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SUPREME COURT OF NORTH CAROLINA

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1992

CITE THIS VOLUME
331 N.C.

IN MEMORIAM

WILLIAM H. BOBBITT

CHIEF JUSTICE
17 NOVEMBER 1969-31 DECEMBER 1974

ASSOCIATE JUSTICE
1 FEBRUARY 1954-16 NOVEMBER 1969

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*Deceased 27 September 1992.

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2. Appointed and sworn in 1 August 1992 to replace James W. Hardison who became Chief Judge.
3. Appointed Chief Judge 22 May 1992 to replace Charles E. Rice who resigned as Chief Judge 22 May 1992 and as District Court Judge 31 May 1992.
4. Appointed and sworn in 22 June 1992.
5. Resigned 30 June 1992.
6. Resigned 15 August 1992.

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RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

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I, FRED P. PARKER, III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 21st day of March, 1992, and said persons have been issued license certificates.

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I, FRED P. PARKER, III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 10th day of April, 1992, and said persons have been issued license certificates.

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JOHN ROBERT BENNETT, III ..... Burlington
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JUDY LEE WHISNANT ..... Chapel Hill
SUSAN G. WHITE ..... Durham
NELL HOLLOWAY ISELIN WRIGHT ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 27th day of April, 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 22nd day of May, 1992 and said persons have been issued certificates of this Board:

STEPHEN W. VOELKER ..... Jeffersonville, Indiana
Applied from the State of Indiana
MARGO FREY EVANS ..... Charlotte
Applied from the State of Ohio
BYRON N. COHEN ..... Brown Summit
Applied from the State of Ohio
RAYFORD ALLEN MEANS ..... Philadelphia, Pennsylvania
Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners this the 29th day of May, 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 29th day of May, 1992 and said persons have been issued certificates of this Board:

MICHAEL G. STEIN ..... Wrightsville Beach
Applied from the State of Texas
CHARLES DAVID MORISON ..... Raleigh
Applied from the State of Tennessee
JOHN S. BOWLER ..... Cary
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 8th day of June, 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 person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 10th day of July, 1992 and said person has been issued certificate of this Board:

RONALD L. DAVIS ..... Midland, Michigan
Applied from the State of Michigan

Given over my hand and seal of the Board of Law Examiners this the 20th day of July, 1992.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 31st day of July, 1992 and said person has been issued certificate of this Board:

STEPHEN J. GRABENSTEIN ..... Asheville
Applied from the State of Tennessee and the District of Columbia

Given over my hand and seal of the Board of Law Examiners this the 3rd day of August, 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 31st day of July, 1992 and said persons have been issued certificates of this Board:

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Applied from the State of New York
JOHN RICHARD FLETCHER ..... Norfolk, Virginia
Applied from the State of Virginia
CHIEGE OJIUGO KALU ..... Charlotte
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GARY B. WILCOX ..... Washington, District of Columbia
Applied from the State of Oklahoma and the District of Columbia
MARIANNE E. FRESCO ..... Carrboro
Applied from the State of Pennsylvania
VEDIA JONES-RICHARDSON ..... Durham
Applied from the State of Illinois

Given over my hand and seal of the Board of Law Examiners this the 12th day of August, 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 duly passed the examinations of the Board of Law Examiners as of the 22nd day of August, 1992, and said persons have been issued license certificates.

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JAMES PRINGLE LAURIE, III ..... Raleigh
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Eric Lee Levinson	Charlotte
Helen Elizabeth Lewis	Durham
Kevin Neil Lewis	Jackson
Min Li	Charlotte
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Jeffrey Scott Lisson	Winston-Salem
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James Michael Lloyd	Greensboro
Joseph Luke	Greensboro
James Manly Lupton	Chapel Hill
Thad Christopher Lutz	Kings Mountain
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Alana Danielle Marquis	Evergreen, Colorado
Darrell Lane Matthews	Charlotte
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Scott Anthony Matthews	Newton
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John William McCauley	Fayetteville
Patricia Colleen Cox McCulloch	Raleigh
Susan Jean McDaniel	Wilmington
John Liam McGrath	Winston-Salem
Helen Suzanne McGraw	Pineville, West Virginia
Mary Margaret McHugh	Raleigh
Daniel Baker McIntyre, III	Charlotte
Neil Ray McLean	Durham
John D. McLemore, III	Decatur, Alabama
Beth Kelly Meares	Pittsboro
Khurshid K. Mehta	Winston-Salem
Robert Bailey Melvin	Cary
Mary Guy Mendini	Durham
Shawn Douglas Mercer	Raleigh
Susan Margaret Merry	Lenoir
Deborah Norris Meyer	Durham
Kathlyn Corbett Meyer	Raleigh
Amy Jeanne Meyers	Durham
Jeffrey Dean Michael	Albemarle
Brent Marriott Milgrom, Jr.	Charlotte
Philip Raiford Miller, III	Raleigh
Willia Greene Mills	Durham
Henry Jerome Mims	Taylors, South Carolina
Karen Marie Mincavage	Arlington, Virginia
Scott Alan Miskimon	Raleigh

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RUBY VALERIE MITCHELL ..... Raleigh
CHARLES D. MOONEY ..... Raleigh
THOMAS KENDALL MOORE ..... Smithfield
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Given over my hand and seal of the Board of Law Examiners this the 15th day of September, 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 person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 11th day of September, 1992 and said person has been issued certificate of this Board:

LARRY CURRELL JONES ..... Charlotte
Applied from the State of Texas

Given over my hand and seal of the Board of Law Examiners this the 16th day of September, 1992.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 18th day of September, 1992, and said persons have been issued license certificates.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

CARL A. MOORE, PLAINTIFF v. KNIGHTDALE BOARD OF ELECTIONS, GENE ANTHONY, CHAIRMAN, JUDY JOHNSON AND DOROTHY PARRISH, MEMBERS, DEFENDANTS, AND NORTH CAROLINA STATE BOARD OF ELECTIONS; M. H. HOOD ELLIS, CHAIRMAN, GREG O. ALLEN, WILLIAM A. MARSH, RUTH TURNER, JUNE K. YOUNGBLOOD, MEMBERS, AND ALEX K. BROCK, EXECUTIVE SECRETARY-DIRECTOR, INTERVENING-DEFENDANTS, AND VERNON CHARLES BULLOCK, PLAINTIFF v. KNIGHTDALE BOARD OF ELECTIONS, GENE ANTHONY, CHAIRMAN, JUDY JOHNSON AND DOROTHY PARRISH, MEMBERS, DEFENDANTS

No. 480PA91

(Filed 24 February 1992)

Elections § 60 (NCI4th)— "resign to run" statute—unconstitutional additional qualification for office

The "resign to run" statute, N.C.G.S. § 163-125(a), which provides that "[n]o individual may qualify as a candidate for elective public office who holds another elective office . . . without resigning from such office," violates Art. VI, § 6 of the North Carolina Constitution by adding a qualification for election to office beyond those prescribed in the Constitution. Therefore, the Knightdale Board of Elections erred in refusing to allow plaintiffs to file for the office of mayor until they resigned their seats on the town council.

Am Jur 2d, Elections § 175.

ON discretionary review prior to 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 judgment entered on 12 August 1991 by *Hight, J.*, in Superior Court, WAKE County, permanently enjoining and restraining the enforcement of N.C.G.S. § 163-125 with respect to plaintiffs. Heard in the Supreme Court 10 February 1992.

Tharrington, Smith & Hargrove, by Michael Crowell, for plaintiff-appellee Carl A. Moore.

Hatch, Little & Bunn, by John D. Elvers, for plaintiff-appellee Vernon Charles Bullock.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for intervening defendant-appellants North Carolina State Board of Elections, et al.

S. Ellis Hankins, General Counsel, and Robert E. Hagemann, Assistant General Counsel, for North Carolina League of Municipalities, James B. Blackburn, III, General Counsel, for North Carolina Association of County Commissioners, and George T. Rogister, Jr., General Counsel, for North Carolina School Boards Association, amici curiae.

WHICHARD, Justice.

Plaintiffs Carl A. Moore and Vernon Charles Bullock won election to the Knightdale Town Council in 1989 for terms to expire in 1993. More than forty days before the termination of their council terms both sought to become candidates for mayor of Knightdale, which office was scheduled to be filled by election on 5 November 1991. Pursuant to the authority of N.C.G.S. § 163-125, defendant, the Knightdale Board of Elections, refused to allow plaintiffs to file for the office of mayor until they resigned their seats on the council. Effective 1 January 1991, section 163-125(a) provides that:

> No individual may qualify as a candidate for elective public office who holds another elective office, whether State, district, county or municipal, more than 40 days of the term of which runs concurrently with the term of office for which he seeks to qualify without resigning from such office prior to the last day of qualifying for the office he intends to seek.

N.C.G.S. § 163-125(a) (1991).

Plaintiff Moore filed suit on 29 July 1991 in Superior Court, Wake County, seeking a temporary restraining order, a preliminary injunction, and a permanent injunction prohibiting defendants from enforcing the provisions of N.C.G.S. § 163-125. The trial court issued a temporary restraining order on plaintiff Moore's behalf on 29 July 1991. On 6 August 1991, the North Carolina State Board of Elections filed both a motion to intervene and its accompanying answer to plaintiff's complaint. Plaintiff Moore did not object to the motion to intervene, and the trial court allowed the motion.

Plaintiff Bullock filed suit on 7 August 1991, alleging the same facts and seeking the same relief as plaintiff Moore. The trial court granted a temporary restraining order on behalf of plaintiff Bullock on 7 August 1991.

The trial court consolidated the two cases and heard the matter on 8 August 1991. On 12 August 1991, the court entered judgment for plaintiffs, concluding that N.C.G.S. § 163-125 violates Article VI, Section 6 of the North Carolina Constitution by adding a qualification for election to office. The court permanently enjoined and restrained defendants from enforcing the statute with respect to plaintiffs.

On 5 December 1991, this Court allowed the parties' joint petition for discretionary review prior to determination by the Court of Appeals. We address the identical question presented to the trial court—whether N.C.G.S. § 163-125(a) imposes an unconstitutional additional qualification for election to office. We conclude that it does, and we thus affirm the judgment of the trial court.

In support of the statute's constitutionality, the intervening defendant-appellant State Board of Elections (the State) argues that (1) the "resign to run" statute is entitled to the presumption of constitutionality afforded all legislative enactments, (2) the statute is not properly characterized as an additional qualification for election, and (3) the statute is a reasonable restriction on eligibility for candidacy like other legislation regulating elections that this Court has upheld.

The State correctly asserts that the statute is entitled to a presumption of constitutionality.

> 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) (quoting *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 9 (1833)). As we said in *Preston*, it is "firmly established that our State Constitution is not a grant of power. 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.* at 448-49, 385 S.E.2d at 478 (citation omitted).

The presumption of constitutionality is not, however, and should not be, conclusive.

> [I]t is not only within the power, but . . . it is the duty, of the courts in proper cases to declare an act of the Legislature unconstitutional, and this obligation arises from the duty imposed upon the courts to declare what the law is.
>
> The Constitution is the supreme law. It is ordained and established by the people, and all judges are sworn to support it. When the constitutionality of an act of the General Assembly is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people.

State v. Knight, 169 N.C. 333, 351-52, 85 S.E. 418, 427 (1915).

Our duty, then, is to determine whether the "resign to run" statute is indeed contrary to the express terms of Article VI, Section 6. Article VI, Section 6 of the North Carolina Constitution provides: "*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. As we noted in *Baker v. Martin*, 330 N.C. 331, 410 S.E.2d 887 (1991):

> 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. . . . *[W]e note that [Article VI, Section 6] does expressly limit disqualifications to office for those who are elected by the people to those disqualifications set out in the Constitution.*

Id. at 338-39, 410 S.E.2d at 891-92 (emphasis of last sentence added). Thus, under Article VI, Section 6, "[t]he Legislature is . . . forbidden by the organic instrument to disqualify any voter, not disqualified by [the Constitution], from holding any office. The General Assembly cannot render any 'voter' ineligible for office by exacting any additional qualifications . . . ." *State ex rel. S. B. Spruill v. Bateman*, 162 N.C. 588, 591, 77 S.E. 768, 769 (1913); *see also Starbuck v. Havelock*, 252 N.C. 176, 179, 113 S.E.2d 278, 280 (1960); *Cole v. Sanders*, 174 N.C. 112, 114, 93 S.E. 476, 477 (1917) (Clark, C.J., concurring); *State of N.C. by the At. Gen'l, Hargrove, ex rel. Lee v. Dunn*, 73 N.C. 595, 602-03 (1875).

To be eligible for election to office under Article VI, Section 6, one must be: twenty-one years of age, a qualified voter, and not otherwise disqualified under the Constitution. Article VI, Section 2 describes the qualifications of voters and includes a residency period for both state and presidential elections. Article VI, Section 8 contains enumerated disqualifications for office as follows:

> 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 has 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 rights of citizenship in the manner prescribed by law.

N.C. Const. art. VI, § 8. Other constitutional provisions describe additional qualifications or prerequisites for particular offices.

The record does not suggest, and the parties do not contend, that plaintiffs are disqualified from seeking or holding office by any constitutional or statutory provision other than N.C.G.S. § 163-125(a). We thus consider that statute. By its plain terms the statute provides, "No individual may *qualify as a candidate for elective public office* who holds another elective office . . . more than 40 days of the term of which runs concurrently with the term of office for which he seeks to qualify without resigning from such office . . . ." N.C.G.S. § 163-125(a) (emphasis added). It is abundantly clear that the aforementioned constitutional qualifications and disqualifications do not include the "resign to run" qualification enacted by the General Assembly and codified at section 163-125(a).

The State argues that the statute is not an additional qualification for election to office because it can be characterized as (1) a legislative qualification on candidacy, or (2) a limitation on the right to retain one office while seeking another. First, the State notes that although Article VI, Section 6 requires broad eligibility for *election* to office, it makes no reference to the qualifications for an individual's *candidacy.* In contrast, the language of N.C.G.S. § 163-125(a) specifically governs those who may "qualify as a *candidate* for elective public office . . . ." N.C.G.S. § 163-125(a) (emphasis added). Because there is no constitutional provision speaking to the qualifications for candidacy, the State argues that the statute should be upheld as a reasonable exercise of the General Assembly's legislative authority. Second, the State notes that other jurisdictions have interpreted their "resign to run" statutes as limiting the right to retain office. For example, the Supreme Court of Florida has said with respect to that state's "resign to run" statute:

> [It] does not prescribe additional qualifications for the office, as the candidate may well be qualified in a legal sense to hold either. The law is simply a limitation upon the right to retain the office already held when seeking another. It is not a limitation upon the right to seek another office, for the incumbent of an office has the choice under the statute to retain it unmolested or give it up and seek another.

Holley v. Adams, 238 So. 2d 401, 406 (Fla. 1970); *accord Mulholland v. Ayers*, 109 Mont. 558, 99 P.2d 234 (1940).

We decline to adopt either characterization of the "resign to run" statute. Construing the statute as a qualification on candidacy is ineffective because the words candidacy and election in this context are related in such a manner that an additional qualification on candidacy inevitably constitutes an additional qualification on election to office. The provision of Article VI, Section 6 that "[e]very qualified voter . . . shall be eligible for election" necessarily implies that candidacy for an office will be the means to achieve election to it. Candidacy describes "the state of being a candidate" and the word candidate means "one that aspires to or is nominated or qualified for an office." *Webster's New Collegiate Dictionary* 159 (G. & C. Merriam Co. 1980). Thus, even under the State's construction of the statute, N.C.G.S. § 163-125(a) creates an additional limitation on the state of being one who is qualified for an office. " 'When the main purpose of a statute, or a part of a statute, is to evade the constitution by effecting indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law.' " *Mulholland v. Ayers*, 109 Mont. at 575, 99 P.2d at 243 (Erickson, J., dissenting) (quoting *People v. Howland*, 155 N.Y. 270, 280, 49 N.E. 775, 778 (1898)).

We also decline to follow the cases cited by the State for the proposition that the "resign to run" statute is merely a limitation on the right to retain the office already held. The language of our statute—"[n]o individual may qualify as a candidate for elective public office who holds another elective office . . . without resigning from such office"—reveals that its purpose is to establish a qualification for office rather than to serve as a limitation on continued occupancy of a currently held office. Further, characterizing the statute as a limitation on the right to retain an office to which an individual has been duly elected does not remove all constitutional concerns. Though we express no opinion on the issue, the State's interpretation of the statute appears to conflict with the provisions of Article VI, Section 10, which states: "*Continuation in office.* In the absence of any contrary provision, all officers in this State, whether appointed or elected, shall hold their positions until other appointments are made or, if the offices are elective, until their successors are chosen and qualified." N.C. Const. art. VI, § 10.

Thus, we are unpersuaded by the State's purported distinction between restrictions on candidacy and retaining office on the one hand and qualifications for election to office on the other. Both

logic and the plain meaning of the words dictate that the "resign to run" requirement is at bottom an additional qualification, beyond those prescribed in the Constitution, on those who are eligible to seek election to office. As Chief Justice Ervin stated in his dissenting opinion in *Holley*:

> [The statute] is a legislatively imposed requirement affecting and conditioning the status of a person seeking to qualify for election to a particular public office and as such is contrary to the qualification and disqualification provisions spelled out with specificity in the Constitution; burdens the potential candidate with a disqualification not prescribed in the Constitution; deprives him of the same freedom enjoyed by other electors not otherwise prohibited by the Constitution from seeking election to a public office; and denies the electorate of the state or county the candidacies of those who are unwilling to shed their current offices in order to become candidates.
>
> . . . .
>
> It is sheer sophistry to say that there is a dichotomy here—that [the statute] only regulates the right to continue to hold a current office without relation to eligibility or qualification to seek and hold another.

Holley, 238 So. 2d 401, 409-10 (Ervin, C.J., dissenting).

Finally, the State argues that the "resign to run" statute is a reasonable restriction on candidacy that is contemplated by the Constitution and that carries out identifiable policies under the Constitution. The State's argument is two-fold: (1) requiring a current officeholder to resign his or her office before becoming a candidate for another office implements the provision in Article VI, Section 9 prohibiting dual officeholding, and (2) requiring such resignation before the close of the filing period for election allows the vacancy to be filled by election rather than appointment, thereby effectuating the policy that elective offices be filled by election.

While arguably N.C.G.S. § 163-125(a) advances these constitutional policies to some extent, Article VI, Section 9 itself contains no provision that prevents *pursuing* one office while holding another. Instead, for reasons apparent in its own text it condemns dual *officeholding*. That section provides:

> Sec. 9. *Dual office holding.*
>
> (1) *Prohibition.* It is salutary that the responsibilities of self-government be widely shared among the citizens of the State and that the potential abuse of authority inherent in the holding of multiple offices by an individual be avoided. Therefore, no person who holds any office or place of trust or profit under the United States or any department thereof, or under any other state or government, shall be eligible to hold any office in this State that is filled by election of the people. No person shall hold concurrently any two or more appointive offices or places of trust or profit, or any combination of elective and appointive offices or places of trust or profit, except as the General Assembly shall provide by general law.

N.C. Const. art. VI, § 9(1). The evil the section seeks to prevent is that of *holding* more than one office simultaneously. This evil is not present in the mere pursuit by an officeholder of another office.

Additionally, N.C.G.S. § 163-125 is selective in its purported implementation of the provisions against dual officeholding. Under the Constitution *all* dual officeholding is forbidden.[1] The statute, however, specifically excludes "persons holding any elective federal office" and "persons holding the office of judge or justice in the General Court of Justice who seek another office as a judge or justice in the General Court of Justice." N.C.G.S. § 163-125(e) (1991). The statute also requires an officeholder to resign only if the term of his or her current office overlaps with the term of the desired office by more than forty days. N.C.G.S. § 163-125(a). *Any* overlap in the *holding* of offices would violate the constitutional prohibition against dual officeholding. These statutory exceptions are obvious indications that the intent of the General Assembly in enacting this statute was not to implement the dual officeholding provisions of the state Constitution.

These exceptions also make it unlikely that the General Assembly intended through this legislation to ensure to the greatest extent possible that elective offices are filled by election rather

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1. We have interpreted this constitutional provision so that acceptance of a second office automatically vacates the first. *See Barnhill v. Thompson*, 122 N.C. 493, 29 S.E. 720 (1898). Thus, prior to the enactment of the statute, the dual officeholding provision did not lack a means of implementation.

than appointment. In addition, the statute provides both that the office shall be deemed vacant at the time the official's resignation is submitted and that one who has resigned under its provisions shall not hold over until a successor is elected or appointed. N.C.G.S. § 163-125(b), (d) (1991). Thus, application of the statute itself guarantees that appointment of replacement officials will be necessary for at least a short period each time the statute forces a resignation. Finally, contrary to the State's argument, because the dates of filing and election vary from year to year the statute does not assure that an election will be held to fill the vacated office.

To the extent the "resign to run" statute does implement important policies under the Constitution, the State contends that it is a reasonable restriction on the election process similar to other restrictions this Court has upheld previously. Undoubtedly, "[s]o long as there is no unjust discrimination the State may, by exercising its inherent police power, suppress whatever evils may be incident to a primary or convention for the designation of candidates for election to public office. Statutes prescribing reasonable rules and regulations to this end are constitutional." *McLean v. Board of Elections*, 222 N.C. 6, 10-11, 21 S.E.2d 842, 845 (1942) (citations omitted).

In *McLean*, this Court upheld requirements that the plaintiff file notice of his candidacy, sign a required pledge to abide by the result of the primary, and pay a filing fee.[2] *Id.* We also have upheld other "assurance[s] for the faithful discharge of the duties of the office." *Bateman*, 162 N.C. at 592, 77 S.E. at 769 (discussing *Dunn*, 73 N.C. 595). *See, e.g., Caldwell v. Wilson*, 121 N.C. 425, 470, 28 S.E. 554, 562 (1897) (statute requiring candidate for state railroad commissioner to hold no interest in operation of railroad); *Dunn*, 73 N.C. 595 (requirement that elected official account for monies collected during first term of office).

The statute at issue here, however, is not like the regulations upheld in *McLean*, *Caldwell*, and *Dunn*. This statute is neither a mere "assurance" of the faithful discharge of official duties, nor is it a regulation that applies uniformly to those who seek elective office. Rather than operating as a regulation of the procedures

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2. The Court did not address in *McLean* the specific question of whether the regulations were additional qualifications to election.

necessary to the orderly conduct of the election, this statute effectively disqualifies a distinct category of potential candidates.

In *Preston*, 325 N.C. 438, 385 S.E.2d 473, we upheld against constitutional challenge the provisions of N.C.G.S. § 163-106 which required that "no person may file a notice of candidacy for superior court judge unless that person is at the time of filing the notice of candidacy a resident of the judicial district as it will exist at the time the person would take office if elected." *Id.* at 461-62, 385 S.E.2d at 486 (quoting 1987 N.C. Sess. Laws ch. 509, tit. IV, § 13). Article IV, Section 9 provided only that "[e]ach regular Superior Court Judge shall reside in the district for which he is elected." N.C. Const. art. IV, § 9. The Court in *Preston* compared the residency requirements for other offices under the Constitution with the residency requirement for superior court judgeships and concluded that there existed a "constitutional intent to provide the legislature some limited flexibility in setting residency requirements for candidates for superior court judgeships." *Preston*, 325 N.C. at 462, 385 S.E.2d at 486.

The State argues that just as in *Preston* the legislature was permitted to change the residency requirement for superior court judgeships from a post-election condition to a pre-election condition, it should be permitted to change the dual officeholding prohibition from post-election to pre-election with the "resign to run" law. This argument is without merit. In *Preston* residency was a *qualification* for office already provided by the Constitution for superior court judgeships. N.C. Const. art. IV, § 9. The Court compared this office-specific qualification with the residency qualifications for other constitutional offices and discerned a constitutional intent to provide legislative flexibility in implementing the qualification for office. In this case, by contrast, the dual officeholding provision of Article VI, Section 9 is not a qualification for election to office that requires implementation by the legislature prior to an election. Instead, it is a prohibition against *holding* two offices simultaneously. As stated above, the prohibition is not against seeking a second office, it is against simultaneously holding a second office. Whereas "qualification" implies a precondition to attainment of an office, "holding" connotes a *fait accompli*, an "occupancy as a result of an appointment, promotion, or election." *Webster's New Collegiate Dictionary* 540. In light of the plain language of the provision against dual officeholding, we detect no intent to allow the General Assembly

to transform a prohibition against a post-election condition into a pre-election qualification for office.

We conclude that N.C.G.S. § 163-125, the "resign to run" statute, is contrary to the express terms of Article VI, Section 6, of the North Carolina Constitution. Plaintiffs are qualified voters in North Carolina, who are not disqualified from elective office by any provision of our Constitution. Hence, they are "eligible for election by the people to office" under the express language of Article VI, Section 6. The legislative attempt to require the resignation of those having plaintiffs' status as holders of "another elective office" imposes an additional qualification for elective office, not provided by our Constitution; thus, it fails to pass constitutional muster.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

STATE OF NORTH CAROLINA v. KENNETH LEE TUCKER AND HOYLE EUGENE WRAY

No. 332A89

(Filed 5 March 1992)

1. Evidence and Witnesses § 1214 (NCI4th) — codefendants — statement of one not admissible

The trial court in a murder prosecution properly excluded statements made by codefendant Tucker on 12 April 1988 as hearsay and under the authority of *Bruton v. United States*, 391 U.S. 123, where codefendant on that date gave a detailed statement implicating himself, Donna Tucker (his wife and defendant Wray's sister), and Wray, stating that Wray hired the Tuckers to kill Cecil in exchange for $1,000 in cash and $1,000 in pills; Tucker described meeting Cecil and driving around with her as the Tuckers and Cecil looked for hidden pills; according to defendant Tucker, he began to have doubts about killing Cecil, but hit Cecil over the head at Donna Tucker's urging; and Wray paid the Tuckers the next day and told them how to get rid of the car.

Am Jur 2d, Evidence §§ 263, 658.

Supreme Court's application of rule of Bruton v. United States (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S.Ct. 1620, holding that accused's rights under confrontation clause of Federal Constitution's Sixth Amendment are violated where codefendant's statement inculpating accused is admitted at joint trial. 95 L. Ed. 2d 892.

2. Evidence and Witnesses § 1214 (NCI4th) — codefendants — statement of one — admissible

The trial court erred in a murder prosecution by precluding admission of a statement made by codefendant Tucker on 15 April 1987 because a statement is inadmissible as to a codefendant only if it is made outside his presence and incriminates him. The statement here does not incriminate defendant Wray; was not inadmissible hearsay because, upon Tucker's invocation of his right not to testify, it was a statement against penal interest by an unavailable witness; the statement was such that the declarant would understand its damaging potential; statements that subject the declarant to criminal liability for offenses other than those for which defendant is on trial are admissible under N.C.G.S. § 8C-1, Rule 804(b)(3); and the evidence provides the requisite indications of trustworthiness.

Am Jur 2d, Evidence §§ 541, 618, 620; Homicide § 344.

Witness' refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions. 43 ALR3d 1413.

3. Evidence and Witnesses § 1214 (NCI4th) — codefendants — statement by one incriminating the other — admissible

The trial court erred in a murder prosecution by precluding admission of the 22 and 25 February 1988 statements in which defendant Tucker said that codefendant Wray had killed Cecil, the victim, where Wray sought to use the statements to support his defense that the Tuckers planned and executed the murder without any involvement on his part and conspired to implicate him in order to get a deal from the State. The trial court erroneously applied *Bruton v. United States*, 391 U.S. 123, because Wray sought to include rather than exclude statements by his codefendant. Further, because Wray did not offer the statements as the truth of the matters asserted,

but to discredit the State's theory of the case, the statements are not inadmissible hearsay. N.C.G.S. § 8C-1, Rule 801(c).

Am Jur 2d, Evidence §§ 619, 620; Homicide § 344.

4. **Evidence and Witnesses § 1214 (NCI4th)— codefendants—exclusion of statements—prejudicial**

The trial court's error in excluding statements of a codefendant in a murder prosecution was not harmless where the sole direct evidence against Wray, who sought to include the evidence, was the testimony of Donna Tucker, an interested witness of highly questionable credibility; Wray's defense was that the Tuckers killed the victim, Cecil, with no knowledge or involvement on his part, then sought to escape punishment by implicating him; and the number of and inconsistencies in defendant Tucker's pretrial statements not only support this theory, but could well have fatally undermined the State's theory of the case as contained in the testimony of Donna Tucker. N.C.G.S. § 15A-1443(a).

Am Jur 2d, Evidence §§ 619, 620; Homicide § 344.

5. **Criminal Law § 1293 (NCI4th)— murder—conviction based on testimony of coconspirator—sentencing**

There was no prejudice in a murder prosecution where defendant contended that he should not have been convicted of a Class A or capital felony because his conviction was based solely on the uncorroborated testimony of a coconspirator. However, the jury found that the conviction was not based solely on the uncorroborated testimony of one or more principals, and, although defendant Wray challenged the trial court's instructions defining corroboration, he did not object at trial and cannot now assign error. Even assuming that the conviction was based on the uncorroborated testimony of a coconspirator, there is no prejudice because defendant received a life sentence and cannot be subjected to the death penalty at his new trial. N.C.G.S. § 14-5.2.

Am Jur 2d, Conspiracy §§ 43, 44, 46; Evidence §§ 1151-1153.

6. **Constitutional Law § 265 (NCI4th)— invocation of right to counsel—continued questioning—new trial**

Defendant Tucker was granted a new trial for murder where he was taken to district court on 20 April and a public

defender was appointed for him; the public defender talked to defendant later that afternoon or evening and told defendant not to talk or go with anyone without counsel; deputy Siwinski met with defendant Tucker on 21 April in the Guilford County Jail Complex and stated that he wanted Tucker to go with him to Surry County; Tucker told Siwinski what his lawyer had said; Tucker tried to call his attorney twice that morning; and Siwinski told Tucker that they needed to hurry and something to the effect that "if I want you, I'll tell you. I want Gene," a codefendant. Statements made on 21 April were obtained in violation of defendant's Fifth and Sixth Amendment rights.

Am Jur 2d, Criminal Law §§ 791, 792, 796.

Requirement, under Federal Constitution, that law enforcement officers' custodial interrogation of suspect cease after suspect requests assistance of counsel—Supreme Court cases. 83 L. Ed. 2d 1087.

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

APPEAL by defendants of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of life imprisonment entered by *Rousseau, J.*, at the 1 May 1989 Criminal Session of Superior Court, GUILFORD County, upon jury verdicts finding defendants guilty of first-degree murder. Heard in the Supreme Court 16 October 1991.

Lacy H. Thornburg, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.

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

Charles T. Browne and C. Richard Tate, Jr., for defendant appellant Wray.

WHICHARD, Justice.

Defendants were convicted of the first-degree murder of Brenda Cecil. Their cases were consolidated for trial over the objections of both defendants. The joinder raised perceived *Bruton* problems

because defendant Tucker had made several inconsistent, pretrial statements. After lengthy debate, the State acknowledged that it could not properly "sanitize" certain statements by defendant Tucker and announced that it would not offer them. The State also chose not to offer other statements of defendant Tucker that undermined its theory of the case. Defendant Wray was not able to cross-examine defendant Tucker about the latter statements because defendant Tucker invoked his Fifth Amendment right not to incriminate himself. As a result, defendant Wray contends that the joinder of the cases prevented him from introducing certain of defendant Tucker's statements that either exonerated defendant Wray or were inconsistent with the State's theory of the case. We hold only that defendant Wray was entitled to introduce defendant Tucker's statements. We therefore order a new trial for defendant Wray. We also grant defendant Tucker a new trial because the trial court erroneously admitted a statement obtained from him in violation of his Fifth and Sixth Amendment rights.

Donna Tucker, defendant Tucker's wife and defendant Wray's sister, was a principal State witness against both defendants. She testified pursuant to an agreement with the State that allowed her to plead guilty to the second-degree murder of Cecil in exchange for her testimony against defendants. She testified that she and defendant Tucker killed Cecil at the behest of defendant Wray, who wanted to eliminate Cecil as a witness against him in a drug case.

About a month prior to Cecil's death, the Guilford County Sheriff's Department was investigating her for suspected drug activity. On 29 August 1986, on the basis of a tip, a deputy sheriff observed Cecil enter defendant Wray's place of business, Mid-State Welding Company. The officer saw Donna Tucker enter Mid-State about the same time. When Cecil left the premises, other officers stopped her, searched her car, and seized several Dilaudid tablets, Fiorinal tablets, a needle and syringe, and defendant Wray's business card. The officers then obtained a warrant to search Mid-State and there discovered twenty-one Dilaudid tablets, five Valium tablets, some marijuana, and two revolvers. Both Cecil and defendant Wray were charged with various drug offenses and scheduled for court appearances on 16 (Cecil) and 17 (Wray) September 1986.

Cecil did not make her court appearance. At trial, her mother, Patricia Stout, testified that she had last seen Cecil on 11 September 1986. That evening a white female, whom Stout identified at trial

as Donna Tucker but who introduced herself as Debbie Peterson, approached Stout at her home in Greensboro, which she shared with Cecil and Cecil's brother Barry. Donna asked for Cecil, who was not at home. Donna then left. She returned a second time and found Cecil still absent. When Cecil returned at about 10:00 p.m., her mother told her about the visitor, whom Cecil said she did not know. When Donna came back a third time, however, Cecil went outside with her and followed Donna's black car with her own car. Stout testified that her daughter returned at about 10:50 p.m., riding in the black car with Donna and a white male. Cecil retrieved her work shoes and left again in the black car, saying she was going to work. Stout never saw her again.

At first Stout thought her daughter might have gone on vacation with a friend, but on 23 September 1986 she reported her daughter missing. The missing person investigation turned into a murder investigation upon the discovery of Cecil's body on 24 September 1986. Her body was found in an advanced state of decomposition in a rural wooded area in Surry County, with a short piece of television antenna wire looped around the neck. An autopsy revealed that she was four months pregnant and that she died from ligature strangulation.

On 15 October 1986, S.B.I. Agent J. W. Bryant and Detective Schmidt of the Greensboro Police Department interviewed Donna. She told them she had a drug relationship with Cecil and that she and defendant Tucker had gone to Greensboro on 11 September in response to a phone call from Cecil for drugs. Donna, defendant Tucker, and Cecil spent the evening driving around taking drugs. Donna told the officers she last saw Cecil riding away with someone in a red Pontiac.

Subsequently, in April 1988, Donna and defendant Tucker were arrested on charges of armed robbery and first-degree burglary in Randolph County. While in custody, on 6 April, Donna made a tape-recorded statement that her brother, defendant Wray, had hired her and defendant Tucker to kill Cecil, which they did on 11 September. Following her release on bond, however, Donna told several people that her 6 April statement was not true. She also wrote a letter to her mother on 11 July 1988 denying any involvement in the murder on defendant Wray's part. On 11 April 1988, Donna told law enforcement officers defendant Wray had nothing to do with the murder of Cecil. When faced with these inconsistent

statements at trial, Donna recanted them and the letter, claiming that they were motivated by fear that her family would turn against her. Donna testified that she wrote the letter at the request of her mother and upon the insistence of defendant Wray.

At trial, Donna testified that at the time of the murder her husband, defendant Tucker, was a heavy and dependent user of Dilaudid and that she purchased it for him from her brother, defendant Wray. On 10 September 1986, defendant Wray told Donna he wanted to get rid of someone. On 11 September, the Tuckers met with defendant Wray, who explained that he wanted to get rid of a girl who was going to testify against him in a drug case. The Tuckers agreed to kill Cecil for $2,000.

Donna further testified that she and defendant Tucker left immediately for Greensboro. They made several phone calls to Cecil's home from a shopping center. Eventually Cecil met them at the shopping center, where the Tuckers lured her into their car with a story that they had hidden the drugs elsewhere. They drove around for a while, and both defendant Tucker and Cecil were "shooting up" some Dilaudid. At one point they returned to Cecil's house, where Cecil retrieved her work shoes. Finally, they went to a wooded area and began to search for the pills. During this activity, defendant Tucker hit Cecil with a tire tool and began to choke her. Donna watched and took Cecil's pulse while defendant Tucker choked her. Afterwards, defendant Tucker slipped antenna wire around Cecil's neck. The Tuckers then drove to Surry County and dumped the body.

The next day, defendant Wray paid them $1,000 in cash and $1,000 in pills, remarking that defendant Tucker would end up using the money for pills anyway. Donna told her brother she did not want the car anymore because a dead body had been in it. She asked him to have someone burn it, and he agreed. Defendant Wray instructed the Tuckers to go to the movies the following Tuesday and to leave a $100 bill in the glove compartment and the keys in the car. The following Tuesday, the car disappeared. An Archdale policeman discovered it burning on 16 September.

Both defendants closely cross-examined Donna about her various inconsistent statements. The State attempted to rehabilitate her with corroborating testimony from her attorney and from law enforcement officers. The State also introduced records of eighteen long-distance phone calls from the Stout residence to the home

of defendant Wray's girlfriend (later wife), Kathy Wray, between 18 June 1986 and 11 September 1986, and twenty-five calls from the Stout residence to defendant Wray's place of business between 4 June 1986 and 29 August 1986. As further evidence, the State presented testimony of David Johnson, Cecil's boyfriend, that both he and Cecil had bought drugs from defendant Wray and defendant Wray had expressed concern that Cecil might talk.

While defendant Tucker did not testify, he presented witnesses on his behalf. One, Thomas Lee Vestal, Kathy Wray's brother, testified that in April 1988 Donna told him she had killed Cecil because Cecil had been sleeping with defendant Tucker and Tucker had gotten Cecil pregnant. Defendant Tucker thought he was the murderer, however, because he was so heavily drugged at the time. The confession was prompted by a scene on television portraying a betrayed wife drawing a gun on her husband and his lover. When Vestal commented that an adulterous spouse was not worth losing one's life over, Donna responded, "When you got the feds wrapped around you, you don't get in any trouble."

Defendant Tucker also presented the expert testimony of Dr. Billy Ray Hunter, a psychiatrist, on the effect of Dilaudid. According to Hunter, a person under the influence of this potent pain killer is generally passive and withdrawn. While an addict will experience withdrawal symptoms of nausea, vomiting, cramps, restlessness, and irritability, an addict will remain withdrawn, passive, and seemingly functional as long as the drug is available. Due to the mental cloudiness or confusion, sleepiness, and periods of short-term memory loss the drug causes, use of Dilaudid would impair the user's ability to operate machinery safely. After reviewing defendant Tucker's medical files, Hunter determined that defendant Tucker had been an addict since 1981 and was addicted around the time of the crime. Hunter also described the relationship between an addict and his source as an intense, controlling one in which the addict is "pretty much an indentured slave."

Defendant Wray testified on his own behalf. He also presented the testimony of several witnesses.

June Hall, the sister of defendant Wray and Donna Tucker, testified about two conversations with Donna in early April 1988 before Donna's arrest for Cecil's murder. During the first, Donna said she had told the police something that "was going to burn [defendant Tucker's] ass good." She also would have to serve some

time, but only a little. In the second, Donna told June she and defendant Tucker had killed Cecil, but she made no mention of any involvement of defendant Wray. June also testified that when defendant Wray was arrested on the drug charges, Donna had told her that she sold drugs to Cecil. Around 3 or 4 September 1986, Donna had asked June for money to help her make payments on a new Escort which she had bought in June 1986. The day after the car disappeared, Donna had told June it was stolen while she and defendant Tucker were at the movies and she thought her brother, Walter Wray, had the missing extra set of keys. Later, Donna told June that she and defendant Tucker had burned the car because there had been a body in it. At no point did Donna mention any involvement of defendant Wray in the burning of the car.

June also testified about a phone call from Donna from prison in which Donna told June she (Donna) would probably get twenty to twenty-five years, so she "had to do something." June further testified that Donna and defendant Wray had never gotten along, that she knew defendant Tucker had a serious drug problem, that Donna usually obtained defendant Tucker's drugs for him, and that Donna had a reputation for lying. June had never known of Donna getting Dilaudid from defendant Wray.

Lawrence Watford testified that he became acquainted with David Johnson while being held in the Randolph County jail. Johnson told him he had to kill defendant Tucker and Donna because they had killed his "wife" and baby. Johnson also told Watford he was prepared to lie under oath in order to get the people who killed his wife and child. At one time, Johnson said he thought defendant Wray was the one who killed Cecil, but later he said it was not Wray but almost surely was Donna. Watford said Johnson never mentioned buying drugs from defendant Wray; Watford was under the impression that Johnson was a drug dealer himself.

Defendant Wray's wife Kathy also testified on his behalf. According to Kathy, defendant Wray was hospitalized in August 1985 for three to four days for reconstructive surgery on his nose and sinuses. Upon his release, defendant Wray received a prescription for Dilaudid. He later kept the leftover medicine in a milk crate at Kathy's house with some of his other personal belongings which he would carry to Mid-State Welding Company.

The weekend after defendant Wray's arrest for the drug offenses he and Kathy went to the beach. There they saw Jack

Green, an attorney, who gave Wray advice on the charges. When they returned home on 1 September 1986, Cecil called. Wray and Kathy introduced Cecil to Green and Cecil also retained Green.

In September 1986 Kathy did not know Donna well, as defendant Wray and Donna did not speak to each other. When Kathy married defendant Wray in 1988, Kathy and Donna became closer, but Donna would only visit when defendant Wray was not at home. Defendant Wray began to tolerate Donna for Kathy's sake and allowed Donna to come on a family trip to Florida in April 1988 at Kathy's suggestion. Kathy testified that on the drive down, while defendant Wray was asleep in the back seat of the van, Donna told her that she and defendant Tucker had killed Cecil. Donna explained that she and defendant Tucker had been selling drugs to Cecil and that they had gone to Greensboro in response to a call from Cecil for drugs. Cecil joined the Tuckers in their car, which Donna was driving because defendant Tucker kept "nodding out." Defendant Tucker and Cecil began to argue about Cecil stealing drugs from defendant Tucker. Donna became angry because Cecil was acting "like she was [defendant Tucker's] wife." When defendant Tucker and Cecil continued to argue, Donna got out of the car, picked up something, and "knocked the shit out of [Cecil]." Donna thought Cecil was merely unconscious. She had defendant Tucker put Cecil's body in the car. Donna continued to drive because defendant Tucker was "nodding out" again. After driving awhile, Donna pulled off the road and told defendant Tucker: "[T]hrow the bitch out. Somebody will get her."

According to Kathy, Donna never mentioned anything about defendant Wray or about Cecil's being choked. While the women never discussed the incident again in detail, whenever it came up Donna always tried to blame her husband. The conversation inevitably began with Donna characteristically accusing defendant Tucker of sleeping with someone. When Donna was in jail, Kathy visited her several times. On one occasion, Donna said she had told the police and the prosecutor that she had lied, to which they had responded that she should stick to her statement or she would get the death penalty or life imprisonment. Donna told Kathy she was only twenty, too young for that, so she had to do something. Kathy did not know until defendant Wray's arrest that Donna had implicated him. Kathy had no knowledge of her husband dealing drugs.

Luanne Hicks, Kathy's roommate before Kathy married defendant Wray, testified about a conversation with Donna the day Donna had told Vestal she had killed Cecil. Hicks had been upstairs taking a bath while Donna and Vestal talked. When Hicks came downstairs, Vestal rolled his eyes and whispered to her, in reference to Donna, "I think she's crazy." After Vestal left, Donna confided to Hicks that defendant Tucker had choked a girl over a dope deal.

Defendant Wray then testified, denying any involvement in the disappearance or death of Cecil. He claimed he met David Johnson when Johnson came looking for Wray's brother, a friend from prison, and for a job as part of a parole work plan. Wray offered to help. As a result, Johnson paid more visits to Mid-State and called several times. On one of Johnson's visits, Wray met Cecil. When Johnson was taken off work-release, Wray then had contact with Johnson through Cecil. Wray denied selling drugs to Johnson or Cecil.

Wray also explained the presence of Dilaudid at Mid-State on 29 August 1986 as resulting from his nose surgery. That morning around 10:00 a.m., Cecil had stopped by to discuss Johnson's work plan. Cecil stayed about twenty minutes and used the bathroom before leaving. Around 1:00 p.m., Donna stopped by to ask if Wray had seen their mother, which Wray found to be strange because Donna had only come to Mid-State once before and because there was no reason for their mother to come by that day. Moments later the officers arrived, conducted the search, and arrested Wray. Donna left as the officers entered.

Wray testified that he had never been close to Donna and rarely saw her. In 1983 he got into a fight with the Tuckers, as a result of which he was tried for assault on a federal witness.[1] Both Tucker and Donna testified against defendant Wray on the assault charges. For years afterward, contact between Wray and the Tuckers was even more limited. He did know from family sources that Donna supplied Tucker with drugs.

Defendant Wray also testified that the first time he saw Donna after his 29 August 1986 drug arrest was at Christmas 1987 at their mother's house. After Wray heard the Tuckers arguing in

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1. Defendant Tucker was a witness against Wray's and Donna's father on federal drug charges at the time; Tucker was placed in a federal witness protection program for a period in connection with the federal case against his father-in-law.

the living room, Donna came into the kitchen and told Wray that Tucker had killed Cecil. When their mother later showed him Donna's letter saying Wray had nothing to do with the murder of Cecil, he was baffled because it had never occurred to him that he was involved.

DEFENDANT WRAY'S APPEAL

[1] Wray sought to introduce statements made by defendant Tucker on 15 April 1987, 22 February 1988, and 25 February 1988. In the first, defendant Tucker stated to Agent Bryant that he could say with "absolute certainty" that his source of Dilaudid was an individual in Gastonia, that Wray was not the source, and that he and Donna did not deal drugs with Wray because neither trusted him after defendant Tucker testified against Wray's father in a federal drug case. In this statement defendant Tucker did not implicate Wray in the murder of Cecil.

On 22 February 1988, however, defendant Tucker claimed that Wray had killed Cecil. On 25 February 1988, Tucker claimed that Wray killed Cecil and the Tuckers were hired only to lure her out for Wray.

The trial court excluded these statements, as well as statements made by defendant Tucker on 12 April 1988, as hearsay and under the authority of *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968). In *Bruton*, the United States Supreme Court held that at a joint trial, admission of a statement by a nontestifying codefendant that incriminated the other defendant violated that defendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. *Id.* at 126, 20 L. Ed. 2d at 479. This right binds the states via the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 13 L. Ed. 2d 923, 926 (1965); *State v. Parrish*, 275 N.C. 69, 74, 165 S.E.2d 230, 234 (1969).

> The result is that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant . . ., and (2) that the declarant will not take the stand. If the declarant can

be cross-examined, a codefendant has been accorded his right to confrontation.

State v. Fox, 274 N.C. 277, 291, 163 S.E.2d 492, 502 (1968).

These principles are substantially codified in N.C.G.S. § 15A-927(c). The trial court has three choices when a defendant objects to joinder due to the existence of an extrajudicial statement by a codefendant that makes reference to the objecting defendant but is not admissible as to the objecting defendant: 1) a joint trial at which the statement is not admitted; 2) a joint trial at which the statement is admitted in a sanitized form; or 3) a separate trial for the objecting defendant. N.C.G.S. § 15A-927(c) (1988).

The trial court correctly precluded admission of statements given by defendant Tucker on 12 April 1988. On that date, Tucker gave a detailed statement implicating himself, Donna, and defendant Wray. He stated that Wray hired the Tuckers to kill Cecil in exchange for $1,000 in cash and $1,000 in pills. Tucker described meeting Cecil and driving around with her as the Tuckers and Cecil looked for the hidden pills. According to Tucker, he began to have doubts about killing Cecil, but at Donna's urging he hit Cecil over the head. The next day Wray paid the Tuckers and told them how to get rid of the car. After lengthy debate and an unsuccessful attempt to "sanitize" this statement, the State withdrew its proffer. Later, the trial court ruled that other statements made by Tucker on 12 April were part of the same transaction and therefore were also inadmissible.

[2] While the 12 April 1988 statement clearly was inadmissible under *Bruton* and N.C.G.S. § 15A-927(c), the trial court erred in precluding admission of the 15 April 1987 statement. *Bruton* only applies when a confession by a nontestifying defendant is "inadmissible as to the codefendant." *Fox*, 274 N.C. at 291, 163 S.E.2d at 502; *see also* N.C.G.S. § 15A-927(c)(1) (1988). A statement is inadmissible as to a codefendant only if it is made outside his presence and incriminates him. *See State v. Bonner*, 222 N.C. 344, 345, 23 S.E.2d 45, 46 (1942); *see also State v. King*, 287 N.C. 645, 654, 215 S.E.2d 540, 550 (1975), *judgment vacated in part*, 428 U.S. 903, 49 L. Ed. 2d 1209 (1976). While the 15 April statement was made outside Wray's presence, it does not incriminate him. Indeed, it tends to exonerate him, which is why he sought to introduce it. The refusal to admit this statement deprived Wray not only

of exculpatory substantive evidence but also of evidence that contradicted testimony of the State's key witness, Donna Tucker.

Neither was the 15 April statement inadmissible as hearsay. Upon defendant Tucker's invocation of his right not to incriminate himself, the 15 April statement became admissible as a statement against penal interest by an unavailable witness. N.C.G.S. § 8C-1, Rules 804(a)(1), 804(b)(3) (1988); *State v. Singleton*, 85 N.C. App. 123, 128, 354 S.E.2d 259, 263, *disc. rev. denied*, 320 N.C. 516, 358 S.E.2d 530 (1987). If a statement "so far tend[s] to subject [the declarant] to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true, it is admissible." N.C.G.S. § 8C-1, Rule 804(b)(3). The statement must actually subject the declarant to criminal liability. *Singleton*, 85 N.C. App. at 129, 354 S.E.2d at 263. An anonymous letter does not satisfy this element because a declarant who conceals his identity does not tend to expose himself to criminal liability. *State v. Artis*, 325 N.C. 278, 304, 384 S.E.2d 470, 484-85 (1989), *cert. granted and judgment vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604, *on remand*, 327 N.C. 470, 397 S.E.2d 223 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). Here, however, Tucker's identity was known and his liability for various drug offenses was clear.

The statement also must be such that the declarant would understand its damaging potential. *Id.* at 305, 384 S.E.2d at 485. Some courts have held that statements made to law enforcement officers or prosecutors as part of plea bargain negotiations do not meet this element because the reasonable man in those circumstances would not believe his statement necessarily subjected him to criminal liability. *United States v. Rhodes*, 713 F.2d 463, 473 (9th Cir. 1983), *cert. denied*, 464 U.S. 1012, 78 L. Ed. 2d 715, *cert. denied sub nom. Dudley v. United States*, 465 U.S. 1038, 79 L. Ed. 2d 711 (1984); *United States v. Callahan*, 442 F. Supp. 1213, 1222 (D. Minn. 1978), *record supplemented*, 455 F. Supp. 524, *judgment rev'd on other grounds sub nom. United States v. Larson*, 596 F.2d 759 (8th Cir. 1979). While there is evidence that defendant Tucker cooperated with law enforcement officers during the spring of 1988, there is no evidence that he had entered into a relationship with the authorities as early as 15 April 1987.

In the majority of cases, the statement at issue subjects the declarant to liability for the crime(s) of which the defendant is

accused. Under our pre-Rules case law the declaration had to be one that the declarant committed the crime for which the defendant was on trial, and the admission had to be inconsistent with the guilt of the defendant. *State v. Haywood*, 295 N.C. 709, 730, 249 S.E.2d 429, 442 (1978). *Haywood* overturned the prior North Carolina practice of precluding admission of statements against penal interest as hearsay yet retained several restrictive requirements, most of which survived passage of the Rules of Evidence. *Singleton*, 85 N.C. App. at 129, 354 S.E.2d at 263; 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 147 at 679 (3d ed. 1988).

This Court, however, has admitted statements under Rule 804(b)(3) that subject the declarant to criminal liability for offenses other than those for which the defendant is on trial. In *State v. Levan*, 326 N.C. 155, 388 S.E.2d 429 (1990), several witnesses were permitted to testify about statements made by the victim of a murder charged against the defendant. The victim said he had shot and killed someone to whom he was sent to collect a drug debt owed to the defendant. Later, the collector was himself killed. The State tried the defendant for the murder on the theory that the defendant killed him because the defendant feared the collector would testify against him in drug cases in exchange for a deal from the State on the collection-shooting death. The Court held that the statement by the defendant's victim that he had shot one of the defendant's clients who had "cut" the defendant on a drug deal was a statement against the penal interest of the victim, admissible under Rule 804(b)(3). *Id.* at 163-64, 388 S.E.2d at 433; *see also Maugeri v. State*, 460 So. 2d 975, 976-79 (Fla. Dist. Ct. App. 1984), *cause dismissed*, 469 So. 2d 749 (1987) (statement by victim to his girlfriend, two days before his murder, that he had stolen two kilograms of cocaine from the defendant's airplane, admissible under the hearsay exception for statements against penal interest); *cf.* David W. Louissell & Christopher B. Mueller, *Federal Evidence* § 489 at 1149-52 (1980) (against-interest requirement satisfied by a third-party confession which "implicates both the declarant and the accused in *some other crime*, where the effect of the statement is to exonerate the accused in some way respecting the charged crime, as by . . . *corroborating a defense explanation* of otherwise damning circumstantial evidence") (emphasis added).

As in the cited cases, Tucker's declaration involved crimes other than those for which Wray was tried. Tucker's statement is similar to those at issue in the above cases in that it bears

on collateral but related issues in the case against Wray. In *Levan* and *Maugeri*, the statements by the victims helped explain, from the State's point of view, why the victims were killed. Though it incriminates him in drug dealing, Tucker's statement tends to corroborate Wray's testimony that Wray did not deal in drugs, that he did not have a relationship with the Tuckers, that he would not have turned to them for aid because he did not trust them or get along with them, and that he did not ask them to help with a problem witness. The statement tended to counter the State's position on important issues in the case—Wray's involvement in the drug trade, his motivation to kill Cecil, and his employment of the Tuckers to kill Cecil.

One requirement enunciated in *Haywood* which expressly carries over in the Rules is that a statement against penal interest is not admissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement." N.C.G.S. § 8C-1, Rule 804(b)(3); *see Haywood*, 295 N.C. at 730, 249 S.E.2d at 442. "The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." N.C.G.S. § 8C-1, Rule 804(b)(3), comment (quoting Advisory Committee's Note); *see also United States v. Harris*, 403 U.S. 573, 583, 29 L. Ed. 2d 723, 734 (1971); *Levan*, 326 N.C. at 163-64, 388 S.E.2d at 433. This aspect of Rule 804(b)(3) requires that corroborating evidence support the assumption of reliability. The evidence here provides the requisite indications of trustworthiness: 1) Tucker had been addicted for years; 2) the Tuckers had been estranged from Wray during some of those years; 3) the Tuckers had been inaccessible to Wray and his family at least during the period while Tucker was placed in a witness protection program; 4) Donna had used many sources to satisfy Tucker's drug needs; 5) Tucker had testified against Wray and Wray's father; and 6) Tucker made this statement almost a full year before he made the statements implicating Wray. While Tucker later said he received drugs from Wray on at least one occasion in part payment for Cecil's murder, the record does not reveal that Tucker ever expressly repudiated his 15 April 1987 statement that Wray was not his drug source. We conclude that Tucker's statement on 12 April 1988 is not so inconsistent with his assertion on 15 April 1987 that the assertion is untrustworthy.

[3] The trial court also erred in precluding admission of the 22 February and 25 February 1988 statements, in which Tucker said that Wray, not he, killed Cecil. Despite the inculpatory nature of the statements as to Wray, Wray sought to use them to support his defense that the Tuckers planned and executed the murder of Cecil without any involvement on his part, and over a period of time conspired to implicate him in order to get a deal from the State. Wray contends that the mere existence of such inconsistent statements by Tucker undermines the State's theory of the case and adds weight to his theory that the Tuckers cast about for a means of escaping punishment. Because defendant Tucker was not a witness at the trial, the February statements would have served to impeach only Donna.

As to the February statements, we hold that the trial court erroneously applied *Bruton* to Wray's prejudice by precluding him from presenting evidence in support of his defense. Further, because Wray did not offer the statements as the truth of the matters asserted, *i.e.*, that he killed Cecil or hired the Tuckers to lure her out, but rather offered them to discredit the State's theory of the case, the statements are not inadmissible hearsay. N.C.G.S. § 8C-1, Rule 801(c) (1988).

Because Wray sought to introduce rather than to exclude statements by his codefendant, *Bruton* is inapposite. The more appropriate precedents are those in which joinder of charges against codefendants, one who testifies and one who does not, leads to deprivation of the right to a fair trial because the testifying defendant is precluded from presenting exculpatory evidence. *E.g.*, *State v. Boykin*, 307 N.C. 87, 296 S.E.2d 258 (1982); *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, *vacated in part on other grounds sub nom. Carter v. North Carolina*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976).

Alford involved a joint trial of two codefendants, Alford and Carter, for armed robbery and murder. Alford testified and presented an alibi defense, while Carter did not testify. Carter had made a pretrial statement to the authorities implicating himself and another man, Larry Waddell, in the crimes. Carter did not mention Alford in the statement, and eyewitness testimony established that there were only two perpetrators. The State did not offer the statement, apparently to avoid weakening its case against Alford. *Id.* at 387, 222 S.E.2d at 232. This Court held that because Carter could have

refused to testify on the basis of the Fifth Amendment, Alford was effectively deprived of evidence which would have corroborated his alibi testimony. *Id.* at 388, 222 S.E.2d at 232. Under the circumstances, Alford's defense was so prejudiced by the trial court's denial of his motion to sever that he was denied his rights to due process and confrontation. *Id.* at 389, 222 S.E.2d at 233; *see also Boykin*, 307 N.C. at 90-92, 296 S.E.2d at 260-61.

In *Alford* the Court relied on *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297 (1973), in which the Supreme Court held that the conjunction of two errors by the trial court deprived the defendant of a fair trial. *Chambers*, 410 U.S. at 302, 35 L. Ed. 2d at 313. The first occurred when the trial court prevented the defendant from cross-examining his own witness McDonald about circumstances surrounding the signing by the witness of a written confession to the shooting for which the defendant was being tried. *Id.* at 296, 35 L. Ed. 2d at 309. The trial court also precluded, as hearsay, testimony by three witnesses that McDonald had confessed to them that he shot the victim. *Id.* at 298-302, 35 L. Ed. 2d at 310-13.

While these cases support our holding awarding Wray a new trial, they differ from this case in two ways. First, they are all pre-Rules. As such, they turn on analyses of the constitutional rights to due process and confrontation and the statutory right to a fair trial. Here, the Rules of Evidence apply. Courts do not resolve issues on a constitutional basis when they can be resolved on other grounds. *State v. Agee*, 326 N.C. 542, 546, 391 S.E.2d 171, 173 (1990); *State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985). We thus confine our reasoning and holding to the Rules of Evidence. Second, because there were then no hearsay exceptions covering these statements, this Court in *Alford* and *Boykin* was obliged to find error in the failure of the trial court to grant severance.

[4] Here, we hold that the trial court erred in precluding admission of the statements because they were either nonhearsay or admissible under a hearsay exception. The sole direct evidence against Wray was the testimony of Donna Tucker, an interested witness of highly questionable credibility. Wray's defense was that the Tuckers killed Cecil with no knowledge or involvement on his part, then sought to escape punishment by implicating him. The number of and inconsistencies in defendant Tucker's pretrial

statements not only support this theory, but could well have fatally undermined the State's theory of the case contained in the testimony of Donna Tucker. We thus cannot conclude that the error was harmless. N.C.G.S. § 15A-1443(a) (1988).

[5] Defendant Wray also contends he should not have been convicted of a Class A or capital felony because his conviction was based solely on the uncorroborated testimony of a coconspirator, Donna. The statute under which Wray was convicted provides:

> [I]f a person who heretofore would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime, he shall be guilty of a Class B felony.

N.C.G.S. § 14-5.2 (1986). In a related argument, Wray challenges the trial court's instructions defining "corroboration" for purposes of this statute.

Because Wray did not object to the instructions at trial, he cannot now assign them as error. Further, the jury found that "the conviction of First Degree murder [was] *not* based solely on the uncorroborated testimony of one or more principals." (Emphasis in original.) Even assuming, however, that Wray's conviction was based solely on the uncorroborated testimony of Donna, Wray cannot show prejudice. Having received a sentence of life imprisonment, he cannot be subjected to the death penalty at his new trial. *Bullington v. Missouri*, 451 U.S. 430, 68 L. Ed. 2d 270 (1981); *State v. Silhan*, 302 N.C. 223, 270, 275 S.E.2d 450, 482 (1981). Whether he is tried, therefore, for a Class A or a Class B felony, the maximum punishment he can receive is life imprisonment.

DEFENDANT TUCKER'S APPEAL

[6] Tucker's appeal involves statements he made to Agent Bryant and Deputy Siwinski on 21 April 1988, which he claims were obtained in violation of his Fifth and Sixth Amendment rights and to his prejudice. We agree, and we therefore award defendant Tucker a new trial.

On 12 April, Tucker had shown Bryant and Siwinski sites in Guilford County related to the murder of Cecil. The light failed before Bryant and Siwinski were able to drive Tucker to Surry

County to show them where Cecil's body was left. As a result, Siwinski and Bryant took Tucker to Surry County on 21 April. The trial court allowed both officers to testify about what Tucker said and what he showed them while there. Bryant testified that Tucker identified both the general area where the dumping occurred and the dirt road down which the Tuckers initially had turned to dump the body. Tucker explained that the condition of this first road concerned him and Donna, so they backed out and went north, recrossing the river, to dispose of Cecil's body. Siwinski's testimony was consistent with Bryant's.

Prior to trial, Tucker filed a motion to suppress any statements made by him to law enforcement officers. During pretrial hearings, the State asserted that the only statement it intended to introduce was the one made on 12 April. At trial, however, the State began to question Agent Bryant regarding his meeting with defendant Tucker on 21 April. When Tucker objected, the trial court held a *voir dire* to determine the admissibility of the 21 April statements. It ruled that the statements were admissible, concluding that Tucker had "freely, voluntarily and understandingly waived his right to an attorney" before making the statements and that the officers did not threaten or coerce him in order to obtain the statements.

The trial court so concluded after hearing the following evidence:

On 18 April, Siwinski appeared before the grand jury which indicted Tucker for the murder of Cecil. On 19 April, Tucker turned himself in to Siwinski. On 20 April, Tucker made his first appearance, had a public defender appointed to represent him, and met with appointed counsel. During the *voir dire*, Siwinski testified that on 21 April he had Tucker brought from the jail to the sheriff's department between 8:00 and 8:30 a.m. Siwinski read Tucker his rights, then asked if he agreed to accompany him to Surry County. According to Siwinski, Tucker responded that he wanted to make a phone call first. Initially, Siwinski denied he knew Tucker was trying to call his attorney or that Tucker told him he was unsuccessful in reaching his attorney. When faced with contrary testimony from a 13 February 1989 hearing, however, Siwinski "remembered" that he knew Tucker attempted unsuccessfully to call his attorney.

Tucker gave the following testimony on *voir dire*:

He had met with his attorney, Robert O'Hale, on the evening of 20 April, following his first appearance. O'Hale told him not

to talk to anyone or go anywhere without counsel. When officers came to Tucker's cell the next morning, he thought they were taking him to his lawyer. Instead, they took him to Siwinski, who asked him to go to Surry County and read him his rights. He responded, "Well, my lawyer told me not to go with you or—and talk to anybody, unless I call him first." It was then about 8:05 a.m. Tucker did not have a card with his counsel's phone number; therefore, Siwinski escorted him to a phone booth and gave him a directory. When Tucker had trouble finding the phone number, Siwinski helped him find it. Tucker called once and let the phone ring several times, but no one answered.

When Tucker told Siwinski nobody was answering, the following exchange occurred: Siwinski said, "Well, we need to hurry, because SBI Agent Bryant has to be somewhere else and we need to get to him early." Tucker said he wanted to phone his attorney once more. Again, he was unable to reach anyone at the Public Defender's Office. When he told Siwinski, Siwinski said, "Well, what are you going to do? You're either going with me or you're not. We need to know now." Tucker responded, "Well, I'm not supposed to. Robert O'Hale told me not to." Siwinski then said:

> Well, you've swam too far up the river now to turn back . . . . It'll be rough on you, if you stop cooperating now. . . . Mr. McBryde has told you that, and I have too. . . . I told you before, if I want to fuck you, I'll tell you. But if I—I don't want you; I want Gene (defendant Wray). . . . I want you to get in the car.

After this exchange, and because of it, Tucker agreed to go with Siwinski and to sign a waiver form. Tucker believed Siwinski when Siwinski threatened him if he did not continue to cooperate. This was not the first time Siwinski had told Tucker he did not want him, but wanted Wray. Siwinski and others had told him if he cooperated the charges would be consolidated and he probably would receive only three to five years.

Of the findings of fact made by the trial court, the following are pertinent: 1) On 20 April, Tucker was taken to District Court, where Robert O'Hale was appointed to represent him; 2) O'Hale talked to Tucker later that afternoon or evening and told Tucker not to talk or go with anyone without counsel; 3) On 21 April, Siwinski met with Tucker in the Guilford County Jail Complex and stated that he wanted Tucker to go with him to Surry County;

4) On 21 April, Tucker told Siwinski what his lawyer had said; 5) Tucker tried to call his attorney twice that morning; and 6) Siwinski told Tucker they needed to hurry and "something to the effect that 'If I want you, I'll tell you. I want Gene.' "

Rather than challenging the trial court's conclusions of law that the resulting statement was not involuntary or due to threats or promises, Tucker argues that the statement was elicited after his Sixth Amendment right to counsel had attached and he had invoked his right to counsel under the Fifth Amendment. Tucker's Sixth Amendment right to counsel clearly had attached prior to his meeting with Siwinski on the morning of 21 April. This right attaches upon the commencement of criminal judicial proceedings against a defendant, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 688-89, 32 L. Ed. 2d 411, 417 (1972); *see also Michigan v. Harvey*, 494 U.S. 344, 348, 108 L. Ed. 2d 293, 301-02 (1990); *Michigan v. Jackson*, 475 U.S. 625, 629-30, 89 L. Ed. 2d 631, 638 (1986); *Brewer v. Williams*, 430 U.S. 387, 398, 51 L. Ed. 2d 424, 436, *reh'g denied*, 431 U.S. 925, 53 L. Ed. 2d 240 (1977); *State v. Nations*, 319 N.C. 318, 324, 354 S.E.2d 510, 513 (1987). Here, the right attached during Tucker's initial appearance, because at that point the State's position against him had solidified with respect to the charge of murder. *McNeil v. Wisconsin*, --- U.S. ---, 115 L. Ed. 2d 158, 168 (1991).

Equally clearly, Tucker invoked the right when he requested and received appointment of counsel at his initial appearance. *See Patterson v. Illinois*, 487 U.S. 285, 290-91, 101 L. Ed. 2d 261, 271 (1988). Thus, his 21 April statements were admissible only if he subsequently waived his asserted right.

To determine whether Tucker validly waived the right, we must ask: (1) whether the 21 April interview was police-initiated—*Jackson*, 475 U.S. at 636, 89 L. Ed. 2d at 642; and (2) whether Tucker knowingly and intelligently waived the right. *Patterson*, 487 U.S. at 293, 101 L. Ed. 2d at 272; *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-46, 77 L. Ed. 2d 405, 411-13 (1983); *Nations*, 319 N.C. at 326-27, 354 S.E.2d at 515; *State v. Robey*, 91 N.C. App. 198, 202-03, 371 S.E.2d 711, 713-14 (1988). If the law enforcement authorities, not Tucker, initiated the 21 April interrogation, we need not proceed to the second question because "any waiver of the defendant's right to counsel for that police-initiated interroga-

tion is invalid." *Jackson*, 475 U.S. at 636, 89 L. Ed. 2d at 642; *see also Robey*, 91 N.C. App. at 203, 371 S.E.2d at 714. The question, therefore, is whether Siwinski or defendant Tucker initiated the conversation that resulted in the incriminating statements.

The trial court found that Siwinski met with Tucker and asked Tucker to go to Surry County with him. The evidence on *voir dire*, from both Tucker and the State, was that Siwinski had Tucker brought to him. Tucker did not request to see Siwinski; rather, Tucker thought he was going to see his attorney. The findings and evidence thus establish without contradiction that the interview was police-initiated. Therefore, the waiver executed by Tucker is invalid, despite Siwinski's informing Tucker of his rights and Tucker's ultimately acquiescing in Siwinski's "request" to accompany him to Surry County. *Jackson*, 475 U.S. at 635-36, 89 L. Ed. 2d at 641-42.

Language in *Patterson*, 487 U.S. at 296-98, 101 L. Ed. 2d at 275-76, suggesting that a proper admonishment of a defendant's Miranda rights will suffice to show a valid waiver is limited to the facts of that case. There, the defendant had not asserted his Sixth Amendment right to counsel, had not invoked his Fifth Amendment right to counsel, had not been appointed counsel, and had not made his first appearance. The Court distinguished the *Michigan v. Jackson* situation, in which the defendant had been arraigned and counsel had been appointed. *Id.* at 296 n. 9, 101 L. Ed. 2d at 275 n. 9. *Jackson*, rather than *Patterson*, is the controlling precedent here. Thus, the waiver Tucker executed during the interrogation initiated by Siwinski is invalid and his statements were obtained in violation of his Sixth Amendment right to counsel.

Further, the statements were inadmissible under the prophylactic rules established to safeguard the Fifth Amendment right to counsel. In *McNeil v. Wisconsin*, the Supreme Court rejected the argument that a defendant's assertion of his Sixth Amendment right to counsel automatically results in an invocation of the right to counsel for Fifth Amendment purposes. *McNeil*, --- U.S. at ---, 115 L. Ed. 2d at 166-69. For a request for counsel at a judicial proceeding to serve as a Fifth Amendment invocation as well, there must be an indication of a desire to deal with the police only through counsel, not merely the expression of a desire to have counsel present at formal proceedings. *Id.* at ---, 115 L. Ed. 2d at 169. Here, however, Tucker's assertions and the cir-

cumstances on the morning of 21 April, rather than his request for counsel at his first appearance, determine the sufficiency of his invocation of the right to counsel for Fifth Amendment purposes.

After Siwinski asked Tucker if he would go to Surry County, Tucker said his attorney had told him not to talk to anyone or go anywhere without counsel. Tucker asked to, and did, call his attorney twice. Siwinski knew whom Tucker was trying to reach and that Tucker was not successful. If a defendant "indicates in any manner . . . that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda v. Arizona*, 384 U.S. 436, 444-45, 16 L. Ed. 2d 694, 707 (1966). This Court recently relied on this language in holding that a defendant invoked the right to counsel when she asked if she needed an attorney and her friend looked up the defendant's attorney's phone number, only to be dissuaded by the officers from calling him. *State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992). In informing the authorities of his desire to call his attorney and in attempting to do so, Tucker, too, invoked his Fifth Amendment right to counsel. *See United States v. Porter*, 764 F.2d 1, 6-7 (1st Cir. 1985) (suspect's attempt to telephone his attorney in presence of DEA agent constituted invocation of right to counsel); *Silva v. Estelle*, 672 F.2d 457, 458 (5th Cir. 1982) (defendant's request to call a lawyer, made to arraignment magistrate, "can only be construed" as exercise of right to counsel); *United States v. Lilla*, 534 F. Supp. 1247, 1279 (N.D.N.Y. 1982), *on subsequent appeal*, 699 F.2d 99 (2d Cir. 1983) (suspect's request to his mother to call attorney, made in the presence of arresting officers, invoked right to counsel); *Gorel v. United States*, 531 F. Supp. 368, 371 (S.D. Tex. 1981) (recognizing that if suspect's request to his wife to telephone attorney had been attempt to obtain present counsel, suspect's Fifth Amendment rights would have been violated).

Because Tucker invoked his Fifth Amendment right to counsel during custodial interrogation, he was not subject to further police interrogation until his attorney was made available unless he himself initiated subsequent communication with Siwinski. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 386, *reh'g denied*, 452 U.S. 973, 69 L. Ed. 2d 984 (1981). Under *Edwards*, a valid waiver of the invoked right cannot be established merely by showing that the defendant responded to further police-initiated custodial interrogation, even if read his rights. *Id.; see also Smith v. Illinois*, 469 U.S. 91, 98-100, 83 L. Ed. 2d 488, 496 (1984). A valid waiver

can only occur if the defendant reinitiates the conversation and the waiver was knowing and intelligent. *Bradshaw*, 462 U.S. at 1044-46, 77 L. Ed. 2d at 411-13. Unless defendant initiated the contact, we do not even consider whether any waiver was knowing and intelligent. *Id.*

Siwinski's interrogation of Tucker clearly violated *Edwards* in that Siwinski continued to pressure and question Tucker after Tucker attempted to call his attorney. Siwinski engaged in the very conduct *Edwards* proscribes. *See Minnick v. Mississippi*, 498 U.S. ---, ---, 112 L. Ed. 2d 489, 496 (1990); *Harvey*, 494 U.S. at ---, 108 L. Ed. 2d at 302 (1990). Thus, Tucker's 21 April statement was inadmissible.

The State contends that Tucker's Fifth Amendment invocation was a limited invocation only to call his attorney and that the interrogating officer respected the limited invocation by stopping his interrogation and even aiding Tucker in calling his attorney. It relies on *Connecticut v. Barrett*, 479 U.S. 523, 93 L. Ed. 2d 920 (1987) and *Griffin v. Lynaugh*, 823 F.2d 856 (5th Cir. 1987). In *Barrett*, the Supreme Court held that an oral statement by a defendant, who said he would not make a written statement without his attorney present but had "no problem" talking about the offense charged, was admissible. *Barrett*, 479 U.S. at 527-30, 93 L. Ed. 2d at 927-28. In *Griffin*, the Fifth Circuit held that the defendant's request to talk to his attorney was a limited, unambiguous request to do just that. *Griffin*, 823 F.2d at 863. Upon the defendant's request the police stopped the interrogation, aided the defendant in calling his attorney, and left the defendant alone while he talked with the attorney on the telephone. Upon reentering the interrogation room and learning from the defendant that the attorney had declined to represent him, the interrogating officers asked the defendant if he wanted to call another attorney, to which the defendant responded in the negative. *Id.*

Unlike the defendants in those cases, Tucker did not make an invocation limited merely to calling his attorney or declining to make only one kind of statement. Tucker prefaced his two attempts to call his attorney with the statement that the attorney had told him not to talk to anyone or go anywhere without calling him first. When he failed to reach the attorney a second time, Tucker repeated that he was not supposed to go with Siwinski. Even interpreting Tucker's statements narrowly, which is counter

to authority,[2] we would have to conclude that Siwinski did not honor Tucker's request. At a minimum, Tucker's communication conveyed an intent to make actual contact with his attorney to see what he advised. Finally, unlike in *Griffin*, where the court noted that there was no overreaching by the police, Siwinski's conduct here clearly violated the proscriptions of *Edwards*. *Griffin*, 823 F.2d at 863.

The State further argues that Tucker's Sixth Amendment challenge is barred because he failed to assert it at trial. According to the State, the basis of Tucker's objection at trial was that "there was no proper waiver of rights." The State contends that because Tucker did not argue *Michigan v. Jackson* at trial, he cannot argue it on appeal. *See State v. Robbins*, 319 N.C. 465, 495-96, 356 S.E.2d 279, 297-98, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987); *State v. Hunter*, 305 N.C. 106, 112-13, 286 S.E.2d 535, 538-39 (1982).

While Tucker argued at trial that the waiver was signed under duress, he also argued that the statement was obtained in violation of his Sixth Amendment rights after he had received appointed counsel. Specifically, Tucker's attorney argued that the waiver was signed under duress

> and in the face of his [Tucker's] clearly announced desire to communicate, and efforts, not just statements, but efforts, along with Mr. Siwinski's cooperation, to talk with his attorney. These statements are not admissible. They are obtained in violation of constitutional guarantees and the announced right of the defendant and *exercise of his Sixth Amendment rights* to have the assistance of counsel in this matter, *counsel that had already been appointed.*

(Emphasis added.) Tucker thus clearly argued at trial that the statement was obtained in violation of his attached and invoked Sixth Amendment right to counsel. This Court, therefore, properly may consider and determine the validity of his Sixth Amendment argument. *See Hunter*, 305 N.C. at 112, 286 S.E.2d at 539.

Because the error in admitting Tucker's statement was of constitutional dimension, the State must show that it was harmless

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2. Courts should indulge every reasonable presumption against waiver of fundamental constitutional rights, and doubts must be resolved in favor of protecting the constitutional claim. *Jackson*, 475 U.S. at 633, 89 L. Ed. 2d at 640.

beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710-11, *reh'g denied*, 386 U.S. 987, 18 L. Ed. 2d 241 (1967). It argues that because evidence that Tucker remembered the "general area" in which he and Donna disposed of Cecil's body was not inconsistent with Tucker's defense at trial, any error was harmless. While Tucker contended that he was too drugged to have killed Cecil, he never denied being with Donna on the night of the murder. The State argues that, in fact, the officers' testimony that Tucker could not remember the exact spot of the dumping aided Tucker's defense of "mental cloudiness."

While the officers testified that Tucker could not locate the exact spot along the wooded bank of the river that ultimately became the disposal site, they also testified that Tucker remembered crossing the river, choosing a dirt road, driving down it, rejecting it, recrossing the river, and disposing of the body. Evidence that Tucker could remember such details of an evening a year and a half before the statement renders his defense considerably less credible. Such evidence may well have caused the jury to reject his evidence of mental cloudiness and apathy at the time Cecil was choked. We thus cannot conclude beyond a reasonable doubt that the error in admitting the statement was harmless.

In summary, the trial court erred, to defendant Wray's prejudice, in excluding the 15 April 1987 and the 22 and 25 February 1988 statements. It also erred, to defendant Tucker's prejudice, in admitting the 21 April 1988 statement. We therefore award both defendants a new trial.

Defendant Wray's appeal: New trial.

Defendant Tucker's appeal: New trial.

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

STATE OF NORTH CAROLINA v. BERRY SCOTT

No. 330PA90

(Filed 5 March 1992)

1. **Evidence and Witnesses § 293 (NCI4th)— prior alleged offense—acquittal—probative value divested**

Evidence that defendant committed a prior alleged offense for which he has been tried and acquitted may not be admitted in a subsequent trial for a different offense when its probative value depends upon the proposition that defendant in fact committed the prior crime. Defendant's acquittal of the offense so divests the evidence of probative value that, as a matter of law, it cannot outweigh the tendency of such evidence unfairly to prejudice the defendant, and the admission of such evidence violates Rule of Evidence 403.

Am Jur 2d, Evidence § 332; Rape § 71.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense. 25 ALR4th 934.

2. **Evidence and Witnesses § 90 (NCI4th)— intrinsic nature of evidence—prejudice outweighing probative value—inadmissibility**

When the intrinsic nature of evidence itself is such that its probative value is always necessarily outweighed by the danger of unfair prejudice, the evidence becomes inadmissible under Rule of Evidence 403 as a matter of law.

Am Jur 2d, Evidence §§ 253, 260.

3. **Evidence and Witnesses § 726 (NCI4th)— prior rape for which defendant acquitted—admission prejudicial on rape and kidnapping charges**

The trial court's erroneous admission of testimony that defendant had previously committed another rape for which he was acquitted was prejudicial to defendant on charges of rape and kidnapping and entitled defendant to a new trial on those charges where the principal question for the jury in those cases was whether to believe the prosecuting witnesses or the defendant on the element of consent, and there was a reasonable possibility that a different result would have obtained at trial had this testimony not been admitted given

the similarity of the circumstances of the rape for which defendant was on trial and those of the prior alleged rape.

Am Jur 2d, Evidence § 332; Rape § 71.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense. 25 ALR4th 934.

4. **Evidence and Witnesses § 726 (NCI4th)— prior rape for which defendant acquitted—admission harmless on crime against nature charge**

The trial court's erroneous admission of testimony that defendant had previously committed a rape for which he was acquitted was not so prejudicial as to warrant a new trial on a crime against nature charge because consent is not a defense to crime against nature, defendant admitted that he committed cunnilingus upon the prosecuting witness, and this testimony could have had no conceivable effect on whether the jury believed defendant committed the crime against nature.

Am Jur 2d, Evidence § 332; Rape § 71.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense. 25 ALR4th 934.

Justice MEYER dissenting.

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

ON discretionary review pursuant to N.C.G.S. § 7A-31 from the decision of the Court of Appeals, 99 N.C. App. 113, 392 S.E.2d 621 (1990), finding no error in defendant's trial and conviction at 16 January 1989 Criminal Session of Superior Court, COLUMBUS County, *Herring, J.*, presiding. Heard in the Supreme Court 12 March 1991.

Lacy H. Thornburg, Attorney General, by Mary Jill Ledford, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

EXUM, Chief Justice.

Upon duly returned indictments defendant was tried and convicted of crime against nature, second-degree kidnapping, and three

counts of second-degree rape. After being sentenced to ten years' imprisonment on the crime against nature conviction, thirty years' imprisonment on the kidnapping conviction, and forty years' imprisonment on the consolidated rape convictions, defendant appealed. The Court of Appeals found no error in defendant's trial and the judgments entered against him. We dismissed defendant's appeal but allowed his petition for discretionary review of the Court of Appeals' determination of one of the issues raised: whether the State may introduce in a subsequent criminal trial evidence of a prior alleged offense for which defendant had been tried and acquitted in an earlier trial. We hold that where the probative value of such evidence depends upon defendant's having in fact committed the prior alleged offense, his acquittal of the offense in an earlier trial so divests the evidence of probative value that, as a matter of law, it cannot outweigh the tendency of such evidence unfairly to prejudice the defendant. Such evidence is thus barred by N.C. R. Evid. 403.

I.

Evidence presented by the State tended to show defendant approached the prosecuting witness, a woman with whom he was acquainted, some time after 11:30 p.m. on 26 June 1988 at a convenience store where she had come to buy food for a friend. Defendant asked her for a ride home, and she agreed. She first drove with defendant to deliver the food. Around 1:30 a.m., she drove defendant at his request back to the convenience store to buy some cigarettes. As they were leaving the parking lot, defendant threatened her with a pocket knife and ordered her to drive elsewhere, where he forced her to have vaginal intercourse. Defendant subsequently forced her to drive to his house, enter, and engage in vaginal intercourse and fellatio.

The State introduced the testimony of Wanda Freeman, also a past acquaintance of defendant, who stated defendant had raped her two years earlier under similar circumstances. Defendant objected on the ground that he had been tried for the rape of Freeman and acquitted by the jury. The trial court ruled the evidence was admissible to show "opportunity, intent, preparation and plan" under Evidence Rule 404(b) and that its probative value outweighed any danger of unfair prejudice under Evidence Rule 403. The trial court later instructed the jury that it could consider this evidence on the issue of defendant's "intent, knowledge, plan, scheme, or design."

Defendant testified that he had accompanied the prosecuting witness with her consent from the convenience store, that she agreed to accompany him and that they engaged in consensual sexual relations at his house only. He admitted that they engaged in consensual cunnilingus (but said nothing regarding fellatio).

The Court of Appeals found no error in its review of five issues raised by defendant on appeal. Defendant argued before the Court of Appeals that the testimony of Wanda Freeman should not have been admitted. As he had been acquitted of the rape of Freeman, defendant argued that admission of her testimony concerning the rape violated the fundamental fairness component of due process, and any probative value this evidence might have was outweighed by its tendency unfairly to prejudice defendant. It was therefore inadmissible under Evidence Rule 403.[1] The Court of Appeals concluded that defendant had not objected to the testimony on constitutional grounds at trial; therefore he was precluded from arguing constitutional grounds for its inadmissibility on appeal. The Court of Appeals did not address admissibility of this testimony under the Rules of Evidence.

[1] We conclude that evidence that defendant committed a prior alleged offense for which he has been tried and acquitted may not be admitted in a subsequent trial for a different offense when its probative value depends, as it did here, upon the proposition that defendant in fact committed the prior crime. To admit such evidence violates, as a matter of law, Evidence Rule 403.

[2] We acknowledge that, ordinarily, whether the probative value of evidence is "substantially outweighed by the danger of unfair prejudice," as Rule 403 provides, is a determination resting in the trial judge's discretion. *E.g., State v. Meekins*, 326 N.C. 689, 700, 329 S.E.2d 346, 352 (1990). The trial court's discretion, however, is not unlimited. Sound judicial discretion is "that [which] is . . . exercised . . . with regard to what is right and equitable under the circumstances and the law, and directed by the reason

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1. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1988).

Defendant also argued the evidence had no tendency to prove any of the matters listed in Rule 404(b) and thus was inadmissible on that ground.

and conscience of the judge to a just result." *State v. Tolley*, 290 N.C. at 367, 226 S.E.2d at 367-68 (quoting *Langnes v. Green*, 282 U.S. 531, 541, 75 L. Ed. 520, 526 (1931)). Its exercise is reviewable; and we have on occasion found the exercise of this discretion in favor of admission of the evidence to be error. *See, e.g., State v. Hennis*, 323 N.C. 279, 287, 372 S.E.2d 523, 527 (1988); *State v. Jones*, 322 N.C. 585, 590-91, 369 S.E.2d 822, 825 (1988); *State v. Kimbrell*, 320 N.C. 762, 769, 360 S.E.2d 691, 695 (1987). When the intrinsic nature of the evidence itself is such that its probative value is always necessarily outweighed by the danger of unfair prejudice, the evidence becomes inadmissible under the rule as a matter of law. The evidence at issue here is of that sort.

Two principles support this conclusion. First, fundamental to the admissibility of evidence of charges of which the defendant has been acquitted is the judicial presumption of innocence. This Court has recognized:

> An acquittal is the "legal and formal certification of the innocence of a person who has been charged with a crime." Black's Law Dictionary 23 (5th ed. 1979). Once a defendant has been acquitted of a crime he has been "set free or judicially discharged from an accusation; released from . . . a charge or *suspicion* of guilt." *People v. Lyman*, 53 A.D. 470, 473, 65 N.Y.S. 1062, 1065 (1900) (quoting 1 Am. & Eng. Enc. Law (2d ed. p. 573)) (emphasis added).

State v. Marley, 321 N.C. 415, 424, 364 S.E.2d 133, 138 (1988). Although a jury may acquit simply because the State has failed to prove a defendant's guilt beyond a reasonable doubt, we cannot enter the jury's "inner sanctum" to divine whether acquittal was based upon the State's failure to meet its burden of proof or upon the jury's belief in the defendant's innocence. *Id.*

> The inescapable point is that . . . [the] law requires proof beyond a reasonable doubt in criminal cases as the standard of proof commensurate with the presumption of innocence; a presumption not to be forgotten after the acquitting jury has left and sentencing has begun.

Id. at 424-25, 364 S.E.2d at 138 (quoting *State v. Cote*, 129 N.H. 358, 374, 530 A.2d 775, 784 (1987)).

Nor is the presumption of innocence to be forgotten in subsequent trials for other offenses. The presumption of innocence enters

the courtroom with the accused, and it leaves with the acquitted: neither accusation nor suspicion may again enter the courtroom. "By definition, when the Government fails to prove a defendant guilty . . . , the defendant is considered legally innocent. . . . '[T]he acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime.' " *Dowling v. United States*, 493 U.S. 342, 361 n.4, 107 L. Ed. 2d 708, 726 n.4 (1990) (Brennan, J., dissenting, joined by Marshall, J., and Stevens, J.) (quoting *State v. Wakefield*, 278 N.W.2d 307, 308 (Minn. 1979)).

"Acquittal" is the judicial recognition of the innocence of a person who has been charged with a crime and whose presumed innocence, tested, is not overcome. One acquitted is "judicially discharged" from the accusation and released from both the charge and the suspicion of guilt. *State v. Marley*, 321 N.C. at 424, 364 S.E.2d at 138. A person acquitted of a charge should not be required again to defend himself against that charge in subsequent criminal proceedings in which he may become involved.

Second, the overwhelming potential for prejudice when such evidence is introduced, with or without limiting instructions, is a factor "which may 'undermine the fairness of the fact-finding process' and thereby dilute 'the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.' " *State v. Tolley*, 290 N.C. 349, 365, 226 S.E.2d 353, 366 (1976) (quoting *Estelle v. Williams*, 425 U.S. 501, 503, 48 L. Ed. 2d 126, 130 (1976)). *See Dowling v. United States*, 493 U.S. at 361-62, 107 L. Ed. 2d at 726 (Brennan, J., dissenting, joined by Marshall, J., and Stevens, J.) ("One of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense." (quoting *United States v. Beechum*, 582 F.2d 898, 914 (5th Cir. 1978))).

The North Carolina Rules of Evidence must be interpreted and applied in light of this proposition: an acquittal and the undefeated presumption of innocence it signifies mean that, in law, defendant did not commit the crime charged. When the probative value of evidence of this other conduct depends upon the proposition that defendant committed the prior crime, his earlier acquittal of that crime so erodes the probative value of the evidence that its potential for prejudice, which is great, must perforce outweigh its probative value under Rule 403. *See State v. Little*, 87 Ariz.

295, 307, 350 P.2d 756, 763 (1960) ("The fact of an acquittal, . . . when added to the tendency of such evidence to prove the defendant's bad character and criminal propensities, lowers the scale to the side of inadmissibility of such evidence."); *State v. Holman*, 611 S.W.2d 411, 413 (Tenn. 1981) ("[T]he probative value of such evidence cannot be said to outweigh its prejudicial effect upon the defendant. For such evidence to have any relevance or use in the case on trial, the jury would have to infer that, despite the acquittal, the defendant nevertheless was guilty of the prior crime. No such inference can properly be drawn from an acquittal").

The use of evidence of conduct underlying a prior charge of a crime for which the defendant has been tried and acquitted has been permitted in the exceptional case in which the conduct occurred in the same "chain of circumstances" as the crime for which the defendant is being tried. In *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990), we held testimony that the defendant had possessed marijuana, despite his earlier acquittal of the possession charge, was admissible because that conduct was part of the same chain of circumstances which included the charged offense for which the defendant was on trial. Introduction of testimony about the marijuana possession was, despite the acquittal, necessary for the testifying witness to complete his story about what led to defendant's arrest and was inextricably entwined with the offense for which the defendant was then being tried. Holding this evidence was thus relevant under Rule 401, we examined its admissibility as a "crime, wrong or act" under Rule 404(b), and noted its essential identity to the "chain of circumstances" category of evidence when the two acts occurred contemporaneously. Under the particular circumstances of that case, evidence of the marijuana possession "form[ed] an integral and natural part of an account of the crime, or [was] necessary to complete the story of the crime for the jury." *Agee*, 326 N.C. at 548, 391 S.E.2d at 174 (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

Under our view of Rule 404(b) as a general rule of inclusion, the evidence presented in *Agee* did not fit the single exception "requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54 (1990). This Court thus assumed, despite the defendant's acquittal, that evidence of his marijuana possession had some probative value by virtue of its inextricable

connection to the chain of circumstances. Noting that evidence which is probative is inevitably prejudicial but that its balance is a question of degree within the discretion of the trial court, we held that under the circumstances of that case, the trial court had not abused its discretion. *State v. Agee*, 326 N.C. at 550, 391 S.E.2d at 176.

The logic of *Agee* does not apply to the case before us. The "chain of circumstances" link that arguably made this evidence probative in *Agee* by virtue of its temporal relevance to the crime for which the defendant was on trial is absent here. Unlike the evidence that defendant raped Freeman, the probative value of the evidence in *Agee* did not depend on defendant's having committed the crime of possession of marijuana.

[3] The error in admitting the testimony of Wanda Freeman entitles defendant to a new trial on the charges of kidnapping and rape. The test for prejudicial error is whether there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988). Defendant admitted being with the prosecuting witness and engaging in sexual relations with her. He testified she consented to being with him and to the sexual conduct which ensued. The State's evidence tended to show the prosecuting witness did not consent. Both the State's evidence and the defendant's were corroborated to some extent by the testimony of other witnesses. The principal question for the jury in the kidnapping and rape cases was whether to believe the prosecuting witnesses or the defendant on the element of consent. Given the similarity of the circumstances of the rape for which defendant was on trial and those of the rape about which Ms. Freeman testified, we conclude there is at least a reasonable possibility that had the error in admitting Ms. Freeman's testimony not been committed and this evidence excluded a different result would have obtained at trial. This determination is underscored by the high potential for prejudice inherent in the introduction of evidence of prior offenses, as we have already recognized.

[4] Consent, however, is not a defense to crime against nature. *E.g., State v. Adams*, 299 N.C. 699, 700, 264 S.E.2d 46, 50 (1980). Defendant admitted he had committed cunnilingus upon the prosecuting witness. Given this admission, Ms. Freeman's testimony could have had no conceivable effect on whether the jury believed defend-

ant had committed the crime against nature. As to this charge, therefore, the error in admitting Ms. Freeman's testimony is not so prejudicial as to warrant a new trial.

The result is: As to the crime against nature conviction (No. 88CRS3806), the decision of the Court of Appeals is affirmed and that conviction will stand. As to the kidnapping conviction (No. 88CRS3807) and the three convictions for rape (Nos. 88CRS3808, 88CRS3809, 88CRS3810), the decision of the Court of Appeals is reversed and defendant is given a new trial; these cases are remanded to the Court of Appeals for further remand to the Superior Court, Columbus County, for further proceedings consistent with this opinion.

Affirmed in part, reversed in part and remanded.

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

Justice MEYER dissenting.

First, I dissent because the majority has departed from our established standard of review for Rule 403 rulings by the trial court and has established a new standard. Heretofore, the standard of review of a trial judge's ruling, as in this case, that the probative value of a particular piece of evidence outweighed any danger of unfair prejudice under Rule 403 had been an abuse of discretion standard. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985). The majority's new rule is, "When the intrinsic nature of the evidence itself is such that its probative value is always necessarily outweighed by the danger of unfair prejudice, the evidence becomes inadmissible under the rule 'as a matter of law.'" It should be noted that the application of the new rule is not limited to evidence of prior crimes of which a defendant has been acquitted. While the facts of the case at bar place under the new standard of review only prior crimes of which a defendant has been acquitted, who is to say what will, in future cases, fall within the category of evidence whose "intrinsic nature . . . is such that its probative value is always necessarily outweighed by the danger of unfair prejudice," causing that evidence to become "inadmissible . . . as a matter of law."

It is clear to me that the abuse of discretion standard is the only correct standard to be applied to Rule 403. The statute itself provides that "evidence *may* be excluded if its probative value is *substantially* outweighed" by reason of several circumstances, including (1) "unfair prejudice," (2) "confusion of the issues," or (3) misleading the jury; or "by *consideration of*" (4) "undue delay," (5) "waste of time," or (6) "needless presentation of cumulative evidence." N.C. R. Evid. 403 (emphasis added). The legislature's use of words that in themselves imply some kind of balancing or weighing, such as "unfair," "misleading," "undue," "waste," and "needless," evidences a legislative intent favoring *discretionary* rulings. The language of the rule itself convinces me that the legislature never intended to require the trial judge to exclude relevant and otherwise admissible evidence "as a matter of law." Those in the majority should ask themselves whether "confusion of the issues," "misleading the jury," "undue delay," "waste of time," and "needless presentation of cumulative evidence"—like "unfair prejudice"—are not better determined by discretionary weighing rather than by a ruling "as a matter of law."

I also dissent because I do not agree with the majority that evidence of another offense is rendered inadmissible "as a matter of law" by the fact that the defendant was tried and acquitted of that offense. Where evidence of another criminal act committed by the defendant is relevant and otherwise admissible, the trial court, in its discretion, may admit such evidence upon finding that the probative value of the evidence is not substantially outweighed by the prejudicial effect of the evidence. I conclude that the trial court in this case did not abuse its discretion in admitting evidence demonstrating that defendant had previously committed another rape for which he was tried and acquitted.

I.

> It is an established principle of the law of evidence that when a criminal defendant elects to testify in his own behalf, he is subject to cross-examination, for the purpose of impeachment, with respect to prior specific criminal acts or degrading conduct for which there has been no conviction.

State v. Royal, 300 N.C. 515, 529, 268 S.E.2d 517, 527 (1980). Our prior case law establishes that inquiry into prior criminal acts is permissible even where the defendant has been tried and judicially discharged of the criminal activity. *See State v. Leonard*, 300 N.C.

223, 266 S.E.2d 631 (permitting cross-examination of defendant concerning a prior shooting for which defendant had been found not guilty by reason of temporary insanity), *cert. denied*, 449 U.S. 960, 66 L. Ed. 2d 227 (1980); *State v. Herbin*, 298 N.C. 441, 259 S.E.2d 263 (1979) (concluding that it is permissible to cross-examine a defendant about a specific act of misconduct even though the defendant has been acquitted of charges arising out of the misconduct); *accord State v. Ross*, 295 N.C. 488, 246 S.E.2d 780 (1978) (approving of cross-examination about defendant's prior possession of drugs despite the fact that charges against defendant had been dismissed because the search that disclosed the drugs was declared unlawful).

I find no support for the majority's position in the case law of this state. The authorities relied on by the majority are unusual to say the least. Interestingly, the majority relies heavily on a dissenting opinion, *Dowling v. United States*, 493 U.S. 342, 354, 107 L. Ed. 2d 708, 721 (1990) (Brennan, J., dissenting), in a case decided by a 6 to 3 vote contrary to its position here. *Dowling* held that defendant's prior acquittal did *not* preclude the state from introducing evidence of those crimes in a subsequent case as is more fully explained herein.

The majority also relies on and quotes from our prior case of *State v. Marley*, 321 N.C. 415, 364 S.E.2d 133 (1988), which is totally inapposite. In *Marley*, the defendant was tried for first-degree murder on the theory of premeditation and deliberation. The jury found the defendant not guilty of first-degree murder but guilty of second-degree murder. The trial judge then aggravated the defendant's second-degree conviction upon finding that the defendant had premeditated and deliberated the murder—the very charge of which the jury had just acquitted the defendant. We properly held that the trial judge erred. Furthermore, in *Marley* we knew that the jury acquitted the defendant of first-degree murder *specifically* because it rejected the theory that the defendant premeditated and deliberated the murder.

For the proposition that the potential for prejudice (of crimes for which a defendant has been acquitted) undermines the fact-finding process, the majority cites language from *State v. Tolley*, 290 N.C. 349, 365, 226 S.E.2d 353, 366 (1976), in which this Court discussed the prejudice of trying a defendant while he is shackled. *Tolley* had nothing whatever to do with the introduction of evidence of other crimes. The only cases cited by the majority that lend

legitimacy to its position are one case from Arizona and one from Tennessee. The majority's holding today is contrary to the majority view in the United States. Christopher Bello, Annotation, *Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of that Offense*, 25 A.L.R.4th 934, § 2, at 939 (1983) ("[A] majority of jurisdictions [follow the rule] . . . that otherwise relevant and admissible evidence of another offense is not rendered inadmissible by the fact of the defendant's previous acquittal of that other offense, except to the extent that the acquittal may be a factor to be weighed in the discretionary balancing by the trial judge of the probative value of the evidence against its unfairly prejudicial effect, and in determining the threshold question of whether the evidence is sufficiently convincing to warrant its admission."); *see, e.g.*, *Ex parte Bayne*, 375 So. 2d 1239 (Ala. 1979); *California v. Griffin*, 66 Cal. 2d 459, 426 P.2d 507, 58 Cal. Rptr. 107 (1967); *Womble v. Maryland*, 8 Md. App. 119, 258 A.2d 786 (1969); *Missouri v. Millard*, 242 S.W. 923 (Mo. 1922); *Montana v. Hopkins*, 68 Mont. 504, 219 P. 1106 (1923); *Oregon v. Smith*, 271 Or. 294, 532 P.2d 9 (1975). It is also interesting to note that the majority spends approximately one-fifth of its opinion distinguishing *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990), in which this Court held that a defendant's acquittal of a prior charge did not prohibit introduction in a subsequent trial of evidence of the crime for which the defendant was acquitted.

I find no compelling reason why relevant, probative, and otherwise admissible evidence of a defendant's prior acts must be excluded for all purposes at subsequent criminal proceedings against the defendant simply because the evidence relates to alleged criminal conduct for which the defendant has been acquitted. An acquittal is not a judicial determination that the defendant charged did not commit the acts alleged against him. It merely shows that the State failed to carry its burden of proving *beyond a reasonable doubt every element* of the crime charged. The admissibility of other crimes evidence is not contingent upon the same standard of proof. Such evidence is relevant and admissible if "the jury can *reasonably conclude* that the act occurred and that the defendant was the actor." *Dowling*, 493 U.S. at 348, 107 L. Ed. 2d at 719 (emphasis added) (applying federal Rule 404(b), which, with one exception not applicable to this case, is identical to the North Carolina rule). Furthermore, the State's failure to meet its burden of proof as to *one element* of a crime charged, although necessar-

ily resulting in an acquittal, does not mean that the jury decided all issues in favor of the person charged. *Id.* at 349, 107 L. Ed. 2d at 719. A general verdict finding a defendant not guilty of alleged criminal activity may rest upon any one of a number of reasons that have absolutely no bearing on the purpose for which evidence of the criminal behavior is admitted in a subsequent trial against the defendant.

Recognizing the "number of possible explanations for [a] jury's acquittal verdict," the United States Supreme Court in *Dowling v. United States*, 493 U.S. 342, 107 L. Ed. 2d 708, held that the defendant's acquittal at his first trial of burglary, attempted robbery, assault, and weapons offenses did not preclude the state from introducing evidence of these crimes to prove, in a subsequent trial of the defendant, that the defendant was the perpetrator of a bank robbery. The *Dowling* Court reasoned that the jury in the first trial might reasonably have found that the defendant was the masked man who entered the victim's home, even if the jury did not believe beyond a reasonable doubt that the defendant had committed the crimes charged at the first trial. Finding the record devoid of any evidence that the question of identity was determined in the defendant's favor at the prior trial, the Court, even applying a constitutional standard, concluded that the defendant had "failed to satisfy his burden of demonstrating that the first jury concluded that he was not one of the intruders in [the victim's] home." *Dowling*, 493 U.S. at 352, 107 L. Ed. 2d at 720.

Applying the reasoning of the United States Supreme Court in *Dowling*, it is possible, for instance, that a defendant tried for first-degree murder might be acquitted because premeditation and deliberation was not proved to the jury's satisfaction beyond a reasonable doubt. Despite the defendant's acquittal, evidence of the prior murder, if relevant and probative, should be admissible in a subsequent murder trial of the same defendant where the perpetrator's identity is in question. Similarly, a jury might acquit a defendant of a burglary charge due to a lack of evidence that the prior incident occurred in the nighttime. This evidence might, however, be relevant and probative in the defendant's subsequent robbery trial to prove a plan or scheme on the part of the defendant to commit a series of robberies.

II.

In the case *sub judice*, the evidence showing that defendant had previously raped Wanda Freeman was relevant, probative,

and admissible in defendant's subsequent rape trial. Evidence of other crimes, wrongs, or acts is inadmissible if its only relevancy is to show the defendant's character or his disposition to commit an offense of the nature of the one charged. N.C. R. Evid. 404(b); *State v. Jeter*, 326 N.C. 457, 389 S.E.2d 805 (1990). Where, however, such evidence tends to prove any other relevant fact, it will not be excluded simply because it shows the defendant to have been guilty of an independent crime. *Jeter*, 326 N.C. 457, 389 S.E.2d 805; *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990).

As recognized by the majority, Rule 404(b) of the North Carolina Rules of Evidence is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant." *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54.

> This rule of inclusion is "subject to but *one exception* requiring [the] exclusion [of evidence of other crimes, wrongs, or acts] if [the] *only* probative value [of such evidence] is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged."

Jeter, 326 N.C. at 459-60, 389 S.E.2d at 807 (quoting *Coffey*, 326 N.C. at 279, 389 S.E.2d at 55).

Here, we are dealing with a trial of offenses including three counts of second-degree rape and one count of crime against nature, as well as second-degree kidnapping, and the prior acquittal was on second-degree rape and sexual offense charges. As evidenced by many of our previous decisions, this Court has been very liberal in admitting evidence of similar sexual offenses by a defendant for the purposes set out in Rule 404(b). *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987). We have reaffirmed this position in several recent cases:

> Additionally, our decisions, both before and after the adoption of Rule 404(b), have been "markedly liberal" in holding evidence of prior sex offenses "admissible for one or more of the purposes listed [in the Rule] . . . ."

Coffey, 326 N.C. at 279, 389 S.E.2d at 54 (quoting 1 Brandis on North Carolina Evidence § 92 (3d ed. 1988)).

> [N]ot only has this Court employed a "markedly liberal" interpretation of Rule 404(b) when the State was seeking to introduce evidence of prior, similar sex offenses by a defendant,

> but we have stressed repeatedly that the rule is, at bottom, one of relevancy.

State v. Jeter, 326 N.C. at 459, 389 S.E.2d at 807 (citation omitted).

This is particularly the case where the purpose is to show *intent*, whether the other offense precedes or follows the incident for which defendant is being tried. *See, e.g., State v. Boyd*, 321 N.C. 574, 364 S.E.2d 118 (1988) (testimony regarding defendant's conduct with a young relative demonstrated defendant's scheme or intent to take advantage of young relatives left in his custody); *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (defendant had attempted to commit a sexual offense upon another victim ten weeks after the alleged forcible cunnilingus on the prosecutrix), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988); *State v. Craven*, 312 N.C. 580, 324 S.E.2d 599 (1985) (subsequent indecent liberties probative as to *mens rea* for crimes with which defendant was charged); *State v. Williams*, 303 N.C. 507, 279 S.E.2d 592 (1981) (at trial upon two counts of first-degree sexual offense, evidence that, after the date of the offense charged, defendant sexually assaulted another victim by rubbing her breasts was admissible to show intent, plan, or design to commit the crimes charged); *State v. Davis*, 229 N.C. 386, 50 S.E.2d 37 (1948) (evidence of improper advances toward another female victim at the orphanage where defendant was superintendent was admissible to show attitude, animus, and purpose); *State v. Hall*, 85 N.C. App. 447, 355 S.E.2d 250 (defendant's intent in a prior conviction of assault with intent to commit rape was probative of his intent to rape another victim he later assaulted and kidnapped), *disc. rev. denied*, 320 N.C. 515, 358 S.E.2d 525 (1987).

Wanda Freeman's testimony concerning the earlier rape incident, in many respects, closely paralleled the evidence of the incident in the present case. The defendant, on foot, approached both Ms. Freeman and the victim in this case, who were approximately the same age, around midnight and requested rides home in their automobiles. Defendant previously knew each victim casually, allowing him to predict their amenability to his request. While the two crimes differ in that defendant brandished a knife in the present case but used no weapon against Ms. Freeman, defendant threatened both with serious bodily harm. Once the defendant got his victims to an isolated area, he ordered them out of the car, tried to pull them out of the car, took their keys, and once he got them outside, ordered them to take down their pants. When they

refused the latter demand, defendant forcibly loosened their pants. Subsequently, the victims were forced to submit to multiple acts of vaginal intercourse, and both victims were forced to perform one act of fellatio upon the defendant. In both cases, defendant showed a modicum of concern for his victim. After forcing the victim in this case to engage repeatedly in intercourse, defendant inquired if he had hurt her. He walked her to her car, drove with the victim to her apartment, and told her he would see her later. Following intercourse and fellatio with Ms. Freeman, defendant returned her keys and left the scene to obtain assistance in getting her car out of the mud. Given the similarities in the circumstances of the two rape incidents, the evidence of the earlier rape incident was relevant and highly probative of defendant's *intent* to commit the kidnapping, rape, and sexual offense charges for which he was being tried.

For the purpose of impeaching the victim's testimony and to suggest that she had fabricated the rape story, defendant introduced evidence tending to show that the victim in this case consented to accompanying him and to the sexual acts performed. Where, as here, a defendant maintains that the sexual acts for which he is being tried were committed with the victim's *consent*, evidence of other crimes and acts is also relevant to rebut the defendant's claim of consent. *See State v. Arnold*, 284 N.C. 41, 199 S.E.2d 423 (1973) (this Court, in a rape case, held that evidence of a prior offense was relevant where consent was an issue).

Courts in a majority of the other jurisdictions have likewise held admissible evidence of other offenses in cases where a defendant claims that the alleged victim *consented* to the sexual act and his intent, or the victim's nonconsent, is a material issue. *See, e.g., Fisher v. State*, 57 Ala. App. 310, 328 So. 2d 311 (prior sexual assault relevant to rebut defendant's claim that the victim's participation in the sexual act was voluntary), *cert. denied*, 295 Ala. 401, 328 So. 2d 321 (1976); *State v. Hill*, 104 Ariz. 238, 450 P.2d 696 (1969) (prior conviction of rape with similar circumstances relevant to prove a forcible rape by defendant, who had fallen asleep in bed of victim whom defendant claimed had consented); *People v. Gray*, 259 Cal. App. 2d 846, 66 Cal. Rptr. 654 (1968) (nature of prior attacks probative of consent where issue was that of consent); *Williams v. State*, 110 So. 2d 654 (Fla.) (evidence of common plan, scheme, and design admissible to meet anticipated defense of consent), *cert. denied*, 361 U.S. 847, 4 L. Ed. 2d 86 (1959); *Hunt*

v. State, 233 Ga. 329, 211 S.E.2d 288 (1974) (evidence of similar sexual offenses relevant to show intent of defendant relative to the issue of whether the victim consented to the sexual acts); *People v. Lighthart*, 62 Ill. App. 3d 720, 379 N.E.2d 403 (1978) (whether complainant consented was a question of fact for the jury, and evidence of prior conviction for attempted rape was admissible to show the defendant's mental state); *People v. Oliphant*, 399 Mich. 472, 250 N.W.2d 443 (1976) (evidence of other crimes admissible when the lack of consent is crucial to the prosecution's case).

After ruling that the evidence of the prior rape incident was admissible to show intent, preparation, and plan, the trial court properly weighed the probative value and prejudicial effect of the evidence, as follows:

> [C]onsidering the evidence presented in the trial of this case, . . . the prior acts of the defendant, as above found in 1986, are sufficiently close in time and are of such a nature as to afford proof of opportunity, intent, preparation and plan as to be admissible in the trial of this case.
>
> The Court find[s] further that the probative value of the testimony sought to be elicited by the State is—out—outweighs any danger of unfair prejudice, or confusion of issues, or of misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Based upon the evidence before the trial court, it cannot be shown that the trial judge's ruling was so arbitrary as to constitute an abuse of his discretion.

Nor did the trial court permit the jury to consider this evidence for any purpose prohibited by our rules of evidence. Defendant was permitted during cross-examination of Wanda Freeman to establish that he was found not guilty following a trial upon charges of second-degree rape and sexual offense arising from the incident. Thereafter, the trial judge instructed the jury that it could consider Wanda Freeman's testimony only for the purposes of showing intent, knowledge, plan, scheme, or design. His instructions in this regard were as follows:

> Now, evidence has been presented in the trial of this case on behalf of the State tending to show that the witness, Wanda Freeman, knows the defendant, Berry Scott. That he was a boyfriend of her best girlfriend. That on the 6th of

July, 1986, she saw him at about 11:30 to 12:00 at a parking lot and at his request agreed to give him a ride to his aunt's house. That she didn't know where it was, and he directed her down Highway 74-76 to a road six[ ] or seven miles out of Whiteville. That they ended up in an open field with the car stuck, and while there the defendant forced himself upon her and engaged in vaginal intercourse with her without her consent and against her will, as well as oral sex. And that although the case was brought to trial, there was a verdict of not guilty in that case.

Now, that's what some of that evidence tends to show. The defendant denies that he committed those acts.

I instruct you that this evidence has been received solely for the purpose of showing, if you find, that the defendant in this case had the intent, which is a necessary element of the crimes charged in this case; or, that the defendant had the knowledge, which is a necessary element of the crime or part of them charged; and that there existed in the mind of the defendant a plan, scheme, system or design involving the crime charged in this case.

If you believe this evidence, members of the jury, then you may consider it, but only for the limited purpose for which it was received and none other.

You may not convict the defendant in this case based upon something that you may find happened in the past with respect to someone else.

You should also weigh and consider the fact, along with the other evidence in this regard, that a jury returned a verdict of not guilty in that particular case on those particular facts.

In my view, this was a correct, proper, and adequate limiting instruction.

The burden is on the defendant to demonstrate that the issue which he seeks, by his challenge to the evidence, to foreclose was actually decided in the first case. *Dowling*, 493 U.S. 342, 107 L. Ed. 2d 708. Where, as here, no evidence is introduced as to the reason for the acquittal in the prior case, a trial court may, in its discretion, admit evidence of the defendant's prior criminal activity, if relevant and probative of some issue before the trial court.

I believe that the majority has grievously erred in adopting its new rule. Furthermore, I cannot conclude, under our traditional rule, that the trial court's ruling in admitting evidence establishing that defendant had previously committed another rape for which he was tried and acquitted was so arbitrary that it could not have been the result of a reasoned decision. Therefore, I dissent from the majority's opinion and vote to affirm the decision of the Court of Appeals finding no error in defendant's trial.

JO ANN ROUMILLAT v. SIMPLISTIC ENTERPRISES, INC. D/B/A BOJANGLES FAMOUS CHICKEN N' BISCUITS

No. 373A91

(Filed 5 March 1992)

1. **Rules of Civil Procedure § 56.4 (NCI3d)— summary judgment for defendant—when proper**

Defendant was entitled to summary judgment if it was able either to show the nonexistence of an essential element of plaintiff's claim *or* to show that plaintiff could not produce evidence of an essential element of her claim.

Am Jur 2d, Summary Judgment §§ 6, 26.

2. **Negligence § 53.3 (NCI3d)— premises liability—notice of dangerous condition—burden of proof**

In an action to recover for injuries sustained by plaintiff when she slipped on a greasy substance in a restaurant parking lot and fell, defendant was not required to produce evidence showing that it did not know or should not have known of the substance in its parking lot. Contrary language in *Durham v. Vine*, 40 N.C. App. 564, and *Tolbert v. Tea Co.*, 22 N.C. App. 491, is disapproved.

Am Jur 2d, Premises Liability §§ 29, 30, 144, 659.

Liability of owner or operator of parking lot for personal injuries allegedly resulting from condition of premises. 38 ALR3d 10.

3. Negligence § 53.3 (NCI3d) — premises liability — notice of greasy substance — burden of proof

In an action to recover for injuries sustained by plaintiff when she slipped on a greasy substance in a restaurant parking lot, defendant met its burden in a summary judgment hearing by showing that plaintiff could not come forward with a forecast of evidence that defendant knew or should have known of the presence of the substance and, having sufficient time to do so, negligently failed to do so; the burden was then upon plaintiff to make a contrary showing, and plaintiff's reliance on her complaint would not suffice.

Am Jur 2d, Premises Liability §§ 29, 30, 144, 659.

Liability of owner or operator of parking lot for personal injuries allegedly resulting from condition of premises. 38 ALR3d 10.

4. Negligence § 53 (NCI4th) — invitee — premises liability case — duty of owner

In a premises liability case involving injury to an invitee, the owner of the premises has a duty to exercise ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision.

Am Jur 2d, Premises Liability §§ 136-138.

5. Negligence § 53.3 (NCI3d) — invitee — premises liability — proof of negligence

In order to prove that a defendant-proprietor is negligent, plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive knowledge of its existence.

Am Jur 2d, Premises Liability §§ 136-138.

6. Negligence § 53.3 (NCI3d) — invitee — unsafe condition caused by third party — knowledge by owner — plaintiff's burden of proof

When an unsafe condition is attributable to third parties or an independent agency, *plaintiff* must show that the condition existed for such a length of time that defendant knew

or by the exercise of reasonable care should have known of its existence in time to have removed the danger or to have given proper warning of its presence.

Am Jur 2d, Premises Liability §§ 144, 146, 147.

7. **Negligence § 57.10 (NCI3d)— invitee—fall on greasy substance—knowledge by owner—insufficient forecast of evidence**

Summary judgment was properly entered for defendant restaurant owner in plaintiff's action to recover for injuries sustained when plaintiff slipped on a greasy substance in the restaurant parking lot and fell where defendant carried its burden of showing the inability of plaintiff to forecast evidence that defendant knew or should have known of the greasy substance on the surface of its parking lot; plaintiff failed to offer any affidavits or other evidence in support of the bald assertion in her pleading that defendant knew or should have known of the greasy substance; plaintiff did not forecast any evidence as to the condition of the parking lot prior to plaintiff's fall; and plaintiff's own deposition testimony indicated that she did not see any grease as she, her husband, and her son initially walked across the well-lighted parking area to enter defendant's restaurant, that less than an hour earlier her husband successfully traversed the very area on which she slipped, and that plaintiff exited the restaurant within a few feet of the path she used to enter the restaurant.

Am Jur 2d, Premises Liability § 144; Summary Judgment §§ 6, 26.

Liability of owner or operator of parking lot for personal injuries allegedly resulting from condition of premises. 38 ALR3d 10.

8. **Negligence § 57.10 (NCI3d)— fall in parking lot—downward slope—negligence—insufficient forecast of evidence**

A plaintiff who fell on a greasy substance in a restaurant parking lot failed to forecast sufficient evidence to show negligence by defendant due to the downward slope of its parking lot where plaintiff presented no evidence in response to defendant's interrogatory of any violation of any building code, ordinance, or regulation; plaintiff failed to name any expert witnesses in this respect either in her interrogatory responses or at the summary judgment hearing; photographs

presented by defendant reveal nothing out of the ordinary about the slope of defendant's parking lot; and defendant had no duty to warn plaintiff of the slope which was in plain view.

Am Jur 2d, Premises Liability § 144; Summary Judgment §§ 6, 26.

Liability of owner or operator of parking lot for personal injuries allegedly resulting from condition of premises. 38 ALR3d 10.

9. **Negligence § 53.3 (NCI3d)— grease spot—proximity to restaurant—photographs—insufficient evidence of notice**

In the absence of accompanying evidence from experts or lay witnesses, photographs showing the proximity of a grease spot in a restaurant parking lot to the restaurant will not suffice to prove that defendant restaurant owner was or should have been aware of the grease spot.

Am Jur 2d, Premises Liability § 144.

Justice FRYE dissenting.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals, 103 N.C. App. 440, 406 S.E.2d 10 (1991), reversing the judgment of *Morgan, J.*, entered in Superior Court, FORSYTH County, on 20 July 1990. Heard in the Supreme Court 12 February 1992.

Frye and Kasper, by Leslie G. Frye and Granice L. Geyer, for plaintiff-appellee.

Hutchins, Tyndall, Doughton & Moore, by Laurie L. Hutchins, for defendant-appellant.

Womble Carlyle Sandridge & Rice, by William F. Womble, Jr., for North Carolina Association of Defense Attorneys, amicus curiae.

Maxwell & Hutson, P.A., by Monica Umstaedt Rossman and Alice Neece Moseley, and Marjorie Putnam, General Counsel, for North Carolina Academy of Trial Lawyers, amicus curiae.

MEYER, Justice.

The issues before the Court are whether the Court of Appeals applied the proper test in reviewing the trial court's entry of sum-

mary judgment for defendant in the instant case and whether summary judgment was appropriate under the facts before the trial court at the time it was entered. We conclude that the Court of Appeals applied the wrong test and further conclude that the Court of Appeals erred in holding that the trial court improperly granted summary judgment in favor of defendant. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Forsyth County, for reinstatement of the summary judgment originally entered 20 July 1990.

The evidence before the trial court tended to show the following. On 21 December 1987 at approximately 8:15 p.m., plaintiff and her husband and son exited the Bojangles restaurant located on Peters Creek Parkway in Winston-Salem, North Carolina. Plaintiff, forty-eight years old at the time of the accident, crossed the entrance walkway, traversed the drive-thru lane, and walked the "couple of steps" over a concrete traffic island that separated the drive-thru lane from the parking spaces intended for restaurant patrons. Plaintiff then walked across the empty parking space adjacent to her auto, taking three steps toward the driver's side door. Plaintiff's left foot slipped on a substance on the asphalt parking space, and she fell on her right knee. Plaintiff was taken to Forsyth Memorial Hospital where X rays revealed that she had sustained a broken kneecap, which required surgery. Plaintiff suffers a twenty percent permanent partial disability of the knee as a result of the fall.

In her deposition, plaintiff stated that the parking lot was "basically" a well-lit area that "slopes" downward away from the restaurant and that on the evening of the accident she was wearing a skirt, sweater, and casual dress shoes with three-quarter inch heels. She also described the substance on which she slipped as being from an automobile, "[b]lack," "[t]hick, mucky like," "[m]ore like grease rather than oil," and two and one-half or three feet in "circular" dimension. The deposition made no mention of any other material on the parking lot surface. The complaint, however, describes the substance differently, as it refers to a "slick, greasy substance and other debris." Plaintiff stated in her deposition that the substance measured in thickness "as much as a sixteenth of an inch." Plaintiff was unable to say whether the greasy substance was located across from the restaurant entrance. Plaintiff also related in her deposition that she returned to the accident scene some

two and one-half weeks after the accident, and in response to defense counsel's inquiry as to whether the parking lot space was in "exactly the same" condition as on the day of the accident, plaintiff replied "Yes."

On 25 June 1990, defendant moved for summary judgment. At the hearing, defendant produced plaintiff's deposition, three sets of interrogatories answered by plaintiff, and seven photos of the parking lot taken approximately two months after plaintiff fell. Plaintiff produced no affidavits or anything else in response to defendant's motion. The trial court entered summary judgment in favor of defendant.

The Court of Appeals held that the trial court erred in granting summary judgment for defendant. While conceding that there is no evidence in the record that defendant knew or should have known of the existence of the substance, the Court of Appeals nevertheless concluded that this lack of evidence did not entitle defendant to summary judgment. The majority of the panel below held that defendant is entitled to summary judgment "only if it meets its burden of showing that it did not know, and should not have known," of the presence of the substance in the parking lot; because the record was bereft of such evidence, defendant failed to carry its burden, and therefore summary judgment was inappropriate. *Roumillat*, 103 N.C. App. at 442, 406 S.E.2d at 12.

In her dissenting opinion, Judge Parker contended that the majority employed the wrong test in assessing the propriety of the summary judgment granted in favor of defendant. We agree. Under *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 376 S.E.2d 425 (1989), defendant could have succeeded by showing that plaintiff was incapable of producing evidence of an essential element of her claim. According to the dissent, defendant in the instant case had demonstrated that plaintiff could not produce evidence to prove an essential element of her case—that defendant knew or should have known of the existence of the substance in the parking lot.

The North Carolina Rules of Civil Procedure provide that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). The burden of establishing

a lack of any triable issue resides with the movant. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). In *Collingwood v. G.E. Real Estate Equities*, we characterized this burden as follows:

> The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

324 N.C. at 66, 376 S.E.2d at 427; *see also Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974). Once a moving party meets its burden, then the nonmovant must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427. In order to meet its burden, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial." N.C. R. Civ. P. 56(e). All inferences of fact must be drawn against the movant and in favor of the nonmovant. *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427.

[1, 2] The standard employed by the Court of Appeals in the instant case is not in accord with our well-established rule. Defendant was entitled to summary judgment if it was able either to show the nonexistence of an essential element of plaintiff's claim *or* to show that plaintiff could not produce evidence of an essential element of her claim. *Id.* Contrary to the view of the Court of Appeals, defendant was not required to produce evidence showing that it did not know or should not have known of the substance in its parking lot. Such a requirement lacks support in our law and is indeed erroneous. Language to the same effect appears in *Durham v. Vine*, 40 N.C. App. 564, 567-68, 253 S.E.2d 316, 319 (1979), and *Tolbert v. Tea Co.*, 22 N.C. App. 491, 494, 206 S.E.2d 816, 817 (1974), and is hereby disapproved.

[3] Further, the Court of Appeals erred in its application of the burdens of proof between the respective parties in the summary judgment proceeding. Under N.C. R. Civ. P. 56(e), after defendant

met its burden by showing that plaintiff could not come forward with a forecast of evidence that defendant knew or should have known of the presence of the substance and, having sufficient time to do so, negligently failed to remove it, the burden then was upon the plaintiff to make a contrary showing. Plaintiff's reliance on her complaint does not suffice. The trial court must go "beyond the pleadings to determine whether there is a genuine issue of material fact." *Zimmerman*, 286 N.C. at 29, 209 S.E.2d at 798; *see also Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 85, 249 S.E.2d 375, 378 (1978) ("Thus, plaintiff here cannot rely on his complaint alone to defeat defendant's motion for summary judgment since the motion is accompanied by competent evidentiary matters in support of it."). To hold otherwise, as the Court of Appeals did in the case at bar, would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

[4-6] Finally, we disagree with the conclusion reached by the Court of Appeals that summary judgment for defendant was inappropriate in the instant case. In a premises liability case involving injury to an invitee, the owner of the premises has a duty to exercise "ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision." *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963). In order to prove that the defendant-proprietor is negligent, plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence. *Hinson v. Cato's, Inc.*, 271 N.C. 738, 739, 157 S.E.2d 537, 538 (1967). When the unsafe condition is attributable to third parties or an independent agency, *plaintiff* must show that the condition "existed for such a length of time that defendant knew or by the exercise of reasonable care should have known of its existence, in time to have removed the danger or [to have] given proper warning of its presence." *Powell v. Deifells, Inc.*, 251 N.C. 596, 600, 112 S.E.2d 56, 58 (1960). In short, a proprietor is not the insurer of the safety of its customers. *Wrenn v. Convalescent Home*, 270 N.C. 447, 154 S.E.2d 483 (1967).

[7] In the instant case, that defendant was on actual or constructive notice of the substance in the parking lot and failed to correct

it was an essential element of plaintiff's claim. Citing *Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App. 163, 336 S.E.2d 699 (1985), and *Southern Railway Co. v. ADM Milling Co.*, 58 N.C. App. 667, 294 S.E.2d 750, *disc. rev. denied*, 307 N.C. 270, 299 S.E.2d 215 (1982), the Court of Appeals held that a triable issue of material fact existed as to whether defendant was aware or should have been aware of the substance on the parking lot surface. Scrutiny of these two cases, however, provides no support for the conclusion reached by the majority below.

In *Warren*, a grocery store patron slipped and fell as a result of human excrement that was deposited on the floor of defendant's store. In support of its motion for summary judgment, defendant submitted affidavits of three employees, each stating that the excrement was deposited immediately before plaintiff stepped in it. 78 N.C. App. at 165, 336 S.E.2d at 701. Plaintiff submitted her own affidavit contradicting defendant's evidence that the excrement had fallen onto the floor immediately prior to her stepping in it. In her affidavit, plaintiff stated that the excrement was dried and had footprints in it. In her answers to defendant's interrogatories, plaintiff stated that she was at the checkout counter for approximately fifteen minutes and during that time she saw no one enter or leave the store. Moreover, in her affidavit, plaintiff stated that an employee of the store informed her that he knew the excrement was on the floor but that it was not his job to clean it up. *Id.* at 165-66, 336 S.E.2d at 701-02. On this basis, the Court of Appeals concluded that a dispute existed as to a material fact regarding the length of time the excrement was actually on the floor, making summary judgment for defendant inappropriate.

The instant case is distinguishable. The plaintiff in *Warren* complied with her obligation to present in response to defendant's summary judgment motion a forecast of the evidence necessary to rebut defendant's contention that her claim was incapable of being sustained at trial. Here, plaintiff failed to offer any affidavits or other evidence in support of the bald assertion in her pleading that defendant knew or should have known of the greasy substance in its parking lot.

Similarly, *Southern Railway* does not provide a basis for the majority's holding below. There, plaintiff, who was an employee of defendant railway company, slipped and fell on some grain lying in a work area in which plaintiff regularly walked and had slipped

"time after time." Despite receiving complaints about the presence of the grain, defendant never took steps to remedy the situation. 58 N.C. App. at 674, 294 S.E.2d at 755. Because defendant was on notice of the dangerous condition and plaintiff had no choice but to encounter the condition in completing his job duties, the question of the reasonableness of defendant's failure to take additional precautions was for the jury to decide.

Unlike *Southern Railway*, in the instant case, plaintiff failed to forecast evidence that defendant was aware or should have been aware of the presence of the automobile grease. Plaintiff's own deposition testimony indicated that she did not see any grease as she, her husband, and her son initially walked across the "basically" well-lit parking area to enter defendant's restaurant. Significantly, plaintiff exited the restaurant within a few feet of the path she used to enter the restaurant, and her husband himself, less than an hour before, successfully traversed the very area on which plaintiff slipped. These facts are pertinent on the motion for summary judgment only insofar as they tend to show either that the grease spot was not so noticeable as to put defendant on notice of its existence or that the grease was deposited during the relatively brief time plaintiff and her family were within the restaurant, diminishing any prospect of constructive notice. Nor, for that matter, did plaintiff forecast any evidence as to the condition of the parking lot prior to plaintiff's fall. Thus, plaintiff was unable to carry her burden, and summary judgment for defendant was appropriately granted by the trial court.

Support for this view is found in recent cases decided by this Court as well as by the Court of Appeals. The mere fact that the automobile grease was present on the parking lot surface is not of itself dispositive of negligence. As the dissent below states, it is common knowledge that residues from engines frequently leak from parked automobiles. A proprietor has no duty to warn an invitee of an obvious danger or of a condition of which the invitee has equal or superior knowledge. *Harris v. Department Stores Co.*, 247 N.C. 195, 100 S.E.2d 323 (1957). Reasonable persons are assumed, absent a diversion or distraction, to be vigilant in the avoidance of injury in the face of a known and obvious danger. *Walker v. Randolph County*, 251 N.C. 805, 112 S.E.2d 551 (1960). In *Goard v. Branscom*, 15 N.C. App. 34, 189 S.E.2d 667, *cert. denied*, 281 N.C. 756, 191 S.E.2d 354 (1972), the Court of Appeals upheld a summary judgment under similar circumstances entered in favor

of defendant by then Judge (now Chief Justice) Exum. There, the Court of Appeals said:

> the fact that oil may have been on the driveway does not constitute negligence . . . . It is common knowledge that . . . oil and grease often leak[ ] from automobiles, whether they are parked or moving. The record is silent as to how long the oil or grease that plaintiff stepped on had been there. We are of the opinion that no actionable negligence has been shown in this case and that there is no genuine issue as to any material fact germane to the cause of action.

Id. at 39-40, 189 S.E.2d at 670. The fact that plaintiff was unable to adduce evidence regarding how long the dangerous condition existed has been deemed significant by this Court. In *Hinson v. Cato's, Inc.*, we said:

> Even if a negligent situation could be assumed here, had it existed a week, a day, an hour, or one minute? The record is silent; and since the plaintiff must prove her case, we cannot assume, which is just a guess, that the condition had existed long enough to give the defendant notice, either actual or implied.
>
> The plaintiff has failed to meet the requirements which permit the cause to be submitted to the jury.

271 N.C. 738, 739, 157 S.E.2d 537, 538.

[8] Plaintiff also alleged in her complaint that defendant was negligent due to the downward slope of its parking lot. Because it appears that this argument was not raised by plaintiff before the Court of Appeals, plaintiff arguably waived any right to argue that the slope amounted to negligence here. N.C. R. App. P. 28(b). Because slope was discussed by Judge Parker in her dissent and because it was addressed in oral argument before this Court, we elect to address this issue pursuant to our supervisory powers. N.C. R. App. P. 2.

In response to defendant's interrogatory, plaintiff presented no evidence of any violation of any building code, ordinance, or regulation and failed to name any expert witnesses in this respect either in her interrogatory responses or at the summary judgment hearing. Scrutiny of the photographs presented by defendant in support of its summary judgment motion reveals nothing out of the ordinary about the slope of defendant's parking lot. Whether

slope constitutes negligence was addressed by this Court in *Garner v. Greyhound Corp.*, 250 N.C. 151, 108 S.E.2d 461 (1959). In *Garner*, we held that defendant, the owner of the premises, had no duty to warn plaintiff of the slope on its premises, which was in plain view, and had breached no duty to keep the premises safe. *Id.* at 160, 108 S.E.2d at 468; *see also Stoltz v. Burton*, 69 N.C. App. 231, 235, 316 S.E.2d 646, 648 (1984) ("It would be unjust and extremely burdensome to require . . . owners to . . . insure a perfectly even drop-off from the sidewalk to the parking lot at all points. The varying height of the drop-off is a natural result of the particular tract . . . .").

[9] Finally, plaintiff contended in oral argument before this Court that the photographs before the court at summary judgment revealed that the grease spot allegedly causing the fall was located so close to the entrance of the restaurant that a jury could reasonably have inferred that defendant was or should have been on notice. These photographs, while showing that the parking space where plaintiff fell is within eyesight of the restaurant entrance, support the deposition evidence that it is separated from that entrance by a raised entrance walkway or sidewalk, a drive-thru lane, and a low concrete parking barrier. At the summary judgment hearing, plaintiff presented no forecast of expert or lay testimony to attest to the reasonableness of detecting the substance on the basis of mere proximity. Further, plaintiff herself was unable to say whether the grease spot was located across from the restaurant entrance. These facts, in tandem with the fact that no evidence was presented as to how long the substance was present, made summary judgment appropriate.

Heretofore we have never concluded that proximity alone is indicative of negligence. Our case law is rife with findings by this Court and the Court of Appeals that affirmative showings of dangerous conditions even *within* defendant's premises do not suffice to make out a prima facie case of negligence. *See, e.g., Dawson v. Light Co.*, 265 N.C. 691, 144 S.E.2d 831 (1965); *Hill v. Allied Supermarkets, Inc.*, 42 N.C. App. 442, 257 S.E.2d 68 (1979). Negligence is not presumed from the mere fact of injury. Plaintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, nonsuit is proper. *Heuay v. Halifax Constr. Co.*, 254 N.C. 252, 118 S.E.2d 615 (1961).

In the absence of accompanying evidence from experts or lay witnesses, the photos themselves do not suffice to prove constructive notice on defendant's part. Cases are not to be submitted to a jury on speculations, guesses, or conjectures. *Hopkins v. Comer*, 240 N.C. 143, 81 S.E.2d 368 (1954). The law does not require omniscience on the part of defendants, and proof of negligence must rest on a more solid foundation than mere conjecture. *Clark v. Scheld*, 253 N.C. 732, 117 S.E.2d 838 (1961).

We conclude that after defendant carried its burden of showing the inability of plaintiff to forecast evidence of a material element of her negligence claim, namely, that defendant was aware or should have been aware of the greasy substance on the surface of its parking lot, plaintiff failed to satisfy her burden of responding with a forecast of evidence of that element of her claim. Further, absent notice, actual or constructive, of its presence, the failure to remove the grease does not constitute a breach of defendant's duty to maintain the premises in a reasonably safe condition. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Forsyth County, for reinstatement of the summary judgment in favor of defendant entered 20 July 1990.

Reversed and remanded.

Justice FRYE dissenting.

I agree with the majority that the Court of Appeals applied the wrong test for summary judgment, but I disagree that, on the facts of this case, summary judgment was properly entered in favor of defendant. I therefore dissent from that portion of the Court's opinion which holds that the Court of Appeals erred by reversing the trial court's entry of summary judgment.

"Negligence claims," wrote Justice (now Chief Justice) Exum for the Court, "are rarely susceptible of summary adjudication, and should ordinarily be resolved by trial of the issues." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983). "Hence, it is only in exceptional negligence cases that summary judgment is appropriate because the rule of the prudent [person] or other applicable standard of care, must be applied, and ordinarily the jury should apply it under appropriate instructions

from the court." *Vassey v. Burch*, 301 N.C. 68, 73, 269 S.E.2d 137, 140 (1980).

In order to succeed, the moving party—in this case the defendant—must meet an initial burden of (1) proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party (2) cannot produce evidence to support an essential element of his or her claim or (3) cannot surmount an affirmative defense which would bar the claim. *Bernick v. Jurden*, 306 N.C. 435, 440-41, 293 S.E.2d 405, 409 (1982); *accord Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). " 'If the moving party fails in his showing, summary judgment is not proper regardless of whether the opponent responds.' " *Bernick*, 306 N.C. at 441, 293 S.E.2d at 409 (quoting *City of Thomasville v. Lease-Afex Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980)). Furthermore, all inferences of fact at the summary judgment hearing "must be drawn against the movant and in favor of the party opposing the motion." *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427.

Thus, in this case, plaintiff did not need to respond with a more detailed forecast of her evidence until defendant met its initial burden. The majority holds that defendant met this initial burden by demonstrating through discovery that plaintiff could not produce evidence of actual or constructive notice on the part of defendant. I disagree.

As the majority states, in order to prevail at trial, plaintiff must show that the dangerous condition " 'existed for such a length of time that defendant knew or by the exercise of reasonable care should have known of its existence, in time to have removed the danger or [to have] given proper warning of its presence.' " *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 343 (1992) (quoting *Powell v. Deifells, Inc.*, 251 N.C. 596, 600, 112 S.E.2d 56, 58 (1960)). This duty to keep the premises in a reasonably safe condition "implies the duty to make reasonable inspection and to correct unsafe conditions which a reasonable inspection would reveal . . . ." *Rappaport v. Days Inn*, 296 N.C. 382, 387, 250 S.E.2d 245, 249 (1979).

In her deposition, plaintiff states that she and her family arrived at the Bojangles restaurant about 7:30 p.m. on 21 December 1987 and left between 8 and 8:15 p.m. Upon leaving the restaurant, plaintiff states that she slipped on a thick, mucky, greasy black

substance which measured two and one-half to three feet in circular dimension. She estimated that the substance was as much as a sixteenth of an inch in thickness. The parking space where she fell, according to photographs, is located near the entrance to the restaurant. Plaintiff also states in her deposition that when she returned to the restaurant two and one-half to three weeks later, "the parking space where I fell had more of a grease build up than the other areas." Defendant's attorney then asked plaintiff: "Did it [parking space] look exactly the same as it had on December 21, 1987 when this happened? Was the spot that you described there"? Plaintiff responded, "Uh huh. Yes."

Based on plaintiff's deposition, seven photographs, and three sets of interrogatories answered by plaintiff, the majority concludes that defendant met its burden of proving that plaintiff *cannot* produce evidence to support her claim. Defendant offered no affirmative evidence on the issue of notice, such as depositions by its own employees that they had inspected the parking area prior to plaintiff's spill and found no grease spot. *Cf. Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App. 163, 336 S.E.2d 699 (1985) (*defendant* produced affidavits of two employees, each stating that the excrement which caused the plaintiff to slip was deposited on the floor immediately prior to the plaintiff's fall).

Considering the facts before the trial court in the light most favorable to the plaintiff, I believe a reasonable inference can be drawn that this large, mucky, greasy spot did not suddenly appear in the thirty to forty-five minutes that plaintiff was inside the restaurant. Photographs taken by the plaintiff approximately two months after her fall, and submitted by defendant in support of its motion for summary judgment, show spots of oil or grease in the parking space where plaintiff slipped. Given the size of the grease spot, its thickness, plaintiff's photographs and plaintiff's deposition statement that the grease spot was intact more than two weeks after her fall, a jury could reasonably infer that this particular parking spot, for whatever reason, had a coat of grease for some period of time prior to plaintiff's fall. Furthermore, given that the parking space is near the entrance of the restaurant, a reasonable jury could conclude that defendant should have been aware of the dangerous condition and taken steps to correct it.

The majority also suggests that summary judgment was appropriate in this case because oil or grease in a parking lot is

an obvious danger, and a "proprietor has no duty to warn an invitee of an obvious danger or of a condition of which the invitee has equal or superior knowledge." *Roumillat*, 331 N.C. at 66, 414 S.E.2d at 344 (citing *Harris v. Department Stores Co.*, 247 N.C. 195, 100 S.E.2d 323 (1957)). The majority relies on *Goard v. Branscom*, 15 N.C. App. 34, 189 S.E.2d 667, *cert. denied*, 281 N.C. 756, 191 S.E.2d 354 (1972), in which the Court of Appeals states that it is common knowledge that oil and grease leak from automobiles. *Id.* at 39-40, 189 S.E.2d at 670. The majority fails to mention, however, that the issue in *Goard* was not whether oil in parking lots is a common danger; instead, the issue was whether the plaintiff was an invitee or licensee on the church premises where she fell. *Id.* at 36, 189 S.E.2d at 668. The court held that plaintiff was neither an invitee nor a licensee, but rather "one of the persons in possession of the premises involved . . . ." *Id.* at 40, 189 S.E.2d at 670. Defendant, therefore, did not owe the plaintiff in *Goard* the same duty that defendant in this case owed plaintiff, an invitee of the restaurant.

Although it is well known that cars occasionally leak grease and oil, the question in this case is whether a large black oil or grease spill on an asphalt surface near the restaurant entrance should be so obvious to a restaurant patron at night that the restaurant has no duty either to warn or remove the danger. That question, I believe, is one better left to a jury, not a trial judge or appellate court.

For the reasons outlined above, I vote to modify and affirm the decision of the Court of Appeals.

Chief Justice EXUM and Justice LAKE join in this dissenting opinion.

JOANN W. WADDLE AND JACQUELINE E. SIMPSON v. JACK SPARKS AND GUILFORD MILLS, INC.

No. 476A90

(Filed 5 March 1992)

1. **Rules of Civil Procedure § 56.3 (NCI3d)— summary judgment— proof of nonexistence of essential element**

Summary judgment is properly entered in the movant's favor if the movant establishes that an essential part or element of the opposing party's claim is nonexistent. Therefore, in order to overcome defendants' motions for summary judgment, plaintiffs must forecast sufficient evidence of all essential elements of their claims.

Am Jur 2d, Summary Judgment § 26.

2. **Trespass § 2 (NCI3d)— intentional infliction of emotional distress—elements**

The essential elements of an action for intentional infliction of emotional distress are (1) extreme and outrageous conduct by the defendant (2) which is intended to and does in fact cause (3) severe emotional distress.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 4-7.

3. **Trespass § 2 (NCI3d)— intentional infliction of emotional distress—meaning of severe emotional distress**

The standards for determining the element of severe emotional distress in actions for the intentional infliction of emotional distress and the negligent infliction of emotional distress are the same. Therefore, the term "severe emotional distress" in an action for the intentional infliction of emotional distress means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 3, 4, 47, 51.

4. Trespass § 2 (NCI3d)— intentional infliction of emotional distress—insufficient forecast of evidence of severe emotional distress

Plaintiff's forecast of evidence failed to show that she has suffered the severe emotional distress necessary to maintain her cause of action against her former supervisor for intentional infliction of emotional distress based on sexually suggestive comments and offensive actions where plaintiff stated during her deposition that she had not seen a psychiatrist or psychologist since well before the events comprising her lawsuit; plaintiff stated that the only time she had taken "nerve pills" prescribed by her doctor for a protracted period of time was during episodes of family-related stress due to problems with her mother and daughter; plaintiff stated that the only time she missed work was when her mother was hospitalized and again when her teenage daughter eloped; and there was no forecast of any medical documentation of plaintiff's alleged "severe emotional distress" and no forecast of evidence of "severe and disabling" psychological problems.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 8-10, 12.

5. Rules of Civil Procedure § 56.4 (NCI3d)— statute of limitations—defendants' summary judgment motions—burden on plaintiff

Where defendants pleaded the statute of limitations as a defense to plaintiff's claim for the intentional infliction of emotional distress and relied on it in their separate motions for summary judgment, plaintiff was required to produce a forecast of evidence of specific acts which took place within three years prior to the filing of her complaint in order to sustain her claim over defendants' summary judgment motions.

Am Jur 2d, Limitation of Actions § 470; Summary Judgment §§ 26, 27.

6. Trespass § 2 (NCI3d)— intentional infliction of emotional distress—summary judgment—statute of limitations

Summary judgment was properly entered against the second plaintiff on her claim against her former supervisor for intentional infliction of emotional distress because her forecast of evidence failed to show that any conduct of defendant oc-

curred within the applicable three-year statute of limitations where she was unable to state during her deposition a date, even within a year, when any one of the various specific incidents she alleged against defendant occurred.

Am Jur 2d, Limitation of Actions § 470; Summary Judgment §§ 26, 27.

7. Master and Servant § 29 (NCI3d)— negligent retention of supervisor—insufficient forecast of evidence

Summary judgment in favor of defendant employer was proper on plaintiffs' claims for negligent retention of their former supervisor where the only tort at issue against the supervisor was intentional infliction of emotional distress, and plaintiffs' forecasts of evidence were insufficient to sustain their claims against the supervisor for this tort.

Am Jur 2d, Summary Judgment §§ 26, 27.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress. 52 ALR4th 853.

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

ON appeal of right by defendants pursuant to N.C.G.S. § 7A-30(2) and on discretionary review of additional issues pursuant to N.C.G.S. § 7A-31(a), from the decision of a divided panel of the Court of Appeals, 100 N.C. App. 129, 394 S.E.2d 683, reversing summary judgment against plaintiff Waddle and affirming summary judgment against plaintiff Simpson, the judgments having been rendered on 15 June 1989 in Superior Court, GUILFORD County, *Walker (Ralph A.), J.*, presiding. Heard in the Supreme Court on 8 April 1991.

Ling & Farran, by Jeffrey P. Farran, for plaintiff-appellee Joann W. Waddle and plaintiff-appellant Jacqueline E. Simpson.

Haines, Short, Campbell & Ferguson, by W. Marcus Short, for defendant Jack Sparks.

Smith, Helms, Mullis & Moore, by Martin N. Erwin and Michael A. Gilles, for defendant Guilford Mills, Inc.

Harvey L. Kennedy and Harold L. Kennedy, III, for the North Carolina Academy of Trial Lawyers, Amicus Curiae.

EXUM, Chief Justice.

Plaintiffs' complaint, filed 20 April 1988, alleges intentional and negligent infliction of emotional distress against defendant Jack Sparks and negligent hiring and retention of Sparks by defendant Guilford Mills, Inc. On 24 April and 26 April 1989, defendants, respectively, filed motions for summary judgment as to all plaintiffs' claims. The trial court granted these motions on 15 June 1989. Plaintiffs appealed the summary judgments entered against them on their intentional infliction of emotional distress claims against Sparks and their negligent retention claims against Guilford Mills to the Court of Appeals.[1] A divided panel of the Court of Appeals reversed the summary judgments entered in favor of both defendants as to plaintiff Waddle. 100 N.C. App. 129, 394 S.E.2d 683 (1990) (Lewis, J., dissenting). The Court of Appeals unanimously affirmed the summary judgments entered in favor of both defendants as to plaintiff Simpson. *Id.* Defendants appealed to this Court on the basis of Judge Lewis' dissent. Both defendants petitioned for discretionary review of additional issues which were raised in, but not addressed by, the Court of Appeals. Plaintiff Simpson also petitioned for discretionary review. The Court allowed all petitions on 10 January 1991.

The questions before us are, on defendants' appeal, whether the Court of Appeals erred in reversing summary judgments in their favor on plaintiff Waddle's claim for intentional infliction of emotional distress against Sparks and negligent retention against Guilford Mills; and on plaintiff Simpson's petition for discretionary review, whether the Court of Appeals erred in affirming summary judgments for both defendants on her claims resting on these same

1. Plaintiffs did not challenge in the Court of Appeals the summary judgments against them on their negligent infliction of mental distress and negligent hiring claims. They further acknowledged during oral arguments here that they had abandoned their claims for negligent infliction of emotional distress. Plaintiff Simpson also failed to present these issues in her petition for discretionary review. Pursuant to Appellate Procedure Rule 28(a) assignments of error relating to these claims have not been preserved on appeal and are therefore deemed abandoned.

torts. We conclude the Court of Appeals should have affirmed summary judgments entered for defendants as to both plaintiffs on both claims. Because of this conclusion we need not address the various additional issues raised by the parties in their petitions for discretionary review.

I.

The trial judge considered several documents propounded by the parties in determining that defendants' motions for summary judgment on all claims should be granted. Among these were the pleadings, the depositions of each plaintiff and of defendant Jack Sparks, defendants' responses to requests for admissions and, finally, a summarized version of an attitude survey of employees working under defendant Sparks taken by defendant Guilford Mills. Taken in the light most favorable to each plaintiff, the following facts can be gleaned from these documents.

Joann Waddle began working for defendant Guilford Mills, Inc. in 1970. In early 1983, defendant Jack Sparks became the third-shift supervisor of the Knitting Department in Guilford Mills' Wendover plant. In this position Sparks was plaintiff Waddle's direct supervisor.

In 1984, defendant Guilford Mills took an attitude survey of the employees under defendant Sparks' supervision. The survey tended to show that Sparks was not well liked by the employees working on his shift. A report of the survey stated that

> [s]ome employees feel Sparks is vicious and "likes to stir people up," while others think it's his idea of "humor." In any event, its [sic] causing problems and largely of this supervisor's own making. The mix, particularly among women, ranges from fear to anger, with Sparks viewed as "the most vindictive egocentric person in the plant." Even when things are "mentioned to Jack that he can and should correct, he gets so profane and angry that we're afraid to mention anything that needs attention." . . . The situation in this department would be radically improved if Sparks were reclaimed, recycled or removed.

Quotations from the above survey are apparently direct quotes of department employees.

Waddle's deposition was taken on 16 August 1988. During her deposition Waddle testified that sometime in 1983 Sparks brushed his arm against her breast while she was working on a clipboard. Although Waddle initially felt the brushing incident was an accident, she stated that a similar occurrence happened the next week and she began to suspect it was deliberate. The actual touching occurred only twice; however, Waddle testified that she had to step away from Sparks on several more occasions in order to avoid similar attempts. The last time she had to avoid these attempts "was about 1984." Plaintiff acknowledged, "I wasn't worried about his brushing up against me because I knew I could get away from him if he tried anything." She further acknowledged in her deposition that any acts of a sexual nature, except "dirty talk," occurred within the first six months or a year that Sparks supervised her (i.e., in 1983 and 1984).

In its opinion, the Court of Appeals outlined specific allegations of Waddle against Sparks which it gleaned from Waddle's deposition. It believed the following allegations could potentially support her claim of intentional infliction of mental distress (paraphrased except where quoted from the Waddle deposition):

1. In 1983 Sparks brushed up against plaintiff's breast; however, Waddle acknowledged she was not worried about these attempts because of her ability to dodge them.

2. In March, 1985, a male employee was cleaning and greasing a knitting machine. A female employee approached the machine and said "Bill, you have not greased the balls." Another female employee present at the scene then said to Sparks "Jack, listen over here. Frances is worried about whether Bill's greased his balls or not." Sparks responded to her "What are you worrying about Bill's balls for?" Waddle was not involved in this exchange, although she did overhear the conversation.

3. Sometime in either March or April, 1985, Waddle and Sparks were examining some fabric together. Waddle commented to Sparks that the fabric "has four holes the way its [sic] supposed to." According to Waddle, Sparks responded by asking, "[D]o you have four holes? I bet you know how to use all four of them don't you?"

4. In the fall of 1985, Waddle approached Sparks for some medicine for an infected cut on her finger which was oozing

pus. Sparks asked Waddle how she knew it was infected. Waddle stated "it's red and it's swollen and it's got pus in it." Sparks started laughing and asked another employee to take care of plaintiff. Sparks then said "Yeah, Joann's got a pussy finger. Walt's going to have to work on Joann's pussy." Sparks then got up from his desk laughing even harder and said "I'd better leave on this one. I can't stand it anymore." As Sparks was leaving, another employee approached the office. Sparks stopped him and Waddle allegedly overheard Sparks tell the person "You can't go in there. Walt's working on Joann's pussy finger." Waddle stated that Sparks paused between the words "pussy" and "finger."

Plaintiff has also alleged in her complaint that defendant Sparks "frequently and constantly used dirty or obscene language of a sexual nature." During her deposition, Waddle was pressed for details about incidents at which Sparks used such sexually suggestive comments. Waddle responded that she bought a watch for her father around Christmas 1984 and that one day she brought the watch with her to work. When she showed the watch to Sparks, he responded "Well, that's nice." Sparks then turned around and commented to another employee "Yeah, I guess one of her boyfriends gave it to her." This incident and those already mentioned are the only specific, sexually suggestive comments made by Sparks, as recounted in Waddle's deposition. Waddle did say during her deposition that, throughout her employment on Sparks' shift, he frequently used offensive and vulgar language. She stated that defendant "always threw cuss words in every sentence he said."

In "the early part of the fall" of 1985, Waddle complained to plant manager John Moffitt and assistant plant manager Ed Gray regarding Sparks' alleged unfair treatment of her as compared to other employees. During the meeting Moffitt left to go to another meeting. After Moffitt left, she told Gray about Sparks' excessive use of dirty language, saying that Sparks "used G.D. all the time and the 'f' word." She acknowledged not telling Gray about the touching incidents in 1983 and 1984, and she did not tell Gray about any incidents where Sparks had used sexually suggestive remarks.

"[I]n the later part of the fall" of 1985, Waddle complained to personnel manager Brenda Shelton about Sparks. The thrust of her complaints involved Sparks giving other employees special

treatment at her expense. Waddle also mentioned that Sparks had a "filthy mouth." When Shelton asked if Waddle had ever spoken to Sparks about his language, plaintiff told Shelton that she had but that "you can't talk to him. The man's crazy. . . . Every time you try to talk to him, he makes something dirty out of it or he uses cuss words—dirty words. . . . You can't talk to him. It's impossible." Waddle testified that Shelton replied "Well, sex should never enter into the workplace." When pressed for details about those incidents when Sparks had "talked dirty," Waddle testified that she could not "remember telling her [Shelton] anything specific."

Waddle attempted to persuade Shelton to go to the plant and speak to other employees to verify Waddle's complaints. Shelton thought it would be a bad idea because it "would be too obvious" to Sparks what was going on. Instead Shelton encouraged plaintiff to get some of her co-workers to bring their complaints directly to Shelton's office. Shelton attempted to assure Waddle that she would see "anybody that wants to talk." Waddle, however, was apprehensive about getting into trouble if she encouraged others to talk to Shelton. Waddle also begged Shelton to keep Waddle's name out of any conversations Shelton might have with Moffitt, Gray or Sparks, fearing that the three would retaliate against her.

Defendant Jack Sparks' deposition was taken on 9 December 1987 during the discovery period of another case not involving the present plaintiffs. In that deposition, which Judge Walker (now a member of the Court of Appeals) had before him at the summary judgment hearing in this case, Sparks acknowledged that he was verbally reprimanded by Moffitt for use of offensive language. Moffitt warned Sparks that if Sparks "was found guilty of vulgar language . . . [he] would be terminated."

From the record and the deposition testimony of Waddle, it appears that none of the above-cited incidents of inappropriate language about which Waddle testified occurred after plaintiff Waddle complained to Gray or Shelton. In February 1986, Waddle requested a transfer to the second shift. Guilford Mills granted the request on 24 February 1986. Thereafter, she was not supervised by defendant Sparks. On 22 October 1987 plaintiff Waddle voluntarily quit her job at Guilford Mills. She then complained that she was being unfairly accused of incorrectly measuring a set of beams, and she refused to sign a "write-up sheet" acknowledging the mistake. Apparently, at a later date, Guilford Mills deter-

mined that the mistake was not the fault of Waddle. Defendant Sparks was not involved in this final incident.

Plaintiff Jacqueline Simpson was also deposed on 16 August 1988. During her deposition, Simpson testified that on several occasions Sparks brushed his elbow against her breast while walking by her. She also stated that he frequently used dirty language and that, if someone talked to him about it, "he tried to turn it into something sexual." For example, when pressed by defendants' counsel for details of Sparks' "dirty talk," Simpson testified as follows:

> He said lots of dirty talk. If you had any—lots of people used lotion out there in dealing with the yarn. And they put lotion in your hand. If you had lotion in your hand and he came by he would say, "Who you been messing with?" or "Have you been messing with yourself?" or "We know what you've been doing." If the yarn was pulled apart in the middle, "What did you do, get your titty in that?" If there was a wet spot on the floor, "Did you pee on the floor?" If there was a wet spot on your pants, "What have you been doing?"
>
> If your legs were sore from walking and you'd say, "My legs are sore."
>
> He'd say, "Well, I know why they're sore."

On several occasions, Sparks also made lewd gestures to Simpson with his hands where he would turn his palm up and wiggle his middle finger.

When asked during her deposition to recount when any of these episodes took place, Simpson largely could not. She could not specify when any of these statements by Sparks occurred—even within a single year. Her responses were generally vague and apparently the majority of these incidents took place on a sporadic basis.

II.

[1] Civil Procedure Rule 56 governs motions for summary judgment. Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1983).

The procedures and guidelines by which summary judgment is properly allowed have oft been recited by this Court, but they bear repeating here.

> By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial. . . . The party moving for summary judgment has the burden of establishing the lack of any triable issue. . . . The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, *or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim* or cannot surmount an affirmative defense which would bar the claim. . . . All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion. . . .

Boudreau v. Baughman, 322 N.C. 331, 342-43, 368 S.E.2d 849, 858 (1988) (citations omitted).

> Rule 56(e) of the Rules of Civil Procedure states:
>
> [w]hen a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of his pleading*, but his response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C.G.S. § 1A-1, Rule 56(e) (1983). We have previously held that summary judgment is properly entered in the movant's favor if the movant establishes that an essential part or element of the opposing party's claim is nonexistent. *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355 (1985). Therefore, in order to overcome defendants' motions for summary judgment, plaintiffs must have forecast sufficient evidence of all essential elements of their claims.

[2] The essential elements of an action for intentional infliction of emotional distress are "1) extreme and outrageous conduct by the defendant 2) which is intended to and does in fact cause 3) severe emotional distress." *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). *See also* Restatement (Second) of Torts § 46(1) (1965). Defendant contends, among other points, that plaintiff Waddle

has failed to forecast sufficient evidence of "severe emotional distress." We agree. Because we believe plaintiff Waddle has failed to produce a sufficient forecast of evidence on this essential element of her claim, we need not, and therefore do not, address the remaining elements of this tort.

This Court first discussed the tort of intentional infliction of emotional distress in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). In *Stanback* we stated that, in order to show severe emotional distress, the plaintiff must show she was suffering "emotional distress of a *very* serious kind." *Id.* at 196, 254 S.E.2d at 622 (citing William L. Prosser, *Handbook of The Law of Torts* § 12, at 56 (4th ed. 1971)) (emphasis added). We reaffirmed the validity of an independent claim for intentional infliction of emotional distress in *Dickens*, 302 N.C. 437, 276 S.E.2d 325. In *Dickens*, however, we failed to address in any detail the severe emotional distress element of this tort, having focused instead on the "extreme and outrageous" element. Today we focus on the crucial issue of what level of evidence is sufficient to show severe emotional distress in the context of an action for intentional infliction of mental distress.

[3] This is not the first time we have broached a definition of the element of severe emotional distress. In the context of a claim for *negligent* infliction of mental distress, we stated:

> the term "severe emotional distress" means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of *severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Johnson v. Ruark Obstetrics & Gynecology Assoc., 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990) (emphasis added). We see no reason not to adopt the same standard for a claim for intentional infliction of emotional distress. At a minimum, applying the same standard to both torts promotes a symmetry desirable in this area of the law.

Support for a high standard of proof on the severe emotional distress element can also be found in the second Restatement of Torts, from which we have derived most of our present standards for the remaining elements of intentional infliction of emotional distress.

> The rule stated in this section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. *It is only where it is extreme that the liability arises.* Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. *The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.* The intensity and the duration of the distress are factors to be considered in determining its severity. . . . It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.

Restatement (Second) of Torts § 46 cmt. j (1965) (emphasis added). *See also Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309 (6th Cir. 1989) (applying Ohio law); *Polk v. Yellow Freight System, Inc.*, 801 F.2d 190 (6th Cir. 1986) (applying Michigan law); and *Hubbard v. United Press Internat'l, Inc.*, 330 N.W.2d 428 (Minn. 1983).

As the drafters of the Restatement point out, the rationale for limiting or restricting liability for intentional infliction of emotional distress is simple:

> The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt.

Restatement (Second) of Torts § 46 cmt. d (1965). The majority of jurisdictions having adopted the independent tort of intentional infliction of emotional distress have done so based on the standards enunciated in the Restatement. *See* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42, 43 n.9 (1982).

III.

[4] In the present action, plaintiff Waddle's forecast of evidence, taken in the light most favorable to her, fails to show that she has suffered the requisite degree of emotional distress necessary to maintain her cause of action. When questioned during her deposition about having ever seen a psychiatrist or psychologist, Waddle stated that she had not been to a psychiatrist since the early 1970's. This was well before the events comprising this lawsuit against defendants. Although Waddle did state that her doctor had prescribed "nerve pills" in March 1986 during a spate of family-related problems, she stated that she has only once taken the medication on a regular basis for any protracted period of time. This was during episodes of family-related stress due to problems with her mother and daughter. She stated that the only time she missed work during her employment with Guilford Mills was when her mother was hospitalized and again when her teenage daughter eloped. Waddle also *alleged* in her unverified complaint that she was continually upset and frequently cried; but, as Judge Lewis pointed out in his dissent below, she *testified* during her deposition to only one such incident and that did not involve defendant Sparks.

There is no forecast of any medical documentation of plaintiff's alleged "severe emotional distress" nor any other forecast of evidence of "severe and disabling" psychological problems within the meaning of the test laid down in *Johnson v. Ruark*, 327 N.C. at 304, 395 S.E.2d at 97. Consequently, we conclude that plaintiff Waddle has failed to forecast sufficient evidence of the "severe emotional distress" element of the tort to survive defendant Sparks' motion for summary judgment on this claim. We, therefore, reverse the Court of Appeals' decision to the contrary as to this plaintiff.

IV.

Plaintiff Simpson has also alleged intentional infliction of emotional distress against defendant Sparks. We are persuaded that the unanimous decision of the Court of Appeals correctly concluded that plaintiff Simpson's forecast of evidence failed to show that any conduct of defendant Sparks occurred within the applicable statute of limitations.

[5] The statute of limitations for intentional infliction of mental distress is three years. *Dickens v. Puryear*, 302 N.C. 437, 442, 276 S.E.2d 325, 330 (1981). "Once a defendant has properly pleaded

the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985); *see also Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974). Defendants pleaded the statute of limitations as a defense to plaintiff Simpson's claim and relied on it in their separate motions for summary judgment. In order to sustain her claim over defendants' summary judgment motions, plaintiff Simpson was required to produce a forecast of evidence of "specific facts" which took place *after* 20 April 1985, three years prior to the filing of her complaint. *See* N.C. R. Civ. P. Rule 56(e). This she has not done.

[6] During her deposition, Simpson was unable to recount any one, specific instance which would sustain her claim over each defendant's motion for summary judgment based on the statute of limitations. Her testimony is replete with vague responses to opposing counsel's repeated questions as to when any of the events she has alleged took place. Not only could she not remember a day or month when any of defendant's alleged comments of a sexually suggestive nature occurred, but she also failed to recall the year they occurred. For example, the following exchange took place between Simpson and counsel for defendants:

> Q. So are you [Simpson] testifying that you can't tell us any specific things that happened to you in either 1985 or 1986?
>
> A. Just what I've already told you. Like a [sic] said, I don't know any dates. I just know the stuff happened. That's why I left.
>
> Q. But you don't know when any of it happened?
>
> A. No.

This exchange is typical of plaintiff Simpson's answers to defendants' repeated inquiries as to when any of the alleged incidents took place. Her forecast of evidence has failed to place any of Sparks' conduct within the applicable statute of limitations for claims of intentional infliction of mental distress.

We are cognizant of the fact that Simpson stated during her deposition that some or all of defendant Sparks' questionable con-

duct occurred throughout her employment at Guilford Mills. For example, at one point, Simpson testified as follows:

> Q. (by Mr. Farran) When did you quit Guilford Mills?
>
> A. In February of '86.
>
> Q. And why did you quit?
>
> A. Because all this stuff was still going on. *It continued until the time I left.* And I waited to see improvements and there was none.
>
> Q. Now when you say "all this stuff," what are you referring to?
>
> A. Cussing, the favoritism and the sexual harassment.

(Emphasis added.) If plaintiff Simpson could have testified that any of the specific incidents with Sparks occurred as late as February of 1986, her evidentiary forecast of Sparks' conduct would have been sufficient to survive a summary judgment motion based on the statute of limitations. Simpson, however, was not able to state a date—even within a year—when any one of the various specific incidents she alleges against Sparks occurred. As such, she has failed to meet the requirements of Civil Procedure Rule 56(e) which mandate that the non-movant "may not rest upon the mere allegations of [her] pleading," but must instead "set forth *specific facts* showing that there is a genuine issue for trial." This plaintiff Simpson has not done. We, therefore, affirm the Court of Appeals' decision that summary judgment was properly entered against plaintiff Simpson on her intentional infliction of emotional distress claim against defendant Sparks.

V.

[7] An essential element of a claim for negligent retention of an employee is that the employee committed a tortious act resulting in plaintiffs' injuries. *Pleasants v. Barnes*, 221 N.C. 173, 177, 19 S.E.2d 627, 629 (1942). *See also Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 141 (1986). Because we hold that summary judgment in Sparks' favor was proper on both plaintiffs' intentional infliction of emotional distress claims, the only tort at issue against Sparks, we likewise hold that both plaintiffs' negligent retention claims against Guilford Mills cannot survive its motion for summary judgment as to these claims.

VI.

The decision of the Court of Appeals as to plaintiff Waddle is reversed and the judgments of the Superior Court, Guilford County, are reinstated. The decision of the Court of Appeals as to plaintiff Simpson is affirmed.

Reversed as to Plaintiff Waddle.

Affirmed as to Plaintiff Simpson.

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

JOHNSTON COUNTY, N.C. v. R. N. ROUSE & CO., INC.

No. 308PA91

(Filed 5 March 1992)

Arbitration and Award § 3 (NCI4th)— construction contract— arbitration clause in general provisions—consent to jurisdiction in supplementary conditions

The trial court and the Court of Appeals erred by holding that a supplementary general condition in a construction contract, which provided that the contractor agreed to submit to the jurisdiction of North Carolina courts, conflicted with an arbitration clause in the general conditions and, under a precedence clause in the instructions to bidders, that the contract did not contain an agreement to arbitrate. There is no irreconcilable conflict between the arbitration clause of the general conditions (section 7.9) and the supplementary general condition (section 7.1.1) because that section merely provides that the contractor consents to the jurisdiction of the courts of North Carolina for any action brought to enforce the arbitration agreement or an award resulting from arbitration.

Am Jur 2d, Arbitration and Award §§ 14, 15, 33.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction. 12 ALR3d 892.

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

ON discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of the Court of Appeals affirming an order of *Stanback, J.*, entered 24 July 1989 in Superior Court, JOHNSTON County. Heard in the Supreme Court 11 February 1992.

Patton, Boggs & Blow, by Charles B. Robson, Jr., and William Britt, County Attorney for Johnston County, for petitioner-appellee.

Gordon C. Woodruff, P.A., by Gordon C. Woodruff, and Smith, Currie & Hancock, by Ronald G. Robey and D. Lee Roberts, Jr., for respondent-appellant.

MEYER, Justice.

The sole question presented for review by this Court concerns the effect, if any, to be given an arbitration clause contained in a construction contract executed by the parties, Johnston County and R.N. Rouse & Co., Inc. Respondent contends that the Court of Appeals erred in concluding that another provision of the contract irreconcilably conflicted with the arbitration clause and thus rendered the arbitration clause ineffectual. We agree and therefore reverse the Court of Appeals.

The dispute in this case concerns a contract for the construction of the Johnston County Courthouse and Jail Annex in Smithfield, North Carolina. In July 1986, Johnston County solicited competitive bids for the project. R.N. Rouse & Co., Inc. ("Rouse"), a North Carolina corporation, submitted the lowest bid and was awarded the contract.

On 24 September 1986, Johnston County and Rouse entered into a contract for the construction of the project. An architect and engineer hired by Johnston County prepared the contract, which consists of several documents, including (1) American Institute of Architects Standard Form of Agreement Between Owner and Contractor (AIA Document A101); (2) American Institute of Architects General Conditions of the Contract for Construction (AIA Document A201); (3) supplementary general conditions; and (4) instructions to bidders.

Article 7 of the General Conditions of the Contract for Construction contains several provisions. Section 7.1.1 of the general

conditions, following the title, "Governing Law," provides that "[t]he Contract shall be governed by the law of the place where the Project is located." Section 7.9 of the general conditions, entitled "Arbitration," includes an arbitration clause, as follows:

> 7.9.1 All claims, disputes and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. . . . The foregoing agreement to arbitrate . . . shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Also included in the contract between the parties are certain supplementary general conditions, which were drafted by Johnston County's architect and engineer. These provisions are typewritten, with typewritten article headings that correspond to the article headings contained in the general conditions. Article 7 of the supplementary general conditions includes the following provision:

> 7.1.1 By executing a contract for the Project the Contractor agrees to submit itself to the jurisdiction of the courts of the State of North Carolina for all matters arising or to arise hereunder, including but not limited to performance of said contract and payment of all licenses and taxes of whatever nature applicable thereto.

A typewritten document entitled "Instructions to Bidders & General Conditions" contains a provision concerning the precedence to be given conflicting provisions of the contract. Section 01.B. of the instructions provides that "in the event of any conflicting statements or requirements in these General Conditions and the Supplementary General [C]onditions . . . of these Specifications, the Supplementary General Conditions shall have precedence."

After Rouse had completed construction of the project, a dispute arose concerning the payment due Rouse. In March 1989, Rouse filed with the American Arbitration Association a demand for arbitration. In its demand, Rouse alleged that it was due additional compensation for extra work, delays, inefficiencies, interferences,

and hindrances caused by Johnston County and by those for whom Johnston County was responsible. Rouse also sought "compensation for the contract balance, the costs of . . . arbitration, interest, attorney's fees and expenses, and for all other relief appropriate and just."

On 2 June 1989, Johnston County filed with the Johnston County Superior Court a motion to stay the arbitration proceeding. By order dated 24 July 1989, the trial court granted Johnston County's application for a stay and denied a motion to compel arbitration filed by Rouse. On Rouse's motion for findings of fact and conclusions of law, made pursuant to N.C. R. Civ. P. 52(b), the trial court subsequently entered an order on 7 August 1989 in which it concluded that the contract between Johnston County and Rouse did not contain an agreement to arbitrate and that the court was therefore required to stay the arbitration proceeding.

In an unpublished opinion, a unanimous panel of the Court of Appeals affirmed the trial court, reasoning, as did the trial court, that section 7.1.1 of the supplementary general conditions conflicted with the arbitration provision contained in section 7.9 of the general conditions. Applying the precedence clause contained in section 01.B. of the instructions to bidders, the Court of Appeals concluded that the contract did not contain an agreement to arbitrate, "the parties instead having agreed to submit their disputes to the North Carolina courts."

Respondent Rouse contends that the contract contains a binding arbitration provision, which was not superseded by the language provided in section 7.1.1 of the supplementary general conditions. We agree.

N.C.G.S. § 1-567.2 provides that a contract provision requiring that the parties settle disputes by arbitration is valid, enforceable, and irrevocable unless the parties agree to the contrary. *Servomation Corp. v. Hickory Construction Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986). North Carolina has a strong public policy favoring the settlement of disputes by arbitration. Our strong public policy requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. This is true " 'whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.' " *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984) (quoting *Moses H. Cone Hosp.*

v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 785 (1983)). In *Servomation Corp.*, we considered the public policy favoring arbitration and concluded that the plaintiff in that case had failed to show that the defendant had waived its contractual right to arbitration by proceeding to litigate a court action brought by the plaintiff. Today, we are faced with a question not of waiver of the parties' rights to compulsory arbitration but one concerning the *existence* of an arbitration agreement between the parties. We reaffirm the position we articulated in *Cyclone Roofing Co.* and *Servomation Corp.* and reiterate that any doubt concerning the existence of such an agreement must also be resolved in favor of arbitration.

The parties in this case have strenuously argued that there is no doubt concerning the existence of an arbitration agreement between the parties. According to respondent, Rouse, the arbitration clause set forth in section 7.9 of the general conditions is "entirely consistent with" section 7.1.1 of the supplementary general conditions, and "*both* clauses should have been enforced by the trial court." Johnston County contends, and the Court of Appeals agreed, that the contract must be construed as requiring that all disputes arising under the contract be litigated in the courts of North Carolina. To support its position, Johnston County argues that section 7.9 of the general conditions (the arbitration clause) and section 7.1.1 of the supplementary general conditions (erroneously referred to as a forum selection clause by Johnston County) are in irreconcilable conflict, as they both purport to establish the exclusive forum for resolution of disputes arising under the contract. We agree with respondent and therefore reverse the decision of the Court of Appeals.

Historically, parties have endeavored to avoid potential litigation concerning judicial jurisdiction and the governing law by including in their contracts provisions concerning these matters. Although the language used may differ from one contract to another, one or more of three types of provisions (choice of law, consent to jurisdiction, and forum selection), which have very distinct purposes, may often be found in the boilerplate language of a contract. The first type, the choice of law provision, names a particular state and provides that the substantive laws of that jurisdiction will be used to determine the validity and construction of the contract, regardless of any conflicts between the laws of the named state and the state in which the case is litigated. Robert A.

Leflar, *American Conflicts Law* § 144, at 405-07, § 147, at 413-19 (4th ed. 1986); *see also* Restatement (Second) of Conflict of Laws §§ 186, 187 (1971); U.C.C. § 1-105, 1 U.L.A. 29 (1989). The second type, the consent to jurisdiction provision, concerns the submission of a party or parties to a named court or state for the exercise of personal jurisdiction over the party or parties consenting thereto. By consenting to the jurisdiction of a particular court or state, the contracting party authorizes that court or state to act against him. Robert A. Leflar, *American Conflicts Law* § 3, at 5, § 27, at 74-77 (4th ed. 1986). A third type, a true forum selection provision, goes one step further than a consent to jurisdiction provision. A forum selection provision designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship. We are not here concerned with a true forum selection provision.

Due to the varying language used by parties drafting these clauses and the tendency to combine such clauses in one contractual provision, the courts have often confused the different types of clauses. *See, e.g., Patten Sec. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987) (describing a provision combining a choice of law clause and a consent to jurisdiction clause as a forum selection clause). One commentator recognizing this confusion has offered the following guidance:

> A typical forum-selection clause might read: "[B]oth parties agree that only the New York Courts shall have jurisdiction over this contract and any controversies arising out of this contract." . . .
>
> A . . . "consent to jurisdiction" clause[ ] merely specifies a court empowered to hear the litigation, in effect waiving any objection to personal jurisdiction or venue. Such a clause might provide: "[T]he parties submit to the jurisdiction of the courts of New York." Such a clause is "permissive" since it allows the parties to air any dispute in that court, without requiring them to do so.
>
> . . . A typical choice-of-law provision provides: "This agreement shall be governed by, and construed in accordance with, the law of the State of New York."

Leandra Lederman, Note, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. Rev. 422, 423 n.10 (1991) (citations omitted).

Reviewing the contractual provisions at issue in this case, it is clear that neither section 7.1.1 of the general conditions (choice of law) nor section 7.1.1 of the supplementary general conditions (consent to jurisdiction) conflicts with the agreement to arbitrate contained in section 7.9 of the general conditions. Section 7.9 contains an arbitration clause, providing that "[a]ll claims, disputes and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." Under N.C.G.S. § 1-567.2, this provision is valid and enforceable. Section 7.1.1 of the supplementary general conditions merely provides that "the Contractor [Rouse] agrees to submit *itself* to the jurisdiction of the courts of the State of North Carolina." (Emphasis added.) Despite Johnston County's characterization of the provision as a forum selection clause and the Court of Appeals' treatment of it as such, this provision is a consent to jurisdiction clause, whereby the contractor, in this case Rouse, waived any right to challenge the North Carolina courts' exercise of personal jurisdiction over it. Nor does section 7.1.1 of the general conditions contravene the parties' agreement to arbitrate pursuant to section 7.9 of the general conditions. Section 7.1.1 of the general conditions is a choice of law clause and merely states the parties' agreement to have the validity of the contract and the construction of the contract determined according to "the law of the place where the Project is located," in this case North Carolina.

