of Appeals' vacating of the trial court's denial of sanctions based on improper purpose.

On Issue III we reverse the Court of Appeals' remand and affirm the trial court's denial of attorneys' fees under N.C.G.S. § 6-21.5.

Reversed in part and affirmed in part.

MICHAEL OWENS, D/B/A OWENS EXPRESS v. PEPSI COLA BOTTLING COMPANY OF HICKORY, N.C., INC.

No. 440PA89

(Filed 27 January 1992)

1. **Unfair Competition § 1 (NCI3d)— Soft Drink Interbrand Competition Act—state unfair practices laws—preempted**

The federal Soft Drink Act preempts North Carolina's unfair practices laws to the extent that they would proscribe wholesaling restrictions imposed by bottlers to prevent transshipment (selling outside a bottler's territory). The language of the federal act makes it clear that parent soft drink companies may require their bottlers to ensure that their products are not transshipped directly or indirectly, and, in light of Congress's intent to preserve territorial exclusivity, wholesaling restrictions imposed by bottlers to prevent transshipping must be deemed reasonable. The Soft Drink Act preempts North Carolina's unfair practices laws because those laws are decidedly an obstacle to the accomplishment of Con-

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6. For other methods by which courts may sanction counsel who have abused the judicial process see, e.g., *Chambers v. Nasco, Inc.*, --- U.S. ---, 115 L. Ed. 2d 27.

gress's objectives; however, the Soft Drink Act authorizes bottlers to impose wholesaling restrictions on their customers only to prevent transshipping. N.C.G.S. § 75-1.1(a).

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 461, 468, 735, 788.

2. **Unfair Competition § 1 (NCI3d)— soft drink pricing—unfair competition—summary judgment**

Plaintiff's forecast of evidence on claims for unfair practices, price fixing, and tortious interference with prospective economic advantage involving soft drink pricing was sufficient to raise a question of fact as to whether defendant's conduct was for the proper purpose of preventing transshipment of its products and therefore protected by the Soft Drink Act; whether defendant intervened with plaintiff's business relationships for a legitimate purpose; and whether plaintiff suffered injury in the form of lost sales.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 461, 468, 735, 788; Summary Judgment § 23.

ON discretionary review of a decision by a unanimous panel of the Court of Appeals, 95 N.C. App. 47, 381 S.E.2d 819 (1989), affirming in part and reversing and remanding in part an order of summary judgment entered by *Lamm, J.*, on 25 February 1988, in Superior Court, CALDWELL County. Heard in the Supreme Court 17 May 1990.

Tuggle Duggins Meschan & Elrod, P.A., by Joseph F. McNulty, Jr., for plaintiff-appellee.

Petree Stockton & Robinson, by George L. Little and J. David Mayberry, for defendant-appellant.

EXUM, Chief Justice.

Plaintiff, a retailer of Pepsi-Cola products, brought this action against defendant, a bottler and distributor of these products, alleging unfair practices and price-fixing under Chapter 75 of our General Statutes, fraud and tortious interference with prospective economic advantage. Defendant pleaded the protections of the Soft Drink Interbrand Competition Act of 1980 (Soft Drink Act), 15 U.S.C. §§ 3501-03.

After an evidentiary hearing, the trial court granted defendant's motion for summary judgment as to all claims. On plaintiff's appeal the Court of Appeals reversed on the Chapter 75 claims and affirmed on the other two. We allowed defendant's petition for discretionary review of the ruling by the Court of Appeals on plaintiff's Chapter 75 claims. Pursuant to Appellate Procedure Rule 15(d), plaintiff brought forward for further review the Court of Appeals' ruling on his interference with prospective economic advantage claim. Plaintiff has abandoned his fraud claim.

Of primary importance in the resolution of this appeal is a question of first impression: whether the Soft Drink Act preempts our unfair practices statutes and related common law principles in governing efforts by soft drink bottlers to restrict the manner in which their customers may resell these products. We hold that it does, but only to the extent that these efforts are for the purpose of insuring compliance with the territorial exclusivity provisions contained in the licensing arrangements common to the soft drink industry. Because the forecast of evidence presented at the hearing on summary judgment raises a question of fact as to whether defendant acted for this purpose, defendant is not entitled to prevail at this stage of the lawsuit.

I.

The forecast of evidence on summary judgment, taken in the light most favorable to plaintiff, the nonmoving party, tends to show the following:

Defendant is the exclusive bottler and distributor of Pepsi-Cola (Pepsi) brand soft drinks in several northwestern North Carolina counties, including Caldwell. As such, defendant is part of PepsiCo, Inc.'s exclusive territorial distribution system. This system functions as follows. PepsiCo produces syrup and concentrate, the flavoring ingredients for its trademarked soft drinks, which it sells to independent bottlers. The bottlers are licensed by PepsiCo to produce and sell finished soft drinks in exclusive geographic territories. Bottlers generally sell their soft drinks to retailers, who in turn sell directly to the consuming public.

To preserve the integrity of the territorial system, PepsiCo forbids its bottlers from "transshipping"—selling outside their territories. Indeed, PepsiCo holds its bottlers accountable for any sale of Pepsi products outside their territories, whether such sales

are made by the bottlers themselves or by their retail customers. Bottlers whose products are transshipped are subject to fines, loss of advertising funds and even cancellation of their franchise agreements. PepsiCo monitors compliance by coding products, tracing them and investigating all reported instances of transshipment.

Plaintiff owns and operates a convenience store in the Caldwell County community of Granite Falls. Operating under the trade name "Owens Express," he offers the usual fare including Pepsi soft drinks, which he purchases from defendant. Plaintiff sells Pepsi products to two types of customers: walk-in customers who purchase in small quantities for individual consumption, and institutional customers—local schools and factories—which purchase in large quantities for resale to ultimate consumers. Plaintiff offers a wide variety of Pepsi products to his walk-in customers, including soft drinks packaged in two-liter plastic bottles ("two-liters") and canned soft drinks in packs of twelve ("twelve-packs"). Plaintiff sells only twelve-packs to his institutional customers. Because defendant also wholesales twelve-packs to schools and factories in Caldwell County, the parties are in direct competition.

By taking full advantage of defendant's seasonal promotional sales, plaintiff is able to undersell both his retail competitors and defendant. During these promotionals, plaintiff purchases discounted soft drinks in quantities sufficient to service his retail and wholesale trades until the next promotional sale. With little storage space in his store, plaintiff stores quantities beyond his immediate needs in warehouses, from which he periodically replenishes his store supply. Thus, plaintiff's prices, both retail and wholesale, are based year-round on defendant's promotional prices. Retail competitors who do not buy in bulk are able to match plaintiff's "everyday low prices" only during promotional periods. During the rest of the year, these competitors must base their prices on defendant's higher "truck price," the fluctuating price at which defendant sells products off its delivery trucks. By the same token, defendant cannot compete with plaintiff's wholesale prices during nonpromotional periods.

Defendant has at times encouraged plaintiff's practice of buying in bulk, as well as his practice of selling to local schools and factories. During its 1986 twelve-pack promotional, defendant offered plaintiff substantial rebates on large purchases and agreed to deliver these purchases to plaintiff's warehouses. In addition,

one of defendant's local route sales personnel made deliveries directly to plaintiff's institutional customers.

On 2 April 1987, defendant's representatives visited plaintiff's store and demanded that he raise, and maintain, his price for two-liters above defendant's truck price. This was not the first time defendant had attempted to dictate plaintiff's prices for two-liters. In an earlier incident, defendant's representatives responded to complaints from plaintiff's retail competitors by cutting down a banner at his store which advertised two-liters at a low price.

During the 2 April 1987 visit, defendant's agents also forbade plaintiff from wholesaling twelve-packs to local schools and factories, threatening to cut off his supply of Pepsi products if he failed to comply. Plaintiff indicated that he would neither raise his prices nor stop wholesaling.

Shortly thereafter, defendant started its 1987 twelve-pack promotional without offering plaintiff an opportunity to participate. After being contacted by plaintiff's lawyer, defendant informed plaintiff that he would be allowed to participate upon certain conditions. First, plaintiff's store display of twelve-packs would be limited to 100 cases (two twelve-packs to a case), replenished no more than twice a week. Second, he could not store twelve-packs in the back room of the store or in his warehouses. Third, he could sell no more than ten cases per customer. And finally, he could not wholesale twelve-packs. Though plaintiff indicated that he required more than 200 cases a week to service his retail trade alone, defendant refused to increase the prescribed limit.

Plaintiff was permitted to purchase only 2,500 cases of twelve-packs in 1987, 5,000 fewer than in 1986. As a result, he could neither fill orders from local schools and factories nor meet his retail demand. By early fall of 1987, his stock was completely depleted. Though plaintiff had never sold two-liters wholesale, defendant also limited his supply of these products. Plaintiff needed 300 cases of two-liters a week, but was limited to as few as ten.

Defendant also enforced its no-wholesaling command by forbidding at least one of plaintiff's institutional customers from doing business with plaintiff. Defendant threatened to remove the school's vending machines unless it agreed to purchase twelve-packs exclusively from defendant.

Plaintiff filed his complaint on 10 August 1987, pleading four causes of action: (1) unfair practices under N.C.G.S. § 75-1.1(a), based on defendant's attempts to force him to raise his prices for two-liters, (2) price-fixing under N.C.G.S. § 75-5(b)(3), based on defendant's attempts to prevent him from wholesaling twelve-packs, (3) fraud, and (4) tortious interference with prospective economic advantage. In its answer, defendant admitted curtailing plaintiff's supply of Pepsi products and forbidding him from wholesaling. Defendant explained that it did so to ensure that its products would not be transshipped, and that the restrictions were designed to limit only plaintiff's wholesale trade. Defendant argued that such restrictions are sanctioned by the Soft Drink Act and therefore immune from scrutiny under North Carolina law.

Defendant also admitted that one of its route sales personnel, eager for extra commissions, encouraged plaintiff to wholesale. Defendant asserted, however, that the salesperson acted without the knowledge of management. Defendant denied attempting to force plaintiff to raise his prices for two-liters, or bullying plaintiff's institutional customers.

II.

[1] We turn first to the issue of whether the Soft Drink Act preempts our unfair practices laws. In its ruling on this issue, the Court of Appeals found the Soft Drink Act "inapplicable" to plaintiff's Chapter 75 claims. The court reasoned as follows:

> Plaintiff's complaint raises allegations concerning tortious contractual interference, fraud, price fixing and unfair and unlawful trade practices arising out of factual allegations that do not pertain to the matters covered by the Act. Therefore, since this Act does not apply, there is no preemption, express or otherwise, of North Carolina authority to apply its laws to the case *sub judice*.

Owens v. Pepsi Cola Bottling Co., 95 N.C. App. 47, 51, 381 S.E.2d 819, 821. Insofar as plaintiff's claims are based on defendant's allegedly improper wholesaling restrictions, the above language amounts to a ruling that wholesaling restrictions, regardless of their purpose, are not protected by the Soft Drink Act. Based on the language of the Act, its legislative history and relevant case law, we are persuaded that it authorizes soft drink bottlers to impose wholesaling restrictions on their customers to prevent transshipping, and

that our unfair practices laws must be deemed preempted to the extent they conflict with that authority.

The Soft Drink Act provides that:

> Nothing contained in any antitrust law shall render unlawful the inclusion and enforcement in any trademark licensing contract or agreement, pursuant to which the licensee engages in the manufacture . . ., distribution, and sale of a trademarked soft drink product, of provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area or limiting the licensee, directly or indirectly, to the manufacture, distribution, and sale of such product only for ultimate resale to consumers within a defined geographic area: *Provided*, That such product is in substantial and effective competition with other products of the same general class in the relevant market or markets.

15 U.S.C. § 3501 (1980). Section 3503 of the Act specifies that "the term 'antitrust law' means the Sherman Act, the Clayton Act, and the Federal Trade Commission Act." (Citations omitted.)

This legislation was enacted in response to a 1978 ruling by the Federal Trade Commission that the syrup manufacturers' long-standing territorial distribution system was an unreasonable restraint of trade. S. Rep. No. 645, 96th Cong., 2d Sess. 4-6 (1980). The Act is intended to exempt territorial arrangements from *per se* illegality under the antitrust laws and thereby "preserve the present system of local manufacture, distribution, and sale." *Id.* at 10. In furtherance of this goal, the Soft Drink Act provides for the "enforcement" of license provisions which restrict bottlers, "directly or indirectly," to sale of their product "only for ultimate resale to consumers within a defined geographic area."

The language of the Act makes it clear that licensors—parent soft drink companies—may require their licensees—bottlers—to ensure that their products are not transshipped, whether such transshipment is accomplished directly, by the bottlers themselves, or indirectly, through intermediary resellers. This conclusion is buttressed by the Act's legislative history. According to the Senate Report: "the bill makes lawful license provisions which have the effect of precluding indirect evasions of the license agreement. Thus, the exclusive territorial rights of one licensee are protected from the direct or indirect sales by the licensor or any of its

other licensees into his defined geographic area." S. Rep. No. 645, 96th Cong., 2d Sess. 10. If licensors may require licensees to prevent transshipment as a condition of the licensing agreement, licensees must be empowered to take reasonable steps to comply with such agreement.

The question remains, of course, whether wholesaling restrictions are a reasonable means of preventing transshipping. Plaintiff contends that such restrictions are unreasonable in the situation presented by this case: where the retail customer has engaged in wholesaling but only *within* the bottler's exclusive territory. Defendant responds that it has hundreds of retail customers and cannot afford to speculate as to the market intentions of each one individually. Because some will inevitably transship, a blanket prohibition against wholesaling is the only economically feasible response.

Defendant rejects as unreliable plaintiff's pledge, made in an affidavit opposing summary judgment, to sell only to customers located in defendant's territory and "not to knowingly sell any [soft drinks] to any customer for purposes of resale to an ultimate purchaser located outside [defendant's territory]." As defendant points out, plaintiff has no control over the ultimate disposition of the soft drinks once they are out of his hands. That plaintiff has pledged only to prevent "knowing" transshipment proves this point. Furthermore, it is defendant, not plaintiff, who faces severe economic sanctions for transshipment. Clearly then, bottlers should not be required to rely on their retail customers to prevent transshipping. In light of Congress' intent to preserve territorial exclusivity, wholesaling restrictions imposed by bottlers to prevent transshipping must be deemed reasonable.

Our conclusion that the Soft Drink Act authorizes bottlers to restrict wholesaling in order to prevent transshipping has been approved in every jurisdiction that has considered the issue. *See Commw. of Pa., ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173 (3d Cir. 1988); *Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc.*, 754 F.2d 10 (1st Cir. 1985); *Sun Dun, Inc. v. Coca-Cola Co.*, 770 F. Supp. 285 (D. Md. 1991); and *O'Neill v. Coca-Cola Co.*, 669 F. Supp. 217 (N.D. Ill. 1987). In *Zimmerman*, Pennsylvania brought a *parens patriae* action against PepsiCo and two of its bottlers alleging that the three defendants had engaged in the following practices:

> using a coding identification system to trace and monitor soft drink sales; fining bottlers when their product is transshipped . . .; refusing to deal with resellers who engage in transshipping; refusing to deal with resellers who buy from or sell to other resellers; threatening termination of resellers who engage in such sales; and limiting sales to resellers to the amount the reseller needs solely for its own retail sales, in order to prevent that reseller from wholesaling.

Zimmerman, 836 F.2d at 175. The court upheld the trial court's dismissal under Rule 12(b)(6), Fed. R. Civ. P., of Pennsylvania's antitrust challenge, holding that the alleged practices were "*expressly* permitted by the provisions of section 3501." *Id.* at 183. The court reasoned that

> the Soft Drink Act applies to the entire chain of distribution—from the manufacturer all the way through the consumer. It permits the manufacturer to require a bottler to ensure that the ultimate resale of the PepsiCo products it produces will be to consumers within its territory. Thus, it allows bottlers to refuse to sell to resellers whose actions impede this goal.

Id. Implicit in the last sentence of the above quote is the assumption that wholesaling by resellers impedes the goal of territorial exclusivity.

Though the Court of Appeals in *Zimmerman* deemed it unnecessary to consider whether wholesaling restrictions were a *reasonable* means of preventing transshipping, the district court considered the issue at length. Citing a case which dealt with the same issue in a different context, *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853 (1st Cir. 1982), the court found wholesaling restrictions reasonable, even though presented with a situation in which the resellers did not intend to transship:

> It would appear that virtually any box of Hollister (the manufacturer) products sent to Bruce (the retailer) could, potentially, wind up overseas . . . . Defendant cannot be faulted for failing to engage in elaborate and possible [sic] time-consuming speculation about Bruce's marketing intentions on an order-by-order or box-by-box basis.

Zimmerman, 658 F. Supp. at 820-21.

Based on the foregoing, we are convinced that the Soft Drink Act authorizes wholesaling restrictions by bottlers as a reasonable means of preventing transshipping. We turn, therefore, to the question of whether the Soft Drink Act preempts our unfair practices laws. Having found the Soft Drink Act "inapplicable" to claims challenging wholesaling restrictions, the Court of Appeals necessarily answered this question in the negative. We believe the Court of Appeals erred in its holding.

Contrary to plaintiff's contention, the preemption question is not answered simply by observing that the Soft Drink Act, on its face, only protects against federal antitrust liability. Preemption may be express or implied. *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 152-53, 73 L. Ed. 2d 664, 674-75 (1982). As articulated by the Court in *Fidelity*, the Supremacy Clause of the United States Constitution, Article VI, Section 2, requires preemption where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 587 (1941)). In such a situation, state law is preempted to the extent that it conflicts with federal law. *Id.*

North Carolina's unfair practices laws are decidedly an obstacle to the accomplishment of Congress' objectives. Absent the protections of the Soft Drink Act, defendant's wholesaling restrictions would be deemed coercive conduct and therefore violative of N.C.G.S. § 75-1.1(a). *See Wilder v. Squires*, 68 N.C. App. 310, 315 S.E.2d 63, *disc. review denied*, 311 N.C. 769, 321 S.E.2d 158 (1984). As shown above, bottlers must be able to forbid wholesaling by retail customers to preserve territorial exclusivity. We hold, therefore, that our unfair practices laws are preempted by the Soft Drink Act to the extent that they would proscribe wholesaling restrictions imposed by bottlers to prevent transshipment.

We emphasize that our holding is limited. The Soft Drink Act authorizes bottlers to impose wholesaling restrictions on their customers *only* to prevent transshipping. Wholesaling restrictions imposed for any other purpose are outside the purview of the Soft Drink Act and therefore subject to the full scrutiny of North Carolina law.[1] Since retail sales, *i.e.* sales to ultimate consumers,

1. The protections of the Soft Drink Act apply only when there exists "substantial and effective competition with other products of the same general class in

by bottlers' customers can pose no danger of transhipping, the Soft Drink Act provides no protection to bottlers' conduct designed to affect or restrict only retail sales by their customers.

III.

We now examine the forecast of evidence in the light most favorable to plaintiff, the nonmoving party, to determine whether his claims—unfair practices, price-fixing and tortious interference with prospective economic advantage—survive summary judgment. We conclude that plaintiff has established the existence of a genuine issue of material fact as to each of his claims. His claims, therefore, survive summary judgment. N.C.G.S. § 1A-1, Rule 56(c) (1990).

A.

[2] Plaintiff's unfair practices claim brought under N.C.G.S. § 75-1.1(a) alleges that defendant employed coercive business tactics to force him to raise his retail prices for two-liters. His evidentiary forecast shows that on at least two occasions defendant demanded that he raise his retail price for two-liters and threatened to cut off his supply if he did not comply. Plaintiff's evidence further shows that defendant severely limited his supply of two-liters when he refused to raise his prices. The Court of Appeals deemed this evidence sufficient to survive defendant's motion for summary judgment. We agree with the Court of Appeals.

There is no forecast of evidence that plaintiff sold two-liters wholesale. Rather, the forecast shows that plaintiff sold two-liters only to his walk-in customers. If this is true, there would be no danger of two-liter transshipping. The forecast of evidence is thus sufficient to raise a question of fact as to whether defendant imposed the two-liter supply restrictions in order to prevent wholesaling and, therefore, transshipping, or whether defendant's restrictions pertained solely to plaintiff's retail sales. Thus, defendant may not, on summary judgment, escape liability for plaintiff's unfair practices claim by invoking the Soft Drink Act. Defendant may raise the Soft Drink Act as a defense at trial. Whether it will

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the relevant market or markets." 15 U.S.C. § 3501 (1980). Such competition is presumed to exist, however, unless plaintiff can prove otherwise. H. Rep. No. 1118, 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S.C.C.A.N. 2373, 2389. Plaintiff has not made such an allegation in this case.

shield defendant from liability will depend on what the fact finder determines the nature and purpose of the restrictions to have been.

Defendant advances two other theories in support of summary judgment. Neither is persuasive. Defendant first argues that plaintiff's claim makes no economic sense. According to defendant, the challenged supply restrictions could not have influenced plaintiff's retail price for two-liters since defendant supplied plaintiff with sufficient quantities to service his retail trade. There are two responses to this argument. First, plaintiff's forecast of evidence shows that, in actuality, defendant did *not* supply sufficient quantities to service his retail trade. Second, as plaintiff points out, defendant accomplished with supply restrictions that which it was not able to accomplish with threats. By preventing plaintiff from buying in bulk during price promotionals, defendant ensured that plaintiff's retail price would remain linked to the higher "truck price."

Defendant's final argument is that plaintiff has not shown a compensable injury and is therefore barred from recovery by N.C.G.S. § 75-16. According to defendant, plaintiff has not produced any evidence that he actually raised his prices for two-liters as a result of the alleged threats and supply restrictions. Plaintiff's forecast of evidence is that, as a result of the supply restrictions, he did not have enough two-liters to satisfy walk-in customer demand. Lost sales, if proven at trial, would constitute a compensable injury.

Plaintiff's forecast of evidence tends to show that defendant used its control over the supply of Pepsi products to pressure him to raise his prices. Coercive conduct and inequitable assertions of power in a business context are prohibited by Chapter 75 of our General Statutes. *See Wilder v. Squires*, 68 N.C. App. 310, 315 S.E.2d 63, and *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 303 S.E.2d 565, *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983).

Thus, plaintiff's forecast of evidence on his claim under N.C.G.S. § 75-1.1(a) is sufficient to raise a question of fact as to whether defendant's conduct was for the proper purpose of preventing transshipment of the two-liters and protected by the Soft Drink Act or whether it was for other improper purposes alleged by plaintiff and violative of our unfair practices laws. We affirm, as to this claim, the decision of the Court of Appeals.

B.

In his claim under N.C.G.S. § 75-5(b)(3), plaintiff alleges that defendant limited his supply of twelve-packs in an effort to destroy him as a business rival in the wholesale market and thereby fix the price for twelve-packs at the "truck price." Plaintiff's forecast of evidence shows that defendant imposed severe supply restrictions after plaintiff refused to stop wholesaling. Plaintiff's evidence shows further that, as a result of these restrictions, he was no longer able to fill orders from his institutional customers, and that such customers were forced to buy twelve-packs from defendant at the "truck price." The Court of Appeals found plaintiff's forecast of evidence sufficient to survive summary judgment. In reaching this decision, the court relied in part on evidence that defendant attempted to force plaintiff to raise his prices for two-liters. Though we agree that plaintiff's evidence is sufficient to survive summary judgment, we believe the court erred in relying on the evidence relating to two-liters.

N.C.G.S. § 75-5(b)(3) provides as follows:

> (b) . . . it is unlawful for any person directly or indirectly to do . . . any of the following acts:
>
> > (3) To willfully destroy or injure, or undertake to destroy or injure, the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed.

As defendant points out, the parties were not in competition in the retail market for two-liters. Indeed, defendant only sells two-liters wholesale. Thus, evidence that defendant attempted to force plaintiff to raise the retail price of his two-liters, though applicable to plaintiff's unfair practices claim, has no relevance to his claim under N.C.G.S. § 75-5(b)(3).

Plaintiff's claim under N.C.G.S. § 75-5(b)(3) is based on evidence that defendant prevented him from wholesaling by limiting his supply of twelve-packs. Defendant asserts that these restrictions, because imposed to prevent transshipping, are protected by the Soft Drink Act and therefore not actionable under N.C.G.S. § 75-5(b)(3). Though defendant may raise the Soft Drink Act as a defense at trial, the forecast of evidence raises a question of fact as to whether the restrictions were in fact imposed to prevent transshipping.

Defendant's entire course of conduct vis-a-vis plaintiff is such that it should be left to the fact finder at trial to determine the propriety of the twelve-pack wholesaling restrictions. First, though defendant claims that it has a strict policy of dealing only with retailers who do not wholesale, defendant initially encouraged plaintiff's practice of buying in bulk and wholesaling to local schools and factories. Defendant went so far as to deliver Pepsi products directly to plaintiff's warehouses as well as to some of his institutional customers. Second, defendant first requested that plaintiff stop wholesaling only after plaintiff had begun underselling defendant. This request was made by defendant's representatives when they visited plaintiff's store on 2 April 1987. During that visit, defendant's representatives also threatened to cut plaintiff off altogether unless he raised his prices for two-liters. These two actions taken in concert suggest they could have been part of a common, unlawful design. Third, defendant imposed supply restrictions on both twelve-packs and two-liters within three weeks of plaintiff's refusal to raise his prices or stop wholesaling. Again, that defendant imposed supply restrictions on two-liters even though plaintiff had never sold this product wholesale, casts doubt on defendant's entire course of conduct. Fourth, contrary to defendant's supposed "anti-transshipping" policy, the restrictions on twelve-packs were so severe that plaintiff could not continue to service his retail trade. That the means do not match the supposed ends calls into question the ends themselves. Finally, even after imposing supply restrictions on plaintiff, defendant threatened sanctions against one of plaintiff's institutional customers to force that customer to buy twelve-packs exclusively from defendant at the "truck price."

The evidence marshaled above is logically compatible with plaintiff's claim that defendant imposed wholesaling restrictions on twelve-packs, not to prevent transshipping, but rather to drive plaintiff out of the wholesale market and fix the price of twelve-packs at its "truck price." There is also evidence to support defendant's explanation of its conduct. The question is one of fact to be resolved at trial and not as a matter of law.

Plaintiff's forecast of evidence on his claim under N.C.G.S. § 75-5(b)(3) is thus sufficient to raise a question of fact regarding whether defendant's conduct was for the proper purpose of precluding transshipment of its products and protected under the Soft Drink Act or whether it was for the improper purposes which plaintiff has alleged and violative of our unfair practices laws. For the

reason stated, we affirm the ruling of the Court of Appeals on this claim.

C.

Plaintiff's final claim is that defendant interfered with the business relationship between plaintiff and his institutional customers thereby robbing him of prospective economic advantage. Plaintiff's evidence shows that defendant curtailed his supply of twelve-packs so that he could no longer fill orders from local schools and factories, and that defendant forbade at least one of these customers from continuing to purchase from plaintiff. The Court of Appeals held this evidence insufficient to survive summary judgment. The court based its decision on the fact that plaintiff had not shown disruption of any existing contracts. As the court noted, "[n]otably absent from plaintiff's forecast are statements alleging the existence of contracts with any of the persons with whom plaintiff did business." *Owens*, 95 N.C. App. at 53, 381 S.E.2d at 822.

On this point the court overlooked the principle that an action for tortious interference with prospective economic advantage may be based on conduct which prevents the making of contracts. *See Coleman v. Whisant*, 225 N.C. 494, 35 S.E.2d 647 (1945). We believe plaintiff has presented a sufficient forecast of evidence to survive summary judgment on such a claim.

As stated by the Court in *Coleman*:

> We think the general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of defendant's own right, but with design to injure the plaintiff, or gaining some advantage at his expense.

Id. at 506, 35 S.E.2d at 656. Plaintiff's forecast of evidence shows that he had a valid business relationship with several schools and factories in the Granite Falls area, and that he had a reasonable expectation of continuing to do business with these customers. His evidence also shows that defendant was aware of these relationships and intervened to destroy them. As discussed in section III (B) above, plaintiff's forecast of evidence at least raises a question of fact as to whether defendant intervened for a legitimate purpose. Finally, plaintiff's evidence shows that he suffered injury in the form of lost sales. We believe the forecast of evidence sufficient

to survive summary judgment. We therefore reverse the Court of Appeals on this claim and remand it to the trial court.

IV.

Plaintiff's evidentiary forecast raises a question of fact as to whether defendant's wholesaling restrictions were imposed to prevent transshipping. Thus, the Soft Drink Act does not shield defendant from liability at the summary judgment stage, though defendant may raise the Act as a defense to these restrictions at trial. In addition, plaintiff has presented sufficient evidence to survive summary judgment on his unfair practices, price-fixing, and tortious interference with prospective economic advantage claims. We therefore affirm in part and reverse in part the ruling of the Court of Appeals, and remand to the trial court.

Affirmed in part; reversed in part; and remanded.

INVESTORS TITLE INSURANCE CO. v. DAVID F. HERZIG, JERRY S. CHESSON, SOUTHEASTERN SHELTER CORPORATION, LEE L. CORUM, AND EVERETT, CREECH, HANCOCK & HERZIG, A PARTNERSHIP

No. 28PA91

(Filed 27 January 1992)

1. Unfair Competition § 1 (NCI3d) — unfair practice claim — not assignable

A claim for unfair practices arising from a fraudulent title insurance certification was not assignable because the causes of action of conspiracy to commit fraud and unfair practice are personal in nature. The legislative intent in enacting Chapter 75 of the North Carolina General Statutes was to establish an effective cause of action for aggrieved consumers and to promote good faith and provide a method to maintain ethical standards of dealings between persons engaged in business, thereby achieving the ultimate goal of protecting the consuming public. Assignability of this claim would be offensive to both legislative objectives.

Am Jur 2d, Assignments §§ 27, 34, 40; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

2. Subrogation § 1 (NCI3d)— title insurance claim—amount paid by insurance company

Plaintiff title insurance company was entitled to recover the amount paid to a bank arising from a fraudulent title certification. Plaintiff became subrogated to the bank's claims against defendants to the extent of its payment to the bank.

Am Jur 2d, Insurance §§ 1794, 1795, 1800.

3. Evidence and Witnesses § 1987 (NCI4th)— deposition in prior proceeding—absent witness—admissible

The trial court did not err in an action arising from an attorney's fraudulent title insurance certification by admitting as evidence the deposition of the attorney in a separate foreclosure proceeding arising from the same action. The availability test in the former testimony exception to the hearsay rule was met and, while defendant Southeastern contends that it was not a party to the foreclosure proceeding and therefore did not have the proper motive while cross-examining the attorney for that deposition to be admitted in this action, Southeastern was not only present at the deposition but also had the opportunity and motive to develop testimony by cross-examination and actively did so. N.C.G.S. § 8C-1, Rule 804; N.C.G.S. § 1A-1, Rule 32(a).

Am Jur 2d, Depositions and Discovery §§ 181, 189, 190.

Admissibility in evidence of deposition as against one not a party at time of its taking. 4 ALR3d 1075.

4. Evidence and Witnesses § 827 (NCI4th)— copy of document—authenticity—admissible

The trial court did not err in an action arising from a fraudulent title insurance certification by allowing plaintiff to introduce a duplicate of a trust agreement between two of the defendants as evidence of a conspiracy. Plaintiff satisfied the requirements of authenticity by providing evidence sufficient to support a finding by the jury that the trust agreement shows the basis of an agreement between two defendants. All the facts contained in the duplicate of the trust agreement were proven through other sources, and while the testimony of defendant Southeastern's president was inconsistent as to

the signing of various contracts, the credibility of his testimony was for the jury. N.C.G.S. § 8C-1, Rule 901(a).

Am Jur 2d, Evidence §§ 849-852.

5. **Evidence and Witnesses § 839 (NCI4th)— copy of document—admissible**

A duplicate trust agreement was admissible in an action arising from a fraudulent title insurance certification where the court found that the original was lost, destroyed, or in the exclusive possession of another defendant, plaintiff was not a party to the agreement and did not have the original, plaintiff took extensive measures to secure the presence of the defendant who was believed to be in sole possession of the original of the trust agreement, and the jury made the final decision on whether the duplicate was convincing evidence that a conspiracy existed between the defendants. N.C.G.S. § 8C-1, Rule 1004(2).

Am Jur 2d, Evidence §§ 459-463, 467.

6. **Conspiracy § 1 (NCI4th)— fraudulent title certification—conspiracy—instructions**

The trial court did not err in an action arising from an attorney's fraudulent title insurance certification by giving a peremptory instruction on conspiracy where the court found that one defendant had committed an act constituting an unfair or deceptive practice, the jury still had to decide whether defendant Southeastern conspired with defendant Herzig, and the jury by its verdict found that Southeastern conspired to commit fraud but did not find that the president of Southeastern conspired to commit fraud.

Am Jur 2d, Conspiracy §§ 54, 55, 64, 66; Trial §§ 913, 914.

7. **Unfair Competition § 1 (NCI3d); Costs § 36 (NCI4th)—fraudulent title certification—attorney fees—justiciable issue**

Attorney fees were not recoverable in an action arising from a fraudulent title insurance certification where N.C.G.S. § 75-16.1 did not apply to Investors Title and, since both parties were able to sustain and prevail on several different issues through the various stages of this case, one cannot reasonably say that there was a complete lack of a justiciable issue as to either party.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 735; Costs § 72.

8. **Rules of Civil Procedure § 59 (NCI3d)— fraudulent certification of title—motion for a new trial denied—no abuse of discretion**

There was no abuse of discretion in the denial of a motion for a new trial under N.C.G.S. § 1A-1, Rule 59, where defendant Southeastern failed to cite any error in law occurring at trial to which it objected and failed to demonstrate how the abundance of evidence presented can be deemed insufficient to justify the verdict reached.

Am Jur 2d, New Trial §§ 39, 83.

9. **Appeal and Error § 147 (NCI4th)— argument first raised in Supreme Court—not heard**

A defendant in an action arising from a fraudulent certification of title cannot raise an argument concerning restrictive covenants in the Supreme Court when it was not presented to the trial court or the Court of Appeals.

Am Jur 2d, Appeal and Error §§ 545, 547.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 101 N.C. App. 127, 398 S.E.2d 659 (1990), affirming the judgment entered by *Hudson, J.*, in the Superior Court, DURHAM County, on 6 September 1989 and 2 October 1989. Heard in the Supreme Court on 12 November 1991.

Maxwell & Hutson, P.A., by James H. Hughes and Robyn R. Compton Whitman, for plaintiff-appellee.

McCall & James, by Randolph M. James and M. Lee Decker, for defendant-appellant Southeastern Shelter Corporation.

Womble Carlyle Sandridge & Rice, by G. Eugene Boyce and Elizabeth L. Riley, for defendant-appellant Everett, Creech, Hancock & Herzig.

MARTIN, Justice.

In this appeal this Court is faced for the first time with the issue of whether a cause of action for unfair practices is assignable. For the reasons later related, we hold that such cause is not

assignable. We also discuss additional issues presented by defendant Southeastern Shelter Corporation and find them to be without merit.

This is an action arising out of an attorney's fraudulent certification of a title insurance application. On 29 February 1984, plaintiff filed a lawsuit against defendant Southeastern Shelter Corporation ("Southeastern"), David F. Herzig ("Herzig"), Jerry S. Chesson ("Chesson"), and Lee L. Corum ("Corum") seeking damages for fraud, conspiracy to commit fraud, unfair or deceptive practices under N.C.G.S. § 75-1.1, negligence and breach of warranty. On 20 June 1984, plaintiff amended its complaint to add Herzig's law partnership, Everett, Creech, Hancock & Herzig ("Partnership"), as a defendant in this action.

On 13 September 1985, plaintiff and defendant Partnership filed cross-motions for summary judgment on the issue of defendant Partnership's vicarious liability. Summary judgment was entered for defendant Partnership denying plaintiff's cross-motion. The Court of Appeals affirmed, but this Court granted discretionary review, reversed the Court of Appeals and remanded the case to the trial court. *Investors Title Ins. Co. v. Herzig*, 320 N.C. 770, 360 S.E.2d 786 (1987). The trial judge granted defendant Southeastern's motion for directed verdict on its cross-claims against defendant Herzig. On 27 July 1989, the jury returned verdicts for plaintiff against Herzig on the issues of fraud (specific acts later found to constitute an unfair practice), compensatory damages in the amount of $34,364.38 and punitives damages in the amount of $100,000 and against defendant Southeastern on the issue of conspiracy to commit fraud and compensatory damages in the amount of $42,000. On 6 September 1989, the trial court entered judgment against Herzig and Partnership, jointly and severally, on the issues of breach of warranties and representation of title certificate in the amount of $34,364.38. On 6 September 1989, the trial court held that the acts of Southeastern and Herzig constituted unfair or deceptive practices; it trebled all damages and awarded attorney's fees against Herzig and Southeastern pursuant to N.C.G.S. § 75-1.1. On 2 October 1989, the trial court denied Partnership's motion for judgment notwithstanding the verdict and Southeastern's motion for a new trial.

On appeal by defendants Partnership and Southeastern, the Court of Appeals affirmed on 18 December 1990. Partnership and Southeastern filed petitions for discretionary review with this Court.

We allowed their petitions on 12 June 1991. We now reverse the Court of Appeals and remand for entry of judgment against Southeastern in the amount of $34,364.38. We also hold that Partnership's petition for discretionary review was improvidently allowed.

In September 1975, the Redevelopment Commission of the City of Henderson recorded restrictions on a tract of land consisting of four parcels in Vance County. Southeastern was selected as the developer of this land as part of the city's urban renewal program.

Southeastern and J. Leo Hawkins entered into a limited partnership called Henderson Heights, Ltd. Hawkins agreed to pay Southeastern $100,000 for all of the rights to Southeastern's contract with the Redevelopment Commission. On 11 November 1980, the Commission deeded the tract of land to Henderson Heights. The deed was subject to some prior recorded restrictive covenants which prohibited any encumbrances on the land and any transfers of the property without the consent of the Commission. Hawkins failed to pay Southeastern the $100,000, and Southeastern did not close on the sale of the land.

Henderson Heights deeded two parcels of the land to Southeastern as security for $45,000. Southeastern agreed to reconvey the parcels back to Hawkins when he paid Southeastern the $45,000. The Commission did not approve the conveyance to Southeastern or the contract for sale between Hawkins and Southeastern; both transactions violated the restrictive covenants of record. Hawkins never paid Southeastern the $45,000; consequently, Southeastern was in serious need of cash.

Herzig, an attorney for Southeastern, informed Southeastern that if he and his law firm, Partnership, held the deed for the two parcels in escrow, it would be possible to obtain a loan of $30,000 using the parcels as security. Southeastern conveyed its contract for the sale of the parcels to Herzig and later recorded a deed conveying the two parcels to Herzig.

Herzig subsequently obtained a $30,000 loan from Planter's Bank ("Bank") in violation of Southeastern's instructions to Herzig not to encumber the land. The loan was evidenced by a promissory note and secured by a deed of trust. Herzig himself certified title to Investors and stated that the restrictive covenants were not violated. Lee Corum, an attorney, presented Bank with a preliminary

certificate of title listing three exceptions. After further investigation over Herzig's objections, Corum discovered that the deed from Southeastern to Herzig was not recorded; Corum added this fact as a fourth exception to the certificate of title. The final certificate signed by Herzig, below the typed name of his then law partnership, stated that there were no violations of the restrictive covenants.

The $30,000 loan obtained from Bank was divided between Southeastern and Herzig: $20,000 to Southeastern and $10,000 to Herzig. Investors issued a title insurance policy to the Bank in reliance on Herzig's certification of title.

In March 1981, Herzig presented a Trust Agreement to Southeastern granting full discretionary authority to Herzig over the two parcels deeded to him. Southeastern refused to sign the agreement. In December 1981, Southeastern learned for the first time that Herzig had encumbered the two parcels he held in escrow.

Herzig defaulted on the $30,000 loan. On 7 June 1982, Herzig recorded a quitclaim deed to Southeastern trying to persuade Southeastern to assume all the encumbrances on the land. Southeastern refused to accept the deed.

The Bank filed a claim on the title insurance policy issued by Investors because of the improper acknowledgment on the deed from Southeastern to Herzig. Investors stated that it would pay the claim only after the Bank pursued all its available legal remedies. The Bank subsequently instituted a foreclosure proceeding that was denied due to the restrictive covenants that were placed on the land in 1975. The Bank's appeal is still pending. In preparing for the foreclosure proceeding, Herzig was deposed in August 1983, before his incarceration for failure to disclose liabilities on a financial statement to a bank. Plaintiff paid the Bank $30,000 plus interest in the amount of $4,364.38. The Bank assigned all its rights arising out of the claim to plaintiff.

I.

[1] This Court having concluded that discretionary review was improvidently allowed as to defendant Partnership, the only defendant remaining on this appeal is Southeastern.

Plaintiff alleges in its complaint that Bank has assigned to plaintiff "all rights and causes of action which it has against all defendants." Whether an unfair or deceptive practice claim pur-

suant to N.C.G.S. § 75-1.1 is assignable is a question of first impression in North Carolina. No North Carolina statute allows the assignment of fraud or unfair practice claims. Plaintiff, citing *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595 (Tex. Ct. App. 1984), argues that the Court should allow assignment of the unfair practice claim because assignability is the general rule under modern law and nonassignability is the exception.

While, in general, causes of action may be assigned, 2 N.C. Index 4th *Assignments* § 2 (1990), we hold that unfair practice claims pursuant to N.C.G.S. § 75-1.1 cannot be assigned. *See generally North Carolina Baptist Hospitals, Inc. v. Mitchell*, 88 N.C. App. 263, 362 S.E.2d 841 (1987); *Southern Ry. Co. v. O'Boyle Tank Lines, Inc.*, 70 N.C. App. 1, 318 S.E.2d 872 (1984). Claims such as defamation, abuse of process, malicious prosecution or conspiracy to injure another's business are not assignable as such claims are considered personal torts. *See generally Southern Ry. Co. v. O'Boyle Tank Lines, Inc.*, 70 N.C. App. 1, 318 S.E.2d 872 (1984); 6 Am. Jur. 2d *Assignments* § 37 (Supp. 1991); R.D. Hursh, Annotation, *Assignability of Claims for Personal Injury or Death* 40 A.L.R.2d 500, § 3 (Supp. 1991).

The causes of action of conspiracy to commit fraud and unfair practice are also personal in nature. Therefore, the assignment of such claims violates our public policy and will not be enforced. *See generally North Carolina Baptist Hospitals, Inc. v. Mitchell*, 88 N.C. App. 263, 362 S.E.2d 841 (1987), *aff'd*, 323 N.C. 528, 374 S.E.2d 844 (1988); *Southern Ry. Co. v. O'Boyle Tank Lines, Inc.*, 70 N.C. App. 1, 318 S.E.2d 872 (1984).

The legislative intent in enacting Chapter 75 of the North Carolina General Statutes was to establish an effective cause of action for aggrieved consumers and to provide a method to maintain ethical standards of dealings between persons engaged in business and promote good faith thereby achieving the ultimate goal of protecting the consuming public. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981); *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975); *Bunting v. Perdue, Inc.*, 611 F. Supp. 682 (E.D.N.C. 1985). In the present case, assignability of this claim would be offensive to both legislative objectives. This Court, in *Marshall*, 302 N.C. at 543, 276 S.E.2d at 400, emphasized the consumer protection nature of Chapter 75 and the notion that the treble damages

provision of N.C.G.S. § 75-16 was intended to create an effective private remedy for aggrieved consumers.

The plaintiff in this case is not an aggrieved "consumer" because it is not a "consumer" with respect to defendants. Indeed, Investors is the "seller" of the title insurance which was purchased by Herzig to protect the Bank. The question before us focuses on what effect assignability of the claim would have upon the legislative intent and spirit of the Act. The punitive nature of the Act allows treble damages to be recovered by the victim. If a claim under the Act is deemed assignable, the consumer would not be provided the protection afforded by this statutory provision. Rather, the recovery of trebled damages would result in a third party receiving a windfall from another person's injury.

If a claim for violation of the Act is assignable, insurance companies and other powerful parties could buy these potentially profitable causes of action and ultimately profit from another's injuries, further negating the statutory intent of protecting the consumer. The assignment of an unfair practice claim would wreak havoc by creating a market for claims of a personal nature.

Finally, nonassignability of these claims achieves the Act's ultimate goal. Common law subrogation is available to an insurer to recover any monies paid, while the aggrieved party can maintain an action for fraud or unfair practices. In this way, the injured party, not the insurer, will receive trebled damages as contemplated by the Act. Nonassignability ensures that all the parties are properly protected and the purposes of the law are upheld.

[2] Investors paid the Bank $34,364.38. It can therefore sue Southeastern to recover that amount on the basis of common law subrogation. *See Insurance Co. v. Insurance Co.*, 277 N.C. 216, 176 S.E.2d 751 (1970); *Dowdy v. R.R. and Burns v. R.R.*, 237 N.C. 519, 75 S.E.2d 639 (1953); *NCNB Nat. Bank v. Western Surety Co.*, 88 N.C. App. 705, 364 S.E.2d 675 (1988); *Trustees of Garden of Prayer Baptist Church v. Geraldco Builders, Inc.*, 78 N.C. App. 108, 336 S.E.2d 694 (1985); 12 N.C. Index 3rd *Subrogation* § 1 (1990). Subrogation is an equitable assignment in which an insurance company can seek reimbursement to the extent of its payment to the insured. *See Insurance Co.*, 277 N.C. at 221, 176 S.E.2d at 756; *J&B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 11, 362 S.E.2d 812, 818 (1987). Thus, plaintiff became subrogated to Bank's claims against defendants to the extent of

its payment to Bank. Therefore, pursuant to the findings of the jury, we hold that Investors is entitled to a judgment against defendant Southeastern for $34,364.38 which is the amount plaintiff paid to the Bank on its subrogated claim.

II.

[3] Prior to the institution of this action, Herzig's deposition was taken in the foreclosure proceeding separate from this action. In the foreclosure proceeding, the Bank was trying to foreclose on the Henderson Heights property which had been used to secure the loan for development. Herzig's deposition was used in that proceeding to determine if the conveyance to the Bank was defective. The foreclosure proceeding was limited to consideration of the four statutory issues. Southeastern's counsel was present at the deposition, but only addressed these four issues. At that time, plaintiff had not yet filed its suit naming Southeastern.

In this trial, the entire deposition from the foreclosure proceeding was read to the jury. No cross-examination of Herzig during trial was possible because Herzig was unavailable for trial as defined by Rule 804 of the North Carolina Rules of Evidence. The deposition was admitted at trial over Southeastern's objection, and it contends this was error.

North Carolina law limits the use of depositions in civil cases. *See Tennessee-Carolina Transportation, Inc. v. Strick Corp.*, 291 N.C. 618, 231 S.E.2d 597 (1977); *Warren v. Asheville*, 74 N.C. App. 402, 328 S.E.2d 859, *disc. rev. denied*, 314 N.C. 336, 333 S.E.2d 496 (1985). Oral testimony is more desirable, but a deposition may be used if the witness is unavailable. Rule 32(a) of the North Carolina Rules of Civil Procedure states:

> [A]ny part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, . . .:
>
> . . . .
>
> (4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or upon application and notice, that such exceptional circumstances exist

> as to make it desirable, in the interest of justice and with due regard to the importance of presenting testimony of witnesses orally in open court, to allow the deposition to be used . . . .

N.C. R. Civ. P. 32(a).

Rule 804 of the North Carolina Rules of Evidence defines "unavailable" in part, as situations where the declarant:

> (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means.

N.C. R. Evid. 804(a)(5). Rule 804 also exempts certain evidence and testimony from the Hearsay Rule and, thereby allows its admittance, if the declarant is unavailable as a witness.

> (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

N.C. R. Evid. 804(b)(1).

The unavailability test in the former testimony exception to the Hearsay Rule was met. Plaintiff went to extraordinary lengths to locate Herzig. The plaintiff subpoenaed Herzig for deposition; however, Herzig ignored the subpoena. In an effort to subpoena Herzig to appear at trial, plaintiff attempted to locate Herzig through various means. Plaintiff's counsel discovered Herzig's phone number was unlisted so he could not be reached by telephone. Plaintiff conducted a credit check to determine Herzig's physical location, but the Orange County Sheriff was still unable to serve a subpoena on Herzig at his address. The trial court determined upon making these findings that Herzig was unavailable for trial. Although Southeastern asserts that plaintiff's action to locate Herzig should have been instituted earlier, it cites no authority for such a proposition. Southeastern argues that plaintiff's counsel began the search for Herzig only three to four weeks before trial began in an action that had been going on for over five years, clearly showing that plaintiff was dilatory in tracking down Herzig. However, a con-

tinuous search for a witness is unnecessary. *Econo-Travel Motor Hotel Corp. v. Foreman's, Inc.*, 44 N.C. App. 126, 260 S.E.2d 661 (1979), *disc. rev. denied*, 299 N.C. 544, 265 S.E.2d 404 (1980). The fact that Herzig was served with a subpoena, but chose to ignore it is indicative that earlier action would have been just as futile.

In North Carolina, "testimony must have been given at . . . the trial of another cause involving the issue and subject matter to which the testimony is directed at the current trial." 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 145, at 575-76 (1982). The party against whom the deposition is offered must have both (1) the opportunity to develop testimony and (2) a similar motive to cross-examine the deponent.

Southeastern asserts that it was not a party to the foreclosure proceeding in which Herzig gave his deposition. Therefore, it did not have the proper motive while cross-examining Herzig for Herzig's deposition to be admitted into evidence. However, Southeastern had an interest in the foreclosure proceeding because the property being foreclosed upon was the property it had agreed to place in escrow with Herzig in exchange for funds to begin the development of that property. As evidenced by the first two pages of the deposition, Southeastern's counsel appeared at the deposition. The trustee who initiated the foreclosure testified that notice of foreclosure was sent to Southeastern. During cross-examination of Herzig by Southeastern's counsel, a number of exhibits were identified with the designation "SE" standing for Southeastern.