As recognized by the Court of Appeals below, it is a fundamental rule of contract construction that the courts construe an ambiguous contract in a manner that gives effect to all of its provisions, if the court is reasonably able to do so. *Woods v. Insurance Co.*, 295 N.C. 500, 505-06, 246 S.E.2d 773, 777 (1978); 4 Samuel Williston, *A Treatise on the Law of Contracts* § 619, at 731 (Walter H.E. Jaeger ed., 3d ed. 1961). "[C]ontract provisions should not be construed as conflicting unless no other reasonable interpretation is possible." *Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 639, 217 S.E.2d 682, 693, *cert. denied*, 288 N.C. 393, 218 S.E.2d 467 (1975).

The Court of Appeals correctly recognized that both Rouse and Johnston County are residents of North Carolina and are therefore subject to the personal jurisdiction of the courts of North Carolina. We do not agree with the Court of Appeals, however, that this fact requires us to conclude that section 7.1.1 of the supplementary general conditions must be construed as more than a consent to jurisdiction clause to avoid rendering that section meaningless under the particular facts of this case. As we have indicated, the contract at issue in this case unambiguously provides an arbitration agreement between the parties. To interpret the contract in any other manner would violate the most fundamental principle of contract construction—that the courts must give effect to the plain and unambiguous language of a contract. *See Woods*, 295 N.C. at 506, 246 S.E.2d at 777 ("[I]f the meaning of the [contract] is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein."). Moreover, even assuming arguendo that the contract at issue here is ambiguous, we do not agree with the Court of Appeals' reasoning that the parties must have intended section 7.1.1 of the supplementary general conditions as more than a consent by Rouse to the jurisdiction of the North Carolina courts. Where, as here, the consent to jurisdiction clause was drafted and included in the contract prior to the solicitation of competitive bids, we find it more reasonable to conclude that this provision was included to resolve any disputes concerning the exercise of personal jurisdiction over a nonresident contractor who might have been awarded the contract.

Contrary to the Court of Appeals' suggestion, N.C.G.S. § 1-75.4(5) does not render section 7.1.1 of the supplementary general conditions superfluous under our interpretation of the contract. N.C.G.S. § 1-75.4(5) is a portion of North Carolina's long-arm statute. It is a legislative device vesting the North Carolina courts with *in personam* jurisdiction over nonresident defendants. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977). The mere fact that N.C.G.S. § 1-75.4(5) authorizes the courts of North Carolina to exercise jurisdiction over a nonresident contracting within the state or contracting to perform services within the state does not end the inquiry of whether the courts may constitutionally exercise *in personam* jurisdiction, however. As we recognized in *Dillon*, resolving the question of the existence of

in personam jurisdiction involves a two-step inquiry. *Dillon*, 291 N.C. at 674, 231 S.E.2d at 629. A court attempting to exercise personal jurisdiction over a nonresident defendant must first determine whether a statute, such as N.C.G.S. § 1-75.4(5), permits the court to entertain an action against the defendant. *Dillon*, 291 N.C. at 675-76, 231 S.E.2d at 630-31. If there is a statute authorizing the court to act, the court must further determine whether the nonresident defendant has sufficient, minimum contacts with the state so that maintenance of the suit within the courts of North Carolina will not offend " 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)); *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 706, 208 S.E.2d 676, 680 (1974). Where, however, a party has validly consented to the jurisdiction of a court, it is not necessary to conduct this two-step determination because the person has waived any right to object to the court's exercise of *in personam* jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14, 85 L. Ed. 2d 528, 540 n.14 (1985) (stating that due process is not offended by the enforcement of a consent to jurisdiction provision that is obtained through free negotiations and is not unreasonable or unjust).

Furthermore, section 7.1.1 of the supplementary general conditions, as we interpret it, is not rendered meaningless as a result of N.C.G.S. § 1-567.17. N.C.G.S. § 1-567.17 provides that "[t]he making in this State of an agreement [to arbitrate] . . . confers jurisdiction on the court to enforce the agreement . . . and to enter judgment on an award thereunder." N.C.G.S. § 1-567.17 (1983). This statute explains that the courts of the State of North Carolina retain *subject matter* jurisdiction over claims that are subject to arbitration, at least for the purposes of enforcing the agreement and entering judgment on an award resulting from arbitration. This statute does not concern the courts' exercise of *in personam* jurisdiction as does the consent to jurisdiction clause at issue in this case.

We conclude that there is no irreconcilable conflict between section 7.9 of the general conditions and section 7.1.1 of the supplementary general conditions. Under section 7.9 of the general conditions, the parties agreed that they will submit to arbitration, according to the Construction Industry Arbitration Rules of the American Arbitration Association, any claims arising out of the

contract documents or a breach thereof. Section 7.1.1 of the supplementary general conditions merely provides that the contractor, Rouse, consents to the jurisdiction of the courts of the State of North Carolina for any action brought to enforce the arbitration agreement or an award resulting from arbitration. Because the parties agreed to arbitrate their disputes pursuant to section 7.9 of the general conditions and Johnston County has failed to show that this agreement to arbitrate was obviated by any other provision of the contract, there was no basis for the trial court to grant a stay of the arbitration proceeding instituted by Rouse. We therefore reverse the decision of the Court of Appeals and remand the case to that court for further remand to the Superior Court, Johnston County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

LAURIE O. SEGREST, ADMINISTRATOR OF THE ESTATE OF AMY DOLAN SEGREST, PLAINTIFF v. MICHAEL T. GILLETTE, KATHRYN N. GREENHOOT, SOUTHEAST ANESTHESIA ASSOCIATES, P.A., CHARLOTTE MEMORIAL HOSPITAL AND MEDICAL CENTER, INC., AND CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY, DEFENDANTS

No. 49PA90

(Filed 5 March 1992)

1. Evidence and Witnesses § 1958 (NCI4th)— lab slip—admitted without limiting instruction—no error

There was no error in a wrongful death action in the admission of a lab slip where, assuming that a party may introduce an exhibit for the limited purpose of impeaching it, the plaintiff in this case simply offered it into evidence and did not request that the court restrict the jury's consideration of the slip. After the slip was received into evidence, the other witnesses could testify to its contents and it could be considered by the jury.

Am Jur 2d, Evidence § 1010.

2. Evidence and Witnesses § 1972 (NCI4th)— wrongful death—death certificate—admissible

There was no prejudicial error in the exclusion of a death certificate and the medical examiner's testimony in a wrongful death action. Although the rule that prohibits the introduction of death certificates containing opinions has been changed so that opinions on death certificates are no longer barred, the medical examiner who signed the death certificate testified at a voir dire that he did not conduct the autopsy but relied on the report of another doctor. If the jury did not accept plaintiff's other evidence, which was strong, it could not be said that the weaker evidence contained in the death certificate or the medical examiner's testimony would have brought a different result. N.C.G.S. § 8C-1, Rule 803(8) and (9), 130A-93(h), 1A-1, Rule 61.

Am Jur 2d, Evidence § 1009.

Official death certificate as evidence of cause of death in civil or criminal action. 21 ALR3d 418.

Justice FRYE dissenting.

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

ON discretionary review for plaintiff and defendants of the decision of the Court of Appeals, 96 N.C. App. 435, 372 S.E.2d 88 (1989), reversing a judgment entered by *Downs, J.*, in the Superior Court, MECKLENBURG County on 29 March 1988 and awarding plaintiff a new trial. Heard in the Supreme Court 9 October 1990.

This is an action for wrongful death based on medical malpractice. The plaintiff's intestate, a seven year old child, was admitted as a patient to Charlotte Memorial Hospital on 22 December 1982. Amy Segrest, the child, was suffering from a fourth degree burn to her leg. Over the course of the next three weeks, five surgical procedures were performed on Amy. Her condition deteriorated following the fifth procedure and she died on 24 January 1983.

The plaintiff contends that Amy's death was caused by a liver failure induced by the anesthetics administered to her. The defendants contend that Amy's death was caused by a liver failure induced by a viral infection.

The jury found for the defendants. The plaintiff did not appeal the verdicts for Charlotte Memorial Hospital and Medical Center, Inc. and Charlotte Mecklenburg Hospital Authority. The Court of Appeals ordered a new trial against Michael T. Gillette and Kathryn Greenhoot who are anesthesiologists and against Southeast Anesthesia Associates, P.A., with whom Dr. Gillette and Dr. Greenhoot are associated.

We granted petitions for discretionary review by the plaintiff and defendants.

Law offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., Kenneth B. Oettinger, and William R. Hamilton, for plaintiff appellant and appellee.

Golding, Meekins, Holden, Cosper & Stiles, by Elaine Cohoon Miller and John G. Golding, for defendants, Gillette, Greenhoot and Southeast Anesthesia Associates, P.A., defendants appellants and appellees.

WEBB, Justice.

Defendants' Appeal

[1] The defendants appeal from that part of the decision of the Court of Appeals which held it was error to admit into evidence an exhibit which contained evidence that Amy's death was caused by a viral infection rather than an anesthetic as contended by the plaintiff. A short time before Amy died, blood was drawn from her for a laboratory test for the Epstein-Barr virus. The test was performed at Presbyterian Hospital which had the only laboratory in Charlotte capable of performing the Epstein-Barr test. According to the defendants' evidence, the results of the test were sent by Presbyterian Hospital to Charlotte Memorial Hospital. The results were placed in Charlotte Memorial's file but for some reason were not placed on Amy's chart, although her chart did show that the test had been ordered and the results returned.

The defendants' evidence further showed that at some time after Amy's death, Dr. Dana Hershey, the president of Southeast Anesthesia Associates, but not a defendant in this case, was gathering information for a medical article. Dr. Hershey called a lab technician at Charlotte Memorial, and asked for the results of the test. The technician called the Presbyterian laboratory and wrote the results of the test on a slip of paper which she sent Dr. Hershey.

This slip showed that the test for the Epstein-Barr virus was positive.

The defendants' evidence also showed that Dr. Hershey sent a photocopy of the slip to the defendant Dr. Greenhoot, who placed it in her file without being aware of its significance. During a conference with her attorneys in preparation for the trial, she found the slip in her file. The defendants furnished a copy of the slip to the plaintiff on 12 February 1988. The Presbyterian Hospital had purged its files and destroyed the evidence it had by the time Dr. Greenhoot delivered the slip to her attorneys.

The plaintiff made a motion to suppress any evidence of the slip on the ground of surprise. The court denied this motion without prejudice on 24 February 1988. The trial commenced on 29 February 1988. Dr. Greenhoot was called as a witness by the plaintiff. She testified for four days. On the third day of her testimony, she was being examined by her attorney who asked her what, in her opinion, was the cause of Amy Segrest's death. She testified that in her opinion the death was caused by a viral infection. She gave three factors in support of her opinion which were: (1) the symptoms Amy exhibited, (2) the rarity of halothane hepatitis in children, and (3) the result of a test done just before Amy died. The plaintiff objected to the admissibility of the slip. The court did not allow the slip to be admitted into evidence but allowed the witness to testify that the slip was a factor on which she based her opinion.

The plaintiff questioned Dr. Greenhoot in an effort to discredit the evidence adduced from the slip. At the close of the plaintiff's evidence he had the slip marked as plaintiff's exhibit number 11 and introduced it into evidence.

The defendants contend the plaintiff introduced the slip into evidence and cannot contend on appeal that it was error for the jury to hear testimony about it. The plaintiff argues that he did not introduce the slip as substantive evidence but to attack it. He contends it was error to allow Dr. Greenhoot to testify that she based her opinion, as to the cause of death, on the information contained on the slip. He says he introduced the slip for the purpose of attacking the authenticity, reliability and relevancy of the document. He argues that he was entitled to have the slip introduced for the purpose of attacking it without having it considered for any other purpose.

The plaintiff cites no authority for the proposition that a party may introduce a document for the purpose of impeaching it and in such a case the jury can consider it only for impeachment purposes.

Assuming that a party may introduce an exhibit for this limited purpose without allowing the jury to consider it for any other purpose, the plaintiff in this case did not do so. He did not request the court to restrict the jury's consideration of the slip but simply offered it into evidence. After the slip was received into evidence, other witnesses could testify to its contents and it could be considered by the jury. We reverse the holding of the Court of Appeals that it was error to admit the slip into evidence.

Plaintiff's Appeal

The plaintiff's first assignment of error is to the Court of Appeals' holding that although the slip was inadmissible as substantive evidence, it could nevertheless be used as the basis of opinion testimony by the defendants' witnesses. Based on our holding that it was not error to introduce the slip into evidence, we overrule this assignment of error.

[2] The plaintiff next assigns error to the exclusion from evidence of the death certificate of Amy Segrest. The plaintiff offered into evidence the death certificate which said:

> Death caused by
>
> (a) Immediate cause: Acute liver failure with massive necrosis;
>
> (b) Due to, or as a consequence of: History of Halothane anesthesia.

The court ordered the reference to halothane anesthesia, as a cause of death, struck from the death certificate as a condition of allowing it into evidence. The plaintiff contends this was error.

This assignment of error brings to the Court a question as to the admissibility into evidence of a death certificate. There have been several cases dealing with this question. *See Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395 (1965); *Flintall v. Insurance Co.*, 259 N.C. 666, 131 S.E.2d 312 (1963); *Blalock v. Durham*, 244 N.C. 208, 92 S.E.2d 758 (1956); *Rees v. Insurance Co.*, 216 N.C. 428, 5 S.E.2d 154 (1939); *Drain v. United Services Life Insurance Co.*, 85 N.C. App. 174, 354 S.E.2d 269, *disc. rev. denied*, 320 N.C. 630,

360 S.E.2d 85 (1987); *Spillman v. Hospital*, 30 N.C. App. 406, 227 S.E.2d 292 (1976).

N.C.G.S. § 130A-392 provides in part:

> Reports of investigations made by a county medical examiner or by the Chief Medical Examiner and toxicology and autopsy reports made pursuant to this Part may be received as evidence in any court or other proceeding.

Chapter 130A of the General Statutes provides that the Secretary of Environment, Health and Natural Resources shall appoint a State Registrar of Vital Statistics who shall supply copies of death certificates. N.C.G.S. § 130A-93(h) provides in part:

> A certified copy issued under the provisions of this section shall have the same evidentiary value as the original and shall be prima facie evidence of the facts stated in the document.

N.C.G.S. § 8C-1, Rule 803 provides in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (8) Public Records and Reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
>
> (9) Records of Vital Statistics.—Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

It appears from the above statutes and rules of evidence that a death certificate is admissible in evidence and is prima facie

evidence of the facts stated therein. In *Rees v. Insurance Co.*, 216 N.C. 428, 5 S.E.2d 154 (1939), we held that the statute making death certificates admissible as prima facie evidence of the facts stated therein did not make admissible opinions as to the cause of death contained on the death certificate. If the holding of *Rees* applies to this case, it was not error to exclude the portion of the death certificate which related the cause of death because this was the expression of an opinion.

The Evidence Code, Chapter 8C of the General Statutes, was adopted after the decision in *Rees*. Rule 803(9) excepts death certificates from exclusion under the hearsay rule without limit as to opinions as to the cause of death. The Commentary on Rule 803(8) says,

> Part (C) covers factual findings resulting from an investigation made pursuant to legal authority. The term "factual findings" is not intended to preclude the introduction of evaluative reports containing conclusions or opinions. Apparently North Carolina courts currently exclude statements in reports that only amount to an expression of opinion.

It appears from the language of Rule 803(9) and the Comment on Rule 803(8), that the rule that prohibits the introduction of death certificates containing opinions has been changed so that opinions contained on death certificates are no longer barred by the hearsay rule. In order to be admissible, however, pursuant to Rule 803(8) the opinion expressed must result "from an investigation made pursuant to authority granted by law." This is consistent with our opinion in *Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395, in which we held that a death certificate which contained a statement as to how the collision occurred which caused the death of the decedent should be excluded from evidence. The person signing the death certificate in that case did not have authority "granted by law" to investigate the cause of the accident. In this case the county medical examiner was granted authority by law to investigate the cause of death of Amy Segrest and it was error to exclude the death certificate.

Having decided that it was error to exclude the death certificate from evidence, we must determine whether this was harmless error. We hold that the error was harmless. The county medical examiner who signed the death certificate testified, at a voir dire hearing before the certificate was offered into evidence, that he

did not conduct the autopsy but relied on the report of another doctor. He testified that he was really not "in a position to opine or give an opinion as to the cause of death." This equivocal testimony of the medical examiner must be compared with the plaintiff's other evidence. As described by the plaintiff in his brief, he "presented several highly qualified expert witnesses at trial who advanced" the opinion that "Amy's death was the result of repeated improper exposures to the anesthetic Halothane." If the jury did not accept this strong evidence, we cannot say that the weaker evidence contained in the death certificate would have brought a different result. The erroneous exclusion of evidence did not deny the plaintiff a substantial right. *Warren v. City of Asheville*, 74 N.C. App. 402, 328 S.E.2d 859, *cert. denied*, 314 N.C. 336, 333 S.E.2d 496 (1985). N.C.G.S. § 1A-1, Rule 61 (1990).

We hold, for the same reasons that it was not prejudicial error to exclude the death certificate, that it was not prejudicial error to exclude the testimony of the county medical examiner. When the court excluded the death certificate from evidence the plaintiff called the county medical examiner as a witness. The court excluded testimony by the medical examiner because he did not personally perform the autopsy. Assuming this was error, we hold it was not prejudicial. If the jury was not persuaded by much stronger evidence as to the cause of Amy's death, we cannot say this more equivocal evidence would have caused a different result.

For the reasons stated in this opinion, we reverse the Court of Appeals' holding that it was not error to exclude the death certificate but we hold this was harmless error. We reverse the holding of the Court of Appeals that it was error to admit into evidence the exhibit which contained the results of the Epstein-Barr test. We remand to the Court of Appeals for further remand to the Superior Court of Mecklenburg County for reinstatement of the judgment in favor of the defendants.

Reversed and remanded.

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

Justice FRYE dissenting.

The question before the jury in this case was whether this child's liver failure was induced by the anesthetics administered

to her or by a viral infection. The death certificate supported the testimony of plaintiff's witnesses that the liver failure was induced by anesthesia. The majority concludes, correctly I think, that the trial judge erred by excluding this portion of the death certificate from the jury's consideration. The majority then concludes, erroneously I believe, that the error was harmless. The death certificate was the crucial piece of evidence which would have supported plaintiff's expert witnesses' opinions that Amy's death was the result of repeated improper exposures to the anesthetic Halothane. Had the jury known that the death certificate supported plaintiff's view of the evidence, the jury might have ruled for plaintiff rather than defendants. Thus, keeping this information away from the jury denied the plaintiff a substantial right. N.C.G.S. § 1A-1, Rule 61 (1990). I dissent from the Court's decision that the error was not prejudicial.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 147, ALLEN W. HARRELL, RESPONDENT

No. 484A91

(Filed 5 March 1992)

Judges § 7 (NCI3d)— censure of district court judge—conduct prejudicial to administration of justice

A district court judge is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute for his actions in involving himself in a criminal child abuse case in the district in which he was sitting by acting as an advocate for the female defendant during police questioning; attempting to dissuade the investigating officer from pursuing the investigation and bringing charges against the defendants; requesting that magistrates release the defendants on unsecured bonds; attempting to influence the selection of an attorney to represent the defendants; and seeking an opinion from the Attorney General's office concerning an aspect of the case through a letter which implied that respondent would be the presiding judge and which failed to reveal that respondent was actually involved as a witness for the defense.

Am Jur 2d, Judges §§ 18-20, 98, 112.

Justices MEYER, WEBB and LAKE did not participate in the consideration or decision of this case.

THIS matter is before the Court upon a recommendation by the Judicial Standards Commission, filed with the Court on 29 October 1991, that Judge Allen W. Harrell, a Judge of the General Court of Justice, District Court Division, Seventh Judicial District of the State of North Carolina, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Calendared in the Supreme Court 9 December 1991.

No counsel for the Judicial Standards Commission or for the respondent.

PER CURIAM.

The Judicial Standards Commission (Commission) notified Judge Allen W. Harrell on 19 October 1990 that it had ordered a preliminary investigation to determine whether formal proceedings under Commission Rule 7 should be instituted against him. The subject matter of the investigation included allegations that the respondent improperly involved himself in *State v. Wadell Williams* and *State v. Virginia Williams* by attempting to dissuade the investigating officer from pursuing the investigation and bringing charges against the defendants and by seeking an opinion from the Attorney General's office concerning an aspect of the case through a letter which implied that the respondent would be the presiding judge and failed to reveal that the respondent was actually involved as a witness for the defense.

Special Counsel for the Commission filed a complaint on 18 February 1991. Respondent answered the complaint and prayed that the action be dismissed and that no recommendation of discipline be forwarded to the North Carolina Supreme Court as provided by N.C.G.S. § 7A-377, the Code of Judicial Conduct and the Rules of the Judicial Standards Commission.

On 29 July 1991, respondent was served with a Notice of Formal Hearing concerning the charges alleged against him. On 5 September 1991, respondent was accorded a plenary hearing before seven members of the Commission on the charges contained in the complaint. The Commission's evidence was presented by James

J. Coman, Senior Deputy Attorney General, and respondent was represented by his counsel, Allen G. Thomas, Don Evans, and Donald L. Smith. After hearing the evidence, the Commission concluded on the basis of clear and convincing evidence that

> 1. . . . the totality of the actions of the respondent in interceding at every stage of the proceedings on behalf of Mr. and Mrs. Williams constitutes:
>
> a. conduct in violation of Canons 2 and 3A(4) of the North Carolina Code of Judicial Conduct;
>
> b. conduct which disregards the spirit of Canons 3C(1)(a) and 5F of the North Carolina Code of Judicial Conduct; and
>
> c. conduct prejudicial to the administration of justice that brings the judicial office into disrepute.
>
> 2. . . . [from] the totality of the circumstances surrounding the respondent's actions . . . the respondent did not engage in *willful misconduct in office* as that phrase has been defined by the North Carolina Supreme Court.

(Emphasis in original.) The findings upon which the Commission based its conclusion are found in paragraph 9 of its Recommendation and are as follows:

> 9. Over the years the respondent and his wife had developed and maintained a very close friendship with Virginia Williams, a relationship he considered to be almost parent-child in nature. In late October of 1989 the respondent learned that juvenile proceedings had been initiated concerning suspected child abuse or neglect of Nehemiah Williams by Virginia Williams and her husband who were Nehemiah's adoptive parents. Perceiving this action involving his close personal friends to be a horrible mistake and relying on his own version of disputed evidentiary facts, the respondent, then a sitting judge in the judicial district in which the juvenile proceeding was pending, embarked on a course of conduct in which he interjected himself at every stage of the matter and at times during the course of proceedings in the matter and acted as an advocate for and to the benefit of Mr. and Mrs. Williams as follows:
>
> a. On February 6, 1990, the respondent accompanied Mr. and Mrs. Williams to the Wilson Police Department where

they were to be questioned in conjunction with the investigation of possible criminal child abuse charges. At his own request and with the consent of investigating officer James Faison, the respondent was present during officer Faison's attempted interview of Mrs. Williams. The respondent, after witnessing Mrs. Williams' signature on a waiver of rights form, assumed the role of advocate for her by advising her not to answer any questions even though the respondent was aware that she was prepared to talk to officer Faison. Furthermore, in an effort to influence officer Faison's ultimate decision as to whether to pursue the investigation and seek an arrest warrant, the respondent discussed with and offered to provide officer Faison research materials which he felt would illustrate to officer Faison the respondent's belief that prosecution was not justified and which would hopefully persuade officer Faison to terminate the investigation. After talking with the respondent and reviewing the research materials which the respondent made available to him the following day, officer Faison did in fact terminate the investigation and closed the case.

b. Upon learning in mid-July of 1990 that the case had been reopened and criminal child abuse arrest warrants were going to be served on Mr. and Mrs. Williams, and expecting that a significant bond ordinarily would be set in such a case, the respondent telephoned the Wilson County magistrate's office and spoke with magistrate Sherwood Batchelor. The respondent advised magistrate Batchelor that the Williamses would be coming in on a child abuse case [to have warrants served on them]. The respondent also informed magistrate Batchelor and asked him to advise the other magistrates that the respondent knew Mr. and Mrs. Williams to be reliable people, that they would appear in court and that the respondent suggested they be released on unsecured bonds. As a result of the respondent's conversation with magistrate Batchelor, the substance of which was reduced to writing by magistrate Batchelor and left for the information of other magistrates, magistrate Robert Smith released Mr. Williams on July 18, 1990, on a $500.00 unsecured bond, and magistrate Batchelor released Mrs. Williams on July 27, 1990, on her written promise to appear. Both magistrates were acting in accordance with the respondent's suggestion.

c. In August of 1990 the respondent telephoned Ann Murray, Wilson County assistant clerk of superior court, and told her that Mrs. Williams was coming in to complete an affidavit of indigency to see if she and her husband qualified for a court-appointed attorney. The respondent also told Ms. Murray that if Mrs. Williams did qualify, he wanted a capable attorney appointed to look after Mrs. Williams' side of the issue. At the time the respondent talked with Ms. Murray, he was aware that Mr. and Mrs. Williams were dissatisfied with the attorney appointed to represent them in the juvenile proceedings and that they wanted to avoid appointment of the same attorney for their criminal case as would be customary. The respondent then suggested to assistant clerk Murray that either Tom Sallenger or Randy Hughes be appointed to the exclusion of others in an effort to influence and insure the selection of an attorney whom the respondent felt would properly represent the Williamses in their criminal case. Within an hour of this conversation Mrs. Williams came to assistant clerk Murray's office, completed an affidavit of indigency form, and ultimately was determined by Ms. Murray not to qualify for a court-appointed attorney. In addition, assistant clerk Murray had occasion to see attorney Tom Sallenger, one of the two attorneys the respondent had suggested for appointment, within an hour or so of her conversation with the respondent and told attorney Sallenger about the conversation. Thereafter, but prior to Mrs. Murray's determination that Mrs. Williams did not qualify for a court-appointed attorney, attorney Sallenger advised Ms. Murray that he would be available for the appointment and would represent Mrs. Williams *pro bono* if she did not qualify for a court-appointed attorney. This information was communicated to the respondent by Ms. Murray, and attorney Sallenger did in fact represent the Williamses at their trial on September 10, 1990.

d. On August 13, 1990, the respondent wrote to Attorney General Lacy H. Thornburg indicating that he was "involved with" a child abuse case and ostensibly was seeking an opinion concerning the meaning of "physical injury" as used in G.S. 14-318.2, the offense with which the Williamses were charged. In addition, the respondent at the same time advocated the Williams' position in the letter in an effort to obtain favorable information which the respondent could and intended to use

to put an end to their prosecution which the respondent considered a tragedy.

Based upon these findings of fact and conclusions of law, the Commission recommended that the Supreme Court of North Carolina censure the respondent. On 30 October 1991, pursuant to Rule 2(a) of the Rules Governing Supreme Court Review of Recommendations of the Judicial Standards Commission, the Clerk of this Court forwarded to the respondent and his counsel a certified true copy of the Findings of Fact, Conclusions of Law, and Recommendations of the Judicial Standards Commission, together with a copy of the Rules Governing Supreme Court Review of Recommendations of the Judicial Standards Commission. Respondent was also advised, as provided in Rule 2(b), that he had ten (10) days from the date shown on the return receipt in which to petition the Supreme Court for a hearing. The return receipt, properly filed with this Court, shows a delivery date of 31 October 1991. No petition having been filed with this Court for a hearing, and no briefs having been filed in this case by any party, an order was entered by this Court on 4 December 1991, that this case be disposed of on the record.

> A proceeding before the Judicial Standards Commission is "an inquiry into the conduct of one exercising judicial power . . . . Its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice." *In Re Nowell*, 293 N.C. 235, 241, 237 S.E.2d 246, 250 (1977). The recommendations of the Commission are not binding upon the Supreme Court, and this Court must consider all the evidence and exercise its independent judgment as to whether it should censure the respondent, remove him from office, or decline to do either. *In re Martin*, 295 N.C. 291, 301, 245 S.E.2d 766, 772 (1978).

In re Bullock, 328 N.C. 712, 717, 403 S.E.2d 264, 266 (1991).

We have carefully examined the evidence presented to the Commission. We conclude that the findings of fact made by the Commission in paragraph 9 are supported by clear and convincing evidence. *See In Re Kivett*, 309 N.C. 635, 309 S.E.2d 442 (1983). We also agree with the Commission's conclusions of law. We therefore adopt the Commission's findings, conclusions, and recommendation of censure.

Now, therefore, it is ordered by the Supreme Court of North Carolina, in Conference, that the respondent, Judge Allen W. Harrell, be, and he is hereby, censured by this Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Justices MEYER, WEBB and LAKE did not participate in the consideration or decision of this case.

WAYLAND S. BARNES, INDIVIDUALLY AND EXECUTOR OF THE ESTATE OF MILDRED L. WILSON v. KEN EVANS, MARIE STERLING, ELLEN NORTHEY O'NEAL, MARGARET POMEROY, VIRGINIA SMITH, PAT DALY, COLERAIN BAPTIST CHURCH, COLERAIN METHODIST CHURCH, BILLY GRAHAM EVANGELICAL ASSOCIATION, J. FRANK WILSON, DOROTHY WILSON, MARGARET STERLING, KAY STERLING ELLIS, RUTH BRISTOW, CAROL BARNES, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO AND ANY UNKNOWN AND UNNAMED HEIRS OF MILDRED L. WILSON, ET ALS.

No. 220PA91

(Filed 5 March 1992)

ON appeals by the petitioner, Wayland S. Barnes, and by the respondent, Lou Wilson Mason, 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. 428, 402 S.E.2d 164 (1991), which affirmed in part and reversed and modified in part the judgment entered 4 October 1989 by *Grant, J.*, in Superior Court, BERTIE County. Heard in the Supreme Court on 14 February 1992.

Pritchett, Cooke & Burch, by W. L. Cooke, for petitioner-appellant Wayland S. Barnes.

Baker, Jenkins & Jones, P.A., by Robert C. Jenkins and Robert E. Ruegger, for respondent-appellant Lou Wilson Mason.

Charles A. Moore, pro se, as guardian ad litem for the unknown and unnamed heirs of Mildred H. Wilson.

Lacy H. Thornburg, Attorney General of North Carolina, by Special Deputy Attorney General Charles J. Murray, for the State.

PER CURIAM.

For the reasons stated in the opinion by Wells, J., the decision of the Court of Appeals is affirmed.

On 2 October 1991, this Court allowed the petition of the petitioner-appellant, Wayland S. Barnes, for discretionary review of the additional issue of whether certain taxes should be paid by the estate of Mildred L. Wilson or by the individual beneficiaries. In its judgment, the trial court ordered that the individual beneficiaries, with one exception, pay certain inheritance and federal estate taxes. We now affirm that part of the order of the trial court.

The result is that we affirm the decision of the Court of Appeals as to the issues resolved by that court, and we additionally affirm that part of the order of the trial court providing for the payment of taxes.

Affirmed.

STATE OF NORTH CAROLINA v. MICHAEL RAY McDANIELS

No. 331A91

(Filed 5 March 1992)

APPEAL 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. 175, 405 S.E.2d 358 (1991), affirming the judgment of *Stephens, J.*, at the 4 June 1990 Criminal Session of Superior Court, WAKE County. Heard in the Supreme Court 12 February 1992.

Lacy H. Thornburg, Attorney General, by Francis W. Crawley, Special Deputy Attorney General, for the State.

Cheshire, Parker, Hughes & Manning, by George B. Currin, for defendant-appellant.

David F. Tamer for North Carolina Civil Liberties Union, amicus curiae.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA v. PAUL JACKSON

No. 321A91

(Filed 5 March 1992)

APPEAL by defendant 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. 239, 405 S.E.2d 354 (1991), finding no error in a trial before *Griffin (Kenneth A.), J.*, at the 29 January 1990 Criminal Session of Superior Court, MECKLENBURG County, in which defendant was convicted of trafficking in cocaine by possessing 28 grams or more but less than 200 grams, trafficking in cocaine by transporting 28 grams or more but less than 200 grams and feloniously conspiring to commit the felony of trafficking in cocaine by possessing or transporting 28 grams or more but less than 200 grams. Heard in the Supreme Court 11 February 1992.

Lacy H. Thornburg, Attorney General, by Robin Perkins Pendergraft, Assistant Attorney General, for the State.

Isabel Scott Day, Public Defender, 26th Judicial District, by Robert L. Ward, Assistant Public Defender, for defendant-appellant.

PER CURIAM.

Affirmed.

ARTHUR BENNETT MANNING AND WIFE, LUGENE MANNING v. CLARENCE ERNEST FLETCHER, JR. AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE

No. 229PA91

(Filed 5 March 1992)

ON discretionary review of a unanimous opinion of the Court of Appeals, 102 N.C. App. 392, 402 S.E.2d 648 (1991), which reversed a judgment entered on 14 December 1989 in Superior Court, NASH County, by *Allsbrook, J.*, and remanded for entry of a judgment in accordance with the opinion of the Court of Appeals. Heard in the Supreme Court 14 February 1992.

Ralph G. Willey, P.A., by Ralph G. Willey, III, for plaintiff appellees.

Poyner & Spruill, by Ernie K. Murray, for defendant appellant North Carolina Farm Bureau Mutual Insurance Company.

PER CURIAM.

Affirmed.

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

WILLIAM H. MIZELL v. K-MART CORPORATION

No. 410A91

(Filed 5 March 1992)

APPEAL by defendant 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. 570, 406 S.E.2d 310 (1991), reversing an order granting summary judgment in favor of defendant entered by *Freeman, J.*, on 11 May 1990 in Superior Court, GUILFORD County, and remanding for a jury trial. Heard in the Supreme Court 13 February 1992.

Spencer W. White for plaintiff-appellee.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Clinton Eudy, Jr., and Amiel J. Rossabi, for defendant-appellant.

PER CURIAM.

Affirmed.

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

BAXLEY v. NATIONWIDE MUTUAL INS. CO.

No. 538PA91

Case below: 104 N.C.App. 419

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 March 1992.

COX v. HOZELOCK, LTD.

No. 51P92

Case below: 105 N.C.App. 52

Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 4 March 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

DOZIER v. CRANDALL

No. 54PA92

Case below: 105 N.C.App. 74

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 4 March 1992.

FRAZIER v. BOWMAN

No. 26P92

Case below: 104 N.C.App. 803

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 March 1992.

GAY v. BIRD

No. 25P92

Case below: 104 N.C.App. 803

Petition by defendant (Mecklenburg County) for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992. Petition by defendants (Henry and Scott) for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992. Petition by defendants (Bird, Charlotte Radiology Group and Providence Radiology Associates) for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

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

GRAIN DEALERS MUTUAL INS. CO. v. LONG

No. 516PA91

Case below: 104 N.C.App. 310

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 4 March 1992.

HELMS v. YOUNG-WOODARD

No. 28P92

Case below: 104 N.C.App. 746

Motion by plaintiff to dismiss appeal by defendants (Linda and Caroline Alexander) for lack of substantial constitutional question allowed 4 March 1992. Petition by defendants (Linda and Caroline Alexander) for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

HOLLOWAY v. WACHOVIA BANK AND TRUST CO.

No. 11PA921

Case below: 104 N.C.App. 631

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 4 March 1992.

IN RE PAPER WRITING OF VESTAL

No. 38P92

Case below: 104 N.C.App. 739

Petition by caveators for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

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

No. 40A92

Case below: 104 N.C.App. 665

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 4 March 1992.

MARANTZ PIANO v. KINCAID

No. 552P91

Case below: 104 N.C.App. 802

Temporary stay dissolved 4 March 1992. Petition by defendant (Kincaid Enterprises, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

MORGAN v. MARTIN

No. 532P91

Case below: 104 N.C.App. 554

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

NATIONWIDE MUTUAL INS. CO. v. SILVERMAN

No. 36PA92

Case below: 104 N.C.App. 783

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 4 March 1992.

REID v. REID

No. 5P92

Case below: 104 N.C.App. 802

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

SAFETY MUT. CASUALTY CORP. v.
SPEARS, BARNES

No. 531PA91

Case below: 104 N.C.App. 467

Petition by plaintiff (Safety Mutual) for discretionary review pursuant to G.S. 7A-31 allowed 4 March 1992.

SALT v. APPLIED ANALYTICAL, INC.

No. 35P92

Case below: 104 N.C.App. 652

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 4 March 1992.

STATE v. BRADDOCK

No. 539P91

Case below: 104 N.C.App. 554

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

STATE v. BUTLER

No. 31P92

Case below: 104 N.C.App. 804

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

STATE v. CLAYTON

No. 16P92

Case below: 101 N.C.App. 575

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 March 1992. Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 4 March 1992.

STATE v. CORNELIUS

No. 10P92

Case below: 104 N.C.App. 583

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

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

STATE v. COX

No. 27P92

Case below: 104 N.C.App. 804

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

STATE v. JEFFERSON

No. 534P91

Case below: 104 N.C.App. 556

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

STATE v. JOYCE

No. 13P92

Case below: 104 N.C.App. 558

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 4 March 1992.

STATE v. MITCHELL

No. 560A91

Case below: 104 N.C.App. 514

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 4 March 1992.

STATE v. PETERSILIE

No. 043P92

Case below: 105 N.C.App. 233

Petition by Attorney General for writ of supersedeas allowed 4 March 1992. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 and petition for certiorari under Rule 21 allowed 4 March 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 March 1992.

STATE v. REEDER

No. 062P92

Case below: 105 N.C.App. 343

Petition by Attorney General for writ of supersedeas and temporary stay denied 4 March 1992.

STATE v. REID

No. 527PA91

Case below: 104 N.C.App. 334

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question denied 4 March 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 March 1992.

STATE v. VEST

No. 033P92

Case below: 104 N.C.App. 771

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 March 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

STATE v. WHALEY

No. 557P91

Case below: 104 N.C.App. 557

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 March 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

STATE OF NORTH CAROLINA v. JIMMY DALE HUDSON

No. 454A87

(Filed 22 April 1992)

1. **Constitutional Law § 342 (NCI4th)— ex parte conversations between judge and jurors—not "stage" of trial—constitutional right to presence at trial not violated**

It is doubtful that ex parte conversations between the judge and jurors in the courthouse corridor during a recess in a capital trial constituted a "stage" of the trial within the meaning of the constitutional right of an accused to be present at every stage of his trial. Assuming arguendo that the chance meeting in the corridor did constitute a "stage," error, if any, in the ex parte communications between the judge and jurors was harmless beyond a reasonable doubt where the trial judge reconstructed the conversations for the record; the record reveals that the conversations pertained to the presence of cameras in the courtroom, the jury's ability to hear defendant's testimony, and selection of the jury foreman and that the contents of the conversations were thus not significant; and defendant's presence at the time of the conversations could not have had a reasonably substantial relation to his ability to present a full defense.

Am Jur 2d, Criminal Law §§ 692-695; Trial §§ 226, 1573, 1577-1579.

Accused's right, under Federal Constitution, to be present at his trial—Supreme Court cases. 25 L. Ed. 2d 931.

2. **Criminal Law § 507 (NCI4th)— judge's conversations with jurors during recess—record not required**

Ex parte conversations between the judge and jurors in a courthouse corridor during a recess in a capital trial did not amount to a "proceeding" within the meaning of the statute requiring the trial court to have made a true, complete, and accurate record of all "statements from the bench and all other proceedings," N.C.G.S. § 15A-1241. Therefore, the recordation requirement of N.C.G.S. § 15A-1241 was not triggered, and the failure to record these conversations did not implicate defendant's federal due process rights.

Am Jur 2d, Trial §§ 1573, 1577-1579.

Communications between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal—post-Parker cases. 35 ALR4th 890.

3. **Criminal Law § 870 (NCI4th)— encounter between judge and jurors during recess—not additional instructions—open court requirement inapplicable**

Ex parte communications between the judge and jurors in the courthouse corridor during a trial recess did not breach the mandatory requirement of N.C.G.S. § 15A-1234(d) that all additional instructions be provided in open court where the conversations pertained to cameras in the courtroom, the jury's ability to hear defendant's testimony, and selection of a jury foreman and cannot reasonably be considered as "instructions" within the meaning of the statute.

Am Jur 2d, Trial §§ 1111, 1114, 1573.

4. **Criminal Law § 406 (NCI4th)-- filming of defendant's trial—exercise of discretion by court**

The record shows that the trial court did in fact exercise its discretion in allowing the filming of defendant's trial.

Am Jur 2d, Trial § 256.

5. **Constitutional Law § 261 (NCI4th)— electronic media coverage—commencement at mid-trial—no prejudice as matter of law**

Commencement of electronic media coverage of defendant's trial near mid-trial, at the time defendant began to present his case, was not prejudicial as a matter of law.

Am Jur 2d, Trial § 256.

6. **Constitutional Law § 261 (NCI4th)— rules for electronic media—court's failure to follow—no violation of due process**

Although the trial court erred in applying the rules regarding electronic media coverage of defendant's trial by failing to inform the jury that coverage of jurors is expressly prohibited at any stage of a judicial proceeding, by failing to ensure that electronic equipment was completely obscured from view in the courtroom, and by permitting a microphone to be placed at the bench to allow electronic media coverage

of bench conferences, such error was not prejudicial to defendant where defendant made no specific allegations that media coverage impaired the jury's ability to decide the case on the evidence or had an adverse impact on trial participants sufficient to constitute a denial of due process.

Am Jur 2d, Trial §§ 184, 256.

7. **Criminal Law § 757 (NCI4th)— instruction on reasonable doubt—due process**

The trial court's instruction that a reasonable doubt "is an honest, substantial misgiving" did not reduce the State's burden of proof in violation of defendant's constitutional right to due process.

Am Jur 2d, Trial §§ 1371-1375.

8. **Criminal Law § 496 (NCI4th)— jury request to review testimony—denial because transcript unavailable—harmless error**

The trial court improperly failed to exercise its discretion in a prosecution for two murders when it denied the jury's request to examine the transcript of a psychiatrist's testimony because the transcript was "not available." However, this error was not prejudicial to defendant where the psychiatrist's testimony was adverse to defendant in that he concluded that defendant was sane at the time of the killings; the record reveals that the psychiatrist disagreed with the diagnoses of three defense witnesses as to whether defendant suffered from a reactive psychosis at the time of the killings; and the jury was provided with the psychiatrist's testimony in substance because his written notes were introduced into evidence and submitted to the jury for review.

Am Jur 2d, Trial § 1690.

9. **Criminal Law § 23 (NCI4th)— consideration of insanity issue first—failure to instruct not error**

While the better procedure would be to have the jury determine defendant's sanity before considering defendant's guilt of the substantive offenses, the trial court's failure to so instruct the jury did not constitute error.

Am Jur 2d, Criminal Law § 107; Trial § 1270.

10. Criminal Law § 884 (NCI4th)— failure to instruct—absence of request

Defendant waived his right to assign as error the trial court's failure to instruct the jury to consider purported evidence of defendant's diminished mental capacity where he failed to request such an instruction. N.C. R. App. P. 10(b)(2).

Am Jur 2d, Criminal Law §§ 40, 41; Trial § 1081.

11. Criminal Law § 769 (NCI4th)— evidence of insanity—consideration after finding of guilt—instruction not violation of due process

The trial court's instruction that the jury in a prosecution for two murders should consider evidence of defendant's legal insanity "only if you find that the State has proved beyond a reasonable doubt each of the elements of one of the offenses about which I have already instructed you" did not lessen the State's obligation to prove the elements of the crimes with which defendant was charged in violation of due process.

Am Jur 2d, Trial § 1278.

12. Criminal Law § 133 (NCI4th)— plea bargain with sentence recommendation—withdrawal by State—court's refusal to enforce—no violation of due process

The trial court did not violate defendant's federal or state due process rights by refusing to enforce a plea bargain agreement for defendant to plead guilty to two counts of second degree murder and receive two consecutive fifty-year sentences where defendant's acceptance of the agreement was communicated on 20 June 1986; the State officially withdrew the agreement by letter on 1 August 1986; the trial commenced on 9 February 1987; the alleged agreement between defendant and the State, if any, was merely executory and of no effect as a matter of law because it had not been approved by the trial judge as required by N.C.G.S. § 15A-1023(b); any reliance on the agreement by defendant was thus not reasonable; defendant's assertion of detriment on the ground that he suspended trial preparations for an insanity defense is doubtful in the face of the extensive psychiatric testimony presented at trial; and the trial court found that defendant had not changed his position in detrimental reliance upon the agreement.

Am Jur 2d, Criminal Law §§ 481, 483, 484.

Right of prosecutor to withdraw from plea bargain prior to entry of plea. 16 ALR4th 1089.

13. Evidence and Witnesses § 672 (NCI4th)— waiver of objection—admission of similar tesimony without objection

Even if testimony by an emergency room physician that defendant did not appear psychotic during an emergency room visit two weeks prior to the killings in question constituted expert opinion testimony by a nonqualified witness, defendant waived objection to such testimony when defense counsel subsequently elicited similar testimony from the witness and when defendant failed to object to similar testimony thereafter elicited by the prosecutor.

Am Jur 2d, Trial §§ 411, 412, 420.

14. Evidence and Witnesses § 765 (NCI4th)— sexual proclivities of defendant—opening door to cross-examination

In a prosecution of defendant for the murders of his wife and child, defendant opened the door to cross-examination of defendant by the State about his sexual proclivities when defendant's statement to a detective alluding to numerous extramarital affairs was read into evidence at defendant's initiative, and defendant testified on direct examination that he and his wife were a "very erotic couple."

Am Jur 2d, Trial § 419.

15. Criminal Law § 1148 (NCI4th)— aggravating factor—heinous, atrocious or cruel murder—sufficiency of evidence

There was ample evidence to support the trial court's finding that defendant's second degree murder of his wife was especially heinous, atrocious or cruel where it tended to show that the murder was carried out with a butcher knife; the victim sustained numerous blunt trauma injuries to the forehead, nose, eye, and cheek areas; there was a stab wound to the right side of the neck and at least three incise wounds; one massive incise wound to the neck damaged the right and left carotid arteries and right and left jugular veins and was so deep as to damage the spine; defendant used substantial force as he slashed the victim with the murder weapon; the victim died as a result of loss of blood and possibly interference with the oxygen supply to the body because of severance of the windpipe; and as life was ebbing from the victim, defend-

ant's three-year-old adopted child, his second murder victim, watched and cried uncontrollably.

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

16. Criminal Law § 1116 (NCI4th)— perjury—improper aggravating factor—nonretroactivity of opinion

The holding in *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373, that perjury constitutes an impermissible aggravating factor and may not, as a matter of law, be considered in the sentencing decision does not apply where defendant was sentenced ten months prior to the certification date of that decision, 23 February 1988.

Am Jur 2d, Criminal Law §§ 598, 599.

Propriety of sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial. 34 ALR4th 888.

17. Criminal Law § 1116 (NCI4th)— aggravating factor—perjury—sufficiency of evidence

Ample evidence supported the trial court's finding of perjury as a nonstatutory aggravating factor for defendant's second degree murder of his wife where it tended to show that defendant falsely asserted under oath at trial that he attempted to commit suicide the day prior to the killing, that his wife attacked him with a butcher knife prior to the murder and this attack accounted for a number of injuries defendant complained of during his examination by a doctor on the day of the murder, that his knowledge of state law relating to the insanity defense was limited to what he was told by his counsel, and that after he was attacked by his wife he remembered nothing else until he was at the sink washing his hands.

Am Jur 2d, Criminal Law §§ 598, 599.

Propriety of sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial. 34 ALR4th 888.

18. Appeal and Error § 550 (NCI4th)— perjury as improper aggravating factor—nonretroactivity—no due process violation

Failure to apply retroactively the rule of *State v. Vandiver*, 321 N.C. 570, that perjury is an improper nonstatutory ag-

gravating factor does not violate defendant's federal or state due process rights since the "new rule" before the Supreme Court is not of constitutional magnitude.

Am Jur 2d, Criminal Law §§ 598, 599.

Propriety of sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial. 34 ALR4th 888.

19. Criminal Law § 1245 (NCI4th) — mitigating factor — extenuating relationship — marital difficulties

A relationship between a husband and wife, including marital difficulties in the past, is not sufficient, standing alone, to support a finding of the statutory mitigating factor that the relationship between defendant and the victim was extenuating. N.C.G.S. § 15A-1340.4(a)(2)(i).

Am Jur 2d, Criminal Law §§ 598, 599.

Justice WEBB concurring.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence upon defendant's conviction of first-degree murder entered by *Ross, J.*, at the 9 February 1987 Special Criminal Session of Superior Court, GUILFORD County. Defendant's motion to bypass the Court of Appeals, pursuant to N.C.G.S. § 7A-31, as to his second-degree murder conviction, for which he received a consecutive sentence of fifty years, was allowed by this Court 14 January 1992. Heard in the Supreme Court 12 February 1992.

Lacy H. Thornburg, Attorney General, by John H. Watters, Assistant Attorney General, for the State.

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

MEYER, Justice.

On 24 March 1986 at approximately 8:00 p.m., defendant Jimmy Dale Hudson visited the Greensboro police department and spoke with Officer Gregory Deans. According to Deans, defendant appeared calm and his face was expressionless. Defendant related that he had an argument with his wife, Kathryn Hudson, and that

she had come at him with a butcher knife. He took the knife away from her and did not remember what next occurred, but he thought he might have killed her and that his daughter, three-year-old Wilma Dale Hudson, might have gotten in the way. Defendant informed Deans that he himself had been cut about the neck, hand, and chest in the melee. Defendant provided Deans with directions to the apartment where the killings occurred.

Defendant was taken to the emergency room at Wesley Long Hospital. While en route, defendant asked Deans if anyone had visited the apartment. Deans responded that he did not know, and defendant told Deans, "I know what they'll find when they get there." At the hospital, Dr. James Kindl examined defendant and discovered superficial scratches to the neck most likely caused by fingernails. A one-inch superficial wound that required no stitches was detected on defendant's chest. A two-inch laceration on the thumb side of the palm of defendant's left hand was also evident; this wound was not deep but required seven stitches to close. A tiny cut over the knuckle of the index finger of defendant's left hand required no treatment whatsoever. Finally, defendant complained of soreness on his right wrist. There were no obvious signs of cuts or bruises, and the wrist retained a full range of motion.

At approximately 8:25 p.m., police arrived at the scene of the killings and observed the lifeless body of a small child lying on the floor in a pool of blood, with a large gaping laceration in her neck. A butcher knife with a five-inch blade covered almost entirely in blood lay four or five feet from the body of the child. In the living area, officers observed the body of a white female, lying face upward on the floor. She also had a large neck wound and appeared to be dead. The adult female had a handkerchief stuffed inside the neck wound.

The apartment appeared to be in order, with no broken furniture or anything out of arrangement. A blue oxford shirt, later identified as being the shirt worn by defendant on the night of the killings, was discovered on the landing of the apartment by the stairs. The shirt had no holes in the shoulder area.

A 1979 Volkswagen driven by defendant to the police station was also inspected. The inspection revealed bloodstains on the steering wheel, horn, seat, and the driver's side floor mat. Also found was a brown leather briefcase on the back seat and a man's shaving kit under the front seat containing a .38-caliber revolver.

The revolver was lying exposed on the top of the kit and, unlike the kit, had blood on it.

Roger McQueen, currently serving time for a double murder, testified for the State. In 1986, McQueen met defendant in the course of his work in the law library at the Eastern Correctional Center, where McQueen assisted inmates in legal research. Defendant confided in McQueen that he was charged with one count of first-degree murder. Defendant went into great detail so that McQueen could provide an opinion as to whether premeditation and deliberation existed and whether an insanity defense was tenable. Defendant first told McQueen that the killing occurred as a result of an argument between him and his wife. At a subsequent meeting, defendant informed McQueen that there was actually a second killing, the latter involving Wilma Dale Hudson. Defendant related that the child was present at the time Kathryn was killed, that the child began to cry, and that defendant sent her to her room. The daughter returned and defendant killed her. McQueen asked defendant how long the interval was between killings, and defendant replied that it was longer than fifteen minutes. Defendant told McQueen that he killed the little girl "to make it fit." Defendant never told McQueen anything about his wife's approaching him with a butcher knife.

Defendant testified in his own behalf. Defendant and Kathryn Hudson met while in school at the University of North Carolina at Chapel Hill. The couple married in 1971. In 1974, defendant graduated from dental school and began a practice in Robbinsville, North Carolina. He left the practice in 1979, moving to Greensboro to begin a practice with Dr. Julian Rogers. After a year and a half, defendant became a full partner. The Hudsons adopted a female child in 1983, naming her Wilma Dale Hudson. In December 1985, defendant was informed by his partners that they wanted him out of the practice. He was disassociated in 1986 and thereafter worked on a temporary basis for other dentists.

On the evening of 7 March 1986, defendant arrived at his home and discovered a letter from his wife informing him that she and Wilma Dale had moved out and that she had an attorney. After several unsuccessful attempts, defendant finally located his wife by phone; she refused to discuss the problem and kept telling defendant to read the letter. On 13 March, defendant and Kathryn

signed a separation agreement. Shortly after signing the agreement, defendant left the country for a vacation.

Upon his return, defendant arranged to spend the day with Wilma Dale. When they returned, defendant and his estranged wife talked. Some time later, Kathryn asked defendant to leave, as she had to prepare dinner. Defendant testified that he resisted and became hysterical. He began to leave and Wilma Dale ran over to him and he began hugging and kissing her. Kathryn became angry and began yelling at defendant. Kathryn then came over to defendant and slapped him twice. She then approached defendant with a knife, and defendant was unable to remember anything else until he was washing his hands at the sink. Defendant turned around and Wilma Dale was on the floor. He noticed the two bodies and that they lacked signs of life. Defendant then entered his car and drove around the area. He eventually made his way to the police station. When at the station, he contemplated suicide but was unable to carry it out. Defendant testified that he remembered being cut on his left hand but none of his other injuries.

Considerable testimony was mounted concerning defendant's mental condition at or about the time of the killings. Dr. Bob Rollins, Clinical Director of the Forensic Unit at Dorothea Dix Hospital, evaluated defendant in March and April 1986. Rollins diagnosed defendant as having a mixed personality disorder with narcissistic and dependent features. He also testified that defendant was able at the time of the murder to distinguish right from wrong and that defendant did not suffer from a brief reactive psychosis at the time of the killings.

Drs. John Edwards, Selwyn Rose, and Donald Fidler all testified that defendant was unable to distinguish right from wrong and that defendant suffered from a reactive psychosis at the time of the killings.

Dr. Aldo Mell examined defendant in the Guilford County jail on 26 March 1986. Mell testified that defendant was probably suffering atypical psychosis and that he recommended a full psychiatric evaluation and transfer to Dorothea Dix.

The jury convicted defendant of one count of second-degree murder for the murder of Kathryn Hudson and one count of first-degree murder for the murder of Wilma Dale Hudson. The jury recommended a sentence of life imprisonment on the first-degree

murder conviction. The trial court imposed a mandatory life sentence for the first-degree murder and a consecutive fifty-year term for the second-degree murder.

Defendant raises numerous claims on appeal. We will address these claims seriatim.

Defendant first claims that the trial court committed reversible error in engaging in ex parte conversations that were not recorded and that took place out of the presence of defendant and his counsel.

Defendant was the first witness to testify for the defense. During the course of the lengthy direct examination, the court took its regularly scheduled afternoon recess. When court reconvened, outside the presence of defendant and the jury, the judge recounted to counsel at a recorded bench conference conversations he had had with various jurors during the recess. The following colloquy occurred involving the court, defense attorneys Manning and O'Donnell, and district attorneys Greeson and Goodman:

> (A recess was taken at 3:16 p.m.)
>
> (Court reconvened at 3:39 p.m. All counsel were present. The defendant was not present. The jury was not present.)
>
> THE COURT: Approach the bench, counsel.
>
> (The following proceedings were had by the Court and all counsel at the bench:)
>
> THE COURT: Just for the record, so you all will know—and I've told them right back here just now—that when I left the courtroom to go up around the corner, one of the jurors, the first words out of their [sic] mouth was, "We didn't realize that they allowed cameras in the courtroom."
>
> And I said, "Well, you weren't supposed to see that."
>
> (The defendant entered the courtroom at 3:40 p.m.)
>
> THE COURT: And they said, well, it was hard not to notice, with all the cable and the wire. And one of them said, "And they left the tape in our chair."
>
> And I said, "Well, all I can say to you about it is that, the Supreme Court has authorized that, under certain circumstances." And I said, "I would say to you now, as I've said all along, that this is the reason why you're not to observe

any of that on television at night, because they may record some particular part." And I said, "If you're interested in it, have somebody tape it, and you can view it after the trial's over, but you're not to view it."

And they said, "Well, we understand."

But I just wanted you to know that had occurred, in case either of you now wish me to instruct them in open court about the fact that the cameras are in there, and that they're—

MR. GREESON: If there was only—

THE COURT: —to erase that—

MR. GREESON: —two of them that said that—

THE COURT: Oh, there were five or six of them around there at that point, you know. And they clearly know.

MR. GREESON: I don't care.

THE COURT: They talked about it among themselves.

MR. GOODMAN: They all know.

MR. O'DONNELL: Just for at the end of the day—

THE COURT: Yes, that's what I mean, as part of my normal explanation at the close of the day.

MR. O'DONNELL: That's fine.

THE COURT: The other thing, they mentioned to me out there in the hall, and again, for the record is, that they were having difficulty hearing Dr. Hudson. I've told Mr. Manning that. And I told the jurors, I said, you know, that when they were not able to hear, that I've instructed them previously to raise their hand, and I will ask him to speak up.

And they said, was there not a microphone, couldn't they turn up the microphone for the sound?

And I said, "Well, those microphones don't have anything do to [sic] with sound. We don't have any microphones that have anything to do with sound in this courtroom."

And then they wanted to know, who selected the foreman, was it appointed, or did the jury vote on it. I explained—

MR. MANNING: Oh, geez.

THE COURT: —to them that—

MR. GREESON: That's what I say.

THE COURT: I explained to them that they would be—

MR. GREESON: Have they got—

THE COURT: —instructed with respect—

MR. GREESON: —somebody running already?

THE COURT: I don't know. I explained to them that there would be instructions with respect to that at a later time in the proceedings.

MR. MANNING: There's probably going to be a primary run-off election to see who's the foreman.

THE COURT: Well, there could be—

MR. GOODMAN: We could voir dire them to find out who it's going to be.

THE COURT: It might be a hung jury on that issue. There is a story, you know, about where the jury—an open-and-shut case, where the judge sent the jury out and told them they could select a foreman. They were about two hours, and he couldn't understand why. He finally called them back in and they said, "Judge, we're hung up six to five."

And he said, "Well, we haven't even given you the issues sheet yet."

"We're hung up six to five, judge, on who's the foreman."

I just advise you of that, because I like to let you know when there's been any kind of contact like that, first of all. And second of all, I wanted you to know so that if you request any instructions, you'll be aware of it and you can request them.

MR. GREESON: That's fine, Judge.

THE COURT: Okay?

MR. MANNING: Okay.

Defendant contends that the ex parte conversations recounted above were improper in three respects. First, defendant argues that the conversations violated defendant's state constitutional right to be present at each stage of the capital proceeding. N.C. Const. art. I, § 23. Second, defendant argues that the conversations violated defendant's federal constitutional right to due process of law because he was effectively deprived of a state statutory entitlement, namely, the right to a true, complete, and accurate record of all proceedings during his capital trial. N.C.G.S. § 15A-1241 (1988). Finally, defendant argues that the conversations violated defendant's right to a complete recordation of the proceedings in his capital trial as required by N.C.G.S. § 15A-1241.

It is well settled that a defendant in a capital trial has an unwaivable right to be present at every stage of his trial. *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987) ("*Payne I*"). "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). This right to presence derives from the Confrontation Clause of our State Constitution. N.C. Const. art. I, § 23; *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 650-51 (1989), *sentence vacated*, --- U.S. ---, 111 L. Ed. 2d 777 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991). Significantly, however, any violation of a defendant's right to be present is subject to a harmless error analysis. *State v. Artis*, 325 N.C. 278, 297, 384 S.E.2d 470, 480 (1989), *sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). Such harmlessness must be proven beyond a reasonable doubt by the State. *Huff*, 325 N.C. at 33, 381 S.E.2d at 653.

[1] As a preliminary matter, we must first determine whether the conversations in the instant case, which took place in a courtroom corridor and during a trial recess, constitute a "stage" as that term has been interpreted in our jurisprudence pertaining to the constitutional right to presence. It is now well settled that our state constitutional right of confrontation is broader than that embedded in the federal Constitution, "guaranteeing the right of every accused to be present at *every stage* of his trial." *Huff*, 325 N.C. at 29, 381 S.E.2d at 651.

Recently, in *State v. Brogden*, we 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.' " 329 N.C. 534, 541, 407 S.E.2d 158, 163 (1991) (quoting *State v. Kelly*, 97 N.C. 404, 405, 2 S.E. 185, 185-86 (1887)). Our case law has also acknowledged that where the conversations are held is not dispositive. *State v. Buchanan*, 330 N.C. 202, 221, 410 S.E.2d 832, 843 (1991) ("as a practical matter not all of the proceedings in an accused's capital trial occur in the courtroom itself"). Nor, for that matter, is a defendant's confrontation right rendered inapplicable merely because the conversations transpired over the course of a recess. For instance, in *Payne I* the Court ordered a new trial when the trial court, during a jury recess, administered its admonitions in the jury room. The jury recess became a "stage" when the court, in derogation of its duty to ensure the presence of defendant at each stage of the capital trial, directly addressed the jury. *Payne I*, 320 N.C. at 139, 357 S.E.2d at 612; *see also State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985) (defendant not present during voir dire of jurors during recess).

Under the instant facts, it is not at all clear whether the conversations between judge and jurors constitute a "stage." The conversations here were indisputably unintended and spontaneous, and not at the behest of the judge, occurring in the corridor of the courthouse during a trial recess. Thus, even under our relatively liberal reading of the constitutional right to presence, it is doubtful that such conversations may be equated with a "stage" in any meaningful sense.[1]

Assuming arguendo that the chance meeting in the corridor did constitute a "stage," we nevertheless conclude that the error here, if any, is harmless beyond a reasonable doubt.

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1. Support for this view is contained in the recent United States Supreme Court case *Rushen v. Spain*, 464 U.S. 114, 78 L. Ed. 2d 267 (1983). *See id.* at 118, 78 L. Ed. 2d at 273 (per curiam) ("There is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial."); *id.* at 125-26, 78 L. Ed. 2d at 277 (Stevens, J., concurring) ("I think it quite clear that the 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.").

Citing *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990), and *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991), defendant contends that prejudicial error occurred as a result of the unrecorded ex parte communications between judge and jurors here. In *Smith*, the trial judge had private, unrecorded bench conferences that resulted in the excusal of a number of prospective jurors. This Court concluded that the conversations denied defendant his constitutional right to presence and, further, that this violation was not harmless beyond a reasonable doubt. *Smith*, 326 N.C. at 794, 392 S.E.2d at 363-64. The Court was constrained to conclude that harmlessness was not shown because there existed no record of the conversations such as to reveal their substance. *Id.* Moreover, the Court found support for its conclusion in the fact that the trial judge failed to comply with the statutory requirement that there be made a complete and accurate record of the jury selection process in defendant's capital trial. N.C.G.S. § 15A-1241(a) (1988); *Smith*, 326 N.C. at 794-95, 392 S.E.2d at 363-34.

In *McCarver*, the trial judge had conversations with numerous prospective jurors that were unrecorded and out of the presence of both defendant and his counsel. These conversations apparently concerned the fitness of the jurors to hear the capital case. Subsequent to the conversations, the judge excused numerous jurors "for good cause shown." 329 N.C. at 260, 404 S.E.2d at 821. Citing *Smith* and *Payne I*, the Court held that the conversations violated defendant's right to be present and that the unrecorded violations could not be deemed harmless beyond a reasonable doubt because no record was made of the conversations. *McCarver*, 329 N.C. at 261, 404 S.E.2d at 822.

The case at bar differs from *Smith* and *McCarver* in several significant respects. First, unlike *Smith* and *McCarver*, in the instant case there exists in the record a reconstruction of the ex parte conversations. In this respect, the facts here resemble those in *Artis*, where the existence of the memorialization facilitated the harmlessness review, which ultimately allowed a finding of harmlessness. *Artis*, 325 N.C. at 297, 384 S.E.2d at 480. We have no reason to doubt the completeness or accuracy of the trial court's memorialization, and the lack of any objection by defendant in this regard lends support to this view. Moreover, the record reveals that the content of the conversations was not significant. Therefore, under the circumstances, we are unable to conclude that defendant's presence at the time of the conversations "could have had

a reasonably substantial relation to his ability to present a full defense." *Payne I*, 320 N.C. at 139, 357 S.E.2d at 612.

[2] Defendant also contends that his federal constitutional right to due process of law was violated by the trial court's failure to make a true, complete, and accurate record of all "statements from the bench and all other proceedings" in his capital trial, as required by N.C.G.S. § 15A-1241. Defendant's pretrial motion for recordation was granted; however, as noted above, aspects of the proceedings, most notably ex parte conversations between judge and jurors in the courthouse corridor, were not recorded. Defendant, citing *Hopt v. Utah*, 110 U.S. 574, 28 L. Ed. 262 (1884), argues that this violation of his statutory guarantee violates due process.

We disagree. As discussed above, we do not deem the chance encounters in the corridor a "proceeding." Therefore, the recordation requirement of N.C.G.S. § 15A-1241 was not triggered, and defendant's federal constitutional right to due process was not implicated.

Finally, defendant's claim that N.C.G.S. § 15A-1241 was violated because of the unrecorded ex parte conversations is meritless. As already discussed, the conversations did not amount to a "proceeding" within the meaning of that statute, and therefore the recordation requirement was not violated.

[3] Next, defendant contends that the chance encounter between the trial judge and five or six jury members breached the mandatory requirement that all additional instructions be provided in open court. N.C.G.S. § 15A-1234(d) (1988); *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985). Here, defendant contends, the trial court memorialized communications cautioning some but not all jurors regarding the presence of electronic media and other matters. Scrutiny of the record, however, reveals that defendant's claim is without merit.

As a threshold matter, the conversations, which took place well before the jury retired, cannot reasonably be considered to be "instructions" within the meaning of N.C.G.S. § 15A-1234(d). Further, no objections were lodged by defense counsel as to the conversations regarding the jury's ability to hear defendant's testimony or the selection of a jury foreman, the other two matters discussed in the corridor. Therefore, the question is whether the record revealed "plain error." We conclude that no "plain error"

occurred here. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

Defendant next contends that the trial court committed reversible error in overruling defendant's objections to the filming of his trial and in failing to properly apply the rules we have mandated regarding such filming. Shortly before the State rested its case, the trial court informed counsel that the news media wished to film the trial. The following day, the trial court, over defense objections, announced its intention to permit the filming and related a number of instructions it had imposed to ensure the unobtrusive filming of the trial.

[4] Defendant first argues that the trial court failed to exercise the discretion granted to it by this Court in *Order Concerning Electronic Media and Still Photography of Public Judicial Proceedings*, 306 N.C. 797 (1982) [hereinafter *Order Concerning Electronic Media*]. *See also* General Rules of Practice for the Superior and District Courts, Rule 15 (1992). In *Order Concerning Electronic Media*, we expressly provided that "[t]he presiding judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public judicial proceedings." *Order Concerning Electronic Media*, 306 N.C. at 797. Citing *State v. Ashe*, 314 N.C. 28, 35-37, 331 S.E.2d 652, 656-58, defendant contends that the trial court failed to exercise the discretion provided to it and this amounted to reversible error. However, after a review of the pertinent parts of the trial transcript we find no error to have occurred here, as the record reveals that the trial court exercised its discretion in allowing the filming of defendant's trial. *See State v. Eason*, 328 N.C. 409, 427, 402 S.E.2d 809, 816 (1991) (finding that trial judge did not use the words, "I am allowing it in my discretion," is not dispositive if the record shows the exercise of discretion).

[5, 6] Defendant also argues that the trial court erred in numerous respects in its implementation of the procedural requirements we set out in *Order Concerning Electronic Media* to ensure unobtrusive media coverage of trials.[2] First, defendant claims that the

2. In the case at bar, the court was approached by the media not at the outset of trial, a time apparently contemplated by our directives in *Order Concerning Electronic Media*, but rather at the near midpoint of the proceeding. We do not believe that the timing of the decision to allow media coverage diminishes in any way the importance of the procedural safeguards set in place in *Order*

court erred when it failed to instruct the jury that "[c]overage of jurors is prohibited expressly at any stage of a judicial proceeding." 306 N.C. at 797. Subsection 2(d) of our mandate provides that jurors *shall* be informed of this prohibition at the beginning of the jury selection process. *Id.* In this regard, the record reveals that it was the court's intention not to advise the jury that filming was taking place, and defendant's counsel agreed that defendant would rather the jury not be informed. The court stated to both counsel: "I don't intend to advise the jury that there's a camera in the courtroom. I don't think they'll know it." Second, defendant claims that the trial court violated *Order Concerning Electronic Media* by not ensuring that "[t]he location of equipment" for the media "shall be at a place . . . completely obscured from view from within the courtroom." *Id.* at 798. That the equipment was not so obscured is evident on the basis of comments made by members of the jury during recess, as discussed above. Third, defendant claims that the trial court erred when it permitted a microphone to be placed at the bench to allow electronic media coverage of bench conferences. Once again, *Order Concerning Electronic Media* expressly prohibits such coverage, stating that "there shall be no audio pickup or broadcast of conferences which occur . . . between counsel and the presiding judge held at the bench." *Id.* at 800-01.

Applying the standard of review articulated by the United States Supreme Court in *Chandler v. Florida*, 449 U.S. 560, 66 L. Ed. 2d 740 (1981), we find that while the trial court did err in applying the rules regarding the media coverage of the trial, such error did not prejudice defendant. In *Chandler*, the Court considered whether the filming of defendants' criminal trial violated due process. In rejecting defendant's constitutional claim, the Court stated:

> [T]he appellants have not attempted to show with any specificity that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them or that their trial was affected adversely by the impact on any of the participants of the presence of cameras and the prospect of broadcast.

Id. at 581, 66 L. Ed. 2d at 756.

Concerning Electronic Media. However, we reject defendant's contention that commencement of media coverage at near mid-trial, at a time a defendant begins to present his case, is prejudicial as a matter of law.

Like the *Chandler* Court, we reject defendant's claim of prejudice in the instant case. Rather than making specific allegations of prejudice, defendant makes only "generalized allegations of prejudice," *id.* at 577, 66 L. Ed. 2d at 753, which of themselves do not demonstrate prejudice of constitutional dimension. Indeed, the record reveals that defendant was aware of the jurors' cognizance of the media coverage yet made no objection. We therefore conclude that this claim has no merit.

[7] Defendant next contends that the jury instruction on reasonable doubt given in his case was constitutionally infirm. The instruction provided was as follows:

> A reasonable doubt, as that term is employed in the administration of criminal law, *is an honest, substantial misgiving*, generated by the insufficiency of the proof, an insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused.
>
> This does not mean satisfy beyond any doubt, nor satisfy beyond all doubt, nor does it mean satisfy beyond a shadow of a doubt, or some vain, imaginary or fanciful doubt.
>
> A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

(Emphasis added.)

Citing *Cage v. Louisiana*, --- U.S. ---, 112 L. Ed. 2d 339 (1990), defendant contends that the trial court unconstitutionally reduced the State's burden of proof as to his guilt. In *Cage*, the Supreme Court considered whether the following instruction on reasonable doubt violated defendant's due process rights:

> [Reasonable doubt must be] "*such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*"

Id. at ---, 112 L. Ed. 2d at 342 (quoting *Louisiana v. Cage*, 554 So. 2d 39, 41 (La. 1989)). In construing the instruction, the Court considered "how reasonable jurors could have understood the charge as a whole." *Id.*[3] The Court concluded that the combination of the terms in the reasonable doubt instruction amounted to constitutional error, stating:

> The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id. (citation omitted). Accordingly, the Court reversed the conviction of the defendant in *Cage* and remanded the case for further proceedings not inconsistent with its opinion.

Defendant argues that the trial court here impermissibly equated reasonable doubt with "an honest, substantial misgiving" and, in so doing, ran the risk that the jury could find guilt "based on a degree of proof below that required by the Due Process Clause." *Id.* We disagree. Significantly, the combination of the terms found offensive by the *Cage* Court is not present here. Indeed, none of the objectionable language present in *Cage*, "grave uncertainty," "actual substantial doubt," or "moral certainty," is evident in the instant jury instruction. Rather, here we are concerned merely with the phrase "substantial misgiving." Thus, like other courts that have considered this question, we conclude that the reasonable

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3. In *Estelle v. McGuire*, --- U.S. ---, 116 L. Ed. 2d 385 (1991), the Supreme Court reconsidered the standard of review articulated in *Cage* regarding jury instructions and reasserted the standard first enunciated in *Boyde v. California*, 494 U.S. 370, 108 L. Ed. 2d 316, *reh'g denied*, 495 U.S. 924, 109 L. Ed. 2d 322 (1990). In *Estelle*, the Court inquired " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle*, --- U.S. at ---, 116 L. Ed. 2d at 399 (quoting *Boyde*, 494 U.S. at 380, 108 L. Ed. 2d at 329).

doubt instruction given here is not constitutionally unsound. *See Parker v. Alabama*, 587 So. 2d 1072, 1085 (Ala. Crim. App. 1991); *South Carolina v. Johnson*, 410 S.E.2d 547, 554 (S.C. 1991), *cert. denied*, --- U.S. ---, 118 L. Ed. 2d 404 (1992).[4] Further support for this view is found in our prior case law that has repeatedly held that a definition of reasonable doubt does not require exactitude. *See State v. Watson*, 294 N.C. 159, 167, 240 S.E.2d 440, 446 (1978) ("the definition should be given in substantial accord with those approved by this [C]ourt, although no exact formula is required"). Indeed, the instruction provided by the trial court here is virtually identical to the instruction approved by this Court in *Watson*. In sum, we reject defendant's claim that the reasonable doubt instruction provided by the trial court here violated defendant's constitutional right to due process.

[8] In his next assignment of error, defendant contends that the trial court abused its discretion in refusing to comply with the jury's request to examine the transcript of the testimony of Dr. Bob Rollins. During the course of its deliberation, the jury requested the written reports of expert witnesses who testified to defendant's mental capacity and ability to differentiate between right and wrong. Dr. Rollins had not prepared a written report, so no such report was introduced into evidence or available to the jury; however, the written notes of Rollins were admitted into evidence and were available to the jury. The jury also requested a transcript of Rollins' testimony. The trial court then permitted the jury to review the available written reports of the others and the notes of Dr. Rollins but refused to permit the jury to examine a transcript of the Rollins testimony.

Under N.C.G.S. § 15A-1233, the trial court has the discretionary authority to permit the jury to reexamine writings that have been received into evidence and to rehear specified parts of the testimony heard at trial. N.C.G.S. § 15A-1233 (1988). In *State v. Ashe*, 314 N.C. 28, 34, 331 S.E.2d 652, 656, we stated that pursuant to N.C.G.S. § 15A-1233 "the trial court must exercise its discretion in determining whether to permit requested evidence

4. Additional support for the narrow reading of the Court's *Cage* opinion is found in *Gaskins v. McKellar*, --- U.S. ---, 114 L. Ed. 2d 728, *reh'g denied*, --- U.S. ---, 115 L. Ed. 2d 1098 (1991). There, Justice Stevens noted that the Court correctly denied certiorari because the jury instruction in *Gaskins* did not contain the "grave uncertainty" language condemned in *Cage*. *Id.* at ---, 114 L. Ed. 2d at 728-29 (Stevens, J., concurring).

to be read to or examined by the jury." Citing *Ashe* and *State v. Lang*, 301 N.C. 508, 272 S.E.2d 123 (1980), defendant contends that the trial court here failed to exercise its discretion. In *Lang*, after beginning deliberations, the jury requested that trial testimony be read to it. Denying the request, the trial court stated:

> "No sir, the transcript is not available to the jury. The lady who takes it down, of course, is just another individual like you 12 people. And what she hears may or may not be what you hear, and 12 of you people are expected, through your ability to hear and understand and to recall evidence, to establish what the testimony was."

Lang, 301 N.C. at 510-11, 272 S.E.2d at 125. The *Lang* Court concluded that the response by the trial judge was not an exercise of discretion and that the denial of the request because the transcript was "not available" was error. A similar result was reached in *Ashe*, where we found error on an identical basis. *Ashe*, 314 N.C. at 35, 331 S.E.2d at 656-57. Similar facts are present in the instant case. Here, the court responded to the jury's request as follows:

> I will provide you with the notes and report of Dr. Edwards, the notes and report of Dr. Rose, the notes of Dr. Rollins, the report of Dr. Dees, the report of Dr. Newmark, and the statement of Mr. McQueen.
>
> Now, with respect to any request for a transcript of any portions of the testimony, I would say to you that *there is no transcript available at this time* of any of the testimony. I would further say to you, as I did during my earlier instructions to you, that you are to rely on your recollection of the evidence as it was presented during the course of the trial during your deliberations.

(Emphasis added.) We find the above passage to be indistinguishable from that related to the juries in *Lang* and *Ashe* and held improper by this Court in those cases.

However, unlike *Lang* and *Ashe*, the trial court's action here did not involve prejudice amounting to reversible error. In both *Lang* and *Ashe*, the only defense presented related to alibi, and the jury desired to review evidence pertaining to this all-important matter. Here, on the other hand, the Rollins testimony was actually adverse to defendant because Rollins concluded that defendant was sane at the time of the killings. Also, the record reveals that Dr.

Rollins disagreed with the diagnoses of defense witnesses Edwards, Fidler, and Rose as to the defendant suffering from brief reactive psychosis. Furthermore, the jury was provided with the Rollins testimony in substance because his written notes were introduced into evidence and submitted to the jury for review. Therefore, we deem this claim to be meritless.

Defendant next argues that the trial court erred when it denied defendant's request to instruct the jury on the defense of insanity following its instructions on each particular offense. Specifically, the trial court instructed the jury to "consider this evidence [of defendant's legal insanity], only if you find that the State has proved beyond a reasonable doubt each of the elements of one of the offenses about which I have already instructed you." This instruction, defendant contends, was improper as it precluded the jury from considering "the substantial evidence of defendant's diminished, impaired mental capacity on the issues of premeditation, deliberation, specific intent to kill, or malice." Moreover, defendant contends that the instruction violated the federal and state Constitutions by relieving the State of a significant portion of its burden of proof because it required defendant to prove lack of capacity to the satisfaction of the jury before the jury was able to consider the evidence regarding the various offense elements.

With this assignment, we revisit the familiar territory encountered in our case of *State v. Cooper*, 286 N.C. 549, 213 S.E.2d 305 (1975).[5] In *Cooper*, defendant was charged with the murders of his wife and four of his children. A forensic psychiatrist testified at trial that defendant suffered from paranoid schizophrenia and that defendant was unable to distinguish right from wrong at the time of the murders. The trial court failed to instruct the jury that it should consider the evidence of defendant's mental disease on the question of premeditation and deliberation. *Id.* at 572, 213 S.E.2d at 320. The jury found that defendant was not legally insane at the time of the killings and convicted him of five counts of

5. Defendant also urges that this case is somehow controlled by *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). *Shank*, however, concerned the impropriety of the trial court's failure to allow expert opinion testimony as to defendant's diminished capacity at the time of the first-degree murder with which he was charged. We found this refusal to be error, concluding that under Rule of Evidence 704 such testimony was admissible and it concerned the element of premeditation and deliberation, making it highly relevant. In the case at bar, we consider the propriety of the trial court's instructions to the jury, a wholly distinct matter.

first-degree murder, resulting in the imposition of five sentences of life imprisonment. On appeal, the defendant argued before this Court that the trial court erred in failing to instruct the jury that it should consider evidence of his mental disease on the question of whether he premeditated and deliberated the killings. We held that no reversible error occurred. *Id.* at 572-73, 213 S.E.2d at 320-21.

[9] As an initial matter, we reject defendant's contention that the trial court erred in refusing a defense request to have the jury determine defendant's sanity first, before considering defendant's guilt as to the substantive offenses. This option was considered in *Cooper* to be the "better procedure," relative to the procedure employed in the case at bar. However, the *Cooper* Court stated that such a procedure was merely advisory and held that the failure to so instruct did not constitute error. *Cooper*, 286 N.C. at 571, 213 S.E.2d at 320; *see also State v. Adcock*, 310 N.C. 1, 21, 310 S.E.2d 587, 599 (1984). We conclude likewise here.

[10] We also reject defendant's contention that the trial court's instruction to the jury was in error because it precluded the jury from considering purported evidence of defendant's diminished mental capacity. The record fails to reveal any evidence that such an instruction was requested. Therefore, under Rule 10(b)(2), defendant waived his right to assign as error the trial court's failure to so instruct. N.C. R. App. P. 10(b)(2).

[11] Similarly, we reject defendant's claim that the trial court's instruction violated due process because it impermissibly lessened the State's obligation to prove the elements of the crimes with which he was charged. The identical claim was addressed by this Court in *State v. Mize*, 315 N.C. 285, 292-94, 337 S.E.2d 562, 567 (1985), and was rejected.

[12] In his next assignment of error, defendant argues that the trial court violated his federal and state due process rights in not enforcing a plea bargain agreement allegedly entered into by defendant and the State and that defendant was prejudiced by this violation. The record reveals that negotiations between defendant and the State resulted in an offer for defendant to plead guilty to two counts of second-degree murder and receive two, consecutive fifty-year sentences. On 14 June 1986, defendant agreed to this proposal. Within a week, defense counsel communicated the agreement to the prosecutor, who then revealed the necessity of defend-

ant settling a separate civil lawsuit involving defendant and the family of the victims. Defendant orally accepted the proposal, and sometime thereafter the prosecutor withdrew it. Defendant alleges that in the interim he relied upon the agreement to his detriment by suspending trial preparations, including the investigation and development of a potential insanity defense.

The trial court denied defendant's motion to enforce the plea bargain agreement and entered a lengthy order containing extensive findings of facts and conclusions of law. The court found as a matter of law "that there was not a meeting of the minds . . . and that there was not, therefore, a plea bargain agreement reached between the State of North Carolina and the defendant in these cases." The court also found that "even if a plea bargain agreement did exist between the State of North Carolina and the defendant in these cases as of June 20, 1986, that the defendant has not changed his position in detrimental reliance upon the agreement."

The law in this area was set out in *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980), in which we considered the enforceability of a plea bargain agreement under similar circumstances. The defendant in *Collins* entered into a written plea bargain agreement with the State, which the State subsequently refused to honor. The trial judge denied defendant's motion to enforce the agreement. *Id.* at 143-44, 265 S.E.2d at 173. We examined recent federal constitutional cases in this area, most notably *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427 (1971), and *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979), and concluded that the trial court did not commit constitutional error in refusing to enforce the plea bargain agreement. In *Collins*, we stated:

> We therefore hold that there is no absolute right to have a guilty plea accepted. The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement.

300 N.C. at 148, 265 S.E.2d at 176. Because defendant had neither entered a guilty plea nor in any way relied on the agreement to his detriment, the *Collins* Court denied defendant's appeal.

As a state constitutional matter, the *Collins* Court concluded that the existence of N.C.G.S. § 15A-1023(b) provided even greater support for the State's position, and distinguished *Collins* from *Cooper v. United States*, 594 F.2d 12. N.C.G.S. § 15A-1023(b) provides that a plea bargain agreement proposed by the State that involves a recommended sentence must first be approved by the trial court before it can become effective. "Such a lack of judicial approval when required by statute renders the proposed plea bargain agreement null and void." *Collins*, 300 N.C. at 149, 265 S.E.2d at 176. "[T]he prosecutor ha[s] no authority to bind the State to the dispensation of a particular sentence in defendant's case until the trial judge ha[s] approved of the proposed sentence." *Id.* at 150, 265 S.E.2d at 176-77.

The issue was revisited recently by the federal courts in *Mabry v. Johnson*, 467 U.S. 504, 81 L. Ed. 2d 437 (1984). There, the Supreme Court noted that "[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Id.* at 507, 81 L. Ed. 2d at 442. "[T]here is a critical difference between an entitlement and a mere hope or expectation that the trial court will follow the prosecutor's recommendation." *Id.* at 507 n.5, 81 L. Ed. 2d at 442 n.5.

Because defendant did not enter a guilty plea pursuant to the purported agreement, whether defendant's federal due process rights were violated turns on whether the facts reveal that defendant relied to his detriment on the agreement. We agree with the trial court's conclusion that no such reliance is evident.

Indeed, acceptance of the purported plea bargain agreement was communicated on 20 June 1986. On 1 August 1986, the State officially withdrew the agreement by means of a letter; the trial commenced 9 February 1987. The defense contends that it ceased pursuit of its case until December 1986, attributing the six-month lapse to the State's reneging on the agreement. We disagree. As noted by the *Collins* Court, a plea bargain agreement involving a sentence recommendation by the State must first have judicial approval pursuant to N.C.G.S. § 15A-1023(b) before it is enforceable; it is merely an executory agreement until approved by the court. The alleged plea bargain agreement here involved a sentence recommendation, namely, that defendant plead guilty to two counts of

second-degree murder and receive two, consecutive fifty-year sentences. Thus, the understanding between defendant and the State, if any, not having been approved by the trial judge, was merely executory and of no effect as a matter of law. Any reliance by defendant, therefore, was not reasonable. Defendant's assertions of detriment here are decidedly nonspecific and are rendered doubtful in the face of the extensive psychiatric testimony actually mounted at trial. Moreover, the trial judge found that defendant had not changed his position in detrimental reliance upon the agreement.

Defendant's claim is similarly unavailing on state constitutional grounds. Given the absence of judicial approval pursuant to N.C.G.S. § 15A-1023(b), the agreement was of no effect. Because judicial approval did not occur, we reject defendant's state constitutional claim.

[13] Defendant's next basis for appeal concerns the testimony, over defense objection, of an emergency room physician, Dr. Mayer, that defendant did not appear psychotic during an emergency room visit two weeks prior to the killings in the instant case. The trial court agreed that Mayer was not qualified as an expert, and therefore no opinion testimony was allowable. However, the court ruled that Mayer could be asked about matters related to his more general practice and medical education. The transcript reveals the following cross-examination of Mayer by the State:

> BY MR. GOODMAN:
>
> Q Dr. Mayer, during your years of medical experience, and particularly as an emergency physician, have you had an opportunity to observe and see individuals in a psychotic situation, or who were psychotic?
>
> A Yes, I have.
>
> Q All right. Based upon your medical training and knowledge and experience, what are, and can you describe the general symptoms of somebody in a psychotic state, due to an emotional situation?
>
> A Okay. First of all, I'm not a psychiatrist or a psychologist.
>
> MR. MANNING: We'd object then.
>
> THE COURT: Well, overruled, if he knows.

A But from my perspective, when I see a patient, if they break from reality and cannot function in reality any longer, they've entered a psychotic state.

Q What are the physical symptoms, if you will, that you've observed in persons in a psychotic state?

A Most of them were emotional symptoms of how to respond to me, if they're hallucinating, if they're not answering questions appropriately, if they're looking off into the distance while I'm talking to them and not acting appropriately, those are things I look for in the psychotic patients that I see.

Q Now, did you observe any of those symptoms that you've enunciated, or any of the other symptoms that you have previously observed in a person in a psychotic state in Dr. Hudson on March 10, 1986?

MR. O'DONNELL: Object to the form of the question.

A No, I did not.

THE COURT: Overruled.

Defendant contends that the trial court acted improperly in overruling defendant's objection to the State's cross-examination of Mayer as to defendant's mental state at the time of his emergency room visit. Defendant argues that merely because the questions were artfully crafted so as not to require a response prefaced by "In my opinion," the statements made by Mayer nonetheless amounted to unwarranted opinion testimony. Accordingly, the trial court erred in holding that Mayer could not offer an opinion but could draw inferences based in part upon his general expertise. Defendant argues that this action by the court violated our prohibition of expert testimony by nonqualified witnesses. *State v. Satterfield*, 300 N.C. 621, 628, 268 S.E.2d 510, 515 (1980). Moreover, defendant contends, this is not an instance where the trial court implicitly found that the witness was an expert. *See Apex Tire & Rubber Co. v. Tire Co.*, 270 N.C. 50, 153 S.E.2d 737 (1967). Here, the trial court expressly concluded that Dr. Mayer had not been qualified as an expert. Moreover, defendant contends that the testimony prejudiced him because of the conclusory nature of Mayer's testimony and the fact that the emergency room visit occurred only two weeks prior to the killings.

Assuming *arguendo* that it was error to admit Dr. Mayer's testimony in this regard, the trial court's action here did not amount to prejudicial error because defendant waived any objection that he may have had. The transcript reveals that subsequent to the testimony objected to by defendant as described above, defense counsel engaged in the following colloquy with Dr. Mayer on redirect:

> Q Dr. Mayer, your testimony was that you didn't feel that Dr. Hudson was psychotic when you saw him; isn't that correct?
>
> A That's correct.
>
> Q You felt, I think, that he was having a situational reaction?
>
> A That's correct.

Later, on recross-examination, the prosecutor asked the following question, not objected to by defendant:

> Q I'm asking, the symptoms that you observed in Dr. Hudson on March 10th were any of those symptoms consistent with your observations of a person in a psychotic state?
>
> A No they were not.

In *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979), we stated: "It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." Because defendant waived his prior objection this assignment is overruled.

[14] Next, defendant contends that the trial court erred in overruling defendant's repeated objections to references made by the State during the cross-examination of defendant regarding his sexual proclivities. This examination included references to written communications defendant had with other married couples and with women other than his wife regarding sexual activity. Defendant concedes that objections were not lodged against all such inquiries and argues that the references nevertheless amounted to "plain error." Defendant argues that the cross-examination had no relevance to any material fact and had no probative value with respect to impeaching defendant's veracity.

During the presentation of the State's case-in-chief, Detective Brady of the Greensboro Police Department testified. On cross-examination by the defense, Brady was requested to read into

the record a statement given by defendant on the night of the killings. This statement was as follows:

> "On approximately six or seven different times, I had affairs with different women, but [Kathryn] probably knew about only three of them. But I had terminated all of this behavior since August 1985. But about three or four weeks ago, [Kathryn] had found some letters in my briefcase that I had written to some women. One of the letters was current, and the other one went further back than a year or more. My affairs were also with out-of-town women, as I never saw any women here in Greensboro, due to my position here in the community.
>
> "At one point in our marriage, I suggested that we go to a nudist colony, but [Kathryn] didn't want any part of it. She finally just told me to do my thing, but don't bring home any pregnant women or diseases. As far as I am aware, [Kathryn] never had any affairs with anyone.["]

Further, direct examination of defendant resulted in the following exchange between defendant and his counsel:

> Q What was under the bed in your and [Kathryn's] bedroom at your house?
>
> A What was under there?
>
> Q Yes.
>
> A My guns.
>
> Q And what else?
>
> A Some adult magazine, correspondences, things that [Kathryn] and I had shared between '79 and about '82.
>
> Q And was some of that material pornographic?
>
> A Yes.
>
> Q Why did you have it there?
>
> A We were a very erotic couple. It was something we were involved with for a short while together, and then later, I was involved with to a minor degree for a couple or three years. It had been under the bed, most of it, for three or

four years, without us even looking at it, except maybe at night, sharing a laugh, looking at it, that type of thing.

On numerous occasions, we have considered the propriety of efforts to elicit testimony from witnesses regarding their sexual behavior. In *State v. Scott*, 318 N.C. 237, 243, 347 S.E.2d 414, 418 (1986), we stated that such a cross-examination was improper because "instances of sexual relations or proclivities[ ] fall[ ] outside the bounds of admissibility under Rule 608(b)." Indeed, such extrinsic evidence rarely will be probative of a witness' character for truthfulness, as is required by Rule 608(b). *See* N.C.G.S. § 8C-1, Rule 608(b) (1988).

The State first contends that the cross-examination references to defendant's extramarital affairs and other sexual behavior were directed toward contesting defendant's assertion in the statement provided to Detective Brady that defendant had terminated such activities in August 1985. Moreover, the State argues that defendant opened the door to the references to illicit sexual activity by means of the above-described direct examination of defendant by defense counsel and the admission of defendant's statement during cross-examination of Detective Brady. Finally, the State argues that the alleged error does not reach the level of plain error. The defendant never denied killing his wife and daughter; his sole defense was that he did so while legally insane. Once the jury rejected the insanity defense, the evidence of guilt was unequivocal.

A review of the record reveals that defendant, early on in the cross-examination, conceded that after 1985 he corresponded with other adults about sexual matters and possible physical encounters but that he did not consider such activities to be "affairs." Therefore, his statement to Detective Brady that he ceased encounters of a physical nature, "affairs," was truthful. The record also reveals that none of the State's references to the illicit activities concerned actual physical contact between defendant and others. On this basis, the State's continued references to the defendant's purported nonphysical activities with adults were improper.

We agree with the State, however, that defendant opened the door to the cross-examination of defendant regarding his various and extensive illicit activities during the course of his marriage to Kathryn Hudson. In *State v. Albert*, 303 N.C. 173, 277 S.E.2d 439 (1981), we related the following principle:

> [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.

Id. at 177, 277 S.E.2d at 441. Here, defendant conceded on direct examination that he and his wife were a "very erotic couple." Further, defendant's statement to Detective Brady, read into evidence at the initiative of defendant, alluded to numerous extramarital affairs. Thus, seen in context, the State's inquiries regarding defendant's sexual proclivities were not impermissible. We therefore deem this assignment of error to be without merit.

Defendant next objects to the fifty-year sentence he received for the second-degree murder of Kathryn Hudson, claiming that the sentence impermissibly exceeded the presumptive sentence of fifteen years. The sentence, in part, was based upon two aggravating factors: that the offense was especially heinous, atrocious, or cruel and that defendant committed perjury during the trial. Defendant notes that when a sentencing court relies on an aggravating factor lacking in either evidentiary or legal support, the matter must be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983).

[15] Defendant contends that there existed insufficient evidence to support a finding that the killing of Kathryn Hudson was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-1340.4(a)(1)(f) (1991). In examining whether the evidence supports this aggravating factor, "the focus should be on whether the facts of the case disclosed *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983). It is not "inappropriate in any case to measure the brutality of the crime by the extent of the physical mutilation of the body of the deceased or surviving victim." *Id.* at 415, 306 S.E.2d at 787.

In *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983), defendant entered a plea of guilty to second-degree murder. The evidence disclosed that the victim was beaten with a stick, fracturing his skull in several places and driving the orb of one eye into the

brain. We held that the evidence supported the finding that the crime was especially heinous, atrocious, or cruel.

As in *Benbow*, we find support for the finding here. The autopsy of Kathryn Hudson revealed that in her killing, apparently carried out with a butcher knife, the brutality was excessive and the injuries severe. The victim sustained numerous blunt trauma injuries to the forehead, nose, eye, and cheek areas. There also was a stab wound to the right side of the neck, and at least three severe incise wounds, one extending eleven inches, running from the left side of her neck through the right side to a midpoint on the back of the neck. This massive incision damaged the right and left carotid arteries and right and left jugular veins and was so deep as to damage the spine. According to the medical examiner, defendant used substantial force as he slashed his victim more than three times with the murder weapon. The autopsy revealed that the victim died as a result of the loss of blood and possibly interference with the oxygen supply to the body because of severance of the windpipe. Moreover, the evidence at trial indicated that as life was ebbing from the victim, Kathryn Hudson, three-year old Wilma Dale, defendant's second murder victim, watched and cried uncontrollably. Under the circumstances, extreme psychological suffering and torment in both the mother and child would be natural. We conclude that there was ample evidence to support the trial court's finding that the murder, which involved repeated stabbings resulting in severe and massive incised wounds and considerable loss of blood, was especially heinous, atrocious, or cruel.

[16] The trial court also found that Kathryn Hudson's killing was aggravated by the fact that defendant perjured himself during his trial. In *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984), we expressed significant reservations about the use of perjury as a nonstatutory aggravating factor, saying a "trial judge should exercise extreme caution in this area and should refrain from finding perjury as an aggravating factor except *in the most extreme case.*" *Id.* at 227, 311 S.E.2d at 876 (emphasis added). Four years later, in *State v. Vandiver*, 321 N.C. 570, 574, 364 S.E.2d 373, 375 (1988), we reexamined our position in *Thompson* and held that a finding of perjury constituted an impermissible aggravating factor and could not, as a matter of law, be considered in the sentencing decision. Significantly, however, we stated that the rule would be effective only as to sentencing proceedings commencing on or after the certification date of the *Vandiver* opinion, which was 23 February

1988. Here, defendant was sentenced approximately ten months prior to the certification date of *Vandiver*, thereby rendering the court's application of the factor permissible here.

[17] We conclude that the "extreme case" standard enunciated in *Thompson* is satisfied here. The record reveals numerous significant contradictions between the testimony of defendant and the record, and the trial court's finding of perjury is supported by a preponderance of the evidence. *State v. Ahearn*, 307 N.C. 584, 596, 300 S.E.2d 689, 696-97.

First, defendant testified at trial that on the day before the murder, he grazed himself with a bullet while trying to commit suicide while seated in his car with a .38-caliber revolver. However, when Dr. James Kindl examined defendant on the day of the murders, he discovered no such graze mark. Moreover, when the revolver was recovered from defendant's car by the police, the revolver was fully loaded. Also, the police discovered no bullet holes within the vehicle. Altogether, the record reveals that defendant perjured himself on the basis of his assertion that he attempted to commit suicide the day prior to the killings.

Second, the record belies defendant's assertion that Kathryn Hudson attacked defendant with a butcher knife prior to the murders and that the attack accounted for a number of injuries defendant complained of during his examination by Dr. Kindl on the day of the murders. None of the clothing defendant wore at the time of the killings revealed any cuts or slashes naturally attending an attack with a butcher knife. Further, in confiding with jailmate Roger McQueen, his ersatz legal advisor, defendant never mentioned anything about his wife attacking him with a butcher knife.

Third, defendant testified on cross-examination that his knowledge of this State's law relating to the insanity defense was limited to what he was told by his counsel. This contention is belied by testimony by Roger McQueen that indicated that defendant did a substantial amount of research in this area while being held as a safekeeper.

Finally, defendant testified that after he was attacked by Kathryn Hudson with a butcher knife, he remembered nothing else until he was at the sink washing his hands. This testimony was decisively contradicted by the record, which reveals that at least fifteen minutes passed between the killings of the mother

and daughter and that defendant admitted that he killed Wilma Dale to "make it fit."

Taken together, defendant's false assertions under oath amply support the nonstatutory aggravating factor that defendant perjured himself during his trial. Unlike *Vandiver*, where the trial court supported its finding of perjury only on the basis of the jury's guilty verdict, 321 N.C. at 574, 364 S.E.2d at 375, here ample evidence exists of perjury. In sum, we conclude that the trial court did not err in employing perjury as a nonstatutory aggravating factor.

[18] Nevertheless, defendant argues that failure to apply the *Vandiver* rule retroactively constitutes a violation of defendant's federal and state due process rights. Support for defendant's view is found in the recent Supreme Court case of *Griffith v. Kentucky*, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 661 (1987), where the Court provided that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." Here, because defendant's appeal was pending before this Court at the time *Vandiver* was certified, defendant argues that the *Vandiver* rule should be applied retroactively.

An examination of *Griffith* and the long series of contradictory cases regarding retroactivity culminating with *Griffith*, however, reveals that the *Vandiver* rule need not be applied retroactively. Significantly, *Griffith* and the cases preceding it concerned the announcement of new rules concerning *constitutional* rights of the accused. *See, e.g., Griffith*, 479 U.S. 314, 93 L. Ed. 2d 649 (Equal Protection Clause and *Batson*); *Allen v. Hardy*, 478 U.S. 255, 92 L. Ed. 2d 199 (1986) (Equal Protection Clause and *Batson*); *Shea v. Louisiana*, 470 U.S. 51, 84 L. Ed. 2d 38 (1985) (Fifth Amendment and *Edwards*); *United States v. Johnson*, 457 U.S. 537, 73 L. Ed. 2d 202 (1982) (Fourth Amendment and *Payne*); *Linkletter v. Walker*, 381 U.S. 618, 14 L. Ed. 2d 601 (1965) (Fourth Amendment and *Mapp*). This distinction was expressly related in *Griffith*, where the Court provided: "[F]ailure to apply a newly declared *constitutional rule* to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322, 93 L. Ed. 2d at 658 (emphasis added).

The "new rule" before the Court in the instant case is not of constitutional magnitude. It is clear that the discouragement of the use of the aggravator stems from practical concerns over

its application, rather than any abiding concern for the constitutional rights of defendants as was the case in *Griffith*, and was prescribed by this Court pursuant to its powers to prescribe rules of practice and procedure under N.C.G.S. § 7A-34 and Article IV, Section 13 of the North Carolina Constitution. According to the *Vandiver* Court, the use of perjury as an aggravating factor was precluded because:

> The "extreme case" standard has proved unworkable and our words of caution insufficient bulwarks against misuse of the aggravating factor. . . .
>
> Because a trial judge's determination of the factor is basically dependent upon his subjective evaluation of the defendant's demeanor, we find it impossible to formulate adequately concrete guidelines to prevent future erroneous findings. In the interests of justice, we therefore hold that perjury may no longer constitute a nonstatutory aggravating factor in North Carolina.

Vandiver, 321 N.C. at 573-74, 364 S.E.2d at 375. For this reason, we reaffirm our statement in *Vandiver* that the *Vandiver* rule is not to apply retroactively.

[19] Finally, defendant assigns error to the trial court's refusal to find the statutory mitigating factor that "the relationship between the defendant and the victim was . . . extenuating." N.C.G.S. § 15A-1340.4(a)(2)(i) (Supp. 1991). Defendant argues that the uncontroverted evidence adduced at trial established that such a relationship existed between him and his wife and that therefore the matter must be remanded for a new sentencing hearing. *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983). We disagree.

In *State v. Watson*, 311 N.C. 252, 257, 316 S.E.2d 293, 297 (1984), we responded to a similar claim as follows: "We decline to hold . . . that a relationship between husband and wife, including marital difficulties in the past, is sufficient, standing alone, to support a finding of this mitigating factor." We reach the identical conclusion here.

In conclusion, we hold that defendant received a fair trial free of prejudicial error.

No error.

Justice WEBB concurring.

I concur with the result reached by the majority but not with all its reasoning.

The majority says that it was harmless error to admit Dr. Mayer's testimony that the defendant did not exhibit the symptoms of a person in a psychotic state. I would hold it was not error to admit this testimony. A witness may testify as to the mental condition or capacity of a person if he has had a chance to observe that person although the witness is not an expert in mental disorders. *See* 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 127 (3d ed. 1988).

STATE OF NORTH CAROLINA v. THOMAS JOHN REEB AND RANDY LEE SCOTT

No. 582A88

(Filed 22 April 1992)

1. **Criminal Law § 78 (NCI4th)— change of venue—pretrial publicity—denied**

The trial court did not err in a murder prosecution by denying defendants' motions that their trials be moved to another county or that a jury be drawn from a special venire from another county due to pretrial publicity where there was no testimony that Rowan County was permeated with prejudice against the defendants; four of the jurors said they had no prior knowledge of the case; and the other eight jurors who said they had heard about the case before trial stated that they had formed no opinion as to the guilt or innocence of the defendants and would not be prejudiced by the pretrial publicity. N.C.G.S. § 15A-957.

Am Jur 2d, Criminal Law § 688.

Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.

2. **Jury § 6 (NCI3d)— murder—individual voir dire—denied**

There was no abuse of discretion in a murder prosecution in the denial of individual voir dire where defendants contend-

ed that they were restricted in their examinations of prospective jurors by not being able to ask certain questions.

Am Jur 2d, Jury §§ 197, 200.

3. Criminal Law § 319 (NCI4th)— murder—defendants consolidated for trial—no error

The trial court did not err by consolidating for trial the prosecutions of two defendants for murder, assault, and armed robbery where it is apparent, considering all of the evidence, that the defendants were not deprived of a fair trial by the consolidation of their cases; the State presented plenary evidence for the jury to convict both defendants of the crimes with which they were charged; and inconsistencies between a witness's testimony at the preliminary hearing and at trial does not rise to the level of antagonistic defenses which require severance of the charges against defendants. N.C.G.S. § 15A-927(c)(2).

Am Jur 2d, Trial §§ 157, 158, 170.

Antagonistic defenses as ground for separate trials of codefendants in criminal case. 82 ALR3d 245.

4. Evidence and Witnesses § 1025 (NCI4th)— hearsay—statement against interest—no corroborating circumstances

The trial court did not err in a prosecution for murder, assault and armed robbery by excluding a statement made to the witness by defendant Scott while he was in jail. The record does not show what the testimony would have been if the witness had been allowed to finish her answer; if the answer was against penal interest, it was not accompanied by corroborating circumstances which clearly indicated the trustworthiness of the statement; and the rule of *Chambers v. Mississippi*, 410 U.S. 284, does not apply. N.C.G.S. § 8C-1, Rule 804.

Am Jur 2d, Evidence § 610.

Admissibility, as against penal interest, in criminal case of declaration of commission of criminal act. 92 ALR3d 1164.

5. Criminal Law § 775 (NCI4th)— voluntary intoxication—instructions—harmless error

There was no prejudicial error in a prosecution for murder, assault and armed robbery in an erroneous instruction on voluntary intoxication as it affected defendants' ability to premeditate and deliberate in forming the intent to kill the victim where the evidence fell far short of showing that defendants were so intoxicated that the State could not prove they formed an intent. The defendants contended that there was prejudice in that the instruction took the matter of intoxication away from consideration by the jury, but the Supreme Court was confident that the jury would not have found that either of the two defendants was so intoxicated that he could not form an intent if the instruction had not been given.

Am Jur 2d, Homicide § 517; Trial §§ 1279, 1280.

6. Assault and Battery § 13 (NCI4th)— acting in concert—evidence sufficient

The trial court did not err by denying defendant Scott's motion to dismiss an assault charge based on acting in concert where there was evidence that the defendants went together to the home of the victims with the intent to rob them; defendants were armed so that they could carry out this plan; after two people were sent from the home, defendants conferred softly in the kitchen; defendant Reeb immediately returned to the room where the victim was being held and fired a pistol at her, but did not hit her; after the other victim was shot, there was a further colloquy between defendants; and the first victim was then shot by Reeb.

Am Jur 2d, Assault and Battery § 11.

7. Criminal Law § 793 (NCI4th)— acting in concert—instruction—no error

There was no error in an armed robbery and assault prosecution in the court's instructions that, if two persons join in a common purpose to commit robbery, each of them actually present is guilty as a principal if the other commits that crime and is also guilty of any other crimes committed by the others in pursuance of the common purpose or as a natural and probable consequence thereof, and also that, if two or more persons act together with a common purpose to commit armed robbery,

each of them is held responsible for the actions of the others done in the commission of the crime. The first cited portion of the charge is a correct statement of the law, and the second a correct application of the law.

Am Jur 2d, Criminal Law §§ 163, 166-178.

8. **Assault and Battery § 13 (NCI4th)— aiding and abetting—instruction—no error**

There was no plain error in an assault prosecution where the court instructed the jury that, if they did not find a common purpose of aiding and abetting, they would decide whether the evidence shows beyond a reasonable doubt that each of the defendants is guilty of the crime as charged, defendant contended that there was no evidence that he committed an assault except as an aider and abettor or while acting in concert, and defendant did not object to this portion of the charge. This portion of the charge did not have a probable impact on the jury's finding of guilt.

Am Jur 2d, Criminal Law §§ 163, 166-178.

9. **Homicide § 10 (NCI4th)— premeditation and deliberation—acting in concert or aiding and abetting—evidence sufficient**

There was no error in not dismissing the charge of murder against defendant Scott based on premeditation and deliberation and not arresting judgment on the underlying felony of armed robbery where defendant Scott went to the victim's home armed with a pistol; he was the first person to draw his gun; he conferred with defendant Reeb in the kitchen immediately before the killing; both defendants then returned to the room where the victims were being kept and defendant Reeb fired at Ms. Hensley but missed; and Reeb then shot and killed Mr. Grade. This was evidence from which the jury could conclude that defendants planned the murder in the kitchen and returned to the room to carry it out with defendant Scott being there to assist defendant Reeb.

Am Jur 2d, Criminal Law §§ 163, 166-178.

10. **Homicide § 512 (NCI4th)— first degree murder—instructions—premeditation and deliberation**

There was no plain error in a prosecution for assault, armed robbery and murder where the court lumped the two defendants together so that the jury was instructed that to

find the defendants guilty the jury must find "defendants acted after premeditation and deliberation" and that the "defendants act[ed] with deliberation." At another place in the charge, the court told the jury that, although the cases had been consolidated for trial, the burden of proof was on the State to prove the guilt of each defendant. This adequately explained to the jury that it should not find one defendant guilty because it found the other defendant guilty.

Am Jur 2d, Homicide § 501.

11. Homicide § 496 (NCI4th)— premeditation and deliberation— consideration of threats and use of grossly excessive force

There was no error in a murder prosecution where the trial court instructed the jury that it could consider, in determining premeditation and deliberation, whether the two defendants used grossly excessive force or made any threats or declarations concerning the killing. The evidence showed that defendant Scott was the first to draw a gun and that he said at that time, "[t]his ain't no joke," which constitutes evidence of a threat, and there was excessive force if the jury found that one victim was shot while the defendants were acting in concert and the victim was bound and lying helpless on the floor.

Am Jur 2d, Homicide §§ 439, 501.

12. Evidence and Witnesses § 3082 (NCI4th)— inconsistent statements—preliminary hearing—admissible

There was no prejudicial error in the admission by defendant Reeb of a transcript of the preliminary hearing to impeach a witness's trial testimony by means of inconsistent statements where defendant Scott contended that the evidence did not lessen Reeb's culpability but increased Scott's culpability. The jury could have found defendant Scott guilty if they believed the witness's testimony at trial or at the preliminary hearing.

Am Jur 2d, Witnesses §§ 596, 597, 603.

13. Criminal Law § 414 (NCI4th)— murder—introduction of evidence by codefendant—concluding argument

The Supreme Court declined to review Rule 10 of the General Rules of Practice for the Superior and District Courts where the State was allowed the last argument to the jury

because a codefendant had introduced into evidence the transcript of a witness's testimony at a preliminary hearing.

Am Jur 2d, Trial §§ 539, 540, 544-546.

14. Criminal Law § 1122 (NCI4th)— assault—aggravating factor—victim left in pain and bleeding without rendering assistance

The trial court did not err when sentencing defendants for assault with a deadly weapon with intent to kill inflicting serious injury by finding for each defendant the nonstatutory aggravating factor that, after shooting the female victim and as part of the same transaction, defendant mercilessly left the victim who was then bleeding and in great pain, without rendering any type of assistance to her. Refusing to help a victim after the crime of assault is complete is not an inherent part of the crime, and leaving without showing mercy is not inherent in intent to kill.

Am Jur 2d, Criminal Law §§ 598, 599.

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

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing life sentences entered by *Friday, J.*, on 25 August 1988 at a Criminal Session of Superior Court, ROWAN County, upon jury verdicts of first degree murder. Defendants' motions to bypass the Court of Appeals as to additional judgments allowed by the Supreme Court on 20 February 1990. Heard in the Supreme Court 15 November 1990.

Each of the defendants was tried for first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury and armed robbery. The Court allowed a motion by the State to consolidate the cases for trial and denied motions by the defendants that the cases be severed.

Cindy Hensley testified for the State that on 8 December 1986 between 11:00 p.m. and midnight she was in Salisbury at the home of Gary Grade. At that time Randy Scott, his wife Brenda Scott, Cat Andrews and Thomas Reeb came to Mr. Grade's home. Randy Scott, Andrews, and Reeb drew pistols and forced Gary Grade to lie on the floor. While Andrews stood guard, Randy Scott, Brenda Scott and Tom Reeb ransacked the house. Mr. Grade was forced to open his lock box and Ms. Hensley was forced to strip

in order for the four persons to search her clothes. Ms. Hensley testified that the four persons took $500, Mr. Grade's gold ring and jewelry belonging to Ms. Hensley worth $4,000. Ms. Hensley testified that at that time Reeb bound her hands and Mr. Grade's hands behind their backs with duct tape and forced them to lie face down on the floor. Reeb then wrapped duct tape around Ms. Hensley's head and mouth.

Either Randy Scott or Reeb directed Brenda Scott and Cat Andrews to go outside. Defendants Reeb and Scott went to the kitchen. Ms. Hensley testified that after Reeb and Scott had been in the kitchen for a few moments they returned to the living room. Reeb straddled Ms. Hensley and put a pillow over her face as she struggled. A gun was fired. The bullet missed her but she lay still pretending she was dead. She testified that she then saw Reeb straddle Mr. Grade and point the pistol at him. She closed her eyes and heard the gun fire. Mr. Grade died from the gunshot.

Ms. Hensley testified further that after Mr. Grade had been shot, Reeb returned to her, put a pillow over her face and shot her in the face. Before Reeb and Scott left the house one of them said "she's alive," "just let her die." "She'll die anyway." "Let her die slow."

On 10 December 1986 the defendant Reeb went to the home of Donna Wright. Ms. Wright told Reeb that she had read of the shooting in the newspaper. Reeb said, "I know it." "I shot the cunt twice." "She should be dead." "I blowed the son of a bitch's brains out." Reeb then drew his gun and said, "if you say anything, you'll get the same thing."

Each of the defendants was convicted of first degree murder based on premeditation and deliberation and on felony murder. Each of them was also convicted of armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury. After a sentencing proceeding, the jury did not recommend the death penalty for either defendant.

Each of the defendants was sentenced to life in prison for first degree murder. After finding that the aggravating factors outweighed the mitigating factors, the court sentenced each defendant to twenty years for the assault with a deadly weapon with intent to kill resulting in serious injury to commence at the expiration of the life sentences. Reeb was sentenced to an additional

thirty years for armed robbery. Scott was sentenced to an additional fourteen years for armed robbery.

The defendants appealed.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant appellant Randy Lee Scott.

James R. Glover for defendant appellant Thomas John Reeb.

WEBB, Justice.

[1] Both defendants assign error to the denial of their motions, made prior to trial and repeated immediately before the trial commenced, that their trials be moved to another county or that a jury be drawn from a special venire from another county. The defendants contended that the pretrial publicity made it impossible for the defendants to receive fair trials in Rowan County. The removal of a case to another county or the drawing of a special venire from another county is governed by N.C.G.S. § 15A-957 which provides in part:

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or
>
> (2) Order a special venire under the terms of G.S. 15A-958.

This Court has interpreted this section in many cases. *See State v. Hunt*, 325 N.C. 187, 381 S.E.2d 453 (1989); *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988); *State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (1987); *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984); and *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984).

The above cases establish that the purpose of N.C.G.S. § 15A-957 is to insure that jurors decide cases based on evidence introduced at trial and not on something they have heard outside the court-

room. The burden is on the moving party to show that due to pretrial publicity, there is a reasonable likelihood that defendant will not receive a fair trial. If newsmedia reports are relied on by the moving party and such accounts are factual and consist of matters which may be introduced at trial, a motion for change of venue should not ordinarily be granted. In most cases, a showing of identifiable prejudice to the accused must be made, and relevant to this inquiry is testimony by potential jurors that they can decide the case based on the evidence presented and not on pretrial publicity. However, we held in *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983), that when a moving party produces evidence in the form of uncontradicted testimony from several witnesses that a county is so permeated with a prejudice against him that he cannot receive a fair trial, the trial court should have moved the trial or ordered a special venire from another county without a showing of identifiable prejudice among the jurors selected. The size of the county's population is relevant to this issue. Some of our cases have said that it is within the discretion of the trial court as to whether to move the case or order a special venire. The statute requires, however, that if the moving party makes a sufficient showing of prejudice the court must grant the motion.

The evidence in this case in support of the motion to move the trial showed that there were articles appearing in several newspapers including The Salisbury Post, The Daily Independent, published in Kannapolis, The Dispatch, published in Lexington, and The Greensboro News and Record from the time of the incident until 1 April 1987. The articles reported the shooting and developments from it. Most of the articles were factual and reported matters that were introduced as evidence at the trial. In addition there were references to an "execution style slaying," and a statement by the sheriff that it was "pretty obvious" that the killing was "drug related." There was also an article in which it was reported that Randy Scott, Brenda Scott and Cat Andrews had admitted lying to the sheriff as to the fourth person involved in the incident. There was also an article that reported that the defendant Reeb had pled guilty in a federal court in Baltimore to charges of conspiracy to distribute marijuana, income tax evasion and a related drug count. Other articles said that the defendant Reeb was a member of a family that had a drug smuggling operation from Key West, Florida, to Baltimore, Maryland, that his brother was to be tried in Key West for first degree murder based on

an execution style killing, and that he operated an exotic bird farm in Randolph County which was a front for a marijuana distribution system. Similar reports were broadcast over radio stations in the area.

The newspaper articles and news accounts contained a considerable amount of material which was not factual and could not have been introduced at trial. We must determine whether the defendants have shown that due to pretrial publicity there was a reasonable likelihood that they could not receive a fair trial so that it was error for the superior court not to move the trial or order a special venire.

In this case there was not testimony, as in *Jerrett*, that Rowan County was permeated with prejudice against the defendants. The defendants relied on the newspaper articles and the news accounts to show prejudice. We cannot hold that the two judges who denied the motions committed error by doing so. Four of the jurors said they had no prior knowledge of the case. The other eight jurors who decided the case and who said they had heard about the case before the trial stated that they had formed no opinion as to the guilt or innocence of the defendants and would not be prejudiced by the pretrial publicity. We hold the defendants have failed to show identifiable prejudice by the denial of their motions.

[2] The defendants also contend it was error not to allow individual voir dire examinations of each juror. They say that they were restricted in their examinations of prospective jurors by not being able to ask certain questions of prospective jurors in the presence of the entire panel. Motions for an individual voir dire examination of prospective jurors are addressed to the sound discretion of the trial judge. In *State v. Crandell*, 322 N.C. 487, 369 S.E.2d 579 (1988), we held it was not an abuse of discretion to deny an individual voir dire of potential jurors in a case in which the defendant contended the case should be moved to another county for trial because inflammatory newspaper accounts had prejudiced his right to a fair trial in the county in which he was to be tried. We find no abuse of discretion in this case.

[3] In their next assignment of error each defendant contends it was error to consolidate the cases for trial and to deny his motion to sever. Each of the defendants was charged with accountability for each of the offenses and the charges against them were

properly joinable for trial. N.C.G.S. § 15A-926(b)(2) (1988). N.C.G.S. § 15A-927(c)(2) provides in part:

> The court, on motion of the prosecutor, or on motion of the defendant . . . must deny a joinder for trial or grant a severance of defendants whenever:
>
> (a) If before trial, it is found necessary to protect a defendant's right to a speedy trial, or it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants[.]

The defendants contend a severance of their cases for trial was necessary "to promote a fair determination of the guilt or innocence of" both of them.

Both defendants say their defenses were antagonistic. Defendant Reeb says the conflict between the two defenses arose because Ms. Hensley's testimony at trial contradicted her testimony at the preliminary hearing. At the preliminary hearing, Ms. Hensley testified she did not see or hear Mr. Grade being shot but did see the gun in defendant Scott's hands immediately before the shooting and that both defendant Reeb and defendant Scott came to her and put the pillow on her face just before she was shot. At the trial, she testified that defendant Reeb shot Mr. Grade and then shot her and that defendant Scott did not participate in the shooting. At trial, defendant Reeb cross-examined Ms. Hensley as to her testimony at the probable cause hearing in an effort to decrease his culpability and to increase the culpability of defendant Scott.

Defendant Reeb argues that this change in Ms. Hensley's testimony required that each defendant guard against the evidence of the other as much as against the evidence of the State. It permeated the jury selection which is shown by each defendant's challenge of jurors because they had connections with the other defendant's lawyers. Defendant Scott says the only evidence offered by either of the defendants was the transcript of the probable cause hearing and some telephone records introduced by defendant Reeb in order to prove the guilt of defendant Scott. He says that the introduction of this evidence caused both defendants to lose the right to make the closing argument.

Defendant Scott argues further that his defense was that he did not intend for Ms. Hensley to be assaulted, that he did not

intend for Mr. Grade to be killed, and that he did not help defendant Reeb in any way. For that reason he was not guilty of assault or murder by premeditation and deliberation. He could only be guilty of felony murder which would mean judgment should be arrested on the armed robbery charge. He contends he did not receive a fair trial when defendant Reeb was allowed to provide, through the cross-examination of Ms. Hensley, evidence that he was involved in the killing and the assault.

We cannot hold that the defendants were deprived of a fair trial by the joinder of their cases. In *State v. Nelson*, 298 N.C. 573, 587, 260 S.E.2d 629, 640 (1979), we said:

> Prejudice would ordinarily result where codefendants' defenses are so irreconcilable that "the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." . . . Severance should ordinarily be granted where defenses are so discrepant as to pose an evidentiary contest more between defendants themselves than between the state and the defendants. . . . To be avoided is the spectacle where the state simply stands by and witnesses "a combat in which the defendants . . . destroy each other."

When we consider all the evidence it is apparent that the defendants were not deprived of a fair trial by the consolidation of their cases. The State presented plenary evidence for the jury to convict both defendants of the crimes with which they were charged. The cross-examination of Ms. Hensley revealed some inconsistency between her testimony at trial and her testimony at the preliminary hearing. The court instructed the jury that it would not consider the testimony elicited on cross-examination as substantive testimony but would consider it only as bearing on the credibility of the witness. If the jury believed either version of Ms. Hensley's testimony, it could have convicted both defendants of the crimes with which they were charged based on the theory that each of them was the actual perpetrator of the crime or was aiding or abetting or acting in concert with the other. *See State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987). The inconsistency between Ms. Hensley's testimony at the preliminary hearing and the trial does not rise to the level of antagonistic defenses which requires severance of the charges against the defendants. *State v. Short*, 322 N.C. 783, 370 S.E.2d 351 (1988); *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986).

[4] The defendant Reeb next assigns error to the exclusion of testimony by Donna Wright as to a statement made to her by Randy Scott while he was in jail. Donna Wright testified on cross-examination that on the Sunday after Cat Andrews, Randy Scott and Brenda Scott were arrested, she visited them in jail. At this time, William Morgan had been arrested and charged with being the fourth person involved in the shooting. The following colloquy then occurred:

> Q. And you say that you told the law enforcement authorities this about Mr. Reeb as soon—well, that the reason you didn't tell them was he wasn't apprehended. Is that what you're saying?
>
> A. Yes, ma'am. Until I could speak to my sister and Morris Andrews and Randy Scott on Sunday after they were arrested on Wednesday, because then they said it was—Randy says it was Bill Morgan that—
>
> MR. BOWERS: The State objects.
>
> THE COURT: Sustained.
>
> MR. BOWERS: Move to strike.
>
> THE COURT: Sustained, somebody said. Disregard that statement, Members of the jury.

Reeb contends that if the objection had not been sustained Donna Wright would have testified that Randy Scott told her William Morgan was with him at the time of the shooting. He says this testimony was admissible as an exception to the hearsay rule and that *Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed.2d 297 (1973), requires that it be admitted under the due process clause of the United States Constitution.

The first difficulty with Reeb's argument is that the record does not show what testimony Donna Wright would have given if she had been allowed to finish her answer. It is speculation that she would have said Randy Scott told her William Morgan was with him at the time of the shooting. If the record does not show what a witness' answer would have been, the exclusion of the testimony is not shown to be prejudicial. *State v. Fountain*, 282 N.C. 58, 191 S.E.2d 674 (1972).

Assuming Donna Wright would have answered as Reeb contends, it was not error to exclude this testimony. The defendant

says the testimony was admissible under N.C.G.S. § 8C-1, Rule 804 which provides in part:

> (b) *Hearsay exceptions.*—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (3) Statement Against Interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

If the statement by defendant Scott was against his penal interest, it was not accompanied by corroborating circumstances which clearly indicated the trustworthiness of the statement. There was no other evidence that William Morgan was with defendant Scott at the time of the shooting and there were no other circumstances that indicated defendant Scott was telling the truth. The statement was not admissible as a declaration against a penal interest. *See State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989) and *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988).

We also hold that *Chambers v. Mississippi* does not require the admission of Donna Wright's statement. In that case, the defendant was prevented under the hearsay rule, which in Mississippi contained an exception for declarations against pecuniary interest but not penal interests, from introducing testimony by three separate witnesses that a certain person told them he had committed the murder for which the defendant was charged. The defendant was also prevented from cross-examining a hostile witness as to crucial evidence in the case because the defendant had called him as a witness. The Supreme Court said that the way the hearsay rule and the rule against a party's impeaching his own witness was applied in that case, prevented the defendant from presenting some very credible testimony and thus violated his right to due process. The Supreme Court was careful to say it did not condemn the

use of the hearsay rule in other cases. We are confident that the application of the hearsay rule in this case did not prevent defendant Reeb from introducing any credible testimony. The rule of *Chambers* does not apply.

[5] Both defendants assign error to the court's instruction on voluntary intoxication as it affected their ability to premeditate and deliberate in forming the intent to kill Mr. Grade. The court charged the jury as follows:

> If, as a result of intoxication or drug condition, the defendants, or one of them or both of them, did not have the specific intent to kill the deceased formed after premeditation and deliberation, that is, that they were utterly incapable of forming this intent, then they are not guilty of first-degree murder. In such a situation, it is said that the grade of the offense is reduced to murder in the second degree.

It was error to give this charge. *See State v. McQueen*, 324 N.C. 118, 377 S.E.2d 38 (1989) and *State v. Mash*, 323 N.C. 339, 372 S.E.2d 532 (1988). In *McQueen* and *Mash*, we held it was error to tell the jury the defendant must be utterly incapable of forming the intent to kill. The question is whether the jury, considering all the evidence including the evidence of intoxication, finds that the State has proved beyond a reasonable doubt that defendants formed the intent to kill after premeditation and deliberation.

We hold that although there was error in the instructions to the jury, it was harmless error. The defendants did not introduce any evidence of their intoxication but relied on the State's evidence. Cindy Hensley testified that she was at Gary Grade's residence on 8 December 1986 when the two defendants accompanied by Brenda Scott and Cat Andrews arrived. She testified that everyone consumed beer, did a line or two of cocaine and passed around a marijuana cigarette. There was no definitive evidence as to what amount of beer either of the defendants consumed, what amount of cocaine either of them consumed, or how much either of them smoked from the marijuana cigarette that was shared with six persons. The action of neither of them was that of a person out of control as was the case of the defendant in *Mash*. They were deliberate in the way they conducted themselves. They took the beer cans when they left which would show they were able to reason to the extent they did not want to leave a clue.

It is not enough that the defendants may have been intoxicated. The evidence must show that they were so intoxicated the State could not prove they formed an intent. The evidence falls far short of that.

The defendants argue that if they were not entitled to a charge on intoxication, it was harmful to them to give the intoxication charge which was used in this case. They say this is so because if no charge on intoxication was given, the jury would have known the defendants were intoxicated to some extent and would have used their knowledge of the effect alcohol has on a person's reasoning power to determine whether they formed an intent to kill Mr. Grade. They say the jury could not do this, after the erroneous instruction given by the court, because it took the matter of intoxication away from consideration by the jury.

We are confident that with the paucity of evidence that either of the two defendants was so intoxicated that he could not form an intent, the jury would not have so found if the instruction had not been given.

[6] The defendant Scott assigns error to the court's denial of his motion to dismiss the charge against him of the assault on Ms. Hensley. He contends there was not sufficient evidence to show he was acting in concert with the defendant Reeb in the assault on Ms. Hensley or that he was an aider or abettor in the assault. The defendant Scott relies on *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984), in which we held that there was insufficient evidence to convict a defendant of a sexual assault on the theory of acting in concert when the evidence showed the defendant and several other persons broke into a home and two of the persons raped the occupant of the house.

Forney does not govern this case. There is evidence that defendant Scott was acting in concert with defendant Reeb in the assault on Ms. Hensley, in addition to the defendant Scott's presence when the assault was committed. The State's evidence showed that the defendants went together to the home of Mr. Grade and Ms. Hensley with the intent to rob them. They were armed so that they could carry out this plan. After Cat Andrews and Brenda Scott were sent from the home, defendants Reeb and Scott conferred softly in the kitchen. Immediately after this conference, Reeb returned to the room in which Ms. Hensley was being held and fired the pistol at her but she was not hit. After Mr. Grade

was shot there was a further colloquy between Scott and Reeb after which Reeb shot Ms. Hensley. This is evidence from which the jury could find that Scott was acting in concert with Reeb or aiding and abetting him in the assault on Ms. Hensley. This assignment of error is overruled.

[7] The defendant Scott next argues error to the charge. The court, while charging on the assault charge, instructed the jury as follows:

> [I]f two persons join in a common purpose to commit robbery, each of them, actually present, is not only guilty as a principal if the other commits that crime, but is also guilty of any other crimes committed by the others in pursuance of the common purpose to rob or as a natural and probable consequence thereof.
>
> In North Carolina, for a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute a crime. If two or more persons in North Carolina act together with a common purpose to commit armed robbery, each of them is held responsible for the actions of the others done in the commission of the crime.

The defendant Scott contends this charge is in error because it instructs the jury that a defendant who is charged with acting in concert to commit a certain crime may be convicted for the commission of another unconnected crime committed by his codefendant. The defendant relies on *State v. Hunt*, 91 N.C. App. 574, 372 S.E.2d 744 (1988), *disc. rev. improv. allowed*, 325 N.C. 430, 383 S.E.2d 656 (1989).

The first difficulty for the defendant Scott is that he did not object to this portion of the charge and he is prohibited by Rule 10(b)(2) of the Rules of Appellate Procedure from assigning error to it. Nevertheless, this portion of the charge is a correct statement of the law. In this state, if two or more persons join in a purpose to commit a crime each of them is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuit of the common purpose. *State v. Miller*, 315 N.C. 773, 340 S.E.2d 290 (1986); *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *death penalty vacated*, 408 U.S. 939, 33 L.Ed.2d 761 (1972). This is what the court charged the jury. The court also charged that a person acting in concert to commit a crime would be guilty of any other crime

that occurred as a natural and probable consequence of the crime for which the common plan was formed. This is a correct application of the law.

Hunt is not helpful to defendant Scott. In that case the Court of Appeals awarded a new trial because of a charge in which it was said the defendant could be convicted of second degree murder if the jury found the defendant had acted in concert with his codefendant to commit robbery. The difference between the charge in *Hunt* and in this case is that here the court charged that the defendant could be convicted of assault if the assault occurred pursuant to the carrying out of the common purpose to commit a robbery.

[8] The defendant Scott also contends that it was error for the court to charge as follows:

> [I]f you do not find a common purpose of aiding and abetting, you will decide whether the evidence shows beyond a reasonable doubt that each one of the defendants is guilty of the crime as charged in the Bill of Indictment.

The defendant Scott contends there was not any evidence to show he committed an assault except as an aider and abettor or while acting in concert and it was error to submit this charge. *See State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975). The defendant did not object to this portion of the charge. In reviewing the entire record, we determine that this portion of the charge did not have a probable impact on the jury's finding of guilt. It was not plain error. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). This assignment of error is overruled.

[9] The defendant Scott contends that although there was sufficient evidence to convict him of felony murder there was no evidence that the murder was committed by him after premeditation and deliberation. For that reason, he contends it was error not to dismiss the charge of murder based on premeditation and deliberation and to arrest judgment on the underlying felony of armed robbery on which the felony murder was based. *See State v. Carroll*, 282 N.C. 326, 193 S.E.2d 85 (1972).

The defendant Scott relies on *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987), in which we held that there was not sufficient evidence of murder based on premeditation and deliberation to

submit to the jury. In that case, the evidence showed the defendant participated in an armed robbery in which the codefendant killed a clerk in the store. There was no evidence that the defendant aided in the killing. In contrast to the evidence in *Reese*, there is evidence in this case that the defendant Scott aided and abetted or was acting in concert with defendant Reeb in the killing of Mr. Grade.

The defendant Scott went to Mr. Grade's home armed with a pistol. He was the first person to draw his gun. Immediately before the killing he conferred with defendant Reeb in the kitchen. Defendants Reeb and Scott then returned to the room in which Mr. Grade and Ms. Hensley were being kept and defendant Reeb fired at Ms. Hensley but missed. He then shot and killed Mr. Grade. This was evidence from which the jury could conclude that defendants Scott and Reeb planned the murder in the kitchen and returned to the room to carry it out with defendant Scott being there to assist defendant Reeb. This supports a murder conviction of defendant Scott as an aider and abettor or by acting in concert. This assignment of error is overruled.

[10] The defendant Scott next contends there was error in the charge on premeditation and deliberation. Once again the defendant Scott did not object to this portion of the charge and we must examine it under the plain error rule. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375. The defendant says first that in charging on felony murder, the court instructed the jury that the State did not have to prove premeditation and deliberation for the jury to convict the defendant Scott of first degree murder. Although the defendant Scott concedes this is a correct statement of the law, he argues it left the jury with the impression that the State did not have to prove premeditation and deliberation to convict him on that theory.

In charging on murder after premeditation and deliberation, the court lumped the two defendants together so that the jury was instructed that to find the defendants guilty the jury must find "defendants acted after premeditation" and that the "defendants act[ed] with deliberation." The defendant Scott says that this did not require the jury to find he premeditated and deliberated the killing but allowed them to find him guilty if it found defendant Reeb premeditated and deliberated the killing. We cannot hold that the jury was misled by this charge. At another place in the

charge, the court told the jury that although the cases had been consolidated for trial the burden of proof was on the State to prove the guilt of each defendant. This adequately explained to the jury that it should not find one defendant guilty because it found the other defendant guilty. We cannot hold that there was plain error in this portion of the charge.

[11] The defendant Scott also says it was error for the court to charge that in determining whether there was premeditation and deliberation, the jury could consider whether the two defendants used grossly excessive force or made any threats or declarations concerning the killing. The defendant Scott says there was no evidence of grossly excessive force or any threats made by him concerning the killing. He says, relying on *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80, that it is plain error for the court to instruct a jury on a theory not supported by the evidence. In this case the evidence showed that the defendant Scott was the first person to draw a gun. He said at that time, "[t]his ain't no joke." That constitutes evidence of a threat. If the jury found that Mr. Grade was shot while the defendants were acting in concert and Mr. Grade was bound and lying helpless on the floor, this was certainly excessive force so far as any threat Mr. Grade could have been to the defendants. This assignment of error is overruled.

[12] The defendant Scott also assigns error to the court's allowing the defendant Reeb to impeach Cindy Hensley by the use of a transcript of her testimony at the preliminary hearing. Ms. Hensley testified at the preliminary hearing that "they" assaulted her and she could not tell who held her down and who assaulted her. At trial she testified that all the acts of the assault were done by the defendant Reeb. At the preliminary hearing she testified that the defendant Scott thought he was owed money by Mr. Grade and by her. At trial she testified that the defendant Reeb demanded his $10,000. She also testified at the preliminary hearing that after defendant Reeb shot Mr. Grade she thought defendant Scott tried to help with the pistol which was jammed so that it could be fired again. At trial she testified that when she saw defendant Scott holding the pistol he was "like jacking it back or something—I don't know. I don't know, trying to get it away or just jacking it back up."

The defendant Scott objected to questions propounded by defendant Reeb's counsel to Ms. Hensley on cross-examination based on her testimony at the preliminary hearing. The court overruled these objections and allowed the transcript to be introduced into evidence. In ruling on the defendant Scott's objection, the court said:

> I appreciate your predicament. The Court takes a different view of it. The Court takes the point of view that the State has at least prima facie shown an agreement to enter into a common purpose, both parties being willing partners in armed robbery and murder, and when both are—whatever happens to each, happens to the other. That's the whole theory of aiding and abetting. They're guilty of all crimes like that, which are of common design or common intent to commit a crime. I think the Court will have to overrule your motion based on that principle of North Carolina law.

The defendant Scott objected to the questions concerning Ms. Hensley's testimony at the preliminary hearing and the introduction of the transcript of the preliminary hearing on the ground that this evidence should have been excluded under N.C.G.S. § 8C-1, Rule 403 which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The defendant Scott concedes that the court's ruling pursuant to Rule 403 is discretionary. *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986). He says in this case there was error because the court did not exercise its discretion but made its ruling under a misapprehension of the law. He argues that it is not the law, as stated by the superior court, that when the State has made a prima facie case that two persons are acting in concert or aiding and abetting each other in the commission of a crime, any evidence admissible against one of them is admissible against the other. Defendant Scott says that this evidence did not help defendant Reeb because it did not lessen his culpability for the crime but it was very damaging to defendant Scott because it increased his culpability. He says this is a perfect example of testimony whose probative value is outweighed by the danger of unfair prejudice.

Assuming it was error for the court not to exercise its discretion in ruling on the admissibility of this evidence, we cannot hold that had the error not been committed a different result would have been reached at the trial. N.C.G.S. § 15A-1443 (1988); *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981). The jury could have found the defendant Scott guilty if they believed Ms. Hensley's testimony at the trial or her testimony at the preliminary hearing. We hold this was harmless error.

[13] The defendant Scott next assigns error to the court's allowing the State to have the last argument to the jury because defendant Reeb introduced into evidence the transcript of Ms. Hensley's testimony at the preliminary hearing. He concedes that the General Rules of Practice for the Superior and District Courts, Rule 10, provides that the State has the last argument in this situation. *See State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976). The defendant Scott asks us to reconsider the propriety of this rule. This we decline to do.

[14] Both defendants assign error to the finding of an aggravating factor which the court used to enhance their sentences. Each defendant was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury. This is a Class F felony which carries a presumptive sentence of six years in prison. The maximum sentence is imprisonment for twenty years. The court in each case sentenced the defendant to twenty years in prison after finding the following nonstatutory aggravating factor:

> After shooting the female victim and as part of the same transaction, the defendant mercilessly left the victim who was then bleeding and in great pain, without rendering any type of assistance to her.

The defendants say that N.C.G.S. § 15A-1340.4(a)(1) says that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." The defendants say that this portion of the statute is consistent with the policy behind the Fair Sentencing Act which proscribes the enhancement of a sentence based on factors which are an inherent part of the crime. The defendants say the General Assembly has taken these factors into account when fixing presumptive sentences and they cannot be used to enhance sentences. *See State v. Abdullah*, 309 N.C. 63, 306 S.E.2d 100 (1983). The defendants say that their leaving Ms. Hensley without helping her is a fact that has been subsumed

in the crime of assault with a deadly weapon with intent to kill inflicting serious injury.

The evidence that the defendants left Ms. Hensley without trying to help her was not necessary to prove an element of the assault charge. The assault was complete when they left the house. It may be some proof of the defendants' intent to kill. *State v. Freeman*, 326 N.C. 40, 387 S.E.2d 158 (1990). By the same token, refusing to help a victim after the crime of assault is complete is not an inherent part of the crime. It is a factor which makes the assault more reprehensible.

The defendants argue further that one half the aggravating factor was the finding that they left the victim bleeding and in pain and these factors are inherent in the element of serious injury. The bleeding and the pain were part of the serious injury but it was the leaving of the defendants which was the gravamen of this aggravating factor. This factor is not inherent in the crime. The defendants say the other half of this aggravating factor is that the defendants showed no mercy and left the victim without rendering aid which are inherent in the element of intent to kill. We have said that this may be some evidence of intent to kill but it was not necessary in this case to prove this element. Leaving without showing mercy is not inherent in intent to kill. The element of intent to kill could have been proved without any reference to this factor.

The defendants rely on *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985), in which the Court of Appeals held it was error to find as an aggravating factor, after the defendant had pled guilty to manslaughter, that "[t]he defendant left the victim dying in a field and did not seek to have help sent to him." *Id.* at 678, 334 S.E.2d at 74. In that case, the defendant had been badly wounded in a fight with the deceased and was unable to aid the deceased. *Bates* is not precedent for this case.

The defendants also rely on *State v. Newton*, 82 N.C. App. 555, 347 S.E.2d 81 (1986), *cert. denied*, 318 N.C. 699, 351 S.E.2d 756 (1987). In that case, the defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. The Court of Appeals held it was error to find as a statutory aggravating factor that the offense was especially heinous, atrocious or cruel because the defendant refused to help his wife after he

had shot her. The court in this case did not find the heinous, atrocious or cruel factor.

We hold that this aggravating factor was supported by a preponderance of the evidence and was reasonably related to the purposes of sentencing. *See State v. Setzer*, 61 N.C. App. 500, 301 S.E.2d 107 (1983), *cert. denied*, 308 N.C. 680, 304 S.E.2d 760 (1983).

The defendants had a fair trial free of prejudicial error.

No error.

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

ALTON RAY MOZINGO, JR., BY HIS GUARDIAN AD LITEM, ALLEN G. THOMAS; AND ALTON RAY MOZINGO v. PITT COUNTY MEMORIAL HOSPITAL, INC., MELINDA WARREN, RICHARD JOHN KAZIOR

No. 162A91

(Filed 22 April 1992)

1. Physicians, Surgeons, and Allied Professions § 11.1 (NCI3d)—on-call supervising physician—duty to patient treated by resident

A physician who undertook to provide on-call supervision of obstetrics residents at a teaching hospital and who knew that the residents were actually treating patients owed the infant plaintiff a duty of reasonable care in supervising the resident who delivered plaintiff at his birth.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 286, 289, 292.

2. Physicians, Surgeons, and Allied Professions § 17 (NCI3d)—on-call supervising physician—breach of standard of care—sufficient forecast of evidence

Plaintiffs' forecast of evidence established a genuine issue of material fact as to whether defendant breached the applicable standard of care for on-call physicians supervising obstetrics residents at a teaching hospital where the forecast

of evidence tended to show that the infant plaintiff received severe injuries during birth when his shoulder became wedged in the mother's pelvic cavity; the resident who delivered the infant plaintiff called defendant at his home two miles away and told him that she was having problems with the delivery because the baby was suffering from shoulder dystocia; when defendant arrived at the hospital, the delivery of the infant plaintiff had been completed; the affidavits of defendant's own experts stated that an on-call supervising physician may take calls at home "unless a problem is specifically anticipated"; and the affidavit and deposition of plaintiffs' expert stated that defendant should have called in at the beginning of his on-call coverage and periodically thereafter to check on the status of patients, and that defendant did not meet the accepted medical standard for on-call supervising physicians given the known medical condition of the mother and the known risk factors for this pregnancy which included a significant risk factor of shoulder dystocia.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 286, 289, 292.

3. Physicians, Surgeons, and Allied Professions § 11.1 (NCI3d)—negligent supervision of resident physicians—contract not shield from liability

A contract providing for supervision of resident physicians in a manner which substantial evidence tends to show is negligent will not shield a supervising physician from legal liability for providing such negligent supervision.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 286.

Justice MEYER dissenting.

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

ON appeal pursuant to N.C.G.S. § 7A-30 of a decision by a divided panel of the Court of Appeals, 101 N.C. App. 578, 400 S.E.2d 747 (1991), reversing summary judgment for the defendant Dr. Richard John Kazior entered by *Griffin, J.*, at the 21 March 1990 Session of Superior Court, PITT County. Heard in the Supreme Court on 12 December 1991.

Young, Moore, Henderson & Alvis, P.A., by Jerry S. Alvis and Brian E. Clemmons, for the defendant-appellant.

Narron, Holdford, Babb, Harrison & Rhodes, P.A., by William H. Holdford and Elizabeth B. McKinney, for the plaintiff-appellees.

MITCHELL, Justice.

The issue before this Court is whether the Court of Appeals erred in reversing the trial court's grant of summary judgment in favor of the defendant Dr. Richard John Kazior. To resolve this issue, we must decide whether there was a forecast of evidence tending to show that the defendant, in his capacity as an on-call supervising physician, owed a duty of reasonable care to the plaintiffs. For reasons differing from those stated in the opinion of the Court of Appeals, we conclude that the forecast of evidence before the trial court tended to show that the defendant had such a duty, and we affirm the holding of the Court of Appeals.

As summary judgment was entered for the defendant by the trial court, the facts set forth are taken from the forecast of evidence found in allegations in the complaint, the depositions, the stipulations of the defendant Dr. Richard John Kazior and others, and the affidavits in the record on appeal. We express no opinion, of course, as to what the plaintiffs will be able to prove at trial.

In this action, the plaintiff Alton Mozingo, Jr., by his guardian ad litem, seeks money damages from the defendant Dr. Richard John Kazior for injuries allegedly caused by Dr. Kazior's negligent supervision of resident physicians at Pitt County Memorial Hospital ("Hospital"). Mozingo, Jr., alleges that the resident physicians who delivered him at his birth did so negligently, causing him severe injuries. The plaintiff Alton Mozingo, the father of the injured child plaintiff, seeks money damages for the loss of services of his son.

The forecast of evidence before the trial court tended to show that during December 1984 Dr. Kazior was an employee of Eastern OB/GYN Associates ("Eastern"). Eastern had entered into an agreement with the East Carolina University Medical School to provide on-call supervision of the interns and residents in the obstetrics residency program at the Hospital. On the afternoon of 5 December 1984, Sandra Dee Mozingo was admitted to the Hospital for the delivery of her second child, Alton Mozingo, Jr., one of the two plaintiffs in the present case. Two residents in the post-graduate

training program in obstetrics treated Sandra Dee Mozingo who was not under the care of a private physician.

At 5 p.m. on 5 December 1984, the defendant Dr. Kazior began his assignment to provide on-call services for the obstetrics residents at the Hospital who were caring for patients. Dr. Kazior remained at his home available to take telephone calls from the residents. Shortly before 9:45 p.m., Dr. Kazior received a telephone call from Dr. Melinda Warren, a second-year resident at the Hospital, informing him that she had encountered a problem with the delivery of Mozingo, Jr. The baby was suffering shoulder dystocia, a condition in which a baby's shoulder becomes wedged in the mother's pelvic cavity during delivery. Dr. Kazior stated that he would be there immediately and left his home for the Hospital located approximately two miles away. When Dr. Kazior arrived at the hospital, the delivery of Mozingo, Jr., had been completed.

On 3 December 1987, the plaintiffs filed an amended complaint alleging *inter alia* negligent supervision of the obstetrics residents by Dr. Kazior. The plaintiffs alleged that Alton Mozingo, Jr., suffered severe and permanent injuries due to the shoulder dystocia and that Dr. Kazior's negligent supervision of the residents actually performing the delivery proximately caused these injuries. The plaintiffs alleged that Dr. Kazior "failed to make a reasonable effort to monitor and oversee the treatment administered by the defendant, Melinda Warren, and the agents of the Defendant, Hospital." Dr. Kazior filed an answer denying all allegations of negligence on his part.

The defendant Dr. Kazior filed a motion for summary judgment on 6 October 1989 supported by four affidavits, the pleadings, and other material obtained during discovery. Three of the affidavits were given by the heads of the Departments of Obstetrics and Gynecology of other teaching hospitals in North Carolina. The affidavits from the Chairmen of the Departments of Obstetrics and Gynecology of the Bowman-Gray School of Medicine of Wake Forest University, the University of North Carolina School of Medicine, and the Duke University School of Medicine stated that the protocol of their respective medical schools "permitted the Attending On Call physicians to afford coverage during the hours of their assignment by either being present in the hospital or, unless a problem is specifically anticipated, by being present at their residence or

other specified place and immediately available to a telephone so as to come immediately to the hospital upon request."

The plaintiffs responded with the sworn affidavit of Dr. William Dillon and the transcript of the deposition of Dr. Dillon, a board-certified obstetrician and an expert witness for the plaintiffs, who stated that an on-call supervising physician should call in periodically during his coverage shift. Dr. Dillon in his affidavit stated that Dr. Kazior had a "responsibility, when he came *on call*, to find out what obstetrical patients had been admitted to the hospital, their condition and to formulate a plan of management." (Emphasis added). Dr. Dillon in his deposition also stated, "I think in at least a minimum sense a supervising physician needs to make contact sometimes, preferably at the beginning, and maybe a few times in between, as to what is occurring on his service." Dr. Dillon further stated, "I think that what we are talking about is what is proper supervision and what is not proper supervision. . . . I think that there is a certain standard when one is supervising residents that must be met. If a private physician is going to supervise residents, he must meet those standards." Further, according to Dr. Dillon, Sandra Dee Mozingo "was a known gestational diabetic with extreme obesity and no established estimated fetal weight notwithstanding sonography. As such there was a known significant risk of a macrosomic baby [an extremely large baby]. Therefore, there were very significant known risk factors for this pregnancy which included a known significant risk factor of shoulder dystocia."

The trial court granted summary judgment for the defendant Dr. Kazior on 29 December 1989, and the plaintiffs filed a notice of appeal. Subsequently, the trial court rescinded summary judgment and received into evidence Dr. Kazior's stipulation dated 28 March 1988. Thereafter, the trial court again granted summary judgment in favor of Dr. Kazior on 27 March 1990. The plaintiffs again filed a notice of appeal with the Court of Appeals.

A divided panel of the Court of Appeals reversed the trial court's entry of summary judgment in favor of the defendant Dr. Kazior, concluding that he owed the plaintiffs a duty of care arising out of a contract between Eastern and East Carolina University Medical School. The Court of Appeals concluded, however, that the defendant owed no duty of reasonable care to the plaintiffs based on a doctor-patient relationship because no such relationship

existed. For different reasons, we affirm the holding of the Court of Appeals reversing the trial court's entry of summary judgment for the defendant Dr. Kazior.

Dr. Kazior contends that the Court of Appeals erred in reversing the trial court's grant of summary judgment in his favor.

> The North Carolina Rules of Civil Procedure provide that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982); *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial. *Dickens*, 302 N.C. 437, 276 S.E.2d 325. All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion. *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972).

Collingwood v. General Electric Real Estate Equities, Inc., 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Summary judgment is a drastic measure and should be used with caution. *Williams v. Carolina Power and Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979).

The gravamen of the plaintiffs' claim is that the defendant Dr. Kazior negligently supervised the obstetrics residents who cared for Mozingo, Jr., and his mother during his birth and that this negligent supervision proximately caused the plaintiffs' injuries. "To recover damages for actionable negligence, a plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach." *Waltz v. Wake County Bd. of Education*, 104 N.C. App. 302, 304-05, 409 S.E.2d 106, 107 (1991)

(quoting *Matthieu v. Piedmont Natural Gas Co.*, 269 N.C. 212, 217, 152 S.E.2d 336, 341 (1967)), *disc. rev. denied*, 330 N.C. 618, 412 S.E.2d 96 (1992).

[1] Dr. Kazior argues that the parties' forecasts of evidence in the trial court established as a matter of law that he owed no duty of care to the plaintiffs because no doctor-patient relationship existed. Uncontroverted evidence before the trial court tended to show that Dr. Kazior's first contact with Alton Mozingo, Jr., and his parents occurred when Dr. Kazior arrived at the Hospital after the delivery of Mozingo, Jr., on 5 December 1984, in response to the telephone call from Dr. Warren. However, the defendant Dr. Kazior stipulated that he was responsible for supervision of the obstetrics residents at the Hospital on the night of 5 December. In a stipulation dated 28 March 1988, the defendant stated he had "responsibility for supervision of the OB/GYN residents and interns at the time of the birth of Alton Ray Mozingo, Jr." "Stipulations are viewed favorably by the courts because their usage tends to simplify, shorten, or settle litigation as well as save costs to litigants." *Pelham Realty Corp. v. Board of Transportation*, 303 N.C. 424, 430-31, 279 S.E.2d 826, 830 (1981). *See also Miller v. Marrocco*, 63 Ohio App. 3d 293, 296, 578 N.E.2d 834, 836 (1989) (physician in stipulation admitted he owed a duty of care to plaintiff patient and had breached that duty). "Such stipulations continue in force for the duration of the controversy and preclude the later assertion of a position inconsistent therewith." *In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 14, 249 S.E.2d 698, 706 (1978). Based on this stipulation and the uncontested fact that Dr. Kazior knew the residents at the Hospital were actually treating patients when he undertook the duty to supervise the residents as an on-call supervising physician, we conclude that he owed the patients—including Mozingo, Jr.—a duty of reasonable care in supervising the residents. Further, we conclude that the defendant's duty of reasonable care in supervising the residents was not diminished by the fact that his relationship with the plaintiffs did not fit traditional notions of the doctor-patient relationship.

The modern provision of medical care is a complex process becoming increasingly more complicated as medical technology advances. *Moeller v. Hauser*, 237 Minn. 368, 371, 54 N.W.2d 639, 642 (1952); *Maxwell v. Cole*, 126 Misc. 2d 597, 599, 482 N.Y.S.2d 1000, 1002 (1984); *Grubb v. Albert Einstein Med. Center*, 255 Pa. Super. 381, 396, 387 A.2d 480, 487 (1978). Large teaching hospitals,

such as the Hospital in the present case, care for patients with teams of professionals, some of whom never actually come in contact with the treated patient but whose expertise is nevertheless vital to the treatment and recovery of patients. One commentator states,

> In the delivery of health care services in an institutional setting it is increasingly difficult to determine factually who is in control of whom. As allied health professionals proliferate and are accorded a greater degree of independence from the direct supervision and control of the attending physician, the matter of the right to control another's actions becomes a very difficult question both as a matter of fact and of law.

Arthur F. Southwick, *The Law of Hospital and Health Care Administration* 580 (2d ed. 1988). Another commentator states,

> The health care environment requires cooperation and teamwork. Physicians are dependent upon many other health care professionals in a health care institution to ensure good patient care. . . . The health care professional is obligated to take actions to protect the interest of patients, who are innocent parties in the health care environment. A failure to act in the interest of good patient care or in the protection of the public welfare creates liability.

John Dale Dunn, *Practice with co-providers, in Legal Medicine: Legal Dynamics of Medical Encounters* 434, 438 (2d ed. 1991).

Medical professionals may be held accountable when they undertake to care for a patient and their actions do not meet the standard of care for such actions as established by expert testimony. Thus, in the increasingly complex modern delivery of health care, a physician who undertakes to provide on-call supervision of residents actually treating a patient may be held accountable to that patient, if the physician negligently supervises those residents and such negligent supervision proximately causes the patient's injuries. *See* Jerry Zaslow, *What is Malpractice in General Surgery?*, Medical Trial Technique Quarterly 272, 285-86 (1981 Annual) (discussing supervisory duties of surgical staff in a "teaching institution"). *See also* Stewart R. Reuter, *Some Legal Aspects of Angiography and Interventative Radiology*, Medical Trial Technique Quarterly 59, 67 (1987 Annual) ("Physicians with supervisory responsibilities must

act in a reasonably prudent manner" or face tort liability for negligent supervision).

Courts in other jurisdictions also have recognized a duty of care owed by a supervising physician to a patient actually cared for by a supervised resident. *McCullough v. Hutzel Hosp.*, 88 Mich. App. 235, 276 N.W.2d 569 (1979); *Maxwell v. Cole*, 126 Misc. 2d 597, 482 N.Y.S.2d 1000 (Sup. Ct. 1984) (rejecting the defendant's "narrow reading of [a supervising] physician's responsibility" and concluding that failure "to provide medically acceptable rules and regulations which would insure appropriate supervision of ill patients" is a reasonable basis on which to find "a breach of the standards of medical care by that individual [defendant physician]"); *see also Moeller v. Hauser*, 237 Minn. 368, 54 N.W.2d 639 (1952) (although a doctor-patient relationship existed, the appellate court affirmed the verdict finding the supervising doctor liable for his patients' injuries caused by the negligent post-operative care rendered by resident physicians). In *McCullough v. Hutzel Hosp.*, 88 Mich. App. 235, 276 N.W.2d 569 (1979), for example, the appellate court concluded that a supervising physician owed the plaintiff a duty of care in supervising the residents actually caring for the plaintiff. *Id.* at 239, 276 N.W.2d at 571.

The plaintiff in that case claimed that the defendants improperly performed a tubal ligation on her. *Id.* at 237, 276 N.W.2d at 571. Because the surgery was performed in a teaching hospital, a resident supervised by the defendants actually performed the operation. *Id.* at 238, 276 N.W.2d at 570. A few months after the operation, the plaintiff became pregnant and underwent a therapeutic abortion and a hysterectomy. *Id.* at 237-38, 276 N.W.2d at 570. The jury awarded the plaintiff $100,000 in damages. *Id.* at 238, 276 N.W.2d at 570. The court in upholding the verdict stated, "Even though the surgical procedure was actually performed by a resident, defendants were under a duty to see that it was performed properly. . . . Their [defendants'] failure to take reasonable care in ascertaining that the surgery was competently performed renders them liable for the resulting damages." *Id.* at 239, 276 N.W.2d at 571.

In the present case, the defendant Dr. Kazior stipulated that he assumed the responsibility for the on-call supervision of the obstetrics residents at the Hospital. As a result, we have concluded

that the defendant owed Mozingo, Jr., a duty of reasonable care in supervising the residents who actually cared for him.

[2] The defendant Dr. Kazior further argues that the affidavits of the chairmen of the three teaching hospitals in North Carolina established that he did not breach the applicable standard of care for on-call supervising physicians. These affidavits are not as unequivocal as the defendant and the dissent suggest. In these affidavits, each chairman using nearly identical language states that an on-call supervising physician may take calls at home "unless a problem is specifically anticipated." Thus, according to the defendant's own experts, simply remaining at home and available to take telephone calls is not always an acceptable standard of care for supervision of residents.

In opposition to the defendant's motion, the plaintiffs introduced the affidavit and deposition of Dr. Dillon in which he stated that the defendant Dr. Kazior did not meet the accepted medical standard for an on-call supervising physician, given the known medical condition of Sandra Dee Mozingo. In Dr. Dillon's opinion, the defendant Dr. Kazior should have called in at the beginning of his on-call coverage and periodically thereafter to check on the status of patients. The evidence forecast by the plaintiffs establishes a genuine issue of material fact as to whether the defendant doctor breached the applicable standard of care and thereby proximately caused the plaintiffs' injuries. Such issues are questions for the jury. *Turner v. Duke Univ.*, 325 N.C. 152, 162, 381 S.E.2d 706, 712 (1989). Therefore, without expressing any opinion as to what the plaintiffs will be able to prove at trial, we conclude that the trial court erred by entering summary judgment for the defendant.

The dissent makes much of a contract between Dr. Kazior's employer and East Carolina University Medical School, contending that the contract somehow relieved Dr. Kazior of the responsibility for any negligence on his part in supervising the obstetrics residents at the Hospital. The precise terms of the contract are not before us, as it was not before the trial court and is not a part of the record on appeal. However, the defendant's forecast of evidence did refer to certain provisions of the contract.

[3] Notwithstanding the assertions made in the dissent, we recognize the general principle that a physician may contractually limit the extent and scope of his employment. *E.g.*, *Childers v. Frye*, 201 N.C. 42, 158 S.E. 744 (1931); *Nash v. Royster*, 189 N.C.

408, 127 S.E. 356 (1925). Here, however, the defendant has stipulated that he undertook the duty of on-call supervision of—not merely consultation with—the resident physicians actually caring for the plaintiff Alton Ray Mozingo, Jr., and his mother. The plaintiffs' forecast of evidence tends to show that the defendant performed his duty in this regard in a negligent manner. We conclude that a contract providing for supervision of resident physicians in a manner which substantial evidence tends to show is negligent will not shield a supervising physician such as the defendant from legal liability for providing such negligent supervision, at least where, as here, the plaintiff patient was not a party to that contract. *See generally* A. M. Swarthout, Annotation, *Validity and Construction of Contract Exempting Hospital or Doctor from Liability for Negligence to Patient*, 6 A.L.R.3d 704 (1966) (cases cited and analyzed therein and in the supplement); *cf.* 61 Am. Jur. 2d *Physicians and Surgeons* § 304 (1981); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 68, at 482-84 (5th ed. 1984).

For the above stated reasons, different from those relied upon in the opinion of the Court of Appeals, we affirm the holding of the Court of Appeals, which reversed the trial court's summary judgment for the defendant.

Affirmed.

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

Justice MEYER dissenting.

It should be remembered that the plaintiffs' action against the resident physician who attended the birth of Alton Ray Mozingo, Jr., and the hospital is alive and well and will proceed to trial. The only question before this Court is the liability of Dr. Kazior. Dr. Kazior did not at any time examine, treat, care for, or in any other manner act as physician for Sandra Dee Mozingo or Alton Ray Mozingo, Jr., prior to or during the birth of Alton Ray Mozingo, Jr. Prior to the telephone call from the hospital, Dr. Kazior received no request for assistance of any kind from any person with respect to Sandra Dee Mozingo. Upon being notified by telephone that residents attending Mrs. Mozingo had encountered shoulder dystocia, Dr. Kazior immediately went to the hospital, arriving approximately three minutes after he was called, only

to find that the delivery was completed before his arrival. Dr. Kazior's only contact with Mrs. Mozingo and her infant son came after the event of the birth, and there is no claim that anything he did after the event of birth has caused any injury or damage to any plaintiff.

The agreement between East Carolina University Medical School and Eastern OB/GYN Associates, which was entered into prior to Dr. Kazior's employment, provided that the physician employees of Eastern's practice group could fulfill the on-call agreement by remaining at their homes and being immediately available to a telephone to respond to any call from the chief resident in obstetrics and gynecology for advice or assistance with respect to obstetric or gynecologic patients admitted to the hospital but not under the care of a private practitioner. This system of providing *on-call* supervision for resident physicians specializing in obstetrics at Pitt County Memorial Hospital was the same system that was used in the local teaching hospital facilities of Duke University Medical School, the University of North Carolina School of Medicine, and Wake Forest University's Bowman Gray School of Medicine, as testified to by expert physicians from those institutions.

Until today, it has been fairly well settled that absent a physician-patient relationship or vicarious liability based on the negligence of a servant, a physician is liable for his negligence to the same extent as any other individual—a physician is liable in tort when he undertakes responsibility to do some act and negligently performs the act thereby causing injury to a person whom it was reasonably foreseeable might be injured as a consequence of the physician's negligence. *See* W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 56 (5th ed. 1984) (physician has no duty to render professional services but having volunteered or agreed to render such services must use due care); 9 Strong's North Carolina Index 3d *Negligence* § 1.1, at 344 (1977) (same). To my knowledge, no court in the country has heretofore held a private physician liable for injuries suffered by an individual whom he has never treated, never met, and never agreed to treat based on that physician's compliance with a contract to provide consultation to and limited on-call supervision of a hospital's resident physician. This is not to say that a physician may never be held accountable for injuries caused by the acts of another physician not in his employ. To find such liability, however, there

must be some evidence that the physician has negligently performed some responsibility voluntarily assumed by him.

In this case, the majority errs in concluding that there exists a genuine issue of material fact concerning Dr. Kazior's liability for the alleged negligent delivery performed by resident physicians. The evidence of record in this case establishes that the residents who performed the delivery were "agent[s], servant[s] or employee[s] of . . . Pitt County Memorial Hospital, Inc." Nothing in the record suggests that the residents were employed by or were servants of Dr. Kazior, and thus no liability may be vicariously imputed to Dr. Kazior for the resident's alleged negligence. *Smith v. Duke University*, 219 N.C. 628, 633, 14 S.E.2d 643, 646 (1941), *overruled on other grounds by Rabon v. Hospital*, 269 N.C. 1, 152 S.E.2d 485 (1967); *cf. Moeller v. Hauser*, 237 Minn. 368, 54 N.W.2d 639 (1952) (hospital vicariously liable for negligence of resident physicians in its employ); *Stuart Circle Hosp. Corp. v. Curry*, 173 Va. 136, 3 S.E.2d 153 (1939) (liability imposed on hospital for negligent acts of interns and nurses).

Moreover, the record does not, as the majority apparently concludes, establish that Dr. Kazior had responsibility for the general supervision of the residents. As the employer of the resident physicians, such responsibility lay with Pitt County Memorial Hospital, Inc. *Riverside v. Loma Linda Univ.*, 118 Cal. App. 3d 300, 173 Cal. Rptr. 371 (1981); *Maxwell v. Cole*, 126 Misc. 2d 597, 599, 482 N.Y.S.2d 1000, 1002 (Sup. Ct. 1984). As with most other duties, a hospital may, in appropriate circumstances, delegate its duty of supervision to others by, for example, entering into an affiliation agreement with a medical school. *Id.*

The mere existence of such an agreement does not, however, end the inquiry of determining who has responsibility for supervision. As with the delegation of all duties, the terms of the agreement between the delegator and the delegatee control. The delegatee will be charged only with the duties that he has voluntarily assumed. Stewart R. Reuter, *Some Legal Aspects of Angiography and Interventative Radiology*, 33 Med. Trial Tech. Q. 59, 67 (1987); *see also Maxwell v. Cole*, 126 Misc. 2d 597, 482 N.Y.S.2d 1000 (Sup. Ct.).

The evidence in this case establishes a number of agreements concerning the supervision of the resident physicians practicing at Pitt County Memorial Hospital. First, the record shows that

Pitt County Memorial Hospital, like most other teaching hospitals, entered into an agreement whereby it delegated some or all of its responsibility to supervise the resident physicians of East Carolina University Medical School. Subsequent to this delegation of supervision, the medical school and Eastern OB/GYN Associates entered into an agreement whereby Eastern agreed to provide consultation services to and *limited* supervision of the residents of the obstetrics and gynecology service of Pitt County Memorial Hospital. The parties have not included the agreement in the record on appeal, and thus the Court is not aware of the specific details of the agreement. However, the uncontradicted evidence of record establishes that this agreement provided that Eastern would make its physician employees available at certain times

> to the end that if the chief resident of the obstetrics and gynecology service of Pitt County Memorial Hospital identified a problem or if there was a difficult case, that *chief resident would call* a designated physician employee of Eastern OB/GYN Associates, *and upon call the responding physician would assist the chief resident* in whatever manner appeared to the responding physician to be appropriate.

(Emphasis added.) Specifically, the record establishes that "[i]t was understood by the parties to the agreement [Eastern and the medical school] that the *physician could made [sic] himself available* to the chief resident *by being available to be reached by telephone.*" (Emphasis added.)

Subsequent to the entry of this agreement, Dr. Kazior came into the employ of Eastern as a physician practicing in obstetrics and gynecology. The record is unclear whether Dr. Kazior contracted expressly with Eastern to assume Eastern's responsibility under its agreement with the medical school; however, the record does establish that Dr. Kazior voluntarily assumed responsibility to fulfill Eastern's *contractual obligations*. Having done so, Dr. Kazior thereby became obligated to perform the consultation and limited supervisory duties in a non-negligent manner so as to avoid injuring any persons whom it was reasonably foreseeable might be injured as a result of his actions.

Contrary to the majority's conclusion, Dr. Kazior did not have a duty of *general* supervision of the residents. Pursuant to his employment with Eastern, Dr. Kazior merely assumed responsibility to provide limited supervision of the residents—to remain at

home when he was assigned on-call supervision and to make himself available by telephone for advice and assistance to the chief resident. The majority places great importance on a stipulation made by Dr. Kazior but fails to interpret it in connection with and in light of the limited nature of Dr. Kazior's duties under his employer's contract. The stipulation made by Dr. Kazior merely states that he "was the Attending Physician *on Call* for the OB/GYN Service of Pitt County Memorial Hospital with the responsibility for supervision of the OB/GYN residents and interns at the time of the birth of [infant plaintiff]." This stipulation does not contradict the undisputed evidence of Dr. Kazior's limited supervisory duties but, in fact, supports the evidence demonstrating that Dr. Kazior had assumed no more responsibility than to make himself available by telephone for advice and assistance when called by the chief resident.

Moreover, the cases relied upon by the majority do not support the conclusion that Dr. Kazior owed any duty beyond that which he voluntarily assumed pursuant to his employment agreement with Eastern. In *Maxwell v. Cole*, 126 Misc. 2d 597, 482 N.Y.S.2d 1000 (Sup. Ct.), the court considered the liability of a hospital's chief of service for negligent supervision of residents providing post-operative care. The *Maxwell* court denied the physician's motion for summary judgment, concluding that the physician had presented no evidence to rebut the plaintiff's allegations that he had negligently performed his responsibilities "to supervise residents and interns and to develop and implement rules, regulations and guidelines for treatment and supervision." *Id.* at 598, 482 N.Y.S.2d at 1002. The court did not, however, express any opinion as to whether such a duty had in fact arisen. Rather, the court determined that summary judgment was inappropriate as the scope of the physician's duty had not been established. Recognizing that the physician could only be charged with those duties voluntarily assumed by him, the court stated, "If those supervisory responsibilities are demonstrated to be beyond his actual grant of power, then it would be appropriate for Dr. Ledger [the defendant physician] to renew this motion [for summary judgment]." *Id.* at 599, 482 N.Y.S.2d at 1002.

Moeller v. Hauser, 237 Minn. 368, 54 N.W.2d 639 (1952), and *McCullough v. Hutzel Hosp.*, 88 Mich. App. 235, 276 N.W.2d 569 (1979), two other cases relied upon by the majority, are inapposite to this case. In those cases, the physicians sought to be held liable

were the attending physicians to whom the injured patients were assigned for treatment. As the attending physicians, they had a duty to exercise due care to see that the patients received adequate medical care. The majority correctly notes that the plaintiff in *Moeller* was a patient injured "by the negligent post-operative care rendered by resident physicians." While the physician in that case had assumed some responsibility to supervise the residents who injured the plaintiff, the case against the physician was not predicated on the theory of negligent supervision but upon the theory that the physician had failed to care adequately for a patient for whom he had assumed responsibility to provide medical services. In fact, after examining the hospital's rules and regulations, which vested the staff physicians with responsibility for "the training of internes [sic] and residents," the *Moeller* court concluded that "there is nothing to indicate that [the staff physicians' responsibility to supervise residents] extends to the duties which the residents perform as a part of the general hospital routine." *Moeller*, 237 Minn. at 372, 377, 54 N.W.2d at 642, 645.

Even assuming that the duty undertaken by Dr. Kazior was of such a nature as to permit plaintiff to recover for a breach thereof, the uncontradicted evidence of record shows that Dr. Kazior did not breach his duty. Pursuant to the terms of the contract between Eastern and the medical school, Dr. Kazior was at his home, approximately two miles from the hospital, when he came on call at 5:00 p.m., 5 December 1984. Plaintiff concedes that Dr. Kazior remained there, with an open telephone line, available to respond to any request for assistance from the chief resident of the obstetrics and gynecology service of the hospital. Plaintiff has not shown that Dr. Kazior was negligent in failing to take any telephone calls or in giving any advice or assistance. When Dr. Kazior received a telephone call informing him that the residents had encountered a birthing problem with one of the hospital's obstetrics patients, Dr. Kazior immediately went to the hospital, arriving approximately three minutes after he was called, to find that delivery was complete.

Plaintiff does not dispute the evidence that Dr. Kazior fully performed the terms of his contract, but instead proffers as evidence of negligence on Dr. Kazior's part an affidavit alleging that "[a]cceptable standards of care require[ ] that [an on-call] attending [physician] . . . communicate[ ] with the hospital when he [comes] 'on call.' " Whatever weight is given the allegations of this affidavit,

they do not constitute evidence that *Dr. Kazior* breached any duty voluntarily assumed by him. If the contract between the medical school and Eastern falls short of the acceptable standards of care required for supervising resident physicians practicing obstetrics and gynecology, then liability would rest with the hospital (or the medical school if it had assumed responsibility for general supervision of the residents).

To permit liability for negligent supervision to be imposed against Dr. Kazior, however, flies in the face of the cardinal principles of contract and tort law. We have long recognized that a physician may contractually limit the extent or scope of professional services to be rendered. *See Childers v. Frye*, 201 N.C. 42, 45, 158 S.E. 744, 746 (1931). In *Nash v. Royster*, 189 N.C. 408, 127 S.E. 356 (1925), we stated:

> A physician or surgeon may agree to perform an operation without undertaking or rendering himself responsible for the subsequent treatment of the case. He thus contracts against liability beyond the exercise of reasonable care, diligence and skill in the performance of the operation and for such services as are contemplated by both parties to the special or limited contract.

Id. at 413, 127 S.E. at 359. The *Nash* reasoning applies equally well where, as here, a private physician enters a contract to provide limited supervision of residents employed by a teaching hospital.

The majority's bold extension of tort liability to on-call physicians who have no physician-patient relationship with persons seeking medical care from a hospital because they have no personal physician will, in my opinion, chill the willingness of experienced medical practitioners to serve in that capacity. If that proves to be the case, the impact of the majority opinion will fall not upon those who have personal attending physicians, but upon those who cannot afford them. The impediment to the delivery of obstetric and gynecologic services to which I alluded in my dissent in *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 311-12, 395 S.E.2d 85, 101-02 (1990) (Meyer, J., dissenting), will be exacerbated by today's decision.

The uncontradicted evidence presented in this case shows that Dr. Kazior performed his legal duty to provide advice and assistance when telephoned by the chief resident of the obstetrics and gynecology service of the hospital. Because plaintiff failed to pro-

duce a forecast of evidence showing that Dr. Kazior breached a legal duty owed to plaintiff, the trial court properly entered summary judgment for Dr. Kazior. For these reasons, I dissent from the majority opinion and vote to reverse the decision of the Court of Appeals and remand for reinstatement of the judgment entered by the trial court.

STATE OF NORTH CAROLINA v. HENRY LEVI PIGOTT

No. 228A90

(Filed 22 April 1992)

1. **Criminal Law § 83 (NCI4th)— racial discrimination in selection of grand jury foreman—motion to dismiss indictments—denied**

The trial court erred in a murder prosecution by denying defendant's motion to dismiss the indictments on the ground that the grand jury foreman was chosen in a racially discriminatory manner where the court summarily denied defendant's motion on the ground that the rule in *State v. Cofield*, 324 N.C. 452 (*Cofield II*) operated prospectively, but the principles announced in *State v. Cofield*, 320 N.C. 297 (*Cofield I*) were fully applicable to defendant's motion. Defendant would have been entitled to a hearing to determine whether there was in fact racial discrimination in the selection of the indicting grand jury foreman had his motion been timely filed.

Am Jur 2d, Grand Jury § 14.

Group or class discrimination in selection of grand or petit jury as prohibited by Federal Constitution—Supreme Court cases. 33 L. Ed. 2d 783.

2. **Grand Jury § 43 (NCI4th)— racial discrimination in selection of grand jury foreman—motion to dismiss indictments—untimely filed**

The trial court did not err by denying defendant's motion to dismiss indictments on the ground that the grand jury foreman was chosen in a racially discriminatory manner where the Certificate of Arraignment shows that defendant was allowed twenty-one days to file motions and waited some five months before filing his *Cofield* motion the week before trial

was to begin. Whether to grant relief was within the trial court's discretion.

Am Jur 2d, Grand Jury §§ 21, 23.

3. Arson and Other Burnings § 32 (NCI4th)— arson—occupation by a living person—evidence sufficient

The trial court did not err in denying defendant's motion to dismiss the charge of first degree arson on the ground of insufficient evidence that the building was occupied by a living person when the arson occurred where defendant poured kerosene throughout the building and lit a fire in the bedroom area of the building; the victim was still alive and breathing when defendant left; defendant told one witness that the building had not burned when doused with kerosene, so he got his girlfriend to go back with him to get some gas; defendant returned with a gallon of gasoline, poured it in the bedroom and kitchen area of the building, ignited it, and left; investigators discovered burned areas on part of the porch roof and around the window and door frame in addition to burned furnishings; the pathologist who examined the victim's body testified that it contained a potentially lethal fifty percent saturation of carbon monoxide, caused by smoke inhalation; and the pathologist concluded the victim had been alive while the fire was burning and generating carbon monoxide because of the significant quantity inhaled.

Am Jur 2d, Arson and Related Offenses §§ 5, 46.

4. Kidnapping § 1.2 (NCI3d)— kidnapping and armed robbery—separate restraint—evidence sufficient

There was such additional restraint as to satisfy that element of kidnapping in a prosecution for armed robbery, kidnapping, arson and murder where all the restraint necessary and inherent to the armed robbery was exercised by threatening the victim with the gun. When defendant bound the victim's hands and feet, he exposed the victim to a greater danger than that inherent in the armed robbery itself.

Am Jur 2d, Abduction and Kidnapping § 9.

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.

5. Kidnapping § 1.3 (NCI3d)— instructions—lesser offense not submitted—no error

The trial court did not err by not instructing the jury on false imprisonment as a lesser included offense of first-degree kidnapping where the evidence indicates unerringly that defendant restrained the victim only for the purpose of facilitating the commission of armed robbery and for no other purpose. His decision to murder the victim and burn the premises came after the restraint underlying the kidnapping offense was complete.

Am Jur 2d, Trial § 1429.

6. Criminal Law § 1237 (NCI4th)— Fair Sentencing Act—mitigating factors—apprehension of other felons—not found—error

The trial court erred when sentencing defendant by failing to find in mitigation that defendant aided law enforcement officers in the apprehension of other felons where two officers testified that defendant had been an informant for some years and had provided information and participated in investigations which led to the arrests and convictions of felons. For a trial court to ignore uncontradicted, manifestly credible evidence of either an aggravating or a mitigating factor would render the Act's requirement to consider the statutory factors meaningless and would contradict the objective that the punishment imposed take into account factors that may diminish or increase the offender's culpability. N.C.G.S. § 15A-1340.4(a)(2)h.

Am Jur 2d, Criminal Law §§ 598, 599.

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

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Stephens, J.*, at the 14 August 1989 Special Criminal Session of Superior Court, BRUNSWICK County, upon defendant's conviction by a jury of murder in the first degree. Defendant's motion to bypass the Court of Appeals as to convictions and sentences on lesser charges was allowed pursuant to N.C.G.S. § 7A-31(b). Heard in the Supreme Court 14 November 1990.

Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

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

EXUM, Chief Justice.

Defendant was charged in proper indictments and, following a capital trial, found guilty by a jury of first-degree murder, armed robbery, first-degree arson, and first-degree kidnapping. Defendant was acquitted on a charge of burglary arising from the same circumstances. The jury recommended and the trial judge imposed a sentence of life imprisonment in the capital murder case. We find no error in defendant's trial, but because the sentencing judge failed to find a statutory mitigating factor supported by uncontradicted and manifestly credible evidence, we hold defendant is entitled to a new sentencing hearing in the noncapital cases.

Evidence presented by the State, including a voluntary statement by defendant, tended to show that, shortly after midnight, 25 September 1988, defendant visited his employer, Darwin Freeman, who lived in an apartment adjoining the office of his lumber business. Defendant asked Freeman for a fifty-dollar loan, but was refused. Defendant left but soon returned with a gun. Defendant forced Freeman to lie on the floor, bound his hands with the sash from his robe, and ransacked the apartment and office for money. Defendant subsequently bound Freeman's feet to his hands and shot him in the head. After looking around for more money, defendant located some kerosene with which he doused rags and furnishings, which he then ignited. Defendant left again and later returned with his girlfriend and some gasoline to Freeman's apartment, where he poured the gasoline throughout the bedroom and kitchen, ignited it and left. Freeman's body was discovered in the burning building shortly before 4:00 a.m. A pathologist who performed the autopsy testified that cause of death was probably the gunshot wound to the head although carbon monoxide was found in sufficient quantities in the bloodstream to have caused death. The pathologist testified that the level of carbon monoxide in the bloodstream indicated that Freeman had been alive and breathed fumes from the fire for some time. He admitted that some carbon monoxide could have entered Freeman's body through reflexive inhalation.

I.

[1] Defendant first contends the trial court erred in denying his motion to dismiss all indictments. The Brunswick County Grand Jury returned indictments in all cases against defendant on 27 February 1989. Defendant was arraigned on 13 March 1989. According to the Certification of Arraignment defendant pled not guilty to all charges and was allowed twenty-one days to file motions. Defendant was tried at the 14 August 1989 Criminal Session of Superior Court in Brunswick County.

Defendant's motion to dismiss the indictments was filed on 10 August 1989 under N.C.G.S. § 15A-955 and challenges the array of the grand jury on the ground the foreman was chosen in a racially discriminatory manner. The motion alleged that defendant was black and the grand jury foreman was white. The motion acknowledged that under N.C.G.S. § 15A-952 it should have been filed at or before arraignment where, as here, the arraignment was held before the session of court at which trial was calendared. The motion asked, pursuant to the statute, that the trial judge grant relief from the untimely filing and grant defendant a hearing.

The motion was based on our decisions in *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987) (*Cofield I*) and *State v. Cofield*, 324 N.C. 452, 379 S.E.2d 834 (1989) (*Cofield II*).

In *Cofield I* we held that racial discrimination in the selection of the grand jury foreman violates both the North Carolina and United States Constitutions and is a sufficient ground to dismiss an indictment returned by that grand jury and to vitiate any verdict and judgment entered against defendant pursuant to that indictment. Defendant, of course, remains subject to the State's power to reindict. We also held that a defendant makes out a prima facie case of racial discrimination by showing either that the selection process was not racially neutral or that for a substantial period of time relatively few blacks served as grand jury foremen when blacks were substantially represented as grand jury members.

In *Cofield II* we held as follows:

> A method of selecting a grand jury foreman that meets the racially neutral standard must ensure that all grand jurors are considered by the presiding judge for his selection and that his selection be made on a racially neutral basis.

> Because we have for the first time interpreted our state Constitution to require that, in meeting the racially neutral standard for selecting the foreman of the grand jury, the trial judge must consider all the grand jurors, *our holding in that regard will apply only to this case and cases in which the indicting grand jury's foreman is selected after the certification date of this opinion.*

324 N.C. at 460, 379 S.E.2d at 839. *Cofield II* was certified on 28 June 1989. The foreman of the grand jury indicting defendant having been selected before the indictments were returned, the selection obviously occurred before certification of *Cofield II* and well after our decision in *Cofield I.*

The trial court denied defendant's *Cofield* motion on two grounds. The first was that the principle set out in *Cofield II* applies prospectively only to cases in which the grand jury foreman was selected after the certification date of the opinion. The second ground was that defendant's failure to move to dismiss at or before arraignment waived, under N.C.G.S. § 15A-952, his right to make the motion.

The trial court nevertheless permitted defendant to enter for the record evidentiary support for his motion. Defendant offered the testimony of the Clerk of Superior Court of Brunswick County, Hon. Diana Morgan, which tended to show as follows:

According to Division of Motor Vehicles records, the racial composition of licensed drivers in Brunswick County over eighteen years old is 14.7 percent black and 84.69 percent white. The Clerk thought these records were a good reflection of the racial composition of the county. The Clerk's opinion was that the racial composition of Brunswick County grand juries over the last ten to fifteen years reflected that of the county. The Clerk said that after *Cofield I* the presiding judge had not selected grand jury foremen upon recommendation of various court personnel, as had been the prior custom. Rather, since *Cofield I* presiding judges had asked the grand jury itself to recommend a foreman and the judges appointed whomever was so recommended. New foremen are selected every six months. During the last 15 years two blacks have served as foremen of the Brunswick County Grand Jury. The last black foreman served July 1979 to December 1979. The Clerk was "virtually positive" that the foreman of the grand jury which indicted defendant was chosen by the post-*Cofield I* method.

Defendant's evidence thus tended to show that over the past fifteen years seven percent of grand jury foremen had been black when blacks had made up approximately fifteen percent of grand jury membership. It also tended to show that the foreman of the indicting grand jury was recommended by the grand jury itself and the presiding judge followed the recommendation.

The trial court erred in summarily denying defendant's *Cofield* motion on the ground that the rule in *Cofield II* operated prospectively. The *Cofield II* rule is that to have a racially neutral selection process the appointing judge must give equal consideration to all eligible members of the grand jury in determining whom to select as foreman. This rule operates, as the case plainly holds and as the trial court recognized, only prospectively. The principles announced in *Cofield I*, however, were fully applicable to defendant's motion. Had his motion been timely filed, he would have been entitled to a hearing to determine whether there was in fact racial discrimination in the selection of the indicting grand jury foreman.

[2] There is, however, no error in the trial court's summary denial of defendant's *Cofield* motion on the ground that it was not timely filed. The motion was a challenge to the grand jury array within the meaning of N.C.G.S. § 15A-955(1), and was expressly made pursuant to that statute. "A motion to dismiss or quash an indictment because of an irregularity in the selection of the grand jury is now governed by G.S. 15A-955." *State v. Duncan*, 30 N.C. App. 112, 114, 226 S.E.2d 182, 184, *disc. rev. denied*, 290 N.C. 779, 229 S.E.2d 34 (1976). More specifically, we analyzed the timeliness of a *Cofield* motion under the time limit requirements of N.C.G.S. § 15A-952(b)(4) in *State v. Robinson*, 327 N.C. 346, 361, 395 S.E.2d 402, 411 (1990), assuming that the motion was filed pursuant to N.C.G.S. § 15A-955(1). Under N.C.G.S. § 15A-952(b)(4), motions made pursuant to N.C.G.S. § 15A-955 are subject to the time limits of N.C.G.S. § 15A-952(c), which provides:

> (c) Unless otherwise provided, the motions listed in subsection (b) must be made at or before the time of arraignment if arraignment is held prior to the session of court for which the trial is calendared. If arraignment is to be held at the session for which trial is calendared, the motions must be filed on or before five o'clock P.M. on the Wednesday prior to the session when trial of the case begins.

N.C.G.S. § 15A-952(c) (1988). Subsection (e) provides:

> (e) Failure to file motions listed in subsection (b) within the time required constitutes a waiver of the motion. The court may grant relief from any waiver except failure to move to dismiss for improper venue.

N.C.G.S. § 15A-952(e) (1988).

Here the Certificate of Arraignment shows that defendant was allowed twenty-one days to file motions. He failed to file his *Cofield* motion within that period. This delay waived his right to file the motion under the statute and rebuts any "presumption against waiver by a defendant charged with a crime of fundamental constitutional rights" in which courts must otherwise indulge. *State v. Covington*, 258 N.C. 501, 504, 128 S.E.2d 827, 829 (1963).

The trial court, by denying defendant's motion on the ground it was not timely filed under the statute, also denied by implication defendant's request that it grant relief from the waiver as the statute permits. We find no error in this ruling. The statute does not require that such relief be given, and it sets no standards for determining when to grant relief. It says simply that "[t]he court *may* grant relief." N.C.G.S. § 15A-952(e) (1988) (emphasis added). Under these circumstances we hold, as the Court of Appeals has already held, that whether to grant relief is a matter within the trial court's discretion. *State v. Wilson*, 57 N.C. App. 444, 291 S.E.2d 830, *disc. rev. denied*, 306 N.C. 563, 294 S.E.2d 375 (1982).

The trial court's denial of defendant's request that it grant relief from defendant's waiver, under the circumstances here, was a decision well within the trial court's discretion. Defendant was clearly allowed twenty-one days after arraignment to file pretrial motions. He waited some five months before filing his *Cofield* motion the week before trial was to begin. The motion came far too late in the process to be a fair candidate for relief from the waiver.

For the reasons stated we hold the trial court did not err in denying defendant's motion to dismiss the indictments.

II.

[3] Defendant next contends the trial court erred in denying defendant's timely motion to dismiss the charge of first-degree arson. Defendant argues the State failed to produce sufficient evidence

to establish the building was occupied by a living person when the arson occurred.

In ruling on a motion to dismiss, the trial court must consider all the evidence admitted in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom, and it must decide whether there is substantial evidence of each element of the offense charged. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* "If there is any evidence that tends to prove the fact in issue or that reasonably supports a logical and legitimate deduction as to the existence of that fact and does not merely raise a suspicion or conjecture regarding it, then it is proper to submit the case to the jury." *State v. Artis*, 325 N.C. 278, 301, 384 S.E.2d 470, 483 (1989), *judgment vacated on other grounds*, --- U.S. ---, 108 L. Ed. 2d 604 (1990).

The common law definition of arson, in force in this state, is " 'the willful and malicious burning of the dwelling house of another person.' " *State v. Allen*, 322 N.C. 176, 196, 367 S.E.2d 626, 636 (1988) (quoting *State v. Vickers*, 306 N.C. 90, 100, 291 S.E.2d 599, 606 (1982)). Because "the main purpose of common law arson is to protect against danger to those persons who might be in the dwelling house which is burned," *State v. Jones*, 296 N.C. 75, 77, 248 S.E.2d 858, 860 (1978), the codification of this offense for punishment purposes distinguishes between a dwelling house that is occupied and one that is not:

> There shall be two degrees of arson as defined at the common law. If the dwelling burned was occupied at the time of the burning, the offense is arson in the first degree and is punishable as a Class C felony. If the dwelling burned was unoccupied at the time of the burning, the offense is arson in the second degree and is punishable as a Class D felony.

N.C.G.S. § 14-58 (1986). The crime of arson is consummated by the burning of any part of the house; and a burning occurs when there is charring, that is, when wood is reduced to coal and its identity changed, but not when it is merely scorched or discolored by the heat. *State v. Oxendine*, 305 N.C. 126, 129, 286 S.E.2d 546, 547 (1982).

The State's evidence in support of the offense of first-degree arson tended to show as follows:

Defendant recounted in his pretrial statement offered against him at trial that he had poured kerosene throughout the building and had "lit a fire in the bedroom area of the building." When defendant left, the victim was "still alive and breathing." Defendant told one witness that the building had not burned when doused with kerosene, so he got his girlfriend "to go back with him to get some gas." Defendant returned with a gallon of gasoline, poured it in the bedroom and kitchen area of the building, ignited it, and left. Investigators discovered burned areas on part of the porch roof and around the window and door frame in addition to burned furnishings. The pathologist who examined the victim's body testified that it contained a potentially lethal fifty percent saturation of carbon monoxide, caused by smoke inhalation. The pathologist concluded the victim had been alive while the fire was burning and generating carbon monoxide because of the significant quantity inhaled.

We hold this evidence supports the elements of first-degree arson. From it a jury could reasonably infer that the victim, while living, inhaled quantities of smoke containing carbon monoxide from the same fire that caused the charring of the window and door frames. If a reasonable inference of defendant's guilt can be drawn from evidence that is not merely speculative, but real and substantial, "then it is the jury's decision whether such evidence convinces them beyond a reasonable doubt of defendant's guilt." *State v. Irwin*, 304 N.C. 93, 98, 282 S.E.2d 439, 443 (1981). We conclude the trial court did not err in denying defendant's motion to dismiss the charge of first-degree arson.

III.

[4] Defendant also assigns error to the trial court's failure to dismiss the kidnapping charge. He argues the State presented insufficient evidence of a restraint separate from that inherent in the armed robbery; therefore, he cannot be convicted of both crimes under the principle first announced in *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978), and followed in *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439.

The offense of kidnapping, defined by statute, provides in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age

> or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) facilitating the commission of any felony or facilitating flight of any person following the commission of a felony.

N.C.G.S. § 14-39 (1986). In *Irwin*, this Court interpreted the statute to mean that "it was not the legislature's intent in enacting G.S. 14-39(a) to make a restraint which was an inherent, inevitable element of another felony, such as armed robbery or rape, a distinct offense of kidnapping thus permitting conviction and punishment for both crimes." *State v. Irwin*, 304 N.C. at 102, 282 S.E.2d at 446.

In accord with these cases the trial court submitted the offense of kidnapping to the jury on the theory that defendant unlawfully restrained the victim by binding his hands and feet for the purpose of facilitating the commission of armed robbery, and it informed the jury of the State's burden to prove this restraint was independent of any restraint inherent in the offense of armed robbery. Defendant now contends the State failed to carry this burden.

In *State v. Irwin*, this Court said the defendant's forcing the victim to move to the back of the store at knifepoint was "an inherent and integral part of the attempted armed robbery," 304 N.C. at 103, 292 S.E.2d at 446, because the journey was necessitated by the defendant's objective that the victim obtain drugs by going to the prescription counter at the back of the store and opening the safe. We held the victim's removal was "a mere technical asportation and insufficient to support conviction for a separate kidnapping offense." *Id.*

In *Fulcher* the victims were forced to lie on a bed and their hands were bound behind their backs with tape. They were then each compelled to commit an act of oral sex upon the person of the defendant. We held that, once the victims' hands were bound and their submission procured by the defendant's threat to inflict serious injury upon them with a deadly weapon, this having been accomplished to facilitate the commission of the felony of crime against nature, "the crime of kidnapping was complete, irrespective of whether the then contemplated crime against nature ever occurred." 294 N.C. at 524, 243 S.E.2d at 352. "The restraint of each of the women was separate and apart from, and not an inherent

incident of, the commission upon her of the crime against nature, though closely related thereto in time." *Id.*

The key question here is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping "exposed [the victim] to greater danger than that inherent in the armed robbery itself, . . . [or] is . . . subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *State v. Irwin*, 304 N.C. at 103, 292 S.E.2d at 446.

On its facts this case is more like *Fulcher* than like *Irwin*. Defendant bound his victim twice. In his statement defendant said he first threatened the victim with a gun, then forced him to lie on his stomach and tied his hands behind his back. This restraint was sufficient to enable defendant to search the office and adjoining apartment for money. At this point defendant returned and asked the victim if he had any more money. The victim responded he did not. Defendant then secured the victim's feet to his hands, rendering him utterly helpless, and shot him. He then continued his search for money.

We hold that all the restraint necessary and inherent to the armed robbery was exercised by threatening the victim with the gun. When defendant bound the victim's hands and feet, he "exposed [the victim to a] greater danger than that inherent in the armed robbery itself." *Id.* This action, which had the effect of increasing the victim's helplessness and vulnerability beyond the threat that first enabled defendant to search the premises for money, constituted such additional restraint as to satisfy that element of the kidnapping crime.

IV.

[5] Defendant next asserts the trial court erred in not instructing the jury on false imprisonment as a lesser included offense of first-degree kidnapping.

The difference between kidnapping and the lesser included offense of false imprisonment is the purpose of the confinement, restraint, or removal of another person: the offense is kidnapping if the purpose of the restraint was to accomplish one of the purposes enumerated in the kidnapping statute. *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986). The kidnapping indictment here alleged defendant unlawfully confined and restrained Darwin

Freeman "for the purpose of facilitating the commission of a felony, to wit: Armed Robbery, First Degree Arson and Murder." "When an indictment for kidnapping alleges an intent to commit a particular felony, the State must prove the particular intent alleged." *Id.* at 519, 342 S.E.2d at 517. Intent is a condition of the mind ordinarily susceptible of proof only by circumstantial evidence. Evidence of a defendant's actions following restraint of the victim is some evidence of the reason for the restraint. *E.g., State v. Gray*, 322 N.C. 457, 461, 368 S.E.2d 627, 629 (1988). *See also State v. Peacock*, 313 N.C. 554, 559, 330 S.E.2d 190, 193 (1985).

At the close of the evidence, the State elected to submit to the jury only the underlying felony of armed robbery as the basis for the kidnapping charge.[1] Defendant argues the evidence did not point unerringly to restraint for the purpose of facilitating armed robbery; he says it points as strongly to restraint for the purposes of facilitating the commission of arson or murder. The key, defendant argues, is defendant's intent at the time of the restraint.

The crux of the question whether the lesser included offense of false imprisonment should have been submitted to the jury is "whether 'there was evidence from which the jury could have concluded that the defendant, although restraining . . . the victim, [did so] for some purpose other than . . . to commit' " armed robbery. *State v. Whitaker*, 316 N.C. at 520-21, 342 S.E.2d at 518 (quoting *State v. Lang*, 58 N.C. App. 117, 118-19, 293 S.E.2d 255, 256, *cert. denied*, 306 N.C. 747, 295 S.E.2d 761 (1982)). In *Whitaker*, this Court held it was error not to instruct the jury on the lesser included offense of false imprisonment and ordered a new trial.[2]

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1. Had the State not made this election, it would have been permitted to rely on all three felonies alleged in the indictment, alternatively or conjunctively, to sustain a kidnapping conviction. Having alleged all three as purposes of the restraint, the State needed to have proved only one, but it need not have elected which one before submission of the case to the jury. Then, only if there was evidence of some other underlying felony not alleged, or the evidence of the underlying felonies alleged was equivocal, as purposes of the restraint, would the lesser included offense of false imprisonment have to be submitted. *See State v. Whitaker*, 316 N.C. 515, 342 S.E.2d 514; *see also infra* note 2.

2. In *Whitaker*, the indictment, unlike in the instant case, alleged only rape as being the purpose of the restraint. Thus, the State in *Whitaker* was bound to prove that rape was the purpose of the restraint. Since there was evidence that other crimes not alleged in the indictment might have been the purpose

> The evidence here [did] not so unerringly point to a purpose to rape the victim as to preclude the jury from reasonably finding defendant guilty of the lesser included offense of false imprisonment. Left to its own devices after having been instructed fully on all pertinent law in the case, the jury reasonably could have inferred from defendant's statement and acts that he did not intend to attempt to rape his victim, but intended only to commit some sexual offense short of attempted rape.

Id. at 521, 342 S.E.2d at 518.

In this case defendant's actions following his restraint of the victim included murder and arson as well as armed robbery and are arguably some evidence that one of those offenses, rather than armed robbery, motivated the restraint. By contrast to *Whitaker*, however, other circumstances surrounding the kidnapping and the sequence of their occurrence demonstrate overwhelmingly that defendant was motivated throughout by an intent to rob.

In his statement defendant recounted that he had first come to his employer's office asking to borrow fifty dollars because his car was out of gas. When defendant said he had spent all his money on drugs, the victim refused to lend defendant money, but permitted defendant to borrow a company truck in order to find another loan source. Defendant drove to his own residence, picked up his .22-caliber rifle, and returned to his employer's office. Placing the gun out of sight, defendant told the victim he had not found another lender. The victim again refused to lend defendant money for drugs. At this point defendant pretended to leave, reached around the door for his rifle, and re-entered, pointing the gun at the victim. After forcing the victim to the floor and securing his hands, defendant ransacked the office and adjoining apartment, taking more than one hundred dollars. He returned to the victim and asked him if he had any more money. When the victim said there was no more money in the building, defendant secured the victim's feet to his hands and shot him in the head. He then continued to search the premises for more money. During this time he could hear the victim continuing to breathe. Defendant then "decided to burn the building and attempt to hide any of the evidence" that he had been at the scene. He found kerosene in a storage

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of the restraint, the lesser included offense of false imprisonment was required to be submitted to the jury. *See supra* note 1.

shed and poured it throughout the building. The last time he saw the victim before he ignited the kerosene, the victim was still alive and breathing.

We hold this evidence, considered in the light most favorable to defendant, *State v. Whitaker*, 316 N.C. at 518, 342 S.E.2d at 516, indicates unerringly that defendant restrained the victim only for the purpose of facilitating the commission of armed robbery and for no other purpose. His decision to murder the victim and burn the premises came after the restraint underlying the kidnapping offense was complete. The trial court, therefore, did not err in not submitting the lesser included offense of false imprisonment.

V.

[6] Finally, defendant contends the trial court erred in the sentencing phase of his trial by failing to find in mitigation of offenses governed by the Fair Sentencing Act that defendant had aided law enforcement officers in the apprehension of other felons. We agree.

Defendant was sentenced to fifty years for first-degree arson, for which the presumptive term is fifteen years; he was sentenced to forty years for robbery with a dangerous weapon, for which the presumptive term is twelve years; and he was sentenced to forty years for first-degree kidnapping, for which the presumptive term is twelve years. *See* N.C.G.S. § 15A-1340.4(f) (1988). The record fails to reflect that in determining defendant's punishment for these crimes, the trial judge considered the statutory mitigating factor that defendant had "aided in the apprehension of another felon." N.C.G.S. § 15A-1340.4(a)(2)(h) (1988).

At defendant's sentencing hearing, a narcotics officer for the Brunswick County Sheriff's Department testified that between 1985 and 1988, defendant had been a paid informant, targeting and identifying known drug offenders for the Sheriff's Department. The officer estimated defendant had assisted in ten to twelve investigations leading to ten arrests of drug users or dealers in Brunswick County. In addition, an officer with the Ocean Isle Police Department testified he had known defendant as an informant since 1976. He had used information given him by defendant about alcohol violations, stolen property, break-ins, and marijuana sellers and users through the last years of the 1970s and from 1984 through part of 1987. The officer estimated defendant's information had

led to the arrests of between twenty and twenty-five felons. The officer testified that in 1987 defendant had also helped with drug investigations in South Carolina. The officers' testimony was uncontradicted.

The Fair Sentencing Act obligates the trial court to consider every statutory aggravating and mitigating factor before imposing a sentence exceeding the presumptive term, and "specifically [to] list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence." N.C.G.S. § 15A-1340.4(b) (1988). For a trial court to ignore uncontradicted, manifestly credible evidence of either an aggravating or a mitigating factor would render the Act's requirement to consider the statutory factors meaningless and would contradict the objective that the punishment imposed take " 'into account factors that may diminish or increase the offender's culpability.' " *State v. Gardner*, 312 N.C. 70, 72, 320 S.E.2d 688, 689 (1984) (quoting N.C.G.S. § 15A-1340.3 (Supp. 1981)). In order to give proper effect to the Fair Sentencing Act, when evidence of the existence of a statutory mitigating factor is both uncontradicted and manifestly credible, the trial court's failure to find that factor must be deemed error. *State v. Jones*, 309 N.C. 214, 220, 306 S.E.2d 451, 455 (1983).

The position of a defendant arguing that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence is analogous to "asking the court to conclude that 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a matter of law.' " *State v. Jones*, 309 N.C. at 220, 306 S.E.2d at 455. In this case the uncontradicted testimony of the Ocean Isle police officer that defendant had helped him obtain the arrests of numerous individuals on felony charges is manifestly credible because "there are only latent doubts as to the credibility of oral testimony and the opposing party has 'failed to point to specific areas of impeachment and contradictions.' " *Id.* (quoting *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976)); *accord State v. Cartwright*, 81 N.C. App. 144, 147, 343 S.E.2d 557, 559 (1986). Moreover, the officer's testimony was corroborated by evidence of similar aid to Brunswick County narcotics officers and to law enforcement officers in South Carolina.

We hold, therefore, that the trial court erred in imposing sentences in excess of the presumptive terms for each noncapital

offense without finding and considering the mitigating factor that defendant had "aided in the apprehension of another felon." N.C.G.S. § 15A-1340.4(a)(2)(h) (1988). For this error defendant is entitled to be resentenced for all offenses except the murder.

No error in the trial; remanded for a new sentencing hearing.

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

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; AND DUKE POWER COMPANY (APPLICANT) v. PUBLIC STAFF, NORTH CAROLINA UTILITIES COMMISSION (APPELLANT) AND LACY H. THORNBURG, ATTORNEY GENERAL; AND CITY OF DURHAM (CROSS-APPELLANTS)

No. 416A89

(Filed 22 April 1992)

1. **Utilities Commission § 41 (NCI3d)— power company rates— rate of return on common equity—increment for future stock issuance costs—absence of support in record**

The Utilities Commission's inclusion of a 0.1% increment in a power company's rate of return on common equity to cover future financing, or stock issuance, costs was not supported by substantial evidence in view of the whole record where there was no evidence that the company intended to issue stock in the near future.

Am Jur 2d, Public Utilities §§ 133, 189-193.

2. **Utilities Commission § 41 (NCI3d)— power company rates— rate of return on common equity—improper considerations**

The Utilities Commission's approved rate of return of 13.2% on Duke Power Company's common equity was affected by improper considerations and not otherwise supported by substantial evidence in the record as a whole where the only evidence in the record supporting a rate of return higher than 13% was an unreliable risk premium study; the Commission improperly considered the rates of return on equity allowed AT&T by the Commission and allowed electric utilities in five

other states by their state regulatory commissions when there was nothing in the record to show that the equity return requirement for any of those utilities was comparable to that of Duke; the Commission was improperly concerned about an "extreme fluctuation" between the rate of return allowed in Duke's last general rate case and that allowed in the present case; and the Commission improperly considered the effect of leveling costs Duke will incur from payments Duke makes to owners of the Catawba Nuclear Station.

Am Jur 2d, Public Utilities §§ 133, 189-193.

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

APPEAL pursuant to N.C.G.S. § 7A-29(b) from a final order of the North Carolina Utilities Commission entered 10 March 1989. Heard in the Supreme Court 9 April 1990.

Duke Power Company, by Steve C. Griffith, Jr., Senior Vice President and General Counsel; Ellen T. Ruff, Deputy General Counsel; and Ronald L. Gibson, Associate General Counsel; and Kennedy Covington Lobdell & Hickman, by Clarence W. Walker and Myles E. Standish, for applicant-appellee Duke Power Company.

Public Staff, by James D. Little and David T. Drooz, Staff Attorneys, for appellant Public Staff.

Lacy H. Thornburg, Attorney General, by Karen E. Long, Assistant Attorney General, and City of Durham, by W. I. Thornton, Jr., City Attorney, and Carolyn J. Joyner, Assistant City Attorney, for cross-appellants.

EXUM, Chief Justice.

This is the second appeal from the Commission's order granting a rate increase to Duke Power Company (Duke). On the first appeal, *State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. 689, 370 S.E.2d 567 (1988), this Court held the Commission failed to include in its order "material factual findings sufficient in detail to permit meaningful review of its conclusion that 13.4% is a fair return on common equity." 322 N.C. at 699, 370 S.E.2d at 573. More specifically, the Court held that required factual findings were missing on the extent to which the Commission included

in its approved rate of return on common equity an increment designed to cover purported future financing, or stock issuance, costs (costs of issuing common stock) and whether and to what extent it included an increment to protect Duke's shareholders against dilution of their investment should Duke be required, during unfavorable market conditions, to issue common stock below book value. Duke's witness, Dr. Charles Olson, referred to these increments, respectively, as "financing costs" and "down-market" adjustments to what would otherwise be an appropriate equity rate of return. We concluded that the Commission erred in approving a 13.4% rate of return on common equity, in part because it omitted these findings.

In addition to directing the Commission on remand "to support its conclusion on [the proper rate of return on common equity] with specific findings as to its treatment of financing costs and down market protection," we charged the Commission "to reconsider the proper rate of return on Duke's common equity in light of this opinion." We said, "The Commission may make such other findings of material facts in support of its conclusion on this issue as it deems appropriate." *Id.* at 701, 370 S.E.2d at 574. We now examine whether in its new order on remand underlying evidence supports the findings and the findings support the Commission's revised conclusion regarding the appropriate rate of return on Duke's common equity.

On remand, the Commission reassessed the evidence and issued new findings of fact and conclusions. It concluded 13.2% was a fair rate of return on Duke's common equity. The Commission's new order makes clear that there is no increment included in the new rate of return for protection of shareholders against stock issuance in "down-market" conditions. It also makes clear that there is a 0.1% increment in the new rate of return to cover future financing, or stock issuance, costs. The Commission's new order provides the necessary specificity lacking in its previous order with regard to these increments. We are now in a position to review (1) whether the Commission erred in including the 0.1% increment in its approved 13.2% rate of return on common equity and (2) whether this approved rate of return is supported by "material factual findings sufficient in detail to permit meaningful appellate review of its conclusion." *State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. at 699, 370 S.E.2d at 573.

We now hold that the Commission's inclusion of this "stock issuance" increment is not supported by substantial evidence in view of the whole record. Further, we hold the whole record fails to support the Commission's approved rate of return of 13.2% on Duke's common equity. For these reasons, we vacate the Commission's order setting a 13.2% rate of return on common equity and remand the matter to the Commission for further proceedings consistent with this opinion.

I.

The evidence presented to the Commission in hearings held between 3 September and 24 September 1986 is detailed in *State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. at 693-98, 370 S.E.2d at 570-72. This evidence includes the prefiled testimony and updated oral testimony of three expert witnesses. Briefly summarized:

Dr. Charles E. Olson presented the results of a Duke-specific DCF (discount cash flow methodology) study,[1] which indicated to him a return requirement of 11.9% to 12.4%. To this recommended rate of return Dr. Olson made two upward adjustments: one for future financing costs and one for possible future "down-market" conditions. Dr. Olson valued each adjustment at 0.5%, for a total upward adjustment of 1.0%. Dr. Olson "checked" these results with two other studies—a DCF study of comparable electric utilities and a "risk premium study."[2] These suggested return requirements of 12.5% to 13% and 13.85%, respectively, also factored upward for financing costs and "down-market" considerations. After making some other adjustments to the return suggested by his Duke-specific DCF study, he ultimately recommended a rate of return on equity between 13.5% and 14.0%.

Public Staff witness George T. Sessoms also presented a Duke-specific DCF study, which indicated an investor return of 11.5% to 12.3%. This was supplemented by a DCF study of comparable utilities, which suggested a 12.0% to 12.9% investor return requirement. Together, these figures supported an investor return requirement of 12.3%, which included a weighted average financing

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1. This method determines the proper rate of return by adding to the common stock's current yield a rate of increase investors expect to occur over time. *State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. at 693-94, 370 S.E.2d at 570.

2. See n. 5, *infra*, for an explanation of this study.

expense factor of 0.1%, based upon Duke's actual, historical costs of issuing new common equity shares between 1976 and 1985.

The Attorney General's witness, Dr. John W. Wilson, recommended a return for common equity of 11%, based on a DCF model that includes the historical growth rates of seventy-nine electric utilities, including Duke. He made no adjustment for stock issuance costs.

The Commission originally concluded Duke should be permitted a 13.4% rate of return on its common equity. The Commission recited the testimony of witnesses Olson, Sessoms, and Wilson in support of this conclusion. The Commission said the rate of return included some increment for financing costs, but it did not quantify this increment; and it did not state whether the 13.4% figure included a "down-market" increment.

On the first appeal this Court noted the Commission's approved 13.4% rate of return was identical to the return suggested by Dr. Olson's Duke-specific DCF study (12.4%) upwardly adjusted 1.0% for financing costs and "down-markets." We further noted the absence of any indication whether the Commission included a down-market increment in that rate of return. We approved Chairman Wells' observation that "ordinarily 'it is not the responsibility of the ratepayers to protect investors from swings in the marketplace,' " *id.* at 699, 370 S.E.2d at 573, and expressly disapproved inflating rate of return estimates with "down-market" increments. We also questioned the Commission's failure to quantify the financing costs increment which it concededly had used in its approved rate of return. Prompted by the statement of Duke's chairman, Mr. Lee, that "the company's 'present expectation is that we will be back into the capital markets for new funds in about three to four years,' " *id.* at 700, 370 S.E.2d at 574, the only evidence in the record on the probability of Duke's issuing new stock, we noted the record included no evidence that Duke would issue any new stock sooner than three or four years from the time of the hearing. We then said:

> [T]he record reveals that both Dr. Olson, testifying for Duke, and Mr. Sessoms, for the Public Staff, adjusted the rate of return derived from their DCF studies to account for future financing costs. The adjustments they suggested, however, .5% and .1% respectively, differ widely and amount to a significant difference to ratepayers. A .5% financing cost adjustment will

> increase rates by $21.2 million annually, while a .1% increase will cost ratepayers only $4.2 million annually.
>
> We find nothing in the record which supports a $21.2 million annual adjustment for financing costs. The record shows that over the entire period of 1975-1985 the total cost of Duke's new stock issues was only $16.1 million. The average cost per issue was approximately $3.2 million. The only reference in the record to Duke's plans to issue stock in the future was the statement of its Chairman, Mr. Lee, that the company's "present expectation is that we will be back into the capital markets for new funds in about three or four years."

Id. at 701, 370 S.E.2d at 574.

On remand, the Commission rectified its error of law with regard to the inclusion of a down-market factor. The Commission stated this factor had not affected the 13.4% rate approved in its original order and did not affect the 13.2% revised rate. The Commission also revealed in its new order that its originally approved rate of return on common equity of 13.4% "erroneously included and reflected an allowance for financing costs of up to 0.3%." The Commission stated:

> The record in this case will not support a financing cost or issuance adjustment in excess of 0.1%. We base our decision to allow an adjustment of 0.1% on the testimony of Public Staff witness Sessoms concerning his calculation and use of a weighted average selling expense factor of 0.1%.

The Commission acknowledged this Court's observation that a 0.1% financing cost adjustment would provide annual revenues that would "more than compensate investors for the cost of issuance of new common stock," *id.*, and concluded that the adjustment on equity rate of return for future stock issuance costs should be no more than 0.1%. It accordingly revised its authorized rate of return on equity downward by 0.2% to 13.2%.

The Commission's findings are conclusive if supported by substantial evidence in view of the whole record, N.C.G.S. § 62-94 (1989), and not affected by an error of law, *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 360, 189 S.E.2d 705, 732 (1972). Such findings so supported provide the basis for the exercise of the Commission's expert judgment.

II.

[1] We first conclude the Commission's inclusion of a 0.1% increment for purported future financing costs in its approved rate of return on common equity, notwithstanding the testimony of Mr. Sessoms, is not based upon substantial evidence in view of the whole record. On the first appeal of this case, we questioned whether the record supported *any* adjustment whatever in the rate of return for purported future stock issuance, or financing, costs.[3] We said:

> Since *no* evidence was introduced that Duke intends to issue new stock for the next three or four years, and because there was *no* evidence regarding the probable cost of a prospective issuance, we question whether the record supports *any* financing cost adjustment.

State ex rel. Utilities Comm. v. Public Staff, 322 N.C. at 700, 370 S.E.2d at 574 (emphasis added). We are now satisfied, for the reasons alluded to in our first opinion, that the record supports no such adjustment in the common equity rate of return.

Inclusion of such an adjustment, on this record, violates the statutory requisite that "the Commission shall fix such a rate of return . . . as will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, *as they then exist*." N.C.G.S. § 62-133(a)(4) (1989). Mr. Sessoms did recommend a 0.1% upward increment in the return on equity, apparently basing this increment on what he found to be Duke's historical stock issuance cost, the frequency of these past issuances and the assumption that such issuances would probably occur at some time in the future. Duke's Chairman, Mr. Lee, however, made it clear that Duke had no "present expectation" to issue capital stock in the immediate future. As we noted on the first appeal, a 0.1% upward increment in Duke's rate of return on common equity costs ratepayers $4.2 million annually in additional rates. Historically, Duke's average costs per issuance of stock was $3.2 million. In light of the whole record on this issue, particularly the absence of any evidence that Duke intended to issue stock in the immediate future, there is simply no substantial evidentiary support for the Commission's addition

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3. Dr. Wilson's recommended rate of return of 11%, for example, included no adjustment for this factor.

of a 0.1% increment to Duke's rate of return on common equity to cover future stock issuance costs.[4]

III.

[2] Second, we conclude the rate of return on Duke's common equity approved by the Commission, even absent adjustments for "down-market" and stock issuance costs, is not supported by substantial evidence in the record as a whole.

The Utilities Commission is charged by statute to fix such a rate of return on the cost of a utility's property

> as will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

N.C.G.S. § 62-133(b)(4) (1989). *See also State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. at 697, 370 S.E.2d at 572. This Court has emphasized that "the primary purpose of Chapter 62 of the General Statutes is not to guarantee to the stockholders of a public utility constant growth in the value of and in the dividend yield of their investment, but is to assure the public of adequate service at a reasonable charge." *State ex rel. Utilities Comm. v. General Telephone Co.*, 285 N.C. 671, 680, 208 S.E.2d 681, 687 (1974). The legislative intent of these provisions is that the Commission "fix rates as low as may be reasonably consistent with the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, those of the State Constitution, Art. I, § 19, being the same in this respect." *State ex rel. Utilities Comm. v. Duke Power Co.*, 285 N.C. 377, 388, 206 S.E.2d 269, 276 (1974).

The rate of return on common equity is one of several components the Commission must consider in determining an appropriate overall rate of return for a utility. Among these components, however,

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4. It is not necessary on this appeal for us to consider the interesting question whether the costs of issuing stock should be included as an operating expense rather than as an adjustment to the annual rate of return on common equity.

this rate of return is "the most difficult to determine and becomes . . . essentially a matter of judgment based on a number of factual considerations which vary from case to case." 322 N.C. at 697, 370 S.E.2d at 572. This determination is extremely important because "it is the most expensive form of capital accumulation, which expense is ultimately borne by the rate payer, and it is the most heavily weighted in arriving at the overall return." *Id.* at 697-98, 370 S.E.2d 572. For these reasons, the evidentiary underpinning for the Commission's findings and whether the findings support its conclusion regarding this figure is critical to this Court's review.

Both the Commission's original order and its order on remand disavow its reliance on any particular study or formula in its determination of an appropriate rate of return on common equity. In support of its conclusion that an appropriate rate of return on equity is 13.2%, the Commission cites the same evidence it summarized in its original order (summarized except where quoted):

1. The DCF studies of witnesses Olson, Sessoms, and Wilson. This methodology is "no more than a guide or channel to aid" the Commission's "informed judgment." "Market prices are only one of the many factors which should bear on the Commission's final judgment as to the fair rate of return." The Commission noted recommendations based on these DCF studies varied widely, reflecting the wild fluctuation of stock prices in 1986. In discounting the value of these studies, the Commission stated: "When the mechanical application of arithmetic models produces results which fail to comport with experience and common sense, the judgment of the Commission becomes paramount." This judgment is aided by such evidence in the record as testimony regarding takeover speculation, which distorted the price of Duke's stock in 1986.

2. Dr. Olson's risk premium methodology, which produced a 13.75% rate of return before adjustment for issuance costs and down markets.[5]

3. The average return on equity allowed by five other state regulatory commissions to five electric utilities of 14.47%.

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5. This study was based on the premium equity capital received over long-term bond rates during 1974-1979. The Commission explained in its order that this data is useful because the premium equity investors require is based on the level of long-term interest rates, and, at the time of the hearing, long-term interest rates were comparable to interest rates prevailing during 1974-1979, rather than to interest rates prevailing subsequent to that period.

4. The 15% rate of return on common equity allowed by the Commission in July 1986 to AT&T Communications of the Southern States, Inc. [hereinafter AT&T].

5. A return of 14.5% recently allowed by the Virginia Corporation Commission to the Virginia Electric and Power Company, a utility comparable to Duke "in many respects."

Other factors affecting the Commission's conclusion included the Commission's "opinion that as a general rule there should not be extreme fluctuations in the allowed return on common equity in fixing the rate of return." A difference of 170 basis points[6] between the 14.9% rate of return allowed in Duke's last rate case one year earlier and its allowed rate on remand of 13.2% "comes even closer to being an extreme adjustment" than the initial reduction of 150 basis points in the Commission's original order. The Commission also cited the effect of leveling the costs Duke will incur from payments Duke makes to owners of the Catawba Nuclear Station, saying this "somewhat increased Duke's risk by requiring Duke to defer collection of substantial revenues."[7]

The Public Staff argues that when the "down-market" and stock issuance increments are eliminated from the recommendations of the expert witnesses Olson, Sessoms, and Wilson, there is no "competent, material and substantial evidence in view of the entire record as submitted," N.C.G.S. § 62-94(b)(5) (1989), supporting the Commission's approved rate of return on common equity of 13.2%. We agree. Under this standard of judicial review the court may not sustain the Commission's findings because there is evidence in the record to support them; we must

> take into account whatever in the record fairly detracts from the weight of the [Commission's] evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the [Commission's] result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

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6. One hundred basis points represent one percentage point.

7. In lieu of permitting Duke to recover costs of buying back capacity and energy from Catawba purchasers in current rates as payments are made, the Commission decided to "levelize" certain components of these costs in order to stabilize the expenses over time and to avoid "rate shock" to present customers. *See State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 378-79, 358 S.E.2d 339, 360-61 (1987).

Thompson v. Board of Education, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

Viewing the record as a whole, we conclude, first, that certain findings supporting the 13.2% rate of return allowed by the Commission are not supported by the evidence; second, some findings, although supported by evidence, are not proper considerations in determining rates of return and do not support the rate of return conclusion. *See State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. at 703, 370 S.E.2d at 576 (Court must determine whether there is substantial evidence, in view of the entire record, to support the Commission's findings, which, in turn, must support its conclusion).

The only evidence in the record supporting a rate of return higher than 13% is Dr. Olson's risk premium study, which suggested a rate of return of 13.75%. Its reliability is drawn into question, however, by Dr. Olson's own testimony that this study, which he used merely as a "check" on his DCF studies, was "not as good as the DCF." This evidence, in light of evidence to the contrary, is insufficient under the whole record test to support the rate of return approved by the Commission.

The rates of return on equity allowed AT&T by the Commission and allowed electric utilities in five other states by their state regulatory commissions similarly fail to support the Commission's findings because there is nothing in the record to show that the equity return requirement for any of these utilities is comparable to Duke's.

The Commission's concern about an "extreme fluctuation" between the rate of return allowed in Duke's last general rate case and that allowed here, termed "gradualism" by Chairman Wells, while based on fact, is an improper consideration in determining rate of return. It has nothing to do with the Company's *existing* cost of equity. *See* N.C.G.S. § 62-133(b)(4) (1989). It appears, like "down-market" factors, to arise from the Commission's inappropriate desire "to protect investors from swings in market prices." 322 N.C. at 699, 370 S.E.2d at 573.

The Commission's projection that leveling costs Duke will incur from payments to owners of the Catawba Nuclear Station will increase Duke's risk by compelling a deferred collection of revenue has no basis in the factual record. Whatever the risk, it is included

in the levelized payments; and it is a known risk, ordered in Duke's previous rate case, so the market has already accounted for it in pricing Duke's stock. Thus it is accounted for in the witnesses' DCF models, which incorporate market price. At the very least, as Commissioner Cook points out in her dissent, "[i]t is not a certainty whether Duke's risk is in fact increased at all." There is no testimony and no other evidence that Duke's risk has been increased by the levelized payments.

We hold the Commission's judgment in determining an allowed rate of return on Duke's common equity of 13.2% was affected by improper considerations and is not otherwise supported by "competent, material and substantial evidence in view of the entire record as submitted." N.C.G.S. § 62-94(b)(5) (1989).

Our cases have recognized that the Utilities Commission is accorded some latitude generally in the exercise of its expertise and judgment in setting rates for regulated industries. *See, e.g., Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 371, 189 S.E.2d 705, 739 (1972). Nothing we do here is intended to impinge on this doctrine. Neither the Commission nor this Court, however, operates in unfenced fields. Both are bound by the evidence before us. In this case we simply conclude, for the reasons stated, that in setting the rate of return on Duke's common equity the Commission went beyond the boundaries established by the evidence.

The Commission's order insofar as it authorizes a rate of return of 13.2% on Duke's common equity is, for the reasons given, vacated. The case is remanded to the Commission for further proceedings consistent with this opinion.

Vacated and remanded.

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

STATE OF NORTH CAROLINA v. JOHN EDWARD BUTLER

No. 361A91

(Filed 22 April 1992)

1. Searches and Seizures § 12 (NCI3d)— stop and frisk—drug corner—lawful—evidence admissible

Evidence of defendant's purchase of a .12 gauge shotgun from a pawnshop and testimony about statements defendant made to a Tampa, Florida officer were not inadmissible as the fruits of an illegal search and seizure under the North Carolina and United States Constitutions where defendant was seen in the midst of a group of people congregated on a corner known in Tampa as a "drug hole"; the officer had had the corner under daily surveillance for several months; the officer knew this corner to be a center of drug activity because he had made four to six drug related arrests there in the past six months; the officer was aware of other arrests there as well; defendant was a stranger to the officers; upon making eye contact with the uniformed officers, defendant immediately moved away, behavior that is evidence of flight; and it was the officer's experience that people involved in drug traffic are often armed. While none of these circumstances alone necessarily satisfies Fourth Amendment requirements, when considered in their totality, the officer had sufficient suspicion to make a lawful stop.

Am Jur 2d, Searches and Seizures §§ 41, 43, 44, 58, 103.

Law enforcement officer's authority, under Federal Constitution's Fourth Amendment, to stop and briefly detain, and to conduct limited protective search of or "frisk," for investigative purposes, persons suspected of criminal activity—Supreme Court cases. 104 L. Ed. 2d 1046.

2. Evidence and Witnesses § 1694 (NCI4th)— murder—photograph of victim—admissible

The trial court did not err in a prosecution for assault and murder by admitting an autopsy photograph of the victim showing her bare breast. The trial court acted within its sound discretion in ruling under N.C.G.S. § 8C-1, Rule 403 that the probative value of the unaltered photograph was not substantially outweighed by any prejudice.

Am Jur 2d, Homicide §§ 417-419.

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

3. **Evidence and Witnesses §§ 635, 423 (NCI4th)— in-court identification—pretrial photographic lineup—failure to conduct voir dire—no prejudicial error**

There was no prejudicial error in a prosecution for assault and murder where defendant objected to the State's question asking the witness to identify his assailant; the trial court overruled the objection and allowed the witness to point to defendant; the trial court then excused the jury to ask defense counsel about the basis of defendant's objection; and, upon confirming that the objection was based on an underlying objection to an allegedly suggestive photographic lineup, the trial court summarily overruled defendant's objection, brought the jury back to the courtroom, and allowed the witness to identify defendant a second time. The trial court's failure to conduct a voir dire in order to determine the admissibility of in-court identification testimony allegedly tainted by a suggestive pretrial photographic lineup was error. However, where, as here, there is clear and convincing evidence that the witness knew and was familiar with the defendant, that the witness had ample and clear opportunity to observe the defendant as he committed the crime, and that the witness consistently identified the defendant as the perpetrator, the failure of the trial court to conduct a voir dire on the possibility of taint from a suggestive photographic lineup is harmless.

Am Jur 2d, Evidence §§ 371.8, 372.

4. **Evidence and Witnesses § 3205 (NCI4th)— murder and assault—identity of defendant as perpetrator—contradictions and discrepancies in testimony**

The State presented substantial evidence that defendant was the perpetrator of an assault and murder despite contradictions and discrepancies in the witnesses' testimony and in their descriptions of the perpetrator. Those are matters within the special province of the jury.

Am Jur 2d, Evidence § 1143; Homicide § 435.

5. Homicide § 246 (NCI4th); Assault and Battery § 26 (NCI4th)— assault and murder—evidence of premeditation and deliberation and of intent to kill—sufficient

There was sufficient evidence of premeditation and deliberation and of intent to kill in a prosecution for assault and murder where there was evidence that defendant was frustrated by a club owner's refusal to accept insufficient payment for the food defendant ordered; Glenda Love, as the messenger between defendant and the owner, became the focus of defendant's frustration; at least enough time passed between the first and second shots for a victim to yell at defendant; defendant pumped his sawed-off shotgun and fired a second time at Glenda and the second victim; defendant then turned and fired one more time in the direction of the bar, wounding at least one more person; and defendant then covered the gun and fled.

Am Jur 2d, Homicide § 439.

6. Assault and Battery § 22 (NCI4th)— assault with a deadly weapon with intent to kill inflicting serious injury—evidence of serious injury

There was sufficient evidence of the element of serious injury in an assault prosecution despite the victim's testimony that he was released from the hospital the night of the shooting and missed only one day of work where the victim also testified that he was hospitalized for gunshot wounds to the back and hip, that he continued to experience pain even at the time of the trial from the shot still lodged in his body, that he did not have the luxury of foregoing work for any length of time, and that he was limited on returning to work in the tasks he could perform.

Am Jur 2d, Assault and Battery § 48.

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 *Britt, J.*, at the 4 March 1991 Criminal Session of Superior Court, ROBESON County, upon a jury verdict finding defendant guilty of first-degree murder. On 23 August 1991 this Court allowed defendant's motion to bypass the Court of Appeals as to additional judgments of imprisonment. Heard in the Supreme Court 10 March 1992.

Lacy H. Thornburg, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.

Angus Thompson, Public Defender, by Gayla Graham Biggs, Assistant Public Defender, for defendant appellant.

WHICHARD, Justice.

Defendant was indicted for one count of first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury. After a noncapital trial, a jury found defendant guilty of first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon. The trial court sentenced defendant to life imprisonment for the murder conviction, fifteen years imprisonment for the first assault conviction, and two years imprisonment for the other assault conviction. On appeal, defendant raises four assignments of error. We find no prejudicial error.

All three offenses arose from a shooting incident on the night of 18 August 1989. Near midnight, a man later identified as defendant shot four people in the parking lot of a club in Lumberton called Studio 41. One of the victims, Glenda Sue Love, died; a second victim, Laura Locklear, suffered a gunshot wound in the leg; the third victim, Darnell Singletary, sustained gunshot wounds in the hip and the back; and the final victim, Kenny Earl Smith, received a gunshot wound to the arm.

The owner of the club, Morris Whitted, who had known defendant for years, testified that on the night in question he refused to sell defendant some food as defendant did not have sufficient funds to pay the price. Whitted then saw defendant confer with Glenda Love, who came to the counter to mediate for defendant. Apparently, Whitted did not accede to her request, at which point Glenda left the bar. A few minutes later Whitted heard shots, opened the door to the club, and saw Glenda lying on the ground.

According to witnesses, three shots were fired. Darnell Singletary testified that defendant fired the first two shots in his and Glenda's direction. Darnell had exited the club to leave, calling to Glenda that he was going. She came up to him and talked to him in the parking lot for a few minutes. Defendant approached the two and Glenda walked off a short distance to talk to him. As she was walking back to Darnell, Darnell heard the first shot,

which hit Glenda, then hit Darnell. Glenda fell into Darnell's arms, and Darnell shouted to defendant, "Hey, you crazy m----f----, what you shooting for?" Defendant stepped closer and shot again as Darnell and Glenda fell to the ground. Defendant fired the third and final shot in the direction of the bar, hitting Kenny Smith, who had been talking to an acquaintance in the parking lot. While it is unclear when and how Laura Locklear was hit, Kenny Smith testified that she was standing next to Glenda Love when Love was hit and fell. Authorities were unable to locate Locklear for the trial.

On the night of the shooting and at the hospital, officers questioned Darnell, who was uncooperative, angry, and in pain. Darnell did not identify the perpetrator that night. The next day, however, he told Officer Downing the perpetrator was named Butler and had dreadlocks. On 26 August, Darnell again named Butler as the perpetrator, describing him as follows: a black male, five feet ten inches tall, long hair, gold tooth, and usually wearing sunglasses and a navy blue baseball cap. Although Kenny Smith did not actually see the perpetrator as he (Kenny) was shot, he testified that a man who had been talking to Glenda Love was the perpetrator. That man, Kenny told officers at the hospital, was five feet five inches tall, dark skinned, with a thick moustache and close-cut hair, and wearing blue jeans and a short black leather jacket over the gun. Dennis Love, the brother of victim Glenda Love, testified that the perpetrator wore a long trench coat over the gun.

Officers at the scene recovered shells from a .12 gauge shotgun. Pathologist Bob Barcus Andrews opined that the perpetrator would have been two to six feet from Glenda when he shot her.

[1] In his first assignment of error, defendant contends that evidence of his purchase of a .12 gauge shotgun from a Fayetteville pawnshop and testimony about statements he made to Officer Ernesto Hedges of the Tampa, Florida Police Department were inadmissible as the fruits of an illegal search and seizure under the North Carolina and United States Constitutions. U.S. Const. amend. IV; N.C. Const. art. I, § 20. The pawnshop owner and an employee confirmed at trial that defendant bought a .12 gauge shotgun from them on 29 July 1989. Officer Hedges obtained the gun purchase receipt and the statements on 11 October 1989 while on patrol as a uniformed officer assigned to a specialty drug unit in Tampa. Hedges and his partner saw defendant, an unfamiliar

figure, standing with a group of people on a Tampa street corner known as a "drug hole," an area frequented by drug dealers and users. Hedges had had the area under daily surveillance for several months. In the past six months, Hedges had made four to six arrests at the corner and knew that other arrests had occurred there. As Hedges and his partner approached the group, defendant and the officers made eye contact, at which point defendant immediately turned and walked away.

Their suspicions raised, the officers followed defendant and asked him for identification. Defendant handed Hedges a Florida driver's license. Before Hedges accepted the identification, he frisked defendant's person. Hedges testified that he conducted the frisk in order to discover any weapons and for his own protection during the face-to-face encounter with a person he suspected of drug activity. Upon obtaining the driver's license, Hedges followed normal procedure and called the information in on his hand-held radio in order to obtain any outstanding arrest warrants. When the response was negative as to any Florida warrants, Hedges returned defendant's license. As defendant walked away, however, the police dispatcher called over the radio that defendant had an outstanding warrant for homicide in North Carolina. At that point Hedges approached defendant and arrested him.

Before placing defendant in the police car, Hedges advised defendant of his rights and the murder charge against him, executed a search incident to arrest, and removed defendant's wallet. At the police station, an inventory search of the wallet produced the pawnshop purchase receipt. After processing defendant at the police station, Hedges and his partner transported defendant to the county jail. On the way, defendant made the following spontaneous, unsolicited statement: "I don't remember any of it. You know what drugs do to you." At the jail, defendant made a second spontaneous statement when he asked Hedges, "Which one died, the man or the woman?" While defendant gave a different version of his encounter with Officer Hedges, the trial court found the facts as set forth in Hedges' account and concluded that both the purchase receipt and the statements were admissible.

The State contended in its brief and in oral arguments that the officers did not make a detention triggering the Fourth Amendment because the officers "never restrained the defendant's freedom to walk away." The United States Supreme Court has stated that

it is "sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his . . . body . . . is not a 'search.'" *Terry v. Ohio*, 392 U.S. 1, 16, 20 L. Ed. 2d 889, 903 (1968). Hedges' frisking of defendant elevated the police action here beyond a mere request for identification. *Id.* at 16-19, 20 L. Ed. 2d at 903-05; *see also United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 ("[e]xamples of circumstances that might indicate a seizure . . . [include] some physical touching of the person . . ."), *reh'g denied*, 448 U.S. 908, 65 L. Ed. 2d 1138 (1980). Hedges thus must have acted upon "specific and articulable facts" that led him to conclude that defendant was, or was about to be, engaged in criminal activity and that defendant was "armed and presently dangerous." *Terry*, 392 U.S. at 21, 24, 20 L. Ed. 2d at 906, 908; *accord, State v. Rinck*, 303 N.C. 551, 559-61, 280 S.E.2d 912, 919-20 (1981) ("[i]f upon detaining the individual, the officer's personal observations confirm that criminal activity may be afoot and suggest that the person detained may be armed, the officer may frisk him as a matter of self-protection"); *State v. Streeter*, 283 N.C. 203, 210, 195 S.E.2d 502, 506-07 (1973).

In determining whether the *Terry* standard is met, we must consider Hedges' actions in light of the totality of the circumstances. *Rinck*, 303 N.C. at 559, 280 S.E.2d at 919; *Streeter*, 283 N.C. at 210, 195 S.E.2d at 506. Those circumstances are: 1) defendant was seen in the midst of a group of people congregated on a corner known as a "drug hole"; 2) Hedges had had the corner under daily surveillance for several months; 3) Hedges knew this corner to be a center of drug activity because he had made four to six drug-related arrests there in the past six months; 4) Hedges was aware of other arrests there as well; 5) defendant was a stranger to the officers; 6) upon making eye contact with the uniformed officers, defendant immediately moved away, behavior that is evidence of flight; and 7) it was Hedges' experience that people involved in drug traffic are often armed.

While no one of these circumstances alone necessarily satisfies Fourth Amendment requirements, we hold that, when considered in their totality, Officer Hedges had sufficient suspicion to make a lawful stop. Hedges observed defendant not simply in a general high crime area, but on a specific corner known for drug activity and as the scene of recent, multiple drug-related arrests. *See United States v. Rickus*, 737 F.2d 360, 365 (3d Cir. 1984) (presence of defendants in area that recently had experienced "a spate of

burglaries"); *United States v. Magda*, 547 F.2d 756, 758-59 (2d Cir. 1976) (two suspects observed one hundred feet west of a park which was under twenty-four hour surveillance for drug activity), *cert. denied*, 434 U.S. 878, 54 L. Ed. 2d 157 (1977). The United States Supreme Court has held that mere presence in a neighborhood frequented by drug users is not, standing alone, a basis for concluding that the defendant was himself engaged in criminal activity. *Brown v. Texas*, 443 U.S. 47, 52, 61 L. Ed. 2d 357, 362-63 (1979). Here, however, there was an additional circumstance—defendant's immediately leaving the corner and walking away from the officers after making eye contact with them. *See United States v. Jones*, 619 F.2d 494, 498 (5th Cir. 1980) (individual's flight from uniformed law enforcement officer may be fact used to support reasonable suspicion "that criminal activity is afoot"); *Magda*, 547 F.2d at 758-59 (defendant's companion immediately moved away with a "rapid motion" after looking in direction of observing officer); *State v. Belton*, 441 So. 2d 1195, 1198 (La. 1983) (flight, nervousness, or a startled look at the sight of an officer may be a factor leading to reasonable suspicion), *cert. denied*, 466 U.S. 953, 80 L. Ed. 2d 543 (1984).

Upon approaching defendant, Hedges lawfully performed a limited frisk to discover any weapons on defendant's person. *Terry*, 392 U.S. at 24, 20 L. Ed. 2d at 908; *Streeter*, 283 N.C. at 210, 195 S.E.2d at 506-07. In concluding that defendant, as a person reasonably suspected of involvement in drug traffic, might be armed, Hedges was entitled to formulate "common-sense conclusions" about "the modes or patterns of operation of certain kinds of lawbreakers." *United States v. Cortez*, 449 U.S. 411, 418, 66 L. Ed. 2d 621, 629 (1981); *accord United States v. Sokolow*, 490 U.S. 1, 8, 104 L. Ed. 2d 1, 10 (1989); *cf. Terry*, 392 U.S. at 28, 20 L. Ed. 2d at 910 (given the actions of suspects that suggested a daylight robbery, officer could reasonably assume suspects might be armed).

Because the "stop and frisk" of defendant was lawful, the receipt and statements were not the poisonous fruits of an illegal search and seizure. Hedges obtained defendant's wallet as part of a proper search incident to arrest. *See Chimel v. California*, 395 U.S. 752, 764-68, 23 L. Ed. 2d 685, 694-97, *reh'g denied*, 396 U.S. 869, 24 L. Ed. 2d 124 (1969). The Tampa police discovered the receipt while conducting a lawful inventory search of the wallet at the police station. *See Illinois v. Lafayette*, 462 U.S. 640, 646-48, 77 L. Ed. 2d 65, 71-73 (1983). Finally, defendant uttered his in-

criminating statements spontaneously, without any compulsion or questioning by the officers. They thus were admissible. *See, e.g., State v. McQueen*, 324 N.C. 118, 128, 377 S.E.2d 38, 44 (1989); *State v. Porter*, 303 N.C. 680, 691-92, 281 S.E.2d 377, 385 (1970).

[2] In his second assignment of error, defendant argues that the trial court erred in admitting a photograph of victim Glenda Love, taken at her autopsy and showing her bare breast. Defendant contends that the photograph impermissibly inflamed the passions of the jury to defendant's prejudice. Dr. Bob Barcus Andrews, the pathologist who performed the autopsy, testified that he took the photograph himself. The trial court denied defendant's motion to cover the breast area of the body, accepting the State's explanation that to cover an area of the already small Polaroid photograph would diminish the use of the photograph in illustrating the location of the victim's wounds.

"This Court has rarely held the use of photographic evidence to be unfairly prejudicial, and the case presently before us is distinguishable from the few cases in which we have so held." *State v. Robinson*, 327 N.C. 346, 357, 395 S.E.2d 402, 409 (1990). Where, as here, Dr. Andrews used the one photograph to illustrate his testimony about the cause of death and the nature and location of the wound, the danger of redundant and excessive use of potentially inflammatory photographs is not present. *See State v. Hennis*, 323 N.C. 279, 284-85, 372 S.E.2d 523, 526-27 (1988). The trial court acted within its sound discretion in ruling, under Rule 403 of the North Carolina Rules of Evidence, that the probative value of the unaltered photograph was not substantially outweighed by any prejudice. N.C.G.S. § 8C-1, Rule 403 (1988).

[3] Defendant assigns as error the admission of Darnell Singletary's in-court identification of defendant as the man who shot him. The State contends that this assignment of error must fail because defendant did not object in a timely manner to the identification. Our review of the record reveals otherwise; prior to Darnell's in-court indication of defendant as the perpetrator, defense counsel objected to the State's question asking the witness to identify his assailant. The trial court overruled the objection and allowed Darnell to point to defendant. Belatedly, the trial court excused the jury to ask defense counsel about the basis of the objection. Upon confirming that defense counsel's objection was based on an underlying objection to an allegedly suggestive pretrial photo-

graphic line-up, the trial court summarily overruled defendant's objection, brought the jury back into the courtroom, and allowed Darnell to identify defendant a second time, again over a defense objection.

The trial court's failure to conduct a *voir dire* in order to determine the admissibility of in-court identification testimony allegedly tainted by a suggestive pretrial photographic line-up was error. *State v. Stepney*, 280 N.C. 306, 314, 185 S.E.2d 844, 850 (1971). In *Stepney*, however, we held that where

> the pretrial viewing of photographs was free of impermissible suggestiveness, and the evidence is clear and convincing that the defendant's in-court identification originated with observation of defendant at the time of the robbery and not with the photographs, the failure of the trial court to conduct a voir dire and make findings of fact . . . must be deemed harmless error.

Id.

Because defendant failed to include the photographs from the line-up in the record on appeal, we are unable to determine whether the line-up was indeed impermissibly suggestive. The record does reveal, however, clear and convincing evidence that Darnell Singletary's identification of defendant as the perpetrator originated with his observation of defendant at the time of the shooting. That evidence includes the following: 1) while it was night when the shooting occurred, the parking lot was illuminated by a security light on the corner of Studio 41 and by streetlights; 2) Darnell was familiar with defendant's appearance and dress that night, as he had seen him earlier at the home of a mutual acquaintance where defendant had requested a cigarette of Darnell; 3) shortly thereafter, Darnell saw defendant and greeted him in the club parking lot; 4) minutes before the shooting, defendant walked up to Darnell Singletary and Glenda Love; 5) Darnell had ample opportunity to observe defendant as the perpetrator when Darnell called out in amazement to him after the first shot and as defendant approached the felled Singletary and Love within two to six feet to shoot at them a second time; and 6) while an angry and uncooperative Darnell did not identify defendant at the hospital on the night of the shooting, he did identify defendant the next morning and again a week later. Under these circumstances, it is clear

that Darnell was able to recognize defendant in the parking lot and to observe him as he fired the shots.

Assuming, *arguendo*, that the photographic line-up was impermissibly suggestive, we hold that satisfaction of the second prong in *Stepney*, the presence of clear and convincing evidence of the independent origin of the identification, renders the trial court's failure to conduct a *voir dire* harmless. Unlike in *Stepney*, the witness here knew the defendant prior to the time of the shooting. The danger that a suggestive photographic line-up will result in a misidentification is much greater when the witness has never seen the perpetrator prior to the time of the crime. *See Simmons v. United States*, 390 U.S. 377, 383, 19 L. Ed. 2d 1247, 1253 (1968) (if a witness only obtained a brief glimpse of a criminal, a subsequent photographic display might cause the witness to retain an image of the photograph rather than an image of the person actually seen). Darnell had worked daily with defendant in tobacco for the two weeks preceding the shooting. They had mutual acquaintances and frequented the same night entertainment spots. Where, as here, there is clear and convincing evidence that the witness knew and was familiar with the defendant, that the witness had ample and clear opportunity to observe the defendant as he committed the crime, and that the witness consistently identified the defendant as the perpetrator, we hold that the failure of the trial court to conduct a *voir dire* on the possibility of taint from a suggestive photographic line-up is harmless.

[4] As a final assignment of error, defendant contends that the trial court erred in denying the following motions: a motion to dismiss the charges at the close of the State's evidence; a motion to dismiss at the close of all the evidence; a motion not to instruct the jury on the charge of first-degree murder because there was insufficient evidence to support the charge; and a motion to dismiss the verdicts on the grounds of insufficient evidence to sustain the convictions. Defendant first argues that the State failed to present substantial evidence that defendant was the perpetrator of the crimes. A guilty verdict will be upheld if the State presents substantial evidence—relevant evidence which a reasonable mind might accept as adequate to support a conclusion—of each element of the offense charged. *State v. Black*, 328 N.C. 191, 199, 400 S.E.2d 398, 403 (1991). Contrary to defendant's argument, the State presented substantial evidence that defendant was the perpetrator of the crimes charged. The contradictions and discrepancies in the

witnesses' testimony and in their descriptions of the perpetrator, to which defendant points, are matters within the special province of the jury to resolve. *Id.*

[5] In the alternative, defendant argues that because the State failed to present substantial evidence of the element of premeditation and deliberation of first-degree murder, the trial court erred in instructing the jury on first-degree murder. "It is well settled that instructions are not improper if based upon 'some reasonable view of the evidence.' " *State v. Garner*, 330 N.C. 273, 295, 410 S.E.2d 861, 874 (1991) (quoting *State v. Buchanan*, 287 N.C. 408, 421, 215 S.E.2d 80, 88 (1975)). Because "[n]either premeditation nor deliberation is usually susceptible of direct proof," this element of first-degree murder usually rests on circumstantial evidence. *Id.*, 410 S.E.2d at 873.

This Court has identified a number of circumstances that may be considered in determining whether a killing was committed with premeditation and deliberation. *See, e.g., State v. Quesinberry*, 319 N.C. 228, 231, 354 S.E.2d 446, 448 (1987), *on remand*, 325 N.C. 125, 381 S.E.2d 681 (1989), *cert. granted and judgment vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 288, 401 S.E.2d 632 (1991). Such circumstances existed in this case in the following forms: 1) evidence that defendant was frustrated by Whitted's refusal to accept insufficient payment for the food defendant ordered at the counter; 2) evidence that Glenda Love, as the messenger between defendant and Whitted, became the focus of defendant's frustration; 3) evidence that at least enough time passed between the first and second shots for Darnell to yell at defendant; 4) evidence that defendant pumped his sawed-off shotgun and fired a second time at the fallen Glenda and Darnell; 5) evidence that defendant then turned and fired one more time in the direction of the bar, wounding at least one more person; and 6) evidence that defendant then covered the gun and fled. From this evidence, a reasonable person could conclude that defendant acted with premeditation and deliberation when he fired the shot that caused the death of Glenda Love. This evidence also supports the element of intent to kill regarding the charge of assault with a deadly weapon with intent to kill inflicting serious injury.

[6] Defendant also argues that there was not sufficient evidence of the element of "serious injury," given Darnell's testimony that he was released from the hospital the night of the shooting and

that he only missed one day of work. The term "serious injury" includes "physical or bodily injury resulting from an assault with a deadly weapon." *State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 373-74 (1978). That a .12 gauge shotgun is a deadly weapon is beyond dispute. Whether serious injury has been inflicted is a question for the jury. *Id.* Darnell testified that he was hospitalized for gunshot wounds to the back and hip, that he continued to experience pain even at the time of the trial from gunshot still lodged in his body, that he did not have the luxury of foregoing work for any length of time, and that he was limited, on first returning to work, in the tasks he could perform. This was sufficient evidence from which a jury reasonably could find that serious injury did occur. *See State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988) (evidence that victim was hospitalized for injuries sustained from a shooting by a .22 rifle); *State v. Hensley*, 90 N.C. App. 245, 248, 368 S.E.2d 208, 210 (1988) (factors courts have considered include, but are not limited to, pain and suffering, loss of blood, hospitalization, and time lost from work).

For the above reasons, we conclude that defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOHN D. LOCKLEAR

No. 610A90

(Filed 22 April 1992)

1. Assault and Battery § 31 (NCI4th)— assault—intent to kill—instruction on transferred intent

There was no unconstitutional burden shifting in a prosecution for murder and assault where the court instructed the jury on the doctrine of transferred intent as it related to the assault charge. The doctrine of transferred intent does not require or permit one fact to be presumed based upon the finding of another fact, and no presumption of any kind arose here where the trial court merely fulfilled its duty by

explaining the well-established rule of substantive law known as the doctrine of transferred intent.

Am Jur 2d, Assault and Battery §§ 18, 52; Homicide § 71.

2. **Homicide § 552 (NCI4th)— murder—no instruction on second degree—no error**

There was no error in a prosecution for first degree murder where the court denied defendant's request to instruct the jury to consider a verdict finding him guilty of the lesser included offense of second degree murder. The only rational verdicts a jury in this case could have returned were guilty of first degree murder on the basis of premeditation and deliberation or not guilty.

Am Jur 2d, Homicide §§ 525, 526, 530.

3. **Jury § 7.10 (NCI3d)— murder—jury selection—removal for cause—no abuse of discretion**

The trial court did not abuse its discretion in a prosecution for murder and assault by removing for cause three prospective jurors who knew defendant, defendant's family members, or defendant's co-counsel. Although the conflicting answers given by the three prospective jurors did not establish their bias with unmistakable clarity, there is no doubt the answers they gave could have left the trial court with the quite reasonable impression that they would be unable to faithfully and impartially apply the law.

Am Jur 2d, Jury §§ 251, 267, 313, 314.

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

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a life sentence for first-degree murder entered on 9 February 1990 by *Hudson, J.*, in Superior Court, SCOTLAND County. The defendant's motion to bypass the Court of Appeals on the appeal of judgment and sentence entered against him for assault with a deadly weapon with intent to kill inflicting serious injury was allowed by the Supreme Court on 3 July 1991. Heard in the Supreme Court on 13 November 1991.

Lacy H. Thornburg, Attorney General, by John H. Watters, and G. Patrick Murphy, Assistant Attorneys General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor, Assistant Appellate Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant was tried upon proper indictments for the first-degree murder of Geraldine H. Donovan and for assault with a deadly weapon with intent to kill inflicting serious injury on Victoria Kay Donovan. The jury found the defendant guilty of both 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, as required by law, imposed a life sentence for that offense pursuant to the jury's recommendation. The trial court also entered a judgment sentencing the defendant to a consecutive term of imprisonment of twenty years for the assault conviction. The defendant appealed his conviction and life sentence for murder to this Court as a matter of right. We allowed the defendant's motion to bypass the Court of Appeals on his appeal of the assault conviction and sentence.

The defendant brings forward three assignments of error. First, he contends that the trial court's instruction on transferred intent with regard to the assault charge denied him due process of law by applying a conclusive presumption. Next, he argues that the trial court erred in failing to instruct the jury on second-degree murder as a lesser-included offense under the indictment against him for the murder of Geraldine Donovan. Finally, he maintains that the trial court erred in removing three prospective jurors for cause due to their relationship with the defendant. We conclude that the defendant's assignments of error are without merit.

The State's evidence tended to show, *inter alia*, that for approximately two years prior to her death on 16 May 1988, Geraldine Donovan had been involved in a relationship with the defendant John D. Locklear. The relationship was described as being "on and off." Geraldine's fifteen-year-old daughter, Vickie Donovan, testified that on 16 May 1988, the relationship between the defendant and her mother could be seen as being "off."

Around 9:00 a.m. on 16 May 1988, the defendant Locklear was seen by his friend Stanton Lewis. Later that afternoon, the defendant came by Lewis' house and asked him if he wanted to ride to the store with the defendant. The two men then headed toward Laurinburg. The defendant's automobile contained clothes on a hanger, a laundry basket with clothes and a shaving kit. On the way towards Laurinburg, the defendant pulled a .25 caliber handgun out of the laundry basket. The defendant stopped at a K-Mart in Laurinburg and purchased a box of .25 caliber ammunition. He asked Lewis to load the gun as they proceeded out of town to Shaw Woods to test-fire the gun. They drove down a path into the woods, where the defendant got out and fired the gun approximately six times.

The defendant drove back to Lewis' house. On the way, Lewis reloaded the gun. They arrived at Lewis' house around 6:00 p.m. As the defendant was leaving, he told Lewis "to take care of myself, that—he might not never [sic] see me again."

The defendant Locklear then went to the Donovan residence, where he arrived at about 6:20 p.m. He entered the house through the side door which opens into the kitchen. He walked past Vickie Donovan in the kitchen and went into the living room where her mother, Geraldine Donovan, was standing. Geraldine and the defendant then went into an adjacent bedroom where Geraldine began putting on make-up and fixing her hair. Vickie went into her bedroom directly across a small hallway.

Moments later Vickie heard her mother yell, "No, John, don't." Vickie went to the door of her room. As she opened it, she heard what sounded like a firecracker going off. When she heard the sound, she stepped back from the door and saw her mother come running into the room with the defendant right behind her holding a handgun. Just before the shots stopped, Vickie peeped over the bed at her mother who was down on her knees in the closet holding the doorknob. Geraldine looked at Vickie, took a breath and fell backwards. Vickie stayed curled up on the floor until the shooting stopped. When the shooting did stop, she looked up and the defendant was gone.

Vickie went into the next room to call the police. As she sat there, she looked up and saw the defendant standing in the doorway reloading the gun. The defendant told Vickie, "Get off the damn phone." Vickie closed the bedroom door in his face.

After closing the door, Vickie proceeded to dial the police. While doing so, she heard more shots coming from her bedroom. She put down the phone and went into her bedroom where she found the defendant standing in front of the closet with the gun pointed at Geraldine Donovan. Vickie pleaded with the defendant, and he stopped shooting and walked out of the house. As Vickie went back to call the police, she noticed blood on her own neck.

At approximately 8:30 p.m., Deputy Benjamin Williams of the Moore County Sheriff's Department answered a call regarding a man acting suspiciously at the Fast Mart in Pine Bluff. Williams found the defendant there and, upon being informed that the defendant was wanted by authorities in Scotland County, transported him to the Moore County Sheriff's Department. While in the defendant's presence, Williams observed that the defendant's speech was not slurred. Although the defendant had the odor of cigarettes and alcohol about him, he did not have any problem communicating with the deputy.

The defendant was returned to Scotland County and processed by Detective Paul Lemmond. During the booking process, the defendant asked the detective, "Is she dead?" Detective Lemmond responded, "Yes, sir."

An autopsy was performed on the body of Geraldine Donovan by Dr. Robert L. Thompson in the presence of Dr. John Butts. During the autopsy, six gunshot entry wounds were located in the victim's body. Two exit wounds were also noted. Four projectiles were recovered from the body. In the opinion of Dr. Butts, Geraldine Donovan died as a result of the six gunshot wounds.

As a result of the defendant's attack upon her on 16 May 1988, Vickie Donovan was treated by Dr. James S. Mitchner for a gunshot wound to her neck. The projectile which struck Vickie entered the back right side of her neck passing through and exiting from the back left side of her neck.

State Bureau of Investigation Agent Steve Carpenter testified as an expert in latent firearms examination and ballistics. From his examination, he concluded that a .25 caliber semi-automatic Raven pistol recovered from the defendant's car fired all of the projectiles linked to the events which had occurred in the Donovan residence.

The defendant did not present any evidence during the guilt-innocence determination phase of the trial.

[1] In his first assignment of error, the defendant contends that the trial court erred in instructing the jury on the doctrine of transferred intent as related to the charge against him for assault with a deadly weapon with intent to kill inflicting serious injury upon Vickie Donovan. He argues that this instruction directed the jury to apply a conclusive presumption against him and, thereby, unconstitutionally shifted the burden of persuasion on the element of specific intent to harm Vickie Donovan to the defendant.

The complained-of instruction occurred when the trial court instructed the jury on the elements of assault with a deadly weapon with the intent to kill inflicting serious injury. The trial court instructed that: "Considering the defendant's intent, the jury is instructed that if the defendant intended to harm one person, but actually harmed a different person, the legal effect would be the same as if he had harmed the intended victim. This is called the doctrine of transferred intent." The defendant recognizes that this instruction was consistent with North Carolina law and conformed with the pattern jury instruction on transferred intent. *See* N.C.P.I.—Crim. 104.13. However, he contends that the challenged instruction amounted to a mandatory conclusive presumption which unconstitutionally relieved the State of its burden of proving each element of the offense charged, denying him due process. We do not agree.

"Elements of criminal offenses present questions of fact which must be resolved by the jury upon the State's proof of their existence beyond a reasonable doubt." *State v. Torain*, 316 N.C. 111, 119, 340 S.E.2d 465, 469, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). The Supreme Court of the United States has stated that the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 375 (1970). This principle prohibits the use of evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Francis v. Franklin*, 471 U.S. 307, 313, 85 L. Ed. 2d 344, 352 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39 (1979); *State v. White*, 300 N.C.

494, 507, 268 S.E.2d 481, 489, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). The instruction in the present case did not have the effect of relieving the State of any part of its burden of persuasion on an essential element; instead, it merely stated the substantive law of this state. 2 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 201 (3d ed. 1988).

In the present case, the trial court merely explained the common law doctrine of transferred intent to the jury. Under that doctrine,

> [i]t is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. Criminal liability, if any, and the degree of homicide must be thereby determined. Such a person is guilty or innocent exactly as [if] the fatal act had caused the death of his adversary. It has been aptly stated that "The malice or intent follows the bullet."

State v. Wynn, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971) (citations omitted).

The doctrine of transferred intent does not require or permit one fact to be presumed based upon the finding of another fact. Instead, under the doctrine of transferred intent, it is immaterial whether the defendant intended injury to the person actually harmed; if he in fact acted with the required or elemental intent toward someone, that intent suffices as the intent element of the crime charged as a matter of substantive law. *Id.*; *cf. State v. Swift*, 290 N.C. 383, 407, 226 S.E.2d 652, 669 (1976) (felony murder rule makes premeditation and deliberation immaterial and does not violate due process by establishing a presumption of premeditation and deliberation); 2 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 215 (3d ed. 1988) (distinguishing presumptions arising upon evidence from matters of substantive law). No presumption of any kind arose here where the trial court merely fulfilled its duty by explaining the well-established rule of substantive law known as the doctrine of transferred intent, as it applied to the assault charged. Therefore, no unconstitutional burden shifting, such as those disapproved in *Francis* and *Sandstrom*, occurred in this case. *Cook v. State*, 255 Ga. 565, 340 S.E.2d 843, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986); *Commonwealth v. Puleio*, 394 Mass. 101, 474 N.E.2d 1078 (1985); *State v. Livingston*, 420

N.W.2d 223 (Minn. App. 1988); *cf. Yates v. Evatt*, 500 U.S. ---, ---, 114 L. Ed. 2d 432, 452 (1991) (discussing the doctrine of transferred intent). This assignment of error is overruled.

[2] By his next assignment of error, the defendant contends that the trial court erred in its instructions on the first-degree murder charge when it denied his request to instruct the jury to consider a verdict finding him guilty of the lesser-included offense of second-degree murder. We find no error in this regard.

We have disavowed any rule that would require the trial court to instruct on second-degree murder as a lesser-included offense in all first-degree murder cases in which the State, as here, relies on the theory that the murder was committed with premeditation and deliberation. *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986); *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 646 (1983). To determine whether it should instruct on the lesser-included offense in such cases, the trial court must examine the State's evidence to see if it is "positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged." *Strickland*, 307 N.C. at 284, 298 S.E.2d at 652. "The trial court is required to charge on a lesser-included offense only when there is evidence to support a verdict finding the defendant guilty of such lesser offense." *Hickey*, 317 N.C. at 470, 346 S.E.2d at 655. On the other hand, when all the evidence tends to show the defendant committed the crime charged and did not commit a lesser offense, the trial court is correct in refusing to charge on the lesser-included offense. *Id.*

The State's evidence in this case tended to show that on the day he killed the victim, the defendant purchased ammunition for a .25 caliber handgun and went with his friend Stanton Lewis to some woods to test-fire the gun. Later that day, the defendant went to the Donovan residence where he entered through the side door and went into a bedroom to talk with Geraldine Donovan. Moments later, Vickie Donovan heard her mother yell, "No, John, don't." Vickie heard what sounded like a firecracker going off, and then saw her mother running from the room with the defendant right behind her holding a handgun. After the shots stopped, Vickie went to another room to use the telephone. The defendant followed her and told her to get off the telephone. Vickie got up and closed the door, then began to dial the number for the police department. At that point, she heard more shots coming from her bedroom.

She put the telephone down and went to her bedroom, where she found the defendant still pointing the gun at her mother. She yelled at the defendant and, at that point, he stopped shooting and walked out of the house.

Based on the evidence in this case, the only rational verdicts a jury could have returned were a verdict finding the defendant guilty of first-degree murder on the basis of premeditation and deliberation or, if the jury did not believe the evidence, a verdict finding him not guilty. The trial court properly refused to submit the lesser-included offense of second-degree murder.

[3] By his final assignment of error, the defendant contends that the trial court improperly removed three prospective jurors for cause following *voir dire* examination. We conclude that the trial court committed no error in this regard.

Whether to allow a challenge for cause in jury selection is a decision ordinarily left to the sound discretion of the trial court which will not be reversed on appeal except for abuse of discretion. *State v. Kennedy*, 320 N.C. 20, 28, 357 S.E.2d 359, 364 (1987). The primary goal of the jury selection process is to ensure selection of a jury comprised only of persons who will render a fair and impartial verdict. *Id.* at 26, 357 S.E.2d at 363.

The transcript in the present case reveals that the first juror excused for cause, Roy Yarborough, knew the defendant through Alcoholics Anonymous. He also said that he knew the defendant's mother and father "real well." He indicated that he thought a lot of the defendant's parents and considered the defendant a friend. When asked by the prosecutor if his relationship with the defendant's family would impair his ability to be fair to both sides, Yarborough responded, "Yes, sir." The prosecutor then asked if Yarborough thought that his bias would be substantial enough that he could not be impartial, to which Yarborough replied, "I think so." On rehabilitative questioning by the defendant, Yarborough indicated that he "maybe could" hear the evidence in the case and do what the court instructed him to do.

The State's *voir dire* questioning of the second juror excused for cause, John Hudson, revealed he had been represented by Mr. Horne, co-counsel for the defendant, in two previous legal matters. Hudson considered Horne his lawyer and had confidence in his abilities. Hudson then agreed with the prosecutor's statement that

because he held Horne in such high regard, he could not be fair and impartial to both sides. On rehabilitative questioning by the defendant, Hudson agreed that he could listen to what the court said and could be fair to both the State and the defendant.

The third juror excused for cause, Gregory Pegues, indicated he knew the defendant's sister, Lucille Brock, through his employment. He had known her for five years and considered her a good friend. The defendant's sister attended the entire trial and testified at the sentencing proceeding. The prosecutor questioned Pegues as to whether the fact that he knew Mrs. Brock would prevent him from being fair to both sides in this case. Pegues initially responded, "I don't think so." However, when the prosecutor rephrased the question to ask if the fact the defendant was Lucille's brother would prevent him from being fair to both sides, Pegues said, "I think it might." Pegues then agreed that his friendship with the defendant's sister would not allow him to be fair and impartial in this case. During rehabilitative questioning by the defendant, Pegues stated that he "would want to be" fair to both sides if he sat as a juror.

In *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985), the Supreme Court of the United States held that a potential juror's bias does not have to be shown with "unmistakable clarity" before a challenge for cause may be granted. The Court stated that great deference should be shown the trial court in these situations because "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 426, 83 L. Ed. 2d at 852.

It is true that the conflicting answers given by the three prospective jurors here did not establish their bias with unmistakable clarity. But there is no doubt that the answers they gave could have left the trial court with a quite reasonable impression that they would be "unable to faithfully and impartially apply the law." *Id.* The abuse of discretion standard of review is applied to situations, such as this, which require the exercise of judgment on the part of the trial court. The test for abuse of discretion requires the reviewing court to determine whether a decision " 'is manifestly unsupported by reason,' or 'so arbitrary that it could not have been the result of a reasoned decision.' " *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (quoting *White*

v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) and *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985)). From the record in the present case, it is clear that the trial court did not abuse its discretion in excusing the three prospective jurors in question for cause under N.C.G.S. § 15A-1212(9).

The defendant received a fair trial free from prejudicial error.

No error.

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

DEBORAH ANN REED v. CLARA PARKS ABRAHAMSON, JAMES OWEN ABRAHAMSON, KAREN BARWICK AND ROBERT LEONARD BARWICK, SR.

No. 230PA91

(Filed 22 April 1992)

1. **Rules of Civil Procedure § 58 (NCI3d) — notation "jury verdict" in minutes — insufficient for entry of judgment**

Assuming arguendo that paragraph one of N.C.G.S. § 1A-1, Rule 58 governs the entry of judgment in this case and that the court calendar constituted the official minutes of the court, the mere notation "jury verdict" on the court calendar contained insufficient detail to comply with the Rule 58, paragraph one requirement of a "notation in [the clerk's] minutes of *such* verdict or decision." Use of the word "such" in the rule imports the recording of sufficient detail regarding the judgment to give notice of its essential character and content.

Am Jur 2d, Judgments §§ 152, 156, 160, 166.

2. **Rules of Civil Procedure § 58 (NCI3d) — entry of judgment — requisites of notation**

An adequate notation of entry of judgment must include, at a minimum, the names of the parties, the prevailing party, the relief awarded, and the date the verdict was returned.

Am Jur 2d, Judgments §§ 152, 172.

3. Rules of Civil Procedure § 58 (NCI3d)— jury verdict for sum certain—direction for preparation of judgment—when entry of judgment occurs

The first paragraph of Rule 58 does not determine when entry of judgment for a sum certain occurs when the trial court makes a direction contrary to its terms, and the trial court makes such a contrary direction when it requests that one of the parties draft the order or judgment.

Am Jur 2d, Judgments § 161.

4. Rules of Civil Procedure § 58 (NCI3d)— jury verdict for sum certain—preparation of judgment by plaintiff's attorney—time of entry of judgment—timely notice of appeal

Even if the clerk's notation "jury verdict" in the minutes had been sufficient to constitute entry of judgment for a sum certain, entry of judgment did not occur at that time because the trial court's contrary direction to plaintiff's attorney to prepare the judgment precluded application of the automatic entry provisions of Rule 58, paragraph one. Rather, entry of judgment occurred when the trial court adopted and signed the proposed judgment submitted by plaintiff's counsel, and written notice of appeal filed by defendants within thirty days after that date was timely.

Am Jur 2d, Appeal and Error §§ 302-304; Judgments § 161.

ON discretionary review pursuant to N.C.G.S. § 7A-31(a) of a decision of a unanimous panel of the Court of Appeals, 102 N.C. App. 318, 401 S.E.2d 834 (1991), dismissing as untimely defendants' appeals from a judgment entered 9 October 1989 by *Battle, J.*, in Superior Court, ORANGE County, upon a jury verdict for plaintiff. Heard in the Supreme Court 13 February 1992.

Toms, Reagan & Montgomery, by Frederic E. Toms, for plaintiff appellee.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr. and E. Elizabeth Lefler, for defendant appellants Barwick.

Young, Moore, Henderson & Alvis, P.A., by Ralph W. Meekins, for defendant appellants Abrahamson.

WHICHARD, Justice.

On 2 October 1989, at the conclusion of a civil jury trial in plaintiff's action for personal injury, the jury returned a verdict of $50,000 for plaintiff against all defendants. The assistant clerk of court wrote the words "jury verdict" beside the case caption on the court calendar, and the trial court directed plaintiff's counsel to prepare a judgment reflecting the jury verdict. On 9 October 1989, the trial court signed the judgment prepared by plaintiff's counsel.

Rule 3(c) of the North Carolina Rules of Appellate Procedure required defendants to file written notice of appeal within thirty days after entry of the judgment. Defendants Barwick filed written notice of appeal on 3 November 1989. Defendants Abrahamson filed notice of appeal on 13 November 1989, within the ten-day period Rule 3(c) provides for coparties. Plaintiff moved to dismiss the Barwick defendants' appeal as untimely, but the trial court denied the motion.

Prior to filing the record and briefs, plaintiff filed a motion in the Court of Appeals to dismiss the appeals under Rule 3 of the North Carolina Rules of Appellate Procedure and Rule 58 of the North Carolina Rules of Civil Procedure. The Court of Appeals concluded that entry of judgment occurred on 2 October 1989 when the jury returned its verdict and the assistant clerk made the notation "jury verdict" on the court calendar. Because the Barwick defendants did not file notice of appeal until 3 November, the Court of Appeals ruled that their appeal was outside the thirty-day period allowed by Rule 3. Under this view of the law, the Abrahamson defendants' notice of appeal was also untimely. Thus, the Court of Appeals dismissed the appeals. We allowed defendants' petitions for discretionary review, and we now reverse.

The issue is when entry of judgment occurred. Rule 58, which governs entry of judgment, provides:

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these

rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.

In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

N.C.G.S. § 1A-1, Rule 58 (1990). The Court of Appeals concluded that "[t]his case falls within the plain language of paragraph one of Rule 58." *Reed v. Abrahamson*, 102 N.C. App. 318, 320, 401 S.E.2d 834, 836 (1991). It noted that the jury verdict clearly was for a sum certain and held that the assistant clerk's notation "jury verdict" was sufficient to constitute entry of judgment. *Id.* at 321, 401 S.E.2d at 836. It thus held that entry of judgment occurred on 2 October 1989 when the assistant clerk made the notation, and that defendants' notices of appeal filed more than thirty days later were untimely.

[1] Assuming, *arguendo*, that paragraph one of Rule 58 governs and that the court calendar constituted the official minutes of the court,[1] we conclude that the mere notation "jury verdict" contained insufficient detail to comply with the Rule 58, paragraph one, requirement of a "notation in [the clerk's] minutes of *such* verdict or decision." N.C.G.S. § 1A-1, Rule 58 (emphasis added). Use of the word "such" in the rule imports the recording of sufficient detail regarding the judgment to give notice of its essential character and content.

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1. There are affidavits by the clerk and assistant clerk stating that the court calendar constituted the official minutes. They were filed with plaintiff's motion to dismiss in the Court of Appeals and are found in plaintiff's brief to this Court, but are not in the record on appeal.

Before the adoption of Rule 58, our statutes expressly required a detailed entry in the court minutes in order to constitute entry of judgment. N.C.G.S. § 1-205 provided:

> Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration. If a different direction is not given by the court, the clerk must enter judgment in conformity with the verdict.

N.C.G.S. § 1-205 (1953) (repealed by 1967 N.C. Sess. Laws ch. 957, § 4). In addition to the court minutes mentioned in section 1-205, the clerk was required to keep a judgment docket. N.C.G.S. § 2-42 provided:

> Each clerk shall keep the following books . . .
>
> . . . .
>
> 2. Judgment docket, which shall contain a note of *the substance of* every judgment and every proceeding subsequent thereto.
>
> . . . .
>
> 8. Minute docket of superior court, which shall contain a record of all proceedings had in the court during term, in the order in which they occur, and such other entries as the judge may direct to be made therein.

N.C.G.S. § 2-42 (1953) (emphasis added) (repealed by 1971 N.C. Sess. Laws ch. 363). The clerk made the entry in the minutes as required by section 1-205 and also made a detailed entry of superior court judgments in the judgment docket pursuant to N.C.G.S. § 1-233, which provided:

> Every judgment of the superior court, affecting the right to real property, or requiring in whole or in part the payment of money, shall be entered by the clerk of said superior court on the judgment docket of the court. The entry must contain the names of the parties, and the relief granted, date of judgment, and the date, hour and minute of docketing . . . .

N.C.G.S. § 1-233 (1953) (current version at N.C.G.S. § 1-233 (1983)). Thus, prior to the adoption of Rule 58 our statutes mandated that

the clerk make detailed notations when recording the judgment of the court in both the minutes of the court and the judgment docket.

In 1971, the General Assembly repealed section 2-42, which required the keeping of a "minute docket" and a "judgment docket," and replaced it with N.C.G.S. § 7A-109, which provides: "Each clerk shall maintain such records, files, dockets and indexes as are prescribed by rules of the Director of the Administrative Office of the Courts." N.C.G.S. § 7A-109(a) (1989). Though the language of the new statute differs from its predecessor, court minutes and judgment dockets are still statutorily prescribed. For example, where section 2-42 expressly required the maintenance of judgment and minute dockets, current section 7A-109(a) explicitly acknowledges that the clerk should continue to keep such dockets: "[T]hese records . . . shall include civil actions, special proceedings, estates, criminal actions, juvenile actions, *minutes of the court*, [and] *judgments* . . . ." *Id.* (emphasis added).

In 1967, the General Assembly repealed the entry of judgment provision of section 1-205 and enacted the North Carolina Rules of Civil Procedure, including Rule 58, effective 1 January 1970. As noted, Rule 58 provides that entry of judgment occurs when the clerk "makes a notation in his minutes[.]" In contrast to the express language of the previous section on entry of judgment, the current rule does not specify the degree of detail necessary for a sufficient "notation." We are convinced, however, that by specifying a notation of "*such* verdict" in the first paragraph of Rule 58, the General Assembly intended to retain the former requirements at least as to the essential details of the judgment.

[2] Where the provisions of paragraph one of Rule 58 apply, *i.e.*, when there is "a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect," the clerk "shall make a notation in his minutes of such verdict or decision . . . ." N.C.G.S. § 1A-1, Rule 58. In order to make a notation of "such verdict" as was returned in this case, the clerk had to specify more than the mere words "jury verdict." An adequate notation would have reflected much of the information on the actual jury verdict form, including, at minimum, the names of the parties, the prevailing party, the relief awarded, and the date the verdict was returned.

N.C.G.S. § 7A-109 supports the conclusion that the essential details of a judgment are a necessary component of the notation constituting entry of judgment. That section governs the clerk's record-keeping procedures, including minutes of the court and judgments. It provides that such records shall be kept in accordance with rules prescribed by the Director of the Administrative Office of the Courts. N.C.G.S. § 7A-109. It also states that the Director shall establish rules designed

> (1) To provide an accurate record of every determinative legal action, proceeding, or event which may affect the person or property of any individual, firm, corporation, or association;
>
> (2) To provide a record during the pendency of a case that allows for the efficient handling of the matter by the court from its initiation to conclusion and also affords information as to the progress of the case[.]

N.C.G.S. § 7A-109(a)(1)-(2). These provisions reveal a legislative intent that court records provide an accurate source of information about the status and disposition of cases. The clerk's notation in the minutes of the court is important because it establishes the point from which a party has thirty days to file written notice of appeal under Rule 58 and North Carolina Rule of Appellate Procedure 3. "It is . . . highly desirable that the moment of entry of judgment be easily identifiable and it is also desirable that fair notice be given to all parties of the entry of judgment." N.C.G.S. § 1A-1, Rule 58 comment. Thus, it is essential that the notation of entry of judgment include at least the names of the parties, the prevailing party, the relief awarded, and the date the verdict was returned. The notation here lacks these specifics and is therefore insufficient to constitute entry of judgment under Rule 58.

[3] Even if the assistant clerk's notation had been sufficient to constitute entry of judgment, we disagree with the Court of Appeals holding that paragraph one of Rule 58 determines when entry occurred on the facts of this case. The parties do not contend that the judgment here was anything other than a jury verdict for a sum certain; thus, that aspect of paragraph one is met. The first paragraph of Rule 58 does not determine when entry of judgment occurs, however, when the trial court makes a direction contrary to its terms. The trial court makes such a contrary direction when it requests that one of the parties draft the order or judgment. *Stachlowski v. Stach*, 328 N.C. 276, 283, 401 S.E.2d 638,

643 (1991); *see also Cobb v. Rocky Mount Board of Education*, 102 N.C. App. 681, 683, 403 S.E.2d 538, 540 (1991), *aff'd per curiam*, 331 N.C. 280, 415 S.E.2d 554 (1992). Though such a request is primarily directed to the party assigned to draft the judgment, it necessarily operates as an implicit direction to the clerk not to follow the remaining, otherwise automatic, procedures of paragraph one—noting entry of judgment in the minutes and "forthwith prepar[ing], sign[ing], and fil[ing] the judgment without awaiting any direction by the judge." N.C.G.S. § 1A-1, Rule 58. Clearly, a request that prevailing counsel draft the order or judgment is inconsistent with the last sentence of paragraph one which makes the clerk responsible for preparing the judgment. Further, as noted in *Stachlowski*, "when the judge makes a contrary direction, such as requesting one of the parties to draft the order or judgment, the likelihood of fair notice to both parties may be jeopardized." 328 N.C. at 283, 401 S.E.2d at 643.

Plaintiff argues that where, as here, there is a jury verdict for a sum certain, there is no need for the trial court to make findings of fact or even to sign the judgment. *See* N.C.G.S. § 1A-1, Rule 58 comment. In such cases, plaintiff suggests, entry of judgment is a purely ministerial act and it should be irrelevant who prepares the judgment for filing with the court records. As we noted in *Stachlowski*:

> The clearest description of what constitutes fair notice of entry of judgment is the typical case contemplated by paragraph one of Rule 58. Upon a jury verdict or a judge's decision that a party recover only a sum certain or costs or that all relief shall be denied, absent a direction to the contrary by the court the clerk makes a notation of the judgment in the minutes. Entry of judgment occurs at that time and because "it involves an open court verdict or decision, all parties are deemed to be on notice of the fact and time of the entry." W. Shuford, *N.C. Civil Practice and Procedure* § 58-4 (1988).

328 N.C. at 283, 401 S.E.2d at 643. This is not the typical case contemplated by paragraph one of Rule 58, however, because the trial court made a contrary direction that the prevailing party draft the judgment. Even though entry of judgment could have occurred upon the clerk's proper notation in the minutes of the jury verdict, it did not occur at that time because the court's contrary direction to plaintiff's attorney to prepare the judgment

precluded application of the automatic entry provisions of paragraph one.

Plaintiff further argues that there was no "contrary direction" within the meaning of the first paragraph of Rule 58 because the trial court, in ruling on plaintiff's motion to dismiss defendants' appeals, found as a fact that it gave no direction to the clerk. This argument is without merit. The entire finding is as follows:

> 4. The Clerk assigned to the Courtroom wrote "jury verdict" on the Court calendar for the September 26, 1989 term. The Court gave no direction to the Clerk with respect to a notation of such verdict. The entry of Judgment for the purpose of Rule 58 occurred when the Judgment was entered and signed by the Court on October 9, 1989.

This finding does not support plaintiff's argument that there was no "contrary direction" by the trial court. Instead, it reveals that the assistant clerk made the notation upon her own initiative, while the trial court proceeded on the understanding that entry would follow its adoption of the judgment. Thus, the finding supports the trial court's conclusion that entry of judgment occurred on 9 October 1989 when it signed the written judgment prepared by plaintiff's counsel.

Because of the trial court's contrary direction, the automatic entry provisions of paragraph one do not operate to determine when entry of judgment occurred. Neither do the remaining paragraphs of Rule 58 effectively resolve the question. There was no entry of judgment under paragraph two of Rule 58 because there is no indication that the clerk made a notation in the minutes pursuant to the trial court's direction.[2] In fact, the trial court's

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2. There is a fundamental difference between paragraphs one and two of Rule 58. Paragraph one contemplates a simple case in which entry of judgment occurs automatically, absent a contrary direction by the court, upon the clerk's notation in the minutes of the verdict rendered by the trial court or jury. Paragraph two, however, does not contemplate an *automatic* notation by the clerk; instead, entry of judgment occurs under this paragraph only if the court *expressly* directs the clerk to make a notation. Upon such an *affirmative* direction and a notation entered in response to such direction, entry of judgment occurs, and subsequent directions by the trial court do not affect the timing of entry of judgment. Thus, under paragraph one of Rule 58, a *contrary* direction by the trial court to a party regarding preparation of the judgment delays entry of judgment, while under paragraph two of Rule 58, an *affirmative* direction by the trial court to the clerk to make a notation constitutes entry of judgment notwithstanding subsequent direction to a party to prepare the judgment.

finding that it "gave no direction to the Clerk" is supported by the record and is determinative. Paragraph three of the rule applies only "where judgment is not rendered in open court"; thus, it is inapplicable here.

[4] Absent entry of judgment under the express provisions of Rule 58, we determine the time of entry of judgment under the framework established in *Stachlowski*:

> In cases where the procedures used do not fit within the express provisions of the rule or where there is no evidence to indicate when or whether such notation was made, the spirit and purpose of the rule should determine when entry of judgment occurs. . . . [R]elevant factors in this analysis are: (1) an easily identifiable point at which entry occurred, such that (2) the parties have fair notice of the court's judgment and the time thereof, and that (3) the matters for adjudication have been finally and completely resolved so that the case is suitable for appellate review.

328 N.C. at 287, 401 S.E.2d at 645. In light of those factors, we conclude that entry of judgment here occurred on 9 October 1989 when the trial court adopted and signed the proposed judgment submitted by plaintiff's counsel, not on 2 October 1989 when the jury returned its verdict and the assistant clerk wrote "jury verdict" on the court calendar. The date of signing of the judgment provided an easily identifiable point at which entry occurred. Assuming timely receipt of a copy of the judgment by opposing counsel, the parties had fair notice of the court's judgment and the time thereof. And, the matters for adjudication clearly had been finally and completely resolved at that point.

Thus, the Barwick defendants' written notice of appeal, filed on 3 November 1989, was timely. Because defendants Abrahamson filed their notice of appeal within ten days of the timely appeal of their coparties, their appeal is timely as well. N.C.R. App. P. 3(c). Defendants' timely appeals were sufficient to establish jurisdiction in the Court of Appeals; therefore, we reverse the decision of that court and remand the case to it for a determination on the merits.

Reversed and remanded.

STATE OF NORTH CAROLINA v. MICHAEL LESLIE RAINEY

No. 70A89

(Filed 22 April 1992)

Homicide § 765 (NCI4th); Criminal Law § 1310 (NCI4th)— first degree murders—felonious assaults—no error in guilt or sentencing phases

In an appeal from three convictions of first degree murder and three convictions of assault with a deadly weapon with intent to kill inflicting serious injury wherein defendant's counsel submitted a brief in accordance with *Anders v. California*, 386 U.S. 738, in which he requested that the Supreme Court review the record to determine whether there was any error which might warrant reversal of any of defendant's convictions or modification of the sentences imposed, the Court found no error in the guilt-innocence phase of defendant's trial warranting reversal of any of defendant's convictions where the evidence of defendant's guilt was overwhelming; numerous eyewitnesses testified as to the events and circumstances surrounding the crimes charged; officers who interrogated defendant testified regarding defendant's lawfully obtained confession; defendant admitted during his own testimony that he fired several shots at the victims, injuring several of them and killing three others; and defendant's sole theory of defense at this phase of the trial that he was fearful of the victims was seriously undermined by the abundant evidence establishing that defendant initiated the shooting spree before the victims exited their cars and that defendant continued firing at the victims despite the apparent absence of any weapons held by the victims. The Court further found that the trial court committed no error in the capital sentencing proceeding or in the sentences imposed for defendant's noncapital convictions and noted that any error that might have occurred during the capital sentencing proceeding must be deemed harmless because defendant received a sentence of life imprisonment, the minimum sentence, for each of the first degree murder convictions.

Am Jur 2d, Criminal Law §§ 807, 809; Homicide §§ 425, 559.

APPEAL as of right pursuant to N.C.G.S. § 7A-27 from final judgment and commitments entered by *Beaty, J.*, at the 22 August 1988 term of Superior Court, HENDERSON County, after a capital trial, imposing three consecutive life sentences upon defendant's conviction of three counts of first-degree murder. Defendant's motion to bypass the Court of Appeals pursuant to N.C.G.S. § 7A-31 was allowed by this Court on 6 November 1991 as to three additional consecutive six-year sentences imposed upon defendant for his conviction of three separate counts of assault with a deadly weapon with intent to kill inflicting serious injury. Calendared for argument in the Supreme Court 9 March 1992; determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(d).

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

Stephen P. Lindsay for defendant-appellant.

MEYER, Justice.

On 3 April 1988, defendant, who had no prior criminal record, shot six people, three of whom died as a result of their wounds, in the parking lot of Mountain Home Baptist Church in Henderson County. Defendant was subsequently indicted on and convicted, in a capital trial, of three counts of first-degree murder and three counts of assault with a deadly weapon with intent to kill inflicting serious injury. In each of the murder cases, the jury found aggravating and mitigating circumstances, found that the mitigating circumstances were not outweighed by the aggravating circumstances, and returned a recommendation of life imprisonment. We find no error in defendant's trial or sentencing proceeding.

The evidence presented at defendant's trial tended to show the following facts and circumstances. Defendant and one of the victims, Andrea Owensby Rainey, were married in 1970. After marrying, they first lived in Atlanta for approximately nine years, returning to North Carolina in 1979. They purchased approximately nine acres of land on Sugar Loaf Mountain from Andrea's maternal grandfather, Mr. Justice, built a house on it, and moved into the house in June 1981. Andrea and her two young sons moved back to Atlanta in the summer of 1984, and she and defendant later divorced.

Defendant retained the house and land on Sugar Loaf Mountain, and Andrea took possession of a house they owned in Atlanta. Defendant's house was set back off the road, and for access, he used an old road on the property still belonging to Andrea's grandfather. There was no right-of-way granted to defendant, and he used the road with Mr. Justice's permission.

During their marriage, defendant and Andrea had invested in a riding tack store operated by Andrea's mother, Ponelle Justice Owensby. When that business was dissolved in 1984, a conflict arose between defendant and Ponelle. The next year, the conflict increased when Mr. Justice died and Ponelle took over responsibility for his Sugar Loaf Mountain property. Ponelle refused to sell defendant more land on the mountain, refused to increase the width of the access road to defendant's house, and subsequently fenced in the Justice property, blocking defendant's access by erecting a gate.

Mr. Justice's widow, Andrea's grandmother, Effie Justice, died, and the funeral was arranged for 3 April 1988 at a church within a half mile of defendant's home. Just before the funeral service was to take place, the Justice family members gathered before going to the church. The group included Ponelle and her husband, Wilford Owensby; Andrea; her two sons, Justin and Brandon; Andrea's sister, Sheila, and her husband, Billy Johnston; and their two young daughters, Wendy and Kimberly. All of them except Billy Johnston, who was a pallbearer and had gone ahead of the group, rode in two vehicles to the church. One vehicle was a Ford automobile, driven by Andrea; with Andrea were her sister, Sheila Johnston; Sheila's two daughters, Wendy and Kimberly Johnston; and Andrea's seven-year-old son, Brandon Rainey. The other vehicle was a pickup truck driven by Wilford Owensby; with him were his wife, Ponelle, and Andrea's other son, seven-year-old Justin Rainey. The group waited in the vehicles for a signal from the pallbearers, who were on the church porch, to enter the church.

While sitting in her car, Andrea saw defendant go into the church, come back out, and return to the car defendant had driven to the church. Defendant retrieved from the car a twelve-gauge pump shotgun, which he loaded; a .380-caliber semiautomatic handgun; and ammunition for the weapons, which he put in his coat pockets.

Defendant turned and walked in the direction of the church. When he arrived in front of the car driven by his former wife, he stopped and stood directly in front of the car, yelled at Andrea "Ah hell, f--- you," and pointed the shotgun directly at his former wife's sister, Sheila. He looked over toward Ponelle, who was seated in the truck, smiled, turned back, and pulled the trigger. The shotgun did not fire, and as Andrea was pushing Sheila onto the floor of the car, defendant began pumping the shotgun to eject the shell.

Andrea glanced up at the passenger window and saw defendant there, with the gun barrel pointed at the window, and still smiling. Defendant then shot into the vehicle with his .380-caliber pistol, hitting Andrea in her face and arm. Billy Johnston, Sheila's husband, came to the scene and said to defendant, who was still smiling, "Mike, you'll never get away. Why don't you quit." Defendant replied, "I don't intend to." Defendant then moved toward the rear passenger side window, and continued firing into the back seat of the car. When defendant had emptied his .380-caliber pistol, he laid it on top of the car.

After defendant shot into Andrea's car, he proceeded to the pickup truck parked nearby, which his former father-in-law, Wilford Owensby, had just exited to investigate the gunshots. Defendant approached Owensby, who told defendant that he was not armed. Defendant said, "Good," and immediately fired the shotgun, hitting Owensby in the chest and instantly killing him.

Andrea managed to get the car keys from her purse, start the car, and put it into reverse. Andrea drove out of the church parking lot and onto the highway. The children were screaming, and she could see bloody holes in her sister's back. Both windows on the right side of the car were blown out, and there were several bullet holes in the windshield. Andrea stopped her vehicle at a traffic light and attracted the attention of officers in a nearby police car, who called an ambulance. Nine-year-old Wendy, who was seated in the back seat, received gunshot wounds to her leg, chest, and arm.

Johnston, who had rushed toward the truck to care for Owensby, was handed a .25-caliber semiautomatic pistol by another of the pallbearers. Johnston fired at defendant but missed him. As Andrea's car left the parking lot, defendant ducked out of sight and reappeared near Johnston. Defendant pointed the shotgun at Johnston and made him throw the .25-caliber pistol on the ground. Owensby's

wife, Ponelle, then got out of the pickup truck and rushed to her husband. She looked at defendant and said, "Please," whereupon defendant shot her, killing her also.

Scott Bowles, Andrea's cousin, ducked behind Owensby's pickup truck after defendant shot Ponelle. As Bowles was crouched at the back of the truck, defendant ducked under the front of the truck and fired his shotgun under the pickup truck at Bowles, causing Bowles to fall to his knees. Johnston escaped, carrying Justin with him. Defendant then walked around the truck, picked up the .25-caliber pistol, and shot Bowles again. Bowles fell face forward on the ground, and defendant then grabbed Bowles' leg, turned him over, and shot him in the head. Defendant shot Bowles at least four times.

After defendant shot and killed Bowles, defendant kicked the bodies of Bowles, Ponelle, and Wilford. Then he laid the shotgun and keys on the hood of a hearse parked nearby, turned, and walked to his home a short distance away. From his home, defendant telephoned his girlfriend and 911. Defendant then walked to the road, where he was met by officers.

After defendant was taken into custody, he was transported to the Henderson County Sheriff's Department where he signed a waiver of counsel and acknowledgment of his *Miranda* rights. Defendant gave the interrogators a full statement concerning the events at the church.

Investigating officers found in the parking lot, near the place where Andrea's car had been parked, glass, wadding from shotguns, shells, pellets, brain tissue, pieces of skull, and blood. A witness testified that he saw defendant reload the shotgun at least three times. The officers found eight spent twelve-gauge shotgun shells, thirteen spent .380-caliber casings, as well as a number of live and spent .25-caliber shells.

Autopsies revealed that Wilford Owensby suffered shotgun wounds as well as a .25-caliber wound, Ponelle Owensby suffered numerous shotgun pellet wounds, and Scott Bowles suffered shotgun pellet wounds as well as a .25-caliber wound. The autopsy surgeon testified that Wilford Owensby, Ponelle Owensby, and Scott Bowles died as a result of multiple gunshot wounds.

Andrea suffered the loss of part of her jaw and underwent surgery. Sheila Johnston received seven bullet wounds and under-

went surgery. Wendy Johnston was hospitalized and underwent multiple surgeries.

In his own defense, defendant testified that he shot Wilford, Ponelle, and Scott because he was afraid of them and thought they had guns. Defendant stated that he did not remember retrieving his weapons from the back of the car but that he "obviously did." Defendant admitted shooting into Andrea's car as well as shooting Owensby, Ponelle, and Bowles. However, defendant could not recall the exact sequence of the events. According to defendant, he walked out of the church, passed Andrea's car, and walked to the car he had driven to the church. Defendant testified:

> The first thing after that, that comes into mind was [Owensby] . . . .
>
> I was afraid of them. And, because of [Owensby's] quality of shooting, I proceeded, when I saw [Owensby] he was behind his pick-up truck, with his left hand up against the camper top.
>
> The right hand was folded at the small of his back. I asked [Owensby] if he had a gun. He said, "No."
>
> And, I said, "Good."
>
> And, then somewhere within a split second there, his right arm that was folded behind the small of his back, started folding, or at the angle of it, started getting smaller, and he started turning, and I shot him.

Defendant's appellate counsel, in accordance with *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinche*, 314 N.C. 99, 331 S.E.2d 665 (1985), has submitted a brief in which he requests that the Court review the record to determine whether there is any error that might warrant reversal of any of defendant's convictions or modification of the sentences imposed.

Defendant made eighteen assignments of error covering all phases of his trial and sentencing. As to his first sixteen assignments, defendant says that prevailing case law has decided the issues against him, and he thus abandons them. The remaining two assignments of error concern the nonproduction of certain inconsistent statements of witnesses for the State. As conceded by defendant, these assignments of error were determined by our prior denial of his motion for appropriate relief. *State v. Rainey*, No. 70A89

(N.C. 9 November 1989) (unpublished). In his brief, defendant's appellate counsel states:

> Undersigned counsel has extensive experience in the practice of criminal law at both the trial and appellate levels, and has successfully prosecuted appeals on behalf of criminal appellants, which efforts have resulted in reversals of convictions or modifications of sentences. Counsel has expended in excess of 90 hours reviewing and re-reviewing the record and transcript of this trial, relating exceptions and assignments of error to existing case law, and has exhausted every conceivable source attempting to find reasonable precedent or other support for even the slightest suggestion that defendant was denied a fair trial or that his rights were prejudiced in any way. Counsel is convinced that any error that may have been committed during the course of defendant's trial was at most, harmless, and that in every incidence [sic] the trial court gave defendant the benefit of the doubt on evidentiary rulings. Consequently, counsel cannot in good faith argue that defendant was in any way denied a fair trial. The undersigned has also consulted with other experienced appellate attorneys who, after considering the facts and the result obtained at trial, are of the same opinion as regards this appeal.
>
> Because of the overwhelming evidence of defendant's guilt, coupled with his lawfully obtained confession, the primary objective of trial counsel was to save defendant from the death penalty. In this regard they were successful. Nevertheless, appellant respectfully submits the entire record to the Court for its review in the event counsel is, himself, mistaken. Counsel has fully apprised trial counsel, Mr. Ron Blanchard, and the defendant of this position, and defendant fully agrees and consents hereto.

The evidence of defendant's guilt was overwhelming. Numerous eyewitnesses testified as to the events and circumstances surrounding the crimes charged. Officers who interrogated defendant testified regarding defendant's lawfully obtained confession, relating to the jury the details of defendant's acts. In addition, defendant admitted during his own testimony that he fired several shots at the victims, injuring several victims and killing Ponelle, Owensby, and Bowles. Defendant's sole theory of defense at the guilt-innocence phase of the trial was based upon defendant's alleged fear of the victims.

However, this defense theory was seriously undermined by the abundant evidence establishing that defendant initiated the shooting spree even before the victims had exited their cars and that defendant continued firing at the victims despite the apparent absence of any weapons held by the victims.

Both the State and defendant presented evidence at the sentencing proceeding. The State presented the testimony of four witnesses to establish that defendant appeared angry, not frightened or nervous, during the shooting incident; that defendant acted calmly after the shooting; and that defendant did not express any remorse during police interrogation. Defendant presented extensive evidence, including the testimony of twenty-one witnesses, to support twelve mitigating circumstances submitted to the jury. Based on evidence presented during the sentencing proceeding, defense counsel argued to the jury that defendant is a paranoid schizophrenic, that he shot the victims because he had "distorted disillusions [sic] that the Owensbys were out to get him," that defendant is a person of good character, and that defendant should be given a sentence of life imprisonment.

We have conducted a thorough review of the transcript of the trial and sentencing proceeding, the record on appeal, and the briefs of defendant and the State. We find no error in defendant's trial warranting reversal of any of defendant's convictions. We further find that the trial court committed no error in the capital sentencing proceeding or in the sentences imposed for defendant's noncapital convictions. Moreover, we note that any error that might have occurred during the capital sentencing proceeding must be deemed harmless beyond a reasonable doubt because defendant received life imprisonment, the minimum sentence, for each of the first-degree murder convictions.

No error.

STATE OF NORTH CAROLINA v. PERRIE DYON SIMPSON

No. 316A89

(Filed 22 April 1992)

1. **Criminal Law § 1352 (NCI4th)— murder—McKoy error—polling of jury—not sufficient to establish harmless error**

There was prejudicial *McKoy* error in a capital sentencing hearing where the jury was given instructions requiring them to be unanimous in finding mitigating circumstances and there was evidence from which one or more jurors could have found one or more of the twenty-five rejected mitigating circumstances. Moreover, the polling of the jury was insufficiently exact to establish that the error was harmless beyond a reasonable doubt.

Am Jur 2d, Homicide § 548; Trial §§ 1759, 1760.

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

2. **Jury § 7.9 (NCI3d)— murder—jury selection—knowledge of prior death penalty—excusal not mandatory**

In an appeal from a capital sentencing proceeding which was reversed on other grounds, the Supreme Court declined to adopt a *per se* rule that any juror with knowledge that a previous jury returned a recommendation of death for the same murder must be excused for cause. Where, as here, the trial court establishes through individual, sequestered, searching voir dire examination that the prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence, excusal is not mandatory.

Am Jur 2d, Jury §§ 267, 276.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *DeRamus, J.*, at the 15 May 1989 Special Session of Superior Court, ROCKINGHAM County, upon defendant's plea of guilty of first-degree murder. Heard in the Supreme Court 11 February 1992.

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

James R. Glover and Ann B. Petersen for defendant appellant.

WHICHARD, Justice.

Defendant pled guilty to the first-degree murder of Jean Earnest Darter, robbery with a dangerous weapon, and conspiracy to commit murder. After his guilty pleas were entered, a jury was empaneled for the purpose of determining defendant's punishment for the first-degree murder. N.C.G.S. § 15A-2000(a) (1988). Upon the jury's recommendation, the trial court sentenced defendant to death for the first-degree murder. Defendant previously appealed to this Court as of right on the judgment and sentence of death, and was allowed to bypass the Court of Appeals as to the judgments and sentences for the additional offenses.

On defendant's first appeal, this Court found no error in the judgments and sentences for armed robbery and conspiracy to commit murder. It found prejudicial error in the capital sentencing proceeding, however, and remanded the case to the trial court for resentencing on the first-degree murder. *State v. Simpson*, 320 N.C. 313, 357 S.E.2d 332 (1987), *cert. denied*, 485 U.S. 963, 99 L. Ed. 2d 430 (1988). At the new sentencing proceeding, the jury unanimously found two aggravating circumstances. Of the twenty-nine mitigating circumstances submitted, the jury unanimously found only four. Upon the jury's recommendation that defendant be sentenced to death, the trial court entered the judgment from which defendant now appeals.

The facts of the murder, which are not pertinent to the issues on this appeal, are summarized in the Court's prior opinion. *See id.* Additional facts relevant to this appeal are discussed below.

[1] Subsequent to the sentencing hearing at issue, 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 jurors to be unanimous in the finding of mitigating circumstances. *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). Our review of the record reveals, and the State concedes, that the trial court here so instructed the jury. Specifically, the trial court instructed the jury to write "yes" after a mitigating circumstance if the jury

found unanimously that it existed and to write "no" if the jury did not unanimously find it to exist. The State further concedes that it cannot argue successfully that this error was harmless because there is evidence from which one or more jurors could have found one or more of the twenty-five rejected mitigating circumstances.

For example, there was substantial evidence to support the mitigating circumstances that defendant committed the murder while he was under the influence of mental or emotional disturbance, and that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. N.C.G.S. § 15A-2000(f)(2), -2000(f)(6) (1988). Both circumstances were supported by the uncontradicted testimony of Dr. Claudia Coleman, a psychologist, that defendant's ability to conform his conduct to the requirements of the law was impaired because he was suffering from emotional disturbance, attention deficit/hyperactivity disorder, and a "not otherwise specified" or "mixed" personality disorder. The trial court peremptorily instructed the jury that all the evidence tended to show the existence of these two statutory circumstances; yet, the jury answered "no" as to both. Given the substantial evidence in support of these and other mitigating circumstances, we cannot conclude beyond a reasonable doubt that the erroneous unanimity instruction did not preclude one or more jurors from considering one or more circumstances in mitigation. *State v. Barnes*, 330 N.C. 104, 108, 408 S.E.2d 843, 845 (1991).

The State also grants that the polling of the jury was insufficiently exact to establish that the *McKoy* error was harmless beyond a reasonable doubt. It acknowledges that the polling fell somewhere between the type of polling found sufficient to show harmless error in *State v. Laws*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 174, *reh'g denied*, --- U.S. ---, 116 L. Ed. 2d 648 (1991), and the type found insufficient to make such a showing in *State v. Lloyd*, 329 N.C. 662, 407 S.E.2d 218 (1991). In *Laws*, the trial court asked the jury foreman if the answers on the verdict form reflected the "unanimous verdict of the jury." The trial court also had the clerk read each answer on the verdict form to each individual juror and had the clerk ask each juror, "Are these your answers and your recommendation as to punishment?" The foreman and the individual jurors answered all inquiries in the affirmative. Under those circumstances, the Court concluded that the *McKoy* error had not precluded any juror from

considering mitigating evidence. *Laws*, 328 N.C. at 554-55, 402 S.E.2d at 576-77. In *Lloyd*, however, the trial court asked questions only of the foreman and the jury as a whole. Only as to the final sentencing decision did the trial court address the individual jurors. Further, the questions asked and the answers given did not reveal whether the jury's rejection of the mitigating circumstances was unanimous. Under those circumstances, the Court held that the jury poll was not sufficiently specific to render the *McKoy* error harmless. *Lloyd*, 329 N.C. at 665-67, 407 S.E.2d at 220-21.

Here, the trial court first asked the jury foreman whether each answer on the verdict form was "the jury's answer." The transcript then reveals the following:

> THE COURT THEN ASKED THE REMAINING JURORS THE FOLLOWING QUESTIONS:
>
> COURT: You have heard the questions and the answers indicated by your foreman her[e] in open court? Are those your answers as a juror and is that your recommendation as to the death penalty as a juror? And do you still consent thereto?
>
> To the foregoing questions all the jurors answered in the affirmative.
>
> COURT: Members of the jury, for your answer to issues as indicated by your foreman here in open court, are those your answers so say you all?
>
> JURORS: Yes sir.
>
> COURT: And for your recommendation as to punishment, your foreman has returned the verdict of the jury being that the jury unanimously recommends that the defendant, Perrie Dyon Simpson be sentenced to death, is that your recommendation, so say you all?
>
> JURORS: Yes sir.

The State suggested in its brief and in oral arguments that the above transcription reflects a failure on the part of the court reporter to record individual colloquies between each juror and the trial court. It acknowledged that "this omission makes the polling insufficiently exact to prove any *McKoy* error harmless beyond a reasonable doubt." We agree that the polling was "not specific enough to distinguish between unanimous and nonunanimous 'no' verdicts on

the unfound mitigating circumstances." *Lloyd*, 329 N.C. at 667, 407 S.E.2d at 221. Because we cannot conclude beyond a reasonable doubt that the *McKoy* error was harmless, we vacate the sentence of death and order a new capital sentencing proceeding.

[2] Because it is likely to recur upon resentencing, we also address defendant's issue of whether a prospective juror who knows that a prior jury recommended the death penalty for the same murder should be excused for cause. The trial court denied defendant's motions to excuse for cause several prospective jurors who knew defendant had been sentenced to death for Darter's murder. Three had formed an opinion about the appropriateness of the sentence recommended in the first sentencing hearing.

The parties uncovered the jurors' prior knowledge and opinions during individual, sequestered *voir dire* examinations by the trial court to explore pretrial exposure or bias. The trial court, the State, and defense counsel closely and extensively questioned each prospective juror on the effect the prior knowledge or opinion would have on the juror's ability to make an independent decision. All stated that they would be able to put aside that prior knowledge and/or opinion and render an impartial, fair decision based only on the evidence presented and the law as explained by the trial court. In most instances, the trial court instructed the prospective juror that the previous proceeding had been legally flawed and should have no bearing on the disposition at the current hearing. In one instance, the trial court instructed the juror that she should not discuss her prior knowledge with other jurors during jury deliberations.

We join other jurisdictions in declining to impose a *per se* rule that any juror with knowledge that a previous jury returned a recommendation of death for the same murder must be excused for cause. *See, e.g., Giles v. State*, 554 So. 2d 1073, 1079-80 (Ala. Crim. App. 1984) (jurors with such knowledge not automatically excluded), *judgment aff'd in part, rev'd in part on other grounds*, 554 So. 2d 1089 (Ala. 1987); *Turner v. Commonwealth*, 234 Va. 543, 547-49, 364 S.E.2d 483, 485-86 (whether a juror can "stand indifferent" is basically a factual question within discretion of trial court), *cert. denied*, 486 U.S. 1017, 100 L. Ed. 2d 218 (1988). We stress, however, the importance of "searching questioning of prospective jurors . . . to screen out those with fixed opinions" as to the appropriate penalty. *Nebraska Press Ass'n v. Stuart*, 427

U.S. 539, 564, 49 L. Ed. 2d 683, 700 (1976). Where, as here, the trial court establishes through individual, sequestered, searching *voir dire* examination that the prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence, excusal is not mandatory. *See Mu'Min v. Virginia*, --- U.S. ---, ---, 114 L. Ed. 2d 493, 509 (relevant question in trial preceded by extensive pretrial publicity is not whether jurors remember the case but whether they have such fixed opinions that they cannot judge defendant impartially), *reh'g denied*, --- U. S. ---, 115 L. Ed. 2d 1097 (1991); *Bundy v. Dugger*, 850 F.2d 1402, 1425-27, *reh'g denied*, 859 F.2d 928 (11th Cir. 1988) (upholding denial of defendant's challenge for cause of prospective juror who knew defendant had been sentenced to death for other murders where juror stated he would follow the law, presume defendant's innocence, and base his decision as to guilt and penalty on the evidence), *cert. denied*, 488 U.S. 1034, 102 L. Ed. 2d 980 (1989); *State v. Bell*, 302 S.C. 18, 24, 393 S.E.2d 364, 367-68 (jurors who knew defendant had been sentenced to death for a different murder could serve if they stated they could set aside their opinions and base their decisions on the evidence), *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 182 (1990); *State v. Corbett*, 309 N.C. 382, 390, 395, 307 S.E.2d 139, 145, 147 (1983) (prospective juror who states opinion on disposition of case can serve if it is established that he can "lay aside" his opinion and render verdict on the evidence).

Death sentence vacated. Remanded for new capital sentencing proceeding.

STATE OF NORTH CAROLINA v. WADE LARRY COLE

No. 349A89

(Filed 22 April 1992)

1. Constitutional Law § 344 (NCI4th)— excusal of jurors—private bench conferences—right of defendant to be present

It was not error for the trial court to excuse prospective jurors after unrecorded bench conferences when defendant's trial for a first and a second degree murder had not com-

menced, but it was error to do so after defendant's trial had begun and he had an unwaivable right to be present at all stages of the trial. The State failed to carry its burden of showing that the error was harmless beyond a reasonable doubt although the State contended that the error was harmless because there must be a new sentencing hearing due to *McKoy* error and the guilt phase was therefore not a capital trial; that the court did not excuse the jurors but deferred their services to a later term and pursuant to N.C.G.S. § 9-6(f) there is no provision for objections to deferrals to jury service, so that the composition of the jury would have been no different had defendant been present at the bench conferences; that the evidence against defendant was so overwhelming that the jury would have convicted him whatever its composition; and that defendant was not tried for his life for the second degree murder, so that he could waive his right to be at the bench conferences for that trial.

Am Jur 2d, Criminal Law § 901.

2. Homicide § 212 (NCI4th)— beating—heart attack—evidence of homicide sufficient

The trial court properly denied defendant's motion to dismiss a charge of second degree murder, which produced a manslaughter conviction, where the State's evidence was that the victim's death was caused by an abnormal heartbeat caused by the assault she had suffered from defendant. It is too much of a coincidence that the victim died of heart failure shortly after being assaulted to say this makes the assault speculative as a cause. The stress of seeing her daughter assaulted was a part of the stress of being assaulted by the defendant as part of one incident.

Am Jur 2d, Homicide § 18.

Homicide by fright or shock. 47 ALR2d 1072.

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

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a death sentence entered by *Stephens, J.*, at the 17 July 1989 Criminal Session of Superior Court, CAMDEN County. Defendant's motion to bypass the Court

of Appeals as to an additional judgment was allowed by the Supreme Court 5 February 1991. Heard in the Supreme Court 10 December 1991.

The defendant was charged with the murder of his girlfriend Theresa Graham and his girlfriend's mother Hattie Graham. The two cases were consolidated for trial and defendant was tried for his life for the murder of Theresa Graham. He was tried for second degree murder on the charge in regard to the death of Hattie Graham.

A jury panel was present for the trial of cases during the week commencing 17 July 1989. After the court announced the first order of business was the selection of a grand jury and a grand jury foreman, it considered excuses from prospective jurors. The jurors were questioned individually at the bench and off the record by the judge. Neither the defendant nor his attorney was present at the bench. While the record does not reflect the contents of these discussions, it indicates that the court said, "I've excused those or deferred those that seemed appropriate." The grand jury was then selected. The petit jury panel was then administered the oath and dismissed until the next morning in order for the court to resolve pretrial matters.

On Tuesday, 18 July 1989, the defendant's case was called for trial and jury selection began. The following day, Wednesday, a second pool of prospective jurors reported for jury duty. The judge questioned prospective jurors individually at the bench concerning their requests to be excused or deferred from jury service. Neither the defendant nor his counsel was present at the bench when these conferences took place nor were these conferences recorded. After these bench conferences, the court excused some of these prospective jurors. The record does not show why they were excused.

The State's evidence showed that defendant killed Theresa Graham by inflicting multiple stabbings upon her as well as two gunshot wounds. He also stabbed his girlfriend's mother who intervened in the fight. The State introduced evidence that the mother's death was caused by abnormal heartbeat (cardiac arrhythmia). In the opinion of the State's expert witness, the precipitating cause of the abnormal heartbeat was "the assault she had suffered, the physical injuries, shallow cuts, evidence of blunt force, blows about the face and chest."

The defendant was found guilty of the murder of Theresa Graham and received the death penalty on this charge. He was convicted of involuntary manslaughter for the death of Hattie Graham and was sentenced to ten years in prison on this charge.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor, Assistant Appellate Defender, for defendant appellant.

WEBB, Justice.

[1] The defendant's first assignment of error deals with the unrecorded bench conferences at which the court excused some of the jurors. We believe this assignment of error has merit. We held in *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991) and *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990), that a defendant's unwaivable right to be present at every stage of a capital trial made it error for a court to excuse a juror after an unrecorded conference at the bench at which neither the defendant nor his counsel was present.

In this case, it was not error for the court to excuse prospective jurors after the unrecorded bench conferences on 17 July 1989. The defendant's trial had not commenced at that time. The jurors were not excused at a stage of the defendant's trial and the defendant did not have the right to be present at the conferences.

It was error to excuse jurors after the unrecorded bench conferences on 19 July 1989. The defendant's trial had commenced at that time and he had an unwaivable right to be present at all stages of the trial. In this case, as in *McCarver* and *Smith*, the conferences at the bench were not recorded and we cannot determine whether the error was harmless. We conclude that the State has failed to carry its burden of showing the error was harmless beyond a reasonable doubt.

The State concedes there was error in excusing the jurors during the trial after the bench conferences. It says the error was harmless beyond a reasonable doubt. The State says it has conceded error in the charge of the penalty phase of the trial because of a violation of the rule of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). For this reason, says the

State, there must be a new trial as to the penalty which prevents the guilt phase of this case from being a capital trial and the defendant did not have the right to be present at the bench conferences. We cannot hold that a phase of the trial, at which if the defendant is found guilty, he may then be tried to determine whether he will be sentenced to death, is not a part of a capital trial.

The State also contends that the record shows that the court did not excuse the jurors but deferred their services to a later term. It says that pursuant to N.C.G.S. § 9-6(f) there is no provision for objections to deferrals of jury service and if the defendant had been present at the bench conferences, the composition of the jury would have been no different. N.C.G.S. § 9-6(f) provides:

> The discretionary authority of a presiding judge to excuse a juror at the beginning of or during a session of court is not affected by this section.

N.C.G.S. § 9-6 mandates a procedure to be promulgated by the chief district court judges to provide for the excusal of prospective jurors. Subsection (f) provides that with this procedure, the superior court judges retain the power to excuse jurors. Although N.C.G.S. § 9-6(f) provides that superior court judges have the power to excuse jurors, this power must be exercised within the constraints of constitutional requirements which was not done in this case.

The State also says the evidence against the defendant was so overwhelming that the jury would have convicted him at the guilt phase whatever its composition. *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), dealt with a defendant's unwaivable right under the Constitution of North Carolina to be present at all stages of the trial. We held in that case that in order to find a violation of this right is harmless error, the State must show and we must find the error was harmless beyond a reasonable doubt. We said that error is harmless beyond a reasonable doubt if it does not contribute to the verdict obtained. *Id.* at 33, 381 S.E.2d at 653. We cannot hold in this case that a change in the composition of the jury did not contribute to the verdict. Although the evidence for the State was strong we cannot say beyond a reasonable doubt that a different jury would have returned a death sentence.

The State argues finally that the defendant was not tried for his life for the murder of Hattie Graham. For this reason, he could waive his right to be at the bench conferences for that

trial, which he did, and the judgment in that case should be affirmed. *See State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978). In *McCarver* and *Smith*, the defendants were granted new trials for the charges joined for trial with the murder charges. We are bound by those cases to order a new trial on the charge involving the death of Hattie Graham.

[2] The defendant also assigns error to the denial of his motion to dismiss the charge against him arising from the death of Hattie Graham. The court charged the jury that in order to find the defendant guilty they must find that the defendant unlawfully committed an assault on Hattie Graham which was the proximate cause of her abnormal heartbeat. The defendant, relying on *State v. Cox*, 303 N.C. 75, 277 S.E.2d 376 (1981), *State v. McCoy*, 79 N.C. App. 273, 339 S.E.2d 419 (1981) and *State v. Smith*, 65 N.C. App. 770, 310 S.E.2d 115, *modified on another point and affirmed*, 311 N.C. 145, 316 S.E.2d 75 (1984), argues that in order to survive a motion to dismiss, the evidence must support a conviction on the theory submitted to the jury. He says the case against him in regard to the death of Hattie Graham was tried on the theory that the assault on her by him was the cause of her heart failure and the evidence on this point was too speculative to be submitted to the jury.

The defendant says that there was evidence that Hattie Graham's heart failure could have been caused by (1) her heart disease without further stress, (2) the stress of seeing her daughter assaulted, or (3) the assault on her by the defendant. He says the cause of death was too speculative for the charge against him to be submitted to the jury on the theory that his assault on Hattie Graham was the cause of her death.

The State presented expert testimony that defendant's assault on Hattie Graham was the precipitating cause of the abnormal heartbeat that caused her death. It is too much of a coincidence that Hattie Graham died of heart failure shortly after being assaulted to say this makes the assault speculative as a cause. The stress of seeing her daughter assaulted was a part of the stress of being assaulted by the defendant. It was all part of one incident. The charge was properly submitted to the jury.

We do not pass on the defendant's other assignments of error as the questions they pose may not arise at a new trial.

New trial.

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

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, PUBLIC STAFF AND REGIONAL INVESTMENTS OF MOORE, INC. v. VILLAGE OF PINEHURST

No. 362PA90

(Filed 22 April 1992)

ON discretionary review pursuant to N.C.G.S. § 7A-31(a) of a decision of the Court of Appeals, 99 N.C. App. 224, 393 S.E. 2d 111 (1990), affirming an order issued on 23 February 1989 by the North Carolina Utilities Commission approving the applications of Regional Investments of Moore, Inc. to acquire the water and sewer franchises of Pinehurst Water Company and Pinehurst Sanitary Company and to mortgage these assets. Heard in the Supreme Court 10 March 1992.

Hunton & Williams, by Edward S. Finley, Jr., for plaintiff-appellee.

DeBank, McDaniel & Anderson, by William E. Anderson, for defendant-appellant.

PER CURIAM.

Affirmed.

GRAY v. SMALL

[331 N.C. 279 (1992)]

CARMEN P. GRAY AND HUSBAND, BILLY GRAY v. LYNDON F. SMALL AND WIFE, LYNN McQUEEN SMALL

No. 483A91

(Filed 22 April 1992)

APPEAL by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 104 N.C. App. 222, 408 S.E.2d 538 (1991), affirming the judgment of *Brown (Frank R.), J.*, entered 26 September 1990 in Superior Court, DARE County. Heard in the Supreme Court 11 March 1992.

Twiford, O'Neal and Vincent, by Russell E. Twiford and Edward A. O'Neal, for plaintiff appellants.

Hornthal, Riley, Ellis & Maland, by L. P. Hornthal, Jr., for defendant appellees.

PER CURIAM.

The decision of the Court of Appeals is affirmed.

Affirmed.

MARVIN E. COBB v. ROCKY MOUNT BOARD OF EDUCATION

No. 269A91

(Filed 22 April 1992)

APPEAL by defendant from the decision of a divided panel of the Court of Appeals, 102 N.C. App. 681, 403 S.E.2d 538 (1991), reversing an order dismissing petitioner's appeal entered by *Allsbrook, J.*, in Superior Court, EDGECOMBE County, on 14 June 1990, and allowing petitioner to proceed with the appeal. Heard in the Supreme Court 11 March 1992.

Eastern Carolina Legal Services, Inc., by Wesley Abney, for petitioner appellee.

Poyner & Spruill, by Ernie K. Murray and Steven A. Rowe, for respondent appellant.

William W. Finlator, Jr., Associate Attorney General, amicus curiae.

PER CURIAM.

On the authority of *Reed v. Abrahamson*, 331 N.C. 249, 415 S.E.2d 549 (1992) (No. 230PA91, filed simultaneously herewith), the decision of the Court of Appeals is affirmed.

Affirmed.

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

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
KEITH NORMAN SUDDRETH	)	

No. 64A92

(Filed 21 April 1992)

THIS matter is before the Court upon the defendant's Notice of Appeal, defendant's Petition for Discretionary Review as to additional issues, and the Attorney General's Motion to Dismiss Appeal for lack of legal principles of major significance.

Upon consideration, defendant's Petition for Discretionary Review as to additional issues is denied, and notwithstanding the dissent in this matter in the Court of Appeals by the Honorable Robert F. Orr, the Attorney General's Motion to Dismiss Appeal is allowed pursuant to Rule 10, North Carolina Rules of Appellate Procedure and previous ruling of this Court in *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463, 323 S.E.2d 23, 25 (1984). Judge Orr's dissent in this matter concerned only the testimony of the State's hair analysis expert. There was no assignment of error concerning the testimony of the hair analysis expert referred to in the dissent, and, accordingly, defendant is foreclosed from arguing the issue of the hair expert's testimony to this Court.

These matters determined and done in Conference this the 21st day of April, 1992.

LAKE, J.
For the Court

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; THE PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION (INTERVENORS), METRO MOBILE CTS OF CHARLOTTE, INC.; GTE MOBILE COMMUNICATIONS INCORPORATED; CONTEL CELLULAR CORPORATION; G.M.D. PARTNERSHIP; BLUE RIDGE CELLULAR TELEPHONE COMPANY; CENTEL CELLULAR COMPANY; N.C. RSA 2 CELLULAR TELEPHONE COMPANY; N.C. RSA 3 CELLULAR TELEPHONE COMPANY; CELLCOM OF HICKORY, INC.; ALLTEL MOBILE COMMUNICATIONS, INC.; UNITED STATES CELLULAR CORPORATION (JOINT PETITIONERS); CAROLINA TELEPHONE AND TELEGRAPH COMPANY; EASTERN RADIO SERVICE, INC.; AND N.C. CELLULAR ASSOCIATION, INC.	)	
v.	)	ORDER
ATTORNEY GENERAL LACY H. THORNBURG (INTERVENOR)	)	

No. 103PA92

(Filed 23 April 1992)

BY its order dated 21 April 1992 allowing plaintiffs' petition for writ of certiorari, the Court determined only to review the question whether the Court of Appeals' decision made 12 March 1992 to issue its writ of supersedeas should be affirmed or reversed. The Court will consider and determine this question based on the materials contained in and attached to the plaintiffs' petition and the defendant's response filed with this Court. Pending further orders of this Court, the writ of supersedeas issued by the Court of Appeals shall remain in full force and effect.

Done by the Court in Conference this the 23rd day of April 1992.

LAKE, J.
For the Court

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

BADGETT v. DAVIS

No. 90P92

Case below: 104 N.C.App. 760

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

COMAN v. THOMAS MANUFACTURING CO.

No. 53P92

Case below: 105 N.C.App. 88

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992. Motion by defendant for sanctions denied 21 April 1992.

HASSETT v. DIXIE FURNITURE CO.

No. 39PA92

Case below: 104 N.C.App. 684

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 21 April 1992.

HOUSE v. HILLHAVEN, INC.

No. 67P92

Case below: 105 N.C.App. 191

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

LOG SYSTEMS, INC. v. WILKEY

No. 156P92

Case below: 106 N.C.App. 90

Petition by plaintiff for temporary stay allowed 28 April 1992.

MCGILL v. FRENCH

No. 108PA92

Case below: 105 N.C.App. 246

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 21 April 1992.

MEYERS v. DEPT. OF HUMAN RESOURCES

No. 119A92

Case below: 105 N.C.App. 665

Petition by defendant (DHR) for temporary stay allowed 1 April 1992.

NESBIT v. HOWARD

No. 79PA92

Case below: 105 N.C.App. 105

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 21 April 1992.

OCEAN HILL JOINT VENTURE v.
N.C. DEPT. OF E.H.N.R.

No. 77P92

Case below: 105 N.C.App. 277

Petition by defendant for temporary stay allowed 18 March 1992. Petition by defendant for writ of supersedeas allowed 21 April 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 21 April 1992.

PITTMAN v. UNION CORRUGATING CO.

No. 80P92

Case below: 105 N.C.App. 105

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

POSTELL v. B&D CONSTRUCTION CO.

No. 50P92

Case below: 105 N.C.App. 1

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

POWELL v. POWELL

No. 559P91

Case below: 104 N.C.App. 554

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

POWERS v. PARISHER

No. 544P91

Case below: 104 N.C.App. 400

Notice of appeal by defendant pursuant to G.S. 7A-30 dismissed 21 April 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

SEBRELL v. CARTER

No. 97P92

Case below: 105 N.C.App. 322

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

SEVERANCE v. FORD MOTOR CO.

No. 55P92

Case below: 105 N.C.App. 98

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

SONEK v. SONEK

No. 93PA92

Case below: 105 N.C.App. 247

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 21 April 1992.

STATE v. BROOKS

No. 475PA91

Case below: 104 N.C.App. 139

Petition by defendant (Brooks) for writ of certiorari to the North Carolina Court of Appeals allowed 21 April 1992.

STATE v. EVANS

No. 72A92

Case below: 105 N.C.App. 236

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 April 1992.

STATE v. GARRETT

No. 91P92

Case below: 105 N.C.App. 443

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

STATE v. HASKINS

No. 42P92

Case below: 104 N.C.App. 675

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

STATE v. HENDERSON

No. 73P92

Case below: 105 N.C.App. 246

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 April 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

STATE v. HICKS

No. 550P91

Case below: 104 N.C.App. 556

Motion by the Attorney General to dismiss appeal by defendant (Hicks) for lack of substantial constitutional question allowed 21 April 1992. Petition by defendant (Hicks) for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

STATE v. HUNTLEY

No. 41P92

Case below: 104 N.C.App. 732

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

STATE v. LEWIS

No. 20P92

Case below: 104 N.C.App. 804

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 April 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

STATE v. LIPSCOMB

No. 69P92

Case below: 105 N.C.App. 246

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

STATE v. MARSHALL

No. 109P92

Case below: 105 N.C.App. 518

Petition by Attorney General for temporary stay allowed 24 March 1992.

STATE v. MATHIS

No. 126P92

Case below: 105 N.C.App. 402

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

STATE v. McGEE

No. 57P92

Case below: 105 N.C.App. 106

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

STATE v. PENN

No. 99P92

Case below: 105 N.C.App. 444

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

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

STATE v. PHIPPS

No. 547P91

Case below: 104 N.C.App. 557

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

STATE v. REEDER

No. 62P92

Case below: 105 N.C.App. 343

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

STATE v. WALLACE

No. 558P91

Case below: 104 N.C.App. 498

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 March 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1992.

STATE EX REL. COBEY v. SIMPSON

No. 56PA92

Case below: 105 N.C.App. 95

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992. Motion by Conservation Council for Leave to File Amicus Curiae Brief pursuant to Rule 28(i) allowed 21 April 1992.

STATE EX REL. UTILITIES COMM. v. THORNBURG

No. 103PA92

Case below: 331 N.C. 282

Petition by plaintiffs for writ of certiorari to review the order of the North Carolina Court of Appeals allowed 21 April 1992.

SUMNER v. NATIONWIDE MUT. INS. CO.

No. 6P92

Case below: 104 N.C.App. 803

Petition by defendant (Nationwide Mutual Ins. Co.) for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

URBACK v. EAST CAROLINA UNIVERSITY

No. 110P92

Case below: 105 N.C.App. 605

Petition by defendant for temporary stay allowed 30 March 1992. Stay dissolved 21 April 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

WALLACE v. HASERICK

No. 98P92

Case below: 105 N.C.App. 315

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992.

WILSON v. PEARCE

No. 71P92

Case below: 105 N.C.App. 107

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 21 April 1992. Motion by defendants to amend petition allowed 21 April 1992.

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

PETITIONS TO REHEAR

VILLAGE OF PINEHURST v.
REGIONAL INVESTMENTS OF MOORE

No. 69A90

Case below: 330 N.C. 725

Petition by plaintiff to rehear pursuant to Rule 31 denied 21 April 1992.

YATES v. NEW SOUTH PIZZA, LTD.

No. 176PA91

Case below: 330 N.C. 790

Petition by defendant to rehear pursuant to Rule 31 denied 21 April 1992.

CHARLES RUNYON, MARY ROBBINS RUNYON, AND PATSY SIMPSON WILLIAMS v. WARREN D. PALEY, CLAIRE PALEY, AND MIDGETT REALTY, INC., D/B/A MIDGETT REALTY

No. 306A91

(Filed 8 May 1992)

1. Deeds § 58 (NCI4th)-- restrictive covenants—validity—distinctions

It is well settled that an owner of land in fee has a right to sell his land subject to any restrictions he may see fit to impose, provided the restrictions are not contrary to public policy. Such restrictions may be classified as either personal covenants, which create a personal obligation or right enforceable at law only between the original covenanting parties, or as real covenants, which create a servitude upon the land subject to the covenant for the benefit of another parcel of land. A real covenant may be enforced at law or in equity by the owner of the dominant estate against the owner of the servient estate, whether the owners are the original covenanting parties or successors in interest.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 16, 20, 21, 29-31, 36, 37.

2. Deeds § 65 (NCI4th)— restrictive covenant—real covenant—requirements

A restrictive covenant is a real covenant that runs with the land of the dominant and servient estates only if the subject of the covenant touches and concerns the land, there is privity of estate between the party enforcing the covenant and the party against whom the covenant is being enforced, and the original covenanting parties intended the benefits and the burdens of the covenant to run with the land.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 29, 30, 33-35.

3. Deeds § 65 (NCI4th)— restrictive covenant—real covenant—touch and concern

Plaintiffs showed that a restrictive covenant touches and concerns not only the servient estate owned by defendants, but also the properties owned by plaintiffs where the right to restrict the use of defendants' property would af-

fect plaintiffs' ownership interests in the property owned by them. It is not necessary for a covenant to have a physical effect on land for it to touch and concern the land; it is sufficient that the covenant have some economic impact on the parties' ownership rights and it is essential that the covenant in some way affect the legal rights of the covenanting parties as landowners. The covenant does not touch and concern the land and will not run with the land where the burdens and benefits created by the covenant are of such a nature that they may exist independently from the parties' ownership interests in land.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 33, 35.

4. Deeds § 65 (NCI4th)— restrictive covenant—real covenant—privity of estate

In an action to enforce a restrictive covenant as one running with the land at law, horizontal privity of estate was established and vertical privity was established as to defendant Paley and plaintiff Williams but not as to plaintiffs Runyon. A party seeking to enforce at law a covenant as one running with the land must show the presence of both horizontal and vertical privity, horizontal privity being privity of estate between the covenantor and covenantee at the time the covenant was created, and vertical privity being privity of estate between the covenanting parties and their successors in interest. The Runyons did not make a sufficient showing of vertical privity because their only interest was acquired before the creation of the covenant.

Am Jur 2d, Covenants, Conditions, and Restrictions § 34.

5. Deeds § 65 (NCI4th)— restrictive covenant—real covenant—intent of parties

The trial court erred in an action to enforce restrictive covenants by concluding that plaintiff Williams was not entitled to enforce the covenants against defendants where the instrument creating the restrictions was ambiguous as to the parties' intention that the benefit of the covenants run with the land and there was ample evidence establishing that the parties intended that the restrictive covenants be enforceable by the owner of the property retained by Mrs. Gaskins and

now owned by plaintiff Williams. Defendants offered no contrary evidence and relied solely upon the theory that plaintiff Williams could not enforce the restrictions because the covenants did not expressly state the parties' intent and because plaintiff Williams had failed to show that the covenants were created as part of a common scheme of development.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 4, 5.

6. Deeds § 78 (NCI4th)— restrictive covenant—real covenant not enforceable—equitable servitude

In certain circumstances, a party unable to enforce a restrictive covenant as a real covenant running with the land may nevertheless be able to enforce the covenant as an equitable servitude. In order to enforce a restrictive covenant on the theory of equitable servitude, it must be shown that the covenant touches and concerns the land and that the original covenanting parties intended the covenant to bind the person against whom enforcement is sought and to benefit the person seeking to enforce the covenant. The touch and concern element need only be established where the covenant is sought to be enforced either by or against successors in interest to the original or named parties to the covenant, and the party seeking to enforce the covenant must meet the intent requirement by showing that the covenanting parties intended that the burden run to successors in interest or the covenantor's land. The covenants at issue met the touch and concern requirement, but the plaintiffs Runyon failed to show that the original covenanting parties intended that they be permitted to enforce the covenants either in a personal capacity or as owners of any land they now own.

Am Jur 2d, Covenants, Conditions, and Restrictions § 26.

7. Deeds § 78 (NCI4th)— restrictive covenants—notice—chain of title—no provision regarding enforcement

It is well settled in North Carolina that a restrictive covenant is not enforceable, either at law or in equity, against a subsequent purchaser of property burdened by the covenant unless notice of the covenant is contained in an instrument in his or her chain of title. While it would be advisable to include an express provision with respect to rights of enforce-

ment in the conveyance that creates them, such notice is not required. However, for a restrictive covenant to be enforceable against a subsequent purchaser, there must be some evidence in the public records from which it reasonably may be inferred that the covenant was intended to benefit the party seeking enforcement, either personally or as a landowner. Plaintiff Williams has shown that the public records provided sufficient notice to defendants to enable her to enforce the restrictive covenants against them, but, while the records in defendants' chain of title unambiguously provide notice of the restrictive covenants, they do not in any way suggest any right of enforcement in favor of the plaintiffs Runyon, either personally or as owners of the land.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 304, 305, 307-309.

Justices MITCHELL and WEBB concur in the result.

ON plaintiff Williams' appeal 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. 208, 405 S.E.2d 216 (1991), affirming an order of dismissal entered by *Small, J.*, at the 7 May 1990 session of Superior Court, HYDE County. On 4 September 1991, we allowed the petition for discretionary review as to additional issues filed by plaintiffs Runyon. Heard in the Supreme Court 12 March 1992.

Parker, Poe, Adams & Bernstein, by Charles C. Meeker and John J. Butler, for plaintiff-appellants.

Young, Moore, Henderson & Alvis, P.A., by John N. Fountain, Henry S. Manning, Jr., and R. Christopher Dillon, for defendant-appellees.

MEYER, Justice.

This case involves a suit to enjoin defendants from constructing condominium units on their property adjacent to the Pamlico Sound on Ocracoke Island. Plaintiffs maintain that defendants' property is subject to restrictive covenants that prohibit the construction of condominiums. The sole question presented for our review is whether plaintiffs are entitled to enforce the restrictive covenants.

On 17 May 1937, Ruth Bragg Gaskins acquired a four-acre tract of land located in the Village of Ocracoke bounded on the

west by the Pamlico Sound and on the east by Silver Lake. By various deeds, Mrs. Gaskins conveyed out several lots, which were later developed for residential use.

One and one-half acres of the sound-front property, part of which is at issue here, were conveyed by Mrs. Gaskins and her husband to plaintiffs Runyon on 1 May 1954. On 6 January 1960, the Runyons reconveyed the one and one-half acre tract, together with a second tract consisting of one-eighth of an acre, to Mrs. Gaskins. By separate deeds dated 8 January 1960, Mrs. Gaskins, then widowed, conveyed to the Runyons a lake-front lot and a fifteen-foot-wide strip of land that runs to the shore of Pamlico Sound from the roadway separating the lake-front and sound-front lots. This fifteen-foot strip was part of the one and one-half acre parcel that the Runyons had reconveyed to Mrs. Gaskins.

The next day, 9 January 1960, Mrs. Gaskins conveyed the remainder of the one and one-half acre parcel to Doward H. Brugh and his wife, Jacquelyn O. Brugh. Included in the deed of conveyance from Mrs. Gaskins to the Brughs was the following:

> BUT this land is being conveyed subject to certain restrictions as to the use thereof, running with said land by whomsoever owned, until removed as herein set out; said restrictions, which are expressly assented to by [the Brughs], in accepting this deed, are as follows:
>
> (1) Said lot shall be used for residential purposes and not for business, manufacturing, commercial or apartment house purposes; provided, however, this restriction shall not apply to churches or to the office of a professional man which is located in his residence, and
>
> (2) Not more than two residences and such outbuildings as are appurtenant thereto, shall be erected or allowed to remain on said lot. This restriction shall be in full force and effect until such time as adjacent or nearby properties are turned to commercial use, in which case the restrictions herein set out will no longer apply. The word "nearby" shall, for all intents and purposes, be construed to mean within 450 feet thereof.
>
> TO HAVE AND TO HOLD the aforesaid tract or parcel of land and all privileges and appurtenances thereunto belonging or in anywise thereunto appertaining, unto them, the [Brughs],

as tenants by the entirety, their heirs and assigns, to their only use and behoof in fee simple absolute forever, [b]ut subject always to the restrictions as to use as hereinabove set out.

Prior to the conveyance of this land to the Brughs, Mrs. Gaskins had constructed a residential dwelling in which she lived on lakefront property across the road from the property conveyed to the Brughs. Mrs. Gaskins retained this land and continued to live on this property until her death in August 1961. Plaintiff Williams, Mrs. Gaskins' daughter, has since acquired the property retained by Mrs. Gaskins.

By mesne conveyances, defendant Warren D. Paley acquired the property conveyed by Mrs. Gaskins to the Brughs. Thereafter, defendant Warren Paley and his wife, defendant Claire Paley, entered into a partnership with defendant Midgett Realty and began constructing condominium units on the property.

Plaintiffs brought this suit, seeking to enjoin defendants from using the property in a manner that is inconsistent with the restrictive covenants included in the deed from Mrs. Gaskins to the Brughs. In their complaint, plaintiffs alleged that the restrictive covenants were placed on the property "for the benefit of [Mrs. Gaskins'] property and neighboring property owners, specifically including and intending to benefit the Runyons." Plaintiffs further alleged that the "restrictive covenants have not been removed and are enforceable by plaintiffs."

Defendants moved to dismiss the lawsuit, and plaintiffs thereafter moved for summary judgment. Following a hearing on both motions, the trial court granted defendants' motion to dismiss for failure to state a claim upon which relief could be granted and, pursuant to Rule 54(b), rendered a final judgment after having determined that there was no just reason for delay in any appeal of the matter. The Court of Appeals affirmed the trial court, concluding that the restrictive covenants were personal to Mrs. Gaskins and became unenforceable at her death. Judge Greene dissented in part, concluding that the dismissal of plaintiff Williams' claim was erroneous.

At the outset, we note that at the hearing on plaintiffs' and defendants' motions, the trial court allowed plaintiffs to present evidence of matters outside the pleadings. Because it is not clear whether the trial court excluded this evidence in ruling on defend-

ants' motion to dismiss, the trial court's order must be treated on appeal as a *partial* summary judgment for defendants.[1] N.C. R. Civ. P. 12(b)(6).

Having considered the evidence presented to the trial court, we conclude that plaintiff Williams presented sufficient evidence to show that the covenants at issue here are real covenants enforceable by her as an owner of property retained by Mrs. Gaskins, the covenantee. Accordingly, we reverse that part of the Court of Appeals' decision that affirmed the trial court's dismissal of plaintiff Williams' claim. However, we agree with the Court of Appeals that the covenants are not enforceable by the Runyons, and we therefore affirm that part of the Court of Appeals' decision that concerns the dismissal of the Runyons' claim.

[1] It is well established that an owner of land in fee has a right to sell his land subject to any restrictions he may see fit to impose, provided that the restrictions are not contrary to public policy. *Sheets v. Dillon*, 221 N.C. 426, 431, 20 S.E.2d 344, 347 (1942). Such restrictions are often included as covenants in the deed conveying the property and may be classified as either personal covenants or real covenants that are said to run with the land. *See* 5 Richard R. Powell, *Powell on Real Property* ¶ 673 (1991) [hereinafter *Powell on Real Property*]. The significant distinction between these types of covenants is that a personal covenant creates a personal obligation or right enforceable at law only between the original covenanting parties, 5 *Powell on Real Property* ¶ 673[1], at 60-41, whereas a real covenant creates a servitude upon the land subject to the covenant ("the servient estate") for the benefit of another parcel of land ("the dominant estate"), *Cummings v. Dosam, Inc.*, 273 N.C. 28, 32, 159 S.E.2d 513, 517 (1968). As such, a real covenant may be enforced at law or in equity by the owner of the dominant estate against the owner of the servient estate, whether the owners are the original covenanting parties or successors in interest.

I. Real Covenants at Law

[2] A restrictive covenant is a real covenant that runs with the land of the dominant and servient estates only if (1) the subject

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1. Plaintiffs Runyon also alleged claims against defendants for breach of a settlement agreement and for willful and intentional trespass to real property. These claims were not subjects of the trial court's order and are therefore not before this Court.

of the covenant touches and concerns the land, (2) there is privity of estate between the party enforcing the covenant and the party against whom the covenant is being enforced, and (3) the original covenanting parties intended the benefits and the burdens of the covenant to run with the land. *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 669, 248 S.E.2d 904, 908 (1978); 5 *Powell on Real Property* ¶ 673[1], at 60-43; 3 Herbert Thorndike Tiffany, *The Law of Real Property* §§ 848-854 (Basil Jones ed., 3d ed. 1939) [hereinafter *Tiffany Real Property*].

A. Touch and Concern

[3] As noted by several courts and commentators, the touch and concern requirement is not capable of being reduced to an absolute test or precise definition. *See Neponsit Property Owners Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 256-58, 15 N.E.2d 793, 795-96, *reh'g denied*, 278 N.Y. 704, 16 N.E.2d 852 (1938); Charles E. Clark, *Real Covenants and Other Interests Which "Run With Land"* 96 (2d ed. 1947) [hereinafter Clark, *Real Covenants*]. Focusing on the nature of the burdens and benefits created by a covenant, the court must exercise its best judgment to determine whether the covenant is related to the covenanting parties' ownership interests in their land. Clark, *Real Covenants* 97.

For a covenant to touch and concern the land, it is not necessary that the covenant have a physical effect on the land. *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618, 624 (Utah 1989). It is sufficient that the covenant have some economic impact on the parties' ownership rights by, for example, enhancing the value of the dominant estate and decreasing the value of the servient estate. 7 George W. Thompson, *Commentaries on the Modern Law of Real Property* § 3155, at 84 (1962) [hereinafter *Thompson on Real Property*]. It is essential, however, that the covenant in some way affect the legal rights of the covenanting parties as landowners. Where the burdens and benefits created by the covenant are of such a nature that they may exist independently from the parties' ownership interests in land, the covenant does not touch and concern the land and will not run with the land. *See Choisser v. Eyman*, 22 Ariz. App. 587, 529 P.2d 741 (1974) (covenant capable of enforcement regardless of status as owner of interest in land is personal in nature); *Flying Diamond Oil Corp.*, 776 P.2d at 623 (Utah) ("[T]o touch and concern the land, a covenant must bear upon the use and enjoyment of the land and be of the kind that

the owner of an estate or interest in land may make because of his ownership right.").

Although not alone determinative of the issue, the nature of the restrictive covenants at issue in this case (building or use restrictions) is strong evidence that the covenants touch and concern the dominant and servient estates. As recognized by some courts, a restriction limiting the use of land clearly touches and concerns the estate burdened with the covenant because it restricts the owner's use and enjoyment of the property and thus affects the value of the property. *Net Realty Holding Trust v. Franconia Properties*, 544 F. Supp. 759, 762 (E.D. Va. 1982); *see also* 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* § 167 (1965). A use restriction does not, however, always touch and concern the dominant estate. *See Stegall v. Housing Authority*, 278 N.C. 95, 178 S.E.2d 824 (1971) (holding that covenant did not meet the touch and concern requirement where the record failed to disclose the location of the grantor's property "in the area" or the distance from the grantor's property to the restricted property). To meet the requirement that the covenant touch and concern the dominant estate, it must be shown that the covenant somehow affects the dominant estate by, for example, increasing the value of the dominant estate.

In the case at bar, plaintiffs have shown that the covenants sought to be enforced touch and concern not only the servient estate owned by defendants, but also the properties owned by plaintiffs. The properties owned by defendants, plaintiff Williams, and plaintiffs Runyon comprise only a portion of what was at one time a four-acre tract bounded on one side by the Pamlico Sound and on the other by Silver Lake. If able to enforce the covenants against defendants, plaintiffs would be able to restrict the use of defendants' property to uses that accord with the restrictive covenants. Considering the close proximity of the lands involved here and the relatively secluded nature of the area where the properties are located, we conclude that the right to restrict the use of defendants' property would affect plaintiffs' ownership interests in the property owned by them, and therefore the covenants touch and concern their lands.

B. Privity of Estate

[4] In order to enforce a restrictive covenant as one running with the land at law, the party seeking to enforce the covenant must

also show that he is in privity of estate with the party against whom he seeks to enforce the covenant. 5 *Powell on Real Property* ¶ 673[2]; 7 *Thompson on Real Property* § 3155, at 84. Although the origin of privity of estate is not certain, the privity requirement has been described as a substitute for privity of contract, which exists between the original covenanting parties and which is ordinarily required to enforce a contractual promise. 3 *Tiffany Real Property* § 851, at 451 n.32. Thus, where the covenant is sought to be enforced by someone not a party to the covenant or against someone not a party to the covenant, the party seeking to enforce the covenant must show that he has a sufficient legal relationship with the party against whom enforcement is sought to be entitled to enforce the covenant.

For the enforcement at law of a covenant running with the land, most states require two types of privity: (1) privity of estate between the covenantor and covenantee at the time the covenant was created ("horizontal privity"), and (2) privity of estate between the covenanting parties and their successors in interest ("vertical privity"). William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861, 867 (1977) [hereinafter Stoebuck, 52 Wash. L. Rev. 861]. The majority of jurisdictions have held that horizontal privity exists when the original covenanting parties make their covenant in connection with the conveyance of an estate in land from one of the parties to the other. 7 *Thompson on Real Property* § 3155, at 85, and cases cited therein. A few courts, on the other hand, have dispensed with the showing of horizontal privity altogether, requiring only a showing of vertical privity. *See, e.g., Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y.2d 240, 164 N.E.2d 832, 196 N.Y.S.2d 945 (1959) (vertical privity sufficient); *but see Eagle Enters. v. Gross*, 39 N.Y.2d 505, 349 N.E.2d 816, 384 N.Y.S.2d 717 (1976) (referring to vertical privity as meeting horizontal privity requirement).

Vertical privity, which is ordinarily required to enforce a real covenant at law, requires a showing of succession in interest between the original covenanting parties and the current owners of the dominant and servient estates. As one scholar has noted:

> The most obvious implication of this principle [of vertical privity] is that the burden of a real covenant may be enforced against remote parties only when they have succeeded to the covenantor's *estate* in land. Such parties stand in privity of

> estate with the covenantor. Likewise, the benefit may be enforced by remote parties only when they have succeeded to the covenantee's *estate*. They are in privity of estate with the covenantee.

Stoebuck, 52 Wash. L. Rev. 861, 876 (emphasis added).

We adhere to the rule that a party seeking to enforce a covenant as one running with the land at law must show the presence of both horizontal and vertical privity. In order to show horizontal privity, it is only necessary that a party seeking to enforce the covenant show that there was some "connection of interest" between the original covenanting parties, such as, here, the conveyance of an estate in land. *Accord* Restatement of Property § 534 (1944).

In the case *sub judice*, plaintiffs have shown the existence of horizontal privity. The record shows that the covenants at issue in this case were created in connection with the transfer of an estate in fee of property then owned by Mrs. Gaskins. By accepting the deed of conveyance, defendants' predecessors in title, the Brughs, covenanted to use the property for the purposes specified in the deed and thereby granted to Mrs. Gaskins a servitude in their property.

To review the sufficiency of vertical privity in this case, it is necessary to examine three distinct relationships: (1) the relationship between defendants and the Brughs as the covenantors; (2) the relationship between plaintiff Williams and the covenantee, Mrs. Gaskins; and (3) the relationship between plaintiffs Runyon and Mrs. Gaskins. The evidence before us shows that the Brughs conveyed all of their interest in the restricted property and that by mesne conveyances defendant Warren Paley succeeded to a fee simple estate in the property. Thus, he is in privity of estate with the covenantors. Any legal interests held by the other defendants were acquired by them from defendant Warren Paley. As successors to the interest held by defendant Warren Paley, they too are in privity of estate with the covenantors. Plaintiff Williams has also established a privity of estate between herself and the covenantee. Following the death of Mrs. Gaskins, the property retained by Mrs. Gaskins was conveyed by her heirs to her daughter, Eleanor Gaskins. Thereafter, Eleanor Gaskins conveyed to plaintiff Williams a fee simple absolute in that property. The mere fact that defendants and plaintiff Williams did not acquire the property directly from the original covenanting parties is of no moment.

Regardless of the number of conveyances that transpired, defendants and plaintiff Williams have succeeded to the estates then held by the covenantor and covenantee, and thus they are in vertical privity with their successors in interest. Such would be true even if the parties had succeeded to only a part of the land burdened and benefitted by the covenants. 5 *Powell on Real Property* ¶ 673[3], at 60-85 to -86; 5 Restatement of Property §§ 536, 551 (1944). Plaintiffs Runyon have not, however, made a sufficient showing of vertical privity. The Runyons have not succeeded in any interest in land held by Mrs. Gaskins at the time the covenant was created. The only interest in land held by the Runyons was acquired by them prior to the creation of the covenant. Therefore, they have not shown vertical privity of estate between themselves and the covenantee with respect to the property at issue in this case. Because the Runyons were not parties to the covenant and are not in privity with the original parties, they may not enforce the covenant as a real covenant running with the land at law.

C. Intent of the Parties

[5] Defendants argue that plaintiff Williams is precluded from enforcing the restrictive covenants because the covenanting parties who created the restrictions intended that the restrictions be enforceable only by Mrs. Gaskins, the original covenantee. According to defendants, such a conclusion is necessitated where, as here, the instrument creating the covenants does not expressly state that persons other than the covenantee may enforce the covenants. We disagree.

Defendants correctly note that our law does not favor restrictions on the use of real property. It is generally stated that "[r]estrictions in a deed will be regarded as for the personal benefit of the grantor unless a contrary intention appears, and the burden of showing that they constitute covenants running with the land is upon the party claiming the benefit of the restriction." *Stegall*, 278 N.C. at 101, 178 S.E.2d at 828. This, however, does not mean that we will always regard a restriction as personal to the covenantee unless the restriction expressly states that persons other than the covenantee may enforce the covenant. *See, e.g., Reed v. Elmore*, 246 N.C. 221, 98 S.E.2d 360 (1957) (concluding that covenant was intended to benefit land despite the absence of an express statement to that effect).

"Whether restrictions imposed upon land . . . create a personal obligation or impose a servitude upon the land enforceable by subsequent purchasers [of the covenantee's property] is determined by the intention of the parties at the time the deed containing the restriction was delivered." *Stegall*, 278 N.C. at 100, 178 S.E.2d at 828; *Reed*, 246 N.C. at 224, 98 S.E.2d at 362. The question of the parties' intention is one that the court must decide by applying our well-established principles of contract construction.

Our case law, as well as that of other jurisdictions, has been less than clear in delineating who should decide the issue of the parties' intent. Some courts have stated that the parties' intent is a question of fact that should be decided by a jury. *See Gallagher v. Bell*, 69 Md. App. 199, 212, 516 A.2d 1028, 1035 (1986), *cert. denied*, 308 Md. 382, 519 A.2d 1283 (1987). Other courts, including our Court of Appeals, have expressed the view that the parties' intention with respect to the terms of a deed is a question of law for the court's consideration. *See Mason-Reel v. Simpson*, 100 N.C. App. 651, 397 S.E.2d 755 (1990). We believe that the correct view is that the effect to be given *unambiguous* language contained in a written instrument is a question of law, *Lane v. Scarborough*, 284 N.C. 407, 200 S.E.2d 622 (1973), but where the language is *ambiguous* so that the effect of the instrument must be determined by resort to extrinsic evidence that raises a dispute as to the parties' intention, the question of the parties' intention becomes one of fact. However, the determination of the parties' intention is not for the jury but is the responsibility of the judge in construing and interpreting the meaning of the instrument. 4 Samuel Williston, *A Treatise on the Law of Contracts* § 601 (Walter H.E. Jaeger ed., 3d ed. 1961 & Supp. 1991); *see also* N.C.G.S. § 39-1.1 (1984).

Ordinarily, the parties' intent must be ascertained from the deed or other instrument creating the restriction. *Stegall*, 278 N.C. at 100, 178 S.E.2d at 828. However, when the language used in the instrument is ambiguous, the court, in determining the parties' intention, must look to the language of the instrument, the nature of the restriction, the situation of the parties, and the circumstances surrounding their transaction. *Id.*; *Reed*, 246 N.C. at 224, 98 S.E.2d at 362; *Monk v. Kornegay*, 224 N.C. 194, 200, 29 S.E.2d 754, 758 (1944).

We conclude that the language of the deed creating the restrictions at issue here is ambiguous with regard to the intended enforcement of the restrictions. The deed from Mrs. Gaskins to the

Brughs provided that the property conveyed was being made "subject to certain restrictions as to the use thereof, running with said land by whomsoever owned, until removed [due to a change of conditions in the surrounding properties] as herein set out." As noted by the dissent in the Court of Appeals, this provision unequivocally expresses the parties' intention that the burden of the restrictions runs with the land conveyed by the deed.[2] *Runyon v. Paley*, 103 N.C. App. 208, 215, 405 S.E.2d 216, 220 (1991) (Greene, J., concurring in part and dissenting in part). In the habendum clause of the deed, the parties also included language providing that the estate granted shall be "*subject always* to the restrictions as to use as hereinabove set out." (Emphasis added.) We conclude that the language of the deed creating the restrictions is such that it can reasonably be interpreted to establish an intent on the part of the covenanting parties not only to bind successors to the covenantor's interest, but also to benefit the property retained by the covenantee.