Southeastern not only was present at the deposition, but also had opportunity and motive to develop testimony by cross-examination and it actively did so. Counsel's cross-examination went for twenty pages and covered the entire transaction between Herzig and Southeastern as it relates to the property in question and the loan from the Bank. Southeastern's opening argument in the present case tracks Herzig's deposition. The president of Southeastern stated that the subject matter of his deposition in the foreclosure proceeding was identical to the subject matter of his deposition in the present case. Southeastern cross-examined Herzig at his deposition on the same issues in the foreclosure proceeding as were present in the case *sub judice*. Herzig was questioned only on the property and statutory issues in the foreclosure proceeding. The trial court properly admitted Herzig's deposition as evidence.

III.

[4] Plaintiff introduced a duplicate of a document entitled "Trust Agreement" between Herzig and Southeastern as evidence to show a conspiracy between Herzig and Southeastern. Southeastern now contests the authenticity of the duplicate. It argues that the admitted document is textually inconsistent with the original. The original has more pages than the duplicate. Southeastern refused to sign the original; therefore, the duplicate with its signature is neither indicative of an agreement or conspiracy nor authentic.

Every writing sought to be admitted must be properly authenticated. *See generally 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); *Gastonia v. Parrish*, 271 N.C. 527, 157 S.E.2d 154 (1967); *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 354 S.E.2d 767 (1987). Southeastern argues that the Trust Agreement was not authenticated according to Rule 901 of the North Carolina Rules of Evidence. Rule 901(a) states: "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." Plaintiff satisfied the requirements of authenticity by providing evidence sufficient to support a finding by the jury that the Trust Agreement shows the basis of an agreement between two defendants. All the facts contained in the duplicate of the Trust Agreement were proven by Investors through other sources. Southeastern's president, Chesson, testified that the duplicate had fewer pages than the original and the documents were textually inconsistent. Chesson's testimony was inconsistent as to the signing of various contracts, and the credibility of his testimony was for the jury. We find that the document was properly authenticated.

[5] The Best Evidence Rule, Rule 1002 of the North Carolina Rules of Evidence states: "To prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by statute." The Best Evidence Rule merely requires the exclusion of secondary evidence offered to prove the contents of a document whenever the original document itself is available. *See generally* N.C. Gen. Stat. § 8C-1, Rules 1002-04 (1988); *State v. Eason*, 328 N.C. 409, 402 S.E.2d 809 (1991); *Overby v. Overby*, 272 N.C. 636, 158 S.E.2d 799 (1968); *U.S. Leasing v. Everett, Creech, Hancock*

and Herzig, 88 N.C. App. 418, 363 S.E.2d 665, *disc. rev. denied*, 322 N.C. 329, 369 S.E.2d 364 (1988); 2 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 192 (3d ed. 1988). Here, the original document is unavailable. The trial court admitted the duplicate because it found the original was lost, destroyed, or in the exclusive possession of Herzig. Plaintiff does not have the original because it was not a party to the agreement. The president of Southeastern said that he never signed the Trust Agreement and, therefore, does not have an original agreement.

Defendant Southeastern argues that no evidence exists to support the court's findings that plaintiff searched for the original. Defendant contends it was severely prejudiced by the admission of the copy because this document was central to plaintiff's proof of conspiracy. However, plaintiff did take extensive, albeit unsuccessful, measures to secure the presence of Herzig who was believed to be in sole possession of the original of the Trust Agreement. As contemplated in Rule 1004(2), the court found that the original could not be obtained by any available judicial process or procedure, thereby placing the duplicate within an exception to the Best Evidence Rule and allowing its admission into evidence. The jury made the final decision of whether the duplicate was convincing evidence that a conspiracy existed between the defendants. Therefore, we hold that the duplicate was properly admitted.

IV.

[6] Southeastern's argument that the trial court erred in giving a peremptory instruction in the jury charge regarding the charge of conspiracy is meritless. The trial court found that Herzig committed an act constituting an unfair or deceptive practice. Southeastern argues that by this finding the trial court impermissibly suggested to the jury that a conspiracy had been formed between Herzig and one of the other two defendants. The only question before the jury, according to Southeastern's reasoning, was with whom Herzig conspired thereby impermissibly influencing the jury to find that a conspiracy existed between Herzig and Southeastern.

We reject this argument. The jury still had to decide whether Southeastern conspired with Herzig. The jury by its verdict found that Southeastern conspired to commit fraud, but did not find that the president of Southeastern conspired to commit fraud. The peremptory instructions did not improperly influence the jury's

verdict on the conspiracy issue. We thereby hold that this contention is without merit.

V.

[7] Southeastern also argues that the court did not make the necessary findings to allow attorney's fees as required by N.C.G.S. § 75-16.1. Attorney's fees are not recoverable by Investors under N.C.G.S. § 75-16.1 because, as we have previously decided, the statute does not apply to Investors. Therefore, attorney's fees may not be awarded under the Act.

Attorney's fees are also not allowable in this case under N.C.G.S. § 6-21.5. *See Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991); *Short v. Bryant*, 97 N.C. App. 327, 388 S.E.2d 205 (1990). North Carolina General Statute § 6-21.5 states:

> In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.

Since both parties were able to sustain and prevail on several different issues through the various stages of this case, one cannot reasonably say that there was a complete lack of a justiciable issue as to either party.

VI.

Southeastern further argues that the court committed error by submitting issues of conspiracy to commit unfair practices to the jury after ruling in Southeastern's favor that it was entitled to indemnification from Herzig. Southeastern contends the result was inconsistent verdicts. However, these arguments are moot due to this Court's decision concerning the assignability of unfair practice claims.

VII.

[8] Southeastern argues that the trial court abused its discretion by denying defendant's motion for a new trial under Rule 59 of the North Carolina Rules of Civil Procedure. Under this Rule, a party may obtain a new trial either for errors of law committed during the trial or for a verdict not sufficiently supported by the evidence. *See generally Bryant v. Nationwide Mut. Fire Ins. Co.*,

313 N.C. 362, 329 S.E.2d 333 (1985); *Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982). The grounds for a new trial relied upon by Southeastern are outlined in Rule 59 of the North Carolina Rules of Civil Procedure: "(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law; (8) Error in law occurring at the trial and objected to by the party making the motion, or (9) Any other reason heretofore recognized as grounds for new trial."

Our courts have held repeatedly since 1820 that the ruling of a judge on a motion for a new trial is in the sound discretion of the trial judge. In the absence of abuse of discretion, such ruling is not reversible on appeal. *See generally Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989); *Smith v. Price*, 315 N.C. 523, 340 S.E.2d 408 (1986); *Armstrong v. Wright*, 8 N.C. 93 (1820). Southeastern fails to cite any error in law occurring at trial to which it objected. It fails to demonstrate how the abundance of evidence presented can be deemed insufficient to justify the verdict reached. It fails to show any abuse of discretion by the trial judge. We overrule this argument.

VIII.

[9] Southeastern argues that the restrictive covenants placed on the land when it was transferred by the City of Henderson to Henderson Heights, Ltd. are void as a restriction on alienation. This argument cannot be raised for the first time in this Court as it was not presented to the trial court or the Court of Appeals. *White v. Pate*, 308 N.C. 759, 304 S.E.2d 199 (1983).

In summary, we hold that a claim for unfair practices under N.C.G.S. § 75-1.1 cannot be assigned. However, Investors is subrogated to the Bank's claim to the amount it paid to the Bank as determined by the jury's verdict and is entitled to a judgment in that amount. We hold that discretionary review as to petitioner Everett, Creech, Hancock & Herzig was improvidently allowed.

The decision of the Court of Appeals is reversed and this cause is remanded to that court for further remand to the Superior Court, Durham County, for the entry of judgment against defendant Southeastern in the amount of $34,364.38 and the costs of this action.

Reversed and remanded as to defendant Southeastern.

Discretionary review improvidently allowed as to defendant Partnership.

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

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY v. LOUISE HOOKS STOX AND GORDON OWENS

No. 124A91

(Filed 27 January 1992)

1. **Insurance § 149 (NCI3d)— homeowners insurance—exclusion for expected or intended bodily injury**

In order for the exclusion in a homeowners policy for bodily injury which is "expected or intended by the insured" to apply, it is insufficient for the insurer to show only that the act was intentional; rather, the insurer must prove that the injury itself was expected or intended by the insured. Therefore, the exclusion did not apply where the insured intentionally pushed a co-worker on the shoulder, causing her to fall and sustain injuries, and competent evidence supported the trial court's finding that the insured did not intend to cause bodily injury to the co-worker.

Am Jur 2d, Insurance §§ 708, 709.

Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured. 31 ALR4th 957.

2. **Insurance § 149 (NCI3d)— homeowners insurance—assault and battery action—intent to injure not inherent—exclusion inapplicable**

An allegation of intent to injure was not inherent in the injured party's assault and battery tort complaint against the insured so as to render applicable the "expected or intended" bodily injury exclusion in the insured's homeowners policy.

Am Jur 2d, Insurance §§ 708, 709.

Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured. 31 ALR4th 957.

3. **Insurance §§ 45, 149 (NCI3d)— homeowners insurance—accident—injury from intentional act**

Where the term "accident" is not specifically defined in an insurance policy, that term includes injury resulting from an intentional act if the injury is not intentional or substantially certain to be the result of the intentional act. Therefore, the trial court correctly concluded that the insured's liability, if any, for an unintended injury to a co-worker resulting from the insured's intentional act of pushing the co-worker was covered under the insured's homeowners policy as an "occurrence" or "accident."

Am Jur 2d, Insurance §§ 708, 709.

Liability insurance: assault as an "accident," or injuries therefrom as "accidentally" sustained, within coverage clause. 72 ALR3d 1090.

4. **Insurance § 149 (NCI3d)— homeowners insurance—business pursuits exclusion—exception—ambiguity—construction**

The "business pursuits" exclusion in a homeowners policy and the exception to that exclusion for "activities which are usual to non-business pursuits" are ambiguous, and these ambiguities must be construed against the insurance company and in favor of coverage.

Am Jur 2d, Insurance § 727.

Construction and application of "business pursuits" exclusion provision in general liability policy. 48 ALR3d 1096.

5. **Insurance § 149 (NCI3d)— homeowners insurance—business pursuits exclusion—pushing of co-worker—exception for usual nonbusiness activities**

Assuming that the insured was engaged in a "business pursuit" at the time he pushed a co-worker within the meaning of the "business pursuits" exclusion of a homeowners policy, the insured's act of pushing the co-worker came within the exception to the "business pursuits" exclusion for "activities which are usual to non-business pursuits."

Am Jur 2d, Insurance § 727.

Construction and application of "business pursuits" exclusion provision in general liability policy. 48 ALR3d 1096.

APPEAL by the defendant Stox pursuant to N.C.G.S. § 7A-30(2) from a decision by a divided panel of the Court of Appeals, 101 N.C. App. 671, 401 S.E.2d 82 (1991), reversing the judgment and order entered by *Watts, J.*, on 9 April 1990 in Superior Court, PITT County. The plaintiff's petition for discretionary review of additional issues was allowed by the Supreme Court. Heard in the Supreme Court on 12 November 1991.

Speight, Watson and Brewer, by James M. Stanley, Jr., for the plaintiff-appellee.

Ward and Smith, P.A., by A. Charles Ellis, for the defendant-appellant Stox.

MITCHELL, Justice.

The plaintiff, North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau), brought this declaratory judgment action seeking a determination as to the proper construction of a homeowners insurance policy. The primary issue to be resolved in this appeal is whether liability for personal injuries suffered by the defendant Louise Hooks Stox, which occurred when she fell as the result of a push by the defendant Gordon Owens, is covered by a policy of homeowners liability insurance issued to Owens by Farm Bureau. We conclude that under the language of the policy in question, coverage is provided. Accordingly, the decision of the Court of Appeals, which held to the contrary, is reversed.

All parties to the present case waived trial by jury. Evidence was introduced before the trial court tending to show, *inter alia*, that on 20 May 1989, the defendant Stox, age seventy, received a severely fractured right arm as a result of a fall which occurred while she was working at a Roscoe-Griffin shoe store in Greenville. While another employee, the defendant Owens, age sixty-eight, was assisting a customer, Stox began speaking with the customer's mother. Owens was sitting on a stool in front of the customer, a few feet away from Stox. Owens got up, stepped toward Stox, placed his hands on her left shoulder and pushed her, while saying

"get away from here." This unexpected push caused Stox to lose her balance and fall, severely fracturing her right arm.

Stox was wearing shoes with heels at the time of the fall. Stox testified that had she been expecting the push to her shoulder, she could have braced herself for it and not fallen. No evidence tended to show that Stox experienced any pain or injury in the area where Owens put his hands on her shoulder. Owens testified at deposition that he did not intend to knock Stox to the floor or cause her any injury. Prior to 20 May 1989, Owens had never pushed or laid a hand upon Stox or any other employee of the store.

On 20 May 1989, Owens was insured under a homeowners insurance policy issued by the plaintiff Farm Bureau which provided him liability coverage. The relevant portions of that policy provide:

> COVERAGE E—Personal Liability
>
> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, we will:
>
> 1. pay up to our limit of liability for the damages for which the insured is legally liable; and
>
> 2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. . . .
>
> . . . .
>
> DEFINITIONS
>
> . . . .
>
> 5. "occurrence" means an accident, including exposure to conditions, which results, during the policy period, in:
>
> a. bodily injury; or
>
> b. property damage.
>
> . . . .
>
> SECTION II—EXCLUSIONS
>
> Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage:
>
> a. which is expected or intended by the insured;

b. arising out of business pursuits of an insured or the rental or holding for rental of any part of any premises by an insured.

This exclusion does not apply to:

(1) activities which are usual to non-business pursuits; . . . .

Business is defined in the policy as "trade, profession, or occupation."

At the conclusion of the evidence, the trial court entered its Judgment and Order in which it made the following findings of fact:

2. On May 20, 1989, Gordon Owens intentionally pushed Louise Stox, causing her to fall and receive injury.

3. The pushing of Louise Stox by Gordon Owens involved foreseeable consequences of significant bodily injury.

4. At the time Gordon Owens pushed Louise Stox, he had no specific intent to cause bodily injury to Louise Stox, and the injuries sustained by Louise Stox were the unintended result of an intentional act by Gordon Owens.

5. Although the pushing incident occurred in an employment setting, the pushing incident did not occur as a result of Gordon Owens engaging in a business pursuit.

6. The "business pursuit" exclusion in Plaintiff's insurance policy and the exception to the exclusion are ambiguous.

Based on its findings, the trial court entered the following conclusions of law:

1. The pushing incident constituted an "occurrence" under the terms of the homeowners insurance policy issued by Plaintiff to Gordon Owens.

2. The "expected or intended injury" exclusion contained in the policy is inapplicable.

3. The "business pursuit" exclusion contained in the policy is inapplicable.

4. In the alternative, if the pushing incident occurred as a result of Gordon Owens engaging in a business pursuit, the act of pushing Ms. Stox constituted an activity which was usual to a non-business pursuit under the exception to the "business pursuit" exclusion.

> 5. The policy of insurance issued by Plaintiff to Gordon Owens affords liability coverage to Gordon Owens for damages for which he becomes legally responsible because of the pushing incident involving Louise Stox, and which forms the basis of Pitt County Case . . . .

Based on its findings and conclusions, the trial court ordered the plaintiff to pay any amount for which Owens became legally liable to Stox, up to the limit of liability of the homeowners insurance policy. The plaintiff appealed. A divided panel of the Court of Appeals concluded that the policy did not cover Owens' liability for Stox's injuries, because those injuries were excluded from coverage by the exclusion for "expected or intended" injuries. For that reason the Court of Appeals reversed the judgment of the trial court.

We conclude that there was competent evidence to support the trial court's findings of fact which, in turn, supported its conclusions of law that Stox's injuries were covered under the Farm Bureau policy. Therefore, we reverse the decision of the Court of Appeals.

At the outset, it is important to note that the rules of construction which govern the interpretation of insurance policy provisions extending coverage to the insured differ from the rules of construction governing policy provisions which exclude coverage. *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986). Those provisions in an insurance policy which extend coverage to the insured must be construed liberally so as to afford coverage whenever possible by reasonable construction. *Id.* However, the converse is true when interpreting the exclusionary provisions of a policy; exclusionary provisions are not favored and, if ambiguous, will be construed against the insurer and in favor of the insured. *Id.*; *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970).

It must also be remembered that on appellate review of a declaratory judgment, a trial court's findings of fact in a trial without a jury will be upheld if supported by any competent evidence. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975). This is true even when evidence to the contrary is present. *Id.* The function of an appellate court in reviewing declaratory judgments in such cases "is, then, to determine whether the record contains competent evidence to support the findings; and whether the find-

ings support the conclusions." *Nationwide Mut. Ins. Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E.2d 473, 475, *disc. rev. denied*, 303 N.C. 315, 281 S.E.2d 652 (1981). If the trial court's findings are supported by competent evidence and, in turn, support its conclusions, the declaratory judgment must be affirmed on appeal.

[1] We first consider whether the policy's exclusion of "bodily injury . . . which is expected or intended by the insured" places Owens' liability for injury to Stox in the present case outside the coverage of the policy. The trial court found from competent evidence before it that, although Gordon Owens intentionally pushed Louise Stox, he had no specific intent to cause her injury. Thus, the injuries she sustained were "the unintended result of an intentional act." These findings supported the trial court's conclusion that "the 'expected or intended injury' exclusion contained in the policy is inapplicable."

The Court of Appeals, however, reversed the trial court, concluding that the present case was controlled by *Commercial Union Insurance Co. v. Mauldin*, 62 N.C. App. 461, 303 S.E.2d 214 (1983). We disagree with the Court of Appeals and conclude that *Commercial Union* is not controlling. In *Commercial Union*, one of the defendants, Tommy Joe Wilmoth, drove up beside a car occupied by his wife and Kay Mauldin Pugh. After arguing with his wife for a moment, Wilmoth pulled out a .38 caliber pistol and fired four or five shots into Pugh's car. The shots killed Pugh and injured Wilmoth's wife. Wilmoth pled guilty to the second-degree murder of Pugh, and stipulated that he had intended to shoot and injure his wife but not Pugh. The Court of Appeals affirmed the trial court's holding that Wilmoth's actions in shooting Pugh were excluded from coverage under his homeowners policy by the "expected or intended injury" exclusion.

In the present case, the Court of Appeals put misplaced reliance on *Commercial Union* and focused on the intentional nature of the act rather than the resulting injury. The Court of Appeals stated that "[w]hile there might well have been no specific intent to injure [Stox], the focus must be on the intentional *act* not the resulting consequence." *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 101 N.C. App. 671, 675, 401 S.E.2d 82, 85 (1991). Under the rules of construction which govern this exclusionary provision in the Farm Bureau homeowners policy, we disagree with the Court of Appeals and conclude that it is the resulting injury, not merely

the volitional act, which must be intended for this exclusion to apply.

Commercial Union involved a situation in which the insured fired four or five bullets into an occupied car at close range. The insured stipulated that he had the specific intent to shoot and injure his wife, and he pled guilty to the second-degree murder of Pugh. Thus, he obviously knew it was probable that he would injure Pugh when he fired four or five shots into her moving car. *Commercial Union*, 62 N.C. App. at 464, 303 S.E.2d at 217. Stated otherwise, through the insured's actions and admissions, the injury to Pugh was established to have been "intended" within the meaning of that term as used in the insurance policy.

In the present case, we encounter a different situation. Here, the insured intended the act, but competent evidence supported the trial court's finding that he did not intend to cause bodily injury. Owens testified he had no intent to injure Stox when he intentionally pushed her. Stox also testified that she did not believe Owens pushed her with the intent to injure her. The trial court was not required to find an intent to injure from evidence showing a mere push to the left shoulder which left no soreness or sign of injury—evidence entirely unlike the violent firing of bullets into an occupied car at close range.

We have focused on the language of the policy exclusion in dispute and have found no other North Carolina case interpreting this exact language. However, provisions contained in homeowner policies excluding expected or intended injuries have been the subject of extensive case law in other jurisdictions. *See* James L. Rigethaupt, Jr., Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected By Insured*, 31 A.L.R.4th 957 (1984). Our interpretation of the provision in the policy before us is consistent with the majority rule that has emerged from the case law on this issue in other jurisdictions.

In *Kling v. Collins*, 407 So. 2d 478 (La. App. 1981), the Louisiana Court of Appeal, First Circuit, interpreted a similar exclusionary provision. In that case, Collins and Ms. Kling harbored ill feelings for each other. *Id.* at 480. While visiting Collins' home, Kling began shouting and making gestures towards Collins. *Id.* Collins then shoved Kling in an effort to make her leave his house. *Id.* As a result of the shove, Kling fell to the floor and sustained

a wrist injury. *Id.* The Court affirmed the decision of the trial court that the exclusion was inapplicable because, though Collins intended to push Kling, the bodily injury was neither intended nor expected by the insured. *Id.* The Court explained that "[t]he exclusionary clause sought to be enforced herein does not preclude liability for an expected or intended 'act' but rather for an expected or intended 'injury'." *Id.* at 481.

More recently, in *Physicians Insurance Co. v. Swanson*, 58 Ohio St. 3d 189, 569 N.E.2d 906 (1991), the insured, a teenage boy, shot a BB gun at a group of teenagers approximately seventy to one hundred feet away. *Id.* at 189, 569 N.E.2d at 907. According to the testimony of the insured, he was aiming at a sign ten to fifteen feet above the group to scare them. *Id.* Unfortunately, one of the BBs struck one of the teenagers in the right eye causing him to lose that eye. *Id.* at 190, 569 N.E.2d at 907. The Supreme Court of Ohio held that the exclusion for bodily injury which is "expected or intended" by the insured was inapplicable. *Id.* at 193, 569 N.E.2d at 911. The Court reasoned:

> [I]n order for an exclusion of this nature to apply, an insurer must demonstrate not only that the insured intended the act, but also that he intended to cause harm or injury. The rationale for this rule of law is twofold. First, the plain language of the policy is in terms of an intentional or expected injury, not an intentional or expected act. Were we to allow the argument that only an intentional act is required, we would in effect be rewriting the policy. Second, . . . many injuries result from intentional acts, although the injuries themselves are wholly unintentional.

Id. at 193, 569 N.E.2d at 910-11.

Further support for our conclusion in the present case is found in *Caspersen v. Webber*, 298 Minn. 93, 213 N.W.2d 327 (1973). There, the Supreme Court of Minnesota interpreted a similar exclusionary provision which excluded "bodily injury . . . caused intentionally or at the direction of the insured." The insured went to the cloak checkroom in a restaurant but was unable to find his claim check. *Id.* at 95, 213 N.W.2d at 328. He asked the plaintiff, a hatcheck attendant, for permission to enter the checkroom. *Id.* The plaintiff objected but the insured proceeded to enter anyway. *Id.* The plaintiff attempted to block the insured's passage into the checkroom, and the insured proceeded to push her aside. *Id.* This

caused the plaintiff to lose her balance and fall, striking her back against a metal message rack on the wall. *Id.* The Court concluded that the exclusion did not apply where the act itself was intended but the resulting injury was not. *Id.* at 98, 213 N.W.2d at 330.

Similarly, in the case at bar, the trial court found that while the insured intentionally pushed Louise Stox, the injuries sustained were the unintended result of the intentional act. We find competent evidence to support these findings in the record. The character of the insured's act did not rise to the level which would require that an intention to inflict an injury be inferred. Therefore we conclude that in order to avoid coverage on the basis of the exclusion for expected or intended injuries in the insurance policy at issue in this case, the insurer must prove that the injury itself was expected or intended by the insured. Merely showing the act was intentional will not suffice.

[2] The plaintiff Farm Bureau argues that Stox will be limited in her tort action against Owens to the theory of recovery she alleged in her complaint, assault and battery. Therefore, the plaintiff reasons, Owens will be found liable in that action, if at all, only for intended injuries. The plaintiff primarily relies here on *Aetna Casualty & Surety Co. v. Freyer*, 89 Ill. App. 3d 617, 411 N.E.2d 1157 (1980), where a tort action for assault and battery was filed against the defendant insured for beating a woman with his fists causing bruises, a black eye, and other injury. In *Freyer*, the injured woman alleged that the acts were "wanton, willful and malicious on the part of the defendant." *Id.* at 619, 411 N.E.2d at 1158. The Appellate Court of Illinois, First District, Fourth Division found that "malice" was specifically alleged in the action and was defined under Illinois law as an intent to do harmful injury. *Id.* at 622, 411 N.E.2d at 1161. The Court stated, "Thus it is clear that in alleging that malice was the gist of both causes of action, the tort plaintiff was alleging that the insured intended to injure the tort plaintiff." *Id.*

Stox merely alleged in her tort action that Owens "willfully committed an assault." No allegation of malice was put forth by Stox, and she testified in this declaratory judgment action that she did not believe Owens had any intent to injure her when he pushed her. Still, the plaintiff Farm Bureau urges that under North Carolina law, an intent to injure is inherent in every tort action involving an assault or battery. We disagree. This Court has stated,

"the interest protected by the action for battery is freedom from *intentional and unpermitted contact* with one's person; the interest protected by the action for assault is freedom from apprehension of a harmful *or offensive contact* with one's person." *Dickens v. Puryear*, 302 N.C. 437, 445, 276 S.E.2d 325, 330 (1981) (emphasis added); *see also* Prosser, Law of Torts §§ 9, 10 (5th ed. 1984) (hereinafter "Prosser"). Further, Dean Prosser has stated that "[t]he intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids." Prosser, § 8, p. 34. We conclude that an allegation of an intent to injure was not inherent in Stox's assault and battery tort complaint.

[3] We have allowed the plaintiff Farm Bureau's petition to bring forward additional issues for our review. Under its first issue, Farm Bureau contends that Owens' act was not a covered "occurrence" or "accident" under the terms of its homeowners policy in question. The policy provides coverage for "bodily injury . . . caused by an occurrence." "Occurrence" is defined as "an accident, including exposure to conditions, which results, during the policy period, in . . . bodily injury." The term "accident" is not defined anywhere in the policy. The trial court found that at the time Gordon Owens pushed Louise Stox, he had no specific intent to cause bodily injury to Louise Stox, and the injuries sustained by Louise Stox were the unintended result of an intentional act by Gordon Owens. The trial court then concluded from those findings that "the pushing incident constituted an 'occurrence' under the terms of the homeowners insurance policy issued by Plaintiff to Gordon Owens."

Again, we are guided by established rules of construction for interpreting provisions of insurance policies. Provisions, such as the one in question, "which extend coverage must be construed liberally so as to provide coverage, whenever possible by reasonable construction." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. at 538, 350 S.E.2d at 68. It is also well settled that when an insurance policy contains no ambiguity, it shall be construed according to its terms, but when ambiguity exists the policy shall be construed in favor of coverage and against the insurer who selected its language. *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 430, 146 S.E.2d 410, 410 (1966).

In *Iowa Mutual Insurance Co. v. Fred M. Simmons, Inc.*, 258 N.C. 69, 128 S.E.2d 19 (1962), this Court was required to interpret the term "accident" where it was not defined in a liability insurance policy. We focused on various accepted definitions of the term "accident" and cited with approval Webster's definition of " 'an event that takes place without one's foresight or expectation; and [sic] undesigned, sudden, and unexpected event; chance; contingency.' " *Id.* at 74, 128 S.E.2d at 22 (quoting *Lacey v. Washburn & Williams Co.*, 309 Pa. 574, 577, 164 A. 724, 725 (1932)). We also noted in *Simmons*, that an element of carelessness or negligence probably enters into most accidents. *Id.* at 75, 128 S.E.2d at 23 (quoting *Aetna Life Ins. Co. v. Little*, 146 Ark. 70, 225 S.W. 298 (1920)).

In the present case, the plaintiff argues that the defendant Stox's injuries resulted from the intentional acts of the defendant Owens and therefore could not be covered as an "occurrence" or "accident" under the terms of the homeowners policy. We disagree. In choosing not to define the term "accident" in its policy, the plaintiff Farm Bureau left its interpretation open and subject to ambiguities. As our rules of construction dictate, all ambiguities must be resolved in favor of the insured. We have found no North Carolina case on point; however, other jurisdictions have found an unintended injury resulting from an intentional act to be a covered "occurrence" or "accident" under homeowners insurance policies.

In *Hartford Fire Insurance Co. v. Blakeney*, 340 So. 2d 754 (Ala. 1976), the Supreme Court of Alabama held that an insured's intentional pushing of a guest out of a doorway in his house, which resulted in serious brain damage when the guest hit his head on the ground, was a covered "occurrence" or "accident" under the policy. *Id.* at 754. The Court upheld the jury's finding that there was coverage under the policy. *Id.* In the process, the Court upheld the trial court's jury charge which stated: "It is an accidental injury where an unexpected result arises from an intended act." *Id.* at 755.

In *Quincy Mutual Fire Insurance Co. v. Abernathy*, 393 Mass. 81, 469 N.E.2d 797 (1984), the insured, a sixteen-year-old boy, admitted to intentionally throwing a large piece of blacktop at a passing car. *Id.* at 82, 469 N.E.2d at 798. The rock shattered the window on the driver's side of the car, causing the driver to sustain facial cuts. It then traveled to the rear seat where

it struck a passenger in the forehead, fracturing her skull. *Id.* The Supreme Judicial Court of Massachusetts reversed the trial court's granting of summary judgment for the insurer. *Id.* at 88, 469 N.E.2d at 802. The Court held that "the resulting injury which ensues from the volitional act of an insured is still an 'accident' within the meaning of an insurance policy if the insured does not specifically intend to cause the resulting harm or is not substantially certain that such harm will occur." *Id.* at 84, 469 N.E.2d at 799.

We conclude that where the term "accident" is not specifically defined in an insurance policy, that term *does* include injury resulting from an intentional act, if the injury is not intentional or substantially certain to be the result of the intentional act. Competent evidence supported the trial court's finding in the case *sub judice* that the injury to Stox was an unintended injury resulting from Owens' intentional act. Therefore, the trial court correctly concluded from that finding that Owens' liability, if any, for that injury was covered under the policy as an "occurrence" or "accident."

Finally, the plaintiff Farm Bureau contends that the defendant Stox's injury arose out of a "business pursuit" of the defendant Owens and, for that reason, is excluded from coverage under the policy. The provision the plaintiff relies upon here excludes coverage for bodily injury "arising out of the business pursuits of an insured." The policy defines "business" as "trade, profession or occupation." The policy also contains an exception to the "business pursuits" exclusion, however, which causes the exclusion not to apply to "activities which are usual to non-business pursuits." The trial court determined that "[t]he 'business pursuit' exclusion in Plaintiff's insurance policy and the exception to the exclusion are ambiguous." The trial court concluded:

> The "business pursuit" exclusion contained in the policy is inapplicable. 4. In the alternative, if the pushing incident occurred as a result of Gordon Owens engaging in a business pursuit, the act of pushing Ms. Stox constituted an activity which was usual to a non-business pursuit under the exception to the "business pursuit" exclusion.

[4, 5] We agree with the trial court that the "business pursuits" exclusion and the exception to that exclusion are ambiguous. Applying established rules of construction, these ambiguities must be construed against the insurance company and in favor of coverage. Further, even assuming *arguendo* that the defendant Owens was

engaged in a "business pursuit" at the time he pushed Stox, a reasonable construction of the exception to that exclusion renders Owens' act of pushing Stox "an activity which is usual to non-business pursuits" and affords coverage.

Though no North Carolina decision has interpreted the exact exclusion and exception involved here, decisions from other jurisdictions have found such provisions ambiguous. In *Myrtil v. Hartford Fire Insurance Co.*, 510 F. Supp. 1198 (E.D. Pa. 1981), an insured restaurant owner held a party for employees and business-related guests of the restaurant. *Id.* at 1200. The son-in-law of an employee dove into a canal adjacent to the property and was seriously and permanently injured. *Id.* The United States District Court for the Eastern District of Pennsylvania concluded that while the injury was associated with the insured's business pursuit, her party, it arose from an activity which ordinarily would be incident to non-business pursuits and was covered under her insurance policy. *Id.* at 1202. The Court noted that the provisions had been the subject of extensive litigation, with many courts finding the language of the exclusion ambiguous. *Id.; see Stanley v. American Fire and Casualty Co.*, 361 So. 2d 1030 (Ala. 1978); *Gulf Ins. Co. v. Tilley*, 280 F. Supp. 60 (N.D. Ind. 1967). The Court stated that "intelligent people for years have differed in their interpretation of the business pursuits clause and divergent results have been reached as a consequence. If reasonably intelligent people differ as to the meaning of a policy provision, ambiguity exists." *Id.*

Also, in *Foster v. Allstate Insurance Co.*, 637 S.W.2d 655 (Ky. Ct. App. 1981), the Court of Appeals of Kentucky interpreted a similar business pursuits exclusion as it related to an accident in the insured's home while she was babysitting. The Court found the business pursuits exclusion and the exception ambiguous, stating:

> [T]he exception provision contained in the exclusion leaves some doubt as to its meaning, and it is clearly susceptible to two reasonable interpretations, one of which would be favorable to the insured and one which would not. In such a case, the law in this Commonwealth is that the interpretation favorable to the insured will be adopted.

Id. at 657.

The pushing of Stox by Owens in the present case may reasonably be viewed as usual to "non-business" pursuits within

the meaning of the insurance policy in question. Under well established rules of construction governing insurance policies, this interpretation which affords coverage must be adopted, as all exclusionary provisions are strictly construed against the insurer.

The trial court's findings were supported by competent evidence and, in turn, supported its conclusions and its Judgment and Order. Therefore, the decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to the Superior Court, Pitt County, for reinstatement of the trial court's Judgment and Order affording coverage under the policy.

Reversed and remanded.

STATE OF NORTH CAROLINA v. WAVERLY WILLIAMS

No. 384A91

(Filed 27 January 1992)

1. **Evidence and Witnesses § 3023 (NCI4th)— impeachment of witness—drug habit, suicide attempts, psychiatric history—Rule 608(b) inapplicable**

Rule of Evidence 608(b), which governs the admissibility of evidence of specific instances of conduct bearing on truthfulness or untruthfulness, does not govern the admissibility of evidence of the drug habit, suicide attempts and psychiatric history of the State's chief witness in a first degree murder case.

Am Jur 2d, Witnesses §§ 540, 546, 563.

2. **Evidence and Witnesses §§ 2947, 2948 (NCI4th)— State's chief witness—impeachment—drug habit, suicide attempts, psychiatric history**

The trial court erred in precluding defendant from cross-examining the State's chief witness in this first degree murder trial about his chronic drug habit, suicide attempts and psychiatric history because this evidence was admissible under Rule of Evidence 611(b) to impeach the witness's ability to perceive, retain, or narrate even though the suicide attempts and psychiatric counselling occurred more than two years prior to the victim's death. Furthermore, defendant was prejudiced

by the exclusion of this evidence where the testimony of this witness was the only evidence directly linking defendant to the murder, and impeachment of the witness was particularly critical in light of the testimony of defendant's witnesses that contradicted this witness's estimation of the time of the victim's death and his claim that defendant was with him when the victim was killed.

Am Jur 2d, Witnesses §§ 540, 546.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility. 44 ALR3d 1203.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Hobgood, J.*, at the 7 May 1990 Criminal Session of Superior Court, VANCE County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 12 December 1991.

Lacy H. Thornburg, Attorney General, by Valerie B. Spalding, Assistant Attorney General, for the State.

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

WHICHARD, Justice.

Defendant was tried on an indictment charging him with the first-degree murder of Marcelleta (Marcie) Youlande Williams. In a noncapital trial, the jury returned a verdict of guilty and the trial court sentenced defendant to life imprisonment.

Defendant and the victim, Marcie Williams, were first cousins and members of a close family, some members of which lived in New York City and some in Henderson, North Carolina. In the fall of 1988, defendant occupied a room in the trailer of his and Marcie's mutual aunt, Sharon Williams, in Henderson. When Marcie graduated from college in December 1988, defendant moved out of the room and into the home of another aunt, Carolyn Williams, and Marcie moved into the trailer of Sharon Williams. On the afternoon of 19 January 1989, Marcie was found shot to death in the living room of the trailer. She sustained a shot to the top of her head and a patterned bruise on her face and forehead, consistent with an impact from ridged boots.

Defendant was arrested for first-degree murder two months later. At trial, the State's case rested almost exclusively on the testimony of William Carroll, who was also charged with the murder. Carroll testified for the State pursuant to an agreement under which he received a ten-year sentence in return for pleading guilty to second-degree murder and testifying against defendant. At trial, Carroll admitted that he was afraid of serving a life sentence and had heard that ten years can mean less in actual time served. According to Carroll, he witnessed a fight between defendant and Marcie over some cocaine about 9:30 a.m. on the day of the murder, which resulted in defendant's shooting Marcie in the head with Carroll's father's shotgun.

While defendant presented alibi witnesses, his main defense strategy was to impeach Carroll's credibility with evidence that, among other things, Carroll had a drug habit, had attempted suicide twice, and had received psychiatric counselling as a result. Specifically, defendant sought to impeach Carroll by cross-examining him about two suicide attempts in 1987. On voir dire, defendant elicited testimony from Carroll that he first attempted suicide in January 1987 by taking an overdose of Hydroxin and Vistaril. In June 1987, Carroll attempted suicide a second time by pouring rubbing alcohol on himself and setting himself on fire, sustaining second-degree and third-degree burns. As a result of the suicide attempts, Carroll received psychiatric counselling for a period of two or three months. At the time of the attempts, Carroll was depressed because of personal problems and problems with some teachers in his high school, one of whom he had assaulted. Also at the time, and through 1989, Carroll regularly smoked marijuana and cocaine.

While the trial court allowed defendant to inquire about Carroll's drug use on the day of the crime, it precluded him from cross-examining Carroll about his suicide attempts, psychiatric history, and drug habit. Defendant argues that as a result he was precluded from pursuing his main defense. The court based its ruling on Rule 608(b), which governs admissibility of evidence of specific instances of conduct bearing on truthfulness or untruthfulness. We hold that the trial court erred in excluding this evidence because it was admissible impeachment evidence under Rule 611(b). We further conclude that the error was prejudicial and award defendant a new trial.

Carroll testified as follows:

He first saw defendant at Carolyn Williams' house on the morning of 19 January around 8:00 a.m. When Carroll asked defendant where he wanted to go, defendant asked him for a gun. Carroll responded that he did not have his gun, but he offered to, and did, secure his father's shotgun. Defendant then asked him to drive him to Marcie's residence so he could attend to some business. They arrived at the trailer around 9:00 a.m.

At first, Carroll stayed in the car at defendant's request. Marcie answered the door. Ten minutes later, defendant asked Carroll to come inside, and he did. He sat on a couch with Marcie. Defendant then came from the back of the trailer with the gun. When Carroll asked him what was going on, defendant responded, "When somebody fucks me, I fuck 'em back." Defendant demanded his cocaine and his money, and Marcie stood up and began to scream. Defendant pointed the gun at Carroll and told him to silence Marcie, whereupon Carroll grabbed her and fell to the floor with her. While they were on the floor, with Carroll's head only six inches from Marcie's, defendant kicked Marcie in the face with his boots, hit her with the butt of the gun, and shot her in the head.

The two men then went to the home of Carroll's father to return the gun. On the way, defendant told Carroll only he and Carroll knew about the incident, so defendant would know the source of any rumors. Once there, defendant gave Carroll a bag of cocaine and asked him to sell it and bring defendant the money. Carroll originally told the officers he was not successful in selling the cocaine, so he threw it in the sewer.

Both men then went to Carolyn Williams' house, where they remained for about an hour. They then went to another relative's house to try to sell the cocaine. Next, they returned to the home of Carroll's father, where defendant asked Carroll to obtain $130—enough, defendant said, for two bus tickets. Carroll went to Revco Warehouse, his mother's place of work, seeking the money, but she did not give it to him. That afternoon, while defendant and Carroll were together at Carolyn Williams' home, another relative called to say that Marcie had been shot. Carroll took a bus to New York two days later because he was afraid of defendant.

The State presented no other evidence, physical or otherwise, which placed defendant at the scene of the crime at the time of the murder. The remainder of the State's case consisted of testimony

of the officers who questioned Carroll and investigated the crime scene, and corroborative testimony by Carroll's attorney.

On cross-examination of Carroll, defendant elicited the following testimony:

On 15 March 1989, officers questioned Carroll for over five hours. For the first three hours Carroll maintained that he had nothing to do with the murder. After the officers indicated they did not believe his story, Carroll advised them that while he did not kill Marcie, he was present and knew who did kill her. He also was willing to "turn State's witness," saying that he had not been telling the truth but that he would tell them the whole truth. Carroll then gave a statement, less detailed than his testimony at trial, implicating himself and defendant.

Carroll met with officers again on 6 November 1989 in the presence of his attorney and the district attorney. He then added details, such as defendant's kicking Marcie in the face before shooting her, which he did not relate in his initial statement. In his original statement, he had said he was with defendant throughout the day of the murder, but in the 6 November interview he mentioned for the first time that he left defendant around noon to ask his mother for money. While Carroll originally told the officers he had thrown the cocaine from the trailer into the sewer, at trial he admitted that he sold it for $200 in order to buy the bus ticket to New York. Although in his first statement Carroll described restraining Marcie at defendant's instruction, at trial he mentioned for the first time that his head was only six inches from Marcie's when defendant brought the gun down on her head and shot her.

Defendant also elicited evidence that Carroll had prior convictions for resisting an officer and injuring real property, that following these convictions Carroll was directed to seek help from the Vance County Mental Health Clinic, and that Carroll smoked marijuana cigarettes laced with cocaine once or twice a week on or about 19 January 1989.

Three relatives of defendant and Marcie testified about defendant's and Marcie's whereabouts on the day of the murder. The first, Sharon Williams, testified that Marcie was still alive when Sharon left the trailer at 10:00 a.m.—a half hour later than the time of death according to Carroll's testimony—to go to work. At about 7:00 a.m., someone driving a blue car had knocked on

the door, but Sharon was still in bed and Marcie did not open the door. Sharon learned of Marcie's death at about 1:00 p.m. when a neighbor called her at work.

The second witness, Carolyn Williams, testified that after waking at 7:00 a.m. on the day of Marcie's death to ready her youngest son for school, she woke defendant, who had slept on the sofa in her den. At 9:00 a.m., defendant and Carroll, who was present, helped Carolyn load laundry into the car and Carolyn left for the laundromat, first dropping off Carroll on the corner near his home. Carolyn returned with the clean laundry around 11:00 or 11:30 a.m. and found defendant and her older sons at home and still asleep. After waking them and talking with them for about a half hour, she left to run errands with and for her mother, returning at 1:30 p.m. to prepare for work at 2:00 p.m. Both times Carolyn returned home, defendant and her sons were present, but Carroll was not. Defendant went with Carolyn's son Kevin to take her to work at 2:00 p.m., and at 3:00 p.m. she received a call about Marcie. Carolyn then joined family members, including defendant, at the trailer park.

Defendant's third witness, Kevin Williams, adult son of Carolyn Williams, testified that he saw Carroll on 19 January around 3:00 a.m. in the den of his mother's house. Carroll was dressed in his work clothes and ridged work boots. After going to bed late, Kevin awoke at 11:30 a.m. to help his mother bring in the laundry, then went back to sleep until 1:30 p.m. Kevin saw defendant at both 11:30 a.m. and 1:30 p.m. At 2:00 p.m., he and defendant drove Carolyn Williams to work, drove their grandmother home, and then returned to the house, where they received the call about the discovery of Marcie's body. According to Kevin, defendant was very upset and cried about the news. Kevin and defendant left for the trailer, dropping Carroll off first. Carroll said, "It's a family thing." At the trailer defendant continued to cry and hit a girl who was laughing and "being smart." Officers told Kevin to take defendant away from the scene. Kevin was aware that defendant later was convicted of assault as a result of the incident, and that defendant performed community service as a sentence.

Although defendant presented these alibi witnesses, his main defense strategy was to impeach Carroll. The trial court allowed him to ask both Carolyn and Kevin Williams about Carroll's reputation for truthfulness. Carolyn answered that he "fantasized," and

Kevin answered that "he lied quite a bit." Defendant also presented testimony from Carroll's mother, Barbara Carroll, that her son came alone to her on 19 January while she was on her lunch break to ask her for $160, explaining that "he needed to get away."

In a further effort to impeach Carroll, defendant presented the testimony of Robert Benge, who was in the cell next to Carroll's while Carroll was being held in connection with Marcie's murder. Benge testified that Carroll told him he alone murdered Marcie while he was on drugs that affected his mind, but that he was going to turn State's witness against a cousin of Marcie's because the cousin knew he had killed Marcie and because he wanted to lessen his sentence. The State impeached Benge by eliciting evidence that Benge had corresponded with and conducted an interview with defendant's attorneys.

Marcie's mother, Melissa Williams Norwell, testified for defendant at his bond hearing in March 1989. She had known defendant all his life, had helped rear him, knew him well, and did not believe he had murdered her only child. Immediately following the murder, Ms. Norwell had gone to North Carolina, but she returned to New York in the middle of February. In March, she read in the paper that William Carroll had accused defendant of being the murderer. Upon learning of this, Ms. Norwell told defendant, who had returned to his home in New York, and defendant was shocked and puzzled as to why Carroll would lie in this way.

The day Ms. Norwell and defendant learned of the accusation, they took a bus to North Carolina to straighten out the matter, knowing that defendant would be met with a warrant for his arrest. Although the bus stopped in both Washington and Richmond, and although defendant had money with him, Ms. Norwell testified that he never gave any indication of turning back or leaving her company. A sheriff's deputy met Ms. Norwell and defendant at the Henderson bus station.

[1] At trial the State argued, and the trial court agreed, that Rule 608(b) governed the admission of evidence about Carroll's drug habit, his suicide attempts, and his psychiatric history. As a result, the State and the trial court believed that *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986), controlled. In *Morgan*, the Court set out the factors that determine when Rule 608(b) applies and when it allows the admission of evidence of specific instances of conduct:

> Rule 608(b) addresses the admissibility of specific instances of conduct (as opposed to opinion or reputation evidence) only in the very narrow instance where (1) the *purpose* of producing the evidence is to impeach or enhance credibility by proving that the witness' conduct indicates his character for truthfulness or untruthfulness; and (2) the conduct in question *is in fact probative* of truthfulness or untruthfulness and is not too remote in time; and (3) the conduct in question did *not result in a conviction*; and (4) the inquiry into the conduct *takes place during cross-examination.*

Id. at 634, 340 S.E.2d at 89-90.

The State argues that because evidence of Carroll's drug habit and mental problems is not probative of truthfulness, it cannot come in under Rule 608(b). It further argues that this evidence is inadmissible because it fails to meet the requirement of close temporal proximity, given the passage of two years between Carroll's suicide attempts and counselling and Marcie's murder. It argues still further that the trial court did permit defendant to cross-examine Carroll about his drug use during the pertinent period—on or around the date of the murder.

The State also relies on language in *Morgan* that "evidence routinely disapproved as irrelevant to the question of a witness' general veracity [under Rule 608(b)] . . . includes specific instances of conduct relating to 'sexual relationships or proclivities, the bearing of illigitimate [sic] children, the use of drugs or alcohol . . . or *violence against other persons.*' " *Id.* at 635, 340 S.E.2d at 90 (quoting 3 David Louisell & Christopher B. Mueller, *Federal Evidence* § 305 (1979) [hereinafter *Federal Evidence*]). *Accord State v. Finch*, 293 N.C. 132, 142-43, 235 S.E.2d 819, 825 (1977); *State v. Rowland*, 89 N.C. App. 372, 382, 366 S.E.2d 550, 555 (1988).

The State is correct that evidence of drug use alone is not admissible under Rule 608(b). In *State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1988), we held that the trial court erred when it failed to sustain the defendant's objection to a question about her use of marijuana. The purpose of the question was to undermine her testimony about her claims of abuse by a first, drug-addicted husband, and a second, alcoholic husband. The Court held that the "defendant's admission to having smoked marijuana had no conceivable tendency to prove or disprove her truthfulness." *Id.* at 167, 377 S.E.2d at 67.

[2] While the State and the trial court correctly set out the law regarding Rule 608(b), that rule does not govern this case. Instead, Rule 611(b) governs. It states: "A witness may be cross-examined on any matter relevant to any issue in the case, *including credibility*." N.C.G.S. § 8C-1, Rule 611(b) (1988) (emphasis added). While the language of the rule alone does not clearly illuminate the issue here, the case law and treatises interpreting it establish that evidence of Carroll's drug use, his suicide attempts, and his psychiatric history is proper and admissible for purposes of impeachment. "There is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case." *United States v. Abel*, 469 U.S. 45, 56, 83 L. Ed. 2d 450, 460 (1984).

While specific instances of drug use or mental instability are not directly probative of truthfulness, they may bear upon credibility in other ways, such as to "cast doubt upon the capacity of a witness to observe, recollect, and recount, and if so they are properly the subject not only of cross-examination but of extrinsic evidence . . . ." 3 *Federal Evidence* § 305, at 236. While evidence of addiction

> seems too far removed from veracity to be [a] permissible subject[ ] for cross-examination under Rule 608 as proof that the witness is by disposition untruthful, it is far less clear that such evidence should be excluded on the question of the credit to be given the witness, when viewed as a reflection on his ability to observe, retain, and narrate.

Id. § 342, at 489-90. Rule 608 does not apply because mental, psychological, or emotional defects "reflect on *mental capacity* for truth-telling rather than on *moral inducements* for truth-telling . . . ." 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* § 607(04), at 607-55 (1991) (emphasis added).

While no North Carolina cases specifically discuss application of Rules 608(b) and 611(b) in this context, pre-Rules cases concede the admissibility of evidence of mental defects or instability, suicide attempts, and drug or alcohol addiction for the purpose of discrediting a witness' testimony due to impairment of the ability to observe, retain, or narrate. *See, e.g., State v. Newman*, 308 N.C. 231, 254, 302 S.E.2d 174, 187 (1983) (evidence of past mental defects); *State v. Armstrong*, 232 N.C. 727, 728, 62 S.E.2d 50, 51 (1950) (evidence of mental retardation and impairment); *Moyle v. Hopkins*, 222 N.C.