Having determined that the instrument creating the restrictions at issue here is ambiguous as to the parties' intention that the benefit of the covenants runs with the land, we must determine whether plaintiff Williams has produced sufficient evidence to show that the covenanting parties intended that the covenants be enforceable by the covenantee's successors in interest. Defendants argue that plaintiff Williams has not met her burden because (1) the covenants do not expressly state that the benefit of the covenant was to run with any land retained by the covenantee; and

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2. The majority of the Court of Appeals' panel incorrectly concluded that this provision was not a sufficient expression of the parties' intent to bind the successors of the conveyed estate. In so deciding, the Court of Appeals misplaced its reliance on North Carolina case law establishing that a recital that a covenant is to run with the land cannot convert into a real covenant one that is personal because it does not meet the other legal requirements for a covenant to run with the land. *See, e.g., Raintree Corp.*, 38 N.C. App. at 669, 248 S.E.2d at 908 (holding that a covenant that did not touch and concern the land could not be considered a real covenant running with the land despite the parties' expressed intent that it run with the land). Where the parties include *unambiguous* language to the effect that the restrictive covenant is to run with the burdened land, the benefitted land, or both, it is conclusively established that the parties so intended. *Flying Diamond Oil Corp.*, 776 P.2d at 627 (Utah) (stating that "[a]n express statement . . . that the parties intend to create a covenant running with the land is usually dispositive of the intent issue"); 5 *Powell on Real Property* ¶ 673[2], at 60-61; *accord Starmount Co. v. Memorial Park*, 233 N.C. 613, 65 S.E.2d 134 (1951) (enforcing against covenantor's successor in interest a restrictive covenant containing a recital virtually identical to the one included in the restrictive covenants at issue here).

(2) plaintiff Williams has not shown that the property was conveyed as part of a general plan of subdivision, development, and sales subject to uniform restrictions. While evidence of the foregoing would clearly establish the parties' intent to benefit the covenantee's successors, such evidence is not the only evidence that may be used to prove the parties' intent.

We find strong evidence in the record of this case to suggest that the covenanting parties intended the restrictive covenants to be real covenants, the benefit of which attached to the land retained by Mrs. Gaskins, the covenantee. The covenants at issue here are building and use restrictions that restrict the use of the burdened property to "two residences and such outbuildings as are appurtenant thereto" to be used for "residential purposes." The covenants expressly prohibit the use of the property for "business, manufacturing, commercial or apartment house purposes." The only exception provided by the covenants is that the latter restriction "shall not apply to churches or to the office of a professional man which is located in his residence." As noted by some courts, restrictions limiting the use of property to residential purposes have a significant impact on the value of neighboring land, and thus the very nature of such a restriction suggests that the parties intended that the restriction benefit land rather than the covenantee personally. *See, e.g., Bauby v. Krasow*, 107 Conn. 109, 115, 139 A. 508, 510 (1927) (concluding that only reasonable inference to be drawn from use restriction "is that its sole purpose was to protect the [covenantee's] homestead"); *accord Elliston v. Reacher*, 2 Ch. 374, *aff'd*, 2 Ch. 665 (1908). We need not decide whether the nature of a building or use restriction, in and of itself, is sufficient evidence of the parties' intent that the benefit run with the land, however.

In this case, the evidence also shows that the property now owned by defendants was once part of a larger, relatively secluded tract bounded by Silver Lake and the Pamlico Sound. Prior to conveying the property now owned by defendants, Mrs. Gaskins had erected on a portion of the tract a single-family residence in which she lived. At some point, her property was subdivided into several lots. Mrs. Gaskins conveyed several of these lots, on which residences were thereafter erected. Although none of these deeds of conveyance contained restrictions limiting the use of the property to residential purposes, it is reasonable to assume that Mrs. Gaskins, by later restricting the use of defendants' property,

intended to preserve the residential character and value of the relatively secluded area. This evidence is further supported by the fact that Mrs. Gaskins retained land across the road from the property now owned by defendants and continued to reside in her dwelling located on the retained land. We believe that this evidence of the parties' situation and of the circumstances surrounding their transaction strongly supports a finding that the covenanting parties intended that the restrictive covenants inure to the benefit of Mrs. Gaskins' land and not merely to Mrs. Gaskins personally.

Moreover, we conclude that the language of the deed creating the restrictive covenants supports a finding that the parties intended the benefit of the covenants to attach to the real property retained by Mrs. Gaskins. The pertinent language of the deed provides that the property was conveyed subject to certain use restrictions "running with said land by whomsoever owned, until removed," and that the property is "subject always to the restrictions." As the Connecticut Appellate Court concluded after analyzing similar language in *Grady v. Schmitz*, 16 Conn. App. 292, 547 A.2d 563, *cert. denied*, 209 Conn. 822, 551 A.2d 755 (1988), we believe that this language suggests a broad, rather than a limited, scope of enforcement. That the deed expressly stated that the covenants were to run with the land and continue indefinitely, unless and until the surrounding property is "turned to commercial use," indicates that the parties intended the restrictive covenants to be enforceable by Mrs. Gaskins as the owner of the land retained by her or by her successors in interest to the retained land. *See Grady*, 16 Conn. App. at 297, 547 A.2d at 566.

Having reviewed the language of the deed creating the restrictive covenants, the nature of the covenants, and the evidence concerning the covenanting parties' situation and the circumstances surrounding their transaction, we conclude that plaintiff Williams presented ample evidence establishing that the parties intended that the restrictive covenants be enforceable by the owner of the property retained by Mrs. Gaskins and now owned by plaintiff Williams. Defendants did not offer any contrary evidence of the parties' intent but relied solely upon the theory that plaintiff Williams could not enforce the restrictions because the covenants did not expressly state the parties' intent and because plaintiff Williams had failed to show that the covenants were created as part of a common scheme of development. Based upon the uncontradicted

evidence presented by plaintiff Williams, the trial court erred in concluding that plaintiff Williams, the successor in interest to the property retained by Mrs. Gaskins, was not entitled to enforce the restrictive covenants against defendants.

II. Equitable Servitudes

[6] With regard to plaintiffs Runyon, we must go further because, in certain circumstances, a party unable to enforce a restrictive covenant as a real covenant running with the land may nevertheless be able to enforce the covenant as an equitable servitude. Although damages for breach of a restrictive covenant are available only when the covenant is shown to run with the land at law, "*performance* of a covenant will be decreed in favor of persons claiming under the parties to the agreement or by virtue of their relationship thereto, notwithstanding the technical character and form of the covenant." 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* § 26, at 596 (1965) (emphasis added). To enforce a restriction in equity, it is immaterial that the covenant does not run with the land or that privity of estate is absent. *Bauby*, 107 Conn. 109, 139 A. 508; *Johnson v. Robertson*, 156 Iowa 64, 135 N.W. 585 (1912).

> "A covenant, though in gross at law, may nevertheless be binding in equity, even to the extent of fastening a servitude or easement on real property, or of securing to the owner of one parcel of land a privilege, or, as it is sometimes called, 'a right to an amenity' in the use of an adjoining parcel, by which his own estate may be enhanced in value or rendered more agreeable as a place of residence."

Johnson, 156 Iowa at 77, 135 N.W. at 590 (quoting *Parker v. Nightingale*, 88 Mass. (6 Allen) 341, 344 (1863)).

In this case, plaintiffs seek injunctive relief, which is available for the breach of an equitable servitude. Therefore, we now examine the question of whether plaintiffs Runyon, although unable to enforce the covenants as covenants running with the land, may nevertheless enforce the covenants against defendants on the theory of equitable servitudes.

"Even though a promise is unenforceable as a covenant at law because of failure to meet one of the requirements, the promise may be enforced as an equitable servitude against the promisor or a subsequent taker who acquired the land with notice of the restrictions on it." *Traficante v. Pope*, 115 N.H. 356, 359, 341 A.2d

782, 784 (1975). In order to enforce a restrictive covenant on the theory of equitable servitude, it must be shown (1) that the covenant touches and concerns the land, and (2) that the original covenanting parties intended the covenant to bind the person against whom enforcement is sought and to benefit the person seeking to enforce the covenant. 5 *Powell on Real Property* ¶ 673[1], at 60-44.

A. Touch and Concern

Whether a covenant is of such a *character* that it touches and concerns land is determined according to the same principles applicable to real covenants running at law. Unlike with real covenants, however, it is not always necessary to show that both the burden and the benefit touch and concern land. To enforce a restrictive covenant as an equitable servitude, it is only necessary to show that the covenant is of such a nature as to bind the party sued and to be enforceable by the party suing. The covenant itself establishes these rights and obligations between the original covenanting parties as well as any named parties intended to be benefitted thereby. Thus, the touch and concern element need only be established where the covenant is sought to be enforced either by or against successors in interest to the original or named parties to the covenant. Where, for example, a covenantee or a named beneficiary seeks to enforce the restriction against the covenantor's successor in interest, the party seeking enforcement need not show that the benefit touches and concerns his land but need show only that the burden touches and concerns the land of the party against whom he seeks to enforce the restriction. *See Bauby*, 107 Conn. 109, 139 A. 508.[3] Similarly, a successor in interest to the

3. We recognize that at least one scholar has suggested that our courts will not permit the covenantee to enforce a restrictive covenant, at law or in equity, against the covenantor's successor in interest unless the covenantee is able to demonstrate that the benefit of the covenant touches and concerns land owned by him and is not personal to him. *See* Stoebuck, 52 Wash. L. Rev. 861, 902 (interpreting *Stegall*). We do not agree that *Stegall* or any other opinion of this Court set forth such a requirement. As noted by the California Court of Appeal, "the talisman for enforcement [of an equitable servitude] . . . rests . . . upon a determination of the *intention* of those creating the covenant." *B.C.E. Dev. v. Smith*, 215 Cal. App. 3d 1142, 1147, 264 Cal. Rptr. 55, 59 (1989). Where, as in *Stegall*, it is shown that the covenanting parties intended that the covenant be enforceable by the covenantee only for the benefit of property owned by it, then the covenantee may not enforce the covenant once it has parted with all its interest in the benefitted land. *Stegall*, 278 N.C. at 102, 178 S.E.2d at 829. This, however, does not mean that a covenant personal to the covenantee may not be enforced in equity simply because the covenant does not touch and concern land owned

covenantee or to a named beneficiary who seeks to enforce the restriction against the original covenantor must show only that the benefit of the restriction touches and concerns the successor's land. Where, however, the covenant is sought to be enforced by *and* against parties neither of whom were the covenanting parties or named beneficiaries, the party seeking to enforce the restriction must show that the covenant touches and concerns the land of both.

Plaintiffs Runyon have shown that the covenants at issue here meet the legal requirement that the covenants touch and concern defendants' property as well as the property owned by the Runyons. Because a covenant that touches and concerns the land at law will also touch and concern the land in equity, we need not further examine this requirement.

B. Intent of the Parties

A party who seeks to enforce a covenant as an equitable servitude against one who was not an original party to the covenant must show that the original covenanting parties intended that the covenant bind the party against whom enforcement is sought. To meet this requirement, the party seeking to enforce the covenant must show that the covenanting parties intended that the burden run to successors in interest of the covenantor's land.

If the party seeking enforcement was not an original party to the covenant, he must show that the covenanting parties intended that he be able to enforce the restriction. Maurice T. Brunner, Annotation, *Comment Note.—Who May Enforce Restrictive Covenant or Agreement as to Use of Real Property*, 51 A.L.R.3d 556, 573 (1973). It is presumed in North Carolina that covenants may be enforced only between the original covenanting parties. *Stegall*, 278 N.C. at 101, 178 S.E.2d at 828. However, this presumption may be overcome by evidence that (1) the covenanting parties intended that the covenant personally benefit the party seeking enforcement, or (2) the covenanting parties intended that the covenant benefit property in which the party seeking enforcement holds a present interest. *B.C.E. Dev. v. Smith*, 215 Cal. App. 3d 1142, 1147, 264 Cal. Rptr. 55, 59 (1989). The latter may be shown by evidence of a common scheme of development, *e.g.*, *Higdon v. Jaffa*,

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by the covenantee. Equity will intervene to enforce a covenant the benefit of which is in gross just as it will intervene to enforce a covenant appurtenant to the covenantee's land.

231 N.C. 242, 56 S.E.2d 661 (1949); of succession of interest to benefitted property retained by the covenantee, *e.g.*, *Sheets v. Dillon*, 221 N.C. 426, 20 S.E.2d 344 (1942); or of an express statement of intent to benefit property owned by the party seeking enforcement, *e.g.*, *Lamica v. Gerdes*, 270 N.C. 85, 153 S.E.2d 814 (1967).

Applying these principles as well as the rules of construction used to determine the parties' intent that a covenant run with the land, which likewise apply here, we conclude that plaintiffs Runyon have failed to show that the original covenanting parties intended that they be permitted to enforce the covenants either in a personal capacity or as owners of any land they now own. The Runyons were not parties to the covenants, and neither they nor their property are mentioned, either explicitly or implicitly, as intended beneficiaries in the deed creating the covenants or in any other instrument in the public records pertaining to defendants' property. Although they own property closely situated to defendants', in an area which was primarily residential at the time the restrictive covenants were created, they did not acquire their property as part of a plan or scheme to develop the area as residential property. In fact, they acquired their property free of any restrictions as to the use of their property. Finally, the Runyons purchased their property prior to the creation of the restrictive covenants at issue here, and thus they cannot be said to be successors in interest to any property retained by the covenantee that was intended to be benefitted by the covenants.

An affidavit filed by Mr. Runyon is the only evidence tending to support the Runyons' claim that they were intended beneficiaries of the covenants. This affidavit, filed with plaintiffs' motion for summary judgment, states that the covenants were created as a result of a "three-party land swap" whereby the Runyons conveyed their sound-front property to effectuate two transfers of the property: the transfer of a fifteen-foot-wide strip of land to the Runyons for access to the Pamlico Sound and the transfer of the remainder of the property to the Brughs, defendants' predecessors in interest. Mr. Runyon alleges in his affidavit that the covenants were included in the deed of conveyance to the Brughs "for the benefit of the land retained by [Mrs.] Gaskins and neighboring property owners, specifically including and intending to benefit [the Runyons]."

This affidavit by Mr. Runyon, no matter how informative of the parties' intent, is not competent evidence to support the Runyons' claim. Unlike the evidence relied upon to support plaintiff Williams' claim, the allegations contained in this affidavit reference no matters of public record that tend to explain ambiguous deed language by showing the parties' situation or the circumstances surrounding their transaction. The Runyons' reliance on this affidavit is an attempt to use inadmissible parol evidence to add to or vary the terms of the instrument to include the Runyons, who owned no interest in the property conveyed, as named beneficiaries to the covenants. Moreover, even if the allegations of the affidavit were admissible to explain some ambiguous language of the instrument, the affidavit would still be incompetent under our well-established rule that declarations and testimony of the parties are not admissible to prove the covenanting parties' intent. *See Stegall*, 278 N.C. at 100, 178 S.E.2d at 828.

III. Notice

[7] It is well settled in our state that a restrictive covenant is not enforceable, either at law or in equity, against a subsequent purchaser of property burdened by the covenant unless notice of the covenant is contained in an instrument in his chain of title. N.C.G.S. § 47-18 provides:

> No . . . conveyance of land . . . shall be valid to pass any property interest as against . . . purchasers for a valuable consideration . . . but from the time of registration thereof in the county where the land lies . . . .

N.C.G.S. § 47-18(a) (1984). Unlike in many states, actual knowledge, no matter how full and formal, is not sufficient to bind a purchaser in our state with notice of the existence of a restrictive covenant. *Turner v. Glenn*, 220 N.C. 620, 625, 18 S.E.2d 197, 201 (1942).

> A purchaser is chargeable with notice of the existence of the restriction only if a proper search of the public records would have revealed it . . . . If the restrictive covenant is contained in a separate instrument or rests in parol and not in a deed in the chain of title and is not referred to in such deed a purchaser, under our registration law, has no constructive notice of it.

Id.

Notwithstanding the fact that the covenants at issue here were created in a properly recorded deed of conveyance from Mrs. Gaskins to defendants' predecessors, defendants contend that they are purchasers for value and that N.C.G.S. § 47-18 precludes enforcement of the restrictions against them. Relying on *Reed v. Elmore*, 246 N.C. 221, 98 S.E.2d 360, defendants argue that a restrictive covenant is not enforceable against a subsequent purchaser of the property unless the instruments in the chain of title *expressly* state "*both* an intention to bind succeeding grantees and an intention to permit enforcement by successors of the grantor or named beneficiaries."

While it would be advisable to include an express provision with respect to the rights of enforcement in the conveyance that creates them, we do not agree that such notice, as defendants demand, is required. An examination of our case law reveals that we have required the certainty of an express statement in the chain of title only with respect to the *existence* of a restrictive covenant. *See Reed*, 246 N.C. 221, 98 S.E.2d 360; *Turner*, 220 N.C. 620, 18 S.E.2d 197. " 'If the restrictive covenant is contained in a separate instrument or rests in parol and [is] not [referred to] in a deed in the chain of title,' " a subsequent purchaser will take the property free of restrictions. *Reed*, 246 N.C. at 230, 98 S.E.2d at 367 (quoting *Turner*, 220 N.C. at 625, 18 S.E.2d at 201). Where, however, the restriction is contained in the chain of title, we have not hesitated to enforce the restriction against a subsequent purchaser when the court may reasonably infer that the covenant was created for the benefit of the party seeking enforcement.

In *Reed*, the deed creating the restrictive covenant provided:

> "The foregoing tract of land [lot 3] is conveyed subject to the easement of a road leading from Pineville-Matthews Road to lot designated No. 2 . . . and lot designated No. 1 . . . and the right is hereby reserved to the owners of said Lots 1 and 2 to the use in common of said private road as a means of ingress, regress and egress to and from said tracts of land to the Pineville-Matthews Road.
>
> "The foregoing lands are conveyed subject to the condition or restriction that no structure shall be erected by the grantee within 550 feet of the Pineville-Matthews Road, it being understood and agreed that the 100 foot strip leading to said tract of land from the Pineville-Matthews Road shall not be

used for purpose of constructing any building thereon, and this restriction shall likewise apply to Lot No. 4, retained by the grantor, said lot No. 4 being adjacent to lands hereby conveyed."

Reed, 246 N.C. at 223, 98 S.E.2d at 361. Despite the fact that the deed and other instruments of record did not expressly state who could enforce the restrictions, we concluded that subsequent purchasers of lot 4 were provided sufficient notice that the deed imposed on their property an equitable servitude in favor of lots 1, 2, and 3. *Id.* at 226, 230, 98 S.E.2d at 364, 366.

This is not to say that a restrictive covenant, the existence of which is clearly set forth in the chain of title, may be enforced by any person who is able to show by any means possible that the covenanting parties intended that he be permitted to enforce the covenant. For a restrictive covenant to be enforceable against a subsequent purchaser, there must be *some* evidence in the public records from which it reasonably may be inferred that the covenant was intended to benefit, either personally or as a landowner, the party seeking enforcement.

In this case, a proper search of the public records pertaining to defendants' property would have revealed not only the existence of the restrictive covenants, but also that prior to the conveyance the property was part of a larger tract owned by Mrs. Gaskins. Upon conveying the property to defendants' predecessors, Mrs. Gaskins did not part with all of her property but retained adjacent or nearby property that would be benefitted by the restrictive covenants. From this evidence, it reasonably may be inferred that the restrictive covenants were intended to benefit the property retained by Mrs. Gaskins. Therefore, plaintiff Williams, Mrs. Gaskins' successor in title, has shown that the public records provided sufficient notice to defendants to enable her to enforce the restrictive covenants against them.

The Runyons have not made a sufficient showing so as to charge defendants with notice of the existence of any restriction that may have inured or was intended to inure to their benefit. While the records in defendants' chain of title unambiguously provide notice of the restrictive covenants, they do not in any way suggest any right of enforcement in favor of the Runyons, either personally or as owners of any land. The day before the restrictive covenant was created, the Runyons did acquire from Mrs. Gaskins

a fifteen-foot strip of land adjacent to the restricted property. Even assuming *arguendo* that recordation of this conveyance would have provided some notice of Mrs. Gaskins' intent to benefit the Runyons, a question about which we express no opinion, this conveyance is nonetheless of no avail to the Runyons because it was not recorded by them until some fifteen to sixteen years after the Brughs recorded their deed of conveyance from Mrs. Gaskins. Thus, the deed from Mrs. Gaskins to the Runyons provided no notice to defendants that the Runyons claimed any interest in adjacent land that may have been benefitted by the restrictive covenants.

For the reasons stated herein, we conclude that the restrictive covenants contained in the deed from Mrs. Gaskins to defendants' predecessors are not personal covenants that became unenforceable at Mrs. Gaskins' death but are real covenants appurtenant to the property retained by Mrs. Gaskins at the time of the conveyance to defendants' predecessors in interest. As a successor in interest to the property retained by Mrs. Gaskins, plaintiff Williams is therefore entitled to seek enforcement of the restrictive covenants against defendants. We therefore reverse that part of the Court of Appeals' decision that affirmed the trial court's dismissal of plaintiff Williams' claim and remand this case to that court for further remand to the Superior Court, Hyde County, for further proceedings not inconsistent with this opinion.

We further conclude that the Runyons have not proffered sufficient evidence to show that they have standing to enforce the restrictive covenants, either personally or as owners of any land intended to be benefitted by the restrictions. We therefore affirm that part of the Court of Appeals' decision that affirmed the trial court's dismissal of the Runyons' claim.

Affirmed in part, reversed in part, and remanded.

Justices MITCHELL and WEBB concur in the result.

STATE OF NORTH CAROLINA v. GEORGE WILLIAM ADAMS

No. 25A91

(Filed 8 May 1992)

1. Evidence and Witnesses § 3107 (NCI4th)— homicide—prior inconsistent statement—error cured by like testimony amplified on cross-examination

The trial court in a homicide prosecution erred in admitting for corroborative purposes hearsay testimony by a witness regarding statements made to him by defendant's brother pertaining to the circumstances surrounding how the victim was shot where these statements were inconsistent with the brother's trial testimony, but such error was cured when testimony of like import was amplified on cross-examination by defense counsel.

Am Jur 2d, Trial §§ 418, 420.

2. Homicide § 22 (NCI4th); Evidence and Witnesses § 683 (NCI4th)— capital trial--jury deadlocked on punishment—case not transformed into noncapital—general objection to corroborating testimony

A first degree murder case prosecuted capitally was not transformed into a noncapital case when the jury deadlocked as to whether the death penalty was proper and a sentence of life imprisonment was imposed. Defendant was thus not required to object to each allegedly objectionable portion of a corroborating witness's testimony but could rely upon a general objection made only once at the outset of the testimony.

Am Jur 2d, Criminal Law § 26; Appeal and Error § 723.

3. Evidence and Witnesses § 3105 (NCI4th)— hearsay—corroboration—substantial similarity to trial testimony

Assuming arguendo that a witness's testimony that defendant's brother showed him the alleged murder weapon was hearsay, this evidence was properly admitted for corroborative purposes, notwithstanding the brother contended on direct examination that he did not show the gun to the witness, because there was "substantial similarity" between this testimony and

testimony by defendant's brother on cross-examination that the witness had in fact seen the weapon.

Am Jur 2d, Trial §§ 418, 420.

4. **Homicide § 268 (NCI4th)— armed robbery—felony murder—acting in concert—sufficiency of evidence**

There was sufficient evidence that defendant acted in concert in the robbery and murder of the victim to support submission of a felony murder charge to the jury where the evidence tended to show that defendant and his brother were in need of quick money in that defendant was being pressed to make payments on a television and videocassette recorder and defendant needed money to purchase necessities for his children; at the time defendant and his brother drove to the victim's residence, they had already broken into another residence where they stole a pistol, television satellite equipment, and some coins; after stopping the car once to fire the stolen pistol, they next arrived at the home of the victim, for whom defendant's brother had worked in the past; defendant's brother was aware that the victim carried money on his person, including one or more hundred dollar bills; after the victim was shot with the stolen pistol, the brothers searched his clothing and found $300.00 to $400.00 in cash in a wallet in the bib of the victim's overalls; the two split the money after leaving the murder scene and burned the wallet; and three days after the shooting, defendant made a payment with a hundred dollar bill on a debt for which he was in arrears. Even if the intent to rob or steal the wallet was formed after the shooting, the theft and shooting were part of a single transaction.

Am Jur 2d, Homicide §§ 27-29, 34-36, 46, 425.

5. **Larceny § 4.2 (NCI3d)— pistol belonging to husband—allegation of ownership in wife—no fatal variance**

There was no fatal variance between a larceny indictment alleging that a stolen pistol was the property of the wife and evidence that the pistol belonged to the husband where the evidence showed that the husband and wife had joint possession of the pistol, which was kept in the couple's bedroom, thereby giving the wife a sufficient special property interest

in the pistol to support the allegation of ownership contained in the indictment.

Am Jur 2d, Larceny § 167.

6. **Larceny § 1 (NCI3d)— larceny of firearm—felonious larceny of property including firearm—separate convictions improper**

Where the evidence showed that defendant and his brother stole satellite equipment, coins, and a .38 caliber pistol during a single breaking or entering of a residence, defendant was improperly convicted and sentenced for both larceny of a firearm and felonious larceny pursuant to a breaking and entering of property that included the firearm. Therefore, defendant's conviction for felonious larceny pursuant to a breaking or entering is reversed and the sentence for that offense is vacated.

Am Jur 2d, Larceny §§ 3, 4.

7. **Larceny § 1 (NCI3d); Receiving Stolen Goods § 1 (NCI3d)— larceny and possession of same goods—only one conviction**

While a defendant may be indicted and tried on charges of larceny and possession of the same property, the defendant may be convicted of only one of the offenses. Therefore, where defendant was convicted of both larceny of a firearm and felonious possession of the same firearm, his conviction for possession must be reversed and his sentence for that offense vacated.

Am Jur 2d, Indictments and Informations §§ 221, 223; Larceny § 55; Receiving Stolen Property §§ 14-16.

8. **Larceny § 1 (NCI3d); Receiving Stolen Goods § 1 (NCI3d)— possession of property stolen by breaking or entering—larceny of firearm—possession sentence vacated**

Although defendant's conviction for felonious larceny pursuant to a breaking or entering was reversed, defendant's conviction for felonious possession of property stolen pursuant to the breaking or entering is also reversed where scrutiny of the jury instructions reveals that there is a reasonable likelihood that the jurors could have believed that the "other personal property" possessed by defendant pursuant to the larceny included a pistol which was the basis for defendant's conviction for larceny of a firearm.

Am Jur 2d, Larceny §§ 55, 124, 174.

9. Homicide § 727 (NCI4th) — felony murder — arrest of judgment on underlying felony

Where defendant was convicted of first degree murder on the theory of felony murder, judgment entered on the underlying felony of armed robbery must be arrested.

Am Jur 2d, Homicide §§ 72, 218.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence upon defendant's conviction of first-degree murder entered by *Currin, J.*, at the 7 May 1990 Special Criminal Session of Superior Court, ANSON County. Defendant's motion to bypass the Court of Appeals, pursuant to N.C.G.S. § 7A-31, as to additional convictions and sentences was allowed by this Court on 29 October 1991. Heard in the Supreme Court 13 March 1992.

Lacy H. Thornburg, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

J. Kirk Osborn for defendant-appellant.

MEYER, Justice.

On 20 March 1989, at approximately 4:00 p.m., the residence of George and Lina Hildreth was illegally entered, and television satellite equipment, a .38-caliber pistol, and several Eisenhower silver dollars and Indian head pennies were taken. Ms. Hildreth, who had left her home at 3:40 p.m. to run an errand, returned home to discover the glass window of her kitchen door broken and the house ransacked. Upon discovering the intrusion, she notified the police and awaited their arrival.

Later that afternoon, at approximately 5:00 p.m., the wife of Lee Wallace Parker discovered Mr. Parker lying on the ground of his yard with gunshot wounds to the chest. Ms. Parker discovered that her husband also had been robbed of his wallet and a distinctive pocketknife he customarily carried. Near the body, the police discovered a Newport cigarette butt, a case for a pair of glasses, and a button.

An autopsy revealed that the victim had been shot four times: twice in the chest, once in the right leg, and once in the right hand. Forensics results indicated that the bullets recovered from

the murder scene were fired from the .38-caliber pistol stolen from the Hildreth residence. There was no evidence of gunpowder or residue in or around any of the wounds, and analyses of the victim's clothing produced similar results. No fingerprints were discovered on the murder weapon, which was ultimately recovered by the police. Two prints were identifiable on one piece of the satellite equipment and were determined to belong to defendant.

On the evening of 22 March 1989, Richard Adams was arrested for the breaking and entering of the Hildreth residence. He subsequently provided a written statement regarding the events of 20 March 1989. In the early morning hours of 23 March, the police located defendant, who consented to a search of his home. An officer searching the vanity drawer in defendant's bedroom found a blue sock containing silver dollars. Defendant immediately grabbed the sock and placed it in a closet behind some clothes. In yet another blue sock in the same vanity, police discovered bullet cartridges. Defendant seized this sock as well and placed it in the same location as the first sock. Both socks were later seized by the police and revealed, respectively, five Eisenhower silver dollars and four .38-caliber bullets. The officers also seized a wad of five two-dollar bills, a pack of Newport cigarettes, and some Newport cigarette butts found in an ashtray. Defendant denied any knowledge of the stolen satellite equipment or pistol and denied any involvement in the shooting of the victim. Police later arrested defendant and a search was conducted, which revealed a small pocketknife identified at trial as belonging to the victim. Defendant later directed police to a small pond where the murder weapon was discovered.

At trial, Richard Adams, defendant's older brother, testified for the State. He testified that in February and March of 1989, he and his girlfriend lived in Raleigh with their three small children. On 2 March 1989, the group traveled to Wadesboro and stayed at the home of the sister of defendant and Richard, Sara Garris. Defendant lived within walking distance of the Garris residence. Within a week, Richard ran out of money, and his girlfriend wanted to return to Raleigh. On 20 March 1989 at approximately 1:00 p.m., Richard Adams borrowed a car from Ms. Garris, and the Adams brothers drove toward Albemarle to look for work. While en route, they stopped at a store in Cedar Hill owned by Doris Galliher and saw Ms. Galliher and Gertrude Threadgill. They then proceeded to the Hildreth residence and knocked on the door to determine if anyone was at home. Finding no one at home, Richard

gave defendant a small rock, and defendant cracked the window in the door leading from the carport into the house. When inside, they discovered and removed from the premises a sterling silver pistol with a wooden handle, with five of the six chambers loaded; some television satellite equipment; and some silver dollars. The two were interrupted by the entry of a car in the carport and fled.

After leaving the Hildreth residence, the two returned to their car and drove toward Burnsville, with Richard Adams driving. Defendant asked Richard to stop so that defendant could fire the pistol. Richard complied and defendant shot the pistol one time. The two once again proceeded until they came to another house. Richard recalled at trial that he had been to the house some twelve years before to help the resident, the murder victim, Lee Wallace Parker, with some pigs. The Adams brothers exited the car, and Richard spoke to the victim and asked him for a job. The victim responded that he had no work. Richard then turned to go back to the car, and the victim also walked in that direction. Defendant then shot the victim four times with the pistol stolen from the Hildreth residence. Defendant and his brother then approached the victim, who was lying on the ground, and removed a wallet from the bib part of the victim's overalls.

Richard testified that he and his brother then left the murder scene and drove to defendant's residence in Wadesboro. While there, they removed the satellite equipment and placed it in defendant's home and split the $300.00 to $400.00 that was in the victim's wallet. They then tore up the wallet and burned it. Richard Adams retained possession of the pistol, and defendant kept the satellite equipment. Richard spent the night at the home of a friend, William Kadore Rivers. The next day, defendant brought the satellite equipment to the home of Sara Garris; after showing the equipment to Richard, defendant placed the items in a closet and left. On 22 March, defendant asked Richard for the pistol, and Richard gave it to him.

Richard Adams testified on cross-examination that his earlier written statement indicating that defendant shot the victim while the victim was on the ground was untrue, and insisted that the defendant shot the victim four times before the victim hit the ground. He also indicated that the cigarette butt at the scene belonged to defendant because he was the only one smoking at the time.

Annie McCollum, girlfriend of Richard Adams, testified for the State that on 20 March defendant and Richard Adams left together in Sara Garris' car. She also testified that on the morning of 21 March 1989, defendant brought the stolen satellite equipment to Sara Garris' home. Defendant showed the equipment to Sara Garris and Ms. McCollum and stated that it belonged to him. Defendant also said that "he was looking for Richard because he wanted his gun back." On cross-examination, Ms. McCollum related that she and Richard Adams on a previous occasion had fought over the lack of money for items for the children.

Doris Galliher, who operates a grocery store in the Cedar Hill community near Ansonville, testified that on 20 March 1989, at some time between 3:30 and 4:00 p.m., she saw the Adams brothers in her store. She also testified that she saw the two drive away in a car "just like" that belonging to Sara Garris, which the Adams brothers allegedly borrowed on the day of the murder. Upon exiting the store, the brothers drove in the direction of the Hildreth residence.

Gertrude Threadgill also testified that Richard and another black man, similar in size to Richard, were in the store owned by Ms. Galliher on 20 March 1989. She related that she saw the two drive away in a blue car heading toward the Hildreth residence.

Henry Lee, who was employed as a bill collector by the Heilig-Meyers Furniture Company, testified that approximately a week before the murder, he visited defendant at his home and inquired about late payments on a television and videocassette recorder that defendant had purchased. At the time, defendant promised that he would make payments within a week. On 23 March, Mr. Lee once again visited defendant and sought payment. At this time, defendant made a payment to Mr. Lee of a hundred-dollar bill, and stated that he would make another payment by the end of the month.

William Kadore Rivers testified that at about 1:00 a.m. on 21 March, he was awakened by Richard Adams, whom he had known since 1982. Once inside Rivers' home, Richard Adams talked about one or two robberies that he and his brother had carried out the night or afternoon before. Richard showed Rivers a wallet containing "some bills, maybe a couple hundred dollars, twenties, fives, maybe a ten or so, and he also flashed a gun." Richard also showed Rivers some coins that Rivers believed might have

been Eisenhower silver dollars. Richard told Rivers that he and defendant had gone to Burnsville and that defendant had shot an old man "[t]wo or three" times while the old man was on the ground. Richard described having his knee across the victim's chest and neck area while the defendant shot the victim. Later, Richard asked Rivers if he had any .38-caliber bullets for the pistol, and Rivers provided Richard with approximately ten bullets. On cross-examination, Rivers stated that Richard visited his home at about 1:30 p.m. on 19 March 1989 and told Richard that he needed to make a "lick" (commit a robbery) in order to buy diapers for the children. Richard also told Rivers that he and defendant had broken in and "wrecked" a coin machine at Anson County High School, but Richard did not indicate when this crime had occurred.

Defendant testified on his own behalf and denied any involvement in the breaking and entering of the Hildreth residence and the killing and robbery of the victim. He denied traveling anywhere with Richard Adams on the day of the murder. He further testified that the pocketknife was his and that he won the silver dollars and two-dollar bills in a gambling game with Richard. He admitted touching the satellite equipment at a time when Richard Adams attempted to sell it at a local gambling house. Defendant also testified that the .38-caliber bullets found in his home had been stolen from a house he had broken into "a long time ago." Finally, defendant testified that he was able to lead police to the location of the gun because Richard had shown him the gun on 21 March. He testified that Richard had gone to a lake and returned without the gun, whereupon Richard commented that the "gun was gone." Defendant also offered several witnesses to establish an alibi defense.

The case was tried capitally. The jury convicted defendant of first-degree felony murder, robbery with a dangerous weapon, felonious breaking or entering, felonious larceny, felonious larceny of a firearm, felonious possession of property stolen pursuant to a breaking or entering, and felonious possession of a stolen firearm. Upon the jury's deadlock as to sentencing pursuant to N.C.G.S. § 15A-2000, the court imposed a life sentence for the felony murder conviction. The court also imposed on defendant the following sentences: a ten-year sentence for the felonious breaking or entering conviction to run consecutive to the life sentence, a ten-year sentence for felonious larceny to run consecutive to the breaking or entering sentence, and a ten-year sentence for the felonious

larceny of a firearm conviction to run consecutive to the felonious larceny sentence. Finally, the court imposed a forty-year sentence for the robbery with a dangerous weapon conviction to be merged with the life sentence defendant received and ten-year sentences for both defendant's convictions for felonious possession of property stolen pursuant to a breaking or entering and felonious possession of a stolen firearm, which were merged with defendant's sentences for felonious larceny and felonious larceny of a firearm.

Defendant makes several assignments of error. We will address each in turn.

[1] Defendant first argues that the trial court erred in admitting the testimony of William Kadore Rivers regarding statements made to him by Richard Adams concerning the shooting of the victim. The trial transcript reveals that Rivers related the following on direct examination by the State:

> Q. What else did Richard say about this lick?
>
> A. Well, when he first—when he first came in, I don't know, he was like he was a little hyped. He was talking about the lick, and he flashed a wallet on me.
>
> MR. JONES: I couldn't understand that.
>
> THE WITNESS: He flashed a wallet.
>
> A. (Continuing) The wallet contained some bills, maybe a couple hundred dollars, twenties, fives, maybe a ten or so, and he also flashed a gun. He was talking about him and his brother went to Burnsville, and in Burnsville—somewhere doing this lick in Burnsville. He had ran [sic] up on an old man that he said that they put the bum rush on.
>
> Q. They did what?
>
> A. Subdued him, in other words. And as he subdued [sic], and he said his brother shot him.
>
> Q. Did he say how many times his brother shot the old man?
>
> A. Two or three. I'm not sure. I'm pretty sure he said two or three.
>
> . . . .

Q. Did Richard describe how his brother Catfish killed the old man?

A. The only thing he said—he made a statement like he subdued him. Richard said, well, he had his knee kind of like across the man's chest and neck area and his brother shot him.

Q. And his what?

A. His brother shot him.

Q. Did he say how many times his brother shot him in that position?

A. He said two or three times.

Q. Did he tell you how far [his brother] was from the old man when he shot him?

A. From the way he was talking, he was right up on him.

Q. Did he say whether or not the old man was on the ground when he—

A. He said he was on the ground.

Q. —when he shot him?

A. Yes.

Q. When his brother shot him?

A. Yes.

The record indicates that, near its very outset, defense counsel objected to the Rivers testimony on the basis of hearsay and requested an instruction to this effect. The court instructed the jury as follows:

> THE COURT: Members of the jury, you must consider this testimony solely for the purpose that it—as you may find it to corroborate the prior testimony of Richard Adams. You may not consider it as substantive evidence of the matter stated.

Also, at the close of all the evidence, defense counsel moved for a mistrial or, alternatively, that the court strike Rivers' testimony, give a corrective instruction to the jury, and prohibit the State from arguing that Richard's alleged statement to Rivers could be considered as evidence of defendant's guilt. The trial court denied these requests.

Defendant first argues that the court committed prejudicial error in admitting Rivers' testimony insofar as it is impermissible to admit prior inconsistent statements under the guise of corroboration. *State v. Burton*, 322 N.C. 447, 368 S.E.2d 630 (1988); *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986); *State v. Murphy*, 100 N.C. App. 33, 394 S.E.2d 300 (1990). Defendant asserts that the testimony was inconsistent in several respects and was therefore not admissible. Richard Adams testified at trial that defendant shot the victim four times as Richard Adams was walking back to the car and that both of the Adams brothers then searched the victim's clothing and retrieved the wallet. On cross-examination, Richard Adams admitted that his written statement indicating that defendant shot the victim while the victim was lying on the ground was untrue. Rivers, on the other hand, testified that Richard informed him that defendant shot the victim two or three times while Richard subdued the victim on the ground. Moreover, although Richard Adams admitted visiting Rivers on 20 and 21 March 1989, he denied showing Rivers the pistol stolen from the Hildreth residence. Rivers stated on direct examination that Richard Adams showed him the gun and allowed Rivers to hold it.

These variations, defendant argues, amounted to the improper admission of new evidence, entered under the guise of corroboration. *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989). According to defendant, *Ramey*, *Burton*, and *Murphy* permit the introduction of "new facts" only if such facts further explain or embellish previously admitted substantive evidence. The Rivers testimony, defendant contends, amounted to an entirely new depiction of the facts, one that characterized defendant as the triggerman, a characterization at variance with defendant's theory that Richard Adams acted alone in the killing.

The State argues that defendant waived any objection in this regard. While defendant made a general objection and successfully sought an instruction at the outset, defendant failed to make specific objections during Rivers' testimony and on cross-examination of Rivers pursued the line of inquiry pertaining to the circumstances surrounding how the victim was shot. Defendant even had Rivers demonstrate for the jury how he understood Richard to have his knees across the victim's chest and neck area.

We conclude that no prejudicial error occurred in this regard. Scrutiny of the trial transcript reveals that defense counsel cross-

examined Rivers about Rivers' assertion that Richard had told him that defendant had shot the victim while Richard subdued the victim on the ground. Moreover, defense counsel elicited the help of Rivers in demonstrating how Richard allegedly held the victim on the ground while defendant shot the victim. It is well settled that an adverse party may explain evidence or may contradict its probative value on cross-examination and not thereby waive an initial objection. *State v. Godwin*, 224 N.C. 846, 847-48, 32 S.E.2d 609, 610 (1945). However, it is equally well settled that waiver does occur in the event that the "cross-examiner's questions [are] general ones, propounded for the sole purpose of amplifying the information [the witness has] given on direct examination and not for the purpose of impeaching his testimony or establishing its incompetency." *State v. Van Landingham*, 283 N.C. 589, 604, 197 S.E.2d 539, 549 (1973). Here, it is manifest that defense counsel sought not to impeach the Rivers testimony, but rather to amplify the account rendered by Rivers. As in *Van Landingham*, we conclude that the admission of Rivers' testimony was error, but the error was cured when testimony of like import was thereafter amplified on cross-examination by defense counsel.[1]

[3] As to the admission of Rivers' statement that Richard Adams showed Rivers the alleged murder weapon, we conclude that the court did not err. Assuming *arguendo* that the Rivers testimony as to the gun was hearsay, we conclude that this evidence was properly admitted for corroborative purposes. While Richard contended on direct examination that he did not show the gun to Rivers, he conceded on cross-examination that Rivers in fact saw the weapon. Further, on direct examination by the State, Richard admitted asking Rivers for some bullets for the gun.

> Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of

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[2] 1. The State also argues that because the jury deadlocked as to whether the death penalty was proper, the instant case was transformed into a noncapital case. Citing *State v. Harrison*, 328 N.C. 678, 682, 403 S.E.2d 301, 304 (1991), the State contends that because the case became noncapital in nature, defendant could not rely upon a general objection made only once at the outset of the testimony, but was required to object to the incompetent portions of Rivers' testimony. Although unnecessary to the disposition of this issue, we feel compelled to express our disagreement with the State's contention. The instant case was prosecuted capitally and did not lose its capital nature at sentencing with the jury's deadlock, well after the arguably erroneous testimony was admitted. Thus, it was not incumbent upon defendant to object to each allegedly objectionable portion of the extensive direct examination of Rivers.

> another witness. Where testimony which is offered to corroborate the testimony of another witness does so substantially, it is not rendered incompetent by the fact that there is some variation. It is the responsibility of the jury to decide if the proffered testimony does, in fact, corroborate the testimony of another witness.

State v. Rogers, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980) (citations omitted). In *Rogers*, we determined that there is a "threshold test of substantial similarity." *Id.* at 601, 264 S.E.2d at 92. We conclude that there was "substantial similarity" between the testimony of Rivers and Richard Adams as it related to the gun, given that Richard Adams admitted on cross-examination that Rivers had in fact observed the gun. We therefore overrule this assignment of error.

[4] In his next assignment of error, defendant argues that the trial court erred in submitting the felony murder theory to the jury and in not dismissing the robbery with a dangerous weapon charge. Defendant contends that no evidence was adduced tending to show that defendant discussed the theft of the victim's wallet with Richard Adams or that defendant was aware that Richard intended to take the wallet from the victim. Only as an afterthought, knowing that the victim carried money on his person, did Richard Adams rob the victim. Defendant argues that because the intent to steal did not coincide with the use of violence to perpetrate the robbery, the common law definition of robbery is not satisfied. Citing *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), defendant contends that where a robbery is committed as an afterthought once the victim has died, the evidence is insufficient to convict on the basis of robbery with a dangerous weapon. According to defendant, the evidence presented here will at best support a conviction of larceny. Therefore, defendant argues, he is entitled to a reversal of his conviction of first-degree murder under the felony murder rule because the State is required to show an interrelationship between the felony and the homicide. *State v. Strickland*, 307 N.C. 274, 291-94, 298 S.E.2d 645, 657-58 (1983), *overruled on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

The rules governing motions to dismiss are well settled. 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 offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). If the evidence, viewed in a light most favorable to the State, permits a reasonable inference that the defendant is guilty of the crime charged, the trial judge should allow the case to go to the jury. *Id.* at 237, 400 S.E.2d at 61. This is the case whether the evidence is direct, circumstantial, or both. *Id.*

In *State v. Small*, we stated as follows:

> [R]obbery [with a dangerous weapon] under N.C.G.S. § 14-87 consists of the following elements:
>
> > (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened.
>
> *State v. Beaty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982) (in part quoting *State v. Mull*, 224 N.C. 574, 576, 315 S.E.2d 764, 765 (1944)).

Small, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (citation omitted). We conclude that there was ample evidence from which a jury could reasonably infer the satisfaction of each of the statutory elements enunciated above. The record shows that defendant and his brother Richard were in need of quick money. Richard needed money to purchase necessities for the children, and defendant was being pressed to make payments on a television and a videocassette recorder. At the time that defendant and Richard drove to the victim's residence, they had already broken into the Hildreth residence, where they stole a pistol, television satellite equipment, and some coins. The thefts from the Hildreth residence were interrupted when Ms. Hildreth returned home unexpectedly. According to Richard Adams, the brothers were looking for anything of value.

After stopping the car once to fire the stolen pistol, they next arrived at the home of the victim, for whom Richard had worked in the past. Trial testimony indicated that the victim "nearly always" carried one or more hundred-dollar bills on his person, as well as two-dollar bills that he collected. The record reveals that Richard Adams was aware that the elderly victim carried money on his person. This belief proved well founded, for after shooting the victim the brothers searched his clothing, finding $300.00

to $400.00 in cash in a wallet located in the bib of the victim's overalls. The two split the money after leaving the murder scene and burned the wallet. Only three days after the shooting, defendant made a payment with a hundred-dollar bill on a debt in which he was in arrears. Given this evidence, the jury reasonably could have inferred that the Adams brothers acted in concert to rob the victim.

Even if the intent to rob or steal the wallet was formed after the shooting, the theft and shooting were part of a single transaction. As we noted recently in *State v. Faison*, "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." *State v. Faison*, 330 N.C. 347, 359, 411 S.E.2d 143, 150 (1991). Therefore, we conclude that the evidence was sufficient for the jury to find defendant guilty of acting in concert in the felony murder of the victim, and the trial court properly denied defendant's motion to dismiss.

[5] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of felonious larceny. The indictment in question alleges that the stolen .38-caliber pistol was the property of Lina Hildreth; however, both Ms. Lina Hildreth and Mr. George Hildreth testified that the pistol belonged to Mr. Hildreth. This variance, defendant argues, is fatal and required dismissal of the charge. *See State v. Watson*, 272 N.C. 526, 158 S.E.2d 334 (1968). The State contends, and we agree, that no such fatal variance exists. Although the Hildreths alluded to the pistol as belonging to George, such references did not preclude Lina's ownership or possessory interest in the pistol. In *State v. Greene*, 289 N.C. 578, 584, 223 S.E.2d 365, 369 (1976), we stated that "the general law has been that the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that the person has ownership, meaning title to the property or some special property interest." Here, the evidence showed that the Hildreths had joint possession of the pistol, which was kept in a chest of drawers in the couple's bedroom, thereby giving Lina Hildreth a sufficient *special* property interest in the pistol to support the allegation of ownership contained in the indictment. *State v. Hauser*, 183 N.C. 769, 111 S.E. 349 (1922) (spouses have special interests in one another's property); *see also State v. Young*, 60 N.C. App. 705, 299 S.E.2d 834 (1983). We therefore overrule this assignment of error.

[6] In his next assignment of error, defendant argues that the trial court erred in imposing consecutive sentences for defendant's convictions of felonious larceny of a firearm and felonious larceny of property stolen pursuant to a breaking or entering. Defendant argues that the indictment in case number 89-CRS-1139 alleges that he stole "one video sub carrier, one antenna and other personal property," and the evidence at trial tended to show that such "other personal property" included the .38-caliber pistol that was the subject of the indictment in case number 89-CRS-1140. Citing *State v. Boykin*, 78 N.C. App. 572, 337 S.E.2d 678 (1985), defendant argues that when a defendant has been convicted of larceny of property that includes a firearm that is also the subject of a felonious larceny of a firearm conviction, the trial court may not impose sentences for both crimes.

The State contends that no error occurred because the trial court instructed the jury that the charge of felonious larceny of a firearm in case number 89-CRS-1140 was separate and distinct from the charge of felonious larceny in case number 89-CRS-1139. According to the State, the charges were in fact separate, and defendant was not subjected to multiple punishments for the same offense as a result of being convicted and sentenced on both charges. Further, the State argues that *Boykin* is distinguishable from the case at bar and hence does not control this issue.

We agree with defendant that the holding in *Boykin* controls here and further conclude that the decision of the Court of Appeals in that case was correct. In *Boykin*, the defendant was indicted on three separate counts of felonious larceny of a firearm and one count of felonious larceny of goods in excess of $400.00. The Court of Appeals held that the trial court erred in failing to dismiss the three larceny of firearms charges because the defendant could only be charged with one count of felonious larceny. In a case of first impression, the Court of Appeals held that

> the purpose of G.S. 14-72 is to establish levels of punishment for larceny based on the value of the goods stolen, the nature of the goods stolen or the method by which stolen, not to create new offenses. Nothing in the statutory language suggests that to charge a person with a separate offense for each firearm stolen in a single criminal incident was intended.

Boykin, 78 N.C. App. at 576, 337 S.E.2d at 681. Here, defendant was charged with one count of felonious larceny of a firearm, under

N.C.G.S. § 14-72(b)(4), and one count of felonious larceny of property stolen pursuant to breaking or entering, under N.C.G.S. §§ 14-72(b)(2) and 14-54. As noted by then-Judge (now Justice) Whichard, "[a] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *State v. Froneberger*, 81 N.C. App. 398, 401, 344 S.E.2d 344, 347 (1986); *see also State v. Martin*, 82 N.C. 672, 674 (1880). In the case at bar, the Adams brothers stole the satellite equipment, various coins, and the .38-caliber pistol during the course of a single breaking or entering of the Hildreth residence. Hence, defendant was improperly convicted and sentenced for both larceny of a firearm and felonious larceny of that same firearm pursuant to a breaking or entering. Therefore, we reverse defendant's conviction of and vacate defendant's sentence on the felonious larceny pursuant to a breaking or entering charge.

Finally, defendant argues that the trial court erred by entering judgments on his convictions for felonious possession of stolen property in case numbers 89-CRS-1139 and 89-CRS-1140, as well as entering a judgment for his underlying conviction of robbery with a dangerous weapon in case number 89-CRS-1138. As to the former, defendant argues that he cannot be sentenced for both larceny and possession of the same property. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982). Here, the trial court entered judgments imposing ten-year sentences for larceny in both 89-CRS-1139 and 89-CRS-1140. According to defendant, the trial court therefore improperly entered judgments for felonious possession of the same property. As to the robbery with a dangerous weapon judgment, defendant argues that he cannot be sentenced for both felony murder and the underlying felony, and therefore the underlying felony must be arrested. *State v. Woods*, 286 N.C. 612, 213 S.E.2d 214 (1975); *State v. Moore*, 284 N.C. 485, 202 S.E.2d 169 (1974).

[7-9] We conclude that the judgments were improperly entered. The court's action violated the rule stated in *Perry*, namely, that while a defendant may be indicted and tried on charges of larceny and possession of the same property, the defendant may be convicted of only one of the offenses. *Perry*, 305 N.C. at 236-37, 287 S.E.2d at 815-16. Therefore, defendant's conviction for felonious possession of a stolen firearm is reversed and his sentence thereon vacated. Defendant's conviction and sentence for felonious possession of property stolen pursuant to a breaking or entering poses a somewhat different legal question. As discussed above, we reverse

defendant's conviction for felonious larceny pursuant to a breaking or entering and vacate his sentence; as a result, the concurrent sentence defendant received for felonious possession of property stolen pursuant to a breaking or entering is potentially activated. However, scrutiny of the jury instructions reveals that there is a reasonable likelihood that the jurors could have believed that the "other personal property" possessed by defendant pursuant to the larceny included the .38-caliber pistol stolen from the Hildreth residence. Therefore, defendant's conviction for felonious possession of property stolen pursuant to a breaking or entering is reversed and his sentence thereon vacated. Finally, as to the judgment regarding robbery with a dangerous weapon in case number 89-CRS-1138, we also conclude that judgment was improperly entered. The record shows that the jury returned its guilty verdict as to first-degree murder on the basis of defendant's involvement in the commission of felony murder, namely, the robbery and murder of the victim. Thus, judgment should have been arrested as to the robbery charge. *State v. Woods*, 286 N.C. 612, 213 S.E.2d 214.

In conclusion, we find no error in defendant's convictions and sentences for first-degree murder, felonious larceny of a firearm, and felonious breaking or entering. We reverse defendant's convictions and vacate defendant's sentences for felonious larceny pursuant to a breaking or entering and felonious possession of a stolen firearm, reverse defendant's conviction and vacate defendant's sentence for felonious possession of property stolen pursuant to a breaking or entering, and arrest the judgment entered against defendant regarding robbery with a dangerous weapon.

No. 89-CRS-1115, first-degree murder: no error.

No. 89-CRS-1138, robbery with a dangerous weapon: judgment arrested.

No. 89-CRS-1139, count 1, felonious breaking or entering: no error.

No. 89-CRS-1139, count 2, felonious larceny: judgment of conviction reversed and sentence vacated.

No. 89-CRS-1139, count 3, felonious possession of property stolen pursuant to a breaking or entering: judgment of conviction reversed and sentence vacated.

No. 89-CRS-1140, count 1, felonious larceny of a firearm: no error.

No. 89-CRS-1140, count 2, felonious possession of stolen firearm: judgment of conviction reversed and sentence vacated.

JUDGE ANTHONY M. BRANNON v. NORTH CAROLINA STATE BOARD OF ELECTIONS; M. H. HOOD ELLIS, CHAIRMAN, GREGG O. ALLEN, WILLIAM A. MARSH, RUTH TURNER, JUNE K. YOUNGBLOOD, MEMBERS, STATE BOARD OF ELECTIONS; ALEX K. BROCK, EXECUTIVE SECRETARY-DIRECTOR, STATE BOARD OF ELECTIONS; JUDGE ROBERT F. ORR, JUDGE JACK COZORT, JUDGE JOHN B. LEWIS, JR., AND JUDGE JAMES A. WYNN, JR.

No. 102PA92

(Filed 8 May 1992)

Judges § 8 (NCI3d)— Supreme Court, Court of Appeals, superior court—election for unexpired portions of terms—constitutionality of statute

The statute providing that midterm vacancies in the offices of the Supreme Court, the Court of Appeals, and the superior court shall be filled first by appointment of the Governor, and ultimately by election "to fill the unexpired term of the office," N.C.G.S. § 163-9, does not violate Article IV, Section 16 of the N.C. Constitution, which provides that judges "shall hold office for terms of eight years," but is authorized by the provision of Article IV, Section 19 that "elections shall be held to fill the offices." Article IV, Section 16 refers to the term of the judicial office, not to an individual judge's tenure, and it will be inferred from the word "fill" in Article IV, Section 19 that elections to vacated judicial seats are intended for the unexpired portions of terms only.

Am Jur 2d, Judges §§ 9-11, 14, 15, 239, 240.

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

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 judgment granting plaintiff's request for a mandatory injunction and writ of mandamus against defendants Board of Elections and Brock, by *Herring, J.*, in the Superior Court, WAKE County, on 28 February 1992. Heard in the Supreme Court on 16 April 1992.

Tharrington, Smith & Hargrove, by Michael Crowell and Mark J. Prak, for Plaintiff Appellee.

Parker, Poe, Adams & Bernstein, by Robert W. Spearman and Robert H. Tiller, for Defendant Appellant State Board of Elections; Womble Carlyle Sandridge & Rice, by Donald L. Smith, for Intervenor Defendant Appellants Judge Jack Cozort, Judge John B. Lewis, Jr., and Judge James A. Wynn, Jr.

Petree Stockton & Robinson, by John F. Mitchell, for Intervenor Defendant Appellant Judge Robert F. Orr.

EXUM, Chief Justice.

This action arises from a decision of the North Carolina State Board of Elections declining to accept plaintiff's notice of candidacy for the seat on the North Carolina Court of Appeals currently occupied by Judge Robert F. Orr. Following the Board's decision, plaintiff, a judge of the North Carolina Superior Court, brought this action for injunctive relief and mandamus against the Board and its individual members. On 21 February 1992 the trial court allowed a motion to intervene by Judge Orr and three other members of the Court of Appeals, Judge Jack Cozort, Judge John B. Lewis, Jr., and Judge James A. Wynn, Jr. Following a hearing on 28 February 1992, the trial court entered judgment for plaintiff and issued a writ of mandamus ordering the Board of Elections to conduct an election in 1992 for the Court of Appeals seats held by Judges Orr, Cozort, Lewis, and Wynn. Defendants appealed and original defendants petitioned for discretionary review prior to determination by the Court of Appeals. The petition was allowed on 17 March 1992.

The sole issue raised by defendants' appeal is whether a person elected to fill a vacancy on the superior court, Court of Appeals, or Supreme Court serves for a new, full eight-year term, or serves only the unexpired portion of the vacated term. This question re-

quires us to decide if N.C.G.S. § 163-9, which provides that such an election is for the unexpired term, violates Article IV, Section 16 of the North Carolina Constitution, which provides in part that judges "shall hold office for terms of eight years." The trial court held that the statute does not violate our State Constitution and that eight-year commissions issued by the Governor to Judges Orr, Cozort, Lewis, and Wynn are a nullity. For reasons explained below, we agree and affirm the judgment of the trial court.

I.

The facts of this case are not disputed. The judgeship now held by Judge Orr was created by the legislature in 1977 when it expanded the Court of Appeals from nine to twelve members. 1977 N.C. Sess. Laws ch. 1047. The legislation provided that the Governor was to make temporary appointments to the three seats, and that in 1978 successors would be elected "to serve the remainder of the unexpired term which began on January 1, 1977." *Id.* The Governor appointed John Webb to one of the seats, and Judge Webb was elected in 1978 to serve the remainder of the term. In 1984 Judge Webb was reelected to a new eight-year term beginning 1 January 1985. Judge Webb resigned from his seat in 1986 after being elected to this Court. The Governor appointed Judge Orr to the vacancy on the Court of Appeals. In conformity with N.C.G.S. § 163-9, an election was held in 1988 purportedly to fill the unexpired term of that office. Official records with the Board of Elections, including the election ballot, referred to the seat as "For Judge of Court of Appeals (Term ending 12/31/92)." Judge Orr won the election and was issued a certificate of election by the Secretary of State providing that the election was for the unexpired term of office. In September 1991, the Governor issued a commission to Judge Orr stating that he was to serve "for a term of eight years beginning on November 29, 1988, and ending on November 28, 1996, unless earlier terminated."[1]

In December 1991 the Board of Elections voted not to accept notices of candidacy or conduct an election in 1992 for the Court

1. The Governor issued similar commissions of office to Judges Cozort, Lewis, and Wynn, who like Judge Orr were elected to Court of Appeals seats vacated during their terms. Each commission lists a beginning date of office in November of the year the judge was elected and an ending date eight years later.

of Appeals seat held by Judge Orr.[2] Based on that decision, the Board refused to accept plaintiff's notice of candidacy, prompting the action now before us.

II.

Plaintiff contends the Board is required by N.C.G.S. § 163-9 to hold an election for Judge Orr's seat this year. Section 163-9 provides that vacancies in the offices of the Supreme Court, the Court of Appeals, and the superior court shall be filled first by appointment of the Governor, and ultimately by election "to fill the unexpired term of the office."[3] Defendants contend that Section 163-9, insofar as it provides for elections of judges to fill only the unexpired portions of eight-year terms, violates Article IV, Section 16, of the North Carolina Constitution, providing that judges "shall be elected . . . and shall hold office for terms of eight years." Therefore, defendants contend, this much of the statute is invalid and Judge Orr, by reason of the constitutional provision, was elected in 1988 for a full eight-year term and was entitled to the eight-year commission issued him by the Governor.

We noted in *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989), that it is "firmly established that our State Constitution is not a grant of power. 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

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2. The Board also voted not to accept notices of candidacy or to conduct elections in 1992 for the Court of Appeals seats held by Judges Cozort, Lewis, and Wynn.

3. N.C.G.S. § 163-9 provides in full:

> Vacancies occurring in the offices of Justice of the Supreme Court, judge of the Court of Appeals, and judge of the superior court for causes other than expiration of term shall be filled by appointment of the Governor. An appointee shall hold his place until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, at which time an election shall be held to fill the unexpired term of the office: Provided, that when the unexpired term of the office in which the vacancy has occurred expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office.
>
> Vacancies in the office of district judge which occur before the expiration of a term shall not be filled by election. Vacancies in the office of district judge shall be filled in accordance with G.S. 7A-142.

by that Constitution." For this reason, this Court reviews acts of the state legislature with great deference; a statute cannot be declared unconstitutional under the State Constitution unless that Constitution clearly prohibits the statute. "Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond a reasonable doubt." *Assurance Co. v. Gold, Comr. of Insurance*, 249 N.C. 461, 463, 106 S.E.2d 875, 876 (1959); *accord, Mitchell v. North Carolina Industrial Development Financing Authority*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968).

The dispute in this case requires us to construe two provisions in Article IV of our State Constitution. Section 16 provides, in pertinent part, that "[j]ustices 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." Section 19 provides, in pertinent part, that

> 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 60 days after the vacancy occurs, when elections shall be held to fill the offices.

Section 16 provides for eight-year terms for certain judicial offices, but it does not contemplate the filling of vacancies occurring during those terms. Therefore, the answer to the dispute before us cannot be found in that provision alone. Section 19 provides for filling vacancies in judicial offices, albeit in language not explicit enough to preclude the dispute before us. On close examination, however, the language of Section 19 allows filling prematurely vacated judicial offices by election for the unexpired portions of the terms.

The part of Article IV, Section 19 bearing on the issue now before us, the provision that elections for vacated offices are to "fill the offices," does not specify whether those elected to vacated judicial offices are to finish the unexpired terms or begin new terms. Defendants contend the plain meaning of the language in Section 16 is that all judges, no matter when elected, are to receive commissions of eight years. They construe the language of Section 19 by reference to the eight-year term provision in Section 16. There is, however, a different approach to the interpretation of

Section 19 which we conclude gives fuller meaning to its language independent of, but not inconsistent with, the eight-year judicial term provision in Section 16.

The words "elections shall be held to fill the offices" in Section 19 allow a reasonable inference that the elections are intended to select persons to assume the specific terms of offices that have been prematurely vacated and which expire eight years from when they began. The verb "fill" commonly means "to supply with as much as can be held or contained" or "to make full or complete." Webster's Third New International Dictionary 849 (1976). A partially empty glass of water is filled by adding only as much water as brings the total quantity to the brim. Likewise, an office vacated before the expiration of its term is filled by election of someone to complete the unexpired term. This concept is not a novel one, as we have recognized before.

> A term of office is one thing. An office holder is something else. The incumbent may go out, nobody come in, and the term goes on. If a successor is appointed or elected, he fills the unexpired portion of the term.

State ex rel. Martin v. Preston, 325 N.C. at 452-53, 385 S.E.2d at 481 (quoting *Murray v. Payne*, 137 Kan. 685, 689, 21 P.2d 333, 335 (1933)). Construed in this way, Article IV, Section 19 provides for elections to fill unexpired terms in the event of midterm vacancies. Article IV, Section 16 does not speak to the question of how such vacancies are filled. It simply provides for judges to be elected and sets their terms at eight years. There is, therefore, no conflict between the sections, nor does one limit the other. They simply deal with different things—Section 16 with the length of terms and the method of selection and Section 19 with the filling of vacancies.

This Court is vested with the authority, and obligation, to resolve disputes about the meaning of our State Constitution. *Id.* at 449, 385 S.E.2d at 478. If the meaning of our Constitution is clear from the words used, we need not search for a meaning elsewhere. *Id.* In the case of Article IV, Section 19, we infer from the word "fill" that elections to vacated judicial seats are intended for the unexpired portions of terms only. "[I]n construing either the federal or State Constitution, what is implied is as much a part of the instrument as what is expressly stated." *In re Martin*, 295 N.C. 291, 299, 245 S.E.2d 766, 771 (1978). This construction

supports our conclusion that, not only does N.C.G.S. § 163-9 not violate the State Constitution, but it is authorized by Article IV, Section 19.

The historical context in which the provision was initially adopted, later amended, and readopted and longstanding judicial precedent support our interpretation of Article IV, Section 19.

The State Constitution first provided for the election of judges in 1868.[4] Two sections of Article IV provided for elections. Section 26, now Section 16, provided that judges elected by the people "shall hold their offices for eight years."[5] Section 31, now Section

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4. Before 1868, the State Constitution provided that judges be elected by joint vote of both chambers of the General Assembly. N.C. Const. of 1776, art. IV, §§ 2-3. Delegates to the constitutional convention of 1868 advocated three alternatives for selecting judges of the Supreme Court and superior court: that they be elected by the General Assembly, as they had been in the past; that they be elected by the people; and that they be appointed by the Governor with the consent of the state senate or the General Assembly. Convention Journal, Constitutional Convention of 1868, at 181. The resolution for popular political election of judges was made only after lengthy debate. *See* J. W. Holden, "Proceedings of the Convention," *The Daily North Carolina Standard*, February 29, 1868. Delegates expressed concern that popular elections for short terms of office would too frequently expose the judiciary to political pressures and would drive talented judges from the bench. *Id.* The delegates discussed various term lengths, ranging from six to sixteen years, and ultimately settled on terms of eight years for justices of the Supreme Court and judges of the superior court. N.C. Const. of 1868, art. IV, § 26. The debate over whether North Carolina judges should be elected by the people continues to this day. *See* S.B. 71 (providing for referendum to amend the North Carolina Constitution to provide for appointment of justices and judges), S.B. 72 (providing for appointment of justices and judges), 1991 Reg. Sess., N.C. Gen. Assembly; *Report of the Judicial Selection Study Commission*, 1989 Reg. Sess., N.C. Gen. Assembly.

5. Section 26 of Article IV in the North Carolina Constitution of 1868 provided as follows:

> The Justices of the Supreme Court shall be elected by the qualified voters of the State, as is provided for the election of members of the General Assembly. They shall hold their offices for eight years. The Judges of the Superior Courts shall be elected in like manner, and shall hold their offices for eight years; but the Judges of the Superior Courts elected at the first election under this Constitution, shall, after their election, under the superintendance of the Justices of the Supreme Court be divided by lot into two equal classes, one of which shall hold office for four years, the other for eight years.

After several amendments to the Constitution, the eight-year term provision is now in Section 16 of Article IV, as adopted in 1970. It provides:

19, provided that vacancies in the offices "shall be filled by appointment of the Governor, . . . and the appointees shall hold their places until the next regular election."[6]

The vacancy provision of Article IV was first construed in *People of North Carolina ex rel. Cloud v. Wilson*, 72 N.C. 155 (1875). The *Cloud* Court was required to determine whether the language "next regular election" meant appointees to vacant judicial seats were to face election at the next election of the General Assembly, or at the next regular election for the vacant judicial office. The Court decided that the language provided for an election to be held at the next regular election for that office. *Id.* at 161. Accordingly, when a judicial office under Article IV became vacant, the office was to be filled by appointment of the Governor, and

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> **Terms of office and election of Justices of the Supreme Court, Judges of the Court of Appeals, and Judges of the Superior Court.** 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. Justices of the Supreme Court and Judges of the Court of Appeals shall be elected by the qualified voters of the State. Regular Judges of the Superior Court may be elected by the qualified voters of the State or by the voters of their respective districts, as the General Assembly may prescribe.

6. Article IV, Section 31 of the 1868 North Carolina Constitution provided in full as follows: "All vacancies occurring in the offices provided for by this article of this Constitution, shall be filled by the appointment of the Governor, unless otherwise provided for, and the appointees shall hold their places until the next regular election." This section has been amended and renumbered several times since 1868.

The current vacancy provision, in Article IV, Section 19, ratified in 1970 and amended in 1986, provides:

> 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 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term of any of the offices named in this Article of the Constitution in which a vacancy has occurred, and in which it is herein provided that the Governor shall fill the vacancy, expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office. If any person elected or appointed to any of these offices shall fail to qualify, the office shall be appointed to, held, and filled as provided in case of vacancies occurring therein. All incumbents of these offices shall hold until their successors are qualified.

the appointee was to serve the unexpired portion of the term before facing election by the people for the next term.

In reaching its decision, the *Cloud* Court reasoned that if judges had to face election at the next election of the General Assembly, and if these elections were for full eight-year terms, as the Constitution may have required, the result would be to disturb a system of regularly staggered judicial offices. *Cloud* at 162.[7]

Within a few months after the *Cloud* decision, the people of North Carolina amended our State Constitution so as to, in effect, overrule the Court's holding. Article IV, Section 31 was renumbered Section 25, and words were added to specify that persons appointed by the Governor to fill vacancies in judicial offices provided for by the article "shall hold their places until the next regular election for members of the General Assembly, when elections shall be held to fill such offices." N.C. Const. of 1875, art. IV, § 25. The first part of the amendment, which overruled *Cloud*, meant that judicial offices vacated before their expiration were to be filled by the voters earlier than the regularly scheduled elections for the next terms of those offices. The provision that midterm elections would "fill such offices" allows the reasonable interpretation, as we have demonstrated above, that those elected were to serve the remainder of unexpired terms.

We can infer that those who crafted and voted for the amendment to Article IV in 1875 were aware of the problems raised in *Cloud* and intended to resolve them. *Cf. Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 264 S.E.2d 106 (1980) (reviewing history to conclude that a state constitutional provision for "free public schools" was never understood to preclude modest, supplementary fees for those able to pay). Shortly after the 1875 amendments, the General Assembly enacted the precursor to N.C.G.S. § 163-9, in Chapter 275, Section 65 of the Public Laws.[8] That statute provided:

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7. The State Constitution of 1868 provided that superior court judges elected at the first election for judges would be "divided by lot into two equal classes, one of which shall hold office for four years, the other for eight years." N.C. Const. of 1868, art. IV, § 26.

8. The statute was amended and renumbered several times before its current codification at N.C.G.S. § 163-9, which was last amended in 1986. 1986 Sess. Laws ch. 920, § 6.

> Whenever any vacancies shall exist by reason of death, resignation, or otherwise, in any of the following offices, to wit: . . . justices of the Supreme Court, and judges of the superior court, the same shall be filled by elections to be held in like manner and places, and under the same regulations and rules as are prescribed for general elections, at the first general election thereafter, except as otherwise provided for in the Constitution.

1876-77 Sess. Laws ch. 275, § 65. The statute and the constitutional amendment were soon thereafter applied to fill vacancies in judicial offices by elections for the unexpired terms, according to an advisory opinion of this Court in 1894. *Opinion of the Judges*, 114 N.C. 925, 21 S.E. 963 (1894). The earliest example occurred in 1881, when Justice Ruffin was elected to fill the unexpired term of office vacated by Justice Dillard. That term began in 1878 and would not expire until 1886. Within a year of his election, Justice Ruffin resigned, and Justice Merrimon was appointed, and then elected, to serve out the term until it expired. Justice Merrimon was reelected to an eight-year term in 1886. *Id.* at 926-27, 21 S.E. at 964-65. Although the advisory opinion has no precedential value, *State ex rel. Martin v. Preston*, 325 N.C. at 454, 385 S.E.2d at 481, its contents are historically relevant to demonstrate the practice followed shortly after the 1875 constitutional amendment.

This Court expressly disapproved the reasoning in *Cloud* in *Rodwell v. Rowland*, 137 N.C. 443, 450, 50 S.E. 319, 323 (1905), acknowledging that "the great weight of authority is to the effect that a person so elected [to fill a judicial office vacated during a term] will hold only for the unexpired term." The *Rodwell* decision involved the filling of a vacated post for clerk of superior court, but the Court drew on authorities concerning vacancies in judicial office and endorsed reasoning that applies to the case now before us. Quoting the advisory opinion of 1894, the *Rodwell* Court noted that " 'when the duration of the term of office which is filled by popular election is in doubt or uncertain, the interpretation is to be followed which limits it to the shortest time, and returns

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Another statute enacted in 1899 more specifically provided that vacancies in judicial office "shall be filled for the unexpired term at the next general election for members of the General Assembly." 1899 Sess. Laws ch. 613. This statute was eventually repealed, 1969 Sess. Laws ch. 1190, § 57, but before that the "unexpired term" language was added to N.C.G.S. § 163-9. 1967 N.C. Sess. Laws ch. 775, § 163-9, para. 1.

to the people at the earliest period the power and authority to refill it.' " *Id.* at 447, 50 S.E. at 321 (quoting *Opinion of the Judges*, 114 N.C. at 929, 21 S.E. at 966).

Since this Court's decision in *Rodwell*, our State Constitution has been amended several times and has been completely ratified anew once, always by a vote of the people. In 1962 a new Article IV was ratified with a slight change in its provision for judicial offices. Section 14, now Section 16, was amended, in pertinent part, to provide more specifically that judges "shall hold office for terms of eight years." The addition of the word "terms" clarifies the notion that a term of judicial office, not necessarily an individual judge's tenure, shall be eight years. The vacancy provision of Article IV was amended in 1962 with language not pertinent to this case. In 1970 a new State Constitution was ratified with no substantive change to Article IV.

Plaintiff argues, and we agree, that by ratifying changes in the State Constitution in 1962 and a new Constitution in 1970 without substantial changes in the vacancy provision, the people should be presumed to have accepted the interpretations given that provision since it was adopted in 1875. This Court has said:

> "It is an established rule of construction that, where a constitutional provision has received a settled judicial construction, and is afterward incorporated into a new or revised Constitution, it will be presumed to have been retained with a knowledge of the previous construction, and the courts will feel bound to adhere to it."

Williamson v. City of High Point, 213 N.C. 96, 105, 195 S.E. 90, 95 (1938) (quoting 12 C.J. *Constitutional Law* § 69, at 717 (1917)). The people's vote to ratify a new Article IV in 1962, and their vote to ratify the State Constitution in its entirety in 1970, each time with no substantive change in the vacancy provision of Article IV, allows the inference that the people adopted the longstanding and, until the issuance of the commissions in question, consistent interpretation of that provision by all branches of state government.

The view of the *Rodwell* Court that vacancies in judicial office are to be filled by election for the unexpired term has been implemented consistently by the State Board of Elections in ballots, official records, and declarations of elections results. This construc-

tion was so well entrenched that it was included in a 1986 ballot to approve a related constitutional amendment:

> FOR [OR AGAINST] constitutional amendment providing that an election shall be held to fill the remainder of the unexpired term if the vacancy occurs more than 60 days before the next election, rather than 30 days as is presently provided.

While the history of legislative and executive interpretation of the State Constitution is not dispositive, it adds weight to our construction of Article IV, Sections 16 and 19. *See Corporation Comm'n v. Constr. Co.*, 160 N.C. 582, 590, 76 S.E. 640, 643 (1912).

Defendants contend it is unreasonable to hold that the drafters or the people intended the vacancy provision in Article IV to allow election for unexpired terms, in light of the vacancy provision in Article III, which expressly allows elections for unexpired terms of executive offices. Article III, Section 13 of the 1868 State Constitution provided that persons elected to fill vacancies in certain executive branch offices "shall hold the office for the remainder of the unexpired term fixed in the first section of this Article." The most recently ratified State Constitution provides in Article III, Section 7, that prematurely vacated executive offices shall be filled by election "for the remainder of the unexpired term fixed in this Section." If the drafters were able expressly to provide for elections to fill only the unexpired portions of these offices, defendants argue, their failure to express the same explicitly in Article IV indicates they intended it to have a different result. We are not persuaded by this argument.

Article III establishes various, discrete offices, each starting and ending on the same day, every four years, beginning on an exact date provided in Article III.[9] Elections for these offices are to be held at the same time as elections for the General Assembly. N.C. Const. art. III, § 7. The express provision in Article III that executive offices prematurely vacated are to be filled by elections for the unexpired terms is appropriate and conveniently articulated,

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9. In the 1868 State Constitution, Article III, Section 1 provided that the executive officers would "hold their offices four years from and after the first of January, 1869." In the most recently adopted State Constitution, Article III, Section 7 provides that the executive officers "shall be elected by the qualified voters of the State in 1972" and that "[t]heir term of office shall be four years and shall commence on the first day of January next after their election."

since all the terms of the various offices, being of the same length, begin and end on the same day. In contrast to Article III's provision for discrete and specified executive offices, Article IV does not establish discrete judgeships, nor does it state when each judicial office is to begin, or when elections are to be held for these offices. Article IV establishes judicial offices in groups, allowing the legislature to increase the number of judgeships. N.C. Const. art. IV, §§ 6, 7, 9, 10. In the State Constitution of 1868, Article IV provided for a wide variety of offices in addition to judicial offices, such as clerk of the Supreme Court, clerks of the superior courts, sheriffs, constables, and coroners, whose terms of office ranged from two to four years. An express provision for filling vacancies in these offices by election for the unexpired term might have been thought confusing, because the date of expiration would differ depending on the office. Even after most of the other offices were removed from Article IV, the remaining judicial offices, though all eight years in duration, began in different years. The system of staggered judicial offices mentioned in *Cloud* still exists. The variety of expiration dates of these offices explains why the constitutional provision for filling these vacancies is less specific than the vacancy provision in Article III.

For the reasons stated, we conclude that N.C.G.S. § 163-9 is not prohibited by our State Constitution and is a lawful exercise of legislative power. The eight-year commissions issued by the Governor, being inconsistent with the statute, are invalid. The judgment of the trial court ordering the Board of Elections to conduct elections for the judicial seats in 1992 is, therefore,

Affirmed.

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

SHARON AMOS, KATHY HALL AND EARLINE MARSHALL v. OAKDALE KNITTING COMPANY AND WALTER MOONEY, III

No. 278A91

(Filed 8 May 1992)

1. **Master and Servant § 8.1 (NCI3d)— minimum wage—employees required to work for less—violation of public policy**

Defendants violated the public policy of North Carolina by firing plaintiffs for refusing to work for less than the statutory minimum wage. Although the definition of "public policy" approved by the Supreme Court does not include a laundry list of what is or is not "injurious to the public or against the public good," at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes.

Am Jur 2d, Labor and Labor Relations §§ 2559, 2567, 2571.

2. **Master and Servant § 10.2 (NCI3d)— wrongful discharge—refusal to accept less than minimum wage—alternative remedies**

The availability of alternative remedies does not prevent a plaintiff from seeking tort remedies for wrongful discharge based on the public policy exception to the employment at will doctrine, absent federal preemption or the intent of our state legislature to supplant the common law with exclusive statutory remedies. The availability of alternative common law and statutory remedies supplements rather than hinders the ultimate goal of protecting employees who have been fired in violation of public policy.

Am Jur 2d, Master and Servant §§ 48.7, 60.

3. **Master and Servant § 10.2 (NCI3d)— wrongful discharge—public policy exception—federal preemption—state statutory preclusion**

The issue of whether the federal Fair Labor Standards Act preempted a state action for wrongful discharge for refusal to work for less than minimum wage was a constitutional question which was not passed upon by the trial court or the Court of Appeals and was not properly before the Supreme Court. Moreover, the North Carolina legislature, by enacting

the Wage and Hour Act, did not intend to preclude wrongful discharge actions based on violation of the state's public policy requiring employers to pay their employees at least the statutory minimum wage.

Am Jur 2d, Labor and Labor Relations §§ 2545, 2546, 2559; Master and Servant §§ 48.7, 66.

4. **Master and Servant § 10.2 (NCI3d)— wrongful discharge— separate claim for bad faith discharge—not recognized**

The discussion of bad faith discharge by the North Carolina Supreme Court in *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, was dicta. The issue in *Coman* was whether to adopt a public policy exception to the employment at will doctrine and the Court did not recognize a separate claim for wrongful discharge in bad faith.

Am Jur 2d, Master and Servant § 48.7.

ON appeal by plaintiffs 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. 782, 403 S.E.2d 565 (1991), affirming an order of *Morgan, J.*, at the 3 April 1989 Session of Superior Court, SURRY County, dismissing plaintiffs' complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). Plaintiffs' petition for discretionary review as to additional issues was allowed by the Supreme Court on 14 August 1991. Heard in the Supreme Court 13 February 1992.

Kennedy, Kennedy, Kennedy and Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellants.

Allman Spry Humphreys Leggett & Howington, P.A., by W. Thomas White, David C. Smith and W. Rickert Hinnant, for defendant-appellees.

J. Wilson Parker, Deborah Leonard Parker, J. Michael McGuinness, Lisa A. Parlagreco, Gayle C. Wintjen and McGuiness S. Parlagreco for North Carolina Academy of Trial Lawyers; and Elliot, Pishko, Gelbin & Morgan, by Robert M. Elliot, for North Carolina Civil Liberties Union Legal Foundation, amici curiae.

Pamela R. DiStefano and Maureen A. Sweeney for Farmworkers Legal Services of North Carolina, amicus curiae.

FRYE, Justice.

For the first time since our decision in *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989), we examine the contours of the public policy exception to the employment-at-will doctrine. Three issues are presented: (1) does firing an employee for refusing to work for less than the statutory minimum wage violate the public policy of North Carolina? (2) does the availability of alternative remedies prevent a plaintiff from seeking tort remedies for wrongful discharge based on the public policy exception to the employment-at-will doctrine? and (3) did *Coman* recognize a separate and distinct exception to the employment-at-will doctrine based on "bad faith" termination?

For the reasons outlined below, we hold that firing an employee for refusing to work for less than the statutory minimum wage violates the public policy of North Carolina. Furthermore, we hold that absent (a) federal preemption or (b) the intent of our state legislature to supplant the common law with exclusive statutory remedies, the availability of alternative federal or state remedies does not prevent a plaintiff from seeking tort remedies for wrongful discharge based on the public policy exception. Based on these two holdings, we conclude that plaintiffs in this case have stated a valid claim for wrongful discharge in violation of public policy. Finally, we hold that *Coman* did not recognize a separate and distinct "bad faith" exception to the employment-at-will doctrine.

On 27 January 1989, plaintiffs Amos, Hall, and Marshall filed a complaint in Surry County Superior Court alleging the following facts. In February 1988, plaintiffs, employees at defendant Oakdale Knitting Company, learned that their pay had been reduced to $2.18 per hour, below the statutory minimum wage. When they inquired of their supervisor, Herbert Bowman, as to why their pay had been reduced below the minimum wage, they were instructed to talk with defendant Walter Mooney, III, one of the owners of Oakdale Knitting. When Mooney arrived at the plant, he told the plaintiffs that they either had to work for the reduced pay or they were fired. Plaintiffs refused to work for $2.18 per hour and were terminated.

Plaintiffs' complaint alleges that their firing violates the public policy of North Carolina as set forth in N.C.G.S. § 95-25.3—the minimum wage section of the state's Wage and Hour Act. Plaintiffs sought actual damages, including lost wages, and special damages

for "great worry, embarrassment, humiliation, anxiety and mental and emotional distress." Plaintiffs also sought punitive damages.

Defendants filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to N.C. R. Civ. P. 12(b)(6). On 6 April 1989, Judge Morgan granted defendants' motion and dismissed the action. Plaintiffs appealed to the Court of Appeals, which affirmed the trial court, holding that plaintiffs had not stated a valid claim for wrongful discharge. *Amos v. Oakdale Knitting Co.*, 102 N.C. App. 782, 403 S.E.2d 565 (1991). Judge Johnson dissented on the narrow ground that plaintiffs' complaint had stated a claim pursuant to N.C.G.S. § 95-25.22 (recovery of unpaid wages under the Wage and Hour Act). Plaintiffs appealed to this Court based on the dissenting opinion; on 14 August 1991 we allowed plaintiffs' petition for discretionary review as to additional issues. We now reverse the Court of Appeals.

I.

This case comes to us, via the Court of Appeals, on a motion to dismiss for failure to state a claim upon which relief can be granted. For purposes of this appeal, therefore, all allegations of fact are taken as true. *Jackson v. Bumgardner*, 318 N.C. 172, 174-75, 347 S.E.2d 743, 745 (1986).

In *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445, plaintiff Coman alleged that he was discharged from his job as a long-distance truck driver after refusing to violate federal transportation regulations. Coman brought suit for wrongful discharge. This Court reversed the Court of Appeals, which had agreed with the trial court's dismissal of the action, and allowed Coman's suit to proceed. In so doing, we explicitly recognized a public policy exception to the well-entrenched employment-at-will doctrine, quoting with approval the following language from the Court of Appeals' opinion in *Sides v. Duke Hospital*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985):

> "[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent."

Coman, 325 N.C. at 175, 381 S.E.2d at 447 (quoting *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826). We then said that public policy "has been defined as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.* at 175 n.2, 381 S.E.2d at 447 n.2 (citing *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959)).

[1] The first issue in this case, then, is whether defendants' alleged decision to fire plaintiffs for refusing to work for less than the statutory minimum wage is injurious to the public or against the public good. Stated differently, has defendants' conduct as alleged by plaintiffs violated the public policy of North Carolina? We note at the outset that both courts below indicated that defendants had, indeed, violated this state's stated public policy that employees such as plaintiffs be paid at least the statutory minimum wage. Judge Morgan, in his order granting defendants' 12(b)(6) motion, said defendants' conduct "offends this Court, and also appears to violate the public policy of this State as set out in N.C.G.S. 95-25.3." Judge Morgan, however, felt constrained by the *Court of Appeals*' decision in *Coman*, which had yet to be reversed by this Court. *See Coman v. Thomas Manufacturing Co.*, 91 N.C. App. 327, 371 S.E.2d 731 (1988), *rev'd*, 325 N.C. 172, 381 S.E.2d 445 (1989). Under *Coman*, as decided by the Court of Appeals and interpreted by Judge Morgan, the public policy exception was limited to instances in which an employer attempted to interfere with an employee's testimony in a legal proceeding. The Court of Appeals in this case also expressed its strong disapproval of defendants' alleged conduct: "By this opinion we do not in any way condone an employer's violation of the minimum wage law with the resultant hardship and inconvenience to its employees, and we expressly denounce such unlawful coercive attempts to deprive employees of the wages to which they are lawfully entitled." *Amos*, 102 N.C. App. at 786, 403 S.E.2d at 567. The Court of Appeals, however, affirmed the trial court's dismissal of plaintiffs' complaint, holding that in order to state a valid claim for wrongful discharge, there must be no other remedy available. *Id.* at 787, 403 S.E.2d at 568. We address this issue later in the opinion.

Defendants argue in their brief that they did not violate public policy, as that term is defined in *Coman*, because the "alleged acts are peculiar to the plaintiff, are not injurious to the public, and do not in any way affect the public good." Defendants then

suggest that in order to state a valid claim for wrongful discharge in violation of public policy an employee must either be required to engage in unlawful conduct or the employer's conduct must threaten public safety. Defendants read *Coman* too narrowly. Although the definition of "public policy" approved by this Court does not include a laundry list of what is or is not "injurious to the public or against the public good,"[1] at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes.

Article 2A of Chapter 95 of the North Carolina General Statutes, the Wage and Hour Act, provides:

> (b) The public policy of this State is declared as follows: The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry. The General Assembly declares that the general welfare of the State requires the enactment of this law under the police power of the State.

N.C.G.S. § 95-25.1(b) (1989).[2] Accordingly, the legislature set a minimum wage of $3.35 per hour effective 1 January 1983, with subsequent increases through 1 June 1989 to coincide with those of the federal Fair Labor Standards Act (FLSA) up to a maximum hourly wage of $4.00. N.C.G.S. § 95-25.3. Businesses covered by the FLSA are exempt from the state Wage and Hour Act. N.C.G.S. § 95-25.14(a)(1). Remedies under the FLSA are similar to those provided in the state statute. Thus, as recognized by the Court of Appeals, "[w]ithout question, payment of the minimum wage is the public policy of North Carolina." *Amos*, 102 N.C. App. at

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1. Although it may be tempting to refine the definition of "public policy" in order to formulate a more precise and exact definition, we decline to do so. Any attempt to make the definition more precise would inevitably lead to at least as many questions as answers. True to the common law tradition, we allow this still evolving area of the law to mature slowly, deciding each case on the facts before us.

2. Various sections of the Wage and Hour Act have been amended since the filing of this lawsuit. All references to the Wage and Hour Act in this opinion are to the version in force at the time plaintiffs were allegedly fired for refusing to work for less than the minimum wage.

785, 403 S.E.2d at 567. We hold therefore that, taking plaintiffs' allegations as true, defendants violated the public policy of North Carolina by firing plaintiffs for refusing to work for less than the statutory minimum wage.

II.

[2] Defendants argue that, even if their conduct violates public policy, plaintiffs have alternative remedies available and therefore should not be permitted to proceed under the common law theory of wrongful discharge. Defendants ask this Court to uphold the decision of the Court of Appeals, which established a two-part test for employees wishing to proceed under a theory of wrongful discharge in violation of public policy. Quoting a federal district court from Pennsylvania, the Court of Appeals held that the " 'application of the public policy exception requires two factors: (1) that the discharge violate some well-established public policy; and (2) that there be no remedy to protect the interest of the aggrieved employee or society.' " *Amos*, 102 N.C. App. at 787, 403 S.E.2d at 568 (quoting *Wehr v. Burroughs Corp.*, 438 F. Supp. 1052, 1055 (E.D. Pa. 1977), *aff'd as modified*, 619 F.2d 276 (3d Cir. 1980)). On the facts of this case, the Court of Appeals held that the state legislature had provided plaintiffs an adequate statutory remedy:

> Plaintiffs thus had two options: (i) to continue working and pursue their remedy [for backpay] under N.C.G.S. § 95-25.22, which would have made them whole, or (ii) to refuse to work and be fired. Plaintiffs chose the latter. They were not terminated in retaliation for filing a complaint. N.C.G.S. § 95-25.20(a), therefore, has no applicability.

Amos, 102 N.C. App. at 786, 403 S.E.2d at 567. The Court of Appeals then held that because plaintiffs had an adequate remedy at their disposal, they could not proceed under a theory of wrongful discharge in violation of public policy. *Id.* at 787, 403 S.E.2d at 568.

Although the Court of Appeals decided this case on the basis of a state statutory remedy, both parties now assert that the applicable statutory scheme may be the FLSA, 29 U.S.C. §§ 201-219 (1978), not the North Carolina Wage and Hour Act. If, as the parties now believe, defendant Oakdale Knitting is covered by the FLSA, it would be exempt from the state statute. N.C.G.S. § 95-25.14(a)(1). Because the record on appeal in this case does not contain sufficient information to determine whether Oakdale Knitting is covered by

the FLSA or the state Wage and Hour Act, we will address both statutory schemes.

In *Coman*, we held that an employee who has been fired in violation of public policy has a claim for wrongful discharge notwithstanding this state's allegiance to the employment-at-will doctrine. The issue now before this Court is whether *Coman* is limited to situations in which the fired employee has no other available remedy. The Court of Appeals added this limitation. *Amos*, 102 N.C. App. at 786-87, 403 S.E.2d at 567-68. Several courts in other jurisdictions have also limited the public policy exception, arguing that the rationale behind the exception is to provide a remedy for discharges in violation of public policy "which otherwise would not be vindicated by a civil remedy." *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 605, 561 A.2d 179, 180 (1989) (and cases cited therein); *see also Crews v. Memorex Corp.*, 588 F. Supp. 27, 29 (D. Mass. 1984) (wrongful discharge action recognized "in order to fill [a] legislative gap. When a statutory remedy is available, there is no gap, and the justification for judicial creativity is absent.") (citation omitted). Other courts have chosen not to add this limitation. *See Broomfield v. Lundell*, 159 Ariz. App. 349, 767 P.2d 697 (1988); *Holien v. Sears, Roebuck & Co.*, 298 Or. 76, 689 P.2d 1292 (1984); *see also Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 533 (4th Cir. 1991), *rev'g* 724 F. Supp. 1185 (M.D.N.C. 1989) (Fourth Circuit, interpreting post-*Coman* North Carolina law, reversed district court's limitation of wrongful discharge claims to instances in which there was no alternative remedy, stating that it found "no North Carolina authority" for the addition of this limitation).

If the sole rationale for the adoption of the public policy exception in *Coman* was to provide a remedy where no other remedy existed, then the reasoning of the Court of Appeals would be persuasive. *Coman*, however, was not predicated on the "no alternative remedy" theory. Indeed, we noted in *Coman* that the fired employee arguably had an "additional remedy in the federal courts." *Coman*, 325 N.C. at 174, 381 S.E.2d at 446 (footnote omitted). Whether the plaintiff in *Coman* was without an additional state remedy[3]

3. The North Carolina Civil Liberties Union Foundation, in an amicus curiae brief, argued that defendant Thomas Manufacturing Company had violated both state and federal statutory law when it discharged plaintiff Coman. Thomas Manufacturing responded in its brief that, assuming state law applied, Coman not only

was not the key factor behind this Court's adoption of the public policy exception. The underlying rationale was the recognition that the judicially created employment-at-will doctrine had its limits and it was the role of this Court to define those limits. *See id.* at 177 n.3, 381 S.E.2d at 448 n.3 ("[t]his Court, not the legislature, adopted the employee-at-will doctrine in the first instance, [and thus] it is entirely appropriate for this Court to further interpret the rule."). Accordingly, we held that although " 'there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy.' " *Id.* at 175, 381 S.E.2d at 447 (quoting *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826). The public policy exception adopted by this Court in *Coman* is not just a remedial gap-filler. It is a judicially recognized outer limit to a judicially created doctrine, designed to vindicate the rights of employees fired for reasons offensive to the public policy of this State. The existence of other remedies, therefore, does not render the public policy exception moot.

Although we now hold that the existence of an alternative remedy does not *automatically* preclude a claim for wrongful discharge based on the public policy exception, we also hold that under certain circumstances a legislative remedy may be deemed exclusive. If federal legislation preempts state law under the Supremacy Clause, U.S. Const. art. VI, cl. 2, then state claims, such as one for wrongful discharge, will be precluded. *See English v. General Electric Co.*, 496 U.S. 72, 110 L. Ed. 2d 65 (1990). Additionally, if our state legislature has expressed its intent to supplant the common law with exclusive statutory remedies, then common law actions, such as wrongful discharge, will be precluded. *See Biddix v. Henredon Furniture Industries*, 76 N.C. App. 30, 331 S.E.2d 717 (1985) (vitality of common law actions for nuisance and continuing trespass dependent upon federal preemption and whether state Clean Water Act precludes common law civil actions). We hold therefore that absent (a) federal preemption or (b) the intent of our state legislature to supplant the common law with exclusive statutory remedies, the availability of alternative remedies does

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had a federal remedy available, but also a state statutory remedy pursuant to the state Occupational Safety & Health Act, N.C.G.S. § 95-130(8), (9) (1989). Thus, Thomas Manufacturing argued, given the statutory remedies available, there was no need for this Court to create an exception to the employment-at-will doctrine. This is essentially the same argument defendant Oakdale Knitting makes in this case.

not prevent a plaintiff from seeking tort remedies for wrongful discharge based on the public policy exception. The availability of alternative common law and statutory remedies, we believe, supplements rather than hinders the ultimate goal of protecting employees who have been fired in violation of public policy.

As mentioned previously, the record on appeal does not contain sufficient information to determine whether Oakdale Knitting is covered by the FLSA or the state Wage and Hour Act. We therefore address both statutory schemes.

[3] Defendants argued before the Court of Appeals that the FLSA preempted state law and that the remedies contained in the state Wage and Hour Act were intended to be exclusive. In response to the federal preemption argument, plaintiffs argued that Congress, in adopting the FLSA, did not intend to "occupy the field," and therefore an action for wrongful discharge was not precluded. *See Webster v. Bechtel*, 621 P.2d 890 (Alaska 1980) (the FLSA does not preempt state law claims). The Court of Appeals, however, did not pass upon defendants' federal preemption argument, noting that defendants had failed to raise the issue before the trial court. *Amos*, 102 N.C. App. at 784, 403 S.E.2d at 566. The issue of federal preemption is a constitutional question and therefore will not be reviewed by this Court unless it affirmatively appears from the record that the issue was raised and passed upon in the court below. *Coman*, 325 N.C. at 171 n.1, 381 S.E.2d at 446 n.1; *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 428, 269 S.E.2d 547, 577 (1980). Because this issue was not passed upon by either the Court of Appeals or the trial court, it is not properly before this Court.

The Court of Appeals did, however, suggest that our state legislature intended the remedies in the Wage and Hour Act to be exclusive in all instances where an employer refuses to pay the minimum wage. *Amos*, 102 N.C. App. at 786, 403 S.E.2d at 567-68 ("The legislature having expressed its intent, however, we decline to extend the public policy exception to the employment at will doctrine to afford a cause of action in addition to that provided by statute."). We will therefore address the issue of whether our state legislature intended the Wage and Hour Act to supplant the common law with exclusive statutory remedies. We hold it did not.

In determining whether the state legislature intended to preclude common law actions, we first look to the words of the statute to see if the legislature expressly precluded common law remedies. The Wage and Hour Act, unlike the Workers' Compensation Act, does not expressly preclude common law remedies. *See* N.C.G.S. § 97-10.1 (1991) (common law rights and remedies precluded under Workers' Compensation Act). Because the legislature did not expressly preclude common law remedies, we "look to the purpose and spirit of the statute and what the enactment sought to accomplish, considering both the history and circumstances surrounding the legislation and the reason for its enactment." *Biddix*, 76 N.C. App. at 34, 331 S.E.2d at 720 (state Clean Water Act does not abrogate common law).

In February 1988, when defendants allegedly reduced plaintiffs' wages below the statutory minimum wage, plaintiffs' remedies under the Wage and Hour Act were as follows. Plaintiffs could have stayed on the job, working for $2.18 per hour, and pursued an action to recover unpaid wages. N.C.G.S. § 95-25.22. In its discretion, the court could have awarded exemplary damages in an amount "not in excess of the amount found to be due as provided above." N.C.G.S. § 95-25.22(a). Plaintiffs, in the discretion of the court, also could have recovered reasonable attorneys' fees. N.C.G.S. § 95-25.22(d). An employee who has been discharged in retaliation for filing a complaint or participating in an investigation under the Wage and Hour Act also has a statutory right to be reinstated. N.C.G.S. § 95-25.20(a). Because plaintiffs in this case did not file a complaint, this section presumably has no application. *See Amos*, 102 N.C. App. at 786, 403 S.E.2d at 567 (N.C.G.S. § 95-25.20(a) not applicable to this case). Judging from these statutory remedies, it seems apparent that the intent of the legislature was to provide an employee an avenue to recover back wages *while remaining employed*. The statute, as recognized by the Court of Appeals, provides *no remedy* for an employee who is discharged for refusing to work for less than the statutory minimum wage. *See id.* (plaintiffs had two options: continue working and seek backpay or refuse to work and be fired).

The strongest argument, however, that the legislature did not intend by its adoption of the Wage and Hour Act to supplant the common law claim of wrongful discharge in violation of public policy is also the most obvious: at the time section 95-25.22 was enacted in 1959 and 95-25.20 was enacted in 1979, neither this

Court nor the Court of Appeals had recognized the public policy exception to the employment-at-will doctrine. As the Supreme Court of Oregon succinctly stated in *Holien v. Sears, Roebuck and Co.*, 298 Or. at 96, 689 P.2d at 1303: "It seems elementary that before a legislative body can intend to eliminate certain forms of remedy it must be aware that such remedies exist." (Footnote omitted). We hold that the legislature, by enacting the Wage and Hour Act, did not intend to preclude wrongful discharge actions based on violation of the state's public policy requiring employers to pay their employees at least the statutory minimum wage.

III.

[4] The final issue before the Court is whether *Coman* recognized a separate and distinct claim for bad faith discharge. We hold it did not.

In *Coman*, we noted that this Court "has never held that an employee at will could be discharged in bad faith." *Coman*, 325 N.C. at 176, 381 S.E.2d at 448 (citing *Haskins v. Royster*, 70 N.C. 601 (1874)). We then recognized that courts in other states "have recognized wrongful discharge theories characterized either as the bad faith exception to the at-will doctrine or under the implied covenant of good faith and fair dealing." *Id.* at 177, 381 S.E.2d at 448 (citations omitted). Finally, we added, "[b]ad faith conduct should not be tolerated in employment relations, just as it is not accepted in other commercial relationships." *Id.* These statements were dicta; they were not relied upon for our ultimate holding that plaintiff had stated a valid claim for wrongful discharge based on the public policy exception to the employment-at-will doctrine.

Most courts interpreting *Coman* have recognized that our discussion of bad faith discharge was dicta, but have come to differing conclusions. *Compare Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 412 S.E.2d 97 (1991) (disallowing tort claim for bad faith discharge), *cert. denied*, 331 N.C. 119, 415 S.E.2d 200 (1992); *English v. Gen. Elec. Co.*, 765 F. Supp. 293 (E.D.N.C. 1991) (disallowing tort claim for bad faith discharge); and *Haburjak v. Prudential Bache Sec., Inc.*, 759 F. Supp. 293 (W.D.N.C. 1991) (disallowing tort claim for bad faith discharge) *with Iturbe v. Wandel & Goltermann Technologies*, 774 F. Supp. 959 (M.D.N.C. 1991) (allowing claim for bad faith discharge); *see also*, Duncan Alford, Note, *Coman v. Thomas Manufacturing Co.: Recognizing a Public Policy Exception to the At-Will Employment Doctrine*, 68 N.C. L. Rev. 1178,

1192 (1990) ("The language regarding bad faith was not necessary to the court's holding and may be weakened in future cases."). A few courts have not characterized our bad faith discussion as dicta and have indicated that *Coman* did recognize a distinct tort for bad faith discharge. *Riley v. Dow Corning Corp.*, 767 F. Supp. 735 (M.D.N.C. 1991); *McLaughlin v. Barclays American Corp.*, 95 N.C. App. 301, 382 S.E.2d 836, *disc. rev. denied*, 325 N.C. 546, 385 S.E.2d 498 (1989).

To repeat: our discussion of bad faith discharge in *Coman* was dicta. The issue in *Coman* was whether to adopt a *public policy exception* to the employment-at-will doctrine. In setting out the issue presented, we said: "Our present task is to determine whether we should adopt a public policy exception to the employment-at-will doctrine." *Coman*, 325 N.C. at 175, 381 S.E.2d at 447 (footnote omitted). We did. We did not recognize a separate claim for wrongful discharge in bad faith.

IV.

To summarize: Firing an employee for refusing to work for less than the statutory minimum wage violates the public policy of North Carolina. Absent federal preemption or the intent of our legislature to supplant the common law with exclusive statutory remedies, the availability of alternative federal or state remedies does not prevent a plaintiff from seeking tort remedies for wrongful discharge based on the public policy exception to the employment-at-will doctrine. The issue of federal preemption is not properly before this Court and we decline to address the merits; however, we hold that the state legislature did not intend to preclude common law remedies when it adopted the Wage and Hour Act. Because plaintiffs' claim has not been determined to be preempted by federal law or supplanted by state legislation, the complaint was improperly dismissed by the trial court for failure to state a claim upon which relief can be granted. Finally, *Coman* did not recognize a separate and distinct claim for bad faith discharge.

We reverse the decision of the Court of Appeals and remand to that court for further remand to Superior Court, Surry County, for proceedings not inconsistent with this opinion.

Reversed and remanded.

TOWN OF PINE KNOLL SHORES v. WALLACE N. EVANS II AND WIFE, LENORA H. EVANS

No. 462A91

(Filed 8 May 1992)

1. **Municipal Corporations § 30.11 (NCI3d)— zoning—deck—setback from canal**

A deck built between a house and a canal, and not attached to the house, violated plaintiff's zoning ordinance, which provided that "No building may be constructed nearer than thirty (30') feet to the mean high water mark of any interior waterway or canal to include decks and porches." It was not necessary to consider the differences between the former and current versions of the setback rule because, under the plain meaning of the current version, no building, deck, or porch may be constructed within thirty feet of the canal. Even if the words of that section of the ordinance are rendered ambiguous when read in conjunction with the section defining building, defendants' deck would still violate the ordinance because the definition of building included attached decks and porches before an amendment adding the language "to include decks and porches." Those words must be read as referring to unattached decks and porches in order to give meaning to the words.

Am Jur 2d, Zoning and Planning §§ 88, 91-95.

2. **Municipal Corporations § 30.11 (NCI3d)— zoning—deck constructed in violation of setback—abatement ordered—economic waste not applicable**

The theory of economic waste applies in suits against contractors for minor defects in construction, a completely different context from the trial court's order to remove a deck built in violation of a zoning ordinance. To apply the theory of economic waste in this context would be novel and far-reaching and would substantially erode powers the General Assembly has granted to municipalities.

Am Jur 2d, Zoning and Planning §§ 242, 248, 252.

Justice MITCHELL dissenting.

Justice LAKE joins in this dissenting opinion.

APPEAL by plaintiff-town pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 104 N.C. App. 79, 407 S.E.2d 895 (1991), affirming in part and vacating in part the judgment of *Llewellyn, J.*, entered at the 14 May 1990 Civil Session of Superior Court, CARTERET County. Heard in the Supreme Court 15 April 1992.

Kirkman & Whitford, P.A., by Neil B. Whitford, for plaintiff-appellee.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C. R. Wheatly, Jr., for defendant-appellants.

WHICHARD, Justice.

The issue is whether defendants' "deck" violates the setback requirement of plaintiff-town's zoning ordinance. Plaintiff-town is located on a barrier island. Defendants' home in plaintiff-town is situated along an artificially-made canal connected to Bogue Sound. Plaintiff-town has enacted a comprehensive zoning code ("Code"), which defendants allegedly violated by building a "deck" in their backyard between their house and the canal.

Defendants refer to the structure at issue as a "ground cover," while plaintiff-town calls it a "deck." The Court will refer to it as a deck. The deck runs approximately fifty to seventy feet along the waterfront and extends approximately twenty feet from the rear lot line into the yard. It consists of boards laid on wooden stringers, which lie on the ground. Three wooden steps lead down to the deck, which is framed and backed by squared-off timbers. The timbers are placed three deep, one on top of the other, and form a low wall separating the deck from the yard. The deck is not attached to the house. Defendants have placed wooden deck chairs and tables on the deck. Defendants constructed the deck themselves with the help of family and friends.

On the day construction commenced, 30 May 1987, plaintiff-town's Building Inspector went to defendants' home and told defendant-wife to stop construction because defendants had failed to apply for, receive, and post a building permit as required by plaintiff-town's Code. The Building Inspector also told defendant-wife that the deck probably was in violation of a thirty-foot setback requirement. Work ceased at that time. On 8 June 1987, defendant-wife went before plaintiff-town's Community Appearance Commit-

tee about the deck. The Committee informed her that she could not obtain a permit, as the partially constructed deck was within the thirty-foot setback area. Despite this knowledge, defendants resumed construction of the deck, completing it in May 1988. Defendants also instituted an action seeking to enjoin plaintiff-town from further harassment in regard to the construction of the deck, which suit defendants dismissed upon completion of the deck.

On 17 June 1988, plaintiff-town instituted this action against defendants, seeking a mandatory injunction and an order of abatement requiring removal of defendants' deck. At the conclusion of plaintiff-town's evidence, defendants moved for a directed verdict. The trial court granted defendants' motion as to plaintiff-town's allegation that defendants had violated "stop-work" orders. At the conclusion of all the evidence, defendants again moved for a directed verdict. The trial court directed a verdict against defendants for constructing the deck without applying for, receiving, and posting a building permit, as required by section 21-5.2 of the Code. It ordered defendants to abate their violation by removing the deck within fourteen days or to purge themselves of the violation by paying $2,000 to plaintiff-town. The trial court directed judgment in favor of defendants as follows: 1) defendants' deck is not a "building" as defined in section 21-2 of the Code and, therefore, does not violate the thirty-foot setback requirement contained in section 21-8.3, and 2) defendants' deck is not a "separate structure" and thus does not violate section 21-8.1. Plaintiff-town appealed these two decisions, as well as the decision that defendants could purge themselves of the order of abatement by paying a $2,000 civil penalty.

In a divided opinion, the Court of Appeals vacated in part, holding that the deck was a "separate structure" built in violation of the Code and that the trial court was without authority to allow defendants to avoid removal of the deck by payment of a civil penalty. The Court of Appeals affirmed the trial court's ruling that defendants violated the Code by failing to seek and obtain a permit. The majority expressly declined to address whether the deck was a "building" located in the prohibited thirty-foot setback area.

Judge Lewis agreed that the trial court acted without authority in imposing the civil penalty; that issue thus is not before us. He dissented, however, from the holding that the deck was a

"separate structure" in violation of the Code. According to the dissenting opinion, the section defining "structure" suffers from vagueness and overbreadth. As to whether the deck was a "building" in violation of the setback requirement, Judge Lewis concluded that it was not and, therefore, that it did not violate the thirty-foot setback requirement. He further concluded that ordering defendants to dismantle the deck "violates the principle that the court should avoid economic waste where possible." *Town of Pine Knoll Shores v. Evans*, 104 N.C. App. 79, 87, 407 S.E.2d 895, 899-900 (1991) (Lewis, J., dissenting).

[1] As defendants state in their brief, "[t]he question [on appeal to this Court] is simply whether or not the defendants[']] construction violated the zoning ordinance." Section 21-8.3 of the Code provides:

> *Required setback.* No building may be constructed nearer than thirty (30') feet to the mean high water mark of any interior waterway or canal *to include decks and porches.*

(Emphasis added.) Prior to a 12 August 1986 amendment, section 21-8.3 read: "No building may be constructed nearer than 20 feet to the mean high water mark of any interior waterway or canal." At the time defendants built their deck, the amended version of section 21-8.3 was in effect. "Building" was and is defined in section 21-2 of the Code as:

> any structure built for the support, shelter or enclosure of persons, animals, chattel, or property of any kind, which has enclosing walls for fifty (50%) percent or more of its perimeter. The term "building" shall be construed as if followed by the words "or parts thereof" including porches, decks, carports, garages, sheds, roof extensions and overhangs, and *any other projections.*

(Emphasis added.)

Defendants focus on the words "any other projections" and contend that as their deck is not attached to the main house, it is not included within the definition of "building." Because the deck is not a "building," they argue, it does not come within the prohibition of the setback rule.

Plaintiff-town focuses, instead, on the differences between the current and former versions of Code section 21-8.3. According to

plaintiff-town, the 1986 amendments to that section accomplished two substantive changes. First, the setback area was increased from twenty to thirty feet. Second, decks and porches were prohibited within the setback area regardless of whether they were attached to the dwelling on the premises. Plaintiff-town contends that defendants' reading of the amended version of section 21-8.3 would relegate the new language to mere surplusage, a reading contrary to established rules of statutory construction.

It is unnecessary to consider the differences between the former and current versions of the setback rule. Under the plain meaning of the current version, no building, deck, or porch may be constructed within thirty feet of the canal. *See Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988) (words in a statute are to be given their natural and ordinary meaning unless the context requires otherwise). Defendants read only as far as the second word of section 21-8.3—"building." They then turn immediately to the definition of "building" in section 21-2 and conclude that the only structures or architectural units prohibited by the setback rule are those included within the definition in section 21-2. Defendants are correct to refer to that definition to determine what "building" comprises. Section 21-8.3 is not, however, concerned with or limited by the definition of "building." The purpose of section 21-8.3 is to list those structures which may not be placed within thirty feet of an interior waterway. In 1986, plaintiff-town amended the section to cover buildings, as defined in section 21-2, as well as decks and porches. As defendants' deck is within thirty feet of the canal, it violates the setback rule.

Even if we were to conclude that section 21-8.3 is rendered ambiguous when read in conjunction with section 21-2, defendants' deck would still violate the setback requirement. Prior to 12 August 1986, porches and decks *unattached* to a house did not violate section 21-8.3 even if they were within the setback area. This was so because under the former setback rule, only "buildings" were prohibited in the setback area, and "buildings" did not and do not include *unattached* structures. As the definition of "building" in section 21-2 already included *attached* decks and porches, there would have been no need for plaintiff-town, in 1986, to add to section 21-8.3 the language "to include decks and porches," if the intent of the amendment was to draw only *attached* porches and decks within the ambit of the setback requirement. In order, therefore, to give meaning to the words "to include decks and

porches," we must read those words as referring to *unattached* decks and porches.

Established rules of statutory construction dictate this reading of section 21-8.3. Where, as here, there are two provisions of an ordinance, one which treats a subject matter in detail and the other which deals more generally with that subject matter, the particular provision controls, especially where, as here, the particular provision is the later enactment. *See Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969). While section 21-2 defines "building," and therefore must be considered in determining what structures may not be placed within thirty feet of the canal, section 21-8.3 is the controlling, particular provision listing those structures prohibited within the setback area. In holding that section 21-8.3 applies to defendants' unattached deck, we follow the maxims of statutory construction that words of a statute are not to be deemed useless or redundant and amendments are presumed not to be without purpose. *See, e.g., Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 268, 382 S.E.2d 759, 765, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989); *Schofield v. Tea Co.*, 299 N.C. 582, 590, 264 S.E.2d 56, 62 (1980); *Childers v. Parker's Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483-84 (1968); *In re Watson*, 273 N.C. 629, 634, 161 S.E.2d 1, 6-7 (1968).

[2] The authorities Judge Lewis cites in support of his proposed application of the economic waste theory—*Lapierre v. Samco Development Corp.*, 103 N.C. App. 551, 406 S.E.2d 646 (1991); *Warfield v. Hicks*, 91 N.C. App. 1, 370 S.E.2d 686, *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 602 (1988)—are inapposite. Both of these cases involved suits by homeowners against building constructors for defective construction leading to breach of warranty and contract, not suits by municipalities to enforce zoning codes. In both cases, the Court of Appeals discussed the theory of economic waste, which " 'recognizes the need to avoid economic waste . . . when, although the building substantially conforms to the contract specifications, a minor defect exists that does not substantially lower its value.' " *Lapierre*, 103 N.C. App. at 559-60, 406 S.E.2d at 650 (quoting *Kenney v. Medlin Construction and Realty Co.*, 68 N.C. App. 339, 344-45, 315 S.E.2d 311, 314-15, *disc. rev. denied*, 312 N.C. 83, 321 S.E.2d 896 (1984)). As can be seen, the theory of economic waste applies in suits against contractors for minor defects in construction, a completely different context from that in this case. To apply that theory in the context presented here would be novel and

far-reaching and would substantially erode powers the General Assembly has granted to municipalities. Defendants' deck clearly violates that section of plaintiff-town's Code requiring a thirty-foot setback. The General Assembly empowered municipalities to regulate setbacks when it granted cities the authority to "regulate . . . the size of yards, courts and other open spaces, . . . and the location . . . of buildings [and] structures . . . for . . . residence . . . purposes." N.C.G.S. § 160A-381 (1987). The remedy of an order of abatement, one of four remedies authorized in plaintiff-town's Code, is itself authorized by the General Assembly's general grant of police power to municipalities. N.C.G.S. §§ 160A-365, -175(a), (d) (1987). To allow defendants' violation of plaintiff-town's Code to succeed merely because defendants mounted the deck prior to plaintiff-town's obtaining judicial relief would vitiate the applicable Code provisions. Such action would be particularly inappropriate in light of the facts that defendants resumed construction of the deck in defiance of the information that the deck was in violation of the Code and even though they had been informed about the proper procedures for appealing to the Board of Adjustment for a variance.

For these reasons, which differ from the reasons given in the Court of Appeals' opinion, we affirm that court's decision affirming the order of abatement.

Modified and affirmed.

Justice MITCHELL dissenting.

Both the majority and dissenting opinions in the Court of Appeals agree that the only part of any construction at issue in the present case consists exclusively and entirely of a section of boards laid flat on wooden stringers on the ground. It does not appear from the record on appeal that the plaintiff contends or has ever contended that any construction on the defendants' property, other than this flat and unobstructive construction, was at issue in the present case.

The timbers which the majority opinion in this Court describes as "forming a low wall separating the deck from the yard" are not mentioned in the transcript of the proceedings in the trial court. This Court knows of the existence of the low wall described by the majority only by resorting to a photograph which was introduced at trial. I believe that even a cursory review of that

photograph by anyone familiar with the various types of constructions used to stabilize sandy lots on our barrier islands reveals that the low wall described by the majority is a "bulkhead" or "seawall" put in place to prevent erosion of the defendants' sandy lot into the adjacent canal. Seawalls and bulkheads simply are not parts of a "deck," as that descriptive term is used in our coastal region. The plaintiff's witness, Chief Building Inspector Fred Fulcher, clearly understood this when he described the "deck" at issue in the present case simply as "somewhere around 50 to 60 feet across the front, and by the depth of it deepest point may be 15, 16 feet deep." Chief Building Inspector Fulcher seems to have known that the bulkhead and stairs behind the deck were not parts of the construction which the plaintiff-town contended was in violation of law and which was at issue in this case.

As only a flat and unobstructive construction is properly at issue in the present case, I dissent from the decision of the majority of this Court for the reasons fully stated and explained by Judge Lewis in his dissenting opinion in the Court of Appeals. *Town of Pine Knoll Shores v. Evans*, 104 N.C. App. 79, 86-87, 407 S.E.2d 895, 899-900 (1991) (Lewis, J., dissenting).

Justice LAKE joins in this dissenting opinion.

BRENDA WATSON GREER, ADMINISTRATRIX OF THE ESTATE OF KANDY RENAE GREER, DECEASED v. BYNUM HARRISON PARSONS AND PHYLLIS McLEOD PARSONS

No. 334PA91

(Filed 8 May 1992)

1. Abortion; Prenatal or Birth-Related Injuries and Offenses § 7 (NCI4th); Torts § 7 (NCI3d)— punitive damages claim for stillborn child's death—release by parents not bar

Plaintiff administratrix's claim for punitive damages for the wrongful death of her stillborn child arising from an automobile accident was not barred by a release signed individually by plaintiff and her husband before plaintiff qualified as the administratrix of her child's estate, since plaintiff had no authority to settle the wrongful death claim of the fetus

prior to qualifying as administratrix, and the release operated only to discharge defendants' liability to the signers thereof.

Am Jur 2d, Abortion § 37; Death §§ 187, 191, 192.

2. Abortion; Prenatal or Birth-Related Injuries and Offenses § 6 (NCI4th)— wrongful death of stillborn child—punitive damages—failure to join with parents' claims—claim not barred by DiDonato decision

Plaintiff administratrix's claim for punitive damages for the wrongful death of her stillborn child arising from an automobile accident was not barred by the decision in *DiDonato v. Wortman,* 320 N.C. 423, because it was not joined with personal injury claims of the parents in a settlement with the tortfeasors where the parents settled their claims on 8 April 1987; the *DiDonato* decision was filed on 28 July 1987; plaintiff qualified as administratrix of her child's estate on 28 July 1988; and it was thus impossible for plaintiff to anticipate and comply with the mandatory joinder requirement announced in *DiDonato.*

Am Jur 2d, Abortion § 37; Death §§ 191, 412.

3. Abortion; Prenatal or Birth-Related Injuries and Offenses § 8 (NCI4th)— wrongful death of stillborn child—pecuniary and loss of services damages not recoverable

Pecuniary damages and damages for loss of services and companionship are not recoverable in an action for the wrongful death of a stillborn child.

Am Jur 2d, Death §§ 220, 250.

Right to maintain action or to recover damages for death of unborn child. 84 ALR3d 411.

ON discretionary review pursuant to N.C.G.S. § 7A-31(a) from the decision of a unanimous panel of the Court of Appeals, 103 N.C. App. 463, 405 S.E.2d 921 (1991), affirming in part and reversing in part an order of summary judgment entered by *Allen (C. Walter), J.,* in Superior Court, CALDWELL County, on 17 April 1989. Heard in the Supreme Court 12 March 1992.

Wilson, Palmer and Lackey, P.A., by Hugh M. Wilson and Wesley E. Starnes, for plaintiff-appellant.

Mitchell, Blackwell & Mitchell, P.A., by Hugh A. Blackwell and Juleigh Sitton, for defendant-appellees.

WHICHARD, Justice.

This appeal presents two issues: (1) whether the Court of Appeals was correct in reversing the trial court's order of summary judgment with respect to plaintiff's claim for punitive damages arising out of defendants' alleged negligent acts causing the death of Kandy Renae Greer, and (2) whether the Court of Appeals was correct in affirming the trial court's order of summary judgment with respect to plaintiff's claim, arising out of defendants' allegedly negligent acts, for pecuniary damages or damages for loss of services and companionship. We affirm on both issues.

On 19 October 1986, Brenda Watson Greer and her husband, Danny Robert Greer, suffered serious injuries as a result of an automobile collision between their car and one owned by defendant Phyllis McLeod Parsons and operated by defendant Bynum Harrison Parsons. Brenda Watson Greer was more than eight months pregnant at the time of the accident, and the fetus, subsequently named Kandy Renae Greer, was delivered stillborn soon afterwards.

On 8 April 1987, the Greers settled their claims against the defendants and signed a release "for ourselves, heirs, personal representatives and assigns." The release discharged defendants "from any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of action" for any injuries, present or future, stemming from the accident.

On 28 July 1988, Brenda Watson Greer qualified as administratrix of the estate of Kandy Renae Greer. On 4 August 1988, seeking both compensatory and punitive damages, she filed this wrongful death action. On 17 April 1989, the trial court entered an order granting defendants' motion for summary judgment on plaintiff's claims for punitive damages and for pecuniary damages or damages for loss of services and companionship. The trial court based its grant of summary judgment on the release signed by the Greers and on the authority of *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E.2d 73 (1987). The court, however, denied defendants' motion for sum-

mary judgment with respect to plaintiff's claim for damages for pain and suffering.

The Court of Appeals refused to consider defendants' appeal of the trial court's ruling with respect to the pain and suffering aspect of plaintiff's claim. *Greer v. Parsons*, 103 N.C. App. 463, 465, 405 S.E.2d 921, 923 (1991) (refusing also to consider appeal of the trial court's denial of defendants' motions to dismiss under Rules 12(b)(6) and (7) of the North Carolina Rules of Civil Procedure). Defendants did not seek review of the pain and suffering issue; thus, that issue is not before us. On 6 November 1991, we allowed discretionary review of the issues discussed below.

I

[1] The Court of Appeals reversed the trial court's order of summary judgment with respect to plaintiff's claim for punitive damages. The court first addressed defendants' contention that plaintiff's claim for punitive damages was barred by the release executed by the Greers. That release was signed by Danny and Brenda Greer personally, before Brenda Greer qualified as the administratrix of Kandy Renae Greer's estate, and it operated only to discharge defendants' liability to the signers.

Prior to becoming administratrix of her daughter's estate, Brenda Greer had no authority to settle or compromise the potential wrongful death action. "The duties and powers of a personal representative commence upon his appointment." N.C.G.S. § 28A-13-1 (1984). North Carolina cases and statutes are clear that only personal representatives have authority to pursue a wrongful death action on behalf of a decedent. *See Bank v. Hackney*, 266 N.C. 17, 20, 145 S.E.2d 352, 355 (1965); *Graves v. Welborn*, 260 N.C. 688, 690, 133 S.E.2d 761, 762 (1963). "When the death of a person is caused by a wrongful act . . . of another . . . the person or corporation that would have been . . . liable . . . shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent . . . ." N.C.G.S. § 28A-18-2(a) (1984). Similarly, "[u]pon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, . . . shall survive to and against the personal representative or collector of his estate." N.C.G.S. § 28A-18-1(a) (1984). Though the personal representative of the decedent has the authority to maintain and

settle actions for wrongful death, he or she must do so in accordance with the provisions of N.C.G.S. § 28A-13-3(23).

In sum, the release itself does not purport to settle anything other than the claims belonging to Danny and Brenda Greer as individuals, and Brenda Greer had no authority to settle the wrongful death claim of the fetus prior to qualifying as administratrix of her daughter's estate. Thus, the Court of Appeals was correct in holding that the release does not bar plaintiff's claim for punitive damages.

[2] Next, the Court of Appeals considered whether this Court's decision in *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, barred plaintiff's claim for punitive damages because it was not joined with the Greers' claims under the settlement. In *DiDonato*, the Court held that North Carolina's wrongful death statute, N.C.G.S. § 28A-18-2, permits "an action to recover for the destruction of a viable fetus *en ventre sa mere*." 320 N.C. at 430, 358 S.E.2d at 493. Such an action entitles the parents of the decedent to recover certain types of damages under the statute as long as they can be proved and are not based on sheer speculation. *Id.* The Court then held that, because of their speculative nature, damages for lost income, loss of services, companionship, advice and the like "will not be available in an action for the wrongful death of a viable fetus." *Id.* at 432, 358 S.E.2d at 494. The Court declined, however, to foreclose recovery for damages for pain and suffering as long as such damages could be reasonably established. *Id.*

With respect to punitive damages, the Court noted that a wrongful death action for a viable fetus created the possibility that a defendant could be made to pay twice to the same party for the same wrongful action. *Id.* This possibility arises because the parents of the decedent are the real parties in interest in the wrongful death action, and they, or at least the mother, frequently will have personal injury actions of their own against the tort-feasor. The Court noted that there had been essentially a single injury to the family unit and that the potential for a double recovery of punitive damages by the parents would be unjust. Therefore, the Court held that "plaintiff's claim for the wrongful death of a viable fetus must be joined with any claims based on the same acts of alleged negligence brought by the parents in their own right." *Id.* at 434, 358 S.E.2d at 495.

The trial court in this case, relying on *DiDonato*, granted summary judgment for defendants, apparently due to plaintiff's failure to join the wrongful death claim with the claims settled earlier. The Court of Appeals reversed. We hold that it did so correctly.

We note that the Greers settled their personal injury claims on 8 April 1987. The *DiDonato* decision was filed on 28 July 1987. Brenda Watson Greer qualified as administratrix of her daughter's estate on 28 July 1988. Thus, it was impossible for plaintiff to anticipate and comply with the mandatory joinder requirement announced in *DiDonato*, and we decline to apply that requirement to this case. In cases such as this, we agree with the following from the Court of Appeals opinion:

> Defendants' right not to be assessed with punitive damages that have already been paid can be protected in another, simpler way. If they allege that part of the moneys the parents received in settlement of their claims was for punitive damages[,] defendants would have a right . . . to support that contention with evidence and have the jury consider it in evaluating the Administratrix's claim for punitive damages, if that claim goes to the jury.

Greer, 103 N.C. App. at 468, 405 S.E.2d at 924.

II

[3] The trial court granted defendants' motion for summary judgment with respect to plaintiff's claim for recovery of pecuniary damages or damages for loss of services and companionship. For the reasons described above, the release signed by the Greers was not effective to bar this claim. The Court of Appeals correctly upheld the grant of summary judgment, however, under *DiDonato*. In *DiDonato*, we held:

> [L]ost income damages normally available under N.C.G.S. § 28A-18-2(b)(4)a. cannot be recovered in an action for the wrongful death of a stillborn child. . . .
>
> We also hold that damages normally recovered under N.C.G.S. § 28A-18-2(b)(4)b. & c.—loss of services, companionship, advice and the like—will not be available in an action for the wrongful death of a viable fetus. The reasons are the same as in the case of pecuniary loss. When a child is stillborn we simply cannot know anything about its personality and

other traits relevant to what kind of companion it might have been and what kind of services it might have provided. An award of damages covering these kinds of losses would necessarily be based on speculation rather than reason.

320 N.C. at 432, 358 S.E.2d at 494 (footnote omitted). We decline plaintiff's invitation to revisit this holding. Under *DiDonato*, the trial court properly granted summary judgment for the defendants on this issue.

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

Affirmed.

BARBARA DYER AND RONALD PERKINS v. STATE OF NORTH CAROLINA

No. 227PA91

(Filed 8 May 1992)

1. **Wills § 25 (NCI3d) — caveat — lack of testamentary capacity — jury verdict for propounder — substantial merit of claim — award of attorney fee to caveators**

The evidence supported the trial court's finding that a caveat filed on the ground that testatrix lacked the necessary testamentary capacity had substantial merit so as to permit the court to award an attorney fee to the caveators to be paid from the estate pursuant to N.C.G.S. § 6-21(2), notwithstanding the jury found that testatrix had the mental capacity to make a will, where caveators presented evidence tending to show that testatrix left all of her property to the State; testatrix had been involuntarily committed to a mental hospital for approximately three months some ten years before her death; her physical condition deteriorated very fast a few years before her death; she believed in witchcraft and talked about it every day; she thought her son was practicing witchcraft on her and put him out of the house; she kept a Bible at every door to keep the devil out and put salt between her mattresses to kept evil spirits away; testatrix had two personalities so that she was very receptive and would welcome

an elder from her church when he visited one day and the next day she would not do so; and testatrix told the elder that she could hear doors slamming and bells ringing when she was alone at home.

Am Jur 2d, Wills §§ 1094, 1095.

2. Wills § 25 (NCI3d) — caveat proceeding — amount of attorney fee

The trial court could properly rely on the statement of caveators' attorney that he had devoted over seventy hours to the case in determining the amount of the attorney fee to be awarded to the caveators and could determine the attorney's skill and the difficulties the attorney faced in trying the case by his observation of the attorney during the trial, and the court did not err in allowing $50.00 per hour for a total of $3,500 as the fee.

Am Jur 2d, Wills §§ 1094, 1095.

ON petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals reported at 102 N.C. App. 480, 402 S.E.2d 464 (1991), reversing an order of *Reid, J.*, entered at the 14 March 1990 Session of Superior Court, NEW HANOVER County. Heard in the Supreme Court 14 February 1992.

On 29 November 1982, Jannie Lou Perkins Alston (testatrix) executed a will devising all of her property to the State of North Carolina. She died on 21 November 1985. In March of 1986, the caveators, the children of the testatrix, filed a caveat proceeding seeking to annul the will on the ground that the testatrix lacked the necessary testamentary capacity at the time she executed her will. The caveat proceeding was heard in the superior court, and on 8 February 1990, a jury returned a verdict favoring the propounder of the will.

The caveators did not appeal but moved the court pursuant to N.C.G.S. § 6-21(2) for an award of attorneys' fees. The trial court awarded a fee to the caveators in the amount of $3,500 and directed that the fee be paid from the estate of the testatrix.

The Court of Appeals reversed the award of attorneys' fees to caveators, holding that the caveators did not present substantial evidence to support the order of the trial court.

Hardee & Hardee, by G. Wayne Hardee and Charles R. Hardee, for caveator-appellants.

Lacy H. Thornburg, Attorney General, by T. Buie Costen, Special Deputy Attorney General, for the State.

WEBB, Justice.

[1] This case is governed by N.C.G.S. § 6-21 which provides in part as follows:

> Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:
>
> . . . .
>
> (2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, that in any caveat proceeding under this subdivision, the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit.
>
> . . . .
>
> The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow[.]

We dealt with N.C.G.S. § 6-21(2) before it was in its present form in *In re Ridge*, 302 N.C. 375, 275 S.E.2d 424 (1981). At that time, the statute did not require that courts find that a caveat have substantial merit before allowing attorneys' fees as part of the costs, but it did provide that if a court should find the proceeding was without substantial merit it could disallow attorneys' fees for the caveator.

In interpreting the statute and setting forth the appropriate standard of review in *Ridge* we said:

> The findings of the trial judge are conclusive on appeal if there is competent evidence in the record to support them. . . . This is true even though there may be evidence in the record which could sustain findings to the contrary. . . . We

> must therefore determine whether the trial judge's award of caveators' attorneys' fees and costs from the estate constituted an abuse of discretion. In order to make that determination we must first consider whether there is competent evidence in the record before us to support the findings and conclusion of the trial judge.

In re Ridge, 302 N.C. at 380, 275 S.E.2d at 427.

Although N.C.G.S. § 6-21(2) has been amended so that it now provides that the court must find that a caveat proceeding has substantial merit before it may award an attorney's fee, the standard of review of an order made under the section has not been changed. If the findings of the superior court are supported by the evidence we cannot disturb them.

In this case the court found as a fact, "[t]hat evidence was presented which suggested that there was reasonable grounds to suspect that Jannie Lou Perkins Alston suffered from some mental illness such that she was not of sound mind at the time she signed the paper writing which has been adjudicated to be her last will and testament." The court concluded "as a matter of law, that the filing of the caveat was apt and proper, was done in good faith, and had substantial merit." If this finding of fact is supported by the evidence, it supports the conclusion made by the superior court.

In this case the record shows that the testatrix died in 1985. She had been involuntarily committed to Cherry Hospital on 12 February 1975 and was discharged on 6 May 1975. The testatrix' daughter testified that her mother's physical condition was "deteriorating very fast" in 1981. Her son testified that she believed in witchcraft and talked about it every day. He also testified his mother thought he was practicing witchcraft on her and put him out of the house, that she kept a Bible at every door to keep the devil out, that she put salt between her mattresses, apparently to keep evil spirits away from her. An elder in her church testified the testatrix had two personalities so that she was very receptive and would welcome him one day when he visited and the next day she would not do so. The elder also testified that the testatrix told him she could hear doors slamming and bells ringing when she was alone at home. We hold that this evidence supports the finding of fact by the superior court that there was evidence presented which suggested the testatrix was not of sound mind.

This finding of fact supports the conclusion that there was substantial merit in the caveat.

The propounders offered substantial evidence that the testatrix did have the mental capacity to make a will and the jury so found, but that is not the test. We do not weigh the evidence and it was error for the Court of Appeals to do so. There was competent evidence in the record to support the findings of the superior court and we are bound by those findings.

[2] The State also contends there was not sufficient evidence to support the amount awarded as an attorney's fee. After the trial was complete, the court inquired of the attorney for the caveators as to how much time he had devoted to the case. The attorney told the court he had spent over seventy hours on the case. The court said it would allow $50.00 per hour as an attorney fee for a total of $3,500. The court found as a fact that the attorney for the caveators devoted in excess of 75 hours for the preparation and trial of the case and taxed an attorney's fee of $3,500 as a part of the costs.

The State, relying on *In re Estate of Tucci*, 104 N.C. App. 142, 408 S.E.2d 859 (1991), *rev. granted*, 330 N.C. 612, 412 S.E.2d 96 (1992), *Barker v. Agee*, 93 N.C. App. 537, 378 S.E.2d 566, *aff'd in part, rev'd in part*, 326 N.C. 470, 389 S.E.2d 803 (1990) and *Epps v. Ewers*, 90 N.C. App. 597, 369 S.E.2d 104 (1988), argues that the amount of the award of the attorney's fee was not supported by competent evidence or proper findings of fact. We hold that the court properly relied on the statement of the caveators' attorney as to the amount of time he devoted to the case. The attorney was an officer of the court. The court observed the attorney during the trial and could determine his skill in trying the case as well as the difficulty of the problems faced by the attorney. We assume the court took these factors into account in setting the attorney's fee. The amount of the fee was within the discretion of the court. The findings of fact are supported by the evidence and the findings of fact support the conclusion of the court. The court did not abuse its discretion in awarding the attorney's fee.

We reverse the decision of the Court of Appeals and remand for an order from that court reinstating the order by the Superior Court, New Hanover County.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JOHN PAUL JEWELL

No. 510A91

(Filed 8 May 1992)

APPEAL pursuant to N.C.G.S. § 7A-30(2) from a divided panel of the Court of Appeals, 104 N.C. App. 350, 409 S.E.2d 757 (1991), which affirmed the sentences imposed on defendant by *Greeson, J.*, pursuant to the defendant's pleas of guilty on 5 December 1989 in Superior Court, FORSYTH County, to attempted first degree burglary and accessory after the fact of murder. Heard in the Supreme Court 15 April 1992.

Lacy H. Thornburg, Attorney General, by J. Bruce McKinney, Assistant Attorney General, for the State.

David F. Tamer for defendant appellant.

PER CURIAM.

Affirmed.

JEFFERSON L. EVERS v. PENDER COUNTY BOARD OF EDUCATION AND HAYWOOD DAVIS, SUPERINTENDENT

No. 453A91

(Filed 8 May 1992)

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from a decision by a divided panel of the Court of Appeals, 104 N.C. App. 1, 407 S.E.2d 879 (1991), which affirmed an order entered by *Strickland, J.*, in Superior Court, PENDER County, upholding the dismissal of plaintiff as a teacher in the Pender County School System. Heard in the Supreme Court 15 April 1992.

Reid, Lewis, Deese & Nance, by James R. Nance, Jr., for plaintiff appellant.

Hogue, Hill, Jones, Nash & Lynch, by William L. Hill, II, for defendant appellees.

PER CURIAM.

For the reasons stated in the opinion by Judge Wynn for the Court of Appeals, the decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; THE PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION (INTERVENORS), METRO MOBILE CTS OF CHARLOTTE, INC.; GTE MOBILE COMMUNICATIONS INCORPORATED; CONTEL CELLULAR CORPORATION; G.M.D. PARTNERSHIP; BLUE RIDGE CELLULAR TELEPHONE COMPANY; CENTEL CELLULAR COMPANY; N.C. RSA 2 CELLULAR TELEPHONE COMPANY; N.C. RSA 3 CELLULAR TELEPHONE COMPANY; CELLCOM OF HICKORY, INC.; ALLTEL MOBILE COMMUNICATIONS, INC.; UNITED STATES CELLULAR CORPORATION (JOINT PETITIONERS); CAROLINA TELEPHONE AND TELEGRAPH COMPANY; EASTERN RADIO SERVICE, INC.; AND N.C. CELLULAR ASSOCIATION, INC.	)	
v.	)	ORDER
ATTORNEY GENERAL LACY H. THORNBURG (INTERVENOR)	)	

No. 103PA92

(Filed 8 May 1992)

PURSUANT to its orders dated 21 and 23 April 1992, allowing plaintiffs' petition for writ of certiorari to review and determine only the question whether the Court of Appeals' decision made 12 March 1992 to issue its writ of supersedeas should be affirmed or reversed, the Court, upon consideration of the plaintiffs' petition with attachments thereto and the defendant's response, determines said decision should be reversed. Accordingly, the writ of supersedeas of the Court of Appeals issued 12 March 1992 temporarily staying the 14 February 1992 order of the North Carolina Utilities Commission is hereby vacated.

Done by the Court in Conference this the 7th day of May 1992.

LAKE, J.
For the Court

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

AETNA CASUALTY AND SURETY CO. v. FIELDS

No. 134P92

Case below: 105 N.C.App. 563

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 May 1992.

BARHAM v. BARHAM

No. 125P92

Case below: 105 N.C.App. 619

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 May 1992.

BROWN v. BROWN

No. 85P92

Case below: 104 N.C.App. 547

Petition by defendant for a writ of certiorari to the North Carolina Court of Appeals denied 7 May 1992.

DAUM v. LORICK ENTERPRISES

No. 116P92

Case below: 105 N.C.App. 428

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 May 1992.

GRYB v. HIATT

No. 172P92

Case below: 106 N.C.App. 228

Petition by plaintiff for temporary stay pending determination of petition for discretionary review allowed 11 May 1992.

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

LAKE FOREST, INC. v. WILLIAMS

No. 68PA92

Case below: 104 N.C.App. 802

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals allowed 7 May 1992.

MGM DESERT INN v. HOLZ

No. 24P92

Case below: 104 N.C.App. 717

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 May 1992.

NEWBERRY METAL MASTERS FABRICATORS v. MITEK INDUSTRIES

No. 114PA92

Case below: 105 N.C.App. 445

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 May 1992 only as to Rule 41(a) issue.

RUTLEDGE v. STROH COMPANIES

No. 131P92

Case below: 105 N.C.App. 307

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 May 1992.

STATE v. DARTY

No. 66P92

Case below: 104 N.C.App. 804

Petition by defendant (Pro Se) for writ of certiorari to the North Carolina Court of Appeals denied 7 May 1992. Petition by defendant (through counsel) for writ of certiorari to the North Carolina Court of Appeals denied 7 May 1992.

STATE v. MURPHY

No. 133P92

Case below: 105 N.C.App. 716

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 May 1992. Amended petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 May 1992.

STATE v. QUARG

No. 164P92

Case below: 106 N.C.App. 106

Petition by Attorney General for temporary stay allowed 8 May 1992 pending consideration and determination of his petition for discretionary review.

STATE v. YOUNG

No. 142P92

Case below: 105 N.C.App. 619

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 May 1992.

WILSON FORD TRACTOR v. MASSEY-FERGUSON, INC.

No. 144PA92

Case below: 105 N.C.App. 570

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 May 1992.

WIREWAYS, INC. v. MITEK INDUSTRIES

No. 115PA92

Case below: 105 N.C.App. 445

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 May 1992 only as to Rule 41(a) issue.

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

PETITION TO REHEAR

SEGREST v. GILLETTE

No. 49PA90

Case below: 331 N.C. 97

Petition by plaintiff to rehear pursuant to Appellate Rule 31 denied 7 May 1992.

STATE OF NORTH CAROLINA v. ZANE BROWN HILL

No. 233A91

(Filed 25 June 1992)

1. **Constitutional Law § 372 (NCI4th)— death penalty—no prosecutorial discretion**

The death penalty statute, N.C.G.S. § 15A-2000, does not unconstitutionally give the district attorney the discretion to decide whether to seek the death penalty.

Am Jur 2d, Criminal Law § 628.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L. Ed. 2d 1001.

2. **Criminal Law § 1334 (NCI4th)— death penalty—failure to list aggravating circumstances in indictment**

The State did not violate the guarantees of due process contained in the U.S. Constitution and in Art. I, § 23 of the N.C. Constitution by failing to list in the indictment the aggravating circumstances upon which it would rely during a capital sentencing proceeding.

Am Jur 2d, Indictments and Informations §§ 7-10; Criminal Law §§ 825, 826, 830.

3. **Jury § 7.14 (NCI3d)— doubts about death penalty—peremptory challenges**

It was not improper for the prosecutor in a capital case to use the State's peremptory challenges to remove potential jurors who expressed doubts about capital punishment.

Am Jur 2d, Criminal Law § 685.

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

4. **Jury § 6.4 (NCI3d)— death penalty views—challenge for cause—rehabilitation by defendant not allowed**

The trial court in a capital case did not err in refusing to allow defendant to rehabilitate prospective jurors challenged for cause by the State because of their expressed inability

to comply with the law because of their death penalty views where there was no showing that further questioning by defendant would likely have produced different answers to the questions propounded to the challenged jurors.

Am Jur 2d, Criminal Law § 685.

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

5. Jury § 6.3 (NCI3d)— voir dire examination—attempt to stake out jurors—improper questions

The trial court did not abuse its discretion in refusing to allow defendant to ask prospective jurors (1) what type of crimes they felt were deserving of the death penalty, (2) whether they understood that they might find defendant guilty of something other than first degree murder, (3) whether they believed that any type of premeditated murder was deserving of the death penalty, (4) whether they understood that all of them need not agree that a mitigating circumstance existed in order for individual jurors to consider it mitigating, and (5) whether they would "feel the need to hear from" defendant in order to find him not guilty, since each of these questions sought to "stake out" the jurors as to their answers to legal questions before the jurors had been informed in any manner of applicable legal principles by which they should be guided.

Am Jur 2d, Jury § 203.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.

6. Criminal Law § 466 (NCI4th)— comments by prosecutor—defense counsel with Public Defender's Office—absence of prejudice

Defendant was not prejudiced when the prosecutor in a capital case, during questioning of prospective jurors, mentioned that both defense counsel served with the Public Defender's Office and the jurors thus learned that tax dollars were paying for his defense where defendant failed to object to the prosecutor's statements at trial, and defendant himself

testified extensively about his impoverished status and his reliance on various programs for support.

Am Jur 2d, Appeal and Error § 508.

Prosecutor's appeal in criminal case to self-interest or prejudice of jurors as taxpayers as ground for reversal, new trial, or mistrial. 60 ALR4th 1063.

7. Evidence and Witnesses § 344 (NCI4th)— felonious assault on wife—previous threat—relevancy to show intent

In a prosecution of defendant for assaulting his wife with a deadly weapon with intent to kill, testimony by the victim that defendant broke into her house and threatened to kill her six weeks before the incident in question was relevant and admissible to show defendant's intent and ill will toward the victim. Furthermore, the trial court did not err by failing to exclude this testimony as being unfairly prejudicial under Rule of Evidence 404(b).

Am Jur 2d, Assault and Battery § 51.

8. Criminal Law § 557 (NCI4th)— restraining order against defendant—testimony withdrawn and cautionary instruction given—mistrial denied

The trial court did not err in denying defendant's motion for a mistrial in his trial for murdering his son and feloniously assaulting his wife after an officer briefly mentioned during her testimony the existence of a restraining order against defendant where the trial court cured any error by withdrawing the challenged evidence from the jury's consideration and issued a cautionary instruction. Furthermore, defendant mentioned the restraining order during his own testimony and thereby waived any error in this regard.

Am Jur 2d, Appeal and Error § 807.

9. Evidence and Witnesses § 1694 (NCI4th)— photographs of victim's body—admissibility for illustrative purposes

The trial court did not abuse its discretion in admitting for illustrative purposes five photographs taken of a murder victim's body at the crime scene where the photographs, which showed the victim tangled in a telephone cord with a pistol in his front pants pocket, illustrated the testimony of the crime

scene technician and tended to refute defendant's explanation of the killing.

Am Jur 2d, Homicide § 417.

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

10. Homicide § 244 (NCI4th)— first degree murder—sufficient evidence of premeditation and deliberation

The State's evidence was sufficient to establish the elements of premeditation and deliberation so as to support defendant's conviction of first degree murder where it tended to show that defendant left a garage near his wife's house when his wife arrived home from work; as he was leaving, defendant told some teenagers nearby that they were "going to see some blue lights now"; defendant then retrieved a .22 caliber rifle from a trailer on the property and went to his wife's house carrying the loaded gun; after entering the house, defendant pointed the rifle at his son; when defendant's son went to telephone for help, defendant followed him to another room and shot him three times; and defendant then fled.

Am Jur 2d, Homicide § 439.

11. Evidence and Witnesses § 110 (NCI4th); Homicide § 100 (NCI4th)— habit of taking medication—inadmissibility to show diminished capacity

Questions posed to a defendant on trial for first degree murder as to whether he was in the habit of taking medication were not admissible under Rule of Evidence 406 to establish his habit of abusing prescribed medication and thus the defense of diminished capacity since (1) only direct evidence of defendant's impairment at the time of the murder is relevant to the defense of diminished capacity; (2) mere evidence of intemperance ordinarily does not meet the "invariable regularity" standard required of evidence of habit; (3) the questions posed to defendant were either not in the proper form or were without proper foundation; and (4) the court did allow questions dealing with defendant's use of alcohol and Darvon on the day of the killing. Furthermore, defendant was not prejudiced because ample evidence of defendant's long-term alcohol and drug abuse was already before the jury.

Am Jur 2d, Homicide § 115.

Comment Note—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

12. Evidence and Witnesses § 110 (NCI4th)— use of alcohol and drugs—habit—insufficient foundation

A defendant on trial for first degree murder failed to lay a proper foundation to establish a witness's testimony about defendant's use of alcohol and drugs as evidence of habit where the witness stated that she had no knowledge of defendant's drug use until she began living with him only a few months before the killing and had no knowledge of defendant's use of alcohol and drugs on the day of the killing.

Am Jur 2d, Evidence § 244.

13. Evidence and Witnesses § 2793 (NCI4th)— expert witness—exclusion of speculative testimony—absence of offer of proof

The trial court did not err when it excluded a psychiatrist's response to a question about the effect of medication on defendant's brain damage where the witness began his response by stating, "Well, we don't know, but the . . . ," since the trial court merely cut off a speculative response by the witness. Furthermore, the exclusion of this evidence was not preserved for appellate review where defendant made no offer of proof of the excluded testimony.

Am Jur 2d, Expert and Opinion Evidence § 200.

14. Evidence and Witnesses § 752 (NCI4th)— admission of evidence—introduction of similar evidence—waiver of error

In a prosecution of defendant for murder of his son and assault on his wife, defendant waived any error in the State's cross-examination of him about an adulterous relationship when he previously introduced evidence of this adulterous relationship.

Am Jur 2d, Witnesses § 811.

15. Evidence and Witnesses § 967 (NCI4th)— discharge summary—insufficient foundation—exclusion harmless error

Defendant failed to lay a proper foundation for the admission of defendant's discharge summary from a psychiatric hospital where a psychiatrist testified that he reviewed the summary in forming his opinion, but he never stated affirma-

tively that the summary contained facts upon which he based his opinion regarding defendant's state of mind. Assuming *arguendo* that the discharge summary was admissible under Rule of Evidence 803(6), defendant was not prejudiced by its exclusion since the psychiatrist testified to the same facts as those contained in the summary.

Am Jur 2d, Expert and Opinion Evidence § 186.

Admissibility on issue of sanity of expert opinion based partly on medical, psychological, or hospital reports. 55 ALR3d 551.

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludable as hearsay—state cases. 89 ALR4th 456.

16. Criminal Law § 900 (NCI4th)— verdict form—order of issues

The trial court did not err in failing to rearrange the verdict form by placing the blank for "Not Guilty" at the top, followed by the blanks for the lesser included offenses, and then by the blank for first degree murder.

Am Jur 2d, Trial § 1825.

17. Criminal Law § 734 (NCI4th)— instructions—use of "victim"—no expression of opinion

The trial court in a first degree murder trial did not intimate that defendant was guilty by using the word "victim" rather than the term "deceased" in the jury charge.

Am Jur 2d, Trial § 1204.

18. Evidence and Witnesses § 1064 (NCI4th)— flight—order of instructions

The trial court did not err in giving its instructions on flight immediately after giving its instructions on first degree murder.

Am Jur 2d, Trial § 1146.

19. Evidence and Witnesses § 752 (NCI4th)— question about "adulterous" relationship—other similar evidence—absence of prejudice

Assuming error *arguendo* in the State's question to a psychiatrist during a capital sentencing proceeding as to whether

defendant had left his wife and entered into an "adulterous" relationship with another woman, defendant was not prejudiced where defendant himself testified about his adulterous relationship with the other woman and the woman testified about her relationship with defendant.

Am Jur 2d, Appeal and Error § 776.

20. Criminal Law § 1310 (NCI4th)— capital sentencing proceeding—exclusion of evidence—offer of proof

The propriety of the trial court's exclusion of purported mitigating testimony by two witnesses in a capital sentencing proceeding was not before the appellate court where defendant made no offer of proof of the responses of the witnesses.

Am Jur 2d, Appeal and Error § 604.

21. Criminal Law § 1314 (NCI4th)— capital sentencing proceeding—witness's feelings if defendant executed—exclusion proper

The trial court properly refused to permit the son of defendant's girlfriend to answer a question during a capital sentencing proceeding as to how he would feel if the jury voted to kill defendant since this was not a proper matter for consideration in sentencing defendant as it did not involve any aspect of defendant's character or record or any of the circumstances of the offense.

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

22. Criminal Law § 1309 (NCI4th)— capital sentencing proceeding—irrelevant evidence

In a capital sentencing proceeding wherein a witness testified that defendant and a friend had been bitten by a rabid dog when they were children and that defendant began to drink after receiving the painful rabies treatment, the trial court properly refused to allow the witness to testify that defendant's friend who had been bitten by the rabid dog committed suicide fifteen years later since defendant established no linkage between the rabies treatment, the suicide, and defendant.

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

23. Criminal Law § 1362 (NCI4th)— capital sentencing proceeding—mitigating circumstance—age of defendant

The trial court did not err in refusing to submit the statutory mitigating circumstance of defendant's age for the jury's consideration in a capital sentencing proceeding where defendant's chronological age was fifty-four, defendant argues that his physiological age was seventy-five to eighty, but defendant presented no evidence of advanced physiological age.

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

24. Criminal Law § 1363 (NCI4th)— capital sentencing proceeding—residual doubt as to defendant's guilt—improper mitigating circumstance

Lingering or residual doubt as to defendant's guilt is not a proper nonstatutory mitigating circumstance for submission to the jury in a capital sentencing proceeding.

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

25. Criminal Law § 1363 (NCI4th)— capital sentencing proceeding—mitigating circumstance—trauma from friend's suicide—insufficient evidence

The trial court did not err in refusing to submit to the jury in a capital sentencing proceeding the nonstatutory mitigating circumstance that defendant suffered trauma as a child due to the suicide of a close friend where defendant presented no evidence that the death of his friend caused him any trauma.

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

26. Criminal Law § 1349 (NCI4th)— nonstatutory mitigating circumstance—written request

The failure of the trial court to submit a nonstatutory mitigating circumstance to the jury in a capital sentencing proceeding is not error absent a timely written request for the submission of the circumstance.

Am Jur 2d, Homicide §§ 554, 559, 560; Criminal Law §§ 598, 599.

27. Criminal Law §§ 1324, 1363 (NCI4th)— capital sentencing proceeding—nonstatutory mitigating circumstance—failure to submit and list—harmless error

The trial court in a capital sentencing proceeding erred in failing to submit the nonstatutory mitigating circumstance as to whether defendant was a positive influence on a behaviorally-emotionally handicapped child and in failing to include such nonstatutory mitigating circumstance in writing on the form to be given the jury where defendant made a written request for submission of this circumstance and presented sufficient evidence during the sentencing hearing to support submission of this circumstance. However, this error was harmless beyond a reasonable doubt where (1) the jury was allowed to consider and must have given full consideration to all evidence of defendant's positive influence on the child in question when it considered the good character and catch-all mitigating circumstances, and (2) the evidence supporting this particular nonstatutory mitigating circumstance was of little import given the overwhelming evidence supporting defendant's conviction and the aggravating circumstances found by the jury.

Am Jur 2d, Homicide §§ 559, 560.

28. Criminal Law § 458 (NCI4th)— capital sentencing proceeding—jury argument—no reference to possibility of parole

The prosecutor's closing argument in a capital sentencing proceeding asking the jury whether it could guarantee that defendant would not get a .22 automatic sometime in the future and kill again if it chose not to exercise the option of the death penalty was not an improper reference to the possibility of parole since the prosecutor never mentioned the term "parole" and never argued the consequences of a life sentence.

Am Jur 2d, Homicide §§ 464, 555.

Prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 ALR3d 1137.

29. Criminal Law § 1323 (NCI4th)— capital sentencing proceeding—mitigating circumstances—instructions

The trial court in a capital sentencing proceeding did not err in instructing the jury that it must first find whether

each nonstatutory mitigating circumstance existed and then whether that circumstance had mitigating value.

Am Jur 2d, Homicide §§ 483, 561.

30. Criminal Law § 1347 (NCI4th)— capital sentencing proceeding—course of conduct aggravating circumstance—instructions—limiting consideration of other crimes

The trial court's instruction on the course of conduct aggravating circumstance for the first degree murder of defendant's son properly limited the jury's consideration to the conduct involved in defendant's attempt to kill his wife on the same date and did not allow the jury to consider events prior to the date of the murder where the court directed the jury that it was to consider other crimes of violence occurring "on or about" the day defendant killed his son, and the court used the terms "crime" and "person" in their singular forms in the challenged instruction.

Am Jur 2d, Homicide §§ 483, 561.

31. Criminal Law § 1357 (NCI4th)— mental or emotional disturbance mitigating circumstance—instructions—evidence considered

The trial court's instructions on the mental or emotional disturbance mitigating circumstance for the first degree murder of defendant's son did not prevent the jury from considering the testimony of a psychiatrist concerning defendant's jealousy and fear of separation from his wife as evidence supporting this circumstance where the instructions clearly directed the jury that, in order to find this mitigating circumstance, "it is enough that the defendant's mind or emotions were disturbed, from any cause."

Am Jur 2d, Homicide §§ 483, 561.

32. Criminal Law § 1361 (NCI4th)— impaired capacity mitigating circumstance—drug and alcohol use—sufficiency of instructions

Although the trial court did not specifically instruct the jury that it could consider evidence of defendant's drug and alcohol use on the day of the killing when determining whether defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the law was impaired, the trial court's instructions on the impaired capacity mitigating

circumstance were not improper where they did not preclude the jury from considering and weighing that evidence for this purpose.

Am Jur 2d, Homicide §§ 483, 561.

33. Criminal Law § 1348 (NCI4th)— definition of mitigating circumstance—failure to give requested instruction

The trial court did not err by failing to give defendant's tendered instruction generally defining the term "mitigating circumstance" where the court gave the jury a correct general definition of "mitigating circumstance" drawn directly from the pattern jury instructions.

Am Jur 2d, Homicide §§ 483, 561.

34. Criminal Law § 1348 (NCI4th)— capital case—instructions on mitigating circumstances—avoidance of use of "sympathy"

Trial courts should avoid mentioning "sympathy" in instructions concerning mitigating circumstances in capital sentencing proceedings, as there will always be some danger that some jurors will misconstrue any suggestion that they may consider sympathy during sentencing as giving them the type of unbridled discretion as to sentencing which violates the Eighth Amendment. Instead, when instructing the jury to consider the statutory catch-all mitigating circumstance of "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value," trial courts should emphasize that the jury must weigh all mitigating considerations whatsoever which it finds supported by evidence. N.C.G.S. § 15A-2000(f)(9).

Am Jur 2d, Homicide §§ 483, 561.

35. Jury § 6.4 (NCI3d)— voir dire—death penalty views—no Morgan error

Defendant's rights under the Fourteenth Amendment as set forth in *Morgan v. Illinois*, --- U.S. --- (1992), were not violated where defendant was permitted to seek information on the views of prospective jurors as to whether they would automatically sentence defendant to death regardless of the facts of the case and defendant received answers on this matter.

Am Jur 2d, Homicide § 466.

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

36. Criminal Law § 1373 (NCI4th)— death penalty—not excessive or disproportionate

The sentence of death imposed on defendant for the first degree murder of his son was not excessive or disproportionate to the penalty imposed in similar cases considering the crime and defendant where the evidence showed that defendant deliberately entered the house of his estranged wife and threatened his wife and his son with a rifle; defendant then deliberately shot his son three times when his son attempted to telephone law enforcement authorities for help; defendant then struck his wife with the butt of his rifle when she came to her mortally wounded son; if defendant had not had to reload the rifle, giving his wife time to escape, defendant would likely also have shot and killed her at that time; and having failed to do so, defendant pursued her and attempted to shoot her as she was running away from the house.

Am Jur 2d, Homicide §§ 549, 552.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L. Ed. 2d 1001.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment and sentence of death upon the defendant's conviction of first-degree murder, entered by *Allen (C. Walter), J.*, in the Superior Court, BUNCOMBE County, on 2 October 1990. The defendant's motion to bypass the Court of Appeals on his appeal of an additional judgment for assault with a deadly weapon with intent to kill was allowed by the Supreme Court on 10 June 1991 and that appeal was consolidated with the defendant's appeal of the murder conviction. Heard in the Supreme Court on 12 February 1992.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.

William D. Auman and Robert W. Clark, Assistant Public Defenders, Twenty-Eighth Judicial District, for the defendant-appellant.

MITCHELL, Justice.

The State's evidence tended to show the following. In October 1989 the defendant Zane Brown Hill abandoned his wife Bonnie Hill. Early on the morning of 29 November 1989, the defendant broke a bedroom window and entered his estranged wife's home. The defendant placed a pistol to his wife's throat and said he had come to kill her. He then ordered his wife to bed. The defendant soon passed out, and Mrs. Hill left the house.

On 10 January 1990 Mrs. Hill left for work at 6:20 a.m. The defendant telephoned her at work several times that day to discuss the possibility of their reconciliation. Mrs. Hill arrived home at approximately 5:30 p.m. and noticed the defendant's van behind a trailer located on her property. Mrs. Hill went into the house and spoke with her son Randall and the defendant's mother who also lived with her. Mrs. Hill and Randall saw the defendant leave the nearby trailer and approach the house carrying a rifle. Randall then got a pistol from within the house.

The defendant entered the house and pointed his rifle at his son Randall. The defendant had alcohol on his breath. Randall asked his father to put the rifle down. The defendant's mother also attempted to calm the defendant. During the commotion, Randall went to a bedroom to call the police. The defendant ran after Randall. Mrs. Hill heard one shot fired, and then Randall moaned. A second shot was fired, and Randall moaned again. A third and final shot was then fired.

Mrs. Hill ran into the bedroom and saw her son lying on the floor with the telephone receiver in his hand. She attempted to help her son, but the defendant struck her with the butt of the rifle knocking her to the floor. As the defendant was attempting to reload the rifle, Mrs. Hill ran out of the house. As she ran across her yard, she heard gunshots. Glancing over her shoulder, she saw the defendant standing on her porch holding the rifle. She ran to a neighbor's house and asked the neighbor to call the police. The defendant did not pursue her.

Jason Scott Smith, a neighbor of Mrs. Hill's, testified that on 10 January 1990 he saw the defendant at a garage near the Hill residence. When Mrs. Hill arrived at home that afternoon, the defendant told Smith, "You're going to see some blue lights now." A few minutes later Smith saw Mrs. Hill run out of the

house. The defendant came out to the porch and shot toward her, but he missed.

Jeremy Banks also saw the defendant at the garage near the Hill residence on 10 January 1990. Banks saw Mrs. Hill arrive home from work. The defendant then went into the house with a gun. Five minutes later, Mrs. Hill ran out of the house, and the defendant shot at her from the porch.

Sheriff's deputies apprehended the defendant later that day. They found the defendant lying in the front seat of a truck with a rifle underneath him. The deputies seized the rifle.

At the crime scene, the deputies found Randall's body on the floor of a bedroom. The telephone cord was wrapped around his arm, and the receiver was on the floor.

An autopsy of Randall Hill's body revealed three gunshot wounds: (1) one in the upper abdomen; (2) one in the upper middle back; and (3) one in the left upper side of the back. One bullet had passed through the aorta producing massive bleeding inside Randall's chest. Randall Hill died from the combination of gunshot wounds to his chest and abdomen.

The deputies collected .22 caliber spent shell casings from inside Mrs. Hill's house and from her front porch. A .22 caliber bullet was recovered from Randall Hill's body. Ballistics tests showed that the spent shells had been fired from the rifle seized from the defendant. The deputies also retrieved a fully loaded .38 caliber pistol from Randall's right front pants pocket.

The defendant introduced evidence tending to show the following. The defendant had a long history of alcohol and drug abuse. On 10 January 1990 the defendant began drinking at 9 a.m. and consumed twelve beers during the course of the day. The defendant also took four Darvons, a pain reliever, and two Flexorils, a muscle relaxant.

The defendant called his wife at her work on 10 January 1990 to discuss a possible reconciliation. He testified that he went to the trailer near the Hill residence because his wife asked him to do so. When Mrs. Hill arrived home at approximately 5:45 p.m., the defendant walked up to the house with a rifle intending to leave it in the house as he had always done. When the defendant entered the house, Randall threatened him with a pistol. Randall

went to telephone the sheriff, and the defendant followed. While Randall was on the phone, Randall drew the pistol on the defendant a second time. The defendant testified, "I just figured he was going to maybe shoot me, and I pulled the trigger, I reckon. That's all I remember." The defendant testified that he never reloaded the rifle, never struck his wife with it, and never fired it at her.

The defendant testified that he left the house after shooting Randall. While walking through a field, he fell into a creek. He then borrowed clean clothes from a neighbor. Later, he got into a truck and fell asleep on the front seat. The sheriff's deputies woke him later and arrested him.

The defendant also testified about the November 1989 incident when he entered Mrs. Hill's residence. The defendant testified that he went to his estranged wife's house to retrieve some of his clothes. His wife had changed the locks to the house. He broke a window because he had no other way to enter the house.

At the time he killed Randall, the defendant was living with Teresa Taylor and her son Edward. Taylor testified that the defendant treated her son Edward like his own son. Taylor also testified that the defendant took Darvon and other prescription drugs for pain.

Dr. Richard Reed Felix, a psychiatric expert, conducted a psychiatric evaluation of the defendant. He testified that the defendant took prescription drugs for pain resulting from his arthritis. Dr. Felix testified that on 10 January 1990 the defendant suffered from a degree of brain damage, primarily to the frontal and limbeck areas which control the processing and sorting of information. The defendant's long-term alcohol abuse had contributed to his brain damage. In Dr. Felix's opinion, the drugs the defendant testified that he had consumed on the day of the killing, coupled with the eight to ten beers the defendant said he drank, would have aggravated his mental impairment and worsened his perception.

Mrs. Hill, the defendant's wife, testified for the State on rebuttal about an incident on 1 January 1990 when the defendant came to her residence with a pistol. The defendant and Mrs. Hill went for a drive on that day, and the defendant shot the pistol two times into the floorboard of the car. The defendant then rented a motel room, and the defendant and Mrs. Hill went to bed. Shortly afterwards, the defendant passed out. Mrs. Hill found the pistol the defendant had been carrying, took it with her, and went home.

At some point during the incident, the defendant threatened to kill Mrs. Hill.

Other evidence introduced in the trial court is discussed at other points in this opinion, where pertinent to the issues raised by the defendant.

[1] In his first assignment of error, the defendant contends that the death penalty as provided for by N.C.G.S. § 15A-2000 is unconstitutional because the district attorney has the discretion to decide whether to seek the death penalty. "[T]he question of trying a first degree murder case as capital or non-capital is not within the district attorney's discretion." *State v. Britt*, 320 N.C. 705, 709, 360 S.E.2d 660, 662 (1987). The defendant's argument is without merit.

[2] The defendant also argues under this assignment that the State violated the guarantees of due process contained in the Constitution of the United States and Article I, Section 23, of the Constitution of North Carolina by not listing in the indictment the aggravating circumstances upon which it would rely during any sentencing proceeding under N.C.G.S. § 15A-2000. This Court rejected a similar argument in *State v. Williams*, 304 N.C. 394, 420-22, 284 S.E.2d 437, 453-54 (1981), *cert. denied*, 456 U.S. 932, 72 L. Ed. 2d 450 (1982). N.C.G.S. § 15A-2000(e) sets forth an exclusive list of the only eleven aggravating circumstances which may be considered by the jury. Therefore, the statute fully apprised the defendant of all of the aggravating circumstances that the State might rely upon in seeking the death penalty. *Id.* at 422, 284 S.E.2d at 454. No more was required. *Id.* This assignment of error is overruled.

[3] In his next assignment of error, the defendant contends that the trial court allowed the prosecutor to unconstitutionally select a jury uncommonly willing to recommend a sentence of death by using the State's peremptory challenges to remove potential jurors who expressed doubts about capital punishment. The defendant concedes that this Court has rejected this argument many times. *E.g. State v. Bacon*, 326 N.C. 404, 414, 390 S.E.2d 327, 333 (1990); *State v. Spangler*, 314 N.C. 374, 380, 333 S.E.2d 722, 727 (1985). We continue to adhere to our prior holdings on this issue.

[4] The defendant next assigns as error the trial court's refusal to allow defense counsel to rehabilitate jurors whom the State

moved to excuse for cause because of their expressed inability to comply with the law. Specifically, the defendant contends that the trial court's failure to allow defense counsel to inquire into the jurors' beliefs on the death penalty and their ability to follow the law denied him due process of law. The defendant points only to the examination of prospective juror Carol Jordan Shumbera as an example of the trial court's purported error. A review of the trial transcript reveals that Ms. Shumbera unequivocally stated she would not be able to follow the law. In earlier cases, we have concluded that the defendant is not entitled to engage in attempts to rehabilitate such jurors by repeating the questions the jurors have already answered. *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990); *State v. Zuniga*, 320 N.C. 233, 250, 357 S.E.2d 898, 909, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). " 'When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged [about the same matter].' " *Cummings*, 326 N.C. at 307, 389 S.E.2d at 71 (quoting *State v. Oliver*, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1983)). The defendant has not made such a showing, and this assignment is without merit and is overruled.

[5] The defendant next assigns as error the trial court's failure to allow him to ask prospective jurors (1) what type of crimes they felt were deserving of the death penalty, (2) whether they understood that they might find the defendant guilty of something other than first-degree murder, (3) whether they believed that any type of premeditated murder was deserving of the death penalty, (4) whether they understood that all of them need not agree that a mitigating circumstance existed in order for individual jurors to consider it mitigating, and (5) whether they would "feel the need to hear from" the defendant in order to find him not guilty. We conclude that the trial court properly prevented the defendant from asking each of those questions in the context of the present case.

In *State v. Phillips*, 300 N.C. 678, 681-82, 268 S.E.2d 452, 455 (1980), we held that the trial court did not err by refusing to permit counsel for the defendant to ask a prospective juror whether the "defendant would have to prove anything to her before he

would be entitled to a verdict of guilty." In reaching that holding, we expressly stated that during jury selection,

> [c]ounsel should not fish for answers to legal questions *before the judge has instructed the juror on applicable legal principles by which the juror should be guided.* Counsel should not argue the case in any way while questioning the jurors. Counsel should not engage in efforts to indoctrinate, visit with or establish "rapport" with jurors. *Jurors should not be asked what kind of verdict they would render under certain named circumstances.*

Id. at 682, 268 S.E.2d at 455 (emphasis added). In the present case, each of the above-listed questions counsel for the defendant sought to ask represented attempts to "stake out" the jurors as to their answers to legal questions before the jurors had been informed in any manner of applicable legal principles by which they should be guided. In the context in which they were asked in this case, none of the rejected questions amounted to a proper inquiry as to whether the jury could follow the law or "whether the juror would be able to follow the trial court's instructions." *Id.; see State v. Hedgepeth*, 66 N.C. App. 390, 393-94, 310 S.E.2d 920, 922-23 (1984); N.C.G.S. § 15A-1214(c) (1988). The nature and extent of the inquiry made of prospective jurors on *voir dire* ordinarily rests within the sound discretion of the trial court. *State v. Brown*, 315 N.C. 40, 53, 337 S.E.2d 808, 820 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). The defendant has shown no abuse of discretion in the present case. This assignment of error is without merit and is overruled.

[6] In his next assignment of error, the defendant argues that he suffered prejudice requiring a new trial when the prosecutor, during questioning of prospective jurors, mentioned that both of the counsel for the defendant served with the Public Defender's Office. The defendant argues that the prosecutor's statements highlighted his impoverished status and created a bias among the jurors when they learned that their tax dollars were paying for his defense. The defendant did not object at trial to the prosecutor's statements. After the prosecutor mentioned the defense counsel's association with the Public Defender's Office a second time, the trial court intervened *ex mero motu* and directed the prosecutor

not to mention this fact again. The prosecutor complied with the directive of the trial court.

The defendant failed to object to the prosecutor's statements at trial. Therefore, this issue was not preserved for appellate review. N.C. R. App. P. 10(b)(1). In any event, our review of the transcript and record in this capital case reveals that the defendant himself testified extensively about his impoverished status and his reliance on various programs for support. The prosecutor's comment on his status could not have prejudiced him. This assignment is not properly before this Court and is dismissed.

[7] The defendant contends in his next assignment that the trial court erred by allowing Mrs. Hill to testify about the November 1989 incident when the defendant broke into her house and threatened to kill her. The defendant argues that this evidence is outside the scope of Rule 404(b) of the North Carolina Rules of Evidence. The defendant further contends that even if the testimony of Mrs. Hill in this regard was otherwise admissible, it should have been excluded as being unfairly prejudicial to the defendant.

Mrs. Hill testified on direct examination that on 29 November 1989 the defendant broke into her house, put a pistol to her throat, and threatened to kill her. Evidence of other offenses committed by the defendant is admissible under Rule 404(b) so long as it is relevant to the other facts at issue. *State v. Spaugh*, 321 N.C. 550, 364 S.E.2d 368 (1988). Rule 404(b) provides that while "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show he acted in conformity therewith," such evidence is "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b) (1988). "Rule 404(b) state[s] a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). When a husband is charged, as here, with an attack upon his wife with intent to kill her, "the State may introduce evidence covering the entire period of his married life to show malice, intent and ill will toward the victim." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990). Evidence of the 29 November

1989 incident was directly related to the relationship of Mrs. Hill and the defendant shortly before he shot at her. It is one circumstance which tends to shed light on the crime charged by tending to show that approximately six weeks before the crime the defendant had the intent to kill his wife. The testimony involved a direct threat to Mrs. Hill made a few weeks before the assault and was relevant and admissible.

The defendant also argues that even if the evidence was not excludable under Rule 404(b), the trial court erred by failing to exclude it as being unfairly prejudicial under Rule 403 of the North Carolina Rules of Evidence. The decision whether to exclude otherwise admissible evidence under Rule 403 is left to the discretion of the trial court. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). We find no abuse of discretion by the trial court in failing to exclude Mrs. Hill's testimony under the balancing test of Rule 403. This assignment of error is overruled.

[8] The defendant next assigns as error the trial court's denial of his motion for a mistrial after Detective Chris Jennings mentioned during her testimony the existence of a restraining order against the defendant. Under N.C.G.S. § 15A-1061, the trial court must declare a mistrial "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1988). In the present case, the trial court cured any error by withdrawing the challenged evidence from the jury's consideration and issuing a cautionary instruction. *State v. Smith*, 301 N.C. 695, 272 S.E.2d 852 (1981). Detective Jennings mentioned the restraining order only briefly during her testimony. The defendant immediately objected and moved to strike the testimony. The trial court granted the defendant's motion and gave the jury a proper cautionary instruction. As a result, the defendant can show no prejudice. Furthermore, the defendant during his own testimony mentioned the restraining order and thereby waived any error in this regard. We overrule this assignment of error.

[9] By his next assignment of error, the defendant argues that the trial court erred by admitting for illustrative purposes five photographs taken of the body of Randall Hill at the crime scene. According to the defendant, the photographs served no purpose

other than to inflame the jury and were unfairly prejudicial to the defendant.

Deputy Sheriff Patrick Hefner, the crime scene technician, testified about his observations at the crime scene. Hefner found Randall Hill entangled in the telephone cord and found a pistol in his front pants pocket. Hefner used the photographs to illustrate his testimony.

The determination of unfair prejudice due to the admission of photographs rests primarily within the sound discretion of the trial court. *State v. Mercer*, 275 N.C. 108, 120, 165 S.E.2d 328, 337 (1969), *overruled on other grounds by State v. Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975). The defendant made no showing that the State presented an excessive number of photographs or that the photographs were irrelevant. The defendant claimed he killed his son Randall in self-defense. The photographs showing the victim entangled in the cord with the pistol in his front pants pocket and the location of the gunshot wounds on the victim's body illustrated the testimony of the witness and tended to refute the defendant's explanation of the killing. We conclude that the trial court did not abuse its discretion in admitting the photographs, and we overrule this assignment of error.

[10] The defendant next assigns as error the trial court's denial of his motion to dismiss the charge of first-degree murder for insufficiency of the evidence. The defendant argues in this regard that the State presented insufficient evidence of premeditation and deliberation. According to the defendant, the evidence presented was only sufficient to support a conviction for second-degree murder.