33, 34, 21 S.E.2d 826, 827 (1942) (evidence of mental retardation); *State v. Harrelson*, 54 N.C. App. 349, 350, 283 S.E.2d 168, 170 (1981), *disc. rev. denied*, 305 N.C. 154, 289 S.E.2d 381 (1982) (evidence of mental illness); *State v. Parker*, 45 N.C. App. 276, 278, 262 S.E.2d 686, 688 (1980) (evidence of past psychiatric treatment); *State v. Wright*, 29 N.C. App. 752, 753, 225 S.E.2d 645, 646 (1976) (evidence of psychiatric history); *see also State v. Fields*, 315 N.C. 191, 204, 337 S.E.2d 518, 526 (1985) (effect of drug use is more properly a question of credibility than of competency); *State v. Looney*, 294 N.C. 1, 21, 240 S.E.2d 612, 624 (1978) (discussing New Jersey case, Court recognized that evidence of alcoholism and commitments to institutions on that account is proper for impeachment, but viewed refusal to allow defense request for order directing involuntary psychiatric examination of a witness as "an entirely different matter"); *State v. Conrad*, 275 N.C. 342, 349, 168 S.E.2d 39, 44 (1969) (assumes witness' "attempt at suicide conceivably might have some relevancy as to her mental balance and her recollection sufficient to be impeaching" while holding that "chance remark that the judge failed to see relevancy [did] not amount to prejudicial error"); *State v. Poolos*, 241 N.C. 382, 383, 85 S.E.2d 342, 343 (1955) (State's witness asked if she had once attempted suicide by eating bobby pins; Court thought "the question . . . a permissible one for the purpose of impeaching the credibility of the testimony of the witness," but held ruling excluding answer not prejudicial because what reply would have been not in record); *State v. Jones*, 64 N.C. App. 505, 509, 307 S.E.2d 823, 826 (1983) (evidence accomplice drunk at time of crime does not make his testimony inherently incredible; rather, credibility is for the jury); *State v. Edwards*, 37 N.C. App. 47, 49, 245 S.E.2d 527, 528 (1978) (evidence of drug use goes to credibility, not competency). The State acknowledges this extensive case law, but contends that most of these cases involved evidence that the witness was suffering from a mental defect either at the time of observing the events or at the time of testifying at trial. Evidence of the type in question, it argues, is therefore only admissible if the defendant can show that the witness' ability to perceive, recollect, or narrate was affected by the mental impairment.

It is true that some of the above cases involved a mental defect present at the time of the events witnessed. *Fields*, 315 N.C. at 203-04, 337 S.E.2d at 525-26; *Jones*, 64 N.C. App. at 509, 307 S.E.2d at 826; *Edwards*, 37 N.C. App. at 49, 245 S.E.2d at 528. *Parker* addressed the admissibility of evidence that the defend-

ant had undergone a psychiatric examination just before trial in order to determine his competency. *Parker*, 45 N.C. App. at 278, 262 S.E.2d at 688. In *Edwards*, although the issue was one of competency rather than credibility, the Court of Appeals reasoned that

> evidence that the witness was using drugs, either when testifying or when the events to which he testified occurred, is properly admitted only for purposes of impeachment and only to the extent that such drug use may affect the ability of the witness to accurately observe or describe details of the events which he has seen.

Edwards, 37 N.C. App. at 49, 245 S.E.2d at 528.

Some courts have limited admission of evidence that a witness suffers from mental illness or addiction to cases where the illness or addiction actually affected the mental capacity of the witness at the time of commission of the crime or testimony at trial. Federal: *United States v. Sampol*, 636 F.2d 621, 667 (D.C. Cir. 1980); *United States v. Leonard*, 494 F.2d 955, 971 (D.C. Cir. 1974). State: Alabama—*Stewart v. State*, 398 So. 2d 369, 375 (Ala. Crim. App.), *writ denied, Ex parte Stewart*, 398 So. 2d 376 (Ala. 1981); Arizona—*State v. Johnson*, 106 Ariz. 539, 540-41, 479 P.2d 424, 426 (1971); California—*People v. Smith*, 4 Cal. App. 3d 403, 412, 84 Cal. Rptr. 412, 418 (1970); Florida—*Edwards v. State*, 548 So. 2d 656, 658 (Fla. 1989); Illinois—*People v. Helton*, 153 Ill. App. 3d 726, 734, 506 N.E.2d 307, 311-12 (1987); Massachusetts—*Commonwealth v. Carrion*, 407 Mass. 263, 273-74, 552 N.E.2d 558, 565 (1990); Tennessee—*State v. Barnes*, 703 S.W.2d 611, 617-18 (Tenn. 1985), *cert. denied*, 476 U.S. 1153, 90 L. Ed. 2d 705 (1986). In this jurisdiction, however, we have allowed juries to evaluate not only the effect of mental defects, but also of the passage of time, on a witness' ability to perceive, retain, and recount. Most recently, we held that a defendant was entitled to discredit the prosecuting witness' testimony by cross-examining her about her past mental problems and treatment in the years 1977-78, even though the events about which the witness testified occurred in July 1981 and the trial occurred in January 1982. *State v. Newman*, 308 N.C. at 243-54, 302 S.E.2d at 182-88. That cross-examination included some twenty detailed questions about the witness' involuntary commitments in May 1977 and January 1978 and the nature of her hallucinations. In contrast, the trial court here precluded all questions about Carroll's suicide attempts, his psychiatric treat-

ment, and his chronic drug abuse, with the effect of largely depriving defendant of his major defense.

In both *Newman* and here, the mental problems about which the defendants sought to cross-examine the witnesses occurred some period of time prior to either the crimes witnessed or the trials. *Newman* involved a three- to four-year gap, even longer than the two-year gap in the case at bar. In *Conrad*, the Court granted that a key prosecution witness' suicide attempt two years before the witness testified was conceivably proper impeachment evidence. *Conrad*, 275 N.C. at 349, 168 S.E.2d at 44.

We are not alone in allowing admission of evidence of mental defects and chronic substance abuse despite a time gap between the problem, the events testified to, and the trial. In a case in which the details the defendants sought to elicit occurred up to ten years before the trial, the Eleventh Circuit held that a trial court erred by limiting the scope of the defendants' cross-examination of a key State witness and insider to mail fraud. *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983). The court so held even though the trial court allowed the defendants to question the witness about her commitments for mental illness in 1971, 1978, and 1981, and about her suicide attempts in 1971 and 1978. Given that the witness was the chief prosecution witness, that she initiated and pursued the investigation against the defendants, and that the defendants' defense was that she did these things as part of a vendetta against them, the court held that the defendants were entitled to question the witness as well about her certified history of violent, manipulative, and vindictive acts and her diagnoses as suicidal, homicidal, and delusional. *Id.* at 1163.

Other cases in which courts have held that evidence of mental defects and/or substance abuse—at times other than when the witness observed the offense or testified at trial—is admissible to impeach a witness' ability to perceive, retain, or narrate, include the following: Federal: *United States v. Partin*, 493 F.2d 750, 763-64 (5th Cir. 1974). State: Illinois—*People v. Crump*, 5 Ill. 2d 251, 261-62, 125 N.E.2d 615, 621 (1955); *People v. DiMaso*, 100 Ill. App. 3d 338, 342, 426 N.E.2d 972, 975 (1981); Maryland—*Reese v. State*, 54 Md. App. 281, 290-92, 458 A.2d 492, 497-98 (1983); Minnesota—*State v. Hawkins*, 260 N.W.2d 150, 158 (Minn. 1977); Mississippi—*Walley v. State*, 240 Miss. 136, 138, 126 So. 2d 534, 535 (1961); Ohio—*State v. Browning*, 98 Ohio App. 8, 14, 128 N.E.2d 173, 176

(1954). While none of these cases impose a time limitation on the admission of the impeachment evidence, nearly all reveal a concern for the potential of witness harassment and prejudice to the parties. As a result, nearly all impose, either expressly or by implication, some form of restraint on the use of evidence that a witness has suffered or suffers from mental illness or addiction or alcoholism. The most common restraint or limiting factor is that the witness must be a crucial witness for the prosecution. All the North Carolina cases involved cross-examination of key State witnesses. *See State v. Newman*, 308 N.C. at 254, 302 S.E.2d at 187 (prosecuting witness in a rape and kidnapping case); *State v. Conrad*, 275 N.C. at 349, 168 S.E.2d at 44 (State witness who strongly implicated both defendants in the conspiracy and substantive charge); *State v. Poolos*, 241 N.C. at 383, 85 S.E.2d at 343 (State witness in prosecution for prostitution); *State v. Wright*, 29 N.C. App. at 753, 225 S.E.2d at 646 (State's only eyewitness). All the federal and state cases cited also featured key prosecution witnesses—either prosecuting witnesses, accomplices, or addict-informers. *Cf. State v. Barnes*, 703 S.W.2d at 617-18 (evidence of witness' psychiatric history admissible for impeachment; must be a key prosecution witness and evidence of the mental instability must be shown to have existed within a reasonable time of the event observed or of the testimony). Some cases further note the weakness of the prosecution's case without the testimony of these important witnesses. *Hawkins*, 260 N.W.2d at 158; *Walley*, 240 Miss. at 138, 126 So. 2d at 535.

Where, as here, the witness in question is a key witness for the State, this jurisdiction has long allowed cross-examination regarding the witness' past mental problems or defects. As stated by Chief Justice Stacy: "The denial of any impeachment [as to mental defects] of the State's only eye-witness to the fatal assault necessitates another hearing. It is always open to a defendant to challenge the credibility of the witnesses offered by the prosecution against him." *State v. Armstrong*, 232 N.C. 727, 728, 62 S.E.2d 50, 51 (1950). It is beyond dispute that Carroll's testimony here was essential to the State's case. No other evidence linked defendant directly to the murder.

The evidence of Carroll's troubled past was considerable, including two suicide attempts, one of a particularly bizarre nature which necessitated psychiatric treatment, and a history of chronic abuse of marijuana and cocaine. Because Carroll's testimony was the State's sole direct evidence on the ultimate issue, his credibility

took on enhanced importance. *See Browning*, 98 Ohio App. at 14, 128 N.E.2d at 176. Further, impeachment was particularly critical in light of the testimony of defendant's witnesses that contradicted both Carroll's estimation of the time of Marcie's death and his claim that defendant was with him in the trailer when Marcie was killed. The testimony of these three witnesses, all of equal relation to defendant and Marcie, squarely placed Carroll's credibility in question, while the State offered no explanation as to why these witnesses would express a greater loyalty to defendant than to Marcie. The fact that defendant was allowed to elicit reputation evidence that Carroll "lied" or "fantasized" does not decrease the moment of the evidence the trial court excluded. Had the more detailed and concrete evidence of the whole of Carroll's disturbed past, consisting of suicide attempts, psychiatric treatment, and chronic drug abuse been before the jury, it may well have evaluated Carroll's credibility and his testimony to the State's detriment.

For the reasons stated, the trial court erred in not allowing defendant to cross-examine Carroll about his suicide attempts, psychiatric history, and drug habit. Because Carroll's credibility was critical to the State's case, we cannot conclude that the error was harmless. Accordingly, we award a new trial.

New trial.

VILLAGE OF PINEHURST v. REGIONAL INVESTMENTS OF MOORE, INC., WACHOVIA BANK AND TRUST COMPANY, N.A., PINEHURST ENTERPRISES, INC., RESORT HOLDING CORPORATION, PINEHURST WATER COMPANY, INC., PINEHURST SANITARY COMPANY, INC., THE CITIBANK, N.A., FIRST NATIONAL BANK OF CHICAGO, THE CHASE MANHATTAN BANK, N.A., CROCKER NATIONAL BANK, WELLS FARGO, N.A., FIRST PENNSYLVANIA BANK, N.A., FIRST NATIONAL STATE BANK OF NEW JERSEY, J. WALTER McDOWELL, III, JOHN KARSCIG, JR., ROBERT W. VAN CAMP AND JAMES R. VAN CAMP

No. 69A90

(Filed 27 January 1992)

1. **Deeds § 59 (NCI4th); Vendor and Purchaser § 2.1 (NCI3d)—preemptive right—purchase of water and sewer systems—rule against perpetuities**

The rule against perpetuities applied to a preemptive right in a consent judgment giving the Village Council of Pinehurst a right of first refusal to purchase on behalf of the Village of Pinehurst residents the water and sewer systems serving those residents in the event that Pinehurst, Inc. decided to sell such systems. Therefore, the preemptive right was unenforceable where it was not limited in time.

Am Jur 2d, Perpetuities and Restraints on Alienation § 65.

Pre-emptive rights to realty as violation of rule against perpetuities or rule concerning restraints on alienation. 40 ALR3d 920.

2. **Deeds § 59 (NCI4th); Vendor and Purchaser § 2.1 (NCI3d)—preemptive right—rule against perpetuities—property used in business**

A preemptive right will not be excepted from the rule against perpetuities because the real property which plaintiff desires to purchase is used in the operation of a business.

Am Jur 2d, Perpetuities and Restraints on Alienation § 65.

Pre-emptive rights to realty as violation of rule against perpetuities or rule concerning restraints on alienation. 40 ALR3d 920.

3. Vendor and Purchaser § 2.1 (NCI3d)— preemptive right—purchase of water and sewer systems—not charitable or benevolent use—rule against perpetuities

A preemptive right granted by Pinehurst, Inc. to the Village Council of Pinehurst to purchase its water and sewer systems for the benefit of residents of the Village of Pinehurst was not for a charitable or benevolent use so as to be exempted from the rule against perpetuities by N.C.G.S. § 36A-49.

Am Jur 2d, Perpetuities and Restraints on Alienation § 65.

Pre-emptive rights to realty as violation of rule against perpetuities or rule concerning restraints on alienation. 40 ALR3d 920.

4. Deeds § 59 (NCI4th); Vendor and Purchaser § 2.1 (NCI3d)—preemptive right—Village Council as grantee—rule against perpetuities—right not personal to grantee

A preemptive right granted to the Village Council of Pinehurst to purchase its water and sewer systems for the benefit of the residents of the Village of Pinehurst was not personal to the grantee so as to exclude it from the operation of the rule against perpetuities since the period cannot be measured by the life of the Village Council but must be measured by a human life or lives.

Am Jur 2d, Perpetuities and Restraints on Alienation § 65.

Pre-emptive rights to realty as violation of rule against perpetuities or rule concerning restraints on alienation. 40 ALR3d 920.

5. Estoppel § 15 (NCI4th)— preemptive right—consent judgment—acceptance of benefits—insufficiency for estoppel

Defendants were not estopped from contesting the validity of a preemptive right granted by a consent judgment to the Village Council of Pinehurst to purchase the water and sewer systems serving Village of Pinehurst residents by their acceptance of benefits under the consent judgment because those alleged benefits were insufficient to support an estoppel where they consisted of (1) defendants' avoidance of further litigation; (2) defendants' right to appoint three members of an expanded architectural committee which approves plans for the construction of residences within the Village, a right

they already had; and (3) defendants' references to the beneficial terms of the consent judgment when selling property within the Village.

Am Jur 2d, Perpetuities and Restraints on Alienation §§ 10, 65.

Justice MEYER dissenting.

Chief Justice EXUM joins in this dissenting opinion.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 97 N.C. App. 114, 387 S.E.2d 222 (1990), affirming a summary judgment of *Seay, J.*, at the 15 December 1988 Session of Superior Court, MOORE County. Heard in the Supreme Court 7 September 1990.

The plaintiffs brought this action to enforce a preemptive right or a right of first refusal to purchase from the defendant Pinehurst Enterprises, Inc., the water and sewage facilities serving the Village of Pinehurst. In 1973, a lawsuit was filed in superior court against the Diamondhead Corporation, which was then the principal owner of land in Pinehurst, by persons representing the class of the residents of Pinehurst. The Village of Pinehurst was not at that time incorporated and the purpose of the lawsuit was to stop certain practices in the development of the Village.

A consent judgment was entered, one part of which provided that in the event the defendant decided to sell the sewage and water systems, the Village Council of Pinehurst would have the right to purchase the systems on behalf of the residents of the Village of Pinehurst at a price and on terms at least equal to the price and terms of the highest offer by a bona fide purchaser. The consent judgment provided that in the event the stock or assets of Pinehurst, Inc. were sold, the right of first refusal would survive the sale. Pinehurst Enterprises, Inc., a wholly-owned subsidiary of Resort Holding Corporation has succeeded to the assets of Pinehurst, Inc.

On 2 December 1986, Regional Investments of Moore, Inc. offered to purchase the water and sewer systems for $2,500,000. The plaintiff offered to pay this amount, but Pinehurst Enterprises, Inc. sold the water and sewer systems to Regional Investments of Moore, Inc. on 27 February 1987. The plaintiff brought this action to have its rights determined.

The superior court entered an order of summary judgment for the defendants and the Court of Appeals affirmed. The plaintiff appealed to this Court.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Gaither S. Walser, D. Clark Smith, Jr. and Stephen W. Coles, for plaintiff appellant.

Hunton & Williams, by Edward S. Finley, Jr., for defendant appellees.

WEBB, Justice.

[1] The Court of Appeals held that summary judgment was properly entered for the defendants because the right of first refusal was not limited in time and this duration violated the rule against perpetuities. We hold that we are bound by *Smith v. Mitchell*, 301 N.C. 58, 269 S.E.2d 608 (1980), to affirm the Court of Appeals. In *Smith*, we held that a preemptive right was not void because it terminated within the period of the rule against perpetuities. We said that a preemptive right or a right of first refusal to be valid must not extend beyond the period of the rule against perpetuities. It is true, as the plaintiff argues, that this part of our opinion in *Smith* could be considered dictum. It is clear, however, that in *Smith* it was this Court's intention to make the rule against perpetuities applicable to preemptive rights. We would have to overrule *Smith* to say the rule does not apply, which we decline to do.

The plaintiff, relying on cases from other jurisdictions, *Metropolitan Transp. Auth. v. Bruken Realty Corp.*, 67 N.Y.2d 156, 501 N.Y.S.2d 306 (1986) and *Singer Co. v. Makad, Inc.*, 213 Kan. 725, 518 P.2d 493 (1974), argues that there should be an exception to the application of the rule against perpetuities in this case because the preemptive right is for the purchase of a business. In *Metropolitan Transp. Auth.*, the New York Court of Appeals held that certain preemptive rights do not have to comply with the rule against perpetuities. In that case, the State of New York, acting through a public authority, gave a subsidiary of the Pennsylvania Railroad a preemptive right to purchase real estate owned by the Long Island Railroad, which was owned by the State of New York. The New York Court of Appeals said that the enforcement of the rule in that case would invalidate an agreement which promoted the use and development of property while imposing only a minor impediment to free transferability. The New York

Court of Appeals held that the rule against perpetuities does not apply to preemptive rights in commercial and governmental transactions. In *Singer*, the Supreme Court of Kansas held that the rule does not apply to commercial leases.

[2] We do not believe we should make an exception to the rule because the real property which the plaintiff desires to purchase is used in the operation of a business. If a restraint on alienation is bad, we see no reason why it is made good because it is part of a commercial transaction or the property is used for business purposes. We note that in *Smith* the restriction was put on the lot in connection with the development of a tract of land as a real estate development. This made it part of a commercial transaction.

[3] The plaintiff contends that the preemptive right should not be subject to the rule against perpetuities because of N.C.G.S. § 36A-49 which says in part:

> No gift, grant, bequest or devise . . . to religious, educational, charitable or benevolent uses . . . shall be invalid . . . by reason of the same in contravening any statute or rule against perpetuities.

The plaintiff says the creation of the preemptive right was a grant for a charitable or benevolent use and is exempt under this section from the application of the rule against perpetuities. Assuming the creation of the preemptive right was a grant, it was not for a charitable or benevolent use. A municipal corporation's ownership and operation of a water and sewer service is a proprietary function operated for a profit. *See Bowling v. Oxford and R.R. v. Oxford*, 267 N.C. 552, 148 S.E.2d 624 (1966).

[4] The plaintiff next argues that the preemptive right was personal to the grantee which keeps it from violating the rule. The action in which the consent judgment was entered was a class action in which the plaintiff represented all persons owning property in the Village of Pinehurst. The Village Council of Pinehurst received the preemptive right. If the Village Council was a corporation, the period cannot be measured by its life. If we allowed the measuring life to be the life of a corporation, which may be perpetual, we would eviscerate the rule. The measuring life or lives must be a human life or lives.

[5] The plaintiff next contends that the defendants should be estopped from contesting the validity of the preemptive right. The plaintiff says, relying on *Redevelopment Comm. v. Hannaford*, 29 N.C. App. 1, 222 S.E.2d 752 (1976), *Shuford v. Oil Co.*, 243 N.C. 636, 91 S.E.2d 903 (1956) and *Oil Co. v. Baars*, 224 N.C. 612, 31 S.E.2d 854 (1944), that the facts in this case support a quasi-estoppel. The plaintiff contends that the defendants have accepted the benefits of the consent judgment and cannot now attack its validity to the detriment of the plaintiff who relied on the validity of the judgment.

The plaintiff says the defendants accepted benefits under the judgment in three ways. First, the entry of the judgment ending litigation was a benefit to the defendants in that they were allowed to avoid further litigation and carry on the development of Pinehurst. The plaintiff also says that the defendants were allowed under the consent judgment to have three members of an architectural committee which approves plans submitted for construction of residences on property within the Village. The plaintiff finally says the defendants have referred to the beneficial terms of the consent judgment when selling property within the Village.

Assuming an estoppel can bar the application of the rule against perpetuities, the benefits accepted must be more substantial than were accepted in this case to support an estoppel. The mere signing of a judgment which ends litigation does not create an estoppel. We can assume that both sides wanted to end the litigation and they bargained so that each gave up something. This is not the acceptance of benefits under the judgment.

We cannot say that the defendants' right to appoint three members of the architectural committee was a benefit whose acceptance by the defendants created an estoppel. The record shows that prior to the litigation there were three members of the committee, all of whom were appointed by the defendants. Under the terms of the consent judgment, the committee was increased to five members, two of whom were appointed by the plaintiffs in that case. The defendants did not benefit from this change in the committee.

The plaintiff has failed to show how the reference to prospective customers of the consent judgment is a benefit to the defendants. The record shows that Pinehurst Enterprises was required to deliver a "HUD statement" to prospective purchasers which

referred to the use of consent judgment as a possible restriction on the use of the property. This would not be a benefit to the defendants.

The plaintiff, relying on *Thompson v. Soles*, 299 N.C. 484, 263 S.E.2d 599 (1980), contends that under the doctrine of elections, judgment should be entered in its favor. In *Thompson*, we held there was evidence of an election by the defendant by which he relinquished all other interest in the real property left by his father and mother when he accepted a deed to property which said, "this conveyance is accepted as an advancement to Richard V. Soles of his entire interest in the real property of the estate of the grantor and of his father." *Thompson v. Soles*, 299 N.C. 484, 489, 263 S.E.2d 599, 603. We held that by accepting the property conveyed by the deed, the grantee had elected to relinquish his right to all other real property which had been owned by his father and mother.

The plaintiff contends that the defendants, by electing to accept the benefits of the consent judgment, are bound by this election so that the preemptive right must be enforced. Assuming that the doctrine of elections would be applicable, the defendants have not received sufficient benefits to make it applicable in this case.

The decision of the Court of Appeals is affirmed.

Affirmed.

Justice MEYER dissenting.

I dissent from the majority opinion because I do not agree that the preemptive right held by the Village Council of Pinehurst is subject to the rule against perpetuities. By strictly applying the rule to the preemptive right at issue in this case, the majority ignores the purpose and policy underlying the rule as well as the unsuitability of the rule to the transaction at issue here.

Concerned with the ability of royalty and landed gentry to control indefinitely the disposition of their real and personal property, the courts of England first began prohibiting long-term inalienability of property. The early English cases gave rise to the common law rule against perpetuities recognized by the majority

of American jurisdictions, including North Carolina. The underlying and fundamental purpose of the common law rule against perpetuities is the protection of society by allowing full utilization of land. As commonly noted, "[t]he rule [against perpetuities] evolved to prevent . . . property from being fettered with future interests so remote that the alienability of the land and its marketability would be impaired, preventing its full utilization for the benefit of society at large as well as of its current owners." *Anderson v. 50 E. 72nd St. Condominium*, 119 A.D.2d 73, 76, 505 N.Y.S.2d 101, 103 (1986), *appeal dismissed*, 69 N.Y.2d 743, 504 N.E.2d 700, 512 N.Y.S.2d 1032 (1987).

Although sound in its general prohibition of long-term inalienability of property, the rule against perpetuities is probably the most widely criticized principle of common law. The rule has been characterized as a labyrinth, *see* Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 Cal. L. Rev. 1867, 1867-68 (1986), inflexible, unduly harsh, and a trap for the unwary. W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 Harv. L. Rev. 721, 721-24 (1952). Some have suggested that the rule, once beneficial, has outlived the reasons for its origins. *See Anderson*, 119 A.D.2d at 78, 505 N.Y.S.2d at 104 (comparing property ownership of "the postfeudal agrarian period in which the then progressive Rule Against Perpetuities had its genesis" with "the realities of contemporary commerce and economics" involved in the "recent emergence and widespread use of new and creative ownership arrangements of property"); W. Barton Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 Harv. L. Rev. 1318 (1960).

In comparatively recent years, courts have created a myriad of exceptions in an attempt to avoid the harshness of the rule's invalidation *in toto* of contingent future interests that may not vest within the period prescribed by the rule. Thus, courts have exempted from the rule rights of re-entry, possibilities of reverter, resulting trusts, and covenants running with the land. *Wong v. DiGrazia*, 60 Cal. 2d 525, 536 n.19, 386 P.2d 817, 825 n.19, 35 Cal. Rptr. 241, 249 n.19 (1963) (en banc); 61 Am. Jur. 2d *Perpetuities* § 28 (1981); 6 Lewis M. Simes & Allan F. Smith, *The Law of Future Interests* § 1201, at 88 (2d ed. 1956); W. Barton Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638, 647-48 (1938). Courts have also engrafted as exceptions to the applicability of

the rule property transferred from one charity to another,[1] perpetual renewal options in leases, and commercial agreements. 50 Am. Jur. 2d *Landlord and Tenant* § 1169 (1970) (perpetual renewal options); Verner F. Chaffin, *The Rule Against Perpetuities As Applied to Georgia Wills and Trusts: A Survey and Suggestions for Reform*, 16 Ga. L. Rev. 235, 293-98 (1982) [hereinafter Chaffin] (charitable gifts); *see, e.g., Singer Co. v. Makad, Inc.*, 213 Kan. 725, 518 P.2d 493 (1974) (commercial lease).[2]

The most notable exceptions, however, concern the validity of preemptive rights, also called, *inter alia*, rights or options of first refusal. Despite the general recognition that the rule against perpetuities applies to contingent future interests in personal as well as real property, courts have uniformly upheld as valid and enforceable perpetual corporate charters, bylaws, or shareholders' agreements requiring shareholders desirous of selling their stock to afford the corporation, the other shareholders, or both the first right to purchase the stock. *See generally* J.P. Ludington, Annotation, *Validity of Restrictions on Alienation or Transfer of Corporate Stock*, 61 A.L.R.2d 1318 (1958). In addition, courts of various jurisdictions have in a number of different ways avoided applying the rule against perpetuities to preemptive rights to purchase both real and personal property.

In *Weber v. Texas Co.*, 83 F.2d 807 (5th Cir.), *cert. denied*, 299 U.S. 561, 81 L. Ed. 413 (1936), the Fifth Circuit Court of Appeals was confronted with determining the validity of a lease provision that granted to the lessee a preemptive right virtually unlimited in duration. Upholding this preemptive right, the Fifth Circuit reasoned:

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1. N.C.G.S. § 36A-49 provides an even broader exception than that recognized by most jurisdictions and North Carolina cases decided prior to the effective date of the statute. Under the statute, the rule against perpetuities does not invalidate any "gift, grant, bequest or devise . . . to religious, educational, charitable or benevolent uses," irrespective of the transferor's and transferee's status as charitable entities. N.C.G.S. § 36A-49 (1991).

2. In addition, some states have ameliorated the harshness of the rule against perpetuities by adopting a wait-and-see approach, thereby invalidating only those contingent future interests that actually fail to vest within the period prescribed by the rule. *See Merchants Nat'l Bank v. Curtis*, 98 N.H. 225, 97 A.2d 207 (1953) (judicial adoption of wait-and-see); Chaffin, 16 Ga. L. Rev. at 346 (discussing the differences between the wait-and-see statutes enacted by ten states).

A few states have also extended the *cy pres* doctrine to "mitigate the destructive impact of the Rule Against Perpetuities." Chaffin, 16 Ga. L. Rev. at 350.

> The rule against perpetuities springs from considerations of public policy. The underlying reason for and purpose of the rule is to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation, which is regarded at common law as a public evil.
>
> The option [of first refusal] under consideration is within neither the purpose of nor the reason for the rule. . . . It amounts to no more than a continuing and preferred right to buy at the market price whenever the lessor desires to sell. This does not restrain free alienation by the lessor. He may sell at any time, but must afford the lessee the prior right to buy. The lessee cannot prevent a sale. His sole right is to accept or reject as a preferred purchaser when the lessor is ready to sell. The option is therefore not objectionable as a perpetuity.

Id. at 808 (citations omitted).

Since *Weber*, several courts have followed the Fifth Circuit's reasoning and have concluded that preemptive rights to purchase property are not subject to invalidation by the rule against perpetuities. *See Cambridge Co. v. East Slope Inv. Corp.*, 700 P.2d 537 (Colo. 1985) (en banc); *Shiver v. Benton*, 251 Ga. 284, 304 S.E.2d 903 (1983); *Barnhart v. McKinney*, 235 Kan. 511, 682 P.2d 112 (1984); *Terrell v. Messenger*, 428 So. 2d 1241 (La. Ct. App. 1983); *Anderson v. 50 E. 72nd St. Condominium*, 119 A.D.2d 73, 505 N.Y.S.2d 101; *Producers Oil Co. v. Gore*, 610 P.2d 772 (Okla. 1980); *Forderhause v. Cherokee Water Co.*, 623 S.W.2d 435 (Tex. Civ. App. 1981), *rev'd on other grounds*, 641 S.W.2d 522 (Tex. 1982); *Robroy Land Co. v. Prather*, 95 Wash. 2d 66, 622 P.2d 367 (1980) (en banc); *cf. Brooks v. Terteling*, 107 Idaho 262, 688 P.2d 1167 (1984) (upholding preemptive right as not unconscionable); *Hartnett v. Jones*, 629 P.2d 1357 (Wyo. 1981) (reciting its approval of *Weber* but concluding that a state statute made certain that the preemptive right at issue would vest within the period prescribed by the rule).

Some courts have applied the *Weber* analysis in part and have concluded that the rule against perpetuities does not apply to preemptive rights acquired in *commercial* or *governmental* transactions. *See Metropolitan Transp. Auth. v. Bruken Realty Corp.*, 67 N.Y.2d 156, 492 N.E.2d 379, 501 N.Y.S.2d 306 (1986); *Southern Pennsylvania*

Transp. Auth. v. Philadelphia Transp. Co., 426 Pa. 377, 233 A.2d 15 (1967), *cert. denied*, 390 U.S. 1011, 20 L. Ed. 2d 161 (1968); *accord Joseph Schonthal Co. v. Sylvania*, 60 Ohio App. 407, 415, 21 N.E.2d 1008, 1012 (1938) ("Certainly no rule against perpetuities could ever be intended to apply to municipal corporations.").

Still other courts have developed other methods to avoid applying the rule against perpetuities to preemptive rights. *See Greenshields v. Warren Petroleum Corp.*, 248 F.2d 61 (10th Cir.) (preemptive right creates a vested interest that is not subject to the rule against perpetuities), *cert. denied*, 355 U.S. 907, 2 L. Ed. 2d 262 (1957); *Dozier v. Troy Drive-In-Theaters, Inc.*, 265 Ala. 93, 89 So. 2d 537 (1956) (preemptive right creates an estate on a condition subsequent to which the rule against perpetuities does not apply); *Weitzmann v. Weitzmann*, 87 Ind. App. 236, 161 N.E. 385 (1928) (construing preemptive right as a personal right not subject to the rule against perpetuities); *Windiate v. Leland*, 246 Mich. 659, 225 N.W. 620 (1929) (preemptive right creates no interest in land and is therefore not subject to the rule); *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. 1955) (preemptive right is a personal right not subject to the rule against perpetuities); *cf. Keogh v. Peck*, 316 Ill. 318, 147 N.E. 266 (1925) (concluding that an option creates no interest in land).

I agree with the majority of other jurisdictions that have concluded that the rule against perpetuities should not be strictly applied against all preemptive rights. As we noted in *Smith v. Mitchell*, 301 N.C. 58, 269 S.E.2d 608 (1980):

> [The common law prohibition of restraints on alienation] has always conflicted with another common law tenet that one who has property should be able to convey it subject to whatever condition he or she may desire to impose on the conveyance.
>
> Faced with this tension, the law has evolved in such a way that . . . *restraints on alienation are premissible [sic] where the goal justifies the limit on the freedom to alienate or where the interference with alienation in a particular case is so negligible that the major policies furthered by freedom of alienation are not materially hampered.*

Id. at 62, 269 S.E.2d at 611 (emphasis added) (citations omitted).

Applying the above-described principles enunciated in *Smith*, it becomes clear that the rule against perpetuities should not be

applied to the preemptive right at issue in this case. As we have previously stated, "the preemptive right is a useful tool for creating planned and orderly development." *Id.* at 63, 269 S.E.2d at 612.

> [A]ny interference of a preemptive right with freedom of alienation is so negligible that the major policies of utilization of wealth and economy of land control are not hampered. . . . [T]he minimal interference with alienability presented by a preemptive right does little violence to the primary reason for prohibiting restraints on alienation . . . .

Id. at 62-63, 269 S.E.2d at 611 (citations omitted). Where, as here, the preemptive right is held by a municipality, I submit that the policies favoring validity of the preemptive right clearly outweigh the minimal restraint imposed.

The purpose of the preemptive right at issue in this case provides additional justification for upholding it as valid and enforceable. As indicated in the majority opinion, the consent judgment entered into by the Village of Pinehurst and Pinehurst, Inc. granted to the Village Council of Pinehurst the right to purchase on behalf of its residents the sewer and water systems owned by Pinehurst, Inc. in the event that Pinehurst, Inc. decided to sell such systems. As recognized by N.C.G.S. § 160A-311, sewer and water systems are public enterprises. N.C.G.S. § 160A-311 (1987). The operation of such facilities by a municipality, like the Village of Pinehurst, provides a service to the public and presents important considerations of public concern and welfare. Applying the rule against perpetuities to the preemptive right at issue here defeats the policies underlying the rule because it invalidates an agreement, bargained for at arm's length, which promotes the public's interest in acquiring services necessary for the public health, safety, and welfare. *See Anderson*, 119 A.D.2d at 76, 505 N.Y.S.2d at 103 (stating that the purpose of the rule against perpetuities was for the benefit of society at large).

Without recognition of the purpose and policy underlying the rule against perpetuities, the majority today declares that our previous decision in *Smith* requires that the Court apply the rule against perpetuities to the preemptive right at issue here. However, a careful reading of *Smith* demonstrates that such is not the case. In *Smith*, we recognized the harm to be caused by blindly applying rules prohibiting restraints on alienation. Refusing to declare preemptive rights as invalid *per se*, we undertook an analysis of the pur-

poses for the common law prohibition of restraints on alienation and the goals justifying restrictions on alienation. In our analysis, we considered the degree that alienation was hindered by the preemptive right, the analogous character of preemptive rights to other restrictive devices upheld by the courts of our State, the nature of the transaction in which the preemptive right was acquired, as well as the necessity for such restrictive devices. After balancing these factors, we concluded that preemptive rights are valid as long as they do not amount to unreasonable restraints on alienation. Although in dicta we indicated that a preemptive right is valid only if its duration is limited to a period within the rule against perpetuities, we were not faced in *Smith* with the type of preemptive right involved in this case. Where, as here, we are confronted with a municipality's right to purchase all or a major portion of a business's assets for the purpose of serving the public's interest, there are additional factors that must be considered in determining the reasonableness of the preemptive right. Having considered all of the factors justifying the preemptive right in this case and having weighed them in light of the policies we enunciated in *Smith*, I conclude that the preemptive right in this case should be exempt from the rule against perpetuities.

Moreover, I cannot agree with the majority's conclusion that N.C.G.S. § 36A-49 does not exempt the preemptive right held by the Village Council of Pinehurst from application of the rule against perpetuities. N.C.G.S. § 36A-49 provides that "[n]o gift, grant, bequest or devise . . . to religious, educational, charitable or benevolent uses . . . shall be invalid . . . by reason of the same in contravening any statute or rule against perpetuities." N.C.G.S. § 36A-49 (1991). In this case, Pinehurst, Inc. granted to the Village Council the right to purchase its sewer and water systems *for the benefit of the residents* of the Village of Pinehurst. According to Chapter 160A of the North Carolina General Statutes, municipally owned sewer and water systems are public enterprises, the operation of which provides a service to the public. *See* N.C.G.S. §§ 160A-311, -312 (1987). In my opinion, the grant of this preemptive right was to a benevolent use within the meaning of N.C.G.S. § 36A-49 and is therefore exempt from the rule against perpetuities. The mere fact that the Village could operate the sewer and water systems for profit does not change that outcome.

I do not agree with the majority that the preemptive right held by the Village Council of Pinehurst is invalid as violative

of the rule against perpetuities. Having reviewed the terms of the preemptive right, I conclude that the preemptive right here is in all respects a reasonable restraint on alienation. Therefore, I dissent from the majority opinion and vote to reverse the Court of Appeals and remand this case to that court for further remand to the Superior Court, Moore County, for further proceedings.

Chief Justice EXUM joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JEFFREY KARL MEYER

No. 177A89

(Filed 27 January 1992)

1. **Criminal Law § 146 (NCI4th)— withdrawal of guilty pleas— not allowed—no error**

The trial court did not err by denying a murder defendant's motion to withdraw his guilty pleas where the only reason given in support of the motion was a change of circumstances due to media coverage of the case and defendant's escape during his first sentencing proceeding. Defendant's motion for a change of venue was granted and, although a change of circumstances might constitute a fair and just reason for allowing the withdrawal of a guilty plea prior to sentencing under the facts of a given case, a change of circumstances does not in itself mandate that such a motion be granted. The court must look to the facts of each case to determine whether a defendant has come forward with a fair and just reason to allow withdrawal of guilty pleas. None of the factors favoring withdrawal outlined in *State v. Handy*, 326 N.C. 532, are present in this case, and, although *Handy* notes that the State may refute a defendant's motion to withdraw by evidence of concrete prejudice, the State need not even address this issue until the defendant has asserted a fair and just reason why he should be permitted to withdraw his guilty plea.

Am Jur 2d, Criminal Law §§ 501, 502, 505.

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

A murder defendant was entitled to a new sentencing hearing where the State acknowledged that the jury instructions were unconstitutional under *McKoy v. North Carolina*, 494 U.S. 108, and defendant presented credible evidence from which at least one juror could have reasonably found the mitigating factor of impaired capacity to appreciate the criminality of conduct or to conform conduct to the requirements of the law.

Am Jur 2d, Criminal Law § 600; Homicide § 548; Trial §§ 1753-1755.

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 judgments imposing two sentences of death entered by *Clark (Giles R.), J.*, at the 24 October 1988 Special Session of Criminal Superior Court, NEW HANOVER County. Heard in the Supreme Court 9 December 1991.

Lacy H. Thornburg, Attorney General, by William N. Farrell, Jr., Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellant.

FRYE, Justice.

Defendant, Jeffrey Karl Meyer, argues that the trial judge erred by refusing to grant his presentence motion to withdraw his pleas of guilty to two counts of first-degree murder. Defendant also argues that he is entitled to a new sentencing proceeding because the jury instructions were unconstitutional under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). We hold that the trial judge did not err by refusing to grant defendant's motion to withdraw his guilty pleas, but that defendant is entitled to a new sentencing proceeding because of *McKoy* error.

Defendant was indicted by a Cumberland County Grand Jury on two counts of first-degree murder, two counts of robbery with a dangerous weapon and one count of first-degree burglary. On 12 May 1988, in Cumberland County Superior Court, defendant

entered pleas of guilty to the robbery with a dangerous weapon and first-degree burglary charges. On 16 May 1988, in Cumberland County Superior Court, defendant entered pleas of guilty to the first-degree murder charges. On 17 May 1988, Judge E. Lynn Johnson accepted the pleas and adjudicated defendant guilty as charged. After finding aggravating and mitigating factors, Judge Johnson sentenced defendant to life imprisonment for first-degree burglary and two consecutive forty-year prison terms for the two robbery with a dangerous weapon convictions. These non-capital cases are not before the Court on this appeal.

On 3 June 1988, a jury was impanelled in Cumberland County Superior Court for a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000. On Sunday, 12 June 1988, during the presentation of defendant's evidence, defendant and another inmate escaped from the Cumberland County Jail. On 13 June 1988, after the opening of court, Judge Johnson continued the sentencing proceeding until the next day. On 14 June 1988, upon motion by defendant's attorney, Judge Johnson declared a mistrial.

Defendant was apprehended on 19 June 1988. On 6 September 1988, prior to a new sentencing proceeding, defendant sought to withdraw his guilty pleas to the two counts of first-degree murder. This motion was denied by Judge Giles R. Clark. Defendant also sought a change of venue for the sentencing proceeding due to the publicity surrounding his escape. This motion was granted, and the sentencing proceeding was moved to New Hanover County. The jury recommended the death penalty for each of the two murders, and Judge Clark imposed the sentences on 16 November 1988. Defendant appeals to this Court as of right.

I.

A detailed recital of the facts of this brutal double murder is not necessary for resolution of the issues presented. We will therefore give an abbreviated version of the facts as developed during defendant's sentencing proceeding.

In the wee hours of the morning of 2 December 1986, a pickup truck driven by seventeen-year-old Mark Thompson[1] and defend-

1. Thompson was indicted on two counts of first-degree murder, first-degree burglary and two counts of robbery with a dangerous weapon. *State v. Thompson*, 328 N.C. 477, 481, 402 S.E.2d 386, 387-88 (1991). Thompson pleaded not guilty by reason of insanity but was convicted on all five counts. *Id.* at 483, 402 S.E.2d

ant, then twenty, was stopped by Sergeant Robert Provalenko of the Fort Bragg Military Police. Both Thompson and defendant were employed by the U.S. Army on active duty at Fort Bragg. Numerous items were found in the vehicle, including jewelry, a small television, credit cards and papers bearing the name of Paul Kutz, a pair of nunchucks, two butterfly knives, a blow gun, two pairs of rubber gloves, nine pieces of black "Ninja" clothing, including two black hoods, four armbands, two black face masks and a black jacket, and two empty Ninja shoe boxes. At the time of his arrest, defendant was wearing distinctive black pants, no shirt, a pair of green socks with the toes cut out and V-toed shoes. The clothing worn by defendant and the clothing found in the vehicle are that of a Ninja warrior: an oriental assassin from feudal times, highly trained in martial arts and stealth, who dresses in black and slips in and out of places unheard and unseen.

On the evening of 1 December 1986, Paul Kutz, sixty-eight, and his wife, Janie Mae Meares Kutz, sixty-two, were at their home in Fayetteville, North Carolina. Cumberland County sheriff's deputies found the couple brutally murdered in the early morning hours of 2 December 1986. Both had been stabbed numerous times. Both had their throats cut.

Testimony at the sentencing proceeding placed defendant at the scene of the crime. A footwear impression lifted from a seat cushion in the Kutzes' home was consistent with the distinctive V-toed shoes worn by both defendant and Thompson on the night of the murder. Blood of the types consistent with both victims was found on defendant's clothing and knife. Fibers consistent with materials from the Kutzes' home were found on defendant's clothing and knife, and fibers consistent with the Ninja clothing worn by defendant and Thompson were found in the Kutzes' home.

The State also presented the testimony of Dale Wyatt, a member of the armed forces stationed at Fort Bragg. Mr. Wyatt met defendant in a holding cell at the Cumberland County Law Enforcement Center on 3 December 1986 while being held for failure to appear for a court date on a worthless check charge. Mr. Wyatt testified

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at 388-89. He was sentenced to two consecutive terms of life imprisonment for the murder charges, an additional consecutive term of life imprisonment for the burglary charge and forty years imprisonment for the combined counts of robbery with a dangerous weapon. *Id.* Thompson's convictions and sentences were upheld by this Court on 3 April 1991. *Thompson*, 328 N.C. 477, 402 S.E.2d 386.

that defendant gave him the following account of what happened the night of the murders: defendant and another person had attempted to rob a house, believing the homeowners were away. When defendant entered the house, a man came toward him, so defendant shot him with a blow gun. When the man did not stop, defendant stabbed him. Defendant also told Mr. Wyatt that he (defendant) had been dressed as a Ninja at the time of the crime.

Defendant presented psychiatric testimony which indicated that, at the time of the crimes, he suffered from a dissociative personality disorder, a mental illness which causes the person to detach himself from reality. Specifically, Dr. Selwyn Rose testified that defendant was obsessed with Dungeons and Dragons, a role-playing, fantasy-adventure game set in medieval times, and that his mental disorder caused defendant to retreat into a fantasy world of Ninja warriors. "The thrust was that [defendant] was going to make points in the Dungeons and Dragons game; that he wanted to prove that he could slip in and out of a house and not be seen like a great Ninja," Dr. Rose testified.

Another psychiatrist, Dr. Thomas E. Radecki, testified that defendant "was so out of touch with reality . . . I don't think that he really appreciated that he was really killing people. I think that he was living out a game, living out a fantasy . . . . I really don't think he appreciated really seriously what he was doing. He's a very sick man . . . ."

II.

[1] Defendant contends that the trial court erred by refusing to grant his motion to withdraw his pleas of guilty to two counts of first-degree murder. Defendant does not argue that the guilty pleas were improperly adjudicated, only that the trial judge erred by denying his subsequent motion to withdraw the pleas. The State argues that the trial judge correctly denied the motion because defendant presented no fair and just reason why he should be allowed to withdraw his guilty pleas. We agree with the State.

In *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990), this Court held that a "presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason." *Id.* at 539, 391 S.E.2d at 162. Although there is no absolute right to withdraw a guilty plea, "withdrawal motions made prior to sentencing, and especially at a very early stage of the proceedings, should be granted

with liberality." *Id.* at 537, 391 S.E.2d at 162. After a thorough review of case law from other jurisdictions, this Court listed several factors which favor the granting of a presentence motion to withdraw guilty pleas.

> Some of the factors which favor withdrawal include whether the defendant has asserted his legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

Id. at 539, 391 S.E.2d at 163 (citation omitted). After a defendant has come forward with a "fair and just reason" in support of his motion to withdraw, the State "may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea." *Id.*

In this case, defendant pleaded guilty to two counts of first-degree murder on 16 May 1988. During the sentencing proceeding, defendant escaped from jail, causing a mistrial to be declared. After his recapture, defendant sought to withdraw his pleas of guilty. In his motion to withdraw, defendant cited a "change of circumstances" as the reason for his decision to change his pleas to not guilty. Because of his escape from jail, defendant said, "media coverage of the case and escape was extensive." No other reason was given in support of his motion. Defendant's attorneys, experienced public defenders, offered no additional reasons to support the motion when it came before Judge Clark. Based upon defendant's written motion, Judge Clark ruled that "in the absence of a showing of some circumstances which would justify the withdrawal, . . . his pleas should stand, and no such circumstances having been made to appear, [the] Court is of the opinion that the Defendant's motions to withdraw his pleas of guilty should be and the same [are] hereby denied." Although Judge Clark did not have the benefit of *Handy* when he made his ruling, we believe his decision is consistent with the test outlined in that case.

Although a change of circumstances might, under the facts of a given case, constitute a fair and just reason for allowing the withdrawal of a guilty plea prior to sentencing, a change of circumstances does not in itself mandate that such a motion be granted. Instead, a court must look to the facts of each case to determine

whether a defendant has come forward with a fair and just reason to allow withdrawal of his guilty pleas.

Turning then to the facts of this case, we find none of the factors favoring withdrawal outlined in *Handy* to be present. *See Handy*, 326 N.C. at 539, 391 S.E.2d at 163. Perhaps most importantly, defendant in this case, unlike the defendant in *Handy*, has not asserted his "legal innocence." In *Handy*, the defendant pleaded guilty to felony murder based on the underlying charge of armed robbery. The following morning, the defendant told the trial judge that he had felt "under pressure" to plead guilty, and that after praying about it overnight and talking with his mother and attorneys, he believed he was not actually guilty of first-degree murder. *Id.* at 541, 391 S.E.2d at 164. In this case, defendant sought to withdraw his guilty pleas not because he believed he was innocent of the crimes charged, but because of the extensive media coverage generated by his escape.[2]

Consideration of the other factors cited in *Handy* do not help defendant. The State's case is exceptionally strong. There is no evidence, and defendant does not argue, that he did not have competent counsel, that he misunderstood the consequences of his guilty plea, that his plea was entered in haste or that he was confused or coerced at the time he pleaded guilty. And finally, defendant's motion to withdraw his guilty pleas came more than three and one-half months after he pleaded guilty and after his first sentencing proceeding was cut short by his escape. *Cf. Handy*, 326 N.C. at 540, 391 S.E.2d at 163 (defendant sought to withdraw his guilty plea less than twenty-four hours after he initially offered it and prior to the beginning of jury selection).

Defendant suggests, however, that unless the State can show "concrete prejudice" to its case, the motion to withdraw should be granted. Defendant misreads *Handy*. Although *Handy* notes that the State *may refute* a defendant's motion to withdraw by evidence of concrete prejudice, *id.* at 539, 391 S.E.2d at 163, the State need not even address this issue until the defendant has asserted a fair and just reason why he should be permitted to withdraw his guilty pleas. *See United States v. Haley*, 784 F.2d 1218, 1219 (4th Cir. 1986) (only after defendant has established

2. We note that defendant's motion for a change of venue, also based on extensive media coverage, was granted by the trial judge.

a just and fair reason is it appropriate to consider whether the government would be prejudiced). *Accord United States v. Alvarez-Quiroga*, 901 F.2d 1433, 1439 (7th Cir. 1990); *United States v. Rojas*, 898 F.2d 40, 43 (5th Cir. 1990).

Based on the facts of this case, we hold that defendant has not proffered a fair and just reason why he should be permitted to withdraw his guilty pleas; therefore, the trial judge did not err by denying defendant's motion.

III.

[2] In his next twelve arguments, defendant contends that the trial judge committed errors entitling him to a new sentencing proceeding. Because we find defendant is entitled to a new sentencing proceeding under *McKoy*, we address only that issue. *State v. Robinson*, 330 N.C. 1, 31, 409 S.E.2d 288, 305 (1991).

Defendant argues the trial judge erred by instructing jurors that they could not consider any mitigating circumstance when making the final sentencing determination unless the mitigating circumstance was found by all twelve jurors. *See McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369. Defendant argues that the *McKoy* error in this case was not harmless beyond a reasonable doubt because jurors failed to find six of the seventeen mitigating circumstances submitted, including two statutory circumstances, and that there was credible evidence to support at least one of these six.

Because *McKoy* error is of constitutional magnitude, the State bears the burden of demonstrating that it was harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990); N.C.G.S. § 15A-1443(b) (1988). The State acknowledges that the jury instructions in this case were unconstitutional under *McKoy* and that it is unable to distinguish this case from other decisions in which this Court has ordered new sentencing proceedings. The State "acknowledges therefore that this Court is required to order a new capital sentencing proceeding because of *McKoy* error." We agree.

Of the six submitted but unfound mitigating circumstances, we need only address one: the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct

to the requirements of law was impaired.[3] Defendant, at his sentencing proceeding, presented psychiatric evidence to support this mitigating circumstance. Dr. Radecki testified that defendant was "living out his fantasies of a game of Dungeons and Dragons and of his tremendous fascination with martial arts, Ninja martial arts, which are a very violent form." Dr. Radecki further testified that he did not think defendant "really appreciated that he was really killing people. I think he was living out a game, living out a fantasy . . . . I really don't think that he appreciated really seriously what he was doing."

We agree with defendant that he presented credible evidence from which at least one juror could have reasonably found this mitigating circumstance to exist. Furthermore, we cannot say beyond a reasonable doubt that no juror, upon weighing this circumstance along with the other mitigating circumstances, could have concluded that life imprisonment rather than death was the appropriate punishment. Defendant is therefore entitled to a new sentencing proceeding.

For the foregoing reasons, we conclude that the trial court did not err in rejecting defendant's motion to withdraw his guilty pleas. However, error in the sentencing proceeding requires that the death sentence be vacated and this case be remanded to the Superior Court, New Hanover County, for a new capital sentencing proceeding.

No error in guilt phase; death sentence vacated; remanded for a new capital sentencing proceeding.

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3. This mitigating circumstance is statutory, N.C.G.S. § 15A-2000(f)(6), and thus, if found, is presumed to have mitigating value as a matter of law. *State v. Quick*, 329 N.C. 1, 34, 405 S.E.2d 179, 199 (1991).

STATE OF NORTH CAROLINA v. ALBERT EUGENE DODD

No. 490A90

(Filed 27 January 1992)

1. Constitutional Law § 318 (NCI4th)— murder—lack of meaningful argument for appeal—submission for review

Defense counsel fully complied with *Anders v. California*, 386 U.S. 738, where she stated that, after a thorough review of the record and the relevant law and further consultation with fellow counsel, she was unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal; defense counsel submitted a brief in which she discussed three possible assignments of error "that might arguably support the appeal" and requested the Supreme Court to conduct a thorough examination of the record; and defense counsel submitted a copy of her brief to defendant, with copies of the transcript and record and a letter notifying defendant of his right to submit a brief to the Supreme Court on his own behalf.

Am Jur 2d, Criminal Law §§ 751, 809, 875, 985.

Supreme Court's views as to accused's federal constitutional right to counsel on appeal. 102 L. Ed. 2d 1049.

Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies. 15 ALR4th 582.

2. Evidence and Witnesses § 194 (NCI4th)— murder—condition of third party at scene—no plain error

There was no plain error in a murder prosecution in the admission of testimony that Cunningham, whom defendant claimed to be the actual perpetrator, had previously been shot in the leg and was in a cast. Although defendant contended that the witness lacked personal knowledge regarding whether Cunningham was in a cast on the day the victim was shot, the witness did not testify to Cunningham's physical condition on the day of the crime, and her knowledge of his physical condition shortly before and after the crime was sufficiently

probative of his condition on the day of the crime to satisfy the standards of relevance. N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Evidence § 241.

3. **Criminal Law § 685 (NCI4th)— murder—requested instruction on identification—substantially similar instruction given**

There was no plain error in a murder prosecution where defendant requested an instruction regarding the identification of defendant and the court adequately explained to the jury the various factors they should consider in evaluating witness testimony and clearly emphasized the importance of proper identification and that the burden rested with the State to prove such identity beyond a reasonable doubt.

Am Jur 2d, Homicide § 487; Trial § 1098.

4. **Criminal Law § 468 (NCI4th)— murder—prosecutor's argument—flight as evidence of deliberation—not grossly improper**

Although the prosecutor in a murder prosecution improperly referred to defendant's flight with regard to deliberation, no objection was made at trial and the misstatement of the law was not so grossly improper or prejudicial as to require the court to intervene *ex mero motu*. Given the evidence, it was highly unlikely that the State's improper characterization of the law with respect to flight and deliberation affected the jury's decision. Any error was cured by the court's proper instruction on the law, the court's prefatory remarks directing jurors to apply the law as given to them by the court, and the State's urging of the jurors to keep the judge's instructions in mind.

Am Jur 2d, Evidence § 228; Homicide §§ 501, 507; Trial §§ 554, 555, 566, 711.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Warren, J.*, at the 16 July 1990 Criminal Session of Superior Court, MECKLENBURG County. Calendared for argument in the Supreme Court 12 December 1991; determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(d) upon motion of the parties.

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

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

MEYER, Justice.

Defendant, Albert Eugene Dodd, was indicted by the Mecklenburg County Grand Jury on 5 February 1990 for the murder of Charles Henri Arms. The case was tried noncapitally at the 16 July 1990 Criminal Session of Superior Court, Mecklenburg County.

The evidence at trial tended to show that on 14 January 1990, Charles Henri Arms died as a result of a gunshot wound to the upper chest sustained that afternoon. According to eyewitnesses, on the afternoon of 14 January, defendant hired a cab to take him to the Southland Supermarket on Thirteenth Street in Charlotte. There, defendant walked toward a group of young men who stood outside the store, one of whom was the victim. As defendant approached, he nodded his head as though he was speaking to the group. When several feet away, he turned around as if to walk to the store, then turned around again and started shooting, hitting the victim, Charles Arms. Defendant fired three to five shots from two revolvers, a .38- and a .357-caliber. The victim was first struck in the foot; a later bullet entered the upper left back and struck both lungs and the aorta. This latter wound proved fatal and was determined to have been caused by a large-caliber weapon, such as a 9 millimeter, a .357, a .38, or a .45. Eyewitnesses at the murder scene identified defendant as the perpetrator.

Evidence for the defendant showed that Patricia Robinson resided in an apartment located directly behind the Southland Supermarket. Ms. Robinson was familiar with both defendant and the victim. On the afternoon of 14 January, Ms. Robinson testified that she heard neighbors yelling that some people were in the parking lot in a blue Ford. She went to her door and observed a group of males, one of whom carried a gun, enter the vehicle and depart. After reentering her apartment, Ms. Robinson heard three or four gunshots and ran outside to see what had happened. She went outside and discovered the victim lying on the sidewalk and observed Antonio Cunningham, in the possession of a gun, run to the blue vehicle and quickly drive away.

Officer Paula S. Forest of the Charlotte Police Department spoke to Robinson at the scene. Robinson informed Officer Forest that she saw Antonio Cunningham and another black male run up to the victim and shoot him. Forest searched an area she knew to be frequented by Cunningham and located a vehicle matching the description provided by Robinson.

On cross-examination by the State, Officer Forest testified that Antonio Cunningham had been shot in the leg two weeks prior to the 14 January incident and was still wearing a cast the last time she saw him, approximately a week after the shooting of the victim. On redirect by defense counsel, Forest stated that, although she had seen Cunningham "a couple of hundred" times, she did not know whether he was wearing a cast on 14 January. The first time she had seen Cunningham in a cast was the week following the shooting of Arms.

Following presentation of the evidence, the jury found defendant guilty of first-degree murder, and he was sentenced to the mandatory term of life imprisonment. Defendant appeals as of right from that sentence.

[1] Upon defendant's application of indigency, the Appellate Defender was assigned to represent defendant on his appeal to this Court. In her brief filed with this Court, defendant's appellate counsel stated that after a thorough review of the record and the relevant law and further consultation with fellow counsel, she was unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal. In accordance with *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), defense counsel submitted a brief in which she discussed three possible assignments of error "that might arguably support the appeal," *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498, and requested this Court to conduct a thorough examination of the record. Defense counsel submitted a copy of her brief to defendant, with copies of the transcript and record and a letter notifying defendant of his right to submit a brief to this Court on his own behalf in accord with *Anders*. Defendant failed to submit any brief. We conclude that defense counsel fully complied with *Anders*.

[2] The first of the three possible assignments suggested is that the trial court committed plain error when it permitted the State to introduce the testimony of Officer Forest. Specifically, defendant

asserts that the court erred by permitting the State to cross-examine Forest concerning the fact that Antonio Cunningham had been shot in the leg two weeks prior to the victim's death and as a result of the wound was wearing a cast at the time of the victim's death. The transcript reveals the following cross-examination of Officer Forest by the prosecutor:

> Q. Do you remember anything unusual about Antonio Cunningham's legs in January of 1990?
>
> A. Yes, I do.
>
> [DEFENSE COUNSEL]: Object to the relevance, Your Honor.
>
> [PROSECUTOR]: Identification, Judge.
>
> THE COURT: Objection overruled.
>
> Q. Explain to the jury.
>
> A. Yes. He was shot two weeks prior to this shooting in the leg, and was wearing a cast the last time I saw him. I didn't see him the day of this shooting.
>
> Q. Did you see him shortly after the shooting?
>
> A. Yes, I did.
>
> Q. And how was his leg then?
>
> A. It was still in a cast.

Defendant argues that admission of this testimony violated N.C. R. Evid. 602 because Forest lacked personal knowledge regarding whether Cunningham was in a cast on the day the victim was shot. Defendant also maintains that this testimony was prejudicial because his sole theory of defense was that Cunningham killed the victim. We disagree.

The essence of Forest's testimony was that she was aware that Cunningham was in a cast two weeks before and one week after the shooting. Officer Forest did not testify to Cunningham's physical condition on the day of the crime; therefore, defendant's objection is without merit. Moreover, Forest's knowledge of Cunningham's physical condition shortly before and after the crime was sufficiently probative of Cunningham's condition on the day of the crime to satisfy the standards of relevance. N.C.G.S. § 8C-1,

Rule 401 (1988); *see State v. Cheek*, 307 N.C. 552, 562, 299 S.E.2d 633, 639-40 (1983).

[3] The second suggested assignment of error is that the trial court erred by refusing to include in its jury charge defendant's requested instruction regarding the identification of defendant as the perpetrator of the killing. The requested instruction emphasized at length the jury's need to examine the testimony of the witnesses to assess whether they had the opportunity to observe the alleged crime, their ability to identify the perpetrator given the length of time they had to observe, their mental and physical conditions, and the lighting and other conditions that might have affected their observation. The requested instruction also emphasized that the identification of the defendant as the perpetrator had to be purely the product of the witnesses' recollection of the crime and that the jury could properly discount a witness' identification if the circumstances regarding any subsequent confrontation might have influenced the purported identification. Rather than giving the requested instruction, the trial court instructed the jury:

> You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of what a witness has said on the stand. In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your everyday affairs. As applied to this trial, these tests may include the opportunity of the witness to see, to hear, know or remember the facts or occurrences about which he or she testified, the manner and appearance of the witness, any interest, bias or prejudice the witness may have, the apparent understanding and fairness of the witness, whether his or her testimony was reasonable, and whether his or her testimony is consistent with other believable evidence in this case.
>
> You are the sole judges of the weight to be given to any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of the evidence in light of all other believable evidence in this case.

The court then provided the pattern jury instruction on identification:

> I instruct you that the State has the burden of proving the identity of the defendant as the perpetrator of the crime

> charged beyond a reasonable doubt. This means that you, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before you may return a verdict of guilty.

When a defendant makes a timely written request for an instruction that is correct in law and supported by the evidence, as was the case here, the trial court must relate the substance of that instruction, although it is not required to give the instruction verbatim. *State v. Green*, 305 N.C. 463, 476-77, 290 S.E.2d 625, 633 (1982). The defendant in *Green* requested instructions regarding identification that were substantially similar to those proffered by the defendant in this case. However, the trial court refused the special instruction and instructed the jury using an instruction virtually identical to that provided by the court here. In *Green*, we concluded that the instruction given "adequately conveyed the substance of defendant's proper request; no further instructions were necessary." *Id.* at 477, 290 S.E.2d at 633. As in *Green*, we conclude that the trial court did not err because the instruction given was substantially similar to that requested. The charge adequately explained to the jury the various factors they should consider in evaluating witness testimony. Moreover, the instruction clearly emphasized the importance of proper identification and emphasized that the burden rested with the State to prove such identity beyond a reasonable doubt. Therefore, we overrule this assignment of error.

[4] The third and final suggested assignment of error is that the trial court improperly failed to intervene or correct the prosecutor's improper assertion in her argument to the jury that defendant's flight from the crime scene was evidence of deliberation. In her closing, the prosecutor argued, among other things:

> The State is also required to show deliberation, and that, again, is something that cannot be proven generally directly. It needs to be shown by the circumstances. That, again, refers to the idea of the lack or [sic] provocation and the conduct of the defendant before, during and after the killing—deliberation. There was no provocation in this case. The victim did nothing to require [defendant] to shoot him in the back. And we'd remind you that after that shooting the defendant fled, and we would submit that that again shows to you there was deliberation.

> His honor will also give you some further instructions, but we would ask you to keep those instructions in mind as you listen to the final arguments of counsel.

While correctly noting that the above reference to defendant's flight with regard to deliberation was improper as a matter of law, *see, e.g., State v. Bolin*, 281 N.C. 415, 425, 189 S.E.2d 235, 242 (1972), defendant concedes that no objection was made at trial to this misstatement of the law. Therefore, the proper standard of review is whether the comment of the prosecutor was so prejudicial and grossly improper as to require the court to intervene *ex mero motu* to correct the abuse. *State v. James*, 322 N.C. 320, 324, 367 S.E.2d 669, 672 (1988). We conclude that it was not.

In the instant case, there were three eyewitnesses to the murder. Maxwell Ogwo, the cab driver who drove defendant to the murder scene, testified that after exiting the cab defendant approached a group of four or five young men standing in front of the store. As Ogwo reversed the car to drive away, he saw defendant walk side-by-side with one of the young men, take a few steps back, pull a gun from his torso area, and fire four shots. Two other eyewitnesses, Willie Springs and Edward Carraway, were standing with the victim in front of the store when defendant exited the cab and walked toward them. Mr. Springs testified that defendant "nodded his head like he was speaking to us, and then he got several feet towards us, and then when he turned around—he turned back around like he was walking towards the store, and when he turned back around he started shooting." Mr. Carraway testified that defendant

> nodded his head to Willie Springs, and he came towards us and had two revolvers in his pants.
>
> Q. What kind of guns did he appear to have?
>
> A. He had a .38 and a .357 tucked down in his pants, and he went about three steps away from us and he pulled one of the revolvers out of his pants and started shooting.

The above testimony clearly tended to show that defendant deliberated the killing of Charles Arms. *State v. Myers*, 299 N.C. 671, 677-79, 263 S.E.2d 768, 772-73 (1980). Given this evidence, it is highly unlikely that the State's improper characterization of the law with respect to flight and deliberation affected the jury's decision in this case. Therefore, the misstatement of the law was not

so grossly improper or prejudicial as to require the court to intervene *ex mero motu*. Furthermore, while the court did not instruct on flight, any erroneous statement of the law in the prosecutor's closing argument regarding flight was cured by the court's proper instruction to the jury on the law pertinent to the case. This proper instruction was reinforced by the judge's prefatory remarks to the jurors directing them to apply the law as given to them by the court and the State's *own* urging of the jurors to "keep [the judge's] instructions in mind." Under the circumstances, we cannot say that the misstatement of law contained in the argument of the prosecutor was so grossly improper as to have required the trial court to intervene *ex mero motu*. *State v. Harris*, 290 N.C. 681, 695-96, 228 S.E.2d 437, 445-46 (1976); *State v. Braswell*, 67 N.C. App. 609, 614, 313 S.E.2d 216, 219-20 (1984).

Defense counsel also suggested, but did not brief, eleven other possible assignments of error. We have reviewed these and conclude that these assignments do not merit relief. Further, we have conducted a thorough review of the transcript of the proceedings and the record on appeal. We find no error warranting reversal of defendant's conviction or modification of his sentence.

No error.

FRANK GEORGE, D/B/A FRANK GEORGE ELECTRIC, INC. v. HARTFORD ACCIDENT AND INDEMNITY COMPANY

No. 260A91

(Filed 27 January 1992)

Principal and Surety § 10 (NCI3d)— laborers' and materialmen's lien—bond discharging lien—accrual of action against surety

The statute of limitations begins to run in favor of a corporate surety which has filed a bond discharging a lien under N.C.G.S. § 44A-16(6) when final judgment is entered in favor of the lien claimant, not when the surety files the bond discharging the lien. The primary purpose of N.C.G.S. § 44A-16(6) is to protect the landowner, not the lien claimant, who is already protected by virtue of the lien on the property. Because the bond acts as a substitute for the land, the lien

claimant's right to make demand upon the bond accrues at the same time that he would have been able to enforce the lien against the land, *i.e.*, at final judgment in his favor.

Am Jur 2d, Suretyship §§ 236, 237.

APPEAL by defendant Hartford Accident and Indemnity Company pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 102 N.C. App. 761, 404 S.E.2d 1 (1991), affirming the judgment of *Downs, J.*, at the 9 July 1990 Session of Superior Court, MACON County. Heard in the Supreme Court 14 October 1991.

Creighton W. Sossomon for plaintiff-appellee.

Glass, McCullough, Sherrill & Harrold, by C. Walker Ingraham; and Patrick U. Smathers, for defendant-appellant.

FRYE, Justice.

The question presented in this case is when does the statute of limitations begin to run in favor of a corporate surety which has filed a bond discharging a lien under N.C.G.S. § 44A-16(6). We agree with the Court of Appeals that the statute of limitations begins to run when final judgment is entered in favor of the lien claimant; however, we reach this result by a different path than the one taken by the Court of Appeals. We therefore modify and affirm the decision of the Court of Appeals.

I.

Following are the facts necessary for an understanding of the single issue involved in this appeal. On 10 July 1984, plaintiff Frank George (George), an electrical subcontractor, filed a "notice of claim of lien by first-tier subcontractor" against property owned by V. Glenn Arnette and his wife, Shannon P. Arnette. On 27 August 1984, George filed a complaint against Burke Engineering, Inc. (Burke), the general contractor on the construction project, and the Arnettes. The complaint alleged that Burke had not paid George $18,610.22 in connection with George's work on the Arnettes' property known as the Highlands Inn in Highlands, North Carolina. George prayed for judgment against Burke and also for enforcement of his lien rights with respect to the Arnettes' property.

On 18 February 1985, a consent order was entered, staying the action pending arbitration proceedings. On 23 April 1985, Burke, as principal, and defendant Hartford Accident and Indemnity Company (Hartford), as surety, filed a "bond discharging lien" with the Macon County Clerk of Superior Court pursuant to N.C.G.S. § 44A-16(6). After a delay due to bankruptcy proceedings involving Burke, arbitrator James R. Simpson, II, on 25 May 1988, entered an award in George's favor for $13,278.60. On 26 August 1988, Judge Downs confirmed the award.

On 19 January 1989, George's counsel requested payment on the bond from Hartford. Hartford refused. The present action, demanding payment on the bond, as well as other damages not pertinent to this appeal, was instituted on 13 February 1989. In its answer, Hartford argued that George's action was barred by the three-year statute of limitations.[1] On 17 July 1990, Judge Downs filed an order granting George's motion for partial summary judgment on the issue of Hartford's liability on the bond and entered final judgment in the amount of $13,278.60 plus costs, expenses and interest.

The Court of Appeals, on a 2-1 vote, upheld the trial court. *George v. Hartford Accident and Indem. Co.*, 102 N.C. App. 761, 404 S.E.2d 1 (1991) (Parker, J., dissenting). Hartford appeals as of right based on Judge Parker's dissent.

II.

Ironically, both Hartford and the Court of Appeals, which held for George, rely on the same passage from the same case to support their opposing positions. The case is *Bernard v. Ohio Casualty Insurance Co.*, 79 N.C. App. 306, 339 S.E.2d 20 (1986), and the passage is as follows:

> Although the surety's obligation depends upon a valid obligation of the principal, the surety may be sued immediately when the principal becomes liable to a third party on an obligation covered by the suretyship contract, *unless the suretyship contract or a statute provide otherwise.* . . . It is also recognized that "the statute of limitations begins to run in favor of the surety from the time that he is subject to suit."

1. Both parties and the Court of Appeals agree that the appropriate statute of limitations is the three-year limitations period of N.C.G.S. § 1-52(1). We do not disagree.

Id. at 310, 339 S.E.2d at 23 (citations omitted) (emphasis added). The Court of Appeals, relying on the italicized clause above, turned to the language of the bond. The bond reads, in pertinent part:

> Burke Engineering, Inc., as Principal, and Hartford Accident and Indemnity Company, as Surety, will pay the full amount of the Lien Claim *as established in any appropriate court proceeding*, . . . but in no event shall the liability of the Principal or Surety under this Bond exceed the bond penalty of $23,080.28.

(Emphasis added.) Thus, reasoned the Court of Appeals, "under the clear wording of the bond, the defendant's liability did not accrue until the amount was 'established in any appropriate court proceeding.' The amount was established in the award of the arbitrator on 25 May 1988 and became a final judgment 26 August 1988." *George*, 102 N.C. App. at 765, 404 S.E.2d at 3. George's claim, filed 13 February 1989, was within three years of the final judgment and was therefore timely. *Id.*

Hartford argues, however, that the statute of limitations began to run when it filed the bond discharging the lien on 23 April 1985. Thus, George's complaint, filed more than three years later, is barred.

Hartford bases its argument on the same passage from *Bernard* quoted above. *Bernard*, according to Hartford's brief, "recognized two cardinal rules of suretyship: the liability of a surety accrues at the same time as that of the principal; and the surety may be sued immediately when the principal becomes liable." Thus, Hartford argues, its liability accrued on 23 April 1985, the date it filed the bond discharging the lien, because its principal, Burke, was already subject to suit at that time; accordingly, the statute of limitations began to run on that date.

As for the bond language relied on by the Court of Appeals, Hartford notes that the bond states that Hartford, as surety, will pay the full amount of the lien claim "as established in *any* appropriate court proceeding." (Emphasis added.) The bond contains no provision requiring that a judgment must first be entered against the *principal* before Hartford, as surety, can be held liable. George, Hartford contends, could have filed suit against Hartford as of 23 April 1985, won its case and collected its judgment from Hartford. This would have complied with the requirement that "Hartford

Accident and Indemnity Company, as Surety, will pay the full amount of the Lien Claim as established in any appropriate court proceeding."

Although Hartford makes a persuasive argument, we agree with George that both Hartford and the Court of Appeals make the same crucial mistake: the suretyship principles outlined in *Bernard* are not applicable to this case. The issue in *Bernard* was whether the statute of limitations had run on plaintiff Bernard's claim against defendant Ohio Casualty Insurance Company (Ohio Casualty). *Bernard*, 79 N.C. App. at 307, 339 S.E.2d at 21. Ohio Casualty was surety for Central Carolina Truck Sales (Central Carolina), the principal, under a motor vehicle dealer surety bond governed by N.C.G.S. § 20-288(e). *Id.* That statute requires motor vehicle dealers like Central Carolina to furnish a corporate surety bond for the protection of consumers. The purpose of the statute is to provide protection for the consumer by holding liable "both the motor vehicle dealer and its surety . . . to any consumer who suffers a loss or damages by any act of the motor vehicle dealer that violates either article 12 or article 15 of chapter 20 of the General Statutes of North Carolina." *Tomlinson v. Camel City Motors*, 330 N.C. 76, 78, 408 S.E.2d 853, 855 (1991).

The general suretyship principles outlined in *Bernard* are consistent with and support the policy objectives of N.C.G.S. § 20-288(e). The liability of the surety necessarily accrues at the same moment as liability of the motor vehicle dealer; therefore, the surety may be sued immediately when the principal becomes liable. This serves the underlying purpose of the statute, which is to provide a ready source of money for the consumer who has been injured. Thus, the Court of Appeals was correct in *Bernard* when it held that plaintiff Bernard's actions against Ohio Casualty and Central Carolina arose at the same time. *Bernard*, 79 N.C. App. at 310-11, 339 S.E.2d at 23. Because the plaintiff in that case waited too long to file suit against the surety, its suit was time barred. *Id.* at 311, 339 S.E.2d at 23.

The statute at issue in this case, N.C.G.S. § 44A-16, outlines six ways that a lien, already properly filed against property, can be discharged. One of these is by filing a corporate surety bond.[2]

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2. N.C.G.S. § 44A-16(6) reads as follows:

> Any lien filed under this Article may be discharged by any of the following methods:
>
> . . . .

In contrast to N.C.G.S. § 20-288(e), the primary purpose of N.C.G.S. § 44A-16(6) is not to provide a ready source of money for those who have been injured. The primary purpose of this subsection, as explained by the Court of Appeals in *Gelder & Associates v. St. Paul Fire and Marine Insurance Co.*, 34 N.C. App. 731, 239 S.E.2d 604 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978), is to provide the landowner a convenient way to unburden his property while the lien claimant's claim is litigated. We quote with approval the following language from *Gelder*:

> The statute, G.S. 44A-16(6), is more for the benefit of the landowner than the lien creditor. In many instances substantial development projects are fettered by the existence of liens of relatively small amounts over which there are serious disputes as to the sums due. Time is often of the essence. The landowner finds himself faced with the dilemma of either paying what he considers to be an unjust claim or incurring the risks inherent in the delay pending litigation of the claim. Under this statute the landowner can post a bond and free his land from the weight of the lien while the parties litigate over the amount, if any, that may finally be determined to be due. He can accomplish the same result by depositing cash with the clerk. G.S. 44A-16(5). He is then free to sell, mortgage, or otherwise encumber the land free of the lien. The lien-creditor has no choice as to whether the lien will be canceled. He can, however, rest in the knowledge that, if he proves his debt, the debt will be paid. He is thereby relieved of the necessity of protecting his interest in the land by taking all the steps that a prudent creditor would take, including possible negotiations with other creditors and efforts to insure that, in the event of a foreclosure, the property does not sell for less than its real value.

Id. at 733-34, 239 S.E.2d at 605-06. Thus, while the lien claimant may receive some benefit from the statute, the *primary* purpose of N.C.G.S. § 44A-16(6) is to protect the *landowner*, not the lien

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> (6) Whenever a corporate surety bond, in a sum equal to one and one-fourth times the amount of the lien or liens claimed and conditioned upon the payment of the amount finally determined to be due in satisfaction of said lien or liens, is deposited with the clerk of court, whereupon the clerk of superior court shall cancel the lien or liens of record.

N.C.G.S. § 44A-16(6) (1989).

claimant, who is already protected by virtue of the lien on the property. The bond, in other words, simply takes the place of the land.

Because the bond acts as a substitute for the land, logic dictates that the lien claimant's right to make demand upon the bond accrues at the same time that he would have been able to enforce the lien against the land: at final judgment in his favor. *See* N.C.G.S. § 44A-13(b) ("The judgment shall direct a sale of the real property subject to the lien thereby enforced."). We therefore hold that the statute of limitations begins to run in favor of the corporate surety under N.C.G.S. § 44A-16(6) when final judgment is entered in favor of the lien claimant. Because George filed suit against Hartford within three years of final judgment being entered in his favor, the suit was timely. The decision of the Court of Appeals is modified and affirmed.

Modified and affirmed.

DR. ALVIS L. CORUM v. UNIVERSITY OF NORTH CAROLINA THROUGH ITS BOARD OF GOVERNORS; C. D. SPANGLER, PRESIDENT OF THE UNIVERSITY OF NORTH CAROLINA IN HIS OFFICIAL CAPACITY; APPALACHIAN STATE UNIVERSITY; AND JOHN THOMAS, CHANCELLOR OF APPALACHIAN STATE UNIVERSITY, AND HARVEY DURHAM

No. 163PA90

(Filed 31 January 1992)

1. **Constitutional Law § 86 (NCI4th)— § 1983 claims—UNC, ASU and university officials—official capacities—damages claims barred**

Plaintiff was barred from seeking damages under 42 U.S.C. § 1983 from the University of North Carolina, Appalachian State University, the president of the University of North Carolina in his official capacity, and the chancellor and a vice chancellor of Appalachian State University in their official capacities because neither a state nor its officials acting in their official capacities are "persons" under § 1983 when the remedy sought is monetary damages.

Am Jur 2d, Civil Rights §§ 17, 264.

Public institutions of higher learning as "persons" subject to suit under 42 USCS sec. 1983. 65 ALR Fed 490.

2. **Constitutional Law § 86 (NCI4th)— § 1983 claims—UNC, ASU and university officials—official capacities—injunctive relief permissible**

Plaintiff could properly bring actions under 42 U.S.C. § 1983 for injunctive relief against UNC, ASU, and the individual defendants in their official capacities because state institutions or employees acting in their official capacities are "persons" reachable under § 1983 when sued for prospective equitable relief.

Am Jur 2d, Civil Rights §§ 17, 264.

Public institutions of higher learning as "persons" subject to suit under 42 USCS sec. 1983. 65 ALR Fed 490.

3. **Constitutional Law § 86 (NCI4th)— § 1983 claims—official capacities—sovereign and qualified immunity inapplicable**

Sovereign immunity alleged under state law is not a permissible defense to § 1983 actions. Nor is the defense of qualified immunity available under § 1983 to one sued in his official capacity. Insofar as *Truesdale v. University of North Carolina*, 91 N.C. App. 186, 371 S.E.2d 503, states that § 1983 claims against state institutions are barred by the doctrine of sovereign immunity, it is overruled.

Am Jur 2d, Constitutional Law §§ 283, 713, 717.

4. **Constitutional Law § 86 (NCI4th)— § 1983 claims—individual capacities—damages—qualified immunity**

State government officials may be sued in their individual capacities for damages under 42 U.S.C. § 1983, but officials sued as individuals may raise a defense of qualified immunity.

Am Jur 2d, Civil Rights §§ 268, 269.

5. **Constitutional Law § 86 (NCI4th)— § 1983 claims—individual capacities—objective test for qualified immunity—motivation**

State officials sued for constitutional violations under 42 U.S.C. § 1983 will be protected from liability by qualified immunity where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Where the existence of a constitu-

tional violation depends on proof of motivation, proof of the official's intent is required to determine whether the qualified immunity defense is appropriate.

Am Jur 2d, Civil Rights §§ 268, 269.

6. **Constitutional Law § 115 (NCI4th)— public official—free speech limitations**

A public employee's right to free speech is limited by the government's need to preserve efficient governmental functions. Furthermore, only speech on a matter of "public concern" is constitutionally protected, and in determining whether speech fits in this category, the court must examine the content, form and context of the public employee's speech.

Am Jur 2d, Constitutional Law §§ 496, 497.

7. **Constitutional Law § 115 (NCI4th)— free speech—relocation of Appalachian Collection—matter of public concern**

Speech by plaintiff, the Dean of Learning Resources at ASU, concerning the relocation of the Appalachian Collection at ASU addressed a matter of public concern for free speech purposes.

Am Jur 2d, Constitutional Law §§ 496, 497.

8. **Constitutional Law § 115 (NCI4th)— relocation of Appalachian Collection—free speech right of plaintiff**

Plaintiff, the Dean of Learning Resources at ASU, had a constitutionally protected right to speak out in 1984 about a vice chancellor's directive for relocation of the Appalachian Collection which would separate the artifacts from the written materials and to propose an alternate plan which would keep the entire Collection intact when it was moved, since such speech did not impede plaintiff's duties or interfere with the regular operation of ASU; the speech did not affect the vice chancellor's decision to relocate the Appalachian Collection and its danger to the organization was *de minimus*; and plaintiff's interest in speaking out on this public issue thus outweighed any negative effect it might have had on the efficient functioning of ASU.

Am Jur 2d, Constitutional Law §§ 496, 497.

9. Constitutional Law § 115 (NCI4th)— § 1983 claim—ASU vice chancellor—demotion of plaintiff—free speech—evidence of motive—summary judgment improper

In plaintiff's 42 U.S.C. § 1983 action against a vice chancellor of ASU in his individual capacity based on plaintiff's claim that his right to free speech was violated when he was removed as Dean of Learning Resources of ASU because of statements he made at a staff meeting concerning the vice chancellor's plan for relocation of the Appalachian Collection, plaintiff presented sufficient evidence of improper motive to raise a material question as to whether a reasonable vice chancellor would have believed that demoting plaintiff was lawful where the vice chancellor's evidence indicates that his motive for demoting plaintiff was to promote discipline and efficient administration and to punish insubordination, but plaintiff presented specific evidence indicating that defendant's motive was to stifle debate about where to relocate the Appalachian Collection, to carry out his decision to split the Collection quickly, and to punish plaintiff. Therefore, defendant vice chancellor's motion for summary judgment based upon the defense of qualified immunity was properly denied by the trial judge.

Am Jur 2d, Civil Rights §§ 19, 20.

10. Constitutional Law § 86 (NCI4th)— § 1983 claims—UNC, ASU and university officials—summary judgment proper

Summary judgment should have been entered in favor of UNC, ASU, the president of UNC, and the chancellor of ASU on all of plaintiff's 42 U.S.C. § 1983 claims based on his removal as the Dean of Learning Resources at ASU where plaintiff failed to present a forecast of evidence as to any improper action or motive by these defendants.

Am Jur 2d, Civil Rights § 287.

11. Constitutional Law § 115 (NCI4th)— free speech violation by state official—direct claim under N.C. Constitution

A plaintiff has a direct cause of action under the N.C. Constitution against state officials in their official capacities for alleged violations of plaintiff's right of free speech, and the common law will provide the appropriate remedy for the adequate redress of a violation of that right. Therefore, plain-

tiff had a direct cause of action under the N.C. Constitution against a vice chancellor of ASU for an alleged violation of his free speech rights based on his removal as Dean of Learning Resources at ASU.

Am Jur 2d, Civil Rights § 261; Constitutional Law § 496.

12. Constitutional Law § 115 (NCI4th); Courts § 3 (NCI4th)— violation of free speech right—common law remedy—limitations on judiciary

It will be a matter for the trial judge to craft the necessary relief for a violation of a plaintiff's free speech right under the N.C. Constitution. When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, however, the judiciary must recognize two critical limitations: (1) it must bow to established claims and remedies where those provide an alternative to the extraordinary exercise of its inherent constitutional power, and (2) in exercising that power, it must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong.

Am Jur 2d, Constitutional Law § 316.

13. Constitutional Law § 115 (NCI4th); State § 4.2 (NCI3d)— free speech violation—sovereign immunity inapplicable

The doctrine of sovereign immunity is inapplicable to a plaintiff's claim for violation of his free speech rights or other rights protected by the Declaration of Rights of the N.C. Constitution. When there is a clash between these constitutional rights and judge-made sovereign immunity, the constitutional rights must prevail. Art. I, § 14 of the N.C. Constitution.

Am Jur 2d, Civil Rights § 261; Constitutional Law § 496.

14. Constitutional Law § 115 (NCI4th)— free speech violation—no direct claim under N.C. Constitution against individual

A plaintiff has no direct cause of action for monetary damages under the N.C. Constitution against persons sued in their individual capacities for violations of plaintiff's free speech rights.

Am Jur 2d, Civil Rights § 261; Constitutional Law § 496.

15. Constitutional Law § 115 (NCI4th)— free speech claims under N.C. Constitution—UNC, ASU and university officials—summary judgment proper

Plaintiff failed to present a forecast of evidence sufficient to defeat the motion for summary judgment on behalf of UNC, ASU, the president of UNC, and the chancellor of ASU as to plaintiff's claims under the N.C. Constitution for violation of his free speech rights based on his removal as Dean of Learning Resources at ASU.

Am Jur 2d, Civil Rights § 261; Constitutional Law § 496.

Justice WEBB dissents.

ON appeal and discretionary review of an opinion by the Court of Appeals, 97 N.C. App. 527, 389 S.E.2d 596 (1990), reversing an order entered 21 October 1988 by *Gray, J.*, which denied defendants' motion for summary judgment. Heard in the Supreme Court 11 February 1991.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by John W. Gresham, for plaintiff-appellant/appellee.

Lacy H. Thornburg, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, and Laura E. Crumpler, Assistant Attorney General, for defendant-appellants/appellees.

William G. Simpson, Jr., John Vail, Travis Payne, J. Michael McGuinness, for amicus curiae North Carolina Civil Liberties Union Legal Foundation; and M. Jackson Nichols, for amicus curiae North Carolina Association of Educators.

MARTIN, Justice.

For the reasons stated below, we reverse in part and affirm in part the decision of the Court of Appeals. Plaintiff filed this action on 20 February 1987 seeking injunctive relief and damages for the defendants' alleged retaliation against plaintiff for his exercise of certain free speech rights. Plaintiff's claims were brought under the North Carolina Constitution Article I, Sections 14, 19, and 35 and 42 U.S.C. § 1983. After filing an answer containing defenses, which included sovereign immunity and qualified immunity, defendants moved for summary judgment. Defendants' motion for summary judgment was denied on 21 October 1988.

Defendants appealed the denial of their motion for summary judgment to the Court of Appeals. The Court of Appeals properly reasoned that a denial of a summary judgment motion is normally not immediately appealable; however, under the case of *Mitchell v. Forsyth*, 472 U.S. 511, 86 L. Ed. 2d 411 (1985), when a motion for summary judgment based on immunity defenses to a section 1983 claim is denied, such an interlocutory order is immediately appealable before final judgment. The Court of Appeals went on to hold that the trial court erred in denying defendants' summary judgment motion with respect to plaintiff's 42 U.S.C. § 1983 claims, except for the motion pertaining to plaintiff's claims against individual defendants Spangler, Thomas, and Durham in their official capacities only for prospective injunctive relief. The Court of Appeals further held that the trial court erred in failing to grant defendants' motion for summary judgment with respect to plaintiff's claims brought under the State Constitution regarding the University of North Carolina, Appalachian State University, and the three individual defendants in their official capacities. The Court of Appeals also held that the defendants' motion was properly denied insofar as it concerned plaintiff's claims for monetary damages against the two individually named defendants for violation of plaintiff's state constitutional rights.

Viewing the record in the light most favorable to plaintiff, as we must when evaluating a summary judgment motion, the following facts arise upon the record. In early summer 1984, the plaintiff, a tenured faculty member at Appalachian State University, was the Dean of Learning Resources, a position he had held for approximately fourteen years. As Dean, Dr. Corum's responsibilities included supervising Appalachian State University's academic support units, including the library, the audiovisual services, and the Appalachian Collection. The Appalachian Collection, a diversified collection of books, research reports, music, and artifacts, represents the mountain culture of the Southern Appalachian Region. Until mid-summer 1984 the Appalachian Collection was housed in the Daughtery Library.

Beginning in September 1983 and continuing for several months, various administrators at Appalachian State University ("ASU") discussed the possibility of moving the Appalachian Collection out of the Daughtery Library into different facilities. The plaintiff's chief concern regarding this move was that the Appalachian Collection remain intact so that the artifacts would not be split off from

the books, manuscripts, and other materials. In the administrative chain of command at ASU the person responsible for deciding where the Appalachian Collection would be moved and whether it would be broken up was defendant, Dr. Harvey Durham. Dr. Durham was the Vice Chancellor for Academic Affairs and Dr. Corum's immediate supervisor.

In December 1983 Dr. Durham decided to split up the Collection and move the artifacts to University Hall, a building on the campus where the artifacts would form the basis of a new museum. The decision to split the artifacts off from the rest of the Collection was not communicated to Dr. Corum at this time; however, the decision was documented by a memorandum written at or near the time of the decision.

On 21 June 1984 Dr. Durham informed Dr. Corum that the Appalachian Collection would be moved to University Hall and that the move would need to be completed within a two-week period. On that same day, Dr. Durham informed Dr. Corum that the relocation of the Collection also entailed removing the personnel and budget supporting the Collection from Dr. Corum's purview to a new administrative home. While Dr. Corum expressed concern over this transfer, he accepted the decision as one which was workable because, in his understanding, it would at least maintain the physical integrity of the Collection. Dr. Durham did not inform Dr. Corum at this time that the artifacts would be separate from the rest of the Collection. Dr. Corum proceeded to set up a subsequent meeting with relevant administrators in order to work out the details of the moving of the Collection; the next meeting was scheduled for 25 June 1984.

At the 25 June meeting, Dr. Corum met with Dr. Barker, ASU's Librarian; Ms. Ball, the library staff member associated with the Appalachian Collection; and Dr. Clinton Parker, an Associate Vice Chancellor of Academic Affairs. Dr. Parker attended the meeting as Dr. Durham's representative because Dr. Durham had gone out of town. At the outset of the meeting on 25 June, Dr. Parker announced to those assembled that the written materials in the Appalachian Collection would be moved to University Hall, while the artifacts would be stored in Belk Library. Dr. Corum later testified that he saw this announcement as a dramatic shift from the directions previously given to him by defendant Durham.

The day after this meeting, plaintiff sought to present an alternative plan for the relocation of the Appalachian Collection, a plan that would keep the Collection secure and physically intact. Dr. Corum read aloud his proposal for an alternate location during a meeting held 26 June 1984 that was attended by Dr. Parker and Dr. William Strickland, Dean of Arts and Sciences at ASU. In the memorandum that he read to those assembled, Dr. Corum claimed that Dr. Durham's decision to move the Collection to University Hall presented many problems. Dr. Corum proposed instead to move the Collection into Belk Library and intershelve the holdings with the regular university library. To this proposal Dr. Parker responded that he had no authority to change Dr. Durham's decision. However, Dr. Parker volunteered to try to contact Dr. Durham to let him know of Dr. Corum's concerns. Dr. Parker did contact Dr. Durham later in the evening regarding Dr. Corum's concerns.

There is a material issue of fact in dispute as to whether at the 26 June meeting Dr. Corum refused to implement the move as per Dr. Durham's 21 June directive or whether he encouraged his staff to go ahead with the move. The defendants' position is that Dr. Corum announced at the meeting that he would not go through with the move until he could talk to Dr. Durham. Dr. Corum's account is that he did not resist the move and cooperated fully despite his misgivings about the decision. Dr. Corum actually physically helped in the packing and moving.

When Dr. Parker called Dr. Durham after the 26 June meeting, Dr. Durham responded by immediately returning to ASU. Dr. Durham met at 6:30 a.m. on 27 June with defendant Dr. Thomas, the Chancellor of ASU. At 8:30 a.m. Dr. Durham met with Dr. Corum and informed him that he was being removed from his deanship. There is no evidence that Dr. Durham gave Dr. Corum an opportunity to explain his proposal or to comment on the events of the previous day. Chancellor Thomas subsequently affirmed Dr. Durham's decision to remove Dr. Corum from his duties as Dean of Learning Resources. Dr. Corum has, however, retained his position as a tenured faculty member.

Plaintiff contends that defendants discharged him from his deanship in retaliation for his speaking freely about the moving of the Appalachian Collection. Plaintiff contends that Dr. Durham's concealment of the fact that the Collection was to be split was intended to make the move administratively easier by preventing

vocal opposition to the decision. When this "ruse" was discovered and exposed by Dr. Corum in his speaking out, defendants improperly removed him in retaliation for his speech. Plaintiff seeks damages and, among other things, reinstatement as Dean of Learning Resources as a result of this impermissible retaliatory removal.

It is defendants' position that the sole reason Dr. Corum was removed from his deanship was because he refused to carry out the move, and this insubordination justified his demotion.

Plaintiff filed a grievance proceeding with the University of North Carolina ("UNC") which resulted in a decision that Dr. Corum had failed to prove that his removal from the deanship was impermissibly based on his exercise of his right to freedom of speech. After this proceeding was completed Dr. Corum filed the instant case on 20 February 1987.

I. 42 U.S.C. § 1983 CLAIMS

Plaintiff's complaint alleges:

> 24. In relieving plaintiff of his duties as Dean and in denying plaintiff salary increases in retaliation for plaintiff having exercised his First Amendment rights, defendants violated plaintiff's rights protected by the First and Fourteenth Amendments of the Constitution of the United States. Such acts are in violation of 42 U.S.C. § 1983.

Under 42 U.S.C. § 1983, plaintiff sought a preliminary and permanent injunction, additional equitable relief including reinstatement, promotion, and compensatory seniority, as well as monetary damages. Section 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding to redress.

42 U.S.C. § 1983 (1979). The law regarding the interpretation of section 1983 is labyrinthine; for purposes of clarity we discuss the law in terms of several subcategories.

A. ASU, UNC, and State Officials—Official Capacities

[1] The text of section 1983 permits actions only against a "person." In *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45 (1989), the Supreme Court held that when an action is brought under section 1983 in state court against the State, its agencies, and/or its officials acting in their official capacities, neither a State nor its officials acting in their official capacity are "persons" under section 1983 when the remedy sought is monetary damages.[1] *Accord Quern v. Jordan*, 440 U.S. 332, 59 L. Ed. 2d 358 (1979). Thus, under section 1983 plaintiff in the instant case is barred from seeking damages from UNC, ASU, Harvey Durham in his official capacity, Dr. Thomas in his official capacity, or C.D. Spangler in his official capacity.[2]

[2] Notably however, when injunctive relief is being sought under section 1983 from State institutions or employees acting in their official capacities, such equitable actions are not barred. The *Will* court explained:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham*, 473 U.S. at 167, n 14, 87 L Ed 2d 114, 105 S Ct 3099; *Ex parte Young*, 209 U.S. 123, 159-160, 52 L Ed 714, 28 S Ct 441 (1908).

Will, 491 U.S. at 71 n.10, 105 L. Ed. 2d at 58 n.10. Therefore, plaintiff's action against UNC, ASU, and the individual defendants sued in their official capacities for prospective equitable relief is not barred because in this context these defendants are "persons" reachable under section 1983.

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1. *Kentucky v. Graham*, 473 U.S. 159, 165-67, 87 L. Ed. 2d 114, 121-22 (1985) (explaining official versus individual capacities).

2. While the Court of Appeals reaches this result it does so under the case of *Truesdale v. University of North Carolina*, 91 N.C. App. 186, 371 S.E.2d 503 (1988), *disc. rev. denied*, 323 N.C. 706, 377 S.E.2d 229 (1989), *cert. denied*, 493 U.S. 808, 107 L. Ed. 2d 19 (1989). Insofar as *Truesdale* states that section 1983 actions against state institutions are barred by the doctrine of sovereign immunity, it is overruled. *Martinez v. California*, 444 U.S. 277, 283, 62 L. Ed. 2d 481, 488 (1980) (sovereign immunity cannot bar liability in section 1983 actions filed in state courts); *accord Howlett v. Rose*, 496 U.S. ---, 110 L. Ed. 2d 332 (1990).

[3] In addition, under the federal cases interpreting section 1983, sovereign immunity alleged under state law is not a permissible defense to section 1983 actions. *Martinez v. California*, 444 U.S. 277, 283, 62 L. Ed. 2d 481, 488 (1980) (sovereign immunity cannot bar liability in section 1983 actions filed in state courts). The defense of qualified immunity is not available under section 1983 to one sued in his official capacity. *Brandon v. Holt*, 469 U.S. 464, 83 L. Ed. 2d 878 (1985).

Having determined that the equitable relief sought against the defendants in their official capacities is not barred under section 1983 and that the defenses of sovereign and qualified immunity are not available to defendants, the question then becomes whether plaintiff has made a sufficient forecast of evidence to repel defendant's motion for summary judgment. Before examining the factual basis set forth by plaintiff in this regard, we continue analysis of section 1983 and will treat the factual aspect below *in toto*.

B. Durham and Thomas—Individual Capacities

[4] Under *Kentucky v. Graham*, 473 U.S. 159, 87 L. Ed. 2d 114 (1985), state governmental officials can be sued in their individual capacities for damages under section 1983. This holding was affirmed and applied in *Hafer v. Melo*, --- U.S. ---, --- L. Ed. 2d --- (Nov. 1991). This is because unlike a suit against a state official in his official capacity, which is basically a suit against the official office and therefore against the State itself, a suit against an individual who happens to be a governmental official but is not acting in his official capacity is not imputed to the State. Such individuals are sued as individuals, not as governmental employees. Presumably, they are personally liable for payment of any damages awarded. Under United States Supreme Court precedent, however, such officials sued as individuals may raise a defense of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396 (1982). The defendants in the instant case have raised this defense.