The State's evidence tended to show that the defendant left a garage near his wife's house when his wife arrived home from work. As he was leaving, the defendant told some teenagers nearby that "You're going to see some blue lights now." The defendant then retrieved a .22 caliber rifle from a trailer on the property and went to the house carrying the loaded gun. After entering the house, the defendant pointed the rifle at his son. When the defendant's son went to telephone for help, the defendant followed him to another room and shot him three times. The defendant then fled. We conclude that this evidence was sufficient to establish the elements of premeditation and deliberation and to support a conviction for first-degree murder. *See State v. Austin*, 320 N.C. 276, 294-95, 357 S.E.2d 641, 653, *cert. denied*, 484 U.S. 916, 98

L. Ed. 2d 224 (1987); *State v. Bullard*, 312 N.C. 129, 160-61, 322 S.E.2d 370, 388-89 (1984).

[11] By his next assignment of error, the defendant argues that the trial court erred in sustaining numerous objections by the State to testimony by several defense witnesses, thereby excluding testimony of the defendant and defense witnesses that would have tended to show the defendant's long-term excessive consumption of alcohol and abuse of prescribed medication. The defendant contends that this evidence was admissible under Rule 406 as tending to establish his habit of alcohol and drug abuse and, thus, would have permitted the jury to infer that he was under the influence of alcohol and drugs on the day of the murder. Without this evidence, the defendant argues he was unable to establish the defense of diminished capacity.

The trial court sustained the State's objection to questions posed to the defendant as to whether he was in the habit of taking medication. Rule 406 of the North Carolina Rules of Evidence provides:

> Evidence of habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

N.C.G.S. § 8C-1, Rule 406 (1988). Generally, only direct evidence of the defendant's impairment at the time of the murder is relevant to the defense of diminished capacity. *See State v. Pinch*, 306 N.C. 1, 14-15, 292 S.E.2d 203, 216, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled in part on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988) and *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988). Mere evidence of intemperance ordinarily does not meet the "invariable regularity" standard required of evidence of habit. 1A John H. Wigmore, *Evidence* § 95 (Peter Tillers rev. 1983) [hereinafter Wigmore, *Evidence*]; *cf. Levin v. U.S.*, 338 F.2d 265 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 999, 13 L. Ed. 2d 701 (1965) (defendant's habit of being at home on the Sabbath not admissible to show he was in fact at home on a particular day).

In any event, the trial court did not err in sustaining the State's objections here, as the questions posed to the defendant

were either not in the proper form or were without proper foundation. The trial court properly sustained the State's objections to the leading questions asked of the defendant concerning his long-term intemperance. The trial court did allow questions dealing with the defendant's use of alcohol and Darvon on the day of the killing. Finally, the defendant can show no prejudice because ample evidence of the defendant's long-term alcohol and drug abuse was already before the jury.

The defendant also argues under this assignment that the trial court erred by excluding certain testimony of Leroy Luther regarding the defendant's consumption of alcohol. Luther had already testified generally about the defendant's use of alcohol. The defendant's offer of proof as to other testimony Luther would have given added no additional information. Therefore, the defendant could not have been harmed by the exclusion of Luther's proffered testimony.

[12] The defendant also argues under this assignment that the trial court erred by excluding proffered testimony of Teresa Taylor. The defendant lived with Teresa Taylor beginning in September or October before the January 1990 killing of Randall Hill. Taylor testified that the defendant took some prescription medication on the day of the killing. In an offer of proof by the defendant, Taylor stated that she had no knowledge of the defendant's drug use before September 1989 and had no knowledge of the defendant's use of alcohol on the day of the killing. The defendant failed to lay a proper foundation to establish Taylor's proffered testimony as evidence of habit. *See* 1A Wigmore, *Evidence* § 95. Taylor had limited knowledge of the defendant's long-term substance abuse, because she had only lived with him for a few months. Also, the questions posed by the defendant were leading and assumed facts not in evidence. The trial court properly excluded Taylor's testimony regarding the defendant's use of alcohol and drugs at times prior to the date of the crimes for which the defendant was on trial.

The defendant also argues under this assignment that the trial court erred in sustaining the State's objections to portions of the testimony of defense witness Robert Garner Warren. The defendant made no offer of proof concerning Warren's proffered testimony. Therefore, the defendant failed to preserve this issue for appellate review. *State v. King*, 326 N.C. 662, 674, 392 S.E.2d 609, 617 (1990).

[13] Dr. Richard Reed Felix, a psychiatrist, testified regarding the defendant's mental condition. According to Dr. Felix, the defendant suffered some brain damage and the defendant's use of alcohol and drugs worsened this condition. Dr. Felix expressed his opinion that, in light of the defendant's condition, "[I]f he had formed a plan, he wouldn't have been able to remember it." The defendant argues under this assignment that the trial court erred when it excluded Dr. Felix's response to a question on the effect of medication on the defendant's brain damage. The exclusion was proper because the doctor's response was "Well, we don't know, but the. . . ." The trial court by sustaining the State's objection merely cut off a speculative response by Dr. Felix. *See State v. Clark*, 324 N.C. 146, 160, 377 S.E.2d 54, 62 (1989). Furthermore, the defendant made no offer of proof of Dr. Felix's testimony excluded by the trial court. Therefore, we can only speculate as to what his answer would have been. "[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), *quoted in*, *State v. King*, 326 N.C. 662, 674, 392 S.E.2d 609, 617 (1990).

In sum, the exclusion of the evidence the defendant complains of in this assignment was not error because the questions were not in proper form or the defendant failed to make an offer of proof. Additionally, the record already contained extensive evidence of the defendant's long-term history of alcohol and drug abuse, and the defendant received the full benefit of this evidence. We overrule this assignment of error.

[14] The defendant next assigns as error the action of the trial court in allowing the State to cross-examine him about adulterous relationships. The defendant argues that evidence of such relationships was irrelevant. The defendant testified at trial that he went to the home of his estranged wife on 10 January because she invited him there to discuss the possibility of reconciliation. The State contended that the defendant's relationship with Teresa Taylor tended to refute the defendant's testimony that his estranged wife wished to reconcile. This issue is not properly before us because the defendant waived any error by presenting earlier similar evidence. *State v. Lloyd*, 321 N.C. 301, 308-09, 364 S.E.2d 316, 322, *vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18

(1988). During his cross-examination of Mrs. Hill, the defendant himself had already introduced evidence of his adulterous relationship with Ms. Taylor. This assignment is overruled.

[15] The defendant next assigns as error the trial court's failure to admit into evidence the defendant's discharge summary from Highland Psychiatric Hospital, dated 25 August 1987. The defendant contends the discharge summary was properly authenticated by Dr. Felix and was admissible under Rule 803(6) of the North Carolina Rules of Evidence. We conclude the defendant failed to lay a proper foundation for the admission of the summary. Dr. Felix testified that he reviewed the summary in forming his opinion, but he never stated affirmatively that the summary contained facts upon which he based his opinion regarding the defendant's state of mind.

Furthermore, the defendant suffered no prejudice. Dr. Felix testified regarding the same facts as those contained in the summary. The admission of the summary would have been redundant. *Lloyd*, 321 N.C. at 314, 364 S.E.2d at 325. Assuming *arguendo* that the discharge summary was admissible under Rule 803(6), we thus conclude that its exclusion was harmless. This assignment is overruled.

[16] The defendant next assigns as error the trial court's failure to rearrange the verdict form by placing the blank for "Not Guilty" at the top, followed by the blanks for the lesser included offenses, and then by the blank for first-degree murder. The defendant cites no authority supporting his contention, and we have found none. The trial court properly instructed the jury using the pattern jury instructions on the elements of the offenses submitted for the jury's consideration and on the presumption of the defendant's innocence. The defendant points to nothing in the record indicating that the jury failed to follow the instructions. *See State v. Clark*, 324 N.C. 146, 165-67, 377 S.E.2d 54, 66 (1989). This assignment is overruled.

[17] The defendant next assigns as error the trial court's use of the word "victim" rather than the term "deceased" in the jury charge. The use of the word "victim" in the jury charge was not improper. *State v. Allen*, 92 N.C. App. 168, 171, 374 S.E.2d 119, 121 (1988), *cert. denied*, 324 N.C. 544, 380 S.E.2d 772 (1989). By using the term "victim," the trial court was not intimating that the defendant committed the crime. This assignment of error is overruled.

[18] The defendant next assigns as error the trial court's action of giving its instructions on flight immediately after giving its instructions on first-degree murder. The defendant contends this order of the instructions violated the rule that the jury charge should clarify the issues, explain the law, and eliminate confusion of the jury. *State v. Cousin*, 292 N.C. 461, 233 S.E.2d 554 (1977). The trial court properly instructed the jury on the use of the evidence of the defendant's flight from the crime scene. Nothing in the record tends to indicate that the instruction might have confused or misled the jury. The defendant has shown no prejudice; therefore, this assignment is overruled.

[19] The defendant next assigns error to the State's questioning of Dr. Felix about the defendant's adulterous relationship with Teresa Taylor. The State asked Dr. Felix if the defendant had left his wife and entered into an adulterous relationship with Ms. Taylor. The defendant claims that the use of the term "adulterous" was prejudicial. Assuming error *arguendo*, the defendant has shown no prejudice. The defendant himself testified regarding his adulterous relationship with Teresa Taylor. Teresa Taylor also testified regarding her relationship with the defendant. We therefore overrule this assignment of error.

The defendant next assigns as error the trial court's exclusion of certain mitigating evidence during his capital sentencing proceeding conducted under N.C.G.S. § 15A-2000. The Supreme Court of the United States has held that a capital " 'sentencer [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " *Eddings v. Oklahoma*, 455 U.S. 104, 110, 71 L. Ed. 2d 1, 8 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978)). Bearing this rule in mind, we turn to consider *seriatim* each of the trial court's rulings which the defendant contends, under this assignment, excluded proper mitigating evidence.

[20] Lynn Cunningham, a family therapist, testified that the defendant participated in counseling sessions with Teresa Taylor and her son Edward. The trial court refused to allow testimony by Cunningham or by Dean Vic, a court counselor, regarding the nature of Edward's illness. The defendant made no offer of proof of Cunningham's response or Vic's response. Therefore, the propriety

of the trial court's exclusion of their testimony is not before us, because we can only speculate as to what their responses would have been. *State v. King*, 326 N.C. 662, 674, 392 S.E.2d 609, 617 (1990).

[21] Edward Taylor testified extensively regarding his relationship with the defendant, but the trial court did not allow him to answer the question, "If the jury were to vote to kill him [the defendant], how would you feel?" How the child might feel if the defendant were to be executed was not a proper matter for consideration in sentencing the defendant, as it did not involve "any aspect" of the defendant's "character or record" or "any of the circumstances of the offense." *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978).

The jury heard evidence of the defendant's interaction with Edward. The trial court thereafter properly sustained an objection to a question to Dean Vic regarding the effect of the defendant's incarceration on Edward, as no foundation for the question had been established. There was no evidence that Vic dealt with Edward after the defendant's arrest or had any idea of the effect of the defendant's incarceration upon him. Further, Edward Taylor's feelings about the defendant's incarceration were not relevant to the issues to be decided during the sentencing proceeding. *Id.*

[22] A friend of the defendant, Jim James, testified that the defendant and another friend had been bitten by a rabid dog when they were children. James testified that the rabies treatment was painful and that the defendant first began to drink after the treatment. The defendant argues that the trial court erred by refusing to allow James to testify that the defendant's friend who had been bitten by the rabid dog committed suicide fifteen years later. The suicide occurred fifteen years after the rabies treatment and the defendant established no linkage between the rabies treatment, the friend's later suicide, and the defendant. We conclude that such evidence was not relevant in the sentencing proceeding. *Id.*

The trial court did not allow a response by Thomas Rogers, a neighbor of the Hill family, when he was asked whether the defendant's father had ever been in jail. The defendant made no offer of proof and therefore cannot show prejudice by this exclusion. *King*, 326 N.C. at 674, 392 S.E.2d at 617.

Having considered each of the defendant's many contentions under this assignment of error, we conclude that none has merit. This assignment is overruled.

[23] The defendant next contends that the trial court erred when it declined to submit the statutory mitigating circumstance of the defendant's age for the jury's consideration. N.C.G.S. § 15A-2000(f)(7) (1988). The defendant argues that his chronological age is fifty-four, but that his physiological age is in fact seventy-five to eighty and justified submission of this mitigating circumstance. Advanced age should be submitted for jury consideration as a mitigating circumstance upon proper evidence. *State v. Porter*, 326 N.C. 489, 511, 391 S.E.2d 144, 158 (1990). Chronological age, however, ordinarily is not determinative. *Id.* Here, the defendant presented no evidence of advanced physiological age. His chronological age of fifty-four did not, standing alone, entitle him to have this mitigating circumstance submitted. We overrule this assignment of error.

The defendant next assigns as error the trial court's refusal to submit three nonstatutory mitigating circumstances to the jury. The three nonstatutory mitigating circumstances requested by the defendant but not submitted by the trial court were (1) residual or lingering doubt as to the defendant's guilt, (2) trauma the defendant suffered as a result of the suicide of a close friend and as a result of receiving rabies treatment, and (3) the defendant's positive influence on an emotionally handicapped child. The defendant contends that the failure to submit these three nonstatutory mitigating circumstances on the issues and recommendation form given the jury during the capital sentencing proceeding was prejudicial error. We disagree.

> In order for defendant to succeed on this assignment, he must establish that (1) the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury. Upon such showing by the defendant, the failure by the trial judge to submit such nonstatutory mitigating circumstance to the jury for its determination raises federal constitutional issues.

State v. Benson, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988) (citations and footnote omitted). Bearing these principles in mind, we turn to consider the trial court's failure to submit the three

nonstatutory mitigating circumstances at issue here on the form given the jury.

[24] Trial courts should not submit lingering doubt of guilt as a mitigating circumstance. *See Franklin v. Lynaugh*, 487 U.S. 164, 101 L. Ed. 2d 155, *reh'g. denied*, 487 U.S. 1263, 101 L. Ed. 2d 976 (1988) (submission of doubt of guilt as mitigator not constitutionally required). Lingering or residual doubt as to the defendant's guilt does not involve the defendant's character or record, or the circumstances of the offense. *Id.* Therefore, residual doubt is not a relevant circumstance to be submitted in a capital sentencing proceeding.

[25] The trial court also properly refused to submit the requested nonstatutory mitigating circumstance, "The defendant suffered trauma as a child due to the suicide of a close friend." The defendant presented no evidence that the death of his friend caused him any trauma. The defendant never mentioned the friend's suicide to his psychiatrist or during his testimony. We conclude that no reasonable juror could have found this mitigating circumstance to exist from the evidence offered by the defendant. Therefore, the trial court did not err in refusing to submit this nonstatutory mitigating circumstance.

[26] The defendant also contends under this assignment that the trial court erred by failing to submit for jury consideration a nonstatutory mitigating circumstance to the effect that he had suffered trauma as a result of being bitten by a rabid dog as a child. The record on appeal reflects that the defendant did not include this nonstatutory mitigating circumstance among those he listed in his written request for instructions on mitigating circumstances. Nor does the record reflect that the defendant ever made a timely *written* request that this nonstatutory mitigating circumstance be submitted to the jury for its consideration. Absent such a request, the failure of the trial court to submit the nonstatutory mitigating circumstance for the jury's consideration was not error. *See State v. Cummings*, 326 N.C. 298, 324, 389 S.E.2d 66, 80-81 (1990).

[27] The defendant also argues under this assignment that the trial court erred by failing to comply with the defendant's written request that it submit for the jury's consideration the mitigating circumstance that the "defendant was a positive influence on a behaviorally-emotionally handicapped child." In *Cummings*, we held

that "where a defendant makes a timely *written* request for a listing *in writing* on the form of possible nonstatutory mitigating circumstances that are supported by the evidence and which the jury could reasonably deem to have mitigating value, the trial court must put such circumstances in writing on the form." *Id.* at 324, 389 S.E.2d at 80 (emphasis in the original). Our holding in *Cummings* was made applicable prospectively to all capital proceedings tried after 1 March 1990. *Id.* at 324, 389 S.E.2d at 81. The case at bar was tried at the 2 October 1990 Session of Superior Court, Buncombe County, and, therefore, the holding of *Cummings* governs here. *Id.* The evidence presented by the defendant during the sentencing phase was sufficient to support submission of this circumstance, which a reasonable jury could find to be a mitigating circumstance. Therefore, we must conclude that the trial court erred by not submitting this nonstatutory mitigating circumstance on the issues form to the jury.

Our conclusion that the trial court erred does not end our consideration of this issue, however, because both errors in failing to submit a nonstatutory mitigating circumstance altogether and errors in failing to include such nonstatutory mitigating circumstances in writing on the form to be given the jury are subject to harmless error analysis. *Id.* Assuming *arguendo* that this error by the trial court amounted to constitutional error under *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), we nevertheless conclude, for reasons which follow, that it was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988).

In *Cummings*, the trial court only submitted two mitigating circumstances, both of which were statutory: "lack of significant prior criminal activity" and "any other circumstance or circumstances arising from the evidence which [the jury deems] to have mitigating value." 326 N.C. at 322, 389 S.E.2d at 79. The trial court submitted none of the nonstatutory mitigating circumstances submitted by the defendant. *Id.* In contrast, in the present case, the trial court failed to submit only three of the ten nonstatutory mitigating circumstances proposed by the defendant. We have already concluded in this opinion that the trial court's failure to submit two of those three was not error. We now conclude that all of the evidence of the third nonstatutory mitigating circumstance not submitted—that the "defendant was a positive influence on a behaviorally-emotionally handicapped child"—was considered by the jury under the mitigating circumstance of the defendant's good character and

the catch-all mitigating circumstance. The trial court's error in failing to submit all of the defendant's requested nonstatutory mitigating circumstances was harmless here, where it is clear the jury was not prevented from considering any potentially mitigating evidence. *See State v. Greene*, 324 N.C. 1, 20-22, 376 S.E.2d 430, 442 (1989), *vacated and remanded on other grounds*, 494 U.S. ---, 108 L. Ed. 2d 603 (1990). The jury was allowed to consider and must have given full consideration to all evidence of the defendant's positive influence on the child in question when the jury considered the good character and the catch-all mitigating circumstances. By submitting these mitigating circumstances in writing on the form given the jury, the trial court afforded the jury the flexibility necessary to consider all of the evidence of the defendant's good character, including evidence of his positive influence on the child. *Cf. Greene*, 324 N.C. at 20-22, 364 S.E.2d at 442. The trial court by its error here did not preclude the jury from considering any mitigating evidence.

Finally, the particular mitigating evidence supporting this particular nonstatutory mitigating circumstance was of little import, given the overwhelming evidence supporting the defendant's conviction and the aggravating circumstances found by the jury. For the aforementioned reasons, we conclude the State has shown that the trial court's failure to submit this nonstatutory mitigating circumstance in writing on the form given the jury was harmless beyond a reasonable doubt. This assignment of error is overruled.

[28] The defendant next assigns as error the trial court's action in overruling his objection to the prosecutor's statement in closing arguments to the jury: "[I]f you chose [sic] not to exercise the option of the death penalty, can you guarantee that Zane Hill will not go get a .22 automatic sometime in the future and kill again?" The defendant contends that the effect of the prosecutor's statement was to prompt jury consideration of the possibility of parole. The prosecutor never mentioned the term "parole" and never argued the consequences of a life sentence. This assignment is without merit. *State v. Johnson*, 298 N.C. 355, 366-67, 259 S.E.2d 752, 760 (1979).

[29] By his next assignment of error, the defendant argues that the trial court erred in instructing the jury as to the manner in which the jury should consider nonstatutory mitigating circumstances. The trial court instructed the jury that it must first

find whether each *nonstatutory* mitigating circumstance existed and then whether that circumstance had mitigating value. The defendant contends that once the jurors find that a *nonstatutory* mitigating circumstance exists, they cannot give it no weight in their deliberations. We have rejected the identical argument in *State v. Fullwood*, 323 N.C. 371, 395-97, 373 S.E.2d 518, 533-34 (1988), *vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *remanded for new sentencing hearing*, 329 N.C. 233, 404 S.E.2d 842 (1991), and *State v. Huff*, 325 N.C. 1, 58-61, 381 S.E.2d 635, 668-70 (1989), *vacated on other grounds*, 494 U.S. ---, 111 L. Ed. 2d 777 (1990), *remanded for new sentencing hearing*, 328 N.C. 532, 402 S.E.2d 577 (1991). This assignment of error is overruled.

[30] The defendant argues by his next assignment that the trial court erred in instructing the jury on the aggravating circumstance that the murder was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against other persons. N.C.G.S. § 15A-2000(e)(11) (1988). The trial court instructed the jury:

> If you find from the evidence beyond a reasonable doubt that, in addition to killing the victim, the defendant on or about the alleged date was engaged in a course of conduct which involved the commission of another crime of violence against another person and that these other crimes were included in the same course of conduct in which the killing of the victim was also a part, you would find this aggravating circumstance.

The defendant contends that this instruction erroneously allowed the jury to consider events occurring over a ten year period in determining whether this aggravating circumstance existed. He argues that these events included the alleged attempt by the defendant to kill Mrs. Hill at the time he killed Randall on 10 January 1990, the defendant's prior acts directed towards his wife in November 1989 and on 1 January 1990, and an assault upon a law enforcement officer which occurred in 1980. We do not agree.

The trial court in its instruction on the course of conduct aggravating circumstance directed the jury that it was to consider other crimes of violence occurring "on or about" *the day the defendant killed Randall*, thus indicating that the events the jury could consider must be closely related in time to that killing. The trial court also used the terms "crime" and "person" in their singular

forms in the challenged instruction, which tended, in light of the evidence in the present case, to indicate that the jury could only consider the defendant's attempt to kill Mrs. Hill on 10 January 1990 and not other events.

The course of conduct aggravating circumstance may in some situations involve crimes committed over several hours, *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), or over several days, *State v. Price*, 326 N.C. 56, 388 S.E.2d 84, *vacated on other grounds*, --- U.S. ---, 112 L. Ed. 2d 7 (1990). We conclude that the trial court's instruction in the present case properly focused the jury's consideration of the course of conduct aggravating circumstance by limiting the jury's consideration to the conduct involved in the defendant's attempt to kill Mrs. Hill on 10 January 1990. Therefore, the trial court did not err, and this assignment is overruled.

[31] The defendant next assigns as error the trial court's instructions to the jury on two mitigating circumstances. The trial court instructed the jury on the mitigating circumstance that the murder was committed while the defendant was under the influence of a mental or emotional disturbance in the following manner:

> For this mitigating circumstance to exist, it is enough that the defendant's mind or emotions were disturbed, from any cause, and that he was under the influence of the disturbance when he killed the victim. You would find this mitigating circumstance if you find some type of damage to his brain and that as a result, the defendant was under the influence of mental or emotional disturbance when he killed the victim.

The defendant argues that the trial court's instructions improperly limited the jury in its consideration of evidence supporting this mitigating circumstance. The defendant claims that the instructions prevented the jury from considering the testimony of Dr. Felix concerning the defendant's jealousy and his fear of separation from his wife. We simply do not agree. The instructions expressly directed the jury that in order to find this mitigating circumstance, "it is enough that the defendant's mind or emotions were disturbed, from any cause." This instruction clearly prevented the jury being precluded from the consideration of any evidence tending to support this mitigating circumstance. This argument is without merit.

[32] The defendant next argues under this assignment that the trial court erred in instructing the jury on 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 law was impaired. The defendant specifically complains that the trial court did not expressly inform the jury that it could consider the defendant's drug and alcohol consumption on the day of the killing when determining whether this mitigating circumstance existed. We assume *arguendo* that the evidence in the present case would have permitted the jury to take into account the defendant's alcohol and drug use on the day of the killing when considering this mitigating circumstance. However, the trial court is not required to summarize the evidence during its instructions to the jury. N.C.G.S. § 15A-1232 (1988). Although the trial court did not completely review the evidence or specifically instruct the jury that it could consider the evidence of the defendant's drug and alcohol use on the day of the killing when determining whether the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to law was impaired, the trial court's instructions did not preclude the jury from considering and weighing that evidence for this purpose. This assignment is overruled.

[33] By his next assignment the defendant argues that the trial court erred by failing to give his tendered instruction generally defining the term "mitigating circumstance" and expressly authorizing the jury to base its verdict on sympathy arising from the mitigating evidence. The defendant first argues under this assignment that the trial court erred by failing to submit his proposed instruction generally defining the term "mitigating circumstance." The trial court gave the jury a correct general definition of "mitigating circumstance" drawn directly from our pattern jury instructions. *See* N.C.P.I.—Crim. 150.10 (1990). Where a defendant requests an instruction which is supported by evidence and which is a correct statement of law, the trial court must give the instruction *in substance*. *Fullwood*, 323 N.C. at 390, 373 S.E.2d at 529. The trial court need not give the instruction in the words the defendant requests, however. *Id.* Here, the trial court's instructions correctly defined "mitigating circumstance." The trial court's failure to give the precise instruction requested by the defendant was not error.

[34] The defendant next argues under this assignment of error that the trial court erred by rejecting his request that it specifically

instruct the jury during the capital sentencing proceeding that "you are entitled to base your verdict upon any sympathy or mercy you may have for the defendant that arises from the evidence presented in this case." In *California v. Brown*, 479 U.S. 538, 93 L. Ed. 2d 934 (1987), the Supreme Court of the United States held that an instruction to jurors during capital sentencing that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" did not unconstitutionally deny the defendant a fair consideration of the full range of all of the evidence introduced in mitigation. The Supreme Court indicated *inter alia* that the instruction did not direct the jury to disregard considerations such as sympathy entirely, but only to disregard such considerations where they did not arise from the evidence introduced in mitigation. *Id.* However, while the Supreme Court held in that case that an instruction that the jury should not consider "mere sympathy" unsupported by mitigating evidence was not error, the Supreme Court did not hold that an instruction directing the jury to consider and weigh sympathies arising from mitigating evidence was constitutionally required. *Id.* We conclude that the better and constitutionally safer course for trial courts is to avoid mentioning sympathy in instructions concerning mitigating circumstances in capital sentencing proceedings, as there will always be some danger that some jurors will misconstrue any suggestion they may consider sympathy during sentencing as giving them the type of unbridled discretion as to sentencing which violates the Eighth Amendment as interpreted in *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859 (1976). We believe that trial courts should not refer to "sympathy." Instead, when instructing the jury to consider the statutory catch-all mitigating circumstance of "*[a]ny other circumstance arising from the evidence* which the jury deems to have mitigating value," trial courts should emphasize that the jury must weigh all mitigating considerations whatsoever which it finds supported by evidence. N.C.G.S. § 15A-2000(f)(9) (1988) (emphasis added). We believe that this course will lead the jury to consider all of the mitigating evidence introduced as required by *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), without the risk of encouraging the jury to exercise unbridled, and thus unconstitutional, discretion. As the trial court submitted the statutory catch-all mitigating circumstance after proper instructions in the present case, we conclude that it did not err in this regard. For the foregoing reasons, this assignment of error is overruled.

[35] The defendant has made no assignment of error or argument relating to *Morgan v. Illinois*, --- U.S. ---, --- L. Ed. 2d ---, 52 CCH S. Ct. Bull. B2665 (U.S. June 15, 1992). As *Morgan* was decided after briefs were filed and oral arguments conducted, we elect to review any possible violation of its holding on our own motion. In that recent case, the Supreme Court of the United States held that the trial court's refusal to ask prospective jurors "If you found Derick Morgan [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?" was prejudicial error and violated the defendant's rights under the Fourteenth Amendment of the Constitution of the United States. We have thoroughly reviewed the transcript of the present case. The defendant was permitted to seek information on the views of prospective jurors on whether they would automatically sentence the defendant to death regardless of the facts of the case. The defendant received answers on this matter, and we conclude that his rights under the Fourteenth Amendment as set forth in *Morgan* were not violated.

Having determined that the defendant's trial and capital sentencing proceeding were free from prejudicial error, we turn to duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 354-55, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). It is our duty in this regard to ascertain (1) whether the record supports the jury's findings of the aggravating circumstances on which the sentence of death was based, (2) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration, and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Id.*

We have thoroughly examined the record, transcripts, and briefs in the present case. We have also closely examined those exhibits which were forwarded to this Court. We conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

[36] We turn now to our final statutory duty of proportionality review. This duty requires that we determine whether the death sentence in the present case is excessive or disproportionate to

the penalty imposed in similar cases, considering the crime and the defendant. *Id.*

> In essence, our task on proportionality review is to compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and defendant's character, background, and physical and mental condition.

State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985), *quoted in*, *State v. Lloyd*, 321 N.C. 301, 322, 364 S.E.2d 316, 329, *vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988).

In the present case, the defendant was convicted of first-degree murder based on premeditation and deliberation and also convicted of assault with a deadly weapon upon another victim with intent to kill. The jury found all three aggravating circumstances submitted to exist; the defendant had been previously convicted of a felony involving the use of violence to the person, the murder was part of a course of conduct in which the defendant engaged and that included the commission by the defendant of other crimes of violence against other persons, and the murder was committed for the purpose of avoiding or preventing lawful arrest. The jury found the following mitigating circumstances: (1) "The defendant voluntarily submitted himself for alcohol and drug abuse treatment prior to the murder"; (2) "The defendant has exhibited good conduct in jail following his arrest"; (3) "The defendant has spinal arthritis and was disabled"; (4) "The defendant's alcohol abuse was episodic"; and (5) "The defendant began his use of alcohol at an early age."

In our proportionality review, we must compare the present case with other cases in which this Court has ruled upon the proportionality issue. This case is not particularly similar to any case in which this Court has found the death penalty disproportionate and entered a sentence of life imprisonment. Each of those cases included facts not present here.

In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), the defendant was convicted solely on the theory of felony murder. The jury did not find premeditation and deliberation. The jury found only one aggravating circumstance, murder for pecuniary gain. The jury found as mitigating circumstances that (1) the de-

fendant had no significant history of prior criminal activity, (2) the defendant was under the influence of an emotional or mental disturbance, (3) the defendant confessed to the murder and cooperated with the police, (4) the defendant consented to a search of his motel room, car, home, and storage bin, and (5) that the defendant was abandoned by his natural mother at an early age. *Benson* is easily distinguishable from the present case. In the present case, unlike *Benson*, the jury found that the defendant had committed the first-degree murder after premeditation and deliberation. In addition, the jury here found three aggravating circumstances.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), the defendant was convicted solely on a felony murder theory, and the majority of this Court felt there was little or no evidence of a premeditated killing. In the present case, the defendant was convicted of having committed first-degree murder after premeditation and deliberation. Additionally, he was found guilty of a contemporaneous assault with a deadly weapon with intent to kill another person. *Stokes* is also easily distinguishable from the present case, because Stokes' co-defendant, whom the majority of this Court seemed to believe more culpable than Stokes, was sentenced to life imprisonment.

In *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), the only aggravating circumstance found by the jury was that the murder for which Rogers was convicted was part of a course of conduct which included the commission of violence against another person or persons. In the present case, the jury found that aggravating circumstance *plus* two additional aggravating circumstances.

In concluding that the death penalty was disproportionate in *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), this Court noted that the jury found as aggravating circumstances that the murder was committed during the commission of a robbery or burglary and that it was committed for pecuniary gain. In the present case, the defendant was convicted of first-degree murder and assault with a deadly weapon with the intent to kill. This Court distinguished *Young* from cases where the death sentence had been upheld by focusing on the failure of the jury in that case to find either the aggravating circumstance that the murder was especially heinous, atrocious or cruel, or the aggravating circumstance that the murder was committed as part of a course

of conduct which included the commission of violence against another person or persons. *Id.* at 691, 325 S.E.2d at 194. The present case is distinguishable from *Young* because, among other things, the jury found the course of conduct aggravating circumstance to exist.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the single aggravating circumstance found was that the murder was committed against a law enforcement officer engaged in the performance of his official duties. In *Hill*, the officer had chased down the defendant on foot, and the officer had been shot as the two men had struggled for control of the officer's gun. The *Hill* case differs markedly from this case in which the defendant walked up to his estranged wife's house with a rifle, shot his son three times, then went outside and attempted to kill his fleeing wife.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the evidence tended to show that the defendant and a group of his friends were riding in a car when the defendant taunted the victim by telling him he would shoot him and questioning whether the victim believed the defendant would shoot him. The defendant shot the victim, but then immediately directed the driver to proceed to the emergency room of the local hospital. The jury found as aggravating circumstances that the crime was especially heinous, atrocious, or cruel, and that it was a part of a course of conduct including crimes of violence against other persons. In concluding that the death penalty was disproportionate there, we focused on the defendant's attempt to obtain medical assistance for the victim and the lack of any apparent motive for the killing. In contrast, the defendant in the present case shot his son Randall to prevent him from seeking help from law enforcement officers, and the defendant never sought medical assistance for Randall. The defendant's prior assaults on his estranged wife and his failed attempts to reconcile with her exhibit a clear motive for the attack on his wife and the murder of his son who was intervening in their reconciliation.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant was on foot and waved down the victim as the victim passed in his truck. Not long thereafter, the victim's body was discovered in the truck. He had been shot twice in the head and his wallet was gone. The jury convicted the defendant of first-degree murder only on a felony murder theory and found the aggravating circumstance that the murder was committed for pecuniary

gain. In contrast, the defendant in the present case was found to have committed first-degree murder after premeditation and deliberation, and the jury found three aggravating circumstances.

For the foregoing reasons, we conclude that each of the cases in which we have found the death penalty to be disproportionate is distinguishable from the present case. The present case is not strikingly similar to any of those cases.

We next must compare this case with the cases in which we have found the death penalty to be proportionate. Although we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, we have previously stated, and we reemphasize here, that we will not undertake to discuss or cite all of those cases each time we carry out that duty. *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). "The Bar may safely assume that we are aware of our own opinions filed in capital cases arising since the effective date of our capital punishment statute, 1 June 1977." *Id.* at 81-82, 301 S.E.2d at 356.

Here, it suffices to say we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence of death disproportionate. *E.g.*, *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984) (defendant during the course of a burglary shot and killed one victim and attempted to murder another); *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 232 (1991) (defendant murdered a man and then raped his girlfriend); *State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250, *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526 (1985) (defendant murdered seventy-two year old woman then stabbed and sexually assaulted the victim's mentally retarded daughter); *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025, 68 L. Ed. 2d 220 (1981) (defendant stabbed a four year old child and assaulted her fourteen year old sister). The evidence presented in the present case was that the defendant deliberately entered the house of his estranged wife and threatened his wife and his son with a rifle. The defendant then deliberately shot his son three times when his son attempted to telephone law enforcement authorities for help. The defendant then struck his wife with the butt of his rifle when she came to her mortally wounded son. If the defendant had not had to reload the rifle, giving Mrs. Hill

time to escape, the defendant would likely also have shot and killed her in the bedroom. Having failed to do so, the defendant pursued her and attempted to shoot her as she was running away from the house. After comparing this case carefully with all others in the pool of "similar cases" used for proportionality review—including all those in which the jury recommended either death or a life sentence—"[w]e cannot say that it does not fall within the class of first degree murders in which we have previously upheld the death penalty." *State v. Brown*, 315 N.C. 40, 71, 337 S.E.2d 808, 830 (1985), *quoted in Lloyd*, 321 N.C. at 327, 364 S.E.2d at 332. Accordingly, we conclude that the sentence of death entered in the present case is not disproportionate.

Having considered and rejected all of the defendant's assigned errors, we hold that the defendant's trial was free of prejudicial error and that the sentence of death entered against him must be and is left undisturbed.

No error.

STATE OF NORTH CAROLINA v. MICKEY ALTON PHIPPS

No. 565A90

(Filed 25 June 1992)

1. Constitutional Law § 266 (NCI4th)— robbery and murder—questioning—Sixth Amendment right to counsel—no custodial interrogation

A defendant in a robbery and murder prosecution was not deprived of his Sixth Amendment right to counsel where he contended that law enforcement officers postponed arresting him so that they could interrogate him repeatedly without affording him constitutional protections. The Sixth Amendment right to counsel does not attach at the time of interrogation or arrest, but at the first appearance before a judge of the district court. Defendant here had not been arrested at the time he gave his confession and it could not be concluded that there was a violation of his Sixth Amendment right to counsel.

Am Jur 2d, Criminal Law §§ 732, 734, 735.

Denial of, or interference with, accused's right to have attorney initially contact accused. 18 ALR4th 669.

2. Evidence and Witnesses § 1235 (NCI4th)— robbery and murder—interrogation—Miranda warnings—no custodial interrogation

The trial judge correctly concluded that a defendant in a murder and robbery prosecution was not in custody and was not entitled to *Miranda* warnings prior to his confession where defendant cooperated with the investigation from the outset and several times went to the police station on his own; he answered questions on those occasions and was fingerprinted; defendant was not arrested and was permitted to return home each time; defendant returned investigators' phone calls, agreed to meet with them to discuss his alibi, agreed to a polygraph test, and accompanied law enforcement officers to Hickory for that purpose; defendant declined to take the test after being informed that he did not have to take the test, that he could remain silent, and that anything he said could be used against him; the officers drove him back to North Wilkesboro; defendant later spoke in casual circumstances with a local attorney who advised defendant that he did not have to take the polygraph test; defendant later agreed to go with the officers to the police station to clear up some matters; after about an hour at the station, defendant agreed to go with officers to Hickory to take the polygraph test; officers complied with defendant's request to take him by his house and offered to make sure he got something to eat; defendant was advised by his wife to call an attorney and not take the test; defendant waited at the SBI office in Hickory by himself in a lobby with unlocked doors for over thirty minutes; he was allowed to use the restroom unaccompanied several times; he was again informed of his rights prior to taking the test and signed a waiver; he waited alone while the results were compiled; he was again informed that he was not under arrest and was free to leave; an agent then confronted defendant with negative test results and asked for the truth; defendant asked for and received permission to call his mother; and defendant made and then repeated his confession.

Am Jur 2d, Criminal Law §§ 791-797.

What constitutes "custodial interrogation" within the rule of Miranda v. Arizona requiring that suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565, Sec. 1.

3. Evidence and Witnesses § 1221 (NCI4th)— murder and robbery—interrogation—waiver of rights—knowing, intelligent and voluntary

The confession of a robbery and murder defendant was voluntarily made although defendant contended that multiple interrogations including law enforcement visits to his home, the long duration of one session including lack of sleep and food, and the confrontation with his earlier inconsistent and untruthful statements caused both his confession and the waiver of his constitutional rights to be involuntary.

Am Jur 2d, Evidence §§ 529, 543-545, 549-552.

Suppression before indictment or trial of confession unlawfully obtained. 1 ALR2d 1012.

Admissibility of pretrial confession in criminal case—Supreme Court cases. 4 L. Ed. 2d 183.

4. Constitutional Law § 252 (NCI4th)— appointment of investigator denied—no error

The trial court did not err by denying a murder and robbery defendant's motion for the appointment of an investigator where defendant's motion referred to no particular evidence or issue that would be significant to the case and was an insufficient showing of particularized need for expert assistance.

Am Jur 2d, Criminal Law § 719.

Right of indigent defendant in state criminal case to assistance of investigators. 81 ALR4th 259.

5. Constitutional Law § 244 (NCI4th)— motion for additional expert assistance—ex parte hearing denied—no error

The trial court did not abuse its discretion in a prosecution for murder and robbery by denying defendant an *ex parte*

hearing at which to apply for funds to employ expert assistance. The decision to grant an *ex parte* hearing is within the trial court's discretion; although such a hearing may be the better practice, it is not always constitutionally required under *Ake v. Oklahoma*, 470 U.S. 68.

Am Jur 2d, Criminal Law § 719.

6. **Evidence and Witnesses § 1686 (NCI4th)— murder—photographs of crime scene and victim's body—no abuse of discretion**

The trial court did not abuse its discretion in a prosecution for robbery and murder by allowing the State to introduce fifty-two color photographs of the crime scene and the victim's body where the circumstances surrounding the presentation of the photographs, and the photographs themselves, were not such that it could be said that their admission for illustrative purposes was not the result of a reasoned decision.

Am Jur 2d, Homicide §§ 416-419.

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

7. **Criminal Law § 410 (NCI4th)— murder and robbery—volume of physical evidence—cumulative effect—no error**

There was no error in a prosecution for robbery and murder in the manner in which the prosecutor sought to fulfill his duty through the presentation of evidence where defendant contended that the cumulative effect of the prodigious volume of physical evidence and expert or investigative testimony was confusion and undue prejudice.

Am Jur 2d, Trial §§ 497, 502.

8. **Homicide § 113 (NCI4th)— first degree murder—intoxication as defense—instruction refused—degree of intoxication**

The trial court did not err in a first degree murder prosecution by refusing defendant's request for a jury instruction on voluntary intoxication where defendant presented no evidence relating to his degree of intoxication.

Am Jur 2d, Homicide § 458.

9. Criminal Law § 25 (NCI4th)— voluntary intoxication—standard of proof—defendant not unconstitutionally prevented from presenting evidence

The high evidentiary standard of proof required as a prerequisite to a voluntary intoxication instruction does not unconstitutionally prevent a defendant from presenting evidence in his defense; the presence of a burden of production cannot reasonably be said to preclude introduction of evidence.

Am Jur 2d, Homicide § 458.

10. Homicide § 514 (NCI4th)— second degree murder—not submitted—no prejudicial error

There was no prejudicial error in a prosecution for murder and robbery where the court denied defendant's request to submit the possible verdict of second degree murder. Although second degree murder should have been submitted because the jury could have concluded on the evidence that defendant killed the victim with malice but without premeditation and deliberation, the jury based its verdict on both premeditation and deliberation and the felony murder rule.

Am Jur 2d, Homicide §§ 486, 496.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of a higher or lesser offense. 15 ALR4th 118.

Justice MEYER dissenting.

Justices MITCHELL and LAKE 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 life imprisonment entered by *Ross, J.*, at the 7 May 1990 Criminal Session of Superior Court, WILKES County, upon a jury verdict finding defendant guilty of one count of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his conviction for robbery with a dangerous weapon was allowed by this Court on 25 February 1992. Heard in the Supreme Court 11 May 1992.

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

D. Thomas Lambeth, Jr., June K. Allison, and Julie A. Risher for defendant appellant.

WHICHARD, Justice.

Defendant appeals his convictions for first-degree murder and robbery with a dangerous weapon. In a capital trial, the jury found defendant guilty of first-degree murder on the basis of both premeditation and deliberation and the felony murder rule. The jury recommended a sentence of life imprisonment for the murder. The trial court imposed that sentence in addition to a forty-year sentence for the robbery conviction. We conclude that the trial court erred in failing to submit the charge of second-degree murder, but we hold the error to be nonprejudicial in light of the felony murder verdict. Because the first-degree murder conviction may be upheld only by virtue of the felony murder rule, however, we arrest judgment on the underlying felony, robbery with a dangerous weapon.

The State presented evidence tending to prove the following facts and circumstances: On 7 May 1989, Janice Sheets was working as the manager of the Adams Seafood restaurant in North Wilkesboro. As manager, one of her duties was to make the night deposit at First Union Bank. Sheets left the restaurant at about 11:00 p.m. and drove her car to make the deposit. A night watchman in the vicinity of the bank saw Sheets' car in the parking lot at 11:40 p.m. and again at 12:40 a.m. A depositor discovered Sheets' car in the bank parking lot at approximately 1:20 a.m. and reported it to the authorities. Officers Burns and Bailey of the North Wilkesboro Police Department investigated the report and found the dead body of Janice Sheets.

The autopsy revealed both blunt and sharp force injuries to the victim's head and a defensive injury to one finger on the victim's right hand. The victim received as many as eighteen blows to the head, but the cause of death was an incised wound or a sharp force wound to the neck. This wound was approximately four inches long, one and one-half inches wide, and it involved a complete transection, or cutting, of the right jugular vein.

The murder investigation revealed that two bank deposit bags containing cash, checks, and credit card receipts totalling $9,556.65

were taken from Janice Sheets. Nineteen identifiable fingerprints were found in the victim's car, fifteen of which matched the victim's. The four remaining identifiable fingerprints did not match the victim's or defendant's, but were otherwise unidentified. Investigators found several other latent prints with insufficient ridge detail for proper identification. Forensic tests of blood and hair samples failed to identify a suspect.

Two witnesses testified that they saw an individual matching defendant's general description in the vicinity of the murder scene near the time of the crime. One identified defendant as the individual she saw that night.

As part of the murder investigation, SBI Special Agent Steve Cabe spoke with employees of the restaurant, including defendant, who worked as a cook and busboy. Agent Cabe first spoke with defendant on 8 May 1989. Defendant told Cabe he had left the restaurant at about 10:00 p.m. and gone to the Run-In, a nearby convenience store, and talked with Mark McNeill. In a second conversation with Agent Cabe, on 10 May 1989, defendant said he had bought a six-pack of beer and some gasoline at the Run-In. Defendant said he spoke with McNeill and then went straight home. After learning that investigators had interviewed his wife, defendant admitted that he had not gone straight home but instead had been with his cousin, Lois Bailey, until midnight. Defendant told Cabe that he had been seeing Lois for approximately four years, and that they parked his car in an alley that evening.

Lola Simpson, whose maiden name was Bailey,[1] testified that she had known defendant for about seven years and that they had had an affair for about four years. Simpson testified that defendant called her on 12 May 1989 and told her he had given the police her name and that he needed an alibi for the time of Janice Sheets' murder. Defendant responded negatively when Simpson asked him if he had killed Sheets. He said that he needed the alibi because he had been out drinking with Tracy Dowell, who was underaged, and did not want to get Tracy in trouble. Simpson indicated to defendant that she needed to think about whether to provide him with an alibi. Tracy Dowell testified at trial that he was not with defendant on the evening of the murder.

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1. It appears from the transcript, though with less than complete clarity, that Lois Bailey and Lola Simpson are one and the same.

Defendant called Simpson again on 18 May 1989 to ask whether the police had spoken with her. He again said he wanted her to tell the police that he was with her between 10:30 and 11:00 p.m. on the evening of the murder. Police officers spoke with Simpson the next day, and she told them she had been at her mother's house on the evening of 7 May and defendant had not been with her.

Defendant spoke with SBI Special Agent William Foster at the police department on 19 May 1989. According to Foster, defendant said he had "told some fabrications" because he did not have an alibi for the night of Janice Sheets' murder. In this interview, defendant told Foster that Sheets had asked him to put a cardboard box in her car just before he left work. Defendant complied with that request and then told Sheets he was leaving. Defendant went to the Run-In and then waited in the alley for Lola Simpson. Defendant drank a couple of beers, drove around for a while, and then went home.

Less than a month later, defendant admitted his responsibility for the death of Janice Sheets. SBI Special Agent Jonathan Jones testified that defendant made the following inculpatory statement to him on 8-9 June 1989:

> I got of [sic] work at Adams Seafood and Steakhouse around 10:30 p.m. Sunday night. I called my mother from the pay phone at Adams Seafood and Steakhouse. Jan asked me to put a box in the car. I used Jan's keys to unlock her car and put the box on the front seat. I think the box contained papers. I locked Jan's car and gave Jan her keys back. I got in my car and smoked pot and drank beer and rode around. At approximately 10:45 p.m., I went back to Adams and sat in my car and drank beer. Jan came out and asked me to ride with her to make the deposit. I got in Jan's gray Buick and ask [sic] Jan how much money did they take in. Jan said thirty-some hundred. I asked Jan—excuse me—I asked could I have the money and Jan said, "No." We drove to the bank and I said, "Janice, I really need this money because I am about to lose my house." She said, "Hell, no!" Jan started out of the car and I grabbed her by the hair and pulled her into the car. She smacked me in the face. I hit her around the head with my hand. Jan had a ratchet that was silver chrome. She tried to hit me with it. I blocked it. It fell to the floor. I picked it up and hit Jan in the head with the

> ratchet several times. It stung her, but didn't knock her out. Jan came up with a knife and Jan tried to cut me. We wrestled and I got the knife and stabbed Jan in or around the neck. She was bleeding a lot. I picked up everything I had my hands on and the money bag and the ratchet or bar and her keys and ran, ran towards my car at Adams.

The State also presented evidence that defendant was in dire financial straits. Shortly before the murder, defendant unsuccessfully sought loans of more than one thousand dollars from two financial institutions, and he faced foreclosure on his residence. Yet, within a week after the murder and robbery, defendant made up two delinquent house payments with $2,137.75 in cash. He also made up delinquencies on two other loan accounts and a Duke Power Company account. Further, he made retribution in cash of almost $100 worth of bad checks he had written.

Defendant presented no evidence at the guilt stage of the trial. The jury returned a verdict of guilty of first-degree murder, based on both the felony murder rule and a finding of premeditation and deliberation, and robbery with a dangerous weapon. The jury recommended that defendant receive a sentence of life imprisonment for the murder. The trial court sentenced defendant to life imprisonment for the murder conviction and to a consecutive forty-year term for the robbery conviction.

In his first assignment of error, defendant contends that the trial court erred in denying his motion to suppress certain inculpatory statements. During the investigation, law enforcement officials questioned defendant at least ten times. The questioning culminated in the 8-9 June confession described above. Defendant argues that his motion to suppress the inculpatory statements should have been granted because the statements were obtained prior to his having been advised of his constitutional rights and under such circumstances that the statements were made unknowingly, unintelligently, and involuntarily. We disagree.

Judge Rousseau denied defendant's motion to suppress on the grounds that

> all statements given by the Defendant to the officers or to Officer Cabe on May the 8th, and 10th, to Chief Miller on May the 10th, to Detective Jarvis on May the 10th, May the 19th, June the 2nd, June the 5th, and June the 8th, were

freely and voluntarily given; that at no time was the Defendant arrested or in custody, and that he was not entitled at that time to any Miranda warnings . . . .

The Court further concludes that no reasonable person would have believed that he was in custody prior to 2:00 a.m. on June 9, 1989, and therefore, the defendant was not entitled to any *Miranda* warnings prior to that time.

The Court further concludes that the Defendant freely and voluntarily went to the SBI office in Hickory with North Wilkesboro police officers and that at that time, he was advised of his Miranda rights as well, as well as his right to take the polygraph, and that the Defendant freely, voluntarily and of his own free will agreed to take the polygraph after being advised of the rights to take the polygraph and after being advised of his Miranda rights; [and] that the Defendant freely and voluntarily agreed to talk without a lawyer knowing that his statement could be used against him . . . .

These legal conclusions were based on the following extensive findings of fact:

That on May the 7th, 1989 sometime prior to midnight, that a body was found in the Town of North Wilkesboro; that that person had been an employee of Adams Seafood . . . that the North Wilkesboro Police Department began an immediate investigation of the killing; that on May the 8th, the police department, along with the SBI, and other law enforcement officers began interviewing each of the employees at Adams Seafood, one of them being the defendant; that at 8:35 p.m. in response to a request, the Defendant went to the North Wilkesboro Police Department at which time he was interviewed by . . . SBI Agent Cabe. At that time, the Defendant was not under arrest and left [at] approximately 9:00 p.m. . . .

That some eight or ten other employees were also requested by the officers to come to the police department at which time they were all interviewed; each of these persons being interviewed individually, and on this occasion, the Defendant was not advised of any rights, nor was he under arrest.

That on May 10th, the Defendant was again asked to come to the police station; that the Defendant and other employees were being reinterviewed that day; that the Defend-

ant was not under arrest, nor were any threats or promises made to him on this occasion or the previous day; that he appeared at the police department about 5:45 p.m. and left about 8:00 p.m.; that prior to leaving he was asked who he thought killed the deceased.

Again, on May the 10th, Detective Jarvis . . . was investigating this crime as well as some other crime, and that he asked the Defendant to submit to fingerprinting to be used in another case as well as the incident [sic] case in order to possibly eliminate any person whose prints were found at the scene; that the police department took prints of four or five other employees, some EMS employees as well as the North Wilkesboro police that might have been found at the scene; that on this occasion, the Defendant voluntarily submitted to fingerprinting; that at this time, he was not under arrest, nor was he in custody.

That again, on May the 18th, the Defendant was asked to take the polygraph test and he was taken to Hickory at about 4:00 p.m. by the North Wilkesboro police officers; that prior to going, the Defendant stated that he would take the polygraph; that he did not have an attorney, but at that time, was not under arrest and voluntarily went with the officers to the SBI office in Hickory; that upon arriving at the office, SBI Agent Jones advised him of his rights to remain silent, anything he said could be used against him, and that he did not have to take the polygraph examination; that at that time, the Defendant refused to take the polygraph; that sometime after that date, the Defendant, while at the supermarket . . . met John Hall, an attorney in Wilkesboro; that Mr. Hall advised him that he did not have to take a polygraph . . . .

That on May the 19th, Detective Jarvis again talked to the Defendant by telephone; that the officer had previously left word for the Defendant to call him at the police station and the Defendant did return the call to Detective Jarvis . . .; that at that time, Detective Jarvis made some notes of the conversation; at that time, the Defendant was not advised of his rights, nor was he under arrest and was not in custody; that later that day, the Defendant did come to the police department as a result of Officer Jarvis' request; that the Defendant came by himself at about 5:45 p.m. and remained

until about 7:00 p.m. at which time the Defendant left; that on June the 2nd, Officer Jarvis again asked the Defendant to come to the police department, at which time, he was there about thirty minutes, during which time, Officer Jarvis talked to the Defendant about another case as well as the incident [sic] case; that at no time was the Defendant placed under arrest, nor advised of any rights; that Officer Jarvis again, on June the 5th, went to the Defendant's residence and talked to the Defendant outside the Defendant's house for several minutes; that he was not arrested at that time, nor in custody.

On June the 8th, Officer Jarvis again went to the Defendant's residence at about 7:45 p.m. and told the Defendant that he needed to talk to him and that he needed to go with him to the police station; that the Defendant left with Officer Jarvis and went to the police department; at that time, the Defendant was not under arrest and voluntarily went with the police officer; that upon arriving at the police station, Chief Miller, Lieutenant Brown and SBI Agent Foster talked with the Defendant; at that time, he was not under arrest, and was not in custody; that the Chief advised the Defendant he needed to talk with him in order to clear up certain things; that the Chief asked the Defendant to take a polygraph and the Defendant stated that he would; that he would do it tomorrow or Monday; the Chief then told him that it needed to be done tonight; that the Defendant advised the Chief that he had not eaten and the Chief said they would eat on the way to Hickory; that the Chief further advised him that the Defendant had put his friends in the middle of a murder situation, and that it needed to be cleared up; that the Defendant then said he would take the polygraph, but he wanted to go by his residence first; that the Defendant, the Chief and the other two officers then went to the Defendant's residence, at which time the Defendant asked the Chief to go inside the house with him . . . which the Chief did; that upon being inside the house . . . the Defendant's wife was present; that she advised the Defendant to get a lawyer, call John Hall; that the Defendant said, "No, I'm not going to. I'm going to clear it up tonight and take the test." That the Defendant and his wife walked down the hall away from the Chief for some several minutes; that the Defendant then returned and said he needed some money for cigarettes, and after getting the money, he

and the chief went to the car and they started to Hickory; that on the way to Hickory the Chief suggested that they stop and eat, but the Defendant said, "No, let's get it over with. We can eat later"; that the Defendant and the officers arrived at the SBI office in Hickory at around ten o'clock, at which time the Defendant was left in the lobby of the SBI office for some thirty minutes or more while the Chief, SBI Agent Foster and Lieutenant Brown went into an inner office; that at about 10:33, SBI Agent Jones came into the lobby, introduced himself to the Defendant and asked the Defendant if he wanted to take the polygraph; that the Defendant replied that he wanted to take the polygraph, but asked where the rest room was; that the officer showed the Defendant where the rest room was and the Defendant left his presence; that while sitting in the lobby of the SBI office, the outer door to the office was unlocked at all times while the Defendant was in the lobby; that when the Defendant returned from the rest room, Agent Jones took the Defendant to an examination room at which time he advised him of certain rights; that the Defendant signed a waiver stating that he was . . . twenty-six years of age, and that he voluntarily, without threats, duress, coercion, force, promise of immunity or reward, and understandingly agreed to take the polygraph examination; that Officer Jones then advised him that he was not required to take the examination; that he had a right to consult with an attorney, or anyone he wished to before signing this form or taking the examination; Officer Jones advised him that he had a right to remain silent the entire time that he was there, that anything he said could be used against him, that he had a right to talk to an attorney before answering any questions, and to have the attorney present during the questioning, that if he could not afford an attorney, and desired one, an attorney would be appointed before any questions if he wished; that if he desired to make any statements that he had a right to stop at any time, and that he had a right to stop and not answer any questions until he talked to an attorney; that the defendant stated that he understood those rights and signed a written waiver whereupon . . . Officer Jones proceeded to prepare for the examination and did examine the Defendant, and having completed the examination at 12:12 a.m. on June 9th; that Officer Jones then went to another room to analyze the results of the test and when

> he returned, he, again, told the Defendant that he was free to leave, that he was not under arrest; that the Defendant stated he wanted to stay and knew that he could leave at any time he wanted to whereupon the agent told the Defendant that he was lying and that he wanted him to tell him the truth about the murder, this being approximately 2:00 a.m.; that at that time the Defendant requested to make a telephone call to his mother and the officer stated that he asked him if he would tell the truth if he made the phone call; that the Defendant stated that he would; that the Defendant then made a phone call to supposedly his mother; that the Defendant then made a statement beginning about 2:00 a.m. and ending at . . . 2:30 a.m.; during this period of time, the Defendant did not appear sleepy; that he was not confused; that his answers were responsive; that he didn't complain of anything, though he did use the restroom on one or more occasions; that he did not request an attorney; that he made no complaints of anything; that no promises were made to him and no threats.
>
> Agent Jones then requested of the Defendant as to whether he could call in SBI Agent Foster and have the Defendant repeat his statement to Officer Foster; that Officer Foster was brought into the interview room, at which time the Defendant made a statement to Officer Foster; that after Officer Foster obtained a statement, he then had the Defendant . . . sign another form or waiver stating that he reaffirmed the above agreement and that he knowingly and intelligently continued to waive all rights, and that during the period of time he had been in the SBI office, that he'd been well treated; that he submitted freely to the examination knowing he could stop any time; that he remained on his own free will and stated that he could have left the room at any time he so desired; Defendant further stated by the statement that no threats or promises or harm was done to him during the entire period.

Our review of the record reveals that these findings of facts are supported by plenary competent evidence. They thus are binding on this Court on appeal. *State v. Jenkins*, 292 N.C. 179, 184, 232 S.E.2d 648, 652 (1977).

[1] Defendant argues first that Judge Rousseau erred in concluding that he was not entitled to *Miranda* warnings until 2:00 a.m. on

9 June 1989, and second, that Judge Rousseau erred in concluding that his confession was free, voluntary, and made with knowledge that it could be used against him. With respect to the first question, defendant specifically argues that he was deprived of his right to counsel under the Fifth and Sixth Amendments during all questioning prior to his confession on 9 June. He argues that the law enforcement officers postponed arresting him so they could interrogate him repeatedly without affording him the constitutional protections, such as the right to counsel, that would arise during custodial interrogation or the commencement of formal adversarial proceedings.

We note first that defendant's right to counsel under the Sixth and Fourteenth Amendments "attaches only at such time as adversary judicial proceedings have been instituted 'whether by way of formal charge, preliminary hearing, indictment, information or arraignment.'" *State v. Franklin*, 308 N.C. 682, 688, 304 S.E.2d 579, 583 (1983) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417 (1972)), *overruled on other grounds by State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985). In *State v. Nations*, 319 N.C. 318, 324, 354 S.E.2d 510, 514 (1987), this Court held that the defendant's Sixth Amendment right to counsel did not attach at the time of his interrogation or arrest; instead, it attached at his first appearance before a judge of the district court. In this case, defendant had not even been arrested at the time he gave his confession; thus, we cannot conclude that there was a violation of his Sixth Amendment right to counsel.

[2] With respect to defendant's claim that he was interrogated without first being advised of his constitutional rights, particularly his right to counsel under the Fifth Amendment, the crucial question is whether defendant underwent custodial interrogation. In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the Supreme Court held:

> the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Id. at 444, 16 L. Ed. 2d at 706 (footnote omitted). "[T]he Supreme Court of the United States has specifically rejected arguments that the principles of *Miranda* should be extended to cover interrogation in noncustodial circumstances after a police investigation has focused on the suspect . . . ." *State v. Davis*, 305 N.C. 400, 408, 290 S.E.2d 574, 580 (1982). Thus, defendant's claim of a *Miranda* violation is without merit unless there was custodial interrogation.

In resolving the question of whether there was custodial interrogation,

> the reviewing court must determine whether the suspect was in custody based upon an objective test of whether a reasonable person in the suspect's position would believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant way or, to the contrary, would believe that he was free to go at will.

Id. at 410, 290 S.E.2d at 581; *see also United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980).

We hold that Judge Rousseau correctly concluded that defendant was not in custody, and thus was not entitled to *Miranda* warnings, prior to his 2:00 a.m. confession. Defendant had cooperated with the investigation of this murder from the outset. Several times, upon request, he had come to the police station on his own. On these occasions, he had answered questions and had even been fingerprinted once. On no occasion was defendant placed under arrest; to the contrary, each time he was permitted to return home. During the investigation defendant also cooperated by returning investigators' phone calls and agreeing to meet with them to discuss his alibi for the evening of the murder. Defendant agreed to take a polygraph test and accompanied law enforcement officers to Hickory on 18 May 1989 for that purpose. Upon being advised by SBI Agent Jones that he did not have to take the polygraph test, that he had the right to remain silent, and that anything he said could be used against him, defendant chose to exercise those rights and declined to take the test. The officers acceded to defendant's choice and drove him back to North Wilkesboro. Defendant later spoke in casual circumstances with a local attorney who advised defendant that he did not have to take the polygraph test.

On the evening of 8 June 1989, law enforcement officers sought to speak again with defendant regarding the murder. Because he had no operable telephone, the officers were constrained to go to defendant's residence. Defendant agreed to go with the officers to the police station to "clear up" some matters. After about an hour at the police station, defendant agreed to go with the officers to Hickory to take the polygraph test. Defendant requested that the officers take him by his house first to inform his wife. The officers granted this request and offered to make sure defendant got something to eat on the way to Hickory. While at defendant's house, Chief Miller heard defendant's wife tell him not to take the test and to call his attorney. Defendant's response was that he wanted to clear up the matter that evening.

Instead of stopping for food on the way to Hickory, the officers complied with defendant's preference that he take the polygraph first and eat later. Once at the SBI office, defendant waited by himself in a lobby with unlocked external doors for over thirty minutes. He was allowed to use the rest room unaccompanied several times. He was again informed by Agent Jones of his rights prior to taking the polygraph test, and he signed a form indicating that he wished to waive his rights. Defendant took the polygraph test and waited alone while the results were compiled. After Agent Jones analyzed the results, he again informed defendant that he was not under arrest and was free to leave. Agent Jones then confronted defendant with the negative results and asked him to tell the truth. Defendant then asked for and received permission to call his mother. Following this phone call, defendant made and repeated his confession in which he admitted responsibility for the death of Janice Sheets.

The facts of this case are similar to those in *Davis*, where:

> [T]he defendant initially came to the detective offices voluntarily and unescorted in response to a request left with his grandmother two days previously. At that time he was asked questions concerning the murder under investigation and made an exculpatory statement. This interview took place in comfortable surroundings in which the defendant was given soft drinks and in no way deprived of any physical necessities. During this first visit to the detective offices . . . the defendant was offered a polygraph examination. He agreed to take the test. Upon asking and being told what questions he would

be asked in the course of the polygraph examination, the defendant stated that he would not take the polygraph examination. The defendant thus terminated the interview, was allowed to leave at will and was given a ride home. . . . [E]very indication given the defendant was to the effect that he could terminate the questioning by leaving at any time. He in fact exercised this freedom by stating that he was not going to take the polygraph test and by leaving the police station.

The uncontroverted testimony on *voir dire* further reveals that the officers asked to see the defendant at the detective offices again at approximately 10:00 p.m. on the evening of 4 September 1980. The defendant agreed to meet with them at that time. . . . [T]he officers drove through [the defendant's] neighborhood to see if he was walking in that direction. . . . During their drive through the neighborhood, the officers saw the defendant and offered him a ride to the offices. He got into the car with them and they proceeded to the detective offices. . . . When he wanted a soft drink he was given one. When he wanted to go to the bathroom he was allowed to go. [During the second interrogation, defendant gave an inculpatory statement.]

. . . .

. . . [W]e do not think that in the context of these facts the failure specifically to advise the defendant during either the first or second periods of questioning that he was free to go at any time would have indicated to a reasonable person in the defendant's circumstances that he was not free to go at will. The defendant once exercised his right to leave, and we do not believe the conduct of the officers during the second period of questioning differed from that employed during the first period of questioning in any manner so substantial as to indicate to a reasonable person that there had been any significant change in his status which would deprive him of his freedom of action in any way. We conclude that the defendant was not in custody or deprived of his freedom of action in any significant way and that *Miranda* is not applicable.

Davis, 305 N.C. at 415-17, 290 S.E.2d at 584-85.

As in *Davis*, we conclude that there was no custodial interrogation within the meaning of *Miranda* prior to the time defendant

gave his confession. Further, defendant gave his confession after having been advised of his constitutional rights and after having waived those rights in writing prior to taking the polygraph examination. Thus, there was likewise no violation of *Miranda* at the time of the confession.

[3] Defendant's final argument under this assignment of error is that his waiver of rights and confession were not knowing, intelligent, or voluntary. Defendant essentially contends that the multiple interrogations, including law enforcement visits to his home, the long duration of the 8-9 June session, including the lack of sleep and food, and the confrontation with his earlier inconsistent and untruthful statements, caused both the confession and the waiver of his constitutional rights to be involuntary. For all the reasons described above relating to the question of custodial interrogation, we conclude that defendant's confession was voluntarily made, and that defendant made the confession after being advised fully of his constitutional rights and having voluntarily, knowingly, and intelligently relinquished those rights.

[4] Defendant next contends that the trial court erred in denying his pretrial motions for (1) authorization of a private investigator and (2) an *ex parte* hearing at which to apply for funds to employ expert assistance. These contentions are without merit.

In *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), the United States Supreme Court held:

> when a[n indigent] defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83, 84 L. Ed. 2d at 66. This Court has followed *Ake* and required, upon a threshold showing that a particular matter subject to expert testimony is likely to be a significant factor in a defendant's defense, the provision of psychiatric and fingerprint experts. *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988). Further, an indigent defendant has a statutory right to "counsel and the other necessary expenses of representation." N.C.G.S. § 7A-450(b) (1989); *see also* N.C.G.S. § 7A-454 (1989) (in its discretion the court may approve expert witness fee for an indigent defendant).

"[T]o establish a specific need for the assistance of an expert, the defendant must show that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that the expert assistance will materially assist him in the preparation of his case." *State v. Coffey*, 326 N.C. 268, 284, 389 S.E.2d 48, 58 (1990). Undeveloped assertions that the requested assistance would be "beneficial" or "essential" to preparing an adequate defense are insufficient to meet the threshold showing required by *Ake*. *State v. Tucker*, 329 N.C. 709, 719, 407 S.E.2d 805, 811 (1991) (citing *State v. Hickey*, 317 N.C. 457, 469, 346 S.E.2d 646, 654 (1986) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1, 86 L. Ed. 2d 231, 236 n.1 (1985))). We have also held that

> "[m]ere hope or suspicion" of the availability of certain evidence that might erode the State's case or buttress a defense will not suffice to satisfy the requirement that defendant demonstrate a threshold showing of specific necessity for expert assistance. *State v. Tatum*, 291 N.C. 73, 82, 229 S.E.2d 562, 568 (1976). Nor will a "general desire to search for possible evidence which might be of use in impeaching" a key witness for the State suffice as a "significant factor" in the defense so as to justify the appointment of an expert. *State v. Hickey*, 317 N.C. at 469, 346 S.E.2d at 654.

Id. at 719-20, 407 S.E.2d at 811-12.

Defendant sought the appointment of an investigator because his attorney did not have

> the expertise in criminal investigation work to investigate the facts and witnesses surrounding the alleged crime with which the defendant is charged. Defendant's attorney has no formal training in criminal investigation. Because of the large number of legal issues that must be researched and briefed, defendant's attorney does not physically have the time to interview all the potential witnesses that will be essential to providing the defendant with an adequate defense.

Defendant's motion for the appointment of an investigator referred to no particular evidence or issue that would be significant to the case, and simply was an insufficient showing of particularized need for expert assistance under *Ake*. *See State v. Locklear*, 322 N.C. 349, 355, 368 S.E.2d 377, 381 (1988). The trial court did not err in denying defendant's motion.

[5] Defendant also filed a motion for an *ex parte* hearing for additional expert assistance. The trial court denied this motion. Defendant notes that four identifiable fingerprints were located inside the victim's automobile, none of which matched the victim's or defendant's. Defendant says that at the requested *ex parte* hearing he would have sought funds to hire an expert in fingerprint identification.

Defendant contends that the trial court's ruling violated his right to due process of law, to the effective assistance of counsel, and to be reliably sentenced in a capital trial. Defendant says that specific language in *Ake* guarantees his right to an *ex parte* hearing on his motion for expert assistance: "When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." *Ake*, 470 U.S. at 82-83, 84 L. Ed. 2d at 66. We note that although the Court referred to an "*ex parte* threshold showing," it also stated in the paragraph denominating its express holding: "Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the States the decision on how to implement this right." *Id.* at 83, 84 L. Ed. 2d at 66.

Defendant and the State agree that the issue of defendant's entitlement to an *ex parte* hearing is a question of first impression in this jurisdiction. Our opinions have often quoted the "*ex parte*" language from *Ake*, but the issue has never arisen squarely, as it does here. *See, e.g., State v. Tucker*, 329 N.C. at 718, 407 S.E.2d at 811; *State v. McLaughlin*, 323 N.C. 68, 83, 372 S.E.2d 49, 60 (1988), *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. Moore*, 321 N.C. at 344, 364 S.E.2d at 656; *State v. Smith*, 320 N.C. 404, 420, 358 S.E.2d 329, 338 (1987); *State v. Hickey*, 317 N.C. at 468, 346 S.E.2d at 654.

Our research also reveals that no federal court has passed on the question of whether an *ex parte* hearing on a motion for expert assistance is constitutionally required.[2] At the time *Ake* was decided, 18 U.S.C. § 3006A(e)(1) stated:

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2. In *Thor v. United States*, 574 F.2d 215, 219 (5th Cir. 1978), the court said "the right to an *ex parte* hearing pursuant to [Federal Rule of Criminal Procedure]

> Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application. Upon finding, after appropriate inquiry in an *ex parte* proceeding, that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services.

18 U.S.C. § 3006A(e)(1) (1988); *see also* Fed. R. Crim. P. 17(b).[3] The then-existing federal practice may shed light on the origin of the "*ex parte*" language in the *Ake* opinion. The federal practice under the statute has persisted, and several federal courts have enforced the statutory right of an indigent defendant to an *ex parte* hearing when seeking expert assistance. *See United States v. Dolack*, 484 F.2d 528 (10th Cir. 1973); *United States v. Sutton*, 464 F.2d 552 (5th Cir. 1972); *United States v. Theriault*, 440 F.2d 713 (5th Cir. 1971); *Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970).

Three states have addressed the question of whether *Ake* demands, rather than presumes, that the request for expert assistance be heard *ex parte*. In *Brooks v. State*, 259 Ga. 562, 385 S.E.2d 81 (1989), the Supreme Court of Georgia stated:

> We have found no clear authority, and the parties have shown us none, mandating that hearings on motions for public funds be held *ex parte*. The *Ake* holding does not clearly mandate that the hearing be *ex parte*. Other federal cases upon which defendant relies construe federal statutes providing for *ex parte* hearings and are not binding upon us.
>
> . . . .
>
> Identification of the right which is at stake here is more complicated than acknowledging the right of the indigent defendant to obtain the expert assistance necessary to assist in preparing his defense. While exercising that right, the de-

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17(b) does not appear to rise to a constitutional level." The federal rule considered in *Thor* provides for issuance of subpoenas and the payment of witness fees for indigent defendants. We note, however, that *Thor* was decided prior to *Ake*.

3. Several states have codified procedures for providing expert assistance to indigent defendants following an *ex parte* showing of need. *See* Kan. Stat. Ann. § 22-4508 (1988); S.C. Code Ann. § 16-3-26(C) (Law. Co-op. Supp. 1991); Tenn. Code Ann. § 40-14-207(3)(b) (1990).

> fendant also has the right to obtain that assistance without losing the opportunity to prepare the defense in secret. Otherwise, the defendant's "fair opportunity to present his defense," acknowledged in *Ake*, will be impaired.

Id. at 564-65, 385 S.E.2d at 83-84. The court went on to prescribe a procedure by which an indigent defendant would seek funds for expert assistance:

> The matter will be heard *ex parte*. The state may submit a brief, which will be considered at the time of the *ex parte* hearing. The *ex parte* proceeding shall be reported and transcribed as part of the record but shall be sealed in the same manner as are those items examined *in camera*. The court in its discretion may reserve issues to be heard at a separate hearing at which the state will be present. The state may always be represented when the defendant is examined as to his indigency.

Id. at 566, 385 S.E.2d at 84. In *McGregor v. State*, 733 P.2d 416 (Okla. Crim. App. 1987), the court granted a writ of mandamus requiring a previously ordered evidentiary hearing to be held *ex parte*. The hearing was on the defendant's motion for a court-appointed psychiatrist. The court summarily concluded that "[t]he intention of the majority of the *Ake* Court that such hearings be held *ex parte* is manifest." *Id.* at 416. The court based its conclusion on the same passage in *Ake* as does this defendant. To the contrary, the Supreme Court of South Dakota has held that a state statute requiring that "appointment of expert witnesses by the court shall be made only after reasonable notice to the parties to the proceeding of the names and addresses of the experts proposed for appointment" does not violate a defendant's rights to due process or equal protection of the law. *State v. Floody*, 481 N.W.2d 242, 254-56 (S.D. 1992).

We conclude that the decision to grant an *ex parte* hearing is within the trial court's discretion. Though such a hearing may in fact be the better practice, it is not always constitutionally required under *Ake*. In *Ake* the right to expert psychiatric assistance on behalf of indigent defendants was rooted in the Due Process Clause of the Fourteenth Amendment:

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal

> proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake. . . .
>
> . . . We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. . . . To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," . . . and we have required that such tools be provided to those defendants who cannot afford to pay for them.

Ake, 470 U.S. at 76-77, 84 L. Ed. 2d at 61-62 (citation omitted).

Whereas an indigent defendant's access to the "basic tools of an adequate defense" is a core requirement of a fundamentally fair trial, the need for an *ex parte* hearing on a motion for expert assistance is not. Defendant may participate meaningfully in the preparation of his defense even though the prosecutor is present for and contests his motion for expert assistance.

The primary justification for an *ex parte* hearing is that it allows an indigent defendant to make a detailed showing, sufficient to meet the *Ake* threshold, of his need for expert assistance without alerting the prosecution to vital trial strategy and theories of defense. Though this is a desirable advantage, and one available to both the State and nonindigent defendants, we conclude that its absence does not necessarily render the trial of an indigent defendant fundamentally unfair.

Apart from its holding that the states would be responsible for implementing the right recognized in *Ake*, that decision included several other references suggesting that an *ex parte* hearing is not necessarily constitutionally required. First, in conducting its due process balancing test, the Court implicitly recognized that the State's interest in its economy is a valid consideration. The

Court stated that "it is difficult to identify any interest of the State, other than that in its own economy, that weighs against recognition of this right," *Ake*, 470 U.S. at 79, 84 L. Ed. 2d at 63, and noted that "[m]any States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to prejudice this assistance," *id.* at 78, 84 L. Ed. 2d at 63. Through such language the Court recognized the need to balance the importance of the protection sought with the associated cost to the State. Because the "assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense," *id.* at 80, 84 L. Ed. 2d at 64, the Court concluded that cost considerations failed to tip the balance in favor of the State. Although the Court tipped the scales in favor of the accused when considering the importance of obtaining expert assistance to aid in building a defense, it did not address the importance of the procedures by which expert assistance is sought.

Further, the Court realized that although indigent defendants must be afforded the basic tools for an effective defense, it would not be possible to require that indigent defendants have all the advantages and privileges that result from greater wealth. The Court held that a psychiatrist must be appointed upon a threshold showing that a defendant's sanity would be a significant issue at trial, but it was careful to note: "This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Id.* at 83, 84 L. Ed. 2d at 66.

For the reasons described above, we conclude that *Ake* did not mandate that motions for expert assistance be heard *ex parte*. We also conclude that an *ex parte* hearing is not constitutionally required in every case. There are strong reasons for conducting the hearing *ex parte*, and the court may, in its discretion, do so. Defendant has failed to demonstrate any prejudice from the denial of his motion here. We thus find no abuse of discretion and overrule this assignment of error.

[6] Defendant next contends that the trial court abused its discretion in allowing the State to put into evidence certain testimony and numerous exhibits. He says first that an excessive number of graphic and repetitious photographs of the crime scene and victim were erroneously admitted over his objection. Second, de-

fendant contends that an excessive volume of physical evidence and expert or investigative testimony was presented, despite its failure to link the defendant to the crime, so as to confuse and unduly prejudice the defendant. Defendant objected to the evidence based on Rule 403 of the Rules of Evidence:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1988).

In *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988), we described the proper framework for analyzing a defendant's contention that the trial court admitted unduly prejudicial and inflammatory photographs.

> "Unfair prejudice" means an undue tendency to suggest a decision on an improper basis, usually an emotional one. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). Photographs are usually competent to explain or illustrate anything that is competent for a witness to describe in words, . . . and properly authenticated photographs of a homicide victim may be introduced into evidence under the trial court's instructions that their use is to be limited to illustrating the witness's testimony. . . . Thus, photographs of the victim's body may be used to illustrate testimony as to the cause of death. Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree, . . . and for this reason such evidence is not precluded by a defendant's stipulation as to the cause of death. . . . Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury. . . .
>
> This Court has recognized, however, that when the use of photographs that have inflammatory potential is excessive or repetitious, the probative value of such evidence is eclipsed by its tendency to prejudice the jury.
>
> . . . .

> In general, the exclusion of evidence under the balancing test of Rule 403 . . . is within the trial court's sound discretion. . . . Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each likewise lies within the discretion of the trial court. . . . Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. . . .
>
> The test for excess is not formulaic: there is no bright line indicating at what point the number of crime scene or autopsy photographs becomes too great. The trial court's task is rather to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation. What a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies—these are all factors the trial court must examine in determining the illustrative value of photographic evidence and in weighing its use by the state against its tendency to prejudice the jury.

Id. at 283-85, 372 S.E.2d at 526-27.

In *Hennis*, the Court found reversible error where the State introduced thirty-five eight-by-ten-inch glossy photographs and duplicate slides. The circumstances under which the photographs and slides were introduced, however, were important to the determination that error occurred. The State constructed a screen upon which the slides were projected in images three feet ten inches by five feet six inches, and in such a manner that the images were projected immediately above the defendant's head. Nine of the slides illustrated the testimony of the deputy sheriff who discovered the bodies of the three victims, and twenty-six slides illustrated the testimony of the pathologists who conducted the autopsies. The photographs, most of which were in color, were distributed to the jury in silence, one at a time, for a full hour.

In the present case, the State introduced fifty-two color photographs of the crime scene and the victim's body. Of these, thirty-eight illustrated testimony regarding the scene of the crime and, though some revealed the presence of blood, none showed

more of the victim's body than her foot protruding from an open car door. Of the fourteen remaining photos, six related to the testimony concerning the autopsy report. These six photos depicted isolated areas of injury to the scalp and the neck, and the injuries as they appeared to the upper torso as a whole. Three photographs showed the victim's body slumped over in the car, but none of her injuries were apparent. Three photos of the victim's body in the car, and one photo taken at the morgue, were particularly gruesome, but without undue repetition they illustrated Agent Melton's testimony regarding his investigation of the crime. The remaining photograph depicted what was described as a defensive, sharp force injury to the victim's finger.

The circumstances surrounding the presentation of these photographs, and the photographs themselves, are not such that we can say their admission into evidence for illustrative purposes was not the result of a reasoned decision. The number of photographs alone is an insufficient measure of their capacity to prejudice and inflame the jury; instead, the court looks to their probative value and the circumstances of their introduction into evidence. *See State v. Robinson*, 327 N.C. 346, 358, 395 S.E.2d 402, 409 (1990). The trial court carefully considered the photographs prior to admitting them into evidence, and we cannot conclude that it abused its discretion in admitting them. This assignment of error is overruled.

[7] Further, we reject defendant's argument that the cumulative effect of the prodigious volume of physical evidence and expert or investigative testimony was confusion and undue prejudice. Defendant argues that the State, in an improper attempt to prejudice the jury, presented physical evidence such as bloodstained objects from the victim's car (for example, the victim's purse, soft drink can, telephone book, and key chain, in addition to car door panels, windows, and steering wheel), scientific evidence (such as fingerprint, serology, and hair identification tests which failed to link defendant to the crime scene), and investigative testimony relating to the above. According to defendant, prejudice occurred because the State was sending a subtle message to the jury that it had conducted an exhaustive investigation of the murder and had isolated only one possible perpetrator—defendant. Given that message, defendant fears the jury was inclined to convict him regardless of the fact that despite the comprehensive investigation there was little direct evidence linking him to the crime.

In remarking on the propriety of a prosecutor's closing argument, we have said:

> The solicitor, an officer of the State, after investigation, determined, on behalf of the State, that the defendant should be tried for this offense and that the death penalty should be sought. These determinations having been made on behalf of the State, it was the right and duty of the prosecuting attorney, vigorously, but fairly and in accordance with the law, *both in the presentation of evidence* and in his argument, to seek that result.

State v. Westbrook, 279 N.C. 18, 37, 181 S.E.2d 572, 583 (1971) (emphasis added), *judgment vacated on other grounds*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972). Under the circumstances of this case, we find no error in the manner in which the prosecutor sought to fulfill his duty through the presentation of evidence. Further, defendant's suggestion that the jury was convinced to convict him for any improper purpose is belied by the import of defendant's own admission of his responsibility for the death of Janice Sheets.

[8] Defendant next contends that the trial court committed reversible error when it refused his request for a jury instruction on voluntary intoxication as a defense to premeditated and deliberated murder. Defendant says the failure to instruct on the legal significance of his voluntary intoxication evidence unconstitutionally lightened the State's burden of proving premeditation and deliberation.

The controlling precedent on this question is *State v. Mash*, 323 N.C. 339, 372 S.E.2d 532 (1988). In *Mash*, the Court stated:

> A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, of his intoxication. Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. He must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.
>
> The evidence must show that at the time of the killing the defendant's mind and reason were so completely intox-

> icated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. . . . In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

Id. at 346, 372 S.E.2d at 536 (quoting *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987) (quoting *State v. Medley*, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978))) (citations omitted).

"When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *Id.* at 348, 372 S.E.2d at 537. Defendant presented no evidence relating to his degree of intoxication. Instead, defendant relies on evidence presented by the State. This evidence is twofold. First, Agents Jones and Foster testified regarding defendant's inculpatory statement in which he said he got off work at either 10:00 or 10:30 p.m. and then went to the Run-In to buy a six-pack of beer. Defendant rode around for a while, drinking beer and smoking marijuana, until shortly before 11:00 p.m. According to his statement to the agents, defendant was "pretty buzzed on beer and pot." Second, Mark McNeill, who worked at the Run-In on the night of the murder, corroborated defendant's statement that he purchased beer that evening. Defendant makes no reference to additional evidence in the record relating to his state of intoxication at any relevant time.

We hold that the trial court was correct to deny defendant's requested instruction on voluntary intoxication, as the evidence was insufficient to warrant such an instruction. The evidence falls far short of that found to be sufficient in *Mash*, where the defendant had been seen drinking from 4:00 p.m. until 11:00 p.m., where witnesses described him as "definitely drunk" and "pretty high" by 9:30 p.m., and where the defendant's actions became "drunker, wilder and out of control." *Mash*, 323 N.C. at 348, 372 S.E.2d at 538; *see also State v. Baldwin*, 330 N.C. 446, 463, 412 S.E.2d 31, 41 (1992) (insufficient evidence of intoxication where defendant drank five or six beers and consumed an indeterminate amount of marijuana and cocaine).

[9] Defendant also argues that the high evidentiary standard of proof required as a prerequisite to a voluntary intoxication instruction unconstitutionally prevents a defendant from presenting evidence in his defense. We see no merit to this contention, as

the presence of a burden of production on an issue cannot reasonably be said to preclude introduction of evidence thereon. Accordingly, we overrule this assignment of error.

[10] Defendant next contends that the trial court erred in denying his request to submit to the jury the possible verdict of second-degree murder. Such an instruction is required under the following circumstances:

> Under North Carolina and federal law a lesser included offense instruction is required if the evidence "would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater." *Strickland*, 307 N.C. at 286, 298 S.E.2d at 654, quoting *Beck v. Alabama*, 447 U.S. 625, 635, 65 L. Ed. 2d 392, 401 (1980). The test is whether there "is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). . . .
>
> > It is well settled that "a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternative verdicts." *State v. Palmer*, 293 N.C. 633, 643-44, 239 S.E.2d 406, 413 (1977). On the other hand, the trial court need not submit lesser included degrees of a crime to the jury "when the State's evidence is positive as to each and every element of the crime charged *and there is no conflicting evidence relating to any element of the charged crime.*"
>
> *State v. Drumgold*, 297 N.C. 267, 271, 254 S.E.2d 531, 533 (1979), quoting *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972) (emphasis in original). Such conflicts may arise from evidence introduced by the State . . . or the defendant. They may arise when only the State has introduced evidence.

State v. Thomas, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) (citations omitted).

Defendant does not contend there was insufficient evidence of premeditation and deliberation, making submission of the first-degree murder charge error. Instead, he contends, and we agree, that the State's evidence would have permitted a rational jury to convict him of second-degree murder. Second-degree murder

is defined as the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Young*, 324 N.C. 489, 493, 380 S.E.2d 94, 96 (1989).

In its case-in-chief, the State presented testimony of Agents Jones and Foster regarding defendant's inculpatory statements. According to their testimony, defendant stated that he got off work between 10:00 and 10:30 p.m. the night of the murder. At the victim's request, defendant used her keys to open her car door and put a box on the front seat. He then returned the keys and told the victim he was going to make a phone call. The victim, who had known defendant since they had worked together at Kentucky Fried Chicken several years previously, and who had hired defendant to work at Adams Seafood, then said, "Well, if you're going to be around a while, why don't you ride to the bank with me?" Defendant agreed to do so, and he telephoned his mother from the pay phone inside the restaurant. While waiting to go to the bank, defendant went to buy beer at the Run-In and then came back to the restaurant and waited for about thirty minutes. The victim came outside eventually and asked defendant if he was ready to go. When defendant replied "Yes," she asked if he wanted to follow her in his car or to ride with her. Defendant said that he would ride with her.

Defendant got in the front seat next to the victim and they rode together towards the bank. On the way, defendant asked how much money was made that night. He then said that he needed the money because he was about to lose his home. He asked if she could give the money to him. The victim replied, "Hell, no!" When they arrived at the bank, defendant said again, "Janice, I need that money." The victim made a response that defendant could not remember, then he tried to snatch the money bag. The victim, who was five feet nine inches tall and weighed 230 pounds, "smacked the hell out of [defendant]." She then tried to get out of the car and defendant grabbed her by the hair and pulled her back into the car.

According to the testimony relating his confession, defendant then said the victim grabbed a chrome bar that looked like a ratchet and tried to hit him with it. Defendant stopped the blow, took the bar, and hit her with it several times. He tried again to get the money bag, but the victim produced a large pocketknife and tried to cut him. Defendant wrestled the knife from her and stabbed

her in the neck. Defendant then grabbed the money bags, the knife, and the bar, and left.

" 'Whenever there is any evidence or when any inference can be fairly deduced therefrom tending to show a lower grade of murder, it is the duty of the trial judge, under appropriate instructions, to submit that view to the jury.' " *State v. Strickland*, 307 N.C. at 285, 298 S.E.2d at 653 (quoting *State v. Perry*, 209 N.C. 604, 606, 184 S.E. 545, 546 (1936)). From the evidence described above, a rational jury could have concluded that defendant killed Janice Sheets with malice but without premeditation and deliberation. The jury could have concluded that defendant carried no weapons with him when he went to the bank with the victim, and that he merely tried to take the money bags from her with permission or with the force of his own hands. If the jury believed his statement, it could have concluded that defendant only killed the victim as a result of the struggle that ensued after defendant pulled the victim back into the car and after the victim escalated the struggle by using deadly weapons to defend herself. Thus, the jury could have concluded that defendant killed the victim with malice but without the premeditation and deliberation necessary for first-degree murder. It therefore was error for the trial court to refuse to instruct on second-degree murder.

Defendant is not entitled to a new trial, however, because the jury based its verdict on both premeditation and deliberation and the felony murder rule. Defendant's first-degree murder conviction under the felony murder rule is without error and is therefore upheld. *See State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982). As a result, however, we must arrest judgment on the conviction for the underlying felony, robbery with a dangerous weapon.

First-degree murder (89 CRS 3312)—no error.

Robbery with a dangerous weapon (89 CRS 3311)—judgment arrested.

Justice MEYER dissenting.

I do not agree with the majority's conclusion that defendant's "first-degree murder conviction may be upheld only by virtue of the felony murder rule" and that the Court must therefore "arrest judgment on the underlying felony, robbery with a dangerous

weapon." I believe that the trial court properly refused to submit second-degree murder as a lesser offense of the charge of first-degree murder committed with premeditation and deliberation and that it committed no error requiring the reversal of defendant's convictions or the sentences imposed thereon.

It is not every case in which first-degree premeditated and deliberated murder is charged that an instruction on second-degree murder must be given. *State v. Strickland*, 307 N.C. 274, 284-85, 298 S.E.2d 645, 653 (1983). Such an instruction must be given as a lesser offense of first-degree premeditated and deliberated murder only where the evidence presented at trial raises a genuine issue as to whether the defendant acted with premeditation and deliberation in the killing. In making this determination, the question is not whether the jury could convict defendant of second-degree murder but whether "the evidence, reasonably construed, tend[s] to show lack of premeditation and deliberation." *Id.* at 287, 298 S.E.2d at 654.

Relying on a portion of defendant's confession, wherein defendant stated that the victim "smacked the hell out of [defendant]," tried to hit defendant with a chrome bar resembling a ratchet, and pulled a pocketknife on defendant, the majority states:

> [A] rational jury could have concluded that defendant killed [the victim] with malice but without premeditation and deliberation. . . . If the jury believed his statement, it could have concluded that defendant only killed the victim as a result of the struggle that ensued after defendant pulled the victim back into the car and after the victim escalated the struggle by using deadly weapons to defend herself.

I disagree.

The evidence presented at defendant's trial showed a ruthless killing committed by a man who had devised a plan to rob his employer and who had committed himself to using whatever force was necessary to carry out his plan. The evidence, viewed in a light most favorable to defendant, showed that the victim had refused to hand over the money to defendant and had "started out of the car" when defendant "grabbed her by the hair and pulled her into the car." When the victim sought to defend herself, first with a ratchet and then with a pocketknife, defendant overcame the victim and responded by inflicting multiple blows to the victim's

head. The uncontradicted evidence presented at trial showed that defendant inflicted eighteen blows to the victim's head, all while she was alive. Many of the blows were inflicted with such force as to expose the victim's skull. Not content with the fact that the victim was only stunned by the blows, defendant then proceeded to slash the victim's throat, inflicting the four inch long, one and one-half inch wide fatal wound that completely severed the victim's right jugular vein, partially severed the victim's right common carotid artery, and cut the victim's thyroid cartilage deeply enough to expose the victim's windpipe. Having accomplished this, defendant then grabbed the deposit bags containing his employer's money and fled the scene.

In my opinion, the statement by defendant raises no question as to the premeditation and deliberation on the part of defendant. Even assuming that defendant had not formed an intent to kill the victim before he dealt the first blow to her head, I fail to see how any rational juror could have reasonably found that defendant, having dealt eighteen blows to the victim's head, did not act with premeditation and deliberation when he subsequently slashed the victim's throat and left her helpless, to bleed to death.

Based on the overwhelming evidence of defendant's guilt, the jury returned the only reasonable verdict, finding defendant guilty of first-degree murder based upon the theories of premeditation and deliberation and of felony murder. I find it beyond all reason and logic to conclude, as does the majority, that the jury may have found that defendant did not act with premeditation and deliberation had it been instructed on second-degree murder. I therefore dissent from the portion of the majority opinion that concludes that the trial court erred in failing to submit the charge of second-degree murder.

Associate Justices MITCHELL and LAKE join in this dissenting opinion.

STATE OF NORTH CAROLINA v. STEPHEN WAYNE HOLDER

No. 600A90

(Filed 25 June 1992)

1. **Homicide § 678 (NCI4th)— diminished capacity—specific intent to kill—premeditation and deliberation—separate instructions not required**

The trial court in a first degree murder prosecution did not err in failing to give the jury a separate instruction on diminished capacity as it related to defendant's ability to premeditate and deliberate after having instructed on diminished capacity as it related to defendant's ability to form a specific intent to kill since specific intent is a constituent of premeditation and deliberation.

Am Jur 2d, Homicide §§ 499, 501, 516.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

2. **Criminal Law § 399 (NCI4th)— judge's statement to defense counsel—no comment on defendant's failure to testify**

The trial judge did not express an opinion on defendant's failure to testify when, during a discussion relating to the State's objection to a question asked a witness by defense counsel about defendant's reputation for truthfulness, he stated to defense counsel, "I assume he plans to testify. Have you decided if he's going to testify?" Furthermore, any prejudice was removed by the trial court's explicit instruction that defendant's election not to testify was an exercise of his legal right and should not be considered against him. N.C.G.S. § 8-54.

Am Jur 2d, Trial § 292.

Violation of federal constitutional rule (Griffin v. California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error. 24 ALR3d 1093.

3. **Evidence and Witnesses § 1622 (NCI4th)— tape recording—refusal to hold voir dire—sufficient authentication**

Defendant failed to show an abuse of discretion or harm resulting from the trial court's decision not to conduct a voir

dire before the authentication of a tape recording of a phone call allegedly made by defendant to a murder victim shortly before her death where (1) the recording was authenticated by a detective's testimony concerning statements made to him by defendant and by the victim recounting comments on the recording which closely parallel the actual text of defendant's comments on the recording, and (2) the recording was further authenticated by the testimony of two of the victim's friends that they listened to the recording shortly after it was made, that they recognized defendant's voice on the tape, and that the contents of the tape played in court were unaltered. N.C.G.S. § 8C-1, Rules 901(a)(5) and (b)(1).

Am Jur 2d, Evidence § 436.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules. 58 ALR3d 598.

4. Criminal Law § 441 (NCI4th)— prosecutor's jury argument—credibility of psychiatrist—no improper speculation on punishment

The trial court did not err in failing to intervene *ex mero motu* when the prosecutor argued to the jury that a psychiatrist who testified that defendant was insane when he murdered the victim and recommended psychotherapy as treatment for defendant's problems "wants you to find him not guilty by reason of insanity so he can talk to him for a while, I contend to you. Talk. No medication; nothing," since the prosecutor's remarks did not constitute speculation that there would be no consequences for defendant's actions if the jury concluded that he was insane but were geared to undercut the psychiatrist's credibility by characterizing his treatment recommendation as amounting to little more than talking to defendant about his problems.

Am Jur 2d, Expert and Opinion Evidence §§ 380-382.

Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases. 88 ALR4th 209.

5. Appeal and Error § 147 (NCI4th)— failure to preserve issue for appeal

The issue of whether the State attempted to place before the jury a fact not in evidence during cross-examination of

a defense expert witness was not preserved for appellate review where defendant permitted the allegedly improper "fact" to come before the jury without an initial objection; defense counsel merely objected to the form of the State's question, not that the prosecutor was improperly seeking to argue evidence not before the jury; and this specific ground was not apparent from the context of the question. Furthermore, defense counsel's subsequent proper objection did not redeem the initial failure to enter a proper objection. Appellate Rule 10(b)(1).

Am Jur 2d, Trial §§ 424-427, 429.

6. **Evidence and Witnesses § 2192 (NCI4th)— hypothetical questions—reasonable inferences from evidence**

The prosecutor was not attempting to place before the jury facts not in evidence when he posed hypothetical questions to an expert witness that included as predicate facts reasonable inferences that could be drawn from the evidence before the jury.

Am Jur 2d, Expert and Opinion Evidence §§ 98-116.

Modern status of rules regarding use of hypothetical questions in eliciting opinion of expert witness. 56 ALR3d 300.

7. **Criminal Law § 460 (NCI4th)— jury argument—reasonable inferences from evidence**

The prosecutor did not attempt to place before the jury facts not in evidence when he argued to the jury that "you can infer from the evidence that [defendant] made those hang up calls to ascertain whether or not [the victim] was there" where the evidence provided a reasonable basis for the prosecutor's inference.

Am Jur 2d, Prosecuting Attorneys § 27.

8. **Criminal Law § 18 (NCI4th)— second psychiatric evaluation—uncooperative defendant**

The trial court did not err in ordering that defendant submit to a second psychiatric evaluation at Dorothea Dix Hospital where the court found that a second psychiatric evaluation was necessary because defendant was uncooperative during his first evaluation.

Am Jur 2d, Expert and Opinion Evidence § 180.

9. Evidence and Witnesses §§ 865, 876 (NCI4th)— hearsay—proof that statement made—state of mind exception

A murder victim's statements to others shortly before her death that defendant refused to leave her alone, that he carried a gun, and that he frightened her with threats of physical violence were not hearsay because they were probative not of the truth of the victim's statements but of the fact that the victim in fact made the statements. Moreover, even if hearsay, the statements were admissible under N.C.G.S. § 8C-1, Rule 803(3) to show the nature of the victim's relationship with defendant and the impact of defendant's behavior on the victim's state of mind prior to the murder.

Am Jur 2d, Evidence §§ 497, 650.

Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declarant's mental, emotional, or physical condition. 75 ALR Fed 170.

10. Evidence and Witnesses § 1501 (NCI4th)— victim's bloody shirt—bullet holes—illustration of pathologist's testimony

A bloody shirt worn by a murder victim on the day of the killing was not introduced by the State merely to inflame the jury and was properly admitted in conjunction with the testimony of the pathologist who performed the autopsy on the victim's body where the pathologist articulated the reasons for the examination of clothing worn by gunshot victims and used the shirt to illustrate his testimony as to the location of the holes in the shirt that related to bullet holes in the victim's body, and the shirt was not excessively displayed or discussed.

Am Jur 2d, Homicide §§ 413, 463.

Admissibility, in homicide prosecution, of deceased's clothing worn at time of killing. 68 ALR2d 903.

11. Homicide § 441 (NCI4th)— instructions—use of deadly weapon—evidence of lack of specific intent—State's burden not lessened

The State's burden in a first degree murder case to prove beyond a reasonable doubt that defendant killed the victim with malice was not impermissibly lessened by the court's instruction on the inference of malice from the use of a deadly

weapon or infliction of a fatal wound by means of a deadly weapon where defendant introduced evidence that he lacked the capacity to form the specific intent to kill or inflict serious bodily harm. In determining whether the State proved beyond a reasonable doubt that defendant killed the victim with malice, the jury was entitled to infer malice from defendant's use of a deadly weapon along with other evidence of malice, including defendant's threats to physically harm the victim, countered by evidence presented by defendant that he lacked the capacity to form the specific intent to kill or inflict bodily harm.

Am Jur 2d, Homicide § 454.

12. Criminal Law § 1108 (NCI4th)— felonious assault—aggravating factor—dangerousness to others—sufficiency of evidence

The evidence supported the trial court's finding as a nonstatutory aggravating factor for assault with a deadly weapon with intent to kill inflicting serious injury that defendant's mental condition rendered him dangerous to other persons where there was expert psychiatric testimony that (1) defendant had a schizotypical personality disorder, making him believe that external forces controlled his behavior, (2) defendant also suffered from a mixed personality disorder which made him paranoid that others were intent on injuring or humiliating him, causing defendant to become angry, abusive and aggressive, (3) defendant also had a borderline personality causing him to have unstable mood swings during which he became angry for no apparent reason, (4) defendant had particular trouble when women terminated romantic relationships with him and would become angry, hostile, and threatening, and (5) these problems were exacerbated by defendant's abuse of marijuana, prescription drugs, and alcohol; and defendant's volatile behavior and violent proclivities were also manifested in numerous anecdotal accounts provided by lay testimony, as well as the fact that defendant customarily carried a gun because "little guys were always getting jumped on." This evidence was sufficient to prove by a preponderance of the evidence that defendant poses a greater threat or danger to other persons than other members of the public convicted of assault with a deadly weapon with intent to kill inflicting serious injury.

Am Jur 2d, Homicide §§ 568-582.

13. Criminal Law § 467 (NCI4th)— closing argument—use of victim's photograph and tape recording—no gross impropriety

The trial court did not abuse its discretion in failing to intervene *ex mero motu* when, during the closing argument, the prosecutor attached a photograph of a murder victim to the podium in front of the jury box and played a tape recording of defendant's threatening telephone message to the victim since both the photograph and the tape recording were relevant and admissible evidence introduced as exhibits during the trial, and the prosecutor's employment of them was not grossly improper.

Am Jur 2d, Trial § 666.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3d 8.

14. Criminal Law § 1098 (NCI4th)— aggravating factor—same evidence used to prove crime element

Defendant is entitled to a new sentencing hearing on a kidnapping conviction where the same evidence that was used to prove the "facilitating flight" element of the kidnapping charge was also used to prove the "avoiding or preventing a lawful arrest" aggravating factor employed to impose a sentence greater than the presumptive term.

Am Jur 2d, Criminal Law § 598.

Justice WEBB concurring.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence upon defendant's conviction for first-degree murder entered by *Freeman, J.*, at the 14 May 1990 Criminal Session of Superior Court, GUILFORD County. Defendant's motion to bypass the Court of Appeals, pursuant to N.C.G.S. § 7A-31, as to additional convictions and sentences, was allowed by the Court 20 December 1991. Heard in the Supreme Court 14 April 1992.

Lacy H. Thornburg, Attorney General, by Thomas F. Moffitt, Special Deputy Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

MEYER, Justice.

On 5 June 1988, defendant was indicted for the first-degree murder of Joyce Varner, assault with a deadly weapon with intent to kill inflicting serious injury on William E. Leitch, and the first-degree kidnapping and robbery with a dangerous weapon of Brian Shipp. Defendant was tried capitally in the Superior Court, Guilford County, in May 1990 and was found guilty of all charges. Subsequent to a sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant receive a life sentence for the first-degree murder conviction. The trial court thereafter imposed the life sentence for murder, as well as forty-year sentences for first-degree kidnapping and robbery with a firearm, to run consecutively, and a twenty-year sentence for assault with a deadly weapon with intent to kill inflicting serious injury, to run concurrently with the robbery sentence.

The State's evidence in the guilt phase tended to show the following. Early in 1988, Joyce Varner separated from her husband and lived with her four-year-old daughter, Emily, in an apartment in Greensboro, North Carolina. Ms. Varner, a thirty-year-old employee of the Richardson-Vicks Chemical Company, dated defendant for a short time after her separation. Dissatisfied because defendant wanted the relationship to be more intense than she wished, Varner attempted to terminate the relationship, but defendant refused to leave Varner alone.

Several witnesses testified about defendant's attempts to maintain his relationship with Varner. Cindy Blake, a friend of Varner's, testified that Varner told her that she had dated defendant several times, did not have a serious relationship with him, tried to break it off but could not get rid of defendant, and felt threatened by him. Phillip Purcell, one of the men Varner dated, testified that Varner told him that defendant followed her around, cruised by her house in his car, and left messages and cards on Varner's desk at work. Varner told Purcell that the relationship with defendant was not a serious one but that defendant thought it was, and that Varner became scared when she discovered that defendant carried a gun. Purcell also testified about several incidents wherein defendant threatened or physically molested Varner because he was upset about her seeing other men. Patrick Goldbeck, another man Varner had dated, testified that wherever he and Varner went, defendant always seemed to appear. In particular, he testified

that one evening Varner traveled home by cab only to return shortly thereafter because defendant was following her in another cab and she was afraid to go home alone. Varner went home an hour later and told Goldbeck that she saw the cab circling the block around her house. Goldbeck also testified that on one occasion defendant and Varner had a fight in a bar and that defendant kicked a hole in the fence behind the bar.

Carla Delvitto, Joyce Varner's mother, testified that Varner told her that she had been out with defendant but was afraid of him because he carried a gun and that on one particular Valentine's Day, defendant left flowers at Varner's front door, and Varner threw the flowers in a trash can. Delvitto also testified that in April 1988 she was baby-sitting Emily one evening and saw a car drive by the Varner residence very slowly, turn around in the driveway, drive up the street, turn around, and repeat the process three times. Upon being told of the incident by Delvitto, Varner replied: "Don't worry about that car. It's just Steve. He's still up in the parking lot waiting. He does this quite often. He wants to see who I'm coming home with and what time I come home."

Denise Wetzel, Joyce Varner's older sister, testified about several incidents regarding Varner's relationship with defendant. On one occasion, Wetzel saw defendant grab Varner by the arm merely because a casual acquaintance said "hello" to her. Varner also told Wetzel about numerous phone calls she received in which the caller immediately hung up the phone without speaking and about numerous other calls from defendant in which he interrogated her about men being at her home with her, what time she arrived home, and other personal matters. Wetzel testified that defendant was very possessive and scared Varner.

The State played a message that defendant left on Varner's telephone answering machine on 25 April 1988, which was as follows:

> [W]omen around where I suspect you to be at. Now, I expect the same consideration from you. That if you say this being friends or whatever, that excuse is wearing kind of thin as much as you've been around the boy. But, I want to tell you something, you going to wind up flaunting that stuff in front of me and you going to wind up getting yourself and your man friend hurt; or your men friends, whatever the situation may be. I'm tired of it; I'm tired of trying to be nice to you. I've had two months to think about it and you're just a spoiled

> woman. That's all there is to it. And there ain't going to be no more being nice. There's no need. I've done tried it and it don't work. So, from now on, when you see me out, expect me to mean business.

After receiving the message, Varner phoned her friends to tell them about it. Cindy Blake, Dennis Wetzel, Patrick Goldbeck, and Chuck Varner listened to the message. They testified that Varner was crying and very shaken by the message.

When Phillip Purcell came home on 26 April 1988, he found Varner and her daughter sitting on the steps to his house. Varner told Purcell that she was scared to return home because she had seen defendant around her house and she was afraid for her life.

Varner had a warrant issued for defendant's arrest for communicating threats to her, and the police arrested defendant on 26 April. As he was being taken to the magistrate's office, defendant raged that he "didn't do nothing to that bitch." When in the magistrate's office, defendant related: "This bitch got me down here on a shit charge, but that's okay. I'll get the bitch."

On 28 April 1988, Detective Allen Travis of the Greensboro police interviewed defendant. Defendant admitted leaving the message on Varner's answering machine in which he told her to "stop bringing her male friends around or someone was going to be hurt."

On the day of the murder, 5 May 1988, Varner got off work at 4:30 p.m. and was picked up by William Leitch, a friend of hers, and her daughter Emily. The three planned to dine together before Leitch was to meet another and drive to his home in Denver, North Carolina. The trio returned to Varner's house, and as they were deciding where to eat, Varner received several hang-up phone calls. They then went out to dinner and arrived home at approximately 8:30 p.m. Just before leaving to drop Leitch off at a meeting place for his ride, Varner received several more hang-up calls. Emily, Varner, and Leitch then entered the car, which was parked in a detached garage next to the house, with Leitch sitting on the passenger's side, Varner driving, and Emily in the back seat. Before leaving, Leitch made a final check in his duffel bag to see if he had collected all his belongings. As he was doing so, he heard a bang or pop as Varner turned the ignition key. As he turned, he saw a gun pointed at him. The gun fired and Leitch

was hit in the face with a bullet. Leitch heard Varner yell, "Stop. Quit, Stephen, quit." After a few seconds, Leitch heard Varner plead, "Help. Stop." Then he saw the gun discharge four more times in rapid succession into Varner's body. Shortly thereafter, Leitch went into the house and summoned the police. Leitch was taken to the hospital, where a bullet was removed from the back of his neck. Emily was not physically harmed but was heard screaming for her mother and was extremely upset.

When the police arrived, at approximately 9:05 p.m., they found Varner, already deceased, lying face down between two cars parked in her garage. The autopsy revealed that Varner had sustained five gunshot wounds. Two bullet wounds in her lower back were fatal, with one bullet penetrating Varner's lung, diaphragm, and liver, and the other penetrating her small intestine, liver, diaphragm, and heart.

At approximately 9:15 p.m. on the night of 5 May, Brian Shipp met defendant and agreed to give defendant a ride to a friend's house. Shipp testified that defendant kissed him and performed oral sex on him. The two thereafter bought some wine coolers at a convenience store and drove to a nearby bridge to urinate. There, defendant exhibited a handgun and demanded Shipp's car keys. Fearful for his safety, Shipp offered defendant money and to take him anywhere he wished to go. The two then traveled north on Interstate 85. As they drove, defendant sat in the passenger's seat with the gun pointed at Shipp. Defendant told Shipp that he eventually wanted to arrive in Canada. Shipp asked defendant what had happened, and defendant told Shipp that he had a fight with his girlfriend and that he shot and killed both her and her new boyfriend. After crossing into Virginia, Shipp noticed that the car was low on gas. Shipp drove to a truck stop and removed the keys from the ignition, telling defendant that he needed the key to open the gas cap. Shipp then ran into the truck stop and hid behind a counter until the police arrived.

On 7 May 1988, defendant was apprehended by the Virginia state police after commandeering a car from a resident in Dillwyn, Virginia. On 19 May 1988, Greensboro police traveled to Virginia and searched the area where defendant was apprehended. They discovered defendant's black leather jacket and a box of .22-caliber bullets. These bullets, along with bullets seized from defendant's residence and those taken from the bodies of Joyce Varner and

William Leitch, were analyzed. Federal Bureau of Investigation ballistics expert Gerald F. Wilkes testified that all of the spent bullets were .22-caliber, long-rifle, brass-coated lead bullets that had been fired from the same gun. He also testified that the bullets seized at defendant's residence and in Virginia were all .22-caliber, long-rifle, brass-coated lead bullets.

Defendant's evidence tended to show that on the evening of the murder, 5 May, defendant drank four double rum and coke mixed drinks and a shot of schnapps at a bar and left before 9:00 p.m. Numerous friends testified on behalf of defendant, most stating that he was a good friend and nonviolent.

Two expert witnesses testified, in effect, that defendant was insane at the time of the killing. Doctor Brad Fisher, a forensic psychiatrist, stated that defendant suffered from depression and a paranoid personality disorder characterized as recurrent and acute that rendered defendant's thinking susceptible to paranoia when defendant was stressed. Fisher testified that defendant had an inability to maintain relationships with women and that when those relationships failed, the stress contributed to paranoid delusions. Fisher related that defendant told him that he had consumed alcohol and the prescription drug Talwin and had smoked marijuana on the evening of the murder. In Fisher's opinion, defendant lacked the capacity to make and carry out plans on 5 May because his thoughts were disorganized and affected by a paranoid delusional sense of the world exacerbated by medications and drinking.

Doctor Billy Royal, a forensic psychiatrist, testified that defendant had problems with obsessiveness; that defendant had great difficulty dealing with terminated relationships with women when they did not desire the intense closeness he desired; and that during such times, defendant became angry, hostile, and threatening. Royal testified that on 5 May, defendant lacked the capacity to distinguish right from wrong and that defendant was incapable of deliberating or forming the intent to kill Varner or Leitch.

Expert witnesses for the State testified, in effect, that defendant was sane at the time of the killings. Doctor Bob Rollins, a forensic psychiatrist at Dorothea Dix Hospital, testified that defendant had a longstanding personality disorder affecting his ability to get along with women and that defendant was distressed at the time of the killing. However, Rollins stated that defendant was able to distinguish right from wrong at the time of the killing

and that defendant had no mental condition that would have prevented him from being able to form the specific intent to kill.

Doctor James Groce, also a forensic psychiatrist at Dorothea Dix Hospital, testified that defendant had a personality disorder with some borderline traits that caused him to decompensate under stress and become paranoid and that defendant was depressed. In Groce's opinion, defendant was able to distinguish right from wrong at the time of the killing. Also, Groce testified that defendant was able to make plans and form the intent to kill and that use of alcohol and drugs would not have rendered defendant incapable of formulating the specific intent to kill. However, on cross-examination, Groce opined that on 5 May, defendant experienced significant depression that would have impaired his ability to appreciate the criminality of his conduct and to conform his behavior to the requirements of the law, and that alcohol and drug use contributed to defendant's decreased judgment and increased impulsivity.

[1] Defendant first argues that the trial court improperly failed to instruct on diminished capacity as it relates to defendant's ability to premeditate and deliberate. In particular, defendant sought to instruct the jury on whether his alleged diminished capacity affected his capacity to form the requisite specific intent for first-degree murder *as well as* his capacity to premeditate and deliberate. The record shows that the trial court agreed to provide defendant's requested instruction "in substance." The court provided the following instruction:

> Now, as I told you a little earlier, you may find that there is evidence which tends to show that the defendant was intoxicated and/or drugged and/or that he lacked the mental capacity at the time of the acts alleged in this case. Now, generally, voluntary intoxication or a voluntary drug condition is not a legal excuse for a crime. However, if you find that the defendant was suffering from a combination of intoxication, drug condition and lacking a mental capacity, you should consider whether this condition affected his ability to formulate the specific intent which is required for a conviction of first degree murder. In order for you to find the defendant guilty of first degree murder, you must find beyond a reasonable doubt that he killed the deceased with malice and in the execution of an actual specific intent to kill performed—excuse me,

> formed after deliberation and premeditation. If, as a result of the combined intoxicated, drugged and lacking mental capacity of the defendant, if, as a result of this, the defendant did not have the specific intent to kill the deceased formed after premeditation and deliberation, then he is not guilty of first degree murder.

After so instructing the jury, the court asked counsel whether there were "any objections to the jury charge, request[s] for additional instructions or corrections or clarifications." Counsel for the State and for defendant answered in the negative.

It is well settled that when a request is made for a specific instruction that is supported by the evidence and is a correct statement of the law, the court, although not required to give the requested instruction verbatim, must charge the jury in substantial conformity therewith. *State v. Davis*, 291 N.C. 1, 229 S.E.2d 285 (1976). Defendant contends that there was compelling evidence here that the defendant could not premeditate or deliberate and could not form the specific intent to kill. In essence, defendant's argument rests on the premise that intent is an element independent of premeditation or deliberation and that he was entitled to have a separate diminished capacity instruction with regard to each.

In response, the State argues that defendant was not entitled to the requested instruction. In support of its contention, the State cites *State v. Quesinberry*, 319 N.C. 228, 230, 354 S.E.2d 446, 448 (1987), where we noted that while specific intent to kill is a necessary element of first-degree murder, it is also an essential constituent of the elements of premeditation and deliberation. " 'Thus, proof of premeditation and deliberation is also proof of intent to kill.' " *Id.* (quoting *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 839 (1981)). Given this interrelatedness, the State asserts that the court did not err in instructing only as to intent. We agree.[1]

The language attending the substantive elements of first-degree murder is well known:

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1. While acknowledging that he failed to lodge an objection in the wake of the allegedly improper instruction, defendant submits that the error was preserved because the instruction was properly requested, he was told by the court that the instruction would be given "in substance," and therefore he complied with the "spirit" of Appellate Rule 10(b)(2). *State v. Pakulski*, 319 N.C. 562, 575, 356 S.E.2d 319, 327 (1987). The State, on the other hand, argues that "plain error" analysis controls. Because we conclude that the reasonable doubt instruction provided by the trial court did not amount to error, we need not decide this issue.

> Premeditation means that the defendant formed the specific intent to kill for some length of time, however short, before the actual killing. Deliberation means that the intent to kill was executed in a cool state of blood, without legal provocation, and in furtherance of a fixed design for revenge or to accomplish some unlawful purpose. No particular length of time is required for the mental processes of premeditation and deliberation; it is sufficient that the processes occur prior to, and not simultaneously with, the killing.

State v. Cummings, 323 N.C. 181, 188, 372 S.E.2d 541, 547 (1988) (citations omitted), *judgment vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 602 (1990), *on remand*, 329 N.C. 249, 404 S.E.2d 849 (1991). Thus, specific intent is a constituent of premeditation and deliberation. We therefore conclude that the trial court did not err in its instruction and overrule defendant's assignment of error.

[2] Defendant next argues that the trial judge committed reversible error because he improperly expressed an opinion regarding defendant's failure to testify. Defendant bases his argument on the following exchange:

> Q. [By defense counsel, Mr. Elmore] Ms. Ragan, do you have an opinion as to [defendant's] truthfulness in the community?
>
> MR. KIMEL [prosecutor]:— We OBJECT as to his general truthfulness in the community.
>
> THE COURT:— Do you want to rephrase that?
>
> Q. Do you have an opinion as to his reputation for truthfulness and character?
>
> A. I've never—
>
> MR. KIMEL:— Just a minute, ma'am. We maintain that's improper at this time until and unless the defendant puts his truthfulness into evidence, if Your Honor please, i.e., by testimony.
>
> THE COURT:— *I assume he plans to testify. Have you decided if he's going to testify?*
>
> MR. ELMORE [defense counsel]:— Judge, we wouldn't say at this point, but it would certainly corroborate anything she would say at a later time if that were the case. I'll withdraw the question, Your Honor.

THE COURT:— Okay.

MR. ELMORE:— I don't have anything further. Thank you, Ms. Ragan.

(Emphasis added.) No objection was made, nor was any curative instruction requested concerning the court's remark about defendant's plans to testify. As the trial progressed, defendant did not testify, and the court subsequently charged the jury as follows:

> Now, the defendant in this case has not testified, and the law of North Carolina gives him this privilege. This same law also assures him that his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision in anyway [sic].

Defendant contends that the court's statements amounted to an improper comment on defendant's decision not to testify and impermissibly gave the jury the impression that the trial court thought it best if the defendant were to testify. According to defendant, this violated his right to remain silent and not take the stand in his own defense. N.C.G.S. § 8-54 (1988).

We disagree. Examination of the record reveals that the trial judge's comment was not directed to defendant's failure to testify; he did not specifically advert to defendant's failure to testify. Nor is it likely that an average juror would interpret the court's remark otherwise. *State v. Taylor*, 289 N.C. 223, 228, 221 S.E.2d 359, 363 (1976); *State v. Hughes*, 54 N.C. App. 117, 122, 282 S.E.2d 504, 508 (1981). Furthermore, any prejudice was removed by the trial court's explicit instruction that defendant's election not to testify was an exercise of his legal right and should not be considered against him. *State v. Lindsay*, 278 N.C. 293, 179 S.E.2d 364 (1971).

[3] Next, defendant argues that the trial court erred in admitting, over defendant's objection and request for a voir dire, a tape recording of a phone call allegedly made by defendant to the victim shortly before her death. Defendant contends that because the court refused his request for a voir dire, he was wrongly denied the opportunity to fully explore and question the reliability and authenticity of the tape. A transcript of the message, which provided as follows, was submitted to the jury:

> [W]omen around where I suspect you to be at. Now, I expect the same consideration from you. That if you say this being

> friends or whatever, that excuse is wearing kind of thin as much as you've been around the boy. But, I want to tell you something, you going to wind up flaunting that stuff in front of me and you going to wind up getting yourself and your man friend hurt; or your men friends, whatever the situation may be. I'm tired of it; I'm tired of trying to be nice to you. I've had two months to think about it and you're just a spoiled woman. That's all there is to it. And there ain't going to be no more being nice. There's no need. I've done tried it and it don't work. So, from now on, when you see me out, expect me to mean business.

We conclude that the trial court did not err in this regard. N.C.G.S. § 8C-1, Rule 901 governs the authentication requirements of such recordings. *State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991). Rule 901(b) provides by way of illustration numerous means of authentication. Within this nonexclusive list, the legislature provided that recordings may be authenticated by means of testimony by a witness who has knowledge that a matter is what it is claimed to be, Rule 901(b)(1), and by means of voice identification, Rule 901(a)(5). Here, Detective Travis of the Greensboro police testified that defendant admitted to him that he made the phone call to Varner on 25 April 1988 because she was "running men in front of him," that her behavior had made him very mad, and that he left a message on the victim's answering machine telling her to "stop bringing her male friends around or someone was going to get hurt." The following day, the victim herself contacted Travis, and Travis testified that "she had came [sic] home one night and found a message on her telephone recorder in which words to the effect that said, 'When I see you out, I just want you to know that you and your male friends are going to get hurt, and I mean business.' " These statements closely parallel the actual text of defendant's comments on the recording, and the witness' testimony suffices to authenticate the recording. Moreover, witnesses Blake and Goldbeck, both friends of the victim who were acquainted with the defendant, testified that they listened to the recording shortly after it was made, that they recognized defendant's voice on the tape, and that the contents of the tape played in court were unaltered from when they first heard the tape in April 1988. This testimony constituted an independent basis of authentication. Therefore, defendant is unable to show either an abuse of discretion or harm resulting from not having a voir dire hearing before the

tape recording was authenticated, and any error emanating from the trial court's decision not to conduct a voir dire is harmless. We therefore overrule defendant's assignment of error.

[4] In his next assignment of error, defendant argues that the trial court erred when it failed to intervene *ex mero motu* to censor remarks made by the State during its closing argument. The statement by the prosecutor concerned remarks made by Doctor Billy Royal, who stated that defendant was not responsible for his actions because he was insane when he murdered Joyce Varner. Doctor Royal recommended psychotherapy as treatment for defendant's problems. During his final argument, the prosecutor remarked:

> And you know, you go through all this. Doctor Royal gives his opinion: "He's insane. You know, he probably did these acts; he murdered this woman; he shot this man; he probably did these other things, but in my opinion, you know, he's just not responsible." I said, "Well, Doctor Royal, you know, if he's not responsible for murdering this woman and shooting this man and robbing this fellow, what kind of treatment do you recommend for him?" Do you know what he said? Remember that? Psychotherapy. Do you know what psychotherapy is? Talk. He wants to talk to him. That's what Dr. Royal's opinions were. *He wants you to find him not guilty by reason of insanity so he can talk to him for a while, I contend to you. Talk. No medication; nothing. Just, "I want to talk to him." Psychotherapy.*

(Emphasis added.)

Defendant argues that the above argument prejudiced the jury and amounted to an inaccurate statement of the law, insofar as it effectively informed the jury that if it concluded that defendant was insane, there would be no consequences for his actions. Citing *State v. Jones*, 296 N.C. 495, 502, 251 S.E.2d 425, 429 (1979), defendant contends that although counsel may inform the jury of the punishment for an offense, counsel may not speculate on the outcome of possible appeals, paroles, executive commutations, or pardons. The prosecutor's remarks here, defendant argues, were the functional equivalent of that condemned in *Jones*, and the trial court was therefore obliged to intervene *ex mero motu*. We disagree.

The prosecutor's remarks were not geared toward speculating on the punishment to be meted out by the judicial system upon conviction; rather, the thrust of his remarks was to undercut Doctor Royal's credibility by characterizing his treatment recommendation as amounting to little more than talking to defendant about his problems. Given the wide latitude prosecutors are granted in the scope of their arguments, such remarks were not so grossly improper as to require the trial court to intervene *ex mero motu*. *State v. Rogers*, 323 N.C. 658, 664, 374 S.E.2d 852, 856 (1989).

[5] In his fifth assignment of error, defendant argues that the State acted improperly in that it attempted to place before the jury facts that were not in evidence during both the State's cross-examination of a defense expert witness and the State's final argument. As for the cross-examination, the record reveals that Doctor Brad Fisher, a psychiatrist serving as a defense witness, testified that defendant could not think coherently when the crimes were committed. The following exchange transpired:

> Q. And wouldn't you call that—wouldn't that reach the standard of coherent thinking, if you were able to call someone up and say, "The next time I catch you and your boyfriend out, I'm going to do something to you," and then, do something to them? Isn't that coherent thinking, Doctor?
>
> A. I guess that is open to interpretation. My opinion is that it is not. That was indicative of a person whose thinking was based on a delusional system, was paranoid, and was not fair, but [the recording] said what it said.
>
> Q. I understand. And Doctor, calling someone on the night of May 5, 1988, and hanging up before you went over there, to make sure they were there, that would be some evidence of coherent thinking, wouldn't it, Doctor—
>
> MR. ELMORE:— OBJECTION to the form of the question.
>
> MR. KIMEL:— It's cross examination. It's in evidence.
>
> THE COURT:— Well, OVERRULED. Go ahead. You can answer that.
>
> A. Well, I frankly hadn't thought about that specific thing before, but the idea that you would call and hang up the phone, I think that's one possible—there's more than one possible

interpretation for exactly what that meant, but yes, one interpretation of that would be to make sure the person was there.

Q. But that is a rational interpretation, isn't it?

A. That—that's—yes.

Somewhat later, a similar exchange occurred:

Q. Doctor, would you just, based on that answer there, would you consider it a step by step thing to threaten someone with physical violence, to phone call them and make sure they were there—

MR. ELMORE:— OBJECTION, Your Honor. That's an interpretation of the evidence that he sees fit to interpret.

MR. KIMEL:— It's a question for his expert, Your Honor, on cross examination.

MR. ELMORE:— There's no evidence as to who made phone calls or—

THE COURT:— Well, OVERRULED. Go ahead, please.

On the basis of the above cross-examination, defendant argues that the trial court erred in allowing the State's questions because there was no evidence presented as to the identity of the individual who telephoned Joyce Varner just prior to her death. While conceding that it was proper for the prosecutor to argue that the jury could infer that the calls had been made by defendant, defendant contends that it was improper for the State to use the inference as a "fact" upon which the jury could infer premeditation and deliberation. We disagree.

As a threshold matter, as shown above, defendant permitted the allegedly improper "fact" to come before the jury without an initial objection; defense counsel merely objected to the "form" of the State's question, not that the prosecutor was improperly seeking to argue evidence not before the jury. "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.*" N.C. R. App. P. 10(b)(1) (emphasis added). Here, it cannot be said that the "specific grounds were . . . apparent from the context." *Id.* Moreover, "[i]t is well established that the admission of evidence

without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979). Therefore, defense counsel's subsequent proper objection did not redeem the initial failure to enter a proper objection. Because defendant waived his prior objection, this assignment is overruled.

[6] Assuming *arguendo* that no waiver occurred, we do not deem the prosecutor's line of questioning to have been in error. The record shows that the prosecutor was not attempting to place before jurors facts not in evidence. Rather, he posed hypothetical questions to an expert witness that included as predicate facts reasonable inferences that could be drawn from the evidence before the jury.

> A hypothetical question may include only such facts as are in evidence or such as the jury will be justified in inferring from the evidence. . . . [T]he interrogator may form his hypothetical question on any theory which can be deduced from the evidence and select as a predicate therefor such facts as the evidence reasonably tends to prove.

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 243, 311 S.E.2d 559, 570 (1984) (citations omitted). The evidence before the jury of defendant's erratic behavior with regard to Joyce Varner leading up to the murder of Ms. Varner suffices as a reasonable basis for the prosecutor's questions here. Moreover, the testimony of William Leitch, while not explicitly stating that defendant made the phone calls, provided a reasonable basis on which to predicate an inference such as that raised by the State in this instance.

[7] As for the allegedly improper final argument, the record reveals that the prosecutor addressed the jury as follows:

> I contend to you [that defendant] followed a pattern that he had all the way through his relationship with Joyce Varner. *I contend to you that you can infer from the evidence that he made those hang up calls to ascertain whether or not she was there.* That's what he did. He would always call her to see whether she was there. On this case, he had more of a reason, because he knew that a man had picked her up at work that day, and he'd seen her, and that really made him mad. He went right straight to Annabelle's in the normal course of what he was doing. There are phones there. And

> he broke his pattern a little bit, because something was happening.

(Emphasis added.) Defendant failed to object to the allegedly improper argument.

We conclude, once again, that the State did not attempt to place before the jury facts not supported by the evidence. It is well settled that trial counsel are given wide latitude in jury argument and "may argue the law and the facts in evidence and all reasonable inferences drawn from them." *State v. Kirkley*, 308 N.C. 196, 212, 302 S.E.2d 144, 153 (1983), *rev'd on other grounds, State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988); *see also State v. Craig*, 308 N.C. 446, 454-55, 302 S.E.2d 740, 745 (1983). Further, because defendant failed to object to the closing argument, the standard of review is one of "gross impropriety." *Craig*, 308 N.C. at 454, 302 S.E.2d at 745. Here, as discussed above, there existed a reasonable basis on which the prosecutor based his inference; therefore, the argument did not constitute a "gross impropriety," and the trial court did not abuse its discretion in failing to intervene *ex mero motu*. For this reason, we overrule this assignment of error.

[8] In his next assignment of error, defendant contends that the trial court erred in acceding to a request by the State for a second psychiatric examination of defendant and subsequently admitting into evidence testimony regarding the second examination. The factual background attending this claimed error is as follows. On 23 February 1990, defendant notified the State of his intent to raise an insanity defense and to introduce expert testimony in support. On 19 March 1990, the trial court ordered that defendant be examined at Dorothea Dix to ascertain whether he was sane when the crimes were committed. The examining psychiatrist, Doctor Bob Rollins, reported to the court as follows:

> My evaluation of Mr. Holder is limited in that he declines to provide information about his condition on or about the time of the alleged crime, his involvement in those events, and his relationship with the victim. Additionally, I requested, but did not obtain, reports from the other two clinician[s], Dr. Royal, and Dr. Fisher who are said to have examined Mr. Holder. Also, Mr. Holder's attorney did not furnish us any information.

Doctor Rollins also stated that defendant provided little information, refused to take laboratory tests, and answered questions on the Minnesota Multiphasic Personality Inventory so that the results were invalid.

The State moved to strike defendant's insanity defense because of his failure to cooperate and, in the alternative, moved to have defendant reexamined. After a hearing, the court found as facts that defendant had not been sufficiently forthcoming about the events surrounding the murder and his relationship with the victim and that defendant refused to participate in laboratory testing. On this basis, the court ordered that defendant be returned to Dorothea Dix for further examination. Defendant's second examination, conducted by Doctor Groce, revealed that defendant was experiencing significant depression exacerbated by substance abuse such as to cause impairment but that defendant was sane at the time the crimes were committed.

Defendant concedes that the court was empowered to order the initial examination but argues that the court erred in ordering the reexamination. Rather than requiring the defendant to undergo an additional examination, defendant contends that the court should have stricken the insanity defense. We disagree. In *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), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991), we discussed the parameters of the court's power to order additional psychiatric examinations:

> The conclusions of any mental health expert, his diagnoses and postdictions, are only as reliable as the data on which those conclusions are based. If there is reason to believe that defendant's evaluation was based on incomplete or distorted data, then there is good reason to reevaluate the individual in light of more complete or more accurate data. The skill of the clinician interpreting the raw data can also affect the validity of a diagnosis or other clinical judgment. Furthermore, retesting is often useful in defining the parameters of a mental illness. Although the underlying condition may always be present, the mental illness may over time manifest itself with symptoms of varying intensity. Knowing the parameters of the illness may increase the reliability of an expert's postdictions about a defendant's mental condition.

Id. at 46, 381 S.E.2d at 661. Here, the trial court found that defendant was insufficiently cooperative, and for this reason, a second psychiatric evaluation was necessary. We therefore conclude that the court did not err in ordering that defendant submit to a second psychiatric examination. Moreover, because the court acted properly in ordering the reexamination, no error occurred in allowing into evidence testimony concerning defendant's sanity at the time of the murder.

[9] Defendant next argues that the trial court, over defense objections, improperly admitted hearsay statements of several witnesses who testified as to what the victim had told them. These statements were to the effect that the victim had said that she had seen a small handgun in the defendant's pocket, that defendant had threatened her with physical harm and that she was scared, and that the defendant refused to leave her alone after she had tried to end the relationship. Defendant submits that the hearsay statements were improperly admitted and prejudiced his trial.

We conclude that the trial court did not err in admitting into evidence the victim's statements to witnesses shortly before she was murdered. As a threshold matter, the statements admitted over objection did not amount to hearsay. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence *to prove the truth of the matter asserted.*" N.C.G.S. § 8C-1, Rule 801(c) (1988) (emphasis added). "[W]henever an extrajudicial statement is offered for a purpose other than proving the truth of the matter asserted, it is not hearsay." *State v. Maynard*, 311 N.C. 1, 15-16, 316 S.E.2d 197, 205, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). "The Hearsay Rule does not preclude a witness from testifying as to a statement made by another person when the purpose of the evidence is not to show the truth of such statement but merely to show that the statement was, in fact, made." *State v. Kirkman*, 293 N.C. 447, 455, 238 S.E.2d 456, 461 (1977). Here, the testimony was probative not of the truth of Varner's statements to the witnesses, but rather was probative of the fact that Varner in fact made the statements.

Moreover, even if hearsay, the statements were admissible under the state-of-mind exception to the hearsay rule. This rule provides as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind . . . (such as intent, plan, motive, design . . .), but not including a statement of memory or belief to prove the fact remembered or believed . . . .

N.C.G.S. § 8C-1, Rule 803(3) (1988). " 'Evidence tending to show state of mind is admissible as long as the declarant's state of mind is a relevant issue and the possible prejudicial effect of the evidence does not outweigh its probative value.' " *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990) (quoting *Griffin v. Griffin*, 81 N.C. App. 665, 669, 344 S.E.2d 828, 831 (1986)). Here, the victim's statements to others that defendant refused to leave her alone, that he carried a gun, and that he frightened her with threats of physical violence were admissible under Rule 803(3), as they tended to show the nature of the victim's relationship with defendant and the impact of defendant's behavior on the victim's state of mind prior to the murder. Varner's state of mind is highly relevant, as it relates directly to the status of her relationship with defendant prior to her death. *See Cummings*, 326 N.C. at 313, 389 S.E.2d at 74. The probative value of this testimony outweighed any potential prejudice to defendant. *Id.*

[10] Defendant next argues that he was unfairly prejudiced by the admission, over defense objection, of a bloody shirt worn by the victim on the day of the killing. The shirt was introduced in conjunction with the testimony of Doctor Robert Thompson, the forensic pathologist who performed the autopsy on the victim's body. Doctor Thompson testified that the clothing worn by gunshot victims is customarily examined:

> [I]n cases such as this, when there have been gunshot wounds, we look at the clothing to see what holes might have been caused by the bullets, and as I mentioned, we examine the clothing to see if there's any powder, gunshot powder, on the clothing, and sometimes, it's useful or it's helpful to help to determine which is entrance and is exits [sic]. So, these are the general reasons that we examine the clothing in a gunshot wound case.

Doctor Thompson further testified that such clothing is examined to determine if the holes in clothing correspond with the bullet holes in the body. Thompson identified the material on the victim's shirt as blood and used the bloody shirt to illustrate his testimony as to the location of the holes in the shirt that related to the bullet holes in the victim's body. Defendant argues that the shirt was introduced as a disingenuous bad faith attempt to inflame the jury, given that there was no dispute as to the cause of the victim's death.

Under Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1988). "In general, the exclusion of evidence under the balancing test of Rule 403 . . . is within the trial court's sound discretion. . . . Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). We conclude that no such abuse occurred in the instant case. Doctor Thompson articulated the reasons undergirding the use of such clothing in autopsies, and he used the shirt to illustrate and corroborate his testimony. Moreover, the shirt was not excessively displayed or discussed; with the exception of the chain of custody testimony of Detective Caldwell, the shirt was not mentioned again after the Thompson testimony. Nor is there any basis of support for defendant's contention that the State introduced the shirt in bad faith.

[11] Defendant next assigns error to the following instruction given by the trial court:

> If the State proved beyond a reasonable doubt that the defendant killed the victim with a deadly weapon, or intentionally inflicted a wound upon the victim 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're not compelled to do so. You may consider this, together with all the other facts and circumstances, in determining whether the killing was unlawful and whether it was done with malice. And, of course, a firearm is a deadly weapon.

While acknowledging that the above instruction accords with N.C.P.I.—Crim. 206.10, defendant argues that the instruction was erroneous because the State cannot rely upon the inference of malice after the defendant introduces evidence that challenges the inference. To do so, defendant argues, impermissibly lessens the State's burden of proving each element of the crime charged beyond a reasonable doubt. *Francis v. Franklin*, 471 U.S. 307, 85 L. Ed. 2d 344 (1985). According to defendant, malice presupposes the existence of intent, and because there was much evidence that defendant lacked the specific intent to kill, it was error for the court to instruct on the inference of malice from the use of a deadly weapon or infliction of a fatal wound by means of a deadly weapon.

We reject defendant's argument. It is well settled that an instruction to the jury that the law implies malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death is not a conclusive irrebuttable presumption. *State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982). In *State v. Forrest*, 321 N.C. 186, 362 S.E.2d 252 (1987), we said the following with regard to a jury instruction substantially similar to that used here:

> Significantly, the trial court did not instruct the jury that malice should be *presumed*. On the contrary, the trial court instructed the jury that it "*may infer*" that the killing was unlawful and committed with malice, but that it was not compelled to do so. The trial court properly instructed the jury that it should consider this permissive inference along with all the other facts and circumstances . . . in deciding whether the State had proven malice beyond a reasonable doubt.

Id. at 191-92, 362 S.E.2d at 255. In the presence of evidence raising an issue on the existence of malice and unlawfulness, a permissible inference of malice arises that the jury may accept or reject along with other evidence of malice. *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988). Here, there was substantial evidence of malice on the part of defendant. Less than a week before the murder, defendant threatened the victim with physical harm in a message recorded on her telephone answering machine. Defendant also threatened the victim at the magistrate's office after his arrest for the tape-recorded threat, saying "[t]his bitch got me down here on a shit charge, but that's okay. I'll get the bitch." On this basis, the jury was entitled to infer malice from defendant's use of a

deadly weapon along with other evidence of malice, countered by evidence presented by defendant tending to show that he lacked the capacity to form the specific intent to kill or inflict serious bodily harm, to determine if the State proved beyond a reasonable doubt that defendant killed the victim with malice. Thus, the State's burden to prove that defendant killed the victim with malice beyond a reasonable doubt was not impermissibly lessened, and therefore no error occurred.

[12] Defendant next argues that the trial court erred in sentencing defendant to twenty years' imprisonment for assault with a deadly weapon with intent to kill inflicting serious injury on William Leitch on the basis of a nonstatutory aggravating factor that defendant's mental condition rendered him dangerous to other persons. In particular, defendant contends that he is entitled to a new sentencing hearing, arguing that there was insufficient evidence to support the factor because there was no evidence that defendant had assaulted another in the past or that defendant would do so in the future.

In order to support the nonstatutory aggravating factor that defendant poses a dangerous threat to others, the State must prove by a preponderance of the evidence that defendant poses a greater threat or danger to other persons than other members of the public convicted of assault with a deadly weapon with intent to kill inflicting serious injury. *State v. Vaught*, 318 N.C. 480, 486, 349 S.E.2d 583, 587 (1986). Here, extensive expert psychiatric testimony showed that defendant posed an unusual threat to the public. Doctor Billy Royal testified that defendant had a schizotypical personality disorder, making defendant believe that external forces controlled his behavior. According to Doctor Royal, defendant also suffered from a mixed personality disorder which made him paranoid that others were intent on injuring or humiliating him, causing defendant to become angry, abusive and aggressive. Defendant also had a borderline personality causing defendant to have unstable mood swings during which he became angry for no apparent reason. Doctor Royal testified that defendant had particular trouble when women terminated romantic relationships with him and that defendant would become angry, hostile, and threatening, sometimes threatening homicide or suicide. Exacerbating these problems, defendant also abused marijuana, prescription drugs, and alcohol. Defendant's volatile behavior and violent proclivities were also manifested in numerous anecdotal accounts provided by lay testi-

mony, as well as the fact that defendant customarily carried a gun because "little guys were always getting jumped on." On this basis, we conclude that the trial court did not err in finding as an aggravating factor that defendant's mental condition caused defendant to be a threat to others.

[13] Finally, defendant argues that the trial court erred in failing to strike *ex mero motu* a portion of the State's final argument to the jury. During the closing argument, the prosecutor attached a photograph of Joyce Varner to the podium in front of the jury box, played the tape recording of defendant's threatening message, and related the following:

> Now, Ms. Varner suffered a lot, I contend to you, and she—you know, you deserve to see her, I contend, and what I want to do, just look at this picture while I show you the last words—I'm going to sit down. Look at that picture as you listen to the last words that this woman heard right here . . . .

Both the recording and the photo were introduced as exhibits during the trial. Moreover, defense counsel failed to object to the closing argument. Nevertheless, defendant now argues that the State's behavior amounted to a "theatrical trick" and that he was prejudiced when the court failed to intervene *ex mero motu*.

In deciding whether the trial court improperly failed to intervene *ex mero motu* to correct an allegedly improper argument of counsel at final argument, our review is limited to discerning whether the statements were so grossly improper that the trial judge abused his discretion in failing to intervene. *State v. Hamlet*, 312 N.C. 162, 172, 321 S.E.2d 837, 844 (1984). This same analytic framework applies to alleged prosecutorial misconduct in the display of evidence to the jury at final argument. *State v. Robinson*, 327 N.C. 346, 359, 395 S.E.2d 402, 409 (1990). We find no abuse of discretion here. Both the tape recording and the photo were relevant and admissible evidence, seen by the jury during the trial. The State's employment of the tape recording and the photo were not so grossly improper as to have us conclude that the trial court abused its discretion in failing to intervene *ex mero motu*.

[14] Subsequent to oral arguments in this case, defendant filed a Motion to Suspend the Rules of Appellate Procedure and Amend the Record and Brief. In that motion, defendant argued that the same evidence that was used to prove the "facilitating flight" ele-

ment of the kidnapping charge was used to prove the "avoiding or preventing a lawful arrest" aggravating factor to impose a sentence greater than the presumptive on the kidnapping conviction. N.C.G.S. §§ 14-39(a)(2) (Supp. 1991), 15A-1340.4(a)(1)(b) (Supp. 1991). According to defendant, the sentencing proceeding violated the requirement in our Fair Sentencing Act that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." N.C.G.S. § 15A-1340.4(a)(1) (Supp. 1991). In its response to defendant's motion, the State argues that defendant waived this alleged error but that in the event this Court suspends the rules and allows the filing of the motion, it cannot distinguish between the evidence used to prove the offense and the aggravating factor. We hereby suspend the rules and allow defendant's motion. In view of the State's concession of error, we vacate the forty-year consecutive sentence imposed for the kidnapping conviction and remand the case to the Superior Court, Guilford County, for resentencing upon defendant's conviction for kidnapping.

For the reasons stated above, we therefore hold that defendant's sentences for first-degree murder, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury were free of prejudicial error. Defendant's sentence for first-degree kidnapping is contrary to the law and is therefore remanded to Superior Court, Guilford County, for proceedings not inconsistent with this opinion.

No. 88CRS36131, first-degree murder: no error.

No. 88CRS36132, robbery with a dangerous weapon: no error.

No. 88CRS36133, first-degree kidnapping: no error in the guilt phase; sentence vacated and case remanded for resentencing.

No. 88CRS36134, assault with a deadly weapon with intent to kill inflicting serious injury: no error.

Justice WEBB concurring.

I concur with the result reached by the majority but I do not agree with its rationale that certain testimony was not hearsay. The defendant assigned error to the testimony of certain witnesses as to what the victim had told them—to wit, that she had seen a small handgun in the defendant's pocket, that the defendant had

threatened her and she was afraid, and that the defendant refused to leave her alone after she had tried to end their relationship. The defendant contends this was inadmissible hearsay testimony.

I cannot agree with the majority that this is not hearsay testimony. The majority says the testimony was not introduced to prove the truth of the statements but to prove the victim made them. While it is true that this testimony was introduced to show the victim made the statements, it is obvious to me that the reason the State wanted to prove the victim made the statements was so that the jury would believe the defendant carried a pistol, that the victim was afraid of the defendant, and the defendant refused to leave the victim alone. This makes the testimony hearsay.

I also do not believe the testimony was admissible under the state of mind exception to the hearsay rule. The victim's state of mind was not relevant to any issue in the case.

I do not believe this error was prejudicial because there was substantial other evidence introduced to prove the matters proved by this hearsay testimony. For that reason, I vote with the majority.

STATE OF NORTH CAROLINA v. DANIEL THOMAS GARNER

No. 263A91

(Filed 25 June 1992)

1. Searches and Seizures § 32 (NCI3d)— exclusionary rule— illegal seizure under warrant—inevitable discovery exception adopted

The trial court did not err in a murder and robbery prosecution by admitting into evidence a copy of a pawn shop receipt and Bureau of Alcohol, Tobacco and Firearms records of the purchase of a gun by defendant where those documents were obtained derivatively from a search of defendant's residence supported by a warrant based on a partially incorrect probable cause affidavit, but the court found that "but for" the information found at defendant's residence officers would have conducted a routine check and discovered the duplicate receipt and ATF records at the pawnshop by lawful means. The inevitable discovery exception to the Fourth Amendment exclu-

sionary rule is adopted. The case by case approach of *United States v. Silvestri*, 787 F.2d 736, is adopted for determining whether proof of an ongoing, independent investigation is necessary to show inevitability.

Am Jur 2d, Evidence §§ 412, 415, 416, 416.5.

What circumstances fall within "inevitable discovery" exception to rule precluding admission, in criminal case, of evidence obtained in violation of Federal Constitution. 81 ALR Fed 331.

2. **Searches and Seizures § 32 (NCI3d)— illegal search—inevitable discovery exclusion—burden of proof of inevitability**

The trial court's application of the inevitable discovery doctrine did not violate a defendant's Fourth Amendment rights where, although police first learned the identity of the gun merchant from whom defendant purchased the weapon through an illegal search, a police investigator testified that, had a pawnshop receipt not been found at defendant's residence, the serial number of the weapon seized during the permissive search where defendant was arrested would have been run through a PIN and ATF records check, officers testified that it was normal procedure to check ATF and PIN records, the pawnshop did in fact file the documentation required upon the sale of a firearm, and an independent inquiry of the ATF would have produced the reference to the pawnshop. The U.S. Supreme Court held in *Nix v. Williams*, 467 U.S. 431, that the burden of proof of inevitability was preponderance of the evidence and, since defendant offered no evidence, the State thus proved inevitable discovery by a preponderance of the evidence.

Am Jur 2d, Evidence §§ 412, 415, 416, 416.5.

What circumstances fall within "inevitable discovery" exception to rule precluding admission, in criminal case, of evidence obtained in violation of Federal Constitution. 81 ALR Fed 331.

3. **Searches and Seizures § 32 (NCI3d)— exclusionary rule—inevitable discovery exception—North Carolina Constitution**

The Supreme Court rejected the contention of a robbery and murder defendant that derivative evidence obtained from

an illegal search should have been suppressed because the exclusionary rule arising from Article I, Section 20 of the North Carolina Constitution does not and should not contain an inevitable discovery exclusion. While the Supreme Court has held that Article I, Section 20 of the North Carolina Constitution, like the Fourth Amendment to the United States Constitution, prohibits unreasonable searches and seizures and requires the exclusion of evidence obtained by unreasonable search and seizure, there is nothing to indicate anywhere in the text of Article I, Section 20 any enlargement or expansion of rights beyond those afforded in the Fourth Amendment as applied to the states by the Fourteenth Amendment.

Am Jur 2d, Evidence § 416.5.

What circumstances fall within "inevitable discovery" exception to rule precluding admission, in criminal case, of evidence obtained in violation of Federal Constitution. 81 ALR Fed 331.

4. Searches and Seizures § 32 (NCI3d)— exclusionary rule— inevitable discovery exception—absence of bad faith by officers

The trial court did not err in a robbery and murder prosecution by ruling that the question of bad faith on the part of investigating officers was irrelevant in the proper application of the inevitable discovery doctrine. Although defendant contended that the parameters of the inevitable discovery doctrine should be narrowly drawn in order to preserve the deterrence value of the exclusionary rule, the trial court's suppression of primary evidence, while not necessary in its application of the doctrine of inevitable discovery, unquestionably served the deterrence objective because the risk of suppression inherently preserves the deterrence value of the exclusionary rule. Further, if the State carries its burden and proves inevitable discovery by separate, independent means, thus leaving the State in no better and no worse position, any question of good faith, bad faith, mistake or inadvertence is irrelevant.

Am Jur 2d, Evidence § 416.5.

What circumstances fall within "inevitable discovery" exception to rule precluding admission, in criminal case, of

evidence obtained in violation of Federal Constitution. 81 ALR Fed 331.

5. Evidence and Witnesses § 380 (NCI4th)— murder—subsequent attempted murder—same weapon—admissible

The trial court did not err in a murder prosecution by admitting testimony regarding a subsequent attempted murder by defendant where the evidence tended to prove the defendant's possession and control of the murder weapon at a time close to the murder. Although the evidence also showed defendant to be guilty of another crime of violence, it cannot be said that its only probative value was to show defendant's murderous propensities. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 321, 329.

Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan. 47 ALR Fed 781.

6. Evidence and Witnesses § 90 (NCI4th)— murder—subsequent attempted murder—probative value not outweighed by prejudice

The trial court did not abuse its discretion in a murder prosecution by admitting evidence of a subsequent attempted murder where the evidence was significantly inculpatory and more directly linked defendant to the murder weapon than any other evidence presented. While the evidence would have some prejudicial effect, it could not be said that the trial court abused its discretion in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence §§ 321, 329.

Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan. 47 ALR Fed 781.

Justice FRYE concurring in the result.

Chief Justice EXUM joins in the concurring opinion.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment

entered by *Brewer, J.*, at the 15 October 1990 Criminal Session of Superior Court, CUMBERLAND County, upon a jury verdict of guilty of first-degree murder on theories of both premeditation and deliberation and felony murder. Defendant's motion to bypass the Court of Appeals as to his conviction of robbery with a dangerous weapon was allowed by this Court on 9 October 1991. Heard in the Supreme Court 14 February 1992.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

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

LAKE, Justice.

The defendant was indicted on 23 January 1989 by a Cumberland County Grand Jury on the offenses of robbery with a dangerous weapon and the first-degree murder of Eva Gail Harrelson. Defendant pled not guilty. He was tried capitally to a jury at the 15 October 1990 Criminal Session of Superior Court, Cumberland County. The jury found the defendant guilty as charged of armed robbery and of first-degree murder on theories of both premeditation and deliberation and felony murder. Following a separate sentencing hearing, the jury recommended a sentence of life imprisonment for the murder conviction. In judgments entered 14 November 1990, Judge Brewer sentenced defendant to consecutive terms of life imprisonment for the murder and twenty-five years imprisonment for the armed robbery. Defendant appealed his murder conviction to this Court as a matter of right, and on 9 October 1991 this Court allowed his motion to bypass the North Carolina Court of Appeals with regard to his appeal of the armed robbery conviction.

At trial, the State presented evidence tending to show that Eva Gail Harrelson died on the evening of 27 October 1988 as a result of two gunshot wounds to the head which she sustained while working as a cashier at the BTO Food Store No. 1, located on Ramsey Street in Fayetteville. Ms. Harrelson had been employed by BTO Food Stores for about five months and knew the defendant as a regular customer of the store.

Sometime after midnight on 28 October 1988 two high school students stopped by the store and observed, through the open door of a storage room behind the checkout counter, Ms. Harrelson's

body lying face down in a pool of blood. The students called the police, and officers arrived within five to six minutes. Crime scene technicians conducted a search which produced several pieces of evidence, including two spent Federal .25 caliber shell casings near Eva Harrelson's body. Various items had been knocked off the counter and scattered about behind the cash register, which was jammed and reading "error." All the money was gone from the cash register except some change. The store manager testified that she had been acquainted with defendant for over a year and that he was a regular customer of the BTO store.

The State's evidence further showed that the defendant and one Brad Dickens met on 15 October 1988 and became friends who would go out and drink together. Dickens testified that during the period from 15 October until 28 October when the murder occurred, he had learned the defendant lived about two blocks behind the BTO store and that he had seen the defendant on a few occasions in possession of a small caliber automatic handgun, which Dickens identified at trial, the same being State's Exhibit 15.

Dickens also testified at trial that he met the defendant after work around 10:00 p.m. on 10 November 1988, and went with him to defendant's apartment and drank a few beers. Dickens testified that after they left the apartment, defendant told him that he had gone into the BTO store with a gun and told the clerk to give him the money. She had responded, "Danny, stop playing around. Put the gun away." Whereupon defendant said, "Listen bitch, I'm not playing." Defendant then took the money and shot her. Defendant also told Dickens that "they wouldn't suspect him because he lived right there and he came in all the time and they knew him."

On cross-examination, Dickens testified that, on the same night, 10 November 1988, after he and defendant had been riding around and drinking beer, they broke into a house on Lakecrest Drive. Dickens was charged with first-degree burglary in connection with that break-in. His testimony against defendant in the present case was pursuant to a proposed plea-bargain.

The State further offered the testimony of a driver for AAA Checker Cab Company, William Jackson, who testified that on 18 November 1988, some three weeks after the Harrelson murder, he was called to pick up a fare at the Express Stop on Ramsey Street. There he saw defendant get out of a white car driven

by a young woman later identified as Sherri Faulkner. Jackson took defendant as he requested through Linden in rural Cumberland County and turned onto a dirt road where defendant asked to be let out of the cab. Jackson then observed the white car approaching, driven by the same woman he had seen earlier. The defendant got out of the cab, seemed to be searching for his wallet, and then suddenly shot Jackson twice in the side and once in the back of the head.

Jackson slumped over and pretended to be dying. When he heard defendant talking to the woman, he sat up and began driving away. Faulkner and the defendant chased him in Faulkner's car until the cab driver slammed on the brakes, causing Faulkner to hit him and swerve into an embankment. Jackson then escaped and sought help.

On that same evening of 18 November 1988, following discovery of the abandoned car rented at that time to defendant and earlier driven by Faulkner, and armed with information that defendant was there, law enforcement officers went to the residence of Dana Adams and Angela Weems on Glen Reilly Road and were given permission to enter and search. They found defendant therein with Sherri Faulkner and arrested both. Among the items of evidence obtained at this location were a bank bag like the one missing from the BTO; a box of .25 caliber ammunition; the defendant's jacket, in the pockets of which were the keys to the rental car; and a .25 caliber Beretta handgun which the State's evidence established to be the weapon used in the BTO killing.

On 18 November 1988, subsequent to the arrest of defendant and recovery of the .25 caliber Beretta pistol, law enforcement officers obtained a warrant to search the defendant's residence. This search warrant was issued by a magistrate upon a finding of probable cause pursuant to: (1) an application therefor identifying the crime as the homicide of Eva Gail Harrelson on October 28, 1988 by Daniel Thomas Garner, the premises to be searched as 129 Treetop Dr., Apt. A, occupied by Daniel T. Garner; and (2) a probable cause affidavit by the investigating officers listing articles which they believed would be found therein, including .25 automatic ammunition, and giving a description of evidence to be seized which included ".25 caliber ammunition to analyze against spent shell casings and projectiles recovered from homicide." The inventory of property seized as a result of the search of said residence

included among eleven items the following: "P. Beretta Box showing model 950BS, serial number BR88945V from Jim's Pawn Shop; receipt from Jim's Pawn Shop showing a purchase of a Beretta PPGGG Model 950BS, SN#BR88945V on 20 Dec 86; five F.C., .25 auto bullets."

As a result of this seizure law enforcement officers went to Jim's Pawnshop in Fayetteville on 18 November 1988 and there obtained another copy of the Beretta pistol purchase receipt and a second document purporting to be defendant's Alcohol, Tobacco and Firearms application to purchase this pistol. Also on this date the State's firearms identification expert, S.B.I. Lab Technician, R.N. Marrs, concluded and communicated to Cumberland law enforcement officers that the spent casings found at the scene of the Jackson shooting and at the scene of the Harrelson homicide were fired from the same gun. However, contrary to a statement in the probable cause affidavit, the pistol taken from defendant's coat, when he was earlier arrested on 18 November at another location, was not delivered to the S.B.I. in Raleigh until 21 November, three days later. Thus, Agent Marrs had no firearm available for ballistics comparison on 18 November and was unable to say on 18 November, the date of the search warrant, that the pistol seized at defendant's arrest, or any specific .25 caliber pistol, was the gun used in both crimes. The probable cause affidavit supporting the search warrant was thus incorrect to this extent.

Prior to trial, the defendant moved to suppress all evidence obtained "as a direct or indirect result" of the search of his residence on the basis of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 20 and 23 of the North Carolina Constitution. This motion thus included both the primary evidence (the gun box and the Jim's Pawnshop purchase receipt obtained at defendant's residence) as well as the derivative evidence (a copy or duplicate of said receipt and the Bureau of Alcohol, Tobacco and Firearms records of the purchase by the defendant) obtained by the officers from Jim's Pawnshop, the gun merchant.

In its pretrial hearing of defendant's suppression motion relating to the items seized from his residence, the trial court heard evidence, made a statement of principles of law affecting the "inevitable discovery" exception under Federal Constitutional cases, citing principally *Nix v. Williams*, 467 U.S. 431, 81 L. Ed. 2d 377 (1984), made findings of fact and conclusions of law, and entered orders

allowing the motion and excluding from evidence all items obtained directly from defendant's residence. The trial court, however, excepted from the orders the duplicate purchase receipt and the Bureau of Alcohol, Tobacco and Firearms (hereinafter ATF) records later obtained by the officers from the pawnshop itself, on the basis of the "inevitable discovery" doctrine.

The trial court allowed the motion as to the direct or primary evidence taken from defendant's residence, on the premise that the search warrant did not state sufficient facts to establish probable cause to search the residence. However, the court allowed into evidence the derivative evidence from the pawnshop upon findings (1) that it is standard or routine procedure in cases involving firearms to cause certain checks to be made including Police Information Network (hereinafter PIN) and ATF checks, and (2) that "but for" the fact the information was readily ascertainable by the pawn receipt found in defendant's residence the officers would have conducted a routine check and discovered the duplicate receipt and ATF records at Jim's Pawnshop by lawful means. The court thus concluded as a matter of law that the State had proven by a preponderance of the evidence that the information at Jim's Pawnshop would have been discovered inevitably by lawful means.

At trial the State introduced all items of evidence obtained from the permissive search of the residence where defendant was arrested, as well as the duplicate receipt showing the purchase of a .25 caliber Beretta pistol from Jim's Pawnshop, and the ATF documentation showing that the .25 caliber pistol seized at defendant's arrest was purchased by defendant on 20 December 1986 from Jim's Pawnshop. The State's firearms identification expert positively identified the two spent cartridge casings and a bullet recovered from the BTO store, the bullet removed from the victim during the autopsy, the three spent casings recovered from William Jackson's taxicab, and a bullet removed from Jackson's body as all having been fired from the pistol recovered from defendant's coat at the time of his arrest.

I.

[1] The first issue raised by defendant on appeal is whether the trial court violated defendant's constitutional rights under the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution, by admitting into evidence, under an "inevitable discovery" exception to the exclusionary rule,

certain documents obtained derivatively from the search of defendant's residence tending to prove defendant's ownership of the murder weapon.

The ruling of the trial court here in question, in allowing the challenged evidence under an "inevitable discovery" exception to the Fourth Amendment exclusionary rule, was predicated in chief upon the opinion of the United States Supreme Court in *Nix v. Williams*, 467 U.S. 431, 81 L. Ed. 2d 377 (1984), delivered by Chief Justice Burger, in which the Supreme Court itself formally adopted this particular exception to the exclusionary rule. In so doing, it is worth noting the Court stated that "the 'vast majority' of all courts, both state and federal, recognize an inevitable discovery exception to the exclusionary rule." *Id.* at 440, 81 L. Ed. 2d at 385.

Since the *Nix* opinion in 1984, the "inevitable discovery" exception has been further advanced in numerous circuit court cases. *See, e.g., United States v. Mancera-Londono*, 912 F.2d 373 (9th Cir. 1990); *United States v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990); *United States v. Evans*, 848 F.2d 1352 (5th Cir. 1988); *United States v. Whitehorn*, 813 F.2d 646 (4th Cir. 1987), *cert. denied*, 487 U.S. 1234, 101 L. Ed. 2d 931 (1988); *United States v. Silvestri*, 787 F.2d 736 (1st Cir. 1986), *cert. denied*, 487 U.S. 1233, 101 L. Ed. 2d 931 (1988); *United States v. Merriweather*, 777 F.2d 503 (9th Cir. 1985), *cert. denied*, 475 U.S. 1098, 89 L. Ed. 2d 898 (1986); *United States v. Cherry*, 759 F.2d 1196 (5th Cir. 1985); *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117, 86 L. Ed. 2d 262 (1985). As the defendant concedes, *Nix* dispels any doubt about the existence of the inevitable discovery doctrine under federal constitutional standards.

However, unlike the vast majority of jurisdictions, both state and federal, North Carolina law does not yet include this exception to the exclusionary rule in any form, and thus the central question presented by this case is whether this Court will put its imprimatur on the inevitable discovery doctrine. We conclude this doctrine should be adopted as a logical and meaningful extension of our law.

The Supreme Court, in setting its premise for establishing the inevitable discovery doctrine in *Nix*, related the historic "core rationale" for the exclusion of illegally obtained evidence as being the need to deter police from violations of constitutional protections, notwithstanding the drastic social cost of letting the obvious-

ly guilty go free; and the Court further related the breadth of the rule from its genesis in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L. Ed. 319 (1920), to include not only the illegally obtained evidence itself but also other evidence derived from the primary evidence. In so doing the Court in *Nix* stated: "The holding of *Silverthorne* was carefully limited, however, for the Court emphasized that *such information* does not automatically become 'sacred and inaccessible.' " *Nix v. Williams*, 467 U.S. at 441, 81 L. Ed. 2d at 386 (emphasis added) (citation omitted).

With reference from *Silverthorne* to "[such facts]," which are to be "gained from an *independent source*," the Court in *Nix* quotes *Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 455 (1963), as to the emphasis of the Court in that case that evidence (including the indirect product or "fruit") illegally obtained need not always be suppressed, stating: " 'We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light *but for the illegal actions* of the police.' " *Nix v. Williams*, 467 U.S. at 442, 81 L. Ed. 2d at 386. It is notable from these references that the Supreme Court from the outset, and in *Nix* itself, makes no distinction between primary and derivative evidence with respect to either its exclusion under the rule or its inclusion by way of an exception to the rule.

The Supreme Court in *Nix*, in further establishing its predicate, reviews historically the close kinship among the inevitable discovery doctrine, the independent source doctrine and the harmless error rule, particularly with respect to the fundamental reasoning, the essence of these parallel doctrines, which is that, in the search for truth in the administration of justice, the vital interests of society in deterring unlawful police conduct *and* in having juries receive all relevant and probative evidence of a crime "are properly balanced by putting the police in the same, not a *worse*, position tha[n] they would have been in if no police error or misconduct had occurred. . . . See *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964); *Kastigar v. United States*, 406 U.S. 441, 457, 458-459, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972)." *Nix v. Williams*, 467 U.S. at 443, 81 L. Ed. 2d at 387.

The *Nix* opinion, in this context, sets forth by footnote the following:

> The ultimate or inevitable discovery exception to the exclusionary rule is closely related in purpose to the harmless-error rule of *Chapman v. California*, 386 U.S. 18, 22, 17 L. Ed. 2d 705, 87 S. Ct. 824, 24 ALR 3d 1065 (1967). The harmless-constitutional-error rule "serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct.

Nix v. Williams, 467 U.S. at 443 n.4, 81 L. Ed. 2d at 387 n.4.

Thus, the Supreme Court in *Nix* held: "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. . . . Anything less would reject logic, experience, and common sense." *Id.* at 444, 81 L. Ed. 2d at 387-88.

While defendant acknowledges that *Nix* dispels any doubt about the existence of the inevitable discovery doctrine under federal law, he nevertheless contends the trial court in the instant case misapplied the doctrine by not requiring the State to prove an ongoing independent investigation and by allowing inadequate proof of inevitability.

The trial court, upon consideration of various approaches taken by the circuit courts since the *Nix* decision, ruled that the requirement of proof of an ongoing independent investigation was not supported by the better authorities. We concur. A careful reading of *Nix* reveals that the Supreme Court imposed no requirement upon the prosecution to prove an independent investigation was under way at the time the tainted investigation was taking place. *See United States v. Silvestri*, 787 F.2d 736 (1st Cir. 1986), *cert. denied*, 487 U.S. 1233, 101 L. Ed. 2d 931 (1988). The Ninth Circuit has applied the inevitable discovery exception without concern for or requirement of any ongoing legal investigation. *United States v. Merriweather*, 777 F.2d 503 (9th Cir. 1985). Further, in this regard, in *United States v. Boatwright*, 822 F.2d 862 (9th Cir. 1987), Judge Kennedy (now Justice Kennedy), addressing both the question of dual ongoing investigations and the variety of circumstances under which inevitable discovery may be established and applied, stated for the Court:

> There will be instances where, based on the historical facts, inevitability is demonstrated in such a compelling way that operation of the exclusionary rule is a mechanical and entirely unrealistic bar, preventing the trier of fact from learning what would have come to light in any case. In such cases, the inevitable discovery doctrine will permit introduction of the evidence, whether or not two independent investigations were in progress. The existence of two independent investigations at the time of discovery is not, therefore, a necessary predicate to the inevitable discovery exception.

Boatwright, 822 F.2d at 864.

In a thorough analysis of this question, comparing "no warrant" situations to cases where a warrant is obtained subsequent to an illegal search, and cases like *Nix* where no warrant is involved in any way, the First Circuit in *Silvestri* concluded that an "ongoing" investigation test is too inflexible and instead suggested "that the analysis focus on the questions of independence and inevitability and remain flexible enough to handle the many different fact patterns which will be presented." *United States v. Silvestri*, 787 F.2d at 746. This clearly envisions a case-by-case approach, recognizing that the particular facts of any given case will determine whether, absent other means, proof of an ongoing, independent investigation is necessary to show inevitability. We consider this the more practical and correct approach in application of the doctrine, and we adopt this approach.

[2] With regard to defendant's challenge of the adequacy of the State's proof of inevitability, the Supreme Court in *Nix* held:

> As to the quantum of proof, we have already established some relevant guidelines. In *United States v. Matlock*, 415 U.S. 164, 178, n.14, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974) . . ., we stated that "the controlling burden of proof at suppression hearings should impose *no greater burden* than proof by a preponderance of the evidence." . . . We are unwilling to impose added burdens on the already difficult task of proving guilt in criminal cases by enlarging the barrier to placing evidence of unquestioned truth before juries.

Nix v. Williams, 467 U.S. at 444 n.5, 81 L. Ed. 2d at 388 n.5.

While the police first learned the identity of the gun merchant from the receipt found with the gun box pursuant to the search

of defendant's residence, the State's evidence showed, through the testimony of three law enforcement officers, that it was normal law enforcement procedure in Cumberland County to check the ATF and the PIN records to determine whether a recovered weapon was stolen, the location of its manufacture, the time and place of its sale by a gun merchant and its ownership if it does not "come up stolen." Specifically, according to the testimony of a Fayetteville Police Department investigator, had the pawnshop receipt not been found at defendant's residence, the serial number of the weapon seized during the permissive search where defendant was arrested would have been "run through" the PIN and the ATF records check.

Since it is clear from the record that Jim's Pawnshop did in fact file with the ATF (and keep copies of) the documentation required by federal law upon the sale of a firearm, it is manifest that an independent inquiry of the ATF would have produced the reference to Jim's Pawnshop. The defendant offered no evidence in this case. The State thus proved inevitable discovery by a preponderance of the evidence. We therefore conclude that the trial court's application of the inevitable discovery doctrine did not violate the defendant's Fourth Amendment rights.

[3] The defendant further contends, under this first issue, that the derivative evidence obtained directly from the pawnshop, regarding his ownership or purchase of the murder weapon in 1986, should have been suppressed because the exclusionary rule arising from Article I, Section 20 of the North Carolina Constitution does not and should not include an "inevitable discovery exception." While conceding that there is no provision in our State Constitution which explicitly calls for the exclusionary rule, the defendant contends the rule has been held by this Court to be "implied" in Article I, Section 20, citing *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984), and defendant further argues that the text of the State Constitution itself (Article I, Section 20) calls for "broader" protection than that of the Fourth Amendment.

This Court in *Arrington* refers to *State v. Small*, 293 N.C. 646, 239 S.E.2d 429 (1977); *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970), *cert. denied*, 404 U.S. 840, 30 L. Ed. 2d 74 (1971); and *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968), *cert. denied*, 393 U.S. 1087, 21 L. Ed. 2d 780 (1969) as "implying an exclusionary rule arising from Article I, Section 20," *State v. Arrington*, 311

N.C. at 644, 319 S.E.2d at 261; however, the holding of this Court in *Arrington* is as follows:

> [A]pplication of the totality of circumstances test leads us to hold that there was a substantial basis for the finding of probable cause in the present case. Therefore, we need not consider or decide whether the guarantees against unreasonable searches and seizures in Article 1, Section 20 of the Constitution of North Carolina require the exclusion of evidence seized under a search warrant not supported by probable cause.

State v. Arrington, 311 N.C. at 643, 319 S.E.2d at 261.

The evolution of the exclusionary rule in North Carolina is set forth in *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376, wherein our Court stated that in derogation of the common law, the exclusionary rule was first laid down in *Weeks v. United States*, 232 U.S. 383, 58 L. Ed. 652 (1914), which held that evidence illegally seized by federal officers violated defendant's Fourth Amendment constitutional rights and was inadmissible, but that the Fourth Amendment reached only the federal government and evidence seized illegally by state or local officers continued to be admissible unless prohibited by state statute. The United States Supreme Court declined to extend the exclusionary rule adopted in *Weeks* to the states by the due process clause of the Fourteenth Amendment until its decision in *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081 (1961). This decision held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Id.* at 655, 6 L. Ed. 2d at 1090. Thus, in light of *Mapp* this Court stated in *Colson*: "Evidence unconstitutionally obtained is excluded in both state and federal courts as an essential to due process—not as a rule of evidence but as a matter of constitutional law." *State v. Colson*, 274 N.C. at 306, 163 S.E.2d at 384. The federal exclusionary rule adopted in *Weeks* became statutory law in North Carolina before *Mapp* by enactment in 1937 of N.C.G.S. § 15-27, later N.C.G.S. § 15-25 which was repealed in 1973. The current applicable statutory law is N.C.G.S. § 15A-974, which simply provides in relevant part that evidence seized in violation of the federal or state constitution must be suppressed. This Court, in its majority opinion in *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988) stated: "Our state constitution, like the Federal Constitution, re-

quires the exclusion of evidence obtained by unreasonable search and seizure." 322 N.C. at 712, 370 S.E.2d at 555.

Considering the precise wording of Article I, Section 20, we find no support for defendant's position that the "text" itself calls for "broader" protection than that of the Fourth Amendment. Article I, Section 20 is captioned "General warrants," and speaks solely to the prohibition of issuance of such warrants which allow officers "to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence . . . ." N.C. Const. art. I, § 20 (1984). While this Court has held that Article I, Section 20 of our Constitution, like the Fourth Amendment to the United States Constitution, prohibits unreasonable searches and seizures, *e.g.*, *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254; *State v. Ellington*, 284 N.C. 198, 200 S.E.2d 177 (1973), and requires the exclusion of evidence obtained by unreasonable search and seizure, *e.g.*, *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553, there is nothing to indicate anywhere in the text of Article I, Section 20 any enlargement or expansion of rights beyond those afforded in the Fourth Amendment as applied to the states by the Fourteenth Amendment. In terms of modern day jurisprudence and actual practice, it is abundantly clear that the language of this provision of our Constitution, relating entirely to "general warrants," of the past (while still relevant to protect against any recurrence of the historic abuses specified), should not be viewed as a vehicle for any inventive expansion of our law.

As Justice (now Chief Justice) Exum stated for the Court in *State v. Richards*, 294 N.C. 474, 242 S.E.2d 844 (1978):

> Our holding here . . . does not transform the warrant which authorized the search into a general warrant—a device . . . "abhorred since colonial days and banned by both the Federal and State Constitutions." Such warrants are banned, too, by the North Carolina Constitution, Art. I, § 20. The general warrant against which these constitutional provisions speak did not specify items to be searched for or persons to be arrested nor were they supported by showings of probable cause that any particular crime had been committed.

294 N.C. at 491-92, 844 S.E. 2d at 855 (citations omitted). We therefore hold the defendant's contention that Article I, Section 20 of our

Constitution should be read as an extension of rights beyond those afforded in the Fourth Amendment is misplaced.

[4] Next defendant contends that in the event this Court does adopt the inevitable discovery doctrine, the parameters for its application in North Carolina should be narrowly drawn in order to preserve the deterrence value of the exclusionary rule. In addition to arguing for the "clear and convincing evidence" standard and an "ongoing independent investigation" as to quantum of proof, both of which we have hereinabove rejected, the defendant argues that the State should be required to prove an absence of bad faith on the part of investigating officers. Relying primarily on this Court's majority opinion in *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553, which held there is no "good faith" exception to the exclusionary rule in North Carolina, under Article I, Section 20 of our Constitution, the defendant argues the trial court, in the interest of maintaining necessary minimal safeguards against intentional police misconduct, should have required the State to prove the absence of bad faith on the part of the investigating officers, instead of ruling as it did that the question of bad faith was irrelevant in the proper application of the inevitable discovery doctrine. We find this argument without merit and affirm the trial court.

The trial court in the instant case did not apply the inevitable discovery doctrine to any "primary evidence" seized from defendant's residence pursuant to the defective search warrant. Rather, the trial court suppressed the evidence it determined to have been illegally seized and applied the inevitable discovery doctrine only to the documentary evidence obtained directly from Jim's Pawnshop. This evidence was derivative, or secondary evidence which was the product of the primary evidence. In light of the clear lack of distinction between primary and derivative evidence as to either exclusion or inclusion under the *Nix* opinion, we hold that the trial court's suppression of the primary evidence was not necessary in its application of the doctrine. However, by so doing the trial court in this case unquestionably served the deterrence objective because any suppression by limiting application of the doctrine has its own deterrent effect. If the State finds itself in any situation where it must prove that the evidence inevitably would have been discovered by other legal, independent means, and it fails to do so, the doctrine is not applied and the evidence is suppressed. This risk of suppression inherently preserves the deterrence value

of the exclusionary rule. Further, if the State carries its burden and proves inevitable discovery by separate, independent means, thus leaving the State in no better and no worse position, any question of good faith, bad faith, mistake or inadvertence is simply irrelevant.

The ruling of the Supreme Court on this question and its underlying public policy basis, as set forth in *Nix*, is clear and compelling. The Court states:

> The requirement that the prosecution must prove the absence of bad faith, imposed here by the Court of Appeals, would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a *worse* position than they would have been in if no unlawful conduct had transpired. And, of equal importance, it wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice. Nothing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach.

Nix v. Williams, 467 U.S. at 445, 81 L. Ed. 2d at 388. We thus hold that the trial court correctly applied the doctrine under the *Nix* standard in declining to hear evidence, either from the defendant or the State, on the issue of bad faith.

The majority based its ruling in *Carter* on two grounds: (1) the deterrence value of the exclusionary rule and (2) "for the sake of maintaining the integrity of the judicial branch of government." *State v. Carter*, 322 N.C. at 719, 370 S.E.2d at 559. With regard to the great importance of maintaining the integrity of the judicial branch, we agree with the public policy basis set forth above by the Supreme Court in *Nix* and its further relevant ruling:

> Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. . . . Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.

Nix v. Williams, 467 U.S. at 446-47, 81 L. Ed. 2d at 389.

For the foregoing reasons, we find the positions asserted by defendant in his first issue to be without merit.

II.

[5] The second issue raised by defendant on appeal is whether the trial court erred in allowing into evidence testimony regarding the defendant's attempted murder of William Jackson some three weeks after the murder for which he was tried in this case.