[5] *Harlow* sets forth an objective standard for determining whether qualified immunity will act as a bar to further litigation in a suit by providing that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have

known." *Id.*, at 818, 73 L. Ed. 2d at 410.[3] This standard was set forth to allow determination of whether a qualified immunity defense bars further proceedings by means of a process of examining the law in existence at the time of the offense to determine whether it contained "clearly established . . . rights of which a reasonable person would have known." *Id.* By using the "reasonable person standard," the Supreme Court intended to avoid the necessity of an evidentiary consideration of whether a defendant raising the immunity defense, in fact, subjectively knew that his conduct toward plaintiff would violate plaintiff's constitutional rights. *Harlow*, 457 U.S. 800, 73 L. Ed. 2d 396 (citing *Wood v. Strickland*, 420 U.S. 308, 322, 43 L. Ed. 2d 214, 225 (1975)). *Cf. Mitchell*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 425 (Qualified immunity, if available, provides "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.").

As a number of federal courts of appeal have observed, however, *Harlow's* "purely 'objective' test cannot in the end avoid the necessity to inquire into official motive or intent or purpose when such states of mind are essential elements of the constitutional right allegedly violated." *Collinson v. Gott*, 895 F.2d 994, 1001-02 (4th Cir. 1990) (Phillips, J., concurring) (citations omitted). *Accord, e.g., Stewart v. Baldwin County Bd. of Election*, 908 F.2d 1499 (11th Cir. 1990); *Morris v. Clifford*, 903 F.2d 574 (8th Cir. 1990); *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642 (10th Cir. 1988). In other words, whether a qualified immunity defense is appropriate requires proof of an official's intent where the existence of a constitutional violation depends on proof of motivation. For example, as the Sixth Circuit Court of Appeals has written:

> [I]f a public employer terminates a black employee because he is black, that act clearly violates federal constitutional and statutory law. If, however, the employer terminates the black employee because of incompetence, then the discharge obviously does not violate the law at all. The act itself—the act of discharge—is neutral; it is the motive or intent that makes the act both actionable and violative of clearly established law.

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3. Although *Harlow* did not concern the elements of qualified immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983, *see* 457 U.S. at 818 n.30, 73 L. Ed. 2d at 410 n.30, later cases apply the *Harlow* standard to state officials in this context.

Poe v. Haydon, 853 F.2d 418, 431 (6th Cir. 1988), *cert. denied*, --- U.S. ---, 102 L. Ed. 2d 780 (1989).

Similarly, in the instant case, if the defendants demoted Corum *because* of his exercise of free speech rights, such demotion clearly would violate federal law. If, however, he was demoted because of insubordination, the discharge may not violate the law at all. The act itself—the act of demotion—is neutral; it is the motive or intent that makes the act both actionable and violative of clearly established law. *Id.* Thus, in addition to *Harlow's* objective step—that is, a determination of whether at the time of the alleged act the law concerning the right was clearly established—we must also concern ourselves with the material issue of fact surrounding Dr. Durham's motive in demoting Corum. As explained below, we adopt the reasoning applied in the majority of federal circuit courts of appeal which have had to reconcile this issue with the objective test enunciated in *Harlow*. In brief, this approach holds that

> where the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to *specific evidence* that the officials' actions were improperly motivated.

Pueblo Neighborhood Health Ctrs., Inc. v. Losavio, 847 F.2d 642, 649 (10th Cir. 1988) (emphasis supplied).

Under *Harlow*, the first question arising upon the defendants' motion for summary judgment is whether a reasonable official in each defendant's position could have believed that his actions were lawful in light of clearly established law at the time and in light of the information possessed by the official at the time the conduct occurred. *Harlow*, 457 U.S. 800, 73 L. Ed. 2d 396; *Anderson v. Creighton*, 483 U.S. 635, 642, 97 L. Ed. 2d 523, 532 (1987). The right that the officials allegedly violated must have been clearly established in a particularized sense: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640, 97 L. Ed. 2d at 531. This is because "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-19, 73 L. Ed. 2d at 411. *Accord Anderson*, 483 U.S. 635, 640 n.2, 97

L. Ed. 2d 523, 530 n.2 Therefore, our focus is not upon the broad First Amendment right to speak freely in its most general or abstract sense, but upon its application to the particular conduct being challenged in the instant case. *Anderson*, 483 U.S. at 638-39, 97 L. Ed. 2d at 530; *Collinson*, 895 F.2d 994, 998 (4th Cir. 1990) (Phillips, J., concurring).

In the present case, this inquiry requires us to begin by examining the contours of a public employee's rights in June 1984 to speak without retaliation in his place of work. After this, we must ask (a) whether a reasonable vice chancellor (in the instant case, Dr. Durham) could have believed his actions were lawful in light of the information possessed by him at the time he demoted Dr. Corum, and (b) whether a reasonable chancellor (in the instant case, Dr. Thomas) could have believed that his or her actions in officially approving the demotion were lawful in light of clearly established law at the time and in light of the information possessed by him at the time he approved the demotion of Dr. Corum.

[6] As the United States Supreme Court explained in *Connick v. Myers*, "[f]or at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick*, 461 U.S. 138, 142, 75 L. Ed. 2d 708, 716-17 (1983). However, in 1984 a public employee's right to speak was not absolute, nor is it today. Under *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 817 (1968), a public employee's right to free speech is limited by the government's need to preserve efficient governmental functions. As a recent case explained, "[t]his balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment." *Rankin v. McPherson*, 483 U.S. 378, 384, 97 L. Ed. 2d 315, 324 (1987).

A further limitation under *Pickering* is that only speech on a matter "of public concern" is constitutionally protected. *Pickering*, 391 U.S. at 568, 20 L. Ed. 2d at 817. To determine whether speech fits in this category, the Court examines the content, form, and context of the public employee's speech. Only if the speech was on a matter of public concern is the balancing test reached.

[7] In the oral argument before this Court, although not in the briefs, counsel for defendants[4] contended that Dr. Corum's speech was not on a matter of public concern. Even though not at issue on this appeal, the record discloses that the question of what to do with the Appalachian Collection had been publicly debated on the campus and was a matter of public concern. Given that the speech at issue addressed a matter of public concern we return to the *Pickering* balancing test to determine whether in 1984 the free speech rights allegedly violated by defendants were clearly established when defendants acted.

In the *Pickering* analysis the manner, time, and place of the employee's expression are relevant, as is the context in which the speech occurred. *See Connick*, 461 U.S. 138, 75 L. Ed. 2d 708. *Accord, e.g., Rankin*, 483 U.S. at 388, 97 L. Ed. 2d at 327. Specifically, considerations such as whether the speech impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise are relevant in balancing the two competing interests. *Pickering*, 391 U.S. at 570-73, 20 L. Ed. 2d at 817-20.

[8] In the instant case, we conclude that Dr. Corum had a constitutionally protected right to speak out in 1984 in the manner alleged. While the speech may have affronted Dr. Durham, it cannot be said that the speech impeded Corum's duties or interfered with the regular operation of the University, particularly during the approximately eighteen-hour period between the time he spoke out and the time he was demoted, nor was the likelihood of such interference over a longer interval great given that Corum did not, as we must presume on a review of a denial of summary judgment, refuse to carry out Durham's instructions. Later, in fact, Dr. Corum participated in carrying out Dr. Durham's directive. Durham's action in effect preempted the possibility of interference with ongoing library functions since it removed Corum from the chain of command. Since Corum's speech clearly could not have affected and did not affect Durham's decision to move the Appalachian Collection, its danger to the organization was *de minimis*. Thus, we conclude, after having balanced competing interests, that

4. The Attorney General represented all defendants by virtue of N.C.G.S. § 143-300.2.

Corum's interest in speaking out on this public issue outweighed any negative effect it might have had on the efficient functioning of ASU. The law was clearly established in 1984 that Corum had a right to speak out in the way alleged. *See Pickering*, 391 U.S. 563, 20 L. Ed. 2d 811. Whether a material question of fact exists as to whether Corum's demotion was constitutionally justified is discussed hereinafter.

[9] The next question then becomes whether a reasonable vice chancellor could have believed that demoting Dr. Corum was lawful in light of clearly established law and the information which he possessed at the time. *Anderson*, 483 U.S. at 643, 97 L. Ed. 2d at 532-33. For purposes of this analysis, Dr. Durham's subjective beliefs about the legality of the demotion are irrelevant. *Id.*

Where the "clearly established law" contains a subjective element, as in this case, of motive or intent, it is a part of the summary judgment analysis. While his subjective beliefs in this narrow respect are not relevant, an inquiry into Dr. Durham's motive or intent in demoting Corum is an unavoidable part of the process of determining whether a reasonable vice chancellor's actions here can be said to have violated Dr. Corum's First Amendment rights. This is so because if the motive was to suppress speech, one result is reached, while if the motive was to punish insubordination, another conclusion results. One problem this subjective analysis creates is a difficulty in deciding at summary judgment whether a qualified immunity defense is justified for the official whose conduct and motive are challenged. As one judge has explained:

> Vindication of immunity policies depends heavily upon the ability to dispose of insubstantial claims by resolving immunity questions at the earliest possible stages of a litigation, preferably on pleading or summary judgment motions. *See Mitchell*, 472 U.S. at 526, 105 S. Ct. at 2815. Questions of subjective states of mind are of course notoriously ill-adapted to summary resolution because of the ease with which they can be held at issue by conclusory allegations and conjectures in pleadings and discovery materials. *Harlow's* wholly "objective" test was adopted in large part to avoid this impediment to early resolution, by making irrelevant to the immunity inquiry any question of an official's "bad faith" or his purely subjective perceptions about a plaintiff's rights. *See Harlow*, 457 U.S. at 815-19, 102 S. Ct. at 2736-39. As several courts of appeals

have since recognized, however, the resulting purely "objective" test cannot in the end avoid the necessity to inquire into official motive or intent or purpose when such states of mind are essential elements of the constitutional right allegedly violated. *See, e.g., Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 647-48 (10th Cir. 1988); *Musso v. Hourigan*, 836 F.2d at 743; *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1050 n. 25 (9th Cir. 1988); *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1432 (D.C. Cir.), *holding vacated*, 817 F.2d 144 (D.C. Cir.), holding reinstated *sub nom. Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987).

As a result, as several of these courts also have recognized, there is a risk that in such cases the impediment to summary resolution that *Harlow* deliberately sought to remove could be reimposed. *See Pueblo*, 847 F.2d at 648; *Martin*, 812 F.2d at 1433. To minimize that risk, these courts have adopted a procedural approach designed to insure that meritorious immunity defenses can yet be established by summary judgment in such cases. Building on the Supreme Court's recent encouragement to proper usages of summary judgment in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Tenth Circuit, for example, has held that

> [w]here the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the officials' actions were improperly motivated.

Pueblo, 847 F.2d at 649; *see also Martin*, 812 F.2d at 1434.

Collinson, 895 at 1001-02 (4th Cir.) (Phillips, J. concurring). *Accord, e.g., Stewart*, 908 F.2d 1499 (11th Cir.).

This approach appropriately retains the *Harlow* "objective look" test with respect to the law applicable at the time of the alleged violation, but it also permits a plaintiff who has some proof of the alleged violation to attempt to convince the finder of fact that his allegations are correct. To foreclose this opportunity would

effectively prevent every plaintiff from recovering on a claim which has an element requiring a determination of subjective intent.

In the present case then, the immediate question becomes whether there was sufficient evidence before the trial judge that Dr. Durham's demotion of Dr. Corum was improperly motivated, justifying the denial of summary judgment.

In this regard, Dr. Durham testified that he had gone to Chapel Hill prior to 25 June and that Dr. Parker, who had been at the meeting when Dr. Corum made his remarks, telephoned him to report on that meeting. Dr. Parker told him that Dr. Corum had decided not to carry out the decision that had been made, and that Dr. Corum wanted to talk with him (Dr. Durham). Dr. Durham replied that the time for talking was over. He returned to Boone that night, contacted Chancellor Thomas, and met with Chancellor Thomas at 6:30 the next morning. All Dr. Durham had to rely upon in regard to Dr. Corum's position concerning the moving of the Collection was the short telephone conversation that he had the previous evening with Dr. Parker. At the 6:30 a.m. meeting with Chancellor Thomas, Dr. Durham made his recommendation to the Chancellor, and they agreed that Dr. Corum would be relieved of his responsibilities or given the opportunity to resign. Dr. Corum was relieved of his responsibilities as Dean of Learning Resources.

However, Dr. Parker's testimony as to the telephone communication with Dr. Durham was to the contrary. He testified:

> I told Harvey [Durham] that Bill Strickland and I had met with Al Corum, Judy Ball and Richard Barker, and that Al presented an alternative proposal and that he wanted to talk to Harvey about that before he would take any action regarding the Collection.
>
> Q What was Dr. Durham's response?
>
> A Well, I believe I asked him, "Do you want to talk to Dr. Corum?" And as well as I remember, his response was emphatic. He said, "Hell, no. The time for talking is over. I made my decision."
>
> . . . .
>
> Q And then, I believe, referring to the chronology there, you did have a meeting at 7:00 the next morning?

A Yes.

Q At that meeting at 7:00 did Dr. Durham inform you that he had just finished meeting with Chancellor Thomas, and he had decided to ask Dr. Corum to resign, and if Dr. Corum did not he was going to relieve him of his duties as Dean?

A Yes.

As to the 26 June meeting between Dr. Corum, Dr. Parker, and others, Parker testified:

Q Did you ever tell Dr. Durham in that meeting on June 26 that his desire to discuss the issue of how the move of—tell Dr. Corum that his desire to discuss the hows and whys of the move of the Appalachian Collection further with Dr. Durham or to discuss it at some point with Dr. Thomas would be insubordination?

A I certainly did not.

. . . .

Q You just answer the question, Dr. Parker. Now, what do you recall him actually saying?

A That he would not continue with it [dealing with the Appalachian Collection] until he had a chance to talk to Dr. Durham.

The effect of the proposed move on the Collection had been the subject of public debate on the campus. It was Dr. Corum's chief interest to keep the entire Collection intact when it was moved. However, the evidence also showed that Dr. Durham did not advise Dr. Corum that the Collection would be split up when he told Corum that it would be moved. The 21 June 1984 memorandum from Durham to Corum stated: "Further, the Appalachian Collection will be physically housed in University Hall," leading Corum to believe that the entire Collection would be together. In fact, Durham had already decided to split the Collection, the artifacts to be stored in the basement of another building. Thus, the 21 June memo becomes the "smoking gun," revealing the effort to deceive Dr. Corum until it was too late for public protests. Dr. Alvis L. Corum's deposition, exhibit 2.

The evidence before the trial court on the motion for summary judgment was sufficient to raise a material question of fact as

to the motive of Dr. Durham in demoting Dr. Corum. Dr. Durham's evidence indicates his motive was to promote discipline and efficient administration of ASU; Corum's evidence indicates that Dr. Durham's motive was to stifle debate over the issue, to carry out his decision to split the Collection quickly, as well as to improperly punish Dr. Corum. We hold that plaintiff has presented sufficient specific evidence of improper motive to defeat defendant Durham's motion for summary judgment. *See Collinson*, 895 F.2d 994 (4th Cir.) (Phillips, J. concurring).

Upon the foregoing findings and conclusions, we hold that defendant Durham's motion for summary judgment based upon the defense of qualified immunity to plaintiff's 42 U.S.C. § 1983 claims was properly denied by the trial judge. The Court of Appeals erred in reversing the trial court's order denying defendant Durham's motion for summary judgment.

[10] Plaintiff has failed to present a forecast of evidence as to any improper action or motive by ASU, UNC, President Spangler or Chancellor Thomas; therefore, the motion for summary judgment should have been allowed as to these defendants on all of plaintiff's 42 U.S.C. § 1983 claims.

II. State Constitutional Claims

The Court of Appeals properly reversed the trial court's denial of summary judgment regarding plaintiff's state constitutional claims against defendants ASU, UNC, and President Spangler and Chancellor Thomas acting in their official capacities. However, as later discussed, the Court of Appeals erred in relying upon the doctrine of sovereign immunity in so deciding. The Court of Appeals erred in reversing the trial court on this issue as to defendant Durham.

[11] This issue brings forward the question of whether a plaintiff has a direct cause of action under the State Constitution against governmental defendants for alleged violations of the plaintiff's free speech rights.

Our Constitution states: "*Freedom of speech and Press.* Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." N.C. Const. art. I, § 14. The words "shall never be restrained" are a direct personal guarantee of each citizen's right of freedom of speech.

In *Midgett v. Highway Commission*, this Court held:

> Our Constitution, Article I, section 17, guarantees payment of compensation for property taken by sovereign authority. . . . A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement nor is susceptible of impairment by legislation. And where the Constitution points out no remedy and no statute affords an adequate remedy under a particular fact situation, the common law will furnish the appropriate action for adequate redress of such grievance.

Midgett, 260 N.C. 241, 249-50, 132 S.E.2d 599, 608 (1963) (citing *Sale v. Highway Commission*, 242 N.C. 612, 89 S.E.2d 290 (1955)). Therefore, in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution. The provision of our Constitution which protects the right of freedom of speech is self-executing. *See Sale*, 242 N.C. 612, 89 S.E.2d 290. Therefore, the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right. *Id.*

This great bulwark of liberty is one of the fundamental cornerstones of individual liberty and one of the great ordinances of our Constitution. Freedom of speech is equal, if not paramount, to the individual right of entitlement to just compensation for the taking of property by the State. *Flake v. News Co.*, 212 N.C. 780, 790, 195 S.E. 55, 62 (1938). Certainly, the right of free speech should be protected at least to the extent that individual rights to possession and use of property are protected. *Id.* A direct action against the State for its violations of free speech is essential to the preservation of free speech.

The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action under the rationale adopted in the above-cited authorities. The Declaration of Rights was passed by the Constitutional Convention on 17 December 1776, the day before the Constitution itself was adopted, manifesting the primacy of the Declaration in the minds of the framers. The fundamental purpose for its adoption was to provide citizens with protection from the State's encroachment upon these rights. Encroachment

by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State. The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State. *State v. Manuel*, 20 N.C. 144 (1838).

In *Trustees of the University of North Carolina v. Foy*, 5 N.C. 57 (1805), the Court recognized the supremacy of rights protected in Article I and indicated that it would only apply the rules of decision derived from the common law and such acts of the legislature that are consistent with the Constitution. This Court is the ultimate interpreter of our State Constitution. *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787).

It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State. *King v. South Jersey Nat. Bank*, 66 N.J. 161, 330 A.2d 1 (1974). Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983); Chief Justice James G. Exum, Jr., *Dusting Off Our State Constitution*, 33 State Bar Quarterly, No. 2 6-8 (1986). We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property. *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1939).

This Court has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights. *Sale*, 242 N.C. 612, 89 S.E.2d 290. Having no other remedy, our common law guarantees plaintiff a direct action under the State Constitution for alleged violations of his constitutional freedom of speech rights. *Id.* We conclude that plaintiff does have a direct cause of action under the State Constitution against defendant Durham in his official capacity for alleged violations of plaintiff's free speech rights.

The authorities in North Carolina are consistent with the decisions of the United States Supreme Court and decisions of other state supreme courts to the effect that officials and employees of the State acting in their official capacity are subject to direct causes of action by plaintiffs whose constitutional rights have been

violated. *See, e.g., Bivens v. Six Unknown Agents*, 403 U.S. 388, 29 L. Ed. 2d 619 (1971); *Bagg v. University of Tex. Medical Branch*, 726 S.W.2d 582 (Tex. Ct. App. 1987); *Widgeon v. Eastern Shore Hosp. Ctr.*, 300 Md. 520, 479 A.2d 921 (1984); *Phillips v. Youth Dev. Programs, Inc.*, 390 Mass. 652, 459 N.E.2d 453 (1983); *Schreiner v. McKenzie, Tank Lines & Risk Management Servs., Inc.*, 408 So.2d 711 (Fla. Dist. Ct. App. 1982), *approved Schreiner v. McKenzie Tank Lines, Inc.*, 432 So.2d 567 (Fla. 1983); *Fenton v. Groveland Community Servs. Dist.*, 135 Cal. App. 3d 797, 185 Cal. Rptr. 758 (1982); *Lloyd v. Stone Harbor*, 179 N.J. Super. 496, 432 A.2d 572 (1981); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 389 A.2d 465 (1978); *Walinski v. Morrison and Morrison*, 60 Ill. App. 3d 616, 377 N.E.2d 242 (1978). In *Laguna Publishing Co. v. Golden Rain Found*, 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982), the court allowed damages for violations of plaintiff's constitutional free speech rights.

[12] As stated, the common law provides a remedy for the violation of plaintiff's constitutionally protected right of free speech. What that remedy will require, if plaintiff is successful at trial, will depend upon the facts of the case developed at trial. It will be a matter for the trial judge to craft the necessary relief. As the evidence in this case is not fully developed at this stage of the proceedings, it would be inappropriate for this Court to attempt to establish the redress recoverable in the event plaintiff is successful; however, such redress could consist of, *inter alia*, reinstatement to his prior status or a comparable status, with or without any loss of wages. Various rights that are protected by our Declaration of Rights may require greater or lesser relief to rectify the violation of such rights, depending upon the right violated and the facts of the particular case. When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, however, the judiciary must recognize two critical limitations. First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power. *In re Alamance County Court Facilities*, 329 N.C. 84, 100-01, 405 S.E.2d 125, 133 (1991) (discussing and applying inherent powers of the judiciary). Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong. *Id.*

In *Sale*, we concluded: "[W]hen a person has been deprived of his private property for public use nothing short of actual payment, or its equivalent, constitutes just compensation. The entry of a judgment is not sufficient." *Sale*, 242 N.C. at 618, 89 S.E.2d at 296. Our conclusion there, however, was dictated by the absence of any other adequate remedy and the fact that, in *Sale*, we were unable to fashion a common law remedy less intrusive than money damages which would correct the State's violation of the plaintiff's particular constitutional right at issue. *Id.*

[13] Having determined that there is a direct claim against the State under the Declaration of Rights for the protection of plaintiff's free speech rights, we turn to the question of the relevance of the doctrine of sovereign immunity. The doctrine of sovereign immunity is judge-made in North Carolina and was first adopted by the North Carolina Supreme Court in *Moffitt v. Asheville*, 103 N.C. 237, 9 S.E. 695 (1889). A brief history of the doctrine is found in *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971). The doctrine originated with the feudal concept that the king could do no wrong and culminated with its judicial recognition in the English case of *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. R. 359 (1788). North Carolina adopted the common law of England as it existed in 1776. Sovereign immunity was not a part of the common law of England at that time because the holding of *Men of Devon* with respect to sovereign immunity was not promulgated until 1788. Accordingly, early North Carolina decisions expressly rejected the doctrine. *Steelman*, 279 N.C. 589, 184 S.E.2d 239. Only with the *Moffitt* decision was sovereign immunity made a part of our law. It is, nevertheless, firmly established in the law of our State today and has been recognized by the General Assembly as the public policy of the State. The doctrine of sovereign immunity has been modified, but never abolished. It has been said that the present day doctrine seems to rest on a respect for the positions of two coequal branches of government—the legislature and the judiciary. Thus, courts have deferred to the legislature the determination of those instances in which the sovereign waives its traditional immunity.

However, in determining the rights of citizens under the Declaration of Rights of our Constitution, it is the judiciary's responsibility to guard and protect those rights. The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declara-

tion of Rights. It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.

It is also to be noted that individual rights protected under the Declaration of Rights from violation by the State are constitutional rights. Such constitutional rights are a part of the supreme law of the State. *Ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989). On the other hand, the doctrine of sovereign immunity is not a constitutional right; it is a common law theory or defense established by this Court as hereinabove set forth. Thus, when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail.

Furthermore, this Court has long held that when public officials invade or threaten to invade the personal or property rights of a citizen in disregard of law, they are not relieved from responsibility by the doctrine of sovereign immunity even though they act or assume to act under the authority and pursuant to the directions of the State. *Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975), *superceded on other grounds by statute as stated in, State v. Williams and Hessee*, 53 N.C. App. 674, 281 S.E.2d 721 (1981); *Schloss v. Highway Commission*, 230 N.C. 489, 53 S.E.2d 517 (1949). *Accord Shingleton v. State*, 260 N.C. 451, 133 S.E.2d 183 (1963); *Teer v. Jordan*, 232 N.C. 48, 59 S.E.2d 359 (1950); *Pue v. Hood, Comr. of Banks*, 222 N.C. 310, 22 S.E.2d 896 (1942). Indeed, that is the very harm that the people sought to thwart by adopting the Declaration of Rights.

This, of course, does not mean that defendant has no defense to the action. Durham is entitled to all defenses that may arise upon the facts and law of the case.

For the foregoing reasons, we hold that plaintiff does have a direct cause of action under the State Constitution for alleged violations of his freedom of speech rights, guaranteed by Article I, Section 14.

[14] We turn now to Thomas and Durham's petition for discretionary review of the decision of the Court of Appeals holding that defendants' motion for summary judgment as to plaintiff's

claims for monetary damages against Thomas and Durham, sued in their individual capacities, for alleged violations of plaintiff's constitutional free speech rights was properly denied by the trial court. By allowing this petition, we are now faced with the first impression issue of whether North Carolina recognizes a direct cause of action for monetary damages under the North Carolina Constitution against persons, sued only in their individual capacities, who allegedly violated a plaintiff's constitutional rights of freedom of speech. We answer the issue in the negative and hold that North Carolina does not recognize this cause of action.

In deciding this issue, the Court of Appeals made no analysis as to whether plaintiff had a direct cause of action against Thomas and Durham in their individual capacities, but only held that the doctrine of sovereign immunity did not bar plaintiff's claim. We begin with an analysis of whether plaintiff has such direct action against these defendants sued in their individual capacities.

The Declaration of Rights was adopted by the people in 1776 in order to affirmatively reserve the rights of the people as well as to protect those rights from encroachment by the State. *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949). In 1776 when the people of North Carolina established the State of North Carolina, they clearly and affirmatively set forth certain fundamental human rights which their government was bound to respect. Through the Declaration of Rights, the people of North Carolina secured these rights against state officials and shifting political majorities. The Declaration of Rights, Article I, Section 35 states: "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. With that in mind, this Court considers the purpose for the Declaration of Rights, the language of Article I, Section 14, as well as the function and traditional role of the courts in North Carolina's constitutional democracy. The Declaration of Rights was intended to protect individual rights from infringement by the State. To that end, the Declaration of Rights expresses the rights it guarantees in clear and explicit language.

As a matter of fundamental jurisprudence the Constitution itself does not recognize or create rights which may be asserted against individuals. Instead, the Constitution is the instrument by which "We, the people of the State of North Carolina," first acknowledge our individual rights and liberties and then create

a government to better secure our enjoyment of those rights and liberties. The significant fact is that "We, the people," created the Constitution and the government of our State in order to limit our actions as the body politic. The Constitution is intended to protect our rights as individuals from our actions as the government. The Constitution is not intended to protect our rights vis-a-vis other individuals.

From its earliest days, this Court has noted this essential feature of the Constitution. In *Hoke v. Henderson*, 15 N.C. 1 (1833), then Chief Justice Ruffin, writing for the Court, expounded on the nature of constitutional government. Among many of the points relevant to this issue, Chief Justice Ruffin stated:

> In America, written Constitutions, conferring and dividing the powers of government, and restraining the actions of those in authority, for the time being, have been established as securities of public liberty and private right.
>
> . . . .
>
> It is true, the whole community may modify the rights which persons can have in things, or at their pleasure, abolish them altogether. But when the community allows the right and declares it to exist, that constitution is the freest and best, which forbids the *government* to abolish the right, or which restrains the *government* from depriving a particular citizen of it. In other words, *public liberty requires that private property should be protected even from the government itself.*

Id. at 9, 12 (emphasis added). In light of the purpose and language of the Constitution, plaintiff cannot rely on the Constitution to support a claim for money damages against individuals, acting in their personal capacities for the alleged violation of freedom of speech rights recognized under the Constitution. The Constitution only recognizes and secures an individual's rights vis-a-vis "We, the people of the State of North Carolina," not individual members of that body politic. Of course, the State may only act through its duly elected and appointed officials. Consequently, it is the state officials, acting in their official capacities, that are obligated to conduct themselves in accordance with the Constitution. Therefore, plaintiff may assert his freedom of speech right only against state officials, sued in their official capacity.

Although plaintiff's counsel at oral argument candidly admitted that plaintiff only sought relief against Thomas and Durham sued in their official status, we deemed it necessary to discuss the issue. We hold that plaintiff has no direct cause of action against Thomas or Durham sued in their *individual capacities* for alleged violations of plaintiff's constitutional freedom of speech rights. We reverse the Court of Appeals' holding to the contrary as to this issue.

[15] We conclude that the Court of Appeals erred in applying the defense of sovereign immunity to plaintiff's claims under the State Constitution. However, plaintiff has failed to present a forecast of evidence sufficient to defeat the motion for summary judgment on behalf of ASU, UNC, President Spangler, and Chancellor Thomas as to plaintiff's state constitutional claims. Thus, the result reached by the Court of Appeals as to those defendants is affirmed. Plaintiff has, however, presented a sufficient forecast of evidence as to defendant Durham, sued in his official capacity, on this issue; therefore, the decision of the Court of Appeals as to Durham is reversed.

This holding completes the analysis of possible causes of action. Under section 1983, plaintiff has causes of action for:

1. Equitable relief against defendant Durham sued in his official capacity; and

2. Monetary damages against defendant Durham sued in his *individual* capacity.

Under the State Constitution, plaintiff has a direct cause of action against defendant Durham sued in his official capacity.

Thus, under 42 U.S.C. § 1983, plaintiff can only obtain prospective equitable relief against Durham sued in his official capacity and monetary damages against Durham sued in his individual capacity. Plaintiff cannot recover monetary damages under section 1983 against Durham sued in his official capacity. Therefore, plaintiff's right to sue Durham in his official capacity under the State Constitution completes his remedies. Plaintiff is not required to elect now, at summary judgment, among his remedies. N.C.G.S. § 1A-1, Rule 18(a), (e)(2) (1983).

The decision of the Court of Appeals is affirmed in part, reversed in part, and the cause is remanded to the Court of Appeals

for further remand to the Superior Court, Watauga County, for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Justice WEBB dissents.

ANTHONY GENE YATES v. NEW SOUTH PIZZA, LTD., D/B/A DOMINO'S PIZZA

No. 176PA91

(Filed 31 January 1992)

Torts § 7.6 (NCI3d)— covenant not to sue employee—employer not released under respondeat superior

For purposes of section 1B-4 of the Uniform Contribution Among Tortfeasors Act, a "tortfeasor" is one who is liable in tort and thus includes a vicariously liable employer. Therefore, an injured plaintiff was entitled to proceed against an employer on the theory of respondeat superior after having executed a covenant not to sue the employee or the employee's insurer. N.C.G.S. § 1B-4(1).

Am Jur 2d, Contribution §§ 41, 68; Master and Servant §§ 408, 409; Release § 38; Torts § 69.

Release of (or covenant not to sue) master or principal as affecting liability of servant or agent to tort, or vice versa. 92 ALR2d 533.

Justice MEYER dissenting.

Chief Justice EXUM and Justice WHICHARD join in this dissenting opinion.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of a unanimous panel of the Court of Appeals, 102 N.C. App. 66, 401 S.E.2d 380 (1991), affirming the judgment of *Beaty, J.*, entered 17 May 1989 in Superior Court, FORSYTH County. Heard in the Supreme Court 13 November 1991.

David F. Tamer for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter, Gary W. Jackson, and James R. Morgan, Jr., for defendant-appellee.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by Adam Stein, for North Carolina Academy of Trial Lawyers; Grover C. McCain, Jr., and Bree Andrew, amici curiae.

FRYE, Justice.

On 5 September 1985, plaintiff was a passenger in an automobile owned by Franklin Hobert Simmons and operated by Lisa Dawn Simmons. Donald Lee Powell, a delivery person for defendant, New South Pizza, Ltd., d/b/a Domino's Pizza, ran a stop sign and collided with the Simmons car. As a result of the collision, plaintiff suffered injuries to his head and right wrist, and permanent damage to his left hip. On 26 August 1987, plaintiff executed a covenant not to sue Powell or his insurer in exchange for $25,000 consideration, the amount of coverage under Powell's insurance policy. The covenant expressly reserved all rights to proceed against defendant, Powell's employer, and reads in relevant part:

> It is understood that [plaintiff] contends there are joint tortfeasors in this matter; to wit, Donald Lee Powell and Domino's Pizza, Inc., said joint tortfeasor relationship arising out of the servant-master relationships and [plaintiff] expressly reserves and maintains his right to pursue any and all claims against Domino's Pizza, Inc. arising out of the incident and that [plaintiff] agrees only not to sue Donald Lee Powell and INA/Action, his vehicular insurance carrier.

The issue before this Court is whether an injured plaintiff is entitled to proceed against an employer on the theory of respondeat superior after having executed, for valuable consideration, a covenant not to sue the negligent employee or his insurer. We hold that such a plaintiff may proceed.

At trial, the employer (defendant) admitted that the employee (Powell) was acting within the scope of his employment when the collision occurred but denied that Powell was negligent in causing the collision. Defendant also moved for summary judgment, arguing that the settlement between plaintiff and Powell operated to release defendant from liability as a matter of law. The trial court granted the motion. The Court of Appeals affirmed the trial court, con-

cluding that the covenant not to sue released any claim against defendant under the doctrine of respondeat superior. The court further held that when there is a right of indemnity from another tort-feasor, the Uniform Contribution Among Tort-feasors Act, N.C.G.S. § 1B-1, *et seq.* (the Act),[1] does not apply. Plaintiff's petition for discretionary review of the unanimous decision of the Court of Appeals was allowed by this Court on 12 June 1991. *Yates v. New South Pizza, Ltd.*, 329 N.C. 276, 407 S.E.2d 855 (1991). We now reverse.

Plaintiff contends that the Court of Appeals erred in holding that the Act does not apply to the present case. Plaintiff argues that the plain language of the Act includes employer-employee liability, and thus a covenant not to sue the employee does not release the employer pursuant to section 1B-4 of the Act. Defendant contends that the Act is irrelevant to the disposition of this case because, *inter alia*, an employer is not a tort-feasor within the meaning of the Act.

We agree with plaintiff that section 1B-4 of the Act controls the disposition of this case. Section 1B-4 of the Act provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
>
> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

N.C.G.S. § 1B-4 (1983). The question of whether this provision applies to vicarious liability in the master-servant context is one of first impression for this Court. Other courts, as noted by the Court of Appeals, have not been uniform in interpreting this provi-

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1. The Uniform Contribution Among Tort-feasors Act was originally promulgated in 1939 by the National Conference of Commissioners of Uniform State Laws. It was revised in 1955. North Carolina adopted the 1955 version in 1967. 1967 N.C. Sess. Laws ch. 847, § 1.

sion of the Uniform Act. We agree with those courts which have held that this provision does apply to liability that has been vicariously derived. *See, e.g., Alaska Airlines v. Sweat*, 568 P.2d 916, 929 (Alaska 1977) (release of independent contractor negligently performing licensed common carrier's non-delegable duty does not release carrier); *Brady v. Prairie Material Sales, Inc.*, 190 Ill. App. 3d 571, 583, 546 N.E.2d 802, 810 (2d Dist. 1989), *appeal denied*, 129 Ill. 2d 561, 550 N.E.2d 553 (1990) ("Since the servant who acts negligently is obviously a person liable in tort, it is reasonable to conclude that the liability of the master, although derivative, is still a form of liability in tort as that term is used in the Contribution Act, and an employer is also a "tortfeasor" as that term is used in the Contribution Act."); *Van Cleave v. Gamboni Constr. Co.*, 101 Nev. 524, 528, 706 P.2d 845, 848 (1985) ("We . . . hold that because the employer Gamboni, and its employee, Alimisis are both allegedly liable for Van Cleave's injury, the Uniform Act applies."). *Accord Harris v. Aluminum Co. of America*, 550 F.Supp. 1024 (W.D.Va. 1982); *Blackshear v. Clark*, 391 A.2d 747 (Del. 1978) (interpreting the 1939 version of the Act); *Smith v. Raparot*, 101 R.I. 565, 225 A.2d 666 (1967) (interpreting the 1939 version of the Act); *Thurston Metals & Supply Co. v. Taylor*, 230 Va. 475, 339 S.E.2d 538 (1986); *Krukiewicz v. Draper*, 725 P.2d 1349 (Utah 1986) (interpreting the 1939 version of the Act); *contra, e.g., Mamalis v. Atlas Van Lines, Inc.*, 364 Pa. Super. 360, 528 A.2d 1987, *aff'd*, 522 Pa. 214, 560 A.2d 1380 (1989) (interpreting the 1939 version of the Act); *Craven v. Lawson*, 534 S.W.2d 653 (Tenn. 1976). We hold, therefore, that section 1B-4 applies to master-servant vicarious liability, and that on the facts of this case, the covenant not to sue the employee does not release defendant-employer from liability.

We recognize that at common law this Court held that the release of or covenant not to sue the servant also served to release the master. *Smith v. R.R.*, 151 N.C. 479, 66 S.E. 435 (1909). Since the decision in *Smith*, our legislature has adopted the Uniform Contribution Among Tort-feasors Act. 1967 N.C. Sess. Laws. ch. 847, § 1. The question becomes, therefore, whether the Act changes this holding in *Smith*. Defendant argues that the Act is not applicable to the present situation because a vicariously liable master is not a wrongdoer and therefore not a "tort-feasor." Although defendant's argument finds support in our case law prior to the adoption of the Uniform Act, *see Smith*, 151 N.C. at 481-82, 66 S.E. at 436, we believe the Act broadens the definition of "tort-

feasor" to encompass a vicariously liable master. Stated differently, *for purposes of this Act*, a "tort-feasor" is one who is liable in tort.

An analysis of the 1939 Act and its 1955 revision supports our conclusion. The 1939 Act defined "joint tort-feasors" broadly:

> *For the purposes of this chapter*[,] the term *'joint tort-feasors' means two or more persons jointly or severally liable in tort for the same injury* to person or property, whether or not judgment has been recovered against all or some of them.

Raparot, 101 R.I. at 567, 225 A.2d at 667 (quoting section 1 of the 1939 version of the Act) (our emphasis). This language clearly includes master-servant vicarious liability. *See id.* ("That [definition] is plain and unambiguous. It declares its own sensible meaning and leaves no room for judicial construction."). Although this definition was omitted from the 1955 Act,[2] we believe the 1955 Act is consistent with this broad definition. For example, section 1B-1(a) provides as follows:

> Except as otherwise provided in this Article, where *two or more persons become jointly or severally liable in tort for the same injury* to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against any or all of them.

N.C.G.S. § 1B-1(a) (emphasis added). More importantly, as we have noted, section 1B-4 provides that when a release or covenant not to sue is given in good faith "to one of two or more persons liable in tort for the same injury or the same wrongful death," it does not discharge "any of the other tort-feasors from liability." Clearly, both the master and the servant are "persons liable in tort for the same injury," and "tort-feasors" as used in this provision refers

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2. The term "joint tort-feasor" and its definition were not included in the 1955 version of the Act because the term "joint tort-feasor" in the 1939 Act led to confusion:

> The term 'joint tort-feasors' was not used in the Uniform Act in order to avoid confusion in those jurisdictions where persons who act independently, and not in concert, cannot always be joined as defendants.

T. Merritt Bumpass, Jr., Comment, *North Carolina Legislation: An Act Providing for Contribution Among Joint Tort-Feasors and Joint Obligors*, 5 Wake Forest Intra. L. Rev. 160 (citing Uniform Act, section 1, Commissioner's Note Subsection (a)). The term "joint tort-feasor" was replaced with "tort-feasor." Neither the 1955 Uniform Act nor the North Carolina statute defines "tort-feasor."

to those persons liable in tort. We agree with the Alaska Supreme Court that such language "is intended to include those vicariously liable." *Sweat*, 568 P.2d at 930; *accord Krukiewicz*, 725 P.2d at 1352. We therefore hold that the provisions of N.C.G.S. § 1B-4 apply to situations involving master-servant vicarious liability, such as in the instant case.

Defendant also suggests that section 1B-1(f) of the Act excludes indemnity actions. We disagree. Section 1B-1(f) reads:

> This Article does not impair any right of indemnity under existing law. Where one tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

N.C.G.S. § 1B-1(f) (1983). We agree with the Supreme Court of Nevada that nothing in this provision precludes application of the Act to situations involving vicarious liability. *Van Cleave*, 101 Nev. at 529, 706 P.2d at 848. The provision "simply states that the vicariously liable employer would have a right to indemnity, rather than contribution. This provision merely provides that no *contribution* exists where *indemnity* exists." *Id.; see also* 12 U.L.A. cmt. 66 (1975) (second sentence of this provision added by drafters in 1955 revision to make clear that in cases of vicarious liability there should be indemnity and not contribution); *Sweat*, 568 P.2d at 930 n.19 ("Alaska's act is expressly intended to cover situations covering vicarious liability which is one reason for inclusion of subsection (f).").

In its opinion, the Court of Appeals noted that because a right of indemnity remains against a servant who has settled with the injured party, the servant effectively gains nothing. *Yates*, 102 N.C. App. at 71, 401 S.E.2d at 383. Thus, the underlying policy of the statute to encourage settlements is undermined. *Id.* We do not agree. Although the Court of Appeals is correct that the servant remains liable to the master, in practice, the master may elect not to seek indemnification. This is especially true in cases such as this one where the servant's settlement was for the entire amount of his insurance coverage. Given that the master may choose not to seek indemnity from his servant, who in many cases may be judgment proof, the servant's settlement with the injured party fulfills the underlying policy of the Act.

Having determined that "tort-feasor" under the Act includes vicariously liable employers, we turn to the simple facts of this case. Plaintiff, in good faith, executed a covenant not to sue the employee or the employee's insurer, expressly reserving the right to sue defendant. Therefore, pursuant to N.C.G.S. § 1B-4(1), defendant was not discharged from liability. Accordingly, the decision of the Court of Appeals is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Justice MEYER dissenting.

I dissent from the majority opinion for the following reasons.

The majority errs when it concludes that N.C.G.S. § 1B-4 (governing contribution among tort-feasors) controls the outcome here. Traditional tools of statutory construction require that the principles of common law, rather than the statute, dictate the outcome in this case.

As an initial matter, the majority misconstrues the plain language and intent of N.C.G.S. § 1B-4, concluding that "the Act broadens the definition of 'tort-feasor' to encompass a vicariously liable master." When technical terms or terms of art are used in a statute, they are presumed to have been used with their technical meaning in mind. *Black v. Littlejohn*, 312 N.C. 626, 325 S.E.2d 469 (1985). Where the language of a statute is clear and unambiguous, there is no room for judicial construction, and the Court must give the language its plain and definite meaning and resist the temptation to interpolate or superimpose provisions and limitations not contained therein. *State v. Camp*, 286 N.C. 148, 209 S.E.2d 754 (1974).

Such should be the case with respect to the term "tort-feasor" as used in N.C.G.S. § 1B-4. "Tort-feasor" is defined as "[a] wrongdoer; an individual or business that *commits* or *is guilty of a tort.*" *Black's Law Dictionary* 1489 (6th ed. 1990) (emphasis added). This Court has evinced an identical view. "To make persons joint tort feasors they must actively participate in the act which causes the injury." *Brown v. Louisburg*, 126 N.C. 701, 703, 36 S.E. 166, 167 (1900). In *Bowen v. Ins. Co.*, 270 N.C. 486, 491-92, 155 S.E.2d 238, 242-43 (1967), we stated that with "joint tort-feasors, although there is a single damage done, there are several wrongdoers. The act

inflicting injury may be single, but back of that, and essential to liability, lies some wrong done by each tort-feasor contributing in some way to the wrong complained of." In *White v. Keller*, 242 N.C. 97, 100, 86 S.E.2d 795, 797 (1955), we said: "Joint tort-feasors are those who act together in committing a wrong, or whose acts, if independent of each other, unite in causing a single injury." Indeed, the author of today's majority opinion recognized that one must be *actively* negligent in order to be a "tort-feasor":

> [T]he right to contribution does not exist unless two or more parties are joint tortfeasors. Two or more parties are joint tortfeasors when their *negligent* or *wrongful* acts are united in time or circumstance such that the two acts constitute one transaction or when two separate acts concur in point of time and place to cause a single injury.

State Farm Mut. Ins. Co. v. Holland, 324 N.C. 466, 470, 380 S.E.2d 100, 102-03 (1989) (Frye, J.) (citations omitted) (emphasis added); *see also* Robert E. Lee, *North Carolina Law of Agency and Partnership* at 32 (6th ed. 1977) ("a joint tort is not actually involved when a master is held liable on the doctrine of respondeat superior; the master has not participated").

Cases from other jurisdictions to the same effect are numerous. In *McCall v. Roper*, 685 P.2d 230 (Colo. Ct. App. 1984), the Colorado Court of Appeals said:

> In *Hamm v. Thompson*, 143 Colo. 298, 353 P.2d 73 (1960), the court stated:
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> > "[T]he common law rule prohibiting contribution between joint tortfeasors does not apply to a master whose liability for the torts of his servant is based on respondeat superior, for even though the liability is joint and the two may be joined in one action, they are not joint tortfeasors."
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> In applying the principles of *Hamm v. Thompson* here, we note that [defendant's] liability for McCall's injury was vicarious, based solely upon the family car doctrine. As such, this situation is no different than a respondeat superior situation in which the liability of the servant is imputed to the master. Therefore, although jointly and severally liable for McCall's injury, [defendant] and [defendant's son] are not joint tortfeasors.

The court in *Hamm v. Thompson* cited with approval 1 *F. Harper & F. James, Torts* § 10.1 (1956). That section provides:

> "[A] joint tort is not actually involved when a master or a principal is held liable respectively for his servant's or agent's wrong . . . . The master or principal has not participated in the planning or the consummation of the tort; his liability is based instead on the doctrine of respondeat superior, which is grounded in the law of agency."

Id. at 232.

In *Bristow v. Griffitts Constr. Co.*, 140 Ill. App. 3d 191, 488 N.E.2d 332 (1986), the Illinois Court of Appeals said:

> The resolution of this case depends upon the meaning of the word "tortfeasors" . . . . The plaintiffs maintain the word is synonymous with the phrase "one or more persons liable in tort arising out of the same injury." A tortfeasor has also been defined as a "wrong-doer; one who commits or is guilty of a tort." Under the doctrine of vicarious liability, . . . the employer is held liable as a matter of policy, but he is not a wrongdoer. The liability of the master and servant for the acts of the servant is deemed that of one tortfeasor and is a consolidated or unified one. The master, therefore, would not be "any of the other tortfeasors."
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> . . . .
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> . . . We, therefore, find a party whose liability is solely derivative is not "any of the other tortfeasors" . . . . [T]he covenant not to sue the employee discharged the employer's vicarious liability.

Id. at 193-94, 198-99, 488 N.E.2d at 334-35, 338 (citations omitted).

In *Elias v. Unisys Corp.*, 410 Mass. 479, 573 N.E.2d 946 (1991), the Massachusetts Supreme Judicial Court said:

> The [contribution among tortfeasors] statute relied on by the plaintiffs applies only to joint tortfeasors, those "jointly liable in tort" for an injury. We have defined joint tortfeasors as "two or more wrong-doers [who] negligently contribute to the personal injury of another by their several acts." The plaintiffs acknowledge that Unisys, whose liability is based

solely on the theory of respondeat superior, is not a joint tortfeasor with its employee. It follows that the statute, by its express terms, does not apply to the case.

The plaintiffs urge, however, that we invoke common law decision-making to apply the principles stated in the statute to their situation. They claim essentially that Unisys and its negligent employee should be treated like joint tortfeasors, thus permitting the plaintiffs . . . to maintain an action against Unisys after having released its employee from liability. Because the principles of joint liability which underlie the statute are distinct from the principles of vicarious liability, we decline to extend the statute in the manner requested by the plaintiffs.

. . . .

. . . The outcome sought by the plaintiffs would tend to obliterate the distinctions discussed above and unsettle principles of well-established law.

Id. at 480-81, 483, 573 N.E.2d at 947, 948 (citations omitted) (footnote omitted).

In *Theophelis v. Lansing General Hosp.*, 430 Mich. 473, 424 N.W.2d 478 (1988), the Michigan Supreme Court said this:

Plaintiffs argue that the word "tortfeasors" in the statute includes persons whose liability is based solely upon the theory of respondeat superior, as in the case of principal and agent. We disagree.

The Michigan contribution act does not include a definition of the terms "1 of 2 or more persons liable in tort," or "other tort-feasors," as used in . . . § 2925d [of the Michigan act]. The Uniform Contribution Among Tortfeasors Act, 12 ULA 63, § 4 (1955 rev), upon which the Michigan act is based, likewise fails to define the term "tortfeasor." Hence, the present question has arisen, and a split has developed among the jurisdictions as to whether a vicariously liable principal is a "tortfeasor" for purposes of § 2925d.

. . . .

. . . The principal, having committed no tortious act, is not a "tortfeasor" as that term is commonly defined. . . .

> . . . [T]he statute did not abrogate the common-law rule that release of an agent discharges the principal.
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> . . . .
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> Section 2925d of the contribution act which is invoked by the plaintiff in this case makes clear that a release or a covenant not to sue given to *A* would not discharge the "other tortfeasors" (*B* and *C*) from liability. However, the statute says no more, leaving in place the deep-rooted common-law principle that the release of *A* would discharge his principal. Any other result would be illogical and unjust because release of the agent removes the only basis for imputing liability to the principal.

Id. at 481-82, 483, 484, 491, 424 N.W.2d at 481-82, 483, 486 (citations omitted) (footnotes omitted).

In *Kinetics, Inc. v. El Paso Products Co.*, 99 N.M. 22, 653 P.2d 522 (Ct. App. 1982), the New Mexico Court of Appeals said:

> In the case at bar, the liability of El Paso Products was, if at all, vicarious. Because the respondeat superior form of vicarious liability is imposed upon one party through a legal fiction, the parties are not joint tortfeasors. If the parties are not joint tortfeasors, it is elementary that the Uniform Contribution Among Tortfeasors Act does not apply.

Id. at 28, 653 P.2d at 528 (citations omitted).

In *Mamalis v. Atlas Van Lines, Inc.*, 522 Pa. 214, 560 A.2d 1380 (1989), the Supreme Court of Pennsylvania related:

> [A]n agent and its principal are not joint tortfeasors under UCATA [the Uniform Contribution Among Tortfeasors Act] when the liability of the principal is vicarious liability and is not based upon the principal's independent actionable fault.

Id. at 216, 560 A.2d 1381.

In *Craven v. Lawson*, 534 S.W.2d 653 (Tenn. 1976), the Supreme Court of Tennessee said:

> [P]laintiff reasons that the language of the Act embraces vicarious tort-feasors as well as joint tort-feasors and active-passive tort-feasors by the use of the language "one (1) of two (2) or more *persons liable in tort for the same injury.*"

> The argument is persuasive; however, our research convinces us that it was not the intent of the Commissioners on Uniform State Laws nor of our Legislature to embrace the derivative or vicarious liability of masters or principals within the scope of [the Act].

Id. at 655-56 (citations omitted).

In abrogating the long-held definition of "tort-feasor," the majority blurs the important distinction between vicarious and direct liability, legal principles that undergird the law of torts. This crucial distinction has been recognized by courts elsewhere in their consideration of the same matter faced by the Court today.

In *Bristow* the Illinois Court of Appeals said:

> [T]he doctrine of vicarious liability is not based upon fault but upon a policy of proper allocation of the risk. As between the master and the innocent third party, the doctrine requires the master to bear any loss for his servant's negligence. The master, however, is not at fault; rather, the servant's negligence is imputed to the master. As between the master and the servant, it is the servant who should bear the entire loss. In the case of vicarious liability, therefore, there is a sound basis for indemnity but not for any apportionment of damages between the master and servant.
>
> . . . Applying the Act in situations where one party's liability is derivative would be repugnant to the central purpose of the Act.

Bristow, 140 Ill. App. 3d at 198, 488 N.E.2d at 337-38.

In *Elias*, the Massachusetts Supreme Judicial Court said:

> Underlying the concept of joint liability is the principle that all joint (or concurrent) tortfeasors are independently *at fault* for their wrongful acts. . . . [The Act] permits a plaintiff to bring an action against one joint tortfeasor after having released another joint tortfeasor from liability. By contrast, the principles of vicarious liability apply where only the agent has committed a wrongful act. The principal is *without fault*. The liability of the principal arises simply by the operation of law and is only derivative of the wrongful act of the agent. Because of this, established case law holds that a general release given to an agent will preclude a subsequent action against

his principal. In asking us to change this rule of law, the plaintiffs would have us ignore the basic and significant distinctions between vicarious and joint liability . . . .

Elias, 410 Mass. at 481-82, 573 N.E.2d at 947-48.

In *Kinetics, Inc.*, the New Mexico Court of Appeals said:

> The definition of vicarious liability is indirect legal responsibility. In *Dessauer v. Memorial General Hospital*, 96 N.M. 92, 628 P.2d 337 (Ct.App.1981), the following definition of vicarious liability is provided:
>
> > Vicarious liability is based on a relationship between the parties, irrespective of participation, either by act or omission, of the one vicariously liable, under which it has been determined as a matter of policy that one person should be liable for the act of the other. Its true basis is largely one of public or social policy under which it has been determined that, irrespective of fault, a party should be held to respond for the acts of another.

Kinetics, Inc., 99 N.M. at 27, 653 P.2d at 527 (Ct. App.) (quoting *Dessauer v. Memorial Gen. Hosp.*, 96 N.M. 92, 108, 628 P.2d 337, 353 (Ct. App. 1981) (Sutin, J., concurring)).

In *Mamalis*, the Supreme Court of Pennsylvania stated:

> The Superior Court succinctly summarized the distinction between the concept of liability vicariously imposed by law and the purpose behind UCATA, stating,
>
> > The rules of vicarious liability respond to a specific need in the law of torts: how to fully compensate an injury caused by the act of a single tortfeasor. Upon a showing of agency, vicarious liability increases the likelihood that an injury will be compensated, by providing two funds from which a plaintiff may recover. If the ultimately responsible agent is unavailable or lacks the ability to pay, the innocent victim has recourse against the principal. If the agent is available or has means to pay, invocation of the doctrine is unnecessary because the injured party has a fund from which to recover.
> >
> > The system of contribution among joint tortfeasors, of which the Uniform Act's apportionment rules are a

> key component, has arisen completely apart from the system of vicarious liability and indemnity and meets an entirely distinct problem: how to compensate an injury inflicted by the acts of more than one tortfeasor. Unlike the [indirect or derivative] liability of a principal, the liability of a joint tortfeasor is direct (because the tortfeasor actually contributed to the plaintiff's injury) and divisible (since the conduct of at least one other also contributed to the injury).
>
> *Mamalis v. Atlas Van Lines, Inc. et al.*, 364 Pa.Super. 360, 365-366, 528 A.2d 198, 200-201 (1987).
>
> We hold that absent any showing of an affirmative act, or failure to act when required to do so, by the principal, termination of the claim against the agent extinguishes the derivative claim against the principal. A claim of vicarious liability is inseparable from the claim against the agent since any cause of action is based on the acts of only one tortfeasor. There was no evidence introduced to establish acts of the principal that would make Atlas's liability anything other than vicarious. We find that UCATA is inapplicable to the factual circumstances of this case.

Mamalis, 522 Pa. at 220-21, 560 A.2d at 1383.

In short, the majority's conclusion that a vicariously liable defendant is a "tort-feasor" exists in stark contrast to North Carolina law as it has existed for over ninety years as well as in contrast to the law of many other states. The conclusion that New South Pizza, an employer derivatively liable under only the doctrine of respondeat superior, is a "tort-feasor" blurs the significant distinction between vicarious and joint liability and is completely unsupportable given our understanding of that term.

Similarly, the majority errs in its construction of N.C.G.S. § 1B-4 when it infers from the structure of the statute itself that the legislature intended those merely vicariously liable to be "liable in tort" and thus joint "tort-feasors." While the statute's prefatory sentence speaks of "one or more persons liable in tort," the succeeding subparagraphs speak with particularity of "other tort-feasors," "the tort-feasor," and "any other tort-feasor." As the majority itself concedes, the term "tort-feasor" is not defined in the Act. Nevertheless, the majority states that necessarily "both

the master and the servant are 'persons liable in tort for the same injury,' and 'tort-feasors' as used in [the Act] refers to those persons liable in tort." On this basis, the majority concludes that under N.C.G.S. § 1B-4, a master, wholly lacking in active involvement in the alleged tort, is a "tort-feasor" and therefore remains liable notwithstanding the release from liability of the directly culpable servant.

We are obligated to interpret all acts of the legislature so as to give meaning to *all* language used. *Domestic Elec. Service, Inc. v. City of Rocky Mount*, 285 N.C. 135, 203 S.E.2d 838 (1974). If we do not give some meaning to the term "tort-feasor" other than merely a "person liable in tort," the term becomes superfluous, and we have not given meaning to *all* the language used. The majority's view that N.C.G.S. § 1B-4 somehow broadens the legal definition of tort-feasor to include the status of master is a blatant exercise in improper statutory construction. "It is a recognized principle of statutory construction[ ] that when words of general import, the subject of a statute, are followed by words of particular or restricted import relating to the same subject matter, the latter will operate to limit or restrict the former." *In re Steelman*, 219 N.C. 306, 311, 13 S.E.2d 544, 547 (1941). Here, words of general import ("one or more persons liable in tort") are followed by specific language ("tort-feasor(s)"). Thus, the generalized language, to which the majority attaches such great importance, seen in the context of the later, more specific terms, in no way can be seen to validate the majority's conclusion that a vicariously liable master is subject to N.C.G.S. § 1B-4.

Also, it is plain from the nature of N.C.G.S. § 1B-4 itself that the majority errs in the application of that statute altogether. N.C.G.S. § 1B-4 is contained in the "Uniform Contribution Among Tortfeasors Act" and as such pertains only to *contribution*. *Equipment Finance Corp. v. Scheidt*, 249 N.C. 334, 106 S.E.2d 555 (1959) (when meaning of statute is in doubt, reference may be had to title and context in order to ascertain legislative intent). It is hornbook law that "rights of contribution and indemnity are mutually inconsistent; the former assumes joint fault, the latter only derivative fault." *Edwards v. Hamill*, 262 N.C. 528, 531, 138 S.E.2d 151, 153 (1964); *see also State Farm Mut. Auto Ins. Co. v. Holland*, 324 N.C. 466, 471, 380 S.E.2d 100, 102 (1989) (no right of contribution unless both parties are active tort-feasors). Indeed, the distinction between the doctrines of indemnity and contribution is explicitly

preserved by N.C.G.S. § 1B-1(f), which provides: "This Article does not impair any right of indemnity under existing law." N.C.G.S. § 1B-1(f) (1988). Because New South Pizza is at best "derivatively" liable here, contribution is not implicated. Therefore, the common law principle that the discharge of the servant requires the discharge of the master, rather than N.C.G.S. § 1B-4, should control. *See Smith v. R.R.*, 151 N.C. 479, 66 S.E. 435 (1909).

The majority cites eight cases for the proposition that, under the Uniform Act, a release of the servant does not release the master. Three of the cases, *Blackshear v. Clark*, 391 A.2d 747 (Del. 1978), *Smith v. Raparot*, 101 R.I. 565, 225 A.2d 666 (1967), and *Krukiewicz v. Draper*, 725 P.2d 1349 (Utah 1986), interpret the 1939 Model Act, which contained the "joint tortfeasor" language not contained in the 1955 Act or in our Act. Two cases cited, *Harris v. Aluminum Co. of America*, 550 F. Supp. 1024 (W.D. Va. 1982), and *Thurston Metals & Supply Co. v. Taylor*, 230 Va. 475, 339 S.E.2d 538 (1986), interpreted a contribution statute not containing the important indemnity provision contained in ours. A sixth case, *Brady v. Prairie Material Sales, Inc.*, 190 Ill. App. 3d 571, 546 N.E.2d 802 (1989), is from a jurisdiction in which the circuit courts are divided on this issue. *See Bristow v. Griffitts Constr. Co.*, 140 Ill. App. 3d 191, 488 N.E.2d 332. There are a substantial number of cases that hold to the contrary. *See, e.g., McCall v. Roper*, 685 P.2d 230 (Colo. Ct. App.) (vicarious liability theory of family car doctrine, like master-servant, does not make defendants joint tort-feasors); *Bristow v. Griffitts Constr. Co.*, 140 Ill. App. 3d 191, 488 N.E.2d 332 (respondeat superior theory involving employer-employee as defendants does not make defendants joint tort-feasors); *Elias v. Unisys Corp.*, 410 Mass. 479, 573 N.E.2d 946 (same); *Theophelis v. Lansing General Hosp.*, 430 Mich. 473, 424 N.W.2d 478 (same); *Kinetics, Inc. v. El Paso Products Co.*, 99 N.M. 22, 653 P.2d 522 (Ct. App.) (same); *Mamalis v. Atlas Van Lines, Inc.*, 522 Pa. 214, 560 A.2d 1380 (respondeat superior theory involving principal-agent does not make defendants joint tort-feasors); and *Craven v. Lawson*, 534 S.W.2d 653 (Tenn.) (vicarious liability theory involving driver and owner of car does not make defendants joint tort-feasors). Thus, our 1909 case of *Smith v. R.R.* is followed by the better-reasoned modern cases from other jurisdictions. *See also* 53 Am. Jur. 2d *Master and Servant* § 408 (1970); Vitauts N. Gulbis, Annotation, *Release of, or Covenant Not to Sue, One Primarily Liable for Tort, but Expressly Reserving Rights Against*

One Secondarily Liable, as Bar to Recovery Against Latter, 24 A.L.R.4th 547 (1983 & Supp. 1991).

Furthermore, the majority is wrong when it states that its interpretation serves the policy and ends of N.C.G.S. § 1B-4. The Uniform Act was enacted to serve two purposes. First, it was intended to "distribute the burden of responsibility equitably among those who are jointly liable and thus avoid the injustice often resulting under the common law." Unif. Contribution Among Tortfeasors Act, 12 U.L.A. commissioners' prefatory note (1955 rev.), at 59 (1975). Second, the Act was designed to encourage settlements.

The majority's decision to impose liability on a vicariously liable principal when the agent has been discharged from liability promotes neither of these goals. The avowed interest in avoiding injustice is already well served by N.C.G.S. § 1B-1(f), which provides that the Act "does not impair any right of indemnity under existing law." Moreover, under the majority's view, incentives for settlement will be lessened: even if a servant and plaintiff enter into a covenant not to sue, the servant remains potentially liable as an indemnitor. *See Bristow v. Griffitts Constr. Co.*, 140 Ill. App. 3d 191, 198, 488 N.E.2d 332, 338 (settlement encouraged by discharge of employer upon discharge of employee); *Elias v. Unisys Corp.*, 410 Mass. 479, 483-84, 573 N.E.2d 946, 948-49 (settlement is discouraged by continuing threat of indemnity); Darrell L. West, Comment, *Torts—Vicarious Liability—Covenant Not to Sue Servant or Agent as Affecting Liability of Master or Principal*, 44 Tenn. L. Rev. 188, 198 (1976) (settlement encouraged by discharge); T. Merritt Bumpass, Jr., Comment, *North Carolina Legislation: An Act Providing for Contribution Among Joint Tort-feasors and Joint Obligors*, 5 Wake Forest L. Rev. 160, 175-76 (1968) (same). The majority's cavalier assertion that "in practice the master may elect not to seek indemnification" is unconvincing not only as an empirical matter, but also given the explicit policy goals of the Act itself.

After recognizing that North Carolina adopted the 1955 version of the Uniform Act, and further admitting that the term "joint tortfeasor(s)" was deleted from the 1955 Act and does not appear in our Act, the majority relies almost entirely upon the 1939 Act to declare that, "*for purposes of this Act*, a 'tort-feasor' is one who is liable in tort."

This focus upon the 1939 Act once again points up the error in the majority opinion. The 1939 Act not only contained the "joint

tortfeasor" language later deleted in the 1955 Act, but also lacked a critical provision regarding indemnity that appears in the 1955 Act and distinguishes the two Acts. *See Craven v. Lawson*, 534 S.W.2d 653, 656-57 (Tenn.).

Further, the majority's consideration of what amounts to the legislative history of N.C.G.S. § 1B-4 is improper. In construing a statute, legislative purpose is first ascertained from the plain words of the statute. *Electric Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 403 S.E.2d 291 (1991). Only if, after analyzing the text, structure, and policy of the statute, the Court is still unsure as to legislative intent, may we consult the legislative history of a statute. *Id.* The plain language here makes clear that a vicariously liable principal is not a "tort-feasor," and because indemnity rather than contribution is at issue, N.C.G.S. § 1B-4 is not at play. Moreover, the dual policies of the Act are not served by the majority's expansion of the law. Therefore, the majority's resort to the 1939 and 1955 Model Acts is not only disingenuous, but is improper as well. *Id.*

Finally, I am unpersuaded by the majority's assertion that N.C.G.S. § 1B-4 overrides the holding in *Smith v. R.R.*, 151 N.C. 479, 66 S.E. 435, that the discharge from liability of the servant also discharges the master. In *Smith*, plaintiff sued to recover damages for an injury suffered while he was employed by a construction company engaged in the construction of a railroad section. In exchange for consideration, plaintiff covenanted with defendant construction company not to sue further for any recovery against the company. The Court concluded that the release from liability between plaintiff and construction company also served to release the railroad from liability. "If the master is bound through his agent, can he not be released through his agent? . . . This would seem to be obvious, except in those cases where the master actively participates in the wrong and thereby makes himself a joint tort feasor." *Id.* at 482-83, 66 S.E. at 437; *see also* Robert E. Lee, *North Carolina Law of Agency and Partnership* at 33 (6th ed. 1977).

Here, as in *Smith*, there is no evidence that defendant New South Pizza "actively participated in the alleged wrong." Therefore, the majority's superficial conclusion that New South Pizza remains liable lacks support in the law. Implicit in the majority's opinion is the view that the legislature in enacting N.C.G.S. § 1B-4 was unaware of the rule in *Smith*. In ascertaining legislative intent, "it is always presumed that the Legislature acted with full knowledge

of prior and existing law." *Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977). Absent clear legislative intent to the contrary, we should presume that the legislature was aware of and intended to retain the longstanding common law rule enunciated in *Smith*.

Moreover, even if the majority were correct in its assertion that somehow N.C.G.S. § 1B-4 "changes the holding in *Smith*," the outcome reached by the majority still is untenable. A fundamental dictate of statutory construction is that statutes in derogation of the common law must be strictly construed. *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978); *Quick v. United Ben. Life Ins. Co.*, 287 N.C. 47, 213 S.E.2d 563 (1975); *Price v. Edwards*, 178 N.C. 493, 101 S.E. 33 (1919). Here, at common law the release from liability of the servant required the release of the master. *See Smith*, 151 N.C. 479, 66 S.E. 435. In the face of this understanding, and the interpretative requirement of strict construction, the majority nevertheless bases its holding on the most tenuous foundation: it "*believe[s]* the Act broadens the definition of 'tort-feasor' to encompass a vicariously liable master." (Emphasis added.) In so doing, it eviscerates a tenet held fast by our common law for nearly a century.

For the foregoing reasons, I respectfully dissent from the opinion of the majority.

Chief Justice EXUM and Justice WHICHARD join in this dissenting opinion.

STATE OF NORTH CAROLINA v. DONNIE RAY HALL

No. 201PA90

(Filed 31 January 1992)

1. Evidence and Witnesses § 2332 (NCI4th)— child rape victim— symptoms of abused children

Although expert testimony on the symptoms and characteristics of sexually abused children has been held admissible to assist the jury in understanding the behavior patterns of sexually abused children, and evidence that a par-

ticular child's symptoms were consistent with those of sexual or physical abuse victims was admissible to aid the jury in assessing the complainant's credibility, the trial court here did not limit the permissible uses of the profile evidence and the witness was never explicitly or implicitly qualified as an expert witness by the trial court.

Am Jur 2d, Infants §§ 16, 17.5; Rape § 68.

2. **Evidence and Witnesses § 2342 (NCI4th)— child rape victim—post-traumatic stress syndrome—admissible for corroborative purposes**

Evidence that a prosecuting witness is suffering from post-traumatic stress syndrome should not be admitted for the substantive purpose of proving that a rape has in fact occurred; however, such evidence may be admitted for certain corroborative purposes. The trial court should balance the probative value of evidence of post-traumatic stress, or rape trauma, syndrome against its prejudicial impact under N.C.G.S. § 8C-1, Rule 403 and should also determine whether the admission of this evidence would be helpful to the trier of fact under N.C.G.S. § 8C-1, Rule 702. If admitted, the trial court should take pains to explain to the jurors the limited uses for which the evidence is admitted and the evidence may not be admitted in any case for the sole purpose of proving that a rape or sexual abuse has occurred.

Am Jur 2d, Expert and Opinion Evidence § 197; Infants §§ 16, 17.5; Rape §§ 68, 68.5.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. 42 ALR4th 879.

3. **Evidence and Witnesses § 2342 (NCI4th)— child rape victim—conversion reaction—admissible for corroborative purposes**

Evidence that a prosecuting witness has suffered a conversion reaction may be admitted for corroborative purposes to the same extent as evidence that she has suffered from post-traumatic stress syndrome.

Am Jur 2d, Expert and Opinion Evidence § 197; Infants §§ 16, 17.5; Rape § 68.

4. Evidence and Witnesses § 2342 (NCI4th)— child rape victim—post-traumatic stress syndrome—conversion reaction—erroneously admitted

The trial court erroneously admitted evidence that a 15 year old rape victim was suffering from post-traumatic stress syndrome and conversion reaction where the testimony was admitted for the substantive purpose of allowing the jury to infer that the victim had in fact been raped and was not limited by the court to corroborating the victim's version of events.

Am Jur 2d, Expert and Opinion Evidence § 197; Infants §§ 16, 17.5; Rape §§ 68, 68.5.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. 42 ALR4th 879.

5. Evidence and Witnesses § 737 (NCI4th)— child rape victim—expert testimony admitted—abused child profile, conversion reaction, and post-traumatic stress syndrome—reversible error

There was reversible error requiring a new trial in the prosecution of defendant for the rape of his 15 year old stepdaughter where the court admitted evidence of an abused child profile, post-traumatic stress syndrome, and conversion reaction without limiting instructions and the remaining evidence of sexual abuse was in sharp conflict. In light of that conflict, defendant did show under N.C.G.S. § 15A-1443(a) that there was a reasonable possibility that he would have been acquitted had evidence of the disorders not been erroneously admitted.

Am Jur 2d, Expert and Opinion Evidence § 197; Infants §§ 16, 17.5; Rape §§ 68, 68.5.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. 42 ALR4th 879.

6. Evidence and Witnesses § 2854 (NCI4th)— detective's notes—in camera examination—not used when testifying—privileged information—not disclosed

The trial court did not err in a prosecution of defendant for the rape of his stepdaughter by not permitting defense counsel to examine certain notes in a detective's file where the court reviewed the notes *in camera* and found that the

notes contained privileged information which the interests of justice did not require to be disclosed and that the detective had not used that information to refresh his memory before testifying. The trial court employed the proper procedures pursuant to N.C.G.S. § 8C-1, Rule 612.

Am Jur 2d, Depositions and Discovery § 425; Witnesses §§ 459-461.

Justice WHICHARD dissenting.

Justices MITCHELL and WEBB join in this dissenting opinion.

ON discretionary review of a unanimous decision by the Court of Appeals, 98 N.C. App. 1, 390 S.E.2d 169 (1990), finding no error in the verdict and judgment rendered at the 17 January 1989 Criminal Session of Superior Court, SURRY County, *Morgan, J.*, presiding. Heard in the Supreme Court 14 March 1991.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten and John F. Maddrey, Assistant Attorneys General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

EXUM, Chief Justice.

This appeal arises from defendant's convictions for second-degree rape in violation of N.C.G.S. § 14-27.3 and sexual activity by a substitute parent in violation of N.C.G.S. § 14-27.7. The trial court admitted evidence that the prosecuting witness suffered a conversion reaction and post-traumatic stress disorder following an alleged rape by her stepfather. We conclude that the admission of evidence on these two psychological phenomena constitutes error where offered for the substantive purpose of proving that the rape did in fact occur. Accordingly, we reverse the decision of the Court of Appeals and remand for a new trial.

I.

The events at issue took place on 13 February 1988. At about 2 a.m., defendant Donnie Ray Hall and the prosecuting witness [whom we shall refer to as M.M. because of her young age], defendant's fifteen-year-old stepdaughter, returned to their home after visiting a family friend. The rest of the family, including defendant's

wife (and M.M.'s mother), were already asleep. M.M. testified that, after making defendant a sandwich, she proceeded to her bedroom which she shared with her eight-year-old stepsister. After M.M. was in the bedroom and dressed for bed, defendant came into the room supposedly to check on a wood stove.

M.M. testified that defendant started kissing her, although she told defendant to stop. Defendant fondled M.M.'s breasts and between her legs, eventually penetrating her vagina with his penis. He told her not to tell anyone, and threatened to harm her family members if she did. She did not scream or call for help, although her sister was in the bedroom with her, and her mother was in the next room. M.M. claimed she was too frightened. Within a few days, M.M. told a friend, her mother, and the authorities about these events.

Several weeks later, M.M. suffered some degree of paralysis, which could not be attributed to any physiological causes. Her doctors decided that M.M.'s condition was due to psychosomatic causes. She was hospitalized for several months beginning on 27 March 1988. Several weeks after her discharge, she was readmitted after attempting suicide.

M.M. also testified about several instances in 1985 when defendant had inserted his fingers between her legs. These events resulted in defendant pleading guilty to taking indecent liberties with a minor. He was subsequently incarcerated.

Several health care professionals testified about symptoms M.M. displayed after the alleged rape. The crux of this collective testimony, which is discussed in more detail below, was: that M.M. fit the "profile" of sexually abused children; that she suffered a neurologically inexplicable paralysis known as "conversion reaction," which is caused by severe psychological trauma, anxiety or depression; and that she was suffering from post-traumatic stress disorder, which involves psychological responses to certain emotionally traumatic events.

At the close of the State's evidence, the trial court denied defendant's motion to dismiss. Defendant then proceeded to put on evidence of his own.

Patricia Hall, who is defendant's wife and M.M.'s mother, testified on her husband's behalf. She stated that, although her bedroom was next to M.M.'s, she heard no sounds from it on the

night in question. Deborah Graybill, a family friend, testified that, during the time defendant was incarcerated for his 1985 indecent liberties conviction, M.M. told Graybill that she would send defendant back to prison one way or another. Carleen Boulden, a neighbor, testified that M.M. telephoned a social worker from the Boulden home in 1987. M.M. told the social worker that defendant hit her. After this conversation, M.M. told Boulden that she would do anything to put defendant back in prison, and that she didn't care what it took. Furthermore, a doctor who examined M.M. a few days after the alleged assault testified that his examination revealed no evidence of physical trauma. M.M. did, however, complain to him that she had some tenderness in the back part of her vagina.

Taking the stand in his own defense, defendant admitted pleading guilty in 1985 to taking indecent liberties with M.M. He stated further that he was in fact guilty of this earlier crime. However, defendant denied ever having sex with M.M. or doing anything with her, or to her, on the night in question. He denied both entering the room and touching her.

The trial court submitted verdict sheets to the jury, which found defendant guilty of second-degree rape and of sexual activity by a substitute parent. The trial court sentenced defendant to thirty years' imprisonment for rape and to a consecutive six-year term for the sexual activity charge.

Defendant appealed to the North Carolina Court of Appeals, which unanimously affirmed the trial court's decision. Subsequently, we allowed defendant's petition for discretionary review. We now reverse the Court of Appeals and order a new trial.

II.

We consider the admissibility of expert testimony that M.M. suffered a conversion reaction and post-traumatic stress disorder after the alleged rape. We conclude that this evidence, although admissible for corroborative purposes, was not admissible to show that a rape had in fact occurred. We therefore reverse the decision of the Court of Appeals.

A.

The testimony at issue today was offered by the State and came from three sources: Judy Stadler, a clinical social worker with a Bachelor of Arts degree in psychology and a Masters in

counseling; Dr. Sarah Sinal, a pediatrician at Baptist Hospital and the Bowman-Gray School of Medicine; and Dr. Roy Haberkern, a child psychiatrist and the head of Child Psychiatry at Baptist Hospital and the Bowman-Gray School of Medicine. The State presented no physical evidence nor any other medical evidence that a rape had in fact occurred. It relied heavily on the testimony of the prosecuting witness and the three experts to make its case against defendant.

Stadler, who was not tendered by the State as an expert witness, testified that she had counseled M.M. on separate occasions in 1985 and 1988. On both occasions, M.M. had been referred to Stadler due to allegations by the child of sexual abuse. Stadler testified that in both 1985 and 1988 M.M. fit a profile of characteristics of children who had been sexually abused. The following exchange between Stadler and the prosecuting attorney took place:

> Q. . . . Now, on the first visit that you saw her [M.M.] back in 1985 would you state whether or not [M.M.] exhibited any characteristics of a child that had been sexually abused.
>
> MR. WHITE: Objection.
>
> THE COURT: Overruled.
>
> Q. You may answer.
>
> A. There are profile, there is a profile of characteristics that you can look at that has been stated that where other children who have been abused appear. And yes, [M.M.] did fit that profile.
>
> Q. Now, on the second time that you saw her in March of 1988, would you state whether or not [M.M.] exhibited any of those characteristics of a sexually abused child.
>
> MR. WHITE: Objection.
>
> THE COURT: Overruled.
>
> A. Again, she did fit this profile. And at that point of time she was quite a great deal more serious in those characteristics.

On cross-examination, Stadler further testified in explaining an answer that

> [M.M.] fit the profile of a sexually abused child. And one of the characteristics of that is that a sexually abused victim

> feels very helpless, powerless. And often they're unable to fight back. They have very low self-esteem and low confidence.

On redirect examination by the State, Stadler stated that M.M. did in fact exhibit the characteristic of helplessness often associated with the profile of a sexually abused child.

Dr. Sinal was qualified as an expert in pediatrics. She testified that she treated [M.M.] at Baptist Hospital in Winston-Salem in April 1988. Dr. Sinal stated that M.M. was admitted to the hospital because she had been "functioning as if she was paralyzed from the neck down." When tests for physical or neurological damage turned out negative, Dr. Sinal made a diagnosis of a "conversion reaction." She described a conversion reaction in the following manner:

> A conversion reaction is where a person has a paralysis, for example, is unable to move an arm or a leg, but there is not anything wrong with muscles or nerves. There is no neurological condition to explain that. And the way I understand it is that it's the result, usually, of very severe anxiety and sometimes depression.

Over repeated objections by counsel for the defendant, Dr. Sinal stated her opinion that M.M. had a conversion reaction resulting from sexual abuse. Furthermore, she opined that M.M. displayed other characteristics of sexual abuse, including suicidal tendencies, depression, anxiety, frustration at her inability to control events around her and an increasing feeling of being victimized. Dr. Sinal also testified "that in many incidents a feeling of powerlessness, unable to control the environment around you is a sign, a symptom of sexual abuse."

Dr. Haberkern was qualified as an expert in the area of child psychiatry. He testified that M.M. was admitted to his service on 4 April 1988. He was M.M.'s attending physician until her discharge on 12 May 1988 and continued treating her on an outpatient basis thereafter. Dr. Haberkern diagnosed M.M. as suffering from post-traumatic stress syndrome and conversion disorder. He described conversion disorder, or conversion reaction, as "an impairment of function that has the appearance of being physical in nature. It begins generally in the context of a significant psychological stress. . . ." In Dr. Haberkern's opinion, M.M.'s conversion reaction was consistent with characteristics of sexual abuse.

He stated that he knew of no other significant event in her life that could have led to such a reaction.

Dr. Haberkern also diagnosed M.M. for post-traumatic stress syndrome. He described this condition as follows:

> It is a response of an individual to what would be an emotionally traumatic event for anyone: Landslide, earthquake, fire, being told your mother has cancer, being raped, that in which the behavior pattern seems to consist of being flooded by memories associated with tremendous anxiety of the traumatic event alternating with what's termed psychic numbing, where one kind of shuts out one's receptiveness to everyday events. Also associated with a state of hyper-vigilance, hyper-awareness, alarm, feeling endangered.

He stated that this condition can last from several months to years. Dr. Haberkern further testified that feelings of powerlessness or helplessness, being unable to "fight back" or resist, and suicidal tendencies are also characteristic of sexual abuse.

Defendant repeatedly objected to the testimony of these three witnesses as it related to M.M.'s psychological status. The trial court overruled the objections and admitted the evidence. It did not, however, limit the permissible uses of such evidence.

B.

[1] We first consider Stadler's testimony and do so separately from the testimony of Sinal and Haberkern because we believe the subject matter of her statements to be of a different nature than those of the two, qualified experts. As such, it may well be outside the parameters of our order allowing discretionary review. As we understand the petition for discretionary review, defendant was to argue that the statements of the three witnesses regarding conversion disorders and post-traumatic stress syndrome are inadmissible. However, our review of the trial transcript shows that Stadler never discussed conversion disorders or post-traumatic stress syndrome during her testimony, as did Drs. Sinal and Haberkern. Stadler's testimony was limited to a discussion of the typical symptoms and characteristics of sexually abused children. She further stated that M.M.'s symptoms appeared to fit that "profile" of a sexually abused child. Because we are ultimately remanding this case for retrial, we have decided to discuss some difficulties we perceive to be present in the transcript.

This Court has already considered the admissibility of so-called "profile" evidence in *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987). In *Kennedy*, we stated that expert testimony on the symptoms and characteristics of sexually abused children is admissible to assist the jury in understanding the behavior patterns of sexually abused children. *Id.* at 32, 357 S.E.2d at 366. Furthermore, we allowed evidence that a particular child's symptoms were consistent with those of sexual or physical abuse victims, but only to aid the jury in assessing the complainant's credibility. *Id.* We note at the outset that the trial court here did not limit the permissible uses of the "profile" evidence as presented by Stadler.

Additionally, we are concerned that Stadler was never explicitly or implicitly qualified as an expert witness by the trial court. The Court of Appeals held that the trial court exercised its sound discretion in qualifying Stadler as an expert pursuant to *State v. Howard*, 78 N.C. App. 262, 270, 337 S.E.2d 598, 603 (1985), *disc. rev. denied*, 316 N.C. 198, 341 S.E.2d 581 (1986). We disagree. Although Stadler was not explicitly qualified by the trial court, her testimony was nevertheless permissible if she had been *implicitly* qualified as an expert on the profiles of sexually abused children. *State v. Aguallo*, 322 N.C. 818, 370 S.E.2d 676 (1988). In *Aguallo*, this Court found that similar testimony from a child protective services case worker and from a juvenile investigator was admissible where "the nature of their jobs and the experience which they possessed made them better qualified than the jury to form an opinion as to the characteristics of abused children." *Id.* at 821, 370 S.E.2d at 677. The *Aguallo* testimony was admitted over the general objections of the defendant where the defendant failed to specially request that the trial court make a finding as to the expert qualifications of the two witnesses. Absent such a request, we held that the trial court's admission of their testimony over defendant's general objections was an implicit holding that the witnesses were qualified to testify as experts. *Id.; see also State v. Phifer*, 290 N.C. 203, 225 S.E.2d 786 (1976), *cert. denied sub nom., Lawrence v. North Carolina*, 429 U.S. 1050, 50 L. Ed. 2d 766 (1977), *and cert. denied, Phifer v. North Carolina*, 429 U.S. 1123, 51 L. Ed. 2d 573 (1977). However, in the present case the record affirmatively reveals that Stadler was never *tendered* by the State as an expert witness. The transcript indicates that the prosecution purposefully did not tender Stadler as an expert

witness.[1] Only an expert in the field may testify on the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent with this profile.[2] *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987); *State v. Aguallo*, 322 N.C. 818, 370 S.E.2d 676 (1988).

C.

[2] The question of the admissibility of evidence that a prosecuting witness is suffering from post-traumatic stress syndrome has also been previously presented to our appellate courts. However, this Court has not finally resolved the extent of its permissible uses. The question first arose in *State v. Stafford*, 77 N.C. App. 19, 334 S.E.2d 799 (1985), *aff'd*, 317 N.C. 568, 346 S.E.2d 463 (1986). In an opinion written by Judge (now Justice) Webb, a majority panel of the Court of Appeals found that evidence regarding rape trauma syndrome[3] was inadmissible hearsay not within a hearsay

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1. At page 223 of the transcript, the prosecutor made the following statement to the trial judge during the direct examination of Stadler:

> I have not tendered her as an expert. I've not been allowed. I asked expert questions. Each time the Court sustained her opinion as to those characteristics and progression of those characteristics, how long they would last. I'm not asking her as an expert. I'm asking her as a counselor at Crossroads, Surry Friends of Youth, about this, which is [an] entirely different matter from the expert. We don't intend to ask the doctors that.

The affirmative statements by the prosecutor that he did not tender this witness as an expert witness distinguish the present case from *Aguallo*.

2. We express no opinion as to whether Stadler could or could not qualify as an expert in this field. As the Court of Appeals correctly pointed out, pursuant to *State v. Howard*, 78 N.C. App. 262, 270, 337 S.E.2d 598, 603 (1985), *disc. rev. denied*, 316 N.C. 198, 341 S.E.2d 581 (1986), this is a decision within the sound discretion of the trial court.

3. Although M.M. was not diagnosed as having "rape trauma syndrome," we consider it today for evidentiary purposes in the same light as post-traumatic stress syndrome. Rape trauma syndrome is apparently but one of several different variations of post-traumatic stress syndrome. The cases and commentaries that discuss rape trauma disorders highlight particular characteristics, such as fear of men, which do not necessarily occur in the more generic post-traumatic stress syndrome. *See People v. Taylor*, 75 N.Y.2d 277, 287, 552 N.E.2d 131, 135, 552 N.Y.S.2d 883, 891 (1990); *see generally*, Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 Minn. L. Rev. 395 (1985). Nevertheless, the symptoms and characteristics particular to post-traumatic stress disorder are also generally found in victims of rape trauma syndrome and other particularized variations of this disorder. *Id.*

exception. In *Stafford* the prosecuting witness communicated with a physician about her symptoms, not for the purpose of medical diagnosis or treatment, but rather in preparation for trial. *Stafford*, 317 N.C. at 568-69, 346 S.E.2d at 464. We affirmed the Court of Appeals decision holding that the evidence was inadmissible hearsay, specifically leaving open the question of the admissibility of rape trauma syndrome evidence. *Id.* at 575-76, 346 S.E.2d at 468.

The question of the admissibility of evidence that a prosecuting witness in a sex offense trial suffered post-traumatic stress syndrome was again presented to this Court in *State v. Godwin*, 320 N.C. 147, 357 S.E.2d 639 (1987). In *Godwin* we concluded that the State failed to lay a sufficient foundation to qualify its witness as an expert in what was, at the time, a newly emerging field. *Id.* at 151, 357 S.E.2d at 641. We held that the relatively recent recognition of the disorder, coupled with the lack of evidence that the witness had the proper education and experience to testify on that subject, precluded the witness's qualification as an expert witness. *Id.* Once again, we left open the issue presented to us today.

The Court of Appeals has since found this type of expert testimony on post-traumatic stress syndrome to be admissible, both in the case at bar, 98 N.C. App. 1, 390 S.E.2d 169, and in *State v. Strickland*, 96 N.C. App. 642, 387 S.E.2d 62, *disc. rev. denied*, 326 N.C. 486, 392 S.E.2d 100 (1990). Today, we specifically address the admissibility of evidence that the complainant suffered from post-traumatic stress syndrome, as well as evidence that she suffered a conversion disorder.

Courts in other jurisdictions have encountered difficulty in admitting evidence that a complainant suffers from these psychological disorders, but for reasons other than the relatively recent recognition of the disorders. *See People v. Taylor*, 75 N.Y.2d 277, 289-92, 552 N.E.2d 131, 136-38, 552 N.Y.S.2d 883, 888-90 (1990). Both disorders were identified by the American Psychiatric Association in their most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987) ("DSM III-R"). *See* DSM III-R at 247 ("Post-traumatic Stress Disorder"); DSM III-R at 257 ("Conversion Disorder"). As such, we believe that these disorders have gained sufficient recognition in the medical, and particularly the psychiatric, community to be considered as the proper subject of expert testimony.

Nevertheless, we remain concerned about the unlimited use of evidence that a prosecuting witness suffers from either disorder, especially where, as here, the expert testimony is admitted as substantive evidence that a rape has in fact occurred. There are two, primary problems when such evidence is employed to show that a rape has occurred. First, the psychiatric procedures used in developing the diagnosis are designed for therapeutic purposes and are not reliable as fact-finding tools to determine whether a rape has in fact occurred. Second, the potential for prejudice looms large because the jury may accord too much weight to expert opinions stating medical conclusions which were drawn from diagnostic methods having limited merit as fact-finding devices. In excluding rape trauma syndrome evidence, the California Supreme Court has stated that:

> [A]s a rule, rape counselors do not probe inconsistencies in their clients' descriptions of the facts of the incident, nor do they conduct independent investigations to determine whether other evidence corroborates or contradicts their clients' renditions. Because their function is to help their clients deal with the trauma they are experiencing, the historical accuracy of the clients' descriptions of the details of the traumatizing events is not vital in their task. To our knowledge, all of the studies that have been conducted in this field to date have analyzed data that have been gathered through this counseling process and, as far as we are aware, none of the studies has attempted independently to verify the "truth" of the clients' recollections or to determine the legal implication of the clients' factual accounts.

People v. Bledsoe, 36 Cal. 3d 236, 250, 681 P.2d 291, 300, 203 Cal. Rptr. 450, 459 (1984). The *Bledsoe* court also expressed its concern that rape trauma syndrome "does not consist of a relatively narrow set of criteria or symptoms whose presence demonstrates that the client or patient has been raped; rather, . . . it is an 'umbrella' concept, reflecting the broad range of emotional trauma experienced by clients of rape counselors." *Id.* at 250, 681 P.2d at 301, 203 Cal. Rptr. at 460. It is this lack of critical inquiry into the factual accuracy of complainant's story that renders this evidence's probative value slight, and its helpfulness to the jury minimal. Thus, the demand of Evidence Rule 702 that the special knowledge of the expert "assist the trier of fact to understand the evidence or to determine a fact in issue" is hardly met.

Furthermore, when it comes to the more general post-traumatic stress syndrome, rape is but one of several, possible causes of the disorder. DSM III-R at 247-48. As Dr. Haberkern pointed out in his testimony, there are a number of traumatic stimuli that potentially could trigger the syndrome. In those cases where post-traumatic stress syndrome evidence is admitted to prove sexual abuse has in fact occurred, we believe the potential for prejudice against the defendant looms large because of that aura of special reliability and trustworthiness often surrounding scientific or medical evidence. Thus, on balance, evidence that a prosecuting witness is suffering from post-traumatic stress syndrome should not be admitted for the substantive purpose of proving that a rape has in fact occurred.

Nonetheless, we will not exclude such evidence for all purposes and hold that it may be admitted for certain corroborative purposes. Although we find that evidence of post-traumatic stress syndrome does not alone prove that sexual abuse has in fact occurred, we believe that this should not preclude its admission at trial where the relevance to certain disputed issues has been shown by the prosecution.

We find support for our decision in *People v. Taylor*, 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990). In *Taylor*, the New York Court of Appeals found evidence of rape trauma syndrome to be admissible for the limited purpose of explaining why a rape victim may have been initially unwilling to report that the defendant was the person who attacked her. In a companion case, however, the *Taylor* court refused to permit the admission of such evidence for the sole purpose of proving that a rape had in fact occurred. *Id.* at 293, 552 N.E.2d at 138-39, 552 N.Y.S.2d at 890. Upon an exhaustive, insightful review of the myriad approaches which jurisdictions across the country have taken to the admission of post-traumatic stress disorder and rape trauma syndrome, the *Taylor* court concluded that such evidence could indeed aid the jury in reaching a verdict "by disspelling common misperceptions" about rape and sexual abuse. *Id.* at 292, 552 N.E.2d at 138, 552 N.Y.S.2d at 890. "[T]he reason why the testimony is offered will determine its helpfulness, its relevance and its potential for prejudice." *Id.*

We adopt similar reasoning in holding that the purposes for which such evidence is offered will ultimately determine the admissibility of evidence that the prosecuting witness suffers from

post-traumatic stress disorder or rape trauma syndrome. When the complainant testifies at trial that she has been sexually assaulted, the jury is given the unique and exclusive opportunity to access the credibility of her story, both on direct and cross examination. This is accomplished in a manner which is not usually available to the treating physician who generally assumes the veracity of the patient's account in formulating a diagnosis and treatment. The jury is also able to evaluate her story in light of other evidence adduced at trial. These factors ameliorate the lack of critical inquiry by therapists and may put the jury in an improved position to determine the complainant's credibility. However, jurors may not completely understand certain post-assault behavior patterns of a sexual assault victim and, as pointed out in *Taylor*, may entertain other misconceptions about the often bewildering nature of the crime of rape. Testimony that the complainant suffers from post-traumatic stress disorder may therefore cast light onto the victim's version of events and other, critical issues at trial. For example, testimony on post-traumatic stress syndrome may assist in corroborating the victim's story, or it may help to explain delays in reporting the crime or to refute the defense of consent.

This list of permissible uses is by no means exhaustive. The trial court should balance the probative value of evidence of post-traumatic stress, or rape trauma, syndrome against its prejudicial impact under Evidence Rule 403. It should also determine whether admission of this evidence would be helpful to the trier of fact under Evidence Rule 702. If the trial court is satisfied that these criteria have been met on the facts of the particular case, then the evidence may be admitted for the purposes of corroboration. If admitted, the trial judge should take pains to explain to the jurors the limited uses for which the evidence is admitted. In no case may the evidence be admitted substantively for the sole purpose of proving that a rape or sexual abuse has in fact occurred.

[3] Although conversion disorders are characterized by different symptoms, diagnoses and methodologies than is post-traumatic stress syndrome or rape trauma syndrome, DSM III-R at 257-59, we believe the same evidentiary approach should apply to each of these types of disorders. Like post-traumatic stress syndrome, conversion disorders are caused by severe psychological trauma. Also, as with the "syndrome" disorders, treatment is largely based on the assumption that the alleged victim's explanation of the causes of her problems is true. Thus, evidence a complainant is suffering

a conversion disorder, allegedly caused by sexual abuse, is fraught with the same reliability problems as similar testimony on post-traumatic stress syndrome. Likewise, the same threat of prejudice arises with expert testimony of either disorder due to that special reliability jurors often attach to scientific or medical evidence.

Therefore, evidence that a prosecuting witness has suffered a conversion reaction may be admitted for corroborative purposes to the same extent as evidence that she has suffered from post-traumatic stress syndrome. In both situations, the jury's opportunity to observe the witness under direct and cross examination, and to evaluate her story in light of other evidence, may make admission of such evidence more probative than prejudicial on the question of the prosecuting witness's credibility. Expert testimony of this type could also be helpful to the jury in understanding the nature and causes of these disorders, as well as the post-assault behavior patterns of the complainant.

D.

[4] Pursuant to the rule we have enunciated today, we find error in the admission of the expert testimony by Drs. Sinal and Haberkern. Dr. Sinal's testimony relating to M.M.'s treatment and condition largely addressed her conversion reaction to the alleged sexual abuse by her stepfather. Similarly, Dr. Haberkern's testimony indicated that M.M. suffered a conversion disorder, as evidenced by her paralysis, and from post-traumatic stress syndrome. The testimony of both witnesses, taken over defendant's repeated objections, was not limited by the trial court to any particular purpose. It was admitted for the substantive purpose of allowing the jury to infer that M.M. had in fact been raped. Because this evidence was not limited by the trial court to corroborating M.M.'s version of the events that transpired on 13 February 1988, we find error in its admission.

III.

[5] Finally, we must assess whether the admission of the proffered evidence of Drs. Sinal and Haberkern, as well as that of Judy Stadler, constituted reversible error requiring a new trial. We conclude that it did. The remaining evidence of the alleged sexual abuse was in sharp conflict. The State portrayed defendant as taking sexual gratification by raping M.M., perhaps as part of an ongoing scheme or plan that had previously included taking inde-

cent liberties with the child. This portrayal was based exclusively on the testimony of M.M. There was no physical evidence of rape or sexual abuse. Meanwhile, defendant's evidence portrayed M.M. as vindictively attempting to have defendant reincarcerated. There were several witnesses who testified that M.M. was dishonest to the point that she would lie on the stand about the rape, in order to have her stepfather put back in jail. Even M.M.'s mother testified on behalf of defendant that she was in the next room and heard nothing on the night in question. In light of this conflict, defendant has shown under N.C.G.S. § 15A-1443(a) that there is a reasonable possibility he would have been acquitted of the charges had evidence of the disorders not been erroneously admitted against him.

IV.

[6] Defendant's second assignment of error deals with certain documents contained in a file used by Detective Gray Shelton of the Mount Airy Police Department during his testimony for the State. Detective Shelton was the investigating officer on this case. At trial, following Detective Shelton's direct examination, defense counsel requested that counsel be allowed to examine Detective Shelton's file. The State objected to the disclosure of certain notes contained in the file which, it argued, were not discoverable. The trial judge excused the jurors, and proceeded to an *in camera* review of the notes in question. The trial judge found that, pursuant to Rule 612 of the North Carolina Rules of Evidence, these notes contained privileged information about the prosecuting witness which it would not be in the interests of justice to disclose. He further found that Detective Shelton had not used this information to refresh his memory before testifying. The trial judge then ordered the documents in question sealed for appellate review.

This Court has previously held that it is not error for the trial court to refuse to afford defendant access to notes carried to the witness stand by an investigating officer who does not refer to them during his testimony. *State v. Jackson*, 302 N.C. 101, 106-07, 273 S.E.2d 666, 671 (1981). The trial court employed the proper procedures pursuant to the dictates of Evidence Rule 612. Defendant's argument is, therefore, rejected.

V.

Based on defendant's first assignment of error, we reverse the decision of the Court of Appeals and remand to that court,

with further instructions that it remand the case to the Superior Court, Surry County, for a new trial consistent with this opinion. Defendant's second assignment of error is overruled.

Reversed and remanded.

Justice WHICHARD dissenting.

I agree with the Court of Appeals that the evidence in question was a proper subject for expert testimony. *See State v. Hall*, 98 N.C. App. 1, 7-8, 390 S.E.2d 169, 172-73 (1990). Most jurisdictions apparently allow such evidence. *See State v. Strickland*, 96 N.C. App. 642, 646-47, 387 S.E.2d 62, 65 (1990). It clearly has some "tendency to make the existence of [a] fact that is of consequence to the determination of the action [*i.e.*, the alleged rape] more probable . . . than it would be without the evidence," and it thus meets the statutory test for relevancy. N.C.G.S. § 8C-1, Rule 401 (1988). The concerns presented in the majority opinion are properly addressed by cross-examination, introduction of rebuttal evidence (expert or otherwise), and jury argument, not by exclusion of the testimony as substantive evidence. The concerns properly relate to the weight or credibility of the evidence, not its admissibility.