Clearly, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C.G.S. § 8C-1, Rule 404(b) (1988). Yet, "[w]here . . . such evidence reasonably tends to prove a material fact in issue in the crime charged, it will not be rejected merely because it incidentally proves the defendant guilty of another crime." *State v. Johnson*, 317 N.C. 417, 425, 347 S.E.2d 7, 12 (1986). Indeed, this Court has held that Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, . . . [committed] by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

Here, the evidence concerning the defendant's attempted murder of the taxicab driver three weeks later with the same gun tended to prove the defendant's possession and control of the weapon at a time close in proximity to that of the Harrelson murder. Therefore, although the evidence also showed the defendant to be guilty of another crime of violence, we cannot say that its only probative value was to show the defendant's murderous propensities. Thus, the evidence is admissible under Rule 404(b).

[6] The defendant next contends, as to this issue, that the trial court should have excluded the evidence under N.C.G.S. § 8C-1, Rule 403, because, on balance, its probative value was outweighed by its prejudicial effect. Certainly the evidence of defendant's attempt to commit another murder would have some prejudicial effect on the jury. However, we again agree with the State's assessment that evidence showing that a regular customer of the BTO store had possession of the weapon used to kill Ms. Harrelson three weeks after the murder was significantly inculpatory. Moreover, the testimony of the taxicab driver linked defendant more directly

to the murder weapon than any other evidence presented at trial. In light of all this, we cannot say that the trial court abused its discretion in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice in this case. We therefore find

No error.

Justice FRYE concurring in result.

Today the Court adopts a rule which permits the admission of illegally seized evidence based upon a quantum of proof which I believe to be less than that required by our State Constitution. Accordingly, I cannot join in the Court's opinion; however, because I believe the Court reached the right result on the facts of this case, I concur in the result.

In *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988), this Court held the exclusionary rule of Article I, Section 20 of the North Carolina Constitution served two essential functions: (1) maintenance of the integrity of our judicial branch of government; and (2) maintenance of an effective institutional deterrence to police violation of the constitutional law of search and seizure. *Id.* at 722, 370 S.E.2d at 560. In my view, the Court today undermines these important principles by adopting a preponderance of the evidence standard for "inevitable discovery" cases. I believe an inevitable discovery exception to the exclusionary rule is constitutionally permissible only when the State can demonstrate inevitability by *clear and convincing* evidence.[1]

Article I, Section 20 of the North Carolina Constitution provides:

> *General Warrants.* General warrants, whereby an officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

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1. My concurrence is based exclusively on state constitutional grounds. Of course, I recognize that the United States Supreme Court, interpreting the Federal Constitution, has adopted a preponderance of the evidence standard for inevitable discovery cases. *Nix v. Williams*, 467 U.S. 431, 81 L. Ed. 2d 377 (1984).

N.C. Const. art. I, § 20. Although worded differently than the Fourth Amendment of the United States Constitution, Article I, Section 20, like its federal counterpart, prohibits unreasonable searches and seizures. *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984). Furthermore, it is now settled that Article I, Section 20, like its federal counterpart, requires the exclusion of evidence obtained by unreasonable search and seizure. *Carter*, 322 N.C. at 712, 725, 370 S.E.2d at 555, 562 (although *Carter* was a 4-3 decision, justices were unanimous on this point); *State v. Small*, 293 N.C. 646, 656, 239 S.E.2d 429, 436 (1977); *State v. Reams*, 277 N.C. 391, 395, 178 S.E.2d 65, 67 (1970), *cert. denied*, 404 U.S. 840, 30 L. Ed. 2d 74 (1971).

Although Article I, Section 20 and the Fourth Amendment protect the same fundamental right to be free from unreasonable searches and seizures, "[w]hether rights guaranteed by the Constitution of North Carolina have been provided and the proper tests to be used in resolving such issues are questions which can only be addressed with finality by this Court." *Arrington*, 311 N.C. at 643, 319 S.E.2d at 260; *see also Carter*, 322 N.C. at 713, 370 S.E.2d at 562 (this Court has the authority to interpret our own Constitution differently than the Federal Constitution as long as our citizens are accorded no lesser rights than guaranteed by a parallel federal provision). Thus, even though this Court may choose to adopt federal standards when interpreting Article I, Section 20, this Court has not hesitated to part ways with the federal judiciary when our State Constitution so requires. For example, in *Carter*, this Court held that there was no "good faith" exception to the exclusionary rule under the North Carolina Constitution, rejecting the lead of the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677 (1984), which recognized such an exception under the Fourth Amendment.

In *Carter*, this Court reviewed in detail the history and importance of the exclusionary rule in North Carolina, noting that the rule was first recognized in this state by legislative enactment in 1937. *See generally Carter*, 322 N.C. 709, 370 S.E.2d 553. Thus, for more than half a century, "the expressed public policy of North Carolina has been to exclude evidence obtained in violation of constitutional rights against unreasonable searches and seizures." *Id.* at 719, 370 S.E.2d at 559. Speaking for the Court in *Carter*, Justice Martin explained the crucial and central role the exclusionary rule

plays in fulfilling our state constitutional prohibition against unreasonable searches and seizures:

> The exclusionary sanction is indispensable to give effect to the constitutional principles prohibiting unreasonable search and seizure. We are persuaded that the exclusionary rule is the only effective bulwark against governmental disregard for constitutionally protected privacy rights. Equally of importance in our reasoning, we adhere to the rule for the sake of maintaining the integrity of the judicial branch of government.
>
> The preservation of the right to be protected from unreasonable search and seizure guaranteed by our state constitution demands that the courts of this state not condone violations thereof by admitting the fruits of illegal searches into evidence. . . .
>
> . . . .
>
> In determining the value of the exclusionary rule, we regard the crucial matter of the integrity of the judiciary and the maintenance of an effective institutional deterrence to police violation of the constitutional law of search and seizure to be the paramount considerations. We do not discount the implications of the failure to convict the guilty because probative evidence has been excluded in even one grave criminal case. The resulting injuries to victim, family, and society are tolerable not because they are slight but because the constitutional values thereby safeguarded are so precious.

Id. at at 719-722, 370 S.E.2d at 559-60.

The inevitable discovery exception to the exclusionary rule, as recognized by the Court today, is a first cousin to the independent source exception, first recognized by the United States Supreme Court in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L. Ed. 319 (1920). Under the independent source exception, evidence which has *actually been obtained* through constitutional means can be introduced at trial even though that *same evidence* has also been obtained through unconstitutional means. As this Court explained in *State v. Phifer*, 297 N.C. 216, 254 S.E.2d 586 (1979): "Since the evidence sought to be suppressed *was obtained* through lawful means unrelated to the invalid inventory search, it follows that the 'fruit of the poisonous tree' doctrine has no application to this case." *Id.* at 226, 254 S.E.2d at 591 (emphasis added).

As recognized by Justice Brennan in his dissent in *Nix*, there is one crucial distinction between the independent source exception and the inevitable discovery exception:

> When properly applied, the "independent source" exception allows the prosecution to use evidence only if it was, in fact, obtained by fully lawful means. It therefore does no violence to the constitutional protections that the exclusionary rule is meant to enforce. The "inevitable discovery" exception is likewise compatible with the Constitution, though it differs in one key respect from its next of kin: specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed.

Nix, 467 U.S. at 459, 81 L. Ed. 2d at 397 (Brennan, J., dissenting). The inevitable discovery exception "necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule." *Id.*, 81 L. Ed. 2d at 397-98. Thus, concluded Justice Brennan, in order to "protect fully the fundamental rights served by the exclusionary rule, I would require clear and convincing evidence before concluding that the government had met its burden of proof on this issue." *Id.*, 81 L. Ed. 2d at 398. Although Justice Brennan's argument did not carry the day in *Nix*, I find his reasoning persuasive, especially in light of this Court's past reluctance to eviscerate the exclusionary rule. *See Carter*, 322 N.C. 709, 370 S.E.2d 553.

To allow the admission of illegally seized evidence under the preponderance of the evidence standard undermines the importance of our state constitutional prohibition against unreasonable searches and seizures. The preponderance of the evidence standard, also known as the greater weight of the evidence standard, is the ordinary standard for civil cases. 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 212 (3d ed. 1988). To meet this burden, the State is only required to demonstrate that it is *more likely than not* that the illegally seized evidence would have been inevitably discovered by independent means.[2] *See id.* Given this low

2. Inevitable means "unable to be avoided, evaded, or escaped; certain; necessary." *Random House Webster's College Dictionary* 688 (1991). It thus seems inconsistent to ask whether it is "more likely than not" that evidence would have been "inevitably" discovered.

standard, and the natural temptation to utilize this newly recognized exception, I fear that the exclusionary rule may no longer be able to fulfill its twin objectives of maintaining the integrity of our judicial system, and acting as an effective deterrent to police misconduct. Only by requiring a heightened burden of proof can we ensure that the exclusionary rule will continue to serve its historic function of protecting the people of North Carolina from unreasonable searches and seizures. I would therefore require clear and convincing evidence that illegally seized evidence would have been discovered by constitutional means before concluding that the State has met its burden of proof. In the words of the exception, would the same evidence have been "inevitably discovered?"

On the facts of this case, the State may very well be able to prove by clear and convincing evidence that the illegally obtained information would have been inevitably discovered. However, it is not necessary to reach this question because, on the facts of this case, the introduction of the evidence at issue was clearly harmless beyond a reasonable doubt. *See* N.C.G.S. § 1443(b) (1988).

As noted by the Court, the State's firearm identification expert positively identified the bullet removed from the victim and the bullet removed from cab driver William Jackson's body as having been fired from the pistol legally seized from defendant's coat at the time of his arrest. In addition, Brad Dickens testified that defendant confessed the murder to him. Dickens also testified that he had seen defendant on more than one occasion prior to the murder in possession of the murder weapon. The disputed evidence in this case was admitted to prove that defendant had purchased the murder weapon from Jim's Pawn Shop some two years prior to the murder. This evidence was not crucial to the State's case. Given that (1) the murder weapon was legally seized from defendant's coat at the time of his arrest, (2) the murder weapon was seen in defendant's possession prior to the murder, and (3) defendant confessed his crime to Dickens, I believe the State has met its burden of proving harmlessness beyond a reasonable doubt.

For the reasons stated above, I join in the Court's result.

Chief Justice EXUM joins in this concurring opinion.

STATE OF NORTH CAROLINA v. WILLIAM KENNETH HANDY

No. 315A91

(Filed 25 June 1992)

1. Homicide § 493 (NCI4th)— murder—instructions—premeditation and deliberation—lack of provocation

There was sufficient evidence in a first degree murder prosecution to instruct the jury that it could infer premeditation and deliberation from lack of provocation by the victim. The evidence of provocation by the victim was not uncontradicted and, notwithstanding the State's introduction of defendant's statements to the contrary, the jury could reasonably have concluded that the victim did nothing to provoke defendant and that defendant killed the victim with premeditation and deliberation while engaged in an armed robbery.

Am Jur 2d, Homicide § 529.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.

Homicide: presumption of deliberation of premeditation from the fact of killing. 86 ALR2d 656.

2. Homicide § 493 (NCI4th)— murder—instructions—premeditation and deliberation—provocation—manslaughter

An instruction by a trial court in a murder prosecution on inferring premeditation and deliberation from a lack of provocation by the victim was not erroneous where it was clear that the trial court's instruction, read as a whole, correctly informed the jurors that the State had the burden of proving beyond a reasonable doubt the elements of premeditation and deliberation and that the jurors could consider the evidence of the facts and circumstances surrounding the killing, including any evidence suggesting an absence of provocation by the victim, in determining whether the killing was committed with premeditation and deliberation. The mere fact that the jury was instructed concerning voluntary manslaughter and legal provocation does not change the outcome.

Am Jur 2d, Homicide §§ 290, 501, 529.

3. Homicide § 499 (NCI4th); Robbery § 4.3 (NCI3d)— felony murder—armed robbery—intent to take property after killing

The trial court did not err in its instructions on armed robbery and felony murder where the court instructed the jury that the order of the killing and the taking of property is immaterial where there is a continuous transaction and that it is immaterial whether the intent to commit the theft was formed before or after the killing, provided that the theft and the killing are aspects of a single transaction. The trial court's instructions did not in any way prevent the jurors from considering any evidence to support defendant's theory that the murder and the taking were not part of a single, continuous transaction.

Am Jur 2d, Homicide §§ 72-74, 498, 534.

What constitutes termination of felony for purpose of felony-murder rule. 58 ALR3d 851.

4. Jury § 6.3 (NCI3d)— jury selection—prohibited question—incorrect statement of law

The trial court did not abuse its discretion in a prosecution for robbery and murder by sustaining the State's objection to a question from defense counsel to prospective jurors where the question was based upon an incorrect statement of the law and the court had not yet instructed the jury on the legal principles applicable to the case.

Am Jur 2d, Homicide § 466.

5. Evidence and Witnesses § 338 (NCI4th)— murder—statements by defendant concerning homosexuals—admissible

The trial court did not err in a prosecution for murder and armed robbery by admitting testimony to the effect that defendant had said on the evening of the killing that he had a "faggot" waiting on him and that defendant could probably get him to buy defendant some pot or cocaine. Defendant's attitude toward homosexuals was extremely relevant to the issues at defendant's trial because defense counsel suggested throughout the trial that a homosexual advance by the victim sent defendant into a rage resulting in the killing. The jury could have inferred from this testimony and other evidence that defendant knew that the victim was homosexual and nevertheless went to his hotel room for the purpose and with the

intent of robbing the victim. Evidence of other crimes, wrongs, or acts is inadmissible under N.C.G.S. § 8C-1, Rule 404(b) if its *sole* relevance is to show the defendant's character or his propensity to commit an offense with which he is charged.

Am Jur 2d, Evidence §§ 245, 263, 270, 274.

6. Evidence and Witnesses § 90 (NCI4th)— murder—statements by defendant—desire to obtain drugs—probative value not outweighed by prejudice

The trial court did not abuse its discretion in a murder and robbery prosecution by admitting testimony to the effect that defendant had said on the evening of the killing that he had a "faggot" waiting on him and that defendant could probably get him to buy defendant some pot or cocaine. The testimony was relevant and probative to defendant's state of mind, intent, and motive, and it could not be said that the admission of this evidence created a danger of unfair prejudice to defendant, especially in light of defendant's subsequent testimony that he was looking forward to the marijuana. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence §§ 245, 263, 270, 274.

7. Criminal Law § 1167 (NCI4th)— armed robbery—sentencing—aggravating factor—intoxication of victim

The trial court did not err when sentencing defendant for armed robbery by finding in aggravation that the victim was physically infirm because he was intoxicated where there was ample evidence to support the trial judge's finding of infirmity as a result of intoxication and ample evidence from which the trial judge may have inferred that defendant either targeted the victim due to his state of intoxication or took advantage of the victim's drunken condition during the commission of the robbery and murder. N.C.G.S. § 15A-1340.4(a)(1)j.

Am Jur 2d, Criminal Law § 598.

8. Criminal Law § 1239 (NCI4th)— robbery—sentencing—mitigating circumstance—provocation

The trial court did not err when sentencing defendant for robbery by not finding the mitigating circumstance of strong provocation based on evidence that defendant killed the victim as a result of a homosexual advance. Although the State in-

troduced statements in which defendant asserted that he killed the victim as a result of a homosexual advance and subsequently took the victim's property only to make it appear that the victim was killed in a robbery, the mere fact that the State introduced these statements does not mean that the evidence was uncontradicted. By returning a verdict of first degree murder with premeditation and deliberation rather than a verdict of second degree murder or voluntary manslaughter, the jury rejected defendant's claim of provocation. N.C.G.S. § 15A-1340.4(a)(2)i.

Am Jur 2d, Criminal Law § 598.

Insulting words as provocation of homicide or as reducing the degree thereof. 2 ALR3d 1292.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Strickland, J.*, at the 22 October 1990 Criminal Session of Superior Court, ONSLOW 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 robbery with a dangerous weapon was allowed by this Court 20 November 1991. Heard in the Supreme Court 13 May 1992.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the State.

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

MEYER, Justice.

During the evening of 3 November 1986 or the early morning of 4 November 1986, defendant stabbed Eugene Michael Morgan sixteen times, killing him. Defendant was subsequently indicted for murder and robbery with a dangerous weapon and was tried capitally. The jury returned verdicts finding defendant guilty of robbery with a dangerous weapon and first-degree murder on the theories of premeditation and deliberation and felony murder. Following a sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment after determining that the two aggravating circumstances found

were not sufficiently substantial to call for the imposition of the death penalty when considered with the one mitigating circumstance found. The trial court, following the recommendation of the jury, sentenced defendant to life imprisonment for the murder of Morgan and imposed a consecutive sentence of forty years' imprisonment for the robbery with a dangerous weapon 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. We therefore affirm defendant's convictions and the sentences imposed thereon.

The evidence presented at defendant's trial tended to show that Eugene Michael Morgan was killed by defendant during the execution of a robbery planned by defendant and Michael Felty, defendant's friend. Defendant was nineteen years old at the time and had been discharged from the Marine Corps two or three months earlier. Since the time of his discharge, defendant had been working at various jobs but was nonetheless low on cash. He lived with several friends after he was discharged, and on 3 November 1986, defendant moved in with Felty at Felty's mother's home.

During the afternoon of 3 November, defendant and Felty went to a nearby store and purchased a fifteen-pack of beer. Later, they walked to a car wash and spoke with the owner about employment. After leaving the car wash, the two went to Gary's Lounge, a nearby bar. On their way to the bar, defendant and Felty met Loretta Malone and Wendy Davis. The four began talking, and the two women invited defendant and Felty to a party at their house. Defendant and Felty explained that they were on their way to Gary's Lounge but might go to the party later. Before going to Gary's Lounge, defendant and Felty had consumed two beers each. At the bar, defendant drank two more beers while playing pool.

About an hour later, defendant and Felty went to the party at the home of Malone and Davis, where they finished drinking the fifteen-pack they had purchased earlier. At the party, defendant met several people, including the victim, Eugene Michael Morgan. Defendant and Morgan talked, and at some point in the evening, Morgan told defendant that he had some money and asked defend-

ant if he would like to go to Harvey's Lounge at the Holiday Inn for a drink. Defendant and Morgan left the party but returned shortly thereafter. One witness who was at the party testified that defendant appeared angry when he and Morgan returned and that defendant later "seemed upset" when Morgan hugged one of the men at the party. Later in the evening, defendant pulled a knife on Felty, pressing it to his groin area. According to Malone, defendant pulled the knife on Felty after Felty made some comment to defendant. Malone testified that defendant became upset, shoved Felty against the wall, pressed the knife against Felty, and said, "This is what I do to faggots that mess with me."

Morgan was intoxicated when he left the party driving his moped. Davis had offered to let Morgan stay and sleep on the couch, but Morgan declined the offer, stating that he was going to stay at the Holiday Inn because he had been drinking too much to drive home. Defendant and Felty left the party approximately fifteen to twenty minutes after Morgan. Malone testified that she was talking to defendant and Felty at the time and that defendant acted as though "[h]e was in a hurry to leave."

The next morning, 4 November, Morgan was found dead, on a bed in Room 220 of the Holiday Inn. He was lying on his back at the foot of the bed, with his feet on the floor and his pants unbuttoned, unzipped, and partially pulled down. His face was turned toward the door, and blood was running from his mouth. On the other bed was a wallet, identification papers, and some nails. A vest identified as belonging to Morgan was found on the floor. The pockets of the vest had been turned inside out.

An autopsy of Morgan's body revealed sixteen stab wounds: three to the chest and three to the abdomen, as well as multiple wounds to the neck, the area below the collarbone, the inner portion of the left arm, and the scrotum. The pathologist who performed the autopsy opined that Morgan died as a result of massive hemorrhage caused by the wounds to the chest and abdomen. From a blood-alcohol test, the pathologist also determined that Morgan was "acutely intoxicated" at the time of his death, with a blood-alcohol level of .22.

On 4 November, defendant was questioned by officers investigating Morgan's death. Defendant told the officers that he struck Morgan with his fist after Morgan made homosexual advances toward him. According to defendant, Morgan fell back-

ward and defendant stabbed him, first in the genital area, then "everywhere." Defendant stated that he "filtered" through Morgan's wallet and took Morgan's keys to make it look like a robbery.

After his arrest, defendant made a written statement describing the details of the previous night's events. Defendant explained that he had met Morgan at a party and that he and Morgan left the party to go to Harvey's Lounge at the Holiday Inn but returned to the party because Morgan stated that he needed to change clothes and defendant "didn't want to go through the hassle" of waiting for Morgan as he changed clothes. Defendant stated that he and Morgan returned to the party and that he drank for some period of time afterward. Defendant continued:

> We left and we walked up the street, Mike Felty and I. We saw Morgan putting his bike, his moped up, and he was drunk and we saw him leave his helmet outside so [Felty] ran up and grabbed [Morgan's] helmet and we could [not] find [Morgan] so [Felty] took it up to the office and turned it in . . . .
>
> So we started to walk home and we, [Felty] and I, saw [Morgan] and told him where his helmet was and [Morgan] said don't worry about it. [Morgan] then asked both of us if we wanted to come up. We, [Felty] and I, did and we went up to the second floor. Then went into this room and sat down with the T.V. set on. . . .
>
> I sat down on the bed, and [Morgan] asked me something about gay people. I said I don't know 'cause I'm not gay and don't know anybody that was. We started cracking a few jokes, [Felty], Morgan and I, and [Morgan] reached over and shook my hand and wouldn't let go of it for about 15 seconds or more telling me that he liked me and said that I was an all right dude. . . .
>
> . . . .
>
> . . . I said cool, and pulled my hand away. I was ready to go and I had to use the head. I came out of the bathroom and [Morgan] wanted to use it. On the way into the doorway he grabbed my right . . . buttock . . . . I got really pissed. I mean I was mad and just turned around and said you f------ a--hole. [Morgan] looked at me and I pushed him up against the side of the bathroom door and he back [sic] away from me and I started calling him all sorts of names. I wasn't yelling

but I went off and [Felty] pushed him and I just couldn't control myself.

I hit him with my left hand and I pulled my knife out and stabbed him. I think the first time was in the [scrotum] and then he fell down on the bed and I started stabbing him.

Mike Felty ran out of the door and left. He said, man, I'm getting out of here. He split. I then still couldn't stop. I was more pissed off now that he was dead. I kicked and beat him, stabbed him, and wiped off my knife on the bed.

I tried to make it look like it was a robbery. I took [Morgan's] billfold out and grabbed the $12 he had in it, and took his keys which were either on the nightstand or on the floor. . . .

I left the room after I kicked him a few more times.

Defendant further stated that he and Felty went to the Thunderbird Lounge and drank a couple of beers after leaving the Holiday Inn.

After defendant made this handwritten statement, the investigating officers asked defendant specific questions concerning the events of the previous night. When one of the officers stated that she did not believe defendant's story, defendant admitted that he had gone to Morgan's room to rob Morgan, that he and Felty "had planned doing the robbery when they were walking up the steps [to Morgan's room], and that [Felty] had stabbed [Morgan] one time and that [Felty] had wiped the knife off twice."

Throughout the trial, defense counsel proceeded on the theory that, at most, defendant was guilty of second-degree murder. Defendant admitted killing Morgan but maintained that he did not act with premeditation or deliberation, that he was drunk and went "berserk" when Morgan made a homosexual advance toward him. Defendant further maintained that he could not be found guilty under the felony murder rule because the killing and the taking of Morgan's property were not part of a single transaction, that defendant and Felty took Morgan's belongings only to make it appear as though Morgan was killed during a robbery.

At trial, defendant denied telling the investigating officers that he and Felty planned to rob Morgan or that Felty stabbed Morgan. For the most part, defendant's trial testimony was virtually identical to the written statement defendant had given to the investigating officers. Defendant testified that he and Felty were

leaving the Holiday Inn when Morgan came out of a stairway area and invited the two to his hotel room for what defendant understood to be a drink. Defendant stated that he, Felty, and Morgan went to Morgan's room, where they sat and joked, and that defendant went "berserk" and started stabbing Morgan when Morgan grabbed defendant's buttock. Contrary to his prior statements to the police, however, defendant testified that Felty did not leave after the stabbing began but remained in the hotel room throughout the entire incident.

Defendant also produced evidence tending to establish that defendant's violent reaction to Morgan's advance resulted from a prior sexual assault experienced by defendant. Defendant testified that he was seven years old when an adult male picked him up at the park, told defendant that he would take defendant home, but drove defendant to a remote area where the man sodomized defendant. Defendant admitted that prior to killing Morgan he had told only his half brother about the sexual assault, that he did not tell the investigating officers that he had been sexually assaulted as a child, and that he had not explained to the investigating officers that a prior sexual assault caused him to react violently toward Morgan. To corroborate defendant's testimony of the prior alleged sexual assault, defendant's half brother testified that defendant had told him of the alleged sexual assault approximately ten years after the incident. In addition, Dr. Stack, a clinical psychologist, and Dr. Colligan, a pyschiatrist, both testified that they believed that defendant had been sexually assaulted as a child and that the reason for defendant's violent attack upon Morgan was, in part, due to the prior sexual assault of defendant.

I.

[1] Defendant first contends that the trial court erred by instructing the jury, over defendant's objection, that it could infer premeditation and deliberation from, among other things, "lack of provocation by the victim." Defendant argues that this instruction was erroneous because (1) the instruction was not supported by the evidence, which tended to show that defendant killed the victim after the victim made homosexual advances toward defendant; (2) the instruction impermissibly shifted the burden of proof to defendant, requiring him to come forward with evidence of provocation to rebut an inference of premeditation and deliberation; (3) the instruction may have resulted in juror confusion in that the instruction "did

not adequately distinguish between 'legal provocation' (the kind sufficient to reduce murder to manslaughter by negating malice) and 'ordinary provocation' (the kind sufficient to reduce first-degree murder to second-degree murder by negating premeditation and deliberation)"; and (4) the instruction amounted to an impermissible expression of judicial opinion that the State had proven a lack of provocation.

In *State v. Faison*, 330 N.C. 347, 411 S.E.2d 143 (1991), we addressed similar contentions, concluding that the defendant in that case had failed to show plain error resulting from the trial court's instructions. In *Faison*, the evidence showed that the defendant went to the victim's home, killed the victim, and stole some of the victim's belongings. The defendant in that case claimed that he did not act with premeditation and deliberation but killed the victim after a homosexual assault upon him by the victim. As in this case, the defendant contended that the trial court erred in instructing the jury that it could infer premeditation and deliberation from lack of provocation by the victim. Because the defendant had not objected to the trial court's instructions at trial, we reviewed the defendant's assignment of error only for plain error. Despite abundant evidence of provocation by the victim, we concluded that the defendant had failed to show plain error, stating that "[t]he State's evidence, as presented at trial, could reasonably lead jurors to conclude that defendant killed [the victim] with premeditation and deliberation while committing an armed robbery." *Id.* at 362-63, 411 S.E.2d at 152.

As in *Faison*, the evidence of provocation on the part of the victim in this case was not uncontradicted. Much evidence was presented, by both the State and defendant, suggesting that defendant killed Morgan as a result of rage brought about by a sexual advance made by Morgan toward defendant. However, the State also introduced into evidence an alleged statement by defendant admitting that he and Felty went to Morgan's room for the purpose of robbing Morgan. This alleged statement made no mention of any homosexual advance by Morgan. Testimony was also presented establishing that defendant had only three to four dollars and needed money to rent an apartment, that defendant knew Morgan had money and was intoxicated, and that defendant "was in a hurry to leave" the party once Morgan had left. Notwithstanding the State's introduction of defendant's statements to the contrary, the jury could reasonably have concluded that Morgan did nothing

to provoke defendant and that defendant killed Morgan with premeditation and deliberation while engaged in an armed robbery. *See State v. Wooten*, 295 N.C. 378, 387-88, 245 S.E.2d 699, 705 (1978) (State not bound by exculpatory portions of confession introduced by it when other evidence sheds different light on circumstances surrounding offense); *State v. Hankerson*, 288 N.C. 632, 637-38, 220 S.E.2d 575, 580-81 (1975), *rev'd on other grounds*, 432 U.S. 233, 53 L. Ed. 2d 306 (1977) (same). Therefore, we reject defendant's argument that there was no evidence to support the instruction that premeditation and deliberation on the part of defendant could be inferred from "lack of provocation by the victim."

[2] Having concluded that there was sufficient evidence to support an instruction that the jury could infer premeditation and deliberation from lack of provocation by the victim, we now consider whether the instruction, as given by the trial court, was erroneous. Defendant concedes that the instruction, standing alone, may not have been error. However, defendant maintains that this instruction, coupled with the trial court's subsequent charge on voluntary manslaughter and the definition of "legal" or "adequate" provocation, which is sufficient to reduce murder to manslaughter, may have misled the jurors to believe that a killing committed without "legal" or "adequate" provocation constitutes first-degree murder committed with premeditation and deliberation. We disagree.

In this case, the trial court properly instructed the jury that the State had the burden of proving beyond a reasonable doubt each and every element of the crime of first-degree murder, including the elements of premeditation and deliberation. At no point during its charge to the jury did the trial court instruct the jury that premeditation and deliberation should be *presumed*. Nor did the trial judge express any opinion as to whether the State had proven a lack of provocation by the victim. *See State v. Fowler*, 285 N.C. 90, 96, 203 S.E.2d 803, 807 (1974) (statement that jury may consider "evidence of the absence of provocation" "in determining whether there was . . . premeditation and deliberation" does not amount to judicial "expression of an opinion that there was no evidence of provocation"), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1212 (1976). Rather, the trial court instructed:

> 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, lack

> of provocation by the victim; conduct of the defendant before, during, and after the killing; use of grossly excessive force; infliction of lethal wounds after the victim is felled; brutal or vicious circumstances of the killing; manner in which or means by which the killing was done.

(Emphasis added.) It is clear that the trial court's instructions, when read as a whole, correctly informed the jurors, first, that the State had the burden of proving beyond a reasonable doubt the elements of premeditation and deliberation and, second, that the jurors could consider the evidence of the facts and circumstances surrounding the killing, including any evidence suggesting an absence of provocation by the victim, in determining whether the killing was committed with premeditation and deliberation. *Cf. State v. Forrest*, 321 N.C. 186, 362 S.E.2d 252 (1987) (holding that trial court did not err in instructing jury that it could infer malice from use of deadly weapon).

The mere fact that the jury was instructed concerning voluntary manslaughter and "legal" provocation does not change the outcome of this case.[1] With regard to first-degree murder, the jury was repeatedly instructed that it could find defendant guilty only if the State had proven beyond a reasonable doubt that defendant acted with premeditation and deliberation in the killing. In accord with the North Carolina Pattern Jury Instructions and extensive North Carolina case law, the trial court defined premeditation as an "intent to kill the victim [formed] over some period of time, however short, before" the killing. *See* N.C.P.I.—Crim.

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1. The trial court's instructions on voluntary manslaughter and "legal" provocation were as follows:

> Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and without deliberation.
>
> A killing is not committed with malice if the defendant acts in the heat of passion upon adequate provocation.
>
> The heat of passion does not mean mere anger. It means that the defendant's state of mind was at the time so violent as to overcome reason so much so that he could not think to the extent necessary to form a deliberate purpose and control his actions.
>
> Adequate provocation may consist of anything which has a natural tendency to produce such passion in a person of average mind and disposition, and the defendant's act took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.

206.10 (1989). The trial court further instructed that "deliberation . . . means that [defendant] acted while he was in a cool state of mind" and that the "intent to kill was formed for a fixed purpose, *not under the influence of some suddenly aroused violent passion.*" (Emphasis added.) *Accord* N.C.P.I.—Crim. 206.10. Significantly, the jury was correctly charged that defendant would not be guilty of first-degree murder if he formed the intent to kill Morgan under the influence of some suddenly aroused violent passion, such as was alleged to have arisen from Morgan's homosexual advance toward defendant. The instructions given by the trial court may not have been a model of clarity insofar as they did not define for the jury what type of provocation the proof of which will prevent the jury from inferring premeditation and deliberation. However, we do not agree with defendant that these instructions may have caused the jurors to conclude that defendant acted with premeditation or deliberation merely because the evidence showed that defendant did not act in a heat of passion following adequate provocation the proof of which reduces the degree of homicide to voluntary manslaughter. We therefore overrule this assignment of error.

II.

[3] In his next assignment of error, defendant contends that the trial court erred in instructing the jury on the charges of felony murder and robbery with a dangerous weapon ("armed robbery"). Specifically, defendant assigns as error the underscored portions of the following instruction given by the trial court:

> I further charge that for you to find the defendant guilty of first degree murder under the first degree felony-murder rule, the State must prove three things beyond a reasonable doubt:
>
> First, that the defendant committed robbery. That is, that the defend[a]nt ant [sic] took property from the person of another or in his presence.
>
> In this regard, all that is required is that the elements of robbery with a dangerous [sic] occur under circumstances and in a time frame that can be perceived as a single transaction. Where the death and the taking are so connected as to form a continuous chain of events, a taking from the body of the dead victim is a taking from the person.

Next, that the defendant carried away the property. That the person did not voluntarily consent to the taking and carrying away of the property. That the defendant knew he was not entitled to take the property. That at the time of the taking the defendant intended to deprive the owner of its use permanently. That the defendant had a dangerous weapon in his possession at the time he obtained the property. A dangerous weapon is a weapon which is likely to cause death or serious bodily injury. And that the defendant obtained the property by endangering or threatening the life of that person with a dangerous weapon.

In this regard, the commission of robbery with a dangerous weapon does not depend upon whether the threat or use of violence precedes or follows the taking of the victim's property.

Where there is a continuous transaction, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial. Provided that the theft and the force are aspects of a single transaction, it is immaterial whether the intention to commit the theft was formed before or after forced [sic] was used upon the victim.

Second, that while committing robbery with a dangerous weapon the defendant killed the victim with a deadly weapon.

In this regard, the commission of first degree murder under the felony-murder rule does not depend upon whether the killing precedes or follows the taking of the victim's property. . . .

Where there is a continuous transaction, the temporal order of the killing and the taking is immaterial. Provided that the theft and the killing are aspects of a single transaction, it is immaterial whether the intent to commit the theft was formed before or after the killing.

And third, that the defendant's act was a proximate cause of the victim's death.

(Emphasis added.) Conceding that the evidence was sufficient to support the jury's verdicts finding defendant guilty of armed robbery and felony murder based on the underlying offense of armed

robbery, defendant nevertheless argues that the trial judge erred in instructing the jury that "it is immaterial whether the intent to commit the theft was formed before or after the killing." The State argues that this instruction is a correct statement of the law of our state. We agree and therefore overrule this assignment of error.

"A murder . . . committed in the perpetration or attempted perpetration of any . . . robbery . . . shall be deemed to be murder in the first degree . . . ." N.C.G.S. § 14-17 (Supp. 1991). The evidence is sufficient to support a charge of felony murder based on the underlying offense of armed robbery where the jury may reasonably infer that the killing and the taking of the victim's property were part of one continuous chain of events. *Faison*, 330 N.C. 347, 411 S.E.2d 143; *State v. Green*, 321 N.C. 594, 365 S.E.2d 587, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988); *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987). Neither the commission of armed robbery, as defined by N.C.G.S. § 14-87(a), nor the commission of felony murder based on armed robbery depends upon whether the intention to commit the taking of the victim's property was formed before or after the killing. *Faison*, 330 N.C. at 359, 411 S.E.2d at 150. Under N.C.G.S. § 14-17, a killing is committed in the perpetration of armed robbery when there is no break in the chain of events between the taking of the victim's property and the force causing the victim's death, so that the taking and the homicide are part of the same series of events, forming one continuous transaction. *Wooten*, 295 N.C. at 385-86, 245 S.E.2d at 704; *cf. State v. Thomas*, 329 N.C. 423, 434, 407 S.E.2d 141, 149 (1991) (felony murder charge supported by evidence that sexual act forming the basis for felony murder "was committed during a continuous transaction that began when the victim was alive").

We conclude that the trial court did not err in its instructions on armed robbery and felony murder. The trial judge did not, as defendant contends, peremptorily instruct the jurors that defendant was guilty of armed robbery or felony murder. In accord with our prior cases, the trial court merely instructed that "the temporal order of the killing and the taking [of the victim's property] is immaterial" "*[w]here there is a continuous transaction*" and that "it is immaterial whether the intent to commit the theft was formed before or after the killing" "*[p]rovided that the theft and the killing are aspects of a single transaction.*" (Emphasis added.) The trial court's instructions did not in any way prevent the jurors

from considering any evidence to support defendant's theory, strenuously argued by defense counsel, that the murder and taking were not part of a single, continuous transaction.

Having reviewed the evidence presented in this case, we further conclude that there was sufficient evidence to submit to the jury the charge of felony murder based on armed robbery. Defendant himself testified at trial that he removed twelve dollars from Morgan's wallet immediately after killing Morgan. In addition, the State presented evidence tending to establish that defendant was low on cash and could not afford to rent an apartment and that defendant and Felty discussed robbing Morgan before going to Morgan's hotel room. Based on this evidence, the jury may reasonably have inferred that the killing and the taking were part of a continuous chain of events and that defendant therefore killed Morgan in the perpetration of an armed robbery. Therefore, we conclude that the trial court did not err in its instructions on robbery with a dangerous weapon and on felony murder.

III.

[4] Defendant further contends that the trial court abused its discretion in restricting defendant's voir dire examination of prospective jurors. Specifically, defendant argues that the trial court erred in sustaining the State's objection to the following question propounded by defense counsel:

> Q. Now the district attorney has asked you some questions about two types of first degree murder. That is, the premeditation and deliberation, and the felony-murder rule, and the robbery-murder rule.
>
> And he has basically explained to you that if a person's death is caused during the perpetration of a robbery that that would be the basis for a conviction of first degree murder.
>
> *I would ask you again that if you would understand that if the robbery were to have occurred after the death, that could not be a felony-murder.*

(Emphasis added.)

We find no merit in this assignment of error. The question propounded by defense counsel is based upon an incorrect statement of the law of our state. As discussed earlier, a person may be convicted of felony murder based upon armed robbery despite the fact that the taking of the victim's property occurred after

the killing. *Faison*, 330 N.C. at 359, 411 S.E.2d at 150. Moreover, the trial court had not yet instructed the jury on the legal principles applicable to the case. Thus, we conclude that the trial court did not abuse its discretion in sustaining the State's objection. *See State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988); *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980).

IV.

[5] Next, defendant argues that the trial court erred by allowing the State to introduce, over defendant's objection, testimony to the effect that on the evening of the killing defendant stated that he had "a faggot waiting on him at Gary's Lounge and that he needed to go up there because he could probably get him to buy [defendant] some pot or cocaine." Defendant maintains that this testimony "tended mainly to suggest defendant's propensity or predisposition to commit" the crimes charged and was thus inadmissible under Rules 404 and 403 of the North Carolina Rules of Evidence.

The State argues, and we agree, that the admission of this testimony was not error. "Under Rule 404(b), evidence of other crimes, wrongs, or acts is inadmissible if its *sole* relevancy is to show the defendant's character or his propensity to commit an offense with which he is charged." *State v. White*, 331 N.C. 604, 611, --- S.E.2d ---, --- (1992).

> Recent cases decided by this Court under Rule 404(b) state a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). In *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990), we stated:

> "Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury."

Id. at 548, 391 S.E.2d at 174 (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

The testimony at issue here tended to support the State's explanation of the circumstances surrounding Morgan's death. Throughout the trial, defense counsel suggested that a homosexual advance by Morgan sent defendant into a rage resulting in the killing of Morgan. Defendant's attitude toward homosexuals was extremely relevant to the issues at defendant's trial. Evidence, including testimony establishing that defendant had threatened Felty with a knife, stating "I'll cut you up. . . . This is what I do to faggots that mess with me," tended to show that defendant had an extreme dislike for homosexual men. Other evidence was presented from which the jury could have concluded that defendant was at the party when he discovered that Morgan was homosexual but nevertheless left the party with Morgan at one point in the evening and later went to Morgan's hotel room. Defendant's alleged statement that he had a "faggot waiting on him . . . and . . . he could probably get him to buy [defendant] some pot or cocaine" tends to buttress the State's theory that despite his dislike for homosexuals, defendant sought to take advantage of homosexuals. From this testimony and the other evidence presented at defendant's trial, the jury could reasonably have inferred that defendant, knowing that Morgan was homosexual, nevertheless went to Morgan's hotel room for the purpose and with the intention of robbing Morgan. Thus, we conclude that Rule 404 did not require that this testimony be excluded.

[6] We further reject defendant's argument that this testimony should have been excluded under Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice. Whether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court. *State v. Baldwin*, 330 N.C. 446, 456, 412 S.E.2d 31, 37 (1992). 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.' " *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986) (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)), *quoted in Baldwin*, 330 N.C. at 456, 412 S.E.2d at 37. For the reasons discussed hereinabove, we believe that the testimony at issue here was relevant and probative with respect to defendant's state of mind, intent, and motive. We have no doubt that

this testimony was prejudicial to defendant. *See Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 ("Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant . . . ."). However, we are unable to say that the admission of this evidence with its reference to defendant's desire to obtain "some pot or cocaine" created a danger of *unfair* prejudice to defendant, especially in light of the fact that defendant himself subsequently testified on direct examination that he "was actually kind of looking forward to the marijuana" that his friends were supposed to be bringing to the party that evening. *See State v. Adams*, 331 N.C. 317, 328, 416 S.E.2d 380, 386 (1992) (evidence not considered prejudicial to defendant where defense counsel presents evidence of like import for purposes other than discrediting previously admitted evidence). We conclude that defendant has failed to show that the trial court abused its discretion in admitting this testimony.

V.

[7] With regard to the sentence imposed for his conviction of armed robbery, defendant contends that the trial court erred in finding as an aggravating factor that "[t]he victim was physically infirm[ ] in that he was acutely intoxicated." *See* N.C.G.S. § 15A-1340.4(a)(1)(j) (Supp. 1991). According to defendant, the only evidence to support the finding of this aggravating factor was the pathologist's testimony that Morgan had a blood-alcohol level of .22 at the time of his death. Defendant argues that the trial court's finding was in error because the State failed to present any evidence "showing [that] Morgan suffered from any physical infirmity" as a result of intoxication or that Morgan's blood-alcohol level "was in any way transactionally related to the robbery." We find no merit in this argument.

Pursuant to the Fair Sentencing Act, "the trial judge is to consider certain statutory aggravating and mitigating factors in determining whether to sentence the defendant for a prison term in excess of the presumptive term." *State v. Vaught*, 318 N.C. 480, 482, 349 S.E.2d 583, 584 (1986). It is well established that the State bears the burden of proving the existence of an aggravating factor. *State v. Thompson*, 318 N.C. 395, 397, 348 S.E.2d 798, 800 (1986). However, the existence of such factors need not be proved beyond a reasonable doubt but by a preponderance of the evidence. *Id.*

With regard to the physical infirmity aggravating factor, N.C.G.S. § 15A-1340.4(a)(1)(j), we have stated on numerous occasions that "the victim's 'vulnerability is clearly the concern addressed by this factor.' " *Vaught*, 318 N.C. at 485, 349 S.E.2d at 586 (quoting *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E.2d 689, 701 (1983)); *State v. Drayton*, 321 N.C. 512, 514, 364 S.E.2d 121, 122 (1988). To meet its burden of proving the existence of this aggravating factor, the State must ordinarily prove by a preponderance of the evidence (1) that at the time of the offense, the victim was suffering from a physical infirmity that impeded the victim's ability to flee, fend off the attack, recover from the effects of the attack, or otherwise avoid being victimized; and (2) that the defendant either targeted the victim because of the victim's infirmity or took advantage of the victim's infirmity during the actual commission of a crime, knowing that the victim, by reason of his infirmity, would be unlikely to intervene or defend himself effectively. *Drayton*, 321 N.C. at 514, 364 S.E.2d at 122; *Thompson*, 318 N.C. at 398, 348 S.E.2d at 800.

In this case, the record contains ample evidence to support the trial judge's finding that Morgan was physically infirm as a result of intoxication. The pathologist who conducted the autopsy of Morgan's body testified that Morgan was "acutely intoxicated" at the time of his death, with a blood-alcohol level of .22. Witnesses who had seen Morgan at the party earlier that evening also testified that Morgan was "pretty well high," "about drunk," and "intoxicated." Defendant himself testified that Morgan was so intoxicated that Morgan fell off his moped while driving a short distance across the street, then proceeded on his way, leaving his helmet lying on the ground. This evidence alone suggests that Morgan's ability to perform normal functions was impaired as a result of intoxication. In addition, the evidence presented at defendant's trial suggested that Morgan, who was virtually the same size as defendant, made no effort to defend himself against defendant's deadly assault. Both at trial and in his prior statements to the police, defendant stated that he "grabbed" Morgan, "pushed him . . . against the door," and "hit him." According to defendant, Morgan made no attempt to flee or to defend himself against this assault but "stumbled" backwards to the bed, where he fell. Despite the fact that defendant thereafter stabbed Morgan sixteen times, an autopsy revealed no defensive wounds to Morgan's hands or outer arms. Moreover, officers who investigated the crime scene testified that

there was no evidence of a struggle in the room and that the bed on which Morgan was found dead was virtually undisturbed. We believe that this evidence is sufficient to support the trial court's finding that Morgan's state of intoxication impeded his ability to flee from, fend off, or otherwise avoid defendant's attack upon him.

We further conclude that there was ample evidence from which the trial judge may have inferred that defendant either targeted Morgan due to his state of intoxication or took advantage of Morgan's drunken state during the commission of the robbery and murder. Clearly, this is not a case where the defendant was unaware of the victim's physical infirmity. Throughout the evening, defendant had been at a party with Morgan. Defendant had seen and spoken with Morgan, and at one point during the evening, defendant had left the party with Morgan. According to defendant's own testimony, defendant knew that Morgan was drunk, if not beforehand, at the time Morgan left the party. In addition, the State presented evidence of an oral statement wherein defendant admitted to police officers that he and Felty went to Morgan's hotel room to rob Morgan. This evidence, coupled with the testimony establishing that Morgan had "flashed" some money at the party and that defendant "was in a hurry to leave" after Morgan left the party, was sufficient to support a reasonable inference that defendant went to Morgan's hotel room for the purpose of robbing Morgan, knowing that defendant's chances of success were greater because Morgan was intoxicated. Moreover, we conclude that the evidence establishing Morgan's apparent inability to flee, fend off, or otherwise avoid defendant's attack, heretofore discussed, sufficiently supports a finding that defendant took advantage of Morgan's physical infirmity during the course of the robbery and murder. Thus, the trial court did not err in finding as an aggravating factor that the victim was physically infirm as a result of intoxication.

VI.

[8] Finally, defendant contends that he is entitled to a new sentencing hearing on his armed robbery conviction because the trial court failed to find the existence of the statutory mitigating factor that "defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating," N.C.G.S. § 15A-1340.4(a)(2)(i) (Supp. 1991). Defendant argues that it was error for the trial court not to find the existence of this

mitigating factor because strong provocation and an extenuating relationship were both proved by uncontradicted evidence establishing that defendant had killed Morgan as a result of a homosexual advance. We disagree.

As discussed previously herein, the evidence of provocation on the part of the victim was not uncontradicted. As we stated in *Faison*, "[t]his case, in essence, boiled down to whether [the] jurors believed defendant's version of what happened . . . or whether they believed the State's version of [the] events." *Faison*, 330 N.C. at 362, 411 S.E.2d at 152. The State presented ample evidence from which it could reasonably be inferred that defendant went to Morgan's hotel room for the purpose of robbing Morgan. The State did introduce into evidence statements wherein defendant asserted that he killed Morgan as a result of a homosexual advance and subsequently took Morgan's property only to make it appear as though Morgan was killed during the course of a robbery. However, the mere fact that the State introduced these statements into evidence does not mean that the evidence of provocation was uncontradicted. *See Wooten*, 295 N.C. at 387-88, 245 S.E.2d at 705. By returning a verdict finding defendant guilty of first-degree murder with premeditation and deliberation rather than a verdict of second-degree murder or voluntary manslaughter, the jury rejected defendant's claim of provocation. Thus, the trial court did not err in failing to find in mitigation of the robbery that defendant acted under strong provocation or that the relationship between defendant and Morgan was otherwise extenuating.

We conclude that defendant received a fair trial, free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. DAVEY LYNN BENSON

No. 420A91

(Filed 25 June 1992)

1. Homicide § 277 (NCI4th)— felony murder—robbery—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first degree murder based on felony murder where the evidence of defendant's presence at the scene around the time of the victim's death, while not unequivocal, was strong; there was strong evidence that defendant had a motive for committing the robbery-murder in his great desire to reconcile with his girlfriend and child and his feeling that obtaining a large amount of cash quickly was the only means to that end; defendant was aware that the victim carried a large amount of money on his person and that it would be easy to forcibly obtain the money because of the victim's advanced age; and defendant had often spoken of the ease with which the crime could be committed, stating that the victim could easily be hit on the head and have his money taken, the modus operandi employed in the actual murder.

Am Jur 2d, Homicide §§ 72, 442.

2. Evidence and Witnesses §§ 3110, 3111 (NCI4th)— felony murder—corroborating testimony going beyond original—broadside objection—assignment of error waived—no prejudicial error

Defendant's failure to specify the nature of his objection did not waive his assignment of error to corroborative testimony regarding statements made to a cellmate which went beyond the original, but his failure to object to the allegedly incompetent portions of the testimony did waive the assignment of error. Any error was cured by the trial court's instruction and, given the substantial evidence against defendant, there was no reasonable possibility that the jury would have reached a different result absent any error.

Am Jur 2d, Homicide §§ 559, 560.

3. Evidence and Witnesses §§ 3110, 3106 (NCI4th)— felony murder—corroborating testimony going beyond original—broadside objection—assignment of error waived—evidence admissible

Defendant's failure to specify the nature of his objection did not waive his assignment of error to corroborative testimony regarding statements made before the crime which went beyond the original, but his failure to object to the allegedly incompetent portions of the testimony did waive the assignment of error. Assuming the assignment of error was properly preserved, the testimony was properly admitted because the variation was modest and went only to the weight of the testimony.

Am Jur 2d, Homicide §§ 559, 560.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment upon defendant's conviction of first-degree murder entered by *Jenkins, J.*, at the 11 March 1991 session of Superior Court, JOHNSTON County. Heard in the Supreme Court 16 April 1992.

Lacy H. Thornburg, Attorney General, by Clarence J. DelForge, III, Assistant Attorney General, for the State.

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

MEYER, Justice.

On 11 December 1989, defendant, Davey Lynn Benson, was indicted for the first-degree murder of Joe F. Horne. On 14 January 1991, a second indictment was issued charging defendant with the robbery with a dangerous weapon of the same victim. Defendant was tried noncapitally for the murder.

The facts pertinent to our decision in this case are as follows. At approximately 8:30 a.m. on the morning of 19 July 1989, Donnie Lee Boykin sat with defendant in an outdoor meeting area in the community of Moore Schoolhouse. Defendant told Boykin that he had recently broken up with his girlfriend, Michelle Hiatt, and that Hiatt and the couple's daughter, Brandy, were living with Hiatt's mother in Kenly. Defendant expressed a desire to visit the two in Kenly but said he lacked money, having only fourteen

cents in his pocket. Defendant asked Boykin for gas money for his moped, and Boykin replied that he did not have any money.

Shortly thereafter, Boykin and defendant observed Joe "Chunk" Horne, an eighty-five-year-old resident of Moore Schoolhouse, walk past the meeting area. Mr. Horne, a survivor of the great depression of the 1930s, was known to customarily carry large amounts of cash on his person because he distrusted banks. The money included denominations of hundreds, fifties, twenties, tens, fives, and ones. Two months earlier, Mildred Deans, Mr. Horne's daughter, witnessed Mr. Horne count his savings; the amount was estimated to be in excess of $16,000. Mr. Horne carried some of his money in his wallet in his left hip pocket and the rest rolled up in a plastic bag in his right hip pocket. According to Boykin, defendant stated something to the effect that Mr. Horne "had a lot of money on him . . . [,] if somebody didn't rob him or knock him in the head or something." Boykin replied that Mr. Horne had "been mighty lucky he'd been this long and carried it with him and never been hit." Boykin testified that on previous occasions defendant had remarked about Mr. Horne's practice of carrying large amounts of money and that defendant would like to obtain it. According to Boykin, as Mr. Horne passed by, he told Boykin and defendant that he intended to go fishing that day at his favorite fishing spot, Atkinson Mill, a popular nearby fishing destination. Boykin also testified that defendant took with him three or four full Budweiser beer cans when defendant left the meeting area at approximately 9:45 a.m.

Christy Deans Pearce, Mr. Horne's granddaughter, gave Mr. Horne a ride to Atkinson Mill that morning. As he stepped out of the car at approximately 9:30 a.m. at the Mill, Mr. Horne had three fishing poles and a white, five-gallon bucket that he sat on while fishing. Ms. Pearce noticed the usual bulge in Mr. Horne's pocket caused by the money he carried. While on her way home from work that same day, Ms. Pearce stopped by Atkinson Mill to pick up her grandfather. Calling for him but receiving no reply, she thought he had obtained a ride from a friend or other family member, which was not uncommon. She returned with her boyfriend a number of hours later to search for him again. As they approached the area, the two saw on the ground a number of fish with torn mouths, as if they had been stripped off a fish stringer. As they continued, they saw a dirty, torn cloth on the trail, which was later identified as Mr. Horne's shirt. Upon arriving at the river,

they saw Mr. Horne lying in the water without his shirt, and the white bucket and fishing poles were floating nearby. Vertical scars and abrasions were visible on Mr. Horne's back, indicating that he had been dragged on the ground. Mr. Horne was also missing his right boot. His pants were pulled down below his knees, but the belt was still buckled.

When the authorities arrived, Mr. Horne was pronounced dead; the body's condition indicated that he had been deceased for some time, but no exact time of death was determined. No money was found on Mr. Horne's person, and his body showed indicia of a severe beating about the head and face with a flat, blunt object. An autopsy revealed additional trauma to the throat consistent with strangulation and several bruises on the back of the hand that were likely defensive wounds. The cause of death was brain trauma due to a blow or blows of a blunt instrument to the head.

At the murder scene, there was a three or four foot wide "drag trail," where leaves had been disturbed, leading to the river. The point of origin of the trail was a wooded area where there were several fish with torn mouths lying on the ground and a felled pine tree that was splattered with blood. There was also blood on the ground around the fish. Six or eight feet from the fish, a slate rock about the size of a man's hand was found; the rock appeared to have blood on it. Five or six steps down the drag trail, Mr. Horne's right boot was found lying on the ground. Nearby, there was a pool of blood. About six feet away, there was another pool of blood measuring the size of a man's hand, with an indentation in the blood. At various locations throughout the murder scene there were Budweiser beer cans.

At approximately 5:30 p.m. that same day, defendant saw his brother, Danny Curtis Benson, and told him that he wanted to get back together with Michelle Hiatt. Defendant told his brother that he would give him $400.00 if Danny could persuade Hiatt to return. Defendant also stated that he would give Hiatt $1,000 and a new car. Danny Benson testified that he was surprised by this offer because he knew that only two days earlier defendant had to borrow five dollars from Hiatt. When Danny asked defendant where he had obtained the money, defendant stated that he acquired it by selling drugs around Kenly. Defendant then pulled from his pocket a wad of money one-half an inch thick with a one hundred dollar bill on top. Danny also testified that a few

days later defendant took six persons, including Danny, Hiatt and Brandy, out to dinner and paid the bill with a one hundred dollar bill. Evidence was also adduced showing that defendant rented a mobile home on 3 August 1989, paying a cash deposit of $150.00 plus a month's rent of $175.00, and bought two bottles of propane gas for $54.00. Two of the bills defendant used to pay these sums were one hundred dollar bills. Evidence was presented that defendant started working as a day laborer for a local farmer for $4.00 an hour on 20 July 1989, the day after Mr. Horne's death, and earned a total of $160.00 at the time he quit on 2 August 1989.

Testimony was also presented by eight persons who stated that defendant had stated on numerous occasions how easy it would be to strike Mr. Horne on the head and take his money. Other testimony placed defendant and his moped, which was silver and black, at the murder scene itself. Carl Smith testified that he was in the Atkinson Mill area on the day of the murder between twelve noon and three in the afternoon and saw a young white male in his twenties working on a disabled moped. On his return trip, Mr. Smith considered stopping to render assistance but decided not to do so because he was taken aback by the behavior of the young man who at that time was rolling around in the grass with his hands and feet in the air appearing very happy and laughing about something.

Donald Pearce, then the boyfriend of Christy Deans Pearce, testified that he saw defendant on three separate occasions on the day of the murder. He saw defendant on a black and gray moped between 9:30 and 10:00 a.m. Defendant was neatly dressed, as was customarily the case. Some time between 3:30 and 4:30 p.m., Pearce saw defendant tinkering with his moped near the roadside. At this time, defendant appeared disheveled; his shirttail was half pulled out, his tennis shoes were dirty, and he did not look as neat as he typically appeared. In addition to witnesses Pearce and Smith, several other persons testified that they saw defendant or someone that looked like him at Atkinson Mill on the day of the murder.

Defendant did not present any evidence on his own behalf. After deliberating for fifty-five minutes, the jury found defendant guilty of robbery with a dangerous weapon and of first-degree murder on the theory of felony murder. The court imposed a life sentence on the basis of the first-degree murder conviction and

arrested judgment on defendant's robbery with a dangerous weapon conviction.

Additional facts will be discussed as necessary for the proper disposition of the issues raised by defendant.

[1] Defendant first argues that the trial court erred in denying defendant's motion to dismiss the charge of first-degree murder based on the felony murder theory because the evidence was insufficient to convince a rational trier of fact of defendant's guilt beyond a reasonable doubt. According to defendant, the evidence that he perpetrated the felony murder against the victim in the instant case was speculative at best.

Defendant offers several arguments in support of his position. First, the State's evidence failed to establish the time of the victim's death with any accuracy. This inability was of critical importance because of the inconsistent evidence pertaining to when defendant was at Atkinson Mill on 19 July, if he was there at all. Second, no eyewitnesses to the murder existed, and no specific motive linked solely to defendant was presented by the State. It was common knowledge that the victim carried a large sum of money on his person. Further, many people spoke threateningly of the ease with which the victim could be robbed. Third, no weapon linked defendant to the crime. The State offered a rock as the murder weapon, despite a weak foundation supporting it. The pathologist could only say that the rock, which was in no way linked to defendant, "could be consistent with causing [the victim's] head injuries." The lack of any link between defendant and the rock, combined with the absence of any proof that it was the instrument of death, is fatal to the State's case. Finally, defendant belittles the State's testimony to the effect that a moped strikingly similar to that owned by defendant was seen at Atkinson Mill on the day of the murder. Even if true, the testimony at best placed defendant in the vicinity where the victim's body was found. Further, the State's evidence also placed a man, not explicitly identified as defendant, with a moped near Atkinson Mill on the day of the murder.

Defendant also argues that the evidence was insufficient to show that defendant robbed the victim. The State's case rested on the mere fact that defendant possessed money in the weeks subsequent to the murder and that defendant knew that the victim carried large amounts of money. Defendant's expenditure of money

for dinner and the trailer rental were made possible by defendant's legitimate employment and his involvement in the drug trade. Further, defendant's purported willingness to buy Michelle Hiatt a car and house in exchange for reconciling with defendant was based on suspect testimony, and such extravagance was patently incredible. No evidence showed that the victim had nearly that amount of money in his wallet. As to defendant's awareness of the fact that the victim customarily kept large amounts of cash on his person, defendant reiterates that other persons were aware of this fact as well.

Defendant argues that, taken altogether, the evidence supported a compelling inference that someone other than defendant perpetrated the killing or, at least, robbed the victim. By way of support for his position, defendant notes that the trial court, before denying the motion to dismiss, acknowledged that "this is a close case." In sum, defendant argues, the evidence here, taken in a light most favorable to the State, was "sufficient only to raise a suspicion or conjecture as to whether the offense charged was committed" by defendant. *State v. Evans*, 279 N.C. 447, 453, 183 S.E.2d 540, 544 (1971). Therefore, defendant argues that the State failed to present the "substantial evidence" required to avoid dismissal. *Id.*

The State contends that substantial evidence was presented tending to show that defendant killed the victim while perpetrating a felony in the instant case. As a threshold matter, defendant had a strong motive to rob the victim because he wanted to use the money to facilitate a reconciliation with his girlfriend and daughter. Michelle Hiatt's mother testified that she had told defendant that one reason his relationship with her daughter would not work was because they had no home of their own. Not coincidentally, the State argues, one of the first things defendant did after the robbery-murder was rent a mobile home. In addition, numerous witnesses testified that defendant on various occasions stated how easy it would be to hit the victim on the head and rob him. The State also labels as spurious defendant's argument that the large amount of cash defendant possessed in the wake of the murder was derived from drug deals and legitimate employment. The testimony regarding drug-related money was provided by the defendant's brother, Danny Benson, and was uncorroborated and likely self-serving and exculpatory in design. No substantive evidence suggests that defendant was involved in the drug trade, and he

certainly did not lead the life-style of a drug dealer. Also, the $160.00 defendant earned as a farm laborer does not account for his extravagance in the wake of the murder. Finally, there was substantial evidence placing defendant at Atkinson Mill around the time of the murder. In sum, the State argues that the evidence, when considered as a whole, was sufficient to support defendant's first-degree murder conviction based on a theory of felony murder.

The law attending our review of denials of motions to dismiss in criminal trials is well settled. In *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980), we stated the law as follows:

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

Id. at 98, 261 S.E.2d at 117 (citations omitted). In conducting our analysis, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Small*, 328 N.C. 175, 180, 400 S.E.2d 413, 417 (1991). Finally, "contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982).

We agree with the State that there exists substantial evidence that defendant killed the victim while engaged in a robbery of the victim. The evidence of defendant's presence at the murder scene around the time of the victim's death, while not unequivocal, is strong. There also exists strong evidence that defendant had a motive for committing the robbery-murder of the victim; he had a great desire to reconcile with his girlfriend and child and felt that obtaining a large amount of cash in a quick fashion was the only means to that end. Defendant was aware that the victim carried a large amount of money on his person and that because of the victim's advanced age, it would be easy to forcibly obtain the money. Indeed, defendant himself had often spoken of the ease with which the crime could be accomplished, stating that the victim

could easily be hit on the head and have his money taken—the very modus operandi employed in the victim's actual murder. In sum, viewed in the light most favorable to the State, there exists substantial evidence to support defendant's first-degree murder conviction under the felony murder theory. *See* N.C.G.S. § 14-17 (Supp. 1991).

[2] In his remaining assignment of error, defendant argues that the trial court committed reversible error in admitting into evidence corroborative testimony provided by a witness for the State when the testimony included critical facts not previously testified to by the principal witnesses. The first basis for defendant's assignment of error involves testimony provided by Kenneth Eatmon, an investigator with the Johnston County Sheriff's Department, who testified to statements made to him by Randy Bryan, who shared a jail cell with defendant prior to trial. On direct examination by the State, Bryan testified as follows:

> Q. And did you have occasion to discuss with [defendant] the reasons that he was being held in Johnston County Jail?
>
> A. Yes.
>
> Q. What did you and he talk about?
>
> A. Just told me what he was charged with and I didn't know any other people he was talking about and—just talking. He told me what he was charged with and what kind of evidence they had.
>
> Q. And what did he tell you? What did he tell you?
>
> A. He told me that the guy had got hit with a rock and they had found some blood, but it didn't match, and they didn't have any evidence. They had to let him go because they didn't have any evidence.
>
> Q. Now, did you ever hear [defendant] make any statement about any dreams that he was having?
>
> A. Yes.
>
> Q. What did [defendant] tell you?
>
> A. He said he had some nightmares when he first went there, but, I guess, when he was taken in jail. And they had some doctors that are there, somewhere, to be evaluated.

Q. All right. When he said he was having nightmares, did he tell you what the nature of the nightmares were about [sic]?

A. About the guy in the river. I don't know who he was talking—. Also, it was the one—.

Q. What did he tell you about the nightmares?

A. That he saw the guy in the river floating and—

Q. Did he tell you how long he had had those nightmares? When?

A. He said for a few days after he first got there. The first week or something; I don't know. I'm not sure exactly.

Q. Now, did he also talk to you about anything else?

A. Well, he told about the rock that they had found, and he named the guy, I didn't know any of them. I'm not from this area. He told me they found a pair of jeans with some blood; it matched animal blood where they had been hunting. He was talking about some of the evidence they had and things like that, or what he thought they had.

Shortly after Bryan's testimony, the State called Eatmon to the witness stand. Eatmon testified on direct examination as follows:

Q. And did Randy Thomas Bryan give you a statement at that time?

A. Yes, he did.

MR. HALE [counsel for the State]: Your Honor, for the purpose of corroborating the witness, I would now offer the statement.

THE COURT: Is there any objection by the defendant?

MR. MORGAN [defense counsel]: Yes, Your Honor, there is.

THE COURT: All right. Ladies and gentlemen of the jury, the statement—the testimony of this witness is offered for the purpose of corroborating the witness, Randy Bryan, if you find that it, in fact, does corroborate the witness, Randy Bryan, and for no other purpose.

All right, sir.

MR. HOLLAND [defense counsel]: We further object to it being repetitious.

THE COURT: Well, overruled.

Q. With the Court's permission, would you please, Lieutenant Eatmon, relate to the jury what Randy Thomas Bryan told you on April 18, 1990?

A. Statement goes as this: Randy states he's in the same cell block where [defendant] is; that [defendant] has been talking about the murder he is charged with saying they don't have enough evidence to hold him. [Defendant] talked about a pair of jeans with a small amount of blood on them that could not be identified. [Defendant] also talked about a rock that was found with some blood on it, but they couldn't identify it either. [Defendant] told Randy that when he was first arrested he, [defendant], had nightmares when he was first in about seeing the old man floating in the water, but hasn't had any nightmares since then, so he, [defendant], must not have a conscience.

[Defendant] further told Randy that the law had tried to pressure him into confessing, but he wasn't going to confess to anything because they, the law, didn't have any evidence.

Q. That's the statement in substance that Mr. Bryan gave you on April 18, 1990?

A. That's correct.

Defendant argues that the admission of Eatmon's testimony, ostensibly for corroborative purposes, was erroneous; Bryan made no reference during his trial testimony either to the fact that defendant lacked a conscience or to the fact that defendant would not confess because the State lacked sufficient evidence. Defendant argues that the error and attendant prejudice stemming from the admission of the testimony were borne out by the court's statement to counsel, made out of the presence of the jury, which was as follows:

[THE COURT:] . . . It's now 4:55. The Court being in session, I admonish the attorneys for the State not to mention in jury argument or any other—or any stage of the proceedings in the presence of the jury, Detective Eatmon's statement that the witness Bryan told the witness Eatmon that the defendant . . . told [Bryan], quote, that he must not have a conscience, end quote. Quote, I won't confess because they don't have enough evidence to hold me, end quote.

> The Court finds that this testimony by the—by the witness Eatmon purportedly to corroborate the witness Bryan is not corroborative and that the prejudicial effect of this statement which could lead to the conclusion that the defendant, in some way, confessed to the murder when the witness Bryan made no indication of that fact, would outweigh the probative value of such testimony.

According to defendant, because this error was prejudicial, he is entitled to a new trial.

The State first contends that defendant's assignment of error is not reviewable by this Court by reason of the fact that defendant waived any potential assignment of error because it was not properly preserved. The defendant lodged only a general objection to Eatmon's challenged statement and later lodged another objection alleging that the testimony was repetitious, the latter objection being irrelevant to this assignment of error. Thus, argues the State, waiver occurred. N.C.G.S. § 8C-1, Rule 103(a)(1) (1988); N.C. R. App. P. 10(b).

Further, the State urges that portions of Bryan's statement such as the reference to defendant's dreams about seeing an old man floating in the water are clearly competent to support Bryan's in-court testimony. Therefore, it was incumbent upon defendant to lodge specific objections to the other parts of Bryan's statement that he now contends are incompetent, that is, that defendant must not have a conscience and that he would not confess because the State lacked sufficient evidence.

> In a noncapital case, where portions of a statement corroborate and other portions are incompetent because they do not corroborate, the defendant must specifically object to the incompetent portions.

State v. Harrison, 328 N.C. 678, 682, 403 S.E.2d 301, 304 (1991).

Furthermore, the State contends that Eatmon's testimony referring to defendant's lack of conscience and refusal to confess due to insufficient evidence implicating him in the crime was substantially similar to Bryan's in-court testimony and was therefore properly admitted. *State v. Rogers*, 299 N.C. 597, 264 S.E.2d 89 (1980).

Further, the State argues, even if error, the admission of the testimony was harmless. Given the strong circumstantial evidence

against defendant, the State argues, there is no reasonable possibility that, absent the alleged error, the jury would have reached a different result. N.C.G.S. § 15A-1443(a) (1988); *State v. Martin*, 322 N.C. 229, 367 S.E.2d 618 (1988).

Finally, the State contends that the error here, if any, was cured when the trial court, subsequent to defense counsel's cross-examination of Eatmon, specifically instructed the jury as follows:

> THE COURT: Ladies and gentlemen of the jury, I have previously instructed you as to corroborative testimony. That you are to consider the statement given the officer in so much as it tends to corroborate the testimony that you heard from the witness stand from the witness. Anything that this witness might have testified to that was not testified to by the prior witness, Randy Bryan, you are not to consider.

As a threshold matter, we disagree with the State that defendant waived this assignment of error because he failed to specify the nature of his objection. The patent nature of the basis of defendant's objection is borne out by the fact that the trial court responded to the objection in terms of the very basis sought by defendant: that the testimony about to be provided by Eatmon was not corroborative of Bryan's testimony. Therefore, we conclude that defendant successfully preserved this assignment of error for appellate review. *See* N.C.G.S. § 8C-1, Rule 103(a)(1) ("No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court . . . ."); N.C. R. App. P. 10(b).

However, we agree with the State that, because defendant, in this noncapital trial, made only a broadside objection to the allegedly incompetent corroborative testimony, this assignment of error is waived. *Harrison*, 328 N.C. at 682, 403 S.E.2d at 304. Assuming, *arguendo*, that defendant properly preserved this assignment, we conclude that the error here, if any, was cured by the trial court's instruction in the wake of Eatmon's testimony. *State v. Batts*, 303 N.C. 155, 160, 277 S.E.2d 385, 388-89 (1981); *see also Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985) ("The Court presumes that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them."). Moreover, given the substantial evidence against defendant, there is no reasonable possibility that, absent the alleged

error, the jury would have reached a different result. N.C.G.S. § 15A-1443(a); *State v. Martin*, 322 N.C. 229, 367 S.E.2d 618 (1988).

[3] Defendant also objects to another portion of Eatmon's testimony, this time pertaining to a statement provided to Eatmon by Elton Mitchell. Mitchell testified as follows:

Q. All right. Did you see the defendant . . . on that occasion?

A. Yes.

Q. And under what circumstances did you see [defendant]?

A. My brother, he was on the inside and he just walked up to the car and started talking.

Q. Who walked up to the car and started talking?

A. [Defendant].

Q. What did he say to you?

A. His words was, let's go knock Chunk in the head and—

Q. Did you know who he was referring to?

A. Yes.

Q. Who?

A. Mr. Chunk Horne.

Q. What did you think about when you heard him make that statement to you?

A. He kind of laughed and I didn't pay it a bit of mind and never thought nothing else of it.

During the State's direct examination of Eatmon, the following exchange occurred:

MR. O'HALE: For the purposes of corroboration, Your Honor, we offer this testimony on February the 7, 1990.

Q. Detective Eatmon, would you please relate to the Court and jury the statement given to you by Elton Howard Mitchell?

MR. HOLLAND: Objection.

THE COURT: The evidence now being offered by the State is for the purpose of corroboration. If you, the jury, find that

the testimony of this witness does, in fact, corroborate the witness Parrish (sic) who previously testified.

All right. Overruled, go ahead.

Q. Okay. What did Elton Mitchell tell you on February 7, 1990?

A. Elton stated that he knew Mr. Joe, Chunk, Horne. That he also knew [defendant]. Further stated that sometime three to four weeks prior to Mr. Horne being killed, that he, Mitchell, was at the store in Moore School Crossroads and [defendant] was there and they were talking. [Defendant] saw Chunk Horne and stated to Elton Mitchell, there's Chunk Horne, let's go knock him in the head and take his money. Elton stated nothing else was said and [defendant] had not told him anything else since Mr. Horne was killed.

Defendant argues that the trial court committed prejudicial error when it admitted the Eatmon testimony over defense objection. In particular, defendant argues that Eatmon provided a more detailed, divergent account of the incident Mitchell testified to, specifically expanding on the timing and tenor of Mitchell's statement. In support of his position, defendant cites a number of cases where we have ordered new trials because statements admitted by the trial court were not corroborative. *See State v. Moore*, 300 N.C. 694, 268 S.E.2d 196 (1980); *State v. Warren*, 289 N.C. 551, 223 S.E.2d 317 (1976).

The State argues, once again, that defendant waived any objection in this regard because he lodged only a general objection, and hence the matter is not properly preserved for appellate review. Also, because defendant did not specifically object to the allegedly incompetent portions of Eatmon's testimony, he has waived appellate review. Additionally, the Eatmon testimony regarding the Mitchell statement was not so different as to warrant a new trial. Finally, even if erroneously admitted, the testimony was harmless.

Once again, we disagree with the State's assertion that defendant waived his right to appeal this issue because he did not specify the nature of his objection. However, once again, we conclude that waiver did occur by virtue of defendant's failure to lodge objections to the allegedly incompetent portions of the Eatmon testimony. *Harrison*, 328 N.C. at 682, 403 S.E.2d at 304. Assuming, *arguendo*, that the assignment of error was preserved, we conclude that the

testimony was properly admitted. "Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980). Prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is *substantially similar* to the principal witness' in-court testimony. *Harrison*, 328 N.C. at 682, 403 S.E.2d at 304. "When the statements are generally consistent with the witness' testimony, slight variations will not render them inadmissible. Such variations affect only the weight of the evidence which is for the jury to determine." *State v. Moore*, 300 N.C. 694, 697, 268 S.E.2d 196, 199 (1980) (citation omitted).

Here, the variation between Mitchell's testimony and Eatmon's recapitulation of Mitchell's prior statement is modest. Mitchell testified that he heard defendant say something to the effect of "let's go knock [Mr. Horne] in the head and—." Eatmon's depiction of the Mitchell statement was as follows: "let's go knock [Mr. Horne] in the head and take his money." Also, Eatmon stated that the pertinent conversation between Mitchell and defendant took place some three to four weeks prior to the murder, a fact not stated by Mitchell during his testimony. We conclude that the testimonies provided by Mitchell and Eatmon were substantially similar; Eatmon's reference to the timing of the conversation is properly considered a "slight variation[ ]" and therefore went only to the weight of the testimony. Mitchell's prior statement to Eatmon, "although including additional facts not referred to in his testimony, tended to strengthen and add credibility to his trial testimony. [It was], therefore, admissible as corroborative evidence." *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986).

For the foregoing reasons, we conclude that defendant received a fair trial, free of prejudicial error.

No error.

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

ANGELL v. CITY OF SANFORD

No. 176P92

Case below: 106 N.C.App. 90

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 25 June 1992.

CITY OF STATESVILLE v. CLOANINGER

No. 173P92

Case below: 106 N.C.App. 10

Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 24 June 1992. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992.

EVANS v. DIAZ

No. 149PA92

Case below: 105 N.C.App. 436

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 24 June 1992.

FRIZZELLE v. HARNETT COUNTY

No. 201P92

Case below: 106 N.C.App. 234

Petition by defendants for writ of supersedeas and temporary stay allowed 8 June 1992.

HAYWOOD v. HAYWOOD

No. 181A92

Case below: 106 N.C.App. 91

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 24 June 1992. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992.

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

HYLER v. GTE PRODUCTS CO.

No. 96PA92

Case below: 105 N.C.App. 443

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 24 June 1992.

IN RE MURPHY

No. 151A92

Case below: 105 N.C.App. 651

Appeal by respondent (Larry David Murphy) pursuant to G.S. 7A-30 retained by order of the Court 29 June 1992.

LOG SYSTEMS, INC. v. WILKEY

No. 156P92

Case below: 106 N.C.App. 90

Temporary stay dissolved 24 June 1992. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992.

MEYERS v. DEPT. OF HUMAN RESOURCES

No. 119A92

Case below: 105 N.C.App. 665

Petition by defendant (Commission) for temporary stay allowed 27 May 1992, nunc pro tunc 2 April 1992. Petition by defendant (Commission) for writ of supersedeas allowed 24 June 1992. Petition by defendant (Commission) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 24 June 1992 as to issue as to whether Personnel Commission is necessary party, otherwise denied.

Petition by defendant (DHR) for writ of supersedeas allowed 24 June 1992. Petition by defendant (DHR) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 24 June 1992.

SHAIKH v. BURWELL

No. 78P92

Case below: 105 N.C.App. 291

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992.

SORRELLS v. M.Y.B. HOSPITALITY VENTURES OF ASHEVILLE

No. 153PA92

Case below: 105 N.C.App. 705

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 24 June 1992.

STATE v. CHAPMAN

No. 163P92

Case below: 106 N.C.App. 229

Petition by Attorney General for temporary stay allowed 19 May 1992 pending receipt and determination of a timely filed petition for discretionary review. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992. Temporary stay dissolved 24 June 1992.

STATE v. HECHLER

No. 161P92

Case below: 105 N.C.App. 716

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 24 June 1992.

STATE v. HUNTLEY

No. 138P92

Case below: 105 N.C.App. 709

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992.

STATE v. HYDER

No. 186P92

Case below: 106 N.C.App. 230

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992.

STATE v. MARTIN

No. 70P92

Case below: 105 N.C.App. 182

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 June 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992.

STATE v. QUARG

No. 164PA92

Case below: 106 N.C.App. 106

Petition by Attorney General for writ of supersedeas allowed 24 June 1992. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 24 June 1992.

STATE v. RICHARDSON

No. 196P92

Case below: 106 N.C.App. 393

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 24 June 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992.

STATE v. RIDDLE

No. 191P92

Case below: 106 N.C.App. 230

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992.

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

STATE v. ROPER

No. 189P92

Case below: 106 N.C.App. 230

Petition by defendant for writ of supersedeas and temporary stay denied 2 June 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 June 1992. Notice of appeal by defendant and petition by defendant for writ of certiorari to the North Carolina Court of Appeals dismissed 4 June 1992.

STATE AUTOMOBILE MUTUAL INS. CO. v. HOYLE

No. 178P92

Case below: 106 N.C.App. 199

Petition by defendants (Hoyles) for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992.

STATE EX REL. WILLIAMS v. COPPEDGE

No. 129A92

Case below: 105 N.C.App. 470

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 24 June 1992.

SULLIVAN v. SULLIVAN

No. 154P92

Case below: 105 N.C.App. 717

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992.

THOMAS v. MILLER

No. 139P92

Case below: 105 N.C.App. 589

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992.

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

WILSON v. BELLAMY

No. 141P92

Case below: 105 N.C.App. 446

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 24 June 1992.

PETITION TO REHEAR

CORUM v. UNIVERSITY OF NORTH CAROLINA

No. 163PA90

Case below: 97 N.C.App. 527

Petition by defendants to rehear pursuant to Appellate Rule 31 denied 24 June 1992.

STATE OF NORTH CAROLINA v. RODNEY LEE MONTGOMERY

No. 265A90

(Filed 25 June 1992)

1. Homicide § 253 (NCI4th)— first degree murder—premeditation and deliberation—sufficiency of evidence

The State's evidence was sufficient to support a jury verdict finding defendant guilty of first degree murder on the theory that he killed the victim with premeditation and deliberation where it tended to show that about one hour before the victim's body was found, defendant was in the parking lot next to the apartment in which the murder was committed; the victim did not know defendant and defendant had never been inside the apartment before the day of the murder; the victim cleaned her eyeglasses on a regular basis and had cleaned them on the day she was murdered; a fingerprint lifted from a lens of the victim's glasses found in the apartment matched one of defendant's fingerprints; pubic hairs consistent with those of defendant were found in front of and on the sofa in the apartment; a butcher knife with human blood and fibers consistent with fibers taken from the sweatshirt the victim was wearing at the time of her death was found in a location between the victim's apartment and the house where defendant was residing at the time of the murder; the victim had nine different stab wounds and four cutting wounds; two wounds were inflicted on the victim's back, which permitted an inference that the victim was helpless or had been felled when the murderer inflicted some of the wounds; no evidence of provocation was presented; the murderer and the victim initially had contact in the living room based upon the physical evidence presented; and the fact that the victim's body was found in the bedroom suggests premeditation on the part of the murderer.

Am Jur 2d, Homicide §§ 52, 439, 454.

Presumption of deliberation or premeditation from circumstances surrounding the killing. 96 ALR2d 1435.

2. Homicide §§ 266, 281 (NCI4th)— felony murder—underlying felonies of armed robbery and attempted rape—sufficiency of evidence

The State's evidence was sufficient to support a jury verdict finding defendant guilty of first degree murder under the theory that defendant killed the victim while engaged in the underlying felony of armed robbery where it tended to show that the pocketbook of one of the victim's roommates had been rifled through at about the time of the murder and the money it had contained had been stolen. The evidence was also sufficient for the jury to find defendant guilty based on the underlying felony of attempted rape where it tended to show that the victim was found with her sweatpants inside out and without panties on; the victim's roommates testified that the victim was wearing underwear earlier that evening and was generally meticulous about her appearance; the couch on which the victim had been sitting when her roommates left was in disarray after the murder; and five pubic hairs consistent with those of the defendant were found on the couch, which tended to show that defendant had removed his pants while in the apartment.

Am Jur 2d, Homicide §§ 71-75, 454.

3. Rape and Allied Offenses § 18.2 (NCI3d)— attempted rape—sufficiency of evidence

The State's evidence was sufficient to support a jury verdict finding defendant guilty of attempted first degree rape where it tended to show that the victim did not know defendant and defendant had never been in the victim's apartment; the body of the victim, who had been repeatedly stabbed, was found in a bedroom of the apartment; when the victim's roommates left on the evening of the murder, the victim dressed in sweatpants was sitting on the sofa reading the newspaper with her eyeglasses on; when the victim's body was found, her sweatpants were inside out and she was not wearing panties; there were bruises and abrasions on her knees in addition to the stab wounds to her body; the sectional sofa on which the victim had been sitting was pulled apart and the coffee table in front of the sofa had been moved; the victim's panties were wadded up on the couch; the victim's eyeglasses were smeared with fingerprints, one of which was defendant's; the

police found pubic hairs consistent with those of defendant in front of and on the couch; an expert testified that because of the condition of the hairs, it was likely that the pubic region of the person who left them was exposed directly to the couch; and several hairs had flesh at the end, indicating a forceful removal.

Am Jur 2d, Rape §§ 25, 26, 53, 54.

4. Burglary and Unlawful Breakings § 61 (NCI4th)— first degree burglary—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of first degree burglary where it tended to show that defendant was not an acquaintance of the victim or any of her roommates; when the victim's roommates left on the evening the victim was found murdered in their apartment, they closed the front door; the couch in the living room was in disarray after the murder, suggesting that the victim was surprised by defendant when he entered the apartment between 10:30 p.m. and 11:00 p.m.; and defendant stole money from a pocketbook after he entered the apartment, thus permitting the inference that he had the intent to commit larceny at the time he entered the apartment as alleged in the indictment.

Am Jur 2d, Burglary §§ 29, 47.

5. Robbery § 2.2 (NCI3d)— armed robbery—ownership of property—conjunctive in indictment—no fatal variance

There was no fatal variance between the indictment, the proof and the instructions in an armed robbery case where the indictment charged that defendant took money from the person and presence of the victim, the court instructed the jury that the State must prove that defendant took property from the person of the victim or took property of another in the victim's presence, and the evidence showed only that money was taken from the victim's presence, since the use of a conjunctive in the indictment does not require the State to prove various alternative matters alleged.

Am Jur 2d, Indictments and Informations §§ 96, 214.

6. Robbery § 4.3 (NCI3d)— armed robbery—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for robbery with a dangerous weapon where it tended to show that the victim possessed or had custody of a purse and its contents belonging to her roommate; money was stolen from the purse that was found in the bedroom where the victim was stabbed; and the victim was threatened or endangered by the knife used to stab her when the robbery occurred.

Am Jur 2d, Robbery §§ 5, 51, 62.

7. Appeal and Error § 531 (NCI4th)— new trial—two votes for one basis—three votes for different basis

A defendant convicted of first degree murder is awarded a new trial where two members of the Supreme Court support the result of a new trial solely on the basis that the trial court's instruction on reasonable doubt was unconstitutional and three members support that result solely on the basis that a potential juror was improperly excused by the prosecutor because of his national origin.

Am Jur 2d, Appeal and Error § 963.

Justice FRYE concurring in result.

Chief Justice EXUM and Justice WHICHARD join in this concurring opinion.

Justice MEYER dissenting.

Justice LAKE joins in this dissenting opinion.

APPEAL as of right pursuant to N.C.G.S. § 7A-27 from a judgment imposing a sentence of death upon the defendant for his conviction of first-degree murder, entered by *Downs, J.*, in the Superior Court, MECKLENBURG County, on 13 June 1990. The defendant's motion to bypass the Court of Appeals on his appeals from additional judgments for first-degree burglary, robbery with a dangerous weapon, and attempted first-degree rape was allowed by the Supreme Court, and those appeals were consolidated with the defendant's appeal of the murder conviction. Heard in the Supreme Court on 10 March 1992.

Lacy H. Thornburg, Attorney General, by Joan Herre Byers, Special Deputy Attorney General, and Valerie B. Spalding, Assistant Attorney General, for the State.

Kenneth J. Rose for the defendant-appellant.

MITCHELL, Justice.

The defendant was convicted of first-degree murder, robbery with a dangerous weapon, first-degree burglary, and attempted first-degree rape. The jury recommended a sentence of death for the conviction of first-degree murder. The defendant raised thirty-six assignments of error on appeal. We do not reach all these assignments of error because, for the reasons stated below, we grant the defendant a new trial.

Some of the State's evidence at trial tended to show the following. On Saturday, 21 January 1989, Kimberly Piccolo, a student at the University of North Carolina at Charlotte, and her roommates invited several friends to their apartment near the university campus for dinner. After dinner, Piccolo's roommates and their friends went to a party held at an adjoining apartment complex. Piccolo declined their invitation to attend. When Piccolo's roommates left, Piccolo was wearing a maroon sweatshirt, sweatpants, and socks and was sitting on the couch with her eyeglasses on reading the newspaper. Piccolo was unable to see well without her glasses. Piccolo was alone in the apartment when her friends left.

That same evening around 10:00 p.m., Christy Webb, a neighbor of Piccolo, drove up to her apartment with her boyfriend, Steve Aumer. As Webb was walking away from her car, she was stopped by a man who was wearing a green army jacket to which an identification badge was attached. The man asked Webb for change for a twenty-dollar bill. Webb stated that she did not have any change. The man then asked if she had any change upstairs in her apartment. At that point Aumer got out of the car, looked the man in the eye, and stated that Webb did not have any change. Aumer testified at trial that the defendant was the man he saw in the parking lot that evening.

At 11:00 p.m., Piccolo's roommates returned to the apartment. Upon entering, they noticed that the contents of a purse had been spilled on the floor. They went upstairs and found Piccolo's body

on the bathroom floor. She had been stabbed many times. They immediately called the police. When Piccolo's body was found, she was dressed in a sweatshirt, sweatpants which were inside out, and socks, but she was not wearing panties.

An autopsy showed that Piccolo had received nine stab wounds that were clustered in her chest, arm, back, and abdomen and several defensive wounds on her hands. One stab wound went completely through her right hand. The cause of death was loss of blood.

The couch on which Piccolo had been sitting when her roommates had left her had been pushed apart. The panties Piccolo had been wearing earlier that evening were found on the couch. A butcher knife was missing from the kitchen. Piccolo's eyeglasses were found on the coffee table. A fingerprint was lifted from one of the lenses; this print matched a print of the defendant's left ring finger. Five pubic hairs were found on the couch; these hairs were consistent with those of the defendant. The police later found the missing butcher knife in a parking lot located between Piccolo's apartment and the house owned by the defendant's sister where the defendant was staying at the time of the murder. Blood and fibers consistent with fibers from Piccolo's sweatshirt were on the knife. The defendant's brother owned a green army jacket to which a University of North Carolina identification badge was attached.

The defendant at trial presented alibi evidence. Several of the defendant's relatives testified that he was with them the entire evening of 21 January 1989.

Other evidence introduced at trial is discussed at other points in this opinion where pertinent to the issues raised by the defendant.

The defendant assigns as error the trial court's denial of his motion to dismiss the first-degree murder charge for insufficiency of the evidence. The defendant contends that the State presented insufficient evidence to support a finding that he killed the victim with premeditation and deliberation or that he killed her while he was engaged in one of the underlying felonies of first-degree burglary, robbery with a dangerous weapon, or attempted first-degree rape.

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

"On a motion to dismiss on the ground of insufficiency of the evidence, the question for the court is whether there is substantial evidence of each element of the crime charged and of the defendant's perpetration of such crime." *State v. Bates*, 309 N.C. 528, 533, 308 S.E.2d 258, 262 (1983).

> [T]he trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it. . . . If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Locklear, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988) (citations omitted). Further, "[t]he defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). The determination of the witnesses' credibility is for the jury. *See Locklear*, 322 N.C. at 358, 368 S.E.2d at 383. "[C]ontradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982).

State v. Small, 328 N.C. at 180-81, 400 S.E.2d at 415-16, *quoted in State v. Quick*, 329 N.C. 1, 19, 405 S.E.2d 179, 190-91 (1991). " 'The trial court's function is to determine whether the evidence will permit *a reasonable inference* that the defendant is guilty of the crimes charged.' " *Quick*, 329 N.C. at 19, 405 S.E.2d at --- (quoting *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991)).

[1] Under this standard, there was substantial evidence to support findings that the defendant killed the victim with premeditation and deliberation and that he killed her during the course of one of the underlying felonies. The State's evidence tended to show that a fingerprint lifted from a lens of the victim's eyeglasses found in the apartment matched one of the defendant's fingerprints. The victim did not know the defendant and the defendant had never been inside the apartment before the day of the murder. The victim cleaned her glasses on a regular basis and had cleaned them on the day she was murdered. About one hour before the victim's body was found, the defendant was in the parking lot next to the apartment in which the murder was committed. The

police found pubic hairs consistent with those of the defendant in front of and on the sofa in the apartment. A butcher knife with human blood and fibers consistent with the fibers taken from the sweatshirt the victim was wearing at the time of her death was found in a location between the victim's apartment and the house where the defendant was residing at the time of the murder.

When determining whether there is sufficient evidence that a killing was done with premeditation and deliberation, the court may consider, *inter alia*, evidence tending to show the following: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) the dealing of lethal blows after the deceased has been felled and rendered helpless; (4) evidence that the killing was done in a brutal manner; and (5) the nature and number of the victim's wounds. *See State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991); *State v. Bullock*, 326 N.C. 253, 258, 388 S.E.2d 81, 84 (1990).

The State presented evidence of the brutal manner in which the victim was killed. The victim had nine different stab wounds and four cutting wounds on her arms. The repeated stabbing showed the brutality of the murder. Two wounds were inflicted on the victim's back, which permitted an inference that the victim was helpless or had been felled when the murderer inflicted some of the wounds. No evidence of provocation was presented. *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). The murderer and the victim initially had contact in the living room based upon the physical evidence presented. The victim's body was found in the bedroom. The movement of the victim from the living room to the bedroom suggests premeditation on the part of the murderer. *State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986), *vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987).

[2] Substantial evidence was introduced from which the jury could find the defendant guilty under the felony-murder theory with robbery as the underlying felony. The pocketbook of Denise Robbins, one of the victim's roommates, had been rifled through at about the time of the murder, and the money it had contained had been stolen. The evidence also tended to show that the victim was murdered during an attempted rape. The victim was found with her sweatpants inside out and without panties on. The victim's roommates testified that the victim was wearing underwear earlier

that evening and was generally meticulous about her appearance. The couch on which she had been sitting when her roommates left was in disarray after the murder. Five pubic hairs consistent with those of the defendant were found on the couch, which tended to show that the defendant had removed his pants while in the apartment.

The defendant argues that the evidence in the present case was no stronger than that in other cases where the court dismissed first-degree murder charges. Specifically, the defendant relies upon *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987), and *State v. Cutler*, 271 N.C. 379, 156 S.E.2d 679 (1967). In *Reese* and *Cutler*, however, there was no physical evidence tying the defendants to the actual murder scenes. In the present case, the defendant's fingerprints were found in the victim's apartment. The defendant was also identified as being in the apartment complex at approximately the time of the murder. Pubic hairs consistent with those of the defendant were found in the apartment. We conclude that *Reese* and *Cutler* are distinguishable from the present case. Here, the evidence was sufficient to survive the defendant's motion to dismiss the charge of first-degree murder both on the theory of premeditation and deliberation and on the felony-murder theory.

[3] The defendant next assigns as error the trial court's denial of his motion to dismiss the charge of attempted first-degree rape for insufficiency of the evidence. We disagree and conclude that the evidence was sufficient for submission of that charge to the jury. In order to prove attempted first-degree rape, the State must prove that the defendant had the intent to commit the crime and committed an act which went beyond mere preparation, but fell short of actual commission of the first-degree rape. *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982). The evidence presented by the State tended to show that the victim did not know the defendant and the defendant had never been in the victim's apartment. When the victim's roommates left on the evening of the murder, the victim dressed in sweatpants was sitting on the sofa reading the newspaper with her eyeglasses on. When the victim's body was found, her sweatpants were inside out and she was not wearing panties. There were bruises and abrasions on her knees in addition to the stab wounds to her body. The sectional sofa on which the victim had been sitting earlier in the evening was pulled apart and the coffee table in front of the sofa had been moved. The victim's panties were wadded up on the couch. The victim's

eyeglasses were smeared with fingerprints, one of which was the defendant's. The police found pubic hairs consistent with those of the defendant in front of and on the couch. An expert testified that because of the condition of the hairs, it was likely that the pubic region of the person who left them was exposed directly to the couch. Also, several of the hairs had flesh at the end, indicating a forceful removal.

Such evidence would support a finding by a reasonable juror that the defendant surprised the victim. A struggle occurred during which the defendant removed the victim's sweatpants and panties and raped or attempted to rape her. The defendant took the victim upstairs where he stabbed her numerous times and replaced her sweatpants inside out. Such substantial evidence in the present case formed a sufficient basis from which a reasonable jury could infer that the defendant committed attempted first-degree rape. *See generally State v. Harris*, 319 N.C. 383, 354 S.E.2d 222 (1987); *State v. McDougall*, 308 N.C. 1, 12, 301 S.E.2d 308, 315-16, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983).

[4] The defendant next assigns as error the trial court's denial of his motion to dismiss the charge of first-degree burglary for insufficiency of the evidence. First-degree burglary is the breaking or entering of an occupied dwelling at night with intent to commit a felony therein. *State v. Noland*, 312 N.C. 1, 13, 320 S.E.2d 642, 650 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985); N.C.G.S. § 14-51 (1986). Substantial evidence presented by the State tended to show that the defendant broke into or entered the apartment while it was occupied by the victim between 10:30 p.m. and 11:00 p.m. The evidence tended to show that the defendant was not an acquaintance of the victim or any of her roommates. When the victim's roommates left on the evening of the murder, they closed the front door of the apartment. The couch in the living room was in disarray after the murder, suggesting that the victim was surprised by the defendant when he entered the apartment.

The criminal intent of the defendant at the time he entered the apartment could be inferred from the acts he committed after he entered. *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992). The indictment against the defendant alleged he had the intent to commit larceny at the time of the breaking or entering. The State's evidence tending to show that the defendant stole money from a pocketbook after he entered the apartment was

substantial evidence that he had the intent to commit larceny when he entered the apartment. The trial court did not err in denying the defendant's motion to dismiss the first-degree burglary charge.

[5] The defendant next assigns two errors with respect to the charge of robbery with a dangerous weapon. The defendant argues that the trial court's instructions to the jury varied from the indictment. The trial court instructed the jury that the State must prove that "the defendant took the property from the person of Ms. Piccolo or took property of another in the presence of Ms. Piccolo." The indictment stated in pertinent part that "Rodney Lee Montgomery did unlawfully, willfully and feloniously steal, take, and carry away another's personal property, United States currency of the value of approximately $160.00, from the person and presence of Kimberly Ann Piccolo. . . ." The defendant argues that the State presented no evidence that the money was taken from the person of Ms. Piccolo; it only presented evidence tending to show that the money was taken from her presence.

The use of a conjunctive in the indictment does not require the State to prove various alternative matters alleged. *State v. Williams*, 314 N.C. 337, 355, 333 S.E.2d 708, 721 (1985). We conclude, therefore, that there was no fatal variance between the indictment, the proof presented at trial, and the trial court's instructions to the jury.

[6] The defendant also contends that the evidence was insufficient to support the submission of the charge of robbery with a dangerous weapon to the jury. Robbery with a dangerous weapon is the taking of personal property from the person or presence of another, by use or threatened use of a dangerous weapon, whereby the victim's life is endangered or threatened. *State v. Rasor*, 319 N.C. 577, 356 S.E.2d 328 (1987); N.C.G.S. § 14-87(a) (1986). There was substantial evidence that the victim possessed or had custody of the purse and its contents. The evidence also tended to show that $180.00 was stolen from the purse that was found in the bedroom where the victim was stabbed. The victim was threatened or endangered by the knife used to stab her when the robbery occurred. We, therefore, conclude that the evidence was sufficient to require submission of the charge of robbery with a dangerous weapon to the jury.

[7] The defendant next assigns as error the trial court's instruction to the jury defining the term "reasonable doubt." The defendant contends in this regard that the instruction given in this case

was nearly identical to the instruction found unconstitutional in *Cage v. Louisiana*, 498 U.S. ---, 112 L. Ed. 2d 339 (1990) (*per curiam*).

The defendant requested by written motion that the trial court use the pattern jury instruction on reasonable doubt in its charge to the jury. The trial court has the duty to define the term "reasonable doubt" when requested to give such an instruction to the jury. *State v. Shaw*, 284 N.C. 366, 200 S.E.2d 585 (1973). Trial courts are not required to use an exact formula when instructing on reasonable doubt. *State v. Watson*, 294 N.C. 159, 167, 240 S.E.2d 440, 446 (1978). Where the trial court undertakes to define the term "reasonable doubt," however, its instruction must be a correct statement of the law. *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976).

The State contends that the defendant did not object to the instruction and, therefore, that this assignment is not properly before us for appellate review. We conclude, however, that the defendant properly preserved the issue raised in this assignment for appellate review.

The defendant submitted a written request to the trial court to give the reasonable doubt instruction contained in the pattern jury instructions. N.C.P.I.—Crim. 101.10 (1974). Understandably, the trial court instead gave an instruction taken directly from *State v. Williams*, 308 N.C. 47, 63, 301 S.E.2d 335, 345-46, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), a case decided seven years before *Cage* and in which the question decided in *Cage* was not before us. The defendant's written request for a particular instruction on reasonable doubt met the requirements of Appellate Rule 10(b)(2) and constituted a sufficient objection to the different instruction actually given to preserve this issue for appellate review. *State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984); *see also State v. Pakulski*, 319 N.C. 562, 575, 356 S.E.2d 319, 327 (1987) (applying the "spirit" of Appellate Rule 10(b)(2)).

In the present case, the trial court failed to give the defendant's requested instruction on reasonable doubt and instructed the jury in the following manner:

> Members of the jury, a reasonable doubt, or at least a definition of that [sic] is acceptable by our Supreme Court, is that it is not a vain, imaginary or fanciful doubt, but rather it is one based upon sanity or saneness and rationality. And

when it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it means that you must be fully satisfied or entirely convinced or satisfied to a *moral certainty* of the truth of the charge, and after considering and comparing and weighing all the evidence, or the lack of that evidence, as the case may be, if your minds are left in such condition that you cannot say that you have abiding faith to a *moral certainty* of the defendant's guilt of one or more or all of those charges, then under those circumstances, you have a reasonable doubt. Otherwise, you do not.

A reasonable doubt, as that term is employed in the administration of criminal law, is an *honest, substantial misgiving*, one generated by the insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused.

A reasonable doubt is not a doubt suggested by the ingenuity of counsel, or by your own ingenuity not legitimately warranted by the testimony or the lack thereof; nor is it one born of a merciful inclination or disposition to permit a defendant to escape the penalty of the law; nor is it one prompted by sympathy for him or anyone connected with him.

(Emphasis added.)

Five months after the trial of this defendant, the Supreme Court of the United States held in *Cage* that the following instruction violated the Due Process Clause of the Fourteenth Amendment:

If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man

> can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*

498 U.S. at ---, 112 L. Ed. 2d at 341-42 (emphasis placed by the Court). The Supreme Court reviewed the instruction given in *Cage* as a whole and focused on the combination of terms used there in holding the instruction unconstitutional. The Court stated:

> The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When these statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id. at ---, 112 L. Ed. 2d at 342.

Relying on *Cage*, the defendant contends that the instruction given by the trial court in the present case was contrary to the requirement of proof "beyond a reasonable doubt" embodied in the Due Process Clause. *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368 (1970). We addressed this same issue recently in *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992). In that case, the defendant also argued that the trial court's instruction on reasonable doubt violated *Cage*. The trial court in its instruction in *Hudson* used the term "substantial misgiving," but did not equate reasonable doubt with a "moral certainty." *Id.* at 141, 415 S.E.2d at 742. Because the trial court in *Hudson* did not use the combination of terms condemned in *Cage* and, thus, could not have misled the jury, we concluded that the instruction there was not error. *Id.* at 142-43, 415 S.E.2d at 742-43. However, in the case at bar, the use of the terms "substantial misgiving" and "moral certainty" in combination in the trial court's reasonable doubt instruction violated the requirements of the Due Process Clause as interpreted by the Supreme Court in *Cage*.

The trial court in the present case in instructing on reasonable doubt used a combination of terms that was nearly identical to the combination condemned in *Cage*. The trial court equated reasonable doubt with a "substantial misgiving" which, while not identical to the "substantial doubt" or "grave uncertainty" language condemned in *Cage*, conveyed a nearly identical meaning. More importantly, the trial court in the present case joined its definition of a reasonable doubt as an "honest, substantial misgiving" with a requirement that to convict the jury must be convinced to a "moral certainty," rather than to evidentiary certainty. The trial court stated the "moral certainty" test two separate times in the instruction. While the instruction given here was not identical to the instruction held unconstitutional in *Cage*, the trial court used a combination of terms so similar to the combination disapproved in *Cage* that there is a "reasonable likelihood" that the jury applied the challenged instruction in a way that violated the Due Process Clause. *See Estelle v. McGuire*, 502 U.S. ---, ---, n.4, 116 L. Ed. 2d 385, 399 n.4 (1991) (disapproving the language describing the standard of review set forth in *Cage* and *Yates v. Evatt*, 500 U.S. ---, 114 L. Ed. 2d 432 (1991), in terms of how reasonable jurors could or would have understood the trial court's instructions, and reasserting the standard of review set forth in *Boyde v. California*, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 329 (1990) ("[W]hether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violated the Constitution)). Our opinion in *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), supports no different conclusion, as this question was not before us in that case.

Having determined that the trial court's instruction gave rise to error under the Constitution of the United States, we next must determine whether the State has met its burden of showing that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). The evidence presented by the State tending to show the defendant's guilt, while strong, was circumstantial. The defendant's evidence tended to show an alibi. There was neither a confession by the defendant nor a witness to the murder. Based on this evidence, we conclude that the State has failed to show that the constitutional error in this case was harmless beyond a reasonable doubt. Therefore, under the binding authority of the *Cage* decision, this Court is required to hold that the defendant is entitled to a new trial on the charges against him.

New trial.

Justice FRYE concurring in result.

I agree with Justice Mitchell's opinion insofar as it holds that the evidence was sufficient to support the verdicts. I also agree that defendant must have a new trial, although I do so for an entirely different reason: the exclusion of a potential juror because of his national origin in violation of Article I, Section 26 of the North Carolina Constitution.

While questioning potential jurors, the prosecutor discovered that venireperson Benson Sesay, a black junior high school science teacher, was originally from Africa. The prosecutor subsequently excused Mr. Sesay as a juror in defendant's trial. Pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), defendant's attorney requested that the prosecutor state for the record his grounds for excusing Mr. Sesay. The prosecutor stated:

> Two grounds, Your Honor. First is the potential juror was a teacher, and we as a team will look to strike teachers unless we can find a reason to keep them. We have kept one teacher. We found reason to keep her, Ms. Beasley, because she is about the same age as the victim, she went to UNCC, and we feel that she will associate with the victim. The fact that Mr. Sesay is a teacher is a reason for us to strike him unless we can find a reason to keep him. The fact that he is not from this country is also another reason. I have had experiences where, because of the upbringings in other countries, people are influenced in the way they look at the law in this country. For these two reasons, the State exercises a challenge.

Defendant's attorney then objected to Mr. Sesay's excusal "under these circumstances." The trial court denied the objection.

Defendant argues on appeal that the excusal of Mr. Sesay violated the Equal Protection Clause of the Fourteenth Amendment, *see Batson*, 476 U.S. 79, 90 L. Ed. 2d 69, and Article I, Section 26 of the North Carolina Constitution. I agree with defendant that Mr. Sesay's excusal violated our State Constitution.[1]

1. Defendant also argues that the excusal of another venireperson, Adabishi Amusan, violated the United States and North Carolina Constitutions for the same reason as the excusal of Mr. Sesay. Mr. Amusan, originally from Nigeria, was excused by the prosecutor because of his ambivalence toward the death penalty

Because I decide this case on state constitutional grounds, I do not express an opinion as to whether Mr. Sesay's excusal from jury service in this case also violated the United States Constitution.

Article I, Section 26 states that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin." In *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987), a case involving racial discrimination in the selection of a grand jury foreman, we explained in detail the purposes served by Article I, Section 26. Writing for the Court, Chief Justice Exum said:

> Article I, section 26 does more than protect individuals from unequal treatment. The people of North Carolina have declared in this provision that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice. They have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction. It must also be *perceived* to operate evenhandedly . . . .
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> . . . The effect of racial discrimination on the outcome of the proceedings is immaterial. Our state constitutional guarantees against racial discrimination in jury service are intended to protect values other than the reliability of the outcome of the proceedings. Central to these protections, as we have already noted, is the perception of evenhandedness in the administration of justice. Article I, section 26 in particular is intended to protect the integrity of the judicial system, not just the reliability of the conviction obtained in a particular case. The question, therefore, is not whether discrimination in the foreman selection process affected the outcome of the grand jury proceedings; rather, the question is whether there was racial discrimination in the selection of this officer at all.

Id. at 302-04, 357 S.E.2d at 625-26 (footnote omitted). Similarly, the question in this case is not whether discrimination in the jury selection process affected the outcome of defendant's trial; rather,

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and because he "came from Nigeria, and not being familiar—possibly imposing his laws and customs of that country in this country and in this trial." Because I conclude that the excusal of Mr. Sesay violated our State Constitution, it is not necessary to consider the excusal of Mr. Amusan.

the question is whether there was discrimination on the basis of national origin in the excusal of a potential juror.

The prosecutor stated for the record that one of the reasons he was excusing Mr. Sesay was "the fact that he is not from this country." He explained that it was his experience that "because of their upbringings in other countries, people are influenced in the way they look at the law in this country." Certainly, a potential juror can be excused from jury service if he or she is unable to understand and follow the law as explained by the trial court. *See* N.C.G.S. § 9-15(a) (1986) (prospective jurors may be asked questions to determine their "fitness and competency . . . to serve as a juror"). In this case, however, there was no evidence that Mr. Sesay, because of his African heritage or for any other reason, would be unable to understand and follow the law of this state and country. A review of the record indicates that Mr. Sesay was not asked in which African country he was born, how long he had lived in that African country, how long he had lived in the United States, or whether his "upbringing" in that other country would influence the way he looked at the law in this country. To the contrary, in response to questioning from the prosecutor, Mr. Sesay said he could follow the law of North Carolina as it related to the death penalty. Based on the record, the prosecutor's suggestion that Mr. Sesay's upbringing would influence his understanding of North Carolina law was completely without foundation. To allow Mr. Sesay's removal on the facts of this case would mean that any person born in another country could be prevented from serving on any jury in this state, regardless of his or her understanding of our judicial system.

The fact that the prosecutor gave two reasons for excusing Mr. Sesay, one of which was facially nondiscriminatory, does not change the result in this case. As noted above, Article I, Section 26 is intended "to protect the integrity of the judicial system, not just the reliability of the conviction obtained in a particular case." *Cofield*, 320 N.C. at 304, 357 S.E.2d at 626. Accordingly, it is imperative that the judicial system "also be *perceived* to operate evenhandedly." *Id.* at 302, 357 S.E.2d at 625. To allow an ostensibly valid reason for excusing a potential juror to "cancel out" a patently discriminatory and unconstitutional reason would render Article I, Section 26 an empty vessel. At the very least, in this case, the prosecutor's facially nondiscriminatory reason does not eliminate the perception that a potential juror was not allowed

to serve because he "is not from this country." As we said in *Cofield*, "[e]xclusion of a racial group from jury service . . . entangles the courts in a web of prejudice and stigmatization." *Id.* at 303, 357 S.E.2d at 625; *see also id.* at 310, 357 S.E.2d at 630 (Mitchell, J., concurring in result) ("[T]he intent of the people of North Carolina [in enacting Article I, Section 26] was to guarantee *absolutely unto themselves* that in *all* cases *their* system of justice would be free of both the reality and the appearance of racism, sexism and other forms of discrimination in these twilight years of the Twentieth Century.").

Finally, the fact that defendant is American does not prevent him from objecting to the exclusion of Mr. Sesay on the basis of Mr. Sesay's national origin. In *State v. Moore*, 329 N.C. 245, 404 S.E.2d 845 (1991), we held that a black defendant had standing to object to the removal of a white grand jury foreman. "The issue," we said, "is whether he was selected in a racially discriminatory manner. We conclude that defendant had standing to raise this issue . . . ." *Id.* at 247-48, 404 S.E.2d at 847 (footnote omitted); *cf. Powers v. Ohio*, 499 U.S. ---, 113 L. Ed. 2d 411 (1991) (Supreme Court, interpreting Fourteenth Amendment, held that a white defendant had standing to object to the removal of a black venireperson).

Having found error under Article I, Section 26 of the North Carolina Constitution, it is unnecessary to engage in harmless error analysis. *Moore*, 329 N.C. at 248, 404 S.E.2d at 848 ("[V]iolations of article I, section 26 involve more than the reliability of the result of the proceedings. The integrity of the judicial system is at issue, and a harmless error analysis under these circumstances is inapposite."). Defendant must therefore receive a new trial.

For these reasons, and not those stated in Justice Mitchell's opinion, I vote to remand this case for a new trial.

Chief Justice EXUM and Justice WHICHARD join in this concurring opinion.

Justice MEYER dissenting.

I dissent from the result reached by the plurality regarding the instruction on reasonable doubt tendered by the trial court in the instant case. It is a fundamental tenet of our procedural law that a party must object to an allegedly improper jury instruc-

tion if the party is to preserve the objection for appellate review. Appellate Rule 10(b)(2) states this in explicit terms: "A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection . . . ." N.C. R. App. P. 10(b)(2). Here, as noted in the main opinion, it is apparent that defense counsel made a written request to the court that the pattern jury instruction on reasonable doubt be used. Nowhere in the record does there appear any indication that the court denied this request. However, at the charge conference, the following colloquy occurred:

> THE COURT: . . . . Now, as to reasonable doubt, I will give a definition of reasonable doubt from *State vs. Williams* in 308 North Carolina Reporter. There are two *Williams* cases, but I will be glad to show it to you if you'll approach the bench.
>
> (Conference at the Bench)
>
> THE COURT: Anything else, gentlemen, as far as the precharge conference or requested instructions?
>
> MR. WOLFE: Nothing from the State, Your Honor.
>
> MR. HOWERTON: No, sir.

As is apparent from the above discussion, defense counsel related that he had no objection to the court's announced intention to use the *Williams* instruction, rather than the pattern jury instruction. Therefore, defendant's assignment of error in this regard should be deemed waived, and a "plain error" analysis should prevail.

Attempting to reconcile this glaring reality, the main opinion argues that somehow defendant here complied with Rule 10(b)(2) and does so on the basis of our opinions in *State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984), and *State v. Pakulski*, 319 N.C. 562, 575, 356 S.E.2d 319, 327 (1987). *Smith* is clearly not apposite because *Smith* dealt with a failure to object, whereas here, we have an affirmative waiver by an announcement that defendant had no objection to the use of the *Williams* instruction. *Pakulski* is similarly inapposite. In *Pakulski*, the defendants argued that the trial court erred in failing to give a requested instruction on prior inconsistent statements of a witness. During the instruction conference, defense counsel asked the court to give the pattern jury instruction on prior inconsistent statements. The trial judge

then stated, "If I overlook that, call it to my attention. I don't think I will." *Id.* at 574, 356 S.E.2d at 327. Nevertheless, the court failed to provide the requested instruction; apparently, no objection was thereafter made by the defendant. *Id.* at 574-75, 356 S.E.2d at 327. The instant case presents a far different factual background. Here, as noted above, after announcing its intent to provide the *Williams* reasonable doubt instruction the trial court expressly asked counsel whether they took issue with the *Williams* instruction. This inquiry was answered in the negative by defense counsel. Under the circumstances, defendant's failure to object when presented with an opportunity to do so amounted to a waiver of this potential assignment of error. Therefore, defendant's argument should be addressed in terms of "plain error" analysis.

In deciding whether an assignment of error amounts to "plain error," we have traditionally employed an exacting standard.

> "[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 '*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. 1982) (footnotes omitted)). Before deciding that an error by the trial court amounts to "plain error," the reviewing court must be convinced that absent the error, the jury probably would have reached a different verdict. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). "In other words, the appellate court must determine that the error in question 'tilted the scales' and caused the jury to convict the defendant." *Id.* (citing *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983)). In the case *sub judice*, a review of the whole record reveals that the reasonable doubt instruction did not amount to plain error. As noted in the main opinion, there was "substantial evidence to support findings that the defendant

killed the victim with premeditation and deliberation and that he killed her during the course of one of the underlying felonies." The existence of defendant's fingerprint on the victim's glasses, defendant's presence in the parking lot shortly before the murder, the presence in the victim's apartment of pubic hairs consistent with that of defendant, and the location of the murder weapon near the defendant's residence made any error in the court's instruction pale in significance. In the face of this overwhelming evidence, so characterized and exhaustively set out in the main opinion, defendant is unable to show that the instruction had a "probable impact" on the jury's verdict.

Moreover, assuming *arguendo* that defendant did not waive his objection in this regard, *Cage* does not dictate that we find reversible error in the instant case. In *Cage*, the Supreme Court found error in the Louisiana trial court's reasonable doubt instruction, stating:

> The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Cage v. Louisiana, --- U.S. ---, ---, 112 L. Ed. 2d 339, 342 (1990).

Only recently, in *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), we had occasion to interpret the Court's holding in *Cage*. In *Hudson*, we stated that *Cage* was to be read narrowly and emphasized that the *Cage* Court condemned a *combination* of three terms: "grave uncertainty," "actual substantial doubt," and "moral certainty." *Id.* at 142, 415 S.E.2d at 742. Therefore, because none of the terms condemned in *Cage* appeared in the *Hudson* instruction, we upheld the trial court's instruction. *Id.* at 142-43, 415 S.E.2d at 742-43.

Notwithstanding our position in *Hudson*, the main opinion today finds unconstitutional the *Williams* reasonable doubt instruction, an instruction that contains only *one* of the phrases found objectionable by the Court in *Cage* ("moral certainty"). Disavowing our express intent to give *Cage* a "narrow reading," the main opinion relates: "While the instruction given here was not identical to the instruction held unconstitutional in *Cage*, the trial court used a combination of terms so similar to the combination disapproved in *Cage* that there is a 'reasonable likelihood' that the jury applied the challenged instruction in a way that violated the Due Process Clause." In reading *Cage* broadly, the main opinion deviates from the clear dictate of our own prior case law as well as from that of virtually every other appellate court in the land that has considered the matter. *See Gaskins v. McKellar*, --- U.S. ---, 114 L. Ed. 2d 728 (Stevens, J., concurring in denial of writ of certiorari and acknowledging that *Cage* is to be read narrowly and emphasizing the critical import of the "grave uncertainty" language), *reh'g denied*, --- U.S. ---, 115 L. Ed. 2d 1098 (1991); *see also Ex parte White*, 587 So. 2d 1236 (Ala. 1991) (finding permissible an instruction that failed to equate reasonable doubt with "grave uncertainty" and "actual substantial doubt" and that did not require jury to find guilt to a "moral certainty"), *cert. denied*, --- U.S. ---, 117 L. Ed. 2d 142, *reh'g denied*, --- U.S. ---, 117 L. Ed. 2d 665 (1992); *Smith v. State*, 588 So. 2d 561 (Ala. Crim. App. 1991) (finding no error in use of terms "actual and substantial doubt" and "moral certainty"); *Adams v. State*, 587 So. 2d 1265 (Ala. Crim. App. 1991) (finding permissible use of terms "actual and substantial doubt" and "moral certainty"); *Fells v. State*, 587 So. 2d 1061 (Ala. Crim. App. 1991) (finding use of term "moral certainty" to be proper); *People v. Jennings*, 53 Cal. 3d 334, 807 P.2d 1009, 279 Cal. Rptr. 780 (same), *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 462 (1991); *Bradford v. State*, 261 Ga. 833, 412 S.E.2d 534 (1992) (instruction permissible when court used only "moral and reasonable certainty"); *Potts v. State*, 261 Ga. 716, 410 S.E.2d 89 (1991) (instruction permissible when court did not equate reasonable doubt with "grave uncertainty" or "actual substantial doubt"), *cert. denied*, 120 L. Ed. 2d 908 (1992); *State v. Rhoades*, 121 Idaho 63, 822 P.2d 960, 977 (1991) (Johnson, J., concurring) (instruction permissible with "actual doubt"), *petition for cert. filed*, --- U.S. ---, --- L. Ed. 2d --- (No. 91-8010, filed 20 April 1992); *Commonwealth v. Beldotti*, 409 Mass. 553, 567 N.E.2d 1219 (1991) (instruction permissible with "moral certain-

ty" language); *State v. Barnard*, 820 S.W.2d 674 (Mo. Ct. App. 1991) (instruction permissible where no *Cage* language used); *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991) (instruction permissible when "moral uncertainty" and "actual and substantial doubt" used); *Lee v. State*, 107 Nev. 507, 813 P.2d 1010 (1991) (instruction permissible with "actual and substantial doubt" language); *Lord v. State*, 107 Nev. 28, 806 P.2d 548 (1991) (same); *State v. Gonzalez*, 822 P.2d 1214 (Utah App. 1991) (instruction proper when contains none of the language condemned in *Cage*).

Furthermore, and more specifically, I disagree with the main opinion's assertion that the instruction here involved a "combination of terms that was nearly identical to the combination condemned in *Cage*" and that it was therefore improper. First, the majority concludes that the instruction here was improper because the term used here, "substantial misgiving," is "nearly identical" to the "substantial doubt" and "grave uncertainty" language condemned in *Cage*. Second, according to the main opinion, the trial court improperly joined its definition of reasonable doubt as an "actual substantial misgiving" with a requirement that to convict, the jury must be convinced to a "moral certainty."

As a threshold matter, the phrase, "honest, substantial misgiving," in itself, is not improper in a reasonable doubt instruction. This much we concluded in *Hudson*, 331 N.C. at 142-43, 415 S.E.2d at 742-43. The main opinion here, however, exhibits its skillful hand at semantic sleight-of-hand and concludes that the phrase "honest, substantial misgiving" is the equivalent of the "substantial doubt" and "grave uncertainty" language condemned in *Cage*. This conclusion is contrary to *Hudson* and can only be considered specious. Thus, the majority's holding, at bottom, is that the use in a reasonable doubt instruction of the term "moral certainty" alone violates due process. This view is plainly contrary to our view that *Cage* is to be read narrowly, and given that there exists in the challenged instruction only one of the phrases condemned in *Cage*, it is highly unlikely that there is a "reasonable likelihood" that the jury applied the instruction in a manner violative of the Due Process Clause. Moreover, the main opinion's holding is contrary to the well-settled principle that a definition of reasonable doubt does not require exactitude. *See State v. Watson*, 294 N.C. 159, 167, 240 S.E.2d 440, 446 (1978).

As I read the opinions filed in this case, four votes do not exist to overrule *Williams* or to condemn its reasonable doubt instruction. Two members of the Court support the result of a new trial solely on the basis of a *Cage* violation, and three members solely on the basis of a *Cofield* violation. The majority vote in this case thus supports only the result reached in the main opinion and not its reasoning. The language in *Williams* that is condemned in the main opinion seems to have been preferred over the language of the pattern instructions by a number of our trial judges and, consequently, has been used frequently. We have no way of knowing how many hundreds of cases in which the trial judge employed the *Williams* language are in the appeal pipeline. Given the lack of any precedential value of the main opinion, it will have no effect on those cases.

In sum, I believe that the main opinion errs in its conclusion that the reasonable doubt instruction tendered by the trial court was unconstitutional.

I do not join the concurring-in-result opinion of Justice Frye, as I perceive no *Cofield* error in this case.

I respectfully dissent.

Justice LAKE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. STEVEN JAMES McAVOY

No. 27A90

(Filed 25 June 1992)

1. Homicide § 242 (NCI4th)— first degree murder—sufficiency of evidence

The evidence was sufficient for submission to the jury in a prosecution for first degree murder based on premeditation and deliberation where it was stipulated that defendant shot the victim and the victim died as a result of the gunshot wound to his head inflicted by defendant, and substantial evidence tended to show that, even though the victim could not reach the defendant behind a bar and held no weapon

himself, defendant responded to the victim's verbal taunts by pulling out a gun and shooting the victim in the head.

Am Jur 2d, Homicide §§ 47, 52, 246.

2. **Criminal Law § 692 (NCI4th)— jury's request for written instructions—denial as matter of law—harmless error**

The trial court erred in ruling as a matter of law that it had no authority to grant the jury's request during its deliberations for written instructions on the elements of first degree murder and the lesser included offenses which had been submitted to the jury, but such error was harmless where the trial court orally repeated the requested instructions.

Am Jur 2d, Homicide §§ 482-497; Trial §§ 633 et seq.

Propriety and prejudicial effect of sending written instructions with retiring jury in criminal case. 91 ALR3d 382.

3. **Evidence and Witnesses §§ 765, 3172 (NCI4th)— opening door to testimony—corroborating testimony—inclusion of additional facts**

Defendant opened the door to testimony by a witness that defendant carried a gun at times outside the club where he worked when he testified that he carried his gun only in the club. Furthermore, a pretrial statement by the witness that defendant "carries a gun most of the time" was admissible to corroborate the witness's trial testimony relating two specific instances when defendant carried the gun outside the club since this statement was consistent with and tended to strengthen and add credibility to her trial testimony.

Am Jur 2d, Evidence §§ 267-269, 500.

4. **Evidence and Witnesses § 2870 (NCI4th)— cross-examination of defendant—credibility**

The prosecutor's cross-examination of defendant as to whether he told a witness that he carried a gun because he hated black people and whether defendant left the club where he worked on one occasion to get his gun because narcotics agents were in the club was relevant and admissible on the issue of the credibility of defendant's testimony that he carried

the gun out of a fear of robbery and only in the club. N.C.G.S. § 8C-1, Rule 611(b).

Am Jur 2d, Evidence §§ 267-269.

5. **Evidence and Witnesses § 318 (NCI4th) — gun used in killing — possession as violation of law — cross-examination proper**

The trial court in a first degree murder case did not err in allowing the prosecutor to cross-examine defendant and the manager of the club where defendant worked as a bartender about defendant's having the gun used in the killing on the premises of the club in violation of the law since evidence of the manner in which defendant possessed the gun at the time of the killing was relevant to establish facts surrounding the killing of the victim by defendant and a proper subject of cross-examination.

Am Jur 2d, Evidence § 251.

6. **Homicide § 648 (NCI4th) — self-defense — place of business — insufficient evidence of assault by victim — instruction on no duty to retreat not required**

The trial court in a first degree murder prosecution did not err by failing to instruct the jury that a person attacked in his place of business has no duty to retreat and may use force in self-defense, including deadly force, when appropriate where the evidence was insufficient to show that the victim assaulted defendant while defendant was at his place of business. The evidence was insufficient to show an assault by the victim upon defendant where it tended to show only that defendant was working as a bartender at a club; after the victim and defendant exchanged words in the hallway of the club near the storage room, the two men returned to the room where the bar was located; defendant then went behind the bar, and the victim stood in front of the bar facing defendant; the victim shouted at defendant to shoot him or he was going to kill defendant; defendant drew a pistol from his belt and aimed it at the victim's head; defendant and the victim continued to yell at each other while defendant was pointing the gun at the victim's head; and defendant testified that the victim then reached back with his right hand toward his right hip to grab what defendant thought was a pistol, whereupon defendant shot the victim.

Am Jur 2d, Homicide §§ 139-142, 145-147, 169.

Duty to retreat as condition of self-defense when attack occurs at office, or place of business or employment. 41 ALR3d 584.

7. Homicide § 588 (NCI4th)— self-defense—necessity for deadly force—honest but unreasonable belief—murder not reduced to manslaughter

It would be incorrect for the trial court in a first degree murder prosecution to instruct the jury that an honest but unreasonable belief that deadly force was necessary will reduce murder to manslaughter. Such an instruction would conflict with a long line of cases which hold that the State's disproof of the reasonable belief element of self-defense permits a conviction for murder while the State's disproof of only the nonexcessive force element of self-defense results in manslaughter. To the extent that some prior cases may be read to require that a jury be instructed that it should return a verdict of manslaughter rather than murder if it finds that defendant killed the victim under an honest but unreasonable belief that deadly force was necessary, these cases are disapproved.

Am Jur 2d, Homicide §§ 151-159.

Modern status of rules as to burden and quantum of proof to show self-defense. 43 ALR3d 221.

Justice MITCHELL dissenting.

Justice WEBB joins in this dissenting opinion.

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

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Davis, J.*, at the 25 September 1989 Criminal Session of Superior Court, GUILFORD County. Heard in the Supreme Court 11 February 1991.

Lacy H. Thornburg, Attorney General, by Jane P. Gray, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

Defendant was tried in a non-capital trial upon a true bill of indictment charging him with first-degree murder. The jury returned a verdict of guilty as charged, and the trial court sentenced defendant to a term of life imprisonment. We find no prejudicial error in defendant's trial.

The State's evidence tended to show that on the evening of 7 September 1988, defendant was working as a bartender at the Winner's Circle Club. Around 11:30 or 11:45 p.m., Gary Gray was in the club and told Annette Underwood and Michelle Williams that his wife and defendant were "seeing each other." Gray said that he wanted to take photographs of his wife and the defendant to use as evidence in order to gain custody of the Grays' children if he and his wife separated.

When defendant went to a storage room behind the bar in the club to answer the telephone, Gray walked to a door between a hallway and the storage room, opened the door, and talked with defendant. The two men exchanged words, and defendant pushed Gray back into the hallway. Gray then went around to the front of the bar. As more words were exchanged between the two men, defendant pulled out a gun and aimed it at Gray's head. There was conflicting testimony at trial as to what the two men said to each other and whether defendant pulled out his gun before or after Gray yelled at him. There was testimony that defendant pulled out his gun, and Gray slapped at it once as he stood on the ledge of the bar yelling, "Shoot me. Go ahead shoot me."

After Gray's challenge, defendant shot Gray in the head. Defendant then asked someone to call the police. Anita Hawkins testified that she then went to a telephone in the back of the club, but defendant followed her and told her that it did not work and to use the telephone outside. As she walked outside, Hawkins observed another patron calling the police on a pay telephone. She also testified that when she returned inside, defendant was using the same telephone that he had told her did not work.

When the police arrived at approximately 11:50 p.m., defendant was on the telephone. The police arrested him. Officer Paul Rocco of the Greensboro Police Department testified that defendant was cooperative and told police where his gun was when they asked.

Officer Rocco also testified that he did not detect any odor of alcohol about the defendant.

There was also evidence tending to show that Gray was a carpet installer and was wearing a leather holster containing an all-purpose knife. The knife contained a double-edged razor blade.

Gray died on 12 September 1988. At trial, it was stipulated that the gunshot wound to the head, inflicted by defendant, caused Gray's death. It was also stipulated that the bullet removed from Gray's body was fired from defendant's pistol.

Defendant testified in his own defense. According to defendant, Gray confronted him two weeks to a month before the shooting. On that occasion, Gray entered the club and accused defendant of going out with his wife, Carol Gray. Gray told defendant if he ever caught him going out with his wife, he would kill him.

Defendant testified that on 7 September 1988, when he went to the storage room to answer the telephone, Gray told him that five people in the bar that night had said that defendant was going out with Carol. After defendant denied the accusation, Gray replied, "Well, I'm going to tell you right now, I'm going to kill you." Gray reached for defendant's shirt, and defendant stepped away. As defendant stepped back from Gray, he noticed that Gray was carrying a weapon on his side. It looked like a pearl-handled pistol in a holster. Defendant further testified that as he stepped back into the club, Gray walked to the other side of the bar from defendant, leaned over the bar, and screamed at defendant more than once, "Shoot me or I'm going to kill you." Defendant testified that he was not sure, but he might have told Gray, "Leave and I won't call the police." After Gray shouted his first threat, defendant drew a pistol from his belt. Gray then reached back with his right hand toward his right hip to grab what defendant thought was a pistol. Defendant then shot Gray.

Defendant testified that he shot Gray because he thought Gray was going to shoot him. Defendant said he intended only to hurt Gray, not kill him.

Defendant testified that he told Anita Hawkins she could not use the telephone behind the bar because it would not reach 911 (emergency assistance). Later he realized that it was 411 (directory assistance) that could not be reached on that telephone. He knew the telephone could be used for outgoing calls generally; he himself

made a call from the telephone to Robert Patavoni, the manager of the club, after the police arrived.

Evidence also tended to show that Gray said something like "shoot me, MF. If you don't shoot me, I'll shoot you." According to one witness, defendant told Gray that if Gray would calm down and go home, defendant would not call the police. Gray then screamed, "Shoot me, shoot me . . . , you MF or I'll kill you." Defendant then shot Gray.

Defendant first assigns as error the failure of the trial court to dismiss the charge of murder. Defendant argues that the evidence at trial was insufficient to support a conviction for first-degree murder, second-degree murder or voluntary manslaughter and that the trial court erred in instructing the jury to consider verdicts finding him guilty of any of those offenses. This assignment of error is without merit.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense charged, or any lesser offense, and that the defendant is the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982).

> Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The term "substantial evidence" simply means "that the evidence must be existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

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

Murder in the first degree is the unlawful killing of another human being with malice and with premeditation and deliberation. N.C.G.S. § 14-17; *State v. Woodard*, 324 N.C. 227, 230, 376 S.E.2d 753, 755 (1989). The intentional use of a deadly weapon gives rise

to a presumption that the killing was unlawful and that it was done with malice. *State v. Judge*, 308 N.C. 658, 661, 303 S.E.2d 817, 820 (1983). Premeditation is defined as thought beforehand for some length of time, however short. *Id.* Deliberation means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *Id.*

[1] The evidence taken in the light most favorable to the State in the present case tended to show that defendant acted with malice, premeditation and deliberation. It is undisputed that defendant shot Gray and that Gray died as a result of the gunshot wound to his head inflicted by defendant. Substantial evidence tended to show that even though Gray could not reach defendant behind the bar and held no weapon himself, defendant responded to Gray's verbal taunts by pulling out a gun and shooting Gray in the forehead. Furthermore, substantial evidence tended to show that thereafter defendant made no effort to assist Gray. In fact, the jury reasonably could have found from the evidence presented that defendant prevented the person whom he had asked to call the police from doing so by telling her the telephone did not work, when in fact it did. Taken in the light most favorable to the State, such substantial evidence would permit, but not require, a jury to reasonably conclude that defendant did not believe it necessary to kill the deceased to save himself from death or great bodily harm and that the State had carried its burden of disproving self-defense. *See State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982). Further, such evidence would support, but not compel, a reasonable finding by the jury that the State had carried its burden in the present case of showing that the defendant did not act in the heat of passion suddenly aroused by just cause or legal provocation. *Id.* Taken in the light most favorable to the State, there was substantial evidence that defendant acted with malice, premeditation and deliberation. The trial court did not err in denying defendant's motion to dismiss at the conclusion of all of the evidence.

[2] By his next assignment of error, defendant contends that the trial court erred by orally reinstructing the jury on the elements of murder in the first degree, murder in the second degree, voluntary manslaughter, and self-defense after ruling that it could not provide those instructions in writing as requested by the jury.

We conclude that the trial court erred in its ruling but that the error was harmless.

During its deliberations in this case, the jury asked the trial court for written instructions on the elements of first-degree murder and the lesser included offenses which had been submitted for the jury's consideration. In denying the request, the trial court stated that it lacked the authority to give the jury written instructions. Instead, the trial court orally repeated the requested instructions. After the trial court did so, the jury foreman thanked the trial court, and the jury returned to the jury room.

The trial court erred in ruling as a matter of law that it had no authority to give the jury written instructions. A trial court has inherent authority, in its discretion, to submit its instructions on the law to the jury in writing. *State v. Bass*, 53 N.C. App. 40, 45, 280 S.E.2d 7, 10 (1981). When a trial court fails to exercise its discretion in the erroneous belief that it has no discretion as to the question presented, there is error. Where the error is prejudicial to a party, that party is entitled to have the question reconsidered and passed upon as a discretionary matter. *State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980); *see Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). In such cases, this Court may remand the case or take such other actions as the rights of the parties and applicable law may require. *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984).

While the trial court's ruling was erroneous in the present case, it did not result in prejudice to the defendant. The trial court repeated the requested instructions in their entirety, thereby complying with the essence of the jury's request. Defendant gives no reason, and we find none, why giving the requested instructions orally did not serve the same purpose as written instructions. Furthermore, it appears from the record that the instructions satisfied the jury's request since it made no further inquiry; therefore, defendant has not carried his burden of showing that the trial court's error was harmful. Because defendant has failed to show a reasonable possibility that the outcome at trial would have been different had the requested instructions been provided in writing rather than orally, we conclude that the trial court's error was harmless error. N.C.G.S. § 15A-1443(a) (1988).

By another assignment of error, defendant contends the trial court abused its discretion in allowing the prosecutor to elicit cer-

tain evidence and then refer to it or use it in his final argument. During direct examination, defendant testified that the reason he bought the gun he used to kill the victim was his fear of a robbery at the club. He also denied carrying the gun anywhere but in the club. Thereafter, Michelle Williams was recalled and testified in rebuttal about two occasions when defendant had carried his gun unrelated to any fear of robbery. On one of those occasions, he carried the gun into a restaurant where he had gone with Williams.

[3] Defendant first contends under this assignment of error that the trial court erred in allowing the prosecutor to introduce testimony concerning a pretrial statement given by Williams to Officer Ken Ventura. This testimony was offered and admitted as evidence in corroboration of the testimony given by Williams during presentation of the State's case. The trial court gave a proper limiting instruction that evidence concerning the statement was admitted for purposes of corroboration only. The statement was then read without objection by defendant. In the statement, Williams said that defendant "carries a gun most of the time."

The trial court properly admitted evidence concerning defendant's carrying a gun at times when he was not in the club, because defendant "opened the door" for this evidence when he testified that he carried his gun only in the club. Nevertheless, defendant contends that the trial court erred in allowing testimony concerning Williams' pretrial statement to the effect that defendant carried a gun most of the time because Williams' testimony at trial only related to specific instances when defendant had carried a gun. We do not agree. "In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness' testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony." *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986). Here, Williams' prior statement, although including additional facts not referred to in her testimony, was consistent with and tended to strengthen and add credibility to her trial testimony that the defendant had carried a gun outside the bar; therefore, the statement was admissible as corroborative evidence. *Id.* at 470, 349 S.E.2d at 574.

[4] Next, defendant contends in support of this assignment of error that the trial court erred in allowing the prosecutor to ask defendant during cross-examination whether, as Williams had

testified, defendant told Williams that he carried a gun because he hated black people. Defendant also contends the trial court erred in allowing the prosecutor to ask defendant during cross-examination whether, as Williams had testified, defendant left the club on one occasion to get his gun because narcotics agents were in the club. Under N.C.G.S. § 8C-1, Rule 611(b), subject to certain exceptions not pertinent here, cross-examination of a witness as to any matter relevant to any issue in a case, including credibility, is proper. Hence, we conclude that this line of cross-examination was proper, as it was relevant to the issue of the credibility of defendant's testimony that he carried the gun out of fear of robbery and only carried the gun in the club.

[5] Defendant further contends in support of this assignment of error that the trial court erred in allowing the prosecutor to cross-examine him and Robert J. Patavoni, the manager of the club, about having the gun on the premises of the club in violation of law. Such cross-examination was proper if it related to any matter relevant to any issue in the case, N.C.G.S. § 8C-1, Rule 611(b) (1988), and is not otherwise excludable. N.C.G.S. § 8C-1, Rule 402 (1988). Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1988).

It is unlawful for "any person," with certain exceptions not pertinent here, to carry a gun into a business where alcohol is sold and consumed. N.C.G.S. § 14-269.3 (1986). Evidence that defendant carried the gun into the club in violation of criminal law was relevant to the manner in which he possessed the gun at the time of the killing in the present case and, thus, "of consequence to the determination of the action." Therefore, it was "relevant evidence" tending to establish facts surrounding the killing of the victim by defendant and a proper subject to explore during cross-examination. Furthermore, the probative value of this evidence is not "substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (1988). The trial court did not err in admitting any of the evidence complained of under this assignment of error.

In addition, defendant argues that the trial court erred in permitting the prosecutor to refer during his closing argument to the evidence complained of in this assignment of error. Since

we have concluded that the evidence complained of under this assignment of error was properly admitted, the prosecutor's arguments based upon that evidence were proper. We conclude that there was no error in admitting the evidence and allowing the prosecutor to refer to it in his closing argument. Accordingly, this assignment of error is without merit.

[6] In another assignment of error, defendant contends that the trial court erred by failing to instruct the jury that a person attacked in his place of business has no duty to retreat and may use force in self-defense, including deadly force, when appropriate. The question at issue is whether the trial judge should have instructed the jury in accord with the following pattern instruction:

> If the defendant was not the aggressor and he was [in his own home] [on his own premises] [at his place of business] he could stand his ground and repel force with force regardless of the character of the assault being made upon him. However, the defendant would not be excused if he used excessive force.

N.C.P.I.—Crim. 308.10 (1983).

It is to be noted that this instruction is to be used following the usual self-defense instructions where there is evidence raising the issue of retreat. The instruction is to be given if the evidence shows that the victim assaulted defendant while defendant was at his place of business. *See State v. Benge*, 272 N.C. 261, 158 S.E.2d 70 (1967).

In the instant case, there was no evidence of an assault by the victim upon the defendant at the time in question. After the two men exchanged words in the hallway near the storage room, defendant and the victim returned to the room where the bar was located. Defendant then went behind the bar, and the victim stood in front of it facing defendant. The parties at that time were separated by the serving bar in the establishment. The victim then shouted at defendant, "Shoot me or I'm going to kill you." Defendant then drew a pistol from his belt and aimed it at the victim by pointing the gun at his head. Defendant and the victim continued to yell at each other while defendant was pointing the gun at the victim's head. Defendant testified that the victim then reached back with his right hand towards his right hip to grab what defendant thought was a pistol, whereupon defendant shot the victim.

While this evidence may be sufficient to support an instruction on self-defense upon the theory that the defendant had a reasonable belief that it was necessary to kill the victim in order to protect himself from death or great bodily harm, it does not support a finding that the deceased made an assault upon the defendant. An assault is a show of violence causing a reasonable apprehension of immediate bodily harm, an intentional offer or attempt by force or violence to do injury to the person of another. *See State v. Thompson*, 27 N.C. App. 576, 219 S.E.2d 566 (1975), *disc. rev. denied*, 289 N.C. 141, 220 S.E.2d 800 (1976). The only assault being committed at the time of the shooting was by the defendant upon the victim by pointing the gun at the victim's head. N.C.G.S. § 14-34 (1986). Therefore, the judge was not required to give the instruction concerning the duty of one to retreat when assaulted in his own place of business. The judge gave proper instructions on self-defense based upon the evidence in this case. The jury heard the self-defense testimony and the court's instruction, but found that defendant could not avail himself of this defense. Thus, we find no error in this assignment of error.

[7] Under his next assignment of error, defendant contends that the trial court erred by giving the jury conflicting instructions on self-defense. The principles regarding the law of self-defense are well established. The elements which constitute perfect self-defense are:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981). Under the law of perfect self-defense, a defendant is excused

altogether if, at the time of the killing, all of the above four elements existed. *Id.* On the other hand, under the law of imperfect self-defense, if the first two elements existed at the time of the killing, but defendant, although without murderous intent, was the aggressor in bringing on the affray or used excessive force, defendant is guilty at least of voluntary manslaughter. *Id.*, 279 S.E.2d at 573. Defendant concedes that the trial court instructed the jury in accordance with these principles, but argues that further instruction was required.

Defendant contends that there are two inconsistent lines of cases discussing the law of imperfect self-defense. The first line of cases recognizes an imperfect right of self-defense when both elements one and two of perfect self-defense are present, but either element three or four does not exist. Under these cases, if the State disproves either element one or two, the court is not required to give a charge on imperfect self-defense. *See generally State v. Norman*, 324 N.C. 253, 260, 378 S.E.2d 8, 12 (1989); *State v. Mize*, 316 N.C. 48, 53, 340 S.E.2d 439, 442 (1986).

In a second line of cases, defendant argues, this Court has treated elements two and four as being legally equivalent. Defendant calls our attention to four cases: *State v. Jones*, 299 N.C. 103, 112, 261 S.E.2d 1, 8 (1980) ("A defendant who honestly believes that he must use deadly force to repel an attack but whose belief is found by the jury to be unreasonable . . . has, by definition, used excessive force."); *State v. Clay*, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979) ("Our decision says, in effect, that where the assault being made upon defendant is insufficient to give rise to a reasonable apprehension of death or great bodily harm, then the use of deadly force by defendant to protect himself from bodily injury or offensive physical contact is excessive force as a matter of law."), *overruled on other grounds by State v. Davis*, 305 N.C. 400, 415, 290 S.E.2d 574, 583 (1982); *State v. Woods*, 278 N.C. 210, 217, 179 S.E.2d 358, 363 (1971) ("If defendant had reasonable grounds to believe that it was necessary to shoot [the victim] to save herself from death or great bodily harm, she did not use excessive force in shooting him."); and *State v. Thomas*, 184 N.C. 757, 762, 114 S.E. 834, 837 (1922) ("[I]f the slayer acts from an honest belief that it is necessary to protect himself, and not from malice or revenge, even though he formed such conclusion hastily and without due care, and when the facts did not justify it, still, under such a case, although such belief on his part will not fully justify him,

it may go in mitigation of the crime, and reduce the homicide from murder to manslaughter."), *overruled on other grounds by State v. Young*, 324 N.C. 489, 492, 380 S.E.2d 94, 96 (1989).

Relying upon this second line of cases, defendant contends that the State's proof of unreasonableness under element two and the State's proof of excessiveness under element four should result in identical verdicts. He urges this Court to reconsider its decisions in the first line of cases and to adopt what he concludes is the reasoning of the second line of cases: "[T]he reduced culpability of a person who makes a sincere but unreasonable mistake about the need to kill in self-defense (i.e., of a person who uses excessive force) should result in a conviction for voluntary manslaughter, not murder."

The essence of defendant's contention is this:

> If the jury finds that defendant killed the victim under an honest but unreasonable belief that killing the victim was necessary to protect the defendant from imminent death or great bodily harm, the use of deadly force was necessarily excessive (and thus not in perfect self-defense), but the sincerity of defendant's belief negates malice, an essential element of murder. Therefore, upon such a finding, defendant may be convicted of voluntary manslaughter but not murder.

While this contention finds support in *State v. Thomas*, 184 N.C. 757, 114 S.E. 834, and in the reasoning of this Court in *State v. Jones*, 299 N.C. 103, 261 S.E.2d 1, we find it to be contrary to the principles enunciated in a long line of well-reasoned decisions of this Court defining the law of self-defense. *E.g., State v. Mize*, 316 N.C. 48, 340 S.E.2d 439; *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982); *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570; *State v. Potter*, 295 N.C. 126, 244 S.E.2d 397 (1978). Accordingly, we reject defendant's contention.

Defendant relies principally upon *State v. Jones*, 299 N.C. 103, 261 S.E.2d 1. Jones was convicted of first-degree murder after shooting a man who had chased several people down the street and into Jones' home. Jones shot the victim while the victim was on the porch after the victim had torn the lock off the screen door and after Jones' brother struck the victim with a shovel. The Court of Appeals found no error in the trial. *State v. Jones*, 41 N.C. App. 465, 255 S.E.2d 232 (1979). Judge (now Justice) Webb

dissented on the grounds that defendant was entitled to a charge on the defense of home and acting out of the heat of passion. *Id.* at 472, 255 S.E.2d at 237 (Webb, J., dissenting). The Court of Appeals was unanimous in rejecting defendant's contention that if he had an "honest and actual belief" that the killing was necessary in order to prevent great bodily harm or death to his brother, that would be sufficient to rebut the presumption of malice. *Id.* at 471, 255 S.E.2d at 237. Noting that the rule argued for by defendant had never been the law of North Carolina, the court continued:

> In order for the killing of another to be excused on the basis of defense of a family member, the defendant must have had a *reasonable* belief that the killing was necessary to prevent the death or serious injury of the family member.

Id. (citation omitted). On appeal, the Supreme Court held that the trial judge erred in refusing to instruct the jury on defendant's right to defend his home from an attempted forceful entry by the victim and by refusing to instruct on voluntary manslaughter by reason of a killing committed in the heat of passion. *Jones*, 299 N.C. at 113, 261 S.E.2d at 8. This Court continued:

> Defendant is entitled to an instruction on voluntary manslaughter due to the use of excessive force while otherwise acting in defense of a family member and in defense of home or due to defendant's being the aggressor. *He is not entitled to an instruction on self-defense or voluntary manslaughter due to an honest but unreasonable belief in the necessity (real or apparent) to kill.*

Id. (Emphasis added.) We agree with this Court's decision in *Jones*. However, in reaching its decision, the Court reasoned as follows:

> A defendant who honestly believes that he must use deadly force to repel an attack but whose belief is found by the jury to be unreasonable under the surrounding facts and circumstances, has by definition, used excessive force. This rule was made clear in *State v. Clay, supra*, where Justice [Branch] wrote:
>
> > "[W]here the assault being made upon defendant is insufficient to give rise to a reasonable apprehension of death or great bodily harm, then the use of deadly force by defendant to protect himself from bodily injury or offen-

> sive physical contact is excessive force as a matter of law." *State v. Clay, supra* at 563, 256 S.E.2d at 182; *see also*, LaFave & Scott, *Criminal Law* § 53, pp. 392-94, § 77, pp. 583-84 (1972).
>
> Thus, for all practical purposes, to state that one who, while acting in defense of a family member or in defense of home uses excessive force is guilty of voluntary manslaughter is but another way of stating that one who has an honest but unreasonable belief that it is necessary or apparently necessary to kill is guilty of voluntary manslaughter.

Jones, 299 N.C. at 112, 261 S.E.2d at 8. We agree with the holding in *Jones* that the defendant was "not entitled to an instruction on self-defense or voluntary manslaughter due to an honest but unreasonable belief in the necessity . . . to kill." However, we do not adopt the *Jones* Court's reading of the language in *Clay* when it says that "for all practical purposes, . . . one who . . . uses excessive force is guilty of voluntary manslaughter is . . . another way of stating that one who has an honest but unreasonable belief that it is necessary . . . to kill is guilty of voluntary manslaughter." The quoted language in *Clay* does not equate elements two and four. We conclude, therefore, that reliance by the *Jones* Court on the quoted sentence from *Clay* was misplaced.

In *Clay*, defendant was charged with assault with a deadly weapon with intent to kill inflicting serious bodily injury and convicted of assault with a deadly weapon inflicting serious injury. This Court held 1) that the trial judge correctly denied defendant's motion to suppress her inculpatory statements, and 2) the instructions on self-defense were not prejudicial to defendant. *Clay*, 297 N.C. at 566, 256 S.E.2d at 183. In writing for the Court, Justice (later Chief Justice) Branch said:

> Notwithstanding the language in [two earlier cases] we hold that a defendant may employ deadly force in self-defense *only* if it reasonably appears to be necessary to protect against death or great bodily harm. . . . In so holding, we expressly reject defendant's contention, and any implication in our cases in support thereof, that a defendant would be justified by the principles of self-defense in employing deadly force to protect against bodily injury or offensive physical contact. Our decision says, in effect, that where the assault being made

> upon defendant is insufficient to give rise to a reasonable apprehension of death or great bodily harm, then the use of deadly force by defendant to protect himself from bodily injury or offensive physical contact is excessive force as a matter of law. . . . This decision precludes the use of deadly force to prevent bodily injury or offensive physical contact and in so doing recognizes the premium we place on human life. However, it does not preclude the use of deadly force where such force reasonably appears to be necessary to prevent death or great bodily harm.

Id. at 563-64, 256 S.E.2d at 182.

We conclude that defendant's reliance upon *Clay* is misplaced. *Clay* speaks to the use of deadly force in response to other force—whether the other force is sufficient to create a reasonable apprehension that deadly rather than non-deadly force is required on the part of the defendant to protect himself [or his family or home]. It does not speak to "an honest but unreasonable" belief; nor does it attempt to equate elements two and four of the principles of self-defense.

In *State v. Woods*, 278 N.C. 210, 179 S.E.2d 358, defendant was charged with first-degree murder and tried for second-degree murder. Defendant was convicted of voluntary manslaughter. A new trial was awarded for several assigned errors in the instructions to the jury. *Id.* at 217, 179 S.E.2d at 363. Chief Justice Sharp, writing for a unanimous Court, then said:

> However, we also deem it appropriate to call attention to certain additional errors in the charge.
>
> In the mandate, the judge instructed the jurors to return a verdict of *involuntary* manslaughter in the event defendant satisfied them she shot [the victim] in the reasonable belief "that the shooting of the deceased was necessary in order to save herself from death or great bodily harm" but failed to satisfy them that the force she used was not excessive under the circumstances. Obviously this charge incorporates contradictions. If defendant had reasonable grounds to believe that it was necessary to shoot [the victim] to save herself from death or great bodily harm, she did not use excessive force in shooting him. Furthermore, when one who is fighting in self-defense uses excessive force he is guilty of *voluntary*

> manslaughter. *State v. Ramey, supra; State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305. There was in this case no evidence which would have justified a verdict of involuntary manslaughter.

Woods, 278 N.C. at 217-18, 179 S.E.2d at 363.

There was evidence in *Woods* tending to show that defendant shot twice in the direction of the victim, intending to scare him. Under these circumstances, the Court's comment that defendant did not use excessive force in shooting the victim if she had reasonable grounds to believe that it was necessary to shoot him to save herself from death or great bodily harm seems to be correct. Thus, it would seem unnecessary *in this fact situation*, to give the fourth element of the self-defense instruction. However, this does not speak to defendant's contention here that an honest but unreasonable belief that deadly force is necessary will reduce murder to manslaughter.

State v. Thomas, 184 N.C. 757, 114 S.E. 834, while not entirely clear as to whether the suggested instructions should be given in defining the malice necessary to convict of murder or on what the State must disprove in reference to imperfect self-defense, may be read as supporting defendant's contention that the jury should be instructed that an honest but unreasonable belief that deadly force is necessary will reduce murder to manslaughter. Nevertheless, we conclude that such an instruction conflicts with the long line of cases which hold that the State's disproof of element two permits a conviction of murder, while the State's disproof only of element four results in manslaughter. Therefore, to the extent that the four cases upon which defendant relies, *i.e.*, *Jones*, *Clay*, *Woods*, and *Thomas*, may be read to require that a jury be instructed that it should return a verdict of manslaughter rather than murder if it finds that defendant killed the victim under an honest but unreasonable belief that deadly force was necessary, these cases are disapproved. Based upon the foregoing, we conclude that defendant has not shown error in the trial judge's instruction on imperfect self-defense.

For the foregoing reasons, we find defendant's trial free of prejudicial error.

No error.

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

Justice MITCHELL dissenting.

The defendant contends that the trial court erred by failing to instruct the jury that a person attacked in his place of business has no duty to retreat and may use force in self-defense, including deadly force, when appropriate.

> Ordinarily, when a person who is free from fault in bringing on a difficulty is attacked in his home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self-defense. The person is entitled to stand his ground, to repel force with force, and to increase his force to overcome the assault and to secure himself from harm.

State v. Morgan, 315 N.C. 626, 642, 340 S.E.2d 84, 94 (1986) (quoting *State v. McCray*, 312 N.C. 519, 532, 324 S.E.2d 606, 615 (1985)) (citation omitted). The defendant requested that the trial court instruct the jury with regard to self-defense. Substantial evidence in the present case tended to show that the defendant was free from fault and acted in self-defense to repel an attack made upon him on his business premises. Therefore, the trial court erred by failing to give an instruction negating any duty of the defendant to retreat under such circumstances.

The majority errs in its view that "there was no evidence of an assault by the victim upon the defendant at the time in question." Frankly, I find that view of the evidence to be incredible.

In ruling on this assignment of error, the evidence must be viewed in the light most favorable to the defendant. *State v. Baldwin*, 330 N.C. 446, 412 S.E.2d 31 (1992); *State v. Webster*, 324 N.C. 385, 378 S.E.2d 748 (1989). Taken in that light, the evidence tended to show that the defendant was the bartender at the Winner's Circle Club on 7 September 1988. Gary Gray was in the club at approximately 11:45 p.m. that evening, having been told previously that the defendant and Gray's wife were "seeing each other." When the defendant went to a storage room to answer the telephone, Gray followed him and told him that five people in the bar that night had said that the defendant was going out with Gray's wife. When the defendant denied the accusation, Gray replied, "well,

I'm going to tell you right now, I'm going to kill you." Gray reached for the defendant's shirt, and the defendant stepped away from him. As the defendant stepped away from Gray, he noticed that Gray had what appeared to be a pearl-handled pistol in a holster on his belt. As the defendant stepped back into the club, Gray came to the other side of the bar from him, leaned over the bar and screamed more than once, "shoot me or I'm going to kill you." After Gray shouted his first threat at the bar, the defendant drew a pistol from his belt and pointed it at Gray. Gray, who was standing on the ledge of the bar, slapped at the defendant's pistol once. Gray then reached back with his right hand toward his right hip to grab what appeared to be a pearl-handled pistol in the holster on his belt. The defendant then shot Gray.

A jury could reasonably have found from such evidence that Gray had mounted the bar ledge, placing the defendant easily within his reach, and had attempted to slap the pistol from the defendant's hand. That fact, coupled with the fact that Gray had just made several statements clearly indicating his intent to kill the defendant, had followed the defendant from the storage room to the bar, and was reaching for a weapon on his hip, would clearly support a reasonable finding that the defendant killed in response to an unprovoked and deadly attack by Gray. *See, e.g., State v. Thornton*, 211 N.C. 413, 418, 190 S.E. 758, 761 (1937). Therefore, the trial court erred in failing to give an instruction negating the duty to retreat on one's own business premises.

As the issue does not arise under the Constitution of the United States, the burden of showing prejudice is upon the defendant. N.C.G.S. § 15A-1443(a) (1988). Such errors relating to rights that do not arise under the Constitution of the United States 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 trial. *State v. Gardner*, 316 N.C. 605, 342 S.E.2d 872 (1986). In the present case, the defendant has made the required showing of prejudice.

Here, there was almost no variance between the State's version of the critical events and the defendant's version of those events; the disputed factual and legal issues revolved around the question of the defendant's state of mind at the time he killed the deceased. Taken in the light most favorable to the defendant, as it must be, the evidence at trial required an instruction that

if the jury found that the defendant was free from fault in bringing on the difficulty and was attacked on his own business premises by the deceased, the law imposed on the defendant no duty to retreat before repelling the assault with whatever force necessary to save himself from harm. Had such an instruction been given, there is a reasonable possibility that the jury would have found the defendant not guilty. Therefore, the defendant has carried his burden of showing that the trial court's failure to instruct the jury in this regard was prejudicial, and the defendant is entitled to a new trial. Accordingly, I dissent from the decision of the majority.

Justice WEBB joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. CLIFTON ALLEN WHITE

No. 468A90

(Filed 25 June 1992)

1. **Evidence and Witnesses § 345 (NCI4th)— prior sexual assault— admissible to show intent in burglary case—erroneous instruction**

In a prosecution for first degree kidnapping, first degree murder, second degree burglary, armed robbery, and larceny of an automobile, testimony by a witness concerning a sexual assault committed on her by defendant ten days before the crimes in question was relevant and admissible to support the prosecution's theory in the burglary case that defendant entered the victim's home with the intent to commit first degree rape or first degree sexual offense where there were substantial similarities between the two alleged sexual assaults in that both the witness and the victim were young women in their late twenties whom defendant knew casually through friends; neither of the women had a previous sexual relationship with defendant; defendant went to the woman's home in each instance; defendant used a box cutter in his attack on the witness and a knife in his attack on the victim; defendant admitted that the victim performed fellatio upon him; and this was the same type of sexual activity that defendant allegedly forced the witness to commit. However, the jury should have

been instructed to disregard testimony about the prior sexual assault when the trial court refused to instruct the jury on second degree burglary on the basis of a sexual assault, and the court erred in giving the jury an instruction which may have led the jury to conclude erroneously that it could consider evidence of the prior sexual assault for the purpose of proving that defendant had the intent to commit any of the crimes with which he had been charged.

Am Jur 2d, Evidence §§ 298-301, 363, 364, 366.

2. Evidence and Witnesses §§ 299, 887 (NCI4th)— prior sexual assault—triple hearsay—impeachment—prejudicial effect outweighing probative value

In a prosecution for murder, kidnapping, armed robbery, larceny, and second degree burglary based on an intent to commit a sexual assault, a witness's triple hearsay testimony during cross-examination by the State about a seventeen-year-old girl's allegation that defendant had previously sexually assaulted her was not admissible for substantive purposes to prove that the sexual assault occurred or for impeachment purposes. Even assuming that the State's cross-examination was relevant for impeachment purposes as tending to show that the witness was biased in favor of defendant and would not have believed anyone who made a claim of sexual assault against defendant, this testimony should have been excluded under Rule of Evidence 403 on the ground that its probative value was substantially outweighed by its danger of unfair prejudice to defendant where the jury was given no limiting instruction, and this testimony exacerbated the prejudicial effect of other prior sexual assault evidence for which the jury was given defective instructions permitting its consideration for the purpose of proving intent for any of the crimes charged.

Am Jur 2d, Evidence § 493.

3. Constitutional Law § 252 (NCI4th); Criminal Law § 109 (NCI4th)— appointment of defense psychiatric experts—requiring reports to prosecutor—use of reports at sentencing—harmless error

The trial court erred in requiring court-appointed defense psychiatric experts to prepare and submit to the prosecutor written reports of their evaluations of defendant as a condition

of their appointment where the court's order was not limited to disclosure of results or reports intended to be introduced at trial or related to the testimony of an expert whom defendant intended to call as a witness at his trial. However, defendant was not prejudiced by this error where defendant relied at the sentencing hearing upon the results and reports of the mental examinations and tests conducted by the court-appointed experts, and consequently the State would have been entitled to pretrial discovery of these reports. N.C.G.S. § 15A-905(b).

Am Jur 2d, Criminal Law § 67.

4. **Criminal Law § 109 (NCI4th)— discovery by State—mental examination reports—intent to use in guilt-innocence or sentencing phase**

Under N.C.G.S. § 15A-905(b), results or reports of mental examinations or tests conducted by defense experts are subject to pretrial discovery by the State as long as such information or the experts are intended to be relied upon by the defendant at *either* the guilt-innocence or the sentencing phase of his trial.

Am Jur 2d, Criminal Law § 67.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Burroughs, J.*, at the 17 August 1990 Criminal Session of Superior Court, MECKLENBURG County, upon the jury's recommendation following its verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional convictions and sentences imposed thereon was allowed by this Court on 1 October 1991. Heard in the Supreme Court 11 March 1992.

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

Thomas K. Maher for defendant-appellant.

MEYER, Justice.

Defendant was indicted for the first-degree kidnapping and first-degree murder of Kimberly Ewing as well as second-degree burglary, robbery with a dangerous weapon, and larceny of an automobile. Defendant was tried capitally and was found guilty

of first-degree murder on the theories of murder committed with premeditation and deliberation and murder perpetrated by lying in wait; the jury also found defendant guilty of first-degree kidnapping, second-degree burglary, robbery with a dangerous weapon, and felonious larceny of an automobile. Following a sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of death for the first-degree murder conviction. In accordance with the jury's recommendation, the trial court sentenced defendant to death for the murder of Ewing and imposed consecutive sentences of imprisonment of forty years each for first-degree kidnapping, second-degree burglary, and robbery with a dangerous weapon, as well as a consecutive sentence of ten years' imprisonment for felonious larceny of an automobile.

The evidence presented at trial tended to show that defendant had known Ewing for two weeks before her death. They met through Wendy Gibson, Ewing's roommate, whom defendant had met at a bar around the same time. Defendant and Gibson became friends, and defendant often visited Gibson at Ewing's home. Ewing had seen defendant on three or four occasions during the two-week period.

On the evening of Friday, 5 May 1989, defendant was visiting Gibson at Ewing's home when Angela and Teddy Owens, friends of Ewing and Gibson, came to visit. They decided to go dancing, and Gibson unsuccessfully attempted to get off work. Defendant went with Ewing and the Owenses so that Ewing would have someone with whom to dance. While at a party late in the evening or early the next morning, Ewing became upset with defendant and accused him of giving some syringes to one of her friends who had a serious drug problem.

Around 3:00 a.m., defendant left the party and went to visit Gibson at the Waffle House where she worked. He explained to her that he had gotten into an argument with Ewing over the syringes. About an hour later, Ewing came to the Waffle House. Defendant and Ewing again began arguing but eventually stopped. When Gibson completed her work shift at 7:00 a.m., the three then left and went back to Ewing's house. Gibson and Ewing went to their respective bedrooms, and defendant slept on the couch.

Upon awaking at 11:00 a.m., Ewing told defendant to leave. Gibson testified at trial that Ewing and defendant talked and that Gibson thought that the argument had been resolved. Defendant apparently stayed at the house until defendant, Gibson, and Ewing

left to go to a bar around 2:00 that afternoon. The three drank at several bars and returned to Ewing's home at 8:00 that evening.

Around 10:00 p.m., Ewing, Gibson, and defendant left the house in Ewing's car, with Ewing driving. At defendant's request, Ewing left defendant at a convenience store about two miles from the house. Ewing then drove Gibson to work at the Waffle House. Ewing left the Waffle House for about ten minutes, then returned to eat dinner. Ewing stayed at the Waffle House until 11:30 p.m. or 12:00 midnight, when she left to go home.

Sometime before 11:00 that evening, defendant took a taxi cab from the convenience store to the street where Ewing's house was located. Defendant, who had been drinking, told the cab driver that his wife had left him and had taken everything and that she was not home but that he would wait for her to "kick her ass" and kill her. Defendant then told the cab driver that he would take her VCR and obtain some cocaine to pay him for the cab fare. The cab driver declined defendant's offer and left.

Around 11:00 a.m. the next morning, Gibson returned home to find the house in disarray. She walked into Ewing's room where she found Ewing dead, naked and lying on the floor. Her head was covered in blood, and her hands were tied behind her back with an electrical cord. Ewing had been cut and stabbed in the neck and beaten over the head with a blunt object. Two brass fireplace tools lay on the floor above Ewing's head. Her legs were spread apart, and blood and excrement covered her legs. One investigating officer noticed a "white matter" around Ewing's vaginal area, and excrement was also found on Ewing's bed. Several items, including Ewing's car, a stereo, a television, a VCR, a microwave, and a paring knife, were missing from the house. The paring knife was later found, stained with blood matching Ewing's blood type, in the vicinity of Ewing's home.

Earlier, around 5:00 a.m. that same morning, defendant drove Ewing's car to a friend's house. In the car, defendant had a microwave, a stereo, some clothing, and jewelry. He explained to his friends that he had broken up with his girlfriend and had taken some of her belongings. Defendant traded the microwave and VCR for some cocaine, which he smoked, then left driving Ewing's car.

A few weeks after Ewing's death, defendant was arrested in Florida for breaking or entering. He told an officer, "I got something to tell you that's driving me crazy." In a tape-recorded interview, defendant then told the officers that he "got drunk . . . and got messed up on some drugs," that he went to Ewing's house to wait for her, and that he "jumped on her and . . . tied her hands behind her back and killed her." Defendant explained that he did not know what caused him to kill her, that he was "stoned" and "mad" and that his "mind just snapped."

Defendant later gave another statement to two Charlotte police officers. Defendant told the officers that he was angry and went to Ewing's house to "slap the girl," that the door was locked so he walked around the house and climbed in an open window. Defendant stated:

> When she came in, I was standing in the living room and it startled her at first. And I grabbed her and . . . I started cussing her out. I . . . called her a sorry bitch for blaming everything on me, making me look like a fool in front of everybody and I was mad and drunk. And she kept telling me . . . that she was sorry she done it and everything.
>
> Then she started playing with my chest and messing with me and picking with me and I guess trying to calm me down . . . .

According to defendant, Ewing took her clothes off and performed fellatio. Defendant began thinking about their prior argument, became angry, and told Ewing, "[p]ut your hands behind your back," "I'm just gonna tie your hands behind your back and beat your ass and I'm gonna leave." Defendant stated that he then tied Ewing's hands, got a shovel, and

> popped [Ewing] in the back of the head with it. . . . [T]here was a knife on the dresser and I grabbed her knife and I come down. I know I cut her.
>
> . . . .
>
> . . . I hit her and I come back again. . . . [S]he rolled back over . . . [a]nd when she did that's when I stuck the knife in the back of her neck and she quit moving.

Throughout the trial, defense counsel proceeded on the theory that defendant did not lie in wait or act with premeditation and deliberation in the killing. Defendant admitted killing Ewing but

maintained that he did so "in a frenzy and a passion and in a drug induced, alcohol induced, kind of furry [sic]" that came about when an argument erupted between defendant and Ewing. Defendant testified that he had been on a "cocaine binge" for three or four days prior to the weekend of Ewing's death and that he was "pretty wrecked" the night of the killing. He went to Ewing's house to make sure Ewing was not mad at him and to ask if he could sleep on her couch because he was drunk and did not think he could make it home. Defendant testified that he waited on the back porch for a period of time, then walked up a flight of stairs outside the house to Gibson's room and opened the door with a key Gibson had given him. Once inside, he walked downstairs to the living area, sat on the couch listening to music, smoked some marijuana, and began thinking about the argument he had with Ewing. Defendant stated that he became angry and decided to get even with Ewing by taking her television. Defendant had moved the television to the floor when Ewing walked in, and the two began to argue.

Defendant testified that he slapped Ewing, that they began hitting each other, and that he followed Ewing into her bedroom and they calmed down. According to defendant, Ewing changed into a robe and the two began talking. Defendant testified that Ewing performed fellatio, that they again talked, and that he killed Ewing when another argument erupted and Ewing swung and hit defendant in the head with a roller skate. Defendant testified, "And that's when I grabbed the knife. The knife was sitting right there on the night stand. And I grabbed the knife and I cut her." Defendant stated that he did not know if he "passed out or . . . just blacked out or what," but everything after that point was a "blur." Defendant testified that he did not remember tying Ewing's hands, hitting her with any object, or taking and disposing of Ewing's belongings.

I.

Defendant assigns error to several rulings made by the trial court concerning evidence of prior bad acts allegedly committed by defendant. We agree with defendant that the trial court's rulings with regard to this evidence were erroneous in two respects. Although neither of the trial court's errors, when considered in isolation, might have been sufficiently prejudicial to warrant a new trial, we are of the opinion that cumulatively they are sufficiently

prejudicial that we are unable to say that defendant received a fair trial, and therefore a new trial is required.

[1] Defendant first argues that the trial court erred in permitting Darlene Hamrick to testify for the State concerning a prior sexual assault allegedly committed by defendant. Following a voir dire, the trial court ruled that the evidence of the prior sexual assault of Hamrick was relevant and admissible under Rule 404(b) of the North Carolina Rules of Evidence to prove defendant's motive or intent and that the evidence should not be excluded under Rule 403 of the North Carolina Rules of Evidence. Thereupon, Hamrick testified that she was a neighbor of defendant's sister and that ten days prior to Ewing's death, Hamrick and Karen, a friend of Hamrick's, had driven defendant to buy some cocaine. Upon returning, Hamrick went to her apartment, and defendant and Karen went to defendant's sister's apartment. Hamrick stated that she needed to talk with Karen so she walked over to defendant's sister's apartment twice during the evening to see if Karen was going to Hamrick's apartment. Hamrick further testified that defendant came to her apartment later that evening, told Hamrick that Karen was coming over, and asked if he could come into Hamrick's apartment. Hamrick and defendant talked for a period of time, then she asked defendant to leave because it was getting late. According to Hamrick, defendant then straddled her and forced her to commit fellatio as defendant held a box cutter blade to her throat. Defendant maintains that the evidence of the alleged sexual assault against Hamrick was irrelevant and not admissible to prove intent or motive under Rule 404(b).

The State argues, and we agree, that this evidence was relevant, probative, and admissible at the time the testimony was presented by the State. Under Rule 404(b), evidence of other crimes, wrongs, or acts is inadmissible if its *sole* relevancy is to show the defendant's character or his propensity to commit an offense with which he is charged. N.C. R. Evid. 404(b); *State v. Jeter*, 326 N.C. 457, 389 S.E.2d 805 (1990). Where, however, the evidence tends to prove any other relevant fact, such as an intent or motive to commit a crime charged, the evidence will not be excluded simply because it shows that the defendant is guilty of an independent crime. *Jeter*, 326 N.C. 457, 389 S.E.2d 805; *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990).

With respect to prior sexual offenses, we have been very liberal in permitting the State to present such evidence to prove any relevant fact not prohibited by Rule 404(b). As we have previously noted,

> our decisions, both before and after the adoption of Rule 404(b), have been "markedly liberal" in holding evidence of prior sex offenses "admissible for one or more of the purposes listed [in Rule 404(b)] . . . ."

Coffey, 326 N.C. at 279, 389 S.E.2d at 54 (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 92 (3d ed. 1988)). This is particularly true where the fact sought to be proved is the defendant's intent to commit a similar sexual offense for which the defendant has been charged. *See, e.g., State v. Boyd*, 321 N.C. 574, 364 S.E.2d 118 (1988) (evidence that defendant was found naked in bed with young female relative on prior occasion admissible to demonstrate defendant's intent or scheme to take sexual advantage of young female relatives left in his custody); *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987) (evidence of defendant's subsequent attempt to commit sexual offense admissible to rebut defendant's claim that prosecutrix had consented to cunnilingus), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

In this case, defendant had been indicted for second-degree burglary based upon the theory that defendant had entered Ewing's home with the intent to commit, among other offenses, first-degree rape or first-degree sexual offense. To support this charge, the State presented evidence tending to show that Ewing was found naked, with her hands bound behind her back with an electrical cord tied in a triple knot. Although the medical examiner testified that he was unable to detect the presence of any sperm or physical injuries to Ewing's genitalia, he further explained that he was not able to say that no sexual activity had occurred. Blood and fecal material were present on Ewing's bed and body, and one witness observed an unidentified "white matter" around Ewing's vaginal area.

As noted by the trial court, the State's evidence showed substantial similarities between the two alleged sexual assaults. Both Hamrick and Ewing were young women in their late twenties whom defendant knew casually through friends. Neither of the young women had a previous sexual relationship with defendant. As to each instance of alleged sexual assault, defendant went to the vic-

tim's home. The evidence also suggested that defendant made a surprise attack on each victim, restraining her, either by straddling her or by binding her hands. A similar instrument was allegedly used by defendant against each of the women. According to Hamrick, defendant held a box cutter to her neck, threatening to kill her if she did not comply with his orders. Similarly, the evidence in this case showed that defendant brandished a knife with which he cut Ewing's neck several times. Although no forensic evidence was presented to show sexual activity between defendant and Ewing, defendant did admit that Ewing performed fellatio upon him. This was the same type of sexual activity that defendant allegedly forced Hamrick to commit. Given the similarities in the circumstances of the two incidents, the evidence of the sexual assault of Hamrick was relevant and highly probative of defendant's intent to commit a sexual assault against Ewing, and thus we are unable to say that the trial court abused its discretion in admitting this evidence.

The trial court's rulings with regard to this prior sexual assault evidence were not completely without error, however. Immediately after Hamrick's testimony, the trial judge instructed the jury that it could consider Hamrick's testimony as evidence of defendant's intent, without specifying that this evidence was to be considered only with respect to the second-degree burglary charge. At the conclusion of all of the evidence, the trial court, apparently because of concern over the lack of direct evidence to show that defendant sexually assaulted Ewing, concluded that there was insufficient evidence to support the State's theory that defendant broke or entered Ewing's home with the intent to commit rape or a first-degree sexual offense. Accordingly, the trial judge refused to instruct the jury on second-degree burglary on this basis. This may very well have been error favorable to defendant. However, because the testimony of defendant's alleged sexual assault of Hamrick was admitted only for the purpose of proving that defendant entered Ewing's home with the intent to commit a sexual assault upon Ewing, the jury should have been instructed that it should disregard Hamrick's testimony. Nevertheless, the trial court did not instruct the jury to disregard this evidence but instead repeated in substance its earlier instruction, stating:

> Now, Members of the jury, in this case, evidence was received, tending to show, and what it does show is for you, the jury, to determine, that the defendant, Clifton White, had an assaultive sexual encounter with Mrs. Hamrick.

> This evidence was received solely for the purpose of showing that the defendant had the intent, which is a necessary element of the crimes charged in this case.
>
> If you believe this evidence, you may consider it only for the limited purpose for which it was received.

Based on this instruction, the jury may have erroneously concluded that it could consider the evidence of the sexual assault for the purpose of proving that defendant had the intent to commit any of the crimes with which he had been charged.

[2] Were this the only error concerning evidence of alleged sexual assaults committed by defendant, we might be inclined to conclude that the trial court's error did not prejudice defendant. However, we believe that this error was greatly compounded when evidence of another alleged sexual assault committed by defendant was elicited during the State's cross-examination of Brenda Hunt.

During defendant's case-in-chief, Hunt testified that Hamrick had confided in her about the alleged sexual assault committed by defendant. According to Hunt, Hamrick said that Hamrick and one of her friends had promised to have sex with defendant in exchange for some cocaine, that the three of them went to defendant's sister's apartment "[to do] some drugs," but that Hamrick left and returned to her own apartment because defendant and her friend had cheated her out of the last portion of the cocaine. Hunt further testified that Hamrick told her that defendant came to Hamrick's apartment and tried to force Hamrick to perform fellatio. Hunt stated that she encouraged Hamrick to call the police, and when Hamrick refused, Hunt woke defendant's sister, who called the police after hearing Hamrick's allegations.

The State then questioned Hunt as follows:

> Q. . . . So, why did you tell Officer Horner [that defendant's sister] called the police?
>
> A. Okay. She, [defendant's sister] did say—
>
> [DEFENSE COUNSEL]: I OBJECT to what [defendant's sister] said.
>
> THE COURT: OVERRULED.
>
> . . . .

A. [Defendant's sister] did say, when I woke her up, she said, "I've heard this before."

Q. What?

A. That he had—Casey had told us or something that [defendant] had tried to rape her or something and that's what I told [the police]; I didn't believe that.

Q. Casey; that's a 17 year old?

A. Yes, sir.

We agree with defendant that the testimony concerning defendant's alleged sexual assault of Casey, the seventeen-year-old, was not admissible under the North Carolina Rules of Evidence. The answer elicited from Hunt was triple hearsay as it was an allegation by Casey to defendant's sister, repeated by defendant's sister to Hunt, and further repeated by Hunt to the police. Because this testimony does not fall within any of the exceptions to the hearsay rule, the evidence was not admissible for substantive purposes—to prove that the sexual assault actually occurred. Nor was this testimony admissible for impeachment purposes. The admissibility of evidence, including that offered for the purpose of impeaching a witness, is governed by Rule 403 of the North Carolina Rules of Evidence, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. R. Evid. 403. As we have repeatedly stated, the decision to exclude or not exclude relevant but prejudicial evidence is a matter within the sound discretion of the trial court and will be reversed only upon a showing that the trial court abused its discretion. *State v. Baldwin*, 330 N.C. 446, 456, 412 S.E.2d 31, 37 (1992). Evidence that "may reasonably tend to prove two or more facts" but is competent to prove only one of them is not deemed inadmissible simply because the evidence tends to prove some fact that is not relevant or for proof of which the evidence is not competent. 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 79, at 351-52 (3d ed. 1988). If, however, the probative value of the evidence is so slight and the evidence is so prejudicial that there

is a substantial likelihood that the jury will consider the evidence only for the purpose of determining the defendant's propensity to commit the crimes with which he has been charged, the evidence must be excluded under Rule 403. *See State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 825 (1988) (concluding that evidence of defendant's prior sexual misconduct should have been excluded because "its probative impact ha[d] been so attenuated by time that [the evidence] bec[a]me little more than character evidence illustrating the predisposition of the accused").

Even assuming, as the State argues, that the State's cross-examination was relevant as tending to show that Hunt was biased in favor of defendant and that Hunt would not have believed anyone who made a claim of sexual assault against defendant and thus otherwise might have been admissible for impeachment purposes, we believe that the peculiar circumstances of this case required that the testimony concerning defendant's alleged sexual assault of Casey be excluded under Rule 403. At the time that this testimony was elicited, the jury had already heard extensive and severely damaging evidence suggesting that defendant had committed two sexual assaults—one upon Hamrick and one upon Ewing. Admitting evidence of yet another sexual assault upon Casey, a seventeen-year-old, would surely have tended to exacerbate the prejudicial effect of the other sexual assault evidence and increase the probability that the jury might consider the sexual assault evidence for purposes prohibited by Rule 404. Because the jury was given no instruction limiting its consideration of this evidence and was further given defective instructions concerning the relevance of the Hamrick assault evidence, we believe that any probative value of the evidence of defendant's alleged assault upon Casey was substantially outweighed by the danger that the evidence would predispose the minds of the jurors to believe that defendant was guilty of the crimes charged. Therefore, we conclude that the evidence should have been excluded under Rule 403.

Even assuming that defendant has failed to show that either of the trial court's rulings, considered individually, is sufficiently prejudicial to require a new trial, we believe that the admission of the severely damaging evidence of prior sexual assaults allegedly committed by defendant, when considered in combination, may have deprived defendant of his fundamental right to a fair trial. Thus, we conclude that defendant is entitled to a new trial.

II.

[3] Defendant further assigns as error a portion of the trial court's order granting defendant's pretrial motion for the appointment of experts to perform psychiatric and psychological testing of defendant. Because this assignment of error concerns evidence previously disclosed to the State and because the State's right to rely on such evidence at a new trial might be affected, we elect to address this assignment of error.

After conducting a hearing on defendant's motion for the appointment of experts, the trial court found that defendant had demonstrated the need for expert assistance and that he was indigent and could not personally afford to hire such experts. In an order dated 4 May 1990, the trial court granted defendant's motion for the appointment of two experts, at state expense, on the condition that the experts prepare written reports of their evaluations of defendant and that they submit copies of such reports to the trial court and the prosecutor on or before 1 August 1990. Specifically, the trial court ordered that the experts prepare written reports containing "all pertinent information concerning [the experts'] evaluation of the Defendant" and that the experts "make available to the [prosecutor] information including, but not be [sic] limited to, raw data scores, interpretation of raw data scores, observations, and any further information and conclusions concerning the Defendant which is observed by the [experts] and relied upon by the [experts] in arriving at their conclusions concerning the Defendant's prior and current mental state." The trial court's order further provided: "If no written report is filed on or before August 1, 1990, neither [expert] will be permitted to testify . . . nor will they be paid by the State for their services."

We agree with defendant that the trial court erred in requiring the experts to prepare and submit to the prosecutor written reports of their evaluations of defendant. N.C.G.S. § 15A-905, which governs the State's right to pretrial discovery in criminal cases, provides the State with the right to copies only of

> results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case . . . which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial, when the results or reports relate to his testimony.

N.C.G.S. § 15A-905(b) (1988). Under this statute, results or reports of a mental examination or test are not discoverable by the State if the defendant intends neither to introduce the reports or the results thereof into evidence at his trial nor to call the expert witness who prepared the items to testify at the defendant's trial with regard to matters related to the mental examination or test. Because N.C.G.S. § 15A-905 "expressly restricts [the State's right to] pretrial discovery, . . . the trial court has no authority to order [greater] discovery." *State v. Hardy*, 293 N.C. 105, 125, 235 S.E.2d 828, 840 (1977); *State v. Crandell*, 322 N.C. 487, 498, 369 S.E.2d 579, 585-86 (1988). In this case, the trial court's order was not limited to disclosure of results or reports intended to be introduced at trial or relating to the testimony of an expert whom defendant intended to call as a witness at his trial. Although not expressly delineated as an order compelling discovery, the trial court's order exceeded the court's authority by effectively granting to the State greater discovery than permitted by N.C.G.S. § 15A-905.

Defendant further maintains that by conditioning payment of the experts' services upon the disclosure of this information, the trial court deprived defendant of his constitutional rights to due process and equal protection as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Defendant argues that the trial court's order granted to the State discovery greater than that available against defendants who are not indigent and thus deprived defendant of his right to the assistance of independent experts necessary for his defense as recognized by the United States Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985).

Assuming, *arguendo*, that the trial court's error is of constitutional magnitude, we conclude that the State has shown that any error resulting from the trial court's order was harmless beyond a reasonable doubt. When a defendant obtains discovery of like material, the State, upon request, becomes entitled to pretrial discovery of results or reports of mental examinations or tests "which the defendant intends to introduce in evidence at the *trial* or which were prepared by a witness whom the defendant intends to call at the *trial*, when the results or reports relate to his testimony." N.C.G.S. § 15A-905(b) (1988) (emphasis added). Defendant argues that the State is unable to show that it was entitled to pretrial discovery of the defense experts' reports because nothing

in the record on appeal or the transcript of the proceedings suggests that defendant intended to rely on this information or the experts' testimony at the *guilt-innocence phase* of his trial and defendant did not do so. We do not agree that the State is required to make such a showing.

[4] In determining the State's entitlement to pretrial discovery under N.C.G.S. § 15A-905(b), the determinative question is whether the defendant intends to rely on such evidence at his *trial*. The term "trial," as used in N.C.G.S. § 15A-905(b), is not restricted to the guilt-innocence phase but encompasses all portions of the defendant's trial, including the sentencing phase. Thus, under N.C.G.S. § 15A-905(b), results or reports of mental examinations or tests conducted by defense experts are subject to pretrial discovery by the State as long as such information or the experts are intended to be relied upon by the defendant at *either* the guilt-innocence phase or sentencing phase of his trial.

At his sentencing proceeding in this case, defendant relied heavily upon the results and reports of the mental examinations and tests conducted by the court-appointed experts. Dr. Billinsky, the psychiatrist appointed to assist defendant in preparing for trial, testified in detail concerning the interviews he conducted as well as the psychological testing conducted by Dr. Varley, the psychologist appointed to assist defendant. Based on information obtained during his personal interviews of defendant and documents submitted to him, including the report prepared by Dr. Varley, Dr. Billinsky testified that at the time of the killing, defendant was suffering from a mixed personality disorder, that defendant was under the influence of some mental or emotional disturbance, and that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

The record does not reveal that defendant lodged any objection to discovery by the State on the basis that he did not intend to rely upon this evidence at his trial. Nor has defendant presented any evidence on appeal to support his claim that he did not intend to call Dr. Billinsky at his sentencing proceeding. As noted by the State, all of the evidence of record tends to show that defendant did intend to rely on the experts' reports at the sentencing proceeding. The reports prepared by Drs. Billinsky and Varley were clearly favorable to defendant. Dr. Billinsky's testimony was crucial in defendant's case, as it was the only medical evidence tending

to support two of the statutory mitigating circumstances found by the jury—that defendant committed the murder while under the influence of mental or emotional disturbance and that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Under these circumstances, we conclude that the State has shown that it was entitled to pretrial discovery of these reports. Therefore, the trial court's order, although erroneous insofar as it required the experts to prepare and submit to the prosecutor written reports of their examinations and testing, did not in any way prejudice the rights of defendant. We overrule this assignment of error.

For the foregoing reasons, we conclude that the admission of evidence relating to alleged sexual assaults committed by defendant was prejudicial to defendant's fundamental right to a fair trial and that defendant is entitled to a new trial on this basis. We do not find it necessary to address defendant's remaining assignments of error because the alleged errors are not likely to recur upon retrial.

New trial.

STATE OF NORTH CAROLINA v. RICKY LEE PRICE

No. 585A87

(Filed 25 June 1992)

1. Criminal Law § 1352 (NCI4th)— McKoy error—jury polled—error not prejudicial

McKoy error in capital sentencing instructions was not prejudicial where the jury was polled as a whole to confirm each answer on the verdict sheet and then polled individually as to each answer on the verdict sheet, including those concerning mitigating circumstances. Although defendant contended that jurors could have understood "Is this your answer?" to refer to the jury as a whole, reasonable jurors would understand that they were being polled individually and that the question therefore was referring to them as individual jurors. Moreover, although the trial court clerk did not poll the jury foreman about the jury's group responses, as in *State v. Laws*, 328 N.C. 550, the results of the polls considered together

establish with sufficient certainty that each mitigating circumstance rejected by the jury was rejected unanimously and that no individual juror would have found any of these mitigating circumstances to exist had each individual juror been permitted to do so.

Am Jur 2d, Criminal Law §§ 786, 787, 1012-1019.

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

2. **Criminal Law § 964 (NCI4th) — murder — motion for appropriate relief on appeal — subject to dismissal — reviewed in interests of judicial economy and thorough review**

Arguments raised by a murder defendant in a motion for appropriate relief directed to the North Carolina Supreme Court following remand from the U.S. Supreme Court were subject to dismissal because both arguments could have been raised in the original appeal. Motions for appropriate relief may not be used to add new arguments which could have been raised in the briefs originally filed. However, the Court elected to review defendant's contentions in the interests of judicial economy and thorough scrutiny of a capital case.

Am Jur 2d, Appeal and Error § 723.

3. **Criminal Law § 1353 (NCI4th) — murder — mitigating circumstance — impaired capacity — one prong omitted — harmless error**

Although the trial court erred in a murder prosecution by not submitting the mitigating circumstance of impaired capacity to appreciate the criminality of the conduct, the record demonstrates beyond a reasonable doubt that none of the jurors would have found that circumstance to exist had the trial court submitted it to the jury. Although defense counsel made an affirmative, tactical request that the circumstance not be submitted and stated their reasons on the record, the trial court is mandated by the language of N.C.G.S. § 15A-2000(b) to submit a statutory mitigating circumstance to the jury when evidence is presented which may support the circumstance. The evidence was sufficient to support submission of the mitigating circumstance, but it would have rested on the same evidence as all of the other mitigating circumstances dealing with defendant's mental disease and substance abuse. It is

inconceivable that, having rejected the evidence as to all the other mitigating circumstances dealing with defendant's alleged mental or emotional disturbance, the jury would have accepted the evidence and found that prong of the impaired capacity mitigating circumstance not submitted.

Am Jur 2d, Homicide §§ 513, 516.

4. **Criminal Law § 1363 (NCI4th)— murder—mitigating circumstance—life sentence in Virginia—not submitted—no error**

The trial court did not err in a murder prosecution by refusing to submit to the jury as a nonstatutory mitigating circumstance that defendant had received a life sentence in Virginia for another killing about which the prosecution had introduced evidence. Although the sentence comprises part of defendant's formal criminal record and was offered against defendant by the State in the sentencing hearing, "the additional protection to society" possibly achieved by his incarceration under that sentence is not an aspect of defendant's record and was irrelevant.

Am Jur 2d, Homicide § 514.

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

ON remand from the Supreme Court of the United States. Heard in the Supreme Court 10 April 1991. Additionally, on defendant's motion for appropriate relief filed in the Supreme Court on 30 April 1991, pursuant to N.C.G.S. § 15A-1418.

Lacy H. Thornburg, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

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

EXUM, Chief Justice.

Defendant, after being convicted of the first-degree murder of Brenda Smith, was sentenced to death. On defendant's appeal this Court found no prejudicial error in either the guilt determination proceeding or the capital sentencing proceeding. *State v. Price*, 326 N.C. 56, 388 S.E.2d 84 (1990) (*Price I*).

On 1 October 1990 the Supreme Court of the United States vacated our judgment and remanded the case to us for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *Price v. North Carolina*, --- U.S. ---, 112 L. Ed. 2d 7 (1990).

We again heard the case on supplemental briefs ordered by the Court and directed to the questions whether under *McKoy* there was error in the sentencing proceeding and, if so, whether the error was harmless. We conclude that although there was *McKoy* error, the error was harmless beyond a reasonable doubt.

We also deny defendant's motion for appropriate relief assigning error to the trial court's failure to submit two mitigating circumstances to the jury. Although the trial court erred in not submitting one statutory mitigating factor, we conclude that error was harmless beyond a reasonable doubt.

The evidence is adequately summarized in *Price I* and will not be repeated here, except as necessary for our consideration of the issues raised in this appeal.

I.

[1] In *McKoy* the United States Supreme Court held that capital sentencing jury instructions requiring the jury to find the existence of a mitigating circumstance unanimously before any juror could consider that circumstance in determining a defendant's sentence violated the Eighth and Fourteenth Amendments to the Federal Constitution. It is undisputed that the jury here received the unanimity instruction found unconstitutional in *McKoy*. The trial court instructed the jury to answer each mitigating circumstance "no" if it did not unanimously find the circumstance to exist by a preponderance of the evidence. The only issue remaining is whether this is the "rare case in which a *McKoy* error could be deemed harmless." *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990). Because this error is one of constitutional dimension, the State has the burden of showing the error was harmless beyond a reasonable doubt. *Id.; see also* N.C.G.S. § 15A-1443(b) (1988). For reasons explained below, we conclude that the State has met its burden.

The State's evidence tended to show that defendant strangled Brenda Smith to death and left her body in a wooded area in the Hurdle Mills community of rural Person County. A pathologist

testified that the victim died of ligature strangulation with "something broad." She and defendant had been dating. Less than three days before Brenda Smith's body was found, defendant strangled Joan Brady to death in Danville, Virginia. Defendant had also been romantically involved with her. An inmate with whom defendant had been incarcerated pending trial testified that defendant admitted killing both women, saying he had been dating too many women and felt he had to eliminate somebody. Before the trial from which he now appeals, defendant was convicted by a Virginia court of murder in Joan Brady's death and received a life sentence.

Evidence for the State further tended to show that the day after Brenda Smith's body was found, defendant set fire to the house of another female acquaintance with knowledge that she was in the house at the time. Later that day, defendant bound and gagged his uncle, attempted to set the uncle afire with lighter fluid, held the uncle and another man at knifepoint in a basement, and held police at bay for several hours before surrendering.

In the sentencing proceeding, the jury found two aggravating circumstances in Brenda Smith's murder: Defendant previously had been convicted of a felony involving violence to another person, and defendant murdered Brenda Smith in a course of conduct involving the threat of violence to another person. Defendant disputed the submission of the course of conduct circumstance, and this court upheld that submission in *Price I*, 326 N.C. at 83, 388 S.E.2d at 99.

The trial court submitted ten mitigating circumstances:

(1) the murder was committed while defendant was under the influence of mental or emotional disturbance;

(2) the capacity of defendant to conform his conduct to the requirements of the law was impaired by low intelligence;

(3) the capacity of defendant to conform his conduct to the requirements of the law was impaired by manic-depressive illness;

(4) the capacity of defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness;

(5) the capacity of defendant to conform his conduct to the requirements of the law was impaired by emotional instability;

(6) the capacity of defendant to conform his conduct to the requirements of the law was impaired by drug abuse;

(7) the capacity of defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness;

(8) the capacity of defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder;

(9) the defendant's family has a history of mental illness or emotional disturbance;

(10) Any other circumstance or circumstances arising from the evidence which the jury deemed to have mitigating value.

The jury unanimously found only one of the ten circumstances, number (9), the history of mental illness or emotional disturbance in defendant's family. After finding that circumstance insufficient to outweigh the aggravating circumstances, and finding the aggravating circumstances sufficiently substantial to warrant the death penalty when considered with the mitigating circumstance found, the jury unanimously recommended that defendant be sentenced to death.

Upon return of its sentencing verdict in open court, the jury was polled about each answer on the verdict form, including the mitigating circumstances not found. First, the jury was polled as a whole to confirm each answer on the verdict sheet. Then, each juror was polled individually under the following procedure:

The Court: Now, under the statute, Madam Clerk, you will poll the jury individually. You will poll them as to their recommendation.

Defense Counsel: We would ask that the entire series of questions be asked, Your Honor.

The Court: I will allow that upon your request. Ladies and gentlemen of the jury, at this time, beginning first with the foreman of the jury, and then each other member of the jury, you will be polled concerning the verdict. And Madam Clerk, you will, upon request which has been allowed, do it in the same manner individually that you did collectively.

The Clerk polled each juror as to each answer on the verdict sheet, including those answers concerning mitigating circumstances. Each juror was polled individually as to each mitigating circumstance as follows:

> **The Clerk:** "Issue Two: Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances? Answer, Yes." Is this your Answer?
>
> **Mr. Kimbrough** [jury foreman]: Yes, ma'am.
>
> **The Clerk:** Do you still assent thereto?
>
> **Mr. Kimbrough:** Yes, ma'am.
>
> **The Clerk:** As to the mitigating factors, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No." Is this your answer?
>
> **Mr. Kimbrough:** Yes, ma'am.
>
> **The Clerk:** Do you still assent thereto?
>
> **Mr. Kimbrough:** Yes, ma'am.

The clerk proceeded to ask Mr. Kimbrough, the jury foreman, the same questions about each mitigating circumstance. Then the clerk asked Mr. Kimbrough about the remaining sentencing issues:

> **The Clerk:** "Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you? Answer: Yes." Is this your answer?
>
> **Mr. Kimbrough:** Yes, ma'am.
>
> **The Clerk:** Do you still assent thereto?
>
> **Mr. Kimbrough:** Yes, ma'am.
>
> **The Clerk:** "Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? Answer: Yes." Is that your answer?

Mr. Kimbrough: Yes, ma'am.

The Clerk: Do you still assent thereto?

Mr. Kimbrough: Yes, ma'am.

The Clerk: Recommendation: "We the jury unanimously recommend that the defendant, Ricky Lee Price, be sentenced to death." Is that your recommendation?

Mr. Kimbrough: Yes, ma'am.

The Clerk: Do you still assent thereto?

Mr. Kimbrough: Yes, ma'am.

After questioning Mr. Kimbrough, the clerk asked each of the remaining eleven jurors the same questions. When the poll was completed, each juror had answered questions regarding each issue on the verdict sheet. Each individual answer was the same as the jury's answer on the verdict sheet. In other words, no individual juror had reached a decision different from that of the jury as a whole.

In *State v. Laws*, 328 N.C. 550, 402 S.E.2d 573 (1991), we found *McKoy* error harmless where the trial court clerk's poll of the jury foreman and individual jury members demonstrated that the jury was unanimous in rejecting a mitigating circumstance not found to exist. We concluded that where "the record clearly establishes that no juror individually found defendant's evidence sufficiently substantial to support a finding of the . . . mitigating circumstance, we can conclude with confidence that the unconstitutional unanimity requirement did not preclude any juror from considering mitigating evidence." *Id.* at 555, 402 S.E.2d at 577. The facts now before us are very similar to those in *Laws*, and for the reasons explained below we likewise conclude that the *McKoy* error here was harmless.

The polling in this case established that for each of the nine mitigating circumstances not found by the jury, each individual juror had answered "No," thus rejecting that circumstance. Defendant contends that the clerk's question, "Is this your answer?" following the recitation of each mitigating circumstance was ambiguous, because a juror might have understood the word "your" to refer to the jury as a whole. In the context of polling jurors individually, defendant's interpretation is not reasonable. A reasonable juror would understand that if she were being questioned individually,

the question was referring to her as an individual juror. The very purpose of the poll is to ascertain each juror's individual vote on the issue or issues in question. We are confident the jurors here did not understand it to be otherwise.

The *McKoy* error in *Laws* was cured by two polling procedures: A poll of the jury foreman about the jury's rejection as a whole of a mitigating circumstance and an individual poll of each juror about his or her rejection of the mitigating circumstance. In the instant case the trial court clerk polled jurors individually but did not poll the jury foreman about the jury's group responses. This is not a dispositive difference. Considered together, the results of the polls of each juror establish with sufficient certainty that each mitigating circumstance rejected by the jury was rejected unanimously and that no individual juror would have found any of these mitigating circumstances to exist had each individual juror been permitted to do so.

We recognized in *State v. Lloyd*, 329 N.C. 662, 407 S.E.2d 218 (1991), that *McKoy* error is not cured by every jury poll. The trial court clerk in *Lloyd* polled no jurors individually as to mitigating circumstances, but merely polled the jury foreman and the jury as a whole. The polling questions did not ask whether the jury's rejection of mitigating circumstances was unanimous. The record in that case was insufficient to demonstrate that the jury's rejection of each mitigating circumstance was unanimous. *Lloyd*, therefore, does not control here.

Although there is evidence which supports several of the mitigating circumstances not found by the jury, the *McKoy* error here is harmless beyond a reasonable doubt because the jury poll demonstrates unequivocally that "the instruction did not prevent any juror's consideration of defendant's mitigating evidence." *Laws*, 328 N.C. at 556, 402 S.E.2d at 577. Rather, the jury was unanimous in rejecting all the mitigating circumstances that it failed to find. A jury verdict unanimously rejecting mitigating circumstances cannot be disturbed simply because the evidence would have permitted a reasonable juror to find otherwise. Unless the evidence entitles defendant to a peremptory instruction, *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), it is the jury's province to accept or reject such evidence.

Defendant's challenge to the death sentence on this basis must, therefore, fail.

II.

[2] Following the remand of this case by the United States Supreme Court, defendant filed a motion for appropriate relief asserting two assignments of error in regard to his sentencing hearing not included in his initial appeal. He assigns error to the trial court's failure to submit both prongs of the impaired capacity mitigating circumstance, N.C.G.S. § 15A-2000(f)(6), for the jury's consideration and to the trial court's refusal to submit as a nonstatutory mitigating circumstance defendant's ongoing sentence of life imprisonment for another murder. Defendant contends these new arguments are reviewable under N.C.G.S. § 15A-1415(b)(3), which provides for appropriate relief when defendant's conviction "was obtained in violation of the Constitution of the United States or the Constitution of North Carolina"; § 15A-1415(b)(7), which provides for appropriate relief when "[t]here has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required"; and under § 15A-1415(b)(8), which provides for appropriate relief when the sentence imposed "was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." Defendant further contends the motion is properly before this Court as provided in N.C.G.S. § 15A-1418(b):

> When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

Defendant argues that none of the grounds provided in N.C.G.S. § 15A-1419(a) for denying a motion for appropriate relief applies to this case, because defendant is still pursuing his initial appeal and has not exhausted a "previous" appeal in which he might have raised the issues presented here. The remand of this case by the United States Supreme Court has prolonged the pendency of defendant's direct appeal from his death sentence. Defendant notes that § 15A-1419(b) provides that in the interest of justice and for

good cause shown the appellate court may in its discretion grant a motion for appropriate relief.

Defendant's arguments based on N.C.G.S. §§ 15A-1415, 15A-1418, and 15A-1419 are unpersuasive. Motions for appropriate relief generally allow defendants to raise arguments that could not have been raised in an original appeal, such as claims based on newly discovered evidence and claims based on rights arising by reason of later constitutional decisions announcing new principles or changes in the law. *See* N.C.G.S. § 15A-1418 official commentary (1988). We agree with the State that statutes governing motions for appropriate relief were not intended to circumvent the orderly briefing of arguments on appeal. Motions for appropriate relief may not be used to add to an appeal new arguments which could have been raised in the briefs originally filed. Both of the arguments now raised by defendant in the motion for appropriate relief could have been raised in his original appeal. Therefore, defendant's motion for appropriate relief is subject to being dismissed.

We have nevertheless elected to review defendant's contentions raised in his motion for appropriate relief in the interests of both judicial economy and thorough scrutiny of this capital case. "[I]t is the uniform practice of this Court in every case in which a death sentence has been pronounced to examine and review the record with minute care to the end it may affirmatively appear that all proper safeguards have been vouchsafed the unfortunate accused before his life is taken by the State." *State v. Fowler*, 270 N.C. 468, 469, 155 S.E.2d 83, 84 (1967); *accord State v. Chance*, 279 N.C. 643, 657, 185 S.E.2d 227, 236 (1971) ("in capital cases we review the record and *ex mero motu* take notice of prejudicial error"); *see also* N.C. R. App. P. 2. We conclude that neither error assigned in his motion for appropriate relief entitles defendant to a new sentencing hearing.

[3] Defendant first contends the trial court committed reversible error by failing to instruct jurors on one of two prongs of a statutory mitigating circumstance regarding defendant's impaired mental capacity. N.C.G.S. § 15A-2000(f)(6) requires that the trial court submit to the jury the following mitigating circumstance if supported by the evidence: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." This statutory mitigating circumstance embraces two types of disability, one diminishing a

person's ability to appreciate the criminal nature of his conduct, and the other diminishing a person's ability to control himself. *State v. Johnson*, 298 N.C. 47, 68, 257 S.E.2d 597, 613 (1979). During a charge conference at defendant's sentencing proceeding, defense counsel requested the trial court to instruct jurors only on the second prong of section 15A-2000(f)(6), concerning defendant's diminished capacity to conform his conduct to the law. According to the trial transcript, defense counsel explained the request:

> [W]e would submit to the Court that there is very little evidence that the capacity of the defendant to appreciate the criminality of his conduct was impaired. We would submit with respect to that that it is confusing to the jury to consider whether or not there might be some impairment of his ability to appreciate the criminality of his conduct, whereas, we would contend there was ample evidence there was an impairment of his ability to conform his conduct to requirements of law.

Obliging that request, the trial court did not submit to jurors the mitigating circumstance of defendant's diminished capacity to appreciate the criminality of his conduct. Also at defendant's request, the trial court submitted seven separate mitigating circumstances concerning various mental conditions impairing defendant's ability to control his conduct.[1]

The law concerning the submission of mitigating circumstances has developed significantly since defendant's initial appeal was heard and no error was found by this Court. In *State v. Bacon*, 326 N.C. 404, 417-20, 390 S.E.2d 327, 334-36 (1990), we held that when a statutory mitigating circumstance encompasses two distinct aspects, both must be submitted to the jury if they are supported by the evidence. In *State v. Lloyd*, 321 N.C. 301, 311-13, 364 S.E.2d 316, 323-24 (1988), *vacated and remanded on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 329 N.C. 662, 407 S.E.2d 218 (1991), we held that a statutory mitigating circumstance supported by the evidence must be submitted even when a defendant requests that it not be submitted. The State contends this case differs from *Lloyd*, in which the trial court submitted a mitigating circumstance over defendant's objection, because here defense

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1. These circumstances, reprinted in full *supra*, concerned evidence of defendant's low intelligence, manic-depressive illness, schizophrenic illness, emotional instability, drug abuse, drug-induced mental illness, and mixed personality disorder.

counsel made an affirmative, tactical request that the circumstance not be submitted and stated their reasons on the record. This procedural difference does not avoid the rule that "[w]hen evidence is presented in a capital case which may support a statutory mitigating circumstance, the trial court is mandated by the language in 15A-2000(b) to submit that circumstance to the jury for its consideration." *Lloyd*, 321 N.C. at 311-12, 364 S.E.2d at 323.

The State next contends the trial court committed no error in failing to give the instruction defendant now seeks because the evidence in this case did not support a finding that defendant lacked the capacity to appreciate the criminality of his conduct. We disagree. During defendant's sentencing proceeding, Dr. Brad Fisher, a psychologist allowed to testify as an expert by the trial court, testified that in his opinion defendant's manic-depression, exacerbated by drugs defendant said he was taking around the time of the murder, "would indeed have put severe limitations on his ability to make judgments, have appropriate mood responses, conform to the law and basically be properly in touch with reality." The test for sufficiency of evidence to support submission of a statutory mitigating circumstance is whether a jury could reasonably find that the circumstance exists based on the evidence. *Lloyd*, 321 N.C. at 312, 364 S.E.2d at 323. Dr. Fisher's testimony that defendant suffered from a mental illness that impaired his ability to make judgments, have appropriate mood responses, and be in touch with reality, considered with other evidence of defendant's past psychiatric problems resulting in hospitalization, would, in our view, allow a reasonable inference that defendant's capacity to appreciate the criminality of his conduct was impaired. *Cf. State v. Payne*, 328 N.C. 377, 408, 402 S.E.2d 582, 600 (1991) (evidence of defendant's substance abuse, including drinking alcohol the night before the murder and smelling like beer shortly after the murder, held sufficient to support submission of mitigating circumstance that intoxication impaired defendant's ability to appreciate the criminality of his conduct). Although evidence that defendant fled from the murder scene and hid supports a contrary conclusion, it does not negate the sufficiency of the evidence supporting the mitigating circumstance. *Cf. State v. Wilson*, 322 N.C. 117, 142-43, 367 S.E.2d 589, 603-04 (1988) (defendant's prior conviction for second-degree kidnapping and evidence that defendant had stored illegal drugs and participated in farm theft did not negate sufficiency of evidence to support submission of mitigating circumstance that

defendant had no significant history of prior criminal activity). Because the evidence was sufficient to support submission of the mitigating circumstance to the jury, the trial court committed error in not submitting it, irrespective of defense counsel's request.

Having concluded the trial court erred in not submitting this mitigating circumstance, we now must decide whether the error prejudiced defendant so as to require a new sentencing hearing. Because this error implicates defendant's constitutional rights, *Wilson*, 322 N.C. at 145, 367 S.E.2d at 605, it is presumed prejudicial unless the State demonstrates that it was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988).

The State has borne this burden. The mitigating circumstance of defendant's impaired capacity to appreciate the criminality of his act, had it been submitted, would have rested on the same evidence as all of the other mitigating circumstances dealing with defendant's mental disease and substance abuse. This evidence was that defendant suffered from various mental illnesses exacerbated by substance abuse. The most general of these mitigating circumstances was that the murder was committed while defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2). The jury unanimously rejected this most general and all the other more specific mitigating circumstances resting on the same evidence dealing with defendant's mental illnesses and substance abuse. It is clear, therefore, that the jury simply did not find this evidence credible. Having rejected it as to all the other mitigating circumstances resting upon it, particularly the most general of those circumstances dealing with defendant's alleged mental or emotional disturbance, it is inconceivable the jury would have accepted the evidence and found, on the basis of it, that prong of the impaired capacity mitigating circumstance not submitted. That the evidence, as defendant's trial counsel conceded, more strongly supported the mitigating circumstances submitted than it did the one not submitted reinforces this conclusion. The record here thus demonstrates beyond a reasonable doubt that had the trial court submitted to the jury the mitigating circumstance of defendant's impaired capacity to appreciate the criminality of his conduct, none of the jurors would have found that circumstance to exist. Therefore, the error in failing to submit this circumstance does not require a new sentencing hearing.

[4] Defendant also assigns error to the trial court's refusal to submit to the jury as a nonstatutory mitigating circumstance that defendant had received a life sentence in Virginia for another killing about which the prosecution had introduced evidence. Defendant contends the imposition of a substantial penalty in the other crime could have served as a basis for a sentence less than death in this case. According to the trial record, during the charge conference for the sentencing proceeding, defense counsel asked the trial court to submit the following mitigating circumstance: "The fact that defendant has received a life sentence and the fact that this judge may impose [an] additional life sentence to commence at the expiration of the previous life sentence provides additional protection to society." The prosecution objected to the proposed circumstance, and the trial court sustained the objection.

Defendant relies on *Skipper v. South Carolina*, 476 U.S. 1, 90 L. Ed. 2d 1 (1986), in which the United States Supreme Court held that a defendant's peaceful adjustment to prison life was an aspect of his character and relevant as a mitigating circumstance in a capital sentencing proceeding. The *Skipper* Court explained that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 7, 90 L. Ed. 2d at 8. The Court based that holding on the rule established in *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and reiterated in *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1982), requiring that in capital cases " ' "the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." ' " *Skipper*, 476 U.S. at 4, 90 L. Ed. 2d at 6 (quoting *Eddings*, 455 U.S. at 110, 71 L. Ed. 2d at 8 (quoting *Lockett*, 438 U.S. at 604, 57 L. Ed. 2d at 990 (plurality opinion of Burger, C.J.))) (emphasis in original).

That defendant is currently serving a life sentence for another unrelated crime is not a circumstance which tends to justify a sentence less than death for the capital crime for which defendant is being sentenced. Although the sentence comprises part of his formal criminal record and was offered against defendant by the State in the sentencing hearing, "the additional protection to society" possibly achieved by his incarceration under that sentence is not an aspect of defendant's record. Because this evidence was

irrelevant, we uphold the trial court's refusal to submit it as a mitigating circumstance. *See Lockett*, 438 U.S. at 604 n.12, 57 L. Ed. 2d at 990 n.12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."); *see also State v. Robbins*, 319 N.C. 465, 519-23, 356 S.E.2d 279, 311-13 (1987) (evidence about possibility of parole is irrelevant to sentencing and the federal Constitution does not require consideration of such evidence).

In his initial appeal, defendant contended the trial court erred in barring defense counsel from arguing to the jury that if it returned a verdict of life imprisonment, the trial court could require the sentence to commence at the termination of the life sentence he was presently serving in Virginia. We held this was not error, noting that "[a]rgument concerning the effect of consecutive life sentences upon the period of a defendant's incarceration is, in another guise, argument about the legal effect of parole upon defendant's sentence" and equally irrelevant to capital sentencing. *Price I*, 326 N.C. at 84, 388 S.E.2d at 100. Our holding today with regard to the very similar issue of defendant's proffered mitigating circumstance is the same.

In conclusion, we hold that because the record establishes that the jury unanimously rejected all mitigating circumstances not found on the verdict sheet, the *McKoy* error in this case was harmless. We further conclude that neither of the assignments of error raised in defendant's motion for appropriate relief merits relief. Accordingly, the sentence of death is affirmed and the mandate of our prior opinion is reinstated. The case is remanded to the Superior Court, Person County, for further proceedings.

Death sentence affirmed; mandate reinstated; case remanded.

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

STATE OF NORTH CAROLINA v. BOBBY RAY HIGHTOWER

No. 1A89

(Filed 25 June 1992)

1. **Jury § 7.9 (NCI3d)— defendant's failure to testify—consideration by juror—denial of challenge for cause—prejudicial error**

The trial court erred in denying a challenge for cause of a prospective juror who indicated that he would try to be fair to the defendant but might have trouble doing so if the defendant did not testify. Moreover, the failure to allow this challenge for cause was prejudicial error where defendant exhausted his peremptory challenges in excusing this juror, and defendant renewed his challenge for cause to this juror and told the court that he would peremptorily challenge the juror then being questioned if he had not exhausted his peremptory challenges. N.C.G.S. §§ 15A-1212(8) and (9).

Am Jur 2d, Jury §§ 213 et seq.

2. **Evidence and Witnesses § 177 (NCI4th)— pregnancy of murder victim—evidence of motive and premeditation and deliberation**

Evidence of a murder victim's pregnancy and defendant's knowledge thereof was relevant and admissible to show that defendant's motive for the murder was to eliminate the victim and her pregnancy as a potential threat to his reconciled marriage and to show that the murder was premeditated and deliberate. Furthermore, the probative value of this evidence substantially outweighed any prejudice. N.C.G.S. § 8C-1, Rules 401 and 402.

Am Jur 2d, Homicide § 273.

Justice MEYER dissenting.

Justice WHICHARD joins in this dissenting opinion.

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

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the sentence of death entered by *Freeman, J.*, at the 14 November 1988 Criminal Session of

Superior Court, GUILFORD County. Heard in the Supreme Court 10 September 1991.

The defendant was tried for his life for first degree murder. The State's evidence showed that the defendant stabbed Naomi Donnell to death and threw her body into a river. The jury found the defendant guilty and recommended the death penalty be imposed. The defendant was sentenced to death.

The defendant appealed to this Court.

Lacy H. Thornburg, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

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

WEBB, Justice.

The defendant has brought forward seventeen assignments of error. We shall discuss two of them.

[1] In his first assignment of error he contends it was error not to allow a challenge for cause to a juror. The defendant preserved his right to bring forward this assignment of error by following the procedure of N.C.G.S. § 15A-1214(h). He peremptorily challenged the juror. He then exhausted his peremptory challenges and renewed his challenge for cause to the juror, which was denied.

During the selection of the jury the following colloquy occurred:

> MR. LIND:— Okay, well, I appreciate that. That brings me to the next question is, Bobby very well may not take the witness stand. We may not present any evidence. Now, do you feel like if he didn't take the witness stand, do you feel like that might affect your ability to give him a completely fair and impartial trial because you might feel like you want to hear both sides before you could decide the case?
>
> JUROR BROWNING:— Yes, I would like to hear both sides, but—
>
> MR. LIND:— Well, if he—that's why I'm asking this now. There's a good chance that he probably will not testify. So, knowing that, do you feel like you could—that that would affect your ability to give him a fair and impartial trial?

JUROR BROWNING:— Yes.

. . . .

THE COURT:— All right, Mr. Browning, as you may have heard me say earlier, under our law, the defendant is presumed to be innocent. He's not required to prove his innocence, and our law and the Constitution gives him the right not to testify if he so elects, and the law also says that that decision, if he should make that, not to testify, is not to be held against him, and that you, as a juror, are not to consider his silence in anyway in your deliberations. Now, I don't care whether you agree with that law or disagree with it, or whether you don't like it or do like it, or whether it doesn't make sense to you or whatever. That's not the issue. I don't want to debate that law. My question is, could you follow that law whether you like it or not?

JUROR BROWNING:— I'm just trying to think and give you a fair answer.

THE COURT:— I know that's a difficult question, and I'll tell you, when we get into the case, I'll tell you that your duty as a juror is to follow the law of North Carolina as I give it to you and not as you think it is and not as you might like it to be. So, what I'm saying is, it doesn't matter whether you like it or not like it. The bottom line is, can you follow the law as I explain it to you and not as you might like it to be or think it ought to be?

JUROR BROWNING:— Yeah, I could follow it, if it's the law.

THE COURT:— And if I tell you that the law says that you're not to use, or consider in anyway, the defendant's silence against him in your deliberations, you could do that, is that what you're saying?

JUROR BROWNING:— I still feel like it might stick in the back of my mind, even though I—you know, I'll try to discount it, but I—

THE COURT:— But you would make every effort to follow the law?

JUROR BROWNING:— Right.

THE COURT:— And you think you could follow the law?

JUROR BROWNING:— Yes.

THE COURT:— You just have some reservation about whether or not that would stick in the back of your mind?

JUROR BROWNING:— Right.

. . . .

THE COURT:— Well, let's go back to the silence of the defendant one more time. You understand that he has that right under the law?

JUROR BROWNING:— Right, uh huh.

THE COURT:— And you—let me just ask you, could you follow that law or could you not?

JUROR BROWNING:— Like I say, I could follow the law, but I'm not going to—you know, it could stick in the back of my mind. I could—

THE COURT:— Well, it's obviously going to be in your mind. I mean, you can't erace [sic] it, but could you ignore it and follow the law as I explain it to you and not let it—it's going to be there, obviously. If you know something, you can't erace [sic] it completely, but could you—even being aware of that, could you just not let it affect your decision in anyway?

JUROR BROWNING:— I can't tell you for sure, because if the, you know, first degree murder charge is pretty serious, and I don't want—I want to give an impartial decision, and I don't want anything to hinder it, and I'm afraid that might hinder it.

. . . .

MR. LIND:— The fact that your feelings about him not taking the witness stand and testifying could substantially impair your deciding the case. Despite your best efforts to try to follow that Judge's instructions, that would still be in your mind, and that would still be in your mind, and you would have some severe concerns that it might affect your ability to give him a fair trial, correct?

JUROR BROWNING:— Right.

MR. LIND:— Okay, I don't have any other questions.

THE COURT:— Go back and forth forever with this. Do you want to ask him some questions?

MR. KIMEL:— I just want to get his answer to the last question.

THE COURT:— What was your last answer?

JUROR BROWNING:— He asked me what I said, or, you know, whether it would stick, and I said yes, and he asked me if I could follow the law, and I said yes, so—

MR. KIMEL:— I don't have anything else. The issue is if he can follow the law.

MR. LIND:— I asked—my question was, I asked if his feeling in the back of his mind would substantially impair him, despite his best efforts to follow the law, and he said he couldn't follow the law.

JUROR BROWNING:— I would try to follow the law.

THE COURT:— You would make every effort whatsoever to follow the law, whether you agree with it or not, would you not?

JUROR BROWNING:— Yes, right.

THE COURT:— I'm going to DENY the challenge for cause.

N.C.G.S. § 15A-1212 provides in part:

> A challenge for cause to an individual juror may be made by any party on the ground that the juror:
>
> . . . .
>
> (8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
>
> (9) For any other cause is unable to render a fair and impartial verdict.

We have held that N.C.G.S. § 15A-1212(8), which is a codification of the rule in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968), applies to the qualification of jurors in all cases. *State v. Kennedy*, 320 N.C. 20, 26, 357 S.E.2d 359, 363 (1987).

The defendant's challenge for cause should have been allowed under both section (8) and (9) of N.C.G.S. § 15A-212. When the defendant's attorney first asked if the defendant's failure to testify would affect the juror's ability to give him a fair and impartial trial, the juror said "[y]es." When the court questioned the juror, he said on one occasion that he could follow the law as given to him by the court but he repeatedly said the defendant's failure to testify would "stick in the back of my mind" while he was deliberating. On one occasion he told the court, "I want to give an impartial decision, and I don't want anything to hinder it, and I'm afraid that might hinder it." In Mr. Lind's last question to the juror, he asked if the juror had serious concerns that the defendant's failure to testify "might affect your ability to give him a fair trial[.]" The juror said "[r]ight." We can only conclude from the questioning of this juror that he would try to be fair to the defendant but might have trouble doing so if the defendant did not testify. In this case the defendant did not testify.

We have said that the granting of a challenge for cause of a juror is within the discretion of the judge. *State v. Quick*, 329 N.C. 1, 17, 405 S.E.2d 179, 189 (1991); *State v. Watson*, 281 N.C. 221, 227, 188 S.E.2d 289, 293, *cert. denied*, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972). Nevertheless, in a case such as this one, in which a juror's answers show that he could not follow the law as given to him by the judge in his instructions to the jury, it is error not to excuse such a juror. It was error for the court not to allow the challenge for cause to Juror Browning in this case.

The question we next face is whether the failure to allow this challenge for cause was prejudicial error. After the challenged juror was excused and the defendant had exhausted his peremptory challenges, he renewed his challenge for cause to Juror Browning and told the court he would peremptorily challenge the juror then being questioned if he had not exhausted his peremptory challenges. Although this juror might not have been subject to a challenge for cause, it was the prerogative of the defendant as to whether to exercise a peremptory challenge. He was deprived of this right and for this reason there must be a new trial.

[2] Defendant's second assignment of error is that the trial court erred in denying his pretrial motion to exclude testimony from various people, including his own statements, regarding Naomi

Donnell's pregnancy and his knowledge thereof. He contends that such evidence was irrelevant, had no probative value to any fact of consequence in the case, and its probative value was substantially outweighed by its prejudicial and inflammatory effect on the jury. We disagree.

N.C.G.S. § 8C-1, Rule 402 (1988) provides "[a]ll relevant evidence is admissible[ ]" except if it is excluded by some other exclusionary rule. " '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). The prosecution may offer evidence of motive as circumstantial evidence to prove its case where the commission of the act is in dispute when "[t]he existence of a motive is, however, a circumstance tending to make it more probable that the person in question did the act[.]" 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 83 (3d ed. 1988).

In the instant case, the evidence of Donnell's pregnancy is relevant because it tended to support the State's theory of the defendant's motive for the murder. It is also relevant to prove that the murder was premeditated and deliberate and not a frenzied stabbing. The fact that Donnell threatened to tell everyone that defendant was the father of her baby, that defendant knew this, and that defendant had reconciled with his wife, tended to prove that defendant's plan and motive for the murder were to eliminate Donnell and her pregnancy as a potential threat to his reconciled marriage.

Further, the probative value as to motive and premeditation and deliberation substantially outweighed any prejudice. "[R]elevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it as evidence." *State v. Eason*, 328 N.C. 409, 421, 402 S.E.2d 809, 814 (1991). The evidence of Donnell's pregnancy enhanced the State's case against the defendant. This evidence will be admissible at the new trial. This assignment of error is overruled.

We do not discuss the defendant's other assignments of error because the questions they raise may not arise at a new trial.

New trial.

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

Justice MEYER dissenting.

I do not agree with the majority that the trial court erred in denying defendant's challenge for cause of prospective juror Browning. Having reviewed the transcript of the proceedings, the record on appeal, the briefs of both parties, and the oral arguments, I find no error in the guilt phase of defendant's trial; however, I believe that defendant is entitled to a new sentencing proceeding for error committed during the penalty phase of defendant's trial, a matter not addressed by the majority.

Until today, it has been well established that "[t]he question of the competency of jurors is a matter within the trial judge's discretion" and that the trial judge's ruling on a challenge for cause may be reversed only upon a showing of abuse of discretion. *State v. Watson*, 281 N.C. 221, 227, 188 S.E.2d 289, 293, *cert. denied*, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972); *see also State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991); *State v. Black*, 328 N.C. 191, 400 S.E.2d 398 (1991); *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987); *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974), *death penalty vacated*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976). Although not explicitly delineated in our prior opinions, the reason for giving such great deference to a trial judge's ruling on a challenge for cause is clearly grounded upon the fact that the trial judge, as opposed to an appellate court, is in a much better position to decide whether a prospective juror will be fair, impartial, and able to render a decision based upon the laws of our state.

A trial judge "is not required to remove from the panel every potential juror" whose initial voir dire testimony supports a challenge for cause pursuant to N.C.G.S. § 15A-1212. *State v. Cummings*, 326 N.C. 298, 308, 389 S.E.2d 66, 71 (1990). Once a challenge for cause has been made based upon the juror's voir dire, it is the trial judge's responsibility to determine whether, in his or her opinion, the juror would be able to exercise properly his duties as a juror and base his findings upon the evidence presented at trial. *Black*, 328 N.C. at 196, 400 S.E.2d at 401; *State v. Young*, 287 N.C. 377, 387, 214 S.E.2d 763, 771 (1975). As Judge (later Justice) Harry C. Martin stated in *State v. Wright*, 52 N.C. App. 166, 278 S.E.2d 579, *disc. rev. denied*, 303 N.C. 319 (1981), "[a] juror's

answers need not be completely unequivocal or unambiguous for the judge to make his determination." *Id.* at 172, 278 S.E.2d at 585. The trial judge has the opportunity to hear the potential juror's responses and to observe the demeanor of the juror during voir dire examination. From this, the trial judge must determine what weight and credibility should be given to the potential juror's voir dire responses and assess independently the potential juror's ability to perform his duties as a juror. If, in the trial judge's opinion, the prospective juror "credibly maintains" that he will be able to set aside any bias he may have and render a fair and impartial verdict based on the evidence presented at trial, "then it is not error for the court to deny defendant's motion to remove [the] juror for cause." *Cummings*, 326 N.C. at 308, 389 S.E.2d at 71.

On at least two prior occasions, we have had the opportunity to decide whether a challenge for cause must be granted when a prospective juror indicates that the defendant's failure to offer evidence at trial might influence his or her decision. In *Cummings*, the initial voir dire examination of juror Walters showed that "Walters was a close friend and supporter of state's witness, Sheriff Barrington, had knowledge of the case based upon newspaper and television coverage and could potentially be biased against defendant if he elected to offer no evidence at trial." *Cummings*, 326 N.C. at 308, 389 S.E.2d at 71. Despite the potential bias of Walters, we held that the trial judge did not abuse his discretion in denying the defendant's challenge for cause because the juror subsequently stated that he could set aside his preconceived opinions as to defendant's guilt or innocence and decide the case based upon the evidence presented at trial. *Id.* at 308, 389 S.E.2d at 72.

In *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991), we were faced with determining the propriety of the trial judge's denial of a challenge for cause of prospective juror Hayes. At the outset, we noted that the transcript of Hayes' voir dire indicated some confusion on her part. At one point during the questioning, Hayes indicated that she would require defendant to present evidence in his defense. Following her response, however, Hayes asked that the question be repeated. After further questioning, Hayes ultimately indicated "that if the State did not meet its burden of proof she could find defendant not guilty even though he presented no witnesses in his behalf." *McKinnon*, 328 N.C. at 677, 403 S.E.2d at 479. The defendant argued that the trial court should have allowed his challenge for cause of juror Hayes because

of her conflicting and ambiguous responses. We rejected the defendant's argument, concluding, "[t]he responses of juror Hayes indicated that she would be able to hold the State to its burden of proof without requiring defendant to present evidence; therefore, the trial court did not abuse its discretion in refusing to excuse her for cause." *Id.* at 677-78, 403 S.E.2d at 479.

As in *McKinnon*, the voir dire of Browning, the prospective juror challenged in this case, indicates some confusion on his part. Upon initial questioning by both the court and the State, Browning unequivocally responded that he "could . . . be completely fair and impartial and render a fair decision in both stages [of defendant's trial]," that he "[c]ould . . . follow the [c]ourt's instructions on the legal concepts of burden of proof and reasonable doubt in [the] case," and that he understood that "the State has to prove the defendant's guilt, and [defendant is] presumed innocent." When questioned by defense counsel concerning the possibility that defendant might not testify or present any evidence at trial, Browning stated, "Yes, I would like to hear both sides, *but*—" (Emphasis added.) Before Browning was able to finish answering the question, defense counsel interrupted, following up with a question that first appeared to ask whether Browning could remain fair and impartial but switched mid-question to inquire whether defendant's failure to testify would affect Browning's ability to be fair and impartial:

> Well, if he—that's why I'm asking this now. There's a good chance that he probably will not testify. So, knowing that, *do you feel like you could—that that would affect your ability to give him a fair and impartial trial*?

(Emphasis added.) Following Browning's affirmative response and without questioning Browning further about this subject, defense counsel asked the court to excuse Browning because of "his feelings as far as if [defendant] didn't testify."

In fulfillment of his responsibility to determine whether Browning could be fair and impartial, the trial judge then attempted to clarify Browning's response by inquiring of Browning's ability to follow the law:

> THE COURT:— All right, Mr. Browning, as you may have heard me say earlier, *under our law, the defendant is presumed to be innocent. He's not required to prove his innocence, and our law and the Constitution give[ ] him the right not to testify*

if he so elects, and the law also says that that decision, if he should make that, not to testify, is not to be held against him, and that you, as a juror, are not to consider his silence in anyway in your deliberations. Now, I don't care whether you agree with that law or disagree with it, or whether you don't like it or do like it, or whether it doesn't make sense to you or whatever. That's not the issue. I don't want to debate that law. *My question is, could you follow that law whether you like it or not?*

JUROR BROWNING:— I'm just trying to think and give you a fair answer.

THE COURT:— I know that's a difficult question, and I'll tell you, when we get into the case, I'll tell you that your duty as a juror is to follow the law of North Carolina as I give it to you and not as you think it is and not as you might like it to be. So, what I'm saying is, it doesn't matter whether you like it or not like it. *The bottom line is, can you follow the law as I explain it to you and not as you might like it to be or think it ought to be?*

JUROR BROWNING:— *Yeah, I could follow it, if it's the law.*

THE COURT:— *And if I tell you that the law says that you're not to use, or consider in anyway, the defendant's silence against him in your deliberations, you could do that, is that what you're saying?*

JUROR BROWNING:— I still feel like it might stick in the back of my mind, even though I—you know, I'll try to discount it, but I—.

THE COURT:— *But you would make every effort to follow the law?*

JUROR BROWNING:— *Right.*

THE COURT:— *And you think you could follow the law?*

JUROR BROWNING:— *Yes.*

. . . .

THE COURT:— *Well, let's go back to the silence of the defendant one more time. You understand that he has that right under the law?*

JUROR BROWNING: Right, uh huh.

THE COURT:— And you—let me just ask you, *could you follow that law or could you not?*

JUROR BROWNING:— *Like I say, I could follow the law,* but I'm not going to—you know, it could stick in the back of my mind. I could—

(Emphasis added.) As evidenced by a portion of the voir dire omitted from the majority opinion, Browning, upon inquiry by the State, once again reiterated that he could follow the court's instructions regarding defendant's right to not testify. Later, Browning did give ambiguous and somewhat contradictory responses when questioned by defense counsel. However, it is clear from the voir dire transcript that Browning became confused by defense counsel's questions. Another portion of the voir dire transcript omitted from the majority opinion reveals that Browning asked defense counsel to repeat the following question asked of Browning:

> And so, there is some real question in your mind that that fact [that defendant may not testify] might impair your ability—substantially impair your ability to give him a completely fair and impartial trial in this matter, isn't that true?

Defense counsel then rephrased the question, asking the following confusing and compound question:

> The fact that your feelings about him not taking the witness stand and testifying could substantially impair your deciding the case. Despite your best efforts to try to follow the Judge's instructions, that would still be in your mind, and you would have some severe concerns that it might affect your ability to give him a fair trial, correct?

Although Browning responded affirmatively, it is clear that Browning did not understand defense counsel's question. When asked by the court what his response was to that question, Browning stated, "He asked me what I said, or, you know, whether it would stick, and I said yes, and *he asked me if I could follow the law, and I said yes,* so—." (Emphasis added.)

Contrary to the majority's conclusion, the denial of defendant's challenge for cause of prospective juror Browning was not error. After carefully examining and clarifying Browning's responses, the

trial judge determined that Browning could remain fair and impartial and render a verdict based on the evidence presented at defendant's trial. Having observed the demeanor of Browning and having heard the questions propounded to Browning, the trial judge was in a much better position than are we to determine the meaning of Browning's ambiguous responses and to assess Browning's ability to perform his duties as a juror. Like the prospective jurors challenged in *Cummings* and *McKinnon*, Browning repeatedly stated that he could follow the law as he was instructed by the court. From this, one can only conclude that the trial judge's decision to deny the challenge for cause was amply supported by reason and was therefore a proper exercise of the trial judge's discretion. It is only by discarding our well-established principle that challenges for cause are reviewable only for abuse of discretion that the majority is able to reach its conclusion that "[i]t was error for the court not to allow the challenge for cause to Juror Browning in this case."

In conclusion, I agree with the majority that the evidence of Donnell's pregnancy was relevant and admissible to show defendant's motive and intent to kill Donnell, and I therefore concur in that portion of the majority opinion. However, I conclude that the trial judge properly exercised his discretion in denying defendant's challenge for cause of prospective juror Browning, and I therefore dissent from the portion of the majority opinion that grants defendant a new trial on this basis. With respect to defendant's other assignments of error, I have conducted a thorough examination of the transcript of the proceedings, the record on appeal, the briefs of both parties, and the oral arguments. I find no error in defendant's trial warranting reversal of defendant's conviction. However, I conclude that defendant is entitled to a new sentencing hearing based on the trial court's erroneous instruction that the jury could not reject the sole aggravating circumstance submitted unless the jurors *unanimously* agreed that the evidence presented did not prove the existence of the aggravating circumstance.

Justice WHICHARD joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JONATHAN PARKS

No. 202A91

(Filed 25 June 1992)

1. **Constitutional Law § 252 (NCI4th)— right to court-appointed psychiatrist—sufficiency of showing**

The trial court erred in the denial of an indigent defendant's pretrial motion for appointment of a psychiatrist at state expense to assist in the preparation of his defense on numerous charges stemming from a three and one-half hour ordeal in which defendant held his half sister at gunpoint where defendant showed that he had previously been diagnosed as being schizophrenic; his current diagnosis by a psychiatrist at Dorothea Dix Hospital "suggested a longstanding and severe personality disorder," possibly accompanied with delusional beliefs; defendant's attorney informed the trial court that he would pursue an insanity defense if the court-appointed psychiatrist believed such a defense was viable; and the prosecutor clearly anticipated the possibility of an insanity defense in that she had already subpoenaed the Dix Hospital psychiatrist who examined defendant to determine his competency to stand trial.

Am Jur 2d, Criminal Law §§ 67, 70.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist. 85 ALR4th 19.

2. **Constitutional Law § 252 (NCI4th)— right to court-appointed psychiatrist—lack of problems between arrest and motion not dispositive**

While evidence of psychiatric problems during the interval between defendant's arrest and his motion for appointment of a psychiatrist may be considered by the trial court in determining whether to grant the motion, the lack of such evidence is not dispositive.

Am Jur 2d, Criminal Law §§ 67, 70.

3. **Constitutional Law § 252 (NCI4th)— motion for court-appointed psychiatrist—examination by Dix Hospital psychiatrist not sufficient**

The trial court erred in denying defendant's motion for a court-appointed psychiatrist on the ground that there was

no need to appoint a psychiatrist to assist defendant because a psychiatrist from Dorothea Dix Hospital had already examined defendant and his conclusions were somewhat favorable to defendant, since the only role of the Dix Hospital psychiatrist was to determine if defendant was competent to stand trial, and his involvement did not fulfill the state's constitutional obligation to defendant.

Am Jur 2d, Criminal Law §§ 67, 70.

APPEAL by defendant as of right pursuant to N.C.G.S. § 7A-30(1) from an unpublished opinion of the Court of Appeals, 102 N.C. App. 354, 402 S.E.2d 662 (1991), finding no error in defendant's convictions of felonious breaking and entering, second-degree kidnapping, larceny of a firearm, robbery with a dangerous weapon, and carrying a concealed weapon, before *Downs, J.*, at the 29 August 1988 Session of Superior Court, GRAHAM County. Heard in the Supreme Court 10 March 1992.

Lacy H. Thornburg, Attorney General, by Howard E. Hill, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellant.

FRYE, Justice.

The sole issue on appeal is whether the Court of Appeals erred by affirming the trial court's denial of defendant's pretrial motion for appointment of a psychiatrist at state expense to assist in the preparation and presentation of his defense. We hold it did and therefore reverse and remand for a new trial.

I.

Defendant Jonathan Parks was convicted by a Graham County jury on numerous charges stemming from a bizarre three and one-half hour ordeal in which he held his half sister at gunpoint, threatening her life, and rambling about such diverse topics as war leaders and childhood memories of their father. Following is an account based on testimony and evidence produced at defendant's trial and sentencing hearing.

Defendant, twenty-four years old at the time of trial, had a history of psychiatric problems. In fact, he had checked himself

into Angel Community Hospital for psychiatric treatment on 5 January 1988. On 15 January 1988, defendant, against the advice of his doctors, left the hospital and went to his half sister's home located about four miles from Robbinsville, North Carolina.

Martha Parks, defendant's half sister, was director of Graham County Social Services in January 1988. When she arrived home from work around 5 p.m. on 15 January, she noticed that two panes of glass had been broken out of her patio door. Once inside the house, she saw defendant coming down the hall with a shotgun pointed at her. Miss Parks testified that defendant's face was flushed, he was extremely agitated and he had a "strange smile on his face." Defendant asked Miss Parks if she knew what a mess a shotgun would make. He then proceeded to tell Miss Parks that she did not deserve to live, that she had deprived him of his "birthright," and that there were other people in Graham County who also deserved to die. Defendant then asked Miss Parks if she was ready to make peace with God. Defendant was "very, very angry—very, very—filled with anger," she testified.

After a period of time, Miss Parks told defendant that she was cold, noting that defendant had broken out two panes of glass in the patio door. Defendant said he would repair the door if Miss Parks had a piece of cardboard. Miss Parks gave defendant a cardboard box, and he placed it over the open space in the door.

Miss Parks testified that defendant told her at some point during the evening that he had found a gun and ammunition that she kept in the house and had loaded it. Soon thereafter, defendant said: "I'll tell you what. I'll give you a chance. I'll put your gun on the table and we'll draw." Defendant then tossed the gun on a table. Miss Parks said she kept her hands in her pocket and told defendant that she was not a violent person.

During the next few hours, defendant talked constantly. He talked about having just been released from the psychiatric unit in Franklin and how the psychiatrists were trying to make him crazy. He talked about war leaders, about his great admiration for Vietnamese and Israeli soldiers. "We had a rather intellectual discussion on war leaders," Miss Parks recalled during testimony. He talked about the death of his mother and about his childhood memories of their father.

Before leaving her house, defendant said he was taking $40 and Miss Parks' gun. Miss Parks handed defendant two twenty dollar bills out of her purse. Finally, around 8:30 p.m., defendant left the house. Miss Parks testified she "was still like numb. This was a period of three and a half hours."

Five minutes later, there was a knock at the door. When Miss Parks went to investigate, she heard defendant say, "I've dropped my shotgun in the snow. I need a flashlight." Miss Parks gave defendant a flashlight. Within a few minutes, defendant returned the flashlight, saying he had found the shotgun. Defendant left once more.

A short while later, while still debating whether to call the sheriff, Miss Parks heard a gunshot. Believing defendant was still on her property, Miss Parks called Graham County Sheriff Melvin Howell, who promptly came to her home. Sheriff Howell contacted Deputy Richard Lofty and told him to pick up defendant and bring him to jail. Deputy Lofty, who was already responding to a disturbance call of someone cursing and shooting on the highway, spotted defendant walking along Highway 129 about two miles from Miss Parks' house. Deputy Lofty testified that he pulled his patrol car next to defendant and told him to get inside. Defendant responded that he was a "freedom fighter" and would not get into the car. After being ordered into the patrol car a second time, defendant complied and was taken to jail.

Defendant, who acted as his own attorney at trial,[1] called only one witness, former Graham County Sheriff's Deputy Jerry Crisp. Defendant asked Deputy Crisp whether defendant's rights had been read to him when he was arrested. Deputy Crisp replied that defendant was advised of his rights prior to being interviewed, and that defendant declined to make a statement. Defendant requested that he be allowed to submit a written statement in lieu of giving oral testimony. Judge Downs sustained the State's objection, and defendant did not testify. Defendant also chose not to address the jury during closing arguments.

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1. After twice trying to "fire" his court-appointed attorney prior to trial, defendant requested at trial that he be allowed to represent himself. After questioning defendant and making findings of fact, Judge Downs allowed defendant to represent himself, with his appointed attorney acting as standby counsel.

Defendant was convicted of felonious breaking and entering, second-degree kidnapping, larceny of a firearm, robbery with a dangerous weapon, and carrying a concealed weapon. He was sentenced to twenty-six years in prison. The Court of Appeals, in an unpublished opinion, upheld defendant's convictions. *State v. Parks*, 102 N.C. App. 354, 402 S.E.2d 662 (1991). Defendant appealed as of right based on a substantial constitutional question. N.C.G.S. § 7A-30(1) (1989). Defendant also filed a petition for discretionary review pursuant to N.C.G.S. § 7A-31. The State filed a motion to dismiss the appeal. Defendant's petition for discretionary review and the State's motion to dismiss the appeal were denied by this Court. *State v. Parks*, 329 N.C. 503, 407 S.E.2d 548 (1991).

II.

Prior to trial, on 20 May 1988, defendant's appointed counsel, James L. Blomeley, Jr., filed a written Motion for Appointment of Psychiatrist. The motion stated that defendant was indigent, that he had been recently diagnosed at Dorothea Dix Hospital as having a "mixed personality disorder with schizoid, dependent, inadequate and avoidant features," and was found to be suffering from delusions. The motion also noted that defendant had been previously evaluated at Dorothea Dix Hospital in relation to another criminal case. In that earlier case, psychiatrists concluded that "his crime seems to be the result of mental impairment." Attorney Blomeley concluded that he was "of the opinion that a full psychiatric evaluation of Mr. Parks would be [of] great importance in fully preparing an adequate defense in this matter."

Judge Downs listened to oral arguments prior to ruling on defendant's motion. At the hearing, Judge Downs reviewed defendant's Dorothea Dix Discharge Summary prepared on 5 February 1988 by state psychiatrist Dr. Bob Rollins.[2] The Discharge Summary stated, in pertinent part:

> SOCIAL HISTORY: Mr. Parks was evaluated by the undersigned [Dr. Rollins] on somewhat similar charges in April, 1987. Diagnosis at that time was Mixed Personality Disorder. Mr. Parks has had past diagnoses of Schizophrenia and Dependent

2. Defendant had been ordered to undergo a psychiatric evaluation at Dorothea Dix Hospital to determine if he was competent to stand trial. The order was issued at the request of the *prosecutor* because defendant refused to talk with his attorney.

> Personality. Subsequent to that evaluation, Mr. Parks got an active sentence on those charges and was released from prison November 6, 1987. During that incarceration he took neuroleptic medication and it was the opinion of clinicians that there were [sic] some slight improvement in his overall mental state as [a] result of medication. . . .
>
> HOSPITAL COURSE: Mr. Parks refused neuroleptic medication. He indicated that he did not wish to be in the Forensic Unit and was relatively uncooperative with the evaluation process.
>
> OPINIONS: Mr. Parks has longstanding adjustment problems. At times these have been viewed as representing Schizophrenia, but the present clinical picture suggest[s] a longstanding and severe personality disorder. Mr. Parks does not have a mental disorder that would prevent him from being capable to stand trial or being responsible for his actions. Any lack of cooperation on his part is willful. . . .

Dr. Rollins also noted in the Discharge Summary that "[d]elusional beliefs may be present. . . . Intellectual functions are dull and judgment and insight are impaired." The principal diagnosis was mixed personality disorder with schizoid, dependent and avoidant features.

During the hearing on defendant's motion, attorney Blomeley informed Judge Downs that defendant's April 1987 evaluation mentioned in Dr. Rollins' current report "comes down much more heavily on the notion that the illness or whatever the problem is, is a substantial contributing factor and influences the way that he views the world . . . ." Mr. Blomeley argued that, "the nature of what is alleged [in this case] indicates a significant likelihood that there was a problem of this sort involved and I think that it calls for some kind of . . . evaluation toward that end."

Mr. Blomeley also informed Judge Downs that defendant "has been hospitalized at Angel Hospital and has had significant contact with Smokey Mountain Mental Health." In addition, Judge Downs was made aware that Dr. Rollins was "on call" for the prosecution, having been subpoenaed by assistant district attorney Christina B. Clapsaddle.

Judge Downs, attempting to get to the heart of the matter, said to Mr. Blomeley:

> Well, you are not asking for an examination, you want an appointment of an expert to assist you in the trial preparation and maybe be a witness on the merits of the sanity issue, prospective sanity issue.

To which Mr. Blomeley responded:

> That is quite true. Now of course, it is entirely possible that if someone was appointed they wouldn't do anything in the world from that point of view; they may agree with Dr. Rollins. But assuming their views came out like I suspected that they would, I would want that expert available for that purpose, your Honor.

Judge Downs, before denying defendant's motion, explained:

> Well, when you send someone to the State hospital and the State psychiatrist says that they are totally competent and there is no question about any sort of mental illness or any mental disease, and the other side needs their own psychiatrist or psychologist, usually that is the scenario from [sic] appointing one. But this one, this particular doctor [Dr. Rollins] agrees with you some. I don't know if he would be more help than anybody that you could get in addition to that.

III.

An indigent defendant's right to the assistance of an expert at state expense "is rooted in the Fourteenth Amendment's guarantee of fundamental fairness and the principle that an indigent defendant must be given a fair opportunity to present his defense." *State v. Tucker*, 329 N.C. 709, 718, 407 S.E.2d 805, 811 (1991). This Court recognized the constitutional implications of an indigent defendant's request for expert assistance nearly a decade before the United States Supreme Court decided *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), the landmark case which guaranteed indigent defendants the right to expert assistance under certain circumstances. *See State v. Tatum*, 291 N.C. 73, 81, 229 S.E.2d 562, 567 (1976). In *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988), we set out in detail the appropriate standard under *Ake* and our cases for determining whether an indigent defendant is entitled to a state-funded expert to assist in the preparation and presentation of his defense. We said:

In *Ake* the Supreme Court held that when a defendant makes a preliminary showing that his sanity will likely be a "significant factor at trial," the defendant is entitled, under the Constitution, to the assistance of a psychiatrist in preparation of his defense. *Id.* at 74, 84 L. Ed. 2d at 60. We have applied the holding in *Ake* to instances when an indigent defendant moved for the assistance of experts other than psychiatrists, holding that such experts need not be provided unless the defendant "makes a threshold showing of specific necessity for the assistance of the expert" requested. *State v. Penley*, 318 N.C. 30, 51, 347 S.E.2d 783, 795 (1986) (pathologist). *See State v. Hickey*, 317 N.C. 457, 468, 346 S.E.2d 646, 654 (1986) (investigator); *State v. Johnson*, 317 N.C. 193, 199, 344 S.E.2d 775, 779 (1986) (medical expert).

In order to make a threshold showing of specific need for the expert sought, the defendant must demonstrate that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his case. *State v. Johnson*, 317 N.C. at 198, 344 S.E.2d at 778. This test was developed originally under N.C.G.S. § 7A-450(b), which provides that the state must furnish an indigent defendant "with counsel and the other necessary expenses of representation." Subsequent to the Supreme Court's *Ake* decision, we reaffirmed this standard as that which the defendant must meet in order to assert a constitutional right to the assistance of experts. *State v. Johnson*, 317 N.C. at 199, 344 S.E.2d 775 [sic] at 778; *State v. Massey*, 316 N.C. 558, 566, 342 S.E.2d 811, 816 (1986). In determining whether the defendant has made the requisite showing of his particularized need for the requested expert, the court "should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made." *State v. Gambrell*, 318 N.C. 249, 256, 347 S.E.2d 390, 394 (1986).

Moore, 321 N.C. at 335-36, 364 S.E.2d at 652. In short, *Ake*'s "significant factor" test is satisfied when an indigent defendant makes a particularized showing that (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case. *See State v. Wilson*, 322 N.C. 117, 125, 367 S.E.2d 589, 594 (1988). The particularized showing demanded by our cases is a flexible

one and must be determined on a case-by-case basis, *Moore*, 321 N.C. at 344, 364 S.E.2d at 657; however, "[m]ere hope or suspicion that favorable evidence is available is not enough to require that such help be provided." *State v. Holden*, 321 N.C. 125, 136, 362 S.E.2d 513, 522 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988).

[1] Defendant argues that he met this burden, listing the following nine "facts and circumstances" which were before the trial court at the time his motion was denied:

(1) defendant anticipated relying on the insanity defense at trial;

(2) defendant had longstanding mental illness requiring professional attention;

(3) defendant was currently diagnosed by Dr. Rollins as suffering from severe personality disorder with schizoid, dependent and avoidant features;

(4) defendant had previously been diagnosed as suffering from schizophrenia;

(5) defendant may have delusional beliefs;

(6) defendant's attorney, based on his experience with defendant and knowledge of the facts, "suspected" that another mental health professional would find defendant even "sicker" than Dr. Rollins found him to be;

(7) defendant was administered neuroleptic medication[3] while incarcerated in 1987 and was offered neuroleptic medication while being evaluated at Dorothea Dix Hospital in February 1988;

(8) defendant was charged with "similar" offenses in 1987, and at that time Dr. Rollins apparently believed that the crime "seem[ed] to be the result of mental impairment";

(9) the prosecutor already had Dr. Rollins "on call" as a mental health expert for the State.

After reviewing the record, we agree with defendant that these facts and circumstances were before the trial court at the time defendant's motion was denied. We also agree with defendant

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3. A neuroleptic drug is one "that favorably modifies psychotic behavior." *Dorland's Illustrated Medical Dictionary* 887 (26th ed. 1985).

that, based upon these facts, the trial court erred by denying defendant's motion for a psychiatrist at state expense.

Although Dr. Rollins ultimately concluded in his Discharge Summary that defendant's mental disorder did not prevent him from "being responsible for his actions," we agree with defendant's trial attorney that another mental health expert may have come to a different conclusion. The question under *Ake*, as we said in *Gambrell*, "is not whether defendant has made a *prima facie* showing of legal insanity. The question is whether, under all the facts and circumstances known to the court at the time the motion for psychiatric assistance is made, defendant has demonstrated that his sanity when the offense was committed will likely be at trial a significant factor." *Gambrell*, 318 N.C. at 256, 347 S.E.2d at 394. (Footnote omitted). And, as previously noted, the *Ake* standard is satisfied when a defendant has made a particularized showing that he will either be deprived of a fair trial without the expert assistance, or that there is a reasonable likelihood that the expert assistance would materially assist him in the preparation of his case. *See Wilson*, 322 N.C. at 125, 367 S.E.2d at 594.

Based upon the aforementioned facts, we hold that defendant met his burden and was entitled to a psychiatrist at state expense. Not only had defendant been previously diagnosed as being schizophrenic, his current diagnosis "suggest[ed] a *longstanding and severe* personality disorder," possibly accompanied with delusional beliefs. (Emphasis added). Defendant's attorney informed the trial court that he would pursue an insanity defense if the court-appointed psychiatrist believed such a defense was viable. Finally, the prosecutor herself clearly anticipated the possibility of an insanity defense, having already subpoenaed Dr. Rollins. Certainly, the evidence before the trial court established more than a "mere hope or suspicion" that a court-appointed psychiatrist would be able to materially assist in the preparation and presentation of defendant's case.

[2] The State relies primarily on this Court's *Gambrell* decision for its argument that defendant did not make a particularized showing of his need for the assistance of a psychiatrist in preparing and presenting his defense. The State suggests that *Gambrell* stands for the proposition that in order to receive the assistance of a state-funded mental health expert a defendant must present evidence of psychiatric problems between the time of his arrest and the

time at which he requests the expert assistance. Because defendant in this case did not present such evidence, the State argues, the trial court was correct in denying his motion. The State misreads *Gambrell*. Although there was evidence in that case of psychiatric problems between the time of defendant's arrest and the time at which he requested the assistance of a psychiatrist, the Court stated in no uncertain terms that the critical time period was the *time of the offense*. "The issue," we said, "resolves itself into whether defendant made 'a preliminary showing that his sanity *at the time of the offense* [was] likely to be a significant factor at trial.' " *Gambrell*, 318 N.C. at 256, 347 S.E.2d at 394 (quoting *Ake v. Oklahoma*, 470 U.S. at 74, 84 L. Ed. 2d at 60) (emphasis added). Thus, while evidence of psychiatric problems during the interval between arrest and the motion for appointment of a psychiatrist may be considered by the trial court in determining whether to grant the motion, lack of such evidence is certainly not dispositive.

[3] Finally, we note that the reason stated by the trial court in denying defendant's motion for a court-appointed psychiatrist was rejected by this Court in *Moore* and *Gambrell*. The trial court said, in essence, that there was no need to appoint a psychiatrist to assist defendant because Dr. Rollins from Dorothea Dix Hospital had already examined defendant, and his conclusions were somewhat favorable to defendant. Therefore, the trial court said, another psychiatrist would be of little value. Putting aside whether Dr. Rollins' conclusions were in fact favorable to defendant, we said in *Gambrell* that what is required by *Ake* is that a "defendant be furnished with a competent psychiatrist for the purpose of not only examining defendant but also assisting defendant in evaluating, preparing, and presenting his defense in both the guilt and sentencing phases." *Gambrell*, 318 N.C. at 259, 347 S.E.2d at 395; *see also Moore*, 321 N.C. at 338-39, 364 S.E.2d at 653-54. Dr. Rollins was not appointed to assist defendant in this case. His only role was to determine if defendant was competent to stand trial. Dr. Rollins' involvement, therefore, "did not fulfill the state's constitutional obligation as *Ake* expounded it." *Gambrell*, 318 N.C. at 259, 347 S.E.2d at 395; *Moore*, 321 N.C. at 339, 364 S.E.2d at 654.

Because the trial court's error in denying defendant's motion for the appointment of a psychiatrist is of constitutional magnitude, and because we cannot say that the error was harmless beyond a reasonable doubt, N.C.G.S. § 15A-1443(b) (1988), defendant is en-

titled to a new trial. We therefore reverse the decision of the Court of Appeals and remand this case to that court for further remand to Superior Court, Graham County, for a new trial.

Reversed and remanded.

STATE OF NORTH CAROLINA v. CAESAR LAMONT JOHNSON

No. 530A89

(Filed 25 June 1992)

1. **Criminal Law § 1314 (NCI4th)— murder—sentencing—plea bargain—aggravating factors not submitted—no error**

A guilty plea in a murder prosecution was not set aside even though the plea called for the State to submit only two aggravating circumstances where a careful review of the evidence presented failed to disclose any evidence to support any aggravating circumstance other than the two submitted.

Am Jur 2d, Criminal Law §§ 481 et seq.

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

There was *McKoy* error in a capital sentencing hearing even though the jury was instructed that each juror could consider mitigating circumstances found by that juror but not the entire jury as to Issue Four, which asked whether the aggravating circumstance or circumstances were sufficiently substantial to call for imposition of the death penalty when considered with the mitigating circumstance or circumstances. The jurors were informed at three points in the written issues that they must be unanimous before considering any of the mitigating circumstances submitted and the court's oral instructions required unanimity on sixteen occasions.

Am Jur 2d, Criminal Law § 628.

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

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L. Ed. 2d 1001.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Allen (J.B., Jr.), J.*, at the 19 September 1989 Criminal Session of Superior Court, WAKE County. Defendant's motion to bypass the Court of Appeals as to his convictions of three counts of robbery with a dangerous weapon was allowed by this Court on 10 December 1991. Heard in the Supreme Court 15 April 1992.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, and Steven F. Bryant, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

Defendant was charged in proper bills of indictment with first-degree murder and three counts of robbery with a dangerous weapon. He pled guilty to all charges, and after a capital sentencing proceeding, the jury recommended a sentence of death. He was sentenced to death for the first-degree murder conviction and to three consecutive sentences of terms of years for the three robbery with a dangerous weapon convictions. We find no error in the guilt-innocence phase of defendant's trial in which he entered his pleas of guilty, or in the sentencing phase on the three robbery with a dangerous weapon convictions. For *McKoy* error in the capital sentencing proceeding on the murder conviction, we vacate the sentence of death and remand for a new capital sentencing proceeding.

Only a brief summary of the facts is necessary to address defendant's assignments of error. Allen Swanger was maintenance supervisor at Tara East Apartments in Raleigh. The decedent, Jerry Powell, a young man in his twenties, worked for Swanger as his maintenance assistant. On 21 September 1988, an armed robbery occurred in the office of the apartment complex, during which Swanger and others were robbed and Powell was killed.

The apartment complex office was on the first floor of one of the apartments, which was also used as a model apartment. The office consisted of a leasing office in the living room at the front of the apartment and the manager's office in the dining area in the back, with a short hallway connecting them. At 12:30 p.m., Swanger was at a closet in the hallway between the two offices, making a key for a tenant. He sensed someone's presence, looked up, and saw that defendant had entered and was standing about three feet away with a sawed-off shotgun. Swanger, thinking that defendant was playing a joke, asked him whether he was serious. Defendant "said something to the effect you bet your ass." Swanger turned around and raised his hands. When defendant realized someone was in the back office, which was obscured by the open closet door, he told Swanger to summon the individual (Pamela Varsel, the apartment leasing agent) out, and Swanger complied.

Defendant "said something to the effect that someone is going to die, . . . who wants to die," and Swanger replied that he did not want to die. Defendant demanded Swanger's money, and Swanger gave him all the money from his wallet, forty dollars. Defendant was about a foot away, pointing the shotgun at Swanger. Defendant demanded that Swanger lie prone on the floor, and Swanger lay on his stomach, facing down the hallway from the back office. Defendant demanded and received money of Pamela Varsel. Defendant again asked who wanted to die, and Swanger again said that he did not want to die. When defendant demanded the money that belonged to the apartment complex, both Swanger and Varsel replied that the complex received only checks. Defendant then lowered the shotgun to Swanger's head. Defendant pulled the phone off the desk in the back office, proceeded down the hallway, and ripped a phone off the wall in the front office. Defendant rifled through the desk drawers, then started down the hallway toward the back office.

Swanger heard the bolt of the shotgun click, indicating that a shotgun shell had been chambered. From where he was lying, Swanger saw Jerry Powell through a window, walking toward the office. Once Powell was inside the office, Swanger yelled for him not to move, and Powell stopped at the beginning of the hallway. Defendant turned and pointed the shotgun at Powell's chest. Defendant said nothing to Powell, and Powell made no offensive move toward defendant. Powell looked down at the gun, looked up and

said "oh shit," and then defendant fired. Defendant stepped over Powell's fallen body and moved toward the front door.

At that time, James Halstead, another maintenance employee, entered the office. Defendant pointed the gun at Halstead's face and told Halstead to give defendant everything he had. Halstead gave defendant his wallet with seventeen dollars in it and sat down in a chair as instructed by defendant. Defendant then left the apartment office, carrying the shotgun and a purple or lavender tote bag. Swanger and Halstead felt no pulse on Powell and, after repairing one of the phones, called for police and emergency personnel.

During all these events, Shirley Poole, the apartment resident manager, was hiding under her desk in the back office. She overheard all that went on, though she could not see anything. She testified that defendant's voice was low and articulate and that defendant seemed cool and rational.

Paramedics arrived but found no sign of life in Powell's body. A Raleigh police officer found one shotgun shell on the floor. The cause of death was rapid bleeding from the liver and aorta caused by the shotgun blast, which was fired on contact with or within one inch of Powell's chest.

Other witnesses for the State connected defendant to the shotgun used in the murder and robberies, the spent shell found at the scene to the type of shotgun defendant was known to have, and defendant's fingerprints to those found at the crime scene. Witnesses also testified as to defendant's attempted flight to New York and his confession to the shooting and robberies.

Defendant offered testimony by psychologist Dr. Brad Fisher to the effect that defendant was "very disturbed," "undersocialized," and "developmentally regressed" and that defendant had made several suicide attempts. A Central Prison staff psychiatrist testified that defendant was paranoid and suffered from a severe personality disorder. A number of other mental health professionals, including Dr. Morton Meltzer, also testified. Dr. Meltzer testified, *inter alia*, that defendant was not suicidal, psychotic, depressed, paranoid, or despondent; was of average intelligence, articulate, alert, optimistic, and oriented; and "was quite intelligent from the point of view of street savvy and prison savvy." However, according

to Dr. Meltzer, defendant did suffer from a personality disorder and borderline antisocial behavior.

Dr. Adam Adams, a psychotherapist, testified that defendant admitted to "beating the system" by acting crazy and had once acted crazy in prison in order to get transferred to the mental health unit. Adams also testified that personality disorders do not cause people to commit armed robbery or murder.

There was also much evidence tending to show that defendant had been mistreated, beaten, and neglected as a youth and that he had few positive socializing experiences and a limited education.

At the close of defendant's capital sentencing proceeding, the jury, having affirmatively found the two aggravating circumstances submitted and not having found any of the eleven mitigating circumstances submitted, recommended a sentence of death.

Defendant brings forward one assignment of error in the guilt-innocence phase of his trial and nine issues relating to the capital sentencing proceeding conducted in his case. Because we vacate defendant's capital sentence and remand his case for a new capital sentencing proceeding by reason of *McKoy* error, we do not address the remainder of defendant's assigned errors regarding the capital sentencing proceeding.

GUILT-INNOCENCE PHASE

[1] The record reveals that the court submitted two aggravating circumstances for the jury's consideration: (1) the murder was committed for pecuniary gain, and (2) the murder was part of a course of conduct in which defendant engaged that included the commission by the defendant of other crimes of violence against other persons. Relying on *State v. Case*, 330 N.C. 161, 410 S.E.2d 57 (1991), defendant first contends that this Court should set aside his guilty plea in the first-degree murder conviction because the plea bargain agreement was improper in that it called for the State to submit only two aggravating circumstances, when the prosecutor was aware of additional aggravating circumstances. We disagree.

Defendant argues that the evidence shows that after he took money from Allen Swanger and Pamela Varsel, he ordered them to lie down on the floor in the back room, and they complied. Defendant then searched for money in the front room, killed Jerry

Powell, and robbed James Halstead. Defendant contends that the confinement and restraint of Swanger and Varsel by forcing them to lie down and remain on the floor of the back room was not an inherent, inevitable part of the robberies committed against them. According to defendant, the evidence supported a finding that defendant was guilty of second-degree kidnapping of Swanger and Varsel. N.C.G.S. § 14-39(a)(1) (Supp. 1991). Therefore, says defendant, the evidence supported submission of the additional aggravating circumstance that defendant killed Jerry Powell while engaged in the commission of, or flight after, the separate crime of second-degree kidnapping. N.C.G.S. § 15A-2000(e)(5) (1988). Moreover, defendant argues that the evidence showed that he did not rob Powell and that he shot Powell because Powell kept walking toward him after being warned to stop. This evidence, argues defendant, would support the submission of the aggravating circumstance that, because he feared that Powell was trying to stop him, defendant killed Powell to avoid or prevent a lawful arrest. N.C.G.S. § 15A-2000(e)(4) (1988). While these are ingenious arguments, we conclude that neither of these purported additional aggravating circumstances is supported by the evidence, and thus they were not improperly withheld from the jury's consideration.

It is well settled that 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, *judgment vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18, *on remand*, 323 N.C. 622, 374 S.E.2d 277 (1988), *judgment vacated on other grounds*, 494 U.S. 1021, 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).

Defendant's reliance on *Case* is misplaced. In *Case*, the defendant pled guilty to felony murder. Pursuant to the plea bargain agreement, the prosecutor agreed to submit only one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel, although he was well aware that the evidence would

have supported another, and perhaps two, additional aggravating circumstances. Here, unlike *Case*, there was a genuine lack of evidence of any aggravating circumstances other than the two that were submitted to and found by the jury. Contrary to defendant's argument, all the evidence showed that the murder occurred during the course of the robbery and not during a kidnapping or to avoid apprehension.

The record reflects that both the prosecutor and the trial court were aware of the requirement of submitting for the jury's consideration every aggravating circumstance that is supported by the evidence. Prior to the trial court's acceptance of the plea bargain agreement, in which the State agreed to submit only the aggravating circumstances that the murder was for pecuniary gain and that the murder was part of a course of conduct that included violence against others, the prosecutor stated:

> I would like to put on the record that the State contends that these are the only aggravating circumstances for which there is evidence and I would like for these attorneys to put on the record, if they do in fact feel so, that they feel that this is in their client's best interest, this plea.

Some ten days later, after hearing the evidence and at the conclusion of the evidence presented at the sentencing hearing, the trial court announced that it would submit the two aggravating circumstances that were "based on the evidence" and "based on the plea arrangement." Our careful review of the transcript of the evidence presented fails to disclose any evidence to support any aggravating circumstance other than the two that were submitted.

CAPITAL SENTENCING PROCEEDING

[2] Defendant contends that the trial court's sentencing instructions with regard to proposed mitigating circumstances, considered in their totality, violate *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369, *on remand*, 327 N.C. 31, 394 S.E.2d 426 (1990). We agree. Prior to the charge conference, defendant submitted written requests that would have eliminated the unanimity instructions from the jury instructions as to Issues Two and Three. At the charge conference, defense counsel repeated the request. The trial court stated that it would instruct the jury that, with respect to Issue Four only, each juror could consider individual mitigating

circumstances found by that juror, though not found unanimously by the entire jury.

The following issues as to punishment were submitted to and answered by the jury:

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER: YES

. . . .

(1) Was this murder committed for pecuniary gain?

ANSWER: YES

(2) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against other persons?

ANSWER: YES

IF YOU ANSWERED ISSUE ONE "NO," SKIP ISSUES TWO, THREE, AND FOUR AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE "YES," PROCEED TO ISSUE TWO.

Issue Two:

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

ANSWER: NO

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, WRITE "YES" IF YOU UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE. WRITE "NO" IF YOU DO NOT UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE.

IF YOU WRITE "YES" IN ONE OR MORE OF THE SPACES AFTER THE FOLLOIWNG [SIC] MITIGATING CIRCUMSTANCES, WRITE "YES" IN

THE SPACE AFTER ISSUE TWO AS WELL. IF YOU WRITE "NO" IN ALL OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE "NO" IN THE SPACE AFTER ISSUE TWO.

(1) This murder was committed while the defendant was under the influence of mental or emotional disturbance.

ANSWER: No

(2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

ANSWER: No

(3A) Could the defendant never develop a father-son relationship with his father, and do you deem this to have mitigating value?

ANSWER: No

(3B) Was the defendant deprived of the family nurturing necessary to properly develop, and do you deem this to have mitigating value?

ANSWER: No

(3C) Did the defendant not resist arrest, and do you deem this to have mitigating value?

ANSWER: No

(3D) Did the defendant voluntarily confess to the crimes after being warned of his right to remain silent and without the assistance of counsel, and do you deem this to have mitigating value?

ANSWER: No

(3E) Did the defendant cooperate with the police upon his arrest, and do you deem this to have mitigating value?

ANSWER: No

(3F) Was the defendant's mental or emotional age significantly below that of persons of his chronological age, and do you deem this to have mitigating value?

ANSWER: No

(3G) Are psychiatric care and treatment available to the defendant in prison, and do you deem this to have mitigating value?

ANSWER: NO

(3H) Is the defendant remorseful for the crimes, and do you deem this to have mitigating value?

ANSWER: NO

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

ANSWER: NO

. . . .

Issue Four:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? When making this final balance in the fourth issue, each juror may consider any circumstance or circumstances in mitigation that the juror determined to exist by the preponderance of the evidence whether or not that circumstance is found to exist unanimously by the jury in Issue Two.

ANSWER: YES

At three points in the written issues, the jurors were informed that they must be unanimous before considering any of the mitigating circumstances submitted. Also, on some sixteen occasions, the court's oral instructions required unanimity as to the proposed mitigating circumstances. Although the oral and written instructions on the fourth issue were modified to allow a juror to consider a mitigating circumstance not found unanimously by the jury, the jury failed to find any of the eleven mitigating circumstances presented.

The State concedes that there was error in the instructions pursuant to the holding in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369. In addition, the State concedes that it is unable to distinguish this Court's decisions in *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426, *State v. Huff*, 328 N.C. 532, 402 S.E.2d

577 (1991), and *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991); the State also concedes that it cannot meet its burden of establishing that the error was harmless beyond a reasonable doubt. *See State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158 (1991).

To demonstrate the validity of the State's concession in this regard, we need only examine the evidence before the jury with regard to the statutory mitigating circumstance of mental or emotional disturbance at the time this murder was committed, N.C.G.S. § 15A-2000(f)(2) (1988), a circumstance presumed to have mitigating value if found. A reasonable juror could have found the existence of this mitigating circumstance. Dr. Brad Fisher testified that based on his evaluation of defendant, he was of the opinion that defendant is a "severely disturbed person." He and two other mental health experts, Dr. James A. Smith and Dr. Bob Rollins, testified, in effect, that defendant has a serious personality disorder that impairs his capacity to control his impulses, anger, and conduct and that leads to episodes of destructive conduct and paranoid distrust of other people. He also has a seizure disorder that aggravates his problems by lowering his already low self-esteem. These expert witnesses agreed that physical abuse by his alcoholic father during childhood contributed to defendant's mental disorder. Dr. Smith testified that defendant's emotional age is thirteen years old. Dr. Rollins testified that defendant's reasoning and overall intellectual ability are below average. Dr. Fisher agreed that defendant's intellectual ability is below average and that his emotional characteristics are adolescent in nature. Given this evidence, we conclude that the sentencing proceeding was constitutionally infirm in that we cannot conclude beyond a reasonable doubt that the erroneous instruction did not prevent one or more jurors from finding the mitigating circumstance to exist.

As other alleged errors in the sentencing phase are unlikely to recur at a new capital sentencing proceeding, and because defendant's preservation issues have previously been determined contrary to defendant's contention, we do not address them.

In summary, we find no error in the guilt-innocence phase of defendant's trial. We do, however, find prejudicial *McKoy* error in the capital sentencing proceeding. Therefore, we vacate the sentence of death and remand the case to the Superior Court, Wake County, for a new capital sentencing proceeding on the first-degree murder conviction. We find no error in defendant's convic-

tions and sentences as to the three robbery with a dangerous weapon counts.

No. 88CRS60405, first-degree murder: guilt phase: no error; sentencing phase: death sentence vacated, remanded for new capital sentencing proceeding.

No. 88CRS66404, robbery with a dangerous weapon: no error.

No. 88CRS66405, robbery with a dangerous weapon: no error.

No. 88CRS66406, robbery with a dangerous weapon: no error.

STATE OF NORTH CAROLINA v. JESSE LEE THOMAS

No. 218A90

(Filed 25 June 1992)

1. Constitutional Law § 283 (NCI4th)— murder—appearance without counsel—error

The trial court erred in a murder prosecution by allowing defendant to represent himself where defendant's repeated requests to appear as "leading attorney" at the head of "assistant" counsel did not amount to clear and unequivocal expressions of a desire to proceed *pro se*. Waiver of the right to counsel and election to proceed *pro se* must be expressed "clearly and unequivocally," and the trial court must then determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel. The inquiry required by N.C.G.S. § 15A-1242 satisfies constitutional requirements.

Am Jur 2d, Criminal Law § 768.

Accused's right to represent himself in state criminal proceeding—modern state cases. 98 ALR3d 13.

2. Criminal Law § 1337 (NCI4th) — murder — aggravating factor — previous conviction — criminal record form — not sufficiently reliable

In a murder prosecution reversed on other grounds, the evidence was not sufficient to support the sole aggravating circumstance of a previous conviction of a felony involving the use or threat of violence to the person where the evidence consisted solely of a form document issued by the Administrative Office of the Courts entitled "Criminal Record Check" which expressly disclaimed reliability and omitted substantial identification information. N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Criminal Law § 599; Evidence §§ 320 et seq.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Barefoot, J.*, at the 7 May 1990 Criminal Session of Superior Court, NASH County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 12 May 1992.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Justice.

Defendant was tried capitally for the first-degree murder of Debra Ann Proctor. Immediately before jury selection, the trial court conducted a hearing on the issue of defendant's representation by counsel and ruled that defendant could proceed *pro se*. After a trial in which defendant did not present evidence, the jury convicted him of first-degree murder on the theory of premeditation and deliberation. At the penalty phase, the State presented documentary evidence in support of the sole aggravating circumstance submitted to the jury — whether defendant previously had been convicted of a felony involving the use or threat of violence to the person. Defendant did not present evidence at the sentencing proceeding and made no jury argument. The only mitigating circumstance the trial court submitted to the jury was a residual one — any circumstance or circumstances which any of the jurors found by a preponderance of the evidence. Upon finding the sole

aggravating circumstance and rejecting the sole mitigating circumstance, the jury recommended a sentence of death.

On 13 July 1978, Debra Ann Proctor was killed in Rocky Mount. That morning, defendant was seated on the porch of a house on South Church Street. Several other people were gathered on the porch and in the front yard. One of those, Alphonso Taylor, testified that defendant's car was parked in front of the house. Around 11:00 a.m., Taylor saw the victim walk by the house in the direction of a grocery store at the corner of South Church and Home Streets. Taylor testified that as Proctor walked by, defendant rose from his place on the porch, went to his car, opened the trunk, withdrew a long-bladed knife about a foot long, placed the knife under his clothing, and began to walk in the direction of the store. Taylor and a few other men followed, intending to buy cigarettes at the store. Blondie Hinton, who was nine months pregnant, was also walking up South Church Street to the store with a friend.

As the people drew close to the store, the victim walked out. Defendant, without speaking, approached the victim from behind, grabbed her by the hair, pulled her head back, stabbed her, and cut her throat. Taylor and Hinton were within four feet of the victim when defendant assaulted her. Defendant ran past Hinton, said "I'll see y'all later," and warned Hinton not to say anything or he would "get" her. Defendant continued down the street to his car and drove off. Authorities immediately mounted a manhunt, but they did not apprehend defendant until over ten years later. He was then extradited from New York City to North Carolina.

[1] Defendant contends, and we agree, that the trial court committed reversible error by allowing defendant to represent himself. Even before the United States Supreme Court recognized the federal constitutional right to proceed *pro se* in *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975), it was well settled in North Carolina that a defendant "has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972); *see* N.C. Const. art. I, § 23. Before allowing a defendant to waive in-court representation by counsel, however, the trial court must insure that constitutional and statutory standards are satisfied.

First, waiver of the right to counsel and election to proceed *pro se* must be expressed "clearly and unequivocally." *State v.*

McGuire, 297 N.C. 69, 81, 254 S.E.2d 165, 173, *cert. denied*, 444 U.S. 943, 62 L. Ed. 2d 310 (1979); *see also State v. Treff*, 924 F.2d 975, 978 (10th Cir.), *cert. denied*, --- U.S. ---, 114 L. Ed. 2d 723 (1991). "Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention." *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981). By requiring an unequivocal election to proceed *pro se*, courts can avoid confusion and prevent gamesmanship by savvy defendants sowing the seeds for claims of ineffective assistance of counsel. *See Treff*, 924 F.2d at 979.

Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court, to satisfy constitutional standards, must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel. *Faretta*, 422 U.S. at 835, 45 L. Ed. 2d at 581-82; *State v. Bullock*, 316 N.C. 180, 185, 340 S.E.2d 106, 108 (1986). In order to determine whether the waiver meets that standard, the trial court must conduct a thorough inquiry. This Court has held that the inquiry required by N.C.G.S. § 15A-1242 satisfies constitutional requirements. *State v. Gerald*, 304 N.C. 511, 519, 284 S.E.2d 312, 317 (1981). That statute provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (1988).

The inquiry under N.C.G.S. § 15A-1242 is mandatory, and failure to conduct it is prejudicial error. *State v. Pruitt*, 322 N.C. 600, 603, 369 S.E.2d 590, 592 (1988). In conducting such inquiries, " '[p]erfunctory questioning is not sufficient.' " *United States ex rel. Axselle*

v. Redman, 624 F. Supp. 332, 337 (D. Del. 1985) (quoting *United States v. Welty*, 674 F.2d 185, 187 (3d Cir. 1982)). As a further safeguard, the trial court must obtain a written waiver of the right to counsel. N.C.G.S. § 7A-457 (1989).

Here, defendant did not "clearly and unequivocally" state a desire to proceed *in propria persona*. Instead, he was confused about the choices available to him. From the beginning, defendant sought to proceed to trial as lead counsel of a defense team which was to include licensed, appointed attorneys.

At defendant's first appearance on 7 April 1989, Judge Patterson in the District Court, Nash County, noted that "[d]efendant desires to proceed pro se *with assistance of counsel*." (Emphasis added.) In October 1989, Judge Allsbrook in the Superior Court, Nash County, heard motions in the case. On 3 October, defendant stated to the court, "I'm going pro se *but I do need an assistant* but I don't need Mr. Alford [defendant's appointed counsel]; he's incompetent." (Emphasis added.) Recognizing the contradictions inherent in defendant's request, Judge Allsbrook had defendant sworn and inquired whether he desired to waive counsel and proceed *pro se*. Judge Allsbrook attempted to explain to defendant that if he proceeded *pro se*, he would be held to the same rules of evidence and procedure as an attorney would be and that he would face the danger of procedural default. While defendant acknowledged that he would have to follow the normal rules and procedures, Judge Allsbrook was not successful in his efforts to help defendant understand that the trial court could not act as his advocate or counsel. Despite Judge Allsbrook's patient attempts, which span several pages of the transcript, it is apparent that defendant did not understand that the trial court could not step in, absent objection, to insure that defendant's constitutional rights were protected and proper procedures were followed. *See State v. Lashley*, 21 N.C. App. 83, 85, 203 S.E.2d 71, 72 (1974).

Toward the end of the lengthy colloquy, Judge Allsbrook asked defendant whether "[w]ith all of these things in mind do you now waive your right to the assistance of a lawyer and voluntarily and intelligently decide to represent yourself in this case?" Defendant responded that he wanted Alford to be removed, that he wanted the trial court to "appoint me an assistant to assist me on my behalf," and that he did not "want to be left standing alone in court with a[n] incompetent assistant attorney . . . . *I do need*

legal assistance but I am going pro se. *I would like for the Court to appoint me an assistant* that is going to help prepare me in this case and my legal defense . . . ." (Emphasis added.) When asked whether he waived his right to counsel, defendant responded, "I waive—I waive my rights for Mr. Terry Alford as my assistant."

Unable to determine to his satisfaction whether defendant sought to waive his right to counsel and proceed *pro se*, Judge Allsbrook ended proceedings for the day. On 4 October, he informed defendant that while he had the right to be represented by counsel or to represent himself, he did not "have a right to have the Court appoint an attorney and to appear as co-counsel [him]self." When defendant continued to respond that he wanted to proceed *pro se*, but with an assistant, although not Mr. Alford, Judge Allsbrook finally asked defendant to sign a written waiver of counsel. Defendant declined, but continued to insist that the trial court remove Alford and allow defendant to proceed *pro se* with a new assistant. Citing defendant's irrational conduct in refusing to cooperate with counsel, Judge Allsbrook committed defendant to Dorothea Dix Hospital for evaluation of his competency to stand trial and assist in his defense.

On 6 November 1989, defendant again appeared before Judge Allsbrook. The State then announced for the first time that it had evidence to support an aggravating circumstance and that, therefore, it would try defendant capitally. Defendant declared his readiness to be tried without counsel, but after he revealed through a long, rambling monologue that he did not understand why the State had changed the nature of the case, Judge Allsbrook denied defendant's motion to appear as co-counsel. He removed Alford as counsel and appointed Anthony Brown as main attorney in the capital case, with appointment of assistant counsel to follow.

On 5 February 1990, defendant first appeared before Judge Barefoot, who tried the case in Superior Court, Nash County. At that time Anthony Brown and Henry Fisher represented defendant. On 8 March 1990, Fisher and Brown asked permission to withdraw as counsel. Defendant, in another rambling statement, made a corresponding motion to dismiss his attorneys, arguing that the Sixth Amendment guaranteed him the right to "participate in my own trial as co-counsel" and that he needed assistance, but not from incompetent counsel. Judge Barefoot denied the motions to withdraw and the motions to remove counsel.

On 7 May 1990, defendant again appeared before Judge Barefoot, and again the issue of defendant's representation by counsel was raised. In yet another lengthy, incoherent statement, defendant referred to his lawyers as his assistants and to himself as "leading attorney." Rather than clarifying the options available to defendant, Judge Barefoot interpreted defendant's statements as a request to proceed *pro se*. After a short inquiry, he permitted defendant so to proceed.

A defendant has only two choices—"to appear *in propria persona* or, in the alternative, by counsel. There is no right to appear both *in propria persona* and by counsel." *State v. Parton*, 303 N.C. 55, 61, 277 S.E.2d 410, 415 (1981), *disavowed on other grounds by State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985); *accord State v. Williams*, 319 N.C. 73, 75, 352 S.E.2d 428, 430 (1987); *State v. Porter*, 303 N.C. 680, 688, 281 S.E.2d 377, 383 (1981); *State v. House*, 295 N.C. 189, 204, 244 S.E.2d 654, 662 (1978); *cf. Treff*, 924 F.2d at 979 n.6 ("a defendant has no right to hybrid representation and a request to proceed in such a manner is not deemed an election to proceed *pro se*"); *State v. Robinson*, 290 N.C. 56, 64-67, 224 S.E.2d 174, 178-80 (1976) (trial court's adoption of a "middle course" of legal representation prejudiced defendant). If a defendant chooses to proceed *pro se*, he cannot on appeal claim ineffective assistance of counsel. *E.g., Redman*, 624 F. Supp. at 336; *State v. Brincefield*, 43 N.C. App. 49, 52, 258 S.E.2d 81, 84, *disc. rev. denied*, 298 N.C. 807, 262 S.E.2d 2 (1979). A trial court faced with a *pro se* defendant may appoint standby counsel pursuant to N.C.G.S. § 15A-1243. The duties of standby counsel are limited by statute to assisting the defendant when called upon and to bringing "to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion." N.C.G.S. § 15A-1243 (1988). Because "standby counsel" is a creature of legislation, with duties limited by statute, defendant does not benefit from a typical lawyer-client relationship. He thus cannot claim ineffective assistance on the part of standby counsel beyond the limited scope of the duties assigned to such counsel by the statute or the defendant or voluntarily assumed by such counsel. *See Ali v. United States*, 581 A.2d 368, 379-80 (D.C. 1990), *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 213 (1991).

In *State v. McCrowre*, 312 N.C. 478, 322 S.E.2d 755 (1984), the defendant signed a written waiver of appointed counsel, with the intent to retain counsel. On the day of trial, however, defendant,

who had been released from jail only recently, had not yet succeeded in retaining counsel. The Court held that defendant's statement "I'm ready for trial and I would ask the Court to please get someone to assist me in this case" did not constitute an expression of the desire to proceed without an attorney. *Id.* at 480, 322 S.E.2d at 776-77; *see also McGuire*, 297 N.C. at 81-84, 254 S.E.2d at 173-74 (an indigent defendant who stated several times that he wanted different counsel, on another occasion stated that he wanted to represent himself, later apparently acquiesced in appointed counsel, and subsequently behaved at trial in a way that would have required termination of his self-representation, did not clearly and unequivocally assert his desire to conduct a *pro se* defense). We likewise hold that defendant's repeated requests here to appear as "leading attorney" at the head of "assistant" counsel did not amount to clear and unequivocal expressions of a desire to proceed *pro se*. The trial court thus erred in allowing him to do so.

For the reasons stated, the trial court erred in allowing defendant to represent himself. Defendant is therefore entitled to a new trial. *Pruitt*, 322 N.C. at 604, 369 S.E.2d at 593; *Dunlap*, 318 N.C. at 388-89, 348 S.E.2d at 804.

[2] Because the issue may arise upon retrial, we discuss one further assignment of error. Defendant contends he can receive only a life sentence because the State's evidence of the sole aggravating circumstance—that defendant "had been previously convicted of a felony involving the use or threat of violence to the person," N.C.G.S. § 15A-2000(e)(3) (1988)—was insufficient as a matter of law. That evidence consisted solely of a form document, issued by the Administrative Office of the Courts, entitled "Criminal Record Check." The form contains fields of information, some of which were filled in by the Edgecombe County Clerk of Superior Court. In the field near the top of the form for name and address, the clerk had typed "Jesse Lee Thomas." In the middle part of the form, the clerk had checked a box to show that "the following excerpts from the public record [were] indexed by the name given above." Placed immediately below that information is a "disclaimer," which reads: "The criminal records in this office are indexed solely by name and not by any other identifying characteristics. This office cannot guarantee that the records listed herein belong to the individual for whom such record is sought." Just below the disclaimer are the following fields of information, some of which were left blank and others of which contained typed answers:

1) File No.—left blank; 2) Race/Sex—"B/M"; 3) DOB—left blank; 4) Charge—"ROBBERY WITH FIREARM"; and 5) Date Disposed And Disposition—"True Bill: January 16, 1967[.] Judgment: February 23, 1967[.] Deft. pled Not Guilty. At end of evidence, deft. rendered plea of guilty to Common Law Robbery. 9-10 years State Prison."

Prior to the sentencing proceeding and prior to the State's reading to the jury of the information contained on the form, defendant objected that this document was insufficient to support the sole aggravating circumstance. Unlike the Fair Sentencing Act, which contains a similar aggravating factor, N.C.G.S. § 15A-1340.4(a)(1)(o) (1988), the capital sentencing statute does not specify methods of proving convictions. The Fair Sentencing Act specifies two methods of proof—"by stipulation of the parties" or "by the original or a certified copy of the court record of the prior conviction." N.C.G.S. § 15A-1340.4(e) (1988). This Court has held, in a series of cases, that N.C.G.S. § 15A-1340.4(e) is permissive, not mandatory, and that it does not preclude other methods of proof. *See, e.g., State v. Strickland*, 318 N.C. 653, 660, 351 S.E.2d 281, 284-85 (1987) (testimony of law enforcement officer's personal recollection of conviction); *State v. Carter*, 318 N.C. 487, 491, 349 S.E.2d 580, 582 (1986) (same); *State v. Graham*, 309 N.C. 587, 593, 308 S.E.2d 311, 315 (1983) (same and defendant's own testimony); *State v. Thompson*, 309 N.C. 421, 424, 307 S.E.2d 156, 159 (1983) (defendant's own testimony). However, a statement by a prosecuting attorney is not a sufficient method of proof. *State v. Canady*, 330 N.C. 398, 399, 410 S.E.2d 875, 876 (1991); *Thompson*, 309 N.C. at 424-25, 307 S.E.2d at 159.

In capital cases, this Court has recognized that the preferred method of proving a prior violent felony is introduction of the judgment itself. *See State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984); *State v. Silhan*, 302 N.C. 223, 272, 275 S.E.2d 450, 484 (1981). We have recognized other methods of proof, however. *See, e.g., State v. McDougall*, 308 N.C. 1, 20-23, 301 S.E.2d 308, 320-21 (stipulation by defendant and testimony by victims of prior felony), *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983); *State v. Hamlette*, 302 N.C. 490, 503, 276 S.E.2d 338, 346-47 (1981) (testimony of defendant at guilt phase); *State v. Goodman*, 298 N.C. 1, 23-24, 257 S.E.2d 569, 584 (1979) (stipulation by defendant at penalty phase).

The partially completed form the State offered here contains a disclaimer warning that the office of the clerk "cannot guarantee that the records listed herein belong to the individual for whom such record is sought." Neither the file number nor the date of birth of the named "Jesse Lee Thomas" is indicated. The form thus was not a sufficiently reliable method of proof to support the sole aggravating circumstance underlying a sentence of death.

At defendant's new capital trial, the State may again attempt to prove the prior violent felony aggravating circumstance. *See Canady*, 330 N.C. at 399, 410 S.E.2d at 876. It must do so, however, by a method that inspires confidence in the fact of the conviction and the identity of the defendant as the perpetrator of the offense. The form offered here expressly disclaims reliability and omits substantial identification information. It thus is inadequate to inspire the confidence in its reliability required in a capital case.

New trial.

STATE OF NORTH CAROLINA v. JOE CEPHUS JOHNSTON, JR. AND MORRIS WAYNE JOHNSON

No. 200A89

(Filed 25 June 1992)

1. Homicide § 244 (NCI4th)— first degree murder—sufficiency of evidence of premeditation and deliberation

The State presented sufficient evidence of premeditation and deliberation to support defendants' convictions for first degree murder where the evidence tended to show that, after defendants and their group shouted vulgarities at the victim and his two female friends in a nightclub parking lot, the victim attempted to leave; one of the members of defendants' group then hit the victim's vehicle with a cinderblock; the victim got out of the car and knocked this person to the pavement, but then let him up and told him that he and his friends wanted to be left alone; this person ran back to the others, and the group started after the victim; as they approached the car, the victim stood alone to meet them and to defend himself and his friends; the two defendants then made a con-

certed attack on the victim; during the fight, the first defendant pulled out a knife and stabbed the victim; the second defendant used a boxcutter during the course of the fight, which was found ten to fifteen feet from the victim's body; after the victim was rendered helpless, the first defendant continued to strike him; and the two defendants then fled the scene. This evidence was sufficient to support jury findings of an absence of provocation on the part of the victim, the dealing of lethal blows by the defendants after the victim had been rendered helpless, and a killing accomplished in a brutal manner through the infliction of numerous mortal wounds.

Am Jur 2d, Homicide §§ 52, 246, 316, 454.

2. **Constitutional Law § 344 (NCI4th) — capital trial — private bench conferences with prospective jurors — denial of right to presence at all trial stages**

The trial judge violated the right of defendants to be present at all stages of their capital trial when he conducted unrecorded private bench conferences with prospective jurors and excused numerous prospective jurors after these conferences. The State failed to show that the exclusion of these capital defendants from this stage of their trial was harmless beyond a reasonable doubt where the record does not reveal the substance of most of the trial court's private discussions with the prospective jurors who were excused. Art. I, § 23 of the N.C. Constitution.

Am Jur 2d, Criminal Law § 913.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case. 33 ALR4th 409.

3. **Homicide § 22 (NCI4th); Constitutional Law § 342 (NCI4th) — first degree murder — life sentence — capital trial — presence at all stages**

Where defendant was tried on an indictment charging him with the capital felony of first degree murder and, upon his conviction for that crime, was subjected to a capital sentencing proceeding, the fact that the jury recommended and the trial court entered a sentence of life imprisonment did not change the capital nature of that trial or his status as a capital defendant in that trial, and the unwaivable require-

ment of the presence of a capital defendant at every stage of his trial was thus applicable.

Am Jur 2d, Criminal Law §§ 901 et seq.

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

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from judgments entered by *Allsbrook, J.*, on 4 May 1989, in the Superior Court, HALIFAX County. Heard in the Supreme Court on 11 December 1991.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for the defendant-appellant Joe Cephus Johnston, Jr.

Harry H. Harkins, Jr., for the defendant-appellant Morris Wayne Johnson.

MITCHELL, Justice.

The defendants were each tried upon proper indictments charging them with murder. The jury found both defendants guilty of murder in the first degree. At the conclusion of a capital sentencing proceeding, the jury recommended a sentence of death for the defendant Joe Cephus Johnston, Jr., and a sentence of life imprisonment for the defendant Morris Wayne Johnson. The trial court imposed the respective sentences pursuant to the jury's recommendation.

The defendants contend that the trial court committed reversible error by denying each defendant's motion to dismiss the charge of first-degree murder against him based on the insufficiency of the evidence. We find this contention without merit. The defendants also contend that the trial court erred by communicating with the jurors in the absence of the defendant, counsel, or a court reporter. We agree and hold that the defendants are entitled to a new trial. Because the issues presented in the defendants' other assignments of error are not likely to arise upon retrial, we do not reach or discuss them.

The State's evidence tended to show that on 20 February 1988, Jackie Jamerson, Cindy Davis and the decedent, Ralph Bryant, decided to go to Ick's, a nightclub in Roanoke Rapids, North Carolina. All three were from the Capron, Virginia area and had known each other a long time. They had been to Ick's on many occasions.

At closing time, Jamerson, Davis and Bryant left Ick's and walked toward their car. A group of men, including the defendants, began making vulgar comments to the two women as they walked to their car. The women and Bryant ignored the comments and reached the car. Charlie Johnston, brother of the defendant Joe Cephus Johnston, brushed up against Bryant as Bryant was getting into the car. Charlie Johnston then proceeded to a hill behind a fence, where the defendants were located, and challenged Bryant to come across the fence and fight. At that point, Bryant took off his boots, walked to the other side of the fence and stood there saying nothing. When no one in the defendants' group approached him, Bryant went back to the car and began to drive away.

As Bryant and the women drove away, Cindy Davis saw a man from the defendants' group, Mike Smith, run toward them and throw a cinderblock which struck the car. Bryant then pulled the car into the parking lot of a bank, got out of the car and began chasing Smith. Bryant caught Smith from behind, grabbed his shirt and flipped him onto the pavement. Bryant told Smith he was not going to hurt him. Bryant said he merely wanted the group of men to leave Bryant and the two women alone.

After Bryant let Smith get up, the defendants and their group walked down the hill in Bryant's direction. Bryant left the two women and went to meet the defendants' group in the street. The defendant Joe Cephus Johnston said something to Bryant to which Bryant responded that he could take the men on one at a time, "but just leave the women alone." The defendant Morris Johnson swung his fist at Bryant. Bryant blocked that blow and hit Johnson. The defendant Joe Cephus Johnston then began hitting Bryant on the upper left side of his body. Both defendants then attacked Bryant at the same time. During the fight, Joe Cephus Johnston pulled a knife from his pocket and began stabbing Bryant. Morris Johnson also reached into his pocket, pulled something out, and began to strike Bryant in the back in a "slicing motion." During the course of the fight, Morris Johnson was stabbed in the stomach and the victim Bryant was fatally wounded.

Joe Cephus Johnston and several others left the scene to take Morris Johnson to the hospital. After leaving Johnson in the hospital, Johnston left North Carolina and went to a relative's house in Virginia. On the next day, Johnston telephoned a deputy sheriff in North Carolina and said that he was coming back to surrender to authorities. However, he was arrested in Virginia later and brought back to North Carolina for trial.

Phil Ricks, an emergency medical technician, testified that he arrived at Ick's about three or four minutes after receiving a call for medical assistance. The victim Bryant showed no sign of life when Ricks arrived. Ricks testified that he found a boxcutter about ten or fifteen feet from Bryant's body, which was identified at trial as belonging to Morris Johnson.

Dr. Robert Dorian, a pathologist, testified that he had done an autopsy on the body of the victim Ralph Bryant. In Dr. Dorian's opinion, Bryant's death resulted from multiple stab wounds. Dr. Dorian opined that Bryant had died within five to ten minutes after being stabbed, but he could not say for sure how long Bryant had remained conscious.

At the close of the State's evidence, and again at the close of all the evidence, the defendants moved to dismiss the charges of first-degree murder to the extent those charges were based on the theory of premeditation and deliberation. The motions were denied.

In one of their assignments of error, the defendants contend that the trial court erred in denying their motions to dismiss the first-degree murder charges against them because there was no substantial evidence to support a reasonable inference of premeditation and deliberation. On a defendant's motion for dismissal, the trial court must only determine 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. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). What constitutes substantial evidence is a question of law reserved for the court. *Id.* Substantial evidence is that which is existing and real, not just seeming or imaginary. *Id.; 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. *Olson*, 330 N.C. at 564, 411 S.E.2d at 595. 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 that may be drawn therefrom. *Id.* Contradictions or discrepancies in the evidence are for the jury's consideration and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

"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 that the act was thought out by the perpetrator beforehand for some period of time, however short, but no particular amount of time is necessary. *Id.* "Deliberation" means that the intent to kill was 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.* 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. *Olson*, 330 N.C. at 564, 411 S.E.2d at 595-96. A perpetrator may premeditate, deliberate, and intend to kill although prompted and to a large extent controlled by passion at the time. *Id.*

Premeditation and deliberation are mental processes not normally susceptible to proof by direct evidence. In a majority of cases, circumstantial evidence must be relied upon to prove them. Some of the circumstances from which premeditation and deliberation may be implied are (1) the absence of provocation on the part of the deceased, (2) the statements and/or conduct of the defendant before and after the killing, (3) any threats or declarations of the defendant before or 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. *Olson*, 330 N.C. at 565, 411 S.E.2d at 596; *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693 (1986).

[1] In the present case, substantial evidence was introduced which would support findings by the jury to the effect that after the defendants and their group shouted vulgarities at the victim and his two female friends, the victim Bryant attempted to leave. One

of the members of the defendants' group, Mike Smith, then hit the victim's vehicle with a cinderblock. Bryant got out of the car and knocked Smith to the pavement, but then let him up and merely told him that he and his friends wanted to be left alone. Smith ran back to the others, and at this point the defendants' group started after Bryant. As they approached the car, the victim stood alone to meet them and to defend himself and his friends. The two defendants then made a concerted attack on the victim. During the fight, Joe Johnston pulled out a knife and stabbed the victim. Morris Johnson used a boxcutter during the course of the fight, which was found ten to fifteen feet from the victim's body when the paramedics arrived. After the victim was rendered helpless, Johnston continued to strike him. The two defendants then fled the scene; Johnson went to the hospital and Johnston went to Virginia.

The foregoing substantial evidence also would have supported jury findings of an absence of provocation on the part of the deceased, the dealing of lethal blows by the defendants after the deceased had been rendered helpless, and a killing accomplished in a brutal manner through the infliction of numerous mortal wounds. From such findings, it could reasonably be inferred that the defendants killed the victim with premeditation and deliberation. Therefore, the trial court did not err in denying the defendants' motions to dismiss the charges of first-degree murder based upon premeditation and deliberation.

[2] In another assignment of error, the defendants contend that the trial court erred *inter alia* by holding unrecorded private bench discussions with prospective jurors. These unrecorded discussions resulted in the trial court excusing a number of the prospective jurors. After review of the jury selection process, we conclude that the trial court committed error in this regard.

When the first group of prospective jurors was brought into the courtroom during the defendants' capital trial, the trial court asked if any of them knew of any reasons why they were not qualified to sit or had extraordinary problems that might excuse them from service. The trial court announced that it would hear any such prospective jurors individually at the bench. The trial court then heard excuses at the bench. This procedure was repeated eight times. Numerous prospective jurors were excused after these private unrecorded bench conferences. Because these conferences

were not recorded, there is no indication in the record before us as to why most of these prospective jurors were excused.

The confrontation clause of Article I, Section 23 of the Constitution of North Carolina requires that a defendant be present at every stage of his capital trial. *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *vacated on other grounds*, --- U.S. ---, 111 L. Ed. 2d 777 (1990). The trial court's affirmative duty to insure the defendant's presence at every stage of a capital trial is not waiveable by the capital defendant. *Id.*

It is well settled that the process of selecting and impaneling the jury is a stage of any capital trial at which the defendant must be present. *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990). Therefore, it was error for the trial court to exclude the defendants, their counsel, and the court reporter from its private conversations with prospective jurors prior to excusing those jurors. The State thus bears the burden of showing that the exclusion of these capital defendants from that stage of their trial was harmless beyond a reasonable doubt. *Huff*, 325 N.C. at 33, 381 S.E.2d at 653.

In the present case, the record before us does not reveal the substance of most of the trial court's private discussions with the prospective jurors who were excused. Thus, we are unable to engage in the proper analysis to determine whether the errors were harmless beyond a reasonable doubt. Therefore, we must conclude that the State has failed to carry its burden, and we cannot say that the trial court's errors were harmless beyond a reasonable doubt.

[3] The State points out that since Morris Johnson received a sentence of life imprisonment, he will not be tried capitally at any new trial. The State contends, therefore, that the defendant Johnson should not be considered a "capital defendant" whose presence was required at all stages of his trial. We find this contention without merit.

Capital cases are cases in which there is a possibility, but never a certainty, that the death penalty will be imposed. *State v. Lachat*, 317 N.C. 73, 86, 343 S.E.2d 872, 879 (1986); *State v. Barbour*, 295 N.C. 66, 70, 243 S.E.2d 380, 383 (1978). A conviction of the offense charged in such cases must result in either a sentence of death or a sentence of life in prison. *Id.*; N.C.G.S. § 15A-2000 (1983). It has always been the law in this state that a defendant must be present at every stage of his capital trial. *E.g., Huff*,

325 N.C. at 31, 381 S.E.2d at 651 (review of the early cases on this rule); *State v. Moore*, 275 N.C. 198, 208, 166 S.E.2d 652, 659 (1969). In the present case, the defendant Morris Johnson was tried on an indictment charging him with the capital felony of first-degree murder and, upon his conviction for that crime, was subjected to a capital sentencing proceeding under G.S. § 15A-2000. The fact that the jury recommended and the trial court entered a sentence of life imprisonment did not change the capital nature of *that* trial or his status as a capital defendant in *that* trial. Therefore, the unwaiveable requirement of his presence applied at every stage of his trial and was violated by the trial court's private bench conferences with prospective jurors.

We are certain that the actions of the trial court were taken in good faith and resulted from its concern for the efficient selection and comfort of the jury. Nevertheless, we must vacate the verdicts and judgments entered against each of the defendants and remand their cases to the Superior Court, Halifax County, for a new trial.

New trial.

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

KATHLEEN WIENCEK-ADAMS[1] v. ROY REX ADAMS

No. 4A92

(Filed 25 June 1992)

Divorce and Separation § 161 (NCI4th)— equitable distribution—payment of marital debt—child support not paid—unequal distribution

The trial court did not abuse its discretion in an equitable distribution action by its unequal division of marital property where the parties agreed at the time of their separation that

1. Throughout the notice of appeal and briefs filed in this Court, the plaintiff's name was spelled "Wieneck-Adams." However, this is inconsistent with pleadings included in the record on appeal filed in the Court of Appeals. Investigation reveals the correct spelling to be the one as used in this opinion.

the husband would pay all back taxes and make all payments on the deed of trust on the marital home and that the wife would take custody of the children and not seek child support until the back taxes were paid; the agreement was not reduced to writing; the tax debt was paid by the husband without reimbursement from the wife and the wife supported the children without seeking child support payments from the husband; a dispute arose as to whether the agreement included a waiver by the wife of all of her interest in the marital home; and the trial court disregarded the agreement because it had not been committed to writing, found that the husband could not have made child support payments while he was paying back taxes, entered a child support order for the subsequent period, credited the husband with payment of the wife's share of the marital debt by awarding him sole ownership of the home, and awarded the wife two amounts not in dispute. Although the Court acknowledged the unfairness of the wife's supporting the children for three years without help from their father and without compensation in the ultimate resolution of the matter, the issue of child support is not encompassed in the equitable distribution issue and its consideration is explicitly barred by N.C.G.S. § 50-20(f) from inclusion in the determination of equitable distribution.

Am Jur 2d, Divorce and Separation §§ 915, 919, 930.

Justice WEBB dissenting.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 104 N.C. App. 621, 410 S.E.2d 525 (1991), affirming an order entered by *Hooks, J.*, on 24 September 1990 in District Court, BRUNSWICK County, which provided for the equitable distribution of the marital assets of the parties pursuant to N.C.G.S. § 50-20. Plaintiff-appellant's argument heard in the Supreme Court on 13 April 1992.

Shipman & Lea, by Jennifer L. Umbaugh, for plaintiff-appellant.

David P. Ford for defendant-appellee.

LAKE, Justice.

A Judgment of Absolute Divorce between the parties in this case was entered on 2 March 1989. The issues of custody, child

support and equitable distribution were tried before Judge D. Jack Hooks, Jr. at the 1 December 1989 and 17 July 1990 sessions of the District Court, Brunswick County. The plaintiff appealed the trial court's order to the Court of Appeals, which rendered its opinion on 3 December 1991, with Judge Cozort dissenting.

The parties were married on 2 August 1981 and were separated on 3 January 1987; they have three daughters. At trial it was stipulated that at the time of the parties' separation there were two major assets: the husband's pension plan at Carolina Power & Light Company, which the court divided equally by way of a Qualified Domestic Relations Order, and the marital home located at 106 21st Street, Long Beach, North Carolina. On the date of separation, the fair market value of the home was $31,000.00, with an outstanding mortgage balance of $19,605.29, resulting in a net equity of $11,394.71. The parties had a joint marital debt to the Internal Revenue Service of $23,042.70 in back taxes for 1981 and 1982.

The evidence indicates that at the time of their separation, the parties reached the following agreement: the husband would pay all the back taxes; the husband would assume and make payments on the deed of trust on the marital home; the wife would take custody of the children and seek no child support from the husband until such time as the back taxes were paid. The parties carried out this agreement to the extent that the husband did pay off all of the tax debt without seeking reimbursement from the wife and the wife supported the children without seeking child support payments from the husband. The parties did not reduce their agreement to writing.

Following the separation, a dispute arose between the parties as to whether the agreement included a waiver by the wife of all her interest in the marital home as part of the consideration for the husband's paying the taxes. That dispute led to this contested action for equitable distribution.

After hearing the evidence, the trial court found that the parties' oral agreement had included a provision for the wife to convey her interest in the marital home in exchange for the husband's agreement to pay the taxes. However, the trial court also found as a fact that the parties had not committed to writing the terms of their agreement, as required by N.C.G.S. § 22-2, and therefore disregarded the agreement in its treatment of the issues in this case.

The trial court held that the husband could not have afforded to make any child support payments from the time of the parties' separation on 3 January 1987 to 1 January 1990 because he was making payments on the back taxes during that period. The court entered a child support order for the period from 1 January 1990 to the date of its order, 24 September 1990, carefully calculating the amount owed under the Child Support Guidelines both prior to and after their modification as of 1 July 1990.

In dividing the marital home under N.C.G.S. § 50-20, the court credited the defendant with his payment of the wife's share of the joint marital debt in the amount of $11,521.35 by awarding him sole ownership of the marital home, which had a net equity of $11,394.71.

Ultimately, the court awarded the wife $2,450.00 and the husband $13,844.71. The wife's award represents a one-half interest in a motorcycle and the appreciation in the marital home, neither of which was in dispute. The difference between the spouses' awards represents the net equity in the marital home.

Because this case comes before us by way of an appeal based solely on a dissenting opinion in the Court of Appeals, our review is "limited to a consideration of those questions which are (1) specifically set out in the dissenting opinion as the basis for [the] dissent, (2) stated in the notice of appeal, and (3) properly presented in the . . . briefs . . . ." N.C. R. App. P. 16(b); *see also State v. Hooper*, 318 N.C. 680, 351 S.E.2d 286 (1987); *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 323 S.E.2d 23 (1984). Therefore, the sole issue before us is whether the trial court's facially unequal distribution of the marital property constitutes an abuse of discretion in light of its finding that the distribution in this case should be equal. This is the issue presented in the dissent, the notice of appeal and the briefs.

Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986); *Nix v. Nix*, 80 N.C. App. 110, 341 S.E.2d 116 (1986), or a finding that the trial judge failed to comply with the statute, N.C.G.S. § 50-20(c) (1987), will establish an abuse of discretion. *White v. White*, 312 N.C. 770, 324 S.E.2d

829. The record before us reflects that the trial judge's decision is supported by reason and complies with the statute.

The wife's argument against the equitability of the court's distribution of the assets is grounded in the court's refusal to consider her waiver of child support during the period from the parties' separation on 3 January 1987 until 1 January 1990 while the husband was making payments on the joint marital tax debt. The contention is that if the court had offset the child support which would have accumulated during that period (found by the court to be $24,570.00)[2] against the amount paid by the husband in back taxes ($23,042.70), the parties would have been essentially even, and the marital home should have been divided evenly between them. According to the wife, the court's failure to so consider her waiver, while awarding the husband the entire house, results in a double credit to the husband, who got both the benefit of not paying child support and the credit for paying the wife's share of the debt. Judge Cozort's dissent reflects these same arguments and concludes that "[this] kind of double credit is an abuse of discretion, and [the court] should not let it stand." *Wieneck-Adams v. Adams*, 104 N.C. App. at 624, 410 S.E.2d at 527.

As a preliminary matter, we affirm the trial court's view that the oral agreement between the parties had to be disregarded. *McLean v. McLean*, 88 N.C. App. 285, 363 S.E.2d 95 (1987), *aff'd*, 323 N.C. 543, 374 S.E.2d 376 (1988); *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E.2d 600 (1985); *see* N.C.G.S. § 50-20(d) (1987) (providing for *written, duly executed and acknowledged* agreements dividing marital property). However, the above cited authorities do not stand for the proposition that the court was barred from considering, apart from the agreement, the fact that the wife had paid for the children's support for three years without contribution from the husband. What precluded the court from such consideration is the plain meaning of subsection (f) of N.C.G.S. § 50-20, the equitable distribution statute, which states:

> (f) The court shall provide for an equitable distribution *without regard to alimony for either party or support of the children of both parties*. After the determination of an equitable

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2. The court found as a fact that the husband's child support obligation for the period in question would have been $682.50 per month. Multiplied by 36 months, this amounts to $24,570.00.

> distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

N.C.G.S. § 50-20(f) (1987) (emphasis added).

In *Bradley v. Bradley*, 78 N.C. App. 150, 336 S.E.2d 658 (1985), the Court of Appeals held that N.C.G.S. § 50-20(f) "indicates that amounts paid or received by a party as support for the children of the parties are not to be considered in determining an equitable distribution." 78 N.C. App. at 153, 336 S.E.2d at 660. We agree with the wife that *Bradley* is different from this case in that it focused on the prohibition on treating child support as income to either party. It is also true, as the wife argues, that our courts have not interpreted N.C.G.S. § 50-20(f) to exclude consideration of "an entire waiver of child support in exchange for satisfaction of a marital debt." However, the holding in *Bradley* reflects the broader prohibition of the statute: that past payments or receipts of child support are not to be taken into account in determining equitable distribution.

Alternatively, the wife contends that the trial court could and should have considered the wife's unrequited waiver of child support under the catchall section of the statute allowing consideration of "any other factor which the court finds to be just and proper." N.C.G.S. § 50-20(c)(12) (1987). We read the words "any other" to exclude those factors explicitly excluded from consideration by other provisions of N.C.G.S. § 50-20(f). Thus we conclude that in its determination of equitable distribution the trial court properly excluded the wife's payment of child support and her waiver of claims for the husband's payment of child support for the period from 3 January 1987 through 1 January 1990.

Finally, the wife maintains that the court was inconsistent, and therefore erroneous, in finding that an equal distribution of the assets would be equitable in this case, but awarding the parties unequal parts of the marital estate. We understand the meaning of the trial court's ruling that an equal distribution of the assets would be equitable in this case to be that the parties were equally deserving when judged by the criteria in N.C.G.S. § 50-20(c). For example, they were both well employed, neither had assets or liabilities that far exceeded those of the other, and the wife had no desire or need to reside with the children in the marital home. Further, the wife was entitled to one-half the equity in the home

($5,697.00) but she was relieved of $11,521.00 in debt in exchange for her interest in the home. In order to achieve the equal distribution, the judge made an allowance in the husband's favor to reflect his post-separation payments to remove a debt that would otherwise have been divided equally here as well. We do not find any inconsistency or error in the trial court's order. In light of the facts properly under consideration by the trial court, including the "relative parity in the incomes of the parties" and the husband's having "expended substantial sums to alleviate . . . the marital debt," we find no abuse of discretion in allowing the husband a credit for his payment of the parties' joint marital debt to the Internal Revenue Service. Even Ms. Wiencek-Adams concedes that if the child support waiver is not to be taken into consideration, the distribution by the trial court is equitable.

While we acknowledge the unfairness of the wife's supporting the children for three years without help from their father and without compensation in the ultimate resolution of the matter, unfortunately the issue of child support is not within the scope of our review in this case. It is not encompassed in the equitable distribution issue; indeed its consideration is explicitly barred by statute from inclusion in the determination of equitable distribution. Furthermore, the child support issue was not raised in any petition for further discretionary review under N.C.G.S. § 7A-31. Therefore, we cannot and do not reach it.

We conclude that there was no abuse of discretion by the trial court, and the decision of the Court of Appeals is

Affirmed.

Justice WEBB dissenting.

I dissent for the reasons stated by Judge Cozort in his dissenting opinion in the Court of Appeals.

STATE OF NORTH CAROLINA v. RALPH MAYNOR

No. 67A91

(Filed 25 June 1992)

1. Homicide § 588 (NCI4th)— necessity for killing—honest but unreasonable belief—imperfect self-defense instruction inappropriate

The trial court did not commit plain error in a first degree murder case by failing to instruct the jury that it should find that the defendant acted in the exercise of imperfect self-defense and was thus not guilty of first degree murder if it found that he killed the victims due to an honest but *unreasonable* belief that it was necessary to save himself from imminent death or great bodily harm. To the extent that some prior decisions of the Supreme Court and the Court of Appeals may tend to imply that a contrary holding is required, they are disapproved.

Am Jur 2d, Homicide §§ 152-155.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary—modern cases. 73 ALR4th 993.

2. Evidence and Witnesses § 282 (NCI4th)— character evidence—rebuttal by acts of misconduct—harmless error

Assuming arguendo that a witness's testimony about defendant's acts of violence toward her was not admissible to rebut defendant's evidence of his nonviolent character, the admission of such testimony in defendant's trial for three first degree murders was harmless beyond a reasonable doubt in light of defendant's testimony about prior acts of violence he had committed and the uncontradicted evidence at trial that defendant shot each of the three victims in the back two or more times, stopping at one point to reload his rifle before continuing to shoot them, that there was no gun in the victims' car before, during or after the killings, and that nothing had ever happened previously to cause defendant to believe that any of the victims wanted to harm him. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Appeal and Error §§ 517, 797 et seq.; Evidence §§ 339-343.

3. Criminal Law § 445 (NCI4th)— jury arguments—personal disbelief of witness—curative instruction

Impropriety in the prosecutors' closing arguments which expressed their personal disbelief in the testimony of a key defense witness was cured when the trial court sustained defendant's objections thereto and instructed the jury to disregard such arguments.

Am Jur 2d, Appeal and Error § 807.

Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases. 88 ALR4th 209.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment entered by *Ellis, J.*, on 11 December 1989 in the Superior Court, ROBESON County. Heard in the Supreme Court on 13 February 1992.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for the defendant-appellant Maynor.

MITCHELL, Justice.

The defendant was tried upon proper indictments charging him with three counts of murder. The jury found the defendant guilty of murder in the first degree on all three counts under the theory that the defendant committed the murders during the perpetration of a felony committed with a deadly weapon. At the conclusion of a capital sentencing proceeding, the jury recommended sentences of life imprisonment for the defendant. The trial court sentenced the defendant to three consecutive sentences of life imprisonment.

The defendant presents three arguments on appeal. First, he argues that the trial court's jury instructions on self-defense constituted plain error. Next, the defendant contends that the trial court erred in allowing the State to introduce evidence of specific acts of misconduct by the defendant to rebut the defendant's character evidence. Finally, the defendant argues that he was preju-

diced by the prosecutors' closing arguments which expressed their personal disbelief in the testimony of a key defense witness.

The State's evidence tended to show that on 9 October 1985, the defendant Ralph Maynor drove Theresa Oxendine and her seven-year-old daughter to Pembroke, North Carolina in Oxendine's 1979 Ford LTD. After they ran some errands in Pembroke, they left to go to the mobile home they lived in together three or four miles out of town. While driving, the defendant kept his loaded .44 caliber automatic rifle at his side.

As the defendant drove toward their mobile home, he told Oxendine that he believed they were being followed. She turned around and saw a car, but it was about a mile behind them. As they neared a bridge, the defendant repeated that they were being followed. Oxendine again looked around and saw a car, but it was doing nothing unusual. As they drove onto the bridge, the defendant "got ready to stop" and told Oxendine to get down. After they crossed the bridge, the defendant pulled the car to a stop on the right shoulder of the road. Oxendine told her daughter sitting in the back seat to get down. After she had done this, a small blue car swerved in front of them.

Oxendine saw the defendant get out of her car with the rifle, walk up to the blue car, and begin to shoot. At this point the blue car had gone down an embankment. The defendant began to shoot the people in the blue car. Oxendine heard six or seven shots. After the defendant had finished shooting, he got back into Oxendine's car and they left "in a hurry." Oxendine never saw any weapon other than the defendant's gun. Oxendine asked the defendant whether he had killed "all of them," and he replied that he had.

Dawn Maynor testified at trial that she was married to the defendant. Prior to their marriage, the defendant had told her about killing the three victims in question in this case. The defendant told her that the three victims had been trying to kill him, and he had shot them before they could shoot him. He told her that he had then gone up to the blue car and shot the last man who was still breathing.

State Bureau of Investigation Special Agent James Bowman testified that he and a detective had interviewed the defendant on 16 July 1988. The defendant made a statement to them, during

which he gave his version of the events of 9 October 1985. He said he had thought the blue car with three men was following him. He stated that the blue car had bumped the car he was driving in the rear going about fifty-five miles per hour. He said he had seen what he thought was a gun being passed from the back seat to the front. He had pulled over to the side of the road, and the car with the three men had then swerved in front of him and blocked him from leaving. He had seen the gun being passed around in the blue car and had gotten out and shot into the blue car before the men could shoot him. He stated that he had feared for his life and had believed that had he not shot the men they would have killed him and the others with him.

The defendant gave testimony at trial substantially the same as the statement he had made to law enforcement officers. The defendant also testified that prior to the events of 9 October 1985, nothing had ever happened with any of the three victims to cause him to believe that any of them wanted to hurt him.

The defendant also introduced the testimony of Crystal Oxendine, the daughter of Theresa Oxendine. At the time of the defendant's trial in 1989, Crystal was ten-years-old. Crystal testified that on 9 October 1985, she was in the back seat of the car the defendant was driving. She saw two people in a blue car, and what looked like a stick coming out of the car on the passenger side. She further stated that this "stick" resembled the top of a gun. On cross-examination, Crystal stated that she had heard about seven to thirteen shots and that the entire incident had lasted about thirty minutes. She testified that the car the defendant had been driving had not been bumped by the blue car.

[1] By his first assignment of error, the defendant contends that the trial court gave erroneous instructions on self-defense to the jury. Specifically, the defendant contends that the trial court erred by failing to instruct the jury that if it found that he killed the victims due to an honest but *unreasonable* belief it was necessary to do so to protect himself from death or great bodily harm, the jury must conclude that he was engaged in acts of imperfect self-defense when he killed the victims and was not guilty of first-degree murder. We note here that the defendant has properly notified this Court that he did not object to the trial court's instructions on this ground. Therefore, our review is for "plain error." *State v. Odom*, 307 N.C. 655, 300 S.E.2d 378 (1983). We conclude that

the trial court committed no such error when instructing the jury on the doctrine of self-defense as a defense to a charge of murder.

In the present case, the jury found the defendant guilty of first-degree murder solely on the basis of the felony murder theory. At the outset, we assume *arguendo* but do not decide that in certain circumstances, some instruction on the doctrine of self-defense as a defense to first-degree murder under the felony murder theory may be proper. *But see, e.g., Rainer v. State*, 342 So. 2d 1348 (Ala. Crim. App. 1977); *Gray v. State*, 463 P.2d 897 (Alaska 1970); *State v. Celaya*, 135 Ariz. 248, 660 P.2d 849 (1983); *People v. Loustunau*, 181 Cal. App. 3d 163, 226 Cal. Rptr. 216 (1986); *State v. Marks*, 226 Kan. 704, 602 P.2d 1344 (1979); *Layne v. State*, 542 So. 2d 237 (Miss. 1989); *People v. Guraj*, 105 Misc. 2d 176, 431 N.Y.S.2d 925 (N.Y. Sup. Ct. 1980); *Smith v. State*, 209 Tenn. 499, 354 S.W.2d 450 (1961); *Dank v. State*, 597 S.W.2d 358 (Tex. Crim. App. 1980); *State v. Dennison*, 115 Wash. 2d 609, 801 P.2d 193 (1990) (*en banc*).

It is well settled that perfect self-defense which excuses a killing altogether arises where, at the time of the killing:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) 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; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Bush, 307 N.C. 152, 158, 297 S.E.2d 563, 568 (1982) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)). Our cases also recognize an imperfect right of self-defense which arises when *both* elements (1) *and* (2) in the preceding quotation exist, but elements (3) and/or (4) do not exist. *State v. Mize*, 316 N.C. 48, 340 S.E.2d 439 (1986); *State v. Bush*, 307 N.C. 152, 297

S.E.2d 563 (1982); *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981); *State v. Potter*, 295 N.C. 126, 244 S.E.2d 397 (1978); *State v. Deck*, 285 N.C. 209, 203 S.E.2d 830 (1974); *State v. Ellerbe*, 223 N.C. 770, 28 S.E.2d 519 (1944). Elements (1) *and* (2) "are common to *both* perfect self-defense and imperfect self-defense." *State v. Wilson*, 304 N.C. 689, 695, 285 S.E.2d 804, 808 (1982) (emphasis added). Therefore, a trial court is not required to instruct on either perfect or imperfect self-defense with regard to a charge of murder "unless evidence was introduced tending to show that at the time of the killing, the defendant *reasonably* believed" it necessary to kill the victim in order to save himself from imminent death or great bodily harm. *State v. Norman*, 324 N.C. 253, 260, 378 S.E.2d 8, 12 (1989).

For the foregoing reasons, we hold that the trial court did not commit plain error in the present case by failing to instruct the jury that it should find that the defendant acted in the exercise of imperfect self-defense if it found that he killed the victims due to an honest but *unreasonable* belief that it was necessary to save himself from imminent death or great bodily harm. To the extent that some prior decisions of this Court and the Court of Appeals may tend to imply that a contrary holding is required, they are disapproved. *E.g.*, *State v. Jones*, 299 N.C. 103, 261 S.E.2d 1 (1980); *State v. Thomas*, 184 N.C. 757, 114 S.E. 834 (1922); *State v. Best*, 79 N.C. App. 734, 340 S.E.2d 524 (1986).

[2] In his next assignment of error, the defendant contends that the trial court committed reversible error by allowing the State to introduce evidence of specific acts of misconduct by the defendant to rebut his character evidence. In the case *sub judice*, the defendant called Clara Chavis who testified to his non-violent character. The trial court erroneously sustained the defendant's objection when the State attempted to cross-examine Chavis about her knowledge of several incidents of violence by the defendant against Theresa Oxendine. N.C.G.S. § 8C-1, Rule 405(a) (1991). Thereafter, the State called Oxendine to testify concerning the acts of violence by the defendant against her. The State indicated to the trial court on *voir dire* that it sought to introduce Oxendine's testimony in order to rebut Chavis' testimony as to the defendant's non-violent character. The trial court then permitted Oxendine to testify about specific instances of violence by the defendant, including one occasion on which the defendant threatened to blow up Oxendine's mother's house in order to get Oxendine to visit

him. Oxendine further testified that on another occasion the defendant shot at her inside their mobile home three or four times as she was lying on the bed.

Assuming *arguendo* that Oxendine's testimony was not admissible under N.C.G.S. § 8C-1, Rule 404(b) or any other of our Rules of Evidence, the defendant has not carried 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 trial." N.C.G.S. § 15A-1443(a) (1988). Uncontradicted evidence at trial was to the effect that the defendant shot each of the three victims in the back two or more times, stopping at one point to reload his rifle before continuing to shoot them. Numerous witnesses testified that before, during, and after the killings there was no gun in the victims' car. The defendant testified that nothing had ever happened previously to cause him to believe that any of the three victims wanted to harm him. Further, the defendant himself testified at trial to prior acts of violence he had committed, including cutting Oxendine's husband. We therefore conclude that if the admission of the testimony of Oxendine complained of here was error, it was harmless. *Id.* This assignment of error is overruled.

[3] By his next assignment of error the defendant contends that he was prejudiced by the prosecutors' repeated assertions during their closing arguments to the jury that they personally disbelieved a key defense witness. On four separate occasions during closing arguments, the prosecutors interjected their personal opinions concerning the testimony of Crystal Oxendine. After each such statement, the defendant's counsel entered an objection which was sustained by the trial court. After the second statement, the trial court also instructed the jury, "Don't consider what the D.A. believes." The defendant argues that despite the trial court's remedial actions, the prosecutors were still able to place their personal beliefs before the jury, thereby violating the defendant's right to due process of law. We do not agree. We have said that: "Where immediately upon a defendant's objection to an improper remark made by the prosecutor in his closing argument, the trial court instructs the jury to disregard the offending statement, the impropriety is cured." *E.g.*, *State v. Small*, 328 N.C. 175, 185, 400 S.E.2d 413, 418 (1991) (quoting *State v. Woods*, 307 N.C. 213, 222, 297 S.E.2d 574, 579 (1982)). In the present case, the trial court cured the impropriety of the prosecutors' arguments when it sustained the

defendant's objections and instructed the jury to disregard such arguments.

We hold that the defendant received a fair trial free from prejudicial error.

No error.

CLYDE P. MURPHEY v. GEORGIA PACIFIC CORPORATION

No. 189A90

(Filed 25 June 1992)

1. Negligence § 9 (NCI3d)— rewiring electric meter—ground fault interrupter disconnected—summary judgment for defendant—improper

The trial court erred by granting summary judgment for defendant in a negligence action brought by a plaintiff injured when an electric meter exploded while plaintiff was rewiring the meter, and defendant had previously disconnected a ground fault interrupter (GFI) which would have extinguished the arc and prevented injury to plaintiff. There was evidence that the National Electric Code requires an operational GFI for the type of switchgear to which the meter was connected, and a violation of the National Electric Code is negligence *per se*. There was also testimony from which a jury could find that, in disabling the protective equipment, defendant did something a reasonable man in similar circumstances would not do, and the jury could find that operating the switchgear after the GFI had been disconnected was negligence in that it created a hidden defect which was known by defendant and not known by plaintiff. While it is true that the disconnected GFI did not cause the explosion, the complaint is that the GFI did not shut down the power when the fault occurred, and the burden will be on the plaintiff to show how much of the injury was caused by the negligence of the defendant.

Am Jur 2d, Negligence §§ 716 et seq.

2. Negligence § 13.1 (NCI3d)— rewiring electric meter—explosion—contributory negligence

Summary judgment was incorrectly granted for defendant in an action brought by a plaintiff injured when the electric meter which he was rewiring exploded and defendant had claimed that contributory negligence barred recovery. The evidence does not show why plaintiff did not see that a ground fault interrupter (GFI) was disconnected and it could not be held as a matter of law that plaintiff should have seen the disconnection, and affidavits made it a jury issue as to whether it was contributory negligence for plaintiff to work in the cabinet without shutting down the power.

Am Jur 2d, Negligence §§ 842 et seq.

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

APPEAL as of right by plaintiff pursuant to N.C.G.S. § 7A-30(2) from a divided panel of the Court of Appeals, 98 N.C. App. 55, 389 S.E.2d 826 (1990), affirming a judgment entered by *Johnson (E. Lynn), J.*, on 10 November 1988 in Superior Court, COLUMBUS County. Heard in the Supreme Court 13 November 1990.

The plaintiff brought this action to recover for personal injuries he received while performing work as an electrician for the defendant. The defendant made a motion for summary judgment. The papers filed in support and in opposition to the motion showed that in the summer of 1981 the plaintiff was employed as a general job superintendent with Ireland Electric Company. Ireland Electric had installed an electric meter at a sawmill the defendant owned and operated near Whiteville, North Carolina.

The meter did not work properly. Ralph Ireland, the owner of Ireland, and the plaintiff went to the premises of the defendant on 8 August 1981 to rewire the meter. The meter was attached to the outside of a cabinet which contained electrical equipment known as a switchgear. There was a ground fault interrupter (GFI) as a part of the switchgear. The GFI is a piece of equipment that senses when there is an abnormal amount of power going from phase to ground and signals a circuit breaker to shut down the power. The GFI does not prevent a fault from occurring. When a fault occurs, the GFI will shut down the power. At some point

in 1977 or 1978, because of unexplained tripping in one of the defendant's wood processing facilities, the defendant disconnected the GFI.

When Mr. Ireland and the plaintiff entered the premises of the defendant, they were not told that the GFI had been disconnected. Mr. Ireland and the plaintiff opened the cabinet. The plaintiff said he saw the GFI but did not see that it had been disconnected. Mr. Ireland said that he saw the GFI had been disconnected but he did not tell the plaintiff. The plaintiff entered the cabinet and began rewiring the meter. There was an explosion which caused a flame which severely burned the plaintiff. The explosion was caused by a fault in a conductor which caused an arc. There was no evidence as to what caused the fault.

Edward W. McNally, an electrical engineer, testified by affidavit that had the GFI been operable it would have extinguished the arc and prevented injury to the plaintiff. An affidavit by James Samuel McKnight, an electrical engineer, was filed in which he said that if the GFI had been operable, it would have significantly decreased the magnitude of the fire by reducing approximately 95% or more of the electrical power which fed the fire. In such a case, said Mr. McKnight, it is highly unlikely that the plaintiff would have received the serious injuries which he received.

The superior court granted the defendant's motion for summary judgment. The Court of Appeals affirmed. The plaintiff appealed to this Court.

DeBank, McDaniel, Holbrook & Anderson, by William E. Anderson, for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey, for defendant appellee.

WEBB, Justice.

This case brings to the Court a question as to the propriety of allowing a motion for summary judgment in an action for personal injury based on negligence. When a defendant moves for summary judgment in such a case and supports the motion with a forecast of evidence that would entitle him to a directed verdict if the evidence were offered at trial, the defendant is entitled to have his motion allowed unless the plaintiff makes a forecast of evidence which shows there is a genuine issue for trial. *Moore*

v. Fieldcrest Mills, Inc., 296 N.C. 467, 251 S.E.2d 419 (1979); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). The question posed by this case is whether the evidence forecast by the papers filed by both parties shows as a matter of law that the defendant's negligence was not the proximate cause of the plaintiff's injury or that the plaintiff's contributory negligence was the proximate cause of the injury.

[1] The parties agree that the disconnected GFI did not cause the explosion. The explosion would have occurred even if the GFI had been connected. The plaintiff contends that if the GFI had been operational, it would have prevented the fire from spreading and, at the least, he would not have been burned as severely as he was burned. He contends that a reasonable man would not have disconnected the GFI and if he had done so, he would have warned the plaintiff of this hidden defect.

The first question we face is whether the papers filed show that the defendant was negligent in operating the switchgear after the GFI had been disconnected. Mr. McKnight said in his deposition that the National Electric Code requires that a GFI be operational for the type switchgear used in this case. We held in *Jenkins v. Electric Co.*, 254 N.C. 553, 119 S.E.2d 767 (1961), that a violation of the National Electric Code is negligence *per se*.

In addition to the evidence of the violation of the National Electric Code, there was other evidence of negligence contained in the affidavits of Mr. McNally and Mr. McKnight. Mr. McNally said,

> [S]afe and sound standard electrical system management practices require that the GFI be operational. Safe, prudent engineering practices would have indicated that the circuit be checked out for a fault condition and repaired, rather than having this protective device disabled. In my opinion this was a willful act without regard for the life and safety of persons who might be affected thereby.

Mr. McKnight said in his affidavit,

> A reasonable and prudent man in the same or similar circumstances would have undertaken a thorough shake-down of the system by his employees or an independent contractor such as Ireland Electric Company rather than simply disabling the protective equipment. A reasonable and prudent person in the same or similar circumstances would not have continued

to operate this particular equipment with the protective device disabled for a period of three years until the accident.

A jury could find from this testimony that the defendant did something a reasonable man in similar circumstances would not do and was negligent. *See Sparks v. Phipps*, 255 N.C. 657, 122 S.E.2d 496 (1961); *Electric Co. v. Dennis*, 255 N.C. 64, 120 S.E.2d 533 (1961).

This Court, in applying negligence principles to a case in which an independent contractor was performing work on the premises of an owner of property, held in *Deaton v. Elon College*, 226 N.C. 433, 38 S.E.2d 561 (1946), that the owner is under the same duty to the contractor as he is to third persons generally. If there is a hidden defect on the premises which is known to the owner and the contractor does not know and he ought not to know of the defect, the owner is under a duty to notify the contractor of the defect.

In this case, the jury could find that operating the switchgear after the GFI had been disconnected was negligence. It created a hidden defect which was known by the defendant and was not known by the plaintiff. The defendant violated its duty to the plaintiff by not notifying him of the defect.

We also hold that a jury could find that the negligence of the defendant was a proximate cause of the injury to the plaintiff. Proximate cause is a cause which in natural and continuous sequence produces a plaintiff's injuries and one from which a person of ordinary prudence could have reasonably foreseen that such a result or some similar injurious result was probable. *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E.2d 296 (1968). We believe the jury could find that the National Electric Code would not require the use of a GFI if it were not reasonably foreseeable it was dangerous not to use it. By the same token, Mr. McNally and Mr. McKnight would not have testified that it was not a good practice to operate the switchgear without the GFI being operational unless they believed there was danger of injury if the GFI was not operational. This is evidence from which a jury could find proximate cause.

The defendant argues that the failure to have the GFI in operation was not the proximate cause of the injury to the plaintiff because this failure did not cause the explosion. It is true that the disconnected GFI did not cause the explosion. The complaint

of the plaintiff is that when the fault occurred the GFI did not shut down the power. If the evidence is as forecast at the summary judgment hearing, there will not be an issue submitted as to negligence in causing the explosion. There will be an issue submitted as to whether the negligence of the defendant caused or enhanced the injury to plaintiff when the explosion occurred. The burden of proof will be on the plaintiff to show how much of the injury was caused by the negligence of the defendant. The jury should be able, from the evidence, to make this determination.

This case is not like *Warren v. Colombo*, 93 N.C. App. 92, 377 S.E.2d 249 (1989), a case in which Judge Orr said the Court of Appeals would for the first time recognize a claim for enhanced damages. In that case, there were several defendants. The allegations of the complaint showed that one of the defendants, the manufacturer of a school bus, did not do anything that caused the accident, but it had manufactured the bus in such a way that the injuries to the passengers were enhanced. In that case, there was a problem of apportioning damages among several defendants. In this case, the only injury to the plaintiff, as shown by the forecast of evidence, was caused by the defendant. The problem of apportioning damages among two or more defendants does not arise, although the defendant may not be liable for all the plaintiff's injuries. This eliminates several problems which might arise in an action for enhanced injuries. *See* Kerry A. Shad, *Warren v. Colombo: North Carolina Recognizes Claim for Enhanced Injury*, 68 N.C. L. Rev. 1330 (1990).

[2] The defendant contends the papers filed show as a matter of law that the contributory negligence of the plaintiff bars his recovery. The defendant first says that the depositions and affidavits of several witnesses show that they saw that the GFI had been disconnected when they looked into the cabinet shortly before the explosion. The defendant argues that all the evidence shows the plaintiff should have seen the disconnection when he inspected the workplace and he was negligent in not doing so. Whether the plaintiff should have seen that the GFI was disconnected is a question for the jury. The evidence does not show why the plaintiff did not see that the GFI was disconnected and we cannot hold as a matter of law that the plaintiff should have seen the disconnection. *See Diamond v. Service Stores*, 211 N.C. 632, 191 S.E. 358 (1937), in which this Court held that it was a jury question as to whether a welder who was injured in an ex-

plosion should have seen the can of flammable liquid which exploded.

The defendant also contends the plaintiff was contributorily negligent for working in the cabinet without cutting off the power to the switchgear. In his affidavit, Mr. McNally said:

> It is not a violation of any established safety rule or practice, and was not in August, 1981, to perform the procedure which Mr. Murphey was performing and [sic] the location where he was performing it. The procedure being followed was neither an unsafe procedure nor at an unsafe location, so long as the electrician maintains adequate clearance which he did, and is careful not to come into contact with energized equipment, which he did not.

James McKnight said in his affidavit:

> It is not, and was not in 1981, a violation of any safety code to stand in that location, or to work on either the low-voltage potential transformers or the non-energized (neutral) buss while the switch gear as a whole is energized. A reasonable and prudent person under the same or similar circumstances would do so, and have done so, provided he had adequate clearance, adequate distance from the hot area, and avoided harmful contact with a hot component.

The affidavits of Mr. McNally and Mr. McKnight make it a jury issue as to whether it was contributory negligence for the plaintiff to work in the cabinet without shutting down the power.

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

Reversed and remanded.

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

GENEVA THOMPSON AND DAVID O. THOMPSON v. WILLIAM H. NEWMAN, INDIVIDUALLY, AND WILLIAM H. NEWMAN, M.D., P.A.

No. 69A91

(Filed 25 June 1992)

Rules of Civil Procedure § 41.1 (NCI3d) — voluntary dismissal — oral notice — subsequent written notice — beginning of one-year savings provision

When a trial court instructs, or expressly permits, a plaintiff who has given oral notice of voluntary dismissal pursuant to Rule 41(a)(1) to file written notice to the same effect at a later date during the session of court at which oral notice was given, and plaintiff files written notice accordingly, the one-year provision for refiling provided by the rule begins to run when written notice is filed.

Am Jur 2d, Limitation of Actions § 316.

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

APPEAL by defendant 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. 385, 399 S.E.2d 407 (1991), reversing an order rendered at the 26 January 1990 session of Superior Court, CUMBERLAND County, *Johnson, J.*, presiding, and remanding for findings. Heard in the Supreme Court 10 September 1991.

Bailey & Dixon, by David M. Britt, Gary S. Parsons, and Mary Elizabeth Clarke, for plaintiff-appellants.

Anderson, Broadfoot, Johnson, Pittman & Lawrence, by Hal W. Broadfoot, for defendant-appellant.

EXUM, Chief Justice.

This is a civil action seeking compensatory and punitive damages for alleged medical malpractice based on allegations that defendant physician performed a mastectomy on plaintiff Geneva Thompson without obtaining her informed consent. Plaintiffs voluntarily dismissed their original action and subsequently filed this one. The issue before us is whether the present action was filed within the one-year savings provision of Rule 41(a)(1) of the North Carolina

Rules of Civil Procedure. Resolution of this issue depends upon whether the year began to run when plaintiffs gave oral notice of voluntary dismissal in open court or when plaintiffs, two days later, pursuant to the trial court's instructions, and during the same session of court, filed written notice of dismissal.

The operative facts are these:

Plaintiffs originally filed their complaint on 2 June 1983. The case was apparently on the trial calendar for the 7 November 1988 session of Superior Court, Cumberland County, Battle, J., presiding. On Monday, 7 November 1988, during the hearing of pretrial motions in this and other cases, the trial court granted motions to quash plaintiffs' subpoena for certain witnesses and thereafter denied plaintiffs' motion to continue the case to a future date. Plaintiffs' counsel said, "We're prepared to go forward." The trial court then proceeded to other cases on the calendar, presumably to hear pretrial motions and determine trial readiness. Later that day, the following colloquy occurred between the trial court, counsel for plaintiffs, Mr. David, and counsel for defendant, Mr. Broadfoot:

COURT: All right. Mr. David, are you ready?

MR. DAVID: Yes, your Honor. Your Honor, with regrets, rather than continue to consume the time of the Court and other people involved and the jury, with Geneva Thompson being in court with me now, we're going to take a voluntary dismissal without prejudice.

COURT: All right. Thank you. I'm sure it's a difficult matter, *and you may file that later in the week.*

MR. DAVID: Thank you, your Honor.

COURT: Thank you very much.

MR. BROADFOOT: May we be excused, your Honor?

COURT: Yes, sir.

(Emphasis added.) When this colloquy occurred, according to an affidavit of plaintiff Geneva Thompson received at the hearing on summary judgment, the case had not been called for trial and neither the jury nor defendant was in court. Minutes entered by the trial court clerk on 7 November 1988 state in pertinent part:

"Vol. dismissal w/o prejudice to be filed by atty. H. David."[1] Plaintiffs filed written notice of voluntary dismissal two days later, on 9 November 1988, during the 7 November 1988 session of court. On 8 November 1989, plaintiffs, represented by different counsel, filed this action.

Defendant moved to dismiss the current suit under Rule 12(b)(6) on grounds the claim was barred by the three-year statute of limitations, N.C.G.S. § 1-15(c),[2] and by Rule 41(a)(1), because plaintiffs had refiled the action more than one year after their voluntary dismissal. The trial court treated defendant's motion as one for summary judgment. It received evidence tending to show the facts as recited. Concluding the one-year provision for refiling under Rule 41(a)(1) began to run when plaintiffs gave their oral notice, the trial court allowed summary judgment for defendant.

The Court of Appeals' majority, in an opinion by Orr, J., considered plaintiffs' oral notice to be "ambiguous in the absence of additional evidence as to whether plaintiffs' attorney was in fact taking a voluntary dismissal or was merely expressing an intention to do so." It reversed the summary judgment and remanded for findings of fact. Judge Greene dissented on the basis that plaintiffs' oral notice was not ambiguous and was "effective immediately" to start the time for refiling, and he voted to affirm the trial court's summary judgment order.

We conclude the time for refiling began to run when plaintiffs' written notice was filed and the trial court erred in granting summary judgment for defendant on the ground specified. The Court of Appeals' decision insofar as it reversed the trial court's summary judgment for defendant is, for the reasons given herein, affirmed. Its decision remanding the matter for findings is vacated.

While we agree with the Court of Appeals' majority that the trial court erred in entering summary judgment for defendant,

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1. These minutes are not in the original record on appeal. Plaintiffs have submitted to this Court a motion under Rule 9(b) of the North Carolina Rules of Appellate Procedure to amend the record to include the minutes, and that motion is unopposed. We, therefore, grant the motion and consider the minutes as part of the record.

2. According to plaintiffs' complaint, the mastectomy was performed on 12 October 1980. Thus, but for the one-year savings provision of Rule 41(a)(1), plaintiffs' claim would be barred by the statute of limitations.

we do so for a different reason. We hold that when a trial court instructs, or expressly permits, a plaintiff who has given oral notice of voluntary dismissal pursuant to Rule 41(a)(1) to file written notice to the same effect at a later date during the session of court at which oral notice was given, and plaintiff files written notice accordingly, the one-year period for refiling provided by the rule begins to run when written notice is filed.

Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, with some exceptions not here material, provides that civil actions may be voluntarily dismissed by the plaintiff "without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action." The rule then provides that "a new action based on the same claim may be commenced within one year after such dismissal."

By its terms Rule 41(a)(1) requires voluntary dismissals either by notice of plaintiff or by stipulation of parties to be filed. The rule clearly contemplates a written notice or stipulation. In order, however, to prevent abuse of the one-year savings provision and because, before the new rules took effect, giving oral notice was common practice, we have held: "when a case has proceeded to trial and both parties are present in court the one-year period in which a plaintiff is allowed to reinstate a suit from a Rule 41(a)[(1)] voluntary dismissal begins to run from the time of oral notice of voluntary dismissal in open court." *Danielson v. Cummings*, 300 N.C. 175, 180, 265 S.E.2d 161, 164 (1980).

In *Danielson* plaintiff did not file written notice of the dismissal until nearly three months after his oral notice, made after the jury had been impaneled but before plaintiff rested. Plaintiff attempted to refile his action within a year of the written notice but more than a year after oral notice. Noting that "[n]o written motion of voluntary dismissal was filed at that session of court," 300 N.C. at 176, 265 S.E.2d at 161, the Court explained why the written notice in that case filed months later could not be allowed to extend the one-year provision of 41(a)(1):

> [T]o allow plaintiff's interpretation of Rule 41(a)[(1)] would allow all plaintiffs to extend indefinitely the time for reinstituting a lawsuit by delaying filing written notice of dismissal

with the clerk of court once they have given notice in open court.

Id. at 180, 265 S.E.2d at 164.

In *Cassidy v. Cheek*, 308 N.C. 670, 303 S.E.2d 792 (1983), the trial court was considering a pretrial motion to dismiss plaintiff's case for failure to comply with a discovery order when, before the trial court ruled on the motion, counsel for plaintiff gave the court oral notice of voluntary dismissal. Plaintiff filed written notice of voluntary dismissal two days later. Within a year of the oral notice of dismissal plaintiff refiled the complaint, and defendant moved to dismiss, contending that the first action had been dismissed with prejudice. The trial court dismissed the suit. This Court reversed the dismissal, holding that the suit was voluntarily dismissed and noting that Rule 41(a)(1) allowed plaintiff one year to refile the action. *Id.* at 673, 303 S.E.2d at 794. We noted, without having to decide the question, that although written notice of voluntary dismissal was filed, the effective date of dismissal for purposes of the one-year savings provision was the day plaintiff gave oral notice in open court. *Id.* at 674, 303 S.E.2d at 795.

The circumstances now before us distinguish this case from *Danielson* and *Cassidy*. The trial court here expressly permitted, if not instructed, plaintiffs' counsel to file written notice "later in the week," during the same session of court in which oral notice was given. Plaintiffs' counsel filed written notice according to the permission given. There was no danger plaintiff could have extended indefinitely the one-year savings provision of the rule.

The intent of the legislature in adopting the Rules of Civil Procedure was " 'to achieve simplicity, speed, and financial economy in litigation. Liberality is the canon of construction.' " *Lemons v. Old Hickory Council*, 322 N.C. 271, 275, 367 S.E.2d 655, 657 (quoting James E. Sizemore, *General Scope and Philosophy of the New Rules*, 5 Wake Forest Intra. L. Rev. 1, 6 (1968)), *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988). The actions of the plaintiffs and the trial court here vis-a-vis plaintiffs' voluntary dismissal served these purposes. Plaintiffs' counsel, apparently believing pursuit of the action was futile without certain witnesses, gave oral notice to the trial court, before trial commenced, that the case would be voluntarily dismissed. The trial court, cognizant of the rule's filing requirement, authorized plaintiffs' counsel to file the notice later during the session and did not begin trial of the case. Plain-

tiffs' counsel complied. The trial court was thereby saved the time of beginning and continuing the trial until the notice could be prepared and filed, and the rule's filing requirement was duly satisfied.

Under the foregoing circumstances the written notice provides a more certain, more easily ascertainable, and less impeachable event from which to measure the beginning of the one-year period for refiling. We, therefore, see no reason to depart from the language of the rule; and we conclude the one-year period for refiling provided by the rule began when the written notice was filed.

The Court of Appeals' decision reversing summary judgment for defendant is, therefore, affirmed. Its decision remanding the case for findings of fact is vacated.

Affirmed in part; vacated in part.

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

IN THE MATTER OF DEBBIE SUE ELLER

IN THE MATTER OF NIKKI LOVE GREER

No. 403A91

(Filed 25 June 1992)

Schools § 15 (NCI3d)— disruptive behavior—juvenile adjudication

The trial court erred by not dismissing two juvenile petitions where respondent Greer was observed by her teacher making a move toward another student, which caused the student to dodge; the teacher finished giving the assignment at the chalkboard, then approached Greer and asked to see what was in Greer's hand; Greer willingly and without delay gave the teacher a carpenter's nail; the same teacher subsequently had both respondents in a basic mathematics class with a total of four students; respondents struck the metal shroud of the radiator more than two or three times, producing a rattling, metallic noise that caused the other students to look

to that location and the teacher to interrupt her lecture for 15 to 20 seconds each time the noise was made; the teacher did not intervene other than to stare silently at respondents and then resume her teaching; the teacher reported the incident to the school principal the next day or the following afternoon; and the principal filed juvenile petitions alleging delinquency. The radiator and nail incidents do not qualify as "disorderly conduct" as defined in N.C.G.S. § 14-288.4(a)(6) as a matter of law.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 54.

APPEAL as of right by respondent-juveniles 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. 625, 406 S.E.2d 299 (1991), affirming the orders of *Helms (Michael E.), J.*, entered 13 July 1990, in District Court, ASHE County. Petition for discretionary review by respondent-juvenile Greer as to an additional issue was allowed by the Court on 6 November 1991. Heard in the Supreme Court 11 May 1992.

Lacy H. Thornburg, Attorney General, by Jane Rankin Thompson, Assistant Attorney General, for the State, petitioner-appellee.

John T. Kilby for respondent-juvenile-appellant Eller.

Grier J. Hurley for respondent-juvenile-appellant Greer.

MEYER, Justice.

The facts pertinent to this case are as follows. On 30 January 1990, respondent Greer, then a fourteen-year-old student at Beaver Creek High School in Ashe County, attended a basic special education reading class taught by Ms. Linda Weant. There were five students in the classroom. While giving a reading assignment at the chalkboard, Ms. Weant observed Greer make a move toward another student, who was separated by an aisle, causing the other student to dodge Greer's move. Ms. Weant finished relating the assignment, then approached Greer and asked Greer to show her what was in Greer's hand. Greer thereupon "willingly" and without delay gave Ms. Weant a carpenter's nail. The other students observed the discussion and resumed their work when so requested by Ms. Weant.

On 1 March 1990, Ms. Weant taught her basic mathematics class to four students, including respondents Greer and Eller (fifteen years old at the time). Greer and Eller were seated at the rear of the classroom with their peers in a single, horizontal row parallel to the rear wall situated near a radiator located on the wall. During the course of their instruction time, Greer and Eller "more than two or three times" struck the metal shroud of the radiator. Ms. Weant testified that she saw each child strike the radiator at least once. Each time contact was made, a rattling, metallic noise was produced that caused the other students to look "toward where the sound was coming from" and caused Ms. Weant to interrupt her lecture for fifteen to twenty seconds each time the noise was made. Ms. Weant did not intervene other than to silently stare at Greer and Eller for fifteen to twenty seconds and then resume her teaching. She did, however, report the incident to the school principal that afternoon or the following day.

Pamela Scott, principal of Beaver Creek High School, subsequently filed juvenile petitions alleging delinquency on the part of respondents. Respondent Greer was alleged to be a delinquent under N.C.G.S. § 7A-517(12) in that the radiator and the nail incidents amounted to disorderly conduct within an educational institution in violation of N.C.G.S. § 14-288.4(a)(6). Respondent Eller was alleged to be a delinquent by virtue of her engaging in the radiator incident alone. Judge Michael Helms, after making findings of fact, concluded that each student violated N.C.G.S. § 14-288.4(a)(6) in that each intentionally caused an actual and material interference with the program of educational instruction at Beaver Creek High School, and therefore adjudicated the girls as delinquents. Pursuant to this determination, the court placed each juvenile on probation and mandated numerous special conditions.

The Court of Appeals agreed with the lower court, finding as a matter of law that respondents' behavior with regard to the radiator amounted to disorderly conduct in violation of N.C.G.S. § 14-288.4(a)(6). *In re Eller*, 103 N.C. App. 625, 406 S.E.2d 299 (1991). Judge Parker dissented from this holding, stating that "striking the radiator in a class of four students does not as a matter of law constitute a substantial disruption of the teaching program." *Id.* at 628, 406 S.E.2d at 300 (Parker, J., dissenting). By virtue of Judge Parker's dissent, respondents appeal as of right the issue of whether the radiator incident constituted disorderly conduct. Subsequent to the holding of the Court of Appeals, counsel for

respondent Greer filed a petition for discretionary review to determine whether the radiator incident, in tandem with the nail incident, the latter discussed by neither the majority nor the dissenting opinion of the Court of Appeals, satisfy the requirements of N.C.G.S. § 14-288.4(a)(6). We granted this petition and now decide whether the nail and radiator incidents, as alleged in the juvenile petitions, constitute disorderly conduct such as to justify the lower court's conclusion of law.

Respondent-appellants contend that the disruptive behaviors in which they engaged do not qualify as a "substantial interference" and that therefore the trial court erred in not dismissing the charge that they violated N.C.G.S. § 14-288.4(a)(6) and in adjudicating them as delinquents.

In order to withstand a motion to dismiss charges contained in a juvenile petition, there must exist substantial evidence of each of the material elements of the offense alleged. *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985). The evidence must be considered in the light most favorable to the State, and the State is entitled to receive every reasonable inference of fact that may be drawn from the evidence. *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980).

N.C.G.S. § 14-288.4(a)(6) provides as follows:

> (a) Disorderly conduct is a public disturbance intentionally caused by any person who:
>
> . . . .
>
> (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

N.C.G.S. § 14-288.4(a)(6) (Supp. 1991).

On a previous occasion, in which we construed former N.C.G.S. § 14-273, which made it a misdemeanor to "interrupt or disturb any public . . . school," we stated that the words in the statute "are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise." *State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967) (construing

N.C.G.S. § 14-273 (1953) (repealed 1971)), *cert. denied*, 390 U.S. 1028, 20 L. Ed. 2d 285 (1968). Proceeding to interpret the terms of the statute, we stated:

> When the words "interrupt" and "disturb" are used in conjunction with the word "school," they mean to a person of ordinary intelligence a *substantial interference* with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled.