I share the following view expressed by Judge John C. Martin in a dissenting opinion for the Court of Appeals:

> I would hold such expert testimony admissible. There is recognized scientific authority for the medical conclusion that there exists a complex and unique number of physical and emotional symptoms exhibited by victims of rape, which are similar, but not identical, to other post-traumatic stress disorder symptoms. . . . An understanding of those symptoms, the unique reactions of victims of rape, is not within the common knowledge or experience of most persons called upon to serve as jurors. Therefore, expert testimony as to the symptoms of the syndrome and its existence, is admissible to assist the jurors in understanding the evidence and in drawing appropriate conclusions therefrom. . . .
>
> To say that such evidence is irrelevant misinterprets relevance. G.S. 8C-1, Rule 401 makes relevant "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." Just

as evidence of physical injury has been admissible as relevant to the issue of rape, so should evidence of emotional injury to the victim be relevant to show that it is more likely that a rape occurred. Neither should the expert testimony be excluded on the grounds of unfair prejudice. . . . [T]he admission of expert testimony as to the symptoms or existence of rape trauma syndrome is no more inflammatory, prejudicial or invasive of the province of the jury as the judges of credibility and fact than any other expert testimony.

State v. Stafford, 77 N.C. App. 19, 26-27, 334 S.E.2d 799, 803-04 (1985) (Martin, J., dissenting) (citations omitted), *aff'd*, 317 N.C. 568, 346 S.E.2d 463 (1986).

I therefore respectfully dissent.

Justices MITCHELL and WEBB join in this dissenting opinion.

STATE OF NORTH CAROLINA v. BENJAMIN F. HOLMES AND BERNARD PENN

No. 24PA91

(Filed 31 January 1992)

Evidence and Witnesses § 2607 (NCI4th)— murder—testimony by wife against husband—not admissible

The trial court erred in a murder prosecution by admitting into evidence over defendant's objection privileged, confidential communications between defendant and his wife. N.C.G.S. § 8-56 provides essentially that while no husband or wife shall be compellable to disclose any confidential communications made by one to the other during their marriage, each is "competent and compellable to give evidence, as any other witness, on behalf of any party to such suit, action, or proceeding." On the other hand, N.C.G.S. § 8-57, when read properly, provides that the spouse of a defendant is competent to testify for the State and against defendant in five instances listed in the statute, provided that "[n]o husband or wife shall be compellable *in any event* to disclose any confidential communications made by one to the other during their marriage." Neither of these statutes destroys the common law privilege against

disclosure of confidential marital communications; rather, they protect the privilege.

Am Jur 2d, Witnesses §§ 149-151.

Justice WEBB dissenting

Justices MEYER and MITCHELL join in this dissenting opinion.

ON writ of certiorari pursuant to N.C.G.S. § 7A-32(b) and Rule 21(a)(2) of the Rules of Appellate Procedure to review a unanimous decision of the Court of Appeals, 101 N.C. App. 229, 398 S.E.2d 873 (1990), ordering a new trial for defendant Penn but finding no error in the trial of defendant Holmes wherein judgment was entered on 16 December 1988 by *Beaty, J.*, in Superior Court, FORSYTH County. Heard in the Supreme Court 15 October 1991.

Lacy H. Thornburg, Attorney General, by Mabel Y. Bullock, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellee Penn.

FRYE, Justice.

Defendants Holmes and Penn were tried together for the murder of "Danny Boy" Hooper. The State's evidence showed that on 11 January 1988, Holmes, Penn, and the deceased left a liquor house in an automobile driven by Penn. Approximately twenty-four hours later, Hooper's body was found lying in some woods in Winston-Salem.

The State called as a witness Debra Penn, the wife of defendant Penn and the sister of defendant Holmes. Penn objected to the testimony of his wife as to a conversation they had when no one else was present and to certain conduct by him which she observed at that time. After a voir dire hearing out of the presence of the jury, the court overruled Penn's objection.

The issue in this case is whether a witness spouse may testify at trial as to confidential communications made to her by defendant spouse over defendant spouse's objection and assertion of privilege. We hold that she may not.

Over defendant Penn's objection, Debra Penn testified that at approximately 3:15 p.m., on 11 January 1988, defendant Penn, Holmes, and Hooper came to the house in which she lived with defendant Penn and their children. After Hooper used the telephone, Penn told Holmes and Hooper "to go outside—step out on the porch, that he wanted to talk to [Debra] about something." After the two men left, Penn took a gun from a cabinet. He told his wife that he was "going to shoot and kill the guy, Danny Boy, because he had messed up his money." Debra Penn testified further that Penn, whom she said trusted her, wrapped the gun in a sweater and left with the others at approximately 3:40 p.m. She said that Penn returned at approximately 11:30 p.m. that night. She admitted she told an entirely different story to the officers on 13 January 1988.

Both Holmes and Penn were found guilty of second degree murder. The trial court found as an aggravating factor for each defendant that he had a prior conviction or convictions for criminal offenses punishable by more than sixty days confinement. The court found no mitigating factors for either defendant and sentenced each of them to fifty years in prison.

The Court of Appeals found no error in the trial of Holmes. It ordered a new trial for Penn (hereinafter defendant) because Penn's wife was allowed to testify, over his objection, as to confidential communications between them. On 7 February 1991, we allowed the State's petition for certiorari to review the decision of the Court of Appeals as it pertains to defendant Penn.

The State contends that Debra Penn was competent to testify about her husband's confidential marital communications and that the privilege pertaining to such communications belonged to her and not to her husband. Defendant contends that the Court of Appeals correctly determined that he is entitled to a new trial because the trial court erroneously admitted privileged confidential communications between him and his wife into evidence. We agree with defendant and affirm the decision of the Court of Appeals.

The common law has long recognized a privilege protecting confidential marital communications, that is, information privately disclosed between a husband and wife in the confidence of the marital relationship. *See Trammel v. United States*, 445 U.S. 40, 63 L. Ed. 2d 186 (1980) (citing *Blau v. United States*, 340 U.S. 332, 95 L. Ed. 306 (1951)). This privilege is different from and independent of the general common law rule making the spouse

of a defendant incompetent to testify either for or against the defendant in a criminal proceeding. *Trammel*, 445 U.S. 40, 63 L. Ed. 2d 186. At common law, the general rule regarding spousal testimony was that neither spouse could testify for or against the other in either a civil or criminal proceeding. *Rice v. Keith*, 63 N.C. 319 (1869). This spousal incompetency rule was later relaxed to provide that a spouse was competent to testify in favor of the other spouse and be subject to cross-examination. *See generally* Douglas P. Arthurs, Note, *Spousal Testimony in Criminal Proceedings*, 17 Wake Forest L. Rev. 990. This modification of the general rule of spousal incompetency gave rise to a rule against adverse spousal testimony. *See id.* The rule against adverse spousal testimony, although subject to a few exceptions, left intact the privilege against the disclosure of confidential marital communications. *See State v. Jolly*, 20 N.C. (3 Dev. & Bat.) 108 (1838) (recognizing the rule concerning confidential marital communications). This privilege protected both spouses such that neither spouse could disclose a confidential marital communication over the objection of the other. *Supra* Note, 17 Wake Forest L. Rev. at 1000-01.

The State contends that N.C.G.S. § 8-57 abolishes the common law rule against the disclosure of confidential marital communications, leaving only a rule against being *compelled* to disclose a confidential marital communication. The State argues that section 8-57(b) makes the spouse competent to testify, and section 8-57(c) gives the privilege of not being compelled to the witness spouse, thus effectively overruling *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981). We disagree. We believe that while section 8-57 modifies the rule against adverse spousal testimony, it preserves the rule against disclosure of confidential marital communications.

Section 8-57 provides:

> (a) The spouse of the defendant shall be a competent witness for the defendant in all criminal actions, but the failure of the defendant to call such spouse as a witness shall not be used against him. Such spouse is subject to cross-examination as are other witnesses.
>
> (b) The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action or grand jury proceedings, except that the spouse of the defendant shall be both competent and compellable to so testify:

(1) In a prosecution for bigamy or criminal cohabitation, to prove the fact of marriage and facts tending to show the absence of divorce or annulment;

(2) In a prosecution for assaulting or communicating a threat to the other spouse;

(3) In a prosecution for trespass in or upon the separate lands or residence of the other spouse when living separate and apart from each other by mutual consent or court order;

(4) In a prosecution for abandonment of or failure to provide support for the other spouse or their child;

(5) In a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any illegitimate or adopted or foster child of either spouse.

(c) *No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage.*

N.C.G.S. § 8-57 (1986) (emphasis added).

Prior to its amendment in 1983, section 8-57 provided as follows:

Husband and wife as witnesses in criminal actions.

The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. *No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.* Nothing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding, except to prove the fact of marriage and facts tending to show the absence of divorce or annulment in cases of bigamy and in cases of criminal cohabitation in violation of the provisions of G.S. 14-183, and except that in all criminal prosecutions of a spouse for an assault upon the other spouse,

> all criminal prosecutions of a spouse for communicating a threat to the other spouse, or in any criminal prosecution of a spouse for trespass in or upon the separate residence of the other spouse when living separate and apart from each other by mutual consent or by court order, or for any criminal offense against a legitimate or illegitimate or adopted or foster minor child of either spouse, or for abandonment, or for neglecting to provide for the spouse's support, or the support of the children of such spouse, it shall be lawful to examine a spouse in behalf of the State against the other spouse: Provided that this section shall not affect pending litigation relating to a criminal offense against a minor child.

(Emphasis added.)

The State contends, essentially, that the legislature in 1983 amended N.C.G.S. § 8-57 so as to make the spouse competent but not compellable to testify against a defendant spouse regarding a confidential marital communication, thus overruling *Freeman*. While this view seems plausible at first glance, when the history of this statute is considered together with the cases interpreting it, it is clear that the 1983 version of section 8-57 is consistent with *Freeman*. As explained in the commentary to Rule 601 of the North Carolina Rules of Evidence, the Court in *Freeman* "removed the incompetence to testify against the other spouse (except to the extent that it preserved the privilege against disclosure of confidential communications)." N.C.G.S. § 8C-1, Rule 601 cmt. (1988). While the Court used the words "incompetent to testify" as to confidential marital communications, the effect of the Court's holding was to preserve the privilege against disclosure of confidential marital communications.

In North Carolina, the common law rule preventing one spouse from testifying on behalf of the other in a criminal proceeding was abandoned by statute many years ago. *Freeman*, 302 N.C. at 595, 276 S.E.2d at 452. The incompetency of the wife as a witness for her husband was abandoned by the legislature in 1881. 1881 N.C. Sess. Laws, ch. 110, s. 3 ("on the trial of all criminal actions, the wife of the defendant shall be a competent witness for defendant"). Through various amendments and rewrites, this provision is now codified as N.C.G.S. § 8-57(a) as follows:

> (a) The spouse of the defendant shall be a competent witness for the defendant in all criminal actions, but the failure of

> the defendant to call such spouse as a witness shall not be used against him. Such spouse is subject to cross-examination as are other witnesses.

This subsection carries forward the first two sentences of N.C.G.S. § 8-57 as it appeared in the General Statutes at the time that *Freeman* was decided. The next sentence of the statute, at the time of *Freeman*, was as follows: "No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage." This sentence, we believe, made it clear that, notwithstanding the right to cross-examine a spouse testifying on behalf of another spouse, this right of cross-examination did not encompass the right to compel the testifying spouse to disclose a confidential marital communication. This same provision has remained a part of N.C.G.S. § 8-57 through several amendments, and appears in the current version as subsection (c) with the insertion of the words "in any event" between the words "compellable" and "to." N.C.G.S. § 8-57(c).

The common law rule against adverse spousal testimony has been modified by statute in North Carolina, creating several exceptions. *See, e.g.*, 1856-57 Sess. Laws, ch. 23 ("in all criminal prosecutions of a husband for an assault and battery upon the person of the wife, it shall and may be lawful to introduce and examine the wife in behalf of the State against her said husband; any law or custom to the contrary notwithstanding"); 1868-69 Sess. Laws, ch. 210, s. 4 (wife competent witness to fact of abandonment or neglect to provide adequate support for wife and children); 1957 N.C. Sess Laws, ch. 1036, s. 1 (rewriting fourth sentence of N.C.G.S. § 8-57 to provide: "Nothing herein shall render any husband or wife competent or compellable to give evidence against each other in any criminal action or proceeding, except to prove the fact of marriage and facts tending to show the absence of divorce . . . and except that [in certain other cases] it shall be lawful to examine the wife in behalf of the State against the husband.").

Except as modified by N.C.G.S. § 8-57, the common law rule against adverse spousal testimony remained in full effect in North Carolina at the time this Court decided the case of *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450. As stated by the Court in *Freeman*, "G.S. 8-57 and its predecessors merely state that, aside from the exceptions listed therein, the common law rule pertaining to the competency of spouses to testify against each other remains un-

changed and in full effect." *Id.* at 594, 276 S.E.2d at 452. The Court then proceeded to change the common law rule against adverse spousal testimony by abolishing it in its entirety except as necessary to preserve the privilege against disclosure of confidential marital communications. Although the language used by the Court was consonant with the language used in the statute, it is clear from the Court's reasoning that the exception protected the confidential marital communications privilege. "Henceforth, spouses shall be incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a 'confidential communication' between the marriage partners made during the duration of their marriage. This holding allows marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation." *Id.* at 596, 276 S.E.2d at 453-54.

The *Freeman* Court's holding regarding the privilege against disclosure of confidential marital communications is further illuminated by its reference to N.C.G.S. § 8-56, "the statute preserving a privilege in civil actions not to testify as to 'confidential communications' with one's spouse." *Id.* at 598, 276 S.E.2d at 454. Whether the challenged testimony includes a "confidential communication" within the meaning of the new rule "is to be determined by the guidelines set forth in our previous decisions interpreting the term under G.S. 8-56," the Court said. Applying those guidelines to the case before it, the *Freeman* Court held that the testimony in question related to actions of defendant husband in a public parking lot in the presence of a third person and therefore "could not have been a communication made in the confidence of the marital relationship or one which was induced by affection and loyalty in the marriage. [Citations omitted.] Consequently, Mrs. Freeman's testimony is competent and admissible under the rule adopted in this case." *Id.*, 276 S.E.2d at 455.

While our cases and statutes have not been models of clarity, collectively they stand for the proposition that a confidential communication between husband and wife is privileged and that this privilege, even in criminal cases, survives both the North Carolina Rules of Evidence and the amendments to N.C.G.S. § 8-57. The statute makes it clear that neither spouse may be compelled to disclose confidential communications between husband and wife when testifying as a witness. The fact that a witness is *competent* to testify, even as to a confidential communication, and the fact

that the spouse is willing to testify, do not answer the question of whether a witness may voluntarily give such testimony over the objection of the defendant spouse who asserts a privilege against such testimony.

N.C.G.S. § 8-56 provides essentially that while no husband or wife shall be compellable to disclose any confidential communications made by one to the other during their marriage, each is "competent and compellable to give evidence, as any other witness, on behalf of any party to such suit, action or proceeding." On the other hand, N.C.G.S. § 8-57, when read properly, provides that the spouse of a defendant is competent to testify for or against a defendant and may be compelled to testify for the State and against defendant in the five instances listed in section 8-57(b), provided that "[n]o husband or wife shall be compellable *in any event* to disclose any confidential communications made by one to the other during their marriage." N.C.G.S. § 8-57(c) (emphasis added). Neither of these statutes destroys the common law privilege against disclosure of confidential marital communications; rather, they protect the privilege.

Section 8-57.1 provides that notwithstanding the provisions of sections 8-56 and 8-57, "the husband-wife *privilege* shall not be ground for excluding evidence [under certain circumstances relating to the abuse or neglect of a child under the age of sixteen years]." (Emphasis added.) The "privilege" is the spousal privilege of preventing the other spouse from disclosing any confidential communication made by one to the other during their marriage as set out in section 8-56, and the defendant spouse's privilege protected in section 8-57(c) to keep the other spouse *in any event* from disclosing any confidential communication made by one to the other during their marriage. If, as the State suggests, section 8-57 abolished the husband-wife privilege against disclosure of confidential communications made by one to the other during their marriage, section 8-57.1 would seem to be unnecessary. The same is true for section 8-57.2 which permits the presumed father or mother of a child to testify regarding paternity of the child, including nonaccess, "regardless of any *privilege* which may otherwise apply." (Emphasis added.)

This Court has not always spoken with clarity when discussing "privilege." In *State v. Britt*, 320 N.C. 705, 709 n.1, 360 S.E.2d 660, 662 n.1 (1987), we noted that "the privilege belongs to the

wife, and not to the defendant, and it does not appear that anyone advised her that she had a right to refuse to testify." The privilege in *Britt*, as noted by this Court in *State v. McQueen*, 324 N.C. 118, 137, 377 S.E.2d 38, 49 (1989), is the privilege of choosing not to testify against the other spouse. This should not be confused with the privilege of the communicating spouse to prevent disclosure of confidential marital communications.

In the instant case, we agree with the Court of Appeals that "all of the circumstances . . . show that Penn's statements were induced by the confidence of his marital relationship." At trial, when the State called Debra Penn as a witness, defendant Penn immediately objected and asserted his privilege. Debra Penn testified, over this objection, that on 11 January 1988 she was at home when Penn, Holmes, and Hooper arrived. After a few minutes, defendant instructed the two other men to go outside the house because he wanted to talk to his wife about something. After the two men left, and while defendant and his wife were alone, defendant reached into a kitchen cabinet and took out a gun. Defendant then told Debra Penn, his wife, that he was going to shoot and kill Hooper because Hooper had "messed up some of his money." Defendant then wrapped the gun in a sweater and left. Debra Penn testified that defendant trusted her. All of these circumstances clearly show that defendant's statements, made only in the presence of his wife, were induced by the confidence of the marital relationship. *See Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799 (1967). We hold, therefore, that these statements were privileged and protected. We also believe that defendant's actions in the room alone with his wife were protected. An action may be protected if it is intended to be a communication and is the type of act induced by the marital relationship. *See generally State v. Suits*, 296 N.C. 553, 251 S.E.2d 607 (1979); *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978). Just like the statements at issue here, defendant's actions also appear to have arisen out of the trust engendered by his marriage to Debra Penn. Accordingly, we hold that the wife's testimony regarding defendant's removal of the gun was also inadmissible over defendant's objection.

We agree with the Court of Appeals that the trial court erred in allowing Debra Penn to testify over defendant's objection as to confidential marital communications made to her by defendant. Defendant had the right to assert the privilege against his wife and prohibit her from testifying both about his statements to her

and about his actions in procuring the firearm. Accordingly, we agree with the unanimous panel of the Court of Appeals that defendant Penn is entitled to a new trial because the trial court admitted into evidence over his objection, privileged, confidential communications between him and his wife. We therefore affirm the decision of the Court of Appeals.

Affirmed.

Justice WEBB dissenting.

I dissent from the majority. It appears to me that the resolution of this case depends on what the General Assembly intended for the word "competent" to mean. The majority says that although the General Assembly has made persons competent to testify against their spouses, a defendant spouse has the privilege to prevent the disclosure of confidential communications between the parties. I believe the majority is in error.

I believe that the parts of N.C.G.S. § 8-57(b) that render a spouse competent to testify without any stated exception for confidential communications, coupled with the statement in subsection (c) that a spouse is not compellable to testify as to a confidential communication, shows that the General Assembly intended to make a spouse able to testify as to confidential communications in spite of an objection by the defendant spouse. If a defendant can stop his or her spouse from testifying as to confidential communications, there is no need for that part of subsection (c) which provides that a spouse may not be compelled to testify as to confidential communications. The majority has made this part of the statute to be surplus.

The majority says the "common law has long recognized a privilege protecting confidential marital communications, that is, information privately disclosed between a husband and wife in the confidence of the marital relationship." If this is true it has never before today in this jurisdiction been recognized independently of the rule which made a person incompetent to testify against his or her spouse. Prior to *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981), a person was incompetent to testify against his or her spouse. There was no reason for a rule barring testimony as to confidential communications. I believe the rule excluding confidential marital communications was based on the incompetency

of a spouse as a witness and when the incompetency was removed that removed the bar to confidential communications.

One difficulty with the majority opinion is that it treats N.C.G.S. § 8-57 as not being complete. I believe when this section was revised and adopted by the General Assembly, it was intended to state the law as to marital testimony. The majority holds that there is a phase of the law dealing with confidential communications which is not covered by the statute. This is contrary to the manner in which the General Assembly normally operates and I do not believe it was its intention to leave a part of the law uncovered.

As the majority observes, in *State v. Freeman*, 302 N.C. 591, 596, 276 S.E.2d 450, 453, we said, when speaking of confidential marital communications, that a spouse was incompetent to testify to them. It is only natural that when the General Assembly was revising N.C.G.S. § 8-57 it would believe it could change the rule by saying the person is competent to testify against his or her spouse.

I vote to reverse the Court of Appeals.

Justices MEYER and MITCHELL join in this dissenting opinion.

JOE C. MEDLEY v. NORTH CAROLINA DEPARTMENT OF CORRECTION

No. 360PA90

(Filed 31 January 1992)

State § 8.3 (NCI3d)— inmates—medical care—doctor as agent of state

A doctor was an agent of the state as a matter of law for whose negligence the State is liable under the Tort Claims Act regardless of whether the doctor was an employee or an independent contractor. The duty to provide adequate medical care to inmates, imposed by the state and federal Constitutions, and recognized in state statute and case law, is such a fundamental and paramount obligation of the State that the State cannot absolve itself of responsibility by delegating it to another. When a principal has a nondelegable duty, one with whom the principal contracts to perform that

duty is as a matter of law an agent for purposes of applying the doctrine of respondeat superior.

Am Jur 2d, Penal and Correctional Institutions § 93.

Justice MARTIN concurring.

ON appeal pursuant to N.C.G.S. § 7A-30 and discretionary review pursuant to N.C.G.S. § 7A-31(c) from the decision of the Court of Appeals, 99 N.C. App. 296, 393 S.E.2d 288 (1990), reversing a decision and order entered 25 August 1989 by the North Carolina Industrial Commission. Heard in the Supreme Court 12 February 1991.

North Carolina Prisoner Legal Services, Inc., by Richard E. Giroux, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kim L. Cramer, for defendant-appellant.

EXUM, Chief Justice.

This appeal arises from a medical negligence claim filed with the North Carolina Industrial Commission by plaintiff, an inmate at Odom Correctional Institution, against the Department of Correction (DOC) under the North Carolina Tort Claims Act, N.C.G.S. § 143-291. Defendant filed answer and motion to dismiss the claim insofar as it was based on the alleged negligence of Dr. John H. Stanley, a physician who had treated plaintiff. The motion to dismiss was grounded on the allegation that at the time of the alleged negligence Dr. Stanley was an independent contractor and not an officer, employee, involuntary servant or agent of the state within the meaning of the Tort Claims Act. On 23 January 1989 Deputy Commissioner Page issued an order holding that Dr. Stanley was an independent contractor not subject to the Tort Claims Act. The order treated defendant's motion as one for summary judgment as to Dr. Stanley and granted that motion. Plaintiff appealed the order to the Full Commission pursuant to N.C.G.S. § 143-292. On 25 August 1989 the Full Commission entered a decision and order affirming Deputy Commissioner Page's order. Plaintiff appealed the Commission's decision to the Court of Appeals pursuant to N.C.G.S. § 143-293.

The Court of Appeals agreed that Dr. Stanley was not an employee of DOC, but it reversed the decision below on the ground

that DOC had a nondelegable duty to provide medical care to inmates. Defendant petitioned this Court for discretionary review, which we granted on 30 August 1990.

We need not review the Court of Appeals' ruling that Dr. Stanley was as a matter of law not an employee of DOC. We conclude that regardless of whether Dr. Stanley was an employee or an independent contractor, he was as a matter of law an agent of the state because he was performing a nondelegable duty for the state. We, consequently, affirm the Court of Appeals' decision.

I.

Pleadings and evidence presented to the Industrial Commission tend to show the following:

Plaintiff, a diabetic, developed an infection under his left great toenail in April 1984. On 3 April 1984 Dr. Stanley examined plaintiff at Odom Correctional Institution (Odom) and diagnosed plaintiff's infection as being due to an ingrown toenail. Dr. Stanley prescribed an antibiotic. On 6 April 1984 Dr. Stanley again examined plaintiff and removed the toenail. Four days later, on 10 April 1984, Dr. Stanley again examined plaintiff and found the toe was quite dark. He transferred plaintiff to Central Prison Hospital for further surgical treatment. At Central Prison another physician diagnosed plaintiff as suffering from diabetic gangrene of the left great toe and performed a limited amputation of the toe. The wound from that operation failed to heal, and an above-knee amputation was performed on the leg on 14 May 1984.

Dr. Stanley began working as the unit physician at Odom Correctional Institution on 1 July 1981. The contract relevant to this action required Dr. Stanley, for a five-year period beginning 1 January 1984, at a salary of $1,250 a month, to provide medical services for inmates at Odom twice weekly and in emergency situations at any time. Either party could terminate the agreement upon thirty days' written notice to the other. Dr. Stanley was not provided benefits, such as a retirement pension, enjoyed by full-time state employees. Nor was any money withheld from his pay for taxes or social security benefits.

Richard K. Panek, Director of Health Services for DOC's Division of Prisons, stated in an affidavit that physicians working in prison units are subject to the administrative authority of unit

superintendents. Unit physicians are required to comply with DOC regulations concerning inmate health care.

Defendant's answers to interrogatories established that once a year a state medical audit team reviews medical records at Odom, and that a unit physician's contract is renewed by approval of several DOC officials, including the Director of Health Services, the Director of the Division of Prisons, and the Secretary of DOC.

During the time plaintiff was treated by him, DOC required Dr. Stanley to conform to regulations governing inmate health care. Until last year, the North Carolina Administrative Code required the Director of Health Services for the Division of Prisons to have on staff a Chief of Health Services responsible for developing and implementing procedures for inmate health care. The Code further required prison physicians to defer their judgment when security regulations conflicted with the performance of medical treatment: "Matters of medical . . . health involving clinical judgment are the sole province of the responsible physician . . . . However, these services must be provided in keeping with the security regulations of the facility." NCAC 2E.0204 (Feb. 1976) (amended eff. Sept. 1980) (repealed eff. Nov. 1991).

II.

We hold, for reasons discussed below, that at the time he treated plaintiff Dr. Stanley was as a matter of law an agent of the state for whose alleged negligence the state is liable under the Tort Claims Act.

The Tort Claims Act encompasses claims arising from

> the negligence of any officer, employee, involuntary servant or agent of the State while acting in the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C.G.S. § 143-291 (1990). The legislature has not defined the term "agent" in the Tort Claims Act. "Under the Tort Claims Act negligence, contributory negligence and proximate cause, as well as the applicability of the doctrine of respondeat superior, are to be determined under the same rules as those applicable to litiga-

tion between private individuals." *Barney v. Highway Comm.*, 282 N.C. 278, 284, 192 S.E.2d 273, 277 (1972).

The Court of Appeals concluded that DOC is liable for Dr. Stanley's alleged negligence because the state has a nondelegable duty to provide adequate medical care for persons it incarcerates. We agree with this conclusion and hold that because the state's nondelegable duty renders an independent contractor hired to perform that duty an agent of the state as a matter of law, plaintiff's claim falls within the State Tort Claims Act and should be heard by the Commission.

A nondelegable duty may arise from circumstances recognized at common law and statute, and in "situations wherein the Law views a person's duty as so important and so peremptory that it will be treated as nondelegable. Defendants who are under such a duty '. . . cannot, by employing a contractor, get rid of their own duty to other people, whatever the duty may be.' " 5 Fowler V. Harper et al., *The Law of Torts* § 26.11, at 83 (2d ed. 1986) (quoting *Hardaker v. Idle Dist. Council*, 1 Q.B. 335, 340 (C.A.) (1896)). "It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 71, at 512 (5th ed. 1984). The nondelegable duty theory is an exception to the rule of nonliability by a principal for the work of independent contractors. The exception 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." Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts* § 23.31, at 392-93 (1991).

The Restatement (Second) of Torts notes that a nondelegable duty can be based on a statute or regulation imposing a duty on one person or entity to care for others:

> One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

Restatement (Second) of Torts § 424, at 411 (1963).

This Court has recognized as nondelegable a duty of care arising from important policy in the absence of a statute. In *Pace v. Pace*, 244 N.C. 698, 699, 94 S.E.2d 819, 821 (1956), the Court noted public policy that a father provide for his minor children, " 'a duty he may not shirk, contract away, or transfer to another' " (quoting *Ritchie v. White*, 225 N.C. 450, 453, 35 S.E.2d 414, 415 (1945)). Just as a minor child is, relative to his adult parents, less able to care for himself, so is a prison inmate who is prevented from seeking medical care outside the prison less able to care for himself than are his custodians.

North Carolina courts and lawmakers have long recognized the state's duty to provide medical care to prisoners. "The prisoner by his arrest is deprived of his liberty for the protection of the public; it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926). *See also State v. Sparks*, 297 N.C. 314, 321, 255 S.E.2d 373, 378 (1979) (acknowledging state's duty to provide necessary medical care to inmates). Our legislature has codified this duty in a statute requiring DOC to "prescribe standards for health services to prisoners, which shall include preventive, diagnostic, and therapeutic measures on both an outpatient and hospital basis, for all types of patients." N.C.G.S. § 148-19 (1991). In furtherance of those standards, the statute also requires DOC to "seek the cooperation of public and private agencies, institutions, officials and individuals in the development of adequate health services to prisoners." *Id.*

In addition to common-law and statutory duties to provide adequate medical care for inmates, the state also bears this responsibility under our state Constitution and the federal Constitution. In *West v. Atkins*, 487 U.S. 42, 56, 101 L. Ed. 2d 40, 54 (1988), the Supreme Court of the United States interpreted the Cruel and Unusual Punishment Clause of the Eighth Amendment to impose a duty on prisons to provide medical care for inmates:

> Whether a physician is on the State payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner. Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those

> in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights.

Likewise relevant is the United States Supreme Court's view in *Estelle v. Gamble*, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 261 (1976), that the government has an "obligation to provide medical care for those whom it is punishing by incarceration." The *Estelle* decision explained the constitutional basis for this duty:

> An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," the evils of most immediate concern to the drafters of the [Eighth] Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.

Id. (citations omitted).

More recently the United States Supreme Court, through Chief Justice Rehnquist, acknowledged "that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 198, 103 L. Ed. 2d 249, 260 (1989). The Court explained further:

> The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Deshaney, 489 U.S. at 200, 103 L. Ed. 2d at 262 (citing *Estelle*, 429 U.S. 93, 50 L. Ed. 2d 251, and *Youngberg v. Romeo*, 457 U.S. 307, 73 L. Ed. 2d 28 (1982)).

Defendant notes that the *Estelle* Court held that only deliberate indifference to a prisoner's medical needs, and not mere medical malpractice in prison, violates the Eighth Amendment. *Estelle*, 429 U.S. at 106, 50 L. Ed. 2d at 261. The *West* Court interpreted *Estelle* to require the state to provide "adequate medical care

to those whom it has incarcerated." *West*, 487 U.S. at 54, 101 L. Ed. 2d at 53. The *West* Court also referred to the state's duty under the Eighth Amendment "to provide essential medical care" for inmates. The *Deshaney* Court interpreted *Estelle* to provide that "the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth Amendment's Due Process Clause, requires the State to provide adequate medical care to incarcerated prisoners." *Deshaney*, 489 U.S. at 198, 103 L. Ed. 2d at 260 (citation omitted). The United States Supreme Court seems to interpret the Eighth Amendment to impose on states a broad duty—to provide "adequate medical care" to inmates—while at the same time allowing actions under section 1983 only for deliberate breaches of that duty. *See Whitley v. Albers*, 475 U.S. 312, 319, 89 L. Ed. 2d 251, 260-61 (1986) ("It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause."). A less egregious breach, such as negligence, is actionable against the state in tort. *See Estelle*, 429 U.S. at 107, 50 L. Ed. 2d at 262 (medical malpractice by prison doctor actionable under Texas Tort Claims Act).

Article I, Section 27 of the North Carolina Constitution provides a prohibition similar to the Eighth Amendment's Cruel and Unusual Punishment Clause. Our state constitutional provision emphasizes the importance of this interest in North Carolina.

We do not hold that plaintiff has alleged facts to support a claim that DOC has violated his state or federal constitutional rights. We hold that the duty to provide adequate medical care to inmates, imposed by the state and federal Constitutions, and recognized in state statute and case law, is such a fundamental and paramount obligation of the state that the state cannot absolve itself of responsibility by delegating it to another.

Other courts have held that the government's duty to provide medical care to inmates in its custody is nondelegable. In *Shea v. Spokane*, 17 Wash. App. 236, 562 P.2d 264 (1977), *aff'd per curiam*, 90 Wash. 2d 43, 578 P.2d 42 (1978), the Washington Court of Appeals held that a city jail had a nondelegable duty to provide adequate medical services to an inmate in its custody. The *Shea* court quoted a Michigan decision that is also relevant to the case before us:

> "The duty which defendant owed to plaintiff [prisoner] arose out of this special relationship in which defendant was one

'required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection.' 2 Restatement of Torts 2d § 314A(4), p. 118 (1963)."

Shea, 17 Wash. App. at 242, 562 P.2d at 267 (quoting *Thornton v. Flint*, 39 Mich. App. 260, 275, 197 N.W.2d 485, 493 (1972)).

North Carolina case law, statute, the federal Constitution, our state Constitution, and other authorities discussed above all support our conclusion that DOC has a duty to provide adequate medical care to inmates in its custody, and that the duty is of such great importance that the state cannot avoid liability by contracting with someone else to perform it.

Where a principal has a nondelegable duty, one with whom the principal contracts to perform that duty is as a matter of law an agent for purposes of applying the doctrine of *respondeat superior*. *Hendricks v. Leslie Fay, Inc.*, 273 N.C. 59, 62, 159 S.E.2d 362, 366 (1968); *Dockery v. Shows*, 264 N.C. 406, 410, 142 S.E.2d 29, 32 (1965). This rule, like other common-law tort rules, applies to the definition of "agent" under the State Tort Claims Act. We conclude, therefore, that by virtue of the state's nondelegable duty to provide medical care for inmates, Dr. Stanley, hired by the state to perform this duty, was at the time of the alleged negligence as a matter of law an agent of DOC. DOC is liable to plaintiff under the State Tort Claims Act for any negligence of Dr. Stanley. We therefore affirm that part of the Court of Appeals' decision reversing the Industrial Commission's summary judgment order for defendant.

Affirmed.

Justice MARTIN concurring.

The majority refers to the interest of North Carolina in our constitutional prohibition against "cruel or unusual punishments." In this respect, I note that Article I, Section 27 of the North Carolina Constitution provides a prohibition similar to the Eighth Amendment to the United States Constitution. The difference is found in the provision upon which the State's duty to provide medical care for inmates is based: While the federal Constitution prohibits "cruel *and* unusual punishments," our State Constitution prohibits "cruel *or* unusual punishments." The conjunction in the

federal Constitution has been interpreted to limit the Eighth Amendment's prohibition to punishments that are *both* cruel and unusual. *See Stanford v. Kentucky*, 492 U.S. 361, 378, 106 L. Ed. 2d 306, 323, *reh'g denied*, 492 U.S. 937, 106 L. Ed. 2d 635 (1989). The disjunctive term "or" in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment. It therefore follows that if the Cruel and Unusual Punishment clause of the federal Constitution requires states to provide adequate medical care for state inmates, the Cruel or Unusual Punishment clause of the North Carolina Constitution imposes at least this same duty, if not a greater duty.

STATE OF NORTH CAROLINA v. CASEY JACK MONROE

No. 252A86

(Filed 31 January 1992)

Constitutional Law § 344 (NCI4th)— capital case—unrecorded bench conferences with jurors—prejudice to defendant

The trial court violated defendant's nonwaivable state constitutional right to be present at all stages of his capital trial by conducting unrecorded conferences with several jurors at the bench immediately following notification by the State and defense counsel that those particular persons were acceptable for service on the jury. The State cannot meet its burden of showing the harmlessness of this constitutional error where the trial court conducted its conferences outside the presence of the defendant, his counsel, and the court reporter.

Am Jur 2d, Criminal Law §§ 908, 916.

Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys during arguments on question of law. 85 ALR2d 1111.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Ellis, J.*, at the 24 March 1986 Criminal Session of Superior Court, SCOTLAND County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 12 November 1991.

Lacy H. Thornburg, Attorney General, by Thomas F. Moffitt, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Justice.

Defendant was tried capitally on an indictment charging him with the first-degree murder of Karen Gibson Monroe. The jury returned a guilty verdict and recommended that defendant be sentenced to death. Defendant contends that the trial court committed reversible error by conducting unrecorded conferences with jurors in the absence of defendant and his attorneys. We agree and hold that defendant is entitled to a new trial. Although defendant brings forth numerous other assignments of error, their resolution is unnecessary to the disposition of this appeal.

A complete presentation of the evidence also is unnecessary to an understanding of the legal issue involved in this case. In summary, the State presented evidence tending to show that on the day of the murder defendant was seen in his car following the victim, who was in her car. Later that day, police found the victim's car abandoned on the side of the road. Defendant's palm print was on the left doorpost of the car. Several days after finding the car, investigators discovered the victim's body in a wooded area just over a mile from the plant where defendant worked. Witnesses for the State testified that defendant carried a twenty-gauge shotgun in the trunk of his car. The victim's autopsy revealed that she died as a result of a gunshot wound to the back of the head. There were thirteen entrance and seven exit wounds in the victim's head and five buckshot-type projectiles were recovered during the autopsy.

On the day of the murder defendant, who later told investigators he did not know the victim, cashed a personal check drawn on the victim's account, made payable to his order, for $126.75. Once paid, this check left a balance of $2.89 in the victim's account. Police seized from defendant's residence a current bank statement showing a zero balance as of the date of the murder, yet witnesses testified that defendant made change for a fifty-dollar bill later that day.

Lottie Gamble, acting as a police informant, gained defendant's confidence and testified at trial regarding defendant's statements to her admitting responsibility for killing the victim. Glenn Locklear, who was incarcerated in the same cell as defendant, also testified regarding several incriminating statements by defendant.

Defendant contends the trial court violated his nonwaivable state constitutional right to be present at all stages of his capital trial by conducting unrecorded conferences with jurors at the bench. Our review of the record reveals, and the parties do not contest, that the trial court held at least seven such conferences—three with sitting jurors and four with alternate jurors. On these occasions, immediately following notification by the State and defense counsel that a particular person was acceptable for service on the jury, the court called the juror to the bench for a brief conference.

Article I, Section 23 of the North Carolina Constitution provides for capital defendants a nonwaivable right to be present at all stages of their trials. *See State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987) (hereinafter *Payne I*). "The process of selecting and impaneling the jury is a stage of the trial at which the defendant has a right to be present." *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990). Thus, defendant's right to be present encompasses the situation here.

Defendant and defense counsel were present in the courtroom while the trial court conducted its off-the-record conferences with jurors, but as in other cases defendant's presence "essentially was negated by the court's cloistered conversations with [the] jurors." *State v. Buchanan*, 330 N.C. 202, 222, 410 S.E.2d 832, 844 (1991) (discussing *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362, and *State v. McCarver*, 329 N.C. 394, 407 S.E.2d 821 (1991)). The trial court's actions, therefore, were in derogation of defendant's state constitutional rights. Even so, " '[e]very violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of the particular case, . . . where the appellate court can declare a belief that it was harmless beyond a reasonable doubt.' " *Payne I*, 320 N.C. at 140, 357 S.E.2d at 612-13 (quoting *State v. Taylor*, 280 N.C. 273, 280, 185 S.E.2d 677, 682 (1972)); *see also State v. Huff*, 325 N.C. 1, 33, 381 S.E.2d 635, 653 (1989), *death penalty vacated*, --- U.S. ---, 111 L. Ed. 2d 777 (1990).

Defendant does not contend that harmful error occurred with respect to the alternate jurors who did not participate in the jury

deliberations. As to the other jurors, the State contends that the error was harmless beyond a reasonable doubt, despite the lack of a written transcript of the private conferences, because defendant was not deprived of his opportunity to determine the acceptability of the jurors with whom the court conversed. The State urges that we follow *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991) (hereinafter *Payne II*), where we said:

> Whether this kind of error is harmless depends . . . on whether the questioning of prospective jurors in defendant's absence might have resulted in a jury composed differently from one which defendant might have obtained had he been present and participated in the process. . . . [D]efendant had sufficient opportunity to observe [the jurors'] demeanor and behavior in considering whether to accept or reject them.

Id. at 389-90, 402 S.E.2d at 589. Under *Payne II*, the State argues the error here is harmless because when the trial court conducted its conferences defendant already had expressed his satisfaction with every juror who ultimately served on his jury. Thus, under the facts of this case we can be certain that, (1) defendant's opportunity "to observe [the jurors'] demeanor and behavior" was unimpaired, and (2) there is no possibility that defendant's absence from the conferences affected the ultimate composition of his jury.

If *Payne II* controlled the resolution of this case, perhaps we could conclude that the error here was harmless. *Payne II* does not control, however, because that case involved preliminary questioning of prospective jurors by the trial court on the record with defense counsel, but not defendant, present. In *Payne II* the presence of a record allowed the Court to review the proceedings conducted in defendant's absence. *Payne II*, 328 N.C. at 389, 402 S.E.2d at 589. Because there is no record here, *Payne II* is inapposite and *State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978) and *Payne I*, 320 N.C. 138, 357 S.E.2d 612, control.

In *Tate* the Court expressly disapproved the trial court's practice of holding a private discussion with a seated juror when the juror addressed a question to the court. *Tate*, 294 N.C. at 197-98, 239 S.E.2d at 827. Because *Tate* was a second-degree murder case, the error was waivable and the Court overruled defendant's assignment of error on that basis. In *Payne I*, however, the Court held that a capital defendant's nonwaivable right to presence was violated when the trial court addressed the jury in the absence of defendant,

his counsel, and the court reporter. *Payne I*, 320 N.C. 138, 357 S.E.2d 612. There the Court stated: "The State cannot meet its burden of showing that the trial court's error was harmless beyond a reasonable doubt . . . because the defendant, counsel, and the court reporter all were absent during the ensuing admonitions [to the jury]." *Id.* at 140, 357 S.E.2d at 613; *see also State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (reversible error where trial court excused prospective jurors as result of private, unrecorded bench conferences outside defendant's presence); *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (same).

As in *Payne I*, the State here cannot meet its burden of showing the harmlessness of this constitutional error. The trial court conducted its conferences outside the presence of defendant, his counsel, and the court reporter. The court did not have the benefit of our decisions in *Payne I*, *Smith* and *McCarver* when this case was tried. The court undoubtedly acted in good faith and intended only to facilitate the administration of the trial, but without a record of what transpired we cannot conclude that the error was harmless.

New trial.

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

BARR v. FRENCH BROAD ACQUISITIONS

No. 514P91

Case below: 104 N.C.App. 309

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 January 1992.

BURTON STEEL ERECTION CO. v. HIATT

No. 545P91

Case below: 104 N.C.App. 554

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 January 1992.

HENDERSON v. HERMAN

No. 540P91

Case below: 104 N.C.App. 482

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 January 1992.

IN RE APPEAL OF FORSYTH COUNTY

No. 8P92

Case below: 104 N.C.App. 635

Petition by Forsyth County for discretionary review pursuant to G.S. 7A-31 denied 24 January 1992.

IN RE NAKELL

No. 3P92

Case below: 104 N.C.App. 638

Temporary stay dissolved 30 January 1992. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 January 1992. Petition by Barry Nakell for discretionary review pursuant to G.S. 7A-31 denied 30 January 1992.

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

MANNING v. TRIPP

No. 9A92

Case below: 104 N.C.App. 601

Petition by Nationwide for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 24 January 1992.

PRIVETTE v. MERRITT

No. 551P91

Case below: 104 N.C.App. 556

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 January 1992.

ROUSE v. PITT COUNTY MEMORIAL HOSPITAL

No. 543P91

Case below: 104 N.C.App. 554

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 January 1992.

STATE v. ANEMONT

No. 537P91

Case below: 104 N.C.App. 556

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 January 1992.

STATE v. FORBES

No. 549P91

Case below: 104 N.C.App. 507

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 24 January 1992.

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

STATE v. KELLAM

No. 289P91

Case below: 103 N.C.App. 171

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 30 January 1992.

STATE v. MAYE

No. 533A91

Case below: 104 N.C.App. 437

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 January 1992.

STATE v. PETERSILIE

No. 43P92

Case below: 105 N.C.App. (9124SC313)

Motion by Attorney General for temporary stay allowed 31 January 1992 pending consideration and determination of his petitions for discretionary review and writ of certiorari.

THOMASSON v. GRAIN DEALERS MUT. INS. CO.

No. 522PA91

Case below: 103 N.C.App. 475

Petition by defendant (Insurance Company) for writ of certiorari to the North Carolina Court of Appeals allowed 24 January 1992.

WEST AMERICAN INSURANCE CO. v.
TUFCO FLOORING EAST

No. 542PA91

Case below: 104 N.C.App. 312

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 24 January 1992.

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

PETITION TO REHEAR

BRASWELL v. BRASWELL

No. 225A90

Case below: 330 N.C. 363

Petition by plaintiff to rehear pursuant to Appellate Rule 31 denied 24 January 1992.

APPENDIX

RULES OF JUDICIAL STANDARDS COMMISSION

STATE OF NORTH CAROLINA
JUDICIAL STANDARDS COMMISSION

RULES
As Amended September 6, 1991

TABLE OF RULES

Rule

RULE 1. AUTHORITY

These Rules are promulgated pursuant to the authority contained in G.S. 7A-377, and are effective January 1, 1973.

RULE 2.
ORGANIZATION; OFFICERS; MEETINGS; QUORUM

The Commission shall have a Chairman, who is the Court of Appeals member, and a Vice-Chairman, who shall be elected by the members. The Vice-Chairman shall preside in the absence of the Chairman. The Commission shall also have a Secretary, who shall be elected by the members and perform such duties as the Commission may assign. The Vice-Chairman and Secretary shall serve for one-year terms, and may succeed themselves.

The Commission shall meet on the call of the Chairman or of any four members.

A quorum for the conduct of business shall consist of any four members, except as otherwise provided in these rules.

Each member of the Commission, including the Chairman, Vice-Chairman, Secretary, or other presiding member, shall be a voting member.

The Commission shall ordinarily meet in Raleigh, but may meet anywhere in the State. The Commission's address is P. O. Box 1122, Raleigh, N.C. 27602.

RULE 3. INTERESTED PARTY

A judge who is a member of the Commission is disqualified from acting in any case in which he is a respondent, except in his own defense.

RULE 4. CONFIDENTIALITY OF PROCEEDINGS

(a) Unless otherwise waived by the justice or judge involved, all papers filed with and proceedings before the Commission, including any preliminary investigation which the Commission may make, are confidential except as provided herein. If the Commission concludes that formal proceedings should be instituted after a preliminary investigation is completed, the notice and complaint filed by the Commission along with the answer and all other pleadings are not confidential. Formal hearings ordered by the Commission are not confidential, and recommendations of the Commission to

the Supreme Court along with the record filed in support of such recommendations are not confidential.

(b) At the request of the judge involved or on its own motion in any case in which a complaint filed with the Commission or a Commission proceeding is made public by the complainant, the judge involved, independent sources, or the law, the Commission may issue such statements of clarification and correction as it deems appropriate in the interest of maintaining confidence in the justice system. Such statements may address the status and procedural aspects of the proceeding, the judge's right to a fair hearing in accordance with due process requirements, and any official action or disposition by the Commission, including release of its written notice to the complainant or the judge of such action or disposition.

(c) All written communications to a judge (counsel, guardian, guardian ad litem) which are considered confidential pursuant to these rules shall be enclosed in a securely sealed inner envelope marked "Confidential."

RULE 5. DEFAMATORY MATTER

Testimony and other evidence presented to the Commission is privileged in any action for defamation.

RULE 6. UNFOUNDED OR FRIVOLOUS COMPLAINTS

(a) Upon receipt of a written complaint that is obviously unfounded or frivolous, the Commission shall write a short letter of explanation to the complainant. The judge involved shall not be notified of these complaints unless otherwise determined.

(b) A determination that a complaint is unfounded or frivolous may be made by two Commission members one of whom must be a judge or attorney. Such determination may be reconsidered by the full Commission at its next meeting.

RULE 7. PRELIMINARY INVESTIGATION

(a) The Commission, upon receiving a written complaint, not obviously unfounded or frivolous, alleging facts indicating that a judge may be guilty of wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or alleging that a judge is suffering from a mental or

physical incapacity interfering with the performance of his duties, which incapacity is, or is likely to become, permanent, shall make a preliminary investigation to determine whether formal proceedings should be instituted. The Commission may also make a preliminary investigation on its own motion.

(b) The judge shall be notified of the investigation, the nature of the charge, and whether the investigation is on the Commission's own motion or upon written complaint, and afforded a reasonable opportunity to present such relevant matters as he may choose. Such notice shall be in writing, and may be transmitted by a member of the Commission, any person of suitable age and discretion designated by it, or by certified or registered mail.

(c) Once a preliminary investigation has been ordered, if the Commission feels that immediate suspension of the judge involved is necessary for the proper administration of justice, it may recommend to the Chief Justice that the judge be temporarily suspended from performing judicial duties pending final disposition of the inquiry. A copy of the recommendation shall be provided to the judge by certified mail.

If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the judge shall be so notified, and the case closed.

RULE 8. PRIVATE ADMONITION

The Commission may issue a private admonition in any inquiry which discloses conduct by a judge which requires attention but is not of such a nature as would warrant a recommendation of censure or removal; provided, no private admonition may be issued after a formal proceeding has been instituted in accordance with Rule 9. Issuance of a private admonition will not bar proceedings before the Commission in future inquiries concerning similar or other conduct by a judge who receives a private admonition. In the event the Commission intends to refer to or consider, in subsequent proceedings, an inquiry which has been closed with a private admonition, adequate notice of such intentions shall be included in the Rule 9, NOTICE OF FORMAL PROCEEDINGS to the judge.