Id. at 154, 158 S.E.2d at 42 (emphasis added).[1]

Under the instant facts, we conclude that the State has not produced substantial evidence that the respondents' behavior consituted a "substantial interference."[2] Indeed, the radiator incident merited no intervention by the instructor other than glares of disapproval for a total of at most sixty seconds during the entire class period. The relative insignificance of the behavior is borne out by the fact that Ms. Weant waited as long as until the following day to report respondents' activities to the school principal. Similarly, the nail incident was not so egregious an interference as to amount to a "substantial interference." Greer "willingly" and without delay forfeited the nail, and the other students were only modestly interrupted from their work and returned to their lesson upon being instructed to do so by their teacher. Thus, we conclude that the evidence, seen in a light most favorable to the State, is insufficient to establish each of the material elements of the offense charged. *In re Bass*, 77 N.C. App. at 115, 334 S.E.2d at 782.

Support for our decision today is found in previous decisions by this Court as well as by the Court of Appeals. In *State v.*

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1. We do not consider it significant that the word "interrupt" does not appear in N.C.G.S. § 14-288.4(a)(6). Its absence does not alter the interpretation provided by the *Wiggins* Court and therefore has no bearing on our decision here.

2. In its brief, the State argues that the instant juvenile petitions were the product of a "pattern of misconduct" engaged in by the respondents and that we should consider this "pattern" in reviewing the delinquency adjudications. In particular, respondent Greer had thirty-four referrals for misconduct in one year and twice had been assigned to the in-school suspension program. Respondent Eller was also subjected to numerous disciplinary measures, including demerits, lunch detention, time-out periods, and two in-school suspensions. This notwithstanding, we are constrained to interpret the law within the context of the particular offenses alleged in the juvenile petitions themselves, to wit, the radiator and nail incidents. If the legislature had intended us to do otherwise, it could have expressly so provided.

Wiggins, 272 N.C. 147, 158 S.E.2d 37, we considered a case wherein the student-defendants demonstrated with signs pertaining to civil rights in front of a high school during school hours. The other students " 'look[ed] and carr[ied] on' to such an extent that the principal had 'to get them back to their classes and walk up and down the hall . . . trying to keep them in class.' " *Id.* at 151, 158 S.E.2d at 40. Once inside the classrooms, the students peered out the windows to observe the demonstration; a number of students went so far as to travel to other classrooms to gain a better vantage point. *Id.* This Court upheld the lower court's conviction for disorderly conduct. Even more disruptive behavior was considered by the Court of Appeals in *State v. Midgett*, 8 N.C. App. 230, 174 S.E.2d 124 (1970). There, twelve students entered the school secretary's office and informed the secretary that " 'they were going to interrupt [school] that day.' " *Id.* at 233, 174 S.E.2d at 126. The secretary then left her office to summon help, and upon her return, she was unable to reenter her office. The defendants occupied the principal's office, moved office furniture in front of the doors and windows, and rang school bells at unofficial times. As a result, school was dismissed early due to the commotion. *Id.* The Court of Appeals upheld the disorderly conduct convictions for substantial interference with the school in violation of the former N.C.G.S. § 14-273.

Respondents' behavior in the instant case pales in comparison to that encountered in *Wiggins* and *Midgett*, and those cases are readily distinguishable on their facts. Here, even the small classes in which respondents perpetrated their disruptive behavior were not interrupted for any appreciable length of time or in any significant way, and the students' actions merited only relatively mild intervention by their teacher. We agree with respondents that while egregious behavior such as that condemned in *Wiggins* and *Midgett* is not required to violate N.C.G.S. § 14-288.4(a)(6), more than that present in the case at bar is necessary. *See also In re Grubb*, 103 N.C. App. 452, 405 S.E.2d 797 (1991) (finding that talking in class does not constitute a violation of N.C.G.S. § 14-288.4(a)(6)).

Further support for our view is found in the location of N.C.G.S. § 14-288.4(a)(6) within our statute books. The statute is contained within Article 36A, which concerns "Riots and Civil Disorders." This article was passed by our legislature in 1969, amid the concern generated by the tumult of the dramatic civil unrest gripping the nation and this state in the late 1960s. *See Sykes v. Clayton*, 274

N.C. 398, 163 S.E.2d 775 (1968) (title of act may be considered in aid of statutory construction to show intent of legislature); *Ellis v. Greene*, 191 N.C. 761, 133 S.E. 395 (1926) (same). To say that the relatively modest disturbances caused by respondents in the instant case do not rise to this level of concern would appear self-evident.

Because we conclude as a matter of law that the radiator and nail incidents do not qualify as "disorderly conduct" as defined in N.C.G.S. § 14-288.4(a)(6) and that therefore the trial court erred in not dismissing the juvenile petitions, we need not consider respondents' second claimed error that the trial court erred in adjudicating the respondents delinquent when the evidence was insufficient to prove the State's case beyond a reasonable doubt.

For the foregoing reasons, we reverse the opinion of the Court of Appeals and remand this case to the District Court, Ashe County, for proceedings not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. STEVIE LOCKLEAR

No. 19A92

(Filed 25 June 1992)

Criminal Law § 693 (NCI4th)— jury's request for instructions— written form of oral instructions—handwritten strike-outs and additions—no plain error

The trial court did not commit plain error when, in response to a jury request for a written list of the criteria for first degree murder, second degree murder and voluntary manslaughter, and without objection from defendant, the court submitted the typewritten form of its earlier oral charge, with certain paragraphs, sentences and phrases marked through with ink, and with several handwritten additions in the margins, where the court attempted to prevent the possibility of confusion from the strike-outs and handwritten additions by orally instructing the jury regarding use of the instructions and encouraging the jury to make the court aware if it had any

difficulty understanding the modified instructions; the court offered to bring the jury back into the courtroom and repeat the oral instructions; and defendant failed to show that the jury actually was confused by the written instructions or that it gave undue emphasis to matters prejudicial to him.

Am Jur 2d, Appeal and Error § 813; Trial §§ 1154, 1155.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Ellis, J.*, at the 10 September 1991 Criminal Session of Superior Court, ROBESON County, upon a jury verdict finding defendant guilty of one count of first-degree murder. Heard in the Supreme Court 14 May 1992.

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

John Wishart Campbell for defendant appellant.

WHICHARD, Justice.

This case presents the question of whether the trial court committed reversible error in delivering to the jury in writing during its deliberations certain portions of the court's instructions. We conclude that it did not and that defendant received a fair trial, free from prejudicial error.

A detailed presentation of the facts is unnecessary to an understanding of the legal issue involved. In summary, the State presented evidence tending to prove the following: At about nine p.m. on 12 March 1991, the victim, Jadell Locklear, drove with Johnny Troublefield and Curtis Locklear to defendant's residence. Defendant's girlfriend, Karen Williams, came out onto the trailer porch and saw Jadell Locklear back the car out of the yard, pull it onto the road, and sit in the car with the engine running. Williams yelled at him to drive back into the yard, but Jadell Locklear responded by saying that if defendant were a man, he would come out into the yard. Defendant then came out of the front door of the trailer, yelled something, and shot his .38 caliber pistol into the car, killing Jadell Locklear with a single bullet through the neck.

Defendant presented evidence tending to show that Jadell Locklear had had previous violent altercations with defendant's sister, who was the mother of Jadell's daughter. Wilbert Locklear

testified that he was visiting defendant on the night of the killing and he heard Jadell tell defendant that he should "come out and talk to him like a man before he cut loose." Defendant testified that he had previously told Jadell to stay away from his house. When defendant heard Jadell say that he should come outside like a man, defendant went to the bedroom and got his pistol. Defendant shot towards the road, hoping to scare Jadell away. Defendant testified that he had known Jadell to shoot several people and he was afraid Jadell and his friends were going to shoot him.

Defendant was indicted on one count of first-degree murder. In a noncapital trial, the State proceeded solely on the basis of the felony murder rule, with the underlying felony being shooting into an occupied vehicle. The jury returned a guilty verdict, and the trial court sentenced defendant to life imprisonment.

Defendant brings forward one assignment of error. He contends that the trial court erred when, in response to a jury request for a written list of the criteria for first- and second-degree murder and voluntary manslaughter, the court submitted the written form of its earlier oral charge. Defendant acknowledges that he made no objection to the written instructions, and he does not contest their accuracy. He argues, instead, that the trial court erred because the instructions were illegible, unintelligible, and confusing. The instructions were typewritten, with certain paragraphs, sentences, or phrases marked through with ink, and with several handwritten additions in the margins. Defendant further contends that because the written instructions dealt with only a part of the entire oral instruction, they had the potential to emphasize elements unduly prejudicial to defendant.

The trial court's decision to submit the written instructions to the jury occurred in the following context:

> THE COURT: Gentlemen, the jury has passed out a note which reads, "We would like to know if it is possible for us to have a written list of the criteria for first, second and voluntary manslaughter. We have questions on the differences between the various charges. . . ."
>
> . . . .
>
> I have my charge here that I put together. Does anyone have any objection to sending it in?

[THE STATE]: State doesn't have any objections.

[DEFENSE COUNSEL]: I don't have any objection to either part of it.

THE COURT: Let me have a black magic marker so I can—some of this is surplusage . . . .

. . . .

[DEFENSE COUNSEL]: Might just be more prudent to call them in here and give it to them again.

THE COURT: I can read it or—they've asked for the—to have it in there. It's my understanding there wasn't any objection to passing it to them.

[DEFENSE COUNSEL]: I've got some concern, though, about—well, let's look at it when you get done.

THE COURT: One of the last times I gave it to the jury, they still wanted to see it because they had difficulties comprehending it so I—I did scratch out the parts that were objected to that were not—that were surplusages. If you have objection to it, though, I will bring them back and just read it to them again.

[DEFENSE COUNSEL]: I don't have any inherent—I want to see it, see what it's going to look like.

THE COURT: Yes. Okay. Y'all step up here and take a—just take a look.

(Counsel approached the bench and viewed the charge.)

[DEFENSE COUNSEL]: John and I can make it all out as you have fixed it up for them. If I—if I didn't know what you were saying, I would have trouble making out some of those inserted portions.

[THE STATE]: Could you maybe write that in again with your ink pen, Judge, so it will be more legible.

THE COURT: I'm not sure writing it in will make it more legible with my handwriting, but I'll go over it again.

The court retraced the handwritten portions of the instructions and had the jury return to the courtroom. The court then addressed the jury as follows:

> Ya'll have first requested that—to have the instructions that I read to you. I have prepared those. Let me explain to you what—how to use them. There's certain portions of the pages that have been drawn through with a magic marker. They have nothing to do with the case and that part you should disregard. The part that you have requested is typed out and there are certain portions that are in my handwriting. You may have difficulty reading my handwriting. If you have any questions, cannot decipher what I say, if you'll come back in with another question, I will try to decipher what I have written in; but I think that it will be explanatory to you when you look at it. But if you do have difficulties reading my writing, let me know.

The trial court gave the jury the written instructions and sent the jury to resume deliberations. The court then asked counsel for the State and for defendant if there were any objections "to the instructions I just gave the jury." Both counsel expressly stated that they had no objections. The written instructions which the jury requested regarding the charged offenses were identical to the oral instructions previously given to the jury.

Having failed to object to the submission of the written instructions to the jury, defendant may not assign such instructions as error. N.C. R. App. P. 10(b)(2). Upon such failure to object to jury instructions, defendant's contention is subject to review only under the plain error standard. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Plain error is

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

Id. (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (alteration in original).

We conclude that there was no plain error. The trial court acted with great caution in responding to the jury's request. It discussed at length with counsel its proposal to submit the written instructions from which it had earlier instructed orally. The substance of the submitted instructions included the elements of each of the charged offenses and defendant's theory of defense. The court's instructions did not include matters upon which it had instructed earlier, but which were not responsive to the jury's query. There was little danger that, as a result of the form of the written instructions, the jury would place undue emphasis on any particular aspect of the submitted instructions.

The court recognized the possibility of confusion arising from numerous strike-outs and handwritten additions, but again took pains to prevent such confusion. The court offered to bring the jury back into the courtroom and repeat the oral instructions. The court also, in advance of actually giving the jury the written instructions, orally instructed it regarding use of the instructions and encouraged it to make the court aware if it had any difficulty understanding the modified instructions. Defendant has failed to show that the jury actually was confused by the written instructions or that it gave undue emphasis to matters prejudicial to him.

We are confident that the court's efforts to minimize the risk of confusion and misinterpretation were successful. The written instructions served fairly and adequately to answer the jury's inquiry. We cannot conclude that the form in which they were submitted had a probable impact on the jury's finding that defendant was guilty. *Id.* Defendant's assignment of error is thus without merit.

No error.

KATHARINE N. DiORIO v. WILLIAM E. PENNY AND BETTY S. PENNY

No. 372A91

(Filed 25 June 1992)

Landlord and Tenant § 8.4 (NCI3d)— dangerous stairs—knowledge by landlord—summary judgment for landlord

The trial court correctly granted summary judgment for defendants in a negligence action arising from plaintiff Betty Penny's fall down a staircase in a house which plaintiffs rented from defendants. Plaintiffs failed to produce any evidence showing that defendants had actual or implied knowledge that the carpet on the staircase was negligently installed and overlapped the risers, and plaintiffs had sufficient knowledge of the staircase's narrowness, uneven risers and lack of handrail to place the burden on plaintiffs to either correct the problem or inform defendants of the need for repair.

Am Jur 2d, Premises Liability § 39.

APPEAL by plaintiff 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. 407, 405 S.E.2d 789 (1991), affirming the judgment of *Gray, J.*, entered 30 August 1990 in Superior Court, HENDERSON County. Heard in the Supreme Court 12 February 1992.

Morris, Bell & Morris, by William C. Morris, Jr., for plaintiff-appellant.

Roberts, Stevens & Cogburn, P.A., by Frank P. Graham, for defendant-appellees.

LAKE, Justice.

On 13 July 1985 the plaintiff and her husband, the DiOrios, leased from the defendants a two-story house that was 75 to 125 years old. In past years the defendants had lived in this house for approximately six months and then leased the house to other tenants prior to its rental by plaintiff and her husband. When plaintiff signed the lease the house contained a staircase which was covered by carpeting which extended unsupported beyond each step before continuing down the riser to the next step. The risers or height of the steps on this staircase varied from 4 inches at

the bottom to 9-1/2 inches at the top. The average staircase riser is 8-1/2 inches. This staircase had no railing, was narrow, and had lighting at the top and bottom.

The plaintiff and her husband, before leasing the house, viewed the interior of the house and walked up and down the staircase. Upon moving into the house, the DiOrios used one of the upstairs rooms as their bedroom. The DiOrios had been living in the house for six months prior to 20 January 1986 when plaintiff, while descending the staircase barefoot at night, slipped and fell. She sustained a compound fracture of the arm and a severed artery. When the accident occurred, the light at the bottom of the staircase was on.

In discovery documents plaintiff admits she was aware that the staircase was narrow and difficult, but asserts she was unaware of the varying depths of the risers and of the fact that the carpeting had been laid in a way that caused it to extend approximately two inches beyond each step before continuing down the riser to the next step. Plaintiff's husband had experience in the building industry. He noticed that the risers varied in height, but does not recall ever warning his wife. Prior to 20 January 1986 the plaintiff had slipped on the staircase on more than one occasion, but she had always caught herself on the wall and had never fallen. Also, plaintiff's daughter had fallen down the staircase previously. During the six months they lived in the house prior to the accident, neither the plaintiff nor her husband had ever mentioned the condition of the staircase to the defendants or notified them of any danger, or undertaken any action to correct the condition.

The plaintiff instituted this action seeking damages against defendants for the personal injuries sustained when she fell down the staircase. The defendants by answer denied any negligence on their part and alleged contributory negligence as a defense. The trial court, upon review of the pleadings and discovery documents, including plaintiff's answers to interrogatories and her deposition, granted defendants' motion for summary judgment. The Court of Appeals affirmed the trial court and plaintiff appeals by virtue of a dissenting opinion in the Court of Appeals.

The sole issue in this case is whether the Court of Appeals' majority was correct in affirming the trial court's granting of defendants' motion for summary judgment. We conclude the Court of Appeals was correct.

The majority opinion of the Court of Appeals held that summary judgment for defendants was proper on the grounds that plaintiff was contributorily negligent as a matter of law in knowingly exposing herself to a risk of which she had long-term prior notice and which she could have avoided by notifying the landlord or taking reasonable corrective measures. *DiOrio v. Penny*, 103 N.C. App. 407, 405 S.E.2d 789 (1991). The Court of Appeals declined to address the issue of whether plaintiff had made out a case of negligence on defendants' part sufficient to take the case to the jury since it held plaintiff contributorily negligent as a matter of law.

The dissenting opinion, *id.* at 410, 405 S.E.2d at 791, argued that (1) a tenant's contributory negligence for not repairing a particular defect is a jury question, (2) plaintiff's failure to notify defendants of the condition of the staircase does not render her contributorily negligent as a matter of law, and (3) the defendants do not deserve summary judgment on the basis plaintiff failed to show defendants' negligence because the defendant, as the moving party, bears the burden on a summary judgment motion to show that an essential element of the non-moving party's claim does not exist.

On motion for summary judgment, the question before the trial court is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E.2d 584 (1980). The trial court will grant summary judgment in cases where the evidence is uncontroverted that a party failed to use ordinary care and that want of ordinary care was at least one of the proximate causes of injury. *Bogle v. Power Co.*, 27 N.C. App. 318, 219 S.E.2d 308 (1975), *cert. denied*, 289 N.C. 296, 222 S.E.2d 695 (1976). This was the basis of the Court of Appeals' decision.

The uncontroverted projection of the evidence in this case, from the discovery materials presented on the motion hearing, clearly indicates that the plaintiff had used the stairs at least twice a day for nearly six months, and that by her own admission she was aware they presented a danger in that she had to catch herself on the wall while descending on more than one occasion. We thus do not disagree as to the Court of Appeals' conclusion regarding

plaintiff's contributory negligence. However, we do not need to reach this question, as we proceed first to the plaintiff's allegations and projection of evidence regarding defendants' negligence.

While summary judgment is rarely appropriate in cases involving negligence and contributory negligence, *e.g., Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979), summary judgment is appropriate in such cases when the moving party carries his initial burden of showing the nonexistence of an element essential to the other party's case and the non-moving party then fails to produce or forecast at hearing any ability to produce at trial evidence of such essential element of his claims. *See Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992); *Anderson v. Canipe*, 69 N.C. App. 534, 317 S.E.2d 44 (1984).

The plaintiff relies upon N.C.G.S. § 42-42(a)(2), from the Residential Rental Agreements Act, which states that it is the duty of a landlord to "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." Plaintiff contends that the defendants were negligent in this case because they failed to repair a dangerous staircase, causing plaintiff to suffer personal injury. However, the statute requires that a landlord must have knowledge, actual or imputed, or be notified, of a hazard's existence before being held liable in tort. N.C.G.S. § 42-42(a)(4) (1984). Plaintiff never notified the defendants about any problems with the staircase and never attempted to repair the staircase herself. Further, the record is clear that plaintiff also failed to project or forecast solid evidence that the defendants actually were informed or had actual knowledge of a dangerous staircase.

Implied knowledge of the hazard also cannot be imputed to the defendants from any forecast of evidence produced by plaintiff. There is no dispute that plaintiff found the staircase to be difficult, narrow, and steep. However, the plaintiff's point is that she did not know that the carpeting extended two inches beyond the actual ledge of each step, creating a false appearance of solidity, when in fact the carpet could give way and cause a fall. While the defendants did live for a time in the house, the plaintiff failed to allege that the defendants lived in the house during the time when the carpeting was on the staircase or was being laid. Therefore, plaintiff fails to allege or project any ability to produce evidence showing that the defendants knew the carpet was negligently installed or

was in any way a hazard. There is also a lack of forecast evidence that the defendants ever had difficulties with the staircase. Therefore, there is no showing that the defendants had any implied knowledge of the danger.

Defendants alleged in answer and contended on the motion that they were not negligent. Further, they made a sufficient showing from the discovery material at hearing in support of the motion to require plaintiff to come forth with sufficient allegation and forecast of evidence of a cause of action and a triable issue of material fact. *See Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976); *Dendy v. Watkins*, 288 N.C. 447, 219 S.E.2d 214 (1975). The plaintiff has failed in this respect. The plaintiff did not notify the defendants of the danger and failed to show the existence of actionable defects in the staircase, either in the pleadings, admissions on file, answers to interrogatories, affidavits, or in any other manner of discovery. Under N.C.G.S. § 42-42(a)(4), the duty to repair only arises once the tenant notifies the landlord of the need for repairs. There is no showing of any evidence that the defendants knew the staircase was dangerous. Before the defendants can be held negligent for failure to correct a defect, the plaintiff must show the existence of a defect. Plaintiff did not provide any evidence that a 75 to 125 year old house is subject to building codes and that such codes were violated. Plaintiff also did not provide expert testimony to support the allegations that the poor carpet condition actually existed.

In summary, we hold that plaintiff has failed to produce any evidence showing that defendants had actual or implied knowledge that the carpet on the staircase was negligently installed and overlapped the risers. We also hold that plaintiff had sufficient knowledge of the staircase's narrowness, uneven risers and lack of handrail to place the burden on plaintiff to either correct the problem or inform the defendants of the need for repair. Therefore, the Court of Appeals did not err in affirming the trial court's grant of summary judgment for the defendants Penny against plaintiff DiOrio.

Affirmed.

STATE OF NORTH CAROLINA v. LAMONT McKOY

No. 458A91

(Filed 25 June 1992)

Criminal Law § 732 (NCI4th)— instructions—use of "tends to show"—no expression of opinion

The trial court did not express an opinion on the evidence in a first degree murder trial when it instructed the jury that the evidence "tends to show" that defendant "admitted the facts charged" where the jury could reasonably find from the evidence that defendant had admitted to an officer by responding "I know" to the officer's statements that he shot the victim as the victim drove away in his car, and a further instruction made it clear that even though there was evidence tending to show that defendant had made an admission, it was solely for the jury to determine whether defendant in fact had made any admission.

Am Jur 2d, Trial §§ 1104, 1191, 1194, 1204.

Propriety and prejudicial effect of federal judge's expressing to jury his opinion as to defendant's guilt in criminal case. 7 ALR Fed 377.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment entered by *Britt, J.*, on 2 May 1991 in the Superior Court, CUMBERLAND County. Heard in the Supreme Court on 10 February 1992.

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

Carlton E. Fellers for the defendant-appellant, Lamont McKoy.

MITCHELL, Justice.

The defendant was tried upon a proper indictment charging him with murder. The jury found the defendant guilty of murder in the first degree. At the conclusion of a capital sentencing proceeding, the jury recommended a sentence of life imprisonment for the defendant. The trial court imposed the sentence pursuant to the jury's recommendation.

In his assignment of error, the defendant contends that the trial court committed reversible error by instructing the jury that the defendant had admitted facts relating to the crime charged. We find this contention without merit.

The State's evidence tended to show that on 25 January 1990, Bobby Lee Williams met Myron Hailey on Branson Street in Fayetteville. Hailey had about twelve or thirteen plastic "zip-lock" bags of "rock" cocaine in his hand. He showed these to Williams, who tasted one piece and realized that it was "beet"—imitation or fake cocaine.

Hailey and Williams proceeded to look for the person who had sold the fake cocaine to Hailey. Hailey saw the defendant and identified him as the seller. Williams knew the defendant and told him to return Hailey's money or give him real cocaine. The three men went behind a house, where an exchange of the fake cocaine for real cocaine was made between the defendant and Hailey.

Shortly after the three men had separated, Williams heard the sound of a gunshot coming from Bryan Street, where Hailey had left his car, and a voice saying "Don't do it. Don't do it." Williams saw a group of men running along a path towards Davis Street nearby. The defendant was in this group. Williams followed the men to Davis Street, where he saw the defendant pull out a pistol, aim it, and shoot. When the defendant fired the pistol, Williams saw sparks coming from the rear of Hailey's car. Williams then saw a female passenger in the car. He heard her scream, "Put your feet to the gas pedal," and saw her lean over as if to take the steering wheel. Williams saw the car weave down Davis Street and turn onto Hay Street.

Hailey was later found by the authorities slumped over in the car on the side of the road. There were bullet holes in the trunk of the car and in the rear left turn signal. Bullets had entered through the back of the vehicle, then passed through the back seat and through the front seat. Three bullets struck Hailey, with one going completely through his body causing his death.

In his assignment of error, the defendant contends that the trial court committed reversible error by expressing an opinion on the evidence when instructing the jury. The statutory prohibitions against expressions of opinion by the trial court are now contained in N.C.G.S. § 15A-1222 and N.C.G.S. § 15A-1232. *State*

v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978); *State v. Whitted*, 38 N.C. App. 603, 248 S.E.2d 442 (1978). The language which relates to the defendant's assignment of error states that: "In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved. . . ." N.C.G.S. § 15A-1232 (1988).

During its instructions to the jury in this case, the trial court stated:

> There is evidence which tends to show that the defendant has admitted the facts relating to the crime charged in this case. If you find that the defendant made that admission, then you should consider all the circumstances under which it was made in determining whether it was a truthful admission and the weight you will give to it.

The defendant argues that the trial court's statement that evidence "tends to show" that the defendant "admitted the facts relating to the crime charged" amounted to an impermissible expression of opinion on the evidence. We disagree.

A trial court's use of the words "tends to show" in reviewing the evidence does not constitute an expression of opinion on the evidence. *State v. Young*, 324 N.C. 489, 495, 380 S.E.2d 94, 97 (1989); *State v. Allen*, 301 N.C. 489, 272 S.E.2d 116 (1980). In *Young*, the trial court instructed the jury that evidence tended to show that the defendant had confessed that he committed the crime charged. 324 N.C. at 494, 380 S.E.2d at 97. This Court held that the instruction did not violate the prohibition against judicial expression of opinion as to what had been proven because it was qualified with the "tending to show" language. *Id.* at 495, 380 S.E.2d at 98. Further, the instruction was held proper in that case "because evidence had been introduced which in fact tended to show that the defendant had confessed." *Id.*

In the case at hand, the defendant was found guilty of first-degree murder under the felony murder rule. The underlying felony relied upon by the State was that the defendant had discharged a firearm into an occupied vehicle. The State presented evidence tending to show that after the defendant had been forced to exchange real cocaine for the "beet" he had sold to the victim, he followed the victim to his car and shot him as he began to drive away.

Officer Michael Ballard testified that on 9 March 1990 he had a conversation with the defendant. Ballard testified that:

> I then stated the night you shot Myron Hailey, you did so because he ripped you off. McKoy replied with a smile on his face, "I know it." I stated that Hailey got into his car and started driving away, and he shot him, bamb, bamb. McKoy replied, "I know it." I then said you, Ant Lee, Cat, [and] Charmain ran through the path, came out the corner of Davis and Arsenal[. W]hen Hailey turned down Davis, you shot again, and Hailey started swerving from side to side. McKoy replied, "I know it."

If the jury believed such evidence that the defendant gave the repeated answers of "I know it," it reasonably could have found that the defendant had admitted shooting the victim as the victim drove away in his car. Therefore, we conclude that the trial court did not err in stating that there was evidence "tending to show" that the defendant had "admitted the facts relating to the crime charged in this case."

The defendant contends that his repeated answers of "I know it" to Officer Ballard's questions were ambiguous at best, and that the trial court's instructions failed to leave it for the jury to determine whether those answers in fact were admissions. We conclude that contrary to the assertions of the defendant, the jury was allowed to determine whether any admission actually was made by the defendant. The trial court's statement that there was evidence tending to show that the defendant had admitted the facts relating to the crime charged was followed immediately by the following instruction: "If you find that the defendant made that admission, then you should consider all the circumstances under which it was made in determining whether it was a truthful admission and the weight you will give to it." This instruction made it clear that even though there was evidence tending to show that the defendant had made an admission, it was solely for the jury to determine whether the defendant in fact had made any admission. *State v. Young*, 324 N.C. 489, 498, 380 S.E.2d 94, 99 (1989). The trial court's instructions in this regard were proper.

We hold that the defendant received a fair trial free of prejudicial error.

No error.

THE ELKIN TRIBUNE, INC., THE NORTH CAROLINA PRESS ASSOCIATION, INC., AND THE NORTH CAROLINA FIRST AMENDMENT FOUNDATION, INC. v. YADKIN COUNTY BOARD OF COUNTY COMMISSIONERS, GRADY J. HUNTER, ARTHUR H. WINTERS, MICHAEL D. CROUSE, RONALD O. BALL AND THOMAS T. WOOTEN; AND JOHN BARBER, INTERIM COUNTY MANAGER

No. 431PA91

(Filed 25 June 1992)

Counties § 37 (NCI4th); State § 1.2 (NCI3d)— applications for county commissioner—no right of inspection by public

The inspection and disclosure of applications for the position of county manager are governed by N.C.G.S. § 153A-98, not by N.C.G.S. § 132-6 of the Public Records Act, and since there is no provision in § 153A-98 for access to the files of applicants for positions with counties, the trial court erred in ordering that plaintiffs be given access to the names and applications of persons who applied for the county manager position.

Am Jur 2d, Inspection Laws §§ 1, 6, 7.

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

ON discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of an order denying the defendants' motion to dismiss and granting judgment in favor of the plaintiffs, entered by *Freeman (William H.), J.*, in Superior Court, YADKIN County on 15 July 1991. Heard in the Supreme Court 10 December 1991.

In the spring of 1991, defendant, the Yadkin County Board of Commissioners, instructed the interim Yadkin County Manager to begin taking applications for the position of County Manager. On 24 May 1991, plaintiff, The Elkin Tribune, Inc., requested that all submitted applications be made available to the Tribune for inspection. The Board refused this request.

The plaintiffs brought this action pursuant to N.C.G.S. § 132-9 and the North Carolina Declaratory Judgment Act, N.C.G.S. § 1-253 *et seq.*, seeking a judgment that all applications received by the Board for the position of Yadkin County Manager are "public records"

as defined by N.C.G.S. § 132-1, *et seq.*, and requiring that the Tribune be permitted to inspect and copy the applications.

We granted the defendants' petition for discretionary review.

Everett, Gaskins, Hancock & Stevens, by Katherine R. White, Everett & Everett, by James A. Everett, for plaintiff appellees.

James Lee Graham and Finger, Parker & Avram, by Raymond A. Parker, II, for defendant appellants.

James B. Blackburn, III, for North Carolina Association of County Commissioners, amicus curiae.

S. Ellis Hankins, General Counsel, and Kimberly L. Smith, Assistant General Counsel, for North Carolina League of Municipalities, amicus curiae.

WEBB, Justice.

This case brings to the Court a question as to the availability to the public of the names and applications of people who have applied for the position of county manager in a county of this state. N.C.G.S. § 153A-98 provides in part:

> (a) Notwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a county are subject to inspection and may be disclosed only as provided by this section. For purposes of this section, an employee's personnel file consists of any information in any form gathered by the county with respect to that employee and, by way of illustration but not limitation, relating to his application, selection or nonselection, performance, promotions, demotions, transfers, suspension and other disciplinary actions, evaluation forms, leave, salary, and termination of employment. As used in this section, "employee" includes former employees of the county.

If the inspection and disclosure of applications for the position of county manager are governed by N.C.G.S. § 153A-98, they are not governed by N.C.G.S. § 132-6 of the Public Records Act because N.C.G.S. § 153A-98 provides such inspection and disclosure may only be done as provided by that section.

We hold that the inspection and disclosure of applications for positions as county manager are subject to N.C.G.S. § 153A-98. The section says "personnel files of . . . applicants for employment maintained by a county" are subject to inspection and may be disclosed only as provided by this section. N.C.G.S. § 153A-98 (1991). If an application for employment as county manager is part of the applicant's personnel file, the application is subject to the section. In defining personnel files of county employees the section includes "any information in any form gathered by the county . . . and, by way of illustration but not limitation, relating to his application[.]" *Id.* The definition of a personnel file in the section applies only to employees. It is a definition, however, that comports with the commonly understood definition of a personnel file. We believe it should also apply to the files of applicants. The definition "any information in any form . . . relating to his application" covers applications for employment. *Id.*

N.C.G.S. § 153A-98 defines employees to include former employees. It is significant that applicants are not included in this definition. The section then provides that some information as to employees may be disclosed under certain circumstances. The section provides that personnel files "are subject to inspection and may be disclosed only as provided by this section." N.C.G.S. § 153A-98 (1991). There is not a provision in the section for the access to the files of applicants for positions with counties. It was error for the court to order the release of the applications for the position of County Manager.

The plaintiffs argue that the personnel file which is defined and made confidential in N.C.G.S. § 153A-98 does not include applications for employment. They say that it was intended to make confidential such things as the subjective, evaluative information about an employee, such as letters of recommendation, opinions of former employers, test scores, performance evaluations and complaints. The statute provides that a "personnel file consists of any information in any form gathered by the county with respect to that employee and, by way of illustration but not limitation, relating to his application[.]" *Id.* This definition includes an application.

The plaintiffs also argue that the section says it applies to information "gathered by the county." *Id.* The applicants, say the plaintiffs, sent their applications to the County. They say that applications were not gathered by the County and thus are not

subject to N.C.G.S. § 153A-98. In reading the whole section we believe it is clear the word "gathered" includes applications that were sent to the County.

The plaintiffs argue further that if the section is not interpreted to include applicants in the definition of employees, the section makes no sense. They say the definition of an employee's personnel file contains as an example his "selection or nonselection[.]" The plaintiffs say this shows that it was intended to include applicants who were not hired. The plain words of the statute include former employees in the definition of employees. The section deals with applicants but it does not include them in the definition of employees. We can only conclude that the section does not include applicants as employees. When the plain words of a statute are clear as to legislative intent, we do not look further for an interpretation. *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 403 S.E.2d 291 (1991).

For the reasons stated in this opinion, we reverse and remand with an order that the relief for which the plaintiffs prayed be denied.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. JACOB A. NORMAN

No. 475A90

(Filed 25 June 1992)

1. Homicide § 253 (NCI4th)— murder—premeditation and deliberation—evidence sufficient

There was sufficient evidence of premeditation and deliberation to survive a motion to dismiss in a non-capital first degree murder prosecution where defendant said that, as he was arguing with his wife, he remembered what a friend had told him about his son's passing out after holding his breath and decided to choke his wife until she passed out, and sufficient evidence of intent to kill in the strangling of his wife, a statement

by the victim that defendant would kill her if her son left the room, and her plea with defendant to let her write a letter to her son before he killed her.

Am Jur 2d, Homicide §§ 52, 63 et seq.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation" as elements of murder in the first degree. 18 ALR4th 961.

Presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

2. **Evidence and Witnesses § 765 (NCI4th)— murder of spouse— pictures and letters involving other women—admissible**

The trial court did not err in a non-capital first degree murder prosecution in which defendant was accused of strangling his wife by allowing the prosecutor to ask several questions on cross-examination concerning pictures of nude or partially nude women found in defendant's briefcase and a letter from another woman also found in defendant's briefcase. Defendant had testified that he loved his wife and had not intended to kill her and opened the door to questions about matters which show that he did not love his wife, such as affairs with other women. Defendant answered these questions in the negative and it is not clear that he was prejudiced.

Am Jur 2d, Evidence § 269; Homicide §§ 377-379.

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

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Owens, J.*, at the 19 March 1990 Criminal Session of Superior Court, TRANSYLVANIA County, upon a jury verdict of guilty of first degree murder. Heard in the Supreme Court 15 March 1991.

The defendant was tried for first degree murder in a case in which the State did not seek the death penalty. The State's evidence showed that in November 1989, the defendant and his wife Sylvia Norman had been married for ten years and were living in Brevard. On 3 November 1990, Nicolas Norman, the six year old son of the defendant and his wife, was in his room of

the Norman's house with a four year old cousin. Nicholas heard the defendant and Sylvia "fussing" and the couple then came into Nicolas' room.

The defendant told Nicolas to leave the room and close the door, at which time Sylvia told Nicolas not to leave because if he did the defendant would kill her. Nevertheless, Nicolas and his friend left the room and closed the door. Nicolas heard a sound like a "stomp" in his bedroom and went to the room but the door was closed. He heard his mother say, "[y]ou can kill me but let me write a letter to my son." It sounded to Nicolas like his mother was crying. He heard his father say "[n]o."

A dispatcher for the City of Brevard Police Department testified that between 6:00 p.m. and 6:30 p.m. on 3 November 1989, she received a call from a man who identified himself as Jacob Norman who said, "I'd like to report a murder." The caller said he had killed his wife by choking her. The police went to the defendant's home and found the body of Sylvia Norman who had died of strangulation.

The defendant testified that on the day his wife died, they were quarreling about an affair in which he had been involved and during which he had impregnated a woman. He said he had never seen her so upset. He testified that when she had become hysterical in the past he would hold her down until she became calm. This time when she continued to scream and fight, he remembered that a friend had told him that his son would hold his breath when he was angry until he passed out, at which time the child would start breathing again. He decided to choke his wife until she passed out. He thought she would start breathing again and he did not intend to kill her.

The jury found the defendant guilty of first degree murder. He appealed from the imposition of a life sentence.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, and Constance H. Everhart, Assistant Appellate Defender, for the defendant appellant.

WEBB, Justice.

[1] The defendant's first assignment of error is to the court's denial of his motion to dismiss the charge of first degree murder on the ground that the State failed to prove premeditation and deliberation or a specific intent to kill. Whatever the defendant's intent, there was substantial evidence that it was formed after premeditation and deliberation. The defendant said that as he was arguing with his wife, he remembered what a friend had told him about his son's passing out after holding his breath and the defendant decided to choke his wife until she passed out. This is evidence from which a jury could find the defendant formed the intent to kill his wife for some period of time before the killing. *See State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981). It is also evidence from which a jury could find the intent was formed in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation. *See State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981). There was sufficient evidence of premeditation and deliberation to submit to the jury.

In determining whether there was sufficient evidence of intent to kill it is necessary to look at all the circumstances. The deliberate strangling of a person to death is some evidence that the strangler intended to kill. The defendant denied such an intent, but the jury did not have to believe this testimony. When this evidence is coupled with the statements of the victim that if her son left the room the defendant would kill her, and with her plea to the defendant to let her write a letter to her son before he killed her, there is sufficient evidence of intent to kill to submit to the jury. *See State v. Artis*, 325 N.C. 278, 384 S.E.2d 470, *death sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990); *State v. Cauley*, 244 N.C. 701, 94 S.E.2d 915 (1956). The statements of the victim were not the statements of the defendant, as to his intent, but they were evidence of what the victim thought was the intent of the defendant and the jury could consider this evidence.

The defendant's first assignment of error is overruled.

[2] The defendant contends, under his second assignment of error, that the court improperly allowed several questions by the prosecuting attorney. When the defendant testified, the prosecuting attorney asked him on cross-examination about several pictures which were found in his briefcase. The defendant identified one of the pictures, which the prosecutor described as a picture of a girl

"with her breast hanging out," as a picture of his brother's girlfriend. He identified three pictures of a nude woman as pictures taken at a club he had operated. The prosecuting attorney asked the defendant if he had been involved with this woman and the defendant denied that he had been so involved. The prosecuting attorney also questioned the defendant about a letter found in his briefcase from a Teresa Kolka in which Miss Kolka said, "[w]ell, I've been staying out of the candy, unfortunately," and "[y]es, I am still interested and I really enjoy pictures. I'll be waiting." The defendant denied he had ever been involved with Teresa Kolka.

The defendant says that the testimony which these questions were intended to elicit was irrelevant and should have been excluded under N.C.G.S. § 8C-1, Rules 401 and 402. He also says the probative value of this testimony was substantially outweighed by the danger of unfair prejudice and it should have been excluded under N.C.G.S. § 8C-1, Rule 403. The defendant also says this testimony was admitted to prove his character in order to show he acted in conformity therewith and was inadmissible under N.C.G.S. § 8C-1, Rule 404(b). Finally, the defendant says the specific instances about which the prosecuting attorney inquired were not probative of truthfulness or untruthfulness and should not have been admitted under N.C.G.S. § 8C-1, Rule 608(b). *See State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986).

The defendant answered in the negative as to all the questions about which he now complains. It is not clear that he was prejudiced by these questions. The defendant had testified that he loved his wife and did not intend to kill her. This opened the door to questions by the State as to matters which would show the defendant did not love his wife, as evidenced by his affairs with other women. *See State v. Darden*, 323 N.C. 356, 372 S.E.2d 539 (1988). The defendant, by his testimony, made this subject relevant under Rule 401 and admissible under Rule 402.

This assignment of error is overruled.

No error.

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

SHANNON LEE HAWKINS v. JAMES F. HAWKINS

No. 141PA91

(Filed 25 June 1992)

Damages § 68 (NCI4th)— assault and battery established—nominal damages not submitted—punitive damages awarded without compensatory damages—no error

Plaintiff could recover punitive damages from defendant where the jury failed to award compensatory damages, was not instructed on nominal damages, and plaintiff established to the jury's satisfaction all of the elements of assault and battery arising from the sexual abuse she suffered from defendant, her father. Although it was said in *Jones v. Gwynne*, 312 N.C. 393, that the jury must award plaintiff actual or nominal damages before punitive damages may be awarded, that language is an inexact description of the law in prior cases. Punitive damages may not be awarded unless otherwise a cause of action exists and at least nominal damages are recoverable by plaintiff. The jury found here that plaintiff had established her cause of action, plaintiff was therefore entitled to at least nominal damages, and that entitlement was sufficient to support the award of punitive damages.

Am Jur 2d, Damages §§ 741-744.

Sufficiency of showing of actual damages to support award of punitive damages—modern cases. 40 ALR4th 11.

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

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision by the Court of Appeals, 101 N.C. App. 529, 400 S.E.2d 472 (1991), which affirmed a judgment entered in plaintiff's favor by *Greeson, J.*, at the 9 February 1990 session of Superior Court, CALDWELL County. Calendared for argument in the Supreme Court on 9 December 1991; determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(d).

McElwee, McElwee, Cannon & Warden, by William H. McElwee, III, for plaintiff-appellee.

Rudisill & Brackett, P.A., by H. Kent Crowe, for defendant-appellant.

EXUM, Chief Justice.

Plaintiff Shannon Hawkins brought this action against her adoptive father, defendant James F. Hawkins, seeking compensatory and punitive damages for assault and battery. The uncontradicted evidence at trial tended to show that defendant sexually abused plaintiff from the time she was five and a half years old until she was fourteen years old. Plaintiff brought this action when she was eighteen years old.

At the end of all evidence, the trial court instructed the jury on three issues to be considered by it during its deliberations. These issues were then submitted and answered by the jury:

1. Did James F. Hawkins commit an assault(s) and battery(ies) on Shannon Lee Hawkins?

Answer: Yes

2. If so, what amount, if any, is Shannon Lee Hawkins entitled to recover for:

a. Medical expenses: None

b. Future medical expenses: None

c. Pain and suffering: None

3. In your discretion what amount of punitive damages, if any, should be awarded to Shannon Lee Hawkins?

Answer: $25,000

The trial court did not instruct on plaintiff's entitlement to nominal damages.

The sole issue presented is whether plaintiff Shannon Lee Hawkins can recover punitive damages from defendant James F. Hawkins where the jury failed to award compensatory damages and was not instructed on nominal damages. Defendant argues that plaintiff should not recover punitive damages under these circumstances. Plaintiff argues that, by establishing to the jury's satisfaction all of the elements of an action for assault and battery, she is entitled to recover nominal damages, whether submitted or not; therefore, she should be entitled to recover punitive damages as awarded by the jury. For the reasons set out in the Court of Appeals opinion, we agree with plaintiff. Support for this result

can also be found in a recent Florida Supreme Court decision in an opinion by Overton, J., formerly *C.J. Ault v. Lohr*, 538 So. 2d 454 (Fla. 1989).

Confusion as to how the issue before us should be resolved results from language in *Jones v. Gwynne*, 312 N.C. 393, 323 S.E.2d 9 (1984). In *Jones*, we said "[b]efore punitive damages may be awarded to the plaintiff, the jury must find that the defendant committed an actionable legal wrong and it *must award* the plaintiff either compensatory or nominal damages." *Id.* at 405, 323 S.E.2d at 16 (emphasis added). Cited for this proposition were *Clemmons v. Life Ins. Co.*, 274 N.C. 416, 163 S.E.2d 761 (1968), and *Parris v. Fischer & Co.*, 221 N.C. 110, 19 S.E.2d 128 (1942). Understandably, defendant argues that this language mandates a decision in his favor.

The language in *Jones* is an inexact description of the law as found in our prior cases. Both the *Clemmons* and *Parris* decisions cited in *Jones* relied on the seminal case of *Worthy v. Knight*, 210 N.C. 498, 187 S.E. 771 (1936). In *Worthy*, former Chief Justice Stacy stated for the Court: "Punitive damages may not be awarded unless otherwise a cause of action exists and at least nominal damages are *recoverable* by the plaintiff." *Id.* at 499, 187 S.E. at 772 (emphasis added). Before *Jones*, this Court had never said that nominal damages must actually be recovered, only that they be recoverable.

The Court of Appeals correctly overlooked the *Jones* dicta and instead relied on *Worthy* when it stated that "[o]nce a cause of action is established, plaintiff is entitled to recover, as a matter of law, nominal damages, which in turn support an award of punitive damages." *Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 474 (1991). The jury, as trier of fact, found that plaintiff had in fact established her cause of action for assault and battery. Plaintiff was, therefore, entitled to recover at least nominal damages. This entitlement is sufficient to support the award of punitive damages.

The decision of the Court of Appeals is

Affirmed.

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

STATE OF NORTH CAROLINA v. TIMOTHY LANIER ALLEN

No. 70A86

(Filed 25 June 1992)

Criminal Law § 1352 (NCI4th)— McKoy error—harmlessness

The trial court's *McKoy* error in requiring unanimity on mitigating circumstances in a capital sentencing proceeding was harmless beyond a reasonable doubt where the jury failed to find seven of the ten mitigating circumstances submitted to it; each juror was polled as to his or her answer to each mitigating circumstance; it appears from this poll that the jury was unanimous as to each of the mitigating circumstances which the jury failed to find; and thus no juror would likely have considered such a circumstance in his or her determination as to imposing the death penalty if the charge had been correct on this feature of the case.

Am Jur 2d, Criminal Law § 628.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed. 51 L. Ed. 2d 886.

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

HEARING on remand from the United States Supreme Court, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990). Heard in the Supreme Court 8 May 1991.

The defendant was convicted of first degree murder and received the death penalty. This Court found no error and affirmed the sentence. *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988). The United States Supreme Court allowed the defendant's petition for certiorari, vacated the judgment of this Court, and remanded the case to us for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.

Allen Holt Gwyn and Julie A. Davis for defendant appellant.

WEBB, Justice.

In *McKoy*, the United States Supreme Court held that the defendant's constitutional rights were violated because, pursuant to the court's instructions, no juror could consider a mitigating circumstance in determining whether a death sentence should be imposed if such mitigating circumstance was not unanimously found by the jury. This would be so even if such a juror felt the circumstance had mitigating value. In this case, the court instructed the jury that it must be unanimous to find a mitigating circumstance. This could keep a juror, who believed a mitigating circumstance had value, from considering such a circumstance in determining whether the death penalty should be imposed. This was error pursuant to *McKoy*.

The State concedes there was error in the charge but contends it was harmless beyond a reasonable doubt. *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990). We agree with the State. In this case, ten mitigating circumstances were submitted to the jury. The jury found three of the mitigating circumstances and did not find seven of them. When the verdict was returned, the trial judge announced that the jury would be polled. She said, "[y]ou will be asked individually as to your answers to the issues and as to the recommendation." The clerk then polled the jurors by stating to each of them each mitigating circumstance and whether it was found or not. The clerk asked each juror whether these were the answers to "your issues," whether these were still the answers to the issues and whether he or she still assented thereto. Each juror answered in the affirmative.

It appears from this poll that the jury was unanimous as to each of the mitigating circumstances which the jury failed to find. No juror would likely have considered such a circumstance in his or her determination as to imposing the death penalty if the charge had been correct on this feature of the case. We hold this error was harmless beyond a reasonable doubt. *State v. Laws*, 328 N.C. 550, 402 S.E.2d 573 (1991).

Accordingly, the sentence of death is affirmed and the mandate of our prior opinion is reinstated. The case is remanded to the Superior Court, Halifax County, for further proceedings.

Death sentence affirmed; mandate reinstated; case remanded.

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

WILLIAM N. DOYLE, PETITIONER-APPELLANT v. SOUTHEASTERN GLASS LAMINATES, INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENT-APPELLEES

No. 535A91

(Filed 25 June 1992)

APPEAL by the petitioner pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 104 N.C. App. 326, 409 S.E.2d 732 (1991), affirming a judgment entered on 18 September 1990, by *Wilson, J.*, in Superior Court, MECKLENBURG County. The petitioner's petition for discretionary review as to additional issues was allowed by the Supreme Court on 9 January 1992. Heard in the Supreme Court on 12 May 1992.

Legal Services of Southern Piedmont, Inc., by Kenneth L. Schorr, for the petitioner-appellant, William N. Doyle.

T. S. Whitaker, Chief Counsel, and John B. DeLuca, Staff Attorney, for the respondent-appellee, Employment Security Commission of North Carolina.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion of Judge Cozort.

Reversed.

IN RE ESTATE OF SHIRLEY ALLRED TUCCI

No. 495PA91

(Filed 25 June 1992)

ON discretionary review of an opinion of the Court of Appeals, 104 N.C. App. 142, 408 S.E.2d 859 (1991), affirming orders entered by *Rousseau, J.*, in Superior Court, FORSYTH County, on 29 June 1990 and 24 July 1990. Heard in the Supreme Court 14 May 1992.

Womble Carlyle Sandridge & Rice, by Michael E. Ray, Kurt C. Stakeman and Eric C. Morgan, for appellant Estate of Shirley Allred Tucci.

Harrison, North, Cooke & Landreth, by A. Wayland Cooke and Michael C. Landreth, for appellees.

PER CURIAM.

Discretionary review improvidently allowed.

ROY LYNN THOMASSON v. GRAIN DEALERS MUTUAL INSURANCE COMPANY v. JOHNNIE M. TILLEY, D/B/A JOHNNIE M. TILLEY PEST CONTROL SERVICE, COCKERHAM PEST CONTROL COMPANY

No. 522PA91

(Filed 25 June 1992)

ON petition by defendant Grain Dealers Mutual Insurance Company for a writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure to review the decision of the Court of Appeals, *Thomasson v. Grain Dealers Mut. Ins. Co.*, 103 N.C. App. 475, 405 S.E.2d 808 (1991), reversing and remanding an order entered on 17 July 1990 by *Albright, J.*, in Superior Court, SURRY County. Heard in the Supreme Court 14 May 1992.

Franklin Smith for plaintiff-appellee.

Everett & Everett, by James A. Everett, for defendant-appellant Grain Dealers Mutual Insurance Company.

PER CURIAM.

After reviewing the briefs and record and listening to oral argument, we conclude that defendant's petition was improvidently allowed.

Discretionary review improvidently allowed.

APPENDIXES

RULES AND REGULATIONS RELATING
TO THE APPOINTMENT OF COUNSEL
FOR INDIGENT DEFENDANTS

AMENDMENT TO CODE
OF JUDICIAL CONDUCT

MODEL RULES RELATING
TO LEGAL SPECIALIZATION

MODEL RULES RELATING TO
CONTINUING LEGAL EDUCATION

MODEL RULES RELATING TO INTEREST
ON LAWYERS' TRUST ACCOUNTS

MODEL RULES RELATING TO
CLIENT SECURITY FUND

AMENDMENTS TO RULES GOVERNING
ADMISSION TO PRACTICE

ORDER ADOPTING AMENDMENTS TO THE RULES AND REGULATIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS PURSUANT TO N.C. GEN. STAT. 7A-459

The Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants Pursuant to N.C. Gen. Stat. 7A-459, are hereby amended to read as stated on the attached resolution adopted by the Council of the North Carolina State Bar and filed with the Supreme Court on 3 March 1992.

Adopted by the Court in Conference this 4th day of March, 1992, this amendment is effective immediately.

These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

LAKE, J.
For the Court

Be it RESOLVED that the amendments to the Appointment of Counsel for Indigents pursuant to G.S. 7A-459 were adopted by the Council and the rules as shown in Article VI, Section 5, and as appear in 275 N.C. 709 and amended are hereby amended and rewritten to provide as follows:

RULES AND REGULATIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS PURSUANT TO N.C. GEN. STAT. 7A-459

ARTICLE I.

Authority.

Section 1.1. These Rules and Regulations are issued pursuant to the authority contained in G.S. 7A-459, Chapter 1013 of the Session Laws of 1969.

ARTICLE II.

Determination of Indigency.

Section 2.1. Prior to the appointment of counsel on grounds of indigency, the Court shall require the defendant to complete and sign under oath an Affidavit of Indigency in a form approved by the Director of the Administrative Office of the Courts.

Section 2.2. Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally under oath to determine the truth of the statements made in the Affidavit of Indigency.

Section 2.3. The defendant's Affidavit of Indigency shall be filed in the records of the case.

Section 2.4. Upon the basis of the defendant's Affidavit of Indigency, his statements to the Court on this subject, and such other information as may be brought to the attention of the Court which shall be made a part of the record in the case, the Court shall determine whether or not the defendant is in fact indigent.

ARTICLE III.

Waiver of Counsel.

Section 3.1. Any defendant desiring to waive the right to counsel as provided in G.S. 7A-457 shall complete and sign under oath

a Waiver of Counsel in a form approved by the Director of the Administrative Office of the Courts. If such defendant waives the right to counsel but refuses to execute such waiver, the court shall so certify in a form approved by the Director of the Administrative Office of the Courts.

Section 3.2. Prior to the call of the case for trial, the Judge shall make reasonable inquiry of the defendant personally to determine that the defendant has understandingly waived his right to counsel.

Section 3.3. The Judge, upon being so satisfied, shall accept the Waiver of Counsel executed by the defendant, sign the same and cause it to be filed in the record of the case.

ARTICLE IV.

Appointment of Counsel.

Section 4.1. The North Carolina State Bar shall adopt a model plan for the appointment of counsel for indigent persons charged with certain crimes or otherwise entitled to representation. Each judicial district bar shall adopt a plan or plans for the appointment of counsel by the public defender and or the court to represent indigent persons which provides for the appointment of experienced counsel for persons charged with serious crimes, with respect to which the model plan may serve as a guide or example. A plan may be applicable to the entire district, or, at the election of the district bar, separate plans may be adopted by the district bar for use in each separate county within the district.

Section 4.2. Such plan or plans as adopted by the judicial district bar shall be certified to the Council of the North Carolina State Bar for its approval, following which the plan or plans shall be certified to the Clerk of Superior Court of each county to which each plan is applicable by the Secretary of the North Carolina State Bar and shall constitute the method by which counsel shall be selected in said district for appointment to indigent defendants. Thereafter all appointments of counsel for indigent defendants in said district shall be made in conformity with such plan or plans, unless the trial judge or, where authorized, the public defender, in the exercise of his discretion deems it proper in furtherance of justice to appoint as counsel for an indigent defendant or defendants some lawyer or lawyers residing and practicing in the judicial district, who is or are not on the plan or list certified to the Clerk of Superior Court, and if so, the trial judge or, where authorized, the public defender, may appoint as counsel to represent

an indigent defendant some lawyer or lawyers not on said plan or list residing and practicing in the judicial district.

Section 4.3. No attorney shall be appointed as counsel for an indigent defendant in a court of any district except the district in which he resides or maintains an office except by consent of counsel so appointed.

Section 4.4. No indigent defendant shall be entitled or permitted to select or specify the attorney who shall be assigned to defend him.

Section 4.5. The Clerk of Superior Court of each county shall file or record in his office, maintain and keep current the plan for the assignment of counsel applicable to said county as certified to him by the Secretary of the North Carolina State Bar.

Section 4.6. The Clerk of Superior Court of each county shall keep a record of all counsel eligible for appointment under the plan applicable to said county as certified to him by the Secretary of the North Carolina State Bar.

Section 4.7. Orders for the appointment of counsel shall be entered by the court in a form approved by the Director of the Administrative Office of the Courts.

Section 4.8. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, two counsel shall be appointed to represent an indigent defendant charged with murder where the State is seeking the death penalty.

Section 4.9. Notwithstanding any other provisions of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime

(a) Who does not have a minimum of five years' experience in the general practice of law, provided that the Court or, where authorized, the public defender, may in its or his discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the court or, where authorized, the public defender, appointing him to have demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Section 4.10. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime

(a) Who does not have a minimum of five years' experience in the general practice of law, provided, that the Court or, where authorized, the public defender, may in its or his discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the trial judge or, where authorized, the public defender, to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Unless good cause is shown an attorney representing the indigent defendant at the trial level shall represent him at the appellate level if the attorney is otherwise qualified under the provisions of this section.

Section 4.11. In those cases in which a public defender has authority to appoint a member of a judicial district bar to represent an indigent person, the public defender shall make the appointment pursuant to the procedures set out herein.

Section 4.12. It is contemplated that in those districts with a public defender, additional outside counsel will be appointed in those instances in which the volume of work handled by the public defender necessitates additional counsel and in those instances where a conflict of interest exists as regards the public defender and multiple defendants. Provided, when a conflict of interest on the part of the public defender necessitates additional counsel, the court shall appoint outside counsel.

Section 4.13. Nothing in these regulations or in the Model Plan shall be construed to prohibit assignment of otherwise qualified counsel to represent indigent defendants pursuant to specialized programs, plans or contracts which may be implemented from time to time to improve efficiency and economy where such programs, plans or contracts are consistent with the ends of justice and are approved by the Council of the N.C. State Bar.

ARTICLE V.

Withdrawal by Counsel.

Section 5.1. At any time during or pending the trial or re-trial of a case the trial judge, the appointing judge, or the resident judge of the district upon application of the attorney, and for good cause shown, may permit said attorney to withdraw from the defense of the case.

Section 5.2. At any time after the trial of a case and during the pendency of an appeal, the trial attorney, for good cause shown, may apply to the Appellate Court for permission to withdraw from the defense of the case upon the appeal.

Section 5.3. Applications for permission to withdraw as counsel shall be made only for good cause where compelling reasons or actual hardship exists.

ARTICLE VI.

Procedure for Payment of Compensation.

Section 6.1. Upon completion of the representation of an indigent defendant by appointed counsel in the trial court, the trial judge shall, upon application enter an order allowing such compensation as is provided in G.S. 7A-458.

Section 6.2. Upon the completion of any appeal, the trial judge, the resident judge or the judge holding the courts of the district, shall, upon application, enter a supplemental order in the cause allowing the appointed attorney upon the appeal such additional compensation as may be appropriate.

Section 6.3. Orders for the payment of compensation to counsel for representation of indigent defendants shall be entered by the judge in a form approved by the Director of the Administrative Office of the Courts.

Section 6.4. Two certified copies of the order for the payment of fees shall be forwarded by the Clerk of the Superior Court to the Administrative Office of the Courts, Attention: Assistant Director, Raleigh, North Carolina, for payment.

Section 6.5. Upon the entry of the order for the payment of counsel fees, the court shall upon final conviction likewise enter a judgment against the defendant for whom counsel was assigned in the amount allowed as counsel fees, said judgment to be in the form approved by the Director of the Administrative Office of the Courts.

Section 6.6. Counsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the Court.

MODEL PLAN

REGULATIONS FOR APPOINTMENT OF COUNSEL IN INDIGENT CASES IN THE _____ JUDICIAL DISTRICT

ARTICLE I.

Purpose.

The purpose of these regulations is to provide for effective representation of indigent criminal defendants at all stages of trial and appellate proceedings.

ARTICLE II.

Applicability.

These regulations apply to any criminal case arising in the _____ Judicial District in which the court has determined that the defendant is entitled to the appointment of counsel. Reference to the masculine gender shall be construed to include both male and female persons. Reference to the singular shall, as appropriate, be construed to include the plural.

ARTICLE III.

Lists of Attorneys.

Section 3.1. Any attorney engaged in the private practice of law primarily in the _____ Judicial District who

(a) Maintains an office in the _____ Judicial District, and

(b) Practices criminal law in the courts of the _____ Judicial District to an appreciable extent, or intends or desires to do so,

may be placed on one of three lists governing the appointment of counsel in criminal cases involving indigent persons. No other attorneys will be placed on the lists.

Section 3.2. Attorneys included on the first list may only be appointed to represent defendants charged with misdemeanors or felonies punishable by imprisonment for not more than five years.

Section 3.3. Attorneys on the second list may be appointed to represent defendants charged with misdemeanors or felonies other than capital crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

Section 3.4. Attorneys on the third list may be appointed to represent defendants charged with any crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointments to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

Section 3.5. The Committee on Indigent Appointments shall, prior to the effective date of these regulations, meet and develop three lists of attorneys of the types described herein from the roster of attorneys currently accepting appointments in indigent cases in the _____ Judicial District. The first list shall include all such attorneys who have been licensed less than two years or who have been admitted by comity. The second list shall include all such attorneys who have been licensed for two years or more. The third list shall include all such attorneys who have had not less than five years experience in the general practice of law and who have demonstrated proficiency in the field of criminal trial practice. With respect to these initial lists, any other requirement not otherwise met by any listed attorney is hereby waived unless the committee determines that it ought not to be waived.

Section 3.6. Subject to the exception contained in Section 3.5 requirements for inclusion on the three lists are as follows:

(a) An attorney licensed to practice law in North Carolina may be included on the first list if the Committee on Indigent Appointments finds that:

(1) He is competent to represent criminal defendants charged with misdemeanors and felonies, and

(2) Two attorneys who have engaged in the practice of law in the _____ Judicial District for not less than three years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with misdemeanors and felonies and that they

recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation.

(b) An attorney who has been licensed to practice law in North Carolina for not less than two years or who has been admitted to the North Carolina State Bar by comity may be included on the second list if the committee finds that:

(1) He has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters, and

(2) Two attorneys who have engaged in the private practice of law in the _____ Judicial District for not less than four years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with felonies and that they recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation, and

(3) He is competent to represent criminal defendants charged with felonies.

(c) An attorney who has been licensed to practice law in North Carolina for not less than five years may be included on the third list if the committee finds that:

(1) He has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters, and

(2) Two attorneys who have engaged in the private practice of law in the _____ Judicial District for not less than five years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with capital crimes and that they recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation, and

(3) He has not less than five years experience in the general practice of law, provided that the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any District Attorney's office, and

(4) He is competent to represent criminal defendants charged with capital crimes.

Section 3.7. The Committee on Indigent Appointments shall review the lists not less than once a year to ensure that the lists are current and that the attorneys whose names appear on the lists meet the qualifications set out herein.

ARTICLE IV.

Committee on Indigent Appointments.

Section 4.1. A Committee on Indigent Appointments is hereby established to assist in the implementation of these regulations. The committee shall have authority to act when the regulations become effective.

Section 4.2. All members of the committee shall be attorneys who

(a) Are included on one of the appointment lists, and

(b) Have practiced criminal law in the _____ Judicial District, whether as a prosecutor or defense counsel, for not less than five years, and

(c) Are knowledgeable about practicing attorneys in the _____ Judicial District.

Section 4.3. The committee shall consist of _____ members appointed by the President of the _____ Judicial District Bar. At least one member shall be appointed from each county in the district. Members of the committee shall be appointed for terms of two years, except that initially a minority of the members shall be designated to serve one year terms in order to stagger terms. The appointments shall be made by letter, a copy of which shall be maintained in the records of the committee. No member shall serve two consecutive terms, except that a person who has been appointed to replace a member who did not complete his term may be appointed to a full term following his completion of the partial term. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced for his term as soon as practicable.

Section 4.4. The President of the _____ Judicial District Bar shall appoint one of the members as Chairman of the Committee, who shall serve at the pleasure of the president as shall all other members of the committee.

Section 4.5. The committee shall meet at the call of the Chairman upon reasonable notice. The first meeting shall be on _____.

Thereafter, the committee shall meet as often as is necessary to dispatch its business.

Section 4.6. The committee shall have complete authority to accomplish the following:

(a) Supervise the administration of these regulations;

(b) Review requests from attorneys concerning their placement on any list and obtain information pertaining to such placement;

(c) Approve or disapprove an attorney's addition to or deletion from any list or the transfer of any attorney from one list to another, provided that an attorney's request to be deleted from a list or transferred to a lower numbered list shall not require committee approval;

(d) Establish procedures with which to carry out its business;

(e) Interview attorneys seeking placement on any list and witnesses for or against such placement.

Section 4.7. A majority of the committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor or a motion or any proposed action shall be required in order for the motion to pass or for the action to be taken.

Section 4.8. The committee shall meet in private, except it may invite persons to make limited appearances to be interviewed. Discussions of the committee, its records, and its actions shall be treated as confidentially as possible. The names of the members of the committee shall not be confidential.

ARTICLE V.

Placement of Attorneys on List.

Section 5.1. Any attorney who wishes to have his name added to or deleted from any list, or to have his name transferred from one list to another, shall file a written request with the administrator. The request shall include information that will facilitate the committee's determination whether the attorney meets the standards set forth in Article III for placement on a certain list. The written statements of competency required by Article III must be attached to the request.

Section 5.2. The administrator shall maintain records for the committee and shall advise each member of the committee of the name

of the requesting attorney and the nature of this request before the committee meets to review the request. The administrator shall assure that all requests properly filed are brought to the committee's attention at the next meeting at which it is practicable for the committee to review the request.

Section 5.3. The administrator shall assure that all District Court Judges, Resident Superior Court Judges, any special Superior Court Judge with a permanent office in the _____ Judicial District, and the District Attorney for the _____ Judicial District are advised of any request concerning placement on any list so that such officials will have an opportunity to comment on the request to the committee.

Section 5.4. When the committee meets to review placement requests, it may require any requesting attorney to appear before it to be interviewed and may require information in addition to that submitted in the request. Any member of the committee may discuss requests with other members of the bar in a confidential manner and may relate information obtained thereby to the other members. Rules of evidence do not apply with respect to the review of requests. The committee may hold a request in abeyance for a reasonable period of time while obtaining additional information.

Section 5.5. The committee shall determine whether an attorney requesting to be added to a list when he is not currently on any list or to be transferred from a lower numbered list to a higher numbered list (such as from the first list to the second list) meets all the applicable standards set out in Article III. The request shall be granted or the addition or transfer allowed if the committee finds that he does meet all the standards. Conversely, the request shall be denied if the committee does not find that he meets all the standards. The findings shall be reduced to writing and kept in the regular records of the committee by the administrator. The committee shall assure that the requesting attorney is given prompt notice of the action taken with respect to his request and is advised of the basis for denial if the request is not granted.

Section 5.6. If at any time it reasonably appears to the committee that an attorney no longer meets a standard set forth in Article III for the list on which he is placed, or that he can no longer meet the responsibilities of representing indigent defendants with respect to such list, the committee shall direct the attorney to show cause why he should not be deleted from the list or transferred from a higher numbered list to a lower numbered list. If the attorney cannot show sufficient cause, the committee may take

appropriate action, including suspending the attorney from receiving appointments in indigent cases for a definite or indefinite time, or deleting his name from the list he is on, or transferring him from a higher numbered list to a lower numbered list. Appropriate written findings shall be made by the committee in this regard, and the attorney shall be informed of the basis of any action taken.

Section 5.7. An attorney whose name is deleted from a list or who is transferred to another list by the committee may appeal the committee's action to the senior resident Superior Court Judge of the _____ Judicial District. In such a case the resident superior court judge will make the final decision regarding the deletion or transferral of the attorney.

Section 5.8. Whenever an attorney who provided information to the committee, collectively or through any member, requests that his name not be used or that his information be treated confidentially, his request shall be granted unless doing so results in manifest unfairness.

ARTICLE VI.

Appointment Procedure (Non-Capital Cases).

Section 6.1. The administrator shall provide the clerk in each courtroom in the district and Superior Criminal Courts of the _____ Judicial District with current lists of attorneys subject to appointment in indigent cases. Attorneys shall be appointed only in accordance with the lists on which they appear, and only in cases to be tried in counties in which they maintain offices, unless they agree in advance to accept cases from other counties.

Section 6.2. Each courtroom clerk shall maintain a record of attorneys subject to appointment to represent indigents. Beside each attorney's name shall appear the number of any list he is on. The court shall proceed in sequence in appointing attorneys. If an attorney's name is passed over because he is not on a list relating to a particular charge, the court shall return to his name for the next appointment consistent with his lists. The court may pass over the name of any attorney known not to be reasonably available because of vacation, illness or other reasons.

Section 6.3. In its discretion, the court may appoint an attorney in any case without regard to sequence or an attorney not maintaining an office in the county where the case is to be tried.

Section 6.4. The clerk shall provide notice of the appointment to the attorney concerned as soon as possible. Further, the clerk shall advise the defendant of the name of his attorney.

Section 6.5. The court may appoint an attorney to represent more than one defendant in a single case.

Section 6.6. In those cases in which the public defender cannot serve, and is authorized to appoint a substitute member of the bar to represent an indigent defendant, the public defender shall consult the current lists of attorneys subject to appointment in indigent cases maintained by the court administrator and referred to in Article III herein, and shall appoint the next eligible attorney on the list. The public defender shall proceed in sequence in appointing attorneys, but may pass over the name of any attorney known to be unavailable because of vacation, illness or other reasons, or, in his or her discretion, where justice so requires.

Section 6.7. If a judge is not reasonably available to appoint counsel to represent an indigent defendant, the clerk of court shall appoint the next eligible attorney on the list. Appointments of counsel by the clerk shall be subject to review and approval by the judge.

ARTICLE VII.

Appointments in Capital Cases.

Section 7.1. In addition to the provisions of Article VI, the provisions of this Article shall apply to the appointment of counsel in capital cases.

Section 7.2. A counsel and an assistant counsel shall be appointed to represent an indigent defendant charged with murder, in cases in which the State is seeking the death penalty. The assistant counsel may be on the second list or the third list of attorneys.

Section 7.3. No attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime:

(a) Who has less than five years experience in the general practice of law, provided that the court may, in its discretion, appoint as assistant counsel an attorney who has less experience; or

(b) Who has not been found by the court appointing him to have a demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

ARTICLE VIII.

Appellate Appointments.

Section 8.1. If a criminal defendant who has given notice of appeal from a conviction is found to be eligible, because of indigency, for appointment of counsel at the appellate level, the attorney representing the defendant at the trial level may be appointed to represent the defendant at the appellate level. If the attorney representing the defendant at the trial level was retained, he may be appointed to represent the defendant at the appellate level even though he does not meet all the requirements of Article III or the other pertinent provisions of these regulations. For good cause, the attorney at the trial level may be relieved of responsibility for the appeal. Whenever it is otherwise necessary to appoint an attorney to represent an indigent person at the appellate level, the attorney appointed shall be selected in a manner consistent with appointment of counsel at the trial level. If the trial attorney is not appointed, the appellate defender's office or any other qualified attorney may be appointed, in a manner consistent with these rules, to represent the defendant at the appellate level.

Section 8.2. No attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime:

(a) Who has less than five years experience in the general practice of law, provided, however, that the court or, where authorized, the public defender, may in its or his discretion, appoint as assistant counsel an attorney who has less experience; or

(b) Who has not been found by the court or the public defender to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

ARTICLE IX.

Administration.

Section 9.1. The Senior Resident Superior Court Judge for the _____ Judicial District shall designate a person to serve as administrator of these regulations.

Section 9.2. The administrator will perform the duties described previously and particularly shall:

(a) Maintain records relating to these regulations and to the actions of the Committee on Indigent Appointments;

(b) Keep current the three lists of attorneys;

(c) Assist the courtroom clerks and the Clerk of Superior Court in carrying out these regulations;

(d) Attend meetings of the committee as appropriate;

(e) Inform the judges of the district and the district attorney and the members of the committee of requests by attorneys concerning placement on any lists;

(f) Perform other administrative tasks necessary to the implementation of these regulations.

Section 9.3. The administrator shall have such office, supplies, and equipment as can be provided by the Senior Resident Superior Court Judge or the committee.

Section 9.4. The Clerk of Superior Court of each county in the _____ Judicial District shall file and keep current these regulations for the assignment of counsel as certified to him by the Secretary of the North Carolina State Bar.

Section 9.5. The Clerk of Superior Court of each county in the _____ Judicial District shall keep a record of all counsel eligible for appointment under these regulations and a permanent record of all appointments made in his county.

ARTICLE X.

Miscellaneous.

Section 10.1. These regulations are issued pursuant to Article IV of the rules and regulations promulgated in accordance with North Carolina General Statute 7A-459 by the North Carolina State Bar Council, entitled Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases, as set

out in the Rules Volume of The General Statutes of North Carolina (published by The Michie Company). Nothing contained herein shall be construed or applied inconsistently with the regulations established by the North Carolina State Bar Council or with other provisions of state law.

Section 10.2. It is recognized that the court has the inherent discretionary power in any case to decline to appoint a particular attorney to represent an indigent person. It is also recognized that occasionally the court may determine that the interests of justice would be best served by appointing a particular lawyer to handle a particular case even though he is not next in sequence or does not maintain an office in the county where the case is to be tried.

Section 10.3. These regulations shall be construed liberally in order to carry out the purpose stated in Article I.

Section 10.4. These regulations shall become effective on _____, and shall supersede any existing regulations or plan concerning the appointment of counsel indigent cases.

APPROVED AND PROMULGATED THIS _____ DAY OF _____, 199__.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations Relating to the Appointment of Counsel of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its meeting on January 17, 1992, and the amendments as certified were duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of January, 1992.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations Relating to Appointment of Counsel of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 4th day of March, 1992.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations Relating to Appointment of Counsel of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 4th day of March, 1992.

I. BEVERLY LAKE, JR.
For the Court

ORDER ADOPTING AN AMENDMENT TO CANON 5E OF THE CODE OF JUDICIAL CONDUCT

Canon 5E of the Code of Judicial Conduct is hereby amended to read as follows:

E. A judge should not act as an arbitrator or mediator. However, an emergency justice or judge of the Appellate Division designated as such pursuant to Article 6 of Chapter 7A of the General Statutes of North Carolina, and an Emergency Judge of the District Court or Superior Court commissioned as such pursuant to Article 8 of Chapter 7A of the General Statutes of North Carolina may serve as an arbitrator or mediator when such service does not conflict with or interfere with the justice's or judge's judicial service in emergency status.

Adopted by the Court in Conference this 4th day of March, 1992, this amendment is effective immediately.

This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

LAKE, J.
For the Court

MODEL RULES RELATING TO LEGAL SPECIALIZATION

The following amendment to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 17, 1992:

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Legal Specialization which were established by the Supreme Court of North Carolina and appear in 307 N.C. 725 be and the same are hereby amended by rewriting said rules to conform with Model Rules for all Boards and Agencies of the North Carolina State Bar as follows:

THE NORTH CAROLINA PLAN OF LEGAL SPECIALIZATION

1. PURPOSE

The purpose of this plan of certified legal specialization is to assist in the delivery of legal services to the public by identifying to the public those lawyers who have demonstrated special knowledge, skill and proficiency in a specific field, allowing the public to more closely match their needs with available services; and to improve the competency of the bar by establishing an additional incentive for lawyers to participate in continuing legal education and meet the other requirements of specialization.

2. JURISDICTION: AUTHORITY

The Council of the North Carolina State Bar with the approval of the Supreme Court of North Carolina hereby establishes a Board of Legal Specialization (board) as a standing committee of the State Bar Council, which board shall be the authority having jurisdiction under state law over the subject of specialization of lawyers.

3. OPERATIONAL RESPONSIBILITY

The responsibility for operating the specialization program rests with the board, subject to the statutes governing the practice of law, the authority of the council and the rules of governance of the board.

4. SIZE OF BOARD

The board shall have nine members, six of whom must be attorneys in good standing and authorized to practice law in the State of North Carolina. The lawyer members of the board shall be representative of the legal profession and shall include lawyers who are in general practice as well as those who specialize.

5. LAY PARTICIPATION

The board shall have three members who are not licensed attorneys.

6. APPOINTMENT OF MEMBERS; WHEN; REMOVAL

The members of the board shall be appointed by the Council of the North Carolina State Bar. The first members of the board shall be appointed as of the quarterly meeting of the

State Bar Council following the creation of the board. Thereafter, members shall be appointed annually as of the same quarterly meeting. Vacancies occurring by reason of death, resignation or removal shall be filled by appointment of the State Bar Council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the State Bar Council in session at a regularly called meeting.

7. **TERM OF OFFICE**

Each member who is appointed to the board shall serve for a term of three years beginning as of the first day of the month following the date on which the appointment is made by the State Bar Council. See, however, Section 8.

8. **STAGGERED TERMS**

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year. Of the initial board, three members (two lawyers and one nonlawyer) shall be elected to terms of one year, three members (two lawyers and one nonlawyer) shall be elected to terms of two years, and three members (two lawyers and one nonlawyer) shall be elected to terms of three years. Thereafter, three members (two lawyers and one nonlawyer) shall be elected in each year.

9. **SUCCESSION**

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off of the board for at least three years.

10. **APPOINTMENT OF CHAIRPERSON**

The chairperson of the board shall be appointed from time to time as necessary by the State Bar Council from among the lawyer members of the board. The term of such individual as chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the State Bar Council

the annual report of the board, and generally shall represent the board in its dealings with the public.

11. APPOINTMENT OF VICE CHAIRPERSON

The vice chairperson of the board shall be appointed from time to time as necessary by the State Bar Council from among the lawyer members of the board. The term of such individual as vice chairperson shall be one year. The vice chairperson may be reappointed thereafter during his or her tenure on the board. The vice chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

12. SOURCE OF FUNDS

Funding for the program carried out by the board shall come from such application fees, examination fees, course accreditation fees, annual fees or recertification fees as the board, with the approval of the council, may establish.

13. FISCAL RESPONSIBILITY

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(A) MAINTENANCE OF ACCOUNTS: AUDIT—The North Carolina State Bar shall maintain a separate account for funds of the board such that such funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(B) INVESTMENT CRITERIA—The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the Council of the North Carolina State Bar for the handling of dues, rents and other revenues received by the North Carolina State Bar in carrying out its official duties.

(C) DISBURSEMENT—Disbursement of funds of the board shall be made by or under the direction of the Secretary-Treasurer of the North Carolina State Bar.

14. MEETINGS

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the

North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission or telephone. A quorum of the board for conducting its official business shall be four or more of the members serving at the time of the meeting.

15. ANNUAL REPORT

The board shall prepare at least annually a report of its activities and shall present same to the Council of the North Carolina State Bar one month prior to its annual meeting.

16. POWERS AND DUTIES OF THE BOARD

Subject to the general jurisdiction of the council and the North Carolina Supreme Court, the board shall have jurisdiction of all matters pertaining to regulation of certification of specialists in the practice of law and shall have the power and duty:

(A) To administer the plan;

(B) Subject to the approval of the council and the Supreme Court, to designate areas in which certificates of specialty may be granted and define the scope and limits of such specialties and to provide procedures for the achievement of these purposes;

(C) To appoint, supervise, act on the recommendations of and consult with specialty committees as hereinafter identified;

(D) To make and publish standards for the certification of specialists, upon the board's own initiative or upon consideration of recommendations made by the specialty committees, such standards to be designed to produce a uniform level of competence among the various specialties in accordance with the nature of the specialties;

(E) To certify specialists or deny, suspend or revoke the certification of specialists upon the board's own initiative, upon recommendations made by the specialty committees or upon requests for review of recommendations made by the specialty committees;

(F) To establish and publish procedures, rules, regulations and bylaws to implement this plan;

(G) To propose and request the council to make amendments to this plan whenever appropriate;

(H) To cooperate with other boards or agencies in enforcing standards of professional conduct and to report apparent violations of the Rules of Professional Conduct of this state to the appropriate disciplinary authority;

(I) To evaluate and approve, or disapprove, any and all continuing legal education courses, or educational alternatives, for the purpose of meeting the continuing legal education requirements established by the board for the certification of specialists and in connection therewith to determine the specialties for which credit shall be given and the number of hours of credit to be given in cooperation with the providers of continuing legal education; to determine whether and what credit is to be allowed for educational alternatives, including other methods of legal education, teaching, writing and the like; to issue rules and regulations for obtaining approval of continuing legal education courses and educational alternatives; to publish or cooperate with others in publishing current lists of approved continuing legal education courses and educational alternatives; and to encourage and assist law schools, organizations providing continuing legal education, local bar associations and other groups engaged in continuing legal education to offer and maintain programs of continuing legal education designed to develop, enhance and maintain the skill and competence of legal specialists;

(J) To cooperate with other organizations, boards and agencies engaged in the recognition of legal specialists or concerned with the topic of legal specialization; and

(K) Notwithstanding any conflicting provision of the certification standards for any area of specialty, the board may in its discretion direct any of the specialty committees not to administer a specialty examination if, in the judgment of the board, there are insufficient applicants or such would otherwise not be in the best interests of the specialization program.

17. RETAINED JURISDICTION OF THE COUNCIL

The council retains jurisdiction with respect to the following matters:

(A) Upon recommendation of the board, establishing areas in which certificates of specialty may be granted;

(B) Amending this plan;

(C) Hearing appeals taken from actions of the board;

(D) Establishing or approving fees to be charged in connection with the plan; and

(E) Regulating attorney advertisements of specialization under the North Carolina Rules of Professional Conduct.

18. PRIVILEGES CONFERRED AND LIMITATIONS IMPOSED

The board in the implementation of this plan shall not alter the following privileges and responsibilities of certified specialists and other lawyers:

(A) No standard shall be approved which shall in any way limit the right of a certified specialist to practice in all fields of law. Subject to Canon 6 of the North Carolina Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he or she is certified as a specialist in a particular field of law;

(B) No lawyer shall be required to be certified as a specialist in order to practice in the field of law covered by that specialty. Subject to Canon 6 of the North Carolina Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in any field of law, or advertise his availability to practice in any field of law consistent with Canon 2 of the Rules of Professional Conduct, even though he or she is not certified as a specialist in that field;

(C) All requirements for and all benefits to be derived from certification as a specialist are individual and may not be fulfilled by nor attributed to the law firm of which the specialist may be a member;

(D) Participation in the program shall be on a completely voluntary basis;

(E) A lawyer may be certified as a specialist in no more than two fields of law;

(F) When a client is referred by another lawyer to a lawyer who is a recognized specialist under this plan on a matter within the specialist's field of law, such specialist shall not take advantage of the referral to enlarge the scope of his or her representation and, consonant with any requirements of the Rules of Professional Conduct of this state, such specialist shall not enlarge the scope of representation of a referred client outside the area of the specialty field; and

(G) Any lawyer certified as a specialist under this plan shall be entitled to advertise that he or she is a "Board Certified Specialist" in his or her specialty to the extent permitted by the Rules of Professional Conduct of this state.

19. **SPECIALTY COMMITTEES**

The board shall establish a separate specialty committee for each specialty in which specialists are to be certified. Each specialty committee shall be composed of seven members appointed by the board, one of whom shall be designated annually by the chairperson of the board as chairperson of the specialty committee. Members of each specialty committee shall be lawyers licensed and currently in good standing to practice law in this state who, in the judgment of the board, are competent in the field of law to be covered by the specialty. Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the board to staggered terms of office and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment by the board to a vacancy shall be for the remaining term of the member leaving the specialty committee. All members shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term. Meetings of the specialty committee shall be held at regular intervals at such times, places and upon such notices as the specialty committee may from time to time prescribe or upon direction of the board.

Each specialty committee shall advise and assist the board in carrying out the board's objectives and in the implementation and regulation of this plan in that specialty. Each specialty committee shall advise and make recommendations to the board as to standards for the specialty and the certification of individual specialists in that specialty. Each specialty committee

shall be charged with actively administering the plan in its specialty and with respect to that specialty shall:

(A) After public hearing on due notice, recommend to the board reasonable and nondiscriminatory standards applicable to that specialty;

(B) Make recommendations to the board for certification, continued certification, denial, suspension or revocation of certification of specialists and for procedures with respect thereto;

(C) Administer procedures established by the board for applications for certification and continued certification as a specialist and for denial, suspension or revocation of such certification;

(D) Administer examinations and other testing procedures, if applicable, investigate references of applicants and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as specialists;

(E) Make recommendations to the board concerning the approval of and credit to be allowed for continuing legal education courses, or educational alternatives, in the specialty; and

(F) Perform such other duties and make such other recommendations as may be delegated to or requested of the specialty committee by the board.

20. MINIMUM STANDARDS FOR CERTIFICATION OF SPECIALISTS

To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty:

(A) The applicant must be licensed and currently in good standing to practice law in this state;

(B) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement in the specialty during the five years immediately preceding his or her application according to objective and verifiable standards. Such substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity and differences from other fields and from consideration

of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measurement of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the areas of the specialty, the number or type of matters handled within a certain period of time or any combination of these or other appropriate factors. However, within each specialty, experience requirements should be measured by objective standards. In no event should they be either so restrictive as to unduly limit certification of lawyers as specialists or so lax as to make the requirement of substantial involvement meaningless as a criterion of competence. Substantial involvement may vary from specialty to specialty, but, if measured on a time-spent basis, in no event shall the time spent in practice in the specialty be less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice. Reasonable and uniform practice equivalents may be established including, but not limited to, successful pursuit of an advance educational degree, teaching, judicial, government or corporate legal experience;

(C) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education in the specialty accredited by the board for the specialty, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each of the three years immediately preceding application. Upon establishment of a new specialty, this standard may be satisfied in such manner as the board, upon advice from the appropriate specialty committee, may prescribe or may be waived if, and to the extent, accreditable continuing legal education courses have not been available during the three years immediately preceding establishment of the specialty;

(D) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of

application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the board, or appropriate disciplinary body and other persons regarding the applicant's competence and qualifications to be certified as a specialist;

(E) The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability in the specialty for which certification is applied. The examination must be applied uniformly to all applicants within each specialty area. The board shall assure that the contents and grading of the examination are designed to produce a uniform level of competence among the various specialties;

(F) All matters concerning the qualification of an applicant for certification, including, but not limited to, applications, references, tests and test scores, files, reports, investigations, hearings, findings, recommendations and adverse determinations shall be confidential so far as is consistent with the effective administration of this plan, fairness to the applicant and due process of law; and

(G) The board may adopt uniform rules waiving the requirements of 20(D) and 20(E) for members of a specialty committee at the time the initial written examination for that specialty is given and permitting said members to file application to become a board certified specialist in that specialty upon compliance with all other required minimum standards for certification of specialists.

21. MINIMUM STANDARDS FOR CONTINUED CERTIFICATION OF SPECIALISTS

The period of certification as a specialist shall be five years. During such period the board or appropriate specialty committee may require evidence from the specialist of his or her continued qualification for certification as a specialist and the specialist must consent to inquiry by the board, or appropriate specialty committee, of lawyers and judges, the appropriate disciplinary body or others in the community regarding the specialist's continued competence and qualification to be certified as a specialist. Application for and approval of continued certification as a specialist shall be required prior to the end of each five-year period. To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee,

must demonstrate to the board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards:

(A) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement (which shall be determined in accordance with the principles set forth in Section 20(B)) in the specialty during the entire period of certification as a specialist;

(B) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education accredited by the board for the specialty during the period of certification as a specialist, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each year during the entire period of certification as a specialist; and

(C) The specialist must comply with the requirements set forth in Sections 20(A) and 20(D) above.

22. ESTABLISHMENT OF ADDITIONAL STANDARDS

The board may establish, on its own initiative or upon the specialty committee's recommendation, additional or more stringent standards for certification than those provided in Sections 20 and 21. Additional standards or requirements established under this section need not be the same for initial certification and continued certification as a specialist. It is the intent of the plan that all requirements for certification or recertification in any area of specialty shall be no more or less stringent than the requirements in any other area of specialty.

23. SUSPENSION OR REVOCATION OF CERTIFICATION AS A SPECIALIST

The board may revoke its certification of a lawyer as a specialist in the specialization program if the specialty is terminated or may suspend or revoke such certification if it is determined, upon the board's own initiative or upon recommendation of the appropriate specialty committee and after hearing before the board on appropriate notice, that:

(A) The certification of the lawyer as a specialist was made contrary to the rules and regulations of the board;

(B) The lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the board or appropriate specialty committee;

(C) The lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the board;

(D) The lawyer certified as a specialist has failed to pay the fees required;

(E) The lawyer certified as a specialist no longer meets the standards established by the board for the certification of specialists; or

(F) The lawyer certified as a specialist has been disciplined, disbarred or suspended from practice by the Supreme Court of any other state or federal court or agency.

The lawyer certified as a specialist has a duty to inform the board promptly of any fact or circumstance described in Section 23(A) through 23(F) above.

If the board revokes its certification of a lawyer as a specialist, the lawyer cannot again be certified as a specialist unless he or she so qualifies upon application made as if for initial certification as a specialist, and upon such other conditions as the board may prescribe. If the board suspends certification of a lawyer as a specialist, such certification cannot be reinstated except upon the lawyer's application therefor and compliance with such conditions and requirements as the board may prescribe.

24. RIGHT TO HEARING AND APPEAL TO COUNCIL

A lawyer who is denied certification or continued certification as a specialist or whose certification is suspended or revoked shall have the right to a hearing before the board, and, thereafter, the right to appeal the ruling made thereon by the board to the council under such rules and regulations as the board and council may prescribe.

25. AREAS OF SPECIALTY

There are hereby recognized the following specialties:

(A) Bankruptcy Law

(B) Estate Planning and Probate Law

(C) Real Property Law

1) Real Property—Residential

2) Real Property—Business, Commercial and Industrial

(D) Family Law

(E) Criminal Law

1) Criminal Appellate Practice

26. CERTIFICATION STANDARDS OF THE SPECIALTIES OF BANKRUPTCY LAW, ESTATE PLANNING AND PROBATE LAW, REAL PROPERTY LAW, FAMILY LAW, AND CRIMINAL LAW

Previous decisions approving the certification standards for the areas of specialty listed above are hereby reaffirmed.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its meeting on January 17, 1992, and the amendment as certified was duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of April, 1992.

B. E. JAMES
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 24th day of June, 1992.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 24th day of June, 1992.

I. BEVERLY LAKE, JR.
For the Court

MODEL RULES AMENDMENT RELATING TO CONTINUING LEGAL EDUCATION

The following amendment to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 17, 1992.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Continuing Legal Education which were established by the Supreme Court of North Carolina as appear in 318 N.C. at 713 be and the same are hereby amended by rewriting said rules to conform with the Model Rules of the North Carolina State Bar as follows:

CONTINUING LEGAL EDUCATION RULES OF THE NORTH CAROLINA STATE BAR

RULE 1: PURPOSE AND DEFINITIONS

(A) PURPOSE—The purpose of these continuing legal education rules is to assist lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve. The North Carolina State Bar, under Chapter 84 of the General Statutes of North Carolina, is charged with the responsibility of providing rules of professional conduct and with disciplining attorneys who do not comply with such rules. The Rules of Professional Conduct adopted by the North Carolina State Bar and approved by the Supreme Court of North Carolina require that lawyers adhere to important ethical standards, including that of rendering competent legal services in the representation of their clients.

At a time when all aspects of life and society are changing rapidly or becoming subject to pressures brought about by change, laws and legal principles are also in transition (through additions to the body of law, modifications and amendments) and are increasing in complexity. One cannot render competent legal services without continuous education and training.

The same changes and complexities, as well as the economic orientation of society, result in confusion about the ethical requirements concerning the practice of law and the relationships it creates. The data accumulated in the discipline program of the North Carolina State Bar argue persuasively for the establishment of a formal program for continuing and intensive training in professional responsibility and legal ethics.

It is in response to such considerations that the North Carolina State Bar has adopted these minimum continuing legal education requirements. The purpose of these minimum continuing legal education requirements is the same as the purpose of the Rules of Professional Conduct themselves—to ensure that the public at large is served by lawyers who are competent and maintain high ethical standards.

(B) DEFINITIONS

(1) "Accredited sponsor" shall mean an organization whose entire continuing legal education program has been accredited by the Board of Continuing Legal Education.

(2) "Active member" shall include any person who is licensed to practice law in the State of North Carolina and who is an active member of the North Carolina State Bar.

(3) "Approved activity" shall mean a specific, individual legal education activity presented by an accredited sponsor or presented by other than an accredited sponsor if such activity is approved as a legal education activity under these rules by the Board of Continuing Legal Education.

(4) "Board" means the Board of Continuing Legal Education created by these rules.

(5) "Continuing Legal Education" or "CLE" is any legal, judicial or other educational activity accredited by the board. Generally, CLE will include educational activities designed principally to maintain or advance the professional competence of lawyers and/or to expand an appreciation and understanding of the professional responsibilities of lawyers.

(6) "Council" shall mean the North Carolina State Bar Council.

(7) "Credit hour" means an increment of time of 60 minutes which may be divided into segments of 30 minutes or 15 minutes, but no smaller.

(8) "Inactive member" shall mean a member of the North Carolina State Bar who is on inactive status.

(9) "In-house continuing legal education" shall mean courses or programs offered or conducted by law firms, either individually or in connection with other law firms, corporate legal departments, or similar entities primarily for the education of their members. The board may exempt from this definition those programs which it finds (a) to be conducted by public or quasi-public organizations or associations for the education of their employees or members and (b) to be concerned with areas of legal education not generally offered by sponsors of programs attended by lawyers engaged in the private practice of law.

(10) "Membership and Fees Committee" shall mean the Membership and Fees Committee of the North Carolina State Bar.

(11) A "newly admitted active member" is one who becomes an active member of the North Carolina State Bar for the first time, has been reinstated, or has changed from inactive to active status.

(12) "Practical skills courses" are those courses which are devoted primarily to instruction of basic practice procedures and techniques of law as distinct from substantive law. Examples of such courses would include preparation of legal documents and correspondence, and development of specific basic lawyering skills, such as voir dire, jury argument, introducing evidence, and efficient management of a law office.

(13) "Professional Responsibility" shall mean those courses or segments of courses devoted to:

a) The substance, the underlying rationale and the practical application of the Rules of Professional Conduct, and

b) The professional obligations of the attorney to the client, the court, the public and other lawyers.

This definition shall be interpreted consistent with the provisions of Rule 1(B)(5).

(14) "Rules" shall mean the provisions of the continuing legal education rules established by the Supreme Court of North Carolina.

(15) "Sponsor" is any person or entity presenting or offering to present one or more continuing legal education programs, whether or not an accredited sponsor.

(16) "Year" shall mean calendar year.

RULE 2: JURISDICTION: AUTHORITY

The Council of the North Carolina State Bar hereby establishes a Board of Continuing Legal Education (board) as a standing committee of the council, which board shall have authority to establish regulations governing a continuing legal education program for attorneys licensed to practice law in this state.

RULE 3: OPERATIONAL RESPONSIBILITY

The responsibility for operating the continuing legal education program shall rest with the board, subject to the statutes governing the practice of law, the authority of the council and the rules of governance of the board.

RULE 4: SIZE OF BOARD

The board shall have nine members, all of whom must be attorneys in good standing and authorized to practice in the State of North Carolina.

RULE 5: LAY PARTICIPATION

The board shall have no members who are not licensed attorneys.

RULE 6: APPOINTMENT OF MEMBERS; WHEN; REMOVAL

The members of the board shall be appointed by the Council of the North Carolina State Bar. The first members of the board shall be appointed as of the quarterly meeting of the State Bar Council following the creation of the board. Thereafter, members shall be appointed annually as of the same quarterly meeting. Vacancies occurring by reason of death, resignation or removal shall be filled by appointment of the State Bar Council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the State Bar Council in session at a regularly called meeting.

RULE 7: TERM OF OFFICE

Each member who is appointed to the board shall serve for a term of three years beginning as of the first day of the month following the date on which the appointment is made by the State Bar Council. See, however, Rule 8.

RULE 8: STAGGERED TERMS

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year. Of the initial board, three members shall be elected to terms of one year, three members shall be elected to terms of two years, and three members shall be elected to terms of three years. Thereafter, three members shall be elected each year.

RULE 9: SUCCESSION

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off the board for at least three years.

RULE 10: APPOINTMENT OF CHAIRPERSON

The chairperson of the board shall be appointed from time to time as necessary by the State Bar Council. The term of such individual as chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the State Bar Council the annual report of the board, and generally shall represent the board in its dealings with the public.

RULE 11: APPOINTMENT OF VICE CHAIRPERSON

The vice chairperson of the board shall be appointed from time to time as necessary by the State Bar Council. The term of such individual as vice chairperson shall be one year. The vice chairperson may be reappointed thereafter during tenure on the board. The vice chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

RULE 12: SOURCE OF FUNDS

Funding for the program carried out by the board shall come from sponsor's fees and attendee's fees as provided below, as well as from duly assessed penalties for noncompliance and from reinstatement fees.

(A) Accredited sponsors located in North Carolina (for courses offered within or outside North Carolina), or accredited sponsors not located in North Carolina (for courses given in North Carolina), or unaccredited sponsors located within or outside of North Carolina (for accredited courses within North Carolina) shall, as a condition of conducting an approved activity, agree to remit a list of North Carolina attendees and to pay a fee for each active member of the North Carolina State Bar who attends the program for CLE credit. The sponsor's fee shall be based on each credit hour of attendance, with a proportional fee for portions of a program lasting less than an hour. The fee shall be set by the board upon approval of the council. Any sponsor, including an accredited sponsor, which conducts an approved activity which is offered without charge to attendees shall not be required to remit the fee under this section. Attendees who wish to receive credit for attending such an approved activity shall comply with 12(B).

(B) The board shall fix a reasonably comparable fee to be paid by individual attorneys who attend for CLE credit approved continuing legal education activities for which the sponsor does not submit a fee under 12(A). Such fee shall accompany the member's annual affidavit. The fee shall be set by the board upon approval of the council.

RULE 13: FISCAL RESPONSIBILITY

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(A) MAINTENANCE OF ACCOUNTS: AUDIT—The North Carolina State Bar shall maintain a separate account for funds of the board such that such funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(B) INVESTMENT CRITERIA—The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the Council of the North Carolina State Bar for the handling of dues, rents and other revenues received by the North Carolina State Bar in carrying out its official duties.

(C) DISBURSEMENT—Disbursement of funds of the board shall be made by or under the direction of the Secretary-Treasurer of the North Carolina State Bar pursuant to authority of the Council. The members of the board shall serve on a voluntary basis without compensation, but may be reimbursed for the reasonable expenses incurred in attending meetings of the board or its committees.

(D) All revenues resulting from the CLE program, including fees received from attendees and sponsors, late filing penalties, late compliance fees, reinstatement fees and interest on a reserve fund, shall be applied first to the expense of administration of the CLE program including an adequate reserve fund. Excess funds may be expended by the council on lawyer competency programs approved by the council.

RULE 14: MEETINGS

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Caro-

lina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time.

RULE 15: ANNUAL REPORT

The board shall prepare at least annually a report of its activities and shall present the same to the Council of the North Carolina State Bar one month prior to its annual meeting.

RULE 16: POWERS AND DUTIES OF THE BOARD

The board shall have the following powers and duties:

(A) To exercise general supervisory authority over the administration of these rules.

(B) To adopt and amend regulations consistent with these rules with the approval of the council.

(C) To establish an office or offices and to employ such persons as the board deems necessary for the proper administration of these rules, and to delegate to them appropriate authority, subject to the review of the council.

(D) To report annually on the activities and operations of the board to the council and make any recommendations for changes in the rules or methods of operation of the continuing legal education program.

(E) The board shall submit an annual budget to the council for approval. Expenses of the board shall not exceed the annual budget approved by the council.

RULE 17: SCOPE AND EXEMPTIONS

(A) Except as provided herein these rules shall apply to every active member licensed by the North Carolina State Bar.

(B) The Governor, the Lieutenant Governor, and all members of the Council of State, all members of the federal and state judiciary, members of the United States Senate, members of the United States House of Representatives, members of the

North Carolina General Assembly and members of the United States Armed Forces on full-time active duty are exempt. All active members, including members of the judiciary, who are exempt are encouraged to attend and participate in legal education programs.

(C) Any active member residing outside of North Carolina or any active member residing inside North Carolina who is a full-time teacher at the Institute of Government of the University of North Carolina at Chapel Hill or at a law school in North Carolina accredited by the American Bar Association and who in each case neither practices in North Carolina nor represents North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules upon written application to the board. Such application shall be filed on or before the due date for the payment of annual dues, or sooner as the circumstances may require, and shall be in effect for the year for which the application was made.

(D) The board may exempt an active member from the continuing legal education requirements for a period of not more than one year at a time upon a finding by the board of special circumstances unique to that member constituting undue hardship or other reasonable basis for exemption, or for a longer period upon a finding of a permanent disability.

(E) Nonresident attorneys from other jurisdictions who are temporarily admitted to practice in a particular case or proceeding pursuant to the provisions of N.C.G.S. 84-4.1 shall not be subject to the requirements of these rules.

RULE 18: CONTINUING LEGAL EDUCATION PROGRAM

(A) Each active member subject to these rules shall complete twelve (12) hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

(B) Of the twelve hours, (1) at least two hours shall be devoted to the area of professional responsibility, and (2) at least once every three calendar years, each member shall be required to attend a specially designed three-hour block course of instruction devoted exclusively to the area of professional responsibility which will satisfy the requirement of (B)(1).

(C) During each of the first three years of admission, newly admitted active members shall be required to take a minimum of

nine of the twelve hours of continuing legal education in practical skills courses. The board may provide by regulation for exempting newly admitted members with prior experience as practicing lawyers from the requirements of this paragraph.

(D) Members may carry over up to twelve credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule 18(B)(1), but may not include those hours required by Rule 18(B)(2). Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year, any approved CLE hours earned after that member's graduation from law school.

RULE 19: ACCREDITATION STANDARDS

The board shall approve continuing legal education activities which meet the following standards and provisions:

(A) They shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence and proficiency as a lawyer.

(B) They shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility or ethical obligations of lawyers.

(C) Credit may be given for continuing legal education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs.

(D) Continuing legal education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and equipped with suitable writing surfaces or sufficient space for taking notes.

(E) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented. It is recognized that written materials are not suitable or readily available for some types of subjects. The absence of written materials for distribution should, however, be the exception and not the rule.

(F) Any accredited sponsor must remit fees as required and keep and maintain attendance records of each continuing legal educa-

tion program sponsored by it, which shall be furnished to the board in accordance with regulations.

(G) In-house continuing legal education and self-study shall not be approved or accredited for the purpose of complying with Rule 18.

(H) Programs that cross academic lines, such as accounting-tax seminars, may be considered for approval by the board. However, the board must be satisfied that the content of the activity would enhance legal skills or the ability to practice law.

RULE 20: ACCREDITATION OF SPONSORS AND PROGRAMS

(A) An organization desiring accreditation as an accredited sponsor of courses, programs, or other continuing legal education activities may apply for accredited sponsor status to the board. The board shall approve a sponsor as an accredited sponsor if it is satisfied that the sponsor's programs have met the standards set forth in Rule 19 and regulations established by the board.

(B) Once an organization has been accredited as an accredited sponsor, then the continuing legal education programs sponsored by that organization are presumptively approved for credit, provided that the standards set out in Rule 19 and the provisions of Rule 12 are met. The board may at any time reevaluate and grant or revoke the presumptive approval status of an accredited sponsor.

(C) Any organization not accredited as an accredited sponsor which desires approval of a course or program shall apply to the board which shall adopt regulations to administer the accreditation of such programs consistent with the provisions of Rule 19. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(D) An active member desiring approval of a course or program which has not otherwise been approved shall apply to the board which shall adopt regulations to administer approval requests consistent with the requirements of Rule 19. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of the receipt of the notice of disapproval. The decision by the board on an appeal is final.

(E) The board may provide by regulation for an announcement of accreditation for an approved continuing legal education program.

(F) The board may provide by regulation for the accredited sponsor, sponsor or active member for whom a continuing legal education program has been approved to maintain and provide such records as required by the board.

RULE 21: CREDIT HOURS

The board may designate by regulation the number of credit hours to be earned by participation, including, but not limited to, teaching, in continuing legal education activities approved by the board.

RULE 22: ANNUAL REPORT

Commencing in 1989, each active member of the North Carolina State Bar shall make an annual written report to the North Carolina State Bar in such form as the board shall prescribe by regulation concerning compliance with the continuing legal education program for the preceding year or declaring an exemption under Rule 17, unless the board's records indicate that such member has been previously exempted and the circumstances resulting in the exemption are unchanged. It shall be the responsibility of any previously exempted member whose circumstances have changed and who is therefore not presently qualified for an exemption to notify the board of such changed circumstances within 30 days after such become apparent and to satisfy fully the requirements of these rules for the year following such change in circumstances.

RULE 23: NONCOMPLIANCE

(A) An attorney who is required to file a report of CLE credits and does not do so or who fails to meet the minimum requirements of these rules, including the payment of duly assessed penalties and attendee fees, may be suspended from the practice of law in the State of North Carolina.

(B) The board shall notify an attorney who appears to have failed to meet the requirements of these rules that the attorney will be suspended from the practice of law in this state, unless the attorney shows good cause why the suspension should not be made or the attorney shows that he or she has complied with the requirements within a 90-day period (180 days in 1989 only) after receiving the notice. Notice shall be forwarded to

the attorney's address as shown in the records of the North Carolina State Bar by certified mail. Ninety-three days after mailing (183 days in 1989 only) such notice, if no affidavit is filed with the board by the attorney attempting to show good cause or attempting to show that the attorney has complied with the requirements of these rules, the attorney's license shall be suspended by order of the North Carolina State Bar.

(C) If the attorney responds to the notice, the board shall review all affidavits and other documents filed by the attorney to determine whether good cause has been shown or to determine whether the attorney has complied with the requirements of these rules within the 90-day period (180 days in 1989 only). If the board determines that good cause has been shown or that the attorney is in compliance with these rules, it shall enter an appropriate order. If the board determines that good cause has not been shown and that the attorney has not shown compliance with these rules within the 90-day period (180 days in 1989 only), then the board shall refer the matter to the council for determination after hearing by the membership and fees committee. If the council, after hearing by the membership and fees committee, shall determine that the attorney has not complied with these rules and that good cause therefore has not been shown, it shall suspend the attorney's license to practice law in North Carolina until compliance is shown. The procedures to be followed by the council and the membership and fees committee shall be the same as those followed when the council and the membership and fees committee consider whether to suspend an attorney's license for the nonpayment of dues.

RULE 24: REINSTATEMENT

Any member who has been suspended for noncompliance may be reinstated upon recommendation of the board upon a showing that the member's continuing legal education deficiency has been cured. The member shall file a petition with the board seeking reinstatement in which the member shall state with particularity the accredited legal education courses which the member has attended and the number of credit hours obtained since the last reporting period prior to the member's suspension. The petition shall be accompanied by a reinstatement fee, the amount of which shall be determined by the board upon approval of the council. Within thirty (30) days of the receipt of the petition for reinstatement, the board shall determine whether the deficiency has been cured.

If the board finds that the deficiency has been cured and the reinstatement fee paid, the board shall advise the Secretary of the North Carolina State Bar who shall issue an order of reinstatement. If the board determines that the deficiency has not been cured or that the reinstatement fee has not been paid, the board shall refer the matter to the membership and fees committee for hearing. Any member who complies with the requirements of the rules during the 90-day probationary period (180 days in 1989 only) under Rule 23(B) shall pay a late compliance fee, the amount of which shall be determined by the board upon approval of the council.

RULE 25: CONFIDENTIALITY

Unless otherwise directed by the Supreme Court of North Carolina, the files, records and proceedings of the board, as they relate to or arise out of any failure of any active member to satisfy the requirements of these rules shall be deemed confidential and shall not be disclosed, except in furtherance of the duties of the board or upon the request of the active member affected or as they may be introduced in evidence or otherwise produced in proceedings under these rules.

RULE 26: EFFECTIVE DATE

(A) The effective date of these rules shall be January 1, 1988.

(B) Active members licensed prior to July 1 of any calendar year shall meet the continuing legal education requirements of these rules for such year.

(C) Active members licensed after June 30 of any calendar year must meet the continuing legal education requirements of these rules for the next calendar year.

RULE 27: REGULATIONS

The following regulations for the continuing legal education program are hereby adopted and shall remain in effect until revised or amended by the board with the approval of the council. The board may adopt other regulations to implement the continuing legal education program with the approval of the council.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its meeting on January 17, 1992, and the amendment as certified was duly adopted at a regularly called meeting of the Council.

Given over my hand and the seal of the North Carolina State Bar, this the 28th day of April, 1992.

B. E. JAMES
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 24th day of June, 1992.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 24th day of June, 1992.

I. BEVERLY LAKE, JR.
For the Court

MODEL RULES AMENDMENT RELATING TO THE INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

The following amendment to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 17, 1992.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules for the IOLTA program as appear in 307 N.C. 718 are hereby amended by rewriting the same to conform to the Model Rules of the North Carolina State Bar as follows:

RULES OF THE BOARD OF TRUSTEES NORTH CAROLINA STATE BAR PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

Section 5. Standing Committees of the Council.

1. PURPOSE. The IOLTA Board of Trustees shall carry out the provisions of the Plan for Disposition of Funds Received by the North Carolina State Bar from Interest on Trust Accounts. The Plan is: Any funds remitted to the North Carolina State Bar from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 10.3 of the RULES OF PROFESSIONAL CONDUCT shall be deposited by the North Carolina State Bar through the IOLTA Board of Trustees in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

The funds received, and any interest, dividends, or other proceeds received thereafter with respect to these funds shall be used for programs concerned with the improvement of the administration of justice, under the supervision and direction of the Board of Trustees established under this plan to administer the funds. The IOLTA Board will award grants under the six categories approved by the North Carolina Supreme Court being mindful of its tax exempt status and the IRS rulings that private interests of the legal profession are not to be funded with IOLTA funds.

The programs for which the funds may be utilized shall consist of:

a. providing legal services for indigents;

b. establishment and maintenance of lawyer referral system in order to assure that persons in need of legal services can obtain such services from a qualified attorney;

c. enhancement and improvement of grievance and disciplinary procedures to protect the public more fully from incompetent or unethical attorneys;

d. development of a client security fund to protect the public from loss due to dishonest or fraudulent practices on the part of lawyers;

e. development and maintenance of a fund for student loans to enable meritorious persons to obtain a legal education when otherwise they would not have adequate funds for this purpose; and

f. such other programs designed to improve the administration of justice as may from time to time be proposed by the Board of Trustees and approved by the Supreme Court of North Carolina.

2. JURISDICTION: AUTHORITY. The Board of Trustees of the North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts (IOLTA) is created as a standing committee by the North Carolina State Bar Council pursuant to Chapter 84 of the North Carolina General Statutes for the disposition of funds received by the North Carolina State Bar from interest on trust accounts.

3. OPERATIONAL RESPONSIBILITY. The responsibility for operating the program of the Board rests with the governing body of the Board, subject to the statutes governing the practice of law, the authority of the Council and the rules of governance of the Board.

4. SIZE OF BOARD. The Board shall have nine (9) members, at least six (6) of whom must be attorneys in good standing and authorized to practice law in the State of North Carolina.

5. LAY PARTICIPATION. The Board may have no more than three (3) members who are not licensed attorneys.

6. APPOINTMENT OF MEMBERS; WHEN; REMOVAL. The members of the Board shall be appointed by the Council of the North Carolina State Bar. The July quarterly meeting is when the appointments are made. Vacancies occurring by reason of death, resignation or removal shall be filled by appointment of the State Bar Council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the Board may be removed at any time by an affirmative vote of a majority of the members of the State Bar Council in session at a regularly called meeting.

7. TERM OF OFFICE. Each member who is appointed to the Board shall serve for a term of three (3) years beginning on September 1.

8. STAGGERED TERMS. It is intended that members of the Board shall be elected to staggered terms such that three (3) members are appointed in each year.

9. SUCCESSION. Each member of the Board shall be entitled to serve for one full three (3) year term and to succeed him/herself for one additional three (3) year term. No member

shall serve more than two consecutive three-year terms, in addition to service prior to the beginning of a full three (3) year term, without having been off the Board for at least three (3) years.

10. APPOINTMENT OF CHAIRMAN. The Chairman of the Board shall be appointed from time to time as necessary by the State Bar Council. The term of such individual as Chairman shall be for one year. The Chairman may be reappointed thereafter during his/her tenure on the Board. The Chairman shall preside at all meetings of the Board, shall prepare and present to the State Bar Council the annual report of the Board, and generally shall represent the Board in its dealings with the public.

11. APPOINTMENT OF VICE CHAIRMAN. The Vice Chairman of the Board shall be appointed from time to time as necessary by the State Bar Council. The term of such individual as Vice Chairman shall be one year. The Vice Chairman may be reappointed thereafter during tenure on the Board. The Vice Chairman shall preside at and represent the Board in the absence of the Chairman and shall perform such other duties as may be assigned to him/her by the Chairman or by the Board.

12. SOURCE OF FUNDS. Funding for the program carried out by the Board shall come from funds remitted from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 10.3 of the RULES OF PROFESSIONAL CONDUCT, voluntary contributions from lawyers, and interest, dividends or other proceeds earned on the Board's funds from investments.

13. FISCAL RESPONSIBILITY. All funds of the Board shall be considered funds of the North Carolina State Bar, with the beneficial interest in those funds being vested in the Board for grants to qualified applicants in the public interest, less administrative costs. These funds shall be administered and disbursed by the IOLTA Board in accordance with rules or policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The funds shall be used to pay the administrative costs of the IOLTA Program and to fund grants approved by the Board of Trustees under the six categories approved by the North Carolina Supreme Court as outlined above.

A. MAINTENANCE OF ACCOUNTS: AUDIT. The funds of the IOLTA Program shall be maintained in a separate account from funds of the North Carolina State Bar such that the funds and expenditures therefrom can be readily identified. The accounts

of the Board shall be audited on an annual basis. The audit will be conducted after the books are closed at a time determined by the auditors, but not later than March 31 of the year following the year for which the audit is to be conducted.

B. INVESTMENT CRITERIA. The funds of the Board shall be handled, invested and reinvested in accordance with investment policies adopted by the Council of the North Carolina State Bar for handling of dues, rents and other revenues received by the North Carolina State Bar in carrying out its official duties.

C. DISBURSEMENT. Disbursement of funds of the Board in the nature of grants to qualified applicants in the public interest, less administrative costs, shall be made by the Board in accordance with policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The IOLTA Board shall adopt an annual operational budget and disbursements shall be made in accordance with the budget as adopted. The Board shall determine the signatories on the IOLTA accounts.

14. MEETINGS. The Board by resolution may set regular meeting dates and places. Special meetings of the Board may be called at any time upon notice given by the Chairman, the Vice Chairman or any two members of the Board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, or telephone. A quorum of the Board for conducting its official business shall be a majority of the total membership of the Board.

15. ANNUAL REPORT. The Board shall prepare at least annually a report of its activities and shall present same to the Council of the North Carolina State Bar one month prior to its annual meeting.

16. SEVERABILITY. If any provision of this plan or the application thereof is held invalid, the invalidity does not affect other provisions or applications of the plan which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its meeting on January 17, 1992, and the amendment as certified was duly adopted at a regularly called meeting of the Council.

Given over my hand and the seal of the North Carolina State Bar, this the 28th day of April, 1992.

B. E. JAMES
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 24th day of June, 1992.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 24th day of June, 1992.

I. BEVERLY LAKE, JR.
For the Court

MODEL RULES AMENDMENT RELATING TO CLIENT SECURITY FUND

The following amendment to the Rules, Regulations, and Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at the quarterly meeting on April 17, 1992.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of the Client Security Fund, which were established by the Supreme Court of North Carolina and appear in 311 N.C. 776 be and the same are hereby amended by rewriting said rules to conform with Model Rules for all Boards and Agencies of the North Carolina State Bar as follows:

AMENDED AND RESTATED RULES OF ADMINISTRATION AND GOVERNANCE NORTH CAROLINA STATE BAR CLIENT SECURITY FUND

1. PURPOSE; DEFINITIONS. The Client Security Fund of The North Carolina State Bar is a standing committee of the State Bar Council, established by the Council pursuant to an Order of the Supreme Court of North Carolina dated August 29, 1984. Its purpose is to reimburse, in whole or in part in appropriate cases and subject to the provisions and limitations of the Supreme Court Order and these Rules, clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina, which conduct occurred on or after January 1, 1985.

It is the purpose and intent of these Rules for Governance and Administration of The North Carolina State Bar Client Security Fund to amend in part and restate the Rules, Regulations and the Certificate of Organization of The North Carolina State Bar (221 N.C. 587, as amended) as approved in regard to the Client Security Fund in 311 N.C. 776 and 311 N.C. 785, and the Rules of Procedure of the Client Security Fund, both as approved by the order of the Supreme Court dated October 10, 1984, and to set forth herein a comprehensive and inclusive statement of the Rules of the Fund as so amended and restated. Upon approval by the Supreme Court, these Rules of Governance and Administration shall supersede the Supreme Court Order and the Rules of Procedure of the Client Security Fund.

As used herein the following terms have the meaning indicated:

1.1 "Applicant" shall mean a person who has suffered a reimbursable loss because of the Dishonest Conduct of an Attorney and has filed an application for reimbursement.

1.2 "Attorney" shall mean an attorney who, at the time of alleged Dishonest Conduct, was licensed to practice law by the North Carolina State Bar. The fact that the alleged Dishonest Conduct took place outside the State of North Carolina does not necessarily mean that the Attorney was not engaged in the practice of law in North Carolina.

1.3 "Board" shall mean the Board of Trustees of the Client Security Fund.

1.4 "Council" shall mean the North Carolina State Bar Council.

1.5 "Dishonest Conduct" shall mean wrongful acts committed by an Attorney against an Applicant in the nature of embezzlement from the Applicant or the wrongful taking or conversion of monies or other property of the Applicant, which monies or other property were entrusted to the Attorney by the Applicant by reason of an attorney-client relationship between the Attorney and the Applicant or by reason of a fiduciary relationship between the Attorney and the Applicant customary to the practice of law.

1.6 "Fund" shall mean the Client Security Fund of the State Bar.

1.7 "Reimbursable Losses" shall mean only those losses of money or other property which meet all of the following tests:

(a) The Dishonest Conduct which occasioned the loss occurred on or after January 1, 1985.

(b) The loss was caused by the Dishonest Conduct of an Attorney acting either as an attorney for the Applicant or in a fiduciary capacity for the benefit of the Applicant customary to the private practice of law in the matter in which the loss arose.

(c) The Applicant has exhausted all viable means to collect Applicant's losses and has complied with these Rules.

1.8 The following shall not be deemed "Reimbursable Losses":

(a) Losses of spouses, parents, grandparents, children and siblings (including foster and half relationships), partners, associates or employees of the Attorney(s) causing the losses.

(b) Losses covered by any bond, security agreement or insurance contract, to the extent covered thereby.

(c) Losses incurred by any business entity with which the Attorney or any person described in Section 1.8(a) hereof is an officer, director, shareholder, partner, joint venturer, promoter or employee.

(d) Losses, reimbursement for which has been otherwise received from or paid by or on behalf of the Attorney who committed the Dishonest Conduct.

(e) Losses arising in investment transactions in which there was neither a contemporaneous attorney-client relationship between the Attorney and the Applicant nor a contemporaneous fiduciary relationship between the Attorney and the Applicant customary to the practice of law. By way of illustration but not limitation, for purposes of this section 1.8(e), an Attorney authorized or permitted by a person or entity other than the Applicant as escrow or similar agent to hold funds deposited by the Applicant for investment purposes shall not be deemed to have a fiduciary relationship with the Applicant customary to the practice of law.

1.9 "State Bar" shall mean the North Carolina State Bar.

1.10 "Supreme Court" shall mean the North Carolina Supreme Court.

1.11 "Supreme Court Order" shall mean the Order of the Supreme Court dated October 10, 1984, as amended February 27, 1985 authorizing the establishment of the North Carolina Client Security Fund and approving the Rules of Procedure of the Fund.

2. JURISDICTION: AUTHORITY. Chapter 84 of the General Statutes vests in the State Bar authority to control the discipline, disbarment and restoration of licenses of attorneys; to formulate and adopt rules of professional ethics and conduct; and to do all such things necessary in the furtherance of the purposes of the statutes governing the practice of the law as are not themselves prohibited by law. G.S. 84-22 authorizes the State Bar to establish such committees, standing or special, as from time to time the Council deems appropriate for the proper discharge of its duties; and to determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act and other matters relating to such committees. The Rules of the State Bar, as adopted and amended from time to time, are subject to approval by the Supreme Court under G.S. 84-21.

The Supreme Court Order, entered in the exercise of the Supreme Court's inherent power to supervise and regulate attorney conduct, authorized the establishment of the Fund as a standing committee of the Council, to be administered by the State Bar under rules and regulations approved by the Supreme Court.

3. OPERATIONAL RESPONSIBILITY. The responsibility for operating the Fund and the program of the Board rests with the Board, subject to the Supreme Court Order, the statutes govern-

ing the practice of law, the authority of the Council and the Rules of the Board.

4. SIZE OF BOARD. The Board shall have five (5) members, four (4) of whom must be attorneys in good standing and authorized to practice law in the State of North Carolina.

5. LAY PARTICIPATION. The Board shall have one (1) member who is not a licensed attorney.

6. APPOINTMENT OF MEMBERS; WHEN; REMOVAL. The members of the Board shall be appointed by the Council. Any member of the Board may be removed at any time by the affirmative vote of a majority of the members of the Council at a regularly called meeting. Vacancies occurring by reason of death, disability, resignation or removal of a member shall be filled by appointment of the President of the State Bar with the approval of the Council at its next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

7. TERM OF OFFICE. Each member who is appointed to the Board, other than a member appointed to fill a vacancy created by the death, disability, removal or resignation of a member, shall serve for a term of five (5) years beginning as of the first day of the month following the date on which the appointment is made by the Council. A member appointed to fill a vacancy shall serve the remainder of the vacated term.

8. STAGGERED TERMS. It is intended that members of the Board shall be elected to staggered terms such that one (1) member is appointed in each year.

9. SUCCESSION. Each member of the Board shall be entitled to serve for one (1) full five (5) year term. A member appointed to fill a vacated term may be appointed to serve one (1) full five (5) year term immediately following the expiration of the vacated term but shall not be entitled as of right to such appointment. No person shall be reappointed to the Board until the expiration of three (3) years following the last day of the previous term of such person on the Board.

10. APPOINTMENT OF CHAIRMAN. The Chairman of the Board shall be appointed from the members of the Board annually by the Council. The term of the Chairman shall be one (1) year. The Chairman may be reappointed by the Council thereafter during tenure on the Board. The Chairman shall preside at all meetings

of the Board, shall prepare and present to the State Bar Council the annual report of the Board, and generally shall represent the Board in its dealings with the public.

11. APPOINTMENT OF VICE CHAIRMAN. The Vice Chairman of the Board shall be appointed from the members of the Board annually by the Council. The term of the Vice Chairman shall be one (1) year. The Vice Chairman may be reappointed by the Council thereafter during tenure on the Board. The Vice Chairman shall preside at and represent the Board in the absence of the Chairman and shall perform such other duties as may be assigned to him by the Chairman or by the Board.

12. SOURCE OF FUNDS. Funds for the program carried out by the Board shall come from assessments of members of the State Bar as ordered by the Supreme Court, from voluntary contributions and as may otherwise be received by the Fund.

13. FISCAL RESPONSIBILITY. All funds of the Board shall be considered funds of the State Bar and shall be maintained, invested and disbursed as follows:

13.1 MAINTENANCE OF ACCOUNTS; AUDIT. The State Bar shall maintain a separate account for funds of the Board such that such funds and expenditures therefrom can be readily identified. The accounts of the Board shall be audited annually in connection with the audits of the State Bar.

13.2 INVESTMENT CRITERIA. The funds of the Board shall be kept, invested and reinvested in accordance with investment policies adopted by the Council for dues, rents and other revenues received by the State Bar in carrying out its official duties. In no case shall the funds be invested or reinvested in investments other than such as are permitted to fiduciaries under the General Statutes of North Carolina.

13.3 DISBURSEMENT. Disbursement of funds of the Board shall be made by or under the direction of the Secretary-Treasurer of the State Bar.

14. MEETINGS. The annual meeting of the Board shall be held in October of each year in connection with the annual meeting of the State Bar. The Board by resolution may set other regular meeting dates and places. Special meetings of the Board may be called at any time upon notice given by the Chairman, the Vice Chairman or any two (2) members of the Board. Notice of meeting shall be given at least two (2) days prior to the meeting by mail,

telegram, facsimile transmission or telephone. A quorum of the Board for conducting its official business shall be a majority of the members serving at a particular time. Written minutes of all meetings shall be prepared and maintained.

15. ANNUAL REPORT. The Board shall prepare at least annually a report of its activities and shall present the same to the Council at the annual meeting of the State Bar.

16. APPLICATIONS FOR REIMBURSEMENT. The Board shall prepare a form of Application for Reimbursement which shall require the following minimum information, and such other information as the Board may from time to time specify:

16.1 The name and address of the Applicant.

16.2 The name and address of the Attorney who is alleged to have engaged in Dishonest Conduct.

16.3 The amount of the alleged loss for which application is made.

16.4 The date on or period of time during which the alleged loss occurred.

16.5 A general statement of facts relative to the application.

16.6 A description of any relationship between the Applicant and the Attorney of the kinds described in Sections 1.8(a) and/or 1.8(c).

16.7 Verification by the Applicant.

16.8 All supporting documents, including:

(a) Copies of any court proceedings against the Attorney.

(b) Copies of all documents showing any reimbursement or receipt of funds in payment of any portion of the loss.

The application shall contain the following statement in boldface type:

"IN ESTABLISHING THE CLIENT SECURITY FUND PURSUANT TO ORDER OF THE SUPREME COURT OF NORTH CAROLINA, THE NORTH CAROLINA STATE BAR DID NOT CREATE NOR ACKNOWLEDGE ANY LEGAL RESPONSIBILITY FOR THE ACTS OF INDIVIDUAL ATTORNEYS IN THE PRACTICE OF LAW. ALL REIMBURSEMENTS OF LOSSES FROM THE CLIENT SECU-

RITY FUND SHALL BE A MATTER OF GRACE IN THE SOLE DISCRETION OF THE BOARD ADMINISTERING THE FUND AND NOT A MATTER OF RIGHT. NO APPLICANT OR MEMBER OF THE PUBLIC SHALL HAVE ANY RIGHT IN THE CLIENT SECURITY FUND AS A THIRD PARTY BENEFICIARY OR OTHERWISE."

The Application shall be filed in the office of the State Bar in Raleigh, North Carolina, attention Client Security Fund Board, and a copy shall be transmitted by such office to the Chairman of the Board.

17. PROCESSING APPLICATIONS.

17.1 The Board shall cause an investigation of all Applications filed with the State Bar to determine whether the application is for a Reimbursable Loss and the extent, if any, to which the Application should be paid from the Fund.

17.2 The Chairman of the Board shall assign each Application to a member of the Board for review and report. Wherever possible, the member to whom such application is referred shall practice in the county wherein the Attorney practices or practiced.

17.3 A copy of the application shall be served upon or sent by registered mail to the last known address of the Attorney who it is alleged committed an act of Dishonest Conduct.

17.4 After considering a report of investigation as to an Application, any Board member may request that testimony be presented concerning the application. In all cases, the alleged defalcating Attorney or his representative will be given an opportunity to be heard by the Board if the Attorney so requests.

17.5 The Board shall operate the Fund so that, taking into account assessments ordered by the Supreme Court but not yet received and anticipated investment earnings, a principal balance of approximately $1,000,000 is maintained. Subject to the foregoing, the Board shall, in its discretion, determine the amount of loss, if any, for which each Applicant should be reimbursed from the Fund. In making such determination, the Board shall consider, inter alia, the following:

(a) The negligence, if any, of the Applicant which contributed to the loss.

(b) The comparative hardship which the Applicant suffered because of the loss.

(c) The total amount of Reimbursable Losses of Applicants on account of any one Attorney or firm or association of attorneys.

(d) The total amount of Reimbursable Losses in previous years for which total reimbursement has not been made and the total assets of the Fund.

(e) The total amount of insurance or other source of funds available to compensate the Applicant for any Reimbursable Loss.

17.6 The Board may, in its discretion, allow further reimbursement in any year of a reimbursable loss reimbursed in part by it in prior years.

17.7 *Provided, however*, and the foregoing notwithstanding, in no case shall the Fund reimburse the otherwise Reimbursable Losses sustained (a) by any one Applicant as a result of the Dishonest Conduct of one attorney in an amount in excess of $60,000, or (b) by all Applicants as the result of the Dishonest Conduct of one Attorney in amounts, in the aggregate, in excess of $100,000.

17.8 No reimbursement shall be made to any Applicant unless reimbursement is approved by a majority vote of the entire Board at a duly held meeting at which a quorum is present.

17.9 No Attorney shall be compensated by the Board for prosecuting an application before it.

17.10 An Applicant may be advised of the status of the Board's consideration of the application and shall be advised of the final determination of the Board.

17.11 All applications, proceedings, investigations, and reports involving Applicants for reimbursement shall be kept confidential until and unless the Board authorizes reimbursement to the Applicant, or the Attorney alleged to have engaged in Dishonest Conduct requests that the matter be made public. All participants involved in an application, investigation or proceeding (including the Applicant) shall conduct themselves so as to maintain the confidentiality of the Application, investigation or proceeding. This provision shall not be construed to deny relevant information to be provided by the Board to disciplinary committees or to anyone else to whom the Council authorizes release of information.

17.12 The Board may, in its discretion, for newly discovered evidence or other compelling reason, grant a request to reconsider

any application which the Board has denied in whole or in part; otherwise, such denial is final and no further consideration shall be given by the Board to such application or another application upon the same alleged facts.

18. SUBROGATION FOR REIMBURSEMENT. In the event reimbursement is made to an Applicant, the State Bar shall be subrogated to the amount reimbursed and may bring an action against the Attorney or the Attorney's estate either in the name of the Applicant or in the name of the State Bar. As a condition of reimbursement, the Applicant may be required to execute a "subrogation agreement" to such effect. Filing of an Application constitutes an agreement by the Applicant that The North Carolina State Bar shall be subrogated to the rights of the Applicant to the extent of any reimbursement. Upon commencement of an action by the State Bar pursuant to its subrogation rights, it shall advise the reimbursed Applicant at his or her last known address. A reimbursed Applicant may then join in such action to recover any loss in excess of the amount reimbursed by the Fund. Any amounts recovered from the Attorney by the Board in excess of the amount to which the Fund is subrogated, less the Board's actual costs of such recovery, shall be paid to or retained by the Applicant as the case may be.

Before receiving a payment from the Fund, the person who is to receive such payment or his legal representative shall execute and deliver to the Board a written agreement stating that in the event the reimbursed Applicant or his or her estate should ever receive any restitution from the Attorney or his estate, the reimbursed Applicant agrees that the Fund shall be repaid up to the amount of the reimbursement from the Fund plus expenses.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its meeting on January 17, 1992, and the amendment as certified was duly adopted at a regularly called meeting of the Council.

Given over my hand and the seal of the North Carolina State Bar, this the 28th day of April, 1992.

B. E. JAMES
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 24th day of June, 1992.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 24th day of June, 1992.

I. BEVERLY LAKE, JR.
For the Court

AMENDMENTS TO RULES GOVERNING ADMISSION TO PRACTICE LAW

The following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at its regular quarterly meeting on July 17, 1992.

BE IT RESOLVED that Rules .0206, .0405, .1203(4), and .1207 of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appear in 289 N.C. 742 and as amended in 293 N.C. 759, 295 N.C. 747, 296 N.C. 746, 304 N.C. 746, 306 N.C. 793, 307 N.C. 707, 310 N.C. 753, 312 N.C. 838, 326 N.C. 809 and 329 N.C. 808, be amended as shown by the RESOLUTION of the Board of Law Examiners attached hereto.

RESOLUTION

WHEREAS, the Board of Law Examiners of the State of North Carolina held a meeting in its offices in the N.C. State Bar Building, 208 Fayetteville Street Mall, Raleigh, North Carolina, on May 28, 1992; and

WHEREAS, at this meeting, the Board considered amendments to Rules .0206, .0405, .1203(4), and .1207 of the Rules Governing Admission to the Practice of Law in the State of North Carolina; and

WHEREAS, on motion by Stephen R. Burch, seconded by Landon Roberts, it was RESOLVED that Rules .0206, .0405, .1203(4), and .1207 in the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended to read as follows:

.0206 NONPAYMENT OF FEES

Failure to pay the application fees required by these rules shall cause the application not to be deemed filed. If the check payable for the application fee is not honored upon presentment for any reason other than error of the bank ~~due to insufficient funds~~ the application will ~~not~~ be deemed not timely filed and will have to be refiled. All checks payable to the Board for any fees which are not honored upon presentment shall be returned to the applicant who shall pay to the Board in cash, cashier's check, certified check or money order any fees payable to the Board including a fee for processing that check.

.0405 REFUND OF FEES

No part of the fee required by Rule .0404 (1)(2)(3) of this Chapter shall be refunded to the applicant unless the applicant shall file with the secretary a written request to withdraw as an applicant, not later than the 15th day of June preceding the July written bar examination and not later than the 15th day of January preceding the February written bar examination in which event not more than one-half of the fee may be refunded to the applicant in the discretion of the Board. No portion of any late fee will be refunded.

.1203 CONDUCT OF HEARINGS

(4) The Board or a Panel of the Board may allow an applicant to take the bar examination but seal the results of that examination

until the Board or a Panel has made a final determination that the applicant possesses the qualifications of character and general fitness requisite for an attorney and counsellor at law and is possessed of good moral character and is entitled to the high regard and confidence of the public.

.1207 REOPENING OF A CASE

After a final decision has been reached by the Board in any matter, a party may petition the Board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The petition shall be made within a reasonable time and not more than ninety days after the decision of the Board has been entered.

NOW, THEREFORE BE IT RESOLVED by unanimous vote of the Board of Law Examiners of the State of North Carolina that Rules .0206, .0405, .1203(4), and .1207 of the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended to read as set out above; and that the action of this Board be certified to the Council of the North Carolina State Bar and to the North Carolina Supreme Court for approval.

Enacted at a regularly scheduled meeting of the Board of Law Examiners of the State of North Carolina on May 29, 1992.

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

FRED P. PARKER III
Executive Director

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at its meeting on July 17, 1992, and the amendments as certified were duly adopted at a regularly called meeting of the Council.

Given over my hand and the seal of the North Carolina State Bar, this the 29th day of July, 1992.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3rd day of September, 1992.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 3rd day of September, 1992.

I. BEVERLY LAKE, JR.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d or superseding titles and sections in N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ABORTION; PRENATAL OR BIRTH-RELATED INJURIES AND OFFENSES

§ 6 (NCI4th). Wrongful death of unborn child generally

Plaintiff administratrix's claim for punitive damages for the wrongful death of her stillborn child arising from an automobile accident was not barred by the decision in *DiDonato v. Wortman*, 320 N.C. 423, because it was not joined with personal injury claims of the parents in a settlement with the tortfeasors where the settlement occurred prior to that decision. *Greer v. Parsons*, 368.

§ 7 (NCI4th). Wrongful death of unborn child; persons bringing suit as affecting right of action

Plaintiff administratrix's claim for punitive damages for the wrongful death of her stillborn child arising from an automobile accident was not barred by a release signed individually by plaintiff and her husband before plaintiff qualified as the administratrix of her child's estate. *Greer v. Parsons*, 368.

§ 8 (NCI4th). Damages recoverable for wrongful death of unborn child

Pecuniary damages and damages for loss of services and companionship are not recoverable in an action for the wrongful death of a stillborn child. *Greer v. Parsons*, 368.

APPEAL AND ERROR

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion

The issue of whether the State attempted to place before the jury a fact not in evidence during cross-examination of a defense expert witness was not preserved for appellate review where defense counsel merely objected to the form of the question, not that the prosecutor was improperly seeking to argue evidence not before the jury, and this specific ground was not apparent from the context of the question. *State v. Holder*, 462.

§ 531 (NCI4th). Miscellaneous particular circumstances as warranting new trial

A defendant convicted of first degree murder is awarded a new trial where two members of the Supreme Court support the result of a new trial solely on the basis that the trial court's instruction on reasonable doubt was unconstitutional and three members support that result solely on the basis that a potential juror was improperly excused by the prosecutor because of his national origin. *State v. Montgomery*, 559.

§ 550 (NCI4th). Force and effect of Supreme Court decisions generally

Failure to apply retroactively the rule of *State v. Vandiver*, 321 N.C. 570, that perjury is an improper nonstatutory aggravating factor does not violate defendant's federal or state due process rights since the rule is not of constitutional magnitude. *State v. Hudson*, 122.

ARBITRATION AND AWARD

§ 3 (NCI4th). Effect of arbitration agreement on right to seek judicial relief

The trial court and the Court of Appeals erred by holding that a supplementary general condition providing jurisdiction in the North Carolina courts conflicted with an arbitration clause in the general conditions and that the contract did not contain an agreement to arbitrate. *Johnston County v. R. N. Rouse & Co.*, 88.

ARSON AND OTHER BURNINGS

§ 32 (NCI4th). Ownership and occupancy; dwelling of another

The trial court did not err in denying defendant's motion to dismiss the charge of first degree arson on the ground of insufficient evidence that the building was occupied by a living person when the arson occurred. *State v. Pigott*, 199.

ASSAULT AND BATTERY

§ 13 (NCI4th). Aiders and abettors

The trial court did not err by denying defendant's motion to dismiss an assault charge based on acting in concert. *State v. Reeb*, 159.

There was no plain error in an assault prosecution where the court instructed the jury that, if they did not find a common purpose of aiding and abetting, they would decide whether the evidence shows beyond a reasonable doubt that each of the defendants is guilty of the crime as charged and defendant contended that there was no evidence that he committed an assault except as an aider and abettor or while acting in concert. *Ibid.*

§ 22 (NCI4th). What constitutes "serious injury"

There was sufficient evidence of the element of serious injury in an assault prosecution despite the victim's testimony that he was released from the hospital the night of the shooting and missed only one day of work. *State v. Butler*, 227.

§ 26 (NCI4th). Sufficiency of evidence where weapon is a firearm

There was sufficient evidence of intent to kill in a prosecution for assault and murder. *State v. Butler*, 227.

§ 31 (NCI4th). Instructions; definition of intent to kill

There was no unconstitutional burden shifting in a prosecution for murder and assault where the court instructed the jury on the doctrine of transferred intent as it related to the assault charge. *State v. Locklear*, 239.

BURGLARY AND UNLAWFUL BREAKINGS

§ 61 (NCI4th). Sufficiency of evidence of burglary in conjunction with larceny

The evidence was sufficient to support defendant's conviction of first degree burglary based on an intent to commit larceny. *State v. Montgomery*, 559.

CONSTITUTIONAL LAW

§ 244 (NCI4th). Discovery generally

The trial court did not abuse its discretion in a prosecution for murder and robbery by denying defendant an ex parte hearing at which to apply for funds to employ expert assistance. *State v. Phipps*, 427.

§ 252 (NCI4th). Preparation of defense; miscellaneous information or materials sought by defendant

The trial court did not err by denying a murder and robbery defendant's motion for the appointment of an investigator where there was an insufficient showing of a particularized need for expert assistance. *State v. Phipps*, 427.

The trial court erred in requiring court-appointed defense psychiatric experts to prepare and submit to the prosecutor written reports of their evaluations of

CONSTITUTIONAL LAW — Continued

The trial judge violated the right of defendants to be present at all stages of their capital trial when he conducted unrecorded private bench conferences with prospective jurors and excused numerous prospective jurors after these conferences. *State v. Johnston*, 680.

§ 372 (NCI4th). Death penalty; effect of prosecutorial discretion

The death penalty statute does not unconstitutionally give the district attorney the discretion to decide whether to seek the death penalty. *State v. Hill*, 387.

COUNTIES

§ 37 (NCI4th). County manager; appointment or designation

The inspection and disclosure of applications for the position of county manager are governed by G.S. 153A-98, not by the Public Records Act, and there is no provision in the statute for public access to the files of applicants for the position of county manager. *Elkin Tribune, Inc. v. Yadkin County Bd. of Commissioners*, 735.

CRIMINAL LAW

§ 18 (NCI4th). Burden of proof of mental capacity

The trial court did not err in ordering that defendant submit to a second psychiatric evaluation at Dorothea Dix Hospital where the court found that defendant was uncooperative during his first evaluation. *State v. Holder*, 462.

§ 23 (NCI4th). Separate submission of guilt and insanity issues to jury

While the better procedure would be to have the jury determine defendant's sanity before considering defendant's guilt of the substantive offenses, the trial court's failure to so instruct the jury did not constitute error. *State v. Hudson*, 122.

§ 25 (NCI4th). Mental capacity as affected by intoxicating liquor or drugs generally

The high evidentiary standard of proof required as a prerequisite to a voluntary intoxication instruction does not unconstitutionally prevent a defendant from presenting evidence in his defense. *State v. Phipps*, 427.

§ 78 (NCI4th). Circumstances insufficient to warrant change of venue

The trial court did not err in a murder prosecution by denying defendants' motions that their trials be moved to another county or that a jury be drawn from a special venire from another county due to pretrial publicity. *State v. Reeb*, 159.

§ 83 (NCI4th). Pretrial motions; waiver by failure to file

The trial court ruled incorrectly in a murder prosecution by denying defendant's motion to dismiss the indictments on the ground that the grand jury's foreman was chosen in a racially discriminatory manner where the court incorrectly applied the prospective operation of the *Cofield* decisions; however, the motions were not timely filed. *State v. Pigott*, 199.

§ 109 (NCI4th). Information subject to disclosure by defendant; reports of examinations and tests

Defendant was not prejudiced by the trial court's error in requiring court-appointed defense psychiatric experts to submit to the prosecutor written reports of their evaluations of defendant as a condition of their appointment where defend-

ant relied at the sentencing hearing upon those reports and the State thus would have been entitled to pretrial discovery of the reports. *State v. White*, 604.

Under G.S. 15A-905(b), results or reports of mental examinations conducted by defense experts are subject to pretrial discovery by the State if such information or the experts are intended to be relied upon by the defendant at either the guilt-innocence or the sentencing phase of the trial. *Ibid.*

§ 133 (NCI4th). Acceptance of guilty plea

The trial court did not violate defendant's federal or state due process rights by refusing to enforce a plea bargain agreement for defendant to plead guilty to two counts of second degree murder and receive two consecutive fifty-year sentences. *State v. Hudson*, 122.

§ 319 (NCI4th). Joinder of defendants charged with same offense; homicide

The trial court did not err by consolidating for trial the prosecutions of two defendants for murder, assault, and armed robbery. *State v. Reeb*, 159.

§ 399 (NCI4th). Expression of opinion by comment on failure to produce certain witnesses or evidence

The trial judge did not express an opinion on defendant's failure to testify when, during a discussion relating to the State's objection to a question asked a witness by defense counsel about defendant's reputation for truthfulness, he stated to defense counsel that he assumed defendant planned to testify and asked whether counsel had decided if defendant was going to testify. *State v. Holder*, 462.

§ 406 (NCI4th). Discretionary orders; orders before trial

The record shows that the trial court did in fact exercise its discretion in allowing the filming of defendant's trial. *State v. Hudson*, 122.

§ 410 (NCI4th). General duty of prosecuting attorney

There was no error in the manner in which the prosecutor sought to fulfill his duty where defendant contended that the cumulative effect of the volume of physical evidence and expert or investigative testimony was confusion and undue prejudice. *State v. Phipps*, 427.

§ 414 (NCI4th). Right to conclude argument

The Supreme Court declined to review Rule 10 of the General Rules of Practice for the Superior and District Courts where the State was allowed the last argument to the jury because a codefendant had introduced into evidence the transcript of a witness's testimony from a preliminary hearing. *State v. Reeb*, 159.

§ 441 (NCI4th). Argument of counsel; comment on credibility of expert witnesses

The trial court did not err in failing to intervene *ex mero motu* when the prosecutor argued to the jury that a psychiatrist who testified that defendant was insane when he murdered the victim and recommended psychotherapy as treatment for defendant's problems "wants you to find him not guilty by reason of insanity so he can talk to him for a while, I contend to you. Talk. No medication; nothing." *State v. Holder*, 462.

§ 445 (NCI4th). Argument of counsel; interjection of counsel's personal beliefs

Impropriety in the prosecutors' closing arguments which expressed their personal disbelief in the testimony of a key defense witness was cured when the trial court instructed the jury to disregard such arguments. *State v. Maynor*, 695.

CRIMINAL LAW — Continued

§ 458 (NCI4th). Argument of counsel; possibility of parole, pardon, or executive commutations

The prosecutor's argument in a capital sentencing proceeding asking the jury whether it could guarantee that defendant would not get a .22 automatic some time in the future and kill again if it chose not to exercise the option of the death penalty was not an improper reference to the possibility of parole. *State v. Hill*, 387.

§ 460 (NCI4th). Argument of counsel; reasonable inferences from evidence

The prosecutor did not attempt to place before the jury facts not in evidence when he argued to the jury that the jury could infer from the evidence that defendant made hang up calls to ascertain whether the victim was there. *State v. Holder*, 462.

§ 466 (NCI4th). Argument of counsel; comments regarding defense attorney

Defendant was not prejudiced when the prosecutor in a capital case mentioned during questioning of prospective jurors that both defense counsel served with the Public Defender's Office and the jurors thus learned that tax dollars were paying for his defense. *State v. Hill*, 387.

§ 467 (NCI4th). Argument of counsel; use of or reference to physical evidence

The trial court did not abuse its discretion in failing to intervene *ex mero motu* when, during the closing argument, the prosecutor attached a photograph of a murder victim to the podium in front of the jury box and played a tape recording of defendant's threatening telephone message to the victim. *State v. Holder*, 462.

§ 496 (NCI4th). Deliberations; review of testimony

The trial court improperly failed to exercise its discretion in a prosecution for two murders when it denied the jury's request to examine the transcript of a psychiatrist's testimony because it was "not available," but this error was not prejudicial to defendant where the testimony was adverse to defendant and the psychiatrist's notes were submitted to the jury for review. *State v. Hudson*, 122.

§ 507 (NCI4th). Record of proceedings generally

Ex parte conversations between the judge and jurors in a courthouse corridor during a recess in a capital trial did not amount to a "proceeding" within the meaning of the statute requiring the trial court to have an accurate record made of all "statements from the bench and all other proceedings," and the failure to record these conversations did not implicate defendant's federal due process rights. *State v. Hudson*, 122.

§ 557 (NCI4th). Mistrial; testimony about defendant's other prior criminal activity

The trial court properly denied defendant's motion for a mistrial in his trial for murdering his son and assaulting his wife after an officer briefly mentioned during her testimony the existence of a restraining order against defendant. *State v. Hill*, 387.

§ 692 (NCI4th). Oral or written instruction

The trial court erred in ruling as a matter of law that it had no authority to grant the jury's request during its deliberations for written instructions on the elements of the crimes submitted to the jury, but such error was harmless where the court orally repeated the requested instructions. *State v. McAvoy*, 583.

DAMAGES

§ 68 (NCI4th). Punitive damages; requirement that actual or compensatory damages first be awarded

Plaintiff could recover punitive damages from defendant where the jury failed to award compensatory damages, was not instructed on nominal damages, and plaintiff established to the jury's satisfaction all of the elements of assault and battery. *Hawkins v. Hawkins*, 743.

DEEDS

§ 58 (NCI4th). Restrictive covenants; validity

An owner of land in fee has a right to sell his land subject to any restrictions he or she may see fit to impose, provided the restrictions are not contrary to public policy, and such restrictions may be classed as either personal or real. *Runyon v. Paley*, 293.

§ 65 (NCI4th). Real covenants

A restrictive covenant is a real covenant that runs with the land of the dominant and servient estates only if the subject of the covenant touches and concerns the land, there is privity of estate between the party enforcing the covenant and the party against whom the covenant is being enforced, and the original covenanting parties intended the benefits and the burdens of the covenant to run with the land. *Runyon v. Paley*, 293.

§ 78 (NCI4th). Who may enforce restrictive covenant

In certain circumstances, a party unable to enforce a restrictive covenant as a real covenant running with the land may nevertheless be able to enforce the covenant as an equitable servitude. *Runyon v. Paley*, 293.

A restrictive covenant is not enforceable, either at law or in equity, against a subsequent purchaser of property burdened by the covenant unless notice of the covenant is contained in an instrument in his or her chain of title, and, while it would be advisable to include an express provision with respect to rights of enforcement, such notice is not required. *Ibid.*

DIVORCE AND SEPARATION

§ 161 (NCI4th). Equitable distribution of property; application of distributional factors in particular cases

The trial court did not abuse its discretion in an equitable distribution action by its unequal division of marital property even though it was unfair for the wife to support the children for three years without help from their father and without compensation in the ultimate resolution of the matter, since the issue of child support is not encompassed in the equitable distribution issue and its consideration is explicitly barred by statute. *Wiencek-Adams v. Adams*, 688.

ELECTIONS

§ 60 (NCI4th). Qualifications of candidates

The "resign to run" statute, G.S. 163-125(a), violates Art. VI, § 6 of the North Carolina Constitution by adding a qualification for election to office beyond those prescribed in the Constitution. *Moore v. Knightdale Bd. of Elections*, 1.

EVIDENCE AND WITNESSES

EVIDENCE AND WITNESSES — Continued

§ 318 (NCI4th). Admissibility of other crimes, wrongs, or acts; homicide offenses

The prosecutor was properly allowed to cross-examine defendant and the manager of the club where defendant worked about defendant's having the gun used in a killing on the premises of the club in violation of the law. *State v. McAvoy*, 583.

§ 338 (NCI4th). Admissibility of other crimes, wrongs or acts to show intent in homicide offenses arising out of theft offense

The trial court did not err in a prosecution for murder and armed robbery by admitting testimony to the effect that defendant had said on the evening of the killing that he had a "faggot" waiting on him and that defendant could probably get him to buy some pot or cocaine. *State v. Handy*, 515.

§ 344 (NCI4th). Admissibility of other offenses to show intent; assault offenses

Testimony by a felonious assault victim that defendant broke into her house and threatened to kill her six weeks before the incident in question was relevant and admissible to show defendant's intent and ill will toward the victim. *State v. Hill*, 387.

§ 345 (NCI4th). Evidence of other offenses; rape and other sex offenses

Testimony by a witness concerning a sexual assault committed on her by defendant ten days before the crimes in question was admissible to support the prosecution's theory in a burglary case that defendant entered the victim's home with the intent to commit rape or a sexual offense where there were substantial similarities between the two alleged sexual assaults, but the trial court erred in giving the jury an instruction which may have led the jury to conclude erroneously that it could consider evidence of the prior sexual assault for the purpose of proving that defendant had the intent to commit other crimes with which he was charged. *State v. White*, 604.

§ 380 (NCI4th). Admissibility of other offenses to show opportunity to commit offense generally; homicide offenses

The trial court did not err in a murder prosecution by admitting testimony regarding a subsequent attempted murder by defendant where the evidence tended to prove the defendant's possession and control of the murder weapon at a time close to the murder. *State v. Garner*, 491.

§ 423 (NCI4th). Factors for determining independent origin of in-court identification

The failure of the trial court to conduct a voir dire to determine the possibility that an in-court identification was tainted by a suggestive photographic lineup was harmless where there was clear and convincing evidence that the witness knew and was familiar with the defendant, that the witness had ample and clear opportunity to observe the defendant as he committed the crime, and that the witness consistently identified the defendant as the perpetrator. *State v. Butler*, 227.

§ 635 (NCI4th). Testimony identifying accused; failure to hold hearing as harmless error

There was no prejudicial error in a prosecution for assault and murder where the trial court failed to conduct a voir dire to determine the admissibility of in-court identification testimony allegedly tainted by a suggestive pretrial photograph but there was clear and convincing evidence that the witness knew and was familiar with the defendant, that the witness had ample and clear opportunity to observe the defendant as he committed the crime, and that the witness consistently identified the defendant as the perpetrator. *State v. Butler*, 227.

EVIDENCE AND WITNESSES — Continued

EVIDENCE AND WITNESSES — Continued

§ 887 (NCI4th). Hearsay evidence; use to impeach or corroborate in particular cases

A witness's triple hearsay testimony during cross-examination by the State about a seventeen-year-old girl's allegation that defendant had previously sexually assaulted her was not admissible for substantive purposes to prove that the sexual assault occurred or for impeachment purposes. *State v. White*, 604.

§ 967 (NCI4th). Records of regularly conducted activity generally

Defendant failed to lay a proper foundation for the admission of defendant's discharge summary from a psychiatric hospital where a psychiatrist testified that he reviewed the summary in forming his opinion but he never stated affirmatively that the summary contained facts upon which he based his opinion regarding defendant's state of mind. *State v. Hill*, 387.

§ 1025 (NCI4th). Statements against penal interest

The trial court did not err in a prosecution for murder, assault and armed robbery by excluding a statement made to the witness by defendant while he was in jail. *State v. Reeb*, 159.

§ 1064 (NCI4th). Jury instructions on flight generally

The trial court did not err in giving its instructions on flight immediately after giving its instructions on first degree murder. *State v. Hill*, 387.

§ 1214 (NCI4th). Codefendant implicated by confession or statement

The trial court in a murder prosecution properly excluded some statements made by a codefendant, and improperly excluded others. *State v. Tucker*, 12.

§ 1221 (NCI4th). Procurement of statement by questioning; questioning procedure

The confession of a robbery and murder defendant was voluntarily made. *State v. Phipps*, 427.

§ 1235 (NCI4th). Custodial interrogation defined

The trial judge correctly concluded that a defendant in a murder and robbery prosecution was not in custody and was not entitled to *Miranda* warnings prior to his confession. *State v. Phipps*, 427.

§ 1293 (NCI4th). Accessory before fact punishable as principal felon

There was no prejudice in a murder prosecution where defendant contended that he should not have been convicted of a Class A or capital felony because his conviction was based solely on the uncorroborated testimony of a coconspirator. *State v. Tucker*, 12.

§ 1501 (NCI4th). Bloody or torn clothing; victim

A bloody shirt worn by a murder victim on the day of the killing was not introduced by the State merely to inflame the jury and was properly admitted in conjunction with the testimony of the pathologist who performed the autopsy on the victim's body. *State v. Holder*, 462.

§ 1622 (NCI4th). Determination of admissibility of tape recordings; voir dire hearing

Defendant failed to show an abuse of discretion or harm resulting from the trial court's decision not to conduct a voir dire before the authentication of a tape recording of a phone call allegedly made by defendant to a murder victim shortly before her death. *State v. Holder*, 462.

EVIDENCE AND WITNESSES — Continued

§ 3106 (NCI4th). Corroboration and rehabilitation; inclusion of new facts

Corroborative testimony which went beyond the original was properly admitted because the variation was modest and went only to the weight of the testimony. *State v. Benson*, 537.

§ 3107 (NCI4th). What amounts to corroboration; assertion of contradictory facts

The trial court in a homicide prosecution erred in admitting for corroborative purposes hearsay testimony by a witness regarding statements made to him by defendant's brother pertaining to the circumstances as to how the victim was shot where these statements were inconsistent with the brother's trial testimony, but such error was cured when testimony of like import was amplified on cross-examination by defense counsel. *State v. Adams*, 317.

§ 3110 (NCI4th). Corroboration and rehabilitation; objection

Defendant's failure to specify the nature of his objection did not waive his assignment of error to corroborative testimony which went beyond the original, but his failure to object to the allegedly incompetent portions of the testimony did waive the assignment of error. *State v. Benson*, 537.

§ 3111 (NCI4th). Corroboration and rehabilitation; instructions

Any error in admitting corroborative testimony which went beyond the original was cured by the trial court's instruction. *State v. Benson*, 537.

§ 3172 (NCI4th). What amounts to corroboration; inclusion of new facts

A witness's pretrial statement that defendant "carries a gun most of the time" was admissible to corroborate the witness's trial testimony relating two specific instances when defendant carried the gun outside the club where he worked. *State v. McAvoy*, 583.

§ 3205 (NCI4th). Credibility of witnesses; contradictions and inconsistencies

The State presented substantial evidence that defendant was the perpetrator of an assault and murder despite contradictions and discrepancies in the witnesses' testimony and in their descriptions of the perpetrator. *State v. Butler*, 227.

GRAND JURY

§ 43 (NCI4th). Selection of foreman

The trial court did not abuse its discretion by denying defendant's motion to dismiss indictments on the ground that the grand jury foreman was chosen in a racially discriminatory manner where the motion was not timely filed. *State v. Pigott*, 199.

HOMICIDE

§ 10 (NCI4th). Responsibility for acts of others

There was no error in not dismissing the charge of murder based on premeditation and deliberation and not arresting judgment on the underlying felony of armed robbery where defendant was present to assist the killer. *State v. Reeb*, 159.

§ 22 (NCI4th). First-degree murder as capital case

A first degree murder case prosecuted capitally was not transformed into a noncapital case when the jury deadlocked as to whether the death penalty was

HOMICIDE — Continued

proper and a sentence of life imprisonment was imposed. *State v. Adams*, 317.

The fact that the jury in a capital sentencing proceeding recommended and the trial court entered a sentence of life imprisonment did not change the capital nature of that trial or defendant's status as a capital defendant in that trial, and the unwaivable requirement of the presence of a capital defendant at every stage of his trial was thus applicable. *State v. Johnston*, 680.

§ 100 (NCI4th). Insanity generally

Questions posed to a defendant on trial for first degree murder as to whether he was in the habit of taking medication were not admissible to establish his habit of abusing prescribed medication and thus the defense of diminished capacity since only direct evidence of defendant's impairment at the time of a murder is relevant to the defense of diminished capacity. *State v. Hill*, 387.

§ 113 (NCI4th). Voluntary intoxication as defense to charge of first degree murder

The trial court did not err in a murder prosecution by denying the requested instruction on voluntary intoxication where defendant presented no evidence as to his degree of intoxication. *State v. Phipps*, 427.

§ 212 (NCI4th). Effect of pre-existing condition

The trial court properly denied defendant's motion to dismiss a charge of second degree murder, which resulted in a manslaughter conviction, where the State's evidence was that the victim's death was caused by an abnormal heartbeat caused by the assault she had suffered from defendant. *State v. Cole*, 272.

§ 242 (NCI4th). Evidence of first degree murder; killing with firearm

The evidence was sufficient for the jury to find defendant guilty of first degree murder based on premeditation and deliberation where it tended to show that defendant responded to the victim's verbal taunts by pulling out a gun and shooting the victim in the head. *State v. McAvoy*, 583.

§ 244 (NCI4th). First degree murder; sufficiency of evidence of malice, premeditation and deliberation

The State's evidence was sufficient to establish the elements of premeditation and deliberation so as to support defendant's conviction of first degree murder of his son. *State v. Hill*, 387.

The State presented sufficient evidence of premeditation and deliberation to support defendants' convictions for first degree murder by stabbing the victim during an assault on him in a nightclub parking lot. *State v. Johnston*, 680.

§ 246 (NCI4th). Manner of proving premeditation and deliberation; circumstances to be considered

There was sufficient evidence of premeditation and deliberation in a murder and assault prosecution. *State v. Butler*, 227.

§ 253 (NCI4th). Malice, premeditation, and deliberation; nature and execution of crime; severity of injuries, along with other evidence

The State's evidence was sufficient to support a jury verdict finding defendant guilty of first degree murder on the theory that he killed the victim with premeditation and deliberation. *State v. Montgomery*, 559.

HOMICIDE — Continued

There was sufficient evidence of premeditation and deliberation to survive a motion to dismiss in a noncapital first degree murder prosecution. *State v. Norman*, 738.

§ 266 (NCI4th). Felony murder; robbery generally

The State's evidence was sufficient to support a jury verdict finding defendant guilty of felony murder based on the underlying felony of armed robbery. *State v. Montgomery*, 559.

§ 268 (NCI4th). Murder in perpetration of robbery; acting in concert

There was sufficient evidence that defendant acted in concert in the robbery and murder of the victim to support submission of a felony murder charge to the jury. *State v. Adams*, 317.

§ 277 (NCI4th). Sufficiency of evidence; murder in perpetration of felony; other evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first degree murder based on felony murder committed during a robbery of the victim. *State v. Benson*, 537.

§ 281 (NCI4th). Felony murder; rape or other sex crimes

The evidence was sufficient for the jury to find defendant guilty of felony murder based on the underlying felony of attempted rape. *State v. Montgomery*, 559.

§ 441 (NCI4th). Propriety of instruction permitting inference of unlawfulness and malice

The State's burden in a first degree murder case to prove beyond a reasonable doubt that defendant killed the victim with malice was not impermissibly lessened by the court's instruction on the inference of malice from the infliction of a fatal wound by means of a deadly weapon where defendant introduced evidence that he lacked the capacity to form the specific intent to kill or inflict serious harm. *State v. Holder*, 462.

§ 493 (NCI4th). Instructions on matters considered in proving premeditation and deliberation; lack of just cause, excuse, or justification

There was sufficient evidence in a first degree murder prosecution to instruct the jury that it could infer premeditation and deliberation from lack of provocation by the victim and the instruction was not erroneous. *State v. Handy*, 515.

§ 496 (NCI4th). Instructions on matters considered in proving premeditation and deliberation; defendant's conduct

There was no error in a murder prosecution where the trial court instructed the jury that it could consider in determining premeditation and deliberation whether the two defendants used grossly excessive force or made any threats or declarations concerning the killing. *State v. Reeb*, 159.

§ 499 (NCI4th). Felony murder; instructions on intent

The trial court did not err in its instructions on armed robbery and felony murder where the court instructed the jury that the order of the killing and the taking of property is immaterial where there is a continuous transaction and that it is immaterial whether the intent to commit the theft was formed before or after the killing provided that the theft and the killing are aspects of a single transaction. *State v. Handy*, 515.

HOMICIDE — Continued

defendant's counsel submitted a brief in accordance with *Anders v. California*, 386 U.S. 738, the Supreme Court found no error in either the guilt-innocence phase of defendant's trial or in the capital and noncapital sentencing proceedings. *State v. Rainey*, 259.

JUDGES

§ 7 (NCI3d). Misconduct in office; proceedings before Judicial Standards Commission

A district court judge is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute for his actions in involving himself in a criminal child abuse case against two of his friends in the district in which he was sitting. *In re Harrell*, 105.

§ 8 (NCI3d). Terms of Appellate Justices and Judges

The statute providing that midterm vacancies in the offices of the Supreme Court, the Court of Appeals, and the superior court shall be filled first by appointment of the Governor, and ultimately by election "to fill the unexpired term of the office" does not violate Article IV, Section 16 of the N. C. Constitution but is authorized by Article IV, Section 19. *Brannon v. N.C. State Board of Elections*, 335.

JURY

§ 6 (NCI3d). Voir dire examination; practice and procedure

There was no abuse of discretion in a murder prosecution in the denial of individual voir dire. *State v. Reeb*, 159.

§ 6.3 (NCI3d). Voir dire examination; propriety and scope of examination generally

The trial court did not err in refusing to allow defendant to ask prospective jurors what type of crimes they felt deserved the death penalty, whether they understood they might find defendant guilty of something other than first degree murder, whether they believed that any type of premeditated murder deserved the death penalty, whether they understood that all of them need not agree that a mitigating circumstance existed in order for individual jurors to consider it mitigating, and whether they would feel the need to hear from defendant in order to find him not guilty. *State v. Hill*, 387.

The trial court did not abuse its discretion in a prosecution for robbery and murder by sustaining an objection to a defense question to prospective jurors where the question was based on an incorrect statement of the law. *State v. Handy*, 515.

§ 6.4 (NCI3d). Voir dire examination; questions as to belief in capital punishment

The trial court in a capital case did not err in refusing to allow defendant to rehabilitate prospective jurors challenged for cause by the State because of their expressed inability to comply with the law because of their death penalty views. *State v. Hill*, 387.

Defendant's Fourteenth Amendment rights as set forth in *Morgan v. Illinois*, --- U.S. ---, were not violated where defendant was permitted to seek information on the views of prospective jurors as to whether they would automatically sentence defendant to death regardless of the facts of the case and defendant received answers on this matter. *Ibid.*

LARCENY — Continued

§ 4.2 (NCI3d). Indictment; ownership or possession of property

Where a husband and wife had joint possession of a pistol kept in their bedroom, the wife had a sufficient special property interest in the pistol to support the allegation in the indictment that the pistol was the property of the wife. *State v. Adams*, 317.

MASTER AND SERVANT

§ 8.1 (NCI3d). Compensation of employee

Defendants violated the public policy of North Carolina by firing plaintiffs for refusing to work for less than the statutory minimum wage. *Amos v. Oakdale Knitting Co.*, 348.

§ 10.2 (NCI3d). Actions for wrongful discharge

The availability of alternative remedies does not prevent a plaintiff from seeking tort remedies for wrongful discharge based on the public policy exception to the employment at will doctrine, absent federal preemption or the intent of our state legislature to supplant the common law with exclusive statutory remedies. *Amos v. Oakdale Knitting Co.*, 348.

The Supreme Court did not recognize a separate claim for wrongful discharge in bad faith in *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172. *Ibid.*

§ 29 (NCI3d). Negligence or willful act of fellow employee

Summary judgment in favor of defendant employer was proper on plaintiffs' claims for negligent retention of their former supervisor where plaintiffs' forecasts of evidence were insufficient to sustain their claims against the supervisor for the intentional infliction of emotional distress. *Waddle v. Sparks*, 73.

MUNICIPAL CORPORATIONS

§ 30.11 (NCI3d). Zoning; specific businesses, structures, or activities

A deck built between a house and a canal and not attached to the house violated plaintiff's zoning ordinance, and the theory of economic waste did not apply to the ordered abatement of the violation. *Town of Pine Knoll Shores v. Evans*, 361.

NEGLIGENCE

§ 9 (NCI3d). Foreseeability

The trial court erred by granting summary judgment for defendant in a negligence action brought by a plaintiff injured when an electric meter exploded while plaintiff was rewiring the meter and defendant had previously disconnected a ground fault interrupter which would have extinguished the arc and prevented injury to plaintiff. *Murphey v. Georgia Pacific Corporation*, 702.

§ 13.1 (NCI3d). Contributory negligence; knowledge and appreciation of danger; degree and standard of care in discovery and avoidance of danger

Summary judgment was incorrectly granted for defendant in an action brought by a plaintiff injured when the electric meter which he was rewiring exploded and defendant claimed that contributory negligence barred recovery. *Murphey v. Georgia Pacific Corporation*, 702.

NEGLIGENCE — Continued

§ 53.3 (NCI3d). Notice of unsafe condition

In an action to recover for injuries sustained by plaintiff when she slipped on a greasy substance in a restaurant parking lot, defendant met its burden in a summary judgment hearing by showing that plaintiff could not come forward with a forecast of evidence that defendant knew or should have known of the presence of the substance, and the burden was then upon plaintiff to make a contrary showing. *Roumillat v. Simplistic Enterprises, Inc.*, 57.

Photographs showing the proximity of a grease spot in a restaurant parking lot to the restaurant will not suffice to prove that defendant restaurant owner was or should have been aware of the grease spot. *Ibid.*

§ 57.10 (NCI3d). Cases involving other injuries where evidence is sufficient

Summary judgment was properly entered for defendant restaurant owner in plaintiff's action to recover for injuries sustained when plaintiff slipped on a greasy substance in the restaurant parking lot and fell where defendant carried its burden of showing the inability of plaintiff to forecast evidence that defendant knew or should have known of the greasy substance on the surface of its parking lot, and plaintiff failed to offer any affidavits or other evidence in support of the bald assertion in her pleading that defendant knew or should have known of the substance. *Roumillat v. Simplistic Enterprises, Inc.*, 57.

A plaintiff who fell on a greasy substance in a restaurant parking lot failed to forecast sufficient evidence to show negligence by defendant due to the downward slope of its parking lot. *Ibid.*

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 11.1 (NCI3d). Standards as determined by particular circumstances; locality of practice; specialists

A physician who undertook to provide on-call supervision of obstetrics residents treating patients at a teaching hospital owed the infant plaintiff a duty of reasonable care in supervising the resident who delivered plaintiff at his birth. *Mozingo v. Pitt County Memorial Hospital*, 182.

A contract providing for supervision of resident physicians in a manner which substantial evidence tends to show is negligent will not shield a supervising physician from legal liability for providing such negligent supervision. *Ibid.*

§ 17 (NCI3d). Departing from approved methods or standard of care

Plaintiffs' forecast of evidence established a genuine issue of material fact as to whether defendant breached the applicable standard of care for on-call physicians supervising obstetrics residents at a teaching hospital. *Mozingo v. Pitt County Memorial Hospital*, 182.

RAPE AND ALLIED OFFENSES

§ 18.2 (NCI3d). Sufficiency of evidence of attempted rape

The State's circumstantial evidence was sufficient to support a jury verdict finding defendant guilty of attempted first degree rape. *State v. Montgomery*, 559.

RECEIVING STOLEN GOODS

§ 1 (NCI3d). Generally; nature and elements of the offense

Defendant's conviction for felonious possession of property stolen pursuant to a breaking or entering is reversed where there is a reasonable likelihood that the jurors could have believed from the instructions that the "other personal property" possessed by defendant included a pistol which was the basis for defendant's conviction for larceny of a firearm. *State v. Adams*, 317.

ROBBERY

§ 2.2 (NCI3d). Indictment; ownership of property

There was no fatal variance between the indictment and proof where the indictment charged that defendant took money from the person and presence of the victim and the evidence showed only that money was taken from the victim's presence. *State v. Montgomery*, 559.

§ 4.3 (NCI3d). Armed robbery cases where evidence held sufficient

The State's evidence was sufficient for the jury to find defendant guilty of armed robbery where it showed that money was taken from a purse in the custody of a murder victim who was stabbed to death. *State v. Montgomery*, 559.

RULES OF CIVIL PROCEDURE

§ 41.1 (NCI3d). Voluntary dismissal; dismissal without prejudice

When a trial court instructs, or expressly permits, a plaintiff who has given oral notice of voluntary dismissal pursuant to Rule 41(a)(1) to file written notice to the same effect at a later date during the same session of court, and plaintiff files written notice accordingly, the one-year provision for refiling provided by the rule begins to run when written notice is filed. *Thompson v. Newman*, 709.

§ 56.3 (NCI3d). Summary judgment; necessity for and sufficiency of supporting material; moving party

In order to overcome defendants' motions for summary judgment, plaintiffs must forecast sufficient evidence of all essential elements of their claims. *Waddle v. Sparks*, 73.

§ 56.4 (NCI3d). Summary judgment; necessity for and sufficiency of supporting material; opposing party

Defendant was entitled to summary judgment if it was able either to show the nonexistence of an essential element of plaintiff's claim or to show that plaintiff could not produce evidence of an essential element of her claim. *Roumillat v. Simplistic Enterprises, Inc.*, 57.

Where defendants pleaded the statute of limitations and relied on this defense in their summary judgment motions, plaintiff was required to produce a forecast of evidence of specific acts which took place within the three-year limitation period in order to sustain her claim over defendants' summary judgment motions. *Ibid.*

§ 58 (NCI3d). Entry of judgment

The clerk's mere notation "jury verdict" on the minutes contained insufficient detail to comply with the Rule 58, paragraph one requirement of a "notation in [the clerk's] minutes of such verdict or decision," since use of the word "such" in the rule imports the recording of sufficient detail regarding the judgment to give notice of its essential character and content. *Reed v. Abrahamson*, 249.

RULES OF CIVIL PROCEDURE — Continued

An adequate notation of entry of judgment must include the names of the parties, the prevailing party, the relief awarded, and the date the verdict was returned. *Ibid.*

Even if the clerk's notation "jury verdict" in the minutes had been sufficient to constitute entry of judgment for a sum certain, entry of judgment did not occur at that time because the trial court's contrary direction to plaintiff's attorney to prepare the judgment precluded application of the automatic entry provisions of Rule 58, paragraph one, and entry of judgment did not occur until the trial court signed the proposed judgment submitted by plaintiff's counsel. *Ibid.*

SCHOOLS

§ 15 (NCI3d). Interrupting or disturbing public school

The trial court erred by not dismissing two juvenile petitions where the incidents alleged did not qualify as disorderly conduct under G.S. 14-288.4(a)(6). *In re Eller*, 714.

SEARCHES AND SEIZURES

§ 12 (NCI3d). "Stop and frisk" procedures

Evidence of defendant's purchase of a shotgun from a pawnshop and testimony about his statements to an officer were not fruits of an illegal search and seizure where, considered in the totality of the circumstances, the officer had sufficient suspicion to make a lawful stop on a drug corner. *State v. Butler*, 227.

§ 32 (NCI3d). Scope and conduct of search and seizure in general; items which may be searched for and seized

The inevitable discovery exception to the Fourth Amendment exclusionary rule is adopted. The burden of proof of inevitability is preponderance of the evidence, a case by case approach is adopted for determining whether proof of an ongoing, independent investigation is necessary, and, if the State carries its burden, any question of good faith, bad faith, mistake, or inadvertence is irrelevant. *State v. Garner*, 491.

STATE

§ 1.2 (NCI3d). Public records

The inspection and disclosure of applications for the position of county manager are governed by G.S. 153A-98, not by the Public Records Act, and there is no provision in the statute for access to the files of applicants for the position of county manager. *Elkin Tribune, Inc. v. Yadkin County Bd. of Commissioners*, 735.

TORTS

§ 7 (NCI3d). Release from liability and covenants not to sue

Plaintiff administratrix's claim for punitive damages for the wrongful death of her stillborn child arising from an automobile accident was not barred by a release signed individually by plaintiff and her husband before plaintiff qualified as the administratrix of her child's estate. *Greer v. Parsons*, 368.

TRESPASS

§ 2 (NCI3d). Forcible trespass and trespass to the person

The standards for determining the element of severe emotional distress in actions for the intentional infliction of emotional distress and the negligent infliction of emotional distress are the same. *Waddle v. Sparks*, 73.

Plaintiff's forecast of evidence failed to show that she has suffered the severe emotional distress necessary to maintain her cause of action against her former supervisor for intentional infliction of emotional distress based on sexually suggestive comments and offensive actions. *Ibid.*

Summary judgment was properly entered against the second plaintiff on her claim against her former supervisor for intentional infliction of emotional distress because her forecast of evidence failed to show that any conduct of defendant occurred within the applicable three-year statute of limitations. *Ibid.*

UTILITIES COMMISSION

§ 41 (NCI3d). Fair return generally

The Utilities Commission's inclusion of a 0.1% increment in a power company's rate of return on common equity to cover future stock issuance costs was not supported by substantial evidence in view of the whole record. *State ex rel. Utilities Comm. v. Public Staff*, 215.

The Utilities Commission's approved rate of return of 13.2% on a power company's common equity was affected by improper considerations and not otherwise supported by substantial evidence in the record as a whole. *Ibid.*

WILLS

§ 25 (NCI3d). Caveat; costs and attorneys' fees

The evidence supported the trial court's finding that a caveat filed on the ground that testatrix lacked the necessary testamentary capacity had substantial merit so as to permit the court to award an attorney fee to the caveators to be paid from the estate pursuant to G.S. 6-21(2) even though the jury found that testatrix had the mental capacity to make a will. *Dyer v. State*, 374.

WORD AND PHRASE INDEX

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