RULE 9. NOTICE OF FORMAL PROCEEDINGS

After the preliminary investigation has been completed, if the Commission concludes that formal proceedings should be instituted,

it shall promptly so notify the judge. Such notice shall be entitled "BEFORE THE JUDICIAL STANDARDS COMMISSION, Inquiry Concerning a Judge, No. ____." The notice shall identify the complainant, and shall specify in ordinary and concise language the charge or charges against the judge. The judge shall be advised of the alleged facts upon which such charges are based, and a copy of the verified complaint shall be furnished to the judge, and the notice shall advise the judge of his right to file a written, verified answer to the charges against him within 20 days after service of the notice upon him. The notice shall be served upon the judge by personal service by a member of the Commission, or some person of suitable age and discretion designated by it. If, after reasonable efforts to do so, personal service cannot be effected, service by certified or registered mail is authorized. Notice by mail shall be addressed to the judge at his residence of record.

RULE 10. ANSWER

(a) Within 20 days after service of the complaint and notice of formal proceedings the judge may file with the Commission an original and 8 copies of an answer, which shall be verified.

(b) The notice, complaint and answer constitute the pleadings. No further pleadings may be filed, and no motions may be filed against any of the pleadings.

RULE 11. FORMAL HEARINGS

Upon the filing of an answer, or upon the expiration of the time allowed for its filing, the Commission shall order a formal hearing before it concerning the charges. The hearing shall be held no sooner than 10 days after filing of the answer, or after the deadline for filing of the answer, unless the judge consents to an earlier hearing. The notice shall be served in the same manner as the notice of charges under Rule 9.

At the date set for the formal hearing, the Commission shall proceed whether or not the judge has filed an answer, and whether or not he appears in person or through counsel, but failure of the judge to answer or to appear shall not be taken as evidence of the facts alleged in the charges.

Special counsel (who shall be an attorney) employed by the Commission, or counsel supplied by the Attorney General at the

request of the Commission, shall present the evidence in support of the charges.

The hearing shall be recorded by a reporter employed by the Commission for this purpose.

RULE 12.
WITNESSES; OATHS; SUBPOENAS; COMPENSATION

Witnesses shall take an oath or affirmation to tell the truth. The oath to witnesses may be administered by any member of the Commission.

Subpoenas to witnesses shall be issued in the name of the State, and shall be signed by a member of the Commission. They shall be served, without fee, by any officer authorized to serve process of the General Court of Justice.

Witnesses are entitled to the same compensation and reimbursement for travel expenses as witnesses in a civil case in the General Court of Justice. Vouchers authorizing disbursements for Commission witnesses shall be signed by the Chairman or Secretary of the Commission.

RULE 13. MEDICAL EXAMINATION

When the mental or physical health of a judge is in issue, the Commission may request the judge to submit to an examination by a licensed physician or physicians of its choosing. If the judge fails to submit to the examination, the Commission may take his failure into account, unless it has good reason to believe that the judge's failure was due to circumstances beyond his control. The judge shall be furnished a copy of the report of any examination conducted under this rule.

The examining physician or physicians shall receive the fee of an expert witness, to be set by the Commission.

RULE 14. RIGHTS OF RESPONDENT

In formal hearings involving his censure, removal, or retirement, a judge shall have the right and opportunity to defend against the charges by introduction of evidence, representation by counsel, and examination and cross-examination of witnesses. He shall also have the right to the issuance of subpoenas for attendance of wit-

nesses to testify or to produce books, papers, and other evidentiary matter.

A copy of the transcript of proceedings prepared for transmission to the Supreme Court shall be furnished to the judge and, if he has objections to it, he may within 10 days present his objections to the Commission, and the Chairman or Vice-Chairman or his designee shall consider his objections and settle the record prior to transmitting it to the Supreme Court.

The judge has the right to have all or any portion of the testimony in the hearings transcribed at his own expense.

Once the judge has informed the Commission that he has counsel, a copy of any notices, pleadings, or other written communications (other than the transcript) sent to the judge shall be furnished to counsel by any reliable means.

RULE 15. EVIDENCE

At a formal hearing before the Commission, legal evidence only shall be received, and oral evidence shall be taken only on oath or affirmation.

Rulings on evidentiary matters shall be made by the Chairman, or the Vice-Chairman presiding in his absence.

RULE 16. AMENDMENTS TO NOTICE OR ANSWER

The Commission, at any time prior to its recommendation, may allow or require amendments to the notice of formal proceedings, and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearings. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

RULE 17. COMMISSION VOTING

The affirmative vote of at least five members of the Commission is necessary to recommend to the Supreme Court censure or removal of a judge. A vote of four (a quorum) is necessary for any other official action, except as specified in Rule 6 for disposing of unfounded or frivolous complaints.

RULE 18. CONTEMPT

The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process issued by the Commission.

RULE 19. RECORD OF PROCEEDINGS

The Commission shall keep a record of all preliminary investigations and formal proceedings concerning a judge. In formal hearings testimony shall be recorded verbatim, and if a recommendation to the Supreme Court for censure or removal is made, a transcript of the evidence and all proceedings therein shall be prepared, and the Commission shall make written findings of fact and conclusions of law in support of its recommendation.

RULE 20. TRANSMISSION OF RECOMMENDATIONS TO SUPREME COURT

After reaching a recommendation to censure or remove a judge, when 10 days have expired after the transcript of the proceeding has been transmitted to the judge and no objection has been filed, or when the record is settled after objection has been made, the Commission shall promptly file with the Clerk of the Supreme Court the transcript of proceedings, and its findings of fact, conclusions of law, and recommendation, certified by the Chairman or Secretary. The Commission shall concurrently transmit to the judge a copy of the transcript (if the judge objected to the original transcript, and settlement proceedings resulting in changes in the transcript were had), its findings, conclusions, and recommendation.

RULE 21. PROCEEDINGS IN THE SUPREME COURT

Proceedings in the Supreme Court shall be as prescribed by Supreme Court Rule. See G.S. 7A-33.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d or superseding titles and sections in N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

§ 21 (NCI4th). Appeal from interlocutory order

Where the Court of Appeals erroneously declined to review the merits of the superior court's grant of a new trial in a criminal case on the ground of newly discovered evidence, the action of the Court of Appeals was not a decision upon review within the meaning of G.S. 7A-28, and that statute thus does not prohibit the Supreme Court from deciding the issue of whether the State may appeal a superior court order granting a criminal defendant a new trial on the ground of newly discovered evidence. *State v. Monroe*, 433.

§ 22 (NCI4th). Dissent to decision of Court of Appeals generally

Assuming that the dissenting opinion in the Court of Appeals does not constitute a "dissent" entitling the State to appeal to the Supreme Court as a matter of right under G.S. 7A-30(2) because that opinion reaches the same result as that reached by the majority, the State's notice of appeal is treated as a petition for a writ of certiorari and is allowed in the exercise of the Supreme Court's supervisory powers over the courts of this state. *State v. Monroe*, 433.

§ 32 (NCI4th). When supervisory jurisdiction may be exercised generally; interests of justice

Although plaintiff appellee failed to cross-assign as error pursuant to Appellate Rule 10(d) the trial court's entry of a directed verdict for defendants on her claim for breach of an oral partnership agreement to develop land, the Supreme Court invoked Appellate Procedure Rule 2 and exercised its supervisory power over the trial divisions to consider whether plaintiff is entitled to a new trial on her breach of contract claim. *Potter v. Homestead Preservation Assn.*, 569.

§ 81 (NCI4th). Appeal by State from superior court to appellate division

The State has the right under G.S. 15A-1445 to immediately appeal a superior court order granting a criminal defendant a new trial on the ground of newly discovered evidence. *State v. Monroe*, 433.

§ 147 (NCI4th). Preserving question for appeal; necessity of request, objection, or motion

A burglary and larceny defendant could raise on appeal the reliance of the court on the statement of the prosecuting attorney as to prior convictions even though defendant did not object to the statement at the time it was made or object to the finding when it was made. *State v. Canady*, 398.

Defendants properly preserved for appeal the issue of whether SBI reports to the Poole Commission were exempt from public disclosure by the statute exempting certain personnel information about state employees from the Public Records Law. *News and Observer Publishing Co. v. Poole*, 465.

A defendant in an action arising from a fraudulent certification of title could not raise an argument in the Supreme Court which was not presented to the trial court or the Court of Appeals. *Investors Title Insurance Co. v. Herzig*, 681.

§ 156 (NCI4th). Effect of failure to make motion, objection, or request; civil actions

The Court of Appeals erred in a child support action by concluding that a finding of fact was not supported by the evidence where plaintiff neither made exception to nor assigned as error that finding of fact. *Koufman v. Koufman*, 93.

APPEAL AND ERROR — Continued

§ 422 (NCI4th). Appellee's brief; presentation of additional questions

Plaintiff appellee could seek a new trial under Appellate Rule 28(c) only if she were arguing trial error material to her quantum meruit claim which she successfully prosecuted at trial but could not invoke that rule on her claim for breach of contract which she lost in the trial court. *Potter v. Homestead Preservation Assn.*, 569.

ASSAULT AND BATTERY

§ 32 (NCI4th). Instructions on "serious injury"

A trial court may peremptorily instruct the jury on the serious injury element of felonious assault if the evidence is not conflicting and reasonable minds could not differ as to the serious nature of the victim's injuries. *State v. Hedgepeth*, 38.

The trial court in a prosecution for felonious assault did not err in instructing the jury that a bullet wound that "enters the flesh and exits the flesh is a serious injury." *Ibid.*

§ 86 (NCI4th). Instructions on secret assault

The trial court's disjunctive instructions in a prosecution for secret assault which permitted the jury to return a guilty verdict if it found that defendant committed each element of the offense "upon Douglas Jones and/or Preston Jones" resulted in an uncertain and thus defective guilty verdict in violation of defendant's constitutional right to a unanimous verdict. *State v. Lyons*, 298.

AUTOMOBILES AND OTHER VEHICLES

§ 161 (NCI4th). Bond requirements for dealers

The surety on an automobile dealer's bond was liable under G.S. 20-288(e) only for actual damages for an unfair or deceptive act or practice based on the dealer's fraudulent inducement of plaintiff to purchase an automobile by falsely promising her that it would make the remaining installment payments on her trade-in vehicle and was not liable for the full judgment after the actual damages were trebled pursuant to G.S. 75-16. *Tomlinson v. Camel City Motors*, 76.

The surety on an automobile dealer's bond may be liable to an injured consumer for treble damages where the consumer has lost more than the initial damages and the trebled portion of the award is seen as compensating the consumer for those losses rather than as punitive in nature. *Ibid.*

§ 813 (NCI4th). Requirement of alcohol test

The trial court did not err in denying a DWI defendant's motion to suppress the results of a blood test where the blood for the test was drawn at a hospital while he was unconscious, or by not allowing defendant to cross-examine an officer concerning the statutory requirements for chemical analysis. *State v. Drdak*, 587.

BILLS AND NOTES

§ 5 (NCI3d). Alteration

The reduction of a mortgage late fee was not a fraudulent alteration discharging plaintiffs from the contract. *Swindell v. Federal National Mortgage Assn.*, 153.

BURGLARY AND UNLAWFUL BREAKINGS

§ 99 (NCI4th). Felonious breaking or entering; consent

The trial court did not err by denying defendant's motion to dismiss a felony murder charge which was based on breaking or entering with felonious intent where defendant contended that the State had failed to show that he had acted without the consent of the owner. *State v. Williams*, 579.

§ 101 (NCI4th). Felonious breaking or entering; intent

The evidence was sufficient to support a guilty verdict for breaking or entering with the intent to commit murder where there was substantial evidence of defendant's intent to murder the victim at the time of the breaking in that he shot and killed the victim after the breaking or entering. *State v. Williams*, 579.

§ 165 (NCI4th). Nonfelonious or misdemeanor breaking or entering as lesser included offense of first degree burglary; instruction not required

The trial court did not err in a first degree burglary prosecution by refusing to submit to the jury a possible verdict of misdemeanor breaking or entering where there was no evidence to support misdemeanor breaking or entering. *State v. Garner*, 273.

CONSPIRACY

§ 1 (NCI4th). Requisite elements generally

The trial court did not err in an action arising from an attorney's fraudulent title insurance certification by giving a peremptory instruction where the jury still had to decide whether one defendant had conspired with another. *Investors Title Insurance Co. v. Herzig*, 681.

CONSTITUTIONAL LAW

§ 28 (NCI4th). Power of taxation

Providing compensation for retired state employees and members of the National Guard is a legitimate governmental interest and the exemption of all or a part of that compensation from taxation does not violate art. V, § 2 of the North Carolina Constitution. *Swanson v. State of North Carolina*, 390.

§ 50 (NCI4th). Standing to challenge constitutionality of statute; showing of direct injury

Plaintiff showed sufficient injury to give him standing to challenge the constitutionality of the statute requiring appointees to vacancies in the office of district court judge to be members of the same political party as the vacating judge. *Baker v. Martin*, 331.

§ 86 (NCI4th). State and federal aspects of discrimination

Plaintiff was barred from seeking damages under 42 U.S.C. § 1983 from UNC, ASU, the president of UNC in his official capacity, and the chancellor and a vice chancellor of ASU in their official capacities because neither a state nor its officials acting in their official capacities are "persons" under § 1983 when the remedy sought is monetary damages. *Corum v. University of North Carolina*, 761.

Plaintiff could properly bring actions under 42 U.S.C. § 1983 for injunctive relief against UNC, ASU, and the individual defendants in their official capacities. *Ibid.*

Sovereign immunity alleged under state law is not a permissible defense to 42 U.S.C. § 1983 actions, and the defense of qualified immunity is not available under 42 U.S.C. § 1983 to one sued in his official capacity. *Ibid.*

State government officials may be sued in their individual capacities for damages under 42 U.S.C. § 1983, but officials sued as individuals may raise a defense of qualified immunity. *Ibid.*

State officials sued for constitutional violations under 42 U.S.C. § 1983 will be protected from liability by qualified immunity where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Ibid.*

§ 92 (NCI4th). Equal protection; particular nondiscriminatory applications of law

Exempting the compensation of retired state employees and National Guard members from taxation does not violate the equal protection clause of the N.C. Constitution. *Swanson v. State of North Carolina*, 390.

§ 99 (NCI4th). Synonymity of law of the land and due process

The exemption from taxation of the pensions of retired state employees and the pay of National Guard members has a rational relationship to the provision of pensions and payment and the granting of those exemptions does not violate the law of the land clause of the North Carolina Constitution. *Swanson v. State of North Carolina*, 390.

§ 115 (NCI4th). Right of free speech generally

A public employee's right to free speech is limited by the government's need to preserve efficient governmental functions, and only speech on a matter of "public concern" is protected. *Corum v. University of North Carolina*, 761.

Plaintiff, the Dean of Learning Resources at ASU, had a constitutionally protected right to speak out in 1984 about a vice chancellor's directive for relocation of the Appalachian Collection. *Ibid.*

In plaintiff's 42 U.S.C. § 1983 action against a vice chancellor of ASU in his individual capacity based on plaintiff's claim that his right to free speech was violated when he was removed as Dean of Learning Resources of ASU because of statements he made at a staff meeting concerning the vice chancellor's plan for relocation of the Appalachian Collection, plaintiff presented sufficient evidence of improper motive to raise a material question as to whether a reasonable vice chancellor would have believed that demoting plaintiff was lawful, and defendant vice chancellor's motion for summary judgment based upon the defense of qualified immunity was properly denied by the trial judge. *Ibid.*

Plaintiff had a direct cause of action under the N. C. Constitution against a vice chancellor of ASU in his official capacity for an alleged violation of his free speech rights. *Ibid.*

The doctrine of sovereign immunity is inapplicable to a plaintiff's claim for violation of his free speech rights or other rights protected by the Declaration of Rights of the N. C. Constitution. *Ibid.*

A plaintiff has no direct cause of action for monetary damages under the N. C. Constitution against persons sued in their individual capacities for violations of plaintiff's free speech rights. *Ibid.*

Plaintiff failed to present a forecast of evidence sufficient to defeat the motion for summary judgment on behalf of UNC, ASU, the president of UNC, and the

COURTS — Continued

§ 147 (NCI4th). Conflict of law principles in matters involving negligence

The workers' compensation law of North Carolina rather than of Virginia governs the question of whether an employee injured in Virginia by the negligence of a third-party subcontractor may bring a negligence action against the subcontractor where all the parties are North Carolina residents, plaintiff's employment contract originated in North Carolina, and plaintiff received benefits pursuant to the North Carolina workers' compensation laws. *Braxton v. Anco Electric, Inc.*, 124.

CRIMINAL LAW

§ 45 (NCI4th). Aiders and abettors; presence at scene

There was sufficient evidence in a homicide prosecution to support a finding that defendant acted in concert to kill his father where the killing was accomplished by at least two insulin injections and took several hours, and the jury could infer that defendant was ready to aid his mother in the killing and was present for some of the time in which the killing was consummated. *State v. Gilmore*, 167.

§ 45.1 (NCI3d). Experimental evidence; particular experiments

The trial court did not abuse its discretion by finding that an expert on eyewitness identification had not given an opinion specific enough to support admission of testimony regarding an experiment. *State v. Robinson*, 1.

§ 60.5 (NCI3d). Competency and sufficiency of fingerprint evidence

There was no prejudice from the admission of testimony by a fingerprint expert to the effect that he had discovered identifiable fingerprints in only three percent of the criminal cases in which he had been involved. *State v. Robinson*, 1.

§ 66.3 (NCI3d). Sufficiency of evidence of independent origin of in-court identification in cases involving lineups

The trial court's conclusions that pretrial identification procedures were not tainted and that the in-court identifications were based solely on the witnesses' observations of defendant at the time of the crimes were supported by the findings, which defendant conceded were supported by the evidence. *State v. Robinson*, 1.

§ 73.1 (NCI3d). Admission of hearsay statement as prejudicial or harmless error

There was no prejudicial error in a murder prosecution from the admission of testimony relating threats defendant made to the victim. *State v. Angel*, 85.

There was no plain error in the admission of testimony from detectives that the dumpster in which physical evidence had allegedly been placed had been emptied prior to being searched. *State v. Robinson*, 1.

The trial court's error in admitting the out-of-court statements of defendant's two sons as substantive evidence under Rule 804(b)(5) was prejudicial to the defendant in this first degree murder trial where those statements added strong evidence tending to show a premeditated and deliberate murder. *State v. Miller*, 56.

§ 73.2 (NCI3d). Statements not within hearsay rule

Neither the fact that two State's witnesses failed to remember every detail of a killing nor the fact that they disagreed with an officer's account of their out-of-court statements rendered them "unavailable" as witnesses for purposes of the residual or "catchall" exception to the hearsay rule set forth in Rule of Evidence 804. *State v. Miller*, 56.

§ 914 (NCI4th). Manner of polling the jury

A first degree murder defendant was not sentenced in accordance with statutory requirements where the court polled the jury by having jurors raise their hands if they agreed with the verdict on each issue. *State v. Buchanan*, 202.

§ 1095 (NCI4th). Proof of aggravating factor; mere assertion by prosecutor

The trial court erred when sentencing defendant for burglary and larceny by relying on the statement of the prosecutor in finding the aggravating factor of prior convictions. *State v. Canady*, 398.

§ 1166 (NCI4th). Statutory aggravating factors; mental infirmity of victim, particular cases

There is no requirement that a court must find the aggravating factor that the victim was mentally infirm if the victim was intoxicated and the defendant knew it. *State v. Torres*, 517.

§ 1314 (NCI4th). Aggravating and mitigating circumstances in capital case

A new trial was ordered in a homicide prosecution where the State had agreed to let defendant plead guilty to felony murder and to present evidence of only one aggravating factor. The death penalty scheme would be arbitrary and unconstitutional if the district attorney was permitted to exercise discretion as to when an aggravating circumstance supported by the evidence would or would not be submitted. *State v. Case*, 161.

§ 1352 (NCI4th). Consideration of mitigating circumstances in capital case; unanimous decision

There was prejudicial *McKoy* error in the sentencing proceeding in a murder prosecution where the court instructed the jury that any mitigating circumstances had to be found unanimously and there was evidence supporting mitigating circumstances submitted but not found. *State v. Robinson*, 1.

There was prejudicial *McKoy* error in the sentencing phase of a first degree murder trial entitling a defendant who was sentenced to death to a new sentencing hearing. *State v. Hedgepeth*, 38.

The fact that the jury in a capital sentencing proceeding was not instructed that failure to agree on a mitigating circumstance did not mean that the circumstance did not exist, when coupled with the court's instruction that the jury did not have to answer every issue but could leave any of them blank, did not show that the jury was unanimous in the two mitigating circumstances to which it answered "no" so as to render harmless *McKoy* error requiring unanimity on mitigating circumstances. *State v. McLaughlin*, 66.

Sentences of death for two first degree murders are vacated and the cases are remanded for resentencing because of *McKoy* error in the trial court's instructions requiring unanimity on mitigating circumstances. *State v. Barnes*, 104.

Defendant failed to show that sentences of death were imposed under the influence of an arbitrary factor so as to require imposition of a sentence of life imprisonment under G.S. 15A-2000(d)(2) where he showed that there was a holdout juror in the sentencing proceeding and that the death sentence recommendation could have been made because of the influence of the trial court's erroneous instruction requiring unanimity for finding mitigating circumstances on a jury eager to get home for the Christmas holidays. *Ibid.*

A defendant sentenced to death for first degree murder is entitled to a new sentencing hearing because of *McKoy* error in the court's instructions requiring unanimity for mitigating circumstances. *State v. Turner*, 249.

A *McKoy* error in a capital sentencing proceeding is subject to harmless error analysis. *State v. Hunt*, 501.

A *McKoy* error in a capital sentencing proceeding was harmless beyond a reasonable doubt where only the "catchall" mitigating circumstance was submitted to and not found by the jury, and there was no mitigating evidence offered or arising from the evidence presented which would support a finding of this mitigating circumstance. *Ibid.*

The pattern jury instructions which authorize consideration of mitigating circumstances found by one or more jurors do not deprive defendants of the right to a unanimous jury verdict. *State v. Baldwin*, 446.

A murder defendant was entitled to a new sentencing hearing where there was prejudicial *McKoy* error. *State v. Meyer*, 738.

§ 1355 (NCI4th). Lack of prior criminal activity as mitigating circumstance

A reasonable juror in this first degree murder trial could have found as a mitigating circumstance that defendant had no "significant" history of prior criminal activity. *State v. Turner*, 249.

§ 1356 (NCI4th). Good character or reputation mitigating circumstance

There was sufficient evidence for one or more jurors in a capital sentencing proceeding to find the mitigating circumstance that defendant had a good character and reputation in the community, and *McKoy* error with respect to this circumstance was not rendered harmless by contrary evidence of defendant's bad character, the jury's finding that defendant was a triple murderer, and the jury's findings as aggravating circumstances that defendant had previously been convicted of a felony involving violence to the person and that the murder in this case was a contract killing for pecuniary gain. *State v. McLaughlin*, 66.

§ 1361 (NCI4th). Impaired capacity mitigating circumstance; intoxication

There was sufficient evidence for one or more jurors in a capital sentencing proceeding to find the mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. *State v. McLaughlin*, 66.

No reasonable juror could have found as a mitigating circumstance for two first degree murders that defendant was a heavy drinker and had consumed a large amount of alcohol during the weekend of the murders and that his alcohol consumption impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. *State v. Hunt*, 501.

§ 1362 (NCI4th). Age of defendant as mitigating circumstance

A reasonable juror could have found defendant's age of twenty-two as a mitigating circumstance for first degree murder. *State v. Turner*, 249.

§ 1363 (NCI4th). Other mitigating circumstances arising from the evidence

The jury's findings as mitigating circumstances that defendant lacked the benefit of a normal education and that he can function adequately and appropriately in a structured setting with proper guidance and discipline did not foreclose the possibility that a reasonable juror could find additional mitigation from the uncon-

troverted fact that defendant learned to read while previously incarcerated. *State v. Turner*, 249.

There was substantial, credible evidence from which a reasonable juror could have found the catchall mitigating circumstance in a first degree murder case. *Ibid.*

The fact that others solicited defendant's killing of the first victim had no mitigating value in this sentencing proceeding for two first degree murders. *State v. Hunt*, 501.

Recanted statements by a codefendant's brother that he killed one victim during an argument and in self-defense could not have been found by a reasonable juror to have mitigating value in this capital sentencing proceeding. *Ibid.*

No reasonable juror could have found the absence of evidence that either victim was psychologically tormented or physically tortured before they died to have mitigating value in this capital sentencing proceeding. *Ibid.*

No reasonable juror could have found as a mitigating circumstance for two first degree murders that defendant was an uneducated man with a background of poverty and disadvantage. *Ibid.*

No reasonable juror could have found as a mitigating circumstance for two first degree murders that defendant was regretful and remorseful for the murders based on observations of defendant's demeanor. *Ibid.*

DEEDS

§ 59 (NCI4th). Restrictive covenants; effect of rule against perpetuities

The rule against perpetuities applied to a preemptive right in a consent judgment giving the Village Council of Pinehurst a right of first refusal to purchase on behalf of the Village of Pinehurst residents the water and sewer systems serving those residents in the event that Pinehurst, Inc. decided to sell such systems. *Village of Pinehurst v. Regional Investments of Moore*, 725.

DIVORCE AND SEPARATION

§ 392 (NCI4th). Amount of child support generally

A district court may enter an interim order for child support in which it contemplates entering a permanent order at a later time and may at such later time enter an order retroactive to the earlier order which requires larger child support payments than originally required. *Sikes v. Sikes*, 595.

§ 396 (NCI4th). Child's needs; sufficiency of findings

The trial court correctly calculated plaintiff wife's expenses, including fixed expenses, for a child attending boarding school. *Koufman v. Koufman*, 93.

§ 554 (NCI4th). Counsel fees; parent's refusal to provide adequate support

Although defendant had paid the amount of child support that he had been ordered to pay by an interim order, the court's finding that he refused to provide adequate child support was supported by evidence that defendant refused to pay the amount set by the court as adequate until he was ordered to do so by the court. *Sikes v. Sikes*, 595.

ESTOPPEL

EVIDENCE AND WITNESSES

EVIDENCE AND WITNESSES — Continued

EVIDENCE AND WITNESSES — Continued

The trial court did not err in an action against a sheriff arising from a murder by a deputy by not permitting plaintiff to testify about threats by the deputy towards the victim, or about the sheriff's conversations with and assurances to the victim. *Braswell v. Braswell*, 363.

§ 1011 (NCI4th). Hearsay; residual exception; effect of failure of court to state that hearsay statements not admissible under other exception

While the trial judge's findings of fact did not specifically provide that the evidence was not covered by any other exception found in Rule 804, the error was not prejudicial because the State offered the evidence under Rule 804(b)(5), did not argue at trial that any other exception applied, and defendant's attorney based his argument on the fact that this evidence was not covered under any hearsay exception. *State v. Garner*, 273.

§ 1113 (NCI4th). Admissions by a party opponent generally

The trial court did not err in a murder prosecution by admitting an SBI agent's testimony regarding defendant's responses during interrogation where defendant was a deaf-mute and was interrogated with the aid of an interpreter. *State v. Felton*, 619.

§ 1208 (NCI4th). Extrajudicial confessions

The trial court erred in a murder prosecution by sustaining objections to questions asked a police officer concerning department policy as to the taking of suspects' statements and his own experience with statements recorded in various formats. *State v. Hester*, 547.

§ 1240 (NCI4th). Custodial interrogation; statements at police station

Defendant was in custody for Miranda purposes at the time she inquired of a deputy sheriff and the sheriff about her need for an attorney. *State v. Torres*, 517.

§ 1246 (NCI4th). Warnings as to rights where defendant is a juvenile

There was no prejudicial error in a murder prosecution where the trial court precluded inquiry into why the police failed to contact defendant's parent or guardian prior to the interrogation of the sixteen year old defendant but the police had fully complied with the requirement that juveniles in custody be advised of their right to have a parent or guardian present during questioning. *State v. Hester*, 547.

§ 1252 (NCI4th). What constitutes invocation of right to counsel; extent of invocation

Defendant could invoke her right to have counsel present during her impending interrogation even though she was not being actively questioned at the time she inquired about an attorney. *State v. Torres*, 517.

Defendant invoked her right to counsel when she inquired of sheriff's officials whether she needed an attorney, and any statement made by her in the absence of counsel following police-initiated custodial interrogation is presumed involuntary and inadmissible as substantive evidence even though she was subsequently read her Miranda rights and executed a waiver. *Ibid.*

§ 1482 (NCI4th). Physical evidence; bullets

The trial court did not err in a murder prosecution by allowing the State to present evidence regarding four bullets recovered from a discarded water heater near defendant's home. *State v. Felton*, 619.

EVIDENCE AND WITNESSES — Continued

EVIDENCE AND WITNESSES — Continued

§ 3018 (NCI4th). Basis for impeachment; criminal charges

There was no prejudicial error where the prosecutor was allowed to delve into the details of three prior convictions and to require defendant to read from the underlying arrest warrants. *State v. Garner*, 273.

§ 3023 (NCI4th). Impeachment; specific instances of conduct generally

Rule of Evidence 608(b), which governs evidence of specific instances of conduct bearing on truthfulness, does not govern the admissibility of evidence of the drug habit, suicide attempts and psychiatric history of the State's chief witness. *State v. Williams*, 711.

§ 3098 (NCI4th). Impeachment by contradiction; inquiry on cross-examination

The prosecutor's cross-examination of defendant as to whether he had fought extradition from Pennsylvania was properly permitted to impeach defendant's testimony concerning the reason for his flight to Pennsylvania and did not burden defendant's due process right to resist extradition. *State v. Faison*, 347.

EXECUTORS AND ADMINISTRATORS

§ 23 (NCI3d). Widow's year's support

There was sufficient evidence of opportunity and inclination to support the trial court's finding that respondent wife committed uncondoned adultery and is therefore barred from receiving a year's allowance pursuant to G.S. 31A-1(a)(2). *In re Estate of Trogdon*, 143.

EXTRADITION

§ 1 (NCI3d). Generally

The prosecutor's cross-examination of defendant as to whether he had fought extradition from Pennsylvania was properly permitted to impeach defendant's testimony concerning the reason for his flight to Pennsylvania and did not burden defendant's due process right to resist extradition. *State v. Faison*, 347.

FORNICATION AND ADULTERY

§ 4 (NCI3d). Sufficiency of evidence and nonsuit

There was sufficient evidence of opportunity and inclination to support the trial court's finding that respondent wife committed uncondoned adultery and is therefore barred from receiving a year's allowance pursuant to G.S. 31A-1(a)(2). *In re Estate of Trogdon*, 143.

FRAUDS, STATUTE OF

§ 6.1 (NCI3d). Cases where statute of frauds is inapplicable

An oral partnership agreement to develop and sell real property is not within the statute of frauds. *Potter v. Homestead Preservation Assn.*, 569.

HOMICIDE

§ 4.2 (NCI3d). Instructions; murder in commission of felony

The trial court was not required in a felony murder prosecution to instruct the jury that it must find the kidnapping to be separate and apart from the murder. *State v. Garner*, 273.

§ 15.2 (NCI3d). Evidence of defendant's mental condition; malice

In a prosecution for the first degree murder of a man who was dating defendant's estranged wife, error, if any, in the court's exclusion of testimony by defendant's brother concerning defendant's good relationship with his children and his attempts to reconcile with his wife was harmless. *State v. Hedgepeth*, 38.

The trial court did not err in allowing an expert for the State to testify that defendant was capable of forming the specific intent to kill on the date of an alleged murder. *Ibid.*

§ 21.5 (NCI3d). Sufficiency of evidence of guilt of first degree murder

There was sufficient evidence in a homicide prosecution to support a finding that defendant acted in concert to kill his father where the killing was accomplished with at least two insulin injections and took several hours, and the jury could infer that defendant was present and ready to help with the killing for a part of that time. *State v. Gilmore*, 167.

There was sufficient evidence of premeditation and deliberation to support defendant's conviction for first degree murder by shooting the victim while he was walking away from defendant and while the victim was falling backward to the ground. *State v. Hunt*, 425.

The State's evidence was sufficient to support defendant's conviction of first degree murder on the theory of premeditation and deliberation where it showed that defendant broke and entered the victim's house and shot the victim six times when the victim arrived home early from work. *State v. Olson*, 557.

§ 21.6 (NCI3d). Sufficiency of evidence; homicide by lying in wait or in perpetration of felony

The trial court erred by denying defendants' motions to withdraw their pleas of guilty of first-degree murder based on the deaths of two co-felons at the hands of an officer. *State v. Bonner*, 536.

§ 24.1 (NCI3d). Instructions on presumptions arising from use of deadly weapon

The trial court's erroneous omission of the word "intentionally" before the word "killed" in its instructions permitting the jury to infer unlawfulness and malice from proof "that the defendant killed the victim with a deadly weapon" did not rise to the level of plain error. *State v. Hedgepeth*, 38.

While it was error for the trial court in a first degree murder case to omit the word "intentionally" before the word "killed" in its instructions permitting the jury to infer unlawfulness and malice from proof "that the defendant killed [the victim] with a deadly weapon," this omission was harmless beyond a reasonable doubt. *State v. Turner*, 249.

The trial court's instruction in a first degree murder case that "a sawed-off shotgun is a deadly weapon" was proper. *Ibid.*

§ 25 (NCI3d). Instructions on first degree murder generally

The trial court did not err in a homicide prosecution by instructing the jury on murder by lying in wait. *State v. Baldwin*, 446.

HOMICIDE — Continued

§ 25.2 (NCI3d). Instructions on premeditation and deliberation

The trial court's failure to instruct the jury in a first degree murder case that it could consider defendant's mental or emotional condition on the issue of defendant's specific intent to kill his victim did not constitute plain error where the court's instructions did direct the jury to consider evidence of defendant's mental and emotional state on the elements of premeditation and deliberation. *State v. Hedgepeth*, 38.

Any error in the trial court's instruction that the jury could infer premeditation and deliberation from, among other things, "the lack of provocation by the victim" did not constitute plain error. *State v. Faison*, 347.

There was sufficient evidence to support a jury instruction on grossly excessive force or infliction of lethal wounds as circumstances from which premeditation and deliberation could be inferred. *State v. Garner*, 273.

§ 28.1 (NCI3d). Self-defense; duty of trial court to instruct

The trial court did not err by refusing to instruct the jury on imperfect self-defense in a homicide prosecution. *State v. Baldwin*, 446.

§ 28.6 (NCI3d). Defense of intoxication

Voluntary intoxication is irrelevant to a charge of first degree murder by lying in wait, which is not a specific intent crime; moreover, the evidence was insufficient to support an instruction on voluntary intoxication. *State v. Baldwin*, 446.

§ 30 (NCI3d). Submission of guilt of lesser degrees of the crime

The trial court did not err in a murder prosecution by failing to submit the issue of second degree murder. *State v. Robinson*, 1.

INDICTMENT AND WARRANT

§ 7 (NCI3d). In general

Defendant could properly waive indictment for a first degree burglary joined with first degree murder. *State v. Garner*, 273.

INSURANCE

§ 11 (NCI3d). Liability of agent for failure to procure policy or for negligent advice

An action by the beneficiary of a life insurance policy for negligent advice by an insurance agent to the purchaser of the policy was governed by the three-year limitation period of G.S. 1-52(c) rather than the limitation period for professional malpractice set forth in G.S. 1-15(c). *Pierson v. Buyher*, 182.

When a life insurance policy contains a provision permitting the policy owner freely to change the beneficiary, a cause of action by the policy beneficiary for negligent advice by an insurance agent to the purchaser of the policy accrues at the time of the insured's death rather than at the time of the alleged negligent advice. *Ibid.*

§ 92.1 (NCI3d). Garage liability insurance

The trial court correctly granted summary judgment for defendant insurance company in an action by a garage owner to recover damages paid to customers

JURY — Continued

§ 7.14 (NCI3d). Peremptory challenges; manner, order, and time of exercising challenge

The trial court did not err in a prosecution for murder, assault, and robbery by allowing the State to peremptorily challenge black jurors. *State v. Robinson*, 1.

KIDNAPPING

§ 1.2 (NCI4th). Sufficiency of evidence

There was sufficient evidence to support instructions which permitted the jury to find that defendant committed a kidnapping for the purpose of terrorizing the victim or that defendant did not release the victim in a safe place. *State v. Garner*, 273.

LIMITATION OF ACTIONS

§ 4.2 (NCI3d). Negligence actions

An action by the beneficiary of a life insurance policy for negligent advice by an insurance agent to the purchaser of the policy was governed by the three-year limitation period of G.S. 1-52(c) rather than the limitation period for professional malpractice set forth in G.S. 1-15(c). *Pierson v. Buyher*, 182.

When a life insurance policy contains a provision permitting the policy owner freely to change the beneficiary, a cause of action by the policy beneficiary for negligent advice by an insurance agent to the purchaser of the policy accrues at the time of the insured's death rather than at the time of the alleged negligent advice. *Ibid.*

MASTER AND SERVANT

§ 8.1 (NCI3d). Compensation of employee

Summary judgment was inappropriately entered for defendants in an action to recover compensation under an employment and option to purchase agreement where the corporation was sold shortly after plaintiff was terminated. *Davis v. Dennis Lilly Co.*, 314.

§ 9 (NCI3d). Actions to recover compensation

The correct amount was awarded in the trial court for accrued percentage compensation in an action to determine plaintiff's compensation following the termination of his employment. *Davis v. Dennis Lilly Co.*, 314.

§ 87 (NCI3d). Claim under Compensation Act as precluding common-law action

The workers' compensation law of North Carolina rather than of Virginia governs the question of whether an employee injured in Virginia by the negligence of a third-party subcontractor may bring a negligence action against the subcontractor where all the parties are North Carolina residents, plaintiff's employment contract originated in North Carolina, and plaintiff received benefits pursuant to the North Carolina workers' compensation laws. *Braxton v. Anco Electric, Inc.*, 124.

§ 89 (NCI3d). Remedies against third-person tortfeasors generally

An employee who is injured by the negligence of a third-party subcontractor may bring a negligence action against that subcontractor because the subcontractor is deemed not to be a "statutory employer" of the plaintiff and therefore is not

PRINCIPAL AND SURETY

§ 10 (NCI3d). Private construction bonds

The statute of limitations begins to run in favor of a corporate surety which has filed a bond discharging a lien under G.S. 44A-16(6) when final judgment is entered in favor of the lien claimant, not when the surety files the bond discharging the lien. *George v. Hartford Accident and Indemnity Co.*, 755.

PUBLIC OFFICE

§ 9 (NCI3d). Personal liability of public officers to private individuals

The State Treasurer and the Secretary of Revenue were entitled to immunity in their individual capacities from civil liability on federal and state constitutional grounds for their compliance with the act repealing the income tax exemption for state and local government retirement benefits. *Bailey v. State of North Carolina*, 227.

§ 10 (NCI4th). Personal liability of public officers to the public

A municipality and its agents act for the benefit of the public and there is no liability for the failure to furnish police protection to specific individuals, with two exceptions. *Braswell v. Braswell*, 363.

QUASI CONTRACTS AND RESTITUTION

§ 1.1 (NCI3d). Effect of express contract

A partner who can establish an oral partnership agreement governing real property is not entitled to recover in quantum meruit but is limited to remedies afforded under partnership law. *Potter v. Homestead Preservation Assn.*, 569.

§ 1.2 (NCI3d). Unjust enrichment

Plaintiff's complaint was sufficient to state a claim for relief in the form of an equitable lien based upon unjust enrichment where the last two payments under a construction contract were not made even though the building was finished and there was money remaining in the construction loan. *Embree Construction Group v. Rafcor, Inc.*, 487.

ROBBERY

§ 4.3 (NCI3d). Armed robbery cases where evidence held sufficient

The State's evidence did not show that defendant took the victim's property only as an "afterthought" following the victim's death but was sufficient to support defendant's conviction of armed robbery. *State v. Faison*, 347.

There was no possibility that defendant was convicted of armed robbery on the basis of a taking of his own property because there was evidence that defendant had pawned his television set with the victim and the set was not found at the victim's house, the prosecutor stated during his jury argument that he believed defendant had taken the missing television from the house but had hidden it, and the trial judge used the word "property" in the instructions to describe the items defendant was accused of taking. *Ibid.*

Defendant's conviction of armed robbery was supported by evidence that defendant broke into the victim's residence and collected a number of items near the front door in preparation for their removal, and defendant fatally shot the

ROBBERY — Continued

victim with a handgun in the process of escaping from the victim's home and removing these items from the victim's possession. *State v. Olson*, 557.

RULES OF CIVIL PROCEDURE

§ 11 (NCI3d). Signing and verification of pleadings; sanctions

The trial court was not deprived of jurisdiction to determine the appropriateness of Rule 11 sanctions by the plaintiffs' filing of a voluntary dismissal with prejudice. *Bryson v. Sullivan*, 644.

The Court of Appeals erred in stating that, in the absence of proof that a reasonable person in the client's position would have been aware of the Rule 11 legal deficiencies, the attorney should bear sole responsibility for submitting a pleading or motion not warranted by law. *Ibid.*

The Court of Appeals erred in stating, "Generally, since the lawyer exercises primary control over the litigation, the responsibility for improper purpose violations should rest with the lawyer," since parties as well as attorneys may be subject to sanctions for violations of the improper purpose prong of Rule 11. *Ibid.*

In determining whether a pleading was warranted by existing law at the time it was signed, the court must look at the face of the pleading and must not read it in conjunction with responsive pleadings. *Ibid.*

Whether a document complies with the legal sufficiency prong of Rule 11 is determined as of the time it was signed, and the legal sufficiency prong does not impose a continuing duty to analyze the basis for a pleading. A statement by the Court of Appeals that the failure to dismiss a case when irrefutable evidence has come to plaintiff's attention that the case is meritless may require sanctions under the legal sufficiency prong of Rule 11 is disapproved. *Ibid.*

In determining when to make an award under Rule 11 on the ground that a pleading is not warranted by existing law, the court should look first to the facial plausibility of the pleading, and only if the pleading is implausible under existing law, to the issue of whether to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, the complaint was warranted by the existing law. *Ibid.*

Represented parties, like their counsel, will be held to an objective standard of reasonable inquiry into the legal sufficiency of their claim. Plaintiffs' good faith reliance on the advice of their attorneys that their claims were warranted under the law was sufficient to establish an objectively reasonable belief in the validity of their claims, and the trial court properly denied defendants' motions for sanctions under the legal sufficiency prong of Rule 11. *Ibid.*

Reliance on the advice of counsel does not preclude Rule 11 sanctions based upon improper purpose. *Ibid.*

The Court of Appeals erred in holding that the filing of a complaint cannot be for an improper purpose unless the complaint failed either the legal or factual certification requirement of Rule 11. *Ibid.*

The evidence was insufficient to show that plaintiffs' complaint against defendant administratrix in her representative and individual capacities was filed for the improper purpose of harassing defendant, causing delay in the estate proceedings, and needlessly increasing the cost of the litigation. *Ibid.*

RULES OF CIVIL PROCEDURE — Continued

§ 56 (NCI3d). Summary judgment

An order entered by the trial court passed on all claims even though the motion and the order were entitled partial summary judgment. *Swanson v. State of North Carolina*, 390.

§ 59 (NCI3d). New trials; amendment of judgments

There was no abuse of discretion in the denial of a motion for a new trial where defendant failed to cite any error of law to which it objected and failed to demonstrate how the abundance of evidence presented could be deemed insufficient to justify the verdict reached. *Investors Title Insurance Co. v. Herzig*, 681.

SHERIFFS AND CONSTABLES

§ 4 (NCI3d). Civil liabilities to individuals

The trial court properly granted a directed verdict for defendant sheriff in an action for damages from the sheriff's allegedly negligent failure to protect a decedent from a domestic assault by a deputy sheriff and from the sheriff's allegedly negligent supervision and retention of the deputy. *Braswell v. Braswell*, 363.

STATE

§ 1.2 (NCI3d). Public records

When the SBI submitted its investigative reports to the Poole Commission in its investigation of the men's basketball program at N. C. State University, the reports lost their G.S. 114-15 exemption from the Public Records Law and became Commission records subject to disclosure under the Public Records Law to the same extent as other Commission records. *News and Observer Publishing Co. v. Poole*, 465.

Personnel information about state employees first gathered by the employing state agency or the Office of State Personnel and turned over to the SBI and the Poole Commission remains protected from disclosure under the Public Records Law by G.S. 126-22 because of the language "wherever located and in whatever form" in that statute. *Ibid.*

There is no exemption from the Public Records Law for the minutes of meetings of an agency not subject to the Open Meetings Law. *Ibid.*

Minutes of the Poole Commission's meetings were not excepted from the Public Records Law by the provision of the Open Meetings Law permitting minutes of executive sessions to be withheld from public inspection if such inspection "would frustrate the purpose of the executive session" because the Commission was not a "public body" subject to the Open Meetings Law and public inspection of the minutes will not frustrate the Commission's proceedings. *Ibid.*

Only those portions of the minutes of the Poole Commission's meetings revealing written communications from counsel to the Commission are excepted from the disclosure under the Public Records Law attorney-client privilege. *Ibid.*

Minutes of meetings of the Poole Commission were not exempt from disclosure as public records by the statute exempting certain personnel information gathered by state agencies because the Commission was not the employer of any state employees questioned or mentioned in the meeting minutes. *Ibid.*

STATE — Continued

No "deliberative process privilege" exception to the Public Records Law will be recognized as a matter of public policy to exempt from public inspection preliminary draft reports prepared by members of the Poole Commission. *Ibid.*

§ 4.2 (NCI3d). Particular actions against the State; sovereign immunity

An action against the Department of Revenue is an action against the State, and the State cannot be sued without its permission. *Bailey v. State of North Carolina*, 227.

The doctrine of sovereign immunity is inapplicable to a plaintiff's claim for violation of his free speech rights or other rights protected by the Declaration of Rights of the N. C. Constitution. *Corum v. University of North Carolina*, 761.

§ 8.3 (NCI3d). Negligence of state employee; prisoners

A doctor providing medical care to inmates was an agent of the state as a matter of law for whose negligence the State is liable under the Tort Claims Act regardless of whether the doctor was an employee or an independent contractor. *Medley v. N.C. Department of Correction*, 837.

SUBROGATION

§ 1 (NCI3d). Generally

Plaintiff title insurance company was entitled to recover the amount paid to a bank arising from a fraudulent title certification. *Investors Title Insurance Co. v. Herzig*, 681.

TAXATION

§ 38 (NCI3d). Remedies of taxpayer against collection of tax

When a tax is challenged as unlawful rather than excessive or incorrect, the appropriate remedy is to bring suit under G.S. 105-267. *Bailey v. State of North Carolina*, 227.

Even when taxpayers are seeking a tax refund as a class, each member must individually satisfy the conditions precedent to suit mandated in G.S. 105-267. *Ibid.*

Plaintiffs' class demands for refunds of taxes collected because of the repealed exemption for state and local government retirement benefits were invalid for purposes of suing for refunds where the demands were not made before an action was instituted against the Secretary of Revenue, and the demands failed to include information about individual taxpayers required by reasonable regulations adopted by the Secretary of Revenue. *Ibid.*

§ 38.1 (NCI3d). Injunctive relief against collection of tax

Plaintiff taxpayers were precluded by G.S. 105-267 from obtaining injunctive relief on constitutional grounds to prevent future collection of income taxes on state and local government retirement benefits. *Bailey v. State of North Carolina*, 227.

§ 38.3 (NCI3d). Payment under protest

A taxpayer with a valid defense to the enforcement of the collection of a tax must first pay the tax and demand a refund of that tax within thirty days after payment before he may sue the Secretary of Revenue for the amount demanded. *Bailey v. State of North Carolina*, 227.

TORTS

§ 7.6 (NCI3d). Covenant not to sue

An injured plaintiff was entitled to proceed against an employer on the theory of respondeat superior after having executed a covenant not to sue the employee or the employee's insurer. *Yates v. New South Pizza, Ltd.*, 790.

TRIAL

§ 58.3 (NCI3d). Appellate review; conclusiveness of findings

The trial court's findings of fact in a nonjury trial have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them. *In re Estate of Trogdon*, 143.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices, in general

The federal Soft Drink Act preempts North Carolina's unfair practices laws to the extent that they would proscribe wholesaling restrictions imposed by bottlers to prevent transshipment, and plaintiff's forecast of evidence was sufficient to raise a question of fact as to whether defendant's conduct was for a proper purpose. *Owens v. Pepsi Cola Bottling Co.*, 666.

A claim for unfair practices arising from a fraudulent title insurance certification was not assignable, and attorney fees were not recoverable. *Investors Title Insurance Co v. Herzig*, 681.

USURY

§ 1.2 (NCI3d). Transactions which constitute loan or forbearance

A usury savings clause in a mortgage did not shield a lender for charging usurious rates in its late fees. *Swindell v. Federal National Mortgage Assn.*, 153.

§ 5 (NCI3d). Forfeiture of interest for usury

A mortgage late payment charge was excessive and defendants forfeited their right to collect late charges, but not their right to receive principal and interest. *Swindell v. Federal National Mortgage Assn.*, 153.

VENDOR AND PURCHASER

§ 2.1 (NCI3d). Duration of options

The rule against perpetuities applied to a preemptive right in a consent judgment giving the Village Council of Pinehurst a right of first refusal to purchase on behalf of the Village of Pinehurst residents the water and sewer systems serving those residents in the event that Pinehurst, Inc. decided to sell such systems. *Village of Pinehurst v. Regional Investments of Moore*, 725.

WILLS

§ 7 (NCI3d). Incorporation of other instruments by reference

A legally executed two-page codicil did not incorporate by reference six typewritten pages attached thereto, each of which were signed on the bottom by the decedent but which contained no witness signatures, because there was no reference within the codicil itself clearly designating the six-page document as the "will" to which the codicil referred. *In re Estate of Norton*, 378.

WORD AND PHRASE INDEX

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